

Module 1

General Principles of
Criminal Law



Only study guide for CRW2601

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INTRODUCTION

Literature and method of study



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1

GENERAL

Welcome to the first module in Criminal Law. We trust that you will enjoy your study of this module. Criminal law is one of the most interesting and

topical law subjects to study. Our aim is to assist you as much as we can in mastering this module.

In this introductory chapter, we draw your attention to the subdivision of Criminal Law into two modules, and to the books you will need for your studies. We also give you advice on how to study.

2 COURSE OUTCOMES

This course should enable you to

- identify and describe the arguments that may serve as a justification for convicting and sentencing a person for a crime
- analyse and solve criminal law-related problems by identifying, describing and applying the relevant legal principles

3 SUBDIVISION OF CRIMINAL LAW INTO TWO MODULES

Criminal Law consists of two modules, namely CRW2601 and CRW2602. This study guide deals with the first module, CRW2601. This module deals with the general principles of criminal law. The second module, CRW2602, deals with specific crimes.

YOU WILL NOT UNDERSTAND THE CONTENT OF THE CRW2602 MODULE UNLESS YOU HAVE A PROPER UNDERSTANDING OF THE GENERAL PRINCIPLES OF CRIMINAL LAW DISCUSSED IN THE CRW2601 MODULE. THEREFORE, YOU ARE ADVISED TO STUDY CRW2601 BEFORE YOU START STUDYING CRW2602.

4 LITERATURE

- ***Prescribed books***

There are two prescribed books for this module, namely

- (1) Snyman CR *Criminal Law* 6th ed (2014) LexisNexis, Durban
- (2) Snyman CR *Strafreg-vonnisbundel/Criminal Law Case Book* 5th ed (2013) Juta, Kenwyn

An Afrikaans edition of Snyman's first work, entitled Snyman CR *Strafreg* 5th ed (2006), published by LexisNexis, is also available. The Afrikaans edition is prescribed for Afrikaans-speaking students.

The work entitled *Strafreg-vonnisbundel/Criminal Law Case Book* is bilingual.

- ***Recommended books***

There are no recommended books for this module.

- ***Use of prescribed books***

Snyman's *Criminal Law* contains a discussion of both general principles and specific crimes and, therefore, covers the syllabi of both modules in Criminal Law.

The second prescribed work, namely the *Criminal Law Case Book*, is, as the name indicates, a collection of the most important judgments on criminal law. Court judgments constitute one of the most important sources, not only of criminal law, but also of all branches of the law. In order to study criminal law properly, it is necessary to consult the law reports in which these judgments are published. Few students studying at Unisa have regular access to a law library. The *Criminal Law Case Book* is prescribed to enable all students to read the relevant judgments in this branch of the law.

The book contains an introduction, setting out why it is necessary to read cases, how they should be read, and explaining the meaning of certain expressions in the reported (i.e. published) cases. Particularly those students who have not yet read any cases, or have read only a few, ought to read this introduction. The introduction is followed by excerpts from the most important cases on criminal law. The excerpts from each case are preceded by a summary of the facts of the case and are followed by an explanation of certain aspects of the judgment.

We wish to emphasise that you are expected to read more than merely the study guide and that you should **consult the prescribed book on a specific topic**. When reading this study guide, you may find that you do not clearly understand certain aspects of a particular topic. It is then essential that you consult the prescribed textbook on the matter.

For the purposes of the examination, you should, however, use the study guide as your primary source, except in respect of those topics that are not discussed in the study guide, but only in the prescribed work (see next paragraph).

Take note that certain topics that you must study for the examination are not discussed in the study guide, but only in the prescribed book. The topics that are not discussed in the study guide, but which we expect you to study from the prescribed book, will be pointed out to you. A serious warning, though: do not think that because these topics are not discussed in the study guide, you can afford to ignore them (i.e. not study them from the prescribed book). You should know the topics to be studied from the prescribed book just as well as the topics that are discussed in the study guide. In the examination, we may ask questions on the topics that have to be studied from the prescribed book.

When studying a topic from the prescribed book, you need take note only of the text itself, that is, you need not also consult, study or read the footnotes as well, unless we draw your attention to one or more footnotes.

- ***Other works on criminal law***

Apart from the works already mentioned above, there are also a number of other works on criminal law. We merely draw your attention to the following two works:

- (1) Jonathan Burchell *Principles of Criminal Law* 4 ed (2013) Juta, Kenwyn
- (2) Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2012) Oxford University Press

You need not buy either of these books, since they are not recommended works.

5**METHOD OF STUDY**

- ***Subdivision of study material in study guide***

You will notice that the discussion of the material in the study guide is subdivided into 16 study units. A study unit is a unit or part of the syllabus that deals with a certain topic. You can divide the time you have at your disposal (from the time you enrol until the time you write your examination) into 16 time units and then study one study unit per such time unit.

- ***Contents of study units***

Every study unit is normally subdivided as follows:

- (1) a table of contents of the material discussed in the study unit
- (2) a list of learning outcomes you should keep in mind when studying the study unit
- (3) a short paragraph serving as an introduction or background to the discussion that follows
- (4) the actual exposition of the topic covered in the study unit
- (5) a glossary, containing a list of certain important words and phrases from foreign languages (mostly Latin), along with their translations
- (6) a concise summary of the most important principles as set out in the topic of that particular study unit
- (7) a number of “test yourself” questions

The exposition of the topic may contain activities and feedback. An “Activity” takes the form of questions that you should try to answer by yourself before looking at the answers in the “Feedback”.

- ***What the icons represent***

An icon is a small picture or other graphic symbol that conveys a certain message. We use the following icons in this study guide:

This icon means: “Beware of the following typical mistake often made by students!”



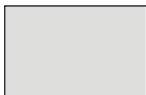


This icon means: “Note the following hint or advice on how to study a certain part of the material or how to answer a question in the examination!”



This icon means: “Read the judgment in the following court case, which appears in your case book (one of the prescribed books you must buy).”

Note that the reading of certain cases (judgments) forms part of your studies. (As a matter of fact, it forms part of the study of all legal subjects.) In the course of our discussion of criminal law, we will draw your attention to the cases you must read. In Tutorial Letter 101, you will also find a list of the cases you must read.



If a sentence/s is/are printed against a grey (shaded) square background (also called a “screened block”), the sentence/s contain/s a definition that you should know so well that you will be able to write it down in the examination.

We expect you to know the definitions of certain concepts and crimes for the examination. These definitions usually consist of only one sentence (although the sentence may, admittedly, sometimes be rather long). By “know”, we mean that you must be able to give us the definition in the examination substantially, as it appears in the study guide. The best would be to try and memorise the definition, but you are also free to give us your own version of it. However, experience has taught us that students who do not memorise the definition, but rather try to paraphrase it in their own words, often lose marks because of deficiencies in their version of the definition.

To assist you in identifying the definitions that you should master for the examination (as explained above), we have “screened” them so that they stand out. We will therefore not warn you repeatedly that you should know certain definitions well for the examination. You should just watch out for the “screened frame”: then you must be aware that you should know the definition appearing in the frame so well that you will be able to give it in the examination.

- ***Important advice on how to study***

At the risk of preaching to the converted, we are taking the liberty of giving you a short pep talk.

- Students of criminal law are sometimes inclined to underestimate the subject because it deals with human actions that are concrete and often spectacular, such as stealing, killing, raping, kidnapping or destroying. We wish to **warn you against underestimating this subject**. Some of the concepts of criminal law are among the most difficult to grasp in the field of law. Don't think that because you regularly read about murder, rape, robbery or other crimes in the newspapers that you can afford to read the study guide only superficially, and to rely in the examination only on the type of broad general knowledge that the average person, who regularly reads newspapers, would have of Criminal Law.

- Try to **understand** the principles of criminal law, such as causation, private defence and intention so that you can apply them to concrete cases. Merely memorising page upon page of the study guide without understanding the principles underlying the topics discussed is of little use. Only a proper understanding of the basic principles will enable you to answer the so-called problem-type questions satisfactorily in the examination. (A “problem-type” question is one in which you are not asked directly to discuss a particular topic, but in which we give you a set of facts and expect you to state whether one of the persons mentioned in the set of facts has committed a particular crime or whether he or she can rely on a particular defence. You must also be able to substantiate your answers.)
- Furthermore, an old but sound piece of advice is that you should not move on to a new principle until you have mastered the preceding one on which it is based.
- We advise you to **make your own notes** or summaries (perhaps even in “telegram” style) while studying the specific topics.
- Although it is important that you understand the principles underlying a particular topic, a knowledge of **only** the principles (or framework of a topic) is insufficient; you must also be able to state **some particulars** regarding the principle (such as giving **illustrations of its application**, the **authority** on which the principle is based, or possible **exceptions** thereto).
- Students often ask us how important it is to remember the **names of cases**. Let’s clarify this matter here: it would be an impossible task to memorise the names of all cases referred to in your lectures, and we do not expect you to do so. However, it is a fact that decisions are some of a law student’s “best friends”, and since it is a good policy not to forget the names of your best friends, we would advise you to concentrate on remembering the names of the **most important, leading** cases. As we progress through the course, we will draw your attention to some of the most important decisions. You are also advised to underline the names of cases when referring to them in the examinations. This will help the examiner to follow your submissions.
- However, please do **not** waste any valuable time attempting to memorise the case references. A case reference is the set of dates, letters and numbers following the name of the case, for example 1966 (2) SA 269 (A). In this reference, 1966 refers to the year in which the judgment was reported (i.e. published), the (2) refers to the volume number of the particular year, the 269 refers to the page in the book where the judgment begins, and the (A) refers to the division that heard the case.. It is absolutely unnecessary, and also a waste of time, to try to memorise these numbers and letters. We do not expect you to know them. Note that even if you fail to remember the name of an important case in the examination, you can simply state: “It has been decided” or “According to a decision”, etc. Our primary aim in the examination is not to test your memory, but your comprehension and insight – but do bear in mind that proper comprehension and insight are also based on a knowledge of facts.
- In the course of the year, we will be issuing a number of **tutorial letters**. Please bear in mind that these tutorial letters form an important part of the study material that you are required to master; sometimes they may even amend the study guide. Therefore, do not ignore tutorial letters!



- We wish to warn you not to neglect the **last portions of the study guide**. We often find that in the examination, students do reasonably well in questions dealing with topics that are discussed in the first part of the study guide, but often prove to have only a very superficial knowledge – or none at all – of topics discussed towards the end of the study guide. You must study the **whole** guide – including topics that are discussed at the end. Your knowledge of some of these last topics may make the difference between failing and passing the examination!

- ***General principles and specific crimes***

A study of criminal law comprises a study of both the general principles of criminal law and the most important specific crimes. By “general principles of criminal law”, we mean those rules that normally apply to all, or at least most, crimes, for example rules about the meaning of concepts such as “intention” or “negligence”, or rules about when an accused person may rely on defences such as insanity, intoxication, provocation or self-defence.

A study of the specific crimes comprises an analysis of the different specific crimes by identifying and critically discussing the different requirements applicable to each specific crime.

In this module, we discuss only the general principles of Criminal Law. In the second module in Criminal Law, we deal with a discussion of the most important specific crimes.

In the second module, the crimes of murder and culpable homicide will be dealt with. However, in the first module, these two crimes are occasionally referred to as examples to illustrate the general principles. The reason for this is that the distinguishing factors between these two crimes are intention and negligence, and these two crimes are used to illustrate the difference between crimes requiring intention and those crimes for which negligence is required. To follow the discussion of the general principles from the beginning, it is therefore necessary to know what the definitions of these two crimes are.

Murder is the unlawful, **intentional** causing of the death of another human being.

Culpable homicide is the unlawful, **negligent** causing of the death of another human being.

The only difference between these two crimes, therefore, is that intention is required for the one and negligence for the other.

- ***Abbreviations***

- When, in the course of this study guide, we refer to your prescribed handbook, that is, Snyman’s *Criminal Law*, we will identify this book merely as *Criminal Law*. If we refer to the prescribed case book, we will indicate this book merely as *Case Book*. In this study guide, all references to *Criminal Law* are to the 5th edition of this book (2008).
- With regard to the **mode of citation of cases**, the following method is used: in accordance with modern usage, we do not cite the full official

name of cases, for example *S v Williams en 'n Ander* 1970 (2) SA 654 (A), but simply the name, followed by the case reference – *Williams* 1970 (2) SA 654 (A). This is the modern “streamlined” method of citing cases.

- In the discussions that follow, we will often refer to the perpetrator or accused simply as X, and to the complainant or victim of the crime as Y.
- We often use the Latin words *supra* and *infra*. *Supra* means “above” and *infra* means “below”.

- ***Language: equal treatment of genders***

In our discussions in the guide, we try to adhere to the principle of equal treatment of the genders. We do this in the following way: In study units beginning with even numbers, the female form is used, while in all study units beginning with uneven numbers, the male form is used. There are necessarily certain exceptions to this rule. In cases such as the following, we do not change the genders:

- in the descriptions of sets of facts in reported decisions
- where we quote legislation (which is, for the most part, drawn up in the masculine form) directly
- in the explanatory notes to existing drawings (which, for practical reasons, unfortunately cannot be changed) depicting males

GLOSSARY

<i>supra</i>	above
<i>infra</i>	below

STUDY UNIT 1

Introductory topics



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- broadly outline the four elements of criminal liability and the logical sequence of investigation into these elements
- know what the four general elements of, or requirements for, criminal liability are

1.1

HISTORY OF SOUTH AFRICAN CRIMINAL LAW

Note: Read only. You are not required to study this topic for the examination or for answering questions in assignments.

We are not going to discuss the history of our South African criminal law in detail. You are advised to read the brief discussion of the historical development of our criminal law in *Criminal Law* 6–9 on your own. This applies particularly to students who have not yet studied any other legal courses. In this study guide, we merely wish to emphasise certain important aspects.

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.

The rules of substantive criminal law – that is, the rules that we will discuss in this course – are, for the most part, not contained in any Act of parliament. Stated differently, we can say that our criminal law – including the general principles of our criminal law – are not **codified** (i.e. summarised in a “code”). (Our criminal procedure, i.e. those rules stipulating how an accused must be brought to trial and how the trial must proceed, is codified in the Criminal Procedure Act 51 of 1977.) There is no Act of parliament stating that you may not murder or steal or commit assault, or stipulating when an accused person may successfully rely on defences such as intoxication or youth or provocation. In order to know what the law is regarding crimes or defences such as these, you must turn to the common law.

The common law of South Africa is Roman-Dutch law. By Roman-Dutch law, we mean the system of law that 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 that formed the Union of South Africa in 1910. 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.

The most important sources of Roman-Dutch criminal law are the works of such eminent jurists as Damhouder, Matthaeus, Voet, De Groot, Huber, Van Leeuwen, Van der Linden, Moorman, Carpzovius and Van der Keessel. They lived and wrote their books between the 16th and 18th centuries.

1.2 THE SOURCES OF OUR CRIMINAL LAW

Note: Read only. You are not required to study this topic for the examination or for answering questions in assignments.

(Criminal Law 5–10)

The sources of our criminal law are the following:

- (1) **Legislation.** If there is an Act (legislation) dealing with a specific crime or other topic relevant to criminal law, the courts must apply such Act. However, in the discussion under the previous heading, we indicated that the most important crimes in our law are not set out in any legislation; rather, they form part of our common law.

As far as legislation is concerned, there is one Act that towers above all other Acts in importance. This is the **Constitution of the Republic of South Africa, 1996**. Chapter 2 of the Constitution contains a Bill of Rights. All rules of law – irrespective of whether they are contained in legislation or in common law – must be compatible with this Bill of Rights. If a rule is incompatible with the Bill of Rights, it may be declared null and void. Among the rights set out in the Bill of Rights are the right to equality before the law (s 9); the right to life (s 11); the right to privacy (s 14); the right to freedom of expression (s 16); the right to freedom of movement (s 21); and the right to a fair trial (s 35). In the course of our exposition of the rules of criminal law, we will refer to the effect of some of these rules from time to time.

- (2) The rules of **common law**. We have already explained the meaning of “common law”. The contents of the common law can first of all be found in the primary sources of the common law, that is, **the writings of the Roman-Dutch authors** referred to above. In practice, however, it is seldom necessary to refer to these writings, because all the most important rules of common law have found their way into the reported (i.e. published) law reports. The latter are referred to as our “**case law**”.

1.3 THE THEORIES OF PUNISHMENT

(Criminal Law 10–20)

Note: Read only. You are not required to study this topic for examination purposes, although you may be assessed on this topic in assignments.

The reasons advanced for punishing offenders are called the theories of punishment. These theories are classified into **the absolute theory** and **relative theories**. The theory of **retribution** falls under the absolute theory of punishment. Retribution means that punishment is justified because it is X's **just desert**. The theory of retribution requires that there be a **proportional relationship between the punishment imposed and the harm caused**. The theories of deterrence, prevention and reformation fall under **relative theories**. In terms of these theories, punishment is only a means to a secondary end or purpose: For the preventive theory, it is the prevention of crime; for the deterrent theory, it is to deter either the individual or the society as a

whole from committing the crime; and for the reformatory theory, it is the rehabilitation of the criminal.

Note that **all** these theories are applied in deciding what would be an appropriate sentence for committing an offence. The authority on this point is *Zinn 1969 2 SA 537 (A)*. **You must read this decision in the *Case Book*.** Note that in imposing a sentence, a court must take into account the **nature and severity of the crime**, the **interests of society** and also the **interest of the accused** (these three factors are known as the “Zinn triad”).

1.4

THE ONUS OF PROOF IN CRIMINAL CASES

Note: Read only. You are not required to study this topic for the examination or for answering questions in assignments.

For the benefit of those students who are just beginning their legal studies, we would like to give a brief explanation of the onus of proof in criminal matters. The general rule in criminal matters is that the onus is on the state (i.e. the prosecution or state prosecutor) to prove the accused’s guilt beyond reasonable doubt. Put differently: it is presumed that an accused is innocent until the state has succeeded in proving his guilt beyond reasonable doubt. The state must therefore prove that the accused’s conduct and state of mind complied with all the requirements (or elements) of the crime charged. Section 35(3)(h) of the Bill of Rights in the Constitution expressly provides that every accused has a right to be presumed innocent. There are, however, exceptions to the general rule that the onus of proof rests on the state to prove all the elements of the crime. In the Law of Evidence course, the whole question of onus of proof is explained in detail.



All of this means that you will make a mistake if, in writing an answer to an assignment or to a question in the examination, you allege the following: “The accused must prove that, for example, he did not have the intention to commit the crime.” In principle, the accused need not prove anything; it is the state that has to prove that the accused has committed the crime. It would also be incorrect to allege that the court must prove a certain requirement of liability. Neither the accused nor the court has to prove X’s guilt. Rather, the state (prosecution) has to prove it.

1.5

CRIMINAL LIABILITY: A SUMMARY

(Note: From this point onwards, you have to study the discussions for the examination.)

1.5.1 *General*

The discussion that follows is aimed at giving you a very concise summary of the first part of the study guide. When investigating the various crimes, we find that they all have certain characteristics in common. Before a person can be convicted of any crime, the following requirements must be satisfied:

The very first question to be asked in determining a person's criminal liability is whether the type of conduct forming the basis of the charge is recognised in our law as a crime. A court may not convict a person and punish him merely because it is of the opinion that his conduct is immoral or dangerous to society, or because, in general terms, "the person deserves" to be punished. On the contrary, it must be beyond dispute that X's alleged type of conduct is recognised **by the law** as a crime. This very obvious principle is known as the "**principle of legality**".

Although this requirement must be borne in mind, it is never regarded as an element of a crime in the sense that the accused, by his conduct and subjective attributes, must comply with this requirement. This consideration is underlined by the fact that in more than 99 per cent of criminal cases, the accused is charged with a crime that is so well known (e.g. assault, theft, culpable homicide) that the court will not waste its time investigating whether, in our law, there is such a crime as the one with which the accused is being charged. Only in fairly exceptional cases is it necessary for the court to study, for example, a statute in order to ascertain whether what the accused is charged with really constitutes a crime. This is another reason the principle of legality is not regarded as an "element" of a crime.

We will now proceed to consider the four elements of a crime.

1.5.2 *The four elements of criminal liability*

(1) **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. By "conduct", we mean an **act** or an **omission**. **Since the punishment of omissions is more the exception than the rule, this requirement of liability is mostly referred to as the "requirement of an act"**.

The word "act", as used in criminal law, does not correspond in all respects with the ordinary everyday meaning of this word; more particularly, it should not be treated as synonymous with a muscular contraction or bodily movement. It should rather be treated as a technical term that is wide enough in certain circumstances to include an omission to act.

For the purposes of criminal law, conduct can lead to liability only if it is **voluntary**. Conduct is voluntary if X is capable of subjecting his bodily or muscular movements to his will or intellect. For this reason, the bodily movements of, for example, a somnambulist (sleepwalker) are not considered by the law to amount to an "act".

An omission (that is, a failure by X to act positively) can lead to liability only if the law imposed a duty on X to act positively and X failed to do so.

(2) Compliance with the definitional elements of the crime

The following general requirement for criminal liability is that X's conduct must **comply with the definitional elements of the crime** in question.

What does "the definitional elements of the crime" mean? 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. By looking at these definitional elements, we are able to see how one type of crime differs from another. For example, the definitional elements of the crime of robbery are "the violent removal and appropriation of movable corporeal property belonging to another".

Every particular offence has requirements that other offences do not have. A study of the particular requirements of each offence is undertaken in the second module. The requirement for liability, with which we are dealing here, is simply that X's conduct must **comply with** or **correspond to** the definitional elements; to put it differently, it must be conduct that **fulfils** the definitional elements, or by which these definitional elements are **realised**.

(3) Unlawfulness

The mere fact that the act complies with the definitional elements does not necessarily mean that it is also unlawful in the sense in which this word is used in criminal law. If a father gives his naughty child a moderate hiding in order to discipline him, or a policeman catches a criminal on the run by knocking him to the ground in a tackle, their respective acts are not unlawful and they will, therefore, not be guilty of assault, despite the fact that these acts comply with the definitional elements of the crime of assault.

"Unlawful", of course, means "contrary to law", but "law" in this context means not merely the rule contained in the definitional elements, but the totality of the rules of law, and this includes rules that, in certain circumstances, allow a person to commit an act that is contrary to the letter of the legal prohibition or norm. In practice, there are a number of well-known situations where the law tolerates an act that 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. In the examples above, the act of the father who gives his son a hiding is justified by the ground of justification known as right of chastisement, while the act of the policeman is justified by the ground of justification known as official capacity.

(4) Culpability

The following, and last, requirement that 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 and knowledge, or lack thereof.

The culpability requirement comprises two questions or two “sub-requirements”.

The first of these sub-requirements is that of **criminal capacity** (often abbreviated merely to “capacity”). This means that at the time of the commission of the act, X must have had certain mental abilities. A person cannot legally be blamed for his conduct unless he is endowed with these mental abilities. The mental abilities X must have are

- (1) the ability to appreciate the wrongfulness of his act (i.e. to distinguish between “right” and “wrong”) and
- (2) the ability to act in accordance with such an appreciation

Examples of categories of people who lack criminal capacity are mentally – ill (“insane”) persons and young children.

The second sub-requirement (or “leg” of the culpability 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.

Briefly, then, we can say that the four general requirements for a crime are the following:

- (1) **conduct**
- (2) **that complies with the definitional elements of the crime**
- (3) **and that is unlawful**
- (4) **and culpable**

1.5.3 *Sequence of investigation into presence of elements*

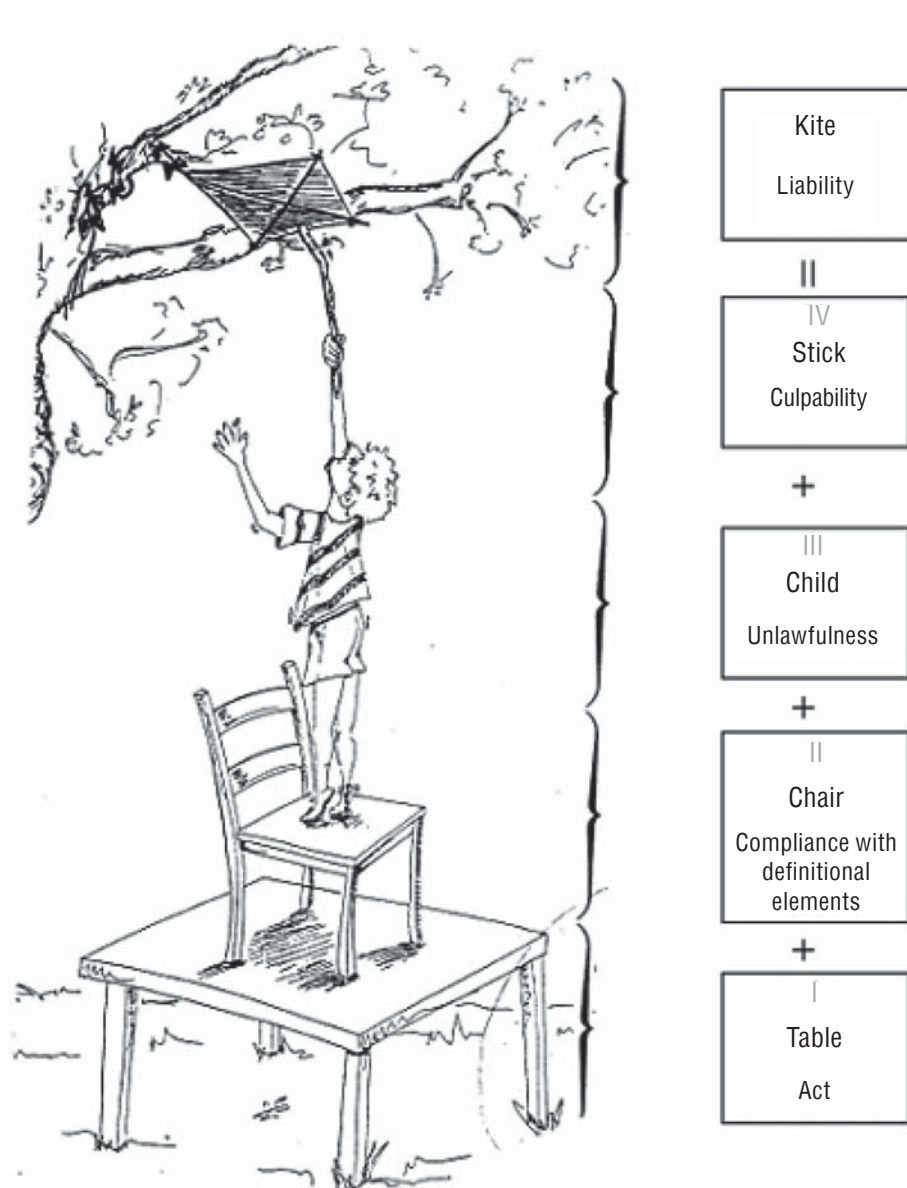
It is of the utmost importance to bear in mind that the investigation into the presence of the four requirements for, or elements of, liability set out above must follow a certain sequence, namely the sequence in which the **requirements were set out above**. If the investigation into whether there was (voluntary) conduct on the part of X reveals that there was, in fact, no such conduct, it means that X is not guilty of the crime in question and the matter is concluded. It is then unnecessary to investigate whether the further requirements, such as unlawfulness and culpability, have been complied with.

An investigation into whether the conduct complied with the definitional elements is necessary only when it is clear that the conduct requirement has been complied with. Again, only if it is clear that the conduct has complied with the definitional elements is it necessary to investigate the question of unlawfulness, and only if the latter requirement has been complied with is it necessary to investigate whether X’s act was also culpable. An enquiry into a later requirement (in terms of the sequence described above) therefore presupposes the existence of the previous requirements.

The basic rule relating to the sequence of the requirements may be compared to the story of a boy whose kite got stuck at the tip of a very high branch of a tree: The boy was hopelessly too short to reach up with his hands to the branch where the kite had got stuck. In order to retrieve the kite, he first

moved a table into position just beneath the branch. Secondly, he placed a chair on the table. Thirdly, he climbed onto the chair, armed with a long stick. Fourthly, he reached out with the stick to the kite, poked at it, and in this way succeeded in freeing the kite from the branch. (Consult the left-hand side of the illustration below.)

The enquiry into criminal liability proceeds along comparable lines. Drawing the conclusion that a person is guilty of a crime is like retrieving the kite. The kite represents criminal liability. The table (the first or bottom agent) represents the requirement of an act. The chair (second agent) represents the requirement that there must be compliance with the definitional elements. The boy (third agent) represents the unlawfulness requirement and the stick (fourth agent) represents the culpability requirement.



Successfully reaching out with the stick towards the kite presupposes the existence of all four objects, or “agents”, needed to reach it. If the first “agent”, namely the table, cannot be found or does not exist, it is of no avail that, say, the fourth agent (the stick) is waved about in an effort to free the kite. If we

apply this metaphor to the principles of criminal liability, it follows that it is a waste of time to enquire whether X had the **intention** to commit an offence (fourth requirement) if it transpires that there was not even an **act** (first requirement) on his part.

Thus the enquiry must always start from the bottom and proceed upwards, not the other way around. Every “agent” (table, chair, boy, stick) rests upon that or those “agents” below it (except, of course, the one right at the bottom, namely the table). The moment it becomes clear that any one of the four elements is missing (that is, has not been complied with), it follows that there is no criminal liability (that is, the kite cannot be retrieved) and it becomes unnecessary to enquire into the existence of any possible further elements or requirements (that is, “agents” that are above them).

ACTIVITY

Let’s apply this simple principle to a concrete set of facts: Assume X is charged with having assaulted Y. The evidence relied upon by the prosecution to prove the charge reveals that one night while X was walking in his sleep, he trampled upon Y, who happened to be sleeping on the floor. Has X committed assault?

FEEDBACK

The answer is obviously “no”, on the following grounds: Because X was walking in his sleep, his act was not **voluntary** – in other words, while sleepwalking, he was not able to subject his bodily movements to his will or intellect. Because there was no act, he is not guilty of assault. (Or, to make use of the metaphor in the illustration above, there was no table for the boy to use and, therefore, any attempt by him – even with the aid of a chair and a stick – to retrieve his kite would be fruitless.) It is unnecessary to enquire whether, for example, X’s act was unlawful or whether he acted with intention (culpability). From a systematic point of view, it would be unsatisfactory – and proof of unimpressive legal thinking – to say that X escapes liability because he lacked the intention to assault. Such an argument presupposes that there was a voluntary act on the part of X – which is patently incorrect.

1.6

HINTS ON ANSWERING PROBLEM-TYPE QUESTIONS

The purpose of asking problem-type questions in this module is to test your understanding of the general principles of criminal liability, primarily (but not exclusively) the four elements of criminal liability: the act, compliance with definitional elements, unlawfulness and culpability (see SG 1.5). Firstly, you must be able to identify the element that is called into question in the factual scenario. This requires knowledge and understanding of **the definitions** of concepts, such as the requirement of a voluntary act or *dolus eventualis*, which are provided in grey blocks. You have also been provided with a **sequence**

of investigation into the presence of the elements (SG 1.5.3) to enable you to identify the elements correctly and speedily, and to focus on discussing the legal principles that are relevant to the question.

The second step in answering a problem-type question is to discuss the legal principles that are relevant to providing the answer to the problem. Most of the legal principles discussed in this module come from **court decisions (case law)**. You must therefore refer to (a) decided case(s) whenever a legal principle is stated. You are reminded that even if you fail to remember the name of a case, you can simply state: "It has been decided" or "According to a decision", when stating the principle. Please note, however, that the discussion of an incorrect principle will not be credited, irrespective of whether the case reference (name) is appropriate. In other words, referring to the correct case name will not earn you a mark if it is done to support an inappropriate legal principle. Students who do this indicate to the lecturer that they do not understand what the cited case actually decided.

The third step in answering a problem-type question is to apply the relevant legal principles to the facts of the problem. Students often combine the second and third steps when answering problem-type questions. In other words, they discuss the principle(s) while applying it/them to the facts. Doing this is not wrong, but the chances of omitting a relevant principle (if there is more than one) are greater when adopting this approach. To minimise this possibility, we would advise you to separate the second and third step. Another advantage of discussing the legal principle(s) before applying it/them to the facts is that you can more easily identify the relevant facts at the stage of discussing the principle(s). This will enable you to address as many relevant facts as possible and will prepare you for a more in-depth analysis at the stage of application.

The final step in answering a problem-type question is to provide a conclusion to the problem. Please ensure that you have addressed the question(s) that you have been asked. If, for example, the question requires you to determine the criminal liability of X on a charge of murder, then your conclusion should state either "X is criminally liable" or "X is not criminally liable on a charge of murder". If the question requires you to determine whether X caused Y's death, then your conclusion should state either "X caused Y's death" or "X did not cause Y's death", etc. Please also note that in order for your conclusion to have any basis, it must be a deduction based on your reasoning.

Finally, if a question asks you to determine "criminal liability", please bear in mind that a determination of criminal liability presupposes the existence of all four elements of liability. Therefore, if the element under discussion is found to be lacking, then, following **the sequence of investigation** for criminal liability, we expect you to expressly indicate that it is unnecessary to investigate whether the further requirements have been complied with before concluding that "X is not criminally liable". Alternatively, should you find that the element in question is present, we expect you to expressly assume the presence of the other elements before concluding that "X is criminally liable".

SUMMARY

History of South African criminal law

- (1) “Common-law” refers to those rules of law not contained in an Act of parliament or in rules of legislation by some other (subordinate) legislative body.
- (2) The common law of South Africa is Roman-Dutch law.

Criminal liability: a summary

- (3) The four elements of criminal liability are
 - (a) act or conduct
 - (b) compliance with definitional elements
 - (c) unlawfulness
 - (d) culpability
- (4) The investigation into the presence of the four elements of liability follows a certain sequence, namely the sequence in which they were mentioned in (3) above.

TEST YOURSELF

- (1) Name the four elements of criminal liability.
- (2) Briefly discuss each of the four elements of criminal liability.
- (3) Should the investigation into the presence of the four elements of liability follow a prescribed sequence? Explain.

STUDY UNIT 2

The principle of legality as entrenched



in the Constitution of the Republic of South Africa, 1996

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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- evaluate the validity of any common-law or statutory rule (including those relating to punishment) with reference to the rules embodied in the principle of legality
- demonstrate your ability to apply the principle of legality to statutory provisions by determining whether a particular statutory provision purporting to create a crime contains a legal norm, a criminal norm and a criminal sanction

2.1 BACKGROUND

Intervention by the criminal law may be traumatic for a person accused of a crime. It can easily happen that criminal law is turned into a tool of suppression or oppression, as occurred during the Middle Ages. It is therefore important that mechanisms exist to protect the rights of the individual against abuse by organs of the state. The principle of legality plays an important role in this regard, as the principle is based on principles of constitutional democracy and fairness.

2.2 THE CONCEPT OF LEGALITY

(Case Book 3–22)

In determining whether a person is criminally liable, the first question to be asked is **whether the type of conduct allegedly committed by such person is recognised by the law as a crime**. Certain conduct may be wrong from a moral or religious point of view, yet may not be prohibited by law. Again, even if it is prohibited by law, it does not necessarily follow that it is a crime: it may lead only to a civil action (i.e. an action or court case in which one private party claims damages from another party), or it may result only in certain administrative measures being taken by some authority (where, for example, a local authority orders me to break down a wall that I have constructed on my property in such a way that it contravenes the local building regulations). Not **every** contravention of a legal rule constitutes a crime. The mere breach of a contract, for example, does not necessarily constitute a crime. It is only if a certain kind of conduct is defined by the law **as a crime** that there can be any question of criminal liability for that type of conduct.

It is this very specific aspect of a person's conduct that lies at the root of the principle of legality. The principle of legality is also known as the *nullum crimen sine lege* principle. This Latin expression means "no crime without a legal provision".

The principle of legality is contained in section 35(3)(l) of the Constitution of the Republic of South Africa, 1996. The provisions of this section will be set out in the discussion that follows.

2.3

DEFINITION AND CONTENTS OF THE PRINCIPLE

2.3.1 *Definition*

A definition of the principle of legality, embodying its most important facets, can be formulated as follows:

An accused may

- (1) not **be convicted of a crime** –
 - (a) **unless the type of conduct** with which she is charged **has been recognised by the law** as a crime
 - (b) **in clear terms**
 - (c) **before the conduct took place**
 - (d) **without** it being **necessary to interpret the words** in the definition of the crime **broadly** in order to cover the accused's conduct; and
- (2) if convicted, **not be sentenced unless the sentence also complies with the four requirements** set out above under 1(a) to (d)

2.3.2 *Rules embodied in the principle*

If we analyse the principle of legality, we find that it, in fact, embodies five rules. In order to facilitate reference to the different rules, we will give each of these rules a brief Latin label. These five rules are the following:

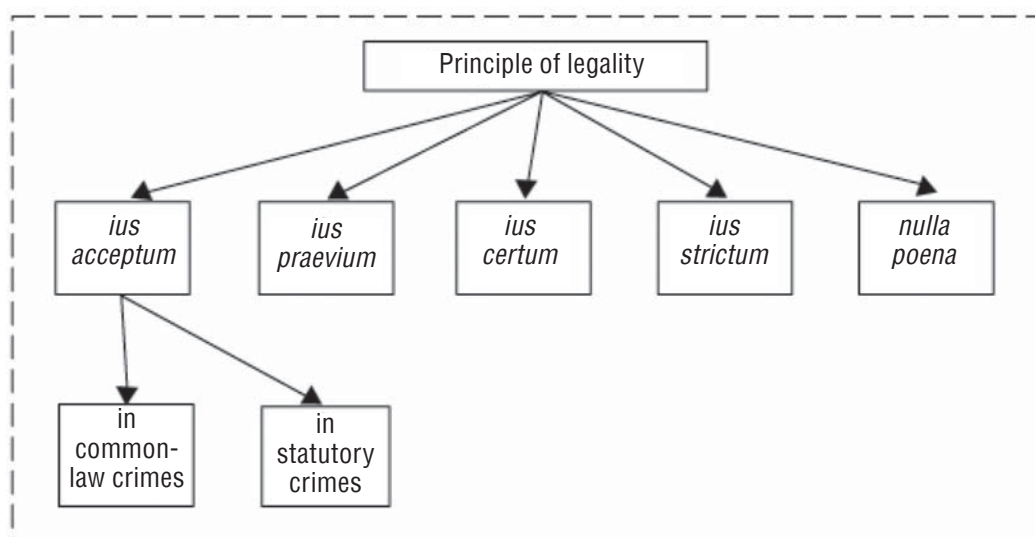
- (1) A court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime – in other words, a court itself may not create a crime. This is the *ius acceptum* rule.
- (2) A court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of its commission. This is the *ius praeivium* rule.
- (3) Crimes ought not to be formulated vaguely. This is the *ius certum* rule.
- (4) A court must interpret the definition of a crime narrowly rather than broadly. This is the *ius strictum* rule.
- (5) After an accused has been found guilty, the above-mentioned four rules must also be applied when it comes to imposing a sentence; this means that the applicable sentence (regarding both form and extent) must already have been determined in reasonably clear terms by the law at the time of the commission of the crime, that a court must interpret the words defining the punishment narrowly rather than broadly, and that a court is not free to impose any sentence other than the one legally authorised. This is the *nulla poena sine lege* rule, which can be further abbreviated to the *nulla poena* rule.

Actually, all the different aspects of the principle of legality can be traced back to one fundamental consideration, namely that the individual ought to

know beforehand precisely what kind of conduct is criminal, so that she may conduct herself in such a way that she will not contravene the provisions of the criminal law.

There is a connection between the principle of legality and a democratic form of government: one of the reasons a judge should not be empowered to create crimes herself, or to extend the field of application of existing crimes, is because parliament, as the gathering of the community's elected representatives, is best suited to decide (after examination and discussion) which acts ought to be punishable according to the general will of the people. In contrast, the judge's function is not to create law, but to interpret it. Naturally, this relationship between legality and a democratic form of government implies that there must be a parliament representing the **entire** population, as well as regular (not a one-off event), free (free from intimidation) and fair elections to ensure that the representatives in parliament genuinely reflect the (sometimes changing) will of the people.

In the discussion that follows, each of the five rules embodied in the principle will be analysed. For the sake of convenience, we will often refer to these rules by their brief Latin labels given above. The following diagram sets out the classification of the rules and sub-rules:



2.4

CONDUCT MUST BE RECOGNISED BY THE LAW AS A CRIME (*IUS ACCEPTUM*)

In a country in which the criminal law is codified, the effect of the principle of legality is that only conduct that falls within the definition of one of the crimes expressly mentioned in the criminal code is punishable. South African criminal law is not codified. Although many crimes are created by statute, some of the most important crimes, such as murder and assault, are not made punishable or defined in any Act. They are simply punishable in terms of the common law. (Compare the discussion earlier in the study guide on the history of criminal law.)

However, the fact that our criminal law is not codified does not mean that the principle of legality has no function in our law. In South African criminal law, the role of the principle of legality is the following: before a court can convict somebody of a crime, it must be clear that the kind of conduct with which she is charged is recognised as a crime in terms of either common law or statutory law. If this is not the case, a court cannot convict the person, even though the judge or magistrate is of the opinion that, from a moral or religious point of view, the conduct **ought** to be punishable. A court may not create a crime; only the legislature may do this.

The rule described above may be described as the *ius acceptum* rule. The Latin word *ius* means “law” and “*acceptum*” means “which has been received”. A free translation of *ius acceptum* would read: “the law as it has been received up to date”. In South Africa, the *ius acceptum* refers not only to the common law, but also to the existing statutory law.

The *ius acceptum* principle is not referred to expressly in the Constitution. However, the provisions of section 35(3)(1) imply the existence of the *ius acceptum* rule. Section 35(3)(1) expresses the *ius praeivium* rule, which will be explained in the discussion of that principle below. **Briefly, this section provides that every accused has a right to a fair trial, which includes the right not to be convicted of an offence in respect of an act or omission that was not an offence at the time it was committed.** However, this formulation of the *ius praeivium* rule implies that the *ius acceptum* rule should also be respected: If a court may not find a person guilty of an act or omission that was not an offence at the time it was committed (*ius praeivium*), it obviously implies that a court does not have the power to create a crime (*ius acceptum*). In other words, if a court had the power to create crimes, it would mean that a court also has the power to convict a person of a crime, even though the accused’s act did not constitute a crime at the time it was performed.

It is convenient to discuss the application of this rule under two headings: firstly, the application of the rule to common-law crimes and, secondly, its application to statutory crimes.

2.4.1 Common-law crimes

Where there is no provision of the common law declaring certain conduct to be a crime, the courts have generally held that there can be no crime – and therefore no punishment. In *M 1915 CPD 334*, Kotze J declared: “We do not possess the power of creating offences upon the ground that in our opinion, they are contrary to good morals.” Our courts are not the guardians of morals. If there is a need to make punishable any conduct that may be viewed as immoral or dangerous to society, it is the task of the legislature to declare such conduct punishable, if it wishes to do so. A court has no legislative powers.

This point was emphasised by the Constitutional Court in *Masiya v Director of Public Prosecutions* 2007 (2) SACR 435 (CC). The court (at par 30) stated that in a constitutional democracy such as ours, the legislature, and not the courts, has the major responsibility for law reform, and that the delicate balance between the functions and powers of the courts, on the one hand,

and those of the legislature, on the other hand, should be recognised and respected.

2.4.2 *Statutory crimes (i.e. crimes created in Acts of parliament)*

If parliament wishes to create a crime, an Act purporting to create such a crime will best comply with the principle of legality if it expressly declares

- (1) that that particular type of conduct is a crime, and
- (2) what punishment a court must impose upon a person convicted of such a crime.

Sometimes, however, it is not very clear from the wording of an Act whether a section or provision of the Act has indeed created a crime or not. In such a case, the function of the principle of legality is the following: a court called upon to interpret such a section or provision should assume that a new crime has been created only if it appears unambiguously from the wording of the Act that a new crime has, in fact, been created. If the Act does not expressly declare that the conduct is a crime, a court should be slow to hold that a crime has been created. This consideration or rule corresponds to the presumption in the interpretation of statutes that a provision in an Act that is ambiguous must be interpreted in favour of the accused (*Hanid* 1950 (2) SA 592 (T)).

In this regard, it is feasible to distinguish between a **legal norm**, a **criminal norm** and a **criminal sanction** in an Act.

- A **legal norm** in an Act is a provision creating a legal rule that does not simultaneously create a crime.
- A **criminal norm** in an Act is a provision that makes it clear that certain conduct constitutes a crime.
- A **criminal sanction** is a provision in an Act stipulating what punishment a court must impose after it has convicted a person of that crime.

The difference may be illustrated by the following example. A statutory prohibition may be stated in the following three ways:

- (1) No person may travel on a train without a ticket.
- (2) No person may travel on a train without a ticket, and any person who contravenes this provision commits a crime.
- (3) No person may travel on a train without a ticket, and any person who contravenes this provision commits a crime and is punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine.

Example (1) merely contains a prohibition; although it creates a legal norm, it is not a legal norm creating a crime. Non-compliance with this provision might lead to certain administrative measures (e.g. that the passenger may be ordered to get off the train at the next stop), but it does not contain a criminal norm. A court will not, without strong and convincing indications to the contrary, hold that such a provision has created a criminal norm (*Bethlehem Municipality* 1941 OPD 230).

Example (2) does contain a criminal norm, because of the words “commits a crime”. It does not, however, contain a criminal sanction, as nothing is mentioned about the punishment that a court must impose after conviction.

Example (3) contains both a criminal norm and a criminal sanction; the criminal sanction is contained in the words “is punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine”.

Before we can accept that a provision in an Act has created a crime, it must be clear that the provision contains a **criminal norm**. But what is the position if a statutory provision creates only a **criminal norm**, but stipulates nothing about a criminal **sanction**?

In *Director of Public Prosecutions, Western Cape v Prins* 2012 9 SACR 183 (SCA), it was contended that no crime is created in the absence of a penalty clause in the particular legislation (prescribed punishment). In other words, the contention was that a person accused of a statutory offence cannot be charged and found guilty of such an offence if there is not also a sentence or punishment prescribed for the offence in the particular legislation. The Supreme Court of Appeal rejected this contention. The court found that there was no support for this contention in the case law. Although the presence or absence of a penalty clause (prescribed punishment) is an important factor in determining whether a crime has, in fact, been created (at par 15), the court was of the view that it is not an essential factor, since it may otherwise be very clear from the particular legislation that a crime was actually created. Apart from focusing upon the language used in the Act, a court must consider, in particular, the **objectives** of the particular legislation. If it is clear from the objectives of the legislation (expressed in the title and preamble to the Act) and the entire context of the Act that the intention was to create a crime or crimes, then a person may be charged with such (a) crime(s) and be found guilty, even if no penalty is prescribed in the particular Act. **The imposition of punishment is then left to the discretion of the court, as has always been the position in the common law.**

It should be noted, however, that the legislature, when creating crimes, usually also includes penalty clauses. Of course, a statutory provision will best comply with the principle of legality if, apart from a criminal norm, it also contains a criminal sanction. The ideal is that the legislature stipulate the maximum punishment for the crime. (In the unlikely event that a statute creates a criminal sanction without a criminal norm, the court will deduce that the legislature did in fact intend to create an offence and that an offence was in fact created.)

2.5

CRIMES SHOULD NOT BE CREATED WITH RETROSPECTIVE EFFECT (*IUS PRAEVIUM*)

Next, the principle of legality implies that nobody ought to be convicted of a crime unless, **at the moment it took place**, the type of conduct committed was recognised by the law as a crime. It follows that the creation of a crime with

retrospective effect (i.e. the *ex post facto* creation of crimes) is at variance with the principle of legality. This application of the principle of legality is known as the *ius praeivium* rule. ("*Praevium*" means "previous". Freely translated, *ius praeivium* means "the law that already exists".)

Suppose somebody had committed a certain act in 1990, which, at that time, was completely innocent in the sense that it did not amount to a crime. Let's suppose that this innocent act consisted of catching a certain type of wild bird not belonging to anybody, and putting it in a cage. Let's suppose, further, that five years afterwards, in 1995, the legislature passed an Act dealing with the protection of wildlife, in terms of which it prohibited the catching of that type of bird and expressly declared that anyone who caught such a bird had committed a crime. Suppose, further, that this Act of 1995 contained a section that read: "This Act is deemed to have come into operation on the first day of 1990." This would be an example of a law that has retrospective effect. Such legislation is usually referred to as *ex post facto* legislation. (*Ex post facto* means that the law was enacted **after** (*post*) the commission of the act.)

You will immediately appreciate that an Act of this nature, that is, one creating a crime with retrospective effect, is most unfair, since the person who caught the bird in 1990, that is, at a time when such an act was not a crime, can now, after 1995, be convicted of the crime created by the Act, and be punished for it, despite the fact that at the time of the commission of the act in 1990, she neither knew nor **could** have known that such conduct is or would be punishable. In 1990 she could not have been **deterred** from committing the act, since at that time it was not yet punishable.

The Constitution of the Republic of South Africa, 1996 contains a provision that expressly sets out the *ius praeivium* rule. Section 35(3) of this Act provides that every accused has a right to a fair trial, and paragraph (1) of this subsection 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.

This section forms part of Chapter 2 of the Constitution, which contains the Bill of Rights. This Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state (s 8(1)). This means that any legislation or law that violates the Bill of Rights may be declared null and void by a court.

In *Masiya supra*, the Constitutional Court had to decide on the constitutional validity of the common-law definition of rape to the extent that it excludes anal penetration of a penis into the anus of a female. (The common-law definition of rape, at that stage, was the unlawful, intentional penetration of the male sexual organ – the penis – into the vagina of a woman.) The court held that the common-law definition of rape be extended to include acts of non-consensual penetration of a penis into the anus of a female.

The accused contended that the extended definition should not apply to him because it would constitute a violation of his rights in terms of section 35(3)(1) of the Constitution. Keeping in mind the *ius praeivium* principle, the

Constitutional Court ruled that the extended definition of the crime of rape be applied prospectively only. In other words, because the field of application of the crime was extended only **after** the accused had performed the prohibited act (i.e. non-consensual penetration of the anus of a female), he could not be convicted of rape, but only of indecent assault.

The *Masiya* decision is discussed in detail in 2.7 below. Once you have read the discussion of the case in 2.7, the facts of the case and the decision of the court will become clear to you.

2.6 CRIMES OUGHT TO BE FORMULATED CLEARLY (*IUS CERTUM*)

Even if the *ius acceptum* and the *ius praeivium* rules (discussed above) are complied with, the principle of legality can still be undermined by the creation of criminal norms that are formulated vaguely or unclearly. If the formulation of a crime is unclear or vague, it is difficult for the subject to understand exactly what is expected of her. At issue here is the *ius certum* rule. (*Certum* means “clear” – the opposite of “vague”).

An example of a criminal prohibition couched in unacceptably vague language and hailing from Nazi Germany in 1935 is the following: “Any person who commits an act which, according to the fundamental idea behind the penal law, and according to the good sense of the nation, deserves to be punished, shall be punishable.”

The Constitution contains no express provision as regards the *ius certum* rule. However, it is probable that the provisions of section 35(3) (already mentioned above) will be interpreted in such a way that section 35(3) covers the *ius certum* rule as well. Such an interpretation of the section may be based either upon an accused’s right to a fair trial in general, or on the principle that if a criminal norm contained in legislation is vague or uncertain, it cannot be said that the accused’s act or omission amounted to a crime before the court interpreted the provision as one containing a criminal norm.

2.7 PROVISIONS CREATING CRIMES MUST BE INTERPRETED STRICTLY (*IUS STRICTUM*)

The fourth application of the principle of legality is to be found in the *ius strictum* rule. Even if the above-mentioned three aspects of the requirement of legality, namely *ius acceptum*, *ius praeivium* and *ius certum*, are complied with, the general principle can nevertheless be undermined if a court is free to interpret widely the words or concepts contained in the definition of the crime, or to extend their application by analogous interpretation. “*Ius strictum*” literally means “strict law”. Freely translated, it means “a legal provision that is interpreted strictly (i.e. the opposite of ‘widely’)”.

There is a well-known rule in the interpretation of statutes that crime-creating provisions in statutes should be interpreted strictly. **The underlying idea here**

is not that the Act should be interpreted against the state and in favour of the accused, but only that where doubt exists concerning the interpretation of a criminal provision, the accused be given the benefit of the doubt.

The *ius strictum* rule implies, further, that a court is not authorised to extend a crime's field of application by means of analogy to the detriment of the accused.

However, in *Masiya supra*, the Constitutional Court held that a High Court may, **in exceptional circumstances**, extend the field of application of a crime in order to **promote the values enshrined in the Constitution**. Note, however, that in this particular case, the accused was not prejudiced in that the extended definition was not applied to him. The background to the case is as follows:

X was charged with the crime of rape. At that stage, the common-law definition of rape was the unlawful, intentional sexual intercourse with a woman without her consent. The element of "sexual intercourse" required nothing less than penetration by the male genital organ into the vagina of the woman.

At X's trial, the evidence established that the victim, a nine-year-old girl, was penetrated anally (i.e. in the anus), and not in the vagina, as required for the crime of rape. The state advocated that X be convicted of indecent assault (a competent verdict on a charge of rape).

However, the regional magistrate held that the common-law definition of rape, according to which the crime is restricted to penile penetration of the vagina, should be declared unconstitutional and should be amended to include penile penetration of the anus. The regional magistrate accordingly convicted the accused of rape.

In an appeal by the accused, the High Court confirmed the decision of the regional magistrate in a judgment reported as *S v Masiya* 2006 (2) SACR 357 (T). The High Court (at par 61) explained that, in terms of the existing common-law definition of the crime, the non-consensual anal penetration of a girl (or a boy) amounted only to the (lesser) common-law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse was regarded as rape.

The court questioned why the non-consensual sexual penetration of a girl (or a boy) *per anum* should be regarded as less injurious, less humiliating and less serious than the non-consensual sexual penetration of a girl *per vaginam*. The court (at par 71) was of the view that the common-law definition of rape was not only archaic, but also irrational, and amounted to arbitrary discrimination regarding which kind of sexual penetration was to be regarded as the most serious.

The court was of the opinion that the conviction of rape did not amount to an unjustified violation of the accused's fair-trial rights (e.g. the principle of legality, which, in sections 35(3)(l) and 35(3)(n) of the Constitution, is guaranteed as one of the rights of the accused), because non-consensual anal

intercourse was already a crime and the accused knew that he was acting unlawfully.

The court (at par 73) argued that it had never been a requirement that an accused, at the time of the commission of an unlawful deed, should know whether it is a common-law or a statutory offence, or what the legal/official terminology is when naming it. The fact that an extension of the definition of the crime of rape had been proposed in the *Criminal Law (Sexual Offences) Amendment Bill* of 2007, but that that Bill, at the time of the hearing of the case, had not yet become legislation, was a factor that convinced the court (at par 77) that it was the appropriate forum to extend the definition of the crime of rape.

In extending the field of application of the crime of rape, the High Court relied upon certain provisions of the Constitution. These provisions empower the courts to develop the common law in order to give effect to a right in the Bill of Rights. The relevant provisions are sections 8(3) and 39(2) of the Constitution.

Section 8(3)(a) provides that

a court –

- (a) in order to give effect to a right in the Bill of Rights, must apply, or **if necessary develop, the common law to the extent that legislation does not give effect to that right ...** (our emphasis)

Section 39(2) provides that

When interpreting any legislation, **and when developing the common law** or customary law, **every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights** (our emphasis).

X once again appealed against his conviction of rape – this time to the Constitutional Court, on the ground of violation of his right to a fair trial. The Constitutional Court (at par 30) emphasised that the legislature is primarily responsible for law reform. However, section 39(2) of the Constitution empowers the courts to develop the common law in any particular case. Where there is a deviation from the spirit, purport and objects of the Bill of Rights (at par 33), the courts are, in fact, obliged to develop the common law by removing the deviation.

The Constitutional Court found that the common-law definition of rape was not unconstitutional, but that it needed to be adapted to comply with the provisions of the Bill of Rights. The Court focused only on the facts before it and on the particular rights of women that are violated by the restricted definition of the crime of common-law rape, namely the rights of women to **dignity, sexual autonomy and privacy**. The definition of the crime was extended in order to give effect to these rights in respect of women only. Of particular concern to the Court was the protection of these rights of young girls who may not be able to differentiate between the different types of penetration, namely penetration *per anum* or *per vaginam*. The Court (at par 39)

remarked that although the consequences of non-consensual anal penetration may differ from those of non-consensual penetration of the vagina, the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter. Inclusion of penetration of the anus of a female by a penis in the definition of rape would therefore increase the extent to which vulnerable and disadvantaged women would be protected by the law. The Court was of the view that this approach would harmonise the common law with the spirit, purport and objects of the Bill of Rights.

The Court (at par 51) held that the **principle of legality** is not a bar to the development of the common law. Such a conclusion would undermine the principles of the Constitution, which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution. However, when developing the common law, it is possible to do so **prospectively only**. The Court held that in that particular case, to develop the common law **retrospectively** would offend the constitutional principle of legality. One of the central tenets underlying the understanding of legality is that of **foreseeability**. The Court (at par 52) explained that this meant that the rules of criminal law should be **clear and precise, so that an individual may easily behave in a manner that avoids committing crimes**. In other words, fairness to the accused required that the extended meaning of the crime of rape not apply to him, but only to those cases that arose **after** judgment in the matter had been handed down. X could therefore be convicted of indecent assault only, and not of rape.



Read the *Masiya* case in the *Case Book* (3–15) and critically consider Snyman's criticism of the judgment. Also read *Mshumpa* 2008 (1) SACR 126 (E) in the *Case Book* (264–275) and compare it with the decision in *Masiya*.

ACTIVITY

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?

FEEDBACK

You should have considered whether the provision complies with all the rules embodied in the principle of legality. The provision complies with certain aspects of the *ius acceptum* rule. It is clearly stated in the provision that the conduct prohibited is a “crime”. This means that the provision contains a criminal norm. (Look again at the train-ticket example above if you still do not understand the difference between these

norms.) 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 or in the workplace, or to relations between people of different cultures or races? The *ius strictum* rule further requires that an act that is ambiguous be interpreted strictly. In practice, this means that a court may not give a wide interpretation of the words or concepts contained in the definition of the crime. A provision that 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.

2.8

THE PRINCIPLE OF LEGALITY IN PUNISHMENT

In the discussion so far, we have considered the application of the principle of legality to the creation, validity, formulation and interpretation of **crimes or definitions of crimes**. When dealing with the imposition of punishment, the *ius acceptum*, *ius praeivium*, *ius certum* and *ius strictum* rules are also applicable. The application of the principle of legality to punishment (as opposed to the existence of the crime itself) is often expressed by the maxim *nulla poena sine lege* – no penalty without a statutory provision or legal rules.

- The application of the *ius acceptum* rule to punishment is as follows: in the same way as a court cannot find anyone guilty of a crime unless the conduct is recognised by statutory or common law as a crime, it cannot impose a punishment unless the punishment, in respect of both its nature and extent, is recognised or prescribed by statutory or common law.
- The application of the *ius praeivium* rule to punishment is as follows: if the punishment to be imposed for a certain crime is increased, it must not be applied to the detriment of an accused who committed the crime before the punishment was increased.
- The application of the *ius certum* rule to punishment is that the legislature should not express itself vaguely or unclearly when creating and describing punishment.
- The application of the *ius strictum* rule to punishment is that where a provision in an Act that creates and prescribes a punishment is ambiguous, the court must interpret the provision strictly.

Section 35(3)(n) of the Constitution contains a provision that 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.

GLOSSARY

<i>ius acceptum</i>	“the law that we have received”, or the rule that 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
<i>ius praeivium</i>	“previous law”, or “the law that already exists”, or the rule that 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 its commission
<i>ius certum</i>	“clear law”, or the rule that crimes ought not to be formulated vaguely
<i>ius strictum</i>	“strict law”, or the rule that a court must interpret the definition of a crime narrowly rather than broadly
<i>nulla poena sine lege</i>	“no punishment without a legal provision”, or the application of the rules of legality to punishment
<i>ex post facto</i>	after the event

SUMMARY OF THE EFFECT OF THE RULES EMBODIED IN THE PRINCIPLE OF LEGALITY

Principle	Effect on definition of the crime	Effect on punishment
<i>ius acceptum</i>	<ul style="list-style-type: none"> • conduct should be recognised by law as crime • courts may not create crimes (s 35(3)(1)) 	<ul style="list-style-type: none"> • punishment must be recognised and prescribed by law; • courts may not create punishment
<i>ius praeivium</i>	<ul style="list-style-type: none"> • act should be recognised as a crime at the time of its commission (s 35(3)(1)) 	<ul style="list-style-type: none"> • punishment that is increased after the commission of a crime may not be imposed to the detriment of an accused (s 35(3)(n))
<i>ius certum</i>	<ul style="list-style-type: none"> • crimes ought to be defined clearly and not vaguely • no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3) 	<ul style="list-style-type: none"> • punishment ought to be defined clearly and not vaguely • no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3)

Principle	Effect on definition of the crime	Effect on punishment
<i>ius strictum</i>	<ul style="list-style-type: none"> • courts should interpret the definitions of crime strictly • no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3) 	<ul style="list-style-type: none"> • courts should interpret the description of punishment strictly • no express provision, but can be inferred from the general right to a fair trial guaranteed in s 35(3)

TEST YOURSELF

- (1) Define the principle of legality.
- (2) Name the five rules embodied in the principle of legality (refer to the Latin terms).
- (3) Discuss the role of the *ius acceptum* rule in determining whether
 - (a) conduct constitutes a crime in terms of the common law
 - (b) a statutory provision has created a crime
- (4) Distinguish between a legal norm, a criminal norm and a criminal sanction.
- (5) With reference to the decision of the Supreme Court of Appeal in *DPP v Prins*, discuss how our courts should determine whether a statutory offence has been created if there is no punishment prescribed for the offence in the particular legislation.
- (6) Define the *ius praeivium* rule.
- (7)
 - (a) Define the *ius certum* rule
 - (b) Is the *ius certum* rule entrenched in the constitution? Motivate.
- (8) Discuss the decision of the Constitutional Court in *Masiya*.
- (9) Discuss the *ius strictum* rule.
- (10) Discuss the principle of legality in punishment.

STUDY UNIT 3

The act



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- expand your understanding of the legal meaning of the word “act”, as used in criminal law, by recognising conduct that might not qualify as an act and by applying appropriate criteria to decide whether such conduct qualifies as an act
- demonstrate your understanding of the defence of impossibility by recognising the potential applicability of the defence of impossibility in a given set of facts and by applying appropriate criteria to reach a conclusion

3.1 BACKGROUND

In study unit 1, we stated that the four cardinal requirements of liability for a crime are as follows: (1) an act, (2) compliance with the definitional elements, (3) unlawfulness and (4) culpability.

In this study unit we will discuss the first of these requirements and related topics. In legal literature, the requirement of an act that corresponds with the definition of the proscription is often referred to by the technical expression *actus reus*.

3.2 INTRODUCTION

Once it is clear that the type of crime with which X is charged is recognised in our law (in other words, once it is clear that the principle of legality has been complied with), the first requirement for determining criminal liability is the following: there must be some **conduct** on the part of X. By “conduct”, we mean an **act** or **omission**. “Act” is sometimes referred to as “positive conduct” or “commission” (or its Latin equivalent *commissio*), and an “omission” (or its Latin equivalent *omissio*) is sometimes referred to as “negative conduct” or “failure to act”.

On the requirement of an act in general, see *Criminal Law 51–58; Case Book 22–28*.

3.3 THE ACT

3.3.1 “Conduct”, “act” and “omission”

From a strictly technical point of view, the term “act” does not include an “omission”. Rather, an act is the exact opposite of an omission. No general concept embraces both these terms. The two concepts differ from each other like night and day, because to do something and not to do something are exact opposites. However, we may use the word “conduct” to refer to both of them.

To be completely correct technically, we would therefore always have to speak of “an act or an omission” or of “an act or a failure to act” when referring to this first basic element of liability. Since such expressions are cumbersome, and since **the punishment of omissions is more the exception than the rule**, writers on criminal law have become accustomed to using the word “act” in a wide sense when referring to both an act and an omission – in other words, as a synonym for “conduct”. Normally this use of the word “act” in a non-technical, non-literal sense does not lead to confusion. From the context of the statement, the reader would normally be able to make out whether the writer is using the word “act” loosely as a term referring to both an act or omission, or whether he is using it in the strict, technical sense of “active conduct”.

In this study guide, the word “act” will mostly be used in its wide, non-literal sense (in other words, as referring to both a commission and an omission). This is the abbreviated way of referring to this basic element of criminal liability.

3.3.2 *Thoughts not punishable*

Merely thinking of doing something, or even a decision to do it, is not punishable. Before there can be any question of criminal liability, X must have started converting his thoughts into actions. This does not mean that only the completed crime, with all the harm already done, is punishable. As will be seen, an attempt to commit a crime is also punishable; but even then, some act is required that goes beyond a mere idea or a decision to do something. Even uttering words may be sufficient to constitute a crime, as is evident from the fact that incitement and conspiracy are punishable.

3.3.3 *Act must be a human act or omission*

The act must be a **human** act; in other words, the perpetrator of the act must be a human being. In ancient societies and during the Middle Ages, animals and even inanimate objects, such as beams that 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. (For an example of the punishment of animals, consult the Bible book of Exodus, chapter 21, verse 28.) **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)).

3.3.4 *Act or conduct must be voluntary*

(*Criminal Law* 54–58; *Case Book* 22–28)

3.3.4.1 *General*

An act or an omission is punishable only if it is voluntary.

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

If conduct cannot be controlled by the will, it is involuntary, such as when a sleepwalker tramples on somebody, or an epileptic swings his hand while having an epileptic fit and hits someone in the face. 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 that **happened to X**.

The concept of a voluntary act should not be confused with the concept of a willed act. To determine whether there was an act in the criminal-law sense of the word, the question is merely whether the act was voluntary. It need not be a willed act as well. Conduct that is not willed, such as acts that a person commits negligently, may therefore also be punishable. This does not mean that a person's will has no significance in criminal law; whether he directed his will towards a certain end is indeed of the greatest importance, but this is taken into consideration only when determining whether the requirement of culpability (and, more particularly, culpability in the form of intention) has been complied with.

From what has been said above, you will note that the concept of an "act" has a different, and more technical, meaning for a lawyer than for a layman. The layman may regard the muscular contractions of a sleepwalker or an epileptic as an "act", but a jurist or lawyer will not take this view, since such contractions do not constitute voluntary conduct.

3.3.4.2 Factors that exclude the voluntariness of the act

The following factors result in the conduct's not being regarded as voluntary in the eyes of the law and, therefore, not qualifying as acts in the criminal-law sense of the word.

a Absolute force

The voluntary nature of an act may first be excluded by absolute force (*vis absoluta*) (*Hercules* 1954 (3) SA 826 (A) 831 (G)). The following is an example of absolute force:

X is slicing an orange with his pocketknife. Z, who is much bigger and stronger than X, grabs X's hand that is holding the knife and presses it, with the blade pointing downward, into Y's chest. Y dies of the knife-wound. X, with his weaker physique, would have been unable to defend himself, even if he had tried. X performed no act. It was Z who performed the act.



Involuntary conduct – absolute force. Z, who is much bigger and stronger than X, grabs X's hand in which she is holding a knife, and presses it, with the blade pointing downward, into Y's chest, resulting in Y's death. X, who is physically much weaker than Z, would have been unable to prevent this, even if she had tried. Does X commit murder or culpable homicide? No, because there is no voluntary conduct on her part.

This situation must be distinguished from one involving relative force (*vis compulsiva*), where X is indeed in a position to refrain from committing the harmful act, but is confronted with the prospect of suffering some harm or wrong if he does not commit it. The following is an example of relative force:

Z orders X to shoot and kill Y, and threatens to kill X himself if he refuses to comply with the order. If X then shoots Y, there is indeed an act, but X may escape liability on the ground that his conduct was justified by necessity.

(The facts in *Goliath* 1972 (3) SA 1 (A) and *Peterson* 1980 (1) SA 938 (A) were materially similar to those given in the above example of relative force. *Goliath's* case will be discussed below, under the ground of justification known as necessity.)

The essential difference between absolute and relative force lies in the fact that absolute force excludes X's ability to subject his bodily movements to his will or intellect, whereas this ability is left intact in cases of relative force. Relative force is therefore aimed at influencing X to behave in a certain way, although it remains possible for him to behave differently.

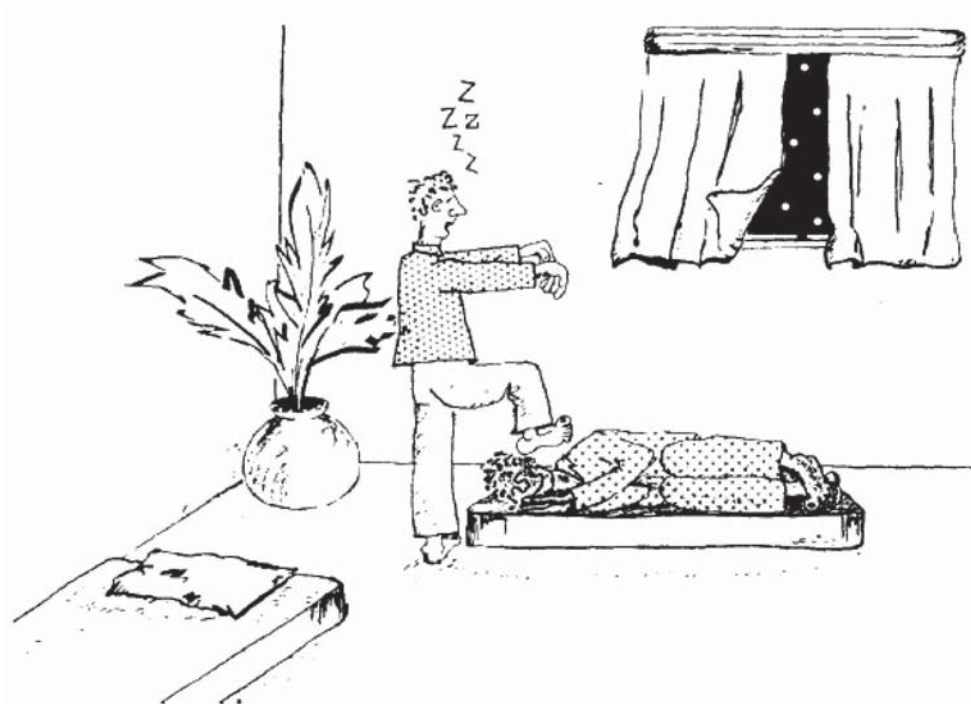
b Natural forces

The voluntary nature of an act may, in the second place, be excluded if a person is propelled by natural forces, thereby causing others damage. If a hurricane blows X through Y's shop-window, X has committed no act for which he may be punished.

c Automatism

i Meaning of “automatism”

The third – and in practice, the most important – instance in which the law does not regard the conduct as voluntary is where a person behaves in a “mechanical” fashion, such as in the following instances: reflex movements such as heart palpitations or a sneezing fit; somnambulism; muscular movements such as an arm movement of a person who is asleep, unconscious, hypnotised or having a nightmare; an epileptic fit; or a so-called blackout. These types of behaviour are often referred to as cases of “automatism”, since the muscular movements are more reminiscent of the mechanical behaviour of an automaton than of the responsible conduct of a human being whose bodily movements can be controlled by his will.



Involuntary conduct – automatism. While walking in his sleep, X tramples on Y’s head. Does X commit assault? No, because there has been no voluntary conduct on his part.

The following are examples (from our case law) of involuntary behaviour in the form of automatism.



- In *Mkize* 1959 (2) SA 260 (N), X stabbed and killed Y with a knife while he (X) was having an epileptic fit and, according to the court, acted “as a result of blind reflex activity”. He was acquitted on a charge of murder.
- In *Du Plessis* 1950 (1) SA 297 (O), X was charged with driving a motorcar negligently, thereby injuring a pedestrian. He was 72 years old and, according to medical evidence (which the court accepted), at the time of the accident, he experienced a “mental black-out” as a result of low blood pressure. He was found not guilty.

ii “Sane” and “insane automatism”

The courts often use the expressions “sane automatism” and “insane automatism”. The meaning of these expressions are as follows:

“**Sane automatism**” refers to cases in which X relies on the defence that there was **no voluntary act** on his part because he momentarily acted “like an automaton”. This is the defence discussed above. X does not rely on mental illness (“insanity”) as a defence. (We will discuss the latter defence in a later study unit.)

“**Insane automatism**” refers to cases in which X relies on the **defence of mental illness** (“insanity”) – a defence that we will discuss in a later study unit. In other words, he does not rely on the defence of absence of a voluntary act. Here, it is not a matter of the defence of “automatism” discussed above. The expression “insane automatism” is actually misleading, because it erroneously creates the impression that it involves the defence of automatism, whereas, in fact, it is a completely different defence, namely that of mental illness. (In the latest case law, there are indications that the courts may be moving away from the use of this misleading expression.)

The difference between “sane” and “insane automatism” is important for the following two practical reasons:

The **first difference** relates to **onus of proof**.

- If X relies on the defence of **sane automatism**, the **onus of proving** that the act was performed voluntarily **rests on the state** (*Trickett* 1973 (3) SA 526 (T) 537).
- If, on the other hand, X raises the defence of **insane automatism** (i.e. the defence of mental illness), the **onus of proving** his mental illness **rests upon X**, and not on the state. (This will become clearer in the later discussion of the defence of mental illness.)

The **second difference** relates to the eventual **outcome of the case**, namely whether X will leave the court as a free person.

- A successful defence of **sane automatism** results in **X’s leaving the court a free person**, as he is deemed not to have acted.
- A successful defence of **insane automatism**, on the other hand, results in the court dealing with X in accordance with the relevant provisions of the Criminal Procedure Act that address the orders that a court can make after finding that X was mentally ill at the time of the commission of the crime. Although there are different types of orders that a court may make, in practice it mostly makes an order that X be detained in a psychiatric hospital for a certain period, which results in **X’s losing his freedom** – in other words, he does not leave the court as a free person.

It may sometimes be very difficult to decide whether, in a given case, you are dealing with sane or insane automatism. If this question arises during

a trial, a court will have to hear expert evidence and decide the issue on the basis of such evidence.



Read the following judgment in the *Case Book: Henry* 1999 (1) SACR 13 (SCA).

iii Defence does not succeed easily

It would be incorrect to infer from the above discussion that it is easy for an accused to succeed with a defence of automatism. Rather, the opposite is the case: the attitude of a court towards a defence of automatism is usually one of great circumspection. An accused who has no other defence is likely to resort to this one in a last attempt to try and escape the consequences of his action. Even where “sane automatism” is pleaded, and the onus is on the state, X must provide a basis for his defence, for example by calling medical or other expert evidence that may create doubt about the voluntary nature of the act (*Henry* 1999 (1) SACR 13 (SCA)).

iv Antecedent liability

Note the following qualification of the rule that muscular or bodily movements performed in a condition of automatism do not result in criminal liability: if X knows that he suffers epileptic fits or that, because of some illness or infirmity, he may suffer a blackout, but nevertheless proceeds to drive a motorcar, hoping that these conditions will not occur while he is sitting behind the steering wheel, but they nevertheless do occur, he cannot rely on the defence of automatism. In these circumstances, he can be held criminally liable for certain crimes that require culpability in the form of negligence, such as negligent driving or culpable homicide. His voluntary act is then performed when he proceeds to drive the car while still conscious. We describe this type of situation as “antecedent liability”.

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.

ACTIVITY

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 blackout. In his state of unconsciousness, he falls on the lever that 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?

FEEDBACK

You would rely on the decision in *Victor* 1943 TPD 77, arguing that 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 that set in motion a series of events that culminated in the accident.

3.4 OMISSIONS

(*Criminal Law* 58–62; *Case Book* 28–31)

We have explained above that the word “act”, when used in criminal law, bears a technical meaning in that it can refer to both positive behaviour (*commissio*) and a failure to act positively – that is, an omission (*omissio*). We will now proceed to discuss liability for omissions.

3.4.1 *Legal duty to act positively*



3.4.1.1 *General rule*

Read the following judgment in the *Case Book*: *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

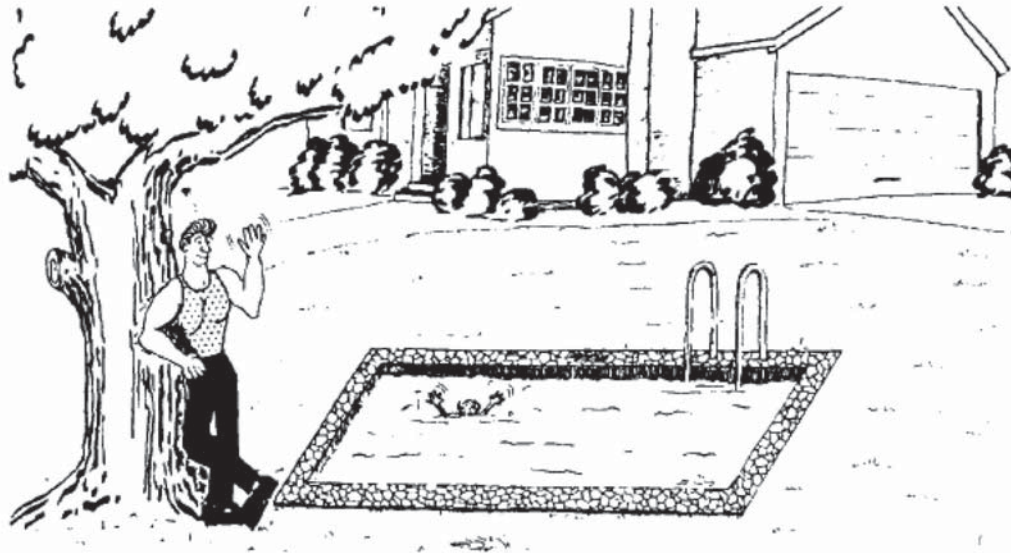
An omission is punishable only **if there is a legal duty upon X to act positively**. A moral duty is not the same as a legal one. When is there a legal duty to act positively?

The general rule is that **there is a legal duty upon X to act positively if the legal convictions of the community require him to do so**. This was decided in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B.

Let's consider the following example:

X, a strong and healthy adult male, is standing next to a shallow pond in which Y, a child, is drowning. X fails to rescue Y. (Assume that X is neither Y's father, nor guardian, nor a lifesaver on duty.) X could have saved Y's life merely by stretching out his arm to Y and pulling him out of the water, but he failed to do this. Can X be held criminally liable for Y's death on the ground of his omission? Although there has not yet been, as far as we are aware, a

reported decision in which our courts have given a specific ruling on the question that arises in this specific set of facts, we submit that in such a set of facts, X indeed has a legal duty to act positively, since the legal convictions of the community require X to act positively in these circumstances.



3.4.1.2 *Legal duty: specific instances*

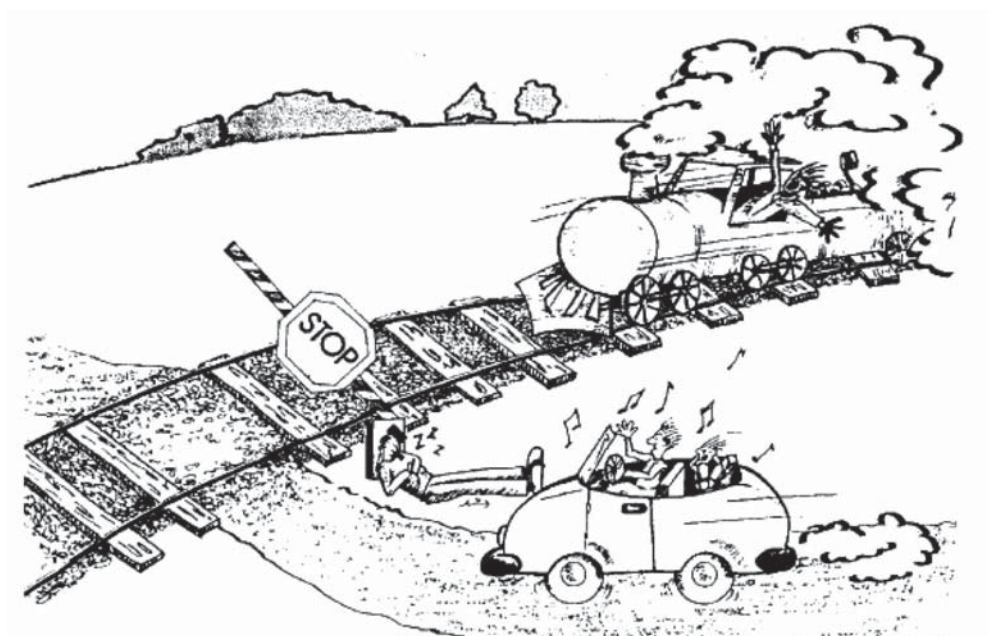
The general rule set out above, in terms of which we should consider the legal convictions of the community, is relatively vague and, therefore, not always easy to apply in practice. In legal practice, a number of specific instances are generally recognised in which a legal duty is imposed upon X to act positively. These instances do not embody a principle that is contrary to the general rule set out above. Most of them may, in fact, be regarded merely as specific applications of the general rule. They are instances encountered relatively often in practice and which have crystallised as easily recognisable applications of the general rule set out above, namely that there is a legal duty to act positively if the legal convictions of the community require that there be such a duty.

These specific instances are the following:

- (1) A **statute** may impose a duty on somebody to act positively, for example to complete an annual income-tax return, or not to leave the scene of a car accident, but to render assistance to the injured and to report the accident to the police (s 61 of the National Road Traffic Act 93 of 1996).

Recently, the state has imposed several legal duties on individuals and institutions to report on persons who commit crimes. For example, there is a duty on a person who knows that the offence of corruption has been committed to report such knowledge to the police (s 20 of the Prevention and Combating of Corrupt Activities Act 12 of 2004). The failure by an individual or accountable institution to report knowledge of the commission of certain financial crimes is also made punishable (in terms of various provisions of the Financial Intelligence Centre Act 2001).

- (2) A legal duty may arise by virtue of the provisions of the **common law**. (Remember: "common law" means those rules of law that are not contained in legislation.) Example: According to the provisions of the common law dealing with the crime of high treason, a duty is imposed on every person who owes an allegiance to the Republic and who discovers that an act of high treason is being committed or planned, to reveal this fact as soon as possible to the police. The mere (intentional) omission to do this is equivalent to an act of high treason.
- (3) The duty may arise from an **agreement**. In an English case, *Pitwood* (1902) 19 TLR 37, the facts were that X and a railway concern had agreed that for remuneration, X would close a gate every time a train went over a crossing. On one occasion he omitted to do so and, in this way, caused an accident, for which he was held liable.



- (4) Where a person **accepts responsibility for the control of a dangerous or potentially dangerous object**, a duty arises to control it properly. In *Fernandez* 1966 (2) SA 259 (A), X kept a baboon and failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died. X was convicted of culpable homicide.
- (5) 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 (2) SACR 237 (E), 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 wellbeing. By omitting to prevent the assaults, she rendered herself guilty of assault upon Y. (Z was also convicted of the assault upon Y.)
- (6) 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 a positive act that created the duty to act positively).

- (7) A duty may sometimes arise by virtue of the fact that a person is the incumbent of 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. In *Gaba* 1981 (3) SA 745 (O), X was one of a team of policemen who were trying to trace a certain dangerous criminal called "Godfather". Other members of the investigation team had arrested a suspect and questioned him in X's presence with a view to ascertaining his identity. X knew that the suspect was in fact "Godfather", but intentionally refrained from informing his fellow investigation team members accordingly. Because of this omission, he was convicted of attempting to defeat or obstruct the course of justice. 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.
- (8) A legal duty may also arise by virtue of an **order of court**. Example: X and Y are granted a divorce, and the court that grants the divorce orders X to pay maintenance to Y in order to support her and the children born of their marriage. If X omits to pay the maintenance, he commits a crime.



STUDY HINT

It ought to be reasonably easy to study the **specific instances** in which a person has a legal duty to act positively. Below is a table containing eight rows, representing the eight specific instances of a legal duty to act positively. The first column contains the number. In the second column, you should write the word or expression that describes the specific instance of a legal duty. In the third column, you should write a few words (including, where applicable, the names of cases) that describe the application of the relevant legal duty. To assist you, we have filled in the particulars of the first three specific instances. You must fill in the particulars of the remaining five instances by yourself.

1	statute	income tax or motor accident
2	common law	high treason – report to police
3	agreement	railway crossing – <i>Pittwood</i>
4		
5		
6		
7		
8		

3.4.1.3 *The state's duty to protect citizens from violent crime*

The Constitutional Court and the Supreme Court of Appeal, in a number of civil cases dealing with delictual liability, ruled that a duty rests on the state, acting through the police, to protect citizens against violent crime.

The watershed case was *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC). In that case, the Constitutional Court recognised the existence of such a legal duty on the police in terms of the court's powers to develop the common law according to the values, norms and rights of citizens enshrined in the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The background to this case was briefly that C was brutally assaulted by a man (X) who had several previous convictions for crimes of violence. This occurred while X was out on bail, awaiting trial on charges of rape and attempted murder in respect of another victim, E. C subsequently claimed damages from the state on the basis that the police and prosecuting authorities had negligently failed to protect her against being assaulted by a dangerous criminal.

In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), the Supreme Court of Appeal recognised the existence of a legal duty resting on the state to protect citizens against violent crimes in the following circumstances: The police had been aware of the fact that X had threatened to kill members of his family. However, the police failed to take the necessary steps to ensure that X be deprived of a licence to possess a firearm. X subsequently shot and injured Y, who instituted a civil claim for damages against the state on the basis of a negligent failure to act positively to protect her. The Supreme Court (at pars 12 and 20) held that while private citizens might "mind their own business" and "remain passive when the constitutional rights of other citizens are under threat", the state has a positive duty to act in protection of fundamental human rights. The majority of the court (at par 20) founded this duty on the concept of "accountability" of government in terms of the provisions of the Constitution, whereas one of the judges, Marais JA, founded the duty on the common-law principle of liability for omissions (namely, the legal convictions of the community).

As pointed out above, these were all civil cases. It is nevertheless also important to take note of these cases for the purpose of criminal liability based upon an omission. The test for determining whether a legal duty to act positively exists is determined by the legal convictions of the community in both civil and criminal cases. (See *Minister van Polisie v Ewels supra.*) According to Burchell, criminal liability of a state official based on a legal duty to act positively may, in view of the trend established by the Constitutional Court and the Supreme Court of Appeal in these civil cases, in the future be recognised in similar cases. It is at least theoretically possible that a state official (e.g. a policeman) who had failed to act positively to protect a person from violent crime may be convicted of, for instance, the crime of assault or even culpable homicide, provided that he had acted with the required culpability (intention or negligence). (For a further discussion of this topic, see Burchell J *Principles of Criminal Law* (2005) 196-207.) We could also argue that certain cases may be brought under the specific instances already recognised in criminal law,

namely where there is a **protective relationship** or **control over a dangerous object**. (Review the discussion in 3.4.1.2 above.)

ACTIVITY

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.

FEEDBACK

You may argue that this is an instance where there was a legal duty upon X to take positive action. More specifically, this duty arose from a **previous positive act**. In law, this is known as an *omissio per commissionem*. See specific instance (6) listed above. The duty may also arise from the fact that X stood in a protective relationship to Y (specific instance 5 listed above).

3.4.2 *The defence of impossibility*

(*Criminal Law 60–62; Case Book 31–33*)

As in the case of active conduct, 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. After all, the law cannot expect somebody who is lame to come to the aid of a drowning person, or somebody who is bound in chains to extinguish a fire. If X is summoned to appear as a witness at the same time on the same day in both Pretoria and Cape Town, it is impossible for him to be present at both places simultaneously. When charged with contempt of court because of his failure to appear at one of these places, he may plead impossibility as a defence. In short, the objective impossibility of discharging a legal duty is always a defence when the form of conduct with which X is charged is an omission.

The requirements for successfully relying on the defence of impossibility are the following:

(1) The legal provision that is infringed must place a positive duty on X

The defence cannot be raised in cases where a mere prohibition, that is to say, a rule that places a "negative duty" on someone, is infringed. The result of this requirement is that the defence of impossibility can be pleaded only if the conduct that forms the basis of the charge consists in an **omission**. Where there is a simple prohibition, X will merely have to refrain from committing

the prohibited act, which he is not compelled to perform. He should therefore not be allowed to plead that it was impossible for him **not** to perform the act.

This defence may, for example, be pleaded successfully if X has failed to comply with a legal provision that placed a positive duty on him to attend a meeting or to report for military duty (*Jetha* 1929 NPD 91; *Mostert* 1915 CPD 226). Note, however, the following case in which the court refused to uphold a plea of impossibility because the law did not impose a positive duty on X to perform the act concerned:

In *Canestra* 1951 (2) SA 317 (A), X was charged with contravening a regulation that prohibited the catching of undersized fish. There was evidence that if a net with a larger mesh had been used, the undersized fish would have escaped, but this would also have allowed some of the most important kinds of fish to escape. Impossibility was rejected as a defence, since the regulations did not oblige anyone to pursue the occupation of fishing.

- (2) It must be objectively impossible for X to comply with the relevant legal provision

It must have been 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. This implies that it must have been **absolutely** (and **not merely relatively**) impossible to comply with the law. If X were imprisoned for a certain period, he could not invoke impossibility as a defence if he were charged with failure to pay tax, if it had been possible for him to arrange for somebody else to pay it on his behalf (*Hoko* 1941 SR 211 212). The criterion to apply in order to determine whether an act is objectively impossible is whether it is possible according to the convictions of reasonable people in society. The question is therefore not so much whether an act is physically possible or not.

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 (*Leeuw* 1975 (1) SA 439 (0)).

- (3) X must not himself be responsible for the situation of impossibility – *Close Settlement Corporation* 1922 AD 194

ACTIVITY

A municipal by-law stipulates that no homeowner 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 critically the merits of his defence.

FEEDBACK

X's defence has no merit. The defence of impossibility cannot be raised in cases where certain conduct is prohibited by law. The defence may be pleaded only if the conduct that forms the basis of the charge consists in an omission. In other words, if the provision stipulates "You may not ...", the defence of impossibility cannot be raised. Conversely, if it stipulates "You must ..." the defence may be raised. Students often have difficulty in understanding this. 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. Also read the leading case in this regard, namely the decision in *Leeuw*.

GLOSSARY

<i>actus reus</i>	an act that corresponds to the definitional elements and is unlawful
<i>commissio</i>	commission, that is, active conduct
<i>omissio</i>	omission, that is, passive conduct or a failure to act positively
<i>vis absoluta</i>	absolute compulsion
<i>vis compulsiva</i>	relative compulsion

SUMMARY

- (1) The first general requirement of criminal liability is that there must be **conduct (act or omission)** on the part of X.
- (2) Conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.
- (3) Factors that exclude the voluntary nature of an act are absolute force, natural forces and automatism.
- (4) "Acts" committed in a situation of automatism are committed in a mechanical fashion, such as in the following instances: reflex movements, sleepwalking, muscular movements such as an arm movement while a person is asleep, and when a person suffers an epileptic fit.
- (5) The examples mentioned in (4) are all cases of sane automatism, where a sane person momentarily behaves involuntarily. Sane automatism should be distinguished from insane automatism. In the case of insane automatism, the above conditions are the result of mental illness or defect. In cases of insane automatism, X is dealt with in accordance with the rules relating to mental illness.

- (6) An omission is punishable only 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 community require X to do so.
- (7) In practice, a number of specific instances are recognised in which there is a legal duty to act positively. There are eight such instances. See the list in 3.4.1.2 above.
- (8) An omission is voluntary if it is **possible** for X to perform the positive act. If it is not possible for him to perform the act, he may rely on the defence of impossibility.
- (9) For the defence of impossibility to be successful,
 - (a) the legal provision that is infringed must place a positive duty on X
 - (b) it must be objectively impossible for X to comply with the relevant legal provision
 - (c) X must not himself be the cause of the impossibility

TEST YOURSELF

- (1) Define the concept of an “act” and provide practical examples of an act in the legal sense of the word.
- (2) What is the difference between the meaning of the word “act”, as this word is used in everyday parlance, and the technical meaning it bears in criminal law?
- (3) Briefly explain the meaning of the requirement that the act must be a human act.
- (4) Fill in the missing words: Conduct is voluntary if X is capable of subjecting his to his ... or ...
- (5) Distinguish between the concepts “voluntary” and “willed”.
- (6) Name three factors that exclude the voluntary nature of an act.
- (7) Explain the meaning of “absolute force”, as well as the difference between this type of force and relative force.
- (8) Give examples of muscular movements or “events” that take place in a state of automatism.
- (9) Give three examples of automatism from our case law.
- (10) X causes an accident while suffering an epileptic fit. The evidence reveals that he has been having epileptic fits for the past thirteen years and that he had insufficient grounds for assuming that he would not suffer one again on the particular day. Could X be convicted of negligent driving? Give reasons for your answer.
- (11) Sort the following phrases under the headings “Sane automatism” and “Insane automatism” and write them in the correct columns.
 - (a) State of automatism is due to mental illness or defect.
 - (b) A sane person momentarily acts involuntarily.
 - (c) Onus is on the state to prove that act was voluntary.
 - (d) Onus is on the accused to prove that he suffered from a mental illness or defect.
 - (e) X is acquitted because he is deemed not to have acted.

- (f) In terms of section 78(6) of the Criminal Procedure Act 51 of 1977, X is found not guilty, but he loses his freedom in that he is referred to a mental hospital.

Sane automatism**Insane automatism**

Sane automatism	Insane automatism
.....
.....
.....
.....
.....
.....

- (12) List and discuss the eight instances in which it is assumed in practice that a person has a legal duty to act positively.
- (13) The law cannot expect somebody to do the impossible. Name the three requirements for the defence of impossibility to succeed. Refer to examples and the case law.

STUDY UNIT 4

The definitional elements and causation



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- isolate the particular requirements that apply to a certain type of crime (in other words, the “definitional elements” of a specific crime)
- deduce from the definitional elements of a specific crime whether that crime is a materially defined crime or a formally defined crime
- determine whether a certain act is the cause of a certain proscribed result; more particularly, you should be able to determine whether a certain act is
 - a factual cause of a result, by applying the *conditio sine qua non* theory
 - a legal cause of a result, by applying the various theories of legal causation

4.1 BACKGROUND

In the previous study unit we discussed the first element of criminal liability, namely the requirement of an act. In this study unit we will discuss the second element of criminal liability. In terms of this element, the act or conduct must comply with the definitional elements of the particular crime with which X is charged. We will first consider the meaning of the concept “definitional elements”. Thereafter, we will discuss a very important requirement that forms part of the definitional elements of certain (**but not all**) crimes, namely the causation requirement.

4.2 THE DEFINITIONAL ELEMENTS

(*Criminal Law* 71–94)

The definitional elements signify the concise description of the requirements set by the law for liability for a specific type of crime. In this context, “requirements” does not mean the general requirements applying to all crimes (e.g. voluntary conduct, unlawfulness, criminal capacity and culpability), but the particular requirements applying only to a certain type of crime. The definitional elements of a crime contain the model or formula that enables both an ordinary person and a court to know which particular requirements apply to a certain type of crime. Snyman uses the expression “definition of the proscription” as a synonym for “definitional elements”, but we prefer the expression “definitional elements”.

We can also explain the meaning of “definitional elements” as follows: all legal provisions creating crimes may be reduced to the following simple formula: “Whoever does X commits a crime.” In this formula, X is nothing other than the definitional elements of the particular crime.

The definitional elements always contain a description of the **kind of act** that is prohibited (e.g. “possession”, “sexual penetration”, “the making of a declaration” or “the causing of a certain state of affairs”). The word “act”, as used in criminal law, always means “the act set out in the definitional elements”.

However, the definitional elements are not limited to merely a description of the type of act required. After all, the law does not prohibit possession, sexual penetration or the making of a declaration as such. It prohibits the possession of **particular, circumscribed articles** (such as pornographic photographs or dagga), or sexual penetration between people who, **on account of consanguinity, may not marry each other** (incest), or the making of a statement **that is false and made under oath in the course of a judicial process** (perjury). Thus the definitional elements contain not merely a description of the kind of act (e.g. possession, sexual penetration) that is prohibited, but also a description of the **circumstances** in which the act must take place, such as the particular **way** in which the act must be committed (e.g. “forcibly”, in robbery); the **characteristics of the person** committing the act (e.g. “a person who owes allegiance”, in high treason); the **nature of the object** in respect of which the act must be committed (e.g. possession of “dagga” or “movable corporeal property”, in theft); sometimes a particular **place** where the act has to be committed (e.g. parking “on a yellow line”); or a particular **time** when or during which the act has to be committed (e.g. “on a Sunday”).

In the second Criminal Law module, the most important specific crimes will be discussed. In that part of the study, we will discuss the definitional elements of each separate crime in some detail.



Don't confuse the “definitional elements” with “the definition of the crime”. The definition of the crime contains the definitional elements as well as a reference to the requirements of unlawfulness and culpability. The definitional elements, on the other hand, do not contain a reference to the requirements of unlawfulness and culpability. The definitional elements of murder are “to cause somebody else's death”. The definition of murder is “the unlawful, intentional causing of somebody else's death”.

X's act must be a realisation or fulfilment of the definitional elements. At this stage of the enquiry, we have to ascertain whether the requirements set out in the definitional elements relating to, for example, the subject, object, time, place or method of execution of the act have been complied with.

4.3

CAUSATION

(Criminal Law 79–94; Case Book 33–60)

4.3.1 *The difference between formally- and materially-defined crimes*

Crimes may be divided into two groups according to their definitional elements, namely formally-defined crimes and materially-defined crimes. In the case of formally-defined crimes, the definitional elements proscribe a certain type of conduct (commission or omission), irrespective of what the result of the conduct is. Examples of crimes falling into this category are perjury and the possession of drugs.

In the case of materially-defined crimes, on the other hand, the definitional elements do not proscribe a specific conduct, but rather any conduct that **causes** a specific condition. Examples of this type of crime are murder, culpable homicide and arson.

Let's consider the example of murder. Here, the act consists in causing a certain condition, namely the death of another person. In principle, it does not matter whether the perpetrator (X) stabbed the victim (Y) with a knife, shot her with a revolver or poisoned her. The question is simply whether X's conduct **caused** Y's death, irrespective of what the particular conduct leading thereto was.

This category of crimes is sometimes concisely referred to as "result crimes".

Materially-defined crimes are also known as "consequence crimes".

Note that in both formally- and materially-defined crimes, there must be an act. In materially-defined crimes, the act consists of, for example, stabbing a knife into Y's chest (which causes Y's death), or firing a shot at her, which causes her death.

4.3.2 *The issue of causation*

When dealing with materially-defined crimes, the question that always arises is whether there is a causal link (or nexus) between X's conduct and the prohibited result (for example, Y's death).



Please note the spelling of the word "**causal**" (as in "causal link"). Many students regularly misspell it, by writing "**casual** link" instead of "**causal** link". (The word "causal" is derived from "cause".) If you write "casual" instead of "causal" in the examination, we will penalise you!

In the vast majority of cases of materially-defined crimes that come before the courts, determining whether X's act was the cause of the prohibited condition does not present any problems. If X shoots Y in the head with a revolver or stabs her in the heart with a knife, and Y dies almost immediately, and if nothing unusual (such as a flash of lightning) that might be shown to have occasioned the death occurs, nobody will doubt that X has caused Y's death. However, the course of events might sometimes take a strange turn, in which case it might become difficult to decide whether X's act was the **cause** of Y's death.

Consider, for example, the following sets of facts:

- (1) X, wishing to kill Y, shoots at her, but misses. In an attempt to escape X, Y runs into a building. However, shortly before she runs into the building, Z, who has nothing to do with X, planted a bomb inside the building because she bears a grudge against the owner of the building. The bomb explodes, killing Y. Is X's act the cause of Y's death? (Shouldn't Z's act rather be regarded as the cause?)

- (2) X assaults Y and breaks her arm. Z, who has witnessed the assault, decides to help Y by taking her to hospital for treatment. She helps Y get onto the back of her truck and drives off. However, Z drives recklessly and Y becomes so afraid that Z may have an accident that she jumps off the back of the moving truck. In jumping off the truck, she bumps her head against a large stone, as a result of which she dies. Who has caused Y's death – X, Z or perhaps even Y, through her own conduct?
- (3) Following X's assault upon Y, Y dies after the ambulance transporting her to the hospital crashes into a tree, or after she is struck by lightning on the spot where she is lying after the assault, or because she suffers from bipolar disorder and the assault induces her to commit suicide. In such circumstances, could we still allege that X has caused Y's death?

Determining causation in situations such as those described immediately above is one of the most vexed questions in criminal law. However, the courts have developed certain basic principles concerning this matter, which they regularly apply. In order to limit the following discussion, the question of causation will be discussed only in the context of the crimes of murder and culpable homicide, since problems in connection with causation in criminal law mostly arise in the context of these crimes.

Since the examples and cases that will be discussed below deal with killing, it is necessary to emphasise, right at the outset, that "to cause the death" actually means to cause death at the time when, and in the circumstances in which, it took place in the particular case. All people die at some time; therefore, when trying to establish whether the act caused the death, the question actually amounts to whether the act **precipitated** the death. Therefore, the fact that Y suffered from an incurable disease from which she would soon have died in any event does not afford X a defence if she stabbed and killed Y only a few days (or even hours) before she would, in any event, have died. (See *Makali* 1950 (1) SA 340 (N); *Hartmann* 1975 (3) SA 532 (C) 534.)

4.3.3 *The principles to be applied in determining causation*

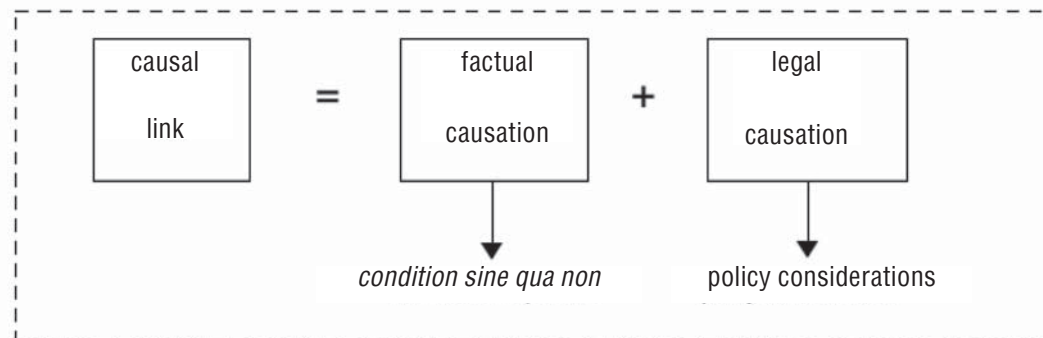
4.3.3.1 *Basic principle*

The basic principle relating to causation applied by the courts is the following: In order to find that there is a causal link between X's act and the prohibited condition (hereafter referred to as Y's death) (that is, in order to find that X's act caused Y's death), two requirements must be met: first, it must be clear that X's act was the **factual** cause of Y's death; secondly, it must be clear that X's act was 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, that is, if there is "but-for causation" or a "but-for" link between X's act and Y's death. (We will explain this in a moment.) If this requirement has been met, we may speak of **factual causation**.

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 be deemed the cause of Y's death. If this requirement has been met, we may speak of **legal causation**.

Briefly, the basic formula may be expressed as follows:



We will now proceed to explain the above concepts in more detail.

4.3.3.2 Factual causation – *conditio sine qua non*

X's act is the factual cause of Y's death if it is a *conditio sine qua non* for Y's death. (The word "*conditio*" is pronounced "kon-dee-tee-ho", not "kon-dee-show".) *Conditio sine qua non* literally means "a condition or antecedent (*conditio*) without (*sine*) which (*qua*) not (*non*)"; in other words, an antecedent (act or occurrence) without which the prohibited situation would **not** have materialised. A convenient English equivalent of this concept is but-for causation (or, more precisely, but-for not causation). For an act or event to be a but-for cause, we must be able to say that **but for** the occurrence of the act or event, the prohibited condition would **not** have happened.

Another way of stating the same test (i.e. the *conditio sine qua non* test) is by asking what would have happened if X's act had not occurred. If it is clear that in such a case the result (Y's death) would not have materialised, then X's act is a factual cause of Y's death.

Definition of *conditio sine qua non* theory:

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.

Therefore, in applying this formula, a court must, for a moment, assume that the act in question had not occurred ("think away" the act) and then consider whether the result would nevertheless have occurred.

In order to determine whether you understand the application of this theory, we suggest that you turn back to the discussion under 4.3.2 above and consider whether X's act in the three sets of facts described under that subheading can be regarded as the *conditio sine qua non*, or factual cause, of Y's death. What is your answer? If your answer is "no", you do not understand the application of this theory. The correct answer is that X's act in all three examples qualifies as the factual cause of Y's death! We advise you to make sure that you fully

understand the application of this theory before you read any further. At a later stage in this study unit, we will consider these examples once again.

That the *conditio sine qua non* test must be applied in order to determine factual causation is clearly borne out by the case law. See, for example, *Makali* 1950 (1) SA 340 (N), *Mokoena* 1979 (1) PH H 13 (A) and *Minister van Polisie v Skosana* 1977 (1) SA 31 (A) 44.

In *Daniëls* 1983 (3) SA 275 (A), the Appeal Court decided that factual causation is determined on the basis of the *conditio sine qua non* theory. This decision (which you have to study in the *Case Book* for examination purposes), will be discussed later in this study unit.

If we apply only the *conditio sine qua non* test (or theory), we could identify a seemingly vast number of events as causes of Y's death. If X stabs Y with a knife and kills her, then it is not only the stabbing that is *conditio sine qua non* for Y's death, but also, for example, the manufacture of the knife, its sharpening and its sale by the shop owner. Even negative factors or antecedents will constitute causes of Y's death, for example the fact that Y did not evade X's blow, or the fact that Z neglected to warn Y of X's evil intention. We could even allege that if it were not for X's parents, X would not have existed and, therefore, the parents are also a cause of Y's death. The same could be said about X's grandparents, and in this vein, we could go back all the way to Adam and Eve. (Indeed, some commentators have cynically referred to the *conditio sine qua non* formula as "Adam and Eve causation".)

4.3.3.3 Legal causation – general

It is exactly because of the wide scope of the *conditio sine qua non* test (i.e. the large number of factors that may be identified as a cause of Y's death in terms of this test) that it is necessary to apply a second criterion by which we may limit the wide range of possible causes of Y's death. This second criterion is usually described as the test to determine legal causation. The idea behind this second criterion is the following: When a court is called upon to decide whether X's conduct caused Y's death, the mere fact that X's conduct is a *conditio sine qua non* for Y's death is insufficient as a ground upon which to base a finding of a causal link. Other factors besides X's conduct may equally qualify as *conditiones sine qua non* for Y's death. When searching for the legal cause (or causes) of Y's death, a court eliminates those factors that, although they qualify as factual causes of Y's death, do not qualify as the cause (or causes) of Y's death according to the criteria for legal causation (which will be set out hereunder).

In the legal literature, certain specific tests to determine legal causation have evolved, such as those that determine the "**proximate cause**", the "**adequate cause**", or whether an event constituted a "*novus actus interveniens*". We will consider these more specific criteria for legal causation in a short while. At the outset, however, it should be emphasised that, generally, the courts are reluctant to choose one of these specific tests as a yardstick to be employed in all cases in which legal causation has to be determined, to the exclusion of all other specific tests. Sometimes they rely on one, and sometimes on another of these tests, according to whether a particular test would, in their opinion, result in an equitable solution. Sometimes they may even base a

finding of legal causation on considerations outside these more specific tests. Before elaborating further on this open-ended approach to legal causation by the courts, we will first consider the different specific criteria that have been formulated to determine legal causation.

4.3.3.4 Theories of legal causation

The three most important specific tests or theories to determine legal causation, which we will briefly discuss below, are the following: the **individualisation theories**, the **theory of adequate causation** and the *novus actus interveniens* theory.

a The individualisation theories

Definition of the individualisation theories:

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

The objection to this approach is that two or more conditions are often operative in equal measure, for example where X bribes Z to commit a murder, which Z commits while W stands guard in order to warn Z, should the police arrive. In a situation such as this, where three different people have acted, we cannot regard the act of one as the **only** cause of death, to the exclusion of the acts of the other two. Today the idea behind this test finds little support, and in *Daniëls* 1983 (3) SA 275 (A), the majority of the Appeal Court judges who discussed the question of causation refused to accept that an act can be the legal cause of a situation only if it can be described as the "proximate cause" (see 314C, 331A and 333G of the report).

b The theory of adequate causation

Because of the vagueness and ineffectiveness of the individualisation theories, many writers have refused to attempt to solve problems of legal causation by looking for the decisive, most effective or proximate condition. Instead, they have preferred to base a causal relationship on generalisations that may be made by an ordinary person regarding the relationship between a certain type of event and a certain type of result, and on the contrast between the normal and the abnormal course of events.

This generalisation theory (a term we use to distinguish it from the individualisation theories) is known as the **theory of adequate causation**.

Definition of the theory of adequate causation:

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. To simplify the matter further, we could aver that the act is the legal cause of the situation if it can be said that “that comes of doing such a thing”. If this test can be met, it is said that the result stands in an “adequate relationship” to the act. (In *Loubser* 1953 (2) PH H190 (W), the court applied this test.) The existence or absence of an adequate relationship can be explained as follows:

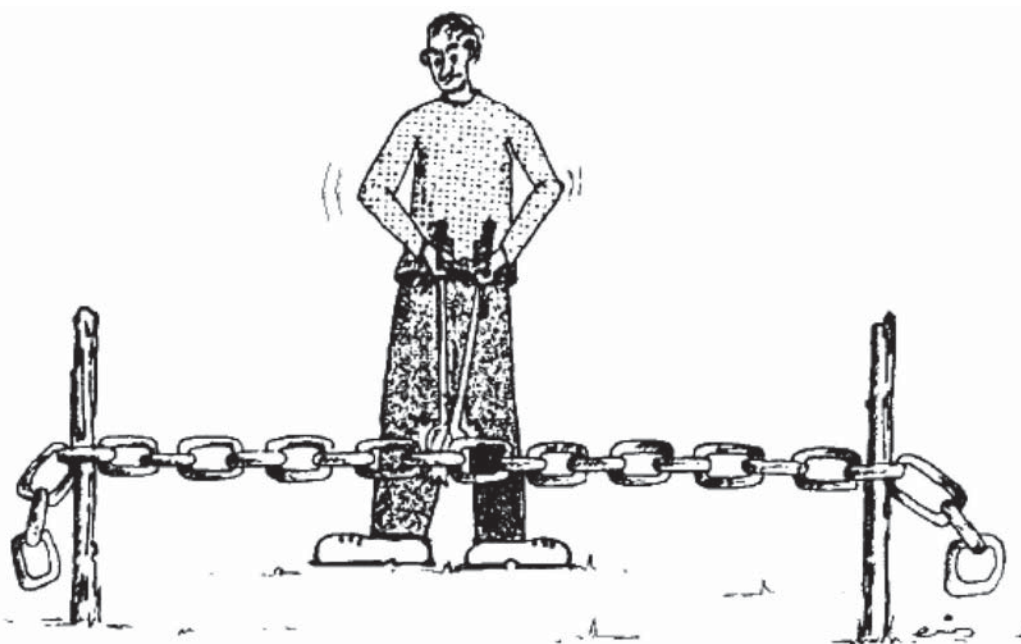
To strike a match is to perform an act that tends to cause a fire, or that, in normal circumstances, has the potential to do so. If, therefore, X strikes a match and uses the burning match to set a wooden cabin alight, we can aver, without difficulty, that her act caused the cabin to burn down. However, the question arises whether her act can be described as causing the cabin to burn down in the following circumstances: All X does is to call a dog. The dog jumps up and, in so doing, frightens a cat. The frightened cat jumps through a window of the cabin, knocking over a lit candle, which, in turn, sets the whole cabin alight. If we apply the theory of adequate causation, it is easy to conclude that in this situation X’s act was not the legal cause of the burning down of the cabin, because all that X did was to call a dog, and merely calling a dog is not an act that, according to human experience in the normal course of events, has the tendency to cause a wooden cabin to burn down.

c *Novus actus interveniens*

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, which **breaks the chain** of causation, has taken place, preventing us from regarding X’s act as the cause of Y’s death.

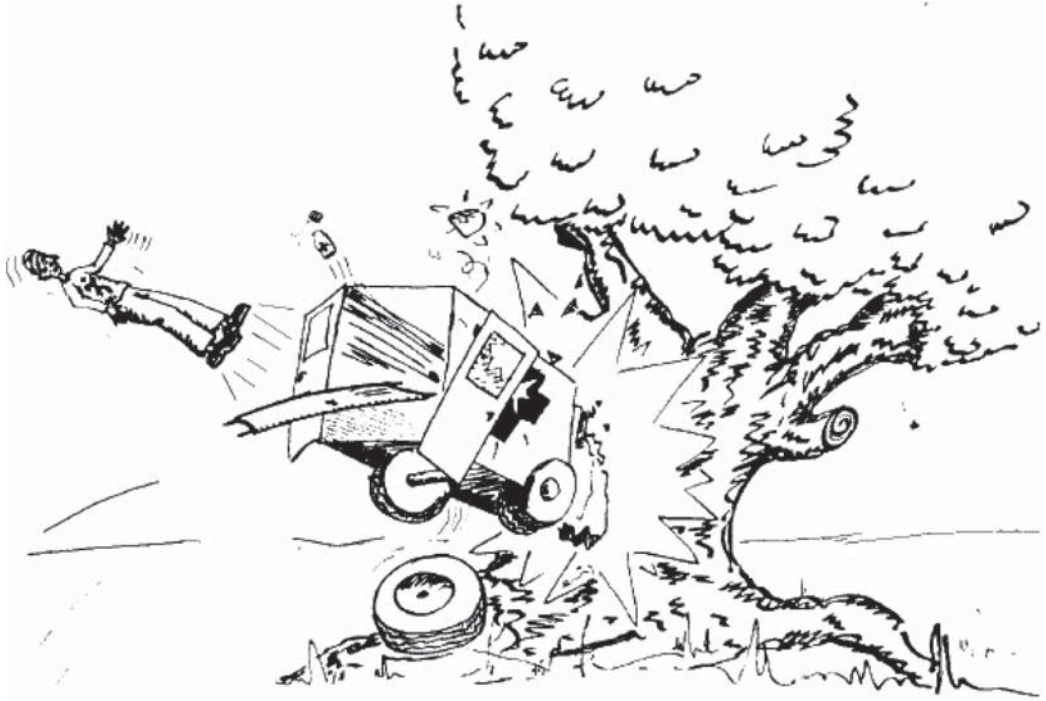
Examples:

- X administers a poison to Y, which will slowly kill her. Shortly afterwards, Z, who also bears a grudge against Y and who acts completely independently of X, shoots Y, killing her. It is then Z’s act, and not that of X, that is the cause of Y’s death.



Breaking the chain of causation

- 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 (or, alternatively, Y is fatally struck by lightning right in front of the hospital entrance). (See illustration below.)



Some authorities regard legal causation as consisting in the absence of a *novus actus interveniens*. Formulated more completely, **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** (see also *S v Counter* 2003 (1) SACR 143 (SCA)).

Unfortunately, our case law contains no precise description of the requirements with which an act must comply to qualify as a *novus actus* (or *nova causa*).

In our view, the following definition of a *novus actus interveniens* is a fair reflection of how our courts understand this concept.

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

With the above in mind, you will note that the *novus actus interveniens* test differs very slightly (if it all) from the test or theory of adequate causation. This similarity becomes even more apparent if we consider the following well-established rule: an act or an event can never qualify as a *novus actus* if X previously knew or foresaw that it might occur. If X gives Y, who suffers from bipolar disorder, a gun, and Y shoots and kills herself with it, but X previously knew or foresaw that Y might kill herself with it, X will not be

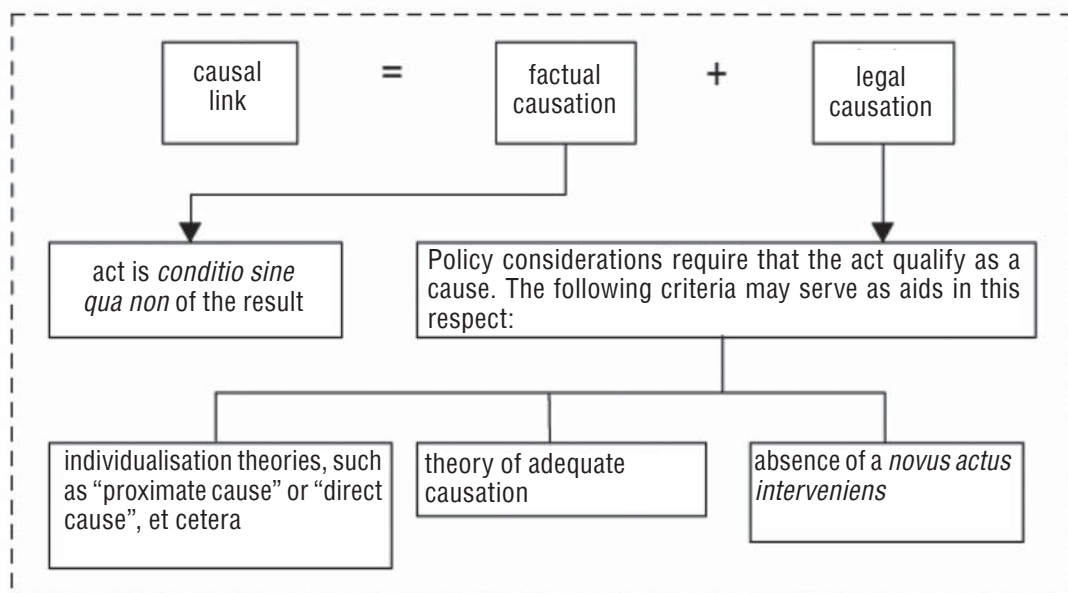
able to rely on a defence that alleges that Y's act of shooting herself was a *novus actus*.

4.3.4 The courts' approach to legal causation

The courts do not single out a specific theory of legal causation as the only correct one to be applied in all circumstances. In the leading cases of *Daniëls* 1983 (3) SA 275 (A) and *Mokgethi* 1990 (1) SA 32 (A) 40–41, the Appellate Division stated that, in deciding whether a condition that is a factual cause of the prohibited situation should also be regarded as the legal cause of that situation, a court must be guided by **policy considerations**.

The policy that the courts adopt is to strive to reach a conclusion that would not exceed the limits of what is reasonable, fair and just. In deciding what a reasonable and fair conclusion is, a court may make use of one or more of the specific theories of legal causation (such as proximate cause or *novus actus*). In fact, in most cases, the courts apply one of these theories. However, in *Mokgethi supra*, the Appellate Division held that it is wrong for a court to regard only one specific theory (e.g. proximate cause) as the correct one to be applied in every situation, thereby excluding from future consideration all the other specific theories of legal causation. A court may even base a finding of legal causation on considerations outside these specific theories.

Earlier in this study unit, we provided you with a diagram containing the basic formula or premise for determining causation. In the diagram that follows, the overall field of enquiry involved in the determination of causation is set out:



4.3.5 *Own view – theory of adequate causation preferable*

Assuming for a moment that we are not bound by the courts' open-ended approach to legal causation, we submit that of the different specific theories of legal causation, the theory of adequate causation is the best to determine legal causation. We have already pointed out the criticism of the individualisation theories, and in *Daniëls* 1983 (3) SA 275 (A), of the three judges of appeal who had to decide the issue of causation, two (Jansen JA and Van Winsen AJA) refused to accept that in our law, criminal liability is necessarily based on proximate cause (which is, perhaps, the best-known of the individualisation theories). We have also pointed out that the *novus actus* criterion does not differ essentially from the theory of adequate causation, both emphasising that a distinction should be drawn between consequences **normally to be expected** from the type of conduct in which X has engaged and consequences that we would **not** normally expect to flow from such conduct.

4.3.6 *Application of principles to stated sets of facts*

Let's now briefly apply the above-mentioned principles to the hypothetical situations described in 4.3.2 above.

In the first set of facts, X's shooting at Y was surely the factual cause of Y's death, because if we apply the *conditio sine qua non* theory, it is clear that if X did not shoot at Y, Y would not have run into the building where the bomb exploded. The next step is to ascertain whether X's act was also the legal cause of Y's death. A court would in all probability decide this question in the negative. The proximate or decisive cause of death was not X's shooting, but the explosion of the bomb planted by Z. It is also doubtful whether X's act can be described as the legal cause of Y's death in terms of the theory of adequate causation, because in the normal course of events, running into a building for safety would not result in being blown up by a bomb. The bomb explosion was an unexpected and unusual event and could, therefore, also be regarded as a *novus actus interveniens*. Accordingly, X's act would most likely not be regarded as the legal cause of Y's death. X could then, at most, be convicted of attempted murder.

In the second set of facts, X's act was also a factual cause of Y's death. A court would most likely hold that Z's reckless driving deviated from the conduct normally expected of a driver, and that it constituted a *novus actus*, so that X's assault would not be regarded as the legal cause of Y's death.

The third set of facts describes a subsequent event that qualifies as a *novus actus*, from which it follows that X's act would not be regarded as the legal cause of Y's death.

4.3.7 Examples from decisions

4.3.7.1 Assisted suicide – the *Grotjohn* decision

What will the position be if X encourages Y to commit suicide, or provides Y with the means of doing so, and Y indeed commits suicide? In this kind of situation, the last act that led to Y's death was her (Y's) own conscious and voluntary act. Does this mean that there is no causal link between X's conduct and Y's death?

Before 1970, there were a number of inconsistent decisions regarding this question, but the decision of *Grotjohn* 1970 (2) SA 355 (A) brought more clarity to the issue.

In this case, X provided his crippled wife with a loaded rifle so that she could shoot and kill herself, should she wish to do so; this she then did. X was acquitted. The state appealed to the Appellate Division on a question of law and the Appellate Division held that the mere fact that the last act causing the victim's death was the victim's own, voluntary, non-criminal act did not necessarily mean that the person handing the gun to the victim was not guilty of any crime. It would therefore be incorrect to assume that there can be no causal link in this kind of situation. If Y's final act is the realisation of the very purpose X had in mind, Y's act can never be regarded as a *novus actus* (*Hibbert* 1979 (4) SA 717 (D)).

4.3.7.2 The *Daniëls* decision

In *Daniëls* 1983 (3) SA 275 (A), X shot Y in the back with a revolver. Y fell to the ground, but was not killed. **However, he was wounded seriously enough to die if he not receive medical treatment within 30 minutes.** Shortly after Y fell to the ground, Z appeared on the scene and shot Y in the ear. X and Z had not previously agreed to shoot Y – in other words, they acted independently of each other. Z's shot was the immediate cause of Y's death and there was no doubt that there was a causal link between Z's shot and Y's death. The question was whether X also caused Y's death.

Jansen JA and Van Winsen AJA held that X's act was indeed a cause of Y's death, because it was not merely a *conditio sine qua non* of Y's death, but was also a legal cause of his death. Jansen JA applied the *conditio sine qua non* theory as follows: If X had not shot Y in the back and he (Y) had not fallen to the ground as a result of these shot wounds, Z would not have had the opportunity to shoot Y in the head, thereby wounding him fatally. X's act was therefore an indispensable condition and factual cause of Y's death.

As far as legal causation is concerned, these two judges were of the opinion that there were no policy considerations exonerating X from liability for what had resulted in accordance with his intention. Z's act of shooting Y in the ear was not a *novus actus interveniens*. It cannot be accepted that in our law, criminal liability is necessarily based on proximate cause.

However, a third judge of appeal who heard the appeal, Trengove JA, held that the shots fired by X at Y's back had not been the cause of Y's death, because of the shot in the head that hit Y thereafter. According to this judge, the shot to the head was a *novus actus interveniens* since, according to his interpretation of the evidence, the person who fired it acted completely independently of X; it was this person's act (and not that of X) that caused Y to die when he did. According to Trengove JA, X was guilty of attempted murder only. (The other two judges of appeal who heard the appeal did not deal with the question of causation since, according to their interpretation of the evidence, X and Z had previously communicated with each other and had the common purpose to murder Y. According to these two judges, Y's death had been caused by the joint conduct of X and Z.)

4.3.7.3 The *Mokgethi* decision



Read the following decision in the *Case Book: Mokgethi* 1990 (1) SA 32 (A).

In *Mokgethi* 1990 (1) SA 32 (A), X shot a bank teller (Y) in the back during a robbery, as a result of which Y became a paraplegic and was confined to a wheelchair. Y's condition improved to such an extent that later he resumed his work at the bank. His doctor instructed him to shift his position in the wheelchair regularly in order to prevent pressure sores from developing on his buttocks. He failed to shift his position often enough, with the result that serious pressure sores and accompanying septicaemia developed, causing his death. He died more or less six months after he had been shot.

The court decided that the wounding of Y had been a *conditio sine qua non* of his death, but that it could not be regarded as a legal cause of his death. In other words, there was **factual** causation but no **legal** causation. The court decided that in this case, none of the ordinary theories of legal causation (absence of a *novus actus interveniens*, the individualisation theories and the theory of adequate causation) could be applied satisfactorily; on a basis of **policy considerations**, the court had to determine whether a sufficiently close link existed between the act and the result. However, the court added that in applying the more "flexible criterion", namely policy considerations, the above-mentioned theories of legal causation could have a subsidiary value.

The court applied this rule to the facts and found that Y's **own unreasonable failure had been the immediate cause of his death** and that X's act had been too **remote from the result** to lead to criminal liability. Therefore, X was found guilty of attempted murder only.

4.3.7.4 Negligent medical treatment – the *Tembani* decision



Read the following decision in the *Case Book: Tembani* 2007(1) SACR 355 (SCA).

In *Tembani* 2007 (1) SACR 355 (SCA), X had been convicted of murder. The evidence showed that he had shot the victim (Y) twice with the intention to kill. One bullet entered her chest and penetrated her right lung, diaphragm and abdomen, perforating the duodenum. Y was admitted to hospital on

the night of the shooting. The medical personnel cleaned the wounds and gave her antibiotics. The next day she vomited and complained of abdominal pains. Those were signs that she was critically ill. She was nevertheless left insufficiently attended to in the ward, and four days later contracted an infection of the abdominal lining. Only at that stage was she treated sufficiently. However, it was already too late to save her life. She died 14 days later of septicaemia, resulting from the gunshot wound to the chest and the abdomen.

X appealed against his conviction of murder. The question before the Supreme Court of Appeal was whether an assailant who inflicts a wound that would be fatal without treatment, but that is easy to treat, can escape liability for the victim's death because the medical treatment that the victim, in fact, received was substandard and negligent. The court had no problem finding that X's act was the factual cause (*conditio sine qua non*) of Y's death. The court, however, had to determine whether X was also the legal cause of Y's death. The crucial issue before the court was whether **negligent medical care can be regarded as a new, intervening cause that exempts the original assailant (X) from liability.**

The court (at par 25) held that the **deliberate infliction by X of an intrinsically dangerous wound to Y, from which Y was likely to die without medical intervention, must generally lead to liability by X for the ensuing death of Y. In the court's view, it was irrelevant whether the wound was readily treatable, 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 Y had recovered to such an extent at the time of the negligent treatment that the original injury no longer posed a danger to her life.**

According to the court (at par 26–27), this approach was justified on the following two **policy considerations**: Firstly, an assailant who deliberately inflicted an intrinsically fatal wound consciously embraced the risk that death might ensue. The fact that others might fail, even culpably, to intervene to save the injured person did not, while the wound remained fatal, diminish the moral culpability of the perpetrator. Secondly, in a country where medical resources were not only sparse but also badly distributed, it was wrong to impute legal liability on the supposition that efficient and reliable medical attention would be accessible to a victim, or to hold that its absence should exculpate an assailant inflicting an intrinsically fatal wound from responsibility for the victim's death. The court held that in South Africa, improper medical treatment was neither abnormal nor extraordinary. Therefore, negligent medical treatment did not constitute a *novus actus interveniens* that exonerated the assailant from liability while the wound was still intrinsically fatal. The conviction of X for murder was therefore upheld.

The court distinguished this case from the *Mokgethi* decision (*supra*), where the eventual fatal septicaemia was caused not by the original wound, but by the deceased's own unreasonable failure to follow medical instructions.

ACTIVITY

In each of the following sets of facts, consider whether X's act is the cause of Y's death:

- (a) Y feels depressed and threatens to commit suicide. X, who harbours a grudge against Y, hands her a loaded firearm, stating that 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.

FEEDBACK

- (a) You probably recognise these facts as being similar to those in the *Grotjohn* case. In that 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 that 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 that, 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, we 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) If you have read the *Mokgethi* case, you will immediately recognise these facts, which were used as an illustration by the court in its judgment. 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, however, we may argue 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) These facts are similar to those in *Tembani*. It is clear that X's act is the factual cause of Y's death (a *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.

4.3.8 Causation: a summary

The rules to be applied in determining causation may be summarised as follows:

- (1) In order to find that there is a causal link between X's act and Y's death, X's act must first be the **factual** cause and, secondly, the **legal** cause of Y's death.
- (2) X's act is the factual cause of Y's death if it is a *conditio sine qua non* of Y's death, that is, if X's act cannot be thought away without Y's death (the prohibited result) disappearing at the same time.
- (3) X's act is the legal cause of Y's death if a court is of the view that there are **policy considerations** for regarding X's act as the cause of Y's death. By "policy considerations", we mean considerations that would ensure that it would be **reasonable and fair** to regard X's act as the cause of Y's death.
- (4) In order to find that it would be reasonable and fair to regard X's act as the cause of Y's death, a court may invoke the aid of one or more specific theories of legal causation. These theories are the individualisation theories (e.g. proximate cause), the theory of adequate causation and the *novus actus interveniens* theory. These theories are merely aids in deciding whether there is legal causation. The courts do not deem any one of these theories to be the only correct theory to be applied in every situation. A court may even base a finding of legal causation on considerations outside these specific theories.

GLOSSARY

conditio sine qua non literally “condition without which not”; in practice, an “indispensable prerequisite”

novus actus interveniens a new intervening event

TEST YOURSELF

- (1) Explain the meaning of the term “definitional elements of the crime”.
- (2) Distinguish between materially and formally defined crimes and indicate in which of these two groups of crimes the crime of possession of dagga should be categorised.
- (3) Discuss the criterion that our courts apply to determine factual causation.
- (4) Explain what you understand by the concept “legal causation”.
- (5) Define and give a critical evaluation of the theory of adequate causation.
- (6) Define and discuss, with reference to decided cases, the theory of *novus actus interveniens*.
- (7) Discuss the decision of the Appeal Court in the *Mokgethi* case.
- (8) Discuss the decision of the Appeal Court in *Tembani*.
- (9) Give a summary of the rules that our courts apply in order to determine causation.
- (10) Can X, if she assists Y to commit suicide and is subsequently charged with the murder of Y, succeed with the defence that there was no causal link between her conduct and Y’s death?

STUDY UNIT 5

Unlawfulness



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the application of the general criterion of unlawfulness (the *boni mores* or legal convictions of society) in solving a dispute about the unlawfulness of a particular act that complies with the definitional elements of a crime, but not with the requirements of any recognised ground of justification
- determine whether certain conduct falls within the scope of a generally recognised ground of justification with reference to the general criterion of unlawfulness
- apply the rules pertaining to the ground of justification known as private defence to the facts of a particular case

5.1 BACKGROUND

In study unit 1 we stated that the four cardinal requirements for liability for a crime are (1) act or conduct; (2) compliance with the definitional elements; (3) unlawfulness; and (4) culpability. We have already dealt with the first two of these requirements. In this study unit we begin our discussion of the third requirement, namely unlawfulness. We first discuss the meaning of “unlawfulness” and, thereafter, the first ground of justification, namely private defence.

5.2 THE MEANING OF “UNLAWFULNESS”

(*Criminal Law 95–102; Case Book 61–64*)

5.2.1 *General*

The mere fact that there is an act that corresponds to the definitional elements does not mean that the person who performs the act is liable for the particular crime. Therefore, satisfying the definitional elements is not the only general requirement for liability. The next step in the determination of liability is to enquire whether the act that complies with the definitional elements is also **unlawful**.

In all probability, a layperson will be of the opinion that once it is clear that the prerequisites for liability set out thus far (namely that the law prohibits certain conduct as criminal and that X had committed an act that falls within the definitional elements) have been complied with, X will be liable for the crime and may be convicted. However, a person trained in the law will realise that there are still two very important further requirements that must be complied with, namely the requirements of **unlawfulness** and **culpability**.

In all probability, the reason a layperson would be unaware of the two last-mentioned requirements is because these are, as it were, “unwritten” or “invisible”: what we understand by “unlawfulness” and “culpability”

does not (ordinarily) form part of the “letter” or “visible part” of the legal provision in question, that is, the definitional elements. Thus if you consult the definition of a crime in a **statute**, you will normally not even come across the word “unlawful”; neither can you necessarily expect to find words by which the culpability requirement is expressed, such as “intentional” or “negligent”. Nevertheless, a court will never convict a person of a crime unless it is convinced that the act that complies with the definitional elements is also unlawful and accompanied by culpability – in other words, that the “unwritten” or “invisible” requirements have also been complied with.

5.2.2 *Acts that comply with the definitional elements are not necessarily unlawful – examples*

An act that complies with the definitional elements is not necessarily unlawful. This will immediately become clear if we consider the following examples:

- (1) In respect of murder, the definitional elements are “the killing of another human being”. Nevertheless, a person is not guilty if he kills somebody in self-defence; his act is then not unlawful.
- (2) X inserts a knife into Y’s body. Although his act may satisfy the definitional elements of assault, it is not unlawful if X is a medical doctor who is performing an operation on Y with Y’s permission, in order to cure him of an ailment.
- (3) X exceeds the speed limit while driving his motorcar. His conduct satisfies the definitional elements of the crime of exceeding the speed limit. However, if he does so in order to get his gravely ill child to hospital for emergency treatment, his conduct is not unlawful (*Pretorius* 1975 (2) SA 85 (SWA)).

There are many other examples of conduct that satisfies the definitional elements, but is nevertheless not unlawful. It is a very common phenomenon that an act that ostensibly falls within the letter of the law (in other words, that corresponds to the definitional elements) proves, upon closer scrutiny, not to be contrary to the law, as the examples above illustrate. In these cases, the law tolerates the violation of the legal norm.

5.2.3 *Content of unlawfulness*

When is conduct that corresponds to the definitional elements not unlawful? In other words, precisely what is meant by “unlawful” and what determines whether an act is unlawful?

(1) Grounds of justification

There are a number of cases or situations, well-known in daily practice, where an act that corresponds to the definitional elements is, nevertheless, not regarded as unlawful. Unlawfulness is excluded because of the presence of **grounds of justification**. Some well-known grounds of justification are

private defence (which includes self-defence), necessity, consent, official capacity and parents' right of chastisement.

The grounds of justification will subsequently be discussed one by one. At this point it is tempting simply to define unlawfulness as "the absence of a ground of justification". However, such a purely negative definition of unlawfulness is not acceptable, for two reasons:

- (a) All jurists agree that there is no limited number (*numerus clausus*) of grounds of justification. If this were so, how would they determine the lawfulness or unlawfulness of conduct that does not fall within the ambit of one of the familiar grounds of justification?
- (b) It should be remembered that each ground of justification has its limits. Where an act exceeds these limits, it is unlawful. What is the criterion for determining the limits of the grounds of justification?

The answer to this question is found under the next heading.

(2) Legal convictions of society

Opinions differ on the material content of the concept of unlawfulness. We do not intend discussing the philosophical arguments underlying the differences of opinion. The current approach (with which we agree) is the following:

Conduct is unlawful if it conflicts with the *boni mores* (literally "good morals") or legal convictions of society.

The law must continually strike a balance between the conflicting interests of individuals, or between the conflicting interests of society and the individual. If certain conduct is branded unlawful by the law, this means that, according to the legal convictions (or *boni mores*) of society, certain interests or values protected by the law (such as life, property or dignity) are regarded as more important than others (*Clark v Hurst* 1992 (4) SA 630 (D) 652–53). The contents of the Bill of Rights in Chapter 2 of the Constitution must obviously play an important role in deciding whether conduct is in conflict with public policy or the community's perception of justice. The values mentioned in section 1 of the Constitution, namely "human dignity, the achievement of equality and the advancement of human rights and freedoms", are also of crucial importance in deciding this issue.

In order to determine whether conduct is unlawful, we must therefore enquire whether the conduct concerned conflicts with the *boni mores* or legal convictions of society. The grounds of justification must be seen as practical aids in the determination of unlawfulness. They merely represent those situations encountered most often in practice, which have therefore come to be known as easily recognisable grounds for the exclusion of unlawfulness. They do **not** cover the entire subject field of this discussion, namely of the demarcation of lawful and unlawful conduct.



In *Fourie* 2001 (2) SACR 674 (C), the facts were the following: X was a regional court magistrate, resident in George. He had to preside at the sessions of the regional court in Knysna. The court's sessions commenced at 9:00. Because of certain circumstances, he left George for Knysna in his motorcar somewhat late on that particular day. On the road between George and Knysna, he was caught in a speed trap, which showed that he had exceeded the speed limit of 80 km/h, which applied to that part of the road. On a charge of exceeding the speed limit, he pleaded not guilty. His defence was that although he exceeded the speed limit, his act was not unlawful. He argued that although not one of the recognised grounds of justification, such as private defence, was applicable to the case, his act should nevertheless be regarded as lawful on the following ground: the act was not in conflict with the legal convictions of the community, because by merely striving to arrive at the court on time, he drove his car with the exclusive aim of promoting the interests of the administration of justice. He did not seek to promote his own private interests, but those of the state and, more particularly, those of the administration of justice.

The court dismissed this defence. If this defence had been valid, it would have opened the floodgates to large-scale unpunishable contraventions of the speed limits on our roads. Many people would then be entitled to allege that since they would otherwise be late for an appointment in connection with a service they render to the state, they are allowed to contravene the speed limit. In the course of the judgment, the court confirmed the principle set out above, namely that the enquiry into unlawfulness is preceded by an enquiry into whether the act complied with the definitional elements, and also that the test to determine unlawfulness is the *boni mores* or legal convictions of the community.

From what has been said above, it is clear that we have to distinguish between

- (1) an act that complies with the definitional elements
and
- (2) an act that is unlawful



An act that complies with the definitional elements is not necessarily unlawful. It is only "provisionally" unlawful. Students often confuse the two concepts. One of the reasons for the confusion is that for the layperson, the word "unlawful" probably means only that the act is an infringement of the letter of the legal provision in question (i.e the definitional elements). You can avoid this confusion by always using the expression "without justification" as a synonym for "unlawful": an act complying with the definitional elements is unlawful only if it cannot be justified.

5.2.4 *Unlawfulness distinguished from culpability*

Unlawfulness is usually determined without reference to X's state of mind. Whether he thought that his conduct was lawful or unlawful is irrelevant.

What he subjectively imagined to be the case comes into the picture only when the presence of **culpability** has to be determined.

We will now proceed to a discussion of the different grounds of justification. The rest of this study unit is devoted to a discussion of the first ground of justification, namely private defence. In the next study unit we will deal with the remaining grounds of justification.

5.3 PRIVATE DEFENCE

(*Criminal Law 102–114; Case Book 65–89*)

5.3.1 *Definition of private defence*

A person acts in private defence – and his conduct is therefore lawful – if he uses force to repel an unlawful attack that has already commenced, or that 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.

(Do not feel discouraged if, when reading it for the first time, this definition seems to be complicated, or if you do not immediately understand all the details it contains. We will explain the details of this ground of justification below. By the time you come to the end of the discussion of this ground of justification, you ought to understand all the elements of this definition.)

Colloquially, this ground of justification is often referred to as “self-defence”, but this description is too narrow, since not only persons who defend themselves, but **also those who defend others**, can rely upon this ground of justification. A person acting in private defence acts lawfully, provided his conduct complies with the requirements of private defence and he does not exceed its limits.

For purposes of classification, it is convenient to divide the requirements and the most important characteristics of private defence into two groups. The first group comprises those requirements or characteristics with which the **attack** against which a person acts in private defence must comply; the second comprises the requirements with which the **defence** must comply.

In order to assist you in your study, we first summarise the requirements in the following diagram. This is the framework of the knowledge you should have.

Private defence requirements

(1) Requirements of attack

The attack

- (a) must be **unlawful**
- (b) must be **against interests that 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

5.3.2 Requirements of the attack

(1) The attack must be unlawful

Private defence against lawful conduct is not possible. For this reason, a person acts unlawfully if he attacks a policeman who is authorised by law to arrest somebody. However, if the policeman is not authorised by law to perform a particular act, or if he exceeds the limits of his authority, he may lawfully be resisted.

Can X rely on private defence if he kills Y in the course of a prearranged duel? In *Jansen* 1983 (3) SA 534 (NC), X and Y decided to “settle their differences” in a knife duel. During the fight, Y first stabbed at X, and then X stabbed Y in the heart, killing him. The court held, quite justifiably, that X could not rely on private defence, and convicted him of murder. X’s averting the blow was merely part of the execution of an unlawful attack, which he had planned beforehand.

In deciding whether the attack of Y (the aggressor) on X is unlawful, there are **three considerations**, marked (a) to (c) below:

- (a) The attack **need not be accompanied by culpability**. X can therefore act in private defence even if his act is directed against a non-culpable act by Y. What does this mean?
 - (i) As will be explained in the exposition of the culpability requirement below, culpability implies, *inter alia*, that a person must be endowed with certain minimum mental abilities. If he has these mental abilities, he is said to have **criminal capacity**. Examples of people who lack these mental abilities and who, therefore, lack criminal capacity are people who are mentally ill (“insane”) and young children.

The requirement for private defence currently under discussion is merely that Y's attack must be unlawful. Since even people who lack criminal capacity can act unlawfully, **X can successfully rely on private defence, even if his defensive act is directed at the conduct of a mentally ill person or a young child** (*K* 1956 (3) SA 353 (A)).

Thus if X is attacked by Y, he may defend himself against Y in private defence, even if the evidence brings to light that Y is mentally ill.

- (ii) Another example of a situation in which a person acts unlawfully but without culpability is where a person who does have criminal capacity acts **without intention because of a mistake** on his part.

(Again, the exclusion of intention because of a mistake will be explained later in the discussion of intention.) The following is an example of such a situation:

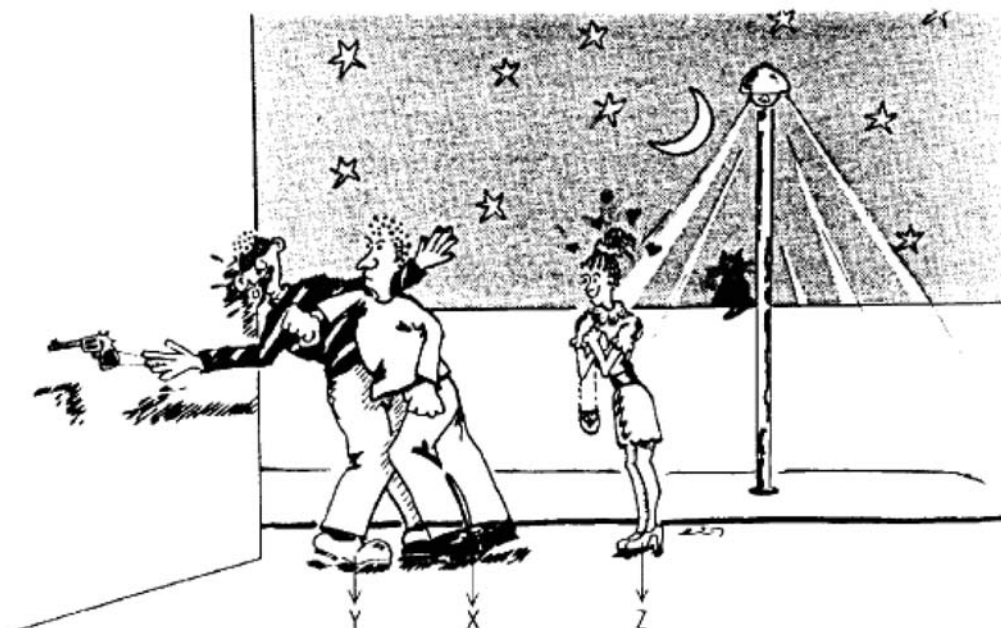
Y thinks that he is entitled to arrest X. However, he is, in fact, not entitled by law to do this. If Y tries to arrest X, Y is acting unlawfully and X is entitled to defend himself in private defence against Y. Y's lack of culpability does not debar X from relying on private defence.

- (iii) Since the law does not address itself to **animals**, animals are not subject to the law and **can, therefore, not act unlawfully**. For this reason, X does not act in private defence if he defends himself or another person against an attack by an animal. In such a situation, X may, however, rely on the ground of justification known as necessity (which will be discussed below).

- (b) The attack **need not be directed at the defender**. X may also act in private defence to protect a third person (Z), even if there is no family or protective relationship between X and Z (*Patel* 1959 (3) SA 121 (A)).



Read the aforementioned decision in the *Case Book*: *Patel* 1959 (3) SA 121 (A).



Private defence. Although the attack must be unlawful, it need not necessarily be directed against the defender. A person can also act in private defence to defend a third party. In this illustration, the villain, Y, initially attacked the lady, Z, whereupon the “hero”, X, appeared on the scene and, in defence of Z, attacked Y, thereby preventing him from continuing with his attack upon Z. As will be pointed out later, the defensive act must be directed against the attacker. This is what happened in this case.

- (2) The attack must be directed against interests that, in the eyes of the law, ought to be protected

Private defence is usually invoked in protection of the attacked party’s life or physical integrity, but, in principle, there is no reason why it should be limited to the protection of these interests. Thus the law has recognised that a person can also act in private defence

- in protecting property (*Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A))
- in protecting dignity (*Van Vuuren* 1961 (3) SA 305 (EC))
- in preventing unlawful arrest (*Mfuseni* 1923 NPD 68)
- in preventing attempted rape (*Mokoena* 1976 (4) SA 162 (0))



Read the following decision in the *Case Book: Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A).

As far as **protection of property** is concerned, the most important decision in our case law regarding private defence is *Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A). The Appeal Court not only held that, in extreme circumstances, a person is entitled to kill another person in defence of property, but also had to apply most of the requirements of private defence referred to above.

We will not discuss this case in detail, as we expect you to read the judgment in this case yourself. You must know the interesting **facts** of this case, the

answers the court gave to the legal questions posed, and the **reasons** for these answers. However, we would like to point out that the common-law rule in *Van Wyk* (i.e. that a person may kill in defence of property) may possibly be challenged on the grounds that it amounts to an infringement of the constitutional rights of a person to life (s 11 of the Constitution) and to freedom and security (s 12). An enquiry as to the constitutionality of this rule will involve a balancing of the rights of the aggressor to his life against the rights of the defender to his property. Legal authors have different points of view on the question of which right (that of the aggressor to his life or that of the defender to his property) should prevail. We submit that killing in defence of property would at least be justifiable if the defender, at the same time as defending his property, also protected his life or bodily integrity. (See the facts of *Mogohlwane* 1982 (2) SA 587 (T), discussed in (3) hereunder.)

As far as protection of dignity is concerned, it was held in *Van Vuuren supra* that a person may rely on private defence in order to defend someone's dignity. In this case, Y insulted X's wife in public, which caused X to assault Y. The court held that X was not guilty of assault. There was a distinct possibility that Y would have continued to insult X's wife, and X acted to prevent this.

(3) The attack must be threatening but not yet completed

X cannot attack Y merely because he expects Y to attack him at some time in the future. He can attack Y only if there is an attack or immediate threat of attack by Y against him; in this case, it is, of course, unnecessary that he wait for Y's first blow – he may defend himself by first attacking Y, with the precise object of averting Y's first blow (*Patel* 1959 (3) SA 121 (A)). Private defence is not a means of exercising vengeance, neither is it a form of punishment. For this reason, X acts unlawfully if he attacks Y when Y's attack upon him is already something of the past.

When automatic defence mechanisms are set up (such as a shotgun that will go off during the night if the shop is entered by a thief), there is, at the time when the device is set up, no immediate threat of attack, but the law recognises that to set up such mechanisms, which will be triggered the moment the threatened "attack" materialises, may constitute valid private defence in certain narrowly defined circumstances.

Such a case was *Van Wyk supra*, in which X, a shopkeeper whose shop was burgled repeatedly, set a shotgun to go off and injure prospective burglars in the lower part of the body. One night Y broke into the shop and was fatally wounded. The Appeal Court held that X could rely on private defence.

In *Mogohlwane* 1982 (2) SA 587 (T), Y tried to take a paper bag containing clothes, a pair of shoes and some food from X. X resisted, but Y threatened X with an axe and gained possession of the bag. X immediately ran to his house, some 350 metres away, fetched a table knife, returned to Y and tried to regain his property. When Y again threatened X with the axe, X fatally stabbed Y with his knife in order to prevent him (Y) from fleeing with his (X's) bag of possessions. The court decided that X acted in private defence:

the attack on X was not completed, because when X ran home and fetched the knife, it was part of one and the same immediate and continued act of resistance. X was a poor man, and the contents of the bag were of value to him. If Y had run off with the bag, X would never have seen it again.

5.3.3 *Requirements of the act of defence*

(1) It must be directed against the attacker

If Y attacks X, X cannot direct his act in private defence against Z.

(2) The defensive act 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 (*Attwood* 1946 AD 331 340).

If, on the termination of the lease, the obstinate lessee refuses to leave the house, the lessor is not entitled to seize him by the collar and forcibly remove him from the premises. The lessor can protect his right and interests by availing himself of the ordinary legal remedies, which involve obtaining an ejection order from a court and, possibly, also claiming damages.

The basic concept underlying private defence is that a person is allowed to “take the law into his own hands”, as it were, only if the ordinary legal remedies do not afford him effective protection. He is not allowed to arrogate to himself the functions of a judge and a sheriff.

On the other hand, a threatened person need not acquiesce in an attack upon his person or rights merely because he will be able to claim damages afterwards. The present rule merely means that the threatened person may not take the law into his own hands summarily if the usual legal remedies afford him adequate protection.

It would seem that our courts require an assaulted person to flee, if possible, rather than kill his assailant, unless such an escape would be dangerous. For criticism of this attitude, read the discussion in *Criminal Law* 106–108.

(3) There must be a reasonable relationship between the attack and the defensive act

Another way of expressing this requirement is by saying that the act of defence may not be more harmful than necessary to ward off the attack (*Trainor* 2003 (1) SACR 35 (SCA)).

It stands to reason that there ought to be a certain **balance between the attack and the defence**. After all, a person is not entitled to shoot and kill someone who is about to steal his pencil. There should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. If, for example, the

attacked party could have overcome the threat by using his fists or by kicking the assailant, he may not use a knife, let alone a firearm.

In order to decide whether there was a reasonable relationship between attack and defence, the Supreme Court of Appeal in *Steyn* 2010 1 SACR 411 (SCA) 417 identified the following factors as relevant, but also stated that the list is not exhaustive and that each case should be determined in the light of its own circumstances:

- the **relationship between the parties**
- the **gender** of the parties, their respective ages and physical strengths
- the **location** of the incident
- the **nature of the weapon** used in the attack
- the **nature, severity and persistence of the attack**
- the **nature and severity** of any injury likely to be sustained in the attack (the **means** available to avert the attack)
- the **nature of the means** used to offer the defence
- the **nature and extent** of the harm likely to be caused by the defence

In practice, whether this requirement for private defence has been complied with is more a question of fact than of law.

A clearer picture of this requirement emerges if we consider the **elements between which there need not be a proportional relationship**:

(a) **There need not be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired.** The attacked party may impair an interest of the assailant that **differs in nature** from the interest that he is defending. The following examples illustrate this point:

- If Y threatens to deprive X of a possession belonging to X, X is entitled to assault Y in private defence in order to protect his possession. This means that X may, in order to protect his own **property**, impair an interest of Y that is not of a proprietary nature, namely Y's **physical integrity**. In *Ex parte die Minister van Justisie: in re S van Wyk supra*, the Appeal Court held that X may, in extreme circumstances, **even kill Y** in order to protect his property. However, see the comment on the constitutionality of this rule under 5.3.2 (2) above.
- If Y threatens to **rape** X, X may defend her chastity **even by killing Y** (*Van Wyk supra* 497A-B).

The nature of the interest protected and the interest impaired may therefore be dissimilar. However, this rule must be tempered by the qualification that in cases of extreme disproportion between interests, reliance on private defence may be unsuccessful (*Van Wyk supra* 498).

(b) **There need not be a proportional relationship between the weapons or means used by the attacker and the weapons or means used by the attacked party.** If the person attacked may not defend himself with a different type of weapon from the one used by the attacker, it follows

that the attacker has the choice of weapon, and such a rule would obviously be unacceptable.

- (c) **There need not be a precise proportional relationship between the value or extent of the injury inflicted by the attacker and the value or extent of the injury inflicted by the defending party.** Unlike a referee in a boxing contest, we don't count the exact number of blows struck by the attacked party and then compare that with the number of blows struck by the assailant. Nevertheless, although there need not be a precise relationship, there must be an approximate relationship, which will be determined by the facts of each case.

This requirement for private defence does not mean that the law, by requiring the attacked party to avail himself of the least harmful means, requires the attacked party to gamble with his life or otherwise expose himself to risks.



Read the following case in the Case Book: *Steyn* 2010 1 SACR 411 (SCA)

Steyn (supra) serves as a good example in this regard. X shot and killed her former husband (Y) in the following circumstances: Y drank heavily and continuously abused X, both mentally and physically over a long period of time. He often told her that he would slit her throat and regularly locked her in her bedroom. X eventually divorced her husband (Y). X got her own flat, but because of financial difficulties, she returned to the matrimonial home, although she no longer shared a bedroom with Y. Y continued to abuse her and, at times, she locked herself in her bedroom to prevent Y from assaulting her. One evening, X, who was suffering from depression and anxiety, told Y that she had contacted the medical aid to find out whether it would pay for treatment for her anxiety at a nearby clinic. Y, who had been drinking, lost his temper, verbally abused X, claiming she was mad, and then grabbed her by the throat and began to hit her. She managed to escape and ran to her bedroom, where she locked herself in. Later that evening she went to the kitchen to find something to eat before taking some prescribed medicine for an ulcer. Because she was overcome with fear, she armed herself with her .38 revolver, which she hoped would dissuade Y from attacking her again. On seeing her, Y shouted that he had told her to stay in her room and that she was not to get anything to eat. Holding a steak knife, he jumped to his feet and rushed at her, shouting that he was going to kill her. X then fired a shot at Y and immediately returned to her room, where she phoned a friend. She was charged with culpable homicide and her plea that she had acted in self-defence was rejected. The trial court held that a reasonable person in X's position would have foreseen the possibility that Y might attack her and would not have left the room. It concluded that she (X) had acted unreasonably and that the fatal incident could have been avoided if she had telephoned for help.

The Supreme Court of Appeal rejected this reasoning of the trial court. The court recognised that there must be a reasonable balance between the attack and the defensive act. However, strict proportionality is not required, the proper consideration being whether, in the light of all the circumstances, the defender acted reasonably (at 417e-f). The court was of the view that it could not have been expected of X to gamble with her life by turning her back on

the deceased who was very close to her and about to attack her with a knife, in the hope that he would not stab her in the back. Leach AJA commented that “she would have had to turn around in order to get back to her room, by which time the deceased would have been upon her and flight would have been futile” (418c). Her assumption that Y would catch her was a reasonable one and therefore “she could not be faulted for offering resistance to the deceased rather than attempting to flee from him” (418d). The court added that X was entitled to leave her bedroom, in her own home, and go to the kitchen to find something to eat. Her life was under threat and she was entitled to use deadly force to defend herself. Her plea of self-defence was accordingly upheld.

ACTIVITY

Assume that X, who is sleeping in his home, is woken up in the middle of the night by Y, an armed burglar, who approaches his room or that of a family member. X shoots at Y in order to protect his family. Y dies as a result of the shot. Can X’s conduct be justified on the grounds of private defence?

FEEDBACK

It would be unfair to expect X first to ask Y to identify himself and state the purpose of his visit in order to decide what, objectively, the appropriate defensive measures would be in the circumstances. It would also be unfair to expect X first to try to arrest Y and then call the police. Experience tells us that even a moment’s hesitation by X in such circumstances might be fatal to X. To deny X the right to shoot in such circumstances is to require him to gamble with his life or with that of the other people in the house.

Even if a court holds that X cannot rely on private defence because, objectively, there was a less harmful way in which he could have overcome the danger, the court would, in most cases, refuse to convict X of murder if he shot and killed Y, on the following ground: although X acted unlawfully, he lacked intention because he honestly believed that his life or the lives of his family members were in danger. This means that there was no awareness of unlawfulness on his part and, therefore, no intention. He was mistaken about the unlawfulness of his action and, therefore, lacked intention. This will become clearer later in the guide where, as part of the discussion of intention, we discuss the effect of mistake relating to unlawfulness. However, X may still be found guilty of culpable homicide if the reasonable person would have acted differently in the circumstances. See the discussion in 11.5 hereunder.

- (4) The attacked person must be aware of the fact that he is acting in private defence

There is no such thing as inadvertent or accidental private defence. Private defence cannot succeed as a defence in cases where it is pure coincidence that the act of defence was, in fact, directed at an unlawful attack.

For example: X decides to kill Y, whom he dislikes, and shoots and kills him while he is sitting in a bus together with other passengers. Only afterwards is it discovered that Y was an urban terrorist, who was on the point of blowing up the bus and all its passengers by means of a hand grenade. If X had not killed Y in time, he (X) himself would have been killed in the explosion. X would, however, not be allowed to rely on private defence in such circumstances. (There is, thus far, no direct authority in our case law dealing with this requirement for private defence.)

5.3.4 *The test for private defence*

The question whether X's acts fell within the limits of private defence must be considered **objectively**, that is, in the light of the actual facts, and not according to what X (at the time) took the facts to be. A person cannot rely on private defence if it appears that he was not, in fact, exposed to any danger, but merely thought that he was.

Example: Y goes out one evening to play cards with his friends. On his way home, he loses his keys, perhaps because he has had one or two drinks too many. Arriving at his home, he decides not to wake his wife, X, by knocking on the door, but rather to climb through an open window. His wife wakes up and, in the dark, sees a figure climbing through the window. She does not expect it to be her husband and assumes it is a burglar. She seizes a pistol and fires at the "burglar" – her husband – killing him. X cannot rely on private defence because, from an objective point of view, she did not find herself in any danger. She merely **thought** she was in danger. We may refer to this type of situation as **putative** private defence. (The word "putative" is derived from the Latin word *putare*, which means "to think". Thus "putative private defence" means private defence that existed only in X's thoughts.) It is not actually private defence. However, the fact that X cannot rely on private defence does not mean that she is guilty of murder. She may, as a defence, rely on **absence of culpability because she was mistaken and her mistake excluded the intention to murder her husband**. We will return to this point later.

Whether there actually was danger or an attack warranting the exercise of private defence must be determined objectively *ex post facto* (after the event). Here the rule is that the court should not act as an armchair critic, but should try to visualise itself in the position of the attacked person at the critical moment, when they possibly had only a few seconds to make a decision that was of vital importance to them.

5.3.5 *Exceeding the limits of private defence*

If X is attacked by Y, but in retaliating, exceeds the limits of private defence (e.g. because he causes the attacker more harm or injury than is justified by the attack), he himself becomes an attacker and acts unlawfully. Whether

he is then guilty of a crime such as murder, assault or culpable homicide will depend on his **culpability** – in other words, his possible intention or negligence. For this reason, the whole question relating to the effect of exceeding the limits of private defence will be discussed later, after the discussion of culpability (see study unit 11).

GLOSSARY

boni mores

the good morals of society

SUMMARY

- (1) Once it is clear that X has committed an act that complies with the definitional elements, the next step in enquiring into the question of criminal liability is whether X's act was also unlawful.
- (2) Conduct is unlawful if it is in conflict with the good morals (*boni mores*) or legal convictions of society.
- (3) The grounds of justification are practical aids for determining unlawfulness. They represent situations often encountered in practice that have come to be known as easily recognisable grounds for the exclusion of unlawfulness.
- (4) See the definition of private defence above.
- (5) See the summary in 5.3.1 above for the requirements with which the attack and the act of defence must comply in order to succeed with a plea of private defence.
- (6) In *Ex parte die Minister van Justisie: in re S v Van Wyk*, the Appeal Court held that X may, in extreme circumstances, even kill another in private defence to protect his (X's) property. The constitutionality of this rule is questioned by legal writers.
- (7) Putative private defence occurs when X thinks that he is in danger, but, in fact, is not. This is not actual private defence, but it may exclude X's culpability.

TEST YOURSELF

- (1) When will conduct be regarded as unlawful?
- (2) Are there a limited number of grounds of justification? Discuss in view of the decision in *Fourie*.
- (3) Is the following statement true or false: "Conduct is unlawful if it accords with the definitional elements."
- (4) Define private defence.
- (5) State the requirements with which the attack, as well as the act of defence, must comply in order to form the basis of a successful plea of private defence.
- (6) Distinguish putative private defence from actual private defence.
- (7) Discuss the question of whether, or in what circumstances, X may act in private defence
 - (a) against a young child
 - (b) against a policeman
 - (c) against an animal
 - (d) in defence of another person
 - (e) in protection of property
 - (f) as punishment for an attack that is already over
 - (g) against another person, who is not the attacker
 - (h) in a situation where it is possible for him (X) to escape
 - (i) in a manner that is more harmful than is necessary to ward off the attack
 - (j) in a situation where he (X) is unaware that his act of defence is directed against an unlawful attack
- (8) Discuss the decision of the Supreme Court of Appeal in the case of *Steyn*.

STUDY UNIT 6

Unlawfulness II



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- further demonstrate your understanding of unlawfulness by evaluating an accused's conduct so as to decide whether it complies with the requirements of the grounds of justification known as necessity, consent, presumed consent, the right of chastisement, obedience to orders, official capacity or triviality

6.1 BACKGROUND

As pointed out in the previous study unit, the discussion of unlawfulness is spread over two study units. In the previous study unit we discussed the meaning of the concept of unlawfulness and, thereafter, the first ground of justification, namely private defence.

In this study unit we discuss the remaining grounds of justification, namely necessity, consent, presumed consent, the right of chastisement, obedience to orders, official capacity and triviality.

6.2 NECESSITY

(Criminal Law 114–122; Case Book 90–102)

6.2.1 *Definition of necessity*

A person acts out of necessity – and her conduct is therefore lawful – if she acts in the protection of her own or somebody else's life, physical integrity, property or other legally recognised interest that is endangered by a threat of harm that has already begun or is immediately threatening and that 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.

Although this definition does not cover every aspect of this ground of justification, it does contain the most important elements.

6.2.2 *Differences between private defence and necessity*

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

- (1) 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.

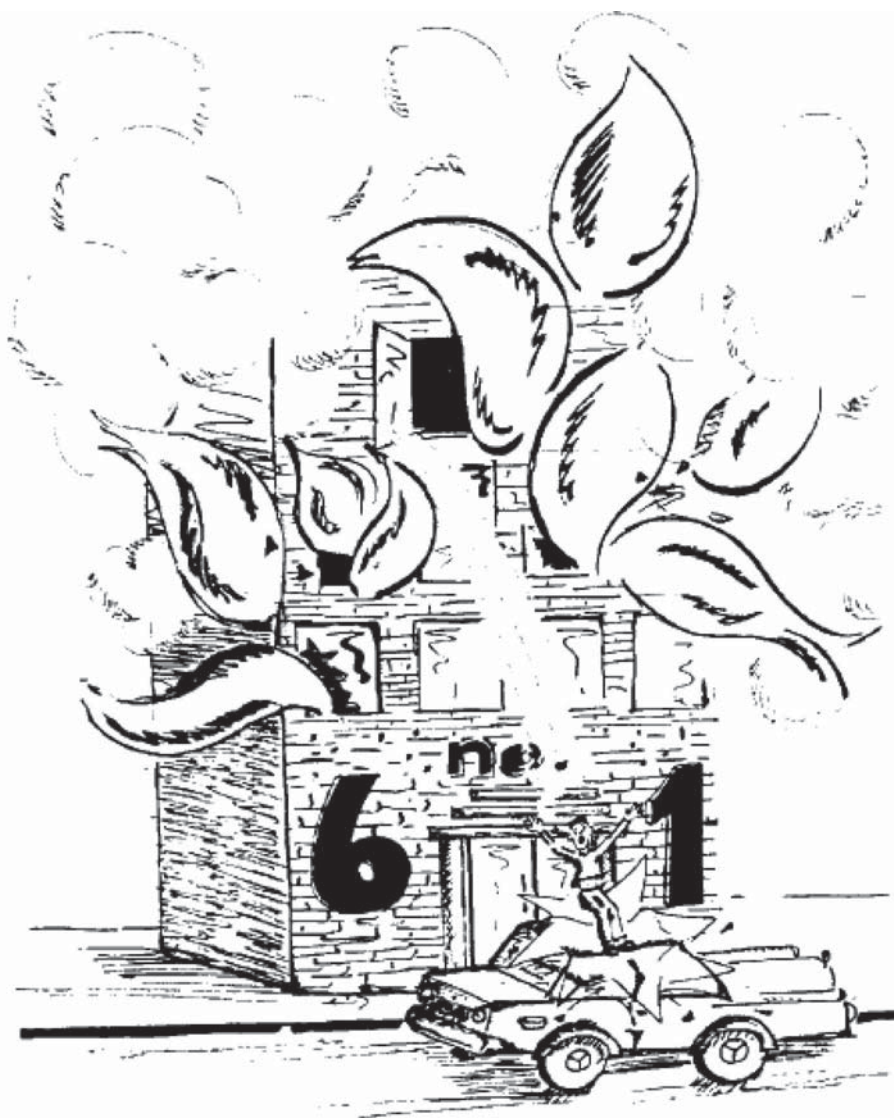
- (2) The **object** at which the act of defence is directed: **Private defence** is always directed at an unlawful human attack; **necessity** is either directed at the interests of another innocent third party or merely amounts to a violation of a legal provision.

The following are examples of situations in which X's conduct is justified because she is acting in a situation of necessity:

- (1) While X is in Y's back yard, Z attacks her (X) with a knife. X finds herself unable to ward off the attack because she (X) is slightly built and unarmed, whereas Z is strong and armed with a knife. There is one possible way for X to escape, and that is to kick a part of the fence (which belongs to Y) to pieces and then run away through the broken fence. This is exactly what X does. If X is subsequently charged with malicious injury to property in that she broke a fence belonging to Y, she can successfully rely on the defence of necessity. In this example, the emergency situation arose from an unlawful act, but the act of defence is directed not against the attacker, but against the interests of an innocent third party, namely Y.
- (2) The facts of *Goliath* 1972 (3) SA 1 (A) are as follows: Z ordered X to kill Y, and threatened to kill X if she did not carry out the order. There were no means of escape for X, so she killed Y. X was found not guilty. This type of situation is known as "compulsion" or "coercion".
- (3) The ship on which X is a passenger sinks during a gale. X ends up in the ocean, clinging to a piece of driftwood. Another former passenger, Y, clings to the same piece of wood. However, the two of them are too heavy to be kept afloat by the wood. X pushes Y into the ocean in order to save her own life. Here the reason for the emergency was an act of nature and the act of defence was directed against an innocent person.
- (4) The facts in *Pretorius* 1975 (2) SA 85 (SWA) are as follows: X's baby swallowed an overdose of Disprin tablets. X rushed the child to the hospital by car for emergency treatment. While driving to the hospital, he exceeded the speed limit. On a charge of exceeding the speed limit, he relied successfully on the defence of necessity. Here, strictly speaking, the reason for the situation of emergency was a series of chance circumstances; the act committed out of necessity was not directed against some person's interests, but amounted merely to a violation of a legal provision, namely the prohibition on speeding.

If X acts in a situation of necessity, she acts lawfully.

For a plea of necessity to succeed, it is immaterial whether the situation of emergency is the result of human action (e.g. coercion) or chance circumstances (the so-called inevitable evil, such as famine, a flash of lightning or a flood). Neither does it matter whether X's act by which she endeavours to escape the emergency is directed against the interests of another human being or amounts merely to a violation of a legal provision. All that matters is whether X found herself in a situation of emergency when she acted.



Example of necessity. While X finds herself on the third storey of a building, a fire breaks out in the building. In order to save her life, she jumps out of the window, landing on the roof of an expensive German luxury sedan. The roof of the car is severely damaged. X is charged with malicious injury to property in respect of the car. She cannot be convicted because she can successfully rely on the defence (ground of justification) of necessity. The damage was caused in the course of committing an act to save her life; the fire that led to her jumping out of the building constituted an immediate threat to her life; there was no other way of escape for her out of the building; and the interest she infringed (namely the car owner's interest not to have his car's roof damaged) was not of more importance than the interest that she sought to protect (namely her own life).

6.2.3 *Restricted field of application*

Private defence can readily be justified on ethical grounds, since there is always an unlawful attack and the attacker simply gets what she deserves. On the other hand, justifying necessity is more difficult. Here X finds herself in a situation where she **must choose between two evils**: she must either suffer personal harm or break the law, and the choice she must make is often a debatable point. It is precisely for this reason that there must be strict compliance with the requirements for necessity before the defence can be successful. The attitude of our courts to the plea of necessity is often one

of scepticism, and they also seek to restrict its sphere of application as far as possible (*Mahomed* 1938 AD 30 36; *Damascus* 1965 (4) SA 598 (R) 602).

6.2.4 Requirements for the plea of necessity

Although the requirements for a successful plea of necessity resemble, to some extent, the requirements for a successful plea of private defence, they are not the same in all respects. In order to assist you in your studies, we will begin by summarising the requirements in the following diagram:

Requirements for a plea 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**

The requirements are the following:

- (1) Some **legal interest** of X, such as her life, physical integrity or property, must be threatened. In principle, a person should also be able to protect other interests, such as dignity, freedom and chastity, in a situation of necessity.
- (2) A person can also act in a situation of necessity to protect **another's interest**, for example where X protects Z from being attacked by an animal.
- (3) The emergency must **already have begun or be imminent**, but must **not have terminated**, nor only be expected in the future.
- (4) Whether a person can rely on the defence of necessity if she herself is responsible for the emergency is a debatable question. In our opinion, X should not be precluded from successfully raising this defence merely because **she caused the emergency herself**. If she were precluded, this would mean that if, because of X's carelessness, her baby swallowed an overdose of pills, X would not be allowed to exceed the speed limit while rushing the baby to hospital, but would have to resign herself to the child's dying (compare the facts in *Pretorius supra*). The two acts, namely the creation of danger and rescue from it, should be separated. If the first act amounts to a crime, X can be punished for it, for example where she sets fire to a house and then has to break out of the house to save her own life.
- (5) If somebody is **legally compelled** to endure the danger, she cannot rely on necessity. Persons such as police officials, soldiers and firefighters cannot avert the dangers inherent in the exercise of their profession by

infringing the rights of innocent parties. Another aspect of this rule is that a person cannot rely on necessity as a defence if what appears to her to be a threat is, in fact, lawful (human) conduct. Thus it was held in *Kibi 1978 (4) SA 173 (EC)* that if X is arrested lawfully, he may not damage the police van in which he has been locked up in order to escape from it.

- (6) The act committed in necessity is lawful only if it is the **only way** in which X can avert the threat or danger. Where, for example, Z orders X to kill Y, and threatens to kill X if she does not obey, and it appears that X can overcome her dilemma by fleeing, she must flee and, if possible, seek police protection (*Bradbury 1967 (1) SA 387 (A) 390*).
- (7) X must be **conscious** of the fact that an emergency exists and that she is therefore acting out of necessity. There is no such thing as a chance or accidental act of necessity. If X throws a brick through the window of Y's house in order to break in, and it later appears that by so doing she has saved Z – who was sleeping in a room filled with poisonous gas – from certain death, X cannot rely on necessity as a defence.
- (8) The harm occasioned by the defensive act must not be out of proportion to the interest threatened. Therefore, X must **not cause more harm** than is necessary to escape the danger. It is this requirement that is the most important one in practice, and it can also be the most difficult to apply. The protected and the impaired interests are often of a different nature, for example where somebody damages another's property in protecting her own physical integrity. One of the most important – and also the most problematic – questions arising in respect of the requirement under discussion is whether a person is entitled to kill someone in a situation of necessity. Because of its complexity, this question will be discussed separately below.

ACTIVITY

While walking in the street, X sees a dog attacking Y, an old person. X and Y do not know each other. In order to protect Y, who cannot defend herself, X hits the dog with her walking stick. The dog dies as a result of a head wound caused by the injuries inflicted by X. X is charged with malicious injury to property in respect of the dog. What is the appropriate defence in these circumstances – private defence or necessity?

FEEDBACK

X can rely on the defence of necessity. In a situation of necessity, a person may also protect the interests of somebody else, even though there is no particular relationship between that person and the party who is being protected. If you protect yourself or another person against an animal's attack, you act in a situation of necessity and not in private defence. Private defence is possible only against an unlawful attack. Only a human being can act unlawfully.

6.2.5 Killing another person out of necessity

Possibly the most perplexing question relating to necessity as a ground of justification is whether a threatened person may kill another in order to escape from the situation of emergency. Naturally, this question arises only if the threatened person finds herself in mortal danger. This mortal danger may stem from compulsion, for example where Y threatens to kill X if X does not kill Z, or from an event not occasioned by human intervention, for example where two shipwrecked persons vie for control of a wooden beam that can keep only one of them afloat, and one of them eventually pushes the other away in an attempt to survive.

Until 1972, our courts usually held that the killing of a person could not be justified by necessity (*Werner* 1947 (2) SA 828 (A); *Mneke* 1961 (2) SA 240 (N) 243; *Bradbury* 1967 (1) SA 387 (A) 399).



Read the following decision in the *Case Book*: *Goliath* 1972 (3) SA 1 (A).

However, in *Goliath* 1972 (3) SA 1 (A), the Appeal Court conclusively decided that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion. In this case, X was ordered by Z to hold on to Y so that Z might stab and kill Y. X was unwilling throughout, but Z threatened to kill him if he refused to help him. The court inferred, from the circumstances of the case, that it had been impossible for X to run away from Z – Z would then have stabbed and killed him. The only way in which X could have saved his own life was by yielding to Z's threat and assisting him in the murder. In the trial court, X was acquitted on the ground of compulsion, and on appeal by the state on a question of law, the Appeal Court held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder.

The Appeal Court added that a court should not lightly arrive at such a conclusion, and that the facts would have to be closely scrutinised and judged with the greatest caution. One of the decisive considerations in the court's main judgment, delivered by Rumpff JA, was that we should never demand of an accused more than is reasonable; that, considering everyone's inclination to self-preservation, an ordinary person regards his life as being more important than that of another; that only somebody "who is endowed with a quality of heroism" would purposely sacrifice his life for another, and that to demand of X that he sacrifice himself therefore amounts to demanding more of him than is demanded of the average person.

The court in *Goliath* did not regard it as necessary to state whether the defence of necessity in the given circumstances is based on justification or absence of culpability.

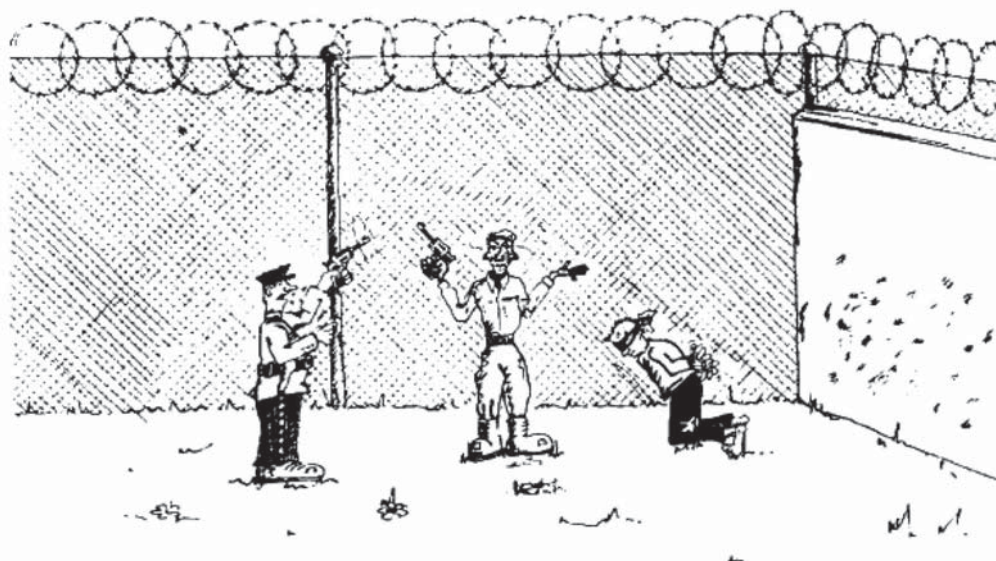
However, in *Maimela v Makhado Municipality and Another* 2011 (2) SACR 339 (SCA), the court regarded necessity as a ground of justification in the following circumstances: X, the second respondent and an employee of the first respondent (the municipality), discharged his pistol into a crowd of striking workers in circumstances of necessity. More than 300 strikers armed with knobkerries had surrounded X while he was lying on the ground and hit

him. Fearing for his life, he fired the shots randomly into the crowd “to scare them away” (at par 7). One person was killed and the other shot in the face. A delictual claim was instituted against X and his employer by the person injured and the wife of the person killed. There was no evidence before the court that the persons injured and killed were actively participating in the attack upon X. The High Court dismissed the delictual claim on the ground that X had acted in a situation of necessity. The Supreme Court of Appeal also upheld the defence of necessity. The court pointed out that necessity, unlike private defence, does not require that the act be an act of defence against an unlawful attack (par 16). The main issue was whether the act of the person who relies on necessity was reasonable. According to the court, X’s life was in danger and there can be no greater harm than a threat to a person’s life. Had X not fired the shots, he would in all probability have been killed. **In the circumstances, X had acted reasonably.** The court ruled that while due regard must be had to the victim’s right to life, denying a person the right to act in circumstances of necessity by killing to protect his life would be to deny that person his or her right to life (pars 18 and 20).

If you are interested in the controversial academic question whether the killing of another person in a situation of necessity amounts to a ground of justification or, rather, a ground excluding culpability, you can read *Criminal Law* 120–122. However, you are not expected to know the various arguments advanced by legal scholars for examination purposes.

6.2.6 *The test to determine necessity is objective*

The question whether X’s acts fell within the limits of the defence of necessity must be considered **objectively**, that is, in the light of the actual facts, and not according to what X (at the time) took the facts to be. If she is not actually (that is, objectively) in such a situation, but merely **thinks** that she is, she cannot rely on necessity as a justification. If she merely thinks that she is acting out of necessity and, while thus mistaken, directs her action against another person’s interests, her action remains unlawful, but she may escape liability because she lacks culpability. This will become clear in the course of the discussion of culpability further on, more particularly in the discussion of the effect of mistake and of awareness of unlawfulness. Such a situation may be described as putative necessity.



Killing another in a situation of necessity (compulsion): Z (on the left) orders X (in the middle) to shoot and kill Y (on the right), threatening to kill X if he refuses to obey the order. (Assume that the circumstances are such that it is impossible for X to escape the situation of necessity by, for example, running away or attacking Z.) If X executes the order and kills Y, he is, according to the Appellate Division decision in *Goliath*, not guilty of murder (or any other crime), since he acted in necessity.

6.3 CONSENT

(*Criminal Law* 122–127)

6.3.1 Introduction

Consent by the person who would otherwise be regarded as the victim of X's conduct may, in certain cases, render X's otherwise unlawful conduct lawful. To generalise about consent as a ground of justification in criminal law is possible only to a limited degree, since consent can operate as a ground of justification only in respect of certain crimes, and then only under certain circumstances.

The idea that consent may render a seemingly unlawful act lawful is sometimes expressed in the Latin maxim *volenti non fit iniuria*. Freely translated, these words mean "no wrongdoing is committed in respect of somebody who has consented (to the act concerned)".

6.3.2 The different possible effects of consent

In order to understand the possible effect of consent on criminal liability properly, it is feasible to differentiate between the following four groups of crimes:

- (1) There are crimes in respect of which consent does operate as a defence, but where such **consent does not operate as a ground of justification**. It forms part of the **definitional elements** of the crime instead. The

reason absence of consent forms part of the definitional elements is that absence of consent by a certain party plays such a crucial role in the construction of the crime that this requirement is incorporated into the definitional elements of the crime. The best-known example in this respect is **rape**. Rape is possible only if the sexual penetration takes place without the person's consent. Absence of consent must, of necessity, form part of the definitional elements of the crime because it forms part of the minimum requirements necessary for the existence of a meaningful criminal prohibition.

- (2) There are crimes in respect of which consent by the injured party is **never recognised as a defence**. The best-known example is **murder**. Mercy killing (euthanasia) at the request of the suffering party is unlawful (*Hartmann* 1975 (3) SA 532 (C)).
- (3) There are crimes in respect of which consent **does operate as a ground of justification**. Well-known examples of such crimes are **theft and malicious injury to property**.
- (4) **There is a group of crimes in respect of which consent is sometimes regarded as a ground of justification and sometimes not**. (These crimes fall, as it were, halfway between categories (2) and (3) mentioned above.) An example of a crime that falls into this category is assault.

6.3.3 *When consent can operate as a ground of justification in assault*

Unlike the law of delict, which, in principle, protects individual rights or interests, criminal law protects the **public interest** too; the state or community has an interest in the prosecution and punishment of all crimes, even those committed against an individual. The result is that, as far as criminal law is concerned, the individual is not always free to consent to impairment of her interests. This is why even physical harm inflicted on somebody at her own request is sometimes regarded by the law as unlawful and, therefore, as amounting to assault. The criterion to be applied to determine whether consent excludes unlawfulness is the general criterion of unlawfulness, namely **the *boni mores* (the legal convictions) of society, or public policy**.

The best-known examples of situations in which consent may indeed justify an otherwise unlawful act of assault are those where injuries are inflicted on others in the course of **sporting events**, and where a person's bodily integrity is impaired in the course of **medical treatment**, such as during an operation. Other examples of "impairments of bodily integrity", such as a kiss, a handshake or even a haircut, occur so often in everyday life that non-liability is taken for granted.

The reason a medical doctor cannot be charged with assaulting a patient upon whom she performs an operation is the patient's consent to the operation (assuming that it has been given). If it was impossible for the patient to consent because of unconsciousness or mental illness, for example, the doctor's conduct may nevertheless be justified by necessity or presumed consent (which will be explained below).

Assault may be committed with or without the use of force or the infliction of injuries. If there was no violence or injuries, consent may justify the act (*D* 1998 (1) SACR 33 (T) 39). Where injuries have been inflicted, it must be ascertained whether the act was in conflict with the *boni mores* (i.e. whether it was *contra bonos mores* – “against good morals”). If this was indeed the case, the consent cannot operate as a ground of justification (*Matsemela* 1988 (2) SA 254 (T)).

6.3.4 Requirements for a valid plea of consent

The consent must comply with certain requirements in order to be valid, that is, in order to afford X a defence. We will now consider these requirements.

To assist you in your studies, we first summarise the requirements for this ground of justification in the following framework:

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**

- (1) **The consent must be given voluntarily, without any coercion.** Consent obtained as a result of violence, fear or intimidation is not voluntary consent. If, for example, X brandishes a revolver while demanding money from Y and Y hands over the money because she feels threatened, there is no valid consent to the giving of the money (*Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A)).

However, **mere submission** cannot be equated with voluntary consent (*D* 1969 (2) SA 591 (RA)). If a woman decides that it is futile to resist the strong, armed attacker who is about to rape her, and simply acquiesces in what he does to her (in other words, she does not expressly manifest her objection verbally or by physical acts), her conduct cannot be construed as consent to intercourse (*Volschenk* 1968 (2) PH H283 (D)).

Note the interesting application of this requirement in *McCoy* 1953 (2) SA 4 (SR) (as illustrated below).

- (2) **The person giving the consent must be endowed with certain minimum mental abilities.** These abilities are the ability
 - to appreciate the nature of the act to which she consents
 - to appreciate the consequences of the act

For this reason, if a woman is mentally ill, under a certain age, drunk, asleep or unconscious, she cannot give valid consent to sexual intercourse

(C 1952 (4) SA 117 (O) 121; K 1958 (3) SA 420 (A)). In *SM* 2013 (2) SACR 111 (SCA), a minor adopted child was induced by threats and rewards over a long period by her adoptive father (a senior pastor of a church) to have sexual intercourse with him. For instance, he gave her permission to go out with friends, provided she afforded him certain “privileges” of a sexual nature (115*b*). He also gave her liquor on numerous occasions in order to break down her resistance. The court explained that “in the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny, with particular attention to be paid to the fact that the person giving the consent is a child. The inequalities in the relationship between the child victim and the adult perpetrator are of great importance in understanding the construction, nature and scope of the child’s apparent consent to any sexual relations. These inequalities may most likely influence the child’s propensity to consent to sexual relations” (120*h*). The court found that the accused (the pastor) had manipulated the complainant’s vulnerability and his stature in the community to his advantage. Because of the accused’s improper behaviour, the complainant’s consent was **no real consent** and the accused was accordingly found guilty of rape.

- (3) **The consenting person must be aware of the true and material facts regarding the act to which she consents.** A fact is material if it relates to the definitional elements of the particular crime.

In the case of rape, for example, the person must be aware of the fact that it is sexual penetration to which she is consenting. In an old English decision (bearing a very appropriate name), *Flattery* (1877) 2 QBD 410, 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 another decision in England, *Williams* [1923] 1 KB 340, a woman thought that X, her singing teacher, had performed a surgical operation on her to improve her breathing ability when singing, whereas, in fact, he 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.

This type of mistake is a mistake relating to the nature of the act, and is referred to in legal terminology as *error in negotio* (“mistake regarding the type of act”).

In *C* 1952 (4) SA 117 (O), a woman was sleeping during a hot summer night and woke to find a man having sexual intercourse with her. She thought that the man was her husband, and allowed him to continue, but then discovered that the man was not, in fact, her husband, but another man, namely X. X was convicted of rape. The court stated that consent that prevents sexual intercourse from amounting to rape required not only a mental state of willingness in respect of the type of act, but also willingness to perform the act with the particular man who, in fact, has intercourse with her.

This type of mistake is a mistake, not regarding the nature of the act, but regarding the identity of X. This type of mistake is referred to in legal

terminology as *error in persona* (freely translated “mistake regarding the identity of the perpetrator”).



Consent as a ground of justification: the facts in *McCoy's case*. In this case, Y, a young air hostess, failed to fasten her safety belt when the plane landed. (This constituted an infringement of certain security regulations of the company.) X, the general manager of the airways company, reprimanded her for her failure and threatened to dismiss her from the service of the airways. She did not want to lose her job and, accordingly, gave permission in writing that X could give her a hiding in exchange for an undertaking by him that he would not dismiss her. X thereupon gave Y a hiding of six strokes on her buttocks. As a result, X was charged with having assaulted Y.

The court rejected X's defence that Y had consented to the chastisement on the following two grounds: Firstly, her consent was not voluntary, since she only “consented” out of fear and in order to avoid being dismissed. Secondly, even if the consent had been voluntary, the court could not recognise such consent as valid and as amounting to a ground of justification. (Although the court did not say so expressly, it is submitted that the reason for the latter ruling is that it would be *contra bonos mores* [contrary to the generally recognised morals prevailing in society] and contrary to the legal convictions of society to recognise such consent as valid, where it was given by a young female employee to the general manager of the company for which she was working, and in order to avoid being dismissed).

- (4) **The consent may be given either expressly or tacitly.** There is no qualitative difference between express and tacit consent.
- (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, in exceptional circumstances, someone else may give consent on her behalf, such as where a parent consents to an operation to be performed on his or her child.

ACTIVITY

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 the latter 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?

FEEDBACK

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 that 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 that contravene the rules of the game, provided such acts are normally to be expected when taking part in that sport. See *Criminal Law* 125. 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.

6.4 PRESUMED CONSENT

You must study the discussion of this ground of justification in *Criminal Law* 127–128 on your own.

6.5 THE RIGHT OF CHASTISEMENT

(*Criminal Law* 137–138)

6.5.1 *The general rule*

Parents have the right to punish their children with moderate and reasonable corporal punishment in order to maintain authority and in the interests of the child's education.

6.5.2 *Teachers no longer have a right to impose corporal punishment*

Before the Constitution came into operation, not only parents, but also teachers and people *in loco parentis* ("in place of a parent"), such as people in charge of school hostels, had the right to punish the children in their charge with moderate and reasonable corporal punishment in order to maintain authority and discipline. However, in accordance with the letter and spirit of the Constitution (more particularly, the right to dignity (s 10); the right

to “freedom and security of the person” and, thereunder, the right “not to be treated or punished in a cruel, inhuman or degrading way” (s 12) and the right of a child to be protected from maltreatment, neglect, abuse or degradation (s 28(1)(d)), legislation was enacted in 1996 banning corporal punishment administered at schools.

Section 10 of the South African Schools Act 84 of 1996 provides that no person may administer corporal punishment at a school to a learner, and that any person who contravenes this provision is guilty of an offence and liable, on conviction, to a sentence that could be imposed for assault. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), the Constitutional Court held that the prohibition of corporal punishment was part and parcel of a national programme to transform the education system and bring it in line with the Constitution. The state was further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people, especially children, from maltreatment, abuse or degradation (at 780 F-G). The court ruled that the ban on corporal punishment laid down in section 10 applies to all schools in South Africa, both state and private.

6.5.3 *Parent’s right to impose corporal punishment*

In terms of the common law, chastisement of a child by a parent is justified only if it is **moderate and reasonable** (*Hiltonian Society v Crofton* 1952 (3) SA 130 (A) 134). The question whether it is moderate and reasonable depends on the circumstances of each case, such as the child’s age, gender, build and health, the nature of the transgression and the nature and extent of the punishment (*Lekgathe* 1982 (3) SA 104 (B) 109). The child must earn the punishment; this means that the child must have transgressed, or have threatened to transgress.

The Constitutional Court has not yet ruled on whether moderate corporal punishment in private homes amounts to a justifiable limitation of the rights of children as set out in section 28(d) of the Constitution (the right to be protected from maltreatment or degradation).

Since child abuse at the hands of parents is so prevalent in South Africa, the question has arisen whether corporal punishment of children by their parents should not be completely banned. Burchell expresses the point of view that, in terms of the constitutional rights of children, “corporal punishment of any nature inflicted on a child of any age by any person, including a parent for educational or correctional objectives is the most defensible position in South Africa” (*Burchell supra* 200). Section 39(3) of the Constitution requires that legislation, common law and customary law be compatible with the Bill of Rights. Therefore, it may be contended that even the reasonable and moderate corporal punishment defence that currently forms part of our common law amounts to an infringement of children’s rights, in particular, children’s rights to dignity and physical integrity.

What is your point of view? Do you think that parents should have a right to inflict corporal punishment upon their children, as long as it is reasonable and moderate?

You will find plenty of interesting point of views on this topic. See, for example, the dissertation by Deirdre Kleynhans, entitled "Considering the constitutionality of the common law defence of reasonable and moderate chastisement" (2011 LLM dissertation, University of Pretoria), which can be accessed at upetd.up.ac.za/thesis/available/etd-09142012-25434/unrestricted/dissertation.pdf.

6.6 OBEDIENCE TO ORDERS

You must study the discussion of this topic in *Criminal Law* 134-136 on your own.

Note the two opposing approaches to this question, and the middle course adopted in the cases of *Smith* and *Banda*. In our opinion, this middle course is preferable. The middle course has also been adopted in section 199(6) of the Constitution, which provides that no member of any security service may obey a manifestly illegal order.

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. 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 is essential that subordinates obey the commands of their superiors. 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; (2) the accused must have been under a duty to obey the order; and (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 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.

ACTIVITY

X, a member of the South African Police Service, is charged with assault with intent to do grievous bodily harm. The facts before the court are that she had instructed a German shepherd dog to attack a beggar loitering in a park. The defence argues that X's act was justified because her superior officer had instructed her to get rid of all the beggars in the park by setting the police dogs on them. You are the state prosecutor. What would your response be to this line of reasoning?

FEEDBACK

According to the decision in *Mostert*, X cannot rely on the ground of justification known as obedience to orders in these circumstances. The order was manifestly unlawful and, therefore, X's conduct is also unlawful.

6.7 OFFICIAL CAPACITY

(*Criminal Law 128–129*)

6.7.1 Definition

An act that would otherwise be unlawful is justified if X, by virtue of her holding a public office, is authorised to perform the act, provided the act is performed in the course of the exercise of her duties.

6.7.2 Examples of the application of official capacity as ground of justification

The following are examples of cases in which X's act, despite initially seeming to be unlawful (since it complies with the definitional elements of the relevant crime), transpires, upon closer scrutiny, not to be unlawful because it is justified by the ground of justification known as official capacity:

- Possessing drugs amounts to the commission of a crime. Nevertheless, the clerk of the court whose official duty it is to exercise control over exhibits at a court will not be guilty of unlawfully possessing drugs if she exercises control over drugs that are exhibits in a current court case.
- To touch or search another inappropriately without her consent amounts to the commission of crimes such as assault, indecent assault or *crimen iniuria*. Nevertheless, X does not commit any crime in the following circumstances, despite the fact that she has searched Y without Y's consent: X is a member of the security personnel at a custom-post or international airport. It is her duty to physically search people crossing international borders in order to ascertain whether they have hidden prohibited articles (such as drugs or weapons) on their bodies or in their clothing. Y is someone who intends crossing the international border and who is searched by X, who is acting in her official capacity.

Arresting a criminal or suspect is an example of an act performed in an official capacity, which is often encountered in practice. The questions of who may arrest and in what circumstances are matters forming part of the course in Criminal Procedure and will not be discussed here. However, it is important to note that section 49 of the Criminal Procedure Act 51 of 1977 provides that people who attempt to arrest a criminal or suspected criminal may, in certain narrowly defined circumstances, kill the suspect if the latter resists the attempt or if she attempts to flee.

6.8 TRIVIALITY

You must study the discussion of this ground of justification in *Criminal Law* 139–140 on your own.

GLOSSARY

<i>volenti non fit iniuria</i>	no wrongdoing is committed in respect of somebody who has consented
<i>error in negotio</i>	a mistake relating to the nature of the act
<i>error in persona</i>	a mistake relating to the identity (of the accused)
<i>negotiorum gestio</i>	presumed consent or spontaneous agency
<i>de minimis non curat lex</i>	the law does not concern itself with trivialities
<i>in loco parentis</i>	in the place of a parent
<i>boni mores</i>	good morals; the legal convictions of society
<i>contra bonos mores</i>	against good morals or the legal convictions of society

SUMMARY

- (1) Although private defence and necessity are closely related, there are the following important differences between them:

Private defence	Necessity
Stems from human conduct	Stems from either human conduct or non-human intervention (i.e. chance circumstances)
Directed against an unlawful attack	Directed against the interests of an innocent third party or consists in the violation of a legal provision

- (2) Only relative compulsion qualifies as necessity – in the case of absolute compulsion, there is no act.
- (3) See the discussion above for the requirements for a successful plea of necessity.
- (4) In *Goliath* 1972 (3) SA 1 (A), it was held that necessity could constitute a complete defence to a charge of murder.
- (5) The test for necessity is objective. However, a mistaken belief in the existence of an emergency (putative necessity) may exclude X's culpability.
- (6) Consent to harm or injury is a ground of justification, provided it is not contrary to the legal convictions of society.
- (7) See the discussion above for the requirements for a successful plea of consent.
- (8) Spontaneous agency takes place when X performs an act in Y's interests, in her (Y's) absence, and without her knowledge and consent.

- (9) Parents are entitled to inflict moderate and reasonable corporal punishment on their children to maintain authority and in the interests of the child's education.
- (10) An act in obedience to an unlawful order can be justified only if the order is not manifestly unlawful.
- (11) An act that would otherwise be unlawful is justified if the person holds a public office that authorises her to perform such an act, provided she performs the act in the execution of her official duties.
- (12) The principle that the law does not concern itself with trifles can exclude the unlawfulness of an act.

TEST YOURSELF

- (1) Distinguish between private defence and necessity.
- (2) Distinguish between absolute and relative compulsion, and indicate which of the two constitutes necessity.
- (3) Name and discuss the requirements for a successful plea of necessity.
- (4) Discuss whether an innocent person may be killed in a situation of necessity.
- (5) May consent constitute a ground of justification in the following circumstances?
 - (a) if X is charged with rape
 - (b) if X kills another person
 - (c) if a rugby player is injured in the course of a match
 - (d) when indecent acts are committed by adults
- (6) Name and discuss the requirements for a successful plea of consent as a ground of justification.
- (7) Discuss the following grounds of justification:
 - (a) spontaneous agency
 - (b) parental disciplinary chastisement by means of corporal punishment in private homes
 - (c) trifling character of an act
- (8) Discuss whether an otherwise unlawful act may be justified because the perpetrator, when she committed the act, obeyed the order of a person to whom she was subordinate.
- (9) May officials occupying a public office, who commit acts that would otherwise be unlawful, rely as a defence on the fact that they are entitled to perform these acts because the acts were performed in the course of their official duties?

STUDY UNIT 7

Culpability and criminal capacity



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the broader concept of “culpability”
- demonstrate your understanding of the principle of contemporaneity by
 - recognising the potential applicability of the principle to a given set of facts
 - applying the relevant case law to such a set of facts
- distinguish criminal capacity from intention (and, more particularly, awareness of unlawfulness) by demonstrating an understanding of the two tests
- express an opinion on whether an accused can rely successfully on the defence of non-pathological criminal incapacity, having regard to
 - the two psychological legs of the test for this defence
 - the cause/s of the criminal incapacity
 - the onus of proof
 - the role of expert evidence from psychiatrists and/or psychologists
 - the courts’ practice of treating this defence with great caution

7.1

BACKGROUND

At this stage, we have already set out three of the four elements of criminal liability, namely

- (1) the act (conduct)
- (2) compliance with the definitional elements
- (3) unlawfulness

In this study unit we will begin to explain the fourth and last general element of liability, namely culpability. The requirement of culpability contains many facets and the discussion of this requirement (or “element”) extends to the end of study unit 14. In this study unit we will first give a general explanation of the requirement of culpability. Thereafter, we will discuss the requirement of criminal capacity, which will be followed by a discussion of the general defence of criminal incapacity (better known as the defence of “non-pathological criminal incapacity”).

7.2

THE REQUIREMENT OF CULPABILITY IN GENERAL

(Criminal Law 145–155)

7.2.1

Introduction

The mere fact that a person has committed an act that complies with the definitional elements and that is unlawful is still not sufficient to render him criminally liable. One very important general requirement remains to be satisfied: X’s conduct must be accompanied by culpability. This means,

broadly speaking, that there must be grounds upon which, in the eyes of the law, he can be **reproached** or blamed for his conduct. This will be the case if he has committed the unlawful act in a **blameworthy state of mind**.

X can be blamed for his conduct only if the law could have expected him to avoid or shun the unlawful act or not to proceed with it. Thus, for instance, the legal order cannot blame a mentally ill (“insane”) person or a six-year-old child who has committed an unlawful act, for that act, since they cannot be expected to act lawfully. Neither can X’s conduct be described as blameworthy in a case such as the following: On leaving a gathering, X takes a coat, which he genuinely believes to be his own, from the row of pegs in the entrance hall of the building. The coat actually belongs to Y, although it is identical to X’s. But for the requirement of culpability, X would be guilty of theft. In the circumstances, X is unaware that his conduct is unlawful.

7.2.2 *Culpability and unlawfulness*

Whether culpability is present need be asked only after the unlawfulness of the act has been established. It would be nonsensical to attach blame to lawful conduct. The unlawfulness of the act is determined by criteria that are applicable to everybody in society, whether rich or poor, clever or stupid, young or old. This is why it is just as unlawful for somebody who is poor to steal as it is for somebody who is rich, and why it is just as unlawful for psychopaths – who find it very difficult to control their sexual desires – to commit sexual offences as it is for normal people. Criteria employed to ascertain the unlawfulness of an act do not refer to the personal characteristics of the perpetrator.

However, when we come to the question of culpability, the picture changes: the focus now shifts to the perpetrator as an individual, and the question we ask is whether **this particular person** – considering **his** personal characteristics, aptitudes, gifts, shortcomings and mental abilities, as well as his knowledge – can be blamed for his commission of the unlawful act.

As pointed out in the previous study unit, the unlawfulness of the act may be excluded by **grounds of justification** (such as private defence and consent). Culpability, on the other hand, may be excluded because X lacked criminal capacity or by some other ground excluding culpability, such as mistake. (This will become clear in the course of the discussion that follows.)



Students often mistakenly use the term “ground of justification” as a synonym for **any** defence that X may raise – even a defence that should exclude his culpability. This should be avoided. **Grounds of justification** refer only to defences that **exclude the unlawfulness** of the act. “**Defence**” denotes any ground that **excludes liability** and includes, for instance, automatism, impossibility, the defence of absence of a causal link, the grounds of justification, criminal incapacity and mistake.

7.2.3 Terminology

In practice, the Latin term *mens rea* is mostly used to denote culpability. Another term sometimes used in place of *mens rea* is “fault”. Although these terms are generally used by our courts, we prefer to use the expression “culpability”.

7.2.4 Criminal capacity and forms of culpability

Before it can be said that a person acted with culpability, it must be clear that such a person was endowed with criminal capacity. The term “criminal capacity” refers to the person’s **mental ability**. This will become clearer in the discussion of criminal capacity that follows. It will be shown that mentally ill persons and young children, for example, do not possess sufficient mental abilities to hold them liable. Such persons cannot be blamed for any unlawful conduct.

But the mere fact that X has criminal capacity, is not sufficient to warrant an inference that he acted with culpability. There must be something more: X must have acted either intentionally or negligently. Intention and negligence are usually referred to as the “two forms of culpability”. If X (who has criminal capacity) carries away somebody else’s property, but is unaware that what he is carrying away belongs to somebody else, thinking that it belongs to him, it cannot be said that he “intentionally” removed another’s property. Therefore, X cannot be convicted of theft, since, as we will see later, the form of culpability required for theft is intention, and the misapprehension under which X laboured (the mistake he made) has the effect of excluding intention and, therefore, also culpability.

The contents of the concept of culpability may be summarised briefly as follows:

<p style="text-align: center;">culpability = criminal capacity + either intention or negligence</p>

(Among certain writers, there is a difference of opinion on certain theoretical aspects of culpability. This is discussed in *Criminal Law* (150–154), where the author refers to the psychological and the normative concept of culpability. For the purposes of this course, we do not expect you to read or know about this aspect of the topic.)

7.2.5 The principle of contemporaneity

(*Criminal Law* 148–149; *Case Book* 131–134)

The culpability and the unlawful act must be contemporaneous. This means that in order for a crime to have been committed, there must have been

culpability on the part of X at the very moment when the unlawful act was committed. No crime is committed if culpability existed only prior to the commission of the unlawful act, but not at the moment the act was committed, or if it came into being only after the commission of the unlawful act.

Let's use a fictitious example to illustrate this: X wishes to shoot his mortal enemy, Y. On the way to the place where the murder is to be committed, X accidentally runs down and kills a pedestrian. It turns out that, unbeknown to X, the pedestrian was, in fact, Y. In these circumstances, although there is undoubtedly a causal connection between X's act and Y's death, X could not be convicted of murdering Y. At the time of the accident, X lacked the necessary intention to kill.

The decision in *Masilela* 1968 (2) SA 558 (A) constitutes an apparent exception to the general rule in relation to contemporaneity. In this case, X assaulted and strangled Y, intending to kill him; then, believing him to be dead, he threw his body onto a bed and ransacked the house. He then set fire to the bed and the house and disappeared with the booty. Y was, in fact, still alive after the assault and died in the fire. The Appellate Division confirmed X's conviction of murder. The court did not accept the argument that there were two separate acts, of which the first, although committed with the intention to murder, did not actually kill Y, while the second did kill Y, but was not accompanied by the intention to murder (because to dispose of what is believed to be a corpse cannot be equated with an intention to kill a human being). According to the Appellate Division, X's actions amounted to "a single course of conduct".

The principle of contemporaneity is closely related to the rule that a mistaken belief concerning the causal chain of events usually does not exclude intention. The latter rule will be discussed later.

7.2.6 *Classifications in the discussion of culpability*

From the discussion of culpability thus far, it is clear that the concept has many facets. Because of the scope of the culpability requirement, it is not feasible to discuss it in only one study unit. Therefore, we will discuss this requirement over a number of study units, as follows: the rest of this study unit will deal with a discussion of criminal capacity in general, as well as the first defence of criminal incapacity, which is known as the defence of non-pathological criminal incapacity. In the following study unit (study unit 8), we deal with the other two defences that exclude criminal capacity, namely the defences of mental illness and youth. Study units 9 and 10 deal with intention, study unit 11 with negligence, unit 12 with intoxication, unit 13 with provocation and unit 14 with the instances in which the requirement of culpability is disregarded.

7.3 CRIMINAL CAPACITY

For a general discussion of this topic, see *Criminal Law* 155–158.

7.3.1 *Definition*

The term “criminal capacity” refers to the mental abilities or capacities that a person must have in order to act with **culpability** and to incur criminal liability.

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

(1) 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

If one (or both) of these abilities is lacking, the person concerned lacks criminal capacity and cannot be held criminally responsible for an unlawful act that he has committed while he lacked such ability.

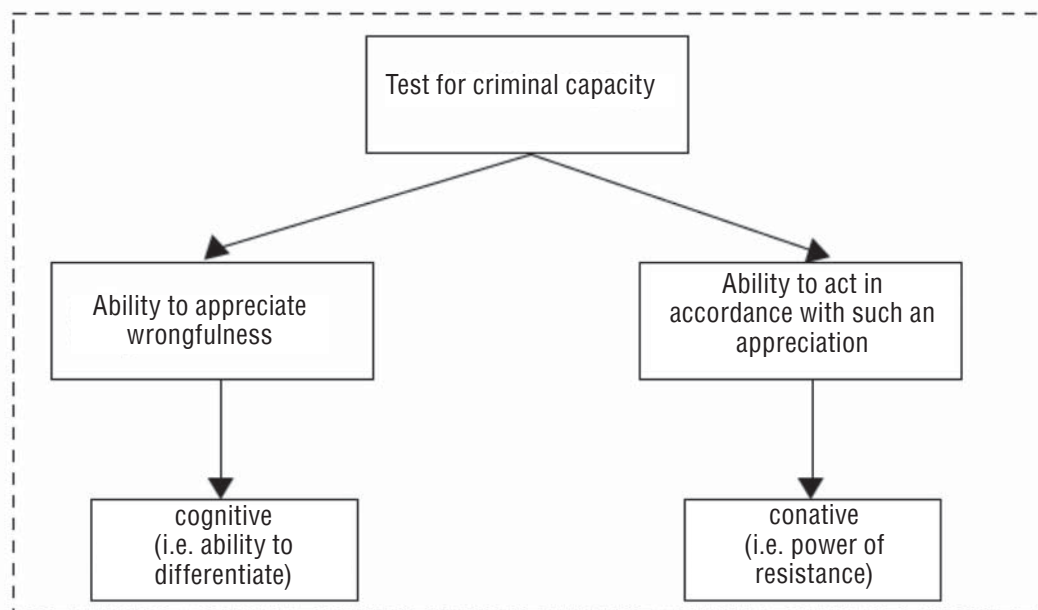
7.3.2 *Criminal capacity distinguished from intention*

Criminal capacity is the foundation or indispensable prerequisite of 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. 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** is concerned with his **mental abilities**, whereas the enquiry into whether he acted intentionally or negligently is concerned with the presence or absence of a certain attitude or state of mind on the part of X. 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.



Students often confuse the test to determine criminal capacity with that to determine intention, and, more particularly, that aspect of intention known as awareness of unlawfulness. A statement such as the following reveals this confusion of concepts: “X did not know that his act was unlawful and therefore he lacked criminal capacity”. The reason this statement is wrong is that absence of awareness of unlawfulness does not mean that X lacked criminal capacity; it means that X lacked **intention**. (The fact that awareness of unlawfulness forms part of the criminal-law concept of intention will become clear in the course of the later discussion of intention.)

7.3.3 Two psychological legs of test



It is apparent from the above definition of criminal capacity that this concept comprises two psychological components: firstly, X's ability to appreciate the wrongfulness of his act or omission, and secondly, his ability to conduct himself in accordance with such an appreciation of the wrongfulness of his act or omission.

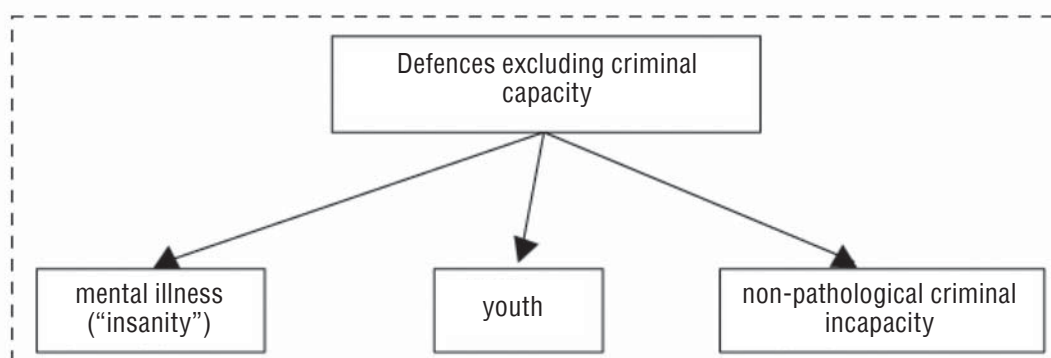
The first component (or first leg of the test) may be expressed in various ways: besides the expression "ability to appreciate the wrongfulness of the act", we may also speak of the "ability to appreciate the unlawfulness of the act" or "the ability to distinguish between right and wrong". Normally, it does not matter which of these expressions you use; they are simply synonyms.

The two psychological components mentioned above refer to two different categories of mental functions. The first function, that is, the ability to distinguish between right and wrong, lawful or unlawful, forms part of a person's **cognitive** mental function. This function is related to a person's reason or intellect, in other words, his ability to perceive, to reason and to remember. Here the emphasis is on a particular person's **insight and understanding**.

The second psychological component, incorporated in the second leg of the test to determine criminal capacity, refers to a person's ability to conduct himself in accordance with his insight into right and wrong. This is known as a person's **conative** mental function. This function relates to a person's ability to control his behaviour in accordance with his insights – which means that, unlike an animal, he is able to make a decision, set himself a goal and pursue it; he is also able to resist impulses or desires to act contrary to what his insights into right and wrong have revealed to him. Here the keyword or idea is "**self-control**".

In short, the cognitive and conative functions amount to insight (**ability to differentiate**) and self-control (**power of resistance**) respectively. These two functions render a person responsible for his conduct. (The exposition of these two components of the test to determine criminal capacity is based on paragraphs 9.7-33 of the *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* RP 69/1967 (the “Rumpff Report”).)

7.3.4 Defences excluding criminal capacity



First, there are the two particular defences excluding criminal capacity, namely the defence of mental illness, which is dealt with statutorily in sections 77 to 79 of the Criminal Procedure Act 51 of 1977, and the defence of youthful age, which is also dealt with statutorily in section 7(1) of the Child Justice Act 75 of 2008. These two defences are referred to as “particular defences” because they can succeed only if the mental incapacities are the result of particular circumscribed mental characteristics to be found in the perpetrator, namely a mental illness or mental defect as envisaged in section 78(1) of the Criminal Procedure Act (in the case of the defence of mental illness), or the perpetrator’s youthful age (in the case of the second particular defence).

Furthermore, these two particular defences are subject to certain rules applicable only to them: for example, the defence of mental illness is specifically governed by sections 77 to 79 of the Criminal Procedure Act, which, *inter alia*, provide for special orders to be made by the court if the defence is successful (e.g. that X may not leave the court as a free person, but that he be detained in a psychiatric hospital). If X relies on his youthful age as a defence, as explained in section 7(1) of the Child Justice Act 75 of 2008, the question of his criminal capacity is, in terms of the Child Justice Act 75 of 2008, governed by certain arbitrary age limits.

Apart from these two specific defences of criminal incapacity, there is also a general defence of criminal incapacity. This general defence is also known as “the defence of non-pathological criminal incapacity”. The success of this general defence is not dependent upon the existence of specific factors or characteristics of the perpetrator that led to his criminal incapacity. However, the judgment of the Supreme Court of Appeal in *Eadie* 2002 (1) SACR 663 (SCA) raises doubts about whether the defence of non-pathological criminal

incapacity still exists. In the meantime, until there is more clarity on this issue in our case law, we will assume that the defence still exists. This matter is discussed in more detail in 7.4 below.

7.3.5 *Arrangement of discussion*

In the discussion that follows, we will first consider the general defence of criminal incapacity. This will be followed by a discussion of the two specific defences of criminal incapacity referred to above, namely mental illness and youth.

7.4 THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY

(*Criminal Law* 158–164)

7.4.1 *General*

All the instances in which X relies on criminal incapacity as a defence, other than cases in which he relies on mental illness and youth, fall under this heading. We can also refer to this defence as the “general defence of criminal incapacity” in order to distinguish it from the particular defences of mental illness and youth, which also deal with criminal incapacity.

In *Laubscher* 1988 (1) SA 163 (A), the Appeal Court first described this defence as “**non-pathological criminal incapacity**”. The court adopted this description of the defence in order to distinguish it from the defence of mental illness created in section 78 of the Criminal Procedure Act. (This latter defence will be discussed later on.) The court stated that the defence created in section 78 applies to **pathological** disturbances of a person’s mental abilities – in other words, the cases in which these disturbances can be traced to some **illness of the mind**. The defence of non-pathological criminal incapacity, on the other hand, may succeed without any need to prove that, at the time of the commission of the act, X was suffering from a mental illness. For this defence to succeed, it is sufficient to prove that X lacked criminal capacity for only a relatively brief period and that the criminal incapacity was not a manifestation of an ailing or sick (pathological) mental disturbance; it would therefore be sufficient to prove that, for a relatively brief period during the commission of the act, X, owing to, for example, an **emotional collapse**, was unable to act in accordance with his insights into right or wrong.

Until 19 February 2002, there was no doubt that our law recognised the defence of non-pathological criminal incapacity. However, on that date, the Supreme Court of Appeal delivered a judgment in *Eadie* 2002 (1) SACR 663 (SCA) that **casts doubt on whether this defence is still recognised in our law**. Before discussing the judgment in *Eadie*, we will first consider the position in our law before the judgment in *Eadie* was delivered.

Note: When answering examination questions, you are free to abbreviate the rather long expression “non-pathological criminal incapacity” to “NPCI”.

7.4.2 *The law before 2002 (when judgment in **Eadie** was delivered)*

If the criminal incapacity is the result of a mental illness as envisaged in section 78(1) of the Criminal Procedure Act, X’s defence is one of mental illness in terms of that section; the merits of this defence are assessed with reference to the principles applying to that defence. If the criminal incapacity stems from youth, X’s defence is the defence commonly called “youth”. If the criminal incapacity is neither the result of mental illness in terms of section 78(1), nor of youth, it means that the defence of non-pathological criminal incapacity applies.

For this defence to succeed, it is **not necessary to prove** that X’s mental inabilities resulted from certain **specific causes**; more particularly, it is not necessary to prove that they were caused by a pathological mental condition. If, on the evidence as a whole, the court is satisfied that at the time of the commission of the crime, X lacked the ability to appreciate the wrongfulness of his act or to act according to such an appreciation, he must be found not guilty, **no matter what the cause of the inability**.

The cause may be what can be called an “**emotional collapse**”, shock, fear, anger, stress or concussion. Such a condition may be the result of **provocation** by Y or somebody else, and this may, in turn, be linked to physical or mental exhaustion resulting from Y’s insulting behaviour towards X, which strained his powers of self-control until these powers eventually snapped. **Intoxication** may also be a cause of the inability. The inability may, furthermore, be the result of a **combination of factors**, such as provocation and intoxication.

If X relies on this defence, the **onus of proving** beyond reasonable doubt that X had criminal capacity at the time of the commission of the act **rests upon the state**. However, X must lay a foundation for the defence in the evidence. There should preferably be **expert evidence** by psychiatrists or clinical psychologists concerning X’s mental abilities shortly before and during the commission of the act. However, the courts do not regard expert evidence as indispensable in order for the defence to succeed.

The two most important decisions in which this defence was recognised and applied are *Campher* 1987 (1) SA 940 (A) and *Wiid* 1990 (1) SACR 561 (A).

7.4.3 *The judgment in **Eadie***

In *Eadie* 2002 (1) SACR 663 (SCA), the Supreme Court of Appeal delivered a judgment that raises doubts about whether there is still such a defence in our law.

The **facts** in this case are the following: X, a keen hockey player, consumed a large quantity of liquor at a social function. Late at night, he got into his car and started driving home. Y, the driver of another vehicle, overtook X’s

car and then drove very slowly in front of him so that X could not overtake him. X eventually succeeded in overtaking Y. Y then drove at a high speed behind X, with the lights of his car on bright. The two cars then stopped. X was very angry, got out of his car, grabbed a hockey stick, which happened to be in the car, and walked to Y's car. X smashed the hockey stick to pieces against Y's car, assaulted Y repeatedly pulled him out of his car and then continued to assault him outside the car, on the road. Y died as a result of the assault. This was a case of "road rage". On a charge of murder, X relied on the defence of non-pathological criminal incapacity. The court rejected his defence and convicted him of murder.

The court discussed previous decisions dealing with this defence extensively and then held (in par 57 of the judgment) that **there is no distinction between non-pathological criminal incapacity owing to emotional stress and provocation, on the one hand, and the defence of sane automatism, on the other.** More specifically, the court said there is no difference between the second (conative) leg of the test for criminal capacity (i.e. X's ability to act in accordance with his appreciation of the wrongfulness of the act – in other words, his ability to resist temptation) and the requirement that applies to the conduct element of liability, namely that X's bodily movements must be voluntary. If X had alleged that, as a result of provocation, his psyche had disintegrated to such an extent that he could no longer control himself, it would have amounted to an allegation that he could no longer control his movements and that he, therefore, had acted **involuntarily**. Such a plea of involuntary conduct is nothing other than the **defence of sane automatism**. (In order to properly understand the court's argument, we advise you to refresh your knowledge of the defence of sane automatism by reviewing the discussion of this defence in 3.3.4 above.)

The court does not hold that the defence of non-pathological criminal incapacity no longer exists, and, in fact, makes a number of statements that imply that the defence does still exist. Nevertheless, it declares that if, as a result of provocation, an accused person relies on this defence, his defence **should be treated as one of sane automatism** (a defence that can also be described as a defence by X that he did not commit a voluntary act). The court emphasises the well-known fact that a defence of sane automatism **does not succeed easily and is, in fact, rarely upheld**.



Read the decision in the *Case Book: Eadie* 2002 (1) SACR 663 (SCA).

7.4.4 *The present law*

After the Supreme Court of Appeal decision in *Eadie*, it is highly unlikely that an accused will succeed with an argument that, as a result of non-pathological criminal incapacity (that is, provocation, emotional stress, fear or anger), he acted voluntarily, but merely lacked criminal capacity. He would also have to adduce evidence that casts a reasonable doubt on the voluntariness of his conduct. In reaching a conclusion, the court will consider the evidence against its own experience of human behaviour. In *Eadie*, Navsa JA made the following statement (in par 64):

Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* [the accused's own account] concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence.

Whether the court in *Eadie* introduced an objective, normative criterion in the otherwise subjective test for criminal capacity, or merely applied existing rules of evidence that relate to inferences drawn from objective facts to determine subjective intention, is not altogether clear. In Snyman's view, the judgment is based on **policy considerations that the law is opposed to affording a person who has killed another after being provoked by the latter a complete defence, that is, a complete acquittal** (Snyman 232–233). This means that if a person is charged with murder and raises the defence of provocation, he will be excused by the law only **partially** and still be convicted of culpable homicide.

Until there is more clarity in our law on how the judgment in *Eadie* is to be interpreted, we submit the following:

Before 2002, the defence of non-pathological criminal incapacity was not limited to cases in which, **as a result of provocation or emotional stress**, X briefly lacked criminal capacity. It also applied to situations in which he lacked capacity owing to other factors, such as **intoxication, fear or shock**. In our opinion, the *Eadie* case should be limited to cases in which X alleges that it is as a result of **provocation or emotional stress** that he lacked capacity. If he alleges that he momentarily lacked capacity owing to other factors, such as intoxication, the defence (of non-pathological criminal incapacity) still exists. However, if, as in the *Eadie* case, X alleges that he lacked capacity as a result of **provocation or emotional stress**, his defence should be treated as one of sane automatism.

GLOSSARY

mens rea

literally “guilty mind”; in practice, the culpability requirement

SUMMARY

- (1) “Culpability”, as an element of criminal liability, means that there are grounds upon which, in the eyes of the law, the perpetrator (X) can be reproached or blamed for his conduct.
- (2) Culpability consists of criminal capacity plus either intention or negligence.
- (3) The culpability and the unlawful act must be contemporaneous.

- (4) See the above definition of the concept of criminal capacity.
- (5) Criminal capacity is based upon two psychological components, or legs, namely the cognitive and the conative legs.
- (6) The cognitive component deals with a person's insight and understanding, and is present if X has the ability to appreciate the wrongfulness of his act or omission.
- (7) The conative element deals with X's self-control and is present if X has the ability to conduct himself in accordance with his appreciation of the wrongfulness of his act or omission.
- (8) Before 2002, it was generally accepted that there is a general defence of criminal incapacity apart from the defence of mental illness set out in section 78(1) of the Criminal Procedure Act and the defence of youth.
- (9) The general defence of criminal incapacity referred to above in the previous statement was known as "non-pathological criminal incapacity". In this defence, X's mental inability is the result of factors such as emotional stress resulting from provocation, intoxication, shock, anger or fear.
- (10) In 2002, the Supreme Court of Appeal, in the case of *Eadie*, 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.
- (11) It is 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.
- (12) It is submitted that if, as in the *Eadie* case, X alleges that he lacked capacity as a result of provocation or emotional stress, he can escape liability only if he successfully raises the defence of sane automatism.

TEST YOURSELF

- (1) Define, in a maximum of two sentences, the meaning of “culpability” (as an element of criminal liability).
- (2) Complete the following statement: Culpability = plus either or
- (3) The principle of contemporaneity in criminal law means the following: If the unlawful act is committed at a certain time without any, and the culpability is present at a later time without there being an act at the same time, no crime is committed.
- (4) Define the concept of criminal capacity.
- (5) Explain the difference between the concepts of “criminal capacity” and “intention”.
- (6) Name and explain the two psychological components, or “legs”, of the test for criminal capacity.
- (7) Name three defences excluding criminal capacity.
- (8) What was the meaning of the concept of non-pathological criminal incapacity before 2002?
- (9) Discuss the decision in *Eadie*, especially the question whether the defence of non-pathological criminal incapacity still exists after this judgment.

STUDY UNIT 8

Criminal capacity: mental illness and youth



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the defence of mental illness, having regard to
 - both the biological (or pathological) and the psychological leg of the test for this defence
 - the cause/s of the criminal incapacity (mental illness or mental defect)
 - the onus of proof
 - the role of expert evidence from psychiatrists and/or psychologists
- decide whether, in a particular case of criminal incapacity, it would be better for the accused to rely on the defence of mental illness or non-pathological criminal incapacity, having regard to
 - the respective criteria
 - the onus of proof
 - the need for expert evidence (and its concomitant cost)
 - the verdict in the case of a finding of incapacity
- distinguish between the result of a successful reliance upon the defence of criminal incapacity and the result of a finding of diminished criminal capacity
- express an informed opinion on whether a child of any age under 14 years should be found to have been criminally incapable on account of their youthful age

8.1

BACKGROUND

In study unit 7, we pointed out that

culpability = criminal capacity + either intention or negligence

In that study unit we began to discuss the concept of criminal capacity. We have already analysed that concept and pointed out that there are three defences that may exclude criminal capacity, namely the defence of non-pathological criminal incapacity, the defence of mental illness (also called insanity) and the defence of youth. We discussed the first of these three defences in the previous study unit. In this study unit we will discuss the other two defences.

8.2 MENTAL ILLNESS

(*Criminal Law 164–172*)

8.2.1 Introduction

Criminal capacity may be excluded by the mental illness or abnormality of the accused (X). The defence of mental illness was previously known as the defence of “insanity”. The latter term has, however, fallen into disfavour in modern psychology. Some of the most important sources dealing with the subject refer to it as “mental abnormality” or “mental illness”, and for this reason we prefer to use the expression “mental illness”.

Since 1977, the whole subject relating to mental illness as a defence in criminal law has been governed by legislation, more particularly by section 78 of the Criminal Procedure Act 51 of 1977. It is interesting to note that this is one of the few subjects in the general principles of criminal law that is regulated by statute. As you will have gathered by now, almost all the other principles or defences (such as automatism, causation, private defence, intention and negligence) are governed by common law, which is that system of legal rules not contained in legislation.

Before 1977, the South African courts, in dealing with the defence of mental illness, applied a set of rules known as the “*M’Naghten rules*”, which were derived from English law. However, since these rules ceased to apply after 1977, we will not discuss them here.

One of the most important sources on the rules relating to this defence is the *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons*, dating from the late 1960s. The chairman of the commission was Mr Justice Rumpff, then a judge of appeal and, later, Chief Justice. The report of the commission is usually described as the “Rumpff Report”.

8.2.2 Contents of section 78(1)

The test to determine the criminal capacity of mentally abnormal persons is contained in section 78(1) of the Criminal Procedure Act 51 of 1977, which reads as follows:

A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable

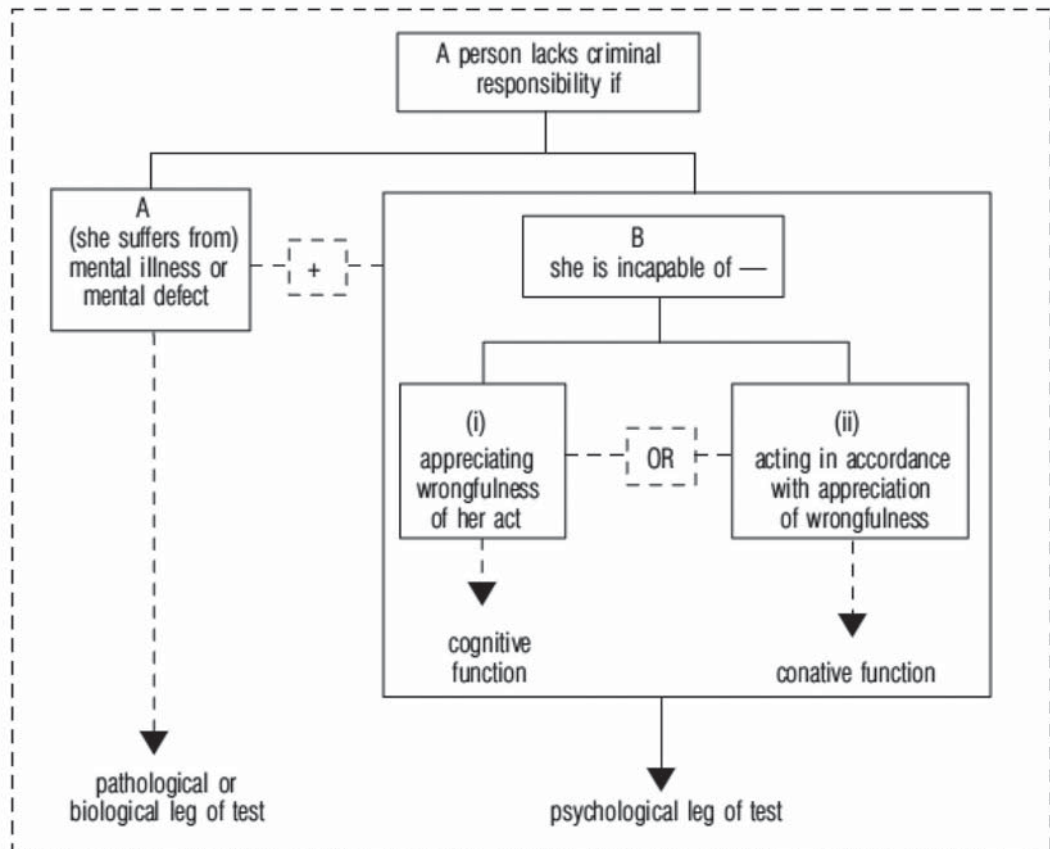
- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

Note that the words “shall not be criminally responsible” in this section actually mean “shall lack criminal capacity”.

8.2.3 Analysis of section 78(1)

Before discussing the contents of section 78(1), consider the following diagram setting out the test:



If you keep this diagram in mind, you should find it easier to understand the discussion that follows.

The defence of mental illness brings us to an area of the law (and, more particularly, of criminal law) in which the lawyer or judge not only has to have a knowledge of criminal law, but also has to take cognisance of knowledge in other spheres, namely psychiatry and psychology. This is what happens in section 78(1). The test enunciated in this section has two legs, which are indicated in the diagram above in two squares marked A and B. The first square, marked A, comprises the **pathological** leg (or biological leg, as it is sometimes called) of the test. The second square, marked B, comprises the **psychological leg** of the test.



Note the plus sign (+) between the two squares (or legs of the test): before you can succeed with the defence of mental illness, both legs of the test must be complied with. The two legs do not apply in the alternative; they are not connected with an “or”. (In reality, there must be a causal connection between A and B – hence the words “which makes him or her incapable” in s 78(1), or, more particularly, the words “wat tot gevolg het”, in the Afrikaans text. We merely use the plus sign in order to simplify the exposition of the test.) Note, further, that the square marked B contains two smaller subdivisions, each of which is put in a smaller square, and marked (i) and (ii) respectively,

and that these two subdivisions of the test apply in the **alternative**, owing to the use of the word “or” in section 78(1). (In their answers, students often use the word “and” where they should use “or”, and vice versa. Please make sure that you do not confuse these two options!)

The test set out in section 78(1) to determine whether X lacks criminal capacity embodies a so-called **mixed** test in the sense that both pathological factors (which refer to X’s illness – see the first square, A) **and** X’s mental abilities (that is, the psychological factors referred to in the second square, B) are taken into account.

We will now proceed to examine the two legs of the test more closely.

8.2.4 *Mental illness or mental defect*

Firstly, we consider the first leg of the test in section 78(1), namely that at the time of the commission of the act, X must have been suffering from a mental illness or mental defect. This requirement means the following:

- (1) The words “mental illness” or “mental defect” refer to a **pathological disturbance** of the mental faculties. “Pathological” means “sick” or “diseased”. The words “mental illness” or “mental defect” do **not refer to** a mere temporary clouding of the mental faculties due to **external stimuli** such as alcohol, drugs or even provocation (*Mahlinza* 1967 (1) SA 408 (A) 417). Thus if X temporarily loses her wits because a brick fell onto her head, her condition could not be described as a “mental illness”.
- (2) It is clear from the further subsections of section 78 and from section 79 that the court must determine whether X was suffering from a mental illness or mental defect with the aid of **expert evidence given by psychiatrists**. The psychiatrists will examine X while she is detained in a psychiatric hospital, or any other place designated by the court, and then report their findings to the court.
- (3) It is not necessary to prove that a mental illness or defect originated in X’s mind: the defence may be successful **even if the origin** of the illness **was organic** (i.e. stemmed from X’s physical organs, as opposed to her mind). An example in this respect is arteriosclerosis (i.e. a hardening of the walls of an artery).
- (4) The duration of the mental illness is not relevant. It may be of **either a permanent or a temporary nature**. In the latter case, it must, of course, have been present at the time of the act. If X was mentally ill before and after the act, but she committed it at a time when she happened to be sane, she does not lack criminal capacity. Such a lucid interval between periods of mental illness is referred to in legal terminology as a *lucidum intervallum* (“lucid interval”).
- (5) Although **intoxication** in itself does not constitute mental illness, the **chronic abuse and subsequent withdrawal of liquor** can lead to a **recognised mental illness** known as *delirium tremens* (*Bourke* 1916 TPD 303; *Holliday* 1924 AD 250). If X committed the act while she was in this

condition and the condition resulted in her lacking the required mental abilities, she may successfully rely on the defence.

- (6) A “**mental defect**” can be distinguished from a “**mental illness**” in that it is characterised by an **abnormally low intellect**, which is usually already evident at an **early stage** and is of a **permanent nature**. “Mental illness”, on the other hand, usually manifests later in life and is not necessarily of a permanent nature. A mental defect usually hinders a child’s development or prevents the child from developing or acquiring elementary social and behavioural patterns.

8.2.5 *Psychological leg of test*

If the test to determine mental illness was formulated in such a way that everything depended upon whether, from a psychiatric point of view, X suffered from a mental illness, a court would be almost entirely in the hands of psychiatrists. However, the question for the lawyer is not merely whether a person was mentally ill, but also whether her mental disease resulted in the impairment of certain mental abilities. This brings us to the second leg of the test for criminal incapacity, contained in square B in the diagram. This part of the test is subdivided into two parts, which operate in the **alternative**.

In this part of the test, we refer to the two psychological factors that render a person responsible for her acts, namely the ability to distinguish between right and wrong (cognitive mental faculty) and the ability to act in accordance with such an insight (conative mental faculty). We have already discussed and explained these two factors in the general discussion of the concept of criminal capacity in the previous study unit (see 7.3.3). Review that discussion now. Note that section 78(1) requires that the lack of mental abilities be attributable to the mental illness or mental defect – in other words, it requires a **causal link** between the mental illness or mental defect and the lack of mental abilities. In the above diagram of the test, the cognitive and conative mental functions are indicated with arrows. B(i) is the cognitive part of the test and B(ii), the conative part. The B(i) part of the test is seldom of great importance in practice. The question is usually whether the B(ii) part of the test has been complied with.

As far as the conative part of the test is concerned, all that is required is that X must have been incapable of acting in accordance with an appreciation of the wrongfulness of her act or omission. Such **lack of self-control may be the result of a gradual process of the disintegration of the personality**. Unlike the former test, which applied before 1977, the lack of self-control need not be the result of a so-called “irresistible impulse”; the expression “irresistible impulse” creates the impression of a conflict that flares up suddenly, sparking an impulsive irresistible urge, whereas the disintegration of the conative function (self-control and power of resistance) may be a gradual process.

This is well illustrated by the decision in *Kavin* 1978 (2) SA 731 (W). X shot and killed his wife and two children and also attempted to kill a third child. He was in financial difficulty and his apparent motive was to reunite his family, whom he dearly loved, in heaven. The panel of psychiatrists concluded that although it could not be said that X had been unable to appreciate the wrongfulness of his conduct, he had been unable, on account of his mental illness, to act in accordance with that appreciation at the time of the commission of the murders. The evidence showed, however, that he had acted, not on an irresistible impulse, but according to a definite plan: there was no question of an impulsive act. The court held that the provisions of section 78(1) were wider than the “irresistible impulse test”, that they were wide enough to cover a case such as this, where there had been a gradual disintegration of the personality through mental illness, and that X’s defence of mental illness should therefore succeed.



Note that the accused in the *Kavin* case relied upon the defence of mental illness (s 78(1)) and **not** on the defence of non-pathological criminal incapacity. The psychiatric evidence in this case was that X suffered from a recognised mental illness, namely reactive depression. Students often quote the *Kavin* case when referring to the defence of non-pathological criminal incapacity. This is incorrect.

8.2.6 *Onus of proof*

Section 78(1A) of the Criminal Procedure Act 51 of 1977 provides that every person is presumed not to suffer from a mental illness or mental defect until the contrary is proved on a balance of probabilities. According to section 78(1B), the burden of proving insanity rests on the party raising the issue. This means that if the accused raises the defence of mental illness, the burden of proving that she suffered from mental illness at the time of the commission of the unlawful act rests upon her. If the state (prosecution) raises the issue, the burden of proof rests on the state.

8.2.7 *Verdict*

If the defence of mental illness is successful, the court must find X not guilty by reason of mental illness or mental defect, as the case may be (s 78(6)). The court then has a discretion (in terms of s 78(6)) to issue any one of the following orders:

- (1) that X be **admitted to, and detained in, an institution** stated in the order **and treated** as if she were an **involuntary mental-health-care user** contemplated in section 37 of the Mental Health Care Act 17 of 2002
- (2) that X be **released** subject to such **conditions** as the court considers appropriate
- (3) that X be **released unconditionally**

An example of a case in which the court may decide to release X unconditionally is a case in which the evidence shows that, although X might have suffered from mental illness when she committed the wrongful act, at the time of her trial she was, mentally, completely normal again.

There is another possible order that the court can make in certain serious cases:

- (1) If X has been charged with
 - (i) **murder**
 - (ii) **culpable homicide**
 - (iii) **rape** or
 - (iv) another charge involving **serious violence**, or
- (2) if the court considers it **necessary in the public interest**, the court may direct that X be **detained in a psychiatric hospital or a prison** until a judge in chambers (i.e. upon the strength of written statements or affidavits placed before the judge, without evidence necessarily being led in open court) makes a decision in terms of section 47 of the Mental Health Care Act, 2002. The judge in chambers may order that the state patient
 - (1) remain a state patient
 - (2) be reclassified and dealt with as a voluntary, assisted or involuntary mental-health-care user in terms of Chapter V of the above-mentioned Act
 - (3) be discharged unconditionally
 - (4) be discharged conditionally

8.2.8 *Diminished responsibility or capacity*

Section 78(7) provides that if the court finds that X, at the time of the commission of the act, was criminally responsible for the act, but that her capacity to appreciate its wrongfulness was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing her.

This subsection confirms that the borderline between criminal capacity and criminal incapacity is not an absolute one, but a question of degree. A person may suffer from a mental illness and yet be able to appreciate the wrongfulness of her conduct and act in accordance with that appreciation. She will then, of course, not succeed in a defence of mental illness in terms of section 78(1).

If it appears that, despite her criminal capacity, she finds it more difficult than a normal person to act in accordance with her appreciation of right and wrong, because her ability to resist temptation is less than that of a normal person, she must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a **less severe punishment**.

8.2.9 *Mental abnormality at the time of trial*

In conclusion, we draw your attention to the difference between an allegation by X or her legal representative

- that she was mentally abnormal **at the time of the commission of the act** and
- that she is mentally abnormal **at the time of her trial**

The discussion thus far has been devoted to mental abnormality **at the time of the commission of the act**. As regards the second type of allegation or investigation, we refer you to the discussion in *Criminal Law* 172. You may read this on your own. A court cannot try a mentally abnormal person. The procedure to be followed in such a case is discussed briefly in that book. This is a procedural matter that is dealt with in the course on Criminal Procedure.

8.3 YOUTH

The Child Justice Act 75 of 2008 (which came into operation on 11 May 2009) deals with youth as a factor that may exclude criminal capacity. Below is a very brief discussion of the relevant provisions of the Act that you must study for the examination.

Part 2 of Chapter 2 of the Act provides for the new minimum age for criminal capacity.

Section 7 provides:

- 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 (s 7(1)).
- 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** (s 7(2)).

Section 11(1) of the Act provides:

- The State must **prove beyond 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.

ACTIVITY

X, a 13-year-old girl, has no home. Every day, she stands on a corner of a street next to the robot, begging for money. Her 18-year-old friend, Y, tells her that she is wasting her time; she should rather resort to crime. Y also tells her that she can come and stay at her home if she would be prepared to rob the drivers of motorcars of their cellphones. X decides that she has had enough of begging. The next day, she smashes a car window at the robot and grabs the car-owner's cellphone. She is caught and charged with robbery. Critically evaluate X's chances of succeeding with the defence that she lacked criminal capacity at the time of the commission of the offence.

FEEDBACK

In terms of section 7(2) of the Child Justice Act 75 of 2008, a child who is ten years or older but under the age of 14 is presumed to lack criminal capacity. However, this presumption can be rebutted by the State. If the State can prove beyond reasonable doubt that X had the capacity to appreciate the difference between right and wrong and could act in accordance with such appreciation at the time of the commission of the robbery, she may be convicted of robbery.

GLOSSARY

<i>lucidum intervallum</i>	lucid interval between periods of mental illness
<i>delirium tremens</i>	the name of a recognised form of mental illness caused by the chronic abuse and subsequent withdrawal of liquor

SUMMARY

Mental illness

- (1) See the above definition of the test to determine whether X may succeed with the defence of mental illness.
- (2) The test to determine whether X may succeed with the defence of mental illness is set out in a statutory provision, namely section 78(1) of the Criminal Procedure Act.
- (3) The abovementioned test comprises a pathological leg (which refers to a pathological disease that X must have) and a psychological leg (which refers to X's cognitive and conative functions).
- (4) The onus of proving the defence of mental illness rests on the party raising the defence.
- (5) If this defence succeeds, X is found not guilty, but the court may order that X be detained in an institution or a psychiatric hospital or prison.

Youth

- (6) A child who commits an offence while under the age of ten years is irrebuttably presumed to lack criminal capacity and cannot be prosecuted for an offence.
- (7) A child who is ten 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.
- (8) The State must prove **beyond reasonable doubt** the capacity of a child who is ten 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.

TEST YOURSELF

- (1) What are the requirements for successful reliance on the defence of mental illness as set out in section 78(1) of the Criminal Procedure Act? Discuss.
- (2) Discuss the pathological leg of the test set out in section 78(1), that is, the requirement that X must have suffered from a mental illness or mental defect.
- (3) Discuss the psychological leg of the test set out in section 78(1), that is, the requirement that there should have been a certain psychological incapability on the part of X.
- (4) If X raises the defence of mental illness, on whom does the onus of proving that she suffered from mental illness rest?
- (5) Discuss the possible orders that a court may issue if X succeeds with her defence of mental illness.
- (6) Discuss the minimum age for criminal capacity as provided for in the Child Justice Act 75 of 2008.

STUDY UNIT 9

Intention I



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the requirement of intention by
 - outlining the two elements of intention (inherent in all of its three forms)
 - determining whether an accused has acted with
 - * direct intention
 - * indirect intention
 - * *dolus eventualis*
 - distinguishing between motive and intention

9.1 BACKGROUND

In study unit 7, we pointed out that culpability rests on two pillars, namely criminal capacity and a form of culpability. There are two forms of culpability, namely intention and negligence. This may be represented in the following way:

culpability	=	criminal capacity	+	either intention or negligence
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The first pillar of the requirement of culpability, namely criminal capacity, has been discussed in the previous two study units. In this and the next study unit we will be discussing intention as a form of culpability. Negligence will be discussed in a later study unit.

9.2 THE TWO ELEMENTS OF INTENTION

Intention, in whatever form, 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**
- the **unlawfulness** of the act

The **conative** element consists in X's directing his **will** towards a certain act or result: X decides to accomplish in practice what he has previously only pictured in his imagination. This decision to act transforms what had, until then, merely been daydreaming, wishing or hoping into intention.

In legal literature, intention is also known as *dolus*.

9.3 DEFINITION OF INTENTION

A person acts or causes a result **intentionally** if

- he **wills** the act or result
- in the **knowledge**
 - of what he is doing (i.e. the **act**),
 - that the act and circumstances surrounding it accord with the **definitional elements**, and
 - that it is **unlawful**.

Defined even more concisely, we can say that intention is to **know** and to **will** an act or a result.

9.4 THE DIFFERENT FORMS OF INTENTION

(*Criminal Law 177–184*)

There are three forms of intention, namely direct intention (*dolus directus*), indirect intention (*dolus indirectus*) and what is usually described as *dolus eventualis*. In a crime requiring intention, the intention requirement is satisfied if X entertained any one of these forms of intention. In other words, there is no crime requiring intention in respect of which, for example, only *dolus directus* is required, just as there is no crime requiring intention in respect of which, for example, only *dolus eventualis* is required.

We will now take a closer look at these three forms of intention. In order to avoid making the discussion too complicated, we will, for the moment, limit our discussion to intention in materially defined crimes – that is to say, crimes that are defined in terms of the causing of a certain result. (Murder is the most important crime in this category. Murder is the unlawful, intentional *causing of* the death of another human being.) Later in this study unit we will briefly indicate how the description of the forms of intention in formally defined crimes (i.e. crimes that are not defined in terms of the causing of a certain result, but merely in terms of the commission of a certain act in certain circumstances) differs from the description of intention in materially defined crimes.

9.4.1 Direct intention (*dolus directus*)

Definition

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

Example

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.

Remark

Note that the reason the person performs the act or causes the result is irrelevant. In the example above, it therefore makes no difference whether X kills Y because he hates him, or because Y is dying of a terminal illness and X wishes to relieve him of the pain he is experiencing.

9.4.2 *Indirect intention (dolus indirectus)*

Definition

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.

Example

- (1) X shoots at a target through a closed glass window. 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 to attain his main purpose, he naturally also wills those consequences that he realises must inevitably accompany his main purpose. If he shoots at the target and shatters the window, he cannot claim that he never intended to shatter the window.
- (2) X's merchandise is insured and is stored in Y's building. To obtain the insurance money, X sets the merchandise on fire, fully realising that the building itself must necessarily catch alight. When this happens, the building burns down. X may be charged with arson because he had the intention to set the building on fire – *Kewelram* 1922 AD 213.

Remark

This form of intention is present when a person visualises what he wants to achieve, realises that in order to achieve it, something else will **necessarily** be caused, but nevertheless proceeds with his conduct.

9.4.3 *Dolus eventualis*

Definition

A person acts with *dolus eventualis* if the causing of the forbidden result is not his main aim, but

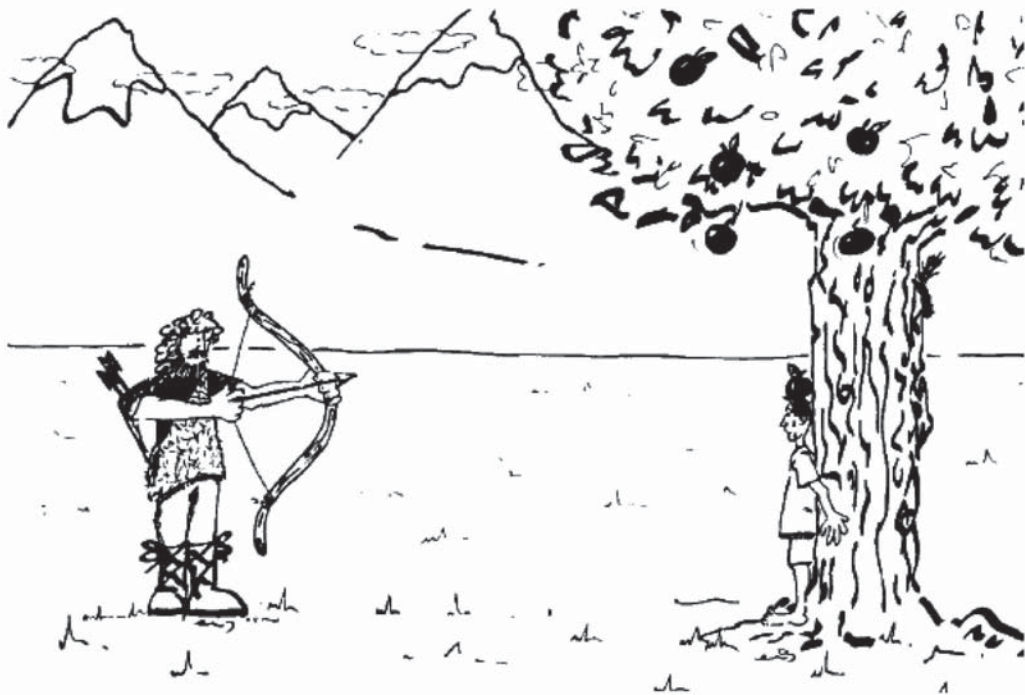
- (1) he subjectively **foresees** the **possibility** that in striving towards his main aim, his conduct may cause the forbidden result and
- (2) he **reconciles** himself to this possibility.

The second part of the definition of *dolus eventualis* (which requires that X must have **reconciled** himself to the possibility) is not always expressed in the same way. Instead of requiring that X must have reconciled himself to

the possibility, it is often said that X must have been reckless with regard to the performance of the act or the causing of the result. In practice, however, the expressions “reconcile to” and “reckless towards” are used as synonyms.



Dolus eventualis is extremely important in criminal law and you should be able to define it properly in the examination and in assignments. We often ask a question in the examination in which it is necessary for you to define *dolus eventualis*. When reading your definition of *dolus eventualis* in your examination scripts, we are especially on the lookout for the words that have been printed in bold in the definition here, namely **foresees**, **possibility** and **reconciles**.



Dolus eventualis. A variation on the well-known story of the legendary Swiss patriot, Wilhelm Tell. In order to prove how well he can shoot with his bow and arrow, X (Wilhelm Tell) places an apple on the head of his son, Y, and shoots an arrow at the apple. He does not wish to kill Y, whom he loves dearly. He wants the arrow to pierce the apple on Y's head. However, assume that the following happens: X foresees the possibility that, in attempting to shoot the apple, the arrow might strike Y instead of the apple, thus killing Y. He aims at the apple, but the arrow strikes Y, killing him. If X is charged with having murdered Y, can he succeed with a defence that he never intended to kill Y, since he wanted the arrow to strike the apple? Assuming that it is proven that he, in fact, foresaw the possibility of the arrow striking Y instead of the apple, and that he had nevertheless reconciled himself to this possibility, his defence will not succeed. In the eyes of the law, X had the intention to kill Y. This form of intention is known as *dolus eventualis*.

Examples of *dolus eventualis*:

- (1) X disconnects sections of a railway track in order to derail a train. He does not desire to kill other people, because his immediate goal is to commit sabotage and, in this way, to express the resentment he feels towards the state. He is nevertheless aware of the possibility that people may die if the train is derailed, and he reconciles himself to this possibility. If he succeeds in derailing the train, and people die, it is futile

for him to allege that he did not intend to kill people (facts analogous to those in *Jolly* 1923 AD 176).

- (2) X wants to burn down a building. He foresees the possibility that Y may be inside the building, but nevertheless proceeds with his plan and sets fire to the building. Y is indeed inside at the time and dies in the flames. In the eyes of the law, X intentionally caused Y's death.
- (3) X and Z undertake a joint robbery. X knows that Z is armed with a loaded revolver. He also knows that Z may use this weapon if the people whom they want to rob offer resistance. They go to a shop, which Z enters while X stands watch outside. The proprietor of the shop (Y) resists Z, causing Z to shoot and kill him. In the eyes of the law, not only Z, but also X had the intention to kill and is guilty of murder (*Nsele* 1955 (2) SA 145 (A)).

Should a court consider whether X acted with *dolus eventualis* and decide that this was not the case, the decision will normally be based on the consideration that X had not foreseen the possibility. However, it is quite possible for the court to conclude that, although X had foreseen the possibility, he had not reconciled himself to it.

The following is an example where a court may reach this conclusion:

X is shooting game. He knows that behind the game, between the trees, there is a hut that is inhabited, and that the inhabitants might be outside in the area between the trees. He thus foresees the possibility that if he shoots and misses the buck he is aiming at, the bullet may hit one of the inhabitants who is outside the hut. However, he decides that this will not happen, since he is a very good marksman and, in the past, he has shot similar buck from the same distance without missing. He pulls the trigger. The shot misses the buck and hits a person, Y, who is standing outside the hut between the trees, killing him. In this example, X did not act with *dolus eventualis*, since the second part of the test, which deals with "reconciling himself to the possibility", has not been complied with. However, in this example, X would in all probability be guilty of culpable homicide, since he acted negligently in shooting after he had become aware of the possibility that there might be people behind the buck.

In *Humphreys* 2013 (2) SACR 1 (SCA), the court held that the accused – although he had **foreseen** the possibility of harm – did not **reconcile** himself to the possible consequences of his actions. A minibus taxi-driver, Humphreys, transported children to school. He drove over a railway crossing and was hit by a train, resulting in ten of the fourteen children in the minibus being killed, while the others were seriously injured. Humphreys himself was also injured. He was charged with ten counts of murder and four counts of attempted murder. At the trial, evidence was led that he had crossed the railway by avoiding the barrier created by the boom and ignoring the flashing warning lights. Evidence that the accused had performed the same manoeuvre on two previous occasions, and had successfully avoided the oncoming train on those occasions, was also accepted by the trial court (par 61). He was convicted on all counts and sentenced to 20 years' imprisonment.

He appealed against his conviction and the issue before the Supreme Court of Appeal was whether he had intention in the form of *dolus eventualis*.

The court set out the test for *dolus eventualis* as consisting of two components: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct (the cognitive component); and (b) did he reconcile himself to that possibility (the conative component) (par 12)? The court explained the second component as meaning that the perpetrator had been reckless in “consenting” to the consequences and had taken it “into the bargain” (at par 22).

The court found that although the appellant did foresee the consequences, he did **not** comply with the second requirement, namely the **conative component** of the test, for the following reasons: If the appellant had taken the death of his passengers into the bargain when he proceeded to act, it would unavoidably require the further necessary inference that he also took his own death into the bargain, in other words, that he would have been indifferent to living or dying. The court found that the appellant did not reconcile himself to his own death and, therefore, also did not reconcile himself to the death of his passengers (par 18). The second reason that the court advanced for its finding was the evidence that the appellant had successfully performed the same manoeuvre in virtually the same circumstances on at least two previous occasions, which probably led him to the “misplaced sense of confidence that he could safely repeat the same exercise” (par 19). The convictions of murder and attempted murder were set aside and the appellant was found guilty only of culpable homicide in respect of the children killed, since there is no crime such as negligent attempted murder.



A mistake students commonly make is to say that intention was present because X “ought to have foreseen or must have foreseen the possibility of a consequence ensuing”. Remember that the correct statement is: “*Dolus eventualis* was present because X, in fact, (actually) **foresaw** the possibility of a result ensuing.”

9.5

THE TEST FOR INTENTION IS SUBJECTIVE

(*Criminal Law 184*)

The test in respect of intention is purely subjective. The court must determine what the state of mind of that particular person – the accused (X) – was when he committed the act. When determining whether X had intention, the question is never whether he **should** have foreseen the result, but whether he actually foresaw it. 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. To do this is to apply the test in respect of negligence, which is objective. 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?

9.6 PROOF OF INTENTION – DIRECT OR INDIRECT

How is intention proved in a court? Sometimes there may be **direct** evidence of intention: if, in a confession, in the course of being questioned at the stage of explanation of plea or in his own evidence before the court, X admits that he acted intentionally, and if the court believes him, there is obviously no problem. However, in most cases, X does not make such an admission. How can the judge or magistrate then determine whether he acted with intent? X is, after all, the only person who knows what his state of mind was at the crucial moment when he committed the act.

There is no rule to the effect that a court may find that X acted with intent only if he (X) admitted that he had intent (in other words, if there is **direct** proof of intent). It is, after all, a well-known fact that many accused who did actually have intent subsequently deny in court that they acted intentionally. A court may base a finding that X acted intentionally on **indirect** proof of intent. This means that the court **infers** the intent from evidence relating to X's outward conduct at the time of the commission of his act, as well as the circumstances surrounding the events.

Consider the following simple example: Eyewitnesses of the events tell the court that, with a knife in his hand, X walked up to Y, who was sitting on a chair, pressed the knife with a swift stabbing motion into Y's chest, and that Y died moments later. The doctor who conducted the *post mortem* examination tells the court that whoever administered the stab wound must have used much force because the wound was deep and the stab even broke one of Y's ribs. It is also clear from the evidence of the eyewitnesses that Y had not provoked or angered X shortly before receiving the stab wound, that X had not been intoxicated, and that there cannot be any suggestion that X acted in private defence. To this may be added evidence that X had harboured a grudge against Y because Y had committed adultery with X's wife a few days before the event. Assuming that the court accepts this evidence, the court will, in all probability, infer from all this that X killed Y intentionally.

Contrast the above set of facts with one in which, according to the evidence, the wound was not deep, Y had provoked X before the stab wound was administered, and X was intoxicated and had told the bystanders (eyewitnesses) shortly before the event that he had only wanted to frighten Y. In such a case, the court will probably find that it cannot infer beyond reasonable doubt that X intended to kill Y.

When a court is called upon to decide, by means of inference from the circumstances, whether X acted intentionally, it must guard against subtly applying an objective instead of a subjective test to determine intent. It is dangerous for a court to argue as follows: "Any normal person who commits the act that X committed would know that it would result in the death of the victim; therefore X acted intentionally." Although the court (judge or magistrate) is free to apply general knowledge of human behaviour and of the motivation of such behaviour, it must guard against exclusively considering what a "normal", "ordinary" or "reasonable" person would have thought or felt in any given circumstances.

The court must go further than this: it must consider all the circumstances of the case (such as the possibility of a previous quarrel between the parties), as well as all of X's individual characteristics that the evidence may have brought to light and which may have a bearing on his state of mind (such as his age, degree of intoxication, his possible irascibility, possible lack of education or low degree of intelligence). The court must then, to the best of its ability, try to **place itself in X's position** at the time of the commission of the act complained of and then try to ascertain what his (X's) state of mind was at that moment – that is, whether he appreciated or foresaw the possibility that his act could result in Y's death (*Mini* 1963 (3) SA 188 (A) 196; *Sigwahla* 1967 (4) SA 566 (A) 570).

9.7

KNOWLEDGE, AS AN ELEMENT OF INTENTION, MUST COVER ALL THE REQUIREMENTS OF CRIME

We have already pointed out that intention consists of two elements, namely knowledge and will. It is now necessary to explain the knowledge requirement, or the cognitive element, in more detail.

In order to have intention, X's knowledge must refer to all the elements of the offence, except the requirement of culpability. Such knowledge must refer to

- (1) the act,
- (2) the circumstances included in the definitional elements, and
- (3) the unlawfulness of the act.

X must be aware of all these factors.

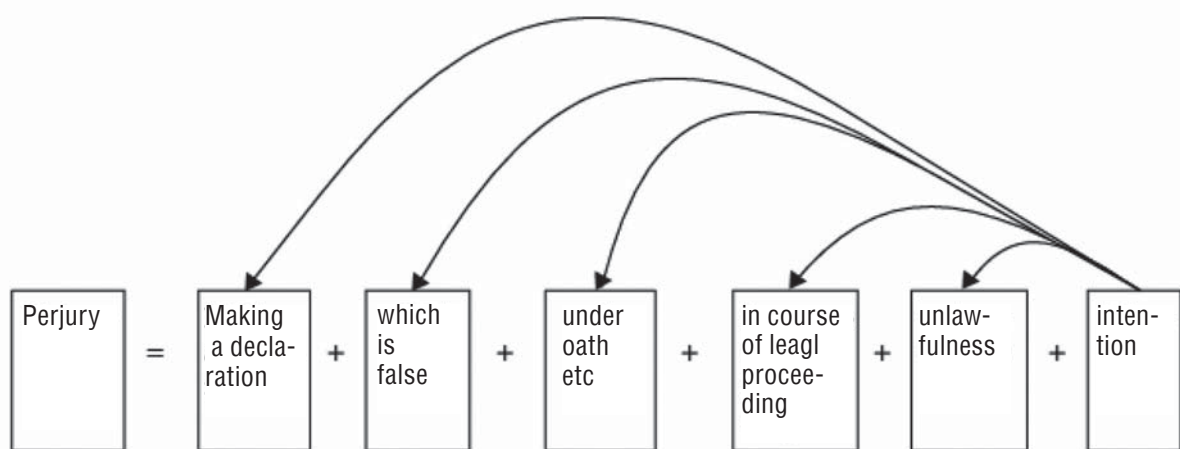
Let's now apply this rule to a specific crime, namely common-law perjury. The form of culpability required for this crime is intention. The elements of this crime are the following:

- (1) making a declaration
- (2) that is false
- (3) under oath or a form equivalent to an oath
- (4) in the course of legal proceedings
- (5) unlawfully and
- (6) intentionally

If we now apply the rule currently under discussion to this crime, it means the following: The act and definitional elements are contained in the elements numbered (1) to (4) above. An application of the present rule means, firstly, that X must know (be aware) that he is making a declaration (element no (1)). Next, he must know that this declaration is false (element no (2)). Furthermore, he must know that he is making the declaration under oath (element (3)). If he is not aware of this (where, for example, he thinks that he is merely talking informally to another person), a material component of the intention requirement for this crime is lacking and X cannot be convicted of the crime.

Intention in respect of element number (4) of the crime (see list above) means that X must know that he is making the statement in the course of legal proceedings. If he is unaware of this (where, for example, he thinks that he is making the statement merely in the course of an administrative process), a material component of the intention required for this crime is, likewise, lacking. Intention in respect of element number (5) of the crime means that X must know that his conduct is unlawful, that is, not covered by a ground of justification (such as necessity, which includes compulsion). It is not necessary to enquire into intention relating to element number (6) of the crime, as this element is the culpability element itself, and an "intention in respect of an intention" is obviously nonsensical.

We may illustrate the rule that intention must relate to all the elements of the crime graphically as follows:



9.8

INTENTION DIRECTED AT THE CIRCUMSTANCES INCLUDED IN THE DEFINITIONAL ELEMENTS

By saying that intention must be directed at the circumstances included in the definitional elements, we mean that X must have **knowledge** of these circumstances. This principle applies particularly to formally defined crimes, because in these crimes the question is not whether X's act caused a certain result, but merely whether the act took place in certain circumstances. The following are examples of the application of this principle:

- (1) In the crime of unlawful possession of drugs, the object that X possesses must be a drug. X must, accordingly, be aware of the fact that what he possesses is a drug. If X is under the impression that the bottle Z has asked him to keep contains talcum powder, whereas in fact it contains a drug, X lacks intention.
- (2) The most common form of theft is the removal of another's property. This is a form of theft where the thing that is stolen must belong to another. X must therefore know that the thing he is appropriating belongs to another, and must not, for instance, labour under the mistaken impression that it is his own.

When we say that X must have knowledge of a circumstance or a fact, it means the following: X need not be convinced that the said circumstance exists (e.g. that the object he possesses is a drug, or that the thing he is handling belongs to another). In the eyes of the law, X will also be regarded as having the knowledge (i.e. the intention with regard to such circumstance or fact) if he merely foresees the possibility that the circumstance or fact may exist, and reconciles himself to that possibility. In such a case, his intention with regard to the circumstance exists in the form of *dolus eventualis*.

It follows that the definitions of the different forms of intention in formally defined crimes (i.e. crimes that do not deal with the causing of a result) differ only slightly from the definitions of the forms of intention in materially defined crimes. The only difference is that all references to “causing a result” are replaced by the words “commit an act” and, where applicable, “circumstances exist”.

9.9

INTENTION WITH REGARD TO UNLAWFULNESS

As far as the intention with regard to unlawfulness is concerned, the principle that has been explained above also applies here. Knowledge of the unlawfulness of an act is knowledge of a fact and is present not only when X actually knows (or is convinced) that the act is unlawful, but also when he merely foresees the possibility that it may be unlawful and reconciles himself to this. His intention with regard to unlawfulness is then present in the form of *dolus eventualis*.

When we say that knowledge of unlawfulness is required for X to have intention, it means that X must be aware that his conduct is not covered by a ground of justification and that the type of conduct he is committing is prohibited by law as a crime. This will be discussed in the next study unit.

9.10

THE DISTINCTION BETWEEN MOTIVE AND INTENTION

(*Criminal Law* 186)

Intention must not be confused with the motive for committing the crime. In determining whether X acted with intention, the motive behind the act is immaterial (*Peeverett* 1940 AD 213). For this reason, X is guilty of theft even though he steals from the rich in order to give to the poor. A good motive may, at most, have an influence on the degree of punishment imposed. If it is clear that X acted intentionally, the fact that his motive was laudable or that we might sympathise with him cannot serve to exclude the existence of intention, such as where he administers a fatal drug to his ailing father to release him from a long, painful and incurable illness (*Hartmann* 1975 (3) SA 532 (C)). Furthermore, if X had the intention to commit an unlawful act or to cause an unlawful result, the fact that he did not desire to commit the act or to cause the result in no way affects the existence of his intention (*Hibbert* 1979 (4) SA 717 (D) 722).

GLOSSARY

<i>dolus</i>	intention
<i>dolus directus</i>	direct intention
<i>dolus indirectus</i>	indirect intention
<i>dolus eventualis</i>	a form of intention in which X foresees a possibility and reconciles himself to such possibility

SUMMARY

- (1) Culpability = criminal capacity + either intention or negligence.
- (2) A person acts or causes a result **intentionally** if he **wills** the act or result, while **aware** that the act and the circumstances in which it takes place accord with the definitional elements and that the act is unlawful.
- (3) There are three forms of intention, namely direct intention (*dolus directus*), indirect intention (*dolus indirectus*) and *dolus eventualis*. A definition of each of these forms of intention was given above. In a crime requiring intention, the intention requirement is satisfied if X entertained any one of these forms of intention.
- (4) Intention, in whatever form, consists of two elements, namely a cognitive and a conative element. The cognitive element refers to X's **knowledge**, while the conative element refers to his **will**.
- (5) As far as the element of knowledge in intention is concerned, X must have knowledge of (a) the act, (b) the circumstances set out in the definitional elements, and (c) the unlawfulness of the conduct.
- (6) The test for determining whether X had intention is subjective. This means that the court must ask itself what X, in fact, thought or willed at the critical moment. In determining whether X had intention, the question is never "what X should have known or thought", or "what X ought to have known or thought", or "what a reasonable person in the same circumstances would have known or thought".

TEST YOURSELF

- (1) Define intention.
- (2) Name the two elements of intention and explain briefly what each entails.
- (3) Name the three forms of intention.
- (4) Define each of the three forms of intention and illustrate each by means of an example.
- (5) Explain the two components of intention in the form of *dolus eventualis* in terms of the *Humphreys* decision.
- (6) Why is it said that the test for intention is **subjective**? Explain briefly.
- (7) Discuss the following statement: "Intention must be directed at all the requirements of the offence."
- (8) Distinguish between intention and motive. Is X's motive relevant where it has to be ascertained whether he had intention?

STUDY UNIT 10

Intention II: mistake



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- further demonstrate your understanding of the requirement of intention by expressing an informed opinion on whether an accused has made a material mistake (be it a mistake relating to the object, the chain of causation, the unlawfulness of the act or the definitional elements) that excludes intention
- demonstrate your understanding of *aberratio ictus* by
 - identifying an instance of *aberratio ictus*
 - applying the concrete-figure approach, as well as the transferred culpability approach, to the facts in such a case
 - distinguishing between instances of *aberratio ictus* and instances of *error in objecto*

10.1 MISTAKE NULLIFIES INTENTION

For a general discussion of mistake, see *Criminal Law 187*.

In the previous study unit we explained that intention must relate to

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

X must be aware of all the factors mentioned under (1), (2) and (3) above. If she is unaware of any of them, it cannot be said that she intended to commit the crime. If such knowledge or awareness is absent, it is said that there is a “mistake” or “error” on X’s part: she imagined the facts to be different from what they, in fact, were; in other words, mistake excludes or nullifies the existence of intention.

The following are two examples of mistake relating to the act (or the nature of the act):

- (1) Within the context of the crime of malicious injury to property, X is under the impression that she is fixing the engine of somebody else’s motorcar that has developed problems, whereas what she is actually doing to the engine amounts to causing “injury” to it.
- (2) Within the context of the crime of bigamy, X thinks that she is partaking in her friend’s marriage ceremony in a church, whereas the service in which she is partaking is, in fact, her marriage ceremony.

The following are two examples of mistake relating to circumstances set out in the definitional elements:

- (1) X is hunting game at dusk. She sees a figure, which she takes to be a buck, and shoots at it. It turns out that she has killed a human being. She will not be guilty of murder, since she did not intend to kill a human being.
- (2) (Within the context of the statutory crime of unlawfully possessing drugs) X thinks that the container of powder that she received from a

friend is snuff, to be used by her as a cure for a certain ailment, whereas, in fact, it contains matter listed in the statute as a drug that may not be possessed.

The following are two examples of mistake relating to unlawfulness:

- (1) X thinks that she is in a situation that warrants private defence because Y is threatening her with a revolver, but Y is merely joking and the “revolver” is, in fact, a toy.
- (2) X believes that there is no legislation or legal rule that prohibits her from possessing a rhinoceros horn, whereas there is, in fact, such legislation. (We will discuss mistake relating to the unlawfulness of the conduct in more detail below.)

10.2 MISTAKE NEED NOT BE REASONABLE

(Criminal Law 188)

Whether there really was a mistake that excludes intention is a question of fact. What must be determined is X’s true state of mind and conception of the relevant events and circumstances. The question is not whether a reasonable person in X’s position would have made a mistake. The test in respect of intention is subjective, and if we were to compare X’s state of mind and view of the circumstances with those of a reasonable person in the same circumstances, we would be applying an objective test in respect of intention, which is not warranted. To say that mistake can exclude intention only if it is reasonable is the same as saying that it is essential for a reasonable person to have made a mistake under those circumstances.

Now that a subjective test in respect of intention has been accepted, there is no longer any room for an objective criterion such as reasonableness (*Modise* 1966 (4) SA 680 (GW); *Sam* 1980 (4) SA 289 (T)).

Because the test is subjective, X’s personal characteristics, her superstitiousness, degree of intelligence, background and character may be taken into account in determining whether she had the required intention, or whether the intention was excluded because of mistake. The reasonableness of the mistake, at most, constitutes a factor that, from an evidential point of view, tends to indicate that there is indeed a mistake; however, it should not be forgotten that in exceptional circumstances, it is possible to make an unreasonable mistake.

10.3 MISTAKE MUST BE MATERIAL

(Criminal Law 188–189)

Not every wrong impression of facts qualifies as a mistake, thus affording X a defence. Sometimes X may be mistaken about a fact or circumstance and yet not be allowed to rely on her mistake as a defence. A mistake can exclude intention (and, therefore, liability) only if it is a mistake concerning an element or requirement of the crime other than the culpability requirement itself. These requirements are

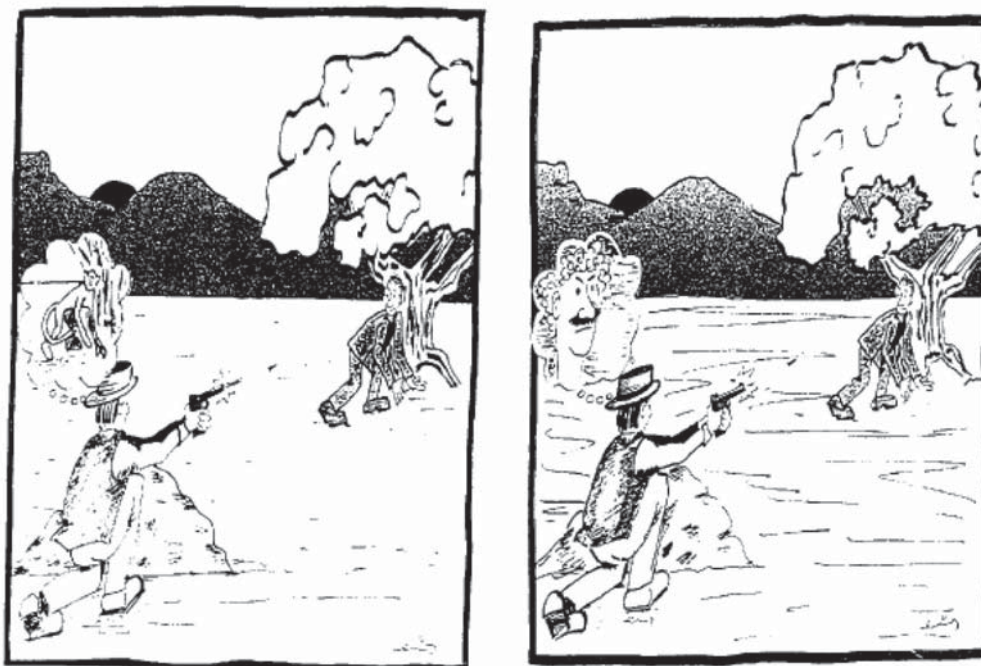
- (1) the requirement of an act,
- (2) a requirement contained in the definitional elements, or
- (3) the unlawfulness requirement.

To use any yardstick other than the above-mentioned one in determining whether a mistake may be relied on as a defence is misleading. This must be borne in mind, especially where X is mistaken about the object of her act. Such a mistake is known in legal literature as *error in objecto*. *Error in objecto* is not the description of a legal rule; it merely describes a certain kind of factual situation. It is therefore incorrect to assume that as soon as a certain set of facts amounts to an *error in objecto*, only one conclusion (that X is guilty or not guilty) may legally be drawn.

Whether *error in objecto* excludes intention and is, therefore, a defence depends upon the definitional elements of the particular crime. Murder is the unlawful intentional causing of the death of another person. The object of the murder is, therefore, a human being. If X thinks that she is shooting a buck, when she is actually shooting a human being, she is mistaken about the object of her act (*error in objecto*), and this mistake excludes the intention to murder. Her mistake excludes intention because it is a mistake concerning the definitional elements of the crime in question (murder).

Note that although, in the above example, X cannot be convicted of murder, it does not necessarily follow that she will go free. Although her mistake excludes intention, the circumstances may be such that she was negligent in shooting at a fellow human being. She would have acted negligently if a reasonable person in the same circumstances would have foreseen that the figure she was aiming at was not a buck, but a human being. (This will become clearer from the discussion below of the test for negligence.) If she had killed a person negligently, she would be guilty of culpable homicide.

What would the position be if X intended to shoot Z, but it subsequently transpired that she mistook her victim's identity and, in fact, shot Y? Here her mistake did not relate to whether she was killing a human being, but to the identity of the human being. Murder is committed whenever a person unlawfully and intentionally kills a human being, and not merely when a person kills the particular human being she intended killing. For this reason, X is guilty of murder in this case. Her mistake about the object of her act (*error in objecto*) will not exclude her intention. Her mistake was not material in this case.



The difference between a material and a non-material mistake. The illustration on the left depicts a case of a **material mistake**. A mistake is material if it relates to the act, a circumstance or result contained in the definitional elements or the unlawfulness. Here we are dealing with a mistake relating to a circumstance or requirement contained in the definitional elements of the crime with which X is charged, namely murder. X wants to shoot a baboon. He thinks that the figure he sees in the semi-darkness is a baboon, and shoots. It transpires that the figure is not that of a baboon, but of another human being, and that X shot and killed that other human being. X cannot be convicted of murder because he did not, in the eyes of the law, have the intention to murder: he was unaware of the fact that the object at which his act was aimed was **another human being**. (According to the definitional elements of the crime of murder, the object that the perpetrator kills must be **another human being**.)

The illustration on the right depicts a case of a **non-material mistake**, that is, a mistake that does not relate to the act, a circumstance or result contained in the definitional elements of the crime or the unlawfulness. X wants to shoot and kill his enemy, John. In the semi-darkness, he sees a figure that he believes to be John, and shoots at the figure, intending to kill him. It transpires that the figure at which he shot was not John, but Peter, and that he shot and killed Peter. Here X is indeed guilty of murder. He cannot succeed with a defence by alleging that he wanted to kill John instead of Peter. Although he was mistaken about the identity of his victim, he knew very well that the object of his action was **another human being**; in other words, his intention (knowledge) related to a requirement contained in the definitional elements.

10.4

MISTAKE RELATING TO THE CHAIN OF CAUSATION

(*Criminal Law* 189–192; *Case Book* 134–144, 171–177).

This form of mistake can occur only in the context of materially – defined crimes, such as murder. X believes that the result will be brought about in a certain manner; the result does ensue, but in a manner that differs from that foreseen by X. The following are examples of this type of mistake:

- X sets about killing Y by pushing her off a bridge into a river, expecting that she will drown; in fact, Y is killed because, in her fall, she hits one of the pillars of the bridge.

- X shoots at Y, but misses; Y, who suffers from a weak heart and nerves, dies of shock.



Read the following decision in the *Case Book*: **Goosen** 1989 (4) SA 1013 (A).

Before 1989, both writers on criminal law and the courts assumed that this form of mistake did not exclude intention. However, in 1989, in **Goosen** 1989 (4) SA 1013 (A), the Appellate Division analysed this form of mistake and held that a mistake relating to the causal chain of events may exclude intention, provided the actual causal chain of events differed materially from that envisaged by X. In other words, in materially defined crimes (i.e. “result crimes”), X’s intention must, according to the court, be directed at bringing about the result in substantially the same manner as that in which it actually was caused.

In this case, X – together with two other persons, Z and W – had taken part in the joint robbery of Y. The shot that actually killed Y had been fired by Z, but the court, after examining the evidence, found that at the crucial moment when Z had fired the shot, he (Z) had acted involuntarily because he had been frightened by an approaching vehicle. The question was whether X, who had taken part in the joint venture by driving the gang in a car to Y, could, on the ground of *dolus eventualis*, be convicted of murdering Y because of the shot fired by the co-member of the gang, Z. X had known that Z had a firearm and had foreseen that Z could fire at Y, but had not foreseen that Y would die as a result of a bullet being fired involuntarily by Z. In a unanimous judgment delivered by Van Heerden JA, the Appellate Division found that there had been a **substantial difference** between the actual and the foreseen manner in which the death was caused, that X had not foreseen that the death could be caused in this way, and that X’s misconception or mistake in this regard negated the intention to murder. The court did not want to amplify the rule it laid down by specifying what criterion should be applied to distinguish between “material” (i.e. “substantial”) and “immaterial” differences in the manner in which death is caused.

(To understand this judgment properly, it is necessary to have a knowledge of common purpose, which will be discussed when dealing with participation in study unit 14 of this study guide.)

ACTIVITY

A thief plans to rob a café owner. She takes a firearm with her, and although she sincerely hopes that there will be no resistance, she does foresee a reasonable possibility that she will have to shoot at her victim and, in so doing, could cause the latter’s death. Hoping that the owner of the café would readily hand over the money, she keeps the weapon in her jacket pocket when she confronts her and demands money. At that moment her feet slip from under her and she falls to the floor. The loaded weapon goes off. Contrary to all expectations, the café owner is fatally wounded. X is charged with murder. Do you think that she can succeed with a defence of mistake regarding the causal chain of events?

FEEDBACK

If you have already studied the *Goosen* case, you ought to recognise these facts. In the judgment in *Goosen*, the court used these facts as an illustration of substantial difference between the actual and the foreseen manner of death. X may, accordingly, succeed with the defence of mistake regarding the causal chain of events.

In *Lungile* 1999 (2) SACR 597 (A), three robbers, among them X, acting with a common purpose, robbed a shop. A policeman, Z, tried to thwart the robbery. In a wild shoot-out between Z and the robbers, which took place in the shop, a shop assistant, Y, was killed. On a charge of murder, X relied, *inter alia*, on the defence of absence of a causal link between his conduct and Y's death. According to him, his conduct was not the cause of Y's death because the shot fired by Z on Y, killing Y, constituted a *novus actus interveniens*. The court rejected this argument, holding that Z's act was not an abnormal, independent occurrence. However, the question arises whether X could not perhaps have relied on the defence that he was mistaken as to the causal course of events: could he not have raised the defence that he was under the impression that Y would die as a result of a shot fired by him or one of his associates, whereas Y was, in fact, killed by a shot fired by Z? The court convicted X of murder without considering such a possible argument. We submit that the court's conclusion is correct, on the following ground: even if X had alleged that he was mistaken as to the chain of causation, such a defence should not have succeeded because there was not a substantial difference between the foreseen and the actual course of events.

The correctness of the decision in *Goosen* is controversial and the courts have been reluctant to apply it. As a matter of interest: critics of the judgment in *Goosen* might rely on the judgment in *Lungile* as support for their argument that a mistake as to the causal chain of events is not – or ought not to be – a defence, or is, in any event, not regarded by the courts as a defence.



Read the aforementioned decision in your *Case Book*: *Lungile* 1999 (2) SACR 597 (A).

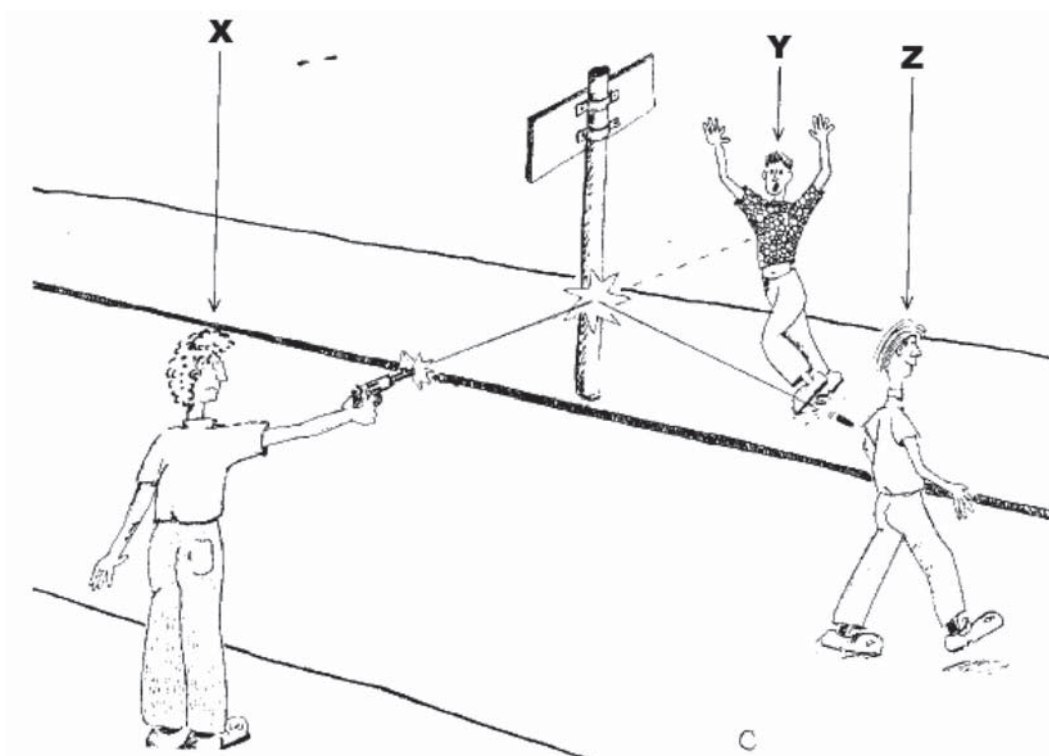
10.5 THE GOING ASTRAY OF THE BLOW (*ABERRATIO ICTUS*) DOES NOT CONSTITUTE A MISTAKE

(*Criminal Law* 193–196; *Case Book* 149–153)

10.5.1 Description of concept

Aberratio ictus means the going astray or missing of the blow. It is not a form of mistake. X has pictured what she is aiming at correctly, but through lack of skill, clumsiness or other factors, she misses her target and the blow or shot strikes somebody or something else. (Please note the spelling of the word

aberratio. Students often spell it incorrectly in the examination. You spell it with one **b** but two **r**'s.)



Examples of *aberratio ictus* are the following:

- (1) Intending to shoot and kill her enemy, Y, X fires a shot at Y. The bullet strikes a round iron pole, ricochets and strikes Z, who is a few paces away, killing her. (See illustration above.)
- (2) X wishes to kill her enemy, Y, by throwing a javelin at her. She throws a javelin at Y, but just after the javelin has left her hand, Z unexpectedly runs out from behind a bush and in front of Y and the javelin strikes Z, killing her.
- (3) Intending to kill her enemy, Y, X places a poisoned apple at a spot where she expects Y to pass, hoping that Y will pick up the apple and eat it. However, Z, not Y, passes the spot, picks up the apple, eats it and dies.

What all these examples have in common is that the blow aimed at Y went awry and struck somebody else, namely Z. In order to decide whether, in these types of situations, X has committed murder, it is necessary to ascertain whether X can be said to have had intention in respect of Z's death.

10.5.2 Two opposite approaches

A perusal of this subject in the legal literature generally reveals two opposite approaches regarding the legal conclusions to be drawn.

(a) The transferred culpability approach

According to the one approach, the question whether X, in an *aberratio ictus* situation, had the intention to kill Z should be answered as follows: X wished

to kill a person. Murder consists in the unlawful, intentional causing of the death of a person. Through her conduct, X actually caused the death of a person. The fact that the actual victim of X's conduct proved to be somebody different from the particular person that X **wished** to kill ought not to afford X any defence. In the eyes of the law, X intended to kill Z, because X's intention to kill Y is **transferred** to her killing of Z, even though X might perhaps not even have foreseen that Z might be struck by the blow. The Anglo-American legal system, which for the most part follows this approach, reaches this conclusion through an application of what is called the "doctrine of transferred malice". X's intent in respect of Y's killing is transferred to her killing of Z.

(b) The concrete-figure approach

There is, however, an alternative approach to the matter. Those who support this approach argue as follows: We can accept that X intended to kill Z only if it can be proved that X knew that her blow could strike Z, or if she had foreseen that her blow might strike Z and had reconciled herself to this possibility. In other words, we merely apply the ordinary principles relating to intention and, more particularly, *dolus eventualis*. If X had not foreseen that her blow might strike Z, she lacked intention in respect of Z's death and cannot be convicted of murder. 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, or figure that, was actually struck by the blow, the question is not simply whether she had the intention to kill a person, but whether she had the intention to kill **that particular (concrete) figure that was actually struck by the blow**. Only if this last-mentioned question is answered in the affirmative can we assume that X had intention in respect of Z. According to this approach, what is crucial is not an abstract "intention to kill a person", but a concrete "intention to kill the actual victim".

10.5.3 Concrete-figure approach to be preferred

Which one of these two approaches should you follow? To a certain extent, support for the transferred culpability approach can be found in South African case law before 1950 (e.g. *Koza* 1949 (4) SA 555 (A) and *Kuzwayo* 1949 (3) SA 761 (A)), but the weight of authority in the case law after this date supports the concrete-figure approach. In our opinion, this last-mentioned approach is also the most preferable, for the following two important reasons:

- (1) Since about 1950 our courts have clearly adopted a subjective test to determine intention. The concrete-figure approach is more in accordance with the subjective test for intention than the transferred culpability approach. For example: if, in example (2) above, X had never even foreseen that after hurling the javelin, an outsider, Z, might run into its trajectory and be hit by the javelin, it is, to say the least, difficult to argue that X had the intention to kill Z. There is much to be said for the argument that if X had not known that Z might run into the path of the javelin, and somebody else had warned her beforehand that this might happen, she might rather have decided not to proceed with hurling the javelin. If X had not known or foreseen that Z might run into the path of the

javelin, the mere existence of an abstract intention to kill a person is, in our opinion, not a sufficient ground for holding that X had the intention to kill Z – especially if we apply the subjective test for intention (a test on which the courts place so much reliance).

- (2) The transferred culpability approach amounts to an application of the doctrine of *versari in re illicita* (or the *versari* doctrine). According to this doctrine, 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, or even though she might not have foreseen the particular consequence for which she is being held liable. If we thus apply the *versari* doctrine, culpability is imputed to X in circumstances in which she actually had no culpability (intention or negligence) in terms of the normal, recognised test for culpability. As can be concluded, the *versari* doctrine should not be applied, as it amounts to a disregard of the requirement of culpability. This doctrine was rejected by the Appeal Court in *Bernardus* 1965 (3) SA 287 (A). Since this doctrine has been rejected by our courts, the transferred culpability approach should similarly be rejected.

If we follow the concrete-figure approach, it follows that in *aberratio ictus* situations, we merely apply the **ordinary principles relating to culpability (intention and negligence) in order to determine whether X had intention in respect of Z's death**; we do not apply any specific rule (such as the transferred culpability rule) in addition to the general rules relating to culpability. *Aberratio ictus* should be viewed merely as a description of a set of facts that, like any other set of facts, is to be judged and evaluated according to the ordinary rules relating to culpability. There is no such thing as a special “*aberratio ictus* rule”, which is to be applied in these types of situations and in no others.

10.5.4 Judging *aberratio ictus* situations



Read the following decision in your *Case Book*: *Mtshiza* 1970 (3) SA 747 (A).

The most important judgment relating to *aberratio ictus* is that of Holmes JA in *Mtshiza* 1970 (3) SA 747 (A). This judgment accords with the concrete-figure approach set out above. 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.

Whether, in a given situation, X acted with intention or negligence in respect of Z's death, or whether she lacked both intention and negligence in respect of Z's death, will depend upon the facts of the particular case. We wish to emphasise and repeat that *aberratio ictus* is merely a description of a factual situation. The expression "motor accident" is also merely a description of a factual situation. It is impossible to infer from the mere fact that a motor accident has occurred, without any further particulars being known, that the driver is guilty of murder or culpable homicide, or that she is not guilty. Likewise, it cannot be inferred from the mere fact that certain events amount to *aberratio ictus* that the perpetrator is necessarily guilty of some or other crime, or that she is not guilty. Consequently, there is no such thing as a special "*aberratio ictus* rule".

It is, therefore, wrong to allege that if a person performs an unlawful act with the intention of killing one person and, in the execution of her act, she kills another, she is automatically guilty of murdering the last-mentioned. What is wrong in this statement is the allegation that X is **automatically** guilty of murder in respect of the other person. We can assume that she is guilty of murder in respect of such other person only if closer investigation reveals that X, in fact, had *dolus eventualis* in respect of that person's death. However, such an investigation may reveal that X lacked *dolus eventualis* and that X was merely negligent in respect of the other's death, or even that she lacked negligence.

10.5.5 *Aberratio ictus* and *error in objecto* – examples of factual situations

We should guard against equating *aberratio ictus* situations with *error in objecto* (mistake relating to the object) situations. As pointed out above, *error in objecto* is a form of mistake in that X believes the object against which she directs her action to be something or somebody different from what it,

in fact, is. This kind of mistake can exclude X's intention if the object, as X believed it to be, differs materially from the nature of the object as set out in the definitional elements. *Aberratio ictus*, on the other hand, is not a form of mistake, because X does not confuse the person struck by the blow (i.e. the deceased) with the person at whom she is aiming. By way of illustration, we now apply these principles to various sets of facts:

- (1) At dusk, X shoots at a figure that she believes to be a horse named Ruby, belonging to her neighbour (against whom she carries a grudge). However, it appears that the figure was not Ruby, but another horse that also belongs to her neighbour. X is charged with malicious injury to property. (Remember that killing or injuring an animal belonging to another normally amounts to the crime of malicious injury to property.) This is a case of *error in objecto*, which affords X no defence – the type of object X had in mind still falls within the description of the object as set out in the definitional elements (“somebody else’s property”).
- (2) At dusk, X shoots at a figure that she believes to be her neighbour’s horse. However, the figure turns out to be her neighbour’s donkey. Similarly, this is a case of *error in objecto*, which affords X no defence on a charge of malicious damage to property: although the type of object that X envisaged (somebody else’s horse) differed from the type of object actually struck by the blow (somebody else’s donkey), the type of object that X envisaged still falls within the description of the object in the definitional elements (“somebody else’s property”).
- (3) At dusk, X shoots at a figure that she believes to be her neighbour’s horse. However, the figure at which she aimed and which was struck by the bullet turns out to be a human being. This is also a case of *error in objecto*. Assuming that X had never foreseen that the figure might, in fact, be a human being, X cannot be convicted of murder, because the type of object envisaged by X differed completely from the type of object that was actually struck by the bullet. If it can be proved that, in the circumstances, a reasonable person in X’s position would have foreseen that the figure could have been a human being, X may be found to have been negligent in respect of the victim’s death and, therefore, guilty of culpable homicide.
- (4) At dusk, X shoots at a figure that she believes to be her neighbour’s horse. The bullet misses the figure at which it was aimed and strikes a stableboy, Z, who is standing in the darkness of the stable, somewhere behind the horse. This is a case of *aberratio ictus*, because the bullet struck an object that was different from the one at which X was aiming. In order to decide whether X was culpable in respect of Z’s death, a court will have to investigate the facts further: if it appears that X had foreseen the possibility that Z might be behind the horse and that he might be struck by the bullet, and that she had reconciled herself to this possibility, she will be found to have had *dolus eventualis* in respect of Z’s death and will, therefore, be guilty of murder. If she lacked intention, but it appears that, in the circumstances, a reasonable person in X’s position would have

foreseen that there might be a human being standing behind the horse and that such human being might be struck by the bullet, X would be found to have been negligent and, therefore, guilty of culpable homicide. X will, in any event, be guilty of attempted malicious injury to property.

- (5) X shoots at a human being in the belief that it is her enemy, Y. The bullet misses Y and strikes Z, who was standing a short distance behind Y. This is a case of *aberratio ictus*. The ordinary test to determine intention and negligence must be applied in order to determine X's possible culpability in respect of Z's death. (See previous set of facts.) X will, in any event, be guilty of attempted murder in respect of Y.
- (6) X shoots at a human being in the belief that it is her enemy, Y. The bullet misses Y and strikes a car's windscreen, shattering it (or the car passes in front of Y at the very moment the shot is fired, so that the bullet strikes the windscreen). This is a case of *aberratio ictus*. Whether X had the required intention for malicious injury to property will depend upon whether she had foreseen that the car might be struck and had nevertheless reconciled herself to this possibility. X will, in any event, be guilty of attempted murder in respect of Y.

Tissen 1979 (4) SA 293 (T) and *Raisa* 1979 (4) SA 541 (O) are examples of cases in which the above-mentioned principles were applied.

Note that if Y is not killed, but only injured, X is either guilty of assault or not guilty at all. While there is a third possibility (namely culpable homicide on the basis of negligence) in those cases in which Y dies, no such possibility exists in instances in which Y is merely injured. The reason for this is that, in our law, there is no such crime as negligent assault – assault, like murder, can be committed only intentionally.



Students often do badly in the examination when answering questions dealing with *aberratio ictus*. This is usually the case if the set of facts given in the question is formulated in such a way that it is not specifically stated – or alleged by implication – that X had foreseen the possibility of hitting Y or Z, or that X had acted negligently. Because the form of culpability that X entertained is not expressly or implicitly mentioned in the given set of facts, it is wrong to simply state categorically – as many students do – that X committed murder or culpable homicide, or that she committed no crime. In other words, it is wrong to come to such a definite conclusion. A useful hint on how to answer such questions is to cast the answer in the form of conditional sentences. This means that you should begin your sentences with the word “if”. For example: “If the evidence brings to light that X had foreseen the possibility that ..., then she would be guilty of ...” (In such a sentence, you should, of course, ensure that you formulate the test for intention or *dolus eventualis* correctly.) Or you may write: “If the evidence brings to light that X, as a reasonable person, should have foreseen the possibility ..., then she would be guilty of ...” (In such a sentence, you should, of course, ensure that you formulate the test for negligence correctly.) In this way, you supply what the examiners are looking for in your answer.

10.6 MISTAKE RELATING TO UNLAWFULNESS

(*Criminal Law* 197–198; *Case Book* 153–156; 168–171)

It was stated above that the intention (more specifically, X's knowledge) must relate to the act, the circumstances contained in the definitional elements and the unlawfulness of the conduct. If X's intention does not relate to all these factors (in other words, if she is not aware of all of them), she labours under a misconception or material mistake, which affords her a defence. We have already discussed mistakes relating to the act and the circumstances contained in the definitional elements. We will now proceed to consider mistakes relating to the unlawfulness of the conduct.

Before we can say that X has culpability in the form of intention (*dolus*), it must be clear that she was also aware of the fact that her conduct was unlawful. This aspect of *dolus* is known as knowledge (or awareness) of unlawfulness. (Clear recognition of this requirement in our case law may be found in *Campher* 1987 (1) SA 940 (A) and *Collett* 1991 (2) SA 854 (A) 859.)

Intention is said to be "coloured" because, in our law, it always includes knowledge of unlawfulness. For this reason, intention in criminal law is often referred to as *dolus* – it is, in fact, an "evil intention" in the sense that X directs her will towards particular conduct, **knowing** that such conduct is unlawful. Without the latter awareness or knowledge, there is only a "colourless intention", which is insufficient for liability.

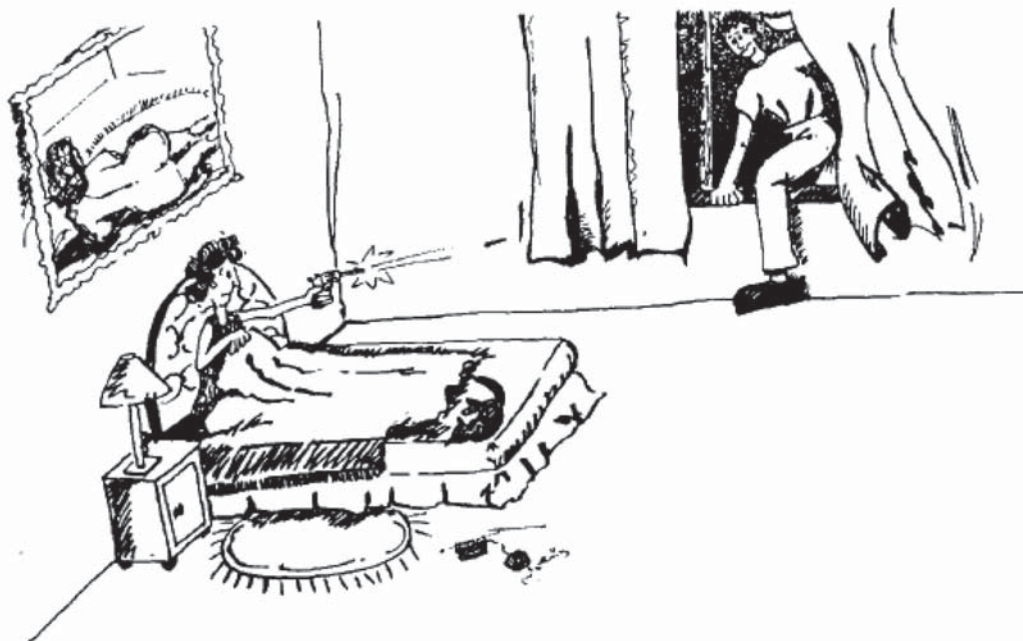
Knowledge of unlawfulness can, for the sake of convenience, be divided into two subdivisions:

- X must know that her conduct is **not covered by a ground of justification**.
- X must know that her conduct, in the circumstances in which she acts, is **punishable by the law as a crime**.

The second bullet point above deals with X's knowledge of the law, whereas the first doesn't necessarily do so. We will now consider these two bullet points one at a time, starting with the first one.

10.6.1 *Mistake relating to a ground of justification*

The following is an example of a mistake relating to the existence of a ground of justification: Y leaves his home in the evening to attend a function. When he returns late at night, he discovers that he has lost his front-door key. He decides to climb through an open window. X, his wife, is woken by a sound at the window. In the darkness, she sees a figure climbing through it. She believes the figure to be either a burglar or the man who has recently raped several women in the neighbourhood. She shoots and kills the person, only to discover that it is her own husband that she has killed (see illustration).



She has acted unlawfully because she cannot rely on private defence: the test in respect of private defence is, in principle, objective, and in a case such as this, her state of mind is not taken into account when determining whether she acted in private defence. Nevertheless, although she intended to kill another human being, she will not be guilty of murder, because her intention (knowledge) did not extend to include the unlawfulness of her act. She thought that she was acting in private defence and, therefore, that she was acting lawfully. **This is a case of what is known as putative private defence.** (See *Joshua* 2003 (1) SACR 1 (SCA).)

In *Sam* 1980 (4) SA 289 (T) X, was charged with pointing a firearm at Y in contravention of a statute. However, the evidence revealed that X pointed the firearm at Y in the honest, yet erroneous, belief that Y was a thief whom he had caught red-handed. X was acquitted, the court holding that in a crime requiring intention (*dolus*), the state must prove beyond reasonable doubt that X acted with knowledge of unlawfulness and, in this case, they found that X had lacked such knowledge.

There have also been a number of cases in which it was held that X was not guilty of rape if he had been under the impression that Y had consented to intercourse (*Mosago* 1935 AD 32; *K* 1958 (3) SA 420 (A)), or that X did not commit theft if she believed that Y (the owner of the property) had consented to her taking the property (*Kinsella* 1961 (3) SA 519 (C) 532; *De Jager* 1965 (2) SA 616 (A) 625).

Knowledge of unlawfulness may also be present in the form of *dolus eventualis*. In such a case, X foresees the possibility that her conduct may be unlawful, but does not allow this to deter her and continues her conduct, not caring whether it is lawful.



Read the following decision in your *Case Book*: *De Oliveira* 1993 (2) SACR 59 (A).

10.6.2 *Mistake of law*

(*Criminal Law 199–204; Case Book 160–167*)

(1) General

We stated above that the requirement of knowledge of unlawfulness can be divided into two subdivisions:

- X's awareness that her conduct is not covered by a ground of justification **and**
- X's awareness that the type of conduct she is committing is prohibited by the law as a crime

We will now consider the second aspect of awareness of unlawfulness. Here, it is X's knowledge of the law, and not of the facts, that has to be considered. (The first aspect of awareness of unlawfulness may conceivably also cover a case where X, because of her making a **mistake relating to the law**, erroneously believes her conduct to be justified.)

The important question here is whether a mistake relating to the law, or ignorance of the law (which is essentially the same thing), constitutes a defence to a criminal charge. Should an accused who admits that she has committed the forbidden act, that it was unlawful, and even that she had (the necessary factual) knowledge of all the material surrounding circumstances, expect to be acquitted merely because she did not know that it was a crime to do what she did?

It is, of course, difficult to imagine a court believing an accused who alleges that she did not know that murder, rape, assault or theft was a crime. These are well-known crimes in all civilised communities. On the other hand, there are lesser-known crimes in our law, such as those relating to specialised technical matters, or offences created in subordinate legislation.

(2) The position prior to 1977

In English law, the principle has always been that, subject to certain qualifications, ignorance of the law is no defence. This rule is usually expressed by the following well-known maxims: "ignorance of the law is no excuse" and "everybody is presumed to know the law". Prior to 1977, the position was the same in South African law. However, in today's complex world, the idea that everybody is presumed to know the law is an untenable fiction. Nobody, not even the most brilliant lawyer, could keep abreast of the law in its **entirety**, even if she read statutes, government and provincial gazettes and law reports from morning till night.

(3) The current South African law



Read the following decision in your *Case Book*: *De Blom* 1977 (3) SA 513 (A).

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.

Rumpff CJ declared (at 529) 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 (see 532). 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.

To sum up: according to our current 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 to this possibility (*dolus eventualis*). In addition, she need not 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)* at 532F–H 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.

ACTIVITY

- (i) X, a seventeen-year-old girl, goes to a rave at a club in Johannesburg. Her friend gives her a packet of cigarettes. X puts the cigarettes in her pocket, thinking that they are ordinary cigarettes. The police raid the club. X is searched and the cigarettes that they find in her pocket turn out to contain dagga. X is charged with the crime known as "possession of drugs". X tells you (her lawyer) that although she knows very well that possession

of dagga is a crime, she was unaware that the cigarettes in her possession contained dagga instead of ordinary tobacco. What defence would you raise on behalf of X?

- (ii) X, a 30-year-old illiterate member of an indigenous tribe in a remote area of the Limpopo Province, comes to Johannesburg to look for her friend. This is the first time that she has left her rural home. In the community from which she comes, it is customary to smoke dagga from an early age for medicinal and recreational purposes. X brings dagga along with her to Johannesburg. The taxi that she is travelling in is stopped by the police near Pretoria. All the travellers are searched for drugs. X is found to be in possession of dagga and arrested. X tells you (her lawyer) that nobody had ever told her that it is against the law to smoke dagga. What defence would you raise on behalf of X?

FEEDBACK

- (i) Your defence would be that, owing to a mistake of fact, X did not have the required intention. She did not know that the cigarettes contained dagga, and was therefore mistaken as to the existence of one of the definitional elements of the crime. She was mistaken as to a material fact relating to her possession.
- (ii) Your defence would be that X lacked intention because she had made a mistake as regards the law. She was under the impression that her conduct did not constitute a crime.

GLOSSARY

error in objecto

mistake relating to the object

aberratio ictus

the going astray of the blow

versari in re illicita

literally “to engage in an unlawful activity”; in practice, this is the rule (rejected by the Appellate Division) that if a person engages in an unlawful activity, he or she is criminally liable for all the consequences flowing from the activity, irrespective of whether there was, in fact, culpability in respect of such conduct

SUMMARY

- (1) The intention must relate to the act, the circumstances contained in the definitional elements and the unlawfulness of the conduct. X must be aware (have knowledge) of all these factors. If she is unaware of any of these factors, it cannot be said that she intended to commit the crime. X is then mistaken as to the existence of these factors.
- (2) Mistake need not be reasonable to exclude intention. The test to determine whether mistake has excluded intention is subjective.

- (3) In order to exclude intention, the mistake must be material. Mistake is material if it relates to the act, the circumstances set out in the definitional elements or the unlawfulness of the conduct.
- (4) In **Goosen**, the Appellate Division held that a mistake with regard to the chain of causation may indeed exclude intention, provided the actual chain of events differed materially from that envisaged by the perpetrator.
- (5)
 - (a) *Aberratio ictus*, or the going astray or missing of the blow, refers to a set of facts in which X aims a blow at Z, the blow misses Z and strikes Y. This is not a form of mistake.
 - (b) In order to determine whether, in such a set of facts, X is guilty of an offence, you should merely apply the normal principles with regard to intention and negligence.
 - (c) It is wrong to apply the transferred culpability approach in an *aberratio ictus* factual situation, that is, to argue that because X had intended to kill a human being and did just that, she necessarily had the intention to kill the actual victim.
- (6) Absence of awareness of unlawfulness excludes intention.
- (7) Awareness of unlawfulness implies that X is aware
 - (a) that her conduct is not covered by a ground of justification
 - (b) that the type of conduct she engages in is actually regarded by the law as constituting an offence
- (8) The effect of the decision in **De Blom** is that ignorance of or a mistake about the law excludes intention.

TEST YOURSELF

- (1) Explain the meaning of the term “mistake”.
- (2) Does mistake exclude intention only if the mistake is reasonable? Explain.
- (3) Will *error in objecto* always (without exception) constitute a defence?
- (4) Explain the difference between a material mistake and a non-material mistake.
- (5) Explain briefly what is meant by a mistake “with regard to the causal chain of events” and indicate whether this form of mistake excludes intention.
- (6) Briefly discuss the two approaches followed in legal literature in determining liability in the case of *aberratio ictus* (going astray or missing of the blow), and indicate which one of these approaches you prefer and why.
- (7) Distinguish between *error in objecto* and *aberratio ictus*.
- (8) Explain, with reference to an example, what you understand by a mistake with regard to the presence of a ground of justification.
- (9) Discuss the decision in *De Blom 1977 (3) SA 513 (A)* critically and indicate its effect on South African law.

STUDY UNIT 11

Negligence



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- comment on the requirement of negligence by expressing an informed opinion as to whether an accused has acted with negligence, having regard to the reasonable person test and the concepts of the reasonable person, reasonable foreseeability and the taking of reasonable steps
- determine the liability of an accused who has exceeded the bounds of private defence by applying the tests of intention and negligence

11.1 ORIENTATION

We have already shown above that

culpability	=	criminal capacity	+	either intention or negligence
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We have already discussed the concepts of criminal capacity and intention. In this study unit we discuss negligence, as well as a certain matter that can be properly understood only if you have studied both intention and negligence: this is the question of how a case of exceeding the limits of private defence should be treated.

On negligence in general, see *Criminal Law* 204–216.

It is not only those unlawful acts that are committed intentionally that are punishable. Sometimes the law also punishes unlawful acts that are committed unintentionally, or the unintentional causing of results, namely if X acts or causes the result negligently. Generally speaking, a person's conduct is negligent if it falls short of a certain standard set by the law. This standard is, generally speaking, the caution that a reasonable person would exercise or the foresight that a reasonable person would have in the particular circumstances.

In crimes of intention, X is blamed for knowing or foreseeing that his conduct is proscribed by the law and that it is unlawful. In crimes of negligence, X is blamed for **not** knowing, **not** foreseeing or **not** doing something, although – according to the standards set by the law – he **should** have known or foreseen or done it. Intention always has a **positive** character: X wills or knows or foresees something. Negligence, on the other hand, always has a **negative** character: X does **not** know or foresee something, although he **should** – according to the norms of the law – **have** known or foreseen it.

Whereas, in legal literature, intention is often referred to as *dolus*, negligence is often referred to as *culpa*.

11.2 OBJECTIVE TEST

The test for negligence is objective, except for a few **less important** exceptions (to which we will refer later). As we have seen above, the test for intention is subjective, since we have to consider what X's actual knowledge was or what he actually envisaged the facts or the law to be. When we describe the test for negligence as objective, we mean that we have 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.

The test for intention is subjective because we have to determine what X's thoughts were as an individual (i.e. as a subject), or what he actually envisaged. Expressed very plainly: we have to ascertain "what went on in his (X's) head". The test for negligence, on the other hand, is described as objective, since here we are 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. Here (in negligence), X's conduct is measured against "something" (a standard) **outside** himself – namely what a reasonable person would have foreseen or done.

11.3 DEFINITION OF NEGLIGENCE

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.

11.4 ABBREVIATED WAY OF REFERRING TO NEGLIGENCE

An abbreviated way of referring to negligence (in respect of either a result or a circumstance) is simply to say that the person concerned did not conduct himself as the reasonable person would have conducted himself in the same circumstances, or – expressed even more briefly – that the person concerned acted **unreasonably**. Sometimes negligent conduct is briefly referred to by saying: "he **must** have done that" or "he **should not** have done that" or "he **ought to** have known or foreseen or done that". These everyday expressions are merely other ways of stating that a reasonable person would not have acted in the same way as X did.

Note that the meaning of the word "must" can be ambiguous. If the adjudicator says "he **must** have foreseen the death", it can conceivably mean "I draw the



inference from the facts that X did, in fact, subjectively foresee the possibility of death". However, it can also mean "X did not foresee the possibility of death, but the reasonable person would have" (in other words, X should reasonably have foreseen it). In the former instance, the adjudicator signifies that X had *dolus eventualis*, and in the latter instance, he signifies that intention was absent and that X was merely negligent. In order to avoid ambiguity, we would strongly advise you to confine your use of the words "must", "must have" and "ought to" to cases in which you describe the presence of negligence as a form of culpability. We prefer the formulation "**ought to** have foreseen".

11.5 DISCUSSION OF THE DEFINITION OF NEGLIGENCE

11.5.1 *Negligence may exist in respect of either a result or a circumstance*

In order to understand the definition of negligence given above, it is first of all necessary to consider the distinction between formally- and materially-defined crimes. In the discussion of causation above, we explained that crimes may be divided into two groups, namely formally- and materially-defined crimes. In formally-defined crimes the law forbids a specific act or omission, irrespective of its result. In materially-defined crimes (also sometimes referred to as result crimes), the law forbids conduct that **causes** a specific condition (result). (If you do not understand this subdivision properly, you must reread the explanation of this subdivision in the study unit dealing with causation.) Certain formally-defined crimes require intention and others require negligence. The same applies to materially-defined crimes: some require intention and some, negligence.

In materially-defined crimes requiring negligence, it must be proved that X was negligent in respect of the **causing of the result**. In formally-defined crimes requiring negligence, it must be proved that X was negligent in respect of **a circumstance**.

In practice, culpable homicide is by far the most important crime in respect of which the form of culpability is not intention, but negligence. Culpable homicide is a materially-defined crime, since the crime proscribes the **causing of a certain result**, namely another's death. Culpable homicide is defined as the unlawful, negligent causing of another's death. Barring a certain form of the crime of contempt of court, culpable homicide is the only common-law crime that does not require intention, but negligence. There are a number of statutory crimes requiring culpability in the form of negligence. Most of them are formally defined, such as the crime of negligently driving a vehicle (contravention of s 63(1) of the National Road Traffic Act 93 of 1996) and the crime of unlawfully possessing a firearm (contravention of s 3 of the Firearms Control Act 60 of 2000).

Negligence was defined above in such a way that it refers to negligence in respect of both a circumstance (see point (1)(a) of the definition) and a result (see point (1)(b) of the definition).

Since culpable homicide is the most important crime requiring negligence, and since this crime is materially defined, the discussion of negligence that follows will, for the most part, concentrate on negligence in respect of the causing of a result. In order not to overcomplicate the statements that follow, they will mostly be formulated in such a way that they refer only to negligence in respect of a result. Later on in the discussion we will briefly say something about negligence in the context of formally-defined crimes, that is, negligence in respect of a circumstance.

11.5.2 *The concept of the reasonable person*

The expression “reasonable person” appears in both the first and second legs (points (1) and (2)) of the definition of negligence. Before considering the first two legs of the definition, it is necessary to explain what is meant by “reasonable person”.

- (1) The reasonable person is merely a **fictitious person** that the law invents to **personify** the objective standard of reasonable conduct that 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*. These expressions are derived from Roman law. Literally, they mean the “diligent father of the family”, but in practice, this expression is synonymous with the reasonable person.
- (3) In the past, the expression “**reasonable man**” was usually used in legal literature, instead of “reasonable person”. Since 1994, when South Africa obtained a new Constitution that emphasises, *inter alia*, gender equality, the term “reasonable man” ought to be avoided because of its sexist connotation.
- (4) By “reasonable person”, we mean an ordinary, normal, average person. In *Mbombela* 1933 AD 269 273, the court described the reasonable person as “the man (*sic*) of ordinary knowledge and intelligence”. He is neither, on the one hand, an exceptionally cautious or talented person (*Van As* 1976 (2) SA 921 (A) 928), nor, on the other, an underdeveloped person, or somebody who recklessly takes chances. Accordingly, the reasonable person finds himself **somewhere between these two extremes**. In *Burger* 1968 (4) SA 877 (A) 879, Holmes JA expressed this idea in almost poetical language when he said:

“One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of the racing driver. In short, a *diligens paterfamilias* treads life’s pathway with moderation and prudent common sense.”

The reasonable person is, therefore, not somebody who runs away from every foreseen danger; he may sometimes take a reasonable risk.

- (5) The reasonable-person concept embodies an **objective criterion**. Personal, subjective characteristics, such as his sex, race, emotional stability or lack thereof, degree of education, or superstitiousness or lack thereof, are not taken into account.
- (6) The reasonable person is not a perfectly programmed automaton that can never make a mistake. He remains an ordinary flesh-and-blood human being whose reactions are subject to the **limitations of human nature**. In crisis situations, when he has to take a quick decision, he can, like any other person, commit an error of judgement, that is, make a decision that later turns out to be wrong. It follows that the mere fact that a person has committed an error of judgement does not necessarily mean that he was negligent.

11.5.3 Reasonable foreseeability

Under this heading we discuss the first leg (i.e. point (1)) of the definition of negligence given above, namely whether the reasonable person would have **foreseen** the possibility of the particular circumstance existing or the particular result ensuing. In practice, this is the most important leg or component of the test for negligence.

- (1) The courts sometimes ask whether the reasonable person would have foreseen the possibility (of the result ensuing), and on other occasions, whether X ought reasonably to have foreseen the possibility. However, it is beyond doubt that **both expressions mean the same thing**: foreseeability by the reasonable person and reasonable foreseeability by the accused are viewed as the same thing.
- (2) What must be foreseeable is the **possibility** that the result may ensue, and not the **likelihood** thereof (*Herschell v Mrupe* 1954 (3) SA 464 (A) 471).
- (3) The test is whether the reasonable person **in the same circumstances as those in which X found himself** would have foreseen the particular possibility. This aspect of the test is very important. Our courts do not assess negligence *in vacuo* ("in a vacuum"), but *in concreto*, that is, in the light of the actual circumstances in which X found himself at the time he committed his act.

Thus if the question arises whether X, a motorist, was negligent when he ran over and killed a pedestrian in a street **during a heavy rainstorm**, the question the court must ask is what a reasonable person who was driving in a street **during a heavy downpour** would have foreseen. It would be wrong to place the reasonable person behind the steering wheel of a motorcar on an occasion when the sun was shining brightly.

If X finds himself in a **sudden emergency** when driving his car, for example, and has to make a quick decision, which, in the event, results in somebody's death, the task of the court that has to decide whether he was negligent is, likewise, to enquire how the reasonable person would have behaved in a similar situation.

- (4) In the discussion of intention above, it was seen that the intention **must relate not only to the act, but also to all the circumstances and consequences set out in the definitional elements, as well as to the unlawfulness. The same principle applies to negligence.** Actually, negligence in respect of the act plays a role only in formally-defined crimes. We will briefly consider negligence in these crimes below. In materially-defined crimes, negligence must relate to the particular result specified in the definitional elements of the crime concerned. In culpable homicide, the result specified in the definition of the proscription is somebody else's **death**.

This means that if X is charged with culpable homicide and the question arises whether he was negligent, the question to be answered is not: "Would the reasonable person have foreseen the possibility that Y might be **injured** as a result of X's conduct?" The correct question is: "Would the reasonable person have foreseen the possibility that Y might be **killed** as a result of X's conduct?" (*Bernardus* 1965 (3) SA 287 (A) 296). Although it is well known that, because of the frailty of the human body, death may be caused by even a mild assault, it is wrong to say that the reasonable person will **always** foresee that even a mild assault, such as a slap, may cause Y's death. In certain exceptional cases, death resulting from a minor assault may not be foreseeable, such as where the victim had an unusual physiological characteristic such as a thin skull or a weak heart (*Van As* 1976 (2) SA 921 (A) 927).

11.5.4 *The taking of steps by the reasonable person to avoid the result ensuing*

Under this heading we discuss the second leg (i.e. point (2)) of the definition of negligence given above, that is, the requirement that the reasonable person would have taken **steps** to guard against the possibility of the result ensuing.

In practice, this second leg of the test for negligence is seldom of importance because, in the vast majority of cases, the reasonable person who had foreseen the possibility of the result ensuing (i.e. who has complied with the first leg of the test) would also have taken steps to guard against the result ensuing. However, there are cases in which the reasonable person who has foreseen the possibility will **not** take steps to guard against the result ensuing. This is where the foreseen possibility is far-fetched or remote, or where the risk of the result ensuing is very small, or where the cost and effort necessary to undertake the steps do not outweigh the more important and urgent purpose of X's act.

In deciding whether the reasonable person would have taken steps to guard against the result ensuing, it may be necessary to balance the social utility of X's conduct against the magnitude of the risk of damage created by his conduct.

11.5.5 *X's conduct differs from that of the reasonable person*

We have now discussed the first two legs of the definition of negligence. It is not necessary to say much on the third leg of the test. It merely embodies the self-evident rule that X is negligent if his conduct differs from that which a reasonable person would have foreseen or guarded against.

11.5.6 *Negligence in respect of a circumstance*

In the discussion thus far, the emphasis has been on negligence in respect of a result. Negligence in respect of a result is found only in materially defined crimes (result crimes). As was pointed out above, there are also certain formally defined crimes that require culpability in the form of negligence. Thus it was held in *Mnisi* 1996 (1) SACR 496 (T), for example, that the crime of possessing a firearm without a licence (currently a contravention of s 3 of the Firearms Control Act 60 of 2000) is one in respect of which the state need merely prove culpability in the form of negligence. This is a formally defined crime, since we are not dealing here with the causing of a certain result. To obtain a conviction, the state need not prove the causing of a certain result, but merely the existence of a certain **circumstance**, namely the possession by X of a firearm without his having a licence for it. What do we mean when we say that X was negligent, not in respect of a result, but merely in respect of a circumstance?

X is negligent in respect of a circumstance if a reasonable person in the same circumstances would have foreseen the possibility that the circumstance could exist. In *Duma* 1970 (1) SA 70 (N), for example, X was charged with unlawfully possessing a firearm. He was caught in possession of a firearm without having a licence to possess it. The question was whether he had committed the crime negligently. X's story, which the court accepted, was that he believed in good faith that he had picked up a toy revolver and that he had then put it in his pocket. The court held that, in order to prove negligence, the state must prove "that, although the appellant genuinely believed that he had picked up a toy, a *diligens paterfamilias* in his position would not have entertained that belief but would have known, or at least suspected, that it was a firearm and would have made certain of its nature". The court held that the state had not proved this and the court accordingly acquitted X.

11.6 SUBJECTIVE FACTORS

As we have already emphasised, the test to determine negligence is, in principle, objective, namely the foreseeability of the result or circumstance by the reasonable person. However, this rule is subject to the following exceptions:

- (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 on the ground that, *inter alia*, 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 1948 (4) SA 349 (C) 350; Van As supra 928E*).

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 that is **superior** to the knowledge a reasonable person would have had of 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 1966 (1) SA 226 (A) 229*).

Example: X is a member of a team of workers that 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’s holding that he was indeed negligent.)

11.7 EXCEEDING THE BOUNDS OF PRIVATE DEFENCE

(*Criminal Law 113–114; Case Book 156–159*)

11.7.1 Introduction

Above, in the study unit setting out the ground of justification known as private defence, we have already explained that if X relies on private defence, but the evidence reveals that he has exceeded the bounds of private defence, he cannot rely on private defence and his conduct is unlawful. The question that we have not yet answered is: What crime does X commit in such a case? In order to answer this question, we must know what the two forms

of culpability – intention and negligence – entail. We have now reached the stage where we have explained both these forms of culpability. We are therefore now in a position to explain what crime, if any, X commits if he exceeds the limits of private defence.

11.7.2 *Application of principles of culpability*

The question arises how the principles relating to culpability must be applied in cases where the bounds of private defence are exceeded.

As seen above, a person acting in private defence acts lawfully and his non-liability is based upon the absence of an unlawful act. Consequently, of what must he be convicted if he oversteps the bounds of private defence, such as when he inflicts more harm upon the aggressor than is necessary to protect himself or the person he is defending, and his act is, therefore, unlawful?

The answer to this question is clearly set out in *Ntuli* 1975 (1) SA 429 (A). In this case, the accused killed an older woman with whom he had an argument, by striking her on the head with two hard blows. 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.



Read the aforementioned decision in the *Case Book*: *Ntuli* 1975 (1) SA 429 (A).

11.7.3 *Killing another*

We first consider the situation in which the party who was originally attacked (X) kills the original aggressor (Y) while exceeding the bounds of private defence. The following set of facts is an example of such a situation. Y unlawfully assaults X by hitting him in the face with his fists. X, in order to defend himself, draws a knife and stabs Y in the arm. As a result of sustaining the stab wound, Y abandons his attack. X nevertheless continues his retaliatory action by inflicting three further stab wounds on Y's chest and neck, as a result of which Y dies. The question now is whether X has committed a crime, and if so, which one.

In this set of facts, three possible legal conclusions must be considered, namely (1) that X is guilty of murder, (2) that he is guilty of culpable homicide, or (3) that he is not guilty of any crime. To sustain a conviction of murder or culpable homicide, there must have been an unlawful causing of another's death. It is clear that X's act caused Y's death. Since X exceeded the bounds of private defence, he cannot rely on private defence as a ground of justification

and, therefore, his act is also unlawful. (If X had abandoned his retaliatory attack upon Y after the infliction of the first stab wound, his retaliation would have fallen within the bounds of private defence.) The only question that remains to be answered is whether X acted with culpability, and if so, whether the culpability was present in the form of intention or negligence.

X will be guilty of murder if he had the intention to murder Y. Before a court can find that he had such an intention, two requirements must be complied with:

- (1) It must be clear that X had, in fact, known that his conduct would result in Y's death, or that he had foreseen that this might happen and reconciled himself to this possibility. This is "colourless" intention in respect of death.
- (2) The intention referred to above, however, is not yet sufficient to warrant a conviction of murder. In the above discussion of intention – and especially of awareness of unlawfulness – we stated that the intention required for a conviction (i.e. *dolus*) must always be "coloured". This would be the case if, apart from intending to commit the unlawful act or causing the unlawful result, X also knew (or foresaw) that his conduct would be **unlawful**. Therefore, before a court can find that X intended to murder Y, it must, in the second place, be clear that he (X) knew that his conduct was also unlawful (in other words, that it exceeded the bounds of private defence), or that he foresaw this possibility and reconciled himself to it. In short, intention to murder consists in intention to kill **plus** the intention to kill **unlawfully**.

We now return to the set of facts mentioned above, where X kills Y while exceeding the bounds of private defence. It is usually easy to find that X had "colourless" intention in respect of death. In fact, even where X kills Y in (lawful) private defence, he knows or foresees that his act will lead to Y's death. However, what X often does not foresee when exceeding the bounds of self-defence in the heat of the moment, is that he is engaged in an **unlawful** attack upon Y – in other words, an attack that exceeds the bounds of self-defence.

Where, in the discussion above, we have used the word "knows", the reference is to *dolus directus*. Where we have used the expression "foresees the possibility ... and reconciles", the reference is to *dolus eventualis*.

If the intention to murder, as explained above, is absent, X may nevertheless be convicted of **culpable homicide** if he **ought reasonably to have foreseen** that he might exceed the bounds of self-defence and that he might kill the aggressor. If that is the case, he was negligent in respect of the fatal result (*Joshua* 2003 (1) SACR 1 (SCA)).

If, subjectively, he **did not foresee** the possibility of death **and** if **it also cannot be said** that he **ought reasonably to have foreseen it**, both intention and negligence in respect of death are absent and he is **not guilty of either** murder or culpable homicide.

11.7.4 Assault

If X did not kill Y, but only injured him while exceeding the bounds of self-defence, there are only two possibilities, namely that X is guilty of assault, or that he is not guilty of any offence.

The crime of assault can be committed only intentionally. There is no such crime as negligent assault in our law. If X subjectively knew or foresaw the possibility that he might overstep the bounds of self-defence and, in so doing, would or could injure Y, the original aggressor, then he had the necessary intention to assault and is guilty of assault. If he did not foresee these possibilities, the intention to assault is absent and he is not guilty. Mere negligence in respect of the injury does not render him guilty of any crime.

GLOSSARY

<i>culpa</i>	negligence
<i>bonus paterfamilias</i>	literally “the good father of the family”; in practice, “the reasonable person”
<i>diligens paterfamilias</i>	literally “the diligent father of the family”; in practice, “the reasonable person”

SUMMARY

- (1) The test to determine negligence is (barring certain exceptions) objective.
- (2) See the definition of negligence above.
- (3) An abbreviated way of referring to negligence is to say that X acted in a way that differed from the way the reasonable person would have acted in the circumstances.
- (4) The crux of the test to determine whether X was negligent in a materially defined crime (i.e. a result crime) is the following: Would the reasonable person in the circumstances have foreseen that the particular consequence could ensue?
- (5) The crux of the test to determine whether X was negligent in a formally defined crime is the following: Would the reasonable person in the circumstances have foreseen that the circumstance in question could exist?
- (6) The reasonable person is also referred to as the *bonus* or *diligens paterfamilias*. This means the ordinary, normal, average person. He is not an exceptionally cautious person who would never take reasonable risks.
- (7) In order to determine whether the reasonable person would have foreseen the reasonable possibility that the circumstance may exist or the consequence ensue, the reasonable person must be placed in the same circumstances as those in which X found himself at the time of the commission of the act.
- (8) Apart from enquiring whether the reasonable person would have foreseen a certain possibility, we must, in order to determine negligence, also enquire whether the reasonable person would have taken steps to guard against the possibility of the result ensuing.

- (9) Although the test for negligence is objective, subjective factors are taken into account in the following instances:
- (a) children
 - (b) experts
 - (c) superior knowledge
- (10) In terms of the decision in *Ntuli*, the ordinary principles relating to intention and negligence must be applied to determine whether a person who overstepped the boundaries of private defence is guilty of a crime.

TEST YOURSELF

- (1) Define the test for negligence.
- (2) Discuss the concept of the reasonable person.
- (3) Discuss the first leg of the test for negligence, that is, the question whether the reasonable person would have **foreseen** the possibility that the particular result might ensue or the particular circumstance might exist.
- (4) Discuss the second leg of the test for negligence, that is, the question whether the reasonable person would have **taken steps to guard** against the possibility of the result ensuing.
- (5) How does the test for negligence in formally defined crimes differ from the test for negligence in materially defined crimes?
- (6) What is the abbreviated way in which we may refer to negligence?
- (7) Name the subjective factors that may be taken into consideration in determining negligence, and give an example of each factor.
- (8) (a) When can X be convicted of **murder** if he killed his attacker in a situation in which he exceeded the bounds of private defence? Discuss.
(b) When can X be convicted of **culpable homicide** if he killed his attacker in a situation in which he exceeded the bounds of private defence? Discuss.

STUDY UNIT 12

The effect of intoxication and provocation on liability



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the effect of intoxication on the liability of an accused by expressing an informed opinion on whether an accused, who had been intoxicated at the time of the commission of a crime, should be convicted of
 - the crime with which she is charged (or an implied alternative)
 - contravention of section 1 of Act 1 of 1988
- demonstrate your understanding of the effect of provocation on liability by expressing an informed opinion on the question whether an accused who had committed crimes involving the assault or killing of another human being, can rely on provocation as an excuse

12.1 BACKGROUND

The effect of intoxication, as well as of provocation, on criminal liability is discussed in this study unit. Intoxication and provocation may play a role in respect of the following elements or requirements of the crime: a voluntary act; criminal capacity; intention and negligence. It is important that you understand these concepts well before you start to study this study unit.

We will first discuss in detail the effect of intoxication on criminal liability.

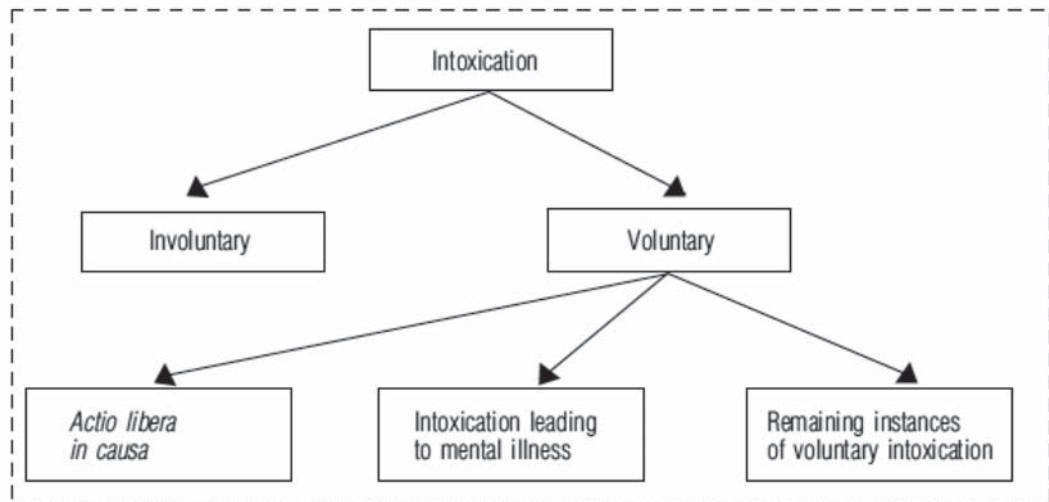
12.2 INTRODUCTION

It is well known that the consumption of alcohol may detrimentally affect a person's capacity to control her muscular movements, to appreciate the nature and consequences of her conduct, as well as its wrongfulness, and to resist the temptation to commit wrongful acts. It may induce conditions such as impulsiveness, diminished self-criticism, an overestimation of her abilities and an underestimation of dangers. It may also result in a person being unaware of circumstances or consequences that she would have been aware of had she been sober. What is the effect, if any, of intoxication on criminal liability?

What we have said here regarding intoxication resulting from the consumption of alcohol or liquor applies equally to intoxication resulting from the use of drugs, such as dagga or opium.

The effect of intoxication on liability is discussed in *Criminal Law* 216–230 and in *Case Book* 109–117.

The discussion of the defence of intoxication that follows can be subdivided as shown in the following diagram. The last form of intoxication described in the diagram, namely remaining instances of voluntary intoxication, requires a fairly long discussion. A summary of the effect of this form of intoxication will be given to you at the end of the study unit.



12.3 INVOLUNTARY INTOXICATION

It is necessary, firstly, to distinguish between voluntary and involuntary intoxication. By “involuntary intoxication”, we mean intoxication brought about without X’s conscious and free intervention, as in the following examples: X is forced to drink alcohol against her will; or X’s friend, Y, without X’s knowledge, pours alcohol or a drug into X’s coffee, which results in X becoming intoxicated and committing a crime while thus intoxicated (as happened in *Hartyani* 1980 (3) SA 613 (T)). It is beyond dispute that involuntary intoxication is a complete defence. The reason for this is that X could not have prevented the intoxication, and therefore cannot be blamed for it.

12.4 VOLUNTARY INTOXICATION

As far as voluntary intoxication is concerned, three different situations have to be clearly distinguished:

- (1) the *actio libera in causa*
- (2) intoxication resulting in mental illness
- (3) the remaining instances of voluntary intoxication

12.4.1 *Actio libera in causa*

The first situation is where X intends to commit a crime, but does not have the courage to do so and takes to drink in order to generate the necessary courage, knowing that she will be able to perpetrate the crime once she is intoxicated. In this instance, intoxication is no defence whatsoever; in actual fact, it would be a ground for imposing a heavier sentence than normal. At the stage when the person was completely sober, she already had the necessary culpability. The person’s inebriated body later merely becomes an instrument used for the purpose of committing the crime. This factual situation – which is difficult to prove – is known as *actio libera in causa*.

12.4.2 *Intoxication resulting in mental illness*

Secondly, certain manifestations of mental illness, such as *delirium tremens*, can be the result of a chronic abuse of alcohol. If the consumption of alcohol results in mental illness or mental defect, the ordinary rules regarding mental illness set out above must be followed. X is acquitted in terms of section 78(6) of the Criminal Procedure Act, owing to lack of criminal capacity. The court may issue one of several orders, including that X be admitted to, and detained in, an institution for the purpose of treatment. (For a discussion of this topic, see study unit 8 above.)

The two instances of voluntary intoxication discussed above, as well as involuntary intoxication, are seldom encountered in practice. The rules applicable to these forms of intoxication, as stated above, are generally not disputed.

12.4.3 *Remaining instances of voluntary intoxication*

(1) General

We now take a look at the third instance of voluntary intoxication. This is the instance where alcohol is taken voluntarily, does not result in mental illness, and where X does not partake of the alcohol with the exclusive purpose of generating the courage to perpetrate a crime.

The vast majority of cases where intoxication comes into the picture in the daily practice of our courts can be categorised under this third instance of voluntary intoxication. The controversy concerning the role of intoxication in criminal law has to do with these cases primarily. Unless otherwise indicated, all references to intoxication hereafter are references to intoxication in this category. It is this type of intoxication with which the courts are confronted daily. For example, X has a couple of drinks at a social gathering and then behaves differently from the way she would have behaved had she not taken any liquor: she takes offence too readily at a rude remark made by Y and then assaults Y, or damages property.

(2) The “lenient” and “unyielding” approach to voluntary intoxication

Throughout the years, there have been two opposing schools of thought regarding the effect that intoxication ought to have on criminal liability. On the one hand, there is the approach that may be described as the **unyielding** one, which holds that the community will not accept a situation in which a person who was sober when she committed a criminal act is punished for that act, whereas the same criminal act committed by someone who was drunk is excused merely because she was drunk when she committed the act. This would mean that intoxicated people are treated more leniently than sober people.

On the other hand, there is the **lenient** approach, which holds that if we apply the ordinary principles of liability to the conduct of an intoxicated person, there may be situations in which such a person should escape criminal

liability, the basis of this being that because of her intoxication, she either did not perform a voluntary act or lacked either criminal capacity or the intention required for a conviction.

In the course of our legal history, the approach towards the effect of intoxication has vacillated. Initially, in our common law, the rule was that voluntary intoxication could never be a defence to a criminal charge, but could, at most, amount to a ground for the mitigation of punishment. This is the unyielding approach.

However, the pendulum has gradually swung away from the unyielding approach adopted in the common law towards the lenient approach, and throughout the twentieth century, right up until 1981, the courts applied a set of rules that enabled them to reach a conclusion somewhere in the middle, that is, between the unyielding and the lenient approach (see the discussion hereafter of the law prior to 1981). However, with the 1981 Appeal Court decision in *Chretien* 1981 (1) SA 1097 (A), the pendulum clearly swung in the direction of the lenient approach. This created the fear that intoxicated persons might too easily escape conviction, which, in turn, led to legislation in 1988 aimed at curbing the lenient approach towards intoxicated persons. At present, the pendulum is poised, somewhat awkwardly halfway between the lenient and the unyielding approach, owing to, *inter alia*, uncertainty regarding the interpretation of the 1988 legislation.

12.5 DEVELOPMENT OF THE DEFENCE OF VOLUNTARY INTOXICATION

As this topic deals with the development of a defence, **the chronological sequence of decided cases and of legislation is important.**

12.5.1 *The law before 1981*

For a clear picture of the role of intoxication in criminal liability, it is necessary to take a brief look at what the law on this subject was in the course of the twentieth century, prior to 1981. During this time, intoxication was never a complete defence, that is, a defence that could lead to a complete acquittal.

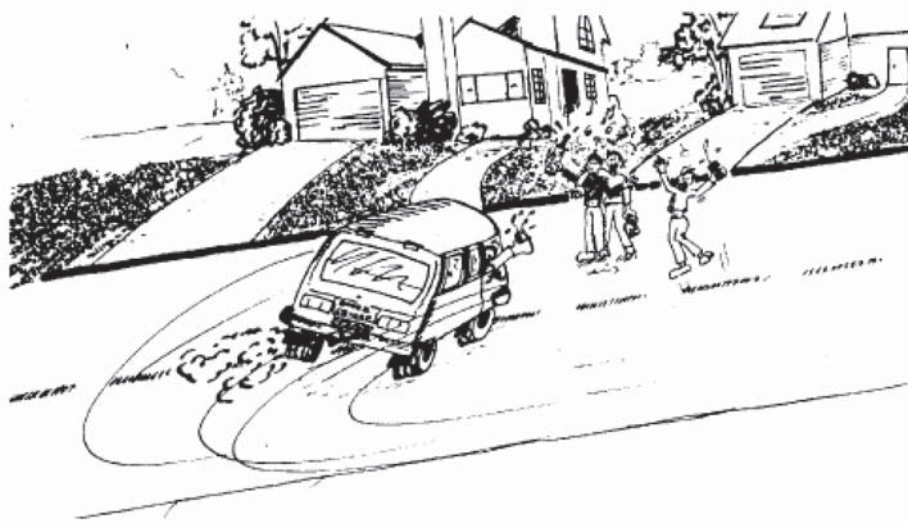
The courts used the so-called specific intent theory. According to this theory, crimes could be divided into two groups: those requiring a “specific intent” and those requiring only an “ordinary intent”. Examples of the first-mentioned group were murder and assault with intent to do grievous bodily harm. The theory entailed the following: If X was charged with a crime requiring a “specific intent”, the effect of intoxication was to exclude the “specific intent”. She could then not be convicted of the “specific intent” crime with which she was charged, but only of a less serious crime, including one in respect of which only an “ordinary intent” was required. Somebody charged with murder could, as a result of her intoxication, be convicted of culpable homicide only. Somebody charged with assault with intent to do grievous bodily harm could, as a result of intoxication, be convicted of ordinary assault

only (*Fowlie* 1906 TS 505; *Bourke* 1916 TPD 303; *Ngobese* 1936 AD 296; *Tsotsotso* 1976 (1) SA 364 (O)).

The “specific intent theory” has been criticised on a number of grounds. It was argued that it is incorrect to assume that intoxication can exclude a “specific intent”, but not an “ordinary intent”: if X was so drunk that she could not form a “specific intent”, how is it possible that she could form any intent whatsoever?

12.5.2 *The law after 1981 – the decision in Chretien and the rules enunciated therein*

Read the aforementioned decision in the *Case Book*: *Chretien* 1981 (1) SA 1097 (A).



The *Chretien* case. For a description of the facts, see the discussion of this case in the text, the prescribed book (Snyman 219–222) and the (*Case Book* 109–117).

The legal position as set out above was drastically changed by *Chretien* 1981 (1) SA 1097 (A). 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.

Summary of legal points decided by Appellate Division (Rumpff CJ) in *Chretien*

- (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. Intoxication can therefore even exclude X's intention to commit the less serious crime, namely assault.
- (4) Chief Justice Rumpff 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.

Lastly, as far as *Chretien* is concerned, it must be emphasised that the rules discussed above regarding involuntary intoxication, *actio libera in causa* and intoxication resulting in mental illness were not altered in any way by this judgment.

The result of *Chretien* is that, as far as X's liability is concerned, intoxication may have one of the following three effects:

- (1) It may mean that the requirement of a **voluntary act was not complied with**.
- (2) It may **exclude criminal capacity**.
- (3) It may **exclude intention**.

The first-mentioned effect (the exclusion of the act) merely has theoretical significance: Such cases are hardly ever encountered in practice. If it should occur in practice, it would mean that X had acted in a state of automatism.

The second effect may occur in practice, although a court will not readily find that X lacked criminal capacity owing to intoxication – especially in the absence of expert evidence (cf *September 1996* (1) SACR 325 (A) 332).

If X does succeed with a defence of intoxication, in practice this usually means that a court decides that, owing to intoxication, she lacked intention. (Intoxication may, of course, also have a fourth effect, namely to serve as a ground for mitigation of punishment; this effect, however, does not refer to X's liability for the crime. We will discuss the effect of intoxication on the measure of punishment at a later stage.)

12.5.3 *The crime created in section 1 of Act 1 of 1988*

(1) Reason for legislation

It was pointed out above that the decision in *Chretien* resulted in intoxication qualifying as a complete defence. This judgment has been criticised. The criticism is that society does not accept a situation where a sober person is punished for criminal conduct, whereas the same conduct committed by a drunk person is pardoned, merely because she was drunk. This would mean that drunk people are treated more leniently than sober people. Society demands that drunk people not be allowed to hide behind their intoxication in order to escape the clutches of the criminal law.

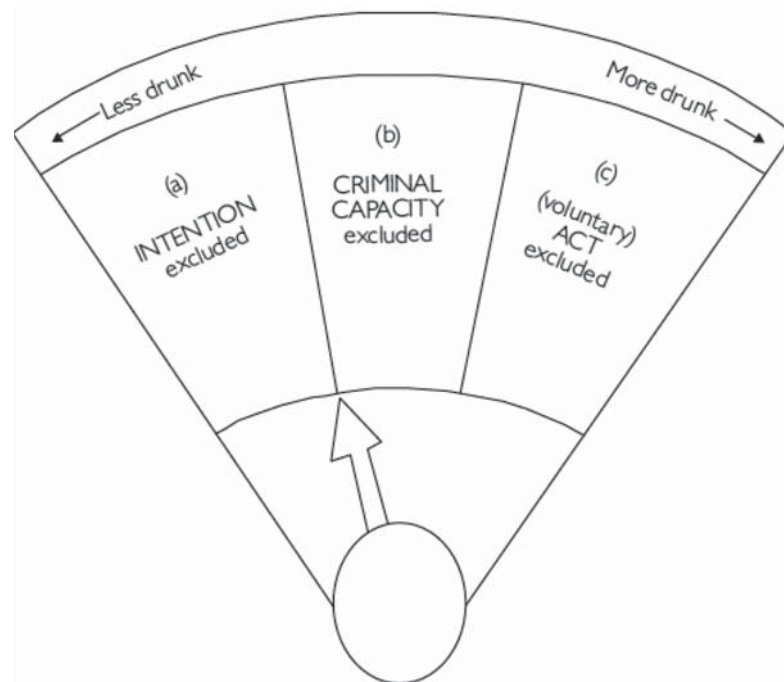
Reacting to this criticism of the judgment, parliament, in the first Act it passed in 1988, enacted a provision that was clearly aimed at preventing a person raising the defence of intoxication from walking out of court a free person too readily. This provision is contained in section 1 of the Criminal Law Amendment Act 1 of 1988.

(2) Different degrees of intoxication

Section 1 of the Act is not easy to understand when you read it for the first time. In order to understand the section properly, it is necessary, at the outset, to emphasise an important aspect of the defence of intoxication, namely that there are different degrees of intoxication. For the purposes of criminal law, we can distinguish the following degrees of intoxication:

- (a) The least intensive of the three degrees of intoxication is intoxication that has the effect of excluding the **intention** required for a conviction. In those instances, the intoxication was not sufficiently serious to render X's act involuntary or to exclude X's criminal capacity, but serious enough to exclude her intention. (This effect of intoxication is relevant only in crimes requiring intention.)
- (b) The next degree of intoxication is of a more serious nature than the intoxication described above. It refers to the situation where X is so intoxicated that she lacks **criminal capacity**. The intoxication was not of a sufficiently serious degree to render her act involuntary. On the other hand, the degree of intoxication was sufficient to exclude her criminal capacity, and not merely her intention.
- (c) The strongest degree of intoxication is when X is so intoxicated that she is not even capable of performing a voluntary **act**.

Imagine a meter, which, like a speedometer on the dashboard of a motorcar, gives a reading of the degree of intoxication of an accused charged with a crime requiring intention. Such a meter would look something like the following:



The strongest degree of intoxication is the one on the right of the meter, and the slightest degree is the one depicted on the left of the meter. The more drunk a person is, the more the needle of the instrument will move to the right. Conversely, the less drunk a person is, the more the needle will move towards the left.

The judgment in *Chretien* means that if X is charged with having committed a crime requiring intention, and she relies on intoxication as a defence, the defence must succeed, irrespective of whether she falls in category (a), (b) or (c). When the legislature drew up the legislation currently under discussion, it had to decide the extent to which the law ought to be amended: should it be amended to the extent that accused falling in all three categories henceforth be punishable, or should it be amended to the extent that only accused falling in certain of these categories henceforth be punishable? We will now focus on the wording of section 1 of the Criminal Law Amendment Act, 1988. Read the wording of section 1 very attentively. See if you can find out from the wording of the section which of the degrees (or categories) of intoxication the legislature decided to make punishable. We will return to this question in point (4) below.

(3) Wording of section 1

The precise wording of section 1 of the Act is as follows:

- (1) Any person who consumes or uses any substance **which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation**, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as aforesaid, shall be guilty

of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.

- (2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

Owing to the rather complicated wording of this section, we do not expect you to be able to state the precise wording of the section in the examination. **However, you must be able to formulate the simplified version of the section, as set out below in point (5).** This version appears below in a block against a grey background.

(4) Effect of section 1 on the judgment in *Chretien*

The wording of section 1 is quite a mouthful. As you have seen in point (1) above, section 1 was enacted in reaction to the judgment in *Chretien* in order to prevent a person who raises the defence of intoxication from walking out of court a free person too readily. Could you, from the wording of the section, figure out for which of the categories of intoxication section 1 is punishable?

If you carefully analyse the wording of section 1, it becomes clear that section 1 is aimed at holding certain persons who, in terms of the judgment in *Chretien* are not criminally liable, liable for contravention of the offence created in section 1(1). These are persons whose **faculties were affected when they consumed an intoxicating substance, such as alcohol, and were not able to appreciate the wrongfulness of their acts or to act in accordance with that appreciation.** Does the phrase printed in bold ring a bell? It virtually amounts to a definition of the abilities that come to the fore when discussing **criminal capacity.** Section 1 therefore clearly applies to the situation where intoxication (or the consumption or use of another substance) has the effect of excluding a person's criminal capacity – in other words, to the instances that fall under category (b) above.

What about those instances that fall under category (c) above – in other words, those persons who, as a result of intoxication, are unable to perform a voluntary act? Although section 1 does not expressly refer to such instances, it does apply to such cases. As we have seen, intoxication that has the effect of rendering a person's conduct involuntary amounts to a more severe degree of intoxication than intoxication that has the effect of excluding a person's criminal capacity. A person who is intoxicated to such an extent that she acts in an involuntary manner will also lack criminal capacity – and if she lacks criminal capacity, section 1 applies.

In *Chretien*, intoxication had the effect of excluding X's intention. X therefore fell under category (a). Can a person such as Chretien, who acted in a voluntary manner and had criminal capacity, but whose intention was excluded owing to intoxication, be convicted of contravening section 1? The answer to this

question is “no”. There is nothing in the provision to suggest that a person who falls under category (a) can be convicted of the statutory offence. Section 1 merely refers to “faculties”, and the question whether there was intention (including awareness of unlawfulness) does not centre on X’s faculties, but on her knowledge. The legislature therefore decided that accused persons who, at the time of the commission of the act, fell only under category (a) should not be punished. Accused persons falling under this category therefore retain the defence that intoxication affords them and are still, as was the case in *Chretien*, acquitted of any crime requiring intention.

In deciding which categories of intoxication should be made punishable, the legislature drew a clear boundary between categories (a) and (b). In the above illustration of the meter, the needle of the meter points exactly to where this boundary is situated.

(5) Simplified version of contents of section

You now know that in terms of the judgment in *Chretien*, intoxication may, in some instances (namely in categories (a), (b) and (c)), be a complete defence. You also know that the legislature was unhappy with this state of affairs and, therefore, enacted section 1 of the Criminal Law Amendment Act, 1988, in reaction to the judgment in *Chretien*. You have already studied the exact wording of section 1. You now know that section 1 applies only to categories (b) and (c). We will now look at precisely what provision the legislature made in order to hold persons falling under categories (b) and (c) liable for the acts they committed in a state of intoxication.

The following is a simplified version of the contents of section 1:

If X commits an act that would otherwise have amounted to the commission of a crime (i.e. 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 (i.e. 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”. In other words, she is convicted of a crime, albeit not the same one as the one she had been charged with initially.

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.

Let’s consider a practical example: X is charged with having assaulted Y. The evidence reveals that, although she had hit Y in the face with her fists, she was so intoxicated when she struck Y that she **lacked criminal capacity**.

Consequently, the court must do the following: They must find X not guilty of assault, but guilty of another crime, namely “**contravention of section 1(1) of Act 1 of 1988**”. The punishment the court then imposes for this crime will be the same as the punishment the court would have imposed had it convicted her of assault. Also, if X is charged with **culpable homicide** and acquitted on the basis that she **lacked criminal capacity** at the time of the commission of the offence, she must be found **not guilty of culpable homicide, but guilty of a contravention of section 1(1) of Act 1 of 1988**.

(6) Elements of crime created in section

We will now proceed to a discussion of the elements or requirements of this statutory crime. In order to follow the discussion, it will be necessary for you to consult the precise wording of the section (see point (3) above).

The requirements for a conviction of contravening the section can be divided into two groups. The first group (indicated below by the letter A) refers to the circumstances surrounding the consumption of the liquor, which is the event that takes place first. This group of requirements comprises the following:

- A1 the **consumption or use** by X
- A2 **of “any substance”**
- A3 that impairs her faculties to such an extent **that she lacks criminal capacity**
- A4 while she **knows that the substance has that effect**

The second group of requirements (indicated below by the letter B) refers to the circumstances surrounding the commission of the act “prohibited ... under penalty”, which is the event that takes place secondly. This group of requirements comprises the following:

- 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**

(We expect you to be able to state these seven requirements (A1–4 plus B1–3) in the examination.)

(7) Discussion of elements of statutory crime

- (a) The section is worded in such a way that it applies not only if X’s mental abilities (or “faculties”) are affected by the consumption of **alcoholic liquor**, but also if these abilities are affected by the **use of drugs**. This follows from the use of the words “any substance” in section 1(1).
- (b) The element of the crime identified above as A4 means that before a court convicts X of contravening the section, it must be satisfied that X had consumed the liquor or substance **intentionally**, that is, with knowledge of its effect.
- (c) The section does not state explicitly that X should have consumed the substance **voluntarily**. We are nevertheless of the opinion that the operation of the section should be limited to cases in which X had consumed the substance voluntarily. This follows from the background and purpose

of the provision, as well as from the unacceptable consequences that would flow from a contrary interpretation.

- (d) The crime created in the section is very peculiar in the following respect: In order to obtain a conviction of contravening the section, the state must prove that X lacked criminal capacity at the time of the commission of the act. This is clear from the element of the crime identified above as B2. What is peculiar is the following: When charging a person with any crime, the state (barring a few exceptions, which are not applicable here) must prove all the requirements of the crime in order to secure a conviction. One of these requirements is that X had criminal capacity at the time of the act. However, if the state (or state prosecutor) wishes to convince the court that X committed a contravention of section 1(1), it must prove the **precisely opposite**, namely that X **lacked criminal capacity** at the time of the act. The crime created in the section is therefore unique, because it is the only crime in our law in which the **absence** of criminal capacity (instead of its presence) is required for a conviction. In other words, this crime is an exception to the general rule that requires that criminal capacity be a prerequisite for a conviction.
- (e) Subsection (2) is more of procedural interest. The subsection amounts to the following: In order to secure a conviction of contravening the section, the state need not necessarily charge X explicitly with contravening this section. Even if X has been charged only with assault, for example, and not also with contravention of this section, she may still be convicted of contravening the section if the evidence reveals that, at the time of the performance of the act, she was intoxicated to the extent set out in the section.

12.6 INTOXICATION AND CULPABLE HOMICIDE

If X, who is charged with murder, raises as a defence the fact that she was intoxicated, she can, in terms of the judgment in *Chretien*, be acquitted on the murder charge (because intoxication negates the required intent), but may nevertheless be found guilty of culpable homicide **if the court finds that she had criminal capacity at the time of the commission of the offence and that she was also negligent**. This is because the test for negligence is objective (namely how the reasonable person would have acted) and because the reasonable person would not have consumed an excessive amount of alcohol. This end result (namely a conviction of culpable homicide) can be reached without making use of the “specific intent” theory.

12.7 THE EFFECT OF INTOXICATION ON PUNISHMENT

In all the instances where X, notwithstanding her intoxication, is found guilty of the crime she is charged with, the intoxication can be taken into account by the court in sentencing her, resulting in a more lenient punishment. This is a daily practice in our courts. Intoxication cannot, however, result in a more lenient punishment in the case of a crime in which intoxication is

an element of the crime, such as driving a motorcar under the influence of liquor (*Kelder* 1967 (2) SA 44 (T)).

Nothing prohibits a court from using intoxication as a ground for imposing a heavier punishment in certain circumstances, for example in the case of a person who knew, before she started drinking, that alcohol made her aggressive (*Ndlovu* 1972 (3) SA 42 (N); s 2 of the Criminal Law Amendment Act 1 of 1988). Where the form of culpability involved in the commission of the offence is negligence, the fact that the negligence was induced by the voluntary consumption of alcohol or drugs will generally be regarded as an aggravating factor.

12.8 STUDY HINT



Experience has taught us that students often obtain poor marks when they have to answer a question dealing with the defence of intoxication in the examination. We have therefore decided to give you a few study hints on how to answer a question in the examination that deals with this topic.

Students are often (although not always) required to discuss the **present** legal rules relating to the defence of **voluntary intoxication**, or to apply the rules relating to this defence to a concrete set of facts. It is, after all, this form of intoxication that arises in almost ninety-nine per cent of cases in which intoxication is raised as a defence.

If you are required to answer a question on the defence of voluntary intoxication in the examination, don't waste time on irrelevant matters. Topics that are irrelevant in this regard include the rules relating to involuntary intoxication, *actio libera in causa*, intoxication resulting in mental illness, the specific intent theory (which applied before 1981, but was abolished in that year by the Appellate Division) and a discussion of the lenient and unyielding approaches to the defence of voluntary intoxication.

Instead of discussing these irrelevant topics, you should begin your answer with a reference to and a discussion of the *Chretien* decision; briefly describe what was decided in this case and how the principles enunciated in this case were affected by section 1 of Act 1 of 1988. If you are required to apply the existing law to a given set of facts, you ought to be able to do this relatively easily by merely applying the rules that are currently applicable in our law, as summarised above under 12.5.2 and 12.5.3.

However, in your examination preparation, you cannot afford to ignore the rules regarding involuntary intoxication, *actio libera in causa*, intoxication that results in mental illness, the specific intent theory and the lenient and unyielding approaches, since we may ask questions on these topics, such as "Discuss the meaning of the expression *actio libera in causa*". As a general rule, you ought to refer to these topics only when specifically required to do so.

ACTIVITY

X and Z visit a bar and consume a number of drinks. Upon leaving the bar, pedestrian Y accidentally bumps against X, who by this stage is 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 Y. 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 critically whether X and Z ought to succeed with this defence.

FEEDBACK

The rules currently 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: (you can mention the facts in this case briefly). The four basic principles enunciated by the Appellate Division are in the case as follows: (mention the four principles set out above under 12.5.2.)

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: (briefly set out the contents of the section).

The application of the rules laid down in *Chretien* and 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. Accordingly, Z 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 would the reasonable person in Z's position have acted? Such a person would have foreseen that her act would result in death.

Please note that although it was not mentioned specifically in the question that X and Z started to drink **voluntarily**, and although it was 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.

12.9 THE EFFECT OF PROVOCATION ON CRIMINAL LIABILITY

You must **read** this topic on your own in *Criminal Law* 230–235. From par 10 (“The effect of provocation in our present law”) on page 240, however, you must **study** the topic up to the end of page 244 for examination and assignment purposes.

GLOSSARY

actio libera in causa the situation in which X intentionally drinks liquor or uses drugs to generate enough courage to commit a crime

SUMMARY

As far as the effect of intoxication on criminal liability is concerned, the legal position at present may be summarised as follows:

Facts	Legal consequences
X is so intoxicated that she is incapable of committing a voluntary act – in other words, her conduct takes place while she is in a state of automatism resulting from intoxication.	In terms of <i>Chretien</i> , X is not guilty of the crime with which she is charged. She must, however, be convicted of contravening section 1 of Act 1 of 1988.
X is so intoxicated that she lacks criminal capacity .	Exactly the same as above.
X is so intoxicated that she lacks the intention required for a conviction.	In terms of <i>Chretien</i> , X is not guilty of the crime with which she is charged, nor can she be convicted of contravening section 1 of Act 1 of 1988. However, if X is charged with murder and the court finds that she had criminal capacity, she may, on the ground of negligence, be found guilty of culpable homicide (which is always a tacit alternative charge to a charge of murder).
On a charge of having committed a crime requiring negligence (e.g. culpable homicide), the evidence reveals that X was intoxicated when she committed the act.	Intoxication does not exclude X’s negligence; on the contrary, it serves as a ground for a finding that X was negligent.

Facts	Legal consequences
Despite her consumption of liquor, X complies with all the requirements for liability, including intention.	X is guilty of the crime with which she is charged, but the measure of intoxication may serve as a ground for the mitigation of punishment. It may, however, also serve as a ground for increasing a sentence as, for example, in a case of a person who knew, before she started drinking, that alcohol makes her aggressive.

As far as the effect of provocation on criminal liability is concerned, the effect may be as follows:

- Theoretically speaking, it may exclude X's **voluntary act**. This will rarely occur in practice. See the discussion of the *Eadie* decision in study unit 7, subsection 7.4.3.
- It may operate as a ground for the **mitigation of punishment**.
- It may reduce **murder to culpable homicide** on the basis that, as a result of intoxication, X lacked the intention to kill, but was nevertheless negligent.
- It may **reduce qualified assault to ordinary assault**.
- If X is charged with common assault, the evidence of provocation cannot result in X's being found not guilty of the crime charged. **The courts are unwilling to treat provocation as a reason to completely acquit a person of common assault. This approach is based on policy considerations and does not necessarily accord with legal theory.**
- It may serve to confirm the existence of intention.

TEST YOURSELF

- (1) Discuss the *Chretien* case and indicate the possible effects that intoxication may have on criminal liability in terms of this decision.
- (2) Discuss the requirements of the crime created in section 1 of Act 1 of 1988 and explain in which circumstances a person may be convicted of this offence.
- (3) Discuss the possible effects that provocation may have on criminal liability.
- (4) X enters a room where he discovers Y having sexual intercourse with his wife. X is enraged and kills Y. On a charge of murder, discuss X's chances of success with a defence of provocation.
- (5) Discuss the possible effect of a defence of provocation where X is charged with assault with intent to do grievous bodily harm.

STUDY UNIT 13

Disregard of the requirement of culpability and the criminal liability of corporate bodies



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- explain the concept of strict liability
- judge the merits of a situation in which a corporate body might be liable for the acts of its director or servant

INTRODUCTION

In this study unit we discuss two different topics, as indicated in the title of this study unit. The two topics or subjects will be discussed separately. **You are not expected to study this study unit for examination purposes; just read through the information. However, you may be assessed on the content in assignments.**

13.1 DISREGARD OF REQUIREMENT OF CULPABILITY

13.1.1 *Background*

The general rule is that culpability is a requirement for all crimes. However, there are certain exceptions to this basic rule. In this study unit we will consider these exceptions, namely

- (1) the principle of strict liability in statutory crimes
- (2) vicarious liability

13.1.2 *Strict liability*

(Criminal Law 236–241)

13.1.2.1 *General*

Culpability is required for all common-law crimes. Bearing in mind the necessity of culpability in a civilised legal system, it should also be a requirement for all statutory crimes. However, this is not the case. The legislature sometimes creates crimes in respect of which culpability is not required. Since culpability has become such a well-established principle of criminal liability, we would be inclined to assume that it could only be excluded by an express provision in a law. However, owing to the influence of English law, our courts have adopted the principle that even in those cases 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. It is in these cases that we can speak of strict liability. **Strict liability is found in statutory crimes only.**

A statutory provision can expressly exclude the requirement of culpability. It can also expressly include this requirement. This will be the case if the legislature employs words such as “intentionally”, “maliciously”, “knowingly”

and “fraudulently”. In the overwhelming majority of cases in which the question arises whether liability is strict, the legislature has simply refrained from making any mention of culpability; it is then the task of the courts to determine, in accordance with the principles of the interpretation of statutes, whether culpability is required.

13.1.2.2 *Strict liability may be unconstitutional*

There is a possibility that the courts may decide that the whole principle of strict liability is unconstitutional (i.e. in conflict with the Bill of Rights enshrined in the Constitution). It may be in conflict with the right to a fair trial (s 35(3)) and thereunder, especially the right to be presumed innocent (s 35(3)(h)), as well as the right to freedom and security of the person (s 12(1)). Although this question has not yet come up directly for decision before the Constitutional Court, it did arise *obiter* (i.e. in passing) in *Coetzee* 1997 (1) SACR 379 (CC). One of the judges in this case, O’Regan J, made it fairly clear in her judgment (442*h–i*) that strict liability may be unconstitutional on the ground that “people who are not at fault [ie who lack culpability] should not be deprived of their freedom by the State ... Deprivation of liberty, without established culpability, is a breach of this established rule”.

13.1.3 *Vicarious liability*

(*Criminal Law* 242–243)

You must study the discussion of this topic in *Criminal Law* on your own.

13.2 CRIMINAL LIABILITY OF CORPORATE BODIES

It is not necessary to make an in-depth study of this topic, but if you are interested in obtaining more information it, please consult *Criminal Law* 245–248 and *Burchell supra* (448–460).

13.2.1 *Background*

The law distinguishes between a natural person, on the one hand, and a legal *persona*, juristic person, corporation or corporate body, on the other. The latter is an abstract or fictitious body of persons, an institution or entity that can also be the bearer of rights and duties, without having a physical or visible body or a mind. Examples of corporate bodies are companies, universities, banks, and so forth.

Some jurists are of the opinion that corporate bodies ought not to be criminally liable because they cannot act with culpability. They argue that only natural persons can act with a blameworthy state of mind (such as intention). Since corporate bodies are not human beings, but abstract entities without a “mind” of their own, they cannot, according to these jurists, act with any state of mind. The jurists argue that to hold corporate bodies criminally liable would

amount to a form of liability without any culpability. However, in South Africa, as in the vast majority of other countries, corporate bodies may indeed incur criminal liability. This whole topic is governed by section 332 of the Criminal Procedure Act 51 of 1977, which expressly provides for the criminal liability of a corporate body.

13.2.2 *Liability of corporate body for the acts of its director or servant*

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 corporate body can commit both common-law and statutory crimes, irrespective of whether intention or negligence is the form of culpability required (*Ex parte Minister van Justisie: in re S v SAUK* 1992 (4) SA 804 (A)). This does not mean that the “original culprit”, that is, the employee or servant, is exempt from liability. He is just as punishable as the corporate body.

The following are examples of the application of this section:

- (1) In *Joseph Mtshumayeli (Pty) Ltd* 1971 (1) SA 33 (RA), 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.
- (2) Company A’s director, B, in an attempt to eliminate competition with her company, steals valuable diagrams from the office of company Y. Both A and B are guilty of theft.
- (3) Company A’s director, B, murders the managing director of company Y in an attempt to promote the interests of A. A and B are **both** guilty of murder.

13.2.3 *Association of persons*

Section 332(7) contains provisions that render members of an association of persons, other than a corporate body (the so-called voluntary association, such as a tennis club or debating society), criminally liable for crimes committed by other members. *Beyleveld* 1964 (2) 269 (T) affords an example of a conviction under this subsection.

13.2.4 *Comments on current model of corporate liability*

The South African model of corporate criminal liability has been criticised for being outdated and in need of reform because it makes the liability of the corporation dependent upon the liability of its director or servant. Therefore, a corporation can be held liable for a crime (e.g. culpable homicide) committed by an employee, even if it did everything reasonably possible to prevent such a crime from occurring. On the other hand, a corporation may go scot-free if an individual employee or director of the corporation is acquitted because

he lacked culpability, even if the institutional practices of the corporation itself were lacking in the extreme. In various other legal systems, reform has been undertaken in terms of which corporations can be held liable **directly** for crimes such as culpable homicide on the basis of “organisational fault” or “collective fault”. Culpability is then proved by focusing on whether the institutional practices, culture and policies of a corporation were of such a nature that they allowed criminal conduct to occur. If you are interested in this topic, see *Burchell supra* 448-460.

In order to understand the practical application of the current South African model of corporate criminal liability set out in section 332(1) of the Criminal Procedure Act, read the following case in your *Case Book: S v SA Metal and Machinery Company* 2010 2 413 (SCA). You will note the arbitrary nature of the liability imposed in terms of this section.

SUMMARY

Strict liability

- (1) Strict liability is a form of liability dispensing with the requirement of culpability. It is found only in certain statutory crimes, 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.

Vicarious liability

- (4) 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 vicarious liability. Vicarious liability is possible only in statutory crimes.
- (5) A typical example of vicarious liability is where, in terms of a statute, an employer is held liable for crimes committed by an employee in respect of acts performed by the employee in the course of his employment.

Criminal liability of corporate bodies

- (6) The law distinguishes between a natural person and a corporate body. The latter is an abstract body of persons that can also be the bearer of rights and duties. An example of a corporate body is a company.
- (7) In South Africa, corporate bodies may be convicted of crimes.
- (8) The Criminal Procedure Act contains a provision in terms of which a corporate body may be held criminally liable for the acts of its director or servant. This section is arguably in need of reform.

TEST YOURSELF

- (1) Explain the meaning of the term “strict liability”.
- (2) Explain the meaning of vicarious liability.
- (3) Distinguish between a natural person and a corporate body, and name a few examples of the latter category.
- (4) Fill in the missing words:

Section 332(1) provides that an act by a director or servant of a corporate body is deemed to be the act of the corporate body itself, provided the act was performed by such a person ... or in the ... as a director or servant, or if the director or servant was ... or ... the interests of the corporate body.

- (5) Can a corporate body be guilty only of a statutory crime?
- (6) State in one paragraph why the current South African model of corporate criminal liability is criticised.

STUDY UNIT 14

Participation I: Introduction and perpetrators



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the principles relating to participation by
 - distinguishing between a perpetrator and an accomplice
 - expressing an informed opinion whether an accused can be held liable as a perpetrator, be it according to the general principles of criminal liability or by virtue of the operation of the doctrine of common purpose
 - recognising a joining-in situation and determining the liability of the joiner-in

14.1 BACKGROUND

In the discussion thus far, we have assumed that only one person has acted. However, it is well known that criminals do not always act alone, but often join forces with others. In this study unit we are going to set out the principles applicable where more than one person is involved in the commission of a crime.

Consider the following set of facts: two people, whom we will call X and Z, decide to rob a café. X walks into the café, threatens the owner with a revolver and, in this way, succeeds in getting possession of the money in the till. Z never goes into the café, but stands guard outside, in order to warn X, should she see the police coming. Nobody will deny that X has committed robbery. The question, however, is whether Z can also be convicted of the robbery. If Z is charged with robbery, can she allege that she cannot be convicted of the crime because she was never even inside the café, never handled the revolver and never even touched the money? It is questions such as these that we will discuss in this study unit.

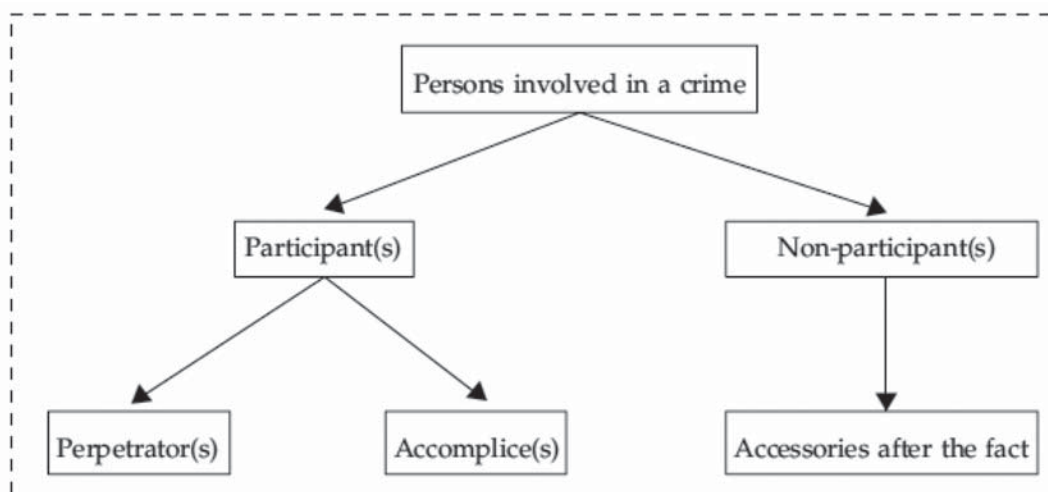
Since the subject of participation is too long to discuss in one study unit, we will spread it over two study units. In this study unit we will discuss the classification of the different persons involved in a crime, as well as perpetrators. In the next study unit we discuss accomplices and accessories after the fact.

14.2 INTRODUCTION

14.2.1 *Classification of persons involved in a crime*

(*Criminal Law* 249–252)

We begin by classifying into various categories those persons who may be involved with, or implicated in, the commission of a crime. We will first set out the classification in a diagram and then discuss the different categories of persons.



The term “persons involved in a crime” is used as a general, collective denominator for all the persons, or groups of persons, involved in the commission of the crime (whether they furthered the commission of the crime or not) and who, consequently, can be charged in connection with the commission of the crime. “Person involved in a crime” is not a legal term. No-one is charged or convicted as a “person involved” in the commission of a crime. It is merely a convenient term that we use to explain our classification of criminals into different groups.

Persons involved in the crime can be subdivided into two broad categories, namely persons who participate and persons who do not participate. A person involved who participates is briefly described as a “participant”.

A **participant** is anyone who does something, in whatever manner, whereby she **further**s the commission of the crime. On the other hand, a person involved who does not participate is someone who, although she can be described as being involved in the crime, does not **further** the commission of the crime at all.

There is only one group of persons that will fall into this category, namely accessories after the fact. An accessory after the fact is someone who, after the crime has already been completed, learns about the crime for the first time and then does something to protect the perpetrators of the crime or to help them to escape criminal liability for their acts. The best example of an accessory after the fact is the person who, after a murder has been committed, helps the murderers to dispose of the body by, for instance, throwing it in a river with a stone tied around its neck. An accessory after the fact cannot be a participant because her act does not amount to **furthering** the commission of the crime. After all, a person cannot further a crime if the crime (e.g. the murder in the above-mentioned example) has already been committed. In the next study unit we will return to the accessory after the fact and will deal with her liability in greater detail. First, however, we will consider the participant and note the various kinds of participants.

The category of persons known as “participants” can, in turn, be divided into two subcategories, namely **perpetrators** and **accomplices**. The distinction between perpetrators and accomplices is of the utmost importance, so you must ensure that you understand it properly.

14.2.2 *Definitions of a perpetrator and an accomplice*

Definition of a perpetrator

A person is a perpetrator if

- (1) her conduct, the circumstances in which it takes place (including, where relevant, a particular description with which she as a person must, according to the definition of the offence, comply) and the culpability with which it is carried out are such that she satisfies all the requirements for liability contained in the definition of the offence,

OR

- (2) if, although her own conduct does not comply with that required in the definition of the crime, she acted together with one or more persons and the conduct required for a conviction is imputed to her by virtue of the principles relating to the doctrine of common purpose.

Don't feel discouraged if you don't understand these definitions immediately. When reading them for the first time, they will probably strike you as very complicated. However, as you proceed with your study of this study unit, these definitions will become clearer. The doctrine of common purpose mentioned in part (2) above will be discussed in some detail below. The crucial words in the definition (i.e. the words that an examiner is always looking for when she marks the examination papers) are, in part (1), **conduct, circumstances and culpability ... satisfies all requirements in definition**, and, in part (2), **imputed ... doctrine of common purpose**.

Definition of an accomplice

A person is an accomplice if,

- (1) although she does not comply with all the requirements for liability set out in the definition of the crime, and
- (2) although the conduct required for a conviction is not imputed to her in terms of the doctrine of common purpose,

she engages in conduct whereby she unlawfully and intentionally **further**s the commission of the crime by somebody else.

The crucial words in this definition are: **not comply with definitions, conduct not imputed in terms of the doctrine of common purpose and furthers crime**.

14.2.3 *Distinction between perpetrator and accomplice explained*

To determine whether someone is a perpetrator, you must first look at the definition of the particular crime and, secondly, consider whether the accused's conduct, state of mind and characteristics comply in all respects with the definition. Murder is the unlawful, intentional causing of the death of another person and anyone who, in whatever manner, unlawfully and intentionally causes the death of another person is a perpetrator of the crime of murder.

Some crimes can be committed only by people complying with a certain description. For example, high treason can be committed only by a person **owing allegiance to the Republic of South Africa**. A crime may also be defined in such a way that it can be committed only by a person who has a **certain occupation** (e.g. a medical doctor) or only by somebody who is the holder of a **certain licence**. What is the position if somebody does not comply with such a description (i.e. to owe allegiance, to be a medical doctor or to be the holder of a certain licence), but nevertheless commits an act whereby she furthers the commission of a crime by somebody who does comply with such a description? The answer is that such a person is an **accomplice**, for the following reason: because she does not comply with the particular description, she cannot be brought within the definition of the crime, but she nevertheless commits an act whereby she furthers the commission of the crime by somebody else.

If a court convicts somebody of a crime without explicitly specifying that she is convicted of being an accomplice to the crime, it normally means that she is convicted as a perpetrator (or co-perpetrator).

14.3 PERPETRATORS

(Criminal Law 252–265)

14.3.1 *Co-perpetrators: where there is more than one perpetrator, it is unnecessary to identify a principal perpetrator for the purposes of liability*

We have seen that a person is a perpetrator if (briefly stated) she complies with all the requirements for liability in the definition of the crime, or if the act of somebody else who is a perpetrator is imputed to her in terms of the common-purpose doctrine.

There is no rule in our law stipulating that where more than one person jointly commits a crime, there can be only a single perpetrator, and that the others who aid in the commission of the crime invariably belong to another category. Where there is more than one participant or perpetrator, it is not always possible to select one as the principal offender. There is no criterion by which we can satisfactorily identify such a principal offender in every case. In certain cases, a principal offender may be identified, and such a person is then referred to in our legal terminology as a **principal offender**,

but the distinction between a principal offender and other perpetrators is not important for the purposes of liability. (However, it may be of great importance in the assessment of punishment.)

Where several persons commit a crime together, and their conduct, state of mind and characteristics all comply with the definition of the crime, each one of them is a co-perpetrator. A co-perpetrator does not belong to any category other than that of a perpetrator. Two persons may act in such a way that each contributes equally to the crime, such as where A takes the victim by the arms, B takes him by the legs, and, together, they throw him over a precipice. One co-perpetrator's contribution may be more or less than that of the other, such as where A enters a house and shoots and kills Y, while B merely keeps guard outside the house. (This happened in *Bradbury* 1967 (1) SA 387 (A).) Both are nevertheless co-perpetrators in the commission of the murder if the conduct of both can be described as the unlawful, intentional causing of the death. That one is a perpetrator in no way detracts from the fact that the other is also a perpetrator.

14.3.2 *Co-perpetrators: difference between direct and indirect perpetrator is irrelevant for purposes of liability*

Sometimes a distinction can be drawn between a **direct** and an **indirect** perpetrator.

- A **direct perpetrator** is a perpetrator who commits the crime with her **own hands or body**.
- An **indirect perpetrator** does not commit the crime with her body, but **makes use of somebody else** to commit the crime.

For instance, X hires Z to murder Y. If Z executes the assignment and she herself fires the shot at Y, killing Y, Z is the direct perpetrator, whereas X is the indirect perpetrator.

The distinction between a direct and an indirect perpetrator is of no significance for the purposes of determining liability. Both X and Z in the above example are guilty of murder as (co-)perpetrators, because the conduct of both falls within the definition of murder: the conduct of both amounts to the (unlawful and intentional) causing of another's death. In the eyes of the law, Z is nothing but an instrument by means of which X commits the crime.

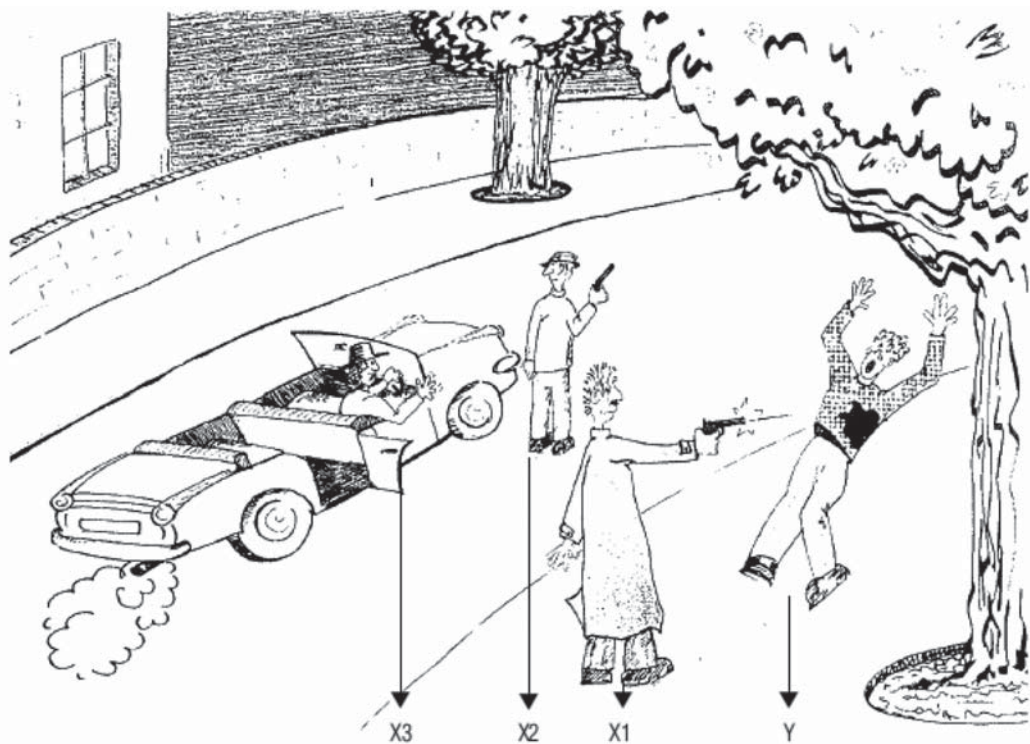


In the examinations, students are sometimes asked to explain the difference between a perpetrator and an accomplice. In answering this question, students often make the mistake of writing that a perpetrator is a person who commits the crime **with her own hands**, whereas an accomplice is somebody who does not commit the crime with her own hands. Such a statement is wrong, because a person can be a perpetrator even if she uses another person to do her "dirty work" for her, as explained in the above example of the hired assassin.

14.3.3 *Being a perpetrator of murder in terms of the general principles of liability*

It is clear from the above definition of a perpetrator that there are two possible grounds on which a person may qualify as a perpetrator. The first ground is set out in part (1) and the second, in part (2) of that definition. We will now consider the first ground. We may refer to this first ground as “being a perpetrator in terms of the general principles of criminal liability” because the question here is merely whether X’s act, the circumstances in which it takes place and her culpability are such that they all comply with the definition of the crime. When applying part (2) of the definition, which we will explain later, we actually apply a special, additional doctrine, that is, a doctrine or rule additional to the ordinary principles of liability.

If two or more persons decide to murder Y, it is unnecessary, in order to hold all of them liable as co-perpetrators, that each of them must have stabbed or shot Y. They do not even each have to touch Y or be present at the scene of the murder.



Being a perpetrator by applying the ordinary principles of liability. X1 shoots and kills Y. X2 assists X1 by merely standing guard (in other words, preventing others from hindering X1 in the execution of his evil deed). X3 is behind the steering wheel of the “getaway car”: he has transported X1 and X2 to the scene of the crime and lets the car idle so that all three of them (X1, X2 and X3) can speed away as fast as possible after the completion of the crime. All three can be convicted of murder by merely applying the ordinary principles of criminal liability, as explained above.

14.3.4 *Being a perpetrator of murder by virtue of the doctrine of common purpose*

(*Criminal Law* 255–264; *Case Book* 171–177, 187–194, 200–215)

14.3.4.1 *General*

If a number of people acting together kill Y, it is often very difficult to find with certainty that the acts committed by each of them contributed causally to Y's death. The facts may be such that there is no doubt that at least one of the group, namely the one who actually shot and killed Y, caused her death, but there are also situations in which not even the conduct of a single one of the group can without doubt be described as a cause (at least in the sense of *conditio sine qua non*) of Y's death. The latter situation occurs especially if there are many people who together kill Y. It may then be difficult to base their liability for the joint murder merely on an application of the general principles of liability. There is usually no difficulty in finding that everybody's conduct was unlawful and that each member of the group entertained the intention to kill. What is, however, often difficult to find is that the individual conduct of each member satisfied the requirement of causation.

In order to overcome difficulties such as these, the courts apply a special doctrine to facilitate the conviction of murder of each separate member of the group. This doctrine is known as the doctrine of common purpose.

Definition of doctrine of common purpose

If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the acts of each of them in the execution of such a purpose are imputed to the others.

Although the doctrine is couched in general terms, in our law it has been applied mostly to the crime of murder.

The crucial requirement of the doctrine is that the different accused should have had the same purpose. Once this is proven, the act of Z, who, for example, threw a heavy stone at Y, which struck her on the head, is imputed to X, who had a common purpose with Z to kill Y, but who threw a stone at Y, which missed her. In fact, Z's act is imputed to everyone who had the same purpose as she did, and who actively associated herself with the achievement of the common purpose, even though we cannot construe a causal connection between such a party's act and Y's death. It is, however, only Z's act that is imputed to the other party (X), not Z's culpability. X's liability is based upon her own culpability (*Malinga* 1963 (1) SA 692 (A) 694).

The common-purpose doctrine as applied to cases of murder may indeed be regarded as nothing other than a mechanism applied to overcome the difficulties inherent in proving causation where a number of people together kill somebody else. If it is possible to base each participant's conviction of murder on an application of the general rules of liability (and, more particularly, on the ordinary principles of causation), it is, in our view, preferable to follow this option rather than resort to the common-purpose

doctrine in order to secure a conviction. The reason for this predilection is the fear expressed in certain quarters that the latter doctrine, with its wide definition and scope, may, in certain circumstances, lead to inequitable results, in that somebody who played only a comparatively minor role in the events may also be convicted of murder (*Mshumpa* 2008 (1) SACR 126 (EC)).

14.3.4.2 Proof of existence of common purpose

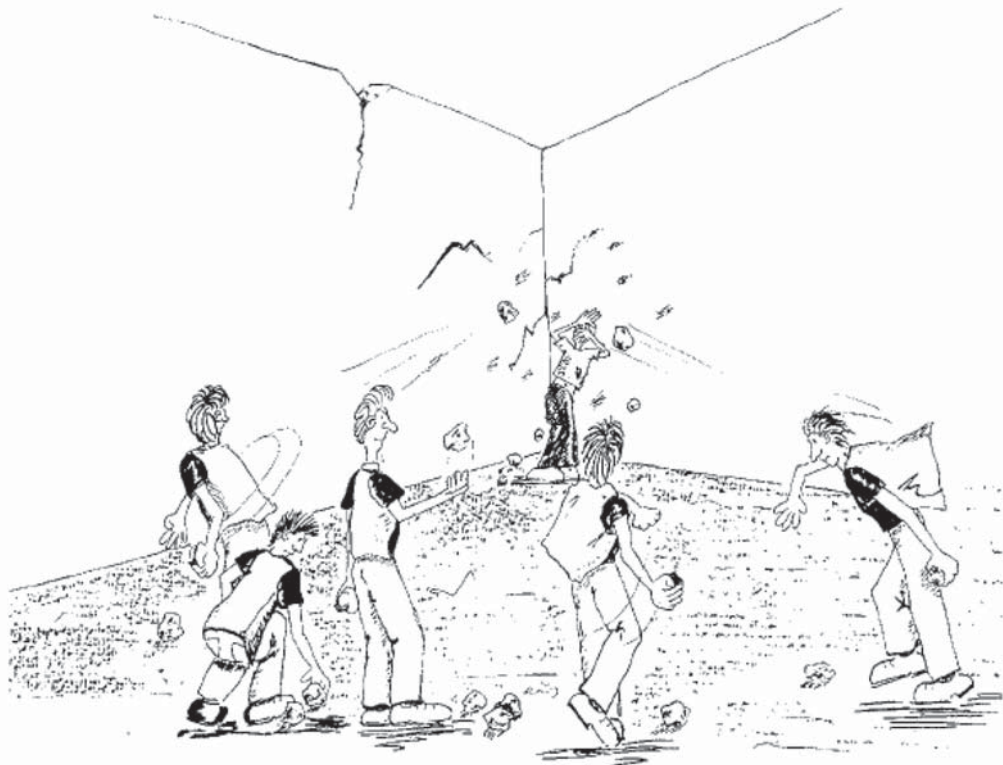
The existence of a common purpose between two or more participants is proved in the following ways:

- On the basis of an express or implied **prior agreement** to commit an offence. Since people mostly conspire in secret, it is very difficult for the state to prove a common purpose based on a prior agreement. (See *S v Mbanyaru* 2009 (1) SACR 631 (C), where it was held that common purpose based on prior agreement was not proved in this case.)
- Where no prior agreement can be proved, the liability arises from an **active association and participation in a common criminal design** (*Thebus* 2003 (2) SACR 319 (CC) 336).

The concept of active association is very important. We will say more about this shortly.

14.3.4.3 Why it is necessary to have such a doctrine

Is this doctrine really necessary? Is it not possible for our law to dispense with this doctrine? The answer to the first question is "Yes", and to the second, "No". To prove the correctness of these answers, we would like to discuss the following practical problem.



Why the common purpose doctrine is necessary. X1, X2, X3, X4 and X5 stone Y to death. See the discussion below.

Assume that a group of five people, whom we will refer to as X1, X2, X3, X4 and X5, throw stones at Y. Y cannot run away from them, since he is trapped in a corner between two high walls. All the assailants (X1 to X5) have the intention of killing Y. This can be gathered from the fact that they shout loudly, within hearing distance of one another, "Kill him!" Some stones strike Y and some miss him (see illustration.) Y dies as a result of the stoning. X1 to X5 are all charged with having murdered Y. During the trial, it is impossible for the court to find which of the accused persons threw stones that struck Y, and which of them threw stones that missed Y, because the events took place very quickly. Stated differently, it is impossible for the court to find beyond reasonable doubt that any of the accused threw a stone that struck Y.

Let's assume for a moment that the doctrine of common purpose did not exist. Would it then have been possible for the court to convict any of the accused of murder? Certainly not, because a court would then be able to convict an accused of murder only if it could be proved that such accused threw a stone that, separately or together with other stones, struck Y, with lethal consequences. However, the court finds it impossible to find beyond reasonable doubt that any of the accused threw a stone that struck Y.

Let's proceed one step further. Let's assume that the events were filmed with a video camera and that the slow-motion portrayal of the events shows that the stone thrown by X3 did indeed strike Y, whereas the stone thrown by X4 happened to miss Y by just an inch. Would it be fair for a court to find, on the ground of this evidential material, that X3 is guilty, but X4 is not? Common sense dictates that it would be grossly unfair not to convict X4 of murder as well: it is in all probability merely coincidental that the one stone struck Y and that the other one missed him by an inch (or, we might add, that a stone thrown by, say, X5 struck Y only on his small toe, without any serious consequences to his life). Apart from this consideration, it is clear that X1 to X5 all shared the same intention, namely to kill Y.

It would therefore be unfair to assume that a court may convict an accused only upon proof that the stone, or stones, he threw himself, struck Y. If this were the law, criminals would be able to escape the clutches of the law by merely ensuring that they never acted alone, but always in a group. This would lead to absurd results. This is why it is necessary to have the doctrine of common purpose.

14.3.4.4 The judgment in *Safatsa*



Read the following decision in the *Case Book*: *Safatsa* 1988 (1) SA 868 (A).

The leading case on the doctrine of common purpose is *Safatsa* 1988 (1) SA 868 (A). In this case, the facts were the following: A crowd of about 100 people attacked Y, who was in his house, by pelting the house with stones, hurling petrol bombs through the windows, catching him as he was fleeing from his burning house, stoning him, pouring petrol over him and setting him alight. The six appellants formed part of the crowd. The court found that their conduct consisted, *inter alia*, of grabbing hold of Y, wrestling with him, throwing stones at him, exhorting the crowd to kill him, forming part

of the crowd that attacked him, making petrol bombs, disarming him and setting his house alight.

In a unanimous judgment delivered by Botha JA, the Appellate Division confirmed the six appellants' convictions of murder by applying the doctrine of common purpose, since it was clear that they all had the common purpose to kill Y. It was argued on behalf of the accused that they could be convicted of murder only if a causal connection had been proved between each individual accused's conduct and Y's death, but the court held that where, as in this case, a common purpose to kill had been proved, each accused could be convicted of murder without proof of a causal connection between each one's individual conduct and Y's death.

If there is no clear evidence that the participants had agreed beforehand to commit the crime together, the existence of a common purpose between a certain participant and the others may be proven by the fact that he **actively associated** himself with the actions of the other members of the group.

14.3.4.5 Active association as proof of participation in a common purpose

The existence of a common purpose between a certain participant and the other members of the group may be based upon a finding that the participant actively associated with the actions of the other members of the group. This happens frequently in practice. In *Mgedezi* 1989 (1) SA 687 (A) 705I–706C, the Appellate Division held that if there is no proof of a previous agreement between the perpetrators, an accused whose individual act is not causally related to Y's death can be convicted of murder only on the strength of the doctrine of common purpose if the following five requirements have been complied with:

- First, he must have been **present** at the scene of the crime.
- Second, he must have been **aware** of the assault on Y.
- Third, he must have **intended to make common cause** with those committing the assault.
- Fourth, he must have manifested his sharing of a common purpose by himself performing **some act of association** with the conduct of the others.
- Fifth, he must have had the **intention to kill Y** or to contribute to his death.

Thus, somebody who was merely a **passive spectator** of the events will not, in terms of this doctrine, be liable to conviction, even though he may have been present at the scene of the action.

Other principles that emerge from the case law are the following:

- In murder cases, active association can result in liability only if the act of association took place **while Y was still alive and at a stage before the lethal wound had been inflicted** by one or more other persons (*Motaung* 1990 (4) SA 485 (A)).
- Active association with the common purpose should not be confused with **ratification** or approval of another's criminal deed that has already been completed. Criminal liability cannot be based on such ratification (*Williams* 1970 (2) SA 654 (A) 658–659).



14.3.4.6 *Liability on the basis of active association declared constitutional*

Read the following decision in the *Case Book: Thebus* 2003 (2) SACR 319 (CC).

In *Thebus* 2003 (2) SACR 319 (CC), liability for murder on the basis of active association with the execution of a common purpose to kill was challenged on the grounds that it unjustifiably limits the constitutional right to dignity (s 10 of the Constitution), the right to freedom and security of a person (s 12(1)(a)) and the right of an accused person to a fair trial (s 35(3)).

The Constitutional Court rejected these arguments and declared constitutional the common-law principle that requires mere “active association” instead of causation as a basis of liability in collaborative criminal enterprises. One of the Court’s main arguments was the following:

The doctrine of common purpose serves vital purposes in our criminal justice system. The principal object of the doctrine is to criminalise collective criminal conduct and thus to satisfy the need to control crime committed in the course of joint enterprises. In consequence crimes such as murder it is often difficult to prove that the act of each person, or of a particular person in the group, contributed causally to the criminal result. Insisting on a causal relationship would make prosecution of collective criminal enterprises ineffectual. Effective prosecution of crime is a legitimate, pressing social need. Thus, there was no objection to the norm of liability introduced by the requirement of “active association”, even though it bypassed the requirement of causation (par [40] at 343f–344b).



14.3.4.7 *Common purpose and dolus eventualis*

Read the following decision in the *Case Book: Lungile* 1999 (2) SACR 597 (A).

For X to have a common purpose with others to commit murder, it is not necessary that his intention to kill be present in the form of *dolus directus*. It is sufficient if his intention takes the form of *dolus eventualis*; in other words, if he foresees the possibility that the acts of the participants with whom he associates may result in Y’s death, and reconciles himself to this possibility.

Assume that X is charged with murder. The evidence brings to light that a number of persons, among them X, took part in a robbery or housebreaking, and that Z, one of the members in the group, killed Y in the course of the action. The question that arises is whether X and Z had a common purpose to kill Y. The mere fact that they all had the intention to steal, to rob or to break in is not necessarily sufficient to warrant the inference that all of them also had the common purpose to kill. A person can steal, rob or break in without killing anybody. Whether X also had the intention to murder must be decided on the facts of each individual case.

The case of *Mambo* 2006 (2) SACR 563 (SCA) provides a practical illustration. Three awaiting-trial prisoners planned to escape from their court cells. The plan included the forceful dispossession (robbery) of a court orderly’s firearm. When the orderly unlocked the gate of the cell so that the accused could enter,

X1 gripped the orderly around his neck, X2 reached for the orderly's lower legs and tugged at them, causing him to lose his balance, and X3 reached for the orderly's firearm in his holster on his right hip and grabbed it with both hands. As the orderly wrestled to free himself from the clutches of X1 and X2, X1 uttered the word "Skiet" ("Shoot"). X3 cocked the firearm and fatally shot the orderly.

They were convicted in the High Court on charges of murder, robbery and escape from lawful custody. The Supreme Court of Appeal upheld the convictions of all three on the robbery and escape charges, because these were part of their prior agreement or mandate, but held that the killing of the orderly did not form part of this mandate [par 16]. It therefore had to determine whether the initial mandate had extended to include the murder of the orderly. The court held that, by his conduct and culpability, X3 satisfied the requirements for liability on the murder charge [par 16]. However, for his conduct (the killing of the orderly) to be imputed to X1 and X2, the court had to establish that each of them foresaw the killing of the orderly as a possibility arising from conduct of one of their number, and had reconciled himself to that possibility. The court held that, by uttering the word "Skiet", X1 had proved that he shared a common purpose with X3 in relation to the murder of the orderly [par 17]. However, the court noted that all that X2 had done in the process of overpowering the orderly was to grab hold of his legs.

The state reasoned that by participating in the plan to escape, which involved the robbery of the orderly's firearm, X2 must have foreseen the possibility that this could result in the death of the orderly, and that he had reconciled himself thereto (i.e. he had *dolus eventualis*). The court rejected this argument on the basis that the mere fact that the three accused intended to rob the orderly in the execution of their plan to escape did not warrant the inference that X2 had *dolus eventualis* in relation to the shooting [par 18]. X2 was therefore acquitted on the murder charge.



Read the following decision in the *Case Book: Molimi* 2006 (2) SACR 8 (SCA).

In *Molimi* 2006 (2) SACR 8 (SCA), the Supreme Court of Appeal held that conduct by a member of a group of persons that **differs** from the conduct envisaged in their initial mandate (common purpose) may **not be imputed** to the other members, unless each of the latter **knew** (*dolus directus*) that such conduct would be committed, or **foresaw the possibility** that it might be committed and **reconciled** themselves to that possibility (*dolus eventualis*).

X1, X2 and Z were co-conspirators to a planned robbery of a big retail store (Clicks) in a shopping mall. X1, the store manager, informed X2 about the exact time at which a security officer (in the employ of Fidelity Guards) would arrive at the store to collect money. X1 encouraged X2 to employ the services of four armed men, who would confront the security guard and rob him of the money he had collected from the store. On the day in question, Z and three armed men dispossessed the security officer of the money and fled with the loot. As they fled, there was an exchange of gunfire between one of the robbers and the store's security guard. They were both fatally wounded in the exchange.

The gunfire attracted the attention of a bystander in the shopping mall. As the three other robbers ran in his direction towards the exit of the mall, they pointed their firearms at him, but did not shoot. He then drew his firearm and shouted at them to drop theirs. He pursued one of the armed men (Z), who had the loot in a bag. Z dropped the bag he was carrying and ran into another store for refuge. Once inside the store, Z turned around and pointed the gun at the bystander, who reacted by shooting at him (Z). The bullet missed Z, but wounded an employee in the store. Z retreated further into the store and took a young man hostage. While holding the hostage, with a firearm pointed at the hostage's head, he ordered the bystander to surrender his firearm. The bystander responded by firing at him, but fatally wounded the hostage. Z eventually surrendered.

X1, X2 and Z were all convicted in the High Court on seven counts, namely robbery; the murder of the security guard of the store in which the robbery took place (Clicks); the attempted murder of the employee who was wounded in the other store; the kidnapping of the hostage; the murder of the hostage held by Z in the other store; and two counts of the unlawful possession of firearms.

X1 and X2 appealed to the Supreme Court of Appeal against their convictions. They conceded the existence and proof of a common purpose (between X1, X2 and Z) to rob the store, but argued that the actions of the bystander, which resulted in the kidnapping and death of the hostage and injury to an employee in the other store, were not foreseeable by them (X1 and X2) as part of the execution of the common purpose. The court held that the attempted murder of the employee in the other store was foreseeable, for, once all the participants in a common purpose foresaw the possibility that anybody in the immediate vicinity of the crossfire could be killed – regardless of who actually shot the fatal bullet – then *dolus eventualis* was present. **It held, however, that the kidnapping of the hostage by Z and the hostage's eventual murder were acts that were so unusual and so far removed from what was foreseeable in the execution of the common purpose that these acts could not be imputed to X1 and X2.** They were therefore acquitted on these charges (murder and kidnapping in respect of the hostage).

14.3.4.8 Dissociation from the common purpose

You need only read this section. You may be assessed on it in assignments, but you do not have to study it for examination purposes.

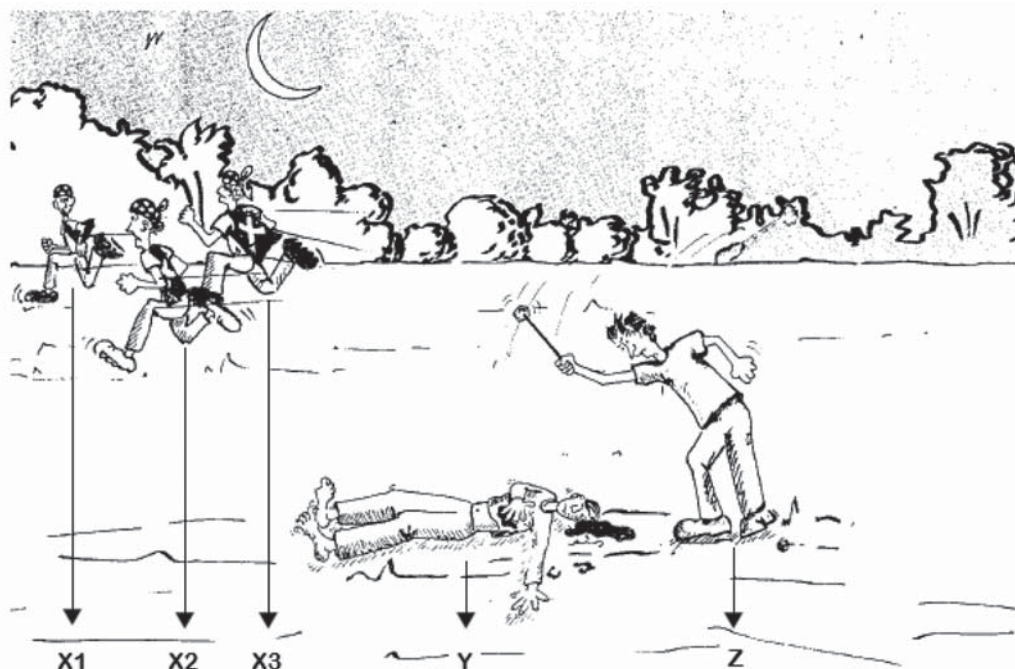
Just as association with the common purpose leads to liability, dissociation or withdrawal from the common purpose may, in certain circumstances, lead to negative liability. South African courts have not yet developed very specific rules relating to the circumstances in which withdrawal will effectively terminate X's liability. The following guidelines are a fair reflection of South African law on this subject:

- (1) In order to escape conviction on the grounds of a withdrawal from a common purpose – whether by prior agreement or active association – X must have a **clear and unambiguous intention** to withdraw from such purpose. If X flees or withdraws because he is afraid of being arrested, or being injured, or aims to make good his escape, then his withdrawal will not have been motivated by a clear intention to withdraw from a common purpose which he was a part of (*Lungile* 1999 (2) SACR 603 (SCA) at 603h–j).
- (2) In order to succeed with a defence of withdrawal, X must perform **some positive act of withdrawal**. Mere passivity on his part cannot be equated with a withdrawal because, by his previous association with the common purpose, he linked his fate and guilt with that of his companions.
- (3) The **type of act required for an effective withdrawal depends on a number of circumstances**. In *Musingadi* 2005 (1) SACR 395 (SCA) at 407h–j, the court listed the following factors: “the manner and degree of the accused’s participation; how far the commission of the crime has proceeded; the manner and timing of disengagement; and, in some instances, what steps the accused took or could have taken to prevent the commission or completion of the crime”. The court added that the list was not exhaustive, but laid down this principle:

The greater the accused’s participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment (409 g–h).
- (4) Much like the principles relating to the voluntary withdrawal of an attempt (SG 16.2.7), a withdrawal will be effective if it takes place **before the course of events has reached the “commencement of the execution”** – the stage when it is no longer possible to desist from, or frustrate, the commission of the crime. It is “a matter of degree and ... calls for a sensible and just value judgment” (*Musingadi supra*).
- (5) The withdrawal must be voluntary.

14.3.5 *Joining-in*

(*Criminal Law 264–265; Case Book 194–200*)



The “joiner-in”. X1, who together with X2 and X3 had already inflicted a lethal wound upon Y, runs away from the scene of the crime. While Y is still alive, Z, who has not previously agreed with X1 and his two associates to kill Y, appears on the scene. Because he himself harbours a grudge against Y, he inflicts a wound on Y with a club. This wound does not, however, hasten Y’s death. Y dies shortly thereafter. May Z also be convicted of having murdered Y? See the discussion below.

Assume that X, acting either alone or together with others in the execution of a common purpose, has already wounded Y lethally. Thereafter, while Y is still alive, Z (who has not previously – expressly or tacitly – agreed with X to kill Y) inflicts a wound on Y, which does not, however, hasten Y’s death. Thereafter, Y dies as a result of the wound inflicted by X. The person in Z’s position is referred to as a joiner-in because he associated himself with others’ common purpose at a stage when Y’s lethal wound had already been inflicted, although Y was then (i.e. when Z joined the assault) still alive.

In order to portray the joining-in situation properly, it is important to bear the following in mind:

- Firstly, if the injuries inflicted by Z, in fact, **hastened Y’s death**, there can be no doubt that there is a causal connection between Z’s acts and Y’s death, and that Z is, therefore, guilty of murder. (Therefore, Z is then not a joiner-in.)
- Secondly, if Z’s assault on Y takes place **after Y has already died** from the injuries inflicted by X or his associates, it is similarly beyond doubt that Z cannot be convicted of murder, since the crime cannot be committed in respect of a corpse. (Therefore, Z is then not a joiner-in.)
- Thirdly, if the evidence reveals a **previous conspiracy** between X (or X and his associates) and Z to kill Y, Z is guilty of murder by virtue of the doctrine of common purpose, since X’s act in fatally wounding Y is then

imputed to Z. (Therefore, Z is then not a joiner-in.) The joining-in situation presupposes the **absence of a common purpose** between X and Z.

To summarise: The joiner-in is a person

- whose attack on Y did **not hasten Y's death**
- **whose blow was administered at a time when Y was still alive**
- **who did not act with a common purpose** together with the other persons who also inflicted wounds on Y

Note that the joiner-in is not a description of a category of participants other than perpetrators and accomplices. It is merely a convenient term to use when referring to person Z, as described in the set of facts mentioned above.

Nobody denies that the conduct of the joiner-in is punishable. The question is merely the following: Of what crime must he be convicted? Before 1990, there was great uncertainty in our law regarding the answer to this question. According to certain decisions and writers, the joiner-in had to be convicted of murder, but according to other decisions and writers, he could, at most, be convicted of attempted murder.

In 1990, in *Motaung* 1990 (4) SA 485 (A), the Appellate Division considered the different views on the matter and, in a unanimous judgment delivered by Hoexter JA, ruled that the joiner-in could not be convicted of murder, but only of attempted murder. The judgment in *Motaung* is now the authoritative judgment on the liability of a joiner-in.

One of the reasons advanced by the court for its ruling was the following argument:

To hold an accused liable for murder on the basis of an association with the crime only after all the acts contributing to the victim's death have already been committed would involve holding him responsible *ex post facto* for such acts. The criminal law is firmly opposed to liability based on *ex post facto*, or retrospective, responsibility and does not recognise it in any other situation. It would therefore be contrary to accepted principle to recognise it here.

(The expression "*ex post facto*" means "after the event".)

14.3.6 *The most important principles relating to common purpose*

We will now proceed to summarise the most important principles relating to the doctrine of common purpose, as well as the liability of the joiner-in. Study these principles thoroughly. If you know them well and are able to reproduce them all, you have the key to all the principles relating to common purpose.

- (1) If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the acts of each of them in the execution of such a purpose are imputed to the others.

- (2) In the case of a charge of having committed a crime that involves the causing of a certain result (such as murder), the **conduct imputed includes the causing of such result**.
- (3) **Conduct by a member of the group of persons having a common purpose that differs** from the conduct envisaged in the said common purpose may **not be imputed** to another member of the group, unless the latter **knew** that such other conduct would be committed, or **foresaw the possibility** that it might be committed and **reconciled** himself to that possibility.
- (4) A finding that a person acted together with one or more other persons in a common purpose may be based upon proof of a prior agreement or proof of **active association** in the execution of the common purpose.
- (5) On a charge of murder, the rule that liability may be based on active association applies only if the active association took place **while the deceased was still alive and before a mortal wound**, or mortal wounds, **had been inflicted** by the person or persons who commenced the assault.
- (6) Just as active association with the common purpose may lead to liability, so **dissociation or withdrawal from the common purpose** may, in certain circumstances, lead to negative liability.

ACTIVITY

X1, X2 and X3 are members of a criminal gang. Their main activities are to steal motor vehicles at shopping centres. X1, the leader, is not involved in the actual stealing of cars. He only tells X2 and X3 what to do. X2 and X3 always carry firearms and knives with them when they engage in their criminal activities. Because of the dangerous nature of their activities, all the members of the gang realise that somebody may get killed. In fact, the gang leader (X1) has instructed them to kill anyone who interferes with their activities. One evening, while X2 and X3 are attempting to steal a car parked in an underground parking garage, Y, the owner of the car, arrives at the scene. Upon seeing the robbers, she screams for help, but X2 and X3 force her into the boot of her car. They drive 20 kilometres out of the city to a desolate area in the bush. X2 rapes Y and then cuts Y's throat. During all these events, X3 holds Y down. They (X2 and X3) then leave the scene of the crime. Y, who is mortally wounded, screams for help. X4, a passerby, hears her screams. X4 is not a member of the gang. He has never even met any of the members of the gang. He also rapes Y and, intending to kill her, hits her with a stick over the head. Fifteen minutes after being raped and assaulted by X4, Y dies. The autopsy report reveals that Y died as a result of blood loss incurred by the throat-cutting. In the report, it is also stated that the head injury did not hasten her death.

You are the state prosecutor. Explain which crimes (if any) X1, X2, X3 and X4 have committed and the legal grounds upon which the liability of each will be based.

FEEDBACK

We will first deal with the murder of Y. X1, X2 and X3 are guilty of having murdered Y in terms of the general principles of liability. The actions of each of them qualify as the **cause** of Y's death. There is no doubt that the act of X2 was the direct cause of Y's death. Because the definition of the crime of murder is very wide, the acts of the gang leader, X1, as well as those of X2 and X3, are the cause (*conditio sine qua non* and legal cause) of Y's death. X1 instructed the members of the gang to kill anybody who interfered with their activities, and X3 held Y down so that X2 could cut her throat. All three of them are perpetrators of murder. X1 is an indirect perpetrator and X2 and X3 are direct perpetrators. See the discussion in 14.3.2 above. All three accused (X1, X2 and X3) had at least foreseen the possibility of an innocent person being killed during the course of their criminal activities. In other words, all of them had at least *dolus eventualis* in respect of Y's death.

The alternative basis upon which X1, X2 and X3 may be convicted of having murdered Y is to rely on the doctrine of common purpose. In terms of this doctrine, the state need not prove the element of causation in respect of each accused. Instead, the acts of each of the participants in the execution of the common purpose are imputed to the others. The leading cases in this regard are *Safatsa* and *Mgedezi*. Keep in mind, however, that the state still has to prove that each accused acted with intention. Since, according to the autopsy report, X4's act did not causally contribute to Y's death, X4 cannot be convicted of murder.

As regards Y's rape, X2 may also be convicted of this crime. X2 is the perpetrator of rape and X3 is an accomplice to rape. The reason why X3 cannot be convicted of rape as a co-perpetrator is that he never performed an act of sexual penetration on Y. His conduct does not fall within the definition of rape. By holding Y down to the ground, X3 nevertheless furthered the commission of the crime by somebody else (X2) and, therefore, he (X3) is an accomplice to rape. X1 cannot be convicted of rape because he never performed an act of sexual penetration on Y and did nothing to further the crime. Presumably, he never even anticipated that X2 and X3 would have sexually penetrated a woman without her consent.

X4 is guilty of rape and attempted murder in respect of Y. As regards the crime of attempted murder, X4 is a typical example of a joiner-in. The leading case in this regard is *Motaung*.

SUMMARY

- (1) Persons involved in the commission of a crime are divided into two groups, namely participants and non-participants.
- (2) Participants further the commission of the crime, whereas non-participants do not further the commission of the crime. An accessory after the fact is a non-participant, since she comes into the picture only after the crime has already been completed, and then helps the perpetrator or accomplice to escape liability.
- (3) Participants are divided into two groups, namely perpetrators and accomplices. The distinction drawn between these two groups is the most important distinction relating to participation in crime. Consult the definitions of a perpetrator and an accomplice given above.

- (4) Unlike a perpetrator, an accomplice does not, through her conduct, state of mind or personal description, fall within the definition of the crime, but nevertheless commits an act whereby she furthers the commission of the crime by somebody else.
- (5) If we consider the definition of a perpetrator, it is clear that there are two grounds upon which a person can qualify as perpetrator, namely either on the ground that she complies with the definition of the crime, in which case we merely apply the ordinary principles of liability (and, in murder more particularly: only the ordinary principles relating to causation), or by virtue of the operation of the doctrine of common purpose.
- (6) As far as the doctrine of common purpose and the liability of the joiner-in are concerned, consult 14.3.6 for the most important principles applicable to this topic.

TEST YOURSELF

- (1) Distinguish between a participant and a non-participant in a crime.
- (2) Distinguish between a perpetrator and an accomplice, and give an example of each.
- (3) Give a definition of each of the following: a perpetrator, an accomplice, and the doctrine of common purpose.
- (4) Explain in one sentence why an accessory after the fact does not qualify as a participant in a crime. (Write the answer here.).....
.....
.....
.....
- (5) If more than one perpetrator is involved in the commission of a crime, is it necessary to identify one of them as the principal perpetrator?
- (6) Explain the meaning of “direct perpetrator” and “indirect perpetrator”. Is there any difference between these two categories of perpetrators as far as their liability for the crime is concerned?
- (7) Summarise the rules pertaining to the doctrine of common purpose.
- (8) Discuss the judgment in *Safatsa* 1988 (1) SA 868 (A). Briefly mention the facts in this case, as well as the points of law decided by the court.
- (9) Briefly discuss the judgment of the Constitutional Court in *Thebus* 2003 (2) SACR 319 (CC).
- (10) (a) What do you understand by the term “joiner-in”?
(b) Explain whether there is any difference between a joiner-in and a co-perpetrator, and give reasons for your answer.
(c) What crime does the joiner-in commit?
(d) What is the leading case on the liability of the joiner-in and what was decided in this case?
- (11) Discuss the circumstances in which our courts may find that a person has dissociated herself or withdrawn from a common purpose.

STUDY UNIT 15

Participation II: accomplices and accessories after the fact



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate a greater understanding of the principles relating to participation by
 - expressing an informed opinion whether an accused can be held liable as an accomplice
 - expressing an informed opinion whether an accused can be held liable as an accessory after the fact

15.1 BACKGROUND

In the previous study unit we started our discussion of participation in a crime. In that study unit we explained the difference between participants and non-participants, as well as between perpetrators and accomplices. Make sure that you understand these differences well before embarking on this study unit. We have already discussed the liability of perpetrators in the previous study unit. In this study unit we discuss accomplices and accessories after the fact.

15.2 ACCOMPLICES

(Criminal Law 265–270; Case Book 181–186)

15.2.1 *Introduction*

Where a person does not participate in the commission of a crime as a perpetrator, he may nevertheless participate in the crime and be liable as an accomplice. The definition of each crime is directed primarily at the perpetrator, and the perpetrator is the person whose conduct conforms to all the elements contained in the definition of the crime in question, or who qualifies as a perpetrator in terms of the common-purpose doctrine. The accomplice is a person whose conduct does not conform to all the requirements in the definition of the crime, but which is nonetheless punishable because he has intentionally **furthered** the commission of the crime by another person. Liability as an accomplice is, therefore, something less than liability as a perpetrator. See our discussion above on the distinction between perpetrators and accomplices.

15.2.2 *Definition*

See the definition of an accomplice given in the previous study unit.

15.2.3 *Technical and popular meaning of the word “accomplice”*

Confusion can easily arise about the meaning of the word “accomplice”. The reason for this is that the word can have two meanings, namely a technical (or

narrow) meaning and a popular (or broad) meaning. The popular meaning is the meaning the word has in the everyday language of laypersons; according to this meaning, the word refers to anybody who helps the “actual” or “principal” perpetrator to commit the crime, or who furthers the commission in some way or another, without distinguishing between persons who qualify as perpetrators, as defined above (i.e. who comply with the definition of the crime or who qualify in terms of the doctrine of common purpose), and those who do not qualify as perpetrators. The popular meaning of this word is, accordingly, so wide that it may also refer to persons who are, technically speaking, perpetrators.

The technical meaning of the word refers only to its narrower meaning as stated in the definition of “accomplice” above. According to this narrower meaning, an accomplice can never include a perpetrator, that is, somebody who complies with all the requirements for liability set out in the definition of the crime. **In the discussion that follows, as well as every time the word “accomplice” is used in legal terminology, it bears the technical (narrow) meaning as explained above.**

15.2.4 *Requirements for liability as an accomplice*

In order to be liable as an accomplice, the following four requirements must be complied with.

(1) Act

There must be an act (in the criminal-law sense of the word) by which the commission of a crime by another person is furthered or promoted. Furtherance can take place by way of **aiding, counselling, encouraging or ordering** (*Jackelson* 1920 AD 486). Merely being a spectator at the commission of a crime naturally does not amount to furtherance thereof (*Mbande* 1933 AD 382, 392-393).

The following are examples of conduct for which a person has been held liable as an accomplice:

- (a) In *Peerkhan and Lalloo* 1906 TS 798, the conduct forbidden in the definition of the crime was the purchasing of unwrought gold. Lalloo bought the gold and was thus a perpetrator. Peerkhan bought no gold, but acted as interpreter, adviser and surety in connection with the transaction. Consequently, his conduct did not comply with the definition of the crime (the purchase of gold), but nonetheless constituted furtherance of the purchase; accordingly, he was an accomplice.
- (b) In *Kazi* 1963 (4) SA 742 (W), the forbidden conduct was the **holding or organising** of a meeting without the necessary permission. Kazi did not hold or organise the meeting, but nonetheless addressed it. It was held that his conduct rendered him guilty as an accomplice.

(2) Unlawfulness

The act of furthering, as described above, must be unlawful. In other words, there must not be any justification for it.

(3) Intention

The crime, which is committed by another person, must be furthered **intentionally** (*Quinta* 1974 (1) SA 544 (T) 547). Negligence is not sufficient. The shop assistant who inadvertently fails to close the shop window is not an accomplice to the housebreaking that follows. He will be an accomplice only if, knowing of the intended housebreaking and in order to help the thief, he does not close the window properly. In such a case, the thief need not be aware of the shop clerk's assistance. It is therefore sufficient if the accomplice intentionally furthers the crime.

It is not necessary for the perpetrator to have been conscious of the accomplice's assistance. **Mutual, conscious cooperation is, therefore, not a requirement** (*Ohlenschlager* 1992 (1) SACR 695 (T) 768g–h).

(4) Accessory character of liability

A crime must have been committed by some other person. Liability as an accomplice is known as "accessory liability". No person can be held liable as an accomplice unless some other person is guilty as a perpetrator (**Williams** *supra* 63; *Maxaba* *supra* 1155). This implies that a person cannot be an accomplice to his own crime, that is, to a crime that he committed as a perpetrator.

15.2.5 *Is it possible to be an accomplice to murder?*

You must study the discussion of this important and interesting topic on your own, in *Criminal Law* (269–270).



You must also read the following judgment dealing with this topic in the *Case Book*: **Williams** 1980 (1) SA 60 (A).

You must know what the objection is to convicting a person of being an accomplice (as opposed to a co-perpetrator) to murder. In the **Williams** case, which you must read, it was accepted that a person can be an accomplice to murder, but this aspect of the judgment has been criticised by Snyman (*Criminal Law*). You must ensure that you know what the criticism is.

In the light of the above-mentioned discussion, we are of the opinion that it is not possible to be an accomplice to murder.

15.3 ACCESSORIES AFTER THE FACT

(*Criminal Law* 271–274; *Case Book* 215–225)

15.3.1 *Introduction*

As was pointed out above, an accessory after the fact is not a participant, because he does not further the crime. He comes into the picture only after

the crime has been completed, and then helps the perpetrator (or perhaps the accomplice) to escape justice.

Examples of the conduct of an accessory after the fact are the following:

- X helps the real murderer by throwing the corpse into a river (*Mlooi* 1925 AD 131).
- Z murdered Y. After the murder, X and Z removed certain parts of Y's body and, thereafter, disposed of the body by leaving it in a lonely spot at the top of a mountain. X had nothing to do with the murder itself, but was convicted of being an accessory after the fact in respect of the murder (*Mavhungu* 1981 (1) SA 56 (A)).

15.3.2 Definition

A person is an accessory after the fact to the commission of a crime if, after the commission of the crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or accomplice to, the crime to evade liability for his crime, or to facilitate such a person's evasion of liability.

15.3.3 Requirements for liability of accessory after the fact

In order to be convicted of being an accessory after the fact, the following six requirements must be complied with:

(1) Act or omission

The accessory after the fact must engage in **some conduct (act or omission)** whereby he assists either the perpetrator or the accomplice to evade liability. Mere approval or condonation of the crime is not enough.

It is possible for a person to be an accessory after the fact on the ground of an **omission**. This will be the case if there is a legal duty upon such a person to act positively. An example in this respect is where a police officer sees that a crime has been committed, but intentionally remains passive because he wants to protect the criminal who has committed the crime from detection. The mere **approval or ratification** of a crime after its commission is insufficient to construe a person as being an accessory after the fact to its commission.

(2) After the commission of the crime

X's act or omission must **take place after the commission of the actual crime**. If X's act takes place at a time when the crime is still in the process of being committed, he may qualify as a co-perpetrator or accomplice. If X had agreed, prior to the commission of the crime, to render assistance, X may, depending upon the circumstances, be a perpetrator himself if his conduct, culpability and personal qualities accord with the definition of the crime; alternatively, he may be an accomplice (*Maserow* 1942 AD 164, 170).

(3) Enabling perpetrator or accomplice to evade liability

The act must be of a certain nature. It must be such that it **assists the perpetrator or accomplice to evade liability** for his crime, or to facilitate such a person's evasion of liability.

The protection or assistance given need not be successful. A person would therefore be guilty as an accessory after the fact even though the corpse that he helped to conceal by submerging it in a river is discovered by the police and recovered from the river, and the murderer is brought to justice.

(4) Unlawfulness

The act must be **unlawful**, which means that there must be no justification for it.

(5) Intention

The accessory after the fact must render assistance **intentionally**. He must know that the person he is helping has committed the crime. He must have the **intention of assisting the perpetrator (or accomplice) to evade liability** or to facilitate the evasion of liability (*Morgan* 1992 (1) SACR 134 (A) 174).

(6) Accessory character of liability

The liability of the accessory after the fact, like that of an accomplice, is **accessory** in character. There can be an accessory after the fact only if somebody else has committed the crime as perpetrator. As a result, you cannot be an accessory after the fact to a crime committed by yourself.

In *Gani* 1957 (2) SA 212 (A), the Appeal Court convicted three persons of the crime of being accessories after the fact to the murder, on the strength of the following argument:

If all three committed the murder, they are all three accessories after the fact because all three of them disposed of the corpse; if the murder was not committed by all of them, those who did not commit the murder are accessories after the fact in respect of the murder committed by the other(s), and the latter are accomplices to the crime of being an accessory after the fact.

In *Jonathan* 1987 (1) SA 633 (A), the Appellate Division was invited to hold that *Gani's* case was wrongly decided, but the court confirmed *Gani's* case, adding that the "rule in *Gani's* case" may be regarded as an **exception to the general rule that you cannot be an accessory after the fact in respect of a crime committed by yourself.**

15.3.4 Reason for existence questionable

In conclusion, it may be asked whether the crime of being an accessory after the fact is really necessary in our law. In our opinion, it is not. Being

an accessory after the fact completely overlaps with the crime known as defeating or obstructing the course of justice – a crime that we will discuss later on in the CRW2602 guide. Even the Appellate Division admitted this: see *Gani supra* 220A; *Pakane* 2008 (1) SACR 518 (SCA).

SUMMARY

- (1) See definition of accomplice in previous study unit.
- (2) The conduct of an accomplice amounts to a furthering of the crime by somebody else. “Furthering” includes rendering assistance, giving advice, encouraging, and so forth.
- (3) An accomplice is guilty only if he furthers the crime unlawfully and intentionally.
- (4) A person cannot be an accomplice unless somebody else is a perpetrator.
- (5) An accessory after the fact is not a participant because he does not further the crime.
- (6) See the above definition of an accessory after the fact.
- (7) In order to be liable as an accessory after the fact, a person must render assistance intentionally to somebody who has already committed the crime as a perpetrator or as an accomplice.
- (8) The liability of an accessory after the fact, like that of an accomplice, is accessory in character. This means that there can be an accessory after the fact only if somebody else has committed the crime as perpetrator. It also means that you cannot be an accessory after the fact to a crime committed by yourself. However, in *Gani*, the Appellate Division created an exception to the aforementioned rule.

TEST YOURSELF

- (1) Name and discuss the requirements for liability as an accomplice (as opposed to a perpetrator).
- (2) Discuss the accessory character of accomplice liability.
- (3) Is it possible to be an accomplice to murder? Give reasons for your answer.
- (4) Define an accessory after the fact.
- (5) Discuss the requirements for liability as an accessory after the fact.
- (6) Discuss the decision in *Gani* relating to the accessory character of the liability of an accessory after the fact.

STUDY UNIT 16

Attempt, conspiracy and incitement



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LEARNING OUTCOMES

When you have finished this study unit, you should be able to

- demonstrate your understanding of the principles relating to anticipatory crimes by expressing an informed opinion whether certain conduct amounts to a punishable attempt to commit a specific crime

16.1 BACKGROUND

Until now, we have dealt with completed crimes and have explained when a person would be guilty of a crime on account of her involvement in the commission of the crime before, during or after its commission. In this study unit we will explain that a person may be guilty of an offence even though the crime that she wanted to commit was never completed. The instances that we are referring to are those where X

- **attempts** (tries) to commit a crime, but does not succeed in completing it
- agrees (**conspires**) with another to commit a crime
- does something to influence (**incites**) another to commit a crime

Attempt, conspiracy and incitement are often referred to as “**inchoate**” or “**anticipatory**” crimes, since they deal with forms of punishable conduct that **anticipate** or **precede** the actual completion of the crime.

Why does the law punish not only the completed crime, but also the above-mentioned anticipatory forms of conduct? One of the reasons is to be found in the **preventive** theory of punishment. The law seeks to prevent the commission of the completed crime. If these anticipatory forms of conduct were not punishable, the maintenance of law and order would suffer seriously because the police would then be powerless to intervene when they happen to become aware of people preparing to commit a crime.

Imagine the police hearing that a group of persons is preparing to rob a bank with the use of firearms. They know who the would-be robbers are and they watch them get into their car and drive, armed, to the bank. If such anticipatory conduct were not punishable, the police would be in the ludicrous position of having to wait until the completion of the crime (perhaps involving the shooting of innocent people) before they could apprehend the robbers.

16.2 ATTEMPT

For a general discussion of attempt, see *Criminal Law* 276–286; *Case Book* 225–233.

16.2.1 *General*

Attempts to commit common-law crimes are punishable in terms of common law. Initially, it was uncertain whether attempts to commit a statutory crime were also punishable, but this uncertainty has now been removed by section 15(1) of Act 27 of 1914 (subsequently replaced by s 18(1) of Act 17 of 1956), which clearly provides that an attempt to commit a statutory offence is also punishable.

16.2.2 *Definition of rules relating to attempt*

We begin by giving a definition of the rules relating to attempt.

- (1) A person is guilty of attempting to commit a crime if, intending to commit that crime, she unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime.
- (2) A person is guilty of attempting to commit a crime, even though the commission of the crime is impossible, if it would have been possible in the factual circumstances that she believes exist, or will exist at the relevant time.

If you find these rules somewhat difficult to comprehend at the first reading, don't feel discouraged. We will explain them in the discussion that follows.

16.2.3 *Four different types of attempt*

We can distinguish four different types of attempt. They correspond to four different reasons that X has not completed the crime, despite having embarked upon the commission thereof. These four types of attempt are the following:

- (1) **Completed attempt.** In this type of situation, **X does everything she can to commit the crime**, but for some reason the crime is not completed, for example
 - where X fires at Y, but misses
 - where X fires at Y and strikes Y, but Y's life is fortunately saved by prompt medical intervention

This type of situation is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above.

- (2) **Interrupted attempt.** In this type of situation, X's actions have reached the stage when they are **no longer merely preparatory**, but are, in effect, **acts of execution** when they are **interrupted**, so that the crime cannot be completed. For example:
 - X, intending to commit arson, pours petrol onto a wooden floor, but is apprehended by a policeman just before she strikes a match.
 - X, a prisoner intending to escape from prison, breaks and bends the bars in the window of his cell, but is apprehended by a warder before he can succeed in pushing his body through the opening.

This type of situation is described in the first paragraph of the definition of the rules relating to attempt given above.

- (3) **Attempt to commit the impossible.** In this type of situation, it is impossible for X to commit or complete the crime, either
- because the **means** she uses **cannot bring about the desired result**, such as where X, intending to murder Y, administers vinegar to her in the firm, but mistaken, belief that the vinegar will act as a poison and kill Y, or
 - because it is impossible to commit the crime in respect of the **particular object** of her actions, such as where X, intending to murder Y while he is asleep in bed, shoots him through the head, but Y, in fact, died of a heart attack an hour before.

This type of situation is described in the second paragraph of the definition of the rules relating to attempt given above.

- (4) **Voluntary withdrawal.** In this type of situation, X's actions have already reached the stage when they qualify as **acts of execution**, when X, **of her own accord, abandons** her criminal plan of action, for example
- where, after putting poison into Y's porridge, but before giving it to Y, X has second thoughts and decides to throw the porridge away.

This type of situation is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above.

We will now proceed to discuss these four forms of attempt one by one.

16.2.4 *Completed attempt*

(*Criminal Law 278–279*)

As a general rule, it may be assumed that **if X has done everything she set out to do in order to commit the crime, but the crime is not completed, she is guilty of attempt.** The following are examples:

- where X fires at Y, but the bullet misses her
- where X fires at Y and strikes Y, but Y's life is fortunately saved by prompt medical intervention
- where X, intending to infringe Y's dignity (conduct that, in principle, amounts to the commission of the crime known as *crimen iniuria*), writes a letter to Y that contains abusive allegations about Y and posts it, but the letter is intercepted by the authorities before it can reach Y

This type of attempt is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above. In that paragraph, conduct that has reached the "commencement of the execution" stage is required. If, as is the case in this type of attempt, X has done everything she set out to do in order to commit the crime, there can be no doubt that her acts are acts of execution, as opposed to preparation. (The difference between

acts of preparation and acts of execution will be explained in the discussion of the next type of attempt.)

16.2.5 *Interrupted attempt*

(*Criminal Law 279–281; Case Book 227–229*)

16.2.5.1 *General*

The majority of reported cases on attempt deal with this form of attempt. Whereas there is, as a rule, no difficulty in holding X liable for attempt in situations of so-called completed attempt (described above), in cases of interrupted attempt it can often be difficult to decide whether X's conduct amounts to punishable attempt.

Mere intention to commit a crime is not punishable. Nobody can be punished for her thoughts. A person can be liable only once she has committed an act, in other words, once her resolve to commit a crime has manifested itself in some outward conduct. However, it is not just any outward conduct that qualifies as a punishable attempt. If X intends to commit murder, she is not guilty of attempted murder the moment she buys the revolver; and if she intends to commit arson, she is not guilty of attempted arson the moment she buys a box of matches.

On the other hand, it stands to reason that there does not have to be a completed crime before a person may be guilty of attempt. Somewhere between the first outward manifestation of her intention and the completed crime there is a boundary that X must cross before she is guilty of attempt. How to formulate this boundary in terms of a general rule is one of the most daunting problems in criminal law.

In cases of this nature, we must, in fact, differentiate between three different stages:

- **In the first stage**, X's conduct amounts to no more than mere **acts of preparation**. For example, intending to kill her enemy, Y, X merely buys a knife at a shop. If this act of preparation is the only act that can be proved against her, she **cannot be convicted of any crime**.
- **In the second stage**, her acts have proceeded so far that they no longer amount to mere acts of preparation, but, in fact, qualify as **acts of execution or consummation**. For example, after searching for Y, she finds her and charges at her with the knife in her hand, although a policeman prevents her from stabbing Y. In this case, X is guilty of **attempted murder**.
- **In the third stage**, X has completed her act and all the requirements for liability have been complied with. For example, she has stabbed and killed Y. In this case, she is **guilty of murder** (the completed crime).

The distinction between the first and second stages is crucial in determining whether X is guilty of attempt. Again, the distinction between the second

and third stages is crucial in determining whether X has merely committed an attempt or whether she has committed the completed crime.

16.2.5.2 *The rule applied in cases of interrupted attempt*

Liability for attempt in this type of situation is determined by the courts with the aid of an **objective criterion**, namely by distinguishing between

- **acts of preparation** and
- **acts of execution** (or consummation).

If what X did amounted merely to preparation for a crime, there is no attempt. If, however, her acts were more than acts of preparation and were, in fact, acts of consummation, she is guilty of attempt.

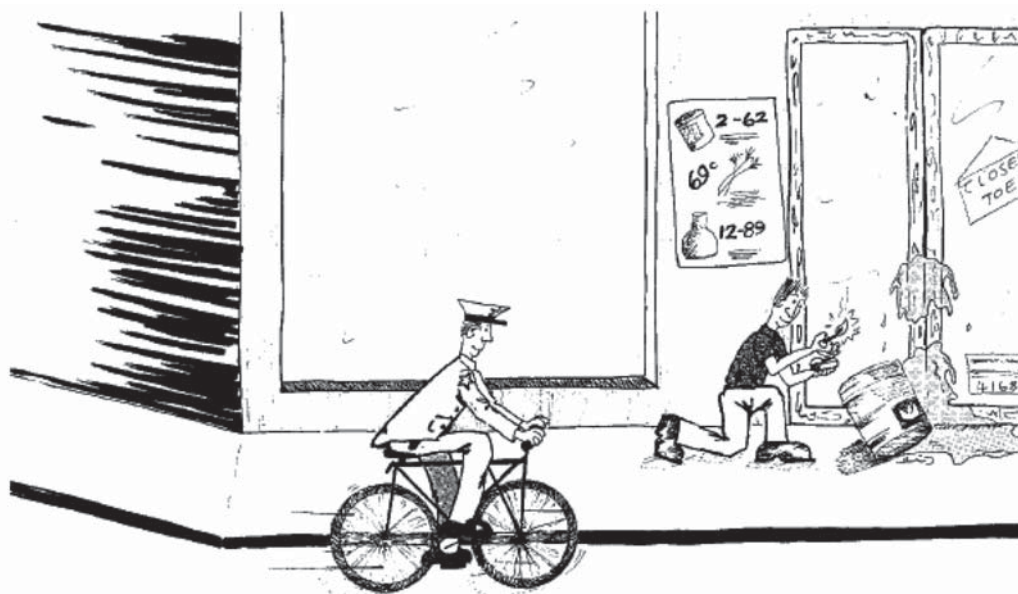
Although this test (namely to distinguish between acts of preparation and acts of consummation) may seem simple in theory, in practice it is often very difficult to apply. The reason for this is the vagueness of the concepts “preparation” and “consummation”. In applying this test, a court has to distinguish between “the end of the beginning and the beginning of the end”. Each factual situation is different and the test as applied to one set of facts may be no criterion in a different factual situation. In *Katz* 1959 (3) SA 408 (C) 422, it was stated that “a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration”.

16.2.5.3 *Examples of the application of rule*

The most important cases in which the courts have enunciated this test (namely to differentiate between acts of preparation and acts of consummation) are *Sharpe* 1903 TS 868 and *Schoombie* 1945 AD 541. In the latter case, X had gone to a shop in the early hours of the morning and had poured petrol around and underneath the door, so that the petrol flowed into the shop. He placed a tin of inflammable material against the door, but his whole scheme was thwarted when, at that moment, a policeman appeared. The Appellate Division confirmed his conviction of attempted arson and, in the judgment, authoritatively confirmed that **the test to be applied in these cases was to distinguish between acts of preparation and acts of consummation**.



Read the aforementioned decision in the *Case Book*: *Schoombie* 1945 AD 541.



The facts in *Schoombie's case*. Just before X can light the match setting fire to the building, a policeman arrives on a bicycle and prevents him from doing so.

The following are some further examples of the application of the test:

- (1) **Mere acts of preparation** (i.e. acts in respect of which X cannot be convicted of attempt)
 - X, intending to murder Y, is merely preparing the poison that she intends to use to poison Y later, when she is caught.
 - X, intending to buy goods that she knows to be stolen goods (conduct that would render her guilty of the crime of possessing stolen goods), merely inspects the goods that the real burglar has stolen, when she is apprehended (*Croucamp* 1949 (1) SA 377 (A)).
- (2) **Acts of consummation** (i.e. acts in respect of which X can be convicted of attempt)
 - X, trying to rape Y, has as yet only assaulted her when he is apprehended (*B* 1958 (1) SA 199 (A) 204; *W* 1976 (1) SA 1 (A)).
 - X, trying to steal from a woman's handbag, has opened the handbag hoping that its contents will fall out, when he is apprehended.

16.2.6 *Attempt to commit the impossible*

(*Criminal Law* 281–282; *Case Book* 229–233)

16.2.6.1 *The subjective and objective approaches*

Before 1956, there was no certainty in our law whether this type of attempt was punishable. In particular, it was uncertain – in deciding if X's conduct amounted to a punishable attempt – whether to employ an objective or a subjective test.

If we employ an **objective test**, we consider the facts only from the outside, that is, without considering the subjective aims that X has in mind when she performs the act. If we follow this approach, X would never be guilty of attempt because what she is trying to do in cases falling within this category cannot physically (i.e. objectively) result in the commission of an offence.

Consider, for example, the situation where X tries to sell uncut diamonds to Y. (It is a statutory offence to sell uncut diamonds.) She offers a stone to Y, which she (X) believes to be an uncut diamond, whereas it is, in reality, merely a piece of worthless glass. (Some uncut diamonds sometimes resemble a piece of glass.) If we employ an objective test, X cannot be convicted of an attempt to sell an uncut diamond, because, objectively, the sale – or offering for sale – of a piece of glass is something entirely different from the sale – or offering for sale – of an uncut diamond.

If, however, we employ a **subjective test**, X can be convicted of attempt because, according to this test, **what is decisive is X's subjective state of mind**, that is, her belief that what she was doing was selling an uncut diamond and not a piece of glass.

16.2.6.2 *The decision in Davies*

In 1956, the uncertainty whether the test was objective or subjective was settled by the Appellate Division in *Davies* 1956 (3) SA 52 (A). In this case, the court had to decide whether X was guilty of an attempt to commit the former crime of abortion if the foetus, which he had caused to be aborted, was already dead, although he had believed the foetus to be still alive. (The crime of abortion could, in terms of its definition, be committed only in respect of a live foetus.) The Appellate Division adopted the subjective test and held that X was guilty of attempt. It further held that X would have been guilty of attempt even if the woman had not been pregnant, provided, of course, that X had believed that she was pregnant and had performed some act intending to bring about an abortion.

The court further held that it is immaterial whether the impossibility of achieving the desired end is attributable to the wrong **means** employed by X, or to the fact that the **object in respect of which the act is committed** is of such a nature that the crime can never be committed in respect of it.

In cases of attempt to commit the impossible, the **test according to this decision is, therefore, subjective** and not objective. What the law seeks to punish in cases of this nature is not any harm that might have been caused by X's conduct (because such harm is non-existent), but X's "evil state of mind", which manifested itself in outward conduct that was not merely preparatory, but amounted to an act of execution.

Note that the rule that, in order to be convicted of attempt, X's act must be an act of consummation, also applies to this form of attempt.



Read the aforementioned decision in the *Case Book: Davies* 1956 (3) SA 52 (A).

The crime of rape can be committed only in respect of a human being who is alive. In *W* 1976 (1) SA 1 (A), X had sexual intercourse with what he believed to be a live woman, whereas the woman was, in fact, already dead. X also believed that the woman did not consent to the intercourse. The court held that he could be convicted of attempted rape. This is an example of impossible attempt, where the impossibility resided in the object in respect of which the act was performed.

In *Ngcamu* 2011 1 SACR 1 (SCA), X had appealed against his conviction of attempted murder involving an attempt to commit the impossible. X had fired at a Coin Security armoured truck, but nobody was injured because the bullets could not penetrate the truck. The court upheld the conviction of attempted murder, arguing that it was irrelevant that the complainant was in an armoured vehicle and that he did not believe that he was at risk of injury or death from the gunfire (par 19). The court found that the shooter had the requisite criminal intent, even if he was attempting the impossible.

16.2.6.3 Committing a “putative crime” is not a punishable attempt

In the *Davies* case, as well as the case of *W*, discussed above, X was **mistaken about the facts**. (In *Davies*, X wrongly believed that the foetus was still alive, and in *W*, he wrongly believed that the woman was still alive. These are not mistakes concerning the contents of the law, but mistakes concerning the presence of certain material facts.) The situation in which this type of mistake is made should be contrasted with the situation in which X is **mistaken, not about the relevant facts, but about the relevant legal provisions**.

Consider the following example:

X thinks that there is a law that makes it an offence for one person to give another a bottle of brandy. (In reality, there is no law stipulating that such conduct is a crime.) X gives Y a bottle of brandy as a present in the mistaken belief that, by performing this act, he is committing a crime. Although X subjectively believes that he is committing a crime, objectively (i.e. viewed from the outside), his conduct is, in reality, perfectly lawful. What he is attempting to do is to commit something (a crime) that is impossible to commit, because there is no law stating that such conduct is punishable.

The question now is: Does X’s conduct in this example also fall within the ambit of punishable attempt to commit the impossible? The answer to this question is “no”. The reason for this is that, in *Davies supra*, the court specifically stated that there is an exception to the rule that impossible attempt is punishable. This exception was formulated as follows by Schreiner JA (at 64):

If what the accused was aiming to achieve was not a crime, an endeavour to achieve it could not, because by a **mistake of law** he thought that his act was criminal, constitute an attempt to commit a crime.

What the judge was actually saying was that although the general rule is that attempts to commit the impossible are punishable, **this rule is limited to cases where the impossibility originated from X's mistaken view of the material facts, and that it does not apply where the impossibility originated from X's mistaken view of the law.** Thus, if, because of a mistake concerning the contents of the law, X thinks that the type of act he is committing is punishable (i.e. that there is a legal provision stating that the type of act he is committing constitutes a crime), whereas the law, in fact, does not penalise that type of act, X's conduct does not qualify as punishable attempt, despite the fact that it may be described as an attempt to commit the impossible.

This type of situation (i.e. impossible attempt originating in X's mistake of law) is sometimes referred to as a **putative crime**. The word "putative" is derived from the Latin word *putare*, which means "to think". **A putative crime is, therefore, a crime that does not actually exist** (because there is no rule of law stating that that particular type of conduct constitutes a crime), **but which X thinks does exist**. The crime only "exists" in X's mind, that is, in what he thinks. A putative crime can never be punishable.

ACTIVITY 1

X thinks that to commit adultery is a crime. In reality, it is not criminal. (It may only result in certain civil-law or private-law consequences, in that it may give the spouse of an adulterous party a ground for suing for divorce.) Believing adultery to be a crime, X commits adultery. Does X commit any crime?

FEEDBACK

X does not commit any crime. More particularly, he cannot be convicted of an attempt to commit adultery. The impossibility "lies in the law, not in the facts".

ACTIVITY 2

X is charged with theft. The crime of theft cannot be committed in respect of *res derelictae* (i.e. property abandoned by its owners with the intention of ridding themselves of it). X, a tramp, sees an old mattress lying on the pavement. The mattress was left by its owner next to his garbage container in the hope that the garbage removers would remove it. X appropriates the mattress for himself. X knows that the owner had meant to get rid of the mattress. However, X erroneously believes that the crime of theft is defined by law in such a way that it can be committed even in respect of property that has been abandoned by its owner (a *res derelicta*). Does X commit attempted theft?

FEEDBACK

Since the mattress was, in fact, a *res derelicta*, it was impossible for X to steal it. The set of facts therefore describes a situation of an attempt to commit the impossible. X was not mistaken about any facts, but only about the contents of the law. This is a case of a putative crime, that is, a crime that exists only in X's mind. The "rule in *Davies*" (i.e. the rule that impossible attempts are punishable) does not apply to putative crimes. Therefore, X cannot be convicted of attempted theft.

16.2.7 *Voluntary withdrawal*

(*Criminal Law 284–286; Case Book 225–226*)

To begin with, it is generally accepted that there is no punishable attempt if X voluntarily abandons her criminal plan of action at a stage when her actions can be described only as preparations, in other words, before her conduct constitutes the commencement of the consummation. The question is simply whether a withdrawal after this stage (the commencement of the consummation stage), but before completion of the crime, constitutes a defence to a charge of attempt. The courts have answered this question negatively.

- In *Hlatwayo* 1933 TPD 441, X was a servant who put caustic soda into her employers' porridge, intending to poison them. She noticed that the caustic soda discoloured the porridge and so threw the mixture away. She was nevertheless convicted of attempted murder. The court held that her acts had already reached the stage of consummation and that her change of heart did not exclude her liability for attempt.
- In *B* 1958 (1) SA 199 (A), the Appellate Division accepted that it was held in *Hlatwayo* that voluntary withdrawal was no defence, and that that decision was correct.
- In *Du Plessis* 1981 (3) SA 382 (A) 410 AB, the Appellate Division stated: "If that change of mind occurred before the commencement of the consummation, then the person concerned cannot be found guilty of an attempt, but if it occurred after the commencement, then there is an attempt and it does not avail the person concerned to say that he changed his mind and desisted from his purpose."

(In *Criminal Law 284–286*, the author, Snyman, criticises the courts' decisions relating to voluntary withdrawal and argues that X's conduct in this type of situation ought not to be punishable. If you are interested, you may read Snyman's arguments, but for the purposes of this module, you won't be examined on them in the examination.)

16.2.8 *Intention*

A person can be found guilty of attempt only if she had the intention to commit the particular crime that she pursued. Intention may, of course, be present in the form of *dolus eventualis*. In *S v Nyalungu* 2013 2 SACR 99 (T), X was convicted of rape and attempted murder on the basis that, at the time of the

rape, he was aware of the fact that he was HIV-positive and did not take any protective measures. The court held that the principles of our common law were wide enough to cover a situation where a virus was intentionally transferred to another person. The fact that the complainant refused to subject herself to an HIV test because of her fear of the result was regarded by the court as irrelevant. As long as the act was performed by the accused with the intention of bringing about a particular result, and that result did not ensue for some extraneous reason, an attempt was nonetheless proven.

Negligent attempt is notionally impossible: a person cannot attempt, that is, intend, to be negligent. There is, therefore, no such thing as an attempt to commit culpable homicide (*Ntanzi* 1981 (4) SA 477 (N)), because the form of culpability required for culpable homicide is not intention, but negligence.

16.3 CONSPIRACY

You need only read this section. You may be assessed on it in assignments, but you do not have to study it for examination purposes.

(Criminal Law 286–289)

- (1) In South Africa, conspiracy to commit a crime is not a common-law crime, but a **statutory crime**. **Section 18(2)(a) of the Riotous Assemblies Act 17 of 1956** criminalises conspiracies to commit crimes. The relevant parts of this section read as follows:

Any person who ... conspires with any other person to aid or procure the commission of or to commit ... any offence ... shall be guilty of an offence.

- (2) This provision does not differentiate between a successful conspiracy (i.e. one followed by the actual commission of the crime) and one not followed by any further steps towards the commission of the crime. Theoretically, it is possible to charge and convict people of a contravention of this provision, even though the crime envisaged was indeed subsequently committed. Our courts have, however, quite correctly indicated that this provision should be utilised only if there is **no proof that the envisaged crime was, in fact, committed** (*Milne and Erleigh* (7) 1951 (1) SA 791 (A) 823; *Khoza* 1973 (4) SA (O) 25; *Mshumpa* 2008(1) SACR 126 (EC)).
- (3) Nobody is ever charged with or convicted of **simply “conspiracy” and no more**. The charge and conviction must be one of conspiracy to commit a certain crime (such as murder or assault).
- (4) The **act** in the crime of conspiracy consists in the **entering into an agreement** to commit a crime or crimes (*Moumbaris* 1974 (1) SA 681 (T) 687).
- (5) While the parties are still **negotiating** with one another, there is not yet a conspiracy.

- (6) The crime is **completed** the moment the parties have come to an **agreement**, and it is **not necessary for the state to prove the commission of any further acts in execution of this conspiracy** (*Alexander* 1965 (2) SA 818 (C) 822).
- (7) The conspiracy need not be express; it may also be **tacit** (*B* 1956 (3) SA 363 (EC) 365).
- (8) The parties need not agree about the **exact manner** in which the crime is to be committed (*Adams* 1959 (1) SA 646 (Sp C)).
- (9) The mere fact that X and Y both have the **same intention does not mean that there is a conspiracy** between them. There must be a **definite agreement** between at least two persons to commit a crime (*Alexander* 1965 (2) SA 818 (K) 821; *Cooper* 1976 (2) SA 875 (T) 879). This idea is often expressed by the statement that “there must be a **meeting of the minds**”. Thus, if X breaks into a house and Y, completely unaware of X’s existence and, therefore, also his plans, breaks into the same house on the same occasion, neither of them is guilty of conspiracy, even though they both have the same intention.
- (10) The conspirators need **not be in direct communication** with one another. If two or more persons unite in an organisation with the declared purpose of committing a crime or crimes, there is a conspiracy. Any person who joins such an organisation while aware of its unlawful aims, or remains a member after becoming aware of these aims, signifies – by her conduct – her agreement with the organisation’s aims, thereby committing conspiracy (*Alexander supra* 822; *Moumbaris supra* 687).
- (11) The **intention requirement** can be subdivided into two components, namely
 - (a) the intention to **conspire**
 - (b) the intention **to commit a crime or to further its commission**
- (12) It goes without saying that there can be a conspiracy only if more than one party is involved. You cannot conspire with yourself to commit a crime.
- (13) As far as the **punishment** for conspiracy is concerned, the section that criminalises conspiracy (i.e. s 18(2)(a) of Act 17 of 1956) provides that somebody convicted of conspiracy **may be punished with the same punishment as the punishment prescribed for the commission of the actual crime** envisaged. However, this provision must be interpreted as **only laying down the maximum punishment** that may be imposed for the conspiracy. In practice, a person convicted of conspiracy to commit a crime normally receives a punishment that is **less severe** than the punishment that would have been imposed had the actual crime been committed. The reason for this is that conspiracy is only a preparatory step towards the actual commission of the (main) crime. In the case of conspiracy, the harm that would have been occasioned by the commission of the actual completed crime has not materialised. (For the same reason, the punishment for an attempt to commit a crime is, as a rule, less severe than that for the completed crime.)

16.4 INCITEMENT

You need only read this section. You may be assessed on it in assignments, but you do not have to study it for examination purposes.

(*Criminal Law 289–296; Case Book 233–237*)

- (1) In South Africa, incitement to commit a crime is not a common-law crime, but a **statutory crime**. **Section 18(2)(b) of the Riotous Assemblies Act 17 of 1956** criminalises incitement to commit crimes. The relevant parts of this section read as follows:

Any person who ... incites, instigates, commands or procures any other person to commit any offence ... shall be guilty of an offence.

- (2) As in the case of conspiracy, X ought to be charged with, and convicted of, incitement **only if there is no proof that the crime to which she incited Y has indeed been committed**. If the main crime has indeed been committed, X is a co-perpetrator or accomplice in respect of such crime (*Khoza 1973 (4) SA 23 (O) 25*).
- (3) Nobody is ever charged with or convicted simply of “incitement” and no more. The charge and conviction must be one of incitement to commit a certain crime (such as murder or assault).
- (4) The purpose of the prohibition of incitement to commit a crime is to discourage people from seeking to influence others to commit crimes (*Zeelie 1952 (1) SA 400 (A) 405*).
- (5) In some older decisions, the view was expressed that X can be guilty of incitement only if the incitement contains an element of persuasion; in other words, there must be an initial unwillingness on the part of Y, which is overcome by argument, persuasion or coercion (*C 1958 (3) SA 145 (T) 147*). However, in *Nkosiyana 1966 (4) SA 655 (A)*, the Appellate Division held that **no such element of persuasion is required**.



Read the latter decision in the *Case Book: Nkosiyana 1966 (4) SA 655 (A)*.

- (6) In *Nkosiyana supra*, X had suggested to Y that they murder Mr Kaiser Matanzima of the Transkei. However, Y was, in fact, a policeman who suspected X of trying to murder Mr Matanzima and wanted to trap X. X was unaware of the fact that Y was a policeman. X was charged with incitement to commit murder. The Appellate Division held that the fact that Y was a policeman, who at no time was susceptible to persuasion, did not stand in the way of a conviction of incitement. Incitement can, therefore, be committed **even in respect of a police trap** in which the police officer involved has no intention of ever committing the actual crime, but who simply wants to trap the inciter.
- (7) In *Nkosiyana supra*, an inciter was described as somebody “who reaches out and **seeks to influence the mind of another to the commission of a crime**”. Whether the other person (Y) is **capable of being persuaded is immaterial**. Neither do the means X uses to influence, or try to influence,

Y carry any weight. The emphasis is therefore on X's conduct, and not that of Y.

- (8) The incitement may take place either **explicitly or implicitly**.
- (9) If the incitement does **not come to Y's knowledge**, X cannot be convicted of incitement, but may be guilty of **attempted incitement**, as in the case where X writes an inflammatory letter to Y, but the letter is intercepted before it reaches Y.
- (10) As far as the **punishment** for incitement is concerned, the section that criminalises incitement (i.e. s 18(2)(b) of Act 17 of 1956) provides that somebody convicted of incitement is **punishable with the same punishment as the punishment prescribed for the commission of the actual crime** envisaged. However, this provision must be interpreted **as only laying down the maximum punishment** that may be imposed for the incitement. In practice, somebody convicted of incitement to commit a crime normally receives a punishment that is **less severe** than the punishment that would be imposed had the actual crime been committed. The reason for this is that incitement is only a preparatory step towards the actual commission of the (main) crime. In the case of incitement, the harm that would be occasioned by the commission of the actual completed crime has not yet materialised.

SUMMARY

Attempt

- (1) See the above definition of the rules relating to attempt.
- (2) There are four forms of attempt, namely completed attempt, interrupted attempt, attempt to commit the impossible, and voluntary withdrawal.
- (3) In cases of completed attempt, X has done everything she set out to do in order to commit the crime, but the crime is not completed, for example where X fires a gun at Y, but the shot misses Y.
- (4) In interrupted attempt, X's actions are interrupted so that the crime cannot be completed. In these cases, X is guilty, provided that her actions are no longer mere acts of preparation, but, in fact, constitute acts of consummation.
- (5) In cases of attempt to commit the impossible, it is impossible for X to complete the crime, because either the means she uses cannot bring about the desired result or the object in respect of which the act is committed is factually impossible to attain.
- (6) In *Davies* 1956 (3) SA 52 (A), it was held that a subjective approach towards attempts to commit the impossible should be followed, and that a person is guilty of attempted abortion if he aborts a dead foetus in circumstances in which he believes that it is still alive, even though an abortion can be committed only in respect of a live foetus.
- (7) There is an exception to the general rule laid down in *Davies*: A person cannot be guilty of an attempt to commit the impossible where such person is, as a result of a mistake of law, under the erroneous impression that the type of conduct she is engaging in is declared criminal by the law, whereas, in fact, it is not criminal. In legal terminology, such a situation is known as a putative crime.

- (8) In cases of voluntary withdrawal, X, of her own accord, abandons her criminal plan of action. According to our courts, such withdrawal is no defence to a charge of attempt if it occurs after the commencement of the consummation.
- (9) Intention is always a requirement for a conviction of attempt.

Conspiracy

- (10) Conspiracy to commit a crime is punishable in terms of section 18(2) of Act 17 of 1956.
- (11) The act of conspiracy consists in entering into an agreement to commit a crime.
- (12) The crime is completed the moment the parties have come to an agreement, and it is not necessary for the state to prove the commission of any further acts in execution of the conspiracy.
- (13) The intention requirement consists in the intention to conspire as well as the intention to commit a crime or to further its commission.

Incitement

- (14) Incitement to commit a crime is punishable in terms of section 18(2) of Act 17 of 1956.
- (15) X ought to be charged with, and convicted of, incitement only if there is no proof that the crime to which she incited another has indeed been committed.
- (16) A person may be convicted of incitement even though there is no proof that she persuaded the incitee to commit the crime.

TEST YOURSELF

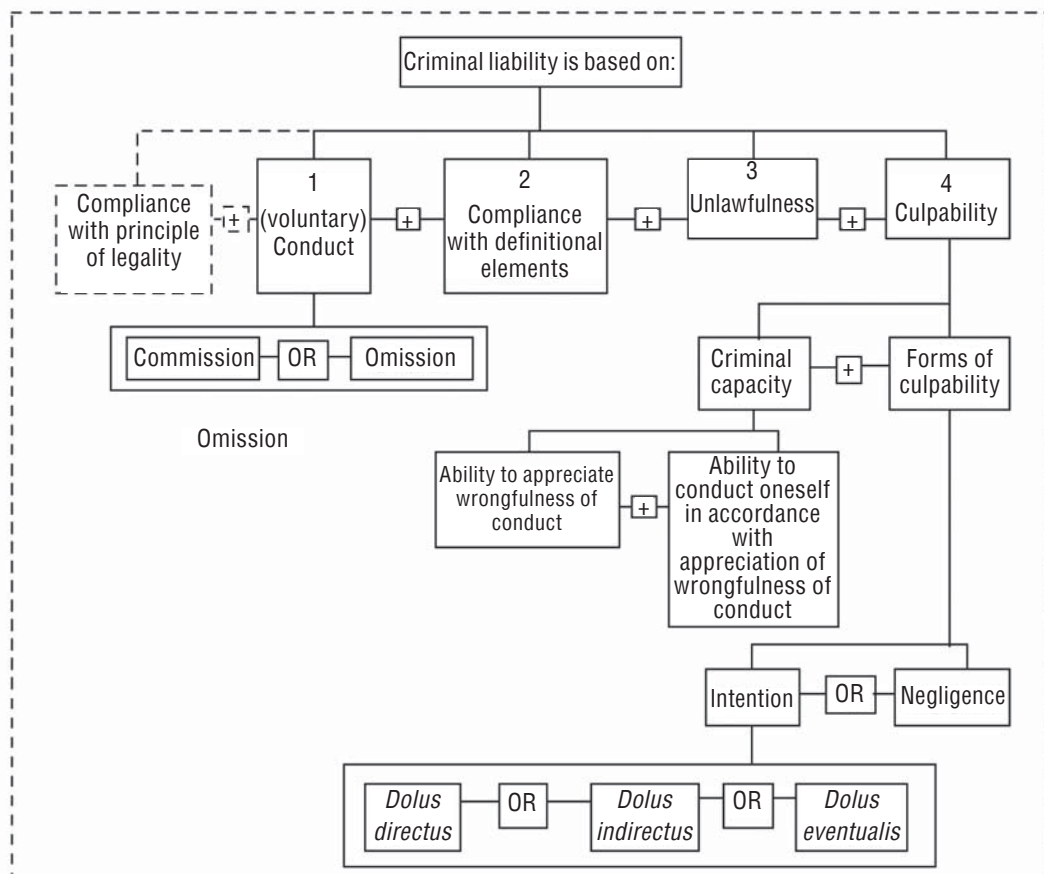
- (1) Define the most important rules relating to the crime of attempt.
- (2) Name the four forms of criminal attempt and briefly explain what each entails.
- (3) Discuss, with reference to examples and decisions, the difference – in the case of an interrupted attempt – between acts of preparation and acts of consummation.
- (4) Explain the rules relating to an attempt to commit the impossible.
- (5) What is meant by a putative crime? Explain.
- (6) Is voluntary withdrawal a defence to a charge of attempt? Explain.
- (7) Discuss the crime of conspiracy.
- (8) Discuss the crime of incitement.

ADDENDUM A

Construction of criminal liability



- Note:** (1) The diagram below represents a standard crime. There are exceptions to this standard model. Strict liability crimes, for example, dispense with the requirement of culpability.
- (2) The reason compliance with the principle of legality is indicated with a dotted line is the following: if a person's liability for a well-known crime such as murder, theft or rape has to be determined, it is so obvious that such a crime is recognised in our law that it is a waste of time to enquire whether there has been compliance with the requirement of legality.



ADDENDUM B

Table of defences and their effect



Note: This table does not contain a complete list of every conceivable defence that an accused can raise when charged with a crime.

Every crime has different definitional elements, and it is impossible here to set out every possible defence based upon the absence of a particular element in the definitional elements of a particular crime (e.g. “premises” in housebreaking, or “property” in theft).

The only defences included in this table are those based upon or related to the absence of a general prerequisite for liability in terms of the general principles of criminal law.

The purpose of this table is to point out the relationship between a particular defence and the corresponding general prerequisite for liability.

Defences of a procedural nature or those related to the law of evidence, as well as the general defence known as an alibi, have been left out for obvious reasons.

If there is an asterisk in the third column after the verdict “not guilty”, it means that a court would not readily find an accused not guilty, but only if the circumstances are fairly exceptional.

Defence	General prerequisite for liability placed in issue	Verdict if defence is successful
Automatism (“sane”, not “insane”)	Act	Not guilty
Act does not comply with definitional elements	Requirement that conduct should comply with definition of the proscription	Not guilty
Act not a <i>sine qua non</i> for result, or not an adequate cause of resultant condition, or <i>novus actus interveniens</i>	Requirement of causation	Not guilty (but possibly guilty of a less serious formally defined crime, such as assault)
Grounds of justification, such as private defence, necessity, consent	Unlawfulness	Not guilty
Youth	Criminal capacity	Not guilty
Mental illness	Criminal capacity	Not guilty
Intoxication	Act	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1998
	Criminal capacity	Not guilty* of crime charged, but guilty of contravening s 1 of Act 1 of 1998
	Intent required for crime charged	Not guilty* of crime requiring intent or contravention of s 1 of Act 1 of 1998, but, if charged with murder, may be found guilty of culpable homicide
If charged with crime requiring intent: result or circumstances not foreseen	Intention	Not guilty (at least on main charge – possibly guilty of less serious crime)
If charged with crime requiring intent: mistake , either of fact or of law	Intention	Not guilty (at least on main charge – possibly guilty of less serious crime)
If charged with crime requiring negligence: conduct was reasonable , i.e. did not deviate from conduct to be expected of reasonable person in the circumstances; OR unlawful result or circumstances not foreseeable	Negligence	Not guilty