Law of Delict 2010

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SU 1: SCOPE

Delict: The act of a person which in a wrongful and culpable way causes loss/damage.

Elements of a delict:

- Act
- Wrongfulness
- Fault
- Causation
- Damage

All 5 elements must be present before conduct=delict.

Exception: Cases of strict liability.

SU 2: INTRODUCTION

The law of delict determines the circumstances in which a person is obliged to bear the damage he has caused another.

Wrongdoer has obligation to compensate; prejudiced person has right to claim compensation.


Distinction made between delicts that cause patrimonial damage (damnum iniuria datum) and those that cause injury to personality (iniuria).

Three pillars of the law of delict:

1. *Actio legis Aquiliae*: Claim damages for wrongful and culpable causing of patrimonial damage
2. *Actio iniuriarum*: Claim satisfaction for wrongful and intentional injury to personality.
3. Action for pain and suffering: Claim compensation for wrongful and culpable impairment of bodily or physical-mental integrity.

Difference between a delict and a breach of contract:

Seems the same, but a breach of contract is only constituted by the non-fulfilment by a contractual party of a personal right(aka claim), or an obligation to perform.

Dws remedies are primarily directed at enforcement, fulfilment or execution of the contract. Delictual remedies directed at damages and not fulfilment.

Law of contract provides specific rules/remedies for breach of contract that are not applicable to a delict.

Delict=breach of duty imposed by law.
Breach of contract=breach of duty voluntarily assumed.
Difference between delict and crime:

Distinction between private and public law. Protect individual vs protects public interest. Delictual remedies are compensationary, while criminal sanctions are of a penal nature, to punish criminal for transgression against public interest. Each delict not necessarily a crime and vice versa.

Constitution= supreme law of RSA. Chapter2 (BOR) is applicable to all law, incl Delict. Vertical & horizontal application of Const can take place directly or indirectly.

Fundamental rights ito Law of Delict:

- Right to property
- Right to life
- Right to freedom and security of person
- Right to privacy
- Right to human dignity
- Right to equality
- Right to freedom of expression
- Right to freedom of religion, belief, opinion
- Right to assembly, demonstration, picket, petition
- Right to freedom of association
- Right to freedom of trade, occupation, profession

Not every delict is necessarily a constitutional wrong. Const. remedies aimed at affirming/enforcing/protecting/vindicating fundamental rights and deterring future violations of Ch2.

Indirect application implemented/applicable eg to open-ended/flexible delictual principles, namely:

- Boni mores test for wrongfulness
- Imputability test for legal causation
- Reasonable person test for negligence
- Policy consideration eg reasonableness, fairness and justice
SU 3: THE ACT

Conduct is prerequisite for delictual liability.
Conduct=voluntary human act or omission.

Characteristics of conduct:

- Human being (natural or juristic person)
- Voluntarily (mental ability to control muscular movements); doesn’t have to be willed/rational to be voluntary; defence is automatism
- Commission or omission

Defence of automatism:

Conduct not voluntary. Dws he acted mechanically.
Following conditions may cause person to act involuntarily (incapable of controlling bodily movements):

- Absolute compulsion (vis absoluta); by human agency or forces of nature
- Sleep
- Unconsciousness
- A fainting fit
- An epileptic fit
- Serious intoxication
- A blackout
- Reflex movements
- Strong emotional pressure
- Mental disease
- Hypnosis
- Heart attack
- Certain other conditions

This defence will not succeed where person/defendant intentionally created a situation in which he acts involuntarily to harm another. Dws action libera in causa. Will still be liable for his culpable conduct.

Will also not succeed where he was negligent wrt his conduct, ie where reasonable man would have foreseen possibility of causing harm while in state of automatism. Eg drinking while knowing you have to drive.

Iro ‘sane’ automatism (automatism not from mental illness), onus on plaintiff to prove defendant acted voluntarily. But where defendant raises automatism agy mental illness, he bears onus to prove lack of conduct.

Liability for omission (failure to take positive step) is more restricted than liability for commission. Law hesitant to declare legal duty on person to act positively to prevent damage to another.
**SU 4: WRONGFULNESS - INTRO**

Wrongful=legally reprehensible or unreasonable

Dual investigation iro wrongfulness:

1. Did act cause harmful result? Ie, factual infringement
2. Did this take place in a legally reprehensible/unreasonable manner? Ie, violation of legal norms

Act only delictually wrongful when it has factual infringement of individual interest as consequence. If such consequence is lacking, act not wrongful.

Act & consequences separated by time+space. Dws unnecessary to employ *nasciturus* fiction to grant delictual action to child born with defects aro pre-natal injuries - Pinchin v Santam Insurance Co Ltd.

**SU 5: WRONGFULNESS – BONI MORES AS TEST**

Criterion/norm for determining unlawfulness of infringement = *Boni mores* (legal convictions of community)

Objective test based on reasonableness: Based on legal convictions of community and on all circumstances, did defendant infringe interest of plaintiff reasonably or unreasonably? Ie balancing of interests.

Nature of balancing process:
Court must weigh conflicting interests in light of circumstances.

Factors influencing balancing process:
- Nature/extent of harm
- Nature/extent of foreseeable loss
- Value of harmful conduct to defendant/society
- Cost/effort of prevention steps
- Degree of probability of success of such steps
- Nature of relationship between parties
- Motive of defendant
- Knowledge that his conduct might cause harm
- Economic considerations
- Legal position in other countries
- Ethical/moral issues
- Public interest/public policy (incl values of Constitution)
  - Legal convictions must incorporate Const values and give effect to them
Court must develop boni mores as part of common law into spirit/purpose/object of BOR
Dws interpret wrongfulness more widely to protect values in BOR

A delictual criterion:
Not concerned with what the community regard as socially, morally, ethically or religiously wrong, but rather whether they regard act as delictually wrong. Also only look at infringement of individual interest.

An objective criterion:
Legal convictions of community to be taken as the legal convictions of policy makers such as legislature and judges. Judge must define and interpret legal convictions of community wrt rights/principles/court cases where convictions of community found expression.

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.

Seldom necessary to make use of boni mores test. Rather look at the infringement of an interest to indicate wrongfulness.
Fact of infringement=prima facie wrongfulness. Ie provisionally deduce wrongfulness. Closer investigation can, however, reveal ground of justification, making conduct lawful.

More precise methods than boni mores test available, eg specific legal norms and doctrines:
- Infringement of subjective right (commission)
- Non-compliance with legal duty to act (omission)

Gives more accurate solutions to question of wrongfulness (these are practical applications of general criterion of reasonableness).
Basically, conduct is wrongful if it infringes a subjective right or violates a legal duty.

Use boni mores test as supplementary criterion. Eg use in novel cases (where specific forms of delict have not crystallised), or for borderline cases.

**SU 6: WRONGFULNESS – INFRINGEMENT OF A SUBJECTIVE RIGHT**

All people have subjective rights.
Dual relationship: subject-object & subject-subject.
Limits/boundaries of person’s rights determined by law. One person has right to something, and others have legal duty to respect that right.

Five classes of right:
- Real rights – things (car/book)
- Personality rights – aspects of personality (good name/honour)
- Personal rights – acts and performances (delivery/payment/services)
- Immaterial property rights – intangible products of mind (invention/poem)
• Personal immaterial property rights – endeavour connected with personality (creditworthiness/earning capacity)

First 4=absolute
Last 1=relative

Two conditions to make an interest worthy of protection (ie legally recognised as subjective right):
   1. Value
   2. Measure of independence

Requirements for infringement of a subjective right is dual investigation:
   1. Was holder disturbed in use/enjoyment of right, ie subject-object disturbance? (Determine bmo evidence)
   2. Was infringement legally reprehensible? (General reasonableness criterion, nl boni mores)

But if (1) is satisfied and person can show justification, will not be wrongful.

**SU 7: WRONGFULNESS – BREACH OF A LEGAL DUTY**

Sometimes no clearly defined right exists. Then determine wrongfulness ito breach of legal duty. Ie case of omission or pure economic loss.

Test still the same: Look at objective reasonableness of conduct of person. Dws also refer to boni mores/legal convictions

Rather use term ‘legal duty’, than ‘duty of care’ (which can refer to either wrongfulness or fault ito negligence, ie duty of care of reasonable man).

**SU 8: WRONGFULNESS – LIABILITY ITO OMISSION & BREACH OF STATUTORY DUTY**

Generally no liability for an omission.
Only where a legal duty rested on him to act positively to prevent harm, which he failed to comply with.

Legal duty determined wrt flexible criterion, nl legal policy/legal convictions of community. Objective test.

Factors indicating existence of legal duty to act:
   • Prior positive conduct. Omission per commissionem rule
      o Person creates a source of danger by a positive act, but then fails to eliminate that danger
      o Is not a prerequisite for legal duty, but gives strong indication thereof
• Control of a dangerous object
  o Was there actual control over object (eg animal/fire/hole in ground/even criminal), or was there legal duty on person to take preventative steps

• Rules of law
  o Common law or statutes
  o Eg owner must provide lateral support for neighbour’s land; duty of police to prevent public from suffering damage

• Special relationship between parties
  o Policeman/citizen
  o Officer/prisoner
  o Employer/employee

• Particular office
  o Person’s occupation places duty on him

• Contract iro safety of 3rd party
  o Eg appointed lifeguard at pool

• Creation of impression that 3rd party will be protected
  o One party acts in reasonable reliance on impression created by another
  o Legal duty rests on party creating the impression to prevent prejudice

Several of these factors may play a role at once. Dws take ALL circumstances into account to see if legal duty to act was present.

Common law/statutory law/constitutional law indicative of legal duty.

Factors that may place positive duty on state to protect rights of persons:

• Fact that violation was observed by employees of state
• Knowledge/foreseeability by state of prejudice
• Special relationship btw state and victim
• Contact to protect victim
• Factual control by state over dangerous situation
• Representation that victim will be protected
• Possible extent of victim’s harm

Breach of a statutory duty:
  Conduct in breach of statutory duty is prima facie wrongful. Must also be legally reprehensible.
Plaintiff must prove:

• That relevant statutory measure (eg interdict) is private law remedy
• That this statutory duty was imposed for plaintiff’s benefit
• That nature of harm is contemplated by the enactment
• That defendant in fact transgressed this provision
• That there was a causal nexus (link) transgression and harm
SU 9: WRONGFULNESS – JUSTIFICATION: DEFENCE

A ground of justification excludes wrongfulness. Dws practical expressions of boni mores, where persons actually acted reasonable. Not numerous clauses (ie not limited number).

Onus to prove ground of defence, rests with defendant.

Traditional justifications:

- Defence
- Necessity
- Provocation
- Consent
- Statutory authority
- Public authority & official command
- Power to discipline

Defence (or private defence): Present when the defendant directs his actions against another person’s (actual/imminent threatening) wrongful act, to protect his or another’s interests.

Both attack and defence action must meet certain requirements for this defence to operate.

Requirements for the attack:

- Must be a human act
  - Commission or omission
  - Aggression by animal not an attack in this case (necessity may be justification however)
  - Unless person uses animal, then defence is against person’s human conduct
- Must be wrongful (threaten or violate legally protected interest without justification) – no fault needed however (eg can act against insane person, or person who wrongfully believes he is acting lawful)
  - Threaten eg life, bodily integrity, honour, property, possession
  - Person may not act in defence against a lawful attack, eg resisting arrest
  - Also may not act in defence against an attack he consented to, eg sport/duel
  - Wrongfulness always concerns an objective test, reasonable grounds for private defence must exist objectively. Does not concern itself with person’s subjective impression of events (but may still escape liability if he did not have fault)
- Attack must already have commenced or be imminently threatening, but must not yet have ceased – does not need to be directed at the defender
  - Don’t have to distinguish between a threatened and actual attack
  - Can’t act in defence where attack already ceased; that would be unjustified revenge
  - Can also defend 3rd party from unlawful attack

Requirements for the defence:

- Must be directed against the aggressor himself
- Must be necessary to protect the threatened right
If interest can be protected in less detrimental way, the defence is wrongful
Dws defence must be the only reasonable alternative
Person must flee, unless it exposes him to danger, or causes an infringement of his interest
But depends on circumstances of each case, no hard rules
- The act of defence must not be more harmful than is necessary to ward off the attack
  - Must be in proportion to attack
  - Judge the reasonableness objectively
  - Threatened interest of defendant and infringed interest of attacker need not be of equal value
  - Means don’t need to be similar either
  - Absolute proportionality not needed, but an extreme imbalance also unacceptable (eg killing person to defend piece of butter)
  - Criteria for reasonableness:
    - Value of interests may differ
    - Interest need not be similar in character
    - Means of defence need not be same as means of attacker

SU 10: WRONGFULNESS – JUSTIFICATION: NECESSITY

State of necessity exists when defendant is placed in such a position by superior force (vis maior), that he is able to protect his interest, or someone else’s, only by reasonably violating the interests of an innocent 3rd party.

A state of necessity gives a person the power to act in a way which, in the absence of necessity, would have wrongfully infringed a 3rd person’s right.

Distinguish from private defence. There a defence is directed at an attack by the wrongdoer. Here, person’s conduct violates the interest of an innocent 3rd party (even an animal).

Guidelines for determining the presence of necessity:
- Question must be whether state of emergency really exists? (Not whether it was caused by human/animal/nature)
  - Unclear if person can rely on necessity which he himself created (seems he may, but may then be held liable for eg crime)
  - Popular view: every act committed out of necessity is lawful, irrespective of who caused it, but damage thereby may still be actionable because of causality to preceding wrongful act
- Possible existence of state of necessity must be determined objectively
  - Take into consideration the circumstances which actually prevailed and actual consequences
  - Question: did it exist? (not: did defendant believe it to exist)
  - Fear/state of terror not really relevant in wrongfulness (may be for fault)
  - Putative necessity not sufficient for defence of necessity (may exclude fault though)
- The state of necessity must be present or imminent
  - Must not have terminated
Must not be expected only in the future

- Defendant may also protect interest of others
  - May eg act to protect your child
  - Same person may even be the prejudiced as well as protected party

- Not only life/physical integrity may be protected out of necessity
  - May also protect eg property
  - Conversely, interests such as honour/privacy/identity/freedom/feelings may be violated in state of necessity (eg doctor to save person’s life)

- Person can’t rely on necessity where he is legally compelled to endure the danger
  - If law compels person to endure it, also means he lacks the power to avoid it

- In general, the interest sacrificed must not be more valuable than the interest that is protected
  - Defendant must not cause more harm than is necessary
  - Proportionality of interests applies here (in contrast to defence)

- Homicide (killing innocent person) may be justified
  - Before S v Goliath case, this was not accepted
  - Person regards his own life as more important than life of another person
  - Compulsion (form of necessity) may justify homicide

- Act of necessity must be the only reasonably possible means of escaping the danger
  - Act must be necessary to protect threatened right
  - No other reasonable means available
  - If person can escape by fleeing, must rather do so

SU 11: WRONGFULNESS – JUSTIFICATION: PROVOCATION

Provocation is present when a defendant is provoked or incited by words or actions to cause harm to the plaintiff.

Court sees this as a complete defence, in that the plaintiff who provoked the defendant may forfeit compensation for injury caused. Dws renders defendant’s conduct lawful.

Assessed objectively by weighing provocative conduct against reaction to it, bmo boni mores (objective) test.

Different from private defence. There a person reacts as situation takes place, or directly before. Here, reaction immediately follows the provocation that already terminated. Dws rather an act of ‘revenge’ than of defence.

Provocation may be a defence for actions violating different aspects of personality, eg honour/reputation/physical integrity.

But our courts generally don’t allow physical attack in retaliation against provocative words (but may act as mitigation). But this is a flexible principle (still look at legal convictions of community).

Two requirements for complete defence against a physical assault as provocation:
1. Nature of provocative conduct must reasonably justify reaction bmo physical assault
   o View objectively
   o Would reasonable person in defendant’s position have acted the same?
2. Defendant’s conduct must be a reasonable and immediate retaliation against body of plaintiff
   o ‘Reasonable’ here = in proportion ito nature/degree to the assault of the first aggressor
   o Dws different interest must be of equal value and similar nature

Defamation or insult made in reaction to provocation, may be justified by applying same test as above:

   1. Nature of provocative conduct must reasonably justify reaction bmo defaming/insult
      o Objective test
   2. Defamation/insult in *retortio* must stay proportional
      o Compensation: the two *iniuriae* cancel each other

**SU 12: WRONGFULNESS – JUSTIFICATION: CONSENT**

Where a person (legally capable of expressing his will), gives consent to injury/harm, the causing of such harm will be lawful.

Dws he permits the defendant to violate his interest. This principle is embodied in the *volenti* maxim, *volenti non fit iniuria* (a willing person is not wronged/he who consents cannot be injured).

Forms of consent:

- Consent to injury
  - Consents to specific harm
  - Eg removing appendix
- Consent to risk of injury/voluntary assumption of risk (sometimes also used to refer to contributory intent, don’t get mixed up) – stick with consent to risk of injury!
  - Consents to risk of harm caused by conduct
  - Eg consent to risk that operation may have side effects
  - Eg participation in sport

Characteristics of consent as ground of justification:

- Consent = unilateral act
  - Need not necessarily be made known to defendant. Dws agreement/contract unnecessary to relieve actor of liability
  - May also ne unilaterally revoked @ any stage preceding conduct
- Consent = legal act that restricts the injured person’s rights
  - To be a legal act, consent must be apparent/manifest/brought to light
  - Consent will not be held to exist where it is not evident
- Consent may be given expressly or tacitly
Consent must be given before the conduct
- Approval after the act is not consent (but may amount to no action being taken)

Prejudiced person himself must consent
- On exceptional circumstances may consent be given on behalf of someone else
- Consent is a question of fact, if defendant thought there was consent, no defence (but fault may be excluded)

Requirements for valid consent:

Given freely/voluntarily
- Forced consent is not valid consent

Person must be capable of volition
- Intellectually mature to appreciate implications of his act (and not mentally ill or under influence of substances)

Consenting person must have full knowledge of extent of (possible) prejudice
- Must be ‘informed’ consent
- Eg doctor’s duty to inform patient of risks

Consenting party must realise/appreciate fully what nature/extent of harm will be
- Mere knowledge not sufficient (eg must not only know risks, but understand them)
- Person must comprehend and understand the nature/extent of risk/harm

Must in fact subjectively consent
- Essential elements are knowledge/appreciation/consent; first 2 alone does not necessarily amount to consent

Consent must be permitted by legal order, dws not contra bonos mores
- Impairment must fall within limits of consent
- Consent to bodily injury usually contra bonos mores, unless contrary proven, eg sport/medical treatment

The pactum de non petendo in anticipando: contractual undertaking not to institute action against actor. Same effect as consent, but reason for non-liability is different (wrongfulness not excluded, only the resultant action). Eg free pass on train on condition that railway will not be liable for injury due to their negligence.

**SU 13: WROGFULNESS – JUSTIFICATION: STATUTORY AUTHORITY, OFFICIAL CAPACITY, OFFICIAL COMMAND & POWER TO DISCIPLINE**

**STATUTORY AUTHORITY**

A person does not act wrongfully, if he performs an act (which is otherwise wrongful) while exercising a statutory authority.
Dws harmful conduct authorised by law is lawful/justified. Statute limits rights of prejudiced person

Two principles:

1. Statute must authorise the infringement of a particular interest
2. The conduct must not exceed the boundaries of the authority conferred

Intent of legislature determined wrt IOS. Appears from Act itself, but also look at guidelines:

- If statute is directory, infringement is authorised.
  - Injured person not entitled to compensation
- If statute is permissive, presume infringement is not authorised.
- Presumption referred to above falls away if authority is entrusted to a public body acting in public interest
- If authorised act is circumscribed/localised, presume infringement is authorised
  - Eg building dam in certain place
- If authorisation is permissive/general (not localised), presume infringement is not authorised

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
OFFICIAL CAPACITY

Certain public officials like law enforcement officers (security/police) and judicial officers (magistrates/judges) are authorised by law to perform certain acts. Should they cause damage in the process, their conduct will be justified (lawful) and they won’t be liable. But if they exceed their authority (eg by malice/mala fide), it’s unreasonable & they will be held liable.

EXECUTION OF AN OFFICIAL COMMAND

Infringement of interest in carrying out a lawful command is not wrongful (eg constable shoots fleeing murderer at order of his officer). This is basically also = official capacity.

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
  - If wrongful order, defence should rather be necessity in form of compulsion (compulsion = order given by superior)
- Accused must have done no more harm than was necessary to carry out order

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 must be to correct, if it doesn’t have this effect, it must not 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.