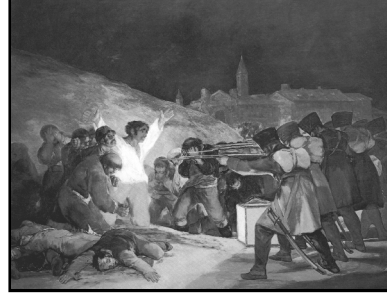


Module 1

Criminal Law



Only study guide for CRW101U

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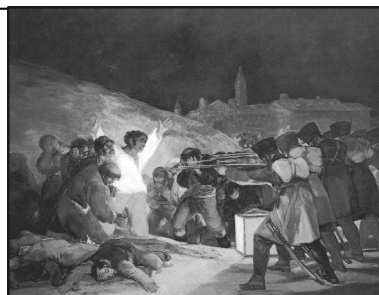
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Cover illustration: "The third of May 1808" by Francisco de Goya (1746–1828).

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INTRODUCTION

Literature and methods of study



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1

GENERAL

Welcome to the first module in Criminal Law. We trust that you will enjoy your study of this module. Criminal law is one of the most interesting and topical law subjects to study. Our aim is to assist you as much as we can in mastering this module.

In this introductory chapter we draw your attention to the subdivision of criminal law into two modules, and to the books you will need for your studies. We also give you advice on how to study.

2 COURSE OUTCOMES

This course should enable you to

- identify and describe the arguments that may serve as a justification for convicting and sentencing a person for a crime
- analyse and solve criminal-law-related problems by identifying, describing and applying the relevant legal principles

3 SUBDIVISION OF CRIMINAL LAW INTO TWO MODULES

Criminal Law consists of two modules, namely CRW101U and CRW201X. This study guide deals with the first module, that is CRW101U. This module deals with the general principles of criminal law. Module CRW201X deals with specific crimes.

4 LITERATURE

● *Prescribed books*

There are two prescribed books for this module, namely:

- (1) Snyman CR *Criminal Law* 5th ed (2008) LexisNexis, Durban
- (2) Snyman CR *Strafreg-vonnisbundel/Criminal Law Case Book* 3 ed (2003) Juta, Kenwyn

An Afrikaans edition of Snyman's first work, entitled Snyman CR *Strafreg* 5 ed (2006), published by LexisNexis, is also available. The Afrikaans edition is prescribed for Afrikaans-speaking students.

The work entitled *Strafreg-vonnisbundel/Criminal Law Case Book* is bilingual.

● *Recommended books*

There are no recommended books for this module.

● *Use of prescribed books*

Snyman's *Criminal Law* contains a discussion of both general principles and specific crimes, and therefore covers the syllabi of both modules in Criminal Law.

The second prescribed work, namely the *Criminal Law Case Book*, is, as the name indicates, a collection of the most important judgments on criminal law. Court judgments constitute one of the most important sources not only of criminal law, but also of all branches of the law. In order to study criminal law properly, it is necessary to consult the law reports in which these judgments are published. Few students studying at Unisa have regular access to a law library. The *Criminal Law Case Book* is prescribed to enable all students to read the relevant judgments in this branch of the law.

The book contains an introduction setting out the reason why it is necessary to read cases, how they should be read, and explaining the meaning of certain expressions in the reported (ie published) cases. Those students in particular who

have not yet read any cases, or have read only a few, ought to read this introduction. The introduction is followed by excerpts from the most important cases on criminal law. The excerpts from each case are preceded by a summary of the facts of the case, and are followed by an explanation of certain aspects of the judgment.

We wish to emphasise the fact that students are expected to read more than merely the study guide and that they should **consult the prescribed book on a specific topic**. When reading this study guide, you may find that you do not clearly understand certain aspects of a particular topic. It is then essential that you consult the prescribed textbook on the matter.

For the purposes of the examination, you should, however, use the study guide as your primary source, except in respect of those topics which are not discussed in the study guide but only in the prescribed work (see next paragraph).

Take note that certain topics that you must know for the examination are not discussed in the study guide, but only in the prescribed book. The topics which are not discussed in the study guide but which we expect you to study from the prescribed book will be pointed out to you. A serious warning, though: do not think that because these topics are not discussed in the study guide, you can afford to ignore them (ie, not study them from the prescribed book). You should know the topics to be studied only from the prescribed book just as well as the topics that are discussed in the study guide. In the examination we may ask questions on the topics which have to be studied from the prescribed book.

When studying a topic from the prescribed book, you need take note only of the text itself, that is you need not also consult, study or read the footnotes as well unless we draw your attention to one or more footnotes.

● *Other works on criminal law*

Apart from the works already mentioned above, there are also a number of other works on criminal law. We merely draw your attention to the following four works:

- (1) Burchell J & Milton J *Principles of Criminal Law* 3 ed by J Burchell (2005) Juta (revised 2008)
- (2) Milton JRL *South African Criminal Law and Procedure* vol II: *Common-Law Crimes* 3 ed (1997) Juta
- (3) Burchell EM & Hunt PMA *South African Criminal Law and Procedure Vol I: General Principles of Criminal Law* 3 ed by Burchell JM (1997) Juta
- (4) De Wet JC & Swanepoel HL *Strafreg* 4 ed (1985) by De Wet JC Butterworths

You need not buy any of these books. Neither are they recommended works.

5

METHOD OF STUDY

● *Subdivision of study material in study guide*

You will notice that the discussion of the material in the study guide is subdivided into 14 study units. A study unit is a unit or part of the syllabus which deals with a certain topic. You can divide the time you have at your disposal (from the time you enrol till the time you write your examination) into 14 time units and then study one study unit per such time unit.

● *Contents of study units*

Every study unit is normally subdivided as follows:

- (1) a table of contents of the material discussed in the study unit
- (2) a list of learning outcomes you should keep in mind when studying the study unit
- (3) a short paragraph serving as an introduction or background to the discussion which follows
- (4) the actual exposition of the topic covered in the study unit
- (5) a glossary, containing a list of certain important words and phrases from foreign languages (mostly Latin) with their translations
- (6) a concise summary of the most important principles as set out in the topic of that particular study unit
- (7) a number of “test yourself” questions

The exposition of the topic may contain “Activities” and “Feedback”. This takes the form of questions which you should preferably first try to answer yourself before looking at the answers in the “Feedback”.

● *What the icons represent*

An icon is a small picture or other graphic symbol which conveys a certain message. We use the following icons in this study guide:



This icon means: “Beware of the following typical mistake often made by students!”



This icon means: “Note the following hint or advice on how to study a certain part of the material or how to answer a question in the examination!”



This icon means: “Read the judgment in the following court case which appears in your case book (one of the prescribed books you must buy).”

If a sentence or sentences are printed against a grey (“coloured”) square background (also called a “screened block”), the sentence or sentences contain a definition which you should know so well that you will be able to write it down in the examination.

As far as the third icon above (the open book) is concerned, you must bear in mind that the reading of certain cases (judgments) forms part of your studies. (As a matter of fact, it forms part of the study of all legal subjects.) In the course of our discussion of criminal law we will draw your attention to the cases you must read. In Tutorial Letter 101 you will also find a list of the cases you must read.

The last icon (the screened block) refers to the definitions you should know for the examination because we expect you to know the definitions of certain concepts and crimes for the examination. These definitions usually consist of only one sentence (although the sentence may, admittedly, sometimes be rather long). By “know” we mean that you must be able to give us the definition in the examination substantially as it appears in the study guide. The best way would be to try and memorise the definition, but you are free to give us your own version of it. However, experience has taught us that students who do not memorise the definition but who paraphrase it, often lose marks because of deficiencies in their version of the definition.

To assist you in identifying the definitions which you should know for the examination (as explained above), we have “screened” them so that they “stand out”.

We shall therefore not warn you repeatedly that you should know certain definitions well for the examination. You should just watch out for the “screened frame”: you must be aware that you should know the definition appearing in the frame so well that you will be able to give it in the examination.

● *Important advice on how to study*

At the risk of preaching to the converted we are taking the liberty of giving you a short “curtain lecture”.

- Students of criminal law are sometimes inclined to underestimate the subject, because it deals with human actions which are concrete and often spectacular, such as stealing, killing, raping, kidnapping, destroying. We wish to **warn you against underestimating the subject**. Some of the concepts of criminal law are among the most difficult in the field of law. Do not think that because you happen to read regularly of murder, rape, robbery or other crimes in the newspapers, you can afford to read the study guide only superficially, and to rely in the examination only on the type of broad general knowledge which the person in the street who regularly reads newspapers would have of criminal law.
- Try to **understand** the principles of criminal law, such as retribution, causation, private defence, intention or accomplice liability, so that you can apply them to concrete cases. Merely memorising page upon page of the study guide without understanding the principles underlying the topics discussed, is of little use. Only a proper understanding of the basic principles will enable you to answer the so-called “problem-type” questions satisfactorily in the examination. (A “problem-type” question is one in which you are not asked directly to discuss a particular topic, but in which we give you a set of facts and expect you to state whether one of the persons mentioned in the set of facts has committed a particular crime or whether he or she can rely on a particular defence. You must also be able to substantiate your answers.)
- Furthermore, an old but sound piece of advice is that you do not move on to a new principle before you have mastered the preceding one on which it is based.
- We advise you to **make your own notes** or summaries (perhaps even in “telegram” style) while studying the specific topics.
- Although it is important that you understand the principles underlying a particular topic, a knowledge of the principles (or framework of a topic) **only** is insufficient if you are unable also to state **some particulars** regarding the principle (such as **illustrations of its application**, the **authority** on which these principles are based, or possible **exceptions** thereto).
- Students often ask us how important it is to remember the **names of cases**. Let us clarify this matter: it would be an impossible task to memorise the names of all cases referred to in your lectures, and we do not expect you to do so. However, it is a fact that decisions count among a law student’s best friends, and since it is a good policy not to forget the names of one’s best friends, we would advise you to concentrate on remembering the names of the **most important, leading** cases. As we progress through the course, we shall draw your attention to some of the most important decisions. You are also advised to underline the names of cases when referring to them in the examinations. This will help the examiner to follow your submissions.



However, please do **not** waste any valuable time attempting to memorise the case references. A case reference is the set of dates, letters and numbers following the name of the case, for example 1966 (2) SA 269 (A). In this reference, 1966 refers to the year in which the judgment was reported (ie published), the (2) to the volume number of the particular year, and the 269 to the page in the book where the judgment begins. It is absolutely unnecessary, and also a waste of time, to try to memorise these numbers and letters. We do not expect you to know them. Even if you fail to remember the name of an important case in the examination, you can simply state: "It has been decided" or "According to a decision", et cetera. Our primary aim in the examination is not to test your memory, but your comprehension and insight — but do bear in mind that proper comprehension and insight are also based on a knowledge of facts.

- In the course of the year we will be issuing a number of **tutorial letters**. Please bear in mind that these tutorial letters form an important part of the study material which you are required to master and, in fact, may even amend the study guide. Therefore do not ignore tutorial letters.
- We wish to warn you not to neglect the **last portions of the study guide**. We often find that in the examination students do reasonably well in questions dealing with topics which are discussed in the first part of the study guide, but often prove to have only a very superficial knowledge or none at all, of topics discussed towards the end of the study guide. You must study the **whole** of the study guide — including topics which are discussed at the end. Your knowledge of some of these last topics may make the difference between failing and passing the examination!

- ***General principles and specific crimes***

A study of criminal law comprises a study of both the general principles of criminal law and the most important specific crimes. By "general principles of criminal law" we mean those rules which normally apply to all, or at least most, crimes, for example rules about the meaning of concepts such as "intention" or "negligence", or rules about when an accused person may rely on defences such as insanity, intoxication, provocation or self-defence.

A study of the specific crimes comprises an analysis of the different specific crimes, by identifying and discussing the different requirements applicable to each specific crime.

In this module we discuss only the general principles of criminal law. In the second module in Criminal Law we discuss certain remaining general principles (namely the principles relating to participation in crime and attempts to commit crime), followed by a discussion of the most important specific crimes.

In the second module the crimes of murder and culpable homicide will be dealt with. In the first module these two crimes are referred to at times as examples, to illustrate the general principles. The particular reason for this is that the distinguishing factors between these two crimes are intention and negligence, and these two crimes are used to illustrate the difference between crimes requiring intention, and those crimes for which negligence is required. To follow the discussion of the general principles from the beginning, it is therefore necessary to know what the definitions of these two crimes are.

Murder is the unlawful, intentional causing of the death of another human being.

Culpable homicide is the unlawful, negligent causing of the death of another human being.

The only difference between these two crimes is therefore that, whereas intention is required for the one, negligence is required for the other.

● *Abbreviations*

- When in the course of this study guide we refer to your prescribed handbook, that is Snyman's *Criminal Law*, we shall identify this book merely as *Criminal Law*. If we refer to the prescribed case book, we shall indicate this book merely as *Case Book*. In this study guide all references to *Criminal Law* are to the 5th edition of this book (2008).
- With regard to the **mode of citation of cases** the following method is applied. In accordance with modern usage we do not cite the full official name of cases, for example *S v Williams en 'n Ander* 1970 (2) SA 654 (A), but simply the name, followed by the case reference — *Williams* 1970 (2) SA 654 (A). This is the modern "streamlined" method.
- In the discussions which follow we shall often refer to the perpetrator or accused simply as X, and to the complainant or victim of the crime as Y.
- We often use the Latin words *supra* and *infra*. *Supra* means "above" and *infra* means "below".

● *Language: equal treatment of genders*

In our discussions in the guide we try to adhere to the principle of equal treatment of the genders. We do this in the following way: In study units beginning with equal numbers the female form is used, while in all study units beginning with unequal numbers the male form is used. There are necessarily certain exceptions to the rule. In cases such as the following we do not change the genders: *first*, in the descriptions of sets of facts in reported decisions; *secondly*, where we quote legislation (which is for the most part drawn up in the masculine form) directly; and *thirdly* in the explanatory notes to existing drawings (which, for practical reasons, unfortunately cannot be changed) depicting males.

GLOSSARY

<i>supra</i>	above
<i>infra</i>	below

STUDY UNIT 1

Introductory topics



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to:

- demonstrate your understanding of the theories of punishment by

- classifying the various theories of punishment
 - distinguishing between retribution and vengeance
 - illustrating the importance of the requirement, inherent to the theory of retribution, that the extent of punishment be proportionate to the extent of the harm done
- use the theories of punishment as a basis to evaluate the appropriateness of a sentence
 - broadly outline the four elements of criminal liability and the logical sequence of investigation into these elements
 - know what the four general elements of or requirements for criminal liability are
 - differentiate between crimes and delicts

1.1

BACKGROUND

We devote our attention in this first study unit to a discussion of certain topics about which you ought to have knowledge, before we start to analyse the rules of criminal law themselves.

We will first discuss the theories of punishment, that is those theories dealing with the possible answers to the following question: Why does society punish people? By considering this question we in fact embark upon an investigation into the whole right of existence of criminal law.

Thereafter we will briefly consider the history of South African criminal law.

Thirdly, we will set out briefly the general prerequisites for criminal liability, that is the general requirements which must be complied with before a person can be convicted of any crime. This discussion in fact amounts to a concise summary of the whole of the first part of this course.

Fourthly, we will consider the differences between crimes and delicts.

1.2

THEORIES OF PUNISHMENT

(Criminal Law 10–21; Case Book 15–20)

Having convicted an accused, the court must impose a punishment upon him. However, what is the purpose of, or justification for punishing offenders? The different answers, as well as arguments justifying the answers which have been given to this question, are called theories of punishment. By considering the theories of punishment we actually consider the whole purpose of criminal law.

1.2.1 *Classification of theories*

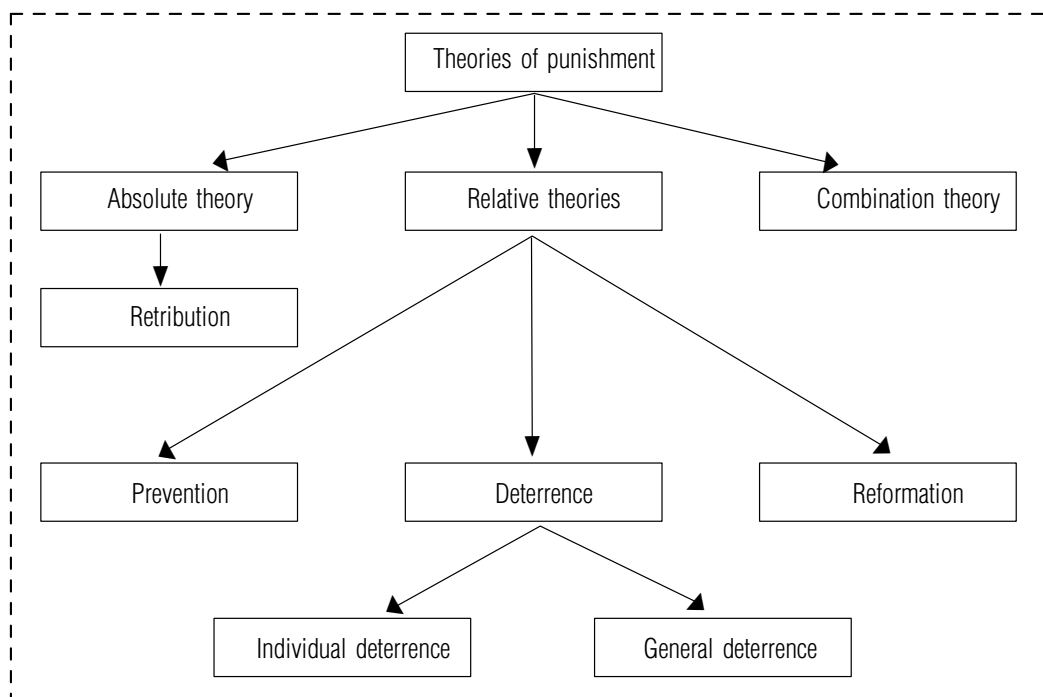
There are a number of theories of punishment. These theories are classified into the absolute theory, the relative theory and the combination theory. In the discussion which follows, the relative theories will be classified as follows: the preventive theory, the deterrent theory and the reformatory theory. The deterrent theory is subdivided into individual deterrence and general deterrence. See the diagram on the next page.

When distinguishing between the absolute and relative theories it should be

noted that there is only one absolute theory, namely the retributive theory, while there are a number of relative theories. (The relative theories are also called the purpose theories.)

According to the absolute theory, punishment is an end in itself, while according to the relative theories, punishment is only a means to a secondary end or purpose (hence the name “relative theories”). This secondary purpose differs from one relative theory to another: the preventive theory sees the purpose as preventing crime, the deterrent theory sees it as deterring the individual or society from committing crime, and the reformatory theory sees it as reforming the criminal.

The nature of the absolute theory is retrospective, as one looks into the past to the crime that has been committed. The relative theories, on the other hand, look to the future; the emphasis is on the future purpose (for example prevention or reformation) which one would like to achieve by means of the punishment.



1.2.2 *Retributive theory*

1.2.2.1 Meaning of retribution

According to the retributive theory, punishment is justified because it is X's **just desert**. Retribution is the **restoring of the legal balance** which has been disturbed by the commission of the crime. Punishment is the **payment of the account** which, because of the commission of the crime, X owes to society.

This simple truth may be explained as follows in some more detail: The legal order offers every member of society certain advantages, while at the same time burdening him with certain obligations. The advantages are that the law protects him in that it prohibits other people from infringing upon his basic rights or interests, such as his life, physical integrity and property. However, these advantages can only exist as long as each member of society fulfills his obligations, which consist in refraining from infringing upon other members' rights.

If, however, a person voluntarily refrains from exercising the required self-control and commits an act harming or injuring another's interests, the scales of justice are disturbed. X (the wrongdoer) renounces a duty which others voluntarily take upon themselves, and in so doing he acquires an **unjustifiable advantage** over those who respect their duties to society. He enjoys the advantages of the system without fulfilling his obligations. In so doing he becomes a "free rider".

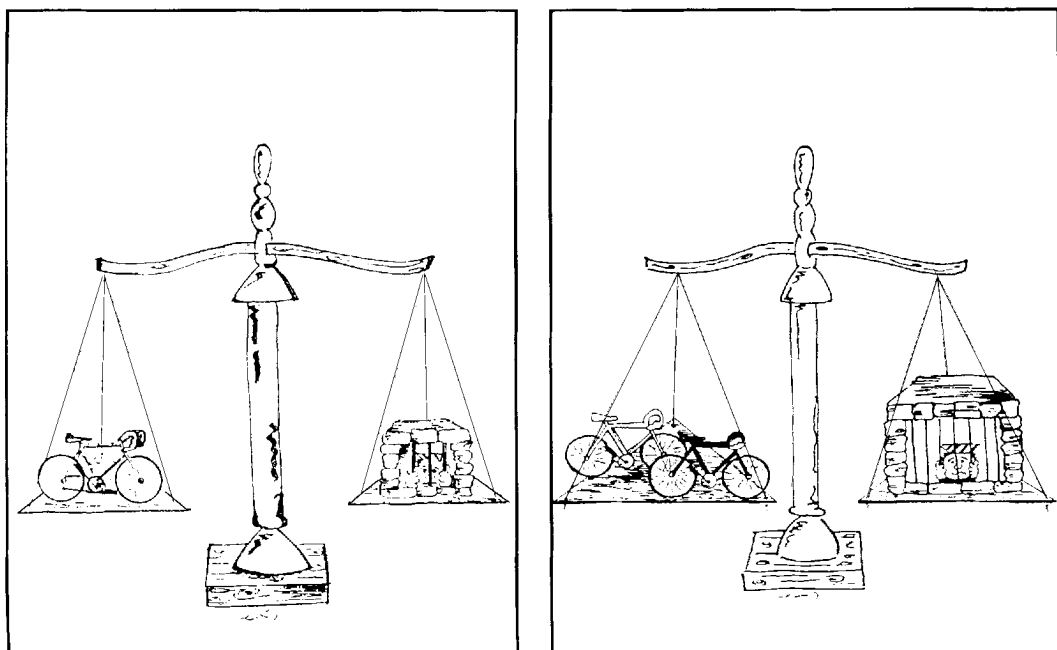
According to the philosophy underlying retribution (or "just deserts"), X now has a debt which he owes to society. By being punished and by serving his punishment he pays the debt he owes to society. The "score is made even again".

1.2.2.2 Retribution does not mean vengeance

It is **wrong to equate retribution with vengeance**. By "vengeance" is meant the idea of an eye for an eye and a tooth for a tooth. This is the "primitive" or "Old Testament" meaning of the word — the so called *lex talionis*. Retribution might have had this meaning in primitive societies, but modern writers on criminal law reject this meaning, and favour the more enlightened meaning described above, namely the restoring of the legal balance which has been disturbed by the commission of the crime.

1.2.2.3 Equal proportion between degree of punishment and degree of harm

According to the retributive theory, the **extent of the punishment must be proportionate to the extent of the harm** done or of the violation of the law. The less the harm, the less the punishment ought to be, because the debt which the offender owes the legal order is then smaller. This is illustrated by the fact that the punishment imposed for an attempt to commit a crime is, as a rule, less severe than for the commission of the completed crime.



The operation of the theory of retribution. The one accused steals one bicycle and is then sentenced to (say) one month's imprisonment. (see illustration on left). Another accused, who steals two bicycles, must, according to this theory of punishment, receive a heavier punishment (say two months' imprisonment) (see illustration on right), because this theory of punishment implies that there should be a direct proportion between the extent of harm and the extent of the punishment imposed. Note that the "prison" in the illustration on the right is larger than the one in the illustration on the left. This symbolises the heavier punishment that must be imposed in a case in which two (instead of only one) bicycles have been stolen.

The idea of a **proportional relationship between harm and punishment**, inherent in the retributive theory, is of great importance in the imposition of punishment. If the retributive theory were rejected and reliance placed merely on the relative theories, it would mean that punishment could be imposed which would be out of proportion to the seriousness of the crime committed. If all the emphasis were on prevention the best thing to do would be to imprison for life each thief who took even the smallest article. Such an extremely harsh punishment would probably also be the best form of deterrence. The reformative theory, applied in isolation, would also have the result that a person who had merely committed a relatively minor crime could be subjected to reformative treatment for a lengthy period in an effort to cure him of his errant ways.

1.2.2.4 Expression of society's condemnation of the crime

According to the retributive theory punishment expresses society's **condemnation**, its **emphatic denunciation**, of the crime. Not to punish crime is to condone it, or even worse, to arouse a perception that the legal order is a party to its commission. This in turn may lead to those immediately affected by the crime deciding to take the law into their own hands and punishing the wrongdoer(s) themselves. It is the duty of the state to prevent this from happening.

1.2.2.5 Retribution explains culpability requirement

It is the retributive theory which is pre-eminently able to explain the need for the general requirement of liability known as "culpability" (*mens rea*). (The culpability requirement is set out below in detail.) The retributive theory presupposes that man has a **free will**. The same cannot necessarily also be said of the relative theories. This means that according to the retributive theory, a person is not merely a helpless cog in a great machine. Exactly because he is a free agent, he can be held responsible for the choices he has made, assuming he has made them voluntarily (without coercion). He can fairly be **blamed** for the choices he has made and if he has freely and voluntarily decided to commit a criminal act, punishment is his just desert. He has earned his punishment. He has only himself to blame for the punishment he receives.

1.2.3 *Preventive theory*

We now turn our attention to the relative theories of punishment. We shall first discuss the preventive theory, according to which the purpose of punishment is the **prevention of crime**. This theory can overlap with both the deterrent and the reformative theories, since both deterrence and reformation may be seen merely as methods of preventing the commission of crimes. On the other hand, certain forms of punishment are in line with the preventive theory without necessarily also serving the aims of deterrence and reformation. Examples are capital punishment, life imprisonment and the forfeiture of, for example, a driver's licence.

Before the preventive theory can be applied, there must be a real possibility that the **offender will again commit a crime**. However, it is often difficult for a court to determine beforehand with certainty whether an accused falls into this category. This is one of the points of criticism against the efficacy of this theory. Should a convicted person's record show **previous convictions**, indicating that he makes a habit of committing crimes, the court may take this into account and sentence him to a long term of imprisonment in order to prevent him from committing crimes again.

1.2.4 *Theory of individual deterrence*

A distinction must be drawn between individual and general deterrence. Individual deterrence means that the offender as an individual is deterred from the commission of further crimes, and general deterrence means that the whole community is deterred from committing crimes.

The idea at the root of individual deterrence is to **teach the individual person convicted of a crime a lesson** which will deter him from committing crimes in the future. The premise of this theory is undermined by the high percentage of recidivists (offenders who repeatedly commit crime) in our prisons. This suggests that this theory is not very effective, in any event not in South Africa.

1.2.5 *Theory of general deterrence*

1.2.5.1 Meaning of general deterrence

In this theory the emphasis is not, as in the previous theory, on the individual offender who should be made frightened of committing a crime again. The emphasis here is on the effect of punishment on society in general. According to this theory the purpose of punishment is to **deter society as a whole from committing crime**. The belief is that the imposition of punishment sends out a message to society that crime will be punished, that as a result of this message the members of society would fear that if they transgress the law, they would be punished, and that this fear would result in their refraining from engaging in criminal conduct.

1.2.5.2 Efficacy of theory does not depend only upon severity of punishment

There is a common misconception that the effectiveness of general deterrence depends only upon the severity of the punishment, and that this theory is accordingly only effective if a relatively severe punishment is prescribed and imposed. Although the degree of punishment is not irrelevant in judging the effectiveness of this theory, the success of the theory in fact depends not on the severity of the sentence, but on how **strong the probabilities are that an offender would be caught**, convicted and serve out his sentence. The theory is accordingly only successful if there is a reasonable certainty that an offender would be traced by the police, that the prosecution of the crime in court would be effective and result in a conviction, and that the offender would serve his sentence and not be freed on parole too early or escape from prison.

If the ability of the police to trace offenders is ineffective (as a result of, for example, understaffing, weak training or corruption), the state prosecutor's ability to prove an accused's guilt in court is weak (as a result of, for example, shortages of personnel, weak training, or lack of professional experience), or the abilities of the prison authorities to ensure that a convicted offender serves his sentence and does not escape before the expiry of his sentence period is under suspicion, the deterrent theory cannot operate effectively. Prospective offenders would then tend to think that it is **worth taking the chance** by committing the crime, since the chances of their being brought to justice are relatively low. (You may ask yourself whether this is not perhaps one of the reasons for the high crime rate in South Africa.)

1.2.5.3 Possible points of criticism against theory

Quite apart from the above misgivings regarding the effectiveness of this theory, attention must be drawn to certain further points of criticism against the theory.

- (1) It must be remembered that this theory in typical utilitarian fashion is based upon the premise that man prefers the painless to the painful, and that he is a rational being who will always **weigh the advantages and disadvantages** of a prospective action before he decides to act. This, however, is by no means always so. Especially in cases where X assaults another person, or murders him while in a rage, while he is in a very emotional frame of mind or when acting in the heat of the moment, it cannot be said that he weighed the advantages and disadvantages of his prospective action before he decided to act. ("Utilitarian" is the name of the doctrine which holds that conduct is correct or commendable if it is **useful**; "useful" in this context means that an act brings the greatest happiness to the greatest number of people.)
- (2) The basic premise of the theory, namely that the average person is deterred from committing a crime by the punishment imposed upon others, can presumably **never be proved**. For its proof one would have to know how many people would commit the crime if there were no criminal sanction. This cannot be ascertained empirically. The deterrent effect of punishment on the community as a whole rests on faith rather than on truly empirical evidence.
- (3) Perhaps the most important criticism against this theory is the following: If one applies this theory, it becomes permissible to impose a punishment which is **not proportional to the harm** inflicted when the offender committed the crime, but which is in fact higher than a sentence which is exactly proportional to the harm. This is, after all, what happens if a court imposes a sentence which it wishes to operate as a deterrent to others. In this way one individual (the accused, X) is sacrificed for the sake of the community, and that individual is degraded to a mere instrument used to achieve a further goal. Such a technique is open to the following criticism: in accordance with the deterministic origin of this theory, X is not (as is the case with retribution) regarded as a free, responsible agent who only gets what he deserves, but is used as a means to an end, namely the presumed improvement of society. According to many writers it is immoral to treat one's fellow human being as merely a means to an end, as opposed to an end in itself.

ACTIVITY

At this stage, you should have a fair idea of the application of the theories of retribution, prevention and deterrence. Let us suppose you are a magistrate. Accused X1, X2 and X3 are appearing before you on charges of theft. You find all of them guilty of this crime. You now have to sentence them. The evidence before you is the following: X1 has stolen one chicken and has no previous convictions. X2 has also stolen one chicken but he has two previous convictions — one of theft of a radio and the other of theft of a watch. X3 has stolen a 4X4 motor vehicle worth about R150 000. The evidence also reveals that chicken theft is very prevalent in the district. Apply the theories of retribution, prevention and general deterrence to these facts.

FEEDBACK

The **theory of retribution** requires that the extent of the punishment be proportionate to the extent of the damage caused. Because the value of the stolen things are different, it follows that punishment for theft of the motor vehicle should be far more severe than punishment for chicken theft. However, if only the retributive theory is applied, the same punishment must be imposed on all the chicken thieves — the value of the objects stolen is the same.

The **theory of prevention** requires that a more severe punishment be imposed on X2 than on X1. Be-

cause he (X2) already has two previous convictions for theft, he must be prevented, as far as possible, from continuing to contravene the law.

According to the **theory of general deterrence**, punishment need not necessarily be proportionate to the damage caused. The fact that chicken theft is so prevalent in the district is a ground for imposing heavier sentences on X1 and X2 for stealing chickens than the sentences that would be imposed if someone were to steal a chicken in an area where such theft is not prevalent.

1.2.6 *Reformative theory*

This theory, also referred to as the **rehabilitation theory**, is of fairly recent origin. According to it, the purpose of punishment is to reform the offender as a person, that he may become a normal law-abiding member of the community once again. Here the emphasis is placed not on the crime itself, the harm caused or the deterrent effect which punishment may have, but on **the person and personality** of the offender. According to this theory an offender commits a crime because of some personality defect, or because of psychological factors flowing from his background, such as an unhappy or broken parental home, a disadvantaged background or bad influences from friends. The theory stems largely from the recent growth of the sociological and psychological sciences.

Criticism of this theory includes the following:

- (1) It is **difficult** for a court which decides to apply this theory to ascertain beforehand **how long** it would take to reform an offender.
- (2) The application of the theory might entail the imposition of long periods of imprisonment (to afford enough time for rehabilitation), even for crimes of a minor nature. The reason for this is that the theory does **not necessarily imply that the period of imprisonment ought to be proportionate to the harm** inflicted.
- (3) The application of this theory is effective only where the offender is a **relatively young person**; when it comes to older offenders it is very difficult, if not impossible, to break old habits and change set ideas.
- (4) Experience has taught that rehabilitation of the offender is more often than not **an ideal rather than a reality**. The high percentage of recidivism is proof of this. Certain people simply cannot be rehabilitated.
- (5) If one relies on this theory, it is, strictly speaking, **not necessary to wait for a person to commit a crime** before one starts with attempts to change him. A completely consistent application of this theory would mean that once a person clearly manifests a morbid propensity towards certain criminal conduct (as for example the kleptomaniac who always has the urge to lay his hands on other people's possessions, or the psychopath who can hardly control his sexual desires), one ought not to wait for him to commit a crime, but should have him committed to a rehabilitation institution immediately (ie even before he commits the criminal acts) so that an attempt may be made to cure him of his problem. There would then be no relationship between what happens to such a "sick person" and the commission of a crime.
- (6) The theory **depersonalises the offender** by not regarding him as a free moral agent (as the retributive theory does), but as a "sick person", to be paternalistically "treated" by therapy until he once more becomes what the authorities deem to be a "normal person". He is thus reduced to an "object to be modified". He may deserve our sympathy, but he cannot fairly be blamed for what he did. This **undermines** (if it does not entirely negate) the crucial **culpability** requirement for liability. The culpability requirement is posited upon the idea of **blame** and upon the personal **responsibility** of the offender for his deeds. If one relies only on reformation as a justification for

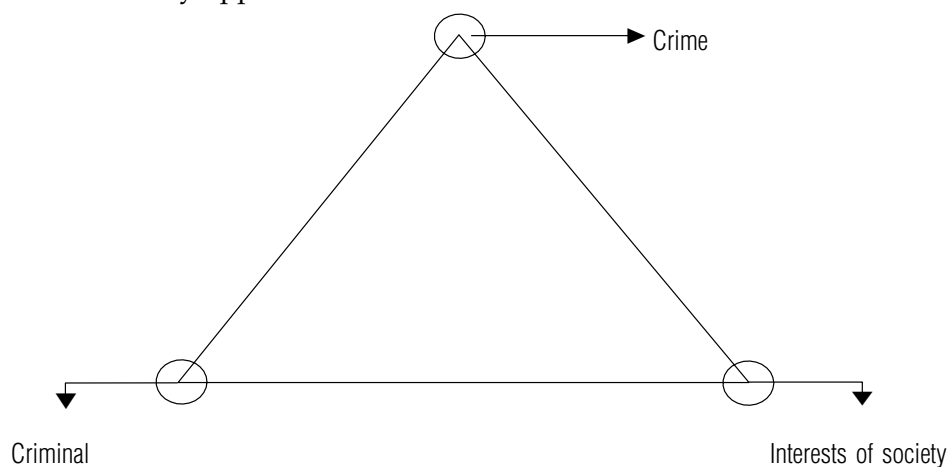
punishment, responsibility for the crime always tends to be shifted to something or somebody else.

1.2.7 *Combination theory*

If the question is asked which of the theories discussed above do our courts prefer as the correct one, the answer is that the courts do not discard a single theory as being incorrect, but on the other hand, they do not apply any single theory as the only correct one to the exclusion of all the others. Our courts, as elsewhere in the Western world, work with a **combination** of theories. We may therefore describe the theory applied in practice by the courts as a combination theory.

In principle the idea of retribution (not in the sense of taking vengeance but in the sense of restoring the legal balance) still ought to form the backbone of the approach to punishment. There is no such thing as punishment which lacks any element of retribution. The retributive theory is indispensable, for it is the only theory which requires a proportional relationship between the punishment meted out and the moral blameworthiness of the offender, as well as between the degree of punishment, on the one hand, and the extent of the harm or degree of violation of the law, on the other hand.

Our courts emphasise that three factors must be taken into account when sentencing, namely the crime, the criminal and the interests of society. This was emphasised in the judgment in *Zinn* 1969 (2) SA 537 (A). These three factors are often referred to as the "triad in *Zinn*". By bearing these three key factors in mind, a court normally applies all the theories set out above.



By "crime" is meant in particular, the consideration that regard must be had to the degree of harm or the seriousness of the violation (retributive theory). By "criminal" is meant, in particular that regard must be had to the personal circumstances of the offender, for example the personal reasons which drove him to crime as well as his prospects of one day becoming again a law-abiding member of society (reformative theory). By "the interests of society" is meant either that society must be protected from a dangerous criminal (preventive theory) or that the community must be deterred from crime (theory of general deterrence) or that the righteous indignation of society at the contravention of the law must find some expression (retributive theory).



Read the following case in the *Case Book*: *Zinn* 1969 (2) SA 537 (A).

There must be a healthy balance between these three factors, and the court may not ignore any of these factors and concentrate on a specific one only. It is, however, impossible beforehand to determine a certain combination of factors with specific weight attached to each of these factors, and then to use this as a

rigid formula in all cases. Each case is unique and each accused differs from another.

1.3

STUDY HINTS



Before we continue with the next topic, we would first like to give you some advice on how to study the discussion above of the theories of punishment. This advice also applies to all the other topics to be discussed in the study guide. Presumably this advice will not contain anything new for those students who are already well advanced in their studies and therefore we request those students to bear with us if what we are about to say is already well known to them. There is a large number of first-year students registered for this course, and we should like to offer the following advice to these students in particular.

If the lecturer drawing up the examination paper wishes to ask a question on the theories of punishment, the examiner would most probably ask a question such as: "Discuss the theory of punishment known as the theory of retribution." About ten to twelve marks (out of the total of 100 marks for the examination paper) may be allotted to such a question. Ask yourself: "How would I go about answering such a question?" You would only obtain a satisfactory mark for your answer if you were to write as balanced a discussion as possible of this theory of punishment. How should you study the study material so as to be able to write a satisfactory answer in the examination? We propose the following method of study:

- (1) Identify the different principles, rules or points which the lecturer makes in the discussion of the retributive theory.
- (2) Give a number to each sentence or combination of sentences setting out a particular principle.
- (3) Decide upon one key word or expression (ie a group of words) which may be said to contain the gist of the principle, underline such word or expression, and write it down on a piece of paper, having numbered it "1".
- (4) Write down, underneath the word or expression numbered "1", the key word or expression in the next sentence or principle which you have identified; number this word or expression "2", and continue with this method until you have a list containing all the numbered words or expressions underneath each other.
- (5) Each of the words or expressions should be a key enabling you in the examination to formulate the principle or rule concerned in a full sentence. (In the examination you will not merely write down a list of words or expressions underneath each other.)
- (6) Memorise (a) the number of principles (ie the words or expressions you have written down underneath each other) you have identified; and (b) the key words or expressions after each number.
- (7) When writing the examination, write down the key words or expressions underneath each other on a page which you have clearly marked "Rough work".
- (8) Then use each word or expression as a key to formulate the relevant principle in a full sentence.

In this way you can ensure that you give a complete and balanced account of the topic you are required to discuss. Students who do not receive satisfactory marks for their answers, are inclined to answer a question such as the one given above by writing down only one or two of the relevant principles, instead of all (or nearly all) of them. They do not deserve as high a mark for their answers as students who have given an account of all the material.

To help you to apply the advice just offered, let us now consider the discussion above of the retributive theory and try and identify and number the different rules or principles set out in that discussion.

Your task in identifying the different principles has been made easier for you by the lecturers, in that they have subdivided the discussion of the retributive theory into five different subdivisions, marked from 1.2.2.1 to 1.2.2.5. You should begin by writing the headings of the first of these subdivisions. This may be marked "1". Underneath this you should write down the key words referring to the principles discussed under this heading.

The first principle is, in our opinion, to be found in the words "just deserts". We therefore suggest that you underline these words and write them down on a separate piece of paper, having marked them "1.1". ("1.1" means the first subdivision under "1".) We would identify the second principle as being contained in the words (still in the same paragraph) "restoring of legal balance". Write this down and mark it "1.2". We would regard the third principle as the one set out in the second paragraph of the discussion of the meaning of retribution, the key words being "advantages ... law protects him ... and obligations ... refrain from infringing ... rights". The fourth might be "scales of justice disturbed ... and ... unjustifiable advantage". The fifth might be "debt owed to society". This brings you to the end of subdivision 1.2.2.1. Then proceed to do the same as regards the further subdivisions. First write down the heading of the particular subdivision, followed by the principles you have identified. It stands to reason that the words contained in the subheading are of particular importance.

Having drawn up the list, you should try and memorise the different points. If this question is asked in the examination, write the points down on the page marked "Rough work" and then use them as a key to describe the different principles in properly formulated statements. In this way you will be able to write a well-balanced answer, that is an answer not merely setting out the first one or two rules relating to the topic, but which does justice to the **whole** discussion of the topic. In this way you will receive good marks for your answer in the examination.

1.4

HISTORY OF SOUTH AFRICAN CRIMINAL LAW

Note: Read only. You are not required to study this topic for the examination.

We are not going to discuss the history of our South African criminal law in detail. You are advised to read the brief discussion of the historical development of our criminal law in *Criminal Law* 6–9 on your own. This applies particularly to students who have not yet studied any other legal courses. In this study guide we merely wish to emphasise certain important aspects.

The term "the common law of South Africa" refers to those rules of law not contained in an Act of Parliament or in legislation by some other (subordinate) legislative body.

The rules of substantive criminal law — that is the rules which we will discuss in this course — are, for the most part, not contained in any Act of Parliament. Stated differently, we can say that our criminal law — including the general principles of our criminal law — are not **codified** (ie summarised in a "code"). (Our criminal procedure, ie those rules stipulating how an accused must be

brought to trial and how the trial must proceed, is codified in the Criminal Procedure Act 51 of 1977.) There is no Act of Parliament stating that one may not murder or steal or rape, or stipulating when an accused person may successfully rely on defences such as intoxication or youth or provocation. In order to know what the law is regarding crimes or defences such as these, one must turn to common law.

The common law of South Africa is Roman-Dutch law. By Roman-Dutch law we mean that system or law which originated about 2 500 years ago in Rome, spread during and after the Middle Ages to Western Europe, was received from the late thirteenth up to the end of the sixteenth century in the Netherlands, applied after 1652 at the Cape by the officials of the Dutch East India Company, and which was later accepted and applied in all those colonies and regions of Southern Africa which formed the Union of South Africa in 1910. After the annexation of the Cape by England, English law exerted a considerable influence on our common law. Roman-Dutch criminal law was also considerably influenced by English criminal law. Our common law was further amended and supplemented by legislation.

The most important sources of Roman-Dutch criminal law are the works of such eminent jurists as Damhouder, Matthaeus, Voet, De Groot, Huber, Van Leeuwen, Van der Linden, Moorman, Carpzovius and Van der Keessel. They lived and wrote their books between the sixteenth and eighteenth centuries.

1.5

THE SOURCES OF OUR CRIMINAL LAW

(Criminal Law 5–9)

Note: Read only. You are not required to study this topic for the examination.

The sources of our criminal law are the following:

- (1) **Legislation.** If there is an Act (legislation) dealing with a specific crime or other topic relevant to criminal law, the courts must apply such Act. However, in the discussion under the previous heading we have already pointed out that the most important crimes in our law are not set out in any legislation. They form part of our common law.

As far as legislation is concerned, there is one Act which towers above all other Acts in importance. This is the **Constitution of the Republic of South Africa** 108 of 1996. Chapter 2 of the Constitution contains a Bill of Rights. All rules of law, irrespective of whether they are contained in legislation or in common law, must be compatible with this Bill of Rights. If a rule is incompatible with the Bill of Rights, it may be declared null and void. Amongst the rights set out in the Bill of Rights are the right to equality before the law (s 9); the right to life (s 11); the right to privacy (s 14); the right to freedom of expression (s 16); the right to freedom of movement (s 21) and the right to a fair trial (s 35). In the course of our exposition of the rules of criminal law we shall from time to time refer to the effect of some of these rules.

- (2) The rules of **common law.** We have already explained the meaning of “common law”. The contents of the common law can first of all be found in the primary sources of the common law, that is **the writings of the Roman-Dutch authors** referred to above. In practice, however, it is seldom necessary to refer to these writings, because all the most important rules of common law have found their way into the reported (ie published) law reports. The latter is referred to as our “**case law**”.

1.6

THE ONUS OF PROOF IN CRIMINAL CASES

Note: Read only. You are not required to study this topic for the examination.

For the benefit of those students who are at the beginning of their study of the law, we would like to give a brief explanation of the onus of proof in criminal

matters. The general rule in criminal matters is that the onus is on the state (ie the prosecution or state prosecutor) to prove the accused's guilt beyond reasonable doubt. Put differently: it is presumed that an accused is innocent, until the state has succeeded in proving his guilt beyond reasonable doubt. The state must therefore prove that the accused's conduct and state of mind complied with all the requirements (or "elements") of the crime charged. Section 35(3)(h) of the Bill of Rights in the Constitution expressly provides that every accused has a right to be presumed innocent. There are, however, exceptions to the general rule that the onus of proof rests on the state to prove all the elements of the crime. In the course known as Law of Evidence the whole question of onus of proof is explained in detail.



All of this means that a student will make a mistake if, in writing an answer to an assignment or to a question in the examination, the student alleges the following: "The accused must prove that (eg) he did not have the intention to commit the crime." In principle the accused need not prove anything; it is the state that has to prove that he or she has committed the crime. It would also be incorrect to allege that the court must prove a certain requirement of liability. Neither the accused nor the court has to prove X's guilt. The state (prosecution) has to prove it.

1.7

CRIMINAL LIABILITY: A SUMMARY

(Note: From this point onwards, you have to study the discussions for the examination.)

1.7.1 *General*

The discussion which follows may be viewed as a very concise summary of the first part of the study guide. When investigating the various crimes, one finds that they all have certain characteristics in common. Before a person can be convicted of any crime, the following requirements must be satisfied:

The very first question to be asked in determining somebody's criminal liability is whether the type of conduct forming the basis of the charge is recognised in our law as a crime. A court may not convict a person and punish him merely because it is of the opinion that his conduct is immoral or dangerous to society or because, in general terms, "the person deserves" to be punished. On the contrary, it must be beyond dispute that X's alleged type of conduct is recognised **by the law** as a crime. This very obvious principle is known as the "principle of **legality**".

Although this requirement must be borne in mind, it is never regarded as an element of a crime in the sense that the accused, by his conduct and subjective attributes, must comply with this requirement. This consideration is underlined by the fact that in more than 99 percent of criminal cases the accused is charged with a crime that is so well known (eg, assault, theft, culpable homicide) that the court will not waste its time investigating whether in our law there is such a crime as the one with which the accused is being charged. Only in fairly exceptional cases is it necessary for the court to study, for example, a statute in order to ascertain whether what the accused is charged with really constitutes a crime. This is another reason why the principle of legality is not regarded as an "element" of a crime.

We now proceed to consider the four elements of each crime.

1.7.2 *The four elements of criminal liability*

(1) **Act or conduct**

Assuming that the law regards the conduct as a crime, the first step in enquiring whether X is criminally liable is to enquire whether there was **conduct** on the part of X. By "conduct" is meant an **act** or an **omission**. **Since the punishment of**

omissions is more the exception than the rule, this requirement of liability is mostly referred to as the “requirement of an act”.

The word “act” as used in criminal law does not correspond in all respects with the ordinary everyday meaning of this word; more in particular it should not be treated as synonymous with a muscular contraction or bodily movement. It should rather be treated as a technical term of art which is wide enough in certain circumstances to include an omission to act.

For the purposes of criminal law, conduct can lead to liability only if it is **voluntary**. Conduct is voluntary if X is capable of subjecting his bodily or muscular movements to his will or intellect. For this reason the bodily movements of, for example, a somnambulist are not considered by the law to amount to an “act”.

An omission — that is a failure by X to act positively — can lead to liability only if the law imposed a duty on X to act positively and X failed to do so.

(2) Compliance with the definitional elements of the crime

The following general requirement for criminal liability is that X’s conduct must **comply with the definitional elements of the crime** in question.

What does “the definitional elements of the crime” mean? It is the concise definition of the type of conduct and the circumstances in which that conduct must take place in order to constitute an offence. By looking at these definitional elements, one is able to see how one type of crime differs from another. For example, the definitional elements of the crime of robbery is “the violent removal and appropriation of movable corporeal property belonging to another”.

Every particular offence has requirements which other offences do not have. A study of the particular requirements of each separate offence is undertaken in the second module. The requirement for liability with which we are dealing here is simply that X’s conduct must **comply with** or **correspond to** the definitional elements; to put it differently, it must be conduct which **fulfils** the definitional elements, or by which these definitional elements are **realised**.

(3) Unlawfulness

The mere fact that the act complies with the definitional elements does not necessarily mean that it is also unlawful in the sense in which this word is used in criminal law. If a father gives his naughty child a moderate hiding in order to discipline him, or a policeman gets hold of a criminal on the run by knocking him to the ground in a tackle, their respective acts are not unlawful and they will therefore not be guilty of assault, despite the fact that these acts comply with the definitional elements of the crime of assault.

“Unlawful”, of course, means “contrary to law”, but by “law” is meant here not merely the rule contained in the definitional elements, but the totality of the rules of law, and this includes rules which in certain circumstances allow a person to commit an act which is contrary to the “letter” of legal prohibition or norm. In practice there are a number of well-known situations where the law tolerates an act which infringes the “letter” of the definitional elements. These situations are known as grounds of justification. Well-known grounds of justification are private defence (which includes self-defence), necessity, consent, right of chastisement and official capacity. In the examples above the act of the father who gives his son a hiding is justified by the ground of justification known as right of chastisement, while the act of the policeman is justified by the ground of justification known as official capacity.

(4) Culpability

The following and last requirement which must be complied with is that X's conduct must have been **culpable**. The culpability requirement means that there must be grounds upon which X may personally be blamed for his conduct. Here the focus shifts from the act to the actor, that is, X himself — his personal abilities, knowledge, or lack thereof.

The culpability requirement comprises two questions or, as it were, "sub-requirements".

The first of these subrequirements is that of **criminal capacity** (often abbreviated merely to "capacity"). This means that at the time of the commission of the act X must have had certain mental abilities. A person cannot legally be blamed for his conduct unless he is endowed with these mental abilities. The mental abilities X must have are:

- (1) the ability to appreciate the wrongfulness of his act (ie to distinguish between "right" and "wrong") and
- (2) the ability to act in accordance with such an appreciation

Examples of categories of people who lack criminal capacity are the mentally ill ("insane") persons and young children.

The second subrequirement (or "leg" of the culpability requirement) is that X's act must be either **intentional** or **negligent**. Intention is a requirement for most offences, but there are also offences requiring only negligence.

Briefly then, we can say that the four general requirements for a crime are the following:

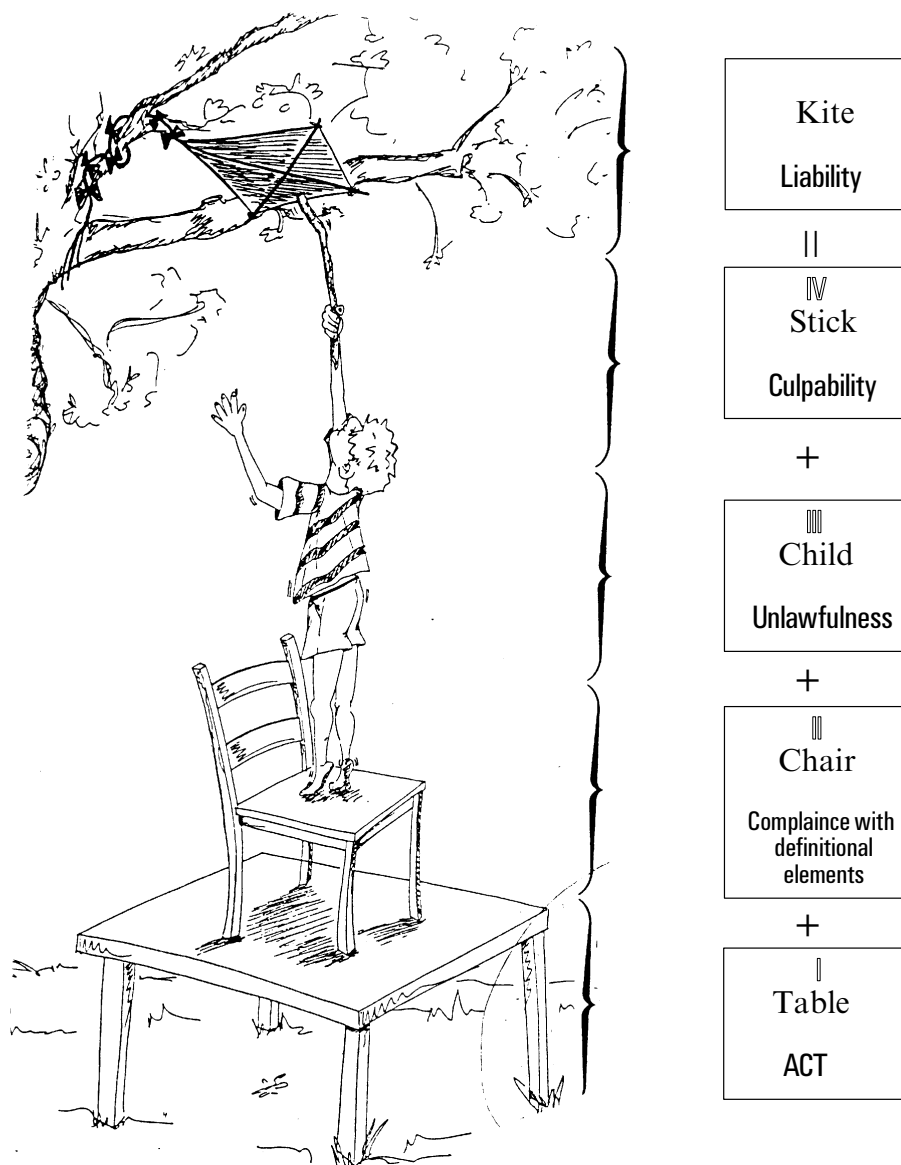
- (1) **conduct**
- (2) which **complies with the definitional elements of the crime**
- (3) and which is **unlawful**
- (4) and **culpable**

1.7.3 *Sequence of investigation into presence of elements*

It is of the utmost importance to bear in mind that the investigation into the presence of the four requirements for or elements of liability set out above must follow a certain sequence. It is the sequence in which the **requirements were set out above**. If the investigation into whether there was (voluntary) conduct on the part of X reveals that there was in fact no such conduct, it means that X is not guilty of the crime in question and the matter is concluded. It is then unnecessary to investigate whether the further requirements such as unlawfulness and culpability have been complied with.

An investigation into whether the conduct complied with the definitional elements is necessary only when it is clear that the conduct requirement has been complied with. Again, only if it is clear that the conduct has complied with the definitional elements is it necessary to investigate the question of unlawfulness, and only if the latter requirement has been complied with is it necessary to investigate whether X's act was also culpable. An inquiry into a later requirement therefore presupposes the existence of the previous requirements.

The basic rule relating to the sequence of the requirements may be compared to the story of the boy whose kite got stuck at the tip of a very high branch of a tree. The boy was hopelessly too short to reach up with his hands to the branch. In order to retrieve the kite, he first moved a table to a position just beneath the branch. Secondly, he placed the chair on the table. Thirdly, he climbed onto the chair, armed with a long stick. Fourthly, he reached out with the stick to the kite,



shook it, and in this way succeeded in freeing the kite from the branch. (Consult the left-hand side of the illustration above.)

The inquiry into criminal liability proceeds along comparable lines. Drawing the conclusion that a person is guilty of the crime is like retrieving the cherished kite. The kite represents criminal liability. The table (the first or bottom agent) represents the requirement of an act. The chair (second agent) represents the requirement that there must be compliance with the definitional elements. The boy (third agent) represents the unlawfulness requirement and the stick (fourth agent) represents the culpability requirement. (Consult the illustration on p16.)

Successfully reaching out with the stick towards the kite presupposes the existence of all four objects or "agents" needed to get to it. If the first "agent", namely the table, cannot be found or does not exist, it is of no avail that, say, the fourth agent (the stick) is waved about in an effort to get the kite. If we apply this metaphor to the principles of criminal liability, it follows that it is a waste of time to enquire whether X had the **intention** to commit an offence (fourth requirement) if it transpires that there was not even an **act** (first requirement) on his part.

Thus the enquiry must always start from the bottom and proceed upwards, not the other way around. Every "agent" (table, chair, boy, stick) rests upon that or

those “agents” below it (except, of course, the one right at the bottom that is the table). The moment it becomes clear that any one of the four elements is missing (that is, have not been complied with), it follows that there is no criminal liability (that is, the kite cannot be retrieved) and it becomes unnecessary to enquire into the existence of any possible further elements or requirements (that is, “agents” that are above them).

ACTIVITY

Let us apply this simple principle to a concrete set of facts: Assume X is charged with having assaulted Y. The evidence relied upon by the prosecution to prove the charge reveals that one night while X was walking in his sleep he trampled upon Y, who happened to be sleeping on the floor. Has X committed assault?

FEEDBACK

The answer is obviously “no”, on the following grounds: Because X was walking in his sleep his act was not **voluntary** — in other words, while sleepwalking he was not able to subject his bodily movements to his will or intellect. Because there was no act, he is not guilty of assault. (Or, to make use of the metaphor in the illustration above, there was no table for the boy to use and therefore any attempt by him — even with the aid of a chair and a stick — to retrieve his kite would be fruitless.) It is unnecessary to enquire whether, for example, X’s act was unlawful or whether he acted with intention (culpability). From a systematic point of view it would be unsatisfactory — and proof of unimpressive legal thinking — to say that X escapes liability because he lacked the intention to assault. Such an argument presupposes that there was a voluntary act on the part of X — which is patently incorrect.

1.8

CRIMES AND DELICTS

You must study the discussion of this topic in *Criminal Law* 3–5 on your own.

The most important points of difference between a crime and a delict can be summarised as follows:

	Crimes	Delicts
1	Directed against public interests.	Directed against private interests.
2	Form part of public law.	Form part of private law.
3	State prosecutes.	Private party institutes action.
4	Result in the imposition of punishment by the state.	Result in the guilty party being ordered to pay damages to the injured party.
5	State prosecutes perpetrator irrespective of the desires of private individual.	Injured party can choose whether he wishes to claim damages or not.
6	Trial governed by rules of criminal procedure.	Trial governed by rules of civil procedure.

GLOSSARY

lex talionis retribution in the sense of vengeance, “an eye for an eye and a tooth for a tooth”

SUMMARY

Theories of punishment

- (1) The theories of punishment are divided into three groups, namely the absolute theory, the relative theories and the combination theory.
- (2) There is only one absolute theory, namely the theory of retribution. According to this theory the aim of punishment is to try and restore the balance which has been disturbed by the commission of the crime. According to this view, punishment is not a means to an end, but an end in itself.
- (3) There are three relative theories, namely the preventive, the deterrent and the reformative theories. According to these theories, punishment is merely a means to some further end, namely to prevent crime, to deter people from committing crime, or to reform the criminal.
- (4) The deterrent theory is subdivided into the theory of individual deterrence and the theory of general deterrence. According to the former the purpose of punishment is to deter the wrongdoer as an individual from committing further crime, and according to the latter the purpose of punishment is to deter society as a whole from committing crime.
- (5) According to the combination theory, all the different theories are combined and used in conjunction, in determining a proper sentence for the wrongdoer.
- (6) South African courts follow a rule in terms of which they combine the different theories in the following way: in imposing punishment a court must consider the following key considerations, namely the crime, the criminal and the interests of society.

History of South African criminal law

- (7) “Common-law” refers to those rules of law not contained in an Act of parliament or in rules of legislation by some other (subordinate) legislative body.
- (8) The common law of South Africa is Roman-Dutch law.

Criminal liability: a summary

- (9) The four elements of criminal liability are
 - (a) act or conduct
 - (b) compliance with definitional elements
 - (c) unlawfulness, and
 - (d) culpability
- (10) The investigation into the presence of the four elements of liability follow a certain sequence. It is the sequence in which they were mentioned in the previous statement.

Crimes and delicts

- (11) There are six points of difference between a crime and a delict. See the summary of these six points in the above discussion of this subject.

TEST YOURSELF

Theories of punishment

- (1) Name the different theories of punishment and describe the way they are classified.
- (2) Distinguish briefly between the absolute theory (on the one hand) and the relative theories (on the other hand).
- (3) Discuss the retributive theory (or any other theory, such as the preventive theory or the theory of general deterrence).
- (4) Would it be incorrect to apply only one of the relative theories (such as the reformatory theory) without also taking into account the retributive theory at the same time? If so, explain why.
- (5) Name the three main considerations which, according to our courts, should be taken into consideration when imposing punishment.
- (6) Fill in the missing words in the following sentence: A is convicted of the theft of one bicycle; B is convicted of the theft of two bicycles. According to the theory of punishment known as, B ought to receive a heavier sentence than A, because according to this theory there ought as far as possible to be a direct proportion between and the
- (7) Fill in the remaining words in the following sentence: The theory of punishment known as the theory places the emphasis on subjective factors relating to the offender, such as his age and standard of education, whereas the theory of punishment known as the theory aims at combining all the different theories of punishment.

History of South African criminal law

- (8) Explain the meaning of the term “common law”.

Summary of criminal liability

- (9) Name the four elements of criminal liability.
- (10) Briefly discuss each of the four elements of criminal liability.
- (11) Should the investigation into the presence of the four elements of liability follow a prescribed sequence? Explain.

Crimes and delicts

- (12) Name and discuss the points of difference between a crime and a delict.

STUDY UNIT 2

The principle of legality



(*Criminal Law 36–49; Case Book 20–26*)

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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- evaluate the validity of any common-law or statutory rule (including those relating to punishment) with reference to the rules embodied

in the principle of legality

- demonstrate your understanding of the application of the principle of legality to statutory rules by determining whether a particular statutory rule purporting to create a crime contains a legal norm, a criminal norm and a criminal sanction

2.1 BACKGROUND

Intervention by the criminal law may be traumatic to a person accused of a crime. It can easily happen that criminal law is turned into a tool of suppression of oppression, as occurred during the Middle Ages. It is therefore important that mechanisms exist to protect the rights of the individual against abuse by organs of the state. The principle of legality plays an important role in this regard, as the principle is based on principles of constitutional democracy and fairness.

2.2 THE CONCEPT OF LEGALITY

In determining whether a person is criminally liable, the first question to be asked is **whether the type of conduct allegedly committed by such person is recognised by the law as a crime**. Certain conduct may be wrong from a moral or religious point of view, yet may not be prohibited by law. Again, even if it is prohibited by law, it does not necessarily follow that it is a crime: it may perhaps only lead to a civil action (ie an action or court case in which one private party claims damages from another party) or it may result only in certain administrative measures being taken by some authority (where, for example, a local authority orders me to break down a wall which I have constructed upon my property in such a way that it contravenes the local building regulations). Not **every** contravention of a legal rule constitutes a crime. The mere breach of a contract, for example, does not necessarily constitute a crime. It is only if a certain kind of conduct is defined by the law **as a crime** that there can be any question of criminal liability for that type of conduct.

It is this very obvious consideration which lies at the root of the principle of legality. The principle of legality is also known as the *nullum crimen sine lege* principle. The Latin expression means "no crime without a legal provision".

The principle of legality is contained in section 35(3)(1) of the Constitution of the Republic of South Africa, 1996 "the Constitution". The provisions of this section will be set out in the discussion that follows.

2.3 DEFINITION AND CONTENTS OF THE PRINCIPLE

2.3.1 *Definition*

A definition of the principle of legality embodying its most important facets can be formulated as follows:

An accused may

(1) not be convicted of a crime –

- (a) unless the type of conduct with which she is charged has been recognised by the law as a crime
- (b) in clear terms

- (c) before the conduct took place
 - (d) without it being necessary to interpret the words in the definition of the crime broadly in order to cover the accused's conduct; and
- (2) if convicted, not be sentenced unless the sentence also complies with the four requirements set out above under 1(a) to (d)

2.3.2 *Rules embodied in the principle*

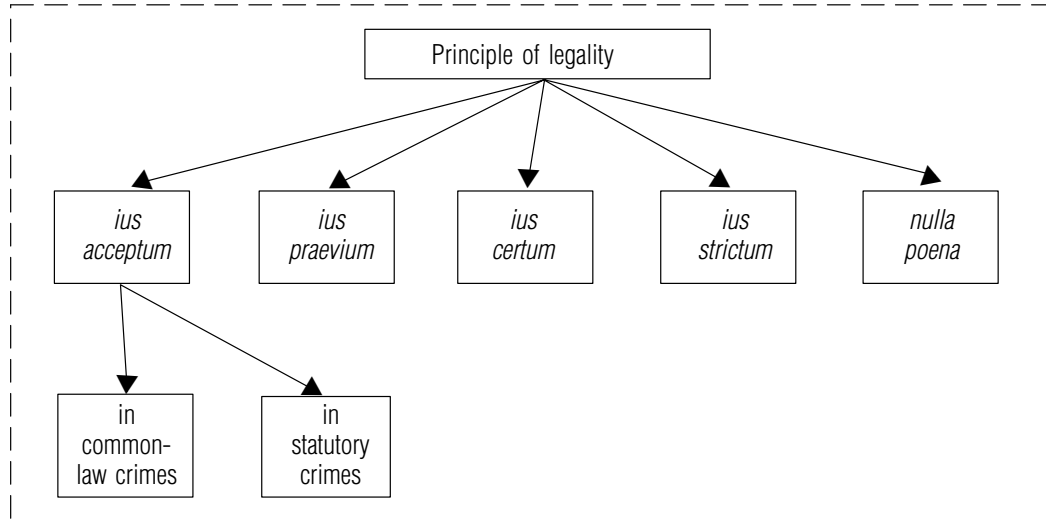
If one analyses the principle of legality, one finds that it in fact embodies five rules. In order to facilitate reference to the different rules, we shall give each of these rules a brief Latin label. These five rules are the following:

- (1) A court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime — in other words, a court itself may not create a crime. This is the *ius acceptum* rule.
- (2) A court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of its commission. This is the *ius praeivium* rule.
- (3) Crimes ought not to be formulated vaguely. This is the *ius certum* rule.
- (4) A court must interpret the definition of a crime narrowly rather than broadly. This is the *ius strictum* rule.
- (5) After an accused has been found guilty, the above-mentioned four rules must also be applied when it comes to imposing a sentence; this means that the applicable sentence (regarding both form and extent) must already have been determined in reasonably clear terms by the law at the time of the commission of the crime, that a court must interpret the words defining the punishment narrowly rather than broadly, and that a court is not free to impose any sentence other than the one legally authorised. This is the *nulla poena sine lege* rule, which can be further abbreviated to the *nulla poena* rule.

Actually all the different aspects of the principle of legality can be traced back to one fundamental consideration, namely that the individual ought to know beforehand precisely what kind of conduct is criminal, so that she may conduct herself in such a way that she will not contravene the provisions of the criminal law.

There is a connection between the principle of legality and a democratic form of government: one of the reasons why a judge should not be empowered to create crimes herself or to extend the field of application of existing crimes, is because Parliament, as the gathering of the community's elected representatives, is best fitted to decide (after examination and discussion) what acts ought to be punishable according to the general will of the people. In contrast, the judge's function is not to create law but to interpret it. Naturally, this relationship between legality and a democratic form of government implies that there must be a parliament representing the **entire** population as well as regular (not merely once only!), free (free from intimidation!) and fair elections to ensure that the representatives in Parliament genuinely reflect the (sometimes changing) will of the people.

In the discussion which follows each of the five rules embodied in the principle will be analysed. For the sake of convenience we shall often refer to them by their brief Latin labels given above. The following diagram sets out the classification of the rules and sub-rules:



2.4

CONDUCT MUST BE RECOGNISED BY THE LAW AS A CRIME (*IUS ACCEPTUM*)

In a country in which the criminal law is codified, the effect of the principle of legality is that only conduct which falls within the definition of one of the crimes expressly mentioned in the criminal code is punishable. South African criminal law is not codified. Although many crimes are created by statute, some of the most important crimes, such as murder and assault, are not made punishable or defined in any Act. They are simply punishable in terms of the common law. (Compare the discussion earlier in the study guide on the history of criminal law.)

However the fact that our criminal law is not codified does not mean that the principle of legality therefore has no function in our law. In South African criminal law the role of the principle of legality is the following: before a court can convict somebody of a crime, it must be clear that the kind of conduct with which she is charged is recognised as a crime in terms of either common law or statutory law. If this is not the case, a court cannot convict the person, even though the judge or magistrate is of the opinion that from a moral or religious point of view the conduct **ought** to be punishable. A court may not create a crime. Only the legislature may do this.

The rule described above may be described as the "*ius acceptum* rule". The Latin word *ius* means "law" and "*acceptum*" means "which has been received". A free translation of *ius acceptum* would read: "the law as it has been received up to date". In South Africa the *ius acceptum* refers not only to the common law, but also to the existing statutory law.

The *ius acceptum* principle is not referred to expressly in the Constitution. However, the provisions of section 35(3)(1) imply the existence of the *ius acceptum* rule. Section 35(3)(1) expresses the *ius praevium* rule, and will be set out in the discussion of that principle below. **In short, this section provides that every accused has a right to a fair trial, which includes the right not to be convicted of an offence in respect of an act that was not an offence at the time it was committed.** However, this formulation of the *ius praevium* rule implies that the *ius acceptum* rule should also be

respected: If a court may not find a person guilty of an act or omission that was not an offence at the time it was committed (*ius praeivium*), it follows by necessary implication that a court does not have the power to create a crime (*ius acceptum*). In other words, if a court has the power to create crimes, it will mean that a court also has the power to convict a person of a crime even though the accused's act did not constitute a crime at the time it was performed.

It is convenient to discuss the application of this rule under two headings: first, the application of the rule to common-law crimes and secondly, its application to statutory crimes.

2.4.1 *Common-law crimes*

Where there is no provision of the common law declaring certain conduct to be a crime, the courts have generally held that there can be no crime — and therefore no punishment. In *M 1915 CPD 334*, Kotze J declared: “We do not possess the power of creating offences upon the ground that in our opinion, they are contrary to good morals.” Our courts are not the guardians of morals. If there is a need to make conduct which may be viewed as immoral or dangerous to society punishable, it is the task of the legislature to declare such conduct punishable, if it wishes to do so. A court has no legislative powers.

This point was emphasised by the Constitutional Court in *Masiya v Director of Public Prosecutions 2007 (2) SACR 435 (CC)*. The court (at par 30) stated that in a constitutional democracy such as ours the legislature, and not the courts, has the major responsibility for law reform and that the delicate balance between the functions and powers of the courts on the one hand and those of the legislature on the other hand should be recognised and respected.

2.4.2 *Statutory crimes (ie crimes created in Acts of Parliament)*

If Parliament wishes to create a crime, an Act purporting to create such a crime will best comply with the principle of legality if it expressly declares

- (1) that that particular type of conduct is a crime, and
- (2) what punishment a court must impose upon a person convicted of such a crime.

Sometimes, however, it is not very clear from the wording of an Act whether a section or provision of the Act has indeed created a crime, or not. In such a case the function of the principle of legality is the following: a court called upon to interpret such a section or provision should only assume that a new crime has been created if it appears unambiguously from the wording of the Act that a new crime has in fact been created. If the Act does not expressly declare that the conduct is a crime, a court should be slow to hold that a crime has been created. This consideration or rule corresponds to the presumption in the interpretation of statutes that a provision in an Act which is ambiguous must be interpreted in favour of the accused (*Hanid 1950 (2) SA 592 (T)*).

In this regard it is feasible to distinguish between a **legal norm**, a **criminal norm** and a **criminal sanction** in an Act.

- A **legal norm** in an Act is a provision creating a legal rule which does not simultaneously create a crime.
- A **criminal norm** in an Act is a provision which makes it clear that certain conduct constitutes a crime.

- A **criminal sanction** is a provision in an Act stipulating what punishment a court must impose after it has convicted a person of that crime.

The difference may be illustrated by the following example. A statutory prohibition may be stated in the following three ways:

- (1) No person may travel on a train without a ticket.
- (2) No person may travel on a train without a ticket and any person who contravenes this provision commits a crime.
- (3) No person may travel on a train without a ticket and any person who contravenes this provision commits a crime and is punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000 or both such imprisonment and fine (cf the cases of *Letoani* and *Landman* referred to hereunder).

Example (1) contains a mere prohibition; although it creates a legal norm, it is not a legal norm creating a crime. Non-compliance with this provision may perhaps lead to certain administrative measures (eg that the passenger may be turned out of the train at the next stop) but it does not contain a criminal norm. A court will not, without strong and convincing indications to the contrary, hold that such a provision has created a criminal norm (*Bethlehem Municipality* 1941 OPD 230).

Example (2) does contain a criminal norm, because of the words “commits a crime”. It does not, however, contain a criminal sanction as nothing is mentioned about the punishment which a court must impose after conviction.

Example (3) contains both a criminal norm and a criminal sanction; the criminal sanction is contained in the words “is punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000 or both such imprisonment and fine”.

Before one can accept that a provision in an Act has created a crime, it must be clear that the provision contains a **criminal norm**. If a statutory provision creates only a criminal **norm** but stipulates nothing about a criminal **sanction**, as in example (2) above, it is presumed that the punishment is in the discretion of the court — a court may then decide for itself what punishment to impose. A statutory provision will, however, best comply with the principle of legality if, apart from a criminal norm, it also contains a criminal sanction. The ideal is that the legislature should stipulate the maximum punishment for the crime. (In the unlikely event of an Act creating a criminal sanction but not a criminal norm, a court will accept that the legislature intended to create a crime, and that a crime was indeed created.)

In some earlier cases our courts assumed that a criminal norm had been created in a statute, despite the fact that no such criminal norm can be found expressed in clear language in the statute. In so doing they disregarded the principle of legality and in fact created crimes. Examples of such cases are *Berg* (1851) 1 Searle 93, *Forlee* 1917 TPD 52 and *Baraitser* 1931 CPD 418.

The judgments in *Zinn* 1946 AD 346, *Letoani* 1950 (3) SA 669 (O), *Landman* 1960 (1) SA 269 (N) and *Le Grange* 1991 (1) SACR 27 (C) are more acceptable. In *Zinn* the Appellate Division declared that a court will not readily read a criminal norm into a section of an Act, unless it is expressly laid down. In *Letoani* and *Landman*, two cases in which almost identical legislation had to be interpreted, it was held that a provision in a statute prohibiting people from travelling by train without a ticket did not create a crime, since it appeared from a study of the statute as a whole that it was only the refusal of the “free traveller” subsequently to make a higher payment for the journey which constituted a crime.



Read the following judgment in the *Case Book*: *S v Francis* 1994 (1) SACR 350 (C).

2.5

CRIMES SHOULD NOT BE CREATED WITH RETROSPECTIVE EFFECT (*IUS PRAEVIUM*)

The principle of legality next implies that nobody ought to be convicted of a crime unless **at the moment it took place** the type of conduct committed was recognised by the law as a crime. It follows that the creation of a crime with retrospective effect (ie the *ex post facto* creation of crimes) is at variance with the principle of legality. This application of the principle of legality is known as the *ius praeivium* rule. (“*Praevium*” means “previous”. Freely translated, *ius praeivium* means “the law which already exists”.)

Suppose somebody had committed a certain act in 1990 which at that time was completely innocent in the sense that it did not amount to a crime. Let us suppose that this innocent act consisted in her catching a certain type of wild bird belonging to nobody, and putting it in a cage. Let us suppose, further, that five years afterwards, in 1995, the legislature passed an Act dealing with the protection of wildlife in which it prohibited the catching of that type of bird and expressly declared that anyone who caught such a bird had committed a crime. Suppose, further, that this Act of 1995 contained a section which read: “This Act is deemed to have come into operation on the first day of 1990.” This would be an example of a law which has retrospective effect. Such legislation is usually referred to as *ex post facto* legislation. (*Ex post facto* means that the law was enacted **after** (*post*) the commission of the act.) You will immediately appreciate that an Act of this nature, that is one creating a crime with retrospective effect, is most unfair, since the person who caught the bird in 1990, that is at a time when such an act was not a crime, can now, after 1995, be convicted of the crime created by the Act, and be punished for it, despite the fact that at the time of the commission of the act in 1990 she neither knew nor **could** have known that such conduct is or would be punishable. In 1990 she could not have been deterred from committing the act, since at that time it was not yet punishable.

The Constitution of the Republic of South Africa Act 108 of 1996 contains a provision which expressly sets out the *ius praeivium* rule. Section 35(3) of this Act provides that every accused has a right to a fair trial and paragraph (l) of this sub-section provides that this right to a fair trial includes the right not to be convicted of an offence in respect of an act or omission that was not an offence under either national or international law at the time it was committed or omitted. This section forms part of chapter 2 of the Constitution, which contains the Bill of Rights. This Bill applies to all law, and binds the legislature, the executive, the judiciary and all organs of state (s 8(l)). This means that any legislation or law that violates the Bill of Rights, may be declared null and void by a court.

In *Masiya supra*, the Constitutional Court had to decide on the constitutional validity of the common-law definition of rape to the extent that it excludes anal penetration of a penis into the anus of a female. (The common-law definition of rape, at that stage, was the unlawful, intentional penetration of the male sexual organ — the penis — into the vagina of a woman.) The court held that the common-law definition of rape be extended to include acts of non-consensual penetration of a penis into the anus of a female.

The accused contended that the extended definition should not apply to him because it would constitute a violation of his rights in terms of section 35(3)(l) of the Constitution. Keeping in mind the *ius praeivium* principle, the Constitutional Court ruled that the extended definition of the crime of rape be applied prospectively only. In other words, because the field of application of the crime was extended only **after** the accused had performed the prohibited act (ie, non-consensual penetration of the anus of a female) he could not be convicted of rape, but only of indecent assault.

The *Masiya* decision is discussed in detail in 2.7 below. Once you have read the discussion of the case in 2.7, the facts of the case and the decision of the court will become clear to you.

2.6 CRIMES OUGHT TO BE FORMULATED CLEARLY (*IUS CERTUM*)

Even if the *ius acceptum* and the *ius praeivium* rules (discussed above) are complied with, the principle of legality can still be undermined by the creation of criminal norms which are formulated vaguely or unclearly. If the formulation of a crime is unclear or vague, it is difficult for the subject to understand exactly what is expected of her. At issue here is the *ius certum* rule. (*Certum* means “clear” — the opposite of “vague”.)

An example of a criminal prohibition couched in unacceptably vague language and hailing from Nazi Germany in 1935, is the following: “Any person who commits an act which, according to the fundamental idea behind the penal law, and according to the good sense of the nation, deserves to be punished, shall be punishable.”

The Constitution contains no express provision as regards the *ius certum* rule. However, it is probable that the provisions of section 35(3) (already mentioned above) will be interpreted in such a way that section 35(3) covers the *ius certum* rule as well. Such an interpretation of the section may be based either upon an accused’s right to a fair trial in general, or on the principle that if a criminal norm contained in legislation is vague or uncertain, it cannot be said that the accused’s act or omission amounted to a crime before the court interpreted the provision as one containing a criminal norm.

2.7 PROVISIONS CREATING CRIMES MUST BE INTERPRETED STRICTLY (*IUS STRICTUM*)

The fourth application of the principle of legality is to be found in the *ius strictum* rule. Even if the above-mentioned three aspects of the requirement of legality, that is *ius acceptum*, *ius praeivium* and *ius certum*, are complied with, the general principle can nevertheless be undermined if a court is free to interpret widely the words or concepts contained in the definition of the crime or to extend their application by analogous interpretation. “*Ius strictum*” literally means “strict law”. Freely translated, it means “a legal provision which is interpreted strictly (ie the opposite of ‘widely’)”.

There is a well-known rule in the interpretation of statutes that crime-creating provisions in statutes should be interpreted strictly. **The underlying idea here is not that the Act should be interpreted against the state and in favour of the accused, but only that where doubt exists concerning the interpretation of a criminal provision, the accused should be given the benefit of the doubt.**

The *ius strictum* rule implies further that a court is not authorised to extend a crime’s field of application by means of analogy to the detriment of the accused.

However, in *Masiya supra*, the Constitutional Court held that a High Court may, **in exceptional circumstances**, extend the field of application of a crime in order to **promote the values enshrined in the Constitution**. Note, however, that in this particular case the accused was not prejudiced in that the extended definition was not applied to him. The background of the case was as follows:

X was charged with the crime of rape. At that stage, the common-law definition of rape was the unlawful, intentional sexual intercourse with a woman without her consent. The element of “sexual intercourse” required nothing less than penetration by the male genital organ into the vagina of the woman.

At X’s trial the evidence established that the victim was penetrated anally (ie, in the anus), and not in the vagina, as required for the crime of rape. The state applied that X be convicted of indecent assault (a competent verdict on a charge of rape).

However, the regional magistrate held that the common-law definition of rape, according to which the crime is restricted to penile penetration of the vagina, should be declared unconstitutional and should be amended to include penile penetration of the anus. The regional magistrate accordingly convicted the accused of rape.

In an appeal by the accused the High Court confirmed the decision of the regional magistrate in a judgment reported as *S v Masiya* 2006 (2) SACR 357 (T). The High Court (at par 61) explained that in terms of the existing common-law definition of the crime the non-consensual anal penetration of a girl (or a boy) amounts only to the (lesser) common-law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse is regarded as rape.

The court questioned why the non-consensual sexual penetration of a girl (or a boy) *per anum* be regarded as less injurious, less humiliating and less serious than the non-consensual sexual penetration of a girl *per vaginam*. The court (at par 71) was of the view that the common-law definition of rape is not only archaic but also irrational, and amounts to arbitrary discrimination regarding which kind of sexual penetration is to be regarded as the most serious.

The court was of the opinion that the conviction of rape did not amount to an unjustified violation of the accused’s fair-trial rights (eg, the principle of legality, which in sections 35(3)(l) and 35(3)(n) of the Constitution is guaranteed as one of the rights of the accused), because non-consensual anal intercourse was already a crime, and the accused knew that he was acting unlawfully.

The court (at par 73) argued that it had never been a requirement that an accused, at the time of the commission of an unlawful deed, should know whether it is a common-law or a statutory offence, or what the legal/official terminology is when naming it. The fact that an extension of the definition of the crime of rape had been proposed in the *Criminal Law (Sexual Offences) Amendment Bill* 2003 but that that Bill, at the time of the hearing of the case, had not yet become legislation was a factor that convinced the court (at par 77) that it was the appropriate forum to extend the definition of the crime of rape.

In extending the field of application of the crime of rape the court relied upon certain provisions of the Constitution. These provisions empower the courts to develop the common law in order to give effect to a right in the Bill of Rights. The relevant provisions are sections 8(3) and 39(2) of the Constitution.

Section 8(3)(a) provides that

a court —

- (a) in order to give effect to a right in the Bill of Rights, must apply, **or if necessary develop, the common law to the extent that legislation does not give effect to that right ...** (our emphasis)

Section 39(2) provides that

When interpreting any legislation, **and when developing the common law** or customary law, **every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights** (our emphasis).

X once again appealed against his conviction of rape — this time to the Constitutional Court on the ground of violation of his right to a fair trial. The Constitutional Court (at par 30) emphasised that the legislature is primarily responsible for law reform. However, section 39(2) of the Constitution empowers the courts to develop the common law in any particular case. Where there is a deviation from the spirit, purport and objects of the Bill of Rights (at par 33), the courts are in fact obliged to develop the common law by removing the deviation.

The Constitutional Court found that the common-law definition of rape was not unconstitutional, but that it needed to be adapted to comply with the provisions of the Bill of Rights. The Court focused only on the facts before it and on the particular rights of women that are violated by the restricted definition of the crime of common-law rape, namely the rights of women to **dignity, sexual autonomy and privacy**. The definition of the crime was extended in order to give effect to these rights in respect of women only. Of particular concern to the Court was the protection by these rights of young girls who may not be able to differentiate between the different types of penetration, namely penetration *per anum* or *per vaginam*. The Court (at par 39) remarked that although the consequences of non-consensual anal penetration may differ from those of non-consensual penetration of the vagina, the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter. Inclusion of penetration of the anus of a female by a penis in the definition of rape would therefore increase the extent to which vulnerable and disadvantaged women will be protected by the law. The Court was of the view that this approach would harmonise the common law with the spirit, purport and objects of the Bill of Rights.

The Court (at par 51) held that the **principle of legality** is not a bar to the development of the common law. Such a conclusion would undermine the principles of the Constitution, which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution. However, when developing the common law it is possible to do so **prospectively only**. The Court held that in that particular case, to develop the common law **retrospectively** would offend the constitutional principle of legality. One of the central tenets underlying the understanding of legality is that of **foreseeability**. The Court (at par 52) explained that this meant that the rules of criminal law should be **clear and precise, so that an individual may easily behave in a manner that avoids committing crimes**. In other words, fairness to the accused required that the extended meaning of the crime of rape not apply to him, but only to those cases that arose **after** judgment in the matter had been handed down. X could therefore be convicted of indecent assault only, and not of rape.

ACTIVITY

Assume the South African parliament passes a statute in 2004 which contains the following provision:

“Any person who commits an act which could possibly be prejudicial to sound relations between people, is guilty of a crime. This provision is deemed to have come into operation on 1 January 1995.”

No punishment is specified for the crime. Do you think that this provision complies with the principle of legality?

FEEDBACK

You should have considered whether the provision complies with *all* the rules embodied in the principle of legality. The provision complies with certain aspects of the *ius acceptum* rule. It is clearly stated in the provision that the conduct prohibited is a “crime”. This means that the provision contains a **criminal norm**. (Look at the train-ticket example above if you still do not understand the difference between these norms.) However, the maximum punishment that may be imposed is not prescribed in the provision. Therefore, the *ius acceptum* rule has not been fully complied with

The provision does not comply with the *ius praeivium* rule because the crime is created with retrospective effect. The provision also does not comply with the *ius certum* rule because it is formulated in vague and uncertain terms. The phrase “possibly prejudicial to sound relations” is very wide and does not indicate exactly what type of conduct is prohibited. Does it refer to “sound relations” in the family context, at the workplace, or to relations between people of different cultures or races? The *ius strictum* rule further requires that an act which is ambiguous be interpreted strictly. In practice this means that a court may not give a wide interpretation to the words or concepts contained in the definition of the crime. A provision which is very wide and vague should be interpreted in favour of the accused. It follows that the provision does not comply with the principle of legality.

2.8

THE PRINCIPLE OF LEGALITY IN PUNISHMENT

In the discussion so far, attention has been paid to the application of the principle of legality to the creation, validity, formulation and interpretation of **crimes** or **definitions of crimes**. When dealing with the imposition of punishment, the *ius acceptum*, *ius praeivium*, *ius certum* and *ius strictum* rules are of equal application. The application of the principle of legality to punishment (as opposed to the existence of the crime itself) is often expressed by the maxim *nulla poena sine lege* — no penalty without a statutory provision or legal rules.

- The application of the *ius acceptum* rule to punishment is as follows: in the same way as a court cannot find anyone guilty of a crime unless the conduct is recognised by statutory or common-law as a crime, it cannot impose a punishment unless the punishment, in respect of both its nature and extent, is recognised or prescribed by statutory or common-law.
- The application of the *ius praeivium* rule to punishment is as follows: if the punishment to be imposed for a certain crime is increased, it must not be applied to the detriment of an accused who committed the crime before the punishment was increased.
- The application of the *ius certum* rule to punishment is that the legislature should not express itself vaguely or unclearly when creating and describing punishment.
- The application of the *ius strictum* rule to punishment is that where a provision in an Act, which creates and prescribes a punishment is ambiguous, the court must interpret the provision strictly.

Section 35(3)(n) of the Constitution contains a provision which incorporates the *nulla poena* rule. It provides that the right to a fair trial also includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishments for the offence have been changed between the time that the offence was committed and the time of sentencing.

GLOSSARY

<i>ius acceptum</i>	“the law which we have received”, or the rule that a court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime
<i>ius praeivium</i>	“previous law”, or “the law which already exists”, or the rule that a court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of its commission
<i>ius certum</i>	“clear law”, or the rule that crimes ought not to be formulated vaguely
<i>ius strictum</i>	“strict law”, or the rule that a court must interpret the definition of a crime narrowly rather than broadly
<i>nulla poena sine lege</i>	“no punishment without a legal provision”, or the application of the rules of legality to punishment
<i>ex post facto</i>	after the event

SUMMARY OF THE EFFECT OF THE RULES EMBODIED IN THE PRINCIPLE OF LEGALITY

Principle	Effect on definition of the crime	Effect on punishment
<i>ius acceptum</i>	<ul style="list-style-type: none"> ● conduct should be recognised by law as crime ● courts may not create crimes (s 35(3)(l)) 	<ul style="list-style-type: none"> ● punishment must be recognised and prescribed by law; courts may not create punishment ● no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3)
<i>ius praeivium</i>	<ul style="list-style-type: none"> ● act should be recognised as a crime at the time of its commission (s 35(3)(l)) 	<ul style="list-style-type: none"> ● punishment which is increased after the commission of a crime, may not be imposed to the detriment of an accused (s 35(3)(n))
<i>ius certum</i>	<ul style="list-style-type: none"> ● crimes ought to be defined clearly and not vaguely ● no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3) 	<ul style="list-style-type: none"> ● punishment ought to be defined clearly and not vaguely ● no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3)
<i>ius strictum</i>	<ul style="list-style-type: none"> ● courts should interpret the definitions of crime strictly ● no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3) 	<ul style="list-style-type: none"> ● courts should interpret the description of punishment strictly ● no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3)

TEST YOURSELF

- (1) Define the principle of legality.
- (2) Name the five rules embodied in the principle of legality (refer to the Latin terms).
- (3) Discuss the role of the *ius acceptum* rule in determining whether
 - (a) conduct constitutes a crime in terms of the common law
 - (b) a statutory provision has created a crime
- (4) Distinguish between a legal norm, a criminal norm and a criminal sanction.
- (5) When will a provision in an Act of Parliament creating a crime best comply with the principle of legality?
- (6) Define the *ius praeivium* rule.
- (7) Define the *ius certum* rule.
- (8) Discuss the decision of the Constitutional Court in *Masiya*.
- (9) What does the *ius strictum* rule mean?
- (10) Discuss the principle of legality in punishment.

STUDY UNIT 3

The Act



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the legal meaning of the word "act" as used in criminal law by recognising conduct which might not qualify as an act and by applying appropriate criteria to decide whether or not such conduct qualifies as such

- demonstrate your understanding of the defence of impossibility by recognising the potential applicability of the defence of impossibility in a given set of facts and by applying appropriate criteria to reach a conclusion

3.1 BACKGROUND

In study unit 1 it was stated that the four cardinal requirements of liability for a crime are: (1) an act, (2) compliance with the definitional elements, (3) unlawfulness and (4) culpability.

In this study unit we shall discuss the first of these requirements, and related topics. In legal literature the requirement of an act which corresponds with the definition of the proscription is often referred to by the technical expression *actus reus*.

3.2 INTRODUCTION

Once it is clear that the type of crime with which X is charged is recognised in our law (in other words once it is clear that the principle of legality has been complied with), the first requirement for determining criminal liability is the following: there must be some *conduct* on the part of X. By “conduct” is understood an *act* or *omission*. “Act” is sometimes referred to as “positive conduct” or “commission” (or its Latin equivalent *commissio*) and an “omission” (or its Latin equivalent *omissio*) is sometimes referred to as “negative conduct” or “failure to act”.

On the requirement of an act in general, see *Criminal Law* 51–58; *Case Book* 27–35.

3.3 THE ACT

3.3.1 “Conduct”, “act” and “omission”

From a strictly technical point of view the term “act” does not include an “omission”. An “act” is rather the exact opposite of an “omission”. No general concept embraces them both. The two differ from each other like night and day, because to do something and not to do something are exact opposites. However, one may use the word “conduct” to refer to both of them.

To be completely correct technically, one would therefore always have to speak of “an act or an omission” or of “an act or a failure to act” when referring to this first basic element of liability. Since such expressions are cumbersome, and since **the punishment of omissions is more the exception than the rule**, writers on criminal law have become accustomed to using the word “act” in a wide sense as referring to both an act and an omission — in other words, as a synonym for “conduct”. Normally this use of the word “act” in a non-technical, non-literal sense does not lead to confusion. From the context of the statement the reader would normally be able to make out whether the writer uses the word “act” loosely as a term referring to both an act or omission, or whether it is used in the strict, technical sense of “active conduct”.

In this study guide the word “act” will mostly be used in its wide, non-literal sense (in other words as referring to both a commission and an omission). This is the abbreviated way of referring to this basic element of criminal liability.

3.3.2 *Thoughts not punishable*

Merely thinking of doing something, or even a decision to do it, is not punishable. Before there can be any question of criminal liability, X must have started converting his thoughts into actions. This does not mean that only the completed crime, with all the harm already done, is punishable. As will be seen, an attempt to commit a crime is also punishable, but even then some act is required which goes beyond a mere idea or a decision to do something. Even uttering words may be sufficient to constitute a crime, as is evident from the fact that incitement and conspiracy are punishable.

3.3.3 *Act must be a human act or omission*

The act must be a **human** act; in other words, the perpetrator of the act must be a human being. In ancient societies and during the Middle Ages, animals and even inanimate objects, such as beams which fell on people's heads, were sometimes "tried" and "punished", but this cannot happen today in the South African (or any other modern) legal system. (For an example of the punishment of animals, consult Exodus 21, verse 28.) **A human being can, however, be punished if he commits a crime through the agency of an animal, for example where he urges his dog to bite someone** (*Eustace* 1948 (3) SA 859 (T); *Fernandez* 1966 (2) SA 259 (A)).

3.3.4 *Act or conduct must be voluntary*

(*Criminal Law* 54–58; *Case Book* 27–35)

3.3.4.1 General

An act or an omission is only punishable if it is voluntary.

The conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.

If conduct cannot be controlled by the will, it is involuntary, such as, for example, when a sleep-walker tramples on somebody, or an epileptic swings his hand while having an epileptic fit and hits someone in the face. If X's conduct is involuntary, it means that X is not the "author" of the act or omission; it was then not X who committed an act, but rather something which **happened to X**.

The concept of a voluntary act should not be confused with the concept of a willed act. To determine whether there was an act in the criminal-law sense of the word, the question is merely whether the act was voluntary. It need not be a willed act as well. Conduct which is not willed, such as acts which a person commits negligently, may therefore also be punishable. This does not mean that a person's will has no significance in criminal law; whether he directed his will towards a certain end is indeed of the greatest importance, but this is taken into consideration only when determining whether the requirement of culpability (and more particularly culpability in the form of intention) has been complied with.

From what has been said above, you will note that the concept of an "act" has a different, and more technical, meaning for a lawyer than for a layman. The layman may also regard the muscular contractions of a sleep-walker or an epileptic as an "act", but a jurist or lawyer will not take this view, since such contractions do not constitute voluntary conduct.

3.3.4.2 Factors which exclude the voluntariness of the act

The following factors result in the conduct not being regarded as voluntary in the eyes of the law, and therefore not qualifying as acts in the criminal-law sense of the word.

a Absolute force

The voluntary nature of an act may first be excluded by absolute force (*vis absoluta*) (*Hercules* 1954 (3) SA 826 (A) 831 (G)). The following is an example of absolute force:

X is slicing an orange with his pocket-knife. Z, who is much bigger and stronger than X, grabs X's hand which holds the knife, and presses it, with the blade pointing downward, into Y's chest. Y dies of the knife-wound. X, with his weaker physique, would have been unable to defend himself, even if he had tried. X performed no act. It was Z who performed the act.



Involuntary conduct — absolute force. Z, who is much bigger and stronger than X, grabs X's hand in which she happens to hold a knife, and presses it, with the blade pointing downward, into Y's chest, resulting in Y's death. X, who is physically much weaker than Z, is unable to prevent this, even if she tries. Does X commit murder or culpable homicide? No, because there is no voluntary conduct on her part.

This situation must be distinguished from one involving relative force (*vis compulsiva*), where X is indeed in a position to refrain from committing the harmful act, but is confronted with the prospect of suffering some harm or wrong if he does not commit it. The following is an example of relative force:

Z orders X to shoot and kill Y, and threatens to kill X himself if he refuses to comply with the order. If X then shoots Y, there is indeed an act, but X may escape liability on the ground that his conduct was justified by necessity.

(The facts in *Goliath* 1972 (3) SA 1 (A) and *Peterson* 1980 (1) SA 938 (A) were materially similar to those given in the above example of relative force. *Goliath's* case will be discussed below under the ground of justification known as necessity.)

The crux of the difference between absolute and relative force lies in the fact that absolute force excludes X's ability to subject his bodily movements to his will or intellect, whereas this ability is left intact in cases of relative force. Relative force is therefore rather aimed at influencing X to behave in a certain way, although it remains possible for him to behave differently.

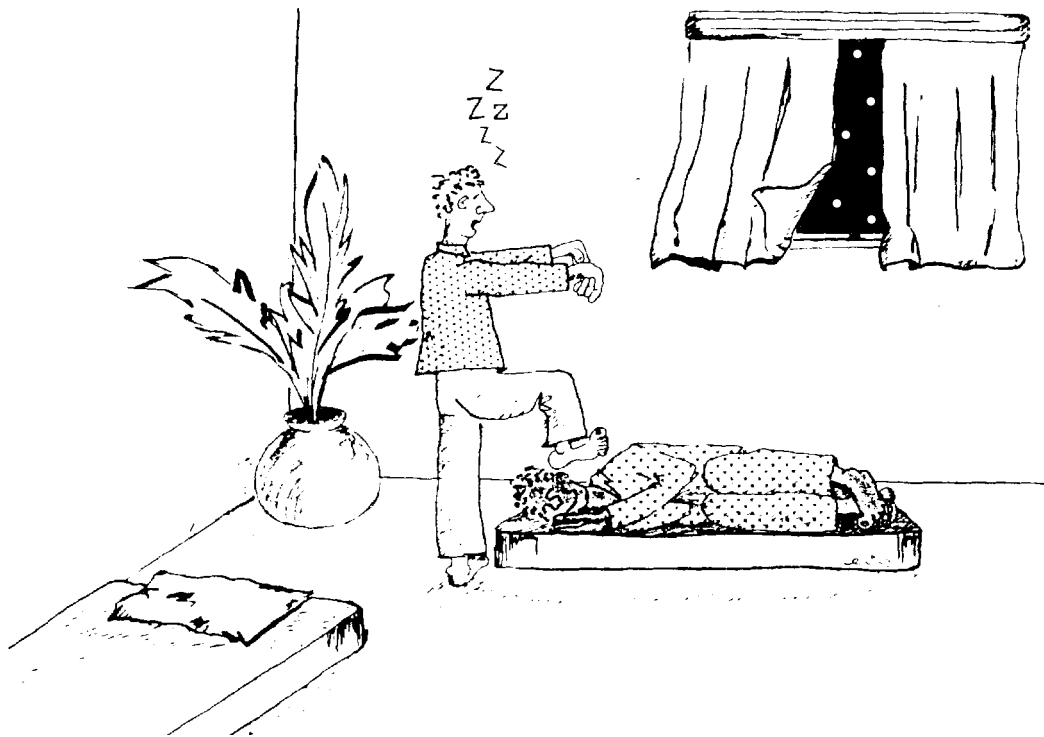
b Natural forces

The voluntary nature of an act may, in the second place, be excluded if a person is propelled by natural forces, thereby causing others damage. If a hurricane blows X through Y's shop-window, X has committed no act for which he may be punished.

c Automatism

i Meaning of "automatism"

The third — and in practice, the most important — instance in which the law does not regard the conduct as voluntary, is where a person behaves in a "mechanical" fashion — as in the following instances: reflex movements such as heart palpitations or a sneezing fit; somnambulism; muscular movements such as an arm movement of a person who is asleep, unconscious or hypnotised, or having a nightmare, an epileptic fit, or the so-called "black-out". These types of behaviour are often referred to as cases of "automatism", since the muscular movements are more reminiscent of the mechanical behaviour of an automaton than of the responsible conduct of a human being whose bodily movements can be controlled by his will.



Involuntary conduct — automatism. While walking in his sleep, X tramples on Y's head. Does X commit assault? No, because there has been no voluntary conduct on his part.

The following are examples (from our case law) of involuntary behaviour in the form of "automatism".



Read the following judgment in the *Case Book: Dhlamini 1955 (1) SA 120 (T)*.

- In *Dhlamini 1955 (1) SA 120 (T)* X, together with a number of other people, was sleeping on the floor of a room. He dreamt that he was being attacked and that he had to defend himself. Y stooped down to pick up a mat near X, when X, not yet awake and still under the influence of the nightmare, stabbed and killed him with a knife. X was not convicted of any crime.

- In *Mkize* 1959 (2) SA 260 (N) X stabbed and killed Y with a knife while he (X) was having an epileptic fit and, according to the court, acted “as a result of blind reflex activity”. He was acquitted on a charge of murder.
- In *Du Plessis* 1950 (1) SA 297 (O) X was charged with driving a motor-car negligently, thereby injuring a pedestrian. He was 72 years old and, according to medical evidence (which the court accepted) at the time of the accident experienced a “mental black-out” as a result of low blood-pressure. He was found not guilty.

ii “Sane” and “insane automatism”

The courts often use the expressions “sane automatism” and “insane automatism”. The meaning of these expressions are as follows:

“**Sane automatism**” refers to cases in which X relies on the defence that there was **no voluntary act** on his part, because he momentarily acted “like an automaton”. This is the defence discussed above. X does not rely on mental illness (“insanity”) as a defence. (We shall discuss this last-mentioned defence in a later study unit.)

“**Insane automatism**” refers to cases in which X relies on the **defence of mental illness** (“insanity”) — a defence which we shall discuss in a later study unit. In other words, he does not rely on the defence of absence of a voluntary act. Here, it is not a matter of the defence of “automatism” discussed above. The expression “insane automatism” is actually misleading, because it erroneously creates the impression that one is dealing with the defence of automatism, whereas it is in fact a completely different defence, namely that of mental illness. (In the latest case law, there are indications that the courts may perhaps be moving away from the use of this misleading expression.)

The difference between “sane” and “insane automatism” is important, for the following two practical reasons:

The **first difference** relates to **onus of proof**.

- If X relies on the defence of “**sane automatism**”, the **onus of proving** that the act was performed voluntarily rests on the **state** (*Trickett* 1973 (3) SA 526 (T) 537).
- If, on the other hand, X raises the defence of “**insane automatism**” (ie, the defence of mental illness), the onus of proving his mental illness **rests upon X**, and not the state. (This will become clearer in the discussion below of the defence of mental illness.)

The **second difference** relates to the eventual **outcome of the case**, namely whether or not X will leave the court as a free person.

- A successful defence of “**sane automatism**” results in **X leaving the court a free person**, as he is deemed not to have acted.
- A successful defence of “**insane automatism**”, on the other hand, results in the court dealing with X in accordance with the relevant provisions of the Criminal Procedure Act dealing with the orders which a court can make after finding that X was mentally ill at the time of the commission of the crime. Although there are different types of orders which a court may make, in practice it mostly makes an order that X be detained in a psychiatric hospital for a certain period, which results in X **losing his freedom** — in other words, he does not leave the court a free person.

It may sometimes be very difficult to decide whether, in a given case, one is

dealing with “sane” or “insane” automatism. If this question arises during a trial, a court will have to hear expert evidence and decide the issue on the basis of such evidence.



Read the following judgment in the *Case Book: Henry 1999 (1) SACR 13 (SCA)*.

iii Defence does not succeed easily

It would be incorrect to infer from the above discussion that it is easy for an accused to succeed with a defence of automatism. Rather the opposite is the case: the attitude of a court towards a defence of automatism is usually one of great circumspection. An accused who has no other defence is likely to resort to this one in a last attempt to try and escape the consequences of his action. Even where “sane automatism” is pleaded, and the onus is on the state, X must provide a basis for his defence, by for example calling medical or other expert evidence which may create a doubt whether the act was voluntary (*Trickett 1973 (3) SA 526 (T) 537* and *Henry 1999 (1) SACR 13 (SCA)*).



Read the following decision in the *Case Book: Trickett 1973 (3) SA 526 (T)*.

iv Antecedent liability

Note the following qualification of the rule that muscular or bodily movements performed in a condition of automatism do not result in criminal liability: if X knows that he suffers epileptic fits or that, because of some illness or infirmity he may suffer a “black-out”, but nevertheless proceeds to drive a motor-car, hoping that these conditions will not occur while he is sitting behind the steering wheel, but they nevertheless do occur, he cannot rely on the defence of automatism. In these circumstances he can be held criminally liable for certain crimes which require culpability in the form of negligence, such as negligent driving or culpable homicide. His voluntary act is then performed when he proceeds to drive the car while still conscious. We describe this type of situation as “antecedent liability”.

In *Victor 1943 TPD 77*, for example, X was convicted of negligent driving despite the fact that the accident he had caused had been due to an epileptic fit: evidence revealed that he had already been suffering epileptic fits for the previous thirteen years, and that he had had insufficient reason to believe that he would not again suffer such a fit on that particular day.

ACTIVITY

X, a 62 year old man, works in a mine. His job is to operate the cocopans. These cocopans are used to transport hard rocks and gravel from the bottom of the mine to the surface. One day, while working, he suddenly experiences a black-out. In his state of unconsciousness, he falls on the lever which controls the movement of the cocopans. A cocopan crashes into another worker, Y. Y is killed instantly. X is charged with culpable homicide. The evidence before the court is as follows: X has been suffering from diabetes for the past year. His doctor had warned him that he may lose consciousness at any time if he fails to take his medication as instructed. On that particular day, X had failed to take his medication. The court finds that X had insufficient grounds for assuming that he would not suffer a blackout on that particular day. X's legal representative argues that X cannot be convicted of culpable homicide because, at the time of the commission of the offence, he was not performing a voluntary act. In other words, the defence raised is that of automatism. You are the state prosecutor. What would your response be to this argument?

FEEDBACK

You would rely on the decision in *Victor* 1943 TPD 77, arguing that this is a case of **antecedent** liability. The voluntary act was performed at the stage when X, fully conscious, started operating the cocopans. What the law seeks to punish is the fact that he (X), while in complete command of his bodily movements, commenced his inherently dangerous tasks at the mine without having taken his medication. In so doing, he committed a voluntary act which set in motion a series of events which culminated in the accident.

3.4

OMISSIONS

(*Criminal Law 58–63; Case Book 36–42*)

We have explained above that the word “act”, when used in criminal law, bears a technical meaning in that it can refer to both positive behaviour (*commissio*) and a failure to act positively — that is, an omission (*omissio*). We now proceed to discuss liability for omissions.

3.4.1 Legal duty to act positively

3.4.1.1 General rule



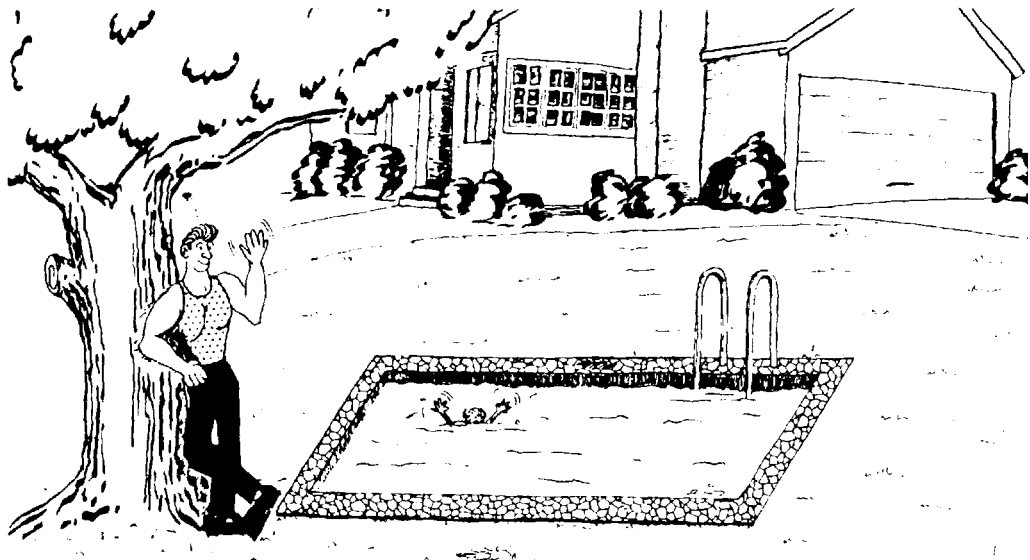
Read the following judgment in the *Case Book: Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

An omission is punishable only if there is a legal duty upon X to act positively. A moral duty is not the same as a legal one. When is there a legal duty to act positively?

The general rule is that **there is a legal duty upon X to act positively if the legal convictions of the community require him to do so**. This was decided in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A–B.

Let us consider the following example.

X, a strong and healthy adult male, is standing next to a shallow pond in which Y, a child, is drowning. X fails to rescue Y. (Assume that X is neither Y’s father or guardian nor a lifesaver on duty.) X could have saved Y’s life merely by stretching



out his arm to Y and pulling him out of the water, but he failed to do this. Can X be held criminally liable for Y's death on the ground of his omission? Although, there has, as far as we are aware, not yet been a reported decision in which our courts have given a specific ruling on the question which arises in this specific set of facts, we submit that in such a set of facts X indeed has a legal duty to act positively, since the legal convictions of the community require X to act positively in these circumstances.

3.4.1.2 Legal duty: specific instances

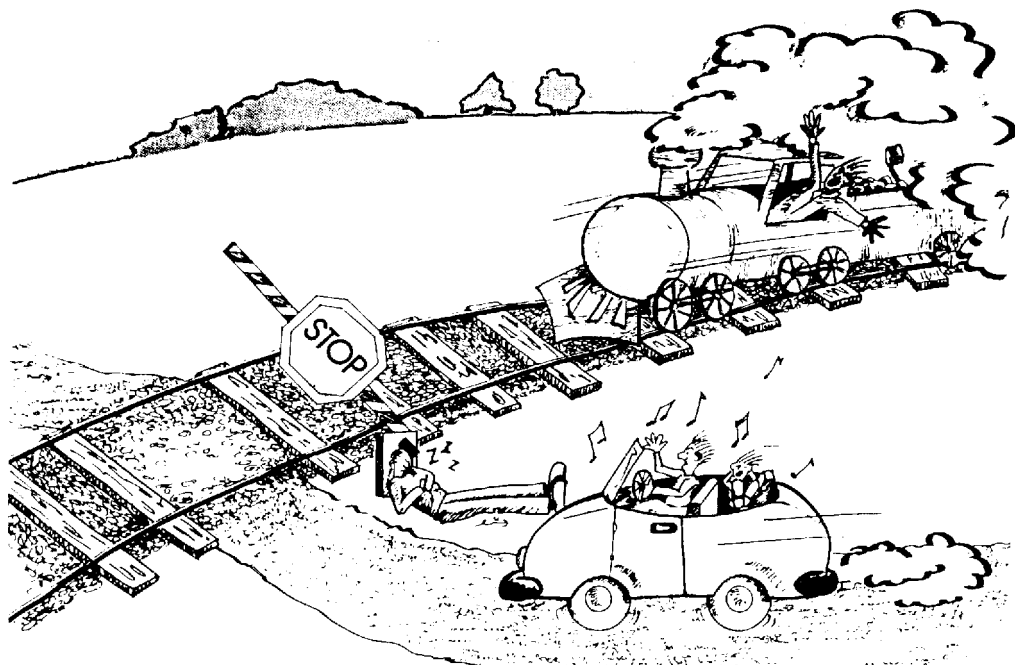
The general rule set out above, in terms of which one should consider the legal convictions of the community, is relatively vague, and therefore not always easy to apply in practice. In the legal practice a number of specific instances are generally recognised in which a legal duty is imposed upon X to act positively. These instances do not embody a principle which is contrary to the general rule set out above. Most of them may, in fact, be regarded merely as specific applications of the general rule. They are instances encountered relatively often in practice and which have crystallised as easily recognisable applications of the general rule set out above that there is a legal duty to act positively if the legal convictions of the community require that there be such a duty.

These specific instances are the following:

- (1) A **statute** may impose a duty on somebody to act positively, for example to complete an annual income-tax return, or not to leave the scene of a car accident, but to render assistance to the injured and to report the accident to the police (s 61 of the National Road Traffic Act 93 of 1996).

Recently, the state has imposed several legal duties on individuals and institutions to report on persons who commit crimes. For example, there is a duty on a person who knows that the offence of corruption has been committed to report such knowledge to the police (section 20 of the Prevention and Combating of Corrupt Activities Act 12 of 2004). The failure by an individual or accountable institution to report knowledge of the commission of certain financial crimes is also made punishable (in terms of various provisions of the Financial Intelligence Centre Act 2001).

- (2) A legal duty may arise by virtue of the provisions of the **common law**.



(Remember: “common law” means those rules of law which are not contained in legislation.) Example: According to the provisions of the common law dealing with the crime of high treason, a duty is imposed on every person who owes allegiance to the Republic and who discovers that an act of high treason is being committed or planned, to reveal this fact as soon as possible to the police. The mere (intentional) omission to do this is equivalent to an act of high treason.

- (3) The duty may arise from an **agreement**. In an English case, *Pitwood* (1902) 19 TLR 37, the facts were that X and a railway concern had agreed that for remuneration, X would close a gate every time a train went over a crossing. On one occasion he omitted to do so and in this way caused an accident, for which he was held liable. (See illustration on previous page.)
- (4) Where a person **accepts responsibility for the control of a dangerous or potentially dangerous object**, a duty arises to control it properly. In *Fernandez* 1966 (2) SA 259 (A) X kept a baboon and failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died. X was convicted of culpable homicide.
- (5) A duty may arise where a person stands in a **protective relationship** to somebody else, for example, a parent or guardian who has a duty to feed a child. In *B* 1994 (2) SACR 237 (E) X was convicted of assault in the following circumstances: She was married and had a child, Y, who was two and a half years old. Her marriage broke up and she began living with another man, Z. Z repeatedly assaulted Y. X was aware of these assaults, but did nothing to stop Z. As Y’s natural mother, X had a legal duty to care for and protect Y and to safeguard his well-being. By omitting to prevent the assaults, she rendered herself guilty of assault upon Y. (Z was also convicted of the assault upon Y.)
- (6) A duty may arise from a **previous positive act**, such as where X lights a fire in an area where there is dry grass, and then walks away without putting out the fire to prevent it from spreading. We sometimes refer to this type of case as an *omissio per commissionem* (an omission following upon a positive act which created the duty to act positively).
- (7) A duty may sometimes arise by virtue of the fact that a person is the incumbent of a certain **office**. It was held in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the person being assaulted. In *Gaba* 1981 (3) SA 745 (O), X was one of a team of policemen who were trying to trace a certain dangerous criminal called “Godfather”. Other members of the investigation team had arrested a suspect and questioned him in X’s presence with a view to ascertaining his identity. X knew that the suspect was in fact “Godfather”, but intentionally refrained from informing his fellow-members of the investigation team accordingly. Because of this omission, he was convicted of attempting to defeat or obstruct the course of justice. Relying on *Minister van Polisie v Ewels* (*supra*), the court held that X had a legal duty to reveal his knowledge, and that this duty was based upon X’s position as a policeman and a member of the investigating team.
- (8) A legal duty may also arise by virtue of an **order of court**. Example: X and Y are granted a divorce, and the court which grants the divorce, orders X to pay maintenance to Y, in order to support her and the children born of the marriage. If X omits to pay the maintenance, he commits a crime.



STUDY HINT

It ought to be reasonably easy to study the **specific instances** in which a person has a legal duty to act positively. Below is a list of eight items. The number eight corresponds to the number of specific instances of a legal duty. After each number you should write the word or expression which describes the specific instance of a

legal duty. In the third column you should write, in telegram style, one or a few words (including, where applicable, the names of cases) describing the application of the relevant legal duty. To assist you we will fill in the particulars of the first three instances. You must, however, fill in the particulars of the remaining five instances yourself.

1	statute	income tax or motor accident
2	common law	high treason — report to police
3	agreement	railway crossing — <i>Pittwood</i>
4		
5		
6		
7		
8		

3.4.1.3 The state's duty to protect citizens from violent crime

The Constitutional Court and the Supreme Court of Appeal in a number of civil cases dealing with delictual liability ruled that there rests a duty on the state, acting through the police, to protect citizens against violent crime. The watershed case was *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC). In that case the Constitutional Court recognised the existence of such a legal duty on the police in terms of the court's powers to develop the common law according to the values, norms and rights of citizens enshrined in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The background to this case was briefly that C was brutally assaulted by a man (X) who had several previous convictions for crimes of violence. This occurred while X was out on bail, awaiting trial on charges of rape and attempted murder in respect of another victim, E. C subsequently claimed damages from the state on the basis that the police and prosecuting authorities had negligently failed to protect her against being assaulted by a dangerous criminal.

In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), the Supreme Court of Appeal recognised the existence of a legal duty resting on the state to protect citizens against violent crimes in the following circumstances: The police had been aware of the fact that X had threatened members of his family that he would kill them. However, the police failed to take the necessary steps to ensure that X be deprived of a licence to possess a firearm. X subsequently shot and injured Y, who instituted a civil claim for damages against the state on the basis of a negligent failure to act positively to protect her. The Supreme Court (at pars 12 and 20) held that while private citizens might "mind their own business" and "remain passive when the constitutional rights of other citizens are under threat" the state has a positive duty to act in protection of fundamental human rights. The majority of the court (at par 20) founded this duty on the concept of "accountability" of government in terms of the provisions of the Constitution, whereas one of the judges, Marais JA, founded the duty on the common-law principles of liability for omissions (namely, the legal convictions of the community).

As pointed out above, these were all civil cases. It is nevertheless important to take note of these cases also for the purpose of criminal liability based upon an omission. The test for determining whether a legal duty to act positively exists is determined

by the legal convictions of the community in both civil and criminal cases. (See *Minister van Polisie v Ewels supra.*) According to Burchell, criminal liability of a state official based on a legal duty to act positively may, in view of the trend established by the Constitutional Court and the Supreme Court of Appeal in these civil cases, in the future be recognised in similar cases. It is at least theoretically possible that a state official (for example, a policeman) who had failed to act positively to protect a person from violent crime may be convicted of, for instance, the crime of assault or even culpable homicide provided that he/she had acted with the required culpability (intention or negligence). (For a further discussion of this topic see Burchell J *Principles of criminal law* 2005 196–207.) One may also argue that certain cases may be brought under the specific instances already recognised in criminal law, namely where there is a **protective relationship** or **control over a dangerous object**. (See again the discussion in 3.4.1.2 above.)

ACTIVITY

Y, a two-year old child, goes to a nursery school. X, the teacher at the nursery school, often does her washing and ironing while looking after the kids. One day, while ironing, the telephone rings. She runs to answer the phone, failing to switch off the hot iron. While playing, Y accidentally pulls the cord of the iron. The iron falls on top of his body. He is severely injured. X is charged with assault. As state prosecutor, you have to prove that the accused had performed an act in the legal sense of the word. Explain how you would go about proving this.

FEEDBACK

You may argue that this is an instance where there was a legal duty upon X to take positive action. More specifically, this duty arose from a **previous positive act**. In law, this is known as an *omissio per commissionem*. See instance (6) listed above. The duty may also arise from the fact that she stood in a protective relationship to Y (instance 5 listed above).

3.4.2 *The defence of impossibility*

(Criminal Law 61–63; Case Book 42–45)

Like active conduct, X's omission must be voluntary in order to result in criminal liability. An omission is voluntary if it is **possible** for X to perform the positive act. After all, the law cannot expect somebody who is lame to come to the aid of a drowning person, or somebody who is bound in chains to extinguish a fire. If X is summoned to appear as a witness at the same time on the same day in both Pretoria and Cape Town, it is impossible for him to be present at both places simultaneously. When charged with contempt of court because of his failure to appear at one of these places, he may plead impossibility as a defence. In short, the objective impossibility of discharging a legal duty is always a defence when the form of conduct with which X is charged is an omission.

The requirements for successfully relying on the defence of impossibility are the following:

(1) The legal provision which is infringed must place a positive duty on X

The defence cannot be raised in cases where a mere prohibition, that is to say a rule which places a "negative duty" on someone, is infringed. The result of this

requirement is that the defence of impossibility can be pleaded only if the conduct which forms the basis of the charge consists in an **omission**. Where there is a simple prohibition, X will merely have to refrain from committing the prohibited act, which he is not compelled to perform. He should therefore not be allowed to plead that it was impossible for him **not** to perform the act.

This defence may, for example, be pleaded successfully if X has failed to comply with a legal provision which placed a positive duty on him to attend a meeting or to report for military duty (*Jetha* 1929 NPD 91; *Mostert* 1915 CPD 226). Note, however, the following case in which the court refused to uphold a plea of impossibility because the law did not impose a positive duty on X to perform the act concerned: In *Canestra* 1951 (2) SA 317 (A), X was charged with contravening a regulation which prohibited the catching of undersized fish. There was evidence that if a net with a larger mesh had been used, the undersized fish would have escaped, but this would also have allowed some of the most important kinds of fish to escape. Impossibility was rejected as a defence, since the regulations did not oblige anyone to pursue the occupation of fishing.

(2) It must be objectively impossible for X to comply with the relevant legal provision

It must have been objectively impossible for X to comply with the relevant legal provision. It must have been impossible for any person in X's position to comply with the law. This implies that it must have been absolutely (and not merely relatively) impossible to comply with the law. If X were imprisoned for a certain period, he could not invoke impossibility as a defence if he were charged with failure to pay tax, if it had been possible for him to arrange for somebody else to pay it on his behalf (*Hoko* 1941 SR 211 212). The criterion to apply in order to determine whether an act is objectively impossible, is whether it is possible according to the convictions of reasonable people in society. The question is therefore not so much whether an act is physically possible or not.

The mere fact that compliance with the law is exceptionally inconvenient for X, or requires a particular effort on his part, does not mean that it is impossible for him to comply with the law (*Leeuw* 1975 (1) SA 439 (0)).



Read the following judgment in the *Case Book*: *Leeuw* 1975 (1) SA 439 (O).

(3) X must not himself be responsible for the situation of impossibility — *Close Settlement Corporation* 1922 AD 194

ACTIVITY

A municipal by-law stipulates that no home-owner may dump his garden refuse in public parks. The conduct prohibited is defined as a crime and is punishable with a maximum fine of R2 000. X is charged with this offence on the grounds that he dumped his garden refuse in a public park. X relies on the defence of impossibility. He alleges that because there are no designated places in the vicinity where he can dump his refuse, it was impossible for him *not* to commit this offence. Discuss the merits of his defence.

FEEDBACK

X's defence has no merit. The defence of impossibility cannot be raised in cases where certain conduct is prohibited by law. The defence can only be pleaded if the conduct which forms the basis of the charge consists in an omission. In other words, if the provision stipulates that "You may not ...", the defence of impossibility cannot be raised. Conversely, if it stipulates that "You must ..." the defence may be raised. Students often have difficulty in understanding this. The basis of the charge against X was not a failure (omission) to do something. A positive act (*commissio*) by X formed the basis of the charge. Also read the leading case in this regard, namely the decision in *Leeuw*.

GLOSSARY

<i>actus reus</i>	an act which corresponds to the definitional elements and which is unlawful
<i>commissio</i>	commission, that is active conduct
<i>omissio</i>	omission, that is passive conduct or a failure to act positively
<i>vis absoluta</i>	absolute compulsion
<i>vis compulsiva</i>	relative compulsion

SUMMARY

- (1) The first general requirement of criminal liability is that there must **be conduct (act or omission)** on the part of X.
- (2) Conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.
- (3) Factors which exclude the voluntary nature of an act are absolute force, natural forces and automatism.
- (4) "Acts" committed in a situation of automatism are committed in a mechanical fashion, such as in the following instances: reflex movements, sleepwalking, muscular movements such as an arm movement while a person is asleep, and when a person suffers an epileptic fit.
- (5) The examples mentioned in (4) are all cases of sane automatism, where a sane person momentarily behaves involuntarily. Sane automatism should be distinguished from insane automatism. In the case of insane automatism the above conditions are the result of mental illness or defect. In cases of insane automatism X is dealt with in accordance with the rules relating to mental illness.
- (6) An omission is only punishable if X is under a legal duty to act positively. The general rule is that there is a legal duty to act positively if the legal convictions of the community require X to do so.
- (7) In practice a number of specific instances are recognised in which there is a legal duty to act positively. There are eight such instances. See the list above under 3.4.1.2.

- (8) An omission is voluntary if it is **possible** for X to perform the positive act. If it is not possible for him, he may rely on the defence of impossibility.
- (9) For the defence of impossibility to be successful
 - (a) the legal provision which is infringed must place a positive duty on X
 - (b) it must be objectively impossible for X to comply with the relevant legal provision
 - (c) X must not himself be the cause of the impossibility

TEST YOURSELF

- (1) Define the concept of an “act”.
- (2) What is the difference between the meaning of the word “act” as this word is used in everyday parlance, and the technical meaning it bears in criminal law?
- (3) Briefly explain the meaning of the requirement that the act must be a human act.
- (4) Fill in the missing words: Conduct is voluntary if X is capable of subjecting to his or
- (5) Distinguish between the concepts “voluntary” and “willed”.
- (6) Name three factors which exclude the voluntary nature of an act.
- (7) Explain the meaning of “absolute force”, as well as the difference between this type of force and relative force.
- (8) Give examples of muscular movements or “events” which take place in a state of automatism.
- (9) Give three examples of automatism from our case law.
- (10) X causes an accident in the course of suffering an epileptic fit. The evidence reveals that he has been suffering epileptic fits for the past thirteen years and that he had insufficient grounds for assuming that he would not suffer one again on the particular day. Could X be convicted of negligent driving? Give reasons for your answer.
- (11) Sort the following phrases under the headings “Sane automatism” and “Insane automatism” and write them in the correct columns.
 - (a) State of automatism is due to mental illness or defect.
 - (b) A sane person momentarily acts involuntarily.
 - (c) Onus is on the state to prove that act was voluntary.
 - (d) Onus is on the accused to prove that he suffered from a mental illness or defect.
 - (e) X is acquitted because he is deemed not to have acted.
 - (f) In terms of section 78(6) of the Criminal Procedure Act 51 of 1977, X is found not guilty, but he loses his freedom in that he is referred to a mental hospital.

Sane automatism

Insane automatism

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- (12) Briefly mention the eight instances in which it is assumed in practice that a person has a legal duty to act positively.
- (13) The law cannot expect of somebody to do the impossible. Name the three requirements for the defence of impossibility to succeed. Refer to examples and the case law.

STUDY UNIT 4

The definitional elements and causation



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- isolate the particular requirements which apply to a certain type of crime (in other words, the “definitional elements” of a specific crime)
- deduce from the definitional elements of a specific crime whether that crime is a materially defined crime or a formally defined crime
- determine whether a certain act is the cause of a certain proscribed result; and more particularly you should be able to determine whether a certain act is
 - a factual cause of a result by applying the *conditio sine qua non* theory
 - a legal cause of a result by applying the various theories of legal causation

4.1

BACKGROUND

In the previous study unit we discussed the first element of criminal liability, namely the requirement of an act. In this study unit, we will discuss the second element of criminal liability. In terms of this element the act or conduct must comply with the definitional elements of the particular crime with which X is charged. We will first consider the meaning of the concept “definitional elements”. Thereupon we will discuss a very important requirement which forms part of the definitional elements of certain (note: not all) crimes, namely the causation requirement.

4.2

THE DEFINITIONAL ELEMENTS

(Criminal Law 71–94)

The definitional elements signify the concise description of the requirements set by the law for liability for a specific type of crime. By “requirements” in this context is meant not the general requirements applying to all crimes (eg voluntary conduct, unlawfulness, criminal capacity and culpability), but the particular requirements applying only to a certain type of crime. The definitional elements of a crime contains the model or formula with the aid of which both an ordinary person and a court may know what particular requirements apply to a certain type of crime. Snyman uses the expression “definition of the proscription” as a synonym for “definitional elements”. We prefer the expression “definitional elements”.

One may also explain the meaning of “definitional elements” as follows: all legal provisions creating crimes may be reduced to the following simple formula: “whoever does ‘X’, commits a crime”. In this formula “X” is nothing other than the definitional elements of the particular crime.

The definitional elements always contain a description of the **kind of act** which is prohibited (eg “possession”, “sexual penetration”, “the making of a declaration” or “the causing of a certain state of affairs”). The word “act” as used in criminal law always means “the act set out in the definitional elements”.

However, the definitional elements is not limited to merely a description of the type of act required. After all, the law does not prohibit possession,

sexual intercourse or the making of a declaration as such. It prohibits the possession of **particular, circumscribed articles** (such as pornographic photographs or dagga), or sexual penetration between people who, **on account of consanguinity, may not marry each other** (incest) or the making of a statement **which is false and made under oath in the course of a judicial process** (perjury). Thus the definitional elements contains not merely a description of the kind of act (possession, sexual penetration) which is prohibited, but also a description of the **circumstances** in which the act must take place, such as, for instance, the particular **way** in which the act must be committed (eg “forcibly”, in robbery), the **characteristics of the person** committing the act (eg “a person who owes allegiance” in high treason), the **nature of the object** in respect of which the act must be committed (eg possession of “dagga” or “movable corporeal property” in theft), sometimes a particular **place** where the act has to be committed (eg parking “on a yellow line”) or a particular **time** when or during which the act has to be committed (eg “on a Sunday”).

In the second module in Criminal Law the most important specific crimes will be discussed. In that part of the study we shall discuss the definitional elements of each separate crime in some detail.



Do not confuse the “definitional elements” with “the definition of the crime”. The definition of the crime contains the definitional elements as well as a reference to the requirements of unlawfulness and culpability. The definitional elements, on the other hand, do not contain a reference to the requirements of unlawfulness and culpability. The definitional elements of murder are “to cause somebody else’s death”. The definition of murder is “the unlawful, intentional causing of somebody else’s death”.

X’s act must be a realisation or fulfilment of the definitional elements. At this stage of the inquiry one has to ascertain whether the requirements set out in the definitional elements relating to, for example, the subject, object, time, place or method of execution of the act have been complied with.

4.3 CAUSATION

(Criminal Law 79–94; Case Book 46–70)

4.3.1 *The difference between formally and materially defined crimes*

Crimes may be divided into two groups according to their definitional elements, namely formally defined crimes and materially defined crimes. In the case of formally defined crimes, the definitional elements proscribe a certain type of conduct (commission or omission) irrespective of what the result of the conduct is. Examples of crimes falling under this category are rape, perjury and the possession of drugs.

Let us consider the example of rape: here the act consists simply in sexual penetration. The result of this act (for example, the question whether or not the woman became pregnant) is, for the purposes of determining liability for the crime, irrelevant (although it may be of importance in determining a fit and proper sentence).

In the case of materially defined crimes, on the other hand, the definitional elements do not proscribe a specific conduct but any conduct which **causes** a

specific condition. Examples of this type of crime are murder, culpable homicide and arson.

Let us consider the example of murder. Here, the act consists in causing a certain condition, namely the death of another person. In principle it does not matter whether the perpetrator (X) stabbed the victim (Y) with a knife, shot him with a revolver or poisoned him. The question is simply whether X's conduct **caused** Y's death, irrespective of what the particular conduct leading thereto was.

This category of crimes is sometimes concisely referred to as "result crimes".

Materially defined crimes are also known as "consequence crimes".

Note that in both formally and materially defined crimes, there must be an act. In materially defined crimes, the act consists of, for example, stabbing a knife into Y's chest (which causes Y's death), or firing a shot at him which causes his death.

4.3.2 *The issue of causation*



When dealing with materially defined crimes, the question which always arises is whether there is a causal link (or nexus) between X's conduct and the prohibited result (for example, Y's death).

Please note the spelling of the word **causal** (as in "causal link"). Many students regularly misspell it, by writing "**casual** link" instead of "**causal** link"! (The word "causal" is derived from "cause".) If you write "casual" instead of "causal" in the examination we will penalise you!

In the vast majority of cases of materially defined crimes which come before the courts, determining whether X's act was the cause of the prohibited condition does not present any problems. If X shoots Y in the head with a revolver or stabs her in the heart with a knife, and Y dies almost immediately, and if nothing unusual (such as a flash of lightning) which might be shown to have occasioned the death occurs, nobody will doubt that X has caused Y's death. However, the course of events might sometimes take a strange turn, in which case it might become difficult to decide whether X's act was the **cause** of Y's death.

Consider, for example, the following sets of facts:

- (1) X, wishing to kill Y, shoots at her, but misses. In an attempt to escape X, Y runs into a building. However, shortly before she runs into the building, Z, who has nothing to do with X, has planted a bomb inside the building because she bears a grudge against the owner of the building. The bomb explodes, killing Y. Is X's act the cause of Y's death? (Shouldn't Z's act rather be regarded as the cause?)
- (2) X assaults Y and breaks her arm. Z, who has witnessed the assault, decides to help Y by taking her to hospital for treatment. She helps Y get onto the back of her truck and drives off. However, Z drives recklessly, and Y becomes so afraid that Z may have an accident that she jumps off the back of the moving truck. In jumping off the truck, she bumps her head against a large stone, as a result of which she dies. Who has caused Y's death X, Z or perhaps Y through her own conduct?
- (3) Following X's assault upon Y, Y dies after the ambulance transporting her to the hospital crashes into a tree, or after she is struck by lightning on the spot where she is lying after the assault, or because she is a manic-depressive person and the assault induces her to commit suicide. In such circumstances can one still allege that X has caused Y's death?

Determining causation in situations such as those described immediately above is one of the most vexed questions in criminal law. However, the courts have developed certain basic principles concerning this matter which they regularly apply. In order to keep the discussion which follows within bounds, the question of causation will be discussed only in the context of the crimes of murder and culpable homicide, since problems in connection with causation in criminal law mostly arise in the context of these crimes.

Seeing that the examples and cases which will be discussed below deal with killing, it is necessary to emphasise right at the outset that “to cause the death” actually means to cause death at the time when, and in the circumstances in which, it took place in the particular case. All people die at some time; therefore, when it is asked whether the act caused the death, the question in fact amounts to whether the act **precipitated** the death. Therefore, the fact that Y suffered from an incurable disease from which she would soon have died in any event, does not afford X a defence if she stabbed and killed Y only a few days (or even hours) before she would, in any event, have died. (See *Makali* 1950 (1) SA 340 (N); *Hartmann* 1975 (3) SA 532 (C) 534.)

4.3.3 *The principles to be applied in determining causation*

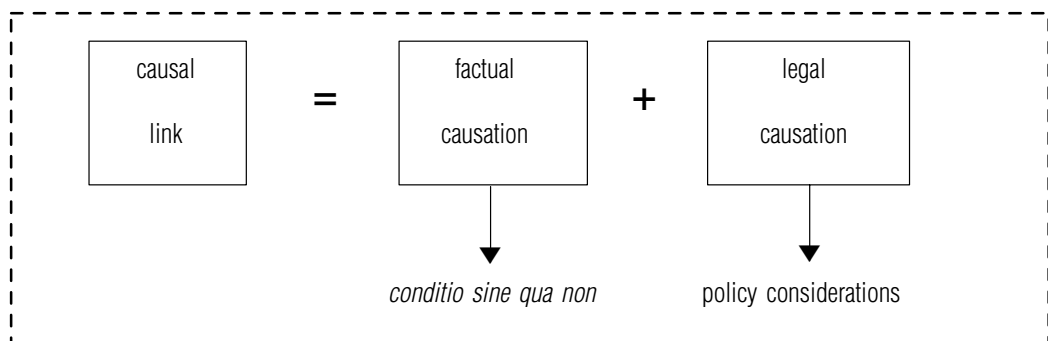
4.3.3.1 Basic principle

The basic principle relating to causation applied by the courts is the following: in order to find that there is a causal link between X’s act and the prohibited condition (hereafter referred to as Y’s death) (that is, in order to find that X’s act caused Y’s death) two requirements must be met: first, it must be clear that X’s act was the **factual** cause of Y’s death, and secondly it must be clear that X’s act was the **legal** cause of Y’s death.

X’s act is the **factual** cause of Y’s death if it is a *conditio sine qua non* for Y’s death, that is, if there is “but-for causation” or a “but-for” link between X’s act and Y’s death. (We shall explain this in a moment.) If this requirement has been met, one may speak of **factual causation**.

X’s act is the **legal** cause of Y’s death if in terms of **policy considerations** it is reasonable and fair that X’s act be deemed the cause of Y’s death. If this requirement has been met, one may speak of legal causation.

In brief, the basic formula may be expressed as follows:



We now proceed to explain the above concepts in more detail.

4.3.3.2 Factual causation — *conditio sine qua non*

X’s act is the factual cause of Y’s death if it is a *conditio sine qua non* for Y’s death. (The word “*conditio*” is pronounced “kon-dee-tee-ho”, not “kon-dee-show”). *Conditio sine qua non* literally means “a condition or antecedent (*conditio*) without

(*sine*) which (*qua*) not (*non*)"; in other words, an antecedent (act or occurrence) without which the prohibited situation would **not** have materialised. A convenient English equivalent of this concept is but-for causation (or more precisely, but-for not causation). For an act or event to be a but-for cause, one must be able to say that **but for** the occurrence of the act or event the prohibited condition would **not** have happened.

Another way of stating the same test (ie the *conditio sine qua non* test) is by asking what would have happened if X's act had not occurred. If it is clear that in such a case the result (Y's death) would not have materialised, then X's act is a factual cause of Y's death.

Definition of *conditio sine qua non* theory:

An act is a *conditio sine qua non* for a situation if the act cannot be thought away without the situation disappearing at the same time.

Therefore, in applying this formula a court must, for a moment, assume that the act in question had not occurred ("think away" the act) and then consider whether the result would nevertheless have occurred.

In order to determine whether you understand the application of this theory, we suggest that you turn back to the discussion under 4.3.2 above and consider whether X's act in the three sets of facts described under that subheading, can be regarded as the *conditio sine qua non*, or factual cause, of Y's death. What is your answer? If your answer is "no", you do not understand the application of this theory. The correct answer is that X's act in all three examples qualify as the factual cause of Y's death! We advise you to make sure that you fully understand the application of this theory before you read further. At a later stage in this study unit, we will once again consider these examples.

That the *conditio sine qua non* test must be applied in order to determine factual causation is clearly borne out by the case law. See, for example, *Makali* 1950 (1) SA 340 (N), *Mokoena* 1979 (1) PH H 13 (A) and *Minister van Polisie v Skosana* 1977 (1) SA 31 (A) 44.

In *Daniëls* 1983 (3) SA 275 (A) the Appeal Court decided that factual causation is determined on the basis of the *conditio sine qua non* theory. This decision (which you have to study in the *Case Book* for examination purposes), will be discussed later in this study unit.

If one applies only the *conditio sine qua non* test (or theory), one could identify a seemingly vast number of events as causes of Y's death. If X stabs Y with a knife and kills her, then it is not only the stabbing which is *conditio sine qua non* for Y's death, but also, for example, the manufacture of the knife, its sharpening, its sale by the shopowner, et cetera. Even negative factors or antecedents will constitute causes of Y's death, for example the fact that Y did not evade X's blow, or the fact that Z neglected to warn Y of X's evil intention. One could even allege that if it were not for X's parents, X would not have existed and therefore the parents are also a cause of Y's death. The same could be said about X's grandparents, and in this vein one could go back all the way to Adam and Eve. (Indeed, some commentators have cynically referred to the *conditio sine qua non* formula as "Adam and Eve causation".)

4.3.3.3 Legal causation — general

It is exactly because of the wide sweep of the *conditio sine qua non* test (ie the large number of factors that may in terms of this test be identified as a cause of Y's

death) that it is necessary to apply a second criterion by which one may limit the wide range of possible causes of Y's death. This second criterion is usually described as the test to determine legal causation. The idea behind this second criterion is the following: When a court is called upon to decide whether X's conduct caused Y's death, the mere fact that X's conduct is a *conditio sine qua non* for Y's death is insufficient as a ground upon which to base a finding of a causal link. Other factors besides X's conduct may equally qualify as *conditiones sine qua non* for Y's death. When searching for the legal cause (or causes) of Y's death, a court eliminates those factors which, although they qualify as factual causes of Y's death, do not qualify as the cause (or causes) of Y's death according to the criteria for legal causation (which will be set out hereunder).

In the legal literature certain specific tests to determine legal causation have evolved, such as those which determine the "proximate cause", the "adequate cause", or whether an event constituted a "*novus actus interveniens*". We shall presently consider these more specific criteria for legal causation. At the outset, however, it should be emphasised that generally the courts are reluctant to choose one of these specific tests as a yardstick to be employed in all cases in which legal causation has to be determined, to the exclusion of all other specific tests. Sometimes they rely on one, and sometimes on another of these tests, according to whether a particular test would, in their opinion, result in an equitable solution. Sometimes they may even base a finding of legal causation on considerations outside these more specific tests. Before elaborating further on this open-ended approach to legal causation by the courts, we first consider the different specific criteria which have been formulated to determine legal causation.

4.3.3.4 Theories of legal causation

The three most important specific tests or theories to determine legal causation, which we shall briefly discuss hereunder, are the following: the individualisation theory, the theory of adequate causation, and the *novus actus interveniens* theory.

a The individualisation theories

Definition of the individualisation theories:

According to the individualisation theories (or tests), one must, among all the conditions or factors which qualify as factual causes of the prohibited situation (Y's death), look for that one which is the **most operative** and regard it as the legal cause of the prohibited situation.

The objection to this approach is that two or more conditions are often operative in equal measure, for example where X bribes Z to commit a murder which Z does while W stands guard in order to warn Z should the police arrive. In a situation such as this, where three different people have acted, one cannot regard the act of one as the **only** cause of death, to the exclusion of the acts of the other two. Today the idea behind this test finds little support and in *Daniëls* 1983 (3) SA 275 (A) the majority of the Appeal Court judges who discussed the question of causation refused to accept that an act can be the legal cause of a situation only if it can be described as the "proximate cause" (see 314C, 331A and 333G of the report).

b The theory of adequate causation

Because of the vagueness and ineffectiveness of the individualisation theory, many writers have refused to attempt to solve problems of legal causation by

looking for the decisive, most effective or proximate condition. Instead they have preferred to base a causal relationship on generalisations which may be made by an ordinary person regarding the relationship between a certain type of event and a certain type of result, and on the contrast between the normal and the abnormal course of events.

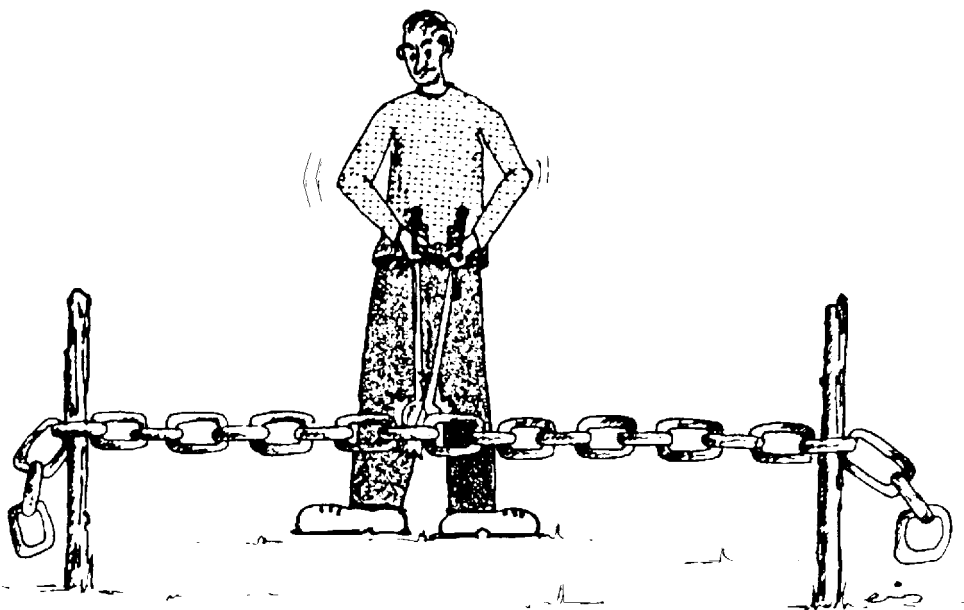
This generalisation theory (a term we use to distinguish it from the individualisation theory) is known as the **theory of adequate causation**.

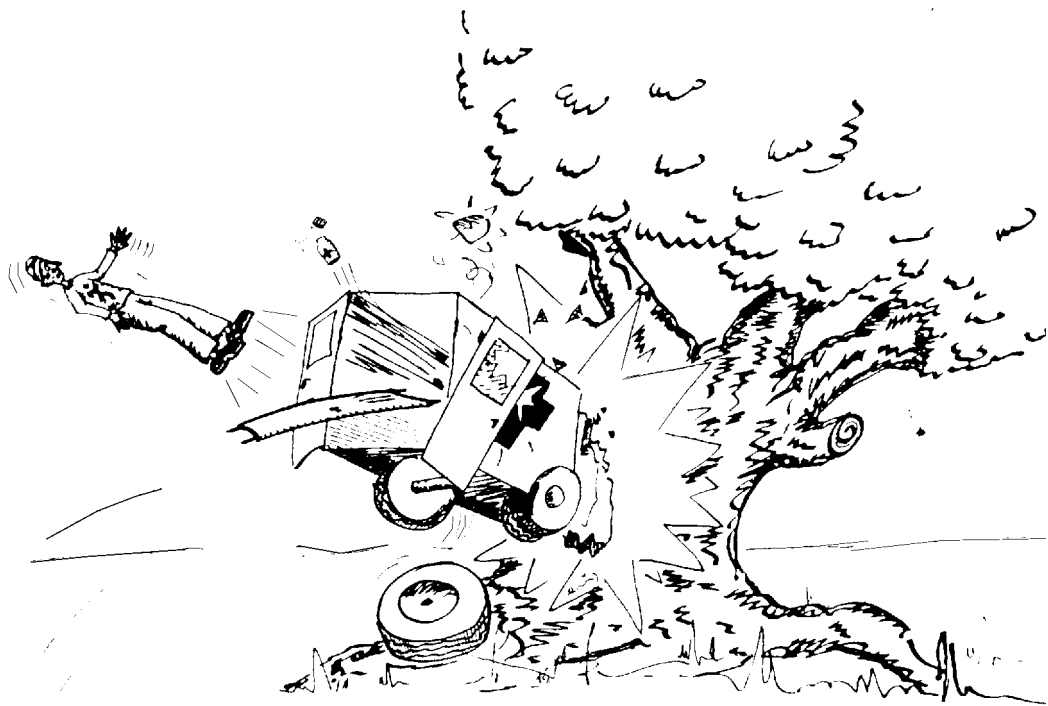
Definition of the theory of adequate causation:

An act is a legal cause of a situation if, according to **human experience**, in the **normal** course of events, the act has the **tendency** to bring about that kind of situation.

It must be typical of such an act to bring about the result in question. To simplify the matter further, one could aver that the act is the legal cause of the situation if it can be said that "that comes of doing such a thing". If this test can be met, it is said that the result stands in an "adequate relationship" to the act. (In *Loubser* 1953 (2) PH H190 (W) the court applied this test.) The existence or absence of an adequate relationship can be explained as follows:

To strike a match is to perform an act which tends to cause a fire, or which in normal circumstances has that potential. If, therefore, X strikes a match and uses the burning match to set a wooden cabin alight, one can aver without difficulty that her act was the cause of the burning down of the cabin. However, the question arises whether her act can be described as the cause of the burning down of the cabin in the following circumstances: All she does is to call a dog. The dog jumps up and in so doing frightens a cat. The frightened cat jumps through a window of the cabin, knocking over a lighted candle which in turn sets the whole cabin alight. If one applies the theory of adequate causation, it is easy to conclude that in this situation X's act was not the legal cause of the burning down of the cabin, because all that X did was to call a dog, and merely calling a dog is not an act which according to human experience in the normal course of events has the tendency to cause a wooden cabin to burn down.





c *Novus actus interveniens*

This expression means “new intervening event”, and is used to indicate that between X’s initial act and the ultimate death of Y, another event which has **broken the chain** of causation has taken place, preventing us from regarding X’s act as the cause of Y’s death.

Examples:

- X inflicts a non-lethal wound to Y’s head. Y is taken to hospital by ambulance. On the way to hospital, owing to the gross negligence of the ambulance driver, the ambulance is involved in an accident in which Y is killed (or, alternatively, Y is fatally struck by lightning right in front of the hospital entrance). (See illustration above.)
- X administers a poison to Y which will slowly kill her. Shortly afterwards Z, who also bears a grudge against Y, and who acts completely independently of X, shoots Y, killing her. It is then Z’s act, and not that of X, which is the cause of Y’s death.

Some authorities regard legal causation as consisting in the absence of a *novus actus interveniens*. Formulated more completely, **according to this approach X’s act is regarded in law as the cause of Y’s death if it is a factual cause of the death and there is no *novus actus interveniens* between X’s act and Y’s death** (see also *S v Counter* 2003 (1) SACR 143 (SCA)).

Unfortunately, our case law contains no precise description of the requirements with which an act must comply to qualify as a *novus actus* (or *nova causa*).

In our view, the following definition of a *novus actus interveniens* is a fair reflection of that which our courts understand under this concept.

An act is a *novus actus interveniens* if it constitutes an **unexpected, abnormal or unusual occurrence**; in other words, an occurrence which, according to general human experience, deviates from the normal course of events, or which cannot be regarded as a probable result of X’s act.

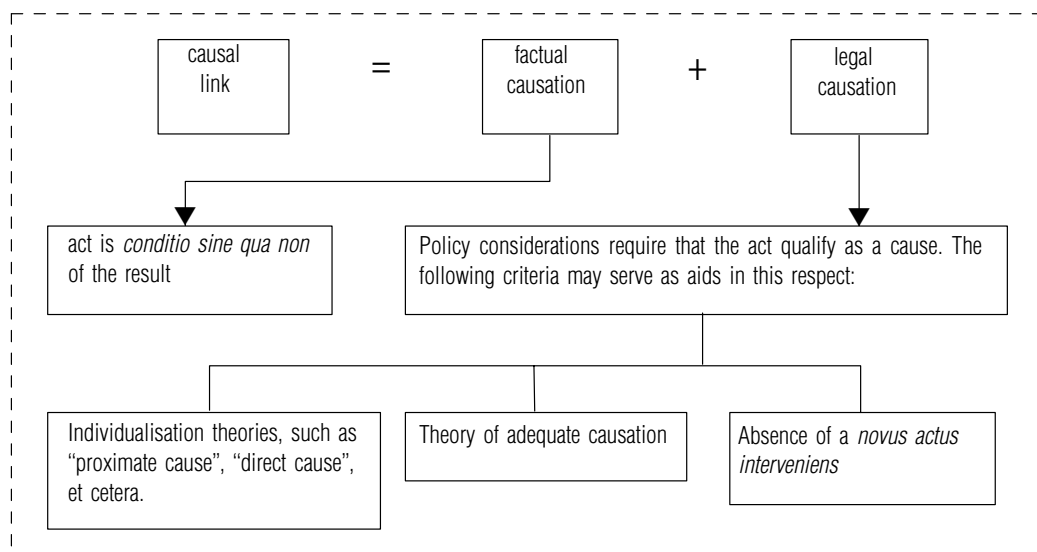
A moment's reflection will serve as a reminder that, viewed thus, the *novus actus interveniens* test differs very slightly from (if it is not synonymous with) the test or theory of adequate causation. This similarity becomes even more apparent if one considers the following well-established rule: an act or an event can never qualify as a *novus actus* if X previously knew or foresaw that it might occur. If X gives Y, who is manic-depressive, a gun, and Y shoots and kills herself with it, but X previously knew or foresaw that Y might kill herself with it, X will not be able to rely on a defence which alleges that Y's act of shooting herself was a *novus actus*.

4.3.4 *The courts' approach to legal causation*

The courts do not single out a specific theory of legal causation as the only correct one to be applied in all circumstances. In the leading cases of *Daniëls* 1983 (3) SA 275 (A) and *Mokgethi* 1990 (1) SA 32 (A) 40–41 the Appellate Division has stated that in deciding whether a condition which is a factual cause of the prohibited situation should also be regarded as the legal cause of that situation, a court must be guided by **policy considerations**.

The policy which the courts adopt is to strive towards a conclusion which would not exceed the limits of what is reasonable, fair and just. In deciding what is a reasonable and fair conclusion, a court may make use of one or more of the specific theories of legal causation (such as "proximate cause" or *novus actus*). In fact, in most cases the courts apply one of these theories. However, in *Mokgethi supra* the Appellate Division held that it is wrong for a court to regard only one specific theory (eg "proximate cause") as the correct one to be applied in every situation, thereby excluding from future consideration all the other specific theories of legal causation. A court may even base a finding of legal causation on considerations outside these specific theories.

Earlier in this study unit, we provided you with a diagram containing the basic formula or premise for determining causation. In the diagram that follows, the overall field of inquiry involved in the determination of causation is set out:



4.3.5 *Own view — theory of adequate causation preferable*

Assuming for a moment that we are not bound by the courts' open-ended approach to legal causation, we submit that of the different specific theories of legal causation, the theory of adequate causation is the best suited to determine legal causation. We have already pointed out the criticism of the individualisation

theories, and in *Daniëls* 1983 (3) SA 275 (A), of the three Judges of Appeal who had to decide the issue of causation, two (Jansen JA and Van Winsen AJA) refused to accept that in our law, criminal liability is necessarily based on “proximate cause” (which is perhaps the best-known of the individualisation theories). We have also pointed out that the *novus actus* criterion does not differ essentially from the theory of adequate causation, both emphasising that a distinction should be drawn between consequences **normally to be expected** from the type of conduct in which X has engaged and consequences which one would **not** normally expect to flow from such conduct.

4.3.6 *Application of principles to stated sets of facts*

Let us now briefly apply the above-mentioned principles to the hypothetical situations described above (under heading 4.3.2).

We first consider the first set of facts. X’s shooting at Y was surely the factual cause of Y’s death, because if one applies the *conditio sine qua non* theory, it is clear that if X did not shoot at Y, Y would not have run into the building where the bomb exploded. The next step is to ascertain whether X’s act was also the legal cause of Y’s death. A court would in all probability decide this question in the negative. The proximate or decisive cause of death was not X’s shooting, but the explosion of the bomb planted by Z. It is also doubtful whether X’s act can be described as the legal cause of Y’s death in terms of the theory of adequate causation, because in the normal course of events, running into a building for safety would not result in being blown up by a bomb. The bomb explosion was an unexpected and unusual event and could therefore also be regarded as a *novus actus interveniens*. Accordingly, X’s act would most likely not be regarded as the legal cause of Y’s death. X could then at most be convicted of attempted murder.

In the second set of facts, X’s act was also a factual cause of Y’s death. A court would most likely hold that Z’s reckless driving deviated from the conduct normally expected of a driver, and that it constituted a *novus actus*, so that X’s assault would not be regarded as the legal cause of Y’s death.

The third set of facts describes a subsequent event which qualifies as a *novus actus*, from which it follows that X’s act would not be regarded as the legal cause of Y’s death.

4.3.7 *Examples from decisions*

4.3.7.1 *Assisted suicide — the Grotjohn decision*

What will the position be if X encourages Y to commit suicide, or provides Y with the means of doing so, and Y indeed commits suicide? In this kind of situation the last act which led to Y’s death was her (Y’s) own conscious and voluntary act. Does this mean that there is therefore no causal link between X’s conduct and Y’s death?

Before 1970, there were a number of inconsistent decisions regarding this question, but the decision of *Grotjohn* 1970 (2) SA 355 (A) brought more clarity to the issue.

In this case X provided his crippled wife with a loaded rifle so that she could shoot and kill herself should she wish to do so; this she then did. X was acquitted. The state appealed to the Appellate Division on a question of law, and the Appellate Division held that the mere fact that the last act causing the victim’s death was the victim’s own, voluntary, non-criminal act did not necessarily mean that the person handing the gun to the victim was not guilty of any crime. It would therefore be incorrect to assume that there can be no causal link in this

kind of situation. If Y's final act is the realisation of the very purpose X had in mind, Y's act can never be regarded as a *novus actus* (Hibbert 1979 (4) SA 717 (D)).



4.3.7.2 The *Daniëls* decision

Read the following decision in the *Case Book: Daniëls* 1983 (3) SA 275 (A).

In *Daniëls* 1983 (3) SA 275 (A), X shot Y in the back with a revolver. Y fell to the ground, but was not killed. **However, he was wounded seriously enough to die should he not receive medical treatment within 30 minutes.** Shortly after Y fell to the ground, Z appeared on the scene and shot Y in the ear. X and Z had not previously agreed to shoot Y — in other words, they acted independently of each other. Z's shot was the immediate cause of Y's death and there was no doubt that there was a causal link between Z's shot and Y's death. The question was whether X also caused Y's death.

Jansen JA and Van Winsen AJA held that X's act was indeed a cause of Y's death, because it was not merely a *conditio sine qua non* of Y's death, but was also a legal cause of his death. Jansen JA applied the *conditio sine qua non* theory as follows: If X had not shot Y in the back and he (Y) had not fallen as a result of these shot wounds, Z would not have had the opportunity to shoot Y in the head, thereby wounding him fatally. X's act was therefore an indispensable condition and factual cause of Y's death.

As far as legal causation is concerned, these two Judges were of the opinion that there were no policy considerations exonerating X from liability for what had resulted in accordance with his intention. Z's act of shooting Y in the ear was not a *novus actus interveniens*. It cannot be accepted that in our law criminal liability is necessarily based on "proximate cause".

However, a third Judge of Appeal who heard the appeal, Trengove JA, held that the shots fired by X at Y's back had not been the cause of Y's death, because of the shot in the head which hit Y thereafter. According to this judge, the head shot was a *novus actus interveniens* since according to his interpretation of the evidence, the person who fired it acted completely independently of X; it was this person's act (and not that of X) that caused Y to die when he did. According to Trengove JA, X was guilty of attempted murder only. (The other two judges of appeal who heard the appeal did not deal with the question of causation since, according to their interpretation of the evidence, X and Z had previously communicated with each other and had the common purpose to murder Y. According to these two judges, Y's death had been caused by the joint conduct of X and Z.)



4.3.7.3 The *Mokgethi* decision

Read the following decision in the *Case Book: Mokgethi* 1990 (1) SA 32 (A).

In *Mokgethi* 1990 (1) SA 32 (A) X shot a bank teller (Y) in the back during a robbery, as a result of which Y became a paraplegic and was confined to a wheelchair. Y's condition improved to such an extent that later he resumed his work at the bank. His doctor instructed him to shift his position in the wheelchair regularly in order to prevent pressure sores from developing on his buttocks. He failed to shift his position often enough, with the result that serious pressure sores and accompanying septicaemia developed, causing his death. He died more or less six months after he had been shot.

The court decided that the wounding of Y had been a *conditio sine qua non* of his death but that it could not be regarded as a legal cause of his death. In other words, there was factual causation but no legal causation. The court decided that in this case none of the ordinary theories of legal causation (absence of a *novus actus interveniens*, the individualisation theories and the theory of adequate causation) could be applied satisfactorily; on a basis of policy considerations the

court had to determine whether a sufficiently close link existed between the act and the result. However, the court added that in applying the more “flexible criterion”, namely policy considerations, the above-mentioned theories of legal causation could have a subsidiary value.

The court applied this rule to the facts and found that Y’s own unreasonable failure had been the immediate cause of his death and that X’s act had been too **remote from the result** to lead to criminal liability. Therefore, X was found guilty of attempted murder only.

4.3.7.4 Negligent medical treatment — the *Tembani* decision

In *S v Tembani* 2007 (1) SACR 355 (SCA), X had been convicted of murder. The evidence showed that he had shot the victim (Y) twice with the intention to kill. One bullet entered her chest and penetrated her right lung, diaphragm and abdomen, perforating the duodenum. Y was admitted to hospital on the night of the shooting. The medical personnel cleaned the wounds and gave her antibiotics. The next day she vomited and complained of abdominal pains. Those were signs that she was critically ill. She was nevertheless left insufficiently attended to in the ward, and four days later contracted an infection of the abdominal lining. Only at that stage was she treated sufficiently. However, it was already too late to save her life. She died 14 days later of septicaemia, resulting from the gunshot wound to the chest and the abdomen.

X appealed against his conviction of murder. The question before the Supreme Court of Appeal was whether an assailant who inflicts a wound that without treatment would be fatal but that is easy to treat can escape liability for the victim’s death because the medical treatment that the victim in fact received was substandard and negligent. The court had no problem finding that X’s act was the factual cause (*conditio sine qua non*) of Y’s death. The court, however, had to determine whether X was also the legal cause of Y’s death. The crucial issue before the court was whether **negligent medical care can be regarded as a new, intervening cause that exempts the original assailant (X) from liability.**

The court (at par 25) held that the **deliberate infliction by X of an intrinsically dangerous wound to Y, from which Y was likely to die without medical intervention, must generally lead to liability by X for the ensuing death of Y. In the court’s view it was irrelevant whether the wound was readily treatable, and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y’s death. The only exception would be if Y had recovered to such an extent at the time of the negligent treatment that the original injury no longer posed a danger to her life.**

According to the court (at par 26) this approach was justified on the following two **policy considerations**: Firstly, an assailant who deliberately inflicted an intrinsically fatal wound consciously embraced the risk that death might ensue. The fact that others might fail, even culpably, to intervene to save the injured person did not, while the wound remained fatal, diminish the moral culpability of the perpetrator. Secondly, in a country where medical resources were not only sparse but also badly distributed it was quite wrong to impute legal liability on the supposition that efficient and reliable medical attention would be accessible to a victim, or to hold that its absence should exculpate an assailant inflicting an intrinsically fatal wound from responsibility for the victim’s death. The court held that in South Africa improper medical treatment was neither abnormal nor extraordinary. Therefore, negligent medical treatment did not constitute a *novus actus interveniens* that exonerated the assailant from liability while the wound was still intrinsically fatal. The conviction of X for murder was therefore upheld.

The court distinguished this case from the *Mokgethi* decision (*supra*), where the

eventual fatal septicaemia was caused not by the original wound, but by the deceased's own unreasonable failure to follow medical instructions.

ACTIVITY

Consider in each of the following sets of facts whether X's act is the cause of Y's death:

- (a) Y feels depressed and threatens to commit suicide. X, who harbours a grudge against Y, hands her a loaded firearm, stating she may shoot and kill herself if she so wishes. Y takes the firearm and shoots and kills herself.
- (b) X, who is very poor, reads a newspaper report about a man who had been caught by a crocodile in a river in Botswana. She persuades her uncle Y, who is very rich and whose heir she is, to go on a safari to Botswana. She also encourages her uncle to take a boat trip on the river, hoping that he will be killed by a crocodile. Y undertakes the safari. He also goes out on a canoe on the river. The canoe is, unexpectedly, overturned by a hippo. Y falls into the water. A crocodile catches and kills him.
- (c) X tries to stab Y, intending to murder her. Y ducks and receives only a minor cut on the arm. However, infection sets in and Y visits a doctor. The doctor gives her an injection and tells her to come back the following week for two more injections. The doctor warns Y that she may die if she fails to come back for the other two injections. Y fails to go back to the doctor, reasoning that her body is strong enough to fight the infection. She dies as a result of the infection.
- (d) X shoots Y in the chest, intending to murder her. The bullet wound is of such a serious nature that Y will die if she does not receive medical treatment. Y is admitted to hospital, but because the nursing staff is on a general strike she receives inadequate medical treatment. The wound becomes infected. Although she is eventually treated for the infection, she dies after a period of two weeks.

FEEDBACK

- (a) You probably recognise these facts as being similar to those in the *Grotjohn* case. In that case the Appellate Division held that the mere fact that the last act was the victim's own voluntary act did not mean that there was no causal relationship between X's act and Y's death. X's act (in the *Grotjohn* case) was a *conditio sine qua non* of Y's death. Y's last act (her suicide) was not a *novus actus interveniens* — an unexpected or unusual event in the circumstances. The court ruled that if X's act was the factual cause of Y's death, an unusual event which took place after X's act but before Y's death cannot break the causal link **if X had previously planned or foreseen the unusual turn of events.**
- (b) X's act can be regarded as a *conditio sine qua non* of Y's death, because if X had not persuaded Y to undertake the safari, Y would not have undertaken the trip. Therefore there was factual causation. However, there was no legal causation. An application of the theory of adequate causation leads to the same conclusion: being killed by a crocodile is not an occurrence which, according to general human experience, is to be expected in the normal course of events during a safari. Merely to *hope* (as X did) that the disastrous event would take place cannot be equated with the situation where X *planned* or *foresaw* the occurrence of the event before it took place. According to the criterion of policy considerations applied in the *Mokgethi* decision, one may also argue that it would not be reasonable and fair to regard X's act as the legal cause of Y's death.

- (c) If you have read the *Mokgethi* case you will immediately recognise these facts, which were used as an illustration by the court in its judgment. It is clear that X's act is the factual cause of Y's death: if X had not stabbed Y, she would never have contracted the infection. In terms of the *Mokgethi* decision one may argue, however, that X's act was not the legal cause of Y's death. Y's failure to go back to the doctor was unreasonable and created such an unnecessary life-threatening situation that, legally speaking, there is not a sufficiently close link between the original stab-wound inflicted by X and the death of Y.
- (d) These facts are similar to those in *Tem bani*. It is clear that X's act is the factual cause of Y's death (a *conditio sine qua non*). According to the court in *Tem bani*, X's act can also be seen to be the legal cause of Y's death. X deliberately inflicted an intrinsically dangerous wound to Y, which without medical intervention would probably cause Y to die. It is irrelevant whether it would have been easy to treat the wound, and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y's death. The only exception would be if at the time of the negligent treatment Y had recovered to such an extent that the original injury no longer posed a danger to her life.

4.3.8 Causation: a summary

The rules to be applied in determining causation may be summarised as follows:

- (1) In order to find that there is a causal link between X's act and Y's death, X's act must first be the **factual** cause and secondly, the **legal** cause of Y's death.
- (2) X's act is the factual cause of Y's death if it is a *conditio sine qua non* of Y's death, that is, if X's act cannot be thought away without Y's death (the prohibited result) disappearing at the same time.
- (3) X's act is the legal cause of Y's death if a court is of the view that there are **policy considerations** for regarding X's act as the cause of Y's death. By "policy considerations" is meant considerations which would ensure that it would be **reasonable and fair** to regard X's act as the cause of Y's death.
- (4) In order to find that it would be reasonable and fair to regard X's act as the cause of Y's death, a court may invoke the aid of one or more specific theories of legal causation. These theories are the individualisation theories (eg "proximate cause"), the theory of adequate causation and the *novus actus interveniens* theory. These theories are merely aids in deciding whether there is legal causation. The courts do not deem one of these theories to be the only correct one which has to be applied in every situation. A court may even base a finding of legal causation on considerations outside these specific theories.

GLOSSARY

<i>conditio sine qua non</i>	literally "condition without which not", in practice an "indispensable prerequisite"
<i>novus actus interveniens</i>	a new intervening event

TEST YOURSELF

- (1) Explain the meaning of the term “definitional elements of the crime”.
- (2) Distinguish between materially and formally defined crimes and indicate in which of these two groups of crimes the crime of possession of dagga should be categorised.
- (3) Discuss the criterion which our courts apply to determine factual causation.
- (4) Explain what you understand by the concept “legal causation”.
- (5) Define and give a critical evaluation of the theory of adequate causation.
- (6) Define and discuss with reference to decided cases the theory of *novus actus interveniens*.
- (7) Discuss the decision of the Appeal Court in the *Daniëls* case.
- (8) Discuss the decision of the Appeal Court in the *Mokgethi* case.
- (9) Discuss the decision of the Appeal Court in *Tembani*.
- (10) Give a summary of the rules which our courts apply in order to determine causation.
- (11) Can X, if she assists Y to commit suicide and is subsequently charged with the murder of Y, succeed with the defence that there was no causal link between her conduct and Y’s death?

STUDY UNIT 5

Unlawfulness I



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to:

- demonstrate your understanding of the application of the general criterion of unlawfulness (the *boni mores* or legal convictions of society) in solving a dispute about the unlawfulness of a particular act which complies with the definitional elements of a crime but not with the requirements of any recognised ground of justification
- determine whether certain conduct falls within the scope of a generally recognised ground of justification with reference to the general criterion of unlawfulness

- apply the rules pertaining to the ground of justification known as private defence to the facts of a particular case

5.1 BACKGROUND

In study unit 1 it was stated that the four cardinal requirements for liability for a crime are: (1) act or conduct; (2) compliance with the definitional elements; (3) unlawfulness and (4) culpability. We have already dealt with the first two of these requirements. In this study unit we begin our discussion of the third requirement, namely unlawfulness. In this study unit we first discuss the meaning of “unlawfulness” and thereafter the first ground of justification, namely private defence.

5.2 THE MEANING OF “UNLAWFULNESS”

(Criminal Law 95–103; Case Book 70–74)

5.2.1 General

The mere fact that there is an act which corresponds to the definitional elements does not mean that the person who performs the act is liable for the particular crime. Therefore satisfying the definitional elements is not the only general requirement for liability. The next step in the determination of liability is to enquire whether the act which complies with the definitional elements is also **unlawful**.

In all probability, a lay person will be of the opinion that once it is clear that the prerequisites for liability set out thus far (namely that the law prohibits certain conduct as criminal and that X had committed an act which falls within the definitional elements) have been complied with, X will be liable for the crime and may be convicted. However, a person trained in the law will realise that there are still two very important further requirements that must be complied with, namely the requirements of **unlawfulness** and of **culpability**.

The reason why, in all probability, a lay person will be unaware of the two last-mentioned requirements, is because they are, as it were, “unwritten” or “invisible”: that which is understood by “unlawfulness” and “culpability” does not (ordinarily) form part of the “letter” or “visible part” of the legal provision in question, that is, the definitional elements. Thus if one consults the definition of a crime in a **statute**, one will normally not even come across the word “unlawful”; neither can one necessarily expect to find words by which the culpability requirement is expressed, such as “intentional” or “negligent”. Nevertheless a court will never convict anybody of a crime unless it is convinced that the act which complies with the definitional elements is also unlawful and accompanied by culpability — in other words, that the so-called “unwritten” or “invisible” requirements have also been complied with.

5.2.2 *Acts that comply with the definitional elements are not necessarily unlawful — examples*

An act which complies with the definitional elements is not necessarily unlawful. This will immediately become clear if one considers the following examples:

- (1) In respect of murder the definitional elements read: “the killing of another human being”. Nevertheless a person is not guilty if he kills somebody in self-defence; his act is then not unlawful.
- (2) X inserts a knife into Y’s body. Although his act may satisfy the definitional

elements of assault, it is not unlawful if X is a medical doctor who is performing an operation on Y with Y's permission, in order to cure him of an ailment.

- (3) X exceeds the speed limit while driving his motor car. His conduct satisfies the definitional elements of the crime of exceeding the speed limit. However, if he does so in order to get his gravely ill child to hospital for emergency treatment his conduct is not unlawful (*Pretorius* 1975 (2) SA 85 (SWA)).

There are many other examples of conduct which satisfies the definitional elements, but is nevertheless not unlawful. It is a very familiar phenomenon that an act which ostensibly falls within the letter of the law (in other words which corresponds to the definitional elements) proves upon closer scrutiny not to be contrary to the law, as the examples above illustrate. In these cases the law tolerates the violation of the legal norm.

5.2.3 *Content of unlawfulness*

When is conduct which corresponds to the definitional elements not unlawful? In other words, what precisely is meant by "unlawful" and what determines whether an act is unlawful?

(1) **Grounds of justification**

There are a number of cases or situations, well-known in daily practice, where an act which corresponds to the definitional elements is, nevertheless, not regarded as unlawful. Unlawfulness is excluded because of the presence of **grounds of justification**. Some well-known grounds of justification are private defence (which includes self-defence), necessity, consent, official capacity, and parents' right of chastisement.

The grounds of justification will subsequently be discussed one by one. At this point it is tempting simply to define unlawfulness as "the absence of a ground of justification". However, such a purely negative definition of unlawfulness is not acceptable, for two reasons:

- (a) All jurists agree that there is no limited number (*numerus clausus*) of grounds of justification. If this were so, how would one determine the lawfulness or unlawfulness of conduct which does not fall within the ambit of one of the familiar grounds of justification?
- (b) It should be remembered that each ground of justification has its limits. Where an act exceeds these limits, it is unlawful. What is the criterion for determining the limits of the grounds of justification?

The answer to this question is found directly below under the next heading.

(2) **Legal convictions of society**

Opinions differ on the material content of the concept of unlawfulness. We do not intend discussing the philosophical arguments underlying the differences of opinion. The current approach (with which we agree) is the following:

Conduct is unlawful if it conflicts with the *boni mores* (literally "good morals") or legal convictions of society.

(*Fourie* 2001 (2) SACR 674 (C) 678). The law must continually strike a balance between the conflicting interests of individuals, or between the conflicting interests of society and the individual. If certain conduct is branded unlawful by the law, this means that according to the legal convictions (or *boni mores*) of society certain interests or values protected by the law (such as life, property or

dignity) are regarded as more important than others (*Clark v Hurst* 1992 (4) SA 630 (D) 652–653). The contents of the Bill of Rights in chapter 2 of the Constitution must obviously play an important role in deciding whether conduct is in conflict with public policy or the community's perception of justice. The values mentioned in section 1 of the Constitution, namely "human dignity, the achievement of equality and the advancement of human rights and freedoms" are also of crucial importance in deciding this issue.

In order to determine whether conduct is unlawful, one must therefore enquire whether the conduct concerned conflicts with the boni mores or legal convictions of society. The grounds of justification must be seen as practical aids in the determination of unlawfulness. They merely represent those situations encountered most often in practice, which have therefore come to be known as easily-recognisable grounds for the exclusion of unlawfulness. They do **not** cover the entire subject-field of this discussion, namely of the demarcation of lawful and unlawful conduct.



In *Fourie* 2001 (2) SACR 674 (C), the facts were the following: X is a regional-court magistrate resident in George. He has to preside at the sessions of the regional court in Knysna. The court's session commences at 9:00. Because of certain circumstances, he leaves George for Knysna in his motor car somewhat late on that particular day. On the road between George and Knysna he is in a hurry to get to Knysna as soon as possible, and is caught in a speed trap, which shows that he exceeded the speed limit of 80 km/h which applied to that part of the road. On a charge of exceeding the speed limit, he pleads not guilty. His defence is that, although he exceeded the speed limit, his act was not unlawful. He argued that although not one of the recognised grounds of justification, such as private defence, was applicable to the case, his act should nevertheless be regarded as lawful on the following ground: the act was not in conflict with the legal convictions of the community, because by merely striving to arrive at the court timeously he drove his car with the exclusive aim of promoting the interests of the administration of justice. He did not seek to promote his own private interests, but those of the state, and more particularly those of the administration of justice.

The court dismissed this defence. If this defence were valid, it would open the floodgates to large-scale unpunishable contraventions of the speed limits on our roads. Many people would then be entitled to allege that, since they would otherwise be late for an appointment in connection with a service they render to the state, they are allowed to contravene the speed limit. In the course of the judgment, the court confirmed the principle set out above that the enquiry into unlawfulness is preceded by an inquiry into whether the act complied with the definitional elements, and also that the test to determine unlawfulness is the *boni mores* or legal convictions of the community.

From what has been said above it is clear that one has to distinguish between

- (1) an act which complies with the definitional elements, and
- (2) an act which is unlawful



The act described in (1) is not necessarily unlawful. It is only "provisionally" unlawful. Students often confuse the two concepts. One of the reasons for the confusion is that for the layman the word "unlawful" probably only means that the act is an infringement of the "letter" of the legal provision in question (ie the definitional elements). You may overcome this possible confusion by always using the expression "without justification" as a synonym for "unlawful": an act complying with the definitional elements is unlawful only if it cannot be justified.

5.2.4 *Unlawfulness distinguished from culpability*

Unlawfulness is usually determined without reference to X's state of mind. Whether he thought that his conduct was lawful or unlawful is irrelevant. What



he subjectively imagined to be the case comes into the picture only when the presence of **culpability** has to be determined.

We will now proceed to a discussion of the different grounds of justification. The rest of this study unit is devoted to a discussion of the first ground of justification, namely private defence. In the next study unit we will deal with the remaining grounds of justification.

5.3 PRIVATE DEFENCE

(Criminal Law 103–115; Case Book 74–93)

5.3.1 *Definition of private defence*

A person acts in private defence — and his conduct is therefore lawful — if he uses force to repel an unlawful attack which has already commenced, or which immediately threatens his or somebody else's life, bodily integrity, property or other interest that ought to be protected by the law, provided the defensive action is necessary to protect the threatened interest, is directed against the attacker, and is no more harmful than is necessary to ward off the attack.

(Do not feel discouraged if, when reading it for the first time, this definition seems to be complicated, or if you do not immediately understand all the detail it contains. We will explain the detail of this ground of justification below. By the time you come to the end of the discussion of this ground of justification, you ought to understand the whole of the contents of this definition.)

Colloquially this ground of justification is often referred to as “self-defence”, but this description is too narrow, since not only persons who defend themselves, but **also those who defend others can** rely upon this ground of justification. A person acting in private defence acts lawfully, provided his conduct complies with the requirements of private defence and he does not exceed its limits.

For purposes of classification it is convenient to divide the requirements and the most important characteristics of private defence into two groups. The first group comprises those requirements or characteristics with which the attack against which a person acts in private defence, must comply; the second comprises the requirements with which the defence must comply.

In order to assist you in your study, we first summarise the requirements in the following diagram. This is the framework of the knowledge you should have.

Private defence requirements

(1) Requirements of attack

The attack

- (a) must be **unlawful**
- (b) must be **against interests which ought to be protected**
- (c) must be **threatening** but not yet completed

(2) Requirements of defence

The defensive action

- (a) must be directed **against the attacker**
- (b) must be **necessary**

- (c) must stand in a **reasonable relationship to the attack**
- (d) must be taken while the defender is **aware** that he is acting in private defence

5.3.2 *Requirements of the attack*

(1) **The attack must be unlawful**

Private defence against lawful conduct is not possible. For this reason, a person acts unlawfully if he attacks a policeman who is authorised by law to arrest somebody. If the policeman is not authorised by law to perform a particular act, or if he exceeds the limits of his authority, he may lawfully be resisted.

Can X rely on private defence if he kills Y in the course of a pre-arranged duel? In *Jansen 1983 (3) SA 534 (NC)* X and Y decided to “settle their differences” in a knife duel. During the fight Y first stabbed at X, and then X stabbed Y in the heart, killing him. The court held, quite justifiably, that X could not rely on private defence, and convicted him of murder. X’s averting the blow was merely part of the execution of an unlawful attack which he had planned beforehand.

In deciding whether the attack of Y (the aggressor) on X is unlawful, there are **three considerations which should be left out of consideration**. These three considerations, marked (a) to (c) below, are the following:

- (a) The attack **need not be accompanied by culpability**. X can therefore act in private defence even if his act is directed against a non-culpable act by Y. What does this mean?

- (i) As will be explained in the exposition of the culpability requirement below, culpability implies *inter alia* that a person must be endowed with certain minimum mental abilities. If he has these mental abilities, he is said to have **criminal capacity**. Examples of people who lack these mental abilities and who therefore lack criminal capacity are people who are mentally ill (“insane”) and young children.

The requirement for private defence presently under discussion is merely that Y’s attack must be unlawful. Since even people who lack criminal capacity can act unlawfully, **X can successfully rely on private defence even if his defensive act is directed at the conduct of a mentally ill person or a young child** (*K 1956 (3) SA 353 (A)*).

Thus if X is attacked by Y, he may defend himself against Y in private defence even if the evidence brings to light that Y is mentally ill.

- (ii) Another example of a situation in which a person acts unlawfully but without culpability is where a person who does have criminal capacity acts **without intention because of a mistake** on his part.

(Again, the exclusion of intention because of a mistake will be explained later in the discussion of intention.) The following is an example of such a situation:

Y thinks that he is entitled to arrest X. However, he is in fact not entitled by law to do this. If Y tries to arrest X, Y is acting unlawfully and X is entitled to defend himself in private defence against Y. Y’s lack of culpability does not debar X from relying on private defence.

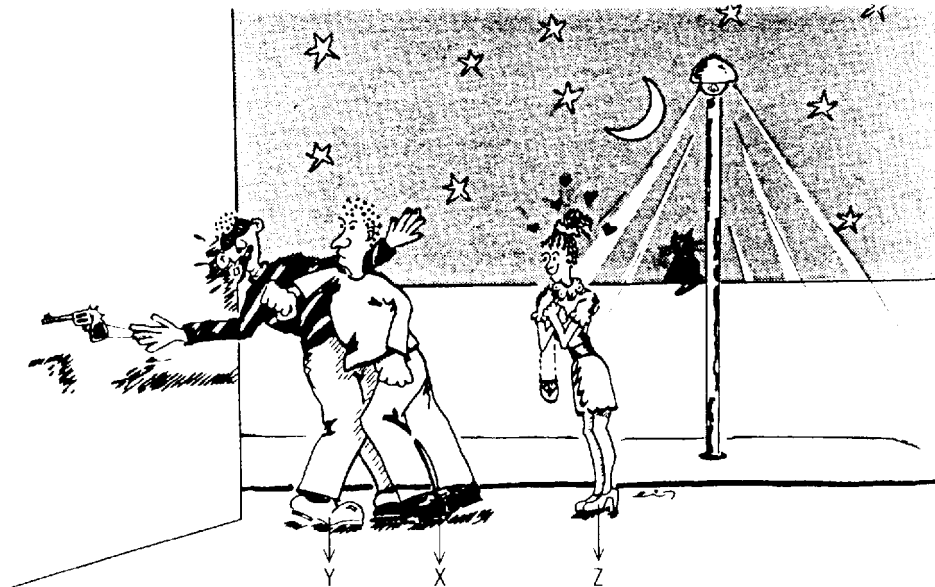
- (iii) Since the law does not address itself to **animals**, animals are not subject to the law and **can therefore not act unlawfully**. For this reason X does not act in private defence if he defends himself or another against an attack by

an animal. In such a situation X may, however, rely on the ground of justification known as necessity (which will be discussed below).

- (b) The attack need not be directed at the defender. X may also act in private defence to protect a third person (Z), even if there is no family or protective relationship between X and Z (*Patel* 1959 (3) SA 121 (A)).



Read the following decision in the *Case Book: Patel* 1959 (3) SA 121 (A).



Private defence. Although the attack must be unlawful, it need not necessarily be directed against the defender. One can act in private defence also in defence of a third party. In this illustration the villain Y initially attacked the lady Z, whereupon the "hero" X appeared on the scene and, in defence of Z, attacked Y, thereby preventing him from continuing with his attack upon Z. As will be pointed out later, the defensive act must be directed against the attacker. This is what happened in this case.

- (c) The attack need not necessarily consist in a positive act (*commissio*), despite the fact that it nearly always does. Although unlikely to occur often, an omission (*omissio*) may also qualify as an "attack", provided the other requirements for private defence are present. An example in this respect is that of the convict who assaults prison warders and escapes when his term of imprisonment has expired but he has not yet been released.

(2) The attack must be directed against interests which, in the eyes of the law, ought to be protected

Private defence is usually invoked in protection of the attacked party's life or physical integrity, but in principle there is no reason why it should be limited to the protection of these interests. Thus the law has recognised that one can also act in private defence

- in protecting property (*Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A))
- in protecting dignity (*Van Vuuren* 1961 (3) SA 305 (EC))
- in preventing unlawful arrest (*Mfuseneni* 1923 NPD 68) and
- in preventing attempted rape (*Mokoena* 1976 (4) SA 162 (0)).



Read the following decision in the *Case Book: Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A).

As far as protection of property is concerned, the most important decision in our

case law regarding private defence is *Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A). The Appeal Court not only held that, in extreme circumstances, a person is entitled to kill another person in defence of property, but also had to apply most of the requirements of private defence referred to above.

We shall not discuss this case in detail, as we expect you to read the judgment in this case yourself. You must know what the interesting **facts** of this case were, what **answers the court** gave to the legal questions posed, and what the **reasons** for these answers were. However, we would like to point out that the common-law rule in *Van Wyk* (ie that one may kill in defence of property) may possibly be challenged on the grounds that it amounts to an infringement of the constitutional rights of a person to life (s 11 of the Constitution) and to freedom and security (s 12). An enquiry as to the constitutionality of this rule will involve a balancing of the rights of the aggressor to his life against the rights of the defender to his property. Legal authors have different points of view on the question which right (that of the aggressor to his life or that of the defender to his property) should prevail. We submit that killing in defence of property would at least be justifiable if the defender, at the same time as defending his property, also protected his life or bodily integrity. (See the facts of *Mogohlwane* 1982 (2) SA 587 (T), discussed in (3) hereunder.)

As far as protection of dignity is concerned, it was held in *Van Vuuren supra* that a person may rely on private defence in order to defend someone's dignity. In this case Y insulted X's wife in public. Thereupon X dealt Y a few blows. The court held that X was not guilty of assault. There was a distinct possibility that Y would have continued insulting X's wife, and X wanted to prevent this.

(3) The attack must be threatening but not yet completed

X cannot attack Y merely because he expects Y to attack him at some time in the future. He can attack Y only if there is an attack or immediate threat of attack by Y against him; in this case, it is, of course, unnecessary that he wait for Y's first blow — he may defend himself by first attacking Y, with the precise object of averting Y's first blow (*Patel* 1959 (3) SA 121 (A)). Private defence is not a means of exercising vengeance; neither is it a form of punishment. For this reason X acts unlawfully if he attacks Y when Y's attack upon him is already something of the past.

When automatic defence mechanisms are set up (such as a shot-gun which will go off during the night if the shop is entered by a thief), there is, at the time when the device is set up, no immediate threat of attack, but the law recognises that to set up such mechanisms which will be triggered the moment the threatened "attack" materialises may constitute valid private defence in certain narrowly-defined circumstances.

Such a case was *Van Wyk supra*, in which X, a shopkeeper whose shop was burgled repeatedly, set a shot-gun to go off and injure prospective burglars in the lower part of the body. One night Y broke into the shop and was fatally wounded. The Appeal Court held that X could rely on private defence.



Read the following decision in the *Case Book: Mogohlwane* 1982 (2) SA 587 (T).

In *Mogohlwane* 1982 (2) SA 587 (T) Y tried to take a paper bag containing clothes, a pair of shoes and some food, from X. X resisted, but Y threatened X with an axe and gained possession of the bag. X immediately ran to his house, some 350 metres away, fetched a table knife, returned to Y and tried to regain his property. When Y again threatened X with the axe, X fatally stabbed Y with his knife, in order to prevent him (Y) from absconding with his bag. The court decided that X acted in private defence: the attack on X was not completed,

because when X ran home and fetched the knife, it was part of one and the same immediate and continued act of resistance. X was a poor man, and the contents of the bag were of value to him. If Y had run off with the bag, X would never have seen it again.

5.3.3 *Requirements of the act of defence*

(1) **It must be directed against the attacker**

If Y attacks X, X cannot direct his act in private defence against Z.

(2) **The defensive act must be necessary**

The defensive act must be necessary in order to protect the interest threatened, in the sense that it must not be possible for the person threatened to ward off the attack in another, less harmful way (*Attwood* 1946 AD 331 340).

If, on the termination of the lease, the obstinate lessee refuses to leave the house, the lessor is not entitled to seize him by the collar and expel him from the premises. The lessor can protect his right and interests by availing himself of the ordinary legal remedies, which involve obtaining an ejectment order from a court, and possibly also the claiming of damages.

The basic concept underlying private defence is that a person is allowed to “take the law into his own hands”, as it were, only if the ordinary legal remedies do not afford him effective protection. He is not allowed to arrogate to himself the functions of a judge and a sheriff.

On the other hand, a threatened person need not acquiesce in an attack upon his person or rights merely because he will be able to claim damages afterwards. The present rule merely means that the threatened person may not take the law into his own hands summarily if the usual legal remedies afford him adequate protection.

It would seem that our courts require an assaulted person to flee if possible rather than kill his assailant unless such an escape would be dangerous. For criticism of this attitude, read the discussion in *Criminal Law* 107–109.

(3) **There must be a reasonable relationship between the attack and the defensive act**

Another way of expressing this requirement is by saying that the act of defence may not be more harmful than necessary to ward off the attack (*Trainor* 2003 (1) SACR 35 (SCA)).

It stands to reason that there ought to be a certain **balance between the attack and the defence**. After all, a person is not entitled to shoot and kill someone who is about to steal his pencil. There should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. If, for example, the attacked party could have overcome the threat by using his fists or by kicking the assailant, he may not use a knife, let alone a firearm.

In order to decide whether there was a reasonable relationship between attack and defence, factors such as the following should be taken into consideration.

- the **relative strength** of the parties (if X is strongly built but Y, the aggressor, is weakly built, X ought normally to be able to overcome Y’s attack without resorting to extreme measures)

- the **sex** of the parties
- the **ages** of the parties
- the **means** they have **at their disposal**
- the **nature of the threat**
- the **value of the interest** threatened
- the **persistence of the attack**

In practice whether this requirement for private defence has been complied with is more a question of fact than of law.

A clearer picture of this requirement emerges if one considers the **elements between which there need not be a proportional relationship**:

- (a) **There need not be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired.** The attacked party may impair an interest of the assailant which **differs in nature** from the interest which he is defending. The following examples illustrate this point:
- If Y threatens to deprive X of a possession belonging to X, X is entitled to assault Y in private defence in order to protect his possession. This means that X may, in order to protect his own **property**, impair an interest of Y which is not of a proprietary nature, namely Y's **physical integrity**. In *Ex parte die Minister van Justisie: in re S van Wyk supra* the appeal court held that X may in extreme circumstances **even kill Y** in order to protect his property. However, see the comment on the constitutionality of this rule under 5.3.2 par (2) above.
 - If Y threatens to **rape** X, X may defend her chastity **even by killing Y** (*Van Wyk supra* 497A–B).

The nature of the interest protected and the interest impaired may therefore be dissimilar. However, this rule must be tempered by the qualification that in cases of extreme disproportion between interests reliance on private defence may be unsuccessful (*Van Wyk supra* 498).

- (b) **There need not be a proportional relationship between the weapons or means used by the attacker and the weapons or means used by the attacked party.** If the person attacked may not defend himself with a different type of weapon from the one used by the attacker, it follows that the attacker has the choice of weapon, and such a rule would obviously be unacceptable.
- (c) **There need not be a precise proportional relationship between the value or extent of the injury inflicted by the attacker and the value or extent of the injury inflicted by the defending party.** One does not, like a referee in a boxing contest, count the exact number of blows struck by the attacked party and then compare with the number of blows struck by the assailant. Nevertheless, although there need not be a precise relationship, there must be an approximate relationship. What constitutes an approximate relationship depends upon the facts of each case.

This requirement for private defence does not mean that the law, by requiring the attacked party to avail himself of the less harmful means, requires of the attacked party to gamble with his life or otherwise expose himself to risks.

ACTIVITY

Assume that X, who is sleeping in his home, is woken up in the middle of the night by Y, an armed burglar, who approaches his room or that of a family member. X shoots at Y in order to protect his family. Y dies as a result of the shot. Can X's conduct be justified on the grounds of private defence?

FEEDBACK

It would be unfair to expect of X first to ask Y to identify himself and state the purpose of his visit in order to decide what, objectively, the appropriate defensive measures would be in the circumstances. It would also be unfair to expect of X first to try to arrest Y and then call the police. Experience tells us that even a moment's hesitation by X in such circumstances might be fatal to X. To deny X the right to shoot in such circumstances is to require him to gamble with his life or with that of the other people in the house.

Even if a court holds that X cannot rely on private defence because objectively there was a less harmful way in which he could have overcome the danger, the court would in most cases refuse to convict X of murder if he shot and killed Y, on the following ground: although X acted unlawfully, he lacked intention because he honestly believed that his life or those of his family members were in danger. This means that there was no awareness of unlawfulness on his part and therefore no intention. He was mistaken about the unlawfulness of his action and therefore lacked intention. This will become clearer later in the guide where, as part of the discussion of intention, we discuss the effect of mistake relating to unlawfulness. However, X may still be found guilty of culpable homicide if the reasonable person would have acted differently in the circumstances. See the discussion in 11.9.3 hereunder.

(4) The attacked person must be aware of the fact that he is acting in private defence

There is no such thing as inadvertent or accidental private defence. Private defence cannot succeed as a defence in cases where it is pure coincidence that the act of defence was in fact directed at an unlawful attack.

For example: X decides to kill Y, whom he dislikes, and shoots and kills him while he is sitting in a bus together with other passengers. Only afterwards is it discovered that Y was an urban terrorist who was on the point of blowing up the bus and all its passengers by means of a hand grenade. If X had not killed Y in time, he (X) himself would have been killed in the explosion. X would, however, not be allowed to rely on private defence in such circumstances. (There is, thus far, no direct authority in our case law dealing with this requirement for private defence.)

5.3.4 *The test for private defence*

The question whether X's acts fell within the limits of private defence must be considered **objectively**, that is in the light of the actual facts, and not according to what X (at the time) took the facts to be. A person cannot rely on private defence if it appears that he was not, in fact, exposed to any danger, but merely thought that he was.

Example: Y goes out one evening to play cards with his friends. On his way home he loses his keys, perhaps because he has had one or two drinks too many. Arriving at his home, he decides not to wake his wife X by knocking at the door, but to climb through an open window. His wife wakes up and in the dark sees a figure climbing through the window. She does not expect it to be her husband,

and takes it to be a burglar. She seizes a pistol and fires at the “burglar” — her husband — killing him. X cannot rely on private defence because, from an objective point of view, she did not find herself in any danger. She merely **thought** she was in danger. One may refer to this type of situation as **putative** private defence. (The word “putative” is derived from the Latin word *putare*, which means “to think”. Thus “putative private defence” means private defence which existed only in X’s thoughts.) This is no actual private defence. However, the fact that X cannot rely on private defence does not mean that she is therefore guilty of murder. She may, as a defence, rely on **absence of culpability, because she was mistaken and because her mistake excluded the intention to murder her husband**. We shall return to this point later.

Whether there actually was danger or an attack warranting the exercise of private defence, must be determined objectively *ex post facto* (after the event). Here the rule is that the court should not act as an armchair critic, but should try to visualise itself in the position of the attacked person at the critical moment, when he possibly had only a few seconds to make a decision which was of vital importance to him.

5.3.5 *Exceeding the limits of private defence*

If X is attacked by Y but in retaliating exceeds the limits of private defence (eg because he causes the attacker more harm or injury than is justified by the attack) he himself becomes an attacker and acts unlawfully. Whether he is then guilty of a crime such as murder, assault or culpable homicide will depend on his **culpability** — in other words, his possible intention or negligence. For this reason the whole question relating to the effect of exceeding the limits of private defence will be discussed later at the end of the discussion of culpability (see study unit 11).

GLOSSARY

boni mores the good morals of society

SUMMARY

- (1) Once it is clear that X has committed an act which complies with the definitional elements, the next step in inquiring into the question of criminal liability is whether X’s act was also unlawful.
- (2) Conduct is unlawful if it is in conflict with the good morals (*boni mores*) or legal convictions of society.
- (3) The grounds of justification are practical aids for determining unlawfulness. They represent situations often encountered in practice which have come to be known as easily-recognisable grounds for the exclusion of unlawfulness.
- (4) Definition of private defence: see definition above
- (5) The requirements with which the attack and the act of defence must comply in order to succeed with a plea of private defence are: see the summary above in 5.3.1.
- (6) In *Ex parte die Minister van Justisie: in re S v Van Wyk* the Appeal Court held that X may, in extreme circumstances, even kill another in private defence to protect his (X’s) property. The constitutionality of this rule is questioned by legal writers.

- (7) Putative private defence occurs when X thinks that he is in danger but in fact he is not in any danger. This is no actual private defence, but may exclude X's culpability.

TEST YOURSELF

- (1) When will conduct be regarded as unlawful?
- (2) Are there a limited number of grounds of justification? Discuss in view of the decision in *Fourie*.
- (3) Is the following statement true or false: "Conduct is unlawful if it accords with the definitional elements."
- (4) Define private defence.
- (5) State the requirements with which the attack as well as the act of defence must comply in order to form the basis of a successful plea of private defence.
- (6) Distinguish putative private defence from actual private defence.
- (7) Discuss the question whether, or in what circumstances, X may act in private defence:
 - (a) against a young child
 - (b) against a policeman
 - (c) against an animal
 - (d) in defence of another person
 - (e) in protection of property
 - (f) as punishment for an attack which is already over
 - (g) against another person, who is not the attacker
 - (h) in a situation where it is possible for him (X) to escape
 - (i) in a manner that is more harmful than is necessary to ward off the attack
 - (j) in a situation where he (X) is unaware that his act of defence is directed against an unlawful attack

STUDY UNIT 6

Unlawfulness II



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to:

- further demonstrate your understanding of unlawfulness by evaluating an accused's conduct so as to decide whether or not it complies with the requirements of the grounds of justification known as necessity, consent, presumed consent, the right of chastisement, obedience to orders, official capacity, and triviality

6.1 BACKGROUND

As pointed out in the previous study unit, the discussion of unlawfulness is spread over two study units. In the previous study unit we discussed the meaning of the concept of unlawfulness and thereafter the first ground of justification, namely private defence.

In this study unit we discuss the remaining grounds of justification, namely necessity, consent, presumed consent, the right of chastisement, obedience to orders, official capacity, and triviality.

6.2 NECESSITY

(Criminal Law 115–123; Case Book 93–105)

6.2.1 *Definition of necessity*

A person acts out of necessity — and her conduct is therefore lawful — if she acts in the protection of her own or somebody else's life, physical integrity, property or other legally recognised interest which is endangered by a threat of harm which has already begun or is immediately threatening and which cannot be averted in any other way; provided that the person who relies on the necessity is not legally compelled to endure the danger, and the interest protected by the act of defence is not out of proportion to the interest threatened by such an act.

Although this definition does not cover every aspect of this ground of justification, it does contain the most important elements.

6.2.2 *Private defence and necessity distinguished*

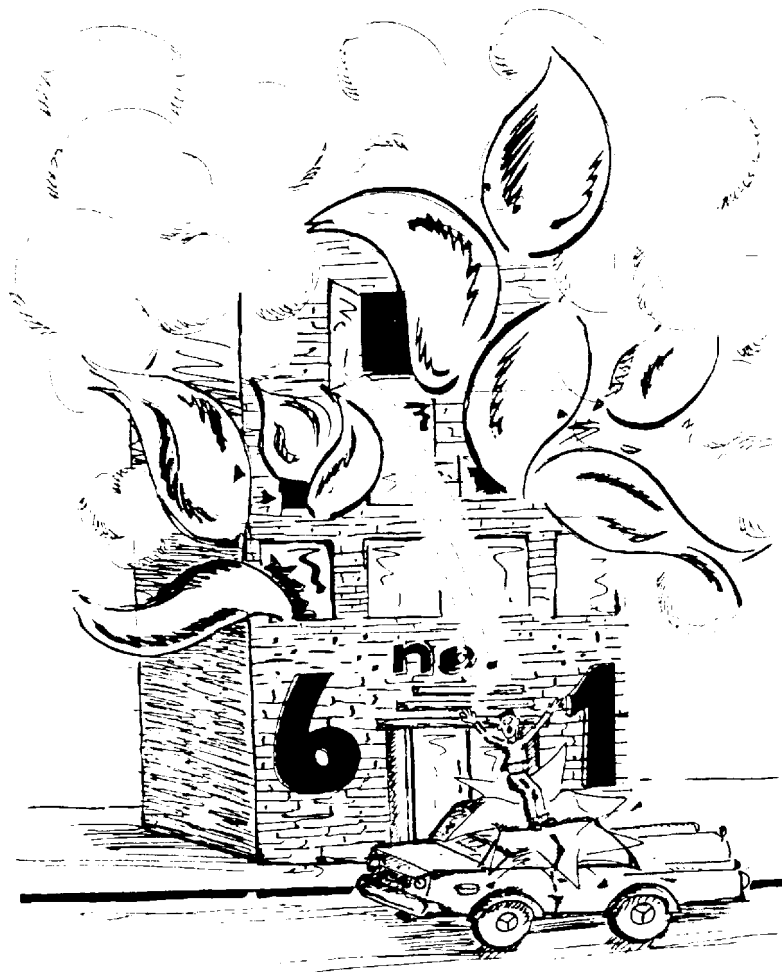
The two grounds of justification known as necessity and private defence are closely related. In both cases the perpetrator (X in the examples which follow) protects interests which are of value to her, such as life, physical integrity and property, against threatening danger. The distinctions between these two grounds of justification are the following:

- (1) the **origin** of the situation of emergency: **Private defence** always stems from an unlawful (and therefore human) attack; **necessity**, on the other hand, may stem either from an unlawful human act, or from chance circumstances, such as natural occurrences.
- (2) the **object** at which the act of defence is directed: **Private defence** is always directed at an unlawful human attack; **necessity** is directed at either the

interests of another innocent third party or merely amounts to a violation of a legal provision.

The following are examples of situations in which X's conduct is justified because she is acting in a situation of necessity:

- (1) While X is in Y's backyard, Z attacks her (X) with a knife. X finds herself unable to ward off the attack, because she (X) is slightly built and unarmed whereas Z is strong and armed with a knife. There is one possible way to escape, and that is to kick a part of the fence (which belongs to Y) to pieces and then run away through the broken fence. This is exactly what X then does. If X is subsequently charged with malicious injury to property in that she broke a fence belonging to Y, she can successfully rely on the defence of necessity. In this example, the emergency situation arose from an unlawful act, but the act of defence is directed not against the attacker, but against the interests of an innocent third party, namely Y.
- (2) The facts of *Goliath* 1972 (3) SA 1 (A) are as follows: Z orders X to kill Y, and threatens to kill X if she does not carry out the order. There are no means of escape for X, and she kills Y. X was found not guilty. This type of situation is known as "compulsion" or "coercion".



Example of necessity. While X finds herself on the third storey of a building, a fire breaks out in the building. In order to save her life, she jumps out of the window, landing on the roof of an expensive German luxury sedan. The roof of the car is severely damaged. X is charged with malicious injury to property in respect of the car. She cannot be convicted, because she can successfully rely on the defence (ground of justification) of necessity. The damage was caused in the course of committing an act to save her life; the fire which led to her jumping out of the building constituted an immediate threat to her life; there was for her no other way of escape out of the building; and the interest which she infringed (namely the car owner's interest not to have his car's roof damaged) was not of more importance than the interest which she sought to protect (namely her own life).

- (3) The ship on which X is a passenger sinks during a gale. X ends up in the ocean, clinging to a piece of driftwood. Another former passenger, Y, clings to the same piece of wood. However, the two of them are too heavy to be kept afloat by the wood. X pushes Y into the ocean in order to save her own life. Here the reason for the emergency was an act of nature and the act of defence was directed against an innocent person.
- (4) The facts in *Pretorius* 1975 (2) SA 85 (SWA) are as follows: X's baby swallows an overdose of Disprin tablets. X rushes the child to the hospital by car for emergency treatment. While driving to the hospital, he exceeds the speed limit. On a charge of exceeding the speed limit he relies successfully on the defence of necessity. Here, strictly speaking, the reason for the situation of emergency was a series of chance circumstances; the act committed out of necessity was directed not against some person's interests, but amounted merely to a violation of a legal provision, namely the prohibition on speeding.

If X acts in a situation of necessity, she acts lawfully.

For a plea of necessity to succeed, it is immaterial whether the situation of emergency is the result of human action (eg coercion) or chance circumstances (the so-called "inevitable evil", such as famine, a flash of lightning, or a flood). Neither does it matter whether X's act by which she endeavours to escape the emergency is directed against the interests of another human being or amounts merely to a violation of a legal provision. All that matters is whether X found herself in a situation of emergency when she acted.

6.2.3 *Restricted field of application*

Private defence can readily be justified on ethical grounds, since there is always an unlawful attack and the attacker simply gets what she deserves. On the other hand, justifying necessity is more difficult. Here X finds herself in a situation where she **must choose between two evils**: she must either suffer personal harm or break the law, and the choice she must make is often a debatable point. It is precisely for this reason that there must be strict compliance with the requirements for necessity before the defence can be successful. The attitude of our courts to the plea of necessity is often one of scepticism, and they also seek to restrict its sphere of application as far as possible (*Mahomed* 1938 AD 30 36; *Damascus* 1965 (4) SA 598 (R) 602).

6.2.4 *Absolute and relative compulsion*

In the case of **absolute compulsion** (*vis absoluta*), X does not commit a voluntary act: for example, Z, who is much stronger than X, grabs X's hand which is holding a knife, and stabs Y. The reason for X's non-liability is then not necessity, but the absence of an act (as this term is understood in law). (Consult the discussion above of the requirements for an act.)

In the case of relative compulsion (*vis compulsiva*) there is indeed a voluntary act on the part of X: Y threatens to kill X if X does not kill Z. In this case, X is free to choose to be killed herself. Only cases of **relative compulsion** may amount to situations of necessity.

6.2.5 *Requirements for the plea of necessity*

Although the requirements for a successful plea of necessity resemble, to some extent, the requirements for a successful plea of private defence, they are not the same in all respects. In order to assist you in your study, we shall begin by summarising the requirements in the following diagram:

Requirements for a plea of necessity

- (1) **legal interest** threatened
- (2) may also **protect another**
- (3) emergency **already begun** but **not yet terminated**
- (4) may rely on necessity **even if personally responsible for emergency**
- (5) **not legally compelled** to endure danger
- (6) **only way** to avert danger
- (7) **conscious** of fact that emergency exists
- (8) **not more harm** caused than necessary

The requirements are the following:

- (1) Some **legal interest** of X, such as her life, physical integrity or property must be threatened. In principle, one should also be able to protect other interests such as dignity, freedom and chastity in a situation of necessity.
- (2) One can also act in a situation of necessity to protect **another's interest**, for example where X protects Z from being attacked by an animal.
- (3) The emergency must **already have begun or be imminent**, but must **not have terminated**, nor be expected in the future only.
- (4) Whether a person can rely on the defence of necessity if she herself is responsible for the emergency, is a debatable question. In our opinion X should not be precluded from successfully raising this defence merely because **she caused the emergency herself**. If she were precluded, this would mean that if, because of X's carelessness, her baby swallowed an overdose of pills, X would not be allowed to exceed the speed limit while rushing the baby to hospital, but would have to resign herself to the child's dying (compare the facts in *Pretorius supra*). The two acts, namely the creation of danger and rescue from it, should be separated. If the first act amounts to a crime X can be punished for it, for example where she sets fire to a house and then has to break out of the house to save her own life.
- (5) If somebody is **legally compelled** to endure the danger, she cannot rely on necessity. Persons such as policemen, soldiers and firemen cannot avert the dangers inherent in the exercise of their profession by infringing the rights of innocent parties. Another aspect of this rule is that a person cannot rely on necessity as a defence if what appears to her to be a threat is in fact lawful (human) conduct. Thus it was held in *Kibi* 1978 (4) SA 173 (EC) that if X is arrested lawfully, he may not damage the police van in which he has been locked up, in order to escape from it.
- (6) The act committed in necessity is lawful only if it is the **only way** in which X can avert the threat or danger. Where, for example, Z orders X to kill Y and threatens to kill X if she does not obey, and it appears that X can overcome her dilemma by fleeing, she must flee, and if possible, seek police protection (*Bradbury* 1967 (1) SA 387 (A) 390).
- (7) X must be **conscious** of the fact that an emergency exists, and that she is therefore acting out of necessity. There is no such thing as a chance or accidental act of necessity. If X throws a brick through the window of Y's house in order to break in, and it later appears that by so doing she has saved Z, who was sleeping in a room filled with poisonous gas, from certain death, X cannot rely on necessity as a defence.
- (8) The harm occasioned by the defensive act must not be out of proportion to the interest threatened, and therefore X must **not cause more harm** than is necessary to escape the danger. It is this requirement which is the most important one in practice, and it can also be the most difficult to apply. The

protected and the impaired interests are often of a different nature, for example where somebody damages another's property in protecting her own physical integrity. One of the most important — and also the most problematic — questions arising in respect of the requirement under discussion is whether one is entitled to kill someone in a situation of necessity. Because of its complexity, this question will be discussed separately below.

ACTIVITY

While walking in the street, X sees a dog attacking Y, an old person. X and Y do not know each other. In order to protect Y, who cannot defend herself, X hits the dog with her kirie. The dog dies as a result of a head injury wound caused by the injuries inflicted by X. X is charged with malicious injury to property in respect of the dog. What is the appropriate defence in these circumstances — private defence or necessity?

FEEDBACK

X can rely on the defence of necessity. In a situation of necessity, one may also protect the interests of somebody else, even though there is no particular relationship between oneself and the party who is being protected. If one protects oneself or another person against an animal's attack, one acts in a situation of necessity and not in private defence. Private defence is possible only against an unlawful attack. Only a human being can act unlawfully.

6.2.6 *Killing another person out of necessity*

Possibly the most perplexing question relating to necessity as a ground of justification is whether a threatened person may kill another in order to escape from the situation of emergency. Naturally, this question arises only if the threatened person finds herself in mortal danger. This mortal danger may stem from compulsion, for example where Y threatens to kill X if X does not kill Z, or from an event not occasioned by human intervention, for example where two shipwrecked persons vie for control of a wooden beam which can keep only one of them afloat and one of them eventually pushes the other away in an attempt to survive.

Until 1972, our courts usually held that the killing of a person could not be justified by necessity (*Werner* 1947 (2) SA 828 (A); *Mneke* 1961 (2) SA 240 (N) 243; *Bradbury* 1967 (1) SA 387 (A) 399).



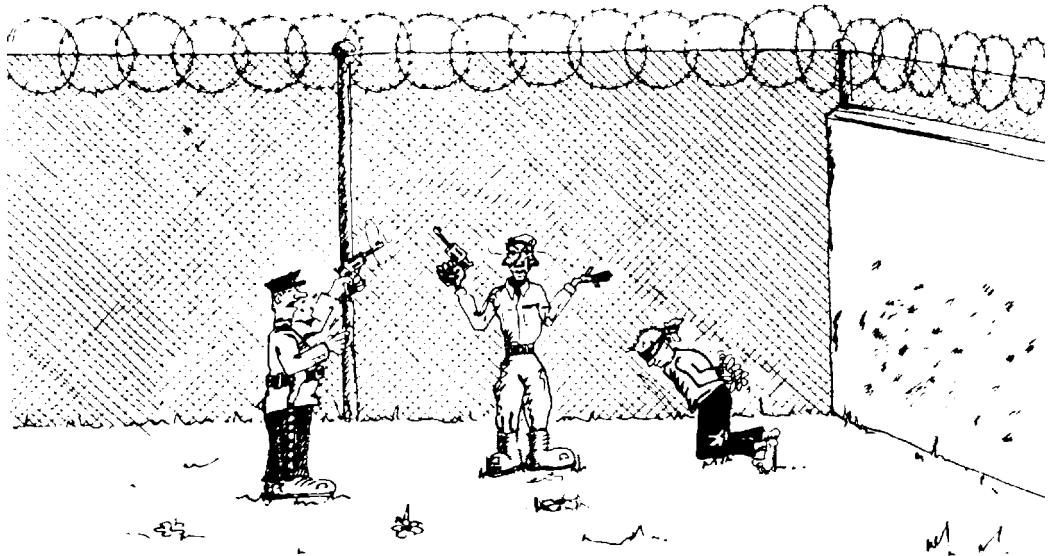
Read the following decision in the *Case Book*: *Goliath* 1972 (3) SA 1 (A).

In *Goliath* 1972 (3) SA 1 (A), however, the Appeal Court conclusively decided that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion. In this case, X was ordered by Z to hold on to Y so that Z might stab and kill Y. X was unwilling throughout, but Z threatened to kill him if he refused to help him. The court inferred, from the circumstances of the case, that it had been impossible for X to run away from Z — Z would then have stabbed and killed him. The only way in which X could have saved his own life was by yielding to Z's threat and assisting him in the murder. In the trial court, X was acquitted on the ground of compulsion, and on appeal by

the state on a question of law reserved, the Appeal Court held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder. (The court refused to state whether the defence is based on justification or absence of culpability.)

The Appeal Court added that a court should not lightly arrive at such a conclusion, and that the facts would have to be closely scrutinised and judged with the greatest caution. One of the decisive considerations in the court's main judgment, delivered by Rumpff JA, was that one should never demand of an accused more than is reasonable; that, considering everyone's inclination to self-preservation, an ordinary person regards his life as being more important than that of another; that only somebody "who is endowed with a quality of heroism" would purposely sacrifice his life for another, and that to demand of X that he should sacrifice himself therefore amounts to demanding more of him than is demanded of the average person.

If, in a case such as *Goliath*, the defence of necessity is rejected, for example because X could have fled, or because the harm he inflicted in warding off the threat was disproportionate to the threat, the extent of the threat may be taken into account as a mitigating factor when punishment is imposed.



Killing another in a situation of necessity (compulsion). Z (on the left) orders X (in the middle) to shoot and kill Y (on the right), threatening to kill X should he refuse to obey the order. (Assume that the circumstances are such that it is impossible for X to escape the situation of necessity by for example running away or attacking Z.) If X executes the order and kills Y, he is, according to the Appellate Division decision in *Goliath*, not guilty of murder (or any other crime), since he acted in necessity.

6.2.7 *The test to determine necessity is objective*

The question whether X's acts fell within the limits of the defence of necessity must be considered objectively, that is in the light of the actual facts, and not according to what X (at the time) took the facts to be. If she is not actually (that is objectively) in such a situation, but merely thinks that she is, she cannot rely on

necessity as a justification. If she merely thinks that she is acting out of necessity and, while thus mistaken, directs her action against another person's interests, her action remains unlawful, but she may escape liability because she lacks culpability. This will become clear in the course of the discussion of culpability further on, more particularly in the discussion of the effect of mistake and of awareness of unlawfulness. Such a situation may be described as putative necessity.

6.3 CONSENT

(*Criminal Law 123–128; Case Book 105–110*)

6.3.1 Introduction

Consent by the person who would otherwise be regarded as the victim of X's conduct may, in certain cases, render X's otherwise unlawful conduct lawful. To generalise about consent as a ground of justification in criminal law is possible only to a limited degree, since consent can only operate as a ground of justification in respect of certain crimes, and then only under certain circumstances.

The idea that consent may render an act not unlawful is sometimes expressed in the Latin maxim *volenti non fit iniuria*. Freely translated these words mean "no wrongdoing is committed in respect of somebody who has consented (to the act concerned)".

6.3.2 *The different effects that consent may have*

In order properly to understand the possible effect of consent on criminal liability, it is feasible to differentiate between four different groups of crimes. They are the following:

- (1) There are crimes in respect of which consent does operate as a defence, but whose dogmatic structure is such that the **consent does not operate as a ground of justification, but forms part of the definitional elements** of the crime. The reason why absence of consent forms part of the definitional elements is that absence of consent by a certain party plays such a crucial role in the construction of the crime that this requirement is incorporated in the definitional elements of the crime. The best-known example in this respect is **rape**. Rape is only possible if the sexual penetration takes place without the person's consent. Absence of consent must of necessity form part of the definitional elements of the crime, because it forms part of the minimum requirements necessary for the existence of a meaningful criminal prohibition.
- (2) There are crimes in respect of which consent by the injured party is **never recognised as a defence**. The best-known example is **murder**. Mercy killing (euthanasia) at the request of the suffering party is unlawful (*Hartmann 1975* (3) SA 532 (C)).
- (3) There are crimes in respect of which consent **does operate as a ground of justification**. Well-known examples of such crimes are **theft and malicious injury to property**.
- (4) There is a group of crimes in respect of which consent is **sometimes regarded as a ground of justification and sometimes not**. (These crimes fall, as it were, halfway between categories (2) and (3) mentioned above.) An example of a crime which falls into this category is assault.

6.3.3 *When consent can operate as a ground of justification in assault*

Unlike the law of delict, which in principle protects individual rights or interests, criminal law protects the **public interest** too; the state or community has an interest in the prosecution and punishment of all crimes, even those committed against an individual. The result is that, as far as criminal law is concerned, the individual is not always free to consent to impairment of his interests. This is the reason why even physical harm inflicted on somebody at her own request is sometimes regarded by the law as unlawful and therefore as amounting to assault. The criterion to be applied to determine whether consent excludes unlawfulness is the general criterion of unlawfulness, namely the *boni mores* (the legal convictions) **of society, or public policy**.

The best-known examples of situations in which consent may indeed justify an otherwise unlawful act of assault are those where injuries are inflicted on others in the course of **sporting events**, and where a person's bodily integrity is impaired in the course of **medical treatment**, such as an operation. Other examples of "impairments of bodily integrity" such as a kiss, a handshake or even a haircut occur so often in everyday life that non-liability is taken for granted.

The reason why a medical doctor cannot be charged with assaulting a patient upon whom she performs an operation is the patient's consent to the operation (assuming that it has been given). If it was impossible for the patient to consent, because of unconsciousness or mental illness for example, the doctor's conduct may nevertheless be justified by necessity or presumed consent (which will be explained below).

Assault may be committed with or without the use of force or the infliction of injuries. If there was no violence or injuries, consent may justify the act (*D* 1998 (1) SACR 33 (T) 39). Where injuries have been inflicted, it must be ascertained whether the act was in conflict with the *boni mores* (ie whether it was *contra bonos mores* – "against the good morals"). If this was indeed the case, the consent cannot operate as a ground of justification (*Matsemela* 1988 (2) SA 254 (T)).

6.3.4 *Requirements for a valid plea of consent*

In those crimes in which consent may operate as a ground of justification (in other words the type of crimes numbered (3) and (4) above under 6.3.2), the consent must comply with certain requirements in order to be valid, that is in order to afford X a defence. We now consider these requirements.

To assist you in your studies we first summarise the requirements for this ground of justification in the following framework:

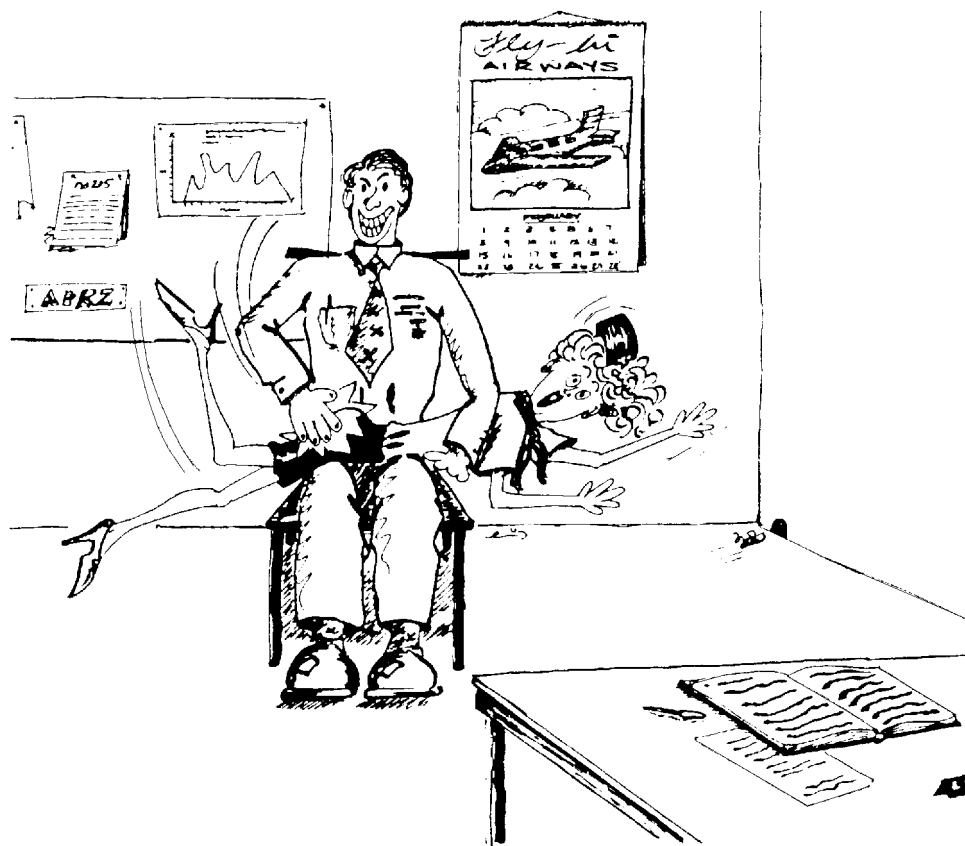
The consent must be

- (1) given **voluntarily**
- (2) given by a person who has **certain minimum mental abilities**
- (3) based upon **knowledge of the true and material facts**
- (4) given **either expressly or tacitly**
- (5) given **before the commission of the act**
- (6) given **by the complainant herself**

- (1) **The consent must be given voluntarily, without any coercion.** Consent obtained as a result of violence, fear or intimidation is not voluntary consent. If, for example, X brandishes a revolver while demanding money from Y and Y hands over the money because she feels threatened, there is no valid consent to the giving of the money (*Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A)).

However, **mere submission** cannot be equated with voluntary consent (*D* 1969 (2) SA 591 (RA)). If a woman decided that it is futile to resist the strong, armed attacker who is about to rape her, and simply acquiesces in what he does to her (in other words she does not expressly manifest her objection verbally or by physical acts), her conduct cannot be construed as consent to intercourse (*Volschenk* 1968 (2) PH H283 (D)).

Note the interesting application of the present requirement in *McCoy* 1953 (2) SA 4 (SR).



Consent as a ground of justification: the facts in McCoy's case. In this case Y, a young air hostess, failed to fasten her safety belt when the plane landed. (This constituted an infringement of certain security regulations of the company.) X, the general manager of the airways company, reprimanded her for her failure and threatened to dismiss her from the service of the airways. She did not want to lose her job, and accordingly gave permission in writing that X could give her a hiding in exchange for an undertaking by him that he would not dismiss her. X thereupon gave a hiding of six strokes on her buttocks. As a result, X was charged with having assaulted Y.

The court rejected X's defence that she had consented to the chastisement, on the following two grounds: First, her consent was not voluntary, since she only "consented" out of fear and in order to avoid being dismissed. Secondly, even if the consent had been voluntary, the court could not recognise such consent as valid and as amounting to a ground of justification. (Although the court did not say so expressly, it is submitted that the reason for the latter ruling is that it would be *contra bonos mores* (contrary to the generally recognised morals prevailing in society) and contrary to the legal convictions of society to recognise such consent as valid where it was given by a young female employee to the general manager of the company for which she was working, and in order to avoid being dismissed).

- (2) **The person giving the consent must be endowed with certain minimum mental abilities.** These abilities are the ability

- to appreciate the nature of the act to which she consents, and
- to appreciate the consequences of the act.

For this reason if a woman is mentally ill, under a certain age, drunk, asleep or unconscious, she cannot give valid consent to sexual intercourse (C 1952 (4) SA 117 (O) 121; K 1958 (3) SA 420 (A)).

- (3) **The consenting person must be aware of the true and material facts regarding the act to which she consents.** A fact is material if it relates to the definitional elements of the particular crime.

In the case of rape, for example, the person must be aware of the fact that it is sexual penetration to which he/she is consenting. In an old English decision (bearing a very appropriate name), *Flattery* (1877) 2 QBD 410, a woman thought that X, a quack surgeon, was operating on her to cure her of her fits, whereas he was in fact having sexual intercourse with her. In another decision in England, *Williams* [1923] 1 KB 340, a woman thought that X, her singing teacher, was performing a surgical operation on her to improve her breathing ability when singing, whereas he in fact had sexual intercourse with her. In both these cases X was convicted of rape, the court refusing to recognise the existence of any “consent” to intercourse.

This type of mistake is a mistake relating to the nature of the act, and is referred to in legal terminology as *error in negotio* (“mistake regarding the type of act”).

In C 1952 (4) SA 117 (O) a woman was sleeping during a hot summer night and woke to find a man having sexual intercourse with her. She thought that the man was her husband, and allowed him to continue, but then discovered that the man was in fact not her husband, but another man, namely X. X was convicted of rape. The court stated that consent which prevents sexual intercourse from amounting to rape required not only a mental state of willingness in respect of the type of act, but also willingness to perform the act with the particular man who in fact has intercourse with her.

This type of mistake is a mistake, not regarding the nature of the act, but regarding the identity of X. This type of mistake is referred to in legal terminology as *error in persona* (freely translated “mistake regarding the identity of the perpetrator”).



Read the following case in the *Case Book*: C 1952 (4) SA 117 (O).

- (4) **The consent may be given either expressly or tacitly.** There is no qualitative difference between express and tacit consent.
- (5) **The consent must be given before the otherwise unlawful act is committed.** Approval given afterwards does not render the act lawful.
- (6) **In principle consent must be given by the complainant herself.** However, in exceptional circumstances someone else may give consent on her behalf, as where a parent consents to an operation to be performed on his or her child.

ACTIVITY

Y participates in a rugby game. According to the rules of the game a player may be tackled to the ground by an opponent, but only if he is in possession of the ball. In the course of the game X tackles Y seconds after he has already passed the ball to a team-mate. Y has three broken ribs as a result of the tackle. X is charged with assault. You are his legal representative. What defence would you rely on?

FEEDBACK

The appropriate defence is the ground of justification known as consent. X's act of tackling Y is justified by consent. Somebody who takes part in sport tacitly consents to the injuries which are normally to be expected in the course of that sport. Most authorities agree that voluntary participation in a particular type of sport implies that the participant also consents to injuries that may be sustained as a result of acts which contravene the rules of the game provided such acts are normally to be expected when taking part in that sport. See *Criminal Law* 125–126. There would, however, be no justification if X, for instance, had intentionally assaulted Y so that he would be unable to play rugby for the rest of the season. That would be against the legal convictions of society.

6.4

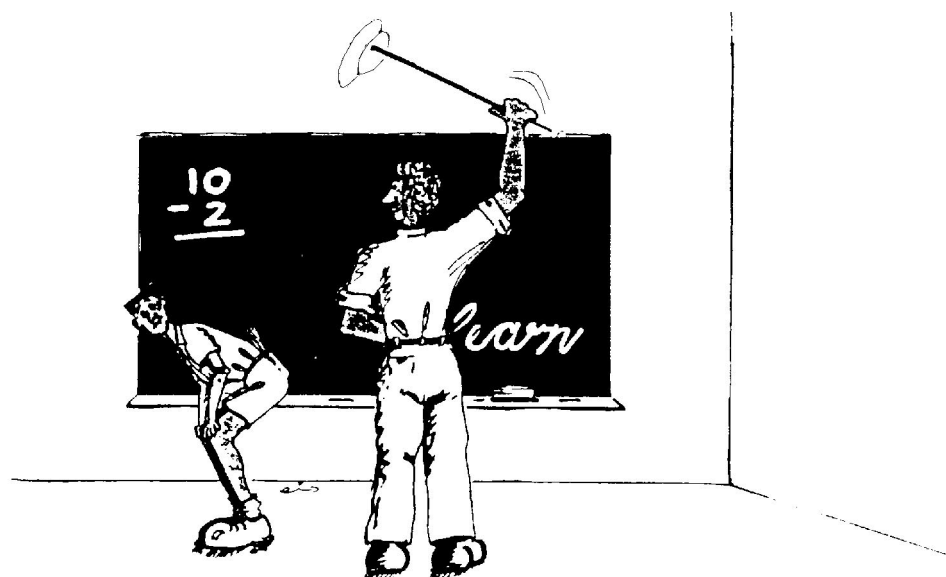
PRESUMED CONSENT

You must study the discussion of this ground of justification in *Criminal Law* 128–129 on your own.

6.5

THE RIGHT OF CHASTISEMENT

(*Criminal Law* 140–143)



Teachers' right of chastisement. Before the coming into operation of the Constitution in 1994, teachers had the right, subject to certain qualifications, physically to chastise boys. As explained in the discussion below, after the coming into operation of the Constitution, teachers no longer have such a right.

6.5.1 *The general rule*

Parents have the right to punish their children with moderate and reasonable corporal punishment in order to maintain authority and in the interests of the child's education.

6.5.2 *Teachers no longer have right to impose corporal punishment*

Before the Constitution came into operation, not only parents, but also teachers and people *in loco parentis* ("in place of a parent"), such as people in charge of school hostels, had the right to punish the children in their charge with moderate and reasonable corporal punishment in order to maintain authority and discipline. However, in accordance with the letter and spirit of the Constitution (more particularly the right to dignity (sect 10); the right to "freedom and security of the person" and thereunder the right "not to be treated or punished in a cruel, inhuman or degrading way" (sect 12) and the right of a child to be protected from maltreatment, neglect, abuse or degradation (sect 28(1)(d)), legislation was enacted in 1996 banning corporal punishment administered at schools.

Section 10 of the South African Schools Act 84 of 1996 provides that no person may administer corporal punishment at a school to a learner, and that any person who contravenes this provision is guilty of an offence and liable on conviction to a sentence which could be imposed for assault. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) the Constitutional Court held that the prohibition of corporal punishment was part and parcel of a national program to transform the education system and bring it into line with the Constitution. The State was further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people, especially children from maltreatment, abuse or degradation (at 780 F-G). The court ruled that the ban on corporal punishment laid down in sect 10 applies to all schools in South Africa, State and private.

6.5.3 *Parent's right to impose corporal punishment*

In terms of the common law, chastisement of a child by a parent is justified only if it is **moderate and reasonable** (*Hiltonian Society v Crofton* 1952 (3) SA 130 (A) 134). The question whether it is moderate and reasonable depends on the circumstances of each case, such as the child's age, gender, build and health, the nature of the transgression and the nature and extent of the punishment (*Lekgathe* 1982 (3) SA 104 (B) 109). The child must earn the punishment; this means that the child must have transgressed, or have threatened to transgress.

The Constitutional Court has not as yet ruled on the question whether moderate corporal punishment in private homes amounts to a justifiable limitation of the rights of children as set out in sect 28(d) of the Constitution (the right to be protected from maltreatment or degradation).

6.6

OBEDIENCE TO ORDERS

You must study the discussion of this topic in *Criminal Law* 138–140 on your own.

Note the two opposing approaches to this question, and the middle course adopted in the cases of *Smith* and *Banda*. In our opinion this middle course is to be preferred. The middle course has also been adopted in section 199(6) of the Constitution, which provides that no member of any security service may obey a manifestly illegal order.



Read the following judgment in the *Case Book: Smith* (1900) 17 SC 561.

In *S v Mostert* 2006 (1) SACR 560 (N), a traffic officer charged with the crime of assault relied on the defence of obedience to orders. The court held that obedience to orders entailed an act performed by a subordinate on the instruction of a superior, and was a recognised defence in law. Although the defence of obedience to orders usually arises in a military context, its application is not exclusive to soldiers. For the proper functioning of the police and the protection services it was essential that subordinates obey the commands of their superiors. The court held that there were three requirements for this defence, namely: (1) the order must emanate from a person in lawful authority over the accused; (2) the accused must have been under a duty to obey the order; and (3) the accused must have done no more harm than was necessary to carry out the order. Regarding the second requirement the test was whether or not the order was manifestly and palpably unlawful. Therefore, the court applied the principle laid down in the Constitution of the Republic of South Africa, 1996 (section 199(6)), namely that the defence of obedience to orders will be successful, provided the orders were not manifestly unlawful.

ACTIVITY

X, a member of the South African Police Service, is charged with assault with intent to do grievous bodily harm. The facts before the court are that she had instructed a German shepherd dog to attack a beggar loitering in a park. The defence argues that X's act was justified because her superior officer had instructed her to get rid of all the beggars in the park by setting the police dogs on them. You are the state prosecutor. What would your response be to this line of reasoning?

FEEDBACK

If you have read the case of *Smith* you will know that X cannot rely on the ground of justification known as obedience to orders in these circumstances. The order was **manifestly unlawful**, and therefore X's conduct is also unlawful.

6.7 OFFICIAL CAPACITY

(Criminal Law 129–130)

6.7.1 *Definition*

An act which would otherwise be unlawful is justified if X, by virtue of her holding a public office, is authorised to perform the act, provided the act is performed in the course of the exercise of her duties.

6.7.2 *Examples of the application of official capacity as ground of justification*

The following are examples of cases in which X's act, despite seeming at first glance to be unlawful (since it complies with the definitional elements of the

relevant crime), upon closer scrutiny transpires not to be unlawful, because it is justified by the ground of justification known as official capacity:

- Possessing drugs amounts to the commission of a crime. Nevertheless the clerk of the court whose official duty it is to exercise control over exhibits at a court will not be guilty of unlawfully possessing drugs if she exercises control over drugs which are exhibits in a current court case.
- To damage or destroy an article normally amounts to the commission of the crime of malicious injury to property. Nevertheless X does not commit this crime in the following circumstances, despite the fact that she in fact destroys property: Y has contravened certain provisions of legislation relating to the organisation of the liquor trade. The court which has convicted Y, orders the liquor in question to be confiscated. X is a police official whose official duty it is to execute the court order. In the course of executing the order, she opens the bottles of liquor, pours out the content of the bottle into a drain pipe and throws the bottles away in a rubbish removal container.
- To touch or search another inappropriately without her consent amounts to the commission of crimes such as assault, indecent assault or *crimen iniuria*. Nevertheless X does not commit any crime in the following circumstances, despite the fact that she has searched Y without Y's consent: X is a member of the security personnel at a custom-post or international airport. It is her duty to physically search people crossing international borders in order to ascertain whether they have hidden prohibited articles (such as drugs or weapons) on their bodies or in their clothing. Y is someone who intends crossing the international border and who is searched by X, who is acting in her official capacity.
- To physically grab another without her consent amounts to assault. Nevertheless X does not commit assault in the following circumstances, despite the fact that she has grabbed Y: X is a police official. Y has committed an offence in X's presence. X attempts to arrest Y for the commission of the offence. Y resists arrest and runs away from X. X runs after Y and succeeds in getting hold of her by diving her to the ground.

Arresting a criminal or suspect is an example of an act performed in an official capacity, which is often encountered in practice. The question of who may arrest and in what circumstances are matters forming part of the course in Criminal Procedure and will not be discussed here. However, it is important to note that section 49 of the Criminal Procedure Act 51 of 1977 provides that people who attempt to arrest a criminal or suspected criminal may, in certain narrowly defined circumstances, kill the suspect if the latter resists the attempt or if she attempts to flee.

6.8

TRIVIALITY

You must study the discussion of this ground of justification in *Criminal Law* 143–144 on your own.

GLOSSARY

<i>volenti non fit iniuria</i>	no wrongdoing is committed in respect of somebody who has consented
<i>error in negotio</i>	a mistake relating to the nature of the act
<i>error in persona</i>	a mistake relating to the identity (of the accused)
<i>negotiorum gestio</i>	presumed consent or spontaneous agency

<i>de minimis non curat lex</i>	the law does not concern itself with trivialities
<i>in loco parentis</i>	in the place of a parent
<i>boni mores</i>	the good morals; the legal convictions of society
<i>contra bonos mores</i>	against the good morals or legal convictions of society

SUMMARY

- (1) Although private defence and necessity are closely related, there are the following important differences between them:

Private defence	Necessity
Stems from human conduct.	Stems from either human conduct or non-human intervention (ie chance circumstances).
Directed against an unlawful attack.	Directed against the interests of an innocent third party or consists in the violation of a legal provision.

- (2) Only relative compulsion qualifies as necessity — in the case of absolute compulsion there is no act.
- (3) The requirements for a successful plea of necessity — see discussion above.
- (4) In *Goliath* 1972 (3) SA 1 (A) it was held that necessity could constitute a complete defence to a charge of murder.
- (5) The test for necessity is objective. However, a mistaken belief in the existence of an emergency (putative necessity) may exclude X's culpability.
- (6) Consent to harm or injury is a ground of justification provided it is not contrary to the legal convictions of society.
- (7) The requirements for a successful plea of consent — see the discussion above.
- (8) Spontaneous agency takes place when X performs an act in Y's interests, in her (Y's) absence, and without her knowledge and consent.
- (9) Parents are entitled to inflict moderate and reasonable corporal punishment on their children to maintain authority and in the interests of the child's education.
- (10) An act in obedience to an unlawful order can only be justified if the order is not manifestly unlawful.
- (11) An act which would otherwise be unlawful is justified if the person holds a public office which authorises her to perform such an act, provided she performs the act in the execution of her official duties.
- (12) The principle that the law does not concern itself with trifles can exclude the unlawfulness of an act.

TEST YOURSELF

- (1) Distinguish between private defence and necessity.
- (2) Distinguish between absolute and relative compulsion, and indicate which of the two constitutes necessity.
- (3) Name and discuss the requirements for a successful plea of necessity.
- (4) Discuss the question whether, according to the decision of *Goliath* 1972 (3) SA 1 (A), an innocent person may be killed in a situation of necessity.
- (5) May consent constitute a ground of justification in the following circumstances:
 - (a) if X is charged with rape
 - (b) if X kills another person
 - (c) if a rugby player is injured in the course of a match
 - (d) when indecent acts are committed by adults
- (6) Name and discuss the requirements for a successful plea of consent as a ground of justification.
- (7) Discuss the following grounds of justification:
 - (a) spontaneous agency
 - (b) chastisement
 - (c) trifling character of an act
- (8) Discuss the question whether an otherwise unlawful act may be justified because the perpetrator, when she committed the act, obeyed the order of a person to whom she was subordinate.
- (9) May officials occupying a public office, who commit acts which would otherwise be unlawful, rely as a defence on the fact that they are entitled to perform these acts because the acts were performed in the course of their official duties?

STUDY UNIT **7****Culpability
and criminal
capacity****Contents**

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LEARNING OUTCOMES

After you have finished this study unit, you should be able to:

- demonstrate your understanding of the broader concept of “culpability”
- demonstrate your understanding of the principle of contemporaneity by
 - recognising the potential applicability of the principle to a given set of facts
 - applying the relevant case law to such a set of facts
- distinguish criminal capacity from intention (and more particularly awareness of unlawfulness) by demonstrating an understanding of the two tests
- express an opinion on whether or not an accused can rely successfully on the defence of non-pathological criminal incapacity, having regard to
 - the two psychological legs of the test for this defence
 - the cause/s of the criminal incapacity
 - the onus of proof
 - the role of expert evidence from psychiatrists and/or psychologists
 - the courts’ practice of treating this defence with great caution

7.1

BACKGROUND

At this stage, we have already set out three of the four elements of criminal liability. These elements are

- (1) the act (conduct)
- (2) compliance with the definitional elements
- (3) unlawfulness

In this study unit, we will begin to explain the fourth and last general element of liability, namely, culpability. The requirement of culpability contains many facets and the discussion of this requirement (or “element”) extends to the end of study unit 14. In this study unit we will first of all give a general explanation of the requirement of culpability. Thereupon we will discuss the requirement of criminal capacity, which will be followed by a discussion of the general defence of criminal incapacity (better known as the defence of “non-pathological criminal incapacity”).

7.2

THE REQUIREMENT OF CULPABILITY IN GENERAL

(Criminal Law 149–152)

7.2.1 Introduction

The mere fact that a person has committed an act which complies with the definitional elements and which is unlawful is not yet sufficient to render him criminally liable. One very important general requirement remains to be satisfied:

X's conduct must be accompanied by culpability. This means, broadly speaking, that there must be grounds upon which, in the eyes of the law, he can be **reproached** or blamed for his conduct. This will be the case if he has committed the unlawful act in a **blameworthy state of mind**.

X can only be blamed for his conduct if the law could have expected him to avoid or shun the unlawful act or not to proceed with it. Thus, for instance, the legal order cannot blame a mentally-ill ("insane") person or a six-year-old child who has committed an unlawful act, for that act, since they cannot be expected to act lawfully. Neither can X's conduct be described as blameworthy in a case such as the following: On leaving a gathering, X takes a coat, which he genuinely believes to be his own, from the row of pegs in the entrance hall of the building. The coat in fact belongs to Y, although it is identical to X's. But for the requirement of culpability, X would be guilty of theft. In the circumstances, X is unaware that his conduct is unlawful.

7.2.2 *Culpability and unlawfulness*

Whether culpability is present need be asked only after the unlawfulness of the act has been established. It would be nonsensical to attach blame to lawful conduct. The unlawfulness of the act is determined by criteria which are applicable to everybody in society, whether rich or poor, clever or stupid, young or old. This is the reason why it is just as unlawful for somebody who is poor to steal as for somebody who is rich, and why it is just as unlawful for psychopaths who find it very difficult to control their sexual desires, to commit sexual offences as for normal people. Criteria employed to ascertain the unlawfulness of an act do not refer to the personal characteristics of the perpetrator.

However, when one comes to the question of culpability, the picture changes: the focus now shifts to the perpetrator as an individual, and the question one asks is whether **this particular person**, considering **his** personal characteristics, aptitudes, gifts, shortcomings and mental abilities, as well as his knowledge, can be blamed for his commission of the unlawful act.

As pointed out in the previous chapter, the unlawfulness of the act may be excluded by **grounds of justification** (such as private defence and consent). Culpability, on the other hand, may be excluded because X lacked criminal capacity or by some other ground excluding culpability such as mistake. (This will become clear in the course of the discussion which follows.)



Students often mistakenly use the term "ground of justification" as a synonym for **any** defence that X may raise — even a defence which should exclude his culpability. This should be avoided. Grounds of justification refer only to defences which exclude the unlawfulness of the act. "Defence" denotes any ground which excludes liability and includes, for instance, automatism, impossibility, the defence of absence of a causal link, the grounds of justification, criminal incapacity and mistake.

7.2.3 *Terminology*

In practice, the Latin term *mens rea* is mostly used to denote culpability. Another term sometimes used in place of *mens rea* is "fault". Although these terms are generally used by our courts, we prefer to use the expression "culpability".

7.2.4 *Criminal capacity and forms of culpability*

Before it can be said that a person acted with culpability, it must be clear that such a person was endowed with criminal capacity. The term "criminal capacity"

refers to the **mental ability**. This will become clearer in the discussion of criminal capacity which follows. We shall see that mentally ill persons and young children, for example, lack criminal capacity. Before X can be blamed for his conduct, he must at least have the mental capacities described above.

The mere fact that X has criminal capacity as described above, is not sufficient to warrant an inference that he acted with culpability. There must be something more: X must have acted either intentionally or negligently. Intention and negligence are usually referred to as the “two forms of culpability”. If X (who has criminal capacity) carries away somebody else’s property, but is unaware of the fact that what he is carrying away belongs to somebody else and thinks it belongs to himself, it cannot be said that he “intentionally” removed another’s property. X therefore cannot be convicted of theft, since, as we shall see later, the form of culpability required for theft is intention, and the misapprehension under which X laboured (the mistake he made) has the effect of excluding intention and therefore culpability.

In short, the contents of the concept of culpability may be summarised briefly as follows:

$$\boxed{\text{culpability}} = \boxed{\text{criminal capacity}} + \boxed{\text{either intention or negligence}}$$

(Among certain writers there is a difference of opinion on certain theoretical aspects of culpability. This is discussed in *Criminal Law* (154–159), where the author refers to the psychological and the normative concepts of culpability. For the purposes of this course we do not expect you to read about or have knowledge of this aspect of the topic.)

7.2.5 *The principle of contemporaneity*

(Criminal Law 152–153; Case Book 138–141)

The culpability and the unlawful act must be contemporaneous. This means that, in order for a crime to have been committed, there must have been culpability on the part of X at the very moment when the unlawful act was committed. No crime is committed if culpability only existed prior to the commission of the unlawful act, but not at the moment the act was committed, or if it came into being only after the commission of the unlawful act.

To illustrate this by a fictitious example: X wishes to shoot his mortal enemy Y. On the way to the place where the murder is to be committed, X accidentally runs down and kills a pedestrian. It turns out that, unbeknown to X, the pedestrian was in fact Y. In these circumstances, although there is undoubtedly a causal connection between X’s act and Y’s death, X could not be convicted of murdering Y. At the time of the accident X lacked the necessary intention to kill.

The decision in *Masilela* 1968 (2) SA 558 (A) constitutes an apparent exception to the general rule in relation to contemporaneity. In this case X assaulted and strangled Y, intending to kill him; then, believing him to be dead, he threw his body onto a bed and ransacked the house. He then set fire to the bed and the house and disappeared with the booty. Y was in fact still alive after the assault and died in the fire. The Appellate Division confirmed X’s conviction of murder. The court did not accept the argument that there were two separate acts of which the first, although committed with the intention to murder, did

not in fact kill Y, while the second did kill Y but was not accompanied by the intention to murder (because to dispose of what is believed to be a corpse cannot be equated with an intention to kill a human being). According to the Appellate Division, X's actions amounted to "a single course of conduct".



Read the following decision in the *Case Book: Masilela* 1986 (2) SA 558 (A).

The principle of contemporaneity is closely related to the rule that a mistaken belief concerning the causal chain of events does not exclude intention. The latter rule will be discussed later.

7.2.6 *Classifications in the discussion of culpability*

From the discussion thus far of culpability, it is clear that the concept has many facets. Because of the scope of the culpability requirement, it is not feasible to discuss it in one study unit only. We shall spread the discussion of this requirement, as follows, over a number of study units: the rest of this study unit will deal with a discussion of criminal capacity in general, as well as the first defence of criminal incapacity, which is known as the defence of non-pathological criminal incapacity. Thereafter follows a study unit (study unit 8) which deals with the other two defences which exclude criminal capacity, namely the defences of mental illness and youth. Study units 9 and 10 deal with intention, 11 with negligence, 12 with intoxication, 13 with provocation and 14 with the instances in which the requirement of culpability is disregarded.

7.3

CRIMINAL CAPACITY

On this topic generally see *Criminal Law* (159–162).

7.3.1 *Definition*

The term "criminal capacity" refers to the mental abilities or capacities which a person must have in order to act with **culpability** and to incur criminal liability.

A person is endowed with criminal capacity if he has the mental ability to

- (1) appreciate the wrongfulness of his act or omission, and
- (2) act in accordance with such an appreciation of the wrongfulness of his act or omission

If one of these abilities is lacking (or both are lacking), the person concerned lacks criminal capacity and cannot be held criminally responsible for an unlawful act which he has committed while he lacked such an ability.

7.3.2 *Criminal capacity distinguished from intention*

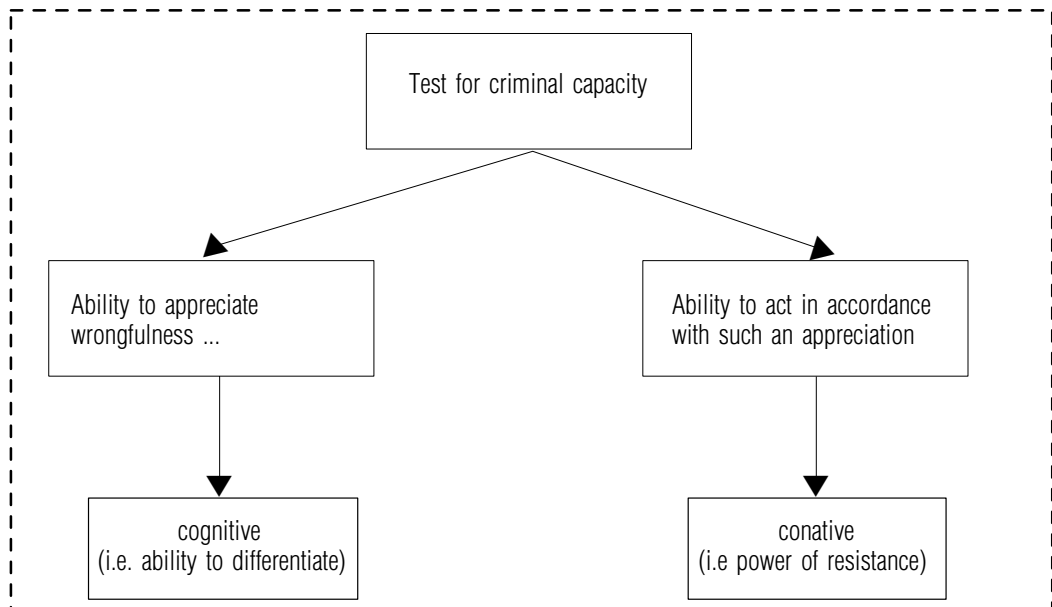
Criminal capacity is the foundation of, or indispensable prerequisite to, the existence of culpability in any of its forms. The question whether X acted intentionally or negligently arises only once it is established that he had criminal capacity. An investigation into X's criminal capacity is independent of, and covers quite a different field from, the investigation into whether he acted intentionally or negligently. The investigation into his criminal capacity

is concerned with his **mental abilities**, whereas the inquiry into whether he acted intentionally or negligently is concerned with the presence or absence of a certain attitude or state of mind on the part of X. More particularly, an investigation into X's intention comprises an investigation into his knowledge. Criminal capacity has nothing to do with X's knowledge; it concerns his mental abilities.



Students often confuse the test to determine criminal capacity with that to determine intention, and more particularly that aspect of intention known as awareness of unlawfulness. A statement like the following reveals such a confusion of concepts: "X did not know that his act was unlawful and therefore he lacked criminal capacity". The reason why this statement is wrong is that absence of awareness of unlawfulness does not mean that X lacked criminal capacity; it means that X lacked **intention**. (That awareness of unlawfulness forms part of the criminal-law concept of intention will become clear in the course of the discussion later of intention.)

7.3.3 *Two psychological legs of test*



It is apparent from the above definition of criminal capacity that this concept comprises two psychological components, namely, first X's ability to appreciate the wrongfulness of his act or omission, and secondly his ability to conduct himself in accordance with such an appreciation of the wrongfulness of his act or omission.

The first component (or first leg of the test) may be expressed in various ways: besides the expression "ability to appreciate the wrongfulness of the act", one may also speak of the "ability to appreciate the unlawfulness of the act" or "the ability to distinguish between right and wrong". Normally, it does not matter which of these expressions one uses; they are simply synonyms.

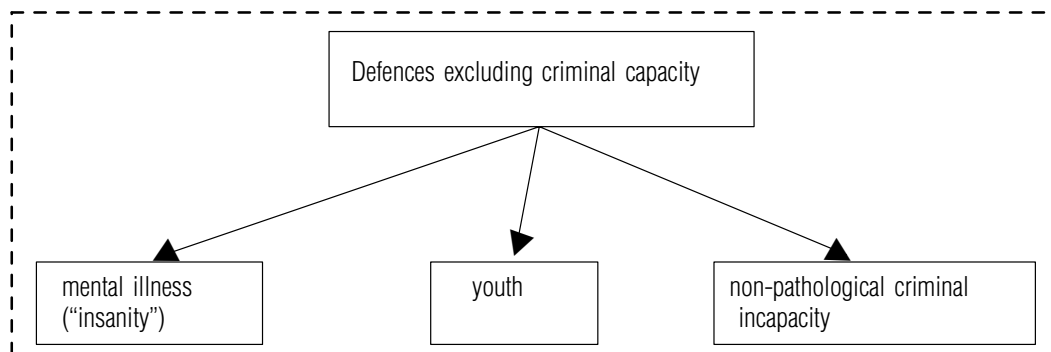
The two psychological components mentioned above refer to two different categories of mental functions. The first function, that is the ability to distinguish between right and wrong, lawful or unlawful, forms part of a person's **cognitive** mental function. This function is related to a person's reason or intellect, in other words his ability to perceive, to reason and to remember. Here the emphasis is on a particular person's **insight and understanding**.

The second psychological component, incorporated in the second leg of the test to

determine criminal capacity, refers to a person's ability to conduct himself in accordance with his insight into right and wrong. This is known as a person's **conative** mental function. This function relates to a person's ability to control his behaviour in accordance with his insights — which means that, unlike an animal, he is able to make a decision, set himself a goal, and pursue it; he is also able to resist impulses or desires to act contrary to what his insights into right and wrong have revealed to him. Here, the key word or idea is “**self-control**”.

In short, the cognitive and conative functions amount to insight (**ability to differentiate**) and self-control (**power of resistance**) respectively. These two functions render a person responsible for his conduct. (The exposition of these two components of the test to determine criminal capacity is based on paragraphs 9.7–33 of the *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* RP 69/1967 (the “Rumpff Report”).)

7.3.4 Defences excluding criminal capacity



First, there are the two particular defences excluding criminal capacity, namely the defence of mental illness, which is dealt with statutorily in sections 77 to 79 of the Criminal Procedure Act 51 of 1977, and the defence of youthful age. These two defences are referred to as “particular defences” because they can succeed only if the mental incapacities are the result of particular circumscribed mental characteristics to be found in the perpetrator, namely a mental illness or mental defect as envisaged in section 78(1) of the Criminal Procedure Act (in the case of the defence of mental illness), or the perpetrator's youthful age (in the case of the second particular defence).

Furthermore, these two particular defences are subject to certain rules applicable only to them: for example the defence of mental illness is specifically governed by sections 77 to 79 of the Criminal Procedure Act, which *inter alia* provides for special orders to be made by the court if the defence is successful (eg that X may not leave the court as a free person, but that he be detained in a psychiatric hospital). If X relies on his youthful age as a defence, the question of his criminal capacity is, in terms of common law, governed by certain arbitrary age limits.

Apart from these two specific defences of criminal incapacity, there is also a general defence of criminal incapacity. This general defence is also known as “the defence of non-pathological criminal incapacity”. The success of this general defence is not dependent upon the existence of specific factors or characteristics of the perpetrator which lead to his criminal incapacity. However, the judgment of the Supreme Court of Appeal in *Eadie* 2002 (1) SACR 663 (SCA) raises doubts about whether the defence of non-pathological criminal incapacity still exists. In the meantime, until there is more clarity on this issue in our case law, we shall assume that the defence still exists. This matter is discussed in more detail below, under heading 7.4.

7.3.5 *Arrangement of discussion*

In the discussion which follows we shall first consider the general defence of criminal incapacity. This will be followed by a discussion of the two specific defences of criminal incapacity referred to above, namely mental illness and youth.

7.4 THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY

(Criminal Law 162–169)

7.4.1 *General*

All the instances in which X relies on criminal incapacity as a defence, other than cases in which he relies on mental illness and youth, fall under this heading. One can also refer to this defence as the “general defence of criminal incapacity” in order to distinguish it from the particular defences of mental illness and youth, which also deal with criminal incapacity.

In *Laubscher* 1988 (1) SA 163 (A), the Appeal Court first described this defence as “**non-pathological criminal incapacity**”. The court adopted this description of the defence in order to distinguish it from the defence of mental illness created in section 78 of the Criminal Procedure Act. (This latter defence will be discussed later on.) The court stated that the defence created in section 78 applies to **pathological** disturbances of a person’s mental abilities — in other words, the cases in which these disturbances can be traced to some **illness of the mind**. The defence of non-pathological criminal incapacity, on the other hand, may succeed without any need of proving that at the time of the commission of the act X was suffering from a mental illness. For this defence to succeed, it is sufficient to prove that X lacked criminal capacity for only a relatively brief period and that the criminal incapacity was not a manifestation of an ailing or sick (pathological) mental disturbance; it would therefore be sufficient to prove that for a relatively brief period during the commission of the act X, owing to, for example, an **emotional collapse**, was unable to act in accordance with his insights into right or wrong.

Until 19 February 2002, there was no doubt that our law recognised the defence of non-pathological criminal incapacity. However, on that date the Supreme Court of Appeal in *Eadie* 2002 (1) SACR 663 (SCA) delivered a judgment which **casts doubt on whether this defence is still recognised in our law**. Before discussing the judgment in *Eadie*, we shall first consider the position in our law before the judgment in *Eadie* was delivered.

When answering examination questions, you are free to abbreviate the rather long expression “non-pathological criminal incapacity” to “NPCI”.

7.4.2 *The law before 2002 (when judgment in Eadie was delivered)*

If the criminal incapacity is the result of a mental illness as envisaged in section 78(1) of the Criminal Procedure Act, X’s defence is one of mental illness in terms of that section; the merits of this defence are assessed with reference to the principles applying to that defence. If the criminal incapacity stems from youth, X’s defence is the defence commonly called “youth”. If the criminal incapacity is the result of neither mental illness in terms of section 78(1) nor youth, it means that the defence of non-pathological criminal incapacity applies.

For this defence to succeed, it is **not necessary to prove** that X’s mental inabilities

resulted from certain **specific causes**; more particularly, it is not necessary to prove that they were caused by a pathological mental condition. If, on the evidence as a whole, the court is satisfied that at the time of the commission of the crime X lacked the ability to appreciate the wrongfulness of his act or to act according to such an appreciation, he must be found not guilty, **no matter what the cause of the inability**.

The cause may be what can be called an “**emotional collapse**”, shock, fear, anger, stress or concussion. Such a condition may be the result of **provocation** by Y or somebody else, and this may in turn be linked to physical or mental exhaustion resulting from Y’s insulting behaviour towards X, which strained his powers of self-control, until these powers eventually snapped. **Intoxication** may also be a cause of the inability. The inability may furthermore be the result of a **combination of factors**, such as provocation and intoxication.

If X relies on this defence the **onus of proving** beyond reasonable doubt that X had criminal capacity at the time of the commission of the act **rests upon the state**. However, X must lay a foundation for the defence in the evidence. There should preferably be **expert evidence** by psychiatrists or clinical psychologists concerning X’s mental abilities shortly before and during the commission of the act. However, the courts do not regard expert evidence as indispensable in order for the defence to succeed.

The two most important decisions in which this defence was recognised and applied are *Campher* 1987 (1) SA 940 (A) and *Wiid* 1990 (1) SACR 561 (A).

7.4.3 *The judgment in Eadie*

In *Eadie* 2002 (1) SACR 663 (SCA), the Supreme Court of Appeal delivered a judgment which raises doubts about whether there is still such a defence in our law.

The **facts** in this case were the following: X, a keen hockey player, consumes a large quantity of liquor at a social function. Late at night, he gets into his car and starts driving home. Y, the driver of another vehicle, overtakes X’s car and then drives very slowly in front of him so that X cannot overtake him. X eventually succeeds in overtaking Y. Y then drives at a high speed behind X, with the lights of his car on bright. The two cars then stop. X is very angry, gets out of his car, grabs a hockey stick which happens to be in the car, walks to Y’s car, smashes the hockey stick to pieces against Y’s car, assaults Y continuously, pulls him out of his car and continues to assault him outside the car, on the road. Y dies as a result of the assault. It is a case of “road rage”. On a charge of murder, X relies on the defence of non-pathological criminal incapacity. The court rejects his defence and convicts him of murder.

The court discusses previous decisions dealing with this defence extensively, and then holds (in par 57 of the judgment) that **there is no distinction between non-pathological criminal incapacity owing to emotional stress and provocation, on the one hand, and the defence of sane automatism, on the other**. More specifically, there is, according to the court, no difference between the second (conative) leg of the test for criminal capacity (ie, X’s ability to act in accordance with his appreciation of the wrongfulness of the act — in other words, his ability to resist temptation) and the requirement which applies to the conduct element of liability that X’s bodily movements must be voluntary. If X alleges that, as a result of provocation, his psyche had disintegrated to such an extent that he could no longer control himself, it amounts to an allegation that he could no longer control his movements and that he therefore acted **involuntarily**. Such a plea of involuntary conduct is nothing else than the **defence of sane automatism**. (In order to properly understand the court’s argument, we advise you to refresh your

knowledge of the defence of sane automatism by once again consulting the discussion of this defence above under heading 3.3.4.)

The court does not hold that the defence of non-pathological criminal incapacity no longer exists, and in fact makes a number of statements which imply that the defence does still exist. At the same time, it nevertheless declares that if, as a result of provocation, an accused person relies on this defence, his defence should be treated as one of sane automatism (a defence which can also be described as a defence by X that he did not commit a voluntary act). The court emphasises the well-known fact that a defence of sane automatism **does not succeed easily, and is in fact rarely upheld**.



Read the following decision in the *Case Book: Eadie* 2002 (1) SACR 663 (SCA).

7.4.4 *The present law*

The judgment in *Eadie* is anything but clear and has given rise to divergent interpretations. According to Burchell (at 430–444) there are at least three possible interpretations of the judgment in *Eadie*, namely:

- (1) In terms of the first interpretation, the defence of non-pathological criminal incapacity is restricted to a situation where X's acts were involuntary in instances where X is alleged to have lacked the necessary power of resistance (in other words, where it is alleged that X did not comply with the conative leg of criminal capacity). This interpretation is supported by Snyman 162–169 and Burchell 430 IV (b), 436–440.
- (2) In terms of the second interpretation, the ambit of the defence of non-pathological criminal incapacity should be limited only by making use of inferences drawn from objective facts (Burchell 430 IV (a), 430–436). The test for criminal incapacity therefore remains subjective — in other words, the question remains whether X in his own state of mind possessed the necessary power of resistance. The court makes use of certain inferences from the objective facts of the case and ordinary human experience in deciding whether or not X subjectively possessed the necessary power of resistance. This interpretation of the judgment rests on certain statements by Navsa JA in *Eadie* in which he makes it clear that he finds the defence of provocation problematical because it is a defence that easily seems to lead to an acquittal. According to Navsa JA, this could be attributed to a misapplication of the test for criminal capacity. He (at par 64) explains as follows:

Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* [the accused's own account] concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence.

This second interpretation is the one that Burchell views as the one that is most likely to be accepted by the courts.

- (3) In terms of the third possible interpretation, the court in *Eadie* identified an essential, qualified objective aspect in the otherwise subjective test for criminal capacity (Burchell 430 IV (c), 440–444). According to this interpretation there had always been an objective aspect implicit to the test for criminal capacity that had never before been fully recognised by the courts. According

to this interpretation the Supreme Court of Appeal now recognised that there is a normative dimension to the conative leg of criminal capacity.

Until there is more clarity in our law on how the judgment in *Eadie* is to be interpreted we submit the following:

Before 2002, the defence of non-pathological criminal incapacity was not limited to cases in which, **as a result of provocation or emotional stress**, X briefly lacked criminal capacity. It also applied to situations in which he lacked capacity owing to other factors, such as **intoxication, fear or shock**. In our opinion, the *Eadie* case should be limited to cases in which X alleges that it is as a result of **provocation or emotional stress** that he lacked capacity. If he alleges that he momentarily lacked capacity owing to other factors, such as intoxication, the defence (of non-pathological criminal incapacity) still exists. However, if, as in the *Eadie* case, X alleges that he lacked capacity as a result of **provocation or emotional stress**, his defence should be treated as one of sane automatism.

GLOSSARY

mens rea literally “guilty mind”; in practice the culpability requirement

SUMMARY

- (1) “Culpability” as an element of criminal liability means that there are grounds upon which, in the eyes of the law, the perpetrator (X) can be reproached or blamed for his conduct.
- (2) Culpability consists of criminal capacity plus either intention or negligence.
- (3) The culpability and the unlawful act must be contemporaneous.
- (4) Definition of the concept of criminal capacity — see definition above.
- (5) Criminal capacity is based upon two psychological components or legs, namely the cognitive and the conative legs.
- (6) The cognitive component deals with a person’s insight and understanding, and is present if X has the ability to appreciate the wrongfulness of his act or omission.
- (7) The conative element deals with X’s self-control and is present if X has the ability to conduct himself in accordance with his appreciation of the wrongfulness of his act or omission.
- (8) Before 2002, it was generally accepted that there is a general defence of criminal incapacity apart from the defence of mental illness set out in section 78(1) of the Criminal Procedure Act and the defence of youth.
- (9) The general defence of criminal incapacity referred to above in the previous statement was known as “non-pathological criminal incapacity”. In this defence, X’s mental inability is the result of factors such as emotional stress resulting from provocation, intoxication, shock, anger or fear.
- (10) In 2002, the Supreme Court of Appeal in the case of *Eadie* held that there is no difference between the defence of non-pathological criminal incapacity resulting from provocation or emotional stress, on the one hand, and the defence of sane automatism, on the other.

- (11) It is submitted that, until such time as there is more clarity in our case law on the question whether the defence of non-pathological criminal incapacity still exists, the judgment in *Eadie* should be limited to cases in which X alleges that his incapacity was caused by provocation or emotional stress. If he alleges that he momentarily lacked capacity owing to other factors such as intoxication, the defence of non-pathological criminal incapacity still exists.
- (12) It is submitted that if, as in the *Eadie* case, X alleges that he lacked capacity as a result of provocation or emotional stress, he can only escape liability if he successfully raises the defence of sane automatism.

TEST YOURSELF

- (1) Define in, at most, two sentences the meaning of “culpability” (as an element of criminal liability).
- (2) Complete the following statement: Culpability = plus either or
- (3) The principle of contemporaneity in criminal law means the following: If the unlawful act is committed at a certain time without any, and the culpability is present at a later time without there being an act at the same time, no crime is committed.
- (4) Define the concept of criminal capacity.
- (5) Explain the difference between the concepts of “criminal capacity” and “intention”.
- (6) Name and explain the two psychological components or “legs” of the test for criminal capacity.
- (7) Name three defences excluding criminal incapacity.
- (8) What was the meaning of the concept of non-pathological criminal incapacity before 2002?
- (9) Discuss the decision in *Eadie*, especially the question whether the defence of non-pathological criminal incapacity still exists after this judgment.

STUDY UNIT 8

Criminal capacity — mental illness and youth



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LEARNING OUTCOMES

After you have finished this study unit, you should be able to

- demonstrate your understanding of the defence of mental illness, having regard to
 - both the biological (or pathological) and the psychological legs of the test for this defence
 - the cause/s of the criminal incapacity (mental illness or mental defect)
 - the onus of proof
 - the role of expert evidence from psychiatrists and/or psychologists
- decide whether, in a particular case of criminal incapacity, it would be better for the accused to rely on the defence of mental illness or non-pathological criminal incapacity, having regard to
 - the respective criteria
 - the onus of proof
 - the need for expert evidence (and its concomitant cost)
 - the verdict in the case of a finding of incapacity
- distinguish between the result of a successful reliance upon the defence of criminal incapacity and the result of a finding of diminished criminal capacity
- express an informed opinion on the question whether a child of any age under the age of 14 years should be found to have been criminally incapable on account of his or her youthful age

8.1

BACKGROUND

In study unit 7 we pointed out that

$$\boxed{\text{culpability}} = \boxed{\text{criminal capacity}} + \boxed{\text{either intention or negligence}}$$

In that study unit we began to discuss the concept of criminal capacity. We have already analysed that concept, and pointed out that there are three defences which may exclude criminal capacity, namely the defence of non-pathological incapacity, the defence of mental illness (also called insanity) and the defence of youth. We discussed the first of these three defences in the previous study unit. In this study unit we will discuss the other two defences.

8.2

MENTAL ILLNESS

(Criminal Law 170–178; Case Book 112–114)

8.2.1 Introduction

Criminal capacity may be excluded by the mental illness or abnormality of the accused (X). The defence of mental illness was previously known as the defence of “insanity”. The latter term has, however, fallen into disfavour in modern psychology. Some of the most important sources dealing with the subject refer to

it as “mental abnormality” or “mental illness”, and for this reason we prefer to use the expression “mental illness”.

Since 1977 the whole subject relating to mental illness as a defence in criminal law has been governed by legislation, more particularly by section 78 of the Criminal Procedure Act 51 of 1977. It is interesting to note that this is one of the very few subjects in the general principles of criminal law which is regulated by statute. As you will have gathered by this time, almost all the other principles or defences (such as automatism, causation, private defence, intention and negligence) are governed by common law, which is that system of legal rules not contained in legislation.

Before 1977 the South African courts, in dealing with the defence of mental illness, applied a set of rules known as the “M’Naghten rules”, which were derived from English law. Since these rules no longer apply after 1977, we shall not discuss them here.

One of the most important sources on the rules relating to this defence is the report of the “Commission of Inquiry into the Responsibility of Mentally Deranged Persons” dating from the late nineteen sixties. The chairman of the commission was Mr Justice Rumpff, then Judge of Appeal and later Chief Justice. The report of the commission is usually described as the “Rumpff Report”.

8.2.2 *Contents of section 78(1)*

The test to determine the criminal capacity of mentally abnormal persons is contained in section 78(1) of the Criminal Procedure Act 51 of 1977, which reads as follows:

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable

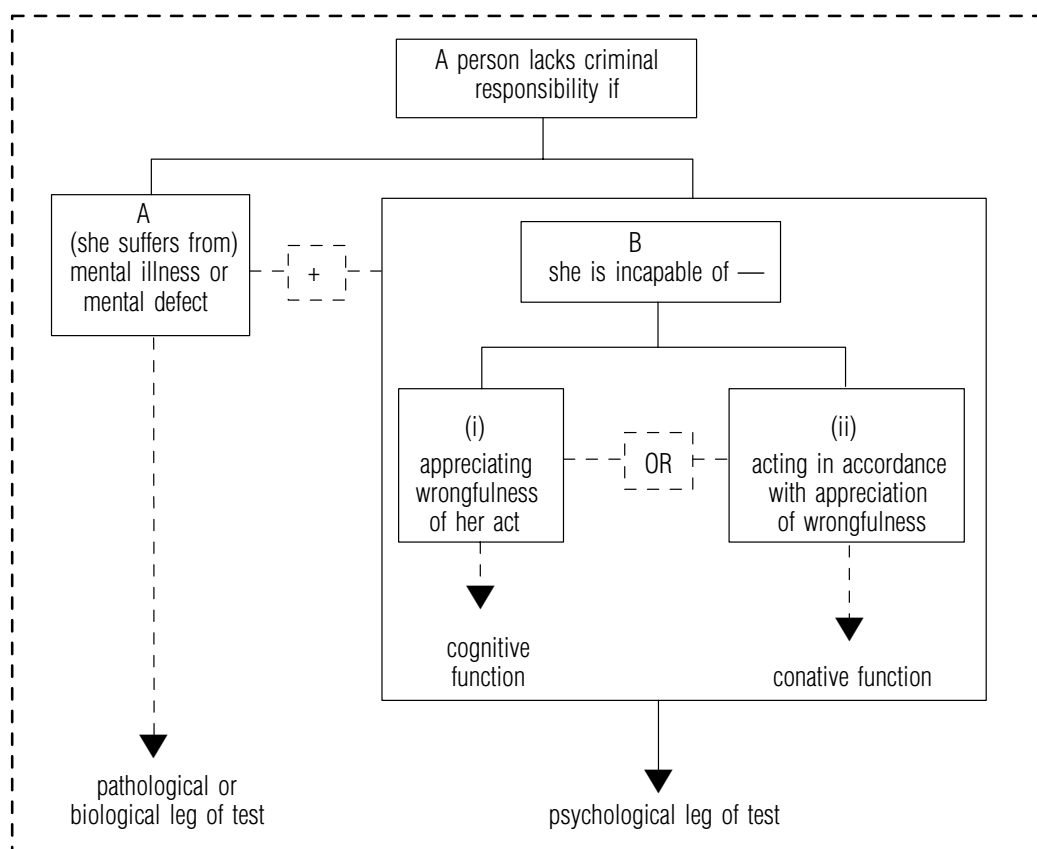
- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

Note that the words “shall not be criminally responsible” in this section in fact mean “shall lack criminal capacity”

8.2.3 *Analysis of section 78(1)*

Before discussing the contents of section 78(1) the following diagram setting out the test is provided:



If you refer back to this diagram, you ought to find it easier to understand the discussion which follows.

The defence of mental illness brings one to an area of the law (and more particularly of criminal law) in which the lawyer or judge not only has to have a knowledge of criminal law, but also has to take cognisance of knowledge in other spheres as well, namely psychiatry and psychology. This is what happens in section 78(1). The test enunciated in this section has two legs, which are indicated in the diagram above in two squares marked “A” and “B”. The first square, marked A, comprises the **pathological** leg (or biological leg, as it is sometimes called) of the test. The second square, marked B, comprises the **psychological** leg of the test.



Note the plus sign between the two squares (or legs of the test): before one can succeed with the defence of mental illness, both legs of the test must be complied with. The two legs do not apply in the alternative; they are not connected with an “or”. (There must in reality be a causal connection between A and B — cf the words “which makes him or her incapable” in s 78(1), or, more particularly, the words “wat tot gevolg het” in the Afrikaans text. We merely use the plus sign in order to simplify the exposition of the test.) Note further that the square marked B contains two smaller subdivisions, each of which is put in a smaller square, and marked “(i)” and “(ii)” respectively, and that these two subdivisions of the test apply in the **alternative**, owing to the use of the word “or” in section 78(1). (In their answers students often use the word “and” where they should use “or”, and vice versa. Please make sure that you do not confuse these two options!)

The test set out in section 78(1) to determine whether X lacks criminal capacity embodies a so-called **mixed** test, in the sense that both pathological factors (which refer to X’s illness — see the first square, A) and X’s mental abilities (that is, the psychological factors referred to in the second square, B) are taken into account.

We now proceed to a closer examination of the two legs of the test.

8.2.4 *Mental illness or mental defect*

We first consider the first leg of the test in section 78(1), namely that at the time of the commission of the act X must have been suffering from a mental illness or mental defect. This requirement means the following:

- (1) The words “mental illness” or “mental defect” refer to a **pathological disturbance** of the mental faculties. “Pathological” means “sick” or “diseased”. The words “mental illness” or “mental defect” do **not refer to** a mere temporary clouding of the mental faculties due to **external stimuli** such as alcohol, drugs or even provocation. Thus if X temporarily loses her wits because a brick fell onto her head, her condition could not be described as a “mental illness”.
- (2) It is clear from the further subsections of section 78 and from section 79 that whether X was suffering from a mental illness or mental defect must be determined by the court with the aid of **expert evidence given by psychiatrists**. The psychiatrists will examine X while she is detained in a psychiatric hospital or any other place designated by the court and then report their findings to the court.
- (3) It is not necessary to prove that a mental illness or defect originated in X’s mind: the defence may be successful **even if the origin** of the illness **was organic** (ie stemmed from X’s physical organs, as opposed to her mind). An example in this respect is arteriosclerosis (ie a hardening of the walls of an artery).
- (4) The duration of the mental illness is not relevant. It may be of **either a permanent or a temporary nature**. In the latter case it must of course have been present at the time of the act. If X was mentally ill before and after the act but she committed it at a time when she happened to be sane, she does not lack criminal capacity. Such a lucid interval between periods of mental illness is referred to in legal terminology as a *lucidum intervallum* (“lucid interval”).
- (5) Although **intoxication** in itself does not constitute mental illness, the **chronic abuse of liquor** can lead to a **recognised mental illness** known as *delirium tremens* (*Bourke* 1916 TPD 303; *Holliday* 1924 AD 250). If X committed the act while she was in this condition and the condition resulted in her lacking the required mental abilities, she may successfully rely on the defence.
- (6) A “**mental defect**” can be distinguished from a “**mental illness**” in that it is characterised by an **abnormally low intellect** which is usually evident already at an **early stage** and is of a **permanent nature**. “Mental illness” on the other hand, usually manifests itself later in life and is not necessarily of a permanent nature. A mental defect usually hinders a child’s development or prevents the child from developing or acquiring elementary social and behavioural patterns.

8.2.5 *Psychological leg of test*

If the test to determine mental illness was formulated in such a way that everything depended upon whether, from a psychiatric point of view, X suffered of a mental illness, a court would be almost entirely in the hands of psychiatrists. However, the question for the lawyer is not merely whether a person was mentally ill, but also whether her mental disease resulted in the impairment of certain mental abilities. This brings us to the second leg of the test for criminal incapacity contained in square B in the diagram. This part of the test is subdivided into two parts, which operate in the **alternative**.

In this part of the test the two psychological factors which render a person responsible for her acts, namely the ability to distinguish between right and wrong (cognitive mental faculty) and the ability to act in accordance with such an insight (conative mental faculty), are referred to. We have already discussed and explained

these two factors above in the general discussion of the concept of criminal capacity in the previous study unit, (see 7.3.3). Consult this discussion once more. Note that section 78(1) requires that the lack of mental abilities be attributable to the mental illness or mental defect — in other words, it requires a **causal link** between the mental illness or mental defect and the lack of mental abilities. In the above diagram of the test the cognitive and conative mental functions are indicated with arrows. B(i) is the cognitive part of the test and B(ii) the conative part. The B(i) part of the test is seldom of great importance in practice. The question is usually whether the B(ii) part of the test has been complied with.

As far as the conative part of the test is concerned, all that is required is that X must have been incapable of acting in accordance with an appreciation of the wrongfulness of her act or omission. Such **lack of self-control may be the result of a gradual process of the disintegration of the personality**. Unlike the old test which applied before 1977, the lack of self-control need not necessarily be the result of a so-called “irresistible impulse”; the expression “irresistible impulse” creates the impression of a conflict which flares up suddenly, sparking off an impulsive irresistible urge, whereas the disintegration of the conative function (self-control and power of resistance) may be a gradual process.

This is well illustrated by the decision in *Kavin* 1978 (2) SA 731 (W). X shot and killed his wife and two children and also attempted to kill a third child. He was in financial difficulty, and his apparent motive was to reunite his family, whom he dearly loved, in heaven. The panel of psychiatrists concluded that although it could not be said that X had been unable to appreciate the wrongfulness of his conduct, he had been unable, on account of his mental illness, to act in accordance with that appreciation at the time of the commission of the murders. The evidence showed, however, that he had acted, not on an irresistible impulse, but according to a definite plan: there was no question of an impulsive act. The court held that the provisions of section 78(1) were wider than the “irresistible impulse test”, that they were wide enough to cover a case such as this, where there had been a gradual disintegration of the personality through mental illness, and that X’s defence of mental illness should therefore succeed.



You must note that the accused in the *Kavin* case relied upon the defence of mental illness (s 78(1)) and **not** on the defence of non-pathological criminal incapacity. The psychiatric evidence in this case was that X suffered from a recognised mental illness, namely reactive depression. Students often quote the *Kavin* case when referring to the defence of non-pathological criminal incapacity. This is incorrect.



Read the following decision in the *Case Book: Kavin* 1978 (2) SA 731 (W).

8.2.6 *Onus of proof*

Section 78(1A) of the Criminal Procedure Act 51 of 1977 provides that every person is presumed not to suffer from a mental illness or mental defect until the contrary is proved on a balance of probabilities. According to section 78(1B), the burden of proving insanity rests on the party raising the issue. This means that if the accused raises the defence of mental illness the burden of proving that she suffered from mental illness at the time of the commission of the unlawful act rests upon her. If the state (prosecution) raises the defence, the burden of proof rests on the state.

8.2.7 *Verdict*

If the defence of mental illness is successful, the court must find X not guilty by

reason of mental illness or mental defect, as the case may be (s 78(6)). The court then has a discretion (in terms of s 78(6)) to issue any one of the following orders:

- (1) that X be **admitted to, and detained in, an institution** stated in the order and **treated** as if she were an **involuntary mental-health-care user** contemplated in section 37 of the Mental Health Care Act 17 of 2002
- (2) that X be **released** subject to such **conditions** as the court considers appropriate
- (3) that X be **released unconditionally**

An example of a case in which the court may decide to release X unconditionally is a case in which the evidence shows that, although X might have suffered from mental illness when she committed the wrongful act, at the time of her trial she was, mentally, completely normal again.

There is another possible order that the court can make in certain serious cases

- (1) If X has been charged with
 - (i) **murder**
 - (ii) **culpable homicide**
 - (iii) **rape** or
 - (iv) another charge involving **serious violence**, or
- (2) if the court considers it **necessary in the public interest**

the court may direct that X be **detained in a psychiatric hospital or a prison** until a judge in chambers (ie, upon the strength of written statements or affidavits placed before the judge, without evidence necessarily being led in open court) makes a decision in terms of section 47 of the Mental Health Care Act, 2002. The judge in chambers may order that the state patient

- (1) remain a state patient
- (2) be reclassified and dealt with as a voluntary, assisted or involuntary mental-health-care user in terms of chapter V of the above-mentioned Act
- (3) be discharged unconditionally
- (4) be discharged conditionally

8.2.8 *Diminished responsibility or capacity*

Section 78(7) provides that if the court finds that X, at the time of the commission of the act, was criminally responsible for the act, but that her capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing her.

This subsection confirms that the border-line between criminal capacity and criminal incapacity is not an absolute one, but a question of degree. A person may suffer from a mental illness and yet be able to appreciate the wrongfulness of her conduct and act in accordance with that appreciation. She will then, of course, not succeed in a defence of mental illness in terms of section 78(1).

If it appears that, despite her criminal capacity, she finds it more difficult than a normal person to act in accordance with her appreciation of right and wrong, because her ability to resist temptation is less than that of a normal person, she must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a **less severe punishment**.

8.2.9 *Mental abnormality at the time of trial*

In conclusion we draw your attention to the difference between an allegation by X or her legal representative

- that she was mentally abnormal **at the time of the commission of the act**,
- that she is mentally abnormal **at the time of her trial**.

The discussion thus far has been devoted to mental abnormality **at the time of the commission of the act**. As regards the second type of allegation or investigation, we refer you to the discussion in *Criminal Law* 178. You may read it on your own. A court cannot try a mentally abnormal person. The procedure to be followed in such a case is discussed briefly in that book. This is a procedural matter which is dealt with in the course on Criminal Procedure.

8.3

YOUTH

(Criminal Law 178–181; Case Book 115–118)

You must study the discussion of this topic in *Criminal Law* 178–181 on your own. The exposition of the different age limits in paragraph 1 on pages 178–179 is very important. You need not study the first paragraph on p 180. You may merely read the part which starts with the words: “In practice a short cut ...” and ends with the words: “... less able than the normal adult to resist temptation.” However, you must again study from the second paragraph on page 180, which starts with the words “From what has been said above ...” till the end of the discussion at the top of 181. You need not study the contents of the footnotes.

ACTIVITY

X, a 13-year-old girl, has no home. Every day, she stands on a corner of a street next to the robot, begging for money. Her eighteen-year-old friend, Y, tells her that she is wasting her time; she should rather resort to crime. She also tells her that she can come and stay at her home if she would be prepared to rob the drivers of motor cars of their cell phones. X decides that she has had enough of begging. The next day, she smashes a car window at the robot and grabs the car-owner’s cell phone. She is caught and charged with robbery. Consider X’s chances of succeeding with the defence that she lacked criminal capacity at the time of the commission of the offence.

FEEDBACK

X may argue that she lacked criminal capacity on the grounds of her age. Children between the ages of seven and fourteen are rebuttably presumed to lack criminal capacity. However, the closer the child comes to the age of fourteen years, the weaker the presumption that she lacked criminal capacity. In other words, the older the child, the slimmer the chances of success with this defence. It may nevertheless be argued that because X had been influenced by her older friend, she had lacked the ability to resist the temptation to commit a criminal act. This refers to the second leg of the test for criminal capacity, namely that the child must have had the capacity to act in accordance with her appreciation of right and wrong. However, as there was no compulsion or an order from an older person (such as a

parent) to commit a crime, and since X is already near the age of fourteen, it is unlikely that X would succeed with this argument. Look at the case law discussed in this regard in the prescribed book.

GLOSSARY

<i>lucidum intervallum</i>	lucid interval between periods of mental illness
<i>delirium tremens</i>	the name of a recognised form of mental illness caused by the chronic abuse of liquor

SUMMARY

Mental illness

- (1) The test to determine whether X may succeed with the defence of mental illness — see definition of this test above.
- (2) The test to determine whether X may succeed with the defence of mental illness is set out in a statutory provision, namely section 78(1) of the Criminal Procedure Act.
- (3) The abovementioned test comprises a pathological leg (which refers to a pathological disease which X must have) and a psychological leg (which refers to X's cognitive and conative functions)
- (4) The onus of proving the defence of mental illness rests on the party raising the defence.
- (5) If this defence succeeds, X is found not guilty, but the court may order that X be detained in an institution or a psychiatric hospital or prison.

Youth

- (6) There is an irrebuttable presumption that a child who has not yet completed his or her seventh year of life, lacks criminal capacity.
- (7) There is a rebuttable presumption that a child between the ages of seven and 14 years lacks criminal capacity.
- (8) The test to determine whether a child between the ages of seven and 14 years has criminal capacity, is the same as the general test for criminal capacity.

TEST YOURSELF

- (1) What are the requirements for successful reliance on the defence of mental illness as set out in section 78(1) of the Criminal Procedure Act? Discuss.
- (2) Discuss the pathological leg of the test set out in section 78(1), that is the requirement that X must have suffered from a mental illness or mental defect.
- (3) Discuss the psychological leg of the test set out in section 78(1), that is the requirement that there should have been a certain psychological incapability on the part of X.
- (4) If X raises the defence of mental illness, on whom does the onus of proving that she suffered from mental illness rest?
- (5) Discuss the possible orders that a court may issue if X succeeds with her defence of mental illness.
- (6) Discuss the rules that are applied by the courts if X raises the defence of youth (immature age).

STUDY UNIT 9

Intention I



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LEARNING OUTCOMES

After you have finished this study unit, you should be able to:

- demonstrate your understanding of the requirement of intention by
 - outlining the two elements of intention (inherent in all of its three forms)
 - determining whether an accused has acted with
 - * direct intention

* indirect intention

* *dolus eventualis*

— distinguishing between motive and intention

9.1

BACKGROUND

In the second last study unit it was pointed out that culpability rests on two pillars, namely criminal capacity and a form of culpability. There are two forms of culpability, namely intention and negligence. This may be represented in the following way:

$$\boxed{\text{culpability}} = \boxed{\text{criminal capacity}} + \boxed{\text{either intention or negligence}}$$

The first pillar of the requirement of culpability, namely criminal capacity, has been discussed in the previous two study units. In this and the next study unit we will be discussing intention as a form of culpability. Negligence will be discussed in a later study unit.

9.2

THE TWO ELEMENTS OF INTENTION

Intention, in whatever form, consists of **two elements**, namely a **cognitive** and a **conative** element.

The **cognitive** element consists in X's **knowledge** or awareness of

- the **act** (or — which is the same thing — the nature of the act)
- the existence of **the definitional elements**
- the **unlawfulness** of the act

The **conative** element consists in X's directing his **will** towards a certain act or result: X decides to accomplish in practice what he has previously only pictured to himself in his imagination. This decision to act transforms what had until then merely been "day-dreaming", "wishing" or "hoping" into intention.

In legal literature intention is also known as *dolus*.

9.3

DEFINITION OF INTENTION

A person acts or causes a result **intentionally** if

- he **wills** the act or result
- in the **knowledge**
 - of what he is doing (ie the **act**)
 - that the act and circumstances surrounding it accord with the **definitional elements**, and
 - that it is **unlawful**

Defined even more concisely, one can say that intention is to **know** and to **will** an act or a result.

9.4 THE DIFFERENT FORMS OF INTENTION

(*Criminal Law 181–188*)

There are three forms of intention, namely direct intention (*dolus directus*), indirect intention (*dolus indirectus*) and what is usually described as *dolus eventualis*. In a crime requiring intention, the intention requirement is satisfied if X entertained any one of these forms of intention. In other words, there is no crime requiring intention in respect of which for example only *dolus directus* is required, just as there is no crime requiring intention in respect of which for example only *dolus eventualis* is required.

We shall now take a closer look at these various forms of intention. In order not to make the discussion of the various forms of intention too complicated we shall for the moment limit ourselves to intention in materially defined crimes — that is to say crimes that are defined in terms of the causing of a certain result. (Murder is the most important crime in this category. Murder is the unlawful, intentional *causing of* the death of another human being.) Later in this study unit we shall briefly indicate how the description of the forms of intention in formally defined crimes (ie, crimes that are not defined in terms of the causing of a certain result, but merely in terms of the commission of a certain act in certain circumstances) differs from the description of intention in materially defined crimes.

9.4.1 *Direct intention (dolus directus)*

Definition

A person acts with direct intention if the causing of the forbidden result is his *aim* or *goal*.

Example

X wants to kill Y. X takes his revolver, presses it against Y's head and pulls the trigger. The shot goes off and strikes Y in the head. Y dies instantly.

Remark

Note that the reason why the person performs the act or causes the result is irrelevant. In the example above it therefore makes no difference whether X kills Y because he hates him, or because Y is dying of a terminal illness and X wishes to relieve him of the pain he is experiencing.

9.4.2 *Indirect intention (dolus indirectus)*

Definition

A person acts with indirect intention if the causing of the forbidden result is not his main aim or goal, but he realises that, in achieving his main aim, his conduct will **necessarily** cause the result in question.

Example

- (1) X shoots through a closed glass window at a target. His main purpose is to hit the target, but he realises that by doing this he must necessarily also

shatter the window. If he decides nevertheless to act to attain his main purpose, he naturally also wills those consequences which he realises must invariably accompany his main purpose. If he shoots at the target and shatters the window, he cannot be heard to say that he never intended to shatter the window.

- (2) X's merchandise is insured and is stored in Y's building. To obtain the insurance money, X sets the merchandise on fire, fully realising that the building itself must of necessity catch alight. When this happens, the building burns down. X may be charged with arson because he had the intention to set the building on fire — *Kewelram* 1922 AD 213.

Remark

This form of intention is present when a person visualises what he wants to achieve, realises that, in order to achieve it, something else will **necessarily** be caused, but nevertheless proceeds with his conduct.

9.4.3 *Dolus eventualis*

Definition

A person acts with *dolus eventualis* if the causing of the forbidden result is not his main aim, but

- (1) he subjectively **foresees** the **possibility** that, in striving towards his main aim, his conduct may cause the forbidden result and
- (2) he **reconciles** himself with this possibility.

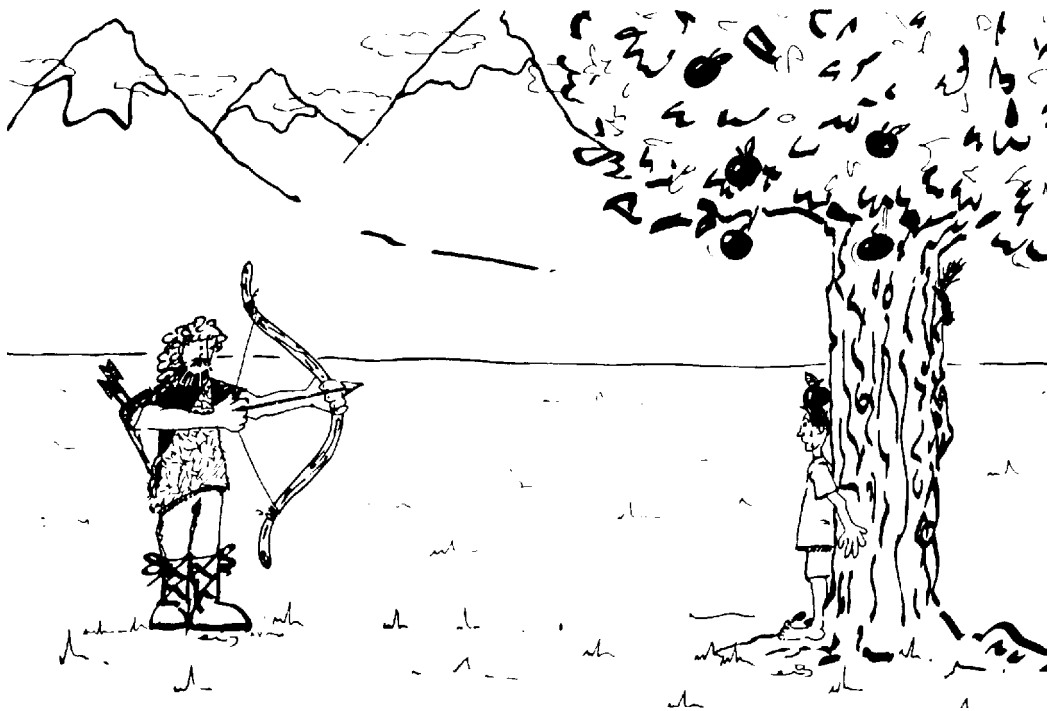
The (2) part of the definition of *dolus eventualis* (which requires that X must have reconciled himself with the possibility) is not always expressed in the same way. Instead of requiring that X must have reconciled himself to the possibility, it is often said that X must have been reckless with regard to the performance of the act or the causing of the result. In practice, however, the expressions "reconcile to" and "reckless towards" are used as synonyms.



Dolus eventualis is extremely important in criminal law and you should be able to define it properly in the examination and in assignments. We often ask a question in the examination in which it is necessary for the student to define *dolus eventualis*. When reading your definition of *dolus eventualis* in your examination scripts, we are especially on the lookout for the words which have been printed in bold in the definition, namely **foresees**, **possibility** and **reconciles**.

Examples of *dolus eventualis*:

- (1) X disconnects sections of a railway track in order to derail a train. He does not desire to kill other people, because his immediate goal is to commit sabotage and in this way to express the resentment he feels against the state. He is nevertheless aware of the possibility that people may die if the train is derailed, and he reconciles himself to this possibility. If he succeeds in derailing the train, and people die, it is futile for him to allege that he did not intend to kill people (facts analogous to those in *Jolly* 1923 AD 176).
- (2) X wants to burn down a building. He foresees the possibility that Y may be inside it, but nevertheless proceeds with his plan, and sets fire to the building. Y is indeed inside, and dies in the flames. In the eyes of the law X intentionally caused Y's death.
- (3) X and Z undertake a joint robbery. X knows that Z is armed with a loaded



Dolus eventualis. A variation of the well-known story of the legendary Swiss patriot Wilhelm Tell. In order to prove how well he can shoot with his bow and arrow, X (Wilhelm Tell) places an apple on the head of his son, Y, and shoots an arrow at the apple. He does not wish to kill Y, whom he dearly loves. He wants the arrow to pierce the apple on Y's head. However, assume that the following happens: X foresees the possibility that, in attempting to shoot the apple, the arrow might strike, not the apple, but Y instead, killing Y. He aims at the apple, but the arrow strikes Y, killing him. If X is charged with having murdered Y, can he succeed with a defence that he never intended to kill Y, since he merely wanted the arrow to strike the apple? Assuming that it is proven that he in fact foresaw the possibility of the arrow striking Y instead of the apple, and that he had reconciled himself to this possibility, his defence will not succeed. In the eyes of the law X had the intention to kill Y. This form of intention is known as *dolus eventualis*.

revolver. He also knows that Z may use this weapon if the people whom they want to rob, offer resistance. They go to a shop, which Z enters while X stands watch outside. The proprietor of the shop (Y) resists and Z shoots and kills him. In the eyes of the law not only Z, but also X had the intention to kill and is guilty of murder (Nsele 1955 (2) SA 145 (A)).

Should a court consider whether X acted with *dolus eventualis* and decide that this was not the case, the decision will normally be based on the consideration that X had not foreseen the possibility. However, it is quite possible for the court to conclude that although X had foreseen the possibility, he had not reconciled himself with it.

The following is an example of where a court may reach this conclusion:

X is shooting game. He knows that behind the game, between the trees, there is a hut which is inhabited, and that the inhabitants may perhaps find themselves outside between the trees. He thus foresees the possibility that if he shoots and he misses the buck he is aiming at, the bullet may hit one of the inhabitants. However, he decides that this will not happen, since he is a very good marksman, and has in the past shot similar buck from the same distance without missing. He pulls the trigger. The shot misses the buck, and hits a person, Y, who is standing outside the hut between the trees, killing him. In this example X did not act with *dolus eventualis* since the second part of the test, which deals with "reconciling himself to the possibility", has not been complied with. However, X in this example would in all probability be guilty of culpable homicide, since he acted

negligently in shooting after he had become aware of the possibility that there might be people behind the buck.



You should note that the minimum requisite for *dolus eventualis* is an **actual contemplation** by X of the possible consequence in question. The court must make such a finding. It is not sufficient merely to find that X *must* have foreseen the possibility of a consequence.

A mistake commonly made by students is to say that intention was present because X “ought to have foreseen or must have foreseen the possibility of a consequence ensuing”. Remember that the correct statement is: “*Dolus eventualis* was present because X in fact (actually) **foresaw** the possibility of a result ensuing.”

9.5

THE TEST FOR INTENTION IS SUBJECTIVE

(*Criminal Law* 188–191)

The test in respect of intention is purely subjective. The court must determine what the state of mind of that particular person — the accused (X) — was when he committed the act. When determining whether X had intention, the question is never whether he **should** have foreseen the result, but whether he foresaw it as an actual fact. To say that X “should have foreseen” says nothing about what X actually thought or foresaw; it is simply comparing his state of mind or conduct with another’s, namely the fictitious reasonable person. To do this is to apply the test in respect of negligence, which is objective. In deciding whether X had intent the question is always: How did X perceive the situation, what knowledge did he have, and did he will the consequence or foresee it as a possibility?

9.6

PROOF OF INTENTION — DIRECT OR INDIRECT

How is intention proved in a court? Sometimes there may be **direct** evidence of intention: if in a confession, in the course of being questioned at the stage of explanation of plea or in his own evidence before the court, X admits that he acted intentionally, and if the court believes him, there is of course no problem. However, in most cases there is no such an admission by X. How can the judge or magistrate then determine whether he acted with intent? X is, after all, the only person who knows what his state of mind was at the crucial moment when he committed the act.

There is no rule to the effect that a court may find that X acted with intent only if he (X) admitted that he had intent (in other words if there is **direct** proof of intent). It is, after all, a well-known fact that many accused who in fact did have intent, subsequently falsely deny in court that they acted intentionally. A court may base a finding that X acted intentionally on **indirect** proof of intent. This means that the court **infers** the intent from evidence relating to X’s outward conduct at the time of the commission of his act as well as the circumstances surrounding the events.

Consider the following simple example: Eye-witnesses of the events tell the court that, with a knife in his hand, X walked up to Y, who was sitting on a chair, pressed the knife with a swift stabbing motion into Y’s chest, and that Y died moments later. The doctor who conducted the *post mortem* examination tells the court that whoever administered the stab wound must have used much force because the wound was deep and the stab even broke one of Y’s ribs. It is also clear from the evidence of the eye-witnesses that Y had not, shortly before receiving the stab wound, provoked or angered X, that X had not been intoxicated, and that there cannot be any suggestion that X acted in private

defence. To this may be added evidence that X had harboured a grudge against Y because Y had committed adultery with X's wife a few days before the event. Assuming that the court accepts this evidence, the court will in all probability infer from all this that X killed Y intentionally.

Contrast the above set of facts to one in which, according to the evidence, the wound was not deep, Y had provoked X before the stab wound was administered, and X was intoxicated and had shortly before the event told the bystanders (eye-witnesses) that he had only wanted to frighten Y. In such a case the court will probably find that it cannot infer beyond reasonable doubt that X intended to kill Y.

When a court is called upon to decide by means of inference from the circumstances whether X acted intentionally, it must guard against subtly applying an objective instead of a subjective test to determine intent. It is dangerous for a court to argue as follows: "Any normal person who commits the act which X committed, would know that it would result in the death of the victim; therefore X acted intentionally." Although the court (judge or magistrate) is free to apply general knowledge of human behaviour and of the motivation of such behaviour, it must guard against exclusively considering what a "normal", "ordinary" or "reasonable" person would have thought or felt in given circumstances.

The court must go further than this: it must consider all the circumstances of the case (such as the possibility of a previous quarrel between the parties) as well as all of X's individual characteristics which the evidence may have brought to light and which may have a bearing on his state of mind (such as his age, degree of intoxication, his possible irascibility, possible lack of education or low degree of intelligence). The court must then to the best of its ability try and **place itself in X's position** at the time of the commission of the act complained of and then try and ascertain what his (X's) state of mind was at that moment — that is, whether he appreciated or foresaw the possibility that his act could result in Y's death (*Mini* 1963 (3) SA 188 (A) 196; *Sigwahla* 1967 (4) SA 566 (A) 570).

9.7

KNOWLEDGE AS AN ELEMENT OF INTENTION MUST COVER ALL THE REQUIREMENTS OF CRIME

We have already pointed out that intention consists of two elements, namely knowledge and will. It is necessary to explain the knowledge requirement or the cognitive element in more detail.

In order to have intention, X's knowledge must refer to all the elements of the offence except the requirement of culpability. Such knowledge must refer to

- (1) the act
- (2) the circumstances included in the definitional elements, and
- (3) the unlawfulness of the act

X must be aware of all these factors.

Let us now apply this rule to a specific crime, namely common-law perjury. The form of culpability required for this crime is intention. The elements of this crime are the following:

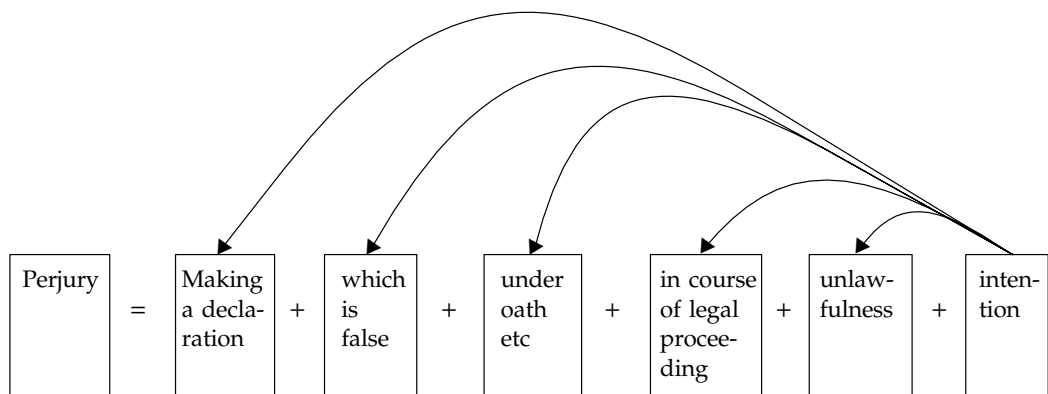
- (1) making a declaration
- (2) which is false
- (3) under oath or a form equivalent to an oath
- (4) in the course of a legal proceeding

- (5) unlawfully and
- (6) intentionally

If we now apply the rule presently under discussion to this crime, it means the following: The act and definitional elements are contained in the elements numbered (1) to (4). An application of the present rule means, firstly, that X must know (be aware of the fact) that he is making a declaration (element no (1)). Next, he must know that this declaration is false (element no (2)). Furthermore, he must know that he is making the declaration under oath (element (3)). If he is not aware of this (where, for example, he thinks that he is merely talking informally to another), a material component of the intention requirement for this crime is lacking, and X cannot be convicted of the crime.

Intention in respect of the element numbered (4) of the crime means that X must know that he is making the statement in the course of a legal proceeding. If he is unaware of this (where, for example, he thinks that he is making the statement merely in the course of an administrative process), a material component of the intention required for this crime is likewise lacking. Intention in respect of the element numbered (5) of the crime means that X must know that his conduct is unlawful, that is, not covered by a ground of justification (such as necessity, which includes compulsion). It is not necessary to enquire into intention relating to the element number (6) of the crime, as this element is the culpability element itself, and an "intention in respect of an intention" is obviously nonsensical.

One may illustrate the rule that intention must relate to all the elements of the crime graphically as follows:



9.8

INTENTION DIRECTED AT THE CIRCUMSTANCES INCLUDED IN THE DEFINITIONAL ELEMENTS

By saying that intention must be directed at the circumstances included in the definitional elements, we mean that X must have **knowledge** of these circumstances. This principle applies particularly to formally defined crimes, because in these crimes the question is not whether X's act caused a certain result, but merely whether the act took place in certain circumstances. The following are examples of the application of this principle:

- (1) In the crime of unlawful possession of drugs the object that X possesses must be a drug. X must accordingly be aware of the fact that what he possesses is a drug. If X is under the impression that the bottle Z has asked him to keep contains talcum powder, whereas in fact it contains a drug, X lacks intention.
- (2) The most common form of theft takes the form of the removal of another's property. This is a form of theft where the thing that is stolen must belong to another. X must therefore know that the thing he is appropriating belongs to

another, and must not, for instance, labour under the mistaken impression that it is his own.

When we say that X must have knowledge of a circumstance or a fact, it means the following: X need not be convinced that the said circumstance exists (eg, that the object he possesses is a drug, or that the thing he is handling belongs to another). In the eyes of the law, X will also be regarded as having the knowledge (ie the intention with regard to such circumstance or fact) if he merely foresees the possibility that the circumstance or fact may possibly exist, and reconciles himself with that possibility. In such a case his intention with regard to the circumstance exists in the form of *dolus eventualis*.

It follows that the definitions of the different forms of intention in formally defined crimes (ie crimes which do not deal with the causing of a result) differ only slightly from the definitions of the forms of intention in materially defined crimes. The only difference is that all references to "causing a result" are replaced by the words "commit an act" and (where applicable) "circumstances exist".

9.9

INTENTION WITH REGARD TO UNLAWFULNESS

As far as the intention with regard to unlawfulness is concerned, the principle which has been explained above, also applies. Knowledge of the unlawfulness of an act is knowledge of a fact, and is present not only when X in fact knows (or is convinced) that the act is unlawful, but also when he merely foresees the possibility that it may be unlawful and reconciles himself to this. His intention with regard to unlawfulness is then present in the form of *dolus eventualis*.

When we say that knowledge of unlawfulness is required for X to have intention, it means that X must be aware that his conduct is not covered by a ground of justification and that the type of conduct he is committing is prohibited by law as a crime. This will be discussed in the next study unit.

9.10

THE DISTINCTION BETWEEN MOTIVE AND INTENTION

(*Criminal Law 190*)

Intention must not be confused with the motive for committing the crime. In determining whether X acted with intention, the motive behind the act is immaterial (*Peverett 1940 AD 213*). For this reason X is guilty of theft even though he steals from the rich in order to give to the poor. A good motive may at most have an influence on the degree of punishment. If it is clear that X acted intentionally the fact that his motive was laudable or that one may have sympathy for him cannot serve to exclude the existence of intention, as where he administers a fatal drug to his ailing father to release him from a long, painful and incurable illness (*Hartmann 1975 (3) SA 532 (C)*). Furthermore, if X had the intention to commit an unlawful act or to cause an unlawful result the fact that he did not desire to commit the act or to cause the result in no way affects the existence of his intention (*Hibbert 1979 (4) SA 717 (D) 722*).

GLOSSARY

<i>dolus</i>	intention
<i>dolus directus</i>	direct intention
<i>dolus indirectus</i>	indirect intention
<i>dolus eventualis</i>	a form of intention in which X foresees a possibility and reconciles himself to such possibility

SUMMARY

- (1) Culpability = criminal capacity + either intention or negligence.
- (2) A person acts or causes a result **intentionally** if he **wills** the act or result, while **aware** that the act and the circumstances in which it takes place accord with the definitional elements and that it is unlawful.
- (3) There are three forms of intention, namely direct intention (*dolus directus*), indirect intention (*dolus indirectus*) and *dolus eventualis*. A definition of each of these forms of intention was given above. In a crime requiring intention the intention requirement is satisfied if X entertained any one of these forms of intention.
- (4) Intention, in whatever form, consists of two elements, namely a cognitive and a conative element. The cognitive element refers to X's **knowledge**, while the conative element refers to his **will**.
- (5) As far as the element of knowledge in intention is concerned, X must have knowledge of (a) the act, (b) the circumstances set out in the definitional elements, and (c) the unlawfulness of the conduct.
- (6) The test for determining whether X had intention is subjective. This means that the court must ask itself what X in fact thought or willed at the critical moment. In determining whether X had intention, the question is never "what X should have known or thought", or "what X ought to have known or thought", or "what a reasonable person in the same circumstances would have known or thought".

TEST YOURSELF

- (1) Define intention.
- (2) Name the two elements of intention and explain briefly what each entails.
- (3) Name the three forms of intention.
- (4) Define each of the three forms of intention and illustrate each by means of an example.
- (5) Why is it said that the test for intention is **subjective**? Explain briefly.
- (6) Discuss the following statement: "Intention must be directed at all the requirements of the offence".
- (7) Distinguish between intention and motive. Is X's motive relevant where it has to be ascertained whether he had intention?

STUDY UNIT 10

Intention II — Mistake



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to:

- further demonstrate your understanding of the requirement of intention by expressing an informed opinion on whether or not an accused has made a material mistake (be it a mistake relating to the object, the chain of causation, the unlawfulness of the act, or of the definitional elements) which excludes intention

- demonstrate your understanding of *aberratio ictus* by
 - recognising an instance of *aberratio ictus*
 - applying the concrete-figure approach as well as the transferred culpability approach to the facts in such a case
 - distinguishing between instances of *aberratio ictus* and instances of *error in objecto*

10.1 MISTAKE NULLIFIES INTENTION

On mistake generally, see *Criminal Law* 191–192.

In the previous study unit we explained that intention must relate to

- (1) the act
- (2) all the circumstances set out in the definitional elements, and
- (3) the unlawfulness of the conduct

X must be aware of all these factors. If she is unaware of any of them, it cannot be said that she intended to commit the crime. If such knowledge or awareness is absent, it is said that there is a “mistake” or “error” on X’s part: she imagined the facts to be different from what they in fact were; in other words, mistake excludes or nullifies the existence of intention.

The following are two examples of mistake relating to the act (or — what amounts to the same — the nature of the act):

- (1) Within the context of the crime of malicious injury to property, X is under the impression that she is fixing the engine of somebody else’s motorcar that has developed problems, whereas what she is in fact doing to the engine amounts to causing “injury” to it.
- (2) Within the context of the crime of bigamy, X thinks that she is partaking in a communion service in a church, whereas the service in which she is partaking is in fact a marriage ceremony!

The following are two examples of mistake relating to circumstances set out in the definitional elements:

- (1) X is hunting game at dusk. She sees a figure which she takes to be a buck, and shoots at it. It turns out that she has killed a human being. She will then not be guilty of murder, since she did not intend to kill a human being.
- (2) (Within the context of the statutory crime of unlawfully possessing drugs) X thinks that the container containing powder which she received from a friend is snuff to be used by her as a cure for a certain ailment, whereas it in fact contains matter listed in the statute as a drug which may not be possessed.

The following are two examples of mistake relating to unlawfulness:

- (1) X thinks that she finds herself in a situation of private defence because Y is threatening her with a revolver, whereas Y is merely joking and the “revolver” is in fact a toy.
- (2) X believes that there is no legislation or legal rule which prohibits her from possessing a rhinoceros horn, whereas there is in fact such legislation. We shall discuss mistake relating to the unlawfulness of the conduct in some more detail below.

10.2 MISTAKE NEED NOT BE REASONABLE

(Criminal Law 192)

Whether there really was a mistake which excludes intention is a question of fact. What must be determined is X's true state of mind and conception of the relevant events and circumstances. The question is not whether a reasonable person in X's position would have made a mistake. The test in respect of intention is subjective, and if one compares X's state of mind and view of the circumstances with those of a reasonable person in the same circumstances, one is applying an objective test in respect of intention, which is not warranted. To say that mistake can exclude intention only if it is reasonable, is the same as saying that it is essential that a reasonable person should have made a mistake under those circumstances.

Now that a subjective test in respect of intention has been accepted, there is no longer any room for an objective criterion such as reasonableness (*Modise* 1966 (4) SA 680 (GW); *Sam* 1980 (4) SA 289 (T)).

Because the test is subjective, X's personal characteristics, her superstitiousness, degree of intelligence, background and character may be taken into account in determining whether she had the required intention, or whether the intention was excluded because of mistake. The reasonableness of the mistake at most constitutes a factor which, from an evidential point of view, tends to indicate that there is indeed a mistake; however, it should not be forgotten that in exceptional circumstances it is possible to make an unreasonable mistake.

10.3 MISTAKE MUST BE MATERIAL

(Criminal Law 192–193)

Not every wrong impression of facts qualifies as a mistake, thus affording X a defence. Sometimes X may be mistaken about a fact or circumstance, and yet not be allowed to rely on his mistake as a defence. A mistake can exclude intention (and therefore liability) only if it is a mistake concerning an element or requirement of the crime other than the culpability requirement itself. These requirements are:

- (1) the requirement of an act
- (2) a requirement contained in the definitional elements, or
- (3) the unlawfulness requirement

To use any yardstick other than the above-mentioned one in determining whether a mistake may be relied on as a defence, is misleading. This must be borne in mind especially where X is mistaken about the object of her act. Such a mistake is known in legal literature as *error in objecto*. *Error in objecto* is not the description of a legal rule; it merely describes a certain kind of factual situation. It is therefore incorrect to assume that, as soon as a certain set of facts amounts to an *error in objecto*, only one conclusion (that X is guilty or not guilty) may legally be drawn.

Whether *error in objecto* excludes intention and is therefore a defence, depends upon the definitional elements of the particular crime. Murder is the unlawful intentional causing of the death of another person. The object of the murder is therefore a human being. If X thinks that she is shooting a buck when she is in fact shooting a human being, she is mistaken about the object of her act (*error in objecto*), and this mistake excludes the intention to murder. Her mistake excludes intention, because it is a mistake concerning the definitional elements of the crime in question (murder).

Note that, although in the above example X cannot be convicted of murder, it does not necessarily follow that she will go free. Although her mistake excludes intention, the circumstances may be such that she was negligent in shooting at a fellow human being. She would have acted negligently if a reasonable person in the same circumstances would have foreseen that the figure she was aiming at was not a buck, but a human being. (This will become clearer from the discussion below of the test for negligence.) If she had killed a person negligently, she would be guilty of culpable homicide.

What would the position be if X intended to shoot Z, but it subsequently transpired that she mistook her victim's identity and in fact shot Y? Here her mistake did not relate to whether she was killing a human being but to the identity of the human being. Murder is committed whenever a person unlawfully and intentionally kills a human being, and not merely when a person kills the particular human being she intended killing. For this reason X in this case is guilty of murder. Her mistake about the object of her act (*error in objecto*) will not exclude her intention. Her mistake was not material here.



The difference between a material and non-material mistake. The illustration on the left depicts a case of a material mistake. A mistake is material if it relates to the act, a circumstance or result contained in the definitional elements or the unlawfulness. Here we are dealing with a mistake relating to a circumstance or requirement contained in the definitional elements of the crime with which X is charged, namely murder. X wants to shoot a baboon. He thinks that the figure he sees in the semi-darkness is a baboon, and shoots. It transpires that the figure is not that of a baboon, but of another human being, and that X had shot and killed that other human being. X cannot be convicted of murder, because he did not, in the eyes of the law, have the intention to murder: he was unaware of the fact that the object at which his act was aimed was **another human being**. (According to the definitional elements of the crime of murder that which the perpetrator kills must be **another human being**.)

The illustration on the right depicts a case of a non-material mistake, that is a mistake which does not relate to the act, a circumstance or result contained in the definitional elements of the crime or the unlawfulness. X wants to shoot and kill his enemy John. In the semi-darkness he sees a figure which he believes to be John, and shoots at the figure, intending to kill him. It transpires that the figure at which he shot was not John, but Peter, and that he had shot and killed Peter. Here X is indeed guilty of murder. He cannot succeed with a defence alleging that he wanted to kill John instead of Peter. Although he was mistaken about the identity of his victim, he knew very well that the object of his action was **another human being**; in other words, his intention (knowledge) related to a requirement contained in the definitional elements.

10.4 MISTAKE RELATING TO THE CHAIN OF CAUSATION

(*Criminal Law 194–196; Case Book 141–150*).

This form of mistake can occur only in the context of materially defined crimes, such as murder. X believes that the result will be brought about in a certain manner; the result does ensue, but in a manner which differs from that foreseen by X. The following are examples of this type of mistake:

- X sets about killing Y by pushing her off a bridge into a river, expecting that she will drown; in fact, Y is killed because in her fall she hits one of the pillars of the bridge.
- X shoots at Y, but misses; Y, who suffers from a weak heart and nerves, in fact dies of shock.



Read the following decision in the *Case Book: Goosen 1989 (4) SA 1013 (A)*.

Before 1989 both writers on criminal law and the courts assumed that this form of mistake did not exclude intention. However, in 1989 in *Goosen 1989 (4) SA 1013 (A)* the Appellate Division analysed this form of mistake and held that a mistake relating to the causal chain of events may exclude intention, provided the actual causal chain of events differed materially from that envisaged by X. In other words, in materially defined crimes (ie “result crimes”) X’s intention must, according to the court, be directed at bringing about the result in substantially the same manner as that in which it actually was caused.

In this case X together with two other persons, Z and W, had taken part in the joint robbery of Y. The shot that actually killed Y had been fired by Z, but the court, after examining the evidence, found that at the crucial moment when Z had fired the shot, he (Z) had acted involuntarily because he had been frightened by an approaching vehicle. The question was whether X, who had taken part in the joint venture by driving the gang in a car to Y, could, on the ground of *dolus eventualis*, be convicted of murdering Y because of the shot fired by the co-member of the gang, Z. X had known that Z had a firearm, and had foreseen that Z could fire at Y, but had not foreseen that Y would die as a result of a bullet’s being fired involuntarily by Z. In a unanimous judgment delivered by Van Heerden JA the Appellate Division found that there had been a **substantial difference** between the actual and the foreseen manner in which the death was caused, that X had not foreseen that the death could be caused in this way, and that X’s misconception or mistake in this regard negated the intention to murder. The court did not want to amplify the rule it laid down by specifying what criterion should be applied to distinguish between “material” (ie “substantial”) and “immaterial” differences in the manner in which death is caused.

(To understand this judgment properly, it is unfortunately necessary to have a knowledge of a certain topic which will only be discussed in the discussion of participation in the second module of criminal law. This topic is the doctrine of common purpose. Briefly, this doctrine amounts to the following: if a number of people have a common purpose to commit a crime (in the present case: murder) and in the execution of this purpose, act together, the act of each of them in the execution of this purpose is imputed to the others. The act on the ground of which somebody may be held liable for murder in terms of this doctrine consists in the active association with the conduct of somebody else which causes death (in the context of this case: Z’s shooting and killing of Y). Likewise the intention to commit a murder together with another may, according to this doctrine, consist in the intention actively to associate yourself with the conduct of somebody else which causes the victim’s death. What is more, this intention may take the form of *dolus eventualis*. If in the present case the court had found that X had the intention (in the

form of *dolus eventualis*) actively to associate himself with Z's act which caused Y's death, the doctrine of common purpose would have come into operation. This means that the court would have convicted X of murder; that his act would have consisted in his active association with Z's conduct; and that he could have been convicted of murder even though the state had not proved a causal connection between his (X's) conduct and Y's death. (According to this doctrine the causal connection between Z's act and Y's death is imputed to X.) The mere fact that X, Z and W had the common purpose to commit a robbery does not mean that a court can find without further ado that they also entertained the common purpose to kill. This is the reason why it was important for the court to decide whether X had an intention (in the form of *dolus eventualis*) in common with Z to kill Y. It is this question which the court answered in the negative. Hopefully you will understand this decision better once you have studied the common purpose doctrine. This judgment in *Goosen* had, however, been criticised in certain quarters. See the criticism of the judgment in *Criminal Law* 195–196. You may read this criticism if you wish, but you need not know it for the examination.)

ACTIVITY

A thief plans to rob a café owner. She takes a firearm with her, and although she sincerely hopes that there will be no resistance, she does foresee a reasonable possibility that she will have to shoot at her victim and in so doing could cause the latter's death. Hoping that the owner of the café would readily hand over her money, she keeps the weapon in her jacket pocket when she confronts her and demands money. At that moment her feet slip from under her and she falls to the floor. The loaded weapon goes off. Contrary to all expectations, the café owner is fatally wounded. X is charged with murder. Do you think that she can succeed with a defence of mistake regarding the causal chain of events?

FEEDBACK

If you have already studied the *Goosen* case, you ought to recognise these facts. In the judgment in *Goosen* the court used these facts as an illustration of substantial difference between the actual and the foreseen manner of death. X may accordingly succeed with the defence of mistake regarding the causal chain of events.

In *Lungile* 1999 (2) SACR 597 (A) three robbers, among them X, acting with a common purpose, robbed a shop. A policeman Z tried to thwart the robbery. In a wild shoot-out between Z and the robbers, which took place in the shop, a shop assistant Y, was killed. On a charge of murder X relied inter alia on the defence of absence of a causal link between his conduct and Y's death. According to him his conduct was not the cause of Y's death because the shot fired by Z on Y, killing Y, constituted a *novus actus interveniens*. The court rejected this argument, holding that Z's act was not an abnormal, independent occurrence. However, the question arises whether X could not perhaps have relied on the defence that he was mistaken as to the causal course of events: could he not have raised the following defence, namely that he was under the impression that Y would die as a result of a shot fired by him or one of his associates, whereas Y was in fact killed by a shot fired by Z? The court convicted X of murder without considering such a possible argument. We submit that the court's conclusion is correct, on the following ground: even if X had alleged that he was mistaken as to the chain of causation, such a defence should not have succeeded, because there was not a substantial

difference between the foreseen and the actual course of events. (As a matter of interest: critics of the judgment in *Goosen* might rely on the judgment in *Lungile* as support for their argument that a mistake as to the causal chain of events is not, or ought not to be, a defence, or is in any event not regarded by the courts as a defence.)



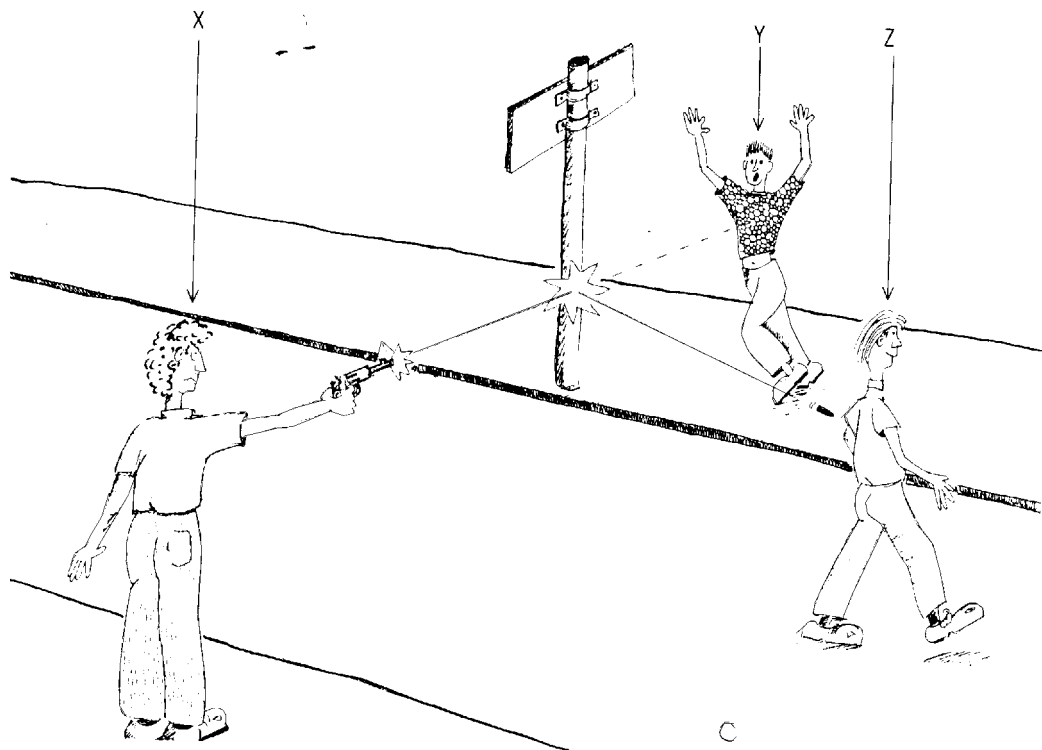
Read the following decision in your *Case Book*: *Lungile* 1999 (2) SACR 597 (A).

10.5 THE GOING ASTRAY OF THE BLOW (*ABERRATIO ICTUS*) DOES NOT CONSTITUTE A MISTAKE

(*Criminal Law* 197–200; *Case Book* 160–164)

10.5.1 Description of concept

Aberratio ictus means the going astray or missing of the blow. It is not a form of mistake. X has pictured what she is aiming at correctly, but through lack of skill, clumsiness or other factors she misses her aim, and the blow or shot strikes somebody or something else. (Do note the spelling of the word *aberratio*. Students often spell it incorrectly in the examination. One spells it with **one** b but **two** r's)



Examples of *aberratio ictus* are the following:

- (1) Intending to shoot and kill her enemy Y, X fires a shot at Y. The bullet strikes a round iron pole, ricochets and strikes Z, who is a few paces away, killing her. (See illustration.)
- (2) X wishes to kill her enemy Y by throwing a javelin at her. She throws a javelin at Y, but just after the javelin has left her hand, Z unexpectedly runs out from behind a bush and in front of Y and the javelin strikes Z, killing her.
- (3) Intending to kill her enemy Y, X places a poisoned apple at a spot where she

expects Y to pass, expecting Y to pick up the apple and eat it. However, Z, and not Y, passes the spot, picks up the apple, eats it, and dies.

What all these examples have in common is that the blow aimed at Y went awry and struck somebody else, namely Z. In order to decide whether in these types of situations X has committed murder, it is necessary to ascertain whether X can be said to have had intention in respect of Z's death.

10.5.2 *Two opposite approaches*

A perusal of this subject in the legal literature generally reveals two opposite approaches regarding the legal conclusions to be drawn.

(a) *The transferred culpability approach*

According to the one approach the question whether X in an *aberratio ictus* situation had the intention to kill Z should be answered as follows: X wished to kill a person. Murder consists in the unlawful, intentional causing of the death of a person. Through her conduct X in fact caused the death of a person. The fact that the actual victim of X's conduct proved to be somebody different from the particular person that X **wished** to kill, ought not to afford X any defence. In the eyes of the law X intended to kill Z, because X's intention to kill Y is **transferred** to her killing of Z, even though X might perhaps not even have foreseen that Z might be struck by the blow. The Anglo-American legal system, which for the most part follows this approach, reaches this conclusion through an application of what is called the "doctrine of transferred malice". X's intent in respect of Y's killing is transferred to her killing of Z.

(b) *The concrete-figure approach*

There is, however, another, alternative approach to the matter. Those who support this approach argue as follows: One can only accept that X intended to kill Z if it can be proved that X knew that her blow could strike Z, or if she had foreseen that her blow might strike Z and had reconciled herself to this possibility. In other words, one merely applies the ordinary principles relating to intention, and more particularly *dolus eventualis*. If X had not foreseen that her blow might strike Z, she lacked intention in respect of Z's death and cannot be convicted of murder. X's intention to kill Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill the person who or figure which was actually struck by the blow, the question is not simply whether she had the intention to kill a person, but whether she had the intention to kill **that particular (concrete) figure which was actually struck by the blow**. Only if this last-mentioned question is answered in the affirmative can one assume that X had intention in respect of Z. According to this approach, what is crucial is not an abstract "intention to kill a person" but a concrete "intention to kill the actual victim".

10.5.3 *Concrete-figure approach to be preferred*

Which one of these two approaches should one follow? To a certain extent, support for the transferred culpability approach can be found in South African case law before 1950 (eg *Koza* 1949 (4) SA 555 (A) and *Kuzwayo* 1949 (3) SA 761 (A)) but the weight of authority in the case law after this date supports the concrete-figure approach. In our opinion, this last-mentioned approach is also the most preferable, for the following two important reasons:

- (1) Since about 1950 our courts have clearly adopted a subjective test to determine intention. The concrete-figure approach is more in accordance

with the subjective test for intention than the transferred culpability approach. For example, if in example (2) above, X had never even foreseen that, after hurling the javelin, an outsider Z might run into its trajectory and be hit by the javelin, it is, to say the least, difficult to argue that X had the intention to kill Z. There is much to be said for the argument that if X had not known that Z might run into the path of the javelin, and somebody else had warned her beforehand that this might happen, she might rather have decided not to proceed with hurling the javelin. If X had not known or foreseen that Z might run into the path of the javelin, the mere existence of an abstract intention to kill a person is, in our opinion, not a sufficient ground for holding that X had the intention to kill Z — especially if one applies the subjective test for intention (a test on which the courts place so much reliance).

- (2) The transferred culpability approach amounts to an application of the doctrine of *versari in re illicita*. We shall discuss this doctrine later in Study unit 14. As will appear from that discussion, the *versari* doctrine should not be applied as it amounts to a disregard of the requirement of culpability. According to this doctrine, if a person engages in an unlawful activity she will be criminally liable for all the consequences flowing from such activity, even though she might not have foreseen the particular consequence for which she is being held liable. In *Bernardus* 1965 (3) SA 287 (A) the Appellate Division rejected this doctrine. Since this doctrine has been rejected by our courts, the transferred culpability approach should similarly be rejected. (In order to follow the argument, at this stage you may find it helpful to read the discussion of the *versari* doctrine in Study unit 14.)

If one follows the concrete-figure approach, it follows that in *aberratio ictus* situations one merely applies the ordinary principles relating to culpability (intention and negligence) in order to determine whether X had intention in respect of Z's death; one does not apply any specific rule (such as the transferred culpability rule) additional to the general rules relating to culpability. *Aberratio ictus* should be viewed merely as a description of a set of facts which, like any other set of facts, is to be judged and evaluated according to the ordinary rules relating to culpability. There is no such thing as a special "*aberratio ictus* rule" which is to be applied in these types of situations and in no others.

10.5.4 Judging *aberratio ictus* situations



Read the following decision in your *Case Book*: *Mtshiza* 1970 (3) SA 747 (A).

The most important judgment relating to *aberratio ictus* is that of Holmes JA in *Mtshiza* 1970 (3) SA 747 (A). This judgment accords with the concrete-figure approach set out above. The judgment confirms that factual situations in which there is an *aberratio ictus* should be judged as follows:

- (1) X will normally always be guilty of attempted murder in respect of Y — that is, the person she **wished** to, but did not, kill.
- (2) As far as X's liability in respect of the person actually struck by her blow (Z), is concerned, there are three possibilities:
 - (a) If she had foreseen that Z would be struck and killed by the blow, and had reconciled herself to this possibility, she had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.
 - (b) If X had not foreseen the possibility that her blow might strike and kill someone other than Y, or, if she had foreseen such a possibility but had not reconciled herself to this possibility, she lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily

mean that X is not guilty of any crime. Murder is not the only crime of which a person can be convicted if she causes another's death. There is also the possibility of culpable homicide, which consists in the unlawful **negligent** causing of the death of another. As we point out below in our discussion of negligence, X will be negligent in respect of Z's death if the intention to kill is absent, but if, as a reasonable person, she nonetheless **ought** to have foreseen that she could cause the death of the victim (Z). In that event, X will be guilty of culpable homicide.

- (c) Only if it is established that both intention (in these instances mostly in the form of *dolus eventualis*) and negligence in respect of Z's death are absent on the part of X, will X be discharged on both a count of murder and one of culpable homicide.

Whether in a given situation X acted with intention or negligence in respect of Z's death, or whether perhaps she lacked both intention and negligence in respect of Z's death, will depend upon the facts of the particular case. We wish to emphasise and repeat that *aberratio ictus* is merely a description of a factual situation. The expression "motor accident" is also merely a description of a factual situation. It is impossible to infer from the mere fact that a motor accident has occurred, without any further particulars being known, that the driver is guilty of murder or culpable homicide or that she is not guilty. Likewise it cannot be inferred from the mere fact that certain events amount to *aberratio ictus* that the perpetrator is necessarily guilty of some or other crime, or that she is not guilty. Consequently, there is no such thing as a special "*aberratio ictus* rule".

It is therefore wrong to allege that if a person performs an unlawful act with the intention of killing one person and in the execution of her act she kills another, she is automatically guilty of murdering the last-mentioned. What is wrong in this statement is the allegation that X is **automatically** guilty of murder in respect of the other person. One can only assume that she is guilty of murder in respect of such other person if closer investigation reveals that X in fact had *dolus eventualis* in respect of that person's death. However, such an investigation may reveal that X lacked *dolus eventualis* and that X was merely negligent in respect of the other's death, or even that she lacked negligence.

10.5.5 *Aberratio ictus and error in objecto — examples of factual situations*

One should guard against equating *aberratio ictus* situations with *error in objecto* (mistake relating to the object) situations. As pointed out above, *error in objecto* is a form of mistake in that X believes the object against which she directs her action to be something or somebody different from what it in fact is. This kind of mistake can exclude X's intention if the object, as X believed it to be, differs materially from the nature of the object as set out in the definitional elements. *Aberratio ictus*, on the other hand, is not a form of mistake, because the person struck by the blow (ie the deceased) is not confused by X with the person at whom she is aiming. By way of illustration we now apply these principles to a number of sets of facts:

- (1) X shoots in the dusk at a figure which she believes to be a horse named "Ruby", belonging to her neighbour (against whom she carries a grudge). However, it appears that the figure was not "Ruby", but another horse which also belongs to her neighbour. X is charged with malicious injury to property. (Remember that killing or injuring an animal belonging to another normally amounts to the crime of malicious injury to property.) This is a case of *error in objecto* which affords X no defence — the type of object X had in mind still

- falls within the description of the object as set out in the definitional elements ("somebody else's property").
- (2) X shoots in the dusk at a figure which she believes to be her neighbour's horse. However, the figure turns out to be her neighbour's donkey. Similarly, this is a case of *error in objecto* which affords X no defence on a charge of malicious damage to property: although the type of object which X envisaged ("somebody else's horse") differed from the type of object actually struck by the blow ("somebody else's donkey"), the type of object which X envisaged still falls within the description of the object in the definitional elements ("somebody else's property").
 - (3) X shoots in the dusk at a figure which she believes to be her neighbour's horse. However, the figure at which she aimed and which was struck by the bullet turns out to be a human being. This is also a case of *error in objecto*. Assuming that X had never foreseen that the figure might in fact be a human being, X cannot be convicted of murder, because the type of object envisaged by X differed completely from the type of object which was actually struck by the bullet. If it can be proved that in the circumstances a reasonable person in X's position would have foreseen that the figure could have been a human being, it could be found that X was negligent in respect of the victim's death and that she is guilty of culpable homicide.
 - (4) X shoots in the dusk at a figure which she believes to be her neighbour's horse. The bullet misses the figure at which it is aimed and strikes a stable-boy Z, who is standing in the darkness of the stable somewhere behind the horse. This is a case of *aberratio ictus*, because the bullet struck an object different from the one at which X was aiming. In order to decide whether X had culpability in respect of Z's death a court will have to further investigate the facts: if it appears that X had foreseen the possibility that Z might be behind the horse and that he might be struck by the bullet, and that she had reconciled herself to this possibility, she will be found to have had *dolus eventualis* in respect of Z's death and therefore to be guilty of murder. If she lacked intention, but it appears that in the circumstances the reasonable person in X's position would have foreseen that there was a human being standing behind the horse and that such human being might be struck by the bullet, X would be found to have been negligent and therefore to be guilty of culpable homicide. X will in any event be guilty of attempted malicious injury to property.
 - (5) X shoots at a human being in the belief that it is her enemy Y. The bullet misses Y and strikes Z, who was standing a short distance behind Y. This is a case of *aberratio ictus*. The ordinary test to determine intention and negligence must be applied in order to determine X's possible culpability in respect of Z's death. (See previous set of facts.) X will in any event be guilty of attempted murder in respect of Y.
 - (6) X shoots at a human being in the belief that it is her enemy Y. The bullet misses Y and strikes a car's windscreen, shattering it (or the car passes in front of Y at the very moment the shot is fired, so that the bullet strikes the windscreen). This is a case of *aberratio ictus*. Whether X did have the intention required for malicious injury to property will depend upon whether she had foreseen that the car might be struck and whether she had reconciled herself to this possibility. X will in any event be guilty of attempted murder in respect of Y.

Tissen 1979 (4) SA 293 (T) and *Raisa* 1979 (4) SA 541 (O) are examples of cases in which the above-mentioned principles were applied.

Note that if Y is not killed but only injured X is either guilty of assault or not guilty at all. While there is a third possibility (namely culpable homicide on the basis of negligence) in those cases in which Y dies, no such possibility exists in

instances in which Y is merely wounded or injured. The reason for this is that in our law there is no such crime as negligent assault — assault, like murder, can be committed only intentionally.



Students often do badly in the examination when answering questions dealing with *aberratio ictus*. This is usually the case if the set of facts given in the question is formulated in such a way that it is not specifically stated or alleged by implication that X had foreseen the possibility of hitting Y or Z or that X had acted negligently. Because the form of culpability which X entertained is not expressly or impliedly mentioned in the given set of facts, it is wrong to simply state categorically — as many students do — that X committed murder or culpable homicide or that she committed no crime. It is, in other words, wrong to come to such a definite conclusion. A useful hint on how to answer such a type of question is to cast the answer in the form of conditional sentences. This means that you should begin your sentences with the word “if”. Write “If the evidence brings to light that X had foreseen the possibility that ..., then she would be guilty of” (In such a sentence you should, of course, ensure that you formulate the test for intention or *dolus eventualis* correctly.) Or you may write “If the evidence brings to light that X, as a reasonable person, should have foreseen the possibility ... then she would be guilty of ...”. (In such a sentence, you should, of course, ensure that you formulate the test for negligence correctly.) In this way, you supply what the examiners are looking for in your answer.

10.6 MISTAKE RELATING TO UNLAWFULNESS

(Criminal Law 201–202; Case Book 164–178)

It was stated above that the intention (more specifically X’s knowledge) must relate to the act, the circumstances contained in the definitional elements and the unlawfulness of the conduct. If X’s intention does not relate to all these factors (in other words, if she is not aware of all of them) she labours under a misconception or material mistake, which affords her a defence. We have already discussed mistakes relating to the act and the circumstances contained in the definitional elements. We now proceed to consider mistakes relating to the unlawfulness of the conduct.

Before one can say that X has culpability in the form of intention (*dolus*), it must be clear that she was also aware of the fact that her conduct was unlawful. This aspect of *dolus* is known as knowledge (or awareness) of unlawfulness. (Clear recognition of this requirement in our case law may be found in *Campher* 1987 (1) SA 940 (A) and *Collett* 1991 (2) SA 854 (A) 859.)

Intention is said to be “coloured” because in our law it always includes knowledge of unlawfulness. For this reason, intention in criminal law is often referred to as *dolus* — it is, in fact, an “evil intention” in the sense that X directs her will towards particular conduct **knowing** that such conduct is unlawful. Without the latter awareness or knowledge there is only a “colourless intention”, and that is insufficient for liability.

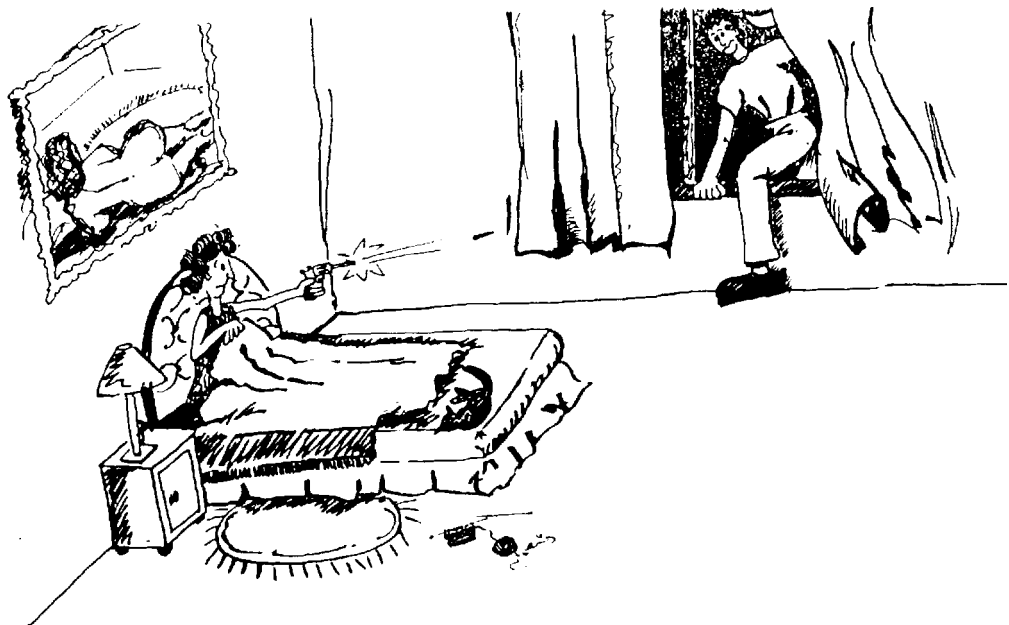
Knowledge of unlawfulness can, for the sake of convenience, be divided into two subdivisions.

- X must know that her conduct is **not covered by a ground of justification**.
- X must know that her conduct, in the circumstances in which she acts, is **punishable by the law as a crime**.

The latter subdivision deals with X’s knowledge of the law; the former does not necessarily. We shall first consider the former.

10.6.1 *Mistake relating to a ground of justification*

The following is an example of a mistake relating to the existence of a ground of justification: Y leaves his home in the evening to attend a function. When he returns late at night, he discovers that he has lost his front-door key. He decides to climb through an open window. X, his wife, is woken by a sound at the window. In the darkness she sees a figure climbing through it. She believes the figure to be a burglar, or the man who has recently raped a number of women in the neighbourhood. She shoots and kills the person, only to discover that it is her own husband whom she has killed. (See illustration.) She has acted unlawfully, because she cannot rely on private defence: the test in respect of private defence is, in principle, objective, and in a case such as this her state of mind is not taken into account when determining whether she acted in private defence. Nevertheless, although she intended to kill another human being, she will not be guilty



of murder, because her intention (knowledge) did not extend to include the unlawfulness of her act. She thought that she was acting in private defence. She thought she was acting lawfully. This is a case of what is known as putative private defence. (See *Joshua* 2003 (1) SACR 1 (SCA).)

In *Sam* 1980 (4) SA 289 (T) X was charged with pointing a firearm at Y in contravention of a statute. However, the evidence revealed that X pointed the firearm at Y in the honest yet erroneous belief that Y was a thief whom he had caught red-handed. X was acquitted, the court holding that in a crime requiring intention (*dolus*) the state must prove beyond reasonable doubt that X acted with knowledge of unlawfulness, and found that X had lacked such knowledge.

There have also been a number of cases in which it was held that X was not guilty of rape if he was under the impression that Y had consented to intercourse (*Mosago* 1935 AD 32; *K* 1958 (3) SA 420 (A)), and that X did not commit theft if she believed that Y (the owner of the property), had consented to her taking the property (*Kinsella* 1961 (3) SA 519 (C) 532; *De Jager* 1965 (2) SA 616 (A) 625).

Knowledge of unlawfulness may also be present in the form of *dolus eventualis*. In such a case X foresees the possibility that her conduct may be unlawful, but does not allow this to deter her and continues her conduct, not caring whether it is lawful or not.



Read the following decision in your *Case Book*: *De Oliveira* 1993 (2) SACR 59 (A).

10.6.2 *Mistake of law*

(*Criminal Law* 203–208; *Case Book* 167–178)

(1) General

We stated above that the requirement of knowledge of unlawfulness can be divided into two subdivisions:

- X's awareness that her conduct is not covered by a ground of justification, and
- X's awareness that the type of conduct she is committing is prohibited by the law as a crime

We shall now consider the second aspect above of awareness of unlawfulness. Here, it is X's knowledge of the law, and not of the facts, which has to be considered. (The first aspect of awareness of unlawfulness above may conceivably also cover a case where X, because of her making a **mistake relating to the law**, erroneously believes her conduct to be justified.)

The important question here is whether a mistake relating to the law, or ignorance of the law (which is essentially the same) constitutes a defence to a criminal charge. Should an accused who admits that she has committed the forbidden act, that it was unlawful, and even that she had (the necessary factual) knowledge of all the material surrounding circumstances, expect to be acquitted merely because she did not know that it was a crime to do what she did?

It is, of course, difficult to imagine a court believing an accused who alleges that she did not know that murder, rape, assault, or theft was a crime. These are well-known crimes in all civilised communities. On the other hand, there are lesser-known crimes in our law, such as those relating to specialised technical matters, or offences created in subordinate legislation.

(2) The position prior to 1977

In English law the principle has always been that, subject to certain qualifications, ignorance of the law is no defence. This rule is usually expressed by the well-known maxims that "ignorance of the law is no excuse" and "everybody is presumed to know the law". Prior to 1977, the position was the same in South African law. In today's complex world, the idea that everybody is presumed to know the law is an untenable fiction. Nobody, not even the most brilliant lawyer, could keep abreast of the law in its **entirety**, even if she read statutes, government and provincial gazettes and law reports from morning till night.

(3) The present South African law



Read the following decision in your *Case Book*: *De Blom* 1977 (3) SA 513 (A).

In 1977 our law on this subject was radically changed as a result of the decision of the Appeal Court in *De Blom* 1977 (3) SA 513 (A). In this case, X was charged *inter alia* with contravening a certain exchange-control regulation, according to which it was (at that time) a crime for a person travelling abroad to take jewellery worth more than R600 out of the country without prior permission. X's defence with regard to this charge was that she did not know that such conduct constituted a crime. The Appeal Court held that she had truly been ignorant of the relevant

prohibition, upheld her defence of ignorance of the law, and set aside her conviction on the charge.

Rumpff CJ declared (at 529) that at this stage of our legal development it had to be accepted that the cliché “every person is presumed to know the law” no longer had any foundation, and that the view that “ignorance of the law is no excuse” could, in the light of the present-day view of culpability, no longer have any application in our law. If, owing to ignorance of the law, X did not know that her conduct was unlawful, she lacked *dolus*; if *culpa* was the required form of culpability, her ignorance of the law would have been a defence if she had proceeded, with the necessary caution, to acquaint herself with what was expected of her (see 532). There is no indication in the judgment that ignorance of the law excludes *dolus* only if such ignorance was reasonable or unavoidable. In other words, the test is purely subjective in this respect.

Thus, to sum up: according to our present law, ignorance of the law excludes intention and is therefore a complete defence in crimes requiring intention. The effect of a mistake regarding the law is therefore the same as the effect of a mistake regarding a material fact: it excludes intention.

It is not only when X is satisfied that a legal rule exists that she is deemed to have knowledge of it: it is sufficient if she is aware of the possibility that the rule may exist, and reconciles herself with this possibility (*dolus eventualis*). Nor need she know precisely which section of a statute forbids the act, or the exact punishment prescribed: for her to be liable, it is sufficient that she be aware that her conduct is forbidden by law (generally).

Furthermore, the difference between crimes requiring intention and those requiring only negligence must be borne in mind. It was emphasised in *De Blom* (*supra*) at 532F–H that it is only in respect of the first-mentioned category of crimes that actual knowledge of the legal provisions is required for liability. In crimes requiring negligence it is sufficient, for the purposes of liability, that X failed to exercise the required care and circumspection in acquainting herself with the relevant legal provisions.

(4) Possible criticism of the *De Blom* case

Note that various commentators have raised certain objections to the decision in *De Blom* (see eg *Criminal Law* 205–208, Whiting 1978 *SALJ* 1–8; Stassen 1977 *TSAR* 259–265). These commentators are of the opinion that, although the Appeal Court’s abolition of the presumption that everybody knows the law, and of the harsh rule that ignorance of the law can never constitute an excuse is to be welcomed, the extent to which ignorance of the law could operate as a defence should nevertheless be limited. The commentators submit that only ignorance (or mistake) of the law which is **unavoidable**, or which is reasonable in the circumstances, should constitute a defence.

The implication of this argument is that if somebody ventured into a particular field governed by certain legal rules, she should first take the trouble to find out what those rules are. This would, for instance, be the case if somebody opened a butchery or started dealing in diamonds. If she were then charged with a crime committed by her in the course of such business, and for which intent was a requirement, she could not rely on ignorance of the law as a defence if she had been ignorant of a rule applicable to her particular field of business.

ACTIVITY

- (i) X, a seventeen-year-old girl, goes to a rave at a club in Johannesburg. Her friend gives her a packet of cigarettes. X puts the cigarettes in her pocket, thinking that they are ordinary cigarettes. The police raid the club. X is searched and the cigarettes found in her pocket. It turns out to be dagga. X is charged with the crime known as “possession of drugs”. X tells you (her lawyer) that although she knows very well that possession of dagga is a crime, she was unaware of the fact that the cigarettes in her possession contained dagga instead of ordinary tobacco. What defence would you raise on behalf of X?
- (ii) X, a 30-year-old illiterate and unsophisticated member of an indigenous tribe in a remote area of the Limpopo Province, comes to Johannesburg to look for her friend. This is the first time that she has left her rural home. In the community from which she comes, it is customary to smoke dagga from an early age for medicinal and recreational purposes. X brings dagga along with her to Johannesburg. The taxi that she is travelling in is stopped by the police near Pretoria. All the travellers are searched for drugs. X is found to be in possession of dagga and arrested. X tells you (her lawyer) that nobody had ever told her that it is against the law to smoke dagga. What defence would you raise on behalf of X?

FEEDBACK

- (i) Your defence would be that, owing to a mistake of **fact**, X did not have the required intention. She did not know that the cigarettes contained dagga, and was therefore mistaken as to the existence of one of the definitional elements of the crime. She was mistaken as to a material **fact** relating to her possession.
- (ii) Your defence would be that X lacked intention because she had made a mistake as regards the **law**. She was under the impression that her conduct did not constitute a crime.

GLOSSARY

<i>error in objecto</i>	mistake relating to the object
<i>aberratio ictus</i>	the going astray of the blow

SUMMARY

- (1) The intention must relate to the act, the circumstances contained in the definitional elements and the unlawfulness of the conduct. X must be aware (have knowledge) of all these factors. If she is unaware of any of these factors, it cannot be said that she intended to commit the crime. X is then **mistaken** as to the existence of these factors.
- (2) Mistake need not be reasonable to exclude intention. The test to determine whether mistake has excluded intention is subjective.
- (3) In order to exclude intention, the mistake must be material. Mistake is material if it relates to the act, the circumstances set out in the definitional elements or the unlawfulness of the conduct.

- (4) In *Goosen* the Appellate Division held that a mistake with regard to the chain of causation may indeed exclude intention provided the actual chain of events differed materially from that envisaged by the perpetrator.
- (5) (a) *Aberratio ictus* or the going astray or missing of the blow refers to a set of facts in which X aims a blow at Z, the blow misses Z and strikes Y. This is not a form of mistake
 - (b) In order to determine whether, in such a set of facts, X is guilty of an offence, one should merely apply the normal principles with regard to intention and negligence.
 - (c) It is wrong to apply the transferred culpability approach in an *aberratio ictus* factual situation, that is to argue that because X had intended to kill a human being and did just that, she necessarily had the intention to kill the actual victim.
- (6) Absence of awareness of unlawfulness excludes intention.
- (7) Awareness of unlawfulness implies that X is aware —
 - (a) that her conduct is not covered by a ground of justification
 - (b) that the type of conduct she engages in is actually regarded by the law as constituting an offence
- (8) The effect of the decision in *De Blom* is that ignorance of or a mistake about the law excludes intention.

TEST YOURSELF

- (1) Explain the meaning of the term “mistake”.
- (2) Does mistake exclude intention only if the mistake is reasonable? Explain.
- (3) Will *error in objecto* always (without exception) constitute a defence?
- (4) Explain the difference between a material mistake and a non-material mistake.
- (5) Explain briefly what is meant by a mistake “with regard to the causal chain of events” and indicate whether this form of mistake excludes intention.
- (6) Briefly discuss the two approaches followed in legal literature in determining liability in the case of *aberratio ictus* (going astray or missing of the blow), and indicate which one of these approaches you prefer and what the reasons for your choice are.
- (7) Distinguish between *error in objecto* and *aberratio ictus*.
- (8) Explain with reference to an example what you understand under a mistake with regard to the presence of a ground of justification.
- (9) Discuss the decision in *De Blom* 1977 (3) SA 513 (A) critically and indicate its effect on South African law.

STUDY UNIT 11

Negligence



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LEARNING OUTCOMES

- When you have finished this study unit, you should be able to:

- demonstrate your understanding of the requirement of negligence by expressing an informed opinion as to whether an accused has acted with negligence, having regard to the “reasonable person” test and the concepts of the “reasonable person”, “reasonable foreseeability” and the “taking of reasonable steps”
- determine the liability of an accused who has exceeded the bounds of private defence by applying the tests of intention and negligence

11.1 ORIENTATION

We have already shown above that

$$\boxed{\text{culpability}} = \boxed{\text{criminal capacity}} + \boxed{\text{either intention or negligence}}$$

We have already discussed the concepts of criminal capacity and intention. In this study unit we discuss negligence, as well as a certain matter that can only be properly understood if one has studied both intention and negligence: this is the question of how a case of exceeding the limits of private defence should be treated.

On negligence in general, see *Criminal Law* 208–220.

It is not only those unlawful acts which are committed intentionally which are punishable. Sometimes the law also punishes unlawful acts which are committed unintentionally, or the unintentional causing of results, namely if X acts or causes the result negligently. Generally speaking, a person’s conduct is negligent if it falls short of a certain standard set by the law. This standard is, generally speaking, the caution which a reasonable person would exercise or the foresight which a reasonable person would have in the particular circumstances.

In crimes of intention X is blamed for knowing or foreseeing that his conduct is proscribed by the law and that it is unlawful. In crimes of negligence X is blamed for **not** knowing, **not** foreseeing or **not** doing something, although, according to the standards set by the law, he **should** have known or foreseen or done it. Intention always has a **positive** character: X wills or knows or foresees something. Negligence, on the other hand, always has a **negative** character: X does **not** know or foresee something, although he **should**, according to the norms of the law, **have** known or foreseen it.

Whereas in legal literature intention is often referred to as *dolus*, negligence is often referred to as *culpa*.

11.2 OBJECTIVE TEST

The test for negligence is objective, except for a few less important exceptions (to which we shall refer later). As we have seen above, the test for intention is subjective, since one has to consider what X’s actual knowledge was or what he actually envisaged the facts or the law to be. When we describe the test for negligence as objective, we mean that one has to measure X’s conduct against an objective standard. This objective standard is that which a reasonable person would have known or foreseen or done in the same circumstances.

The test for intention is subjective because one has to determine what X’s thoughts were as an individual (ie as a “subject”) or what he actually envisaged. Expressed very plainly: one has to ascertain “what went on in his (X’s) head”. The test for negligence, on the other hand, is described as objective, since here one is

not concerned with what X actually thought or knew or foresaw, but only with what a reasonable person in the same circumstances would have foreseen or what he would have done. Here (in negligence) X's conduct is measured against "something" (a standard) **outside** himself — namely what a reasonable person would have foreseen or done.

11.3 DEFINITION OF NEGLIGENCE

A person's conduct is negligent if

- (1) a reasonable person in the same circumstances would have foreseen the possibility
 - (a) that the particular circumstance might exist, or
 - (b) that his conduct might bring about the particular result;
- (2) a reasonable person would have taken steps to guard against such a possibility; and
- (3) the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person.

11.4 ABBREVIATED WAY OF REFERRING TO NEGLIGENCE

An abbreviated way of referring to negligence (in respect of either a result or a circumstance) is simply to say that the person concerned did not conduct himself as the reasonable person would have conducted himself in the same circumstances, or — expressed even more briefly — that the person concerned acted **unreasonably**. Sometimes negligent conduct is briefly referred to by saying: "he **must** have done that" or "he **should not** have done that" or "he **ought to** have known or foreseen or done that". These everyday expressions are merely other ways of stating that a reasonable person would not have acted in the same way as X did.



Note that the meaning of the word "must" can be ambiguous. If the adjudicator says "he **must** have foreseen the death", it can conceivably mean "I draw the inference from the facts that X did in fact subjectively foresee the possibility of death". However, it can also mean "X did not foresee the possibility of death, but the reasonable person would have" (in other words, X should reasonably have foreseen it). In the former instance, the adjudicator signifies that X had *dolus eventualis*, and in the latter instance he signifies that intention was absent and that X was merely negligent. In order to avoid ambiguity, we would strongly advise you to confine the words "must", "must have" and "ought to" to cases in which you describe the presence of negligence as a form of culpability. We prefer the formulation "**ought to** have foreseen".

11.5 DISCUSSION OF THE DEFINITION OF NEGLIGENCE

11.5.1 *Negligence may exist in respect of either a result or a circumstance*

In order to understand the definition of negligence given above, it is first of all necessary to bear the distinction between formally and materially defined crimes in mind. In the discussion of causation above we have explained that crimes may

be divided into two groups, namely formally and materially defined crimes. In formally defined crimes the law forbids a specific act or omission, irrespective of its result. In materially defined crimes (also sometimes referred to as result crimes) the law forbids conduct which **causes** a specific condition (result). (If you do not understand this subdivision properly, you must again consult the explanation above of this subdivision in the study unit dealing with causation.) Certain formally defined crimes require intention and certain require negligence. The same applies to materially defined crimes: some require intention and some negligence.

In materially defined crimes requiring negligence it must be proved that X was negligent in respect of the **causing of the result**. In formally defined crimes requiring negligence it must be proved that X was negligent in respect of a **circumstance**.

In practice culpable homicide is by far the most important crime in respect of which the form of culpability is not intention, but negligence. Culpable homicide is a materially defined crime, since the crime proscribes the **causing of a certain result**, namely another's death. Culpable homicide is defined as the unlawful, negligent causing of another's death. Barring a certain form of the crime of contempt of court, culpable homicide is the only common-law crime which does not require intention, but negligence. There are a number of statutory crimes requiring culpability in the form of negligence. Most of them are formally defined, such as the crime of negligently driving a vehicle (contravention of s 63(1) of the National Road Traffic Act 93 of 1996) and the crime of unlawfully possessing a firearm (contravention of s 3 of the Firearms Control Act 60 of 2000).

Negligence was defined above in such a way that it refers to negligence in respect of both a circumstance (see point (1)(a) of the definition) and a result (see point (1)(b) of the definition).

Since culpable homicide is the most important crime requiring negligence and since this crime is materially defined, the discussion of negligence which follows will for the most part concentrate on negligence in respect of the causing of a result. In order not to overburden the statements which follow, they will mostly be formulated in such a way that they refer only to negligence in respect of a result. Later on in the discussion we will say something brief on negligence in the context of formally defined crimes, that is negligence in respect of a circumstance.

11.5.2 *The concept of the "reasonable person"*

The expression "reasonable person" appears in both the first and the second legs (points (1) and (2)) of the definition of negligence. Before considering the first two legs of the definition, it is necessary first to explain what is meant by "reasonable person".

- (1) The reasonable person is merely a **fictitious person** which the law invents to **personify** the objective standard of reasonable conduct which the law sets in order to determine negligence.
- (2) In legal literature the reasonable person is often described as the *bonus paterfamilias* or *diligens paterfamilias*. These expressions are derived from Roman law. Literally they mean the "diligent father of the family", but in practice it is synonymous with the reasonable person.
- (3) In the past the expression "**reasonable man**" was usually used in legal literature instead of "reasonable person". Since 1994, when South Africa obtained a new Constitution which emphasises *inter alia* gender equality, the term "reasonable man" ought to be avoided because of its sexist connotation.
- (4) By "reasonable person" is meant an ordinary, normal, average person. In *Mbombela* 1933 AD 269 273 the Court described the reasonable person as "the

man (*sic*) of ordinary knowledge and intelligence". He or she is neither, on the one hand, an exceptionally cautious or talented person (*Van As* 1976 (2) SA 921 (A) 928), nor, on the other, an underdeveloped person, or somebody who recklessly takes chances. The reasonable person accordingly finds himself or herself **somewhere between these two extremes**. In *Burger* 1968 (4) SA 877 (A) 879 Holmes JA expressed this idea in almost poetical language when he said:

"One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of the racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense."

The reasonable person is therefore not somebody who runs away from every foreseen danger; he may sometimes take a reasonable risk.

- (5) The reasonable person-concept embodies an **objective criterion**. Personal, subjective characteristics such as his or her sex, race, emotional stability or lack thereof, degree of education, or superstitiousness or lack thereof, are not taken into account.
- (6) The reasonable person is not a perfectly programmed automaton which can never make a mistake. He remains an ordinary flesh-and-blood human being whose reactions are subject to the **limitations of human nature**. In crisis situations, when he has to take a quick decision, he can, like any other person, commit an error of judgment, that is take a decision which later turns out to be wrong. It follows that the mere fact that somebody has committed an error of judgment does not necessarily mean that he was negligent.

11.5.3 Reasonable foreseeability

Under this heading we discuss the first leg (ie point (1)) of the definition of negligence given above, that is the question whether the reasonable person would have **foreseen** the possibility of the particular circumstance existing or the particular result ensuing. In practice this is the most important leg or component of the test for negligence.

- (1) The courts sometimes ask whether the reasonable person would have foreseen the possibility (of the result ensuing), and on other occasions again, whether X ought reasonably to have foreseen the possibility. However, it is beyond doubt that **both expressions mean the same**: foreseeability by the reasonable person and reasonable foreseeability by the accused are viewed as the same thing.
- (2) What must be foreseeable is the **possibility** that the result may ensue, and not the **likelihood** thereof (*Herschell v Mrupe* 1954 (3) SA 464 (A) 471).
- (3) The test is whether the reasonable person **in the same circumstances as those in which X found himself** would have foreseen the particular possibility. This aspect of the test is very important. Our courts do not assess negligence *in vacuo* ("in a vacuum"), but *in concreto*, that is in the light of the actual circumstances in which X found himself at the time he committed his act.

Thus if the question arises whether X, a motorist, was negligent when he ran over and killed a pedestrian in a street **during a heavy rainstorm**, the question the court must ask is what a reasonable person who was driving in a street **during a heavy downpour** would have foreseen. It would be wrong to place the reasonable person behind the steering wheel of a motor car on an occasion when the sun was shining brightly.

If X finds himself in a **sudden emergency** when driving his car, for example, and has to make a quick decision which in the event results in somebody's death, the

task of the court which has to decide whether he was negligent is likewise to enquire how the reasonable person would have behaved in a similar situation.

ACTIVITY

Decide whether X was negligent in the following set of facts, and give reasons for your conclusion. A child unexpectedly runs across a street. X, a motorist, is unable to stop timeously. He is unable to swerve to his left, because there is no space on his left. X must decide quickly whether he should swerve to his right. If he swerves to his right, there is a possibility that he may cause a head-on collision with an oncoming vehicle. This might result in the loss of more lives than would be lost by running over the child. He decides not to swerve to his right, and runs over the child, with fatal consequences for the child. X is charged with culpable homicide. A long, painstaking investigation during the trial (which includes questioning eyewitnesses) reveals that if X had swerved to his right, he would not have been involved in a head-on collision.

FEEDBACK

In order to determine whether X was negligent, one must not consider how a person who had all the knowledge which was only revealed after the event in the course of the long, painstaking investigation, would have acted. The correct approach is to consider how somebody who unexpectedly found himself in an emergency, and who had to take a quick decision on which the lives of people depended, would have acted. A court would in all probability hold that X had **not acted negligently**. The reason for this conclusion is **first** the rule that the reasonable person should be placed in the same circumstances as those in which X found himself, and **secondly** that the reasonable person is not an abstract, perfectly programmed automaton, but a flesh-and-blood human being whose reactions are subject to the limitations of human nature.

- (4) In the discussion of intention above it was seen that the intention **must relate not only to the act, but also to all the circumstances and consequences set out in the definitional elements, as well as to the unlawfulness. The same principle applies to negligence.** Actually negligence in respect of the act plays a role only in formally defined crimes. We shall briefly consider negligence in these crimes below. In materially defined crimes negligence must relate to the particular result specified in the definitional elements of the crime concerned. In culpable homicide the result specified in the definition of the proscription is somebody else's **death**.

This means that if X is charged with culpable homicide and the question arises whether he was negligent, the question to be answered is not: "Would the reasonable person have foreseen the possibility that Y might be **injured** as a result of X's conduct?" The correct question is: "Would the reasonable person have foreseen the possibility that Y might be **killed** as a result of X's conduct?" (*Bernardus* 1965 (3) SA 287 (A) 296). Although it is well known that, because of the frailty of the human body, death may be caused by even a mild assault, it is wrong to say that the reasonable person will **always** foresee that even a mild assault, such as a slap, may cause Y's death. In certain exceptional cases death resulting from a minor assault may not be foreseeable, eg where the victim had an unusual physiological characteristic such as a thin skull or a weak heart (*Van As* 1976 (2) SA 921 (A) 927).

11.5.4 *The taking of steps by the reasonable person to avoid the result ensuing*

Under this heading we discuss the second leg (ie point (2)) of the definition of negligence given above, that is the requirement that the reasonable person would have taken **steps** to guard against the possibility of the result ensuing.

In practice this second leg of the test for negligence is seldom of importance, because in the vast majority of cases the reasonable person who had foreseen the possibility of the result ensuing (ie who has complied with the first leg of the test), would also have taken steps to guard against the result ensuing. However, there are cases in which the reasonable person who has foreseen the possibility will **not** take steps to guard against the result ensuing. This is where the foreseen possibility is far-fetched or remote, or where the risk of the result ensuing is very small, or where the cost and effort necessary to undertake the steps do not outweigh the more important and urgent purpose of X's act.

In deciding whether the reasonable person would have taken steps to guard against the result ensuing, it may be necessary to balance the social utility of X's conduct against the magnitude of the risk of damage created by his conduct.

ACTIVITY

A fire breaks out in a building in a city centre, trapping a number of people inside. Their lives are in danger. The fire brigade is summoned. With screaming sirens X, the driver of the fire engine, drives as fast as he can through busy streets to reach the fire in time. In the course of doing so he drives through an intersection while the robot is red, colliding with another vehicle. Is X's conduct negligent?

FEEDBACK

This is an example of a situation in which the reasonable person would **not** have taken steps to guard against the result ensuing (ie where the law does not reasonably expect X to take steps to guard against the possibility):

The reasonable person in X's position will foresee that conduct such as this may result in damage, or injury to other people in the street. Nevertheless the reasonable person in these circumstances will decide that it is not necessary to take steps to guard against causing damage or injury, for the following reason: to drive slowly through the streets, stopping at every red robot, could result in the people in the burning building losing their lives, and this would in all probability result in the loss of more lives than would be the situation had the fire engine raced through the streets. X's conduct is therefore not negligent.

11.5.5 *X's conduct differs from that of the reasonable person*

We have now discussed the first two legs of the definition of negligence. It is not necessary to say much on the third leg of the test. It merely embodies the self-evident rule that X is negligent if his conduct differs from that which a reasonable person would have foreseen or guarded against.

11.5.6 *Negligence in respect of a circumstance*

In the discussion thus far the emphasis has been on negligence in respect of a result. Negligence in respect of a result is found only in materially defined crimes (result crimes). As was pointed out above, there are also certain formally defined crimes which require culpability in the form of negligence. Thus it was held in *Mnisi* 1996 (1) SACR 496 (T), for example, that the crime of possessing a firearm without a licence (currently a contravention of s 3 of the Firearms Control Act 60 of 2000) is one in respect of which the state need merely prove culpability in the form of negligence. This is a formally defined crime, since one is not dealing here with the causing of a certain result. To obtain a conviction the state need not prove the causing of a certain result, but merely the existence of a certain **circumstance**, namely the possession by X of a firearm without his having a licence for it. What do we mean when we say that X was negligent, not in respect of a result, but merely in respect of a circumstance?

X is negligent in respect of a circumstance if a reasonable person in the same circumstances would have foreseen the possibility that the circumstance could exist. In *Duma* 1970 (1) SA 70 (N) for example X was charged with unlawfully possessing a firearm. He was caught in possession of a firearm without having a licence to possess it. The question was whether he had committed the crime negligently. X's story, which the court accepted, was that he believed in good faith that he had picked up a toy revolver and that he had then put it in his pocket. The court held that, in order to prove negligence, the state must prove "that, although the appellant genuinely believed that he had picked up a toy, a *diligens paterfamilias* in his position would not have entertained that belief but would have known, or at least suspected, that it was a firearm and would have made certain of its nature ...". The court held that the state had not proved this and the court accordingly acquitted X.

11.6 SUBJECTIVE FACTORS

As we have already emphasised, the test to determine negligence is in principle objective, namely the foreseeability of the result or circumstance by the reasonable person. However, this rule is subject to the following exceptions:

- (1) The negligence of **children** who, despite their youth, have criminal capacity, ought to be determined, we submit, by inquiring what the reasonable child would have done or foreseen in the same circumstances.

Example: In *T* 1986 (2) SA 112 (O) the court had to decide whether X, a 16-year-old schoolboy, had committed culpable homicide when he killed a fellow-schoolboy during an argument. The court found him not guilty, *inter alia* on the ground that the test for negligence in this particular case was not the test of the "reasonable person", but of the "reasonable 16-year-old schoolboy".

- (2) In the case of **experts** it must be asked whether the reasonable expert who embarks upon a similar activity would have foreseen the possibility of the particular result ensuing or the particular circumstance existing (*Van Schoor* 1948 (4) SA 349 (C) 350; *Van As supra* 928E).

Example: When determining whether a heart surgeon was negligent during an operation in which the patient died, his actions certainly cannot be measured by the yardstick of how a reasonable person, who for all practical purposes is a layman in the medical field, would have acted.

- (3) If X happens to have **knowledge** of a certain matter which is **superior** to the knowledge which a reasonable person would have had on the matter, he cannot expect a court to determine his negligence by referring to the inferior knowledge of the reasonable person. His superior subjective knowledge of a

fact of which the reasonable person would have had no knowledge must indeed be taken into account (*Mahlalela* 1966 (1) SA 226 (A) 229).

Example: X is a member of a team of workers which is cleaning up a certain terrain. A tin can in which a hand-grenade has been hidden is lying on the terrain. X picks it up and throws it to one side. The result is an explosion in which Y is killed. The reasonable person would not have known or foreseen that there was a hand-grenade in the tin. Assume that X in fact happened to have known that there was a hand-grenade in the tin. If X is charged with culpable homicide and the question whether he was negligent has to be answered, X cannot expect his negligence to be determined by enquiring whether the reasonable person would have known or foreseen that there was a hand-grenade in the tin. X's particular subjective knowledge of the presence of the hand-grenade in the tin must indeed be taken into account. (This would in all probability result in the court holding that he was indeed negligent.)

11.7 NEGLIGENCE AND INTENTION

(Criminal Law 218-219; Case Book 151-155)



Read the following decision in the *Case Book*: *Ngubane* 1985 (3) SA 677 (A)

In a number of cases the question arose whether intention necessarily includes negligence and whether a court may therefore convict X of culpable homicide even though it has been proved that he in fact killed Y intentionally. This question has in particular arisen in cases where X was charged with culpable homicide, but the evidence (unsuspectingly, to the prosecutor's surprise) revealed that he had killed Y intentionally.

After various earlier conflicting decisions, the Appeal Court finally held in *Ngubane* 1985 (3) SA 677 (A) that intention and negligence are conceptually different and that these two concepts never overlap. On the other hand, the court held that it is incorrect to assume that proof of intention excludes the possibility of a finding of negligence. The facts of a particular case may reveal that, although X acted intentionally, he also acted negligently in that his conduct did not measure up to the standard of the reasonable person.

11.8 CONSCIOUS AND UNCONSCIOUS NEGLIGENCE

A distinction is drawn between unconscious and conscious negligence. Although the distinction between these two forms of negligence is recognised in the case law (eg *Ngubane* 1985 (3) SA 677 (A) 685A-F; *Maritz* 1996 (1) SA 405 (A) 416), actual cases of conscious negligence are rare. The overwhelming majority of reported cases of negligence are cases of unconscious negligence.

You must study the explanation in *Criminal Law* 219–220 as well as 187–188 of the difference between these two forms of negligence, on your own. Note the example of conscious negligence (in which X shoots at a duck swimming on a lake while he is aware that there are people having a picnic on the opposite side of the lake who may be hit by the bullet he fires) given in the middle paragraph on page 188.

11.9 EXCEEDING THE BOUNDS OF PRIVATE DEFENCE

(Criminal Law 114–115; Case Book 167–170)

11.9.1 Introduction

Above, in the study unit setting out the ground of justification known as private defence, we have already explained that if X relies on private defence but the evidence reveals that he has exceeded the bounds of private defence, he cannot rely on private defence and his conduct is unlawful. The question which we have not yet answered, is: What crime does X commit in such a case? In order to answer this question, one must have a knowledge of what the two forms of culpability, intention and negligence, entail. We have now reached the stage where we have explained both these forms of culpability. We are therefore now for the first time in a position to explain what crime, if any, X commits if he exceeds the limits of private defence.

11.9.2 Application of principles of culpability

The question arises how the principles relating to culpability must be applied in cases where the bounds of private defence are exceeded.

As seen above, a person acting in private defence acts lawfully and his non-liability is based upon the absence of an unlawful act. Of what must he now be convicted if he oversteps the bounds of private defence, as when he inflicts more harm upon the aggressor than is necessary to protect himself or the person he is defending, and his act is therefore unlawful?

The answer to this question is clearly set out in *Ntuli* 1975 (1) SA 429 (A). In this case, the accused killed an older woman with whom he had an argument, by striking two hard blows to her head. The trial court found that he had exceeded the bounds of private defence and convicted him of culpable homicide. On appeal the finding was confirmed and the Appeal Court laid down the following important principles:

- (1) If the victim dies, the accused may be guilty of either murder or culpable homicide, depending upon his culpability. If the accused did not have any culpability, he should be found not guilty.
- (2) The ordinary principles relating to intention and negligence should be applied to all cases where the bounds of private defence have been exceeded.

11.9.3 Killing another

We first consider the situation in which the party who was originally attacked (X) kills the original aggressor (Y) while exceeding the bounds of private defence. The following set of facts is an example of such a situation. Y unlawfully assaults X by hitting him in the face with his fists. X, in order to defend himself, draws a knife and stabs Y in the arm. As a result of sustaining the stab wound Y abandons his attack. X nevertheless continues his retaliatory action by inflicting three further stab wounds on Y's chest and neck, as a result of which Y dies. The question now is whether X has committed a crime, and if so, which one.

In this set of facts three possible legal conclusions must be considered, namely (1) that X is guilty of murder; (2) that he is guilty of culpable homicide, and (3) that he is not guilty of any crime. To sustain a conviction of murder or culpable homicide there must have been an unlawful causing of another's death. It is clear that X's act caused Y's death. Since X exceeded the bounds of private

defence, he cannot rely on private defence as a ground of justification and therefore his act is also unlawful. (If X had abandoned his retaliatory attack upon Y after the infliction of the first stab wound, his retaliation would have fallen within the bounds of private defence.) The only question which remains to be answered, is whether X acted with culpability, and if so, whether the culpability was present in the form of intention or negligence.

X will be guilty of murder if he had the intention to murder Y. Before a court can find that he had such an intention, two requirements must be complied with.

- (1) It must be clear that X had in fact known that his conduct would result in Y's death, or that he had foreseen that this might happen and reconciled himself to this possibility. This is so-called "colourless" intention in respect of death.
- (2) The intention referred to above, however, is not yet sufficient to warrant a conviction of murder. In the discussion of intention — and especially of awareness of unlawfulness — above, we have stated that the intention required for a conviction (ie, *dolus*) must always be "coloured". This would be the case if, apart from intending to commit the unlawful act or causing the unlawful result, X also knew (or foresaw) that his conduct would be **unlawful**. Before a court can find that X intended to murder Y, it must, in the second place, therefore be clear that he (X) knew that his conduct was also unlawful (in other words that it exceeded the bounds of private defence), or that he foresaw this possibility and reconciled himself to it. In short, intention to murder consists in intention to kill **plus** the intention to kill **unlawfully**.

We now return to the set of facts mentioned above where X kills Y while exceeding the bounds of private defence. It is usually easy to find that X had "colourless" intention in respect of death. In fact, even where X kills Y in (lawful) private defence, he knows or foresees that his act will lead to Y's death. However, what X, when exceeding the bounds of self-defence, in the heat of the moment often does not foresee, is that he is engaged in an **unlawful** attack upon Y — in other words an attack which exceeds the bounds of self-defence.

Where, in the discussion above, we have used the word "knows", the reference is to *dolus directus*. Where we have used the expression "foresees the possibility ... and reconciles", the reference is to *dolus eventualis*.

If the intention to murder as explained above, is absent, X may nevertheless be convicted of **culpable homicide**, if he **ought reasonably to have foreseen** that he might exceed the bounds of self-defence and that he might kill the aggressor. If that is the case, he was negligent in respect of the fatal result. (*Joshua* 2003 (1) SACR 1 (SCA)).

If, subjectively, he **did not foresee** the possibility of death **and if it also cannot be said** that he **ought reasonably to have foreseen it**, both intention and negligence in respect of death are absent and he is **not guilty of either** murder or culpable homicide.

11.9.4 Assault

If X did not kill Y, but only injured him while exceeding the bounds of self-defence, there are only two possibilities, namely that X is guilty of assault, or that he is not guilty of any offence.

The crime of assault can only be committed intentionally. There is no such crime as negligent assault in our law. If X subjectively knew or foresaw the possibility that he might overstep the bounds of self-defence and in so doing would or could injure Y, the original aggressor, he had the necessary intention to assault and is guilty of assault. If he did not foresee these possibilities, the intention to assault is

absent and he is not guilty. Mere negligence in respect of the injury does not render him guilty of any crime.

GLOSSARY

<i>culpa</i>	negligence
<i>bonus paterfamilias</i>	literally “the good father of the family”; in practice “the reasonable person”
<i>diligens paterfamilias</i>	literally “the diligent father of the family”; in practice “the reasonable person”

SUMMARY

- (1) The test to determine negligence is (barring certain exceptions) objective.
- (2) Definition of negligence — see definition above.
- (3) An abbreviated way of referring to negligence is to say that X acted in a way which differed from the way the reasonable person would have acted in the circumstances.
- (4) The crux of the test to determine whether X was negligent in a materially defined crime (ie a result crime) is the following: Would the reasonable person in the circumstances have foreseen that the particular consequence could ensue?
- (5) The crux of the test to determine whether X was negligent in a formally defined crime is the following: Would the reasonable person in the circumstances have foreseen that the circumstance in question could exist?
- (6) The reasonable person is also referred to as the *bonus* or *diligens paterfamilias*. By this is meant the ordinary, normal, average person. He is not an exceptionally cautious person who would never take reasonable risks.
- (7) In order to determine whether the reasonable person would have foreseen the reasonable possibility that the circumstance may exist or the consequence ensue, the reasonable person must be placed in the same circumstances as those in which X found himself at the time of the commission of the act.
- (8) Apart from enquiring whether the reasonable person would have foreseen a certain possibility, one must, in order to determine negligence, also enquire whether the reasonable person would have taken steps to guard against the possibility of the result ensuing.
- (9) Although the test for negligence is objective, subjective factors are taken into account in the following instances:
 - (a) children
 - (b) experts
 - (c) superior knowledge
- (10) In *Ngubane* the court held that it is wrong to assume that proof of intention excludes the possibility of a finding of negligence. Proof of intention is not irreconcilable with a finding that X was negligent.

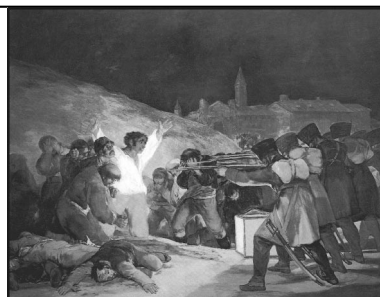
- (11) There is a difference between unconscious and conscious negligence. In the former X does not foresee the particular possibility. In the latter he does foresee it, but unreasonably decides that it will not ensue.
- (12) In terms of the decision in *Ntuli* the ordinary principles relating to intention and negligence must be applied to determine whether a person who overstepped the boundaries of private defence, is guilty of a crime.

TEST YOURSELF

- (1) Define the test for negligence.
- (2) Discuss the concept of the “reasonable person”.
- (3) Discuss the first leg of the test for negligence, that is the question whether the reasonable person would have **foreseen** the possibility that the particular result might ensue or the particular circumstance might exist.
- (4) Discuss the second leg of the test for negligence, that is the question whether the reasonable person would have **taken steps to guard** against the possibility of the result ensuing.
- (5) How does the test for negligence in formally defined crimes differ from the test for negligence in materially defined crimes?
- (6) What is the abbreviated way in which one may refer to negligence?
- (7) Name the subjective factors that may be taken into consideration in determining negligence, and give an example of each factor.
- (8) Can X be found guilty of culpable homicide if he was charged with culpable homicide and the evidence revealed that he actually killed Y intentionally? Discuss in the light of the decision in *Ngubane* 1985 (3) SA 677 (A).
- (9) Distinguish between unconscious and conscious negligence.
- (10) (a) When can X be convicted of **murder** if he killed his attacker in a situation in which he exceeded the bounds of private defence? Discuss.
(b) When can X be convicted of **culpable homicide** if he killed his attacker in a situation in which he exceeded the bounds of private defence? Discuss.

STUDY UNIT **12**

The effect of intoxication on liability



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to:

- demonstrate your understanding of the effect of intoxication on the liability of an accused by expressing an informed opinion on the question whether an accused, who had been intoxicated at the time of the commission of a crime, should be convicted of:
 - the crime with which she is charged (or an implied alternative)
 - contravention of section 1 of Act 1 of 1988

12.1 BACKGROUND

The effect of intoxication on criminal liability is discussed in this study unit. Intoxication may play a role in respect of the following elements or requirements of the crime: a voluntary act; criminal capacity; intention and negligence. It is important that you understand these concepts well before you embark on a study of this study unit.

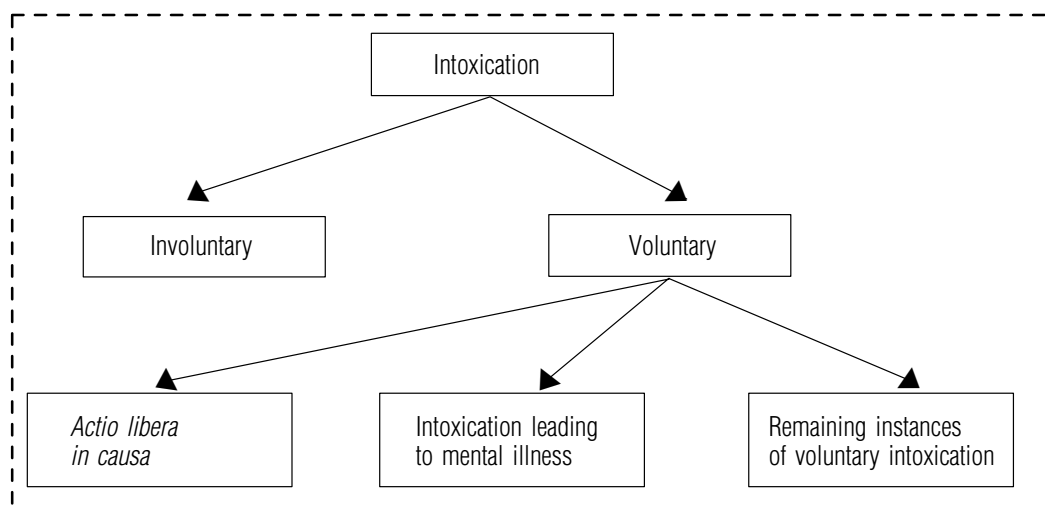
12.2 INTRODUCTION

It is well known that the consumption of alcohol may detrimentally affect a person's capacity to control her muscular movements, to appreciate the nature and consequences of her conduct, as well as its wrongfulness, and to resist the temptation to commit wrongful acts. It may induce conditions such as impulsiveness, diminished self-criticism, overestimation of her abilities and under-estimation of dangers. It may also result in a person being unaware of circumstances or consequences which she would have been aware of had she been sober. What is the effect, if any, of intoxication on criminal liability?

What is said here of intoxication resulting from the consumption of alcohol or liquor, applies equally to intoxication resulting from the use of drugs, such as dagga or opium.

The effect of intoxication on liability is discussed in *Criminal Law* 220–234; as well as in *Case Book* 117–127.

The discussion of the defence of intoxication which follows can be subdivided according to the following diagram:



The last form of intoxication described in the diagram, namely “Remaining instances of voluntary intoxication”, requires a fairly long discussion. A summary of the effect of this form of intoxication will be given below under 12.8.

12.3 INVOLUNTARY INTOXICATION

It is necessary first to distinguish between voluntary and involuntary intoxication. By “involuntary intoxication” is meant intoxication brought about without X’s conscious and free intervention, as in the following examples: X is forced to drink alcohol against her will; or X’s friend Y, without X’s knowledge, pours alcohol or a drug into X’s coffee, which results in X becoming intoxicated and committing a crime while thus intoxicated (as happened in *Hartyani* 1980 (3) SA 613 (T)). It is beyond dispute that involuntary intoxication is a complete defence. The reason for this is that X could not have prevented the intoxication, and therefore cannot be blamed for it.

12.4 VOLUNTARY INTOXICATION

As far as voluntary intoxication is concerned, three different situations have to be clearly distinguished:

- (1) the *actio libera in causa*
- (2) intoxication resulting in mental illness, and
- (3) the remaining instances of voluntary intoxication

12.4.1 *Actio libera in causa*

The first situation is where X intends to commit a crime, but does not have the courage to do so and takes to drink in order to generate the necessary courage, knowing that she will be able to perpetrate the crime once she is intoxicated. In this instance intoxication is no defence whatsoever; in actual fact it would be a ground for imposing a heavier sentence than the normal. At the stage when the person was completely sober, she already had the necessary culpability. The person’s inebriated body later merely becomes an instrument used for the purpose of committing the crime. This factual situation, which is difficult to prove, is known as *actio libera in causa*.

12.4.2 *Intoxication resulting in mental illness*

Secondly, certain manifestations of mental illness, such as *delirium tremens*, can be the result of a chronic abuse of alcohol. If the consumption of alcohol results in mental illness or mental defect, the ordinary rules regarding mental illness set out above must be followed. X is acquitted in terms of section 78(6) of the Criminal Procedure Act, owing to lack of criminal capacity. The court may issue one of several orders, including that X be admitted to, and detained in, an institution for the purpose of treatment. (For a discussion of this topic see study unit 8 above.)

The two instances of voluntary intoxication discussed above as well as involuntary intoxication are seldom encountered in practice. The rules applicable to these forms of intoxication as stated above are generally not disputed.

12.4.3 *Remaining instances of voluntary intoxication*

(1) General

We now take a look at the third instance of voluntary intoxication. This is the instance where alcohol is taken voluntarily, does not result in mental illness, and where X does not partake of the alcohol with the exclusive purpose of generating the courage to perpetrate a crime.

The vast majority of cases where intoxication comes into the picture in the daily practice of our courts can be categorised under this third instance of voluntary intoxication. The controversy concerning the role of intoxication in criminal law has to do mainly with these cases. Unless otherwise indicated, all references to intoxication hereafter are references to intoxication in this category. It is this type of intoxication with which the courts are confronted daily. For example, X has a couple of drinks at a social gathering and then behaves differently from the way she would have behaved, had she not taken any liquor: she takes offence too readily at a rude remark made by Y and then assaults her, or damages property.

(2) The “lenient” and “unyielding” approach to voluntary intoxication

Through all the years there have been two opposing schools of thought regarding the effect that intoxication ought to have on criminal liability. On the one hand, there is the approach that may be described as the **unyielding** one, which holds that the community will not accept a situation in which a person who was sober when she committed a criminal act is punished for that act whereas the same criminal act committed by someone who was drunk is excused merely because she was drunk when she committed the act. This would mean that intoxicated people are treated more leniently than sober people.

On the other hand, there is the **lenient** approach which holds that if one applies the ordinary principles of liability to the conduct of an intoxicated person there may be situations in which such a person should escape criminal liability, the basis of this being that because of her intoxication she either did not perform a voluntary act, or lacked either criminal capacity or the intention required for a conviction.

In the course of our legal history the approach towards the effect of intoxication has vacillated. Initially, in our common law, the rule was that voluntary intoxication could never be a defence to a criminal charge, but could at most amount to a ground for the mitigation of punishment. This is the unyielding approach.

However, the pendulum has gradually swung away from the unyielding approach adopted in the common law towards the lenient approach, and throughout the twentieth century till 1981 the courts applied a set of rules that enabled them to reach a conclusion somewhere in the middle, that is between the unyielding and the lenient approaches (see the discussion hereafter of the law prior to 1981). However, with the Appeal Court decision in 1981 in *Chretien* 1981 (1) SA 1097 (A) the pendulum clearly swung in the direction of the lenient approach. This created the fear that intoxicated persons might too easily escape conviction, which in turn led to legislation in 1988 aimed at curbing the lenient approach towards intoxicated persons. At present, the pendulum once again finds itself poised somewhat uncomfortably half-way between the lenient and the unyielding approaches owing to, *inter alia*, uncertainty regarding the interpretation of the 1988 legislation.

12.5 DEVELOPMENT OF THE DEFENCE OF VOLUNTARY INTOXICATION

As this topic deals with the development of a defence, **the chronological sequence of decided cases and of legislation is important.**

12.5.1 *The law before 1981*

For a clear picture of the role of intoxication on criminal liability, it is necessary to take a brief look at what the law on this subject was in the course of the twentieth century prior to 1981. During this time intoxication was never a complete defence, that is a defence which could lead to a complete acquittal.

The courts used the so-called “specific intent theory”. According to this theory, crimes could be divided into two groups: those requiring a “specific intent” and those requiring only an “ordinary intent”. Examples of the first-mentioned group were murder and assault with intent to do grievous bodily harm. The theory entailed the following: If X was charged with a crime requiring a “specific intent”, the effect of intoxication was to exclude the “specific intent”. She could then not be convicted of the “specific intent” crime with which she was charged, but only of a less serious crime, including one in respect of which only an “ordinary intent” was required. Somebody charged with murder could, as a result of her intoxication, be convicted of culpable homicide only. Somebody charged with assault with intent to do grievous bodily harm could, as a result of intoxication, be convicted of ordinary assault only (*Fowlie* 1906 TS 505; *Bourke* 1916 TPD 303; *Ngobese* 1936 AD 296; *Tsotsotso* 1976 (1) SA 364 (O)).

The “specific intent theory” has been criticised on a number of grounds. It was argued that it is incorrect to assume that intoxication can exclude a “specific intent” but not an “ordinary intent”: if X was so drunk that she could not form a “specific intent”, how is it possible that she could form any intent whatsoever?

12.5.2 *The law after 1981 — The decision in Chretien and the rules enunciated therein*



Read the following decision in the *Case Book: Chretien* 1981 (1) SA 1097 (A).



Chretien's case. For a description of the facts, see the discussion of this case in the text, the prescribed book (*Snyman* 224–226) and the *Case Book*.

The legal position as set out above was drastically changed by *Chretien* 1981 (1) SA 1097 (A). In this case X, who was intoxicated, drove his motor vehicle into a group of people standing in the street. As a result, one person died and five people were injured. He was charged with murder in respect of the person who died and attempted murder in respect of the five persons injured. The court found that owing to his consumption of alcohol, X expected the people in the street to see his car approaching and move out of the way, and that therefore he had no intent to drive into them. On the charge of murder he was convicted of culpable homicide, because the intention to kill had been lacking.

X could not be found guilty on any of the charges of attempted murder owing to the finding that he did not have any intent to kill. The question arose, however, whether X should not have been found guilty of common assault on the charges of attempted murder. The trial court acquitted him on these charges. The state appealed to the Appellate Division on the ground that the trial court had interpreted the law incorrectly and that it should have found the accused guilty of assault. The Appeal Court found that the trial court's decision was correct.

Summary of legal points decided by Appellate Division (Rumpff CJ) in *Chretien*

- (1) If a person is so drunk that her **muscular movements are involuntary**, there can be **no question of an act**, and although the state in which she finds herself can be attributed to an excessive intake of alcohol, she **cannot be found guilty** of a crime as a result of such muscular movements.
- (2) In exceptional cases a person can, as a result of the excessive intake of alcohol, completely **lack criminal capacity** and as a result not be criminally liable at all. This will be the case if she is "so intoxicated that she is not aware that what she is doing is unlawful, or that her inhibitions have substantially fallen apart".
- (3) The "**specific intent theory**" in connection with intoxication is unacceptable and **must be rejected**. It is precisely because of the rejection of this theory that in this case X could not even be convicted of common assault. The intoxication can therefore even exclude X's intention to commit the less serious crime, namely assault.
- (4) The Chief Justice went out of his way to emphasise that a court **must not lightly infer** that owing to intoxication, X acted involuntarily or lacked criminal capacity or the required intention since this would discredit the administration of justice.

Lastly, as far as *Chretien* is concerned, it must be emphasised that the rules discussed above regarding involuntary intoxication, *actio libera in causa* and intoxication resulting in mental illness, were not altered in any way by this judgment.

The result of *Chretien* is that, as far as X's liability is concerned, intoxication may have one of the following three effects:

- (1) It may mean that the requirement of a voluntary act was not complied with.
- (2) It may exclude criminal capacity.
- (3) It may exclude intention.

The first-mentioned effect (the exclusion of the act) merely has theoretical significance: Such cases are hardly ever encountered in practice. If it should occur in practice, it would mean that X had acted in a state of automatism.

The second effect may occur in practice, although a court will not readily find that X lacked criminal capacity owing to intoxication — especially in the absence of expert evidence (cf *September* 1996 (1) SACR 325 (A) 332).

If X does succeed with a defence of intoxication, in practice this usually means that a court decides that, owing to intoxication, she lacked intention. (Intoxication may, of course, also have a fourth effect, namely to serve as a ground for mitigation of punishment; this effect, however, does not refer to X's liability for the crime. We shall discuss at a later stage the effect of intoxication on the measure of punishment.)

12.5.3 *The crime created in section 1 of Act 1 of 1988*

(1) Reason for legislation

It was pointed out above that the decision in *Chretien* resulted in intoxication qualifying as a complete defence. This judgment has been criticised. The criticism is that society does not accept a situation where a sober person is punished for criminal conduct, whereas the same conduct committed by a drunken person is pardoned merely because she was drunk. This would mean that drunken people are treated more leniently than sober people. Society demands that drunken people should not be allowed to hide behind their intoxication in order to escape the clutches of the criminal law.

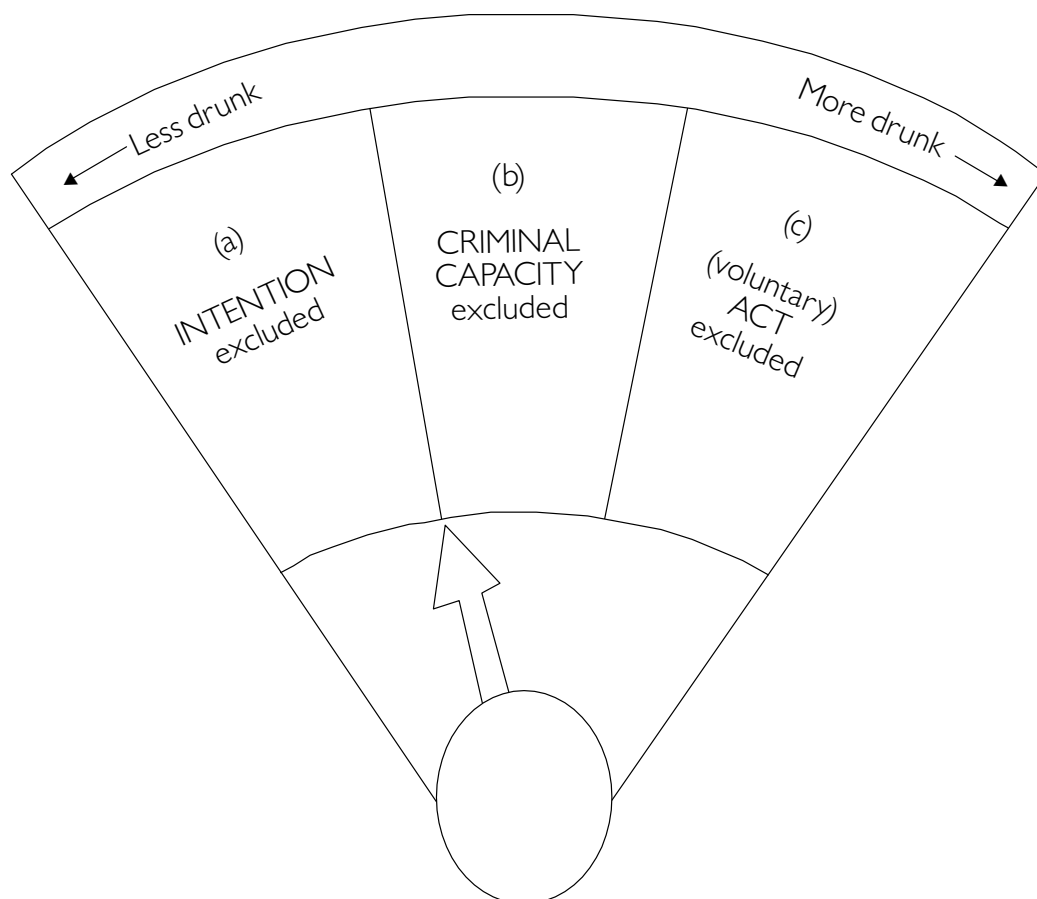
Reacting to this criticism of the judgment, parliament in the first Act it passed in 1988 enacted a provision which was clearly aimed at preventing a person raising the defence of intoxication too readily to walk out of court a free person. This provision is contained in section 1 of the Criminal Law Amendment Act 1 of 1988.

(2) Different degrees of intoxication

Section 1 of the Act is not easy to understand when one reads it for the first time. In order to understand the section properly, it is necessary at the outset to emphasise an important aspect of the defence of intoxication. This is the fact that there are different degrees of intoxication. For the purposes of criminal law one can distinguish the following degrees of intoxication:

- (a) The least intensive of the three degrees of intoxication is intoxication that has the effect of excluding the **intention** required for a conviction. In those instances the intoxication was not sufficiently serious to render X's act involuntary or to exclude X's criminal capacity, but serious enough to exclude her intention. (This effect of intoxication is relevant only in crimes requiring intention.)
- (b) The next degree of intoxication is of a more serious nature than the intoxication described above. It refers to the situation where X is so intoxicated that she lacks **criminal capacity**. The intoxication was not of a sufficiently serious degree to render her act involuntary. On the other hand, the degree of intoxication was sufficient to exclude her criminal capacity, and did not merely exclude her intention.
- (c) The strongest degree of intoxication is when X is so intoxicated that she is not even capable of performing a voluntary **act**.

Imagine a “meter” which, like a speedometer in the dashboard of a motor car, gives a “reading” of the degree of intoxication of an accused charged with a crime requiring intention. Such a “meter” would look more or less as follows:



The strongest degree of intoxication is the one on the right of the meter, and the slightest degree is the one depicted on the left of the meter. The more drunk a person is, the more the needle of the instrument will move to the right. Conversely, the less drunk a person is, the more the needle will move towards the left.

The judgment in *Chretien* is to the effect that, if X is charged with having committed a crime requiring intention, and she relies on intoxication as a defence, the defence must succeed irrespective of whether she falls in category (a), (b), or (c). When the legislature drew up the legislation presently under discussion, it had to decide the extent to which the law ought to be amended: should it be amended to the extent that accused falling in all three categories should henceforth be punishable, or should it be amended to the extent that only accused falling in certain of these categories should henceforth be punishable? We shall now pay attention to the wording of section 1 of the Criminal Law Amendment Act, 1988. Read the wording of section 1 very attentively. See if you can find out from the wording of the section which of the degrees (or categories) of intoxication the legislature decided to make punishable. We shall return to this question in item (4) below.

(3) Wording of section 1

The precise wording of section 1 of the Act is as follows:

1. (1) Any person who consumes or uses any substance **which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in**

accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.

- (2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

Owing to the rather complicated wording of this section, we do not expect you to be able to state the precise wording of the section in the examination. **However, you must be able to formulate the simplified version of the section, as set out below in item (5).** This version appears below in a block against a grey background.

(4) Effect of section 1 on the judgment in *Chretien*

The wording of section 1 is quite a mouthful. As we have seen in item (1) above, section 1 was enacted in reaction to the judgment in *Chretien* in order to prevent a person who raises the defence of intoxication to walk out of court a free person too readily. Could you, from the wording of the section, figure out for which of the categories of intoxication does section 1 make punishable?

If one carefully analyses the wording of section 1 it becomes clear that section 1 is aimed at holding certain persons who, in terms of the judgment in *Chretien* are not criminally liable, liable for contravention of the offence created in section 1(1). These are persons whose **faculties were affected when** they consumed an intoxicating substance such as alcohol and were not able to appreciate the **wrongfulness of their acts or to act in accordance with that appreciation**. Does the phrase printed in bold ring a bell? It virtually amounts to a definition of the abilities that come to the fore when discussing **criminal capacity**. Section 1 therefore clearly applies to the situation where intoxication (or the consumption or use of another substance) has the effect of excluding a person's criminal capacity — in other words, to the instances that fall under category (b) above.

What about those who fall under category (c) above — in other words, those who, as a result of intoxication, are unable to perform a voluntary act? Although section 1 does not expressly refer to such instances, it does apply to such cases. As we have seen, intoxication that has the effect of rendering a person's conduct involuntary amounts to a more severe degree of intoxication than intoxication that has the effect of excluding a person's criminal capacity. A person who is intoxicated to such an extent that she acts in an involuntary manner, at the same time lacks criminal capacity — and if she lacks criminal capacity, section 1 applies.

In *Chretien* intoxication had the effect of excluding X's intention. X therefore fell under category (a). Can a person such as *Chretien* who acted in a voluntary manner and had criminal capacity but whose intention was excluded owing to intoxication be convicted of contravening section 1? The answer to this question is "no". There is nothing in the provision to suggest that a person who falls under category (a) can be convicted of the statutory offence. Section 1 merely refers to "faculties", and the question whether there was intention (including awareness of unlawfulness) or not does not centre around X's faculties, but around her knowledge. The legislature therefore decided that accused persons who at the time of the commission of the act fell only under category (a) should not be

punished. Accused persons falling under this category therefore retain the defence that intoxication affords them and are still, as was the case in *Chretien*, acquitted of any crime requiring intention.

In deciding which categories of intoxication should be made punishable the legislature drew a clear boundary that runs between categories (a) and (b). In the illustration in (2) above the needle of the meter points exactly to where this boundary is situated.

(5) Simplified version of contents of section

You now know that in terms of the judgment in *Chretien* intoxication may in some instances (namely in categories (a), (b) and (c)) be a complete defence. You also know that the legislature was unhappy with this state of affairs and therefore enacted section 1 of the Criminal Law Amendment Act, 1988, in reaction to the judgment in *Chretien*. You have already studied the exact wording of section 1. You now know that section 1 applies only to categories (b) and (c). We shall now look at precisely what the legislature made provision for in order to hold persons falling under categories (b) and (c) liable for the acts they committed in a state of intoxication.

The following is a simplified version of the contents of section 1:

If X commits an act which would otherwise have amounted to the commission of a crime (ie which, “viewed from the outside”, without taking into account X’s subjective mental predisposition, would have amounted to the commission of a crime) but the evidence brings to light that at the time of the performance of the act she was in fact so intoxicated **that she lacked criminal capacity**, the court would, in terms of the *Chretien* judgment, first have to find her not guilty of the crime with which she has been charged (ie the crime she would have committed had she not been drunk), but must then nevertheless convict her of the statutory crime created in section 1(1), that is the crime known as “contravention of section 1(1) of Act 1 of 1988”. She is in other words convicted of a crime, albeit not the same one as the one she had been initially charged with.

The section further provides that when the court has to decide what punishment to impose for the statutory crime of which she had been convicted, the court is empowered to impose the same punishment it would have imposed had she been convicted of the crime she was originally charged with. In this way she is prevented from “walking out of court” unpunished.

Let us take a practical example. X is charged with having assaulted Y. The evidence reveals that, although she had hit Y in the face with her fists, she was so intoxicated when she struck the blows that she **lacked criminal capacity**. What the court must then do, is the following: She must be found not guilty of assault, but guilty of another crime, namely “**contravention of section 1(1) of Act 1 of 1988**”. The punishment the court then imposes for this crime would be the same as the punishment the court would have imposed had it convicted her of assault.

(6) Elements of crime created in section

We now proceed to a discussion of the elements or requirements of this statutory crime. In order to follow the discussion, it will be necessary for you to consult the precise wording of the section above under item (3).

The requirements for a conviction of contravening the section can be divided into two groups. The first group (referred to below with an "A") refers to the circumstances surrounding the consumption of the liquor, which is the event which takes place first. This group of requirements comprises the following:

- A1 the **consumption or use by X**
- A2 of **"any substance"**
- A3 which impairs her faculties to such an extent that she **lacks criminal capacity**
- A4 while **she knows that the substance has that effect**

The second group of requirements (referred to below as "B") refers to the circumstances surrounding the commission of the act "prohibited ... under penalty", which is the event which takes place secondly. This group of requirements comprises the following:

- B1 the commission by X of **an act prohibited under penalty**
- B2 **while she lacks criminal capacity** and
- B3 who, because of the absence of criminal capacity, is **not criminally liable**

(We expect you to be able to state these (altogether) seven requirements in the examination.)

(7) Discussion of elements of statutory crime

- (1) The section is worded in such a way that it applies not only if X's mental abilities (or "faculties") are affected by the consumption of alcoholic liquor, but also if these abilities are affected by the use of **drugs**. This follows from the use of the words "any substance" in section 1(1).
- (2) The element of the crime identified above as A4 means that before a court convicts X of contravening the section, it must be satisfied that X had consumed the liquor or substance **intentionally**, that is with knowledge of its effect.
- (3) The section does not state explicitly that X should have consumed the substance **voluntarily**. We are nevertheless of the opinion that the operation of the section should be limited to cases in which X had consumed the substance voluntarily. This follows from the background and purpose of the provision as well as from the unacceptable consequences which will flow from a contrary interpretation.
- (4) The crime created in the section is very peculiar in the following respect: In order to obtain a conviction of contravening the section, the state must prove that X lacked criminal capacity at the time of the commission of the act. This is clear from the element of the crime identified above as B2. What is peculiar, is the following: When charging a person with any crime the state (barring a few exceptions which are not applicable here) must prove all the requirements of the crime in order to secure a conviction. One of these requirements is that X had criminal capacity at the time of the act. However, if the state (or state prosecutor) wishes to convince the court that X committed a contravention of section 1(1), it must prove the **precise opposite**, namely that X **lacked criminal capacity** at the time of the act. The crime created in the section is therefore unique, because it is the only crime in our law in which the **absence** of criminal capacity (instead of its presence) is required for a conviction. In other words, this crime is an exception to the general rule which requires that criminal capacity is a prerequisite for a conviction.
- (5) Subsection (2) is more of procedural interest. The subsection amounts to the following: In order to secure a conviction of contravening the section, the state need not necessarily charge X explicitly of contravening this section.

Even if X has been charged, for example, only with assault, and not also with contravention of this section, she may still be convicted of contravening the section if the evidence reveals that at the time of the performance of the act she was intoxicated to the extent set out in the section.

12.6 INTOXICATION AND CULPABLE HOMICIDE

If X, who is charged with murder, raises as defence the fact that she was intoxicated, she can in terms of the judgment in *Chretien* be acquitted on the murder charge (because intoxication negates the required intent), but in almost all such cases she will be guilty of culpable homicide. This is due to the fact that the form of culpability required for a conviction of culpable homicide is negligence; because the test for negligence is objective (namely how the reasonable person would have acted), and because the reasonable person would not have indulged in an excessive consumption of alcohol. This end result (namely a conviction of culpable homicide) can be reached without making use of the “specific intent” theory.

12.7 THE EFFECT OF INTOXICATION ON PUNISHMENT

In all the instances where X, notwithstanding her intoxication, is found guilty of the crime she is charged with, the intoxication can be taken into account by the court in sentencing her, resulting in a more lenient punishment. This is a daily practice in our courts. Intoxication cannot, however, result in a more lenient punishment in the case of a crime in which intoxication is an element of the crime, such as driving a motor car under the influence of liquor (*Kelder* 1967 (2) SA 44 (T)).

Nothing prohibits a court from using intoxication as a ground for imposing a heavier punishment in certain circumstances, for example in the case of a person who knew, before she started drinking, that drink made her aggressive (*Ndlovu* 1972 (3) SA 42 (N); s 2 of the Criminal Law Amendment Act 1 of 1988). Where the form of culpability involved in the commission of the offence is negligence, the fact that the negligence was induced by the voluntary consumption of alcohol or drugs will generally be regarded as an aggravating factor.

GLOSSARY

actio libera in causa the situation in which X intentionally drinks liquor or uses drugs to generate enough courage to commit a crime

12.8 SUMMARY

As far as the effect of intoxication on criminal liability is concerned, the legal position at present may be summarised as follows:

Facts	Legal consequences
X is so intoxicated that she is incapable of committing a voluntary act — in other words, her conduct takes place while she is in a state of automatism resulting from intoxication.	In terms of <i>Chretien</i> , X is not guilty of the crime with which she is charged. She must, however, be convicted of contravening section 1 of Act 1 of 1988.

Facts	Legal consequences
X is so intoxicated that she lacks criminal capacity .	Exactly the same as above.
X is so intoxicated that she lacks the intention required for a conviction.	In terms of <i>Chretien</i> , X is not guilty of the crime with which she is charged. Nor can she be convicted of contravening section 1 of Act 1 of 1988. However, if X is charged with murder, she may, on the ground of negligence, be found guilty of culpable homicide (which is always a tacit alternative charge to a charge of murder).
On a charge of having committed a crime requiring negligence (eg culpable homicide), the evidence reveals that X was intoxicated when she committed the act.	Intoxication does not exclude X's negligence; on the contrary, it serves as a ground for a finding that X was negligent.
Despite his consumption of liquor, X complies with all the requirements for liability, including intention.	X is guilty of the crime with which she is charged, but the measure of intoxication may serve as a ground for the mitigation of punishment. It may, however, also serve as a ground for increasing a sentence as for example in a case of a person who knew, before she started drinking, that drink makes her aggressive.

12.9

STUDY HINT



Experience has taught us that students often obtain bad marks when they have to answer a question dealing with the defence of intoxication in the examination. We have therefore decided to give you a few study hints on how to answer a question in the examination which deals with this topic.

Students are often (although not always) required to discuss the **present** legal rules relating to the defence of **voluntary intoxication**, or to apply the rules relating to this defence to a concrete set of facts. It is, after all, this form of intoxication which arises in well-nigh ninety-nine percent of cases in which intoxication is raised as a defence.

If you are required to answer a question on the defence of voluntary intoxication in the examination, do not waste time with irrelevant matters. Topics which do not have a direct bearing on the question are the rules relating to involuntary intoxication, *actio libera in causa*, intoxication which results in mental illness, the specific intent theory (which applied before 1981, but which was abolished in that

year by the Appellate Division) and a discussion of the lenient and unyielding approaches to the defence of voluntary intoxication.

Instead of discussing these irrelevant topics, you should begin your answer with a reference to and a discussion of the *Chretien* decision; briefly describe what was decided in this case, and how the principles enunciated in this case were affected by section 1 of Act 1 of 1988. If you are required to apply the existing law to a given set of facts, you ought to be able to do this relatively easily by merely applying the rules that are currently applicable in our law, and which are summarised above under 12.8.

However, you cannot afford to ignore the rules with regard to involuntary intoxication, *actio libera in causa*, intoxication which results in mental illness, the specific intent theory and the lenient and unyielding approaches. We may ask questions on these topics, such as “Discuss the meaning of the expression *actio libera in causa*”. As a general rule, you ought to refer to these topics only when specifically required to do so.

ACTIVITY

X and Z visit a bar and indulge in a number of drinks. Upon leaving the bar, pedestrian Y accidentally bumps against X, who at that stage was swaying on the sidewalk. A fight ensues. X holds onto Y from behind, and Z kills Y by stabbing her with a knife. X and Z are charged with the murder of Y. The court finds that X and Z have caused Y's death unlawfully, but that X was so intoxicated during the fight, that she was unable to distinguish between right and wrong. The court further finds that at the time of the assault upon Y, Z was able to act and that she had criminal capacity, but that she was so intoxicated that she lacked the intention to murder Y. X and Z rely on the defence of intoxication. Discuss whether X and Z ought to succeed with this defence.

FEEDBACK

The rules presently applicable to the defence of voluntary intoxication are those enunciated in *Chretien* as well as the provisions of section 1 of Act 1 of 1988. The facts in *Chretien's* case were briefly as follows: (you can mention the facts in this case briefly). The four basic principles enunciated by the Appellate Division are in the case as follows: (mention here the four principles set out above under 12.5.2.)

The conclusion reached in *Chretien* was criticised, because the effect of the decision was that a person who was responsible for her own intoxication is treated more leniently than a sober person who had committed the same act. As a result of this criticism section 1 of Act 1 of 1988 was enacted. This section provides briefly as follows: (set out briefly the contents of the section).

The application of the rules laid down in *Chretien* as well as in the Act on the present set of facts is as follows: The fact that X was not able to distinguish between right and wrong means that she did not have criminal capacity as a result of the intoxication. In terms of *Chretien* criminal incapacity, even if it was the result of intoxication, constitutes a defence. However, the effect of the provisions of section 1 of Act 1 of 1988 is that X will be convicted of the crime created by this section.

Z acted with criminal capacity but did not have the intention to murder. Z accordingly cannot be convicted of murder or of a contravention of section 1 of Act 1 of 1988. She can, however, be convicted of culpable homicide, as she caused Y's death negligently. The test for negligence is objective, that is: How

would the reasonable person in Z's position have acted? Such a person would have foreseen that her act would result in death.

Please note that, although it was not mentioned specifically in the question that X and Z started to drink **voluntarily**, and although it is not mentioned expressly that they had not started drinking with the exclusive aim of gaining courage, it can nevertheless be assumed that they started drinking voluntarily and that this was not a case of *actio libera in causa*. These two situations are so extraordinary that, unless specifically mentioned in the question, it can be assumed that the intoxication referred to in the question does not refer to these situations.

TEST YOURSELF

In the light of extensive discussion above we deem it unnecessary to set specific questions. You may use the study objectives set out at the beginning of this study unit, the summary in 12.8 and the study hint in 12.9 to test your knowledge on the subject of intoxication.

STUDY UNIT **13**

The effect of provocation on liability



You must study this topic on your own in *Criminal Law* 234–244.

LEARNING OUTCOMES

When you have finished this study unit, you should be able to:

- demonstrate your understanding of the effects of provocation on liability by presenting arguments as to the effect that provocation should have in a particular case

SUMMARY

- (1) Provocation may have one of the following effects:
 - it may exclude X's **intention**
 - it may **confirm** the existence of X's intention
 - after conviction it may serve as ground for the **mitigation of punishment**
- (2) If X is **charged with murder**, and the court finds that the provocation excluded his intention, he is **usually convicted of culpable homicide**, because it is usually clear from the evidence that **he was negligent**.
- (3) If X is **charged with assault with intent to do grievous bodily harm**, in most cases the evidence of provocation serves to exclude the intention to do grievous bodily harm. X is then found **guilty only of common assault** (which is a less serious crime than assault with intent to do grievous bodily harm).

- (4) If X is **charged with common assault**, the evidence of provocation cannot result in X's being found not guilty of the crime charged. The courts are unwilling to treat provocation as a reason to completely acquit a person of common assault. This approach is based on policy considerations and does not necessarily accord with legal theory.

TEST YOURSELF

- (1) Discuss the three possible effects that provocation may have.
- (2) Explain how it is possible that provocation may sometimes exclude the intention and sometimes have exactly the opposite effect, namely to serve as confirmation of the existence of intention.
- (3) Explain why the courts are reluctant to treat provocation as a reason for completely acquitting X on a charge of common assault.
- (4) Complete the following statements:
 - (a) If X is charged with murder and the court finds that his act was unlawful but that because of provocation he lacked the intention to kill, the court's verdict will normally be that he is guilty of
 - (b) If X is charged with assault with intent to do grievous bodily harm and the court finds that his act was unlawful but that because of the provocation he lacked the intention to do grievous bodily harm, the court's verdict will normally be that he is guilty of
.....
 - (c) If X is charged with common assault and the court finds that his act was unlawful but that he was provoked to commit the act, the court's verdict will normally be that he is nevertheless guilty of
 - (d) The reason why evidence that X was provoked before the act may serve as mitigation of punishment is
.....
.....

STUDY UNIT 14

- Disregard of the requirement of culpability
- The criminal liability of corporate bodies



INTRODUCTION

In this study unit we discuss two dissimilar topics, namely the subjects indicated above in the title of this study unit. The two subjects will be discussed separately.

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LEARNING OUTCOMES

After you have finished this study unit, you should be able to

- name and discuss the principles to be applied in determining whether culpability is required in a particular statutory crime
- recognise an argument which is based on the doctrine of *versari in re illicita*
- explain the meaning of the *versari in re illicita* doctrine
- recognise a situation in which a corporate body might possibly be liable for the acts of its director or servant

14.1 DISREGARD OF REQUIREMENT OF CULPABILITY

14.1.1 *Background*

The general rule is that culpability is a requirement for all crimes. However, there are certain exceptions to this basic rule. In this chapter we will consider these exceptions. They are the following:

- (1) the principle of strict liability in statutory crimes
- (2) vicarious liability
- (3) the *versari* doctrine

14.1.2 *Strict liability*

(Criminal Law 245–250)

14.1.2.1 **General**

Culpability is required for all common-law crimes. Bearing in mind the necessity of culpability in a civilised legal system, it ought also to be required for all

- Disregard of the requirement of culpability

statutory crimes. This, however, is not the case. The legislature sometimes creates crimes in respect of which culpability is not required. Since culpability has become such a well-established principle of criminal liability, one would be inclined to assume that it could only be excluded by an express provision in a law. However, owing to the influence of English law, our courts have adopted the principle that even in those cases where the legislature, in creating a crime, is silent about the requirement of culpability, a court is free to interpret the provision in such a way that no culpability is required. It is in these cases that one can speak of strict liability. **Strict liability is found in statutory crimes only.**

A statutory provision can expressly exclude the requirement of culpability. (Section 50(5) of the Sea Fishery Act 12 of 1988, for example, provides that in any prosecution for an offence in terms of this Act, it shall be no defence that the accused had no knowledge of some fact or other or did not act intentionally.) It can also expressly include this requirement. The last-mentioned will be the case if the legislature employs words such as “intentionally”, “maliciously”, “knowingly” and “fraudulently”. In the overwhelming majority of cases in which the question arises whether liability is strict, the legislature has simply refrained from making any mention of culpability; it is the task of the courts to determine, in accordance with the principles which will presently be set out, whether culpability is required.

14.1.2.2 Principles to be applied in determining whether culpability is required

a The general guidelines

The rules for determining whether the legislature intended culpability to be an ingredient of the crime, are the following:

The point of departure is an assumption or presumption that it was not the intention of the legislature to exclude culpability, unless there are clear and convincing indications to the contrary. Such indications can be found in

- (1) the **language and context** of the provision
- (2) the **object and scope** of the prohibition
- (3) the **nature and extent of the punishment** prescribed for contravening the prohibition
- (4) the **ease with which the provision can be evaded if culpability** is required
- (5) the **reasonableness** or otherwise in holding that culpability is not an ingredient of the offence

b Explanation of guidelines

We shall now have a closer look at the guidelines listed above.

Guideline (1) Language and context

As regards this guideline, the ordinary rules relating to the interpretation of statutes must be followed. The use of similar words or expressions elsewhere in the same Act, as well as the clear meaning which these words have elsewhere in the Act, can be an important aid (*Moeng* 1977 (3) SA 986 (O) 990).

Guideline (2) Object and scope of prohibition

As regards this guideline, the consideration is that if the Act deals with the public welfare, health and safety, it is an indication that the legislature intended to create strict liability. Speaking generally, public welfare offences are offences related in a particular way to our modern technological and industrial society, such as offences contained in statutes dealing with factories, mines and the manufacture of medicine or processing of food. The reason why, according to the courts, no culpability should be required in these crimes, is to exert as much pressure as possible on manufacturers to prevent contaminated products from being brought onto the market.

Guideline (3) Nature and extent of punishment

As regards this guideline, the consideration is that if a severe (heavy) punishment is prescribed, it may be assumed that it was not the intention of the legislature to create strict liability, but that if the punishment prescribed is relatively light, one can more readily assume that the legislature wanted to exclude culpability (*Williams* 1968 (4) SA 81 (SWA) 85).

Guideline (4) The ease with which the provision can be evaded

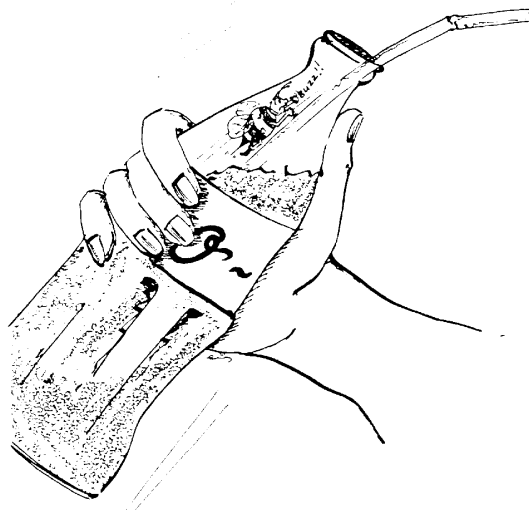
As regards this guideline, the consideration is the following: if the crime is of such a nature that it is difficult for the state to prove culpability, the people who really contravene the provision will too easily escape conviction by simply pleading lack of culpability (in other words by simply alleging "I forgot" or "I did not know"). The effectiveness of the prohibition will then be undermined. The argument runs that in such a case it may be assumed that it was the intention of the legislature to create strict liability (*Swanepoel* 1970 (2) SA 515 (O) 518–519).

Guideline (5) The reasonableness of holding that culpability is not required

As regards this guideline, the consideration is that the judge must ask himself whether the exclusion of the requirement of culpability will lead to inequitable results for the accused or for the state.

c Example from case law: the case of the "bee in the cooldrink bottle"

The case which we want to illustrate as an example is *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* 1994 (1) SACR 373 (A). You do not necessarily have to remember the long name of this case. You may refer to this case simply as "the case of the bee in the cooldrink bottle".



- Disregard of the requirement of culpability

One day, someone bought a cold drink in Durban. When he opened it, he found a bee inside the bottle. As a result the company which manufactured the cold drink was charged with a contravention of a certain statutory offence which provides as follows:

No person who carries on business involving the manufacture or preparation ... of food ... shall ... cause or permit any ... food or drink which is not clean or ... sound and free from any foreign object ... to be exposed for sale.

The company alleged that, although it could not explain how the bee came to be inside the bottle, it had taken all reasonable precautions to prevent the presence of foreign objects in their cold drink bottles and that it therefore had acted without any culpability (intention or negligence). The prosecution, on the other hand, argued that as this particular offence is a public welfare crime (see Guideline (2) above), the legislature had created a strict liability offence, that is, an offence in respect of which culpability is not a requirement.

The majority of the Appeal Court held that the legislature had not created a strict liability offence. The court held that culpability in the form of negligence was, by implication, required by the legislature and that the company which manufactured the cold drink was, in fact, negligent. One of the reasons advanced by the court for its conclusion, was that if one looks at the language and context of the provision (Guideline (1) above), the words "cause or permit" indicate rather the presence than the absence of culpability. (As a matter of interest: the Appeal Court held on the facts that the company was indeed negligent in the way they produced the cold drink; the company was accordingly convicted of the offence.)

14.1.2.3 Form of culpability required

Once the court has decided that culpability is an ingredient of the offence, the next question to be answered is the following: Which form of culpability — intention or negligence — is required for liability in respect of the prohibition involved. The question whether intention or negligence is required is a matter of interpretation of the particular statute.

If a court is of the opinion that a prohibition can be evaded too easily if culpability in the form of intention is required, yet feels loath to find that it is a case of strict liability, it can follow a **middle way** by holding that culpability in the form of negligence is required. The accused will then be guilty if she **ought** reasonably to have foreseen, in the circumstances of the case, that her conduct would bring about the prohibited result or that the circumstances were such that her conduct would fall within the terms of the prohibition (see the discussion of negligence above).

In the past our courts were not always aware of this *via media* (middle course), but since about the middle of the sixties this possibility has gained ground, as a result of the decisions of the Appeal Court in *Arenstein* 1964 (1) SA 361 (A), *Jassat* 1965 (3) SA 432 (A) and *Qumbella* 1966 (4) SA 356 (A). In the case of the bee in the cold drink bottle discussed above, the majority of the Appeal Court in fact held that culpability in the form of negligence was required in respect of the particular statutory offence which the court had to interpret.

14.1.2.4 Strict liability may be unconstitutional

There is a possibility that the courts may decide that the whole principle of strict liability is unconstitutional (ie in conflict with the Bill of Rights enshrined in the Constitution). It may be in conflict with the right to a fair trial (sect 35(3)) and thereunder especially the right to be presumed innocent (sect 35(3)(h)), as well as the right to freedom and security of the person (sect 12(1)). Although this question has not yet squarely come up for decision before the Constitutional Court, it did

arise *obiter* (ie in passing) in *Coetzee* 1997 (1) SACR 379 (CC). One of the judges in this case, O'Regan J, made it fairly clear in her judgment (442*h-i*) that strict liability may be unconstitutional, on the ground that "... people who are not at fault [ie who lack culpability] should not be deprived of their freedom by the State ... Deprivation of liberty, without established culpability, is a breach of this established rule".

14.1.3 *Vicarious liability*

(*Criminal Law* 250–251)

You must study the discussion of this topic in *Criminal Law* 250–251 on your own.

14.1.4 *The rejection of the versari doctrine*

(*Criminal Law* 153–154; *Case Book* 181–187)

14.1.4.1 Introduction

If one applies the *versari* doctrine, culpability is imputed to X in circumstances in which she, in fact, had no culpability (intention or negligence) in terms of the normal, recognised test for culpability. The doctrine can be traced back to the law which prevailed in the Middle Ages and to canon law, and adaptations thereof can still be found in English law today. The complete name of the doctrine is the doctrine of *versari in re illicita*, but it is often abbreviated to "the *versari* doctrine". It is also known as the "taint doctrine".

14.1.4.2 Definition of the doctrine

The *versari* doctrine holds that if a person engages in unlawful (or merely immoral) conduct, she is criminally liable for all the consequences flowing from such conduct, irrespective of whether there was in fact any culpability on her part in respect of such consequences.

14.1.4.3 Examples of application of doctrine

The following are examples, derived from the old sources of our law, of the application of this principle:

If X lawfully shoots at a wild bird (ie a bird belonging to nobody) and the bullet accidentally hits Y, of whose presence she is unaware, X lacks culpability. If, however, X shoots at another's fowl, or hunts on another's land without her permission, and the bullet hits Y (of whose existence X is unaware), X is guilty of murder, for she has engaged in an unlawful act and is liable for all the consequences flowing from it. The blameworthiness of the unlawful conduct is projected onto the causing of Y's death.

A well-known example of the early application of this doctrine by the Appeal Court is *Wallendorf* 1920 AD 383. In this case X assaulted a policeman, Y, who was trying to arrest a third person. Y, however, was not in uniform at the time, so X did not know that he was a policeman. The question was whether X was guilty of the statutory crime of obstructing the police in the performance of their duties. The Appeal Court confirmed X's conviction of this crime, although he was ignorant of Y's status and therefore lacked the intention to commit the crime. The culpability in respect of the statutory crime was simply inferred from the intention to assault. According to the court the requirement of culpability is

- Disregard of the requirement of culpability

satisfied if X has an intention to commit a crime, even though such crime is a completely different one from that with which he is charged.

14.1.4.4 Rejection of the doctrine in the *Bernardus* case

In 1965 the Appeal Court rejected the *versari* doctrine in *Bernardus* 1965 (3) SA 287 (A). In this case X threw a *kierie* at Y to prevent Y from interfering in a dispute he (X) had with Z. The *kierie* (knobstick) struck Y above the ear and as a result he died. The question was whether X was guilty of culpable homicide. It was argued on behalf of X that he was not negligent, since he could not reasonably have foreseen that the *kierie* would kill Y.

The trial court applied the *versari* doctrine and held that X's negligence was not at issue, and that he was guilty merely because he had committed an unlawful act, namely an assault upon Y, which led to the death. However, the Appeal Court held that the *versari* doctrine was in conflict with the requirement of culpability, that the intention in respect of the assault could not serve as substitute for the negligence required in respect of death, and that the reasoning of the trial court was wrong, being based on the *versari* doctrine. X could be guilty of culpable homicide only if he was negligent in respect of death. However, the court concluded that X had indeed been negligent, and for that reason the conviction was upheld.

14.1.4.5 Foreseeability of death in case of assault

In the overwhelming majority of assault cases the possibility of death as a result of the assault is reasonably foreseeable; the reasonable person would have guarded against this possibility and the person committing the assault would therefore be guilty of culpable homicide if the victim died. Nevertheless it is conceivable that in exceptional cases X may assault Y without death being reasonably foreseeable. Such a case was *Van As* 1976 (2) SA 921 (A). In this case X merely slapped Y, an extremely fat person, on the cheek as a result of which Y fell backwards and hit his head on a cement floor, lost consciousness and died. X's conviction of culpable homicide was set aside by the Appeal Court, since Y's death was not reasonably foreseeable.

14.2 CRIMINAL LIABILITY OF CORPORATE BODIES

14.2.1 *Background*

The law distinguishes between a natural person on the one hand and a legal *persona*, juristic person, corporation or corporate body on the other. The latter is an abstract or fictitious body of persons, an institution or entity which can also be the bearer of rights and duties, without having a physical or visible body or a mind. Examples of corporate bodies are companies, universities, building societies and so forth.

Some jurists are of the opinion that corporate bodies ought not to be criminally liable, because they cannot act with culpability. They argue that only natural persons can act with a blameworthy state of mind (such as intention). Since corporate bodies are not human beings, but abstract entities without a "mind" of their own, they cannot, according to these jurists, act with any state of mind. The jurists argue that to hold corporate bodies criminally liable would amount to a form of liability without any culpability. However, in South Africa, as in the vast majority of other countries, corporate bodies may indeed incur criminal liability.

This whole topic is governed by section 332 of the Criminal Procedure Act 51 of 1977, which expressly provides for the criminal liability of a corporate body. On this topic, see *Criminal Law* 253–256.

14.2.2 *Liability of corporate body for the acts of its director or servant*

Section 332(1) provides that an act by the director or servant of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the performance of duties as a director or servant, or if the director or servant was furthering or endeavouring to further the interests of the corporate body. A corporate body can commit both common-law and statutory crimes, and irrespective of whether intention or negligence is the form of culpability required (*Ex parte Minister van Justisie: in re S v SAUK* 1992 (4) SA 804 (A)). This does not mean that the “original culprit”, that is the employee or servant, is exempt from liability. He is just as punishable as the corporate body.

The following are examples of the application of this section:

- (1) In *Joseph Mtshumayeli (Pty) Ltd* 1971 (1) SA 33 (RA), A was a transport company and B a bus driver employed by A. B caused an accident by allowing a passenger to drive the bus. Both A and B were convicted of culpable homicide.
- (2) Company A’s director, B, in an attempt to eliminate competition with her company, steals valuable diagrams from the office of company Y. Both A and B are guilty of theft.
- (3) Company A’s director, B, murders the managing director of company Y, in an attempt to promote the interests of A. A and B are both guilty of murder.

14.2.3 *Association of persons*

Section 332(7) contains provisions which render members of an association of persons, other than a corporate body (the so-called “voluntary association”, such as a tennis club or debating society) criminally liable for crimes committed by other members. *Beyleveld* 1964 (2) 269 (T) affords an example of a conviction under this subsection.

14.2.4 *Punishment*

An abstract entity such as a corporate body cannot be hanged or thrown into jail, or suffer corporal punishment. Section 332(2)(c) therefore prescribes that the court may not impose any punishment other than a fine on a corporate body.

GLOSSARY

versari in re illicita

literally “to engage in an unlawful activity”; in practice the rule (rejected by the Appellate Division) that if a person engages in an unlawful activity he or she is criminally liable for all the consequences flowing from the activity, irrespective of whether there was in fact culpability in respect of such conduct.

- Disregard of the requirement of culpability

SUMMARY

Strict liability

- (1) Strict liability is a form of liability dispensing with the requirement of culpability. It is only found in certain statutory crimes, and never in common-law crimes.
- (2) The legislature sometimes creates crimes in respect of which the requirement of culpability is expressly excluded.
- (3) Even where the legislature, in creating a crime, is silent about the requirement of culpability, a court is free to interpret the provision in such a way that no culpability is required.
- (4) However, in interpreting the legislation referred to above in (3), our courts apply certain principles. See the guidelines set out above.

Vicarious liability

- (1) In our law, a person may in certain exceptional circumstances be liable for a crime committed by another person. This form of liability is known as vicarious liability. Vicarious liability is possible only in statutory crimes.
- (2) A typical example of vicarious liability is where an employer is, in terms of a statute, held liable for crimes committed by an employee for acts performed by the employee in the course of her employment.

Versari doctrine

- (1) Definition of *versari* doctrine — see definition above.
- (2) The doctrine was rejected in our law by the Appeal Court in the *Bernardus* case. In this case, the court held that the doctrine may no longer be applied in our law because it is in conflict with the common-law requirement of culpability.

Criminal liability of Corporate Bodies

- (1) The law distinguishes between a natural person and a corporate body. The latter is an abstract body of persons which can also be the bearer of rights and duties. An example of a corporate body is a company.
- (2) In South Africa corporate bodies may be convicted of crimes.
- (3) The Criminal Procedure Act contains a provision in terms of which a corporate body may be held criminally liable for the acts of its director or servant.

TEST YOURSELF

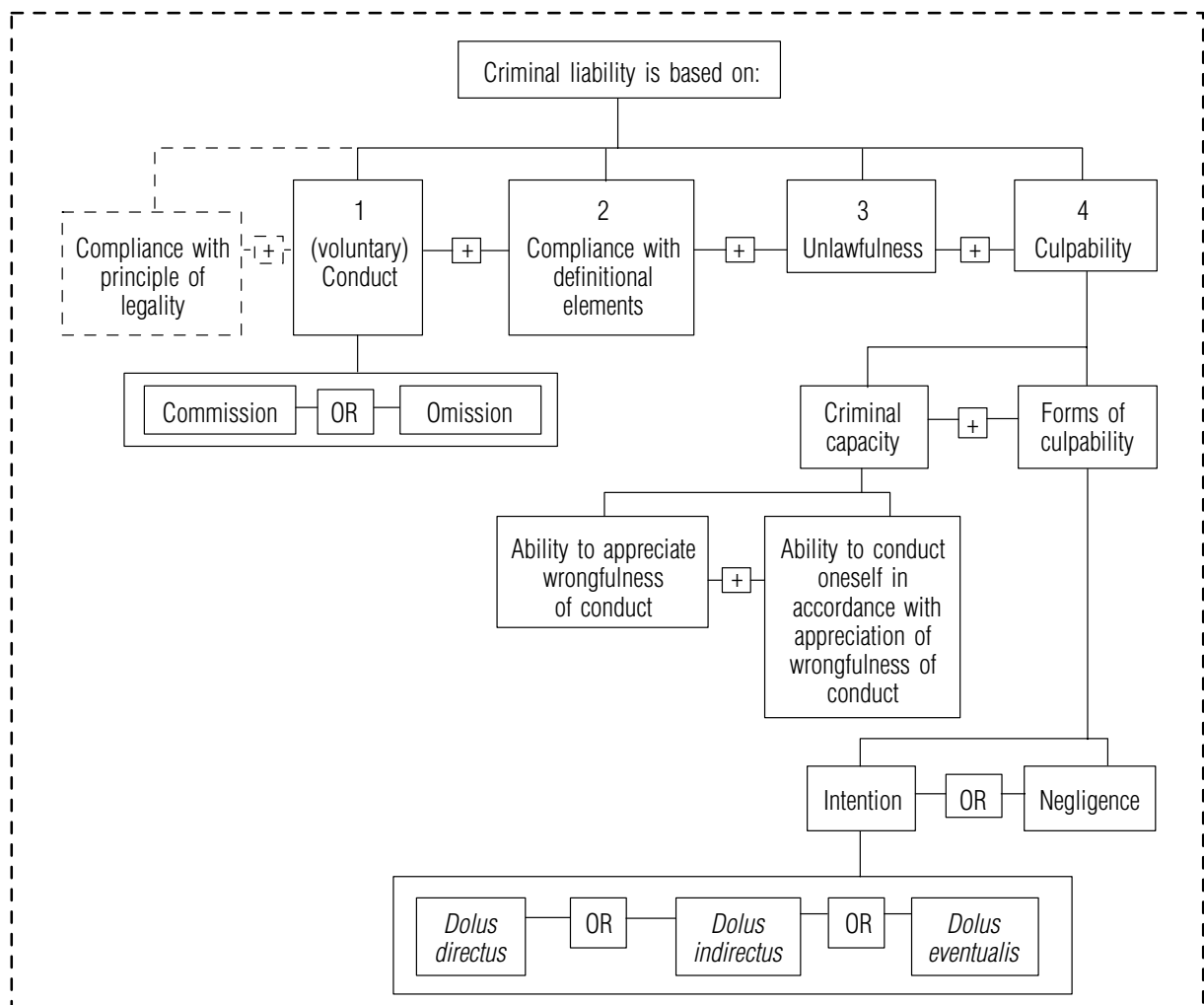
- (1) Discuss the guidelines which our courts apply in determining whether a statutory provision, which does not expressly require culpability, in fact requires culpability.
- (2) Discuss the Appeal Court decision in *Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council* (the “case of the bee in the cooldrink bottle”).
- (3) Explain the meaning of vicarious liability
- (4) (a) What do you understand under the doctrine of *versari in re illicita*?
(b) Does this doctrine, at present, form part of our law?
(c) Give an example of the application of this doctrine.
- (5) Discuss the Appeal Court’s decision in *S v Bernardus*.
- (6) Distinguish between a natural person and a corporate body, and name a few examples of the latter category.
- (7) Fill in the missing words:
Section 332(1) provides that an act by a director or servant of a corporate body is deemed to be the act of the corporate body itself, provided the act was performed by such a person or in the
as a director or servant, or if the director or servant was
or the interests of the corporate body.
- (8) Can a corporate body be guilty only of a statutory crime?
- (9) Which form(s) of punishment can be imposed upon a corporate body?

ADDENDUM **A**

Construction of criminal liability



- Note:
- (1) The diagram below represents a standard crime. There are exceptions to this standard model. Strict liability crimes, for example, dispense with the requirement of culpability.
 - (2) The reason why compliance with the principle of legality is indicated with a dotted line is the following: if a person's liability for a well-known crime such as murder, theft or rape has to be determined, it is so obvious that such a crime is recognised in our law that it is a waste of time to enquire whether there has been compliance with the requirement of legality.



ADDENDUM

B

Table of defences and their effect



Note: This table does not contain a complete list of every conceivable defence which an accused can raise when charged with a crime. Every crime has different definitional elements, and it is impossible here to set out every possible defence based upon the absence of a particular element in the definitional elements of a particular crime (eg “premises” in housebreaking, or “property” in theft). The only defences included in this table are those based upon or related to the absence of a general prerequisite for liability in terms of the general principles of criminal law. The purpose is to point out the relationship between a particular defence and the corresponding general prerequisite for liability. Defences of a procedural nature, or related to the law of evidence, as well as the general defence known as an alibi, have been left out for obvious reasons. If in the third column there is an asterisk after the verdict “not guilty” it means that a court would not readily find an accused not guilty, but only if the circumstances are fairly exceptional.

Defence	General prerequisite for liability placed in issue	Verdict if defence is successful
Automatism (“sane”, not “insane”)	Act	Not guilty
Act does not comply with definitional elements	Requirement that conduct should comply with definition of the proscription	Not guilty
Act not a <i>sine qua non</i> for result, or not an adequate cause of resultant condition, or <i>novus actus interveniens</i>	Requirement of causation	Not guilty (but possibly guilty of a less serious formally defined crime, such as assault)
Grounds of justification, such as private defence, necessity, consent	Unlawfulness	Not guilty
Youth	Criminal capacity	Not guilty
Mental illness	Criminal capacity	Not guilty, but accused may possibly be ordered to be detained in psychiatric hospital or prison
Accused incapable of appreciating wrongfulness of act or of acting in accordance with such appreciation (“non-pathological criminal incapacity”)	Criminal capacity	Not guilty*

Defence	General prerequisite for liability placed in issue	Verdict if defence is successful
Intoxication	Act	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1988
	Criminal capacity	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1988
	Intent required for crime charged	Not guilty*, but usually guilty of less serious crime which is a competent verdict on main charge
Provocation	Intent required for crime charged	Not guilty*, but usually guilty of less serious crime which is a competent verdict on main charge
If charged with crime requiring intent: result or circumstances not foreseen	Intention	Not guilty (at least on main charge — possibly guilty of less serious crime)
If charged with crime requiring intent: mistake , either of fact or of law	Intention	Not guilty (at least on main charge — possibly guilty of less serious crime)
If charged with crime requiring negligence: conduct was reasonable, ie did not deviate from conduct to be expected of reasonable person in the circumstances; OR unlawful result or circumstances not foreseeable	Negligence	Not guilty