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THE LAW OF CULPABLE HOMICIDE IN SOUTH AFRICA

(With reference to the Law of Manslaughter in English Law and the Law relating to Negligent Killing in German Law)

Thesis

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by

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PREFACE

This thesis is the product of work that has been done over a period of about six years and which could not have been done without the assistance of a number of persons and bodies to whom I wish to express my sincere gratitude.

First I would like to thank my wife Ethel and Mrs Heather Taylor for the correcting and typing done by them, sometimes under difficult circumstances.

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J.R. du Plessis
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ABSTRACT

Culpable homicide is the unlawful negligent killing of a fellow human being. As such it is in many respects a 'residual' crime being the verdict prosecutors may expect when they are unable to prove the intention to kill when prosecuting for murder. A feature of this was that in the past when defences such as, for instance, intoxication or provocation were raised at murder trials, convictions of culpable homicide were almost automatic.

In recent years, under the influence of the 'purist' current in our Criminal law, intoxication has become a defence to culpable homicide and provocation resulting in loss of self-control has also become a defence to culpable homicide. These developments are unacceptable to some writers on criminal law and a move away from the purist approach to the 'traditional' or pragmatic approach is to be expected. Greater emphasis will be placed on practical results than on the achievement of logical consistency. This could result in the law of culpable homicide becoming more socially effective than it is at present.

OPSOMMING

Strafbare manslag is die onregmatige nalatige veroorsaking van die dood van 'n medemens. As sulks is dit in baie opsigte 'n 'residuele' misdaad, synde die skuldigbevinding wat aanklaers mag verwag wanneer hulle nie in staat is om die opset om te dood by 'n vervolging weens moord te bewys nie. In die verlede was een aspek hiervan dat wanneer, byvoorbeeld, die verweer van dronkenskap of van provokasie by moordverhore opgewerp is, skuldigbevindings weens strafbare manslag byna automaties gevolg het. Onlangs, onder invloed van die 'juridies suiwere' benadering tot ons strafreg, het dronkenskap 'n verweer teen strafbare manslag geword en provokasie wat aanleiding gee tot 'n verlies aan selfbeheer het ook 'n verweer teen strafbare manslag geword. Hierdie ontwikkelings is onaanvaarbaar vir sommige skrywers oor strafreg, en 'n beweging weg van die 'juridies suiwere' na die 'tradisionele' of pragmatiese benadering kan verwag word. Groter nadruk sal op praktiese resultate as op logiese konsekwentheid geplaas word. Dit kan aanleiding daartoe gee dat die reg aangaande strafbare manslag meer sosiaal effektief kan word as wat huidiglik die geval is.

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GENERAL INTRODUCTION

1 Object of Study and Method to be Employed

The main object of this study is to make a detailed investigation into the law relating to culpable homicide in South Africa. This will entail an investigation into the positive law as well as the theoretical literature relevant to the subject. A lengthy investigation into the history of the crime of culpable homicide is not deemed necessary and no in-depth consideration of the law before the second World War will be embarked upon. The starting point will be 1946 the year in which the fifth and second-last edition of Gardiner and Lansdown appeared.

An exception will be made in the case of the defence of provocation. The law relevant to this defence has undergone changes in the recent past and these will be considered against the background of the history of this defence in South African criminal law. The history of the defence of provocation will also provide a background against which the normative fault doctrine may be considered. The submission will be made that in the treatment of the defence of provocation by our courts prior to the most recent developments, an example of the application of a concept of fault of a normative nature is to be found.

South African criminal law had become fairly stable and settled by 1946 and a study of the law as it was at that stage will be a sufficient preface for the study of the changes that followed.

These changes came about mainly as a result of the appearance in 1949 of the first edition of De Wet and Swanepoel. The importance of this book was not appreciated for some years with the result that the sixth and last edition of Gardiner and Lansdown which appeared in 1956, is, in the field of the theoretical development of our law, something of an anachronism. Like its predecessors, it was nevertheless an extremely useful practitioner's vade mecum.

Because of the undeniable influence of English law on our criminal law the current English law of manslaughter will be considered briefly. As this is not a study in comparative law detailed investigation would serve no useful purpose. The reason for looking at English law is to consider whether English criminal law is to be looked to for guidance in the development of our law of culpable homicide.

Since 1949 German criminal law and especially German criminal legal theory[1)] has exerted a strong and increasing influence on our criminal law and criminal legal literature. A brief investigation of the German law relating to negligent killing will therefore also be undertaken. German criminal law has received increasing attention from South African writers over the

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1) Strafrechtswissenschaft.

past decades[2] and an introduction to the German approach to criminal law will not be necessary.

A detailed investigation of negligent killing in German criminal law would be unnecessary. Attention will focus mainly on the diversity of crimes that in effect constitute the crime of negligent killing in German criminal law. The reason for investigating the German law is that German criminal law may be expected to continue to exert an influence on ours and consideration of the question whether German law should be looked to for guidance in the development of ours, is necessary.

After considering whether English and/or German law should be looked to, submissions will be made on these questions. General conclusions will also be stated on the problematic areas in the South African Law of culpable homicide.

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2) eg in Strauss (Toestemming), CR Snyman's textbook Strafreg (referred to as Snyman (Strafreg) the English translation Criminal Law being referred to as Snyman), Morkel (Nalatigheid), Morkel (Rational Policy), Van Oosten (Kausaliteit), Van der Westhuizen (Noodtoestand), Bergenthuin (Provokasie) and Badenhorst (Misdaadbegrip). These are but a few writings in which the German approach to criminal law is discussed, there are also De Wet and Swanepoel, Van der Merwe and Olivier and innumerable journal articles eg Badenhorst 1983 TSAR 183, Bergenthuin 1986 DJ 98, Bergenthuin 1986 SACC 20, Bergenthuin 1982 DJ 272, Van Oosten 1983 THRHR 383, Labuschagne 1985 DJ 381, Oosthuizen 1985 THRHR 407, Van der Merwe 1981 Obiter 142, Hermann 1981 DJ 39, CR Snyman 1981 DJ 68.

2 The problematic areas of the South African law of culpable homicide and why an investigation into the law of culpable homicide is deemed necessary

In two landmark decisions[3] the Appellate Division rejected the doctrine of versari in re illicita in our Criminal law in the early 1960's. Prior to these two decisions culpable homicide had been defined as the unlawful killing of another human being[4] and the doctrine of versari in re illicita had been invoked mainly to obtain convictions for culpable homicide in cases of death resulting from an assault.[5] It had not been necessary to establish fault in the shape of negligence in respect of the death itself,to obtain convictions in such cases.

With the rejection of the versari doctrine it became necessary to establish fault in the shape of negligence in respect of an unlawful killing, to obtain a conviction of culpable homicide. This gave rise to divergent views and opinions on the nature of criminal negligence and the nature of the crime of culpable homicide, which found expression inter alia in the dispute on the question whether an accused proved guilty of murder could be convicted of culpable homicide.[6] This dispute has now been

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3) van der Mescht 1962 1 SA 521 (A) and Bernardus 1965 3 SA 287 (A).
4) Gardiner and Lansdown 1537 and 1557.
5) Barlow 37.
6) vide September 1972 3 SA 389 (C); Smith 1981 4 SA 140 (C); Zoko 1983 1 SA 871 (N); Breakfast 1984 3 SA 302 (E).Contra Alexander 1982 4 SA 701 (T).

settled by the Appellate Division in Ngubane[7)]

Essential to the ratio in Ngubane is the statement that criminal negligence is to be viewed as conduct and not as mens rea. Negligence as fault in the crime of culpable homicide will therefore be one of the main topics for investigation in this study.[8)]

Negligence is a complex concept and a chapter will be devoted to the question whether only unconscious negligence (culpa) is recognized by our law or whether conscious negligence (luxuria) is also part of our law.

An investigation of the partial excuse doctrine in terms of which intentional killing could in certain circumstances qualify as culpable homicide rather than murder, will not be necessary as this doctrine has been rejected by the Appellate Division in Bailey.[9)] There are, however, still cases of intentional

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7) 1985 3 SA 677 (A).

8) No investigation will be made into the question whether negligence ought to form the basis of criminal liability and whether criminal conduct committed negligently ought to be punished. To do justice to this question would require a very lengthy investigation and this has in any event been done recently by DW Morkel in Morkel (Nalatigheid). It is submitted that because of the sanctity of human life it goes without saying that the negligent killing of a human being should be regarded as a crime and punished with greater or less severity, depending on the exact circumstances of each case.

9) 1982 3 SA 772 (A).

killing amounting to culpable homicide and not to murder in our law and this will be investigated.

Closely related to this latter question is the question whether ignorance of the law, a valid defence since De Blom,[10] has any bearing on the crime of culpable homicide and if so what that bearing and its effects are. This will be investigated mainly in connection with homicide committed under the bona fide but mistaken belief that it is lawful.

Since Chretien[11] voluntary intoxication has become a complete defence to unlawful conduct in our law and an investigation into the effect of this development on the crime of culpable homicide will be necessary.

The question, when is a killing unlawful, will also be investigated. This is necessary as it is no longer accepted in our theoretical literature that this question can simply be approached along the line that any killing is prima facie unlawful, unless it falls within a recognised category of lawful killing.[12]

The question of causality in cases of homicide has received some

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10) 1977 3 SA 513 (A).
11) 1981 1 SA 1097 (A).
12) Snyman 68; Hunt 401 ff.

attention after the recent Daniels[13] decision. The problems appear more complex in cases of murder than culpable homicide, and as discussion would be more appropriate in connection with the former crime, causality will not be investigated in the present thesis.

3. Terminology and definitions

Culpa will be used in the sense of criminal negligence and will be used interchangeably with the term 'negligence'. Dolus will be used to mean criminal intent and where necessary it will be indicated whether dolus directus, dolus indirectus or dolus eventualis is being referred to.

Culpable homicide will be taken to mean the unlawful negligent killing of another human being and murder the unlawful intentional killing of another human being.

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13) 1983 3 SA 275 (A).

CHAPTER I

THE FAULT ELEMENT IN CULPABLE HOMICIDE

1 TWO CURRENTS IN OUR CRIMINAL LAW ILLUSTRATED BY THE DEBATE OF WHETHER MURDER IS A DEFENCE TO A CHARGE OF CULPABLE HOMICIDE.

1.1 Introduction

Two currents have been and are at work in the recent development of South African criminal law. There is the pragmatic, empirical or positivist current and the purist, dogmatic or 'strafregwetenskaplike' current.[1)]

Historically the pragmatic current can be traced back to the first half of the 19th century. In 1949 it was represented in the then authoritative textbook on South African criminal law, the fifth edition of Gardiner and Lansdown.[2)]

The purist current commenced with the work of Professors H D J

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1) vide Forsyth 186 ff; JMI Labuschagne 1982 DJ 381-2; Badenhorst 283 ff (who uses the terms 'aksiomaties-geslote sisteem'and 'problematies-ope' sisteem for purism and pragmatism respectively). Cf Badenhorst 1983 TSAR 183; du Plessis 1984 SALJ 301, 302-3; CR Snyman 1985 SALJ 120, 127-30; du Plessis 1985 SALJ 503, 513; van Blerk 1984 THRHR 255, 267-77; Burchell and Hunt 48-9.

2) vide Badenhorst 83ff for criticism of Gardiner and Lansdown.

Bodenstein,[3] I van Zyl Steyn,[4] LI Coertze[5] and CJC Gie.[6] But with the appearance in 1949 of the first edition of de Wet and Swanepoel the purist approach to criminal law made its first significant[7] and generally accessible contribution. Since 1949 purism steadily gained ground and has made giant strides during the past three decades.[8]

The pragmatists are said to favour casuistic solutions for legal problems without thinking in terms of the long term effect of a particular solution or the role to be played by the solution in the criminal law as a whole. This method results in a loosely structured system. Many of the problems created by this approach are solved on an ad hoc basis by changing or adapting rules of procedure or evidence and shifting issues that belong to the inquiry into guilt or innocence to the inquiry into appropriate sentence.

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3) Author of 'English Influences on the Common Law of South Africa', 1915 SALJ 337 and 'Phases in the Development of Criminal mens rea', 1919 SALJ 323, 1929 SALJ 18. Vide Badenhorst 99-102.

4) Author of 'The Comparative method in Legal Study' 1931 SALJ 203. Vide Badenhorst 103-4.

5) Author of 'Wat beteken Culpa in die Suid-Afrikaanse Strafreg' 1937 THRHR 85. Vide Badenhorst 104-5.

6) Gie made a strong attack on the unsystematic nature of South African criminal law in 'n Kritiek op die Grondslae van die Strafreg in Suid Afrika Unpublished doctoral Thesis, University of Pretoria 1941; vide Badenhorst 105-10.

7) vide Badenhorst 110-1.

8) vide Forsyth 186ff under the heading: 'The Triumph of Purism' and cf Snyman 1985 SALJ 120, 130.

The dogmatists or purists are said to favour the creation of a logically coherent system in which universally valid solutions to legal problems are sought. The object is to obtain legal certainty through the consistent application of basic principles that form a harmonious, smoothly functioning whole.[9)]

The pragmatists and purists do not necessarily work in opposition to each other and at times they have striven towards and gained the same objectives.[10)]

Each of the two currents has its advantages and disadvantages. Pragmatism leads to ready solutions that are easily understood in isolation. The system so created can however become a collection of casuistic rules lacking in logical coherence.[11)]

Purism results in logical coherence and the consistent application of defined principles, but it can lead to a dogmatic system of rigidly applied concepts in which mechanical reasoning could on occasion cause practical exigency to be abandoned in favour of logical consistency.

This could result in the criminal law becoming an arena of

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9) Badenhorst 283 ff provides a detailed discussion.
10) vide Forsyth 194 referring to the adoption of the subjective test for mens rea.
11) This is a patent deficiency in Gardiner and Lansdown; vide Badenhorst 86-8.

refined but unpractical debate,[12] rather than an instrument for achieving socially useful results.

It will be one of the submissions of this thesis that certain purist or 'strafregwetenskaplike' concepts have reached, or are in the process of reaching, a stage of rigidity that can lead to socially unacceptable results.[13]

The concepts to be investigated are 'skuld', 'toerekeningsvatbaarheid' and conscious negligence. The final-conduct doctrine, the normative fault doctrine and the subjective test for negligence will also be examined and evaluated.

The recent history of culpable homicide surrounding the debate of whether murder is a defence to a charge of culpable homicide has provided students of criminal law with an example of rigid dogmatic reasoning leading to a socially unacceptable result. It also provides an example of pragmatic opposition to an unacceptable purist proposition and the reasoning that led to it. More recently, however, there would appear to be a satisfactory solution in the shape of a unanimous decision of the Appellate

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12) vide Labuschagne 1985 DJ 381-2, where the author states that German 'Strafrechtswissenschaft' is uneconomical in that its results do not justify the amount of energy expended in achieving them.

13) vide CR Snyman 1985 SALJ 240, 250.

Division in Ngubane[14] which contains a balanced blend of tempered purism and restrained pragmatism.

1.2 The problem

Culpable homicide is unique among common law crimes in that it is the only common law crime which requires culpa and not dolus as its mens rea or fault.[1]

Culpa, or criminal negligence, is generally regarded as being entirely different from dolus and not to be regarded as a lesser form of dolus.[2] So great is the difference between these two forms of mens rea that it has been submitted by academic writers that culpa, unlike dolus, is not a state of mind but a form of conduct.[3]

Until very recently our courts have viewed criminal negligence as a state of mind.[4] This resulted in the abovementioned 'murder is a defence to culpable homicide' debate between

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14) 1985 3 SA 677 (A).
1) Hunt 397; Burchell and Hunt 192.
2) Hunt 417-20.
3) Burchell and Hunt 195; Hunt 413; Visser and Vorster 337; Snyman 114; Snyman (Strafreg) 195; van der Merwe and Olivier 125-6; de Wet and Swanepoel 157. It is not clear what the view of van der Merwe and Olivier is, since they regard negligence as a reproach and intent as a reproach; cf the criticism of Zoko 126 n45.
4) Zoko 1983 1 SA 871 (N) 886 C-F.

writers[5] on criminal law and some interesting judgments of certain provincial divisions of the Supreme Court.[6]

The problem results from the submission that as culpa is an inadvertent, negative state of mind consisting of lack of foresight and dolus is a positive, advertent state of mind of which foresight is always an ingredient, culpa and dolus cannot co-exist or overlap. A person charged with culpable homicide therefore can not be convicted of that crime once he has been proved guilty of murder. The intent or dolus required for the latter crime would exclude any possibility of the negligence or culpa required for the former crime being present.

Logically, the argument is irrefutable and socially it is indefensible. It is an example of what Glanville Williams calls '... the 'jurisprudence of conceptions', where legal concepts are

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5) Hiemstra 545; De Wet and Swanepoel 231-3; Hunt 417-9; van der Merwe and Olivier 126 esp n45; van der Merwe 1972 THRHR 299, 1983 THRHR 82; Middleton and Rabie 1972 THRHR 383; Hugo 1973 SALJ 334; Skeen 1983 SALJ 177; Van Oosten 1981 DJ 343; Snyman (Strafreg) 199; Snyman 185-6. Contra Rossouw 1973 THRHR 161; du Plessis 1984 SALJ 50; van Zyl 1983 THRHR 100. van Zyl's views are based on a view of normative fault; this represents an example of purism agreeing with pragmatism.

6) September 1972 3 SA 389 (C); Smith 1981 4 SA 140 (C); Zoko supra; Breakfast 1984 3 SA 302 (E). Contra Alexander 1982 4 SA 701 (T). The facts of these cases are of little importance. What happened was that an accused charged with culpable homicide in a regional court was in each case proved guilty of murder. Except in Alexander, it was held that conviction of culpable homicide was competent notwithstanding proof of intent to kill.

applied without considering their purpose.'[7]

The main argument against the logical view that the proof of intent to kill renders a conviction of culpable homicide impossible is that it leads to the unpractical result that an accused charged with murder cannot be convicted of that crime if it was reasonably possible that he may have killed negligently. On the other hand he cannot be convicted of culpable homicide either if it was nevertheless reasonably possible - although not proved beyond a reasonable doubt - that he had killed intentionally. Here, the danger of the mechanical application of concepts, designed to facilitate an understanding of the law rather than to dominate its application, becomes evident.[8] The conceptual nature of *culpa* and *dolus* would become so dominant that an accused who had clearly committed either murder or culpable homicide could be convicted of neither: the less serious crime being a defence to the more serious crime and *vice versa*.[9]

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7) Criminal Law GP 15.

8) Hans Vaihinger *Die Philosophie des Als-Ob* 8ed 1922 develops the interesting view - derived from the metaphysics of Kant - that the human mind works with fictional constructs to represent 'realities'. These constructs are aids to the understanding and any attempt to apply them too rigidly in practice results in antinomies and self-contradictions. Closer analysis could reveal that *dolus* is possibly, and *culpa* is almost certainly, such a 'fiction'; vide Olivier 43.

9) vide du Plessis 1984 *SALJ* 50 for an analysis of the absurdities involved. Didcott J stresses the absurdities in *Zoko* (889 H) stating that the absurd results of refusing to convict of culpable homicide on proof of intent are the overriding reason for his views.

Practical exigency would dictate that an accused who must clearly have committed either negligent homicide or intentional homicide, should be given the benefit of the doubt and convicted of the lesser crime:[10] an application of the principle *in dubio pro reo*.

In *Zoko* Didcott J[11] subjected the fault element in culpable homicide to penetrating investigation. He pointed out that prior to the rejection of the doctrine of *versari in re illicita* in *van der Mescht*[12] and *Bernardus*,[13] culpable homicide had been defined as the unlawful killing of a human being. Once conviction could no longer follow automatically on proof of an unlawful killing, an element of fault became essential. This element of fault was negligence, as killings that had resulted from conduct that were not *per se* unlawful,[14] had resulted in convictions of culpable homicide when the *versari* doctrine was still part of our law, provided such killings had been committed negligently.

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10) De Wet and Swanepoel (232) suggest this solution, but the judgment of Didcott J in *Zoko* is clearly misunderstood; vide du Plessis 1985 *SALJ* 394,403. Cf *Chimbamba* 1977 4 SA 803 (RAD).

11) Kumleben J concurring and Thirion J delivering a separate but not dissenting judgment.

12) 1962 1 SA 521 (A).

13) 1965 3 SA 287 (A).

14) By this is meant conduct, eg driving a motor car, which is not criminal except if done negligently; vide *Matsepe* 1931 AD 150. In English law a lawful act does not become unlawful because it is negligently performed; Smith and Hogan 316.

As Didcott J pointed out[15] negligence was treated as a form of mens rea by our courts; in other words, as a state of mind. He further pointed out that once one accepted the doctrine that the fault element of culpable homicide is a state of mind, it is not a great step further to accept that that state of mind could be dolus. The learned judge used the following metaphor:[16] 'Having swallowed the camel, in short, one must not strain at the gnat'.[17]

Didcott J, accordingly, found himself constrained to regard negligence as a state of mind in view of the indisputable trend in our law to that effect. Having decided that an intentional killing could result in a conviction of culpable homicide he therefore proposed the following re-phrased definition of that crime:[18]

> 'Culpable homicide is the killing of a human being which is both unlawful and blameworthy'.

The definition had obvious merit in that it described what was indeed the practice of the courts; namely, to convict of culpable

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15) 886 C.
16) 887 D-E.
17) 888 B. It was also pointed out that the problem of convicting of culpable homicide in cases where intent to kill is proved, would be easily solved if our law adopted the approach of English law; namely, that negligence is conduct. A negligent killing would be unreasonable conduct and so would an intentional killing.
18) 888B.

homicide where an unlawful blameworthy killing had been proved although the exact basis of the blameworthiness; namely, negligence or intent, had not been established. It is, with respect, doubtful whether the definition was theoretically sound. It appeared to imply a view of culpa that was perhaps too wide in the light of the many dicta[19] to the effect that culpa was negligence.

1.3 The solution

The problem came before the Appellate Division in Ngubane[20] which held that negligence should be viewed as conduct. When this is done an intentional killing can result in a conviction of culpable homicide. Jansen JA stated the view of the court as follows:[21]

> 'The concepts of dolus and culpa are totally different. Dolus connotes a volitional state of mind; culpa connotes a failure to measure up to a standard of conduct. Seen in this light it is difficult to accept that proof of dolus excluded culpa'.

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19) eg Nkosi 1928 AD 488, 489; De Bruyn 1968 4 SA 498 (A) 510 D-E; Burger 1975 4 SA 877 (A) 878-9.
20) 1985 3 SA 677 (A).
21) 687 E.

After analysing the facts before him[22] the learned judge of appeal concluded that the accused had foreseen that he might possibly kill the deceased. In persisting with conduct that could have this result, he had acted in a manner that fell short of the standards of a reasonable man.

In stating that negligence is conduct rather than a state of mind the Appellate Division has now brought the theoretical view of criminal negligence into line with the view generally taken of negligence in the law of delict.[23]

1.4 Negligence as conduct in the Criminal Law

It is submitted that the view that negligence is conduct may obviate theoretical difficulties such as those that gave rise to the controversy whether proof of dolus rendered a conviction of culpable homicide incompetent or not. However, the state of mind resulting in negligence must be investigated when deciding on sentence. It is also submitted that for a person not to consider the possible consequences of his conduct does not necessarily mean that he has no state of mind at all in respect of that conduct. His state of mind could be blameworthy inadvertence.

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22) 687 E-H. The facts are of no importance. The accused had pleaded guilty of culpable homicide on a charge of murder. This plea was accepted, but on proof of intent to kill, he had been convicted of murder. The Appellate Division held that a conviction of murder was procedurally incompetent.

23) Boberg 269.

Not to have certain thoughts in one's mind is a state of mind just as having no oxygen in one's lungs is a state of respiration.

It must, however, be borne in mind that negligence had been viewed or treated as conduct in at least one field of criminal liability before Ngubane; namely, negligent driving and culpable homicide resulting from negligent driving. The further particulars customarily furnished by public prosecutors in response to requests for further particulars of negligence they aver against persons charged with negligent driving or with culpable homicide arising out of alleged negligent driving, may serve to make this clear. A typical list of such particulars usually contains the following:

1 he failed to keep proper look-out;
2 he drove at an excessive speed;
3 he followed behind the complainant at a distance dangerously close to the complainant's vehicle;
4 he failed to give any or adequate warning of his approach;
5 he drove dangerously near the centre of the road while negotiating a right hand turn;
6 he drove on his incorrect side of the road;
7 he failed to stop at a 'stop' sign;
8 he proceeded from a 'stop' sign without first ensuring that it was safe to do so;

9 he entered into an interersection without ensuring that it was safe to do so;

10 he crossed a robot-controlled intersection against the red light;

11 he failed to take into account other users of the road;

12 he made a sudden left-hand turn without any or timeous warning of his intention to do so.

This list could be extended and is similar to the 'further particulars' often furnished in response to a request for further particulars in civil actions for damages arising out of motor car accidents.[24] The feature of these particulars of negligence is that, with the possible exception of the eleventh one, conduct is described without any reference to the state of mind or attitude of mind of the accused.[25]

It, therefore, seems that in relation to motor accident cases

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24) vide Bullen and Leake 796. The examples are from English law, but they are familiar to the South African practitioner.

25) A litigant could possibly take exception to the eleventh on the ground that it is vague and embarrassing, or request that further and better particulars be given as to the exact manner in which the accused allegedly failed to take into account other users of the road. The answer, if any is given, would also consist of allegations of conduct. If the accused were to be convicted the magistrate would also make certain findings as to the conduct of the accused on which the finding of negligence is based.

there has always been substance in the contention that negligence is not a state of mind but conduct. In other words the conduct complained of is measured against the norms prescribed by society and an inference as to its blameworthiness or otherwise is drawn without an investigation into the state of mind of the accused.

A person charged with a crime of negligence arising from the driving of a motor vehicle can be convicted in spite of proof on his part that his state of mind was not careless. If an accused is confronted with a charge based on negligence in that he, for instance, drove into an intersection in front of another vehicle which had the right of way, it will seldom, if ever, be of any use to him to give evidence to the effect that he did look to his left and his right most carefully before entering the intersection. This evidence could in most cases not be contradicted. It is unlikely that any eye-witness would be available, to say that he or she watched the accused and saw him enter the stop street without first looking to his left or his right.

Even if the uncontradicted evidence of the accused were to be accepted, the court might still hold that he may have wished or intended to look properly, but he could not have done so properly otherwise he would have seen the approaching car. Such an accused therefore would be convicted of a crime of negligence in spite of proof that, subjectively, he was not careless.

The Ngubane decision, adopting the pragmatic positivist view that negligence is conduct, has therefore brought greater consistency in our criminal law and harmonised it with our law of delict.

The view that intent to kill (dolus) excludes culpa leads to the socially unacceptable result, that murder can be a defence to culpable homicide. It seems unbelievable that this logical argument (sic) with its unacceptable result, could have been so persistently advanced and so steadfastly defended in our law. Is the practical result in September,[26] Smith,[27] Zoko[28] and Breakfast[29] not to be preferred to that in Alexander?[30] The answer must obviously be, 'yes'. Nevertheless the weight of academic opinion was against this answer.[31]

1.5 Conclusion

It is submitted that the 'murder as a defence to culpable homicide' debate is an example of purism going too far in its adherence to concepts. From the nature of the two concepts of intention and negligence the inference is drawn that they cannot overlap. This is true, but it does not follow that murder and

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26) 1972 3 SA 384 (C).
27) 1981 4 SA 140 (C).
28) supra.
29) 1984 3 SA 302 (E).
30) 1982 4 SA 701 (T).
31) vide n5 supra.

culpable homicide do not overlap. These crimes overlap considerably, the only difference being that dolus is the mens rea or fault of murder while culpa or negligence is the mens rea or fault of culpable homicide. The essential features of unlawfulness, blameworthiness and killing are the same in both.

In cases where, for technical procedural reasons, a conviction of murder cannot be brought, the pragmatist or empirical approach would be that one is in any event dealing with an unlawful killing and that no injustice is done by convicting the accused of the less serious crime of negligent killing when he is in fact guilty of the far more serious crime of intentional killing.

The hyper-dogmatic approach is absolutely against this. Dolus and culpa are conceptually different and there the matter ends. That the law may forfeit part of its social value in the process is apparently of no importance. Dogma and concept must prevail, so it is apparently reasoned, no matter what the cost may be in practical terms.

Ngubane's[32] case, which represents a curb on this trend (but

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32) The judgment contains a discussion of purist concepts and doctrines (viz conscious negligence, the view that objective negligence should found unlawfulness and subjective negligence fault, as well as the view that fault is reproach) and it arrives at the empirical conclusion that negligence is conduct. It therefore represents a balanced purist - pragmatist approach.

without drastic innovation) is to be welcomed.

2. The traditional approach to mens rea and its development

2.1 Explanatory

By the 'traditional' approach to mens rea is meant the approach to be found in the various editions of Gardiner and Lansdown and in Burchell and Hunt, particularly in the first edition of the latter work. This 'traditional' approach is contrasted with the approach to be found in Afrikaans textbooks.

2.2 Gardiner and Lansdown

The German influence in our criminal law dates from about 1949.[1] Prior to then, 'skuld' was virtually an unknown term except as the equivalent of debt or guilt. South African courts and writers used the terms mens rea and this was regarded as the mental element of crime.

In 1949 the leading textbook on Criminal Law in general use was the fifth edition of Gardiner and Lansdown.[2]

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1) ie from the appearance of the 1ed of de Wet and Swanepoel: see infra 3.1.

2) Originally by F G Gardiner and C W H Lansdown the fifth edition being prepared by C W H and AV Lansdown - 1946.

Little attention is paid to the criminal act as such in this textbook. There is the statement that mere criminal intentions are not punishable unless they are translated into action.[3] Authority for this is to be found in two cases on uncompleted attempt,[4] as the conduct of the accused had not gone beyond acts of preparation although there was no doubt about their criminal intentions.

Mens rea or 'the mental element in crime' is dealt with in the first section[5] of chapter IV, the chapter being headed: 'Principles of criminal responsibility'.

Suffice it to say that a distinction is made between intent and negligence as forms of mens rea. But there is a strong tendency to regard intent objectively on the strength of the doctrine that a person is presumed to intend the reasonable and probable consequences of his conduct.[6]

There is no specific mention of the doctrine of versari in re illicita. However, it is implicit in sections to the general effect that the mens rea of a contemplated, but unachieved crime,

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3) 1.
4) Töpken and Skelly 1 Buch AC 471; Sharpe 1903 TS 868.
5) 30-42.
6) 36; cf Badenhorst 86-8 for criticism of this approach.

will suffice for conviction in respect of a criminal result not contemplated, but achieved in the same course of conduct.[7)]

In the final edition of Gardiner and Lansdown[8)] the exposition relating to mens rea is much the same as in the fifth edition, but in the light of some (then) recent Appellate Division decisions,[9)] a more subjective view is taken of intention.

Negligence is viewed as a form of mens rea.[10)] But culpable homicide could result from negligent conduct or unlawful conduct which need not be negligent in relation to the ensuing death.[11)]

Gardiner and Lansdown was a practitioner's handbook often somewhat derisively referred to as 'a prosecutor's manual'. It was not the kind of book that could ultimately meet the academic challenge posed by De Wet and Swanepoel. It stated the positive law without any critical evaluation of the judgments of the courts or investigation of the Roman-Dutch authorities.[12)] It is small wonder that although this book had been the practitioner's vade mecum in the criminal courts from its first

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7) 36; an example is to be found in Sharpe. The accused sought his intended victim with a loaded rifle, but could not find him.
8) 6 ed 1957.
9) Nsele 1955 2 SA 145 (A); Bergstedt 1955 4 SA 186 (A).
10) 42.
11) 1537 and 1557.
12) Preface to 6 ed XIV.

appearance in 1919, it had no real part to play in the theoretical development of our criminal law from 1950 onwards.[13)]

2.3 Burchell and Hunt

In 1970 the first edition of Burchell and Hunt made its appearance.[14)]

Separate chapters are devoted to the actus reus and mens rea.[15)] The authors adopt the division of crime into physical and mental elements stating that:

> '... every crime involves an unlawful physical condition (actus reus) and ..., and unlawful mental condition (mens rea).[16)]

Noteworthy is the doctrine that 'volition' is part of the act.[17)] It is stated that : 'An act for legal purposes must be

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13) 'General principles' are discussed in less than half of the first volume, the rest consisting of a detailed exposition of criminal procedure and evidence. Space simply did not allow for a critical discussion of principles. The work is perhaps best compared with Archbold, cf Elliot and Wood (10) for a perhaps unkind view of Archbold.

14) Subtitled 'formely Gardiner and Lansdown', probably as a matter of courtesy since it bore little relationship to its predecessor.

15) Actus reus chapter 5, mens rea chapter 6.

16) 97.

17) 101.

voluntary in the sense that it is subject to the accused's will ...'[18] This is a clear indication that mens rea or the mental element does not contain volition as one of its components.

Mens rea could take the form of either intention (dolus) or negligence (culpa).[19] The authors adhere to the view that negligence should, strictly speaking, not be regarded as a state of mind but add: 'Nevertheless being a kind of fault it is usually classed as such'.[20]

In the second edition[21] the view that an act must be voluntary in the sense of the actor's body being controlled by his will, is even more strongly expressed than in the first edition and great reliance is placed on certain passages in the judgment of Rumpff CJ in Chretien[22] for this doctrine.

The original view that criminal conduct is to be divided into physical and mental components, is adhered to.[23] The mental components are intention (dolus) and negligence (culpa).

Negligence is regarded as mens rea because it is a form of

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18) 101-2.
19) 116.
20) 148.
21) 1983 by EM Burchell, JRL Milton, and JM Burchell.
22) 1981 1 SA 1097 (A).
23) 98-9 and 110.

fault.[24]

Both editions of Burchell and Hunt contain detailed scholarly discussions of topics such as the criminal act (actus reus) and guilty mind (mens rea), and a critical evaluation of judgments of the courts. For this reason, Burchell and Hunt, though often quoted by the courts, has not been the 'Bible' of practising criminal lawyers in the same way Gardiner and Lansdown used to be. Whether it is still possible to produce a book on South African criminal law that will contain a statement of the positive law as desired by practitioners and provided by Gardiner and Lansdown in the past, is doubtful. There are many debatable issues[25] in our criminal law at present, and our courts have shown a willingness in the past two decades to deviate from accepted principle and doctrine.[26]

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24) 148-9; From what the authors say on 148 one gains the impression that they would prefer to regard negligence as a form of conduct rather than a mental state.

25) eg whether conscious negligence (luxuria) should be recognized by our courts, vide ch II infra; whether there is a subjective test for negligence, vide 5.2.3 infra; whether 'ontoerekeningsvatbaarheid' can be successfully raised as a defence by an accused who killed intentionally while under provocation, vide Lesch 1983 1 SA 814 (O).

26) eg De Blom 1977 3 SA 513 (A); Chretien 1981 1 SA 1097; Barnard 1985 4 SA 431 (W).

3. The concept 'skuld'

3.1 Introduction

The word 'skuld' was virtually unknown in our criminal law[1] before the appearance in 1949 of the first edition of De Wet and Swanepoel. Since then it has become of great theoretical and practical importance and the time has undoubtedly arrived for a close look at the word 'skuld' and its uses. It has become necessary to determine whether the word has a clear meaning and if so, what that meaning is, or whether it is perhaps a vague term loosely used which ought to be clarified or possibly abandoned. In Theron[2] it became obvious that lack of clarity concerning the meaning of the word 'skuld' was sought to be used by the appellant, to persuade the court to place the onus of proof in respect of extenuating circumstances in the crime of murder on the prosecution. The argument advanced on behalf of the appellant was that the onus of proving the 'skuld' of the accused rested on the prosecution, that the presence or absence of extenuating circumstances was a question concerning the

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1) Except in the sense of 'skuldig' ie guilty of a crime, or 'onskuldig' ie not guilty of a 'crime'. 'Skuldig' in this sense means fully proven guilt resulting in a conviction. To this day an accused who pleads 'onskuldig' does not put only fault in issue but every element of the crime as well as authorship.

2) 1984 2 SA 868 (A), discussed by du Plessis in 1985 SALJ 394.

'skuld' of the accused and that, consequently, it was part of the general burden of proof resting on the prosecution to prove the absence of extenuating circumstances beyond a reasonable doubt.

In a unanimous judgment of the Appellate Division Rabie CJ[3] rejected this argument and affirmed that the onus to prove the presence of extenuating circumstances on a balance of probabilities rested on the accused.[4] In so deciding, the learned Chief Justice pointed out that there are two types of 'skuld'; namely, that which founds a conviction, or juridical 'skuld', and that which is relevant to sentence only.[5]

'Skuld' used with reference to criminal liability therefore has at least these two meanings. The word 'skuld' however, does have more meanings than these and in consequence of this, its use can give rise to confusion.[6]

3.2 De Wet and Swanepoel

In the first edition of De Wet and Swanepoel a chapter[7] is devoted to 'skuld'. This is also the case in the second

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3) Joubert JA, Cillier JA, Smuts AJA and Grosskopf AJA concurring.
4) 878 G-H.
5) 880 E-F.
6) Some of the meanings of 'skuld' are discussed in 3.2 infra.
7) Chapter V 62-109.

edition,[8] the third[9] and the fourth.[10]

In the first edition it is clear from the chapter-heading that 'skuld' is dealt with as one of the elements of crime and this also appears to be the case in the subsequent editions.

In the first edition the authors state that the word has more than one meaning[11] and in the three subsequent editions they amend this and state that 'skuld', and terms derived from it, are used with different meanings.[12]

The first meaning alluded to, comes from the private law and is indebtedness (indebitum) or debt. The second meaning of 'skuld' is one known in our criminal law for a very long time; namely, guilt or proven guilt in the sense of an accused being found guilty (skuldig) of a crime. The third meaning, the one in respect of which one could possibly say hinc illae lacrimae is the one with which the chapter is concerned. In the first edition the authors call it the blameworthy[13] attitude of mind which accompanies the commission of an act, and in the second and

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8) 90-144.
9) 99-157.
10) 103-63.
11) 62.
12) 2ed 90, 3ed 99, 4ed 103.
13) 62 verwytbare.

third editions, the deplorable attitude of mind (laakbare gesindheid) which accompanies a criminal act.[14)]

This blameworthy (verwytbare) or deplorable (laakbare) attitude of mind (gesindheid) has to be present, so it is said in all four editions, before a person who has done something unlawful can be reproached with his deed. In the second, third and fourth editions it is also mentioned that 'skuld' has the additional meaning of carelessness or negligence.[15)]

A meaning of the word 'skuld' which is not mentioned is fault. It is a well known and longstanding meaning of the word in expressions such as 'Dit is sy Ma se skuld dat Pietie so stout is; sy bederf hom alewig'.

The substitution of 'laakbaar' (deplorable) for 'verwytbaar' occurs in the later editions of the book.[16)] In the first edition there is at least one reference to 'skuld' as being a 'laakbare gesindheid'.[17)]

The problem with the statement, doctrine, idea or notion that 'skuld' is a ground for reproach or blame, is that it results in

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14) 2ed 92, 3ed 99, 4ed 103.
15) ibid. This is the general meaning of the Dutch word 'schuld' in the criminal law of the Netherlands (Peters 1).
16) 2ed 92, 3ed 99, 4ed 103.
17) 63.

a tautology and gives rise to tautologous or quasi tautologous statements that cause one to wonder whether the word serves any real purpose.[18] To say that the requirement of 'skuld' is necessary for criminal liability to be founded, because a person must have a blameworthy attitude of mind before he can be blamed or reproached for his conduct, tells us nothing about blameworthiness or 'skuld'. It amounts to saying that blameworthiness is blameworthy. To take matters further than this tautology one must determine what constitutes a blameworthy state of mind; in other words, one must determine what attitude of mind has to be proved on the part of the accused before a criminal court will blame or reproach him for his conduct. The tautologous nature of the statements of de Wet and Swanepoel is at its clearest in the sentence commencing as follows in the first edition: 'Die verwyt dat hy skuld het ...'[19] Bearing in mind that they define 'skuld' as a blameworthy state of mind[20] the sentence could be read : 'The reproach that he has a state of mind which can be reproached'. In Afrikaans the sentence could be altered to read: 'Die verwyt dat hy 'n verwytbare gesindheid het...'[21]

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18) Van der Merwe and Olivier 110 n82 point out that De Wet and Swanepoel's view of 'skuld' is tautologous. They add that on analysis the 'skuld' concept of De Wet and Swanepoel proves to be empty.

19) 'The reproach that he has fault ...' 1ed 70.

20) 1ed 62.

21) 'The reproach that his attitude of mind is open to reproach ...'.

The use of the word 'laakbare' in the three later editions does not rid statements made concerning 'skuld' of their tautologous connotations. 'Laakbaar' as ordinarily used, means bad or deplorable or of such a nature as to give rise to reproach. Depending on the context in which the word is used, it could also mean reprehensible, contemptible, disgusting or shocking.[22] In the sense De Wet and Swanepoel use it, it means blameworthy or open to reproach, in other words, 'verwytbaar'.

In treating the content of 'skuld' the authors deal with 'toerekeningsvatbaarheid', dolus and culpa. 'Toerekeningsvatbaarheid' means the capacity to attract criminal liability.[23] The most recent English equivalents are criminal accountability,[24] criminal responsibility,[25] and criminal capacity.[26] Imputability would have been the best English equivalent but its use, although found in Snyman,[27] is obsolete.[28]

In their treatment of 'toerekeningsvatbaarheid' the authors adopt the view that 'toerekeningsvatbaarheid' is not included in the

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22) Tweetalige Woordeboek by DB Bosman, IW van der Merwe and LW Hiemstra, 8ed by PA Joubert and JJ Spies.
23) vide Burchell and Hunt 64 n131 (translation of passage from judgment in Chretien 1981 1 SA 1097 (A)).
24) Visser and Vorster 205.
25) Snyman 117.
26) Arnold 1985 3 SA 256 (C); Burchell and Hunt 239-40.
27) 117.
28) Shorter Oxford English Dictionary 1984.

concept 'skuld' but is a prerequisite for it.[29] An 'ontoerekeningsvatbare' person is one who cannot be held criminally accountable because he is unable to distinguish between right and wrong or even if able to do so is incapable of controlling his actions in conformity with his appreciation of the wrongfulness of his conduct or proposed conduct. It is, therefore, necessary, according to De Wet and Swanepoel, to establish that the accused was 'toerekeningsvatbaar' before any inquiry into his 'skuld' would be relevant.[30] Whether this view of the role and relevance of dolus and culpa is justified, falls outside the scope of the present discussion. What is relevant to this discussion is that 'skuld' is eventually reduced to a collective noun[31] comprising the two concepts dolus (intent) and culpa (negligence). It therefore means mens rea: thus, it may be asked why mens rea has to be referred to as 'skuld' especially as mens rea was in common use in both Afrikaans and English before the appearance of de Wet and Swanepoel's first edition.[32]

'Skuld' as used by de Wet and Swanepoel would appear to be an

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29) 1ed 70, 2ed 99, 3ed 106, 4ed 110.
30) ibid.
31) In all four editions of De Wet and Swanepoel.
32) Mens rea was the term commonly used by Afrikaans as well as English-speaking practitioners until fairly recently. Now there is a tendency for Afrikaans-speaking practitioners to use 'skuld'.

attempted imitation of the German word 'Schuld'[33] and the use of 'skuld' instead of mens rea is not only unnecessary but could give rise to, and indeed has given rise to, confusion.[34] One reason for this confusion is that 'Schuld' does not mean mens rea in the sense in which South African criminal lawyers have used this term. Furthermore, the wider and different meanings of the word 'Schuld' in German criminal legal theory and practice have become attached to mens rea as a result of the employment of the word 'skuld', without these wider and different meanings always being recognized as such.[35]

The key to the situation is provided by the use of the words 'verwytbaar', 'verwyt' and 'laakbaar'. 'Verwyt' denotes stronger condemnation than 'blame' and is more accurately translated into English as 'reproach'. The Afrikaans equivalent of blame is 'blaam' (noun) from which is derived the verb 'blameer'.

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33) 'Schuld' in German possibly has more natural meanings than 'skuld' in Afrikaans. An accused at a German trial could also say that he is 'schuldig' in other words guilty. Used in the sense of fault the word has at least the two meanings ascribed to 'skuld' in Theron supra. 46 (1) StGB commences with the statement that the 'Schuld' of the accused (Täter) shall be the basis for assessing punishment. There is a German translation of Dostoevsky's Crime and Punishment entitled Schuld und Sühne.

34) vide the confusion in Theron (supra) dispelled by Rabie CJ.

35) As used in De Wet and Swanepoel 'skuld' could probably be translated as mens rea. CR Snyman, more in line with recent developments in Germany than De Wet and Swanepoel translates it as mens rea (1985 SALJ 120,121), but obviously means blameworthiness in a wide sense. This is pointed out by du Plessis in 1985 SALJ 503, 505.

'Verwyt' has a harsher ring about it than 'blameer' just as 'reproach' has a harsher ring than 'blame'.[36]

Once mens rea is conjoined with 'laakbaarheid'[37] and 'verwytbaarheid'[38] intent or negligence is no longer investigated and viewed clinically with the sole object of determining whether the accused person falls to be convicted or not. A connotation of reprobation, reproof or moral censure is added which clouds the inquiry into guilt or innocence and ought only to be relevant after conviction when punishment is considered.

The idea of adding reprobation, reproof or censure as an ingredient of 'skuld' is of German origin. 'Schuld' is investigated by a German criminal court not only to arrive at a finding on the presence or absence of intent (Vorsatz) or negligence (Fahrlässigkeit) but also to arrive at an evaluation of the conduct of the accused with a view to sentence.[39] This is so because a

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36) Verklarende Afrikaanse Woordeboek by MSB Kritzinger, FJ Labuschagne and P de V Pienaar 1972, Shorter Oxford English Dictionary and Tweetalige Woordeboek (supra) may be consulted on the meanings of these words.

37) ie being deplorable, reprehensible, contemptible or despicable.

38) Being open to reproach.

39) The German trial is a one-phase trial. 'Schuld' being the basis of sentence (n33 supra) as well as an element of the crime. It is therefore inevitable that 'Schuld' would be judged normatively in both inquiries - they are simultaneous - and that the guilt as well as the sentence of the accused will be arrived at by considering what society expected of him in the circumstances.

German criminal trial is at one and the same time an inquiry into guilt or innocence as well as an inquiry into appropriate sentence. This has given rise to a theoretical development to the effect that intent or negligence belongs to the criminal act[40] and that the inquiry into 'Schuld' is a normative inquiry into the motives of the accused and other factors leading to his criminal conduct.[41]

3.3 Snyman

In 1981 Snyman's textbook on criminal law appeared in Afrikaans and in English in 1984.

In this publication the view that 'skuld' is more than mens rea because it embodies reproach or blameworthiness, is stated very clearly. The incongruities and self-contradictions involved in equating 'skuld' with mens rea become obvious, especially because of the use of mens rea in the English translation as the equivalent of the word 'skuld' as used in the Afrikaans original.

It would have facilitated clarity of expression had the author used either 'blameworthiness' or 'fault' as the equivalent of

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40) The so-called 'finale Handlungslehre' (vide CR Snyman 1979 SACC 4 and 136 and du Plessis 1984 SALJ 301) which is closely related to the normative fault concept (du Plessis op cit, 315-7).

41) du Plessis n39 supra; counsel's argument in Bailey 1983 3 SA 772 (A); Bergenthuin 297-300.

'skuld'.[42] He does suggest these terms as more appropriate, but whether 'fault' would be suitable in all respects is doubtful as 'fault' when used by criminal lawyers in Anglo-Saxon and Anglo-Saxon related countries means mens rea; in other words intent and/or negligence, or recklessness.[43]

In Snyman's discussion one encounters continuous confusion between a subjective and an objective approach to 'skuld', or mens rea as the author calls it in the English text, and the exposition would have been clearer had the author confined himself in one part of the discussion to the subjective elements of crime and in another to the subjective and objective factors relevant to sentence only.

To divide criminal conduct into physical and mental elements is, according to Snyman simplistic[44] or facile.[45] This statement is based on four considerations; namely, that the mental element is reflected in the definition of certain crimes; that some accused are acquitted in spite of the mental element of the crime in question being present in their actions; and that negligence or, at least, unconscious negligence, is not a mental state, but rather the total absence of a mental state. The fourth consideration is that the division of crimes into physical

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42) Snyman 112. Visser and Vorster use culpability as the equivalent of 'skuld' or mens rea 287ff.
43) vide Hosten et al 715.
44) Snyman (Strafreg) 123; Snyman 1985 SALJ 120, 123-4.
45) Snyman 113.

and mental components makes the defence of ignorance of the law too wide.[46)]

As an example of a crime in which a mental condition is part of the physical element of the crime, the author refers to assault with intent to do grievous bodily harm.[47)] The contention appears unfounded. All crimes except possibly crimes of strict liability[48)] require a mental state to accompany their physical commission. One could, therefore, if Snyman's objection is valid, argue that the requirement of a mental element in crime

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46) Snyman 114.

47) Snyman 65-6 amplified at 114. The view that a distinction cannot be drawn consistently between actus reus and mens rea as physical and mental elements of crime appears related to adherence to the German term 'Tatbestand' which is described as the 'description of the prohibition' (63-5). It is surely no valid objection to dividing crimes into actus reus and mens rea that German writers use 'Tatbestand' in the senses mentioned in the text and footnote referred to. The term 'description of the prohibition' immediately gives rise to the following question : What is prohibited? Killing as such or killing which is either intentional or negligent? It is submitted that the better view is that killing as such is prohibited, but that the person who commits it can only be convicted if he acts intentionally or negligently. To take the other view is to equate 'crime' or 'wrongdoing' with actus reus which is obviously what CR Snyman is doing in 1985 SALJ 120, 120-1. The discussion therein is evidence of the confusion that is caused by translating 'skuld' in the sense of blameworthiness with mens rea: vide du Plessis 1985 SALJ 503, 505. CR Snyman 1985 SALJ 120,123 firmly rejects the division between actus reus and mens rea. If by actus reus he means wrongdoing or crime (see 121 op cit) and by mens rea blameworthiness, the view is acceptable (vide du Plessis 1984 SALJ 301,320).

48) A person must at least be conscious and sane to commit a crime of strict liability, vide Glanville Williams GP 14.

renders the mental element somehow a component of the physical act or, at least, no longer purely psychological.[49] This is difficult to follow. Although the mens rea of certain crimes may be complex in that it consists of one intent coupled with another intent, it is in practice not difficult to determine what has to be proved in addition to the physical element of the crime and authorship on the part of the accused in order to obtain a conviction. An example is housebreaking with intent to commit a crime. If a housebreaking by the accused is to be established by the prosecution, it is necessary for the prosecution to prove that the accused broke into the house intentionally and also that when breaking in he had the additional intent to commit a crime on the premises broken into.[50] The complexity of the intent, which is more apparent than real, is surely no ground for saying that the intent is not psychological, and should not be sought in the mind of the accused, but has somehow become part of the actus reus. The same applies to the example Snyman quotes; namely, assault with intent to do grievous bodily harm.[51] He states

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49) In this connection one must think in terms of final-conduct and normative fault. In terms of the final-conduct doctrine intent belongs with the act and in terms of the normative fault doctrine fault is not psychological; vide du Plessis 1984 SALJ 309; CR Snyman 1985 SALJ 120 and du Plessis 1985 SALJ 503.

50) Hunt (707) defines housebreaking with intent to commit a crime as follows: 'Housebreaking with intent to commit a crime consists in unlawfully breaking, and entering premises with intent to commit that crime.'

51) Hunt (467-490) defines assault with intent to do grievous bodily harm as 'Intentionally applying force to the person of another, committed with intent to do grievous bodily harm'. Snyman (65) states that such a crime renders the division into actus reus and mens rea unacceptable.

that the mens rea is complicated, because the physical element (namely assault) has to be accompanied not only by the intent to assault,[52] in other words to apply force, but also by a further intent to do grievous bodily harm. This difficulty is virtually non-existent in practice: the means employed, the nature of the attack and the harm inflicted usually establish the intent without any difficulty. Why a crime of this type should cause one to give up the view that mens rea is in the mind of the accused, is difficult to understand. It appears to have resulted from a tendency imported from Germany to be too technical about the nature of a criminal act[53] in the physical sense. If we regard the physical act as that part of the charge or indictment which alleges what the accused did in the physical sense and mens rea as the intent which the prosecutor also alleges and sets out to prove against the accused, the matter is not very complicated. Snyman is clearly confusing the German concepts 'Tatbestand', 'Unrecht' and 'Handlung' with our terms actus reus and 'crime'. Consequently, he also confuses the German concept 'Schuld' with our concept mens rea.[54]

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52) Snyman 114 n112.
53) vide references in n40 supra.
54) vide references in n47 supra. 'Tatbestand' means the crime with all related circumstances relevant to sentence as well as conviction. 'Unrecht' means wrongdoing ie crime in the sense of all the elements to be proved for a conviction. 'Handlung' meant the physical act but has come to mean the physical act including intent or negligence and 'Schuld' which meant intent or negligence has come to mean the blameworthiness attached to the crime. These developments are to be found in discussions on the 'finale Handlungslehre' and normative fault eg Bertelsman 1974 AJ 34 and Jescheck 1975 CILSA 112, CR Snyman 1979 SACC 3 and 136.

Snyman also states that in many cases mens rea has to be present before there is unlawfulness.[55] In other words the formal description or definition of the crime contains mental as well as physical elements. This is undoubtedly so, but why it should lead to the discarding of the view that mens rea is a mental, subjective or psychological element of crime, remains an unanswered question. It is submitted that this is due to confusion in attempting to accommodate the the German concept 'Unrecht' in our law. Technically, one could possibly say that the physical element of a crime is not in itself proved to be unlawful unless mens rea is also proved. The unlawful killing of a human being is neither murder nor culpable homicide and therefore not a crime unless intent to kill or negligence is also proved. The use of the word 'unlawful' in the previous sentence is, therefore, possibly not appropriate, because a killing cannot be unlawful unless it is a crime. This reasoning is unpractical.[56] In most cases where a murder prosecution fails notwithstanding proof of a killing by the accused, it is clear that the killing was unlawful and that the accused was acquitted because of the prosecution's inability to prove mens rea. This appears to have been the case in Stellmacher.[57] Technically, one could say

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55) 114 and 70.
56) vide n47 supra.
57) 1983 2 SA 181 (SWA). After a day of fasting the accused drank too much in too short a time. He lapsed into a state of automatism or 'ontoerekeningsvatbaarheid' or both and ran amuck in a bar, firing several shots from a pistol. He wounded one man and killed another. He was acquitted on all charges on the ground of 'ontoerekeningsvatbaarheid'. He had no mens rea in addition to lacking

that on the court's findings of fact: namely, that the accused was so drunk as not to know what he was doing, the killing was pure accident and therefore not unlawful. But a more practical view would be that the killing was unlawful, but the killer could not be convicted because his mens rea or criminal capacity could not be proved.[58] The manner in which the proven facts are analysed is really immaterial. The accused escaped conviction because of what could not be proved and that was the mens rea or the subjective element of crime. The matter is put clearly, plainly, briefly and to the point by Hosten et al who say that: '... the question of fault cannot be answered without an investigation into the state of mind with which an act is carried out'.[59]

If the presence of mens rea in the formal definition of crime, or the necessity of mens rea being present to render conduct unlawful, clashes with the view that mens rea is the equivalent of 'skuld', the reason obviously is that mens rea is not the equivalent of 'skuld'. It surely cannot be seriously contended that crimes have no subjective element or that mens rea is not

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criminal capacity, but it cannot be said that the killing was lawful or not unlawful. For comment on this decision vide du Plessis 1984 THRHR 98 and CR Snyman 1985 SALJ 240, 243.

58) It would also seem that the accused could have been aquitted on the ground that he had not acted, as he had lapsed into a state of automatism (vide Snyman 40 n8).

59) 715.

the mental element of crime. These views could only become acceptable if we were to adopt a totally behavioristic approach to human conduct in general and crimes in particular.[60)]

A further objection to the subjective approach to mens rea or 'skuld' raised by Snyman[61)] is that a child under seven or a mentally ill or mentally defective person could have the intent to kill, but that such a person could not be convicted of murder because of his age or mental illness or defect; in other words because of 'ontoerekeningsvatbaarheid'. It is argued that the view that mens rea is a subjective or phychological element of crime is without substance because the subjective or psychological element; namely, intent, is present but the person concerned is nevertheless not convicted.

It is respectfully submitted that this argument is unsound. It is too readily assumed that 'intent' formed in a diseased or defective mind is intent.[62)] Once an unlawful killing and authorship plus intent to kill have been proved, conviction is not automatic. More than this has to be established for conviction. Assuming that a killing by a child under seven or a

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60) vide du Plessis 1984 SALJ 301, 315.
61) 113-4; and is also mentioned by De Wet and Swanepoel 110, criticized by Badenhorst 121-2.
62) vide du Plessis 1985 SALJ 503, 509, cf Badenhorst's criticism that De Wet and Swanepoel contradict themselves by referring to 'skuld' in the case of persons who are 'ontoerekeningsvatbaar' (Badenhorst loc cit n61 supra).

mentally ill or defective person has been proved, a conviction cannot follow because the defences of youth or insanity can be successfully raised. If these defences negative mens rea then the position is the same as it would be if they are treated as negativing 'skuld'.[63] The latter is the view expressed in Snyman. The author states that 'toerekeningsvatbaarheid' is not an ingredient of 'skuld' but a prerequisite for 'skuld'.[64]

The argument does, however, go deeper than that. What is also involved is whether youth and mental illness or defect; in other words, 'ontoerekeningsvatbaarheid', are defences which negative mens rea or whether they are special defences which, if successful, result in an acquittal irrespective of what else may have been proved against or established concerning the accused.

It is submitted that the better view is not that these defences negative mens rea. Treatment of these two defences as standing on their own quite apart from the question of the presence or

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63) One could argue; a) That the accused is not guilty because being mentally ill or defective, he could not form an intent (ie act knowingly) and therefore had no mens rea or b) that the accused is not guilty because he was mentally diseased or mentally defective as a result of which he lacked criminal capacity. This latter condition precludes 'skuld' and he could therefore not be blamed notwithstanding his intent. The latter is a more roundabout way of arriving at the same result as the former. Both really mean that an 'intent' formed in a diseased mind is not an 'intent' for the purposes of the criminal law in other words it is not 'skuld'.

64) 117.

absence of mens rea, leads by a shorter route to the same practical result as the view that they negative mens rea. The latter approach has the merit of avoiding sterile discussion on whether a child under seven or a mentally diseased or defective person can form a criminal intent.[65]

On the other hand there is much to be said for the view that youth or mental illness or defect negatives mens rea as it is doubtful whether a child of tender years or a mentally ill or defective person falling within the ambit of Section 78 (1) of the Criminal Procedure Act, can be said to have an 'intent' or to be negligent for the purpose of fixing criminal liability.[66] Put somewhat colloquially, the question is whether the 'intent' of a young child or mentally ill or defective person 'counts' as an intent for a criminal conviction. Does 'intent' not mean 'intent' formed in the mind of a sane person at least older than seven years? Similar considerations could be raised on the question whether such a person could be held to be negligent. The view that negligence should be regarded as conduct runs into more difficulty when dealing with children and mentally ill or defective persons than does the view that negligences is a state of mind. If negligence is not mens rea but conduct alone,[67]

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65) vide Burchell and Hunt 239-41.
66) ibid.
67) As was decided in Ngubane 1985 3 SA 77 (A); it is an open question whether stare decisis applies to the description given to a phenomenon (in this case negligence) by a court.

surely the conduct of a young child or a mentally ill or deficient person can, objectively viewed, be as negligent as that of a sane adult. It is only when one views the individual concerned subjectively that one realises that on the one hand one is dealing with an immature mind of which reasonable care cannot be expected,[68] and on the other hand an unsound mind concerning which such an expectation can also not be entertained.

Concerning the accused who is acquitted in terms of Section 78(6) of the Criminal Procedure Act[69] one could further argue that his intent is not an intent that can be regarded as 'laakbaar' or relevant from the point of view of deciding on his guilt, because he is unable to appreciate the wrongfulness of his conduct or to act in accordance with such an appreciation. An intent formed in such a mind is an 'intent' by courtesy of language only. It is not an intent for the purpose of the criminal law: the person forming the intent does not know what he is doing or is unable to control himself because of mental illness or defect. In the latter case, there can hardly be any talk of intent since the accused is the victim of determinism caused by his mental condition. The argument that mens rea treated as a

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68) It is submitted that this simple consideration would have prevented the patent injustice to children occasioned by Jones NO v SANTAM BPK 1965 2 SA 542 (A) corrected somewhat artificially in Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A); vide Boberg 680ff; I 1986 SA 112 (O).

69) No 51 of 1977.

state of mind cannot account for the acquittal of children and mentally ill or defective persons is therefore without substance.

3.3.1 Snyman's views of the Normative fault doctrine

Snyman refers to the traditional approach that mens rea consists of intent or negligence as the psychological concept of mens rea and for the four reasons discussed above,[1] he states that it ought to be abandoned in favour of the normative concept of mens rea. A further reason given in Snyman for preferring the normative concept of mens rea is that it deals more adequately with the defence of ignorance of the law.[2]

The normative concept of mens rea is stated in Snyman[3] as follows :

> '...mens rea is simply the blameworthiness of the unlawful act. It is a negative judgment of the act. The blame is based on the following three considerations : a) X knew or could have known the circumstances which made his act correspond to the description of the prohibition and rendered it unlawful (awareness of unlawfulness). b) He could have acted in accordance with the law (he was not,

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1) supra 40-1.
2) 114.
3) 114. It is interesting to note that by implication fault is excluded from the 'description of the prohibition'.

for example, mentally ill - this is the requirement of criminal responsibility). c) He nevertheless decided to proceed with his act, thereby contravening the law (the decision to act, or intention').

At first blush this statement of a concept of mens rea appears to have nothing at all in common with what has traditionally been regarded as mens rea, in other words intention or negligence, in our law. Bearing in mind that in terms of De Blom[4] ignorance of the law has become a defence, one may argue that ignorance of the law negatives mens rea and that point a) in Snyman's description does refer to mens rea as traditionally understood.

A broader view should, however, be taken of the statement that the accused knew that his conduct conformed with the description of the prohibition: It is not only a question of his knowing the law, but of his knowing the circumstances in terms of which his conduct amounts to breaking the law.[5]

An objective as well as a subjective test could be envisaged in the sentence marked a). If the accused did not know the circumstances the question arises: could he have known them? It is then a matter of whether he made a reasonable or unreasonable mistake of fact. Similar considerations would apply to a mistake

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4) 1977 3 SA 513 (A).
5) cf Botha 308. The accused is making neither a mistake of fact nor of law.

of law.[6]

The ingredient or element of the normative concept of mens rea marked b) is 'toerekeningsvatbaarheid'[7] and the ingredient or element marked c) appears to refer to a decision to act, prior to the act taking place. Snyman calls this the decision to act or intention. This cannot be intent as understood in the traditional view that intent is a form of mens rea. Intent in this latter sense is a much wider concept than a decision to act. It would include knowledge of the relevant facts, insight into the criminal result (for instance, the death of a human being) that would or could follow directly or indirectly but inevitably, or indirectly but possibly, from the conduct of the accused; consciousness on the part of the accused of what he is doing, and a failure on his part to desist from the conduct on which he has decided. This leads to the conclusion that calling 'skuld' mens rea in the context of normative fault is confusing.[8] Mens rea is subjective. This is clearly indicated by the use of the Latin word mens. But the factors relevant to normative fault as explained in Snyman are subjective and objective.[9] Fault in this sense is a negative value judgment passed on the conduct

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6) cf Burchell and Hunt 160ff, where mistake of law and mistake of fact are treated in identical terms.

7) cf Snyman (Strafreg) 124.

8) JMT Labuschagne 1985 DJ 381, 383 comments on the altered meaning given to 'skuld' in the normative fault context.

9) Rabie 1985 THRHR 332, 343 concludes that the views expressed by Snyman could result in negligence being the only form of 'skuld' recognized by him.

of the accused by his judges. More factors than the state of mind of the accused when committing the act complained of are taken into account than dolus or culpa.

This is clear from the rest of the discussion in Snyman.[10] Psychological fault[11] is discussed in juxtaposition to normative fault and rejected in favour of the latter.

The reasoning is that psychological fault consists of either dolus or culpa and nothing besides. This cannot explain why a child of five or a mentally diseased or mentally defective person who can nevertheless intend to commit a crime, cannot be convicted.

There are a number of answers to this consideration beside the answer rejected by Snyman that such a child or such a person cannot form an intent.[12]

The most obvious answer is that an intent formed in the immature

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10) 114-6.

11) Snyman regards psychological fault as the view that fault consists of dolus or culpa. Another view of psychological fault is that the motives leading to the decision of the accused to commit a crime are considered in the light of their effect on the subjective make-up of the accused. This is then contrasted with normative fault in terms of which the motives of the accused are considered in the light of what society expects of him in the circumstances; (vide Bergenthuin 198; Bailey supra 776-7 (counsel's argument); du Plessis 1984 SALJ 301, 316).

12) 113-4.

mind of a child or the diseased mind of a mentally ill or defective person is not regarded as an intent for the purposes of the criminal law. The mind in which the intent was formed is too immature, ill or defective to appreciate the implications of what it 'intends' to do and therefore the intent is not thrown into the scales of justice against the accused. This could be regarded as a normative judgment; in other words, a judgment to the effect that it can not be expected of the child or the mentally ill or defective person not to form such an intent and that the intent is therefore not fault in the normative sense. This latter argument is really a psychological theory of fault presented as if it were not psychological but normative. Thus, when one views the accused psychologically, one decides that subjectively he lacks certain psychological attributes such as maturity, mental normality or health, and that this deficiency renders his intent nugatory. This is not very far from saying that because of immaturity of mind or mental illness or defect the accused was unable to form a (criminal) intent.

There is the further consideration that Snyman[13] rejects psychological fault because it is only a necessary, not a sufficient, ground for conviction.[14] This no one has ever denied. Notwithstanding proof of authorship, actus reus and intent or negligence, an accused may still be acquitted. The

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13) ibid and Snyman 1985 SALJ 120, 124.
14) vide du Plessis 1985 SALJ 503, 509; cf ATH Smith On Actus Reus and Mens Rea in Reshaping the Criminal Law ed by PR Glazebrook (95 esp 104-5).

obvious answer is that, assuming the accused to be mature, sober and sane,[15] his conduct must have been justified in the circumstances. The most clearly relevant defence in this connection is duress. The current view is that the defence of necessity or duress if successfully raised, negatives unlawfulness. There is also, however, the view that it negatives fault.[16] If an accused acted sanely and intentionally, but under duress and is excused because he lacked fault, then obviously fault has a wider meaning than intention. This is really no more than a matter of interpretation or systematisation. There are difficulties involved in regarding the defence of duress as excluding fault just as much as there are difficulties involved in regarding it as excluding unlawfulness.[17] If it excludes fault notwithstanding proof of intent, fault clearly does not mean mens rea. The objection to extending the meaning of fault beyond mens rea is that it becomes vague and confused with unlawfulness.[18]

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15) Mental maturity, sobriety and sanity are all psychological factors; (cf Arnold 1985 3 SA 256 (C)). If temporary 'insanity' due to extreme provocation (Arnold) is included the number of psychological factors affecting guilt appears to be exhausted, except that duress of an extreme form could also cause a person to become temporarily insane.

16) CR Snyman 1985 SALJ 120, 124-5.

17) vide C R Snyman 1985 SALJ, 120, 124-5; du Plessis 1985 SALJ 503, 509-10; counsel's argument (774-89) in Bailey supra; de Wet and Swanepoel 81-92.

18) vide CR Snyman 1985 SALJ 120, 126-7. It seems clear that writers who accept normative fault are compelled to widen the concept of fault. Writers who accept psychological fault would include the widened area alluded to by Snyman in unlawfulness or in factors affecting sentence only (vide du Plessis 1984 SALJ 301, 315-21 and 1985 SALJ 503, 506-7) This latter view gains support from Bailey supra and Theron 1984 2 SA 868 (A).

The better view, it is submitted, is that duress negatives unlawfulness[19] unless it has a mentally deranging effect on the accused and because of this, a psychological factor, negatives mens rea.

As far as mens rea in the shape of dolus is concerned 'skuld' in the normative sense is clearly not mens rea.

Negligence, regarded as an attribute of conduct and not as a state of mind in our criminal law since Ngubane,[20] would now probably qualify as normative, rather than psychological, fault. Snyman[21] stresses this point and it is in conformity with the views of writers on criminal law[22] as well as the law of delict.[23]

In so far as negligence is concerned with what an accused ought to have foreseen or how an accused ought to have acted or reacted, it is a form of normative fault. It is a value judgment passed from outside on the accused and his conduct. In terms of psychological fault the accused is regarded as having acted with mens rea in that he did not advert to certain foreseeable

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19) Burchell and Hunt 347; Snyman 92; De Wet and Swanepoel 92.
20) 1985 3 SA 677 (A).
21) 114.
22) Burchell and Hunt 194-6; Hunt 398-400; Morkel 192-7.
23) Boberg 269; Van der Walt 65; Macintosh and Scoble 8; McKerron 25.

consequences of his conduct. This state of mind although negative is still a state of mind, and it is condemned by society. To view negligence as conduct only, is to pass the same judgment without the added consideration that the negligent conduct has resulted from a careless state of mind.

Snyman[24] appears to regard 'toerekeningsvatbaarheid' as a prerequisite of 'skuld', but seems to be self-contradictory in this connection. In the exposition of normative fault[25] it is the second ingredient of fault that is considered 'the requirement of mental responsibility'. In a later passage it is unequivocally stated that criminal responsibility is 'an indispensable prerequisite for mens rea'.[26]

The only explanation for this contradiction is that whereas criminal responsibility is a prerequisite for psychological fault, it is an ingredient of normative fault. This is borne out by the following passage from an earlier section of the book;[27] namely,

> 'In my opinion it is preferable to regard all the subjective elements of the crime as forming part of the description of the prohibition,[28] and then to adopt and

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24) 117.
25) 114.
26) 118.
27) 66.
28) Compared with the ingredients of normative fault listed on 114 this is a clear contradiction vide n3 supra.

employ a normative concept of mens rea (according to which mens rea is merely a reproach) but this is, of course, not the classification employed by our courts'.

Nevertheless a self-contradictory element remains. Criminal responsibility ('toerekeningsvatbaarheid') must surely be subjective. If it is part of normative fault then 'all the subjective elements of the crime' have not been kept distinct from that form of fault. To make of mens rea 'merely a reproach' is unacceptable. This makes mens rea a concept without content.[29)]

Criminals are reproached or blamed for their conduct, but as has been pointed out by JC de Wet,[30)] that does not make reproach an element of crime. It is a consequence of crime; in other words, a consequence visited in the shape of punishment on a person against whom authorship, actus reus and mens rea have been established, and against whom a verdict of 'guilty' has been formally recorded.[31)]

The view that mens rea is a reproach, or that 'skuld' is 'verwyt' has its origin in German Criminal Legal theory and the German one-phase criminal trial. According to one of the earliest

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29) Or as it is said in German: 'Ein blutarmes Gespenst'.
30) 1970 THRHR 68, 72.
31) It cannot be over emphasised that this view has been very strongly supported by the Appellate Division in Theron supra.

German publications[32] in which a normative concept of 'skuld' is expounded it is evident that the author is writing mainly about factors affecting sentence. If one takes the view that 'skuld' is not only an element of crime but also the basis of punishment, it becomes plain why the remarkable theory that mens rea[33] is not in the mind of the accused but in the minds of his judges, came into being. Naturally the reproach to be levelled at an accused in respect of his proven criminal conduct is in the mind of the judges who weigh up all the evidence placed before them not only to arrive at a conviction or an acquittal, but in the event of the former, also at a proper sentence.

In a one-phase trial, the two types of 'skuld' discussed in Theron[34] are investigated in one inquiry and pronounced upon simultaneously at the end of the inquiry.

It is not possible to analyse the proceedings at a German criminal trial in such a way as to say: 'at this stage the accused would have been convicted in a South African trial' and 'at this stage sentence would be considered separately in a South African trial'. However, a rough division can be attempted. Guidance is to be found in Snyman's statement [35] that the German criminal

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32) Über den Aufbau des Schuldbegriffs by Reinhard Frank (1907).
33) Obviously in the sense of blameworthiness and not in the sense of dolus.
34) supra 879 B-H.
35) 1985 SALJ 120, 121.

legal theorist Hans Welzel did distinguish between 'Unrecht' and 'Schuld' although he regarded intent as being part of the criminal act and not part of the 'Schuld' attached to that act. 'Unrecht' means 'wrong' (noun) or 'wrongdoing'[36] and 'Schuld' in the sense used by Welzel means 'blameworthiness'.[37] If 'crime' is substituted for 'wrongdoing' the puzzling features disappear.

Welzel insisted that intent belonged to the act (Handlung) and by the same token to the 'Unrecht' (crime).[38] Consequently what his theory really amounted to translated into South African procedural terms, was that intent is one of the elements that have to be proved in order to establish a crime[39] and once this has been done the blameworthiness of the proven crime is investigated.[40] It is submitted that the astute and interesting investigations of Welzel would have been unnecessary if the German criminal trial were a two-phase trial system and 'wrongdoing' and 'blameworthiness' were ab initio procedurally separated.[41]

It would be an over-simplification to regard what has just been

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36) ibid.
37) du Plessis 1985 SALJ 503, 504-5.
38) CR Snyman 1985 SALJ 120, 121.
39) Or 'Unrecht' (wrongdoing).
40) du Plessis 1984 SALJ 301, 320.
41) In other words the confusion dispelled from our law by Theron supra is not so readily definable in German law because of the one-phase German criminal trial.

written as the last word on the subject. One of the factors taken into account when investigating sentence at our criminal trials is whether the accused acted unreasonably or in conflict with what society expected of him. When crimes of negligence are under consideration this is investigated in order to convict or acquit. This brings one back to the view that negligence or unreasonable conduct is a normative concept. It cannot be otherwise. Reasonableness is a statement of a general objective standard of behaviour. In other words the requirement that conduct should be reasonable is normative. In this sense the fault of the accused is a judgment in the mind of his accusers.

Snyman [42] does not appear to be prepared to accept that blameworthiness should be investigated after, and not before, conviction. It, therefore, becomes a very pertinent question : what remains of the subjective element of crime if intent and negligence are included with the physical element in the unitary concept 'act' which, separated from blame, is included in 'wrongdoing'?

The answer seems to be that one divides the subjective element into intention or volition on the one hand and knowledge or awareness of unlawfulness on the other.[43] Volition or

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42) 1985 SALJ 120, 125-7.
43) Snyman 1979 SACC 3 and 136, 136 ff.
44) 1985 SALJ 120, 127.

intention which is viewed as natural or colourless is part of the act or conduct and knowledge or awareness of unlawfulness is mens rea or fault. Knowledge of unlawfulness in this context means that the accused is making neither a mistake of fact nor of law.

This is, however, an artificial demarcation and it is difficult to understand why a writer who is so opposed to treating the objective and subjective elements of crime as separate,[44] can advocate a division into parts, of the subjective element. Surely the latter line of demarcation must be even more difficult to draw than a line of demarcation between that which is physical and that which is mental. Whether knowledge of unlawfulness is all that remains of mens rea in Snyman's view of normative fault is not clear. He states that normative fault is a reproach or negative value judgment of the act, and also states, (perhaps not in so many words, but the purport is clear), that normative fault or normative mens rea is awareness of unlawfulness.[45]

The statements are not reconcilable except in the limited sphere of ignorance of the law. Snyman[46] is of the opinion that ignorance or mistake of law is not a defence that should on being established automatically negative fault. It would negative psychological fault, but not necessarily normative fault.[47]

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45) 1979 SACC 136, 138 ff.
46) 178-80.
47) Normative fault being an objective evaluation of how the accused ought to have behaved and what he ought to have known, all fault becomes negligence; vide Rabie 1985 THRHR 332, 343.

An enquiry directed at determining whether normative fault is present would centre around the question whether the accused ought to have known the law and not whether as a fact he did know the law. Actual ignorance of the law would not negative dolus if it were grossly unreasonable. This was the finding of Coetzee J in Barnard,[48] the learned judge relying on Snyman (Strafreg) as authority.

Bearing in mind that Snyman's views on mistake of law have been demonstrated by Rabie to lead inevitably to the conclusion that the only form of blameworthiness is negligence[49] one hopes that negligent but bona fide mistakes of fact will not on reasoning similar to that adopted in Barnard lead to convictions of murder. This would take the law back to the view taken by the trial court in Mbombela.[50] The trial judge instructed the jury that Mbombela's mistaken belief that he was killing a spiritual entity and not a human being would not absolve him from murder if it were an unreasonable mistake. This was the expression of a normative concept of fault. No matter whether it was culpa psychologically, the mens rea of the accused would be normatively adjudged dolus.

3.4 NJ van der Merwe

The normative fault doctrine has found favour with writers other

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48) supra 436 B-G.
49) vide n47 supra.
50) 1933 AD 269.

than CR Snyman.[1] Two of them will be considered briefly, namely, NJ van der Merwe[2] and DA Botha.

The view expressed in Van der Merwe and Olivier is that 'skuld' is a reproach. It cannot be a state of mind or disposition as negligence, which is a form of 'skuld', is not a state of mind or disposition.[3]

NJ van der Merwe discussed his concept 'skuld' in an article in the South African Law Journal.[4] Here he advanced a normative

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1) Bergenthuin (thesis); Bergenthuin 1986 DJ 98; Oosthuizen 1985 THRHR 407; Kok 1982 SACC 27.

2) NJ van der Merwe discusses the doctrine in 'Die Onregmatige Daad in die Suid-Afrikaanse Reg' co-authored by PJJ Olivier.

3) Van der Merwe and Olivier 110. Professor JC de Wet attacked the view that 'skuld' is a reproach on the basis that it is the object of a reproach (n30 supra). Van der Merwe and Olivier's reply (110 n82) is to the effect that Professor de Wet does not define what he means by 'skuld' in the sense of its being the object of a reproach. It is then either an insubstantial 'something' or the deplorable disposition (laakbare gesindheid) described in De Wet and Swanepoel (3ed 99 and 136, 4ed 103). The authors repeat the criticism that 'skuld' cannot be a disposition, it is a reproach. Footnore 82 on page 110 of van der Merwe and Olivier is very interesting. It demonstrates that De Wet and Swanepoel's definition of 'skuld' is tautologous and it indicates that van der Merwe and Olivier's own use of the term 'skuld' as reproach or blameworthiness, is meaningless. Reproach as Professor JC de Wet points out (n30 supra) is not an element of crime, it is the disposition of society towards the person who has committed a crime. Thus, in one footnore there is a discussion of the term 'skuld' which makes it doubtful whether the term is worth retaining. The footnote summarises an unmistakeable clash between the normative and psychological approaches to fault.

4) 1976 SALJ 280. The article is concerned with 'skuld' in the Criminal Law.

concept of fault without reference to any German writers. It is evident from the article that the author regards 'skuld' as reproach and that he fails to distinguish between defences on the merits and mitigating factors.[5] All-in-all this theory of criminal fault cannot be regarded as workable. It might have some practical function in a German one-phase trial, but this is doubtful. The author says fault is a reproach but does not say what gives rise to the reproach.[6]

3.5 D A Botha

In four articles[1] D A Botha advances a view of 'skuld' which seems to be aimed at removing dolus and culpa from the field of mens rea and leaving knowledge or awareness of unlawfulness as the sole subjective element of crime. Without referring to the final-conduct doctrine of the German theorist Hans Welzel, the author proposes a view of mens rea and criminal conduct that

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5) The article contains some startling statements concerning 'skuld', inter alia that conduct subsequent to the crime could negative fault and lead to an acquittal. On 288 (n45) it is made clear that 'subsequent conduct' is not to be viewed as relevant to sentence only.

6) vide du Plessis 1984 SALJ 301, 318-9.

1) 1975 SALJ 280, 1975 SALJ 380, 1977 SALJ 280, 1980 SALJ 277. The views expressed and arguments advanced in these four articles are largely based on views expressed and arguments advanced in the author's unpublished doctoral thesis Wederregtelikheidsbewussyn in die Strafeg University of Pretoria 1973. The articles are, however, to be preferred in some respects, the latter two being post De Blom 1977 3 SA 513 (A) in which ignorance of the law was recognized as a defence. The exposition in the thesis is, however, not to be ignored as it is in greater depth.

comes very close to the views of Welzel.[2)]

If one considers Snyman's[3)] exposition of Welzel's doctrine it appears that, shorn of all metaphysical and philosophical embellishment, the doctrine amounts to this; namely, a criminal act should not be regarded as separate from the intention which accompanies it. This intention which accompanies an act is, however, not to be regarded as dolus but as 'natural' or 'ordinary' or 'traditional' intention. Such intention is, on Snyman's analysis, one part of dolus which has a 'dual character'. One of the two components is 'intention' which is colourless (so one presumes) and the other is knowledge of unlawfulness. In terms of Welzel's theory, as interpreted by Snyman, only 'knowledge of unlawfulness' belongs to fault, while the rest of 'intention' belongs with the act.[4)]

Botha divides intention into two parts in much the same way, and concludes that intention belongs with the act, and knowledge of unlawfulness is the sole component of fault or 'skuld'. His exposition is a little difficult to follow at first,[5)] but once the reader realizes that mens rea as used by the author means fault, 'skuld' or blameworthiness, the difficulty can be over

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2) Welzel's views are to the effect that intent and negligence belong with the act (Handlung) and should not be treated as part of fault (Schuld).
3) 1979 SACC 3 and 136. Vide also du Plessis 1984 SALJ 301.
4) 1979 SACC 3 and 136, 138ff.
5) He expresses himself with greater clarity in his Thesis 288ff.

come. Confusion which may be caused by prior reading of the articles written in English, is dispelled by the opinion expressed in the very first paragraph of the 1980 article[6] that dolus should be viewed as not encompassing intent (opset).[7]

The author analyses mens rea in an unusual way and comes to the conclusion that intent has no function at all in formally defined crimes like, for example, rape[8] and incest.[9] He arrives at this conclusion, after considering certain cases on the possession of dagga.[10]

It appears from the discussion[11] however, that the author may have confused knowledge of the fact that a substance is a forbidden substance with knowledge of the statutory provision which makes the substance in question forbidden. Moyage[12] was decided on the question whether the accused knew that what they were conveying was dagga, and not on their knowledge of the statutory measure prohibiting its conveyance. It must be borne in mind that the decision as well as the article and Botha's thesis were written before ignorance or mistake of law was made a defence on the merits in De Blom.[13]

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6) 1980 SALJ 380.
7) cf Botha 288.
8) 1975 SALJ 380, 383.
9) 1980 SALJ 380, 380.
10) Moyage 1958 3 SA 400 (A); Ngwenya 1979 2 SA 96 (A).
11) 1980 SALJ 380, 387 ff.
12) supra.
13) supra.

The main thrust of the argument in 'What Precisely Constitutes Mens Rea'[14] is that intention is only a requirement of 'result' crimes such as murder and that it plays no part in formally defined[15] crimes.[16] In the case of these crimes the volition of the accused cannot be described as intent, it is at most consciousness that he is acting and as such belongs with the act. Mens rea or fault consists in knowing that the act is unlawful.

Thus the statement is made that 'it should be obvious that intention in its dictionary meaning, plays no role in rape'.[17]

It is difficult to agree with this statement. By 'intention in its dictionary meaning' the author means 'having an objective'. This statement should be read with the analysis in Botha's thesis[18] in which the author explains that it has been a mistake to translate the Latin word dolus as 'opset' or 'intent' or 'intention'. He rejects the view that intent is a legal term of art refined over centuries which need not be a dictionary trans-

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14) 1975 SALJ 380.
15) A 'result crime' is a crime in which a result eg the death of a human being is forbidden no matter how it is brought about. A formally defined crime is a crime in which the criminal act is formally defined eg to be in a forbidden place or to be in possession of a forbidden substance.
16) This argument is treated in greater depth in Botha 288 ff.
17) 1975 SALJ 380, 383. What the author is saying, possibly without realising it, is that rape is a crime of basic intent, not specific or ulterior intent; vide Glanville Williams (Textbook) 117-8.
18) 288 ff.

lation of dolus.[19] It is difficult to agree: anyone who uses intention in the senses of dolus directus, dolus indirectus and dolus eventualis is clearly not using the word in its dictionary sense. It is a legal term of art the ultimate basis of which in our law, is knowledge of what one is doing or foresight of the consequences of one's conduct.[20]

The objective a man may have in having intercourse with a woman without her consent is irrelevant from the point of view of his guilt or innocence. If he has intercourse with her knowing that she is a woman, that she is alive and that she does not consent, he has the 'intent' to commit rape. Botha states that knowledge of unlawfulness is the only ingredient of the mens rea of rape. Closely considered this statement says nothing new. By knowledge of unlawfulness he means that the accused is not making a mistake of fact, or a mistake of law. This has always been the case but why it should now be used to bolster the argument that intention belongs to the act and is not fault or 'skuld' is not clear.

Reading the four articles mentioned together with the relevant passages[21] in Botha one can but conclude that Botha is advocating the adoption of a theory or doctrine of normative fault identical to that favoured by C R Snyman.[22]

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19) Botha 289-90.
20) Knowing that the conduct or the results of the proposed conduct is or are unlawful is inextricably interwoven with this knowledge.
21) 288 ff.
22) ie the normative fault theory and the final-conduct theory.

3.6 Concluding remarks on 'Skuld'

It is worth noting that in the fourth and latest edition[23] of De Wet and Swanepoel the normative fault doctrine is not mentioned in the index. It is nowhere referred to by name, but the discussion of mistake of law[24] and the various German theories relevant to this topic has a strong bearing on normative fault. De Wet and Swanepoel could hardly be expected to accept this doctrine as their views of ignorance of the law as a defence stem from the German theory opposite to that espoused by Snyman.[25] De Wet and Swanepoel also appear sceptical of Welzel's 'final-conduct' doctrine.[26] Rejection of this doctrine almost inevitably leads to rejection of the normative fault doctrine.

In a brief article[27] JMT Labuschagne discusses the normative fault doctrine and, although he finds some good in it,[28] seems on the whole to reject it. He is critical of the German orientated legally scientific (regswetenskaplike) approach to the criminal law on the basis that it is uneconomical and results in a waste of intellectual energy.[29]

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23) 1985, prepared by Professor JC de Wet.
24) 149.
25) 178-81.
26) 137-8, n178.
27) 1985 DJ 381.
28) On 384 he holds out the hope that the normative fault concept may be the first in a series of developments that could lead to the disintegration of the dogmatics of 'Strafrechtswissenschaft'.
29) 381.

In other words, it represents what one may call a disproportionate preponderance of the means over the end.

One of his concluding remarks is worth quoting in full; namely,

> 'Kenmerkend van die ontwikkeling is dat die begrip 'skuld' behou word, maar daar word 'n ander inhoud daaraan gegee. Die rede hiervoor is geleë in die feit dat sekere dogmadraende begrippe gepostuleer word waardeur en waarbinne die strafreg moet funksioneer. Dit is 'n inherente gebrek in alle dogmatiese modelle wat insig belemmer en ontwikkeling vertraag.'[30]

As this passage indicates, the word 'skuld' has had its meaning changed. From being the equivalent of mens rea (in other words dolus and culpa in De Wet and Swanepoel) it has come to mean 'reproach' or 'blameworthiness' or 'knowledge of unlawfulness' or 'culpability' in the publications of CR Snyman, NJ van der Merwe and DA Botha.

To use 'skuld' as the equivalent of mens rea as is done in Snyman and in Botha's articles written in English is confusing. It is

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30) 'Characteristic of the development is that the concept 'skuld' is retained but given a different content. The reason for this is that certain dogma-bearing concepts are postulated by means of which and within which the criminal law must function. This is an inherent weakness in all dogmatic models which clouds insight and retards development' (my translation).

submitted that the word should be used with great care and that one should be perpetually on one's guard against simply equating it with mens rea when reading criminal legal literature or publications on delict in which it is used.

4. Summary of Views on Mens rea and/or 'skuld'

The current views on mens rea and/or 'skuld' in the textbooks on South African criminal law could be summarised as follows:-

> Burchell and Hunt divide crime into two components: actus reus and mens rea. The latter is the mental or subjective element of crime and is divided into intent (dolus) and negligence (culpa). There is a strong tendency to regard negligence as conduct.
>
> De Wet and Swanepoel follow the same division but call mens rea 'skuld'. Its components are intent (opset) and negligence (nalatigheid), both are regarded as blameworthy states or attitudes of mind.
>
> There is no great difference between the views of De Wet and Swanepoel and Burchell and Hunt in this respect. The only difference worth mentioning is that De Wet and Swanepoel insist that 'skuld' is a ground for 'verwyt' (reproach or blameworthiness).

Snyman concedes that the above division is followed by our courts, but disapproves of it. The author prefers the normative fault theory which involves an acceptance of Hans Welzel's view that intent and negligence form part of the criminal act. This leaves knowledge of unlawfulness as the sole or main ingredient of 'skuld'. Whether an accused is to be acquitted because of lack of knowledge of unlawfulness is to be answered normatively, not psychologically. The normative inquiry is : 'What ought he to have known?' The psychological inquiry is: 'What did he in fact know?'

Van der Merwe and Olivier and Botha appear to accept the normative fault theory but they do not accept Welzel's final-conduct doctrine in so many words.

5. Current views of South African writers on culpa (negligence) with particular reference to culpable homicide

5.1 The first editions of Burchell and Hunt, and of Hunt

Burchell and Hunt discuss negligence,[1] at length as does Hunt[2] in connection with culpable homicide. A comparison of these discussions in the first editions with those in the second

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1) 1ed 148-61, 2ed 192-213.
2) 1ed 373-84, 2ed 413-20.

editions is revealing. In the first edition of Burchell and Hunt negligence is discussed along traditional lines. By this is meant that it is regarded as a state of mind[3] arrived at by considering the conduct of an accused objectively and deciding whether his conduct complied with the standards of care that a reasonable man would have observed in the circumstances.[4] The personal characteristics of the accused are not taken into account, except that the 'reasonable man' placed in his position is credited with such special knowledge and such special skills as the accused may have.[5]

The authors rejected[6] the view of De Wet and Swanepoel that negligence should be judged subjectively according to the nature and character of the accused and not according to the standards of the reasonable man. In this regard they relied[7] on arguments advanced by Hunt.[8] These latter arguments were to the effect that it would result in chaos and legal uncertainty to judge every person according to his or her own standards and abilities in order to determine whether he or she has been negligent. A reckless, careless, hot-tempered, foolish person would then be entitled to more lenient treatment than one who is self-composed and circumspect.

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3) 148-51.
4) 150.
5) 151.
6) 152.
7) 152 n46.
8) 1ed 379-83.

Neither Burchell and Hunt, nor Hunt, discussed the problem of cultural differences.[9]

5.2 The Second Editions of Burchell and Hunt and of Hunt

5.2.1 Introduction

In the second editions[10] of both Burchell and Hunt and Hunt the discussions are substantially different from those in the first editions. The question of the subjective test for negligence is discussed at some length and the approach of DA Botha in his article 'Culpa - a form of Mens Rea or a Mode of Conduct?'[11] is approved of and followed.[12] It would therefore be appropriate to discuss Botha's views at this stage.

5.2.2 The views of D A Botha

Botha comes to the conclusion that negligence or culpa should be investigated twice in crimes of negligence.[13] First, the presence or absence of culpa should be investigated objectively to determine whether the act is unlawful and then it should be investigated subjectively to determine whether the accused is to

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9) As stated in Nkomo (I) 1964 3 SA 128 (SR), 131 in an oft-quoted passage contrasting the Batonka fisherman with a university professor.
10) cf nn 1 and 2 supra.
11) 1977 SALJ 29.
12) Burchell and Hunt 200-3; Hunt 398-401, 413-20.
13) vide Ngubane supra 686-7.

be blamed or reproached for having committed the act.

Although Botha does not refer to German criminal legal dogmatics, he appears to follow the finalistic trend to divide crime into 'Unrecht' or wrongdoing, on the one hand, and 'Schuld', (that is, blameworthiness, fault or culpability) on the other hand,[14] and to regard negligence as belonging to the former and not the latter.

According to Botha the killing of a human being should first be investigated with a view to determining whether it is unlawful. In the case of a prosecution for culpable homicide this investigation determines whether, objectively considered, the killing was negligent.

Once negligence in this sense has been established, the killing is unlawful. This is, however, not sufficient to establish criminal liability on the part of the accused. The court would also have to determine whether he has 'fault' before he can be convicted. This fault, culpa or blameworthiness on the part of the accused is investigated subjectively by measuring the conduct of the accused against what could be expected of him in the light of his own circumstances, characteristics, knowledge and personality.[15]

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14) vide Snyman 1985 SALJ 120, 121.

15) Botha 1977 SALJ 29, 31. This appears to be an investigation of the psychological fault (if any) of the accused, after a normative (fault?) inquiry has established that the killing was unlawful. This duplicated inquiry could only result in fault being coupled with unlawfulness in a confusing manner.

It is submitted that this suggestion is unpractical. The conduct of the accused would be measured against what two phantoms would have done in the situation in which the accused had caused death.[16] The first phantom is the traditional reasonable man or bonus paterfamilias. If the accused failed to measure up to his standards, the act was unlawful. The second phantom is the accused himself, not as he was at the time of the act, but as he could have and ought to have been, had he measured up to his own standards of reasonableness. The accused is therefore measured against his own reasonable double, alter ego, 'Doppelgänger' or 'besseres Ich' in this second inquiry. If he has failed to comply with his own standards of reasonableness, his conduct is culpable. On this reasoning negligence becomes negligence twice over. Botha would seem to have overlooked the fact that the accused will in any event always be considered as an individual when sentence is passed.[17]

If the individualized negligence test advocated by Botha is applied, an accused may be found to have acted unlawfully because, objectively, he acted negligently. But he could neverthe-

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16) vide Visser and Vorster 346.

17) There can be little doubt that the proposed procedure of investigating or considering negligence twice as an element of the crime charged, has its origin in thinking based on the German one-phase trial. The guilt or innocence of the accused would be investigated by considering the alleged negligence objectively. Appropriate sentence would be investigated by considering the alleged negligence subjectively. As the two investigations are simultaneous, it is conceivable that to some theorists, and probably to some judges, they merge.

less be acquitted because subjectively he did not act negligently. It is doubtful whether any court would ever consciously set out upon these two inquiries in order to decide whether to convict.[18] Traditionally, two inquiries are pursued routinely; first, whether the accused was objectively negligent in which case he is convicted, and second, to what extent he as a person deserves to be punished. This is not to suggest that our courts do not consider subjective factors when deciding upon negligence.[19]

The arguments advanced by Hunt[20] against the application of a subjective test for negligence are countered by Botha as follows:[21]

> 'Hunt writes that "if a hot-tempered individual loses control of himself and (lacking intent to kill) causes death, he cannot then be convicted of culpable homicide, for if we are to judge him by his own characteristics he has acted predictably and in accordance with the disposition which a variety of background influences have shaped". The fallacy in this argument should be

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18) The double test adopted by Tredgold J in Tenganyika 1958 3 SA 7 (F) is the nearest analogy.

19) Such subjective factors are the knowledge or specialized knowledge of the accused, his special skills and (probably) his age, depending on how much weight is to be given to the judgment of M T Steyn J in I 1986 2 SA 112 (O).

20) 1ed 378.

21) 37-8. Visser and Vorster (345) also reject Hunt's (1ed) views, the interpretation placed on van As 1976 2 SA 560 (A) in Ngubane could cause these authors to change their views.

apparent. It lies in the assumption that the legally required conduct has to be fixed by means of the standard of the accused himself. This is wrong. The court must have recourse to the "reasonable man" to determine if the accused's conduct was unlawful. If the court finds that the accused did act unlawfully, thereby causing the death of the deceased, the court must go on to enquire whether the accused acted with culpa, that is, whether with his mental make-up he could and should have foreseen the possibility of causing another's death. The accused should not escape blame if he, knowing that he is apt to lose his temper and control over himself, allows himself to get involved in an argument leading to such a loss of temper and the death of the deceased. In this respect he is in no different a position to that of the unskilled person who undertakes work for which he knows that he is not qualified. Both are aware that they have certain shortcomings and both should know that they dare not act if such shortcomings may lead to injury to others.

It is further argued by Hunt that if a naturally clumsy or careless individual causes an accident he would not be responsible on the subjective approach. This argument is without substance. If a clumsy person has caused damage through his clumsiness, the wrongfulness of his conduct is determined by the 'reasonable man' test. His culpa will depend on the foreseeability, for him, of the damage he

had caused. If he undertakes a task knowing that his clumsiness may result in damage, and fails to take due care, culpa will most likely be found to be present.

Hunt then cites the example of a person whose religious upbringing induces in him a belief that his child can be cured by prayer but not by medical treatment; he refuses medical treatment and causes the child's death. Assuming the court finds that contemporary mores demand that a person in the shoes of the accused should have obtained medical treatment, his unlawful conduct will be established. If the court further finds that despite his religious beliefs the accused ought to have foreseen the possibility of death, he will have acted with culpa.

The unskilled person whose innate foolishness leads him to believe that he is competent to drive a motor car and who causes a fatal collision must be dealt with in the same way. If it is established that his conduct was unlawful because it was objectively unreasonable, the next step is to enquire whether he, with his mental make-up, had the ability to foresee the consequences of his conduct. If he did not have this ability, no fault can be imputed to him'.

It is repectfully submitted that Botha's response to Hunt's arguments are unconvincing. He postulates that every hot-tempered

individual will know in advance that he may be involved in a specific argument and ought therefore immediately to avoid, or remove himself from, the developing situation that could lead to the anticipated altercation. However, arguments can flare up on the spur of the moment and provocative remarks giving rise to quick retaliation can be made without warning. Is the hot-tempered person to be excused if he negligently kills someone in such a situation, but not if he notices that an argument is developing and fails to go away before he loses his temper? What of the hot-tempered man who is so lacking in circumspection as not to realise that someone may shortly provoke him? Is he to be excused in circumstances where a more intelligent hot-tempered man would not? Botha does not deal with these problems and a consideration of them shows that he really has no answer to the arguments of Hunt.

Similarly the clumsy man is not to be excused if he undertakes a task which he knows his clumsiness will not allow him to carry out successfully. But what if he is also an eternally foolish optimist and this optimistic part of his mental make-up leads him to believe that he will overcome the handicap of his clumsiness? Once more Botha's answer to Hunt's argument is shown to be unsound.

What Botha does in his answers to Hunt is merely to shift the negligence one step away from the criminal result. The hot-tempered man cannot be blamed because he is hot-tempered, but he

can be blamed for not having appreciated that his hot-temperedness could soon assert itself. The clumsy man cannot be blamed for his clumsiness, but he can be blamed for not having realised that his clumsiness would lead to disaster. In both cases an objective test must eventually be applied unless one is to fall into the trap,[22] pointed out by Hunt, of allowing every man to set the standard of his own reasonable conduct, thereby ensuring that individuals who are naturally pugnacious, clumsy, foolish or lacking in commonsense enjoy an advantage not enjoyed by their more sensible fellow-citizens.

The man who believes his child can be cured by prayer is in the same category. The more firmly he believes in faith-healing the less likely it is that he ought subjectively to have foreseen the possibility of the death of the child. Thus does his faith take him beyond the reach of the law although it is his duty to protect his child and although human life is the most precious thing known to the criminal law.

Similar considerations apply to the unskilled driver. The more foolish[23] the simpleton who sets out to drive a motor car, without knowing how, the more likely he is to be found blameless on Botha's reasoning. In this connection one may well enquire what person would lack the ability to realise the danger of

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22) Referred to by Hunt 1st ed 378-9.
23) And by the same token, the more potentially dangerous.

driving a motor car whilst lacking the necessary knowledge and skill? The only answer that readily comes to mind, is one who is utterly foolish or arrogant and a danger to his fellow men; that is, of course, if he tries to drive. A reasonable man would realize the danger and not try to drive.

Although Botha's article, on close study is, with respect, not entirely convincing, he does touch on two serious difficulties relating to culpable homicide; namely, the question when unintentional killings are unlawful, and the question whether children are to be subjected to the 'reasonable man' test when their negligence is considered.[24)]

A further weakness of Botha's article is that he strongly supports the view that criminal liability is in the last instance determined with reference to morality or moral considerations.[25)] Yet he does not attempt to define these moral considerations or to give any indication of their nature except to suggest that moral behaviour[26)] is what society regards as reasonable.[27)]

5.2.3 Acceptance of Botha's views by Burchell and Hunt and Hunt

In Hunt's second edition no attempt is made to counter Botha's

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24) 37 cf I supra.
25) 30.
26) Apparently in the context of negligence.
27) 31.

arguments. Indeed, in both the later editions of Burchell and Hunt, and Hunt, views substantially similar to those of Botha are expressed.[28)]

In Burchell and Hunt culpa is treated as a form of mens rea with a very strong leaning towards treating negligence as conduct rather than a state of mind.[29)] The authors found themselves compelled to treat negligence as a state of mind, because that was the way in which it had been treated by the courts.[30)]

Referring to negligence conceived as conduct they write:

> 'Almost by definition, one who "negligently", say, causes the death of another neither wills, intends or even foresees death as a consequence of his conduct. Negligence is thus the antithesis of intention (dolus) and so different in character as to defy description as a state of mind and thus as mens rea.
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> However, this argument rests on the premise that the term mens rea means "a state of mind" which necessarily involves a cognitive mental state. It is more accurate though

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28) supra 5.2.2.
29) 194-5 thereby anticipating Ngubane (supra) one must add. Ngubane appears to be one notable recent decision in which the English approach to criminal law rather than the German approach, has been favoured.
30) 192.

> to understand mens rea as denoting a condition of blameworthiness expressed in terms of the state of mind of an actor in relation to a prohibited act or consequence. On this approach there is no difficulty in conceiving of mens rea as consisting in dolus or culpa. Where intention (dolus) is mens rea, blameworthiness is postulated upon the accused's intentional bringing about of some unlawful act or consequence; where negligence (culpa) is mens rea, blameworthiness is postulated upon the accused's inadvertence vis-à-vis an unlawful act or consequence. If the term 'negligence' is understood to denote a form of culpability or blameworthiness, there is no reason why negligence cannot serve to express the mens rea of some crimes'.

It is difficult to understand this passage. It would appear that the authors accept the doctrine that mens rea is reproach or blameworthiness and subscribe obliquely to a rather obscurely worded version of the normative fault theory. What is meant by 'a condition of blameworthiness expressed in terms of the state of mind of an actor in relation to a prohibited act or consequence'? Does it mean that the act or its result is looked upon as blameworthy and that this gives rise to a fiction that the actor had a state of mind which is termed negligence? This could be stated more directly by simply saying an act which is negligent (as an act) is blameworthy, as society expects people not to act in that way. This would be a statement of normative

fault[31] and as has been said, the mens rea of the accused is in the minds of his judges, not in his own mind.[32] It is also not clear from the quoted passage whether the blameworthiness causes the mental elements (both intent and negligence) to be postulated, or whether the postulated mental elements give rise to the blameworthiness. The general statement in the passage is circular and tautologous: blameworthiness postulates dolus or culpa and dolus or culpa gives rise to blameworthiness. In this respect the authors have become involved in much the same tautology as De Wet and Swanepoel.[33] As indicated above,[34] De Wet and Swanepoel's difficulties originate in the use of the word 'skuld' as a 'something' that gives rise to reproach and the difficulties of Burchell and Hunt originate in the use of the concept of blameworthiness which is not defined. The criticism levelled at De Wet and Swanepoel by van der Merwe and Olivier[35] can therefore also be levelled at this passage in Burchell and Hunt.

A further difficulty of Burchell and Hunt is their attempt to

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31) The view that negligence is conduct is normative, the psychology of the de cujus is not investigated. The difficulties experienced by the authors of Burchell and Hunt and Hunt, referred to in the text, are no doubt due to their having to reconcile their view that negligence is conduct with the clear tendency of the courts, before Ngubane, to regard negligence as mens rea. The problems attendant upon viewing negligence as mens rea are reviewed by Didcott J in Zoko supra.

32) Snyman 115.

33) vide supra 33 ff.

34) ibid.

34) supra 64 esp n3.

find the unlawfulness of negligent crimes in objective negligence and the mens rea in a vague notion of blameworthiness which is subjective and, at the same time, objective.[36] The initial objective negligence consists in the failure to measure up to the standards of the reasonable man. The subjective negligence consists in being negligent (or culpable or blameworthy) through failing to measure up to one's own standards of reasonable conduct. The latter phenomenon is described as blameworthiness expressed as a state of mind. It is to be expected that in a future edition of the textbook the Ngubane[37] view that negligence is conduct will obviate some of the difficulties here alluded to.

5.2.3.1 Burchell and Hunt's views on negligence in statutory offences

Burchell and Hunt's view of negligence in statutory offences[1] is closely related to that of Botha,[2] and it is submitted equally untenable. A consideration of some of the difficulties to which it gives rise demonstrates this.

According to Burchell and Hunt the unlawfulness of statutory

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36) 197-202.
37) Discussed 1.3 supra.
1) 20ff.
2) vide supra 3.5.

offences is provided by the statutory provision itself.[3] Negligence, which is the failure to act as a reasonable man would have acted in similar circumstances, has no role to play in statutory offences.[4] Whether an accused can be convicted on proof that he has contravened a statutory provision depends solely on his personal, subjectively evaluated, blameworthiness or culpability.[5]

The main example referred to[6] is Arenstein.[7] Under pressure of work Arenstein had forgetfully failed to comply with the provisions of a statutory notice served on him. The court held that it was not necessary for the State to establish dolus on his part for a conviction, as culpa would suffice as the mens rea of the crime[8].

It is clear that the court convicting Arenstein found his failure to comply with the notice to have resulted from a lack of the concern which a reasonable man would have shown. A reasonable man would not have overlooked the requirements of the notice in the circumstances in which Arenstein overlooked them. To say that negligence in the sense of objectively unreasonable conduct was irrelevant to the commission of the offence is not

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3) 200ff.
4) ibid.
5) ibid.
6) 201.
7) 1969 1 SA 361 (A).
8) 366B - 367 A.

justified.[9] Placing the reasonable man in the position of the accused is not the same as attributing all the characteristics of the accused to the reasonable man.

It is also not to be overlooked that some statutory offences require *dolus* as their *mens rea*[10] and that it is sometimes no easy task for a court to determine whether *dolus* or *culpa* is the *mens rea* of a statutory offence.[11] If objective negligence is dispensed with by the circumstance that the statutory measure makes the relevant conduct unlawful, one wonders what it is that the courts mean when they find that the *mens rea* of a statutory offence is *culpa*? There is no clear statement that negligence in terms of the personal standards of the accused is meant. In this connection it is also worth mentioning that in the section on *mens rea* in statutory offences, Burchell and Hunt[12] appear to have overlooked what they say about negligence not really being a requirement in their section on *mens rea*.[13]

If one considers the offence of drunken driving[14] concerning which there is a general opinion that the *mens rea* is *culpa*,[15] it becomes clear that the requirement of objective negligence is

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9) In the light of the *dicta* referred to in n8 supra.
10) 220ff.
11) ibid and compare JH du Plessis 61-3.
12) 221-3.
13) supra 2.2.
14) Contravening section 140 (1) (a) of the *Road Traffic Ordinance* 21 of 1966 (Tvl).
15) *Fouche* 1974 1 SA 96 (A); JH du Plessis 61-2.

not dispensed with by the statutory measure which defines the crime. If an accused is proved to have driven under the influence of intoxicating liquor or drugs and there is neither culpa nor dolus on his part, he will be acquitted.[16] If he raises the defence of absence of mens rea the question whether objectively, he acted reasonably will be very thoroughly investigated.[17] If it is not objective negligence which is investigated in this context but some vague concept of personal blameworthiness, one of the results of the Chretien[18] decision could be that almost every accused charged with drunken driving could raise the defence, with a fair prospect of success, that a drunken reasonable man would have acted as he did. To argue that a reasonable man would not get drunk knowing that he may have to drive[19] would elicit the retort that a reasonable alcoholic might very well get drunk in such circumstances depending on the strength of his craving.[20]

5.3 Criticism of the views on Negligence of Burchell and Hunt and Hunt

Adhering to the view that negligence should be objectively

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16) Fouche supra.
17) ibid.
18) 1981 1 SA 1097 (A).
19) As was done in Fouche.
20) vide JH du Plessis 60. The author states that no accused could ever be found to have complied with the subjective test for negligence.

investigated to establish unlawfulness and subjectively to establish fault, Burchell and Hunt arrive at the following statement of the requirements of negligence:[1)]

'An accused will have been negligent where :

I He (could and) should reasonably have foreseen the possibility of the occurrence of the consequence or the existence of the circumstance in question, including its unlawfulness; and

II He (could and) should reasonably have guarded against that possibility; and

III He failed to take the steps which he (could and) should reasonably have taken to guard against it'.

The bracketed requirement is subjective and bolsters the position of the alcoholic as discussed in connection with drunken driving above. It also places a premium, as do the views of Botha,[2)] on natural stupidity and inborn or acquired foolishness.[3)]

When discussing the positive law, the authors draw no clear picture of negligence which supplies the element of unlawfulness in contrast to negligence which supplies the element of fault.

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1) 203-4.
2) Discussed supra 5.2.2.
3) vide supra 5.2.1.

This is because such a doctrine is not part of our positive law, although there may be a tendency among judges occasionally to consider negligence subjectively.[4] This tendency is said to have manifested itself at its strongest in van As.[5] But commentators[6] on that case could have read more into the judgment than the court intended.[7]

In Hunt's second edition culpa is discussed in connection with culpable homicide.[8] The discussion in the first edition is much to be preferred. Culpable homicide is defined as the unlawful negligent killing of another person.[9] Yet a great deal of the discussion that follows is devoted to establishing or postulating that objective negligence is the element which makes a killing other than an intentional killing, which is murder, unlawful. Further discussion is then devoted to the theme that negligence is in fact not negligence in the sense of falling short of the standards of a reasonable man, but some vague, ill-defined individualised moral blameworthiness on the part of the person who has caused the death.

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4) Where the accused has special knowledge or expertise (Burchell and Hunt 293) or is very young.
5) 1976 2 SA 921 (A).
6) eg Schäfer 1978 THRHR 201; Goosen 1979 Obiter 60.
7) Burchell and Hunt (203) suggest this; vide JH du Plessis 60 and 73 n88.
8) 412ff. It should perhaps be mentioned that the second edition of Hunt was prepared by JRL Milton, PMA Hunt having died tragically young.
9) 401.

For some reason which is not in any way made clear the author does not follow the simple course of holding that it is the killing of a human being which is forbidden and therefore unlawful.[10] Instead, he adopts the view that what is forbidden is 'conduct which has fatal consequences for human beings.' This is patently mistaken. Inflicting injury or assaulting a human being can and often does have fatal consequences. But the unintentional inflicting of bodily injury is no crime in our law.[11] The passage in which the statement is made, and which is self-contradictory and vague is worth quoting in full; namely,

> 'Culpable homicide, like murder, is a crime in which the law's prohibition is directed at a consequence (viz death) of prior conduct. Thus, in effect, the law's prohibition of homicide is a direction to citizens not to engage in conduct which has fatal consequences for other human beings.'[12]

The sentence commencing with 'thus' is redundant and contradicts the previous sentence. What is prohibited is the killing of human beings as is said in the first sentence. Dangerous conduct is not prohibited; the only unlawful element of culpable homicide is the killing. Conduct which does not result in death and which is not some intentional crime, for instance assault, is not

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10) ibid.
11) Unlike German law, StGB 230.
12) 401.

prohibited by the common law. The use of the verb 'has' in this second sentence demonstrates the difficulty. Conduct which has fatal consequences is simply killing. Thus the second sentence can be regarded as a confusing and unnecessary repetition of what is said in the first sentence. The author could clearly not have meant to say that the law prohibits conduct which may have fatal consequences; it prohibits conduct which has fatal consequences. In other words, it prohibits killing.

But, having embarked on the course of saying that it is dangerous conduct which is forbidden, the author proceeds and involves himself in unavoidable difficulties and inconsistencies. He continues:

> 'However, the ways of killing and the types of conduct that may be fatal to human life are so numerous as to defy specific identification. In the case of murder this difficulty is largely negated by the requirements of the existence of an intent to kill. Acts which are intended to kill are usually likely to do so and rarely have any justification or purpose which may be set off against the loss of human life. The unlawfulness of the act is thus apparent from its facilitation of an intent to kill.
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> 'In culpable homicide, however, this method of determining the unlawful nature of fatal conduct is not so readily available. Essentially, this is because culpable homicide

> involves the unintended killing of a human being. The conduct which has brought about death thus cannot (as in murder) be characterised as unlawful because it was intended to kill. Indeed, it is almost invariably the case that unintended killings result from activities which are plainly lawful and usually directed towards achieving some legitimate social end'.[13)]

The above passage suggests that there is little difficulty with establishing the unlawfulness in murder as that element is provided by the intent to kill. If one compares this statement with the paragraph[14)] headed 'Unlawful' in the section on murder it seems to contradict what is said in that paragraph. The approach to unlawfulness in this paragraph and the section in Burchell and Hunt[15)] to which it refers, is, apparently, that killing is unlawful unless it is justified in the sense of a defence excluding unlawfulness succeeding. The approach is not that intentional killing is unlawful. At least this is not expressly stated.[16)]

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13) The passage raises questions. Does a lawful activity become unlawful because it is carried out negligently or dangerously or because a statute or statutory regulation forbids its being carried out negligently or dangerously? If the latter view is adopted the dangers of reverting to versari in re illicita are obvious.

14) 341.

15) Burchell and Hunt Part II.

16) 341.

It would therefore appear that Hunt's treatment of the unlawfulness of killing is not consistent. The idea that the unlawfulness of an act is to be determined with reference to the mens rea with which it is committed, can lead to difficulties and will be discussed below.[17] For the present it is submitted that the most rational way[18] of viewing the unlawfulness of murder and culpable homicide, is to regard the killing of a human being as prima facie unlawful, and unless some defence justifying the killing is successfully raised, the prima facie unlawfulness becomes unlawfulness proved beyond a reasonable doubt.[19]

A second statement in the quoted passage deserves attention; namely, that killings which form the basis of prosecutions for culpable homicide usually result from otherwise lawful conduct. Whether this statement is true depends on what one means by lawful conduct. Driving motor cars is lawful, but driving them negligently is forbidden by the various Road Traffic Ordinances. Controlling industrial premises is lawful but allowing dangerous conditions to prevail on such premises is forbidden by industrial legislation. Killings that result from assaults are clearly unlawful and such killings form the subject matter of a large proportion of killings resulting in convictions of culpable homicide. On the other hand there is no record of any

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17) vide infra ch V.
18) If not the most rational certainly the most practical.
19) This is a practical 'working' approach to unlawfulness. There is, however, more to the topic than is stated in the text; vide infra ch V.

prosecution for culpable homicide resulting from a death caused by dangerously[20] rough play during a rugby match. Apparently what some persons would regard as sporting hooliganism is still socially acceptable in South Africa and therefore not 'unlawful'.

The authors are also very much in favour of a more subjective approach to negligence[21] and criticize[22] our courts for not distinguishing between the 'negligence' which provides the element of unlawfulness and the negligence or culpa which provides the element of culpability or mens rea. They argue, somewhat incongruously, that because of the increasing emphasis on subjectivity when deciding on dolus, culpa should also be so treated.[23] The argument is a non sequitur. Dolus is by its very nature viewed subjectively. Why should negligence, which is by its very nature objectively determined, be viewed subjectively to bring it in line with dolus? The very reason for the emphasis placed on the subjectivity of dolus by our courts is to avoid confusion with culpa and to prevent those who are grossly negligent from being treated as if they were malicious.[24]

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20) Normal 'rough' play would be lawful because of the consent of the participants in the game. 'Rough play' that goes beyond the limit of personal injury to which a person may consent can only be lawful on the ground that it is socially acceptable. In passing it is remarkable that a nation which idolizes sport as do the South Africans has so little in its criminal law or law of delict on rough sport.

21) 404, 415 ff.

22) 415.

23) ibid.

24) vide the judgment of Didcott J in Zoko 1983 SA 871 (N) esp 885 C-E.

5.4 Snyman's views on Negligence

Snyman's views on negligence are not very complicated once one has accustomed oneself to thinking in terms of normative fault. The author is in agreement with our courts that negligence should be viewed objectively. The section where negligence is discussed is lucid and there is no inquiry into negligence as the element founding unlawfulness in an unintended homicide. Such negligence is also not contrasted with the personal negligence of the accused. It is doubtful whether Snyman's brief discussion is justified in view of the complicated discussions of unlawfulness and fault or mens rea, in earlier sections of the book.[1] The answer is probably due to the fact that in his discussion[2] of negligence the author is more concerned with stating the positive law than embarking on theoretical discussion. He states that it is settled principle in practice to regard negligence as a form of mens rea.[3] He also states unequivocally on the basis of the normative fault theory that the test for negligence is not to be confused with the test for unlawfulness. His main reason for this latter view is that the unlawfulness of an act is often determined in the light of factors that become evident after the commission of the act, whereas the negligence of an accused is

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1) 110-7.
2) 181ff.
3) 183.

determined in the light of factors known to him only before and during the commission of the offence.[4] Unfortunately Snyman gives no examples from real or hypothetical cases to illustrate what he means. However, this argument appears to be a sound reason for rejecting the view that unintentional killings can only be regarded as unlawful if objectively negligent. Even objective negligence cannot be arrived at in the light of subsequent facts.

In relation to culpable homicide, the discussion of unlawfulness[5] is also uncomplicated. The test for unlawfulness in respect of culpable homicide is regarded as the same as the test for unlawfulness in respect of murder. In connection[6] with the latter the view is that killing is unlawful unless it is justified in terms of one of the defences excluding unlawfulness. This uncomplicated view of unlawfulness is in contrast with the discussion of unlawfulness in the general part of the book.[7]

The views expressed in the general part are to the effect that one cannot simply regard the physical commission of an offence as *prima facie* unlawful unless some ground of justification exists. The grounds of justification are not a *numerus clausus* and there must be criteria in terms of which the courts can determine

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4) 182-3.
5) 383.
6) 376-7.
7) 68. cf J Burchell's criticism 1982 *SALJ* 466, 468-9.

whether a freshly advanced ground of justification qualifies as such or not. A second reason is that every ground of justification has its limits and a more general insight into unlawfulness is necessary to determine whether the bounds of a ground of justification have been exceeded or not.[8)]

5.5 De Wet and Swanepoel's views on Negligence

In the four editions of De Wet and Swanepoel the view that a subjective test should be applied in order to determine the presence or absence of culpa is adhered to throughout.[9)]

According to De Wet and Swanepoel, culpa is a state of mind or a species of deplorable attitude.[10)] It is also a form of 'skuld' (fault) and as 'skuld' is subjective, it is a contradiction in terms to talk of an objective test for 'skuld'. This statement appears to be a petitio principii. The initial assumption is that fault (including negligence) is subjective and then the conclusion is drawn that negligence must be subjective.

At the outset of the discussion the statement is made that it

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8) Snyman's views on unlawfulness are more fully discussed infra chapter V,1.

9) Morkel (Rational Policy) (109-11 and 176) regards this as a serious weakness in the book. It is an attitude which is totally at variance with the positive law and logically indefensible.

10) 156-7.

would be correct to condemn liability founded on negligence as being contrary to the maxim nulla poena sine culpa if negligence amounted to falling short of the standards of a reasonable man.[11] A finding that an accused has acted in a way in which a reasonable man would not have acted, does not say anything about the attitude of the accused.[12] In a system[13] which accepts the principle nulla poena sine culpa one is not concerned with the question whether objective standards have been complied with, but whether the conduct of the accused was accompanied by a deplorable attitude.

In their fourth edition the tendency to view negligence as having a twofold function; namely, first, to determine whether there is unlawfulness and, second, to determine whether there is fault (skuld) is discussed in the light of German law and legal theory, and rejected.[14] The discussion is brief and the rejection peremptory. For an author so enamoured of German ideas one finds this surprising. An inkling that professor JC de Wet, who prepared the fourth edition, was becoming disenchanted with the eternal hair-splitting of the German theorists, is unavoidable.[15]

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11) 156.
12) ibid.
13) What does emerge from the general discussion in De Wet and Swanepoel (156ff) is that this textbook would have no use for the normative fault concept, in terms of which the accused is judged according to what society would expect of him in the circumstances ie objectively.
14) 157-8.
15) vide 70 n4, 156 n267, 137 n178.

In a footnote[16] it is stated that objective negligence which is considered necessary to determine whether there is unlawfulness, is in fact unnecessary.

In the fourth edition the discussion of culpa, apart from references to German law and a brief reference to Dutch law,[17] is almost identical to that of the first edition.[18]

The description of negligence preferred is that of van der Linden[19] who describes it as the 'failure to use one's understanding and powers of circumspection properly'.[20] Moorman's inclusion of ignorance and carelessness[21] is criticised because ignorance can only be an ingredient of negligence if such ignorance is due to carelessness ('onbedagsaamheid'). This statement apparently means that it is careless for a person to undertake an activity if he lacks the necessary knowledge to do it properly.

There is apparent reluctance to discuss the view that the knowledge of the accused is attributed to the reasonable man. This explains the examples of the ignorant labourer who cannot be

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16) 158 n275.
17) 157-8
18) Some later cases are referred to.
19) 158.
20) 'Niet behoorlijk gebruiken van zijn verstand en oplettendheid'.
21) 158: 'onkunde en onvoorsigtigheit'.

blamed for giving his children a detonator to play with. A very simple objective analysis of this example would be that the reasonable man is not an expert on explosives. He does not know that a small capsule of smooth metal he finds at a roadside may be filled with a dangerous high explosive. If a man who knows about detonators were to give his children a detonator to play with, the matter would be different.[22)]

Judgments[23)] to the effect that negligence amounts to failure to exercise the degree of skill and care which a reasonable man would exercise are criticised. The conviction of the accused in Mbombela[24)] is strongly attacked on the basis that it is unfair to judge an ignorant third world youth according to the standards of a western man and to state that his belief in the 'tikoloshe' was an unreasonable belief.[25)]

This criticism of a case which is more than fifty years old[26)] shows exactly why one should be hesitant to make the test for negligence subjective. Assume that the court held that belief in the 'tikoloshe' is not per se unreasonable, then it would surely still have had to consider whether, in the light of his belief,

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22) Consider the inquiry into the appellant's knowledge of the reduction process on the gold mines in van der Mescht 1962 1 SA 521 (A).
23) Meiring 1927 AD 41; Mbombela 1933 AD 269.
24) supra.
25) The criticism is repeated in all four editions.
26) It is a sobering thought to imagine what would have happened to Mbombela in Germany in 1933.

the accused had exercised such care and circumspection as he was capable of exercising.[27] The following questions would then become relevant: What exactly did he believe about the 'tikoloshe'? Was this belief reasonable in the light of the belief held by similar persons in the same area? What was the source of the belief? Had he correctly understood and remembered the belief as originally imparted to him or had he deviated from it unreasonably and had such deviation given rise to the killing with which he was charged? Was it reasonable, in the light of his knowledge or beliefs concerning 'tikoloshes', for him to have assumed without further investigation that the deceased was a 'tikoloshe'? Would it not have been more reasonable for him to have considered, in the light of the number of children he knew or ought to have known were usually playing in the kraal, that the two little feet he saw were probably the feet of a child and not the feet of a 'tikoloshe'? Was it reasonable for him to believe, in the light of the 'tikoloshe' being a spirit and therefore invulnerable, that he could kill or harm it with an axe?[28]

This list is not exhaustive. Was it not more sound and in the interests of justice for the court to find, purely on the

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27) The question in fact becomes: How is a man who is reasonably holding an unreasonable belief to act in the light of his own standards of what is reasonable. Posing such questions would make the law unworkable.

28) To quote Hamlet when warned against following the Ghost:
'And for my soul, what can it do to that
Being a thing immortal as itself?' (I, IV, 67).

strength of his belief, that the accused had acted unreasonably and to sentence him leniently because his background allowed for his holding the belief? It is submitted that the latter is the better view.

After making the point[29] that the law can only create certain rules of conduct[30] by following the reasonable man test as laid down in Meiring,[31] and that the fault of the accused who contravenes any of these rules, cannot be determined in this way, but must be determined by considering him personally, De Wet and Swanepoel give a large number of examples of instances in which the reasonable man test cannot be applied. Most of these examples consist of cases where an ignorant person is judged according to the same rules as a knowledgeable person, and the rule that the knowledge or specialised knowledge of the accused is ascribed to the reasonable man, is overlooked.

The statement by De Wet and Swanepoel[32] that common sense teaches that one cannot measure an engineer by the same standards as his handyman, is misleading. It suggests that specialised knowledge is ignored when our courts investigate culpa. Even on an objective test this is not done. The reasonable man test, if

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29) 159.
30) 'Gedragsvoorskrifte'.
31) supra.
32) 159-61.

applied to the engineer, would take into account his specialised knowledge. No such knowledge would be taken into account when judging the handyman. The handyman's negligence could consist in his taking steps or indulging in conduct on the engineering premises, without bearing in mind that it could be dangerous. This is analogous to the position of the accused in van der Mescht. In deciding whether he had been negligent the court investigated the question whether he had any knowledge or experience, as a worker on the mines, in the light of which he ought to have known that melting gold amalgam was dangerous. Had the accused been a qualified chemical engineer he would have been negligent. He would similarly have been negligent if he had such experience of the reduction process on gold mines as would have put a reasonable man on his guard against the dangers of melting gold amalgam. It is perhaps worth noting that if a person with specialised knowledge of the chemical processes involved in van der Mescht's enterprise, had caused the deaths caused by van der Mescht, he would have been hard pressed to avoid conviction of murder on the basis of dolus eventualis.[33)]

5.6 Criticism of De Wet and Swanepoel's views

De Wet and Swanepoel come out strongly in favour of a subjective test for negligence. One must not look at the hypothetical

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33) It is of course inconceivable that a person who was aware of the danger would not have taken precautions.

reasonable man, but at the accused. The question to be asked is: What ought this accused with all his characteristics reasonably to have known, foreseen and done? What the learned authors do not attempt to answer is how one can ever find negligence along this line of inquiry. Why did the accused not display that degree of care which could (subjectively) be expected of him? No subjective test can answer this without exonerating the accused or finding that he took a conscious risk at some stage of the course of conduct leading to his 'crime'. No room is left for unconscious negligence. Some subjective and, therefore, conscious factor, must account for the failure of the accused to act as he ought to have acted. If the factor is unconscious, its existence can only be determined objectively. Where is the line to be drawn in the application of subjective factors favourable to the accused? The reason for his failure to measure up to his own objectively ascertained standards, must also be subjective. On what basis is such reason not to be regarded as absolving the accused? Because it was unreasonable? By what standards? Those of the accused? Then <u>why</u> could he not live up to these standards on this occasion? The subjective test would lead into an infinite regression and De Wet and Swanepoel seem to admit this, albeit unwittingly, in the following sentence: 'En so is daar ontelbare persoonlike en liggaamlike eienskappe van die beskuldige wat die vraag of hy nalatig was of nie, kan beïnvloed'.[34]

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34) 161. 'And so there are innumerable mental and physical attributes of the accused that can have a bearing on the question whether he had been negligent or not' (my translation).

What court can investigate innumerable attributes? In what circumstances could a court conclude that such an investigation was complete? In other words where is the objective line drawn?

Basically De Wet and Swanepoel present very much the same solution to determining negligence as do the other writers who favour a subjective test. The accused is measured against the standards of his own reasonable alter ego, double or 'Doppelgänger'.[35] The question remains: Why did he not measure up to his own standards? If the answer to this question is sought subjectively, its blameworthiness will elude the investigator until he applies an objective test. There will always be some subjective factor that explains the lapse on the part of the accused. At what stage do we draw the line and refuse to take into account further exculpatory subjective factors? De Wet and Swanepoel give no indication of subjective factors that ought not to excuse the accused; they merely mention that any specialised knowledge which he may have would count against him.[36]

If, in the light of the subjective test for negligence, we consider the famous example of the Batonka fisherman contrasted with the university professor[37] and adapt it to the facts in Mbombela, we could arrive at the following interesting problem: What if a university professor in anthropology had killed the

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35) vide Visser and Vorster 346.
36) 161.
37) Posed in Nkomo supra.

deceased believing him to be a 'tikoloshe?' This would have given rise to a public outrage. Why would a university professor believe in the existence of a 'tikoloshe'? There may have been subjective factors at work in him which would cause such a belief to rise to the surface from the depths of his unconscious.[38] Strange things have happened to anthropologists who do field investigation. Some have commenced as hostile sceptics and ended as complete converts.[39]

Assuming that the defence of insanity is not raised on behalf of such a professor, how would one determine negligence or the absence of negligence on his part? Engrossed in his study of the 'tikoloshe' and living among people who believe in this evil entity, he loses his resistance to a belief which his academic colleagues would not only describe as unreasonable, but as irrational. 'Tikoloshe' may correspond to an archetype in his unconscious mental make-up.[40] What investigations would not be required to determine the guilt of the professor? Where would

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38) vide William Sargant: 'Battle for the Mind' 93ff for the history of Maya Deren a western anthropologist who became a voodooist while doing scientific research into voodooism in Haiti.

39) One must never forget the early history of St Paul, particularly not when dealing with extremists.

40) Archetypes of this nature have incalculable power over men. As Jung pointed out, it was to some extent in response to archetypal beliefs, that millions of men gave the ancient Roman salute in Germany in 1941 and marched to almost certain death in Russia; vide CG Jung: 'The concept of the collective unconscious' Part 2.

it end? Would it not be simple and just to say that no reasonable man would act as he had acted and to regard subjective psychological factors that may have caused his acceptance of the belief as mitigating factors? The personal peculiarities of the accused are always taken into account when deciding on appropriate sentence.[41)]

6. South African Decisions on Criminal Negligence

Meiring,[1)] although reported in 1927 was still regarded as stating the law relating to criminal negligence in 1949.[2)] Meiring was concerned with whether the presiding judge in the court a quo had given an adequate description of criminal negligence to the jury in his summing up at a culpable homicide trial.[3)]

The judge had omitted to inform the jury that the standard by which the conduct of the accused was to be measured was that of the reasonable man. The presiding judge had, however, made a detailed analysis of the evidence to the jury and instructed them to decide, on the facts[4)] admitted by the accused, whether the

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41) Burchell and Hunt 80.
1) 1927 AD 41.
2) Gardiner and Lansdown 5ed Vol II 1423; De Wet and Swanepoel 1ed 106; Barlow 20.
3) 46.
4) Namely that he had driven without keeping a proper lookout.

accused had not placed the deceased in peril by his lack of foresight.[5] Deciding the point in favour of the Crown, Innes CJ said: 'Now the conduct thus outlined was conduct of which clearly no reasonable man would be guilty'.

The judgment is therefore to the effect that although the presiding judge had not specifically referred to the reasonable man test, he had summed up in such a way that the jury would convict if in their opinion the accused had not acted as a reasonable man would have acted. This finding has prompted De Wet and Swanepoel to remark that the jury had come to the right conclusion without having the reasonable man brought to their attention.[6] This comment is, with respect, beside the point. Without mentioning the reasonable man the presiding judge had in fact adequately described the reasonable man test. It is not clear from the decision whether negligence is regarded as mens rea or conduct. The following passage suggests that conduct is in issue rather than mens rea when a court considers whether certain evidence discloses negligence:

> 'The crime in this instance was culpable homicide; the Crown alleged that the homicide was wrongful and unlawful because it was negligent. Now negligence can never be disentangled from the facts; but its existence is best

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5) 48.
6) 162.

ascertained by applying to the facts of each case the standard of conduct which the law requires. And that standard is the degree of care and skill which a reasonable man would require under the circumstances'.[7]

The decision was of great importance because it also laid down that the test of liability for negligence was the same in criminal matters as in civil matters.[8] The submission that as in English law, a greater degree of negligence was required for criminal liability was rejected.[9]

The next important decision on criminal negligence was Mbombela,[10] the famous 'tikoloshe' case. This decision laid down that in considering whether an accused had acted reasonably, he had to be judged objectively according to the standards of the reasonable man and not subjectively according to his own racial and cultural peculiarities.[11]

This case has been a favourite target of De Wet and Swanepoel in all four editions.[12] Their criticism is not based on a

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7) per Innes CJ, 45.
8) 47. This is still the law today.
9) 45-6 .
10) 1933 AD 269.
11) 272-4; cf van Aswegen v Minister van Polisie en Binnelandse Sake 1974 1 PH J1 (T); Camplin 1978 1 AER 1236.
12) 1ed 106-7, 2ed 129-130, 3ed 140-1, 4ed 143-4. The wording of the discussion is identical in all four editions.

correct assessment or analysis of the judgment. They criticise without taking into account the extreme difficulty of the problem with which the court had to deal. It had to apply a system of law crystalised out of more than 2000 years of jurisprudential development in Europe to an accused who lived in primitive conditions in Africa and who held beliefs that were not acceptable in terms of the cultural background against which this system of law had developed.

The court had to be just to the accused and maintain civilized standards. In addition, the law applicable was partly statutory and partly common law.[13] The court was faced with a difficult task and came to an eminently just and fair conclusion. It would probably be adjudged just and fair to-day and[14] one must bear in mind that it was decided over fifty years ago.

The main problem with understanding the Mbombela judgment arises from the fact that Mbombela had been convicted of murder on the basis that his mistake in believing the deceased, a nine-year old

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13) 272.

14) Bertelsman AJ 1973, 34 ff concludes on the strength of the normative fault theory that Mbombela should have been acquitted. The approach and discussion are totally unrealistic. At a (present day!) German one-phase trial the accused could possibly be declared 'straflos', but that would be a far cry from a total acquittal at a South African trial. At a present-day South African trial he would probably receive a suspended sentence which would also amount in effect to declaring him 'straflos'.

boy, to be a 'tikoloshe' had been unreasonable. There was no doubt that Mbombela had made this mistake and that the mistake had been bona fide.

There were two questions before the Appellate Division; namely, (1) whether Mbombela should have been judged by the standards of the reasonable man to determine whether his mistake had been reasonable or whether he should have been judged by the standards of a youth of eighteen who had grown up in an area in which belief in the existence of 'tikoloshe' was general;[15] and, (2) whether the judge in the court a quo had not erred in directing the jury that the accused could not be convicted of culpable homicide.[16]

The first part of the judgment of de Villiers JA was directed at answering the first question namely whether 'reasonable' meant reasonable according to the standards of the reasonable man or according to the standards of the individual accused.[17] This question was answered to the effect that the test for what is reasonable cannot be varied from person to person as that would amount to having no standards.[18]

The second question; namely, whether the jury had been correctly instructed that the accused could not be convicted of culpable

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15) 271.
16) 274.
17) 272-4.
18) 272.

homicide, was answered on the basis that the jury ought to have been instructed that a verdict of guilty of culpable homicide was competent. In coming to this conclusion the court did not deem it necessary to decide what the answer would be in terms of the common law as the definition of murder contained in the Transkeian Penal Code was applicable[19] and was such that a bona fide mistake of fact, even if unreasonable, would be a good defence.[20] The question, therefore, was whether the accused ought to have been convicted of culpable homicide, and the answer was 'yes', as such a verdict was competent and his mistake of fact had been unreasonable when judged by the standards of a reasonable man.[21]

De Wet and Swanepoel are of the opinion[22] that the court was about to find that the accused had been correctly convicted of murder, but baulking at the awful nature of its own conclusion[23] took refuge in a minor technicality ('n tegniese puntjie) to avoid this conclusion. This comment is inexact. The 'tegniese puntjie' was the important consideration that the crime had been committed in the Transkei and that the Transkeian Penal Code was applicable. The decision has been interpreted as laying down that in the common law a bona fide, but unreasonable mistake

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19) 274.
20) ibid.
21) 275.
22) 143.
23) 'Die Hof deins egter terug vir die afgryslikheid van sy eie mening...' Unwarranted comment on a well-considered judgment.

mistake, would be no defence to a charge of murder.[24] This conclusion is unfounded. The question as to what the common law would be, was clearly left open. It was, however, decided that in terms of the common law, which was in this respect not superseded by the Transkeian Penal Code,[25] the test of reasonableness was the objective test of the reasonable man.

If one considers the facts objectively; namely, that Mbombela saw two little feet in a hut in a village where there were a number of small children, decided that the small feet were that of an evil spirit, and then precipitately attacked the 'evil spirit' with an axe, one cannot but conclude that he acted unreasonably. In sentencing him the court took his personal beliefs into account. The sentence of twelve months imprisonment seems a bit harsh to-day, but was it so fifty years ago? Besides, it is the duty of the court to protect the public - also small sleeping children from being killed on the strength of an unfounded and uninvestigated[26] belief that they are evil spirits.

An important case in the law relating to culpable homicide is van der Mescht.[27] In this case the court refused to convict a man of culpable homicide purely on the ground that he had caused

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24) De Wet and Swanepoel 143 n28; Gardiner and Lansdown; 58.
25) 272 top of page.
26) Had the accused 'investigated' whether he was dealing with a 'tikoloshe' before striking the fatal blows, the deceased would not have been killed.
27) 1962 1 SA 521 (A).

people to die while he had been involved in an unlawful activity. It therefore investigated the submission that he had been negligent as negligence on his part was the second leg of the argument advanced by the State in favour of a conviction.

The well known facts of the case are that appellant and one Groesbeek melted gold amalgam in the house of Groesbeek. In so doing they caused mercury vapour to be released from the amalgam. The inhaling of the mercury vapour caused the death of Groesbeek and four children. The conduct was unlawful in terms of statutory measures controlling the possession and melting of unwrought gold.

The main judgment was given by Steyn CJ. Relying on the evidence of the district surgeon that an average person would not expect that the heating of mercury could have fatal consequences, the Chief Justice concluded that the bonus paterfamilias would not have known that heating the gold amalgam could be dangerous to human life.[28] The question whether the accused has been negligent would therefore have to be decided in the light of what the accused actually knew concerning the danger of melting the substance.[29] On the evidence the Chief Justice concluded that the State had not proved beyond a reasonable doubt that the accused had such knowledge of this danger as to have established negligence on his part. Botha JA concurred in this judgment.

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28) 525 F-H.
29) ibid.

Hoexter JA was of the opinion that the accused had sufficient knowledge of the danger involved to render his conduct negligent. According to Hoexter JA the accused had, however, allowed his anxiety to gain possession of the gold to cloud his judgment and consequently he failed to direct his mind at the danger inherent in his conduct and to take precautions against it.[30] It is interesting to note that the learned judge of appeal did not regard the knowledge of the appellant as knowledge that the melting could have fatal consequences, but only as knowledge that it could be harmful. Thus he says:[31]

> 'In my opinion therefore, the evidence proves that the appellant was negligent because he was inadvertent to a danger which was within his knowledge, that danger being one of bodily harm to others against which a reasonable man would have taken steps to guard'.

Van Blerk JA concurred with the Chief Justice. Also concurring with the Chief Justice, van Winsen AJA pointed out the weakness in Hoexter JA's view of the proven facts.[32] The State had not established its case and the inconsistencies and evasions in the evidence of the appellant, could not cure this defect. Hoexter JA's view of the law relating to negligence was, however, not criticised.

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30) 541 D-F.
31) 541 F-G.
32) 54 D-E.

Three judges in van der Mescht[33] emphasised that the question whether death following an unlawful assault would amount to culpable homicide, irrespective of the negligence of the accused, had been left open.[34]

It would then seem that, in the light of the van der Mescht decision, negligence in our criminal law was tested objectively with reference to the reasonable man, that the special knowledge of the accused would be held against him in determining his negligence[35] and that unreasonable failure to foresee harm to human beings, as opposed to failure to foresee death, could be sufficient for a conviction of culpable homicide. The general approach of the court, particularly that of Hoexter JA, was that negligence was a state of mind, more particularly unreasonable failure to advert to the danger of inflicting harm.

The question left open[36] in van der Mescht came up for consideration by the Appellate Division in Bernardus;[37] namely, whether a person who commits an assault resulting in death can be convicted of culpable homicide purely on the strength of the initial assault, an unlawful act, or whether conviction is only possible if negligence in respect of the death is also established. To convict purely because there had been an initial

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33) Hoexter and van Blerk JJA and van Winsen AJA.
34) 538C, 542 B-C, 542 H - 543 A.
35) ie that it would be credited to the reasonable man.
36) n32 supra.
37) 1965 3 SA 287 (A).

assault which resulted in the eventual death would, in the absence of some element of fault in respect of the death, amount to an application of the versari in re illicita doctrine.

Although the doctrine of versari in re illicita was finally rejected in this case,[38] the accused was held to have been negligent when causing the death of the deceased and his conviction of culpable homicide by the trial court was left undisturbed.

The facts of the case are simple. The appellant was a rural Black who had an altercation with his father-in-law. He left the scene of the altercation and in the words of the classic anecdote: 'repaired to his place of domicile to arm himself with the accoutrements of war'.[39] He came back armed with two sticks and, advancing on his father-in-law, found himself faced by the luckless deceased who was adopting the thankless task of peacemaker and indulging in the generally disliked pursuit of interfering in other people's affairs. Accused would have none of the peacemaking and hurled one of his sticks at the deceased. The stick which was not unduly heavy, hit the deceased on the side of his head above the ear and penetrated four or five inches into

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38) In terms of the majority decisions. Vestiges of the doctrine were retained in the minority decision of Rumpff JA, which has not been followed.

39) Translated as: 'Hy het na sy huis gegaan en sy kierie gaan haal'.

his skull, killing him.[40]

Wrestling with the versari problem the court considered whether reasonably foreseeable injury, short of death, to a human being would suffice for a conviction of culpable homicide. This had been the view of Hoexter JA in van der Mescht and it was rejected by Steyn CJ.[41] In rejecting this view Steyn CJ approved of the opinion of E M Burchell[42] that such a view would amount to an application of the versari doctrine, and that the mens rea for culpable homicide would still be lacking.

Considering whether the appellant had been negligent[43] Steyn CJ stated that the stick must have been hurled with some violence and that a reasonable man in the situation of the appellant would have realised that he could cause serious injury by such an assault and that a reasonable man would have foreseen that it could possibly be mortally dangerous. Wessels JA and Potgieter AJA concurred in the judgment of Steyn CJ.

In view of later developments in the law,[44] the judgment of Rumpff JA (as he then was) is of some importance. Reluctant to have a person who commits an assault resulting in death acquitted of culpable homicide, because death was not a reasonably foreseeable result of the assault, and nevertheless in agreement that

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40) 305H - 306B.
41) 298 B-C.
42) 1962 SALJ 247.
43) 300 B-G.
44) Particularly in van As 1976 2 SA 921 (A), in which the minority view of Rumpff JA was rejected.

the versari doctrine should be rejected, the learned judge of appeal made a serious attempt to couple criminal negligence to any assault resulting in death. In so doing he expressed the view[45] that cases in connection with assaults resulting in death which had lead to convictions of culpable homicide on an application of the versari doctrine, had not been wrongly decided, but had only been incorrectly motivated. In his opinion death could result so easily from any assault, that he who assaults someone intentionally must be presumed to foresee that as a result of the assault death may supervene as the ultimate injury, even though he may not have expected death to supervene, and even though death may have been an unusual consequence; provided that a causal connection between the deed and the death was established.[46] Later in the judgment he says:

> 'Net so goed as iemand wat nie wêreldvreemd is nie, weet dat 'n mens soms ongelooflike beserings oorleef en soms op ongelooflike wyse die dood vryspring, net so goed weet hy dat die mens soms sterf deur 'n onverwagte oorsaak. Daarom moet 'n normale mens kan voorsien dat deur 'n ligte aanranding 'n ongewone en onverwagte dood kan intree;.[47]

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45) 301 D-E.
46) 302 H- 303 A.
47) 304 E 'Just as someone who is not lacking in worldly wisdom, knows that a human being may sometimes survive unbelievable injuries and sometimes escape death in an incredible way, he knows equally well that human beings sometimes die of unexpected causes. Consequently a normal person ought to be able to foresee that an unusual and unexpected death may result from a light assault' (my translation).

It is perhaps necessary to remark at this stage that certain passages in the judgment are difficult to understand. For instance:[48)]

> 'Daar bestaan 'n opvatting in ons reg dat daar by aanranding wat die dood veroorsaak twee vorms van skuld is. Die een vorm is die opset om aan te rand en hierdie skuld dek net die aanranding omdat die dood 'n gevolg is wat buite daardie besondere opset val, al was die dood 'n voorsienbare gevolg. Om skuldig te wees aan strafbare manslag moet daar 'n ander skuldvorm wees, nl. die gebruiklike 'nalatigheid'. Die opvatting kom hierop neer dat daar in so 'n geval nalatigheid is omdat, nieteenstaande die dood voorsien kon word, die aanranding nie vermy is nie. In werklikheid is die posisie, natuurlik, dat wat die aanrander moes vermy het, het hy opsetlik gedoen. Na my mening is te verkies die opvatting dat die onregmatige

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48) 301 D-G. 'There is a view that in assaults resulting in death there are two forms of fault. The one form is the intent to assault and this fault covers only the assault because death is a result which falls outside that specific intention, even though death was a foreseeable result. To be guilty of culpable homicide there must be another form of fault, namely the usual 'negligence'. The view amounts to this that in such a case there is negligence because, notwithstanding that death could have been foreseen, the assault was not avoided. In reality the position is that the assaulter deliberately did that which he ought to have avoided. In my opinion the view is to be preferred that the unlawful causing of foreseeable death by assault, is punishable as homicide, not because the death resulted from negligence, but because as a result of an intentional unlawful assault death supervened as a foreseeable result' (my translation).

> veroorsaking van voorsienbare dood deur aanranding strafbaar is as manslag, nie omdat die dood weens nalatigheid plaasgevind het nie, maar omdat as gevolg van 'n opsetlike onregmatige aanranding die dood as voorsienbare gevolg ingetree het'.

The effect of these statements is difficult to ascertain. If death was foreseeable, one presumes by the reasonable man, the person committing the assault is guilty on the basis of negligence. If it was not foreseeable, he can only be guilty on the basis of versari or that approximation to versari known as 'result liability'.[49)]

What the learned judge was in fact doing was to add to the accomplishments and characteristics of the reasonable man, knowledge that any assault can result in death. This may be true of a person who reflects that in the midst of life we are in death, but there are many, many assaults that do not result in death. Some men are frail, but most are tough. The reasonable man would know that thousands of school boys given 'cuts' by their head-

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49) 'Gevolgsaanspreeklikheid'. There follows (302-3) a discussion of crimes qualified by their results in Dutch and German law in which the learned judge, with respect, appears to have been unaware that in 1953 a measure (StGB 18) had been enacted in Germany to the effect that where an increased penalty is provided for a crime if a specified result, for instance death, supervenes, the increased penalty is only to be imposed if the accused was at least negligent in respect of the result in question.

headmasters, youths sentenced to juvenile cuts,[50] adult offenders sentenced to whippings,[51] persons slapped or punched in brawls, boxers knocked unconscious, rugby players robustly tackled, cricketers hit by 'bouncers' and wrestlers jumped upon by their opponents after being hurled about in the ring and bounced up and down, survive. Would the reasonable man, knowing this, expect any person to die of any assault, however slight, at any time? The answer must be 'no'. Once the decision to do away with versari had been taken, a person committing an assault could not, unless negligence in respect of the death were also proved, be convicted of culpable homicide if the assault resulted in death. The 'ongewone gevolg' (unusual result)[52] could not be regarded as reasonably foreseeable. The only answer is that the 'reasonable man' has been fixed with foresight no normal person has. In other words, assault should be a crime that gives rise to purely causal liability, if it results in death. In essence the view of Rumpff JA in Bernardus is a clearer retention of versari in respect of assaults than the view of Hoexter JA unanimously rejected by the majority of the court. In Hoexter JA's view the reasonable foreseeability of bodily injury is the least requirement for a conviction of culpable homicide; this qualification is not to be gleaned from the dicta of Rumpff JA.

Holmes JA, in a clear and uncomplicated judgment, accepted the

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50) Imposed in terms of s294 of the Criminal Procedure Act.
51) Imposed in terms of s292 of the Criminal Procedure Act.
52) 303 pr.

final rejection of versari by the Chief Justice[53] and considered whether the accused had been negligent when killing the deceased. He came to the conclusion that the accused had been negligent because: 'when he threw the stick at the deceased, [he] ought reasonably to have foreseen that it might cause death'.[54]

It is interesting to note that in setting out his reasons for this finding, Holmes JA took into account the background of the accused which would ensure that he had a sound knowledge of the dangers of fighting with and throwing sticks. He also states:[55] 'Furthermore, the possibility of serious injury being reasonably foreseeable, the appellant ought to have foreseen the possibility of death hovering in attendance'. Liability is therefore indisputably coupled to failure to foresee the reasonably foreseeable, in other words culpa. What must be reasonably foreseeable is death, not injury.

This is not to be regarded as an acceptance of the views of Hoexter JA differently worded. It is a statement that in those circumstances, once the possibility of serious bodily injury ought to have been foreseen, the possibility of death ought also to have been foreseen.

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53) 304 H.
54) 306G.
55) 307A.

Bearing in mind that Rumpff JA was in the minority it can be concluded from the judgments of Steyn CJ, in which two of his colleagues concurred, and the judgment of Holmes JA, that the general possibility that death may result from the lightest assault, because of 'the thousand natural shocks that flesh is heir to', is not sufficient for death to be regarded as a reasonably foreseeable result of any assault.

The assault should be of such a nature that death is foreseeable as a real possibility. This is a qualification on the insights of the reasonable man: he does not foresee any assault as a reasonably possible cause of death. This makes the reasonable man a man of practical experience, aware of the thousands of assaults, some of a serious nature, that do not result in death.

It does seem very clear from the judgments that negligence is regarded as a form of mens rea and not as a form of conduct only. The general tenor is also that the standards of the reasonable man are applied to the accused to determine whether he was negligent.

In Zoko[56] Didcott J sums up the result of the van der Mescht and Bernardus decisions as follows:[57]

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56) 1983 1 SA 871 (A).
57) 883.

'The effect on culpable homicide was the emergence of mens rea as an indisputable and indispensable element of the crime. Not only the unlawful act but also its fatal result had to bear that stigma. The old definition would no longer do.[58] It made no mention of mens rea. A fresh definition which remedied the omission was needed. In the situation envisaged by Gardiner and Lansdown, the one in which no intention to kill was proved, negligence was left as the sole sign of mens rea the killing might display. That it served as such for the purpose of culpable homicide had been recognised by the Bernardus decision. It at least therefore had to be proved in all future prosecutions for the offence'.

What really happened is that from being a widely defined crime, culpable homicide had become a narrowly defined crime. Or, to put it differently, there had been two forms of culpable homicide before the van der Mescht and Bernardus decisions. Culpable homicide had been the unlawful killing of a human being and the unlawful negligent killing of a human being. The first of these two definitions had now been discarded. The second of these definitions had been applicable in accident cases where the activity resulting in the death of a human being had not been intrinsically unlawful. The main example of the intrinsically unlawful act had been assault. But negligent driving had also

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58) ie 'the unlawful killing of a human being'.

qualified as an unlawful act, sufficient for conviction of culpable homicide if it resulted in death, in Matsepe.[59] While the partial excuse doctrine was part of our law, intentional killing in situations of partial excuse could also qualify as culpable homicide.[60]

Leaving aside the doctrine of partial excuse it can be said that since van der Mescht and Bernardus culpable homicide in our law was defined as the unlawful negligent killing of a human being and that the element of negligence was treated as a form of mens rea until the Ngubane decision in 1985. This view is supported in a number of Appellate Division decisions referred to by Didcott J in Zoko.[61]

In Mtshiza Holmes JA stated[62] the definition of culpable homicide as 'the unlawful negligent causing of the death of a fellow being'.[63]

Except for the proposed restated definition of culpable homicide in Zoko,[64] the definition in the judgments of Holmes JA in the cases referred to above has been accepted.

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59) 1931 AD 150.
60) Hunt 1ed 373, 2ed. 401.
61) 883-4; Mtshiza 1970 3 SA 747 (A); Ngobozi 1972 3 SA 476 (A); Ntuli 1975 1 SA 429 (A); Burger 1975 4 SA 877 (A).
62) 752 C-E.
63) This was repeated in Ngobozi, Ntuli and Burger.
64) Rejected in Ngubane at 687 H.

It is also clear from these judgments that negligence or culpa was regarded as a form of mens rea; in other words, as constituting the mental element of the crime of culpable homicide, whereas the physical killing was regarded as the objective element or actus reus.

A case which deserves special mention is Van As,[1] because certain dicta in it have given rise to the view that our courts were moving away from the traditional objective test for negligence to a subjective test.[2]

A lengthy discussion of the judgment and the academic comment to which it gave rise, is not necessary, as certain allegedly obscure dicta of Rumpff CJ have been clarified by Jansen JA in Nkwenya[3] and Ngubane[4].

The facts of van As are that during an altercation deceased had told accused that he could 'go to hell'. Accused then slapped deceased. Deceased, who was an exceptionally fat man,[5] fell onto his back as a result of which his head came into sharp contact with the surface of the cement stoep on which he was

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1) 1976 2 SA 921 (A).
2) vide Burchell and Hunt 202; Goosen 1979 Obiter 60; Schäfer 1978 THRHR 201; J H du Plessis (60) regards van As as the leading case on the test for negligence.
3) 1985 2 SA 560 (A) 572-3.
4) 1985 3 SA 676 (A) 687.
5) 925 E.

standing. He incurred a fractured skull with intracranial haemorrhage and died of his injuries. The accused did not raise the defence that he had reacted unthinkingly or automatically to the insult,[6] and the court a quo found him guilty of culpable homicide.

In finding that the accused had been negligent, the trial court placed reliance on the dicta in the minority judgment in Bernardus to the effect that death may be reasonably expected to result from a light assault.[7]

The question before the Appellate Division was whether the accused had acted negligently in slapping the deceased and thereby causing his death. On the minority view expressed by Rumpff JA (as he then was) in Bernardus, the answer would have been in the affirmative, as negligence - in this case the foreseeability of death and failure to avoid causing it - would be established on mere proof of the assault. Rumpff CJ, however, expressed the view that the majority judgments in Bernardus had been supported in subsequent decisions of the Appellate Division[8] and that the minority judgment had, in the light of the majority judgments, gone too far.[9] The court a quo had accordingly made a

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6) 926H. The doctrine that an automatic act or reaction is not an 'act' was not as popular then as it is now.
7) 927 D-E.
8) 927 E.
9) 927 G.

mistake in relying on the minority judgment.[10]

The premise that a reasonable man would automatically foresee death as a possible result being rejected, Rumpff CJ found it necessary to formulate the exact nature of the test for negligence. In doing so, the learned Chief Justice made certain statements that have been interpreted as a 'swing' or move to the subjective test for negligence. These will be briefly considered.[11]

A passage which has caused some difficulty is the following:[12]

> 'In die strafreg, wanneer die dood volg op 'n onregmatige aanranding, moet dit bewys word, alvorens 'n bevinding

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10) 927 H.

11) Bearing in mind that he nowhere criticises the majority judgments in Bernardus, nowhere directly rejects them and that a court of three judges could not overrule views, substantially similar to if not identical with each other, expressed by four judges on a previous occasion, it strikes one as strange that some passages in van As could give rise to the opinion that the objective approach adopted in the majority judgments in Bernardus were being rejected. It is submitted that one ought simply to interpret the judgment on the basis that a court which wishes to change the law will say so clearly and unequivocally and that, in the absence of such a clear statement, a judgment should be read on the assumption that well known existing principles are accepted, assumed and taken for granted. So viewed the van As judgment loses its mystical aura to become a realistic statement of the law based on the views of the majority of the court in Bernardus.

12) 927 H - 928 B.

> van strafbare manslag gedoen kan word, dat die beskuldigde redelikerwyse kon en moes voorsien het dat die dood kon intree as gevolg van die aanranding. Die uitdrukking "Moes voorsien het" word gebesig in the sin van "behoort te voorsien het". Indien dit bewys word dat 'n beskuldigde wel die dood as moontlike gevolg redelikerwyse moes kon voorsien het, en dat aan die kausaliteitsvereiste voldoen is, is die saak afgehandel. Die vraag is dus eenvoudig: kon en moes die beskuldgide redelikerwys voorsien het dat die oorledene deur so 'n klap kon sterf'.[13)]

What makes translation of this passage difficult, is the use of the word 'moes' in the Afrikaans text. 'Moes' is past tense for 'moet' which means 'must'. 'Moes' is, however, not only the past tense of 'moet', it also has subjunctive connotations. In other words 'moes' can be taken to have 'ought to have' as one of its natural meanings. This is reflected by the statement that 'moes voorsien het' is used in the sense of 'behoort te voorsien het'.

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13) 'In the criminal law, when death follows on an unlawful assault, it must be proved, before a finding of culpable homicide can be made, that the accused could and must have reasonably foreseen that death could supervene as a result of the assault. The expression "must have foreseen" is used in the sense of "ought to have foreseen". If it is proved that an accused could and must have been able to foresee death, and that the requirement of causation has been met, the matter is disposed of. The question is therefore simply: Could and ought the accused reasonably to have foreseen that deceased would die as a result of such a slap' (my translation). The translation is substantially the same as that of Messrs Juta's in their English translations of Afrikaans judgments; vide also Burchell and Hunt 208.

As the learned judge explains the sense in which 'moes voorsien het' is being used, one can assume that he uses the phrase in that sense in the rest of the passage. What adds to the problem though, is the addition of the word 'kon' in the following phrase, 'redelikerwyse moes kon voorsien het'. The word 'kon' which is past tense for 'kan' and means 'could' is not retained in translation, but the sense in which it is used is retained by the use of 'have been able'.

It is submitted that 'kon' was used in the sentence to make it clear that one is dealing with a subjunctive construction. Otherwise the exact meaning of 'moes voorsien het' would be doubtful. Without the subjunctive connotation the phrase could be taken to mean that the accused did as a fact foresee, or could not but foresee. The use of 'kon' indicates the meaning to be that such a person could have foreseen but in fact did not. The use of 'moes' indicates that he has no excuse for not foreseeing. In context 'redelikerwyse moes kon voorsien het' means 'reasonably he could have foreseen' in other words 'he ought to have foreseen'.

It is submitted that it is unsound to draw an inference from this passage that a subjective approach was being favoured. The judgment does not say that in the light of the peculiar characteristics the accused, he ought reasonably to have foreseen the death of the deceased. 'Reasonably', taken in conjunction with what is

later on said about the reasonable man,[14] must undoubtedly be taken to mean 'in conformity with the standards of the reasonable man'. In the absence of a clear indication that the traditional 'reasonable man' test was being departed from, linguistic obscurities cannot be regarded as indicating a radical departure from established principle.

Unfortunately this does not dispose of the problems arising from the judgment and passages on the next two pages of the judgment[15] could also be misinterpreted.

Having decided that his minority view in Bernardus was not to be supported and that the negligence or lack of it of the accused in committing that particular assault had to be investigated without recourse to any rule that death is always a reasonably forseeable result of an assault, the Chief Justice proceeded to examine negligence as a general concept in the criminal law and then examined the negligence or otherwise of the accused.[16]

The Chief Justice commenced by pointing out that negligence in the criminal law consists of two elements; namely, failure to foresee an undesirable result which was reasonably foreseeable

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14) 928 C-D; contra Burchell and Hunt 202, but vide J H du Plessis 60 and 73 n88.
15) 928-9.
16) 928 A - 930 pr.

and failure to take reasonable steps to avoid this result from coming about. In the case of an unlawful assault the second element is not the subject of inquiry, because a reasonable person would not have assaulted unlawfully.[17)]

Then the Chief Justice continued to say that 'negligence' is not quite the same as culpa.[18)]

Without in any way condemning the tradition or practice the Chief Justice then makes the statement that in our law we have been using the concept of the diligens paterfamilias as someone who would act in a certain way in certain circumstances; what this diligens paterfamilias would do is regarded as reasonable.[19)] Then follows an interesting passage[20)] which could give rise to

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16) 928 A-930 pr.

17) With respect, it is submitted that in an investigation into alleged culpable homicide the question is whether a reasonable man would have foreseen death and refrained from assaulting. To describe every assault as unreasonable in the context of death possibly resulting from an assault, is casting the net of unreasonable conduct so wide as to come perilously close to adopting the rejected minority view in Bernardus.

18) 928 B-C. 'Wat die graad van nalatigheid betref, moet in gedagte gehou word dat die woord "nalatigheid" ... nie juis weergee wat bedoel word nie. In die deliktereg gaan dit in die algemeen wat culpa betref oor 'n versuim om te voorsien en om versigtig te wees'. ('Concerning the degree of negligence it must be borne in mind that the word "negligence"... does not correctly reflect what is meant. In the law of delict culpa is generally concerned with a failure to foresee and to be careful'. (my translation)).

19) 928 C.

20) 928 D-F.

misunderstanding, unless one bears in mind throughout that there is no clear reason for believing that the law was being changed:

> 'Ons gebruik nie die diligentissimus paterfamilias nie, en wat die diligens paterfamilias in 'n bepaalde geval sou gedoen het, moet die regterlike beampte na die beste van sy vermoë beslis. Hierdie diligens paterfamilias is natuurlik 'n fiksie en is maar al te dikwels nie 'n pater nie. Hy word "objektief" beskou by die toepassing van die reg, maar skyn wesenlik sowel "objektief" as subjektief beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoë. Indien 'n persoon dus nie voorsien nie wat die ander persoon in die groep wel kon en moes voorsien het, dan is daardie element van culpa naamlik versuim om te voorsien, aanwesig. Dat voorsienbaarheid en versigtigheid aan mekaar geskakel is en dat gebrek aan versigtigheid gewoonlik spruit uit versuim om te voorsien, kan, dink ek, beswaarlik ontken word'.[21]

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21) 'We do not use the diligentissimus paterfamilias and what the diligens paterfamilias would have done in a given case, the judicial officer must decide to the best of his ability. This diligens paterfamilias is of course a fiction and is all too often not a pater at all. He is regarded "objectively" in the application of the law, but substantially appears to be judged both "objectively" and "subjectively" because he represents a particular group or type of person who are in the same circumstances as he, with the same ability to know. Should a person therefore

Unfortunately, examples of the various groups persons could belong to, are not given. Examples of how the objective and subjective requirements are investigated and applied, are also not given. The relevance of these considerations to the matter under inquiry is also not indicated. To what special group of persons did the appellant belong? There is no suggestion that the appellant ought to be treated differently from any other person giving another a slap in anger. One can only submit that, in the absence of any indication to the contrary, the learned Chief Justice was explaining the law as it had been up to that time and still was, and that he did not intend to change it.

By 'a particular group or type' the Chief Justice could only have meant persons with special or specialised knowledge, and possibly very young people. There is no indication that he was attempting to create a series of phantoms; namely, the reasonable constable, the reasonable detective, the reasonable professor, the reasonable Xhosa, the reasonable Hollander, the reasonable boxer, the reasonable rugby player, and so forth ad infinitum, out of that one fiction 'the reasonable man' or diligens paterfamilias. Where indeed would such a list end?

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not foresee what the other persons in the group could and must have foreseen, then that element of culpa, namely failure to foresee, is present. That foreseeablility and carefulness are linked and that a deficiency in carefulness usually arises from failure to foresee, can, I think, hardly be denied' (my translation). 'Knowledge capacity' ('a vile phrase' to quote Polonius) is used by Goosen 1979 Obiter 60. In the Juta's translation of the SALR 'Kennisvermoë' is translated simply as 'knowledge'.

The submission that the Chief Justice had no intention to depart from traditional views on the subject, is strengthened by his reference[22] to R v Meiring[23] without criticism.

Considering the facts of the problem before him he stated that in cases of an assault one must view the attacker, the victim, the manner of the assault and the circumstances in which the assault took place.[24] If a person sitting in his armchair is given a fairly hard slap in the face, it is not reasonably foreseeable that he may fall over backward and incur a fractured skull. If a tight-rope walker on his tight-rope is given the lightest of taps serious injury is foreseeable in the absence of safety nets. This latter example is, with respect, a little out of place. Interfering with a tight-rope walker who has no safety nets below him would almost certainly result in death and the person so interfering, with death resulting, would be very fortunate to escape conviction of murder. The inquiry would be one into dolus not culpa.

Then the Chief Justice came to the conclusion that a person in the position of the accused could not be said, beyond doubt, to have reasonably foreseen that the deceased would have fallen and cracked his skull as a result of a slap delivered sideways. Such

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22) 928-929.
23) 1927 AD 41. The view of Innes CJ in this case was that negligence amounted to falling short of the standards of a reasonable man.
24) 929 D; vide the comment in JH du Plessis 60.

a result was so unusual and of such a decidedly rare nature that it could not be said that the prosecution had proved beyond a reasonable doubt that the accused ought to have foreseen it.[25] In coming to this conclusion the Chief Justice took into account that the accused had a limited knowledge and some experience of boxing and judo.[26] It is submitted that the reference to the particular class of person the 'reasonable man' may belong to, is to be explained, and solely to be explained, as a reference to the accused belonging to a class of person that has this limited knowledge and experience of boxing.

The references to the attacker,[27] and the fact that the accused was a young strongly built man,[28] means no more than that the strength of the person delivering the blow would be one of the factors a reasonable man would take into account in deciding whether death was a reasonably possible result of the assault.

It is submitted that there is no solid basis to be found in this judgment for the conclusion that a subjective approach to culpa was being espoused.[29]

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25) 929 G-H.
26) 929 F.
27) 929 C.
28) 929 E.
29) A very simple approach to the facts would have been to consider whether it had been reasonably foreseeable that a very fat person, standing on a hard cement surface could fall and fatally injure himself as a result of a fairly hard quick slap delivered by a rather strong man. Bearing

The view that the reference to particular classes of persons by the Chief Justice in van As is a reference to persons with special or specialised knowledge, is shared by Snyman.[30] Burchell and Hunt[31] concede that the judgment could mean no more than this.

In the fourth edition of De Wet and Swanepoel a suggestion is made[32] that the reasonable man test had not really been employed in van As. Coming from such strong and persistent opponents of the objective test this brief statement, made without explanation, can be taken as an indication that support for the subjective test can only be found in van As on a strained interpretation.

Before proceeding to the leading Nkwenya[33] and Ngubane[34] decisions it would perhaps serve a useful purpose to consider a

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in mind the ungainly build of the deceased, and the well known dangers attendant on falling on a cement surface, it is submitted that death had been reasonably foreseeable and that the appeal against the conviction ought to have failed. Why the detailed discussion of negligence was necessary, is not clear. It was possibly deemed necessary in view of the move away from the minority view in Bernardus (vide Gazambe 1965 4 SA 208 SR). This move away from an extreme of 'objectivity' which could have been regarded as a retention of part of the versari doctrine, is not to be construed as a move into hitherto unknown subjectivity.

30) 189.
31) 203.
32) 162 n 203. The statement is quite untenable in view of the repeated references made by the Chief Justice to the reasonable man and the diligens paterfamilias.
33) 1985 2 SA 560 (A).
34) 1985 3 SA 677 (A).

Rhodesian case in which a clear subjective approach to negligence was adopted.

It is Mara.[35] The judgment was delivered by Young J.

It was a case of a rather brutal assault which had resulted in death in an unusual manner, namely that deceased, having been knocked unconscious by accused, had died of shock in consequence of partial regurgitation of his stomach contents. The magistrate had not been certain whether an assault, which would in any event result in serious bodily harm, could form the basis of a conviction of culpable homicide, where, although death ought, broadly speaking, to have been foreseeable, the precise manner in which it supervened was not foreseeable.[36]

In upholding the conviction of culpable homicide, Young J rejected Rumpff CJ's minority judgment and gave an extremely subjective interpretation to the majority judgments in Bernardus, which, with respect, cannot be justified in the light of those judgments. His view was that according to the majority:

> 'Killing in the course of an unlawful assault is culpable homicide if the accused, given his mental and physical make-up, would, had he thought about the matter, inevitably have recognised that in some way danger to life might

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35) 1966 1 SA 82 (SR).
36) 82-3.

be involved in the act.[37]

This is a far-reaching interpretation of the majority judgments in Bernardus and it was not necessary to apply this 'rule' to uphold the conviction.[38]

Young J also stated the subjective test very unmistakably where he says:[39] 'In the present case the accused must, if he had thought about the matter, have realised that death might result from the serious assault he committed'.

This appears to be a statement of the law contrary to principles accepted at the time. The traditional test is that a reasonable man in the position of the accused would have thought about the matter and would have realised that death could result. Bernardus

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37) 83G emphasis added. The statement is one of an extremely subjective approach which cannot be found in the Bernardus judgments. It reminds one of 'Caldwell recklessness' in English law although Caldwell is only reported in 1981 1 AER 961: vide Lord Diplock's dictum at 982g.

38) The facts were simple: a very serious assault which anyone could foresee might result in death, did in fact result in death. The real question, namely whether the exact manner of death ought to be foreseeable before a conviction can be brought, is also easily answered in the light of long established principle. It is a question not of fault but of causal liability, and it has long been established that in homicide cases death is 'caused' by the conduct of the accused setting in motion a train of events causing death, even though the chain of events may unfold in an unusual way not planned or foreseen by the accused. The question is thoroughly canvassed in the judgments of Van Winsen and Jansen JJA in Daniëls 1983 3 SA 275 (A).

39) 84 A.

certainly is no authority for evicting the reasonable man.[40]

An important case on culpable homicide is the recent Appellate Division decision of Nkwenya.[41] A perusal of the judgments makes it clear that the interpretation of van As as opening the door to the adoption of a subjective test is not endorsed, and a strong objective approach to negligence is adopted.

The facts are that the two accused had planned and thereafter launched a simultaneous attack on a man and a woman who were sitting in the back of a car, with the intention of robbing them.

A blow which must have been light according to the medical evidence, proved fatal to the man. It was uncertain how this blow

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40) The weakness of the subjective test is also to be seen in this passage from the judgment of Young J. If the accused could have foreseen death, had he thought about the matter, why did he not, 'given his mental and physical make-up' think about it? Was it unreasonable for him not to give thought to the matter? If so, by what standards of reasonableness? His own? Then the question why he did not think about this matter becomes unanswerable. It becomes the question: Why did he not live up to his own standards? Because he was angry? But, judging by his own standards, is it not unreasonable that he should not think about the consequences of his actions when he is angry. Clearly, on the facts, he was not a man who thought about the consequences of his actions when angry. Therefore, given his mental and physical make-up, and judging by his standards, he was not acting unreasonably. To arrive at a finding that his conduct was unreasonable one would inevitably have to apply a standard of reasonableness which is not that of the accused. At what stage does one apply it? This question no subjectivist can answer.

41) discussed by du Plessis 1985 SALJ 1,2.

was delivered and also which of the two accused had delivered it. It was certain that they had acted with a common purpose and that the one could therefore be held responsible for such acts of the other as fell within the scope of the common purpose.

In view of the lightness of the fatal blow, the court refused to hold that in striking the blow the appellant who had struck it, ought to have foreseen that death may result.[42)]

The prosecution advanced the argument that when planning the robbery the two accused ought reasonably to have foreseen that one of the intended victims could be fatally injured.[43)]

In deciding on this submission the court arrived at differing views on the facts. Rabie CJ with Miller JA concurring, held that the facts were not such that, at the planning stage, the accused ought to have foreseen the death of one of their proposed victims. The majority of the court; namely, Jansen JA with Joubert JA and Grosskopf AJA concurring, took the opposite view and held that the nature of the planned robbery was such that at the planning stage both accused ought reasonably to have foreseen that their scheme could have fatal consequences.

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42) 570 A-D. It is interesting to compare the facts in Nkwenya with the Rodesian case Gazambe 1965 4 SA 208 (SR). A great deal appears to hinge on the violence of the assault itself. But, as in van As, the physical surroundings of the accused and his victim could affect the potentially dangerous nature of any assault.

43) 570 E.

Both Rabie CJ and Jansen JA viewed the facts objectively and applied an objective test. Rabie CJ laid stress on the slight violence actually used and Jansen JA laid stress on the inherently dangerous nature of the enterprise. Hence their differing conclusions. Jansen JA, correctly it is submitted, pointed out that the accused ought to have anticipated violence, that the exact nature of the violence could not be foreseen and that the appellants ought therefore to have desisted from their intended robbery.

In both judgments the view taken of the law is the same. The difference is in the application of the law to the facts.

It is also significant that Jansen JA specifically refers to van As and states that the van As judgment is not contrary to the finding made by him,[44] because the basis of the van As decision is whether the accused ought reasonably to have foreseen that in those circumstances a slap in the face of the deceased would have caused him to fall backwards onto the stoep banging his head on its surface.[45]

By 'reasonably' (redelikerwys) in the passages referred to[46] the learned judge of appeal, with respect, meant 'reasonably' in the accepted legal sense of the word; namely, according to the

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44) Nkwenya 572-3.
45) 573 A.
46) 572-3.

standards of the reasonable man. It is also abundantly clear that Jansen JA interpreted the van As judgment as laying down an objective test, because the basic question in that judgment according to him, was whether death had been reasonably foreseeable to the accused. In other words, would a reasonable man in the position of the accused, have foreseen the death of the deceased as a result of the slap.

In deciding on the liability of the appellants, Jansen JA also states unequivocally that their liability depended inter alia on the question whether a reasonable person ('n redelike mens) or bonus paterfamilias would have foreseen death as a possibility in the circumstances.[47] There can therefore be no doubt that in Nkwenya the Appellate Division has reiterated and underlined that the test for criminal negligence is objective.

The approach to the problem of negligence in Nkwenya is basically similar to that in Steynberg.[48] In Steynberg's case the accused, armed with a loaded revolver, had gone to the house of the deceased to seek a confrontation and to overpower the deceased. During the ensuing confrontation a shot was fired from the revolver and deceased was killed. There was no reliable evidence concerning the exact nature of the argument and ensuing physical struggle in the course of which the fatal shot was

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46) 572-573.
47) 572 F-G.
48) 1983 3 SA 810 (A).

fired. The trial court had found the accused guilty of murder, but as neither direct or indirect intent to kill had been proved, the conviction could not stand. The question remained whether negligence had been established. Hoexter JA held[49] that even if the shot had gone off accidentally, a reasonable person in the position of the appellant would have foreseen at the stage when he decided upon seeking the confrontation with a strong man whilst armed with a revolver, that a shot could be fired unintentionally in the course of the ensuing events and that such a shot could kill the person with whom he was seeking the confrontation. In this portion of the judgment it is clear that had the accused deliberately fired the shot during the confrontation, but without intent to kill, he would have been guilty of culpable homicide. But in the absence of proof of such a deliberate firing of the shot, he was in any event guilty of culpable homicide as his mens rea (negligence) came into existence at the time when he decided to seek out the deceased and confront him.

The test applied was the reasonable man test and its application was very objective. At a time as yet somewhat remote from the killing, the accused had failed to foresee what a reasonable man would have foreseen and had not guarded against what a reasonable man would have guarded against.

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49) 150 B-D.

In Ngubane[50] Jansen JA had occasion to refer to the subjective test for negligence. He declined to express any opinion on the view that there was a 'swing to the subjective approach' to negligence, but added, significantly it is submitted '... save for mention that there may be some doubt whether the phrase "redelikerwyse kon en moes voorsien het", used in S v van As, connotes anything more than the conventional objective standard, albeit somewhat individualised'.[51]

It is submitted that by 'somewhat individualised' the learned Judge of Appeal meant no more than that the reasonable man is placed in the position of the accused and credited with such special or specialised knowledge as the accused may have.[52]

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50) 1985 3 SA 677 (A).
51) 687 B-C.
52) vide du Plessis 1986 SALJ 1, 7-8.

CHAPTER II

CONSCIOUS NEGLIGENCE OR LUXURIA

1. Introductory

In keeping with the general purist trend to incorporate German doctrines into our law there is the possibility that conscious negligence may be promoted as a doctrine for incorporation into our law. Hence the examination of this concept in the present chapter.

Conscious negligence or luxuria has not been expressly applied in any reported judgment of our courts.[1] It has been written about by South African academic writers[2] and has been referred to, but not applied, in the important Ngubane[3] decision. Conscious negligence (bewusste Fahrlässigkeit) is well known in German criminal legal theory and is also known in other continental systems.[4]

There is more than one version of what conscious negligence

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1) vide Bertelsman 1976 SALJ 59, 68.
2) Bertelsman 1974 AJ 34; 1976 SALJ 59; 1980 SACC 28; Morkel 1981 SACC 162; 1982 THRHR 321; 1983 THRHR 87; 1981 TRW 101; Morkel (Rational Policy) 76; Morkel(Nalatigheid) 136-8 and 145-7; van Oosten 1982 THRHR 183; 1982 THRHR 423; Middleton 1973 THRHR 181; Burchell and Hunt 148-50; Snyman 186; LAWSA 6 89-90; Visser and Vorster 363-4.
3) 1985 3 SA 677 A.
4) Ngubane 685 B-C. Jansen JA refers to 'the Continent' meaning Germany, France and the Netherlands, one supposes.

amounts to.[5] It is proposed to identify and briefly discuss various academic versions and then to investigate some reported decisions in which the concept was allegedly applied.

2. Conscious negligence viewed as foreseeing a criminal result and hoping it will not materialise

The 'classic' version of the concept of conscious negligence is discussed by Jansen JA in Ngubane.[6] The learned judge of appeal points out that dolus eventualis contains a volitional component which is absent from conscious negligence. The consciously negligent person foresees a possible undesirable result of his conduct, but does not take it into the bargain. He hopes that it will not eventuate. In this connection Jansen JA refers to a Dutch writer previously referred to by him in Dladla.[7] Here one of the tests for distinguishing between dolus eventualis and conscious negligence is stated as asking the question whether the accused, had he been informed that the possibility he foresaw would certainly eventuate, would have desisted from his course of conduct. If the answer to this question is no, his mens rea is dolus eventualis; if the answer is yes, his mens rea is conscious negligence. Another question is : What would the accused have preferred: the accomplishment of his design with the undesirable result taken into the bargain, or would he have given up his

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5) In Ngubane there is a brief discussion (685) of some of the different views. This does not state our positive law which does not know conscious negligence.
6) 685 C-G.
7) 1980 1 SA 1 (A); the Dutch writer is van Hattum.

design, rather than have the undesirable result eventuate? In the first case his mens rea would be dolus eventualis; in the second case it would be conscious negligence.

The two tests result in the same answers and are fundamentally similar. In both cases the distinction between dolus eventualis and conscious negligence is dependent on a volitional component; namely, whether the accused takes the undesired result into the bargain or whether he wishes or hopes that it would rather not supervene. If he reconciles himself with the undesirable result his mens rea is dolus eventualis; if he does not, his mens rea is conscious negligence.[8)]

This view of conscious negligence is open to criticism. The most obvious criticism is that it is really nothing other than dolus eventualis and that in the context of our positive law with its very strong emphasis on the subjective nature of dolus and the objective nature of culpa, the volitional component could at most be relevant to the question of sentence. A person who is aware of a possible undesirable consequence of his conduct and takes it into the bargain is conceivably more blameworthy in the moral sense than the person who hopes and wishes that the undesirable consequence will not materialise. In South African positive law the strictly legal liability of both persons is the same: their mens rea is dolus eventualis.

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8) Ngubane 685 F-H; Dladla 2.

The above version of conscious negligence has not found great favour with South African academic writers.[9]

The interest of South African academic writers has mainly centred around two features of the definition of dolus eventualis in South African criminal law; namely, the foreseen possibility and the reckless carelessness. These features will be discussed in the next sub-section.

3. Remote possibilities and recklessness as components of dolus eventualis

The current definition of dolus eventualis in South African criminal law is that of Burchell and Hunt. In respect of consequences it is stated as follows:

> 'Legal intention (dolus eventualis) in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether it does or not;'[10]

and in respect of circumstances as follows:-

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9) Its main proponent is Bertelsman in his publications referred to in n2 supra.

10) 141.

> 'Legal intention (dolus eventualis) in respect of circumstances consists of foresight on the part of the accused that the circumstances may possibly exist coupled with recklessness as to whether it does or not.'[11]

The possibility of consequences and circumstances has received attention, as well as the recklessness in respect of the consequences and circumstances.

In this connection it would seem that there is a divergence of views between our courts when stating and applying the positive law, and the views of some modern writers. This is particularly the case on the question whether remote possibilities actually foreseen, suffice for dolus eventualis to be present,[12] provided the other requirements are met.

A number of South African writers are in disagreement with the view that any possibility, as long as it is actually foreseen will suffice.[13] Once it is accepted or proposed that a very remote or unlikely possibility will not suffice for dolus eventualis, the question arises whether any mens rea and, if so, what

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11) 156.
12) De Bruyn 1968 4 SA 498 (A); Shaik 1983 4 SA 57 (A),62 B-F; Burchell and Hunt 146.
13) Burchell and Hunt 145-8; Snyman (Strafreg) 169; Morkel (Rational Policy) 64-5; Morkel 1982 THRHR 321; 1981 SACC 162-73; Bertelsman 1976 SALJ 59; 1974 AJ 34; 1980 SACC 28; Visser and Vorster 298. Contra van Oosten 1982 THRHR 183.

mens rea will be present if the remote or unlikely possibility does, notwithstanding its remoteness[14] or unlikelihood, nevertheless eventuate? The answer proferred is that the mens rea will be conscious negligence.[15]

This answer, although it has found favour[16] is unsatisfactory. It blurs the distinction between dolus and culpa by recognizing a form of culpa; namely luxuria, that must in practice be indistinguishable from dolus eventualis. The nett effect of recognizing conscious negligence in our positive law would thus be to make dolus eventualis a vague and unworkable concept. 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. The courts would also have to determine how the accused assessed the possibility subjectively. As dolus eventualis must be tested subjectively, this would be the crux of the inquiry. It would be far more practical to retain our law as it is; namely, a possibility actually foreseen no matter how remote, is a possibility and suffices for dolus eventualis.

Naturally this does not mean that the individual who foresaw a

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14) The remoteness or unlikelihood of the possibility is to be judged subjectively from the point of view of the accused and according to his assessment, Ngubane 685G.
15) Burchell and Hunt 148-50.
16) Burchell and Hunt 148-50; Snyman (Strafreg) 170; Morkel 1982 THRHR 321.

remote possibility or who has assessed a possibility as remote, will always be in the same position as one who foresaw a substantial possibility as substantial. Our trials, unlike German trials, are heard in two phases.[17] Once guilt has been established on the basis that the accused did as a fact foresee a possibility, the remote or concrete nature of the possibility would be relevant to the question of sentence. In murder cases the fact that the mens rea was dolus eventualis is not in itself an extenuating circumstance, but this is taken into account in conjunction with all other relevant facts to determine whether there are extenuating circumstances.[18]

What must not be lost sight of is that if the possibility does not eventuate no crime, except perhaps attempt, will have been committed. On the other hand, the possibility may eventuate and the stark fact will be that, no matter how remote, the possibility was real in the sense that it did become a reality.[19]

The term 'recklessness' in the definition of dolus eventualis has

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17) Theron 1984 2 SA 868 (A) - as to the German one-phase trial vide du Plessis 1984 SALJ 301, 317.

18) Sigwahla 1967 4 SA 566 (A); De Bruyn 1968 4 SA 498 (A).

19) The possibility that one of two intending robbers would shoot and kill the other must be remote, but it did happen in Nkombani 1963 4 SA 877 (A); similarly the possibility of one security guard fatally shooting another, but this happened in Nhlapo 1981 2 SA 744 (A). There can be no question that the accused in both cases were guilty of murder.

been described as a 'colourless concept'[20] This means that a certain wanton bravado or callous indifference is not necessary for the requirement of recklessness to be met. It simply means that if an accused subjectively foresees the possibility of a criminal result flowing from his conduct and nevertheless continues with such conduct, he is reckless as to whether the criminal result is or is not brought about by his conduct. It is therefore doubtful whether the word recklessness serves any useful purpose in the definition of dolus eventualis.[21] Perhaps it should be omitted or supplanted with a clearly neutral word like, for instance, 'heedless'.

This may be illustrated by referring to two well-known dicta on dolus eventualis in judgments of the appellate division in Mini and Sigwahla.

The first is:

> 'The proposition is well established in our law that a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another may cause death and nevertheless inflicts the injury reckless whether death will ensue or not'.[22]

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20) Burchell and Hunt 152; Morkel (Rational Policy) 68-71.
21) Morkel (Rational Policy) 68-71.
22) per Hoexter JA in Mini 1963 3 SA 188 (A), 190.

It is submitted that 'reckless' could be left out of this sentence, either alone or with all the words following it, and the sentence would still remain a statement of the nature of dolus eventualis. 'Reckless' could also be substituted with 'heedless' without altering the accuracy of the sentence as a statement of dolus eventualis. The word 'heedless' or other near equivalents such as 'careless', 'unmindful', or 'indifferent' would also fulfil no real function in the sentence.

The second is:

> 'It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result.'[23]

Here the phrase 'reckless of such result' could be substituted with 'nevertheless carried on'; or 'reckless' could be substituted with 'heedless' or 'unmindful'; or the phrase 'was reckless of such result' could be substituted with : 'carried on with the act', or with: 'and did not allow such foresight to deter him'.

It is therefore suggested that the following definition of dolus eventualis would be less confusing:

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23) per Holmes JA in Sigwahla 1967 4 SA 566 (A), 570.

> 'Dolus eventualis is that form of dolus which is encountered when an accused carries on with a course of conduct aware that a criminal result could possibly flow from such conduct'.

In conclusion, it may be noted that in the two current Afrikaans textbooks on criminal law[24] 'roekeloos', the exact Afrikaans equivalent of 'reckless', is not used in the definitions of dolus eventualis.

4. Remote possibilities, recklessness and conscious negligence

Those writers who are of the opinion that only real or concrete possibilities should suffice for dolus eventualis, seek to fit remote or unlikely possibilities, actually foreseen, and which do eventuate, into the niche of conscious negligence.[25]

This appears to be a view of conscious negligence entirely

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24) Snyman (Strafreg) 168-9; De Wet and Swanepoel 139-40. In both textbooks the accused is said to 'versoen' (reconcile) himself with the foreseen possibility, but from the discussion it is clear that the term is used neutrally and not in the sense of calculatedly, maliciously or recklessly accepting the possible result. De Wet and Swanepoel do not recognize conscious negligence; vide Morkel (Rational Policy) 87.

25) Burchell and Hunt 148-9; Morkel (Rational Policy) 89; Morkel 1981 SACC 162, 171-3.

different from the view that conscious negligence is foresight minus the voluntative component which is said to be a component of dolus eventualis.[26)]

If the possibility is very remote the accused is simply consciously negligent should he carry on regardless of whether the consequence eventuates or not. A remote possibility, on this line of thinking, does not require that degree of care to avoid its eventuating, as does a real or concrete possibility. This view is untenable. At the stage when the accused falls to be convicted because of the relevant findings of fact, it will have been established that he foresaw the possibility, that he ignored it and that it eventuated. On what basis could his assessment of the possibility as remote affect his legal guilt or 'juridiese skuld'[27)] so as to make his mens rea such that it is not dolus eventualis? The obvious answer is that his mens rea, so analysed, is clearly dolus eventualis. Some proponents of conscious

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26) Morkel 1982 THRHR 321, 324-5. Morkel (Rational Policy) 89 expresses the difference very clearly by stating that the accused who hopes that the possibility will not materialise has dolus eventualis as his mens rea, but the man who trusts that it will not materialise is consciously negligent. The distinction is, however, unacceptable: the man who really trusts that the result will not materialise, no longer foresees it as possible. Noteworthy is that the man who 'hopes' would in any event lack the voluntative component. Morkel (Rational Policy) 68-9 states that if a man were to cause a dangerous occurrence and actively pray that no one would die as a result, his mens rea would still be dolus eventualis. Clearly this man in earnest prayer would lack the volitional component.

27) For this term vide Theron (supra) at 880 D-F.

negligence[28] are aware of this, and fall back on the alleged volitional component of dolus eventualis as a means of distinguishing between dolus eventualis and conscious negligence in this context. If the possibility is remote, so they say, the accused cannot be said to have taken its materialization into the bargain. This is not a convincing argument: it would be anomalous to place the man who foresees a remote possibility and takes it into the bargain in a worse position than the man who foresees a concrete possibility but does not take it into the bargain while, nevertheless, not avoiding it. In the case of the first man the volitional component is present and in the case of the second man it is absent, but on a commonsense view the former is less blameworthy than the latter.

The 'remote' or 'concrete' nature of the possibility, standing alone, cannot serve as an adequate criterion for distinguishing between conscious negligence and dolus eventualis. To make the presence or absence of the volitional component purely dependent on the remoteness or concreteness of the possibility, is unsatisfactory. The accused may be able to prove that in spite of the concrete nature of the possibility he did not take it into the bargain and the prosecutor may be able to prove that notwithstanding the remote nature of the possibility the accused did, as a fact, take it into the bargain. This would result in the anomaly above referred to.

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28) Bertelsman 1974 AJ 34, 1976 SALJ 59, 1980 SACC 28; van Oosten 1982 THRHR 423.

Other proponents of conscious negligence, focus their attention on the element of recklessness in dolus eventualis. On their view the accused who was aware of the possibility of a criminal result, but who took precautions against such possibility eventuating, is not reckless. He is therefore consciously negligent and does not have dolus eventualis as his mens rea. The argument is not convincing and has led to contradictory statements concerning the effect of taking precautions.[29] The nature of the precautions and their efficacy in the eyes of the accused, have also given rise to divergent views.[30]

The accused who takes precautions which he knows or believes are not sufficiently effective to guarantee that the undesirable result will not supervene, is simply making the foreseen possibility more remote. His position is still that of a person who foresees a possible criminal result of his conduct but does not desist. The accused who takes adequate precautions or, more importantly, who believes that he has taken adequate precautions and that the undesired result will not supervene, obviously no

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29) Here the interesting polemic between Morkel and van Oosten in their notes and articles in THRHR referred to in n2 supra has the merit, inter alia, of providing insight into the difficulties created by the view that the taking of precautions influences the question whether one is dealing with dolus eventualis or luxuria. Van Oosten is clearly right that once a man believes his precautions to be adequate, he no longer foresees the possibility: 1982 THRHR 423, 431-2.

30) vide the Morkel-van Oosten polemic supra.

longer foresees the possibility.[31] Such an accused cannot be said to have dolus eventualis as mens rea. His carelessness caused him to take precautions which, to his mind, removed the possibility. As far as he is concerned the possibility is non-existent and he can therefore at most be unconsciously negligent in respect of the possibility if it is realised. It has been said that one is dealing with conscious negligence in such a case because the accused knew of the possible result. His knowledge is, however, no longer the crux of the matter. The crux of the matter is that he took inadequate precautions negligently but genuinely believing them to be adequate. He was therefore unaware that the precautions would be ineffective and consequently his negligence is unconscious.

It is simply incorrect to say that he was 'taking a chance'. If he believed the possibility previously anticipated had been effectively ruled out, he was taking no chance at all. As far as the theoretical literature is concerned, there can be no doubt that the views expressed by South African writers are very divergent and to some extent confusing.[32]

It now remains to investigate and consider decided cases in which conscious negligence is said to have been considered and/or applied.

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31) vide Bertelsman's criticism of Bodenstein in 1976 SALJ 59, 69.

32) ibid and the Morkel-van Oosten polemic n2 supra.

5. South African Decisions

Conscious negligence is not recognized by our courts. In Ngubane[1] it is discussed for the sake of argument but neither approved nor incorporated into our law.[2]

It has, however, been said[3] that our courts have applied the concept of conscious negligence without stating it in so many words. Cases in which this is said to have happened are inter alia, van Zyl,[4] Dube,[5] Dladla,[6] Fernandez[7] and Hedley.[8]

Van Zyl was a case about reckless driving and in a much quoted passage,[9] Steyn CJ is said to have given some recognition to conscious negligence.

What emerges very clearly is that Steyn CJ regarded conscious negligence as dolus eventualis. Thus he says:[10]

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1) 1985 3 SA 677 (A).
2) 685 A - 686 C, particularly 686 C; cf du Plessis 1986 SALJ 1, 3-4.
3) Bertelsman 1976 SALJ 59.
4) 1969 1 SA 533 (A).
5) 1972 4 SA 515 (W).
6) 1980 1 SA 1 (A).
7) 1966 2 SA 259 (A).
8) 1958 1 SA 362 (N).
9) 577 A-E. Cooper (507) says the passage is difficult to apply.
10) 557 A-B.

'Waar 'n bestuurder se besef van gevaar of moontlike gevaar wat hy op die pad skep, gepaard gaan met onverskillige aanvaarding daarvan en voortsetting van sy handelswyse, sou sy optrede moet deurgaan as roekeloosheid in die sin van 'n doen of late met risiko-bewustheid, maar dit sou regtens buite die grense van die grofste nalatigheid val en op dolus eventualis neerkom'[11]

Whether the recklessness required for reckless driving amounts to dolus eventualis or not is a matter of interpreting the statutory provision in question,[12] and not a question of what our common law on the subjects of dolus eventualis and conscious negligence may be. No authority is to be found in van Zyl for the view that conscious negligence is part of our law.

Hedley is a case in which conscious negligence was allegedly applied.[13] Although, at first blush this appears to be the

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10) 557 A-B.

11) 'Where a driver's realization of danger or possible danger created by him on the road is accompanied by reckless acceptance thereof and a continuation of his conduct, his conduct would have to be regarded as recklessness in the sense of an act or an omission with risk-consciousness, but juridically this would fall outside the borders of the grossest negligence and amount to dolus eventualis ...' (my translation, emphasis added).

12) In terms of van Zyl recklessness has two meanings in the context of the statutory offence of reckless driving viz contravening sec 138 (1) and (2) of the Transvaal Road Traffic Ordinance No 21 of 1966; vide Cooper 509-15.

13) vide Bertelsman 1976 SALJ 59, 73.

case, it is doubtful whether conscious negligence was indeed applied. The judgment is, with respect, somewhat loosely worded, mainly because the result of the appeal with which the court was dealing, was so obvious that a minute analysis and detailed discussion were not called for.

The accused had fired two shots at a bird which was swimming on a dam. The second bullet ricochetted off the water and killed a woman who was sitting about '32 yards off the line of fire.'[14] It was contended on behalf of the accused that he could not reasonably have foreseen that the bullet would deviate from the direct line of fire and kill a person.[15]

Broome JP disposed of this contention on the ground that the accused knew that there were human dwellings behind the bird and that there would probably be human beings. Unfortunately the following is also reported to have been said by the learned Judge President: 'He knew that the bullet he was firing would strike the water and might ricochet and that if it did ricochet it might pass near the huts and so might hit someone.'[16]

Taken literally this passage means that the accused had dolus eventualis as his mens rea; in other words, he was guilty of murder. This could not possibly have been what the Judge

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14) 363 B-C.
15) 363 D-E.
16) 363 G-H.

President meant in finding that the accused had been correctly convicted of culpable homicide[17] What the passage really meant, taken in context, is that the accused knew that he was firing in the direction of human habitations and that he ought to have known that he might kill someone irrespective of his precise knowledge of how a bullet could be expected to ricochet off water. Conscious negligence was completely unknown in our case law at the time (1957) and it is unacceptable that the court would have applied it in such a cursory manner.

Fernandez is a well known case of an omission leading to a conviction of culpable homicide. The accused was in charge of a baboon. He knew that it was dangerous, but failed to keep it under proper control. He was convicted of culpable homicide in respect of the death of a child killed by the baboon.

On the fatal day the baboon had escaped from its cage and the accused, after arming himself with a revolver, had lured it back into the cage. He then set about repairing the cage with the aid of another person. While working at one end of the cage he allowed the other end to remain in a condition that allowed the baboon to escape as it had escaped in the first place.

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16) 363 G-H.
17) The sentence was imprisonment for three months with the alternative of a fine of R50, the entire sentence being conditionally suspended for three years, 363 pr.

The accused was aware of the danger but was clearly not aware that the deceased and her mother were approaching. The baboon escaped and killed the deceased. It was a clear case of the accused being aware of danger and taking inadequate precautions to protect the public.[18] There is no indication at all in the judgment that he was aware of the inadequate nature of his precautions. There is no indication that he knew the deceased to be in danger and hoped that the danger would not materialize or that he was aware of a remote possibility that deceased could be killed but did not take it into the bargain. It was a clear case of unconscious negligence. The conviction was upheld on that basis and there is not the slightest mention of conscious negligence in the judgment. The accused was, unreasonably, unaware that the way in which he set about solving the problem of the escaping baboon did not rule out the possibility of a human being's death. The reasons for the court's finding are summed up by Ogilvie-Thompson JA as follows:

> '... on the facts of this case it was established by the State that appellant ought reasonably to have foreseen that death might result from this baboon's not being prevented from leaving its cage.'[19]

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18) At 264 B it is said that appellant took no steps to ensure that the baboon would not escape a second time. Appellant's enticing the baboon back into its cage was, however, a precaution.

19) 264-5.

This is a statement of unconscious negligence as traditionally understood.

Dladla has been regarded by Bertelsman[20] as a case in which recklessness, dolus eventualis and conscious negligence were placed in proper perspective. Recklessness, so Bertelsman argued, had been jettisoned and the 'real' dolus eventualis finally recognized. As a necessary corollary, conscious negligence is also at last given its rightful place - so it is argued.[21]

The judgment[22] is concerned with sentence, more particularly the question whether there were extenuating circumstances connected with a murder of which Dladla had been convicted. Counsel had submitted[23] that dolus eventualis is an elastic concept. At one end of the scale it borders on dolus directus and at the other end of the scale it borders on culpa. Jansen JA dealt specifically with this contention and it was clear that his object was to prevent the 'elasticity' of dolus eventualis from causing the distinction between dolus eventualis and culpa to become blurred.[24]

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19) 264-5.
20) 1980 SACC 28.
21) 1981 SACC 162, 163.
22) Morkel (1981 SACC 162, 163) expressed the view that Bertelsman was reading more into the judgment than had been intended by the court delivering it and Morkel appears to be right.
23) 2 F-C.
24) 3 H- 4pr.

The learned judge of appeal clearly stated that dolus eventualis was concerned with what the actor foresaw as a fact; culpa was concerned with what the actor ought to have foreseen according to an objective criterion.[25] Then he added that in the case of dolus eventualis there was also the characteristic voluntative decision[26] nevertheless to accept the possible result. It is submitted that the learned judge of appeal was describing the nature of dolus eventualis in this part of his judgment and not making conscious negligence part of our law. He does mention conscious negligence but refers to culpa only, stating that the voluntative decision is not part of it. This is in accordance with our accepted positive law. A negligent person is not aware of the possible harmful consequences of his conduct and by necessary inference does not and can not be said to accept them.

The learned judge then quoted fairly extensively from a Dutch writer.[27] In the quoted passages two theories concerning the distinction between dolus eventualis and culpa are discussed.[28] One theory[29] is to the effect that there is dolus eventualis if the actor would have carried on with his proposed conduct even had he been certain that the harm foreseen by him as a possibility would ensue. The other[30] theory is

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25) 4 A.
26) 4 A-B.
27) van Hattum.
28) 685 C-F referring to Dladla supra 4 B-G.
29) 'de voorstellingstheorie'.
30) 'de wilstheorie'.

to the effect that dolus eventualis was present if the actor would have preferred the intended results of his conduct to ensue together with the unintended results, rather than to desist from his conduct, thereby avoiding both the intended and unintended results. The passages were obviously quoted to stress the subjective nature of dolus eventualis and not to give recognition to conscious negligence. This it is submitted is clear from the judgment viewed as a whole.

Jansen JA concluded with the remark that it might be difficult to prove that a person foresaw and reconciled himself with an extremely improbable result.[31] There is nothing to indicate that by an actor reconciling himself with a foreseen possible result, anything more is meant than that he nevertheless continues with the course of conduct that could possibly bring about that result. No mention is made in the Dutch texts quoted of the effect of a wish or hope[32] on the part of the actor that the result should not ensue.

Kok[33] views Dladla differently from Morkel[34] stating that the views expressed in the Dutch texts are in sharp contrast to Morkel's views. Nevertheless the relevant passages are only concerned with the subjective nature of dolus. The entire discussion is in any event in the context of an inquiry into

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31) 4H.
32) vide van Oosten 1982 THRHR 423, 431.
33) 1982 SACC 27, 29.
34) 1981 SACC 162, 163.

whether extenuating circumstances were present, in other words an inquiry into moral blameworthiness.

It is also to be noted that Kok is very sceptical about the contents of the Dutch passages. He sums them up as being to the effect that dolus eventualis only qualifies as dolus if the actor, were he certain that the possible result would ensue, would bring it about with dolus directus.[35] This would bring an extremely dangerous hypothetical and speculative element into the concept of dolus eventualis.

The concept of conscious negligence appears to be at its most viable in cases of reckless or grossly negligent driving. It would be going too far to suggest that driving a motor car is intrinsically dangerous, and that, consequently, anyone who drives a motor car is consciously negligent in that he realises that he is engaged in a dangerous activity and hopes and trusts that harm to or the death of a human being will not result.[36] Nevertheless a person who drives at an excessive speed through a built up area or who 'shoots' a robot in busy traffic or who overtakes on a blind rise or overtakes in the face of oncoming traffic, could reasonably be described as being consciously negligent. His recklessness is a very gross form of negligence

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35) 29.
36) Morkel 1982 THRHR 321, 322; van Oosten 1982 THRHR 423, 424.

and could amount to dolus eventualis.[37] No person of normal intelligence and even limited driving experience would be unaware of the fact that such driving is extremely dangerous.

Here one must, however, be careful to distinguish the mens rea of the crime of negligent or reckless driving from the mens rea of a negligent or reckless driver whose driving results in another person's death, in respect of that death.

A person who makes a slow U turn in fairly busy traffic is deliberately driving negligently. The name of the crime of 'negligent driving' does not preclude an act which amounts to negligent driving from being committed intentionally.[38] Although it will generally be irrelevant in a prosecution for negligent driving, the mens rea of such a driver in respect of his negligent driving would be dolus directus. The same applies to reckless driving. Should two motorists decide to race each other through a city or town and do this at high speed, they would intentionally be committing the crime of reckless driving.[39] Their mens rea in respect of that crime would be dolus directus.

Assume that a collision occurs as a result of the U turn

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37) van Zyl supra 557 A-B.
38) vide Nxumalo 1982 3 SA 856 (A) 860F where Corbett JA speaks of '... a deliberate course of negligent conduct'.
39) ibid.

described above and someone dies as a result of the collision: the driver making the U turn would in all probability be convicted of culpable homicide as he ought reasonably to have foreseen the accident and resultant death. His mens rea in respect of the death would be culpa.

The two racers, if their racing results in a fatal accident, could be in much the same position. They ought reasonably to have foreseen that their driving which is undoubtedly reckless, could result in someone's death. Would their mens rea in respect of the death be unconscious negligence, conscious negligence or dolus eventualis? The answer to the question would depend on what they as a fact foresaw. If they foresaw the death of the person killed as a possible result of their conduct their mens rea would be dolus eventualis. If they did not as a fact so foresee it, their mens rea would be culpa. There is no room in our law - at this stage of its development - for conscious negligence.[40] For the drivers to have known that their conduct could possibly result in the death of the deceased would amount to dolus eventualis even if they wished or hoped that death would not result or if they regarded the possibility as very remote.

The matter is, however, not devoid of complexity. If two such drivers or a driver driving grossly negligently or recklessly,

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39) ibid.
40) Van Zyl supra 557 A-B makes this clear.

were to cause a fatal accident, it would in some cases be possible to prove that the driver concerned was aware of the possibility of a fatal accident resulting from his conduct. Yet, even in such cases, the prosecution is invariably in respect of culpable homicide. One is at a loss to know why. One answer would be that unlawful killings resulting from road accidents are traditionally treated as cases of culpable homicide by the prosecution and the courts.[41] If this is indeed so, we have, in deaths resulting from accidents caused by extreme recklessness, examples of dolus eventualis being the mens rea of culpable homicide. Dolus eventualis, so treated, could with some justification be called conscious negligence. This would, however, be a de facto rather than a de jure description. In practice it would be extremely difficult, in the absence of a confession, to prove dolus eventualis in respect of death resulting from a fatal motor accident. In most cases there would be no difficulty in proving that the accused ought to have foreseen the accident with its fatal consequence as a possible result of his conduct. In many cases it would be possible to prove that the accused as a fact subjectively foresaw the accident as a possible result of his conduct, but whether he foresaw the possibility of the death

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41) In Mathlojoa 1971 1 SA 523 (W) Irving Steyn J (523-A) expressed the view that the accused, who had been extremely reckless, could regard himself fortunate not to have been indicted of murder. He had been committed for trial on a charge of murder but the Attorney-General had indicted him of culpable homicide. The learned judge referred to the evidence as disclosing '...almost murderous negligence' and '...deliberate recklessness.'

of the deceased would be a different matter. This would have to be established beyond a reasonable doubt and the accused would deny it. It could not be argued in the face of his denial that anyone who foresees the possibility of an accident foresees the possibility of death. That would be to apply a mechanical objective mode of reasoning which is no longer acceptable.

Dube[42] illustrates some of the points made above. The accused drove in an extremely reckless manner in an effort to escape from the police. He overtook a heavy vehicle on its left and in the process drove on the verge of the road, in other words off the actual surface of the road. He found himself about to drive into a culvert of which he had been unaware. Swerving to his right to avoid the culvert he lightly brushed against the heavy vehicle he was overtaking. This caused the driver of that vehicle to unaccountably[43] lose control of it, swerve across the road and collide with another vehicle. A person in this third vehicle was killed in the collision. The accused was charged with murder on the basis of dolus eventualis. Irving Steyn J refused to convict of murder on the grounds that, notwithstanding his extreme recklessness, the accused had not subjectively foreseen that a culvert would cause him to swerve and that the driver of the heavy vehicle would lose control of his vehicle in the manner in which he did. Although the language used in the judgment creates

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42) 1972 4 SA 515 (W).
43) 519 B-E.

the impression that Irving Steyn J was applying an objective test in assessing dolus eventualis,[44] the result shows that he was applying a subjective test. The accused did not foresee the possibility of that particular fatal accident and could consequently not be convicted of murder. In connection with Dube it is interesting to note that Middleton[45] is of the opinion that on Irving Steyn J's reasoning; namely, that the accused could not reasonably have foreseen the chain of events that led to the death of the deceased, the accused ought not to have been convicted of culpable homicide either. Middleton's argument is that in the case of a fatal motor accident the negligence of the accused must extend beyond his negligent driving to reasonable foreseeability of the death of the deceased as a result of such driving.[46] This, it is submitted, was not the case on Irving Steyn J's view of the facts.[47]

6 Conclusion

It is submitted that conscious negligence or luxuria has no place in our criminal law.[48] It is an ill-defined term.[49] In so far as it amounts to knowing of a possibility of harm resulting

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44) vide 520 and Middleton 1972 THRHR 181-5, 182.
45) Middleton 1972 THRHR 181, 183-4.
46) ibid.
47) ibid.
48) To introduce it would place a concept between dolus and culpa ie along a dividing line which is already difficult to determine.
49) vide Ngubane supra 685A - 686B.

from conduct and nevertheless pursuing such conduct with the pious or foolish hope that the harm will not eventuate, it is dolus eventualis. In so far as it amounts to being aware of the possibility of harm as a very remote or far-fetched possibility and nevertheless risking its eventuating, it can be viewed in different ways as a basis of criminal liability. The mere remoteness of a possibility does not remove it from the ambit of dolus eventualis.[50] The question does, however, arise whether conduct resulting in the realization of a very remote possibility of harm can always be classified as unlawful. This point is taken by van Oosten[51] in response to Morkel's[52] examples of the man who knows that driving can result in death and nevertheless buys a motor car and the man who knows that hunting can result in some individual, unseen by the hunter, being shot and killed and who nevertheless continues hunting. Van Oosten points out that buying a motor car is not unlawful and that hunting is not unlawful either. The same considerations would apply to rough and dangerous sports like rugby and boxing. A further consideration is that in the case of a very remote or fanciful possibility it may be open to serious doubt whether the conduct of the accused caused the result to come about. This could be the case in Dube. Although the accused could be said, in a general sense, to have foreseen death as a possible result of his driving, it is doubtful whether he caused the death of the

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50) Shaik supra 62B-F.
51) loc cit supra n36.
52) loc cit supra n36.

deceased. He did not foresee the inexplicable way in which the driver of the heavy vehicle lost control of his vehicle and this could amount to a nova causa interveniens. The argument that a foreseen nova causa does not sever the chain of causality[53] would not defeat the defence of the accused as the court found that he did not and could not reasonably have foreseen this nova causa.

Motor accident cases pose a theoretical problem in the law of culpable homicide. A consideration of reckless driving, of which dolus can be the mens rea,[54] leads one to believe that on a strict application of the law relating to dolus eventualis, murder not culpable homicide could in some cases be the crime committed by persons who kill as a result of reckless driving.[55] It does, however, seem that the prosecution and the courts do not regard motor accidents as a proper field for applying the law of murder except where the driver deliberately tries to 'run down' a pedestrian.[56] The result is that in some cases of death resulting from motor accidents one could be dealing with convictions of culpable homicide where the mens rea is dolus eventualis. This results in the tenable submission that although it may not have been so spelt out in any decision, the

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53) Grotjohn 1970 2 SA 355 (A).
54) Nxumalo supra 860 F.
55) Van Zyl supra 557 AB.
56) As was the case in Chretien 1981 1 SA 1097 (A), bearing in mind that the accused was charged with murder and attempted murder and it was his intoxication that cast doubt on whether dolus had been established.

'negligence' which sustains some convictions of culpable homicide arising from motor accidents, is conscious negligence or luxuria if it is negligence at all, and not in fact dolus eventualis.[57)]

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57) It could be submitted that the courts avoid the stigma of 'murder' when convicting of culpable homicide arising out of motor car accidents involving gross recklessness. It is an open question whether a sentence of 6 years' imprisonment for culpable homicide is to be preferred to a sentence of 4 years imprisonment for murder with extenuating circumstances.

CHAPTER III

INTENTIONAL UNLAWFUL KILLINGS WHICH ARE NOT MURDER

1 Introduction

While the partial excuse doctrine was still accepted in our law, intentional killing could result in convictions of culpable homicide.[1] This happened in Bailey[2] in the court a quo. The accused who had killed intentionally was found guilty of culpable homicide because of the duress to which he had yielded when committing the crime. The Appellate Division held that the defence of necessity failed and that, as the accused had killed intentionally, he should have been convicted of murder. The conviction of culpable homicide was therefore altered to one of murder. At the same time the partial excuse doctrine was rejected. The definition of culpable homicide as the unlawful negligent killing of another human being is therefore definitive. As negligence means inadvertence, it is difficult to understand how an accused can be convicted of culpable homicide in circumstances where he knew as a fact that his conduct would or could result in the death of a human being. It seems strange that such a killing

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1) Hunt 1ed (373) defines culpable homicide as follows: 'Culpable homicide consists in the unlawful killing of another person either negligently or intentionally but in circumstances of partial excuse'. The definition in the 2ed (401) is as follows: 'Culpable homicide consists in the unlawful negligent killing of another person'.

2) 1982 3 SA 772 (A).

could be regarded as inadvertent. Intent in criminal law is a term of art and in the context mentioned, the inadvertence, if inadvertence is found, would be in relation to the unlawfulness of the killing. It is now accepted particularly since De Blom[3] that in South African criminal law intent is not colourless;[4] it must be accompanied by knowledge or awareness of unlawfulness. If such an awareness is absent there cannot be dolus; at most, there can be culpa. This latter element could be present if the accused made an unreasonable mistake of fact or law or of both which rendered the absence of awareness of unlawfulness culpable.

It is in connection with this last mentioned feature that there is a difference of opinion among writers as to the nature of the defence of ignorance or mistake of law.

The view accepted by the courts[5] is that a bona fide mistake of law negatives intent irrespective of whether such mistake is reasonable or not. This is a psychological view of fault.

Adherents of the normative fault doctrine disagree with this view and submit that ignorance or mistake of law should negative intent only in cases where such ignorance or mistake is

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3) 1977 3 SA 513 (A).
4) Bailey supra.
5) And supported by Burchell and Hunt (164-5); Hunt 419-20 and De Wet and Swanepoel, 153-4.

unavoidable.[6] If it could have been expected of the accused that, in the circumstances, he should have known the law then, in terms of the normative fault doctrine, he should be treated as if he did know the law.[7]

This doctrine is accepted in German positive law and is strongly supported by Snyman.[8] Snyman criticizes our courts for adopting the view that any bona fide mistake of law negatives intent. He points out that South Africa is the only country adopting the psychological fault doctrine which allows for such a wide application of the defence of ignorance of the law.[9]

The first indication that there may be a move away from the rule that a bona fide mistake of law will always negative dolus is to be found in Barnard[10] which will be discussed below. The word 'intentional' in the heading of this chapter means intentional in the dictionary sense, in other words without the requirement of

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6) Snyman 178-80. Cf the discussion by Whiting 1978 SALJ 1. Rabie 1985 THRHR 332, 343 points out that Snyman's views result in culpa becoming the sole form of mens rea. It is submitted that to allow ignorance of the law to succeed as a defence only in cases where such ignorance was literally 'unavoidable' would differ very little from the rule that ignorance of the law is no defence. Both are examples of normative fault. In the first case the accused is reproached for unavoidable ignorance and in the other case for ignorance, or, to put it differently, in the one case the accused is expected not to be unavoidably ignorant and in the other case he is expected not to be ignorant.

7) Snyman 178-80.

8) ibid.

9) ibid.

10) 1985 4 SA 431 (W) discussed infra 222ff.

knowledge or awareness of unlawfulness.

In the immediately following section a brief discussion will be devoted to the feature that on occasion an accused proved guilty of murder, that is an intentional unlawful killing committed with awareness of unlawfulness, can be convicted of culpable homicide.

2 Convictions of culpable homicide where murder is proved but a conviction of murder is not procedurally competent

This topic gave rise to fairly lively controversy among academic writers and differences of opinion in the judgments of our courts.[1] But the debate has now been resolved in Ngubane[2] in which case five judges of the Appellate Division unanimously decided that a conviction of culpable homicide is competent when murder is proved but a conviction of murder is procedurally excluded.

This could happen in the regional courts which lack jurisdiction to convict of murder.[3] If, in such a court, intent to kill is established against an accused charged with culpable homicide, he could be convicted of culpable homicide. In serious cases the prosecution would generally, once it becomes obvious that the

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1) vide supra ch I, 1.1.
2) supra.
3) This was the case in September supra, Smith supra, Alexander supra, Zoko supra and Breakfast supra.

crime is murder, apply for the proceedings to be converted into a preparatory examination so that the accused may be indicted for murder in the supreme court.

A similar state of affairs could arise in the Supreme Court. This happened in Ngubane. The accused may be charged with culpable homicide and, notwithstanding proof of intent to kill, the prosecution might not be in a position to apply successfully for the charge to be amended to one of murder. An intentional killing could then result in a conviction of culpable homicide. Another possibility is that the prosecutor might accept a plea of guilty of culpable homicide.[4] In such a case it is now clear[5] that even if the court does not convict on the strength of the plea,[6] but orders the matter to go to trial,[7] the accused may only be convicted of culpable homicide or a lesser crime, but not of murder. Thus an intentional unlawful killing duly proved in the supreme court, could result in a conviction of culpable homicide.

3 Intentional killings that are committed in the bona fide but unreasonably mistaken belief that they are lawful

3.1 Introductory

Mistakes of fact can occur in an infinite number of forms. If an

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4) As happened in Ngubane supra.
5) This was one of the issues finally decided in Ngubane.
6) ito section 112 Criminal Procedure Act.
7) ito section 113 Criminal Procedure Act.

accused intentionally kills a being which he believes not to be human and it turns out that he in fact killed a human being, the bona fide nature of the mistake precludes a conviction of murder because there was no intention to kill a human being. If the mistake was unreasonable the accused would be guilty of culpable homicide.[8] Basically the mistake of fact leads to the erroneous but bona fide belief on the part of the accused that he is acting lawfully.

Intentional killings that are relevant to the present section are those in which an accused knows that he is killing a human being, but believes the act to be lawful because of a mistake of fact or of law or a mixed mistake of fact and of law on his part. If the mistake is unreasonable but bona fide he would in most cases be adjudged guilty of culpable homicide. But, because of a limited application of the normative fault concept, the case of Barnard[9] held that a grossly unreasonable bona fide belief will not suffice for the crime to be reduced from murder to culpable homicide.

The situation in which a mistake of fact or of law could cause an accused unreasonably to believe that he is acting lawfully are many. However, the discussion will be confined to certain main

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8) Mbombela 1933 AD 269.
9) 1985 4 SA 431 (W).

headings. These are self-defence or private defence,[10] duress or necessity and lawful authority.

3.2 Killings committed in self-defence or private defence

It is generally accepted that a person who kills another in order to save his own life which is seriously and unlawfully endangered by that other, is acting lawfully and entitled to an acquittal in respect of the killing. This rule is subject to the proviso that the person acting in self-defence should not exceed the bounds of what is reasonably necessary for him to defend himself successfully.[11]

Before the doctrine of versari in re illicita had been rejected, a person who killed another while exceeding the bounds of self-defence would have been convicted of culpable homicide on the basis that he had killed while acting unlawfully. After the

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10) 'Self-defence' is the term more commonly used and understood by laymen, but 'private defence' is more appropriate (vide Burchell and Hunt 322). As the accused does, in fact, more often than not, plead that he was defending himself the terms 'self-defence' and 'private defence' will be used interchangeably.

11) It is not necessary to discuss the exact nature of the defence for present purposes. It has undergone a certain amount of refinement since I van Zyl Steyn complained in 1932 SALJ 462, that the defence had been treated only casuistically and not scientifically, vide: Gardiner and Lansdown 4ed 1266-8, 5ed 1422 and 1412-15, 6ed 558 and 1546-9; Burchell and Hunt 1ed 272-82, 2ed 322-35; De Wet and Swanepoel 1ed 33-40, 2ed 65-72, 3ed 71-80, 4ed 72-81; Hiemstra 3ed 543-4; Visser and Vorster 107-24; Snyman (Strafreg) 80-92; Snyman 73-85; Van der Merwe and Olivier 71-80.

rejection of this doctrine it became necessary for the prosecution to prove not only that the accused had acted unlawfully, but also that he had been negligent in respect of the killing.

The effect of killing in self-defence was also affected by the partial excuse doctrine in terms of which self-defence could have been one of the partial excuses that reduced an intentional killing to culpable homicide in circumstances where such killing was neither wholly justified nor entirely blameworthy.[12)]

The law relating to self-defence has seldom been clearly stated in decisions of our courts because self-defence usually takes place in circumstances where there is a brawl in which liquor is probably involved,[13)] where there is provocation,[14)] or where there has been a history of acrimony.[15)]

Krull illustrates the above situations. The accused who was young and hot-tempered and while to some extent under the influence of liquor and angry because of a prior altercation, killed the deceased immediately after the latter had provoked him by insulting him. The latter had also caused the accused to think in terms of self-defence by threatening to shoot him. Not one of

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12) Hunt 1ed 383-84, 2ed 418-9; Hercules 1954 3 SA 826 (A) and Goliath 1972 3 SA 1 (A) (the dissenting judgment of Wessels JA).
13) eg Krull 1959 3 SA 392 (A).
14) eg Ntuli 1975 1 SA 429 (A).
15) eg Attwood 1946 AD 331.

these defences taken singly appears to have been good. But their cumulative effect was for the conviction of murder to be reduced to one of culpable homicide.[16)]

In the course of his judgment Schreiner JA stated that:

> 'If you kill intentionally within the limits of self-defence, you are not guilty. If you exceed those limits moderately you are guilty of culpable homicide; if immoderately, you are guilty of murder.'[17)]

The passage is not easy to interpret. But if one reads it with what follows almost immediately[18)] the meaning becomes clearer. This reads as follows:

> 'Under our system it does not follow from the fact that the law treats intentional killings in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet intentional. Since a merely provoked killing is never justified there seems to be no good

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16) What really happened as far as can be seen from the point of view of a practitioner is that all the factors mentioned enabled the defence to 'kick up dust' and cast a reasonable doubt on whether intent to kill had been proved. On the probabilities, as opposed to what could be established beyond a reasonable doubt, Krull appears to have been guilty of murder: vide the dissenting judgment.

17 399 C-D.

18) 399 D-E.

reason for holding it to be less than murder when it is intended'.

Although the statement that intentional killing is culpable homicide if it is moderately in excess of the bounds of self-defence, could be viewed as a bare statement of the partial-excuse doctrine,[19] the reference to intentional killing under provocation never being justified whereas intentional killing within the bounds of self-defence is justified, leads to a different conclusion. The person who moderately exceeds the bounds of self-defence when killing could, unreasonably, believe that he is not exceeding the bounds of self-defence. In such a case he would lack knowledge of unlawfulness and his mens rea would not be dolus.

Support for this view is to be found in Hunt[20] and Snyman.[21] It must be added that the accused would not be making a mistake of law, but of fact. At the time when Krull[22] was decided mistake of law would have been no defence.[23] The

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19) The judgment in Krull (supra) has been criticized by opponents of the partial excuse doctrine particularly in the context of the defence of provocation; vide De Wet and Swanepoel 3ed 134-5, 4ed 135; Snyman (Strafreg) 160; Hunt-419 and 395.

20) 419.

21) 384.

22) supra.

23) This has been a defence only since De Blom 1977 3 SA 513 (A) Krull was also decided before Bernardus and only unlawfulness had to be established for a conviction of culpable homicide.

killing done in moderate excess of the bounds of self-defence would therefore be a result of an unreasonable or negligent assessment of the factual situation and although the accused had intended to bring about the death of the deceased, his mens rea would be culpa. The intention to kill would not be an intention to kill unlawfully.[24)]

In cases where the bounds of self-defence are exceeded immoderately while killing intentionally, the accused would know that he is acting unlawfully, that the danger to which he had been or was still exposed did not require killing, his mens rea would be dolus and he would be guilty of murder.

Krull can no longer be regarded as an accurate statement of our law[25)] mainly because of the objective view taken of provocation.

The leading case on culpable homicide resulting from killing when the bounds of self-defence were exceeded is Ntuli. It is important to note that this case was decided after the rejection of the doctrine of versari in re illicita, and that it is regarded as a case heralding the rejection of the partial excuse doctrine.[26)]

The facts in Ntuli are that the accused, a strong young man, went

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24) Hunt led 383-4, 2ed 418-9. Cf Burchell and Hunt 313-4.
25) De Wet and Swanepoel, 135.
26) Burchell and Hunt 330.

to his mother-in-law, a frail, shrewish old woman, to enquire about the whereabouts of his wife. He received misleading information, insults and blows in response to his enquiry, and after he had become entangled in a thorny fence in his efforts to escape the persistently and continuously aggressive old woman, he killed her by beating her rather severely with the butt of an assegai.

He was found guilty of culpable homicide by the trial court. At the time there was a statutory measure[27] in force which provided for more serious penalties for culpable homicide where death resulted from an assault than when death did not result from an assault. The trial court found that there had been no assault and the State brought the matter before the Appellate Division for determination of the question whether there had been an assault or not. This question involved the deeper question as to whether there had been dolus on the part of the accused when he hit the old woman causing her death. Holmes JA investigated the law[28] and came to the conclusion that dolus, and by the same token an assault, had not been proved. This was so in that it had not been proved that when exceeding the bounds of self-defence the accused had been aware of this. He had therefore not been aware that he was acting unlawfully. Dolus requires actual

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27) S 334 quat 2 (b) Criminal Procedure and Evidence Act 55 of 1956.
28) 435 H - 438 pr.

knowledge of unlawfulness and this had not been established. The accused had however acted unreasonably in that he ought to have known that he was acting unlawfully and ought to have realised that he could kill the deceased unlawfully.[29)]

The decision is important for the emphasis placed on knowledge of unlawfulness[30)] as an ingredient of dolus. In this connection it must be borne in mind that Ntuli was decided before De Blom and that mistake of law or ignorance of the law was not yet a defence to a criminal charge. The mistake the accused made was a mistake of fact; namely, failure to realise that his conduct was exceeding the bounds of self-defence, which caused his failure to realize that he was acting unlawfully. This is the effect of any mistake of fact which is a valid defence to a criminal charge.

In a situation where a person exceeds the bounds of self-defence it could be extremely difficult to determine whether he is making a mistake of fact, a mistake of law or both. Thus an accused may have a bona fide but mistaken belief as to the extent to which he may pursue or enforce measures taken in self-defence. He may believe that the law is such as to allow him to continue an assault on his former assailant at a stage when the law does not allow this. In such a case he would be making a mistake of law which could very easily be viewed objectively as a mistake of

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29) 437 H.
30) vide Visser and Vorster 115.

fact. This is illustrated by van Wyk[31] which held that a person may kill in defence of property in certain circumstances. In van Wyk the accused, driven to desperation by a series of burglaries, set a trap for the next would-be burglar, advised the police of what he was doing, and placed a notice outside his premises that there was a deadly trap inside. A burglar was killed by a discharge of shot from a shotgun, the lethal component of the trap. The Appellate Division held that the accused had acted lawfully in that he had done all that could be reasonably expected of him. The decision is still subject to controversy.[32] Before this decision the general view was that killing in defence of property was not lawful.[33]

The accused in van Wyk clearly had no intention to break the law. He consulted the police. But had he made a mistake of law he would not have been acquitted on appeal.[34] This is a clear case of private defence divorced from a drunken brawl, provocation and immediate danger to the person exercising the right to private defence. A mistaken assessment of the facts could not be in issue, only a mistaken assessment of the law. Prior to De Blom such a mistake would not have availed as a defence on the merits. Now it presumably would. But one must bear in mind the recent development in Barnard where the normative fault doctrine

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31) 1967 4 SA 488 (A).
32) vide.
33) Gardiner and Lansdown 1549-50; contra De Wet and Swanepoel 2ed 67 n34.
34) Ignorance of the law was as yet no defence.

was invoked to arrive at a conclusion which is not easy to reconcile with Ntuli or De Blom.

Subject to the possible effect of Barnard it is plain in the light of these decisions that a person who kills intentionally[35] while exceeding the bounds of self-defence could, if he is making a bona fide but unreasonable mistake of fact or of law, be convicted of culpable homicide with culpa as his mens rea or fault. Absence of awareness of unlawfulness on his part would have to be found to be unreasonable for such a finding, otherwise he would be acquitted.

3.3 The defence of necessity, duress or compulsion

Necessity, duress or compulsion differs from self-defence or private defence in this respect that the accused invades the rights of or injures or kills an innocent party[1] in order to avert harm to himself or others. Until comparatively recently this defence was not available on a charge of culpable homicide[2] and murder.[3]

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35) Bearing in mind that in the absence of awareness of unlawfulness intention is not dolus; vide Hiemstra 97.

1) Burchell and Hunt 336-8; Snyman 85-6; De Wet and Swanepoel 81-2; Visser and Vorster 124.

2) Gardiner and Lansdown 108-11; De Wet and Swanepoel 2ed 80 Snyman 91; Burchell and Hunt 343 ff.

3) Culpable homicide in the sense of a negligently accidental killing under compulsion is difficult to imagine except, perhaps, in the case of someone driving recklessly to get a dangerously ill person to a hospital (Pretorius 1975 2 SA 85 (SWA)), or driving recklessly 'at gun-point' to assist an escaping criminal.

In Hercules[4] the defence of duress was raised with partial success to a charge of murder by an accused who had been threatened with immediate death by being shot if he did not take part in an armed robbery. On an application of the partial excuse doctrine, the accused was convicted of culpable homicide although he had taken part in an intentional killing. In Bradbury[5], a subsequent case, duress was not viewed as an extenuating circumstance sufficient to avert the death penalty for murder.[6]

The tendency commenced in Hercules[7] came to a more positive result in Goliath[8] in which the Appellate Division in a majority judgment, held that no person could be expected to be more heroic than an ordinary human being would be and that, in appropriate circumstances, the defence of duress could result in complete acquittal on a charge of murder.[9] Rumpff CJ who delivered the majority judgment declined to make a final statement as to whether duress is a defence which excludes unlawfulness or whether it is a defence which excludes fault.[10] The general

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4) 1954 3 SA 826 A.
5) 1967 1 SA 387 A.
6) It is a case apparently decided on policy. The accused had to choose between the discipline of a gang of criminals and the law of the land.
7) supra.
8) 1972 3 SA 1 (A).
9) The accused had been forced with threats of death by a companion to hold the deceased while he (the companion) stabbed the deceased to death. The accused had been acquitted by the trial court. The judgment of Rumpff CJ has been praised (Visser and Vorster 133); de Wet and Swanepoel (3ed 87 n114) say that it is disjointed (onsamehangend).
10) 25 H. 'Dit is onnodig vir die beantwoording van die voorbehoue vrae om vas te stel in watter lig die

general tenor of the judgment, however, appears to suggest that the defence excludes unlawfulness.[11)]

In Bailey[12)] the Appellate Division had to deal with the same question and although the conviction of the accused on a charge of culpable homicide was altered to a conviction of murder, the principle that duress could be a complete defence to murder was not disturbed. The question whether the defence is a defence excluding unlawfulness or excluding fault was also not finally decided.[13)]

Academic opinion is generally to the effect that the defence of necessity, duress or compulsion excludes unlawfulness.[14)]

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strafopheffing weens dwang gesien moet word nl of dit weens die regmatigheid van die handeling onder dwang is of weens die opheffing van die volle skuld'. (It is unnecessary for answering the questions reserved to determine in what light the decision not to punish because of duress is to be seen viz whether it is because of the lawfulness of the act under duress or because of the negation of all fault (my translation)).

11) Snyman 92; Burchell and Hunt 347, esp n214; De Wet and Swanepoel 89-92; Visser and Vorster 133.

12) 1982 3 SA 772 A.

13) It is of some significance to note the court's toleration of an unusually lengthy argument by counsel for the State (774C-789F) in which he submitted, relying mainly on German theory,(775C-777F) that the normative fault doctrine should be adopted by the court in preference to the psychological fault doctrine (788 D-E). The court did not adopt the normative fault doctrine but did not reject it either.

14) Visser and Vorster 133; Snyman 86-93; Burchell and Hunt 336; De Wet and Swanepoel 89-92.

In regard to the crime of culpable homicide the defence of necessity, duress or compulsion can be treated on the same footing as the defence of self-defence. Bailey, a case on duress, finally rejected the partial excuse doctrine.[15] A person who kills intentionally under duress, as did the accused in Bailey, will not be convicted of culpable homicide on an application of the partial excuse doctrine. This does not mean that such a person cannot be convicted of culpable homicide at all. Should he or she have acted in the bona-fide but unreasonable belief that the killing was lawful a conviction of culpable homicide would be competent. The accused in Bailey did not raise the defence of ignorance or mistake of law. Yet, this issue and its possible bearing on the finding of the court is discussed at some length in the judgment.[16] This discussion flows from the questions of law reserved[17] and it is submitted that had the court found that the accused had acted under a mistaken and unreasonable but bona fide belief that he was acting lawfully, his conviction of culpable homicide by the lower court[18] would have been upheld.

Like self-defence or private defence, necessity, duress or compulsion can give rise to a conviction of culpable homicide in respect of an intentional[19] killing, if there is an absence of

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15) 799C.
16) 796.
17) 795C-E.
18) Apparently on an application of the partial excuse doctrine.
19) Bearing in mind that 'intention' is only dolus if there is an awareness of unlawfulness; vide Hiemstra 97.

awareness of unlawfulness and it is adjudged unreasonable.

3.4 Putative necessity and putative private defence

In the fields of necessity and private defence one finds the phenomena of so-called putative necessity and putative private defence. In cases where this could be applied the enquiry is no longer as to whether the conduct of the accused was lawful, but whether his belief that he was acting under duress, compulsion or necessity, or his belief that he was acting in private defence, was bona fide[1] and if so, whether it was reasonable or not. It therefore amounts to no more than the defence of absence of mens rea.

Where an accused has killed in circumstances of putative necessity or putative self-defence, the bona fides of his mistake, if accepted, should exclude a finding of dolus on his part and consequently he could not be convicted of murder. If the mistake were unreasonable he would nevertheless be convicted of culpable homicide. The defence of putative necessity or putative private defence therefore, would be simply a defence of mistake of fact or, since the De Blom[2] decision, mistake of law. The many cases of exceeding the bounds of self-defence could also be the

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1) A mistake must be bona fide in this context, a mala fide mistake would not qualify as a mistake. A bona fide mistake would not occur where the accused is aware that he may possibly be mistaken.

2) 1977 3 SA 513 (A).

result of a mistake of fact or of law on the part of the accused.[3)]

3.5 Killing while attempting to effect an arrest

Section 49 of the Criminal Procedure Act No 51 of 1977 reads as follows:

> '49. Use of force in effecting arrest
>
> (1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person -
>
> (a) resists the attempt and cannot be arrested without the use of force; or
>
> (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,
>
> the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

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3) At a stage when he is no longer acting lawfully, the accused would not be aware of this (Ntuli). An accused may imagine the danger greater than it is, that would be mistake of fact, or he would imagine that in law he is allowed to react more violently than the law in fact allows, that would be mistake of law.

(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1[4] is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide'.

Section 49 (2) is, and has been consistently viewed, as very drastic. From the wording of the sub-section it is plain that an accused who raised the defence that he was acting in terms of it, would be averring that his conduct was lawful.[5]

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4) Namely, treason; sedition; murder; culpable homicide; rape; indecent assault; sodomy; bestiality; robbery; assault, when a dangerous wound is inflicted; arson; breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; theft, whether under the common law or a statutory provision; receiving stolen property knowing it to have been stolen; fraud; forgery or uttering a forged document knowing it to have been forged; offences relating to the coinage; any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment whereof may be a period of imprisonment exceeding six months without the option of a fine; escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offences of escaping from lawful custody; any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

5) De Wet and Swanepoel 71 n8, are of the view that 'justified homicide' would be a more appropriate than 'justifiable homicide' in section 49(2). 'Justifiable' is to be preferred. Once a court has pronounced such a killing lawful it is 'justified' up to that stage it is 'justifiable'.

It was accepted for a long time that an accused who raises the defence that a killing committed by him was lawful in terms of the sub-section, bore the onus of proving that his conduct fell within the four corners of the measure he relied on.[6] This came to be doubted because of certain obiter dicta[7] and the opinion was expressed[8] that the onus would soon shift from the accused to the prosecution. In keeping with the sound approach that a measure so drastic should be interpreted in such a way as to make anyone think twice before killing a human being in reliance or purported or assumed reliance on it, the Appellate Division held in Swanepoel[9] that the onus of proving that the killing fell within the ambit of the said measure rested on the accused; such onus to be discharged on a balance of probabilities.

The points to be proved by the accused are the following:[10]

i) that he was a person authorised in terms of the

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6) Hartzer 1933 AD 306; Britz 1949 3 SA 293 (A); Koning 1953 3 SA 220 (T).

7) Matlou v Makubedu 1978 1 SA 946 (A) per Rumpff CJ at 956 A and Jansen JA at 962 D-E. On the strength of these obiter dicta it was confidently assumed that the onus was no longer on the accused; vide Hiemstra 98; Kotze 1980 DJ 126; De Wet and Swanepoel 71; Snyman and Morkel 167. The obiter dicta were apparently followed in an unreported Natal decision: vide Swanepoel 1985 1 576 (A) 588 G-H.

8) n6 above and Lansdown and Campbell 196-7; Visser and Vorster (175) are more cautious.

9) 1985 1 SA 576 (A).

10) For these points vide Snyman and Morkel 167-9; Hiemstra 96-7.

Criminal Procedure Act, to effect an arrest in the circumstances;

ii) that it was his intention to arrest the deceased; in other words, to arrest him with the intention of dealing with the deceased according to law;[11]

iii) that the deceased was to be arrested for the commission or the reasonably suspected[12] commission of an offence mentioned in Schedule I of the Criminal Procedure Act;

iv) that he attempted to arrest[13] the deceased and that the deceased fled from or resisted the arrest,[14] and

v) that killing was the only way in which the deceased could be prevented from escaping[15]

In view of the decision in Macu vs du Toit[16] one could add a sixth requirement; namely, that the deceased knew that he was to

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11) vide Swanepoel supra 589 A Macu v du Toit 1983 4 SA 629 (A), particularly the dissenting judgment of Botha JA.

12) This requirement makes 'reasonableness', generally a factor that would exclude culpa, a prerequisite for lawfulness.

13) The proposed arrest must not be for the purpose of following up vague suspicions or questioning the suspect with the purpose of establishing whether he had committed an offence, but must result from actual knowledge that the person sought to be arrested had committed an offence mentioned in Schedule I or a reasonable suspicion that he had committed such an offence; vide Wiesner v Molomo 1983 3 SA 151 (A).

14) Swanepoel supra 589 A-B.

15) Hiemstra (97) points out that the onus created by this requirement is not lightly discharged.

16) supra n10.

be arrested. On the majority judgment[17] in Macu the word 'arrest' as used in the following phrase in sub-section (b): '... when it is clear that an attempt to arrest him is being made' has to be given a commonsense objective meaning and unfounded or fanciful suspicions subjectively entertained by the arrestee that he is to be dealt with unlawfully; for instance, to be thrashed or killed, are not to be given such weight as to make the otherwise lawful conduct of the arrestor unlawful.[18] On the dissenting judgment of Botha JA, which incorporates a detailed but, with respect, unduly formalistic[19] analysis of the provision and its interpretation, the person to be arrested must be clear in his mind that the intention of the arrestor is to deal with him according to law.[20] The judgment is with respect, unacceptable in that it clearly seeks to place such an onus on a private person effecting an arrest as to amount to an amendment, rather than an interpretation of section 49 (2) (b). The amendment would be that private persons are not allowed to kill in terms of the provision unless and until they have convinced the person sought to be arrested to his full subjective

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17) Cillie JA with Wessels JA, Viljoen JA, and James AJA concurring.

18) So one concludes from the passage at E-G.

19) The statement that an accused who has once been arrested in respect of a crime and who escapes is on immediate re-arrest not arrested for the original crime but for the crime of escaping from custody (643 A) is difficult to accept. The arrest of an accused in respect of a crime does not wipe out that crime. His re-arrest may be a result of an immediate escape and in essence the arrest is still in respect of the original crime.

20) 646 A - 647 A.

satisfaction and without his entertaining lingering doubts that the intention is to deal with him according to law. As this would be practically impossible, private persons would never, or hardly ever, be justified in killing in terms of section 49 (2) (b).[21] This could, on the reasoning of Botha JA, be extended with equal force to policemen on duty, but for some reason clad in mufti, or to 'plain clothes' detectives, because the absence of a uniform could raise doubts as to the lawfulness of their intentions in the mind of the proposed arrestee.[22] It may also be added that Botha JA's view that the uniform worn by a policeman would serve to allay the suspicions of the person sought to be arrested could be unsound, as many persons, whether the belief is justified or not, do believe that they are to be treated with 'police brutality' after arrest. The exact nature of the possible sixth point is therefore not clear. But it is clear that a killing would not be justifiable unless, in addition to the other points listed, the person killed was aware that he was about the be 'apprehended',[23] and, objectively viewed,[24] it appeared that he would be dealt with according to law.

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21) This appears to be the intention of the learned judge; vide 646 F.
22) The learned judge does not extend the suspicions concerning private persons to policemen in uniform 645H - 646A.
23) ie his freedom of movement was to be taken away.
24) ie if a reasonable man would draw that conclusion irrespective of the subjective fears of the arrestee 644F.

As ought to be clear from the above discussion of Macu,[25] section 49 and particularly section 49 (2) have given rise to a fair amount of differences of judicial opinion and academic criticism and debate. It is to be regretted that the practical application of a measure so radical as to provide for the justification of the killing of human beings should still be so uncertain.

From the point of view of the law relating to culpable homicide, it is clear that a person who kills intentionally in terms of the section and who can establish all the points listed above, including the sixth point as interpreted in the majority judgment in Macu, would be guilty of neither murder nor culpable homicide as his conduct will have been lawful.[26] The question is : What if he fails to establish one of these pre-requisities for the justification of his conduct? If any one of the six points can not be established, and this is due to the mala fides of the accused or to the absence of bona fides on his part, he would be guilty of murder. Such instances would be rare. Often encountered are cases where one of the six points is absent because of a bona fide but unreasonable mistake made by the accused. As dolus is not colourless in our law, but includes knowledge of

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25) The uncertainty is to a large extent due to the wording of the section in that it takes an element of fault viz reasonableness and incorporates it into the element of unlawfulness.

26) Hiemstra 98-9 relying on Britz 1949 3 SA 293 (A) points out that the initial onus is on the prosecution to prove an intentional killing, whereafter the onus shifts to the accused to prove that the killing was lawful.

lawfulness,[27] the answer to the problem posed by the accused who has killed or attempted to kill in the bona fide but unreasonable belief that such killing was justifiable in terms of section 49 (2), should be that his mens rea was culpa and that he cannot be convicted of any crimes of which dolus is the mens rea.[28]

This was the solution adopted until fairly recently.[29] But in some recent decisions[30] attempts have been made to treat such killings as murder and such attempted killings as attempted murder, notwithstanding the good faith in which the mistake of fact or of law was made by the accused.

The accused who claims to have acted under a bona fide belief that his conduct was justified in terms of section 49 (2) poses difficult problems to the courts and academic commentators. He may not be able to establish on a balance of probabilities, that his conduct was lawful. It being accepted that the onus of proving lawfulness rests on the accused, the question is whether the onus of proving the existence of the bona fide belief that the conduct was lawful also rests on the accused. In other words : does the prosecution bear the onus of proving mens rea while the

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27) De Wet and Swanepoel 149 ff; Snyman 171 ff; Burchell and Hunt 160-71; Bailey supra; Barnard 1985 4 SA 431 (W), 435G.
28) vide Hiemstra 97; cf Lansdown and Campbell 195-6.
29) vide Matlou 1959 4 SA 102 (C); Mnanzana 1966 3 SA 38 (T).
30) Nel 1980 4 SA 28 (E); Barnard and possibly Swanepoel; cf Lansdown and Campbell 295 bottom of page.

accused bears the onus of proving lawfulness.[31] The question is not purely academic or of no practical importance. An accused who raises the defence that he acted in terms of section 49 (2) is usually facing a charge of murder or culpable homicide or attempted murder or assault with intent to do grievous bodily harm, or common assault. If he has killed someone he can be convicted of culpable homicide if dolus is not established. If he has only injured or attempted to injure, or kill, he cannot be convicted at all on mere proof of culpa, only dolus will suffice.

It would therefore seem that to cast the onus of proving mens rea on the prosecution could to a substantial degree negative the effect of the onus of proving ~~it~~ lawfulness being on the accused. It does, however, seem indisputable that the prosecution bears the onus of proving mens rea beyond a reasonable doubt even though the accused may have failed to prove that his conduct was lawful.[32] In practice, it will invariably mean, that although

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31) If the view (n26 supra) that the prosecution must first establish an intentional killing before the onus in respect of lawfulness passes to the accused, is accepted - and there is no reason for not accepting it - the prosecution must obviously bear the onus of providing mens rea throughout. If the defence fails to prove that the killing was lawful, the initial proven mens rea may still be totally rebutted if the accused could reasonably possibly have made a reasonable bona fide mistake or it could be partially rebutted if the accused could reasonably possibly have made an unreasonable bona fide mistake. In the latter case the mens rea of the accused would be culpa. The bona fide mistake would relate to his belief that he was acting ito section 49 (2).

32) nn 26 and 30 supra.

the accused could not prove that his conduct was lawful, the prosecution would have to prove beyond a reasonable doubt that he did not entertain the bona fide belief that his conduct was lawful. Except where the charge is murder or culpable homicide, the failure to disprove the bona fide belief alleged by the accused would lead to a complete acquittal.[33] In the case of a prosecution for murder or culpable homicide a conviction of culpable homicide could always be obtained if the prosecution proves that the belief relied on by the accused though held in good faith, was unreasonable.

This state of the law is open to criticism.[34] It enables an accused who relies on section 49 to raise his defence twice; namely, firstly, in order to rebut the allegation that he acted unlawfully and, secondly, to rebut the allegation that he had the necessary mens rea. In the absence of mala fides the defence is likely to succeed on the second attempt as it is not likely that a person who kills or attempts to kill in terms of section 49 (2) would do so deliberately in bad faith. Even if this should be the case it would be extremely difficult for the prosecution to prove it. Killings or woundings in terms of section 49 (2) usually take place in the course of hectic and/or heated confrontations between arrestor and arrestee when split-second

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33) Sam 1980 (4) SA 289 (T) leaves no doubt as to this (294 D-E) although it was not a case involving a killing.
34) vide Barnard at 438 A-B.

decisions are made while the parties are excited. Experienced counsel acting on behalf of the arrestor, who is usually charged with murder or assault, could use the general confusion and excitement to cast doubt on the mens rea of the accused. In this connection one must bear in mind that a person who is attempting to arrest a criminal or suspected criminal, who is attempting to escape, cannot be judged by the standards of a man sitting calmly in his arm-chair and deciding coolly and rationally on what the accused ought to have done in the heat of the moment.[35] The latter consideration also contributes to making proof of unreasonable conduct or poor judgment on the part of the accused difficult.

There would be little point in discussing those many decisions[36] in which it was held that a bona fide but unreasonable mistake made by a person purporting to act lawfully in terms of section 49 amounts to culpa on his part and could found a conviction of culpable homicide. These decisions were in accordance with accepted principle and the accepted view of culpable homicide. Before the rejection of the doctrine of versari in re illicita an accused who had killed while believing that he was acting in terms of the predecessors of section 49 (2) would

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35) vide Macu vs du Toit 1983 4 SA 629 (A) 635-6.

36) The best known and most often referred to is Koning 1953 3 SA 220 (T); cf Mathlau 1958 1 SA 350 (A); Metelerkamp 1959 4 SA 102 (E); Denysschen 1955 2 SA 81 (O); Mnzana 1966 3 SA 38 (T); Nell 1967 4 SA 489 (SWA).

automatically have been guilty of culpable homicide once he had failed to establish that his conduct had been lawful. Since the rejection of the doctrine it has been necessary to establish that his conduct was unreasonable in addition to being unlawful.[37)]

3.6 Decisions on killing while attempting to arrest

Certain decisions seem to point the way to the law accepting a principle, that a bona fide belief, if totally unreasonable, will not serve to negative dolus on the part of an accused who raises the defence that his mens rea was not dolus as he believed in good faith that his conduct was lawful in terms of section 49 (2). The first of these decisions is Nel.[38)] The facts were to some extent in dispute, but the court found the following to have been established : The accused were two of three young policemen who decided to set up an 'impromptu road block'.[39)] They set about this clad in plain clothes. The 'road-block' consisted of a flashing blue light, placed at the side of the road near a parked police van with the accused and their companion standing or moving in the vicinity.[40)] They allegedly

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37) The development is admirably traced by Didcott J in Zoko 1983 1 SA 871 (N).

38) 1980 4 SA 28 (E); discussed by Milton 1980 SACC 305; DP van der Merwe 1982 SALJ 430.

39) 30 pr.

40) This is the version accepted by the court. The accused testified that they had placed the flashing blue light in the middle of the road, had put on the head-lights of their vehicles and had stood in the road waving torches. This latter version was rejected (34G).

had flashlights in their hands. After considering the conflicting evidence concerning the 'road block' the court came to the conclusion that it was not a road block in the accepted sense.

At about midnight, while the accused and their companion were conducting their 'road block' a car drove 'through' or past the 'road block'. The accused fired two shots at the car hitting it. The driver of the car stopped.

The accused were subsequently charged with attempted murder in a regional court and convicted. The magistrate rejected their evidence concerning the 'road block' and accepted that of the complainants at whom they had shot. He held that they had not suspected the complainants of committing a 'first schedule offence'. Consequently their conduct had not been lawful; they could not rely on section 49 (2).

On appeal, relying on Banet[41] and De Blom counsel for the appellants advanced the argument;

> 'that the evidence showed that the appellants had made an essential mistake, either of fact or law or of both, as to their right to act as they did, and that this mistake was based on a bona fide belief that they were entitled to so

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41) 1973 4 SA 430 (RA).

act. This bona fide belief, he submitted, negatived mens rea, and the appellants ought therefore to have been acquitted'.[42]

This submission was rejected by Eksteen J. The line of argument adopted by the learned judge reads as follows:[43]

'What exactly the mistake of fact or mistake of law was that the appellants were supposed to have laboured under was not clearly stated by Mr. Mouton. It could hardly have been that they bona fide believed that they 'reasonably suspected' the complainants to have committed an offence referred to in Schedule 1, so as to entitle them to claim the protection of section 49 (2) of the Act. As was pointed out in S v Purcell-Gilpin[44] it would be the height of anomaly for the appellants to claim the protection of section 49 (2) on the grounds that they bona fide but unreasonably suspected the complainants of having committed a First Schedule offence, when the section expressly requires a reasonable suspicion.

At best for the appellants their case must be that they bona fide held the view that, if a motorist failed to stop at a road block, they were entitled to shoot him. This is

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42) 34 A-E.
43) 34 E- 35A.
44) 1971 3 SA 548 (RA) 553.

> in itself so unreasonable a proposition that, more particularly when applied to trained policemen, I do not think that any court could accept that it was a belief bona fide held. But even if, for the purpose of argument, it be accepted that this could have been a bona fide view, then clearly it was a view based on the existence of a proper road block as contended for by the appellants in their evidence. This evidence, however, was rejected by the magistrate, and it has not been suggested that either of the appellants could possibly have claimed to hold a bona fide belief that they were entitled to shoot at a passing motorist simply because he had driven past a flashing blue light at the side of the road, as occurred in the present case. The submission therefore that the State had failed to rebut the suggestion that the appellants had acted on a bona fide belief that they were entitled to act as they did cannot prevail, and the convictions of both appellants must be confirmed'.

The reference to Purcell-Gilpin in the above quoted passage is significant. It demonstrates in a few words how unlawfulness and mens rea as prerequisites for criminal liability are latently confused in the wording of section 49.

It also illustrates how the application of section 49 can lead to the confusion of factors excluding unlawfulness on the one hand and mens rea or fault on the other hand. Section 49 can only

render conduct lawful if its requirements are met. One of its requirements is a reasonable suspicion. If an accused fails to prove that his suspicion was reasonable, his conduct was unlawful. It does not mean that his conduct was intentionally unlawful. It is after all well established that even an unreasonable mistake negatives dolus.[45] If an unreasonable mistake does not negative dolus the law has moved back to where it supposedly was at the time of the much criticized Mbombela[46] decision. Similarly the rule that culpa and dolus do not overlap is undermined. To establish culpa an objective inquiry is made, dolus is established subjectively. To make unreasonableness, an objective concept, an element of or ground on which to base dolus must amount to a fusion of dolus with culpa.

It is with respect, by no means clear that this was not done by Eksteen J in the passage quoted. In support of the learned judge one must point out, as indeed he did, that it is not clear on exactly what allegedly bona fide mistake the accused were relying.[47] Furthermore they were very poor witnesses and their conduct was, on any view, at best grossly unreasonable.

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45) vide Sam supra.

46) 1933 AD 269. De Wet and Swanepoel (43) have never tired of criticizing this decision for being to the effect that a grossly unreasonable mistake cannot negative dolus. Mbombela is not authority for this proposition and is correctly summarised by Gardiner and Lansdown (58, 59) as being to the effect than an unreasonable mistake suffices for a conviction of culpable homicide.

47) 35 E-F.

Nevertheless it is, with respect, doubtful whether on the line of reasoning adopted by the learned judge, they were not, on a full consideration of all the facts and circumstances of the case, convicted of a crime requiring dolus for its mens rea on proof of culpa in the shape of gross negligence and grossly unreasonable conduct.

The accused apparently chose to stand or fall on appeal on their version of how their 'road block' had been constituted. This means that inter alia they relied on the contention that the flashing blue light was in the middle of the road. This gave rise to the complete rejection of the basis of the bona fide belief the accused had relied on. It left the court with the task of deciding whether they had entertained a bona fide belief that they were entitled to shoot at the occupants of a motor car on the complainants' version of events, and not on the version of the accused. The court rejected the existence of such a bona fide belief and upheld their conviction of attempted murder. Whether the finding is unequivocally acceptable is, with respect, open to doubt. The obvious question arises : if the accused did not in good faith believe that they were entitled to shoot, why did they shoot? From the questions and answers quoted from the record[48] it appears that the accused did believe that they were entitled to shoot, or could reasonably possibly have believed that they were entitled to shoot. To hold otherwise

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48) 33, 34.

amounts to holding that they acted in bad faith, that they intended to kill people, whether innocent or not, simply because those people had failed to stop at a blue light flashing beside the road. It is submitted, with respect, that the evidence as discussed in the judgment does not fully support such a finding. Objectively viewed Eksteen J's finding, with respect, really amounts to a finding that gross negligence in the circumstances of the case, amounted to dolus.

This is also how Hiemstra interprets the judgment, which he strongly supports. The relevant passage reads as follows:[49)]

> ''n Geloof te goeder trou by 'n polisieman dat hy geregtig is om te skiet, is onvoldoende. Dit is onhoudbaar om te sê dat hy "te goeder trou geglo het dat hy 'n redelike verdenking het". Sy verdenking moet altyd die verdenking van 'n redelike man wees. Die polisieman moet objektief goeie gronde hê om te glo dat 'n misdryf in sy teenwoordigheid gepleeg is. Waar jong polisiemanne op eie inisiatief 'n ongemagtigde sogenaamde "padblokkade" opgerig het, was dit geen misdryf om daardeur te ry nie, en was dit geensins geoorloof om te skiet en dan

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49) 97.

immuniteit kragtens a.49 (2) te pleit nie'.[50]

It seems, with respect, that the learned author has overlooked the distinction between unlawfulness and mens rea. It was not lawful for the policemen to shoot because their conduct was unreasonable. But unreasonable conduct is not sufficient to establish dolus. Although it is not stated in so many words, there is a strong undercurrent in Nel to apply the objective requirement for unlawfulness to the evidence in order to arrive at a subjective form of mens rea namely dolus.

Swanepoel[51] is a case about an extremely unfortunate incident in which a member of the police force shot and killed an innocent man in the belief that the latter was a fleeing dangerous criminal. The policeman was convicted of culpable homicide by a Provincial Divisional and appealed against his conviction to the Appellate Division. It appeared that while travelling in his police vehicle the appellant received a radio message that a certain very dangerous criminal who would not hesitate to shoot

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50) 'A bona fide belief on the part of a policeman that he is entitled to shoot, is insufficient. It is untenable to say that he 'believed in good faith that he had a reasonable suspicion'. His suspicion must always be the suspicion of a reasonable man. The policeman must objectively have good ground for believing that a crime had been committed in his presence. Where young policemen, on their own initiative, erected a so-called 'road block' it was no crime to drive through it, and it was by no means allowable to shoot and then claim immunity in terms of 49 (2)' (my translation).

51) 1985 1 SA 576 (A).

if cornered and who was wanted by the police, had been seen driving a white Cortina motor-car with registration number FHZ911T. Shortly after receiving the message the appellant happened to see a white Cortina with registration FHZ911T driven by a person who looked very much like the wanted criminal who was known to the appellant. He notified police headquarters by radio and was instructed to arrest the fugitive. A more far-fetched set of co-incidental circumstances can hardly be imagined. The person driving the white Cortina with registration FHZ911T was not the criminal, but an innocent party. The criminal had, for reasons only known to him, placed a false registration number FHZ911T on a white Cortina used by him. The matter had therefore to be adjudicated upon as if the person driving the vehicle seen by the appellant were indeed the wanted criminal.

The evidence on what the appellant did while pursuing the Cortina is not very clear. He could have signalled the Cortina to stop and he could have shouted at the driver. In evidence he stated that the driver of the Cortina saw him. He believed this man to be the wanted criminal and concluded that he (appellant) had been recognized, that the wanted man was now desperate and would do anything. He took his pistol and fired two shots at the Cortina. It is not certain how much time elapsed between the firing of the shots. The first shot hit the metal work of the Cortina and the second shot hit the occupant, killing him.

After deciding (correctly it is submitted) that the onus of proving that the killing was justified in terms of section 49 (2)

rested on the appellant, Rabie CJ held that the appellant could have employed other means than shooting to prevent the 'escape' of the deceased, and that the appellant did not have reasonable grounds for believing that the deceased was fleeing.[52] Consequently the appellant could not rely on the protection of section 49 (2). It still remained for the prosecution to prove that the appellant was guilty of murder or of a crime that is a competent verdict on a charge of murder.[53] As the accused could reasonably have foreseen that the shot fired by him could kill the deceased,[54] his conviction of culpable homicide was upheld. The question whether the accused had a bona fide belief that he was entitled in terms of section 49 (2) to act as he did and the effect of such a bona fide belief on his mens rea or fault, was not considered.

It is, with respect, difficult to agree with this finding on the facts. The coincidence referred to above is sufficient ground for accepting that the appellant had believed in good faith that he was pursuing a dangerous wanted criminal. It must also be accepted that he believed that deceased (the wanted criminal to his mind) had seen him, knew that he was being pursued and was trying to escape. There was no possible means by which the prosecution could rebut his evidence that deceased had seen him

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52) 590 A.
53) 590 B-C.
54) 590 C-D.

and that he (accused) believed he had been recognized. In view of the undisputed evidence that the wanted criminal was a man who would shoot if cornered, it is also, with respect, unacceptable that appellant should have tried to bring the white Cortina to a halt by driving in front of it.[55] This would have amounted to 'cornering' the man believed to be a dangerous criminal. He could then be expected to shoot and appellant would be making an easy target of himself, while attempting to stop the 'dangerous criminal' in this way. It is submitted that the finding that the appellant had acted unreasonably is difficult to support. The appellant could possibly have called for assistance on his radio.

The failure of the court to accept that appellant had acted reasonably illustrates the restrictive application given to section 49 (2). But it is a pity from the point of view of the clarity of our law that the effect of a bona fide belief on the part of appellant that he was acting in terms of section 49 (2) was not subjected to in-depth discussion. The result is that the decision leaves one with the impression that once section 49 (2) is found not to be applicable in rendering a killing justifiable or lawful, it is of no further relevance and has no bearing on the element of mens rea or fault.

A passage in the judgment that must not be overlooked is one in

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55) 589 D-F.

which the Chief Justice says that, because the appellant had given evidence that he had shot at the body of the Cortina and not at the deceased, it was doubtful whether he had shot in order to facilitate the arrest of the deceased and consequently whether section 49 (2) was relevant.[56] This indicates how restrictive an interpretation could be put on the measure. In view of the drastic nature of the measure, this is not unacceptable.

The evidence, dicta and findings in this important Appellate Division decision have been given attention to illustrate how the application of section 49 (2) can lead to confusion between the unlawfulness of killing in the process of arrest and the requirement of mens rea in deciding whether such a killing is murder or culpable homicide.

Barnard[57] is a case in which the difficulties experienced with section 49 (2) can be unmistakably perceived. The facts are very sketchily stated in the reported part of the judgment which is regrettable as a great deal hinged on an exact evaluation of the

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56) 'Die appellant se getuienis was dat hy na die bakwerk van die Cortina geskiet het en geensins bedoel het om die bestuurder van die voertuig raak te skiet of te dood nie. In die omstandighede kom dit my as twyfelagtig voor of die appellant hom op art. 49 (2) kan beroep, (589 A-B)'. (The appellant's evidence was that he fired at the bodywork of the Cortina and did not in any way intend to hit or kill the driver of the vehicle. In these circumstances it seems doubtful to me whether he can rely on section 49 (2) at all'(my translation)).

57) 1985 4 A 431 (W).

evidence and the facts proved.[58]

The two accused apparently set a trap for the deceased, two burglars. They shot the deceased dead in circumstances in which it was not possible to determine who had fired the fatal shot that killed the one deceased and it was clear that only one of the accused had shot the other deceased. Consequently the two accused could only be convicted of attempted murder in respect of the death of the one deceased, and only one accused could be convicted of murder or culpable homicide.[59] No common purpose to kill could be established. Consequently, if the mens rea of the accused were found to be culpa, only the one who had been proven to have actually killed the one deceased, could be convicted and then only of culpable homicide. In the absence of dolus neither could be convicted of murder or attempted murder.

The court found that the accused had not discharged the onus of proving that their conduct was lawful in terms of section 49 (2). This was a unanimous finding of the judge and his two assessors. The basis for this finding was that there were other ways of preventing the escape of the deceased and that it had been grossly reckless and unreasonable to resort to killing them.[60]

There was a difference of opinion between the judge and the

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58) cf Chimbamba 1977 4 SA 803 (RAD).
59) 434 G.
60) 434 F - 435 A.

assessors on whether the accused had entertained a bona fide belief that they were entitled, in terms of the law, to kill the deceased.[61] There was apparently a serious dispute at the trial as to whether the accused had set a trap for the deceased or not. If the trap had indeed been set, so the assessors found, the accused could not reasonably possibly have entertained the bona fide belief that they were acting lawfully.

The conclusion arrived at by the assessors is stated as follows in the judgment:[62]

> 'Beide die here assessore is oortuig bo redelike twyfel, uit hoofde van die roekeloosheid van hierdie optrede, veral in die lig van die beskuldigdes se voorafkennis van die lokval, dat beide beskuldigdes inderdaad bewus was van die wederregtelikheid van hulle skote op die oorledenes; dat hulle inderdaad besef het dat hulle meer moes doen voor hul kon skiet om te verwond en moontlik te dood, roekeloos of aan hierdie voorskrif voldoen word of nie'.[63]

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61) 434 J - 435 C.
62) 434 J - 435 A.
63) 'Both the gentlemen assessors are convinced beyond reasonable doubt, because of the recklessness of their conduct especially in the light of the accused's prior knowledge of the trap, that both accused were in fact aware of the unlawfulness of their shots at the deceased; that they in fact knew that they had to do more before they could shoot to wound and possibly kill, reckless as to whether this requirement had been met or not' (my translation).

It would therefore seem that the assessors had found dolus eventualis to have been established as the mens rea of the accused. They were aware that they could possibly be acting unlawfully and nevertheless continued with their conduct.

The trial judge took a more subjective view. On his view it was reasonably possible that the accused had believed, no matter how unreasonably, that they were entitled to kill the deceased. On a balance of probabilities he accepted that they did know that they were acting unlawfully, but this had not been established beyond a reasonable doubt.

It seemed clear that the accused would be convicted of murder and attempted murder on the findings of fact arrived at by the assessors with the learned presiding judge dissenting and finding that only culpa had been established beyond a reasonable doubt and that only one accused could be convicted and he of culpable homicide only. The anomaly relating to the onus of proof when section 49 (2) is applied became very evident. Could an accused notwithstanding failure to establish that he had acted lawfully in terms of section 49 (2) not escape conviction because of failure on the part of the prosecution to prove mens rea beyond a reasonable doubt? This latter failure could still be due to the reliance placed on section 49 (2) by the accused.[64] The defence that he had acted in terms of the sub-section would fail on the issue of unlawfulness, but succeed on the issue of mens

rea. This would happen because the onus to disprove unlawfulness would rest on the accused while the onus to prove mens rea would rest on the prosecution. This in effect amounts to allowing the accused to raise the defence that he was acting in terms of section 49 (2), twice.[65]

There was no doubt that the accused had killed the deceased intentionally. The only question was whether they had been aware of the unlawfulness of their conduct. Their failure to realise that they were acting unlawfully appears to have been a mistake of law rather than one of fact and is so treated by Coetzee J.[66]

If intent, which included knowledge of unlawfulness, was the mens rea required for conviction of murder and attempted murder, the learned judge would clearly have had to hold it as not proved and he would have dissented from his assessors. The learned judge preferred not to adopt this course for a socially acceptable reason[67] which, it is submitted with respect, led

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64) vide n20 supra.
65) As explained supra.
66) He does not clearly state this, but relies on the views on normative fault expressed in Snyman (Strafreg). These views are applicable to mistake of law and not to mistake of fact (Snyman (Strafreg) 124 and 188-9). It is particularly on the strength of the normative fault theory that De Blom (supra) is criticized by Snyman.
67) Socially acceptable in the sense of curbing killings whilst effecting arrests.

to a result which is not legally sound; it was based on neither binding nor persuasive authority[68] and is contrary to a previous decision of the Transvaal Provincial Division; namely, Sam.[69] Furthermore, the result; namely, that extreme negligence can suffice for a conviction of murder, is against the entire strong trend of our law that dolus is the mens rea of murder and that dolus is arrived at subjectively.[70] The reason why the learned judge refused to arrive at a finding that the accused could only be convicted of culpable homicide on his view of the facts, is the anomaly created by the onus on the accused to prove lawfulness or justification in terms of Section 49 (2) and the onus resting on the prosecution to prove mens rea beyond a reasonable doubt.

This is reflected in the following passage from the judgment:[71]

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68) It appears to be based on Snyman (Strafreg) (435H-6H) and counsel for the State's argument in Bailey supra (436 I-J). Snyman (Strafreg) admits that the normative fault theory is not part of our law (125) and counsel for the States's invitation to the court to adopt the normative fault theory was not accepted in Bailey.

69) 1980 4 SA 289 (W). In Sam, a decision praised by de Wet and Swanepoel (156), a subjective approach to awareness of unlawfulness was adopted and the accused was acquitted on the strength of a bona fide mistake of law and fact. This mistake negatived dolus. Sam was decided by two judges Myburg and de Villiers AJ, and it is doubtful whether Coetzee J, sitting alone in Barnard, had jurisdiction to deviate from the ratio in Sam.

70) This view gave rise to the extreme line of reasoning to be found in Alexander 1982 (4) 701 (T) in terms of which a person found guilty of murder could not be convicted of culpable homicide. In Barnard a complete volte face occurs. Persons proved to have been grossly negligent are convicted of murder and attempted murder.

71) 428 B.

'Moet enige onnosele evaluasie van die situasie deur die opsetlike dader, maar wat nogtans bona fide kan wees, lei tot slegs strafbare manslag en word die strengheid van die bepaling nie daardeur aansienlik afgewater en uitgeskraal nie? Dit maak dan eintlik nie meer saak dat hy die bewyslas nie bevredig nie. Kon sulke regsgevolge deur die Wetgewer bedoel gewees het? Ek betwyfel dit sterk'.[72]

To avoid this anomaly the learned judge applied the normative fault doctrine as stated in Snyman (Strafreg)[73] and in counsels's argument in Bailey[74] The normative fault doctrine is contrasted with the psychological fault doctrine. In terms of the latter, fault is intent or negligence. In terms of the normative fault doctrine fault is not the state of mind of the offender at the time of the offence, but a reproach levelled at the offender because:[75]

'a) dat die dader geweet of kon geweet het van die omstandighede wat sy handeling laat voldoen aan die

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71) 428 B.
72) 'Must any stupid evaluation of the situation by the intentional actor, but which can nevertheless be bona fide, lead to culpable homicide and does this not water down and emasculate the strictness of the provision considerably? In that case it does not make any difference that he failed to discharge the onus. Could such juristic results have been intended by the legislator? I strongly doubt that' (my translation).
73) 122-6.
74) 778 E - 780 E.
75) 436 C-E.

verbodsbeskrywing en dit wederregtelik maak (dit is wederregtelikheidsbewussyn);

b) dat hy in staat was om sy handelinge in te rig ooreenkomstig die regsvoorskrifte (hy was byvoorbeeld nie 'n geestesongestelde nie, dit is die toerekeningsvatbaarheidvereiste); en

c) dat hy nogtans besluit het om voort to gaan met sy handeling, en sodoende regsvoorskrifte te oortree (handelingswil, of opset).[76]

Despite the fact that although this concept of fault had been considered by the Appellate Division in Bailey, but neither applied nor totally rejected, and despite South Africa being the only Western Country to adopt the psychological fault concept currently adopted by the Appellate Division,[77] the learned

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76) '(a) The actor knew or could have known of the circumstances which made his conduct conform with the description of the prohibition and made it unlawful (that is knowledge of unlawfulness); b) he was capable of making his deeds conform to the legal precepts (he was for instance not mentally disordered, this is the requirement of accountability); c) he nevertheless decided to continue with his conduct and contravene the legal precepts (will to act or intent)' (my translation).

77) 436 G-H. This statement is, with respect, only partially correct. The normative fault doctrine is not adopted in countries that adopt the Anglo-Saxon System of dividing crime into actus reus and mens rea. What makes the South African view of criminal intent unique is that it recognises ignorance of the law as a defence which negatives intent (Snyman (Strafreg) 191-3). What Snyman is really criticizing is the way in which the defence of ignorance of the law is treated in our law namely psychologically in

judge decided that he would not apply the psychological fault doctrine so as to arrive at the undesirable result of convicting only the one accused of culpable homicide.

The reasoning is difficult to follow. It seems at one stage that Section 49 (2) was being interpreted in such a way as to cast the onus on the accused to disprove intent and at another stage as if section 49 (2) was interpreted to the effect that if an accused who relies on it, fails to establish it, his mens rea is determined without reference to section 49 or any bona fide belief he might have held that section 49 was applicable to his conduct complained of. This would, according to Coetzee J, amount to allowing the initial knowledge that killing is unlawful, which unlawfulness is not removed in terms of section 49 (2), to survive and would thus be a basis of fault even in terms of the psychological fault doctrine. The argument is stated in the following passage:[78)]

'Die dader wat besluit om opsetlik te dood weet dat dit

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terms of the accused's actual knowledge and not normatively in relation to what is expected of the accused in terms of society's norms (vide du Plessis 1984 SALJ 301, 316; and generally Burchell and Hunt 164-5). The discarded maxim 'Ignorance of the law is no excuse' could be regarded as a normative approach to fault. Society expects everybody to know the law.

78) 438 E.

> wederregtelik is, tensy hy, objektief gesproke, tevrede is dat daar nie 'n ander redelike uitweg is nie. As hierdie objektiewe basis nie bestaan nie, dan bly die aanvanklike bewussyn van die wederregtelikheid voortbestaan as die vereiste element, selfs in die psigologiese skuld begrip'.[79]

In the result the learned judge agreed, on his view of the law, with his assessors that the two accused were guilty of murder and attempted murder.

He remarks:[80]

> 'Moontlik sal hierdie resultaat deur sommige beskou word as 'n geringe inenting van die normatiewe begrip in hierdie bepaalde geval, vir regspolitiese rede, op die aanvaarde psigologiese skuldbegrip. Ek glo egter nie dat dit prakties enige saak maak nie. Ek meen dat dit nodig is om wat andersins 'n onbevredigende juridiese prent is, helderder in te kleur.

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79) 'The actor who decides to kill intentionally knows that it is unlawful, unless he, objectively speaking, is satisfied that there is no other reasonable course to follow. If this objective basis does not exist, then the initial awareness of unlawfulness continues to exist as the required element, even in the psychological concept of fault (my translation).

80) 438 F-G.

> Myns insiens dus in casu, maak dit nie saak of, soos deur die assessore bevind is, daar die daadwerklike wederregtelikheidsbewussyn, simplisties gesproke, aanwesig was of nie. Daar was nogtans, myns insiens, wederregtelikheidsbewussyn in juridiese sin, as die beskuldigde objektief die situasie verkeerd beoordeel het'.[81]

The conclusion as stated by Coetzee J illustrates indisputably that an adoption of the normative fault concept would result in an objective approach to dolus in certain cases and in general uncertainty in our criminal law. The accused would be tried twice; once to establish the elements of the crime and the presence or absence of any special defence he may raise and a second time to decide in terms of normative concepts (which are not clearly expounded anywhere[82] whether he is to be reproached or not. If he is not to be reproached he is acquitted irrespective of proof of the elements of the offence and absence of a

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81) 'Possibly this result will be regarded by some as a slight engrafting of the normative concept in this particular case, for reasons of legal policy, onto the accepted psychological concept. I do not, however, believe that it makes any difference in practice. I am of the opinion that it is necessary to delineate more clearly an otherwise unsatisfactory juridical picture. In my view therefore in casu, it makes no difference whether, as was found by the assessors the actual knowledge of unlawfulness, simplistically speaking, was present or not. There was nevertheless, in my view, knowledge of unlawfulness in the juristic sense, if the accused objectively assessed the situation wrongly' (my translation).

82) vide CR Snyman 1985 SALJ 120, 126.

special defence, if he is to be reproached he is to be convicted notwithstanding failure to establish an exact element of the crime.[83] This is in fact what the learned judge did in Barnard on his version of the facts.[84] Dolus had not in fact been proved but the accused was held to be subject to reproach as if dolus had been proved. The decision appears to be a result of the difficulties occasioned by the drastic provision of section 49 (2). With respect, one has understanding for the difficulties of the court, but the normative fault theory can lead only to greater difficulites.

It is significant that the normative fault concept is followed in Germany and on the Continent, but not in countries where the Anglo-America system of criminal procedure is applied.[85] The normative fault concept can be of value in a one-phase trial system where a wrong-doing or crime is investigated simultaneously with its blameworthiness. In a two-phase trial like ours and those of the Anglo-Saxon Countries, the normative fault concept is out of place and merely causes unnecessary complications. The question of reproach or blameworthiness is decided upon after conviction; in other words after a crime or wrong-

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83) culpa lata instead of dolus.

84) Unfortunately the facts are not dealt with in detail in the report. It is submitted that in view of the findings made by the assessors and Coetzee J's statement of his views at 435 C, the learned judge might very well have found that the accused were aware that they could possibly be acting unlawfully. The net of dolus eventualis is wide and the accused might have been convicted on that basis without recourse to the normative fault theory.

85) vide du Plessis 1984 SALJ 301, 317.

doing has been established in the shape of a duly recorded conviction.

Barnard[86] takes one to the very opposite pole from the main subject of this section: negligent killings that amount to murder. Nevertheless on an orthodox application of the law section 49 (2) is obviously a section that could result in intentional killings resulting in convictions of culpable homicide because of bona fide mistakes of fact or of law or of both.

4. CONCLUSION

The requirement of knowledge or awareness of unlawfulness as an ingredient of dolus may lead to intentional killings being treated as culpable homicide because of a bona fide mistake of law or of fact, in cases where the accused acted in private defence or under duress, if the circumstances are not such as to render the killing lawful.

The normative fault doctrine could lead to culpa being treated as dolus and consequently to culpable homicide being treated as murder. This represents a radical departure from principle and consequently this doctrine should be avoided.[87]

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86) On an application of our law relating to bona fide mistakes as encountered in Sam supra.

87) The conclusion in Barnard lends support to Rabie 1985 THRHR 332, 343, where the author states that on Snyman's views of ignorance of the law negligence is the sole form of fault.

CHAPTER IV

CULPABLE HOMICIDE IN RELATION TO KILLINGS COMMITTED UNDER PROVOCATION OR UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS AND KILLINGS COMMITTED BY YOUNG CHILDREN

1. Initial observations with special reference to the effect of 'toerekeningsvatbaarheid' on the defences under discussion in this chapter

1.1 Introduction

The grouping together of killings committed under provocation, the influence of alcohol and/or drugs and killings committed by young children may seem strange. The last category is clearly distinct from the first two. It could also be regarded as strange that the case of a sober person acting under provocation should be treated in the same chapter as that of an intoxicated person. The reason for the grouping is to be found in the relevance of the concept of 'toerekeningsvatbaarheid' to all three categories.

'Toerekeningsvatbaarheid' could be translated as criminal capacity or criminal accountability and may be regarded as the ability to attract criminal liability. The term made its first important appearance in our law in the first edition of De Wet and Swanepoel.[1] It has since then become fairly strongly

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1) Which appeared in 1949.

entrenched in our law.[2]

De Wet and Swanepoel attacked the approach adopted before 1949 that the defences of insanity, youth, intoxication and provocation should be approached as defences excluding mens rea. Their opinion was that the approach should be to inquire whether the accused who raises one of these defences was criminally accountable ('toerekeningsvatbaar') at the time of the commission of the crime charged.[3]

Criminal accountability or capacity, according to the learned authors depended on whether the accused appreciated the unlawfulness or prohibited nature of his conduct, and whether, even if he did appreciate the nature of his conduct, he could control his conduct according to his appreciation of its nature.[4]

Assuming that the approach to the defences to be discussed in this chapter was, before the acceptance of the doctrine of 'toerekeningsvatbaarheid', that they excluded mens rea, the acceptance of 'toerekeningsvatbaarheid' as a prerequisite of criminal liability has broadened their scope considerably.

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2) It received judicial acceptance in Mahlinza 1967 (1) SA 408 (A); vide CR Snyman 1985 SALJ 120, 130; but cf CR Snyman 1985 SALJ 240, 246 referring to Mahlinza.

3) De Wet and Swanepoel 1ed 71, 2ed 99, 3ed 106, 4ed 110; cf Burchell and Hunt, 1ed, 209-13, 2ed 239-41.

4) Quite literally, the question would be whether he was able to control himself or whether he had lost his self-control; vide Burchell and Hunt 174.

On the mens rea approach the question was whether an accused who had acted while provoked, intoxicated or still very young had acted intentionally or negligently. Subject to certain qualifications that will be discussed below, a person who had acted intentionally under provocation and/or intoxication or while still youthful would be guilty of a crime requiring dolus as its mens rea committed in that condition.[5] Where intent was not required, as for instance in the crime of culpable homicide, culpa would be investigated, and, had the accused acted negligently or unreasonably, he could still be convicted.

'Toerekeningsvatbaarheid' is regarded by De Wet and Swanepoel[6] and by Snyman[7] as a prerequisite for criminal fault. Consequently, if one views fault as being dolus or culpa, the absence of 'toerekeningsvatbaarheid' or the condition known as 'ontoerekeningsvatbaarheid' would result in an acquittal even if culpa were proved in the absence of dolus.

1.2 Five cases dealing with Criminal Capactiy

Our Common Law has advanced far along the road of allowing 'ontoerekeningsvatbaarheid' as a defence excluding culpa. This

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5) This statement is not applicable to children of 7 years and younger and is of limited application to children between the ages of 7 and 14.

6) 103.

7) 117 and 118, 'toerekeningsvatbaarheid' is translated as 'criminal responsibility'; cf Snyman (Stafreg) 127.

is illustrated by five recent cases, two of them regarded as very important.

The cases are Arnold,[8] Chretien,[9] Stellmacher,[10] Baartman[11] and Weber v Santam Versekeringsmaatskappy Beperk[12]

Arnold is a case about provocation. The accused, an emotionally unstable individual of forty-one had married a young woman of twenty-one who was emotionally immature and liable to be influenced for the worse by her mother. Accused had a strong emotional attachment to his wife and also to his youngest son from a previous marriage. This child was deaf. A situation of domestic conflict and tension arose between accused, his wife, his child and his wife's mother.

On the day of the crime, accused's wife, who had previously left him returned to their home to take away some of her belongings. Accused found her there and tried to persuade her to stay. On the findings of the trial judge she taunted and tantalized him,

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8) 1985 3 SA 256 (C), discussed by CR Snyman 1985 SALJ 240.
9) 1981 1 SA 1097 (A).
10) 1983 2 SA 181 (SWA).
11) 1983 4 SA 395 (NC).
12) 1983 1 SA 381 (A).

enjoying his discomfort and the power she had over him.[13] Accused had to leave while she was talking to her mother and returned some time later having left his deaf son at an institution, where it was intended that the child should remain. Accused had a pistol in his possession which he kept loaded at all times. He spoke to his wife in the sitting-room while holding the pistol in his hand. As he spoke to her he knocked the pistol against a piece of furniture to emphasise points made by him. During this conversation a shot went off harmlessly. The conversation continued and a second shot went off killing the wife. Accused was the sole surviving witness of the final scene in the course of which the two shots went off. He could remember the first shot and the events thereafter up to a stage when the deceased bent forward displaying her bare breasts to him through the top of her dress and referring to her activities as a strip dancer.

Accused's recollection of what followed was poor. He remembered hearing the second shot go off and seeing deceased fall, but could not remember aiming the firearm or discharging it. When he became fully conscious of himself and his surroundings he had the

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13) Accused took a more charitable view of the unfortunate woman's behaviour but the court had better insight into her character, having heard psychiatric evidence concerning it. The deceased appears to have made the mistake made by many an arrogant individual not to realize that an apparently docile person may eventually retaliate explosively. The accused also appears to have been an exceptionally good witness.

pistol in his hand with his finger on the trigger and it was pointing at the spot where deceased had stood. He was distressed at her plight, summoned assistance and tried to help her, but shortly afterwards she died.

Accused was acquitted on two grounds. The first was that he had not 'acted' when firing the fatal shot as his will had not been in command of his body. This ground of acquittal does not concern us here. The second ground is that at the time of the fatal shot the accused had lacked criminal capacity, in other words that he had been 'ontoerekeningsvatbaar'.

Expert psychiatric evidence had been led by the defence. Inter alia the judgment records the following concerning the uncontested evidence of the psychiatrist:[14)]

> 'When asked whether the accused could appreciate the wrongfulness of his act, he replied that normally the accused was not deficient in this respect, but that at the relevant time the last thing in his mind was the question as to whether what he did was right or wrong. His conscious mind was so 'flooded' by emotions that it interfered with his capability to appreciate what was right or wrong and, because of his emotional state, he may have

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14) 163 B-C.

lost the capacity to exercise control over his actions'[15])

The onus being on the prosecution to prove every element of the crime including criminal capacity, the prerequisite of fault, it was inevitable in the light of the above undisputed evidence, that the accused should be found to have lacked criminal capacity when firing the fatal shot. If the matter had been approached on the basis that he either had mens rea or lacked it, the court would no doubt have found that intent to kill had not been established, but that the accused had been negligent and he would have been convicted of culpable homicide.

His negligence could have consisted in returning to an emotionally tense situation with a loaded firearm in his hand, in holding the firearm in his hand and knocking it against a couch while talking at an emotionally charged level with the deceased and in not putting the firearm away, at the very latest after the first shot had gone off. This conduct speaks of gross negligence.[16]) But, relying on Chretien[17]) and van Vuuren[18]) the trial judge decided - correctly it is submitted in the light of these authorities - that the matter had to be decided on the basis of the question whether the accused had or had lacked criminal

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15) Emphasis added. In other words, for the moment the accused did not think in terms of right or wrong, and lost his self-control.
16) vide Steynberg 1983 3 SA 140 (A); Nkwenya 1985 2 SA 560 (A).
17) supra.
18) 1983 1 SA 12 (A).

capacity. The finding was that he lacked criminal capacity and he was acquitted.

This case has been discussed in some detail as it illustrates how the application of the test of criminal capacity can result in a total acquittal on a charge of murder in circumstances where in the past the prosecution could have expected a conviction of culpable homicide.

The well-known Chretien case decided, inter alia, that a person rendered 'ontoerekeningsvatbaar' as a result of the voluntary taking of alcohol could not be convicted of a crime committed in that state. This led to the acquittal of the accused in Stellmacher.[19] With a heavy calibre pistol in his possession the accused had, after a day of severe fasting, proceeded to drink somewhat unrestrainedly in the bar of a hotel. After consuming a large quantity of alcohol in a short time he had started firing shots in the bar. He wounded one person severely, hit a few articles in the bar and then fatally shot a person who had attempted to buy wine from him, the accused being behind the counter at the time. The accused pleaded automatism but was acquitted on the basis that he had been 'ontoerekeningsvatbaar' at the time of the fatal shooting. The evidence was very much in favour of the accused lacking intention to kill when the shot was

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19) supra - The investigation into the question of temporary insanity on the part of Stellmacher is not relevant to the present discussion.

fired. He had, however, been grossly negligent in drinking on an empty stomach with a dangerous firearm in his possession. The prosecution apparently did not press for a conviction of culpable homicide. This would have failed as the 'ontoerekeningsvatbaarheid' of the accused would have precluded any finding of fault on his part.[20)]

In Baartman[21)] the accused threatened to 'get drunk' in a few days time and then stab deceased to death. He duly did this. The prosecution adopted two lines of approach to establish dolus on his part. First that he was not so intoxicated at the time of the stabbing as to negative intent and, secondly, that on an application of the actio libera in causa principle he was in any event guilty of murder as he had commenced drinking with the intention of killing the deceased while drunk. On the facts Steenkamp J held that the accused had had the intent necessary for a conviction when he stabbed the deceased. The learned judge added, obiter, that the line of approach based on the actio libera in causa principle would have failed if he had found that the alcohol he had taken had rendered the accused 'ontoerekeningsvatbaar' at the time of the killing. This case is a significant indication that 'ontoerekeningsvatbaarheid' may exclude

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20) vide du Plesiss 1984 THRHR 98 for a discussion of Stellmacher in the light of Chretien.

21) supra.

antecedent liability.[22)]

Where youth is raised as a defence the law is that a child under 7 is irrebuttably presumed to be doli incapax.[23)] Children between the ages of 7 and 14 are also presumed to be lacking in criminal capability, but this presumption can be rebutted by evidence.[24)] The approach in the past has been that a child between the ages of 7 and 14 is presumed not to know that whatever crime he may be committing is wrong. But once such knowledge on his part is proved, the prosecution on proof of fault would be entitled to a conviction.[25)]

The criminal capacity the child was presumed to lack was therefore confined to inability to distinguish between right and wrong. The second requirement of criminal capacity; namely, the ability to control his conduct according to his knowledge of the

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22) Antecedent liability is a doctrine to the effect that in evaluating an allegedly criminal course of conduct one does not view a final occurence in isolation, but views it in the light of the actor's preceding conduct. Fault absent at the time of the final criminal act may be present in the prior behaviour. Chretien has weakened, if not destroyed, the doctrine of antecedent liability: vide Strauss 397; du Plessis 1982 SALJ 189, 201-2, 1985 SALJ 394, 398-401. In view of the peremptory wording of certain passages in Chretien it is difficult to agree with Strauss that Chretien's negligence in respect of his conviction of culpable homicide was founded on antecedent liability; vide du Plessis 1985 SALJ 394, 399.

23) Burchell and Hunt 242 ff.

23) ibid.

24) Burchell and Hunt 244-5.

wrongfulness of what he is doing, allegedly did not receive the attention it ought to have received.[26)]

In a civil matter Jones NO vs Santam Beperk[27)] a little girl of 9 had been adjudged negligent in that she had suddenly dashed from the side of the road in front of a passing motorist. The standard applied to determine her negligence was that of the reasonable man. The case was generally not well received as it was regarded wrong to apply the test of the reasonable man to a child[28)] The hope was expressed in an Appellate Division judgment[29)] that the law would be reviewed.

This was done in Weber v Santam Versekeringsmaatskappy Beperk[30)] The judgment being to the effect that the approach to the negligence of young children had been correct in the Jones case, but that apart from the question of negligence, 'toerekeningsvatbaarheid'; namely, whether the child appreciated the wrongfulness of its conduct and also whether the child could control its conduct according to this appreciation,[31)] had to be considered. The child concerned was a little boy of 7 years and 2 months and the court held that although he had known that motor cars were

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26) Burchell and Hunt 247 n86 referring to Roxa v Mtshayi 1975 3 SA 761 (A).
27) 1965 2 SA 542 (A).
28) Boberg 697-8. Cf I 1986 1 SA (O); Camplin 1978 1 AER 1236.
29) That of Jansen JA in Roxa supra n26.
30) supra.
31) 389-90.

dangerous and ought to have known that playing behind one was dangerous, he did not have the ability to restrain his childish desire to play behind a car, as the exciting prospect of playing would remove from his mind all knowledge of danger and all the training to be careful he had received from his parents. It is noteworthy that in arriving at its decision the majority of the court relied specifically on views expressed in the third edition of De Wet and Swanepoel.[32)]

This discussion of recent decisions has been necessary to demonstrate the influence of the concept of 'toerekeningsvatbaarheid' on the present state of our law. The development to this stage will now be traced and certain conclusions advanced.

2 The defence of Provocation

2.1 Introductory

The history of the defence of provocation shows an interesting development from the adoption of a mixture of objective and subjective standards to an emphasis on subjectivity. The history of the defence will be examined in some detail because of the interesting light it throws on the interaction between normative

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32) 389-H.

and psychological approaches to fault.

2.2 Nathan

The subject is treated in the light of the old authorities and Pascoe[33] by Nathan.[34] The discussion is confined to a clear, terse statement of certain rules and exceptions to those rules in terms of which a killing that would otherwise be murder, becomes culpable homicide.

The distinction between murder and culpable homicide consisted in the absence of 'malice aforethought' in the latter crime. Two types of provocation are discussed; namely, aggression and adultery.[35] If an aggressor provokes a sudden fight, strikes or attempts to strike first and is killed, the killer is guilty of culpable homicide because of the absence of malice aforethought. If his temper had time to cool between the initial act of aggression and his fatal retaliation he would be guilty of murder. Comparison of this part of the text[36] with the section on murder[37] creates the impression that although 'malice aforethought' is said to be intention it was really taken to mean intention coupled with a certain amount of premeditation. A sudden killing provoked by the deceased would not be murder, but

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33) 1884 2 SC 427.
34) 2574-5.
35) ibid.
36) ibid.
37) 2567-8.

culpable homicide, either because there was no premeditation, or because premeditation could not be inferred from the facts. The discussion, particularly that of murder, abounds with statements in which rules of law and of proof are simultaneously stated without any attempt to distinguish between them.

The provocation occasioned by adultery discloses that in certain instances provocation could result in the crime of murder being reduced to culpable homicide without reference to the mens rea of the killer. The impression gained is that such a killing would be semi-lawful[38] or partially justifiable and therefore not murder. The general rule is stated thus:[39]

> 'If a man discovers another in the act of committing adultery with his wife and kills either the adulterer or the adulteress, he is guilty of culpable homicide ....'

The author adds that:[40]

> 'Certain of the Roman Dutch authorities ... hold that if a man kills an adulterer whom he finds in the act of

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38) It may be said that an act is either lawful or unlawful and that there are no degrees of unlawfulness, but some crimes are more seriously unlawful than others. Thus murder is a more serious deviation from lawful standards than culpable homicide.

39) 2575.

40) ibid - The references to authorities are omitted from the quoted passage.

committing adultery with the slayer's wife, or if he kills his wife in such circumstances, this is justifiable homicide, and no penalty attaches to it. But the view of the majority of Roman-Dutch authorities, particularly the more modern ones, is that killing under such circumstances amounts to culpable homicide, and this view of the law has been adopted in South Africa.'

This last observation is made on the strength of the instructions given to the jury by de Villiers CJ in Pascoe.

In Pascoe the accused had killed his wife and her lover with a hatchet. He alleged that he was lawfully married to the deceased woman and that he had caught the pair in the act of adultery. From the judge's summing up it seems as if both these statements were doubtful. The deceased woman could have been the second wife of the accused in a polygamous union contracted in terms of the rules of a religious denomination that recognised polygamy.

The accused 'caught' the two deceased in the same room, but from certain proven facts it was open to serious doubt whether they had been in bed together.

The learned Chief Justice instructed the Jury as follows:[41)]

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41) 427.

> 'I must tell you that no person is justified by the law of this Colony in killing his wife, even if he sees her in the act of adultery. It is quite true it would not be murder, but culpable homicide. The law recognizes the frailty of human nature, and so where a man in a sudden transport of passion kills his wife upon discovering that she is unfaithful, and in the act of committing adultery, it is a case of culpable homicide and not of murder'.

He added:[42)]

> 'Now as I have already said, the case for the defence is founded on two assumptions that these parties were legally married and that the prisoner found the parties in the act of adultery. If you find either of these assumptions is not supported by the evidence I am bound to tell you that it will be your duty to find the prisoner at the bar guilty of murder'.

In referring to the concession made by the law to human frailty, the learned Chief Justice appears to have had mens rea in mind and that the man who acts in a sudden transport of passion does not act intentionally. Nevertheless, even if this subjective factor is taken into account, it is not of over-riding importance when compared with the objective factor of the legality or

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42) ibid.

otherwise of the marriage and the equally formalistic questions whether adultery was actually being committed, or whether the wife and her lover had only been found together in compromising circumstances.

If mens rea were in issue the question would be whether the accused had been so provoked as to lose his self-control[43] and to kill without thinking what he was doing. A man who finds a woman he loves and with whom he lives, in the act of adultery or in highly suspicious circumstances could become equally as angry as a man who finds his lawfully wedded wife in the act of adultery. But only the latter could be found guilty of culpable homicide and not of murder, and then only if the lawfully wedded wife was caught in flagrante delicto with her paramour.

From this one must conclude that either the anger of the man who cannot prove both that the woman was his wife and that she was caught in flagrante delicto would not, irrespective of his real state of mind at the time of the killing, be regarded as a 'lawful' or 'recognized' reason for negativing intent on his part, or that provocation is a ground of partial justification valid only if these two objective requirements were met. In the latter case the state of mind of the killer at the time of the killing is also not relevant. One must, however, not omit to

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43) Loss of self-control was not viewed as the second ingredient of 'toerekeningsvatbaarheid' in the days of Lord de Villiers. 'Toerekeningsvatbaarheid' was totally unknown.

mention that the judge concluded his instruction by stating that if the jury found the accused guilty of murder they could couple their verdict with a recommendation of mercy if the accused had received great provocation from his 'wife'. The subjective state of the accused could therefore serve as a factor to persuade the executive not to exact the supreme penalty. In other words it would reduce blameworthiness.

2.3 Anders and Ellson

Anders and Ellson, writing some years after Nathan deal with provocation under the headings of assault[44] and culpable homicide[45] and mainly in the latter context.

The term 'culpable homicide' is used in two senses; firstly, homicide which is neither justified nor excusable and, secondly, homicide which is neither justifiable nor excusable and committed without malice aforethought. Culpable homicide in the first sense becomes murder if it is committed with malice aforethought.[46] Malice aforethought is apparently intention, but there are also elements of deliberation and premeditation.[47]

Culpable homicide in the first sense which does not become

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44) 52, 53.
45) 122.
46) 127.
47) 126.

murder,[48] is said to be committed mainly in the anger provoked by a sudden combat. An accused who kills 'in the heat of the moment' in a combat not provoked by him is guilty of culpable homicide. The latter crime differs from murder essentially because of the absence of deliberation, or premeditation.

These rules are qualified with reference to articles 245 and 246 of Stephen's Digest from which the following is quoted with approval:[49]

> 'provocation does not extenuate the guilt of homicide (ie does not make it less than murder) unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received; and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind.'

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48) In other words, which is or remains culpable homicide in the second sense.

49) 122.

The passage shows a strong leaning to considering the mens rea of the accused and the effect of the provocation on it. There is also reference to his loss of self-control which comes close to the second ingredient of 'toerekeningsvatbaarheid' namely inability to control one's conduct according to one's appreciation of its wrongfulness.[50]

In the discussion[51] following the passage quoted certain objective requirements for provocation are set out and section 141 of the (then) Transkeian Penal Code[52] is mentioned. The general statement is made that this section together with the passages from Stephen's Digest referred to 'represent the law of this country on the subject'. Pascoe[53] is referred to as authority for this statement.

The mention of Section 141 of the Transkeian Penal Code is significant as this section was for a long time to be regarded as stating the South African law.

It reads as follows:

> 'Homicide which would otherwise be murder may be reduced to culpable homicide, if the person who causes death does

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50) But see n49 supra.
51) 122-4.
52) Act no 24 of 1886.
53) supra.

so in the heat of passion caused by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool. Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received shall be questions of fact.'

In Butelezi[54] the Appellate Division unequivocally regarded the section as stating the South African law on the subject. This was accepted in Gardiner and Landsdown[55] up to the sixth and last edition.

The wording of the section has been criticized and analysed on a number of occasions and detailed analysis at this stage would be redundant.[56]

The following must, however, be pointed out : It is not clear whether the first sentence states the partial excuse rule or not. 'Homicide which would otherwise be murder' must refer to

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54) 1925 AD 160.
55) 6ed 102.
56) Burchell and Hunt 1ed 243 ff; 2ed 309 ff; De Wet and Swanepoel 1ed 83 ff; 4ed 133 ff; Strauss 1959 THRHR 14.

intentional killing. If the homicide becomes culpable homicide because of the absence of intention to kill the first sentence would be unnecessary. Thus one could interpret the section as being to the effect that if the conditions set for provocation are met, it becomes a defence which could reduce an intentional killing from murder to culpable homicide. On this interpretation the real intention, state of mind or mens rea of the killer would appear to be over-ridden by the consideration that he was provoked. If one looks at the Code's definition of murder which reads as follows:

'Culpable homicide becomes murder in the following cases:

a) If the offender means to cause the death of the person killed.

b) If the offender means to cause to 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, he may have desired that his object should be affected without hurting any one;

It would appear, particularly from sections 140(a) and 140(b), that the above interpretation of section 141 is correct. In terms of section 141 facts would therefore be objectively viewed and provocation, if its requisities had been met, treated as a factor affecting the degree of unlawfulness[57] if not necessarily the mens rea of the killing. Another view could be that duly established provocation would reduce the blameworthiness[58] of the killing so that it would be treated as culpable homicide notwithstanding its having been intentional.

From the judgment in Pascoe it seems that the defence of provocation was treated as requiring a combination of subjective

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57) vide n38 supra.

58) This view would be 'modern' in the sense of regarding fault as a reproach, or as the blameworthiness of an act. This seems to indicate that the normative fault theory, although not always known by that name, is nothing new. It could surprise some proponents of 'strafregwetenskap' to learn that section 141, so oft derided was, in a manner of speaking, a statutory measure creating normative fault, a concept nowadays so much espoused.

and objective features to succeed.

2.4 Gardiner and Lansdown

In the fourth edition of Gardiner and Lansdown the discussion of provocation commences as follows:[59]

> 'The presumption of intent to kill may be rebutted by proof of certain circumstances affecting the mind of the accused at the time of the assault which show that this intent was absent. Thus it may be shown that the accused was provoked by the deceased. To establish an absence of intent, the provocation must be of so gross a nature that it would upset the balance of mind of a reasonable man and deprive him for the time being of the power of self-control or of the faculty of realising what would be the probable consequences of his acts'.

The same wording is used in the fifth[60] and sixth editions.[61]

It seems strange that the actual state of mind of the accused is not referred to so much as a set of rules according to which his intent to kill is determined. If he killed he is presumed to

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59) 1554 ff.
60) 1418 ff
61) 1554 ff

have intended the killing. If he was provoked in a way that would have caused a reasonable man to lose his self-control, the presumption is rebutted. Proof of absence of intent would not rebut the presumption if a reasonable man would not have reacted as accused reacted.

Referring to Pascoe, Gardiner and Lansdown state that the rules laid down in that case may have been relaxed so that a finding could be made in favour of a man who kills a woman with whom he has lived for some time although he may not be married to her. They write: '...the affection of the man for the woman may be so great as to lead to the conclusion that the provocation deprived the accused temporarily of the power of self-control, or of realizing the probable consequences of his acts.'[62]

The discussions of the law relating to the effect of provocation on homicide is inclined to be confusing in that objective requirements and subjective requirements are mentioned in such a way that no clear distinction is drawn between them. In the fifth[63] and sixth[64] editions a section on provocation is included in the chapter entitled 'Principles of Criminal Responsibility'[65]

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62) 1554.
63) 78 ff.
64) 101 ff.
65) Book I chapter IV in both editions.

There was no such section in the same chapter[66] in the fourth edition. In both later editions the law is summarised as follows at the start of the section on provocation:[67]

> 'On a charge of murder or assault with intent to murder or do grievous bodily harm, the presumption of intention of reasonable and probable consequences may be negatived by evidence that the accused was subjected by his victim to provocation which :
>
> a) was such as to upset the balance of mind of a reasonable man and deprive him, for the time being, of the power of self-control or of the faculty of realizing the probable consequences of his act; and
>
> b) did, in fact, exercise such an influence on the mind of the accused;
>
> provided it be proved that the conduct of the accused immediately supervened upon the provocation, was the natural reaction to it, and was not disproportionate to the provocation'.

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66) Book I chapter IV.
67) 5ed 78, 6ed 101.

The rule stated is confined to three[68] crimes. This is significant in view of the statement concerning the defence of provocation that ' ... its effect, if established, is to deprive the crime of the particular intention ordinarily attaching to it ...' and the further statement: 'Provocation is not, in itself, a mitigating factor, but a circumstance from which the jury may conclude that the specific intention averred was absent'.

In the sixth edition this is followed by a reference to the statement in Thibani[69] that provocation is a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intention which is an essential ingredient of the crime charged.[70]

In the fifth and sixth editions, in the latter particularly in view of the Thibani dictum, a more subjective approach was adopted.

The issues raised by the defence of provocation became increasingly narrowed down to one question namely, whether intent had been proved. The accused may have been so mentally upset by the

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68) Murder, assault with intent to murder and assault with intent to do grievous bodily harm.
69) 1949 4 SA 720 (A).
70) 101.

provocation that it could become doubtful whether he had indeed intended to bring about the result; namely, death or grievous bodily harm, brought about by him in this upset state of mind.

Notwithstanding this clear statement that provocation was a factor in the evidential material before the court that had to be taken into account in deciding whether intent had been proved, there is still the statement that section 141 of the Transkei Penal Code sets out the law on the subject.[71] In other words the defence of provocation had not yet become divested of the objective factors that had been associated with it before and since Pascoe.[72]

This appears clearly from the following requisites of the plea listed namely:[73]

> '1) The provocation must have been of such a character as to upset the balance of a reasonable man and deprive him, for the time being, of the power of self-control and of the faculty of realizing the probable consequences of his act.
>
> 2) The provocation must, in fact, have exercised that influence on the mind of the accused.

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71) 6ed 102.
72) In modern terms: the defence was viewed as affecting psychological and/or normative fault.
73) 6ed 103, 5ed 79.

3) The act of the accused must have supervened immediately upon the provocation and have been the natural reaction to it.

4) The mode of resentment must have borne a reasonable relationship to the provocation'.

Comments on the first requirement are as follows:

> 'As to the first of these, the provocation must have been such as to affect in the manner stated the mind of a reasonable man: an unusually excitable or pugnacious, or even a neuropathic individual would not be entitled to the relief unless it were shown that a reasonable man would have reacted in the way he did..'[74]

Considerations as to how a reasonable man would have reacted were still very much in evidence, thus creating the impression that anger arising in circumstances in which a reasonable man would not become angry would not be justified or justifiable anger. Or perhaps it would be better put to say that such anger even if it did affect the intent in question, would be ignored in determining the presence or absence of such intent. It is doubtful whether this was really the law in practice. It is far more

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74) 103-4.

likely that in practice the courts were sceptical as to whether provocation that would not have angered the reasonable man, did in fact anger the accused. In other words there was a tendency to regard the accused as bearing the onus to establish that notwithstanding the objectively unreasonable nature of his reaction, he had in fact so reacted. Another view was that, although this is nowhere stated in so many words, a normative view was taken of provocation: if the provocation were not such as to affect a reasonable man the accused was expected not to be angered by it and he would be reproached as if he had not been provoked. The statement concerning the abnormally excitable, psychopathic or psycho-neurotic person[75] is also similarly unsatisfactory. If an accused, because of a combination of provocation and subjective factors of this nature lacked intent, he lacked intent. To hold otherwise was to convict on the strength of mens rea or psychological fault which was not present.

Of interest in the discussion was the mention of 'particular intent' or 'specific intent'. This was not so much the statement of a doctrine as a convenient mode of expression. The three crimes mainly under discussion; namely, murder, assault with intent to murder and assault with intent to do grievous bodily harm, are 'result' crimes as opposed to formally defined crimes. If the accused was proved to have performed an act; for instance, to have thrown a brick at the deceased or the complainant as

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75) 103.

the case may be, and the act was proved to have had a result: the deceased was killed or the complainant seriously injured, the accused could hardly have been heard to say that he had thrown the brick unintentionally. His intention to throw the brick would usually have been easy to establish. But the prosecution's difficulties would have commenced when the accused alleged in his evidence that his mind was so clouded with anger and exasperation that he did not, in throwing the brick, give a thought to the fact that the brick might injure, maim, wound or even kill the person at whom he was throwing it. In cross-examination it would be put to him that he had been aware of these possible results of his conduct and he would probably respond that had he been so aware, he would not have thrown the brick. It would be put to him that in the light of common experience he knew that bricks thrown at people could seriously injure them. His answer would probably be that he had indeed known this since early childhood, but that in the heat of the moment occasioned by the anger engendered by the provocation, he had not thought of it.

If it had been established that the accused had been provoked, that he had picked up the brick and had thrown it in immediate reaction to the provocation, that he had done no more than this and had tried to assist the person who had been injured, it would call for superhuman powers of cross-examination 'to break his story', and prove beyond a reasonable doubt that, in throwing the brick, he had intended to kill or injure the person at whom he

had thrown it. At the close of the case the defence would confidently submit that although an intent to apply force had been proved, the specific intent to kill or inflict serious injury had not been proved. If the person hit with the brick had died, culpable homicide would have been proved and if the person survived, common assault.

It would all really be a question of whether the mens rea alleged by the prosecution had been established. Eye-witnesses may have testified that the accused had told the deceased or injured party as the case may be, to 'hang on a moment' and he would be taught a lesson 'about bricks' that he would either not live to remember or would never forget if he were lucky enough to survive. They might also testify that the accused had spent some time looking for the brick and had then thrown it. He might also have expressed satisfaction with the injuries inflicted on the other party. If the prosecution were so fortunate as to have such evidence on record, there would be no doubt that the accused had indeed foreseen specifically that his throwing of the brick would seriously injure or kill the other party.

Seen in this light, it is a bit astonishing that the use of the term 'specific intent' could have attracted so much adverse academic comment.[76)]

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76) eg De Wet and Swanepoel 1ed 85; cf Chretien 1103H-1104A.

2.5 Pitman

In 1950 Pitman[77] adhered to the view that section 141 of the Transkei Penal Code reflected our law relating to provocation. In the discussion a mixture of objective and subjective factors are mentioned. No clear statement as to proof of the actual state of mind of an accused who assaults or kills under provocation is made. The following is said concerning the effect of provocative conduct:

> 'Such conduct is deemed so to have enraged the killer, so taken him out of himself, that for the moment he was rendered incapable of controlling himself and realizing the probable consequences of his conduct.'[78]

The use of the word 'deemed' is unfortunate. What one would have expected is a reference to what the accused was proved to have actually intended and the possible effect of evidence of provocation on the overall weight of the evidence tendered in support of the prosecution's averment that he acted intentionally.

2.6 Barlow

Barlow[79] stated the law relating to provocation as follows:

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77) 123-5.
78) 124.
79) 10-11.

a) Murder is reduced to culpable homicide if the accused is so provoked by the action of the deceased as to be temporarily deprived of self-control.

b) The killing must take place immediately upon receiving of the provocation.

c) Only under the most extreme circumstances will words amount to sufficient provocation to reduce the nature of the crime.'

The discussion which follows consists of brief statements of particular rules governing the applicability or non-applicability of the defence. These rules consist of objective and subjective requirements. The initial statement is:[80]

> 'Overwhelming anger, springing from some internal emotion, such as jealousy, is not in itself sufficient ground for a plea of provocation. The court must pay attention to the facts that give rise to the anger, not to the anger itself'.

This statement, based on an unknown Dutch writer,[81] is in contrast to the views expressed in Thibani,[82] but is in

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80) 11.
81) van Diense writing in 1860.
82) supra.

conformity with the general policy of viewing provocation objectively as well as, or perhaps 'rather than', subjectively, which appears from the authorities so far discussed. Section 141 of the Transkeian Penal Code is not referred to.

Thibani[83] is referred to, but not in such a way as to suggest that the case was of any great importance. Thus, the author said:[84]

> 'In the recent case of Thibani, it was held that provocation in South Africa was a problem of fact rather than of legal rules. It is probable, however, that the rules set out above will continue to guide our courts on the point.'

2.7 Brokensha

The views of Gardiner and Lansdown, Pitman and Barlow were becoming outmoded in the late 1950's.[85] They ought perhaps to be contrasted with a passage from Brokensha written in 1960:[86]

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83) supra.
84) 12.
85) Some practitioners in the criminal courts were inclined to regard Gardiner and Lansdown as a 'Prosecutor's manual'. It does seem to have favoured the prosecution, and the retention of objective requirements for provocation to succeed as a defence, would have this effect. Barlow also appears to favour the prosecution.
86) 220 - The passage is based on Thibani.

'Since the clarification of the law following upon the cases of Woolmington and Ndhlovu provocation has assumed its proper place, not as a defence - though the Crown need not negative it unless the evidence reveals it as a possible factor in the case - but as a special kind of material from which in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt.'

Thibani is then referred to, obviously as the leading authority on the subject.

2.8 De Wet and Swanepoel

If one reviews the works so far referred to, except Brokensha, it is understandable why S Postma in a thesis on murder and culpable homicide completed in 1957[87] was extremely critical of our law of culpable homicide particularly in the context of the defence of provocation.[88]

It is perhaps regrettable that a work which enjoyed such a favourable reputation as Gardiner and Lansdown and was held in

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87) Moord en Strafbare Manslag in die Suid-Afrikaanse Strafreg (Published doctoral thesis University of Leiden 1957).

88) 81 ff. Postma's comment is marred by undisguised emotional anti-English statements.

such high esteem by our courts, did not adopt a more critical stance towards the untenable co-mixture of subjective and objective criteria for provocation that led to convictions of culpable homicide on charges of murder. It would probably have been out of keeping with its primary aim; namely, to state the positive law for practitioners and judicial officers. Nevertheless, although one must not be carried away by the wisdom of hindsight, it might have served a useful purpose had the authors drawn attention to the inconsistencies in the law and the doubtful nature of the statement that section 141 of the Transkeian Penal Code set out our common law on the subject, instead of their expositions in successive editions being little more than an inventory of often contradictory rules.

In 1949 the first edition of De Wet and Swanepoel appeared. In many respects this book went to the opposite extreme from Gardiner and Lansdown and criticised almost every judgment of the Supreme Court on provocation, in many cases unjustifiably.[89)]

Provocation is a topic under the general heading of 'toerekeningsvatbaarheid'.[90)] But in the first edition the authors say that the question to be considered under the heading of provocation was whether a 'toerekeningsvatbare' person could raise anger

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89) This will be referred to more specifically in the discussion of the decisions in question.

90) led 70-91.

as an excuse for his deed.[91] The question, so they said, did not really belong under the heading of 'toerekeningsvatbaarheid' but would be discussed in that context because the old authorities and the courts sometimes connected quick-temperedness with 'ontoerekeningsvatbaarheid.'[92] The discussion is such that the impression gained is that the authors should have placed more emphasis on 'toerekeningsvatbaarheid'.

The treatment of the topic commences with the statement that serious emotional upheavals do not simply exclude 'toerekeningsvatbaarheid:'[93] men are expected to control their emotions and passions. If a man is incapable of controlling his emotions and passions he lacks criminal capacity, or his criminal responsibility is diminished. Significant is the statement that it is not the particular passion or emotion that makes a person 'ontoerekeningsvatbaar', but the inability of a person to control his passions that is indicative of his lacking capacity (being 'ontoerekeningsvatbaar').[94] It therefore follows that it is not the anger or passion that excuses the accused, but his lack of criminal capacity which was manifested in his inability to control himself. This could be a circular argument. But in the light of the recent development described in the introduction to

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91) 81.
92) ibid.
93) ibid.
94) 82 ff.

this chapter[95], it is perhaps a pity that the authors did not go more deeply into the question of the effect of provocation on 'toerekeningsvatbaarheid'.

The authors then embark on a criticism of English Law, the decisions of our courts, section 141 of the Transkeian Penal Code and the suggestion that provocation could result in the inability to form an intention. Their conclusion is stated[96] briefly to the effect that if the provoked accused has criminal capacity,[97] he is criminally liable. His anger and whether it was justified is only taken into account when punishment is considered.

Noteworthy is the approval accorded a passage from the judgment of Stratford JA in Ngobese;[98] namely,

> 'That there was an absence of legal justification for that state of mind is irrelevant to the enquiry as to what the actual state of mind was.
>
> We are dealing not with a defence of justifiable homicide but with a mental attitude - the intention to kill.[99]

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95) supra 1.1.
96) 91 second paragraph - paraphrased.
97) ie is neither a child, a mentally retarded or ill person, or intoxicated and has the necessary dolus or culpa.
98) 1936 AD 296.
99) 87.

Unfortunately this last mentioned attitude of De Wet and Swanepoel was not maintained in the second edition where the Thibani decision with its ratio very much in the spirit of the dictum of Stratford JA, was severely criticised[100]. The general discussion in the second edition[101] is largely similar to and in many respects identical with that in the first edition. The criticism of Schreiner JA's dictum in Thibani[102] to the effect that provocation is a special kind of material, from which in association with the rest of the evidence the finding must be made whether intent to kill had been proved, is puzzling.

It is argued that Schreiner JA's views are neither Roman Dutch law nor English law, nor reconcilable with section 141 of the Transkeian Penal Code.[103] This may be so, but the authors were opposed to English law, very much opposed to the section in the Transkeian Penal Code and it is questionable whether Roman-Dutch law was clear on the subject of provocation, quite apart from the question whether it would be advisable to return to Roman-Dutch times when dealing with murder and provocation towards the close of the first half of the twentieth century.

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100) 123 first line - the impression is that, try as he might, Schreiner JA could not do well in the eyes of De Wet and Swanepoel.
101) 117-24.
102) supra.
103) 123.

Their further criticism [104] can not be supported. It is mainly to the effect that although anger is a factor from which the state of mind of an actor can be inferred, anger does not necessarily negative intent. It may have the opposite effect. It may be precisely because of provocation and resultant anger that an accused decided to kill. It could hardly be said that the Thibani judgment would contradict this statement. Provocation as a defence can be a two-edged sword: this has always been known. It may result in a sudden welling up of anger and hurt feelings that makes it impossible to determine what was going on in the mind of the person concerned at the time, or it may give rise to a cold quiet rage which prompts the calculated decision to take revenge when the time is ripe. In the latter case provocation is not a defence but a motive and might well serve to prove intent to kill or to injure seriously.[105]

Generally the second edition of De Wet and Swanepoel strongly favours the subjective approach to the effect of provocation on the mind of the person provoked and the criticism of the Thibani judgment is difficult to reconcile with this approach.

The section on provocation concludes[1] with some positive suggestions of what the law ought to be; namely,

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104) ibid.
105) cf Mokonto 1971 2 SA 319 (A), 326 C-D.
1) 124.

a) that when anger is considered as a factor indicative of the mental attitude accompanying a person's conduct, it ought not to make any difference whether the anger is justified or reasonable or whether it was brought about by lawful or wrongful conduct on the part of the other person;

b) that, irrespective of its evidential effect as to the state of mind of the accused it should have a mitigating effect if justified;

c) that the question of the effect of anger should be determined with reference to the circumstances as viewed by the accused at the time and that the lawful or unlawful nature of the act giving rise to the anger, should not be taken into account;

d) that section 141 of the Transkeian Penal Code should not be followed except in the area for which it was enacted;

e) that the view that anger can reduce murder to culpable homicide should be recognised as English law, related to the distinction between murder and manslaughter in that system.[2)]

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2) The Afrikaans text has been paraphrased.

This was a very positive attitude which appears eventually to have borne fruit in Mokonto.[3)]

The mixing of subjective and objective criteria described by Gardiner and Lansdown had become untenable. It was simply not sufficient merely to describe this state of the positive law. Some improvement ought to have been suggested. In this respect De Wet and Swanepoel proved its value as a book suggesting necessary change. One feels that it is a pity that the book should have been marred with so much criticism of the courts. The courts were working in the direction of the same solution and the Thibani judgment was an important stage in the general development. Seen in perspective the purism of De Wet and Swanepoel and the pragmatic approach of the courts were working together towards the same end result.

The third edition [4)] repeats the criticism of Thibani, criticises the dicta of Schreiner JA[5)] in Krull[6)] and welcomes the decision in Mokonto.[7]

The use of the term 'specific intention' in Mokonto is

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3) supra; vide De Wet and Swanepoel 3ed, 134 n185.
4) 127-35.
5) 134. It seems that unlike the King, this judge could 'do no right,' at least not in the eyes of De Wet and Swanepoel.
6) 1959 3 SA 392 (A).
7) supra.

criticised[8] as well as the term provocation. One is inclined to agree that it is not provocation that affects intention but the anger that arises from provocation.

The fourth and most recent edition[9] largely repeats what was said in the third edition.

The section concludes, referring to Lesch,[10] with the remark that a fresh approach in our decisions appears to be the tendency to treat provocation as affecting 'toerekeningsvatbaarheid.' One feels that perhaps a detailed discussion of this development would have been useful.[11]

2.9 Burchell and Hunt

The discussion of provocation in the first edition of Burchell and Hunt,[12] has much to commend it. Section 141 of the Transkeian Penal Code is said to be a statement of English law rather than South African Law[13] and Thibani[14] is regarded, rightly

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8) 134-6.
9) 130-6; Thibani and Krull are criticised at 135.
10) 1983 1 SA 814 (O).
11) Instead one sentence is devoted to the topic. In 1985 de Wet and Swanepoel have to some extent arrived at the anachronistic position of Gardiner and Lansdown in 1956.
12) 240-50.
13) 240.
14) supra.

it is submitted, as the decision which commenced a new approach to this defence.[15] This new approach is that provocation is viewed as a factor from which, among others, a decision is arrived at as to whether intent to kill has been proved. Provocation can also negative the specific intent required for assault with intent to do grievous bodily harm or any other crime requiring a specific intent. The submission is also made that as common assault is a crime requiring intent as its mens rea provocation could in given circumstances negative the intent to commit a common assault.[16]

Krull[17] is referred to[18] with some approval but it is pointed out that the statement of Schreiner JA that the idiosyncracies of the accused, short of actual insanity, are not to be taken into account, is untenable and in any event obiter. The view taken in Tenganyika[19] that provocation can reduce an intentional killing to culpable homicide, is rejected.[20] It is stressed that Krull has made it clear that in South African law provocation cannot reduce an intentional killing to culpable homicide.

The view, expressed by de Wet and Swanepoel[21] that section 141

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15) 240-1.
16) 241-2.
17) supra.
18) 243.
19) 1958 3 SA 7 (FC).
20) 243.
21) 1ed 86, 2ed 122, 3ed 132, 4ed 135.

of the Transkeian Penal Code was accepted as stating South African law, in order to provide the courts with latitude in punishment at a time when death was the only penalty for murder is also adhered to.[22)]

Significant is the statement that for the defence of provocation to succeed it must be established that the provocation had caused the accused to lose his self-control.[23)] This is not elaborated on. This seems to be coming close to saying that the accused must have become 'ontoerekeningsvatbaar', (in other words unable to control his conduct according to his appreciation of its wrongfulness). In practice, an accused would be far more likely to say that in the heat of passion occasioned by the provocation he had not weighed up the consequences of his conduct. For him to say that he had killed another because he lost his self-control and could not prevent himself from killing, would have been an extremely dangerous line of defence before the Chretien,[24)] Lesch[25)] and Arnold[26)] judgments, as it would have amounted to an admission of intent to kill.

A further significant statement by Burchell and Hunt is that in view of the requirement of mens rea for culpable homicide since

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22) 240.
23) 244 ff.
24) supra.
25) supra.
26) supra.

Bernardus[27] it did not automatically follow that an accused whose intent to kill had not been proved, would automatically be convicted of culpable homicide. It might very well be, (so the authors submit), that his conduct had not been unreasonable in the circumstances.[28] In practice an accused charged with murder, would generally have pleaded guilty of culpable homicide. With Lesch[29] and Arnold[30] on record, it may be advisable to plead not guilty altogether depending, of course, on the evidence available.

The discussion in the second edition of Burchell and Hunt[31] is very much the same as that in the first edition, except that the Mokonto[32] decision is, correctly it is submitted, viewed as having finally clarified the law relating to provocation, in that it has clearly indicated that provocation is to be viewed in the light of its subjective effect on the accused irrespective of his personal character traits or pecularities.[33]

2.10 Snyman

Snyman (Strafreg),[34] and Snyman[35] take the view that

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27) supra.
28) 242.
29) supra.
30) supra.
31) 306-18.
32) supra.
33) 314-5.
34) 157-64.
35) 145-54.

provocation is a factor to be taken into account when deciding whether the crime charged had been committed intentionally. The view that provocation can reduce an intentional killing to culpable homicide is rejected.[36] In connection with section 141 of the Transkeian Penal Code it is stated that the courts overlooked the obvious interpretation that this section only came into operation once an intentional killing had been established.[37] In this respect the interpretation placed on the section in Tenganyika[38] is approved of.[39]

Provocation is regarded as not strictly relevant to the topic of 'toerekeningsvatbaarheid',[40] but is, nevertheless, treated under that heading. The learned author is not prepared to concede that provocation can lead to a complete acquittal on a charge of culpable homicide or common assault.[41] It can reduce a serious crime to a less serious crime, but cannot result in a complete acquittal. This latter view could be too objective. It could happen, though it is not easy to imagine, that the reactions of the accused may not be adjudged unreasonable in the circumstances, in which case he would not be guilty of

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36) Snyman 147-8.
37) ibid.
38) supra.
39) 150.
40) 151.
41) 146, 151.

culpable homicide. In the event of no-one being killed it might also not be possible to prove the intent required for common assault.

Snyman rejects the view that anger alone can render a person lacking in criminal capacity ('ontoerekeningsvatbaar').[42] The law expects us to control ourselves so it is argued and if a person reaches a stage of 'ontoerekeningsvatbaarheid' because of rage or anger, he is temporarily insane and should be dealt with in terms of section 78 of the Criminal Procedure Act.[43]

2.11 Visser and Vorster

Visser and Vorster[44] discuss provocation under the heading of criminal accountability which is the term used in this work for 'toerekeningsvatbaarheid'. The authors, however, add that the topic ought not really to be discussed under that heading.

The decision in Mokonto[45] is taken as stating the law on provocation correctly.[46] The authors accept the view that rage could render a person 'ontoerekeningsvatbaar', but contend that this would be difficult to establish.[47]

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42) 151.
43) ibid.
44) 271-83.
45) supra.
46) 279.
47) ibid.

2.12 Bergenthuin

In an unpublished thesis[1] JG Bergenthuin made a detailed investigation into the law of provocation in England, West Germany and South Africa.

He strongly favours[2] the subjective approach increasingly adopted by the courts since Thibani.[3] At the same time he favours the normative fault theory[4] and is of the opinion that fault in the sense of juridical fault as well as fault relevant to sentence, are gradations of moral blameworthiness. The normative fault concept is able to accommodate both types of fault better than the psychological fault concept. The basis of all fault, whether juridical or relevant to sentence only is 'toerekeningsvatbaarheid'. There is no need for a concept of provocation. If general principles are consistently applied, considerations relating to the 'toerekeningsvatbaarheid' of the accused will ensure that he is justly dealt with in terms of his moral blameworthiness. The concept of 'provocation' then becomes, so it is argued, entirely redundant in the criminal law.[5]

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1) Provokasie as Verweer in die Suid-Afrikaanse Strafreg (Unpublished doctoral thesis University of Pretoria 1985); cf 1986 DJ 273.
2) Bergenthuin 600.
3) supra.
4) 601.
5) Bergenthuin's conclusions are stated in the 'Finale Standpunt-inname' in the thesis (599-602).

It seems that there is merit in Bergenthuin's views that the reaction of the accused should be subjectively considered, but on an application of normative fault objective considerations will inevitably come into the picture. On his view of fault the clear line drawn between juridical fault and fault relevant to sentence only[6] is blurred and passionate reactions to provocation are no longer divisable into those that entitle the accused to an acquittal and those that mitigate sentence.

It is submitted that Bergenthuin's views support the opinion that the normative fault doctrine functions best in a one-phase trial system.[7] It is a clumsy tool with which to determine guilt or innocence but useful when considering sentence.

3 SOUTH AFRICAN DECISIONS ON PROVOCATION

In Buthelezi[1] the statement is made that Gardiner and Lansdown correctly states section 141 of the Transkeian Penal Code to reflect the South African common law. The accused had come home unexpected and found his wife arm-in-arm with a man he had for some time suspected of being her lover. He reached for his knife with the intention of killing this man, but the man fled. He then took his wife to their room and asked her who this man was.

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6) Theron supra.
7) du Plessis 1985 SALJ 301, 317-9.
1) 1925 AD 160.

She said she did not know. Then he stabbed her in the upper part of her legs. One stab-wound penetrated the femoral vein behind her knee. Blood spurted out of this latter wound and she soon bled to death. Accused lit a lamp at one stage and became aware that his wife was bleeding profusely. He left the room locking the door behind him.

The court a quo had convicted him of murder. In an application for leave to appeal it was submitted that the accused had not intended to kill firstly, because:

> 'the applicant had received such provocation that in the heat of passion he was deprived of the power of self-control, and inflicted the injuries which resulted in death without any intention either of killing the deceased or of inflicting upon her such grievous bodily harm as was calculated to cause death; and secondly, that the nature and situation of the wounds inflicted show that there was no intention to kill or to inflict serious bodily injury, calculated to cause death.'[2)]

Clearly, counsel for the accused had approached the matter along subjective lines. It is also noteworthy that the court, both Solomon JA[3)] and Kotze JA[4)] approached the matter along

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2) 161.
3) In his minority, but not dissenting judgment.
4) In whose judgment Innes CJ concurred.

the lines whether intent to kill had been established. Intent to kill was found in the callous conduct of the accused in that he left the heavily bleeding woman without any effort to assist her or to obtain assistance. Using to-day's terminology: he was aware of the possibility that she might bleed to death and left her to bleed, recklessly careless as to whether she bled to death or not. His mens rea would therefore be adjudged dolus eventualis at a present-day trial.

The contention that the accused had lost his self-control because of the provocation he had received, was rejected on the grounds that accused had acted too deliberately for the inference to be drawn that he had lost his self-control.

The court made a strong recommendation of mercy. The death sentence was regarded as inappropriate. Had the court wished to invoke section 141 of the Transkeian Penal Code to change the verdict to one of culpable homicide in order to make it possible for a more lenient sentence to be imposed, it could no doubt have done so. This was not done because the objective requirements of section 141 were not met. This could support the contention that the statement that, prior to 1935 the courts readily convicted of culpable homicide in order to avoid the death penalty, is not always true. The court applied the law and made a recommendation of mercy to the executive.

The decision also leads one to believe that in practice, when provocation was raised as an issue in homicide prosecutions, the main thrust of the investigation would be to determine whether intent to kill had been established.[5)]

In Blokland[6)] the facts proved were that the accused had killed his wife in a fit of rage brought on by a strong suspicion that he had caught her at a stage when she was about to commit adultery. The court[7)] accepted the law as stated in section 141 of the Transkeian Penal Code, subject to certain reservations. But the conviction of murder was reduced to one of culpable homicide because of evidence that at the time of the slaying the accused had been demented with rage.

It seems that intent to kill had not been proved because of this extreme state of rage though this is nowehere so stated in the judgment. Consequently, the accused was guilty of culpable homicide. A comparison of Butelezi and Blokland is fruitful. In both cases subjective inquiries were made with the obvious purpose of determining whether there had been intent to kill. By to-days's standards Butelezi would still have been convicted. Blokland might have been acquitted on the ground of 'ontoereken-ingsvatbaarheid'; loss of self-control or inability to control

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5) Such provocation as an accused may have received would nowadays be considered as a possible extenuating circumstance, if he is convicted of murder.
6) 1946 AD 940.
7) per Davies AJA.

his conduct according to his appreciation of its unlawfulness.

Dihau Mobaso,[8] referred to in Blokland, is a difficult case to understand. The accused killed a man caught in flagrante delicto committing adultery with his wife. He was charged and convicted of culpable homicide by a magistrate and sentenced to 6 months imprisonment. On review the whole of the sentence was suspended. From the facts it would appear that intent to kill had not been proved.[9] But as the court was only concerned with sentence, the question of intent was apparently not deemed necessary to discuss. The general tenor of the judgment gives the impression that the provocation would have reduced the crime to culpable homicide even if intent had been proved.

In Tshabalala[10] the approach to provocation was clearly objective. The accused had killed his employer under dire provocation. The trial judge found that the provocation had deprived the accused of his self-control, but it was not such as to have deprived an ordinary person of his self-control. The accused had been convicted of murder and the Appellate Division refused to interfere. The question was therefore not what the accused had in fact intended, but whether the provocation was such as to operate in his favour and to render his crime culpable homicide.

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8) 1944 OPD 192.
9) It was in any event irrelevant in view of the charge.
10) 1946 AD 1061.

Assuming that the accused had not intended to kill, one could submit that the court had applied a normative theory of fault. His fault did not depend on what had been going on in his mind but what the law prescribed his mental state ought to have been. If one assumes that he had intended to kill, the normative finding is that, on the facts, this was not a case in which an intentional killing could be treated as if it were culpable homicide. In other words, in terms of the prescribed norms, the accused had to be convicted as if he had acted intentionally.

Attwood[11] is a grim case in which human folly and arrogance gave rise to two deaths by shooting. The person who did the shooting was sentenced to death. Attwood was a farmer experiencing financial difficulties and placed under pressure as a result. His partner one Kretzner was dissatisfied with the partnership. Also dissatisfied was a borehole contractor, one Genis, who had not been paid for a borehole he had sunk for accused. Genis and Kretzner went to Attwood's home and in the presence and to the exasperation of Attwood Genis took some items Kretzner claimed were his. Genis told Attwood he would remove the casing he had put into Attwood's borehole. It was clear that Genis had decided to resort to self-help rather than sue Attwood. The attitude and threats of Genis incensed Attwood.

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11) 1946 AD 331.

Genis and Kretzner then drove to Attwood's borehole. Attwood took a loaded rifle and followed them. Exactly what happened at the borehole is not clear, but in the course of firing four shots from his rifle Attwood killed Genis and Kretzner.

Attwood's defence was that he had acted in self-defence. On his version Genis had challenged him to a shoot-out pointing his (Genis') rifle at him. He had shot Genis after some careful manoeuvering to ensure that he was not killed. He then shot Kretzner dead as the latter bent down to pick up a rifle - so he thought - with which to shoot him. If accused's version were accepted he could at best have hoped to be convicted of culpable homicide in respect of Kretzner.

His evidence in support of his plea of self-defence was unconvincing and wisely his counsel sought to rely on provocation.

Attwood himself had admitted that he had shot intending to kill. If the defence of self-defence was to be rejected, he would have had to be found guilty of murder unless provocation could reduce the two intentional killings to culpable homicide.

The majority of the Appellate Division held that he had indeed been provoked by the unlawful conduct of Genis; that a reasonable jury properly instructed could have found the provocation sufficient to have deprived an ordinary person of his self-control and that such a jury could have found that Attwood had killed Genis

while so deprived of his power of self-control.

The conviction in respect of the killing of Genis was therefore reduced to one of culpable homicide. In respect of Kretzner's death the court refused to make a similar finding. Kretzner had not acted unlawfully, had sat quietly in the vehicle during the fatal episode between Attwood and Genis, had in no way provoked Attwood and vis-à-vis Kretzner Attwood could therefore not rely on provocation. His conviction of murder in respect of Kretzner's death was therefore upheld.

The decision has been severely criticised by De Wet and Swanepoel[12] on the basis that the loss of self-control experienced vis-à-vis Genis could not work directionally only and would still have been operative at the time of the shooting of Kretzner. This criticism is unfounded in the light of the evidence. On the evidence of the accused he did not shoot Kretzner in the heat of passion or while unable to control himself, but only after observing Kretzner bending down and on the supposition that Kretzner would try to shoot at him. Furthermore a Black labourer who was assisting Genis raised his hands above his head in token of surrender after the shooting of Kretzner. He was told by Attwood

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12) 2ed 122 n167. The statement that Attwood had killed his victims in a few seconds (in 'n·ommesientjie) is misleading. Attwood worked out the situation fairly carefully during the shooting. The glaring weakness in his case was that on his own version he had not shot Kretzner in response to provocation, but in putative self- defence.

to 'scatter'. It would seem that Attwood had been quite capable of deciding who to shoot.

It is by no means certain that the objective standards employed by the court in upholding the conviction of murder would not have been given significantly less weight, had it not been plain on the evidence that accused had intentionally and deliberately killed Kretzner.

The relevant portion of the judgment of Watermeyer CJ reads:

> 'It was suggested in argument that the acts of Genis might have roused the accused to such a pitch of anger that he shot Kretzner without realizing what he was doing. But assuming that acts of Genis constituted provocation sufficient to deprive the accused of his power of controlling his actions directed against Genis, this heat of passion would not have deprived an ordinary man of the power of controlling his action against Kretzner; and in any event the accused's evidence does not suggest that he lost his power of self-control so far as the shooting of Kretzner is concerned'.[12a)]

It is not, however, to be denied that the reference to an ordinary man not being deprived of his power of self-control does

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12a) 342.

still retain an objective requirement reminiscent of Pascoe and to be found in section 141 of the Trankeian Penal Code. One wonders what the court would have decided if it had found that the accused had indeed lacked self-control when shooting Kretzner. Would the considerations that Kretzner had done nothing wrongful and that an ordinary person would not have lost his self-control to this extent, have weighed sufficiently heavily for a conviction of murder in respect of an unintentional killing? A finding similar to that in Tshabalala[13] could have been made, but it is doubtful.

Thibani[14] is the case in which a definite stand in favour of a subjective approach to provocation and its effects was taken. It is generally hailed as a decision which commenced a decided shift from the application of objective requirements such as those set out in section 141 of the Transkeian Penal Code to the evaluation of provocation or alleged provocation as evidential material relevant to the question whether intent had been proved.

As has been pointed out with reference to Butelezi, Blokland and Attwood, the courts had not eschewed investigation into intent as a subjective factor before Thibani. But in Thibani the law is stated with unmistakeable clarity[15] as now requiring this

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13) supra.
14) 1949 4 SA 720 (A).
15) vide Bergenthuin 168-9. Bergenthuin praises Schreiner JA's judgment and comments unfavourably on the criticism to which it is subjected by De Wet and Swanepoel.

approach.

On the facts it is doubtful whether the case is one about provocation as traditionally understood.[16] The accused suspected his wife of adultery. She gave him evasive answers and, apparently fearing that a 'show down' was about to take place, attempted flight. On accused's evidence (which the appeal court could not fault), he caught the deceased and proceeded to hit her with a light whip. She caught him by the private parts and dragged him about. He lost his self-control because of the excruciating pain thus inflicted and beat his wife without restraint for a fairly long period. Eventually he grabbed a stick and hit her over the head. This ended the struggle. She died afterwards of multiple bruises and shock.

As the deceased had acted in self-defence she had not acted unlawfully and it was the accused who had set in motion the train of events by attacking her.

Schreiner JA considered these factors, but stated that the fundamental inquiry was whether there had been an intent to kill. In the absence of such an intent there could be no murder. The following is an extensive extract from the judgment which

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16) The accused assaulted the deceased who inflicted excruciating pain on him in self-defence. He appears to have lashed out at her in order to bring an end to the pain she was inflicting on him. His defence therefore borders on that of necessity.

contains a summary of the principles involved and incidentally supports the view that in Attwood there are distinct signs of the court's employing subjective criteria:[17)]

> 'The general principle that for murder there must be an intention to kill in one of the legally accepted senses is commonly supplemented by sub-rules to such matters as self-defence, provocation, intoxication and the like. The development of such sub-rules is a common and useful feature in the growth of a legal system as they help to make the law easier to discover and more certain. But until it is clear that the working of a particular sub-rule is entirely satisfactory, some caution in its application may be desirable. The sub-rule that we are most obviously concerned with is that which deals with provocation. The language of sec. 141 of the Transkeian Criminal Code was accepted in Rex v. Butelezi (1925, A.D. 160) as correctly laying down our law on the subject. In Rex v. Attwood (1946, A.D. 331) the Chief Justice, while repeating the former general approval of sec. 141 as a statement of the common law, mentioned that it might in some cases need further elaboration; in this connection the treatment, at p.342, of the killing of Kretzner is significant, for it shows that provocation by Genis was

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17) 730-1.

not regarded as clearly irrelevant to the question whether Attwood intended to kill Kretzner. The possibility that further elaboration of the language of the section might be necessary was again referred to by Davis, A.J.A. in Rex v. Blokland (1946, A.D. 940 at p.944), but that was not a case in which any such elaboration was required. In none of these cases was it necessary to examine closely the effect to be given to the word 'wrongful' in the expression 'wrongful act or insult' used in sec. 141, but that is the point with which we have to deal in the present case. It is not easy to see how the deceased in grasping the Appellant's private parts acted wrongfully in any ordinary sense of the latter word, since she was the victim of a cruel assault and only acted desperately in self defence. Does that then conclude the matter, and is an act done in self-defence by the victim never to be regarded as 'provocation', however completely the original wrong-doer has lost his self-control in consequence of the pain or other physical effects of the victim's act? If the matter were merely one between the original wrong-doer and the victim the position would properly be met by saying that the wrong-doer had brought upon himself the victim's natural reaction and could not use its consequences for his own protection. But this reasoning would lead to a conflict between the sub-rule stating the limits of provocation and the general principle that the Crown

must prove the intention to kill. The sub-rule has not, I think, become established so clearly in the precise language of the Transkeian Code as to have produced a modification of the general principle. Since the clarification of the law following upon the cases of Woolmington (1935, A.C. 462) and Ndhlovu (1945, A.D. 369) provocation seems to me to have assumed its proper place, not as a defence - though the Crown need not negative it unless the evidence reveals it as a possible factor in the case - but as a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt'.

The significance of the reference to Woolmington[18] and Ndhlovu[19] is that these cases had squarely placed the onus of proving intent to kill beyond reasonable doubt in murder cases on the prosecution. Rules of thumb according to which intent was rebuttably presumed[20] had been jettisoned in English law in Woolmington, and South African law had followed suit in Ndhlovu.

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18) Woolmington vs DPP 1935 AC 462.
19) 1945 AD 369.
20) Subject to further rules of thumb for instance those in section 141 of the Transkeian Penal Code.

The criticism of Thibani by De Wet and Swanepoel is unsound.[21)]

What Schreiner JA decided in Thibani was that there could be no conviction of murder without proof beyond a reasonable doubt of intent to kill and that the excruciating pain inflicted on the accused had such an effect on his mind, that it could not be said that an intent to kill had been proved beyond a reasonable doubt.

Assume that accused had desisted from beating deceased and that she had relinquished her grip. An hour or so later, reflecting on the indignity he had suffered and the pain he had endured, accused may have returned to exact revenge and beaten the woman

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21) 2ed 123, 3ed 133, 4ed 135 wording slightly altered. It is to the effect that things had gone completely awry (loop dinge heeltemal deurmekaar) in the judgment. They say that the defence had not served merely to exclude dolus malus in Roman-Dutch law, but that the effect had been exactly the opposite namely that provocation was a mitigating factor precisely where the accused had acted dolo malo. In English law provocation was recognized as reducing murder to voluntary manslaughter where the accused had the intent to kill. They also state that the provisions of section 141 of the Transkeian Penal Code were that murder, in other words intentional killing, would be reduced to culpable homicide by provocation. The attitude adopted in De Wet and Swanepoel is puzzling. They appear to favour the approach of English law, which they seldom refer to, or the Transkeian Penal Code, to the enlightened subjective approach of Schreiner JA. They add that they do not wish to suggest that provocation is of no importance in respect of the inferences concerning his mental state to be drawn from a person's conduct. Their view is that this is not the sole function of provocation. Provocation, if resulting in justified anger, can have a mitigating or extenuating effect on punishment. It is probably not really necessary to remark that Schreiner JA had by no means denied that provocation could have this last-named effect; cf supra 2.8.

to death. Then the 'provocation' he had suffered would have served as proof of motive or revengeful malice and of intent to kill. The latter hypothetical events are also reconcilable with Schreiner JA's views on the function of provocation as evidential material.[22] De Wet and Swanepoel's discussion would appear to miss this point

More specifically, the Thibani decision can be said to have made convictions of culpable homicide on charges of murder in circumstances of provocation possible on the basis that the provocation could corroborate the evidence of the accused that he had not intended to kill. An unlawful killing, not committed intentionally, amounted to culpable homicide before Van der Mescht[23] and Bernardus.[24] Since those two decisions culpa would have to be established in addition to the unintentional unlawful killing.

Kennedy[25] is a decision reported some two years after Thibani,[26] which, it is submitted, represents a retrograde step when compared with the latter. Kennedy had arranged to remarry his ex-wife. On the eve of their planned re-marriage he visited her and found her in the amorous embrace of a young man with whom he knew that she had been having an affair. Kennedy

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22) 731.
23) 1962 1 SA 521 (A).
24) 1951 4 SA 431 (A).
25) 1951 4 SA 431 (A).
26) supra.

immediately shot and killed his ex-wife and at the same time shot and seriously wounded her companion.

Kennedy raised two incompatible lines of defence. First that he was a psychopath and had acted in an emotional storm which made it impossible for him to distinguish between right and wrong when killing the unfortunate woman; secondly, that the provocation of seeing his ex-wife and intended future wife in another man's arms had so affected his psychopathic mind that he had fired the shots without intending to kill.[27)]

The first defence was rejected on the grounds that although it was accepted that Kennedy was a psychopath, he had failed to prove on a balance of probabilities that he had acted in a state of psychopathic derangement when killing the deceased.

The second defence was rejected on the grounds that Kennedy had been aware of the relationship between the deceased and her companion, and that the provocation of coming upon them in an amorous embrace was not such a shock as would have provoked a normal person into killing. The fact that Kennedy was a psychopath and therefore more prone to a violent reaction than persons who are not psychopaths, could not count in his favour.

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27) His one line of defence was therefore based on an intent to kill formed as a result of provocation and his other line of defence was that such an intent had been absent.

Provocation, to succeed as a defence had to be considered in the light of its effect on a normal person and not in the light of its effect on an individual with the personal traits and idiosyncrasies of the particular accused. Schreiner JA concurred in the judgment of Greenberg JA and it has created surprise[28] that he could have done so in the light of the views he had expressed in Thibani. One must, however, bear in mind that the case against Kennedy was very strong, that there was no doubt that he had shot with the intention of killing and that there would have been little sense in rejecting the defence of psychopathy in response to the submission that he had acted under an irresistible impulse, whilst accepting it in response to the submission that he had acted under provocation.[29]

In Thibani there had also been no question of any personal peculiarity on the part of the accused. It went without saying that any normal man would have experienced the excruciating pain he experienced.

The Kennedy judgment is not very clear on exactly how a trier of fact should determine the presence or absence of intention in

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28) vide Bergenthuin 270.

29) It must also be borne in mind that at the time, and for many years afterwards, raising the defence that the accused was a psychopath was almost automatically doomed to failure. Psychopaths were regarded as persons who are not able to control themselves and the courts were inclined to regard them as people whose persistent criminal tendencies had been given a scientific name; cf Roberts 1957 4 SA 265 (A).

the light of provocation. In this connection one may consider the following passage from the judgment of Greenberg JA:[30]

> 'In considering whether there was such provocation as could reduce the crime from murder to culpable homicide, the appellant is not entitled to any special consideration because of his psychopathic personality; the question on this factor of provocation is whether an ordinary person would have been deprived of his power of self-control by the act which caused the killing (Rex v. Attwood 1946 A.D. 331). On this issue, however, the onus is on the Crown to prove the intention to kill and if there is a reasonable possibility of the happening of such events as would be sufficient to deprive any ordinary person of his self-control, then, on this requisite the answer must be in the favour of the appellant'.

It is not clear what is meant by loss of self-control. Nor is it clear what bearing loss of self-control would have on intention. Presumably a person who acts while having lost his self-control, does not act intentionally. But it is not certain whether this is what was meant. A person may intend to kill someone and act in furtherance of this intention, precisely because he has lost his self-control. If he had been in control of himself he would not have given way to the impulse or desire to

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30) 438H to 439 pr.

kill. On the other hand loss of self-control may mean that the person concerned is in such a state subjectively that his mental processes are too confused for it to be found that he had fully appreciated the possible, probable or obvious consequences of his conduct.

An inquiry along the above lines would be subjective. The question whether a normal person would have lost his self-control in the same circumstances would be irrelevant to the inquiry. The fact that the accused has a psychopathic - and therefore a more explosive - personality than the normal person would be very relevant to such a subjective inquiry. One must therefore conclude that notwithstanding the dictum in Thibani, Greenberg JA[31] still viewed the law as being such that unless certain objective requirements were met, provocation could not negative intent to kill, irrespective of its significance as evidential material.

The ratio of the decision is not clear. From the concluding passage of the judgment, it would seem that in rejecting the contention that the accused had been sufficiently provoked to negative intention on his part, the court was also not prepared to accept that a reasonable person would have reacted as the accused did. This is a puzzling and inconclusive juxtaposition of subjective and objective considerations.

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31) Schreiner JA and Fagan JA concurring.

In Tenganyika[32] the Federal Supreme Court explained and applied the law in a manner which, with the greatest respect to its South African counterparts, indicated a clearer grasp of the essential effect of the provisions of section 141 of the Transkeian Penal Code, than any South African judgment. The section clearly does not require provocation to comply with the objective requirements enumerated before it is taken into account in determining whether an intent to kill had been proved. Once the intent to kill had been established, such provocation as may have been present, is evaluated for the second time to determine whether, notwithstanding proof of intent to kill, the accused ought in any event not to be convicted of culpable homicide rather than murder.[33]

Difficulty is occasioned by the requirement of section 141 that the accused must indeed have lost his self-control. The answer is that the intentional killing would usually be the result of loss of self-control and, if the accused were a 'cool customer' who used the provocation as an excuse for calculatedly killing the deceased, he would not be entitled to the reduction of the blameworthiness or degree of unlawfulness of his conduct. Tenganyika's case is also not founded on the bare provisions of

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32) 1958 3 SA 7 (FC).

33) In view of the appearance in our law of the normative fault concept, the approach of the Federal Supreme Court is startlingly 'modern'. The normative fault doctrine results in two inquiries, first was there intent or negligence and second, if there was intent or negligence, are there grounds for reproaching the accused?

section 141 but on a view of the law which makes it similar to these provisions.

The question of the personal idiosyncracies or intoxication of the particular accused is also dealt with satisfactorily in Tenganyika. Any such factor would be relevant to the question of the intent that must be established before the objective (normative?) requirements of provocation are considered in the second inquiry above referred to.

It is submitted that Tenganyika's case embodied far sounder principles than its South African contemporaries. To view matters differently than in Tenganyika as was done by the South African courts, really amounted to using an additional measure favourable to the accused, once intent had been subjectively proved, in such a way as to enable 'intent' to be held as proved in terms of objective standards in circumstances where it had not been proved subjectively.[34)]

If one bears in mind that it was a rule of substantive law rather than a rule of evidence that every man was presumed to intend the reasonable, probable and natural consequences of his actions until fairly recently,[35)] it is quite understandable that this

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34) In other words an objective measure designed to assist the accused was used to bring about his downfall subjectively.

35) Burchell and Hunt 1ed 146ff; De Bruyn 1968 4 SA 498 (A).

inverted application of the provisions of section 141 could have taken place. One must also bear in mind that mens rea was presumed once actus reus had been proved up to Ndhlovu in 1945. Consequently provocation could be viewed as a factor rebutting this presumption, but only on certain circumscribed conditions being met.[36)]

The law as stated in Tenganyika has been consistently applied in Zimbabwe (formerly Rhodesia). It was reaffirmed in Nangani.[37)] The judgment of Fieldsend CJ is a model of clarity.[38)]

As an example of clear straight-forward legal thinking the following is quoted from Fieldsend CJ's judgment:[39)]

> 'There are arguments both of principle and expediency in favour of each of the two approaches. The South African approach follows the logical and systematic application of the strict law that an intentional killing of another

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36) That the provocation was such as would have provoked a reasonable man; that the accused had reacted immediately and that his reaction had been directed only at that individual or those individuals who had provoked him.

37) 1982 3 SA 800 (ZSC).

38) Perhaps this is in no small measure due to the fact that Zimbabwean judges had one system of common law to apply. In South Africa we have the so-called purist German orientated approach in which a system of abstract legal theorizing is made use of in our law, and a more traditional pragmatic English-orientated approach, which latter has been giving way steadily to the first-mentioned approach for decades.

39) at 806-7.

person is murder unless there is a legitimate excuse, such as justifiable homicide (Rex v. Koning 1953 (3) SA 220 (T)) or self-defence (Rex v. Mathlau 1958 (1) SA 350 (A)). To act under provocation, it is said, is not to act with any justification. As Schreiner JA put it in Krull's case supra at 399C:

> 'In self-defence the motive is fear, which from the law's viewpoint is a better motive than anger, which operates in provocation'.

Provocation may be an extenuating circumstance and a mitigating factor, but once it is established that a person acted with the intent to kill then he is guilty of murder. In my view there are two answers to this view. First, if the law recognises that provocation is an extenuating circumstance then there is no question of principle involved in recognising it as a circumstance which may reduce murder to culpable homicide. It is only a question of the effect to be given to it. Both self-defence and duress - see S.v. Goliath 1972 (3) SA 1 (A) - are now recognised as defences to murder. Either may be a complete defence or may operate to reduce murder to culpable homicide depending on the facts. But in each case it is accepted that what is excused or reduced is an intentional killing. There is therefore no anomaly in recognising that provocation may have a similar effect, or at least

may reduce murder to culpable homicide even where the killing is intentional.

In the second place to exclude provocation as a defence to an intentional killing is to impose too demanding a standard on ordinary people and to overlook the realities of human behaviour. In practice what may happen when a person is grievously provoked is that he becomes so angry that he intends to kill or to do serious injury to another. That is the position to the classic case of a person who kills his spouse caught in an act of adultery. It is not that he does not realize what he is doing, but that his self-control is so overborne that his intentional killing is partially excused. To require that the loss of self-control must be such that the consequences of the act are not intended is to ignore the true effect of provocation. Further, if strictly applied, such a test would in very few cases admit of the defence. It must be very rare for a person to be able to say that he lost control of himself to the extent of not intending the consequences of his reaction. The approach of Tenganyika's case supra and of the English common law authorities can be characterised as somewhat unsystematic and as departing from the strict definition of the offence of murder. It can also be said that the approach does not give sufficient weight to the importance of enforcing proper standards in trying to reconcile that aim with the objective of treating the

individual fairly. In its favour is that it recognises that criminal law must take into account the realities of human reaction to situations of stress.

The choice between these two approaches is to be made rather on considerations of practicality than on strict legal theory. If duress is to be recognised as a complete defence to a charge of murder as a principal offender, as it is in South Africa and as Lord Wilberforce and Lord Edmund-Davies would have advised in Abbott v R (1976) 3 All ER 140 (PC) at 148, then I see no insuperable objection to allowing provocation to operate to reduce murder to culpable homicide even where there is proved an actual intent to kill. Both are defences which make some concession to human weakness, and provided they are suitably circumscribed I see no undermining of the fabric of society by accepting them as defences. The same can be said of self-defence. This can be a complete defence. It can also reduce murder to culpable homicide if the bounds of self-defence are exceeded to a limited extent. Both are inroads into strict legal logic, and a recognition that an unlawful intentional killing may be something less than murder.

Both as a matter of principle and expediency I would favour the approach enunciated in Tenganyika's case supra and since followed in this country. This is not the

> occasion on which to attempt to lay down authoritatively the limitations on the defence. It is sufficient for the purposes of this case to adopt the tests laid down in Tenganyika's case supra. The provocation must be such as to have actually caused the accused to have lost his self-control, though not necessarily his capacity to intend to kill. The provocation must also have been such that in the circumstances an ordinary man would have lost his self-control and acted in such a manner'.

Particularly interesting is the phrase: 'It must be very rare for a person to be able to say that he lost control of himself to the extent of not intending the consequences of his actions'.

This shows that the learned Chief Justice was not prepared to equate loss or self-control in the sense of doing something intentionally which one would not normally do with the second requirement of 'toerekeningsvatbaarheid'; namely, inability to control one's conduct in conformity with one's appreciation of its wrongfulness. The latter would amount to making the defence of insanity available to the sane.

Under the influence of theories imported from Germany, South African law in Lesch[40] and Arnold[41] appears to have reached this latter stage.

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40) 1983 1SA 814 (0).
41) supra.

One may of course submit that, as the death sentence is no longer compulsory for every conviction of murder, it is more juristically pure to convict of murder and treat provocation as an extenuating circumstance, where intent to kill is proved in a case involving provocation. This appears reasonable. But one must bear in mind that murder with extenuating circumstances is still a very serious crime (the accused could be sentenced to death)[42] and to convict of murder and sentence as if the crime were culpable homicide, could possibly tend to make murder a minor offence in the public eye.

From the South African point of view the above is pure speculation. To quote Skeen[43] in South Africa 'murder is murder is murder' which really means that intentional killing is murder, and nothing else. As has been shown,[44] this is not necessarily always the case. Nevertheless, it is unlikely that our courts will adopt the views of Fieldsend CJ no matter how much there is to commend them.

In Krull[45] Schreiner JA considered and rejected the ratio in Tenganyika, mainly on the basis that it was not in line with recognized South African authority. The result was that the

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42) As in Roberts supra.
43) Skeen 1983 SALJ 177, 179.
44) Chapter III supra.
45) 1959 3 SA 392 (A).

Krull decision is unsatisfactory in that it is once more said that subjective factors peculiar to the accused are not to be taken into account when deciding on the effect of provocation. In spite of this statement of the law, in line with Kennedy but retrograde when compared with Thibani, the accused in Krull was convicted of culpable homicide as intent to kill could not be proved in all the circumstances of the case. These circumstances included his quick-tempered nature, his prior annoyance at a third party and the influence on him of liquor he had consumed.

There are a large number of South African decisions in which the courts wavered in their statement of the law relating to provocation. These decisions need not be discussed in the present context and have been recently closely scrutinized by Bergenthuin.[46)]

Dissatisfaction with the state of the law, was expressed in Mangondo[47)] by Williamson JA. But a clear statement was not to come until Mokonto.[48)]

In Mokonto the accused raised the defence of provocation to a charge of murder. It is obvious that in the circumstances the alleged provocation was really a motive for revenge.[49)]

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46) 249-307, eg Udiya 1890 NLR 222; Dunga 1913 CPD 110; Tsoyani 1915 EDL 380; George 1938 CPD 486.
47) 1963 4 SA 160 (A).
48) 1971 2 SA 319 (A).
49) It was so evaluated by Holmes JA 327.

The accused believed that the deceased had caused the death of his two brothers by witchcraft. He went to her to confront her with this state of affairs arming himself with a cane-knife and a stick. During the course of their confrontation she told him that he would not live to see the sun set. Believing that she could kill him with her sorcery he killed her and cut off her head. He was convicted of murder with extenuating circumstances[50] by the trial court and sentenced to five years' imprisonment.

On appeal two points of law were raised in his defence; first, that he had acted in self-defence in response to deceased's threat and should have been acquitted; second, that the threat had provoked him and that he should have been convicted of culpable homicide.

The first ground was dismissed as accused's belief that deceased would be able to kill him was held to be unreasonable.[51]

The defence of provocation was rejected and the following four

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50) The belief in witchcraft.

51) The question whether putative self-defence ought not to have succeeded to the extent of reducing accused's mens rea to culpa was not considered. As he could have believed in good faith, though unreasonably, that his life was in danger, this part of the judgment is retrograde and could be ascribed to policy considerations, particularly in view of the remarks concerning the belief in witchcraft made by Holmes JA.

points were listed as stating our law on the subject:[52]

'1. Section 141 of the Transkeian Penal Code should be confined to the territory for which it was passed.

2. In crimes of which a specific intention is an element, the question of the existence of such intention is a subjective one; namely, what was going on in the mind of the accused.

3. Provocation, inter alia,[53] is relevant to the question of the existence of such intention.

4. Provocation, subjectively considered, is also relevant to extenuation or mitigation'.

The reference to specific intent is of interest. It apparently means that the mind of an accused may be so affected by provocation that he may not foresee the more remote consequences of his conduct. It appears from Mokonto that provocation can only reduce murder to culpable homicide if, subjectively, its effect is to negative intent to kill. In practice it means that the provocation could raise a reasonable doubt as to whether the accused realised that his actions would result in death. Provocation, objectively considered, could not reduce an intentional killing to culpable homicide. This is the effect of the first point listed.

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52) 326 F-H.

53) Other factors such as self-defence were probably intended by Holmes JA.

It therefore took the greater part of a century for our law to arrive at what appears at this stage to be so simple and self-evident; namely, that provocation is no more than a factor to be taken into account in determining whether an accused had assaulted his victim with intent to kill or to injure seriously.

In this respect one is inclined to agree with De Wet and Swanepoel[54] that it is not so much the provocation that is to be considered but the anger and emotional upset[55] occasioned by it. Once the matter is seen in this light, it becomes evident that provocation as a clearly defined concept standing alone purely as such becomes of little, if any, importance. One is concerned with the anger and/or other emotionally disturbed state of the accused, no matter what the cause may be.

If provocation is regarded as a defence in its own right, irrespective of its actual effect on the state of mind with which the accused acted, one arrives back at section 141 of the Transkeian Penal Code (or similar rules of substantive law) in terms of which provocation as a concept standing on its own is defined.

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54) 130.
55) 'Toorn en heftige gemoedsbeweging'.

At the stage when South African law was as stated in Mokonto[56] it stood in contrast to Zimbabwean law as stated in Tenganyika and confirmed in Nangani. There would be no second consideration of the effect of provocation on guilt or innocence, as would be the case in Zimbabwe, once an initial consideration had failed to negative intent.

In so far as the Zimbabwean second inquiry involves objective considerations; for instance, the effect of provocation on a reasonable man, it may be difficult to apply. Nevertheless, similar considerations would have to engage the attention of a South African court when considering whether provocation is a mitigating factor or an extenuating circumstance in a given case.

The law as stated in Mokonto was acceptable. It was in keeping with the tendency that had grown stronger over the years to require intent to be established subjectively. It was also in keeping with the tendency to regard an intentional killing as murder irrespective of the motive that may have given rise to it.

One aspect of provocation or of extreme anger or a state of being emotionally upset or disturbed, that had not received judicial attention, was the effect of such a subjective condition or such

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56) supra : the law is still as stated in Mokonto except that 'ontoerekeningsvatbaarheid' has now come into the picture.

subjective conditions on the criminal capacity of the accused.

All four editions of De Wet and Swanepoel[57] discuss provocation in the context of anger, rage and serious emotional disturbance or passionate states of mind under the heading of 'toerekeningsvatbaarheid'. They state however that discussion under this heading is not really appropriate and that anger and serious emotional disturbances cannot simply lead to 'ontoerekeningsvatbaarheid'. Similar views are held by Snyman.[58]

As long ago as 1958, however, SA Strauss[59] advanced the view that provocation ought not only to be considered in the light of its subjective effect on intent, but also in the light of its effect on criminal capacity. As Bergenthuin points out,[60] this was a point of view amazingly in advance of juristic thinking on the subject at the time. A few years later views similar to those of Strauss were expressed by Van Niekerk.[61] Writing after Lesch[62] but before Arnold[63] Bergenthuin[64] strongly supported the view that the effect of provocation on 'toerekeningsvatbaarheid' should be given prime consideration.

In Lesch the deceased appears to have been an extremely bad

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57) 1ed 81, 2ed 117, 3ed 127, 4ed 130.
58) 145.
59) 1958 THRHR 14.
60) 319.
61) 1972 SALJ 169.
62) supra 2.I1.
63) supra.
64) 577ff.

neighbour, a bully who terrorised the weak and helpless and who appears to have derived a sadistic joy from this.

He made threatening statements to the daughter of the accused and she advised accused of this by telephone. She was living with accused at the time. Accused came home and armed himself with a revolver before going to confront the deceased. His daughter tried to dissuade accused from taking the revolver but he would not be dissuaded. He went to deceased. Deceased told him rudely to come no nearer. Then the accused took out the revolver and shot deceased dead. His defence was that he had been 'ontoerekeningsvatbaar' at the time of the shooting. He relied on the second ingredient of 'ontoerekeningsvatbaarheid'; namely, inability to control conduct in accordance with an appreciation of its wrongfulness. In support of this contention the accused stated in evidence that at the moment when he shot deceased he could not prevent himself from doing so. He had an overwhelming desire to completely destroy (vernietig) this man who was causing him and his daughter so much distress.

The defence was rejected on the ground that he had nevertheless acted intentionally. With respect, one feels that Hattingh AJ missed the point a little in stating this. The accused did not deny that he had intended to kill. On the contrary, he emphasised that he had intended to kill, but contended that this intentional killing was committed because he could not prevent himself from giving effect to the intention to kill. His

inability to exercise control and suppress the impulse to kill was due to the effect of the provocation on his mind. It had rendered him 'ontoerekeningsvatbaar'; unable to control his conduct in accordance with his appreciation of its unlawfulness. The judgment accepts that a person could become 'ontoerekenings-vatbaar' as submitted by the accused, but the evidence did not lend sufficient support to that contention for the defence to succeed in that particular case.

The issue that had clearly come to the fore was that it had become possible for an intentional killing committed under provocation to result in a complete acquittal. This is indeed a view remote from that adopted when section 141 of the Transkeian Penal Code was severely criticized, as its application could result in an intentional killing being mechanically reduced to culpable homicide.

Arnold[65] has been discussed.[66] In this connection it is perhaps not inappropriate to consider the unreported case of Mundell[67]. Mundell's case is in many respects similar to that of Arnold. The lady in Mundells life, had decided to leave him in favour of one of his friends, and after some procrastination had informed him of this. On the day of the crime she was having a bath. Mundell walked into the bathroom and she ordered him out

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65) supra.
66) 1.2 supra.
67) Unreported CPD 1981. Discussed in 1982 Speculum Juris 74.

as she was now someone else's woman. At the same time she displayed her breasts[68] to Mundell and smiled. He left the bathroom, returned with a knife and stabbed her to death in an attack in which some fifty stab wounds, some serious and some minor, were inflicted on her.

At his trial Mundell pleaded guilty to culpable homicide. The prosecution refused to accept the plea and he was tried for murder.

Medical evidence indicated that Mundell had for some time shown the signs of depression that could lead to a 'rage reaction' during which the enraged person acts irrationally in an outburst of uncontrollable anger. Mundell had also been under the influence of liquor at the time of the killing. Chretien[69] was decided during Mundell's trial and Mundell's counsel attempted to obtain a complete acquittal on the ground that Mundell had not 'acted' when killing the deceased. Further medical evidence was heard. It was to the effect that the accused's will was still in control of his body when he killed. He had therefore acted. His conduct was adjudged unreasonable and he was convicted of culpable homicide.

It would appear that in the light of Lesch and more particularly

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68) Strangely similar to the conduct of the deceased in Arnold supra.

Arnold Mundell would in all probability be acquitted if on trial to-day. His defence that he had not acted would be supported by a further defence that he had not been able to control his conduct in accordance with his realisation of its wrongfulness. The evidence supportive of the rage reaction could support the latter defence far more strongly than the former.

Arnold will no doubt enjoy the support of the 'strafregwetenskap-like' or 'purist' school who view 'toerekeningsvatbaarheid' as an independent general factor at a criminal trial and not a factor that is considered only in conjunction with alleged insanity, youth or intoxication. In other words for the purist, an accused is 'ontoerekeningsvatbaar' if either he cannot appreciate that what he is doing is wrong, or though able to do so is, nevertheless, unable to control his conduct in conformity with such an appreciation. How this unusual condition has been brought about is irrelevant.

CR Snyman has written a thoughtful and well-informed article[70] opposing the result in Arnold. He views the complete acquittal as mistaken because of Arnold's prior negligent conduct. It might be, argues Snyman, that Arnold was not negligent when he went into his house and spoke to his wife with a loaded pistol in his hand, but he was undoubtedly negligent when he failed to get rid of the pistol after the first shot had gone off. Snyman bases

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70) 1985 SALJ 240.

these views mainly on the concept of antecedent liability. His argument is, logically sound. A person should not be allowed to escape liability for criminal conduct simply because, at the last moment when bringing about a criminal result, he became 'ontoerekeningsvatbaar'. The entire course of conduct leading up to the 'ontoerekeningsvatbaarheid' and the crime committed in that state, should be investigated. Fault, more particularly negligence may be found well before (or at least before) the state of 'ontoerekeningsvatbaarheid' supervened. It is submitted that Snyman's views are correct. He supports views expressed[71] along these lines on Stellmacher.[72] The dicta of Rumpff CJ in Chretien to the effect that a person who cannot act cannot possibly be found to have fault (skuld) and that a person who 'acts' while 'ontoerekeningsvatbaar' cannot have fault either, should be clarified at the earliest opportunity by the Appellate Division. What is important in many cases is not so much the inability to act or the state of 'ontoerekeningsvatbaarheid' as what went before.

Snyman is also of the opinion that 'ontoerekeningsvatbaarheid' as a defence should only be allowed to mentally ill or mentally defective persons and the very young. He is prepared to allow it to the intoxicated but with reservation. He contends that a sane and sober adult ought not to be allowed to raise the defence of 'ontoerekeningsvatbaarheid'. This, would be allowing too wide a

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71) 1984 THRHR 98; CR Snyman 1985 SALJ 240, 243.
72) supra.

scope to the 'subjective' approach to criminal liability.

Although Snyman's arguments are sound, it is submitted that the Arnold decision is in accordance with our law as it is at present. 'Ontoerekeningsvatbaarheid' has been allowed to figure as a defence divorced from insanity and youth and has been increasingly considered independently. This tendency has now brought our criminal law to the stage of allowing a sane accused who killed in anger to raise that anger as a defence to murder and to culpable homicide. This is a result of the comparatively recent triumph of 'purism'.

4. THE DEFENCE OF INTOXICATION

4.1 Introductory [1]

The defence of intoxication presents legal theorists with this difficulty that intoxicants such as alcohol or drugs undoubtedly

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1) In view of the many notes and articles (Burchell 1981 SALJ 177; du Plessis 1982 SALJ 189; 1984 THRHR 98; Badenhorst 1981 SALJ 148; Middleton 1981 SACC 83; Kruger 1981 SACC 84; Ellis 1981 THRHR 175; Rabie 1981 SACC 111; Skeen 1982 SALJ 547; van der Merwe 1981 Obiter 142; Oosthuizen 1985 THRHR 406) that followed the judgment in Chretien as well as the lengthy discussions in the textbooks (Burchell and Hunt 198ff; Snyman 134-45; De Wet and Swanepoel 129ff; Visser and Vorster 262ff) that have appeared since that judgment it would be a work of supererogation to discuss the defence of intoxication in any depth here. There is also available for general study a report (January 1986) of the South African Law Commission on the topic: 'Offences Committed under the influence of Liquor or Drugs'.

influence the mental processes of persons who have taken them and can result in such persons becoming insulting, abusive, offensive, aggressive, dangerous, violent, uncontrollable and, sometimes, eventually lapsing into a state of automatism. In extreme cases insanity of a temporary or permanent nature could also supervene.

Consequently a person who has committed an assault or a killing during a state of intoxication, could with some conviction advance the contention that he lacked mens rea in that he did not know what he was doing or that he could not control his actions in accordance with his appreciation of their wrongfulness or that he had lapsed into a state of automatism and could not 'act'[2] at all. Logically, such an argument could negative dolus and also culpa entirely. But, to put it in colloquial terms; 'can the law allow a man to buy a defence to a serious criminal charge in a bottle and get away with it'?[3] Less colloquially put,

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2) This is in accordance with the generally accepted doctrine that a person cannot be said to 'act' unless his will is in charge of his body. The contention that the accused in Johnson 1969 1 SA 201 (A) and Arnold supra could not act prompts one to ask somewhat superciliously: 'In that case who killed Johnson's cell-mate and who killed Arnold's wife?'

3) Strauss 110 makes the point very strongly that psychopaths who are not responsible for their inexplicable abnormal mental condition can be severely punished for their crimes, whereas intoxicated persons who are responsible for their intoxicated condition - often likened to insanity - are treated relatively leniently. The accused in Roberts 1957 4 SA 265 (A) was a psychopath and he was executed for murder. Although only temporarily insane the accused in McBride 1979 4 SA 313 (W) was committed to an institution.

one could ask the question whether the logic according to which intoxication succeeds as a defence is not based on premisses that are too narrow.[4)]

The logical argument that an accused who became intoxicated and committed a crime lacked mens rea or criminal capacity could also be met with the simple rejoinder that it is not the function of the courts to apply logic but law;[5)] and that the criminal law would be failing to meet the very purpose of its existence if it paralysed itself with logic[6)] and failed to protect the public.[7)]

No matter how socially unacceptable it may be to acquit an accused who has committed a serious crime while intoxicated, the thought of a man being punished for a 'crime' committed while he lacked mens rea or the ability to act voluntarily, does not

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4) A more broadly based and equally valid logic would lead to the conclusion that an accused ought not to be allowed to make himself a danger to his fellow-men and then raise the very conduct (namely drinking or taking drugs to excess) that made him such a danger as a defence to acts that resulted in injuries to his fellow-men.

5) See Majewski 1978 2 AE 2 142 (HL) for some rather caustic remarks of members of the House of Lords in answer to the submission that intoxication should be a complete defence; cf du Plessis 1979 DR 119.

6) This appears to be exactly what De Wet and Swanepoel advocate 129-30.

7) In other words logical consistency could lead to social absurdity and it is more important for the law to avoid the latter than to conform with the former.

appeal to legal theorists. The result has been that our courts in the past tended to follow a middle course. If the intoxication was no defence on the merits, it was nevertheless treated as a mitigating factor.[8)]

If the crime charged was serious; for instance, murder, the intoxication could result in a conviction of a less serious crime; for instance, culpable homicide.[9)]

The approach was casuistic and pragmatic and, from the nature of the problem, a legal antinomy,[10)] only pragmatic and casuistic solutions were possible. Judicial officers were reluctant in the past to acquit in respect of crimes of violence where liquor was involved and they were seldom reluctant to reduce assault with intent, to common assault. If a police docket or the record of a preparatory examination revealed that the accused had been intoxicated when committing a killing he would in many cases be charged with culpable homicide. If indicted for murder before

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8) This was the 'pure' Roman-Dutch rule; vide eg De Wet and Swanepoel 124.

9) This could, in our law, be regarded as an extension of the Roman-Dutch principle that intoxication served to mitigate punishment. By reducing the crime from a serious to a less serious crime one paves the way for a lighter punishment vide Pain 1974 SALJ 467, 487.

10) ie a problem that results in two contradictory but equally logical answers. It is illogical to punish a man for something he did while he was so intoxicated as not to know what he was doing; it is also illogical to allow a man, guilty of conduct that would otherwise be criminal, to raise the self-induced condition that gave rise to the conduct as a valid defence to a prosecution in respect of the conduct.

the Supreme Court he would either be convicted of murder with extenuating circumstances or of culpable homicide. That was the law in practice.[11)]

4.2 The Law as Reflected in Johnson[12)]

The position in practice as briefly outlined above was reflected in Johnson. But a change in the general approach to problems of the criminal law had been taking place prior to Johnson and the Johnson decision, to all appearances in conformity with the law as generally applied in the courts,[13)] was subjected to criticism,[14)] in some cases rather severe.[15)]

To understand the criticism of Johnson one must bear in mind that van der Mescht[16)] and Bernardus[17)] had resulted in culpable homicide becoming the unlawful negligent killing of another human being . Before these decisions culpable homicide was simply the unlawful killing of another human being.

Consequently, before van der Mescht and Bernardus, if it was

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11) The prosecution would often be dissatisfied with lenient treatment meted out to such offenders; similarly the defence would often be dissatisfied that his intoxication had not been given greater weight in favour of an accused.
12) 1969 1 SA 201 (A).
13) vide Pain 1974 SALJ 467, 185ff. Pain is one of the few commentators who found any virtue in Johnson; cf Schäfer 1978 SACC 47; du Plessis 1979 DR 119.
14) Burchell and Hunt 1ed 232; De Wet and Swanepoel 3ed 126.
15) De Wet and Swanepoel ibid.
16) supra.
17) supra.

accepted at a murder trial that the accused had not intended to kill, or that intent to kill had not been proved beyond a reasonable doubt, and the accused had relied on his intoxication at the time of the killing to negative such intent, he could in any event still be convicted of culpable homicide if it were proved that he had killed unlawfully. An accused who raised the defence of intoxication to a charge of murder would in most cases have pleaded guilty of culpable homicide. After van der Mescht and Bernardus, it became necessary to prove negligence on the part of the accused in addition to unlawfulness. This would generally occasion no difficulty as a man who killed another while drunk would obviously be acting unreasonably. But, matters become more involved with the advent of the concept of 'toerekeningsvatbaarheid'. If a person were so drunk that he could not appreciate the wrongful nature of his conduct or even if he could appreciate this, could not control his conduct in conformity with such an appreciation, he would lack criminal capacity. A person who lacked criminal capacity could have fault neither in the shape of dolus nor culpa. Similarly if a person became so intoxicated as to lapse into a state of automatism, his will would lose control of his body and he would not be able to 'act' for the purpose of the criminal law.

The outline given above constitutes an example of mechanical reasoning based on concept jurisprudence. The concept of absence of criminal capacity is such that it excludes the concept of fault in the shape of either of its sub-concepts, dolus or

culpa. The concept of a criminal act is such that its absence excludes the very possibility of criminal guilt as there can be no crime without a criminal act. Applied purely logically and without regard to practical exigencies, such arguments could result in the criminal law becoming a field of refined theoretical debate, possibly headed for the limbo of interesting but useless systems of abstract thought.

A more practical and useful approach to 'crimes' committed by persons who lack criminal capacity, or who are unable to act, would be to inquire how they had got into one of these unusual states and how they had managed to commit 'crimes' while in such state. Concept jurisprudence eschews such an approach. It is reasoned that a person who lacks criminal capacity cannot have fault - caedit quaestio; similarly, a person whose will is not in command of his body cannot act - caedit quaestio.

The facts in Johnson are well known. The accused was arrested for being drunk, and placed in a police-cell. There he smashed the head of a sleeping fellow-prisoner with a bucket. The trial court found that at the time of the killing he had not known what he was doing and had been in a state of drink-induced automatism. The evidence in favour of this finding was over-

whelming[18] and on appeal the Appellate Division based its decision on the accused having been in such a state of automatism when killing the deceased. The accused's conviction of culpable homicide was confirmed on the basis that logic had to make way for expediency in a case of this nature. In previous times the question of fault would probably not have been considered, as an unlawful killing would have been established. Botha JA who gave the judgment of the court did, however, investigate the question of fault and said that fault had to be sought at the stage when the accused commenced his drinking.

The decision was generally criticized.[19]

One criticism of Johnson[20] was that it amounted to an

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18) De Wet and Swanepoel 3ed 126 n137 make the suggestion that Johnson had been wrongly decided on the facts. Appreciation of matters of evidence, procedure and proof is not a strong point of this textbook. If one considers the evidence in support of Johnson's defence that he had killed the deceased in a state of automatism, (summarised by Botha JA 201-3) it is clear that most of the evidence favourable to the accused must have been given by witnesses called by the prosecution. How could the prosecution have invited the court to reject such evidence? It has been demonstrated by the writer in 1982 SALJ 189 and 1984 THRHR 98 that the suggestion that Johnson was wrongly decided on the facts, is, with respect, untenable.Even had the onus been on the accused, the evidence in his favour was so strong that he would probably have succeeded in discharging it.

19) Burchell and Hunt (1ed 232) were of the opinion that it ought to have been decided according to the established principles of our criminal law instead of in the service of expediency. De Wet and Swanepoel(3ed 126) were outspoken in their disapproval of the judgment.

20) supra.

application of the versari in re illicita doctrine[21]: the accused had been convicted for his drinking and not for the crime 'committed' while drunk. The view of the South African Law Commission[22] that Botha JA was not applying the doctrine of versari in re illicita is to be preferred. The versari doctrine creates liability without fault and Botha JA did investigate the question of fault on the part of the accused. Botha JA was applying the common law as it had been understood and applied at the time;[23] namely, intoxication which negatived intent to kill was a valid defence to murder but not to culpable homicide.

A further criticism of the decision was that fault ought not to have been projected from the initial drinking onto the eventual killing.[24] This criticism is also regarded as unjustified by the South African Law Commission.[25] Whether the Law Commission's views are sound in this connection is debatable. If the killing of a human being could not reasonably have been foreseen as a result of the drinking, it is difficult to understand how there could have been fault on the part of the accused in respect

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21) De Wet and Swanepoel 3ed 121, 127 and 104 n38.
22) Drugs Report 43.
23) He in fact made a, with respect, commendable practical and erudite effort to reconcile the law with the old authorities and the practise of the courts at the time, vide Pain 1974 SALJ 467, 485ff.
24) Pain 1974 SALJ 467, 486-7.
25) Drugs Report 43. The Commission is of the opinion that 'fault projection', a phrase used by Pain, was not necessary. It was simply a question whether at the time of the drinking the death of a person was foreseeable as a result of the drinking; thus the Commission.

of that killing. In other words excessive drinking per se does not give rise to a negligent actio libera in causa unless a crime, in this case criminal homicide, is foreseeable as a result of the drinking.[26] The reasoning of Botha JA in Johnson gave fault in casu a much wider basis than this. Thus a person who drinks ought reasonably to foresee that he may commit a crime.[27] This argument is untenable as thousands of people get drunk every week without committing crimes in consequence. It is respectfully submitted that it would have been far more realistic for the learned judge of appeal to have treated homicide committed by an intoxicated person as an exceptional case in which, for sound reasons of public policy, an acquittal because of the absence of fault cannot be countenanced. It cannot be gainsaid that this would have amounted to treating certain offences as offences of strict liability when committed under the influence of liquor or drugs. One could naturally reply to this objection that over-imbibing is fault of sorts and that intoxicated persons generally know what they are doing; their wrong-doings are often the result of the deterioration of social and moral inhibitions as a result of the effect of alcohol

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26) De Wet and Swanepoel 3ed 126 criticise the Johnson court's attempt to bring the accused's liability into the ambit of the actio libera in causa. The criticism appears valid although the remarks are restricted to an intentional actio libera in causa. To bring Johnson's liability into the ambit of the negligent actio libera in causa would amount to widening the scope of negligence where intoxication is concerned to the point of making it criminally negligent to drink too much in any circumstances. That would amount to 'stretching matters a bit'.

27) eg a criminal homicide, in that condition.

on certain centres of the brain. Every body knows this and a person who over imbibes must be prepared to face the consequences.[28]

De Wet and Swanepoel levelled a criticism at the Johnson case which seems to have penetrated to the nub of the matter; namely, an accused who is so intoxicated that his will does not control his body cannot be said to 'act'.[29] Before reaching this extreme state of intoxication a person could become 'ontoerekeningsvatbaar',[30] either in the sense of not appreciating that what he is doing is wrong, or of not being able to control his conduct in accordance with an appreciation of its wrongfulness.[31]

Interesting is the criticism[32] of Bourke[33] in which a jury found, that an intoxicated individual, who had enticed a little girl of 11 years into accompanying him, had transported her to his hotel by cab, had told the cabby not to wait for her, had then taken her to his room and attempted to have intercourse with her, had not been responsible for his actions. According to

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28) Or as the old saying goes: 'wat ons koop wanneer ons dronk is, moet ons voor betaal wanneer ons nugter is'.
29) 3ed 52; vide also 115.
30) This is really the main thrust of De Wet and Swanepoel's attack on the Johnson decision (3ed 126-7).
31) This is in conformity with the view adopted in all four editions of De Wet and Swanepoel that intoxication can lead to absence of criminal capacity.
32) De Wet and Swanepoel 3ed 120.
33) 1916 TPD 303.

De Wet and Swanepoel[34] the jury, gifted with prophetic foresight concerning the importance of 'ontoerekeningsvatbaarheid' some seventy years in the future, had better insight into the problem of intoxication than the trial judge. The jury had realised that it was a question of whether the accused had criminal capacity in the sense of being able to control his conduct. In fact the jury appear to have been out of their depth and to have been prepared to allow a man, who in a state of slight inebriation had shrewdly committed a despicable crime while well aware of what he was doing, to go scott-free.

De Wet and Swanepoel's criticism of the manner in which the courts had dealt with the problem of intoxication - a problem unique in the criminal law - shows a complete unwillingness to understand the difficulties the courts were faced with and an over-eagerness to find fault with their solutions and indulge in negative criticism. But one must give credit where credit is due. De Wet and Swanepoel, and the uniquely gifted prophetic members of the jury in Bourke, were right in their opinion that the liability of the accused who pleads intoxication would revolve around the question of criminal capacity. It would also revolve around the question whether the accused had reached such an advanced stage of intoxication as to be unable to 'act'.

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34) The passage from De Wet and Swanepoel (n32 supra) is illustrative of the point that according to this textbook our judge-made law is always wrong.

4.3 The Law in Chretien

In Chretien[1] the accused, who was fairly heavily intoxicated, but not so intoxicated as not to be able to drive a Kombi and weigh up the advantages and disadvantages of taking one of a number of different courses open to him, had driven his Kombi into a crowd of people on a road, killing one and injuring five.

His defence on charges of inter alia one count of murder and five counts of attempted murder was that he had believed that all the members of the crowd would be able to get out of his way before his vehicle collided with any of them. The trial court held that although no sober person could have held such a belief,[2] it was reasonably possible that the accused could have held it because of his intoxication.[3] This finding excluded dolus on his part, it being reasonably possible that he had not as a fact foreseen that he would possibly kill or injure a member of the crowd.[4] As his conduct had been grossly unreasonable he was

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1) 1981 1 SA 1097 (A).

2) Chretien 1979 4 SA 871 (D); the judgment of Friedman J is unfortunately not fully reported where he deals with the mens rea of the accused; vide du Plessis 1982 SALJ 189, 190-1.

3) Intoxication was therefore an evidential factor taken into account in ascertaining whether dolus had been established.

4) Bearing in mind the fairly wide net of dolus eventualis the accused must obviously have come perilously close to being convicted of murder. He seems to have had his wits pretty well about him; vide analysis in du Plessis 1982 SALJ 189, 190-1.

convicted of culpable homicide in respect of death of the one person who had been killed but acquitted in respect of the rest of the charges mentioned.

The most interesting feature of the trial was the attempt of the prosecution to obtain convictions of common assault on the five counts of attempted murder with which the accused had been charged in respect of the five persons injured in the 'accident'. The prosecution had undertaken a difficult task. The court had found that culpa had been proved but not dolus. Dolus is the mens rea of common assault. How could the prosecution hope to obtain convictions of a crime requiring dolus as its mens rea when only culpa had been established?. It really amounted to inviting the court to find that culpa could suffice as the mens rea of common assault if such common assault were committed by an intoxicated person.[5)]

If one considers the effect usually given to intoxication in cases of assault with intent, the submission made on behalf of the prosecution is not as amazing as it may at first blush appear to be.

The law concerning assaults committed by intoxicated persons had

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5) It was neither more nor less than an attempt to obtain a conviction on the basis of normative rather than psychological fault. Kok 1982 SACC 27 points out that the approach to the fault of intoxicated persons before Chretien was normative. It was perhaps not entirely so, but certainly partly so.

been that, whereas the intoxication of an accused may serve to negative or at least cast doubt on his specific intent to, for instance, inflict grievous bodily harm, it could nevertheless not serve to negative or cast doubt on his general intent to assault; that is, to apply force to the person of his victim.[6] Thus an accused who had, while intoxicated, stabbed or seriously injured someone could successfully say that his mind had been so befuddled with drink that he had not foreseen that he would inflict serious injury on his victim. He could nevertheless not submit with any hope of success that he had not intended to stab, (that is in essence to apply force) at all.[7]

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6) eg Johnson 1970 3 SA 535 (C); while intoxicated the accused had injured complainant seriously. As he did not have the specific intent required for assault with intent, he was held to be guilty of common assault.

7) An unusual example is to be found in Jassane 1973 4 SA 658 (T). Whilst under the influence of liquor Jassane had attempted to kill a little girl believing her to be a 'tikoloshe'. He was charged with attempted murder but, in view of his not having intended to kill a human being he was not convicted of this crime. As his mistake of fact, that is the mistaken belief that he was dealing not with a human being but with an evil entity, had been the result of his drinking, he was not acquitted, but convicted of common assault. In some way that is not clear from the reported portion of the judgment, his intoxication was treated as constituting the fault required for a conviction of common assault. There is more than one way of interpreting this judgment. Either that intoxication is ignored when considering whether intent to commit common assault has been proved, or the simple (normative?) rule is applied that in such a case a conviction of a crime with an intent going beyond the application of force is excluded, but conviction of common assault is automatic without considering the actual existence of intent or not. The result is unsatisfactory in view of the mistake made by the accused, more especially as the evidence revealed that the child had an unusual appearance that could have led to an intoxicated person, who believed in the existence of such beings , mistaking her for an evil entity. Had Jassane killed the child a conviction of culpable homicide would have been in order in the light of Johnson which was then still the law, but in those

In the course of time the prosecution, when the defence of intoxication was raised to a serious assault, had come to expect a conviction of common assault as a matter of course, when the mens rea of assault with intent had been negatived by evidence of intoxication.

In Chretien the prosecution entertained the same expectation. Chretien was charged with attempted murder.[8] What was overlooked by the prosecution, was that on the accused's version of events, accepted by the Court as reasonably possible,[9] no intent to apply force to the person of his victims had been proved. He was not in the position of an intoxicated person who had struck someone and who could deny that he had intended to do grievous bodily harm, but who could not deny that he had intended to apply force to his victim's person.

Chretien's mens rea in respect of the person he killed had been culpa. He had injured his other victims with exactly the same state of mind. To convict him of common assault in respect of the infliction of these injuries would amount to finding that

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circumstances; namely, acting while making of a bona fide but unreasonable mistake, dolus could hardly be attributed to the intoxicated man. It was simply a case out of line with the usual type of assault cases in which drunks are involved. Jassane had not, as drunks often do, become truculent as a result of his intoxication; he had become the victim of a delusion.

8) In other words his application of force to the persons of the injured parties was viewed as an assault with the intent of killing them.

9) viz that he had believed that he would not hit any member of the crowd with his Kombi.

culpa would suffice as the mens rea of common assault. Friedman J the trial judge refused to do this, stating that common assault is also a crime which requires a 'specific' intent as its mens rea.[10] The argument of the learned trial judge appeared to be unanswerable, except if one were to view common assault as a crime of strict liability if committed by an intoxicated accused.[11]

There is also another feature that might have misled the prosecution; namely, that it was Chretien's intoxication that had enabled him to cast a reasonable doubt on the intent to kill alleged by the prosecution.[12] If the view is adopted that when deciding on the presence or absence of the mens rea necessary for murder and attempted murder, one takes intoxication into account, but not when deciding on the presence or absence of the mens rea required for common assault, the factual material relating to intoxication would be ignored when deciding whether to convict of common assault and a conviction of this crime would follow.

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10) Chretien 1979 4 SA 871 (D) 875 G - 876 B.
11) vide du Plessis 1982 SALJ 189,193.
12) Put differently it would appear that in applying for five convictions of common assault, the prosecution had allowed itself to be misled by the facts it had attempted, but had failed to prove. In terms of the charge Chretien had intentionally injured the persons hit by his Kombi, but dolus not being proved, the case really became one of negligent driving under the influence of liquor. It is unheard of to convict a driver, who hits a pedestrian while driving negligently, of assault. If such a driver should happen to be under the influence of liquor his intoxication does not have the effect of rendering his negligent conduct intentional.

There appears to be a tincture of this argument in the wording of the question of law reserved by the prosecution for the consideration of the Appellate Division; namely,[13]

> 'Whether on the facts found proven by the Court the learned Judge was correct in law in holding that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol'.

The prosecution apparently feared that the days of obtaining convictions of common assault almost automatically when prosecutions for assault with intent failed because of the intoxication of the accused, could be coming to an end; hence the decision to take the total acquittal on the five charges of attempted murder to the Appellate Division. It is perhaps not mistaken to say that the wording of the question of law carried the germ of its own destruction within it.[14]

Believing itself to be in danger of having to give up the favourable situation of obtaining convictions of common assault

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13) 1102 C-D.

14) The reference to 'the facts found proven by the court' and to the 'necessary intention' as having 'been influenced by the voluntary consumption of alcohol' are self-contradictory. On the facts found proved there was no intention to commit the crime charged, but only gross negligence. The intention had not been proved. The alcohol had not

against intoxicated accused, the prosecution was apparently not prepared to run the risk of perhaps having to give up the even more favourable situation of obtaining convictions of culpable homicide against intoxicated persons charged with murder, hence there is no reference at all to negligence, culpa or culpable homicide in the question of law.[15)]

An acceptable answer could have been that Friedman J's reasoning could not be faulted, that intent to apply force had not been proved, that culpa did not suffice for a conviction of a crime requiring dolus, and that the accused had been correctly acquitted on the five charges of attempted murder. This was, however, not to be. The Appellate Division used the opportunity to review the law relating to the defence of intoxication, entirely.[16)]

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affected the accused's intention - he had no intention to kill - it had merely on the findings of the court, dulled his judgment and caused him to act negligently. Had the prosecution worded the question of law differently and more clearly in conformity with the facts proved the question could have been: 'Was the finding of the learned Judge that culpa does not suffice as the mens rea of common assault where the negligence on which the finding of culpa is based was due to the voluntary consumption of alcohol, correct in law'? It would then have been clear that no success could be hoped for on appeal. Friedman J's reasoning was, with respect, unassailable: the accused had accidentally, through his negligence occasioned by his drinking, hit five pedestrians with a vehicle he was driving. He could not be convicted of common assault.

15) Drugs Report 46.

16) ibid.

Rumpff CJ stated that Johnson had resulted from a tendency to allow logic to make way for expediency and to apply the law in a juristically impure[17] manner in order to appease those members of society who objected to the lenient treatment of drunken offenders. He continued that a perusal of the law reports, however, revealed that there were not too many cases in which a crime had been committed by an accused who had not known that what he was doing was prohibited or whose inhibitions had completely disappeared. Consequently public policy did not require adherence to the principles applied in Johnson.[18]

Furthermore an accused could be so drunk as to be making mere involuntary muscular movements, in which case his fault (skuld) need not be philosophised about as he could in any event not 'act' because of the absence of volition.[19] Consequently if a person were so drunk as to be unable to 'act' or 'ontoerekeningsvatbaar' he could not be convicted of any crime.

The question of law reserved was therefore answered in favour of the accused and against the prosecution.

Conceding that a person might, because of intoxication, not be able to realise the extent of the harm his actions might result in, the learned Chief Justice stated that there was no room for

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17) 'Juridies onsuiwer', 1103 D.
18) 1106 D.
19) 1104 E-G.

the English Law doctrine of specific intent in our law relating to the defence of intoxication.[20)]

The most important statements from the point of view of the law relating to culpable homicide is that an accused who cannot 'act' because of intoxication cannot be criminally liable and that a person who is 'ontoerekeningsvatbaar' because of voluntary intoxication cannot be criminally liable.[21)] The rejection of the 'specific intent' doctrine is really of little consequence.[22)]

Assuming that a person who cannot 'act' because he is in a state of automatism or in a stupor lying down and making involuntary muscular movements, cannot commit a crime of which dolus is the mens rea, it is still by no means certain that such a person cannot, on the basis of antecedent liability,[23)] commit a crime

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20) 1103 H- 1104 pr.

21) What the judgment really amounts to is that absence of intent, absence of 'toerekeningsvatbaarheid' and absence of volition are complete defences even if ascribable to voluntary intoxication. The last two points mean that voluntary intoxication becomes a defence to culpable homicide. Johnson had been very clear on at least one point viz that voluntary intoxication could not be a defence to culpable homicide. The provincial division had also experienced no difficulty in convicting Chretien of culpable homicide.

22) vide du Plessis 1982 SALJ 189, 194. The statement made there concerning specific and general intent has not been challenged.

23) See Strauss 397. It is, however, doubtful whether the learned author's view is correct that Chretien has not affected antecedent liability. Johnson was based on antecedent liability and Chretien overruled Johnson.

of which culpa is the mens rea.

Assume that a person is in charge of a small child. He is sitting at a table on which there is a lighted candle and he is 'floating his powerful mind' in alcohol instead of tea as was done with the latter beverage by the mournful taxidermist Mr Venus in Our Mutual Friend. Eventually the 'floating of his mind in alcohol' has the effect of causing him to collapse in a drunken sleep halfway on the table and halfway off it. He moves his hand involuntarily and knocks the candle off the table. The candle causes the carpet to catch fire and the room to burn down. The child dies in the blaze, but alert firemen save the intoxicated person. Would this latter party, if charged with culpable homicide, be able to plead successfully that his knocking the candle off the table was not an 'act' but the result of an involuntary muscular movement and that fault was not to be philosophised upon as there was in any event no act to which this fault could be coupled? On the strength of Rumpff CJ's dictum[24] about the 'dead drunk' person lying somewhere making involuntary muscular movements whose fault need not be philosophised upon, such a plea ought to succeed as our law stands at present. It would be a clear case of mechanically applied concept jurisprudence; the accused was in a drunken stupor consequently his involuntary muscular movements are not acts for the

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24) Chretien 1104 E-G.

purposes of the criminal law. Even if they should have results that would otherwise be criminal the accused has committed no criminal act. Fault on his part is out of the question and he is discharged. Such a result would be unsatisfactory. But to avoid it a bench of five judges of the Appellate Division would have had to revise the statement that involuntary muscular movements render fault irrelevant.

A similar result has been brought about by Chretien where an accused commits a killing while 'ontoerekeningsvatbaar' because of intoxication. A person would presumably reach this stage of intoxication before passing into a state of drunken automatism although the two conditions might overlap.[25)]

Suppose the accused were to commence heavy drinking in a situation were a reasonable man would foresee that once the alcohol had caused his inhibitions to crumble he might attack and kill someone. Further suppose that his inhibitions were to crumble until he could no longer control his conduct according to his appreciation of its wrongfulness and he were then to attack and kill someone, would his 'ontoerekeningsvatbaarheid' absolve him from culpable homicide as well as murder because 'ontoerekeningsvatbaarheid' excludes fault altogether?

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25) Chretien 1106 E-G. The two conditions appear to overlap in Stellmacher supra.

On the strength of Chretien, Stellmacher[26] and Baartman[27] it is submitted that such a person should not to be convicted. It would be a simple matter of arguing in terms of the concepts of concept orientated criminal law; the accused was 'ontoereken-ingsvatbaar'; 'ontoerekeningsvatbaarheid' excludes fault; fault is therefore excluded, hence no conviction could follow.[28]

If a court were to arrive at a different decision and convict notwithstanding a finding of 'ontoerekeningsvatbaarheid' it would be making an irregular finding, unless it were a bench of five judges of the Appellate Division who, after due consideration, had decided to limit the effect of the statements in the Chretien judgment concerning 'ontoerekeningsvatbaarheid' and the defence of intoxication.

When considering the effect of Chretien on antecedent liability, one must bear in mind that Johnson was founded on antecedent liability inasmuch as Botha JA sought to find the 'skuld' (fault or mens rea) of the accused at the stage when he commenced drinking, and that Johnson was overruled in Chretien as being no

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26) supra.
27) supra.
28) These are mechanical arguments in terms of concepts similar to the argument employed in Alexander supra to arrive at the conclusion that dolus excludes culpa therefore an accused who has committed murder cannot be convicted of culpable homicide. Mechanical argument in terms of concepts is probably the most unfavourable result of the 'strafregwetenskaplike' analysis of the concepts that make up crimes and according to which criminal liability is determined.

longer in keeping with public policy. Perhaps, unfortunately, no investigation into the reliance placed on antecedent liability by Botha JA was made.

From the general tenor of the Chretien judgment it would, however, appear that a person who kills another while drunk could be adjudged to have been negligent although the effect of his intoxication might be such that he did not as a fact, when commencing his drinking, realise that his conduct could possibly result in the death of another. Before the stage of 'ontoerekeningsvatbaarheid' or automatism is reached an accused could still, notwithstanding intoxication be said to have acted unreasonably.[29] This is in fact what happened to Chretien. His poor judgment was due to the effect of the alcohol, but he was found to have acted negligently. In this connection it is worth mentioning that Strauss[30] could be mistaken where he states that Chretien's conviction of culpable homicide was founded on antecedent liability. The trial court found that he had not been so intoxicated as not to have known what he was doing, but that his intoxication explained his faulty judgment in believing that he would not hit any of the members of the crowd he ploughed into with his Kombi.[31] His driving into the crowd as a result of his poor judgment, was sufficiently negligent for a conviction of

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29) At a stage in his worsening state of intoxication when although no longer sober he was still in command of his faculties; vide Lombard 1981 3 SA 198 (A).
30) 400 n12.
31) Chretien 1979 4 SA 871 (D).

culpable homicide. The culpable homicide conviction is not discussed in the Appellate Division judgment.[32] The conviction of culpable homicide was not founded on antecedent liability but on the fault of the accused at the time when he killed the deceased.

4.4 The Actio Libera in Causa

The actio libera in causa is an old figure in the law. The rule is that if a person drinks with the intention of gaining the necessary courage or determination to commit a crime that he would otherwise not have the nerve to commit, he would be found guilty[1] if he commits that crime, and his intoxication would be no defence. Prior to Chretien such a person who intended to injure or kill another and gained the necessary courage from the bottle to injure or to kill, would not have been found guilty of common assault or culpable homicide because of the effect of the liquor, but of assault with intent or of murder, as the case may be. Similarly, so it was said,[2] if he became an automaton he would have been regarded as a self-created zombi who had brought about the crime as a result of his pre-determined design.

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32) From which one concludes that the findings and grounds for such findings of the court a quo in respect of the conviction must have been adjudged to be sound.

1) In other words murder would not be reduced to culpable homicide or assault with intent to common assault.

2) Johnson supra 211, Drugs Report 34.

Even before Chretien it had become doubtful whether the latter proposition would still be acceptable because of the increasing acceptance of the doctrine that an 'act' can only be committed by a human being whose will is in control of his body.[3] This latter aspect of concept jurisprudence had made considerable headway and once it is dogmatically laid down that the object of the concept 'act' could not exist unless the person committing the 'act' were controlled by his will, it would follow that volition being absent, there could be no act; there being no act, there could be no crime.[4]

In Chretien these misgivings were confirmed by the statement that if a person who had become dead drunk and who lay making involuntary muscular movements, happened to commit a crime in this condition, he could not be said to have acted (and his fault was not to be philosophised upon).[5] It must immediately be added that the learned Chief Justice did say that in Chretien he was not considering the case of the person who had commenced drinking with the intention of committing a crime whilst under the influence of alcohol.[6]

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3) vide De Wet and Swanepoel 3ed 115 n99.
4) The mechanical nature of the reasoning in terms of concepts is plain.
5) Chretien 1104 E-G; 'In die geval van die onwillekeurige spierbewegings van 'n papdronke is daar geen sweem van beheer nie en is dit dus nie eers nogig om oor skuld te filosofeer nie'.
6) 1105 G-H.

At the same time Chretien took matters a step further. Thus, a person who was so intoxicated as to be 'ontoerekeningsvatbaar' could not be convicted of any 'crime' commited by him in that intoxicated state. Even though the learned judge did not state this, the inference was inescapable that if the man who drinks to gain courage were to drink so much as to lose his sense of right and wrong or the ability to control his conduct in conformity with his appreciation of its wrongfulness, he could not be convicted of a crime committed in this state. The intention with which he commenced his drinking would not affect the question of his guilt or innocence. This is the inference drawn correctly, it is submitted, by Strydom J in Baartman.[7)]

The South African Law Commission does not agree with Strydom J.[8)] But the argument advanced by the commission[9)] is unconvincing. They compare a man who has become an automaton as a result of excessive drinking done with the intention of committing a crime while intoxicated, and who commits the originally intended crime while in the condition of automatism, to a terrorist who sets a time bomb and falls asleep or goes into a coma before the bomb goes off. The fact that at the time of the explosion of the bomb the terrorist is unable to act because his will does not control his body, will not absolve him from liability as he sets his bomb while able to act.

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7) 1983 4 SA 395 (NC), 400 E-G.
8) Drugs Report 34.
9) In Working paper 5, 33ff, but not repeated in the final Report.

The comparision is not apt as the two cases are dissimilar in an important respect. The intoxicated automaton is the very person himself who commenced drinking. A person who sets a time bomb knows that it will explode because of the mechanical and chemical processes at work in it that can only be stopped by an outside agency or internal malfunction. A person cannot turn himself into such a programmed electro-chemical device. He retains his will and that will could at any stage steer him in a course different from the one he had in mind.[10] If the will does not steer him at all, he does not act and there the argument ends.

It is also to be borne in mind that a person who becomes intoxicated might get a different perspective on things after getting himself into a state of intoxication. Instead of attacking his victim he might decide that his intended victim is not really 'such a bad chap' and join him in a drinking bout.

It is submitted that it is a fallacy to treat the case of a man who drinks with the intention of committing a crime as identical with that of a man who sets in motion an infernal machine. Similar considerations would apply to the case of an accused who intending to commit a crime, drinks himself into a state of 'ontoerekeningsvatbaarheid' and then commits the crime. On the

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10) vide JMT Labuschagne 1981 DJ 335, 337-9.

strength of the dicta concerning 'ontoerekeningsvatbaarheid' in Chretien it would seem that the positive law is now to the effect that the 'ontoerekeningsvatbaarheid' would have a retroactive effect and erase all fault from the conduct of the accused. In the case of the automaton one would be dealing with a person whose will had ceased to control his body because of his intoxication, and in the case of the 'ontoerekeningsvatbare' individual one would be dealing with a person who had lost the ability to appreciate the wrongfulness of his conduct and/or to control it in conforming with such an appreciation, because of his intoxication.

The situation that is more likely to arise out of the two examples mentioned, is that the accused who drinks to commit a crime would commit the crime while unable to control his conduct in conformity with his appreciation of its unlawfulness. The case of an intoxicated human automaton carrying out a plan formed while he was still sober, must in the nature of things, be rare. How a psychologist would be able to testify with a degree of certainty that excludes any reasonable doubt, that a man while in a state of intoxicated automatism was acting in furtherance of an intention formed before he started drinking, is difficult to imagine. The conscious mind of such a person would be in a state of suspension and unconscious impulses that have nothing to do with the intention formed before the drinking commenced, might reasonably possibly be at work in him.

One could argue objectively that, had he not begun to drink with the intention of committing the crime, the crime would not have been committed. That would, however, be an argument based on causal liability: it would not suffice to establish fault in the shape of intent working from the commencement of the drinking, through the state of automatism to the commission of the offence. The human will is an incomprehensible causal factor and would still be unconsciously operative. How could the possibility be excluded that the original intention had disappeared during the state of intoxication and that other impulses had provided the internal dynamic that had caused the person concerned to commit the crime? The psychological imponderables involved are enormous. If such a person were to be convicted of murder it would have to be on the simple basis of a legal rule that a person who drinks with the intention of committing a certain crime is taken to have committed that crime intentionally no matter that at the time of the actual physical commission of the crime, he lacked intention, volition and the ability to act. There is nothing in the nature of things that makes such a legal rule impossible, but it would be contrary to the subjective view nowadays taken of intention in our law and it would also be contrary to the dicta of Rumpff CJ in Chretien concerning the inability of a dead drunk person to 'act'. Such a rule would also not serve as a foundation for normative fault, as the inability to act would exclude all fault.

It would be a better founded argument to submit that had the accused not commenced his drinking with the intention of committing the crime, he would not have 'committed' it and that a reasonable man would have foreseen that a person who drinks in order to commit a crime would possibly commit that crime in a state of intoxicated automatism. In other words the mens rea sought to be established would be culpa.

This brings us to the question of the negligent actio libera in causa. It is disputed that there is a negligent actio libera in causa in our law.[11] De Wet and Swanepoel mention it in the first edition,[12] but it is not referred to in the three subsequent editions. Burchell and Hunt refer to it in both editions,[13] but appear to reject it in the second edition.

Criticizing Johnson, De Wet and Swanepoel state that it was in some respects an attempt to apply a negligent actio libera in causa.[14] The facts, they submit, did not fit into a negligent actio libera in causa. It could not be seriously argued that a reasonable man in the position of the accused when he commenced drinking, would have foreseen that he would possibly kill the the deceased while drunk. This argument has much to commend it.

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11) Oosthuizen 1985 THRHR 407, 419.
12) 81.
13) 1ed 227, 2ed 292.
14) 3ed 1226, but contrast 1ed 80 ng.

While the reasonable man would know, in general, that an intoxicated person could become a danger to himself and others, he would have required special visionary powers to foresee that Johnson would be arrested, would lapse into a state of intoxicated automatism in the police cells and would there in that condition kill a fellow prisoner.

Not all killings committed by drunken automatons are of such an unforeseeable nature. Thus the man who drinks knowing that he may have to drive with passengers in his car through heavy traffic, could easily foresee that he would be materially endangering the lives of others by his drinking.[15] Similarly the man who drinks while working in a railway signal office or who drinks while working with heavy building material on a high wall or roof, or who drinks while in charge of, or about to take charge of dangerous equipment, could be liable on the basis of culpa in respect of any death resulting from his conduct.

In Stellmacher[16] there was ample evidence that the accused killed the deceased while in a state of intoxicated automatism.[17] He was acquitted on the ground that he had been 'ontoerekeningsvatbaar' at the time of the killing. If his case had been approached on the basis of a negligent actio libera in causa he could possibly have been convicted of culpable homicide notwith-

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15) De Wet and Swanepoel 122.
16) supra.
17) Strauss 400 n11.

standing his automatism at the time of the firing of the fatal shot. Naturally the peremptory statement of Rumpff CJ that involuntary muscular movements can not amount to an act and that fault need not be philosophised upon when considering such a case, would have militated against such a finding. One could, however, argue that the example of a crime referred to by Rumpff CJ in that context was assault and that the learned judge could not be taken to have referred to crimes requiring culpa as their mens rea. Had the accused in Stellmacher appealed against his (hypothetical) conviction the Appellate Division would then have had to decide directly whether drinking in such dangerous circumstances amounts to negligence or a negligent actio libera in causa. This is no more than a 'might have been' but it is respectfully submitted, that Stellmacher was negligent when he started drinking heavily with a loaded pistol in his pocket and that his subsequent automatism ought not to have insulated him against a conviction of culpable homicide.[18] He was in fact acquitted because of his 'ontoerekeningsvatbaarheid'[19] and the same considerations should have militated against his total acquittal on this ground.[20]

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18) vide du Plessis 1984 THRHR 98; cf Snyman 1985 SALJ 240, 241; Bergenthuin 505-6.

19) vide du Plessis 1983 Speculum Juris 84.

20) There is some doubt as to the precise reason for the acquittal. He was apparently proved to have acted in a state of automatism and acquitted because of 'ontoerekeningsvatbaarheid': vide Strauss 400 n11; Snyman 40 n8.

It would, however, have been contrary to the dicta in Chretien concerning the effect of 'ontoerekeningsvatbaarheid' on the criminal liability of intoxicated persons, to have held that Stellmacher was guilty of culpable homicide.

Naturally, it could have been argued that the said dicta[21] in Chretien were not to be interpreted as excluding liability in such a clear case of negligent conduct resulting in death and the Appellate Division might have had the opportunity of stating whether, in overruling Johnson, Rumpff CJ had rejected all antecedent liability including the actio libera in causa principle from our law.

It is interesting to note that the South African Law Commission[22] and Bergenthuin[23] point out that the actio libera in causa principle is unnecessary in our law. According to them it is merely a question of applying the general principles of criminal liability and the same result will be achieved. This view appears to be correct although the term actio libera in causa is convenient. As above pointed out, it is also difficult to see how an intention to commit a crime formed at the commencement of the drinking, could result in conviction of an intentional crime by a drunken automaton or an intoxicated person lacking criminal capacity, unless a construct such as the

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21) To the effect that an accused's inability to act makes inquiry into his fault superfluous 1104 E-G.
22) Drugs Report 33.
23) 504.

actio libera in causa is employed.

The submission that the ordinary principles of criminal liability should be employed, is very attractive. But they must not be employed like the trap-doors, sliding partitions and concealed loop-holes in a chinese puzzle. What is meant is that we should avoid the methods of concept jurisprudence in terms of which immutable concepts are mechanically constructed and employed in much the same way as the concepts of the criminal act, and 'ontoerekeningsvatbaarheid' were employed in Chretien,[24] Stellmacher[25] and Arnold.[26] The rule that 'toerekeningsvatbaarheid' is such an absolute prerequisite that it excludes negligence in cases such as Stellmacher and Arnold should be abandoned. In the same way the rule that a criminal act is such that Stellmacher and Arnold could not be said to have acted, should also be abandoned. Whether this can be done as long as the dicta in Chretien are binding as at present, is doubtful. It would undoubtedly be a beneficial step forward in our criminal law if conduct such as that of Stellmacher and Arnold could be looked at in its entirety to determine criminal liability. The employment of the concepts 'criminal act' or 'criminal capacity' should not shut the door to a conviction no matter how socially desirable and in accordance with pre-Chretien principles such a conviction might be.

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24) supra.
25) supra.
26) supra.

The subjective approach to dolus would in any event, rightly it is submitted, result in killings being adjudged to be culpable homicide in most cases where fault is based on antecedent liability, of which the actio libera in causa is but an example.

The rule that actus reus and mens rea must be contemporaneous,[27] also needs to be closely examined and relaxed if necessary. If it were to be rigidly applied[28] antecedent liability would become an unworkable doctrine or concept. No matter how negligent a man like Stellmacher might have been when he commenced his drinking, he could not be said to have had mens rea at the time of the killing. The negligence and the killing would not be contemporaneous. If, on the other hand, the requirement of contemporaneity is relaxed one could simply view the matter in the light that when he commenced his drinking Stellmacher negligently set in motion a train of events which resulted in the death of the deceased. In respect of Arnold one could submit that he negligently set in motion a course of events that resulted in the death of his wife when he commenced an emotionally highly charged discussion with her, whilst holding a loaded pistol in his hand. The fact that he was unable to 'act' when

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27) This view is strongly supported by Burchell and Hunt 106-8; vide Bergenthuin 1986 SACC 21, 24-5 for discussion of contemporaneity and the actio libera in causa. The views advanced are unacceptable.

28) As a further example of mechanical concept jurisprudence.

the course of events so set in motion resulted in the shot being fired ought not to have absolved him. He was able to act at the initial stage, when he set the train of events in motion.[29)]

It is accordingly sumitted that the above may be construed as contradicting the criticism levelled at the South African Law Commission's analogy of the terrorist and the time-bomb. There is no objection to the analogy as long as it is confined to crimes of which culpa is the mens rea. It is only when the analogy is sought to be applied to crimes of which dolus is the mens rea that it is no longer apt. Dolus presupposes active spontaneous subjective factors that are not to be found in a time-bomb, or to the best of our knowledge, in creatures other than man.

With reference to the actio libera in causa whether intentional or negligent, and with reference to antecedent liability generally, it is submitted that the rigid application of dogmatic rules that an act is not an act unless its commission or performance is voluntary, and that 'ontoerekeningsvatbaarheid' excludes the very consideration of mens rea should not be adhered to. Insofar as Chretien supports or appears to support views of the 'act' and 'toerekeningsvatbaarheid' that would tend to narrow

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29) vide Oosthuizen 1985 THRHR 407; the author advanced the view that even in the light of Chretien the accused in Johnson could still be convicted. Bergenthuin 1986 SACC 21, 28 submits that Arnold was correctly decided.

the scope of antecedent liability or reject the entire concept from our law that decision should, with respect, be revised.

4.5 Involuntary Intoxication

The defence of involuntary intoxication lies at the extreme opposite end of the scale to antecendent liability, more particularly antecedent liability in the shape of the intentional actio libera in causa.

The law relating to the defence of voluntary intoxication prior to Chretien could be summed up as being to the effect that voluntary intoxication could not be a complete defence to a killing or an assault.[1] At most its effect on dolus could be to reduce intent to do grievous bodily harm to intent to apply force and to negative intent to kill and place in its stead culpa where an intoxicated person had committed a killing.

If the accused had been brought to a state of involuntary intoxication this could be a complete defence, provided that the intoxication was of such a degree as to negative intent, criminal capacity or the ability to act. It if were of a lesser degree and only made him aggressive or careless while still in possession of his faculties, it would not be a defence. The decision

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1) Johnson supra.

in Hartyani[2] has confirmed this view which had previously been stated in Innes-Grant.[3]

Chretien has had the effect of placing the defence of voluntary intoxication on the same footing as the defence of involuntary intoxication. For that reason alone, Chretien should be treated with some scepticism in the same way as the jurisprudential development in our criminal law that preceded it. A system of criminal law designed to protect society against its dangerous and wayward members should be able to draw a distinction between the criminal liability of a man who overimbibes knowingly and that of a man who does so unwittingly.

4.5 Specific intent and the defences of provocation and intoxication

The so-called doctrine of specific intent has been severely attacked by De Wet and Swanepoel.[4] No doctrine of specific intent has ever been worked out systematically by the courts or our legal writers.[5] It appears to have been a somewhat

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2) 1980 3 SA 613 (T).
3) 1949 1 SA 753 (A).
4) 1ed 77, 85; 2ed 111-110; 3ed 119ff; 4ed 124 ff.
5) It is said to have been first imported into our law in connection with intoxication in Fowlie 1906 TS 505 by the distinguished jurist, judge and legal historian Sir John Wessels (whose treatise on contract must still qualify as one of the most scholarly books written in South African law), and then to have been rejected in Bourke 1916 TPD 303. The Headnote in Bourke is misleading, but was

loosely used term which made more sense in practice than on paper.[6)]

One of the main theoretical objections to this doctrine was that there was no clear categorisation of crimes into crimes of specific intent or crimes of general intent to be found anywhere in our decisions or legal writings.[7)] The solution to the problem whether specific intent was a requirement for conviction on a specific charge would seem to be that this would only become clear in the course of the trial. As the evidence unfolded it would become clear to the bench, the prosecution and the defence whether any specific intent was in issue, what that specific intent was, and whether the prosecution was being successful in its attempts to prove it. If, for instance, the accused had stabbed the complainant seriously in the arms, legs or torso it would generally not be difficult for the prosecution to persuade the court that he had intended to inflict grievous bodily harm. But the accused may raise the defence that in the course of an argument he had stabbed in the direction of the complainant intending at most to frighten him, but that the complainant had

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followed in later cases with the result that Bourke was quoted as authority for the acceptance of a doctrine which had in fact been rejected in it; vide Pain 1974 SALJ 467. Be that as it may, there are many references to specific or special intent in Gardiner and Lansdown subsequent to Bourke and it was a term in constant use in our courts for more than two decades after the appearance of the sixth and last edition of that text-book.

6) vide Chretien 1103 pr where the term is authoratively rejected for the first time.

7) Burchell and Hunt 1ed 230; 2ed 295-6; Snyman (Strafreg) 149-50; Paine 1974 SALJ 467.

unexpectedly moved forward and that this had resulted in his being injured in a manner not intended by the accused. The stabbing as averred by the accused would amount to a common assault and the dispute between prosecution and defence would then revolve around the question whether the accused had intended to inflict serious bodily harm or not. As a matter of linguistic convenience the court would consider the question whether the prosecution had proved that the accused had the 'specific' intent to inflict grievous bodily harm or whether only the intent to commit a common assault had been proved. The same approach would be found in cases where the prosecution attempted to prove murder and the defence was prepared to admit culpable homicide resulting from an assault, but denied any intention to kill. An intent to injure may be clearly proved, but the question remains, had there been a specific intent to kill? The use of the word 'specific' in the latter context would serve, linguistically, to define the issue before the court clearly.

The question whether the accused had a specific intent to inflict grievous bodily harm or to kill could be affected by many factors. Was he threatened and did he strike out wildly because of fear.[8] If so, was he aware that his actions could result

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8) The doctrine of specific intent is not dealt with in relation to self-defence in the text books, but its linguistic use in a self-defence situation is easily recognized. For instance one could ask whether the accused in Ntuli had merely intended to ward off the assault of his assailant or whether he had specifically intended to kill her unlawfully. An accused, bewildered by an attack on his person, might say that he had been so confused that his mind had not focussed specifically on killing, or the possibility that he might kill.

in the death of the deceased? The accused may have been provoked. Could he, with his mind clouded by violent emotions, foresee that his actions would result in death? He may have been under the influence of liquor when stabbing or striking, or shooting. Was his mind perhaps not so befuddled by alcohol that he did not realise he might kill? In all these cases the terminology used would be whether a 'specific' intent to kill had been proved apart from the intent to strike, shoot, wound, repulse, hurt and so forth.

The way in which such an issue arises at a trial is well illustrated by the facts in Chretien.[9] The prosecution had proved that the accused had hit and injured five people with his Kombi. It alleged that he had intended to kill them. The specific intent to kill became the issue in dispute on the evidence. The prosecution failed to prove it beyond a reasonable doubt. Then the point in issue changed : did the accused intend to apply force? In other words did he have the specific intent to commit common assault?[10] Once more the prosecution failed; the accused could be proved to have been negligent only. The unusual feature about the facts in Chretien was that there was a

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9) 1979 4 SA 87 (D). The famous Chretien case stemmed from this Durban case.

10) That is apart from the intention to drive the vehicle at the crowd, trusting (so he said), that he would not hit any member of it.

question as to whether an intent to commit common assault had been proved. This does not often happen. But when the prosecution attempts to obtain a conviction for common assault arising from negligent driving it must prove that in addition to driving negligently the accused had intended to apply force. Although common assault could have been regarded as a crime not requiring specific intent,[11] the issues raised by the facts in Chretien soon showed that it did. Did the accused, in addition to the intent to drive in the direction of the crowd, have the specific intention to hit one or more of the people in the crowd with the Kombi? That was the question the trial court had to decide on. Placing his intoxication in the scales the court found that it tilted the evidence in his favour. The specific intent to apply force to the person of another or others had not been proved.

This view of the so-called doctrine of specific intent is referred to by Rumpff CJ in Chretien as follows:[12]

> 'Vanselfsprekend kan 'n hof volgens ons reg wel bevind dat 'n persoon weens invloed van drank 'n bepaalde gevolg nie

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11) It is interesting to note the Burchell and Hunt 1ed 230 suggest that common assault requires specific intent. Their statement that it is the intent to injure is of course mistaken, an intent to apply force without injuring is sufficient for common assault (that is when mere threats are not the substance of the crime).

12) 1104 A.

voorsien nie wat hy wel kon voorsien het indien hy nugter was, en dat hy dus aan 'n minder ernstige misdaad skuldig is'.[13]

This is a perfectly logical and, with respect, sensible view of the law. The failure to foresee could also be due to fear, anger, distress, mental confusion or other similar causes and need not be confined to intoxication. Viewed in this way the doctrine of 'specific' intent is no more than the use of a certain terminology to describe the narrowing of the issues raised on the evidence at a criminal trial.

If one considers the passage just cited from Chretien the much criticized term : 'able to form an intention' also becomes clearer. The criticism, mainly by De Wet and Swanepoel[14] is to the effect that if a person can not form an intention or a specific intention to inflict grievous bodily harm, it is difficult to see how he could form any intention at all; for instance, the intention to commit common assault. Similarly if he could not form the intention to kill how could he form any intention at all? The answer would appear to be that knowledge or foresight is part of dolus. A person's mind could be so befuddled

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13) 'Undoubtedly a court can find in terms of our law that because of the effect of liquor a person failed to foresee certain results which he would have foreseen had he been sober and he is accordingly guilty of a less serious crime' (my translation).

14) 1ed 85; 3ed 118; Snyman (Strafreg) 149.

by alcohol, confused by fear or clouded by anger that he lacks the judgement to foresee that his actions could result in the infliction of serious bodily injury or death. But he may,at the same time, be able to foresee and intend that his actions should amount to the application of force to the person of another. There is nothing esoteric about this. In this context the ability to form an intention is nothing more than being sufficiently in possession of one's faculties to foresee the results of one's conduct.

There is also another view of specific intent that has never been systematically worked out in our law; namely, that crimes are to be divided into crimes of specific intent and crimes of general intent and that specific intent can be rebutted by intoxication, provocation or the state of mind with which a person exceeds the bounds of self-defence or private defence. But this latter rule would not apply to general intent. This doctrine could possibly have been applied in Johnson[15] and Jassane.[16] It appears to be a normative doctrine of fault; namely, that irrespective of his real or actual state of mind[17] an accused would be treated as if he had the intention to commit a less serious crime if he successfully raised intoxication or provocation as defences to, for instance, the more serious crime of assault with intent to do grievous bodily harm. A similar result would follow where self-

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15) 1970 3 SA 535 (C).
16) 1973 4 SA 658 (T).
17) ie his psychological fault.

defence is raised to this latter crime, but the bounds of self-defence are found to have been exceeded.

This objective approach to dolus is obsolete. It is a mechanical application of presumptions and rebuttals, and if this is what was rejected by Rumpff CJ in Chretien when he said:[18)]

> 'Wat ons reg betref behoort die hele idee van "specific intent" in verband met drank, soos dit in die Engelse reg verskyn, as onaanvaarbaar beskou te word. By 'n behoorlike toepassing van ons reg is daar geen plek vir die besondere benadering nie',[19)]

there is a decided positive benefit to be derived from that decision.

As far as the law of culpable homicide is concerned it has always been a matter of cardinal importance at murder trials whether the accused had the 'specific intent' to kill. If he lacked this intent a conviction of culpable homicide would generally follow. In view of Chretien the reference to 'specific intent' would now simply become a reference to 'intent' but the law remains the

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18) 1103 H - 1104 pr.

19) 'As far as our law is concerned, the whole idea of "specific intent" in connection with liquor as it is found in English law, ought to be regarded as unacceptable. On the proper application of our law there is no room for this particular approach' (my translation). It is, with respect, an improvement in our Law.

same. It is not in the fields of dolus or culpa as such that the main importance of Chretien is to be found, but in respect of inquiries into criminal capacity and the ability to 'act;' in other words, whether the presence or absence of dolus or culpa are to be investigated at all. The nett result is that where absence of 'specific intent' to kill had in the past almost automatically led to a conviction of culpable homicide, this is no longer necessarily the case, even where the conduct of the accused was patently unreasonable: he may have been 'ontoerekeningsvatbaar'.

4.7 Statutory Culpable Homicide arising from intoxication

The effects of the Chretien decision have after six years, during which time a protracted in-depth investigation by the South African Law Commission has taken place and been reported on,[1] resulted in a proposal of the South African Law Commission which will be considered by Parliament in terms of which it would become a statutary offence to commit a 'crime' while under the influence of liquor or drugs.

The legislation proposed by of the Law Commission reads as follows:

> '1) Any person who voluntarily consumes liquor or any drug or substance which affects his mental faculties, knowing that such liquor, drug or substance has that

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1) Working Paper 5 (January 1984), Drugs Report (January 1986).

effect, and who, while his mental faculties are thus affected, commits an act for which he would have been criminally liable had his mental faculties not been thus affected, shall be guilty of an offence and shall be liable on conviction to any punishment, except the death penalty, which could have been imposed on him had he been held criminally liable for such act.

2) If, in a prosecution on a charge of any offence, it is found that the accused is not criminally liable for the offence charged, owing to the fact that his mental faculties had been affected by liquor or any drug or other substance, the accused may be found guilty of the offence in subsection (1) if the evidence proves such offence'.

If this or a similar measure were to become law a person who kills while unable to 'act' because of the consumption of liquor or drugs or who acts while lacking criminal capacity for the same reason, could be convicted of a crime. Such a crime would, strictly speaking, be neither murder nor culpable homicide. But insofar as it would be punishable homicide it could be called culpable homicide, the term culpable being used in a very wide sense.[2)]

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2) If the measure is to the effect that the accused could be convicted notwithstanding absence of mens rea and/or criminal capacity it would create a crime of strict

In this connection it is worth noting that Germany has for many years had a statutory measure,[3] similar to the one proposed by the South African Law Commission, in the German Penal Code. A consideration of the German positive law in addition to German criminal legal theories might very well have caused the many critics of Johnson to temper their expressions of dissatisfaction with the judgment. Irrespective of what the German theorists may say the accused in Johnson would have been convicted of a statutory offence in Germany. He would probably have received a term of imprisonment in excess of the suspended sentence imposed on him in South Africa and his sentence would probably not have been suspended.[4]

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liability and, in this context, culpable homicide would be the unlawful killing of a human being. If the accused could also be convicted if the crime is committed in a state of drunken automation he could be convicted of conduct which did not amount to an 'act' ie he could be convicted in respect of a killing without having 'killed'. This would reveal the latent absurdities in the dogmatic view that only voluntary acts are acts and that 'ontoerekeningsvatbaarheid' at the time of the actual commission of a crime always absolves; vide du Plessis 1985 SALJ 394, 401; contra Bergenthuim 1986 SACC 21, 22-3.

3) StGB 323 (9). The crime is known as 'Vollrausch'.

4) The writer spent 6 weeks attending at criminal trials in German criminal courts and cannot regard himself an expert. However, as an old denizen of South African ciminal courts, his instincts soon told him that the day-to-day administration of criminal justice is very realistic. One accused raised the defence of intoxication to a charge of 'predatory extortion' (räuberische Erpressung). The public prosecutor told the writer this was a mistake as the accused would be more seriously punished. He was convicted of 'Vollrausch' and sentenced to one years' imprisonment. In a South African court he would probably have been sentenced to something like R30 or 30 days for common assault involving threats only. What was clear was that crimes of violence are severely punished in Germany and excuses of 'I was drunk' or 'I was not my true self' are treated with scepticism.

5 THE DEFENCE OF YOUTH

The South African positive law is to the effect that children under the age of seven years are not liable to criminal prosecution.[1] It is submitted that this ought simply to be regarded as a rule founded on common sense.

Traditionally it was said that such children were irrebuttably presumed to be doli incapax.[2] The reference to dolus was clearly not a reference to criminal intention only, but a reference to wrongfulness generally[3] as such children could not be prosecuted for any crime including crimes of negligence and strict liability.

De Wet and Swanepoel[4] pointed out that the rule was based on the immaturity of such children which rendered them 'ontoereken-ingsvatbaar' and that the question of intent (or any other form of fault) on their part was therefore irrelevant. This point of view seemed to be acceptable. Unfortunately, however, it latently contained the idea that a sane person could be 'ontoerekening-svatbaar'. The obvious fallacy, of no importance in respect of the criminal liability of children under seven, is that no distinction is drawn between the sane and the mentally ill or mentally defective child.

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1) Burchell and Hunt 242.
2) ibid.
3) ibid.
4) 1ed 71-2.

In respect of children between the ages of seven and fourteen the traditional view was that they were rebuttably presumed to be doli incapax.[5] The prosecution could rebut this presumption by proving that the child knew that what he was doing was wrong. It was easier to rebut the presumption where the crime in question was a malum per se than where it was a malum prohibitum, and, naturally, the presumption was more readily rebuttable in respect of older than younger children.

De Wet and Swanepoel[6] criticized the rule on the ground that the inquiry should not be confined to an investigation of the child's appreciation of the wrongfulness of his conduct, but that the ability of the child to control his conduct in accordance with his appreciation of its wrongfulness should also be investigated. The latter inquiry should be the main inquiry and the guidance of psychologists and psychiatrists should be obtained.[7] In other words the question to be answered would be whether the child had been 'toerekeningsvatbaar'.

The obvious fallacy of this approach is that no distinction is drawn between the sane and the insane accused falling in the group.[8] Not to be able to control one's conduct in conformity

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5) Burchell and Hunt 242ff. The law is still as stated in the text: it is not yet clear whether the Weber case will have any effect on the criminal law, but it probably will.
6) 1ed 72.
7) 1ed 72; 2ed 100; 3ed 107; 4ed 111.
8) The treatment of the topic by De Wet and Swanepoel (previous note) is also such that no distinction is drawn between the young and the mentally ill or defective.

with an appreciation of its wrongfulness is a symptom of mental illness or defect. It indicates some abnormality of the mind. To state that youthful immaturity of mind with resultant poor judgment and a weaker resistance to temptation than that of a mature person is an abnormality of the mind is unacceptable. Infancy and youth are normal stages through which everyone passes.

Thus far, the view that 'ontoerekeningsvatbaarheid' has to be fully investigated and rebutted by the prosecution when the accused is between the ages of seven and fourteen has not found favour in the criminal courts.[9] Weber's[10] case will in all probability give rise to the adoption of the rule that it is not only the ability of the youthful accused to appreciate the wrongful nature of his conduct that is in issue in criminal trials but the full question of his 'ontoerekeningsvatbaarheid'[11]

Weber was a case in which bad law that had been established in Jones[12] had to be removed. To investigate the 'toerekeningsvatbaarheid' of a child such as the little boy in Weber was certainly infinitely better than to arrive at the untenable result in Jones that the negligence of children is to be determined by

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9) Although a child's inability to resist the pressure of grown-ups has frequently been held in his favour vide Snyman (Strafreg) 143.

10) Weber vs Santam Versekeringsmaatskappy Beperk supra.

11) De Wet and Swanepoel do not appear too hopeful about this possible development (111-2, n57).

12) Jones NO vs Santam supra.

applying the same standards as those applicable to adults, without any qualification based on the immaturity of children. The Weber rule that the ability of the child to control his conduct is such a qualification has served a good purpose. It is, however, submitted that a finding that small children are lacking in good judgment because of their immaturity and that the standards of negligence applicable to adult behaviour are not to be applied to their behaviour for this reason, would have been more realistic.[13] The Weber finding that the little boy in question forgot his training about the danger of motor cars and yielded to the impulse to play behind a car, is on close consideration a finding that he acted unreasonably - by adult standards.[14]

In the context of youth an investigation into 'ontoerekeningsvatbaarheid' when investigating criminal negligence would be an improvement on the rule that the criminal negligence of young children is to be determined along the same lines as that of adults. But one must be aware that what is really happening is that the defence of insanity is being made available to the sane.

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13) How unrealistic the Weber inquiry was, becomes evident when one considers that at the trial the child, then aged ten years, had to testify concerning his knowledge of the dangerous nature of motor cars when he was seven, cf I supra.

14) It is therefore an indirect and somewhat contrived finding that the negligence of children should not be judged according to adult standards. Their self-defence is deficient compared with that of an adult.

It is one thing to say that a person was unable to resist a temptation and is therefore criminally liable; it is another thing to say that inability to resist temptation should be a defence to the sane.

In conclusion it is submitted that the ages of irrebuttable and rebuttable lack of criminal capacity are too low in our law.[15] The legislator ought seriously to consider raising the age up to which a child is not liable to criminal prosecution to ten years and the age up to which a child is held to be rebuttably doli incapax or 'ontoerekeningsvarbaar' to sixteen years.

Had the law of delict been to this effect, neither the Jones nor the Weber case would have posed any problem. It appears incomprehensible, with respect, that the 'negligence' of a child of nine and a child of seven years and two months should have been the subject of serious investigation by our courts. It is so obviously misdirected to treat children as if they were adults as to make comment superfluous.[16]

6 'TOEREKENINGSVATBAARHEID' IN RELATION TO THE DEFENCES DISCUSSED IN THIS CHAPTER

The defence of 'ontoerekeningsvatbaarheid' consisting as it does of the two legs of not appreciating the wrongfulness of one's

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15) vide Snyman (Strafreg) 141-2.
16) Unless it be the famous ungrammatical dictum of the Beadle in Oliver Twist: 'The law is a ass'. But see I supra.

conduct and not being able to control one's conduct in accordance with an appreciation of its wrongfulness,[1] belongs to the field of mental abnormality.

People who act in anger, or who insult or assault others or beat their children unmercifully, are colloquially said to have lost their self-control. This is far from saying that they are incapable of controlling their conduct in accordance with an appreciation of its wrongfulness.[2] The man who acts in anger could be better described as having given way to his anger rather than as having become literally incapable of controlling himself. In the same way a lazy person may decide to 'give way' to his laziness and not do his work, or an amorous individual may give way to his desires and attempt to seduce a girl, or a cricket loving articled clerk may give way to his love of the sport to watch a cricket match rather than take some urgent process to the court as instructed by his principal.

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1) The two legs of 'toerekeningsvatbaarheid' have their origin in the so called cognitive and conative functions of the mind and the ability to 'will'. It is obvious that ignorance is not a cognitive malfunction and it ought to be equaly obvious that yielding to temptation is not a conative malfunction. The first leg does not mean ignorance of the law, but a failure, due to some abnormal state of the mind, to understand or appreciate that what one is doing is wrong. The second leg can obviously only have a bearing on some mental abnormality. Normal persons can and do control themselves. When a man becomes incapable of controlling himself and incapable of preventing himself from doing what he knows to be wrong, there is something abnormal about his mental state.

2) ie that they suffer from some conative malfunction.

These examples may seem facetious. But one can take them further step-by-step to clarify the argument.

Batsmen are often 'out' in cricket matches because of ill-advised 'nibbling' at rising balls moving away outside the off-stump. Every cricketer knows that one of the surest ways of throwing away one's wicket is to play at that type of delivery unless one's eye is well and truly 'in'. No batsman who has lost his wicket in this way will deny that he was aware of the danger, nor will he say that he could not have held his bat back had he wanted to. Why then did he play the shot? He yielded to temptation! A determinist would say that a man yielding to temptation has no real choice in the matter. Such a statement is of doubtful truth and cannot be allowed into the criminal law as it would undermine the very basis of the criminal law; namely, that people must resist the temptation to indulge in criminal conduct.

Of course some temptations are stronger than others. An angry man may be tempted to give the man who angered him a punch on the nose; a man whose wife tells him she intends to 'move in' with another man may be tempted to beat or kill her. The strength of the temptation may serve as a mitigating factor if the individual concerned yields to it. Yielding to or resisting temptations to commit wrongful acts are a common occurrence. But when a man <u>cannot but yield</u> to a temptation his mental condition is no longer normal.

A man may be tempted to drink while on duty or when about to drive a car. He is able to yield or resist. If he is an alcoholic his ability to resist may be very low. But if he is really unable to resist, his alcoholism may with some justification be described as a disease. The man who is attracted by a woman may work out a complicated scheme to seduce her. If she resists he may show great persistence. But if he gives expression to his carnal appetite and rapes her he is guilty of a serious crime. Yielding to the urge to have sex with her at any cost is no defence. One can hardly imagine rape in which the sex urge combined with a certain sadism is not exceedingly strong. This does not make all rapists 'ontoerekeningsvatbaar' on the basis that they could not control their conduct in accordance with their appreciation of its wrongfulness. Colloquially speaking, they may have lost their self-control. But if a rapist falls in the category of persons who cannot control their conduct in conformity with an appreciation of its wrongfulness he must be adjudged to be insane.

The above considerations have not been mentioned as an excercise in lay psychology, but merely as a reminder that criminals generally have some motive for their crimes and if these motives are allowed to become defences under the general heading of 'ontoerekeningsvatbaarheid' the criminal law will cease to fulfil any function. Thus, a psychiatrist who subscribes to determinism could easily be found to testify that the individual concerned had no choice but to yield to the temptation in question.

From the above it should be plain that it is submitted that the defence of not being able to appreciate the wrongfulness of one's conduct or of not being able to control it in accordance with such an appreciation, should be limited to the case of the mentally diseased or defective. Extending it to the youthful is of doubtful validity but, provided one is fully aware that the sane are being treated as if they were insane, it is not necessarily harmful.

Extending the defence to the intoxicated as happened in Chretien[3] which now states the law, has special problems of its own. One is here dealing with a field of the criminal law where the wrong-doer has provided himself with a defence against the criminal consequences of his conduct, which is the very reason for the loss of self control which resulted in the conduct complained of. There is something incongruous about allowing a man to buy his 'ontoerekeningsvatbaarheid' in a bottle, and then to wreak havoc.[4] The effect would be to allow him to hide behind that very 'ontoerekeningsvatbaarheid' when the results of his conduct are sought to be brought home to him.

To have 'solved' the problem by a simple application of the rule that an 'ontoerekeningsvatbare' person cannot have criminal

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3) supra.
4) As for instance in Stellmacher supra.

fault, is, with the utmost respect to the learned judges in Chretien not satisfactory.[5] The homily on the need for courts to be sceptical about such a defence is pointless particularly in view of the onus of proof.[6]

Instead of solving the problem of how to deal with the intoxicated offender, Chretien, with respect, appears to have aggravated it and legislation is being considered[7] to make the law more practical.

Legislation unless it were of a very drastic nature amounting to a direct interference with the general principles of the Common Law,[8] could not arrest the tendency to extend the ambit of the defence of 'ontoerekeningsvatbaarheid' beyond the field of the defence of insanity.

In the case of the intoxicated person one can submit that the use

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5) The Chretien judgment is a good example of concept jurisprudence mechanically applied: 'Ontoerekeningsvatbaarheid' excludes 'skuld' X was 'ontoerekeningsvatbaar and can therefore have no 'skuld'. Here the concepts of 'toerekeningsvatbaarheid' and 'skuld' achieve an absolute predominance in the relevant legal thinking and the practical consideration that X was responsible for his own 'ontoerekeningsvatbaarheid' is overlooked. 'Jurisdiese suiwerheid' in the Chretien sense means the mechanical application of concepts. To realise to what an extreme one is dealing with concept jurisprudence in Chretien, van der Merwe 1981 Obiter 142-52 ought to be carefully perused, particularly 144-7.

6) vide van der Merwe's comments at the conclusion of the article referred to in the previous note.

7) vide Drugs Report.

8) A type of legislation seldom if ever encountered.

of liquor or drugs, because of the effect these substances have on the human brain, could result in temporary insanity giving rise to 'ontoerekeningsvatbaarheid'. Matters are entirely different when one is dealing with the sane, sober adult who becomes enraged, depressed or generally 'fed-up' to the extent that psychologists or psychiatrists may be prepared to describe his conduct as temporarily pathological. To allow such a person successfully to plead that he lacked criminal fault because he became unable to control his conduct according to his appreciation of its wrongfulness, is neither more nor less than allowing the sane to plead insanity to a criminal charge. A man may experience a strong urge to kill a wife who taunts him as Arnold's wife did, or to kill a woman who taunts him as Mundell's live-in lover did or to violently confront a neighbour brutal as was the neighbour of Lesch, but to lose all self-control in such circumstances is no excuse.[9] It may be a strong mitigating factor or extenuating circumstance. But that a person who killed another simply because he became exceedingly angry should escape liability altogether is untenable.[10] Such a person may be

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9) Unless it indeed amounts to genuine identifiable and certifiable mental illness or defect.

10) The fact that the temperament or peculiar emotional circumstances of the accused contributed to his giving way to his anger ought not to absolve him entirely from liability: vide CR Snyman 1985 SALJ 240 esp 249-50. Snyman made a thorough analyses of Arnold supra and the dangers involved in extending the defence of 'ontoerekeningsvatbaarheid' before Arnold was reported in the SALR.

able successfully to advance the defence that he did not intend to kill as he was too angry to realise that his conduct could result in death, but to absolve him from liability for culpable homicide in respect of a killing committed in the course of patently unreasonable conduct, ought not to be acceptable.

In Arnold and Stellmacher there is, however, a factor that is not to be over-looked and that is that the accused both killed while in a state of automatism.[11] In Arnold it was specifically found by the Court that Arnold could not act at the time of the killing.[12] Although the court made no such specific finding in Stellmacher, it is nevertheless clear from the evidence that he had fired the fatal shot while in a state of automatism.[13] The inability of these two men to control their conduct had therefore gone beyond the stage of what, for want of a better term, one could call 'conscious ontoerekeningsvatbaarheid' and their wills were no longer in control of their bodies. Their defences therefore did not amount to saying : 'I knew that what I was doing was wrong, but was unable to control my conduct in

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11) In other words they acted unconsciously not knowing what they were doing. This is a condition entirely different from that advanced on behalf of the accused in Lesch supra. Lesch allegedly knew what he was doing but could not control himself. The very suggestion that such a defence, advanced by a mentally normal person, could possibly succeed, endangers our Criminal Law (vide CR Snyman supra n10 247-8 contra Bergenthuin 1986 SACC 21, 23-8).

12) 263 H-I.

13) supra.

accordance with this knowledge'. What was meant was: 'I neither knew what I was doing, nor did I know that I was doing anything at all'. The significance, as pointed out by CR Snyman,[14] is that these two accused could not be said to have 'acted' in the sense in which the word 'act' has come to be used in the criminal law. Totally to lose one's conscious volition is an infinitely more serious aberration than temporarily to be unable to say 'no' to the temptation or an impulse to do something violent.

In Lesch the condition of the accused did not progress to this advanced stage of absence of or total loss of control. Lesch knew what he was doing and intended to kill the deceased. His defence that he could not prevent himself from yielding to the impulse to kill the deceased, failed.[15] There would therefore appear to be no case on record so far where a sane and sober accused has been acquitted on the basis that he killed intentionally knowing full well what he was doing and that it was wrong, but that he lacked the ability to control his conduct according

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14) supra n10 242-3.

15) That the defence was considered at all is disquieting (CR Snyman supra n10, 247). To allow a sane, sober adult to plead that he knew what he was doing but could not prevent himself from doing it is to open the door to determinism. Psychiatrist Arno Plack, making a well directed attack on the very existence of the criminal law in his book 'Plädoyer für die Abschaffung des Strafrechts' uses as the mainspring of his argument the proposition that the human will is not free. Plack is a determinist.

to his appreciation of its wrongfulness.[16)]

It is also doubtful whether an appreciable number of accused persons would advance this defence. To admit openly at a murder trial that the killing was deliberate and intentional would be a very dangerous line to adopt. If the 'inability to control'[17)] leg of 'ontoerekeningsvatbaarheid' fails, the accused will have relieved the prosecution of the necessity to lead evidence of intent to kill.

'Ontoerekeningsvatbaarheid' of the conscious variety as raised in Lesch can be regarded as a defence that will only be raised in exceptional cases, with no very great prospect of success. It is to be guarded against and the tendency to allow a sane, sober, adult who has committed an intentional killing to successfully raise the defence that he was 'ontoerekeningsvatbaar' in the sense of not being able to resist a temptation or to curb a violent impulse,[18)] is to be discouraged.

From the point of view of the law of culpable homicide, it is

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16) If one may be allowed the colloquialism Lesch supra and van Vuuren 1983 1 SA 12 (A) were 'near misses'. These two cases and Arnold supra should be compared with Kennedy 1951 4 SA 431 (A) to see how a former generation of judges dealt with violence committed under provocation and emotional stress by an emotionally unstable person.

17) ie the conative 'leg' of criminal capacity.

18) vide CR Snyman supra n10, 250.

alarming that persons like the accused in Stellmacher and Arnold could not have been convicted of that crime. Their conduct was grossly unreasonable and their eventual inability to act or their lack of criminal capacity ought not to have absolved them from all fault, including culpa. In the latter context courts should, with respect, pay more attention to considerations of antecedent liability,[19] and prosecutors should argue strenuously in favour of its application.

A Court should not find that a person who, while in possession of all his faculties, embarks on a course of conduct that could reasonably foreseeably result in another person's death, is absolved from liability for murder as well as culpable homicide, should such death eventuate and he be adjudged unable to have acted and/or to have been 'ontoerekeningsvatbaar' when the final fatal act, in the purely physical sense, was committed. Men who kill because they cannot control their violent passions are murderers, and men who bring about the death of others through acting without reasonable foresight are guilty of culpable homicide. That is what the law has been for decades and that is

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19) vide CR Snyman supra n10, 243 for a clear exposition of 'antecedent liability'. Regrettably this doctrine is not receiving sufficient attention in our courts. Nevertheless it was applied in a very practical manner in Steynberg 1983 3 SA 140 (A) (vide esp 352 C-D). Nkwenya (supra) can also be regarded as a case in which convictions of culpable homicide were based on antecedent liability (vide du Plessis 1986 SALJ 1, 1-3, contra Bergenthuin 1986 SACC 20, 22ff).

how it ought to remain if it is to fulfil a social function and not become an intellectual chess-board where concepts are moved about like bishops, knights and pawns.[20)]

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20) vide du Plessis 1984 SALJ 50, 55.

CHAPTER V

THE ELEMENT OF UNLAWFULNESS IN CULPABLE HOMICIDE

1 General remarks on unlawfulness

In the Anglo-American legal system unlawfulness as an element of criminal conduct has not been given much attention.[1] This is no doubt due to the pragmatic approach adopted to criminal law by Anglo-American lawyers, and also to their adherence to the division of criminal conduct in the two basic elements of actus reus and mens rea.[2] A pragmatist would simply take the view that all acts forbidden by the criminal law are prima facie unlawful and should an accused aver that his conduct although apparently unlawful, was justified, it is for him to raise the relevant defence of justification and for the prosecution to rebut it.[3]

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1) Strauss (Toestemming) 231-2; Van der Westhuizen 385-6.
2) Van der Westhuizen 326 ff.
3) South African criminal lawyers have adopted this approach for decades and no in-depth discussion of unlawfulness as an element of crime was embarked on in any of the main textbooks until the appearance of Snyman (Strafreg) in 1981. Although Snyman's discussion (74ff) is not unduly lengthy he deplores the superficial discussion in De Wet and Swanepoel and advises that the in-depth treatment of the element of unlawfulness by Strauss (Strauss (Toestemming) 246-64) and by Van der Westhuizen (371, 452-96) should be studied.

In German criminal law the picture is different. With their love for dogmatic discussions the German Criminal legal theorists have investigated 'das Wesen'[4] of 'Rechtswidrigkeit'[5] 'zum Überdruss'[6] as they have done with all the other elements of crime. In their system of concept jurisprudence the concept of unlawfulness has been 'given the full treatment' and the reader of their works is spared nothing in their indefatigable efforts to arrive at an accurate description of, and a profound insight into, the nature and essential being (das Wesen) of unlawfulness.[7] Their investigations, with respect, appear to be largely wasted effort and an example of the preponderance of the means over the end.

The only real value to be found in this part of the work of Strauss and van der Westhuizen, particularly that of van der Westhuizen which is the more recent, is that there is a brief summary of all the main views on unlawfulness, and these are legion, held by particularly German but also Dutch, Swiss and Austrian writers on criminal law and the law of delict over the last 180 years or so. The positive contribution of all this

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4) The nature or rather 'the essence'.
5) Unlawfulness.
6) ad nauseam.
7) The discussion in Strauss (Toestemming) and van der Westhuizen is largely devoted to the views of German writers. Perusal of van der Westhuizen 452-75 (or only the index (ix) should suffice to indicate the tedious nature of these investigations by the German theorists

theoretical writing on the Continent is not very substantial[8] and it is submitted that in terms of positive results the Anglo-American system in which unlawfulness has not been investigated in any comparable depth is not very much poorer than the German system in which it has been investigated with great diligence.

The commencement of the dogmatic problem posed by the nature of unlawfulness is the rejection of the statement that that is unlawful which is forbidden by the law, as a tautology leading to a vicious cycle.[9] In other words the statement 'that is unlawful which is forbidden by the law' is rejected as a purely quantitative statement. It does not qualify the nature of unlawfulness. Furthermore the statement 'that is unlawful which is not justified' is circular as becomes evident once one adds the qualification: 'and that which is not justified is unlawful'. To put it plainly; the statement 'that is unlawful which is not justified and that is not justified which is unlawful' says nothing.

Now, one virtue that a tautological statement has, is that it is

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8) Commencing with the view that it is tautologous to define that as unlawful which is forbidden by the law, the theoreticians seem to go 'full cycle' after pages and pages of discussion and arrive back at the tautology they initially rejected; vide van der Westhuizen 465. It would also seem that some of the theories differ from each other in name only; vide van der Westhuizen 463-4; Snyman 69.

9) van der Westhuizen 437-8.

incontrovertibly formally true. Many tautological statements are so obviously true that there is no point in making them. These are called fatuous tautologies. In such tautologies the predicate is identical with the subject, for instance 'a man is a man', or 2=2. Unless one wishes to make an excursion into the irrational philosophy of Nietzsche or the supremely rational philosophy of Hegel in both of which systems the proposition of identity namely A=A is denied, such statements hardly merit consideration. Not all tautologies are of this nature. Some are useful in that the predicate tells us something about the subject that would not be apparent from a bare repetition of the subject. Thus 1+1=1+1 tells us nothing[10] but 1+1=2 or 2=1+1 though strictly speaking tautologous[11] are statements in which the subject is clarified by the predicate.

The statement: 'that is unlawful which is forbidden by the law' is at least a useful tautology. It tells us that nothing is unlawful which is not forbidden by the law in other words it is a

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10) Unless we go outside the proposition and investigate what the proposition 1+1=1+1 tells us about the mind that holds it to be incontrovertibly true. This would be a Nietzschean inquiry.

11) The tautologous and analytical nature of mathematical propositions was seriously questioned by Kant. He held that 7+5=12, and by the same token every proposition of pure mathematics, is an a priori synthetic proposition. This is the basis of his critical philosophy and a serious attack is made on it by those who aver that such propositions are tautologous.

statement of the principle of legality.[12] Seen in this light, it is a most meaningful or useful tautology or perhaps not a tautology at all.

The statement : 'That is unlawful which is forbidden by the law and not justified in the circumstances' tells the criminal lawyer a great deal. It is more than an empty circular repetition of one and only one statement, the circular nature being disguised by the use of the synonymous phrase 'not justified' for 'unlawful'. The statement tells us that forbidden conduct is unlawful unless, in the circumstances, some ground of justification is present. In other words once an unlawful act has been established, its unlawfulness is not necessarily final but prima facie only and rebuttable by proof of or failure to disprove a ground of justification.

It is in this latter connection that the dogmatic investigation into the nature of unlawfulness is largely to be seen. There is also the question whether unlawfulness is determined purely objectively, that is by considering solely the physical side of allegedly criminal conduct complained of, or whether subjective factors also determine unlawfulness apart from their bearing on fault.

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12) On arriving at this conclusion one may be said to have gone 'outside the proposition'. But legal propositions are statements of rules within a living system not statements reflecting some aspect of logical form.

Snyman[13] states the problem succinctly as being to the effect that the grounds of justification are not a numerus clausus and that the statement 'all conduct which is forbidden by law is unlawful' is defective as a definition of unlawfulness as it gives no indication as to which grounds of justification may be recognized in future and it also does not indicate the limits of present or future grounds of justification.

If we see the question of the nature of unlawfulness as the question: 'What characteristics must a ground of justification have to be recognized as such?' it becomes clear that the nature of unlawfulness, in this sense, must remain a mystery. At any given stage in the history or development of a system of criminal law it can only be partially and tentatively answered. A most learned and convincing argument and set of submissions may be advanced in favour of a hitherto unknown ground of justification and a court may reject it without ceremony; or a ground of justification previously consistently rejected may be recognized somewhat unexpectedly.[14] One can at most try to predict such results in a spirit of modesty by investigating judicial trends and the current - therefore possibly future - mood of the courts.

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13) 68.

14) eg necessity or duress. This defence was consistently rejected since Dudley and Stevens 1884 14 QBD 273 as appears from Hercules 1954 3 SA 826 (A), but accepted in Goliath 1972 3 SA 1(A). What is puzzling about Goliath is how the Provincial Division could have acquitted Goliath in view of Hercules and Bradbury 1967 1 SA 387 (A).

This statement will no doubt be called 'positivist'.[15] Insofar as a positivist is a man who believes that people should eat when they are hungry and drink when they are thirsty and that the main concern of the lawyer is the law of the courts, the charge is admitted and far from being treated as a reproach it is regarded as a compliment.[16]

If one does not accept the positivist approach as above outlined, one must seek the possible validity of hitherto unknown grounds of justification in the metajuridical field.[17] The answer to what would found a defence of justification is then to be sought 'in the stars' or in natural law or natural reason or an a priori sense of justice inbuilt in the human mind, soul or psyche before, prior to and with ascendancy over all earthly systems of law. There might very well be this LAW beyond the laws, these NORMS (one is tempted to write norms) beyond the norms embodied in criminal prohibitions, but, this LAW and these NORMS have as yet neither been finally discovered, fully uncovered nor comprehensively described. It is also not to be overlooked that even if the true a priori legal or moral nature of unlawfulness were to be conclusively demonstrated by some genius of a stature

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15) vide CR Snyman 1985 SALJ 120, 126.
16) vide Forsyth VII for a similar credo.
17) Strauss (Toestemming) 284 seems to deny this, but the view that future, as yet unknown, grounds of justification are already part of the positive law is patently a legal fiction, part of the beloved fiction that all future developments of the common law are merely clearer expositions of the law as it always has been.

and ability hitherto not encountered among mortal men,[18] the courts might still, on grounds of expediency or public policy or common sense, reject it. The legislature may also decide not to embody its precepts in legislation, and we would still be left with positivism, in other words the law of the courts.

If one were to hazard a guess, or make a prognosis on what considerations would weigh with the courts in deciding whether a hitherto unknown or unrecognized ground of justification should be accorded the status of a defence excluding unlawfulness, one would possibly not be far wrong if one were to say that the courts would be guided by what they consider to be reasonable and in accordance with the community's sense of justice.[19] The limits of any defence of justification would also be determined by what is considered reasonable in the circumstances.[20]

An obvious criticism of these views is that neither the community's sense of justice nor what is reasonable is defined.[21]

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18) He would have to be the superior of Plato, Aristotle, Thomas Aquinas, Grotius and Immanuel Kant. Kant's philosophy of the Categorical Imperative is perhaps the most ambitious and impressive attempt to find a NORM above the norms but although still greatly respected it is no longer accepted.

19) Goliath seems to be based on considerations of what could be reasonably expected of a normal person in the position of the accused.

20) vide Visser and Vorster 107.

21) That instead of defining unlawfulness one unknown has merely been expressed in terms of another unknowm. Logically the criticism is unanswerable but practically one has merely to read the judgments referred to immediately afterwards in the text to realise that the courts work with vague terms like 'the community's sense of justice' or 'public policy'.

As regards the community's sense of justice; it is indefinable. But that obvious consideration has not deterred the Appellate Division from having recourse to it in Ewels,[22] Chretien[23] and Goliath.[24] It is also clear from Goliath, Bailey,[25] Ntuli[26] and the cases on section 49 of the Criminal Procedure Act,[27] that a ground of justification is exceeded if the conduct of the accused becomes unreasonable in the circumstances and the standard of reasonableness is that of the reasonable man.

Whether unlawfulness is to be determined objectively only or whether subjective factors are also to be taken into account, has given rise to considerable debate. The pragmatic approach is that it is objectively determined whether an actus reus has been committed by the accused, and that the question whether the accused has acted unlawfully is also determined with reference to his physical conduct. If any physical act forbidden by the criminal law is established, its unlawfulness is likewise established, at least prima facie, and what remains to be decided upon before conviction or acquittal is whether there has or has not been fault. In other words unlawfulness is an attribute of the physical element of crime and fault is determined with reference to the state of mind of the accused.

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22) Minister van Polisie v Ewels 1975 3 SA 590 (A).
23) supra.
24) supra.
25) 1982 3 SA 772 (A).
26) 1975 1 SA 429 (A).
27) vide Ch III supra.

This view can be criticized as an over-simplification. Consideration of attempt makes this clear. The objective act of the accused in an attempt is very often per se not unlawful. Nevertheless, viewed in conjunction with the state of mind of the accused; namely, an intent to achieve the completed crime, it is seen to be unlawful.[28] This is particularly true of attempts to do the impossible. An accused who attempts an abortion on a woman whom he believes to be pregnant but who is not pregnant, cannot commit the crime of abortion no matter how hard he tries. The unlawful act of bringing about an abortion is simply not possible in the circumstances. There is, however, no doubt that in our law as it stands at present such conduct would be adjudged unlawful.[29] The element of unlawfulness would be supplied by the erroneous belief on the part of the accused that the woman was pregnant and that he could effect an abortion on her. Similarly the objective unlawfulness of homicide is not and cannot be present if one shoots, stabs or in some other way attempts to 'kill' a 'person' who is already dead. But such conduct could, depending on the circumstances, amount to attempted murder.[30]

The same physical conduct could also, depending on the intent with which it is committed, amount to a lawful chastisement or an

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28) This is the essence of the problem with which the court was faced in Ndhlovu 1984 3 SA 23 (A).
29) Davies 1956 3 SA 52 (A); W 1976 1 SA 1 (A); Ndhlovu supra.
30) Ndhlovu supra.

unlawful assault. If a school teacher inflicts corporal punishment on a child to vent his wrath, that would be an assault; if the same act were done for the purpose of inflicting punishment according to law it would be lawful.[31)]

These considerations seem to contradict the division of crime into physical and mental elements and certainly to contradict the view that unlawfulness is ascertained objectively only.[32)] The problem is, however, more apparent than real. The division of crimes into actus reus and mens rea is usually effected without difficulty. The exceptional cases where the act requires a mental element before it becomes unlawful, or where an objectively unlawful act is not unlawful because of the mental attitude of the actor,[33)] merely indicate that one is not dealing with a system of concept jurisprudence where concepts are given absolute delimitations from which no deviation is tolerated. The fact remains that there can be no crime without some physical element and, unless one is dealing with crimes of strict liability, mens rea or fault is always a requirement.

Criticism of the division into actus reus and mens rea usually comes from writers who think in terms of concept jurisprudence.

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31) Snyman 108; CR Snyman 1985 SALJ 120, 124.
32) CR Snyman 1985 SALJ 120, 124 regards I 1976 (1) SA 781 (RA) as a clear pointer that unlawfulness can depend on subjective factors. The case also indicates that grounds of justification are determined with a view to public policy.
33) As for instance in I supra.

Once one realises that one is not dealing with the rigid concepts of a system of concept jurisprudence the criticism is seen to be beside the point.[34] It is submitted that a system of fluid concepts is superior to a system of rigid concepts as only fluidity and elasticity of legal thinking can cope with the multifarious problems and problematic situations that arise from or are encountered in criminal conduct which is after all part of life itself: a boundless totality of objective and subjective, physical and mental, fluidity.

For present purposes conduct will be viewed as unlawful if it is forbidden by the law and not held to be justified in the circumstances.[35]

2 The unlawfulness of culpable homicide

Homicide ought at first blush to pose no problem at all on the

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34) The division of crimes into actus reus and mens rea is generally regarded as Anglo-American. A Danish Criminal Lawyer (LLD and Professor of Law in Copenhagen) told the present writer that the same view is held in Denmark. Anglo-American jurists use the division as a flexible matter of convenience and do not regard it as an inviolable dogmatic basis of the criminal law; vide van der Westhuizen 326 ff.

35) The Germans are forced to resort to this approach as well; vide van der Westhuizen 490. Conduct is formally unlawful if it is in contravention of a criminal provision. It is materially unlawful if it cannot be justified. There are therefore two concepts of unlawfulness viz formal and material. This reminds one of the fact that because his philosophy could not accommodate time, Hegel postulated normal time and absolute time, thereby dividing one incomprehensible concept into two!

question of unlawfulness. One should take as one's starting point the proposition that human life is the most precious thing known to the law. To kill a person is therefore prima facie unlawful. The unlawfulness and the killing are therefore simultaneously established. Grounds of justification for the killing of a human being must also because of the sanctity of human life, be very few and difficult to establish. The above general statements probably reflect ninety per cent or more of every-day practice in homicide cases. But there are theoretical difficulties that ought to be considered. One such is the question whether it is indeed so that conduct is either lawful or unlawful.[1)] To accept this is to accept what logicians call the rule of the 'excluded middle'. It may be stated thus: if all A is either X or Y there is no A which is neither X nor Y. If all conduct is either lawful or unlawful there is no conduct which is neither lawful nor unlawful.

Bearing in mind the difficulties experienced in attempting to define exactly what is unlawful, it is submitted that the rule of the excluded middle must be approached with caution in respect of lawfulness and unlawfulness.

There is also the statement that there are no degrees of

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1) This view is generally held; vide Strauss 1970 SALJ 471, 477 and van der Westhuizen 438ff.

unlawfulness.[2] In view of the uncertainty concerning the precise nature of unlawfulness it is also a statement that should be approached with circumspection.[3]

Could there be killings that are neither lawful nor unlawful? Could there be unlawful killings that are more unlawful than others or killings that are unlawful from one point of view but lawful from another. Are there killings that are objectively lawful but unlawful because of the state of mind of the killer?[4]

It would be arrogant to believe that one can answer these questions with any degree of finality. It would also be impossible to investigate them thoroughly in this one chapter.

Leaving aside the law of delict the first question could be

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2) Van der Westhuizen 438 ff.

3) There are white cats and black cats but there are also grey cats and as Rudyard Kipling wrote: 'Of the grey-coat coming who can say? When night is gathering all is grey' (Barrack Room Ballads: 'The Ballad of the King's jest'). In view of the Russian invasion of Afghanistan in 1979 one is forced to comment wryly that Wali Dad the victim of the King's jest was only about 100 years out in his warning of an impending invasion.

4) A consideration of these and other related questions has brought JMT Labuschagne (1977 DJ 310, and 1974 DJ 108) to the conclusion that the search for material unlawfulness is misdirected. There is much to be said for Labuschagne's approach. It is only a great pity that this author encases some clear thinking in almost unintelligible language, some of the terms being of his own invention. He is, however, no young Osric (Hamlet 5,2, 129-35) and his work is well worth reading; Labuschagne's views are summarised in van der Westhhuizen 421ff.

rephrased as follows: are all killings either lawful or unlawful in terms of the criminal law or are there killings that the criminal law does not forbid but does not sanction either. Posed in this fashion it is submitted that the first question takes on an entirely different complexion. One knows this almost instinctively. A killing which is the result of sheer misfortune is not forbidden by the criminal law, but that is far from saying that it is authorised or sanctioned by the criminal law. If we were to personify the criminal law as a demi-God giving instruction it could well be imagined as saying; 'do not kill negligently, if you do you will be punished. You will not be punished if you should kill through sheer misfortune but if such a killing can at all be avoided; please do so'.

One could of course say that it is unreasonable to kill if one can at all avoid the killing. But in saying this one overlooks that the standard of care expected of a man is that of the reasonable man, the diligens paterfamilias not the diligentissimus paterfamilias. Although one may not be punished for failing to observe standards of unpractical ultra-caution the criminal law personified or semi-deified as above, would certainly not give one a pat on the back for causing death in such a way.

An objection to this line of argument would be that unlawfulness or the absence of it, is being made dependent on mens rea. The objection misses the point. A killing that is purely accidental

involves no mens rea; it is not even unlawful. Insofar as the criminal law would in any event prefer people to avoid it, it is not lawful either - at least not lawful in the sense of being enjoined and sanctioned by the law. In other words, it is neither unlawful nor justified and one could not be faulted for placing it in a 'grey' or 'middle' area between what is clearly lawful and what is clearly unlawful. At this stage, it is, perhaps, apposite to remark that that which is not justified is not necessarily unlawful. Killing a person by misfortune is not justified. We are neither enjoined nor authorised to do this. Compared with killings that are justified it is, therefore, of a more neutral nature and could fit into a grey or middle area between what is justified and what is unlawful. The existence of such a grey area is more readily acceptable than of a grey area between what is unlawful and what is lawful. One could go further and, using a fourth descriptive term, assert that purely accidental killings are neither justified, lawful nor unlawful, but they are certainly not criminal.[5)]

To pursue this line of thinking: is the lawfulness of a killing done in self-defence the same as the lawfulness of a purely accidental killing? Concerning the first, one could say that the killing is justifiable; concerning the latter, the terms would be inappropriate. Is the lawfulness of a killing done by an execu-

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5) The use of this term is a sharp reminder that once one strays off the straight and narrow path of objective unlawfulness, involvement in mens rea, becomes almost immediately inevitable; 'criminal' has overtones of fault.

tioner with due observance of all formalities prescribed by law in terms of a duly pronounced sentence of a court of law the same as the lawfulness of a killing in terms of section 49 of the Criminal Procedure Act,[6] or the lawfulness of a killing in self defence, or a killing committed under duress? There are obvious differences. If the executioner were to take pity on a condemned man and allow him to escape instead of hanging him the executioner would be guilty of a crime. A private citizen effecting an arrest may lawfully decide not to kill whereas a policeman may be in a different position. A man forced to kill, as was the accused in Goliath, but who 'takes his chances' and decides not to kill will be praised rather than reproached, assuming he escapes from the person applying the duress. Similarly a man who is attacked may possibly, on religious grounds, decide not to defend himself. He would be acting lawfully. If, on the other hand, his child is under attack and he decides not to protect the child his conduct may on the strength of Ewels,[7] turn out to be unlawful. In other words there are situations in which one is enjoined by the law to kill lawfully and situations where it would be lawful to kill and also not to kill. It is therefore submitted that the proposition that conduct is either lawful or unlawful and that there is neither a neutral middle area, nor degrees of unlawfulness, should be very

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6) 51 of 1977.

7) Minister van Polisie v Ewels 1975 3 SA 590 (A). In Ewels it was held that policemen were under a duty to protect a person who was being assaulted in their presence. The decision was based on public policy and the community's sense of justice.

carefully treated. It might very well be false and is one of the main reasons why such entertaining, but impractical, anomalies as the following can be devised:

> A threatens B with death unless he kills C. B submits and attempts to kill C but C is stronger or 'quicker on the draw' than B and kills B instead. Has C acted lawfully?[8] One cannot lawfully defend oneself against a lawful attack. If B's attack was lawful C's defence was unlawful.

There are several possible answers to this conundrum. One is that only the survivor will be in court and no formal pronouncement need be made on the lawfulness or otherwise of the deceased's conduct.[9] Another is that C would be defending himself against the unlawful attack of A.[10] A further solution is that C could not be acting unlawfully in doing something he is entitled to do namely to defend himself.[11] The last solution may be said to amount to a petitio principii as C is not entitled to defend himself against a lawful attack. What the last solution, indeed the whole conundrum, demonstrates is that unlawfulness can be variable.[12] From the point of view of B he

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8) vide CR Snyman 1985 SALJ 120, 124; Labuschagne supra 115.
9) This ready answer would not be available if both B and C were to survive and either or both were to be charged with attempted murder.
10) vide du Plessis 1985 SALJ 503, 510.
11) JMT Labuschagne 1974 DJ 108, 117.
12) ibid, Labuschagne points out that conduct may be lawful in one respect and unlawful in another. Worthy of note is his apparent approval of the fluid English approach to actus reus and mens rea (112-4).

is entitled to save his life by killing C; from the point of view of C he is entitled to save his life by killing B. The matter would be entirely different if B were a policeman with a warrant for C's arrest and C were to shoot and kill him in 'self defence' while he was attempting to shoot C lawfully in terms of section 49 of the Criminal Procedure Act.[13)]

A comparison of the case of the policeman with that of the man acting under duress supports the contention that there could be degrees of unlawfulness or lawfulness. When acting in the execution of A's unlawful design there is some taint of unlawfulness about B's conduct.[14)] No such taint attaches to the conduct of the policeman.

Another conundrum is posed by the consideration that a lewd suggestion made to a prostitute does not amount to crimen injuria as she has no dignitas to impair.[15)] A prostitute would therefore not be acting lawfully if she were to slap a man moderately in 'defending' herself against his lecherous suggestions. The obvious answer is that on the bare facts of the problem it may appear insoluble but in a real-life situation it may appear

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13) 51 of 1977.
14) If B were to kill C the killing would be adjudged unlawful at a prosecution of A, but lawful at a prosecution of B. Clearly the word unlawful has no single, clear immutable meaning.
15) JMT Labuschagne 1974 DJ 108, 116.

that the man was being vindictive or that the prostitute was feigning indignation. In the absence of these factors the prostitute would probably be found to have acted lawfully as there is in any event some taint of immorality or unlawfulness attached to making lewd suggestions to any woman no matter how low her standards.

A third example is that of a man defending himself against a very mild attack. The attacker would be acting lawfully on the basis that the defence de minimis non curat lex renders the trivial 'crime' lawful.[16] The answer is that an attack covered by the de minimis rule would nevertheless bear a taint of unlawfulness[17] and that the defender would also have to defend himself in an equally trivial manner or his defence would be excessive and therefore unlawful. If his defence is as trivial as the attack both defence and attack, would fall under the heading of de minimis.

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16) ibid. JMT Labuschagne refers to Burchell and Hunt (1ed) as authority for the proposition that the defence de minimus excludes unlawfulness. This is, however, based on a dictum of Trollip JA in Kgogong 1980 3 SA 600 (A) with which Burchell and Hunt (382-3) disagree. It is submitted that Burchell and Hunt are right, that the crime remains a crime but that the law refuses to take cognizance of it because it is trivial, not because the conduct concerned is lawful. The acquittal of the accused is a procedural formality and not a pronouncement that his conduct was lawful.

17) Even if unlawfulness were excluded the conduct would be criminal in every respect except that it is trivial.

These conundrums discussed in an interesting manner by JMT Labuschagne,[18] serve little purpose except to illustrate that unlawfulness ought to be treated as a fluid concept. In terms of a system of concept jurisprudence where the delimitations of a concept are rigidly adhered to, these comparatively harmless riddles could cause 'elementological' havoc of a high order.

If the killing of a human being is per se unlawful all killings before van der Mescht[19] would have amounted to culpable homicide. This was not the case. What then was the peculiar nature of the unlawfulness that rendered killings unlawful in the days when culpable homicide was defined as the unlawful killing of a human being? The unlawfulness of such killings stemmed from their being the result of some unlawful activity and the application of the rule versanti in re illicita omnia imputantur quae ex delicto sequunter. If one considers the facts in van der Mescht this is clarified. Van der Mescht melted gold amalgam privately - an unlawful activity. This caused certain bystanders, including some children, to inhale a poisonous gas resulting in their death. Their deaths had been caused by the unlawful activity of van der Mescht; he had, therefore, killed them unlawfully. The court rejected the versari doctrine and also

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18) 1974 DJ 108. He refers to more such examples all of which indicate the danger of being shackled by a rigid concept of unlawfulness.
19) 1962 (1) SA 521 (A).

found that van der Mescht had not acted negligently. He was acquitted. Can it be said that the killings had been lawful? As the killings had, on the finding of the court, been the result of an unforeseen and unforeseeable accident, albeit the result of an unlawful activity, it could be submitted that the killings were not unlawful. One baulks at the suggestion that they were lawful; they had after all resulted from an unlawful course of conduct. The killings therefore belong to a twilight zone where they are neither clearly lawful nor clearly unlawful. Had the deceased been passengers in van der Mescht's car and had they died in a road accident van der Mescht would have been convicted of culpable homicide had the accident resulted from his negligence. If, however, he was not proved to have been negligent, would the killings have been lawful? It is submitted that such killings though not unlawful are not lawful either in that the criminal law would rather they did not take place.[20)]

The consideration of facts such as those in van der Mescht provide a further pointer, it is submitted, at the doubtful nature of adopting the dogmatic stance that conduct is either lawful or unlawful and of denying that there are degrees of unlawfulness, or that what is unlawful from one point of view could be lawful from another point of view.

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20) Or else one could say that the rule of public policy which proscribes killing and places a high value on human life, and which underlies the law of murder and culpable homicide would rather that such a killing not take place.

Can the presence of mens rea change an otherwise lawful killing into an unlawful killing? Here we have arrived at the Dadson[21] antinomy. Dadson was a policeman who shot a person stealing wood. The offence, as far as Dadson knew, was of a minor nature and Dadson was not entitled to shoot the offender. In fact the offender had previous convictions thereby making the offence, committed in Dadson's presence, a felony. Dadson was entitled to shoot a felon. On a charge of unlawful wounding Dadson was convicted notwithstanding the objective lawfulness of his conduct. His ignorance of the fact that he was shooting at a felon was the basis of the conviction.

There have been many arguments advanced in support of the conviction and many condemning it.[22] The debate could continue till doomsday without any definite result being reached. The view taken by any one group of writers would probably depend on the general trend of social thinking at the time and, possibly, on the temperament of the individual jurist. In the present South African situation where many people believe, rightly or wrongly, that police powers should be curbed, the decision would probably be supported. In view of our law on attempt to commit the impossible an accused in Dadson's position would probably be

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21) 1850 4 Cox CC 358.

22) vide Smith and Hogan 4ed 328, 5ed 33. The views expressed on page 34 of the 5ed carry great conviction; cf Burchell and Hunt 115 n79.

convicted.[23] Among writers on criminal law it is possibly only the rugged individualist, the supreme positivist who would dismiss Dadsons's knowledge or ignorance as irrelevant and state that a man cannot be convicted of a crime for committing a lawful act, no matter what beliefs he may entertain in his ignorance.

Dadson represents a real life conundrum and one must simply accept that the answer to the riddle is not written in the stars but depends on the policy followed by the courts. The decision does indicate beyond any dispute that an objectively lawful act can lead to a conviction because of the mens rea of the actor.

In respect of culpable homicide the question is whether the killing of a human being is per se unlawful or whether it becomes unlawful because it is negligently committed. The latter is the view of Hunt.[24] But it is submitted that one cannot allow the unlawfulness of homicide to depend on the mens rea of the perpetrator. In the latter case killings, committed by young children, 'ontoerekeningsvatbare' intoxicated people, mentally ill or defective persons and persons provoked to the stage of being 'ontoerekeningsvatbaar' would have to be adjudged lawful.

This would obviously be absurd and the only answer is that the unlawfulness or otherwise depends on many factors including the mens rea of the perpetrator and on the exact circumstances of

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23) Dadson would also be convicted in England to-day, (Smith and Hogan 34, Glanville Williams (Textbook) 498) because of a statutory provision.

24) Discussed supra ch I, 5.3.

each case. To put forward a different view would amount to no more than advancing one more inconclusive theory.

3 CONCLUSION

Culpable homicide is generally committed in road or industrial accidents, or is the result of a fatal assault where intent to kill is either absent or can not be proved. In the case of assault there can be little dispute about the unlawfulness unless one of the defences discussed above[25] is raised. Road and industrial accidents pose a more serious problem as the activities concerned are not intrinsically unlawful. If negligence is not established there will in any event be no conviction and from the point of view of the criminal law it would be irrelevant whether the killing was lawful or not. It would, however, clearly belong to that category of lawful conduct that is not recommended or enjoined.

In the average homicide prosecution one must simply accept the general approach that the killing is prima facie unlawful and that the unlawfulness is accepted as proved beyond a reasonable doubt unless a ground of justification is raised and not rebutted by the prosecution. Ours is not a system of rigid concept jurisprudence and to make more of unlawfulness would result in complicated discussions that are of little, if any, practical value.

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25) Ch IV.

CHAPTER VI

THE ENGLISH LAW RELATING TO MANSLAUGHTER

1 SOME GENERAL INTRODUCTORY REMARKS ON MURDER AND MANSLAUGHTER IN ENGLISH CRIMINAL LAW.

1.1 Introductory

English law presents a different picture from German law: one of the main differences being that there is little, if any,strict adherence to elementological concepts that dominate legal thinking in a dogmatic way. This is well expressed by Smith and Hogan[1] as follows:

> 'The analysis into actus reus and mens rea is for convenience of exposition only. The only concept known to the law is the crime; and the crime exists only when actus reus and mens rea coincide. Once it is decided that an element is an ingredient of an offence, there is no legal significance in the classification of it as part of the actus reus or mens rea'.

This approach has the advantage of avoiding sterile debates on the nature of concepts and it also avoids acquittals on purely dogmatic grounds where convictions on a straightforward

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1) 30

application of the law are clearly called for.[2] The same applies to convictions on purely dogmatic grounds where acquittals are clearly called for.[3]

It is perhaps interesting to note that English positivism or empiricism decried by some,[4] and praised by others,[5] is probably partly a product of Kantian thinking,[6] just as German rationalism is.

A disadvantage of the English empirical or positivist approach is that it may result in a number of divergent specific rules on the same general topic, difficult to reconcile with each other and often in conflict with one another. English judges are also individualists and are not prone to allow dogmatic or logical reasoning to override their perception of their duty to apply the law.[7] Where 'the law' is 'unjust' due to changing circumstances or accidents of history, this can result in what Glanville Williams[8] has called a 'legal hocus pocus' in order to

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2) For an effect of concept jurisprudence vide the 'intent to kill precludes conviction of culpable homicide' debate discussed in du Plessis 1984 SALJ 50; supra ch 1, 1.1.
3) Smith and Hogan 36-7.
4) eg Snyman 1985 SALJ 120, 128-30.
5) eg Forsyth vii - viii .
6) vide Cairns H Legal Philosophy from Plato to Hegel 390.
7) Majewski 1976 2 AER 142 (HL) is a good example of this judicial individualism. The case was about an accused who pleaded that he had committed serious assaults while in a state of drug and drink induced automatism. The court refused to accept the 'logical' argument that the accused had no mens rea and convicted of crimes of 'general' intent; vide du Plessis 1979 DR 119.
8) Glanville Williams (Textbook) 1ed 226.

arrive at an equitable result.

A student approaching English law with the pre-conceived notions of a system of dogmatic concept jurisprudence is therefore bound to find it frustrating and exasperating. Similarly, a positivist is not likely to exercise patience with or display understanding for the dogmatic investigations of German 'Strafrechtswissenschaft'.

In the field of the law relating to homicide, English law does present a rather confusing picture.[9] But patient study and an earnest attempt to understand the reasoning of the English judges is often rewarding.

1.2 Murder in English Criminal Law

As the primary interest in this study is the mens rea of manslaughter, the killing with the attendant problems of causation will not be investigated.

Expressed in terminology readily understood by a South African student, the actus reus of murder may be described as the killing of a human being. The mens rea of murder in English law, is

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9) Williams (Textbook) 259.

however, more complex than in South African Law. It is traditionally termed 'malice aforethought'. But this is a misleading term.[10] Malice in the sense of wicked or evil motives is not required. The term 'aforethought' need not refer to any premeditation in the sense of planning a homicide in advance. An intent formed in a 'split second' would suffice.

Smith and Hogan[11] quote the following statement by the Royal Commission on Capital Punishment with approval; namely, that malice aforethought:

> '... is simply a comprehensive name for a number of different mental attitudes, which have been variously defined at different stages in the development of the law, the presence of any one of which in the accused has been held by the courts to render a homicide particularly heinous and therefore to make it murder'.

Smith and Hogan[12] summarise 'malice aforethought' in present-day English law as follows:

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10) Smith and Hogan 291. Glanville Williams (Textbook) 249 refers to 'malice aforethought' as a '... term of art, if not a term of deception'; cf Cross and Jones 155-6; Bassiouni 234-5 esp 234 n18; Gardner and Manian 405; Dix and Sharlot 453.

11) 291.

12) 292.

1) An intention to kill any person.
2) An intention to do an act knowing that it is highly probable (or perhaps, probable) that it will kill any person.
3) An intention to cause grievous bodily harm to any person.
4) An intention to do an act knowing that it is highly probable (or, perhaps, probable) that it will cause grievous bodily harm to any person.

Categories 3 and 4 would obviously not qualify as the mens rea of either murder or culpable homicide in South African Criminal Law. They seem to state result liability as encountered in German Criminal Law before 1953. In other words one is dealing with 'the infliction of grievous bodily harm with death resulting' where no element of fault is required in respect of the resultant death.[13)]

As Glanville Williams[14)] points out, killings resulting from the infliction of grievous bodily harm and other dangerous acts belong more properly to the field of manslaughter than murder, and prosecutions arising from such killings are usually in respect of the former crime. To use terminology frowned upon in

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13) vide du Plessis 1984 SALJ 301, 309-10.
14) Glanville Williams (Textbook) 250-1.

South African Criminal Law for some time and rejected in Chretien[15] categories 3 and 4 literally applied, could result in convictions of murder where no specific intent to kill has been established.

Although this section is more particularly concerned with manslaughter, the reference to murder has been necessary because of these two categories of mens rea which would, in a South African court, at most lead to a conviction of culpable homicide. In the light of Bernardus[16] and van As,[17] convictions of this offence would only follow if negligence in respect of the death, quite apart from the intentional infliction of injury, could also be established.

2. Manslaughter in English Criminal Law.

2.1 Introductory

Smith and Hogan[18] state the following concerning manslaughter:

> 'Manslaughter is a diverse crime, covering all unlawful homicides which are not murder'.

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15) 1981 1 SA 1097 (A); vide supra ch IV 4.5.
16) 1965 3 SA 287 (A).
17) 1976 2 SA 921 (A).
18) 298.

This is a negative definition, and is qualified by the statement:

> '... but it is customary and useful to divide manslaughter into two main groups which are designated "voluntary" and "involuntary" manslaughter respectively'.[19)]

2.2 Voluntary manslaughter

Voluntary manslaughter is distinguished from murder in that, although the accused may have killed with the malice aforethought required for murder, there is nevertheless one of three specified factors present which reduces the crime to manslaughter.[20)]

There was only one such factor recognised by the common law; namely, provocation.[21)] But under the Homicide Act of 1957 a killing which would otherwise be murder becomes manslaughter if the accused was suffering from diminished responsibility at the time of the commission of the crime,[22)] and such a killing also becomes manslaughter if it is committed in the execution of a suicide pact.[23)]

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19) ibid.
20) Smith and Hogan 198-9.
21) ibid.
22) sec 2.
23) sec 4.

2.3 Involuntary manslaughter

According to Smith and Hogan: 'This category includes all varieties of unlawful homicide which are committed without malice aforethought'.[24]

The authors quote the following passage with approval:[25]

> 'Of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions ... the law ... recognises murder on the one hand based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intent to kill, but with the presence of an element of "unlawfulness" which is the elusive factor'

Concerning the 'elusive factor' Smith and Hogan[26] state that although it is difficult to define' ... it would seem to comprise the following varieties and combinations of mens rea and negligence:

1) an intention to do an act directed against another

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24) 311.
25) 311, quoted from the speech of Lord Atkin in Andrews 1937 2 AER 552, 554-5.
26) 312.

which, whether D knows it or not, is unlawful and dangerous in the sense that it is likely to cause immediate personal injury, though not necessarily serious injury;

2) an intention to do an act, or to omit to act where there is a duty to do so, being grossly negligent whether death, or serious injury be caused;

3) an intention to do an act, or to omit to act where there is a duty to do so, being reckless whether death, or personal injury, or possibly, any injury to "health or welfare", be caused'.

Cross and Jones[27] define the mens rea of involuntary manslaughter more simply as follows:

'A person who causes the death of another is guilty of manslaughter if he does so by:

a) a reckless act or omission; or

b) an act which is unlawful and dangerous'.

Glanville Williams[28] writes as follows concerning involuntary manslaughter:

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27) 176.
28) Glanville Williams (Textbook) 259.

> 'Involuntary manslaughter ... means the form in which there is (or need be) no intention (voluntas) to kill or do grievous bodily harm (a strange meaning of "involuntary"). There are two subspecies, both of them, as will be painfully seen in this chapter, exhibiting the common law at its worst. We cannot even give the first of them an uncontroversial name, since the courts have failed to settle clearly what fault is involved; in this book it will be called "reckless manslaughter", though the word "reckless" will give us trouble. The other subspecies is constructive manslaughter'.

The analysis of Smith and Hogan is more detailed than that of the other writers referred to. But, basically, the analyses amount to the fact that there are two types of involuntary manslaughter; namely, reckless manslaughter and constructive manslaughter. In their discussion Smith and Hogan[29] distinguish between constructive manslaughter, manslaughter which is killing by gross negligence and manslaughter which is reckless killing.

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29) 312-324.

3 THE MENS REA OF VOLUNTARY MANSLAUGHTER WHICH INVOLVES A DISCUSSION OF PROVOCATION, DIMINISHED RESPONSIBILITY AND SUICIDE PACTS

3.1 Provocation

Provocation in English Criminal Law is a defence available only in respect of murder.[1] It may be a mitigating circumstance in respect of other crimes, but it is no defence.[2]

Provocation, however, is not a complete defence to a charge of murder, but only a partial defence in that, if successful, it serves to reduce murder to manslaughter.[3] Provided, therefore, that the provocation complies with certain requirements, it has the effect of reducing what would otherwise be murder to voluntary manslaughter. Where an accused alleges provocative conduct on the part of the deceased this may be part of the evidentiary material on which the finders of fact decide whether

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1) Glanville Williams (Textbook) 524; Samuels 1983 JCL 276, (The English law relating to provocation is briefly, fully stated in this article); Cross and Jones 168. Bergenthuin discusses the English law on provocation fully, 68 ff. This aspect of English Law probably gave rise to S141 TPC.

2) This has lead to some debate as to whether provocation can be a defence to attempted murder. (Glanville Williams (Textbook) 526-7; English 1973 CLR 727; Cross and Jones 168).

3) Smith and Hogan 298-9. The prevailing English law is strongly reminescent of South African Law, while the doctrine of 'partial excuse' was still recognised.

malice aforethought has been established.[4] In this sense, provocation is not a defence eo nomine; it is simply part of the general evidential material presented to the court in the course of the dispute of fact as to whether there was malice aforethought or not.

Once the finding is made that there was indeed a killing with malice aforethought, the alleged provocation is considered in order to determine whether, as a matter of law, it reduces the crime to voluntary manslaughter. This has prompted the comment by Turner[5] that voluntary manslaughter under provocation is really murder in extenuating circumstances.

The question which comes to mind is whether the provocation reduces the fault or mens rea of the accused, or whether it reduces the unlawfulness of the killing. As killing under provocation is not justified in English law,[6] one must conclude that it is the fault or blameworthiness of the act which is

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4) Cross and Jones 167 state the following: 'While evidence that the accused was provoked is a circumstance which the jury must take into account, along with all the other circumstances, in deciding whether he intended to kill or cause grievous bodily harm, the defence of provocation is concerned with the situation where the accused did intend to kill or cause grievous bodily harm but acted under a sudden loss of self-control'. Compare Thibani 1949 4 SA 720 (A).

5) Turner (Mental Element) 223-4; Glanville Williams (Textbook) led refers to 'mitigated murder' 223.

6) If it were 'justified' provocation could result in an acquittal, which it does not.

reduced.[7] English writers would not appear to be disposed to arguing along these lines and their answer would probably be that it does not matter what is reduced or affected; the simple fact is that provocation, properly established, reduces murder to manslaughter.

Speaking in terms that have come into use in South Africa in recent years one might say that it is not the psychological fault of the accused (in other words, his malice aforethought), which is reduced, but his normative fault (in other words, his blameworthiness). It is, however, submitted that the better approach would be to view the matter historically. This reveals that murder was reduced to manslaughter to avoid the compulsory death penalty,[8] and that the true effect of provocation in English law is to empower the court to pass a more lenient sentence. In this sense it does affect blameworthiness, but it has nothing to do with either psychological or normative fault,[9] or the degree of unlawfulness (assuming that unlawfulness has degrees) of the conduct of the accused.

What is particularly noticeable when considering provocation in English Criminal Law is that there is no question of an absence

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7) If the view that there are no degrees of unlawfulness, is accepted, it would also appear that the effect of provocation is to reduce fault or blameworthiness.

8) vide Russell 517 ff; Gordon 764 ff; Bergenthuin 70 ff.

9) Unless one regards normative fault as fault (or blameworthiness) applicable to sentence and not to the question of guilt or innocence.

of criminal capacity (in the sense of 'toerekeningsvatbaarheid') totally absolving the accused. On the contrary, the defence rests mainly on the consideration that provocation deprives a person of his power of self-control[10] and that he should therefore be treated with some leniency as a concession to human frailty. This was expressed as long ago as 1837 by Coleridge J. in Kirkham;[11] namely,

> 'Though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being and requires that he should exercise a reasonable control over his passions'.

The requirements for the defence of provocation to succeed are partly subjective and partly objective. A fairly rigid approach is adopted in determining whether the objective requirements of the defence are met.[12] This was even more so in the past than it is at present, the present law being governed by the Common Law as relaxed by section 3 of the Homicide Act 1957,[13] which reads as follows:

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10) Smith and Hogan 301 ff; Cross and Jones 167. This is similar to the views of De Wet and Swanepoel 131-6.
11) 1837 C and T 115, 119.
12) Cross and Jones 168-9.
13) ibid.

> 'Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man'.

Before the passing of this enactment only strictly circumscribed and limited types of conduct could constitute provocation. A violent act committed by the deceased against the accused was generally required as well as the 'classic' requirement of the deceased being the accused's spouse caught in the act of adultery.[14] The section has made it possible, inter alia, for words spoken to constitute provocation and the provocative words or deeds need not have emanated from the deceased.[15] It would appear that the words or conduct need not have been directed at or against the accused, although there appears to be some doubt on this point.[16]

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14) ibid.
15) Cross and Jones 169 ff.
16) Cross and Jones 169.

The provocation must also have been such as would have caused a reasonable man to lose his self-control.[17] These are the main objective requirements. The subjective requirement is that the provocation must in fact have deprived the accused of his power of self-control.[18]

Russell[19] regards the English law of provocation as unsatisfactory and ascribes this to a historical development in which rules of evidence were confused with rules of law.[20] Prior to the third decade of the 19th century, the question whether alleged provocation would suffice as a defence reducing murder to manslaughter was a matter of law decided on by the judge. But from then on, it became increasingly a matter of fact to be decided by the jury. The 'reasonable man' was then made use of to enable the jury to decide on the facts whether the accused had really been so provoked as to lose his self-control.[21] If a reasonable man would not have lost his self-control then it was unlikely that the accused had. From this the development followed that if a reasonable man would not have lost his self-control, the accused ought not to have lost his self-control. Unreasonable loss of self-control by the accused would therefore not serve as a state induced by provocation that could reduce the crime.

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17) Smith and Hogan 303 ff.
18) Glanville Williams (Textbook) 527.
19) 522 ff.
20) This is also the opinion of Postma 40 ff.
21) Russell 523 ff.

In terms of present-day South African terminology one could say that the 'reasonable man' test is normative. Notwithstanding psychological fault being absent or reduced through loss of self-control caused by provocation the accused would not 'receive' the benefit of his loss of self-control if it were unreasonable for him to have lost it.

The reason for this normative rule is clear. The courts needed a rule to alleviate the harshness of the compulsory sentence for murder. As the substantive law relating to punishment for murder could not be altered, the substantive law relating to successful defences against murder was. In this case the defence was no longer one directed at defeating the Crown's case that there had been a killing with malice aforethought, but a 'special defence' that, notwithstanding proof of a killing with malice aforethought, the verdict could be one of manslaughter only.

The rule really amounted to making a defence out of a mitigating factor or extenuating circumstance. In the process the mitigating factor became closely circumscribed to allow it to operate as a defence. From this arose the question whether the personal characteristics and idiosyncracies of the accused could be ascribed to the reasonable man when deciding whether a reasonable man, subjected to the provocation to which he had been subjected, would have lost his self-control. In Bedder[22] the accused, an impotent youth 18 years of age, was jeered at because of his

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22) 1954 AER 801.

impotence by a prostitute with whom he had attempted intercourse. He was also humiliatingly assaulted by the woman. He lost his self-control and stabbed her to death. In a decision that has been criticized, and no longer represents the law,[23] the Court of Criminal Appeal decided that the trial judge had been correct in instructing the jury not to consider the personal idiosyncracies of the accused; namely, his impotence and his extreme sensitivity about this condition, in deciding whether a reasonable man would have lost his self-control in the circumstances.

Subsequently the House of Lords decided in Camplin[24] that section 3 of the Homicide Act had effected changes sufficient for the decision in Bedder no longer to be binding. In Camplin the accused, a boy of 15, raised the defence of provocation in that after performing an act of paederasty on him against his will, the deceased had taunted him with it. This had caused the accused to lose his self-control and he had killed the deceased by hitting him on the head with a heavy kitchen utensil.

The main point to be decided on appeal was whether, in the light of Bedder, the trial judge had been correct in instructing the jury not to take into account the youth of the accused when deciding whether a reasonable man would have reacted as the

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23) Smith and Hogan 304; Glanville Williams (Textbook) 532; Cross and Jones 171.
24) 1978 1 AER 1236.

accused had reacted. It was held that section 3 of the Homicide Act had changed the law as stated in Bedder. Among the factual material to be considered by the jury, the youth of the accused had to be taken into account in determining whether he had reacted as a reasonable man (in his case a reasonable youth) could have been expected to react.[25] It was further held that the principle in Mancini[26] namely that there has to be a reasonable balance between the provocation and the retaliation, and the principle in Holmes[27] that words alone could not be sufficient provocation for the defence to succeed, had been overruled by section 3 of the Homicide Act.

The effect of Camplin was to render the defence of provocation more flexible and to allow juries a broader field to inquiry within which the defence could be found to have been established.

The law as stated in Camplin was modified in Newell.[28] The effect of Newell, the case of an alcoholic who had killed under provocation while drunk, is summarized as follows by Cross and Jones:[29]

'A "characteristic", it was held is a physical or mental

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25) Smith and Hogan 304-5; Cross and Jones 171-2.
26) 1941 3 AER 272.
27) 1942 2 AER 124.
28) 1980 71 Cr App Rep 331.
29) 172.

> quality, or some such more indeterminate attribute as colour, race or creed, which has a sufficient degree of permanence to warrant its being regarded as something constituting part of the accused's character or personality; a temporary or transitory state of mind, such as a mood of depression or irascibility or intoxication, is not a "characteristic".

Newell also illustrates the requirement that the reasonable man is not invested with any characteristic of the accused which is not directly connected with the provocative words or conduct.

From a South African point of view it is important to note that in the English law relating to provocation it is accepted that, apart from the 'reasonable man' requirement, the defence succeeds only if the accused did in fact lose his self control.[30] This is not regarded as a defence entitling him to an acquittal on the grounds that he had lost criminal capacity (in the sense of being 'ontoerekeningsvatbaar' by virtue of not being able to control his conduct in conformity with his appreciation of its unlawfulness) but as a factor which renders the killing less blameworthy in the sense of calling for less severe punishment.

It is submitted that although South African Law is perhaps more

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30) A feature which seems to have been overlooked by Postma (32ff) in his criticism of the English Law of provocation.

advanced in so far as it looks at the actual mens rea (in other words the psychological fault, of the accused) to determine whether provocation succeeds as a defence, English law is to be preferred for this reason that it does not allow a sane violent criminal's loss of self-control to be regarded as a defence.[31] As CR Snyman[32] rightly points out, in the latter respect South African law has gone too far along the subjective road.

3.2 Diminished Responsibility

According to Smith and Hogan[1] the defence of irresistible impulse has managed to gain admission into English law through a statutory measure. The Statutory measure in question is section 2 of the Homicide Act 1957 which reads as follows:

> '1) Where a person kills or is a party to the killing of another he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

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31) Smith and Hogan 302.
32) 1985 SALJ 240, 250.
1) 185.

2) ...

3) A person who but for this section would be liable, whether as principle or as accessor, to be convicted of murder shall be liable instead to be convicted of manslaughter.'

The section introduces the conative 'leg' of 'toerekeningsvatbaarheid' into English criminal law in a restricted form:[2] restricted that is to the crime of murder.

It is a measure designed to bring relief in the shape of lighter punishment to the mentally abnormal who do not fall under the McNaghten rules. The measure can therefore not be regarded as a contribution to the law of manslaughter, but as statutory relief from the severe penalty for murder for the mentally abnormal accused who is not able to raise the defence of insanity successfully.

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2) Smith and Hogan 186-7; Glanville Williams (Textbook) 544-5; Cross and Jones 100. Cross and Jones state: 'Section 2(1) makes it plain that the accused may rely on the defence although he knew what he was doing and knew that it was wrong and soon after the section came into force it was held that the fact that a killing is premeditated, does not destroy a defence of 'diminished responsibility'. The defence only applies in cases of mental abnormality (Smith and Hogan 186) the measure is similar to Section 78(6) of the Criminal Procedure Act no 51 of 1977, cf Archbold 1413-7.

3.3 Suicide Pacts

Section 4(1) of the Homicide Act 1957 provides that the survivor of a partially successful suicide pact shall be guilty of manslaughter and punishable with a maximum of 14 years imprisonment. It is also to be seen as a measure intended to reduce the severity of the punishment for murder and cannot be regarded as a contribution to the law of manslaughter. It is a normative statutory measure in terms of which, notwithstanding intent to kill, the accused is liable to the punishment prescribed not for murder but for manslaughter.

4 THE MENS REA OF INVOLUNTARY MANSLAUGHTER

4.1 Introductory

Writers[1] on English Criminal Law appear to be in general agreement that the law of involuntary manslaughter is in need of reform. Dividing involuntary manslaughter into two classes; namely, reckless manslaughter and constructive manslaughter, Glanville Williams states:[2]

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1) Cross and Jones 188; Smith and Hogan 324; Glanville Williams (Textbook) 286.

2) Glanville Williams (Textbook) 259. In the first edition of this work the author preferred the term 'straightforward manslaughter' to 'reckless manslaughter' 224. Harris (442) refers to Manslaughter resulting from 'criminal negligence' and not to recklessness. Archbold (1421) expresses the difficulty as follows: 'Simple lack of care is not enough ... Probably of all the epithets that can be applied, 'recklessness' most nearly covers the case. Cf Cross and Jones 8ed 168-71; Harris 444-5.

> 'We cannot even give the first of them an uncontroversial name, since the courts have failed to settle clearly what fault element is involved, in this book it will be called "reckless manslaughter". Though the word "reckless" will give us trouble'.

As mentioned above, Smith and Hogan[3] define three types of mens rea for involuntary manslaughter; namely, (1) the intention to do an unlawful and dangerous act, (2) the intention to do a grossly negligent act and (3) the intention to do a reckless act. Consequently these authors distinguish between (1) constructive manslaughter which requires the first form of mens rea, (2) manslaughter which amounts to killing by gross negligence, and (3) manslaughter which amounts to killing recklessly. Cross and Jones[4] divide involuntary manslaughter into manslaughter by (a) a reckless act or omission and (b) an act which is unlawful and dangerous.

Writing on the Criminal Law of Scotland, Gordon[5] defines involuntary culpable homicide as follows:

> 'Involuntary culpable homicide is the causing of death unintentionally but either with a degree of negligence

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3) 312.
4) 176.
5) 788.

which is regarded as sufficient to make the homicide culpable but not murderous or in circumstances in which the law regards the causing of death as criminal even in the absence of any negligence'.

Archbold,[6] a practical handbook in which theoretical developments are taken into account, states the following concerning involuntary manslaughter:

'The authorities on involuntary manslaughter are difficult to reconcile, but the following propositions appear to be established:

1) The killing is manslaughter if it is either:

a) The result of a grossly negligent (though it may be otherwise lawful) act or omission on the part of the accused; or

b) the result of his unlawful act (though not his unlawful omission), where the unlawful act is one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to some harm resulting therefrom, albeit not serious harm, whether the accused realised this or not.

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6) 1420H.

2) Mens rea is essential to manslaughter but it can consist of either (in (a) above) gross negligence or (in (b) above) the mens rea appropriate to the unlawful act, or both.

3) For the purpose of (b) above an act which is unlawful by the manner of its execution eg dangerous driving, is not an unlawful act.

The division of Smith and Hogan, which does not differ substantially from that of the other writers referred to, will be mainly adhered to in the following discussion, because it is more comprehensive.

4.2 Constructive manslaughter

The crime of constructive manslaughter is reminescent of the South African law relating to culpable homicide before the van der Mescht[7] and Bernardus[8] decisions and also, to some extent of the minority judgment[9] of Rumpff JA in Bernardus.

The English law relating to constructive homicide appears to have been particularly harsh some centuries ago when a man committing some slight offence; for instance, shooting at a guinea fowl,

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7) 1962 1 SA 521 (A).
8) 1965 3 SA 287 (A).
9) 301 D-G.

could have been convicted of murder if the offence resulted in the death of a human being. The question whether the accused had foreseen the death in any way or whether it had been objectively foreseeable made no difference to the question of guilt.[10] This rule was mitigated in course of time, but the development was slow.[11]

The law as it is at present is summarised by Cross and Jones[12] as follows:

> 'To secure a conviction on the basis of constructive manslaughter, the prosecution must prove three things:
>
> a) the commission of an unlawful act;
> b) that the act was directed at another;
> c) that the act was dangerous, in the sense that it was likely to cause immediate injury to another'.

If it were not for the first two requirements, especially the first one, the third requirement - standing alone - would almost be a statement of the minority views[13] in Bernardus.

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10) Smith and Hogan 312 ff, De Wet and Swanepoel 1ed 68.
11) Turner (Mental Element) 210 ff. Glanville Williams (Textbook) 268-9.
12) 182.
13) ie the views of Rumpff and Hoexter JJA.

4.2.1 The requirements of an unlawful act, directed at another

The most common examples of unlawful acts causing death and resulting in convictions of manslaughter are assaults and batteries.[14] Other unlawful acts can suffice, but it is not always easy to determine whether an act not *per se* constituting an offence directed at another suffices for manslaughter if such an act should result in death.

Cross and Jones state:[15]

> '... an act is never criminally unlawful in itself. One thing, at least, which is required to render an act criminally unlawful is that it should occur in those circumstances and/or lead to those consequences prescribed by law as constituting the *actus reus* of an offence'.

and

> '... the fact that a person has committed the *actus reus* of an offence does not in itself make his act criminally unlawful; it only does so if the accused had the *mens rea* required for that offence'.

It therefore seems that the accused must have committed a crime in the sense of *actus reus* and *mens rea* being present[16] from

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14) Cross and Jones 182.
15) ibid.
16) Cross and Jones 183.

which the death ensued. One is therefore not here concerned with an abstract notion of unlawfulness but crime consisting of an unlawful physical and mental element.

The element of unlawfulness has occasioned difficulty where the act appears to have been patently unlawful, resulted in death and yet, on closer investigation, it turns out not to have been a crime 'directed at another'.

This is illustrated by cases[17] concerning the unlawful administration of drugs to others at their request and with their consent and resulting in their death. The administration of the drug may be unlawful, but is it 'directed at another' if that person consents to the administration? It may be argued that whether the recipient consents or not the administration is unlawful, but if there is consent, it is only the handling of the drug that is unlawful, not its administration.

The hair-splitting casuistic nature of such an argument is a result of the 'act' not falling in the normal ambit of unlawful acts directed at other persons causing death, namely assaults and batteries.

As a death has ensued and its cause can be traced back to unlawful conduct, prosecutors are reluctant not to prosecute and a

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17) eg Cato 1976 1 AER 856; Dalby 1982, 1 AER 916.

similar reluctance appears, with respect, to be discernible on the part of judges to instruct juries not to convict.

Glanville Williams[18] alludes to the far-fetched story sometimes told that the accused pulled out a knife or razor to frighten the deceased whereupon the deceased promptly fell onto the knife or razor, killing himself. Judges generally instruct juries to convict if they accept this evidence[19] and one must, with respect, on practical grounds support the instruction. Whether the act of frightening the deceased is really an act 'directed at' him, is debatable.[20]

The tendency, sometimes reversed and sometimes advanced, was for the judges to limit the scope and nature of unlawful acts that would give rise to convictions of manslaughter if they resulted in death.[21] This gave rise to the ruling in Church[22] which has met with academic approval.[23] It was said in this decision[24] that it would be 'wrong to direct a jury that to cause death by any unlawful act in relation to a human being is necessarily manslaughter'

'For such a verdict inevitably to follow, the unlawful act

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18) Glanville Williams (Textbook) 1ed 239.
19) ibid, Larkin 1943 1 AER 217.
20) Cross and Jones 186.
21) Smith and Hogan 312 ff.
22) 1965 1 AER 72.
23) Smith and Hogan 313; Cross and Jones 187.
24) 70 cf Smith and Hogan 313.

> must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least, the risk of some harm resulting therefrom, albeit not serious harm.

Church was followed in Newbury.[25] In Newbury the unlawful act consisted in throwing a piece of paving stone from a bridge while a train was approaching. This resulted in the death of a guard on the train and the accused was convicted of manslaughter the conviction being upheld on appeal to the House of Lords. It is not clear what the unlawful act 'directed at the deceased' was, but, as Smith and Hogan[26] say, the act was so patently unlawful that the House did not deem detailed discussion necessary.

It is also well established that an otherwise lawful act will not become unlawful for the purposes of conviction of manslaughter, because of the negligent manner in which it was done.[27]

4.2.2 The act must be dangerous

By 'dangerous' in this sense is meant an act likely to cause physical harm though not of a serious nature. To intend to

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25) 1976 2 AER 365.
26) 314-5; cf Cross and Jones 182-4; Glanville Williams (Textbook) 269-70. These writers are unanimous in their view that the finding of an unlawful act 'directed at another' is no easy task in Newbury.
27) Smith and Hogan 316-7.

inflict serious injury could result in conviction of murder.[28]

A decision which would be puzzling to South African practitioners is Lamb.[29] The accused and the deceased were playing with a revolver. Accused made quite sure that the chamber in the cylinder directly opposite the hammer was empty. There was a cartridge in the chamber adjacent to the empty chamber. Accused sincerely believed that it would be safe to pull the trigger as the hammer would fall on the empty chamber. What he did not know was that pulling the trigger would cause the chamber to revolve thereby moving the chamber with the cartridge in it, into position opposite the hammer.[30] He pulled the trigger, the shot went off and killed his friend. He was successful on appeal against a conviction of manslaughter as it was held that the trial judge had misdirected the jury in instructing them that pointing the revolver and pulling the trigger was an unlawful and dangerous act. The deceased had consented to the pointing and as accused had not intended to harm him, there had been no assault.

A South African court would probably have convicted of culpable homicide because of the inherent unreasonableness involved in

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28) Cross and Jones 176.
29) 1967 2 AER 1282.
30) Police 'experts' who gave evidence testified that, like the accused, they had believed that the cylinder would revolve after the shot had been fired. In a way they were right: it would move after the firing of one shot but the movement would be caused by pulling the trigger to fire the next shot, which reminds one of Mr Bloom's reflection in Ulysses that the last unit in one series is often the first unit in a subsequent series.

pointing a revolver with a cartridge in its cylinder at a person and pulling the trigger. The mechanical intricacies of whether the cartridge would or would not have moved into a 'firing' position would have been irrelevant. The fact that accused had, before pulling the trigger, inspected the revolver to ensure that it was safe, would count in his favour on sentence.

4.3 Killing recklessly or by gross negligence

4.3.1 Introductory

The question whether a reckless or grossly negligent killing amounts to involuntary manslaughter in English Criminal Law can lead the investigation into a very wide field. There is no doubt that a killing committed recklessly or grossly negligently can lead to conviction of manslaughter. But it is a matter of some difficulty to determine what recklessness and gross negligence are in English law and where the dividing line between these two forms of mens rea is to be drawn.[31)]

For some considerable time there has been fluctuation between the subjective and objective approaches to recklessness.

On the subjective approach, recklessness is conscious risk-taking. The accused is aware of a possibility of harm resulting

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31) Cross and Jones 37 ff; Glanville Williams (Textbook) 96 ff; Smith and Hogan 52 ff; Morkel (Rational Policy) 82-4.

from his conduct and carries on with such conduct reckless as to whether the harm results or not. On the objective approach; the accused carries on with conduct that could obviously result in harm without adverting, as he ought to, to the possibility of harm.

Glanville Williams[32] is of the opinion that the first form of recklessness is ideal. But, as it is difficult to prove, there is a danger that juries would acquit too easily. Consequently, judges tend to instruct them in terms of the second form. The second form is really gross negligence.

The test in Cunningham[33] regarded as authoratative for some time was subjective and based on the statement of recklessness by Professor Kenny[34].

In Caldwell[35] the two tests were combined and in terms of that decision, recklessness consists in taking a risk realising that

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32) Glanville Williams (Textbook) 98.
33) 1957 2 AER 412.
34) In 1902, quoted in Smith and Hogan 53: '... in any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (ie the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will toward the person injured.
35) 1981 1 AER 961.

it might result in harm or in carrying on with conduct inadvertently where a moment's reflection would reveal that it might be potentially harmful.

A further feature is that if a person takes a risk, even a stupid risk, but first satisfies himself, however ineffectively, that the risk is eliminated, he is not reckless. He did care about the possible results of his conduct. He could, therefore, only be negligent or grossly negligent, but not reckless. The accused in Lamb is an example of such a person. Although he played a dangerous and fatal game with his revolver, he was not reckless. Before firing the fatal shot he 'made sure', in his ignorance, that it was safe to do so.[36)]

4.3.2 Manslaughter Committed Recklessly or by gross negligence

Smith and Hogan submit that the Caldwell-type of recklessness is only applicable to statutory offences.[37)] The decision in Caldwell has also been subjected to strong academic criticism.[38)] It has however, notwithstanding the reservations expressed by judges, been consistently applied and would appear to represent the law as it is at present and as it is likely to remain in the foreseeable future.

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36) Cross and Jones 177.
37) 319.
38) A tone of despair is almost detectable in Archbold v-vi; Mitchell 1985 JCL 284 summarises views on the decision; cf Ashall 1984 CLR 467; Syrota 1984 CLR 476; Briggs 1984 CLR 479; Briggs 1983 CLR 764; Syrota 1983 CLR 776.

If this type of recklessness is only applicable to statutory offences, it is not applicable to manslaughter but to the related offence of causing death by reckless driving.[39]

It would appear that recklessness will suffice as the mens rea of manslaughter where the accused foresees the possibility of causing death or the possibility of causing bodily harm and nevertheless proceeds with his conduct.[40]

A case that has given rise to some comment is Pike.[41] Pike's perversion was that he preferred a woman to be unconscious when having intercourse with her. He had discovered that a certain household cleansing agent could render a person unconscious and had made a practice of rendering women unconscious with this chemical compound. None had come to serious harm except the last one who died. Pike was found guilty of manslaughter by a jury who had been instructed to convict either on the basis of recklessness or gross negligence. To a South African lawyer the conviction on the ground of negligence would appear self-evident. Anaethetising a person is a dangerous thing to do and the risk of death must be present, unless clinical conditions are observed on all occasions. Glanville Williams[42] is of the opinion that once the 'sex' element is taken away it becomes

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39) Sec 1 of the Road Traffic Act 1972; vide Smith and Hogan 456-7.
40) Smith and Hogan 319-24; Cross and Jones 176 ff; Glanville Williams (Textbook) 259-62.
41) 1961 CLR 114; 452. Discussed by Smith and Hogan 323-4.
42) Glanville Williams (Textbook) 1ed 117-8.

plain that Pike should have been acquitted because the substance used is harmless. It is difficult to agree with this view as Pike was not a trained anaethetist.

As gross negligence suffices for the mens rea for manslaughter it is doubtful whether any real purpose is served by debating whether Caldwell type recklessness is applicable to common law manslaughter or not. It is so close to gross negligence that in practice the difference must be minimal.[43)]

In contrast to South African law as laid down in Meiring,[44)] negligence other than gross negligence will not suffice for a conviction of manslaughter. In this connection the following dictum from Bateman[45)] has long been regarded as stating the law:

> 'To support an indictment for manslaughter the prosecution must prove ... that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.'

Although the dictum has been said to be tautologous, it is never-

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43) Cross and Jones 177; Smith and Hogan 57.
44) 1927 AD 41.
45) 1925 AER 45.

theless regarded as a useful statement of the law.[46]

Due to the reluctance of juries to convict of manslaughter in cases of death resulting from motor accidents the offence of killing as a result of reckless driving was created by statute.[47] Common law manslaughter could still be committed and has continued to exist side-by-side with the statutory crime. The common law offence, referred to as 'motor-manslaughter' is seldom prosecuted.[48]

The co-existence of these related crimes resulted in the decision in Seymour[49] which has been criticised by writers and which has given rise to the view that the Caldwell-type of recklessness could be applicable to common law manslaughter or, at least, to common law motor manslaughter.[50]

The problem in Seymour seems to arise from the facts which are such that the accused might very well have been guilty of murder, that is intentional killing, but this could not be proved. The heinous nature of what the accused probably intended tends to cloud one's judgment in dealing with what he was proved to have intended. Seymour had an altercation with a woman with whom he

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46) Smith and Hogan 322; Glanville Williams (Textbook) 259.
47) Harris 445. Causing death by reckless driving was made an offence in terms of s 1 of the Road Traffic Act 1972; vide Smith and Hogan 456-8.
48) Cross and Jones 178.
49) 1983 2 AER 1058.
50) Cross and Jones 180.

had been living and shortly afterwards there was a slight collision between a lorry driven by him and a car driven by the woman. She alighted and walked towards the lorry. Seymour set the lorry in motion with the intention, so he said, of pushing the car out of the way. In the process he crushed the woman to death between the lorry and the car. This was accidental, so he said. Seymour was charged with common law manslaughter. The prosecution apparently realised ab initio the futility of attempting to prove beyond a reasonable doubt that he had killed intentionally. He was convicted of manslaughter and appealed on the grounds that the direction given by the judge to the jury had been mistaken.

The direction had been based on a direction approved in Lawrence[51] a case of killing as a result of reckless driving. In Lawrence the direction, approved by the House of Lords, had been that in causing death by reckless driving the accused must have driven in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might be using the road; or in such a manner as to run the risk of causing substantial damage to property. Further that either the accused had not given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved, had nonetheless gone on to 'take-it.' This is Caldwell-type recklessness : awareness of the risk is not a necessary

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51) 1981 1 AER 974. In this case, decided on the same day as Caldwell, Caldwell-type recklessness was reaffirmed.

requirement, inadvertence to serious risk would suffice.

Seymour seems to have read the effect of making the Caldwell-type of recklessness applicable to common-law manslaughter. However, it might be that it is only applicable to motor manslaughter thereby giving effect to the rule that the ingredients of manslaughter and death caused by reckless driving are the same.[52)]

Recklessness in the subjective sense, is a form of mens rea. But in the objective sense it appears to be gross negligence and therefore, on the English law view of negligence, conduct.

The standard according to which negligence is determined is the objective standard of the reasonable man and little if any concession is made to the personal idiosyncracies of the accused.

There appears to be a strong tendency among writers on English law to de-criminalise negligent manslaughter[53)] and to support change to the effect that only conscious recklessness should suffice as the mens rea of involuntary manslaughter. The law of delict would, on this approach, provide sufficient redress in respect of harm inflicted negligently.[54)]

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52) Govt of USA v Jennings 1982 3 AER 104.
53) Smith and Hogan 57-8, 81 ff.
54) Smith and Hogan 324; Cross and Jones 388; Glanville Williams (Textbook) 286-7. Contra Briggs 1983 CLR 764.

5 THE EFFECT OF THE DEFENCES OF PRIVATE DEFENCE, LAWFUL AUTHORITY, DURESS AND INTOXICATION

5.1 Introductory

The effect of the defences discussed in this chapter, when raised to a charge of murder is to some extent markedly different from South African law. It will not be necessary to investigate the defences in detail as the main concern will be with the question whether the defence, if successful or partially successful, reduces murder to manslaughter.[1)]

5.2 Private defence or self-defence

The defence of private defence or self-defence[2)] is well recognised in English law and applies to the defence of person as well as property.[3)] There are certain requirements to be met

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1) Manslaughter not necessarily being negligent killing, the difference between English law and South African law is fairly big, in theory and probably in practise also; vide Gordon 762 for Scots law.

2) Self-defence at common law overlaps with the defence created by section 3 of the Criminal Law Act 1967 which provides for the use of force in the prevention of crime, vide Smith and Hogan 326; Cross and Jones 436-7; Glanville Williams (Textbook) 503.

3) Smith and Hogan 326 ff; Cross and Jones 436 ff; Glanville Williams (Textbook) 501 ff. The scope of the defence when it is property that is being defended is limited. Smith and Hogan write: 'It can rarely, if ever, be reasonable to use deadly force merely for the protection of property' (328-9).

before the defence succeeds. In the case of killing in self-defence the main consideration relevant to the present inquiry is that the defensive steps should be commensurate with the harm sought to be warded off. Unless this is so, the defensive measures are unreasonable.[4] Once the bounds of private defence that would be reasonable in a given situation are exceeded the accused is regarded as having no longer acted defensively, but offensively.[5] If the defence fails on this ground the crime is murder and not manslaughter, there being no rule that self-defence reduces murder to manslaughter.[6]

This rule may appear harsh but it is mitigated in two ways. First, self-defence having failed, provocation will be investigated, and this investigation may result in the reduction of the crime from murder to manslaughter.[7] Second, the law may be to the effect that what is reasonable in the circumstances depends to a large extent on the accused's own assessment of the

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4) Smith and Hogan 327; Cross and Jones 437-8; Glanville Williams (Textbook) 502; Archbold 1404 ff.
5) Archbold 1405-6.
6) Smith and Hogan 330; Archbold 1405 (relying on Palmer 1971 1 AER 1077).
7) Archbold 1405.

situation.[8] If this latter rule is indeed the law,[9] the application of the defence in English law is wider than in South African law. In South African law the conduct of the accused is judged objectively and if it is adjudged unreasonable a conviction of culpable homicide is almost automatic. In English law conduct objectively unreasonable could nevertheless, if reasonable when viewed from the point of view of the accused, result in a complete acquittal.[10] It is, however, not certain that this is the law.

If the accused makes a mistake of fact in deciding that he should act in private defence, this would not necessarily defeat the

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8) Archbold 1405; Smith and Hogan 331. Smith and Hogan refer to the Australian case of McKay 1957 VR 560 where the doctrine that a person who unreasonably uses excessive force kills in self-defence ought to be convicted of manslaughter instead of murder was accepted. This doctrine has been rejected in English law, but in Palmer supra it was held that one of the surest ways of determining what was reasonable in the circumstances would be to consider the immediate reaction of the accused. This latter approach would make an acquittal likely in circumstances where an Australian court would convict of manslaughter and a South African court of culpable homicide; vide Smith and Hogan 331-2. Cross and Jones (438-9) take a more objective view; Glanville Williams (Textbook) takes a more subjective view, relying on Shannon 1975 AC 717.

9) It is likely that it is the law, but Smith and Hogan (331-2) express some doubt.

10) It must be borne in mind that this statement is tentative. The basic approach is objective in English law, but 'armchair' objectivity is eschewed when considering the reaction of a man who is, or believes himself to be, in imminent peril. vide (in connection with rape) Morgan 1975 1 AER 8.

defence.[11] He may still lack the intent to kill. A mistake of law would not avail.

5.3 Lawful Authority

Killing in the course of preventing crime or arresting offenders is now governed by statute in English Law.

Section 3 of the Criminal Law Act 1967 reads as follows:

> '1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or of persons unlawfully at large.
>
> 2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose'.

According to Smith and Hogan[12] the scope of the defence is uncertain, but it will apparently only fail in the case of

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11) The accepted view appears to be that he should be judged in the light of what he believed to be the case, provided he believed so on reasonable grounds, not in the light of what was in fact the case. This is, however, not free of difficulty; vide Smith and Hogan 329-30; Cross and Jones 440-1; Glanville Williams (Textbook) 504.

12) 325-6.

killing if the killing was unreasonable. The criteria of what is reasonable have not been exactly defined. If the defence fails the accused will be guilty of murder and not of manslaughter.[13])

5.4 Duress

It is now accepted in English law that duress could be a defence to any crime except murder as a principal.[14]) It would therefore be a defence to manslaughter in the case where an unlawful act resulting in death is performed under duress.

There is no rule that duress, necessity or compulsion reduces murder to manslaughter.

5.5 Intoxication

The defence of intoxication in English law is very similar to South African law before Chretien.

The leading authority is Majewski[15]) a well known decision of the House of Lords.

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13) Smith and Hogan 330.
14) This has been the law since Lynch 1975 1 AER 913.
15) 1976 2 AER 142; vide Dashwood 1977 CLR 532.

In terms of this decision intoxication, even if it results in complete automatism, cannot succeed as a defence to a crime of general intent; it can only serve to reduce a crime of specific intent to a crime of general intent. If murder is viewed as a crime of specific intent,[16] intoxication can reduce murder to manslaughter a crime of general intent.[17]

English law appears to recognise what we would call the intentional actio libera in causa.[18] In other words if a person drinks with the intention of gaining the nerve to kill someone and he carries out this plan, he will be guilty of murder. This would appear to be the case even should the accused eventually kill in a state of automatism.

In connection with the defence of intoxication it is to be noted that Majewski has been criticized, one of the main grounds of criticism being that there is no clear statement of crimes falling in the category of specific intent and crimes falling in the category of general intent.[19]

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16) This is the general view, vide Smith and Hogan 193. Smith and Hogan submit that murder could be a crime of 'basic intent' in certain circumstances. For the difficulties involved vide Gordon 407 ff.
17) Smith and Hogan 194.
18) Glanville Williams (Textbook) 468; vide Gordon 401 ff for a fuller discussion.
19) Smith and Hogan 193-4.

6 CONCLUSION

There is a fair amount of difference between South African law and English law in relation to the defences referred to in this chapter. The differences are due mainly to murder being differently defined in English law from South African law, that manslaughter is by no means equivalent to culpable homicide and that mistake of law whether reasonable or unreasonable, is no defence in English law.[20)]

Culpa is a wider concept than the various forms of mens rea that suffice for a conviction of manslaughter in English law[21)] and an accused raising one of the defences discussed in this section to a charge of murder is apparently more likely to be convicted of culpable homicide in a South African Court than of manslaughter in an English court.[22)]

It is also important that voluntary intoxication cannot succeed as a defence in English law if it results in lack of self control on the part of the accused. The relevance of 'toerekeningsvatbaarheid', important in South African law in the light of Chretien, is not recognized in English law. An accused may rebut

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20) Certainly not if it leads to an unlawful killing.
21) This has been so since Meiring 1927 AD 41.
22) Barnard 1985 4 SA 431 (W) has not yet been expanded on. Adoption of the normative fault doctrine as in Barnard could result in convictions of murder where convictions of culpable homicide could presently be expected.

evidence of intent with evidence of intoxication in that an intoxicated person is more likely to make a mistake than a sober one. But the fact that intoxication causes inhibitions to crumble is no defence.[23)]

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23) Smith and Hogan 191.

CHAPTER VII

THE GERMAN LAW CONCERNING NEGLIGENT KILLING AND CRIMES RESULTING IN DEATH NEGLIGENTLY CAUSED

1. INTRODUCTORY

1.1 General background

In postulating the existence of two possible approaches to Criminal Law: namely, the 'axiomatic closed' and 'problematic open' approaches, Badenhorst[1] refers to German Criminal Law as a very good example of an 'axiomatic closed' system. Such a system could also be described as a system in which rationalism is the basis of approach as opposed to systems in which pragmatism is the basis.[2]

That the fundamental theoretical approach in German Criminal Law should be rational is readily understood if one considers the origins of modern German criminal law. The theoretical basis of modern German criminal law is rooted in the philosophy of the German Aufklärung or enlightenment and the philosophical movement known as German idealism which resulted from that.[3]

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1) 283 ff.
2) vide CR Snyman 1985 SALJ 120, 126-8; du Plessis 1985 SALJ 503, 512-3.
3) Schmidt 222 ff.

If one regards the period of the Aufklärung as roughly the last sixty years of the eighteenth century the question arises, what was German criminal law before the Aufklärung if modern German criminal law commenced during and after the Aufklärung. The answer is that in the geographical area that was politically unified by Bismarck after the Franco-Prussian war in 1871, criminal law had fallen into virtual total chaos by the middle of the eighteenth century.[4] According to Fischl the criminal law in the numerous states that were later unified by Bismarck, had degenerated into a system of local jurisdictions in which scant attention to any legislation or precedent was paid by judges and law-enforcement agencies. This was largely the result of the obsession with persecutions for witchcraft and the desire of local princes and other rulers to be independent of any higher central control.[5]

Intellectuals of the Aufklärung were painfully aware of the poor state of the criminal law. Efforts were made to remedy this, but initial progress was slow.

The philosopher Kant became the intellectual giant of the German states after the appearance of his Critique of Pure Reason, Critique of Practical Reason and Critique of Judgment.

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4) Fischl 1 - 7.
5) ibid.

Kant laid the foundation of rationalism, a system of philosophy in which it is taken as established that reason provides the key to the attainment of universally valid knowledge and universally valid insight. It also provides a theoretical basis for the erection of universally valid theoretical systems including a universally valid system of legal concepts.[6)]

The first modern German criminal legal theorist of intellectually predominant stature was Anselm Feuerbach.[7)] Feuerbach commenced his studies intending to become a philosopher. Later in his life he became a lawyer thus following in the footsteps of his father. But his initial philosophical training, which had been Kantian remained the basis of his legal thinking. Feuerbach had an enormous effect on German criminal law, his main achievement being the drafting of the Bavarian Criminal Code of 1813.[8)]

Feuerbach's successors were also strongly under the influence of Kant's philosophy. But Hegel became intellectually predominant,[9)] having become the intellectual giant of Germany towards the end of his life. His rationalism was an advance on that of Kant.

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6) Schmidt 219-22; von Hippel (I) 289 ff.
7) Schmidt 283 ff; von Hippel (I) 293 ff.
8) von Bar 248 ff; Schmidt 248 ff.
9) von Bar 276 ff; Schmidt 283 ff; von Hippel (I) 305 ff.

When the influence of Hegel waned[10] towards the end of the nineteenth century there came the neo-Kantian movement which provided the theoretical basis for the so-called classical school of German criminal legal theory which flourished from about the foundation of Bismarck's Empire to well after the first World War.[11]

The underlying rationalism of German criminal legal theory is the main reason for its being an 'axiomatic closed' system. The nature of such a system can be gleaned from the comments of two American writers. Thus, Kretschman writes the following:[12]

> 'Rationalism in whatever field it finds expression stresses principles of reason in opposition to empirical facts, it professes a supreme contempt for positive law, which it regards as founded in experience rather than in principles of reason, and sets up in opposition thereto its own system of "rational" law as a system derived deductively from such principles. Reason, the rationalists contend, demands certainty and logical coherence. Rational law alone achieves these for they can be obtained only by a law which deduces rules from immutable principles. But positive law, dominated in its development by

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10) Welzel (Naturalismus) 60 ff.
11) Badenhorst 234 ff.
12) PM Kretschman 'An exposition of Kant's Philosophy of Law' included in The Heritage of Kant ed G Tapley (247).

historical and non-rational factors, affords contingent principles only, principles which cover only the situations out of which such principles have arisen'.

This passage is followed shortly afterwards by the following sentence.[13)]

'With rationalism, Kant contends that the basic principles of law cannot be derived from experience. Reason supplies these principles from its own resources'.

For his part, Sheldon writes the following:[14)]

'Kant's method implies or suggests that knowing has a peculiar nature of its own, independent of that which is known; that that nature is the norm which tests the truth or falsity of assertions. By independent is here meant, not that there need be no object of knowledge, but that object - e.g. its complex of sense qualities - does not affect the essential structure of the knowing. That structure is self-determined (systematic categorizing) and therefore there can be deduced beforehand the general structure of the real world. For if the very nature of

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13) ibid.
14) WH Sheldon 'Some Bad Results of Kant's Thought' in The Heritage of Kant ed G Tapley (166-7).

> knowing determines those categories, then the object of knowledge must conform to them. Now the result of such a claim is that the philosopher's interest in the concrete detail of the external world must lapse ... Infallibly he will lose interest in the specific make-up of the world about him'.

A rationalist approach to legal thinking would, therefore, inevitably result in an approach in which concepts refined in the general parts of the criminal law would be strictly applied in individual cases where criminal liability is considered.[15] A pragmatic solution such as that found in Johnson[16] where an accused was convicted of culpable homicide notwithstanding his inability to 'act' and his lack of criminal capacity at the time of the killing would not be acceptable in such a system. The practical requirements that persons who commit crimes in a state of voluntary intoxication ought not to be allowed to shelter behind their self-induced condition would carry no weight. A result such as that brought about in Chretien[17] would be preferred and the socially unacceptable side of this result would be left to the legislator to remedy by special legislation.[18]

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15) du Plessis 1984 SALJ 301, 304-5; contra Snyman 1985 SALJ 120.
16) 1969 1 SA 201 (A).
17) Chretien 1981 1 SA 1097 (A).
18) This is the entire purpose of the Drugs Report. In the German Criminal Code there is a statutory provision (StGB 323 (a)) making it a crime to commit a crime while 'schuldunfähig' ie lacking in criminal capacity, because of voluntary intoxication. The fact that such a measure had to be specially enacted is perhaps an indictment against the theoretical system; vide du Plessis 1984 SALJ 300, 314.

It could, therefore, be regarded as fair comment that although a rationalist approach to criminal law leads to a theoretically coherent system, in practice there are legislative measures in conflict with the theoretical background and designed to avoid logically consistent but socially unacceptable results.[19)]

1.2 Procedure

There can be no question that the law of procedure and evidence has laid its stamp on English criminal law.[20)] Thus the 'reasonable man' could be regarded as the ordinary member of an English jury using his commonsense. The Caldwell-type of recklessness[21)] with its objective component could be a measure taken by the House of Lords to ensure that acquittals do not result too readily where the prosecution has difficulty in proving subjective recklessness. The process is possibly more difficult to detect in German criminal law, than English criminal law but substantive German criminal law has been influenced by German criminal procedure.

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19) Beside the crime of 'Vollrausch' (StGB 323 (a)) there is a crime of strict liability 'Totschlag bei einer Schlägerei'(StGB 227) or homicide committed in the course of a brawl. Strict adherence to the subjective requirement of fault and the objective requirement of causation, would allow too many 'brawlers' to escape the results of their dangerous activities, vide Preisendanz 727.

20) Mezger-Schönke - Jescheck 139-40.

21) vide supra.

The German criminal trial is a one-phase trial. Guilt or innocence and appropriate sentence are investigated in one inquiry in court and in the absence of a 'Freisprache', or acquittal, there is a condemnation, or 'Verurteilung', to a certain punishment in respect of a certain crime.[22)]

German criminal procedure has many commendable features, not the least of which is the feature that persons against whom there is not a fairly strong prima facie case are not brought to trial. The procedure followed in the course of a German criminal prosecution can be divided into three stages; namely,[23)]

(1) investigation undertaken by the police under the control of the prosecutor;
(2) consideration of, and decision on, the question whether the prosecution should be permitted to open a trial; and
(3) the trial at which guilt or innocence and appropriate sentence are simultaneously investigated.

In practice the judge or judges who arrive at a decision on the second stage are inclined to be critical of the case put before them by the prosecution and where the prosecution is allowed to proceed to the third stage, that is an actual trial in open

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22) Langbein 36.
23) Naucke 32, Langbein 8 ff.

court, the probabilities are that there will be a conviction.[24] This is not to be construed as a criticism of German trials as being trials at which convictions are a foregone conclusion - far from it. It is merely an inevitable and commendable result of the safeguard against a large number of unsuccessful prosecutions - generally painful to the accused notwithstanding his acquittal - provided by the second stage.

Inevitably, many trials are largely investigations into appropriate sentence, and, as sentence is dependent on 'Schuld'[25] or fault they are investigations into fault with a view to sentence.

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24) In the trial of Dr Brach as described in Langbein 3-60 there could have been little doubt of a conviction and a great deal of time was spent investigating factors relevant to sentence. The present writer observed several trials in Germany. In only one was there any chance of an acquittal. It was a case in which leave to open a trial had been refused but this decision had been reversed on appeal lodged by the prosecution. In another case the accused disputed only intent to kill on a charge of 'Totschlag' (StGB 212) the intent was proved in 'five minutes' by medical evidence of a vicious attack in which blows were initially struck on the head of the deceased with metal tongs and afterwards the deceased, while unconscious, was throttled with extreme force. The main inquiry was into sentence and about 10 neighbours of the accused were called to give evidence on the character of the accused and the relationship between him and his mother (the deceased). None of these witnesses could cast any light on how the killing had taken place. They had not witnessed it nor had the accused made statements to them. Their evidence as to sentence was important: deceased had treated accused very badly and had repeatedly said that she preferred her cats to her son.

25) StGB 46 (1).

This, to a large extent, explains the emphasis on the 'blameworthiness' of conduct in German criminal law. In a two-phase trial, 'blameworthiness' or reproach is investigated and decided upon after conviction, but it is unavoidably also, though to a lesser extent, investigated during the investigation into the merits.[26)]

It is also because of the Anglo-American two-phase system that questions of psychological fault, (mainly intent), are given great weight. Psychological fault may not be sufficient for conviction but it is necessary. The result is that normative fault, if one understands by this term what was to be expected of the accused in the circumstances, is relegated to a minor position at a two-phase trial. Normative fault would simply be totally irrelevant in the absence of psychological fault. Once psychological fault is established, conviction follows almost automatically and only then is there any point in considering the blameworthiness or normative fault of the accused.

At a German trial there is not this definite stage at which the presence or absence of psychological fault is decided upon once and for all and after which, in the event of conviction, normative fault becomes relevant. The result is that German theorists, particularly since the work of Hans Welzel began to have an

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26) The nature of fault in the two-phase trial is stressed in Theron 1984 2 SA 868 (A). In studying this judgment it is well to bear in mind that the German trial is a one-phase trial and then to pose the question how fault is investigated at such a trial.

effect on German criminal legal theory, have spent a great deal of discussion on the position of psychological fault in their system.[27] Clearly it was not sufficient for the purposes of sentence to find that an accused had acted with psychological fault. It could still be found that he ought not to be punished. This has resulted in the view that psychological fault belongs with the act and ought not to be called fault at all. Once the act is found to be proved (in other words once an 'Unrecht', wrongdoing or crime[28] has been established), its blameworthiness remains to be considered.

The procedural feature that there was only one inquiry would render a theoretical dividing line between psychological and normative fault necessary. In a two-phase trial the dividing line would be clearly provided by the feature that the accused would be formally convicted before sentence would be formally considered.[29]

1.3 CONCLUSION

In dealing with German criminal law one may expect a dogmatic approach with the socially unacceptable results of such an

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27) vide du Plessis 1985 SALJ 300; CR Snyman 1979 SACC 3 and 136.

28) von Hippel (I) 270 ff provides an interesting discussion of the development of the 'Schuldbegriff' to 1930. The contrast between 'Unrecht' and 'Schuld' is stressed. For a modern exposition vide Maurach-Zipf (I) 392-3.

29) Theron supra.

approach alleviated by special provisions in the German Criminal Code.

The one-phase German trial,[30] and the emphasis on 'Schuld' as the yard-stick of punishment, may be expected to lead to the result that criminal fault is viewed and defined differently in German criminal law from Anglo-American criminal law.

2 NEGLIGENT KILLING IN GERMAN CRIMINAL LAW

2.1 Homicide in the German Criminal Code

There are a large number of measures dealing with homicide in the German Criminal Code and it is remarkable that, notwithstanding the 'axiomatic closed' or dogmatic theoretical approach, there is not a simple division of homicide into intentional killing and negligent killing.[1]

There are two forms of intentional killing: The first is

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30) What has been said in the text concerning German Criminal Procedure must not be regarded as criticism. It is an excellent system marred only by lengthy and often pointless consideration of hear-say evidence (Langbein 1-2).

1) The result is that the uniform theoretical approach is not always reflected in the StGB. The casuistry eschewed by the theorists makes an unexpected appearance in the positive law; vide Schmidhäuser (AT) 22 ff; Schmidhäuser (BT) 22 ff; Schönke-Schröder 264 ff; Rudolphi (AT) 1/2, 100 ff, Rudolphi (BT) 17, 35ff; Preisendanz 102ff; Dreher-Tröndle 97 ff; Lackner 98 ff; Jescheck 209 ff. Schmidhäuser is the only writer who is critical of the multiplicity of crimes that are all really forms of negligent killing.

'Mord'[2] (murder) which is an intentional killing accompanied by certain specified aggravating features. This crime is not relevant to the present discussion.

Then there is intentional killing or 'Totschlag'.[3] The difference between 'Mord' and 'Totschlag' is that the latter crime is a simple intentional killing without the aggravating features specified in respect of the former.

The third main form of homicide in the German Criminal Code is negligent killing or 'Fahrlässige Tötung'[4]. This is negligent killing without qualification as to the way in which the killing came about. 'Fahrlässige Tötung' is not the only form of negligent killing known to the German Criminal Code. There are a large number of other crimes that could be classified as negligent killings in the German Criminal Code and this is a result of a distinguishing feature of German Criminal Law; namely, the prevalence of crimes qualified by their results or 'die durch ihren Erfolg qualifizierte Delikte'

2.2 Crimes qualified by their results in German Criminal Law

Crimes qualified by their results have been known in German

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2) StGB 211.
3) StGB 212. StGB 213 allows for a reduced sentence where the accused had killed intentionally under provocation.
4) StGB 222.

Criminal Law for centuries.[5] What is meant by a crime qualified by its results is that a certain penalty is fixed in respect of a crime with a further stipulation that should the crime have been followed by a certain specified result, the penalty would be increased.[6]

Two of the results most commonly encountered in this context in the German Criminal Code are bodily harm ('Körperverletzung') and death ('Tod').[7] The present discussion is concerned with resultant death only.

Examples of crimes qualified by their results are: the infliction of bodily harm with death resulting,[8] intentional arson with death resulting,[9] negligent arson with death resulting,[10] eviction[11] with death resulting,[12] the administration of poison with death resulting,[13] unlawful incarceration with death resulting,[14] kidnapping with death resulting,[15]

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5) Frederick the Great approved of these crimes in a rescript issued shortly before his death. It was unacceptable to the Great King (and with some justification) that a person who had killed in the course of a robbery or an assault should escape liability in respect of the killing by saying that he had not intended to kill.
6) Jescheck 209.
7) ibid.
8) StGB 226 vide Langbein 13.
9) StGB 307 (1).
10) StGB 309.
11) Aussetzung.
12) StGB 221.
13) StGB 229 (2).
14) StGB 239 (3).
15) StGB 239 (a) (2). This section of the code specifies that the increased penalty comes into operation if death is caused through gross negligence (Leichtfertigkeit).

intentionally causing a flood with death resulting,[16] negligently causing a flood with death resulting[17] and rape with death resulting.[18] This list is not exhaustive but it is unnecessary to add to it for present purposes.

Up to 1953,[19] these crimes were largely examples of versari in re illicita in that the increased penalty would follow on the supervening of the specified result, irrespective of whether the result had been foreseen or foreseeable by the accused.[20]

This could result in hardship and various efforts[21] were made by theorists to protect an accused against the more serious penalty attached to the result of a crime where such result was totally unforeseeable. A noteworthy attempt in this direction is the so-called 'socially adequate' theory of causality[22] in terms of which an effect could only be regarded as 'caused' for the purposes of the criminal law if it were such as to be commonly encountered according to human social experience.

Another noteworthy attempt to limit causal liability is the

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16) StGB 312.
17) StGB 317.
18) StGB 177 (3). The requirement of gross negligence (Leichtfertigkeit) is specified.
19) Jescheck 209.
20) vide Swanepoel 55-7.
21) Radbruch (VDAT) 242.
22) Jescheck 229 ff. Writing before 1953 von Liszt (125) criticised the theory as limiting liability in a way that amounted to an unjustifiable amendment of the Code. Snyman discusses the theory favourably (48-51).

initial advancing of the final-conduct theory of Hans Welzel. In its original formulation[23] this theory, which has had far-reaching effects, was an attempt to limit causal liability by limiting the scope of the criminal act. A person may only be punished because of a criminal act. An act has to be defined in terms of human conduct and human conduct is goal-directed.[24] Such consequences of an act as were neither foreseen nor foreseeable could not be said to have resulted from an 'act' or from human conduct. A person could therefore not be held liable for the unforeseen or unforeseeable results of his conduct as such results would not be part of a goal-directed act or course of conduct.

The work of the theorists who opposed causal liability bore fruit in 1953 when a section[25] of the German Penal Code was enacted to the effect that if a more severe punishment is provided in respect of a crime in the event of a certain effect resulting from the commission of the crime, the measure increasing the prescribed punishment would only come into operation if the accused had been at least negligent in respect of the supervening result.

If the accused had acted intending to bring about death, the crime would be either 'Mord' or 'Totschlag'. Consequently, when

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23) Welzel. (Kausalität und Handlung); vide du Plessis 1985 SALJ 300, 309-10.
24) For criticism vide du Plessis 1985 SALJ 300.
25) StGB 18 formerly 56.

death is the result qualifying a crime, the crime is in practice a form of negligent killing.

There are certain of these crimes where the resulting death only brings about a greater penalty if it is brought about by gross negligence (Leichtfertigkeit).[26)]

The typical equivalents of culpable homicide in South African law would therefore be 'Fahrlässige Tötung' in respect of negligent accidental killings and 'Körperverletzung mit Todesfolge' in respect of unintentional but foreseeable killings resulting from assaults.[27)] In saying that these crimes are the equivalent of culpable homicide in South African law, one must bear in mind that German criminal law recognizes conscious negligence (bewusste Fahrlässigkeit) which would be dolus eventualis in our positive law as it presently stands.

2.3 Negligence in German criminal law

2.3.1 Introductory

The concept of negligence was allegedly the step-child of the

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26) Both conscious and unconscious negligence can be gross; vide Preisendanz 27.

27) Interesting problems arise where the initial crime is attempted and the attempt fails but nevertheless the victim dies. This is discussed by Preisendanz (104) who submits that where a person loses his life in a foreseeable manner while evading an attack aimed at wounding him, the crime is negligent killing ie 'Fahrlässige Tötung'.

German criminal legal theorists for many years.[28] But towards the end of the nineteenth century and in the twentieth century it attracted ever-increasing attention.[29]

This is due on a practical level to the large number of accidental deaths that can be caused in our industrial age, particularly because of the enormous increase in road traffic. On the theoretical level it is due to the inability of Welzel's final-conduct theory to accommodate criminal negligence. This latter feature has given rise to lively discussions, as yet unabated, in which the finalists submit that the final-conduct theory accommodates negligence more satisfactorily than any other theory. But their opponents submit that the final-conduct theory is unacceptable as a theory of criminal conduct as it cannot accommodate criminal negligence, at least not unconscious negligence.[30]

The history of the various successive theories of criminal negligence up to 1910 is admirably summarised by Exner. The main problem with which the theorists had to contend, was how unconscious negligence could give rise to criminal liability as negligent conduct is not willed and only an evil will (böser Wille)

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28) Binding Die Normen und ihre Übertretung vol IV 311.

29) A number of monographs on negligence appeared from about 1908 eg von Hippel Vorsatz und Fahrlässigkeit, Exner, Köhler, Engisch and more recently Binavince. The massive Die Normen und ihre Übertretung by Karl Binding was initially planned as a treatise on negligence only.

30) Maurach-Zipf 192-3.

ought to be punished.[31] The basis of the problem can be traced to the philosophers of the Aufklärung who widely accepted the view that all fault pertains to the will[32] or, as it is stated in German, 'alle Schuld ist Willensschuld'.

Immanuel Kant based his formidable moral philosophy on the statement:

> 'Es ist überall nichts in der Welt, ja überhaupt auch ausser derselben zu denken möglich, was ohne Einschränkung für gut könnte gehalten werden, als, allein ein guter Wille'.[33]

Clearly, if only a will can be good in the moral sense, only a will can be bad. As unconscious negligence can by definition, not give rise to 'willed' or desired results, it is an impossible task to relate unconscious negligence to the will. But

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31) Exner devotes the first five chapters to a discussion of the various attempts at reconciling conscious negligence as fault with the doctrine that all fault pertains to the will. Maurach-Zipf (394 ff) express the current view that unconscious negligence is not a state of mind or a condition of the will but merely a value judgment passed on conduct. In other words it is normative fault.

32) Löffler 213, 164; Feuerbach (Revision) II 57 fn.

33) It is the opening sentence of his Grundlegung zur Metaphysik der Sitten and may be translated as follows: 'Nowhere in the world, or, for that matter, outside it, can anything be regarded as good without any qualification, except only a good will' (my translation).

many fine minds made the attempt; notably, Anselm Feuerbach, Ernst Ferdinand Klein, L Hascher von Almendingen, Christian Reinhold Köstlin, Albert Friedrich Berner and Karl Binding.

It is unnecessary to investigate the works - interesting though they undoubtedly are - of these writers which span the period from about 1800 to 1920. But it is worth noting that in Hans Welzel's final-conduct doctrine one is faced with the same problem concerning criminal negligence with which Feuerbach had wrestled in 1800.[34] The problem is how to define negligence in terms of intent or how to justify prescribing punishment for negligent conduct as only an evil will or an evil intent should be punished and unconscious negligence cannot be related to intent or to the will. Suffice it to state at this stage that irrespective of the theoretical difficulties above alluded to, it is well established that negligence founds criminal liability in German law.[35]

Negligence is known in two forms in German Criminal Law; namely, unconscious negligence and conscious negligence. Gross negligence is called 'Leichtfertigkeit'.

Section 15 of the German Penal code prescribes the principle nulla peona sine culpa. It is a fundamental section and reads as follows:

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34) du Plessis 1985 SALJ 301, 313-4.
35) Morkel (Nalatigheid) 136 ff.

'Strafbar ist nur vorsätzliches Handeln, wenn nicht das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht'.[36]

2.3.2 Unconscious negligence

The German Civil code contains a definition of negligence. But negligence is not defined in the Criminal Code.[37] It is, therefore, left to the writers and the courts to establish what negligence is in theory and in practice. The general view of negligence is that it amounts to a failure to observe the standard of care generally required in the circumstances in which a person finds himself.[38]

There is generally strong support for the view that not to act as a normal sensible, careful person[39] would, is negligent. This is an objective view, based on the standards of a construct

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36) 'Only intentional conduct is punishable, unless the Statute specifically prescribes punishment in respect of negligent conduct' (my translation).

37) A definition of criminal negligence was suggested in the draft that preceeded the present StGB, but it was not incorporated in the StGB; vide Schönke-Schröder 19ed 232. Negligence is defined in article 276 (i) of the Civil Code.

38) 'Verletzung einer Sorgfaltsplicht' (Jescheck 456) in other words: 'breach of a duty of care'. Jescheck (459, 460) favours the view that unconscious negligence is a subjective state.

39) Einer einsichtigen und besonnener Mensch' (Preisendanz 28; Lackner 81; Jescheck 456 ff).

very much like the 'reasonable man'.[40]

This type of negligence is sufficient to found unlawfulness. The most generally accepted view is that negligence as fault is subjectively tested.[41] In other words, did the accused act carelessly in terms of his own standards? If not he was negligent.[42] These views are a result of a development following on the appearance of Welzel's final-conduct doctrine.

This development is to the effect that crimes of negligence have

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40) vide Morkel (Nalatigheid) 140.

41) Jescheck (457) states that negligence is tested twice and according to a two-fold standard (nach einem doppelten Maszstab). Preisendanz (28) states that a novice driver negligently causing a motor accident could not allege that his conduct was lawful. Objectively his conduct would be unlawful. Subjectively, in the light of his inexperience it may not have been negligent and he would have no 'Schuld'. Maurach-Zipf (II) discusses the unlawfulness of negligent conduct exhaustively 102-12. Some risk to life and limb is dictated by the exigencies of our technological age : to exceed socially acceptable risks is negligent and unlawful. Schönke-Schröder (220-2) express views similar to those of Jescheck; cf Lackner 80-8 (esp 86). Dreher-Tröndle (81-2) are sceptical of the two-fold test for negligence, Rudolphi (AT) 1/2, 70-82 supports it. The general view expressed by the writers is that objective negligence founds an 'Unrecht' (Wrongdoing) and that subjective negligence (that the accused is subjectively to be blamed for his failure to meet the objective standard) founds 'Schuld'.

42) In theory the subjective test for negligence should take into account all the personal traits of the accused relevant to the question whether he could have observed the objective requirements demanded by the situation; vide references in n41 supra.

a different 'Aufbau' (structure) from intentional crimes.[43] In the case of the intentional crime, 'intent' belongs to the act and knowledge of unlawfulness belongs to fault. As there can be no knowledge of unlawfulness in the case of a crime committed unconsciously negligently, this latter fault element is supplied by the consideration that the accused was subjectively capable of realising that his conduct was unlawful. In failing to realize this, he acted negligently. Objective negligence therefore belongs to the act or 'Handlung' and, as such, to the 'Unrecht' or wrong while subjective negligence belongs to fault or 'Schuld'. In terms of section 16 of the German Penal Code a mistake of fact excludes intent, but not negligence. In terms of section 17 a mistake of law is only excusable if it was inevitable in the circumstances. Ignorance of the law is only inevitable if, subjectively, the accused was not able to know the law.

In the German one-phase trial the two inquiries into subjective

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43) vide references n41 supra. Welzel submitted that intent (Vorsatz) belongs with the act (Handlung) and that subjective factors other than intent eg knowledge of unlawfulness, and the decision in favour of crime belong to fault or 'Schuld'. Where the crime is one of negligence the negligence descriptive of the act belongs with the 'Handlung', the subjective factors amounting to negligence (ie failure to observe the objective requirements) belong to 'Schuld'; vide Rudolphi (AT)1/2, 82. It is submitted that this bolsters the view that in a two-phase trial system like ours Welzel's doctrine amounts to this that culpa and dolus are investigated before conviction; and other subjective factors relevant to sentence, after conviction; vide du Plessis 1984 SALJ 301, 320.

and objective negligence are inevitable in that the former inquiry is relevant to sentence. It is submitted that whether the latter inquiry is one into fault or unlawfulness, is immaterial. For 'dogmatic' reasons the finalists would be compelled to regard it as an inquiry into unlawfulness rather than fault.[44)]

2.3.3 Conscious negligence

This concept was first expounded by Anselm Feuerbach.[45)] Influenced by Kant and other philosophers of the Aufklärung his theory of criminal liability is based on the fundamental doctrine that fault pertains to the will.

Conscious negligence is more readily accommodated by this doctrine than unconscious negligence. There is a 'volitional component' in conscious negligence in that the actor is aware of the danger, but his will, although not welcoming the result, does not reject it either. The actor merely hopes or trusts that it will not eventuate.[46)]

Schmidhäuser[47)] sums up two possible forms of conscious negligence; namely, first as viewing a possible result as very remote, or second as hoping that a possible result will not come about. On either version the result is not taken into the bargain. He

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44) cf references in nn 42, 43 supra.
45) Exner 17.
46) Jescheck 460-1; Maurach-Zipf 394-5.
47) AT 223.

rejects both forms stating that on the existing theory conscious negligence can only come into being when the actor, at the moment of acting, trusts that the result foreseen as a possibility, will not eventuate.[48] This is, in fact, at the moment of acting, unconscious negligence.

Schmidhäuser appears to be the only German writer of importance to hold this view. The others[49] subscribe to conscious negligence as not being dolus eventualis in that the actor either regards the possibility as remote[50] or hopes or trusts that the result will not ensue.[51] His will therefore does not accept it and dolus with its 'volitional component' is absent.

2.3.4 Negligence in Crimes qualified by resultant death

Schmidhäuser[52] points out that the negligence encountered where death results from a crime (for instance the infliction of grievous bodily harm) committed intentionally, is different from unconscious and conscious negligence. It consists in one component only; namely, the failure to foresee foreseeable death as a result of the initial crime.

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48) AT 223-4
49) Maurach-Gössler-Zipf 96; Jescheck 483-4; Schönke-Schröder 242; Preisendanz 26-7; Rudolphi (AT) 1/2, 64-5, 90; Lackner 87; Dreher-Tröndle 78-80.
50) 'Warscheinlichkeitstheorie' (probability theory); Dreher-Tröndle 79.
51) 'Einwilligungstheorie' (acceptance theory); Dreher-Tröndle 79.
52) 221-2, criticising particularly Jescheck 464.

The element of unlawfulness is supplied by the initial crime. Where the initial crime is negligently committed there is in fact only one negligence in respect of the death.[53)]

2.4 Conclusion

Negligent killing in German law appears to be unduly diversified and complex. As Schmidhäuser[54)] points out, it is not the resultant death that qualifies the initial crime, but negligent killing which is qualified by the manner (for instance wounding) in which it was brought about.

One crime of negligent killing, like our culpable homicide, would probably suffice to cover all the examples of negligent killing in the German Penal code. The manner in which the negligent killing came about would be a factor affecting sentence.

2.5 Normative fault

Traditionally, fault in German criminal law has been treated as blameworthiness or a ground for reproach. It is said to be the relationship between the actor and his act which renders the act blameworthy.[55)] Another way of stating this is to say that it is the subjective factor, accompanying the act that renders the

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53) Schmidhäuser 230.
54) ibid.
55) Beling 1 ff; Jescheck 326; Maurach-Zipf 440.

actor liable to reproach.

Prior to the work of Welzel and other finalists, fault was regarded as consisting of intent or negligence. It was, however, pointed out that a sane or 'Zurechnungsfähige' actor could commit a crime intentionally, or negligently, and nevertheless escape reproach. Fault, therefore, had to be more than, or different from, intent or negligence. This gave rise to the view that fault is the blameworthiness of conduct.[56] Conduct would consist of objective and subjective elements and the question of blameworthiness would be considered once this had been established.

The objective elements were regarded as the 'Tat', or deed, or as the 'Unrecht' or wrongdoing. Fault separated from this was initially regarded as the subjective factors accompanying the objective 'Unrecht'. In the absence of these factors the person who had committed the 'Unrecht' would not be punishable.

As there could be an intentional or negligent 'Unrecht' which was nevertheless not blameworthy, the view was advanced that the blameworthiness, or 'Schuld' attaching to an 'Unrecht' could not consist of intent or negligence but of blameworthiness in the sense that the actor had intentionally or negligently acted in a

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56) vide Jescheck 328-35 for a full discussion.

way he ought not to have acted.

Jescheck[57] traces this development to views on the freedom of the will. Whether an individual's will was free to direct his conduct in another direction than that of the crime he committed, can never be conclusively proved or disproved. The most one can say is that a normal person or another person in his place could have or could not have acted otherwise. The actor is therefore blamed for intentional or negligent conduct when measured against the conduct of this normal person. The normal person personifies society's expectation of the individual or his 'Zumutbarkeit'. If a normal person would have acted otherwise, in other words if society could expect the accused to have acted otherwise, he had fault in the normative sense; otherwise not.

This reduces fault to decision-making,[58] more particularly the decision in favour of wrong rather than right. This decision can only be blameworthy if the accused was aware that his decision was in favour of wrong in other words if he had awareness of unlawfulness.

This is a broad sketch: there are many conflicting views among German writers.[59] The nett result appears to be that fault becomes awareness of unlawfulness or blameworthy lack of such

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57) ibid.
58) Maurach-Zipf 392.
59) ibid.

awareness.[60] This becomes the foundation of a reproach on which sentence is based.

It is perhaps unnecessary to point out that in such a concept of fault elements of criminal conduct and factors effecting sentence are inextricably interwoven. This is a result of the German one-phase trial.

The normative fault doctrine is generally accepted in Germany and is complimentary to the final-conduct doctrine.

2.6 Final conduct

Although not his sole work, the final-conduct doctrine is mainly associated with Hans Welzel.[61]

Welzel came to the conclusion that intent and negligence belong to the criminal act, or 'Unrecht', rather than to the blame-worthiness, or 'Schuld', associated with the act.[62] He sought to base these views on the scientific premise that all human conduct is goal-directed. An intentional act is obviously goal-directed and a negligent act is one in which the actor is unaware of the undesirable results of his goal-directed act or conduct because of a poor appraisal of all the implications of his proposed conduct.

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60) vide Snyman 1979 SACC 3 and 136.
61) ibid and du Plessis 1984 SALJ 301.
62) Snyman 1985 SALJ 120, 121.

It is generally accepted that the doctrine cannot accommodate negligence.[63] If it accommodates only intent it is little more than the tautology that all intentional conduct is intentional.

This has, however, not been its sole result. Intent in the shape of colourless intent, in other words intent separated from awareness of unlawfulness, is regarded as part of the act and awareness of unlawfulness plus the decision to act notwithstanding such awareness, is fault. As such fault is blameworthiness.

Welzel's theory is a theory that fits well into the German one-phase trial, but could only lead to unnecessary complications in our two-phase trial where actus reus and mens rea are ideally investigated separately from the question whether and to what extent the combination of actus reus and mens rea resulting in a crime is subject to reproach or punishment.

2.7 Conclusion

When dealing with German criminal law one should not forget the German one-phase trial and the inevitable result this procedural feature must have on the fault concept. As subjective factors have become increasingly recognized as supremely relevant to

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63) CR Snyman 1979 SACC 3 and 136; du Plessis 1984 SALJ 301. Badenhorst who supports Welzel's finalism regards crimes of negligence as not being 'true' crimes; vide Badenhorst 10.

sentence, the marked subjectivism of German law should be seen in context. It is not guilt or innocence in our sense that is decided on alone, but sentence also when subjective blameworthiness (Schuld) is placed at the pinnacle of the German criminal legal edifice.

Once one is aware of this and once one realizes that subjective factors are accorded due weight by our courts in arriving at sentence, a more flexible approach to guilt or innocence becomes possible and extreme subjectivism cannot result in an undesirable total acquittal such as happened in Arnold[64] and could have happened in Lesch.[65]

3 THE DEFENCES OF PRIVATE DEFENCE, NECESSITY, PROVOCATION AND INTOXICATION IN RELATION TO NEGLIGENT KILLING

3.1 Introduction : Mistake in German Criminal Law

The German Penal code provides for mistake of law[1] as well as mistake of fact[2] to be defences to a criminal charge.

In the case of a mistake of fact the accused could escape liabi-

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64) 1985 3 SA 256 (C).
65) 1983 1 SA 814 (O).
1) 'Verbotsirrtum' StGB 17.
2) 'Irrtum über Tatumstände' StGB 16.

lity altogether or be convicted of a crime of negligence[3] depending on the nature of the mistake. Killing while labouring under a mistake of fact could, therefore, result in a conviction of negligent killing if the mistake was negligently made in the circumstances.

Mistake of law is more difficult to apply as it only serves as a valid defence if unavoidable in the circumstances;[4] the underlying rationale apparently being that there is a duty on the subject to ascertain the law.[5]

3.2 Exceeding the bounds of Private Defence

In terms of the German Penal Code an act that would otherwise be criminal is lawful or justified if it is committed in private defence.[6] The lawfulness only extends to defensive measures that are necessary to avert the threatened danger.[7]

There are two possible types of mistake that could lead to exceeding the bounds of private defence. First the danger may be

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3) StGB 16 (2).
4) StGB 17. The requirement that the mistake must have been unavoidable is a stricter requirement than the standards set for non-negligent conduct; vide Maurach-Zipf 514-5. In the case of an avoidable mistake of law punishment may be reduced ito StGB 49; vide Maurach-Zipf 506; Jescheck 365.
5) Jescheck 367.
6) StGB 32.
7) The conditions set for the defence to succeed are fairly strict but need not be discussed in any detail for present purposes; vide eg Preisendanz 176 ff; Lackner 170ff.

non-existent or not as great as the accused believed it to be. This is putative private-defence.[8] If the mistake is reasonable the accused is entitled to an acquittal. If the mistake is unreasonable, he may be convicted of a crime of negligence,[9] in other words a killing could become a negligent killing instead of an intentional killing. This is a clear application of the principle laid down in section 16 of the Code.

There is, however, an important exception to this rule which may be interpreted as a measure embodying normative fault and is reminescent of our now discredited partial excuse rule. The section in question[10] provides that where a person exceeds the bounds of self-defence because of confusion, fear or fright his conduct shall not be punishable. This applies even if the conduct is such as would, in the absence of this section, have given rise to punishment on the ground of negligence.[11] It is not clear whether the accused escapes punishment because of absence of unlawfulness or absence of fault.[12] The most acceptable

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8) Jescheck 399; Maurach-Zipf 309.
9) ibid. The topic is fully discussed in all the commentaries when dealing with sections 32 and 33 StGB.
10) StGB 33.
11) Maurach-Zipf (437ff) regard the section as a statutory limitation on 'Zumutbarkeit' in other words on what may be expected of an accused. They also mention the view that the section creates an irrebuttable presumption against negligence in given circumstances.
12) The majority of writers are of the opinion that the measure excludes fault (Rudolphi (AT) 1/2 247ff; Lackner 178-9; Schönke-Schröder 462 ff). Maurach-Zipf are highly critical of the measure (438). Schmidhäuser (245) regards the measure as unnecessary, as the same results would be obtained by applying general principles and as it necessi-

view seems to be that because of the situation a confused, fearful or frightened person cannot be expected to act in a normal way. In other words the approach is normative and the accused lacks 'Zumutbarkeit' in the sense that lawful conduct could not have been expected of him.[13)]

Although one finds an application of the general principle that mistake negatives fault where one exceeds the bounds of self-defence there is a rule relating to confusion, fear or fright which appears to cut across principle in a pragmatic way, in favour of equity and as a concession to human frailty.[14)]

3.3 Exceeding the bounds of Necessity

Two defences of necessity are provided for in the German Penal Code; namely, necessity which justifies otherwise criminal conduct,[15)] and necessity which negatives fault[16)] in respect

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tates a division into two types of the phenomenon of exceeding the bounds of self-defence, so-called extensive as opposed to intensive excess of self-defence. Detailed discussion is unnecessary, but the measure seems to indicate that the 'axiomatic closed' nature of German criminal law is more apparent than real on an analysis of the Penal Code as opposed to the work of the theorists. 33 StGB is apparently designed to protect the confused, fearful or frightened individual and on the principle inclusio unius est exclusio alterius to take away protection from the angry or revengeful individual (Schmidhäuser 245; Jescheck 397ff).

13) Jescheck 397.

14) The measure is reminescent of section 141 of the former Transkeian Penal Code.

15) StGB 34, so-called 'rechtfertigender Notstand'.

16) StGB, so-called 'entschuldigender Notstand'.

of conduct which is otherwise criminal.

Necessity which justifies conduct is a defence in respect of conduct which averts immediate danger to life, person, liberty honour or any other interest in respect of the accused or another person if, in balancing the threatened interest with the interest harmed, it is found that the former is substantially greater than the latter. This measure is also only applicable if the means employed to avert the harm are appropriate in the circumstances. Allowing for error in a crisis situation, the defence is strictly construed and if the actions of the accused exceed the exigencies of the occasion his conduct is unlawful and treated as such. It must be borne in mind that this is not a measure affecting fault and the attitude of the courts and the writers is that it is not for the accused but for the legislator to determine what is lawful in a given situation.[17] Mistake can and often does give rise to a reduction in sentence.[18]

The second form of necessity; namely, that which excludes fault, is more narrowly prescribed. It is only available to a person who acts to avert an immediate danger to the life, person or liberty of himself, a near relation or a person in respect of whom he has a close relationship. If the actor could have been expected to accept the danger the defence is not applicable, but sentence may nevertheless be reduced.

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17) Jescheck 395; Schönke-Schröder 497.
18) ibid and Maurach-Zipf 506.

Mistake in relation to this form of necessity is of very limited application in favour of the accused. A mistake as to the existence of the state of necessity is only excusable if it was unavoidable.[19] Should the mistake be bona fide, but avoidable, punishment may be reduced.[20] According to Jescheck[21] this is a form of mistake of fact, but it is very similar to mistake of law.

The reason for what appears to be a rather harsh approach; namely, that mistake does not reduce intent to negligence but can only result in a reduction of punishment and then only if the mistake was unavoidable, appears to be the consideration that the accused is acting on the assumption that he may excusably commit a crime. It is his duty to ensure that this assumption is well-founded. He acts intentionally and knowingly, and if the assumption is mistaken that is his misfortune and he is punished for such intentional crime as he may have committed.[22] This

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19) StGB 35 (2).

20) ibid. The measure therefore provides for either total acquittal in the case of unavoidable mistake or possible reduction of sentence in the case of avoidable mistake, in this respect it resembles the effect of mistake of law. There is no provision for mistake in this context leading to conviction of a crime of negligence instead of a crime of intent; vide Rudolphi (AT) 1/2 263-4; Schönke-Schröder 495-7; Preisendanz 193.

21) 395; cf Schönke-Schröder 395.

22) This appears to be in keeping with Welzel's finalistic view that human conduct is goal-directed and an actor should bear in mind the implications of his goal-directed conduct. It is also in keeping with a normative view of fault: one is expected to make sure of one's assumptions before embarking on harmful conduct.

attitude appears to be in keeping with the normative fault doctrine and is strongly reminescent of the reasoning adopted by Coetzee J in Barnard.[23] The defence of necessity in German criminal law has been investigated in a recent contribution[24] to South African Criminal Legal literature.

3.4 Provocation

Provocation[25] is not dealt with separately in the German criminal law as a defence or doctrine standing on its own. It is treated according to the general principles of the criminal law and is dealt with in the context of intent or 'Zurechnungsfähigkeit'[26] and the way these requirements of criminal liability

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23) 1985 4 SA 431 (W).

24) Van der Westhuizen 293ff, 511ff.

25) Bergenthuin (131-45) makes a detailed analyses of provocation in German Criminal Law. He concludes (239ff) that the relevant rules represent a systematic application of basic general principles in keeping with the 'axiomatic closed' nature of German Criminal Law. It is difficult to agree with this conclusion. Provocation is not a separate topic in German criminal law (131), but the effect of provocation on unlawfulness and fault is found in a conglomerate of diverse rules in which measures like StGB 33 and StGB 213 and their application lead to a totality of rules, sub-rules and exceptions that are more reminescent of a 'problematic open' system than an 'axiomatic closed' one. The topic goes beyond the scope of the present discussion, but study of Bergenthuin's exhaustive exposition could lead one to believe that the 'axiomatic closed' nature of the system is more apparent than real. The casuistry eschewed by the theorists is patent and latent in the Code. This conclusion is inescapable when one considers the discussion of the decisions (176ff) by Bergenthuin.

26) 'Zurechnungsfähigkeit' or, as it is nowadays more often called, (Bergenthuin 191) 'Schuldfähigkeit' means criminal capacity or 'toerekeningsvatbaarheid'. It is formally defined in StGB 20.

are affected by serious emotional disturbances.

For present purposes 'Zurechnungsfähigkeit' or 'Schuldfähigkeit' in German Criminal Law may be regarded as very similar to 'criminal capacity' in South African criminal law, particularly in the most recent developments of the latter.[27)]

A very much provoked individual may become so emotionally upset as to lose his power to distinguish between right and wrong and/or his power of self-control. German courts and writers are sceptical about allowing a person to successfully plead lack of criminal capacity because of anger. But, as Bergenthuin[28)] points out, the situation may be such that on an application of normative fault, it may be held that the individual concerned could not have been expected to act otherwise.

Where the provocation is coupled with self-defence it may be such as to absolve the accused entirely because of confusion, fear or fright.[29)]

There is a specific provision in terms of which provocation reduces the punishment for intentional killing.[30)] This does not specifically apply to 'Mord', but the provocation may be such as to negative an aggravating factor that would have made the

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27) Bergenthuin 216 ff, 231 ff.
28) 213.
29) ie ito StGB 33.
30) StGB 213, Bergenthuin 235-7.

crime 'Mord'; the crime would then become 'Totschlag' and the provocation would have the further effect of reducing the punishment for this less serious crime.[31)]

3.5 Intoxication

In terms of general principles intoxication could have the effect of negativing 'Schuldfähigkeit'. To prevent persons committing crimes in this condition from escaping liability altogether there is the crime of 'Vollrausch'.[32)] A person is guilty of this crime if he knowingly or negligently imbibed so as to lose his criminal capacity and in this condition committed a crime. A person who has not yet lost his criminal capacity because of imbibing may still be convicted on the basis of intent or negligence.[33)]

The actio libera in causa is well known in German Criminal Law and a person who drinks in circumstances in which he does or ought to foresee that he will commit a crime while 'under the influence' would be guilty of a crime of intent or negligence as the case may be.[34)]

3.6 Conclusion

Examination reveals that notwithstanding the strict adherence to

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31) Bergenthuin 233-9.
32) StGB 323 (a).
33) Dreher-Tröndle 1360-1.
34) Jescheck 364 ff.

principle supported by writers on German criminal law the treatment of the defences discussed in this section, in the German Penal Code, shows a tendency to employ pragmatic rules sometimes at variance with principle, on practical grounds.

The defences do not have the same important bearing on negligent killing as their counterparts have on culpable homicide in South African criminal law.

CONCLUSION

1 PURISM AND PRAGMATISM

This study commenced with a review of the debate of whether murder is a defence to a charge of culpable homicide.[1)]

The debate was illustrative of the two currents at work in our criminal law; namely, the German law orientated purist current, and the 'traditional' and to some extent English law orientated pragmatic current.

The two stances taken in the debate were first the purist stance that dolus and culpa were irreconcileable concepts and that proof if intent to kill rendered a conviction of culpable homicide out of the question. Opposed to this was the pragmatic stance that intent to kill was a more serious form of fault than negligence and that the presence of the former should not be allowed to prevent convictions of culpable homicide in cases where convictions of murder were incompetent for procedural reasons.

The debate was resolved by the Appellate Division in Ngubane.[2)]

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1) Ch 1, 1.
2) 1985 3 SA 677 (A).

The answer is comparatively simple and pragmatic: negligence is unreasonable conduct and viewed as conduct an intentional killing is also unreasonable. Proof of intent therefore does not render a conviction of culpable homicide out of the question.

In the upshot our law benefitted from the debate and its solution. The views of purists and pragmatists who had written on the debate also assisted the court in sifting the legal principles involved. The existence of the purist and pragmatist currents in our law therefore has this advantage that it keeps debate on legal problems alive, stimulates the expression of contrasting points of view and assists our courts in arriving at solutions to problems.

The history of the defence of provocation[3] is more illustrative of the process at work than the 'murder as a defence to culpable homicide' debate.

When section 141 of the Transkeian Penal Code was regarded as stating our law on provocation, a set of formalistic, pragmatic rules relating to this defence, came into being. They were set out in Gardiner and Lansdown[4] and presented an unsystematic and unsatisfactory picture. This was unacceptable to purists and

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3) Ch IV, 2 supra.
4) Ch IV, 2.4 supra.

pragmatists alike and mainly because of the purist criticism of De Wet and Swanepoel,[5] a satisfactory solution was adopted in Mokonto.[6] The unsatisfactory or possibly even dangerous side of purism is, however, now making its presence felt in respect of this defence. Subjectivism is going too far and loss of self-control through emotional stress[7] could result in complete acquittals on charges of murder where convictions of culpable homicide are clearly called for. This is a result of giving the purist concept of 'ontoerekeningsvatbaarheid' too wide an area of application. It would be beneficial to our law if purists and pragmatists could work together to curb this tendency.[8]

The defence of intoxication has reached what is submitted to be an unsatisfactory stage, mainly because of purist influence. The extension of the area of application of the concept of 'ontoerekeningsvatbaarheid' is largely the cause of this. If the proposals of the South Africa Law Commission[9] are given effect to, a pragmatic solution will find its way into our law in the shape of legislation. It is submitted that this would be beneficial to our law as the effects of the adoption of purism in Chretien[10] are proving unsatisfactory.[11]

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5) Ch IV, 2.8 supra.
6) 1971 2 SA 319 (A).
7) vide CR Snyman 1985 SALJ 240.
8) CR Snyman supra could be seen as pointing the way.
9) Drugs Report 118-9.
10) 1981 1 SA 109 7 (A).
11) eg Stellmacher 1983 2 SA 181 SWA; cf Baartman 1983 4 SA 395 (NC).

In recent years the normative fault concept has received attention in our criminal legal literature and it has been discussed although not accepted by the Appellate Division.[12] Its recent partial acceptance[13] by a local division of the Supreme Court is with respect, not to be welcomed in context. As was shown in the discussion on provocation, normative fault is not new. It has simply not been described by that name in the past. It appears to be a quantitative rather than a qualitative approach to fault. The accused is judged according to what others would have done in his position and he is reproached for failure to live up to what the community could expect of him as a normal person. Insofar as negligence is objectively judged according to the standards of the reasonable man it is a normative concept of fault and should be treated as such. An inquiry into criminal intent is and should remain subjective. It is a qualitative determination of what was going on in the mind of the accused. As crimes of intent are generally more seriously punished than crimes of negligence the assessment of intent should remain psychological or qualitative, in other words beamed on the state of mind of the individual accused.

2 ENGLISH LAW AND GERMAN LAW

According to the English writers whose works are referred to in Chapter VI the English law relating to manslaughter is in need of

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12) Bailley 1982 3 SA 772 (A).
13) Barnard 1985 4 SA 431 (W).

reform. To express an opinion after the brief examination in that chapter would be wrong. A very thorough investigation supplemented by a great deal of practical experience gained in the English courts would be required before an evaluation of any worth could be made. No language barrier exists and South African lawyers are in a very favourable position to study English textbooks and other legal writings as well as English law reports. From this a very clear picture of problems and possible solutions may be gained. It would, however, be mistaken to believe that this is enough unless one has extensive experience of how the law works in practice.

The body of literature on German criminal law is enormous. Working against the background of a tradition that can be traced back to the work of some of the greatest modern philosophers,[14] the theoretical investigations have always been aimed at establishing system. A review[15] of the many crimes in the German Code that could be classified as negligent killing leads to the conclusion that the German positive law is perhaps not as systematic as a study of the works of the theorist might lead one to suppose. This conclusion is strengthened by reviewing the way in which, for example necessity, private defence and provocation are dealt with in the Code. A study of the German theorists is time consuming but not without reward. They highlight and

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14) Kant, Fichte, Hegel.
15) Ch VII, supra.

investigate many problematic features of criminal law that are inadequately dealt with in a pragmatic system. It would, however, be dangerous to be 'taken in tow' by the theoretical discussions. What is required is that theoretical study be supplemented by close observation of the proceedings in the German courts.[16] This could serve to put our writers and perhaps also our courts on their guard against accepting German theoretical developments without knowing their practical effects.

3 CONCLUSION

The state of our law relating to culpable homicide is generally sound but there is one grave danger and that is that over-extension of the ambit of the defence of 'ontoerekeningsvatbaarheid'[17] may lead to acquittals where convictions are called for. This tendency has its origins in purism. Ngubane, at present our leading case on culpable homicide, should serve to curb an unfavourable dogmatic or purist development and it is submitted that it would be to the benefit of our law if a similar curb on the extension of 'ontoerekeningsvatbaarheid' could emerge from an authoritative decision in the near future.

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16) The present writer spent 6 weeks in German courts. This is hopelessly inadequate.

17) As happened in Chretien, Arnold 1985 3 SA 251 (C) and Stellmacher (supra).

TABLE OF CASES

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BIBLIOGRAPHY

List of Principal Works cited and Mode of Citation.

(Unless otherwise stated, the edition of a work referred to, is the edition mentioned in this list).

MODE OF CITATION	WORK
Anders and Ellson	The Criminal Law of South Africa by PC Anders and SE Ellson 1915.
Archbold	Archbold's Pleading, Evidence and Practice in Criminal Cases Forty-first edition by S Mitchell, PJ Richardson and JH Buzzard 1982.
Badenhorst	Die Inhoud van die Misdaadbegrip in die Suid-Afrikaanse Strafreg by CHJ Badenhorst, Unpublished Doctoral Thesis Rand Afrikaans University 1982.
Barlow	Digest of the Law of Murder and Culpable Homicide by TB Barlow 1951.
Bassiouni	Substantive Criminal Law by MC Bassiouni 1977
Beling	Unschuld, Schuld und Schuldstufen by E Beling 1910.
Bergenthuin	Provokasie as Verweer in die Suid-Afrikaanse Strafreg by JG Bergenthuin, Unpublished Doctoral Thesis University of Pretoria 1985.

Binavince	Die vier Momente der Fahrlässigkeitsdelikte by ES Binavince 1969
Boberg	The Law of Delict Vol I Aquilian Damages by PQR Boberg 1985.
Botha	Wederregtelikheidsbewussyn in the Strafreg by DA Botha Unpublished Doctoral Thesis University of Pretoria 1973.
Burchell and Hunt	South African Criminal Law and Procedure, Volume I General Principles of Criminal Law Second Edition by EM Burchell, JRL Milton and JM Burchell 1983.
Cooper	Motor Law Volume I by WE Cooper 1982.
Cross and Jones	Cross and Jones' Introduction to Criminal Law tenth edition by R Card, 1984.
De Wet and Swanepoel	Strafreg fourth edition by JC de Wet 1985.
Dix and Sharlot	Basic Criminal Law, Cases and Materials by GE Dix and MM Sharlot second edition 1980.
Dreher-Tröndle	Strafgesetzbuch und Nebengesetze, Kurz-kommentar fortieth edition by E Dreher and H Tröndle 1981.
Drugs Report	Report of the South African Law Commission on Offences Commited under the Influence of Liquor or Drugs 1986.

Du Plessis JH	Drank Dwelmiddels en Padverkeer by JH du Plessis 1985.
Elliot and Wood	Elliott and Wood's Casebook on Criminal Law fourth edition by DW Elliot and C Wells 1982.
Engisch	Untersuchungen über Vorsatz und Fahrlässigkeit by Karl Engisch 1930.
Exner	Das Wesen der Fahrlässigkeit, eine Stafrechtliche Untersuchung by F Exner 1910.
Feuerbach (Revision)	Revision der Grundsätze und Grundrisse des positiven peinlichen Rechts Erster Teil by PJA von Feuerbach 1799
Fischl	Der Einfluss der Aufklärungs-philosophie auf die Entwicklung des Strafrechts by O Fischl 1913.
Gardiner and Lansdown	South African Criminal Law and Procedure sixth edition by CWH Lansdown, WG Hoal and AV Lansdown 1957.
Gardner and Manion	Criminal Law: Principles, Cases and Readings by TJ Gardner and J Manion 1975.
Glanville Williams (Textbook)	Textbook of Criminal Law by Glanville Williams second edition 1983.
Glanville Williams	Criminal Law, the General Part by Glanville Williams second edition 1961.

Gordon	The Criminal Law of Scotland by GH Gordon second edition 1978.
Harris	Harris's Criminal Law twenty-second edition by I McLean and P Morrish, 1973
Hiemstra	Suid-Afrikaanse Strafproses by VG Hiemstra third edition 1983.
Hosten et al	Introduction to South African Law and legal Theory by WJ Hosten, AB Edwards, CK Nathan and FJ Bosman 1977.
Hunt	South African Criminal Law and Procedure, Volume II Common-Law Crimes second edition by JRL Milton 1982.
Jescheck	Lehrbuch des Strafrechts Allgemeiner Teil by H-H Jescheck third edition 1978.
Lackner	Strafgesetbbuch mit Erläuterungen by K Lackner fifteenth edition 1983.
Langbein	Comparative Criminal Procedure: Germany by JH Langbein 1977.
Lansdown and Campbell	South African Criminal Law and Procedure, Volume V Criminal Procedure and Evidence by AV Lansdown and Jean Campbell 1982.
LAWSA 6	The Law of South Africa Vol 6 Criminal Law edited by WA Joubert 1981.

Macintosch and Scoble	Negligence in Delict by JC Macintosch and C Norman-Scoble fifth edition 1970.
Maurach-Gössel-Zipf	Strafrecht Allgemeiner Teil Teilband 2 by R Maurach, KH Gössel and H Zipf fifth edition 1978.
Maurach-Zipf	Strafrecht Allgemeiner Teil Teilband 1 sixth edition by R Maurach and H Zipf 1983.
McKerron	The Law of Delict by RG Mc Kerron seventh edition 1971.
Mezger-Schönke - Jescheck	Das Ausländische Strafrecht der Gegenwart dritter Band by E Mezger, A Schönke and H-H Jescheck 1959.
Morkel (Nalatigheid)	Nalatigheid as Grondslag vir Strafregtelike Aanspreeklikheid by DW Morkel, Unpublished Doctoral Thesis University of the Orange Free State 1977.
Morkel (Rational Policy)	Toward a Rational Policy of Criminal Fault by DW Morkel, Unpublished Master's Thesis University of Pretoria 1981.
Nathan	The Common Law of South Africa Vol IV by M Nathan 1907.
Naucke	Strafrecht eine Einführung by W Naucke third edition 1980.
Olivier	Legal fictions in Practice and Legal Science by PJJ Olivier 1975.

Peters	Opzet en Schuld in het Stafrecht by AAG Peters 1966.
Pittman	Criminal Law in South Africa by W Pittman third edition 1950
Postma	Moord en Strafbare Manslag in die Suid-Afrikaanse Strafreg by S Postma, Unpublished Doctoral Thesis University of Leiden 1957.
Preisendanz	Strafgesetzbuch Lehrkommentar mit Erläuterungen by H Preisendanz thirtieth edition 1978.
Radbruch (VDAT)	Erfolghaftung by G Radbruch in Vergleichende Darstelling des Deutschen und Ausländischen Strafrechts Allgemeiner Teil Vol II 1908.
Rudolphi (AT)	Systematischer Kommentar zum Strafgesetzbuch, Band I Allgemeiner Teil third edition by HJ Rudolphi, E Horn and E Samson 1982.
Rudolphi (BT)	Systematischer Kommentar zum Strafgesetzbuch, Band II Besonderer Teil third edition by HJ Rudolphi, E Horn and E Sampson 1982.
Russell	Russell on Crime Vol I twelfth edition by JWC Turner 1964.
Schmidhäuser (AT)	Strafrecht, Allgemeiner Teil, Studienbuch by E Schmidhäuser and H Alwart 1982.
Schmidhäuser (BT)	Stafrecht, Besonderer Teil, Grundriss by E Schmidhäuser 1980.

Schmidt	Einführung in die Geschichte der Deutschen Strafrechtspflege by E Schmidt 1951.
Schönke-Schröder	Strafgesetzbuch Kommentar twentieth edition by T Lenckner, P Cramer, A Eser and W Stree 1980.
Smith and Hogan	Criminal Law by JC Smith and B Hogan fifth edition 1983.
Snyman	Criminal Law by CR Snyman 1983.
Snyman (Srafreg)	Strafreg by CR Snyman 1981.
Snyman and Morkel	Strafproses by JL Snyman and DW Morkel 1985
Strauss	Doctor, Patient and the Law, a Selection of Practical Issues by SA Strauss second edition 1984.
Strauss (Toestemming)	Toestemming tot Benadeling as Verweer in the Strafreg by SA Strauss Unpublished Doctoral Thesis University of South Africa 1961.
Swanepoel	Die Leer van 'Versari in re Illicita' in die Strafreg by HL Swanepoel Published Doctoral Thesis University of Stellenbosch 1944.
Van Der Merwe	Die Leerstuk van Verminderde Strafbaarheid by DP van der Merwe Unpublished Doctoral Thesis University of South Africa 1980.

Van der Walt	Delict : Principles and Cases by JC van der Walt 1979.
Van der Westhuizen	Noodtoestand as Regverdigingsgrond in die Strafreg by JV van der Westhuizen Unpublished Doctoral Thesis University of Pretoria 1979.
Van Oosten	Oorsaaklikheid by Moord en Strafbare Manslag by FFW Van Oosten Unpublished Doctoral Thesis University of Pretoria 1981.
Visser and Vorster	General Principles of Criminal Law through the Cases by PJ Visser and JP Vorster 1982.
Von Bar	Geschichte des deutschen Strafrechts und der Strafrechtstheorien by CL von Bar 1882
Von Hippel (I)	Deutsches Strafrecht, Band 1, Allgemeine Grundlagen by Robert von Hippel 1925.
Von Hippel (II)	Deutsches Strafrecht, Band 2, Das Verbrechen by Robert von Hippel 1930.
Von Liszt	Lehrbuch des Deutschen Strafrechts by F von Liszt Twenty second edition 1919.
Welzel (Kausalität)	Kausalität und Handlung by H Welzel (1933) reprinted in Abhandlungen zum Strafrecht und zur Rechtsphilosophie edited by H Welzel 1975.

Welzel (Naturalismus) — Naturalismus und Wertphilosophie im Strafrecht - Untersuchungen über die ideologischen Grundlagen der Strafrechtswissenschaft by H Welzel (1935) reprinted in Abhandlungen zum Strafrecht und zur Rechtsphilosophie edited by H Welzel 1975.

LIST OF JOURNAL ARTICLES AND NOTES

Ashall PA 'Manslaughter - The Impact of Caldwell?' 1984 CLR 467.

Badenhorst CHJ 'Vrywillige Dronkenskap as Verweer teen Aanspreeklikheid in die Strafreg - 'n Suiwer Regwetenskaplike Benadering' 1981 SALJ 148.

Badenhorst CHJ. 'Twee Ontwikkelingsmoontlikhede vir die Materiële Strafreg in Suid-Afrika: die Aksiomaties-geslote en die Problematies-ope Modelle as alternatiewe Praktiesteoretiese Uitgangspunte vir Misdaad-beoordeling' 1983 TSAR 137.

Bergenthuin JG 'Die Algemene Toerekeningsvatbaarheids maatstaf' 1982 DJ 273.

Bergenthuin JG 'Die Aanwendingsgebied van die Actio Libera in Causa' 1986 THRHR 21.

Bergenthuin JG 'Provokasie in die Suid-Afrikaanse Strafreg' 1986 DJ 98.

Bertelsman W 'The Essence of Mens Rea' 1974 AJ 34.

Bertelsmann W 'What happened to Luxuria, Some Observations on Criminal Negligence, Recklessness and Dolus Eventualis' 1975 SALJ 58.

Bertelsmann W 'Farewell Recklessness- welcome the real Dolus Eventualis' 1980 SACC 28.

Bodenstein HDJ 'Phases in the Development of Criminal Mens Rea 1919 SALJ 323.

Botha DA 'Mens Rea in the Form of Culpa founded upon Ignorance of Law' 1975 SALJ 280.

Botha DA 'What precisely does constitute Mens Rea?' 1975 SALJ 280.

Botha DA 'Culpa - A Form of Mens Rea or a Mode of Conduct?' 1977 SALJ 29.

Botha DA 'Die Rol van Dolus en Opset in die Strafreg' 1980 SALJ 277.

Briggs A 'In Defence of Manslaughter' 1983 CLR 764.

Briggs A 'A Reply' 1984 CLR 479.

Burchell EM 'Mens Rea and Actus Reus' 1961 SALJ 239.

Burchell JM 'Intoxication and the Criminal Law' 1981 SALJ 177.

Cameron E 'Legal Chauvinism, Executive mindedness and justice - LC Steyn's impact on South African Law' 1982 SALJ 38.

Dashwood A 'Logic and the Lords in Majewski' 1977 CLR 533 and 591.

Du Plessis JR 'Logic v Expediency, Automatism Resulting from Voluntary Intoxication as treated by the House of Lords and by the Appellate Division' 1979 DR 119.

Du Plessis JR 'Chretien - Guest uninvited, Geographer extra-ordinary, Witness first class' 1982 SALJ 189.

Du Plessis JR 'Rage Reaction: A Variation on the Theme of Provocation' 1982 Speculum Juris 74.

Du Plessis JR 'Has it become Necessary to Consider the Negligent Actio Libera in Causa Seriously?' 1983 Speculum Juris 84.

Du Plessis JR 'Dronkenskap as verweer, S v Stellmacher' 1984 THRHR 98.

Du Plessis JR 'Hans Welzels Final Conduct Doctrine - an Importation from Germany we could well do without' 1984 SALJ 301.

Du Plessis JR 'Myth and Murder in the Regional Courts' 1984 SALJ 50.

Du Plessis JR 'Skirmishes on the Strafregwetenskaplike Front : Some Recent decisions' 1985 SALJ 394-403.

Du Plessis JR 'A Reply to Professor Snyman's Retort : Mission Accomplished' 1985 SALJ 503.

Du Plessis JR 'Wavering Fortunes on the Strafregwetenskaplike front- Some Recent Cases' 1986 SALJ 1.

Ellis AG 'Vrywillige Dronkenskap -'n Nuwe Dag' 1981 THRHR 175.

English P 'Provocation and Attempted Murder' 1973 CLR 727.

Goosen H 'The Objective Test for Criminal Negligence - a Re-evaluation' 1979 Obiter 60.

Hermann DJ 'The Anglo-American as opposed to the Continental Approach to Criminal Law; 1981 DJ 39.

Hugo JH 'Can Murder and Culpable Homicide Overlap? Another Penny in the Old Man's Hat' 1973 SALJ 334.

Jescheck H-H 'The Doctrine of Mens Rea in German Criminal Law - its Background and Present state' 1975 CILSA 112.

Kemp KJ 'Die relevansie van Normoortreding by Statutere nie - gevolgsmisdaade' 1986 THRHR 20-37.

Kotze DJL 'Straffelose Doodslag by Inhegtenisneming : Wie moet Bewys?' 1980 DJ 126.

Kok L 'Skuldmetamorfose : De Blom, Dladla en Chretien' 1982 SACC 27.

Kruger A 'Tweede Kommentaar' 1981 SACC 84.

Labuschagne JMT 'Beskonkenheid en Strafreglike Aanspreeklikheid' 1981 DJ 335.

Labuschagne JMT 'Die Normatiewe Skuldbegrip' 1982 DJ 381.

Middleton AJ and Rabie MA 'S v September' 1972 THRHR 384-7.

Middleton AJ 'S v Dube' (Case Note) 1973 THRHR 181.

Milton JRL 'Sentencing: Values relating to human life and limb and the use of excessive force in effecting arrest: Nel 1980 4 SA 28 (E)' 1980 SACC 305.

Mitchell B 'Four Years of Recklessness: What Next?' 1985 JCL 284.

Morkel DW 'The Distinction between Dolus Eventualis and Advertent Negligence' 1981 SACC 162.

Morkel DW 'Die Onderskeid tussen Dolus Eventualis en Bewuste Nalatigheid : 'n Repliek' 1982 THRHR 321.

Morkel DW 'Weer Eens Dolus Eventualis en Luxuria' 1983 THRHR 98.

Oosthuizen MM 'Dronkenskap in Perspektief - 'n strafregtelike bespreking' 1985 THRHR 407

Pain JH 'Specific Intent' 1974 SALJ 467.

Rabie A 'Aspects of the distinction between Ignorance or Mistake of Fact and Ignorance or Mistake of law in Criminal Law' 1985 THRHR 332.

Rossouw DJ 'Die Toespassing van Artikel 205 (1) van die Strafproseswet na Aanleiding van S v September 1972 3 SA 389 (K)' 1973 THRHR 161.

Samuels A 'Provocation' 1983 JCL 276.

Schäfer ID 'The Life of the Law has not been Logic, It has been Experience' 1978 SACC 47.

Schäfer ID 'The Swing towards the Subjective Test for Negligence in Criminal Law' 1978 THRHR 201.

Skeen A StQ 'Chretien: A Riposte and Certain Tentative Suggestions for Reform' 1982 SALJ 547.

Skeen A StQ 'The Problem of Intention in Respect of Culpable Homicide Again' 1982 SALJ 177.

Smith PT 'Recklessness in Dolus Eventualis' 1979 SALJ 81.

Snyman CR 'The 'Finalistic' theory of an Act in Criminal Law' 1979 SACC 3 and 136.

Snyman CR 'Die Invloed van die Engelse en die Duitse Reg op die Suid Afrikaanse Strafreg' 1981 DJ 68.

Snyman CR 'Is there such a defence in our Criminal Law as 'Emotional Stress"?' 1985 SALJ 240.

Snyman CR 'The Attack on German Criminal Legal Theory - A Retort' 1985 SALJ 120.

Steyn I van Zyl 'Noodweer' 1932 SALJ 462.

Strauss SA 'Opmerkings oor Toorn as Faktor by die Vasstelling van Strafregtelike Aanspreeklikheid' 1959 THRHR 14.

Strauss SA : Book Review (Burchell and Hunt first Edition) 1970 SALJ 471.

Syrota G 'Mens Rea in Gross Negligence Manslaughter' 1983 CLR 776.

Van Blerk A 'The Genesis of the "Modernist" - "Purist" Debate: A Historical Bird's-eye View' 1984 THRHR 255.

Van der Merwe NJ 'Die Verband tussen Mens Rea en Skuld' 1976 SALJ 180.

Van der Merwe DP 'Toerekeningsvatbaarheid v "Specific Intent" - die Chretien Beslissings' 1981 Orbiter 142.

Van der Merwe DP 'The Cumulative Effect of "Partial Excuse" and Error Juris - Ntuli and De Blom revisited' 1982 SALJ 430.

Van Niekerk BvD 'A Witch's Brew from Natal - Some Thoughts on Provocation' 1972 SALJ 169.

Van Oosten FFW 'Dolus Eventualis en Luxuria - nog 'n Stuiwer in die Armbeurs' 1982 THRHR 183.

Van Oosten FFW 'Weer Eens Dolus Eventualis en Luxuria 'n Verduideliking weens 'n Repliek' 1982 THRHR 423.

Van Zyl PR 'S v Zoko, 'n Nuwe Definisie vir Strafbare Manslag' 1983 THRHR 100.

Whiting RC 'Changing face of Mens Rea' 1978 SALJ 1.

TABLE OF STATUTES

CAPE COLONY

Transkeian Penal Code Act No 24 of 1886.

REPUBLIC OF SOUTH AFRICA

Criminal Procedure Act No 56 of 1955.
Criminal Procedure Act No 51 of 1977.

PROVINCIAL ORDINANCE

Road Traffic Ordinance No 21 of 1966 (Tvl).

BRITISH

Homicide Act 1957.
Suicide Act 1961.
Criminal Law Act 1967.

LIST OF ABBREVIATIONS

AER	All England Law Reports
AJ	Acta Juridica
CILSA	Comparative and International Law Journal of Southern Africa
CLJ	Criminal Law Journal
CLR	Criminal law Revue
DJ	De Jure
DR	De Rebus
SA	South African Law Reports
SACC	South African Journal of Criminal Law and Criminology.
SALJ	South African Law Journal
StGB	Strafgesetzbuch (German Penal Code) (Numbers adjoining the abbreviation refer to sections of the Code).
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)
TPC	Transkeian Penal Code (1886)
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir Suid-Afrikaanse Reg