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Nov 2015

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SECTION B

QUESTION 1

Question 1(a)

- 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
- No. 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)).

Question 1(b)

- Any 4 of the following factors
 - the relationship between the parties
 - their respective ages, gender and physical strengths
 - the location of the incident
 - the nature, severity and persistence of the attack



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- the nature of any weapon used in the attack
- the nature and severity of any injury or harm likely to be sustained in the attack
- the means available to avert the attack
- the nature of the means used to offer defence
- the nature and extent of the harm likely to be caused by the defence

ii. *Steyn* 2010 1 SACR 411 SCA

The appellant shot and killed her former husband when he threatened her with a knife. The appellant was convicted of culpable homicide. On appeal to the Supreme Court the state argued that the appellant should have fled and thus avoided being assaulted without the necessity of shooting at the deceased. The judge remarked as follows ‘[w]hether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, is a somewhat vexed question. But in the light of the facts in this case, it is unnecessary to consider the issue in any detail’.

OR

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 was 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 or not the order was manifestly and palpably unlawful. Therefore, the court applied the principle laid down in the Constitution of the Republic of South Africa, 1996 (section 199(6)), namely that the defence of obedience to orders will be successful, provided the orders were not manifestly unlawful.

Question (c)

Legal duty: specific instances

- 1.) Statute (eg income tax)



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- 2.) Common law (eg treason – must report)
- 3.) Agreement (eg railway crossing – *Pitwood*)
- 4.) Responsibility for control of dangerous or potentially dangerous object (eg failed to repair cage of baboon that bit child – *Fernandez*)
- 5.) Protective relationship (eg parent/guardian – *B*)
- 6.) Previous positive act (eg lights fire in veldt then walks away without extinguishing)
- 7.) Office (eg police – *Ewels*)
- 8.) Order of court (eg omits to pay maintenance)

QUESTION 2

Question (a)

- No. Only Z is the direct perpetrator because a person is a perpetrator if his conduct, the circumstances in which it takes place and the culpability with which it is carried out are such that he satisfies the requirements for liability contained in the definition of the offence.
X is an indirect perpetrator because he uses Z to commit the murder of Y
- This question deals with causation. In order to find that there is a causal link between Z's act and Y's death, X's act must first be the factual cause and secondly, the legal cause of Y's death.
It is clear that Z's act is the factual cause of Y's death because 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. If Z had not fired a shot in Y's neck, the latter would neither have suffered an injury nor taken to the hospital.
Z'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" is meant considerations which would ensure that it would be reasonable and fair to regard X's act as the cause of Y's death.
In *Mokgheti*, X shot Y, a bank teller into a paraplegic state. Y recovered and resumed work, but was told to move around often in order not to develop pressure sores. Y didn't do this, got pressure sores and died. X was then convicted of murder in regional court. He appealed on the grounds that he should not have been convicted of murder as there was not a sufficient causal connection between the bullet wound and Y's death. Argument: bullet was the factual cause of death; it was not the legal cause.
Judge upheld the appeal confirming that if only the *conditio sine qua non* test has been complied with, at most there is factual causation. Only if there has been compliance with the criterion which further restricts the operation of the sine qua non test can there be legal causation. X was sentenced to 10 years for attempted murder and not murder.

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In light of the factual and legal causation together with the application of the *Mokgheti* case, Z is the factual cause of Y's death but not the legal cause. Therefore Z cannot be convicted of murder of Y but only culpable homicide.

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

In the set of facts it is obvious that Z had the possibility that an accident would occur but nevertheless he proceeds to shoot Y while he was driving his car. In the eyes of law z is the cause of A's death.

Question (b)

X hears the sound of a door opening in the middle of the night. He/she thinks it is a burglar who threatens his/her life. X fires a shot in the direction of the "burglar" and "he" is killed instantly. It appears afterwards that it was X's daughter who had unlocked the door and whom X had killed. X is charged with murder. X can rely on the absence of intention because he was under the impression that he had acted in a situation of private defence (a ground of justification). The criminal liability which is excluded if X is successful with the defence is intention.

Question (c)

i. The doctrine of common purpose holds that if a number of people have a common purpose to commit a crime and in the execution of this purpose, act together, the act of each of them in the execution of this purpose is imputed to the others.

ii. X1, X2 and X3 may all be convicted of murder of Y in terms of the doctrine of common purpose because the intention to commit a murder together with another may consist in the intention actively to associate yourself with the conduct of somebody else which causes the victim's death.

There must be a prior agreement and active association and participation in a common criminal design. In terms of the *Mgedezi* case, if no proof of a previous agreement between the perpetrators, the following requirements must be met to be found guilty based on common purpose:

1. Must have been present at the scene of the crime (not a passive spectator)
2. Must have been aware of the assault on Y
3. He must have intended to make common cause with others
4. He must have performed an act of association



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5. He must have had the intention to kill or to contribute to the death

QUESTION 3

Question (a)

Culpable homicide is the unlawful negligent causing of the death of another. The test for negligence is described as follows; A person's conduct is negligent if:

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

X is negligent in respect of Y's death because the intention to kill is absent, but if, as a reasonable person, he nonetheless ought to have foreseen that he could cause the death of the victim (Y) by driving at a high speed in an urban area. In that event, is guilty and maybe convicted of culpable homicide.

Question (b)

- In Eadie 2002 (1) SACR 663 (SCA), X, a keen hockey player, consumes a large quantity of liquor at a social function. Late at night, he gets into his car and starts driving home. Y, the driver of another vehicle, overtakes X's car and then drives very slowly in front of him so that X cannot overtake him. X eventually succeeds in overtaking Y. Y then drives at a high speed behind X, with the lights of his car on bright. The two cars then stop. X is very angry, gets out of his car, grabs a hockey stick which happens to be in the car, walks to Y's car, smashes the hockey stick to pieces against Y's car, assaults Y continuously, pulls him out of his car and continues to assault him outside the car, on the road. Y dies as a result of the assault. It is a case of "road rage". On a charge of murder, X relies on the defence of non-pathological criminal incapacity. The court rejects his defence and convicts him of murder.

The court discusses previous decisions dealing with this defence extensively, and then holds 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, there is, according to the court, no difference between the second (conative) leg of the test for criminal capacity (ie, X's ability to act in accordance with his appreciation of the wrongfulness of the act \mathcal{D} in other words, his ability to resist temptation) and the requirement which applies to the conduct element of liability that X's bodily movements must be voluntary. If X alleges that, as a result of provocation, his psyche had disintegrated to such an

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extent that he could no longer control himself, it amounts to an allegation that he could no longer control his movements and that he therefore acted involuntarily. Such a plea of involuntary conduct is nothing else than the defence of sane automatism.

The court does not hold that the defence of non-pathological criminal incapacity no longer exists, and in fact makes a number of statements which imply that the defence does still exist. At the same time, it nevertheless declares that if, as a result of provocation, an accused person relies on this defence, and his defence should be treated as one of sane automatism (a defence which 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.

ii. *Thebus* 2003 2 SACR 319 (CC)

Mr Thebus and Mr Adams (the appellants) were convicted and sentenced by the Cape High Court on a count of murder and two counts of attempted murder. They had been part of a protesting group involved in a shoot-out with a reputed drug dealer in Ocean View, Cape Town. As a result of the cross-fire, a young girl was killed and two others wounded. The shots which killed the girl and wounded the other persons came from the group of which first and second appellant were part. However, there was no direct evidence that any of the appellants fired the shots. Appellants were convicted on the basis of the common law doctrine of common purpose

Appellants only raised alibi defences at trial some two years after their arrest.

The SCA confirmed these findings, upheld the state appeal against sentence, and sentenced each appellant to fifteen years imprisonment.

Appellants approached the Constitutional Court on two issues:

1. whether the SCA acted unconstitutionally in failing to develop the doctrine of common purpose, thereby violating their rights to dignity and freedom of the person as well as their right to a fair trial, which includes the right to be presumed innocent;
2. whether the first appellant's right to silence contained in section 35(1)(a) of the Constitution has been infringed by the negative inference drawn by reason of the late disclosure of his alibi defence.

The court dismissed the appeals.

The CC held that the common law doctrine of common purpose is constitutional and does not, in this case, require to be developed as commanded by section 39(2) of the Constitution. It did not violate the right to dignity and did not amount to an arbitrary deprivation of freedom.

The CC found that the right to silence prohibits the drawing of an adverse inference from the failure of the accused to disclose an alibi before the trial commences for two reasons. First, a rule against the drawing of adverse inferences from pre-trial silence protects arrested persons from improper questioning and procedures by the police. Secondly, once an arrested person has been



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informed of the right to remain silent and implicitly that she or he will not be penalised for exercising this right, it is unfair subsequently to use that silence to discredit the person.

Question (c)

- contravening section 1 of Act 1 of 1988
- culpable homicide
- further
- appreciate the wrongfulness / conduct himself in accordance with such an appreciation of the wrongfulness
- knowledge or awareness / will
- definitional elements



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June 2015

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SECTION B

QUESTION 1

- Criminal capacity 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 (ie to distinguish between "right" and "wrong") and
 - (2) the ability to act in accordance with such an appreciation.The defences that may exclude criminal capacity are;
 - Mental Illness(insanity)
 - Youth
 - non-pathological criminal incapacity
- The transferred culpability approach. X intends to shoot and kill Y. The bullet strikes a pole, ricochets and strikes Z fatally. In terms of this approach, X will be guilty of murder because he had the intention to kill a person. The fact that X didn't kill the person that he intended awards him no defence, since the intention he directed towards Y is transferred to the killing of Z.

The concrete figure culpability approach - In terms of this approach X can only be guilty of murder if he was able to foresee the possibility that the bullet could go astray and kill Z and have reconciled himself with this possibility. X's intention to kill Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill the person who was actually struck by the blow, the question



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is not simply whether he had the intention to kill a person, but whether he had the intention to kill the particular person whose death he caused.

Our courts apply the concrete culpability approach,

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

In *Mtshiza* Principles dealt with:

1. *Aberratio ictus*
2. Consequences of *aberration ictus*

Outline:

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

Outcome:

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

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

- iii. The legal points in *Chretien*



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

OR

The “principle of contemporaneity” in culpability

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

S v Masilela 1968

Principles dealt with:

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

Outline:

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

Outcome:

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

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



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

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

QUESTION 2

Question (a)

- The defence of sane automatism. A person who acts in a state of automatism does not act voluntarily.
- The onus on state to prove the act was voluntary
- I would advance on his behalf, by calling medical or other expert evidence to create a doubt whether the act was voluntary.
- X is not guilty of murder because he lacks the intention to kill.
- No. X is not guilty of culpable homicide because he can successfully rely on the defence of automatism.
- Yes X would then be guilty of culpable homicide. 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.

Question (b)

The state will have to prove that X's act was the factual, as well as the legal, cause of Y's death. Factual causation is easy to prove: had X not shot Y in chest and the abdomen, he would not have been admitted to hospital. Therefore, X's act is a *conditio sine qua non* of Y's death.

X's act can also be viewed as the legal cause of Y's death. The relevant authority is *S v Tembani* 2007 (1) SACR 355 (SCA). In this case, the Supreme Court of Appeal held that the deliberate infliction of an intrinsically dangerous wound from which the victim is likely to die without medical intervention generally leads to liability for an ensuing death, even if the medical treatment given later is substandard or negligent. However, the negligent medical treatment may be viewed as a *novus actus interveniens* if, at the time of the treatment, the victim had recovered to such an extent that the original injury no longer posed a danger to his life. In terms of the stated facts, this is not the position.

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

Question (c)

Provocation may have one of the following effects:



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- it may exclude X's intention
- it may confirm the existence of X's intention
- after conviction it may serve as ground for the mitigation of punishment

QUESTION 3

- a) *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 aim, and the blow or shot strikes somebody or something else. *Aberratio ictus* can be illustrated by the following example;

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.

Error in objecto is form of mistake in that the perpetrator believes the object against which he/she directs his/her action to be something or somebody different from what it in fact is. If the mistake is material, it can exclude intention and afford X a defence.

Whether, in a specific set of facts, error in objecto affords a person a valid defence will depend upon the elements of the specific crime with which he/she is charged. For example, the crime of "murder" is defined as the "unlawful, intentional causing of the death of another human being". Therefore the object of the crime is "another human being". Suppose for instance that X goes hunting one evening at dusk. He fires a shot at a figure which he thinks is a buck. The object in fact is a human being who was walking in the bush. The person dies as a result of the shot and X is charged with murder. X can rely on the defence that his mistake excluded intention. Because he did not have the intention to kill a "human being" (as required for the crime of murder) his mistake concerning the object of the crime was material.

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

OR

Private defence requirements

(1) Requirements of attack

The attack

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



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(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

b) Discuss any one of the following

i. *De Oliveira*

Principles dealt with:

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

Outline:

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

Outcome:

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

ii. *S v Goliath* 1982

Principles dealt with:

- Necessity
- Compulsion as an act of necessity


Outline:

Y threatened to kill X if X did not help kill Z. X could not run away or Y would have killed X. Y was convicted of murder and X was acquitted, but the state appealed to the appellate on a question of law. The question asked was whether compulsion could ever be a complete defence to a charge of murder.

Outcome:

Rumpff, AJ

All 5 judges held that compulsion is a valid defence to a charge of murder.



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iii. *S v De Blom* 1977 (3) SA 513 (A).

Principles dealt with:

- Mistake relating to law

Outline:

X was charged with contravening an obscure foreign exchange law with regards to exporting jewelry out of the country and pleaded ignorance of the law. She was convicted and appealed.

Outcome:

Rumpff, HR

Defence of ignorance of the law was upheld and the conviction was set aside. “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”

The test for negligence;

A person’s conduct is negligent if:

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

c) Although the test for negligence is objective, subjective factors are taken into account in the following instances:

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



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3. 5
4. 5
5. 4
6. 5
7. 4
8. 2
9. 2
10. 1

SECTION B

QUESTION 1

- a) Whether a person may kill another person in a situation of necessity?

Possibly the most perplexing question relating to necessity as a ground of justification: whether a threatened person may kill another in order to escape from the situation of emergency.

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 which 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/Mneke / Bradbury*)

In *Goliath* 1972 (3) SA 1 (A) however, 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.

In the trial court, X was acquitted on the ground of compulsion on appeal, Appeal Court held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder. added that a court should not lightly arrive at such a conclusion, facts would have to be closely scrutinised and judged with the greatest caution.



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One of the decisive considerations in the court's main judgment, was that one 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.

OR

The ground of justification known as obedience to orders

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

The first approach is that the subordinate has a duty of blind obedience to his superior's order. According to this view an act performed in obedience to an order will always constitute a ground of justification. This view cannot be supported. For example, a subordinate is ordered by a superior to commit rape. According to this approach, obedience to orders would be a complete defence.

The second approach holds that the fact that the subordinate obeyed an order is not a ground of justification. This approach cannot be supported since it implies that a subordinate must, before complying with any order issued to him, first decide for himself whether it is unlawful or unlawful.

In *Smith* the court rejected both the above approaches, and opted for a middle course: "a soldier is compelled to obey an order only if the order is manifestly lawful. If it is manifestly unlawful, he may not obey it, and if he does, he acts unlawfully". Section 199(6) of the Constitution provides that no member of any security service may obey a manifestly illegal order.

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 was 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 or not the order was manifestly and palpably unlawful. Therefore, the court applied the principle laid down in the Constitution of the Republic of South Africa, 1996 (section 199(6)), namely that the defence of obedience to orders will be successful, provided the orders were not manifestly unlawful.

b) (i)



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The facts in question are materially similar to the fact in *Chretien* 1981 (1) SA 1097 (A) which is discussed below;

In *Chretien*: Principles dealt with:

1. Intoxication

Outline:

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

Outcome:

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

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

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

In conclusion to the matter in question, X cannot be convicted of common assault because his act lacks intention which is a requirement for this offence.

(ii)

The elements of the offence in s 1 of Act 1 of 1988 are the following:

- A person who consumes any substance
- which impairs his faculties to appreciate the wrongfulness of his conduct or act in accordance with that appreciation (in other words, to the extent that he lacks criminal capacity)
- whilst knowing that the substance has that effect
- and then commits an act which is prohibited under penalty (or commits a crime)
- while he lacks criminal capacity
- and is, because of the absence of criminal capacity, not liable for the crime (in other words, acquitted of the crime on the ground of having lacked criminal capacity)
- may be convicted of the statutory offence created in s 1 (1).



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

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

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

c) **Legal duty: specific instances**

- 1.) Statute (eg income tax)
- 2.) Common law (eg treason – must report)
- 3.) Agreement (eg railway crossing – Pitwood)
- 4.) Responsibility for control of dangerous or potentially dangerous object (eg failed to repair cage of baboon that bit child – Fernandez)
- 5.) Protective relationship (eg parent/guardian – B)
- 6.) Previous positive act (eg lights fire in veldt then walks away without extinguishing)
- 7.) Office (eg police – Ewels)
- 8.) Order of court (eg omits to pay maintenance)

QUESTION 2

a)

i. ***Novus actus interveniens***

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

ii. **Indirect intention (*dolus indirectus*)**

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.

iii. ***Dolus eventualis***

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



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(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 with this possibility.

b) Discuss any one of the following two cases

i. *Tembani 2007 (1) SACR 355 (SCA)*

Facts

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.

Legal question: whether negligent medical care can be regarded as a new, intervening cause that exempts the original assailant (X) from liability.

Reasoning:

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.

It is irrelevant whether the wound was treatable, or medical treatment given later was substandard or negligent.

Only exception: If Y had recovered to such an extent at the time of negligent treatment that the original injury no longer posed a threat to his life.

This approach based on **two policy considerations:**

An assailant who deliberately inflicts an intrinsically fatal wound consciously embraced the risk that death might ensue. If others failed to intervene while the wound remained fatal, his moral culpability was not diminished

In South Africa, medical resources are sparse and badly distributed. Negligent medical treatment is neither abnormal nor extraordinary here. Therefore, negligent medical treatment does not constitute a *novus actus interveniens* that exonerates the assailant from liability while the wound is still intrinsically fatal.

ii. *Eadie 2002 (1) SACR 663 (SCA)*

Facts

X, a keen hockey player, consumes a large quantity of liquor at a social function. Late at night, he gets into his car and starts driving home. Y, the driver of another vehicle, overtakes X's car and then drives very



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slowly in front of him so that X cannot overtake him. X eventually succeeds in overtaking Y. Y then drives at a high speed behind X, with the lights of his car on bright. The two cars then stop. X is very angry, gets out of his car, grabs a hockey stick which happens to be in the car, walks to Y's car, smashes the hockey stick to pieces against Y's car, assaults Y continuously, pulls him out of his car and continues to assault him outside the car, on the road. Y dies as a result of the assault. It is a case of "road rage". On a charge of murder, X relies on the defence of non-pathological criminal incapacity. The court rejects his defence and convicts him of murder.

Legal question: Whether non-pathological criminal incapacity (npci) is a defence in our law.

Reasoning:

Judge dismissed appeal

There is no distinction between npcic and the defence of sane automatism.

There is no difference between second leg of criminal capacity (cognitive element) and conduct element requiring voluntary act.

c)

- i. The answer to this question is "yes". X can rely on private defence because he complies with all the requirements for this ground of justification. There is clear authority in our law that the interest protected by the person acting in private defence, and the interest infringed, need not necessarily be the same. See *Van Wyk 1967 (1) SA 488 (A)*. These requirements are:

Attack:

The attack against X was unlawful.

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

The attack was threatening but not yet completed.

Defensive action:

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

The defence was necessary to protect his interests.

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

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

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

- ii. X can not be convicted of culpable homicide because her conduct does not fulfill the definitional elements for the crime of culpable homicide.
- iii. Yes, X's mistake affords him a defence. Because X was under the incorrect impression that he was acting in private defence, he lacked intention and cannot be convicted of assault. Intention consists of two



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elements: knowledge and will. The knowledge requirement means that X's intention must relate to all the elements of the offence except, of course, the requirement of culpability. His intention must relate to

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

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

In *De Oliveira*

Principles dealt with:

1. Mistake relating to a ground of justification
2. Putative private defence

Outline:

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

Outcome:

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

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

QUESTION 3

- a) 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



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OR

The test for negligence;

A person's conduct is negligent if:

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

b) 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**

Which makes him or her incapable

- Of appreciating the wrongfulness of his or her act or omission or
- Of acting in accordance with an appreciation of the wrongfulness of his or her act or omission

Shall not be criminally liable for such act or omission.

c) The answers are;

- i. assault / omission
- ii. objectively
- iii. antecedent
- iv. necessity



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SECTION A

1. 4
2. 3
3. 2
4. 1
5. 3
6. 3
7. 4
8. 5
9. 4
10. 3

SECTION B

QUESTION 1

a) The four general requirements for a crime in the correct sequence are the following:

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

b)

i. The principle of legality

An accused may

- (1) not be convicted of a crime -
 - (a) unless the type of conduct with which she is charged has been recognized 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)

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- ii. This *ius acceptum* principle holds that a court may find an accused guilty of a crime only if the kind of act performed is recognised by either common law or statute as a crime. In short the court can not create a crime.

The facts in question materially relate to the case of *Francis* 1994 (1) SACR 350 (C) summarised below Principles dealt with:

- Whether or not an act is a crime if it is not explicitly stated as such in a statute?

Outline:

Accused absconded from treatment facility and was charged under an Act promulgated in 1971. A later act of 1992, however, repealed the 1971 act and did not contain any criminal sanction or norm. Thus no criminal act was committed.

Outcome:

Conviction of accused was repealed.

The matter in question involves X being charged with a statutory crime. In light with the *ius acceptum* principle, if the legislation involved in this matter intended to create a crime it must comply with two requirements.

Firstly the legislation must describe the conduct that amounts to a crime.

Secondly it must state the sanction that must be imposed by the court upon the person convicted of such a crime.

In order for X to be charged with the concerned crime, the court will have to distinguish between legal norm, criminal norm and a criminal sanction in the legislation. The provision in the scenario creates only a legal norm creating a legal rule that does not create a crime as well as the criminal sanction that may be imposed upon a person who commit the concerned crime. However X may not be charged with the crime in question due to lack of compliance with the *ius acceptum* rule and the decision in the *Francis* case.

c)

- i. If the legal convictions of the community require a person to do so.

ii. **Legal duty: specific instances**

- Statute
- Common law
- Agreement
- Responsibility for control of dangerous or potentially dangerous object
- Protective relationship
- Previous positive act
- Office
- Order of court

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- iii. In *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 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 van Polisie v Ewels* the court held that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the victim of the assault.

QUESTION 2

- a) It is clear from this question that the requirement of criminal liability in dispute is causation. Our courts determine whether X's act is the cause of Y's result by investigating whether the act is the factual as well as the legal cause of Y's death. Factual causation is determined by applying the *condition sine qua non*-test (Daniels case). According to this test, an act is the cause of a result if the act cannot be thought away without the result disappearing at the time.

Because so many factors can be viewed as the cause of the result in terms of this theory, our courts also apply certain other tests to determine legal causation. These are the individualization theory which focuses on the most operative or proximate cause; the theory of adequate causation in terms of which an act is regarded as a cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that kind of situation and the theory of *novus actus interveniens* which requires an investigation whether there was an unexpected, abnormal or unusual occurrence which broke the chain of causation between X's act and the result.

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

- b) Whether a person may kill another person in a situation of necessity?
Possibly the most perplexing question relating to necessity as a ground of justification: whether a threatened person may kill another in order to escape from the situation of emergency.



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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 which 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/Mneke / Bradbury*)

In *Goliath* 1972 (3) SA 1 (A) however, 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.

In the trial court, X was acquitted on the ground of compulsion on appeal, Appeal Court held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder. added that a court should not lightly arrive at such a conclusion, facts would have to be closely scrutinised and judged with the greatest caution.

One of the decisive considerations in the court's main judgment, was that one 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.


- c) The defensive act
- (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

QUESTION 3

- a) The test for negligence;

A person's conduct is negligent if:

- a reasonable person in the same circumstances would have foreseen the possibility
- that the particular circumstance might exist, or that his conduct might bring about the particular result, and
- a reasonable person would have taken steps to guard against such a possibility, and



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- the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person

OR

Provocation may have one of the following effects:

- it may exclude X's intention
- it may confirm the existence of X's intention
- after conviction it may serve as ground for the mitigation of punishment

b)

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

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

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

X's mistake does not relate to whether he was killing a human being, but to the identity of the human being. His mistake (error in objecto) is not material and will not exclude intention because murder is committed whenever a person unlawfully and intentionally kills a human being, and not merely when a person kills the particular person he intended killing.

Therefore X is guilty of murder.

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

Aberratio ictus is not a form of mistake because X has correctly pictured what he is aiming at (thus no *error in objecto*), but through lack of skill or other factors he misses his aim and the blow strikes somebody else. In order to decide whether X has committed murder, it is necessary to determine whether X had intention in respect of A's death.

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

In the *Mtshiza* case: As far as X's liability in respect of A's death is concerned, there are three possibilities: If he had foreseen that A would be struck and killed by the blow, and had reconciled himself to this possibility, he had *dolus eventualis* in respect of A's death and is guilty of murder in respect of A.

If he had not foreseen the possibility that his blow might strike and kill someone other than Y, or, if he had foreseen such a possibility but had not reconciled himself to this possibility, he lacked *dolus eventualis* and therefore cannot be guilty of murder. However, this does not necessarily mean that X is not guilty of any crime. Murder is not the only crime of which a person can be convicted if he causes another's death. There is also the possibility of culpable homicide, which consists in the unlawful negligent causing of the death of another. X will be negligent in respect of A's death if the intention to kill is absent, but if, as a reasonable



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person, he nonetheless ought to have foreseen that he could cause the death of A. In that event, X will be guilty of culpable homicide.

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

c) Any one of the following

1. *Van Wyk* 1967 (1) SA 488 (A).

X rigged a shotgun by a window to protect his property after numerous break ins. Someone broke in and was shot and killed by the rigged gun. He then used private defence to justify his actions and was acquitted. The Minister of Justice then put certain questions to the appellate division:

- Whether someone can rely on private defence when protecting property?
- Assuming (i) is positive, whether limits of private defence had not been exceeded in the above case?

The court held that;

First question was answered positively by all 5 judges.

In second question, 3/5 judges held that the limits had not been exceeded.

However the common law rule in *Van Wyk* (ie that one 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 which right (that of the aggressor to his life or that of the defender to his property) should prevail. It is submitted 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.

OR

2. *Chretien* 1981 (1) SA 1097 (A)

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



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state wanted X found guilty on the charge of common assault (which required intent) for the counts of attempted murder.

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

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

- d) The fill in answers are
- detriment
 - unlawful
 - subjective
 - De Blom* 1977 (3) SA 513 (A)



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SECTION A

1. 3
2. 1
3. 5
4. 3
5. 4
6. 1
7. 2
8. 2
9. 2
10. 4

SECTION B

QUESTION 1

- a) *Zinn 1969 (2) SA 537 (A)*,
- i. The three factors are
the crime,
the criminal, and
the interests of society.
 - ii. Crime – degree of harm or seriousness of violation (retributive theory)
Criminal – personal circumstances of criminal (reformative theory)
Interests of society – protection (preventive theory), deterrence (deterrence theory); retribution (retributive theory)
- b) The four general requirements for a crime in the correct sequence are the following:
- (1) conduct
 - (2) which complies with the definitional elements of the crime
 - (3) and which is unlawful
 - (4) and culpable

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c) A voluntary act is when X is capable of subjecting his bodily movements to his will or intellect. It plays a huge role in determining whether X's actions amount to a conduct or an omission that is punishable under criminal law.

Willed act on the other hand determines whether there was an act in the criminal-law sense of the word, the question. Willed act plays a role when determining culpability especially in form of intention.

d) *Any of the two cases*

i. *Daniels* 1983 (3) SA 275 (A)

Majority – both acts cause of Y's death. 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 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.

Minority – head shot – *novus actus interveniens*. The head shot 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. X was guilty of attempted murder only.

ii. *Mokgheti* 1990 (1) SA 32 (A)

In *Mokgheti*, X shot Y, a bank teller into a paraplegic state. Y recovered and resumed work, but was told to move around often in order not to develop pressure sores. Y did not do this, got pressure sores and died. X was then convicted of murder in regional court. He appealed on the grounds that he should not have been convicted of murder as there was not a sufficient causal connection between the bullet wound and Y's death because Y's failure to move around created a *novus actus interveniens*. Argument: bullet was the factual cause of death, it was not the legal cause.

Judge upheld the appeal confirming that if only the *conditio sine qua non* test has been complied with, at most there is factual causation. Only if there has been compliance with the criterion which further restricts the operation of the *sine qua non* test can there be legal causation. X was sentenced to 10 years for attempted murder and not murder.

iii. *Tembani* 2007 (1) SACR 355 (SCA)



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Legal question: whether negligent medical care can be regarded as a new, intervening cause that exempts the original assailant (X) from liability.

Reasoning:

- 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.
- It is irrelevant whether the wound was treatable, or medical treatment given later was substandard or negligent.
- Only exception: If Y had recovered to such an extent at the time of negligent treatment that the original injury no longer posed a threat to his life.
- This approach based on **two policy considerations:**
- An assailant who deliberately inflicts an intrinsically fatal wound consciously embraced the risk that death might ensue. If others failed to intervene while the wound remained fatal, his moral culpability was not diminished
- In South Africa, medical resources are sparse and badly distributed. Negligent medical treatment is neither abnormal nor extraordinary here. Therefore, negligent medical treatment does not constitute a *novus actus interveniens* that exonerates the assailant from liability while the wound is still intrinsically fatal.

QUESTION 2

Question (a)

The missing words

- unlawful
- necessity
- material
- concrete-figure culpability.....transferred culpability
- S v De Blom* 1977 (3) SA 513 (A)

Question (b)

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



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S v Masilela 1968

Principles dealt with:

- Culpability
- *Mens rea*
- Principle of contemporaneity

Outline:

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

Outcome:

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

Question (c)

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

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


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

It may exclude X's intention. Depending on the specific facts of the case, provocation may have the effect that, at the time of the commission of the unlawful act, X did not act with knowledge of unlawfulness.

It may also have the opposite effect, that is, to confirm the existence of X's intention. Evidence of provocation is then nothing more than evidence of the initial reason for X's conduct.

After conviction it may serve as a ground for the mitigation of punishment.

- ii. X, who is charged with murder, raises as defence the fact that she was intoxicated, he can in terms of the judgment in *Chretien* be acquitted on the murder charge (because intoxication negates the required intent), but in almost all such cases he will be guilty of culpable homicide. This is due to the fact that the form of culpability required for a conviction of culpable homicide is negligence; because the test for negligence is objective (namely how the reasonable person would have acted), and because the reasonable person would



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not have indulged in an excessive consumption of alcohol. This end result (namely a conviction of culpable homicide) can be reached without making use of the "specific intent" theory.

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

Briefly stated, X will be found guilty of contravention of section 1 of the Act if he was charged with an offence of murder of Y.

QUESTION 3

Question (a)

- i. The relevant requirement for deciding whether X can successfully rely on private defence, is the requirement relating to the defensive act that there must be a reasonable relationship between the attack and the defensive act, or put differently, the act of defence may not be more harmful than is necessary to ward off the attack.
- ii. In order to decide whether there was a reasonable relationship between attack and defence, certain factors should be taken into account. The most relevant here are:
- The relative strength of the parties: we are told that X is strongly built; whereas Y is referred to as being young. The fact that X managed to dispossess Y of the knife after grabbing her arm is an indication of his strength.
 - The sex of the parties: in addition to being strongly built, X is a male whereas Y is a female. Generally speaking, it is fair to say that this factor is significant.
 - The means they have at their disposal: Y had a long, sharp knife, whereas X only had his fists. This should be balanced against the first two factors above.
 - The nature of the threat and the value of the interest threatened: it is fair to say that X's life and bodily integrity were in danger. This should be balanced against the first two factors above.



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- The persistence of the attack: Y's attack on X was not persistent, especially after X dispossessed her of the knife. However, even after dispossessing Y of the knife, X persisted in assaulting Y to the point that she was severely injured and subsequently died as a result of brain damage. This factor indicates the excessive nature of X's attack on Y.

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

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

Applying these factors, the conclusion would be that X cannot rely on private defence because he did not satisfy this requirement, or he exceeded the bounds of private defence.

Question (b)

EITHER

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

The point of departure is an assumption or presumption that it was not the intention of the legislature to exclude culpability, unless there are clear and convincing indications to the contrary. Such indications can be found in

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

OR

Section 78(1) of the Criminal Procedure Act 51 of 1977 provides that;

- 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
- Which makes him or her incapable
- Of appreciating the wrongfulness of his or her act or omission or
- Of acting in accordance with an appreciation of the wrongfulness of his or her act or omission



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- Shall not be criminally liable for such act or omission.



Question (c)

The Appeal Court held in *Ngubane* 1985 (3) SA 677 (A) that intention and negligence are conceptually different and that these two concepts never overlap. On the other hand, the court held that it is incorrect to assume that proof of intention excludes the possibility of a finding of negligence. The facts of a particular case may reveal that, although X acted intentionally, he also acted negligently in that his conduct did not measure up to the standard of the reasonable person.