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Scope of study and study material

NB: Study your first tutorial letter and this study unit carefully before you tackle the next study units.

1.1 Scope of study: introductory remarks

1.1.1 Designation of the field of study

The area of the law we are studying in this module is given various names, the most common of which are “delict” and “the law of delict”. In South African law, delict and the law of delict are translated in Afrikaans as delik and deliktereg or die reg aangaande die onregmatige daad respectively.

In German law, a delict is called unerlaubte Handlung (wrongful deed), while delit (delict, from the Latin delictum) is used in French law. In English and American law, the term for delict is “tort”, and the law of delict is the law of tort (or the law of torts).

1.1.2 The concepts “delict” and “law of delict”: general meaning

In general, a delict (wrongful conduct, delik or tort) is the act of a person which in a wrongful (ie legally reprehensible) and culpable (ie legally blameworthy) way causes loss (damage) to another (cf study unit 2 below). The law of delict determines under which circumstances a person can be held liable for the damage or loss he/she has caused another.

1.1.3 Basic premise: the person prejudiced must bear the damage himself/herself

Obviously, not all cases where damage has been caused give rise to delictual liability. In fact, as a point of departure, the law expects me to personally bear the damage I suffer: if I drive my car carelessly and smash the headlamp against the garage door, or if I clumsily drop and break my watch, or if lightning strikes my horse dead, I cannot, in principle, hold anybody else responsible for this (except where, for example, I am insured against the resulting damage, in which case the insurer must take up the burden of damage in terms of the contract of insurance).
1.1.4 However, a wrongdoer is responsible for damage that he has caused another

The consequence of damage caused by way of a delict is that the prejudiced person does not have to bear the loss. The wrongdoer (the person who caused the damage) is held liable by the law to compensate the prejudiced person for the damage. In this module we will study the legal rules that determine under which circumstances a person can legally be held liable for the damage or loss he/she has caused to someone else.

1.1.5 As a point of departure we will study the general requirements for delictual liability

The forms that a delict can assume are legion: interference with another’s property, body, freedom, good name, honour, privacy, feelings, earning capacity and trade secrets are all examples of various ways in which a delict can occur. In a module on the law of delict, it would be possible to study each type of delict (or group of related delicts) separately – an approach largely adopted by the English and American law of torts. However, Unisa (like most South African universities) follows a different approach – we accept that all delicts must fulfil specific general requirements, and that a study of these general requirements should be the basis for the study of the law of delict. (These general requirements for [or elements of] a delict are – as is apparent from the above-mentioned definition of a delict – the act, wrongfulness, fault, causation and damage.)

A thorough knowledge of the general requirements for a delict will enable you to deal with specific delicts. Consequently, this module on delict consists primarily of a study of the general requirements for delictual liability (study units 2 to 27), while the rest of the module is devoted to the study of specific forms of delict (study units 28 to 30) and cases of delictual liability without fault (study units 31 and 32).

1.1.6 Concluding remarks

Having read through the introductory remarks in paragraph 1, you should have a general impression of the meaning of a delict, of the nature of the law of delict and of the approach that this module on delict will take. Naturally, these aspects are examined more fully in the study units that follow. The following paragraph (par 2) deals with the study material to be used in the module.

1.2 Study material

The study material for this module consists of the following:

- tutorial letters (see par 1.2.1 below)
- this study guide (see par 1.2.2 below)
- one prescribed textbook: Neethling & Potgieter Neethling-Potgieter-Visser Law of Delict (2010) (see par 1.2.3 below)
- one prescribed textbook with judgments: Neethling, Potgieter & Scott. Casebook for the law of delict 2007 (see par 1.2.3 below)
- possible supplementary judgments (see par 1.2.4 below)

The study material is dealt with in detail below.
1.2.1 Tutorial letters

The tutorial letters that you will receive during the course of the year form part of the study material and must be studied.

The first tutorial letter contains the information you need to orientate yourself and get started on your studies. In it, you will find, among other things, more information on the prescribed study material, the list of judgments you must study, your assignments and how to contact your lecturers and various administrative departments at the University. It is essential that you study this tutorial letter carefully before you read any other study material.

In the course of the year you will receive further tutorial letters. Some tutorial letters contain feedback on assignments. Others deal with new judgments, changes in the legal position, references to the study manual or prescribed books, information on the examination as well as other important information. You must read all tutorial letters carefully.

1.2.2 This study guide

1.2.2.1 The guide is not a textbook

This study guide serves as a guide to the study of your prescribed textbook (Neethling & Potgieter, Neethling-Potgieter-Visser Law of Delict (2010) [see par 1.2.3 below]), the judgments and other material to which you will be referred in the study units. The study guide serves as the “lecturer” guiding you step by step through the prescribed material. Use the study guide as a point of departure when studying the textbook and other prescribed material.

1.2.2.2 Contents of the study guide

For your convenience, the study guide divides the study material into 32 study units. Each study unit — with the exception of the last two — takes you through a section of the prescribed textbook.

Certain learning outcomes are set at the beginning of each study unit. These outcomes inform you of the knowledge you must acquire and the skills you must master while studying each study unit. The learning outcomes indicate an expected end result: they specify what you must be able to do on completion of a given study unit.

The sections of the prescribed book that you must study to achieve the learning outcomes, as well as the sections that you need only read are indicated in each study unit. For examination purposes you need only know those sections which you had to study. However, do not neglect those sections that you had to read — although you will not be required to answer examination questions on these sections, reading them will promote your understanding of the sections on which you will be examined.

The judgments that you must study are indicated at the beginning of each study unit (see more on this in par 1.2.4 below).

Each study unit contains a commentary, taking you step by step through the prescribed study material. Sometimes you are only referred to the relevant study material, while at other times a study unit may contain supplementary explanations and/or information.

At the end of each study unit there are a number of self-assessment exercises, mainly in the form of questions, on the content of the study unit. The aim of the self-assessment exercises is twofold. They may be used to test your understanding and knowledge of the relevant study material. Furthermore, by doing the exercises, you may acquire the knowledge and skills required in terms of the learning
outcomes. Therefore, we strongly recommend that you do the self-assessment exercises. Note that answers to the questions may sometimes overlap.

We also give feedback on the self-assessment exercises. Sometimes we provide you with a fairly comprehensive answer to a given self-assessment question. More frequently, however, we only refer you to the relevant paragraph in the prescribed textbook or other source where the answer may be found, together with guidelines on how you should have approached the exercise. If, in spite of this feedback, you are still uncertain about what is expected in a given self-assessment question, you should not hesitate to contact us.

Study units vary in length and in degree of difficulty. Some study units demand more time, research and understanding than others. However, we have tried to divide the material in such a way that you can tackle your study of the law of delict systematically. See that you complete each study unit properly before you begin the next one.

1.2.3 The prescribed textbook

1.2.3.1 The title of the prescribed book


1.2.3.2 Content of the prescribed textbook: an overview

Turn to the table of contents in your textbook. You will notice that Law of Delict consists of the following three parts (divided into 11 chapters):

The introduction to the law of delict (part I) deals with the nature and place of delict in the legal system, the difference between delict and breach of contract and between delict and crime, as well as the historical development of delictual liability. Finally, the relationship between the law of delict and the bill of fundamental human rights in the Constitution is discussed.

In part II (ch 2 to 8), the general principles of the law of delict (or general requirements for delictual liability), namely the act, wrongfulness, fault, causation and damage (ch 2 to 6), as well as delictual remedies (ch 7) and joint wrongdoers (ch 8), are discussed.

In part III, specific forms of delict (chs 9 and 10) and forms of liability without fault (ch 11) are discussed.

Specific forms of patrimonial damage/loss (damnum iniuria datum) (ch 9) are discussed first, namely injury or death of another person, psychological lesions, pure economic loss, negligent misrepresentation, interference with a contractual relationship, unlawful competition and manufacturer’s liability.

The forms of personality infringement (iniuria) (ch 10) follow, namely infringement of the body (eg assault and seduction), physical liberty (wrongful and malicious deprivation of liberty), good name (defamation, malicious prosecution, attachment of property), dignity, privacy, identity and feelings (breach of promise, adultery, abduction, enticement, harbouring).

Finally, there are the forms of liability without fault (ch 11), namely liability for damage caused by animals (including the actio de pauperie and the actio de pastu), vicarious liability and cases of statutory liability without fault.
1.2.3.3 Only certain parts of the textbook need to be studied

You are not expected to study the entire textbook for this module, which is an introductory outline to the law of delict. In each study unit we indicate precisely which parts of the textbook (text and footnotes) and which judgments you must study, and which parts you must only read. Note that if a paragraph contains sub-paragraphs, a reference to the paragraph usually includes the sub-paragraphs. For example, if paragraph 4.3 is subdivided into paragraphs 4.3.1, 4.3.2 and 4.3.3 and the study guide indicates that you must study paragraph 4.3, it means that you must study paragraphs 4.3.1, 4.3.2 and 4.3.3 too. You are not expected to study all the footnotes, but those you must study are indicated in each study unit.

1.2.3.4 Marking your prescribed book

We suggest that you page through your textbook right now and carefully mark those parts of the text and footnotes that must be studied, as well as those that you need only read. Use the references in the study units in this study guide as a guideline for marking your book.

At least two objectives are achieved by paging through and marking your textbook: first, you ensure that you do not omit any essential parts or waste time by studying parts that are not necessary for examination purposes. Secondly, you become familiar with your textbook and you gain a brief overview of the material you are going to study.

1.2.4 Judgments: the prescribed casebook for the Law of Delict

1.2.4.1 Certain judgments must be studied

Besides the prescribed parts of the textbook, you are expected to study a number of important judgments (decisions). A list of these judgments appears in the first tutorial letter (Tutorial Letter 101/PVL3703-X). The names of the judgments that must be studied in conjunction with the relevant study material are also noted at the beginning of most of your study units.

1.2.4.2 Where to obtain judgments

a The prescribed casebook for the law of Delict


The most important judgments regarding the law of delict are included in this casebook. The facts of each decision are summarised briefly, followed by excerpts from the relevant parts of the judges’ findings. A note summarising the most important aspects of the decision appears at the end of each judgment.

b The prescribed textbook

Some of the cases are discussed sufficiently in your prescribed textbook. Consult the list of prescribed cases in the first tutorial letter in this regard.

c New judgments

It may happen that important decisions that you must study are published in the course of the year. You
will be informed of this in a tutorial letter. Obviously such decisions will not be in the prescribed Casebook for the Law of Delict, but can normally be found at law libraries, magistrates’ courts and law firms. Should you experience problems in obtaining copies of judgments that do not appear in the Casebook for the law of delict, you may approach the Unisa library for assistance in this regard.

As you know, The South African Law Reports (Die Suid-Afrikaanse Hofverslae) are issued monthly in Cape Town by the publishers, Juta. Always try to keep abreast of the most recent judgments in your field of study.

1.2.4.3 Discussion of judgments

The most important judgments are often discussed in the well-known law journals. (Naturally your textbook also deals with the most important judgments.) A good discussion of a judgment can help you to understand a decision. You may consult well-known law journals such as the Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR), the South African Law Journal (SALJ), De Jure and the Tydskrif vir die Suid-Afrikaanse Reg (TSAR) in this regard.
General principles of the law of delict
Introduction to the law of delict

Before you begin studying this study unit, you must have done the following:

- read the first tutorial letter
- studied study unit 1 thoroughly
- marked your prescribed book carefully as suggested in paragraph 1.2.3.4 of study unit 1

After studying this study unit, you should be able to

- define a delict
- list the five elements of a delict
- name the most important delictual remedies available, and briefly indicate the differences between them
- write brief notes on the differences and/or similarities between a delict and a breach of contract
- write brief notes on the differences and/or similarities between a delict and a crime
- explain, in four or five sentences, how Chapter 2 of the Constitution may influence the law of delict

Prescribed book
- chapter 1 paragraphs 1, 2, 3, 4.1 and 5
- footnotes 12, 14 and 23

Prescribed book
- chapter 1, paragraphs 4.2, 4.3 and 4.4
This study unit is based on chapter 1 of your prescribed textbook and provides a general introduction to the law of delict. (To begin with, reread study unit 1, par 1.)

In paragraph 1 the general nature of the concept of a delict and the place delict occupies in the law are discussed. The difference between a delict and a breach of contract is discussed in paragraph 2, and the difference between a delict and a crime in paragraph 3.

Paragraph 4.1 introduces the three most important delictual actions. It is important to know the names of the actions and their fields of application.

Be sure to read the remainder of paragraph 4 attentively and to make certain that you understand its contents. The historical development of our law of delict is briefly explained here. If you know the historical development of the law of delict, you will understand the present legal position better.

In paragraph 5 the influence of the Constitution of the Republic of South Africa, 1996 is discussed.

Important additional introductory remarks

A delict is defined in paragraph 1 as the act of a person which, in a wrongful and culpable way, causes harm to another. From this description we can establish all the elements of a delict that must be present to hold someone liable for delict: the act, wrongfulness, fault, causation and harm. These elements are discussed in detail in the following study units (specifically, study units 3 to 25). Nevertheless, we wish to provide a provisional overview of these elements here, which will summarise our introduction to the subject. Refer to figure 21 as you study the following explanation.

First, there must have been some act or conduct on the part of the person (the wrongdoer or defendant) against whom the prejudiced party (the plaintiff) wishes to litigate. It is logically inconceivable that somebody can be delictually injured unless there has been some act, conduct or deed by another. Hence the term “wrongful act” (onregmatige daad).

Secondly – and this may be regarded as the essence of a delict – the act must have been wrongful. This means that the wrongdoer must have acted in a legally reprehensible, unlawful or unreasonable way. An act will be wrongful if the wrongdoer has acted in conflict with the community’s conception of what is right (the boni mores). An act is in conflict with the community’s norms when, among other things, the subjective right of the prejudiced party has been violated, or a legal duty to prevent the injury has been breached.

Thirdly, there must have been fault on the part of the wrongdoer. This means that he/she must be legally blameworthy for having acted wrongfully. The law blames the person if he/she willed the damage in the knowledge that he/she was acting wrongfully (ie if he acted intentionally), or if he did not conform to the standard of care required by the law and thus caused the damage through his/her negligence. Thus our law knows two forms of fault: intention and negligence.

Fourthly, there must have been a causal connection between the act of the defendant and damage suffered by the plaintiff. This means that the act must have caused the damage or loss. After all, a person who is prejudiced cannot challenge the action of another if the latter’s conduct had nothing to do with the prejudice suffered. If I kill a bird with a stone, X cannot complain to me that at the very same moment he slipped on his verandah and broke his arm – unless my throwing the stone at the bird gave him a fright, in which case my
conduct would have been the cause of his fall. Two forms of causation are distinguished: factual and legal. The difference between the two forms will become clear to you when you read study units 21 to 24.

Fifthly, the plaintiff must have suffered damage. Damage can take on one of two forms: patrimonial loss (damnum iniuriam datum), that is a reduction of financial power, or injury to personality (iniuria), that is an infringement of an aspect of personality such as a good name.

As a general rule, all five elements must be present before a defendant may be delictually liable. In principle, a plaintiff must therefore prove all five elements if he/she wishes to obtain judgment in his/her favour in a case dealing with an alleged delict. (Sometimes only some of the delictual elements are disputed by the defendant; in such a case the plaintiff obviously need not prove all the elements, since the defendant, in effect, admits that some of them are present.) If the defendant can show that one or more of the five delictual elements are not present, he/she cannot be held delictually liable. This principle is extremely important for a proper understanding of the law of delict and you must always bear it in mind. There are, however, some exceptions to this rule. In certain exceptional cases a wrongdoer can be delictually liable for the wrongful causation of damage, even if he/she had no fault. Here we are dealing with so-called liability without fault or strict liability (skuldlose aanspraklikheid or strikte aanspraklikheid). Cases of liability without fault are discussed in chapter 11 of your prescribed book (study units 31 and 32 of the guide). Furthermore, an interdict – a court order to prevent the causing or continued causing of damage – can be issued by the court in the absence of proof of the elements of fault, causation or damage. The interdict is dealt with in study unit 26.

**FIGURE 2.2**

Now refer to figure 2.2. Various remedies may be available to a person who is prejudiced or threatened by the delict (or wrongful deed) of another. If the person has already suffered harm, he/she may institute an action to be compensated for the damage. The three most important delictual actions in our law are the *actio legis Aquilae*, the *actio iniuriarum* and the action for pain and suffering. As a general rule, the presence of all five delictual elements is a prerequisite for a successful reliance on any of these three actions. However, the actions differ from each other in respect of the form of damage for which they are instituted and the form of fault that must be proved. The *actio legis Aquilae* is instituted for patrimonial loss, and intention or negligence must be proved. The *actio iniuriarum* is instituted for personality infringements, and intention must be proved in the majority of
cases. The action for pain and suffering is instituted only for certain types of personality infringements in the form of bodily injuries, and intention or negligence must be proved. Apart from these three actions — which we can call the classical delictual actions — our law also provides for actions with which damage may be recovered, but for which the element of fault is not a requirement (as noted above, see also study units 31 and 32). The last delictual remedy of which you must take note, is the interdict (study unit 26). Unlike the delictual actions, this remedy is not instituted to recover loss already suffered. As noted above, the interdict is applied for in order to prevent harm. To apply successfully for an interdict, an applicant must prove two delictual elements, namely that an act has already been committed or will be committed, and that it is — or will be — wrongful.

**Important information to keep in mind when preparing for the examination**

You may find it unusual that we want to talk about the examination right now. After all, you have barely started your study of the law of delict. However, we want to share something with you that should help you a great deal, if you keep it constantly in mind when opening your books to study the law of delict. Would you like to know what mistakes are most commonly made by students who get poor marks or even fail this module? We are going to tell you right now, in the hope that you will take this as an early warning, and that you will not make the same mistakes.

There are three common mistakes that prevent students from doing well in the Law of Delict.

1. Confusing the elements of delictual liability
2. Not memorising definitions, tests and requirements
3. Not reading the examination questions properly, and then writing “answers” that do not really address the issue

Let’s consider these one by one.

1. **Confusing the elements of delictual liability.** In this study unit you have learnt that (with certain exceptions) five elements are necessary to constitute a delict. This means that it is extremely important for you to know precisely (not vaguely!) what the differences between these elements are. You would not believe how many students mix these elements up when they write the examinations. It is almost impossible to pass this module if this happens. Please don’t make the same mistake.

2. **Not memorising definitions, tests and requirements.** This mistake goes hand in hand with the previous one. You will encounter many definitions in your textbook, such as definitions of the terms “conduct”, “necessity”, “accountability” and “intent”. You will also encounter tests or yardsticks, such as the *boni mores* test for wrongfulness and the reasonable person test for negligence. You will also encounter lists of requirements, for example the requirements for valid consent, the requirements to succeed when relying on the doctrine of sudden emergency and the requirements for the *actio de pastu*.

**You must memorise these definitions, tests and requirements**

The definitions, tests and requirements are the tools that you need to solve delictual problems. When we confront you with a delictual problem in the examination, you must not try to invent the tools; you must already know them as well as you know your own name and telephone number.

However, memorisation is pointless without understanding. When studying the definitions, tests and requirements of the law of delict, you must go through two
phases. First, make sure that you understand them. Second, make sure that you memorise them.

With the first phase, we can help. You need to find ways of ensuring that your understanding of the definitions, tests and requirements of the law of delict is accurate. One way of doing this is to answer the self-assessment questions in the study guide. If you find it difficult to understand something, please contact us so that we can explain it to you.

With the second phase, you are on your own. Only hard work will ensure that you memorise what is needed. Don’t skip this phase. The reward will be great: If you have really memorised your definitions, tests and requirements, you will be empowered so that you do not confuse the elements of delictual liability – the other very common mistake we just warned you against.

(3) **Not reading the examination questions properly, and then writing “answers” that do not really address the issue.**

This common problem often goes hand in hand with the previous two.

Say, for instance, we ask a question dealing with automatism (like question 12 in the self-assessment section of study unit 3). As you proceed with your studies, you will learn that automatism is a defence that excludes the first of the five delictual elements, namely conduct. This means that you must discuss principles relating to the element of conduct and, more specifically, the defence of automatism, in your answer. However, say that in your answer you discuss whether the defendant infringed a subjective right of the plaintiff and whether he/she acted like a reasonable person in the circumstances. As you proceed with your studies, you will see that infringement of subjective rights is relevant to the element of wrongfulness, while the question of whether someone acted like a reasonable person is relevant to the test for negligence, and negligence is a form of fault, which, in turn, is a separate delictual element. Can we award you any marks for your answer? No, because you discussed delictual elements that the question did not cover.

You may wonder, however, why marks cannot be awarded for your hypothetical answer, since not only conduct (the topic of our hypothetical question), but also wrongfulness and fault (the topics of your hypothetical answer) are requirements for delictual liability. You must remember that, owing to practical considerations of time and space, we cannot test your knowledge of all the delictual elements in each and every exam question. Therefore, each exam question usually deals with one or – at the most – two delictual elements only. Your task is to identify which elements each question deals with and then to demonstrate your knowledge of and insight into those specific elements. If, for example, the first question deals with conduct only, the subsequent questions will almost certainly give you an opportunity to show us how well you know and understand wrongfulness, fault, causation and damage. (NB: When we say that an exam question usually deals with only one or two delictual elements, we are referring to a question without sub-questions. If an exam question has sub-questions, e.g. question 3 is subdivided into questions 3.1 and 3.2, those sub-questions may very well deal with different elements of delictual liability.)

(See study unit 1 par 1.2.2.2 on the aim of the following questions.)

(1) What is the purpose of private law?

(2) Briefly describe the role of the law of delict.
(3) Why is the law of delict considered to be part of the law of obligations?
(4) Define a delict.
(5) Name the elements of a delict (i.e., the general requirements for delictual liability).
(6) The element of delict known as “causation” is actually divided into two elements. Name them.
(7) Is fault always a requirement for delictual liability? Briefly discuss with reference to an example.
(8) (a) Name the three actions that are described as the pillars of our law of delict.
(b) Indicate precisely which types of compensation can be recovered with each of the actions cited in (a).
(c) Indicate what form of fault is required for each of the actions cited in (a).
(d) Indicate which other group of delictual actions is available in our law.
(e) Name another remedy — not an action — that may be employed in delictual cases, and explain how its function differs from that of the delictual actions.

(9) What is the similarity between delict and breach of contract?
(10) What are the reasons for distinguishing between a delict and breach of contract?
(11) What appears to be the similarity between a delict and a crime?
(12) Name the differences between a delict and a crime.
(13) Name the fundamental rights relevant to the law of delict that are entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996.
(14) Explain in a short essay how Chapter 2 of the Constitution may influence the law of delict directly.
(15) Explain in a short essay how Chapter 2 of the Constitution may influence the law of delict indirectly.

**Feedback**

Unless otherwise indicated, references to paragraphs and footnotes in the feedback refer to your prescribed textbook.

(1) See paragraph 1.
(2) See paragraph 1.
(3) See paragraph 1. Keep in mind that obligations between parties may arise in other ways too, for instance by the conclusion of a contract.
(4) See paragraph 1. Also refer to the feedback on question 5.
(5) See paragraph 1. Note that all five of these elements must be present in a definition of a delict — see question 4.
(6) See this study unit under the heading “Important additional introductory remarks”.
(7) See paragraph 1, footnote 10 and the additional introductory remarks made in this study unit.
(8) (a) See paragraph 1.
(b) See paragraph 1.
(c) See paragraph 1. ("Culpably" includes the concepts of negligence and intention.)
(d) See figure 2.2 and the additional introductory remarks made in this study unit. In study units 31 and 32 you will study specific actions in this group.
(e) See figure 2.2 and the additional introductory remarks made in this study unit. In study unit 26 you will become better acquainted with this remedy.

(9) See paragraph 2.
(10) See paragraph 2.
(11) See paragraph 3.
(12) See paragraph 3.
(13) See paragraph 5.
(14) See paragraph 5(a).
(15) See paragraph 5(b).

CONCLUSION You have now learnt about the law of delict. Did you achieve all the learning outcomes set in this study unit? Among the things you should have noted are the different elements of a delict (or, rather, the general requirements for delictual liability), namely the act, wrongfulness, fault, causation and damage. These general requirements are dealt with in study units 3 to 25. The first, discussed in study unit 3, is the act.
The following 23 study units (study units 3 to 25) deal with the different elements of a delict, namely the act, wrongfulness, fault, causation and damage. In this study unit we will consider the act or conduct.
LEARNING OUTCOMES

After studying this study unit, you should be able to

- define an act
- list the requirements of an act and apply them to practical factual examples
- explain the requirements of the defence of automatism and apply them to practical factual examples
- briefly explain the difference between a *commissio* and an *omissio*

STUDY

Prescribed book

- chapter 2, paragraphs 1, 2, 3 and 4
- footnote 21
- Judgment *Molefe v Mahaeng* 1999 (1) SA 562 (SCA)

COMMENTARY

This study unit is based on chapter 2 of your prescribed book. In this chapter the first element of a delict, namely the act, is considered. (It is quite obvious that a defendant cannot be held liable for a plaintiff’s damage if the defendant has not acted at all.)

The general nature and characteristics of an act are discussed first (pars 1 and 2). Note especially the definition of an act and the different characteristics of an act.

The defence of automatism is next (par 3). By raising this defence, a defendant attempts to show that, according to the law, he/she did not act. Here you can read all the footnotes attentively. Although you need not study all the footnotes, the interesting cases to which you are referred in the footnotes will enable you to understand this defence better.

In paragraph 4 the two types of conduct are distinguished: a commission (positive conduct, or *commissio*) and an omission (or *omissio*). (Liability on the grounds of an omission is discussed in more detail in study unit 8 [ch 3, par 5.2 of the prescribed book].)

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Define the concept “act” or “conduct”.
2. Name (but do not discuss) the three characteristics of an act.
3. Can an animal act for the purposes of the law of delict?
4. X encourages his dog to bite Y. Does X act?
(5) Can a juristic person (like a company) act? Explain briefly.

(6) What does the concept of voluntary conduct mean?

(7) X forgets to warn others that an electric current has been switched on. As a result of his neglect (omission), somebody is electrocuted. Does X act voluntarily? Explain briefly.

(8) Can an infant or mentally retarded person act voluntarily?

(9) Name the conditions that can result in a person's being unable to act voluntarily.

(10) With reference to examples, distinguish between absolute compulsion and relative compulsion (vis compulsiva).

(11) Write a short note on the concept of actio libera in causa, giving an example.

(12) X is involved in an accident while driving his car. When he regains consciousness, he has no recollection of how the accident took place. He is hospitalised and during treatment for head injuries, the doctors determine that he suffered an epileptic fit at the time of the accident. The car of Y, the other person involved in the accident, is badly damaged. Can it be said that it was an act on the part of X that damaged Y's car? Will it make a difference to your answer if X had been receiving treatment for epilepsy before the accident, but had failed to take his medicine for several days before the accident took place? Discuss.

(13) On whom does the burden of proof for automatism rest?

(14) According to Van der Merwe and Olivier, automatism does not really exclude the element of conduct in a delict, but rather wrongfulness or fault. Do you agree? Briefly explain with reference to an example.

(15) “An omission to do something can qualify as an act for purposes of the law of delict.” Is this statement valid?

(16) “The difference between a commissio and an omissio is not of importance for the purposes of the law of delict.” Do you agree with this statement? Explain briefly.

**FEEDBACK**

(1) See paragraph 2.

(2) See paragraph 2. Note that the definition of an act (question 2) must include all these characteristics.

(3) See paragraph 2.

(4) See paragraph 2. Although the attack by the dog is not an act, X's incitement of the dog is an act.

(5) See paragraph 2.

(6) See paragraph 2. Have you differentiated willed conduct from voluntary conduct in your answer? Is willed conduct always voluntary? Is voluntary conduct always willed?

(7) See paragraph 2. Note that you must only indicate whether X acted voluntarily or not. The question is not concerned with the other delictual elements (refer to study unit 2 again), and if you have found that X has acted voluntarily, this does not necessarily mean that he will be delictually liable.

(8) See paragraph 2.

(9) See paragraph 3.
(10) See paragraph 3, footnote 21.

(11) See paragraph 3. Is there a link between this question and the next one?

(12) See paragraphs 2 and 3. Conduct is defined as a voluntary human act or omission. “Voluntary” means the bodily movements must be susceptible to control of the will, that is, the person must be able to control his/her muscular movements by means of his/her will. Body movements need not be willed to be voluntary, nor do they need to be rational or explicable. The defence of automatism excludes voluntariness, and this means that the relevant movements were mechanical and the person could not control them by his/her will. Factors that can induce a state of automatism include blackout and epileptic fit. According to Molefe v Mahaeng 1999 1 (SA) 562 (SCA), the defendant does not bear the onus to prove that he was in a state of so-called sane automatism. The onus is on the plaintiff to prove that the defendant acted voluntarily. If we apply these principles to the facts supplied in the question, we can conclude that X did not act voluntarily when the damage to the car was caused. However, the situation will indeed change if X had been receiving medical treatment for diagnosed epilepsy, but failed to take his medication on that particular occasion. A person cannot rely on automatism if he/she intentionally placed himself/herself in a mechanical state; this is known as the actio libera in causa. Furthermore, a person cannot rely on automatism if he/she negligently placed himself/herself in a mechanical state. In the adapted facts, X was probably negligent, or could even have had intention in the form of dolus eventualis (you will study intention and negligence in study units 15 and 16–18). A reliance on automatism would fail in such a scenario.

(13) See paragraph 3.

(14) See paragraph 3.

(15) See paragraph 4.

(16) See paragraph 4.

CONCLUSION

You have now dealt with the first element of a delict, namely the act. Did you achieve all the learning outcomes?
Wrongfulness: introduction, link with act and consequence

PREFACE

In the previous study unit you studied the first element of a delict, namely the act. You will remember that the other elements of a delict are wrongfulness, fault, causation and damage. The second element of delictual liability, namely wrongfulness, will now be discussed. This study unit is the first of eleven study units on wrongfulness.

FIGURE 4.1
LEARNING OUTCOMES

After studying this study unit, you should be able to

- describe the two steps involved in an inquiry into wrongfulness
- explain the relationship between wrongfulness and a harmful result, and apply this knowledge to factual examples

STUDY

Prescribed book
- chapter 3, paragraphs 1 and 2

COMMENTARY

In this study unit you will come across the concept of “wrongfulness” and the fact that an act can usually be wrongful only if it has some consequence. Although this is a short study unit, it is essential that you know exactly what the concept of “wrongfulness” means before you proceed to the next study units. A good understanding of wrongfulness is a cornerstone of the study of the law of delict.

In criminal law, the concept of unlawful is used for wrongfulness. In Afrikaans wrongfulness is known as onregmatigheid (or, in criminal law, as wederregtelikheid).

What follows is a supplementary explanation to enable you to understand paragraph 1: As is evident from paragraph 1, a wrongful act is legally reprehensible or unreasonable conduct. Someone is delictually liable only if he/she has caused harm in a wrongful way, that is in a reprehensible or unreasonable manner. Where damage results from a lawful or reasonable act, no delict has been committed and the perpetrator is absolved. Example: if, in an emergency, X causes Y some damage by breaking Y’s bedroom window to rescue a child from the burning house, X is acting reasonably and he is not liable for the damage to Y’s window. (Necessity is dealt with later in par 6.3 of ch 3 of your prescribed book.)

You will note in paragraph 1 that the determination of wrongfulness entails a dual investigation. Plainly put: it is first ascertained whether the perpetrator’s act was, in fact, the cause of a harmful result to another person. (With reference to the example of the burning house above, the answer to the given question is in the affirmative, that is, X had broken Y’s window and, in so doing, had caused damage to Y.)

Secondly, and this is the essence of wrongfulness, it must be ascertained whether the causing of harm took place in an unreasonable or legally reprehensible way. Legal norms are applied to answer this question (the test for wrongfulness is elaborated on in the following study unit). With reference to our example of the burning house, you will learn that, although X caused damage to Y, X’s act was not legally reprehensible because X had acted in necessity; his conduct was reasonable because he had infringed a less valuable interest (the window) in order to save a more valuable interest (the child’s life).

Note that there is one important exception (which is not sufficiently borne out in the text of your prescribed textbook) to the principle that wrongfulness can only be ascertained after a
harmful consequence has been caused. For the purposes of an interdict, wrongfulness can also be determined with reference to a harmful consequence which has not yet been caused, but which the applicant is attempting to prevent by applying for an interdict (compare study unit 2 above).

**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. “The determination of wrongfulness in principle comprises a dual investigation.” Briefly explain the meaning of this statement.

2. X races down Pretoria's main street during peak hour at 200 km/h without causing anybody any damage. Can X's conduct be described as delictually wrongful? Discuss briefly.

3. X plants a bomb in a busy shop. Before the bomb can explode and cause damage, it is discovered and rendered harmless. Was X's act delictually wrongful? Explain briefly.

4. X fires a missile from Pretoria to Perth, Australia. Can X's conduct be regarded as delictually wrongful before the missile has found its target and caused damage? Explain briefly.

5. In *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), suppose it could have been proved that the unborn baby's brain damage was, in fact, caused by the motorcar accident. Would it then have been necessary to use the *nascliturus* fiction to show that the child had an action on the ground of delict? Explain briefly.

6. Is there an exception to the principle that wrongfulness can only be ascertained after a harmful consequence has been caused? Explain.

**FEEDBACK**

1. See paragraph 1.

2. See paragraph 2, and the feedback on question 4.

3. See paragraph 2, and the feedback on question 4.

4. See paragraph 2. Questions 2, 3 and 4 are three different examples illustrating the same truth, namely that wrongfulness can usually be present only if a harmful result has been caused.

5. See paragraph 2.

6. See the comments made above in this study unit.

**CONCLUSION**

In this study unit you began looking at the element of wrongfulness. You noted the two steps in the inquiry into wrongfulness and you studied the link between wrongfulness and a harmful consequence. Did you achieve all the learning outcomes?
Wrongfulness: the legal convictions of the community (boni mores) as basic test for wrongfulness

PREFACE

This is the second study unit on the element of delict termed “wrongfulness”. In the previous study unit you studied the meaning of wrongfulness, as well as the fact that, in principle, wrongfulness requires a dual investigation: first, whether a harmful result actually arose, and secondly, whether the causing of damage occurred in a legally reprehensible way.

Following this, the first step of the above-mentioned dual investigation was discussed. It was established that in the law of delict an act can usually only be described as wrongful if the act caused a harmful result. We also investigated the meaning of the fact that the act and consequence are always separated in time and space.

In this study unit we begin to deal with the second aspect in establishing wrongfulness, namely the requirement that the loss must have been caused in a legally reprehensible way.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain what is meant by the legal convictions of the community (boni mores)
- name and explain three characteristics of the boni mores as a test for wrongfulness
- write brief notes on the role of subjective factors in the determination of wrongfulness
- discuss, with reference to examples, the ways in which the boni mores can be applied in practice
STUDY

Prescribed book

- chapter 3 paragraph 3
- footnotes 55, 76

Judgment

- Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T) — only those parts of the judgment dealing with the recognition of the boni mores as basic criterion of wrongfulness, and the recognition of the doctrine of subjective rights (which you will study in the next study unit). The discussion of this case in your textbook is sufficient.

COMMENTARY

In this study unit the nature and purpose of the basic test for wrongfulness — the legal convictions of the community (boni mores) — are discussed.

In paragraph 3.1 you will learn, among other things, that, in principle, the boni mores test entails a weighing of the defendant's interests against those of the prejudiced party. You will also learn which factors can influence this balancing of interests and the usefulness of this criterion. Take special note of the role played by the values underlying a bill of rights in the balancing of interests.

In paragraph 3.2 it is emphasised that the boni mores test is a criterion of the law of delict; it does not, for example, entail social or religious reprehensibility of behaviour.

In paragraph 3.3 it is shown that the basic test for wrongfulness is an objective criterion. The role of the adjudicator is discussed, as well as the fact that subjective factors (like the defendant's mental disposition) do not normally influence the question of wrongfulness. It is also shown that, in exceptional cases, certain subjective factors (like the defendant's malice or improper motive or his/her knowledge that the prejudiced party would suffer damage) can play a role in the determination of wrongfulness. (Malice must not be confused with intent: study fn 49.)

In paragraph 3.4 the practical application of the boni mores criterion is discussed. It is shown why, in practice, it is seldom necessary to work directly with the general boni mores test when determining wrongfulness. The application of the boni mores test as "supplementary" criterion is also discussed.

Judgment

You must study Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T) with reference to the study material in study units 5, 6 and 7. At this stage of your studies, Mostert J's finding is of particular importance because of his acceptance of the boni mores test as a basic test for wrongfulness, and because of his acknowledgement of the doctrine of subjective rights (which you will study in the following study unit). Therefore, you should concentrate on these aspects of the decision, as summarised in your textbook.
(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

(1) Briefly describe the general or basic test for wrongfulness.

(2) Cite the factors that can play a role in the process of balancing interests to determine wrongfulness.

(3) “The boni mores criterion is a criterion of the law of delict.” What is meant by this statement? Explain briefly.

(4) When applying the boni mores criterion, can a judicial official rely on his/her own personal opinion of right and wrong exclusively? Explain briefly.

(5) Write a short note on the role of subjective factors in determining wrongfulness.

(6) “Owing to the fact that wrongfulness is established by a criterion of objective reasonableness, the defendant’s motive plays absolutely no role in the determination of wrongfulness.” Is this statement correct? Discuss briefly.

(7) Is it correct to say that the defendant’s intent can sometimes determine the wrongfulness of his/her conduct? Discuss briefly.

(8) Assume the defendant knew that his/her conduct would harm the plaintiff. Can this subjective knowledge play a role in determining the wrongfulness of his/her behaviour? Discuss briefly with reference to an example.

(9) Is it necessary to apply the general boni mores test in every case where wrongfulness must be determined? Explain briefly.

(10) What is the connection between the boni mores test and the viewpoint that wrongfulness lies in the infringement of a subjective right or non-compliance with a legal duty?

(11) Briefly explain the role that the “reasonable person” plays in the application of the boni mores test.

(12) Describe, with reference to examples, the cases where the boni mores test is applied as a supplementary criterion to determine wrongfulness.

(1) See paragraph 3.

(2) See paragraph 3.1.

(3) See paragraph 3.2.

(4) See paragraph 3.3.

(5) See paragraph 3.3.

(6) See paragraph 3.3. Note that the answer to this question overlaps with part of the answer to question 5.

(7) See paragraph 3.3, footnote 55. Have you distinguished clearly between intention and motive in your answer?

(8) See paragraph 3.3. Note that the answer to this question overlaps with part of the answer to question 5.

(9) See paragraph 3.4.
(10) See paragraph 3.4. Infringement of a subjective right and breach of a legal duty as a test of wrongfulness may be regarded as two practical applications of the general *boni mores* criterion.

(11) See paragraph 3.4, footnote 76. You must note that the reasonable person test is usually employed as the test for negligence (study units 16 and further). Use of the “reasonable person” test in connection with wrongfulness takes place only in certain types of situations, and must not be confused with its more usual use (i.e., as a test for negligence).

(12) See paragraph 3.4.

**CONCLUSION**

In this study unit you studied the *boni mores* as a basic test for wrongfulness. Did you achieve all the learning outcomes?
Wrongfulness: wrongfulness as infringement of a subjective right

In the previous study unit it was shown that the general test for wrongfulness lies in the legal convictions of the community (boni mores), and that as a result of this test, an act is wrongful if, among other things, it infringes a subjective right of another person. Infringement of subjective rights is discussed below.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain the concept “subjective right”
- describe how it is ascertained whether a subjective right has been infringed, and apply this knowledge to practical examples

STUDY

Prescribed book

- chapter 3 paragraph 4
- footnotes 89, 94 and 96

Judgment

- Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T). (See the previous study unit’s guidelines for studying this case.)
The **infringement of a subjective right** as criterion for wrongfulness is dealt with in this study unit. This criterion does not concern a completely separate test for wrongfulness, but rather a particular application of the general criterion for wrongfulness (the *boni mores* test), namely that according to the legal convictions of the community (*boni mores*), an act is wrongful when, among other things, it infringes the subjective right of another.

In paragraph 4.1 the **doctrine of subjective rights** is discussed. Note especially the nature and content of the dual relationship that characterises every subjective right.

In paragraph 4.2 the **nature of a subjective right** is dealt with. Note the various classes or categories of subjective rights.

In paragraph 4.3 possible **further developments** in respect of the doctrine of subjective rights are discussed, and paragraph 4.4 deals with the **origins** of subjective rights. In paragraph 4.5 the **requirements** for the **infringement of a subjective right** are discussed.

*Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T):* refer to the guidelines for studying this case that were provided in the previous study unit.

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**SELF-ASSESSMENT**

(See **study unit 1**, par 1.2.2.2 on the aim of the following questions.)

1. Is infringement of a subjective right the only test for wrongfulness?
2. Briefly distinguish between a legal subject and a legal object with reference to examples.
3. Briefly describe, with reference to examples, the dual relationship that characterises every subjective right.
4. What is the content of the subject-object relationship in the case of a subjective right?
5. What is the content of the subject-subject relationship in the case of a subjective right?
6. “For every right to which a person is entitled, somebody else has a corresponding legal duty.” Briefly discuss the meaning of this statement with reference to an example.
7. On what basis are subjective rights divided into categories and named?
8. Name the different classes into which subjective rights are divided and indicate, with reference to examples, the objects of each category of subjective right.
9. Has the development of the doctrine of subjective rights reached its conclusion? Discuss briefly.
11. What requirements must the object of an individual interest fulfil before it can also be a **legal object** in terms of the doctrine of subjective rights?
12. Briefly discuss the nature of the dual investigation that is necessary to establish whether a subjective right has been infringed.
(13) Briefly describe, with reference to examples, when the subject-object relationship has, in fact, been infringed.

(14) What requirement must be fulfilled before factual infringement of the subject-object relationship can amount to violation of a subjective right? Discuss briefly.

FEEDBACK

(1) See paragraph 3.4.

(2) See paragraph 4.1.

(3) See paragraph 4.1.

(4) See paragraph 4.1.

(5) See paragraph 4.1. Note that questions 3, 4 and 5 may easily be combined to form a longer question.

(6) See paragraph 4.1 and footnote 94.

(7) See paragraph 4.2.

(8) See paragraph 4.2.

(9) See paragraph 4.3.

(10) See paragraph 4.4

(11) See paragraph 4.4.

(12) See paragraph 4.5.

(13) See paragraph 4.5. Note that the answer to this question overlaps with part of the answer to question 12.

(14) See paragraph 4.5. Note that the answer to this question overlaps with part of the answer to question 12.

CONCLUSION

In this study unit you studied the infringement of subjective rights as a test for wrongfulness. Did you achieve all the learning outcomes?
Wrongfulness: wrongfulness as breach of a legal duty

PREFACE
You are still busy with a study of wrongfulness, the second of the five general requirements for delictual liability. This study unit is the fourth on wrongfulness. The previous study unit dealt with infringement of a subjective right as a test for wrongfulness. This study unit deals with wrongfulness as a breach of a legal duty.

LEARNING OUTCOMES
After studying this study unit, you must be able to

- explain the relationship between legal duties and wrongfulness
- explain the relationship between boni mores and the breach of a legal duty

STUDY

Prescribed book
- chapter 3, paragraph 3.4 (only the section entitled "Existing legal norms and doctrines")
- chapter 3, paragraph 4.1 (only fn 89, the text dealing with the subject-subject relationship and fn 94)
- paragraph 5.1
- footnote 113

Judgment
- Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T). (See study unit 5 for guidelines for studying this case.)
**COMMENTARY**

This is a short introductory study unit on wrongfulness as breach of a legal duty. You should have mastered study units 5 and 6 before you proceed to study units 7 and 8. In this study unit you will notice that you are expected to review certain sections of study units 5 and 6, this time in connection with paragraph 5.1, which contains the most important material for the study unit.

Make sure that you understand, in particular, the connection between the general test for reasonableness (the boni mores test), the viewpoint that wrongfulness lies in the infringement of a subjective right, and the view that breach of a legal duty constitutes wrongfulness.

**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Give two instances where the boni mores test finds practical application in existing rules of law and legal doctrines.

2. What is the connection between the general test for wrongfulness (the boni mores test) and the views that wrongfulness lies either in the infringement of a subjective right or in the failure to fulfil a legal duty?

3. What is the correlative of the statement that a holder of a right has a right to his/her legal objects?

4. Write a short note on the concepts “legal duty” and “duty of care” and indicate which of the two concepts is preferable when translating the concept regspilig.

**FEEDBACK**

1. See paragraph 3.4.

2. See paragraph 3.4. Infringement of a subjective right and breach of a legal duty as a test of wrongfulness may be regarded as two practical applications of the general boni mores criterion.

3. See paragraphs 4.1 and 5.1.

4. See paragraph 5.1, footnote 113.

**CONCLUSION**

In this study unit you considered the approach that wrongfulness may be constituted by the breach of a legal duty. Did you achieve all the learning outcomes?
Wrongfulness: liability owing to an omission; breach of a statutory duty

PREFACE

The previous study unit was an introduction to the approach that wrongfulness lies not only in the infringement of someone’s subjective right, but also in the unreasonable conduct of the wrongdoer, whose conduct amounted to a failure to fulfil a legal duty to prevent prejudice. This study unit continues with an examination of wrongfulness; in it you will learn how the wrongfulness of an omission (which you learnt about in study unit 3) is determined. You will also study the relationship between non-compliance with a statutory duty and wrongfulness.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain the principles for determining whether an omission is wrongful or not, and then apply these to a set of facts
- explain the factors that may be taken into account during the determination of the wrongfulness of an omission and apply this knowledge to factual situations
- write brief notes on the determination of the delictual wrongfulness of non-compliance with a statutory duty

STUDY

Prescribed book

- chapter 3 paragraph 5.2 and 5.3
- footnotes 152, 153, 154, 155 and 156
Judgements

- *Minister van Polisie v Ewels 1975 (3) SA 590 (A).* This is an important decision and, as is clear from your prescribed book, it represents the conclusion of a series of cases on liability on the ground of an omission.

Prescribed book

- chapter 2 paragraph 4
- chapter 3 paragraph 6

Commentary

You should refresh your memory of the difference between a commission and an omission before you consider the material in paragraphs 5.2 and 5.3. Therefore, carefully reread chapter 2, paragraph 4 ("Commission (commissio) and omission (omission)").

As far as paragraph 5.2 is concerned, you should always bear in mind the basic principle that only in exceptional cases is the wrongdoer liable for causing of damage by an omission. The following subsections of paragraph 5.2 are thus devoted to the factors that indicate that a legal duty rested on the wrongdoer to act positively, which he/she neglected (failed) to do: prior positive conduct (par 5.2.1); control of a dangerous object (par 5.2.2); rules of law (par 5.2.3); a special relationship between the parties (par 5.2.4); assumption of a particular office (par 5.2.5); a contractual undertaking in respect of the safety of a third party (par 5.2.6); and the creation of an impression that another will be protected (par 5.2.7). Paragraph 5.2.8 deals with the interplay between the aforementioned factors and paragraph 5.2.9 highlights the role of the general wrongfulness criterion in this context.

Paragraph 5.3 deals with cases where non-compliance with or breach of a statutory duty points to delictual liability.

Paragraph 6 deals with the view that wrongfulness revolves around the question of whether it is reasonable to hold a defendant liable. Read this paragraph.

Self-assessment

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Briefly discuss the juridical importance of the difference between a “commission” and an “omission”.

2. “As point of departure it is accepted that there is no general legal duty on a person to prevent the suffering of a loss by another” (*Minister van Polisie v Ewels 1975 (3) SA 590 (A) 596*). Briefly discuss this statement.

3. Mention seven factors that can indicate that a legal duty existed to prevent prejudice in the case of an omission.
(4) With reference to case law, briefly sketch the historical development of a so-called prior conduct requirement for liability for an omission. Indicate what role prior conduct plays in the determination of liability for an omission according to the current legal position.

(5) In a certain town, the pavements are in a poor condition due to erosion. Several holes and furrows have developed in the pavements. The municipality fails to repair the pavements, despite requests to this effect by several of the residents. One day Mrs M, an aged resident, inadvertently steps into a hole in a pavement, falls and suffers serious injuries for which she is hospitalised for a month. Mrs M wishes to recover damages from the municipality in a delictual action. Discuss only whether the conduct of the municipality was wrongful. Refer in your answer to relevant case law.

(6) Briefly discuss the role that the following case played in the so-called omissio per commisionem rule: Minister van Polisie v Ewels 1975 (3) SA 590 (A).

(7) According to our present legal position, is “prior conduct” still a requirement for liability for an omission in the “municipality cases”? Briefly discuss with reference to case law.

(8) “The approach to liability for an omission in the Ewels case can result in legal uncertainty.” Do you agree with this statement? Discuss briefly.

(9) Briefly discuss the role that control over a dangerous object plays in the determination of delictual liability on the ground of an omission.

(10) There is dry grass on P’s farm. P fails to cut the grass. A fire breaks out in the grass and spreads to his neighbour, Q’s farm, where it causes some damage. Can P be held liable for Q’s damage? Briefly discuss with reference to liability for an omission.

(11) In certain instances rules of law place an obligation upon a person to perform certain acts. With reference to examples and case law, discuss the role that such rules of law can play in the determination of liability for damage that has resulted from a failure to perform the prescribed acts.

(12) May a special relationship between parties be an indication that the one had a legal duty towards the other to prevent damage? Briefly discuss with reference to examples.

(13) May a specific office held by a person be an indication that he/she has a legal duty to prevent another from incurring loss? Discuss briefly.

(14) Discuss, with reference to an example, the role that a contractual undertaking for the safety of a third party can play in the determination of a legal duty to prevent loss.

(15) Is the existence of a legal duty always based on the presence of a single factor?

(16) X, a champion swimmer, is walking along the riverside when he sees a child drowning. He fails to rescue the child from the water. Owing to his failure to act, the child suffers serious brain damage and becomes a quadriplegic. Did a legal duty rest on X to save the child? Discuss with reference to case law.

(17) What must the plaintiff prove, according to McKerron, in order to establish that a breach of statutory duty by the defendant was wrongful?

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(1) See chapter 2, paragraph 4.

(2) See chapter 3, paragraph 5.2.

(3) See paragraphs 5.2.1 to 5.2.7.
(4) See paragraph 5.2.1. Note that this question deals with the so-called *omission per commissionem* rule.

(5) See paragraph 5.2. Pay special attention to paragraph 5.2.1 and footnote 195. This question deals with the wrongfulness of an omission. The basic question to determine whether an omission is wrongful is whether a legal duty to act was present and was breached. This is determined with reference to the legal convictions of the community, or the *boni mores*. Factors such as prior conduct (*omission per commissionem*); control of a dangerous object; rules of law; a special relationship between the parties; particular office; contractual undertaking for the safety of a third party; and creation of an impression that the interests of a third person will be protected may serve as indications that a legal duty rested on the defendant. In the so-called municipality cases, prior conduct was considered to be a prerequisite for the wrongfulness of an omission. Prior conduct refers to positive conduct that created a new source of danger, preceding a subsequent omission to protect others from being harmed by this new source of danger. The classic case in this respect is *Halliwell v Johannesburg Municipal Council* 1912 AD 659. The view that prior conduct was a prerequisite for wrongfulness of an omission was eroded in *Silva's Fishing Corporation (Pty) Ltd v Mawaza* 1957 2 SA 256 (A); *Regal v African Super slate (Pty) Ltd* 1963 1 SA 102 (A); and *Minister of Forestry v Quahlamba* 1973 3 SA 69 (A). In *Minister van Polisie v Ewels* 1975 3 SA 590 (A), the court finally held that the existence of a legal duty is determined by the *boni mores*, and whereas the presence of prior conduct is a strong indication of the presence of wrongfulness, it is not a prerequisite thereof. Subsequent judgments, such as *Cape Town Municipality v Bakkerd* 2000 3 SA 1049 (SCA), confirmed that the principles formulated in *Ewels* were applicable to municipality cases. An interplay of different factors may also indicate the presence of a legal duty. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC), the Constitutional Court made it clear that the *boni mores* must now be informed by the values underpinning the Bill of Rights in the Constitution. If these principles are applied to the given facts, we can probably conclude that the omission of the municipality was indeed wrongful.

(6) Note that this question partially overlaps with the two previous questions. This case represents the most important turning point in the history of the so-called *prior conduct* requirement for liability for an omission.

(7) See paragraph 5.2.1. Note that the trendsetting decision on liability for omissions — *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) — was not a municipality case, but that a later decision in *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 699 (NC) was a municipality case.

(8) See paragraph 5.2.1.

(9) See paragraph 5.2.2. Take note of the two steps involved.

(10) See paragraph 5.2.2. This question requires a practical application of the principles you should have discussed in the answer to question 8.

(11) See paragraph 5.2.3.

(12) See paragraph 5.2.4.

(13) See paragraph 5.2.5.

(14) See paragraph 5.2.6.

(15) See paragraph 5.2.8.

(16) See paragraph 5.2.9. Did you refer to the *boni mores*, the weighing of interests and
the basic principles concerning liability for an omission, as spelled out in the *Ewels* case?

(17) See paragraph 5.3.

**CONCLUSION**

In this study unit you studied the determination of wrongfulness in the case of an omission, as well as the relationship between non-compliance with a statutory duty and delictual wrongfulness. Did you achieve all the learning outcomes?
Wrongfulness: grounds of justification – defence

PREFACE
This study unit is still concerned with the element of delict known as wrongfulness. You have already dealt with the basic test for wrongfulness (boni mores test) (ch 3 par 3), as well as the approaches that wrongfulness can be found in the infringement of a subjective right (par 4) and in the breach of a legal duty (par 5). In the following five study units the different grounds of justification are considered, starting with defence in this study unit.

LEARNING OUTCOMES
After studying this study unit, you should be able to

- briefly describe the concept of a ground of justification with reference to an example
- briefly indicate the connection between grounds of justification and the boni mores (legal convictions of the community)
- describe private defence with reference to an example
- name the requirements for private defence and apply them to a given set of facts

STUDY

Prescribed book
- chapter 3, paragraphs 7.1 and 7.2
- footnotes 333 and 398

Judgment
- Ex parte die Minister van Justisie: in re S v Van Wyk 1967 (1) SA 488 (A)
First, make sure you understand the material in paragraphs 7.1 and 7.2 before you study this case. (The case is discussed in par 7.2, fn 398.)

**READ**

*Prescribed book*

- all the other footnotes

**COMMENTARY**

This study unit is the first of five study units which deal with the so-called grounds of justification *(regarding gronde)*. It is essential that you understand exactly what a ground of justification is before you go any further. First study paragraph 7.1 which serves as a general introduction to grounds of justification.

In paragraph 7.2 the first ground of justification — defence — is examined. Although you need to study only two footnotes (333 and 398) in respect of defence, you must read all the other footnotes carefully because they contain examples and court cases that will enable you to understand the subject better.

**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. What is a ground of justification? Briefly discuss with reference to an example.
2. What is the connection between grounds of justification and the general test for wrongfulness (the *boni mores*, or legal convictions of the community)?
3. Define “defence” with reference to an example.
4. Can “self-defence” be used as a synonym for “defence”? Discuss briefly.
5. X's vicious dog attacks Y. Y shoots the dog in order to defend himself against the dog's attack. Can it be said that Y acted in defence? Would your answer have been different if it appeared that X had incited his dog to attack Y? Discuss briefly.
6. X, a plain-clothes policeman, arrests Y in the execution of a legitimate warrant of arrest. Y believes that X is not a policeman and resists arrest. Is Y acting in defence? Discuss briefly.
7. A directs his pistol at B and threatens to shoot him. B grabs A's arm to prevent A from shooting him. To loosen his arm from B's grip, A jabs B in the ribcase with his elbow and cracks one of B's ribs. B institutes a claim against A for the medical treatment of the injury to his rib. A alleges that he acted in defence because he wanted to escape B's grasp. Will A succeed with his appeal on defence? Discuss briefly.
8. Can a person act in defence in circumstances where the person has the alternative of protecting his/her interest by gleeing? Discuss briefly.
him into the house and punches him a few times. Is B acting in defence? Discuss briefly.

(10) Does the requirement of commensurateness of interests apply in the case of defence? Discuss.

(11) In the case of defence, can a person protect his/her property by killing the attacker? Discuss with reference to the majority decision by the appeal court in Ex parte die Minister van Justisie: in re S v Van Wyk 1967 (1) SA 488 (A).

**FEEDBACK**

(1) See paragraph 7.1.

(2) See paragraph 7.1.

(3) See paragraph 7.2.1.

(4) See paragraph 7.2.1 footnote 333.

(5) See paragraph 7.2.2 (a).

(6) See paragraph 7.2.2 (b). One may not act in defence against a lawful attack. Because the attack has to be wrongfull, the test is **objective**. An objective test is based only on the true facts established *ex post facto*, and does not take cognisance of the defendant's subjective view of the occurrence. Therefore, when Y believes that he is in danger or that the attack is wrongfull, but in reality it is not, his defensive action does not constitute private defence and Y, therefore, acts wrongfully.

(7) See paragraph 7.2.2 (b). In the given example A will not succeed in his claim that he acted in defence. The "attack" by B against which A defended himself was not wrongfull, but lawful because B himself acted in defence against A's initial wrongfull attack.

(8) See paragraph 7.2.3 (b).

(9) See paragraph 7.2.3 (c).

(10) See paragraph 7.2.3 (c).

(11) See paragraph 7.2.3 (c) and footnote 398.

**CONCLUSION**

In this study unit you were introduced to the concept of a **ground of justification** and you studied **defence** as a ground of justification. Did you achieve all the learning outcomes?
Wrongfulness: grounds of justification – necessity

PREFACE

We are still dealing with the element of delict known as wrongfulness, and, in particular, the grounds of justification. In the previous study unit we dealt with defence. This study unit covers necessity.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- define necessity
- differentiate between defence and necessity
- state, and apply to factual situations, the guidelines for a successful reliance on necessity
- discuss the importance of *S v Goliath* 1972 (3) SA 1 (A) for the law regarding necessity

STUDY

Prescribed book

- chapter 3, paragraphs 7.3.1 and 7.3.2
- footnotes 423, 430, 447, 450 and 451

Judgment

Memorise only the name of this case and the principles decided therein, as discussed in the prescribed textbook.

- *S v Goliath* 1972 (3) SA 1 (A)
Prescribed book
- chapter 3, paragraph 7.3.3

Commentary

Necessity (like defence, which you studied in the previous study unit) is a ground of justification. First read paragraph 7.1 of your prescribed book again and make sure you understand the concept of ground of justification. You must differentiate carefully between defence and necessity; see paragraph 7.3.1. The most important distinction is the following: an act in defence causes harm to an attacker, whereas an act in necessity causes harm to an innocent third party. This is perhaps not stated clearly enough in the prescribed textbook.

Judgment

Study paragraph 7.3 of your prescribed textbook before attempting to study the prescribed case.

- *S v Goliath 1972 (3) SA 1 (A)*: This case deals with the difficult question of whether homicide may occur in necessity. Study the findings of both Rumpf JA and Wessels JA (as discussed in your prescribed textbook), but concentrate on the former finding. Although it is a criminal law case, it is also of particular importance for the law of delict.

Self-assessment

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Define necessity.

2. X offers to take Y's dog for a walk. X notices his sworn enemy, Z, approaching him and incites Y's dog to attack and bite Z. Z draws his pistol and shoots Y's dog dead on the spot. Y institutes the *actio legis Aquilae* against Z. Will Z be able to raise private defence or necessity as a defence? Give a reason for your answer with reference to the basic difference between defence and necessity.

3. Name, *seriatim* (point by point), the different guidelines that can be considered to establish whether there was a state of necessity.

4. Can a person base his/her defence on necessity where he/she was personally responsible for the state of necessity? Discuss briefly.

5. A's three-year-old child swallows a handful of pills. A believes the child's life is in danger and rushes to the hospital at great speed. On the way, he bumps B's car. Afterwards it appears that the pills did no damage to the child. B institutes the *actio legis Aquilae* because of the damage to his car. A's defence is that he was acting in a state of necessity. Will A succeed with this defence? Discuss briefly.

6. When is *negotiæm gestio* present? Discuss with reference to an example.

7. X, Y and Z are stranded on a small, uninhabited island. There is fresh water on the island, but nothing to eat. Z is already very weak. To stay alive, X and Y kill Z and eat
him. Did X and Y act wrongfully? Would it make a difference to your answer if X and Y were picked up by a rescue boat one day later and, according to the evidence of a doctor on board the rescue boat, they were healthy enough to have survived several days without food, thus making the killing of Z unnecessary? Discuss with reference to case law.

(8) Can a defendant rely on necessity where he/she was legally compelled to endure the danger? Briefly discuss with reference to an example.

(9) Is it a prerequisite that a defendant, who can escape from danger by fleeing, should flee rather than prejudice another's interests?

(10) X, brandishing a hunting knife, tells Y that if Y does not help him kill Z, X will kill Y. Y hits X over the head with a blunt object. X suffers a severe concussion. What ground of justification may Y raise if X institutes a delictual action against Y? Substantiate your answer.

(1) See paragraph 7.3.1.

(2) See paragraph 7.3.1. Refer back to the discussion of private defence in your prescribed textbook and read paragraph 7.2.2 (a). Keep in mind that X unlawfully attacked Z, but that Z harmed Y, the owner of the dog, instead of X. Refer again to the commentary in this study unit.

(3) See paragraph 7.3.2.

(4) See paragraph 7.3.2 (a). Note that there are two points of view.

(5) See paragraph 7.3.2 (b). The possible existence of a state of necessity must be determined objectively. It must, therefore, be determined whether, seen objectively, the danger (state of necessity) actually existed, or whether it was only subjectively present in A's mind. If the latter situation is the case, then A did not act in a state of necessity and his actions were therefore wrongful (unless another ground of justification exists). Fear on the part of A may either have a bearing on his accountability or on the aspect of fault, but not on the wrongfulness of his conduct. This does not, however, mean that he will necessarily be held liable for the damage, since all the elements of a delict (and especially fault) must be present to incur liability. See footnote 423.

(6) See paragraph 7.3.2 footnote 430.

(7) See paragraph 7.3 and keep in mind paragraph 5.2.3, footnote 195. The question arising in the given set of facts is whether taking an innocent life in order to save another life/other lives may be justified in necessity. The definition of necessity is as follows: A person acts in necessity if he/she is placed in such a position by a superior force (vis maior) that he/she can only protect his/her interests or those of another person by harming an innocent third person. A principle applicable here provides that the interests must be commensurate; in other words, the interest that is sacrificed must not be more valuable than the interest that is protected. The question of whether an innocent life may be sacrificed to save another life is related to this principle. English case law (R v Dudley and Stephens (1884) 14 QBD 273) originally answered this question in the negative, and this position was followed in our law. However, S v Goliath 1972 3 SA 1 (A), by implication, answered this question in the affirmative. The facts were that X told Y that if Y did not help X to kill Z, X would kill Y. Y thereupon helped X to kill Z and relied on necessity during the court proceedings. The court said that most people value their own life more highly than that of another
person and that necessity could justify homicide. However, this would depend on the facts and had to be approached with the greatest of circumspection. The minority judgment held that fault could have been excluded, but not wrongfulness. If a similar case comes before the courts again, the courts may have to consider whether the **boni mores**, as interpreted in *Goliath*, are fully compatible with the values underpinning the Bill of Rights in the Constitution, as now required in view of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC). Applying these principles, the defendants may rely on necessity and a strong argument could be made that they did not act wrongfully on the strength of the *Goliath* case. The answer would be different if it transpired that they would have been rescued in time. The state of necessity must really objectively be present. The defendants’ conduct would therefore have been wrongful. However, their misguided impression that they were acting in necessity (known as putative necessity) may exclude fault on their part.

(8) See paragraph 7.3.2 (f).

(9) See paragraph 7.3.2 (i).

(10) See paragraphs 7.2 and 7.3. The facts are of such a nature that we must consider two grounds of justification, namely private defence and necessity. Private defence is present when the defendant directs his/her actions against another person’s actual or imminently threatening wrongful act in order to protect his/her own legitimate interests or such interests of someone else. Private defence will be present if the following requirements are met: (i) the defence must be directed against the aggressor; (ii) the defence must be necessary to protect the threatened right and this implies that there must be no reasonable alternative to the act of defence; and (iii) the act of defence must not be more harmful than is necessary to ward off the attack. Requirement (iii) implies that there must be a measure of proportionality between the attack and the defending act, although absolute proportionality is not required; the value of the protected interest and the sacrificed interest may differ; the interests need not be similar in character; and the means of defence employed by the defender need not be similar to those of the attacker. Necessity, on the other hand, exists when the defendant is placed in such a position by a superior force that he/she is able to protect his/her interests or those of someone else only by reasonably violating the interests of an innocent third person. The most important difference between private defence and necessity is the fact that private defence is directed at an attack by a wrongdoer, whereas when acting out of necessity, the interests of an innocent third party are prejudiced. In other words, if the plaintiff was an attacker, private defence may be applicable, whereas if the plaintiff was an innocent third person, necessity may be applicable. From the above it is clear that private defence is the appropriate ground of justification in our set of facts. Y harmed the interests of X, and X was certainly no innocent third person. On the contrary, X had directed wrongful attacks or imminently threatening attacks against both Z and Y. If, on the other hand, Y had assisted X to harm Z, and Z somehow survived and instituted a delictual claim against Y, it would have been appropriate to consider whether necessity was applicable (compare the facts of *S v Goliath* 1972 3 SA 1 (A)).

**CONCLUSION**

In this study unit you studied necessity as a ground of justification. Did you achieve all the learning outcomes?
Wrongfulness: grounds of justification – provocation

PREFACE

We are still dealing with grounds of justification, which are based on circumstances indicating that an ostensibly wrongful act was actually lawful from the outset. Two grounds of justification, defence and necessity, have already been dealt with in the previous two study units. In this study unit, we look at provocation.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- define provocation
- give your opinion on the correct legal basis for the defence of provocation
- distinguish between provocation and private defence
- discuss the requirements for provocation in the case of physical assault, defamation and insult
- explain the principle of compensatio

STUDY

Prescribed book

- chapter 3, paragraphs 7.4.1–7.4.3
- footnotes 461, 465, 469, 473 and 484
COMMENTARY

First read paragraph 7.1 (the introduction to grounds of justification) before you study paragraph 7.4.

You will note that there is no consensus on the view that provocation is a ground of justification. Some people are of the opinion that provocation is, instead, a ground for excluding fault (par 7.4.1). In our opinion, provocation can indeed be a ground of justification.

Provocation must be carefully distinguished from private defence (par 7.4.1). Your prescribed textbook distinguishes between provocation in the case of physical assault (par 7.4.2) and provocation in the case of defamation and insult (par 7.4.3).

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Explain the meaning of the concept of provocation with reference to examples.

2. Is provocation a ground of justification or a ground of exclusion for fault? Briefly discuss with reference to case law.

3. Explain, with reference to an example, the difference between provocation and private defence.


5. Assume that the facts are the same as in the previous question, but that in this case B slaps A’s cheek. Can B’s conduct fulfil the requirements for provocation? Discuss briefly.

6. Without any warning, X slaps Y hard on the face. When Y tries to hit back at X, the latter runs away. When Y encounters X an hour later, Y is still angry and therefore strikes X’s cheek. X feels deeply injured and institutes the actio iniuriam against Y on the ground of physical assault and insult. Can Y succeed with provocation as a ground of justification? Discuss briefly.

7. Write a short note on the meaning of the concept compensatio.

FEEDBACK

1. See paragraph 7.4.1 and footnote 461.

2. See paragraph 7.4.1. In our opinion, provocation is a ground of justification, which renders the defendant’s conduct lawful. The defence of provocation is assessed objectively by weighing the provocative conduct against the reaction to it, using the criterion of reasonableness (boni mores). This is clearly the same criterion that is used for determining wrongfulness, therefore the assumption that provocation excludes wrongfulness and not fault (see fn 484). Authority from case law for this point of view is Bester v Calitz 1982 (3) SA 864 (O). Another opinion is that provocation may affect the defendant’s mental capacity so as to exclude fault, and also that the plaintiff’s claim for damages may be diminished or even extinguished as
a result of the provocative conduct. Authority from case law for this point of view is
Winterbach v Masters 1989 (1) SA 922 (E). (See fn 465.)

(3) See paragraph 7.4.1 and footnote 469. The main difference is that conduct resulting from
provocation is basically an act of revenge that takes place after the termination of
the provocation, whereas an act of defence takes place in defence of a wrongful attack
that has not yet been terminated. (R v Van Vuuren 1961 (3) SA 305 (E), discussed in
fn 469, is not one of your prescribed cases and therefore need not be studied as such.
The facts of the case, however, well illustrate the distinction between private defence
and provocation.)

(4) See paragraph 7.4.1 and footnote 484. (Note that it is irrelevant that the provocative
words were not aimed directly at C; he need only prove that those words motivated
him to retaliate against them.)

(5) See paragraph 7.4.2 and footnote 484. As a general rule, provocation is not a
complete defence where provocative words preceded a physical attack. Such
provocation may nevertheless have the effect of mitigating the damages. (This should,
however, be a flexible principle in terms of which the basic principle is still the legal
convictions of the community, and there may be cases where the verbal incitement is
of such a nature that the resultant physical assault might be considered reasonable.)
However, in the given facts, B will most probably not succeed in proving provocation.

(6) See paragraph 7.4.1. Y’s defence of provocation will fail because his counter-attack
did not follow immediately on X’s attack and also because his counter-attack was out
of proportion to X’s attack.

(7) See paragraph 7.4.3.

CONCLUSION

In this study unit you studied provocation as a ground of justification. Did you achieve
all the learning outcomes?
Wrongfulness: grounds of justification – consent

PREFACE

We are still dealing with the element of delict known as wrongfulness, and in particular with grounds that exclude wrongfulness, that is, the grounds of justification. The grounds of justification of defence, necessity and provocation have already been studied. Consent is the next topic up for discussion.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- distinguish briefly, with reference to examples, between the following concepts:
  - consent to injury
  - consent to the risk of injury
  - volenti non fit iniuria
  - voluntary assumption of risk
  - contributory negligence and contributory intent

- name the characteristics and requirements for valid consent and apply them to a given set of facts
- briefly discuss a pactum de non petendo

STUDY

Prescribed book

- chapter 3, paragraph 7.5
- footnotes 502, 520, 529, 530, 536 and 539
Judgments

Study the following cases with reference to your prescribed textbook:

- Boshoff v Boshoff 1987 (2) SA 694 (O)
- Castell v De Groot 1994 (4) SA 408 (C)

Commentary

In this study unit we will examine consent as a ground of justification. Make sure that you understand the introductory paragraph (7.5.1) very well before you study the rest of the study unit. Most of the problems in understanding this subject are caused by confusing the terminology used in respect of consent and related concepts. Therefore, make sure that you have a clear understanding of the connection between concepts such as “consent”, “consent to the risk of injury”, “volenti”, “volenti non fit iniuria”, “voluntary assumption of risk”, “contributory intent” and “contributory negligence” (par 7.5.1).

It is extremely difficult to master the many facts and principles contained in this study unit. Therefore, it is essential to test your understanding and knowledge of the material thoroughly by means of the self-assessment questions at the end of the study unit.

Judgments

- Boshoff v Boshoff 1987 (2) SA 694 (O)
  The information in footnote 536 of your prescribed textbook is sufficient for studying this decision.
- Castell v De Groot 1994 (4) SA 408 (C)
  Footnote 530 of your prescribed textbook supplies sufficient information on this case for the purpose of your studies.

Self-assessment

(See study unit 1 par 1.2.2.2 above on the aim of the following questions.)

1. Briefly explain the meaning of the following concepts (using examples where possible). Also explain the similarities and differences between them, as well as their effect on the possible liability of the defendant:
   (a) consent to injury
   (b) consent to the risk of injury
   (c) volenti non fit iniuria
   (d) voluntary assumption of risk
   (e) contributory intent
   (f) contributory negligence

2. List the characteristics of consent as a ground of justification.

3. List the requirements for legally valid consent.
(4) X's secretary, Y, commits an offence. X gives her a choice: either Y agrees to a hiding, or she will be fired. Y chooses the former option and X gives her the hiding. Y institutes the *actio injuriarum* against X. Will X succeed with a defence based on consent? Briefly discuss with reference to case law.

(5) Anna would like to have her earlobes pierced so that she can wear fashionable earrings. Andrew, her boyfriend, who is a third-year law student, offers to do this for her. She is only too happy to accept his offer. The procedure goes quite well, but a few days later the wounds have turned septic and medical treatment is necessary. Anna ends the relationship and institutes a delictual action for infringement of personality interests and to recover medical costs against Andrew. Andrew wishes to raise consent as a ground of justification. What are the merits of his defence? Substantiate your answer.

(6) Briefly discuss the importance of the decisions of *Boshoff v Boshoff* 1987 (2) SA 694 (O) and *Castell v De Greeff* 1994 (4) SA 408 (C) for consent as a ground of justification.

(7) Briefly discuss the *pactum de non petendo* with reference to an example.

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**Feedback**

(1) See paragraph 7.5.1 and footnote 502. Think of your prescribed court cases with reference to the different concepts.

(2) See paragraph 7.5.2 (a)–(e).

(3) See paragraph 7.5.3 (a)–(f).

(4) See paragraph 7.5.3 (a). Also remember that consent to bodily injury is, in principle, *contra bonos mores*.

(5) See paragraph 7.5. This question deals with consent as a ground of justification, that is, a defence that eliminates the element of wrongfulness. Two types of consent are known, namely consent to injury and consent to the risk of injury, but the applicable principles are largely the same. From the facts it is clear that Anna accepted Andrew's offer to have her ears pierced; therefore, at face value, it appears that Anna may have consented to the risk of injury. However, to determine whether this is really so, we need to consider the requirements of consent: (a) consent must be given freely and voluntarily, that is, not under pressure or compulsion; (b) the person giving consent must be capable of volition; (c) the person must have full knowledge of the nature and extent of the prejudice; (d) the person must realise or appreciate fully what the harm entails, in other words, he or she must understand it; (e) the person must, in fact, subjectively give the consent; and (f) the consent must be permitted by the legal order, that is, the consent (not the harm consented to, but the consent itself) must not be *contra bonos mores*. Consent to bodily injury (or the risk thereof) is usually *contra bonos mores*. Exceptions are recognised in two instances. Firstly, in the course of medical treatment, a person may consent to bodily injury (or the risk thereof) without the consent being *contra bonos mores*. *Castell v De Greeff* 1994 4 SA 408 (C) constitutes authority for this form of consent. Organised sport is the second class of exception where consent to (the risk of) bodily injury is not *contra bonos mores*. *Boshoff v Boshoff* 1987 2 SA 694 (O) is an example of this. Furthermore, if the bodily injury is of a minor nature, consent to such injury may also be allowed. If we apply these principles to the facts, we may argue that the harm caused was bodily injury, that it was not of a trivial or very minor nature, because septic wounds can be serious, and that the consent was therefore *contra bonos mores* and thus invalid. On the basis of this argument, Andrew's conduct was wrongful and, if all the other delictual
requirements are also present, Anna would be successful with her claim. On the other hand, if Anna was unaware of the possible complications of ear piercing, it could be argued that she did not have full knowledge of the nature and extent of the harm or the risk thereof; on this account, it is possible to conclude that she did not consent. Hence Andrew’s conduct is wrongful and Anna’s claim may succeed. [When answering a question of this nature, your conclusion at the end of the answer is not the most important element. Displaying a good knowledge and understanding of the applicable principles is, however, crucial.]

(6) See footnotes 536 and 530.

(7) See paragraph 7.5.4.

CONCLUSION

In this study unit you studied consent as a ground of justification. Did you achieve all the learning outcomes?
Wrongfulness: grounds of justification – statutory authority, official capacity, official command and power to discipline

PREFACE  As indicated by the heading, we are still dealing with the grounds of justification. In the previous study unit, we discussed consent. In this study unit, the last four grounds of justification are discussed. Remember, however, that the grounds of justification we cover do not constitute a *numerus clausus* (fixed number) (par 7.1).

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain when a statute authorises an infringement of interests
- explain when an act falls within the boundaries of statutory authorisation
- explain when official capacity will constitute a ground of justification
- explain when execution of a wrongful command can constitute a defence
- indicate when punishment will be lawful and which factors must be taken into consideration with reference to case law and section 10 of the South African Schools Act 84 of 1996

STUDY

Prescribed book

- chapter 3, paragraphs 7.6, 7.7, 7.8 and 7.9
- footnote 570
Prescribed book

- chapter 3, paragraph 7.1

COMMENTARY

This is the last study unit on the grounds of justification. The following four grounds of justification are discussed: statutory authority (par 7.6), official capacity (par 7.7), official command (par 7.8) and power to discipline (par 7.9).

SELF-ASSESSMENT

(See study unit 1, par 1.2.22 on the aim of the following questions.)

(1) Discuss the guidelines applied by the court to determine whether the legislature intended to authorise an infringement of interests.

(2) Discuss the considerations to be borne in mind when determining whether the act authorised by the legislator has exceeded the bounds of authority.

(3) Briefly discuss official capacity as a ground of justification.

(4) X, an officer in the defence force, orders Y, a private under his command, to shoot Z and kill him. (X believes that Z is on the point of throwing a hand grenade at some innocent bystanders.) Y shoots and wounds Z. Afterwards it appears that X made a mistake and that Z merely wanted to blow his nose. Z institutes a claim against Y. Y raises official command as ground of justification. Can Y succeed with this defence? Discuss briefly.

(5) Briefly discuss the factors that must be taken into consideration when determining whether chastisement was moderate and reasonable.

(6) Can a teacher rely on power to discipline after having meted out corporal punishment to a pupil?

FEEDBACK

(1) See paragraph 7.6 (a).

(2) See paragraph 7.6 (b).

(3) See paragraph 7.7 and footnote 570.

(4) A soldier must obey all lawful orders and, in doing so, must do no more harm than is necessary to execute the particular order. Where, however, orders are obviously beyond the scope of the authority of the officer issuing them, and are so manifestly and palpably illegal that a reasonable man in the circumstances of the soldier would know them to be manifestly and palpably illegal, he/she is justified in refusing to obey such orders. If the soldier, however, obeys such a manifestly and palpably illegal order, then he/she will not succeed in the defence of official command.
In the given example, X’s command was, objectively viewed, illegal (wrongful). The fact that X suspected (subjectively) that Z intended to kill the bystanders does not render the command lawful; putative defence is not a defence. Therefore Y acted by executing a wrongful command. The next question, therefore, is whether the command by X was manifestly and palpably illegal. This is not clear from the given facts, but if that were the case, then Y would not succeed with his defence.

(5) See paragraph 7.9.

(6) See paragraph 7.9.

CONCLUSION

In this study unit you studied statutory authority, official capacity, official command and power to discipline as grounds of justification. Did you achieve all the learning outcomes?
Wrongfulness: abuse of rights; nuisance

PREFACE

In the previous study unit we studied the last few grounds of justification. This study unit is the last of eleven study units on wrongfulness as an element of delict.

LEARNING OUTCOMES

After studying this study unit you should be able to

- explain the underlying notion of the doctrine of abuse of rights
- briefly name the main principles (or primary guidelines) that can be used to determine whether there was an abuse of rights in a particular case
- apply the above-mentioned main principles to a given set of facts
- discuss the role of an improper motive in the doctrine of the abuse of rights
- describe the delict of nuisance with reference to practical examples

STUDY

Prescribed book

- chapter 3, paragraphs 8 and 9
- footnotes 618, 629 and 631

COMMENTARY

Two related subjects, abuse of rights (misbruik van reg) and nuisance (oorl as) are dealt with in this study unit. The applicable area of law is sometimes called law of neighbours because the judgments in this connection often deal with problems between neighbouring property owners. However, the doctrine of abuse of rights is not limited to owners of neighbouring...
property, but has general validity in the law of delict. The courts sometimes characterise abuse of rights as "nuisance". In English law, nuisance is an independent tort (ie delict). In our law, nuisance is not a separate delict – general delictual principles are applied (see fn 618).

**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. What notion underlies the so-called doctrine of abuse of rights? Explain briefly.
2. Is the following statement correct: "A property owner can do exactly as he pleases on his property"? Briefly discuss with reference to case law.
3. What role does malice (anima* vicino nocendi* or onbehooftlike motie) play in the doctrine of the abuse of rights? Discuss, referring to common law and case law.
4. Briefly give the main principles (or primary guidelines) that can be used to determine whether there was an abuse of rights in a particular case.
5. X and Y are neighbours. Because X does not like Y, X builds a large shed on his property in order to spoil Y’s beautiful view. It appears that X did indeed need a shed, but that he could easily have built it elsewhere. Did X act wrongfully? Briefly discuss with reference to case law.
6. Give a few examples of nuisance that have already occurred in practice.

**FEEDBACK**

1. See paragraph 8.
2. See paragraph 8.
3. See paragraph 8. In considering the reasonableness of the wrongdoer’s conduct, his/her mental disposition plays an important role (Gien and Regal cases). The presence of malice on his/her part may be a strong indication of the unreasonableness of his/her conduct. Although the reasonable utilisation of a person’s property cannot be termed unreasonable merely because of an intention to prejudice another, in many instances it is extremely difficult to determine to what extent a wrongdoer promoted his/her own reasonable interests. In such a case, the wrongdoer’s own, subjective view of the reasonableness of his/her conduct may be an important aid: if he/she himself/herself did not consider his/her conduct to be a reasonable way of advancing his/her interests (and this will necessarily be the case where his/her exclusive aim is to injure the prejudiced person), he/she can hardly complain if his/her conduct is considered unreasonable.

For this reason, conduct with the exclusive aim of harming a neighbour (anima* vicino nocendi*) (eg the conduct of a person who builds a chimney with the exclusive purpose of obstructing his/her neighbour’s view) is, as a general rule, wrongful. In other words, an improper motive renders an act, which would have been lawful but for such motive, wrongful if it prejudices a neighbour without benefiting the actor in any way (Gien case). Where the wrongdoer harms his/her neighbour in the process of advancing his/her own reasonable interests, he/she does not act wrongfully, even if he/she has the improper motive to harm his/her neighbour in the process. Improper motive in itself is therefore insufficient to convert lawful conduct into a wrongful act.
However, where the wrongdoer acts unreasonably (eg where the benefit that he/she derives from his/her conduct is exceptionally slight, but, on the other hand, the nature of his/her conduct is very far-reaching and the harm caused to his/her neighbour relatively serious), he/she exceeds the bounds of reasonableness and acts wrongfully, despite the fact that he/she had no intention to harm his/her neighbour. Any use to which an actor puts his/her property, in which he/she fails to advance his/her reasonable interests, is thus wrongful, whatever his/her motive may be.

(4) See paragraph 8 (a)–(e).

(5) To establish whether X’s conduct was wrongful towards Y, it must be determined whether X exceeded his capacity as owner (whether he “abused” his right). This question must be answered in terms of what is reasonable and fair. The following guidelines may play a role in considering the reasonableness of X’s conduct:

(a) X acts lawfully if it is found that he harmed Y in the process of furthering his own reasonable interests, even if he had the motive of harming his neighbour, Y, in the process. Therefore, improper motive in itself is insufficient to convert lawful conduct into a wrongful act.

(b) If, on the other hand, it is found that X acted unreasonably (eg because the benefit that X would derive from building the shed on the particular spot would be exceptionally slight, while the nature of his conduct and the harm caused to Y would be relatively serious), he exceeds the bounds of reasonableness and acts wrongfully (even if he had no motive to harm Y). Any use to which a wrongdoer puts his/her property, in which he/she fails to advance his/her reasonable interests, is wrongful, whatever his/her motive may be.

(c) If it is not possible to determine whether X’s conduct was reasonable or unreasonable, X’s own subjective view (in so far as it can be ascertained) of the reasonableness of his conduct may be an important aid: if he himself does not consider his conduct to be a reasonable way of advancing his interests (and this will necessarily be the case where his exclusive aim is to injure Y), he can hardly complain if his conduct is considered unreasonable.

Before you read the answer below, apply these principles to the given set of facts and try to decide for yourself whether X’s conduct was wrongful.

X’s conduct was probably lawful: the prejudice suffered by Y as a result of the building of the shed was probably, proportionally, not unreasonably greater than the benefit derived by X from building the shed on that particular spot. In addition, it was not X’s exclusive aim to harm Y. Consequently, X did indeed further a reasonable interest of his own and thus acted lawfully.

(6) See paragraph 9.

CONCLUSION

In this study unit you studied abuse of rights and nuisance. Did you achieve all the learning outcomes?
Fault: general; accountability; intent

We have now dealt with the first two of the five elements of delict, namely the act itself and wrongfulness. We will now turn our attention to the element of fault. As a rule, there is no delictual liability where the defendant has acted without fault (a few instances of liability without fault, which are the exception to the rule, will be dealt with later on).

FIGURE 15.1
LEARNING OUTCOMES

After studying this study unit, you should be able to

- name the two forms of fault
- define accountability and explain the influence of youth, mental disease or illness, intoxication and provocation on accountability
- explain the relationship (nexus) between accountability and fault
- describe all three forms of intent and be able to apply them to practical examples
- briefly distinguish between intent and motive
- briefly explain the effect of mistake concerning the causal chain of events

STUDY

Prescribed book

- chapter 4, paragraphs 1, 2 and 3
- footnotes 50 and 51

COMMENTARY

You have already seen that in the case of wrongfulness, the important question is whether a particular act was objectively unreasonable in the eyes of the law. Where a wrongful act has been established, fault is the next factor to be considered. Now the focus shifts more to the participation or role of the defendant: can he/she be legally blamed for his/her wrongful conduct? The law blames him/her if he/she directed his/her will at the damage he caused, conscious of the wrongfulness of his/her conduct (ie if he/she acted intentionally), or where he/she caused the damage by negligent conduct. Therefore, there are two forms of fault, namely intent and negligence.

No person can be said to have fault, that is to be legally blameworthy, unless he/she has the mental ability to distinguish between right and wrong and can also act in accordance with such appreciation. Such a person is said to be accountable (culpae capax). Accountability is therefore a prerequisite for fault in either of its two forms.

This study unit contains a short, general introduction to fault as an element of delict (par 1), a discussion of accountability (par 2), as well as a discussion of intent as a form of fault (par 3). (Negligence is dealt with in study units 16 to 18.)

With reference to mistake regarding the causal chain of events (par 3.3), you should note an appeal court decision, S v Goosen 1989 (4) SA 1013 (A) (see lns 50 and 51). Van Heerden JA ruled that where the causal chain of events differs fundamentally from that conceived by the defendant, the defendant did not act intentionally. This approach will probably also be followed in the law of delict.
SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Name the two forms of fault.

2. X, Y's archenemy, corners Y unexpectedly with the intention of shooting him with his shotgun. However, Y is much quicker than X and draws his own firearm. Before wounding X in the chest, Y relishes the opportunity that X has afforded him to take a shot at him (X). Can we assert that Y's conduct is accompanied by fault (intent) in this case?

3. Complete the following table by indicating which form of fault can/should be present when instituting each action:

<table>
<thead>
<tr>
<th>Actions</th>
<th>Intent</th>
<th>Negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actio legis Aquiliae</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Actio injuriarum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action for pain and suffering</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4. When is a person accountable?

5. Discuss the possible effect of the following factors on accountability: (a) youth; (b) mental disease or illness; (c) intoxication; and (d) provocation.

6. Define intent with reference to its two elements.

7. Name and briefly describe the three forms of intent with reference to examples.

8. A breaks the windscreen of B's car in order to steal his car radio. Because it was not A's aim to break the windscreen (his aim was to steal the radio), he did not have intent in respect of breaking the windscreen. Is this statement correct? Discuss briefly.

9. A plants a limpet mine in a busy shop and disappears. An hour later the limpet mine explodes and three people are injured. Because A did not know who his victims were (or how many of them there would be), he did not have intent in respect of their injuries. Is this statement correct? Discuss briefly.

10. What does the concept "consciousness of wrongfulness" mean?

11. Discuss mistake as a ground for exclusion of fault.

12. Distinguish between intent and motive.

13. Does a person act intentionally if the result occurred in a manner that differed from what he/she had envisaged?

FEEDBACK

1. See paragraph 1.

2. See paragraph 1. A person can be legally blameworthy — that is, to be at fault — only for wrongful conduct. As Y's conduct can be regarded as an act of self-defence (ground of justification) he was protecting his own life against an immediate wrongful
attack his conduct was lawful. Y’s reprehensible state of mind is therefore irrelevant, because wrongfulness is absent.

(3) See paragraph 1.

<table>
<thead>
<tr>
<th>Actions</th>
<th>Intent</th>
<th>Negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actio legis Aquilae</td>
<td>Need not be present, but if it is then it will suffice for liability*</td>
<td>Must be present for liability (unless intent is present)</td>
</tr>
<tr>
<td>Actio iniurium</td>
<td>Generally required for liability#</td>
<td>Generally insufficient for liability#</td>
</tr>
<tr>
<td>Action for pain and suffering</td>
<td>Need not be present, but if it is then it will suffice for liability</td>
<td>Must be present for liability (unless intent is present)</td>
</tr>
</tbody>
</table>

* The assumption is that it is easier to prove negligence (objective test) than it is to prove intent (subjective test). Therefore, when instituting a claim based on the actio legis Aquilae, a person will usually not try to prove the more difficult form of fault, namely intent, but rather negligence.

# We say “generally” because there are exceptions where the actio iniurium can be instituted without having to prove intent. See, for instance, the liability of the press for defamation (ch 10, par 3.2.2.4.3) – this will be studied later.

(4) See paragraphs 1 and 2.

(5) See paragraph 2.

(6) See paragraph 3.

(7) See paragraph 3.1. (Note, however, that although a distinction is made between the different forms of intent, it is irrelevant which one is present in a particular case. As a rule, no specific consequences are attached to a given form of intent. The fact that the law distinguishes between different forms of intent is important in understanding how wide the concept of intention is in the law.)

(8) See paragraph 3.1 (b).

(9) See paragraph 3.1 and note, especially, the distinction between dolus determinatus and dolus indeterminatus in answering the question.

(10) See paragraph 3.2. (Answer in two sentences.)

(11) See paragraph 3.2. (Answer in three sentences.)

(12) See paragraph 3.3. (Answer in four sentences.)

(13) See paragraph 3.3. (Answer in three sentences.)

CONCLUSION

In this study unit you studied accountability, as well as intent (as a form of fault). Did you achieve all the learning outcomes?
Fault: negligence

This is the second study unit on fault. In the previous study unit we discussed accountability and one of the two forms of fault, namely intent. In the following three study units we will discuss the second form of fault, namely negligence. In the vast majority of instances of delictual liability, negligence (and not intent) is the form of fault present — just think of all the motorcar accidents normally caused through negligence.

![Diagram](image)
LEARNING OUTCOMES

After studying this study unit, you should be able to

- state the test for negligence with reference to the formulation in *Kruger v Coetzee* 1966 (2) SA 428 (A) and apply it to a set of facts
- form a reasoned opinion on whether negligence and intent can overlap
- explain whether it is necessary to differentiate between ordinary and gross negligence
- differentiate between negligence and omission
- briefly discuss the general characteristics of the reasonable person (*diligentia patrumfamilias*) as applied in case law
- discuss in detail, with reference to case law, the reasonable person test as applied to children, and then apply it to a set of facts
- discuss in detail, with reference to case law, the negligence test as applied to experts, and then apply it to a set of facts

STUDY

Prescribed book

- chapter 4, paragraphs 4.1–4.5
- footnotes 99, 101 and 116

Judgments

- *Kruger v Coetzee* 1966 (2) SA 428 (A)
  (You need to study only the information in your prescribed textbook)
- *Jones v Santam Bpk* 1965 (2) SA 542 (A)
- *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A)

COMMENTARY

This is the first of three study units dealing with negligence. The following aspects are discussed in this study unit: the definition and nature of negligence (par 4.1); the question of whether negligence and intent may overlap (par 4.2); ordinary and gross negligence (par 4.3); the difference between negligence and omission (par 4.4); and the characteristics of a reasonable person (which is the basis of the test for negligence) (par 4.5). With regard to the latter, the determination of negligence on the part of children and experts is also examined.

Judgments

Study the prescribed sections of your textbook before you read the cases.
SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. State the test for negligence with reference to its formulation in Kruger v Coetzee 1966 (2) SA 428 (A) 430.

2. Can negligence and intent overlap? Discuss briefly.

3. Is it necessary to differentiate between ordinary and gross negligence? Discuss briefly.

4. Differentiate between negligence and omission.

5. Write short notes on the general characteristics of the reasonable person (diligens patrfamilis).

6. “Since 1965, South African case law has followed a new approach in respect of the negligence of child wrongdoers.” Discuss.

7. Danny, a thirteen-year-old boy, kicks a rugby ball in a suburban garden. The ball breaks the window of a neighbouring house and smashes a priceless vase from the Ming dynasty. Was Danny negligent? Discuss with reference to case law.

8. How is the negligence of experts determined? Discuss briefly.

9. Discuss the concept imperitia culpae adnumeratur, using an example.

FEEDBACK

1. See paragraph 4.1.

2. See paragraph 4.2. Note that there are two points of view on this matter — that of Van der Merwe and Olivier and that of your textbook writers. You must give a reason for which view you prefer.

3. See paragraph 4.3.

4. See paragraph 4.4.

5. See paragraph 4.5.1. Refer in your answer to the relevant dictum (passage) in Weber v Santam Verzekeringsmaatskappy Bpk 1983 (1) SA 381 (A).

6. See paragraphs 2 and 4.5.2.

7. See paragraphs 2 and 4.5.2. Before Jones NO v Santam Bpk 1965 2 SA 542 (A), the negligence of a child used to be determined with reference to a reasonable child standard. In the Jones case, the court held that the test for negligence remains objective, and the reasonable person test (also known as the diligens patrfamili test) must also be employed in the case of a child wrongdoer. The youthfulness of the child wrongdoer is not specifically considered here. However, during the inquiry into the accountability of the child, his or her youthfulness is taken into account. The Jones case was criticised on two counts: firstly, many are of the opinion that a reasonable adult standard for a child wrongdoer is unfair; secondly, the court put the cart before the horse by testing for negligence first and, thereafter, for accountability. In Roxa v Mshayi 1975 3 SA 761 (A), the court followed the correct order. In Weber v Santam Verzekeringsmaatskappy Bpk 1983 1 SA 381 (A), the Jones case was confirmed in essence and the court said that if the principles were applied with insight, the criticism would fall away. In Eskom Holdings Ltd v Hendricks 2005 5 SA 503 (SCA), the court reiterated that in each case it must be determined whether the
child has attained the emotional and intellectual maturity to appreciate the danger to be avoided and to act accordingly. In respect of accountability, a child of seven or younger is irrefutably presumed to be *culpa in capax* not accountable, whereas a child over seven, but under fourteen, is rebuttably presumed to be *culpa in capax* not accountable. Whether Danny in our question would be held to have been negligent would depend on all the circumstances of the case. If he was old enough to be accountable/*culpa capax*, he was probably negligent, because, taken at face value, his conduct deviated from that of the reasonable person in the circumstances.

(8) See paragraph 4.5.3.

(9) See paragraph 4.5.3 and footnote 116.

**CONCLUSION**

In this study unit you studied the test for negligence with particular reference to children and experts. Did you achieve all the learning outcomes?
17
study

Fault: negligence — foreseeability and preventability of damage

PREFACE

The previous study unit served as an introduction to negligence as a form of fault. In this study unit the reasonable person test will be discussed in more detail.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- name the two legs on which the test for negligence stands
- describe the nature and applicability of the abstract and concrete approaches to foreseeability
- name the four considerations that play a role in the preventability aspect of the test for negligence and apply them to factual scenarios

STUDY

Prescribed book

- chapter 4, paragraph 4.6
- footnotes 136, 143 and 148

COMMENTARY

In the previous study unit you will have noted that the test for negligence stands on two legs: the foreseeability of damage and the preventability of damage. Remember that both these legs must be present before there can be negligence. To establish negligence, the reasonable person must not only have foreseen damage, but must also have taken steps to prevent the damage from occurring, and the wrongdoer must have omitted to take either or both of these steps. The nature and application of both these legs are examined in this study
unit. Before you go any further, make certain that you know the definition of negligence well (especially as formulated in *Kruger v Coetzee* — see par 4.1, dealt with in the previous study unit).

**Footnotes**

The judgments discussed in the prescribed footnotes will help you to understand the nature of the test for negligence.

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**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 above on the aim of the following questions.)

1. Define negligence.
2. On which two legs does the test for negligence stand?
3. Describe the two divergent views on the nature of the foreseeability test for negligence and briefly indicate your preference.
4. What general/broad guideline can be used for the application of the foreseeability test for negligence? Discuss briefly.
5. Name the four considerations that play a role in the preventability aspect of the test for negligence, according to Van der Walt and Midgley. Give the name of an applicable judgment in the case of each of the considerations.
6. Discuss *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 (4) SA 523 (RA) in connection with the preventability aspect of the negligence test.
7. Compare *Gordon v Da Mata* 1969 (3) SA 285 (A) and *City of Salisbury v King* 1970 (2) SA 528 (RA) in connection with the preventability aspect of the negligence test.

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**FEEDBACK**

1. See paragraph 4.1.
2. See paragraph 4.6.
3. See paragraph 4.6.
4. See paragraph 4.6.
5. See paragraph 4.6.
6. See paragraph 4.6, footnote 143. (Answer in 5–7 sentences.)
7. See paragraph 4.6, footnote 148. In your answer clearly indicate the differences between the facts of the two cases and also explain why the two courts came to two different decisions.

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**CONCLUSION**

In this study unit you studied the foreseeability and preventability legs of the test for negligence. Did you achieve all the learning outcomes?
Fault: negligence judged in the light of the surrounding circumstances; negligence and duty of care; proof of negligence; relevance of negligence; wrongfulness and negligence

PREFACE

In the previous two study units you were introduced to the concept of negligence as a form of fault; you also analysed the test for negligence — the reasonable person test. Make sure that before you begin this study unit, you know the definition of negligence off by heart and can answer the questions set on the previous two study units.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- identify the general factors that are considered in determining whether negligence was present in a particular case and be able to apply this knowledge to a set of facts
- explain and apply the principles relating to the so-called doctrine of sudden emergency
- explain the English law’s “duty of care” doctrine, the criticism thereof, and the difference between “duty of care” and “legal duty”
- write brief notes on the application of the onus of proof in the case of negligence and, in particular, the res ipso loquitur maxim
- explain the difference between wrongfulness and negligence
**STUDY**

**Prescribed book**
- chapter 4, paragraphs 4.7, 4.8, 4.9 and 4.11

**READ**

**Prescribed book**
- chapter 4, paragraph 4.10
- footnotes 155, 159, 160 and 171

**COMMENTARY**

This is the third study unit on negligence. You must have completely mastered the previous two study units before you start studying this study unit.

Quite a few aspects of this form of fault are discussed:

In paragraph 4.7 the factors that must be taken into consideration in the determination of negligence are discussed under the heading “Negligence judged in the light of the surrounding circumstances”. Note especially the so-called doctrine of sudden emergency.

In paragraph 4.8 the concept “duty of care”, which has often led to much confusion, is examined. Distinguish especially between “duty of care”, which is relevant to negligence, and “legal duty” (egspilg), which is used in the case of wrongfulness.

In paragraph 4.9 we discuss the proof of negligence and, in this connection, the concept res ipsa loquitur (the facts speak for themselves).

In paragraph 4.10 the concept “relevance of negligence” is considered. Read this paragraph.

In paragraph 4.11 the difference between wrongfulness and negligence is dealt with. **It is of the utmost importance that you understand this difference well.** Students who confuse wrongfulness and negligence (and the tests applicable to each), will be unable to master the law of delict.

**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

(1) “The negligence of an act must always be judged in the light of the circumstances of the particular case.” Discuss this statement and name the factors that play a role when evaluating the circumstances of the case.
(2) “The same degree of care is always required of a person, regardless of whether he is dealing with ‘normal’ or disabled people.” Is this statement correct? Discuss briefly.

(3) A, who is wearing a pair of shorts, smokes a pipe while driving his car. An ember falls from his pipe and burns his bare leg. At the same time a bee, which has flown in through the open window, stings him on his upper lip. While trying to get rid of the ember and to kill the bee, A collides with B’s parked car. In the action brought by B against A, A alleges that in the light of the particular circumstances of the case, he did not act negligently. Discuss the merits of A’s defence.

(4) A enters an intersection while the traffic light is green for him and collides with B’s vehicle, which enters the intersection against the red light. The first time that A notices B’s car is at the moment the two cars collide. B concedes that he was negligent, but alleges that A was also negligent because A did not look where he was going and did not take steps to avoid the collision. Discuss the merits of B’s allegation.

(5) A is driving at 60 km/h during a downpour one night when he crashes into B’s vehicle. The speed limit is 60 km/h. B alleges that the fact that A was driving at 60 km/h amounts to negligence. A’s defence is that he did not exceed the speed limit and was therefore not negligent. Will A succeed with his defence? Discuss briefly.

(6) How is negligence determined according to the duty-of-care approach, and what criticism can be levelled against this approach?

(7) On whom does the duty to prove the defendant’s negligence rest?

(8) A collision takes place between the vehicles of A and B after A’s vehicle crosses over onto the wrong side of the road. The collision therefore takes place on what is the wrong side of the road for A. Indicate how B may apply the res ipsa loquitur doctrine to assist in proving A’s negligence.

(9) Describe the test for wrongfulness and the test for negligence and name the factors that may be applied to distinguish between the two tests.

(10) B holds a revolver to A’s head and commands A to kill the sleeping C with a knife. A obeys B, fearing for his life. Afterwards, it appears that the revolver is a toy and that A’s life was never in danger. Did A act (a) wrongfully and (b) negligently? Discuss with reference to the tests for wrongfulness and negligence and refer to case law.

(11) Briefly discuss the difference between wrongfulness and negligence in the case of an omission.

(1) See paragraph 4.7.

(2) See paragraph 4.7(b). Greater care is expected when a person deals with individuals who suffer from some disability or incapacity, for instance deaf-mutes, the blind, children and intoxicated persons.

(3) See paragraph 4.7(c). The question is whether the sudden emergency that A experienced caused him not to be negligent. Test the given facts against each of the three requirements for non-liability in a sudden emergency (see par 4.7(c)(i)–(iii)). For example, did A cause the perilous situation through his own negligence or imprudence (by smoking a pipe next to an open window)? If so, he did not act as a reasonable person and he cannot claim that he was not negligent on the basis of the doctrine of sudden emergency.

(4) This matter is discussed in paragraph 4.7(d). Does a person act reasonably if he/she
accepts that another person will act reasonably (like a reasonable person), for example by stopping at a red traffic light? This is generally the case, but is not necessarily so in modern traffic conditions.

(5) See paragraph 4.7(f) and footnote 171. With this example we want to illustrate that complying with a statutory provision does not necessarily mean that a person is acting as a reasonable person (just as infringement of a statutory provision does not necessarily amount to negligence in terms of private law, but may, at most, be an indication of negligence). It depends on the circumstances.

(6) See paragraph 4.8.

(7) See paragraph 4.9.

(8) See paragraph 4.9 for a detailed explanation. On the ground of the maxim res ipsa loquitur (the facts speak for themselves), the court may infer negligence on the part of the defendant (A). B proves that the accident took place on what was the wrong side of the road for A. Should A fail to come forward with another explanation, the court may, on the proven facts, infer that A was probably negligent. This does not mean that a presumption of negligence on the part of A arises. Res ipsa loquitur is an argument on the probabilities, which a plaintiff (B), who may have little evidence at his/her disposal, may use in order to convince the court that the defendant (A) acted negligently.

(9) The matter is discussed in detail in paragraph 4.11. The distinction between the test for wrongfulness (the objective reasonableness criterion) and the test for negligence (the reasonable person test) is very important and you must make sure that you understand it.

(10) The given problem is based partly on the facts of S v Goliath 1972 (3) SA 1 (A) and is discussed in detail in paragraph 4.11. This question is a good test of your understanding of the important difference between wrongfulness and negligence.

(11) See paragraph 4.11 for a discussion. It is useful to study this question with reference to the facts in Minister of Forestry v Quahlamba 1973 (3) SA 69 (A).

**CONCLUSION**

A number of important matters in connection with wrongfulness and negligence were discussed in this study unit. Make sure that you achieved the learning outcomes.
Fault: contributory fault

The previous four study units dealt with fault on the part of the defendant. The two forms of fault known as intent and negligence were discussed. We will now deal with fault on the part of the plaintiff.

After studying this study unit, you should be able to

- write brief notes on the meaning and relevance of the term “contributory fault”
- explain the common-law position regarding contributory fault and be able to apply this knowledge to factual examples
- explain the terms, meaning and effect of the Apportionment of Damages Act 34 of 1956 and be able to apply this knowledge to factual situations

Prescribed book

- chapter 4, paragraphs 5.1, 5.2 and 5.3
- footnote 264

Judgments

- Union National South British Insurance Co Ltd v Vitoria 1982 (1) SA 444 (A)
- General Accident Versekeringsmaatskappy Bpk v Uljs NO 1993 (4) SA 228 (A)
While the concept of fault is linked with the defendant (see the previous four study units — study units 15 to 18), contributory fault refers to the plaintiff (see this and the following study unit — study units 19 and 20). In practice, contributory fault plays an important role because contributory fault on the part of the plaintiff can limit the extent of the defendant’s liability; in other words, the plaintiff’s claim is reduced (and in some cases, even excluded) when he/she bears contributory fault in respect of the damage.

Paragraph 5.1 is a short introduction to the subject. In paragraph 5.2 the common-law position in respect of contributory fault is set out briefly. At present, contributory fault is regulated by the Apportionment of Damages Act 34 of 1956. The provisions and effect of the Act are dealt with in the various subsections of paragraph 5.3.

Judgments

The cases you must read relate mainly to the material in paragraph 5.3. You must study the prescribed sections in your textbook carefully before you read the cases.

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Briefly distinguish between the concepts of fault and contributory fault.

2. Give a short summary of the common-law position regarding contributory fault.

3. Briefly summarise the contents of sections 1(1)(a) and 1(1)(b) of the Apportionment of Damages Act 34 of 1956 and give a short explanation of how these provisions have changed the common-law position.

4. A intentionally drives into B’s car. B is found to have acted negligently. B institutes a claim against A for the damage to his car. A alleges that the claim should be reduced in the light of B’s negligence. Will A’s plea be successful? Discuss briefly.

5. A intentionally drives into B’s car. B is found to have acted negligently. B institutes a claim against B for the damage to his car. A alleges that A’s claim cannot succeed in the light of A’s intentional conduct. Will B’s plea be successful? Discuss briefly.

6. A and B both intentionally drive their cars into each other. A institutes a claim against B. Can the Apportionment of Damages Act 34 of 1956 be applied in this situation?


8. Explain, with reference to the developments in case law, how damage caused by a negligent defendant and a contributorily negligent plaintiff should be apportioned between the two parties.

9. A and B were both negligent in respect of A’s damage. A was 40 per cent negligent. Is the following statement correct? “B is then, of necessity, 60 per cent negligent.” Briefly discuss with reference to case law.

10. On whom does the burden of proving contributory negligence rest? Discuss briefly.

11. X gives Y a lift in her car. While driving, X talks continuously on her cellphone and also touches up her make-up. Eventually X loses control and drives into a tree. Y,
who had not fastened her seat belt, is injured in the accident. She is hospitalised and incurs hospital costs of R10 000. It transpires that if Y had fastened her seat belt, her hospital costs would have amounted to only R6 000. Y institutes a damages claim of R10 000 against X. X approaches you for legal advice. Advise X, referring to applicable legislation and case law. (Assume, for the purpose of your answer, that the provisions of the Road Accident Fund are not applicable to this set of facts.)

(12) Does contributory negligence pertain to the damage-causing event or the damage itself? Explain.

(1) See paragraph 5.1.

(2) See paragraph 5.2.

(3) See paragraph 5.3.1.

(4) See paragraph 5.3.2. Here the defendant (A) acts intentionally and the plaintiff (B) negligently. Because A acted intentionally, he will fail with his plea that B's claim should be reduced in the light of B's negligence.

(5) See paragraph 5.3.2. Here the plaintiff (A) loses his claim against the negligent B because he (A) acted intentionally.

(6) See paragraph 5.3.2. In light of the wording used in the long title of the Act and the heading of section 1 (where reference is made to negligence only), as well as to the historical background to the Act, it would appear that the legislature intended to make provision only for the defence of contributory negligence and not the defence of contributory intent. The Supreme Court of Appeal has not yet conclusively decided this issue, but has, on occasion, expressed its doubt whether a defence of contributory intent may be raised in terms of the Act. However, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1977 (2) SA 691 (W), the court held that section 1(1)(a) was applicable where both the plaintiff and the defendant had acted with intent.

(7) See paragraph 5.3.4: the answer is in the negative. Why?

(8) See paragraph 5.3.4. In principle, the respective degrees of negligence of the parties concerned must be compared. You should be familiar with the seemingly divergent views in case law on the manner in which this comparison should take place: compare *Jones v Santam Bpk* 1965 (2) SA 542 (A) (the “Jones approach”) and *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) (the “Nomeka approach”). Also study the view that these two approaches are actually compatible, and the view of the Appellate Division in *General Accident Versekeringsmaatskappy SA Bpk v Uijt 1993* (4) SA 228 (A) (one of the cases you should study), namely that the extent of the plaintiff's fault is but one of a number of factors that can be considered by the court to reduce the plaintiff's damages on the basis of equity and justice.

(9) See paragraph 5.3.4. This statement represents the so-called Nomeka approach. You should set out this approach, compare it with the Jones approach, and make a choice between the two. Also take note of the view that the two approaches are actually reconcilable.

(10) See paragraph 5.3.5.

(11) See paragraph 5.3, especially 5.3.1, 5.3.4 and 5.3.7. From the given facts, we can conclude that the defendant has been negligent, but the plaintiff appears to have been
negligent too. Thus we must consider whether contributory negligence was present. Contributory negligence is negligence on the part of the plaintiff, and it is a defence that the defendant can raise. The Apportionment of Damages Act 34 of 1956 is applicable. This Act provides that a contributorily negligent plaintiff's damages be apportioned. The court will determine the degree of deviation from the reasonable person standard shown by the conduct of both the defendant and the plaintiff, express the deviation as percentages, and use these percentages as a basis for the apportionment. According to the Smit 1962 3 SA 826 (A) and Nomuka 1976 3 SA 45 (A) cases, the percentages of negligence attributed to the defendant and plaintiff respectively will always add up to a hundred per cent. According to Jones NO v Santam Bpk 1965 2 SA 542 (A), both percentages must be assessed independently, which could mean that, for example, a defendant may be 80% negligent while the plaintiff is 30% negligent. According to Neethling and Potgieter, the approach in Jones is to be preferred, but the two approaches can be reconciled. According to King v Pearl Insurance Co Ltd 1970 1 SA 462 (W), a defence of contributory negligence could not succeed where the plaintiff had omitted to wear a crash-helmet while driving a scooter, but had not been negligent in respect of causing the accident. However, in Bowkers Park Komga Cooperative Ltd v SAR and H 1980 1 SA 91 (E), the court held that contributory negligence did not refer to negligence in respect of the damage-causing event, such as a motorcar accident, but to negligence in respect of the damage itself, and this was confirmed by the Appellate Division in Union National South British Insurance Co Ltd v Vitora 1982 1 SA 444 (A) and General Accident Verskondingsmaatskappy SA Bpk v Uijis 1993 4 SA 228 (A). Therefore, failure to wear a seat belt would constitute contributory negligence if it contributed to the plaintiff's damage. Applying these principles to the facts, we can conclude that Y was contributorily negligent and that her damages will be apportioned. She will be awarded R6 000 plus a portion of the R4 000 damage to which she contributed, taking into account her and X's respective degrees of negligence.

(12) See paragraph 5.3.7.

CONCLUSION

In this study unit you were introduced to the concept of contributory fault. The provisions and meaning of the Apportionment of Damages Act 34 of 1956 are of particular importance in practice. Answering the self-assessment questions should assist you in mastering the study material. Did you achieve all the learning outcomes?
Fault: voluntary assumption of risk and contributory fault (contributory intent)

PREFACE
In the previous study unit you were introduced to the concept of contributory fault (particularly in the form of contributory negligence) and the provisions of the Apportionment of Damages Act 34 of 1956. This study unit deals with a related topic, namely contributory intent. In this case the question is as follows: what effect will the plaintiff's intentional conduct in respect of the damage have on his/her claim?

LEARNING OUTCOMES
After studying this study unit, you should be able to

- distinguish between the following concepts: volenti non fit iniuria, consent to injury, consent to the risk of injury, voluntary assumption of risk, contributory intent and contributory negligence
- distinguish between voluntary assumption of risk by the plaintiff as ground of justification excluding wrongfulness, and voluntary assumption of risk on the part of the plaintiff as a type of ground excluding fault which excludes the defendant's negligence
- discuss the case law discussed in your textbook as an illustration of contributory intent
- discuss the connection between the doctrine of voluntary assumption of risk and the so-called rescue cases
- explain the importance of the decision in Greater Johannesburg Transitional Metropolitan Council v ABSA Bank (a Volkskas Bank 1997 (2) SA 591 (W) in respect of the defence of contributory intent

STUDY

Prescribed book
- chapter 3, paragraph 7.5.1 (the last paragraph dealing with terminology)
- chapter 3, footnote 502
- chapter 4, paragraph 5.3.2
- chapter 4, paragraph 5.4
- chapter 4, footnotes 291 and 293

**Judgment**

- *Lampert v Hefer* 1955 (2) SA 507 (A)
- *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank t/a Volkskas Bank* 1997 (2) SA 591 (W)

**Commentary**

In this study unit we consider what effect the plaintiff’s intent will have on the claim he/she institutes against a defendant who has acted negligently or intentionally. The facts in the *Lampert* case (see par 5.4.2) make it easier to understand the relevant principles.

Note that contributory intent (a ground for the cancellation of fault) is also known as voluntary assumption of risk (par 5.4.1). As was previously explained, the latter concept is also sometimes used in the sense of consent to the risk of injury, which is a ground of justification (see ch 3, par 6.5.1 above). It is therefore essential that you have absolute clarity on the terminology used in connection with consent as a ground of justification, contributory negligence and contributory intent. Therefore, review the applicable sections of chapter 3, paragraph 6.5.1 above before you tackle this study unit. Also revise chapter 4, paragraph 5.3.2.

**Self-Assessment**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Give the different meanings of the concept “voluntary assumption of risk”.
2. Distinguish between consent to the risk of injury and contributory intent.
3. What is meant by the concept “contributory intent”? Explain its effect briefly.
4. Do our courts accept the defence of contributory intent for the purposes of the Apportionment of Damages Act 34 of 1956?
5. Discuss *Lampert v Hefer* 1955 (2) SA 507 (A) inasmuch as the decision is of importance for the defence of contributory intent.
6. In practice, does it make a difference whether the plaintiff has acted negligently or intentionally, or whether he/she has given consent to the risk of injury? Discuss.
7. Can contributory intent and contributory negligence overlap? Discuss briefly with reference to case law.
8. Discuss contributory intent and consent to the risk of injury with reference to the facts and decision in *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 (1) SA 412 (A).
9. X negligently sets a house alight. Y runs into the burning house to save his jacket and
is injured by the flames. Y institutes a claim against X on the ground of his personal injuries. What defences can X raise against the claim? Discuss briefly.

(10) X negligently sets a house alight. Y runs into the burning house to save a baby and is injured by the flames. Y institutes a claim against X on the ground of his personal injuries. Will X succeed with his defence that Y acted with contributory intent or contributory negligence? Discuss briefly.

(11) What is the importance of Greater Johannesburg Transitional Metropolitan Council v ABSA Bank /v Volkskas Bank 1997 (2) SA 591 (W) in respect of contributory intent? Discuss briefly.

FEEDBACK

(1) See chapter 3, paragraph 7.5.1 and chapter 4, paragraph 5.4.1.
(2) See chapter 3, paragraph 7.5.1 and chapter 4, paragraph 5.4.1.
(3) See paragraphs 5.4.1 and 5.3.2.
(4) See paragraphs 5.4.1, 5.4.2 and 5.3.2. Note the importance of the Greater Johannesburg case.
(5) See paragraph 5.4.2. Remember that you should study the Lampert case in so far as the decision is of importance for the defence of contributory intent.
(6) See chapter 3, paragraph 6.5.1 and chapter 4, paragraph 5.4.2. The question is answered specifically in footnote 410 of the former paragraph. Briefly, if the plaintiff gave consent to the risk of injury, the defendant goes free. On the other hand, contributory negligence is not a complete defence, but the claim of the plaintiff who bears contributory negligence may be reduced by the court in proportion to the degree of his/her contributory negligence. If the plaintiff acted with contributory intent, the result depends on the form of fault on the part of the defendant. If the defendant was negligent, the defendant goes free. If the defendant acted with intent, the contributorily intentional plaintiff's claim will be reduced if the Greater Johannesburg case is followed (cf also study unit 19 above).
(7) See paragraph 5.4.2. Fagan JA declared in the Lampert case that contributory intent and contributory negligence can overlap. Note the explanation in the textbook as to why his statement is incorrect.
(8) See paragraph 5.4.2.
(9) See paragraph 5.4.3, where the answer is provided with reference to the same set of facts.
(10) These facts are specifically discussed in paragraph 5.4.3 of your textbook.
(11) See paragraph 5.3.2.

CONCLUSION

Once again, you are encouraged to master the terminology used in connection with contributory fault. You have now completed fault as an element of delict. Did you achieve all the learning outcomes?
Causation: general; factual causation

The first four chapters of the prescribed book have now been dealt with: the introduction to the law of delict (ch 1), as well as the first three elements of a delict, namely the act (ch 2), wrongfulness (ch 3) and fault (ch 4). In the following four study units (21–24) we will focus on chapter 5 of the textbook, in which the fourth element of delict, causation, is discussed.
LEARNING OUTCOMES

After studying this study unit, you should be able to

- distinguish between factual and legal causation
- explain the operation of the conditio sine qua non doctrine, and be able to apply it to factual situations
- write brief notes on the criticism of the conditio sine qua non doctrine
- explain the apparent application of conditio sine qua non in the case of an omission, and be able to apply this knowledge to factual situations
- explain the correct method of determining a factual causal relationship and be able to apply it to factual examples

STUDY

Prescribed book

■ chapter 5, paragraphs 1 and 2

COMMENTARY

This is the first study unit on the element of delict known as causation. You will note that factual causation is distinguished from legal causation. The latter concept is also sometimes referred to as remoteness of damage. (In Afrikaans it is referred to as juridiese kousaliteit, aansprakelekkindsbegrensing or die toerekenbaarheidsvereiste.) It is important that you understand the difference between factual and legal causation from the outset.

In this study unit we start with a brief introduction to causation (par 1). In paragraph 2 the conditio sine qua non approach is discussed (par 2.2,) and then criticised (par 2.3–2.4). Finally, we explain the correct approach – in our opinion – to determine factual causation (par 2.5).

SELF-ASSESSMENT

(See study unit 1 par 1.2.2.2 above on the aim of the following questions.)

(1) Briefly distinguish between factual and legal causation.

(2) While rushing to catch a train, X bumps into Y, a frail old lady. Y falls and breaks a leg. She is admitted to hospital and her leg is set in plaster. She is then given a set of crutches and is discharged from the hospital. A week later, while using her crutches, Y slips on a smooth floor, falls again and breaks her arm. Is there a factual causal link between X’s conduct and Y’s broken arm? Discuss.
FEEDBACK

(1) See paragraphs 1 and 2.1. (See also paragraph 3.1.) It is very important to understand the distinction between factual and legal causation from the outset. Therefore, make sure that you fully understand this distinction before you proceed.

(2) See paragraph 2. The generally accepted test for factual causation is the conditio sine qua non test, or “but for test”. This entails mentally eliminating, or thinking away, the conduct. If the damage then also disappears, a factual causal link is present between the conduct and the damage. This test is subject to much criticism. Among others, it is said to be based on circular logic and is, at best, a way to express the existence of a causal nexus that has been determined in another way. Neethling and Potgieter argue that evidence and human experience are sufficient to determine whether one fact flowed from another fact, and that a so-called test of factual causation is superfluous. However, the courts consistently state that the conditio sine qua non is the test of factual causation. If we apply the test to the facts, we must conclude that if X had not bumped Y, she would not have broken her arm, and therefore a factual causal link is present between X's conduct and Y's damage.

CONCLUSION

In this study unit factual causation was concluded. Did you achieve all the learning outcomes?
Causation – legal causation: general; the flexible approach; adequate causation; direct consequences

In the previous study unit you were introduced to the concepts of factual causation and legal causation, and factual causation was dealt with in detail. The following three study units are concerned with legal causation.

![Diagram](image-url)
LEARNING OUTCOMES

After studying this study unit, you should be able to

- distinguish between the concepts of factual and legal causation
- discuss the meaning, operation and function of legal causation
- name the different tests for legal causation
- explain the flexible approach to legal causation, as applied by the courts, and be able to apply it
- explain adequate causation as a specific test for legal causation, and be able to apply it
- explain the direct consequences theory as a test for legal causation, and be able to apply it

STUDY

Prescribed book

- chapter 5, paragraphs 3.1, 3.2, 3.3 and 3.4
- footnotes 82, 83, 85 and 100

Judgments

- *S v Makgethi* 1990 (1) SA 32 (A)
- *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)

COMMENTARY

In this study unit you will gain a better understanding of legal causation in general (par 3.1), the flexible approach, as formulated by the Appellate Division (par 3.2), and two further theories of legal causation, namely adequate causation (par 3.3) and direct consequences (par 3.4).

Once again, first make sure that you know exactly what is meant by the concepts of factual and legal causation, as well as the difference between them. Footnotes 85 and 100 contain interesting factual scenarios that will make this aspect clearer to you.

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

(1) What is meant by the concept “legal causation”?
(2) Briefly distinguish between factual and legal causation.
(3) Give two synonyms for “legal causation.”
(4) What is meant by the following statement: “It would be incorrect to describe legal causation as the only mechanism for limitation of liability in delict.” Discuss briefly.

(5) Name five theories of legal causation.

(6) Describe the flexible approach to legal causation, as formulated by the Appellate Division.

(7) Briefly set out the facts of *S v Mokgethi* 1990 (1) SA 32 (A) and state the views for which the case serves as authority.

(8) What is the relationship between the flexible approach to legal causation and the traditional causation theories?

(9) Briefly explain the content and operation of adequate causation as a test for legal causation.

(10) Name an advantage that the theory of adequate causation may have over reasonable foreseeability as a test for legal causation.

(11) Briefly explain the content and operation of direct consequences as a test for legal causation.

(12) How has the direct consequences theory been influenced by the foreseeable plaintiff doctrine? Discuss briefly.

(13) Do direct consequences still have a possible role to play in our law? Discuss briefly.

(14) Formulate your own set of facts, similar to that in the *Alston* or *Mokgethi* case, and indicate how the Supreme Court of Appeal would solve the problem of legal causation.

(15) While rushing to catch a train, X bumps into Y, a frail old lady. Y falls and breaks a leg. She is admitted to hospital and her leg is set in plaster. She is then given a set of crutches and is discharged from the hospital. A week later, while using her crutches, Y slips on a smooth floor, falls again and breaks her arm. Is there a legal causal link between X’s conduct and Y’s broken arm? Discuss.

**Feedback**

(1) See paragraph 3.1, where this matter is discussed in detail.

(2) See paragraph 3.1 and footnotes 82 and 85. As we have stated repeatedly, it is very important for you to understand this distinction well.

(3) The synonyms for legal causation can be found in paragraph 3.1 and, especially, footnote 83.

(4) This involves the limiting role of the elements of a delict that establish liability, such as the act, wrongfulness, fault and damage. See paragraph 3.1 for a discussion of this.

(5) See paragraph 3.1.

(6) The flexible approach is discussed in paragraph 3.2. Note especially Van Heerden JA’s formulation thereof in *S v Mokgethi* 1990 (1) SA 32 (A) and the relationship between the flexible approach and the existing (traditional) legal causation theories. The facts of the *Mokgethi* case are briefly set out in footnote 100.

(7) See footnote 100 for the abbreviated facts of *Mokgethi*. The views for which the case can be considered as authority are set out in the prescribed casebook.
(8) See paragraph 3.2. Note especially the subsidiary role played by the existing tests for legal causation in respect of the application of the flexible approach.

(9) See paragraph 3.3.

(10) See paragraph 3.3.

(11) See paragraph 3.4.

(12) See paragraph 3.4.

(13) See paragraph 3.4.

(14) The facts of these two cases are set out in footnotes 85 and 100 respectively. The flexible approach of the Appellate Division is set out in paragraph 3.2.

(15) See paragraph 3, especially 3.2 and 3.7. The test for legal causation is the so-called flexible approach, as formulated in S v Mokgethi 1990 1 SA 32 (A) and International Shipping Co (Pty) Ltd v Bentley 1990 1 SA 680 (A). In Mokgethi a bank robber shot a teller. The teller was rendered a paraplegic and was discharged from hospital in a wheelchair. Subsequently, the paraplegic man failed to shift his body position in the chair frequently and developed pressure sores, eventually dying from complications. The question that arose was whether the shot fired by the robber was the legal cause of the teller’s death. According to the court, the main question in respect of legal causation is whether there is a close enough relationship between the wrongdoer’s conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.

Several other legal causation theories exist, such as adequate causation, direct consequences, foreseeability and novus actus interveniens. None of these criteria is suitable to be applied to all situations. They may, however, be used as subsidiary aids when employing the flexible approach. In the Mokgethi case, the court held that the shot was not a legal cause of the death. If these principles are applied to the facts in the question, the conclusion is probably that Y’s broken arm was too remote and should not be imputed to the wrongdoer. It could also be argued that a so-called novus actus interveniens, that is, a new intervening act, was constituted by Y’s second fall, and this strengthens the conclusion that there is no legal causal link between X’s conduct and Y’s broken arm.

CONCLUSION

For practical purposes, the flexible approach of the Supreme Court of Appeal is the most important. However, because the other (traditional) tests for legal causation may still play a subsidiary role in the application of the flexible approach, it is important for you to have a thorough understanding of their operation. Did you achieve all the learning outcomes for this study unit?
Causation — legal causation: fault

PREFACE

In the previous study unit you learnt more about legal causation and three of the theories of legal causation, namely the flexible approach, adequate causation and direct consequences. This is the second of three study units on legal causation. In it we discuss fault as a possible criterion for legal causation.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- write brief notes on the content of the so-called fault-in-relation-to-the-loss approach to legal causation
- explain why intent cannot serve as a criterion for legal causation
- explain why negligence cannot serve as a criterion for legal causation

STUDY

Prescribed book

- chapter 5, paragraph 3.5

COMMENTARY

In this study unit we illustrate the untenability of the view that limitation of liability can be applied satisfactorily only by way of fault.
SELF-ASSESSMENT

(See study unit 1, par. 1.2.2.2 on the aim of the following questions.)

1. Briefly explain how the adherents of the fault-in-relation-to-the-loss approach try to solve the question of imputability on the basis of fault.

2. What is the difference between the question of fault and the question of imputability?

3. Van der Merwe and Olivier are of the opinion that a person is liable for the consequences that were implicit in his/her intent. Furthermore, it is traditionally explained that “intended consequences ... can never be too remote”. Is this a valid statement? Briefly explain with the aid of an example.

4. With reference to the facts in Brown v Hoffman 1977 (2) SA 556 (NC), explain why intent does not succeed as a criterion for limitation of liability.

5. Which two approaches to imputability of damage does Boberg distinguish between in the case of negligence? Is his explanation valid? Explain briefly.

6. “Legal causation is concerned with a completely different question to that of fault.” Explain this statement with reference to an example of liability without fault.

FEEDBACK

1. The answer to this question can be found in the introductory parts of paragraph 3.5. According to this approach, a defendant is liable only for those consequences in respect of which he/she had fault.

2. To answer this question meaningfully, it is advisable for you to have worked through all the study material for this study unit. Note especially paragraph 3.5 (before reaching 3.5.1), as well as paragraph 3.5.2, where the matter is dealt with more directly.

3. See paragraph 3.5.1.

4. See paragraph 3.5.1.

5. See paragraph 3.5.2.

6. See paragraph 3.5.2. The example of the actio de pauperie or the facts of Thandani v Minister of Law and Order 1991 (1) SA 702 (EC) may serve as illustrations in answering this question.

CONCLUSION

As was apparent, it is important to distinguish clearly between, among other things, the delictual elements of fault (intent and negligence), on the one hand, and legal causation (imputability of harm), on the other hand, and to realise that intent and negligence cannot serve as exclusive criteria for the limitation of liability. Did you achieve all the learning outcomes?
Causation – legal causation: reasonable foreseeability; *novus actus interveniens*; so-called egg-skull cases (the *talem qualem* rule)

**LEARNING OUTCOMES**

After studying this study unit, you should be able to

- explain reasonable foreseeability as a test for legal causation and be able to apply it
- write brief notes on the relationship between reasonable foreseeability and the flexible approach to legal causation
- explain the meaning and role of an *actus novus interveniens* in the case of legal causation, and be able to apply this knowledge to factual situations
- explain the meaning and role of the so-called egg-skull cases with regard to legal causation, and be able to apply this knowledge to factual situations

**STUDY**

*Prescribed book*

- chapter 5, paragraphs 3.6, 3.7 and 3.8
- footnotes 231, 232 and 237
Judgment

- *S v Mokgethi* 1990 (1) SA 32 (A)

Commentary

This study unit is a continuation of the discussion on legal causation. Another theory of legal causation, **reasonable foreseeability**, is discussed in paragraph 3.6. In paragraph 3.7 the role of a **novus actus interveniens** (or new intervening cause) in the question of imputability is discussed. The so-called **egg-skull cases** are dealt with in paragraph 3.8.

Judgment

Consult study unit 22 again concerning the *Mokgethi* case.

Self-assessment

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Describe the relationship between reasonable foreseeability and the flexible approach as criteria for legal causation.

2. According to Van Rensburg, how must reasonable foreseeability, as a criterion for imputability, be approached?

3. What is a **novus actus interveniens**?

4. What is the approach of the Appellate Division in *S v Mokgethi* 1990 (1) SA 32 (A) to the role of a new intervening cause in respect of the question of legal causation?

5. What are the various ways in which a **novus actus interveniens** can occur?

6. Briefly explain what is meant by the concept of an egg-skull case.

7. Give an example from case law of an egg-skull case.

8. “Most jurists agree that in an egg-skull case the wrongdoer must also be liable for the harm which may be ascribed to the presence of the weakness. However, there is no agreement on how the liability of the wrongdoer for such harm should be explained, or which criterion for legal causation should be used to express liability in legal terms”. In the light of this statement, give an overview of the approaches suggested by Van Rensburg, Van der Walt and Midgley, as well as by Van der Merwe and Olivier, and then give your own point of view in this regard.

Feedback

1. See paragraph 3.6. You can also consult paragraph 3.2 again.

2. See paragraph 3.6; the criterion suggested by Van Rensburg is cited there.

3. See paragraph 3.7 for a definition of a **novus actus interveniens** (or new intervening cause).

4. The answer appears in footnote 232. (Also read fn 231 for a comment on the
relationship between a novus actus interveniens and the flexible approach to legal causation.)

(5) See paragraph 3.7.
(6) See paragraph 3.8.
(7) See footnote 237.
(8) The views of the jurists mentioned are set out in paragraph 3.8.

CONCLUSION

We have now concluded our discussion of the delictual element of causation (factual and legal causation). Did you achieve all the learning outcomes?
Damage: patrimonial loss and non-patrimonial loss

PREF LACE

Four of the elements of delict — the act, wrongfulness, fault and causation — have now been dealt with. The fifth element, damage, will be discussed in this study unit.

Note that you are not expected to study chapter 6 of the prescribed book as a whole. The chapter must be carefully marked according to the guidelines provided under the headings “STUDY” and “READ.”

FIGURE 25.1
LEARNING OUTCOMES

After studying this study unit, you should be able to

- write brief notes on the compensatory function of the law of delict
- define the concept of damage
- explain that damage is a wide concept, including both patrimonial and non-patrimonial loss
- define patrimonial loss
- write brief notes on a person’s patrimony
- explain the methods by which patrimonial loss and the extent thereof are determined in a particular case, and be able to apply these methods
- explain the “once and for all” rule, and be able to apply it
- explain the collateral source rule in one sentence
- write brief notes on the plaintiff’s duty to mitigate
- briefly explain what non-patrimonial loss (or injury to personality) is

STUDY

Prescribed book

- chapter 6, paragraphs 1, 2, 3.1, 3.2.1, 3.2.2 (only the first par), 4.1, 4.2, 4.5 (with its subdivisions), 4.6.1, 4.7.1, 4.8.1, 4.8.2, 4.9, 5.1 and 5.2

READ

Prescribed book

- the rest of chapter 6

COMMENTARY

Only one study unit is devoted to the element of damage in delict. However, this does not mean that the subject is unimportant. In fact, in practice, some of the most important delictual problems revolve around this element. Nevertheless, for the purposes of this introductory course, our main aim is to give you a thorough grounding in a few of the basic principles concerning the element of damage.

Although chapter 6 of your prescribed book does not have to be studied in its entirety, you must read the whole chapter thoroughly.
SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

(1) What does the concept “compensation of damages” mean?
(2) What does the concept “satisfaction” mean?
(3) What is meant by the statement that a wide concept of damage must be adopted?
   Answer briefly.
(4) Define patrimonial loss.
(5) What is the content of the comparative methods whereby patrimonial loss is established?
(6) At what moment is the damage determined for purposes of compensation for damages?
(7) What does the “once and for all” rule mean?
(8) What are the practical implications of the “once and for all” rule in the light of prescription, future damage and the instituting of more than one claim on the ground of a single cause of action?
(9) Explain compensating advantages in one sentence.
(10) Briefly explain what is meant by the plaintiff’s duty to mitigate.
(11) Explain the concept “non-patrimonial loss”.

FEEDBACK

(1) See paragraph 2.
(2) See paragraph 2.
(3) See paragraph 3.2.2.
(4) See paragraphs 4.1 and 4.2.
(5) See paragraphs 4.5.1. and 4.5.2.
(6) See paragraph 4.5.3.
(7) See paragraph 4.7.
(8) See paragraph 4.7.1.
(9) See paragraphs 4.8.1 and 4.8.2.
(10) See paragraph 4.9.
(11) See paragraphs 5.1. and 5.2.

CONCLUSION

The five elements of delict have now been dealt with. Remember that, in principle, all the elements should be present before a delict is established (as you already know, there are exceptions in cases of strict liability). Did you achieve all the learning outcomes?
The general requirements for delict (act, wrongfulness, fault, causation and damage) have now been dealt with. In the remaining study units, specific subjects related to the law of delict, as well as the specific forms of delict, are examined. In this study unit we discuss delictual remedies.

After studying this study unit, you should be able to

- name the different remedies that may be instituted on the basis of a delict (ie the so-called three pillars on which the law of delict rests, as well as the other delictual remedies)
- indicate whether the three main delictual actions are transmissible
- briefly discuss the purpose, forms, function and requirements of an interdict
- write brief notes on concurrence of remedies
- write brief notes on a so-called exclusionary clause
- explain the principles concerning prescription of remedies, and apply them

Prescribed book

- chapter 7 paragraphs 1, 2, 3.1, 3.6 and 4
READ

Prescribed book

- chapter 1 paragraphs 1 and 4
- chapter 7 paragraphs 3.2, 3.3, 3.4 and 3.5

COMMENTARY

Aspects of the delictual remedies are discussed in this study unit.

Chapter 7, paragraph 1 deals particularly with the transmissibility (heritability and cedability) of the *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering. A number of other delictual actions are also mentioned.

Paragraph 2 deals with the interdict. Note especially the purpose of the interdict and the requirements for the granting of an interdict.

In paragraph 3 the problem of the concurrence of actions is discussed. Here you need only study paragraph 3.1. The nature of the problem is examined briefly in this paragraph. You need only read paragraphs 3.2 to 3.5. Study paragraph 3.6 on exclusionary clauses.

In paragraph 4 you will learn about prescription of delictual remedies. Study this paragraph.

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Name the three actions that form the pillars of the South African law of delict.
2. Discuss the transmissibility (heritability or cedability) of the three better-known delictual actions.
3. What is the aim and function of an interdict in the law of delict?
4. What are the two forms that an interdict can take?
5. Name and discuss the three requirements for the granting of an interdict.
6. When does a concurrence of remedies occur?
7. What is an exclusionary clause?
8. Write a short note on the prescription of remedies in respect of the law of delict.
9. When does the period of prescription commence?

FEEDBACK

1. See paragraph 1.
2. See paragraph 1.
CONCLUSION

We have now concluded the discussion of the delictual remedies. Did you achieve all the learning outcomes?
Joint wrongdoers

PREFACE

In the previous study unit we discussed the delictual remedies. In this study unit (ch 8 of your prescribed book) we focus on joint wrongdoing.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- explain what a “joint wrongdoer” is, as defined in terms of the Apportionment of Damages Act 34 of 1956
- explain how joint wrongdoing is regulated in terms of the Apportionment of Damages Act 34 of 1956, and apply this knowledge to factual situations

STUDY

Prescribed book
- chapter 8 paragraph 1

READ

Prescribed book
- chapter 8, paragraph 2
Joint wrongdoing occurs where damage is not caused by one person only, but by more than one person. In this study unit (based on ch 8 of your prescribed book) the legal principles relating to the delictual liability of joint wrongdoers will be discussed.

Distinguish carefully between the concepts of contributory fault (refer back to study units 19 and 20) and joint wrongdoers.

Paragraph 1 contains a general introduction to joint wrongdoing. In paragraph 2, two particular instances of joint wrongdoing are examined: firstly, where a spouse suffers loss as a result of the conduct of the other spouse and a third person (and here marriages in community of property are distinguished from marriages out of community of property) (par 2.1); and secondly, where a person suffers prejudice as a result of the death or injury of another through the conduct of the deceased or injured person and a third party (and here prejudice owing to death is distinguished from prejudice owing to injury) (par 2.2). Read paragraph 2 for non-examination purposes.

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. What is a joint wrongdoer according to the Appointment of Damages Act 34 of 1956?

2. Briefly explain briefly how the court deals with joint wrongdoing today in terms of the Apportionment of Damages Act 34 of 1956.

3. X and Y break into Z's shop and steal the entire stock of Z's famous ginger beer. Z arrives at the scene just as they start to run away. Z recognises X. The police find X only after he and Y have drunk all the ginger beer. Z wants to claim damages from X. Can Z claim the whole amount of damages from X? How can X improve his own position?

4. Say Z in question (3) above has recognised both X and Y. Can he sue both of them in the same action? Who will be liable to pay the damages?

(1) See paragraph 1.

(2) See paragraph 1.

(3) See paragraph 1.

(4) See paragraph 1.

It is very important that you have a thorough understanding of joint wrongdoing. The factual situations in the self-assessment exercises will assist you in this regard. Did you achieve all the learning outcomes?
Specific forms of patrimonial loss
Psychological lesions (emotional shock)

In the following two study units specific forms of delicts causing patrimonial loss are dealt with.

Damage suffered as a result of psychological lesions is studied first. Psychological lesions may be caused in many different ways and may have many different negative results. A parent might, for example, suffer psychological lesions if his/her child is killed in front of his/her eyes.

After studying this study unit, you should be able to

- describe psychological lesions
- name the locus classicus (trendsetting case) in the field of psychological lesions
- name the two artificial restrictions on the delictual principles which were initially applied by our courts in determining liability for psychological lesions
- describe the two principles that were introduced by Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A) in the place of the two former restrictions
- name the factors that may play a role in determining whether psychological lesions were reasonably foreseeable

Prescribed book

- chapter 9, paragraph 3
Judgments

Memorise the names of the following cases as well as the principles decided therein, as discussed in the prescribed textbook:

- Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A)
- Barnard v Santam Bpk 1999 (1) SA 202 (SCA)

READ

Prescribed book

- chapter 9, footnote 102

COMMENTARY

In this study unit we deal with a specific form of *damnnum iniuria datum*, namely damage caused as a result of psychological lesions (emotional shock). Although psychological lesions are discussed under the heading of *damnnum iniuria datum* (ie delicts that involve patrimonial damage), it is important to remember that psychological lesions also result in infringement of a personality interest, namely bodily integrity. In theory, all three of the delictual remedies, namely the *actio legis Aquilia*, the *actio iniuriarum* and the action for pain and suffering (see study unit 26 to refresh your memory) could be relevant in an action for psychological lesions. The *actio legis Aquiliae* will, of course, be used to recover patrimonial damage, such as medical expenses. The action for pain and suffering will be used to claim compensation for the negligent infringement of bodily integrity, while the *actio iniuriarum* may only be used to claim satisfaction for an infringement of personality if it can be proved that the shock was caused intentionally.

The footnote that you must read, contains examples of cases of psychological lesions, which will help you to remember the principles involved.

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

(1) Explain what is meant by “psychological lesion”.

(2) Give an overview of the legal position in respect of emotional shock prior to the appeal court decision in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A).

(3) Write notes on the way in which *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) influenced delictual liability for causing psychological lesions.

(4) With reference to an example, briefly discuss the requirement that the damage resulting from psychological injury be reasonably serious to be actionable.

(5) What restrictions were imposed on the ordinary delictual principles that should have
been applied in respect of liability for psychological lesions prior to the *Bester* case? Do these restrictions still apply today? Discuss briefly.

(6) Name the factors that can influence the question of the reasonable foreseeability of psychological injury.

(7) “The so-called ‘thin skull’ rule finds application in the case of liability for psychological injury.” What is meant by this statement? Discuss briefly.

(8) Is liability excluded where the prejudiced party who suffered shock did not personally witness the disturbing incident, but learnt of it? Briefly discuss with reference to case law.

**FEEDBACK**

You will find all the answers to the above questions in paragraph 3 of chapter 9.

**CONCLUSION**

In this study unit we discussed a form of *damnum iniurio datum*, namely psychological lesions (emotional shock). Did you achieve all the learning outcomes?
Injury or death of another person; pure economic loss; negligent misrepresentation; interference with a contractual relationship; unlawful competition; manufacturer's liability

In the previous study unit we examined how causing a person to suffer psychological lesions is regarded as a specific delictual phenomenon. In this study unit — the second and last on the specific forms of delict that involve patrimonial damage — we look briefly at causing another person to suffer injury or death; pure economic loss; negligent misrepresentation; interference with a contractual relationship; unlawful competition; and manufacturer's liability as examples of specific forms of delict.

After studying this study unit, you should be able to

- explain what is meant by pure economic loss
- name five other specific forms of *damnum injuria datum*

Prescribed book

- chapter 9, paragraph 4 — the first paragraph (pp 290–291)
READ

Prescribed book

- chapter 9, paragraphs 2, 4, 5, 6, 7 and 8

COMMENTARY

In this study unit, six specific forms of *damnum injuria datum* are dealt with. For the purposes of this course, you need only take note of the existence of these topics. The learning outcomes and self-assessment exercises will indicate to you what is important for examination purposes.

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. What is meant by the concept “pure economic loss”? Discuss with reference to case law.

2. Name five other specific forms of *damnum injuria datum*.

FEEDBACK

1. See paragraph 4.

2. See paragraphs 2, 5, 6, 7 and 8.

CONCLUSION

We have now completed the discussion of the specific forms of patrimonial loss caused by a delict. Did you achieve all the learning outcomes?
Specific forms of *iniuria* (personality infringement)
The right to physical integrity; the right to a good name or *fama*; rights relating to *dignitas*

**PREFACE**

The previous two study units dealt with specific forms of patrimonial loss caused by delicts, whereas this study unit focuses on specific forms of personality infringement.

**LEARNING OUTCOMES**

After studying this study unit, you should be able to

- define defamation and give examples of this *inuria*
- name and discuss the elements of defamation
- name, discuss and apply the traditional grounds of justification for defamation
- discuss the grounds on which intent can be excluded in a case of defamation
- name five other forms of personality infringement
- explain what the right to dignity is and, briefly, how it is infringed
- explain what the right to privacy is and, briefly, how it is infringed
- explain what the right to identity is and, briefly, how it is infringed

**STUDY**

*Prescribed book*

- chapter 10, paragraphs 3.2, 4.1, 4.2 and 4.3
**Judgments**

Memorise the name of the following case as well as the principles decided therein as discussed in the prescribed textbook:

- *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)

**READ**

**Prescribed book**

- the rest of chapter 10

**COMMENTARY**

Paragraph 1 is a general introduction to the specific forms of personality infringement, while paragraph 2 is a discussion of rights in respect of physical integrity. Read these paragraphs.

Paragraph 3.1 is an introductory section on defamation. In this section the meaning of a person’s “good name”, as an aspect of personality property, is explained; the acts that, in principle, infringe *fama* are also discussed. Read this paragraph.

Paragraph 3.2 deals with defamation. In paragraph 3.2.1, defamation is described. You should know this definition off by heart. In paragraph 3.2.2 the following elements of defamation are considered: publication, defamatory effect or wrongfulness (and the grounds of justification known as privilege, truth and public interest, media privilege, political privilege and fair comment), intent (*animus injuriandi*) (and, in this regard, the grounds excluding fault known as mistake and jest), and negligence. You must study paragraph 3.2.

Paragraphs 3.3 and 3.4 deal with two other forms of infringement of the right to a good name. Read these two paragraphs for non-examination purposes.

In paragraph 4 the various rights in respect of *dignitas* are discussed. Read this entire section to obtain an overview of this part of the law and to enable you to achieve the last three learning outcomes of this study unit.

**SELF-ASSESSMENT**

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

1. Define the concept of defamation.
2. Name the requirements for the delict of defamation.
3. In which of the following situations can it be said that, according to the courts, publication of defamatory words has taken place? Substantiate your answer.
   
   a. Two Japanese tourists in South Africa start arguing and, in front of a group of South Africans, the one calls the other a liar and a thief.
(b) Mr X tells his wife, Mrs X, that Mrs Y, who works at the office with him, stole some money.

(c) Mr X tells Mr Y that his wife, Mrs Y, stole some money at the office.

(4) Discuss in detail the test to determine wrongfulness in the case of defamation. Also describe the principles that have crystallised in practice with regard to the application of this test.

(5) Mention the most important grounds of justification that are relevant in the case of defamation.

(6) Identify the ground of justification that a defendant in a defamation case may use in each of the following situations:

(a) P is a patient of doctor D. P develops breast cancer and D has to perform a mastectomy. The operation leaves P scarred, and she lays a complaint against the doctor with the Medical and Dental Council, which decides that the doctor acted as a reasonable doctor would have in the particular circumstances. D then accuses P of defaming him.

(b) During a court case in which S is accused of stealing money from her employer, a witness, W, testifies that he saw S taking money from the storeroom. S is later acquitted and wants to sue W for defamation.

(c) G and F are members of a town council. Both of them want to be the mayor of the town. During a public meeting that G arranges in order to address the townsfolk, F reveals that G was expelled from a university years ago because he was found guilty of cheating during an examination. G wants to sue F for defamation.

(7) Define privilege.

(8) Distinguish between the two forms of privilege as grounds of justification for defamation.

(9) Write a note on absolute privilege.

(10) Describe relative privilege and discuss the different fixed categories of relative privilege that have already been developed in our law.

(11) Write notes on the ground of justification known as “truth and public interest” in the case of defamation.

(12) Write brief notes on media privilege as a ground of justification.

(13) Write brief notes on political privilege as a ground of justification.

(14) Write notes on the ground of justification known as “fair comment” in the case of defamation.

(15) Discuss animus injuriandi as a requirement for defamation.

(16) Discuss the grounds excluding intent in the case of defamation.

(17) Is intent a requirement for liability of the press and other media in the case of defamation? Discuss.

(18) Name five other forms of personality infringement.

(19) Explain what the right to dignity is and, briefly, how it is infringed.

(20) Explain what the right to privacy is and, briefly, how it is infringed.

(21) Explain what the right to identity is and, briefly, how it is infringed.
(1) See paragraph 3.2.1.

(2) See paragraph 3.2.1.

(3) Publication did take place in (c), but not in (b), and probably not in (a). In (a) the South Africans probably did not understand the defamatory nature of the remarks (uttered in Japanese); and in (b) the communication of the defamatory words took place between spouses. See also the second paragraph of paragraph 3.2.2.1.

(4) Wrongfulness in respect of defamation lies in the infringement of a person’s right to good name (ānā). The test that is applied is whether, in the opinion of the reasonable person with normal intelligence and development, the publication has the tendency to lower the esteem in which the plaintiff is held by the community. It is very important to remember that this reasonable person test is not the reasonable person test used to determine negligence. This reasonable person test is an objective one, and is actually just a convenient way of expressing the boni mores or reasonableness criterion, which is, of course, the normal test for wrongfulness. It is also clear that the words used need not actually lower the plaintiff’s reputation or the esteem in which he or she is held – the reasonable person (as a concretisation of the boni mores) must merely think that the words will probably have that effect. For the specific principles that have crystallised in practice with regard to the application of the reasonable person (man) test, you should consult paragraph 3.2.2.2 (a)(g).

(5) The traditional grounds of justification applicable in the case of defamation are privilege, truth and public interest, and fair comment – see paragraph 3.2.2.3.

(6) The question requires you to identify (ie name) a ground of justification that may be available to the defendant in each case. Although you were not asked to discuss these grounds of justification, you should be able to discuss the possibility of success in each case, should this be asked in an assignment or the examination. Therefore, make sure that you know the details of each ground of justification.

(a) Relative privilege will be the applicable defence, since the supervisory body (the Medical and Dental Council) has a duty to hear patients’ complaints about their doctors, and a patient that feels aggrieved surely has a right to complain to the Council. Remember that the defence of relative privilege is only a provisional defence, and the doctor can always prove that the patient acted with an improper motive, in which case the ground of justification falls away (see par 3.2.2.3.1(a)).

(b) Here, too, relative privilege is the relevant ground of justification, since all defamatory remarks made during a judicial proceeding are privileged, as long as the remarks are relevant and supported by reasonable grounds (see par 3.2.2.3.1(b)).

(c) The relevant defence will be truth and public interest. Surely it must be in the public interest to know about the dishonesty of a person running for public office. However, the fact that past transgressions should not be raked up after too long a time is also a factor that should be considered when deciding whether the defence should be upheld (see par 3.2.2.3.2).

(7) See paragraph 3.2.2.3.1.

(8) The question refers to absolute and relative privilege. Make sure that you know the difference between the two forms (see par 3.2.2.3.1).

(9) See paragraph 3.2.2.3.1.
(10) See paragraph 3.2.2.3.1.
(11) See paragraph 3.2.2.3.2.
(12) See paragraph 3.2.2.3.3.
(13) See paragraph 3.2.2.3.4
(14) See paragraph 3.2.2.3.5.
(15) See paragraph 3.2.2.4.1.
(16) See paragraph 3.2.2.4.2.
(17) See paragraph 3.2.2.4.3 and especially *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).
(18) See paragraphs 2.2, 2.2.2, 2.3.2, 2.3.3, 3.3, 3.4, 4.1, 4.2, 4.3, 4.4.1, 4.4.2 and 4.4.3.
(19) See paragraph 4.1.
(20) See paragraph 4.2.
(21) See paragraph 4.3.

**CONCLUSION**

In this study unit you studied defamation and noted the existence of other forms of *injurie*. Did you achieve all the learning outcomes?
Forms of liability without fault
General: Damage caused by animals

PREFACE

All the preceding study units dealt with instances where all five delictual elements (refer to study unit 2 again) must, in principle, be present for delictual liability (if we ignore that unique remedy, the interdict (study unit 26), for the time being). The following two study units deal with certain important exceptions where fault (either intent or negligence) is not a requirement for liability. This is known as ‘liability without fault’ or ‘strict liability’.

In this study unit we discuss liability without fault for damage caused by animals.

LEARNING OUTCOMES

After studying this study unit, you should be able to

- discuss the requirements for the actio de pauperie and apply them to a given factual situation
- discuss the requirements for the actio de pastu and apply them to a given factual situation

STUDY

Prescribed book

- chapter 11, paragraphs 2.1.1.1 and 2.1.1.2
- footnote 44

READ

Prescribed book

- chapter 11 paragraphs 1, 2.1.1.3 and 2.1.1.4
COMMENTARY

In this study unit you will learn about the origin and development of liability without fault and you will study two common-law instances of liability without fault that are still important in South African law.

In paragraphs 1.1 and 1.2 we discuss the predominance of the fault theory (ie the view that there can be no delictual liability in the absence of either intent or negligence), as well as the reaction to the given theory. In paragraph 1.3, justification for liability without fault is examined. In paragraph 1.4, the general characteristics of liability without fault are given. Read these paragraphs as background information, not for examination purposes.

Paragraph 2 deals with the South African law on liability without fault. This study unit deals with paragraph 2.1.1, in which damage caused by animals is discussed. Study the requirements for the actio de pauperie and the actio de pastu carefully so that you can name and discuss them and also apply them to a given set of facts.

SELF-ASSESSMENT

(See study unit 1, par 1.2.2.2 on the aim of the following questions.)

(1) Discuss in detail the requirements for success with the actio de pauperie with reference to case law, as well as the defences that can be raised against the action.

(2) In which instances is the actio de pastu applied?

(3) Discuss in detail the requirements for success with the actio de pastu with reference to case law, and name the defences that can be raised against the action.

(4) Answer the following questions in respect of each of the factual situations described below:

  (i) What action is available to B in order to recover the damages?
  (ii) Against whom does B institute the action?
  (iii) How would you substantiate your answer?

  (a) B is delivering mail to A’s house and A’s dog bites her.
  (b) B plans to visit her friend, C, who is looking after A’s house. C mentions to B that there is a vicious dog on the premises, but promises to have the dog locked up before B arrives. B arrives at the appointed time, but on entering the premises, the dog comes running around the corner of the house and bites her leg.
  (c) A’s cattle graze on B’s crops after one of A’s employees left the gate between A and B’s farms open.

FEEDBACK

(1) See paragraph 2.1.1.1.

(2) See paragraph 2.1.1.2.
(3) See paragraph 2.1.1.2.

(4) (a) (i) The actio de pauperie.
   (ii) Against the owner, A.
   (iii) All the requirements for the action are met: A is the owner of the dog, the
dog is a domesticated animal, B was lawfully on the premises, and the dog acted contra naturam sui generis. There is no defence available to the
owner, because nothing is said about a third party provoking the animal or
being negligent in supervising the dog (see par 2.1.1.1).

(b) (i) The actio legis Aquiliae and action for pain and suffering
   (ii) Against C.
   (iii) The owner cannot be liable in terms of the actio de pauperie where a third
party was in control of the animal and acted negligently. The third party, C,
is liable because of her negligence (see Lever v Purdy 1993 (3) SA 17 (A),
par 2.1.1.1 and fn 43). The plaintiff must therefore institute ordinary
delictual actions for patrimonial loss (medical costs, etc) and pain and
suffering.

(c) (i) The actio de pastu.
   (ii) Against A.
   (iii) All the requirements for the action are met: A is the owner of the animals,
the animals caused damage by grazing the crops, and the animals acted on
their own volition. Note that the negligence of a third party (the employee)
does not exclude the owner’s liability (see par 2.1.1.2).

CONCLUSION

In this study unit you studied liability without fault or strict liability for damages caused
by animals. Did you achieve all the learning outcomes?
Vicarious liability

In the previous study unit you learnt about the concept “liability without fault” and we paid particular attention to actions on the basis of which a person can claim for damage caused by animals.

In this study unit, we round off the chapter in your prescribed book on liability without fault with a discussion of vicarious liability (i.e., where one person is held liable for a delict committed by another person).

After studying this study unit, you should be able to

- define vicarious liability
- name three relationships where vicarious liability may apply
- name and discuss the requirements for an employer’s liability for a delict committed by an employee
- name the requirements for liability of the owner of a motor vehicle for a delict committed by the driver of the motor vehicle

Prescribed book
- chapter 11,
- paragraphs 2.1.7.1, 2.1.7.2 and 2.1.7.4
Prescribed book

- Chapter 11, paragraphs 2.1.7.3 and 2.2

Commentary

In this study unit we continue our discussion of liability without fault.

Paragraph 2.1.7 deals with vicarious liability (middellike aanspreeklikheid), that is, one individual's liability without fault (e.g., an employer) for a delict committed by another individual (e.g., an employee). Study paragraph 2.1.7.1 (an introduction — memorize the three relationships that can give rise to vicarious liability), paragraph 2.1.7.2 (where the employer-employee relationship is discussed) and paragraph 2.1.7.4 (where the motor-car owner — motor-car driver relationship is examined). You need only take note of paragraph 2.1.7.3 (the principal-agent relationship) for non-examination purposes.

Liability without fault is also created by legislation: paragraph 2.2. For the purpose of this course, you need only take note of this for non-examination purposes.

Self-assessment

(See study unit 1, par. 1.2.2.2, on the aim of the following questions.)

1. Describe the concept “vicarious liability”.
2. Name three relationships to which vicarious liability applies.
3. Name the requirements for an employer to be vicariously liable for a delict of his/her employee.
4. Name the requirements for vicarious liability that arises from the motor-car owner — motor-car driver relationship.

Feedback

1. See paragraph 2.1.7.1.
2. See paragraph 2.1.7.1.
3. See paragraph 2.1.7.2 (a), (b) and (c).
4. See paragraph 2.1.7.4.
CONCLUSION

In this study unit we examined the topic of vicarious liability. Did you achieve all the learning outcomes?

This study unit also concludes your study of the general principles of the law of delict. We trust that you enjoyed your studies and we wish you success in the examination.