**Study Unit 1 Scope:** SA – Law of Delict / America – Law of Tort

**Definition:**
- Wrongful conduct, an act of a person which is wrongful (legal reprehensible) and culpable (legally blameworthy) in a way that caused loss to another.
- Circumstance a person can be held liable for damage/loss caused to another.
- Part of Private Law – Law of obligation

**Elements of Delict:**

Act,
Wrongfulness
Fault,
Causation
Damage = Delict (exception of cases of strict liability)
Study Unit 2 Introduction:
Elements of Delict – act, wrongfulness, fault, causation and damage = Delict (exception of cases of strict liability)
Role of Law = indicate which interest are recognized by law and under which circumstances they are protected against infringements and how to balance that interest

Fundamental premise = damage/harm results where it falls
- If you break your watch – it’s your fault
- If you cause damage to another – you to compensate as the wrongdoer
- Wrongdoer to obligation to compensate, prejudice person right to claim compensation.

<table>
<thead>
<tr>
<th>General Approach</th>
<th>Casuistic Approach</th>
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<tbody>
<tr>
<td>SA Law</td>
<td>English Law</td>
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<tr>
<td>Change in circumstances and new situations</td>
<td>Constant new delicts</td>
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<tr>
<td>Flexible</td>
<td>Less Flexible</td>
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<tr>
<td>2 types: Delict causing patrimonial damage and Delict causing injury to personally</td>
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Damages caused by Delict:

**Patrimonial Damage/Actio Legis Aquiliae**
- Damage for wrongful & culpable act causing patrimonial damage
- Intentional/negligent

**Injury to Personality/Actio Inuiiarum**
- Satisfaction for wrongful & intentional injury to personality

**Action for pain & suffering**
- Compensation for injury to personality
- Wrongful/intentional & negligent impairment of bodily/physical/mental integrity is claimed

A Crime vs. Law of Delict:

<table>
<thead>
<tr>
<th>A Crime</th>
<th>Law of Delict</th>
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<tr>
<td>Remedies: Penal as tend to punish 4 transgressions against public interest.</td>
<td>Remedies: Compensation for the aggrieved party</td>
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<td>Criminal Law</td>
<td>Private Law</td>
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Breach of Contract vs. Law of Delict:

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<tr>
<th>Breach of Contract</th>
<th>Law of Delict</th>
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<tr>
<td>• Diff type of wrongful conduct in Private Law</td>
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<td>• Act by 1 person (contracting party) where a wrongful &amp; culpable act caused damage to another</td>
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<tr>
<td>Non Fulfillment by contracting party who has a contractual obligation to perform</td>
<td>Excludes non Fulfillment of a duty to perform</td>
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<tr>
<td>Remedies: enforcement, fulfillment to perform a contract</td>
<td>Remedies: damages for non fulfillment</td>
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<tr>
<td>Claim for damage</td>
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<tr>
<td>Not treated as part of law of Delict but law of contract</td>
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</table>
Law of Delict = Constitutional and Fundamental Rights

- CC – supreme anything inconsistent is invalid

Fundamental rights:
- BOR in chapter 2 of CC
- Limited by general application if reasonable & justifiable in an open democratic society based on Human Rights, Equality and freedom
- Not an absolute right

Section 36 Limitation Clause
- NB of purpose of limitation
- Nature & extent of limitation
- Relation between limit & purpose
- Less restrictive means

Horizontal & Vertical Application:

<table>
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<tr>
<th>Horizontal Application:</th>
<th>Vertical Application:</th>
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<tbody>
<tr>
<td>Natural &amp; Juristic person</td>
<td>State – legislative, executive and judiciary</td>
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<td>Direct Horizontal</td>
<td>Direct Vertical</td>
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Court 2 give effect to fundamental rights by applying & developing common law where legislation doesn’t give effect 2 that right, unless reasonable & justifiable & ito sec 36 of CC

State to respect fundamental rights. Infringement to be reasonable & justifiable in an open democratic society based on Human dignity, freedom ito section 36.

Indirect Application - open-ended/flexible delictual principles

- Private law rules subjected to values in chapter 2 of Constitution.
- Boni mores test for wrongfulness
- Imputability test for legal causation
- Reasonable person test for negligence
- Policy consideration eg reasonableness, fairness and justice

Fundamental Rights:
- Right to property, life, freedom security, privacy, human dignity, equality, freedom of expression, religion, belief, right to assembly, demonstrate, picket and petition
- 2 rights in conflict = right to privacy vs. right to freedom of expression =need to balance conflicting rights
- Fundamental rights in the BOR – higher status – take into account limitation clause
- Threat to Fundamental Rights – prejudiced party go to court for relief for a CC Delict

NOT ALL DELICT is a CC Delict!!!

Foot Notes:
- Liability without fault – NB Delictual liability = called strict liability
- Delict has specific forms of delict – each have their own rules
- Hybrid system
- Difference between delict and breach of contract is that delict is a breach of a duty imposed by laws whereas breach of a contract is breach of a duty voluntary assumed.

Cases:
Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) [2]CC held common law deviated from the sprit & purport of the BOR, Courts have duty to develop common law.
**Study Unit 3: Act / Conduct - voluntary** human act/conduct or omission

- Must have cause damage/harm 2 another by an act/conduct
- Prerequisite for delictual liability
- Damage cause by act/conduct

**Characteristics:**
1. Act of a human being (conduct) / can use an animal as an instrument
   Juristic person acting via humans – delictually liable
2. Human Action – needs to be performed voluntary
   - Person had control of muscular movements
   - Not willed or desired conduct – forget to tell someone something – e.g. forgot to tell about electricity & someone got electrocuted – even though not willed still capable of telling but if had a fit & didn’t say – ok cause wasn’t able to talk
   - Claim involuntary act = defense automatism
3. Conduct: Positive Act (commissio) or omission (omission)

**Defense Automatism:**
- Act of wrongdoer must be voluntary to be delictually liable
- Defendant say didn’t act voluntary but mechanically
- Conditions causing person to act involuntary/not culpable of own body movements = (absolute compulsion, unconsciousness, fainting fit, epileptic fit, intoxication, black out, reflex movement, emotional pressure, mental disease, hypnosis, heart attack, sleep)

**Defenses:**
- **Compulsion:** exerted by human force – no choice – have to follow
  E.g. X pushed knife into Y hand, Y can’t resist and forces knife into Z. Y didn’t intend the “act”
- **Relative Compulsion:** exerted by human force – had choice to resist or follow
  E.g. X points gun at Y and tells on Y to damage Z car, Y follows instructions but could have resisted. Y can escape delictual liability on “necessity” or absence of fault.

**No Defenses:**
1) intentionally created the situation where he acted involuntary to harm another - Actio Libera in causa: liable for culpable conduct
2) Negligent – reasonable man test (drinking and driving) - Sane Automatism: not due to mental illness
   Plaintiff 2 prove defendant actual voluntary, Defendant to raise automatism 2 prove absence of conduct.

**Van der Merve & Olivier:**
- Automation doesn’t exclude conduct but can exclude wrongfulness or fault.
- 2 narrow views as automatism doesn’t mean it’s not voluntary BUT the conduct wasn’t voluntary.
- e.g. X has knife in bed @ night, while sleeping attacks Y, X was not voluntary BUT voluntary acts before X injures Y cause X went to bed with a knife BUT doesn’t cover fault = Not delictually liable.
**Commission (commissio) & Omission (omission) = Form of conduct:**

- Liability for omission is more restrictive than liability for commission

**Van der Walt & Midgley:**

- Conduct determined by content which it occurs
- Omission/Failure to take certain measure for certain activities is not a form of conduct but can show action was negatively performed.
- Negligence is failure to take reasonable precautions

**Unisa:**

No control over fire and fails to prevent harm – Negligent/commissio

**Omission:**

- Failure to take positive steps to prevent damage.
- Wrongful – legal duty to act positively

**Case:**

Molefe V Mahaeng 1999 (1) SA 562 (SAC)
**WRONGFULNESS – Chapters 4 - 14**

**Act**
- Consequence

<table>
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<tr>
<th>BASED ON</th>
<th>LIABILITY</th>
<th>JUSTIFICATION</th>
<th>ELEMENTS OF DELICT</th>
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<tr>
<td>- Legal Convictions of Community (boni mores)</td>
<td>- Omission,</td>
<td>- Defense</td>
<td>- Abuse of rights</td>
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<tr>
<td>- Infringement of subjective right</td>
<td>- Breach of statutory duty</td>
<td>- Necessity</td>
<td>- Nuisance</td>
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<tr>
<td>- Breach of legal duty</td>
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<td>- Provocation</td>
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<td>- Consent</td>
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<td>- Statutory authority, official capacity, official command &amp; power to discipline</td>
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**Study Unit 4: Wrongfulness** – needs a consequence
- **Act** – harm = delictual damage
- Wrongfulness = legally reprehensible/unreasonable
- Not wrongful = not liable

Dual investigation for wrongfulness:
1. Did act cause harmful result? I.e., factual infringement
2. Did this take place in a legally reprehensible/unreasonable manner? I.e., violation of legal norms

**Act & Consequence**
- act is a delictually wrong only if it has a consequence
- Act & Consequence separated by time and space
- Act only wrongful when there’s a harmful consequence

**Pinchin V Sanlam** – accident baby was born brain head – held defendant liable for an act that was wrongful but act and consequence happened at different times – accident then baby born later
Study Unit 5: Wrongfulness – Boni Mores Test

Boni Mores:
- basic test to determine wrongfulness
- an objective test based on reasonableness

Question: the legal convictions of a community and circumstance of the case – did the defendant infringe the plaintiff’s interests in reasonable or unreasonable manner?

a. Balancing of interests
- Boni Mores is the balancing and weighting up of interest of the defendant and interest of the plaintiff to decide if the plaintiffs infringement was reasonable

b. Factors to determine reasonableness/unreasonable bless of defendants conduct:
- Nature and extend of harm
- Possible value to the defendant
- Steps that could have been taken to prevent loss
- Degree of probable success of preventative measures
- Nature of relationship between parties
- Motive of defendant
- Knowledge that conduct might cause harm
- Legal position in other countries
- Consideration of public interest/policy
- Values & norms of CC and BOR

c. Influence of CC and BOR
- CC principles = vertically, horizontally, directly & Indirectly
- Legal convictions of the community to incorporate CC values, norms and give effect to them
- Court to develop common Boni Mores as part of Common law into the CC
- Wrongfulness to be interpreted more broadly to give protection to the values in the BOR
- Boni Mores is prima facie indication that conduct is reasonable/unreasonable

d. Conclusion
- Boni Mores is a yardstick of a right/wrong
- Allows court to adapt new laws to reflect the changing views & needs of community.

Delictual Criterion
- Not concerned with the community social, moral, ethical but whether or not the community sees the act as delictually wrongful
- Focus is the legal aspect and not the moral aspect

Objection Criterion
- Legal convictions of a community must be seen as the legal convictions of the legal policy makers.
- Objective ex post facts/balancing of interest 2 c if defendant acted reasonably /unreasonably

Subjective Factors: normally irrelevant: eg defendant’s motive. Honest mistake does not make conduct lawful, but may exclude fault. Sometimes subjective factors can play role.
Application of Boni Mores Criterion

- Legal conviction/Boni Mores of community constitutes the basic norms for wrongfulness

Tests 2 determine wrongfulness:

- Infringement of a subjective right (commission)
- Non Compliance with legal duty to act (omission)

Infringement of interest as indication of wrongfulness:

- Factual infringements (physical) has taken place – indication of wrongfulness – prima facie
- Not all factual infringements are prima facie wrongful = omission, economic loss, non physical personality infringements.

Existing legal norms & doctrines:

- Boni Mores seldom used to determine wrongfulness because its more the legal convictions of the community
- Boni Mores is a yardstick of wrongfulness – infringement of a subjective right OR non compliance with a legal duty.

Boni Mores test as supplementary criterion:

- In novel case with no clear legal norm
- For borderline cases

Foot Notes:

- Malice can’t be confused with intent
- Intent = form of fault – direct will towards a particular result with a consciousness of wrongfulness
- Intent only exits’ when wrongfulness is already present
- Intent can be present even in the absence of improper motives
- Legal convictions is expressed as the convictions of a reasonable person
- Reasonable person – Boni Mores (Not a reasonable person test for negligence)

Case:
Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T)

- Doctrine of subjective rights
- Subject-object relationship: right to a thing
- Subject-subject relationship: others have a duty not to infringe rights
Study Unit 6: Wrongfulness as infringement of a subjective right

- Univesiteit van Pretoria v Tommie Meyer films (Edms) Bpk the court accepted the doctrine of subjective rights-wrongfulness consists of the infringement of a subjective right.

Doctrine of a subjective right
- All legal subjects are holders of subjective rights
- A subjective right gives a right to something enforceable against others.
- Dual relationships: (2)
  1. Relationship between holder of right (legal subject) & object (legal object)
     - Called a subject-object relationship
     - Rights to use, enjoy, dispose of object
     - Regulated by rules & norms of law
  2. Relationship between holder of legal right (legal subject) & all other people (legal subject)
     - Called a subject-subject relationship
     - Holder of a right can uphold the right against others
     - Duty of legal subject not to infringe relationship between holder of right and object of right
     - I have right to a thing, other have right not to infringe my right.
  3. The nature of a subjective right: is determined by the nature of the particular object of the right. Rights are categorised and named with reference to the different types of legal objects to which the rights relate
     - Because a subjective right has not yet been identified in every instance where damage is caused, it is expedient to determine wrongfulness in those cases by inquiring whether a legal duty has not been complied with, rather than trying to determine whether a right has been infringed
       a. Real rights- things e.g. a car, a pen
       b. Personality rights- aspects of personality e.g. physical integrity, hour
       c. Personal rights- acts and performances e.g. delivery of a thing
       d. Immaterial property rights- immaterial e.g. poem, work of art
       e. Personal immaterial property rights- personal immaterial property e.g. Earning capacity, creditworthiness
       f. Absolute rights can be enforced against all people. Whereas relative rights are enforceable against a particular person or persons

- The existing subjective rights are not restricted.
- Subjective rights arise when the law recognises existing individual interests as being worthy of protection
- 2 conditions must be met before the courts will recognise an individual interest as a legal object in terms of the doctrine of subjective rights:
  1) It must have value to the holder of that right
  2) It must have a measure of independence that it is possible to dispose of it and to enjoy it
Study Unit 7: Wrongfulness – Breach of a Legal Duty

7.1 Norms & Doctrines
- Boni Mores test seldom applied cause better methods developed to determine legal convictions of a community
- General Criteria 4 reasonableness = infringement of a subjective right & non compliance with a legal duty 2 act
- Conduct conflicting with legal convictions of comm = wrongful if infringes a subjective right or violates a legal duty

7.2 Wrongfulness as a infringement of a right.

Doctrine of a subjective right
- All legal subjects are holders of subjective rights
- A subjective right gives a right 2 something enforceable against others.
- Dual relationships: (2)
  4. Relationship between holder of right (legal subject) & object (legal object)
     - Called a subject-object relationship
     - Rights to use, enjoy, dispose of object
     - Regulated by rules & norms of law
  5. Relationship between holder of legal right (legal subject) & all other people (legal subject)
     - Called a subject-subject relationship
     - Holder of a right can uphold the right against others
     - Duty of legal subject not to infringe relationship between holder of right and object of right
     - I have right to a thing, other have right not to infringe my right.

7.3 Wrongfulness as a breach of a legal duty
- Wrongfulness = violations of interest in conflict with the legal convictions of a community
- Can’t ask if a subjective right has been infringed cause sometimes no defined rights exist
- Liability 4 omission/eco loss – don’t question if the plaintiff subjective right has been infringed but if the Boni Mores/reasonableness if the defendant has a legal duty to prevent harm
- Van Eden V Minister of Safety & Security – omission wrongful if defendant has a legal duty to act + to prevent harm
- Question – Is there a legal duty – impairment of legal subject isn’t prima facie wrongful, but prima facie lawful cause Boni Mores – there is no legal duty to prevent loss/ eco loss of others by + conduct.
- Determine if there’s a legal duty to act + or a duty to avoid pure eco loss
- Defendant has legal duty - breach + no justification = Contra Boni Mores = Wrongful
- Legal duty is not to act negligently, but rather conduct that is not reasonable.

Foot Notes:
- Infringement of subjective rights is not the only criteria for wrongfulness
- Rights of 1 person = legal duty imposed on others
- Subjective rights not always ID like misrepresentation/eco loss = determine if a legal duty hasn’t been complied with 2 see if a right had been infringed
- Legal duty & not a duty of care = wrongfulness = take steps to prevent loss.

Case:
Universiteit van Pretoria v Tommie Meyer Films 1977 (4) SA 376 (T)
- Accepted doctrine of subjective rights
- Wrongfulness consist of the infringements of a subjective right
Study Unit 8: Wrongfulness – Liability owing to an omission, breach of a statutory Duty

8.1 Liability for an Omission:
• Not wrongful if omits to prevent harm to another = not liable
• Liability follows only if omission was wrongful = if legal duty rested on the defendant to act + 2 prevent harm and failed to comply.

What’s a duty – depends on circumstance of case and convictions of a community: (9) objective test

1. Prior Conduct (omission per commissionem rule)
   • Prima facie wrongful = + dangerous conduct (commission) and fails to stop danger (omission)
   • Not prerequisite of a legal duty but does give an indication
   • Minister van Police V Ewels – Prior conduct/control of dangerous object maybe a factor where wrongfulness can be drawn & legal convictions of a community see the omission as wrongful causing harm

2. Control of a dangerous object
   • Fire, hold in ground, broken stairs, criminal
   • 2 questions - was there control and was there a legal duty to prevent damage?
     a. If there was actual control? - if defendant had
        • control over dangerous situation;
        • was the owner of object,
        • has factual control over object,
        • statutory provisions placing control on defendant
     b. Was there a legal duty to prevent damage?
        • Just cause have control doesn’t mean there’s a duty
        • Facts depend if the defendant should have taken steps to prevent damage
        • Occupier of property/building has a legal duty to prevent damage
        • If duty = injury from not controlling situation = wrongful
        • 2 prevent liability = prove omission was lawful or that you have taken reasonable steps to prevent harm

3. Rules of law
   • Common law/statue places obligation on a person
   • Common law – owner of land to provide lateral support to neighbor
   • Statutory – light fire on own property, you must be in control
   • Wrongful – need to compensate plaintiff
   • E.g. Municipality to fix roads, fails = damage = wrongful.

4. Special relationship
   • 1 party has legal duty towards another 2 prevent harm
   • Contractual relationship = police & citizen, ER & EE, Parent & Child, Doctor & Patient
   • Measure against Boni Mores criteria

5. A particular office
   • Occupation/office places a legal duty to conduct self in a particular manner in relation 2 public/certain people

6. Contractual relationship 4 safety of 3rd party
   • A+B contract 2 ensure safety of C. A places under a legal duty to C
   • e.g. Lifesavers
7. **Creation of the impression that the interest of a 3rd party will be protected**
   - 1 party acts on an impression created by another
   - Legal duty to rests on party creating impression 2 prevent prejudice
   - *Compass Motor Industries V Callguard* – security firm to minimize theft, questioned if firm could be delictually liable 4 rd party loss – held boni mores – defendant had legal duty to plaintiff
   - General requirement 4 wrongfulness - NB

8. **Interplay of Factors**
   - Several factors pay a role
   - Minister Van Police – Police had a legal duty to prevent assault due to statutory duty to prevent crime + a special relationship between police & citizens + Public office occupied by policemen.
   - All factors taken into account 2 determine if legal duty to act existed
   - CC imperatives – shows a legal duty like
     - Duty to respects, promote and protect the BOR
     - Duty to state controlled transport services – safety and affordability
     - Duty to prosecuting authority to perform without fear, favour or prejudice
     - Duty to correction authority to give medical treatment to prisoners
     - Duty of courts to promote the spirit, purport and objectives of the BOR while developing Common Law

9. **General Wrongfulness criteria**
   - Reasonableness of defendants failure to act in view of circumstances
   - Boni Mores test (balance of interests between parties) & legal convictions of community

8.2 **Breach of Statutory Duty:**
   - Causing damage by breach of Statutory duties – prima facie wrongful
   - Non compliance with statutory duties – violation of plaintiffs interests = wrongful
   - Infringing interest of plaintiff in a legally reprehensible manner = wrongful

**Plaintiff to prove:**
1. Statutory measure provided the plaintiff with a private law remedy
2. The plaintiff is a person whose benefits and protection was imposed
3. Nature, harm & manner if occurred
4. Defendant transgressed the statutory provision
5. A causal nexus between transgression of statutory provision & harm

**Foot Notes:**
- *Silva Fishing* – defendant was the owner of a fishing boat, 1 engine fails and the boat drifted to sea, the plaintiff husband drowned – prior conduct, defendant created a potentially dangerous situation - should have rescued the crew
- *Regal V Africa Super slate* – applicant applied to an interdict 2 compel the respondent to stop the slate being washing down the river onto his land.
- *Minister of Forestry* – decided if landowner was liable for damage resulting from failure to control a fire on his property.
Case:
*Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as amicus curiae) 2003 (1) SA 389 (SCA)*
Wrongfulness as a breach of legal duty.
Test for determining wrongfulness of an omission:
An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. Legal duty exists if it is reasonable to expect of the defendant to have taken positive measures to prevent harm.

*Minister van Polisie v Ewels 1975 (3) SA 590 (A)*
Here the respondent claimed damages from the appellant on the ground that a policeman in the service of the appellant failed to take steps to prevent the respondent from being assaulted and injured.

In this judgment, the generally accepted view that wrongfulness is determined by the legal convictions of the community has now been applied to omissions. It’s a more flexible approach – legal duty arises when the legal convictions of the community demand as much. Failure to comply with this duty = wrongful omission.

Any doubt that prior conduct isn’t indispensable for the existence of a legal duty to the municipality cases was removed in:
*Van der Merwe Burger v the municipality of Warrenton (1987)*
Held: prior conduct as a criterion for establishing a legal duty was abandoned in Ewels.
*So the court applied the legal convictions of the community test = the municipality should have foreseen the damage and was liable*

Note:
*Rabie v Kimberley municipality (1991)*:
A municipality, which had been aware that a traffic light was malfunctioning but had failed to properly investigate and repair it, was held liable for damages resulting from an accident at the intersection.
Study Unit 9 – Wrongfulness – Grounds for Justification – Defence

- Special circumstances which conduct appears wrongful (violation of interests) but is lawful (no violation of a norm)
- Violations of interest is therefore not unreasonable or contra bones mores
- Excludes wrongfulness by eliminating the apparent wrongfulness
- Justification that the defendant while exercising rights acted within the scope of his own rights
- Onus on the defendant to prove justification

Justification Grounds:
- Defence
- Necessity
- Provocation
- Consent
- Statutory Authority
- Public Authority & Official Command
- Power to discipline

9.1 Private Defence

9.1.1 General
- Defendant directs actions against another’s actual /threatening wrongful act 2 protect own interests or anothers.
- *Mugwena V Minister of Safety & Security* - SCA private defence was determined if a reasonable person would have viewed it as a real risk or death or injury was threatening
- Wrongfulness is determined by ex ante = reasonable belief

9.1.2 Requirements for the attack:
  a) The attack must be a human act
     - Either commission or omission
     - Omission – can sometimes be an attack for the purpose of defence
     - Aggression by an animal is not an attack
  
  b) The attack must be wrongful = threaten/violate a legally protected interest without justification
     - Legal interest can be protected if acting in defence
     - Defence against attacks for: life, bodily integrity, honour, property or possessions
     - Can’t act in defence against a lawful attack – can’t resist a legitimate arrest
     - Can’t act in defence against attack id consented to it
     - Objective test is used
     - Defendant subjectively believes he’s in danger/attack is wrongful, but not really – can’t use private defence cause reasonable grounds must exist objectively
     - Defendant acts wrongfully cause believe he is acting in private defence – can escape liability if he did not have fault (intent/negligence)

  c) The attack must already have commenced or imminently threatening, but must not yet have ceased
     - Don’t have to distinguish between threatened and actual attack
     - Can’t act in defence if you think you be will attacked in the future BUT also don’t have to wait
     - Can’t act in defence if attack has already happened = unjust revenge
     - Attack threatening – act in defence before attack with intention to prevent attack happening
Non Requirements for an attack:

a) Fault on the part of the aggressor
   - Can’t act in defence against someone who’s incapable of having a blameworthy state of mind (insane/infant)

b) Attack doesn’t have to be directed at the defender
   - Act in defence even if the attack is directed at 3rd party
   - A special relationship like a family tie or claim to protection doesn’t have to exist
   - 3rd party consents to attack – can’t legally act in his defence cause attack against him is not wrongful
   - 3rd party doesn’t consent - legally act in his defence cause attack is wrongful

9.1.3 Requirements for the defence

a) The defence must be directed against the aggressor himself
b) The Defence must be necessary to protect the threaten right
   - If interest protected in another less threatening = defence is wrongful
   - Acting in defence to be the ONLY REASONABLE alternative to protect the threatened interest

9.1.4 Reasonableness of an act of defence:

- Value of interest may differ – value of interest attacked and protected NB 2 determine if the defendant acted reasonable
- Interest need not be similar in character – extreme imbalance can cancel out defence
- Means of defence employed by the defendant need not be similar to those of the attacker – determined by the disposal of the defendant.

De Wet & Swanepoel – defence is essential, the attacker is not deterred by moderate weapons of defence, the attacked person may ward off the attack, is necessary with the most powerful weapons.

Foot Notes:
- Defence as a ground for justification can also be called “ self defence”
- Self defence is too narrow because an act in defence can also be a defence of someone else and property. Self defence is a form of defence.

Cases:
Ex parte die Minister van Justice: in re S V Van Wyk 1967(1) SA 488(A)
- Private defence
- Questioned whether a person can protect his property in defence by killing the attacker. Before this case it was held in R V Schultz that the killing of a thief in protection of property can’t be justified via defence.

Court had to determine:
- If u can rely on defence for killing another while protecting property?
- If yes – were the bounds of defence exceeded?
- All judges agreed that one could rely on dances for killing if life, physical integrity is in danger, but if no danger there is an imbalance of interest threatened, as life is more NB than property.
- Judges on appeal – different opinions – did this person exceed the bounds of defence and was if the only reasonable method? Van Wyk set a gun in his shop to stop the thieves, as he had plenty of this in the past. A shot from his gun killed a burglar, and Van Wyk was charged for murder – can he rely on defence?
- **Majority** – said Yes – as this was the only reasonable way to protect his property, Van Wyk also put up a warrning of danger on the door – Don’t think he exceed the bounds of defence.

- **Minority** – said No – bounds of defence had been exceeded – held that one can’t do something indirectly what they are not allowed to do directly

- **S V Makwanyane** – Self defence should be treated as private defence. Killing in defence of life & property is ok, if reasonable and necessary in the circumstances.
Study Unit 10 – Wrongfulness – Grounds for Justification – Necessity

- Necessity exist when defendant is place in a position of superior force and is able to protect his interest only by violating the interest of an innocent 3rd party
- e.g. A breaks B window to save C – A not liable for damage
- State gives this power – if not given the act would have been wrongful
- *Crown Chicken V Rocklands Poultry V Rieck* – necessity is a ground of justification by cancelling out the wrongfulness of conduct.
- Determined objectively

Guidelines to determine Necessity: (9)

a. Does act of necessity exist? If not was it cause by Human Action, Animals/Forces of Nature
   - If created emergency/damage, defendant liable, but this should not excluded him from acting out of necessity to escape the emergency.

b. Necessity to be determine objectively
   - Take into acc circumstances that actually prevailed and that actually occurred
   - Question – if necessity was NB and not if defendant thought it existed
   - Fear doesn’t mean it was a state of necessity
   - Fear influences accountability but not wrongfulness of his conduct

b. State of necessity to be present or imminent
   - State of necessity must have terminated or be expected only in future

d. Defendant can also protect interst of others
   - E.g. you protect your child

e. Life, physical integrity, property, honour, privacy, identity, freedom and feelings can be protected out of necessity

f. Can’t use necessity if legally compelled to endure danger
   - E.g. landowner can’t change the natural flow of water so it causes damage to others even if his own interest are threatened by flood waters too

g. Interest sacrificed must not be more valuable than the interest that is protected
   - Defendant must not cause more harm than necessity.
   - Commensurability/Proportionality – hard protected interest more/less valuable than interest sacrificed – depends on circumstances

h. Does necessity justify homicide?
   - English Law – No - killing innocent person worse than the death of the threatened person
   - S V Goliath - held homicide can be justified by necessity. A under force of B and fearing his own life, helped B kill C – Court to decided if A could use necessity? Had to decided if the life of the threatened person was more NB that the deceased person?
   - normal human regarded his own life more NB than, that of another
   - Convictions of a comm. = one’s life is more NB than another = can justify homicide. (Depends on circumstances)

i. Act of necessity must be the only reasonable possible means of escaping danger
   - Act must be out of necessity protect a threatened right
   - no other reasonable means available
   - If can escape emergency by causing no harm – he must.
Foot Notes:

- **S V Pretorius** – appellant guilty of speeding while rushing child to hospital for taking too many pain pills – believed child was in danger. On appeal the applicant was acting out of necessity. Child would have been fine – objectively, but subjectively the applicant really believed that the child was in danger and acted in necessity in good faith and like a reasonable person in that same position.
- Conduct of necessity – doctors who have an emergency treat patient without their consent
- **Negotiorum Gestio** – attends to the interest of another without their consent. Person is said to have acted reasonably even if cause damage of interest for the person he is acting for. Won’t be held liable for damage, but could also claim compensation for any expenses he’s incurred.
- **R V Dudley** - English decision – 2 left of a floating boat after a shipping accident, held for murder after killing and eating the weakest person after 20 days at sea and 8 days of no food. Court rejected the plea of necessity cause can’t justify killing an innocent person.
- **JA Wessels** – necessity can’t be used to justify killing – but can exclude fault
- **Van der Merver & Olivier** – certain circumstances homicide can be justified by necessity. Court to determine if the sacrifice of a human life was objectively reasonable in the circumstances.

Case:

**S V Goliath 1972 (3) SA 1 (A)**

Necessity (grounds of justification)

X under compulsion from Y and fearing for his own life, helped Y to kill Z. Court recognised the communities conviction that the ordinary human being does not consider the life of another person to be more important than his own.
Study Unit 11 – Wrongfulness – Grounds for Justification – Provocation

- Provocation is present when a defendant is provoked/incited by words/actions to cause harm to the plaintiff
- Complete defence – plaintiff provoked the defendant may have forfeited compensation for injury caused
- Unisa – provocation is justification when it renders the defendant conduct LAWFUL
- Provocation - objectively weights the conduct and reaction = reasonableness/boni mores
- Raised as a defence 2 actions for the violation of personality, honour, reputation, physical integrity

| Private Defense = act of defense – once the attack is about to happen or has already started | VS |
| Provocation = act of revenge - takes place after the provocative conduct has ended |

11.1 Provocation - physical assault

- justification for a following counter assault of a physical nature

Complete defence if:

a. Conduct 2 be of a nature that a reaction to it by physical assault is reasonable/excusable.
   - Reasonable person in the same situation would have acted the same

b. Conduct of the provoked defendant must be immediate and reasonable retaliation against the body of the plaintiff
   - reasonable – if not out of proportion ito nature/degree to the assault by the 1st aggressor.
   - The violation must not be out of proportion the prior violation.

11.2 Provocation – defamation & insult

- Defamatory/insulting allegations during an argument in reaction to provocation = justified in some circumstances

Requirements:

a. Provocation must be reasonable to justify the retaliation to the defaming/insulting remarks of the plaintiff

b. The violation must not be out of proportion the prior violation.

Compensation – 2 persons have defamed/insulted each other in a manner that is not out of proportion to the other – Neutralise/cancel each other out.

Foot Notes:

- X insults/assaults Y and Y returns the insult/assaults – X institutes a claim against Y, Y uses provocation and says X provoked him = X claim will fail.
- R V Van Vuuren – different between Pvt Defence and Provocation. Appellant prosecuted for assault who grabbed the complainant’s arm, after he insulted the appellant’s wife. Appellant held provocation as a defence – court accepted BUT the verbal abuse had stopped when the appellant took his arm – can’t rely on put defence.
- X slaps Y because Y verbally provoked him – can’t rely on provocation as it’s just verbal and should not justify a physical attack.
- Interest of person who is provoked is compared to the interest of the person who does the provoking.
Study Unit 12 – Wrongfulness – Grounds for Justification – Consent

- A person legally capable of expressing his will gives consent to injury/harm = lawful harm
- Person suffering harm waives his rights & allows defendant to violate his interest = not liable.

Volenti non iniuria:
- Defendant is not liable, when the injured person has consented to injury or risk thereof (willing person is not wronged)
- Both forms of consent – injury and risk of injury
- Voluntary assumption of risk – consent to the risk of injury OR contributory intent (excludes fault/ culpability)

12.1 Forms of Consent:

a. Consent to injury
   - Injured party consents to a specific harm
   - E.g. A consents to B (doctor) to remove his appendix or consent to a hairdresser to cut his hair

b. Consent to the risk of injury
   - Consent to the risk of harm caused by defendants conduct.
   - E.g. A consents the B (doctor) that the operation could have certain side effects.
   - Injured party can’t hold the defendant delictually liable cause he consented to the possible risk

12.2 Characteristics of Consent: (5)

1. Consent to injury as a unilateral act
   - Consent doesn’t have to be made know to the defendant
   - Agreement/contract between the injured party and the action
   - Only wrongful if defendant goes ahead without consent

2. Consent is a legal act that restricts the injured person’s rights
   - 2 be legal – consent to be brought to light – must be evident.

3. Consent may be given expressly or tacitly
   - Knowledge of harm will not amount to consent

4. Consent must be given before the prejudicial conduct
   - Consent after the action is not consent BUT could be an undertaking not to institute action against the defendant = pactum de non petendo

5. Prejudice person must personally give consent
   - Consent will have to be proved – can’t rely on “thought”.

Consent will have to be proved – can’t rely on “thought”.
**12.3 Requirements for Valid Consent: (6)**

1. Consent must be given freely or voluntarily
   - Can’t be forced

2. Person consenting must be capable of volition/choice
   - Mature enough to appreciate actions

3. Person consenting must have full knowledge of the extent of the prejudice
   - Informed consent
   - See Castell VS De Greef

4. Person consenting must realise/fully appreciate the nature & extent of harm
   - Know and understand the risk/harm

5. Person consenting must in fact subjectively consent to the prejudicial act

6. Consent permitted by legal order – cant be contra bonos mores
   - Boshoff VS Boshoff

Pactum de non petendo in anticipando – Contractual undertaking not to institute actions against the actor – that you won’t hold them liable

**Foot Notes:**
- Voluntary assumption of risk – complete defence excluding delictual liability – consent excludes wrongfulness, while contributory intent cancels the defendants negligence
- To look at circumstances:
- Wrongfulness was excluded because of the consent of the injured
- Negligence of a defendant was cancelled by the plaintiffs intention
- Actor can evade liability through lack of fault or where the actor thought the person didn’t consent when he did
- Need informed consent – plaintiff given treatment = serious injuries – Court held that the plaintiff didn’t know of the serious risks
- Medical doc has informed duty to let the patients know of all material risks

**Case:**
**Boshoff V Boshoff 1987 (2) SA 694 (O)** the plaintiff was struck on his head by the plaintiff’s racket during a squash game resulting in injury to his eye. The court rejected his claim for damages on the ground that he had consented to the risk of injury and that the consent was not contra bonos mores

**Castell V De Greef 1994 (4) SA 408 (C)** a reasonable doctor test: the court has to be led by medical evidence on what a reasonable doctor would have told the patient in the circumstances. In an appeal to the full bench Ackermann J differed from this view- he preferred the reasonable patient test whereby the doctor’s duty to inform is to be established with reference to the needs and expectations of the particular patient rather than the insight of the medical profession. “ for the patients consent to constitute a justification that excludes wrongfulness of medical treatment and its consequence, the doctor is obliged to warn a patient so consenting if a material risk inherent in the proposed treatment; a risk being material if, in the circumstances of the particular case a reasonable person in the patients position if warned of the risk, would be likely to attach significance to it; or the medical practitioner is or should be reasonably aware that the particular patient, if warned of the risk, would be likely to attach significance to it”
Study Unit 13 – Wrongfulness – Grounds for Justification – Statutory Authority; Official Capacity; Official Command and Power to discipline

13.1 Statutory Authority
Not wrongful if performs act while exercising statutory authority (not statutory authority – wrongful)

Requirements: (2)

1. State must authorize infringement of interest concerned
   Depends on the intention of legislature – did legislature intend to authorize an infringement?
   a. If statute is directory = infringement of private interest authorized
      • Not entitled to compensation unless statute provides for it
   b. If statute is permissive with no provision for damages – PRESUMED the infringement is not authorized.
   c. Presumption (b) falls away if authority is entrusted to a public body acting in public interest
   d. If authorized act is restricted and localized – PRESUMED the infringement is authorized
      • E.g. building a dam or building a railway between 2 points
   e. If authorization is hands-off & general, not localized & not necessarily an infringement of private interests – PRESUMED legislature didn’t intend that private interest should be infringed.

2. Conduct can’t exceeds the limits of authority conferred by statute
   a. Not possible 4 defendant to exercise powers without infringing the interest of the plaintiff
   b. Defendants conduct must have been reasonable – not possible to have prevented the damage – Plaintiff to prove alternatives

Guidelines to see if act fell in boundaries of authorisation:
• Must not have been possible for defendant to exercise power without infringement (onus on defendant)
• Defendant’s conduct must have been reasonable
  • Must not have been possible to limit/prevent damage by other method
  • Onus on plaintiff to show reasonable alternative existed

Arrestor may use reasonably necessary force, proportional to circumstances, to affect arrest (where suspect flees/resists and cannot be arrested without using force).

Only in certain circumstances justified to use deadly force (where he on reasonable grounds believes it’s necessary):
• To protect arrestor/assistant arrestor/another person from imminent/future death or grievous bodily harm
• Where there is a substantial risk that suspect will cause imminent death/grievous bodily harm if arrest is delayed
• The offence is in progress & is of serious nature involving life threatening violence or strong likelihood of grievous bodily harm

Four requirements for use of lethal force:
1. Arrestor must on reasonable grounds suspect
2. That lethal force is imminently necessary
3. To protect any person’s life/body
4. Against conduct of suspect that is immediately threatening or will happen in future

13.2 Official Capacity
• Public officials =law enforcement officers (security/police) + judicial officers (magistrates/judges) authorised by law to perform certain acts.
• Should they cause damage, conduct will be justified (lawful) and they won’t be liable.
• Exceed authority (e.g. by malice/mala fide), it’s unreasonable & they will be held liable.
13.3 Official Command

- Infringement of interest in carrying out a lawful command is not wrongful (e.g. police shoots fleeing murderer at order of his officer).
- This is basically also = official capacity – police authorised by law to arrest criminals.

Requirements for such defence where a wrongful demand was executed:

- Order must come from person in position over accused that is lawfully authorised
- Must be duty on accused to obey order
  - No absolute/blind duty
  - Just wrongfulness ito reasonable person
- 2 approaches: 1. carrying out a wrongful order is always wrongful & 2. obeying a wrongful order is not necessarily wrongful, but carrying out a noticeably illegal order is also wrongful
- Duty to obey wrongful orders - ground of justification is necessity in the form of compulsion and not official command
  - Look at the reasonable person criterion for wrongfulness
- Accused must have done no more harm than was necessary to carry out order

13.4 Power to Discipline

- Ito common law, parents/persons in loco parentis have power to punish for education/correction. May sometimes include corporal punishment. May delegate power to another person.
- RSA law prohibits corporal punishment in schools. Parent may not delegate this power to persons in public/private schools therefore.
- Must be exercised moderately and reasonably.
- Purpose is to correct, if fails to correct can be inflicted repeatedly.
- Malice/improper motive indicated wrongfulness.

Factors for moderate/reasonable punishment:

- Nature/seriousness of transgression
- Degree of punishment/force inflicted
- Physical/mental condition of person punished
- Gender/age of child
- Physical disposition of child
- Means of correction
- Purpose/motive of punisher
- Presumption of reasonableness; person alleging opposite bears onus.
14.1 Abuse of Rights & Neighbour Law

- Doctrine of abuse of rights - the exercise of a right of a power may take place in manner/circumstances which render such exercise wrongful.
- Normally where property rights of neighbours are concerned.
- From RDL - doctrine of abuse of rights are unequivocally accepted.
- Determine if the actor exceeded his powers of ownership by acting wrongful to his neighbour
- Look at the reasonableness and fairness of actions
- Nuisance - English law is the repeated unreasonable use of land by one neighbour at the expense of another.

Principles:

a) Owner of immovable property use property as sees fit as long as acts within limits of the law.
b) owner is not completely free to utilise property as wishes – owners interests 2 b weighed against neighbours interests
c) Reasonable or unreasonable utilisation by the defendant of his property. Mental disposition is NB Malice can show an unreasonable conduct – if aim is to harm neighbour (animus vicino nocendi) it’s wrongful. Improper motive makes an act that would have been lawful – unlawful if prejudices a neighbour.
d) Benefit the actor gains is slight but, the nature of conduct is drastic and harm caused to neighbour is relatively serious = exceeded bounds of reasonableness and acts wrongfully
e) Actor harms neighbour while advancing own reasonable interests, doesn’t act wrongfully even if intends harming his neighbour in the process. Improper motive is not enough to convert lawful conduct into a wrongful act.

14.2 Nuisance & Neighbour Law

- Legal principle applicable to neighbours of land, sometimes called ‘nuisance’. But rather avoid this term.
- Nuisance is so-called delict. It involves repeated infringement of plaintiff’s property rights.

Examples:
- Repulsive odours
- Smoke and gases
- Water seeping onto plaintiff’s property
- Leaves from defendant’s trees falling onto plaintiff’s premises
- Slate being washed down river onto plaintiff’s land
- Causing a disturbing noise
- Overhanging branches
- Electrified fence on top of a communal wall

Foot Notes:

- Nusiance – English Law – Repeated unreasonable use of land by 1 neighbour at expense of another.
- Kirsh VS Pincus K makes malt and has large cement slab on his property where he left his malt dry. P wanted to injury and planted willow trees on boundary of property and leaves fall into K’s property. Court awarded K damages
- Glen VS Glen – wrongdoer protected a patch of vegetables from baboons by having a continuous explosive sound. Noise affected neighbours. Wrongdoer did nothing to prevent it.
Study Unit 15 – Fault – General – Accountability & Intent

Two forms of fault:
- Intention (dolus)
- Negligence (culpa)

Fault is a subjective element of a delict, because it concerns a person’s attitude. Nevertheless, the test for negligence is an objective one.

Type of fault required for actions:
- Action legis Aquiliae – intention or negligence
- Action for pain and suffering – intention or negligence
- Action iniuriarum – intention

15.1 Accountability
- To be blameworthy (ie have fault), a person must first have accountability.
- Accountable (culpae capax) if person has mental ability to distinguish between right and wrong, and if they can act in accordance with such appreciation.
- Accountability is therefore the basis for fault.

Factors causing persons to lack necessary mental capacity (and are therefore not accountable):
1. Youth
   - Child < 7 years, always culpae incapax – irrebuttable presumption that he is not accountable
   - Rebuttable presumption that child 7-14 years lacks accountability. Dws assume this until contrary is proven; may be blameworthy if all elements of delict is present
2. Mental disease/illness
   - If person can’t at a given moment distinguish between right & wrong, or can’t act in accordance, he’s not accountable.
   - no fault
3. Intoxication/similar condition induced by a drug
   - But mere consumption can be a negligent act, and defendant may be held responsible for this
4. Anger due to provocation
   - Person under provocation can lose his temper and become passionately angry
   - Here he may be said to lack accountability, but rather see provocation as a ground for justification into wrongfulness.
15.2 Intent (intention/Dolus)

5. A person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct.

2 Elements:

1. Direction of the will
   - direct intent/dolus directus
     - wrongdoer actually desires a particular consequence of his conduct
   - indirect intent/dolus indirectus
     - wrongdoer directly intends one consequence of his conduct, but also knows that another consequence will inevitably also occur
     - causing of second consequence thus accompanied by indirect intent
   - dolus eventualis
     - wrongdoer does not desire the particular result, but (actually subjectively) foresees the possibility that he may cause the result and reconciles himself to this fact
     - dws he nevertheless performs the act

Definite - directed at a specific person – in all three above
Indefinite intent - not directed at specific person, e.g. bomb) – in all three above

2. Knowledge/consciousness of wrongfulness
   - Insufficient for wrongdoer to merely direct his will, he must also realise/foresee it is wrongful
   - Intention = willed act known to be wrongful
   - Mistake/error of wrongfulness, excludes intent (e.g. mistake - ground of justification) – because it then excludes knowledge of wrongfulness
   - Unaware of wrongfulness = no intent

Motive and mistake concerning the casual chain of events:
   - Motive shows reason for conduct and must not be confused with intent
   - Intent - willed conduct which the wrongdoer knows is wrongful
   - Motive - reason why a person acts in a particular way
   - Motive used to prove direct intent & consciousness of wrongfulness.

Mistake concerning the casual chain of events:
   - Intent present where wrongdoer causes a result in a manner different from that foreseen by him.
   - Material deviation – intention is absent
   - Immaterial deviation – assume intention was present.
Study Unit 16 – Fault – Negligence/Culpa

- A person is negligent if a reasonable person in his position would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable.

Negligent - blamed for conduct / attitude of:
- Carelessness
- Thoughtlessness
- Imprudence
- Giving insufficient attention to actions & failing to adhere to standard of care legally required of him
- Criterion = objective/reasonable person/bonus paterfamilias

Negligent/Culpa if:
- Diligens paterfamilias - possibility of the defendant forcing a reasonable possibility of conduct injuring another (person/property) and causing patrimonial loss to take reasonable steps to guard against loss
- The defendant failed to take such steps
- Person is guilty of culpa if conduct falls short of that of the standard of the diligens paterfamilias.
- Standard is always objective.

Intention and negligence can be present at the same time.

Negligence and an omission
- Negligence is a form of fault/conduct
- Omission performed intentionally/negligently
- A positive act can be negligent
- Omission is failure to take reasonable steps to prevent foreseeable harm

Characteristics of a reasonable person (3)
1. General
   - Reasonable person not exceptionally gifted/developed person nor
   - Legal personification of qualities the community expects.
   - minimum knowledge and mental capacity to appreciate the dangerous potential of certain actions
   - Physical disability still be negligent if engages in an activity a reasonable person in same position would not have regarded as safe

2. Children
   - The reasonable person test only arises for children > 7 years old
   - Before 1965 applied reasonable child test – Did conduct measure up 2 reasonable standard and Did the child have the intellect, maturity to know right from wrong?
   - After 1965 (Jones v Santam case), courts apply reasonable person test
   - Fact that person is child is irrelevant for negligence
   - Once negligence has been established, however, look @ child’s accountability (did he have insight/experience/maturity & act in accordance herewith, and take all a child’s subjective qualities into account)

3. Experts
   - Use reasonable expert test – ignore/lack of skill = negligent
   - Eg dentist/surgeon/electrician etc
   - Same as reasonable person test, except that measure of expertise is added
Cases:
Kruger v Coetzee 1966 (2) SA 428 (A)
- Test for negligence:
  - A reasonable person in the position of the defendant:
    1. would foresee the reasonable possibility of his conduct injuring another and causing him patrimonial loss.
  - Would take reasonable steps to guard against such occurrence
  - And the defendant failed to take such steps.

Jones v Santam Bpk 1965 (2) SA 542 (A)
- Test for negligence
- A person is guilty if his conduct falls short of that of the standard of the diligens paterfamilias - a standard that is always objective and which varies only if regard to the exigencies arising in any particular circumstance”

New approach to negligence i.r.o. children:
1. Reasonable person test, not reasonable child
2. Accountable? If child did not meet reasonable person requirements, was he accountable?

- Logically you must 1st look at accountability and once someone is found to be accountable only then can you look at fault.
- The AD accepted that once the plaintiff’s degree of negligence had been established it was unnecessary to inquire into the extent to which the defendant’s conduct deviated from the standard of the reasonable person.
- E.g. plaintiff was 40% negligent – so automatically the defendant was 60% negligent.
- But in Jones: They said that if the plaintiff was 30% negligent it doesn’t automatically mean that the defendant was 70% liable
- To establish the degrees of negligence, the carefulness of the conduct of each party must be measured separately against the standard of the reasonable person.

Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A)
- Reasonable person – characteristics
- The court is not concerned with what reasonable person types would have been, such as a reasonable educated person, a reasonable illiterate person, a reasonable skilled person, a reasonable unskilled person, a reasonable adult or a reasonable child. There is only one abstract objective criterion, and that is the Court’s judgment of what is reasonable, because the Court places itself in the position of the diligens paterfamilias.
- Confirmed the new approach in the Jones case
Study Unit 17 – Fault - Negligence - Foreseeability & Preventability of Damage

17.1 Test for negligence rests on 2 legs:

1. Reasonable foreseeability
   - Abstract/absolute approach
     - Was harm in general reasonably foreseeable?
     - Did person’s conduct in general create unreasonable risk of harm to others?
     - No need to have foreseen extent of damage/particular consequences
     - Liable = Look at legal causation
     - This approach not generally accepted by courts
   - Concrete/relative approach
     - Person’s conduct may only be described as negligent to a specific consequence
     - Occurrence of a particular circumstance must be reasonably foreseeable
     - Only negligent for specific consequence, not merely damage in general
     - Precise extent need not be foreseen
     - Need to look at legal causation
     - Preferred approach – question if reasonable person in position of wrongdoer would have acted differently to prevent damage.
     - Foreseeability Test – can’t have hard and fast rules because depends on circumstances of the case and degree of probability of how great the chance loss will occur.

2. Reasonable preventability
   - Issue of avoidance of harm
   - Did defendant take adequate steps to prevent the materialisation of the damage?
   - Preventability: whether the reasonable person would have taken precautionary steps to prevent the damage from occurring
   - Four relevant factors:
     1. Nature/extent of risk
        - If risk not serious & harm foreseen is light, reasonable person might not have taken steps to prevent it (consequently wrongdoer is not negligent)
     2. Seriousness of damage
        - Where possibility is slight, but harm may be extensive, person should take reasonable steps to prevent such damage
     3. Relative importance and object of person’s conduct
        - If purpose of conduct is NB, despite possible risk, reasonable person would not have taken steps to prevent harm
     4. Cost and difficulty of precautionary steps
        - Harm eliminated without cost - reasonable person would not take steps to reduce risk
        - Harm more than risk – reasonable person would have taken steps to minimise

Foot Notes:
- Bolton V Stone – cricket ball hit onto public road and injured a person, only hit out 6 times in 28 years. Court held the risk of causing harm was so small a reasonable person wouldn’t have foreseen it
- Stratton V Spoornet – son of 8 years got burnt when climbed an electric poll at a railway. Court held injuries were not reasonably forceable as it’s very high and that there was no similar record of this issue
- Gordon V Da Mota – plaintiff slipped on a cabbage leave in a store, defendant’s employee dropped the leave – Court held that a reasonable person would have taken steps to prevent the leaves falling.
18.1 Negligence judged in the light of the surrounding circumstances

- negligence evaluated in the light of circumstances
- question the wrongdoer’s behaviour if in accordance with the standard of the reasonable person
- decision in emergency with insufficient opportunity to consider all the consequences of actions - take into account if negligent
- the so-called doctrine of sudden emergency: the law cannot expect a person who has to act swiftly in a situation of imminent peril to show the same judgment and skill as a person who is not acting in such urgent circumstances
- Evaluate all circumstances of a case.

Examples of factors to be taken into account:

1. Things inherently dangerous - Act with more care
2. Disability/incapacity - Act with more care when dealing with them
3. Doctrine of sudden emergency - Can’t be expected to exercise same judgment in emergency
   - Three requirements to escape negligence, ie meet standard of reasonable person:
     a) Situation of imminent peril
     b) Wrongdoer must not have caused such situation
     c) Must not have acted in grossly unreasonable manner
4. Person relies on fact that another person will act in a reasonable way/obey law - don’t have to guard against recklessness of others
5. Customs/usages/opinions of community - Can be a defence if person acted in accordance with normal practices
6. Specific statutory provision which applies - evidentiary material, but is not conclusive proof of negligence

18.2 Negligence and “duty of care”

- Negligence determined by the reasonable person test = so-called duty of care doctrine.
- Duty of care doctrine: (rejected – use reasonable person test for negligence)
  1. establish if defendant owed the plaintiff a duty of care - if yes = negligent
     - Reasonable person in defendant’s position would have foreseen that conduct can cause damage
     - Policy based judgment – foreseeability plays no role – if interests should be protected against negligence
  2. If there was a breach of this duty – if yes = negligent
     - Did the wrongdoer exercise the standard care that a reasonable person would have to prevent damage
     - Duty of care is either for a certain person/group but not everyone

18.3 Proof of negligence

- Onus on plaintiff to prove defendant negligence on a balance of probabilities.
- Onus on defendant, however, to rebut a statutory presumption of negligence.
- Maxim res ipsa loquitur: facts speak for themselves.
- Plaintiff may use this to show defendant acted negligently (merely an argument on probabilities).
18.4 Wrongfulness and negligence

<table>
<thead>
<tr>
<th>Wrongfulness</th>
<th>Negligence</th>
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<tbody>
<tr>
<td>Wrongfulness determined by objective reasonableness</td>
<td>negligence determined by (objective) reasonable person</td>
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<tr>
<td></td>
<td>objective criterion of reasonableness used for both</td>
</tr>
<tr>
<td>- wrongfulness conduct determined by weighing up of conflicting interests in light of the legal convictions of the community (boni mores)</td>
<td>negligence conduct determined with reference to the reasonable foreseeability and preventability of damage</td>
</tr>
<tr>
<td>- Wrongfulness concerned with legal reprehensibility of the conduct (wrongfulness thus qualifies conduct)</td>
<td>negligence concerned with legal blameworthiness of the defendant for wrongful conduct (negligence thus qualifies the defendant or wrongdoer)</td>
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<tr>
<td>- Wrongfulness determined on actual facts or realities</td>
<td>negligence determined on the basis of probabilities</td>
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<td>Wrongfulness is determined before negligence</td>
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<td>Test for wrongfulness is narrower than the test for negligence</td>
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<td>Person may act unreasonable for purposes of wrongfulness, but reasonable for purposes of negligence</td>
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Foot Notes:
- Small children – reasonable man in defendants position would have:
  a) Seen the children in/near the road
  b) If looked or kept a lookout
  c) Reasonably could have anticipated the children.
- Brown V Hunt – fills respondents car and spilt petrol on the floor which caught alight, the attendant tried to put the fire out with water, which pushed the fire under the car and destroyed the care – appellants attorney said it was a sudden emergency and imminent peril – Rejected by court cause this wouldn’t have happen if the petrol didn’t spill – can’t cause an emergency situation.
- Reasonable person in stressful situation would have realised that touching the pistil could set the gun off
- Drive in sudden emergency moves left to avoid damage and somehow moves the other way - not negligent
- Clear wood motors V Akal & Sons – negligent – purpose of law – fails to stop at street where required, if emergency it won’t be seen as negligent.

Cases:
- **S v Goliath** A threatened by B to assist in killing C, court held that compulsion may be a defense to the killing of a human being, conclusion is that because of the differences between the test for wrongfulness and the test for negligence, a defendant may be said to have acted unreasonably for the purposes of wrongfulness but reasonably (like the reasonable person) for the purposes of negligence
- an omission is unreasonable = wrongful ito boni mores test
- legal duty rested on the defendant to act positively to prevent harm
Study Unit 19 – Fault - Contributory Fault

- Fault is the defendant’s conduct
- Contributory fault is the plaintiff’s conduct – limits extent of defendant’s liability
- Contributory fault regulated by the Apportionment of Damages Act 34 1965.

19.1 The common law position

- Roman Dutch law fault of plaintiff prohibited him claiming damages from defendant who was also to blame
- Doctrine of contributory negligence as applied initially was taken over from English law
- Developed from the judgment of Davies v Mann - plaintiff negligently left haltered donkey in the road, defendant driving his wagon, collided with the donkey = negligence on both sides. Court adopted new approach cause defendant last opportunity (last opportunity rule) to avoid collision, plaintiff’s negligence was ignored and the defendant incurred full liability for the damage.
- 1945 English legislature replaced this with the principle of proportional division of damages into each parties degree of fault
- Initially accepted if negligence of two persons contributed to result & one or both of them suffered damage - neither party could institute action unless the negligence of one was the decisive cause of the accident.
- The last opportunity rule didn’t work in practice - legislature intervened

19.2 The Apportionment of Damages Act 34 of 1956

- Changed common law position on contributory fault (in the form of contributory negligence) on part of plaintiff

A. Provisions and meaning of S1 (1) (a) and (b)

S 1(1) (a)
“where any person suffers damage which is caused partly by his own fault and partly by the fault of the other person, a claim in respect of that damage shall to be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage”

S 1(1) (a)
“Damage shall not for the purpose of (a) be regarded as having been caused by a person’s fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so”
- Court now apportions damage of each party into the degree of fault.
- The effect of these two subsections is to abolish the all or nothing principle

B. Meaning of “Fault”:

- Both intent and negligence.
- Defendant intentionally caused damage 2 plaintiff - can’t get reduction in damages cause of contributory negligence
- Plaintiff intentionally contributed towards own loss while defendant was merely negligent - plaintiff forfeits his claim
- Defendant caused loss intentionally and plaintiff’s unreasonable conduct causing loss was also intentional
- Legislature intended - contributory negligence and a defense of contributory intent

Greater Johannesburg v ABSA court held that S 1(1) (a) applies when the form of fault on the part of both the plaintiff and the defendant is intent.
C. Meaning of “apportionment of damages”:
- Reduction of damages received by the plaintiff because of his own fault (negligence)

Criteria for the “apportionment of damages”
- reasonable person test for negligence
- S 1(1) (a) applies only to damage caused by both parties
- doesn’t apply in the case of strict liability
- applies when dealing with a deviation from standard of care that applies 2 a community
- casual nexus determined by usual test, and not so-called last opportunity rule
- doesn’t take into account degrees of causation – if satisfied negligent act /omission of both parties

Jones v Santam AD accepted once plaintiff’s degree of negligence established; unnecessary to see the extent of defendant’s conduct had deviated from the standard of the reasonable person. Used new approach to see degree of fault for plaintiff and defendant. Each party to be measured against a reasonable person.

AA Mutual Insurance association ltd v Nomeka AD confirmed approach in Smit - the degree of plaintiff’s fault automatically determines the degree of fault by the defendant

General Accident Versekeringmatskappy SA Bpk v Uijs plaintiffs fault is taken into account to reduce the plaintiff’s damages in a just and equitable manner.

D. Onus of proof
- Defendant raises defense of contributory negligence – to prove on a balance of probabilities.
- Can also be taken into account even if defendant didn’t pleaded such a defense

E. The concept of contributory “negligence”
- “contributory negligence” - used to determine extent of defendant’s liability
- Method that is similar for determining negligence

F. Fault in regard to “damage” or “damage-causing event”
- Plaintiff was not negligent into accident, but other negligence increased damage resulting from accident
- E.G. not wearing seatbelt even though accident was not cause by his negligence
- Only relevant in so far as it increases the damage – S1(1)(a) applies

G. The provisions and meaning of S1(3):
- “fault” = act or omission which normally would have given rise to the defense of contributory negligence”
- The act erroneously construes fault as an act or omission
- Fault is the legal blameworthiness of a person for his wrongful conduct
- Conduct alone is insufficient to determine the fault of the actor
- Act or omission + other factors to be taken into account in determining fault

H. The defendant’s action:
- Common Law position unchanged until 1971 + last opportunity rule still applied in these cases
- Changed in 1971 - Apportionment of damages act

I. Breach of contract:
- Act doesn’t apply to damage for breach of contract
- Can be argued that a defendant’s breach of contract into his negligence & plaintiff 4 own negligence contributed to the damage.
J. **Legal causation:**
- Different from contributory negligence
- Not every negligent act of plaintiff falls into S1(1)(a).
- Diff between negligence before damage causing event and after
- The before is the apportionment of damages
- The after is the legal causation.

**Foot Note:**
Joint wrongfulness – Voster v AA Mutual Insurance - Plaintiff did not have belt on and was not injured in accident – contributory negligence taken into account

**Cases:**
**Union National South British Ins Co Ltd v Vitoria 1982 (1) SA 444 (A)**
- Contributory negligence
- Failure to wear a seatbelt constitutes contributory negligence.
- Contributory negligence of the plaintiff is only relevant insofar as it has led to an increase in the damage.

**General Accident Versekeringsmaatskappy v Uijs NO 1993 (4) SA 228 (A) [19]**
- Contributory fault
- The extent of a plaintiff’s fault is merely one of a number of factors which the court may take into account in order to reduce the plaintiff’s damages in a just and equitable manner.
Study Unit 20 – Fault - Voluntary Assumption of Risk & Contributory Fault (Contributory Intent)

- Consent to injury/risk of injury (as justification to wrongfulness) sometimes referred to as voluntary assumption of risk. Voluntary assumption of risk can also mean contributing fault (as ground that cancels fault).
- Plaintiff aware of risks/dangers, but exposes self - acts intentionally to prejudice he suffers =contributory intent
- Contributory intent cancels defendant’s fault (negligence only)!
- Voluntary assumption of risk (in both its forms) is a complete defence excluding defendant’s delictual liability.

Relevant cases
Lampert v Hefer - plaintiff took side seat of motorbike, while defendant was intoxicated and not capable to maintain control. Plaintiff suffered injuries and defendant killed. Plaintiff claimed damages from the estate.
- Plaintiff realized he was unable to control the motorbike = guilty of contributory negligence = not courts finding
- Fagan JA “she must have or should have appreciated that risk.
- NB 2 determine if there was contributory intent – plaintiff aware of the danger and still exposed self
- Fagan JA: said that voluntary assumption of risk (contributory intent) and contributory negligence overlap.
- Contributory intent – voluntary exposed to risk while being aware of the risks
- Contributory Negligence - not aware of risk but should have been.

Netherlands Insurance co of SA v Van Der Vyver: O suspected wife was cheating and hired a spy to follow her, who jumped in front of the car with wife & affair to stop them and sustained injuries. AD 2 form of volenti non fit iniurias; -
  1. the consent to the risk of injury (a ground of justification)
  2. Contributory intent or voluntary assumption of the risk (which cancels fault).

“Rescue” cases
- doctrine of voluntary assumption of risk + so-called “rescue cases”
- Y entered house to save baby + injured in flames. Here X would have also been liable because he should have foreseen that there could be a baby in the house and that someone would enter the house to rescue the baby. Could it be argued that there was contributory fault on Y’s part that would exclude X’s liability? In terms of such an argument, Y’s contributory fault could take the form either of contributory intent in that he knowingly exposed himself to the risk of injury or of contributory negligence in that the reasonable man would not have acted likewise. However, there is no question of contributory fault here; as far as contributory negligence is concerned, Y acted like a reasonable man; as far as contributory intention is concerned, his will was directed towards a lawful goal and he did not therefore act consciously unreasonably (that is “consciousness of wrongfulness” is absent)

Foot Notes:
Voluntary assumption of risk – complete defence excluding delictual liability
Consent excluded wrongfulness
Contributory negligence – cancels the defendants negligence but is not a complete defence
Determine –
  a. Was wrongfulness excluded by consent
  b. Was negligence of defendant cancelled by the plaintiffs intentions (contributory intent)
  c. Plaintiff – no consent or contributory intent – but contributed negligently because acted in a diff way that a normal person would have.
Consent – injury = specific harm
Consent – risk of injury = risk of possible harm
Cases:
Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd 1997 (2) SA 591 (W) [20]
- Contributory fault
- Held that a defense of contributory intention could succeed where both the plaintiff and the defendant acted with intent.
- T = employee of Soweto City Council. T steals cheques drawn i.f.o. his employer. Defendant raises contributory negligence on the strength of the fraud of T, who was an employee of City Council. Found i.f.o. plaintiff but ordered a 50% reduction of damages on account of contributory negligence.
Study Unit 21 – Causation - General; Factual Causation

- A causal nexus between conduct and damage is required for a delict.
- A person can thus not be liable if he has not caused any damage
- Causal nexus is something that factually exists or not
- theories of causation have been developed
- NB - conditio sine qua non theory, the adequacy theory, the direct consequence theory, the foreseeability theory and the “flexible approach”
- All theories use the conditio sine qua non theory to determine if a factual casual nexus between the act and harmful consequence exists; if it does exist, so-called factual causation is present
- Question is which harmful events of the defendants conduct should the defendant be liable for.
- Causation in this sense is known as legal causation

Factual Causation

- No delictual liability if can’t prove the conduct of wrongdoer/defendant caused damage to the person suffering
- How 2 determine if a casual nexus exists – based on evidence and probabilities if a causal link exists between the wrongdoers conduct and damage

Conditio sin qua non

- ‘but for’ test
- Need to first know the cause of a consequence
- Shows a link between an act & consequence
- Van der Merwe: if an act cannot be thought away without the result disappearing simultaneously.
- Van Oosten: both a factual test and legal test
- International Shipping co v Bentley: - 1st enquiry is a factual one –is the defendant’s wrongful act the cause of the plaintiff’s loss
- hypothetical enquiry – what might have happened - remove wrongful conduct -c if plaintiffs loss would be the same
- “positive” conduct /comissio of defendant, conduct must be “removed” in the mind to determine whether the relevant consequence would still have resulted
- If positive conduct could have prevented the damage = determined objectively / subjectively - a reasonable person
- CC prefer the objective test
- A reasonable conduct of wrongdoer has the potential to cause a confusion of factual causation and negligence
- First determine if wrongdoer could have done anything to prevent the consequence (causation), and only then whether the reasonable person in the position of the wrongdoer would have prevented the consequence (negligence)
Logical criticism of the *conditio sine qua non*

- *conditio sine qua non* theory - based on clumsy, indirect process of thought that results in circular logic
- *conditio sine qua non* test fails completely in cases of so-called cumulative causation - cumulative causation occurs where more than one act actually causes a particular consequence, for example where X and Y simultaneously, but independently of each other, fire a fatal shot at Z
- Application can lead to absurd results – e.g. neither X nor Y has in fact killed Z
- Not a test of causation because it is merely an ex post facto way of expressing a predetermined casual nexus
- generally accepted that by eliminating in the mind the cause of a consequence – you can establish if it is a cause of the consequences
- convenient and known way of expressing an already determined casual link
- European jurists rejected it – their best a method is a factual casual link on the evidence

*Conditio sine qua non* and causation by an omission

- Used to C if an omission caused the consequence
- S v Van As - test the casual connection between the omission and death - if a reasonable search would have prevented the children’s death, Court inserted positive conduct in the place of the omission. This approach is viewed as an application of *condition sine qua non* by our courts
- prevent certain consequences by interrupting a casual chain of events

The determination of a factual (casual) nexus

- Factual causation concerns a particular kind of link or connection between at least two facts or sets of facts, namely the link existing when, stated succinctly, one fact arises out of another
- determine evidence + probabilities of a factual casual link between the act and the harmful consequence
- Knowledge + experience + reliable evidence = NB 2 determine a causal link.
- factual causation in case of omission = c if the wrongdoer could have done something positive to change the events
- Enough if a defendant’s conduct contributed to damage of plaintiff - no NB that conduct should be the only cause, or the main cause, or a direct cause
Study Unit 22 — Causation - Legal Causation - General; the Flexible Approach Adequate Causation; Direct Consequences

- Legal system doesn’t hold wrongdoer liable without limitation for the endless chain of harmful consequences which his act may have caused.
- Legal causation determines which harmful consequences was caused by wrongdoers wrongful actions
- Wrongdoer not liable for harm that’s too remote from his conduct
- Legal causation (limitation of liability/imputability of harm) = remoteness of damage
- Legal causation only problematic where a chain of consecutive/remote consequences result from wrongdoer’s conduct (can’t be held responsible for all the consequences).

22.1 Theories for determining legal causation:

The flexible approach
- S v Mokgethi: no single/general criterion for the legal causation. A flexible approach is accordingly suggested.
- Basic question: relationship between the wrongdoer’s conduct + consequences for such consequences to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice
- Determines if a link exists between an act and a consequence with reference to policy considerations
- Theories regarded as pointers if damage should be imputed to a person
- Damage imputable if it is a direct consequence of the conduct/reasonably foreseeable/ adequate relationship to the conduct
- The flexible approach diverging needs in different fields = law of delict, criminal law + insurance law

Adequate causation
- “Adequate” according to human experience is the normal course of events where the act brings about a consequence.
Questions:
  - was damage the reasonably-to-be-expected consequence of the act;
  - did the damage fall within the likely field of protection envisioned by the legal norm that was infringed
  - Were the consequences “juridical relevant” with reference to the cause?
- objective prognostic test: “one looks forward as from the moment of the act and ask whether that type of result was to be expected
- No substantial difference between the theory of adequate causation and test of reasonable foresee ability

Direct consequences
- Stems from English law, an actor is liable for all the “direct consequences” of his negligent conduct.
- Liability not necessarily limited to the foreseeable consequences of his conduct.
- Consequence don’t have to follow the cause immediately in time and space to be a “direct consequence”
- may lead to exceptionally wide liability thus been limited to direct physical consequences
- Also limited into ‘foreseeability plaintiff’ doctrine – actor does not act negligently towards a plaintiff, unless it is foreseeable that the particular plaintiff will be injured
- Severely criticised
- Use as subsidiary test only, although may be used in egg-skull cases (where wrongdoer is held liable for consequences he did not reasonably foresee)
Footnotes:

Truck v Commissioner for Inland Revenue it is generally recognized that causation in the law of delict gives rise to 2 distinct enquiries. The first one often termed ‘causation in fact’ or ‘factual causation’, is whether there is a factual link of cause and effect between the act or omission of the party concerned and the harm for which he is sought to be held liable; and in this sphere the generally recognized test is that of the *conditio sine qua non* or the but for test. This is essentially a factual enquiry. Generally speaking no act or omission can be regarded as a cause in fact unless it passes this test. The second enquiry postulates that the act or omission is a *conditio sine qua non* and raises the question as to whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue; or whether the harm is as it is said, ‘to remote’. This enquiry is concerned basically with a juridical problem in which considerations of legal policy may play a part (see International shipping co v Bentley and S v Mokgethi)

- The concepts of ‘legal causation’, ‘limitation of liability’ and ‘imputability of harm’ are used synonymously to indicate the process whereby the court determines which of the heads of damage caused by an actor he should be held liable
- Alston case – P suffered brain injury in accident – negligence of defendant. Plaintiff then suffered depression – ate cheese after taking medicine 4 depression and had a stroke – dangerous
- Mafesa – P leg broken from accident – negligence of defendant – P released from hospital & told not to put pressure on leg, slipped and re broke leg
- Factual causation = actual causation between act & consequence
- Spuy v in of correction services – P was innocent bystander and shot by criminal escaping jail – P claimed damages on vacuous liability for failure of correctional facility to
- Mogethi - Deceased bank teller was shot during a robbery – only died 6 months later – while in wheelchair got readmitted to hospital for septicemia – held that the wounds of deceased was not the cause of death.

Cases:

S v Mokgethi 1990 (1) SA 32 (A)
- Flexible approach to legal causation
- There is no single and general criterion for legal causation which is applicable in all instances. A flexible approach is accordingly suggested. The basic question 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. The existing criteria for legal causation such a direct consequences and reasonable foreseeability may play a subsidiary role in determining legal causation within the framework of this elastic approach.

Facts: Bank teller shot during robbery. Did not die immediately but only six months later. Paraplegic as a result of shot. Resumed his work at the bank. Later re-admitted to hospital suffering from serious pressure sores which developed because he had failed to change his position in the wheelchair frequently. The Appellate Division held that the wounding of the deceased could not be regarded as the legal cause of the deceased death for the purpose of a charge of murder.

International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) [22]

Causation – *conditio sine qua non*

In order to apply this test, one must make a hypothetical inquiry as to what probably would have happened but for the wrongful conduct of the defendant. This inquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical cause of lawful conduct and the posing of the question as to whether upon such a hypothesis, plaintiff’s loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff’s loss. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.
Study Unit 23 – Causation - Legal Causation- Fault

Negligence as criterion for legal causation
- Test for negligence - a reasonable person (same position as wrongdoer) would have foreseen & prevented injury to another in general (abstract approach) or the consequences concerned (concrete approach).
- Abstract Approach – if damage is reasonably foreseeable, wrongdoer liable for specific circumstances and not whether the wrongdoer had been negligent.
- Concrete Approach – investigation into legal causation unnecessary because wrongfulness and negligence are determined with reference to a specific consequence.
- Legal causation - investigation into wrongfulness and negligence.
- Fundamental distinction between wrongfulness/fault/factual & legal causation!
- Extra consequences (for which he has legal causation), the blameworthiness/wrongfulness not an issue, but rather if he should be held liable for such consequences.
- Approaches can also cause trouble into strict liability.
- Wrongdoer liable only for consequences where he had fault
- Van der Merwe and Olivier: liability limited to consequences willed by a person whilst aware of their wrongfulness, and the wrongful consequences that he reasonably should have foreseen and prevented
- Most cases of delictual liability - legal causation is not expressly raised because evident that the consequences caused wrongfully and culpably must be imputed to the actor

Intent as criterion for legal causation
- Consequences caused intentionally cant fall outside the limits of liability
- Intent present if:
  (a) the wrongdoer X actually foresaw conduct could lead to the consequences involved (Y’s death)
  (b) foresaw the consequences in circumstances would be wrongful and reconciled himself with these possibilities

Brown v Hoffman defendant punched plaintiff 3 times at political meeting = plaintiff suffered severe physical injury, in particular injuries to the brain, head, face and neck. In addition to a claim for damages for considerable medical and related expenses, satisfaction was also claimed for shock, pain, suffering, discomfort, loss of amenities of life, and infringement of dignity suffered by the plaintiff.
- Argued 4 defendants that liability was limited to the extent of the defendant’s intent, defendant didn’t intended causing serious injuries and therefore could not be held liable for damages falling outside his intent and compensation for “general damages” such as pain & suffering couldn’t be claimed.
- Rejected by court rejected – cause it results in our law attaching lesser responsibility to one who intentionally injures someone (by assaulting him), than one who cases he same injuries negligently
- Intent cannot serve as a criterion for legal causation
- Reasonable foreseeability test – determine which consequences the defendant should be liable
- Van der Merwe - intentional defendant acted negligently to the circumstances he never intended. “a person can have intent, while being negligent/innocent in respect of others.”

Should a wrongdoer be held liable to a “remote consequence?”
- If the wrongdoers conduct was unreasonable according to legal convictions of community
- Should wrongdoer be legally blamed cause he foresaw & reconciled self to consequences & wrongfulness –(intent)
- If injury was forceable and if reasonable man would have taken steps to avoid injury (negligence)
Study Unit 24 – Causation - Legal Causation - Reasonable Foreseeability; Novus Actus Interveniens; The Talem Qualem Rule

24.1 Reasonable Foreseeability

- Criteria for legal causation
- Not 1 single, decisive criterion for establishing liability
- Foreseeability test not defined – either was or was not forceable
- The foreseeability test - a specific result was foreseeable or not and that is the end of the matter
- Van der Walt and Midgley: not necessary that all consequences of defendant’s conduct should have been foreseen – only kind of harm that actually occurred must been reasonably foreseeable. However, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being farfetched”

Van Rensburg suggests the following general test to determine legal causation:

- Was the consequence & causal progression between act and consequence, at the time foreseeable that the consequences can reasonably be imputed to the alleged wrongdoer?
- Wrongdoer is normally liable for wrongful/culpable act, except for consequences that were highly improbable.
- Reasonable foreseeability may also serve as criterion to impute harm in cases of
  - Intentional wrongful conduct
  - Liability without fault

24.2 Novus Actus Interveniens (Not Reasonably Foreseeable)

- novus actus interveniens = new intervening cause = independent event which, after the person’s act, either caused or contributed to the consequences concerned
- Completely extinguish the causal connection between wrongdoer’s act & consequence, so much that the wrongdoer’s act can no longer be considered to be a factual cause of the consequence, wrongdoer goes free.

Flexible approach (the one favoured by our courts):

- The question should be whether the novus actus has been such that the consequences cannot be imputed to defendant ito fairness/justice/reasonableness/policy.

Direct consequence test:

- Question is whether the novus actus breaks the ‘directness’ of the consequences which is required for liability

Foreseeability test:

- Question is whether novus actus influenced the degree of foreseeability to such an extent, that it may be said the consequence was not reasonably foreseeable

Novus actus interveniens may be brought about by:

- the culpable conduct of the plaintiff himself
- the culpable conduct of 3rd party
- natural factors (wind/rain)
- Event will only qualify as a novus actus interveniens if it was NOT reasonably foreseeable
24.3 Egg-Skull Cases (Talem Qualem Rule)
Where plaintiff (because of one/other physical/psychological/financial weakness) suffers more serious injury/loss as a result of the wrongdoer’s conduct than normally would have.

Talem qualem rule: Take your victim as you find him - Wrongdoer should be liable for harm

Reasonable Forceability:
A specif result was forceable or not

Footnotes:
Novus Actus – influences the question on imputability of loss by the flexible approach - should the consequences be imputed on the defendant

Road Accident V Russel – deceased had brain injuries causing depression & committed suicide.
Novus Actus intervenes – breaking the causal chain between accident and death.
Act was deliberate – but was mentally impaired and therefore lacked capacity to make the right decision = NOT NOVUS ACTUS

Egg shell rule – wrongdoer must take victim as he finds him

Wilson v Brit - Egg shell case – plaintiff injured when defendant employees took scaffolding down in a negligent manner – the polls fell on the plaintiffs head, who a few years before had an operation on his head which results in the plaintiff suffering more damage than he normally would have. Court held that the defendant is liable for the full harm caused.

Cases:
S v Mokgethi 1990 (1) SA 32 (A)
• Flexible approach to legal causation
• ? if the victim own conduct broke the causal nexus between the accused wrongful act (shooting) and the consequence(death)?
• Facts: Bank teller shot during robbery. Did not die immediately but only six months later. Paraplegic as a result of shot. Resumed his work at the bank. Later re-admitted to hospital suffering from serious pressure sores which developed because he had failed to change his position in the wheelchair frequently. The Appellate Division held that the wounding of the deceased could not be regarded as the legal cause of the deceased death for the purpose of a charge of murder.
Study Unit 25 – Damage – Pecuniary/Economic Loss & Injury to Personality

The general compensatory function of the law of delict implies that there must be some loss or damage for which the law makes compensation available.

Forms of the compensatory function of the law of delict
1. Compensation for damage
   - Damages
     - Monetary equivalent of damage awarded to person
     - Object: Eliminate as fully as possible his past/future patrimonial (and sometimes non-patrimonial) damage
     - Money is intended as equivalent of damages

2. Satisfaction
   - Where damage/loss is incapable of being compensated as money is not a true equivalent of impaired interest
   - Satisfaction = reparation of damage (in form of injury to personality) by effecting retribution for the wrong suffered & satisfaction of plaintiff/community’s sense of justice
   - Defendant usually ordered to pay a sum of money

The concept of damage
Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by law.

Extent of the concept of damage
- The concept of damage does, included more than harm for which compensation is recoverable since satisfaction may be awarded for some forms of damage
- Damage is only a reduction in the utility of interests which has been brought about by an uncertain event.
- A reduction in utility which is sure to take place because of, for example, wear and tear, illness due to natural causes, death and consumption cannot be regarded as damage
- **Damage includes patrimonial (pecuniary) as well as non-patrimonial (non-pecuniary) loss:** damage is a broad concept which consists of patrimonial as well as non-patrimonial loss (injury to personality).

Differences between patrimonial and non-patrimonial loss

<table>
<thead>
<tr>
<th>Patrimonial Loss</th>
<th>Non-Patrimonial Loss</th>
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<tbody>
<tr>
<td>decreases patrimonial interests</td>
<td>•</td>
</tr>
<tr>
<td>directly or in money</td>
<td>• indirectly measurable</td>
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<tr>
<td>greater precision – objective criteria</td>
<td>• Less Precision – subjected to feelings - estimate</td>
</tr>
<tr>
<td>Good equitant for damage</td>
<td>• No relationship between money &amp; injury to personality</td>
</tr>
<tr>
<td>value of a patrimonial interest is reduced</td>
<td>• interest of personality is the subject of reduction in</td>
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<td>non-pecuniary damages</td>
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Patrimonial (pecuniary) loss
A person’s patrimony (estate)
- No generally accepted definition of a person’s patrimony.
- Consists of all his patrimonial rights (subjective rights with a monetary value), his exceptions to acquire patrimonial rights and all legally enforceable obligations (or exceptions) with monetary value.

Positive elements of someone’s patrimony:
- A person’s patrimonial rights such as real rights, immaterial property rights, and personal rights.
- Expectations of patrimonial benefits are also part of a person’s estate and this is the legally accepted expectation to acquire patrimonial rights in future.

Negative elements of someone’s patrimony: increase of a monetary debt
- A debt constitutes damage even though the debtor has no assets to pay such debt. An expectation of debt is also part of a person’s patrimony.

The assessment of patrimonial damage

The sum-formula approach:
- Comparison of actual current patrimonial sum with a hypothetical current patrimonial sum
- Provides for prospective damage & loss of profit

A concrete concept of damage:
- Method of differentiation
- Compare difference between the patrimony, before and after the wrongful act
- Better test

Time for the assessment of damage:
- Date of commission of delict
- Date on which 1st damage is manifested
- Events between this date & trial date can also be considered

Prospective patrimonial damage (iucrum cessans)
- Relevant because of once-and-for-all rule (may only claim once)
- Damage which will (with sufficient degree of probability) materialize, after assessment of damage from earlier event
- The creation of an expectation of a debt

Once-and-for-all rule:
- Plaintiff must claim damages (already sustained and expected) insofar as it is based on single cause of action
- Prescription of claim commences as a cause of action accrues (generally after 3 years)
- May not sue twice on single course of action

The collateral source rule and compensating advantages (res inter alios acta)
- Damage causing event may result in plaintiff receiving some benefit from a 3rd party (collateral source)
- May result in plaintiff’s claim for damages (payable by defendant) being reduced

Benefits a plaintiff receives for loses (NOT deducted from damages – res inter alios acta)
- Life insurance
- Medical fund/sick leave benefit (where employer has discretion to pay)
- Benefits received by owner of vehicle by hire-purchaser (who is contractually bound to repair vehicle)
- Insurance money/pension for dependants of deceased breadwinner
- Discretionary payment of pension benefits
• Donations
• Savings on income tax (where delict caused loss of income) in certain cases only
• Pension to member of the citizen force
• Benefit of concluding a beneficial contract on account of delict
• Earning capacity of widow who claims for loss of support
• Re-marriage of widow (insofar as it doesn’t restore her financial position)
• Adoption of a child who claims for loss of support
• Solace money/award

Benefits a plaintiff receives/can receive (Deducted from damages is not res inter alios acta)
• Medical benefits/sick leave person is contractually/statutorily obliged to receive
• Pension & disability pension as above
• Damages received from Compensation Commissioner
• Benefit of free medical treatment
• Marriage prospects of a widow who claims for loss of support
• Savings on income tax due to lost income
• Amount received from wrongdoer/his liability insurer
• Plaintiff’s possible savings on living expenses aro injuries
• Accelerated benefits from deceased breadwinner’s estate

Mitigation of loss
• Plaintiff can’t claim damages that he could have prevented (although it is the factual result of the defendant’s conduct)
• Plaintiff must take reasonable steps to limit the initial loss

Principles:
• Plaintiff is obliged to take all reasonable steps to limit the damage caused by the defendant’s delict
• This duty arises as soon as loss is suffered
• Failure to do so means he can’t recover loss for damage he could have prevented
• But the standard of reasonableness is not very high
• If plaintiff did take steps to mitigate the loss, he may still claim for any additional loss caused by such reasonable steps
• Where he reduced his damage, the defendant is only liable to compensate for actual loss (even if plaintiff did more towards mitigation than was necessary)
• Onus on defendant to prove plaintiff did not fulfil his duty to mitigate
• However, once so proved, onus is on plaintiff to prove what his loss would have been if he had taken reasonable steps

Non-patrimonial (non-pecuniary) damage or injury to personality
• Non patrimonial damage is the detrimental impact (change/factual disturbance of) personality interests worthy of protection by the law and which does not affect the patrimony
• Interest of personality: the different rights to personality provide an indication of the relevant personality interests and thus also of non-patrimonial loss. Physical-mental integrity, liberty, reputation, dignity, privacy, identity and feelings
Study Unit 26 – Delictual Remedies

SA law of delict rests on 3 pillars:

1. **Actio legis Aquiliae**
   - Actively & passively heritable (falls into his estate and can be instituted by executor)
   - Action under this also freely cedable
   - *Litis contestatio* (closing of pleadings) has no effect

2. **Actio iniuriarum**
   - Actively & passively heritable only after *litis contestatio*
   - Dws the claim lapses if plaintiff/defendant dies before such time
   - Claims under this also not cedable

3. **Action for pain and suffering**
   - Actively & passively heritable only after *litis contestatio*
   - Dws the claim lapses if plaintiff/defendant dies before such time
   - Claims under this also not cedable

**Other actions: From RDL**

For liability without fault

**Action for damages caused by animals**
- *Actio de pauperie*
- *Actio de pastu*
- *Actio de feris*

**Action for damages caused by objects thrown out of/falling from building**
- *Actio de effuses vel deiectis*
- *Actio positi vel suspense*

**Action for damages for loss of a stolen thing**
- *Condictio furtive*

**Action caused by owners of neighbouring property**
- *Actio aquae pluviarum arcendae*

**Action for disturbance of the lateral support**
- *Interdictum quod vi aut clam*

**Other:**
- *Actio doli*
- *Actio quod metus causa*
- *Actio ad exhibendum*
- *Amende honourable*

But most of those involving wrongful/culpable damage, can be grouped under the Aquilian action.

**The Interdict:**
- Delictual remedies aimed at compensation for patrimonial damage/impairment of personality.
- Avert an impending wrongful act, or prevent continuation of act that already commenced.
- Thus has a preventative function, not retributive.
- Fault is not a requirement!

**Two forms:**
- **Prohibitory**- Stop wrongful act happening/continuing
- **Mandatory** - Positive conduct of wrongdoer to stop wrongful conduct already committed
Requirements:
1. There must be an act by the respondent
   • Already commenced or threatening; commission or omission
2. The act must be wrongful
   • Infringement of clear right; or breach of legal duty
3. No other remedy must be available
   • Interdict may be final or temporary (pendente lite) – permanent vs. only applies until end of trial

Concurrence of remedies:
• One act may result in several remedies/varies claims, these remedies may be similar or dissimilar
• May also have a choice between alternative remedies

Exclusionary clauses:
• Parties to a contract may restrict their liability – contractual as well as delictual – through an exemption/exclusionary clause
• Precise restriction depends on interpretation

Prescription of remedies:
• Prescription Act 68 1969: Delictual debt prescribes 3 years after it originated
• For 3rd party claims under Road Accident Fund Act 56 1996, the period is 2/3 years
• Period commences moment all delictual elements are present & creditor has knowledge of the ID of the wrongdoer/facts of case

Study Unit 27 – Joint Wrongdoers

• Damage not necessarily caused by only one wrongdoer.
• Common law distinguishes between joint and concurrent wrongdoers.
• Joint: They cooperate consciously to commit delict
• Concurrent: Independent wrongful conduct that contribute causally to same harmful consequences
• At common law, these two are treated differently.
• Apportionment of Damages Act 34 1956 abolishes common law distinction.
• Joint wrongdoers now = are jointly and severally liable in delict for the same damage, irrespective of whether culpability was intentional/negligence.
• Joint wrongdoers are in solidum liable for the full damage.
• Plaintiff can sue whichever one he chooses for full amount or together in same action (then jointly and severally liable).
• Court may apportion damages on basis of their relative degree of fault, and may give judgment against each.
• A plaintiff/defendant in action can notify a joint wrongdoer of the action, before litis contestatio, and defendant may claim recourse from that person if he paid full amount aro judgment against him. Can claim proportionate amount.
• Also, if plaintiff only got a part of the damages from a defendant, he may sue other wrongdoer for balance.
• If joint wrongdoer pays more than is justified, he may exercise his right of recourse against any of the other joint wrongdoers.
Study Unit 28 – Psychological lesions

- Psychological lesion/psychiatric injury/psychological disturbance = any recognisable infringement of the brain and nervous system of a person.
- Existence of such a lesion should be proved by psychiatric evidence.
- Some naturally caused:
  - Through nervous shock
  - Fright
  - Other mental suffering
- But lesions caused by other reasons than emotional shock are also actionable.
- Decision of Appeal Court in Bester v Commercial Union Versekeringsmaatskappy van SA Bpk, is the locus classicus for view that impairment of personality and patrimonial loss agv psychiatric injury/emotional shock caused wrongfully/culpably, founds action for pain & suffering and Aquilian action.
- Before Bester, there were 2 artificial restrictions on liability for emotional shock:
  1. Shock must result from physical injury (concerns wrongfulness)
  2. Party must be in personal danger of being injured (concerns negligence and legal causation)

Wrongfulness:

- This requirement was rejected in Bester (this req necessitated that one distinguishes btw physical/psychological harm)
- After Bester, physical injury not absolutely necessary to found liability
- But to be actionable, the harm caused by the shock must be reasonably serious

Negligence & legal causation with regards to emotional shock:

- rejected in Bester; replaced by yardstick of reasonable foreseeability of harm
- To establish negligence, the reasonable foreseeability/preventability of lesion must be ascertained
- Where the emotional shock is further a consequences of the wrongdoers already established negligent act = question of legal causation is the wrongdoer’s negligent act is the legal cause of the psychological lesion
- No difference to establish negligence or legal causation depends on circumstances
- Factors to see if psychiatric injury was reasonably foreseeable:
  - Fact that it resulted from physical injury
  - Fact that plaintiff was in danger of being physically injured
  - Fact that plaintiff was informed of death/injury of a close relative
  - Fact that plaintiff witnesses death/personal injury of someone he had close relationship with
- Once court has found that serious shock was foreseeable, wrongdoer is liable for physical/mental consequences ensuing from emotional shock (regardless of whether such consequences were also foreseeable)
- thin-skull rule/egg-skull/talem qualem rule - Wrongdoer to take victim as he finds him – defendant can’t escape liability by showing the plaintiff was susceptible to the prejudicial consequences of shock and that the consequences were therefore not reasonably forceable.

Footnote:

- Emotional shock: a sudden painful emotion or fright resulting from the awareness or observation of an overwhelming or disturbing event which causes unpleasant emotions such as fear, anxiety or grief. Emotional shock may be caused by the prejudiced person’s fearing for his own safety, the safety of another person, or even the
safety of his property, by observing a gruesome accident, by learning of the death of a relative or a loved one or by experiencing other disturbing events

- The fact that up to know South African courts have, in by far the majority of instances been faced with delictual liability for emotional shock, therefore, does not exclude the possibility that psychological lesions caused by emotional shock may also be actionable

**Study Unit 29 – Injury or death of another; pure economic loss; negligent misrepresentation; interference with a contractual relationship, unlawful competition, manufacturer’s liability**

**Damnum iniuria datum: delicts involving patrimonial damage**

5 specific forms of *damnum iniuria datum*

1. Injury or death of another person
2. Negligent misrepresentation
3. Interference with a contractual relationship
4. Unlawful competition
5. Manufacturer’s liability

**Aquilian action available in principle to claim damages for pure economic loss.**

**Pure economic loss:**

- Patrimonial loss not resulting from damage to property/personality
- Financial loss flowing from damage to property/personality (but not plaintiff’s property/person)
- Must comply with all delictual elements
- Ito wrongfulness of act causing pure economic loss, it mostly lies in breach of legal duty (but may also sometimes lie in infringement of right)

**Cases:**

Bester v Commercial Union Versekeringsmaatskappy van SA Bpk 1973 (1) SA 769 (A) [29]
Barnard v Santambank 1999 (1) SA 202 (SCA) [29]
Study Unit 30 - The right to physical integrity; the right to a good name or fama; rights relating to dignitas

30. The right to physical integrity; the right to a good name or fama; rights relating to dignitas

Defamation

- The intentional infringement of another person’s right to his good name
- Defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect on injuring his status, good name or reputation
- Elements of this iniuria; the act, an injury to personality, wrongfulness and intent
- True defamatory words can also be actionable

Elements:

1. Publication (act)

- Defamation will arise only if disclosed to 3rd person (because relates to opinion of others concerning person), dws publication is necessary
- Dws only needed to disclose is to at least 1 other person (other than plaintiff himself)

Qualifications:

- Not considered publication if disclosure made to outsider unaware of the meaning/defamatory character thereof plaintiff
- Communication of such defamation concerning 3rd party from one spouse to another, does not constitute publication
- Once publication established, plaintiff must prove that defendant was responsible for the publication.
- Question is whether result was foreseen/reasonably foreseeable
- Not only origin of defamation, but also persons repeating it, are responsible for its publication

2. Defamatory effect: wrongfulness/unlawfulness (infringement of personality right/defamatory effect)

- Wrongfulness lies in infringement of person’s right to his good name
- Question of whether good name has in fact (actually) been infringed is irrelevant
- Question should rather be (objectively) if the reasonable man is of the opinion that the reputation has been injured – embodiment of boni mores criterion

Principles applicable here into reasonable person test:

- Reasonable/normal/fictional/well-balanced/right-thinking person, with normal emotional reactions, not oversensitive or hyper-critical
- Someone who subscribes to norms/values of Constitution
- Member of society in general, and not of a specific group
- Reaction of reasonable person dependent on circumstances
- Verbal abuse is not defamation (doesn’t injure good name)
- Words/behaviour are prima facie defamatory or not – but may even in secondary meaning be defamatory (innuendo) – primary and secondary meaning ascertained objectively bmo test
- Ambiguous meaning – follow one most favourable to defendant

Grounds of justification (5)

- Plaintiff proves defemation = prima facie proof of wrongfulness
- Defendant has onus to rebut + prove justification
1. Privilege or privileged occasion: Privilege
   - Someone has right/duty to make certain defamatory assertions (to injure another’s good name)
   - Absolute privilege (regulated by statute): Liability completely excluded
   - Eg members of parliament having complete freedom of speech during debates
   - Relative privilege: Only conditional protection – It falls away as soon as plaintiff proves defendant exceeded the bounds

Duty discharge or interest furtherance
   - Legal duty
   - Social/moral duty – reasonable person test
   - Legitimate interest
   - Other person has corresponding duty to learn of the assertion
   - Defendant must prove he acted within the scope/limits
   - Plaintiff may still show he has malice

Judicial/quasi-judicial proceedings
   - Applies to all participants
   - They enjoy provisional protection
   - Two grounds: relevance and reasonable grounds – absence of one = limits exceeded
   - But plaintiff may still prove excess ito malice

Privileged reports
   - Court/parliament/public body proceedings’ publications
   - Must be fair and substantially accurate account of proceedings

2. Truth and public interest
   - Prima facie wrongfulness will be cancelled if defendant proves the remarks were true & in public interest – only has to prove substantial, not literal, truth
   - Public interest depends on boni mores
   - Time/manner/occasion is NB – don’t rake up past transgressions
   - Here, limits are NOT exceeded if person acted with malice

3. Media privilege
   - Publication of false/untrue defamatory statements
   - Apply this defence with caution
   - Reasonableness depends on boni mores

   Factors:
   - Public interest (not interestedness)
   - Nature of info on which it is based
   - Nature of mass-medium used
   - Extent of distribution
   - Reliability of info
   - Steps taken to verify info
   - Opportunity given to person to react
   - Necessity/urgency to publish before verification
   - Was less harmful means to achieve same objective available
   - Malicious motive

4. Political privilege
   - Publication of false/untrue defamatory allegations
   - Publications on political terrain
• Same factors ito reasonableness as for media privilege, with one exception:- Publication must be made with ‘the reasonable belief that the statements made are true’

5. Fair comment
• Prima facie wrongfulness may be set aside if defendant proves that the defamatory forms part of a fair comment on facts that are true & in public interest

4 requirements:
1. The defamatory must amount to comment and not to the assertion of an independent fact. The test is that of the reasonable person
2. The comment must be fair- the comment must be relevant to the facts involved and convey the honest and bona fide opinion of the defendant
3. The facts on which the comment is based must be true
4. These facts must be in the public interest

Fault
⇒ Aminus iniuriandi:
⇒ Initially our courts incorrectly undermined aminus iniuriandi as a material requirement for defamation. From the beginning of the 1960s, with the decision in Maisel v Van Naeren and in the well known trilogy of the AD things began to change. Today aminus iniuriandi is, with a few exceptions, accepted as an essential requirement for defamation. Negligence is as a rule therefore insufficient to render the wrongdoer liable
⇒ Aminus iniuriandi or intent to defame means “the mental disposition to will the relevant consequences, with the knowledge that the consequences will be wrongful”
⇒ If one of these elements, namely direction of will and consciousness of wrongfulness, is absent, there is no question of intent to defame.
⇒ Although the plaintiff must expressly aver the existence of aminus iniuriandi in his pleadings, he need not prove intent on the part of the defendant
⇒ A part from the presumption of wrongfulness, there is also a presumption that the defamation was committed intentionally. The burden of rebutting he presumption is placed on the defendant, which can be done by showing that either the direction of the will or consciousness of the wrongfulness or both, as essential elements of intent, are lacking on his part
⇒ Grounds excluding intent:
   ✤ Mistake: if a person is unaware of the wrongfulness of his defamatory publication, because for whatever reason, he bona fide thinks or believes that his conduct is lawful, consciousness of wrongfulness, an essential element of intent, and therefore also intent, are absent as a result of this mistake
   ✤ Mistake is determined subjectively
   ✤ In the case of an unreasonable mistake the defendant s held liable on the ground of his negligence
   ✤ Jest: if the defendant proves that he published the defamatory words in jest, I circumstances where his will was not directed at the infringement of the prejudiced person’s right to good name, direction of will, as an essential element of intent is absent and he should be able to rebut the presumption of aminus iniuriandi
   ✤ The courts incorrectly do not follow this approach. For a successful plea of jest, the courts require that the (reasonable) bystander should also have regarded the words as a joke

Negligence
⇒ Negligence has in the course of time been accepted as the fault requirement for certain forms of defamation.
⇒ Liability based upon negligence has been recognised for distributors and sellers of printed matter containing defamatory matter
⇒ There are judgements on the liability of the press for defamation recognising non-intentional but negligent mistake as ground for liability
A general principle was introduced in National Media Ltd v Bogoshi that negligence is sufficient for defamation by the mass media.

There is case law that wants negligence recognised for all instances of actionable defamation and not only in respect of the mass media.

- **Grounds for justification**
  1. Fault/Culpability (intent/negligence)
    - *Animus iniurandi*
      - Intent to defame = mental disposition to will the relevant consequences, with knowledge that it will be wrong
      - Essential requirement for defamation
      - If either direction of will/knowledge of consequences lacks, no defamation
      - Plaintiff need not prove intent, there is a presumption of wrongfulness/intent, if certain that publication was defamatory & related to plaintiff
      - Burden of rebutting presumption is placed on defendant – he may do this by proving mistake/jest
  2. Grounds excluding intent
    - Mistake:
      - Thinks conduct is lawful – unaware of wrongfulness
      - Mistake rebuts presumption of *animus iniurandi*
      - Determine subjectively – needs to be reasonable & absent of negligence
      - If unreasonable – will be liable for negligence
    - Jest:
      - Requirement for certain forms of defamation only
      - Eg for distributors/sellers of printed matter containing defamatory remarks
      - Eg liability of press for defamation recognising negligent (non-intentional) mistake
      - Eg defamation by mass media
  3. Negligence
    - Insufficient to render wrongdoer liable, except in cases above

2. Causation
3. Injury (defamatory effect of words/behaviour)

**Cases:**
National Media Ltd v Bogoshi 1988 (4) SA 1196 (SCA) [30]
Study Unit 31 - General: damage caused by animals

31. General: Damage caused by animals

Actio de pauperie

❖ The prejudiced person may claim damages from the owner of a domestic animal which has caused damage.
❖ Fault on the part of the owner is not a requirement for liability.
❖ The AD in O’Callaghan v Chaplin decided that it is still part of our law.
❖ Requirements to succeed with the Action de pauperie:
  a) The defendant must be the owner of the animal when the damage is inflicted
  b) The animal must be a domestic animal
  c) The animal must act contra naturam sui generis when inflicting the damage
     ❖ The animal involved must have acted objectively seen, contrary to what may be expected of a decent and well-behaved animal of its kind
     ❖ The animal must have caused the damage spontaneously from “inward excitement or vice” or sponte feriate commotai
     ❖ The animal does not act contra naturam if it reacting to external stimuli. The rule is, however, not consistently applied by the courts
     ❖ Defences against the actio de pauperie relating to spontaneous conduct:
       - culpable conduct on the part of the prejudiced person,
       - culpable conduct on the part of an outsider- where the animal is provoked the a 3rd party the owner is not liable, the same applies where the damage may be attributed to the negligence of a 3rd party provided that the 3rd party was in charge or control of the animal and by his negligent conduct failed to prevent the animal from injuring the victim; and
       - Provocation by another animal.
     ❖ These cases have the effect of excluding liability because the animal did not act from “inward excitement or vice”. The defence of volenti non fit iniuria in the form of voluntary assumption of risk is also available to the defendant
  d) The prejudiced person or his property must be lawfully present at the location where the damage is inflicted
     ❖ Some cases require a “lawful purpose” and others a “legal right” on the part of the prejudiced person in order to establish a lawful presence at the location involved.
     ❖ The test for a “legal right” is narrower that “lawful purpose” since a person, who has a legitimate purpose, may not necessarily have the right to be at the place. The “legal right” approach is preferable because one cannot always determine what the aim or purpose of property, being a lifeless object is
     ❖ Both patrimonial damages and satisfaction may be claimed. The extent of the defendants liability should be limited in accordance with the flexible criterion for legal causation

Actio de pastu
Damages are claimed from the owner of an animal which caused loss by eating plants
Still part of our law
3 requirements:
  1. The defendant must be the owner of the animal when the damage is caused
  2. the animal must cause damage by eating plants
  3. the animal must act of its own volition when causing the damage
Fault on the part of the prejudiced party constitutes complete defences against the actio de pastu. Culpable conduct on the part of an outsider does not exclude the actio de pastu

Actio de feris
The bringing of wild or dangerous animals on or into a public place was prohibited

ANIMALS
Actions to claim for damages caused by animals:
  1. Actio de pauperie
     - Originated from 12 Tables
     - Claim from owner of domestic animal that caused damage
     - Fault not required
     - Can claim damages & satisfaction
     - Use flexible criterion for legal causation
     - Requirements:
       - Defendant must be owner of animal
         ➢ Mere control not sufficient
       - Domestic animal
         ➢ May include horses/mules/meerkats
         ➢ Excludes wild animals
       - Animal must act contra naturam sui generis when inflicting damage
         ➢ Contrary to what may be expected of a decent animal of its kind – eg jumping horse, biting dog
         ➢ But must have caused it spontaneously (inward vice)/ not in reaction to external stimuli
         ➢ Defences:
           ▪ Vis maior
           ▪ Culpable conduct from prejudiced person
           ▪ Culpable conduct from outsider (even 3rd party in control of animal – but may claim from him then)
           ▪ Provocation
           ▪ Voluntary assumption of risk
       - Prejudiced person/property must be lawfully present @ location where damage is inflicted
         ➢ Unsure if this means ‘lawful interest’ or ‘legal right’
         ➢ Legal right preferable
  2. Actio de pastu
     - Also from 12 Tables
     - Damages claimed from owner of animal causing loss by eating plants
     - Three requirements:
       - Defendant must be owner
       - Animal must cause damage by eating plants
       - Animal must act out of own volition
         ➢ But culpable conduct from prejudiced person (not outsider) is defence

Foot Notes:
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**Study Unit 32 - Vicarious liability**

study paragraphs 2.1.7.1, 2.1.7.2, and 2.1.7.4 and read paragraphs 2.1.7.3 in the place of 2.1.6.3

**32. Vicarious liability**

⇒ The strict liability of one person for the delict of another
⇒ The former is thus indirectly or vicariously liable for the damage caused by the latter
⇒ Applies where there is a particular relationship between two persons: employer-employee, principal-agent and motor car owner- motor car driver

**Employer-employee**

⇒ Where an employee acting within the scope of his employment, commits a delict, his employer is fully liable for the damage
⇒ The rationale for or basis of the employer’s liability is controversial. Best known one is: the employer liability is founded on his own fault (culpa in eligendo)
⇒ Other theories/ rationale: the interest or profit theory according to which the employer must also bear the burden of the employee’s services; the identification theory according t which the employee is only the employer’s arm; and the solvency theory according to which an employer is liable because he is normally in a better position financially than the employee
⇒ The convincing theory is the risk or danger theory which furnishes the true rationale for the employer liability- the work entrusted to the employee creates certain risks of harm for which the employer should be held liable on the grounds of fairness and justice, as against injured 3rd parties
⇒ 3 requirements for vicarious liability:

1. There must be an employer-employee relationship at the time when the delict is committed: a contract of service must exist. A contract of mandate (involves an independent contractor) in terms of which one person undertakes to render services to another for remuneration without being subject to the control of the other, does not found vicarious liability
   - The question of control, which does not mean factual control but the capacity or right of control
   - First the AD employed the dominant impression test to determine whether the dominant impression is that or a contract of service or a contract of mandate. Later it was held that in determining the relationship between the parties is a multi-faceted test should be utilised, taking into account all relevant factors and the circumstances of the specific case.
   - The state is in the same position as other employers
2. the employee must commit a delict- due to the fact that the employee is also delictually liable, the employer and employee are in principle regarded as joint wrongdoers as against the prejudiced party. However, a right of recourse is only available to the employer
3. the employee must act within the scope of his employment when the delict is committed- if he acts in the execution or fulfilment of his duties in terms of the employment contract

**Motor car owner- motor car driver**

⇒ where a motor car owner allows someone else (who is not his employee) to drive his car and the driver negligently causes an accident the owner is fully liable for the loss provided that
(a) the owner must request the driver to drive the vehicle or supervise his driving
(b) the vehicle must be driven in the interest of the owner
(c) the owner must retain a right (power) of control over the manner in which the vehicle is driven

vicarious liability may explained with reference to the risk theory
Strict liability of one person for delict of another. Dws indirect liability due to particular relationship between persons.

Three cases:

1. Employer-employee
   - Employer is liable for employee’s delict committed in scope of his employment
   - Fault not required by employer
   - Controversial
   - Risk of danger theory most suitable (out of all the theories)
   - Three requirements:
     - Must be relationship @ time of delict
       - Contract of service must exist
       - Contract of mandate does not found vicarious liability
       - To determine relationship between parties – use multi-faceted test looking at all relevant factors/circumstances
       - State is also an employer
     - Employee must commit the delict
       - Right of recourse available to employer (because technically joint-wrongdoers)
     - Employee must act within scope of his employment when delict is committed
       - Acts in execution/fulfilment of duties ito contract
       - Use standard test:
         - If solely for own interest/purpose, it’s outside course of employment - Subjective test
         - But may also be liable if close link to work - Objective test
         - Dws employer only escapes liability if employee (subjectively) promoted own interest, or if he (objectively) disengaged from duties of contract (dws no sufficient close connection)
       - Scope of employment may also be decided on basis of creation-of-risk by employer:
         - Does act fall within risk created by employer
         - But does not replace standard test

2. Principal-agent

3. Motor car owner - motor car driver
   - Owner lends car to someone to drive
   - Driver negligently makes accident
   - Owner fully liable
   - Requirements:
     - Owner must request driver to drive, or supervise his driving
     - Must be driven in the interest of the owner
     - Owner must retain right/power of control over manner in which it is driven
   - Here too, vicarious liability may be explained wrt risk theory.
LEARNING OUTCOMES
1. Define a delict
2. List the 5 elements of a delict
3. Name the most important delictual remedies available, and briefly indicate what are the differences between them
4. Write brief notes on the differences/ similarities between a delict and a breach of contract
5. Write brief notes on the differences/ similarities between a delict and a contract
6. Explain in 4 or 5 sentences how Chpt. 2 of the Constitution may influence the law of delict

The act
7. Define an act
8. Enumerate the requirements of an act and apply them to practical factual examples
9. Explain the requirements of the defences of automatism and apply them to practical factual examples
10. Briefly explain the difference between a commission and an omission

Wrongfulness
11. Describe the 2 steps involved in an inquiry into wrongfulness
12. Explain the relationship between wrongfulness and a harmful result, and apply this knowledge to factual examples
13. Explain what is meant by the legal convictions of the community (boni mores)
14. Name and explain 3 characteristics of the boni mores test for wrongfulness
15. Write brief notes on the role of subjective factors in the determination of wrongfulness
16. discuss, with reference to examples, the ways in which the boni mores can be applied in practice
17. explain the concept “subjective right”
18. describe how it is ascertained whether a subjective right has been infringed, and apply this knowledge to practical examples
19. explain the relationship between legal duties and wrongfulness
20. explain the relationship between boni mores and the breach of legal duty
21. explain the principles according to which it is determined whether an omission is wrongful or not, and apply them to sets of facts
22. explain the factors which may be taken into account during the determination of the wrongfulness of an omission, and apply this knowledge to factual situations
23. write brief notes on the determination of the delictual wrongfulness of a non-compliance with a statutory duty
24. briefly describe the concept of a ground of justification with reference to an example
25. briefly indicate the connection between grounds of justification and the boni mores (legal convictions of the community)
26. describe private defence with reference to an example
27. name the requirements for private defence and apply them to a given set of facts
28. define necessity
29. differentiate between defence and necessity
30. name, and apply to factual situations, the guidelines for a successful reliance on necessity
31. discuss the importance of S v Goliath for the law regarding necessity
32. define provocation
33. take a point of view on the correct legal basis for the defence of provocation
34. distinguish between provocation and private defence
35. discuss the requirements for provocation in the case of physical assault, defamation and insult
36. explain the principle of Compensatio
37. distinguish briefly, with reference to examples, between the following concepts
   - consent to injury
   - consent to the risk of injury
   - volenti non fit injury
   - voluntary assumption of risk
   - contributory negligence and contributory intent
38. name the characteristics and requirements for valid consent and apply them to given set of facts
39. briefly discuss a pactum de non petendo
40. explain when a statute authorises an infringement of interests
41. explain when act falls within the boundaries of statutory authorisation
42. explain when official capacity will constitute a ground of justification
43. explain when execution of a wrongful command can constitute a defence
44. indicate when punishment will be lawful and which factors must be taken into consideration with reference to case law and S10 of the South African Schools act
45. explaining the underlying notion of the doctrine of abuse of rights
46. briefly name the main principle (or primary guidelines) which can be used to determine whether there was an abuse of rights in a particular case
47. apply the above-mentioned main principles to given set of facts
48. discuss the role an improper motive plays in the doctrine of the abuse of rights
49. describe the delict nuisance with reference to practical examples

Fault
50. name the 2 forms of fault
51. define accountability and explain the influence of youth, mental disease or illness, intoxication and provocation on accountability
52. explain the relationship between accountability and fault
53. describe all 3 forms of intent and be able to apply them to practical examples
54. briefly distinguish between intent and motive
55. briefly explain the effect of mistake concerning the casual chain of events
56. state the test for negligence with reference to the formulation in Kruger v Coetzee and apply it to practical sets of facts
57. form a reasoned opinion on whether negligence and intent can overlap
58. explain whether it is necessary to differentiate between ordinary and gross negligence
59. differentiate between negligence and omission
60. briefly discuss the general characteristics of the reasonable person diligens paterfamilias as applied in case law
61. discuss in detail the reasonable-person test as applied to children with reference to case law and apply to practical examples
62. Discuss in detail the negligence test as applied to experts with reference to case law and apply it to practical sets of facts
63. name the 2 legs on which the test for negligence stands
64. describe the nature and applicability of the abstract and concrete approaches to foreseeability

65. name the 4 considerations that play a role in the preventability aspect of the test for negligence and apply them to factual complexes
66. 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 practical sets of facts
67. explain and apply the principles relating to the so-called ‘doctrine of sudden emergency’
68. explain the English law ‘duty of care’, the criticism thereof, and the difference between ‘duty of care’ and ‘legal duty’
69. write brief notes on the application of the onus of proof in the case of negligence, and in particular the *res ipsa loquitur* maxim
70. explain the difference between wrongfulness and negligence
71. write brief notes on the meaning and relevance of the term “contributory fault”
72. explain the common-law position regarding contributory fault and be able to apply this knowledge to factual examples
73. 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
74. 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
75. 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 defendants negligence
76. discuss the case law as an illustration of contributory fault
77. discuss the connection between the doctrine of voluntary assumption of risk and the so-called rescue cases
78. explain the importance of the decision in Greater Johannesburg Transitional Metropolitan Council v ABSA in respect of the defence of contributory intent

**Causation**
79. distinguish between factual and legal causation
80. explain the operation of the *conditio sine qua non* doctrine, and be able to apply it to factual situations
81. write brief notes on the criticism of the *conditio sine qua non* doctrine
82. 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
83. explain the correct method of determining a factual causal relationship and be apply to apply it to factual examples
84. discuss the meaning, operation and function of legal causation
85. name the different tests for legal causation
86. explain the flexible approach to legal causation as applied by the courts, and be able to apply it
87. explain adequate causation as a specific test for legal causation, and be able to apply it
88. explain the direct consequences theory as a test for legal causation, and be able to apply it
89. write brief notes of the content of the so-called fault in relation to the loss approach to legal causation
90. explain why intent cannot serve as criterion for legal causation
91. explain why negligence cannot serve as criterion for legal causation
92. explain reasonable foreseeability as test for legal causation and be able to apply it
93. write brief notes on the relationship between reasonable foreseeability and the flexible approach to legal causation
94. 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
95. explain the meaning and role of the so-called egg-skull case of legal causation, and be able to apply this knowledge to factual situations

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

**Delictual remedies**
106. name the different remedies that may be instituted on the basis of a delict (i.e. the so-called 3 pillars on which the law of delict rests, as well as the other delictual remedies)
107. indicate whether the 3 main delictual actions are transmissible
108. briefly discuss the purpose, forms, function and requirements of an interdict
109. write brief notes on concurrence of remedies
110. write brief notes on a so-called exclusionary clause
111. explain the principles concerning prescription of remedies, and apply them

**Joint wrongdoers**
112. explain what a “joint wrongdoer” is as defined in terms of the apportionment of damages act 34 of 1956
113. explain how joint wrongdoing is regulated in terms of the apportionment of Damages act and apply this knowledge to factual situations

**Psychological lesions**
114. describe psychological lesions
115. name the locus classicus (trendsetting case) in the field of psychological lesions
116. name the 2 artificial restrictions on the delictual principles which were initially applied by our courts in determining liability for psychological lesions
117. describe the principles that were introduced by Bester v Commercial Union in the place of the 2 old restrictions
118. name the factors that may play a role in determining whether psychological lesions were reasonably foreseeable

**Injury or death of another; pure economic loss; negligent misrepresentation; interference with a contractual relationship, unlawful competition, manufacturer’s liability**
119. explain what is meant by pure economic loss
120. name 5 other specific forms of damnum injuria datum

**The right to physical integrity; the right to a good name or fama; rights relating to dignitas**
121. define defamation and give examples of this iniuria
122. name and discuss the elements of defamation
123. name, discuss and apply the traditional grounds of justification for defamation
124. discuss the grounds on which intent can be excluded in a case of defamation
125. name the 5 other forms of personality infringement

**Damage caused by animals**
126. discuss the requirements for the actio de pauperie and apply them to a given factual situation
127. discuss the requirements for the actio de pastu and apply them to a given situation

**Vicarious liability**
128. define vicarious liability
129. name 3 relationships where vicarious liability may apply
130. name and discuss the requirements for an employers liability for a delict committed by an employee
131. name the requirements for liability of the owner of a motor vehicle for a delict committed by the driver of the motor vehicle