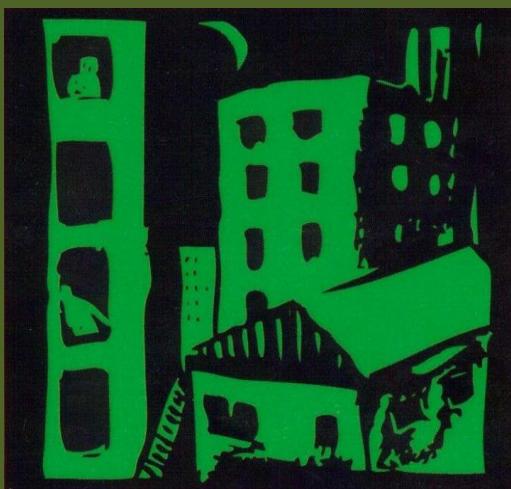


LAW DEMOCRACY & DEVELOPMENT



VOLUME 17 (2013)

DOI: <http://dx.doi.org/10.4314/ldd.v17i1.4>

ISSN: 2077-4907

"One moment of extreme irresponsibility": Notes and comments on *Humphreys v S* and the volitional component of *dolus eventualis* in the context of dangerous or irresponsible driving

HJ VAN DER MERWE*

Lecturer, Faculty of Law, University of the Western Cape

1 INTRODUCTION

Charging irresponsible and reckless motorists with intent based crimes is a relatively recent initiative on the part of

* I am grateful to the academic staff of the Department of Criminal Justice and Procedure at the University of the Western Cape for their valuable comments and suggestions during a departmental discussion at which a preliminary version of this article was presented. My thanks also to Professor Israel "Solly" Leeman for his valuable editorial contribution and comments on the text.

the National Prosecuting Authority (NPA). Traditionally, the NPA's approach to motor vehicle accidents caused by dangerous or irresponsible driving resulting in death has been to charge the person responsible with culpable homicide. However, in March 2010 the NPA decided to proactively pursue a more "aggressive" prosecutorial strategy by bringing charges of murder and attempted murder against Molemo "Jub Jub" Maarohanye and his co-accused for having collided with a group of schoolchildren while "drag racing".¹ Ostensibly the NPA's rationale for a more aggressive approach to such cases is to increase the preventative and deterrent effects of punishment among South African road users, especially dangerous drivers and those motorists prone to risk taking. The underlying intention of this strategy is to counteract the high number of fatalities on South African public roads that occur as a result of dangerous or reckless driving. However, the ruling of the Supreme Court of Appeal (SCA) in *Humphreys v The State* illustrates that this enterprise, however desirable or well received it may be amongst the public, may not always be justifiable in terms of the established principles of substantive criminal law.²

Following the NPA's new approach in the "Jub Jub" case, and also due to the media attention devoted to the incident, there has been much debate in legal and public spheres over whether drivers responsible for killing or injuring persons due to dangerous driving *can* or *should* be charged with intent based crimes (specifically murder and attempted murder). The ruling in *Humphreys* represents the latest legal development on this front. This case emanates from another well-known incident, which occurred later in 2010, and which is also broadly related to death and serious injury resulting from dangerous driving, namely, the appeal against the convictions of murder and attempted murder handed down to Jacob Humphreys in the Western Cape High Court for causing the death of ten schoolchildren and injuring four others when the minibus he was driving collided with a train. Some seem to have interpreted the SCA's ruling as having provided a conclusive answer to the pertinent question of appropriate charges in relation to irresponsible or dangerous driving which results in the death of or serious injury to an innocent party.³ However, this article submits that a proper understanding of the judgment is that the legal principles pertaining to *dolus eventualis* are clarified through correct application of the law in the specific circumstances of the incident.

¹ This incident occurred on 8 March 2010 in Protea North, Soweto. Four teenage boys were killed and two seriously injured. The accused were later convicted of four counts of murder and two of attempted murder on the basis of having possessed intent in the form of *dolus eventualis*. Regarding the NPA's aggressive approach to irresponsible drivers, see also *National Prosecuting Authority - Khasho News Letter* (February/March 2012) at 13.

² *Humphreys v The State* (424/12) [2013] ZASCA 20 (22 March 2013).

³ See "Humphreys' sentence a lifeline for Jub Jub" *IOL News*, 25 March 2013, available at <http://www.iol.co.za/news/crime-courts/humphreys-sentence-a-lifeline-for-jub-jub-1.1491005#.UVWdVKuFBnI> (accessed 30 March 2013). The Western Cape MEC for transport referred to the judgment as "disappointing", see "Driver's reduced sentence 'disappointing'" *News24*, 22 March 2013, available at <http://www.news24.com/SouthAfrica/News/Killer-drivers-reduced-sentence-disappointing-20130322> (accessed 25 March 2013).

2 BACKGROUND TO AND THE DECISION IN THE WESTERN CAPE HIGH COURT

On 25 August 2010, Jacob Humphreys had been the primary cause of a collision between a minibus (of which he was the driver) carrying 14 schoolchildren and a train in the vicinity of Blackheath, Cape Town. The testimony of two passengers that the accused had overtaken a number of stationary vehicles at the Buttskop railway crossing and had ignored various warning signs in his illegal attempt to navigate the minibus through the crossing was accepted by the Western Cape High Court. It was also accepted that the accused had been aware at the time that a train was approaching the crossing.⁴ The ensuing collision claimed the lives of ten children and resulted in injuries to another four passengers as well as to the accused. Humphreys was subsequently charged with murder and attempted murder.

The Western Cape High Court ruled that the accused was guilty of the aforementioned crimes, having found that he possessed intent in the form of *dolus eventualis*. The test for *dolus eventualis* consists of two requirements. First, it requires subjective foresight on the part of the accused as regards the possibility of committing an unlawful act or creating an unlawful result. Secondly, it is required for the accused to accept this possibility into the bargain. Regarding the requirement of foresight, the judge ruled that circumstantial evidence had established that it could be inferred that the accused had been aware that his action could lead to death or serious injury.⁵ The court held that this conclusion was supported, *inter alia*, by the following facts. First, that where a person drives a vehicle into the path of an oncoming train, death or serious injury to persons is a commonly accepted consequence.⁶ Secondly, that due to the accused's experience and knowledge of trains (as a result of his former employment as a 'shunter' for Transnet, and also confirmed through his own testimony), he was aware of this danger.⁷

Regarding the volitional component of *dolus eventualis*, the judge compared the conduct of the accused in the incident to "a person who throws a man into a cage full of hungry lions" and that the accused had acted "almost like someone playing Russian Roulette".⁸ According to the court, the accused knew that his conduct – driving in the manner in which he did - could lead to death or serious injury.⁹ Due to his decision to persist in driving in such a way, the court found that he had been *reckless*.¹⁰

⁴ *S v Humphreys* (Western Cape High Court) Case No. SS10/2011, 31 December 2012 at para 62.

⁵ *S v Humphreys* at para 62.

⁶ *S v Humphreys* at para 62.

⁷ *S v Humphreys* at para 62.

⁸ *S v Humphreys* at para 65 (my translation).

⁹ *S v Humphreys* at para 65.

¹⁰ *S v Humphreys* at para 65. The appropriateness of the Western Cape High Court's reference to 'recklessness' in applying the test for *dolus eventualis* was specifically addressed by the SCA in the subsequent appeal. This is discussed further below.

3 RATIO DECIDENDI OF THE JUDGMENT ON APPEAL

On appeal, the SCA (in a unanimous judgment per Brand JA) overturned the judgment of the Western Cape High Court and ruled that the accused did not possess the requisite intention to commit murder, but should rather be convicted of culpable homicide due to his extreme recklessness and flagrant negligence with regard to the death of the victims.¹¹ In its judgment the SCA set aside the accused's convictions on ten counts of murder and four counts of attempted murder and replaced them with convictions on ten counts of culpable homicide. The accused's sentence was accordingly reduced from 20 to 8 years' imprisonment ante-dated to 28 February 2012.

Regarding the first component of *dolus eventualis*, the SCA essentially agreed with the finding of the Western Cape High Court, namely, that the accused had subjectively foreseen the death of his passengers as a possible consequence of his conduct.¹² The court held that a right-minded person who ignores the preventative measures presented to the accused prior to the accident ("clear warning signals of an approaching train" and "a boom specifically aimed at preventing traffic to enter a railway crossing") would recognise the possibility of fatal consequences.¹³ According to Brand JA: "To deny this foresight would in my view be comparable to a denial of foreseeing the possibility that a stab wound in the chest may be fatal."¹⁴

The court then proceeded to a more detailed discussion of whether the existence of the second component of *dolus eventualis* had been established.¹⁵ The SCA's ruling was based largely on the fact that the accused had no deliberate desire to expose the children in the minibus to the risk of death as a result of the illegal manoeuvre he had decided to execute on the day in question. The court held that it could be inferred that the accused "may have thought that the possible collision he subjectively foresaw would not actually occur".¹⁶ The SCA advanced two reasons for coming to this conclusion. First, common sense dictates that a desire on the part of the accused to expose his passengers to the risk of death or serious injury would also entail a desire to expose himself to a similar risk. According to the SCA, such a conclusion is unwarranted since there was no evidence to indicate that the accused had taken the possibility of his own death into the bargain.¹⁷ The court held that a failure to show that the accused harboured a desire to endanger himself creates a strong inference in favour of negligent behaviour rather than a legal intention to commit murder.¹⁸

¹¹ *Humphreys v The State* at paras 17 and 20. This, together with the SCA's acceptance of the Western Cape High Court's finding that the accused had foreseen the possibility of the death of his passengers, seems to indicate that he possessed fault in the form of *luxuria* or conscious negligence. However, this is not specifically mentioned anywhere in the judgment.

¹² *Humphreys v The State* at para 14.

¹³ *Humphreys v The State* at para 14.

¹⁴ *Humphreys v The State* at para 14.

¹⁵ *Humphreys v The State* at paras 15-19.

¹⁶ *Humphreys v The State* at para 17.

¹⁷ *Humphreys v The State* at para 18.

¹⁸ It must be mentioned that many writers have pointed out the irrelevance of the accused's desire to bring about an unlawful consequence. The *desire to cause* someone's death should not be confused with

Secondly, the court held that the attempted manoeuvre was "practically possible".¹⁹ Furthermore, the fact that the accused had successfully used this manoeuvre on previous occasions indicates that he subjectively, and through a "misplaced sense of confidence", believed that no harm would flow from his actions on the day in question.²⁰ The fact that the accused thought he *would* (not *could*) make it safely through the crossing without incident indicates strongly that he had at no stage reconciled himself to the possibility that he might be placing the lives of his passengers at risk.

In the High Court the accused had testified that he did not under any circumstances wish to cause the children any harm.²¹ According to his own testimony they were like his own children.²² Indeed, the accused had been transporting children to school for nearly ten years using the same route.²³ The accused is described as a family man who is well respected within his community.²⁴ Although this was not specifically addressed in the SCA's judgment, the judges must have been aware of these considerations, which do not seem to be disputed and which support the accuracy of the SCA's inferences about the accused's state of mind at the time leading up to the incident. As rightly pointed out by Snyman, indirect evidence of this kind is a valuable and often the only means of determining whether an accused had intent and may be crucial to the exercise of inferential reasoning.²⁵

4 THE IMPORT OF THE HUMPHREYS JUDGMENT

The exact scope and value of the volitional component of *dolus eventualis* has long presented a point of contention in South African criminal law. As observed by Whiting, the problem emanates broadly from the fact that "conscious risk-taking may take a very wide variety of forms, and [...] the decision in a given case on whether or not the

the *desire to risk causing* someone's death. The latter is a form of "imputed intent", which is tantamount to *dolus eventualis* (not because the accused desires the death of a person, but because the accused is willing to risk causing a person's death). See Snyman CR *Strafreg* (2012) at 197; Kemp GP *Criminal Law in South Africa* (2012) at 186. This was also confirmed in *S v Ngubane* 1985 (3) SA 677 (A) at 685.

¹⁹ *Humphreys v The State* at para 19.

²⁰ *Humphreys v The State* at para 19. Humphreys essentially benefitted from the fact that he had successfully used the exact same manoeuvre on previous occasions. On moral grounds, it might be argued that the judgment amounts to an unfair benefit only for those motorists who take risks regularly and successfully. The SCA cannot be faulted for this result, as it flows directly from the application of the established legal principles of *dolus eventualis* under which *dolus* is determined subjectively. One might also approach this critique from another angle, namely, that, because of the *bona fide* beliefs of the accused in *Humphreys*, his conduct was less morally blameworthy than it would have been for a person without such beliefs. Irrespective of the above arguments, it goes without saying that any moral argument cannot hold sway in a court of law charged with the objective application of legal principles. Moreover, an accused with a history of responsible driving should benefit through a more lenient sentence upon conviction.

²¹ *S v Humphreys* at para 36.

²² *S v Humphreys* at para 36.

²³ *Humphreys v The State* at para 3.

²⁴ *Humphreys v The State* at para 25.

²⁵ Snyman (2012) at 195. These words proved almost prophetic in *Humphreys* as the accused testified that he remembered absolutely nothing about the incident.

requirements of dolus eventualis have been satisfied may be influenced by a number of factors".²⁶ This is especially true in cases involving dangerous or irresponsible driving. It cannot be denied that most people in the modern world are in some way dependent on vehicular transport for their livelihood. The problem is compounded by the fact that it is likely, even understandable, for all but the most scrupulous of drivers to take risks at some stage during the course of their lives. Motor vehicle transport is an inherently risky²⁷, yet indispensable, social activity. Accidents can and do happen every day. It is within this larger context that the legal principles of fault must serve to determine the criminal liability of those that have caused fatal accidents, so as to punish such persons in accordance with their moral blameworthiness. The SCA's judgment in *Humphreys* must also be scrutinised against this background.

A unanimous judgment of the SCA creates a strong precedent regarding the ambit of the test for the presence of *dolus eventualis*, especially in relation to the second part of the test, that it must be shown that the accused had disregarded or 'reconciled himself with' the risk, which s/he had subjectively foreseen as a possibility. However, the judgment does not create a precedent for irresponsible motorists not to be charged with crimes requiring intent in the form of *dolus eventualis*.²⁸ Rather, the judgment argues convincingly that the second part of the *dolus eventualis* enquiry should not be mistaken for something equivalent to the notion of recklessness as it relates to aggravated negligence.²⁹ As set out in *S v De Bruyn*, *dolus eventualis* requires an "insensitive recklessness (which has nothing in common with culpa)" (my emphasis).³⁰ The judgment in *Humphreys* reiterates Jansen JA's dictum in *S v Ngubane* according to which it is possible for a person to "foresee the possibility of harm and yet be negligent [or reckless in the extreme] in respect of that harm ensuing".³¹ According to the SCA in *Humphreys*, this is exactly where the High Court erred in its judgment.³² The SCA held

²⁶ Whiting R "Thoughts on Dolus Eventualis" (1988) 1 *South African Journal of Criminal Justice* 430.

²⁷ Snyman (2012) at 224. Snyman observes that it could be argued that driving a motor car is always a negligent act: "Andersins kan betoog word dat die blote bestuur van 'n motor altyd 'n nalatige handeling is, want dit is voorsienbaar dat selfs met groot voorsorg aan die kant van die bestuurder, die blote bestuur van 'n motor moontlik iemand anders se dood kan veroorsaak."

²⁸See for example "Prosecution accepts Humphreys decision" News24 available at <http://www.news24.com/SouthAfrica/News/Prosecution-accepts-Humphreys-decision-20130322> (accessed 26 March 2013); see also footnote 3 *supra*.

²⁹ *Humphreys v The State* at para 17. See also Smith PT "Recklessness in Dolus Eventualis" (1979) 96 *South African Law Journal* 81 at 86-87: "...the requirement of recklessness in *dolus eventualis* is the result of an historical accident. In adopting s 140 of the Transkeian Penal Code [according to which "culpable homicide becomes murder [...] (b) If the offender means to cause the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not" (my emphasis)], the court in *Valachia's* case introduced into South African law a concept that was not only unwarranted by the weight of previous decisions, but also a misleading expression of the English law."

³⁰ *S v De Bruyn* 1968 (4) SA 498 (A) at 510; see also *S v Du Preez* 1972 (4) SA 584 (A) at 589 where it was held that "to shoot with a pistol in the direction of a moving human being [in order to scare that person off] leaving so small a margin of safety may indeed fairly be described as reckless conduct; but reckless conduct *per se* is not necessarily to be equated with *dolus eventualis*".

³¹ *S v Ngubane* at 685; *Humphreys v The State* at para 15.

³² *Humphreys v The State* at para 16: "It seems to me that the court a quo had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in *Ngubane*."

that the accused believed “that the possible collision he subjectively foresaw would not actually occur”.³³

It is well established that negligence can vary greatly in its severity, a factor that will ultimately affect the guilty party’s sentence only.³⁴ Yet no matter how severe the accused’s negligence, it can never pass the invisible threshold between extreme forms of conscious negligence (which requires a failure to live up to an objective legal standard and focuses on what the accused should have done in order to avoid an unlawful result) and intent in the form of *dolus eventualis* (which constitutes a subjective state of mind focusing on whether the accused had actually accepted or reconciled himself with the fact that an unlawful consequence could follow).³⁵ Cases involving recklessness should, depending on the degree thereof, be prosecuted either on the basis of conscious negligence (*luxuria*), which is an aggravated form of negligence accompanied by foresight of creating or bringing about an unlawful result or situation; or (“unconscious”) negligence, which is not accompanied by any form of foresight by the accused of the unlawfulness of his/her actions. The judgment in *Humphreys* is a good illustration of inferential reasoning, which avoids the unwarranted application of objective standards to the volitional component of *dolus eventualis* (by, for example, not referring to what an “ordinary” or “reasonable” person would have done under similar conditions). According to Brand JA:

[L]ike any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequence that ensued would have been obvious to any person of normal intelligence. The next step would then be to ask whether, in the light of all the facts and circumstances of the case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.³⁶

It seems to me that Brand JA’s references to, for example, “a right minded person”³⁷ and “any person of normal intelligence” (in the quotation above), instead of a ‘reasonable’ or ‘ordinary’ person, indicate that these dicta have been carefully worded in order to differentiate more clearly between the tests for *dolus eventualis* and conscious negligence as well as to guard against creating the impression that the accused’s state of mind is being determined with reference to objective standards.

Ultimately, intent in the form of *dolus eventualis* and conscious negligence (especially cases involving extreme recklessness) are still separated by a fine line located somewhere between deliberate and accidental criminal conduct and which can only be properly separated through a case-by-case approach to the determination of fault. Every “moment of extreme irresponsibility” (to echo Brand JA’s description of

³³ *Humphreys v The State* at para 17.

³⁴ *Kemp* (2012) at 202.

³⁵ *S v Ngubane* at 686: “[D]olus connotes a volitional state of mind; culpa connotes a failure to measure up to a standard of conduct”; Skeen A “Criminal Law” in Joubert WA and Faris JA (eds.) *The Law of South Africa* (2004) at 83: “Reckless conduct as such – even if it is in the highest degree reprehensible – is not sufficient to establish *dolus eventualis* [...]. See also Snyman (2012) at 194-195.

³⁶ *Humphreys v The State* at para 13.

³⁷ *Humphreys v The State* at para 14.

Humphreys's conduct) lies on the verge of intent and might be found to amount to *dolus eventualis*.³⁸ According to Burchell (citing the work of Whiting with approval), "even foresight of the substantial possibility that death may result from [driving] a vehicle may not be sufficient to establish *dolus eventualis* as opposed to negligence".³⁹ The type of risk taken by the accused will have a crucial impact on the element of fault. In the event of a "specific concrete risk" (as opposed to a "general statistical risk") on the part of the accused, it may be more likely to infer that the volitional element of *dolus eventualis* has been satisfied.⁴⁰ However, even in situations, such as that in the *Humphreys* case, where the accused had taken a specific concrete risk, it does not automatically follow that he had reconciled himself to the possibility of causing death or serious injury. The state is also required to show that the accused had taken the risk that death may result "not caring whether it ensues or not".⁴¹ Herein lies the danger of reference to recklessness in the test for *dolus eventualis*. The danger emanates from the double meaning that may be afforded to the term "recklessness" in the grammatical sense, where recklessness broadly connotes *indifference as regards the consequences of one's actions*. In order to be guilty of an intent based crime, it must be shown that the accused was reckless in a subjective sense. This refers to a person being *truly* indifferent or uncaring as regards the possible consequences of his/her actions. It will not suffice to show that the accused had been *unjustifiably* indifferent, unthinking or indifferent where he/she *should* not have been, which connotes recklessness in the objective sense.

In *S v Qeqe*, *dolus eventualis* in the context of murder was defined as "[performing] an action knowing and foreseeing that somebody may be killed, yet despite that knowledge and reckless of the eventuation of the possible result, persists with that action" (my emphasis).⁴² This formulation is particularly representative of how the volitional component of *dolus eventualis* has hereto been defined by courts and criminal law scholars.⁴³ On the strength of the judgment in *Humphreys*, it may be argued that the emphasised text above constitutes an unfairly restrictive formulation of the volitional

³⁸ *Humphreys v The State* at para 25.

³⁹ Burchell J *South African Criminal Law and Procedure* (2011) at 392.

⁴⁰ Burchell (2011) at 392; Whiting (1988) at 441-442. This seems to have been the case in *S v Combrink* 2012 (1) SACR 93 (SCA). The accused, by his own testimony, had described himself as "an experienced hunter and a very good marksman" (at 98). He had fired two shots at an unidentified person on his farm after that person had failed to respond to his calls. It is submitted that this constituted the taking of a "specific concrete risk" by the accused. The second shot resulted in the death of what emerged to be one of the accused's employees. The court held that the accused had "fired the second shot knowing that the bullet might fatally strike the deceased" and that he was guilty of murder on the basis of *dolus eventualis* (at 99).

⁴¹ *S v De Bruyn* at 510. Strikingly similar wording was used in *R v Huebsch* 1953 (2) SA 561 (A), namely, that the accused had continued to act "not caring what the result might be" (at 568).

⁴² *S v Qeqe* 2012 (2) SACR 41 (ECG) at 48. This case also involved dangerous driving resulting in death of innocent persons. The accused had stolen a vehicle and was being pursued by the police. He was speeding through an area where there were many pedestrians when he lost control of the vehicle resulting in the death of three children. He was convicted on three counts of murder on the basis of intent in the form of *dolus eventualis*.

⁴³ See for example Snyman (2012) at 190; Burchell (2011) at 369. The latter author discusses the relevance of recklessness in the test for *dolus eventualis* in some detail (at 390-393). See also De la Harpe S and Van der Walt T "The Volitional Component of Dolus Eventualis" (2003) 16 *South African Journal of Criminal Justice* 207 at 208.

component. It is unfairly restrictive in the sense that it ignores other factors, which may be relevant to the overall subjective inquiry to determine whether the accused possessed intent. The *Humphreys* decision reiterates the basic point of departure in this regard, namely, that it must be established through inference “what *actually* went on in the mind of the accused” (my emphasis).⁴⁴ Thus, an accused having foreseen some risk to a planned course of action and who also “persists with that action” (as formulated in *Qeqe* above) does not necessarily reconcile him- or herself with, or consent to, the possibility of that risk occurring. There may be other factors relevant to the determination of the accused’s state of mind, which must be considered. As highlighted in *Humphreys*, an accused’s genuine albeit misplaced confidence in their ability to prevent the risk from materialising is enough to negate intention.⁴⁵

5 THE NPA’S “AGGRESSIVE” STRATEGY AND THE APPROPRIATE CHARGES FOR DANGEROUS OR IRRESPONSIBLE DRIVING WHICH RESULTS IN THE DEATH OF AN INNOCENT PARTY

The judgment in *Humphreys* is commendable for its clarity and sound reasoning. It reaffirms the fundamental tenet that the legal principles of *dolus eventualis* must be judged on the merits and applied to the specific facts before the court. Thus, if a reasonable inference leads to the conclusion that the accused had no subjective desire to risk the lives of others, he/she cannot be guilty of murder or attempted murder. The judgment does not create a precedent for making it generally impossible, more difficult or ill advised to charge dangerous or irresponsible drivers with murder. Upon an extreme interpretation it indicates that, practically speaking, it may be rare to find cases in which this can be done with a reasonable prospect of securing a successful conviction. Therefore, due consideration must be given to the fact that the case against Jacob Humphreys was, like all cases, bound by a unique set of facts.

In *Humphreys* this uniqueness lies especially in one important aspect of the case, namely, the fact that the incident produced no victims beyond those inside the vehicle driven by the accused. It is submitted that this aspect of the case calls for a cautious approach to preliminary assessments of the judgment as one providing prosecutorial guidance for *all* cases involving dangerous driving or extreme recklessness by motorists.⁴⁶ This argument can best be illustrated through the use of a hypothetical example using facts that are substantially similar to those of the *Humphreys* case. By borrowing from the facts of the *Humphreys* case, it is possible to create a similar hypothetical incident, but which also involves the loss of the life of a person other than those in the same vehicle as the accused. The hypothetical incident is differentiated by

⁴⁴ *S v Sigwahla* 1967 (4) SA 566 (A) at 570.

⁴⁵ This was also highlighted in *S v Maritz* 1996 (1) SACR 405 (A), where it was held that an accused does not accept any risk if he believes that he is able to avoid its occurrence. At 416: “Die dader self aanvaar nie die risiko van die gevolge nie waar hy oortuig is dat hy die intree daarvan kan verhoed. Dat sy oortuiging ex post facto blyk verkeerd te gewees het, ding nie daarvan af nie dat ‘n mens tog nie kan sê dat iemand ‘n gevolg opsetlik veroorsaak het, net omdat hy die gevolg voorsien het nie, indien hy gehandel het in die oortuiging dat dit tog nie sal intree nie.”

⁴⁶ See (n 3 and 28 above).

substituting, respectively, a traffic intersection for the railway crossing and another motor vehicle (for example, a sedan type vehicle occupied by only the driver) for the train. Furthermore, it is posited that one person from each vehicle is killed in a collision caused by a manoeuvre substantially similar to that in the *Humphreys* case. The manoeuvre is one in which the accused, after having foreseen the possibility of a collision with another vehicle, overtakes numerous cars in an attempt to cross a traffic intersection five to ten seconds after the traffic light has changed to indicate that all oncoming traffic (including the accused's car) must stop. As in *Humphreys*, the irresponsible driver survives the accident.

In contrast to the facts in the *Humphreys* case, in this hypothetical scenario it is highly probable for injuries or death to occur among the persons travelling in both vehicles. If we apply the *reasoning* of the *Humphreys* judgment to the accused in our hypothetical case, he, although having foreseen the possibility of "killing the deceased, or someone in the same position, class or category, in substantially the same manner as he did in fact kill him"⁴⁷, would be found guilty of culpable homicide with regard to the death of his passenger (the first deceased) except where it can be shown that he had been "indifferent as to whether he [himself] would live or die".⁴⁸

But could the same be said about the death of the driver (the second deceased) of the other vehicle? Since the second deceased had been travelling in a separate vehicle, his fate is not tied to that of the accused, as was the case for all the deceased in the *Humphreys* case. It is neither unrealistic nor unusual for motorists who had foreseen the possibility that their conduct may give rise to an unlawful consequence not to take the possible risk against their own lives into the bargain. It is also possible for a court to infer that an accused held the belief that he/she would survive a collision even though it had been foreseen by that accused that the death of an innocent party might occur. This could certainly be the case in situations where pedestrians are killed as a result of extremely dangerous driving (the "Jub Jub" case could serve as a possible example). In such cases the first reason advanced by the SCA in concluding that the second component of *dolus eventualis* was not satisfied in the *Humphreys* case (failure to show that the accused harboured a desire to endanger himself) no longer applies. In the hypothetical scenario it may be said that the accused had persisted with his conduct in spite of his foresight and had consciously taken a risk by jumping the traffic light. Furthermore, this fact cannot be refuted, as was correctly done by the SCA in the *Humphreys* case, by creating a nexus between the fortunes of the accused and the second deceased. This in turn, cannot serve to negate the second part of the test for *dolus eventualis*.

It goes without saying that, as in the hypothetical scenario, the *factual reasoning* of the court in the *Humphreys* judgment cannot apply to other cases. Even where it has been shown that the accused had foreseen the possibility of an accident and had regarded his own life as immaterial, indirect evidence, for example, of a subjective confidence in his/her ability to avoid an accident, could indicate that he/she had not

⁴⁷ Kemp (2012) at 187.

⁴⁸ *Humphreys v The State* at para 18.

taken such a risk into the bargain. It is the interpretation and application of legal principles, not factual reasoning, that creates a binding legal precedent. For this reason, the *Humphreys* judgment does not automatically create a window of opportunity for irresponsible or dangerous drivers to escape intent based criminal liability. For example, it does not follow that the murder and attempted murder convictions handed down to Molemo "Jub Jub" Maarohanye and Themba Tshabalala by the Protea Magistrate's Court in Soweto will be overturned. As illustrated by the hypothetical example, it is still entirely possible for a court of appeal (should the case go on appeal) to infer intent in the form of *dolus eventualis* from the accused's conduct and the surrounding circumstances of the case.⁴⁹ If an accused's foresight could not dissuade or discourage him/her or alter his/her mind from embarking on a course of action from which it can be reasonably inferred that he/she had truly consented to risking the lives of others, then he/she may be found guilty of crimes requiring fault in the form of intent.

According to South African criminal law, an actual or specific intent to kill is not the only form of intent sufficient for criminal liability in respect of charges of murder and attempted murder. *Dolus eventualis*, if it can be proved beyond a reasonable doubt, may show that an accused's state of mind was less blameworthy, but it is sufficient for convictions of murder and attempted murder. The volitional component of *dolus eventualis* remains, as before, the distinguishing feature between cases of *dolus eventualis* and conscious negligence, since both these modes of fault are accompanied by subjective foresight of the possibility of causing death or serious injury.⁵⁰ The SCA's ruling has clarified and emphasised the importance of this already existing distinction.

It might be argued that the SCA attached too much weight to the second part of the *dolus eventualis* enquiry.⁵¹ According to such argument, *dolus eventualis* should be determined by focusing primarily on the whether the accused had foreseen a substantial or concrete possibility at the time that he/she was engaging in the unlawful activity.⁵² It is submitted that this is an unsustainable argument, which is generally not supported by South African courts.⁵³ Because we are dealing with a subjective inquiry, the problem cannot be solved only with reference to the probability of death or serious injury foreseen by the accused. The fact that the accused had foreseen a substantial or concrete possibility of death or serious injury does not provide conclusive proof concerning the true will of the accused. Would it not be possible for an accused to exhibit the following state of mind?

⁴⁹ Snyman (2012) at 195.

⁵⁰ *S v Ngubane* at 685; Snyman (2012) at 194-195.

⁵¹ See for example, Burchell (2011) at 385: "The volitional element remains at best a confusing and, at worst, an irrelevant inquiry" (footnote omitted); see also Snyman (2012) at 193 and Kemp (2012) at 191.

⁵² Burchell (2011) at 385: "...foresight of anything less (ie remote possibility) should only qualify as conscious negligence if a reasonable person would have taken steps to guard against such possibility" (footnote omitted); see also Snyman (2012) at 193 and Kemp (2012) at 191. A detailed discussion of the ambit of the "foresight" or "cognitive" component of *dolus eventualis* is beyond the scope of this article. As argued throughout this article, the primary importance of the *Humphreys* judgment lies in the court's interpretation of the volitional component of *dolus eventualis*.

⁵³ Snyman (2012) at 193.

"Yes, I was aware of a real risk of death or serious injury. Yes, I was reckless. Yes, I should have acted otherwise. However, I never harboured a desire to risk causing someone's death. I mistakenly and genuinely believed that death would not occur."

If a reasonable inference indicates that these statements are true, the accused cannot be guilty of murder or attempted murder and will be guilty of culpable homicide due to conscious negligence. The *Humphreys* judgment illustrates the value of the volitional component of the test for *dolus eventualis* for determining the scope of an individual's criminal liability, especially in relation to dangerous driving resulting in death or serious injury. This in turn will have a crucial impact on the determination of a guilty party's punishment, as all forms of *dolus* are deemed more worthy of moral blame than forms of *culpa* and will likely result in a harsher sentence.⁵⁴

It is submitted that the NPA should bear the above in mind despite the failure to successfully prosecute Jacob Humphreys for intent based crimes. The judgment, albeit correct on the merits, does not and cannot entirely rule out *dolus eventualis* as the basis of intent for murder committed by other risk taking drivers, such as, Molemo "Jub Jub" Maarohanye and his co-accused. The Western Cape spokesman for the NPA, Eric Ntabazalila, is reported to have said that the NPA "would no longer be charging people with murder unless they could prove a *direct intention* to do so" (my emphasis).⁵⁵ Assuming the accuracy with which this statement was reported, this is clearly an over-reaction to the *Humphreys* judgment. The *Humphreys* judgment does not constitute a blanket defence available to all irresponsible drivers against charges of murder or attempted murder.

Ultimately, the NPA must continue to act on behalf of the public and in the interests of justice. At present the special attention given by the NPA to cases involving dangerous or reckless driving as well as its commitment to "the proper and effective prosecution of motor-vehicle accidents resulting in death" is surely warranted.⁵⁶ The NPA, together with the courts, have a social responsibility towards ensuring that perpetrators are punished in accordance with their moral blameworthiness. In the presence of reliable evidence indicating intent in any form, this might entail charging those responsible for motor vehicle accidents with murder and/or attempted murder. The NPA's strategy of pursuing heavier sentences for irresponsible drivers may be necessary in order to create a preventative and deterrent effect among South African road users. However, this strategy can only be pursued *after* the accused has been convicted of the *appropriate* crime.

⁵⁴ Kemp (2012) at 188-189.

⁵⁵ See (n 3 above).

⁵⁶ "NPA welcomes legal certainty brought by the Jacob Jumphreys [sic]", *NPA Media Statement*, 22 March 2013, available at <http://www.npa.gov.za/NewsClips/March%202013%20NPA%20Welcomes%20Legal%20Certainty%20Brought%20By%20The%20Jacob%20Jumphreys%20Matter.pdf> (accessed 30 March 2013).

6 CONCLUSION

It is submitted that the decision in *Humphreys* is correct on the specific facts of the case.⁵⁷ The judgment is logically argued as well as juridically sound. The judgment has also provided a great deal of clarity regarding the ambit of the volitional component of *dolus eventualis*, particularly the confusion surrounding repeated and often inappropriate references to recklessness as an essential component of *dolus eventualis*. Above all, it highlights that *dolus* is *always* determined with reference to the accused's actual state of mind. In general, the judgment should prove to be a valuable legal precedent for determining whether an accused possessed fault in the form of *dolus eventualis* or *luxuria*, especially in cases involving blameworthy or extremely reckless driving. As highlighted in this article however, our courts and especially the NPA must be cautious in their interpretation of the judgment for use in future cases involving risk laden or reckless driving which results in death and/or serious injury to one or more persons. The *Humphreys* judgment does not provide a definitive answer to the question of the appropriate charges to bring in cases involving dangerous driving which lead to a loss of innocent life or serious injury. Specifically, it is argued that there may be extreme cases where the requirements of *dolus eventualis* are satisfied and where charges of murder or attempted murder (and also convictions on such charges) may not only be justified, but also necessary to preserve the public's faith in the law.

BIBLIOGRAPHY

Cases

- Humphreys v The State* (424/12) [2013] ZASCA 20 (22 March 2013)
- R v Huebsch* 1953 (2) SA 561 (A)
- S v Combrink* 2012 (1) SACR 93 (SCA)
- S v De Bruyn* 1968 (4) SA 498 (A)
- S v Du Preez* 1972 (4) SA 584 (A)
- S v Humphreys* (Western Cape High Court) Case No. SS10/2011, 31 December 2012
- S v Maritz* 1996 (1) SACR 405 (A)
- S v Ngubane* 1985 (3) SA 677 (A)
- S v Qeqe* 2012 (2) SACR 41 (ECG)
- S v Sigwahla* 1967 (4) SA 566 (A)

⁵⁷ It might be argued that the sentence was somewhat lenient. In his judgment, Brand JA admits that he found the determination of an appropriate sentence to be the most difficult aspect of the case (at para 22). The appropriateness of the accused's sentence is beyond the scope of this article. Nonetheless, it is submitted that the sentence imposed is supported by sufficient reasons and is certainly not grossly inappropriate for multiple convictions of culpable homicide.

Books

Burchell J *South African Criminal Law and Procedure: Volume I (General Principles of Criminal Law)* 4th ed Cape Town: Juta (2011).

Joubert WA and Faris JA (eds.) *The Law of South Africa (Volume 6)* 2nd ed Durban: LexisNexis Butterworths (2004).

Kemp GP (ed.) *et al. Criminal Law in South Africa* Cape Town: Oxford University Press (2012).

Snyman CR *Strafreg* 6th ed Durban: LexisNexis (2012).

Journal Articles

De la Harpe S and Van der Walt T "The Volitional Component of *Dolus Eventualis*" (2003) 16 *South African Journal of Criminal Justice* 207

Smith PT "Recklessness in Dolus Eventualis" (1979) 96 *South African Law Journal* 81

Whiting R "Thoughts on Dolus Eventualis" (1988) 1 *South African Journal of Criminal Justice* 430.

Internet sources

"Humphreys' sentence a lifeline for Jub Jub" *IOL News*, 25 March 2013, available at <http://www.iol.co.za/news/crime-courts/humphreys-sentence-a-lifeline-for-jub-jub-1.1491005#.UVWdVKuFBnI> (accessed 2013/03/30).

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

"Prosecution accepts Humphreys decision" *News24* available at <http://www.news24.com/SouthAfrica/News/Prosecution-accepts-Humphreys-decision-20130322> (accessed 2013/03/26).

National Prosecuting Authority - Khasho News Letter (February/March 2012).

"NPA welcomes legal certainty brought by the Jacob Humphreys", *NPA Media Statement*, 22 March 2013, available at <http://www.npa.gov.za/NewsClips/March%202013%20NPA%20Welcomes%20Legal%20Certainty%20Brought%20By%20The%20Jacob%20Jumphreys%20Matter.pdf> (accessed 2013/03/30).