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KWAZULU-NATAL**

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**INYUVESI  
YAKWAZULU-NATALI**

**AN ALTERNATIVE APPROACH TO DOLUS EVENTUALIS**

**By**

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## DECLARATION

I, Janet Audrey Tsuru, student number 211529399, hereby declare that *AN ALTERNATIVE APPROACH TO DOLUS EVENTUALIS* for LLM is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University.

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Janet Audrey Tsuru

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## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1 Motivation for the research

The rationale for this research is best illustrated by way of a scenario. Peter gets into an argument with Tim at their workplace. As a result, they get into a fight, where Peter stabs Tim in the shoulder and leaves him bleeding. The management board comes just in time to resolve this fight and both parties are dismissed from work on the basis of misconduct. Peter and Tim both leave the workplace. Unbeknown to Peter, Tim still holds a grudge against Peter for what Peter did to Tim's arm. Later on the same day, Tim goes to Peter's house, holding a gun, with the intention of getting his revenge from Peter. Just as Tim gets to Peter's house, he sees Peter standing at the door holding his baby (X) in his arms. Without even thinking twice, Tim fires two bullets towards the direction of Peter. He misses Peter and shoots Baby-X who dies instantly. This is a *dolus eventualis* situation but also classified as a particular type of mistake known as *aberratio ictus*. The *main* issue in this scenario is whether Tim can be found guilty of murder in respect of Baby-X who was not Tim's target.

I will proceed with the issue on the assumption that three elements<sup>1</sup> of murder in respect of Tim's conduct have been satisfied except for the issue of intention. More specifically, Tim cannot be held liable for premeditated murder since he lacked both the direct and indirect intention regarding Peter. From the facts in the scenario above, Tim's main target was Peter not Baby-X. If it can be proved that Tim foresaw that in aiming to shoot Peter, he might miss and fatally wound Baby-X, he will be liable for murder on the basis of *dolus eventualis*. In this instance, he will be said to have intention (to kill) in the form of *dolus eventualis*. A person is said to have intention in the form of *dolus eventualis* if he or she satisfies two requirements namely, foresight of the possibility of harm and reconciliation with the risk of harm occurring.<sup>2</sup>

This dissertation seeks to analyse the elements of *dolus eventualis*. More specifically, the need for inquiry is based on a significant disagreement as regards the elements of *dolus eventualis* amongst legal writers. This inquiry involves an evaluation of the presence of the cognitive and conative element in the accused's intent. Going back to the scenario, there must be foresight of

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<sup>1</sup> CR Snyman *Criminal Law* 6ed (2014) 437. The elements of murder according to Snyman are (a) causing the death (b) of another person (c) unlawfully and (d) intentionally.

<sup>2</sup> The test for *dolus eventualis* was first introduced in the case of *S v Malinga* 1963 (1) SA 692 (A) 694G-H.

the possibility of harm (cognitive element) on Tim's part. This essentially leads to the question of whether or not the degree of foresight in respect of the accused should be qualified. The question that would have to be determined as regards Tim's foresight of harm towards Baby-X is whether upon pointing the trigger towards the direction of Peter he had some *real* foresight or *reasonable* foresight or just foresight no matter how remote, unqualified by any adjective. Chapter 2 shall indicate which approach is preferable as regards the degree of foresight needed in the accused. Determining the cognitive element only is not enough, it will also have to be determined whether Tim reconciled himself with the risk of harm that he foresaw (conative element). In other words, it will have to be proved that Tim foresaw the possibility that he might kill Baby-X but carried on with his act anyway. This is also understood as an act of completely disregarding the consequences and will be discussed in detail in chapter 3. In South African criminal law, the position is that if Tim would have foreseen the possibility of harm occurring and nevertheless reconciled himself with the risk of that possibility occurring, he would have satisfied the conative element of *dolus eventualis*. If it can be established that both the cognitive and conative element have been satisfied in respect of Tim, he can be found guilty of murder in the form of *dolus eventualis*. However, as shall be discussed in detail in the dissertation, the relevance of the second leg of the test (conative) is subject to a lot of criticism.

## **1.2 Outlining the concept of *dolus eventualis* in historical context**

The first section of this chapter briefly introduced readers to the concept of *dolus eventualis* through a scenario. To clearly understand the issues raised in the first section of this chapter, it might be necessary to give a brief description of the historical developments of *dolus eventualis*. *Dolus eventualis* in South African criminal law has in my opinion been accepted and applied in ways that can be deemed irregular in as far as substantive criminal law is concerned. In the 1940s, there was partial evidence of the study of legal intention. A legal writer, Gie, reveals that at the time of his writing, in the year 1941, analogues of *dolus eventualis* in South African case law are basically non-existent; the courts did not call for the real foresight of the outcome occurring in order for intention to be recognized.<sup>3</sup> The reason for the scarcity of judicial reference to *dolus eventualis* at this stage has been argued to be the extensive influence exercised on the law by the assumption that the wrongdoer must have anticipated the natural and probable consequences of his act.<sup>4</sup> It can also be submitted that,

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<sup>3</sup> CJC Gie 'n Kritiek op die Grondslae van die Straffreg in Suid-Afrika' (1941) *PhD thesis, University of Pretoria* 126, "[V]oorbeelde van die laaste opsetsvariasie – die opset by moontlikheidsbewussyn – is geheel en al nie te vind nie, omdat die werklike voorsien van die moontlikheid van die intrede van die gevolg deur die dader nie as 'n eis van opsetlikheid gestel word nie ..."

<sup>4</sup> S Hoctor 'The concept of *dolus eventualis* in South African Law' (2008) *Fundamina* 19.



even though it is now well-known that the test for intention is consistently subjective in nature, thus requiring the court to find, in relation to *dolus eventualis*, actual subjective foresight of the prospect of the harm imminent, it was not always the case.

The Appellate Division actually referred to the objective test for intention with positive reception on quite a lot of occasions in the first half of the twentieth century.<sup>5</sup> The objective test disregards the wrongdoer's actual state of mind in probing whether a reasonable person in the same situation as the accused would have foreseen the possibility of harm ensuing.<sup>6</sup> The important question is accordingly not whether the wrongdoer *actually* foresaw the harm (as per the subjective test), but whether the wrongdoer *ought* to have foreseen it. It is apparent that the rationale for the approval of the objective test for intention was the espousal from English law of the presupposition that a person intends the natural and feasible consequences of his or her actions.<sup>7</sup> This presumption has been relied upon in a number of cases in South Africa.<sup>8</sup> The most apparent explanation for intention is that it is unfeasible to determine the recesses of a wrongdoer's mind; accordingly the law says that a person must be alleged to aim the reasonable consequences of his acts.<sup>9</sup>

In using the presumption, "the courts have pointed out that the source of the presumption was fact rather than law and it could consequently be deduced or not depending on the evidence, and that it was rebuttable."<sup>10</sup> The major opposition to the so-called "presumption" of intention is that it results in an objective test of intention and, as a result there is an overlapping between intention and negligence.<sup>11</sup> In 1920, before the Appellate Division's extensive implementation of this presumption, Bodenstein's warning against this "pernicious maxim of the English law" which has "had such fatal results in the past and caused the untimely death of thousands of human beings" was not heeded.<sup>12</sup> He contends that the courts should once and for all drop the

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<sup>5</sup> EM Burchell, JRL Milton & JM Burchell *South African Criminal Law and Procedure Vol I: General Principles* (1983) 141. See also *R v Jolly* 1923 AD 176, 186; *R v Jongani* 1937 AD 400, 406; *R v Longone* 1938 AD 532, 539-542; *R v Duma* 1945 AD 410, 417; *R v Shezi* 1948 (2) SA 119 (A) 128-130; *R v Koza* 1949 (4) SA 555, 560.

<sup>6</sup> Burchell, Milton & Burchell (supra note 5) 141.

<sup>7</sup> Ibid.

<sup>8</sup> Burchell, Milton & Burchell (supra note 5) 189 & 543 shows a list of the cases in which the presumption was applied.

<sup>9</sup> JH Pain 'Some reflections on our criminal law' 1960 *Acta Juridica* 297 citing Gardiner & Lansdown *South African Criminal Law and Procedure*, which shall be referred to as *Gardiner and Lansdown* (first edition in 1917). This statement echoes the well-known aphorism of Chief Justice Brian (*YB* 17 Edw IV, F 2, Pl 2) that 'the thought of man shall not be tried, for the devil himself knoweth not the thought of man.'

<sup>10</sup> *R v Kewelram* 1922 AD 213 at 217; *R v Jolly* (supra note 5) 181-189; *R v Taylor* 1949 (4) SA 702 (A) 713; *R v Nkatlo* 1950 (1) SA 26 (C) 31; *R v Nsele* 1955 (2) SA 145 (A) 151; *R v Nkosi* 1960 (4) SA 179 (N) 180-181.

<sup>11</sup> Burchell, Milton & Burchell (supra note 5) 189.

<sup>12</sup> HDJ Bodenstein 'Phases in the development of criminal *mens rea*' (1919) 18 *SALJ* 34. (The article concludes at 1920 *SALJ* 18).

aberrations of past ages and get rid of the idea that it is feasible to say that a person intentionally caused results which he actually did not foresee, though he ought to have foreseen them.<sup>13</sup> It is apparent that the employment of this view involved a simple approval of the objective approach to intention. Stuart avers that, the assumption, whether or not it is regarded as rebuttable, is basically the test of negligence – that of reasonable foresight – masquerading in a different form.<sup>14</sup>

Prior to the adoption of the concept of *dolus eventualis* in South African courts, there was a book which provided insights about this form of intention. This is the book by Professors de Wet and Swanepoel<sup>15</sup> entitled *Strafreg*, the first edition of which was in 1949. It introduced a strongly argued theoretical structure for criminal liability for the first time in South African criminal law, which was broadly based on the writings of modern-day Dutch and German writers.<sup>16</sup> The case of *R v Horn*,<sup>17</sup> which was one of the earliest cases to introduce the concept of *dolus eventualis*, cited this book with approval. The case of *R v Horn* involved an assistant stock-inspector and overseer of a farm, who, after spotting two local women stealing melons from the lands on a farm on which they did not belong, had run to catch them up and then asked them who they were and what they were doing in the field.<sup>18</sup> The deceased had failed to stop after the appellant had called upon her to do so for the third time, then he produced a small 35 pistol which he carried and shouted that he would shoot if she did not stop.<sup>19</sup> When she still did not stop he had fired a shot “just to frighten her”, from a distance of about 36 paces, aiming to fire a few paces past her to the right.<sup>20</sup> The bullet had, nevertheless, struck and killed the deceased.<sup>21</sup>

Based on the facts in this case, the question for decision by the trial court was whether the verdict should be one of murder or culpable homicide. The evidence was such that only if the Crown could prove *dolus eventualis*<sup>22</sup> on the part of appellant could he be found guilty of murder, and this intent would be proved if the appellant, who did not have the direct intention to fatally harm the woman, fired the shot accepting that death was a likely result of his act, but

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<sup>13</sup> *Ibid.*

<sup>14</sup> S Hoctor (supra note 4) 21.

<sup>15</sup> *Ibid.*, 22.

<sup>16</sup> *Ibid.*

<sup>17</sup> *R v Horn* 1958 (3) SA 457 (A).

<sup>18</sup> *R v Horn* (supra note 17), 458.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, 458D- H.

nevertheless fired, reckless as to whether death would follow or not.<sup>23</sup> In this manner, it can be seen that the court's conclusion was largely influenced by the appellant's use of the words "if you don't stop I shall shoot."<sup>24</sup>

It is common cause, as Van Blerk JA observes, that these words were uttered in the anticipation that the deceased would stop and that it would not be necessary to shoot.<sup>25</sup> Van Blerk, JA further held that if the appellant had intended to kill her it is reasonable to suppose that he would have taken careful aim, and instead of calling upon her to stop he would have saved his breath, and fired at her while she was still within easy gunshot range. He did neither of these things, and when he did fire, it was from such a distance that the probabilities are in favour of his explanation that he wanted to frighten her into stopping and against any desire on his part to kill her. In my view, this sort of explanation says a lot about the accused's intention, and therefore the trial court erred by rejecting it without giving reasons for doing so.<sup>26</sup>

Some inconsistencies in the concept of *dolus eventualis* were already being seen the first time this concept was adopted in case law. This aspect is indicated by the error made in the trial court of *R v Horn*,<sup>27</sup> where they made a finding that an intention to kill could be inferred from the circumstances in which the shooting took place.<sup>28</sup> A closer analysis reveals that, constructive intent to kill must be proved by applying a subjective test.<sup>29</sup> Intention must be rather about what the accused foresaw rather than what it ought to have foreseen.<sup>30</sup> The trial court, it seems, in my view failed to clarify this distinction. Van Blerk JA went on to apply the test for *dolus eventualis* using the exact words from Bodenstein's article on his earliest writings about *dolus eventualis*.<sup>31</sup>

It was held that intention to kill will be present where the evidence is such that the Crown proves *dolus eventualis* on the part of appellant if he is guilty of murder, and this intent would

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid, 458D.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid, 458H.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> *Rex v Mkize* 1951 (3) SA 28, 33 Where it was held that, "The test as to whether an accused has the particular intent required in a charge when the Crown must prove that intent is a subjective test: The Court must enquire whether the accused had in fact that intent."

<sup>30</sup> *R v Horn* (supra note 17) para D.

<sup>31</sup> Ibid 457G. The case of *R v Horn* is interesting in that it applied the test for *dolus eventualis* in its exact words as suggested given by HDJ Bodenstein (supra note 12) 347-348. In the case of *Horn*, however, the determination of intention is centralised upon one individual who mistakenly shot and killed a woman in the course of doing his job.

be proved if the appellant, who did not have the direct intent to kill the woman, fired the shot appreciating that death was a possible result of his act, but nevertheless fired, reckless as to whether death would follow or not.<sup>32</sup> The most important point of departure of this recklessness is that the accused must in fact have (not ought to have) predetermined death as a consequence; because it would be impossible for him to be reckless as to whether death ensues or not if he never actually appreciated that death was a possible consequence. The appreciation of death as a possible consequence is a fact which cannot be proved by an objective test. In this manner, the Crown failed to prove that the appellant appreciated that death was a possible result of his act, and consequently failed to prove the intention to kill.<sup>33</sup>

After the case of *Horn*, the case of *S v Malinga*<sup>34</sup> also adopted the concept of *dolus eventualis*. This case involved four appellants who were convicted of the crime of murder by Kennedy J in the trial court,<sup>35</sup> and two assessors in the Durban and Coast Local Division who were given a death sentence. In the trial court, it was held that the five accused, including one Mabaso, who gave evidence for the State and was discharged from liability to prosecution, acting in concert, set out in a motor car to commit the crime of house-breaking with intent to steal and theft; that one of them (accused number 4) knew that the other accused armed with a loaded revolver; that, in endeavouring to shake off the subsequent pursuit of the car by the police, accused number 4 shot and killed a policeman, Warrant Officer Werner, who was in a flying squad car which had been able to draw alongside; that the other accused must have foreseen the possibility of such an occasion and were a party to and equally guilty of the murder; and that there were no mitigating circumstances.<sup>36</sup>

The relevant issue brought out in this case was how these five accused were guilty in terms of each being a *socius criminis*.<sup>37</sup> Further, the main points raised on appeal were that the trial Court erred in not regarding Mabaso as a trap; that there was inadequate proof of any common purpose existing at the time when the deceased was shot,<sup>38</sup> alternatively that it could not be said that the use of the revolver by the 4<sup>th</sup> accused was a likelihood foreseeable by the other

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<sup>32</sup> See Bodenstein (supra note 12) 347-348. His writings were strongly influenced by Boehmer *Meditationes in C.C.C*

<sup>33</sup> *R v Horn* (supra note 17) 457D.

<sup>34</sup> *S v Malinga* (supra note 2) 693.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> A Latin term which refers to a person who is an accomplice in a crime.

<sup>38</sup> *S v Malinga* (supra note 2) 694.

accused; and that in any event there were mitigating circumstances in respect of those who did not fire the shot.<sup>39</sup>

In view of the fact that the five accused committed the crime as a group and with a common purpose, it would certainly be wrong, in my opinion to regard their actions as vicarious. The mental state of each one of the accused has to be put into consideration. Holmes JA observed that since these appellants were acting in concert when the deceased was shot, the liability of *socius criminis* is whether each one of them foresaw the possibility that his *socius* would commit the act in question in the persecution of their common purpose.<sup>40</sup> In considering the issue of the intention to kill, the court applied the *dolus eventualis* test which is, “whether the *socius* foresaw the possibility that the act in question in the prosecution of the common purpose would have fatal consequences, and was reckless whether death resulted or not”.<sup>41</sup>

In determining the intention in the accused, it is apparent to note that the issue is not about what the accused “ought to have foreseen” but what he actually foresaw.<sup>42</sup> The accused must have foreseen that the use of a loaded firearm would have grave consequences, in this manner, they can be said to have been reckless into whether or not death would result.<sup>43</sup> It is also in my view; just the same way as Holmes JA stated it in the Appellate Division that, the test to prove intention must be consistent with social necessity in regard to concerted crimes such as violence and housebreaking.<sup>44</sup> Schreiner JA also stated that it is socially important that groups of criminals one or more of who is armed with lethal weapons should be aware of the extreme risks they run in embarking upon ventures that are so evil and dangerous to the community.<sup>45</sup> The same can be said about the accused in the case in point, that is, the *Malinga* case.<sup>46</sup> Based on the test for intention given above,<sup>47</sup> Holmes JA upheld the decision of the trial court that Mabaso foresaw the consequences of the actions he got himself into, and therefore was equally guilty as his gang.

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid, 694.

<sup>43</sup> Ibid.

<sup>44</sup> *S v Malinga* (supra note 2) 695.

<sup>45</sup> *R v Nsele* (supra note 10) 148 D-E.

<sup>46</sup> *S v Malinga* (supra note 2).

<sup>47</sup> *S v Malinga* (supra note 2) 695.  
695.

It can be seen that the test for *dolus eventualis* was finally formulated in the case of *S v Malinga*,<sup>48</sup> as Holmes JA said, “In the pure form in which it is now applied”. Even though the test for *dolus eventualis* was finally formulated in the *Malinga* case, what seems to be the problem is the inconsistency associated with this concept. From the earliest case of *Horn*, which appears to have been the earliest case on legal intention, the trial court already was making errors which can be seen being problematic in present-day cases.<sup>49</sup> The aim of this dissertation therefore is to highlight that, ever since the concept of *dolus eventualis* was introduced into South African criminal law, it has been very controversial and confusing amongst legal writers. A possible remedy therefore is the introduction of a more nuanced approach to *dolus eventualis*, which does not treat *dolus eventualis* cases in a *one-size-fit-all* concept. Having looked at the historical origins of *dolus eventualis*, I shall proceed to look at other forms of intention recognised in South African criminal law.

### **1.3 Other forms of intention recognised under South African law.**

Snyman observes that there are three forms of intention recognised under South African criminal law.<sup>50</sup> These include direct intention (known as *dolus directus*), indirect intention (known as *dolus indirectus*), and *dolus eventualis*. *Dolus directus*, can be interpreted in the plain ordinary meaning of the word, which in this instance refers to the wrongdoer willingly proceeding with a certain act even knowing that his act and consequences of that act are unlawful.<sup>51</sup> Elaborating this state of affairs hypothetically, X is certain that he is committing the prohibited act and does not regard the commission of that act as a mere possibility.<sup>52</sup> It is also known as *intention in its ordinary grammatical sense*,<sup>53</sup> which is present when the accused’s aim and object is to bring about the unlawful consequence, should the chance of its resulting be small. An example will be where X approaches and shoots a person who is leaving

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<sup>48</sup> Ibid, 694. It can also be added that the concept of *dolus eventualis* is a foreign notion, and borrowed from it the criterion of recklessness. It has been argued that perhaps the reason why this concept is ambiguous is due to the fact that it is a combination of Roman and English Law. According to Bertelsmann, blending Romanist with English common-law notions does not always enhance conceptual clarity or logic. At first sight, the choice of “recklessness” as a criterion for a form of intention could even strike one as quite irrational, because the gist of recklessness in English law is “foresight ... without intention”. “However, translated into current South African terminology, this means foresight without actual intention, that is, without *dolus directus* and *dolus indirectus*”. See W Bertelsmann ‘*What happened to Luxuria?* Some observations on criminal negligence, recklessness & *dolus eventualis*’ (1975) SALJ 71.

<sup>49</sup> More specifically in the high profile cases of *Maarohanye and Another v S* 2015 (1) SACR (337) SG, *S v Humphreys* 2013 (2) SACR (1) SCA. *DPP, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015), *S v Van Schalkwyk* [2016] ZASCA 49 (unreported, SCA case no 680/15, 31 March 2016).

<sup>50</sup> CR Snyman (supra note 1) 176.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> JM Burchell *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 4ed (2011) 260.

the bank in hope of robbing them of their money. X knows that shooting a person might cause fatal injuries, and certainly knows that robbing that person is an unlawful act, but proceeds with such an act because it is his goal anyway.

It is also relevant to point out that *dolus directus* and premeditation are not identical. Premeditation murder results in *dolus directus*, but where the accused has *dolus directus* it does not always mean they would have premeditated the murder act. This can be illustrated by case law,

Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and one which had been conceived and planned over months or even years before its execution... Only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at the conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".<sup>54</sup>

*Dolus indirectus* refers to indirect intention. If this has to be illustrated hypothetically, X decides to get his revenge on his neighbour as soon as he sees him leaving the house. He (X) therefore sets his neighbour's house on fire intending to damage their property. When X set the house alight he knew that there was a baby sleeping so when he heard the baby mercilessly crying, he (X) quickly breaks open the locked door and tries to save the baby from the fire. Unfortunately, the baby dies instantly. In this manner, X originally could not have been guilty of murder because he did not intend death. However, X foresaw death as a virtual certainty to occur from his actions, yet proceeded to take that risk; he indirectly intended to kill the victim, even if it was not his primary goal. The third type of intention, which is the main focus of this dissertation, is *dolus eventualis*. As discussed in the first chapter, *dolus eventualis* is when the accused's main aim is to commit an unlawful act, though he has foresight of the fact that the consequences of his actions are unlawful he reconciles himself with the consequences regardless.

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<sup>54</sup> *S v Raath* 2009 (2) SACR 46 (C) 53, para 16.

There is also a concept known as *dolus inderteminatus* which was explained in the recent case of *DPP v Pistorius*<sup>55</sup> as follows: “The perpetrator has the intention to kill and goes ahead with his act...although the perpetrator’s intention to kill must be in connection with the person killed, this does not mean that the perpetrator must know who the victim is.”<sup>56</sup> Similarly, if X causes a bomb to explode in a crowded place he will most likely be ignorant of the identity of his fatalities, but will, even so have the intention to kill those who might die in the ensuing explosion.<sup>57</sup> If this has to be put in the legal language of a lawyer, it is known as intent in the form of *dolus indeterminatus*, which means the killing of an indeterminate person.<sup>58</sup> Snyman<sup>59</sup> reveals that our courts have always held persons engaged in a wild shootout in the course of an armed robbery to be liable for murder on the basis of their having acted with both *dolus eventualis*<sup>60</sup> and *dolus indeterminatus* where persons were killed as a result.<sup>61</sup> Having highlighted the above, I shall now turn on to the area of focus.

## 1.4 AREA OF FOCUS

### 1.4.1 Central research question

The central issue mainly dealt with in this dissertation is, “*An alternative approach to dolus eventualis.*” This concept has been described as a riddle<sup>62</sup> simply because of how complicated it is. Professor Hoctor observes that such uncertainties of the concept are due to the failure of our courts to vividly outline the significance of the concept of *dolus eventualis*.<sup>63</sup> In this regard, it can be observed that the uncertainties surrounding *dolus eventualis* adversely affect

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<sup>55</sup> *DPP Gauteng v Pistorius* (supra note 49) 31.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid. Notable is the fact that, “*dolus indeterminatus* not a form of intention apart from *dolus directus* or *dolus eventualis*; it is merely a label meaning that the perpetrator’s intention is directed at a person or persons of unknown identity”. It has been observed that a wrongdoer can, in this manner, act with *dolus indeterminatus* at the same time with *dolus eventualis*. Kemp *et al Criminal Law in South Africa* (2012) 184 also recognises this concept of *dolus indeterminatus*, where he says, “along with *dolus eventualis*, these forms of intention may be in the nature of a specific, focused intention, or *dolus indeterminatus*, for example where a person’s intention does not encompass a specific or known victim, ‘but he or she is willing, for example in cases of murder, to kill any person who may be present.’”

<sup>59</sup> CR Snyman (supra note 1) 197.

<sup>60</sup> There is another form of intention similar concept to *dolus eventualis*; which is called *dolus generalis*. The logical distinction between the two is that in the case of *dolus eventualis*, the particular victim is foreseen, whereas in the case of *dolus generalis* the classic example is someone firing into a crowd of people knowing full well that one or more persons may be injured or killed, but not having any thought as to which specific person or persons this may be. All three of these types of intention can be sufficient for a finding of murder. By Taitz N, “Judge Masipa was right on Dolus and murder. <http://www.dailymaverick.co.za/opinionista/2014-09-12-judge-masipa-was-right-on-dolus-and-murder/#.Vt7BmXlf2M9>”, Accessed at 12 September 2014.

<sup>61</sup> This was the situation in the case of *S v Nhlapo & another* 1981 (2) SA 744 (A).

<sup>62</sup> Focus ‘Dolus eventualis’ 1988 *SACJ* 414.

<sup>63</sup> S Hoctor (supra note 4) 14.



substantive criminal law and if possible, they must be resolved. Paizes adds that judicial opinions on this issue have been characterised by uncertainty and a surprising lack of clarity.<sup>64</sup> He submits that this uncertainty is undesirable as it is contrary to the principle of legality, which forms the basis of criminal law.<sup>65</sup> Besides, it constitutes a serious obstacle to any logical and constant system of criminal law.<sup>66</sup>

My main aim is to focus on the elements of *dolus eventualis* because I believe that this is where lack of clarity exists regarding the application of this concept. The substantive law regarding the interpretation of the cognitive element of *dolus eventualis* (which has for years been described as “foresight of the possibility of harm”)<sup>67</sup> is problematic. The main problem is what degree of foresight in the cognitive element should be regarded as acceptable. Some legal academics are of the view that the degree of foresight must be qualified<sup>68</sup> whilst some are of the view that it must be interpreted in unqualified terms.<sup>69</sup> After presenting the arguments for and against defining the cognitive element in qualified terms, the author will suggest a better approach to be followed by legal academics.

As regards the conative element, the main problem is whether this element is a significant part of the test for *dolus eventualis*. Some academics are of the view that the conative element should be ignored as it is not a relevant inquiry of *dolus eventualis*.<sup>70</sup> Some on the other hand argue that the conative element is a significant part of the test for *dolus eventualis* because the original definition of *dolus eventualis* includes it and there is no decision in South African courts which has regarded it as irrelevant.<sup>71</sup> After presenting the arguments for and against the relevance of the conative element the author will suggest a best possible approach that legal writers should rather accept.

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<sup>64</sup> A Paizes ‘*Dolus eventualis* reconsidered’ 1988 *SALJ* 636.

<sup>65</sup> *Ibid.*

<sup>66</sup> S Hoctor (supra note 4) 14.

<sup>67</sup> *DPP Gauteng v Pistorius* (supra note 49) 26. See also *S v Stiglingen ‘n ander* 1989 (3) SA 720 (A) 722 I-J. *S v Malinga and others* (supra note 2) 695; *S v Mangondo* 1963 (4) SA 160 (A) 162; *S v Sigwahla* 1967 (4) SA 566 (A) 570B-C; *S v Mtshiza* 1970 (3) SA 747 (A) para 752; *S v Kramer en andere* 1972 (3) SA 331 (A) 334; *S v P* 1972 (3) SA 412 (A) 416; *S v Sikweza* 1974 (4) SA 732(A) para 736F; *S v Grove-Mitchell* 1975 (3) SA 417 (A) 422; *S v Sabben* 1975 (4) SA 303 (A) 304; *S v V* 1979 (2) SA 656 (A) 668; *S v Nhlapo* 1981 (2) SA 744 (A) 750-751; *S v Mbatha* 1987 (2) SA 272 (A) 285; *S v Nomakhlala and another* 1990 (1) SACR 300 (A) 303.

<sup>68</sup> *R v Horn* (supra note 17) 467B; JM Burchell (supra note 53) 370. To avoid repetition, more writers supporting the view of a qualified foresight are discussed in depth at note 124 to note 202.

<sup>69</sup> *R v Nsele* (supra note 10) para 148A; JR du Plessis, *The Law of Culpable Homicide in South Africa* unpublished PhD thesis, Rhodes University (1986) 153: ‘a possibility actually foreseen no matter how remote, is a possibility and constitutes *dolus eventualis*’. To avoid repetition, more writers supporting the view of an unqualified foresight are discussed in depth at note 203 to note 274.

<sup>70</sup> JM Burchell (supra note 53) 390.

<sup>71</sup> CR Snyman (supra note 1) 181.

The final issue will be an examination of the concept of *dolus eventualis* as a whole. This shall be done in way to determine whether the controversy associated with this concept is coming to an end with time, or it is actually getting more complicated by the day. The most recent high-profile cases in South African criminal law regarding the concept of *dolus eventualis* shall be analysed. This shall be done in order to see how the courts have succeeded in explaining the concept of *dolus eventualis* which for years has been regarded as an ambiguous concept. The current high-profile *dolus eventualis* cases to be discussed in this regard are, *DPP Gauteng v Pistorius*,<sup>72</sup> *S v Humphreys*,<sup>73</sup> and *Maaroahanye v S*.<sup>74</sup> Following a study of the very recent judgement in the case of *Van Schalkwyk*,<sup>75</sup> the submission of the dissertation is that the approach to *dolus eventualis* in case A cannot necessarily be used in case B because it may lead to incorrect results (each case must be assessed on its own merits). Therefore, a more nuanced approach to *dolus eventualis* must be considered, one which deviates from the traditional *one-size-fits-all* concept.

#### 1.4.2 Key questions asked

- (i) How should the cognitive element be expressed? Should it be defined in qualified or unqualified terms?
- (ii) How should the conative element be expressed?
- (iii) Is the conative element a relevant part of the test for *dolus eventualis*?
- (iv) What are the general models of *dolus eventualis* in South African criminal law?
- (v) Should the approach to *dolus eventualis* be similar in all cases?

#### 1.5 Research methodology

This dissertation will be a desktop review of the applicable legal material. The legal doctrines, systems and opinions set out in this dissertation will be subject to analysis and criticism. It will be based on the applicable primary and secondary sources relating to South African criminal law. The study will refer broadly to leading cases, text books, articles and law journals on the topic. Other sources will include comments on decisions, reports and electronic sources on the topic. Therefore, this dissertation will be based on a critical analysis of relevant literature.

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<sup>72</sup> *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49).

<sup>73</sup> *S v Humphreys* (supra note 49).

<sup>74</sup> *Maaroahanye and Another v S* (supra note 49).

<sup>75</sup> *S v Van Schalkwyk* (supra note 49) para 31-34.

### **1.6 Limitations of the study**

This dissertation involves a research on the difficult theoretical problems and principles relating to *dolus eventualis*. This will be only based on South African law. The only instance where the author refers to foreign law will be on the historical origins of *dolus eventualis*, in the second Chapter. Seeing that the scope of the theory of *dolus eventualis* is very wide, I shall mainly focus on the theoretical approach relating to substantive law rather than the evidential law. This is done so as to determine what approach can be the best preferred: an approach which can best be followed to avoid uncertainties surrounding *dolus eventualis*. This dissertation will discuss and elaborate only the relevant principles relating to *dolus eventualis* as provided for in case law and legal academics.

### **1.7 Time frame**

This dissertation will be completed within a year; it was begun on the 9<sup>th</sup> February 2016 and was completed on the 31<sup>st</sup> December 2016.

### **1.8 Overview of the chapters-The dissertation will be divided into five chapters**

**Chapter 1: Introduction** -This chapter will introduce the main question, which is: *What is the best approach for the definition of dolus eventualis in South African law?* The problem question will be introduced, where I shall briefly explain the motivation for this research. In this Chapter, the limitations of the dissertation shall be highlighted; furthermore I shall explain how the research will be conducted.

**Chapter 2: The cognitive element of *dolus eventualis*** -This chapter will be on a critical analysis of the cognitive element of *dolus eventualis*. It will examine whether or not the degree of foresight must be defined in qualified terms in terms of South African criminal law.

**Chapter 3: The conative element of *dolus eventualis*** -This chapter will critically analyse the conative element of *dolus eventualis*. Furthermore, arguments for and against the relevance of the conative element in the test for *dolus eventualis* will be discussed. It shall be shown that it is to a greater extent that the conative element has been regarded as an irrelevant part of the test for *dolus eventualis*.

**Chapter 4: A critical examination of the interpretation of *dolus eventualis* in South African law** -This chapter will analyse how the concept has been interpreted by academic writers in South African law from the time it started being applied in early cases like the case

of *R v Horn*<sup>76</sup> till present day. There will be a critical examination of whether or not South African courts must apply the same approach of *dolus eventualis* to all murder cases, particularly death by reckless drivers and intention based murder. This critical examination is done because of the confusion regarding the interpretation of this concept amongst the academic writers.

**Chapter 5: Conclusion** –This chapter will be a summary of the insights as to the degree of effectiveness on the approach of *dolus eventualis* in South African criminal law. It will also summarise how this concept has been used, and also provide recommendations of how the concept must be approached.

All issues introduced in this chapter shall be discussed in depth in the chapters to follow, save for the historical developments of the *dolus eventualis* concept which have already been outlined in this chapter.

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<sup>76</sup> *R v Horn* (supra note 17) para 467B.

## CHAPTER TWO

### 2 THE COGNITIVE ELEMENT OF *DOLUS EVENTUALIS*

#### 2.1 Introduction

The test for *dolus eventualis*, as highlighted in the previous chapter, is twofold, including both a cognitive and a conative element. This chapter deals only with the first requirement which is the cognitive element. The second section of this chapter explains what the cognitive element entails, and traces its origins prior to the 1950s. It shall be shown that in the cases of *R v Hercules*,<sup>77</sup> *S v Nsele*,<sup>78</sup> and *R v Bergstedt*<sup>79</sup> an approach to the cognitive element different from the one applied before the 1950s was formally recognised.<sup>80</sup> This new approach is a subjective inquiry rather than the objective inquiry which was used before. The third section of this chapter deals with the general approach in South African law as regards the degree of foresight required for the cognitive element to be satisfied. Case law and differing academic views pertaining to this issue will be discussed. Thereafter, I shall decide the most preferable view possible to follow, in so far as the determination of the degree of foresight in the cognitive element is concerned.

#### 2.2 Defining the element

The cognitive element is an inquiry which entails that, in committing the crime the wrongdoer foresees the consequences of his actions leading to harm. In other words, when the wrongdoer engages himself in a certain act he must have a certain degree of knowledge in so far as its consequences are concerned in terms of the cognitive element. The issue of the degree of knowledge required is controversial and shall be discussed in more detail under the next subheading. Burchell takes us back, prior to the 1950s, where the cognitive element was considered from an objective point of view.<sup>81</sup> The inquiry back then was whether a reasonable man would have foreseen the consequences of his actions.<sup>82</sup> If on this basis it could be concluded that the accused foresaw such a consequence, then the conclusion is that the accused must have foreseen it and thus did foresee it.<sup>83</sup>

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<sup>77</sup> *R v Hercules* 1954 (3) SA 826 (AD) 831. Also held in the case of *S v Du Randt* 1954 (1) SA 313

<sup>78</sup> *R v Nsele* (supra note 10). This shall be referred to as the *Nsele case* throughout the dissertation.

<sup>79</sup> *R v Bergstedt* 1955 (4) SA 186 (AD) 188.

<sup>80</sup> Notable is the fact that this is not a closed list of the cases that adopted the subjective approach of intention after the objective approach had been done away with.

<sup>81</sup> JM Burchell (supra note 53) 352.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

Before the year 1954, the objective approach to intention was commonly applied in our courts,<sup>84</sup> although a subjective approach was followed by the Appellate Division in *R v Valachia*,<sup>85</sup> *R v Sikepe*,<sup>86</sup> *R v Thibani*,<sup>87</sup> and *R v Mkize*.<sup>88</sup> Across the Limpopo in *R v Ncetendaba*, Beadle J, having reviewed the evidence for the prosecution also applied the subjective approach and held that, “on this evidence I think the Crown has failed to prove that the accused knew or must have known”.<sup>89</sup> In my view, the judge by following a subjective approach in the *Ncetendaba* case did not set the case as precedent for all intention cases, in that it was still not clear which approach must be followed, as most case decisions<sup>90</sup> supported the objective inquiry. After the 1950s, South African courts let go of the objective test and adopted a new approach, a subjective test of intention. Pain argues that the ultimate rejection by the Appellate Division of the objective approach to criminal intention has been the most important and far-reaching development in South African criminal law.<sup>91</sup> He observes that this development has been very significant as it came after so many years of judicial disharmony regarding criminal intention.<sup>92</sup>

In 1954 and in the two years which followed, the Appellate Division articulated a clear preference for the subjective test which subsequently discredited the objective test. Van den Heever JA in *R v Hercules*, after referring to the difficulty of proving a person’s mental processes, continued; “It is a matter of inference, however; but it cannot be based, as the learned Judge stated in his summing up, on what the appellant ought to have foreseen. Apart from recklessness whether death, the probability or possibility of which was foreseen, results, that is, *dolus* in law, a person cannot commit murder by negligent conduct”.<sup>93</sup> The subjective approach was subsequently adopted by the Appellate Division in *R v Nsele*.<sup>94</sup> Van den Heever JA held that, “Stupidity, lack of foresight, negligence - which may consist in *non intellegere*

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<sup>84</sup> *R v Jongani* (supra note 5) 406; *R v Longone* (supra note 5) 539-542; the direction of Tredgold J, (as he then was) to the jury in *R v Kewelram* (supra note 10) 213; *R v Duma* (supra note 5) 417; *R v Ndhlangisa* 1946 AD 1101-1105; *R v Shezi* (supra note 5) 128-130; *R v Koza* 1949 (4) SA 555 AD 560; *R v Mtembu* 1950 (1) SA 670 684. We have statutory recognition of the objective approach in sec. 140 (a) of Act No. 24 of 1886; and it has been decided that sec. 7 of Act No. 27 of 1914 applies an objective test – see *R v Radu*, 1953 (2) SA 245 (E); *R v Maxaulana* 1953 (2) SA 252 (E).

<sup>85</sup> *R v Valachia* 1945 AD 826, 831.

<sup>86</sup> *R v Sikepe* 1946 AD 745, 756.

<sup>87</sup> *R v Thibani* 1949 (4) SA 720 AD 730.

<sup>88</sup> *R v Mkhize* 1951 (3) SA 28 AD 33.

<sup>89</sup> *R v Ncetendaba* 1952 (2) SA 647 SR 648.

<sup>90</sup> *R v Jongani* (supra note 5) 406; See all case citations referred to at Supra note 84.

<sup>91</sup> J H Pain, ‘Some Reflections on Our Criminal Law’ *Acta Juridica*, (1960) 298.

<sup>92</sup> *Ibid.*

<sup>93</sup> *R v Hercules* (supra note 77) 831. See also *S v Du Randt* (supra note 77).

<sup>94</sup> *R v Nsele* (supra note 10).

*quod omnes intelligunt* - cannot to my mind ever be a substitute for the intent, actual or constructive, which is requisite to support a charge of murder”.<sup>95</sup>

In the case of *R v Nsele*,<sup>96</sup> Schreiner JA commented on the commonly-known formulation of the doctrine of common purpose in *R v Garnsworthy*,<sup>97</sup> stating that it has been widely used in trial courts, and also pointed out that it has been referred to on different situations by the Appellate Division without doubt being expressly cast upon its correctness.<sup>98</sup> This equivocation in turn worked to his advantage, as it supported his application of a subjective test for intention later in the judgment.<sup>99</sup> Similarly, in the case of *R v Bergstedt*, Schreiner JA, revealed that there was no doubt the subjective test should be applied, saying:

As appears from *R v Nsele*...the words “or ought to have been”, though they have frequently been used in the past, do not, when applied to crimes like murder and attempted murder where intention must be proved, state the legal position accurately... But the words “was or ought to have been known” contrast knowledge with a merely reprehensible failure to know and wrongly import that either is sufficient to bring common purpose into operation.<sup>100</sup>

This indicates a successful transformation and the common acceptance of the subjective intention in South African criminal law.

Burchell observes that the subjective test recognises the state of mind of the wrongdoer only, the issue being whether the wrongdoer himself or herself foresaw the consequences of his or her act.<sup>101</sup> It no longer benefits the prosecution to prove that, although the accused did not foresee the consequences of his or her act, a reasonable person would, or should have foreseen them.<sup>102</sup> In the case of *S v K*,<sup>103</sup> Centlivres CJ observed, in relation to the case of *S v Bergstedt*,<sup>104</sup> that, Schreiner JA’s usage of the words, “knew or ought to have known” contrasts knowledge with a merely reprehensible failure to know and wrongly import that either is sufficient for proving intention. The subjective test is therefore more in accordance with justice than the objective test, since it excludes the possibility of “useful” or “imaginary” intent, that

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<sup>95</sup> *Ibid*, para 151.

<sup>96</sup> *R v Nsele* (supra note 10).

<sup>97</sup> *R v Garnsworthy* 1923 WLD 17, 19.

<sup>98</sup> *A classic example is the case of R v Duma* (supra note 5) 410; *R v Ndhlengisa* (supra note 84) 1101.

<sup>99</sup> J H Pain (supra note 91) 147, Pain observes that, with great respect, the words of Dove Wilson, J in *Garnsworthy* (supra note 97) 22 do not support the learned judge’s conclusion, the statement that the accused “must be taken to have known” is qualified by the words “as rational reasonable men”.

<sup>100</sup> *S v Bergstedt* (supra note 79) 188.

<sup>101</sup> J M Burchell (supra note 53) 353.

<sup>102</sup> This has been held to be the situation in the cases discussed at note 85.

<sup>103</sup> *S v K* 1956 (3) SA 353 (A) 356.

<sup>104</sup> *S v Bergstedt* (supra note 79) 188.

is, the imputation of criminal intention to the wrongdoer when he did not in fact have such intention.<sup>105</sup> On the other hand, the adoption of the subjective test entails that the more dim-witted, gullible and lacking in foresight the accused is, the more complicated it is to establish his or her fault.<sup>106</sup>

It has further been observed that some Roman-Dutch authorities have used the term “evil” to qualify the intention and the High Court case of *Dougherty* favours this approach.<sup>107</sup> It has thus been argued that adding this standard aspect of intention was part of the decisive process to the meaning of the concept of intention, which introduced vagueness into the definition, and this standard aspect was unnecessary since the courts have now isolated the respective zones of normative unlawfulness and subjective intention.<sup>108</sup> Foreign laws like the Scots law have to struggle with the mercurial meaning of “wicked” which is used to describe “recklessness” in that system of law, and the English law has for a long time had to confront the slippery concept of “malice aforethought”.<sup>109</sup> It is thus apparent to note that, what has saved us the irritation of trying to define the almost obscure terms is the clear distinction between intent regarding fact and intent regarding law.<sup>110</sup>

Notable is the fact that, the English law has once reverted from the objective test of intention, but eventually went back to the subjective test. A case in point to illustrate this is the case of *DPP v Smith*, where the court reverted to the objective approach taking a step back to the 19th century. Their Lordships decided that the objective approach, had always been the law and that the presumption of intention was one of law and irrebuttable in the absence of “proof of incapacity to form an intent, insanity or diminished responsibility.”<sup>111</sup> Regrettably, the court’s notice was not directed to the case of *R v Loughlin*<sup>112</sup> where the trial judge held that: “the appeal was on the grounds of misdirection by the judge on the intent necessary to the commission of the crime of attempting murder.” Pain observes that, it was unfortunate that the judge in this case had dealt with the issue as though it were a *matter of law*,<sup>113</sup> whereas it was of course only a *matter of fact*<sup>114</sup> which the bench should bear in mind together with every proof available in

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<sup>105</sup> JM Burchell (supra note 53) 353.

<sup>106</sup> *R v Nsele* (supra note 10).

<sup>107</sup> *S v Dougherty* 2003 (4) SA 229 (W).

<sup>108</sup> JM Burchell (supra note 53) 353.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *DPP v Smith* (1961) AC 290.

<sup>112</sup> *R v Loughlin* (1959) CrimLR 518 (CCA) 228.

<sup>113</sup> JH Pain (supra note 91).

<sup>114</sup> *Ibid.*



deciding whether the accused had the necessary intent. The judge had told the bench that if a man deliberately did an act, he intended, in law, the natural and probable consequences of that act, and he could not come to court and say “I did not intend to do that”. It is however particularly important to note that South African courts will not apply their law retrospectively, as the case in the English law. Having highlighted on the history of the determination of criminal intention in the cognitive element and the subsequent adoption of the subjective test, the author now turns into the general approach of the cognitive element of *dolus eventualis* in SA law.

### **2.3 The general approach in South African Law as regards the degree of foresight required in the cognitive element of *dolus eventualis*.**

Foresight required in the cognitive element of *dolus eventualis* must be “actual foresight”. Legal writers<sup>115</sup> use various terminology to define what entails “actual foresight” and this, in my view, has created a lot of confusion about what degree of foresight is appropriate for the cognitive element, and whether or not the cognitive element should be defined in qualified terms. Some old cases<sup>116</sup> favoured the view of a qualified possibility whereas some decisions after the case of *R v Horn*<sup>117</sup> favoured the unqualified possibility. As shall be discussed in detail below, such a transition has in my view left some legal academics in a state of confusion regarding the degree of foresight required in the cognitive element of *dolus eventualis*.

#### **2.3.1 Case law and legal writers who define the degree of foresight in *qualified terms***

First and foremost, the author shall provide a discussion on case authority and academic views in support of qualifying the degree of foresight in the cognitive element. From the old cases like *Qenele Xutu*,<sup>118</sup> *Du Randt*,<sup>119</sup> and *R v Bergstedt*<sup>120</sup> one can observe different terminology regarding what entails actual foresight. In these cases it can be observed that the degree of foresight should be qualified and defined as that of “some risk to life”.<sup>121</sup> In certain older cases it was accepted that the guilty party must have foreseen that his conduct was *likely*<sup>122</sup> to cause

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<sup>115</sup> These legal writers shall be discussed in detail in subsection 2.3.1

<sup>116</sup> Old cases in the exact citation at supra note 84 above.

<sup>117</sup> *R v Horn* (supra note 17) 467B.

<sup>118</sup> *R v Qenele Xutu* 1941 (1) PH H7 (W).

<sup>119</sup> *R v Du Randt* (supra note 77) 316.

<sup>120</sup> *R v Bergstedt* (supra note 80) 188E-188ff.

<sup>121</sup> *R v Du Randt* (supra note 77) 316.

<sup>122</sup> *R v Valachia* (supra note 85) 831; *R v Koning* 1953 (3) SA 220 (T) 231E-F; *S v K* (supra note 103) 356B; *R v Sikunyana* 1961 (3) SA 549 (E) 552D-H; *R v Mawena* 1962 (1) SA 896 (FC) 904G. In *R v Thibani* (supra note 87) 729, it was however, subsequently held that ‘likely’ is a confusing word, in that it can refer both to the possibility and the probability of the occurrence of the result.

the consequence in question, almost always the death of the victim. This was regarded as enough proof of the existence of the cognitive element in the accused. This is one of the pitfalls of qualifying the degree of foresight, which shall be explored in detail later on.

Courts tend to be specific when they refer to the requirement of foresight in *dolus eventualis*. Research has shown that a number of cases qualify and require the degree of foresight to be in the form of a real possibility. In *S v Ostilly*,<sup>123</sup> the court held that foresight of a real possibility is a sufficient requirement to prove *dolus eventualis*. The court in the *Ostilly* case referred to Burchell and Hunt as their influence towards this suggestion. Even though Burchell and Hunt cited this case as their authority in their second edition,<sup>124</sup> it has been observed that these writers were relying on their own authority in the first edition.<sup>125</sup> Thus, scholarly views against qualifying the degree of foresight can find such a reference as a weakness, because precedent from case authority normally holds a stronger influence on law application than secondary cases. Nevertheless, in *S v Moodie*,<sup>126</sup> the need for “not merely a remote but a real possibility” was acknowledged by the court without any further explanation.<sup>127</sup> In my view, the failure of the court to explain further in this regard was an indication of the court being satisfied by the notion of the degree of foresight being expressed in qualified terms, and further that such a notion should be the one to carry more weight.<sup>128</sup>

It has further been observed<sup>129</sup> that, in spite of the unclear support in the South African case law for the qualified foresight position, in what Paizes describes as “a significant acceptance of...the correct position”,<sup>130</sup> it has been put forward that the case of *S v Makgatho*<sup>131</sup> has irreversibly changed the law such that “[a]ny doubt that foresight of a remote possibility might suffice has now been eliminated.”<sup>132</sup> The Supreme Court of Appeal examined the “nub of the appeal, whether the appellant acted with *dolus eventualis* when he caused the death of the

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<sup>123</sup> *S v Ostilly and others* (1) 1977 4 (4) SA 699 (D), 728 D-E.

<sup>124</sup> EM Burchell ‘Criminal Intent’ (1973) 8 *Speculum Juris* 23.

<sup>125</sup> EM Burchell & PMA Hunt *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* (1970) 131.

<sup>126</sup> *S v Moodie* 1983 (1) SA 1161 (C) 1162B.

<sup>127</sup> Although there is also no discussion of the nature of the requirement, this criterion for foresight has further been applied in the Zimbabwean case of *S v Modus Publications (Private) Ltd and another* 1998 (2) SACR 151 (ZS) 157D.

<sup>128</sup> My emphasis.

<sup>129</sup> S Hoctor ‘The degree of foresight in *dolus eventualis*’ (2013) 2 *SACJ* 146.

<sup>130</sup> A Paizes (2013) 1 *Criminal Justice Review* 12.

<sup>131</sup> *S v Makgatho* 2013 (2) SACR 13 (SCA).

<sup>132</sup> A Paizes, (supra note 130).

deceased”,<sup>133</sup> thereby rejecting an appeal against conviction and prison term on a charge of murder. In the light of the above assertion, Shongwe JA, held that:<sup>134</sup> “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.” Shongwe JA specifically quotes and concurs with Ackerman AJA, who (in the case of in *S v van Wyk* 1992 (1) SACR 147 (Nms) at 161b), expressed himself as follows: “...I am accordingly of the view that the subjective foresight required for *dolus eventualis* is the subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue.” In view of the quoted parts of the *Makgatho* case judgement, it can be deduced that the degree of foresight must be defined in qualified terms.

Some cases have required foresight of a “reasonable” possibility, as opposed to an unqualified foresight requirement. Holmes J<sup>135</sup> in the case of *R v Suleman*,<sup>136</sup> expressed the test for *dolus eventualis* using this term, even though he was also referring to some passages in two Appellate Division cases which provide specific authority for foresight of a remote possibility.<sup>137</sup> The cases of *R v Du Randt*<sup>138</sup> and *R v Nemashakwe*,<sup>139</sup> also required foresight of “some risk to life”, before stating that the requirement is an appreciation of “a reasonable possibility of risk to life”. There is however no indication of how this requirement was established from the authority cited, but in the case of *R v Horn*, “likely” was compared with “probable.”<sup>140</sup> Hence from the terminology used in these cases to qualify the degree of foresight, one can argue that qualifying the degree of foresight is the best approach to follow.

Whiting is of the view that the degree of foresight is determined by social factors. He argues that the degree of likelihood with which the happening of the result must be foreseen will not

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<sup>133</sup> *S v Makgatho* (supra note 131) 8.

<sup>134</sup> Ibid, 9. The dictum is quoted in full, to assist discussion. In the formulation “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”, there seems to be more than a suggestion of *dolus indirectus*, rather than *dolus eventualis*. For an instance where *dolus eventualis* is incorrectly labelled *dolus indirectus*, see *S v Mnisi* 2009 (2) SACR 227 (SCA) at paragraph 2 read with paragraph 6.

<sup>135</sup> As he was referred to as such in those years.

<sup>136</sup> *R v Suleman* 1960 (4) SA 645 (N) 646H.

<sup>137</sup> Ibid, 647A, citing *R v Thibani* (supra note 87) 729-30 and *R v Horn* (supra 17) 467.

<sup>138</sup> *R v Du Randt*, (supra 77) 316.

<sup>139</sup> *R v Nemashakwe* 1967 (3) SA 520 (RA) 140.

<sup>140</sup> *R v Horn* (supra note 17) 467B.

be the same in all situations.<sup>141</sup> It has been observed that in most cases, the happening of the result will have to be foreseen as a substantial possibility. In this manner, it can be seen that Whiting accepts the view of qualifying the degree of foresight. He further observes that cases where one or more factors militating against a finding of *dolus eventualis* are present, the occurrence of the result will have to be foreseen as something more than a substantial possibility, unless there are countervailing considerations neutralising the effect of such factors.<sup>142</sup> Whiting further argues that in a case where it is the purpose of the person concerned to create the risk, it will be sufficient if he foresees the occurrence of the result only as a remote possibility.<sup>143</sup>

The Appellate Division also discussed the question of the degree of foresight criterion and defined the cognitive element in qualified terms, in *S v Beukes en 'n ander*.<sup>144</sup> The court was aimed at discussing the volitional element of *dolus eventualis*, but first of all gives some insight as regards the cognitive component, noting that the sufficiency of the remote possibility criterion was confirmed in a series of decisions.<sup>145</sup> Specifically, the court<sup>146</sup> confirmed the question of whether foresight of a remote possibility could constitute the cognitive component after it had been left unresolved in the *R v Thibani*<sup>147</sup> whether foresight of a remote possibility could constitute the cognitive component. The court then goes on to discuss some of the academic debate surrounding the conative component, and issues of proof. It was held that:

...where a court establishes that the accused foresaw a consequence, invariably the conative component is also held to be present. The chances that an accused will admit, or that it will be otherwise proved, that he foresaw a remote consequence are extremely slim. A court will therefore draw an inference concerning the accused's state of mind from the facts which indicate that, objectively assessed; it was reasonably possible that the consequence would occur. In the absence of such possibility, it is simply accepted that the accused did not foresee the consequence. If such possibility is established, it is usually accepted from the fact that the accused continued to act that he reconciled himself to the ensuing result.<sup>148</sup>

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<sup>141</sup> RC Whiting 'Thoughts on *dolus eventualis*' (1988) 1 SACJ 446.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> *S v Beukes en 'n ander* 1988 (1) SA 511 (A).

<sup>145</sup> Ibid, para 521I-522B.

<sup>146</sup> Ibid.

<sup>147</sup> *R v Thibani* (supra note 87) 729-30.

<sup>148</sup> Ibid, 522C-E.

In this regard, it can be submitted that the view in the case of *Beukes en 'n ander*<sup>149</sup> is in support of the view that the degree of foresight must be qualified.

Van Heerden JA, in the *Beukes* case, further went on to argue that, the conative element is normally only satisfied if the wrongdoer foresees the consequence as a reasonable possibility. The court's analysis has been criticised in respect of its conclusions regarding problems of proof.<sup>150</sup> It has been argued that Van Heerden JA has attempted to fake a fundamentally unsound relationship between “the substantive principles relating to the degree of foresight required for legal intention” and “the rules governing inferential reasoning”.<sup>151</sup> Argued further, it is not true that it is more difficult to prove foresight of a remote possibility than foresight of a real or substantial possibility by means of inferential reasoning, and that in fact the opposite is usually true. Moreover, Paizes comments that the reasonable possibility of a consequence, objectively viewed, does not entitle the court to infer subjective foresight of such a possibility, and that even if this was feasible, this does not “furnish a rational basis for concluding... that one only takes into the bargain or reconciles oneself to a consequence if one foresees the chance of that consequence ensuing as reasonably possible.”<sup>152</sup>

Notable is the fact that, in as much as some authors have expressed approval of the court's support for the reasonable possibility criterion,<sup>153</sup> it has to be borne in mind that the judgment does not eliminate foresight of a remote possibility. The decisive cases which establish the remote possibility principle are approved and not directly overruled by the court, and essentially the court states that liability for *dolus eventualis* will *normally*<sup>154</sup> only follow where the possibility is foreseen as a strong one. Even though there could be uncertainties on the argument employed in the judgment prior to this statement, there can be no disagreement with this conclusion, as it basically reveals the complexity involved with proof of a state of mind. Hoctor observes that, it is easier to prove foresight where the objective probabilities based on general human experience indicate that it would be present, than when the possibility supposedly foreseen is more unlikely to occur.<sup>155</sup> Notable is the fact that, the interpretation placed on the judgment in *Beukes* in the Namibian case of *S v Van Wyk*<sup>156</sup> was different.

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<sup>149</sup> *S v Beukes en 'n ander* (supra note 144).

<sup>150</sup> A Paizes (supra note 64) 640.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> RC Whiting (supra note 141) 445.

<sup>154</sup> S Hoctor (supra note 129) 142.

<sup>155</sup> Ibid.

<sup>156</sup> *S v Van Wyk* 1992 (1) SACR 147 (NMS) 161 e-h.

During an appeal against a murder conviction, the court looked at the question what the requisite degree of foresight should be for *dolus eventualis* in greater detail.<sup>157</sup> Ackermann AJA commences the argument by referring to the “authoritative formulation” of the test for *dolus eventualis* in *S v Sigwahla*,<sup>158</sup> which entails the need for a subjective foresight of the possibility of the consequence (death) ensuing. To be more precise, given that the definition cited is of an unqualified foresight criterion, Ackermann AJA goes on to mention some of the cases where it is indicated that a remote or slight possibility suffices, although he notes that in each case the wide formulation is not further motivated.<sup>159</sup> Nevertheless, Ackermann AJA goes on to state that the judgment in *S v Beukes* must be taken to have overruled these cases, by necessary implication.<sup>160</sup> This evaluation is concluded in the following terms:

There can, in my view, be no doubt that in this passage,<sup>161</sup> and particularly by virtue of his repeated reference to “redelikemoontlikheid” (“reasonable possibility”), also when discussing the two reasons he advances for the retention of the two criteria, the learned Judge of Appeal lays down a test to the effect that, without proof that the actor foresaw, as a reasonable possibility, that the particular consequence would result, *dolus eventualis* cannot be established.<sup>162</sup>

This case judgement is erroneous. For it to be accepted, a few suggestions have to be put forward to it. The reader is directed to the question as to why did Van Heerden JA choose *not* to specifically overrule the cases favouring the remote possibility criterion? Further, why did he hold that liability would *normally* only be established where the possibility is reasonable, accordingly leaving open the possibility of liability based on foresight of a lesser possibility? This question is particularly appropriate, given that the context for the discussion in *Beukes* is the impact of the seemingly lacunae on proof of *dolus eventualis*.<sup>163</sup> In summing up his argument, Ackermann AJA cites case law in support of foresight of a qualified possibility,<sup>164</sup> and to the opinions of writers, mainly those who support this view,<sup>165</sup> prior to stating that in his view to satisfy the cognitive element it is required to establish the “subjective appreciation that there is a reasonable possibility that the proscribed consequence will ensue”.<sup>166</sup> It has been observed<sup>167</sup> that the *Van Wyk* judgment contains an instructive explanation on the process of

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<sup>157</sup> S Hoctor (supra note 129) 142.

<sup>158</sup> *S v Beukes* (supra note 144) 157i-j, citing *S v Sigwahla* (supra note 67).

<sup>159</sup> *S v Van Wyk* (supra note 156) 158a-e, *S v De Bruyn en 'n ander* 1968 (4) SA 498 (A).

<sup>160</sup> *S v Van Wyk* (supra) 158e-g.

<sup>161</sup> *S v Beukes* (supra note 144) 522B-G.

<sup>162</sup> *Ibid.*, 159i-160b.

<sup>163</sup> *S v Campos* 2002 (1) SACR 233 (SCA) 34 -the court cites *S v Beukes* (supra note 144) 521E-522I.

<sup>164</sup> *S v Van Wyk* (supra note 156) 160b-e, *S v Ostilly and others* (supra note 123).

<sup>165</sup> *Ibid.*, 160e-i.

<sup>166</sup> *Ibid.*, 161b.

<sup>167</sup> S Hoctor (supra note 129) 143.

proof of *dolus eventualis*.<sup>168</sup> It may still be noted that Ackermann AJA's interpretation concerning the effect of the *Beukes* judgment has not found a clear acceptance elsewhere.<sup>169</sup>

Another case revealing a statement concerning foresight of a reasonable possibility is found in *S v De Ruiter*,<sup>170</sup> the solitary case in which *Beukes* has been openly followed as regards to the degree of foresight. The analysis in *Beukes* was viewed as follows: "that the "reasonableness" referred to does not import an objective element into the requirement for intention, but indicates the basis upon which the court must draw an inference from the facts to establish whether an accused, who disputes having *dolus eventualis*, actually had such intent"<sup>171</sup> as Hoctor observes.<sup>172</sup> This conclusion basically mirrors the process of proof of the cognitive component of *dolus eventualis*: that the wrongdoer foresaw the possibility of harm has to be the only *reasonable* inference that can be drawn: in this regard, it has been argued that the court in *Beukes* was not advocating for a doctrinal sea change but simply revealing an evidential reality.<sup>173</sup>

The reasonable possibility standard has been applied in *S v Cameron*<sup>174</sup> and *Dlamini and another v S*.<sup>175</sup> It was submitted that,<sup>176</sup> even though *S v Van Wyk* is cited in the second case, the court referred to the discussion of the process of proof,<sup>177</sup> rather than Ackermann AJA's discussion of the reasonable possibility criterion. Similarly, in the recent case of *S v Ziqhu*,<sup>178</sup> the court approves the reasonable possibility criterion, but the importance of this approval from a substantive perspective is somewhat diluted by the fact that the court immediately proceeds to cite a case which favours an unqualified possibility.<sup>179</sup>

Paizes<sup>180</sup> and Whiting<sup>181</sup> are of the view that the degree of foresight must be defined in qualified terms. They support the requirement of foresight of a substantial possibility; nevertheless, both of them admit that in certain specified cases, foresight of a remote possibility will be enough.<sup>182</sup>

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<sup>168</sup> *S v Van Wyk* (supra note 156) 161e-g.

<sup>169</sup> *S v Mofokeng* 2013 JDR 1832 (GNP) 21-22.

<sup>170</sup> *S v De Ruiter* 2004 (1) SACR 332 (W) 9.

<sup>171</sup> *S v Beukes* (supra note 144) 522C-E.

<sup>172</sup> S Hoctor (supra note 129) 144.

<sup>173</sup> Ibid.

<sup>174</sup> *S v Cameron* 2005 (2) SACR 179 (SCA) 11.

<sup>175</sup> *Dlamini and another v S* [2006] SCA 110 (SA).

<sup>176</sup> S Hoctor (supra note 129) 144.

<sup>177</sup> *Dlamini* (supra note 175) 10, referring to *S v Van Wyk* (supra note 156) 161f-g.

<sup>178</sup> *S v Ziqhu* 2013 JDR 1526 (FB) 122-123.

<sup>179</sup> Ibid, para 122-123, referring to *S v Campos* 2002 (supra note 163) 242j-243c.

<sup>180</sup> A Paizes (supra note 64) 642.

<sup>181</sup> RC Whiting (supra note 141) 446.

<sup>182</sup> Ibid, 443.

They make use of similar examples to illustrate their arguments. Whiting cites the imaginary case of the guns:

A person possesses a number of pistols, knowing that only one is loaded but not knowing which one it is. He takes one of the pistols at random, puts it against another person's temple, and pulls the trigger. His object is not to kill the other person but merely to expose him to the risk of death. If he happens to have selected the loaded pistol, with the result that the other person is killed when he pulls the trigger, will he be guilty of murder? Superficially it might appear that the answer should depend on how many pistols there are in all, because obviously the more pistols there were the slighter would be the possibility of a fatal outcome.<sup>183</sup>

However, the case differs from the ordinary case of killing with *dolus eventualis* in an important respect, namely that here it is the wrongdoer's purpose to expose the victim to the risk of death, or, to put it another way, he has *dolus directus* in relation to the creation of the risk. It seems that a case like this should be treated in the same way as a case where the wrongdoer has *dolus directus* in relation to the result itself. If so, it should not matter how many pistols there were in all: "even if there were a hundred pistols, so that he saw the chance of a fatal outcome only as very slight, the wrongdoer should still be guilty of murder".<sup>184</sup> Paizes uses, at most the same illustration, excluding the point where he refers to the number of chambers in a revolver instead of the number of pistols.<sup>185</sup> In this regard, the two authors are of the view that, where it is the wrongdoer's purpose to expose the victim to the risk of death,<sup>186</sup> the wrongdoer will have *dolus eventualis* regardless of the remoteness of the possibility.<sup>187</sup> Hence from the above views, it can be shown how these two academics are against the notion of foresight of an unqualified degree.

Further support for the view that the degree of foresight in the cognitive element should be qualified is Paizes' argument, where he disputes the utility of foresight of a remote possibility. Paizes argues that even though there are assertions by our courts at the uppermost level which regard foresight of a remote possibility to be enough, *dolus eventualis* has not once been found to be present where the accused has foreseen the possibility of the relevant consequence eventuating as slight or remote, but not real.<sup>188</sup> In support of Paizes, Whiting states that there is "a remarkable disparity" connecting such statements and the manner in which the courts

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<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> A Paizes (supra note 64) 642-3.

<sup>186</sup> RC Whiting (supra note 141) 443.

<sup>187</sup> A Paizes (supra note 64) 642. Whiting qualifies the requisite foresight by introducing the question of social utility (at 446) – "where the act involved is without social utility" the accused will be held liable, even if his foresight was only of a remote possibility, where he consciously created the risk.

<sup>188</sup> A Paizes (supra note 64) 642.



have in fact applied the law.<sup>189</sup> Other schools of thought have further submitted that it is very doubtful that courts would actually put such assertions into practice.<sup>190</sup> Professor Hoctor adds that the question of utility is surely framed by willingness to prosecute, informed by evidentiary constraints, and does not address the question of legal principle as to whether foresight of a remote possibility should constitute the cognitive component of *dolus eventualis*.<sup>191</sup>

Further support in view of expressing the degree of foresight in qualified terms is Burchell and Hunt's submission.<sup>192</sup> The argument is mainly directed on the acceptance of the notion of a *remote* possibility, where it has been argued that if foresight of a remote possibility is accepted it will lead to inconsistent results<sup>193</sup> and raises the spirit of injustice. This idea has been viewed as "too wide"<sup>194</sup> by other academics. Burchell and Hunt use an example of a motorist, stating that applying the remote possibility principle would mean that whenever someone drives his car, he would have *dolus eventualis* in respect of harm to other users of the road, and therefore would be a murderer should death be a consequence of his driving.<sup>195</sup> This example is based on assumption that recklessness is present.<sup>196</sup> Morkel argues that if a remote possibility amounted to sufficient foresight for liability, this would mean that the wrongdoer could be held liable for a crime requiring intention where her conduct did not even fall short of that of the reasonable person.<sup>197</sup>

Burchell and Hunt point towards their support to the view of foresight of a probability, but also state that in light of the rejection of this standard by the courts that the minimum degree of foresight required is foresight of a real or substantial possibility.<sup>198</sup> According to Burchell and Hunt, by insisting on this standard, intention would be confined "to a state of mind that can properly be regarded as such and keep the dividing line between intention and negligence clear

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<sup>189</sup> RC Whiting (supra note 141) 444. He continues that "no reason has ever been given for saying that the foresight required for *dolus eventualis* need be of no more than a remote possibility, and one can only speculate as to why this view should have been adopted".

<sup>190</sup> DW Morkel 'Towards a rational policy of criminal fault' (unpublished LLM dissertation, University of Pretoria) (1981) 64, where he argues further that occasions where courts stated that a remote possibility would be sufficient were in fact "isolated instances" which "do not, in fact, establish the inference that this is the legal position".

<sup>191</sup> S Hoctor (supra note 129) 137.

<sup>192</sup> EM Burchell and PMA Hunt (supra note 125) 146. JM Burchell (supra note 53) 373 gives a similar view.

<sup>193</sup> Ibid.

<sup>194</sup> RC Whiting (supra note 141) 440.

<sup>195</sup> EM Burchell and PMA Hunt (supra note 125) 146. See also JM Burchell (supra note 53) 373.

<sup>196</sup> S Hoctor (supra note 129) 138.

<sup>197</sup> DW Morkel 'Die onderskeid tussen *dolus eventualis* en bewustenalatigheid: 'n Repliek' (1982) 45 THRHR 321, 323. Morkel favours requiring foresight of a "concrete" possibility, the deliberate disregard of which it would be in the interests of the community to punish.

<sup>198</sup> EM Burchell & PMA Hunt (supra note 125) 146-7.

cut.”<sup>199</sup> Burchell supports this view, and is of the opinion that foresight of a “real”, “substantial” or “reasonable” possibility is required.<sup>200</sup> Snyman supports the above views as he accepts that a real or reasonable possibility is required.<sup>201</sup> However, his persistence on this requirement is disrupted by his acknowledgment that *dolus eventualis* “is not limited to cases where the result is foreseen as a strong possibility.”<sup>202</sup> Nevertheless, one can argue that Burchell and Hunt’s arguments can be accepted as evidence for the view that the degree of foresight must be defined in qualified terms.

### 2.3.2 Case law and legal writers who define the degree of foresight in *unqualified terms*

I shall now discuss case law and the arguments of academics who support the view that the degree of foresight must be defined in unqualified terms which is the view favoured by this dissertation. To begin with, Loubser and Rabie<sup>203</sup> submit that what must be foreseen is only the *possibility*<sup>204</sup> and not necessarily the *probability*<sup>205</sup> or the *likelihood*<sup>206</sup> of the occurrence of the result in question – thereby accepting the degree of foresight in unqualified terms. It can be submitted that following Loubser and Rabie’s opinion is preferable because foresight of an unqualified possibility is a notion that has been firmly established<sup>207</sup> under South African criminal law and thus it clearly supports the dominant view in the courts as to what degree of foresight is required in the cognitive element.

To further show that the unqualified possibility is the preferable approach, it is important to refer to the words of Van Blerk JA, in the case of *R v Horn*,<sup>208</sup> where he states that, “It would be incongruous to limit a wrongdoer’s constructive [sic] intent to cases where the result which he has foreseen was likely to cause death and not to infer such intent where the result he had foreseen was, although possible, not likely.” Even though it can be argued that the *Makgatho*<sup>209</sup> case set precedent for the view that the degree of foresight must be defined in qualified terms,

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<sup>199</sup> Ibid.

<sup>200</sup> JM Burchell (supra note 53) 373.

<sup>201</sup> CR Snyman *Criminal Law* 5ed (2008) 185-186 (In this edition he has replaced the term ‘substantial’, which appeared in earlier editions, with ‘real’).

<sup>202</sup> Ibid.

<sup>203</sup> MM Loubser, MA Rabie ‘Defining *Dolus Eventualis*; A volutative element?’ SACJ (1988) 3 Focus 416.

<sup>204</sup> *R v Horn* (supra note 17) 567B; *S v Malinga* (supra note 2) 694G; *S v Nkombani* 1963 (4) SA 877 (A) 891C-D; *S v Sigwahla* (supra note 67).

<sup>205</sup> *S v Sikweza* (supra note 68) 736F; *S v Nkombani* (supra note 204) 891C-D; *S v Tazwinga* 1968 (2) SA 590 (RA) 591D-E. *R v Lungone* (supra note 5) 539, *R v Garnsworthy* (supra note 98) 19.

<sup>206</sup> *R v Horn* (supra note 17) 467A-B; *S v Sikweza* (supra note 67) 736E-G.

<sup>207</sup> *R v Horn* (supra note 17) 567B; *S v Malinga* (supra note 2) 694G; *S v Nkombani* (supra note 204) 891C-D; *S v Sigwahla* (supra note 158) 570B-C; *S v Sikweza* (supra note 205) 736F.

<sup>208</sup> *R v Horn* (supra note 17) 567B.

<sup>209</sup> *S v Makgatho* (supra note 132).

this can be disputed by the weight that is carried over by the judgement in the case *R v Nsele*.<sup>210</sup> Some academics<sup>211</sup> even argue that the dictum in the *Nsele* case was passed in the 1950s, but has since become the prevailing approach to the degree of foresight required for *dolus eventualis* to suffice.<sup>212</sup>

In support of the view that foresight should not be qualified, Schreiner JA in *R v Nsele*<sup>213</sup> held that, “...provided that the risk must have been and therefore, by inference was, present to the mind of the accused, and provided that he was reckless whether or not it matured in death, I do not think that the seriousness of the risk is material.” Further support of the view that the degree of foresight should be defined in unqualified terms is taken from an analysis of the case of *R v Thibani*<sup>214</sup> where Schreiner JA held that:

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

Schreiner JA in this case shows that qualifying the degree of foresight in the accused’s conduct does not necessarily affect the actual foresight present in the accused. The accused shall be regarded as having foresight, even if the realization of a harmful consequence is slight.

In the case of *S v Mini*,<sup>215</sup> Holmes JA found that intention to kill was present where “the appellant did foresee the possibility, even if slight, of death resulting from his conduct and proceeded reckless of the consequences.” Holmes JA further goes on to support the view of foresight of an unqualified possibility in *S v De Bruyn*,<sup>216</sup> where he states that if “an accused were to admit that he foresaw the possibility of death, on the footing that anything is possible,

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<sup>210</sup> *R v Nsele* (supra note 10) 148A.

<sup>211</sup> S Hoctor (supra note 129) 150.

<sup>212</sup> Ibid.

<sup>213</sup> *R v Nsele* (supra note 10) 148A.

<sup>214</sup> *R v Thibani* (supra note 87) para 729-30. Similar findings were made in the case of *S v De Bruyn en ‘n ander* supra note 160) para 510G; *S v Sethoga and others* 1990 (1) SA 270 (A) at 275J-276A; *S v Qeqe* 2012 (2) SACR 41 (ECG) at 49E-G.

<sup>215</sup> *S v Mini* 1963 (3) SA 188 9 (A) para 191.

<sup>216</sup> *S v De Bruyn en ‘n ander* (supra note 159) para 511D.

that would contribute to a conviction for murder.” Furthermore to note is the fact that the Appellate Division in the case of *S v Shaik*,<sup>217</sup> concurred with Holmes JA in *S v De Bruyn* regarding the degree of foresight. The Appellate Division in the *Shaik* case seemed to be in support of the view that the degree of foresight must be defined in unqualified terms. This is revealed where the Appellate Division applied the views of Holmes JA that “legal intention is present if the accused foresees the possibility, however remote, of his act resulting in death to another.”<sup>218</sup> The *Shaik* case rejected the argument that the accused must have foreseen the real possibility of death, shown by the use of words “based on misconception.”<sup>219</sup> The court’s reasoning behind this rejection was that “if an accused admits that he foresaw a possibility of injury or worse, or there is other direct evidence to that effect, or if the facts are such that an adverse inference must be drawn, it will not assist the defence to show that the risk of injury or worse appeared unlikely, highly improbable or remote.”<sup>220</sup>

In the case of *S v Ngubane*,<sup>221</sup> the court looked at the cognitive element and the conative element at the same time therefore the explanation given for possibility of foresight in the cognitive element is closely connected to the conative element. In this manner, it can be said that Van Heerden JA could not find a situation in which the accused had foreseen a consequence but had not been reckless in respect of its occurrence. It has been observed<sup>222</sup> that the reason for this was, he considered, clear: the chances that the perpetrator will admit, or that it will appear from other direct evidence, that he “foresaw a remote consequence” are very unlikely.<sup>223</sup> The court will in this regard objectively determine an inference his state of mind from the circumstances which indicate that it was, reasonably possible that the result in question will follow.

If such a possibility does not exist, it has to be accepted that the wrongdoer was not aware of that result. An inference from the fact that he acted and took the consequences into account are normally indicative of the existence of such a possibility but it should not matter, for the purpose of determining whether an accused has *dolus eventualis*, whether he foresees the possibility “as strong or faint, as probable or improbable”.<sup>224</sup> Van Heerden JA did say,

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<sup>217</sup> *S v Shaik & others* 1983 (4) SA 57 (A).

<sup>218</sup> *Ibid*, para 62E-F.

<sup>219</sup> *Ibid*, para 62D-E.

<sup>220</sup> *Ibid*, 62E-G.

<sup>221</sup> *S v Ngubane* 1985 (3) SA 677 (A).

<sup>222</sup> A Paizes (supra note 64) 637.

<sup>223</sup> *S v Ngubane* (supra note 222) 522C-D.

<sup>224</sup> *Ibid*, 685F-G.

however, that the “likelihood in the eyes of the agent of the possibility eventuating must obviously have a bearing on the question whether he did “consent to that possibility”<sup>225</sup> and that, “if the agent persists in his conduct despite foreseeing a consequence as a real or concrete possibility, the inference could well be drawn that he “reconciled” himself to that consequence, that he was “reckless” of that consequence.”<sup>226</sup> According to Paizes, “it would seem that the inference is that an accused is less likely to consent to or reconcile himself to or take into the bargain consequences if one foresees the likelihood of their ensuing as slight or remote than if one foresees this likelihood as real or concrete.”<sup>227</sup> It has thus been submitted that the fallacy of such a suggestion is manifest: one who acts after foreseeing the real possibility of his act causing the death of another consents to the real possibility of death ensuing; one who acts after foreseeing only the slight possibility of his act causing the death of another reconciles himself to the slight possibility of death.<sup>228</sup> In light of this submission, one can argue that the degree of foresight should be defined in unqualified terms.

Further support of the view of an unqualified possibility is the case of *Nkosi and another*<sup>229</sup> where the court accepts that the appellant was convicted on the basis of foresight of “no more than a remote possibility”. In the case of *Mazibuko and others*<sup>230</sup> the court cites the judgment of the court *a quo*, which convicted the accused of murder on the basis of foresight of the “remote” possibility of death occurring. The court in the case of *S v Humphreys* adopted the terminology used in the *Ngubane* case, and held that foresight of a “remote” possibility is sufficient.<sup>231</sup> In the case of *S v Dladla*, it was also indicated that the requirements for *dolus eventualis* would be satisfied by foresight of a possibility which was “faint”.<sup>232</sup>

Loubser and Rabie<sup>233</sup> observe that, even though South African law has settled the view that the accused need only foresee the possibility and not necessarily the probability of the victim's death, the probability or likelihood of its occurrence may be applicable in drawing the inference that the accused did in fact foresee it, in that the greater the likelihood or probability of death,

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<sup>225</sup> Ibid, 685G-H.

<sup>226</sup> Ibid, 686A-B.

<sup>227</sup> A Paizes (supra note 64) 637.

<sup>228</sup> Ibid.

<sup>229</sup> *S v Nkosi and Another* 1991 (2) SACR 194 (A) 2011.

<sup>230</sup> *S v Mazibuko and others* 1988 (3) SA 190 (A)199H-200C.

<sup>231</sup> *S v Humphreys* 2012 JDR 0277 (WCC) 60.

<sup>232</sup> *S v Dladla* 1980 (1) SA 1 (A) at 3G indicates that foresight of a “vae” (faint) possibility suffices.

<sup>233</sup> MM Loubser & MA Rabie (supra note 203) 417.

the stronger would be the inference that the accused in fact foresaw it.<sup>234</sup> On the other hand, as highlighted in the case of *Shaik*, the more improbable the consequence in question was, the more difficult it would be to prove, by inference, that the wrongdoer actually foresaw it.<sup>235</sup> Remoteness of the possibility is of course relevant in drawing an inference of the wrongdoer's subjective foresight of that possibility;<sup>236</sup> “the more remote the possibility the less likely it is that the accused did in fact foresee it.”<sup>237</sup> However, it does not mean that a person who does foresee a possibility of death is entitled, because the risk is slight, and death is unlikely, highly improbable or remote, to take a chance and, as it were, gamble with the life of another.<sup>238</sup> In view of this contention, it can safely be argued that there is strong support for the view that the degree of foresight in the cognitive element must be defined in unqualified terms.

Further support for the sufficiency of the unqualified degree of foresight in the cognitive element can be deduced from Engers' view. He argues that, to say that foresight of a *remote* possibility is not foresight is complicated in so far as both language and logic are concerned.<sup>239</sup> It has been observed that, using a phrase from Glanville Williams, to say that foresight is not foresight, is simply a misuse of language.<sup>240</sup> The real meaning of *dolus eventualis* is that the wrongdoer should be found guilty of intentional conduct because he foresees the possible harm, and accepting that it might possibly occur, he then decides to take a risk that such a consequence will not result,<sup>241</sup> instead of abstaining from his or her proposed course of conduct. Remoteness of the possibility may be related to punishment, but in principle it cannot affect criminal liability: the accused consciously chose to take the risk, however remote, and so in principle has a “heartless disregard” for the prospect of the harm occurring.<sup>242</sup>

Some academics who support the idea of qualifying the degree of foresight argue that applying the remote possibility principle to a motorist would mean that whenever someone drives his car, he will have *dolus eventualis* in respect of harm of other users of the road, and therefore would be a murderer should death be a consequence of his driving.<sup>243</sup> Professor Hoctor states

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<sup>234</sup> *R v Horn* (supra note 17) 467C.

<sup>235</sup> *S v Shaik* (supra note 217) 62D-E.

<sup>236</sup> *S v Malinga* (supra note 2) 694H.

<sup>237</sup> *S v Shaik* (supra note 217) 62D-E.

<sup>238</sup> *R v Horn* (supra note 17) para 465C.

<sup>239</sup> KAB Engers ‘*Dolus eventualis* –which way now?’ 1973 *Responsa Meridiana* 219, 223.

<sup>240</sup> S Hoctor (supra note 129) 150.

<sup>241</sup> *Ibid.* If the accused rules out the risk of the harm occurring, his consequent conduct will fall within the realm of conscious negligence, rather than intention’.

<sup>242</sup> BD van Niekerk ‘*Dolus eventualis* revisited’ (1969) 86 *SALJ* 136, 140.

<sup>243</sup> EM Burchell & PMA Hunt (supra note 125).

that, even though the prospect of thousands of potential murderers who drive (who, despite having slight worries about their conduct, can hardly be described as manipulative killers) is rather disturbing, this potential mass liability must be viewed by virtue of circumstance.<sup>244</sup> Primarily, it has to be analysed once again that where a motorist foresees the possible harm arising, but goes on to disregard the risk of harm, in the sense of not reconciling himself to the risk, there can be no liability for murder on the basis of *dolus eventualis*.<sup>245</sup> From this assertion, one can argue that defining the cognitive element in unqualified terms is the best approach.

Even though it has been indicated earlier that some courts have occasionally found it proper to express their application of the cognitive element of *dolus eventualis* in qualified terms, the standard approach of accepting proof of an unqualified possibility as adequate for the purposes of liability has not been dismissed formally.<sup>246</sup> For example, in the case of *Van Aardt* in the court a quo, Froneman J applied the standard approach of foresight of an unqualified possibility of the risk of death ensuing;<sup>247</sup> when the matter was taken for an appeal, the full bench of the Eastern Cape High Court, faced with the argument whether the possibility foreseen should be “strong or slight” held that the issue did not merit discussion as the appellant had in fact foreseen the “reasonable” possibility of harm on the facts;<sup>248</sup> and the Supreme Court of Appeal upheld the conviction, on the basis of subjective foresight of the possibility of harm, expressed in unqualified terms.<sup>249</sup> It is also of paramount importance to bear in mind that in dealing with the issue of proof of *dolus eventualis* the court refers to the classic formulation in *S v Sigwahla*.<sup>250</sup>

To support the view that the degree of foresight must be defined in unqualified terms, I shall turn to Burchell & Hunt’s opinion which in my view is to a certain extent flawed. This is when Burchell & Hunt<sup>251</sup> said: “It is sufficient if the accused, having foreseen the real possibility of the existence of the circumstances in question, nevertheless persisted in his conduct irrespective

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<sup>244</sup> S Hoctor (supra note 129) 150.

<sup>245</sup> As demonstrated in *S v Humphreys* (supra note 231).

<sup>246</sup> S Hoctor (supra note 130) 145.

<sup>247</sup> *S v Van Aardt* 2007 JDR 1043 (E) 32.

<sup>248</sup> Ibid, 345H-J.

<sup>249</sup> Ibid, 340H. Perhaps the varying emphases in the different *Van Aardt* judgments could be regarded as variations on a theme.

<sup>250</sup> *S v Sigwahla* (supra note 68) 570B-F, which supports foresight of the unqualified possibility of harm and the Namibian case of *S v Van Wyk* (supra note 157) para 37 also supports foresight of an unqualified possibility, and the strongly argued contention in *Van Wyk* that since *Beukes* foresight of a qualified possibility is required for *dolus eventualis* is not mentioned at all.

<sup>251</sup> EM Burchell & PMA Hunt *South African Criminal Law and Criminal Procedure* 3ed (1997) 131.

of whether it existed or not.”<sup>252</sup> In other words, Burchell & Hunt are of the view that foresight of a real or probable possibility rather than a remote possibility of that consequence must be foreseen. In support of Burchell & Hunt, Morkel<sup>253</sup> similarly suggests that the possibility should be a substantial possibility while Snyman<sup>254</sup> believes that it should be a material or reasonable (wesentliche of redelike) possibility. Burchell & Hunt<sup>255</sup> further state that it is doubtful whether a person can be said to foresee a possibility if he thinks of it but considers it very remote. This opinion may, in my view, lead to incorrect conclusions as it is based on the *mere speculation*<sup>256</sup> of the imaginary possibility of the consequence in question. It can thus be said that too much attention must not be placed upon the mere observation by the accused of the hypothetical possibility of the consequence in question, with a consequent neglect of his consideration as to whether or not an anticipated result will occur.<sup>257</sup>

In addition to the above views, Loubser adds that it is not only the abstract statistical possibility that must be considered in establishing the accused’s intention, but that possibility, and particularly the likelihood of its occurrence in the light of the particular circumstances of the case in question.<sup>258</sup> In this manner, the consequence must at any rate be concretely possible, as Morkel suggests. In short, the accused who does not foresee a possibility as real, does not foresee that it will materialize in the circumstances. The mere fact that the accused at some stage contemplated or foresaw the occurrence of a result as possible, should not invariably lead to a conclusion that he had *dolus eventualis* in respect of that result. It may be that the accused, although initially contemplating the possibility of such occurrence, at a later stage, but before concluding his action, decides that the result will nevertheless not ensue. He may, for example, rely upon his own skill or on defensive measures taken by him, and trust that he is able to avoid the result in question.<sup>259</sup> In such an instance the accused in fact does not foresee the possibility that the consequence will materialize. It appears therefore that what is required is not merely foresight of an intangible possibility of a consequence, but that the accused concluded that it might occur in the particular circumstances.<sup>260</sup> It follows that a wrongdoer who considers a possibility as remote, but nevertheless foresees that it may ensue in the circumstances, has

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<sup>252</sup> Can also be found at the Annual Survey of South African Law (1964) 73.

<sup>253</sup> DW Morkel *Tydskrif vir Regswetenskap* (1981) 5 SACC 162, 173.

<sup>254</sup> CR Snyman *Strafreg* 2ed (1986) 215-216.

<sup>255</sup> Burchell & Hunt (supra note 125) 146.

<sup>256</sup> Italics for my emphasis.

<sup>257</sup> MM Loubser & MA Rabie (supra note 203) 417-419.

<sup>258</sup> Ibid.

<sup>259</sup> DW Morkel (supra note 253) 172.

<sup>260</sup> MM Loubser & MA Rabie (supra note 254) 417-419.



*dolus eventualis*.<sup>261</sup> In this manner, it can thus be said that defining the degree of foresight in unqualified terms is the best approach.

It has been observed elsewhere that the citation<sup>262</sup> from Burchell and Hunt where they mention foresight of a real possibility is however erroneous. Professor Jonathan Burchell was responsible for the third<sup>263</sup> edition of this work in 1997, after the original authors had passed away, but this statement is not found at page 131.<sup>264</sup> The *Annual Survey* reference refers to part of the discussion of the general principles of contract – authored, notably, by Hunt – wherein it is stated that fraudulent intent is established “if one actually foresees that a statement may be false, but nevertheless makes it”.<sup>265</sup> Despite the fact that this reference clearly supports the subjective foresight requirement, it does not provide support for the qualified possibility approach. The references cited in the *Makgatho* case undoubtedly originate directly from the case of *S v Ostilly and others*,<sup>266</sup> which are a clear indication that the source of the first quote is the first edition of Burchell and Hunt, published in 1970.<sup>267</sup> It is argued that it was not the intention of the court to dismiss almost five decades of precedent in the face of a single academic argument, there was therefore an error.<sup>268</sup> I find this observation quite reasonable; hence, with lack of support for the qualified possibility of foresight, the author is of the view that the unqualified possibility is the best approach.

The nature of the state of mind required for *dolus eventualis* may be illustrated with reference to cases where an accused intended to scare another by shooting at him but aimed to miss, and relied for this upon his skill as a marks man. In *Horn*,<sup>269</sup> *Haines*<sup>270</sup> and *Du Preez*<sup>271</sup> it was found that the accused did not in the light of all the evidence subjectively foresee the materialisation of the possibility of death or injury, while in *De Zoete*,<sup>272</sup> on the other hand, the court held that the accused in a similar situation did in fact foresee the victim's death or injury in the circumstances. In *Van Jaarsveld*<sup>273</sup> the court held that the accused did foresee the

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<sup>261</sup> Ibid.

<sup>262</sup> EM Burchell & PMA Hunt (supra note 251) 31.

<sup>263</sup> See JM Burchell (supra note 53).

<sup>264</sup> S Hoctor (supra note 129) 147.

<sup>265</sup> PMA Hunt ‘General principles of contract’ (1964) *Annual Survey of SA Law* 73.

<sup>266</sup> *S v Ostilly and others* (supra note 123) 728D-E.

<sup>267</sup> S Hoctor (supra note 129) 147.

<sup>268</sup> Ibid.

<sup>269</sup> *R v Horn* (supra note 17) 464E-G.

<sup>270</sup> *S v Haines* 1969 (2) PH H191 (N).

<sup>271</sup> *S v Du Preez* 1972 (4) SA 584 (A) 589E-E.

<sup>272</sup> *S v De Voete* 1966 (2) PH H 397 (SWA).

<sup>273</sup> *S v Van Jaarsveld* 1974 (1) PH H 9 (A).

possibility that he may hit the victim, but that he nonetheless concluded that he would be successful in aiming to miss. This would seem to imply that although the accused did contemplate the possible death of the victim, he was satisfied that such death would not ensue in the circumstances; in other words, that he did not actually foresee the victim's death in the circumstances.<sup>274</sup> In other words, what was accepted as sufficient for liability was remote foresight; the court did not necessarily qualify the degree of foresight in any terms.

This dissertation supports the view that the degree of foresight must be of any foresight, no matter how remote, unqualified by any terms with support from the case of *S v Malinga*<sup>275</sup> which favours foresight of a remote possibility. In the case of *Malinga*, it was held that remoteness of the possibility is significant in drawing an inference of the accused's subjective foresight of a possibility;<sup>276</sup> the more remote the possibility the less likely it is that the accused did in fact foresee it.<sup>277</sup> But that is not to say that a person who does foresee a possibility of death is entitled, because the risk is slight, and death is unlikely, highly improbable or remote, to take a chance and, as it were, gamble with the life of another.<sup>278</sup> Furthermore, the author favours the view of an unqualified possibility because the requirement of a real possibility has been expressly rejected.<sup>279</sup> The requirement of a real possibility was rejected following a decision in South African case law that what is required for *dolus eventualis* is not foresight of any possibility, but only of a *real* possibility<sup>280</sup> or foresight of a *substantial* risk<sup>281</sup> or of a *reasonable* possibility of risk to life.<sup>282</sup> In the case of *Beukes*<sup>283</sup> reference has been made to foresight of a reasonable possibility,<sup>284</sup> but it appears that they do not go as far as setting this as a general requirement.<sup>285</sup> This requirement would be in conflict with the view which either does not qualify possibility or even allows a remote possibility to suffice.

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<sup>274</sup> MM Loubser & MA Rabie (supra note 203) 419.

<sup>275</sup> *S v Malinga* (supra note 2) 694H.

<sup>276</sup> Ibid.

<sup>277</sup> *S v Shaik* (supra note 217) 62D-E.

<sup>278</sup> *R v Horn* (supra note 17) 465C.

<sup>279</sup> *S v Fick* 1970 (4) SA 510 (N) 514C-G; *S v Shaik* (supra note 217) 62C-F.

<sup>280</sup> *S v Ushewokunze* 1971 (1) SA 360 (RA) 364B-C; *S v Ostilly* (supra note 123) 728D; *S v Ncwane* 1978 (2) PH H218 (A); *S v Moodie* 1983 (1) SA 1161 (C) 1162B.

<sup>281</sup> *R v Steenkamp* 1960 (3) SA 680 (N) 684F-G.

<sup>282</sup> *S v Tazwinga* (supra note 205) 59 1D; *S v Ushewokunze* (supra note 280) 363.

<sup>283</sup> *S v Beukes* (supra note 144).

<sup>284</sup> Ibid, 522E.

<sup>285</sup> Ibid, 521J-522C.

## 2.4 Conclusion

The formal and substantive definition for the cognitive element of *dolus eventualis* reflects the ultimate purpose of this test, namely the assessment of the degree of foresight required in the accused. It has been shown in this chapter that there is no set rule as to what amount of foresight is the required one in South African criminal law. Some academics<sup>286</sup> favour the notion that the degree of foresight should not be qualified, thereby accepting a remote<sup>287</sup> or a slight possibility<sup>288</sup> of harm as sufficing for *dolus eventualis*. However, this view has been criticised on the basis of being too broad<sup>289</sup> and concerns are that such a concept can lead to unfair results.<sup>290</sup> Some courts qualify the degree of foresight to a reasonable one, some a real possibility.

However, qualifying the degree of foresight has been criticised on the basis of being difficult to interpret. This is affirmed by Loubser's submission that, it is difficult to apportion a legal meaning to these everyday terms like "reasonable", or "real" into day to day terms of a lay person.<sup>291</sup> Therefore, based on the above criticism against qualifying the degree of foresight, this dissertation submits that the use of foresight should be defined in unqualified terms. It has been submitted that this approach is the prevailing one in jurisprudence.<sup>292</sup> Furthermore, it has been observed that such prevalence is an indication of the acknowledgement by the courts, that, if it is indeed established beyond a reasonable doubt, whether on the basis of inferential reasoning or direct evidence, that the accused had actual subjective foresight of the possibility of harm, whilst continuing to act despite such foresight, an accused is said to have intention in the form of mens rea.<sup>293</sup> From the above arguments, it can be argued that the degree of foresight in the cognitive element of *dolus eventualis* should be assessed in unqualified terms under South African law as this approach has been the most prevalent in the case law, as well as finding strong support with some writers.

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<sup>286</sup> These include A Paizes (supra note 64), RC Whiting (supra note 141) and CR Snyman (supra note 1)

<sup>287</sup> *S v Humphreys* (supra note 231) 60.

<sup>288</sup> *S v Mini* (supra note 216) 191h.

<sup>289</sup> EM Burchell and PMA Hunt (supra note 125) 146.

<sup>290</sup> Ibid.

<sup>291</sup> MM Loubser & MA Rabie (supra note 203) 141-142.

<sup>292</sup> S Hoctor (supra note 129) 151.

<sup>293</sup> Ibid.



## CHAPTER THREE

### 3. THE CONATIVE ELEMENT OF *DOLUS EVENTUALIS*

#### 3.1 Introduction

The conative element can be understood as the second leg of the test that must be satisfied in order for intention in the form of *dolus eventualis* to be established. The second section of this chapter shall attempt to define and explain the contents of the second leg of the test for *dolus eventualis*. Further, the historical origins of the second limb of the test prior to 1945 shall be briefly traced, and thereafter it will be highlighted how it was finally adopted into South African criminal law in 1945. I shall constantly refer to the second limb of the test as the conative element throughout the chapter, and also indicate in detail how other legal writers define it. In the third section of this chapter, some insights regarding the acceptance of the conative element as a significant part of the test for *dolus eventualis* in South African criminal law shall be given, and it shall be highlighted how courts and academics have attempted to give content to this element. As shall be discussed in the chapter, legal writers have found it difficult to figure out the correct definition and purpose of the conative element. As such, it has been rejected as a superfluous and an irrelevant concept.<sup>294</sup>

In as much as some academics reject the conative element as confusing, in subsection 3.3 it shall be highlighted that South African court decisions have introduced this element as a necessary part of *dolus eventualis*. These cases include *S v Beukes*,<sup>295</sup> *S v Ngubane*,<sup>296</sup> *S v Valachia*,<sup>297</sup> amongst others.<sup>298</sup> Furthermore, the chapter shall provide some evidence to the view that the definition of *dolus eventualis* from historical sources law involves the conative element and this makes it important. Arguments for and against the recognition of the conative element shall be given in detail. In the last subsection, I shall make an evaluation and give some input concerning whether or not the conative element can indeed be said to be redundant, in South African criminal law.

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<sup>294</sup> DW Morkel (supra note 190) 154. See also E M Burchell and P M A Hunt (supra note 125)154. Some academics who express discontent towards the second limb of the test for *dolus eventualis* shall be discussed in detail later in this chapter.

<sup>295</sup> *S v Beukes en n' ander* (supra note 144).

<sup>296</sup> *S v Ngubane* (supra note 221).

<sup>297</sup> *R v Valachia* (supra note 85).

<sup>298</sup> *R v Sikepe* (supra note 86) 745; *R v Thibani* (supra note 87); *R v Geere* 1952 (2) SA 319 (AD); *R v Huebsch* 1953 (2) SA 561 (AD); *R v Horn* (supra note 17); *S v Mini* (supra note 215).

### 3.2 Elaborating on what the conative element entails

For the sake of clarity, it is in my view important to reflect on the historical development of the conative element before criticising some legal writers' interpretation of this concept. Before 1945, courts have not been applying the conative element of *dolus eventualis*. What made it hard for courts prior to 1945 to give meaning to or recognise the conative element is that in almost every case where the accused was acquitted on the ground that he had no intention, the element found to be lacking was foresight, and recklessness was not discussed at all.<sup>299</sup> As it happened, it was crucial for the courts to examine the requirement only in those rare cases where, although the accused foresaw the possibility of harm, recklessness was not present in all its possible senses (an example being a situation where the accused did care about the result of his act).<sup>300</sup>

After 1945, the phrase "regardless of whether death results or not" appears to have been taken to portray recklessness in the earliest cases,<sup>301</sup> but in the cases before 1945 it is uncommon.<sup>302</sup> Some academics briefly examined the issue of recklessness, for example Gardiner and Lansdown (in their first edition) who observe that: "If one person commits an act upon another, knowing that this act is likely to cause death but reckless whether death results or not, he is held in law to intend to kill."<sup>303</sup> In their fifth edition<sup>304</sup> the case of *R v Valachia*<sup>305</sup> is cited in support of this statement. Smith observes that after the fifth edition was published by Gardiner and Lansdown, no express authority of the term recklessness is given, but the learned authors are thought to have been probably relying on Section 140 of the Transkeian Penal Code,<sup>306</sup> which they set out as a good reflection of the law of intent to kill.<sup>307</sup> Section 140 of the Transkeian Penal Code provides that: *Culpable homicide*<sup>308</sup> becomes murder in the following cases:

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<sup>299</sup> The most obvious examples are the cases of *R v Thibani* (supra note 87) 732; *R v Ncetendaba* (supra note 89) 652; *S v Mili* 1962 (4) SA 238 (W) 241; *S v Mini* (supra note 216) 196 (per Williamson JA); *R v Nemashakwe* (supra note 139) 523; *R v Mabena* 1967 (3) SA 525 (R) 528; *S v P* 1972 (3) SA 412 (AD) 419.

<sup>300</sup> *S v Nkombani* (supra note 204); *R v Chitate* 1968 (2) PH H337 (R).

<sup>301</sup> *S v Makali* 1950 (1) SA 340 (N) 346; *R v Koning* (supra note 122) 230; *S v Sabben* (supra note 67) 304.

<sup>302</sup> *R v Jongani* (supra note 5) 405. An exception is cases which directly applied the principle in *R v Ngcobo* 1921 AD 92 like *R v Butelezi* 1925 AD 160, 161; *R v Kubuse* 1945 AD 189, 200; *R v Valachia* (supra note 85) 829-830.

<sup>303</sup> FG Gardiner and CWH Lansdown *South African Criminal Law and Procedure* 1 ed (1917) 100-109.

<sup>304</sup> FG Gardiner and CWH Lansdown *South African Criminal Law and Procedure* 5 ed (1946).

<sup>305</sup> *R v Valachia* (supra note 85).

<sup>306</sup> The Transkeian Penal Code is an enactment of the Draft Code contained in the Report of the Commission on Indictable Offences of 1879 ;41 and s 140 of the Transkeian Penal Code is identical in every material respect to clause 174 of the Draft Code

<sup>307</sup> PT Smith 'Recklessness in *Dolus Eventualis*' (1979) 96 *SALJ* 82.

<sup>308</sup> S135 of the Transkeian Penal Code of 1879, defines culpable homicide as 'any unlawful killing'.

- a. If the offender means to cause the death of the person killed.
- b. If the offender means to cause the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not.
- c. If the offender means to cause death or such bodily injury as aforesaid to one person, so that if that person be killed the offender would be guilty of murder, and by accident or mistake the offender kills another person, though he does not mean to hurt the person killed.
- d. If the offender for any unlawful object does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

In the result, it is arguable that the decisions before *Valachia*'s case justify the conclusion that *dolus eventualis* involved only foresight of consequences. It has been observed that when recklessness does occur, it is more a manner of speaking than a separate element of intention; and the statements of law in which it is found would have lost nothing by its omission or replacement with the test of foresight.<sup>309</sup>

The learned judge, after referring to different cases, where none of them used the term “recklessness”, said:

It is interesting to see that Section 140 of the Transkeian Penal Code . . . which has not infrequently been found to have incorporated in its provisions the correct view of what our law is, provides that culpable homicide becomes murder in a number of cases, one of which is that if the offender means to cause the person killed any bodily injury, which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not.<sup>310</sup>

The learned judge of appeal continued: “We may, I think, conclude from these authorities that the crime of murder will at all events have been committed if it be proved ... that the accused killed the deceased by an act which they must have known to be of such a dangerous character that death would be likely to result therefrom, and were reckless whether it did or not.”<sup>311</sup>

It can gladly be admitted that the *Valachia* case set precedent for giving effect to the second element of *dolus eventualis*, which it explained as recklessness. After this, most cases have been seen applying the principles of *dolus eventualis* in the manner set out by the *Valachia* case regarding the element of recklessness.<sup>312</sup> It has been observed that the “requirement of

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<sup>309</sup> PT Smith (supra note 307).

<sup>310</sup> *R v Valachia* (supra note 85) 830- 831.

<sup>311</sup> Ibid.

<sup>312</sup> *R v Sikepe* (supra note 86); *R v Thibani* (supra note 87); *R v Geere* (supra note 298); *R v Huebsch* (supra note 298); *R v Horn* (supra note 17); *S v Mini* (supra note 215). The definition of *dolus eventualis* has become so trite

recklessness in *dolus eventualis* is the result of a historical accident. In adopting Section 140 of the Transkeian Penal Code,<sup>313</sup> the court in *Valachia* case introduced into South African law a concept that was not only unwarranted by the weight of previous decisions, but also a misleading expression of the English Law.”<sup>314</sup> It can be observed that after the *Valachia* case the conative element has been defined in interchangeable terms amongst courts and academic writers. Some define it as “recklessness”,<sup>315</sup> some say it is the “reconciliation of harm”,<sup>316</sup> some express it as “persistence in such conduct, despite such foresight”<sup>317</sup> and some say it is the “volitional element”.<sup>318</sup> These expressions can be explained to mean that the wrongdoer must be in a position where he accepts the possibility of a consequence, where even if it is clear that the consequence is unlawful, he reconciles himself with that possibility and proceeds with his actions. A person is said to have *reconciled himself*<sup>319</sup> when he accepts the possible consequences that can be brought about from his actions and lives with it when it happens.

It is particularly important to highlight on the advancement in the *clarification*<sup>320</sup> of what entails the conative element from the time when meaning was given to it by Jansen JA, in the *Ngubane*<sup>321</sup> case up to the time when a more advanced meaning was given to it by Brand JA, in the *Humphreys*<sup>322</sup> case. Brand JA’s main emphasis is on the fact that the alternative term to the conative element “recklessness” is confusing support of this observation is taken from Jansen JA’s words which read:<sup>323</sup>

A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, for example by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers . . . Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) “consents” to the consequence foreseen as a possibility, he “reconciles himself” to it, he “takes it into the bargain” . . . Our cases often speak of the agent being “reckless” of that consequence, but in this

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that authority for it is often not given; but those cases which do give authority rely almost invariably on one or more of the cases just cited or on another case that relies on one of those cases.

<sup>313</sup> Of the Report of the Commission on Indictable Offences of 1879.

<sup>314</sup> PT Smith (supra note 307).

<sup>315</sup> *S v Sigwahla* (supra note 67) 570B-C. MA Rabbie ‘A Bibliography of South African Criminal Law’ *General Principles* (1987) 68 also defines this element as recklessness.

<sup>316</sup> *S v De Bruyn en 'n ander* (supra note 159) 510H.

<sup>317</sup> MM Loubser and MA Rabie (supra note 203) 415.

<sup>318</sup> Accessed at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1191502](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1191502) on 31 July 2008.

<sup>319</sup> My italics, for emphasis.

<sup>320</sup> My italics, for emphasis.

<sup>321</sup> *S v Ngubane* (supra note 221) 685A-H.

<sup>322</sup> *S v Humphreys* (supra note 48) 12.

<sup>323</sup> *S v Ngubane* (supra note 221) 685A-H.



context it means consenting, reconciling or taking into the bargain . . . and not the “recklessness” of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.

As highlighted in the above extract from the *Ngubane* case, the court used a lot of interchangeable terms stating that the accused’s state of mind with regard to a possibility, must be one of “consenting” to the materialisation of the possibility, “reconciling” himself or herself to it, “taking [the foreseen possibility] into the bargain” or “recklessness” with regard to that possibility.<sup>324</sup> Brand JA, in the *Humphreys* case however seems to think that the use of all this terminology (especially the term “recklessness”)<sup>325</sup> can be confusing and therefore is the reason why the *court a quo* made an error in finding that Mr Humphreys reconciled himself with the consequences in question. This echoes with Jansen JA’s emphasis on the need for courts to be cautious when dealing with the conative element. This can be seen from “the way in which the court formulated its finding on this aspect, namely – freely translated from Afrikaans – which the appellant, appreciating the possibility of the consequences nonetheless carried-on with his conduct, reckless as to these consequences”.<sup>326</sup>

Brand JA, further explains that “once the second element of *dolus eventualis* is misunderstood as a synonym of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of the *Humphreys* case seems predictable. In the most obvious way, the appellant was extremely reckless”.<sup>327</sup> But, Jansen JA explained that this is not what the second element entails. He held that “the correct enquiry under this heading is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was irrelevant to him whether these results would flow from his actions. Explained in different terms, the principle is that if it can reasonably be established that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the conative element of *dolus eventualis* would not have been established”.<sup>328</sup> The author observes that “the mere fact that the conative element (“reconciliation with harm”) is defined in the *Humphreys* and *Ngubane* case is indicative of the *recognition* of this second limb of the test as part of *dolus eventualis*”.

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<sup>324</sup> Ibid.

<sup>325</sup> *S v Humphreys* (supra note 48) 12.

<sup>326</sup> *S v Ngubane* (supra note 221).

<sup>327</sup> *S v Humphreys* (supra note 48).

<sup>328</sup> Ibid, 17.

Prior to the *Humphreys* case, it can be observed that there are some cases which define the conative element as recklessness in a confusing way – confusing in the sense that three different explanations of the conative element are given which mean different things. The first one is the case of *Sethoga*,<sup>329</sup> where Smalberger JA acknowledged that *dolus eventualis* involves the need by the state to prove that the guilty party had subjective foresight of the possibility, though remote, of his or her unlawful conduct fatally wounding others, and continued with such conduct with a reckless disregard of the possible consequences thereof.<sup>330</sup> In *S v Campos*,<sup>331</sup> the Supreme Court of Appeal described “the recklessness element of *dolus eventualis* in murder as did [the accused] not care...whether death would result.” On the other hand, Holmes JA in the case of *De Bruyn*<sup>332</sup> portrayed recklessness in the context of the element of *dolus eventualis* required for murder, as “persistence in such conduct, despite such foresight” or “the conscious taking of the risk of resultant death, not caring whether it ensues or not”. In respect of these three different explanations for the conative element, some academics like Burchell marvelled at the confusing nature of the concept and questioned the necessity of recklessness as an extra element for *dolus eventualis*.<sup>333</sup>

One interesting observation made is that, in the case of *Ngubane*, Jansen JA redefined recklessness in the similar way as Snyman:<sup>334</sup> accepting the foreseen possibility into the bargain. According to Jansen JA, the execution of this formulation was to a greater extent influenced by the distinction between foresight of a real possibility and foresight of only a remote (or faint) possibility.<sup>335</sup> Furthermore, the Judge of Appeal observed that “if the agent persists in his conduct despite foreseeing such a consequence as a real or concrete possibility, the inference could be well drawn that “he reconciled” himself to that consequence, that he was reckless of that consequence”.<sup>336</sup> In view of the phraseology in this passage, (that such a deduction “could well be drawn”), Burchell observes that, it can only mean that it is within the court’s discretion to hold that even though the accused foresaw only a remote or faint possibility of a consequence ensuing from his conduct, he might be said to have accepted this consequence into the bargain, reconciled himself to it, or consented to it.<sup>337</sup>

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<sup>329</sup> *S v Sethoga* (supra note 214) para 275- 276.

<sup>330</sup> Ibid.

<sup>331</sup> *S v Campos* (supra note 163) para 38.

<sup>332</sup> *S v De Bruyn en 'n ander* (supra note 159).

<sup>333</sup> JM Burchell (supra note 53),367.

<sup>334</sup> CR Snyman (supra note 1) 128.

<sup>335</sup> *S v Ngubane* (supra note 221) para 686 a-b.

<sup>336</sup> Ibid.

<sup>337</sup> JM Burchell (supra note 53) 367.

### 3.3 Can it be argued that the conative element of *dolus eventualis* is redundant?

The first and second subsections of this chapter indicated that the standard definitions of *dolus eventualis* include a further element in addition to the basic requirement of foresight of the possibility of the happening of the result in question. This further element consists in recklessness as to whether the result ensues or not, which can also be said to consist in reconciling oneself to the possibility that the result will ensue or taking this possibility into the bargain. This section will provide arguments for and against the acceptance of this element. I am of the view that the best way to describe the conative element would be the phrase “reconciliation with harm” as was recently illustrated by Brand JA, in the *Humphreys*<sup>338</sup> case. However, some academics describe the conative element in different terms; I shall portray the conative element in *their*<sup>339</sup> terminology where applicable.

#### 3.3.1 Arguments for the view that the conative element is redundant

In as much as many academics accept the view that the conative element is a significant part of the test for *dolus eventualis*, some are of the view that the conative element is redundant, and therefore should not form part of the test. Whiting<sup>340</sup> does not approve of the explanation given in the *De Bruyn* case about the conative element, where it was held that the second element of *dolus eventualis* “involves the conscious taking of the risk that the result will ensue, not caring whether it ensues or not.”<sup>341</sup> He argues that the first part of this statement is clearly unnecessary, because a person who acts with foresight of the possibility that a result will ensue can always also be said to have consciously taken the risk that the result will ensue.<sup>342</sup> He further argues that the second part of the statement is even more erroneous and positively ambiguous. If a person hopes that a result will not ensue and does everything he can, short of abandoning his contemplated action, to ensure that it will not ensue, he can hardly be said not to care whether it ensues or not, yet the fact that he cared would surely not prevent him from being guilty of *dolus eventualis* in relation to the result in question if he then proceeded with his contemplated action, realising that despite his precautions there was still a substantial possibility that the result would ensue.<sup>343</sup> It is for these reasons that Whiting argues that the second element of *dolus eventualis* must be done away with.

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<sup>338</sup> *S v Humphreys* (supra note 49) para 14.

<sup>339</sup> My italics for emphasis.

<sup>340</sup> RC Whiting (supra note 141).

<sup>341</sup> This explanation was given by Holmes JA in *S v De Bruyn* (supra note 159) 510H.

<sup>342</sup> RC Whiting (supra note 141) 444.

<sup>343</sup> *Ibid.*

Furthermore, Burchell argues that the conative element is an unnecessary appendage.<sup>344</sup> His argument is mainly based on the outcome of the Supreme Court of Appeal's decision in the *Humphreys*<sup>345</sup> case concerning the conative element of *dolus eventualis*, which in this case was referred to as the volitional element. The appeal court approved the trial court's decision that the appellant had, by means of inferential reasoning, subjectively foreseen the death of the school children in the mini-bus as a possible outcome of his conduct,<sup>346</sup> however, "it had not been established that the accused "reconciled" himself with the consequences of his conduct which he subjectively foresaw."<sup>347</sup> Brand JA in the *Humphreys* case was of the view that "if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established."<sup>348</sup>

According to Brand JA, the inference that the appellant may have thought the foreseen collision would not actually occur was not only a "reasonable one, but indeed the most probable one".<sup>349</sup> The judge of the appeal court gave two reasons for this conclusion, i) there was no substantiation that the appellant reconciled himself to the possibility of his own death or the death of his passengers because he thought this would not happen, and ii) he had "successfully performed the same manoeuvre in virtually the same circumstances previously."<sup>350</sup> On this basis, the Supreme Court of Appeal held that negligence, not *dolus eventualis* had been established. Burchell argues that the approach of the Supreme Court of Appeal on the volitional element of *dolus eventualis* disregards an essential aspect of the initial foresight inquiry into *dolus eventualis*: "did the accused foresee the consequence as a real or substantial possibility or not?"<sup>351</sup> Burchell therefore suggests that the inquiry of "foresight" is the one to be recognised (the same one which the Supreme Court of Appeal in *Humphreys* ignored) and argues that the volitional addition to the *dolus eventualis* formulation is an unnecessary addition.<sup>352</sup> This assertion by Burchell adds weight to the argument that the conative element as a second element of *dolus eventualis* does not have a significant force as the cognitive element.

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<sup>344</sup> JM Burchell (supra note 53), 369.

<sup>345</sup> *S v Humphreys* (supra note 49).

<sup>346</sup> Ibid, 14.

<sup>347</sup> Ibid.

<sup>348</sup> Ibid, 17.

<sup>349</sup> Ibid, 18.

<sup>350</sup> Ibid, 19.

<sup>351</sup> JM Burchell (supra note 53) 369.

<sup>352</sup> Ibid.

In addition to the above views, Burchell makes some more observations regarding the *Humphreys* case which the author believes are particularly important to highlight. It has been observed that (regarding the Supreme Court of Appeal's reasoning on the volitional element), it is hard to prove beyond a reasonable doubt that the accused willingly went on with his actions in circumstances where death to him was foreseen, but their supposed optimism caused them to pay no attention to the consequence.<sup>353</sup> Further, a person who agrees to race his car on high speed against a vehicle driven by another on a public road indisputably foresees (or is legally inferred to have foreseen) the real possibility of death ensuing to someone, including himself.<sup>354</sup> This assertion is not weakened by the fact that the accused and others may have managed to get away unharmed from such races in the past or that he may have an over-optimistic impression of his driving ability.<sup>355</sup> In my view the approach used in the *Humphreys* was not satisfactory (for the court to conclude that Mr Humphreys did not reconcile himself because he had previously performed the overtaking manoeuvre and succeeded) and thus gives weaknesses towards the validity of the conative element as an independent inquiry in the test for *dolus eventualis*.

Analysing the judgement in the *Hedley*<sup>356</sup> case in my view makes it easier to understand why South African legal academics argue that the conative element of *dolus eventualis* is a very confusing inquiry. The *Hedley* case supports the conative element but it expresses it in terms of conscious negligence and not the volitional element per se. The court held that *dolus eventualis* should be limited to foresight of the real or substantial possibility of harm and foresight of anything less, that is, the remote possibility should qualify as conscious negligence only if a reasonable person would have taken certain preventative measures to ensure that such a possibility will not result.<sup>357</sup> Most frequently the conative element is concerned with whether the accused acted with foresight of a possibility of harm and could equally apply to foresight of both real and remote possibilities.<sup>358</sup> If the wrongdoer fails to act, in spite of having foresight, he will not be charged, and if the person modifies his or her conduct so that he or she no longer believes that there is any risk, foresight is again absent.

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<sup>353</sup> Ibid.

<sup>354</sup> Ibid, 370.

<sup>355</sup> Ibid.

<sup>356</sup> *S v Hedley* 1958 (1) SA 362 (N) 373-374.

<sup>357</sup> Ibid.

<sup>358</sup> JM Burchell (supra note 53) 370.

The suggestion by the *Hedley*<sup>359</sup> case is in my view indicative of the fact that the conative element is more of a conduct than an independent element of intention. However, the view in *Hedley* case that the conative element can be confusing as it is closely similar to conscious negligence is a resolvable problem. The volition purportedly required for *dolus eventualis* seems to connote the sense of passive acceptance or acquiescence rather than positive will or desire.<sup>360</sup> In effect, volition in such passive form connotes nothing more than a conclusion or awareness on the part of the accused that the harmful result may occur in the particular circumstances, and the purported volition therefore appears to be of a cognitive rather than a voluntative nature. If it is accepted that *dolus eventualis* essentially involves a cognitive awareness or conclusion that the harmful result may occur in the particular circumstances, it is possible to distinguish between *dolus eventualis* and conscious negligence on a logical basis. In the case of conscious negligence, the accused is aware of the possibility of the harmful result occurring, but discounts this possibility. In the case of *dolus eventualis* the accused concludes that the result may occur in the circumstances, but nevertheless proceeds with his action.<sup>361</sup> Thus, it cannot be a strong argument to say the conative element must be regarded as irrelevant simply because it sounds like conscious negligence. Loubser and Rabie also doubt the conative element, and reframe it in terms of a decision rather than risk-taking,<sup>362</sup> but it could be argued that this fits in with the cognitive rather than the conative element.

It can further be observed that, the other reason why it has been argued that the conative element is redundant is the fact that it is sometimes referred to as a descriptive part of the cognitive element.<sup>363</sup> It has been indicated that recklessness is primarily to be inferred from the consequences which result from the accused's act and the still graver consequences which might be expected to result from it.<sup>364</sup> More so, the case of *R v Horn* reveals that the gravity of the risk which an accused took would also be a factor from which it could be inferred that he was in a reckless frame of mind.<sup>365</sup> A finding of recklessness for the purposes of *dolus eventualis*, presupposes subjective foresight of the possible consequences. It can further be

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<sup>359</sup> *S v Hedley* (supra note 358) 373-374.

<sup>360</sup> MM Loubser and MA Rabie (supra note 203) 436 it has been added that, "The volume and variety of terminology used to describe the element of volition for the purposes of *dolus eventualis* demonstrate that the concept of volition is capable of a wide range of meaning, from positive desire at the one end to passive or reluctant acquiescence at the other."

<sup>361</sup> *Ibid.*

<sup>362</sup> MM Loubser & MA Rabie (supra note 203) 420.

<sup>363</sup> A Paizes (supra note 654 641).

<sup>364</sup> *R v Poteradzayi* 1959 (2) SA 125 (FC) 129D-E.

<sup>365</sup> *R v Horn* (supra note 17) 465C.

observed that, reckless conduct without such foresight is not sufficient to establish *dolus eventualis*.<sup>366</sup> If the perpetrator did not actually appreciate that death was a possible result, “there can be no question of his not caring about it; he did not think about it”,<sup>367</sup> for example where a person drove into a crowd of people sincerely believing that the crowd would disappear.<sup>368</sup> It would therefore be reason enough to argue that the conative element of *dolus eventualis* is dependent on the cognitive element. Loubser and Rabie observe that the presence of the element of recklessness is, like that of subjective foresight, normally proved by inference.<sup>369</sup> In this manner, recklessness, (for example in the *Poteradzai* case), may be inferred from previous deliberation and preparation, coupled with a failure to assist and the absence of any signs of surprise, regret or sympathy.<sup>370</sup>

Snyman<sup>371</sup> also makes an observation which in my view raises questions about the relevance of the conative element. He observes that the remoteness of the foreseen possibility may be a significant factor in deciding whether the accused subjectively foresaw a possibility at all.<sup>372</sup> He further holds that “if the possibility of the result ensuing was remote or far-fetched, *dolus eventualis* will probably be absent in that X did not reconcile himself to the possibility that the result might ensue.”<sup>373</sup> After this, readers tend to wonder whether to accept judgemental factors such as social utility of the perpetrator’s conduct as relevant in the subjective inquiry of *dolus eventualis* or rather go for a normative inquiry into negligence or the objective aspect of conscious negligence?<sup>374</sup> To further highlight the confusion associated with this element, it is helpful to look at the decision of the Appellate Division in the *Maritz*<sup>375</sup> case. It has been argued that as a matter of legal principle, the conclusion of the Appellate Division that the appellant had not taken the risk of death into consideration because he was convinced he could avoid it<sup>376</sup> is perhaps better explained on the basis that he did not foresee the materialisation as a real or reasonable possibility. On this contention, Paizes observes that this decision discloses the

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<sup>366</sup> *S v Du Preez* (supra note 271) 589B-F.

<sup>367</sup> *S v Dube* 1972 (4) SA 515 (W) 520-1 and *R v Horn* (supra note 17) 466G-H and *R v Churchill* 1959 (2) SA 575 (A), 578 E-F.

<sup>368</sup> *S v Chretien* 1979 (4) SA 871 (D) 875-876; *S v Chretien* 1981 (1) SA 1097 (A), 1103B-C.

<sup>369</sup> MM Loubser & MA Rabie (supra note 203) 420.

<sup>370</sup> *R v Poteradzi* (supra note 364) 129 D; *S v Maree* 1964 (4) SA 545 (O), 551E.

<sup>371</sup> CR Snyman (supra note 1) 192.

<sup>372</sup> Ibid.

<sup>373</sup> Ibid.

<sup>374</sup> JM Burchell (supra note 53) 378.

<sup>375</sup> *S v Maritz* 1996 (1) SACR 405 (A) para 416 f-g.

<sup>376</sup> *S v Maritz* (supra note 376) para 416 f-g.

advantage of disregarding the volitional element and reverting to the distinction between real and remote possibility in the context of foresight inquiry.<sup>377</sup>

In the case of *S v De Bruyn*,<sup>378</sup> Holmes JA provided a different way of interpreting the volitional element. According to Holmes JA,<sup>379</sup> recklessness is another way of stating the rule that the unlawful conduct must exist contemporaneously with the *mens rea*.<sup>380</sup> This theory of recklessness (volitional element) given by Holmes JA in *De Bruyn* has been referred to as the *Holmesian* concept by Smith.<sup>381</sup> The *Holmesian* theory to recklessness is said to have certain errors which Paul Smith pointed out as follows:

The accused who, initially foreseeing the possibility of harm, has not taken a conscious risk, [using *Holmesian* terminology], has either not acted at all [in which case there would be no charge] or has acted involuntarily, in which case there is no *actus reus* [unlawful conduct], or has modified his conduct so that he no longer believes that there is any risk of harm, in which case there is no foresight.<sup>382</sup>

Regarding the issue of recklessness, Holmes JA in *De Bruyn* also mentioned that, “the conscious taking of the risk [of resultant death], not caring whether it ensues or not.”<sup>383</sup> In this regard, Whiting argues that whether the perpetrator cares about an unlawful consequence or not is definitely irrelevant to his or her ability for taking a foreseen risk.<sup>384</sup> The perpetrator’s worry about the risk ensuing has more to do with the object or reason for acting than his or her foresight. In other words, Whiting and Smith are of the view that the *Holmesian* terminology regarding recklessness was flawed. In support of the above critics,<sup>385</sup> Morkel argues that recklessness in the *Holmesian* sense is a confusing concept and one that is not useful to the test

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<sup>377</sup> A Paizes (supra note 64) 636.

<sup>378</sup> *S v De Bruyn* (supra note 159).

<sup>379</sup> *Ibid.*

<sup>380</sup> RC Whiting (supra note 141) 440.

<sup>381</sup> PT Smith (supra note 309) 92-93.

<sup>382</sup> *Ibid.*

<sup>383</sup> *S v De Bruyn* (supra note 159).

<sup>384</sup> RC Whiting (supra note 141) 440. At 446, Whiting goes on to add that, “A person will have *dolus eventualis* in relation to a result if he intentionally commits an act, foreseeing that it may cause that result. The degree of likelihood with which the happening of the result must be foreseen will not be the same in all situations. In the great majority of cases, the happening of the result will have to be foreseen as a substantial possibility. In cases where one or more factors militating against a finding of *dolus eventualis* are present, the happening of the result will have to be foreseen as something more than a substantial possibility, unless there are countervailing considerations neutralising the effect of such factors. In a case where it is the purpose of the person concerned to create the risk, it will be sufficient if he foresees the happening of the result only as a remote possibility”. He seems to maintain the view that the cognitive element explains the conative element hence there is no need to consider the conative element as a separate element.”

<sup>385</sup> The critics referred to are Whiting and Smith in the argument at supra note 380 and 381.



for *dolus eventualis*.<sup>386</sup> These arguments therefore point to the view that the conative element is redundant, and is an insignificant part of *dolus* element.

Morkel<sup>387</sup> likewise rejects the requirement of recklessness as superfluous, because in his view it merely involves the fact that the accused foresaw the possible consequences, but nevertheless persisted in his conduct. He states that a person, who acts despite his knowledge of the possible infringement of the law, “commits himself to such infringement by the very fact that he becomes active despite such knowledge...should the prospective actor decide against the relevant infringement he will refrain from acting.”<sup>388</sup> According to Morkel, *dolus eventualis* can be understood as a concept that only consists in foresight of the possible consequences combined with persistence in the relevant course of conduct. Therefore, two views emerging are that *dolus eventualis* either lacks a volitional element and contains only the cognitive element of foresight; or contains a volitional element that may be inferred from the fact that the accused persisted in his conduct despite foresight of the harmful result.<sup>389</sup> In my view this is very confusing, it is therefore understandable that legal academics are finding the second limb of the test for *dolus eventualis* to be irrelevant.

Furthermore, Morkel points out that the requirement of volition in addition to foresight of a concrete possibility could produce unsatisfactory results from a policy point of view, and refers in this regard to the case of *Jolly*.<sup>390</sup> In this case the accused derailed a train with foresight that injury or even death of passengers might occur. Morkel argues that it would not have availed the accused to satisfy the court that they did not wish to cause the death of passengers.<sup>391</sup> Even if the accused in fact sat next to the railway line praying that no passenger would come to harm they would still have *dolus eventualis* in respect of the consequences – not because they did not care about the passengers, but because they voluntarily planned and executed the derailment despite knowledge of the imminent danger (as a concrete possibility).<sup>392</sup>

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<sup>386</sup> DW Morkel (supra note 190) 154.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid, 170.

<sup>389</sup> MM Loubser and MA Rabie (supra note 203) 422.

<sup>390</sup> *R v Jolly* (supra note 5) 187.

<sup>391</sup> DW Morkel (supra note 253) 169.

<sup>392</sup> Ibid.

Furthermore, Burchell and Hunt<sup>393</sup> take the view that recklessness is a colourless concept, having nothing to do with the accused's attitude of mind, and meaning the taking of a conscious risk;

Recklessness in this context is a colourless concept in that it has nothing to do with the accused's state of mind to the happening of the consequence. It involves neither desire nor motive nor negligence, whether gross or slight. If this were not so the accused would have to be held to lack legal intention where, although he foresees a consequence as a real possibility, it is the last thing he wants to happen, or he takes precautions in an unsuccessful attempt to avoid it. In these circumstances the accused still takes a conscious risk; and at most his absence of desire or his attempt to avoid the consequence may affect sentence, not liability.

This view finds apparent support in a number of cases which emphasize the accused's persistence in his conduct, despite his appreciation of the risks.<sup>394</sup> In *S v Kritzinger*,<sup>395</sup> for example, the court found recklessness to be proved where the accused foresees the possibility of harm, but "nevertheless decided to act regardless of the consequences."<sup>396</sup> The first difficulty with these cases is that they do not make it clear whether the taking of a conscious risk is itself recklessness, or whether it is really evidence of something else, such as indifference.<sup>397</sup> The second difficulty is that if recklessness is nothing more than the taking of a conscious risk, it is, as a requirement in its own right, quite trivial. Whiting observes that the accused who, at first foreseeing the possibility of harm, does not take a conscious risk, has either not acted at all, or has acted unwillingly, in which case there is no *actus reus*, or has modified his conduct so that he no longer believes that there is any risk of harm, in which case there is no foresight.<sup>398</sup> In this paragraph it has been revealed that the second element of *dolus eventualis* should be done away with, seeing that most courts mention recklessness but do not explain its relevance further.

Another interesting argument against the conative element is that it has on rare occasions been of practical importance in the sense that there are no cases where *dolus eventualis* was explicitly found to be lacking on account of an absence of recklessness. Some legal academics have

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<sup>393</sup> EM Burchell and PMA Hunt (supra note 125) 154, they are of the view that with the volitional element the accused does foresee the consequence at least -as a real possibility and nevertheless persists in his conduct irrespective of whether it results or not, he does consciously take the risk of its happening, see also PT Smith (supra note 309) 92-3.

<sup>394</sup> *S v Mtshiza* 1970 (3) SA 747 (AD) 752; *S v P* (supra note 299) 416; *S v Kaware* 1977 (2) SA 454 (0), 455. In *S v Nkombani* (supra note 204) para 715 Holmes JA said: "To reck means to take heed of something ... so as to modify one's purpose on that account".

<sup>395</sup> *S v Kritzinger* 1973 (1) SA 596 (C).

<sup>396</sup> *Ibid*, 601.

<sup>397</sup> *S v Bvuure* (2) 1974 (1) SA 208 (R) 212.

<sup>398</sup> PT Smith (supra note 307) 92-93.

brought it to our attention<sup>399</sup> that *Chitate*<sup>400</sup> appears to be the only such case where *dolus eventualis* lacks due to the fact that the recklessness element was not satisfied. In this case the court held that the subjective foresight was present and stated that, in addition, it was necessary to show that the accused's attitude of mind was one of heartless disregard of the consequences so that possible death was regarded by him as irrelevant when weighed against the attainment of his immediate objective.<sup>401</sup> The victim died while undergoing an abortion and because it was not shown that the incidence of fatal abortions in like circumstances was high, the court found that *dolus eventualis* was not proved. In this regard, some academics argue that a low incidence of fatalities in these circumstances could also justify the inference that the accused did not actually foresee death as a possible result, and lacked *dolus eventualis* for this reason.<sup>402</sup> Thus, it cannot be concluded that the recklessness element was the only determinative issue to instigate an absence of *dolus eventualis*. On this note, the author submits that this paragraph serves as a contributory opinion for the view that the second limb of the test for *dolus eventualis* is as significant as the cognitive element.

In the *Beukes* case it has firmly been suggested that the second leg of the test will normally only be satisfied if the person in question foresaw the consequence as a reasonable likelihood.<sup>403</sup> The explanation given in the case is that when the person concerned acted he foresaw the happening of the result only as a faint or remote possibility; this would tend to indicate that he did not take the possibility into the bargain or reconcile himself to it.<sup>404</sup> This explanation has been rejected. According to Whiting this would mean that, by acting with foresight of a remote possibility that a result will occur, one necessarily reconciles oneself to there being a remote possibility that it will occur or takes this remote possibility into the bargain – such reasoning is confusing.<sup>405</sup> Therefore, it has been argued that it will be necessary to reject the second limb of the definition of *dolus eventualis* as being a superfluous appendage which in certain forms is also misleading.<sup>406</sup>

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<sup>399</sup> EM Burchell & PMB Hunt (supra note 125) 153 and PT Smith (supra note 307), 93.

<sup>400</sup> *R v Chitate* (supra note 300). However, "it is arguable that a low incidence of fatalities in these circumstances could also justify the inference that the accused did not actually foresee death as a possible result, and lacked *dolus eventualis* for this reason".

<sup>401</sup> Ibid.

<sup>402</sup> MM Loubser & MA Rabie (supra note 203) 421.

<sup>403</sup> *S v Beukes* (supra note 144) 522E.

<sup>404</sup> Ibid.

<sup>405</sup> RC Whiting (supra note 141) 445-446.

<sup>406</sup> Ibid.

In as much as the second limb of the test has been identified as the “distinguishing feature”<sup>407</sup> for *dolus eventualis*, there is some evidence for the view that this element has shortfalls. First and foremost, it can be observed that Jansen JA, in the *Ngubane* case, describes the conative element in a manner that is confusing. He seems to be of the view that the second limb of the test for *dolus eventualis* merely exists to describe the first limb of the test. It was held in the *Ngubane* case that “the “recklessness” of which our courts often speak means no more than this consenting, reconciling or taking into the bargain... Provided this element is present, it should not matter, for the purpose of determining whether an accused has *dolus eventualis*, whether he foresees the possibility ‘as strong or faint’, as probable or improbable.”<sup>408</sup> Paizes rejects the views of the *Ngubane* case and holds that the definition of the second limb of the test serves only to describe a state of mind that must necessarily exist if one proceeds to do an act which one foresees might possibly cause the unlawful consequence in question.<sup>409</sup> It has been observed that the existence of the volitional element is, moreover, independent of the degree of foresight one chooses to employ in the test for legal intention, and it is pointless to attempt to use the way it was used in *Ngubane* and *Beukes* to adjust the foresight element of that test. If one discards the notion that recklessness has any purposeful effect as a component of legal intention, one has, therefore, still, to give flesh to the element of foresight.<sup>410</sup> Consequently therefore, he concludes that the second limb of the test for *dolus eventualis* is confusing, he agrees that it is a “colourless concept.”<sup>411</sup>

Van Oosten<sup>412</sup> also seems to be of the view that the second limb of the test for *dolus eventualis* is not an independent element. He observes that the volitional element is satisfied only when the accused, in addition to foreseeing the result as possible, decides to accept the risk that the consequence may ensue (*decided to take a chance or run the risk*).<sup>413</sup> However, Loubser & Rabie argue that no example has been forthcoming, practically where an accused acted while foreseeing the actual manifestation of a consequence as possible, but did not decide to run the

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<sup>407</sup> *S v Ngubane* (supra note 221) para 685D-E. It was held that the distinguishing feature of intention is the “volitional component” in terms of which the agent consents to the consequence foreseen as a possibility, he reconciles himself to it, he takes it into the bargain.

<sup>408</sup> Ibid, 685F-G.

<sup>409</sup> A Paizes (supra note 64) 642.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

<sup>412</sup> FFW Van Oosten (1982) 45 *THRHR* 183.

<sup>413</sup> The words in italics have been translated from Afrikaans to English by the online dictionary accessed at [https://www.google.co.za/?gfe\\_rd=cr&ei=zTxpVaNBUso8wev3IH4AQ&gws\\_rd=ssl#q=%27besluit+om+die+kans+te+waag+of+die+risiko+te+loop+in+English+T+anslation](https://www.google.co.za/?gfe_rd=cr&ei=zTxpVaNBUso8wev3IH4AQ&gws_rd=ssl#q=%27besluit+om+die+kans+te+waag+of+die+risiko+te+loop+in+English+T+anslation).

risk that the result may occur. In fact, acting with such foresight seems necessarily to incorporate a decision to run that risk.<sup>414</sup> It has further been argued that if the volitional element is viewed as being constituted by the accused's decision to act regardless his foresight, it may be argued that such decision does not amount to a volitional element, but that it is rather necessarily incorporated in the notion of a voluntary action.<sup>415</sup> In any case, there seems to be little, if any, visible difference between the state of mind of one who proceeds to act after concluding that a harmful result may occur in the particular circumstances, and one who proceeds to act after resigning himself to and thus accepting the risk of such a result occurring. In both cases there is hardly any question of volition; the accused merely forms a conclusion that the result may occur and nevertheless proceeds to act.<sup>416</sup>

Loubser and Rabie further observe that,

...the content of the element of volition required for *dolus eventualis* in case law is uncertain. The purported requirement of volition for *dolus eventualis* appears to be undesirable; first because it is difficult to determine the precise content of volition in the form of "acceptance of" or "reconciling to" the harmful result in question; and second because the accused who sets in motion a criminal course of conduct while foreseeing the possibility of the harmful result occurring, should not by mere change of mind and loss of volition obtain the benefit of a defence, just as voluntary withdrawal after setting in motion a criminal course of conduct should not constitute a defence against conviction of attempt.<sup>417</sup>

In this manner, it can be seen that much evidence falls on the view that the conative element is redundant because legal academics seem to struggle in pinning out the exact meaning and significance of this concept. As indicated in this current subsection, there are various definitions of what entails the content of the second limb of the test for *dolus eventualis* which are not clear.

In support of the view that the conative element is redundant, Smith reveals certain aspects of the conative element which leaves readers a bit sceptical about the relevance of this element. He argues that the meaning of "recklessness" in s 140 of the Transkeian Penal Code gives rise to some difficulty because it is a poor expression of the English law.<sup>418</sup> In this manner, if s140

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<sup>414</sup> MM Loubser and MA Rabie (supra note 203) 430.

<sup>415</sup> Ibid, 435.

<sup>416</sup> Ibid.

<sup>417</sup> Ibid, 430.

<sup>418</sup> PT Smith (supra note 307) 85.

is considered a poor expression of the English Law there is all the more reason for rejecting it as a good expression of South African law. Recklessness in the English law relates not only to the actor's state of mind, but also, like negligence in our own law, to his course of conduct. As to state of mind, Smith and Hogan say: "A man is reckless with respect to a consequence of his act, when he foresees that it may occur, but does not desire it or foresee it as virtually certain."<sup>419</sup> Recklessness with respect to circumstances means realization that the circumstances may exist, without either knowing or hoping that they do."<sup>420</sup> Once it is established that the actor foresaw that the consequences might occur, a second question arises "whether in the circumstances a reasonable man having such foresight would have proceeded with his conduct notwithstanding the risk". Only if the accused was acting unreasonably can his conduct be described as "reckless."<sup>421</sup> Because of this objective element, recklessness is sometimes called advertent negligence.<sup>422</sup>

This idea of negligence is traditionally the predominant element of recklessness, which has evolved simply as a degree of negligence sufficient to warrant criminal sanction. In both its legal and its ordinary sense negligence involves at least two ideas.<sup>423</sup> First, the actor must overlook to take precautions against the occurrence of harm; and, secondly, his failure to do so must be culpable. So, in the event of an accident, one would not blame as negligent a driver who had taken all proper precautions, however unthinkingly and automatically he did so. Nor would one think it negligent of an unskilled driver to take to the roads in a dire emergency. English-law recklessness, then, involves a culpable failure to take precautions, coupled with foresight of the consequences. To use the term to denote an attitude towards the foreseen risk of death is wrong, because in the English law it does not involve that idea at all.

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<sup>419</sup> Ibid.

<sup>420</sup> Where the actor does desire the consequence or foresee it as certain, he has intention: Glanville Williams *Criminal Law: The General Part 2* ed (1961) 53.

<sup>421</sup> G Williams (supra note 420) 53.

<sup>422</sup> Ibid, 58.

<sup>423</sup> AR White (1961) 24 *Modern LR* 592. At 593 argues that in ordinary usage "negligence" involves a third idea that the actor failed to attend to the risks involved in his conduct. One would not call a man "negligent" who intended the consequences of his actions, even though he was guilty of a culpable failure to take precautions. Conversely, a person who unthinkingly takes all precautions would not be called 'careful'. However, the law of negligence does not concern itself with whether the actor attended to the risk. Thus once it is established that a reasonable man in the position of the accused would have foreseen the possibility of harm and taken precautions against it, the only question is whether the accused himself took such precautions. The result is that if the State places its case no higher, intentional conduct can result in a conviction on the ground of negligence.

In actual fact, the Transkeian Penal Code apparently uses the term recklessness to denote an attitude towards the foreseen death. Reckless does not relate to the commission of the act or to its culpability: those matters are dealt with in the sections immediately preceding s 140 of the Transkeian Penal Code. It can be argued that, the opening sentence of the Act which states, “Culpable homicide becomes murder in the following cases”, indicates that what is required in that section is additional to an unlawful killing: in the absence of those requirements there would still be culpable homicide. Nor is recklessness an entire state of mind, for it does not embrace foresight of death that is a separate requirement. It seems rather to be an attitude towards the apprehended risk of death.<sup>424</sup> The conclusion must be that the requirement of recklessness in *dolus eventualis* is the result of an historical accident. In adopting s 140 of the Transkeian Penal Code, the court in *Valachia’s* case introduced into South African law a concept that was not only unwarranted by the weight of previous decisions, but also a misleading expression of the English law.<sup>425</sup>

In the case of *Fernandez*<sup>426</sup> the appellant failed to take proper steps to prevent a baboon from escaping while he was engaged in repairing the baboon’s cage. The baboon escaped and attacked and killed a child. It appeared that the appellant had fully appreciated the danger posed by the escaped baboon on a previous occasion and had approached the baboon with a firearm. He also knew that the baboon had previously injured a child standing outside the cage and that people, including children, frequented the shop and the vicinity where the baboon was kept. He also appreciated the extent of the injuries that an adult baboon is capable of inflicting. On these facts the court found that the appellant ought reasonably to have foreseen that death might result from the baboon not being prevented from leaving its cage and confirmed a conviction of culpable homicide. The court thus found that the accused ought to have foreseen that which (by implication) he did not actually foresee.<sup>427</sup> It appears therefore that the absence of foresight of actual occurrence rather than the absence of volition determined the outcome of the case.

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<sup>424</sup> Support of this argument is found in the corresponding article, 244, in the fifth edition (1894) of Stephen’s *Digest of Criminal Law*, which also dwells on the accused’s attitude of mind, though to a different effect: “Malice aforethought means any one or more of the following states of mind ... (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”

<sup>425</sup> Since the meaning of *recklessness* was apparently not settled until *Andrew v DPP* 1937 AC 576 (HL) para 583, (1937) 2 All ER 552 para 556.

<sup>426</sup> *S v Fernandez* 1966 (2) SA 259 (A).

<sup>427</sup> *Ibid*, 265. The appellant armed himself with a revolver before approaching the baboon; he knew that on at least one prior occasion the animal had injured a child; the appellant himself had put a notice on top of the cage, warning

In the case of *Le Roux*<sup>428</sup> the question was whether the accused had or should have had knowledge of the fact that he had illegally camped within the borders of the Kruger National Park. The court held that *mens rea* in the form of negligence was an element of the offence in question<sup>429</sup> and that the appellant knew that he was camping in the vicinity of the Park, but did not concern himself in the least to find out where the borders of the Park were. The appellant was completely careless (“geheel en al onverskillig”) as to whether he illegally entered the Park or not and his conviction was therefore upheld. The decision does not deal with *dolus eventualis* at all, but even if *dolus eventualis* had been the required form of *mens rea*, it appears that primarily the absence of *dolus eventualis* would have turned on the lack of proof that the appellant did actually foresee the fact that he was trespassing, rather than on a lack of volition or carelessness as to whether he was in fact trespassing.

According to Bertelsmann, the conative element is unhelpful because the cognitive element encompasses all inquiries that are needed to satisfy the intention of *dolus eventualis*.<sup>430</sup> He observes that test of *probability* or even *real possibility* in the cognitive element will in practice frequently, though not always, lead to the same results as the inquiry of recklessness. The more likely the consequences appeared to the actor, the easier it will often be to infer that he consented to them.<sup>431</sup> In other words this would mean that evidence relating to cognition will be used in applying the volitional test. He supports the view that *dolus eventualis* should be so defined that it resembles the meaning ascribed to intention by a *reasonable man*.<sup>432</sup> Consequently therefore, this may be the most influential argument for recognizing that nothing can have been intended unless it was willed. On that basis a definition can be formulated that, excluding all cases of conscious *culpa*, should be more in line with the actual practice of our

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parents “to please keep their children out of the animal’s reach” (at 262); under cross examination he admitted that the baboon’s being outside of its cage made him afraid, not only for himself, but also for others. The court rejected the view that the appellant could only reasonably have foreseen an injurious, as distinct from a fatal, attack by the baboon” (at 265). However, it is important to consider Bertelsmann’s views regarding the *Fernandez* case. W Bertelsmann (*What happened to Luxuria? Some observations on criminal negligence, recklessness & dolus eventualis*) (1975) *SALJ* 71 gives this illustration, “Assuming that *Fernandez* acted with actual foresight of possible death, but the baboon preferred to stay in its cage, could it be said that the accused attempted to kill a baby? This situation strikingly illustrates the importance of the volitional element in *dolus*. Middleton (1973) 36 *THR-HR* 181 at 185 rightly points out that where a driver, driving a normal vehicle, has in such circumstances caused a fatal accident, he can hardly be convicted of murder unless he was quite prepared to commit suicide. Otherwise he did not reconcile himself with the possibility of a collision. Actually such drivers, who are obviously in a hurry, do not mentally consent even to the delay which might be caused by a minor accident”. This actually reflects the significance of the conative element.

<sup>428</sup> *S v Le Roux* 1969 (3) SA 725 (T) 729.

<sup>429</sup> *Ibid*, 728H.

<sup>430</sup> W Bertelsmann (*supra* note 48) 74-75.

<sup>431</sup> *Ibid*.

<sup>432</sup> A man in the street.



courts than the current one: “*Dolus eventualis* means that the actor foresees a result, as possible and, not caring whether it ensues or not, is prepared to accept it into the bargain.”<sup>433</sup> In this regard he concludes by saying that the *unhelpful*<sup>434</sup> concept of recklessness should thus be disregarded. In spite of some overwhelming support of the view that the conative element is redundant in this particular subsection, it is also important to turn into other issues raised in support of the relevance of the conative element as a significant leg of the test for *dolus eventualis*.

### 3.3.2 Arguments in support of the acceptance of the conative element as a significant requirement of *dolus eventualis*

To begin with, it can be shown from the *Ngubane*<sup>435</sup> case that the conative element is an inseparable part of the test for *dolus eventualis*. Of much significance are the words of Jansen JA, in the *Ngubane*<sup>436</sup> case, where he identifies the second limb of the test for *dolus eventualis* as a “distinguishing feature”<sup>437</sup> thereby portraying it as a prerequisite of *dolus eventualis*. Furthermore, in the recent case of *DPP, Gauteng v Pistorius*,<sup>438</sup> the judge acknowledged that the concept of *dolus eventualis* involves two tests; “it therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility.”<sup>439</sup> In other words, the court clearly pointed out the fact that the cognitive element alone is not sufficient for a finding of *dolus eventualis* to suffice. As was held,<sup>440</sup> it is necessary that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent. Furthermore, in the most recent case of *S v Van Schalkwyk*,<sup>441</sup> the court acknowledged that the two legs are not considered in isolation.

Furthermore, in case of *S v Beukes*,<sup>442</sup> Van Heerden JA, made it clear that in most cases recklessness would only be satisfied where the perpetrator foresaw the outcome of his conduct as a “reasonable” possibility.<sup>443</sup> Nevertheless, the Judge of Appeal highlighted that recklessness

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<sup>433</sup> W Bertelsmann (supra note 48).

<sup>434</sup> Italics for my emphasis

<sup>435</sup> *S v Ngubane* (supra note 221) 685D-E.

<sup>436</sup> Ibid.

<sup>437</sup> Ibid.

<sup>438</sup> *DPP, Gauteng v Pistorius* (supra note 49) 26.

<sup>439</sup> *S v Pistorius* (supra note 49) 26. However, the court in the same paragraph acknowledges that the second limb of the test for *dolus eventualis* is a very confusing concept.

<sup>440</sup> Ibid.

<sup>441</sup> *S v Van Schalkwyk* (supra note 49) 15.

<sup>442</sup> *S v Beukes* (supra note 144) 522 B-I. This case shall later on be referred to as the *Beukes case*.

<sup>443</sup> Ibid.

is of significance as an additional element of *dolus eventualis*.<sup>444</sup> Van Heerden propounded that, as the perpetrator would hardly ever admit this element, the court had to draw an inference regarding the perpetrator's state of mind from facts indicative of, objectively considered, a reasonable possibility that the result would follow.<sup>445</sup> In this manner, it can be inferred that the perpetrator reconciled himself to the result from the mere fact that he acted. Van Heerden JA further held that the conative element of *dolus eventualis* would normally be satisfied where the wrongdoer had foreseen the result as a reasonable possibility.<sup>446</sup> In view of this judgement in the *Beukes* case, the conative element can be understood as a significant element of the test for *dolus eventualis*; therefore, it cannot be said to be redundant.

To further indicate that the conative element is significant, the judge of the Appeal court in *Beukes* brought forward two situations in which the second limb of the test for *dolus eventualis* is apparent. These are: (i) When the wrongdoer knows that a consequence could certainly follow, but then takes steps to prevent that consequence from ensuing; (ii) when, initially, the wrongdoer had not foreseen the consequences of the outcome as a reasonable possibility, but after the primary chain of events has begun, he or she opts for a different view. In the second situation, Van Heerden JA comments that the wrongdoer will be reckless as to the consequence if he or she fails to take steps to terminate the chain of events.<sup>447</sup> The judge gives an imaginary illustration where X who is a party to a common purpose, primarily does not foresee that another in the group is armed, but later finds out that he or she is.<sup>448</sup> If one has to apply the second theory put forward by the judge, it would then mean that if X, after realising that he is in a group that is armed must remove himself from the group. Failure to do so then amounts to reckless, hence the applicability and significance of conative element in depicting intention.

The significance of the conative element as a part of the test for *dolus eventualis* is further illustrated by the judgment in the case of *S v Maritz*.<sup>449</sup> It has been argued<sup>450</sup> that the facts of *S v Maritz*<sup>451</sup> are indicative of an intense instance of police cruelty. The facts of this case included a suspect in a murder case who was tied by a rope to a police vehicle and forced to run in front of it.<sup>452</sup> The rope was stretched tight and he was caught under the wheel of the police vehicle

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<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup> *S v Maritz* (supra note 375).

<sup>450</sup> JM Burchell (supra note 53) 375.

<sup>451</sup> *S v Maritz* (supra note 375).

<sup>452</sup> Ibid, 416f.

and killed. The Appellate Division held that the intention to kill on the policemen was absent, but confirmed a conviction of culpable homicide. In this case, Van der Heever JA, argued that a person does not accept a foreseen risk into bargain when he or she is convinced that he or she can prevent it from occurring,<sup>453</sup> and he or she cannot be held to have the requisite intention to cause that result merely because, *ex post facto*, its occurrence proves the person wrong.<sup>454</sup>

Van der Heever JA, was of the view that the appellant had not taken the risk of the deceased's death into consideration, but ought as a reasonable person to have done so. The judgment appears to turn on the volitional element of *dolus eventualis*. Even though it has been argued elsewhere on the matter of the appropriate legal classification of the inquiry, it is surely, on the facts, indisputable that tying a person to an eight metre rope and forcing him to run in front of a vehicle carries the real possibility that death could result from his falling under the vehicle. Therefore, judging from the facts of the *Maritz* case, in my view the conduct of the policemen can be said to be reckless, as they completely disregarded the consequences of their actions. Thus, seeing that the conative element was assigned to the accused in the *Maritz* case (as recklessness); one can argue that the conative element is a significant part of the test for *dolus eventualis*.

De la Harpe and Van der Walt are of the view that the conative element of *dolus eventualis* is as important as the cognitive element and therefore both elements are a significant part of the test for *dolus eventualis*. This is particularly shown when they state that it is not sufficient that the accused only foresaw the possibility.<sup>455</sup> De la Harpe and Van der Walt accept the view which was applied in the *Ngubane* case that it is mandatory for courts to give some meaning to the conative aspect in the concept of *dolus eventualis* which, in theory, has been defined as including foresight of even a *remote* possibility.<sup>456</sup> The court emphasised that when taking note of the conative element, the accused's state of mind in 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 or recklessness in regard to that possibility.<sup>457</sup> The acknowledgement, and suggestions made by Jansen JA regarding the conative element in the *Ngubane* case are in my view an indication that the conative element is an indispensable part of *dolus eventualis*.

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<sup>453</sup> Ibid.

<sup>454</sup> Ibid.

<sup>455</sup> S De la Harpe & T Van der Walt 'The Volitional Component of *Dolus Eventualis*' 2003 *SACJ* 208-209.

<sup>456</sup> *S v Ngubane* (supra note 221) 358-359.

<sup>457</sup> Ibid, 685.

In the *Dhlamini*<sup>458</sup> case, the issue in concern was whether the accused accepted the possibility that one of their members might be killed and were reckless as to this possibility. It is not clear from the judgment if and how the court considered this requirement. In the *Dhlamini* case there was a high probability that the accused foresaw the possibility that one of their members might be killed during the robbery.<sup>459</sup> However, it is difficult to argue that they reconciled themselves with that possibility since it is not clear from the judgment to what extent the court entertained the requirement of recklessness.<sup>460</sup> Therefore, it can be observed that one may apply the principles of the case of *Maritz*<sup>461</sup> into the *Dhlamini* case, that a person does not accept a foreseen risk into the bargain when he is convinced that he can prevent it occurring. Such a person can, therefore, may not be held to have the requisite intention to cause that result merely because its occurrence proves him wrong. In a nutshell, my main emphasis is on the importance of the conative element as a part and parcel of the test for *dolus eventualis*.

The second limb of the test for *dolus eventualis* has been said to be redundant due to the fact the cognitive element is mainly the centre of attention when courts are drawing inferences in the intention of the accused. In the case of *S v Dlodlo*,<sup>462</sup> the court makes a similar observation that the second limb of *dolus eventualis* seldom features in practice. It was held that a possible explanation why recklessness so seldom features in practice, is that this element is usually almost automatically inferred from the fact that the accused foresaw the possible occurrence of the result in question and nevertheless persisted in his conduct.<sup>463</sup> It may be assumed that in the great majority of cases proof of recklessness would in fact be furnished by the accused's action with foresight of the possible consequences. On a different footing, in the *Nkombani* case the court took the view that recklessness may sometimes serve as evidence from which an inference may be drawn that the accused in fact foresaw the possible occurrence of the prohibited consequence in question.<sup>464</sup> With these views, the author argues that it is illogical to then conclude that since the recklessness element seldom features it must be discarded. The fact that courts do use it to draw inferences as regards the cognitive element outlines it a significant leg of the test just like the cognitive element.

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<sup>458</sup> *S v Dlamini* (unrep. CC 276/99/AL WLD).

<sup>459</sup> *S De la Harpe & T Van der Walt* (supra note 455).

<sup>460</sup> *Ibid.*

<sup>461</sup> *S v Maritz* (supra note 375) para 416F.

<sup>462</sup> 1994 (1) SACR 405 (A) 416F.

<sup>463</sup> *S v Dlodlo* 1966 (2) SA 401 (A) 405F-H.

<sup>464</sup> *S v Nkombani* (supra note 204) 896D-G.

Paizes is against the notion that the conative element (which he refers to as the “reconciliation of harm”) is redundant as he is shown giving strong evidence to support the view that the conative element is an independent part of the test for *dolus eventualis*.<sup>465</sup> He argues that interpreting the second element in a way that requires the latter instead of the former sets the bar too high for the prosecution and leads, if taken to its logical conclusion, to inappropriate decisions. Some court decisions are criticized on the basis that they believe that “foresight” and “belief” exist on completely different planes, so that an assessment of one cannot have a bearing on the measure of the other.<sup>466</sup> I agree with Paizes that this cannot be true.<sup>467</sup> Where some meaning to the conative element is given by ascertaining how much “foresight” will make up a “belief” necessarily makes inroads into the meaning of the first element by eroding what constitutes foresight of the real possibility of causing the prohibited result.<sup>468</sup> This will then lead to confusing or wrong results. It can be argued that the best possible solution is to regard these two elements<sup>469</sup> as independent and separate, thereby regarding the conative element as a significant part of the test that requires consideration in the similar way as the cognitive element. Thus the conative element cannot be said to be a determinative factor to the cognitive element.

Furthermore, the model for *dolus eventualis* in the civil law systems from which the South African concept originates (Dutch and German law) includes both a cognitive and a conative component, in this manner, the second limb of the test for *dolus eventualis* is as important as the first one. In German criminal law, intention is the label used not only for cases of knowledge and desire; it also includes cases of what in common law is known as recklessness in *dolus eventualis*. Taylor discusses the historical development of the German concept of intention, and shows that *dolus eventualis* consists of two components: the cognitive element, which (as in the common law) considers the state of the accused's knowledge that the offence may occur,

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<sup>465</sup> Paizes A, Van Der Merwe S. “A bi-annual update complementing the *Commentary on the Criminal Procedure Act* NO 1 OF 2014” 2014 *Juta* 11-12.

<sup>466</sup> *S v Humphreys* (supra note 49), where Brand JA at para 18 & 19. Held that the accused “foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialize” at 18. Second, the evidence showed that the appellant had, previously, successfully performed the same maneuver in virtually the same circumstances. The inference was “that, as a matter of probability, he thought he could do so again” at 19”. Paizes is therefore against this finding and believes that the cognitive and conative element exists on separate planes. The following courts decisions also made similar judgements that Paizes disagrees with: *R v Thibani* (supra note 87) 729-730, *S v Tonkin* 2014 (1) SACR 583 (SCA), *S v Ndlanzi* 2014 (2) SACR 318 (33) SCA.

<sup>467</sup> A Paizes & Van Der Merwe S (supra note 465).

<sup>468</sup> *Ibid*.

<sup>469</sup> Refers to the cognitive and conative element.

and a volitional or dispositional element which is unknown to the common law.<sup>470</sup> However, in conclusion of his article, Taylor disputes the volitional element saying that it is not plausible, and that in any harmonization of concepts of intention in the criminal law of the European countries such an element should not be adopted.<sup>471</sup> This has become one of the reasons why some legal writers believe that the second limb of the test for *dolus eventualis* is insignificant.

What remains an important issue however is that, recent case law supports the relevance of the conative element. In the recent case of *S v Van Schalkwyk*,<sup>472</sup> it was highlighted that the two elements of *dolus eventualis* must not be analysed in isolation. In this case, “the State had to prove beyond a reasonable doubt that (a) the appellant had had the subjective foresight of the possibility that striking the deceased on the upper part of his body with the hay hook could have fatal consequences; and (b) the appellant had a disregard of that consequence put differently, he had reconciled himself with the foreseen possibility”. The two legs are not considered in isolation.<sup>473</sup> Brand JA in *S v Humphreys* described the test as follows:

On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.<sup>474</sup>

Similarly, in the recent case of *DPP Gauteng v Pistorius*, the Supreme Court of Appeal confirmed that the conative element is a necessary part of the test for *dolus eventualis*. It said the following:

A person’s intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore gambling as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (i) foresight of the possibility of death occurring, and (ii)

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<sup>470</sup> G Taylor ‘Concepts of Intention in German Criminal law’ *Oxford Journal of Legal Studies* 24, 99-127. The view of accepting the second leg of *dolus eventualis* has also found some overwhelming support in Foreign law. The courts and most academic writers follow this theory in one form or another. For Swiss law: OA Germann *Schweizerisches Strafgesetzbuch* 9 ed (Zurich 1972) 33; Dutch law: J M van Bemmelen *Ons Strafrecht, Algemeen Deel, I Het materiele strafrecht* 4 ed (Groningen 1970) 112; German law: J Baumann *Stra-recht Allgemeiner Teil* 5 ed (Bielefeld 1968) 390ff (‘Since knowledge of the possibility of the consequence is present in both conscious negligence and *dolus eventualis*, the distinction between the two forms of *mens rea* can only be based on the *Einwilligungstheorie*’); Von Hippel 133; R Maurach *Deutsches Strafrecht Allgemeiner Teil* 4 ed (Karlsruhe 1971) 263; and many others.

<sup>471</sup> *Ibid.*

<sup>472</sup> *S v Van Schalkwyk* (supra note 49) 15.

<sup>473</sup> *S v Van Schalkwyk* (supra note 49) 15.

<sup>474</sup> *S v Humphreys* (424/2012) [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) para 13.

reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act reckless as to the consequences (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been reconciled with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. *It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.*<sup>475</sup>

This all goes to prove that the conative element is just as important and useful as the cognitive element, and they are different.

### 3.4 Conclusion

This chapter indicated the difficulties that come with the acceptance of the conative element as a second limb of the test for *dolus eventualis*. Although courts<sup>476</sup> apply both the conative and cognitive elements for *dolus eventualis*, there have been objections by legal academics where the application of the conative element has been regarded as irrelevant. However, as indicated in this chapter, there have been some authoritative pronouncements in favour of the view that the conative element is significant. Due to these two opposing views about the conative element, the relevance of the conative element becomes questionable, or rather confusing. It becomes uncertain which of the two views must be acceptable. This chapter supports the view that the conative element is not redundant, and that it is in fact a relevant part of the test for *dolus eventualis*. As indicated in the above subsections, much evidence supports the view that the conative element is significant. Below is a brief summary in support of the view that the conative element is significant (some sections against the conative element shall be discussed as well.)

First of all, this dissertation supports the view of an unqualified cognitive element. In this manner, the conative element is relevant in so far as it is a safe guard towards liability. It stops liability being too wide and it's a balance against any possible injustice. Even if there is foresight in the accused, the court still has to ascertain that the accused proceeded with his actions willingly despite knowing the consequences (reconciliation). Furthermore, (as discussed in detail above)<sup>477</sup> some legal academics have been seen undermining the relevance of the conative element. The outcome of the *De Bruyn* case according to Whiting did not bring a satisfactory explanation on the relevance and content of conative element.<sup>478</sup> This is where

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<sup>475</sup> *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49) 26.

<sup>476</sup> *DPP, Gauteng v Pistorius* (supra 49), *S v Ngubane* (supra 221), *S v Beukes* (supra 144), amongst others.

<sup>477</sup> At subsection 3.3.1

<sup>478</sup> RC Whiting (supra note 141) 444.

the court held that *dolus eventualis* involves the conscious taking of the risk that the result will ensure, not caring whether it ensure or not.<sup>479</sup> According to Whiting this explanation is erroneous and ambiguous; he prefers a more relaxed explanation about the concept. Thirdly, Burchell argues that the conative element is an unnecessary appendage. His argument is mainly based on the outcome of the *Humphreys* case. He argues that the approach of the Supreme Court of Appeal on the volitional element of *dolus eventualis* disregards an essential aspect of the initial foresight inquiry into *dolus eventualis*.<sup>480</sup> From these views, it has been submitted that the conative element is redundant because even the courts fail to give a clear explanation about the conative element.

Furthermore, as indicated above, Loubser and Rabie are against the conative element, as they argue that the content of the element of volition required for *dolus eventualis* in case law is uncertain.<sup>481</sup> They go on to add that:

The requirement of volition for *dolus eventualis* appears to be undesirable; first because it is difficult to determine the precise content of volition in the form of “acceptance of” or “reconciling to” the harmful result in question; and second because the accused who sets in motion a criminal course of conduct while foreseeing the possibility of the harmful result occurring, should not by mere change of mind and loss of volition obtain the benefit of a defence, just as voluntary withdrawal after setting in motion a criminal course of conduct should not constitute a defence against conviction of attempt.<sup>482</sup>

However, in my view, the fact that courts may have failed to give a clear picture of the relevance of the conative element does not render the element insignificant, as some put it. There is some authoritative pronouncement for the view that the conative element is a significant part of the test for *dolus eventualis*.<sup>483</sup> In the case of *S v Beukes*, Van Heerden JA, approved that no decision in South African courts has actually turned on the question of

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<sup>479</sup> *S v De Bruyn* (supra note 159) para 510H.

<sup>480</sup> JM Burchell (supra note 53) 369.

<sup>481</sup> MM Loubser & MA Rabie (supra 203) 345, these two academics try to explain the content of the conative element in this way, “...described as recklessness in respect of the harmful result. This implies an attitude of carelessness, indifference or callous disregard in respect of the consequences of one's conduct. Because this attitude is almost invariably inferred from the fact that the accused had foresight of the harmful result and nevertheless persisted in his conduct,” they then conclude that requirement of recklessness appears to be superfluous. Further that, “...the concept of recklessness also appears to be difficult to apply in a situation where the accused is heedful of the possible result of his conduct and would rather avoid such a result, but nevertheless persists in his conduct in order to achieve some other aim”.

<sup>482</sup> MM Loubser and MA Rabie (supra note 203) 430.

<sup>483</sup> *R v Valachia* (supra note 85); *S v Beukes* (supra note 144); *S v Ngubane* (supra note 221) 685D-E; *R v Sikepe* (supra note 86); *R v Thibani* (supra note 87); *R v Geere* (supra note 298); *R v Huebsch* (supra note 298); *R v Horn* (supra note 17); *S v Mini* (supra note 215).



recklessness.<sup>484</sup> No court in South Africa has actually stipulated that the conative element is insignificant. *Dolus eventualis* cases have been seen defining *dolus eventualis* as involving both a cognitive and conative element. Furthermore, the model for *dolus eventualis* in the civil law systems from which the South African concept originates (Dutch and German law) includes both a cognitive and a conative component, which makes the second limb of the test for *dolus eventualis* as important as the first one.<sup>485</sup>

Furthermore, some court decisions seem to be of the view that the conative element seldom features in practice; therefore it cannot be regarded as relevant. In the case of *S v Dlodlo*,<sup>486</sup> the court makes a similar observation that the second limb of *dolus eventualis* seldom features in practice. However, my submission is that, the fact that the conative element seldom features in practice does not render it insignificant. It is still a significant limb of the test, which in the *Ngubane* case it was emphasized that it is mandatory for courts to give meaning to the conative aspect of *dolus eventualis*.<sup>487</sup> Moreover, in the recent case of *S v Pistorius*<sup>488</sup> the judge acknowledged that the concept of *dolus eventualis* involves two elements; a conative and a cognitive element.

I am of the opinion that the conative element is an essential part to a test for *dolus eventualis* and is a completely independent element separate from the foresight element. In other words, *foresight of the possibility of harm*<sup>489</sup> and *the decision which thereafter came into the accused's mind about that possibility*<sup>490</sup> are two different issues. Where the wrongdoer ceases to act because he appreciates that a prohibited consequence may follow from his actions, it is because of the emergence of a second thought in his mind, which accepts that the foreseen possibility may happen. Similarly, if he carries on with his conduct, the judge will draw an inference to figure out *the state of the wrongdoer's mind* (conative element) in relation to the foreseen possibility. If he did not care about the result and still persisted with his conduct, he accepted that the forbidden consequence may be the result of his or her action - *dolus eventualis* will be present. If he was acting on the belief that no harm will occur, there is no *dolus eventualis*. In

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<sup>484</sup> *S v Beukes* (supra note 144).

<sup>485</sup> G Taylor (supra note 370).

<sup>486</sup> *S v Dlodlo* (supra note 463).

<sup>487</sup> *S v Ngubane* (supra note 22) para 685. See also, *S v Beukes* (supra note 144) para 522 B-I. Where it was highlighted that recklessness is of significance as an additional element of *dolus eventualis*.

<sup>488</sup> *DPP, Gauteng v Pistorius* (supra note 49) at para 26.

<sup>489</sup> My italics for emphasis. The phrase commonly known as the cognitive element.

<sup>490</sup> My italics for emphasis. The phrase referring to the second element that the author has been referring as the conative element in this chapter.

both situations there are two different phases before the action was taken: foresight of a possibility, and what was the state of the mind (the conative element) towards that possibility. As such, it may only be reasonable to accept the conative element as a significant part of the test for *dolus eventualis*. Therefore, it can be submitted that the conative element of *dolus eventualis* is *not*<sup>491</sup> redundant.

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<sup>491</sup> Italics for my emphasis.

## CHAPTER FOUR

### 4. A CRITICAL EXAMINATION OF THE INTERPRETATION OF *DOLUS EVENTUALIS* IN SOUTH AFRICAN LAW

#### 4.1 Introduction

Chapter 2 and 3 have been critically important in that they examined the elements of *dolus eventualis* in detail. In the current chapter I shall examine the concept of *dolus eventualis* as a whole including how it has been interpreted by South African courts and legal writers. I came up with different models for *dolus eventualis* in South African criminal law based on case law and legal writers. Generally, there are three models of *dolus eventualis* that are accepted by South African legal writers. These so far include, first a model which accepts a qualified cognitive element and disregards the conative element; secondly, a view that accepts an unqualified cognitive element and balances it with the conative element, and thirdly a model which favours the qualified cognitive element and accepts the conative element as significant. The fourth and additional model (my own) accepts an unqualified cognitive element and accepts the conative element plus an additional practical component (for clarity, the fourth option shall be referred to as model 4 because I will link its application to what Paizes and Whiting suggested in terms of specific cases.) This dissertation supports the latter (model 4) so far as it favours the conative element and contains a unique approach to *dolus eventualis* cases. More reasons why this dissertation prefers *model 4* shall be indicated later in this chapter.

Having selected the most preferable model, I shall move on to explain how this model may be applied in case law. This dissertation suggests that *model 4* may be applied on a *case-by-case*<sup>492</sup> basis, rather than a *one-size-fits-all*<sup>493</sup> concept. Theoretically, *model 4* is a much better approach, however, this dissertation partly agrees with Paizes and Whiting in terms of the application of the concept in cases. Basically, my approach differs from Paizes and Whiting in that it accepts the conative element as significant whereas *they*<sup>494</sup> find it irrelevant, but concurs with them in terms of their practical approach to cases. In their practical approach to *dolus eventualis* cases, Paizes and Whiting present some interesting insights against the *one-size-fits-all* concept. The *one-size-fits-all* concept is when all *dolus eventualis* cases are dealt with using the same criteria, regardless of the category each case falls into. If *dolus eventualis* cases had

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<sup>492</sup> My italics for emphasis.

<sup>493</sup> My italics for emphasis.

<sup>494</sup> Refers to Paizes and Whiting.

to be dealt with in terms of a *one-size-fits-all* concept, the approach used in case A will be used in case B regardless of the difference in facts. My argument is that, the fact that there is a standard approach to *dolus eventualis* should not guarantee the outcome of a case in another case, because even though we might have two *dolus eventualis* cases involved, their facts differ. It would thus be best to look at these cases individually. Putting them in a *one-size-fits-all* category may lead to incorrect results.

An example of the *one-size-fits-all* approach (which shall be discussed in detail below) is: where the appellant in *Humphreys* escaped liability for murder on the basis that it was “not immaterial” to him that his manoeuvre would lead to the collision and death of the children who were his passengers. Applying the same approach to the *Nyalungu*<sup>495</sup> case would lead to a finding that the rapist hoped not to infect his victim even though he accepted the real risk of doing so by raping her in the first place. The decision in the *Humphreys* does not make sense if applied in the *Nyalungu* case. So we might have a standard approach to *dolus eventualis*, but its application in cases must not be the same.

Furthermore, this chapter will highlight the rule emphasised by the National Prosecution Authority that reckless drivers are not to be charged with murder, unless intention in the form of *dolus eventualis* can be proved.<sup>496</sup> It shall further be highlighted that because the appellants in *Maaroahanye*<sup>497</sup> and *Humphreys* cases escaped the conviction of murder and attempted murder does not necessarily mean that the same should be the case for other reckless drivers. In as much as the concept of *dolus eventualis* has been explained in these high-profile *dolus eventualis* cases, the nature and its content remain ambiguous. The submission of this dissertation therefore is that, it would be more helpful to follow a more nuanced approach suggested by Paizes, the *case-by-case* application.<sup>498</sup>

This chapter shall further analyse some HIV transmission and road traffic *dolus eventualis* cases. As regards the HIV transmission cases, the dissertation seeks to point out that already there is some discrimination and stigma against the HIV infected people. To then go further and criminalise such accused on the grounds of attempted murder when they have infected

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<sup>495</sup> *S v Nyalungu* 2013 (2) SACR 99 (T).

<sup>496</sup> Driver’s reduced sentence ‘disappointing *News24*, 22 March 2013, available at <http://www.news24.com/SouthAfrica/News/Killer-drivers-reduced-sentence-disappointing-20130322> (accessed on 2013/03/25).

<sup>497</sup> *Maaroahanye and Another v S* (supra note 49).

<sup>498</sup> A Paizes & S Van der Merwe ‘A bi-annual update complementing the *Commentary on the Criminal Procedure Act* NO 1 OF 2016’ 2016 *Juta*.

someone with the HIV seems more of an addition to the stigmatisation. Therefore, to categorise HIV transmission cases as *dolus eventualis* cases in the same manner as in road traffic cases and other intent-based murder crimes would arguably lead to unjust results. The dissertation further analyses certain recent high-profile cases in South African criminal law which have applied the concept of *dolus eventualis*. This shall be done in order to see how the courts have succeeded in explaining the concept of *dolus eventualis* which for years has been regarded as an ambiguous concept. The current high profile *dolus eventualis* cases to be discussed in this chapter are, *DPP Gauteng v Pistorius*,<sup>499</sup> *S v Humphreys*,<sup>500</sup> and *Maarohanye v S*.<sup>501</sup> However, any other relevant cases<sup>502</sup> which might help unravel the problem associated with understanding the concept of *dolus eventualis* shall be discussed in conjunction with the above mentioned *high-profile cases*.<sup>503</sup>

## **4.2 Models of *dolus eventualis* recognised in South African law**

### **4.2.1 Model 1: An acceptance of a qualified cognitive element & a disregard of the conative element**

According to this model, legal writers accept the view that only one element is sufficient for a finding of *dolus eventualis*, that is, the cognitive element. In this manner, qualifying the cognitive element in the test for *dolus eventualis* to a certain extent makes the conative element useless. This can be best illustrated by looking at Professor Burchell's opinion.<sup>504</sup> He believes that *dolus eventualis* should be comprised of a qualified cognitive element, where he advocates for foresight of a "real", "substantial" or "reasonable" possibility.<sup>505</sup> He advocates qualifying the cognitive element because he believes that defining it in unqualified terms leaves the whole concept of *dolus eventualis* too broad.<sup>506</sup> He then goes on to argue that the conative element should be rejected as "irrelevant and confusing".<sup>507</sup> It can be observed that Burchell rejects the conative element and balances the concept of *dolus eventualis* with a qualified foresight component to ensure that the concept is not too broad, and that people who do not deserve to be regarded as acting intentionally are not convicted on the basis of *dolus eventualis*. By insisting on this standard, Burchell further contends that intention would be confined to "a state

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<sup>499</sup> *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49).

<sup>500</sup> *S v Humphreys* (supra note 49).

<sup>501</sup> *Maarohanye and Another v S* (supra note 49).

<sup>502</sup> For example, the recent case of *S v Van Schalkwyk* (supra note 49).

<sup>503</sup> Italics for my emphasis

<sup>504</sup> JM Burchell (supra note 53) 373.

<sup>505</sup> Ibid, at 373.

<sup>506</sup> See a detailed discussion in chapter 2.

<sup>507</sup> JM Burchell (supra note 53), 391. Discussion in Chapter 2 for more reasons why the conative element was rejected.

of mind that can properly be regarded as such and keep the dividing line between intention and negligence clear-cut”.<sup>508</sup> It is on this basis that some academic writers like Paizes, Smith and Morkel have found the view of rejecting the conative element and accepting only a qualified cognitive element of *dolus eventualis*.<sup>509</sup>

Paizes, Smith and Morkel reject the conative element as redundant and argue that all that is required for *dolus eventualis* is subjective foresight of the possibility of harm ensuing provided the possibility is not remote, but substantial or “concrete”.<sup>510</sup> It seems that recklessness adds nothing to the cognitive element: if the accused foresaw the possibility of the result but nevertheless proceeded with his act he was in any event reckless. Recklessness according to *their*<sup>511</sup> understanding can be absent only if the accused foresaw the possibility of the result but decided not to proceed with his act, in which event he will escape liability on the basis that there was no unlawful act.<sup>512</sup> This dissertation acknowledges the existence of this particular model, but however finds it flawed to its attempt at rejecting the conative element as irrelevant. Subsection 4.2.4 discusses the model favoured by this dissertation and how the conative element must always fit into the test for *dolus eventualis*.

#### **4.2.2 Model 2: An acceptance of an unqualified cognitive element & the conative element as significant**

The second model recognised amongst legal academics is the one that qualifies the cognitive element and further accepts the existence of the conative element. This model is completely different from the above one (4.2.1). According to this model, the degree of foresight must be of any foresight, no matter how remote, unqualified by any terms with support from the case of *S v Malinga*<sup>513</sup> which favours foresight of a remote possibility. In the case of *Malinga*, it was held that remoteness of the possibility is significant in drawing an inference of the accused’s subjective foresight of a possibility;<sup>514</sup> the more remote the possibility the less likely it is that the accused did in fact foresee it.<sup>515</sup> But that is not to say that a person who does foresee

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<sup>508</sup> EM Burchell & PMA Hunt *South African Criminal Law and Procedure Vol:1 General Principles of Criminal Law* 2ed (by EM Burchell, JRL Milton & JM Burchell) (1983) 141, 156.

<sup>509</sup> PT Smith (supra note 307) 92; Morkel (supra note 253) 173; A Paizes (supra note 64) 638.

<sup>510</sup> Supra note 509.

<sup>511</sup> Supra note 509.

<sup>512</sup> CR Snyman, (supra note 1), 181.

<sup>513</sup> *S v Malinga* (supra note 2) 694H.

<sup>514</sup> Ibid.

<sup>515</sup> *S v Shaik* (supra note 217) 62D-E.

a possibility of death is entitled, because the risk is slight, and death is unlikely, highly improbable or remote, to take a chance and, as it were, gamble with the life of another.<sup>516</sup>

It can be observed that the view of an unqualified possibility is more favourable because the requirement of a real possibility was expressly rejected in the *Fick* case.<sup>517</sup> The requirement of a real possibility was also rejected following a decision in South African case law that what is required for *dolus eventualis* is not foresight of *any* possibility, but only of a *real* possibility<sup>518</sup> or foresight of a *substantial* risk<sup>519</sup> or of a *reasonable* possibility of risk to life.<sup>520</sup> In the case of *Beukes*<sup>521</sup> reference has been made to foresight of a reasonable possibility,<sup>522</sup> but it appears that they do not go as far as setting this as a general requirement.<sup>523</sup> This requirement would be in conflict with the view which either does not qualify possibility or even allows a remote possibility to suffice.

To a certain extent Loubser and Rabie fall in this category. They accept an unqualified cognitive element and reject the conative element. According to Loubser and Rabie, the cognitive element of *dolus eventualis* requires foresight of the possibility of the harmful result in the sense that the result of the act may occur in a particular manner.<sup>524</sup> Once a person comes to a conclusion that a certain result will follow from his act, but nevertheless proceeds to act appreciates the possibility of the harmful result in question and therefore acts intentionally. It has further been observed that, the degree of probability of the occurrence of the harmful result will be of evidential importance regarding the inference as to whether the actor subjectively concluded that the harmful result may occur, but foresight of a real or substantial possibility of such occurrence is not required.<sup>525</sup> In as much as the conative element has been accepted as significant, it appears that a positive will, wish or desire is not required, but rather a more passive “appreciation of” or “reconciling to” the harmful result.<sup>526</sup>

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<sup>516</sup> *R v Horn* (supra note 17) 465C.

<sup>517</sup> *S v Fick* 1970 (4) SA 510 (N) 514C-G; *S v Shaik* (supra note 217) 62C-F.

<sup>518</sup> *S v Ushewokunze* 1971 (1) SA 360 (RA) 364B-C; *S v Ostilly* (supra note 123) 728D; *S v Ncwane* 1978 (2) PH H218 (A); *S v Moodie* 1983 (1) SA 1161 (C) 1162B.

<sup>519</sup> *R v Steenkamp* 1960 (3) SA 680 (N) 684F-G.

<sup>520</sup> *S v Tazwinga* (supra note 205) at 59 1D; *S v Ushewokunze* (supra note 280) 363.

<sup>521</sup> *S v Beukes* (supra note 144).

<sup>522</sup> *Ibid*, 522E.

<sup>523</sup> *Ibid*, 521J-522C.

<sup>524</sup> Loubser & Rabie (supra note 203) 435.

<sup>525</sup> *Ibid*

<sup>526</sup> *Ibid*.

However, it is hard to determine an extent such acceptance or reconciling constitutes something more than a mere awareness or conclusion that the harmful result may occur in the circumstances. Loubser and Rabie then conclude that it is hard to determine the exact content of volition in the form of “acceptance of” or “reconciling to” the harmful result in question; and second because the accused who sets in motion a criminal course of conduct while foreseeing the possibility of the harmful result occurring, should not by mere change of mind and loss of volition obtain the benefit of a defence, just as voluntary withdrawal after setting in motion a criminal course of conduct should not constitute a defence against conviction of attempt.<sup>527</sup> According to this model, the view of an unqualified component is balanced by an additional element, (the conative element) but to avoid some repetition, more on how the conative element is linked to an unqualified cognitive element is discussed below at (4.2.4), because these two models are almost similar.

#### **4.2.3 Model 3: An acceptance of a qualified cognitive element and the conative element as significant**

The third model accepts both the cognitive and conative element, where foresight in the cognitive element is qualified. Legal academics like Snyman can be placed into this category. According to Snyman, “the cognitive element deals with what the accused conceives to be the circumstances of his act and foresees the prohibited result not as one which will *necessarily* flows from his act, but only as a strong *possibility*.”<sup>528</sup> Snyman further submits that the correct approach is to assume that there must be a real or reasonable possibility that the result may ensue.<sup>529</sup> The Supreme Court of Appeal in the *Makgatho*<sup>530</sup> case expressly endorsed this view as well.

According to Model 3, *dolus eventualis* can be said to be absent where the accused foresees the possibility of harm only as remote or far-fetched. In the case of *Shaik* and *Dladla*,<sup>531</sup> it was held that the fact that the possibility is remote may influence the making of deductions concerning what the accused subjectively saw. The more remote the possibility that the result might ensue, the more difficult it will be to find as a fact that the accused indeed foresaw that possibility. Furthermore, if the possibility of the result ensuing was remote or far-fetched, *dolus*

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<sup>527</sup> Ibid, 436.

<sup>528</sup> CR Snyman, (supra note 1 above) 180.

<sup>529</sup> Ibid.

<sup>530</sup> *S v Makgatho* (supra note 131) 9.

<sup>531</sup> *S v Dladla* (supra note 232) 4H; *S v Shaik* (supra note 217) 62D-E.



*eventualis* will probably be absent in that the accused did not reconcile himself to the possibility that the result might ensue.

The relevance of the conative element is highlighted by Snyman where he argues that, “it does not follow from the fact that X foresaw the result as a reasonable possibility that *dolus eventualis* is therefore present. A person may foresee a result as possible and nevertheless lack *dolus eventualis*, if he decides or comes to the conclusion that the result will not ensue from his act”.<sup>532</sup> In this manner, it can be argued that the conative element indeed has to be accepted, whereby the accused reconciles himself to the possibility that the result will follow. Notable is the fact that, there is almost no direct evidence of the existence of the second element (conative element) to determine *dolus eventualis*.

It has been revealed that courts almost always base their findings on whether the second part of the test has been complied with on inferences from the facts.<sup>533</sup> In summary, the third model accepts a qualified cognitive element because a remote possibility of harm means an absence of *dolus eventualis*, and the conative element is relevant because it is completely independent of the cognitive element. But if a notion of accepting a “remote” foresight possibility is a firmly established concept in South African law, would it be useful to continue neglecting it? Model 4 attempts to answer this question and gives more reasons why the conative element must be accompanied by an unqualified cognitive element in *dolus eventualis*.

#### **4.2.4 Model 4: An acceptance of an unqualified cognitive element & an acceptance of the conative element plus an additional *case-by-case* analysis**

There is no court decision so far or any legal academic that has followed this particular model in the exact same way as suggested by this dissertation. This is a more nuanced approach to *dolus eventualis* currently suggested as an alternative approach to *dolus eventualis*. As explained above, some legal writers accept a qualified cognitive element but reject the conative element, and some writers have accepted the unqualified cognitive element and the conative element as significant.<sup>534</sup> Looking at the level of confusion associated with *dolus eventualis*, this dissertation seeks to deviate from the above well-known models of *dolus eventualis* and recommends a new one. In this particular model, the dissertation advocates for a concept of *dolus eventualis* which accepts both the cognitive and conative element as significant, further

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<sup>532</sup> CR Snyman (supra) 181.

<sup>533</sup> Ibid.

<sup>534</sup> *S v Beukes* (supra note 144), *S v Pistorius* (supra note 49), *S v Maarooahanye* (supra note 49).

accepting the cognitive element in unqualified terms. As discussed in chapter 2, accepting the cognitive element in unqualified terms refers to a situation where foresight of the possibility of harm no matter how “remote”<sup>535</sup> or “slight” is sufficient for a finding of *dolus eventualis*.

Several arguments have been raised against accepting remote foresight, where it has been argued that if foresight of a remote possibility is accepted it will lead to inconsistent results<sup>536</sup> and raises the spirit of injustice. This idea has been viewed as “too wide”<sup>537</sup> by other academics. Burchell and Hunt use an example of a motorist, stating that applying the remote possibility principle would mean that whenever someone drives his car, he would have *dolus eventualis* in respect of harm to other users of the road, and therefore would be a murderer should death be a consequence of his driving.<sup>538</sup> This example is done based on assumption that recklessness is present (which is the similar model suggested by this dissertation).<sup>539</sup> Morkel argues that if a remote possibility amounted to sufficient foresight for liability, this would mean that the wrongdoer could be held liable for a crime requiring intention where her conduct did not even fall short of that of the reasonable person.<sup>540</sup> A closer analysis however reveals that accepting a remote foresight is sufficient for the reasons that follow.

Firstly, accepting the cognitive element in unqualified terms is a notion that has been firmly established<sup>541</sup> under South African law. It has been observed that the dicta in the *Nsele* case is so effective to the extent that even though it was passed in the 1950s, it has since become the prevailing approach to the degree of foresight required for *dolus eventualis* to suffice.<sup>542</sup> Secondly, the standard approach of accepting proof of an unqualified possibility as adequate for the purposes of liability has not been specifically rejected in the case law.<sup>543</sup> For example, as indicated in chapter 2, in the case of *Van Aardt* in the court a quo, Froneman J applied the standard approach of foresight of an unqualified possibility of the risk of death ensuing ;<sup>544</sup> when the matter was taken for an appeal, the full bench of the Eastern Cape High Court, faced

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<sup>535</sup> *R v Thibani* (supra note 87) 729-30. Similar findings were made in the case of *S v De Bruyn en 'n ander* supra note 159) 510G; *S v Sethoga and others* 1990 (1) SA 270 (A) 275J-276A; *S v Qeqe* 2012 (2) SACR 41 (ECG) 49E-G.

<sup>536</sup> See the discussion at supra note 192.

<sup>537</sup> RC Whiting (supra note 141) 440.

<sup>538</sup> EM Burchell and PMA Hunt (supra note 125) 146. See also JM Burchell (supra note 53) 373.

<sup>539</sup> S Hoctor (supra note 129) 138.

<sup>540</sup> DW Morkel (supra note 197) 323. Morkel favours requiring foresight of a “concrete” possibility, the deliberate disregard of which it would be in the interests of the community to punish.

<sup>541</sup> *R v Horn* (supra note 17) 567B; *S v Malinga* (supra note 2) 694G; *S v Nkombani* (supra note 204) 891C-D; *S v Sigwahla* (supra note 67) 570B-C; *S v Sikweza* (supra note 205) 736F.

<sup>542</sup> S Hoctor (supra note 129) 150.

<sup>543</sup> S Hoctor (supra note 129) 145.

<sup>544</sup> *S v Van Aardt* 2007 JDR 1043 (E) 32.

with the argument whether the possibility foreseen should be “strong or slight” held that the issue did not merit discussion as the appellant had in fact foreseen the “reasonable” possibility of harm on the facts;<sup>545</sup> and the Supreme Court of Appeal upheld the conviction, on the basis of subjective foresight of the possibility of harm, expressed in unqualified terms.<sup>546</sup>

Thirdly, this dissertation favours the view of an unqualified possibility because the requirement of a real possibility has been expressly rejected.<sup>547</sup> The requirement of a real possibility was rejected following a decision in South African case law that what is required for *dolus eventualis* is not foresight of *any* possibility, but only of a *real* possibility<sup>548</sup> or foresight of a *substantial* risk<sup>549</sup> or of a *reasonable* possibility of risk to life.<sup>550</sup> In the case of *Beukes*<sup>551</sup> reference has been made to foresight of a reasonable possibility,<sup>552</sup> but it appears that they do not go as far as setting this as a general requirement.<sup>553</sup> This requirement would be in conflict with the view which either does not qualify possibility or even allows a remote possibility to suffice.

Furthermore, some legal academics<sup>554</sup> put forward certain arguments for qualifying the cognitive element which are in my view unsatisfactory. They argue that it is doubtful whether a person can be said to foresee a possibility if he thinks of it but considers it very remote. This opinion may be based on the mere speculation of the imaginary possibility of the consequence in question and therefore is ambiguous. Engers<sup>555</sup> also argues that, the definite claim that foresight of a remote possibility does not amount to foresight, would be straining in both language and logic. It can thus be said that too much attention must not be placed upon the mere observation by the accused of the hypothetical possibility of the consequence in question, with a consequent neglect of his consideration as to whether or not an anticipated result will

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<sup>545</sup> Ibid, 345H-J.

<sup>546</sup> Ibid, 40. Perhaps the varying emphases in the different *Van Aardt* judgments could be regarded as variations on a theme.

<sup>547</sup> *S v Fick* 1970 (4) SA 510 (N) 514C-G; *S v Shaik* (supra note 217) 62C-F.

<sup>548</sup> *S v Ushewokunze* (supra note 280) para 364B-C; *S v Ostilly* (supra note 123) 728D; *S v Ncwane* 1978 (2) PH H218 (A); *S v Moodie* 1983 (1) SA 1161 (C) 1162B.

<sup>549</sup> *R v Steenkamp* 1960 (3) SA 680 (N) 684F-G.

<sup>550</sup> *S v Tazwinga* (supra note 205) at 59 1D; *S v Ushewokunze* (supra note 280) 363.

<sup>551</sup> *S v Beukes* (supra note 144).

<sup>552</sup> Ibid, 522E.

<sup>553</sup> Ibid, 521J-522C.

<sup>554</sup> Burchell & Hunt (supra note 125) 146.

<sup>555</sup> KAB Engers (supra note 239) 223.

occur.<sup>556</sup> In view of the above reasons and more, the cognitive element of *dolus eventualis* is best defined in unqualified terms.

An additional acceptance of the conative element is useful because it is an element that has originally been appended to the concept of *dolus eventualis*. The model for *dolus eventualis* in the civil law systems from which the South African concept originates (Dutch and German law) includes both a cognitive and a conative component, in this manner, the second limb of the test for *dolus eventualis* is as important as the first one. In German criminal law, intention is the label used not only for cases of knowledge and desire; it also includes cases of what in common law is known as recklessness in *dolus eventualis*. Taylor discusses the historical development of the German concept of intention, and shows that *dolus eventualis* consists of two components: the cognitive element, which (as in the common law) considers the state of the accused's knowledge that the offence may occur, and a volitional or dispositional element which is unknown to the common law.<sup>557</sup>

Dropping the conative element altogether will ultimately make South African law different from other laws in the world which may create room for criticism against South African criminal law, or even worse, South African legal writers might encounter some difficulties regarding sources in their study of our law which requires a literature review. Many countries recognize the conative element for example Italy, where *dolus eventualis* is known as *dolo eventuale*. According to Article 43 of the Italian *Codice Penale*, all grave crimes require evidence of the mental element known as *dolo*, which means that the prohibited result must be both *preveduto* (foreseen) and *voluto* (wanted). Nevertheless, a result may be *voluto* even though it is not wanted if, having anticipated the likelihood of bringing it about by pursuing a course of conduct, the perpetrator is prepared to run the risk of doing so (*dolo eventuale*). Even a small risk may be *voluto* if the defendant has reconciled himself to, or accepted it as a part of the price he was prepared to pay to protect his objective.<sup>558</sup>

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<sup>556</sup> MM Loubser & MA Rabie (supra note 203) 417-419.

<sup>557</sup> G Taylor (supra note 299). The view of accepting the second leg of *dolus eventualis* has also found some overwhelming support in Foreign law. The courts and most academic writers follow this theory in one form or another. For Swiss law: OA Germann *Schweizerisches Strafgesetzbuch* 9 ed (1972) 33; Dutch law: J M van Bemmelen *Ons Strafrecht, Algemeen Deel, I Het materiele strafrecht* 4 ed (1970) 112; German law: J Baumann *Strafrecht Allgemeiner Teil* 5 ed (Bielefeld 1968) 390ff ('Since knowledge of the possibility of the consequence is present in both conscious negligence and *dolus eventualis*, the distinction between the two forms of *mens rea* can only be based on the *Einwilligungstheorie*'); Von Hippel 133; R Maurach *Deutsches Strafrecht Allgemeiner Teil* 4 ed (1971) 263; and many others.

<sup>558</sup> F McAuley & JP McCutcheon, *Criminal Liability* (London: Sweet & Maxwell, 2000) 301-303.

Furthermore to note is the fact that German courts, following the tradition of the *Reichsgericht*<sup>559</sup> and the jurisprudence of the Federal Supreme Court of Justice (*BGH*), “adhere to a somewhat watered-down approval theory, yet the approval does not need to be explicit and the offender need not *morally* approve of the result – it is sufficient if he or she accepts it nevertheless in order to reach his or her ulterior goal.”<sup>560</sup> It can be observed that German courts have put much emphasis on differentiating between the principle of the cognitive and volitional elements and inferring their existence from the evidence about the external conduct of the defendant.<sup>561</sup> The Federal Supreme Court has adopted the approach that if the defendant ‘is acting in an objectively highly dangerous situation and still goes ahead with his or her plans without being able to claim realistically that nothing bad will happen, the volitional element may be more easily inferred than in less clear-cut situations, where the danger is not readily recognisable.’<sup>562</sup>

The prevailing opinions of legal writers in Germany, as well as the German courts’ view, show that in the case of *dolus eventualis*, both knowledge and wilfulness must be present. As for the requisite component of knowledge, however, it is sufficient that the offender foresees the consequences as possible; as for the component of wilfulness, the offender has to approve the result or reconcile himself to the result. The Federal Supreme Court went on to draw some lines between *bedingter Vorsatz* or *dolus eventualis* and *bewusster Fahrlässigkeit* or conscious negligence assuring that the perpetrator who trusts in the non-occurrence of the undesired result is merely acting with conscious negligence and not with *dolus eventualis*.<sup>563</sup> What therefore remains important and the main reason for briefly discussing international law is to prove that the conative element is internationally recognised a part of the test for *dolus eventualis*, therefore South African legal writers must accept it as such as well. In this manner a model that favours the unqualified cognitive component and the conative element is favourable.

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<sup>559</sup> Also known as the *Imperial Court of Justice*, was the supreme criminal and civil court in the German Reich from 1879 to 1945.

<sup>560</sup> *A/AC.249/1998/CRP.19*. Footnotes omitted.

<sup>561</sup> Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess, Supp. No. 22, UN Doc. A/50/22 (1995) 18-19, para 87-89. *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt), at 35.

<sup>562</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2009 (Lubanga Decision on the confirmation of charges). *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt), at 1.

<sup>563</sup> Claus Roxin, *Strafrecht: Allgemeiner Teil*, (München: Beck’sche Verlagsbuchhandlung, 1997) 376. There are a lot more countries in the world which recognise the conative element as a part of the test for *dolus*. But this dissertation shall only mention of few because listing more is beyond the scope of this dissertation.

#### 4.2.5 Giving effect to *model 4* by including a *case-by-case* analysis in *dolus eventualis* cases

In the above subsection, a unique approach to *dolus eventualis* which deviates from the general South African approach has been suggested. Here is the reason why. In the case of *S v Van Schalkwyk*,<sup>564</sup> Willis JA analyses the concept of *dolus eventualis* in a way in which one can argue that a more nuanced approach for this concept might help solve its uncertainty. The issue in the *Van Schalkwyk*<sup>565</sup> case was whether the appellant was correctly convicted of murder in the form of *dolus eventualis* in the trial court. More specifically, the issue was whether the appellant had actually foreseen that his actions might cause the death of the deceased. This case involved the deceased, Klaaste, a farm worker who was employed by the appellant at the time of his death on 14 February 2014. The appellant had instructed the deceased to feed the cattle over the weekend of 12 to 13 February 2014. The deceased failed to do so.<sup>566</sup> It was harvest time and the appellant's seasonal workers were already in the vineyard ready to harvest the grapes, but the crates for packing them were not in the vineyard. The appellant instructed Kalanie, another farm worker, to fetch the tractor and a second trailer, load the crates and deliver them to the workers in the vineyard. When Kalanie returned with the trailer, the deceased was standing on it holding two iron hay hooks, apparently intending to do the work he had neglected to do over the weekend. The appellant, standing on the ground next to the trailer, instructed the deceased to leave the hooks and get off the trailer. The deceased remained unresponsive, standing on the trailer holding the two iron hay hooks. All this was common cause.<sup>567</sup>

The State's version, as told by Kalanie and Persoon, another farm worker, was that the appellant grabbed the hooks from the deceased and hit him with one of the hooks on the left side of his chest. It was common cause that the iron hay hook pierced ten centimetres into his heart and in the process also severed his fifth rib; he died pursuant to that injury. This version was accepted by both the trial court and the court below, sitting as court of appeal. There were discrepancies between Kalanie's and Persoon's versions that both courts acknowledged and found immaterial.<sup>568</sup> The appellant denied striking the deceased with the hook. Instead, he admitted grabbing the hooks from the deceased, at which point the deceased moved backwards and turned his chest to the left before immediately moving forward towards the hooks and falling

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<sup>564</sup> *S v Van Schalkwyk* (supra note 49).

<sup>565</sup> Ibid.

<sup>566</sup> Ibid, para 3.

<sup>567</sup> Ibid, para 4.

<sup>568</sup> Ibid, para 5.

to his knees. The appellant said that after he had seized the hook, he threw it to the floor and reached for the other hook, which he realized had become hooked onto the deceased's overalls. The appellant allegedly unhooked it and threw it to the ground. Following this incident, the deceased got up, got off the trailer, and walked off.<sup>569</sup>

The majority, per Lewis JA (Tshiqi JA and Plasket AJA concurring) held that intentional killing had not been proved beyond a reasonable doubt. The minority, Baartman AJA and Willis JA, who delivered separate judgments, disagreed. Willis JA's judgement is the most relevant one in so far as this dissertation is concerned. It is very important to first of all go through the judgement by Willis JA before making a brief commentary on it. Willis JA directs the court to the case of *S v Dladla en andere*,<sup>570</sup> where Botha AJA examined the Dutch writers in order to help one better appreciate "opset by moontlikheidsbewussyn" (intention in regard to an awareness of possibility) and quotes Van Hattum as saying:

The reasoning concerning the question of intention puts the question differently (from culpa), namely in this way: what would the perpetrator rather have intended, the realisation of that which accompanies his intended act together with that which had been intended or the abandonment of his act (and therefore the setting of his face against that which he had intended)? If one comes to the conclusion that the perpetrator was so focused on achieving that which he had intended that he would rather continue with his intended act, despite its unintended consequences, rather than set his face against it, then one deduces therefrom that the perpetrator *brought into* his intention even that emergent possibility. That is then *dolus (eventualis)*.<sup>571</sup>

Willis JA mainly focused on the second element of *dolus eventualis*, where he explains that it is this concept of "bringing into" one's intention an emergent possibility that explains why the presence of *dolus eventualis* as an element of the crime results in a conviction.<sup>572</sup> Murder is an intentional act. So too, the concept of "afzien"<sup>573</sup> is important. He thus argues that the failure to abandon something once one has foreseen the possibility of the consequence ensuing is

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<sup>569</sup> Ibid, para 6.

<sup>570</sup> *S v Dladla en andere* 1980 (1) SA 1 (A).

<sup>571</sup> *S v Dladla en andere*, (supra note 570) 4E. Willis JA translated this paragraph into his own English words, but the original words were, "De wilstheorie stelt de vraag anders, nl in deze vorm: wat zou de dader liever hebben gewild, het verwezenlijken van het door hem beoogde gevolg te zamen met het niet beoogde gevolg of het achterwege laten van zijn handeling (en dus afzien ook van het beoogde gevolg)? Komt men tot de conclusie dat er den dader zoveel aangelegen was het beoogde gevolg te bereiken, dat dit hem liever was, zelfs tezamen met het niet beoogde gevolg, dan het afzien van zijn daad, dan besluit men daaruit dat de dader ook het mogelijke (eventuele) gevolg in zijn wil heeft opgenomen. Er is dus *dolus (eventualis)*."

<sup>572</sup> *S v Van Schalwyk* (supra note 49) para28.

<sup>573</sup> Translated to mean, 'setting one's face against something, abandoning it.'

uncertain. This is similar to the requirement of “*nevertheless proceeding recklessly*”, which has been recognized as being part of South African criminal law since the case of *R v Valachia*.<sup>574</sup>

In *S v Swanepoel*,<sup>575</sup> said Willis JA, the court referred with approval to the views of Snyman who said that, in addition to the requirement of subjective foresight, the perpetrator must “*versoen hom met hierdie moontlikheid*”. Snyman, according to Willis JA, however, “subtly reinterpreted a negative obligation—to refrain or abstain from doing something into a positive requirement that the perpetrator must “*versoen*” himself with the possibility of it occurring. And, apparently influenced by *Swanepoel*, the (then) Appellate Division in *S v Ngubane*<sup>576</sup> began using terminology like “taking a conscious risk”, “consenting”, “reconciling”, “taking into the bargain” in addition to “nevertheless persisting in his conduct” in order to describe the volitional element of *dolus eventualis*. In his article *Dolus eventualis reconsidered*,<sup>577</sup> Professor Paizes gives a useful outline of the conceptual evolution of this volitional element.<sup>578</sup>

Willis JA further goes on to explain that the term “*versoen*” translates into English as “be reconciled with”.<sup>579</sup> Some words, nevertheless, were lost in translation in the process. “To be reconciled” has connotations of mature and considered intellectual and moral reflection, an introspection and self-examination, often over a period of time. This is not what is required before a conviction based on *dolus eventualis* can ensue. He argues that “nuances of translation” may explain some of the difficulties that appear to have been associated with the term “be reconciled with” in regard to this volitional element. “*Versoen*” derives from the root word “*soen*” - a kiss.<sup>580</sup> In his view, the ordinary, everyday idiomatic expressions in the English language such as “do not flirt with death”, “do not court death”, “do not play with death” and “do not dance with death” follow better, what the law stresses, rather than an abstract conceptualization as to what it means to be “reconciled with” the possibility of death occurring.<sup>581</sup>

Willis JA further accepts that, as was noted in *S v Dougherty*<sup>582</sup> the law requires that the prohibited act must have been committed *dolo malo*, that is, with a bad, evil or wicked

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<sup>574</sup> *R v Valachia & another* (supra note 84) 831.

<sup>575</sup> *S v Swanepoel* 1983 (1) SA 434 (A) 456H.

<sup>576</sup> *S v Ngubane* (supra note 220) 685D-686A.

<sup>577</sup> A Paizes (supra note 64) 636. See also PT Smith (supra note 307) 81.

<sup>578</sup> See also *S v Humphreys* (supra note 49) para 17 and *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49) 26 and 51.

<sup>579</sup> *S v Van Schalkwyk* (supra note 49) para 31.

<sup>580</sup> *Ibid*.

<sup>581</sup> *Ibid*, para 32.

<sup>582</sup> *S v Dougherty* (supra note 107).



intention. A value judgment has to be made concerning this volitional element – as to whether or not the accused should “afzien” at the critical moment.<sup>583</sup> He finds it quite helpful to refer to another article by Paizes,<sup>584</sup> – a development to his earlier one on the topic – in which he refers to an article by Professor Roger Whiting<sup>585</sup> to underscore the point that the type of activity involved may be critical in determining whether *dolus eventualis* was present and that, for example, even though the foresight of the possibility of death and a person’s being reconciled thereto may be present in everyday activities such as driving or mining, deaths that result from such activities ordinarily do not result in a conviction of murder. *Dolus eventualis* is a tainted intention.<sup>586</sup> As Paizes said in his earlier article on the subject, when all is said and done, a moral judgment has to be formed to determine whether *dolus eventualis* is present. In his later article Paizes argues that factors such as callousness and the purpose of exposing the victim to the risk of death all weigh in the equation to determine whether *dolus eventualis* was present.<sup>587</sup>

The case of *S v Humphreys*<sup>588</sup> makes it clear that ordinarily a denial of foreseeing that a stab wound in the chest may be fatal is not credible.<sup>589</sup> The inference is irresistible that when the accused was about to strike the deceased with a hay hook, he foresaw the possibility that death might ensue even though that may not have been what he wanted to happen. He should have stopped himself there and then. He did not do so. He flirted with death. He did not “afzien” from his intended act. Having gone ahead, despite having foreseen such a well-known risk and of which he, as a farmer, must have been acutely conscious, the accused is confronted with a moral judgment of the community that is one of deep opprobrium. He is therefore guilty of murder.

In light of this judgment by Willis JA in the *Van Schalkwyk* case, it can be seen that his opinions are part of a minority recalcitrant judgment, nonetheless, it must be kept in mind that he was not agreeing with the majority who, having held that the appellant had not foreseen the possibility of his conduct causing the death of the deceased, found no point in examining the second leg of the test for *dolus eventualis*. Paizes argues that Willis JA was, on this particular

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<sup>583</sup> *S v Dougherty* (supra note 107) 34.

<sup>584</sup> A Paizes, ‘*Dolus eventualis* revisited: *S v Humphreys* 2013 (2) SACR 1 (SCA) (2013) 1 *Criminal Justice Review*.

<sup>585</sup> RC Whiting (supra note 141) 440.

<sup>586</sup> A Paizes (supra note 64) 636,

<sup>587</sup> *S v Van Schalkwyk* (supra note 49) para 34.

<sup>588</sup> *S v Humphreys* (supra note 49)

<sup>589</sup> *Ibid*, at para 14. The second leg of the test for *dolus eventualis* also known as the ‘volitional element.’

phase of the test not necessarily “swimming against the judicial current”.<sup>590</sup> Interestingly, the judgment by Willis JA is, in part, consistent with the full bench decision of the High Court in *S v Maarohanye & another* where it was accepted that “*dolus eventualis* . . . is not amenable to containment within a simple formula, the facts of the matter having a lot to do with the ultimate conclusion”.<sup>591</sup>

Paizes observes that the judgment of Willis JA is to be welcomed because it may contribute to the liberation of *dolus eventualis* from its limitation of mechanical formulation.<sup>592</sup> This is certainly the submission of this dissertation. It is a salutary reminder that *fault or blameworthiness*<sup>593</sup> requires a suitably tainted state of mind. Furthermore, it recognizes that any attempt by the courts to identify a universal solvent to describe what state of mind in *all* cases attracts the *dolus eventualis* label would, no matter how carefully that test is crafted, necessarily be imperfect. It is common cause that if the wrongdoer commits an act that has no social utility and that is certainly dangerous and *prima facie* unlawful, for example, hitting another person on the head with a heavy object, there will be *dolus eventualis* in respect of that person’s death if the wrongdoer proceeds with the act after having foreseen the possibility of causing that result.

However, as Paizes observes, it would not be the same if wrongdoer runs a huge mining operation<sup>594</sup> with a similar state of mind. If it *were*, the wrongdoer would be guilty of *attempted* murder every time a miner went down your mine and all mining operations would have to close. Furthermore, driving a car would draw a similar treatment, and transport would cease to function. In short, economic reality and common sense dictate that you cannot ordinarily be regarded as having *mens rea* in the form of *dolus eventualis* if you cause another’s death in a driving accident-even if you drive recklessly and even if you foresee the possibility that another person may be killed as a result of your conduct. Mining and traffic accidents are properly and suitably the province of another form of fault designed for this purpose: *culpa* or negligence.<sup>595</sup>

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<sup>590</sup> A Paizes & S Van der Merwe (supra note 498) 10.

<sup>591</sup> *S v Maarohanye & another* (supra note 49) para 21. This judgment is discussed in *CJR* 2015 (1) 14. The court Mlambo JP, Maluleke J and Pretorius J following what was said in the *CJR* article ‘*Dolus eventualis* revisited’.

<sup>592</sup> A Paizes & S Van der Merwe (supra note 498) 10.

<sup>593</sup> Italics for my emphasis. Fault or blameworthiness of which *dolus eventualis* is but one manifestation.

<sup>594</sup> Which is inherently dangerous, has social utility and is not *prima facie* unlawful.

<sup>595</sup> A Paizes & S Van der Merwe (supra note 498) 10.

In both *Van Schalkwyk* and *Maarohanye* the courts have endorsed the various *factors* identified by Whiting and Paizes as being relevant and influential in making a non-formulaic determination of *dolus eventualis*. These, it is hoped, will be relied on further by the courts in developing a more flexible and nuanced approach. It seems that Willies JA came very close to the arguments raised by Whiting and Paizes: that the second limb of the test adds nothing to the first one since, once an accused goes ahead and commits the act that constitutes the conduct element of the *actus reus*, foreseeing that this act might cause the death of the victim, he will necessarily have failed to “afzien” or “set his face against” that act. Had he not done so, he would have stopped from performing it.

As regards the volitional element of *dolus eventualis*, Whiting and Paizes maintain that it is only descriptive of what must have been the wrongdoer’s state of mind when he performed the act. It has no additional value and cannot usefully be considered a separate condition for determining *dolus eventualis*.<sup>596</sup> Willis JA, though not a direct opinion, seemed to accept that this was so. This is found in his conclusion<sup>597</sup> after finding on the facts that the inference was irresistible “that when the accused was about to strike the deceased with a hay hook, he foresaw the possibility that death might ensue even though that may not have been what he wanted to happen.”<sup>598</sup> My opinion however, is that, the volitional element actually has some additional value. It should be there as a safeguard, of stopping some liability being too wide. The court will have to ascertain that the accused decided to proceed in crime through his own willful action regardless of his knowledge of the consequences.

If what Whiting and Paizes submit (and what Willis JA seems to accept) is correct, no murder trial where *dolus eventualis* is relied on by the prosecution should turn on whether or not the second “leg” of the test is satisfied. The recent decision of the Supreme Court of Appeal in *S v Humphreys*<sup>599</sup> was a case which did. Paizes again argued in the *Criminal Justice Review* article that the correct result was reached in the *Humphreys case*, but for the wrong reason. The appellant was correctly found not guilty of murder, not because he did not take the risk of death into the bargain, but because the activity in which he was involved which is, driving a motor vehicle, was not one in respect of which the foresight of causing death could appropriately be

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<sup>596</sup> Ibid.

<sup>597</sup> *S v Van Schalkwyk* (supra note 49) para 35.

<sup>598</sup> Ibid.

<sup>599</sup> Ibid.

viewed as resulting in liability for murder by applying the conventional test for *dolus eventualis*.

It has further been argued that if the more flexible approach to blameworthiness recommended by Willis JA finds its way into the judicial mainstream, and if *model 4* suggested in this dissertation is accepted, a more realistic and sharper conceptual framework for undertaking a wide range of circumstances may emerge, and our criminal law will be the richer for it.<sup>600</sup> Most importantly, however, it may easily be anticipated that the courts will not easily give up their attachment to the one-dimensional formula they have used for so long. The standard approach to *dolus eventualis*, indeed, works quite well in most of the cases, and even though the approach supported by Paizes in the 2016 *Criminal Review* may seemingly be difficult to accept, it might yield good results if it is given a try. In this manner, there is a huge call upon legal academics to remember that “our analytical tools are no more than a means to the greater end of achieving just results”.<sup>601</sup> What should then be borne in mind is that, if our analytical tools no longer achieve just results, they must be revised and either modified or replaced.

#### **4.3 Have the high-profile cases succeeded in elaborating on the concept of *dolus eventualis*?**

The current high-profile cases provide a very detailed explanation of the concept of *dolus eventualis*, but are somehow creating more complications in as far as the concept of *dolus eventualis* is concerned.<sup>602</sup> Murder cases resulting from reckless drivers and murder in other intent-based crimes seem to use the same concept of *dolus eventualis*, which of course is the ordinary standard concept. Van Der Merwe acknowledges that *dolus eventualis* cases involving reckless drivers are controversial. He argues that our courts and most importantly the National Prosecution Authority must be careful in their analysis of the judgments for use in future *dolus eventualis* cases involving risk-laden or reckless driving which result in death and, or serious injury to one or more persons.<sup>603</sup> This cautiousness has to be achieved by, for example, analysing *dolus eventualis* cases on a case by case basis rather than the current *one-size-fits-all*<sup>604</sup> concept. Inconsistency in the concept of *dolus eventualis* in my view is detrimental to the substantive law. As indicated above, the recent case of *Van Schalkwyk*<sup>605</sup> is a perfect example

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<sup>600</sup> Ibid.

<sup>601</sup> Ibid.

<sup>602</sup> From example the judgement in *S v Humphreys* (supra note 49) para 10d.

<sup>603</sup> HJ Van der Merwe ‘*Dolus Eventualis* in the context of irresponsible driving; *Law, Democracy & Development*’ 17 (2013) 72 -75.

<sup>604</sup> My emphasis

<sup>605</sup> *S v Van Schalkwyk* (supra note 49).

for the view that a more nuanced approach to *dolus eventualis* must be followed and the current *one-size-fits-all* must be abandoned. The starting point to indicate how some high-profile cases have not succeeded in resolving the ambiguous nature of *dolus eventualis* is the case of *S v Humphreys*.<sup>606</sup>

#### 4.3.1 *Humphreys v S* 2013 (2) SACR (1) SCA

The facts of this case involved the appellant, Humphreys, who ran a transport service for school children.<sup>607</sup> When he was driving a minibus in August 2010 he had a head-on collision with a train at a railway crossing.<sup>608</sup> The minibus he was driving was hit by a train and ten children were fatally injured and only four survived with serious injuries.<sup>609</sup> This whole accident occurred after Humphreys ignored the warning signs and overtook a lot of cars which were on the queue to cross the railway line.<sup>610</sup> Humphreys was then convicted on ten counts of murder and four counts of attempted murder, which altogether amounted to 20 years' imprisonment.<sup>611</sup> In the High Court, it was held that Humphreys had acted with *dolus eventualis*, in that he had foresaw the likelihood of harm occurring, but had nevertheless taken a risk.<sup>612</sup> The matter was then taken for appeal to the Supreme Court of Appeal.<sup>613</sup>

In the Supreme Court of Appeal it was held that Humphreys did not contemplate his death or that of the children. Consequently, therefore he had not reconciled himself with the fact that a collision with the train was predictable. It can be observed that the Supreme Court of Appeal concluded that, in jumping the queue to cross the railway tracks as he did, Humphreys took a risk that he did not think would materialise". In his state of mind (subjective inference), Humphreys did not believe that a train would hit the minibus. A further observation can be made that the Supreme Court of Appeal had another basis for finding that Humphreys did not meet the requirements of *dolus eventualis*. The Supreme Court of Appeal found that, as Humphreys had formerly jumped the queue amongst other motorists and crossing successfully, it would appear that he was subjectively convinced that he would do so again. Subjectively, he had not foreseen the harmful consequences that eventuated. It can be argued that, the fact that

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<sup>606</sup> *S v Humphreys* (supra note 49).

<sup>607</sup> Ibid.

<sup>608</sup> Ibid.

<sup>609</sup> Ibid.

<sup>610</sup> Ibid.

<sup>611</sup> Ibid.

<sup>612</sup> Ibid.

<sup>613</sup> It was taken to the Supreme Court of Appeal on both the conviction and sentence..

his foresight deceived him does not mean that, (for the purposes of the second element of the test for *dolus eventualis*), he had not accepted the possible consequences of his actions. Humphreys had succeeded in crossing in such a manner before, at least twice, so he believed he could do so again. He was clearly wrong. However, this was sufficient to exclude a finding of intent on the basis of *dolus eventualis* – which is sufficient to avoid a conviction on a charge of murder.

The fact that the conviction excluded a charge of murder is matter under examination and that which needs to be clarified in this instance. It seems difficult to obtain some clarity as regards to this issue, which then becomes a problem to future *dolus eventualis* cases. Van Der Merwe argues that the *Humphreys* judgment does not provide a perfect answer to the question of the apposite charges to bring in cases relating to dangerous driving which lead to a loss of innocent life or serious injury.<sup>614</sup> It has further been argued that, in particular, there may be very serious situations where the requirements of *dolus eventualis* are satisfied and where charges of murder or attempted murder (and also convictions on such charges) may not only be justified, but also necessary to safeguard the public's faith in the law.<sup>615</sup> Thus, the *Humphreys* judgement reaffirms the fundamental view that the legal principles of *dolus eventualis* must be judged on the merits and applied on a case-by-case basis before the court.

It has further been observed that, if, by means of reasonable inference, we are led to the conclusion that the accused had no subjective intention to risk the lives of others, he or she cannot be liable for murder or attempted murder.<sup>616</sup> The judgment in the *Humphreys* case does not create a model for making it generally impossible, more difficult or ill-advised to incriminate dangerous or reckless drivers with murder.<sup>617</sup> This basically means that, it may be difficult to find cases in which incriminating reckless drivers can be done with some reasonable hope of maintaining a successful conviction. Consequently, therefore, due consideration must be given to the fact that the case against *Humphreys* was, like all cases, bound by an unusual

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<sup>614</sup> HJ Van der Merwe (supra note 603) 72 -75.

<sup>615</sup> Ibid.

<sup>616</sup> Ibid.

<sup>617</sup> "Prosecution accepts *Humphreys* decision" *News24* available at <http://www.news24.com/SouthAfrica/News/Prosecution-accepts-Humphreys-decision-20130322> (accessed on 26 March 2013)

set of events.<sup>618</sup> This therefore echoes with my point of departure that, *dolus eventualis* cases are very controversial, therefore they need extra caution when interpreting.

I believe that the trial court in *Humphreys* erred in finding *dolus eventualis* to be present. In support of this contention, Paizes states that, “it has become clear over the years that the test set out by our courts is insufficiently subtle, nuanced or elastic to cover the entire range of situations that fall to be considered in such cases”.<sup>619</sup> Whiting provides us with a better method of understanding this issue better.<sup>620</sup> He explains using an illustration of a situation where the wrongdoer takes part in an activity which, although it involves some risk of harm, is not only socially acceptable but also legally acceptable, pointing out that different issues arise.<sup>621</sup>

These will be social activities including mining and driving of a car. Whiting observes that, even if a person drove at an extreme speed and was also aware that the brakes were faulty to an extent that he must have realised how he was jeopardizing the lives of others to a degree which was substantially beyond what was permissible, it would, in the case of a fatal collision, still offend one’s sense of what is right to convict him of murder.<sup>622</sup> *Dolus eventualis*, in Whiting’s opinion would not have been established.<sup>623</sup> Other issues of concern, in his view, include the type of risk involved; the specific question being was it of a generalised statistical nature or was it a specific, concrete risk?<sup>624</sup> Another factor is, whether the accused’s behaviour involved was a positive act or a mere omission; and whether his *aim* was to expose the victim to death or whether he merely accepted that the threat was present.<sup>625</sup> Paizes observes that some of these factors will be applicable to a degree upon which the wrongdoer must have foreseen the possibility of death and, to the question of whether it is proper to be speaking of *dolus eventualis* in the first place.<sup>626</sup> It has thus been argued that, while the conventional test for *dolus eventualis* will produce the correct results in a number of cases, there will be cases like that of *Humphreys*, where it will not. In such cases, conforming properly to the test will lead to the wrong result.

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<sup>618</sup> HJ Van der Merwe (supra note 603). This distinctiveness lies particularly in one significant feature of the case, precisely, the fact that the event did not produce any victims further than those inside the vehicle driven by the Mr Humphreys.

<sup>619</sup> A Paizes, S Van der Merwe ‘Criminal Justice Review 1 of 2013’ (2013) 1 *Criminal Law Review* Juta 122013 *Criminal Law Review* 7.

<sup>620</sup> RC Whiting (supra note 141).

<sup>621</sup> RC Whiting (supra note 141) 444.

<sup>622</sup> Ibid.

<sup>623</sup> Ibid.

<sup>624</sup> A Paizes & S Van der Merwe (supra note 619) 8.

<sup>625</sup> Ibid.

<sup>626</sup> Ibid.

It is also of paramount importance to take cognisance of other factors affecting the test for *dolus eventualis* as they help in understanding the concept. There is no closed list as regards to these factors. The attitude of the accused to the taking of the risk, the question being whether it was immaterial to him that his actions exposed the victim to danger, or did he strongly believe that such danger would not occur.<sup>627</sup> Thus, the principle of *dolus eventualis* works, relatively, on a scale where black and white are separated by substantially many shades of grey. Therefore, it is safe to say that the strongest case for *dolus eventualis* is likely to be found where there is foresight of a substantial possibility of causing the result in question; where the activity is part of an explicitly dangerous and unlawful venture.

It is also important to compare the judgement in the *Ndlanzi*<sup>628</sup> case with that of *Humphreys*. This comparison plays an important role in clarifying the ambiguous nature of the concept of *dolus eventualis*, and hence the advocacy for a more nuanced approach of treating all *dolus eventualis* cases individually. The facts of the *Ndlanzi* case took place on the afternoon of 18 April 2005. The complainant, Macala, and Ndlela, stood at the corner of Bree and Sauer streets in Johannesburg intending to cross Sauer Street to an adjacent taxi rank. The complainant (the deceased), Macala proceeded to cross “the robot when it turned green and her friend Ndlela followed her. Whilst in the middle of the street, a taxi came from around the corner and hit Macala who fell on the ground. Ndlela immediately helped Macala to her feet and they walked to a nearby police station to report the incident but found it closed. Ndlela told Macala that she had written down the registration number of the taxi that hit her, but she could not identify its driver.<sup>629</sup> Later on, Macala was informed about an article which had appeared in the newspaper which carried a report about the accident and which seemingly had the details of a police officer called Owen who could be contacted. Supplied with this information, Macala and Ndlela went to the police station to report the case.<sup>630</sup>

In finding out whether the second element of *dolus eventualis* had been established, the Supreme Court of Appeal in *Ndlanzi* applied the approach from the *Humphreys* case. It was held that the second element of *dolus eventualis* requires proof that the appellant reconciled himself with the foreseen possibility of the death of a pedestrian.<sup>631</sup> Brand JA in *Humphreys* pointed out that:

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<sup>627</sup> RC Whiting, (supra note 141).

<sup>628</sup> *S v Ndlanzi* (supra note 466).

<sup>629</sup> At para 6

<sup>630</sup> At para 7

<sup>631</sup> At para 7



The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his action. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.<sup>632</sup>

The most apparent interpretation of this judgment is that the appellant must have foreseen the possibility of causing the death of a pedestrian by his actions. However, the court accepted that he “believed he would be able to avoid colliding with the pedestrians on the pavement by turning to the right back onto the road”<sup>633</sup> and that, as a result, “it could not be inferred that it was immaterial to the appellant whether he collided with a pedestrian on the pavement”. It could also reasonably be inferred that he may have thought that a collision with a pedestrian, which he subjectively foresaw, would not actually occur. Bosielo JA held that, the appellant “took a risk which he thought would not materialise.”<sup>634</sup> It was on this basis that the second element of *dolus eventualis* was not established.

It can be argued that the application of *dolus eventualis* in the *Ndlanzi* case is susceptible to attack. *The Supreme Court of Appeal in Ndlanzi & Humphreys is seemingly of the view that “foresight” and “belief” exist on entirely different planes, so that an assessment of one cannot have a bearing on the measure of the other.*<sup>635</sup> Paizes argues that the two planes intersect, it is impossible to have two seemingly separate elements that use essentially the same currency, in this case the extent of the appreciation of the risk. Therefore, what must be acceptable in South African law is that *dolus eventualis* is built on the conscious acceptance of risk. Our courts have accepted, quite properly, that conscious risk-taking is based on what is foreseen as a real possibility, not a probability.<sup>636</sup> In this manner, it can be submitted that *dolus eventualis* cases must be treated on a case by case basis, because dealing with them as a uniform concept can lead unjust results or confusion.

#### **4.3.2 *Maarohanye and Another v S* 2015 (1) SACR 337 (SG).**

This case is of great relevance in further demonstrating the argument at hand. It shall be highlighted how the *Maarohanye* case differs from the *Humphreys* case, even though they

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<sup>632</sup> *S v Humphreys* (supra note 49) para 9i-j.

<sup>633</sup> *S v Ndlanzi* (supra note 466) para 39.

<sup>634</sup> Quotation from *S v Humphreys* (supra note 49) para10d.

<sup>635</sup> Italics for my emphasis, to depict the level of confusion brought up by using the same approach to *dolus eventualis* on different cases.

<sup>636</sup> *R v Thibani* (supra note 87) 729–730.

might both be categorised as reckless driving cases where *dolus eventualis* was in issue. In the *Maarohanye* case,<sup>637</sup> the charges against the appellants arose from an unpleasant event which occurred on 8 March 2010 in Mdlalose Street, Soweto. The appellants, Maarohanye and Tshabalala were the drivers of two Mini Cooper vehicles and whilst driving these vehicles in Mdlalose Street, they caused a collision which resulted in the fatal injuries of four school-children and in serious injuries to two others.<sup>638</sup> Another important fact to note is that these school-children were all pedestrians on the road and were on their way to their homes from school.

In reaching its judgment, the appeal court made a background analysis of the current application of *dolus eventualis* in South African courts. It was held that, the application of *dolus eventualis* in situations involving the driving of motor vehicles has been contentious judging by what has been seen in the law reports.<sup>639</sup> The usual procedure had constantly been to charge such drivers with reckless driving and culpable homicide. It was further held that this case was one of the cases in which the prosecution authorities decided to charge the appellants for murder based on *dolus eventualis*. The appeal court accepted that it would be more reasonable for the prosecution authorities to pursue this course when one considers the high number of fatalities on South African public roads that occur as a result of dangerous or reckless driving. However, the appeal court found it wiser to follow the decision of the Supreme Court of Appeal in the case of *Humphreys*.<sup>640</sup>

The appeal court in *Maarohanye* held that the trial court erred in its conclusion that the appellants were liable on the basis of *dolus eventualis*. In reaching its finding, the appeal court stressed that the drug-induced state of mind of the appellants had a direct bearing on how the trial court was to evaluate the evidence in determining whether *dolus eventualis* had been satisfied. Further the court held that, the finding by the trial court that the effect of the drugs on the appellants was to induce a sense of euphoria in them and which led them to believe that they would not cause any accident and that other road users would make way for them, should have left the trial court with huge doubt regarding an appreciation and, importantly an acceptance, by the appellants of the consequences of their driving conduct causing death or serious injury. The appeal court went on to add that, based on the facts of this matter this state

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<sup>637</sup> *Maarohanye and Another v S* (supra note 49).

<sup>638</sup> *Ibid*, para 2.

<sup>639</sup> The appeal court in *Maarohanye and Another v S* (supra note 49) para 15, makes reference to S Van Der Merwe's article at (supra note 584) 72 -75.

<sup>640</sup> *S v Humphreys* (supra note 49).

of mind is completely different from that required to establish an acceptance of the consequences of one's actions, and further reconciling one to such consequences taking place. Therefore, the appeal court held, "whilst the trial court was clearly justified in concluding that the appellants had used drugs before they embarked on the driving leading to the collision with the school children, that court erred in concluding that *dolus eventualis* had been established on the facts found by it to have been proven."<sup>641</sup>

In view of the *Maarohanye* judgment, it can be submitted that the *Humphreys* judgment does not automatically create a window of opportunity for irresponsible or dangerous drivers to escape intent-based criminal liability.<sup>642</sup> Even though the appeal court in *Maarohanye* followed the *Humphreys* approach, their final decision emanated from the issue of the appellants' use of drugs, an issue which was completely different from the *Humphreys* case. In this manner, it would be wrong, in my view, to argue that they reversed the charges of attempted murder and murder in the *Maarohanye* case because of the *Humphreys* judgement. Commenting on the *Maarohanye* case in the *Criminal Justice Review* of 2015, Paizes adds that, the value of the pronouncement in *Maarohanye* is that it invites the courts to engage in assessments of this kind and moves away from the *one-size-fits-all* approach to *dolus eventualis* which has characterized many previous judgments on this question.<sup>643</sup> They are basically calling on legal academics to try a new approach of treating *dolus eventualis* cases individually, which is good at creating the public faith in law.

In view of the *Maarohanye* case, it can be argued that it is ordinarily inappropriate to convict a person of murder in deaths arising out of the driving of a motor vehicle, even if it can be established that the accused *did* foresee the real possibility of causing death. This is so even where the accused is grossly negligent, as in *Humphreys*, since the act of driving a car is not to be placed in the same category as, say, an assault, but should be treated in the same way as other socially and economically useful and important activities such as mining or running a factory. However, once the activity is undertaken in a manner that is, at its outset, clearly

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<sup>641</sup> Ibid, para 22.

<sup>642</sup> 'NPA welcomes legal certainty brought by the Jacob Humphreys', *NPA Media Statement*, 22 March 2013, available at <http://www.npa.gov.za/NewsClips/March%2022%202013%20NPA%20Welcomes%20Legal%20Certainty%20Brought%20By%20The%20Jacob%20Jumphreys%20Matter.pdf> (accessed 30 March 2013) where the National Prosecuting Authority is urged to continue acting on behalf of the public and in the goodness of justice. Furthermore, it has been revealed that the National Prosecution Authority will charge reckless drivers with murder if direct intention can be proved.

<sup>643</sup> Paizes A, Van Der Merwe S. "A bi-annual update complementing the *Commentary on the Criminal Procedure Act* NO 1 OF 2015". 2015 *Juta*

unlawful and lacking in any kind of social or economic value, it may be argued that it falls out of this category and that it is no longer inappropriate to consider a conviction of murder.<sup>644</sup>

Snyman also adds that it is entirely possible for a court of appeal to conclude that there is intent in the form of *dolus eventualis* from the wrongdoer's conduct and the surrounding circumstances of the case.<sup>645</sup> An accused can be found guilty of crimes requiring fault in the form of intent if his foresight could not deter or discourage him or change his mind from going ahead with a course of action from which it can be reasonably inferred that he had truly accepted to risk the lives of others.<sup>646</sup> Snyman observes that, an actual or specific intent to kill is not the only form of intent sufficient for criminal liability in respect of charges of murder and attempted murder in South African criminal law.<sup>647</sup> *Dolus eventualis* may show that the wrongdoer's state of mind was less blameworthy but is enough for convictions of murder and attempted, if by all means, it has been proved beyond a reasonable doubt. The second limb of the test for *dolus eventualis* is the distinguishing feature between cases of *dolus eventualis* and conscious negligence, since both these modes of fault are accompanied by subjective foresight of the possibility of causing death or serious injury.<sup>648</sup> The Supreme Court of Appeal's ruling in the *Humphreys* case has clarified and emphasised the importance of this already existing distinction.

Burchell and Snyman argue that the Supreme Court of Appeal in the *Humphreys* case attached too much weight to the second element of the *dolus eventualis*.<sup>649</sup> In view of this argument, it has been observed that such *dolus eventualis* should be determined by focusing primarily on whether the wrongdoer had foreseen a substantial or tangible likelihood at the time that he was taking part in the unlawful activity.<sup>650</sup> Snyman observes that this is an indefensible argument, which is commonly not supported by South African courts.<sup>651</sup> The issue cannot be resolved only with reference to the probability of death or serious injury foreseen by the wrongdoer because we are dealing with a subjective state of mind inquiry.<sup>652</sup> Van Der Merwe observes

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<sup>644</sup> A Paizes & S Van der Merwe (supra note 498).

<sup>645</sup> CR Snyman (supra note 1) 183.

<sup>646</sup> Ibid.

<sup>647</sup> CR Snyman *Strafreg* (2012) 195.

<sup>648</sup> *S v Ngubane* (supra note 221) para 685; Snyman *Strafreg* (supra note 647) 194-195.

<sup>649</sup> JM Burchell (supra note 53) 385: "The volitional element remains at best a confusing and, at worst, an irrelevant inquiry" (footnote omitted); see also CR Snyman (supra note 647) 193.

<sup>650</sup> JM Burchell (supra note 53) 385: '...foresight of anything less (that is, remote possibility) should only qualify as conscious negligence if a reasonable person would have taken steps to guard against such possibility.'

<sup>651</sup> CR Snyman (supra note 647) 193.

<sup>652</sup> A Paizes & S Van der Merwe (supra note 498).

that, it would be incorrect to conclude that we have enough proof in relation to the true will of the accused because the accused had foreseen an actual or real likelihood of death ensuing or serious injury.<sup>653</sup>

#### 4.3.3 *Director of Public Prosecutions, Gauteng v Pistorius 2016 (2) SA 317 SCA*

Briefly, the facts of the *Pistorius* case were that on the 14<sup>th</sup> of February 2013, screams were heard from the accused's house. The accused (Oscar Pistorius) is believed to have fired four shots at the toilet door while on his stumps. At the time the shots were fired the deceased was in the toilet and three of the four shots hit the deceased. The deceased (Reeva Steenkamp) sustained a wound on the right thigh, a wound on the left upper arm, a head injury and a wound on the web of the fingers and the deceased died from multiple gunshot wounds. Soon after the gunshots, the accused called for help, he was very emotional and was seen trying to resuscitate the deceased.<sup>654</sup> One of the issues was whether at the time the accused shot and killed the deceased he had the requisite intention, and if so, whether there was any premeditation.<sup>655</sup>

My main point of departure in analyzing the *Pistorius* case is to further emphasis on the complexity of the concept of *dolus eventualis* and also indicate that *dolus eventualis* cases should be treated with caution. The submission of this dissertation is that Oscar Pistorius' evidence was contradictory and controversial<sup>656</sup> and does not raise any reasonable doubt in so far as murder is concerned. However, the main emphasis in this section is not to deal with the factual events but the issue of intention itself. It is apparent from the Supreme Court of Appeal judgment that the trial court incorrectly applied the principles of *dolus eventualis*. Masipa J in the trial court, in dealing with legal intent phrased her questions in this manner:

- (i) Did the accused subjectively foresee that it could be the deceased behind the toilet door and
- (ii) Notwithstanding the foresight did he then fire the shots, thereby reconciling himself to the possibility that it could be the deceased in the toilet?<sup>657</sup>

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<sup>653</sup> Supra note 652.

<sup>654</sup> *DPP, Gauteng v Pistorius* (supra note 49) 3288.

<sup>655</sup> *Ibid*, 3289.

<sup>656</sup> *Ibid*, 3288. The accused gave the following testimony which was controversial, "The shooting was an accident. The accused said he shot in the belief that the intruders were coming out to attack him. He did not have time to think. He never intended to shoot anyone. He pulled the trigger when he heard the noise. He fired into the toilet door. He did not purposefully fire into the door. He fired shots at the door, but he did not do so deliberately. He never aimed at the door. The firearm was pointed at the door when he discharged his firearm as he got a fright. He remembered pulling the trigger in quick succession. However, he could not remember firing specifically four shots." The author is of the view that, surely if the accused did not intend to shoot at anyone, it certainly does not make sense for him to then contend that he shot at the intruder that he thought was about to attack him.

<sup>657</sup> *Ibid*.

In respect of the question in the first leg of the test, Masipa J responded with a rhetorical question, “How could the accused reasonably have foreseen that the shots he fired would kill the deceased?”<sup>658</sup> This shows that the judge was strongly convinced that the accused did not subjectively foresee death as a possibility as he believed that the deceased was in the bedroom. Taitz, a legal academic, does not believe that Masipa J was correct in acquitting Pistorius of the murder charge, but he (Taitz) understands the way Judge Masipa J applied the principle of *dolus eventualis*- he defends the judge’s application of law.<sup>659</sup> He argues that if Pistorius had the intent to kill anyone who was in the toilet, and also believed that whoever was behind that door was a threat to his life, it would then mean he has a successful defence to murder of putative self-defence. He further argues that this is an intention-based defence and such an intention (which he did not have) is an essential element of any murder conviction.<sup>660</sup> In my view, Taitz’s opinion is definitely incorrect because he is focusing on the identity of the person behind the toilet door rather than the foreseeability of death itself.

In a different article, De Vos is of the view that Masipa J’s application of the law was incorrect. He expresses some confusion at how the judge concluded that all the evidence suggests that he was truly distressed about having murdered his girlfriend. His question is, “...how could he subjectively have foreseen that he would kill her if after the fact he was so distressed?”<sup>661</sup> He observes that give all the evidence presented in court about Pistorius’s knowledge of guns and what the bullets he used would do to a person; it is unlikely in the extreme that Pistorius did not foresee that the person behind the door would be killed.<sup>662</sup> He goes on to argue that an important question which should have helped reach a convincing decision is whether there was any reason to believe Pistorius did not share the foresight that his actions could lead to the killing of a human being.<sup>663</sup> This inquiry is true and echoes with what was eventually held by the Supreme Court of Appeal in the Pistorius case.

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<sup>658</sup> Ibid.

<sup>659</sup> N Taitz ‘Judge Masipa was right on Dolus and murder.’ Accessed at 12 September 2014: <http://www.dailymaverick.co.za/opinionista/2014-09-12-judge-masipa-was-right-on-dolus-and-murder/#.Vt7BmXlf2M9>

<sup>660</sup> Ibid.

<sup>661</sup> P De Vos <http://constitutionallyspeaking.co.za/pistorius-judgment-was-there-no-intention-to-kill-someone-behind-the-toilet-door/> accessed at 11 September 2014.

<sup>662</sup> P De Vos <http://constitutionallyspeaking.co.za/pistorius-judgment-was-there-no-intention-to-kill-someone-behind-the-toilet-door/> (supra).

<sup>663</sup> Ibid.

The Supreme Court of Appeal<sup>664</sup> in the *Pistorius* case held that, the question posed by Masipa J: “How could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door?” incorrectly applies an objective rather than a subjective approach to the question of *dolus eventualis*. The issue was not about what was reasonably foreseeable when the accused fired at the toilet door but whether he actually foresaw that death might occur when he did so.”<sup>665</sup> The Supreme Court of Appeal referred to the case of *Sigwahla*, where Holmes JA pointed out that:

The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred.<sup>666</sup>

The Supreme Court of Appeal further observed that the rhetorical question<sup>667</sup> indicates that the trial court found the presence of a person behind the door not to have been reasonably foreseeable; but this conflicts with its conclusion later which stated that the accused was guilty of culpable homicide, on the basis that a reasonable person in the same circumstances would have foreseen the reasonable possibility the shots will kill the person in the toilet. Furthermore, the finding that the accused had not subjectively foreseen that he *would kill* whoever was behind the door and that if he had he intended to do so he would have aimed higher than he did, conflates the test of what is required to establish *dolus directus* with the assessment of *dolus eventualis*. The issue was not whether the accused had as his direct objective the death of the person behind the door. What was required in considering the presence or otherwise of *dolus eventualis* was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event.

It was further clarified in the Supreme Court of Appeal that, at the time the fatal shots were fired, the possibility of the death of the person behind the door was clearly an obvious result.<sup>668</sup>

And in firing not one, but four shots, such a result became even more likely. But that is exactly what the accused did. A court, blessed with the wisdom of hindsight, should always be cautious

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<sup>664</sup> The rhetorical question posed by Masipa J can arguably be said to have contributed to the incorrect application of the *dolus eventualis* principle in the *Pistorius* case.

<sup>665</sup> *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49) para 28.

<sup>666</sup> *S v Sigwahla* (supra note 67) para 570C-E.

<sup>667</sup> The rhetorical question referred at *supra note 664*.

<sup>668</sup> *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49) para 50.

of determining that because an accused ought to have foreseen a consequence, he or she must have done so. But in the present case that inference is irresistible. A person is far more likely to foresee the possibility of death occurring where the weapon used is a lethal firearm (as in the present case) than, say, a pellet gun unlikely to do serious harm. Indeed, in this court, counsel for the accused, while not conceding that the trial court had erred when it concluded that the accused had not subjectively foreseen the possibility of the death of the person in the toilet, was unable to actively support that finding. In the light of the nature of the firearm and the ammunition used and the extremely limited space into which the shots were fired, his diffidence is understandable. In order to disturb the natural inference that a person intends the probable consequences of his actions, the accused was required to establish at least a factual foundation for his alleged genuine belief of an imminent attack upon him. This the accused did not do. Consequently, although frightened, the accused armed himself to shoot if there was someone in the bathroom and when there was, he did. In doing so he must have foreseen, and therefore did foresee that the person he was firing at behind the door might be fatally injured, yet he fired without having a rational or genuine fear that his life was in danger. The defence of putative private or self-defence cannot be sustained and is no bar to a finding that he acted with *dolus eventualis* in causing the death of the deceased.<sup>669</sup>

It was further held that,

In the result, on count 1 in the indictment the accused ought to have been found guilty of murder on the basis that he had fired the fatal shots with criminal intent in the form of *dolus eventualis*. As a result of the errors of law referred to, and on a proper appraisal of the facts, he ought to have been convicted not of culpable homicide on that count but of murder. In the interests of justice, the conviction and the sentence imposed in respect thereof must be set aside and the conviction substituted with a conviction of the correct offence.<sup>670</sup>

The conclusion of the trial court that the accused had not foreseen the possibility of death occurring as he had not had the direct intent to kill, shows that an incorrect test was applied. In this regard, the author is of the view that extra caution must be taken when dealing with this complex concept of *dolus eventualis*.<sup>671</sup>

#### **4.4 *Dolus eventualis* cases based on sexually transmitted diseases**

The advocacy for courts to be cautious when dealing with judgments in relation to *dolus eventualis* can further be illustrated from the view of sexual intercourse cases. In my view, if a person infects another with the HIV virus deliberately, they must be convicted of attempted murder. In support of this view, in the case of *S v Nyalungu*<sup>672</sup> the court held that, if a person who has knowledge that he was infected with the HIV virus, rapes another person without

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<sup>669</sup> Ibid, para 54.

<sup>670</sup> Ibid, para 55.

<sup>671</sup> My italics for emphasis.

<sup>672</sup> *S v Nyalungu* 2013 (2) SACR 99 (T), para 9.



taking any precautionary measures, he could be found guilty of attempted murder. This decision has now been followed in *S v Phiri*.<sup>673</sup> The difference between the two cases is that the accused in *Nyalungu* had raped the complainant; in *Phiri* the act of sexual intercourse was consensual and took place within a love relationship. This difference was not mentioned by the court. It was enough in its view that the appellant, who knew he was HIV positive, engaged in sexual intercourse with the complainant, whom he knew to be HIV negative, without any preventative measures, since he had *mens rea* in the form of *dolus eventualis*.<sup>674</sup> The court took judicial notice of the fact that, at present, the disease has no cure and is likely to lead to a reduced life span, and seems to have inferred that the appellant must have been aware of that fact as well.<sup>675</sup>

The court in *Phiri* did not, however, consider the second leg of the test for *dolus eventualis* currently favoured by the courts. Did the appellant “reconcile himself” to the result foreseen by him? If the appellant in *Humphreys* could, in cases involving motor accidents, escape findings of *dolus eventualis* on the ground that it was “not immaterial” to him whether his conduct caused the death of the victims in question, should it not have been asked whether the appellant in *Phiri*, who was in a love relationship with the complainant, and who had had intercourse with her on no more than two occasions, should have been treated in the same way? It is unlikely that the appellant in *Phiri* “reconciled himself” with the possibility of causing his lover’s death in the sense in which that term has been understood by the Supreme Court of Appeal. It is not suggested, however, that that approach should be employed in the first place.

The situations in *Nyalungu* and *Phiri* demonstrate the need for the more nuanced approach to *dolus eventualis* advocated by Paizes.<sup>676</sup> In application of the legal principle of *dolus eventualis* in relation to this issue, the courts too have to be quite thorough. To elaborate this better, if the *Humphreys* approach was applied in the *Nyalungu* case, the statement would be rephrased as follows: “...the rapist in the *Nyalungu* who hoped not to infect his victim even though he accepted the real risk of doing so by raping her in the first place, should escape liability for murder because it was not immaterial to him whether his victim died or not”. By all means, there is no logic in this statement.

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<sup>673</sup> *S v Phiri* 2014 (1) SACR 211 (GNP).

<sup>674</sup> *Ibid.*

<sup>675</sup> *Ibid.*

<sup>676</sup> A Paizes, S Van der Merwe, (*supra* note) 619.

Important questions need to be asked in light of these two cases: is it appropriate to be speaking of *dolus eventualis* and murder when one is dealing with acts of sexual intercourse within a loving relationship? Is it different when the intercourse is an act of rape?<sup>677</sup> Does it matter that the acts of intercourse were infrequent or regular features of a long-term relationship? And these are questions best considered as part of the fine-grained approach to *dolus* set by Paizes, and not within the inquiry into the second leg as that has come to be understood by the courts: to conclude, for instance, that the appellant in *Phiri* should escape liability for murder because it was “not immaterial” to him whether his lover died or not would allow the terrorist in the above example to escape for the same reason.<sup>678</sup> Similarly, a rapist with no hope of infecting his victim even though he accepted the real risk of doing so by raping her in the first place should escape liability.<sup>679</sup> Furthermore, as indicated in subsection 4.1, people living with the HI Virus suffer much stigma as it is already, so criminalising them with murder when they infect someone in a love relationship is rather unjust.

#### 4.5 Conclusion

From the issues raised in this chapter, it has been indicated that there are three general approaches to the elements of *dolus eventualis* recognised in South African law. There is a model which accepts a qualified cognitive element and disregards the conative element, a model that accepts an unqualified cognitive element and balances it with the conative element, and thirdly a model which accepts a qualified cognitive element and the conative element. The fourth model (my own) accepts an unqualified cognitive element and accepts the conative element plus an additional practical component. This fourth model partly agrees with Paizes, Whiting and Wills JA as held in the case of *S v Van Schalkwyk*. A closer analysis of the case of *S v Van Schalkwyk* reveals that a more nuanced approach to *dolus eventualis* is needed, one which deviates from the *one-size-fits-all* concept. To give effect to this newly suggested approach, this dissertation added the view of an appreciation of the unqualified cognitive component, and the conative element which operates as a safe guard in terms of stopping the liability from being too wide. If this more flexible approach finds its way into our law, the controversies associated with *dolus eventualis* may be reduced. The ongoing controversies

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<sup>677</sup> Ibid.

<sup>678</sup> A Paizes, S Van der Merwe, (supra note) 619.

<sup>679</sup> Ibid.

regarding *dolus eventualis* have been shown in this chapter through the cases of *DPP Gauteng v Pistorius*,<sup>680</sup> *S v Humphreys*,<sup>681</sup> and *Maarohanye v S*.<sup>682</sup>

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<sup>680</sup> *Director of Public Prosecutions, Gauteng v Pistorius* (supra note 49).

<sup>681</sup> *S v Humphreys* (supra note 49).

<sup>682</sup> *Maarohanye and Another v S* (supra note 49).

## CHAPTER FIVE

### 5. CONCLUSION AND RECOMMENDATIONS

#### 5.1 Introduction

*Dolus eventualis* is the widest form of intention known in South African criminal law. As indicated in the previous chapters, the concept has been controversial for years. Problems associated with the concept of *dolus eventualis* have been indicated in this dissertation through a critical examination of some earliest cases and current high-profile *dolus eventualis* cases. More specifically, the dissertation was aimed at highlighting the controversies associated with the elements of the concept, where it aimed at answering the following questions:

- (i) How should the cognitive element be expressed? Should it be defined in qualified or unqualified terms?
- (ii) How should the conative element be expressed?
- (iii) Is the conative element a relevant part of the test for *dolus eventualis*?
- (iv) What are the general models of *dolus eventualis* in South African Law?
- (v) Should the approach to *dolus eventualis* be similar in all cases?

#### 5.2 Main issues and findings

##### 5.2.1 How should the cognitive element be expressed?

As discussed above, this dissertation favours the view that the cognitive element should be defined in unqualified terms. There are so many reasons why this approach should be followed, and most of these reasons have been partially hinted upon in the chapters above. One of the reasons why the cognitive element should be defined in unqualified terms is that such a view is the predominant one in jurisprudence. Professor Hoctor observes that such predominance reflects the acknowledgement by the courts that if it is indeed established beyond reasonable doubt, whether on the basis of inferential reasoning or direct evidence, that the accused had actual subjective foresight of the possibility of harm, whilst continuing to act despite such foresight, a finding that the accused acted intentionally is in accordance with the principles of *mens rea*.<sup>683</sup> In Marshall's words, the cognitive component of *dolus eventualis* may be

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<sup>683</sup> S Hoctor (supra note 209) 151.

encapsulated as follows; "...in acting despite sustained foresight that the harm might occur, the accused is attentive to the risks involved in doing so".<sup>684</sup>

Another reason why the cognitive element of *dolus eventualis* should consist of foresight of an unqualified possibility is Burchell and Hunt's approach<sup>685</sup> which is flawed. As Van Oosten has pointed out, if only foresight of a real possibility amounts to foresight for the purposes of intention, and an accused with less than such foresight could only be found guilty on the basis of conscious negligence, then even if the accused has reconciled himself to the consequences, there would be no *dolus eventualis*. Furthermore, it must be highlighted that all expressions used to describe foresight of a qualified possibility is subject to interpretation, and bears all the usual difficulties of trying to apportion a legal meaning to an everyday term- how does one clearly define terms such as "reasonable", "real" or "substantial"? Furthermore, the view of foresight of a reasonable possibility, preferred in *Beukes, Van Wyk and Makgatho* presents certain problems in the context of intention, looking at the first leg of the classic test for negligence in *Kruger v Coetzee*,<sup>686</sup> which provides that the first leg of the test for culpa asks whether a reasonable person would have foreseen the reasonable possibility of his conduct injuring another person and causing her harm. Applying the same principle in the test for intention and negligence does not help in maintaining the difference between the subjective and objective forms of *mens rea*.

The cognitive element must be described in unqualified terms because the logic, language, the longstanding recognition of the unqualified possibility in practice, and the failure of the contrary arguments to provide a cogent alternative, all negatively affect the acceptance of the approach adopted in *Van Wyk and Makgatho*. Professor Hoctor goes on further to argue that, in fact none of the qualifying adjectives in either side of the debate are helpful. Du Plessis' words are accurate, "it would be extremely difficult if not impossible to distinguish between very remote, fairly remote, real, substantial and concrete possibilities objectively as questions of fact".<sup>687</sup> It has been argued<sup>688</sup> that attempts to draw such distinctions derive from a mistaken conflation of issues of proof and issues of principle, and that it is far more sensible to consider

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<sup>684</sup> J Marshall *Intention in Law and Society* (1968) 8 refers to "the Hebrew word *kavanah* to explicate the relationship of intention to attention, in the sense of the mind towards the accomplishment of a particular act..." Marshall refers to AJ Heschel *God in search of Man- a Philosophy of Judaism* (1955) 295, 296, 314, in this regard.

<sup>685</sup> This approach was cited with approval in *S v Makgatho* (supra note 131) para 9.

<sup>686</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. This test has been consistently followed ever since, for example in the case of *Minister of Correctional Services v Mohofe* 2012 (10) SACR 492 SCA.

<sup>687</sup> JR du Plessis 'The Law of Culpable Homicide in South Africa' *unpublished PhD thesis*, Rhodes University (1986) 155.

<sup>688</sup> S Hoctor (supra note 209) 152.

the cognitive component to simply be established in terms of actual subjective foresight of the possibility of harm.

There may still be concerns that adopting this approach may open the floodgates of liability for crimes such as murder. Accordingly, it should be clarified that even if foresight of an unqualified possibility satisfies the cognitive component of *dolus eventualis*, there are still safe guards to ensure that unfair convictions do not occur. First, the probability of a consequence occurring will be relevant in drawing an inference of actual foresight on the part of the accused. As Loubser and Rabie point out, “the greater the likelihood or the probability of death, the stronger would be the inference that the accused foresaw it”.<sup>689</sup> It follows that the more improbable the consequence in question, the more difficult it would be to prove foresight on the part of the accused by way of inferential reasoning.<sup>690</sup>

Secondly the fact of foresight does not suffice for *dolus eventualis* liability; the accused must have reconciled himself to the risk of harm. It should also be noted that remoteness of the foreseen possibility could be relevant to punishment: if an accused had foresight of a remote possibility of death, but regarded death as “although possible, extremely unlikely”, this could constitute mitigating circumstances in taking the risk of the occurrence of death.<sup>691</sup> Therefore even if the remote foreseen possibility founds a conviction, the punishment is likely to be reduced by virtue of the remoteness of the foresight. In this regard, the above reasons can safely be used towards support of the view that the cognitive element must be defined in unqualified terms.

### **5.2.2 How should the conative element be expressed?**

As indicated in chapter 3, the *Valachia*<sup>692</sup> case set a precedent for giving effect to the second element of *dolus eventualis*, which it explained as recklessness. It can be argued that the requirement of recklessness in *dolus eventualis* is the result of a historical accident. In adopting Section 140 of the Transkeian Penal Code,<sup>693</sup> the court in *Valachia* case introduced into South African law a concept that was not only unwarranted by the weight of previous decisions, but also a misleading expression of the English Law.<sup>694</sup> The conative element has been defined in

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<sup>689</sup> Loubser & Rabie (supra note 203), 417; *R v Horn* (supra note 17) 476C.

<sup>690</sup> Loubser & Rabie supra note 203), 417; *R v Horn* (supra note 17) 465B-C ; *S v Nkombani* (supra note 204) para 891D; *S v Dladla en andere* (supra note 570) at 511D-E.

<sup>691</sup> *S v De Bruyn en 'n ander* (supra note 159) 511D-E.

<sup>692</sup> Ibid.

<sup>693</sup> The Transkeian Penal Code of the Report of the Commission on Indictable Offences of 1879.

<sup>694</sup> PT Smith (supra note 307) 86.

interchangeable terms amongst courts and academic writers. Some define it as “recklessness”,<sup>695</sup> some say it is the “reconciliation of harm”,<sup>696</sup> some express it as “persistence in such conduct, despite such foresight”<sup>697</sup> and some say it is the “volitional element”.<sup>698</sup> The most remarkable definition of the conative element is the phrase “distinguishing feature of intention”,<sup>699</sup> which was derived from the *Ngubane* case. These expressions can be explained to mean that the wrongdoer must be in a position where he accepts the possibility of a consequence, where even if it is clear that the consequence is unlawful, he reconciles himself with that possibility and proceeds with his actions. My submission is that a person is said to have *reconciled himself*<sup>700</sup> when he accepts the possible consequences that can be brought about from his actions and lives with it when it happens.

### 5.2.3 The conative element outlined a relevant part of *dolus eventualis*

The significance of conative element as the second leg of the test for *dolus eventualis* has been questioned by many legal writers, and this leaves the element quite vulnerable. It has been argued that the conative element is unnecessary.<sup>701</sup> What has been suggested is that the inquiry of “foresight” is the one to be recognised (the same one which the Supreme Court of Appeal in *Humphreys* ignored) and argued that the volitional addition to the *dolus eventualis* formulation is an unnecessary addition.<sup>702</sup> In other words, the inquiry in the cognitive element is wide to an extent that it covers all the questions involved in the conative element. By acting with foresight of the possibility that a result will ensue, one necessarily reconciles oneself to the possibility that it will ensue or takes this possibility into the bargain, hence the argument that the conative element is unnecessary.

It can further be observed that, the other reason why it has been argued that the conative element is redundant is the fact that it is sometimes referred to as a descriptive part of the cognitive element.<sup>703</sup> Apparently recklessness is primarily to be inferred from the consequences which result from the accused’s act and the still graver consequences which might be expected to

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<sup>695</sup> *S v Sigwahla* (supra note 67) 570B-C. MA Rabie, *A Bibliography of South African Criminal Law (General Principles)* (1987) 68 also defines this element as recklessness.

<sup>696</sup> *S v De Bruyn en ‘n ander* (supra note 160) 510H.

<sup>697</sup> MM Loubser & MA Rabie (supra note 203) 415.

<sup>698</sup> F Ahadi ‘Re-visiting the Concept of Mens Rea: Challenging the Common Approaches Employed under Islamic Jurisprudence and Statute Law.’ (2016) *Journal of Politics and Law* 9, 2-7.

<sup>699</sup> *S v Ngubane* (supra note 221) para 685D-E. It was held that the distinguishing feature of intention is the “volitional component” in terms of which the agent consents to the consequence foreseen as a possibility, he reconciles himself to it, he takes it into the bargain.

<sup>700</sup> My italics, for emphasis.

<sup>701</sup> JM Burchell (supra note 53), 369.

<sup>702</sup> Ibid.

<sup>703</sup> Paizes (supra note 64) 641.

result from it.<sup>704</sup> According to Morkel, *dolus eventualis* can be understood as a concept that only consists in foresight of the possible consequences combined with persistence in the relevant course of conduct. Therefore, two views emerging are that *dolus eventualis* either lacks a volitional element and contains only the cognitive element of foresight; or contains a volitional element that may be inferred from the fact that the accused persisted in his conduct despite foresight of the harmful result.<sup>705</sup> This is actually confusing; it is therefore understandable that some legal writers are finding the second limb of the test for *dolus eventualis* to be irrelevant.

Regardless of the above views, this dissertation supports the view that the conative element of *dolus eventualis* is a significant leg of the test. The single and most important reason for the acceptance of the conative element is that, in this dissertation, it has been argued that acceptable foresight in the cognitive element should be defined in unqualified terms. In this manner, the conative element should be an additional component to safeguard against any possible injustices pertaining to liability. Particularly the fact that foresight on its own is not enough to determine intention, it will have to be determined whether the accused actually reconciled himself with his act and proceeded with his unlawful conduct regardless.

Furthermore, the original definition of *dolus eventualis* from the Roman-Dutch law includes the conative element and this makes it important. There are some academics who in their writings accept the view that the conative element is a significant part of the test, like Taylor,<sup>706</sup> who discusses the historical developments of the German concept of intention, and shows that *dolus eventualis* consists of two components: the cognitive element, which (as in the common law) considers the state of the accused's knowledge that the offence may occur, and a volitional or dispositional element which is unknown to the common law.<sup>707</sup> De la Harpe and Van de Walt also favour of the view that the conative element is significant. They accept the view which was applied in the *Ngubane*<sup>708</sup> case that it is mandatory for courts to give some meaning to the conative aspect in the concept of *dolus eventualis* which, in theory, has been defined as including foresight of even a remote possibility.<sup>709</sup>

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<sup>704</sup> *R v Poteradzayi* (supra note 364) 129D-E.

<sup>705</sup> MM Loubser & MA Rabie (supra note 203) 422.

<sup>706</sup> G Taylor (supra note 299).

<sup>707</sup> G Taylor (supra note 470).

<sup>708</sup> *S v Ngubane* (supra note 221) para 685C.

<sup>709</sup> S De La Harpe & T Van der Walt (supra note 455).



Furthermore, as indicated in the dissertation, there have been some authoritative pronouncements in favour of the view that the conative element is significant, for example the cases of *S v Beukes*,<sup>710</sup> *S v Ngubane*,<sup>711</sup> *S v Valachia*<sup>712</sup> amongst others,<sup>713</sup> where courts strongly hold the view that the conative element of *dolus eventualis* is a relevant inquiry despite the acceptance of the cognitive element in qualified terms. Some jurisdictions too outside South Africa actually support the relevance of the conative element in the test for *dolus eventualis*. For example, Italy in the Italian *Codice Penale*, which states that all grave crimes require evidence of the mental element known as *dolo*, where both the conative and cognitive element of *dolus eventualis* are considered.<sup>714</sup> The submission of this dissertation is that neglecting the conative will not only undermine the relevance of the concept of *dolus eventualis* but will also create uncertainties in our law.

#### **5.2.4 A summary of the *dolus eventualis* models recognised under South African law**

It has been indicated that there are generally three approaches to the elements of *dolus eventualis* recognised in South African law. This involves a model which accepts a qualified cognitive element and disregards the conative element, a model that accepts an unqualified cognitive element and balances it with the conative element, and thirdly a model which accepts a qualified cognitive element and the conative element. Loubser and Rabie accept an unqualified possibility and then reject the conative element. They argue that the content of the element of volition required for *dolus eventualis* in case law is uncertain.<sup>715</sup> Further argued that;

...the requirement of volition for *dolus eventualis* appears to be undesirable; first because it is difficult to determine the precise content of volition in the form of “acceptance of” or “reconciling to” the harmful result in question; and second because the accused who sets in motion a criminal course of conduct while foreseeing the possibility of the harmful result occurring, should not by mere change of mind and loss of volition obtain the benefit of a defence, just as voluntary withdrawal after setting in motion a criminal course of conduct should not constitute a defence against conviction of attempt.<sup>716</sup>

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<sup>710</sup> *S v Beukes* (supra note 144) para 522B-I. See chapter 2 for a full discussion.

<sup>711</sup> *S v Ngubane* (supra note 221) para 685 D- E.

<sup>712</sup> *R v Valachia* (supra note 85).

<sup>713</sup> *R v Sikepe* (supra note 86). See also a list of cases at supra note 299.

<sup>714</sup> See footnote 549 for a full discussion.

<sup>715</sup> MM Loubser & MA Rabie (supra 203) 346.

<sup>716</sup> MM Loubser and MA Rabie (supra note 203) 430.

I disagree. My view is that the conative element is indeed necessary as it operates as a safeguard to liability. The court needs the conative element to ascertain that the accused has decided to go through with the prohibited act using his own will, despite his knowledge of the consequences.

The fourth model (my own) favours an unqualified cognitive element and accepts the conative element plus an additional practical component. In this third model, it is suggested that *dolus eventualis* cases must be analysed on a *case-by-case*<sup>717</sup> basis, rather than a *one-size-fits-all*<sup>718</sup> concept. Theoretically, *model 4* is a much better approach and it concurs with Paizes, Whiting and Wills JA in his judgement of the *Van Schalkwyk* case in terms of the application. In other words, my approach differs from Paizes and Whiting in that it accepts the conative element as significant whereas *they*<sup>719</sup> find it irrelevant, but concurs with them in terms of their practical approach to cases. In their practical approach to *dolus eventualis* cases, Paizes and Whiting present some interesting insights against the *one-size-fits-all* concept.

#### **5.2.5 A newly suggested model for *dolus eventualis*: A case-by-case analysis**

From the issues in this dissertation, it can be noted that the traditional approach to *dolus eventualis* as applied by legal writers in South African criminal law is different from the one proposed in this dissertation, though some issues shall be agreed upon. This dissertation aims at proposing a new approach where both the cognitive and conative elements are equally relevant. Starting with the cognitive element, the degree of foresight must not be qualified by any adjective. My proposal is that any amount of foresight no matter how remote shall be enough to constitute the cognitive element. The idea of foresight has to be flexible. Intent has to require only some awareness of the possibility, wilful conduct and consciousness of unlawfulness. Furthermore, the conative element is a necessary element for *dolus eventualis*. While foresight of possible consequences is present in both conscious negligence and *dolus eventualis*, the latter also requires a volitional element. There is *dolus eventualis* only if the actor consents to, or approves of, or reconciles himself to the consequences; if they should ensue, he accepts them into the bargain.

This approach might seem like it does not differentiate between conscious negligence and recklessness. But a closer analysis reveals that in conscious negligence, too, there is a certain volitional element, which, however, relates only to the risk the actor willfully creates a

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<sup>717</sup> My italics for emphasis

<sup>718</sup> My italics for emphasis

<sup>719</sup> Italic word refers to Paizes and Whiting.

dangerous situation while the element of volition in *dolus eventualis* always relates to the consequences. However, it is very important to be careful with this crucial distinction as it can easily become blurred. For instance, in *S v Van Zyl*,<sup>720</sup> it was held that the use of conscious negligence in a specific sense, namely *as an equivalent of recklessness*, is inappropriate and could cause confusion, hence it needs to be noted. Some academic writers might reject the conative element as too wide or state that it does not differentiate conscious negligence from recklessness. What therefore remains a fact is that there is *dolus eventualis* only if the actor consents to, or approves of, or reconciles himself to the consequences; if they should ensue, he accepts them into the bargain. Such an inquiry cannot be deduced by an acceptance of the cognitive element only.

In this alternative approach to *dolus eventualis* that I propose, (which accepts both the cognitive and conative element as relevant), the application of these concepts in cases must not be the same. Like Paizes and Whiting suggested, a concept must be adopted depending on the various circumstances of a case. For example, the similarity of case conclusions in the appeal court of *Humphreys*<sup>721</sup> and *Maarohanye*<sup>722</sup> must not be interpreted to mean that the *Humphreys* case is the standard decision for all reckless driving cases. Furthermore, because a concept has been adopted in the reckless driving cases we should not apply it HIV murder cases. To clearly set out the proposed approach, I shall refer back to the introductory hypothetical scenario in chapter 1. In my view, Tim can be said to have foreseen the possibility of killing Baby-X by firing towards Peter who happened to be holding Baby-X in his hands. His foresight need not be of any amount, any foresight no matter how remote is enough in this instance. As regards the second leg of the test, the conative element is established from his failure to refrain from his conduct though he noticed that it is unlawful. It does not matter whether his unlawful

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<sup>720</sup> *S v Van Zyl* 1969 (1) SA 553 (AD) para 557A-B.

<sup>721</sup> *S v Humphreys* (supra note 49) para 10d. The Supreme Court of Appeal found that, as Humphreys had formerly jumped the queue amongst other motorists and crossing successfully, it would appear that he was subjectively convinced that he would do so again. Subjectively, he had not foreseen the harmful consequences that eventuated. It can be argued that, the fact that his foresight deceived him does not mean that, (for the purposes of the second element of the test for *dolus eventualis*), he had not accepted the possible consequences of his actions. Humphreys had succeeded in crossing in such a manner before, at least twice, so he believed he could do so again. He was clearly wrong. However, this was sufficient to exclude a finding of intent on the basis of *dolus eventualis* – which is sufficient to avoid a conviction on a charge of murder. To take this approach and apply it in the case of *S v Phiri* (supra note 673) & *S v Nyalungu* (supra note 672), like what the Supreme Court of Appeal did in the discussion at supra note 578 might lead to some serious confusion.

<sup>722</sup> *Maarohanye and Another v S* (supra note 49) para 22. The supreme court of appeal held, based on the facts of this matter that the state of mind in the accused is completely different with that required to establish an acceptance of the consequences of one's actions, and further reconciling one to such consequences taking place. Therefore, whilst the trial court was clearly justified in concluding that that the appellants had used drugs before they embarked with the driving leading to the collision with the school children, that court erred in concluding that *dolus eventualis* had been established on the facts found by it to have been proven.

conduct was directed at Peter or Baby-X. What remains an issue is that he was careless as regards the outcome of his actions.

Having satisfied the cognitive and conative element he would be found guilty of murder *dolus eventualis* as regards Baby-X. If ever Tim had been drinking and driving, where he ended up killing Baby-X, the criteria will have to be different. New circumstances have to come into the picture, for example, an inquiry of the presence of foresight that he might crush and kill Baby-X followed by a complete disregard of the consequences. We cannot then determine the outcome of latter scenario by referring to the former scenario (for example, to say the conative element was present in the latter scenario because that is what normally happens in *dolus eventualis* cases and that is what *scenario (i)* said). Essentially that is the view that is currently adopted by our courts which I disagree on.

A thorough analysis of the current high-profile *dolus eventualis* cases is an indication that the standard approach to *dolus eventualis* must be deviated from. The minority judgement in the *Van Schalkwyk* case has been hinted upon deviating from the standard approach. My thoughts are that if this new approach is adopted, the confusion relating to *dolus eventualis* may decrease. It may easily be predicted that the courts will not easily give up their attachment to their basic formula they have used for so long. If this “alternative approach” is given a fair chance to be followed, it may work well in some cases. In this manner, there is a huge call upon legal academics to consider the proposed approach to *dolus eventualis*. In the event that it has been tried and creates more confusion, it may gladly be accepted that it will be inimical to the public faith in law. It can then be abandoned.

### **5.3 Contributions of the study**

This was a study aimed at highlighting the ambiguous nature of the concept of *dolus eventualis* in South African criminal law. This study was mainly based on a critical analysis of some *dolus eventualis* cases and legal writings. It examined how case law has handled the concept of *dolus eventualis*, and how these have been interpreted by South African legal writers. As indicated above, the concept of *dolus eventualis* has been associated by an overwhelming lack of clarity. The submission of this dissertation therefore is that legal academics must deviate from the standard notion of *dolus eventualis*, which can be described as a *one-size-fits-all* concept. This work is also aimed at calling upon some legal writers to conduct further studies regarding the newly suggested approach to *dolus eventualis*. For if much attention is given to it, its uncertainty could be resolved.



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