Revisiting the relationship between *dolus eventualis* and *luxuria* in context of vehicular collisions causing the death of fellow passengers and/or pedestrians: *S v Humphreys* 2013 (2) SACR 1 (SCA)

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1. Introduction

The relationship between intention and negligence (*dolus* and *culpa*), in the context of the crimes of murder and culpable homicide, has become somewhat clouded since the decision of *S v Ngubane* 1985 (3) SA 677 (A) at 687E-I. This is due to the fact that the Appellate Division (as it was then), ruled that it is incorrect to assume, on the same facts, that proof of intention excludes the possibility that the accused was negligent – thus resulting in the inevitable inference that intention and negligence could overlap or co-exist on the same facts: for example, where an accused is charged with the crime of culpable homicide, but the state proves that the accused, in fact, caused the victim's death *intentionally*, the accused can nevertheless still be convicted of culpable homicide (see CR Snyman *Criminal Law* 5ed (2008) 218: 'From a theoretical point of view the decision in *Ngubane* is clearly wrong. The argument of the court is contradictory and a study in illogicality'; see also *S v Ramagaga* 1992 (1) SACR 455 (B) 465-466; *S v Seymour* 1998 (1) SACR 66 (N); *S v Jara* 2003 (2) SACR 216 (Tk); also compare JM Burchell *Principles of Criminal Law* 3ed (2005) 541; PF Louw '*S v Ngubane* 1985 (3) SA 677 (A): Strafreg – die oorvleueling van opset en nalatigheid' (1987) 20 *De Jure* 173). It is, however, trite law that the crime of culpable homicide postulates an absence of *dolus* and the presence of *culpa* (see *S v Naidoo* 2003 (1) SACR 347 (SCA); compare JC De Wet *Strafreg* 4ed (1985) 160). It also follows that an accused, on the same facts, can surely not act intentionally and negligently at the same time. In this regard, in assessing whether an accused, involved in vehicular collisions causing the death of fellow passengers and/or pedestrians, the relationship/distinction between *dolus eventualis*

and *luxuria* (conscious negligence), is of particular importance. Both these forms of *fault* contain an element of actual subjective foresight of possible death ensuing as a result of the potential collision, but there the similarity ends: the second leg of *dolus eventualis* entails a subjective reconciliation (or recklessness) to the possibility of death ensuing, while the second leg of *luxuria* entails that the accused *unreasonably* decides that the result (death) will not ensue, while a reasonable person in the same circumstances would have foreseen such a result. *Luxuria* is still a form of negligence, not of intention. Seen in this way, the main difference between *dolus eventualis* and *luxuria* is not to be found in the presence or absence of the *foresight* of the result (the so called cognitive element), but whether or not the accused reconciled himself/herself to the foreseen possibility (result) (the so called volitional element)(see *S v Ngubane* supra 685D-F; also compare *R v Hedley* 1958 (1) 362 (N); *S v Beukes* 1988 (1) SA 511 (A) at 521-522; *S v Maritz* 1996 (1) SACR 405 (A) at 415b-416f-g; also see Burchell op cit 487; W Bertelsmann 'What happened to luxuria? Some observations on criminal negligence, recklessness and *dolus*' (1975) 92 *SALJ* 62; JMT Labuschagne '*Dolus eventualis*: die filosofiese onderbou' (1988) 1 *SACJ* 436; MM Loubser and MA Rabie 'Defining *dolus eventualis*: a voluntative element' (1988) 1 *SACJ* 415; A Paizes '*Dolus eventualis* reconsidered' (1988) 105 *SALJ* 636). The material distinction between *dolus eventualis* and *luxuria* is also fraught with difficulties when attempting to formally prove the presence or absence thereof in a court of law. This is usually achieved by way of inferential reasoning (*S v Sigwahla* 1967 (4) SA 566 (A) at 570 (per Holmes JA):'Subjective foresight, like any other factual issue, may be proved by inference'; see also *S v Mini* 1963 (3) SA 188 (A)). However, what the accused actually subjectively foresaw , as opposed to what he *should or ought to have foreseen* becomes a slippery slope, and courts often fall into the trap by applying the yardstick of 'what the accused should or ought to have foreseen' (the objective yardstick for negligence) to determine *dolus eventualis*, instead of 'what the accused subjectively actually foresaw' (the subjective yardstick for intention) (see *S v Mamba* 1990 (1) SACR 227 (A) at 237 where the court cautioned that where an accused 'must have' (in the sense of 'ought to have') foreseen that his victim could die, a court should not too lightly make the jump from 'must have foreseen' in that sense to 'did indeed foresee'; also see *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i-j; *S v Maritz* supra at 416f-g *S v Campos* 2002 (1) SACR 233 (SCA) at 247e; compare CR Snyman *Strafreg* 6ed (2012) 195-197). This flawed judicial inferential reasoning, in tandem with the complex nature of the material distinction between *dolus eventualis* and *luxuria*, invariably leads to the unfortunate conflation of these concepts, with the effect that an accused, involved in vehicular

collisions causing the death of fellow passengers and/or pedestrians, is convicted of murder instead of culpable homicide. It is for this very reason that the present case under discussion, in the context of the interface between *dolus eventualis* and *luxuria*, is particularly instructive and of significance.

2. The facts in *Humphreys*

The salient facts appear from the judgment of Brand, Cachalia, Leach JJA and Erasmus and Van der Merwe AJJA: The appellant, in his late fifties, was charged in the Western Cape High Court, Cape Town before Henney J with ten counts of murder and four counts of attempted murder. All these charges arose from a single incident which occurred on 25 August 2010 when a minibus, driven by the appellant, was hit by a train on a railway crossing near Blackheath on the outskirts of Cape Town. There were fourteen children in the minibus, ranging in ages between seven and sixteen years. Ten of the children were fatally injured in the collision, which gave rise to the ten charges of murder. Four of them fortunately survived, but were seriously injured. They were cited as the complainants in the four charges of attempted murder. At the end of the trial the appellant was convicted as charged on all fourteen counts and sentenced to an effective period of 20 years' imprisonment. An appeal was lodged against both the convictions and the sentences imposed. On appeal, the appellant's main contention was that the State had failed to prove the element of murder described as *dolus* or intent, and more in particular *dolus eventualis*.

3. The judgment

Although the Supreme Court of Appeal was initially confronted in the appellant's heads of argument that the appellant's actions in respect of the accident were not 'conscious and deliberate' (at para [7] of the judgment), the court dismissed this suggestion of a possible defence of automatism, on the basis of confused reasoning, and the absence of any factual basis and expert evidence in support thereof (in this regard the court referred to *S v Potgieter* 1994 (1) SACR 61 (A) at 72j-73g and *S v Cunningham* 1996 (1) SACR 631 (A) at 635i) (at paras [8] to [11] of the judgment).

In the assessment of the question whether the appellant did in fact act with *dolus eventualis*, the court reiterated the substantive criminal law principles relating to *dolus eventualis*: the court ruled that the test for *dolus eventualis* was twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility (see *S*

v De Oliveira supra at 65i-j). The court observed that sometimes the element in (b) was described as 'recklessness' as to whether or not the subjectively foreseen possibility ensued (see *S v Sigwahla* supra at 570). The court was at pains to point out that for the first component of *dolus eventualis*, it was not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. Such a notion, according to the court, would constitute negligence and not *dolus* in any form. On a cautionary note, the court warned that one should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it could be concluded that he did. Such reasoning, according to the court, would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, the court confirmed that subjective foresight could be proven by inference (at paras [12] to [13]). In consideration of the trial court's line of inferential reasoning, in the context of the question whether the appellant subjectively foresaw the death of his passengers as a possible consequence of his conduct (in compliance with the first leg of the test for *dolus eventualis*), the court ruled that it could confidently be accepted that no person in their right mind could avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train might have fatal consequences for the passengers of the vehicle. As a consequence, the court concurred with the trial court's finding that the element of subjective foresight (as contemplated by the first leg of the test for *dolus eventualis*) by the appellant had been established (at para [14] of the judgment).

Having ruled that the first element of *dolus eventualis* had been established, the court had to assess the appellant's compliance or not to the *second* element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. In this regard, the court relied upon the following explanatory *dictum* by Jansen JA in *S v Ngubane* supra at 685A-H:

> 'A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility … The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers… . Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain"… . Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain … and not the "recklessness" of the Anglo American systems nor an aggravated

> degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.'

In view of the foregoing *dictum*, the court considered the question of whether it had been established that the appellant had reconciled himself with the consequences of his conduct which he subjectively foresaw? Although the trial court answered this question in the affirmative, the Supreme Court of Appeal held that it had a difficulty with this finding, as it was indicative that the trial court had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in the case of *Ngubane* supra. In this regard the court held that, as a consequence, once the second element of *dolus eventualis* was misunderstood as the equivalent of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of this case, seemed inevitable. The court accepted that by all accounts the appellant was clearly reckless in the extreme, but pointed out, as Jansen JA explained, that this is not what the second element entails. The court ruled that the true enquiry under this rubric was whether the appellant took the consequences that he foresaw into the bargain; and whether it could be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the court found, that the principle was that if it could reasonably be inferred that the appellant might have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established. Consequently, the court held that the latter inference was not only a reasonable one, but indeed the most probable one (at paras [17] to [18]). Having ruled that the element of *dolus eventualis* had not been established, the court advanced two reasons for this finding: firstly the court ruled that it believed that common sense dictated that if the appellant had foreseen the possibility of fatal injury, it followed, by the same token that he would have foreseen fatal injury to himself – in short, he foresaw the possibility of the collision, but thought it would not happen; he thus took a risk which he thought would not materialise (at para [18]). Secondly, the court ruled (on the proven evidence) that the fact that the appellant had previously been successful in performing this crossing-manoeuvre, probably led him to the misplaced sense of confidence that he could safely repeat the same exercise. However, according to the court, the appellant's misplaced confidence did not detract from the absence of reconciliation with the consequences he subjectively foresaw. Consequently the court held that the trial court's finding of *dolus eventualis* was not justified (at para [19]).

In addition, it is to be noted, that the appellant's final argument in support of his appeal against the convictions was that, because the

deaths of the ten deceased persons resulted from one act or sequence of actions, he could not be convicted on ten counts of culpable homicide, but on one count only. The court considered this argument, but ruled that this proposition thus raised had been considered and found wanting by Supreme Court of Appeal in *S v Naidoo* supra at 347. Consequently, the court ordered that the appeal be upheld; that the ten convictions of murder be set aside and replaced by ten convictions of culpable homicide; that the four convictions of attempted murder be set aside (on the basis that our law does not know such crime as attempted culpable homicide as per *S v Ntanzi* 1981 (4) SA 477 (N) at 481G-482F) and; that the sentences imposed be replaced with eight years' imprisonment (at para [27] of the judgment).

4. Assessment

Although this judgment was delivered on multiple levels with reference to the possible defence of sane automatism, the requirements for *dolus eventualis* and *luxuria*, the question as to the construct of attempted culpable homicide, as well as sentencing, the focus of the present discussion is on the relationship between *dolus eventualis* and *luxuria*. In this regard it can be observed that this judgment follows in the wake of controversial judgments where the facts, involving vehicular collisions causing the death of passengers and/or pedestrians, were similar with subsequent convictions of murder based on *dolus eventualis* (see for example *S v Qeqe* 2011 (3) All SA 570 (ECG) and the case of Jub Jub Maarohanye, discussed by L Samodien 'Humphrey's sentence a lifeline for Jub Jub' *IOLnews* 25 March 2013, available at *http://www.iol.co.za/news/crime-courts/humphreys-sentence-a-lifeline-for-jub-jub-1.1491005#.Ub31a21MrqQ,* accessed on 3 April 2013). Since it is clear, according to the judgment in *S v Ngubane* supra at 687E-I, that the existence of *dolus* on the same facts does not necessarily exclude *culpa*, the relationship/distinction between *dolus eventualis* and *luxuria* in context of the crimes of murder and culpable homicide assessed on the same facts, has often been a judicial 'twilight zone' and the subject of academic debate (see *S v Van Zyl* 1969 (1) SA 553 (A) at 557; *S v Mamba* supra 227; *S v Van As* 1991 (2) SACR 74 (W); *S v Campos* supra 233 (as per the majority judgment by Marais JA and Mpati JA); *S v Naidoo* supra 347; see also the discussion by Burchell op cit at 487 ff and 541; Snyman op cit (2008) at 218; Snyman op cit (2012) at 195-197; G Kemp et al *Criminal Law in South Africa* (2012) 202; JMT Labuschagne 'Nalatigheid en voorsienbaarheid by strafbare manslag' (1994) 7 *SACJ* 221; see specifically the fierce academic debate preceding the decision of *Ngubane* supra with reference to FFW Van Oosten '*Dolus eventualis* en *luxuria* – nog 'n stuiwer in die armbeurs' (1982)

45 *THRHR* 183; DW Morkel 'Die onderskeid tussen *dolus eventualis* en bewuste nalatigheid: 'n repliek' (1982) 45 *THRHR* 321; FFW Van Oosten 'Weer eens *dolus eventualis* en *luxuria*: 'n verduideliking weens 'n repliek' (1982) 45 *THRHR* 423; DW Morkel 'Weer eens *dolus eventualis* en *luxuria*' (1983) 46 *THRHR* 87; also compare JH Hugo 'Can murder and culpable homicide overlap? Another penny in the old man's hat' (1973) 90 *SALJ* 334; NJ Van der Merwe 'Moord en strafbare manslag: laat Barabbas aan die pen ry' (1983) 46 *THRHR* 82). It is for this reason that the present judgment under discussion is to be welcomed, as the distinction between *dolus eventualis* and *luxuria* (conscious negligence) is definitively drawn and judicially applied and explained to the extent that the conviction of culpable homicide on the basis of *luxuria* is justified. It seems clear that when courts in future, in these kind of cases, grapple to determine whether an accused should be convicted of murder or culpable homicide, more often than not, it will be the *absence* of the second leg of *dolus eventualis* that will indicate the *presence* of *luxuria* (in the sense that a reasonable person would have reconciled himself/herself to the fatal consequence, which the accused, in the circumstances, failed to do) to justify a conviction of culpable homicide. Such a finding, however, will be dependant on the proven facts of each case and a good measure of inferential reasoning. It is to be emphasised that *luxuria* remains an overt variant of negligence, and as such, a conviction of culpable homicide based thereupon, is ultimately dependent on the particular circumstances peculiar to each case (so called concrete negligence). In this regard, reference can be made to the following striking *dictum* by Innes CJ in the old case of *R v Meiring* 1927 AD 41 at 45-46:

> 'Negligence can never be disentangled from the facts, but its existence is best ascertained by applying to the facts of each case the standard of conduct which the law requires…. A consideration of those and other authorities does not, I think, justify us in drawing a hard and fast distinction between the negligence necessary to establish liability in civil and in criminal cases, respectively. In civil actions we have adopted as the simple test that standard of care and skill which would be observed by the reasonable man. And it seems right as well as convenient to apply the same test in criminal trials … The difficulty of defining culpable negligence apart from such test is very great. Even [s]o accurate and precise a writer as Sir Fitzjames Stephen does not attempt it. "What amount of negligence can be called culpable" he says is a question of degree for the jury, "depending on the circumstances of each case". … An unsatisfactory position indeed'.

It is indeed evident from the judgment in *Humphreys* supra, that the specific circumstances (inclusive of probabilities/possibilities) served to propel, as it were, the inferential reasoning the court applied to justify a conviction of culpable homicide. In this regard Brand JA stated the following (at para [13]):

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

In view of the foregoing, it may be observed that the fact that the inferential reasoning in the present judgment resulted, on appeal, in the conviction of murder based on *dolus eventualis* being substituted with a conviction of homicide based on *luxuria*, surely cannot be taken to imply that all other convictions of murder based on *dolus eventualis* of other accused involved in similar vehicular collisions causing death (for example *S v Qeqe* supra) , are now, as a matter of fact, also suspect. Often inferential reasoning, based on the proven facts of each case, will inevitably lead to a conviction of murder based on *dolus eventualis*, and justifiably so (see *S v Qeqe* supra; *S v Sigwahla* supra at 570; *S v Campos* supra 233 (as per the dissenting minority judgment of Conradie AJA).

In conclusion, it is to be noted, that although the Supreme Court of Appeal in *Humphreys* revisited and applied the judgment in *Ngubane* supra (at 685A-H), in context of the distinction between *dolus eventualis* and *luxuria*, the court did not venture beyond this distinction. The court certainly did not revisit the contentious *dictum* in *Ngubane* supra at 687E-I, clouding the precise relationship between intention and negligence, and more in particular that a finding of intention, does not exclude the possibility of negligence. It is submitted, with respect, that the present judgment missed the opportunity to clarify this aspect which has been open to criticism for so long (see Snyman op cit (2008) 218 n256; Burchell op cit 487, 541). To only revisit, clarify and apply the distinction between *dolus eventualis* and *luxuria*, as *variants* of intention and negligence, without revisiting the precise relationship between intention and negligence in itself, seems to be, with respect, too selective and a piecemeal approach. It seems then that the contradictory judgment in *Ngubane* supra at 687E-I, with regard to the precise relationship between intention and negligence, is set to continue (arguably because it serves the interests of the practical administration of justice well [as advanced by Snyman op cit (2008) 219]) *despite* the clear distinction between *dolus eventualis* and *luxuria* as enunciated in the *Humphreys*-decision – an unsatisfactory position indeed.