

## Unit 1 - Intro

### Distinguish between a crime and a delict.(5)

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

### (a) Name the four requirements for criminal liability in the correct sequence. (5)

1. **Conduct** - -Conduct can lead to liability only if it is voluntary ie. capable of subjecting his bodily or muscular movements to his will or intellect.  
- An omission can lead to liability only if the law imposed a duty on X to act positively and he failed to do so.
2. **which complies with the definitional elements of the crime** - Definitional elements is the concise definition of the type of conduct and the circumstances in which that conduct must take place in order to constitute an offence
3. **which is unlawful** - Conduct that is contrary to the totality of the rules of law, including rules which in certain circumstances allow a person to commit an act which is contrary to the letter of legal prohibition or norm.
4. **and culpable** - ie. grounds upon which X may personally be blamed.  
- Subrequirements
  1. Criminal Capacity
    - a) The ability to appreciate the wrongfulness of his act
    - b) The ability to act in accordance with such an appreciation
  2. Act must be either intentional or negligent

**(b) X, a sixty-three-year-old public prosecutor who suffers from diabetes, is charged with the crime of corruption. The state's evidence reveals that X received R30 000 from Y in exchange for destroying a police docket which implicated Y in several fraudulent activities. X is**

**convicted of corruption. X has no criminal record. The state prosecutor argues that the appropriate sentence for X's crime is imprisonment for a period of five years because persons in public office should be deterred from abusing their powers. X's legal advisor disagrees with these submissions. She argues that imprisonment for a period of five years is too harsh a sentence, considering the age, health and clean record of the accused. In her view, a sentence of imprisonment would place too much emphasis on general deterrence, and disregards the principle of proportionality embodied in the theory of retribution. With reference to the decision in Zinn 1969 (2) SA 537 (A), discuss the merits of these arguments. In your answer you must explain the difference between the absolute and relative theories of punishment. (7)**

in Zinn the court held that three factors must be taken into account when a court sentences an offender. These factors are:

- the crime,
- the criminal, and
- the interests of society.

By "crime" is meant that regard must be taken concerning the degree of harm or the seriousness of the violation. This consideration is important in terms of the theory of retribution. The theory of retribution is an absolute theory of punishment which means that punishment is an end in itself and not a means to a second end. Punishment is justified because it is the offender's just desert. Retribution requires the restoring of the legal balance which has been disturbed by the commission of the crime. The theory therefore requires that the extent of the punishment must be proportionate to the extent of the harm done. In deciding upon an appropriate punishment, application of the theory of retribution is imperative, because it is the only theory of punishment which requires a proportional relationship between the harm done and the punishment imposed.

Conversely, the relative theories of punishment strive to achieve a secondary goal: for example, deterrence of the community or the offender, reformation of the offender or prevention of the crime. In Zinn it was held that, apart from the seriousness of the crime, the interests of the criminal should also be taken into account. Relative theories of punishment (eg the reformatory theory) are relevant in this context. The court must consider which punishment will be appropriate considering the person and personality of the offender.

Questions that may arise in this context is whether the offender should be incarcerated, or whether he or she can be reformed by some other kind of punishment, (eg community service). The theory of individual deterrence is also applicable in the context of the "criminal". Will the punishment deter him or her from engaging once again in criminal activity?

The consideration of the "interests of society" requires, amongst other things, that society must be protected from criminals. This consideration forms the basis of the preventive theory of punishment. Furthermore, the community must be deterred from crime (the theory of general deterrence).

It is clear that the so-called "triad in Zinn" requires a combination theory of punishment that accommodates the ideas of retribution, deterrence, prevention and reformation.

**According to the retributive theory, punishment is justified because it is X's just desert. Explain the philosophy underlying retribution (or "just desert"). (4)**

According to the retributive theory, punishment is justified because it is X's just desert. The underlying idea can be explained as follows: the legal order offers every member of society certain advantages, while at the same time burdening him/her with certain obligations. The advantages are that the law protects him because it prohibits other people from infringing upon his basic rights or interests, such as his life, physical integrity and property. However, these advantages can only exist if each member of society fulfils his obligations, namely refrains from infringing upon other members' rights. If a person commits an act whereby he/she gets an unjustifiable advantage above other members of society, he/she disturbs the legal balance in society. He/she must be punished to restore the legal balance in society. Therefore, punishment can be described as the paying of a debt which the offender owes society as a result of his/her crime.

Equal proportion between degree of punishment and degree of crime

- The extent of the punishment must be proportionate to the extent of the harm done or of the violation of the law.
- This is illustrated by the fact that the punishment imposed for an attempt to commit a crime is as a rule, less severe than for the commission of the crime.

Retribution explains culpability requirement

- Pre-eminently able to explain the need for the general requirement of liability known as culpability. (mens rea)
- Presupposes that man has a free will.
- Can be held responsible or blamed for choices made.

**Distinguish between the absolute and relative theories of punishment. (6)**

- There is only one **absolute theory** and that is the theory of retribution.
- According to this theory, the aim of punishment is to restore the legal balance which has been disturbed by the commission of the crime.
- The punishment is an end in itself. According to the retributive theory, the extent of the punishment must be proportionate to the extent of the harm done.
- There are three **relative theories** of punishment.
- These are the preventative, deterrent, and reformative theories.
- According to these theories, the aim of punishment is a means to a secondary end rather than an end in itself (as in the case of the retributive theory).
- The relative theories emphasise a future purpose, namely prevention, deterrence or reformation. In order to achieve these aims, the punishment imposed need not be proportionate to the extent of the harm done.
- The theory of retribution, on the other hand, is purely retrospective and focuses only on the crime that was committed in the past.

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

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

The theory of prevention requires that a more severe punishment be imposed on X2 than on X1. Because he (X2) already has two previous convictions for theft, he must be prevented, as far as possible, from continuing to contravene the law.

According to the theory of general deterrence, punishment need not necessarily be proportionate to the damage caused. The fact that chicken theft is so prevalent in the district is a ground for imposing heavier sentences on X1 and X2 for stealing chickens than the

sentences that would be imposed if someone were to steal a chicken in an area where such theft is not prevalent.

## Unit 2 - Principle of Legality

**Do you think the following statutory provision complies with the principle of legality?**

**“Any person who commits an act that offends against the good morals of the nation, shall be punished.” Discuss.(8)**

**In February 2010 parliament enacts legislation which provides "No person may criticize the President of the Republic of South Africa This provision is deemed to have come into effect on 1st January 2009". Discuss whether the provision complies with the following rules embodied in the principle of legality**

- **the nullum crimen sine lege rule (not to be convicted if conduct)**
- **the ius acceptum rule (not recognized by law as a crime)**
- **the ius praevium rule (before conduct took place)**
- **the ius certum rule (in clear terms)**
- **the ius strictum rule (without broadly interpreting the words in the definition)**

The principle of legality also known as the *nullum crimen sine lege* principle means that an accused may not be convicted of a crime if the conduct with which he/she is charged

- \* has not been recognised by the law as a crime (ius acceptum principle)
- \* before the conduct took place (ius praevium principle)
- \* in clear terms (ius certum principle)
- \* without broadly interpreting the words in the definition (ius strictum principle).

A statutory provision purporting to create a crime best complies with the principle of legality if it states that the particular type of conduct is a crime, and also what punishment a court must impose after conviction.

It may be argued that the provision does not comply fully with the ius acceptum principle.

Although it is stated that a person who commits the described act “shall be punished”, it is not stated explicitly that the conduct constitutes an offence. Therefore, there is no criminal norm present.

The ius praevium principle is not at issue here because there is no mention that the provision is created with retrospective effect.

The provision clearly does not comply with the ius certum requirement. The prohibition of “an act that offends against good morals” is formulated in vague and unclear terms. It is impossible for the individual to know what particular conduct is prohibited. Therefore, the subject does not know what particular conduct to avoid.

Lastly, no mention is made in the provision of the punishment that should be imposed in case of a contravention of the provision. Therefore there is no criminal sanction which amounts to a violation of the nullum poena principle.

The purpose of the principle of legality is to ensure that the **state, its organs and its officials, do not consider themselves to be above the law in the exercise of their functions,** but remain subject to it.

1. **“An accused ought not to be found guilty of a crime and sentenced unless the type of conduct with which he is charged has been recognised by the law as a crime,**
  2. **in clear terms and**
  3. **before the conduct took place,**
  4. **without the court having to stretch the meaning** of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition, and
  5. **after conviction, the imposition of punishment also complies with the four principles set out immediately above.”**
- According to the principle of legality, there is **no crime if there is no law** which provides that the accused person's conduct is a crime.
  - Thus, if something is not prohibited by law *per se*, it is not a crime.

### Different Kinds of Crimes

#### **Statutory crimes:**

- Statutory crimes are crimes which are **formally defined in legislation** (an Act) and with respect to which the principle of legality can fully apply. An example is drunken driving (contravention of Section 122(1) (a) of the Road Traffic Act 29 of 1989).

#### **Common-law crimes:**

- **Common law crimes are not defined in legislation, but are transferred from generation to generation by the common law.** An example is murder (the unlawful and intentional killing of another person.)

## No Crime without Legislation

- The principle of legality is based in the Latin maxim *nullum crimen sine lege* (no crime without legislation).
- This maxim is not absolutely applicable to South African criminal law. The principle can only find absolute application in legal systems that are fully codified. Only those legal systems which are fully codified can truly provide that conduct which is not prescribed as a crime in the statutes of that jurisdiction, is not a crime.

## Director of Public Prosecutions v Masiya 2007 JDR 0330 (CC)

- **Facts:** Accused charged with the rape of a 9 year old girl. When crime was committed in 2004, the common law definition of rape only included penetration of the male sexual organ/penis into the vagina. During trial it became evident that penetration took place anally. New legislation with a broader definition of rape (to include anal penetration) was only created after he committed the crime.
- **Legal Question:** Was accused guilty of the crime of rape?
- **Decision:** Fairness to accused required that extended meaning of rape not apply to him, but only to conduct that arose after judgement. Accused convicted of indecent assault only, not rape.

## Legality and the Constitution

### **Section 35(3)(l) reads as follows:**

- "(Every accused person shall have the right) not to be convicted of an act or omission which was not an offence under either national or international law at the time it was committed or omitted."

### **Section 35(3)(n) reads as follows:**

- (Every accused person shall have the right) to the benefit of the least severe of the prescribed punishments if the punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

**Distinguish between a legal norm, a criminal norm and a criminal sanction, and provide one example of each (6)**

**Statutory crimes** Parliament creates a crime – Act must declare

(1) which type of conduct is a crime, and

(2) what the punishment is.

Distinguish between a

1. **Legal norm** – Provision in Act creating a legal rule which does not create a crime, President declares that he may not be criticized
2. **Criminal norm** – Provision in Act making clear that certain conduct constitutes a crime
3. **Criminal sanction** – Provision in Act stipulating what punishment a court must impose after conviction. *S v Francis* case

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

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

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

It is clearly stated in the provision that the conduct prohibited is a `crime'. This means that the provision contains a criminal norm.

However, the maximum punishment that may be imposed is not prescribed in the provision. Therefore, the *ius acceptum* rule has not been fully complied with.

The provision does not comply with the *ius praeivium* rule because the crime is created with retrospective effect.

The provision also does not comply with the *ius certum* rule because it is formulated in vague and uncertain terms. The phrase `possibly prejudicial to sound relations' is very wide and does not indicate exactly what type of conduct is prohibited. Does it refer to `sound relations' in the family context, at the workplace, or to relations between people of different cultures or races?

The *ius strictum* rule further requires that an act which is ambiguous be interpreted strictly. In practice this means that a court may not give a wide interpretation to the words or concepts contained in the definition of the crime. A provision which is very wide and vague should be interpreted in favour of the accused.

It follows that the provision does not comply with the principle of legality.

**Give the Latin words describing each of the different rules embodied in the principle of legality. After each Latin expression, state its meaning.**

ius acceptum rule: A court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime. This means that a court may not create a crime.

ius praevium rule: A court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of the commission of the offence.

ius certum rule: Crimes ought not to be formulated vaguely.

ius strictum rule: A court must interpret the definition of a crime narrowly rather than broadly.

Nulla poena sine lege rule: The abovementioned principles must also be applied when a court imposes a sentence.

**(a) Section 35 (3)(l) of the Constitution of the Republic of South Africa, Act 108 of 1996**

**provides:**

**“Every accused person has a right to a fair trial which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.”**

**or**

**Merely explain in about one sentence the meaning of each of the following rules relating to the principle of legality: ius acceptum; ius praevium; ius strictum and ius certum. Then indicate whether s 35(3)(l) of the Constitution may be interpreted as covering each of these rules. (8)**

ius acceptum rule: A court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime. This rule is not referred to expressly in section 35(3)(l). However, the rule is implied in the provision.

ius praevium rule: A court may find an accused guilty of a crime only if the kind of act performed is recognised as a crime at the time of its commission. The rule is recognised expressly in section 35(3)(l). (provides that this right to a fair trial includes the right not to be convicted of an offence in respect of an act or omission that was not an offence under either national or international law at the time it was committed or omitted.)

ius certum rule: Crimes ought not to be formulated vaguely. The rule is not referred to expressly in section 35(3)(l). However, it is suggested that the provision will be interpreted in the sense that it includes the rule.

ius strictum rule: A court must interpret the definition of a crime narrowly, rather than broadly. The principle is not referred to expressly in section 25(3)(1) but it will also probably be interpreted to include the rule.

#### **Question 1**

**In January 2008, X was charged with drunken driving, a crime which he had allegedly committed in September 2006. Assume that at that time (in 2006) legislation provided that a first offender could not be sent to prison for a conviction of drunken driving. However, in 2007 the legislature amended the legislation, giving the courts a discretion to send a first offender convicted of drunken driving to prison for a period not exceeding six months. X, a first offender, is convicted of the crime of drunken driving. The court, relying on the new legislation, sentences him to a period of three months' imprisonment. Discuss whether the punishment imposed by the court may be challenged on the ground that it violates the principle of legality.**

The punishment of imprisonment imposed on X may be challenged on the grounds that it violates the *ius praeivum* rule. In the context of punishment, this principle means that a more severe punishment may not be imposed on a person than the punishment that could be imposed at the time of the commission of the offence.

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

#### **Unit 3 - The Act**

**X, a 62 year old man, works in a mine. His job is to operate the cocopans. These cocopans are used to transport hard rocks and gravel from the bottom of the mine to the surface. One day, while working, he suddenly experiences a black-out. In his state of unconsciousness, he falls on the lever which controls the movement of the cocopans. A cocopan crashes into another worker, Y. Y is killed instantly. X is charged with culpable homicide. The evidence before the court is as follows: X has been suffering from diabetes for the past year. His doctor had warned him that he may lose consciousness at any time if he fails to take his medication as instructed. On that particular day, X had failed to take his medication. The court finds that**

**X had insufficient grounds for assuming that he would not suffer a blackout on that particular day. X's legal representative argues that X cannot be convicted of culpable homicide because, at the time of the commission of the offence, he was not performing a voluntary act. In other words, the defence raised is that of automatism. You are the state prosecutor. What would your response be to this argument?**

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

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

**An omission is punishable if X is under a legal duty to act positively. The general rule is that there is a legal duty to act positively if the legal convictions of the society require X to do so. In practice a number of specific instances are recognised in which there is a legal duty to act positively. Name and discuss these instances. (10)**

- A statute may impose a duty on somebody to act positively. Example: to complete an
  - a. annual income-tax return.
  - b. not to leave the scene of a car accident but to render assistance to the injured and to report the accident to the police
  - c. to report knowledge of the commission of corrupt activities
  - d. to report knowledge of the commission of certain financial crimes
- A legal duty may arise by virtue of the **provisions of the common law, statutory duty**. Example: a person who owes allegiance to the state, and who discovers that an act of high treason is being committed against the state, has a duty to reveal this fact to the police.
- A duty may arise **from an agreement**. Example: in the case of *Pitwood*, X and a railway concern had agreed that, for remuneration, X would close a gate every time a train went over a crossing. X omitted to do so and thus caused an accident for which he was held liable.

- if a person stands in a **protective relationship to somebody else**; In *B*, X, the biological mother of Y, was living with another man Z. Z repeatedly assaulted Y. X, who was aware of these assaults, did nothing to prevent them. As Y's natural mother, X had a legal duty to care for and protect Y from this. She was held liable for assault.
- Where a person **accepts responsibility for the control of a dangerous or potentially dangerous object**. Example: in the case of *Fernandez*, X kept a baboon and failed to repair its cage properly --- as a result, the animal escaped and bit a child who later died. The court held that X had failed to control the dangerous animal properly and he was convicted of culpable homicide.
- A duty may arise from a **previous positive act** (an omission per commissionem). Example: X lights a fire in an area where there is dry grass and then walks away without putting out the fire, thus failing to prevent it from spreading.
- The fact that a person is an **incumbent of a certain office**. Example: in *Minister van Polisie v Ewels* the court held that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the victim of the assault. Another example here is the case of *Gaba* where a policeman had a duty by virtue of his office to disclose to his fellow investigators his knowledge of the identity of a wanted suspect known as "Godfather", whom they were interrogating.
- A legal duty may also arise by virtue of an **order of court**. Example: X omits to pay maintenance to his ex-wife to support their children as required in terms of an order of court.

**(a) Discuss the defence of automatism. Your answer must include**

- (i) examples from the case law of cases in which this defence succeeded;**
- (ii) an explanation of the points of difference between so-called "sane" and "insane" automatism;**
- (iii) an explanation of what is meant by "antecedent liability". (8)**

Answer

(a) AUTOMATISM -

A person acts in a state of automatism if he acts in a mechanical fashion. Examples of such instances are reflex movements such as heart palpitations or a sneezing fit and A person who acts in a state of automatism does not act voluntarily.

(i) Dlamini's case - X killed Y while under influence of the nightmare.

Mkize's case - X killed Y while he was having an epileptic fit.

Du Plessis's case - an experienced driver had a mental "blackout".

(ii)

sane automatism	insane automatism
onus on state to prove the act was voluntary	onus is on X to prove that he suffered from mental illness
if X's defence is successful, he leaves the court a free man	if defence is successful, X is dealt with in terms of section 78 (6) of the Criminal Procedure Act 51 of 1977

(iii) Antecedent liability: X knows that he suffers from epileptic fits or that, because of some illness or infirmity he may suffer a "black out", but nevertheless proceeds to drive a motor-car, hoping that these conditions will not occur while he is sitting behind the steering wheel, but they nevertheless do occur. He can then not rely on the defence of automatism. He can be held liable for certain crimes requiring negligence, for example culpable homicide. His voluntary act is then performed when he proceeds to drive the car while still conscious.

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

**(b) Name and discuss the requirements for successfully relying on the defence of impossibility**

X's omission must be voluntary in order to result in criminal liability. An omission is voluntary if it is possible for X to perform the positive act.

1. The legal provision which is infringed must place a positive duty on X. The conduct which forms the basis of the charge must consist in an omission. The defence will succeed, for example, if X has failed to comply with a legal provision which placed a positive duty on him to attend a meeting or to report for military duty.

2. It must be objectively impossible for X to comply with the relevant legal provision. It must have been impossible for any person in X's position to comply with the law. It must have

been absolutely (not merely relatively) impossible to comply with the law. The test is objective (in the opinion of reasonable people in society).

3. X must not himself be responsible for the situation of impossibility. X cannot rely on impossibility if he himself is responsible for the circumstances in which he finds himself.

**Name, without discussing, three factors exclude the voluntary nature of the act. (3)**

(i) vis absoluta- absolute force

(ii) natural forces

(iii) automatism

**Question 2**

**X's hobby is to fly a micro-light plane. One day, while flying over a beach, the engine of his plane suddenly stalls. X is unable to control the plane and it crashes on the beach. The boat of Y, a fisherman, is damaged by the impact. X is charged with malicious injury to the property of Y. Discuss which defence X could invoke.**

X may rely on the defence that he did not perform a voluntary act. In fact, the voluntariness of his act was excluded by natural forces - namely, the gravity of the earth, which pulled the plane down onto the beach and into Y's boat.

**Question 3**

**X shoots Y twice in the chest and the abdomen with the intention to kill him. Y is admitted to a state hospital, where he receives inadequate and negligent care. He dies two weeks later as a result of septicaemia, caused by the gun wounds. X is charged with murder. X's lawyer argues that the negligence and inadequate care in the hospital constituted a *novus actus interveniens* which broke the chain of causation between X's original act and the ultimate result. You are the state prosecutor. Discuss the arguments that you will present to prove that X's act was the cause of Y's death.**

The state will have to prove that X's act was the factual, as well as the legal, cause of Y's death. Factual causation is easy to prove: had X not shot Y in chest and the stomach, he would not have been admitted to hospital and would not have contracted septicaemia. Therefore, X's act is a *conditio sine qua non* of Y's death. X's act can also be viewed as the legal cause of Y's death. The relevant authority is *S v Tembani* 2007 (1) SACR 355 (SCA). In this case, the Supreme Court of Appeal held that the deliberate infliction of an intrinsically dangerous wound from which the victim is likely to die without medical intervention generally leads to liability for an ensuing death, even if the medical treatment given later is substandard or negligent. However, the negligent medical treatment may be viewed as a

novus actus interveniens if, at the time of the treatment, the victim had recovered to such an extent that the original injury no longer posed a danger to his life. In terms of the stated facts, this is not the position.

Therefore, X's act can be viewed as the factual, as well as the legal, cause of Y's death.

**(b) Briefly explain the difference between relative and absolute compulsion. (4)**

In the case of absolute compulsion, X does not commit a voluntary act. For example, Z grabs X's hand which is holding a knife and stabs Y. Because X did not perform a voluntary act, he cannot be held liable. In the case of relative force X indeed performs a voluntary act. An example is where Z threatens X to kill him (X) if he does not kill Y. X still has a choice – to kill Y, or to die instead. However, if he/she decides to rather kill Z, he/she may rely on the ground of justification known as "necessity".

**X loses control of her motor vehicle while having a coughing fit and kills a pedestrian. She is charged with murder alternatively culpable homicide. You are her lawyer. What defence will you advance on her behalf at the trial? Discuss. (5)**

X can rely on the defence of sane automatism, which is a complete defence. Sane automatism means that a person did not perform a voluntary act.

In *Trickett* Principles dealt with:

1. Automatism
2. Using of automatism as defence
3. Onus of proof lies on accused to prove said automatism

Outline:

Appellant swerved her car into an oncoming vehicle. She was charged and convicted of negligent driving. She appealed the conviction saying that she must have temporarily blacked out, but provided no proof of this.

Outcome:

Appellant's appeal was dismissed: onus of proof was not discharged properly.

Although the onus of proving that the act was voluntary is on the state, the defence I would advance on her behalf, by calling medical or other expert evidence to create a doubt whether the act was voluntary.

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

**had performed an act in the legal sense of the word. Explain how you would go about proving this.**

There was a legal duty upon X to take positive action.

A duty may arise from a **previous positive act**, such as where X lights a fire in an area where there is dry grass, and then walks away without putting out the fire to prevent it from spreading. We sometimes refer to this type of case as an *omissio per commissionem* (an omission following upon a positive act which created the duty to act positively).

A duty may arise where a **person stands in a protective relationship** to somebody else, for example, a parent or guardian who has a duty to feed a child. In B 1994 X was convicted of assault in the following circumstances: She was married and had a child, Y, who was two and a half years old. Her marriage broke up and she began living with another man, Z. Z repeatedly assaulted Y. X was aware of these assaults, but did nothing to stop Z. As Y's natural mother, X had a legal duty to care for and protect Y and to safeguard his well-being. By omitting to prevent the assaults, she rendered herself guilty of assault upon Y. (Z was also convicted of the assault upon Y.)

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

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

In *Leeuw* the court held that the mere fact that compliance with the law is exceptionally inconvenient for X, or requires a particular effort on his part, does not mean that it is impossible for him to comply with the law

**Unit 4 – The definitional elements and causation**

**(a) Y feels depressed and threatens to commit suicide. X, who harbours a grudge against Y, hands her a loaded firearm, stating she may shoot and kill herself if she so wishes. Y takes the firearm and shoots and kills herself.**

**(b) X, who is very poor, reads a newspaper report about a man who had been caught by a crocodile in a river in Botswana. She persuades her uncle Y, who is very rich and whose heir she is, to go on a safari to Botswana. She also encourages her uncle to take a boat trip on the river, hoping that he will be killed by a crocodile. Y undertakes the safari. He also goes out on a canoe on the river. The canoe is, unexpectedly, overturned by a hippo. Y falls into the water. A crocodile catches and kills him.**

**(c) X tries to stab Y, intending to murder her. Y ducks and receives only a minor cut on the arm. However, infection sets in and Y visits a doctor. The doctor gives her an injection and tells her to come back the following week for two more injections. The doctor warns Y that she may die if she fails to come back for the other two injections. Y fails to go back to the doctor, reasoning that her body is strong enough to fight the infection. She dies as a result of the infection.**

**(d) X shoots Y in the chest, intending to murder her. The bullet wound is of such a serious nature that Y will die if she does not receive medical treatment. Y is admitted to hospital, but because the nursing staff is on a general strike she receives inadequate medical treatment. The wound becomes infected. Although she is eventually treated for the infection, she dies after a period of two weeks.**

(a) in the Grotjohn case the Appellate Division held that the mere fact that the last act was the victim's own voluntary act did not mean that there was no causal relationship between X's act and Y's death. X's act (in the Grotjohn case) was a *conditio sine qua non* of Y's death. Y's last act (her suicide) was not a *novus actus interveniens* an unexpected or unusual event in the circumstances. The court ruled that if X's act was the factual cause of Y's death, an unusual event which took place after X's act but before Y's death cannot break the causal link if X had previously planned or foreseen the unusual turn of events.

(b) X's act can be regarded as a *conditio sine qua non* of Y's death, because if X had not persuaded Y to undertake the safari, Y would not have undertaken the trip. Therefore there was factual causation.

However, there was no legal causation. An application of the theory of adequate causation leads to the same conclusion: being killed by a crocodile is not an occurrence which, according to general human experience, is to be expected in the normal course of events

during a safari. Merely to hope (as X did) that the disastrous event would take place cannot be equated with the situation where X planned or foresaw the occurrence of the event before it took place. According to the criterion of policy considerations applied in the Mokgethi decision, one may also argue that it would not be reasonable and fair to regard X's act as the legal cause of Y's death.

(c) It is clear that X's act is the factual cause of Y's death: if X had not stabbed Y, she would never have contracted the infection. In terms of the Mokgethi decision one may argue, however, that X's act was not the legal cause of Y's death. Y's failure to go back to the doctor was unreasonable and created such an unnecessary life-threatening situation that, legally speaking, there is not a sufficiently close link between the original stab-wound inflicted by X and the death of Y.

(d) It is clear that X's act is the factual cause of Y's death (*conditio sine qua non*). According to the court in Tembani, X's act can also be seen to be the legal cause of Y's death. X deliberately inflicted an intrinsically dangerous wound to Y, which without medical intervention would probably cause Y to die. It is irrelevant whether it would have been easy to treat the wound, and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y's death. The only exception would be if at the time of the negligent treatment Y had recovered to such an extent that the original injury no longer posed a danger to her life.

**Give a summary of the rules our courts apply in order to determine legal causation. Also refer to case law in this regard. (8)**

### **Principles to be applied in determining causation**

**Basic principle** – 2 requirements to find causal link:

- 1.) Factual cause; and
- 2.) Legal cause

### **Factual causation (*conditio sine qua non*)**

- Condition without which prohibited situation would not have materialised ("but for")
- If the act cannot be thought away without the situation disappearing at the same time

**Daniels:** Appeal court decided that factual causation is determined on the basis of the *conditio sine qua non* theory

### **Legal causation [IAN]**

1.) **Individualisation theories**

- Most operative/proximate cause
- Objection: 2 or more conditions are often operative in equal measure

**Daniels:** court refused to accept that in our law criminal liability is necessarily based on "proximate cause."

2.) **Adequate causation theory** [HENT]

- If according to **H**uman **E**xperience, in the **N**ormal course of events, the act has the **T**endency to bring about that kind of situation

3.) **Novus actus interveniens**

- New intervening event
- Chain of causation broken
- Unexpected/abnormal/unusual occurrence; deviates from normal course of events
- Differs slightly from test of adequate causation

**Courts' approach to legal causation**

- Court must be guided by policy considerations – reasonable, fair and just (*Daniels; Mokgethi*)
- May apply one or more theory, or none
- Wrong for court to regard only one specific theory as correct one to be applied in every situation (*Mokgethi*)

**Grotjohn:** assisted suicide by providing crippled wife with loaded rifle. Mere fact that last act causing death was victim's own act did not necessarily mean person handing gun to victim was not guilty of any crime. If victim's final act is the realisation for the very purpose accused had in mind, victim's act can never be regarded as a *novus actus*.

**Daniels:** X shoots Y in back. Y would die in 30min. Latecomer Z shoots Y in head. Majority: both acts cause of Y's death. Shots fired were fatal and would in any case lead to death. Minority: head shot = *novus actus interveniens*

**Mokgethi:** bank teller wounded in robbery – paraplegic. Did not follow doctor's orders and dies from septicaemia after 6 months. Wounding is *conditio sine qua non* but not legal cause. Policy considerations – X's act too remote from result. Y's own unreasonable failure = immediate cause of his death. X guilty of attempted murder only.

**Tembani:** accused shoots girlfriend twice in chest. Admitted to hospital. Medical personnel negligent. Dies from wounds. Deliberate infliction of an intrinsically

dangerous wound from which death likely to occur without medical intervention must generally lead to liability. Irrelevant whether wound was treatable or whether treatment was negligent or sub-standard.

Only exception: if recovered to such an extent that the original injury no longer posed a danger to her life.

Approach justified because of 2 policy considerations:

- 1) Deliberate fatal wound; conscious that death might ensue – intervening persons do not diminish moral culpability of perpetrator
- 2) Legal liability cannot be imputed on supposition that efficient/reliable medical attention would be accessible, especially in our country

**X is employed by Y as a gardener. One day, when Y is not at home, X decides to steal some items from Y's house. Y returns unexpectedly and X is caught in the act of stealing. In an attempt to escape, X assaults Y. Y fights back, but X grabs a garden fork and stabs Y in the leg. X then runs away. Y is taken by ambulance to the hospital. At the emergency unit of the hospital, her wound is treated and she is given antibiotics with the instruction to take her medicine; go home and rest. She is also told by the doctor to come back to the hospital in three days time so that they can check the wound and change the bandage. Y is a stubborn person and ignores the doctor's instructions. She does not take her medication and carries on working. She also does not return to the hospital as instructed. After a week, she gets a high fever and her leg starts to pain badly. However, she ignores this and continues with her life as usual. After two weeks she dies in her house as a result of the infection in her leg. X is charged with the murder of Y. Consider whether X's act can be viewed as the factual as well as the legal cause of Y's death. In your answer you must discuss briefly the relevant theories of factual and legal causation and also discuss the relevant case law.**

It is clear from this question that the requirement of criminal liability in dispute is **causation**. Our courts determine whether X's act is the cause of Y's result by investigating whether the act is the **factual** as well as the **legal** cause of Y's death. Factual causation is determined by applying the *condition sine qua non*-test (*Daniels* case). According to this test, an act is the **cause** of a result if the act cannot be thought away without the result disappearing at the time time. Because so many factors can be viewed as the cause of the result in terms of this theory, our courts also apply certain other tests to determine legal causation. These are the **individualization** theory which focuses on the most operative or proximate cause; the theory of **adequate causation** in terms of which an act is regarded as a cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that kind of situation and the theory of **novus actus interveniens** which

requires an investigation whether there was an unexpected, abnormal or unusual occurrence which broke the chain of causation between X's act and the result.

In **Mokgethi** the Appeal Court ruled that an act is regarded as the legal cause of a result if there are **policy considerations** in terms of which it would be **fair and reasonable** to regard X's act as the cause of Y's death. Any of the abovementioned specific theories may be invoked by the court to come to such a conclusion. The **Mokgethi** case is relevant to the specific facts in this case. The accused had shot the complainant (Y) in the back as a result of which he became a paraplegic. His doctor advised him to shift his position in the wheelchair sufficiently to prevent pressure sores from developing. Because he had failed to follow these instructions, he got septicemia and died. The court held that Y's own unreasonable failure to follow the doctor's instructions was the legal cause of his death. X's act of shooting was regarded as **too remote from the result** to lead to criminal liability.

To return to the facts in the question. X's act is the **factual** cause of Y's death. If we think away his act of stabbing her with a fork knife, she would not have died. However, *Mokgethi* is authority for the point of view that X's act is not the **legal** cause of Y's death because **it is too remote** from the result to lead to criminal liability for the crime of murder. The case of *Tembani* is not relevant because no mention was made of negligent medical treatment in the facts that had to be considered.

**X decides to rob a small branch of a bank in a remote area. As he enters the bank, he is apprehended by Y, the security guard of the bank. X shoots Y with a pistol in his (Y's) chest. X succeeds in robbing the bank without causing physical harm to anybody else. Because an ambulance is not readily available, Y is taken to hospital only three hours after he had been wounded. Y dies while being transported by ambulance to the hospital. X is charged with the murder of Y. At the trial, the state pathologist who had done a post-mortem examination on Y, testifies that the bullet wound inflicted upon Y was fatal and that he would have died in any event regardless of whether he had received medical attention at an earlier stage. The court accepts this evidence. In view of these facts, discuss whether X's act can be regarded as the factual as well as the legal cause of Y's death. (10)**

When dealing with materially defined crimes the question arises whether there is a causal connection between X's conduct and the prohibited result. This question deals with the requirement of causation in materially defined crimes. In considering whether X's act could be viewed as the factual as well as the legal cause of Y's death.

X's act is the factual cause of Y's death if it is a *conditio sine qua non* for Y's death. A similar set of facts were recorded in the *Daniëls* case:

Principles dealt with:

1. Factual causation (But-for X's act, Y would have been alive at the time)

2.      Conditio sine qua non
3.      Considerations of fairness and legal policy by courts

Outline:

X shot Y in the back. Before Y died, Z killed Y by shooting him in the head.

Outcome:

Z's appeal was upheld due to lack of sufficient evidence by the state.

Conditio sine qua non means an indispensable condition. Therefore, an act is a *conditio sine qua non* for a situation if the act cannot be "thought away" without the situation disappearing at the same time.

Application of this theory leads to the conclusion that X's act is indeed the factual cause of Y's death. If X did not shoot Y in the chest, he would never have died at that particular moment in time. However, the mere fact that an act is regarded as *conditio sine qua non* and the factual cause of a specific result is not sufficient. The act must also be the legal cause of the result. There are various theories or tests which the courts use to determine whether an act is also the legal cause of a result.

The first of these theories is the individualisation theory. According to this theory one must, among all the conditions which qualify as factual causes, look for that one which is the most operative and regard it as the legal cause of the prohibited situation. However, in *Daniëls* the Appeal Court held that this test is not the only way to determine legal causation.

Another test is the theory of adequate causation. According to this theory, an act is the legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that kind of situation. In other words, it must be typical of the act to bring about the specific result.

A further theory, which is actually only a different formulation of the theory of adequate causation, is the *novus actus interveniens* theory. According to this approach, X's act can be regarded as the legal cause of Y's death if there is no *novus actus interveniens* (an unexpected, abnormal or unusual occurrence between X's act and Y's death).

Our courts do not regard one particular theory as the only correct theory which should be applied in all circumstances. In *Daniëls* and *Mokgethi* the Appeal Court held that, when dealing with legal causation, the courts should have regard to policy considerations of what is reasonable and fair.

In other words, the specific theories are mere aids to determine whether it is reasonable and fair to regard X's act as the cause of Y's death. *Mokgethi*

Applying the criteria to the facts, it is clear that the delay of the ambulance cannot be regarded as a novus actus interveniens, X's act is also the legal cause of Y's death. By shooting X in the chest, his act also has the tendency, according to human experience in the normal course of events, to bring about this type of result (the death of a person).

Moreover, X's act is the proximate cause of Y's death. Therefore, one can argue on the basis of all these considerations that it is reasonable and fair to regard X's act as the legal cause of Y's death.

**When dealing with materially-defined crimes, the question arises whether there is a causal link between X's conduct and the prohibited result (for example, Y's death).  
Briefly discuss the principles which our courts apply to determine causation. (12)**

Causation is determined by enquiring whether X's act was the factual cause as well as the legal cause of Y's death.

Factual causation is determined by applying the *conditio sine qua non* test. An act is a *conditio sine qua non* for a situation if the act cannot be thought away without the situation disappearing at the same time.

In *S v Daniels* 1983 (3) SA 275 (A) the Appeal Court decided that factual causation is determined on the basis of the *conditio sine qua non* test.

Because too many factors qualify as the cause of a prohibited result in terms of this test, the courts also enquire, secondly, whether X's act can be viewed as the legal cause of Y's death.

This is determined by policy considerations, that is, whether it would be reasonable and fair to regard X's act as the cause of Y's death.

#### *Daniels*

Principles dealt with:

1. Factual causation (But-for X's act, Y would have been alive at the time)
2. *Conditio sine qua non*
3. Considerations of fairness and legal policy by courts

Outline:

X shot Y in the back. Before Y died, Z killed Y by shooting him in the head.

Outcome:

Second appellant's (Z's) appeal was upheld due to lack of sufficient evidence by the state.

*In Mokgheti* Principles dealt with:

1. Factual and legal causation
2. Novus actus interveniens

Outline:

X shot Y, a bank teller into a paraplegic state. Y recovered and resumed work, but was told to move around often in order not to develop pressure sores. Y didn't do this, got pressure sores and died.

X was then convicted of murder in regional court. He appealed on the grounds that he should not have been convicted of murder as there was not a sufficient causal connection between the bullet wound and Y's death. Argument: bullet was the factual cause of death, it was not the legal cause.

Outcome:

Judge upheld the appeal confirming that if only the *conditio sine qua non* test has been complied with, at most there is factual causation. Only if there has been compliance with the criterion which further restricts the operation of the *sine qua non* test can there be legal causation.

X was sentenced to 10 years for attempted murder and not murder.

The most important theories of legal causation are:

- the individualisation theory
- the theory of adequate causation
- the theory of *novus actus interveniens*

These theories are merely aids in deciding whether there is legal causation, and that a court may even base a finding of legal causation on considerations outside these specific theories.

## Question 2

**(a) X wants to murder Y, whom he dislikes, by striking him on his head with a thick metal pipe. He strikes at Y with the pipe. However, just before the blow can strike Y's head, Y jerks his head away. The blow strikes Y on his shoulder. Although Y sustains serious injury to his shoulder, he is not in mortal danger. Z, Y's friend, decides to transport Y to hospital. On the way to the hospital, Z's car passes W's car. Just as the two cars pass each other, a bomb which a terrorist had planted in W's car, explodes. Y dies in the explosion which follows. X is charged with murdering Y. In his defence, X alleges that his act was not the cause of Y's death - in other words, X alleges that there was not a causal connection between X's act and Y's death. Discuss the merits of his defence. (10)**

In order to find that there is a causal link between X's act and Y's death, X's act must be both the factual and the legal cause of Y's death. X's act is the factual cause of Y's death if it can

be proven that if it were not for his (X's) act, Y's death would not have occurred. In this set of facts, it is clear that if X had not struck Y with a metal pipe, Z would not have taken him (Y) to the hospital, and they would not have been caught in the explosion. Therefore, X's act is a *conditio sine qua non* for Y's death. This is the so-called "but-for- test". This means X's act qualifies as the factual cause of Y's death.

Is X's act also the legal cause of Y's death? X's act is the legal cause of Y's death if in terms of policy considerations it is reasonable and fair that X's act is deemed to be the cause of Y's death. Mokgethi and Daniëls.

### Theories of Legal Causation

#### ➤ Individualisation Theories

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

Objection:

- 2 or more conditions are often operative in equal measure. Idea finds little support today.
- In Daniels the court refused to accept that an act can be the legal cause of a situation only if can be described as the 'proximate cause'

#### ➤ Theory of Adequate Causation (Generalisation theory)

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

- It must be typical of such an act to bring about the result in question. If this test can be met, it is said that the result stands in an "adequate relationship" to the act. Loubser 1953
- Theory of adequate causation is similar in that they both emphasise that a distinction should be drawn between consequences normally to be expected from the type of conduct and consequences which one would not normally expect to flow from such conduct.

### Critical evaluation

- Snyman view is that the theory of adequate causation is preferable. Because of the criticism of individualisation in Daniels and that there is no essential difference between adequate causation and *novus actus* criterion.

#### ➤ 3. New intervening act. *Novus actus interveniens*

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

- Used to indicate that between X's initial act and the ultimate death of Y, another event which has broken the chain of causation has taken place, preventing us from regarding X's act as the cause of Y's death.
- Some authorities regard legal causation as consisting in the absence of a novus actus interveniens.
- According to this approach X's act is regarded in law as the cause of Y's death if it is a factual cause of the death and there is no novus actus interveniens between X's act and Y's death. (S v Counter 2003)
- An act or an event can never qualify as a novus actus if X previously knew or foresaw that it might occur.

The explosion was clearly a novus actus interveniens. Therefore there was no legal causation and consequently no causal link between X's act and Y's death.

**(b) Explain the meaning of the expression aberratio ictus. Name and explain the two opposing approaches to cases of aberratio ictus. Indicate which approach ought, in your opinion, to be followed, stating the reasons for why you think such an approach is the correct one. Also name the most important decision of the Appellate Division dealing with aberratio ictus. (9)**

Aberratio Ictus means the going astray of the blow. It is not a form of mistake. The perpetrator X has pictured what he was aiming at correctly, but through lack of skill, clumsiness or other factors, he misses his aim, and the blow or shot strikes something or somebody else. The two opposing approaches are the transferred culpability and the concrete culpability approaches.

**The transferred culpability approach.** X intends to shoot and kill Y. The bullet strikes a pole, ricochets and strikes Z fatally. In terms of this approach, X will be guilty of murder because he had the intention to kill a person. The fact that X didn't kill the person that he intended awards him no defence, since the intention he directed towards Y is transferred to the killing of Z.

**The concrete culpability approach.** In terms of this approach X can only be guilty of murder if he was able to foresee the possibility that the bullet could go astray and kill Z and have

reconciled himself with this possibility. X's intention to kill Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill the person who was actually struck by the blow, the question is not simply whether he had the intention to kill a person, but whether he had the intention to kill the particular person whose death he caused.

Our courts apply the concrete culpability approach,

- (1) because it is in line with the subjective approach for the test of culpability; and
- (2) because the transferred culpability approach results in the *versari in re illicita* doctrine, that has already been rejected by our courts.

In *Mtshiza* Principles dealt with:

1. Aberratio ictus
2. Consequences of aberration ictus

Outline:

X and Y consumed a lot of liquor together. They got into a fight and while trying to stab Y, X stabbed Z and killed him. X was convicted of culpable homicide and sentenced to 10 years' imprisonment & 8 strokes.

Outcome:

The original sentence was put aside and a new sentence of 5 years' imprisonment was given: judge refused to implement *versari in re illicita* doctrine. The judgment confirms that factual situations in which there is an aberratio ictus should be judged as follows:

- (1) X will normally always be guilty of attempted murder in respect of Y that is, the person she wished to, but did not, kill.
- (2) As far as X's liability in respect of the person actually struck by her blow (Z), is concerned, there are three possibilities:
  - (a) If she had foreseen that Z would be struck and killed by the blow, and had reconciled herself to this possibility, she had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.
  - (b) If X had not foreseen the possibility that her blow might strike and kill someone other than Y, or, if she had foreseen such a possibility but had not reconciled herself to this possibility, she lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily mean that X is not guilty of any crime. Murder is not the only crime of which a person can be convicted if she causes another's death. There is also the possibility of culpable homicide, which consists in the unlawful negligent causing of the death of another. As we point out below in our discussion of negligence, X will be negligent in respect of Z's death if the intention to kill is absent, but if, as a

reasonable person, she nonetheless ought to have foreseen that she could cause the death of the victim (Z). In that event, X will be guilty of culpable homicide.

- (c) Only if it is established that both intention (in these instances mostly in the form of *dolus eventualis*) and negligence in respect of Z's death are absent on the part of X, will X be discharged on both a count of murder and one of culpable homicide.

### **Unit 5 - Unlawfulness**

#### **Question 3**

**(a) X, a strongly built male, is in a heated argument with Y, a young female. Y reacts by grabbing a long, sharp knife and attacking X with it. X grabs Y's arm, dispossesses her of the knife and hits her with his fists three times on the head. Y is severely injured and dies later in hospital from brain damage. Discuss X's liability in each of the set of facts that follow. You must evaluate each set of facts separately.**

**(i) On a charge of murder, X relies on private defence. Consider briefly whether X can succeed with this defence. [You need not give a complete definition, nor do you need to discuss all the requirements. Confine your answer to applying the most relevant requirement(s) of private defence to the facts.](4)**

**(ii) In the event that X is found to have exceeded the bounds of private defence, X argues that he did not kill Y intentionally because he subjectively believed that he was acting in private defence. Consider with reference to case law, whether X can succeed with such a defence. (6)**

**(b) Name the defences that may exclude criminal capacity. (3)**

**(c) In your study guide, a summary of the legal points decided by the Appellate Division in *Chretien 1981 (1) SA 1097 (A)* is provided in a shaded block. Set out the summary of these legal points. (5)**

**(d) Name the three instances in which subjective factors are taken into consideration when applying the test for negligence. (3)**

- (a)(i) The relevant requirement for deciding whether X can successfully rely on private defence, is the requirement relating to the defensive act that there must be a

reasonable relationship between the attack and the defensive act, or put differently, the act of defence may not be more harmful than is necessary to ward off the attack.

(ii) In order to decide whether there was a reasonable relationship between attack and defence, certain factors should be taken into account. The most relevant here are:

- The relative strength of the parties: we are told that X is strongly built; whereas Y is referred to as being young. The fact that X managed to dispossess Y of the knife after grabbing her arm is an indication of his strength.
- The sex of the parties: in addition to being strongly built, X is a male whereas Y is a female. Generally speaking, it is fair to say that this factor is significant.
- The means they have at their disposal: Y had a long, sharp knife, whereas X only had his fists. This should be balanced against the first two factors above.
- The nature of the threat and the value of the interest threatened: it is fair to say that X's life and bodily integrity were in danger. This should be balanced against the first two factors above.
- The persistence of the attack: Y's attack on X was not persistent, especially after X dispossessed her of the knife. However, even after dispossessing Y of the knife, X persisted in assaulting Y to the point that she was severely injured and subsequently died as a result of brain damage. This factor indicates the excessive nature of X's attack on Y.
- Applying these factors, the conclusion would be that X cannot rely on private defence because he did not satisfy this requirement, or he exceeded the bounds of private defence.

(iii) X is alleging putative private defence or a mistake relating to unlawfulness.

- In dealing with a situation where X exceeded the bounds of private defence, and thus acted unlawfully, the ordinary principles of culpability (in this case, intention) must be applied to determine X's liability.

In *Ntuli*, the accused killed an older woman with whom he had an argument, by striking two hard blows to her head. The trial court found that he had exceeded the bounds of private defence and convicted him of culpable homicide. On appeal the finding was confirmed and the Appeal Court laid down the following important principles:

- (1) If the victim dies, the accused may be guilty of either murder or culpable homicide, depending upon his culpability. If the accused did not have any culpability, he should be found not guilty.
  - (2) The ordinary principles relating to intention and negligence should be applied to all cases where the bounds of private defence have been exceeded.
- X will be found to have had intention if he satisfies two requirements:

- (1) It can be said that he in fact knew (*dolus directus*) that his conduct would result in Y's death, or that he had foreseen the possibility that this would happen and had reconciled himself to this possibility (*dolus eventualis*) [intention to kill – colourless intention]; AND
- (2) He knew (*dolus directus*) or foresaw the possibility (*dolus eventualis*) that his conduct may be unlawful (that his conduct exceeded the bounds of private defence) and reconciled himself with that possibility [intention to kill unlawfully – coloured intention].
- (3) The Court must place itself in the same position that X was in and draw indirect inferences of X's awareness from all the surrounding circumstances –*De Oliveira* case. **De Oliveira:** employee and friends tried to get into servants quarters at back of X's house. X's wife woke up and told X "there are unknown black men outside". X opened window and fired 6 shots. Hit employee (injured) and one of his friends (died). **Putative private defence** raised. Only inference drawn from evidence (and failure to testify) is that X foresaw possibility of death when he fired 6 shots into driveway knowing people were there. Necessary intention to kill present in form of *dolus eventualis*. Convicted of murder and attempted murder.
- (4) X will not be successful in raising this defence. He had intention in the form of *dolus eventualis* and had the intention to kill unlawfully.

(b) 1. Mental Illness (insanity)

2. Youth

3. non-pathological criminal incapacity

- (c) • If a person is so drunk that her muscular movements are involuntary, there can be no question of an act, and although the state in which she finds herself can be attributed to an excessive intake of alcohol, she cannot be found guilty of a crime as a result of such muscular movements.
- In exceptional cases a person can, as a result of the excessive intake of alcohol, completely lack criminal capacity and as a result not be criminally liable at all. This will be the case if she is "so intoxicated that she is not aware that what she is doing is unlawful, or that her inhibitions have substantially fallen apart".
  - The "specific intent theory" in connection with intoxication is unacceptable and must be rejected.
  - Intoxication can therefore exclude X's intention to commit a less serious crime.
  - The Chief Justice went out of his way to emphasise that a court must not lightly infer that, owing to intoxication, X acted involuntarily or lacked criminal capacity or the required intention since this would discredit the administration of justice.

(d) (1) The negligence of children who, despite their youth, have criminal capacity, ought to be determined, we submit, by inquiring what the reasonable child would have done or foreseen in the same circumstances.

Example: In T 1986 (2) SA 112 (O) the court had to decide whether X, a 16-year-old schoolboy, had committed culpable homicide when he killed a fellow-schoolboy during an argument. The court found him not guilty, inter alia on the ground that the test for negligence in this particular case was not the test of the "reasonable person", but of the "reasonable 16-year-old schoolboy".

(2) In the case of experts it must be asked whether the reasonable expert who embarks upon a similar activity would have foreseen the possibility of the particular result ensuing or the particular circumstance existing (*Van Schoor & Van As*).

Example: When determining whether a heart surgeon was negligent during an operation in which the patient died, his actions certainly cannot be measured by the yardstick of how a reasonable person, who for all practical purposes is a layman in the medical field, would have acted.

(3) If X happens to have knowledge of a certain matter which is superior to the knowledge which a reasonable person would have had on the matter, he cannot expect a court to determine his negligence by referring to the inferior knowledge of the reasonable person. His superior subjective knowledge of a fact of which the reasonable person would have had no knowledge must indeed be taken into account, *Mahlalela*.

Example: X is a member of a team of workers which is cleaning up a certain terrain. A tin can in which a hand-grenade has been hidden is lying on the terrain. X picks it up and throws it to one side. The result is an explosion in which Y is killed. The reasonable person would not have known or foreseen that there was a hand-grenade in the tin. Assume that X in fact happened to have known that there was a hand-grenade in the tin. If X is charged with culpable homicide and the question whether he was negligent has to be answered, X cannot expect his negligence to be determined by enquiring whether the reasonable person would have known or foreseen that there was a hand-grenade in the tin. X's particular subjective knowledge of the presence of the hand-grenade in the tin must indeed be taken into account. (This would in all probability result in the court holding that he was indeed negligent.)

**Name, without discussing, the requirements for a successful reliance on the ground of justification known as private defence(7)**

## Private defence requirements

### (1) Requirements of attack

#### The attack

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

### (2) Requirements of defence

#### The defensive action

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

**X takes his dog, a German shepherd, for a walk in the park. Three men approach X, and one of them demands that he hand over his purse and car keys to them. X refuses and the men hit him in his face. One of the men also puts a gun against X's head and threatens to kill him. X instructs his dog to attack the men. The dog bites one of the men in his throat and kills him. X is charged with murder. Discuss whether X can rely on private defence. In your answer you must name (without any discussion) the requirements for successfully relying on this defence.**

The answer to this question is "yes". X can rely on private defence because he complies with all the requirements for this ground of justification. These requirements are:

#### **Attack:**

The attack against X was unlawful.

The attack was against interests which ought to be protected, namely the physical integrity and life of X.

The attack was threatening but not yet completed.

#### **Defensive action:**

X acted through the agency of his dog and directed his defence in this manner against the attacker.

The defence was necessary to protect his interests.

The defence stood in a reasonable relationship to the attack. X's life was threatened.

There was therefore a balance between the act and the defence.

X was aware of the fact that he was acting in private defence.

#### **Question 4**

**Y, a 60-year old woman, lives on her own in a flat. One evening, while lying in bed, she hears a noise in the passage. She switches on the light, only to discover a young man, aged about 17, standing at her bed. The man has a knife in his hand. He pushes her onto the bed, telling her that he is going to rape her and that as long as she keeps quiet, he will not kill her. Y has a gun, which she keeps under her bed. Before X can rape her, she manages to get hold of the gun. She shoots X in the forehead. X dies instantly, as a result of the gun wound. Y is charged with murder. You are her legal representative. Discuss which defence you will invoke, and on which authority you will rely.**

Y can invoke the defence of private defence. Her conduct complied with all the requirements for private defence. There was, inter alia, a reasonable relationship between the attack and the defensive act. There is clear authority in our law that the interest protected by the person acting in private defence, and the interest infringed, need not necessarily be the same. See Van Wyk 1967 (1) SA 488 (A).

**In Ex parte die Minister van Justisie in re S v Van Wyk 1967 (1) SA 488 (A) the court held that, in extreme circumstances, a person is entitled to kill another person in defence of property. Discuss this case in detail and consider also whether the ruling in the case can be reconciled with specific constitutional rights of a person**

### **Requirements for the attack**

1. Must be unlawful
  - need not be accompanied by culpability (can do private defence against mentally ill; children; mistake)
  - Not private defence if against animals = necessity
  - Attack need not be directed at the defender; may protect 3rd person.
  - Attack need not only be positive act; can also be omission.
2. Directed against interests which should be protected
  - S v Van Wyk -  
kill to protect property
  - Van Vuuren –  
to protect dignity
3. Threatening but not yet complete
  - *Mogohlwane* – although time elapsed, attack not yet completed

### **Requirements for the defence**

1. Directed against the attacker

2. Must be necessary *Snyman*: Duty to flee: says no! (see p 109)

3. Reasonable relationship to the attack (*Patel* case)

- not be more harmful than necessary

- reasonable?

\*relative strength

\*sex; ages

\*means at disposal

\*nature of threat

\*value of interest

\*persistence of attack

Need to be proportionality between:

1. Nature of interests threatened and impaired

2. The weapons or means used by the parties

3. The value or extent of the injuries between the parties

Example: Can you rely on private defence if you shoot a burglar in your house in the middle of the night?

If objectively less harmful means, then no, BUT might be not guilty if lack intention (different requirement to unlawfulness). If negligent (reasonable person test applied) = culpable homicide

4. The defender must be aware that he is acting in private defence

## Unit 6 – Unlawfulness 1

**Upon experiencing pain in her womb, Y goes to a gynaecologist for a check-up. Z, her male gynaecologist, decides that Y should undergo an operation. Y agrees to this procedure. She is taken to the operating room and is administered a strong sedative as a preliminary procedure before receiving anaesthetics. Z leaves the operating room to address another emergency. Moments later, X, a male nurse, enters the operating room. He inserts his finger into Y's vagina with the intention to derive sexual gratification. Y, believing that this conduct amounts merely to a preparatory medical procedure, does not object. X is caught by another nurse and is later dismissed from his employment. A horrified Y lays a rape charge against X. In his defence, X argues that there was consent because Y did not object. Consider only the merits of this defence. (It is not in dispute that the act performed by X amounts to an "act of sexual penetration" as required by the new statutory crime of rape). (6)**

• To be valid, the consent on which X relies on must comply with the following requirements.

It must be

(1) given voluntarily

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

the requirement, that consent must be based upon knowledge of true and material facts is the contentious point on the facts of this case.

For X to be successful in his defence, it must be shown that the act to which Y gave her consent is "sexual penetration".

On the facts given, Y consented to an operation, and not to sexual penetration.

In *Flattery*, a woman thought that X, a quack surgeon, was operating on her to cure her of her fits, whereas he was in fact having sexual intercourse with her.

In *Williams* a woman thought that X, her singing teacher, was performing a surgical operation on her to improve her breathing ability when singing, whereas he in fact had sexual intercourse with her. In both these cases X was convicted of rape, the court refusing to recognise the existence of any "consent" to intercourse.

Therefore, on these facts, we are dealing with a mistake relating to the nature of the act (an error in negotio).

Its effect is that the consent on which X relies is invalid because Y was not aware of the true and material facts, in particular of the nature of the act performed on her.

Therefore, X's reliance on Y's consent will be unsuccessful because Y did not consent to sexual penetration but to an operation.

**(b) Name the requirements for the defence of necessity.**

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

**Name and briefly discuss, with reference to case law, the requirements for a plea of necessity. (10)**

Legal interest threatened – some legal interest of X must be threatened.

- May also protect another – one can also act in a situation of necessity to protect another's interests.
- The emergency must have already begun but must not yet be completed.
- A person may rely on necessity even if he himself was personally responsible for creating the situation of emergency. Our opinion, expressed in the guide, is that X should not be precluded from successfully relying on necessity merely because he caused the emergency himself. However, if the first act (ie the act that caused the emergency) amounts to a crime, then X should not be allowed to rely on this point.
- The person relying on necessity must not be legally compelled to endure the danger. Certain individuals, by virtue of their offices (ie police officers) cannot avert the dangers inherent in the exercise of their professions by harming the interests of innocent persons. Another aspect of this rule is that a person cannot rely on necessity if what appears to him to be a threat is in fact lawful (human) conduct (ie covered by a ground of justification or by law ie lawful arrest by a police officer).
- The act of necessity must be the only way in which X can avert the danger.
- X must be conscious of the fact that an emergency exists, and that he is therefore acting out of necessity.
- In acting out of necessity, X must not cause more harm than is necessary to escape the danger.

It is in relation to this requirement that we encounter the dilemma of whether a person can kill another out of necessity.

This was answered positively in the case of Goliath, where it was held that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion. It was held that one should never demand of an accused more than is reasonable. Considering everyone's inclination towards self-preservation, an ordinary person regards his own life as being more important than that of another.

**In order for consent to be considered valid, certain requirements must be complied with. Merely name these requirements.**

The consent must be

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

**Name and discuss the requirements for successfully relying on consent as a ground of justification.**

1. The consent must be given voluntarily, without any coercion. Consent obtained as a result of violence, fear or intimidation is not voluntary consent. Mere submission cannot be equated with voluntary consent. The relevant case dealing with this requirement is McCoy.

2. Consent must be given by a person who has certain minimum mental abilities.

These abilities are the ability to:

- (i) appreciate the nature of the act to which he consents
- (ii) appreciate the consequences of the act

3. The consenting person must be aware of the true and material facts regarding the act to which he consents. A fact is material if it relates to the definitional elements of the particular crime. For example in the crime of rape, the woman must be aware of the fact that it is sexual intercourse to which she is consenting.

4. The consent may be given either expressly or tacitly.

5. The consent must be given before the otherwise unlawful act is committed – approval given afterwards does not render the act lawful.

6. In principle consent must be given by the complainant herself. However, there is an exception, namely where a parent consents to an operation to be performed on his or her child.

**X, the male coach of a woman hockey team, convinces Y, one of the team members, that the act of sexual intercourse between X and Y will improve her (Y's) game. Y subsequently has sex with X. In an ensuing rape trial X alleges that Y consented to the act. Discuss the merits of his defence. (5)**

Consent does not operate as a ground of justification in the case of rape, but that the absence of consent forms part of the definitional elements of the crime. Valid consent must be given voluntarily and the consenting party must be aware of the true and material facts regarding the nature of the act to which she consents. This means that Y must be aware that it is sexual intercourse to which she is consenting.

Furthermore, as stated in the case of C, true consent requires not only a mental state of willingness in respect of the type of act, but also a willingness to perform the act with the particular man who in fact had intercourse with her.

From the given facts it is clear that Y was aware of the nature of the act (ie sexual intercourse) to which she consented. She also did not make a mistake regarding the identity of the perpetrator. Therefore her consent is valid.

X's defence may therefore be successful.

**note** that a mere misrepresentation regarding the consequences of sexual intercourse does not per se vitiate consent. In the given set of facts Y was not misled about the nature of the act or the identity of the man. She was only misled about the result or consequences of intercourse with X. Such a misrepresentation does not vitiate consent.

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

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

**Write short notes on the contents of the concept of "unlawfulness". You must also discuss the decision in Fourie 2001 (2) SACR 674 (c). (6)**

An action is unlawful if it conflicts with the legal convictions (boni mores) of society. Furthermore, unlimited grounds of justification exist where each ground has its limits, such as private defence, necessity, consent, official capacity and parents right of chastisement , which will render an otherwise unlawful action lawful.

In Fourie, the court confirmed that

- (1) the question of unlawfulness is only to be considered once it has been proven that an action complies with the definitional elements of the crime; and
- (2) that the test for unlawfulness is based on the boni mores or legal convictions of society.

Bill of Rights, contained in the Constitution, plays an important role in the deciding whether conduct is in conflict with public policy or the community's perception of justice.

The values of human dignity, equality and the advancement of human rights and freedoms are of crucial importance in deciding this issue.

## Unit 7 Culpability & Criminal Capacity

**Explain the meaning of the “principle of contemporaneity” in culpability. Refer also to case law.**

In order for a crime to be committed, there must have been culpability on the part of X at the very moment when the unlawful act was committed. There is no crime if culpability only existed prior to the commission of the unlawful act, but not at the moment the act was committed, or it came into being only after the commission of the unlawful act.

S v Masilela 1968 - Principles dealt with:

1. Culpability
2. Mens rea
3. Principle of contemporaneity

Outline:

X and another strangled Y and, believing him dead, set his house on fire. Turns out that Y was not dead and that the fire killed him. X and another were then convicted of murder. They appealed on the basis that they lacked culpability: the act of burning down the house killed Y, but they had no intention of killing Y with this act.

Outcome:

Judge turned down appeal: found that strangling and burning were part of the same act.

Culpability has 2 legs:

1. Criminal capacity

+

2. Intention/ negligence

- What is the principle of contemporaneity?
  - Culpability + unlawful act = contemporaneous (occur at exactly the same time) – *Masilela* case.

### Question 9

**X and Z are both taxi drivers. They work in the same areas, and use the same route. X knows that Z's taxi is always filled to capacity. X feels that he has the sole right to that particular**

**route, and decides to shoot and kill Z. One day, having stopped next to each other at a red traffic light, X is overcome with anger. The windows of Z's taxi are tinted, so that it is impossible to see whether there are any passengers inside. X fires a shot in the direction of the driver's seat of Z's taxi, hoping to kill Z. The bullet misses Z but hits Y, who is sitting next to Z. Y is very badly wounded, but miraculously survives. Discuss X's criminal liability.**

X can be convicted of malicious injury to property because he shattered the taxi window. He had intention in the form of *dolus indirectus* (indirect intention) in respect of the window.

X can be convicted of attempted murder of Z, since he had *dolus directus* (direct intention) to kill Z, even though he did not kill him.

X can also be convicted of attempted murder in respect of Y. X knew that Z's taxi is always filled to capacity. The court will in all probability come to the conclusion that X had foreseen the possibility that he could miss Z and kill a passenger sitting next to the driver, and that he had reconciled himself to such a possibility. Such a conclusion would be fair, since X had fired a shot at the driver's seat despite the tinted windows, knowing full well that Z's taxi was usually filled to capacity. Note that if Y had died, X would be guilty of murder if the court found that he had foreseen the possibility that he could hit Y and that Y could die as a result of it, and had reconciled himself to such a possibility. Since X had *dolus eventualis* in respect of Y's death and since Y did not die, he can be convicted of attempted murder only in respect of Y.

### **Unit 8 – Criminal capacity – Mental illness and Youth**

**Discuss the effect of youthful age on criminal liability. (6)**

Criminal capacity may be completely absent because of an accused's youthful age. There is an irrebuttable presumption that a child who has not yet completed his or her seventh year of life, lacks criminal capacity. There is a rebuttable presumption that a child between the ages of seven and fourteen years lacks criminal capacity. The closer the child approaches the age of fourteen years, the weaker the presumption that the child lacks criminal capacity. The test to determine whether a child between the ages of seven and 14 years has criminal capacity is the same as the general test for criminal capacity.

**X recently gave birth. She is still in hospital. One night she gets up from her bed, walks to the ward where the babies are kept, and strangles her baby. Discuss whether X can be convicted of murder or any other crime if the evidence reveals the following: X suffers from schizophrenia, a well-known disease of the mind, and was labouring under hallucinations when she killed her baby. She was seeing monsters and hearing a voice instructing her to destroy the "monster" lying in the cradle.**

The court will most probably find that X lacked criminal capacity at the time of the events. Since X was suffering from a mental illness when she killed Y, she will be found not guilty in terms of section 78(1) of the Criminal Procedure Act 51 of 1977. In terms of this section, X clearly complies with the pathological leg of the test for criminal incapacity. From the facts it is apparent that she lacked the ability to appreciate the wrongfulness of her act. She therefore also complies with the psychological leg of the test for criminal incapacity, more specifically because she lacked the ability to differentiate between right and wrong (that is, the cognitive function). This incapacity can be attributed to the mental illness from which she was suffering (schizophrenia, with accompanying hallucinations).

**Which rules should be applied to determine whether or not a youth has criminal capacity?**

(1) A child who has not yet completed his or her seventh year is irrebuttably presumed to lack criminal capacity. A child can therefore never be convicted of any crime on the basis of an act or omission committed before his or her seventh birthday.

(2) A child between the ages of seven and 14 is rebuttably presumed to lack criminal capacity. A child who falls in this age group can therefore be convicted of a crime if the state rebuts the presumption of criminal incapacity beyond reasonable doubt.

**Name the defences that exclude criminal capacity (3)**

- 1.) Non-pathological criminal incapacity
- 2.) Mental illness
- 3.) Youth

**NON-PATHOLOGICAL CRIMINAL INCAPACITY (NPCI)**

- Need not prove any mental illness
- Linked rather to an emotional collapse (eg shock, fear, anger, stress; result of provocation)
- If raised, state has onus to prove accused had criminal capacity. However, defence must lay a foundation for the defence (pref expert evidence)

**Eadie:** intoxicated, provoked and in a state of road rage, accused smashed Y's car with hockey stick and assaults Y. Court rejects his defence of NPCI; convicted of murder. Court held that **there is no distinction between NPCI owing to emotional stress and provocation and sane automatism**. More specifically, according to the court, there is no difference between the conative leg for the criminal capacity test and the requirement of voluntariness of act. Court did not categorically state that NPCI no longer exists. But

defence of NPCI due to provocation should be treated as one of sane automatism, which does not succeed easily and is rarely upheld.

## MENTAL ILLNESS

**Sec 78(1), Criminal Procedure Act:** *A person who commits an act/makes an omission which constitutes an offence and who at the time of such commission/omission suffers from a mental illness/ mental defect which makes him incapable of appreciating the wrongfulness of his act/omission; or of acting in accordance with an appreciation of the wrongfulness of his act/omission shall not be criminally responsible for such act/omission*

### 2-legged test in terms of sec 78(1)

#### Pathological leg of test

Mental illness/defect

#### Psychological leg of test

Cognitive          Conative

#### Verdict

- If defence successful, court must find X not guilty and apply one of the following orders:
  - Admit and detain in an institution
  - Release subject to conditions
  - Unconditional release
  - Detainment in a psychiatric hospital/prison

#### Diminished responsibility or incapacity

- Mitigating circumstance
- Sec 78(7): criminally responsible but capacity diminished, taken into account when sentencing

#### Mental abnormality at time of trial

- Court cannot try a mentally abnormal person
- Lacks capacity to understand proceedings and defend himself
- Investigation, psychiatrists; may be detained in psychiatric hospital till fit to stand trial
- Procedural matter

## YOUTH

- Part 2 of **The Child Justice Act 75 of 2008** provides for the new minimum age for criminal capacity (rebuttable presumption no longer starts at 7 years old, but now at 10 years of age)

**Sec 7(1):** a child who commits an offence while **under the age of 10 years** does **not have criminal capacity** and **cannot be prosecuted for that offence**.

A child who is **10 years or older but under the age of 14 years** and who commits an offence is **presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity.**

**Sec 11(1):** the State must **prove beyond a reasonable doubt** the capacity of a child who is 10 years or older but under the age of 14 **to appreciate the difference between right and wrong** at the **time of the commission** of an alleged offence and **to act in accordance with that appreciation.**

### Unit 10 – Intention – Mistake

**(a) X and W are temporarily experiencing problems in their marriage and are not living together any longer. X wants to kill W so that he can benefit from her life insurance policy. He arrives unexpectedly at W's townhouse and finds a man and a woman in her bed, making love. X, who is under the impression that the woman is W, takes out his firearm and fires a shot at the woman. Discuss X's liability in each of the set of facts that follows. You must evaluate each set of facts separately.**

**(i) The woman dies as a result of the shot but afterwards it transpires that the woman was not W, but Y, her sister, who used the townhouse for a secret meeting with her married lover. Can X be convicted of murder or any other crime in respect of Y? (6)**

**(ii) The bullet hits a brass vase which stands on the bedside table, changes direction and kills A, the housekeeper, who enters the room at that moment to investigate the cause of the noise. Discuss X's possible criminal liability in respect of A. (8)**

(i) This is a case of error in objecto (X is mistaken about the object of his act).

One of the instances in which an error in objecto will exclude intention is if it relates to the definitional elements of the particular crime.

The object of the crime of murder is a human being.

X's mistake does not relate to whether he was killing a human being, but to the identity of the human being.

His mistake (error in objecto) is not material and will not exclude intention because murder is committed whenever a person unlawfully and intentionally kills a human being, and not merely when a person kills the particular person he intended killing.

Therefore X is guilty of murder.

(ii) This is a case of aberratio ictus (the going astray of the blow).

Aberratio ictus is not a form of mistake because X has correctly pictured what he is aiming at (thus no error in objecto), but through lack of skill or other factors he misses his aim and the blow strikes somebody else.

In order to decide whether X has committed murder, it is necessary to determine whether X had intention in respect of A's death.

When judging *aberratio ictus* situations, our courts have favoured the concrete figure approach.

In the Mtshiza case:

As far as X's liability in respect of A's death is concerned, there are three possibilities:

- If he had foreseen that A would be struck and killed by the blow, and had reconciled himself to this possibility, he had *dolus eventualis* in respect of A's death and is guilty of murder in respect of A.
- If he had not foreseen the possibility that his blow might strike and kill someone other than Y, or, if he had foreseen such a possibility but had not reconciled himself to this possibility, he lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily mean that X is not guilty of any crime. Murder is not the only crime of which a person can be convicted if he causes another's death. There is also the possibility of culpable homicide, which consists in the unlawful negligent causing of the death of another. X will be negligent in respect of A's death if the intention to kill is absent, but if, as a reasonable person, he nonetheless ought to have foreseen that he could cause the death of A. In that event, X will be guilty of culpable homicide.
- Only if it is established that both intention (in the form of *dolus eventualis*) and negligence in respect of A's death are absent on the part of X, will X be discharged on both a count of murder and one of culpable homicide.

**Discuss whether the view that "ignorance of the law is no excuse" still finds application in our law.(5)**

In 1977 our law on this subject was radically changed as a result of the decision of the Appeal Court in *De Blom* 1977 (3) SA 513 (A). In this case, X was charged *inter alia* with contravening a certain exchange-control regulation, according to which it was (at that time) a crime for a person travelling abroad to take jewellery worth more than R600 out of the country without prior permission. X's defence with regard to this charge was that she did not know that such conduct constituted a crime. The Appeal Court held that she had truly been ignorant of the relevant prohibition, upheld her defence of ignorance of the law, and set aside her conviction on the charge.

The Judge declared that at this stage of our legal development it had to be accepted that the cliché "every person is presumed to know the law" no longer had any foundation, and that the view that "ignorance of the law is no excuse" could, in the light of the present-day view of culpability, no longer have any application in our law. If, owing to ignorance of the

law, X did not know that her conduct was unlawful, she lacked *dolus*; if *culpa* was the required form of culpability, her ignorance of the law would have been a defence if she had proceeded, with the necessary caution, to acquaint herself with what was expected of her. There is no indication in the judgment that ignorance of the law excludes *dolus* only if such ignorance was reasonable or unavoidable. In other words, the test is purely subjective in this respect. Thus, to sum up: according to our present law, ignorance of the law excludes intention and is therefore a complete defence in crimes requiring intention. The effect of a mistake regarding the law is therefore the same as the effect of a mistake regarding a material fact: it excludes intention. It is not only when X is satisfied that a legal rule exists that she is deemed to have knowledge of it: it is sufficient if she is aware of the possibility that the rule may exist, and reconciles herself with this possibility (*dolus eventualis*). Nor need she know precisely which section of a statute forbids the act, or the exact punishment prescribed: for her to be liable, it is sufficient that she be aware that her conduct is forbidden by law (generally).

Furthermore, the difference between crimes requiring intention and those requiring only negligence must be borne in mind. It was emphasised in *De Blom* (*supra*) that it is only in respect of the first-mentioned category of crimes that actual knowledge of the legal provisions is required for liability. In crimes requiring negligence it is sufficient, for the purposes of liability, that X failed to exercise the required care and circumspection in acquainting herself with the relevant legal provisions.

**(c) Briefly explain the meaning and legal effect of the following:**

**(1) an error in *objecto* which is material**

**(2) mistake relating to a ground of justification (8)**

1. Error in *objecto* is form of mistake in that the perpetrator believes the object against which he/she directs his/her action to be something or somebody different from what it in fact is. If the mistake is material, it can exclude intention and afford X a defence. The requirement that the mistake must be "material" before it can exclude intention merely means that the mistake must concern an element or requirement of the crime other than the culpability requirement itself. Therefore, X should have made an error concerning the

- requirement of an act
- the requirement(s) contained in the definitional elements
- the requirement of unlawfulness

Whether, in a specific set of facts, *error in objecto* affords a person a valid defence will depend upon the elements of the specific crime with which he/she is charged. For example, the crime of "murder" is defined as the "unlawful, intentional causing of the death of another

human being". Therefore the object of the crime is "another human being". Suppose for instance that X goes hunting one evening at dusk. He fires a shot at a figure which he thinks is a buck. The object in fact is a human being who was walking in the bush. The person dies as a result of the shot and X is charged with murder. X can rely on the defence that his mistake excluded intention. Because he did not have the intention to kill a "human being" (as required for the crime of murder) his mistake concerning the object of the crime was material.

However, X may still be convicted of culpable homicide if the state can prove that he/she was negligent.

However, if X intended to shoot Y, but it subsequently transpired that he/she mistook his/her victim's identity and in fact shot Z, his mistake is not material. He only made a mistake concerning the identity of the victim. The definition of murder requires merely the unlawful and intentional killing of "another human being". The identity of the human being is irrelevant.

**2.** Intention (more particularly, X's "knowledge") must be directed at the act, the circumstances contained in the definitional elements and the element of unlawfulness. The last-mentioned means that X must have been aware of the fact that his/her conduct was unlawful. This aspect of *dolus* is known as knowledge of unlawfulness. It means, amongst other things, that X must have been aware of the fact that his/her conduct was not covered by a ground of justification.

The following example illustrates this kind of mistake. X hears the sound of a door opening in the middle of the night. He/she thinks it is a burglar who threatens his/her life. X fires a shot in the direction of the "burglar" and "he" is killed instantly. It appears afterwards that it was X's daughter who had unlocked the door and whom X had killed. X is charged with murder. X can rely on the absence of intention because he was under the impression that he had acted in a situation of private defence (a ground of justification). If X's defence is upheld, he can of course still be found guilty of culpable homicide, provided that the state proves that he/she was negligent.

*De Oliviera* - Principles dealt with:

- Mistake relating to a ground of justification
- Putative private defence

Outline:

X lived in an area where many housebreaks occurred. He thought someone was trying to break into his house, when in fact they were just trying to gain the maid's attention. He fired 6 shots directly at the men without firing a warning shot, killing one of them. He was convicted of murder and attempted murder and here appealed on the basis that the state had not

proved beyond a reasonable doubt that he had subjectively had the necessary intent to commit the crimes.

Outcome:

The appellant was held to have had the necessary intention to kill in the form of *dolus eventualis* and his appeal failed.

**(a) Distinguish between direct intention, indirect intention and *dolus eventualis* by giving a definition of each. (5) (*dolus directus*, *dolus indirectus* and *dolus eventualis*)**

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

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

A person acts with *dolus eventualis* if the causing of the forbidden result is not his main aim, but he subjectively *foresees* the *possibility* that, in striving towards his main aim, his conduct may cause the forbidden result

➤ and he *reconciles* himself with this possibility.

**Z works for a security company. His job is to patrol the streets of a certain suburb and to protect the people who live in the suburb. One evening he receives a message on his radio that he must immediately go to a house which has been broken into. He goes to the house and presses the bell at the gate but receives no response. He then climbs over the wall and, as he approaches the house, sees a figure, Y, coming out of the house. Y runs in the direction of the back of the house. Z pursues Y, and tells him to stop. Y disregards his (Z's) request and jumps over a fence into the neighbour's property. Z follows Y into the neighbour's property. The neighbour, X, who has been awoken by the noise, sees Z (the security guard) running across his lawn with his revolver in his hand. He (X) thinks that Z is a burglar and fears that he and his family may be attacked. X approaches Z from behind and hits him (Z) with a cricket bat over the head. X is charged with assault with intent to do grievous bodily harm in respect of Z (the security guard). Discuss whether X's mistake affords him any defence. (8)**

Yes, X's mistake affords him a defence. Because X was under the incorrect impression that he was acting in private defence, he lacked intention and cannot be convicted of assault. Intention consists of two elements: knowledge and will. The knowledge requirement means

that X's intention must relate to all the elements of the offence except, of course, the requirement of culpability. His intention must relate to

- (1) the act;
- (2) the circumstances set out in the definitional elements; and
- (3) the unlawfulness of the conduct.

In the set of facts, X was under the impression that his conduct was covered by a ground of justification, namely private defence. He therefore made a mistake regarding the unlawfulness of the conduct. He thought he was acting in private defence but, judged objectively, his conduct was in fact unlawful. He therefore cannot rely on private defence but may rely on the defence that he lacked culpability. X's defence is known as "putative private defence".

In *De Oliviera*

Principles dealt with:

3. Mistake relating to a ground of justification
4. Putative private defence

Outline:

X lived in an area where many housebreaks occurred. He thought someone was trying to break into his house, when in fact they were just trying to gain the maid's attention. He fired 6 shots directly at the men without firing a warning shot, killing one of them. He was convicted of murder and attempted murder and here appealed on the basis that the state had not proved beyond a reasonable doubt that he had subjectively had the necessary intent to commit the crimes.

Outcome:

The appellant was held to have had the necessary intention to kill in the form of *dolus eventualis* and his appeal failed.

It should be noted that in a case of putative private defence, it is not unlawfulness that is at issue but culpability.

**X is a soldier. In the course of military operations Z, who is X's superior officer, orders him (X) to shoot Y if Y refuses to answer certain questions. Y refuses to answer questions and X shoots and kills him. X is subsequently charged with having murdered Y. As a ground of justification for his conduct he relies on the fact that, in killing Y, he was merely obeying an order from a superior officer. (Note that he does not rely on compulsion or necessity as a defence.) Discuss the relevant rules relating to obedience to orders as a ground of justification.**

There are two approaches to obedience to orders as a ground of justification.

The first approach is that the subordinate has a duty of blind obedience to his superior's order. According to this view an act performed in obedience to an order will always

constitute a ground of justification. This view cannot be supported. For example, a subordinate is ordered by a superior to commit rape. According to this approach, obedience to orders would be a complete defence. In terms of the second approach, the fact that the subordinate obeyed an order is not a ground of justification. This approach cannot be supported since it implies that a subordinate must, before complying with any order issued to him, first decide for himself whether it is unlawful or unlawful.

In *Smith* the court rejected both the above approaches, and opted for a middle course:

"a soldier is compelled to obey an order only if the order is manifestly lawful. If it is manifestly unlawful, he may not obey it, and if he does, he acts unlawfully". Section 199(6) of the Constitution provides that no member of any security service may obey a manifestly illegal order.

If one applies this middle course to the set of facts in the question, X will not succeed with the defence that he relied on a superior order.

**(b) Explain the meaning of the expression *aberratio ictus*. Name and explain the two opposing approaches to cases of *aberratio ictus*. Indicate which approach ought, in your opinion, to be followed, stating the reasons for why you think such an approach is the correct one. Also name the most important decision of the Appellate Division dealing with *aberratio ictus*. (9)**

*Aberratio ictus* means the going astray of the blow. It is not a form of mistake. X has pictured what he is aiming at correctly, but through lack of skill, clumsiness or other factors he misses his aim, and the blow or shot strikes somebody or something else. The two opposing approaches to cases of *aberratio ictus* are the transferred culpability approach and the concrete culpability approach. We shall first consider the transferred culpability approach. X intends to shoot and kill Y. The bullet strikes a pole, ricochets and strikes Z who is a few paces away, killing him (Z). According to this approach, X will be guilty of murder since he intended to kill a person. The fact that the actual victim of X's act proved to be somebody different from the one he wished to kill, ought not to afford him any defence, because X's intention to kill Y is transferred to his killing of Z. We next consider the concrete culpability approach. According to this approach, X can only be guilty of murder if it can be proved that X knew that his blow might strike Z and if he had reconciled himself to this possibility. X's intention of killing Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill the person who was actually struck by the blow, the question is not simply whether he had the intention to kill a person, but whether he had the intention to kill that particular (concrete) person who was actually struck by the blow.

The concrete culpability approach is to be preferred for the following two reasons:

First, this approach is more in accordance with the subjective test for intention than the transferred culpability approach.

Secondly, the transferred culpability approach amounts to an application of the doctrine of *versari in re illicita*.

- The *versari* doctrine holds that if a person engages in unlawful (or merely immoral) conduct, she is criminally liable for all the consequences flowing from such conduct, irrespective of whether there was in fact any culpability on her part in respect of such consequences.

In *Mtshiza* it was held that factual situations in which there is an *aberratio ictus* should be judged as follows:

(1) X will normally always be guilty of attempted murder in respect of Y – that is, the person she wished to, but did not, kill.

(2) As far as X's liability in respect of the person actually struck by her blow (Z), is concerned, there are three possibilities:

(a) If she had foreseen that Z would be struck and killed by the blow, and had reconciled herself to this possibility, she had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.

(b) If X had not foreseen the possibility that her blow might strike and kill someone other than Y, or, if she had foreseen such a possibility but had not reconciled herself to this possibility, she lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily mean that X is not guilty of any crime. Murder is not the only crime of which a person can be convicted if she causes another's death. There is also the possibility of culpable homicide, which consists in the unlawful negligent causing of the death of another. As we point out below in our discussion of negligence, X will be negligent in respect of Z's death if the intention to kill is absent, but if, as a reasonable person, she nonetheless ought to have foreseen that she could cause the death of the victim (Z). In that event, X will be guilty of culpable homicide.

(c) Only if it is established that both intention (in these instances mostly in the form of *dolus eventualis*) and negligence in respect of Z's death are absent on the part of X, will X be discharged on both a count of murder and one of culpable homicide.

<b>Question 7</b>
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**X is the mother of a five-year-old boy, and a single parent. One night, at 04:00, she is woken by the sound of a person walking down the passage of her house. She gets up, grabs her pistol and creeps down the passage. In the dark lounge she sees a figure moving behind the sofa. Fear overcomes her and, believing it to be a burglar who is hiding behind the sofa, she fires a shot in the direction of the sofa. After the noise has died down, she inspects the scene and finds that it is her five-year-old son whom she has killed. It appears that the boy was sleepwalking when his mother mistook him for a burglar and shot him. Can X be convicted of murder or any other crime? Discuss.**

X must be acquitted of murder. Although, objectively speaking, no situation of private defence actually existed and X therefore cannot successfully rely on the ground of justification known as private defence, she lacked the intention required for a conviction of murder because she erred in respect of the unlawfulness of her act. She believed that she was acting in private defence. X can possibly be convicted of culpable homicide. This will be the case if the reasonable person in her position would have foreseen that the figure behind the sofa might not be an attacker (in other words, that this is not a situation of private defence), and that her conduct could lead to the death of an innocent person. A reasonable person would have taken steps to prevent harm being caused to an innocent person and X's conduct therefore differed from that which is expected from the reasonable person.

## **Unit 11 - Negligence**

**Write notes on the "reasonable person" as this expression is used in the determination of negligence.(6)**

- (1) The reasonable person is merely a fictitious person which the law invents to personify the objective standard of reasonable conduct which the law sets in order to determine negligence.
- (2) In legal literature the reasonable person is often described as the *bonus paterfamilias* or *diligens paterfamilias*.
- (3) In the past the expression "reasonable man" was used, and due to its unconstitutionality it ought to be avoided because of its sexist connotation.
- (4) In *Mbombela* the Court described the reasonable person as "the man of ordinary knowledge and intelligence". He or she is neither, on the one hand, an exceptionally cautious or talented person (*Van As*) nor, on the other, an underdeveloped person, or somebody who recklessly takes chances. The reasonable person accordingly finds

himself or herself somewhere between these two extremes. A similar idea was expressed in *Burger*.

- (5) The reasonable person-concept embodies an objective criterion
- (6) He remains an ordinary flesh-and-blood human being whose reactions are subject to the limitations of human nature.

**The required form of culpability for the crime of culpable homicide is negligence. Define the test for negligence in materially defined crimes such as culpable homicide.**

A person's conduct is negligent if

- (1) a reasonable person in the same circumstances would have foreseen the possibility
  - (a) that the particular circumstance might exist, or
  - (b) that his conduct might bring about the particular result;
- (2) a reasonable person would have taken steps to guard against such a possibility; and
- (3) the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person.

**Define the test for negligence. (5)**

A person's conduct is negligent if:

- a reasonable person in the same circumstances would have foreseen the possibility
- that the particular circumstance might exist, or that his conduct might bring about the particular result, and
- a reasonable person would have taken steps to guard against such a possibility, and
- the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person

**2. Name and discuss the subjective factors which the court may take into account to determine negligence. (6)**

The test for negligence is in principle objective, namely the foreseeability of the result or circumstances by the reasonable person. However, this rule is subject to the following subjective factors:

1. Children: the test is that of a reasonable child.
2. Experts: here the test is that of a reasonable expert.
3. Where an accused has more knowledge of a particular situation than the reasonable person

**Name the subjective factors that may be taken into account in determining negligence.(3)**

The negligence of children ought to be determined by inquiring what the reasonable child would have done or foreseen in the same circumstances.

In the case of experts it must be asked whether the reasonable expert who embarks upon a similar activity would have foreseen the possibility of the particular result ensuing.

If X has superior knowledge of a certain matter than a reasonable person, he cannot be judged by referring to the inferior knowledge of a reasonable person. His superior subjective knowledge of a fact must be taken into account.

### **Unit 12 – The effect of intoxication on liability**

**(a) X attends a soccer match between Orlando Pirates and Mamelodi Sundowns. X is a guest of company A and he is accommodated in the company's hospitality box. He drinks steadily throughout the match. During half-time Pirates is leading Sundowns with four goals. Y, a Pirates supporter, taunts X. X gets involved in an exchange of blows with Y, and stabs him with a knife, killing him. Discuss the question whether X can be convicted of murder or any other crime in respect of Y's death if the court finds that as a result of his intoxication. X, at the time of the stabbing.**

**(i) did not act voluntarily**

**(ii) acted with criminal capacity, but lacked the intention to kill Y. (8)**

(i) In terms of the Chretien case X cannot be found guilty of either murder or culpable homicide since no voluntary act exists (a voluntary act is an important element for criminal liability) . X can however be found guilty of section 1 of Act 1 of 1988, as the reason for X's non-liability falls within the ambit of section 1 of the Act, which provides that:

- If a person is so drunk that her muscular movements are involuntary, there can be no question of an act, and although the state in which she finds herself can be attributed to an excessive intake of alcohol, she cannot be found guilty of a crime as a result of such muscular movements.

(ii) X cannot be convicted of murder as he lacked the necessary intent because of his intoxication. He can however be found guilty of culpable homicide, as in the case of Chretien, if the state is successful in proving that his act was negligent. X cannot be convicted of contravening section 1 of Act 1 of 1988 either, since he possessed criminal capacity at the time of the commission of the crime. In order to be convicted of the crime enacted in section 1 of Act 1 of 1988, it is actually required that X must have been acquitted of the original charged crime due to a lack of criminal capacity

**X and Z visit a bar and indulge in a number of drinks. Upon leaving the bar, pedestrian Y accidentally bumps against X, who at that stage was swaying on the sidewalk. A fight ensues. X holds onto Y from behind, and Z kills Y by stabbing her with a knife. X and Z are charged with the murder of the court finds that X and Z have caused Y's death unlawfully, but that X was so intoxicated during the fight, that she was unable to distinguish between right and wrong. The court further finds that at the time of the assault upon Y, Z was able to act and that she had criminal capacity, but that she was so intoxicated that she lacked the intention to murder Y. X and Z rely on the defence of intoxication. Discuss whether X and Z ought to succeed with this defence. (Study this one)**

The rules presently applicable to the defence of voluntary intoxication are those enunciated in Chretien as well as the provisions of section 1 of Act 1 of 1988. The facts in Chretien's case were briefly as follows:

In this case X, who was intoxicated, drove his motor vehicle into a group of people standing in the street. As a result, one person died and five people were injured. He was charged with murder in respect of the person who died and attempted murder in respect of the five persons injured. The court found that owing to his consumption of alcohol, X expected the people in the street to see his car approaching and move out of the way, and that therefore he had no intent to drive into them. On the charge of murder he was convicted of culpable homicide, because the intention to kill had been lacking. X could not be found guilty on any of the charges of attempted murder owing to the finding that he did not have any intent to kill. The question arose, however, whether X should not have been found guilty of common assault on the charges of attempted murder. The trial court acquitted him on these charges. The state appealed to the Appellate Division on the ground that the trial court had interpreted the law incorrectly and that it should have found the accused guilty of assault. The Appeal Court found that the trial court's decision was correct.

The four basic principles enunciated by the Appellate Division are:

(1) If a person is so drunk that her muscular movements are involuntary, there can be no question of an act, and although the state in which she finds herself can be attributed to an excessive intake of alcohol, she cannot be found guilty of a crime as a result of such muscular movements.

(2) In exceptional cases a person can, as a result of the excessive intake of alcohol, completely lack criminal capacity and as a result not be criminally liable at all. This will be the

case if she is "so intoxicated that she is not aware that what she is doing is unlawful, or that her inhibitions have substantially fallen apart".

(3) The "specific intent theory" in connection with intoxication is unacceptable and must be rejected. It is precisely because of the rejection of this theory that in this case X could not even be convicted of common assault. The intoxication can therefore even exclude X's intention to commit the less serious crime, namely assault.

(4) The Chief Justice went out of his way to emphasise that a court must not lightly infer that owing to intoxication, X acted involuntarily or lacked criminal capacity or the required intention since this would discredit the administration of justice.

The conclusion reached in Chretien was criticised, because the effect of the decision was that a person who was responsible for her own intoxication is treated more leniently than a sober person who had committed the same act. As a result of this criticism section 1 of Act 1 of 1988 was enacted.

*This section provides briefly as follows:*

If X commits an act which would otherwise have amounted to the commission of a crime (ie which, "viewed from the outside", without taking into account X's subjective mental predisposition, would have amounted to the commission of a crime) but the evidence brings to light that at the time of the performance of the act she was in fact so intoxicated that she lacked criminal capacity, the court would, in terms of the Chretien judgment, first have to find her not guilty of the crime with which she has been charged (ie the crime she would have committed had she not been drunk), but must then nevertheless convict her of the statutory crime created in section 1(1), that is the crime known as "contravention of section 1(1) of Act 1 of 1988". She is in other words convicted of a crime, albeit not the same one as the one she had been initially charged with.

The section further provides that when the court has to decide what punishment to impose for the statutory crime of which she had been convicted, the court is empowered to impose the same punishment it would have imposed had she been convicted of the crime she was originally charged with. In this way she is prevented from "walking out of court" unpunished.

The application of the rules laid down in Chretien as well as in the Act on the present set of facts is as follows: The fact that X was not able to distinguish between right and wrong means that she did not have criminal capacity as a result of the intoxication. In terms of Chretien

criminal incapacity, even if it was the result of intoxication, constitutes a defence. However, the effect of the provisions of section 1 of Act 1 of 1988 is that X will be convicted of the crime created by this section. Z acted with criminal capacity but did not have the intention to murder. Z accordingly cannot be convicted of murder or of a contravention of section 1 of Act 1 of 1988. She can, however, be convicted of culpable homicide, as she caused Y's death negligently.

The test for negligence is objective, that is: How the effect of intoxication on liability would the reasonable person in Z's position have acted? Such a person would have foreseen that her act would result in death. Although it was not mentioned specifically in the question that X and Z started to drink voluntarily, and although it is not mentioned expressly that they had not started drinking with the exclusive aim of gaining courage, it can nevertheless be assumed that they started drinking voluntarily and that this was not a case of *actio libera in causa*. These two situations are so extraordinary that, unless specifically mentioned in the question, it can be assumed that the intoxication referred to in the question does not refer to these situations.

**X and his friends are on a hunting trip in the Bushveld. One night after drinking too many beers around the camp fire, they decide to shoot at the hyenas howling in the dark. One of X's shots hits and kills Y, the hunting guide who is busy cleaning his rifle. X is charged with murder in respect of Y. The court finds that although X was not so intoxicated that he lacked criminal capacity, he was intoxicated enough not to have formed any intention to cause Y's death. Of what crime(s) can X be convicted in respect of Y's death, if any? Discuss in full with reference to authority.**

Voluntary intoxication may be a complete defence, depending on the degree of intoxication at the time that the offence was committed.

In 1981, in *Chretien*, the Appellate Division set out the legal position in cases of intoxication as follows:

- A person can be so drunk that he/she cannot act, leading to acquittal of any crime.
- A person can be so drunk that he/she lacks criminal capacity, leading to acquittal.
- A person can be too drunk to form intention, leading to an investigation of the person's negligence.
- A court must not lightly infer that intoxication has the above effect.

Therefore, according to *Chretien*, intoxication could qualify as a complete defence leading to an acquittal. Because this position would result in drunken people being treated more

leniently than sober people, parliament passed legislation in 1988 that criminalised drunken behaviour in terms of section 1 of Act 1 of 1988.

This section provides briefly as follows:

If X commits an act which would otherwise have amounted to the commission of a crime (ie which, ``viewed from the outside'', without taking into account X's subjective mental predisposition, would have amounted to the commission of a crime) but the evidence brings to light that at the time of the performance of the act she was in fact so intoxicated that she lacked criminal capacity, the court would, in terms of the Chretien judgment, first have to find her not guilty of the crime with which she has been charged (ie the crime she would have committed had she not been drunk), but must then nevertheless convict her of the statutory crime created in section 1(1), that is the crime known as ``contravention of section 1(1) of Act 1 of 1988''. She is in other words convicted of a crime, albeit not the same one as the one she had been initially charged with.

Briefly stated, a person will be found guilty of contravention of section 1 of the Act if he/she was charged with an offence (eg murder) but acquitted of that offence on the ground that he/she had lacked criminal capacity as a result of intoxication.

The given set of facts states that X had criminal capacity at the time of the commission of the crime, but that he was intoxicated to such a degree that he nevertheless lacked intention. Therefore, the conclusion is as follows:

- \* He cannot be convicted of murder because he lacked intention.

- \* He can also not be convicted of the statutory offence created in section 1 of Act 1 of 1988. In order to be convicted of this offence, the state must prove that X had been acquitted of murder on the ground that he lacked criminal capacity as a result of intoxication at the time of the commission of the offence. The facts clearly state that he was acquitted on the basis that he lacked intention, and not that he was acquitted on the basis that he lacked criminal capacity.

- \* X can, however, be convicted of culpable homicide. He performed an unlawful act and had the required criminal capacity. If the state can also prove that, in causing Y's death, X was negligent, he may be convicted of culpable homicide.

PS. Some students answered that this is a situation of error in objecto which excludes intention (see SG 10.3) or a situation of aberratio ictus (SG 10.5). This is wrong because the facts clearly state that the court found that X had lacked intention. Therefore, the question whether X had intention had already been decided by the court

**X shoots A and B with his pistol. A dies as a result of the shot. B is wounded but survives. X is charged with murder in respect of A and attempted murder in respect of B. At the trial it is proved that, at the time of the shooting, X had been under the influence of alcohol to such an extent that, although he had criminal capacity, he lacked the intention to kill A and B. Discuss the criminal liability of X in respect of both A and B. In your answer you must also consider whether the provisions of section 1 of the Criminal Law Amendment Act 1 of 1988 would be applicable. (8)**

**X's liability for A's death:** According to the facts, X was, at the time of the event, drunk to such an extent that he did not have the intention to kill A. Therefore he cannot be convicted of murder. However, he may be convicted of culpable homicide if the state can prove that he was negligent. According to the facts X had criminal capacity and a conviction of culpable homicide is, therefore, possible.

In Chretien: Principles dealt with:

1. Intoxication

Outline:

X drank a lot at a party, got into his car and mowed down some people, killing 1 and injuring 5. X was found not guilty of murder but was convicted of culpable homicide for the 1 person he killed, due to the fact that he was intoxicated and thus lacked intent. On the 5 counts of attempted murder, X was found not guilty due to his intoxication. The state was unhappy with the outcome and reserved the following question of law to be answered by the appellate division: whether the trial court was correct "in holding that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol." Thus: the state wanted X found guilty on the charge of common assault (which required intent) for the counts of attempted murder.

Outcome:

The judge found that the court a quo was correct in not finding X guilty of assault.

The decision was criticized because this meant a sober person could be punished more harshly for a crime than an intoxicated one.

As a result of the criticism, the Criminal Law Amendment Act 1 of 1988 was passed.

X cannot be convicted of a contravention of section 1 of Act 1 of 1988. For a conviction of this crime it is required that X lacked criminal capacity at the time of the offence and that he was acquitted of the crime charged (ie murder) on this ground. According to the facts, X had criminal capacity. The intoxication only had the effect of excluding X's intention. If

intoxication did not have the effect that a person lacked criminal capacity, he/she cannot be convicted of this offence.

X's liability for B's injuries: X cannot be found guilty of attempted murder in respect of B. According to the given facts it is stated clearly that X, as a result of intoxication, did not have the intention to kill B. Because the Appeal Court had rejected the specific-intent theory in the decision of Chretien, he can also not be charged with a lesser crime such as assault. As a consequence intoxication may completely exclude the intention required for a crime

X can also not be convicted of a contravention of section 1 of Act 1 of 1988. According to the facts, he had criminal capacity and only lacked intention. Therefore X must be acquitted completely. As indicated above, the statutory offence only applies if X lacked criminal capacity as a result of intoxication.

**X goes to a party where he consumes a large amount of alcohol. At the party he meets Y, with whom he enters into an argument. X hits Y with his fists in the face. X is charged with assault. His defence is that, at the time of the commission of the act, he was so intoxicated that he was unable to act in accordance with the appreciation of the wrongfulness of his act. Assuming that the court finds that X was, as a result of intoxication, indeed unable to act in accordance with his appreciation of the wrongfulness of his act, discuss whether X may be convicted of any crime. (8)**

It is clear that X could not be convicted of assault. A person who lacked criminal capacity as a result of intoxication cannot be held liable for assault.

In *Chretien*

Principles dealt with:

1. Intoxication

Outline:

X drank a lot at a party, got into his car and mowed down some people, killing 1 and injuring 5. X was found not guilty of murder but was convicted of culpable homicide for the 1 person he killed, due to the fact that he was intoxicated and thus lacked intent. On the 5 counts of attempted murder, X was found not guilty due to his intoxication. The state was unhappy with the outcome and reserved the following question of law to be answered by the appellate division: whether the trial court was correct "in holding that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol." Thus: the state wanted X found guilty on the charge of common assault (which required intent) for the counts of attempted murder.

Outcome:

The judge found that the court a quo was correct in not finding X guilty of assault.

The decision was criticized because this meant a sober person could be punished more harshly for a crime than an intoxicated one. As a result of the criticism, the Criminal Law Amendment Act 1 of 1988 was passed.

The question remains whether X could nevertheless be convicted of the statutory offence created in section 1 of Act 1 of 1988. The elements of this offence are the following:

Consumption or use by X of any substance which impairs his faculties to such an extent that he lacked criminal capacity while knowing that the substance has the effect **and** commission by X of an act prohibited under penalty while he lacks criminal capacity and who, because of the absence of criminal capacity, is not criminally liable.

Conclusion: if X had been acquitted of assault as a result of criminal incapacity (which can be assumed from the facts in the question), he may nevertheless have been convicted of a contravention of section 1 of Act 1 of 1988 as he complied with all the elements of this offence.

**(a) X attends a party hosted by his friend, Y. X consumes more liquor than usual. X is fairly intoxicated when he decides to go home. He takes a leather jacket hanging on the hall stand which he thinks belongs to him. The leather jacket in fact belongs to Z and not to X. X is charged with theft of the jacket. At the trial the court finds that, although X was intoxicated at the time he removed the jacket, he did have criminal capacity. However, the court finds that X cannot be convicted of theft, because, as a result of his intoxication, he was under the impression that the leather jacket belonged to him and therefore did not have the intention to steal the jacket. Discuss whether X may nevertheless be found guilty of a contravention of the statutory crime created in section 1 of Act 1 of 1988, that is the offence sometimes referred to as "statutory intoxication". In your answer you must briefly state what the provisions of this section are.**

*provisions of section 1 of Act of 1998*

If X commits an act which would otherwise have amounted to the commission of a crime (ie which, "viewed from the outside", without taking into account X's subjective mental predisposition, would have amounted to the commission of a crime) but the evidence brings to light that at the time of the performance of the act she was in fact so intoxicated that she lacked criminal capacity, the court would, in terms of the Chretien judgment, first have to find her not guilty of the crime with which she has been charged (ie the crime she would

have committed had she not been drunk), but must then nevertheless convict her of the statutory crime created in section 1(1), that is the crime known as "contravention of section 1(1) of Act 1 of 1988". She is in other words convicted of a crime, albeit not the same one as the one she had been initially charged with.

The section further provides that when the court has to decide what punishment to impose for the statutory crime of which she had been convicted, the court is empowered to impose the same punishment it would have imposed had she been convicted of the crime she was originally charged with. In this way she is prevented from "walking out of court" unpunished.

In this set of facts X was not so drunk that he lacked criminal capacity. The intoxication only excluded his intention, and therefore his case fell into category (3) of the "meter". The section applies only to cases falling in categories (1) and (2) of this "meter". It is not applicable to a situation such as in the present set of facts in which the accused did have criminal capacity, but to cases falling into category (3) of the "meter".

As a result, the answer to the question is that X cannot be convicted of "statutory intoxication". Neither is he guilty of theft under common law. This fact is mentioned in the description of the set of facts in the question. X is therefore not guilty of any crime.

#### **Question 8**

**X and his entire family go boating at the local dam. X drinks one beer after the other and decides to race around the dam in his ski-boat. X steers the boat. As he is intoxicated, X fails to keep a proper look-out and runs over Y, who is swimming in the dam. Y succumbs, owing to blood loss from a wound to his head made by the propeller of X's boat. The court finds that although X was not so intoxicated that he lacked criminal capacity, he was so intoxicated that he could not have had the intention to cause Y's death.**

**Can X be convicted of contravention of section 1 of Act 1 of 1988 and/or culpable homicide?**

X cannot be convicted of contravention of section 1 of Act 1 of 1988. Section 1 does not make provision for the case where X's intention is excluded as a result of intoxication. A case such as Chretien will therefore not be affected by section 1. (If X were so drunk that he lacked criminal capacity, the section would find application.) X can, however, be convicted of culpable homicide. This ought to be the case *in casu*, since the reasonable person would not have raced around in a boat after such an excessive intake of alcohol.

#### **Unit 13 – The effect of provocation on liability**

**(c) Briefly discuss the possible effects provocation may have on criminal liability. (4)**

Provocation may have one of the following effects:

- Theoretically speaking it may exclude X's voluntary act. This will, however, seldom occur in practice.

In Eadie the court held that there is no difference between the defence of non-pathological criminal incapacity resulting from provocation or emotional stress, on the one hand, and the defence of sane automatism, on the other.

The court further submitted that, until such time as there is more clarity in our case law on the question whether the defence of non-pathological criminal incapacity still exists, the judgment in Eadie should be limited to cases in which X alleges that his incapacity was caused by provocation or emotional stress. If he alleges that he momentarily lacked capacity owing to other factors such as intoxication, the defence of non-pathological criminal incapacity still exists.

And that if, as in the Eadie case, X alleges that he lacked capacity as a result of provocation or emotional stress, he can only escape liability if he successfully raises the defence of sane automatism.

- It may exclude X's intention. Depending on the specific facts of the case, provocation may have the effect that, at the time of the commission of the unlawful act, X did not act with knowledge of unlawfulness.
- It may also have the opposite effect, that is, to confirm the existence of X's intention. Evidence of provocation is then nothing more than evidence of the initial reason for X's conduct.
- After conviction it may serve as a ground for the mitigation of punishment.

**Unit 14 – Disregard of the requirement of culpability**

**Discuss the criminal liability of corporate bodies. (7)**

Liability of corporate bodies (juristic persons) is governed by legislation, namely section 332 (1) of the Criminal Procedure Act.

Section 332(1) provides that an act by the director or servant of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the performance of duties as a director or servant, or if the director or servant was furthering or endeavouring to further the interests of the corporate body.

A juristic person can be found guilty on this basis of any crime, irrespective of whether it is a common law crime or a statutory crime. The form of culpability for the crime may be either intention or negligence. e.g

In Mtshumayeli, A was a transport company and B a bus driver employed by A. B caused an accident by allowing a passenger to drive the bus. Both A and B were convicted of culpable homicide.

**Question 10**

**X is the housemaster of a university hostel. According to the university rules, no student may be subjected to any form of initiation. At the hostel where X is the housemaster, there is a tradition that first-year students are initiated by being subjected to all kinds of initiation activities. Students are, for instance, compelled to dive into a swimming pool while being blindfolded. X does not take part in these practices but condones them and actually watches while the senior students push the blindfolded first-year students into the swimming pool. One day, during such an initiation ceremony, a first-year student, Y, dives into the swimming pool and hits the bottom, breaking his neck, and dies. Discuss whether both X and the university (a legal person) may be convicted of culpable homicide.**

X may be convicted of culpable homicide on the basis that, as head of the university hostel, there was a duty on him to prevent Y from being unlawfully assaulted. This duty can rest on the assumption that, by virtue of the office he held, he stood in a protective relationship towards the inmates of the hostel. Minister van Polisie v Ewels

The state will, of course, also have to prove that X was negligent - namely, that a reasonable person would have foreseen that Y could die and would have taken steps to prevent it. The university, a legal person, can, in terms of the provisions of section 332(1) of the Criminal Procedure Act, also be convicted of culpable homicide. This is an example of liability of a legal person for the unlawful actions of its servants performed in the exercise of their powers or duties.

**Define and explain the versari doctrine (also known as versari in re illicita). (6)**

Definition: The doctrine holds that if a person engages in unlawful (or merely immoral) conduct, he is criminally liable for all the consequences flowing from such conduct, irrespective of whether there was in fact any culpability on his part in respect of such consequences. An example of the application of the doctrine is the following: If X lawfully shoots at a wild bird and the bullet accidentally hits Y, of whose presence X is unaware, X lacks culpability. If, however, X shoots at somebody else's fowl, or hunts on somebody else's

land without his permission, and the bullet hits Y (of whose existence X is unaware) X is guilty of murder for he has engaged in an unlawful act and is liable for all the consequences flowing from it.

This doctrine was rejected in the case of *Bernardus* 1965 (3) SA 287 (A). The Appeal Court held that the doctrine was in conflict with the requirement of culpability.

**In order to determine whether a provision in an Act which creates a crime requires strict liability (ie, liability in respect of which no culpability is required), one must proceed from the starting point that the legislature did not intend to exclude culpability, unless there are clear and convincing indications or guidelines to the contrary. Name, without any discussion, these guidelines. (5)**

- the language and context of the provision
- the object and scope of the prohibition
- the nature and extent of the punishment prescribed for contravening the prohibition
- the ease with which the provision can be evaded if culpability is required
- the reasonableness or otherwise in holding that culpability is not an ingredient of the
- offence

**Explain the meaning of vicarious liability. (3)**

Vicarious liability occurs when a person is held liable for a crime committed by another person- an example would be an employer that is held accountable for the crimes committed by an employee in the course of employment. This form of liability only applies to statutory crimes.

**Discuss the term "strict liability." Also discuss the principles to be applied in determining whether culpability is required when the legislature failed to specify whether intention or negligence is the required form of culpability for an offence. (10)**

(1) Strict liability is a form of liability dispensing with the requirement of culpability. It is only found in certain statutory crimes, and never in common-law crimes.

(2) The legislature sometimes creates crimes in respect of which the requirement of culpability is expressly excluded.

(3) Even where the legislature, in creating a crime, is silent about the requirement of culpability, a court is free to interpret the provision in such a way that no culpability is required.

(4) However, in interpreting the legislation our courts apply certain principles.

(5) The rules for determining whether the legislature intended culpability to be an ingredient of the crime, are the following:

- The point of departure is an assumption or presumption that it was not the intention of the legislature to exclude culpability, unless there are clear and convincing indications to the contrary. Such indications can be found in
  - (1) the language and context of the provision
  - (2) the object and scope of the prohibition
  - (3) the nature and extent of the punishment prescribed for contravening the prohibition
  - (4) the ease with which the provision can be evaded if culpability is required
  - (5) the reasonableness or otherwise in holding that culpability is not an ingredient of the offence

### Question 3

Write in your answer script the number of the question followed by the missing words/phrases:

1. In terms of the principle of contemporaneity the element of **culpability** must be present at the same time as the unlawful act. (1)
2. An act by the director of a company is deemed to be the act of the company itself if the act was performed **during exercising powers or in the performance of duties as a director or furthering the interests of the company** (1)
3. The crime created by section 1 of Act 1 of 1988 is regarded as very unique because **lack of criminal capacity must be proved by the state** (1)
4. An omission is punishable only if there is a **legal duty** upon X to act positively.(1)
5. In the case of conscious negligence X foresees that a result will occur but decides **unreasonably that it will not ensue** (1)
6. Aberratio ictus means the **the going astray of the blow** (1)
7. In Goosen 1989 (4) SA 1013 (A) the court decided that **a mistake**; excludes intention if there is a **material difference** between the actual and the foreseen manner of events. (2)
8. The minimum requirement for dolus eventualis is that X must have **foreseen** the causing of the result and **reconciled himself with it** (2)
9. A **criminal norm** is a provision in an act that states that certain conduct is a crime. (1)
10. In the case of exceeding the limits of private defence, X usually does not realize he is acting **unlawfully** (1)
11. An act by the director of a company is deemed to be the act of the company itself if the act was performed ..... (1)
12. The minimum requirement for dolus eventualis is that X must have ..... the causing

- of the result and ..... (2)
13. In the case of exceeding the limits of private defence, X usually does not realize he is acting ..... (1)
  14. Abberatio ictus means the ..... (1)
  15. The crime created by section 1 of Act 1 of 1988 is regarded as very unique because .....(1)
  16. In Goosen 1989 (4) SA 1013 (A) the court decided that ..... excludes intention if there is a ..... between the actual and the foreseen manner of events. (2)
  17. The application of the ius praevium rule to punishment is that if the punishment to be imposed for a certain crime is increased in an Act, it must not be applied to the ..... of the accused who committed the crime before the punishment was increased (1)
  18. In S v Mostert 2006 (1) SACR 560 (NI) a traffic officer charged with the crime of assault relied on the defence of (3 words) (1)
  19. A ..... test is applied in the case of intention (1)
  20. The versari doctrine holds that if a person engages in unlawful (or merely immoral) conduct, she is criminally liable for all the consequences flowing from such conduct, irrespective of whether there was in fact any ..... on her part in respect of such consequences (1)
  21. In our law, a person may in certain exceptional circumstances be liable for a crime committed by another person. This form of liability is known as ..... liability (1)
  22. Conduct is ..... if it conflicts with the legal convictions of society
  23. Defined more concisely, one can say that intention is to ..... and to ..... an act or result
  24. The versari doctrine holds that if a person engages in unlawful (or merely immoral)
  25. conduct, he is ..... (2 words) for all the consequences flowing from such
  26. conduct, irrespective of whether there was in fact any ..... on his part in respect of such consequences
  27. The most important Judgment relating to aberratio lotus is that of Holmes JA in ..... (only the name)
  28. The case of ..... (only the name) constitutes an apparent exception to the general rule that culpability and the unlawful act must be contemporaneous
  29. In the case of..... defined crimes, the definitional elements proscribe a certain type of conduct irrespective of what the result of the conduct is
  30. In the case of ..... defined crimes, the definitional elements do not proscribe a specific act but any act which causes a specific condition
  31. The crime of "culpable homicide" is an example of a ..... defined crime
  32. The test of factual causation is called the ..... test

33. For X to qualify as the cause of Y's death, his act must be both the factual cause of Y's death, and the ..... cause of Y's death
34. According to the individualisation theories, one must look, among all the conditions or factors which qualify as factual causes for the prohibited situation (Y's death), for that one which is the ..... (two words) and regard it as the legal cause of the prohibited situation
35. In terms of the theory of adequate causation, an act is the legal cause of a result if according to ..... (two words) in the ..... course of events, the act has the .to bring about the result
36. In Mokgeti ► 1990 (1) SA 32 (A) the court decided on the basis of ..... (two words) whether a sufficiently close link existed between the act and the result (10)
37. If X knows that her husband assaults their three year old child and does nothing to prevent it, she may be convicted of ..... on the basis of a ..... (2)
38. If an act of parliament provides: "A person commits a crime if he or she makes a mess in the streets" the provision may be challenged on the ground that it is too vague and therefore, does not comply with the ..... rule (2 words) which
39. forms part of the principle of legality ..... (1)
40. (in) The defence of impossibility may only be raised successfully if it was impossible to comply with the rule, and not merely inconvenient.(1)
41. If X knows that he may lose consciousness any time as a result of an illness and, while driving a car, loses consciousness and causes an accident, he may be found guilty of negligent driving This type of liability is known as ..... liability.
42. (1)
43. A defence of obedience to superior orders may only succeed if the order was not unlawful (1)
44. If X contravenes the speed limit because she takes a person who has just had a heart attack to hospital, she may, if charged with a traffic offence, rely on the defence of ..... (1)
45. In terms of the principle of contemporaneity the element of .....must be present at the same time as the performance of the unlawful act (1)
46. In the case of exceeding the limits of private defence, X usually does not realize that he is acting ..... which means that he cannot be held liable for a crime requiring ..... as the form of culpability (2)
47. The application of the 'us praewum rule to punishment is that if the punishment to be imposed for a certain crime is increased, it must not be applied to the ..... of the accused who committed the crime before the punishment was increased (1)
48. For a plea of necessity to succeed, it is immaterial whether the situation of emergency is the result of ..... or ..... (two words) (2)

49. The minimum requirement for dolus eventualis is that X must have the causing of the result and (2)
50. A test is applied in the case of intention(1)
51. Intention is to and to an act or a result (2)
52. In Goosen 1989 (4) SA 1013 (A) the court decided that excludes intention if there is a (two words) between the actual and the foreseen manner of events (2)

### Question 1

**X and his friends are South African (SA) cricket fans who are present at a World Cup match between SA and Australia. As the SA wickets tumbled at regular intervals, Y and his group of Australian supporters jeer at a frustrated-looking X and his friends. At the end of the game, X and his friends decide to drown their frustrations at a pub. X is known by his friends as a heavy drinker who becomes more aggressive with each additional drink. In their drunk and frustrated state, X and his friends are met by Y and his friends who continue to jeer at them. X swings and smashes a beer bottle on Y's head and stabs him three successive times in the ribs with the broken end of the bottle before being pulled away from Y. Y lost a lot of blood and died on arrival at the hospital.**

**On a charge of murder, the court accepts expert evidence indicating that the effect of intoxication resulted in X lacking the ability to appreciate the wrongfulness of his act and to act in accordance with such appreciation at the time of commission.**

**(a) On the basis of this evidence and with reference to appropriate case law, consider X's criminal liability on a charge of murder. (5)**

**(b) Assume that X had not been intoxicated, but he claims that he had been provoked. He argues that although he had the ability to appreciate the wrongfulness of his act, he was unable to resist the temptation of hitting and stabbing Y. Discuss with reference to case law on what defence, if any, X can rely. (5)**

**(c) On the basis of this evidence and with reference to appropriate case law, consider X's criminal liability on a charge of culpable homicide. (3)**

The element that is called into question is criminal capacity [NB: the problemtype question expressly states that the effect of intoxication resulted in X lacking the ability to appreciate the wrongfulness of his act and to act in accordance with such appreciation (SG 7.3.1 – grey block)].

In Chretien it was held that if a person is so drunk that he lacked criminal capacity at the time of the commission of the prohibited act then he is not criminally liable at all. This means

that he must be acquitted of the crime charged. (SG 12.5.2) [NB: both the case name and the legal principle is correctly provided.]

Culpable homicide cannot be committed without criminal capacity.

Given the absence of one of the components of culpability (SG 7.2.4 – grey block), The element of culpability is lacking and it is unnecessary to investigate whether negligence is present. Therefore X is not criminally liable on a charge of culpable homicide.

Culpability deals with the blameworthy state of mind of the person and whether there are grounds for which he can be blamed for his conduct

The particular person as an individual and his personal characteristics such as aptitudes, mental abilities and knowledge

Culpability has 2 legs:

1. Criminal capacity

+

2. Intention/ negligence

- What is the principle of contemporaneity?
  - Culpability + unlawful act = contemporaneous (occur at exactly the same time) – *Masilela* case.

**(d) X's criminal liability on a charge of contravention of section 1 of Act 1 of 1988. (7)**

X consumed alcohol, a substance which impaired his faculties to such an extent that he lacked criminal capacity, while knowing that the substance has that effect. While in his intoxicated state, lacking criminal capacity, he committed an act prohibited under penalty (the killing of another human being). But because he lacked criminal capacity he cannot be convicted of murder or culpable homicide. Therefore he will be found not criminally liable for these crimes. However, X fulfils all the elements for contravening section 1. Therefore he is criminally liable on a charge of contravention of section 1 of Act 1 of 1988.

**Elements of the crime**

**circumstances surrounding the consumption of the liquor,**

A1 the consumption or use by X

A2 of "any substance"

A3 which impairs her faculties to such an extent that she lacks criminal capacity

A4 while she knows that the substance has that effect

**circumstances surrounding the commission of the act "prohibited ... under penalty",**

B1 the commission by X of an act prohibited under penalty

B2 while she lacks criminal capacity and

B3 who, because of the absence of criminal capacity, is not criminally liable

**Merely explain the meaning of the following terms:**

**(i) lucidum intervallum**

**(ii) delirium tremens (2)**

(i) lucid interval

(ii) the name of a recognised form of mental illness