

Tutorial Letter 102/2/2018

Criminal Law: General Principles CRW2601

Semester 1

Department of Criminal and Procedural Law

This tutorial letter contains important information
about your module.

BARCODE

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Dear Student

We trust that you have already familiarised yourself with the first tutorial letter, as well as with the study guide and prescribed texts. Note that all tutorial letters are very important and should be read carefully.

In this tutorial letter, we discuss the format of the examination paper you will be writing in October/November 2018. In order to assist you with preparation for these exams, we provide you with the exam paper written last year in November.

Feedback on the questions in the November 2017 paper is provided. The feedback also serves as an example of how we expect students to answer if similar types of questions were to be asked. There is information on discussion classes that will be conducted by the lecturers during the semester.

We also alert you to important amendments to the study material, and provide you with information regarding your tutorial letters.

1 FORMAT OF THE OCTOBER/NOVEMBER 2018 EXAMINATION PAPER

The format of the examination paper for the October/November 2018 examinations will in essence be the same as that of previous examination papers.

2 EXAMPLE OF A PREVIOUS EXAMINATION PAPER

Below we provide you with an example of a previous examination paper and feedback on the paper. Please take note that this exam paper as well as other past exam papers for this course are also available online for you to download at "Previous exam papers" under the course code CRW2601 on myUnisa.

If this is the first year that you have enrolled for this module, you will find it difficult to understand the answers and the feedback on the examination paper. However, once you have studied all the different topics dealt with in the examination paper, the questions and the feedback will make sense. We therefore recommend that you do not read the feedback until you have studied the relevant topics. If you were registered for this course previously, you will find the feedback valuable, since you have been exposed to the topics already. If you have previously failed this course, and are now repeating the module, you should read both the answers and the feedback carefully, in order to see where you went wrong in the examination.

CRW2601

(478194) October/November 2017

GENERAL PRINCIPLES OF CRIMINAL LAW

Duration : 2 Hours

100 Marks

EXAMINERS :

FIRST :

PROF L JORDAAN

MR RD RAMOSA

SECOND :

PROF N MOLLEMA

Closed book examination.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

This paper consists of seven (7) pages plus the instruction for the completion of the mark reading sheet.

THE QUESTIONS IN THIS PAPER COUNT A HUNDRED MARKS. THE PAPER CONSISTS OF TWO PARTS, MARKED A AND B. YOU MUST ANSWER BOTH PART A AND PART B. PART A CONSISTS OF TEN MULTIPLE CHOICE QUESTIONS. YOU MUST FILL IN THE ANSWERS TO THESE QUESTIONS ON THE MARK READING SHEET. THE CORRECT ANSWER FOR EACH OF THESE QUESTIONS COUNTS THREE MARKS. THIS MEANS THAT THE QUESTIONS IN PART A COUNT A TOTAL OF THIRTY MARKS. IN PART B, THE ANSWERS TO THE QUESTIONS MUST BE WRITTEN IN THE EXAMINATION ANSWER BOOK. THE QUESTIONS IN PART B COUNT SEVENTY MARKS.

PART A (MULTIPLE CHOICE QUESTIONS)

IMPORTANT NOTICE. THE QUESTIONS IN THIS PART HAVE TO BE ANSWERED ON THE MARK READING SHEET, WHICH WILL BE ISSUED WITH YOUR EXAMINATION ANSWER BOOK. YOU HAVE TO READ THE INSTRUCTIONS IN CONNECTION WITH THE USE OF THE MARK READING SHEET CAREFULLY. FAILURE TO DO SO MAY MEAN THAT YOUR ANSWERS CANNOT BE MARKED BY THE COMPUTER.

Ten questions (marked 1-10) follow. Each question contains three statements (marked (a) – (c)). Some of the statements are correct and some are incorrect. You must decide which of these statements is/are correct. The three statements are followed by five allegations (marked (1) – (5)). Each of them alleges that a certain statement or combination of statements is correct. You must decide which allegation accurately reflects the conclusions to which you have come.

Question 1

- (a) The principle of legality is contained in section 35(3)(l) of the Constitution of the Republic of South Africa, 1996.
 - (b) An investigation into the presence of the four general requirements for a crime, namely conduct, which complies with the definitional elements of the crime and which is unlawful and culpable, need not follow a certain sequence.
 - (c) A legal norm in an Act is a provision that makes it clear that certain conduct constitutes a crime.
- (1) Only statement (a) is correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statements (a) and (b) are correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All the statements are correct.

Question 2

- (a) In *Prins 2012 (2) SACR 183 (SCA)* the court rejected the argument that a person accused of a statutory offence cannot be charged and convicted if there was not a sentence prescribed in the particular legislation.
 - (b) In *Masiya 2007 (2) SACR 435 (CC)* the Constitutional Court held that the extended definition of the crime of rape applied retrospectively upon the accused.
 - (c) *In Mshumpa 2008 (1) SACR 126 (E) the court refused to extend the definition of murder to include the killing of an unborn child.*
- (1) Only statement (c) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (b) and (c) are correct.
 - (4) Only statements (a) and (b) are correct.
 - (5) Only statements (a) and (c) are correct.

Question 3

- (a) In *Henry 1999 (1) SACR 13 (SCA)* the court rejected the accused's reliance on the defence of sane automatism.
 - (b) A successful defence of insane automatism results in X leaving the court a free person.
 - (c) A person who accepts responsibility for the control of a dangerous or potentially dangerous object is under a legal duty to control it properly.
- (1) Only statement (a) is correct.
 - (2) Only statements (a) and (b) are correct.
 - (3) Only statements (a) and (c) are correct.
 - (4) Only statement (c) is correct.
 - (5) Only statement (b) is correct.

Question 4

- (a) Legal causation is determined **only** by using the theory of adequate causation.
 - (b) In *Patel* 1959 (3) SA 121 (A) the court held that X may act in private defence to protect a third party (Y), even if there is no family or protective relationship between X and Y.
 - (c) In *Goliath* 1972 (3) SA 1 (A) the court stated that, considering everyone's inclination to self-preservation, an ordinary person regards his own life as being more important than that of another.
- (1) Only statements (a) and (b) are correct.
 - (2) Only statement (a) is correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All the statements are correct.

Question 5

- (a) In *Van Wyk* 1967 (1) SA 488 (A) the court held that, in extreme circumstances, a person is entitled to kill another person in defence of property.
 - (b) In *Steyn* 2010 (1) SACR 411 (SCA) the court held that the accused could not rely on private defence because she had used more force than was necessary to defend herself.
 - (c) One of the requirements for a valid plea of consent is that the consenting person must be aware of the true and material facts regarding the act to which she consents.
- (1) Only statements (a) and (b) are correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) All the statements are correct.

Question 6

- (a) The case of *Masilela* 1968 (2) SA 558 (A) constitutes an **apparent exception** to the general rule that the unlawful act and the culpability must have existed at the same moment.
 - (b) According to the *Child Justice Act* 75 of 2008, a child who is between the ages of 10 and 14 can be held criminally liable if the state proves that he/she had criminal capacity at the time of committing an offence.
 - (c) "Grounds of justification" refer to **any** defence that excludes criminal liability.
- (1) Only statements (a) and (b) are correct.
 - (2) Only statements (b) and (c) are correct.
 - (3) Only statement (c) is correct.
 - (4) All the statements are correct.
 - (5) Only statements (a) and (c) are correct.

Question 7

- (a) In *Eadie* 2002 (1) SACR 663 (SCA), the accused successfully relied on the defence of non-pathological criminal incapacity and was acquitted of murder.
 - (b) Intoxication in itself can constitute mental illness.
 - (c) The test for mental illness contains a pathological leg and a psychological leg.
- (1) Only statement (a) is correct.
 - (2) Only statement (c) is correct.
 - (3) Only statement (b) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) None of the statements is correct.

Question 8

- (a) Intention, in whatever form, consists of two elements, namely a cognitive and conative element.
 - (b) According to South African law, ignorance of the law is no excuse.
 - (c) Section 1 of the Criminal Law Amendment Act 1 of 1988 prohibits every accused person from committing a crime whilst intoxicated irrespective of the degree of such intoxication.
- (1) Only statements (a) and (c) are correct.
 - (2) Only statement (c) is correct.
 - (3) Only statement (b) is correct.
 - (4) None of the statements is correct.
 - (5) Only statement (a) is correct.

Question 9

- (a) An accomplice is a person who satisfies all the requirements in the definition of a crime.
 - (b) A "joiner-in" cannot be convicted of murder.
 - (c) *Williams* 1980 (1) SA 60 (A) is authority for the point of view that a person may be convicted as an accomplice to the crime of murder.
- (1) Only statements (a) and (b) are correct.
 - (2) All the statements are correct.
 - (3) Only statement (c) is correct.
 - (4) Only statements (a) and (c) are correct.
 - (5) Only statements (b) and (c) are correct.

Question 10

- (a) In *Schoombie* 1945 AD 541 the court decided that liability for interrupted attempt is determined by means of an objective test in terms of which a distinction is drawn between acts of preparation and acts of execution.
 - (b) An accessory after the fact is classified as a non-participant.
 - (c) The distinction between a direct and an indirect perpetrator is significant when determining the degree of liability in participation.
- (1) Only statement (a) is correct.
 - (2) Only statement (b) is correct.
 - (3) Only statements (a) and (b) are correct.
 - (4) Only statements (b) and (c) are correct.
 - (5) All the statements are correct.

SUB-TOTAL [30]

PART B

THIS PART CONSISTS OF THREE QUESTIONS, NUMBERED 1, 2 AND 3. YOU MUST ANSWER ALL THREE QUESTIONS (WITH THEIR SUBDIVISIONS). NOTE THAT SOME OF THE QUESTIONS CONTAIN A CHOICE BETWEEN TWO ALTERNATIVES. SUBSTANTIATE YOUR ANSWERS AND REFER TO DECIDED CASES WHERE RELEVANT. IN DETERMINING THE LENGTH OF YOUR ANSWERS YOU SHOULD BE GUIDED BY THE MARKS ALLOCATED TO EACH QUESTION.

Question 1

- (a) Explain briefly the five rules that embody the principle of legality (do not merely provide the Latin names of these rules). **(5)**
 - (b) Explain the difference between absolute force and relative force. In your answer, also state the defence that X may raise to exclude criminal liability in each instance. **(4)**
 - (c) Distinguish between formally-defined and materially-defined crimes. Indicate in which of these two groups of crimes is the crime of possession of drugs to be categorised. **(5)**
 - (d) Define the *conditio sine qua non* theory, and provide one practical example of the application of the theory. **(3)**
 - (e) Define the test for determining when conduct will be regarded as unlawful. In your answer, briefly explain the application of this test in the case of *Fourie* 2001 (2) SACR 674 (C). **(8)**
- [25]**

Question 2

(a) NOTE THE CHOICE YOU HAVE IN THIS QUESTION

- (i) Briefly discuss the two approaches followed in legal literature for judging an *aberratio ictus* situation.

OR

- (ii) "A mistake can exclude intention only if it is material". Briefly explain the criteria (yardstick) that determine whether a mistake may be relied on as a defence. Provide one example that demonstrates the application of each criterion. (6)

- (b) **A, B and C** plan a cash-in-transit robbery. **A** works at the security company that transports secured monies to service ATMs. The monies are secured in cash boxes that are placed behind a cash-in-transit van. **A** places two explosives in empty boxes whilst assisting to place the boxes containing the monies. The plan involves detonating the explosives on route, and appropriating the money-boxes. The cash-in-transit vehicle leaves the depot and proceeds on its scheduled route. **B** and **C** travel in a separate vehicle whilst monitoring the van at a distance.

The explosives are detonated by a remote and the cash-in-transit van blows up on the freeway. The driver of the van is concussed by the effect of the explosion and the van comes to an immediate stop. Armed with firearms, **B** and **C** get out of their vehicle and proceed towards the stationary van. As they loot the van of the money-boxes, a police vehicle arrives at the scene and gunfire is exchanged between the robbers and the two police officers. **C** is fatally wounded during this exchange. One of the stray bullets fired by the officers fatally wounds a bystander (**Y**).

A and **B** are eventually caught by the police and charged with various charges. Answer the following questions:

- (i) **A** and **B** are charged with **robbery** in relation to the cash-in-transit incident. Define the **doctrine of common purpose** and state the basis of their liability on this charge. (5)
- (ii) **A** and **B** are charged with **murder** in relation to the death of **Y** (the bystander). On behalf of **A**, it is argued that the death of **Y** by a bullet fired by police officers was not foreseen. With **reference to case law**, determine whether **A** had the necessary intention. (5)
- (iii) On the charge of **murder** in relation to the death of **Y** (the bystander), **B**'s lawyer argues that the fatal shot fired by the police officers was a *novus actus interveniens* exonerating **B** from being the cause of **Y**'s death. With **reference to case law**, determine whether **B** can succeed on this argument. In your answer, define a *novus actus interveniens*. (4)
- (c) Define each of the three forms of intention and provide an illustration of each. (8)
- (d) Define the concept "voluntary act". (2)

[30]

Question 3

(a) **NOTE THE CHOICE YOU HAVE IN THIS QUESTION**

(i) Define the test for negligence.

OR

(ii) Summarize the legal points decided in *Chretien* 1981 (1) SA 1097(A) regarding the effect of intoxication on criminal liability. **(5)**

(b) Define criminal capacity, and name the defences that exclude this element. **(6)**

(c) Name the four different forms of attempt. **(4)**

[15]

SUB-TOTAL: [70]

TOTAL: [100]

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3. FEEDBACK AND SELF-ASSESSMENT

We find that most students provide very superficial answers in the examination. Therefore we advise that you actually complete the given examination paper on your own as a form of self-assessment. Test yourself whether you are able to identify the relevant sections of the work. Plan and structure your answers. Look especially at the length of each answer, and how much time to allot to each answer. Compare your answers then with those provided in this feedback. This exercise will enable you to know exactly what is expected of you in the examination.

The following abbreviations are used:

SG - Study Guide

Criminal Law - CR Snyman Criminal Law 6th ed 2014 (the prescribed book)

Reader – Reader for CRW2601.

PART A (MULTIPLE CHOICE QUESTIONS)

QUESTION 1

(a) This statement is correct. See SG 2.2.

(b) This statement is incorrect. In fact the four requirements need to state in a particular sequence. See SG 1.5.3.

(c) This statement is incorrect. It is a **criminal norm** which indicates that certain conduct constitutes to a crime. A legal norm is a mere rule that does not also create a crime. See SG 2.4.2.

Therefore, option **1** is correct because only statement (a) is correct.

QUESTION 2

- (a) This statement is correct. See SG 2.4 page 18.
- (b) This statement is incorrect. The court in fact decided the opposite, that it cannot be applied retrospectively. Therefore, the accused could be found guilty only of indecent assault and not of rape. See SG 2.7 page 23.
- (c) This statement is correct. See the *Mshumpa* case Reader 19.

Therefore, option **5** is correct because only statements (a) and (c) are correct.

QUESTION 3

- (a) This statement is correct. See the *Henry* case in Reader 32.
- (b) This statement is incorrect. See SG at the bottom of page 33.
- (c) This statement is correct. See SG 3.4.1.2 (4). This is one of the instances where the courts have indicated that there is a legal duty to act positively. An omission to act positively where such a duty exists may therefore amount to a crime.

Therefore, option **3** is correct because only statements (a) and (c) are correct.

QUESTION 4

- (a) This statement is incorrect. See SG 4.3.8.
- (b) This statement is correct. See SG 5.3.2, page 70.
- (c) This statement is correct. See SG 6.2.5 and Reader.

Therefore, option **4** is correct because only statements (b) and (c) are correct.

QUESTION 5

- (a) This statement is correct. See SG 5.3.1, page 71 and Reader 56.
- (b) This statement is incorrect. See SG 5.3.3, page 75 and Reader 62.
- (c) This statement is correct. See SG 6.3.4(3).

Therefore, option **4** is correct because only statements (a) and (c) are correct.

QUESTION 6

- (a) This statement is correct. See SG 7.2.5.
- (b) This statement is correct. See SG 8.3.

- (c) This statement is incorrect. Grounds of justification refer to defences that exclude the element of unlawfulness. Make sure that you understand the difference between the separate requirement of unlawfulness and all the requirements for criminal liability. Unlawfulness is only one of the requirements for criminal liability. See SG 5.2.3 page 67.

Therefore, option **1** is correct because only statements (a) and (b) are correct.

QUESTION 7

- (a) This statement is incorrect. See SG 7.4.3 and Reader 75.
- (b) This statement is incorrect. Make sure that you understand that the particular section provides for a conviction of a person who has been acquitted of another offence on the basis of having lacked criminal capacity as a result of intoxication. Therefore, for a conviction of the statutory offence created in section 1, the state must prove that X was intoxicated to such a degree that although he could perform a voluntary act, he could not appreciate the wrongfulness of his conduct or act in accordance with an appreciation of such conduct. See SG 12.5.3.
- (c) This statement is correct. See SG 8.2.2 and 8.2.3.

Therefore, option **2** is correct because only statement (c) is correct.

QUESTION 8

- (a) This statement is correct. See SG 9.2.
- (b) This statement is incorrect. See SG 10.6.2 and the *De Blom* case Reader 100.
- (c) This statement is incorrect. See SG 8.2.4. Intoxication itself does not constitute mental illness. However, the chronic abuse and subsequent withdrawal of liquor may lead to a recognized mental illness.

Therefore, option **5** is correct because only statement (a) is correct.

QUESTION 9

- (a) This statement is incorrect. See SG 14.2.2.
- (b) This statement is correct. See SG 14.3.5 and the case of *Motaung* discussed on page 209.
- (c) This statement is correct. See SG 15.2.5.

Therefore, option **5** is correct because only statements (b) and (c) are correct.

QUESTION 10

- (a) This statement is correct. See SG 143.
- (b) This statement is correct. See SG 14.3.2 and 15.2.

- (c) This statement is incorrect. Both direct and indirect perpetrators are equally liable. See SG 14.3.2.

Therefore, option **3** is correct because only statements (a) and (b) are correct.

PART B

QUESTION 1

- (a) SG 2.3.2
- 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.
 - 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.
 - Crimes ought not to be formulated vaguely.
 - A court must interpret the definition of a crime narrowly rather than broadly.
 - After an accused has been found guilty, the abovementioned four rules must also be applied when it comes to imposing a sentence.
- (b) SG 3.3.4.2a
- Absolute force excludes X's ability to subject his bodily movements to his will or intellect. The defence that X can rely on is that he did not perform a voluntary act.
 - Relative force does not exclude voluntariness; it excludes unlawfulness. The defence is therefore that of necessity (coercion).
- (c) SG 4.3.1
- Formally-defined crimes:- the definitional elements **proscribe a certain type of conduct irrespective of** what the **result** of the conduct is.
 - Possession of drugs is a **formally-defined crime**.
 - Materially-defined crimes:- the definitional elements **do not proscribe a specific conduct**, but any conduct that **causes a prohibited result**.
 - Murder is a **materially-defined crime**.
- (d) SG 4.3.3.2
- 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. An example had to be provided.
- (e) SG 5.2.3(2)
- Conduct is unlawful if it **conflicts** with the **boni mores or legal convictions of society**.
 - In **Fourie**, a regional court magistrate who resided in George, had to preside at the sessions in Knysna. But he left George for Knysna late on the 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 80km/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**.
 - Although his conduct did not fall under any of the recognised grounds of justification, it was **not in conflict with the legal convictions of the community**.

- By 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 interests.
- The court dismissed this defence, holding that if the 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 rendered to the state, they are allowed to contravene the speed limit.
- The court's judgment confirmed the principles 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.**

Question 2

(a) OPTION 1 - SG 10.5.2

- ★ According to the **transferred culpability approach**, the question of whether X had intention to kill Z is determined as follows:
 - X intended to kill **a person**. Murder consists in the unlawful, intentional causing of the death of **a person**.
 - The fact that the actual victim (Z) proved to be somebody different from the particular person that X desired to kill (Y) **does not afford X any defence**.
 - In the eyes of the law, X **intended to kill Z** because his intention to kill Y **is transferred** to his killing of Z.
- ★ According to the **concrete-figure approach**, the question of whether X had intention to kill Z is determined as follows:
 - We merely apply the **ordinary principles relating to intention** and, more particularly, ***dolus eventualis***.
 - If X had **not subjectively foreseen** that his blow might strike Z, then he **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.
 - The question is not whether X had the intention to kill a person, but whether X had the intention to kill **the particular (concrete) figure that was actually struck** by the blow.

OPTION 2 - SG 10.5 and SG 10.1 (for examples)

A mistake can exclude intention only if it is mistake concerning:

- The **requirement of an act** (or the **nature of the act**)

- For example, within the context of the crime of malicious injury to property – X is under the impression that he is fixing the engine of somebody else’s motorcar that has developed problems, whereas what he is actually doing to the engine amounts to causing “injury” to it;
- or within the context of the crime of common-law perjury – X is under the impression that the witness testimony she provides is the truth, whereas in fact the real scenario does not align with what she is saying.
- **A requirement contained in the definitional elements**
 - For example, within the context of the crime of murder – X is under the impression that the object he shot at is a buck, whereas in actual fact he shot at **another human being**. This is an example of an *error in objecto* that will exclude intention because it is a mistake concerning a requirement contained in the definitional elements for the crime of murder (ie, another human being);
 - or within the context of the statutory crime of “use or possession of drugs” – X is under the impression that the container of powder (substance) that she received from a friend is snuff (or bicarbonate of soda), to be used to cure a certain ailment, whereas in fact, she is holding a substance that is listed in the Drugs Act as a prohibited substance. She operated under a mistake that will exclude intention, because it concerns a requirement contained in the definitional elements for the crime of “use or possession of drugs” (ie. it must be a prohibited substance that is listed in the Act).
- **The unlawfulness requirement**
 - For example, X thought that he was in a situation that warrants private defence because he had heard (what he believed was) the sound of an intruder behind the toilet cubicle door, whereas in fact the sound he had heard was his nephew who had kicked a rack whilst using the toilet. This is an example where X was mistaken that he had acted in private defence (and therefore lawfully) to defend himself (mistake relating to a ground of justification);
 - or X believes that there is no legislation or legal rule that prohibits her from possessing rhino horn, whereas there is, in fact, such legislation. This is an example where X was mistaken about the legality/lawfulness of her conduct (mistake of law).

(b)(i) SG 14.3.4

The doctrine of common purpose is defined as follows:

- If **two or more** people, having a **common purpose** to commit a crime
- **act together** to achieve that purpose
- the **acts** of each of them in the execution of such purpose
- are **imputed** to the others.

The basis of the common purpose between **A** and **B** to commit robbery is **prior agreement**.

(ii) SG 14.3.4.7

- The issue is whether A had **dolus eventualis** in relation to the death of Y.
- Did A subjectively **foresee** the **possibility** that, in the course of committing the planned cash-in-transit robbery, their (A, B & C’s) conduct may cause the death of anybody in the vicinity of the scene, and did he **reconcile** himself to this possibility.

There are two possible approaches to answering this question:

First approach:

- In the case of **Lungile** a policeman tried to thwart a robbery, and a wild shoot-out took place between the policeman and one of the robbers. **A shop assistant was killed by a shot fired by the policeman.**
- The court stated that the fact that accused knew that **firearms would be used** in the execution of the robbery, and that such may be **used to thwart resistance to it**, lead to the inescapable inference that he did in fact foresee the death of the employee and reconciled himself to that possibility.
- In the case of **Molimi**, a bystander (private citizen) attempted to prevent the escape of one of the robbers. **In reaction to the accused's pointing of his firearm, the bystander fired a shot that missed the accused, but injured an employee in the store.**
- On the charge of attempted murder, arising therefrom, the court held that the fact that resistance to the escape arose from the actions of a bystander was of no consequence. **Once all participants foresaw the possibility that anybody in the immediate vicinity could be killed by cross-fire, whether from a law-enforcement official or a private citizen, *dolus eventualis* was proved.**
- In relation to the death of the security guard (who died as a result of a gun-shot exchange with one of the robbers) the court held that it was **foreseeable** in the execution of the robbery and during the robbers' flight, that **firearms might be used to overcome resistance**; and they **reconciled themselves** to that possibility.

Second approach

SG 10.4

- In the case of **Goosen**, it was held that a mistake as to the chain of causation may exclude intention if the **actual causal chain of events differed materially (or substantially differed)** from the foreseen manner in which death was envisaged.
 - In this instance, **such a defence would not succeed** because there was not a substantial difference between the foreseen and the actual course of events.
- (iii) In **Lungile** the accused had raised the argument that the shot fired by the police officer was a *novus actus interveniens* that broke the chain of causation between his act and the death of the deceased.
- A *novus actus interveniens* is a **new intervening event between the conduct of accused and the result that breaks the chain of causation.**
 - An act is a *novus actus interveniens* if it constitutes an **unexpected, abnormal or unusual occurrence or**
 - 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.
 - X **will not succeed** with this argument
 - because it is **not unexpected nor unusual** for a victim to die from a cross-fire shooting in the course of a robbery.

(b) SG 9.4.1-9.4.3

- ★ A person acts with ***dolus directus*** if the causing of the forbidden result is his **aim or goal**.
- **An example illustrating the application of *dolus directus*.**
- ★ A person acts with ***dolus indirectus*** 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.
- **An example illustrating the application of *dolus indirectus*.**
- ★ 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 **reconciles** himself to this possibility
- **An example illustrating the application of *dolus eventualis*.**

(c) SG 3.3.4.1

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

QUESTION 3

(a) CHOICE QUESTION

OPTION 1 SG 11.3

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.
- 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.

OPTION 2 SG 12.5.2

- If a person is so drunk that her muscular movements are involuntary, there is no act, and the person cannot be found criminally liable.
- A person can be so drunk as to completely lack criminal capacity, and cannot be criminally liable.
- The "specific intent theory" in connection with intoxication is unacceptable and must be rejected.
- Intoxication can completely exclude the element of intention.
- 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.

(b) SG 7.3.1

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

- **appreciate the wrongfulness** of his act or omission **and**
- **act in accordance with such appreciation** of the wrongfulness of his act or omission.

The three (3) defences excluding criminal capacity are:

- Mental illness
- Youth
- Intoxication

(c) SG 16.2.3

- Completed attempt
- Interrupted attempt
- Voluntary withdrawal
- Attempt to commit the impossible

4. AMENDMENTS TO THE STUDY MATERIAL

Kindly note that there is a **Case Law Reader for CRW2601**. It replaces the **Criminal Law Casebook** as a source for those cases that you need to know. Tutorial Letter 101/3/2018 lists a number of prescribed cases (at 4.4) that you need to know to such an extent that you are able to **provide the facts; the legal questions** that had to be decided upon, and **the legal reasons** provided by the court. **All of these cases are in the Case Law Reader**, which you should have received with your study material.

In Study Unit 6, under 6.3.2(2) it is stated that “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.” (See also *Criminal Law* 124).

We alert you to a new Supreme Court of Appeal decision on this matter, *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* 2017 (3) SA 152 (SCA).

The appeal heard in the matter above followed upon an application heard in the North Gauteng High Court, *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP). The facts of this matter were the following: a terminally-ill person with lung cancer applied to the court that he be assisted by a medical doctor to end his life in a dignified manner. The court granted his application and also held that the absolute prohibition on voluntary active euthanasia or assisted suicide violates fundamental constitutional rights of the person, amongst others, the right to dignity.

The court accordingly developed the common law in this regard to bring it in line with constitutional values. The respondents in the *Stransham-Ford* case appealed to the Supreme Court of Appeal against the decision.

The crucial issue before the Supreme Court of Appeal was whether a cause of action still existed at the time that the order was made since the applicant had in fact died two hours earlier. In a unanimous decision, the court answered this question in the negative and set aside the order for three reasons that it deemed ‘interrelated’ (at para [5]). First, because the applicant had died two hours before the order was made, the cause of action no longer existed. Second, that the current state of the law in this complex area as well as the constitutional issues in relation to the interpretation of the Bill of Rights and the development of the common law was not sufficiently examined by the court of first instance. Third, that the order was made on an incorrect and restricted factual basis.

Wallis JA viewed these circumstances as having made it inappropriate for the court to engage in a reconsideration of the common law (at para [5]). Concerning the first reason, Wallis JA pointed out that the development of the common law as ordered by the court was related to the claim of the applicant alone, and therefore was no longer necessary or relevant (at para [15]).

For the purpose of substantive criminal law, the second reason for upholding the appeal is of more significance. Wallis JA deemed it necessary to discuss issues relating to assisted dying and so-called “mercy killing” (at para [36]). Mercy killing, the court explains, means killing out of compassion and not on the request of the patient. Such conduct constitutes the crime of murder (referring to the cases of *S v Hartmann* 1975 (3) SA 532 (C) and *S v De Bellocq* 1975 (3) SA 538 (T) as instances of mercy killing). The court pointed out that such instances have nothing to do with assisted suicide (PAS) or active voluntary euthanasia (PAE) since a request to be assisted to die was absent in these instances.

Wallis JA acknowledged that as the law currently stood, consent is not a defence available to the medical practitioner who brings about the death of the deceased (at para [38]). He indicated that the crucial issue before the court of first instance was whether “the law in regard to consent as a defence to a charge of murder should change” to allow for justification of the conduct of a medical practitioner in instances of euthanasia (PAE) (at para [41]). It was this particular principle of criminal law, namely that consent cannot be a defence to a charge of murder that was challenged in the court of first instance.

Wallis JA criticised the judgment in the court of first instance, for not having sufficiently addressed the principle of consent relating to murder and the cases relevant to this principle (at para [41] referring to the relevant cases of *S v Peverett* 1940 AD 213 and *S v Robinson and Others* 1968 (1) SA 666 (A)). He was of the opinion that an order making such a ‘profound change to our law of murder’ without consideration of applicable principles had to be set aside (at para [41]).

The court then turned to a consideration of the alternative relief sought by the applicant, Mr Stransham-Ford, namely that a medical practitioner be authorised to enable him to terminate his own life by merely providing him with a lethal agent to commit suicide – referred to as physician assisted suicide (PAS). Wallis JA analysed the case of *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A) which provides authority that a person who helps another to commit suicide may, depending on the particular circumstances, be found guilty of murder or culpable homicide. Of importance was the analysis of the element of causation by Steyn CJ in *Grotjohn* (at 364B-H). Wallis JA translated this analysis (at para [49]) and emphasised the following part:

“The conclusion can hardly be avoided that he who provides the desired or necessary means for an intended suicide, has a causative role therein if suicide is committed; and if he does that willingly and knowingly, with the requisite intention of putting an end to the life of the person who wishes to commit suicide, he is guilty of murder even though the final act is performed by the non-criminal hand of the

deceased, because he [the accused] has then unlawfully and intentionally complicit [sic] in ending the life of another”.

Of significance for future interpretation of the law relating to the unlawfulness of physician-assisted suicide (PAS), is the observation by Wallis JA that whereas these principles were easy to apply to the facts in the *Grotjohn* case (a man handing his depressed wife a loaded gun and inviting her to shoot herself, adding that she is a burden to him), it is ‘to say the least, debatable how to apply these principles to a failed suicide pact or the case of a medical practitioner who reluctantly and at the insistence of a dying patient provides the means for them to commit suicide, while counselling them against doing so’ (at para [52]). Wallis JA stressed this point by stating (at para [54]) that ‘... the court did not decide that a criminal offence is committed whenever a person encourages, helps, or enables someone to commit suicide or to attempt to do so. Whether they will depends on the facts of the case and issues of intention (*mens rea*), unlawfulness and causation. *It follows that it cannot be said that in the current state of our law PAS is in all circumstances unlawful.*’ (my emphasis).

In future, Wallis JA stated, a court confronted with PAS will have to consider the *Grotjohn* principles and how they should be applied today, taking into consideration how medical circumstances have changed in the last fifty years and also the provisions of s 39(2) of the Constitution, ‘which requires that in the development of the common law the court must strive to give effect to the nature purport and objects of the Bill of Rights’ (at para [55]). He envisages that the approach to causation in this type of situation in other jurisdictions may be helpful but that a court will have to decide whether development of the common law would relate to causation, unlawfulness, or to intention (*mens rea*). Of importance is that Wallis JA recognised the possibility that a defence in particular for medical practitioners might arise and should be explored (at para [56]).

In study unit 6, at the end of par 6.5.3, insert the following:

In *YG v S* 2018 (1) SACR 64 (GJ), the South Gauteng High Court ruled that the reasonable chastisement defence as currently recognised in the common law is not constitutionally justifiable (at par [85]). X was charged in the regional court with assault to do grievous bodily harm in respect of 13-year-old son, M, as well as of his wife. The two assaults occurred, allegedly, at the family home on the same day. X was convicted on both charges and appealed to the Gauteng High Court on the ground that he was exercising his right as a parent to chastise M by meting out reasonable corporal punishment for M’s indiscipline. X had caught M using one of the family’s iPads and accused M of watching pornographic material. M denied it and when M refused to admit as required by X, he (X) hit him a number of times. X told the court that they are a Muslim family and that pornography was strictly forbidden.

The court of appeal (High Court) was of the view that it was in the interests of justice for it to determine the constitutionality of the defence (par [30]) because the constitutional rights implicated are the rights of children, “who are afforded particular protection under the Bill of Rights” (par [28]). The court also emphasised its duty under sections 8(1) and 39(2) to develop the common law in line with the Bill of Rights (par [28]). The court identified the following relevant rights in this matter: the right to human dignity (section 10); the right to equal protection (section 9(3)); the right to be free from violence (section 12(1)(c)); the right not to be punished in a cruel, inhuman or degrading way (section 12(1)(e)); the right of children to be protected from maltreatment, neglect, abuse or degradation (section 28(1)(d)) and the constitutional principle that a child’s best interests are of paramount importance in every matter concerning the child (section 28(2)).

The court ruled that the defence of reasonable and moderate parental chastisement undermines a child's right to dignity and also does not give children equal protection to the law since it allows for adult victims of assault and children victims to be treated differently (par [74]). The court could find no justification for such infringement of the relevant rights. Because the principle of legality prohibits retrospective application of the law, the ruling on the unconstitutionality of the defence was not applied to the accused. However, the merits of his conviction was considered and the court upheld the trial court's finding that X had exceeded the bounds of reasonable or moderate chastisement.

In Study Unit 9, under 9.4.3 at the end of the 2nd last paragraph, insert the following:

The approach followed in *Humphreys* was applied in *Ndlanzi* 2014 (2) SACR 256 (SCA). X was driving a taxi during peak hour in Johannesburg and collided with a newspaper stall on the pavement. Unbeknown to X, he had knocked over a pedestrian, Y, who was walking on the pavement. At the same time, X drove also into a stop sign. He then reversed to enable him to get back on the road, and in doing so, drove over Y, causing his death. X was charged with murder and was convicted in the regional as well as in the High Court.

In an appeal to the Supreme Court of Appeal, it was found that although X had foreseen the possibility that by driving on the pavement he could cause the death of pedestrians, he did not reconcile himself with the possibility. The court explained that on the evidence, X believed that he would be able to avoid colliding with pedestrians by turning to the right and back on the road (at par [39]). In the court's view, the second element of *dolus eventualis* was therefore not established on the evidence because X had taken a risk "which he thought would not materialise" (at par [39] relying on *Humphreys* at 10d). The murder conviction was therefore set aside and X was convicted of culpable homicide.

The courts' reluctance to convict drivers of motor vehicles of murder after the ruling in *Humphreys* is illustrated also in *Maarohanye* 2015 (1) SACR 337 (GJ). X and Y, while under the influence of drugs, lost control of their cars while racing against each other on a public road and in a built-up area, causing the death of four pedestrians and maiming two other pedestrians. Their convictions of murder and attempted murder based on intention in the form of *dolus eventualis* were set aside on appeal. The court of appeal held that the trial court's finding on the evidence that "the effect of the drugs had induced a sense of euphoria" which led them to believe that they would not cause any collision, was indicative rather of the *absence* of *dolus eventualis* (at paras [22] and [23]). The court found that because of the intake of drugs, X and Y had not foreseen the possibility that they may cause the death or injury of pedestrians or reconciled themselves with such eventualities (at par [24]). The conviction of murder was set aside and X and Y found guilty of culpable homicide only.

On page 136, scrap the question under point (5) and replace it with the following:

Discuss the *Humphreys* decision and the application of the two components of *dolus eventualis* in this case, as well as in the cases of *Ndlanzi* and *Maarohanye*.

In Study Unit 10 right at the end of par 10.6.1 (after the discussion of the *De Oliviera* case), insert the following:

In *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) the court applied an objective instead of a subjective test to determine whether X had lacked knowledge of unlawfulness. X had shot four shots through a bathroom door and thereby killed his girlfriend, Y, who was standing behind the door. He was charged of murder but convicted by the trial court of culpable homicide only on the basis that he had lacked intention in the form of *dolus eventualis* but was nevertheless negligent.

In an appeal by the state on a point of law, the Supreme Court of Appeal found X guilty of murder. The court held that the trial court had applied the principles of *dolus eventualis* incorrectly and found X guilty on the basis that, at the time that he had fired the shots, X in fact did foresee the possibility that he may cause the death of the person behind the door and reconciled himself to such possibility. The court then also dealt with the X's defence that he had believed that his life was threatened by the person behind the door and that he was acting in private defence. The defence of putative private defence was rejected by the Supreme Court of Appeal on the basis that X had provided no factual basis for his purported belief that the person behind the door was about to attack him. The court relied on the *De Oliveira* ruling that the test for putative private defence is purely subjective, whereas the test for private defence is objective (at par [52], citing Smalberger JA in *De Oliveira* at 63*i* to 64*b*).

However, the Supreme Court of Appeal then stated that “the defence of putative private defence requires rational but mistaken thought” and that “although he may have been anxious, it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy-calibre firearm, without taking even that most elementary precaution of firing a warning shot” (at par [54]).

We submit that the Supreme Court of Appeal had erred in applying an objective test to determine whether X had lacked knowledge of unlawfulness. The mere enquiry should have been whether X had laid a factual foundation that he *honestly believed* that he was acting in defence against an attack. Whether such a belief was irrational was therefore irrelevant since the test is purely subjective.

At page 154, point (2) under summary, add the following sentence: See the criticism of the *Pistorius* case in this regard.

In Study Unit 12, under 12.5, at the end of (d) insert the following:

Consider again the case of *Maarohanye* discussed in 9.4.3 (*dolus eventualis*). Do you think X and Y could nevertheless be convicted of section 1 in respect of the charge of attempted murder for maiming two pedestrians? The answer is “no”. In the *Maarohanye* case the state had proved that the drunken drivers had criminal capacity. The crucial question was whether they had *dolus eventualis*. They were acquitted of attempted murder since the court found that they had lacked *dolus eventualis*. There is no crime such as negligent attempted murder. They could also not be convicted of a contravention of section 1 since it is required, for a conviction of this statutory crime, that they be acquitted of the crime charged (attempted murder) **on the basis that they had lacked criminal capacity**, which was not the case.

In Study Unit 12 under 12.5, insert the following at the end of (e):

The case of *Ramdass* 2017 (1) SACR 30 (KZD) illustrates the difficulty of proving a contravention of the section. X, an unemployed 31-year-old male, was charged with the murder of Y, his girlfriend who he was planning to marry. On the day of Y's death, X and Y and her mother went shopping where after they (Y and her mother) dropped X off at a tavern and went home. X returned home in a state of intoxication and he and Y then went out probably to buy drugs. The mother then went out to a casino. When she returned she found her daughter, Y, lying with a plastic bag over her head, already dead. X was found the next day, still smelling of liquor, disorientated, and seemingly unaware of what had happened. When he was told of her death, his reaction was to give himself up to the police (at par [10]).

At the trial the evidence revealed that X was a loving and caring person. There was also no evidence that there was any argument before the mother left the house. The court stated that there was need for caution to find too readily that a person lacked criminal capacity as a result of intoxication, as this may bring the administration of justice into disrepute (par [29]). However, in this particular case, it found that there was a reasonable doubt as to X's criminal capacity and that he had to get the benefit of that doubt (par [29]). In the court's view, X had established a sufficient foundation for his defence of lack of criminal capacity namely, that he had consumed alcohol and smoked crack cocaine and that what he did was completely out of character (par [30]).

As pointed out by the court, X could also not be convicted of culpable homicide since criminal capacity is a requirement for culpable homicide as well.

The court then considered whether X could be convicted of a contravention of section 1 of the Criminal Law Amendment Act 1 of 1988. The court indicated that the difficulty was the requirement that the accused must have been so drunk that he **lacked criminal capacity** (par [33]). Where an accused was acquitted on the basis that there was a reasonable possibility that he was so drunk that he lacked criminal capacity, he could not be convicted of the statutory offence unless the court could find *beyond reasonable doubt* that he did not have such a capacity. The court pointed out that this dilemma of the prosecution has been pointed out by courts and academic writers and that it was up to the legislature to decide whether the statute should be amended (par [33]). X was accordingly acquitted.

You must also **delete all six points on page 185 and replace it with the following:**

- * Provocation is no defence on a charge of murder. Provocation in fact confirms the existence of intention. However, provocation may be relied upon as a ground for mitigation of punishment. A court may find that X's responsibility was diminished in terms of section 78(7) of the Criminal Procedure Act 51 of 1977.
- * If X is charged with culpable homicide, the provocation will exclude X's negligence only if it is clear that a reasonable person would also have lost his temper and would also have reacted in the way X did.
- * If X is charged with assault with intention to do grievous bodily harm, provocation will not lead to conviction of a lesser offence of assault.
- * If X is charged with common assault, provocation cannot serve as a complete defence leading to a complete acquittal. Again, provocation may serve as a ground for mitigation of punishment.

On page 186, delete the question under (3) and replace it with the following:

Discuss whether provocation may have an effect on criminal liability for the following crimes: Murder; culpable homicide; assault with intent to commit grievous bodily harm and common assault.

On page 186, delete the question under point (6).

In Study Unit 16 under 16.2.4, at the end of the first paragraph add the following:

- Where X, who is HIV positive and is fully aware of this, rapes Y without taking preventative measures (for example, using a condom), he or she may be convicted of rape as well as attempted murder (*Nyalungu 2013 (2) SACR 99 (T)*). In *Phiri 2014 (1) SACR 211 (GNP)* the court held that consent to sexual intercourse is also not a defence in such circumstances. X, after having developed a relationship with Y, had

consensual sexual intercourse with her knowing that he (X) was HIV positive. X was convicted of attempted murder. The form of intention in such instances is at least that of *dolus eventualis*.

5. NUMBER OF TUTORIAL LETTERS

You will receive a total of **FOUR** (4) tutorial letters this semester. You received the first tutorial letter (101) on registration. In addition to this tutorial letter (102), you will also receive a third tutorial letter (201) which will provide the answers to the first compulsory assignment. The last tutorial letter (202) will provide the answers to the second compulsory assignment.

Please note that you can also access these tutorial letters electronically on myUnisa (<http://my.unisa.ac.za>) under the course code, **CRW2601** at the link "Official Study Material".

We wish you success with your studies!

Regards

PROF N MOLLEMA
PROF S LÖTTER
MR RD RAMOSA