shot to frighten the women but one of the women was hit by the bullet and killed. When the appellant fired the shot, he was 30 paces away and he said he shot towards the right of the women, yet the bullet hit her.

- **Court held**: The court *a quo* convicted him of murder but on appeal the AD altered the conviction to one of culpable homicide because the state had failed to prove two elements of *dolus eventualis* and the intention to kill could not be inferred solely from the fact that a dangerous weapon was used. The accused was also entitled to such action as it was his job to take care of the farm and the warning shot was not inappropriate. The death of the deceased was not the natural and probably consequence of his act.
- **Legal principle**: Realization of the possibility of the consequences is sufficient for criminal intention.
- *This situation would be judged very differently today.*

Must there be foresight of a real/substantial possibility of a consequence occurring, or does remote possibility suffice?

- Given that foresight of a possibility will constitute intention in the form of *dolus eventualis*, does it follow that even the remote and unlikely possibility, if foreseen must be taken to have been intended?
- The case law (*S v Shaik*) suggests foresight of even a remote possibility suffices in proving intention but the academic opinion states otherwise.
- *Dolus eventualis* is a legal construct and is aimed at further extending the notion of intention and so the case law is encouraging this. With regard to recklessness, it is really the volitional component of *dolus eventualis* but that does satisfactorily explain it's purpose. Some use the notion that one is reckless if he/she consents to the foreseen possibility but *dolus eventualis* suffices for all crimes.
- It has been said that appreciation of even a slight or remote possibility of risk will suffice:

CASE: *S v De Bruyn*

- There is *dolus eventualis* if the accused foresees the possibility, however remote, of his act resulting in death to another.
- It would be proven if the accused saw the possibility of death, "on footing that anything is possible"

CASE: *S v Shaik*

- **Facts**: There were three appellants who went to the flat of the deceased and the deceased's wife. They had the intention to commit house robbery (steal R40 000) and entered through the window. They wore masks, had with them a baton and a knife which was used to cut the telephone wires. They were under the impression that the elderly couple was not home at the time but they were surprised and beat the deceased to the point of brain damage; he later died.
- The argument for the appellants was that they did not foresee the possibility of the death and that possibility was so remote and unusual.

- **Court held**: The AD held that legal intention is present is the appellant **foresees possibility, however remote** of his act resulting in the death of another person and they must have foreseen the real possibility of the death. The only inference which could be drawn was that they did foresee it because they used a weapon of that nature with such speed and ferocity that it rendered the victim brain-dead and eventually he died as a result of that brain damage. Further, the appellants said they did not expect the couple to be home, but the court refuted this by pointing out that there was no reason to bring a weapon, wear masks or cut telephone wires if they expected nobody would be home. Therefore, it was inferred that the accused foresaw the possibility of death.

- ***S v Ngubane***: It should not matter whether the agent foresees the possibility as strong or faint, however the likelihood in the eyes of the agent of the possibility eventuating must obviously have bearing on the question whether he did consent to that possibility.
- ***S v Beukes***: *dolus eventualis* is normally only present where the accused foresaw the occurrence of the unlawful consequence as a **reasonable** possibility.
  - Even though statements suggesting foresight of a remote possibility, legal intention has never been proven where an accused has foreseen an outcome as a remote or slight possibility.
  - Academic writers reject the notion that remote possibility should suffice.
  - Example: Every time a person drives a car there is a remote possibility of getting involved in an accident and/or killing another person. In the event of that actually occurring, it cannot be said the driver had *dolus eventualis*.

  - Whiting says the idea of *dolus eventualis* is an extension of the notion of intention
  - Burchell and Hunt say if we really apply remote possibility is would decrease the confidence in the administration of justice as it would extend the state of mind to not even including intention at all. The fact the risk is remote may show from an evidentiary standpoint, that the more remote, the less likely an inference can be drawn.

  - The measure of possibility in whether there was a real or remote possibility is not a conclusive determinant for criminal liability and is only one of the elements to prove liability.
  - The moral aspect of the judgements will also factor in when determining if there is *dolus eventualis*. Moral issues and issues of unlawfulness must be considered for the time in which a case occurs:
  - In *R v Horn* the judge viewed the accused to be acting appropriately in firing a warning shot because it was acceptable in that historical and political context and so judged by the morality of the time. However if the same situation were to arise in the present day the result would be different. This is because now there is the benefit of the amendments to

the Criminal Procedure Act as opposed to previously when s49(2) entitled police to shot a fleeing suspect; now the police officer's life must be in danger for him/her/them to be entitled to shoot. Further, the Constitution entrenches several fundamental rights, namely s10 in the right to life (*S v Makwanyane*)

RECKLESSNESS (accepting the possibility into the bargain)

- It is not enough to have subjective foresight of possibility of an occurrence, circumstance or consequence. There must be **recklessness** as to whether the consequence results or circumstance exists; the accused reconciles him/herself or consents to the materialization of a possibility.
- This is thus the volitional component of *dolus eventualis* but it's place within the scheme of intention is uncertain.

S v De Bruyn

- Subjective foresight of a possibility however remote
- Persistence in such conduct despite foresight
- Insensitive recklessness
- Conscious taking of a risk and not caring whether it ensues or not.

- It can never happen that the accused causing the death of a person intentionally, would happen without having persisted in the conduct. Therefore, recklessness is implicit in *dolus eventualis*.

CASE: *S v Ngubane 1985*

- **Facts**: Accused pleaded guilty to culpable homicide but the trial court convicted him of murder. On appeal the conviction was changed to culpable homicide.
- **Court held**: The fact that intention and negligence are mutually exclusive does not mean they exclude each other, in fact they are implicit in each other: if intention is present it does not mean that culpa is not.
- "the distinguishing feature of *dolus eventualis* is the volitional component. The agent consents to the consequences foreseen as a possibility and he reconciles himself to it; he takes himself into the bargain."
- The court also looked at the issue of remoteness: if the possibility is remote then it is more a case of **conscious negligence** than *dolus eventualis*.

- In principle, from case law, it should not matter if the accused foresees an occurrence as a slight possibility but in essence the likelihood in the eyes/mind of the accused must have a bearing on whether he did foresee it. The mere fact the accused foresaw the result as a faint possibility tends to show he did not take it into the bargain. Some courts have tried to mitigate the problematic nature or the recklessness requirement by requiring foresight of a reasonable possibility.

CASE: *S v Beukes 1988*

- **Facts**: Three persons: Van Staden (V), Beukes (B) and Crawford (C) conspired to rob a café. B drove V and C to the café and only V entered the café while B and C waited in the vehicle. B and C were aware that V had a loaded firearm and he had even informed them that if there were any obstructions he would use the firearm. A police officer entered the café and V fatally wounded him and was also killed himself.
- B and C were convicted of murder in the court *a quo* but on appeal they argued they foresaw the possibility that V might kill someone yet **did not reconcile themselves to that possibility.** The AD dismissed the appeals
- **Court held (Van Heerden JA)**: Held that *dolus eventualis* contains an additional element to that of foresight yet he incorrectly referred to it as foreseeability. He examined the academic views as to the importance of recklessness and found it to be divided. Even those requiring recklessness have not really defined what it means. He could not find a case in which an actor had foreseen a consequence but there was not recklessness
- **Recklessness is in any case inevitable**

NO PRESUMPTION OF INTENTION

- Whatever the position was in the past, there is now no presumption that a person intended the probable consequences of his/her conduct
- The test of intention is subjective and there is thus no place for such presumption in our law
- There must be positive proof that the accused foresaw the consequence of the conduct as a real possibility and reconciled him/herself to that consequence.

- ***S v De Bruyn***: One must be careful about applying a rubber-stamp maxim that a person is presumed to intend the natural and probably consequences of his act because (1) it contains a deceptive blending of subjective and objective and (2) the court has been moving away from notions of presumptions arising from selected facts.
- ***S v Mokonto***: It is now judicially recognized that the intention to kill is purely subjective and the old maxim is presumed to intend the reasonable and probably consequences of his act is no longer required as criterion of intention

***Dolus eventualis* in Circumstance Crimes**

CASE: *R v Churchill*

Mistake of Fact

- A man abducted his girlfriend and although he was under the impression she was an adult she was actually under 21 and so he committed the statutory crime of abduction (removing a minor without parent or guardian's consent)

- The court found that because she gave the impression she was a major he lacked the *mens rea* (intention) and on appeal the court found the conviction for abduction should be set aside.

CASE: *R v Z*

- The appellant was charged with rape of an 11 year old girl and acquitted on the basis that the state had failed to demonstrated he knew or foresaw the girl was under 12 years of age and hence legally capable of consenting.
- At the common law if one has intercourse with a girl under the age of 12 it is illegal; even if she consents because it is not real consent. By statute this age was extended to 16.
- In this case, the girl had a mature bodily features but important for our purposes if the foresight of the possibility and recklessness that she was under 12 years of age. The crwon failed to prove she had foresight of a reasonable possibility. Therefore, objective factors were used to determine subjective foresight.

CASE: *S v Kazi 1963*

- **Facts**: The accused was charged with aiding and abetting in holding an unlawful meeting (no permit). He argued he thought they had obtained a permit.
- **Court held**: He was not guilty because he did not foresee the possibility that the permit had not been obtained.

It is sufficient that the actor foresees the existence of the circumstances of the situation.

- Regarding some of these cases: the element of recklessness may be supplied by the deliberate extension of the enquiry. Example: not asking whether or not a permit had been obtained.

Dolus eventualis in Common Law Crimes

CASE: *R v Mzwakahla*

Assault with intent to murder

- **Facts**: A railway worker derailed two trains and was charged with assault. *Dolus eventualis* was held to be sufficient for assault with intent to murder and the accused was convicted of that crime. He argued he did not intend to cause death he was only acting on a grievance against his superiors, and he did not directly set out to bring about injuries to anyone. Court held he still had *dolus eventualis* because even if intention is part of a definition of a crime that form of intention will suffice.

CASE: *R v Huebsch 1953*

Attempted murder

- **Facts**: The appellant was charged with attempted murder as he shot the complainant in the stomach due to his being irritated after work and slightly drunk. The trial court rejected the defense that he was upset/irritable and that he suffered from loss of control of his mind. Instead it was found that he had fired the gun recklessly and did not care for the result. On appeal the AD held he **failed to appreciate** what he had done.

CASE: *S v Basson 1961*

Assault with intent to murder to do grievous bodily harm (GBH)

- **Facts**: A police officer was charged with assault GBH as he fired at a car and wounded someone in the car. The police had been informed of the stolen car driven by an escaped convict, he tried to aim at the car but the bullet could have hit anywhere. The court referred back to *Huebsch* at 280H: in order to support for attempted murder there need not be purpose to kill proved as an actual fact. It is sufficient if there is an appreciation of the risk to life involved in the action contemplated.
- Therefore *dolus eventualis* suffices as foresight is required.
- These facts fell squarely in the ambit of the *Huebsch* case and the accused was convicted.

- All common law crimes require intention.
- For statutory crimes we proceed on presumptions that *mens rea* (usually in the form of intention) is required except where there is *stricti iuris*.

CASE: *S v Sutherland 1950*

This case was promoting racial hostility. The lawmaker decided that before one can be criminally liable it must be demonstrated that that person had that result as his principal/main objective.

- Actual intention is required. The accused did not foresee his words would promote hostility. He was charged with contravening s29(1) because he alleged in an issue of a cartoon/newspaper depicting a European assaulting a native and this constituted wrongfulness and conduct/utterance at the time. On the right side the cartoon was representing the protectorate and the Prime Minister of the Union was shown bowing to the natives while a white person was grabbing the throat of the native. The depiction of violence and protectorates precisely invited to come and visit. The magistrate decided the cartoon was unresting and shrinking it should be held as though it emblazoned in large characters. Duty of the state was to prove intention of the appellants but there was no punishment under that act.

Therefore, *dolus eventualis* is sufficient for all crimes.

For such instances it is good that actual intention be used otherwise the written or spoken freedom of expression will infringe on other rights.

CONSCIOUS NEGLIGENCE

- Conscious negligence exists where the accused foresees only a **remote possibility** of a consequence resulting and fails to take steps that a reasonable person would have taken to guard against this possibility.

CASE: *R v Hedley*

- **Facts**: The accused fired a rifle shot at a cormorant near the edge of a damn but the bullet ricocheted off the surface of the water and struck and killed a woman on the bank of the dam. The accused was convicted of culpable homicide.
- **Court held**: He knew that the bullet he was firing would strike the water and might ricochet and that if it did it might pass near the huts and hit someone. It is true that likelihood of the harm was small but if it resulted it would be serious.

- Jansen JA in *S v Ngubane* referred to conscious negligence and took the view that the concept of conscious negligence establishes that foresight does not exclude negligence.
- It differs from traditional objective negligence and arises in those rare cases whether the accused either admits that he/she foresaw a remote possibility of a consequence occurring or the prosecution manages to prove that he/she did foresee such possibility.
- It is a **hybrid** of foresight of a possible and failure to take objectively reasonable steps to guard against a foreseen consequence.

Negligence

- The general rule is that *dolus* is required for common law crimes except for culpable homicide and contempt of court.
- There are also statutes which required negligence
- Negligence indicates that the conduct of a person has not conformed to a prescribed standard of the reasonable person
- When undertaking any activity a reasonable person takes reasonable precautions in order to ensure that the manner in which the activity is undertaken will not cause harm to another
- To ascertain whether a person was negligent, a fictional standard of reasonable person is used, in which the court will exercise a value judgement regarding the conduct of the accused against this standard.
- If there is deviation from the conduct of a reasonable person, there is negligence

Negligence in contradistinction to Intention

- **Negligence**: Objective test, according to the standard of the reasonable man / *diligens paterfamilias*
- Intention: Subjective test.
- **Negligence**: Would the reasonable person have foreseen? If he/she would have foreseen, then the accused **ought to** have foreseen and thus **did foresee**. It is dependent on whether the reasonable person desisted from acting in accordance with what was foreseen.
- Intention: Did the accused foresee?
- Intention does not necessarily exclude negligence; *dolus* and *culpa* are implicitly included in each other.
- **Negligence**: a person's failure to act in accordance to how a reasonable person would have acted in the circumstances
- Intention: a purposely chosen path and the person's knowledge of the unlawful act

CASE: *S v Ngubane*

- **Facts**: The appellant had been under the influence of alcohol and stabbed the deceased 5 times which caused the deceased's death. pleaded guilty to culpable homicide and the State had accepted that plea. The trial court found *dolus eventualis* however and convicted him of murder. On appeal it was held the court *a quo* had acted irregularly (due to criminal procedure) in adjudicating the charge of murder but there was clear indication that the accused foresaw the **possibility** of death which did not preclude the issue from being viewed differently. The AD had to decide if the conviction should be changed.
- **Court held**: Intention and negligence are conceptually different and never overlap but it is false to assume the proof of finding of negligence. Although the accused acted intentionally he also acted negligently by non-compliance with the standard of the reasonable person.

- 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.

In some countries there is the view that gross negligence amounts to intention, but this is not accepted in our law because the tests for *dolus* and *culpa* are very different.

Example: A is speeding down and a road and hits B, killing him.
→ Speeding is negligent and killing B is *dolus eventualis* because the possibility of killing someone is speeding is foreseen.

In South Africa, an accused is negligent according to the test set out in *Kruger v Coetzee* of 1966 and there are three questions that are really split into two parts: foreseeability and preventability/conduct.

Liability for *culpa* arises if –
(a) a *diligens paterfamilias* in the position of the defendant –
(i) Would **foresee the reasonable possibility** of his conduct injuring another in his person or
property and causing him patrimonial loss; and
(ii) Would take **reasonable steps** to guard against such occurrence; and
(b) The defendant failed to take steps.

CASES: *R v Hedley; S v Ngubane*
Definitions of Reasonable Person by Courts

S v Burger
Culpa and foreseeability are tested with reference to the standard of a *diligens paterfamilias* ("that notional epitome of reasonable prudence") in the position of the person whose conduct is in question. One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.

Herschel v Mrupe
Not a timorous faint hear always in trepidation lest he or others suffer some injury; on the contrary, he ventures out in the world, engages in affairs and takes reasonable chances

PRINCIPLES UNDERLYING THE TEST OF NEGLIGENCE
1) Foresight
2) Preventability / Conduct

(1) FORESIGHT
- ***Mens rea* must extend to every element of the *actus rea***

- Would a reasonable person in the same circumstances as the accused have foreseen the reasonable possibility of the occurrence?
- The accused must not have only foreseen bodily injury but death as a result of the conduct
- From the AD decisions in *van der Mescht*, *Bernadus* and *Van As* (1976) we see that reasonable foresight of bodily injury will not suffice for culpable homicide:

CASE: *Van der Mescht*

- **Facts**: Accused has melted gold amalgam on his stove and mercurial gasses passed through the house causing 4 children to die and one other person. In the trial court he was found guilty of culpable homicide, however on appeal:
- **Court held**: Majority (Steyn JA): The reasonable person in an accused's position must be shown that he/she Would have know that heating the amalgam would result in death.
- the AD set the conviction aside because the prosecution failed to prove beyond reasonable doubt that a reasonable person in a comparable position would have foresee that the heating of gold amalgam might lead to someone's death. Expert evidence showed that an average person would not have this knowledge.

CASE: *S v Bernardus*

- **Facts**: Accused tried to assault the deceased and threw a knobkerrie at him, of which the pointed side penetrated the deceased's skull causing him to die.
- **Issue**: Is a person guilty of homicide if he/she unlawfully assaults another and in so doing, causes his death but **under circumstances which he could not reasonably have foreseen?**
- **Court held:** Majority (Steyn JA): Culpable homicide, the State must prove that the reasonable person would have foreseen death as a result of the conduct. If this is not followed, then it would have the effect of upholding the *versari* doctrine which was rejected in *van der Mescht*.
- Holmes JA: where the possibility of serious injury is foreseeable, death is foreseeable too.
- Rumpff JA: Some injury may cause an extraordinary and unexpected death
- The appellant ought to have foreseen that the throwing of the stick might cause the death of the deceased, although the injury was unusual and happened in a curious way. However there was proof beyond reasonable doubt that the appellant was guilty of culpable homicide
- **Legal principle**: The question is whether the accused **reasonably foresaw** death as result of the conduct
- NOTE: Holmes' statement can be criticized because serious injury does not always result in death.

CASE: *S v Van As 1976*

- **Facts**: The accused slapped the deceased who was described as being an obese person. The deceased person fell backwards and sustained a head injury which resulted in his death. The trial court convicted him of culpable homicide but on appeal:
- **Court held (Rumpff JA)**: He repudiated his judgement from *Bernadus* and he did go with the majority and said that **death** should be **foreseeable**.
- When death follows upon an unlawful assault it must be proved beyond reasonable doubt that there can be a finding of culpable homicide. The proof is that the accused **must reasonably have foreseen** that death could occur. It the accused "must" or "ought" to have foreseen then he is negligent.
- The accused was found guilty of assault only and not culpable homicide because it was not reasonably foreseeable that a slap to a very fat man's face would cause him to fall over and hit his head and subsequently die.

- The foreseeability of serious bodily injury often goes with foreseeability of death, however it depends on the nature of the injuries inflicted in a particular case

CASE: *S v Melk 1988*

- **Facts**: Accused in possession of *Island in Chains*, a book published to promote the ANC and it contravened a statute (Internal Security Act). Apellant pleaded not guilty because she did not know and could not have foreseen that it was unlawful to possess a copy.
- **Court held**: There was an absence of a finding that she knew that her possession was unlawful or foresaw that it might be.

CASE: *Balkwell v S 2007*

- **Facts**: The appellants had employed the deceased but he was a drug addict and he took money belonging to the appellants as well as a car belonging to the business. The appellants tried searching for him and could not find him for some time but when they did find him they hired a bouncer to "teach him a lesson and f*** him up". They beat the deceased up first where they found him and then a second time where the car had been parked. The beatings were particularly brutal and presumably the appellants were taking him to the hospital but he died on the way and they dumped hid body.
- The appellants argued they **did not foresee** he would die and they hired a pathologist who would determine cause of death: He indicated that the deceased died from a number of factors: drug abuse, physical trauma and psychological trauma and it was not foreseeable he would die from the beating alone.
- **Court held**: The court rejected this, claiming death was foreseeable because even a bouncer was fetched to inflict severe harm on the deceased and he was much smaller than that bouncer. The court held the factors of *Van As* had to be taken into account: what is the likelihood that an obese man would fall over and die? So conversely, what is the

likelihood that a small man brutally beaten but a large, strong man would not die?

- "It remains to consider whether the appellants ought reasonably to foresee...and this does not support the influence that the assault was anything but trivial".

NOTE: This crime would not be murder because they did not have intention and **ought reasonably to have foreseen.**

(2) PREVENTABILITY / CONDUCT

- The mere fact that an accused brings about a consequence that a reasonable person would not have brought about means that it is necessary that the accused took steps to guard against that.
- Question: Would a reasonable person have taken steps to guard against that possibility?
- What would a reasonable person have done in the circumstances in terms of taking steps to guard against the harm?
- If a reasonable person in a comparable position would have taken reasonable steps to guard against the harm then the accused would be found guilty of negligence if he failed to take such steps
- The **slightest deviation** from the **standard** of the reasonable man is sufficient (*R v Meiring*)

CASE: *Kruger v Coetzee*

- **Facts**: The plaintiff and her husband were driving in a rural area. The road had fences on either side but there was an opening in one of the fences and as the couple drove past a horse bolted in the road to avoid it. A second horse bolted and this caused damage to the vehicle. The wife sued for patrimonial damages and in the trial court the magistrate granted absolution from the instance (freed defendant from blame).
- On appeal, the finding of the lower court was overturned and the court found in favour of the plaintiff. On appeal again, the defendant argued he was not overturned for the horse running into the road and the gate was also used by people working for the local municipality; he had even complained about it twice. The test was applied and the plaintiff was found in favour of again.

Qualifications to the Reasonable Person Test

- The test for reasonable person has been referred to as only one ojective standard but it does differ:
- Where there is a professional person possessing special skill and knowledge the standard is higher (*S v Kramer; S v Ngubane*)
- The court must take care not to take the position of an armchair critic

1) Accused's conduct is compared to that of a reasonable man **in the circumstances of the accused**
   - These are only external circumstances and not those internal circumstances as that would be to make the enquiry subjective

CASE: *S v Southern

- **Facts**: The accused was the driver of a bus full of tourists. The bus was going down a steep incline and the driver lost control of the bus and it overturned. Consequently, 11 people died and the driver was charged with culpable homicide but from the evidence it appeared that all the braking mechanisms on the bus had suddenly failed and the court then held that the reasonable person would have reacted in the circumstances (considering all the brakes had failed).
- **Court held**: The reasonable person should be judged in the position of driving a fully-laden bus in particular circumstances. The driver was found not guilty.
- **Legal Principle**: The reasonable person within a particular context or circumstances must be considered; this is not to consider factors of the accused but of the **external factors**. Should not be wise *ex post facto*.

2) A person operating in a field in which special knowledge or skill is required will be judged by the standard of the reasonable expert in that field (standard is raised)
   - A surgeon is required to observe standards of a reasonable surgeon and exercise that skill with due care and responsibility.
   - If a reasonable surgeon would have foreseen the risk of harm, guarded against it but the accused did not follow such steps there is negligence
   - *Imperitia culpae adnumeratur* (lack of skill amounts to negligence). It is not the lack of skill, but the engaging in an activity which requires a skill that the accused lacks.
     - → There is an exception to this for cases of emergency, such as if A is injured in an accident then B tries to save him then if A is further injured or dies B would not be negligent for acting without the required skill because of the surrounding circumstances.

Where a skilled person performs a task but failed to do so appropriately then he/she is negligent
A normal unskilled person acting in a situation of emergency would not be unreasonable.

CASE: *S v Mahlalele

- **Facts**: The appellant was a witch doctor who had given a girl a herbal potion and it caused her to die. He was convicted of culpable homicide but did not realize the potion would be poisonous and so he lacked *dolus*.

However, he should have realized and if he did not then he ought to have realized that potion would be dangerous and therefore was culpable.

- He was judged by the standard of the reasonable person having special knowledge of herbs as he did have the requisite skill.
- **Legal Principle**: Even if an actor or accused was not an expert he will be judged by that standard if he had the knowledge

CASE: *S v Van der Mescht*

- Mercurial gas, convicted on two grounds for culpable homicide: that the accused should have foreseen the dangerous fumes causing the death and the *versari* doctrine was applied.
- Upon appeal the conviction was set aside on both grounds because it had not been proven that a reasonable person in the appellant's position would have foreseen death.

3) Higher standard of care relating to disadvantaged persons

- Even in a circumstance in which the accused had no special qualification or experience he/she may be required to observe higher standard of care
- For example: blind persons, epileptic persons, mentally ill persons, children

Individual characteristics in the Reasonable Person Test

CASE: *R v Mbombela 1933*

- **Facts**: Accused was between the age of 18 and 20, living in a rural area and described as being "rather below the normal" intelligence and found guilty in trial court of murder of his nephew. One the day in question some children outside a hut that was supposed to be empty, saw something that had two small feet like those of a human being. They were frightened and called the accused, who believed the object was a "tikoloshe", an evil spirit that according to **widespread** superstitious belief, takes the form of a little old man and it is fatal to look it in the face. He went to fetch a hatchet and in half-light struck the figure but when he dragged it out he realized it was his 9-year old nephew.
- **Court held**: The mistake was *bona fide* but in the conviction of murder the trial court applied the standard of a reasonable person that "ignored the race or idiosyncrasies or the superstitions or the intelligence of the person accused". The accused was found guilty of culpable homicide instead, despite that the mistake was unreasonable, because the killing fell with the Native Territories Penal Code definition of culpable homicide
- **Legal principle**: The reasonable person is **of ordinary intelligence, knowledge and prudence**
- The standard to be adopted in deciding whether mistake of fact or ignorance is reasonable is the standard of the reasonable man, and that the race or idiosyncrasies or the superstitions or the intelligence of the person accused doe not enter the question

CASE: *S v Ngema*

- **Facts**: The accused lived at or very near a kraal where the deceased, a 2-year old toddler, also lived. On one night in 1990 the toddler was brutally hacked to death and from a post mortem report it showed he received 9 wounds to the had and face, inflicted by the accused. The accused fell asleep in his chair and dreamt a tikoloshe was throttling him and this scared him so he woke up and picked up a cane knife and used it to attack what he thought was the tikoloshe.
- **Court held**: Hugo J allowed belief in superstition to be taken into account in the objective test of negligence however this allows for vagueness in an objective test as Hugo J acknowledged. Illiteracy or unsophisticated background should be considered, although not in the test for negligence. They could possibly be dealt with in the capacity inquiry. This requires a value judgement which the judges exercise in the second enquiry for negligence, and it is important that those factors are taken into account somewhere in criminal liability,
- Relate this to *R v Dhlamini* and *R v Mbombela*

Evaluation

- The application of the objective test for determining negligence without considering subjective state of mind has been criticized for its potential of leading to injustice:
  - Society is diverse and multicultural
  - People vary in degrees of education, literacy and cultural background
  - Knowledge, intelligence and experience will not be the same
  - There are different beliefs
- It has a negative effect for uneducated, less intelligent, ignorant or inexperienced persons
- Enquiry must entail consideration of:
  - Level of education
  - Background (culture, beliefs)
- These factors are likely to negative accused's capacity
- In this way, the objective test will be retained and the accused lacking liability will escape liability

Consideration:

X is a staunch Christian with no education and forbids his wife to go to hospital despite that she suffers from excessive uterine bleeding which could kill her. He decides to pray for her claiming she is demon-possessed, however she dies. X believes she will rise from the dead before burial but this does not occur. Can X be charged with culpable homicide?

CAUSATION WITHIN NEGLIGENCE

Assault must be connected to the death and it must be the **causal nexis**, factually and legally.

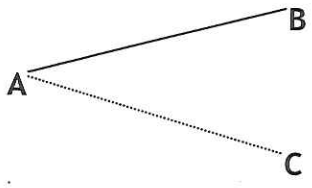
If, notwithstanding the fact the defendant put up the notice and the accident still happened, he could not be said to be the legal cause.

Balkwell para 24 pg 473: Beyond the question on the evidence that the assault was the *sine qua non* of the death.

DEFENCES NEGATING INTENTION

Aberratio Ictus

- "going astray of the blow"
- There is no mistake in such instances, but the consequences merely turn out to be different than the accused expected.
- The *aberratio ictus* rule derives from two 1949 cases (R v Kuzwayo and R v Koza) and provides that because A had intention to kill C but killed B, he is guilty of murder without the prosecution having to prove specific intention with regard to B.



There are two approaches to this defence:

(1) Transferred Intent / Policy Approach

- Transferring the accused's intent to kill/harm one person to apply in respect of the person actually killed or injured.
- There is never prospect of the accused being acquitted and it encourages *versari in re illicita*
- The accused will be liable for an unintended victim's murder according to the generalized approach to *mens rea*. Murder consists of the unlawful, intentional killing a human being but the fact the actual victim deflected from the intended victim ought not to afford a defense.
- *In the eyes of the law the accused intended to kill the actual victim*
- Example: A wanted to kill B so shot at him, but he missed and C was shot and killed instead. By this approach A would be found to have murdered C because his intention towards B would be **transferred** in respect of C.
- Example 2: A wants to get B drunk so gives a can of coke containing a secret concoction of potent alcohol to B, however C is very curious and so takes the can and drinks it. C is allergic to alcohol and dies as a result.
  - → With regard to B there is attempted assault but with regard to C it is assault / murder because intent transferred.

- Support for this is shown in pre-1950 case law; the courts did not take account of whether the death was foreseen or not so the accused's intent to kill one person is transferred in respect of the person killed.

CASE: *R v Koza 1949, AD*

- Facts: The accused instructed his 8 year-old daughter to place poison in a medicine bottle at his enemy's house so that the poison would kill the enemy. However, the daughter put the poison in a drum that the family used for drinking water and the enemy's child drank it and died instead.

The accused was convicted of murder and his appeal was unsuccessful on the basis of transferred intent.

- **Court held**: "where a person commits an act intending to murder one person and kills another he is guilty of murdering that other person". "It is trite law that a person who gives a mandate to someone else to murder a third party is guilty of murder if the third party is killed as a result of the instruction."
- This case was also interesting because it involved instrumentality.

CASE: *R v Kuzwayo 1949, AD*

- **Facts**: The appellant was a hired assassin and fired at the intended victim but he was only wounded. The appellant fired a second shot (*coup de grace*) but this hit and killed another person. Upon appeal the appellant's conviction was upheld using the transferred intent approach.
- **Court held**: The accused intended to kill; he did kill, although not the person intended. The common law demands a consummated deed - here we have a consummation though with respect to a different person.

(2) Concrete / Principled Approach

- It is called the principled approach because it follows the principles of criminal liability.
- It can only be accepted that the accused intended to kill the unintended victim if it can be demonstrated or proved that the accused knew his blow could (possibly) strike the unintended victim (foreseeablity - *dolus eventualis*), or if he did not but he ought to have foreseen.
- One merely applies the ordinary principles relating to intention, especially *dolus eventualis*. If the accused lacked intention is respect of the unintended victim's death, he cannot be convicted of murder and this intention to kill the intended victim cannot be used as a substitute for the actual victim.
- If the accused did not foreseen but ought to have foreseen then he is guilty of culpable homicide.
- It is not an abstract intention but concrete and tangible.
- This approach derives support from Holmes JA in *S v Mtshiza*:

CASE: *S v Mtshiza 1970, AD*

- **Facts**: M and P consumed large quantities of liquor then quarrelled. P was much larger than M and so he provoked him whereupon M (the accused) produced a pocket knife and tried to stab P. W, a friend of M, tried to intervene but he was stabbed and died.
- **Court held**: The trial court convicted the accused of culpable homicide. On appeal, Holmes JA (minority) followed the concrete approach while the majority felt it was unnecessary to consider *aberratio ictus* on the facts. However, Holmes' approach was that the transferred approach was no longer applicable because *aberratio ictus* was no more than "a convenient Latin expression descriptive of the situation where a blow aimed at A misses him and lands on B" and *Koza* and *Kuzwayo* were decided before the Court

had abandoned the *versari* doctrine and formulated the principles of *dolus eventualis*.

- He made noteworthy points that *aberratio ictus* should be judged as follows:
  1) The accused will almost always be guilty of attempted murder (with respect to intended victim)
  2) With regard to the actual victim, there are three possibilities:
     a) If it was foreseen that the unintended victim would be struck and reconciled himself to that, there would be *dolus eventualis* and the accused would be convicted of murder
     b) If it was not foreseen but ought to have been foreseen, then there would be a conviction of culpable homicide
     c) If *dolus eventualis* and culpable homicide did not exist then the accused would be acquitted.
- Holmes JA explained *aberratio ictus* in an ***obiter***.

S v Mtshiza
1. Murder
2. Culpable homicide
3. Acquittal

Since then, there have been two provincial decisions utilizing the concrete approach:

CASE: *S v Tissen 1979, TPD*

- **Facts**: The appellant was charged with common assault and attempt to murder because in shooting at one person the bullet had ricocheted off the street and struck and injured another person. In an appeal against the attempted murder conviction it was held that in shooting at a person in a crowded street the accused must have foreseen the possibility of injuring some person other than the intended victim and had been reckless as to whether the injury resulted or not and thus had committed a crime.
- **Court held**: Applied concrete approach and Margo J said "here the appellant, in shooting at his intended victim in a crowded street...must have foreseen subjectively the possibility of killing or injuring some person other than the intended victim and he was reckless as to whether death or injury resulted or not"

CASE: *S v Raisa 1979, OPD*

- **Facts**: The accused tried to stab a woman who warded off the blow by holding her child up in front of her and as the result the accused stabbed and injured the child. Thereafter he succeeded in stabbing the woman. He pleaded guilty to two counts of assault with intent to do grievous bodily harm and was convicted. However, it appeared that the accused had not admitted intent to assault the child. On review the court confirmed the conviction of assault of the child and it was held the accused could have

been found guilty on that count only if he admitted an intent to assault the child or if such intent had been proved.

- **Court held**: Court set aside the conviction on this count.

CASE: *S v Mavhungu 1981, AD*

Confirmed that in aberratio ictus situations A's liability for murder or culable homicide in respect of C's death depends upon ordinary principles of mens rea

- **Facts**: The accused and three others (one was a woman - Ndou) conspired to murder Ndou's mother-in-law for purpose of removing parts of her body to make medicine therewith. On a particular day Ndou reported her mother-in-law would be home and they arranged to meet, but the accused was delayed in arriving at the house so Ndou started the job without the accused. When the accused did arrive it transpired that Ndou had not killed her mother-in-law but a male stranger. They then removed the body parts nonetheless and disposed of the deceased's body.
- **Court held**: Accused did not have intention with respect to the deceased before or after the murder but was found guilty as an accessory after the fact (facilitating the crime of another). The AD held the verdict of guilty had to be set aside and the only competent verdict was that the accused was guilty after the fact.
- NOTE: Principals and accessory

CASE: *S v Mkansi 2004, TPD*

- **Facts**: The accused went to a tavern to have a beer. As he was walking to the counter F took the money he was holding but the accused took out more money. F took that money again and the accused then took a bottle of beer in order to hit F but he hit the person who just stood up. He was charged with assault.
- **Court held**: Only in respect to the unintended victim he pleaded not guilty because he thought the unintended victim would not stand up. The magistrate court found him guilty but on review it was found the magistrate erred in the decision because the transferred intent approach was used. The court referred to *Raisa* and *Tissen* as authority for the concrete approach.
- The High Court subsequently found the accused not guilty.

There is no ratio of an AD majority that adopts the concrete approach but since *S v Mtshiza*, cases use the concrete approach. However, currently the only AD decision on *aberratio ictus* are *R v Koza* and *R v Kuzwayo* and they will remain the authority on the matter until the SCA makes a definitive judgement regarding it.

- ✓ Example 3: Rupert sees two people in his garden carrying some possessions out of his house, so he pulls out his gun and fires at them. The neighbour Ethel is very nosy and peers out her window to witness the commotion, however one of the bullets hits and kills her.

→ Applying Holmes' obiter in *S v Mtshiza*: Did Rupert foresee the possibility of Ethel being killed and did he reconcile himself to such occurrence? No

Would the reasonable man have foreseen the neighbour being shot in these circumstances? No, therefore Rupert will be acquitted in respect of Ethel's death.

NOTE: If there is no ground of justification for shooting a person then the accused will be liable for attempted murder (if lethal weapon used, seriousness and place of wound)

Example - Disjunction between *Aberratio Ictus* and Mistake of Fact

- ✓ X and Y are twin sisters and they are dating R and S respectively, unbeknown to R and S. R sees Y with S one day and assumes his girlfriend (X) is being unfaithful. He confronts R and "X" and R also becomes suspicious, assuming Y has been unfaithful to him. R and S both start attacking Y but when X rushes in they realize it is not the same person.

→ Mistake of fact as to the identity of the victim; there will still be a charge

ERROR *IN OBJECTIO* AND *ABERRATIO ICTUS*

- The two concepts must be distinguished:
- ❖ ***Error in objectio*** occurs where A, intending to kill B, shoots and kills C whom he mistakenly believes to be B. In such instances a is clearly guilty of murder of C.
- A's intention is directed at "a specific predetermined individual although he is in error as to the exact identity of that individual". He intends to kill the individual regardless of whether it is B or C.
- An undeflected *mens rea* falls upon the person it was intended to affect and error as to identity is thus irrelevant to the question of *mens rea*

- ❖ ***Aberratio ictus***: A intends to kill B but misses him and kills C.
- A's intention is "directed at one whom he knows and recognizes to be B. It is unforeseen and unintended factors that the blow falls upon C.
- A has intention in respect of C only if he foresaw the possibility of C's death or if the death was reasonably foreseeable.

Mistake

- There can be mistake of fact, mistake of law and mistake with regard to grounds of justification
- *Mens rea* must extend to every element of the charge: circumstances, consequences and the unlawfulness of the conduct.
- If an accused is unaware of any of the above factors then he/she is mistaken as to the crime and generally this negates *mens rea*

MISTAKE OF FACT

- It must be **genuine** and **material/essential**
- Genuine relates to a bona fide belief
- Material relates to the definitional elements of the crime and evidence must be adduced.
- It negates intention

- It relates to a situation where the accused need not be reasonable but the mistake must be genuine and material
- It involves a material requirement of the offence in question
- ✓ Example: murder is the intentional and unlawful killing of another human being. There will be no *mens rea* if there was a mistake as to the identity of the deceased.

CASE: *R v Mbombela 1933, AD*

- ➢ **Facts**: The accused, aged 18-20 and living in a rural area, was found guilty of murder of a small child. He assumed him to be a "tokoloshe" which is an evil spirit and according to widespread superstitious belief it took the form of a little old man with small feet and was frightened so took an axe and struck the figure a number of times in half-light. He did not look at the face of the figure for it is part of the superstition that it is fatal to look the spirit in the face. His defence was that he genuinely believed he was killing an evil spirit and so was mistaken as to the fact.
- ➢ The accused lacked *mens rea* as to the identity of the victim and was convicted of culpable homicide.

MISTAKE OF LAW

- ❖ Relates to the unlawfulness of an offence; there is **lack of foresight** with regard to the **law.**
- Where the requisite *mens rea* consists of *dolus*, a mistake with regard to that offence will negate intention
- Where the requisite *mens rea* is *culpa*, a mistake will only negate *mens rea* if it meets the reasonable person test.

- Prior to *S v De Blom*, our law drew on the distinction between mistake of fact and mistake of law.
- Mistake of fact was a defence but mistake of law was not, and this created an anomaly in the law
- This was due to the maxim: ***ignorantia iuris neminem excusat*** - **"ignorance of the law is no excuse"** but this presumption was extremely onerous because there were many complexities in society and new areas of the law were developing including laws regarding development and the environment so it would be difficult for people to know laws regarding every matter.
- Previously, mistake had to be reasonable even if it was in respect of *dolus* but the objective standard was unsuitable for the subjective test

CASE: *S v De Blom 1977, AD*

- ➢ **Facts**: The accused was a woman and was charged with contravention of two exchange control regulations because she took more money out of the country than was allowed and more than R600 000 worth or jewellery without prior permission. Her defence was that she did not know that she required permission.

- **Court held**: With regard to the currency she was found guilty because she travelled often and the court held she should have known (or she did know) about the exchange control regulations, however she was not found guilty with respect to the jewellery she was found not guilty because she was unaware of the regulations in that respect. Her lack of awareness was indicated by the fact that she travelled frequently and each time wore her jewellery so she was not trying to conceal it; she honestly thought she was not acting unlawfully.
- The defence of ignorance of the law was upheld.
- Rumpff CJ: This case lays to rest the maxim. "At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for existence and that the view that "ignorance of the law is no excuse" is not legally applicable in light of the present-day concept of *mens rea* in our law". There is a difference between crimes requiring intention and crimes requiring negligence. It is only in respect of crimes requiring intent that the **actual knowledge of legal intention is required.** It is sufficient for the purposes of liability that the accused failed to act with care and circumspection.
- **Legal principle**: "Ignorance of the law is no excuse" was abolished and so mistake of law can be a defence (as of 1977)
- The AD rejected that mistake must be reasonable.
- For *dolus* crimes the mistake must be genuine and material and for *culpa* the mistake defence will be successful if it was reasonably invoked.

Effect of *De Blom*

- The decision means that ignorance or mistake of law, like ignorance or mistake of fact, now always negates intention so liability will depend upon intention in respect of the unlawfulness element as well as the other elements of the crime.
- It is no longer necessary to distinguish between fact and law and to be concerned with the extent to which exceptions to the maxim can be permitted or the circumstances in which the rule must be applied.
- Ignorance or mistake of law (if genuine) no longer attracts liability
- This accords with ***actus non facit reum nisi mens sit rea*** **(the act is not wrongful unless the mind is guilty)** and notions of fairness and justice.
- Some take the view the AD went too far and the principle arising from *De Blom* unduly favours the wrongdoer, however most writers welcome it.
- The rule is clear and would appear to accord with the legal theory and principle.
- Juridical indications are also that the *De Blom* rule works well in practice. It is submitted therefore, that the rule should not be complicated by adding qualifications to it unless this is found to be necessary.

Mistake of Law in Intention Cases

- Where *mens rea* in the form of intention is required, liability is dependent on the existence of intention in respect of every circumstance or consequence of the crime in question.
- *Ignorantia juris neminem excusat* no longer prevails.
- The growing number of statutory offences demands that genuine ignorance of the law should exclude intention.

Knowledge of Unlawfulness

- The unanimous AD decision in *S v De Blom* in 1977 swept the *ignorantia juris* rule from our criminal law with the result that in line with principle and logic, knowledge on the part of the accused of the unlawfulness of his/her conduct is now a requirement of *mens rea* in the form of intention.
- Ignorance or mistake of law invariably negatives *mens rea* in respect of unlawfulness and so excludes liability.
- Rumpff: "At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for existence and that the view that "ignorance of the law is no excuse" is not legally applicable in light of the present-day concept of *mens rea* in our law".

Post-*De Blom* Era

- Rumpff stated that a person who works in a particular sphere of activity ought to know the law relating to that activity. This qualification applies only where negligence is the fault element for the crime.
- Where intention is required the inquiry is purely subjective and the fact that the accused ought to know the law pertaining to a particular activity is only of evidential value in determining whether the accused's ignorance or mistake was genuine or not

Mistake of Law in Negligence Cases

- If the accused is charged with committing an offence for which negligence is not sufficient for liability the if the accused genuinely and reasonably did not know that what he was doing was unlawful, he must be acquitted.
- *S v De Blom*: Rumpff CJ approved of the view that where a person **works in a particular sphere of activity** he/she ought to know the law relating to that activity (this is a qualification to the rule)

✓ Examples: *S v Du Toit* (illegal petrol conveyance)
S v Longdistance (road transportation and reliance on an advocate's advice)

- If the accused, charged with a crime for which negligence is sufficient, genuinely believes the defence excluding unlawfulness is available, whereas no such defense is available, then the genuineness of the accused's belief alone is in fact available then the genuineness of the accused's belief alone is not sufficient to exclude negligence
- The belief must be **reasonable**

MISTAKE WITH REGARD TO GROUNDS OF JUSTIFICATION / UNLAWFULNESS

- Grounds of justification exclude unlawfulness and they are divided into two categories: excuses and justifications.
- Excuses exclude *mens rea* (fault) and include intoxication; mistake of fact and mistake of law
- Defences exclude the unlawfulness of the act and include consent, private defence and necessity

Example

- If acting excessively because thought an attacker would do much more harm then it goes beyond reasonableness
- Mistake with regard to grounds of justification do not exclude unlawfulness but they excludes ***mens rea***

- If one has failed to exclude unlawfulness then can attempt to exclude *mens rea*
- Unlawfulness can be excluded when the accused was acting **in the bounds of reasonableness** because then there was a mistake as to the boundary of grounds of justification
- Therefore, it is mistake with regard to lawfulness of one's conduct

CASE: *S v Ntuli 1975, AD*

➢ **Facts**: The accused went to his friend's wife's home and asked his mother-in-law where his wife was. She hit him with an assegaai but he took it from her and hit her so hard he killed her. He was charged with culpable homicide.

➢ **Court held**: In the process he exceeded the bounds of self-defence because he used unnecessary force and the reasonable person would have foreseen excessive behaviour such as the accused did would cause death.

CASE: *S v Motleleni 1976, AD*

- **Facts**: The accused and the deceased had an altercation and the deceased drew a knife. The accused fled but he had no way of escaping so the deceased came after him and the accused attacked the deceased, killing me.
- **Court held**: He was convicted of ... but upon appeal he was acquitted because he ...

CASE: *R v Werner 1947, AD*

- **Facts**: The accused was a German prisoner of war in a South African camp and on the instruction of a major the two accused attacked and killed a fellow prisoner. They claimed they were acting under the order of a superior and if they did not obey they would be subject to a court marshal.
- **Court held**: It would have been appropriate if it was on the battlefield but considering it was in a camp it was unlawful. Although the accused said he was unaware of the South African laws, the maxim applied and so his ignorance of this law could not excuse his act. He was found guilty.

CASE: *R v Sachs 1953, AD*

- **Facts**: The deceased contravened a provision of the Suppression of Communism Act by attending a gathering. He was acting on the advice of an attorney who told him he was not acting unlawfully however the advice given was erroneous. The accused had attended the gathering with the belief that he was not acting unlawfully.
- **Court held**: The maxim was applied despite the accused having sought advice from an attorney and under the honest belief that he was acting lawfully. He was found guilty.

CASE: *R v Tshwape 1964, CPD*

- **Facts**: The accused was charged under the statutory offence of slaughtering an animal with a permit (in an urban area), however he was unaware he required a permit as he was from a rural area and it was part of his culture.
- **Court held**: Ignorance of the law is not excuse, but only mistake of fact could negate *mens rea*

- The maxim created great difficulty and the courts began to realize the onerous nature of thus presumption and tried to find ways of circumventing it.

Claim of Right

- One acts unlawfully because one is under the belief that he/she possesses the right to act in that way.

CASE: *S v Rabson 1972, TPD*

- **Facts**: The accused was charged with contravening an ordinance in that he brought certain protected plants from Mozambique into the Transvaal without permission of the administrator. From the evidence it appeared he had a permit from port authorities and had approached various horticulture

societies in Transvaal and was told he did not need such a permit. Therefore, he believed he was entitled to bring the plants into the Transvaal and he did not conceal them.

- **Court held**: He had a bona fide claim of right because of his efforts to gain knowledge on the illegality of the matter and such cases could not be reconciled with the presumption/maxim regarding mistake of law (because he attempted to find out about the law).
- **Legal principle**: Claim of right mitigates the harshness of the maxim.

S v De Blom 1977, AD

Comments

- Commentators raised serious objections to this decision:
- Whiting was of the opinion that although the maxim's abolition is to be welcomed it can only be used as a defence to a certain extent. Only ignorance which is unavoidable or unreasonable should be subject to the maxim, such as if a person ventured into a field of activity then they must have knowledge of law regarding that field.
- In later cases, courts moved away from the subjective test in *De Blom*.

CASE: *S v Du Toit 1981, CPD*

- **Facts**: At a time when there were stringent restrictions on the conveying of petrol other than in the tank of a motor vehicle, the accused had been found in possession of two plastic containers containing 50 litres of petrol. He had no permit to convey this petrol and his defence was that he was unaware of the law relating to conveying petrol. He was convicted of contravening the relevant legislation. He said he was unaware of the regulations.
- **Court held**: The statute required negligence. Motorists should acquaint themselves with regulations regarding their motor vehicles. Further, the regulations were publicised so he could not say he was unaware of them. The appeal against the conviction failed.
- **Legal principle**: Where a person operates in a particular sphere of activity he/she ought to know the law relating to that field.

CASE: *S v Waglines 1986, NPD*

- **Facts**: The first appellant was a cartage company and the second appellant was its director. They were charged with violation of a provision of the Road Transportation Act because they had transported new paper bags from the premises of the manufacturers to the warehouse of the merchant. They had sought the advice of an attorney who gave verbal advice based on a precedent in which a cartage company had transported pellets which were bought as used packing materials. The appellants contended they lacked *mens rea* because they relied on the attorney and the transport consultant so they had the **genuine and mistaken belief** that the cartage of the bags was lawful.
- **Court held**: Cases are distinguishable and the appellants were sophisticated and experienced peers of the reasonable man, and were engaged in an operation that was highly controlled so they had to obligation to explore

their legal obligations to do everything they undertook. **One must acquaint oneself with the rules regulating that sphere of activity.** The enquiry into the conveyance of the paper bags was not sufficient and there had been ample time to have concluded a thorough investigation. They therefore should have realized that the advice given was bizarre. *Mens rea* (negligence) was proved.

- **Legal principle**: Ignorance or mistake must be genuine and material, and where *culpa* serves as the *mens rea* the mistake must be **reasonable**. One must **acquaint oneself with the rules regulating that sphere of activity**

There were three developmental steps regarding mistake of law:

- Ignorance of the law is no excuse, and mistake of law was not a defence (although mistake of fact was)
- Judges shoed displeasure with the maxim and that mistake of law was not a defence
- *De Blom* 1977, maxim abolished and mistake of law now a defence.
  - General principle: If a person operates within a sphere of activity that person must be familiarized with the rules and regulations regarding that sphere
  - Mistake of law does not excuse those who willingly do not want to know the law

CASE: *S v Longdistance 1990, AD*

- **Facts**: The appellants were convicted in the magistrate court for contravening the Road Transportation Act as they had two vehicles and conveyed 2000 packets of refined sugar in each vehicle, and were taking it to a consign in Eastern Transvaal, but this was not covered by the permit they had. They were fined and the vehicles were forfeited. The AD had not discharged the onus of proving the necessary *mens rea* and the appellants believed they conveyance of the sugar was authorized by clause (c) of the permit which said they could transport "tools and equipment as well as scaffolding..." and they had sought advice from a lawyer.
- **Court held**: *Mens rea* in the form of negligence was proven and what the court said was "legal advice has no magic which justifies the recipient in jettisoning his common sense." The lawyer's advice was so bizarre that it must have been given pause to even the most sanguine of carriers and caused him to seek advice from another source.
- **Legal principle**: Simply because the accused obtained advice from a lawyer does not mean their *mens rea* will be negated.

CASE: *S v Claasens 1992, TPD*

- **Facts**: The appellant was convicted in a magistrate court on 16 counts of contravening the Usury Act (setting of interest in a particular transaction; may only set interest up to a certain amount) and the accused, as an intermediary in a money-lending transaction, accepted valuable consideration from a borrower. As it appeared, he was a financial consultant and broker and was unaware of that particular term that he contravened. He had also consulted with an attorney and an advocate and

discussed his business with them to the extent that he had his client mandate forms checked by them. However, he was never informed by either that he was contravening the Act by receiving money. He was sentenced but appealed

- **Court held**: It could have been expected that the attorney and the advocate would have drawn his attention to that provision in the Act and it thus set too high a standard that he himself should have known of that provision. No advice was given on the point so the accused had no reason to think he was doing anything wrong. The appellant had not exceeded the bounds of reasonableness and he had not been negligent.

Comments

- Distinguish this from *Waglines* and *Longdistance* wherein the advice given by the attorneys was wrong.
- Also in *Waglines* the accused had ample time to sufficiently enquire into the legality of his act.

Qualification of the Contemporaneity Principle & Mistake as to Causal Sequence

CONTEMPORANEITY PRINCIPLE

- ❖ **Contemporaneity rule: Where *mens rea* is an element of a crime, *actus reus* and *mens rea* must exist contemporaneously (at the same time).**
- Where fault (*mens rea*) is an element of the crime charged, the unlawful conduct and the fault must exist contemporaneously
- In other words, the wrongdoer must intend to commit or be negligent in the commission of the crime at the time the crime is committed and thus a person will not be guilty of murder "if a person kills another accidentally and later expresses his joy at having killed him."
- The **contemporaneity** rule has been in issue whether the accused intends to kill another and having inflicted what he thinks is a fatal wound to that other person, he then disposes of the body or sets alight to the building in which the body lies.
- The victim does not die from the initial assault but from the subsequent disposing of the body (*R v Chiswibo*) or from the carbon monoxide poisoning caused by the fumes from the fire (*S v Masilela*)
- In such cases the initial assault is accompanied by the intent to kill but technically, the **unlawful consequence** of death is not present **at that time** because death only results later.
- Similarly, when death does arise there is no intent to kill **at that time** because the accused believed the deceased to be dead already.
- Two court decisions reached different conclusions on this principle:
- The AD has **refused to exculpate the accused of murder** in such a case as seen in the decision for (1) *S v Masilela*
- Ogilvie Thompson JA refused to regard the assault and subsequent burning as two separate disconnected acts. Rumpff JA took the view that in this kind of case where the accused and nobody else causes death, the accused's mistake as to the precise manner in which and time when death occurred is not a factor on which he can rely.
- However later in (2) *S v Goosen* van Heerden JA changed this slightly:

> **If death occurred in a manner markedly different from the manner in which it was foreseen then the accused is not liable**

CASE: *R v Thabo Meli 1954, Privy Council*

- ➢ **Facts**: The appellants were convicted of murder in a high court in Lesotho (then Basotholand). They had a preconceived plan whereby they took a man to a hut, gave him enough beer to sufficiently intoxicate him the struck him on the head. Believing him to be dead, they took him outside and he later died of exposure.

- **Court held**: It applied a single transaction approach that it is not unusual for someone who has killed to conceal the body, so contemporaneity is not a necessity but it is a single chain of events.

CASE: *R v Chiswibo 1961, FC*

- **Facts**: The accused struck the deceased with the blunt side of an axe and the blow rendered him unconscious. He genuinely and reasonably believed that the deceased was dead and put the body in an ant-bear hole. The blow itself might not have been fatal and the death might have been caused by the subsequent interment in the hole and the Federal Supreme Court found there was no preconceived plan to murder and then dispose of the body. The court regarded the assault and subsequent disposal of the body as **two separate, disconnected acts.** Act 1 (striking): the *mens rea* was present but the *actus reus* was not since the death did not occur. However for Act 2 (interment) the *actus reus* existed but the *mens rea* was no longer present.
- **Court held**: The accused was guilty of attempted murder and not murder because the *actus* reus (act of killing) and *mens rea* (intention to kill) were **not contemporaneous.** An attempted murder charge was more acceptable.
- (This case differs from previous cases)

  - Burchell and Hunt have argued that although *mens rea* and *actus reus* must undoubtedly be contemporaneous, in the interest of criminal justice in cases of this kind a court should be reluctant to regard the assault and the disposition of the body as two separate unconnected acts.
  - The question should be wither the accused had an intention (actual or legal) in respect of the death of the victim.
  - His mistake as to the precise time and manner of death does not affect his intention to kill
  - His mistake with reference to when the victim dies is not essential to the death of the victim

CASE: *S v Masilela 1968, AD*

- **Facts**: The appellants had assaulted the deceased by striking him over the head and strangling him with a tie. They then threw him on the bed and covered him with a blanket which they set fire to and under the bed. Later the fire was extinguished but the deceased was dead and the post-mortem revealed potentially serious injuries to his head and that his neck had been broken. There were also indications of strangulation. According to the medical evidence the injuries probably only rendered the deceased unconscious, the actual cause of death was carbon monoxide poisoning from the fire. The court *a quo* convicted them of murder but they appealed and it was contended that at most the appellants were guilty of attempted murder on the ground that in respect of the assault the intention for murder had been present but **not the unlawful consequence** of death. With regard to the striking (Act 1), there had been the *mens rea* and with regard to the burning (Act 2) there had been the *actus reus*

(unlawful consequence) required for murder but not the intention since the appellants believed the victim to be already dead.

- **Court held**: AD held the appellants were guilty of murder because Ogilvie Thompson JA refused to regard the assault and subsequent burning as two separate disconnected acts. To accede, on the facts of the present case, to the contention advanced on behalf of the appellants that, once they erronesouly believe that they had achieved the object by strangling the deceased, their **proved intention to kill him fell away and can no longer support the charge of murder, would be wholly unrealistic.** The inference is inescapable that the injuries inflicted prior to the burning were a material and direct contributory cause of the deceased's dying from carbon monoxide poisoning. This is **an extension of the principle of *Thabo Meli's* case** in that the present case the trial court was unable to find positively that there was a preconceived plan to kill the deceased. However this court should not hesitate to make that extension even although their intention to kill was conceived, not previously but as a "matter of improvisation in the course of the execution of a robbery".
- Rumpff JA took the view that in this kind of case where the accused and nobody else causes death, the accused's mistake as to the precise manner in which and time when death occurred is not a factor on which he can rely. In cases like the present where the actor and no one else causes the death, mistake on the actor's part as to precisely how and when the death will come about is not a factor on which he can rely. The actor has meant to bring about the death and has caused such death. In this situation he has been mistaken about the precise way in which and time when the death results. Hs mistake regarding the precise way in which and time when pathologically speaking death results, is in my opinion, completely irrelevant.
- Legal principle:

MISTAKE AS TO THE CAUSAL SEQUENCE

- These situations pose difficulty because it is tricky to distinguish if there is a *novus actus interveniens* and *mens rea*.
- *Mens rea* must extend to all the elements of the *actus reus* and it must be **contemporaneous** with *mens rea*.

- It there is a possibility of death - culpable homicide
- If did subjectively foresee possibility - attempted murder
- ✓ Example: A stabs B and thinks he is dead however B is still alive when A hides his body in a field. A is guilty of attempted murder.

- The general rule is that provided the consequence (death) was foreseen, it is sufficient for *dolus eventualis* and the accused **need not foresee precise or even general manner in which death occurs.**
- As long as the real possibility of consequence was foreseen it is irrelevant that the manner in which it occurs was not foreseen.
- A mistake relating to causal sequence ought not to exclude an accused's intention since in result crimes such a form of mistake is not material.
- Where occurrence of the consequence was **markedly different** from that foreseen, his or her liability or otherwise would often turn to the question of causation rather than intention.

- *S v Goosen differed from the view in S v Masilela* because van Heerden JA took the view that the statements by Rumpff in Masilela and Jansen JA in Daniels that the accused's mistake as regards the prescise way in which death occurs cannot avail him, must be **confined to the factual situations** in those cases and in particular to instances where there was ***dolus directus*** regarding the causing of death.
- Where the accused's **aim and objective (*dolus directus*)** was to bring about the death of the deceased in general his mstake regarding the precise way in which death occurs would be irrelevant. Although the judge did accept that even where *dolus directus* is present there might be exceptions to the rule.
- However, when referring to the judgement of Steyn JA in *S v Nkombani* held that where *dolus directus* is alleged the accused's foresight of the way in which death occurs must not differ **"markedly"**
- The reason for this judgement is compelling: If the accused's aim and objective is to bring about the death of another, he should not be able to shelter behind the fact that death actually came about in a very different way to that which he envisaged.
- For example: If one had asked the appellants in *S v Masilela* before they set fire to the house containing the victim's body if the victim was still alive would they still want to kill him, the reply would have been "yes".

CASE: *S v Goosen 1989, AD**

- **Facts**: The accused had participated in a robbery in which the victim had been shot and killed. The accused had foreseen the possibility that one of his fellow robbers might intentionally shoot and kill the deceased however what actually occurred was that the fellow robber had involuntarily pulled the trigger of his firearm (which was meant mainly as a scare tactic) and so involuntarily caused the death of the deceased. They knew the deceased was an old man and would not be armed and that the carbine would only be used for frightening him, however they foresaw the possibility of some struggle.
- They waited for the deceased in a car outside his place of work where he had got into his car and driven off and they subsequently followed him. When the deceased stopped at a top sign the robbers jumped out of their car and confronted him and one of the accused (Mazibuko) held the gun while another struck the deceased. The car was automatic so when the deceased's foot

slipped off the brake the car started moving forward and Mazibuko got a fright and pulled the trigger.

- He was found guilty of culpable homicide (on grounds that pulling the trigger was involuntary), however the accused (Goosen) had neither held the gun or struck the deceased. On appeal the AD found that the accused could not be guilty of murder because he could not foresee the possibility of death since he was of "low intelligence" but a conviction of culpable homicide was imposed (on the basis that a reasonable person would have foreseen the possibility of death resulting from the involuntary discharging of the firearm).
- **Court held**: The causing of death by intentional action was **markedly different** from the causing of the death. Van Heerden JA: This court has in the past confirmed a perpetrator can be guilty of intentionally causing the death of a victim even though he had not foreseen the precise manner in which the death would occur, but it has never been held that a perpetrator acted intentionally even where the manner in which the foreseen result occurred differed radically from the **foreseen causal sequence. *Dolus* is lacking where an accused's foresight of the causal sequence differs markedly** from the actual causal sequence. In a consequence crime intention must be aimed at bringing about the result in materially the same way as it in actual fact occurs. The appellant had foreseen the possibility that Mazibuko might fire at the deceased intentionally and thereby fatally injure him but what in fact happened was the Mazibuko pulled the carbine's trigger involuntarily. **Causing death by means of intentional conduct obviously differs markedly from involuntary conduct.**
- From referring to *S v Daniels* (Jansen JA) and *S v Masilela* (Rumpff JA) he implied that a mistake on the part of the perpetrators in respect of the chain of causation could not avail them. Hence, the mistakes in question did not exclude intention.
- **Legal principle**: Where the perpetrator's foresight of the deceased's death differs markedly from the manner in which it actually occurred, the accused is not liable.

- Snyman holds the view that a mistake relating to the causal chain of events ought not to exclude X's intention since in result crimes such a form of mistake is not material
- The accused did not have to the precise or even general way in which that consequence (death) which was actually foreseen, came about.
- Where the manner of the occurrence of the consequence was very different from that foreseen by the accused, his liability of otherwise would often turn on the question of causation rather than intention.
- In *S v Goosen*, the AD adopted the approach that the intention element in consequence crimes is not satisfied if the consequence occurs in a way that differs markedly from the way in which the accused foresaw the causal sequence. Thus, for intention in the form of *dolus eventualis* to exist there must not only be foresight of the possibility of consequence occurring and the accused proceeding with his/her conduct despite such foresight, but there

must be **substantial correlation** between the **foreseen way in which the consequence might have occurred** and the **actual way it did.**

- Van Heerden JA made the following example to justify the conclusion on mistake regarding causal sequence made in *S v Goosen*: A robber plans to rob a shop and takes a gun with him and although he hopes he will not have to use it he foresees the reasonable possibility that he might have to kill the owner to achieve his object. Hoping the shop owner will hand over the money without him having to use force he puts the gun in his pocket but as he walks in the shop the gun slips out and goes off, killing the shop owner.
- He is not guilty of murder because he made a fundamental mistake regarding the causal sequence which resulted in death.
- However, he could be acquitted on a causal approach: because although he is the factual cause he is not the legal cause of the death as the gun slipping and going off was an unusual event not foreseen as a real possibility and it breaks the causal chain.
- The theory of mistake, an aspect of *mens rea* may this be an important limiting device in cases of common-purpose liability, excluding liability for murder where death was foreseen by the participants in a common purpose but death in fact occurred in an unexpected or bizarre way.
- Snyman criticizes the judgement because (1) mistake regarding causal sequence is not material to criminal liability and (2) the definition of intention does not include knowledge of the precise time and way in which the result is brought about.

Mens Rea in Statutory Offences

- The rule is that *mens rea* in the form of intention or negligence is a prerequisite for all common law crimes.
- There are common law crimes derived from practice and they are different because they are created by the legislature which imposes a punishment.
- The problem is that in certain instances the legislation may be silent on the **form of *mens rea*** required, or not even require *mens rea* at all (*stricti iuris*)
- Where the **statute is silent** on *mens rea* the **starting point** is that ***mens rea* is presumed**
- In other instances, the wording of the statute indicating *mens rea* indicates it is required.

❖ **Presumption:** *mens rea* is an element of statutory offences (*S v Arenstein*)

➢ ***S v Arenstein***: "The **general rule is that *actus non facit reum nisi mens sit rea***, and that in construing statutory prohibitions or injunctions the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable."

- SA law prefers that fault should be an element of liability in statutory offences; this appears in a principle of statutory interpretation
- Statutes may be classified as follows:
    1) Those requiring *mens rea*
    2) Expressly excluding *mens rea*
    3) Give no express indication as to whether or not *mens rea* is an element of the offence.

1) STATUTES EXPRESSLY REQUIRING *MENS REA*

- The legislature uses words such as:
    - Maliciously
    - Knowingly
    - Willfully
    - Wantonly
    - Corruptly
    - Fraudulently
    - Allows
    - Permits
    - Suffers
    - Fails
    - Evades
    - False
    - Cruelly
- The presumption may be rebutted if there are other considerations which indicate the offence is one of strict liability.
- The requirement of fault and particular form of fault required, may be made by the legislature to appear expressly in the statute by the use of various words such as "intentionally; maliciously; knowingly; negligently..."

- The courts are prepared to interpret a statute which is silent on the matter of fault as tacitly excluding the requirement of fault, although they are reluctant to conclude an offence as being one of strict liability (*S v Qumbella*) and in *S v Arenstein* the AD even set up the requirement of fault as a presumption

CASE: *R v Arenstein 1964, AD*

- Accused was charged with the failure to report to his parole officer between 12 and 2pm on a certain day and this was at a time when the government was cracking down. The accused claimed he forgot about the appointment so he lacked *mens rea*
- **Court held**: By looking at the penalty imposed *mens rea* was required therefore he was guilty of negligence. Within the context, *mens rea* could be presumed to be required.
- "The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable."
- These other considerations are:
  1. Language or other context of the prohibition or injunction
  2. Scope and object of the statute
  3. Nature and extent of the penalty
  4. Ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of *mens rea* (*S v Arenstein*)

INTENTION

- **Intention** is a requirement for all common law crimes but it is not an element of liability for certain statutory offences.
- Strict liability is an exceptional, and constitutionally questionable form of liability for statutory offences and traditionally the doctrine only applied to impose certain standards of conduct in the interest of the community at large such as public welfare etc.
- In regard to statutory offences the general principle is that fault is a necessary element for liability and although fault in the form of *culpa* is a middle-course between intention-based liability and strict liability, the AD indicates that the usual form of fault in statutory offences is intention (*S v Ngwenya*).
- Jansen JA in *S v Ngwenya* held that instead of excluding fault and thus finding strict liability, the court should take the **middle-ground** and find that fault is required in the form of **negligence**, and this relates to standards of care for persons, also:
- ***R v H***: *"Negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person to be circumspect..."*

- In ***S v Van Zyl*** the court (CPD) relied on a rule that intention would be required for a statutory offence unless there is clear indication that