



ZIMBABWE · LAW · REVIEW

Volume 3

1985

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Issue Editors

S.B.O. GUTTO, J.S. HATCHARD AND G. FELTOE.

*Faculty of Law
University of Zimbabwe
P.O. Box MP 167
Mount Pleasant
Harare
Zimbabwe*

Zimbabwe Law Review Volume 3 1985 No. 1 & 2

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STATES OF MIND IN THE ZIMBABWEAN CRIMINAL LAW

FELTOE*

1. INTRODUCTION

One of the most fundamental principles of our common law in criminal matters is that a person can only be found criminally liable if his conduct was accompanied by some blameworthy mental state. For a very long time in our law it has been recognised as being completely pointless and unjust to impose punishment under the criminal law if no moral blameworthiness⁽¹⁾ attached to the conduct of an accused because, not only is it taken that he lacks intention, but also that there is no negligence on his part. We describe a situation, therefore, which is devoid of any moral blameworthiness on the actor's part as one of blameless inadvertence.

On the other hand if the actor's conduct is accompanied by some culpable state of mind then punishment may be imposed under the criminal law. Our criminal law thus seeks to discourage the intentional infliction of various types of harm and the careless causing of certain other types of harm by penalising the wrongdoers. Under our common law all crimes, except one, require proof of the mental state of subjective intention. Culpable homicide is the only common law crime that requires only proof of negligence. Statutory crimes of negligence are common, however, in addition to statutory crimes of intention.

The law recognises that some states of mind are more serious than others. Thus intentional conduct is more morally blameworthy than negligent action. We have sought to establish a descending order of states of mind ranging from the most blameworthy down to the least culpable. This can be illustrated as follows:

Hierarchy of States of Mind

MOST CULPABLE

ACTUAL INTENTION

LEGAL INTENTION

GROSS NEGLIGENCE

SLIGHT NEGLIGENCE

LEAST CULPABLE

NON-CRIMINAL

BLAMELESS

INADVERTENCE

(Unavoidable Harm)

* Geoff Feltoe, Senior Lecturer, Law Dept., University of Zimbabwe.

1. Gordon in The Criminal Law of Scotland, 2nd Edition (W. Green and Co. Edinburgh 1978) at p.213 states that "Mens rea can be defined amorally as 'a legal reprehensible state of mind', but the test of reprehensibility is essentially a moral one, so that the ascription of mens rea is a moral judgement."

The function of composing a hierarchy of mental states is in order to decide upon the extent of blame to attribute to the actor. This function can only be properly served if the boundaries between the various gradations of mental states are clearly drawn. But not only must the distinctions be theoretically precise; they must also be practically maintainable. If we recognise a particular mental state and compose a test for it, but in practical terms it is impossible or exceedingly difficult to apply that test and to fit the facts of any given case into that pigeon-hole, then there is little or no purpose served by marking off that particular category.

The mental element of a crime has, of course, to be related to its actus reus. The actus reus comprises all the definitional ingredients of the crime apart from the mens rea. As Burchell and Hunt point out⁽²⁾ the constituent elements of the actus reus of the various crimes generally consist either of certain circumstances or, sometimes, certain consequences.⁽³⁾ The authors go on to assert that the state of mind, whether it be intention or negligence, has to exist in respect of every such circumstance or consequence which is an element of the crime in question before criminal liability can ensue.

2. THE VARIOUS STATES OF MIND RECOGNISED BY OUR LAW

In our law we distinguish presently between only three different culpable mental states, namely, actual intention, legal (constructive) intention and negligence. In respect of any crime which requires proof of intention, our law lays down that the accused can be convicted if he had either actual or legal intention. In broad theoretical terms the distinctions between these three forms of mental state are quite clear. For the first two the subjective test is applied, whereas the last is objectively tested. The tests applied for the two subjective frames of mind are different and, in theory, they are wholly separate from one another. So, too, the lesser form of intention, legal intention, has a subjective test that at face value would appear to allow it to be differentiated from the objective concept of negligence.

The following are the tests which we apply to draw these distinctions:

Actual Intention is the highest and most blameworthy form of intention. Actual intention as regards a particular result is present when the accused actively strives to cause that result, or when, even though the causing of the result is not his aim and object, he engages in conduct which he subjectively foresees is substantially certain to cause the result. Actual intent as regards a circumstance is present where the accused either knows for certain that it exists or is substantially certain that it does.

2. South African Criminal Law and Procedure, Vol.1 (2nd Ed), (Juta & Co. Cape Town, 1983) at p.150.

3. In fact the actus reus may comprise both certain relevant circumstances and certain consequences.

Legal Intention is a lower form of intention because here the accused neither aims to cause the result nor does he have full knowledge that a circumstance exists. Rather when he acted he was subjectively aware only that there was a possibility that a certain result might ensue from his conduct or that a certain circumstance existed and he continued with his action taking a conscious risk of the result happening or the circumstance being present. (Subjective foresight plus conscious risk taking).

Negligence on the other hand does not revolve around what the accused knew or foresaw. It turns on what he culpably failed to foresee. It is the blameworthy absence of subjective awareness and is present when the accused carelessly does not avert to a certain possibility. Thus the test for negligence is whether the reasonable person would have foreseen and guarded against the possibility of a certain consequence ensuing or a certain circumstance being present. If he would have foreseen and guarded against these things, but the accused neither foresaw nor guarded against them, the accused is guilty of negligence.

3. PRACTICAL DIFFICULTIES IN DISTINGUISHING BETWEEN LEGAL INTENTION AND NEGLIGENCE

In practical terms the first state of mind, actual intention, causes no undue difficulties. The tests for the two forms of actual intention can be practically applied in order to ascertain if the facts of the case concerned fit into this mental state. Although the accused will very often deny that he had actual intention, proof of actual intention on an inferential basis is a relatively straightforward business. Often the overt actions of the accused will be very strongly indicative of the presence of this mental state. Where subjective features, such as intoxication, provocation or some other disturbance of the accused's mind, enter into the picture it is practically possible for the courts to sort out whether in the light of these features actual intention was still nonetheless present. Finally the tests for this form of intention differ sufficiently from those for legal intention in that it is practically feasible to maintain a clear dividing line between this form of intention and the lesser form.

When it comes to legal intention, however, grave problems arise. The supposedly entirely subjective test for this form of intention is frequently inordinately difficult to apply in practice and it is also very hard to maintain a distinct boundary between legal intention and negligence.

In theory a very clear dividing line is drawn between legal intention and negligence.⁽⁴⁾ The Zimbabwean and South African courts

4. See for instance S v Sigwaha 1967 (4) SA 566 (A) at p.570 where it is stated inter alia "The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred."

have stressed over and over again that the test for legal intention is entirely subjective and the objective test is never to intrude into this sacrosanct subjective terrain. Thus supposedly the maxim that gross negligence is equivalent to intention (culpa lata dolo aequiparatur) is said never to apply in the modern context.⁽⁵⁾ So too because it is merely a disguised form of the objective test which artificially attributes to an accused an intention which he may not have possessed at all, a person is never taken or deemed to have intended the natural and probable (or ordinary and reasonable) consequences of his action. In practice this distinction is very frequently inordinately difficult to draw. In most cases the accused will vigorously deny that they subjectively foresaw the possible risk and consciously took that risk (i.e. they will contend that they had no legal intention). Here the cases tell us that inferential reasoning can be used to decide whether the accused's denial is to be believed. It is thus permissible for a court to find that, despite any denial from the accused, he must have and therefore did foresee that possibility. What then is supposed to distinguish the finding that the accused himself must have and therefore did foresee a possibility from the finding under the objective test that the accused ought to have foreseen a possibility? The answer given in the cases is that the test for legal intention entails proper consideration of all the salient subjective features which may have affected the accused's conscious awareness before deciding whether or not he formed that intention, whereas with the objective test these subjective features are entirely excluded as they have no bearing in deciding whether the reasonable person would have averted to a certain possibility.

It must be conceded that in some cases where it is alleged that there was legal intention, reference to the subjective features may make it possible for the court to reach a clear finding that, although a reasonable person would have foreseen that possibility, the particular accused did not. One good example of this type of case is the South African case of P v S 1972 (3) SA 412. On appeal the court found that, although any reasonable person would have foreseen that death would result from the action of wrapping a metal chain around another person's neck and pulling tight on the chain for some time, there was a reasonable doubt that the 16-year old boy who did this was aware of this risk. This was so, said the court, because inter alia, the youth had a psychopathic personality which made him inclined to act precipitately without thinking about the consequences of his action. Additionally, in his reform school, he had played a "game" which entailed rendering fellow inmates unconscious by applying pressure to the throat with a towel pulled around the neck and this might possibly have led the boy to believe that he could achieve the same result with a metal chain.

Thus, the presence of such subjective evidence as that the accused was very slow-witted, or that he suffered from some mental disorder, or that he was extremely intoxicated, or that he had completely lost his temper after being provoked, may allow the court to draw a clear line between the subjective test for legal intention and the objective test for negligence. It may thus find that, given those subjective features,

5. See for example R v Ncetendaba 1952 (2) SA 647 (SR).

the accused did not himself foresee a possibility, although he ought to have done so.⁽⁶⁾ But even here the matter is not that easy. This is illustrated by the decision by the original trial court in the P v S case, that legal intention was present on the facts. Similar cases where the appeal court reached a different decision from the trial court on the matter of legal intention are not uncommon.

In many cases, however, the court has little more to work from than the accused's denial and the nature of his conduct when deciding whether the inference of legal intention can be drawn.⁽⁷⁾ Thus in a situation where the accused is an adult who is not mentally disordered and whose mind at the time of the crime was not completely befuddled by, say, drink or rage, just about all that the court can go on is the credibility of the accused's denial of subjective foresight measured against the objective facts, such as the extent of the risk in the circumstances. If, in this sort of case the court draws the inference that the accused must have foreseen the possibility and acted recklessly, this is very close indeed to saying that the risk was such that any reasonable man would have foreseen it and that, therefore, foresight of that risk is to be artificially attributed to the accused. Thus, in a case like the South African case of S v Du Preez 1972 (2) SA 584 where again the appeal court reached a different conclusion from the trial court on the matter of legal intention, the decision turned largely upon the credibility of the accused's assertion that he was shooting to miss the deceased and that throughout he believed that he was a sufficiently good marksman to be able to avoid hitting the deceased even though he was admittedly shooting extremely close to him.

On the other hand, in the Zimbabwean case of Henderson v S SC-17-84 the Appeal Court found that the appellant had been correctly convicted of attempted murder on the basis of legal intent to kill. As in Du Preez's case a pistol had been used and the person using it was familiar with

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6. This is not always the case. Thus in Brits v S SC-36 - 83 legal intention was found despite immaturity, low intelligence and somewhat impulsive action, and in South Africa in S v Grove-Mitchell 1975 (3) SA 417 (A) the combination of intoxication, provocation and immature personality did not serve to negate legal action.
 7. It is particularly in respect of this type of case that the emphatic view of Whaley that "... the subjective nature of the test for dolus eventualis is a sham; nothing more than culpa (lata) is established." See his article entitled "Criminal in Our Courts: Dolus Eventualis" contained in 1967 Responsa Meridiana 117 at 120. Whaley is surely correct when he argues that the decision in a case like S v Nkombani and Anor 1963 (4) SA 877 (A) is only explicable on the basis that the court applied a disguised objective test to reach its conclusion that the one robber had legal intention to kill his fellow robber. On the basis of his analysis of the cases Whaley concludes that only where there is actual intention to kill should we find an accused guilty of murder. In all other cases we should convict the accused only of culpable homicide because it will not be possible to prove that the accused was guilty of anything other than negligence.

firearms. The appellant's defence was that he had accidentally shot the complainant in the shoulder when he was in the process of implementing his pre-arranged plan to place the poachers in the custody of the police. This plan entailed forcing the poachers to undress and then obliging them to walk to his farmhouse naked in order to recover their clothes by which time the appellant would have called the police who would then arrest the poachers. The appellant was prepared to implement this plan at gun-point. The appellant said that the poachers had initially refused to undress and after some time had started to disperse so he had fired a snap shot to scare them into stopping. He said that he shot very close to the complainant but did not intend to hit him. The Appeal Court apparently accepted that he had intended to miss the complainant.⁽⁸⁾ The court nonetheless concluded that, given the circumstances of the shooting, there was no reasonable possibility that the appellant did not foresee the real risk of one of the poachers being hit fatally. In coming to this conclusion the court stressed such factors as the high degree of risk involved in the shooting arising out of the extremely small margin for error, the precarious nature of the one-handed snap shot and the fact that after the appellant had realised that he had shot the complainant he had shown no remorse and had not sought to obtain medical treatment for him. The court also laid emphasis upon the fact that the appellant was a man of at least ordinary intelligence who was used to handling firearms.⁽⁹⁾

It is respectfully submitted that the Henderson decision comes very close to saying that because any ordinary person would have appreciated that the complainant might be hit and killed in these particular circumstances, the accused was to be taken to have foreseen a possible fatal

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8. One must respectfully ask whether the court in Henderson took sufficient account of the warning by Holmes, J.A. in S v De Bruyn 1968 (4) SA 498 (A) at 507 that the courts should "eschew any tendency toward legalistic armchair reasoning, leading facilely to the superficial conclusion that the accused must have foreseen the possibility of resultant death." This seems to be implicit in such passages in the Henderson judgement as these at p.p.5-6: "Not only did he fire in the direction of the movement, but in doing so he deliberately chose to fire with very little room for error so that the poachers would think that the shot had missed by sheer accident ... Just how close he intended to fire in order to induce the hoped for impression that he had missed merely by accident is made apparent by his answers to the magistrate at the conclusion of his cross-examination and to his counsel in re-examination ..."
 9. Contrast the finding in the Henderson case with that of R v Horn 1958 (3) SA 457 (A). In Horn the accused was charged with murder. He was a farmer who had shot and killed a person whom he had seen stealing his melons. He claimed that he had shot close to the deceased who was fleeing so that he could stop her and then hand her over to the police. After the fatal shooting the accused had shown no remorse because according to a witness he had gone up to the prostrate body and had struck it with a whip. Nevertheless the appeal court found that it had not been proved beyond reasonable doubt that legal intention to kill was present.

consequence flowing from his action despite that fact that he may have been aiming throughout to miss the complainant. Seen in these terms the dividing line between gross negligence and legal intention is almost non-existent. In other words the finding in this context of "must have foreseen" is almost indistinguishable from "ought to have foreseen". Is there really any difference between a finding that:

- (i) because the accused was of ordinary intelligence and knew about firearms, although he may have shot to miss, his margin for error was so small that it must have and therefore did cross his mind that death was a possible outcome of his snap shot; and a finding that:
- (ii) because he was of ordinary intelligence and was knowledgeable about firearms, any reasonable person in his circumstances would have appreciated that death might result if such a small margin for error was left?

The fact remains that even persons who are of ordinary intelligence in the heat of the moment may act precipitately without thinking at all about the consequences of what they are doing; they make errors of judgement.⁽¹⁰⁾

It is interesting to note that when it comes to defences such as mistake of fact and so-called "claim of right", the courts are more candid in admitting that the degree of unreasonableness can be used as a basis for disbelieving an accused's story that he made a genuine mistake. For example in the case S v Banet 1973 (4) SA 430 (RA) at 433 H the following passage appears:

"It will only be in the isolated case ... where the distinction between bona fide and a reasonable belief will be of any significance, because in the vast majority of cases the most cogent evidence as to the bona fides of a man's belief will be whether or not it was a reasonable one. It will only be in the isolated case ... where there will be room for a finding that the belief, though unreasonable, was nonetheless bona fide."

Similarly in Henderson it was claimed that the error in judgement prevented the accused from even realising the possibility of death. Surely what in effect the court did was to say that the claim that such a possibility did not cross his mind was so unreasonable that it was not to be believed. If so, then the land of subjectivity is being invaded to at least some extent by objective considerations. This

10. Sometimes the courts breach their own inviolable rule of never using objective tests in the subjective context of legal intention. One example of this is the dictum of Wessels, J.A. in S v Bradshaw 1977 (1) PH H 60 that "the court should guard against proceeding too readily from ought to have foreseen" to "must have foreseen" and hence "by necessary inference in fact foresaw "the possible consequences..." (My emphasis) Of course, the received wisdom is that the court cannot start and proceed from "ought" because this word embodies the objective test.

is the case because it is just not possible to decide such matters entirely on a subjective basis.

The difficulties in marking off legal intention from negligence do not, however, end here. There are further problems in the interpretation of the concept of legal intention. Although it has been emphatically decided in our cases that legal intention requires foresight only of the possibility of a consequence occurring or a circumstance existing and not foresight of the probability of these things, there has been debate as to what sort of possibility is required.⁽¹¹⁾ In South African Criminal Law and Procedure⁽¹²⁾ the

11. In English law it does not seem to be entirely certain whether the probability or the possibility test is used for the concept of recklessness (which is broadly equivalent to our concept of legal intention). Glanville Williams in Textbook of Criminal Law (Stevens And Son, London, 1978) at pp.73-74 argues that it is fair to direct the jury that there must be realisation of the probability of the consequence and/or of the relevant circumstances, but that if this is seen as being unduly favourable to the accused, occasionally "it may be best to instruct the jury not in terms of knowledge of probability but in terms of knowingly running an 'unreasonable' or 'unjustifiable' or 'unacceptable' degree of risk, having regard to the social value of any of what the defendant is doing".

On the other hand Smith and Hogan in Criminal Law 4th Ed. (Butterworths, London 1978) state at pp.52-53 that "Recklessness is the deliberate taking of an unjustifiable risk ... A person who acts recklessly is, then, taking a deliberate risk; and the word connotes that the risk is an unjustifiable one ... Whether the risk is justifiable depends on the social value of the activity involved, as well as on the probability of the occurrence of the foreseen evil. It is an objective question ... Recklessness is, therefore, sometimes described as 'advertent negligence'. It follows that it is impossible to say in general terms that recklessness requires foresight of probability, or that foresight of mere possibility is enough. If the act is one with no social utility (for example, a game of Russian roulette), the merest possibility is enough. If the act has high social utility, foresight of probability may be required. It is essential that D should have known of the risk or deliberately closed his mind to its existence when he reacted."

The English Law Reform Commission, however, recommends that the test for recklessness should be foresight that his conduct may result or that a circumstance may exist and the comment is made in para. 51 "We do not think ... that it should be necessary for him to appreciate any precise degree of risk". (Law Comm.89.) Professional Books London 1980). Finally, the American Law Institute Model Penal Code (1962) requires for recklessness that there be a conscious disregard of a substantial and unjustifiable risk. (See section 2.02 of that Code). See also tables 1 and 2 at the end of this article.

12. Vol. 1 (2nd Ed.) (Juta and Co., Cape Town 1983.) at pp. 145-148.

authors argue that what is required is a real possibility as opposed to a remote or fanciful possibility. There is little South African case authority in support of this contention, but in Zimbabwe there is a dictum in S v Ushewokunze 1971 (2) SA 360 (RAD) at pp.363-364, to the effect that on a charge of receiving to establish legal intention in the form of knowledge of the circumstances that the goods were stolen, it must be shown that the accused at least foresaw as a real or reasonable possibility (not merely as a remote or speculative possibility) that they were stolen and that he nevertheless received them.

Burchell and Hunt contend, inter alia, that the necessity of proof of a real possibility helps to make the dividing line between legal intention and negligence more clear cut. They go on to argue at pp.148-150 that our concept of negligence should include both conscious and unconscious negligence. (Presently in Zimbabwe we do not recognise that conscious negligence forms part of the concept of negligence. Negligence in our law refers solely to unconscious negligence). The authors contend that legal intention demands foresight of at least a real possibility, there is a need to encompass foresight of something less than a real possibility under some other culpable state of mind. That, they argue, is best done by recognising a sub-species of negligence known as conscious or advertent negligence where liability would turn upon whether the taking of the risk in question was objectively justifiable. This solution is better than the English solution of dealing with such cases under the concept of recklessness, because the English concept has the drawback that "it involves a subtle confusion of subjective and objective elements and thus blurs the distinction between intention and negligence which our courts have always been at pains to keep distinct". (i.e., recklessness overlaps both legal intention and negligence in Roman-Dutch law).⁽¹³⁾

The trouble with the admission of conscious negligence as part of the present concept of negligence is that it will be even more difficult than it is at the moment to distinguish legal intention from negligence as there is only an extremely fine dividing line between foresight of a real possibility and taking of a conscious risk and conscious taking of an objectively unjustifiable risk. But there may be a more fundamental objection to the adoption of the Burchell and Hunt solution. This relates to the "total bondage to the subjectivist bug"⁽¹⁴⁾ which seems to dominate the thinking of South African judges and legal academics.

This complete obsession with subjectivism has resulted in the shaping of the concept of legal intention along entirely subjective

13. By placing conscious negligence under the general umbrella of negligence, it can be argued that the confusion of objectivity and subjectivity has simply been transferred into another category. In other words, where previously negligence was an entirely objective criterion, the inclusion of conscious negligence introduces a subjective element and causes an intermingling of the subjective and objective tests.

14. This phrase was coined by Rupert Cross in his article "Centenary Reflections on Prince's Case" (1975) 91 LQR 540 at p.551. In this article the author warned against slavish adherence to the subjective test.

lines, although, as we have seen in the practical application of this concept, objective considerations creep in. It is the complete fixation on subjectivity that has also led to the discarding of both the rule that ignorance of the law is no excuse and the specific intent doctrine as applied to the defence of voluntary intoxication⁽¹⁵⁾ and presumably also the specific intent doctrine in relation to the defence of provocation. It also leads to the view held by Burchell and Hunt that subjectivity and objectivity should never be mixed and that if there is a need to cover cases involving the taking of a conscious unjustified risk not falling under the present concept of legal intention, the correct approach is to subsume under negligence the notion of conscious negligence. (The approach advocated by the authors would have very little impact upon the area of common law crimes as the only crime that it would touch is that of culpable homicide, all the rest being crimes where intention has to be proved.)

4. SUBJECTIVISM AND LEGAL POLICY

A more fundamental issue which needs to be explained is the matter of legal policy looked at from a completely different angle. The important policy question can be posed as to whether it is not contrary to the interests of social protection that under our present law an accused should invariably escape liability for all common law crimes other than culpable homicide if the supposedly entirely subjective test for legal intention is not satisfied.

In England this issue has recently been very much debated, especially in the light of the rulings by the House of Lords in the Morgan and Caldwell⁽¹⁶⁾ cases respectively. (See Table 4 for a summary of the decisions in these areas relating to the definition of recklessness). In her article in 1982 CLR 209 entitled "Swatting the Subjectivist Bug", Celia Wells puts forward a powerful argument against the thesis that mens rea should invariably be subjectively assessed.⁽¹⁷⁾

"The criminal law has to reconcile the two competing demands of, on the one hand, social protection and on the other, justice to the individual accused. The balance between these two demands will be variable. A monolithic approach to the proper basis of culpability will be unable to respond to the varying nature of that conflict." (pp.211-212).

The author says this in her conclusion, at p.:-

15. See S v De Blom 1977 (3) SA 513(A) and S v Chretien 1981 (1) SA 1097(A).

16. See also (1985) 102 SALJ 240 at pp.250-251.

17. See Table 3 at the end of this article. For criticism of the inclusion of inadvertent negligence as part of the recklessness concept in Caldwell see Glanville Williams' article "Recklessness Redefined" in (1981) 40 CLJ 252.

"The subjective principle of mens rea does not seem to accord with a descriptive account of criminal culpability, nor does it seem desirable that it should be applied wholesale across all areas of criminal liability. A more vigorous examination of the "harms" prohibited by the criminal law discloses that the balance to be struck between social protection and individual guilt should not necessarily be uniform. In addition, a more circumspect approach suggests that the rationale which has given birth to subjectivism is in danger of being suffocated by its progeny. If the starting point for analysis of the criminal law is that ... mens rea is a subjective state of mind, a myopic view of culpability results ... [There should be] a framework of culpability which recognises the roles of both subjective and objective standards."

The question of whether there should be liability only if subjective mens rea is present comes up in two main ways. Firstly, it arises in connection with the definition of crime. One example from English law is the problem which arose for decision in the Caldwell case, namely, whether the Criminal Damages Act covered cases where the accused caused damage to property after having failed to appreciate that there was an obvious risk of such damage occurring. Put in the context of our crimes of arson and malicious injury to property, the question is, do these crimes provide sufficient protection from harm, if they stop short of punishing the taking of an unjustified risk of harm in circumstances where the accused was oblivious to the danger which his conduct was creating? The second way in which the problem manifests itself is in relation to various defences affecting mens rea. The Morgan rape case in England establishes that criminal culpability does not attach where an accused on a grossly negligent basis mistakenly believes that the complainant had consented. Our law on this point is identical. We accept that for the defence of mistake of fact to avail to any charge requiring proof of subjective mens rea a genuine mistake as to an essential fact is all that is required and the mistake does not have to be a reasonable one. This general approach applies equally where there is a genuine, albeit unreasonable mistake as to the essential fact of the presence of consent.⁽¹⁸⁾

In the above mentioned cases it could be argued that criminal liability should be imposed as in both the accused are culpable. In the first there is blameworthy failure to be aware of the danger of property damage, and in the second, the accused makes what is an unreasonable mistake. In both cases deleterious consequences have ensued and in both the accused's behaviour cannot be said to be blameless. The issue which these types of cases raise is whether a theory which entails an unyielding concentration on subjective blameworthiness necessarily produces socially acceptable results.

18. Further complications arise in respect of the inter-relationship between crimes of intention and other defences. For instance, the subjectivists have contended that the specific intent rule as applied to limit the defences of voluntary intoxication and provocation is incompatible with the subjective test.

What is being contended for here is not a wholesale abandonment of the subjective test as the touchstone for criminal liability and a substitution of objectivism in its place. Rather it is a careful study of certain areas where there may be inadequacies in the law from the standpoint of affording proper protection to the public. In these selective areas we should consider supplementing the present law with additional crimes based upon objective culpability. Social utility arguments should not, of course, be permitted to prevail to the extent that objectivism entirely engulfs subjectivism. The battle to introduce subjectivism as the test of blameworthiness and thus also criminal liability in respect of all common law crimes (apart from culpable homicide) was a protracted one. The final victory for the subjective approach placed criminal law on a far more enlightened footing and this victory should in no way be reversed.

The approach being advocated above also takes full account of the fact that we should never create unnecessary crimes. Already we have far too many crimes and we criminalise far too many forms of behaviour. Especially in the area of statutory crimes there is an urgent need to engage in a vigorous process of decriminalising all those offences which could more properly be dealt with outside the criminal law by administrative or civil measures. This does not mean, however, that in some cases where certain behaviour of an unacceptable and deleterious nature is occurring and the criminal law does not presently penalise that type of conduct, it is totally impermissible to supplement the common law by adding new crimes which require only proof of negligence.⁽¹⁹⁾

The main questions which have been raised so far in connection with legal intention are:-

1. Is it possible in practice to apply an exclusively subjective test for this concept?
2. Can a clear distinction be maintained between the concepts of legal intention and negligence? (This is inter-related to the first question).
3. Does the fixation upon the subjective test lead to the socially undesirable result of unjustified exclusion from the ambit of the criminal law of certain types of blameworthy deleterious conduct which social policy suggests should not be excluded?

These first two questions are very much inter-related. It could be argued that if we were to change the test of legal intention from the present foresight of a possibility (whether or not this entails foresight of a "real" possibility) to any foresight of a probability or foresight of an obvious or substantial risk, then this would both relieve the problems of proof of foresight on a subjective basis and

19. In a later article the author intends to explore the prominent place which objective criminality plays in socialist Penal Codes and how this objectivism is inextricably tied up with shaping behavioural patterns which are to be expected of the socialist personality.

would also more clearly mark off legal intention from negligence where the test is reasonable foreseeability of a possibility.⁽²⁰⁾ It is suggested, however, that this alteration of the magnitude of the risk required in legal intention would only marginally improve the situation in both these respects. On the issue of subjective proof it is admitted that it is perhaps safer to draw an inference of subjective intention if the risk inherent in an enterprise was so very substantial or probable that it was extremely likely that the accused could not have failed to foresee it. But again, if the subjective test is applicable the court would have to consider the subjective capabilities of the accused even here. If he was, say, a very slow-witted or unperceptive person he may not have foreseen even a very substantial risk. What must be recognised is that one would still be working from the objective fact of the degree of risk in order to decide whether a subjective intention is to be ascribed. This process of ascription is similar to that which is currently still in use in South Africa, despite the strong trend in favour of subjectivism, in cases involving subjective crimes where the defences of mistake of fact or mistake of law are raised. In such cases the South African courts have laid down that it is permissible for the prosecution to use the line of attack that the alleged mistake was so grossly unreasonable that it could not possibly have been the case that the accused genuinely made it. On the demarcation issue Glanville Williams correctly points to the imprecision of terms such as "possible" and "probable" and observes that what exact magnitude of risk is required before a possibility becomes a probability has not been established.⁽²¹⁾

Again, on the first two questions, the issue arises as to where the concept of conscious negligence is to be placed. As indicated earlier, Burchell and Hunt⁽²²⁾ advocate its inclusion under the heading of negligence so that negligence will come to include both advertent and inadvertent negligence. Its placement under this heading will ensure that the entirely subjectively tested concept of intention is kept separate from the two forms of negligence which both include objective considerations. (Inadvertent negligence is, of course, entirely objectively tested whereas advertent negligence is a concept that joins together subjective and objective features). Conscious negligence is, as a concept, almost the facsimile of the English and American concept of recklessness because both entail an initial assessment as to whether there was subjective foresight of a risk which assessment is then

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20. The authors of the 2nd Edition of South African Criminal Law and Procedure Vol. 1 op cit argue at p.146 that probability would be preferable to real possibility, but that the South African Appellate Division appears to have set its face against the probability test. The learned authors also point out that real possibility "denotes a high degree of possibility amounting to almost, if not quite, probability".
21. See The Mental Element in Crime (Magnes Press, Jerusalem) 1965 p.29. Glanville Williams at this page also states, "The word 'probable' is generally taken to include something beyond bare possibility and less than certainty".
22. Supra.

followed by an objective assessment of whether the taking of that risk was unreasonable or unjustifiable. Looked at in this way it is very close as a concept to that of legal intention in our law. For legal intention too there has to be subjective foresight of a possibility. The only difference would seem to be that for legal intention, after it has been decided that there was subjective foresight of the possibility, it then also has to be decided whether the accused acted recklessly which has been interpreted to mean that the accused took a conscious risk. But as P. Smith points out⁽²³⁾ the issue of recklessness is hardly ever considered as a separate element and none of the verdicts in the cases turn on this element. He indeed goes so far as to maintain that the element of recklessness as an element in legal intention might well have died out in our law. So, too, in Burchell and Hunt (op. cit p.153) it is submitted that "a finding in respect of legal intention should not depend upon recklessness or its absence but rather upon the degree of the accused's foresight of the consequence ..." If then the recklessness aspect is eliminated we are left with liability being imposed simply upon the basis that the accused persisted in conduct after he subjectively foresaw a possibility of criminal harm arising out of such conduct.⁽²⁴⁾

On the other hand, the concept of advertent negligence and recklessness (as defined in England) has the advantage over our legal intention in that, once subjective foresight is established, a process is embarked upon of deciding from an objective standpoint whether the taking of that sort of conscious risk was unjustified and whether, therefore, the imposition of criminal responsibility is warranted. This is not so much "a subtle confusion of subjective and objective elements" as a rational process for deciding criminal liability in these sorts of cases. It is the complete obsession with subjectivity which leads to the claim that it will do irreparable harm to the subjective concept of intention if we were to contaminate this concept by allowing the courts to find intention on the basis of either advertent negligence or the English formulation of recklessness. What this seems to overlook is that under common law the inclusion of conscious negligence under the heading of negligence, will mean that this concept will have no effect on all but one crime as all the common law crimes except culpable homicide require proof of intention.

5 CONCLUSION

In the final analysis one has perhaps to concede that it is impossible to draw a dividing line which will lead to the total

23. "Recklessness in Dolus Eventualis" (1979) SALJ 81 at p.83.
24. But if, as we have argued, it is impossible often to exclude objective considerations when deciding upon the matter of subjective foresight, the character of the test is not as exclusively subjective as authors like Burchell and Hunt make out. Whaley, writing in 1972 Responsa Meridiana 219, goes even further. He contends that legal intention and negligence are indistinguishable as the test for legal intention is nothing more than a sham and in practice the objective test is used by the courts. The test must have foreseen, he argues, is exactly the same as ought to have foreseen.

avoidance of any overlap between conscious and unconscious culpable mental states. Rather, overlap is unavoidable as these concepts shade off into another and are part of a continuum. If this is accepted then the focus shifts away from the somewhat sterile discussion on the designing of watertight compartments for the various mental states to ensure that the subjective and objective tests are kept entirely separate. Instead the more important social policy question can be asked, namely, where should we demarcate the borderline between criminal liability and non-liability. We have said previously that most common law crimes are presently defined so as to require subjective culpability and therefore punishment cannot be meted out for these crimes if there is only objective culpability. There is nothing to stop us from considering whether some or all of these crimes should be redefined so as to cover objective culpability. Alternatively a range of new crimes could be created to supplement the existing common law crimes (e.g. negligently damaging property, negligent rape, where the accused unreasonably made a mistake as to the presence of consent, etc.).

TABLE 1

	Zimbabwean	English Law Reform Commission (Report Vol. 89)	American Law Institute Model Penal Code (1962)
SUBJECTIVE	1. Actual intention	1. Intention	1. Purposely
		2. Knowledge	2. Knowingly
	2. Legal (constructive) intention	3. Recklessness (this has an objective element)	3. Recklessly (this has an objective element)
OBJECTIVE	3. Negligence	4. Negligence	4. Negligently

TABLE 2 - Subjective States of Mind

Zimbabwean	English Law Commission (Report No. 89)	American Law Institute Model Penal Code (1962)
<p>1. <u>Actual intention</u> a) Circumstance - Engaged in conduct knowing that it existed or substantially certain that it existed.</p> <p>b) Result - Aim and object to cause or, although not aim and object foresaw as certain or substantially certain.</p>	<p>1. <u>Intention</u> Intended to produce result or had no substantial doubt that would produce it.</p>	<p>1. <u>Purposely</u> Conscious object to engage in conduct of that nature (if crime element involves nature of conduct) or conscious object to cause result (if crime element involves result of conduct).</p>
<p>2. <u>Legal Intention</u> a) Circumstance - Subjectively foresaw (real) <u>possibility</u> of its existence and continued to act reckless as to whether or not it existed.</p> <p>b) Result - Subjectively foresaw as real <u>possibility</u> and continued to act reckless as to whether or not it ensued.</p>	<p>2. <u>Knowledge</u> Knew of relevant circumstances or had no substantial doubt of their existence. (When word intention used to imply that knowledge of circumstances is required for liability, this test applies).</p>	<p>2. <u>Knowingly</u> Aware that conduct is of that nature or aware that practically certain that conduct will cause that result.</p>
<p>3. <u>Recklessness</u> a) Circumstance - Realised that <u>may exist</u> and <u>unreasonably</u> took risk of its existence.</p> <p>Result - Foresaw that conduct <u>may produce</u> result and <u>unreasonably</u> took risk of producing it.</p>	<p>3. <u>Recklessly</u> Consciously disregarded <u>substantial and unjustifiable risk</u> that the element of the crime existed or would result from conduct. Risk must be of such nature and degree that to disregard involved <u>gross deviation</u> from standard of conduct that law-abiding person would observe in that situation.</p>	<p>3. <u>Recklessly</u> Consciously disregarded <u>substantial and unjustifiable risk</u> that the element of the crime existed or would result from conduct. Risk must be of such nature and degree that to disregard involved <u>gross deviation</u> from standard of conduct that law-abiding person would observe in that situation.</p>

TABLE 3 - Recklessness in English Law

Table 2 sets out the English Law Commission's proposed definition of recklessness. However, in English case law there has recently been some controversy as to whether recklessness is an entirely subjective concept or whether it has objective aspects. Two main approaches which have emerged are summarised below.

<u>MORGAN APPROACH*</u>	<u>CALDWELL APPROACH**</u>
<u>Subjective Test</u>	<u>Objective test</u>
An accused is not guilty of rape on the basis of recklessness, if he genuinely, albeit unreasonably, believed that the complainant had consented.	In the Criminal Damages Act, 1971, the term reckless bore a special meaning and an accused can here be convicted on the basis of recklessness if he does an act which in fact creates an obvious risk that property will be destroyed or damaged and when he does the act he either <u>gives no thought</u> to the possibility that there was such a risk or having recognised that there was some risk nonetheless proceeded with his act.

*Morgan [1976] AC 182**Caldwell [1981] 1 All ER 961
(See criticisms of this case in (1981) 40 CLJ 252).

TABLE 4 - Objective State of Mind

Zimbabwean	English	American
<p>Re circumstance- would reasonable person have foreseen <u>possibility</u> <u>of existence</u> and would he guard against this.</p> <p>Re result - would reasonable person have foreseen <u>possibility</u> of result occurring and would he have guarded against this happening?</p>	<p>No definition by Law Commission. (In English Law presently for involuntary manslaughter gross negligence is required).</p>	<p>Negligently. Should have been aware of <u>substantial and</u> <u>unjustifiable risk</u> that crime element existed or would result from conduct. Risk must have been of such a nature and degree that failure to perceive involved <u>gross deviation</u> from standard of care that a reasonable person would have observed in that situation.</p>



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