

Tutorial Letter 201/1/2017

Introduction to Criminal Law CRW1501

Semester 1

Department of Criminal and Procedural Law

IMPORTANT INFORMATION:

This tutorial letter contains important information
about your module.

BARCODE

ASSIGNMENT 1

- 1.1 In order to determine whether a person is criminally liable, the first question to be asked is whether the type of conduct allegedly committed by this person is recognised by the law as a crime. Certain conduct may be wrong from a moral point of view and thus not forbidden by law. (2)

Even if conduct is forbidden by law it does not necessarily mean that it is a crime – it could lead to a civil action and damages or it could lead to administrative measures being taken. (2)

Only when conduct is defined by the law as a crime can there be any question of criminal liability. This is the root of the principle of legality – i.e. there can be no crime without a legal provision. (2)

- 1.2 An act or an omission is only punishable if it is voluntary. (1)

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

If an act cannot be controlled by the will, it is involuntary, such as when a sleep-walker tramples on somebody, or when an epileptic makes a hand movement during an epileptic fit and hits someone in the face. (2)

If X's conduct is involuntary, it means that X is not the "author" of the act or omission; it was then not X who committed an act, but rather something which happened to X. (1)

TOTAL: 10 marks

ASSIGNMENT 2

- 1.1 4 – only statement (c) is correct. (2)
1.2 3 – Only statements (a) and (b) are correct. (2)
1.3 1- Only statement (a) is correct. (2)
1.4 3 – Only statements (a) and (b) are correct. (2)
1.5 1 – Only statement (a) is correct. (2)

TOTAL: 10 marks

SOLUTIONS TO THE SELF-EVALUATION/ SELF-ASSESSMENT ASSIGNMENT

- **Name and briefly discuss each of the four elements of criminal liability. [8]**

Act or conduct: assuming that the law regards the conduct as a crime, the first step in enquiring whether X is criminally liable is to enquire whether there was conduct on the part of X. For the purposes of criminal law, conduct can lead to liability only if it is a voluntary, human act or omission to act. (2)

Compliance with the definitional elements of the crime: the next requirement for criminal liability is that X's conduct must comply with the definitional elements of the crime in question. It is the concise definition of the type of conduct and the circumstances in which that conduct must take place in order to constitute an offence. To put it differently, it must be conduct which fulfils the definitional elements, or by which these definitional elements are realised. (2)

Unlawfulness: "unlawful", of course, means "contrary to law", but by "law" is meant here not merely the rule contained in the definitional elements, but the totality of the rules of law, and this includes rules which in certain circumstances allow a person to commit an act which is contrary to the "letter" of legal prohibition or norm. In practice there are a number of well-known situations where the law tolerates an act which infringes the "letter" of the definitional elements. These situations are known as grounds of justification. Well-known grounds of justification are private defence (which includes self-defence), necessity, consent, right of chastisement and official capacity. (2)

Culpability: the last requirement which must be complied with is that X's conduct must have been culpable. The culpability requirement means that there must be grounds upon which X may personally be blamed for his conduct. Here the focus shifts from the act to the actor, that is, X himself - his personal abilities, knowledge, or lack thereof. The culpability requirement comprises two questions or, as it were, "sub-requirements".

The first of these subrequirements is that of criminal capacity and the second sub-requirement is that X's act must be either intentional or negligent. Intention is a requirement for most offences, but there are also offences requiring only negligence. (2)

- **Explain the meaning of the term "common law".** [4]

The term "the common law of South Africa" refers to those rules of law not contained in an Act of Parliament or in legislation by some other (subordinate) legislative body. (1)

The common law of South Africa is Roman-Dutch law. By Roman-Dutch law we mean that system or law which originated about 2 500 years ago in Rome, spread during and after the Middle Ages to Western Europe, was received from the late thirteenth up to the end of the sixteenth century in the Netherlands, applied after 1652 at the Cape by the officials of the Dutch East India Company, and which was later accepted and applied in all those colonies and regions of Southern Africa which formed the Union of South Africa in 1910. (2)

After the annexation of the Cape by England, English law exerted a considerable influence on our common law. Roman-Dutch criminal law was also considerably influenced by English criminal law. Our common law was further amended and supplemented by legislation. (1)

- **Name and discuss the points of difference between a crime and a delict. [12]**

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

- **List the rules that are contained in the principle of legality. [5]**

If the principle of legality is analysed closely, one finds that it contains the following rules:

- (a) A court can only convict and punish an accused for a crime if the conduct is recognised by the law (statutory or common law) as a crime. Courts, in other words, cannot create new crimes. The conduct must also have some penalty attached to its commission. (1)
- (b) The conduct of the accused person must have been recognised as a crime at the time of its commission. This rule is referred to as the 'prohibition on retrospectivity' and is confirmed as part of South African law by virtue of its inclusion in the South African Constitution. (1)
- (c) Crimes have to be defined in clear and precise language. In other words crimes cannot be defined vaguely. (1)
- (d) A court of law must interpret the wording in the definition of a crime strictly or narrowly. This rule applies to both common law and statutory crimes. (1)
- (e) Once an accused person has been found guilty, the above four rules also have to apply to sentencing. (1)

- **Briefly explain the meaning of the requirement that "the act must be a human act". [3]**

The act must be a human act; in other words, the perpetrator of the act must be a human being. (1)

In ancient societies and during the Middle Ages, animals and even inanimate objects, such as beams which fell on people's heads, were sometimes "tried" and "punished", but this cannot happen today in the South African (or any other modern) legal system (1)

A human being can, however, be punished if he commits a crime through the agency of an animal, for example where he urges his dog to bite someone (*Eustace* 1948 (3) SA 859 (T); *Fernandez* 1966 (2) SA 259 (A)). (1)

- **A legal duty to act positively may sometimes arise by virtue of the fact that a person holds a certain office. Discuss this statement with reference to case law.** [5]

A duty may sometimes arise by virtue of the fact that a person **holds a certain office**. It was held in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the person being assaulted. (2)

In the case of *Gaba* 1981 (3) SA 745 (0), it was held that there is a legal duty on a police official who is a member of an investigating team to disclose information to the rest of the team. (1)

Since the accused failed to disclose the identity of a dangerous criminal to the team, he was convicted of attempting to defeat or obstruct the course of justice. (1)

Relying on *Minister van Polisie v Ewels (supra)*, the court held that X had a legal duty to reveal his knowledge, and that this duty was based upon X's position as a policeman and a member of the investigating team. (1)

- **One of the instances in which our law does not regard conduct as voluntary is where a person behaves in a mechanical fashion. This is referred to as automatism. Give four (4) examples of conduct that could be regarded as automatism.** [4]

Automatism is where a person behaves in a "mechanical" fashion - as in the following instances:

- Reflex movements such as heart palpitations (1)
- A sneezing fit (1)
- Somnambulism (or sleepwalking) (1)
- Muscular movements such as an arm movement of a person who is asleep, unconscious or hypnotised, or having a nightmare, an epileptic fit, or the so-called "black-out". (1)

- **Explain what you understand by the theory of *novus actus interveniens*.** [2]

This expression means "new intervening event", and is used to indicate that between X's initial act and the ultimate death of Y, another event has taken place and has broken the chain of causation thus preventing us from regarding X's act as the cause of Y's death. (1)

For example, X inflicts a non-lethal wound to Y's head. Y is taken to hospital by ambulance. On the way to hospital, owing to the gross negligence of the ambulance driver, the ambulance is involved in an accident in which Y is killed. (1)

- **Read the scenario below and then answer the questions that follow:**

X wishes to kill Y. He stabs Y with a knife and inflicts a small wound to Y's arm. Y tries to escape from X and runs into the street, where he is run over by a car driven by Z, and killed.

(a) Explain whether X is the *factual cause* of Y's death. [5]

In order to establish causation, one would need to find a causal link between X's conduct or act and the result (Y's death). (1)

In terms of the theory of factual causation, a factual cause must be established between X's act (shooting at Y) and the result (Y's death). (1)

X's conduct would be a factual cause if it is a *condition sine qua non* of Y's death. In other words, "but for" X's conduct, Y would not have died. (2)

It is clear that had X stabbed Y would not have run into the street and died as a result of run over by Z. Therefore X is the factual cause of Y's death. (1)

(b) Explain whether X is the *legal cause* of Y's death. [10]

The basis of the tests for causation is to establish a causal link between X's act and the result (Y's death). One could use one of a number of tests to establish whether X was the legal cause of Y's death. (1)

In terms of the *Individualisation Theory*, one has to seek out the most operative of all factors which were the factual cause of Y's death and regard this as the legal cause of Y's death. In the scenario above therefore, one would regard the most operative of all causes as being the car driven by Z which killed Y. In terms of this theory therefore, X is not the legal cause of Y's death. (3)

According to the *Adequate Cause theory*, one would have to find a causal link between X's act and Y's death (the result) based on generalisations which an ordinary person would make between an act and its eventual result. A certain type of act would lead to a certain result. Therefore according to ordinary human experience stabbing a person (X's act) would result in that person's death (Y's death). Therefore in terms of this theory of legal causation, there could be a causal link between X's act and Y's death. (3)

Finally in the *Novus actus interveniens* theory, there must be a new intervening event between X's conduct and the death of Y (or the result), that breaks the chain of causation. In terms of this theory the car driven by Z could be considered a *novus actus interveniens* which broke the chain of causation between X's act of stabbing Y and the result (Y's death). In terms of this theory therefore, there would not be a causal link between X's act and Y's death. (3)

• **Distinguish between putative private defence and actual private defence. [4]**

The word "putative" is derived from the Latin word *putare*, which means "to think". Thus "putative private defence" means defence which existed only in X's thoughts. (1)

This is not actual private defence. However, the fact that X cannot rely on private defence does not mean that she is guilty of murder. (2)

She may, as a defence, rely on absence of culpability, because she was mistaken and because her mistake excluded the intention to commit a crime (such as murder). (1)

- **List some of the interests that could be protected when invoking private defence as a ground of justification. [5]**

Private defence is usually invoked in protection of the following interests of the attacked party:

- Life or physical integrity (1)
- Property (1)
- Dignity (1)
- Prevention of unlawful arrest (1)
- Prevention of attempted rape (1)

- **X, a 25-year-old man, is walking to work one morning when he is approached by Y, a 12-year-old pickpocket. Y tries to steal the plastic lunchbox that X is carrying. X retaliates by pulling a gun out of his trouser pocket and shooting Y in the chest. Y dies a few seconds later. Can X successfully rely on private defence on a charge of murder? Discuss with reference to the requirements of the defence of private defence. [10]**

A person acts in private defence - and his conduct is therefore lawful - if he uses force to repel an unlawful attack which has already commenced, or which immediately threatens his or somebody else's life, bodily integrity, property or other interest that ought to be protected by the law, provided the defensive action is necessary to protect the threatened interest, is directed against the attacker, and is no more harmful than is necessary to ward off the attack. (2)

Briefly then, the requirements of the of the defence

The *defensive action*:

- *must be directed against the attacker* – in this case, X was attacked by Y. X directed his defence against y, the attacker. (1)
- *must be necessary* - the defensive act must be necessary in order to protect the interest threatened, in the sense that it must not be possible for the person threatened to ward off the attack in another, less harmful way. It could be argued that X, being bigger and stronger than Y did not have to shoot Y with a gun. He could have used less force. (2)
- *must stand in a reasonable relationship to the attack*: the act of defence may not be more harmful than necessary to ward off the attack . There ought to be a certain balance between the attack and the defence. Given that X is bigger built than Y he could have overcome the attack by means other than killing Y. Furthermore there is no evidence that Y was armed and could have killed X. Y was only after stealing X's lunch box. A person is not entitled to shoot and kill someone who is about to steal his lunch box. (2)
- *must be taken while the defender is aware that he is acting in private defence*: it seems that X was aware that he could defend himself from Y's attack. X did not accidentally or inadvertently resort to the use of private defence. (2)

It seems that X's defence would not succeed since he used more force than was necessary, the interest he was protecting, i.e. a lunchbox would not warrant the use of private defence and the defence was not proportional to the attack. (1)

- **Distinguish between private defence and necessity.** [4]

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

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

the **object** at which the act of defence is directed: Private **defence** is always directed at an unlawful human attack; necessity is directed at either the interests of another innocent third party or merely amounts to a violation of a legal provision. (2)

- **Distinguish between absolute and relative compulsion, and indicate which of the two constitutes necessity.** [4]

In absolute compulsion X does not commit a voluntary act. For example, Z who is stronger than X grabs X's hand in which X is holding a knife and stabs Y. X's non liability is not based on necessity, but on the absence of a voluntary act. (2)

In relative compulsion, there is indeed a voluntary act on the part of X. For example, Y threatens to kill X if X does not kill Z. X is free not to kill Z but fears for his own life and chooses to kill Z. This is a situation of relative compulsion and amounts to a situation of necessity. (2)

- **Read the scenario below and then answer the questions that follow:**

X's baby swallows an amount of Disprin tablets. X rushes the child by car to the hospital for emergency treatment. While driving to the hospital, X exceeds the speed limit. Which ground of justification can X rely on for having exceeded the speed limit? Discuss in detail with reference to the requirements of this ground of justification. [10]

X can rely on the ground of justification known as necessity. A person acts out of necessity if he acts in the protection of his own or somebody else's life, physical integrity, property or other legally recognised interest which is endangered by a threat of harm which has already begun or is immediately threatening and which cannot be averted in any other way; provided that the person who relies on the necessity is not legally compelled to endure the danger, and the interest protected by the act of defence is not out of proportion to the interest threatened by such an act. (2)

The requirements for a plea of necessity are as follows:

A legal interest must be threatened: examples of legal interests are life, physical integrity and property. In the case in question, the child's life was at risk. (1)

One can act in a situation of emergency to protect another's interest: Here X acts to protect the life of the child. (1)

The emergency must have already begun or be imminent but must not have terminated or be expected in the future. In this case the emergency had begun since the child had swallowed the tablets. (1)

If someone is legally compelled to endure the danger, he cannot rely on necessity. For example policemen and firemen cannot avert the dangers inherent in their jobs by infringing the rights of others. If the threat to the legal interest is lawful, X cannot rely on necessity. (1)

The act committed in necessity is lawful only if it is the only way in which X can avert the danger. In the case in question, there is no other way for X to get to the hospital on time. She had to exceed the speed limit. (1)

X must be conscious of the fact that he is acting in necessity. There is no such thing as a 'chance or accidental' act of emergency. It seems that in this case, X is doing what she did out of her responsibility as a parent and to save her child's life. (1)

The harm caused by the defensive act must not be out of proportion to the interest threatened and therefore X must not cause more harm than is necessary to escape the danger. For example, where someone damages another's property in protecting his own physical integrity. In this case, X exceeds the speed limit to save her child. (1)

It is clear that X's conduct in exceeding the speed limit to save her child's life complies with the requirements of the ground of justification of necessity. (1)
[10]

- **In cases where consent is raised as a ground of justification, it must comply with a number of requirements. List these requirements. (NB: You do not have to discuss each requirement.)** [6]

The consent must be:

- Given voluntarily (1)
- By a person who has certain minimum mental abilities (1)
- Based upon knowledge of the true and material facts (1)
- Either expressly or tacitly (1)
- Before the commission of the act (1)
- By the complainant him/herself. (1)

- **Can X rely on consent as a ground of justification in the following examples? Explain.**

(a) **X is a doctor. His father, Y, is 85 years old and in severe pain from a terminal illness. Y begs X to end his life as he cannot bear the pain and suffering any longer. X administers a lethal injection to Y. Y dies peacefully a few minutes later.** [2]

No. X cannot rely on consent in this case since murder is a crime in respect of which consent is never recognised as a ground of justification. Mercy killing (or euthanasia) at the request of the suffering party is unlawful (*Hartmann 1975 (3) SA 532 ©*). (2)

- (b) X is a young bodybuilder. He threatens to stab Y, a frail old woman, with a knife if she does not hand over her handbag to him. Y meekly hands over the bag to X. [2]**

No. X cannot rely on consent. The consent must be given voluntarily, without coercion. Consent obtained as a result of violence or intimidation (as is the case with the old lady handing over her handbag meekly to X) is not voluntary consent. **(2)**

- (c) X is a police officer. He arrests Y, an attractive young woman, on a minor charge and takes her to the police station. X promises to release Y if she has sex with him. Y agrees and they have sex. [2]**

No. X cannot rely on consent. The consent must be given voluntarily, without coercion. Consent obtained as a result of violence or intimidation (as is the case with the young woman who only agreed to sex with X because she was intimidated by X) is not voluntary consent. **(2)**

- (d) X is a doctor. After examining Y, a healthy 11-year-old girl, X obtains consent from Y and performs an operation on her to remove her tonsils. [2]**

No. X cannot rely on consent in this case. While in principle consent can only be given by the complainant herself, in certain cases someone else may give consent on her behalf as where a parent gives consent to an operation being performed on her child. Since Y is only 11 years old she is a child and her parents should have given consent to the removal of her appendix. **(2)**

- (e) Y, a mentally ill woman, consents to have sexual intercourse with X. X proceeds to have sex with Y. [2]**

No. X cannot rely on consent in this case. Y, as a mentally ill woman does not have the minimum mental abilities to consent to sexual intercourse with X.

- **Officials occupying a public office who commit acts which would otherwise be unlawful, can rely as a defence on the fact that they are entitled to perform these acts because they were performed in the course of their official duties. Discuss this statement critically. [5]**

An otherwise unlawful act is justified if X holds public office, provided X is indeed authorised to perform the act by virtue of his public office and committed the act in the course of the exercise of his duties. **(2½)**

For example, to physically grab someone without his consent could amount to assault. However if X were a police official he does not commit assault if he grabbed Y in order to arrest him after Y committed an offence in X's presence. **(2½)**

- **Give two examples of conduct that would not be regarded as unlawful since it is justified by the ground of justification of official capacity. [4]**

A clerk of the court who controls official exhibits at court will not be guilty of the possession of drugs if he/she is in control of drugs which are exhibits in a court case. **(2)**

When X is a member of the security personnel at an airport or custom post and she searches Y without Y's consent. X is not guilty of assault or *crimen inuria*. (2)

OR

Where X a police official grabs Y who has committed an offence in his presence. While grabbing someone without consent amounts to assault, since X is a police official and Y has committed an offence in his presence, X's conduct is not unlawful. (2)

- **X is a security officer at OR Tambo International Airport. She conducts a physical search on Y, a female passenger who is about to board a flight to London. Y complains that X had no right to touch her. Which ground of justification can X rely on? Explain.** [3]

An otherwise unlawful act is justified if X holds public office, provided X is indeed authorised to perform the act by virtue of his public office and committed the act in the course of the exercise of his duties. (1)

For example to physically touch a person without his consent could amount to assault. (1)

However if X were a security officer he does not commit assault if he searched Y who is about to board an international flight at OR Tambo Airport. (1)

- **In the case of *S v Mostert 2006 (1) SACR 560 (N)*, the court applied the principle in section 199(6) of the Constitution of the Republic of South Africa, 1996, that the defence of obedience to orders will be successful provided that the orders were not manifestly unlawful. Discuss with reference to the requirements of this defence.** [6]

In *S v Mostert 2006 (1) SACR 560 (N)*, a traffic officer charged with the crime of assault relied on the defence of obedience to orders. The court held that obedience to orders entailed an act performed by a subordinate on the instruction of a superior, and was a recognised defence in law. (1)

Although the defence of obedience to orders usually arises in a military context, its application is not exclusive to soldiers. For the proper functioning of the police and the protection services it was essential that subordinates obey the commands of their superiors. (1)

The court held that there were three requirements for this defence, namely:

- (1) the order must emanate from a person in lawful authority over the accused; (1)
- (2) the accused must have been under a duty to obey the order; and; (1)
- (3) the accused must have done no more harm than was necessary to carry out the order. Regarding the second requirement the test was whether or not the order was manifestly and palpably unlawful. Therefore, the court applied the principle laid down in the Constitution of the Republic of South Africa, 1996 (section 199(6)), namely that the defence of obedience to orders will be successful, provided the orders were not manifestly unlawful. (2)

- **Define the concept of “criminal capacity”.** [3]

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

- (1) appreciate the wrongfulness of his act or omission, and (1½)
- (2) act in accordance with such an appreciation of the wrongfulness of his act or omission (1½)

- **Explain the difference between the concepts of “criminal capacity” and “intention”.** [4]

Criminal capacity is the indispensable prerequisite to the existence of culpability in any of its forms. The question whether X acted intentionally or negligently arises only once it is established that he had criminal capacity. (1)

An investigation into X's criminal capacity is independent of, and covers quite a different field from, the investigation into whether he acted intentionally or negligently. The investigation into his criminal capacity concerns his mental abilities, whereas the inquiry into whether he acted intentionally or negligently concerns the presence or absence of a certain attitude or state of mind on the part of X. (2)

More particularly, an investigation into X's intention comprises an investigation into his knowledge. Criminal capacity has nothing to do with X's knowledge; it concerns his mental abilities. (1)

- **Name and explain the two psychological components or “legs” of the test for criminal capacity.** [5]

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

- (1) appreciate the wrongfulness of his act or omission, and (1½)
- (2) act in accordance with such an appreciation of the wrongfulness of his act or omission (1½)

- **Briefly discuss how culpability is established.** [2]

When it comes to the question of culpability, the focus shifts to the perpetrator as an individual, and the question one asks is whether this particular **person**, considering **his** personal characteristics, aptitudes, gifts, shortcomings, mental abilities and knowledge, can be blamed for his commission of the unlawful act. (2)

- **What are the two (2) forms of culpability?** [2]

Intention/ Negligence
Criminal capacity

- **What are the two (2) components of the test used to determine whether a person is endowed with criminal capacity?** [4]

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

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

- **List two (2) defences that exclude criminal capacity. [2]**

mental illness (1)

youthful age (1)

- **List the possible orders that a court may make if X succeeds with his defence of mental illness. [3]**

ANY 3 OF THE FOLLOWING:

- X is not guilty by reason of mental illness or defect (1)

- X can be admitted to an institution (1)

- X can be released subject to conditions that the court considers appropriate (1)

- X could be released unconditionally (1)

- If X was charged with a very serious crime (such as rape or murder) then he could be detained in a psychiatric hospital pending an order from a judge for his release or his retention. (1)

- **Name the two (2) elements of intention and explain briefly what each entails. [4]**

Intention consists of two elements, namely a cognitive and a conative element. The cognitive element consists in X's knowledge or awareness of the act (or the nature of the act), the existence of the definitional elements and the unlawfulness of the act. (2)

The conative element consists in X directing his will towards a certain act or result. For example, X decides to accomplish in practice what he has previously only pictured to himself in his imagination. This decision to act transforms what had until then merely been "day-dreaming", "wishing" or "hoping" into intention. In legal literature intention is also known as *dolus*. (2)

Define each of the three (3) forms of intention and illustrate each by means of an example. (6)

Dolus directus

X wants to kill Y. X takes his revolver, presses it against Y's head and pulls the trigger. The shot goes off and strikes Y in the head. Y dies instantly. (2)

Dolus Indirectus

X shoots through a closed glass window at a target. His main purpose is to hit the target, but he realises that by doing this he must necessarily also shatter the window. If he decides nevertheless to act in order to attain his main purpose, he naturally also wills those consequences which he realises must invariably accompany his main purpose. If he shoots at the target and shatters the window, he cannot be heard to say that he never intended to shatter the window. (2)

Dolus eventualis

X wants to burn down a building. He foresees the possibility that Y may be inside it, but nevertheless proceeds with his plan, and sets fire to the building. Y is indeed inside, and dies in the flames. In the eyes of the law X intentionally caused Y's death. (2)

- **Why is it said that the test for intention is subjective? Explain briefly.** [5]

The test in respect of intention is purely subjective since the court must determine what the state of mind of that particular person - the accused (X) - was when he committed the act. (1)

When determining whether X had intention, the question is never whether he should have foreseen the result, but whether he foresaw it as an actual fact. (1)

To say that X "should have foreseen" says nothing about what X actually thought or foresaw; it is simply comparing his state of mind or conduct with another's, namely the fictitious reasonable person. (1)

To do this is to apply the test in respect of negligence, which is objective. (1)

In deciding whether X had intent the question is always: How did X perceive the situation, what knowledge did **he** have, and did **he** will the consequence or foresee it as a possibility? (1)

- **Where there is no direct proof of intention, a court may infer or find from indirect proof that an accused acted intentionally. List some of the factors that a court can take into consideration when trying to prove intention.** [6]

In certain cases there may be direct proof of intention, for example, where X confesses that he intentionally killed Y. Where there is no direct proof of intention, a court may infer or find that X acted intentionally from indirect proof. For example, from:

- X's outward conduct or behaviour at the time of the act, (1)
- Statements made by other witnesses, (1)
- The type of weapon used by X, (1)
- The seriousness of the injury inflicted by X, (1)
- Whether the injury was fatal or not, (1)
- And from general human experience. (1)

- **Explain the concept of *error in objecto* by means of a practical example.** [5]

An *error in objecto* refers to a mistake relating to the object of the act. (1)

Whether such mistake is material or not depends on the definition of the crime. In murder for example (which is the unlawful, intentional causing of death of another human being) the object of the act is a human being. (2)

If X thinks she is shooting a buck when she is actually shooting a human being she is mistaken about the object of the act. This mistake will exclude the intention to commit murder. (2)

- **Discuss fully whether X's mistake in the two scenarios below can exclude the intention to commit murder:**

(a) X is out hunting. He sees what he thinks is a buck and decides to shoot. He aims his gun and pulls the trigger. It later appears that what X thought was a buck was actually Y, another human being. [3]

If there is no knowledge or awareness by X as to the act, all the circumstances set out in the definitional elements and the unlawfulness of the conduct it is said that there is a "mistake" or "error" on X's part. (1)

Mistake excludes or nullifies the existence of intention. (1) The example above is of mistake relating to *circumstances set out in the definitional elements* – i.e. X thought he was killing an animal but it was a human being. The definition of murder requires the killing of a human being. (1)

(b) X wants to kill Y. He aims his gun and pulls the trigger. However, it later appears that the person whom X shot and killed was not Y, but Z. [3]

This is an example of where a mistake is **not** material. (1) Since murder is defined as the unlawful, intentional killing of another human being, it is immaterial whether X killed Z or Y. (1) The fact is that X killed another human being and the victim's identity is not relevant or material. For this reason X is still guilty of murder in this example. (1)

- **Suppose X wants to kill Y. Just as X is about to stab Y with a knife, Z steps between them and is stabbed and eventually dies from the stab wound. Can X be found guilty of murdering Z? Explain. [6]**

This is an *aberratio ictus* situation which is not a form of mistake but a situation where, for example, the bullet shot by the accused goes astray and does not strike the intended victim or the accused (X) aims a blow at Y but strikes a third party instead. (2)

South African courts have laid down the following guidelines with regard to these *aberratio ictus* situations:

It will be accepted that X had intention to murder Z if X foresaw that the knife could stab and kill Z but reconciled himself with this possibility (in other words X had *dolus eventualis*), or, (1)

X knew that the knife could stab and kill Z (*dolus directus*) (1)

As regards Y, the person that X initially wanted to murder, X could be charged with the attempted murder of Y. (1)

South African courts therefore require a concrete intention to kill the victim in *aberratio ictus* situations. (1)

- **X intends killing her enemy, Y. X places a poisoned apple at a spot where she expects Y to pass, expecting Y to pick up the apple and eat it. However, Z, and not Y, passes the spot, picks up the apple, eats it, and dies. [6]**

This is an *aberratio ictus* situation which is not a form of mistake but a situation where the bullet shot by the accused goes astray and does not strike the intended victim or the accused (X) aims a blow at Y but strikes a third party instead. (2)

South African courts have laid down the following guidelines with regard to these *aberratio ictus* situations:

It will be accepted that X had intention to murder Z if X foresaw that the poisoned apple could kill Z but reconciled himself with this possibility (in other words X had *dolus eventualis*), or, (1)

X knew that poisoned apple could kill Z (*dolus directus*) (1)

As regards Y, the person that X initially wanted to murder, X could be charged with the attempted murder of Y. (1)

South African courts therefore require a concrete intention to kill the victim in *aberratio ictus* situations. (1)

- **Explain with reference to an example what you understand by a mistake with regard to the presence of a ground of justification.** [3]

The following example illustrates a mistake relating to a ground of justification:

When Y returns home one evening, he realises that he has lost his front door key. He does not want to disturb his wife so he climbs through the bedroom window. X's wife is woken by him entering the window. She believes that it is a rapist who has been attacking women in the area. She shoots and kills the person only to discover later that it was in fact her husband. She has acted unlawfully because she cannot rely on private defence. The test for private defence is objective and in this case her state of mind is not relevant. Although she intended killing another human being, she will not be guilty of murder however, because her knowledge of intention did not extend to include the unlawfulness of her act. She thought she was acting in private defence and acting lawfully. This is known as *putative* private defence. (See: *Joshua* 2003 (1) SACR 1 (SCA).) [3]

The test for negligence is described as objective, whereas the test for intention is described as subjective. Discuss the main differences between the two tests. [6]

The test for intention is subjective, since one has to consider what X's actual knowledge was or what he actually envisaged the facts or the law to be. The test is subjective because one has to determine what X's thoughts were as an individual (i.e. as a "subject") or what he actually envisaged. Expressed very plainly: one has to ascertain "what went on in his (X's) head". (3)

When we describe the test for negligence as objective, we mean that one has to measure X's conduct against an objective standard. This objective standard is that which a reasonable person would have known or foreseen or done in the same circumstances.

This test is described as objective, since here one is not concerned with what X actually thought or knew or foresaw, but only with what a reasonable person in the same circumstances would have foreseen or what he would have done. In determining

negligence, X's conduct is measured against a standard outside himself - namely what a reasonable person would have foreseen or done. (3)

FINAL COMMENT

Please note that according to a decision taken by UNISA, lecturers are not permitted to provide guidelines or "tips" for the final examination. We are also not allowed to provide "scoping" of the syllabus. I would therefore be most grateful if you do not call me or email me for guidelines. I would like to suggest that you revise the entire CRW1501 syllabus in your study guide.

I would like to take this opportunity to wish you everything of the best for the final examination.

DR. K NAIDOO
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