negligence is sufficient, however it is **better to examine a legislative objective independently** rather than apply a rigid formula.

- The use of the word "intention" in a statute naturally indicates *dolus* as a requirement, but this does not necessarily imply *dolus eventualis* is sufficient for liability
- Certain offences created by statute have been held to require *dolus directus* rather than *dolus eventualis*.
- There are **analytical tools** that have been developed by the courts which guide us

2) STRICT LIABILITY (*STRICTI IURIS*) / STATUTES EXPRESSLY EXCLUDING *MENS REA*

- Strict liability refers to no-fault liability, hence liability without proof of intention or negligence.
- Most often *stricti iuris* is found in public affairs/interests legislation
- However, the normal principles of statutory interpretation would ordinarily operate so as to require fault as an element of statutory offences.
- These cases are very rare.
- **General rule**: Penal statutes must be strictly construed since it serves to favour the liberty of the subject, concept, in this context requires that penal statutes should be interpreted so as to require fault as an element of a statutory offence.
- The rise of modern urbanized and industrial society has created crucial need for establishment and maintenance of certain standards of safety and hygiene in commercial, industrial and social undertakings.
- Due to this it was reasoned that persons violating them should be subject to a form of strict liability which takes no account of fault.
- ✓ Example: s29 of the Food, Drugs and Disinfectant Act provided: "on a charge in connection with any food, drug or disinfectant, it would not be a defence to prove that the accused did not act knowingly or willfully". However, if the accused proved that he did not act knowingly or willfully and he took due care and reasonable means to ascertain the article was in accordance with the provisions, this would be taken into consideration.
- It is an exception to the maxim that there can be no liability without fault (*actus non facit reum nisi mens sit rea*) and at risk of being struck down for being unconstitutional on grounds of violating the right to fair trial (*S v Coetzee*); violating the presumption of innocence and violating the right to equality.

CASE: *Amalgamated Beverage Industries v Durban City Council 1994, AD*
Public interest: food

- **Facts**: The appellant was a broker and distributor of soft drinks and contravened certain by-laws: "no person who carries on business involving the manufacture or preparation of food **shall cause or permit** any food or drink which is not clean, wholesome, sound and free from any foreign object... for purposes of sale", in that it supplied a soft drink containing a bee. The appellant's argument was that 6 bottles were packed a second so they could not control if such things fell into the bottle.

- **Legal principle**: Was *mens rea* a prerequisite for liability?
- **Court held**: The question of whether or not the absence of *mens* rea constituted a defence to the charge depended on the nature of the prohibition. There was **no intention on part of the** Legislature to dispense with the *mens* rea as the use of the words "cause or permit" were more consistent with the presence than absence of *mens rea*. The **majority** found that *mens rea* in the form of **negligence** was required in this instance and the appellant had been negligent in permitting bottles to pass checking officials at a speed at which contamination could not be detected.
- The minority however favoured strict liability: Botha JA said it is unsafe to draw general conclusions as to the meaning of words such as "cause" or "permit" in any particular statutory provision. It is safe to consider the context in which the words are used and in the present case the context of the by-law requires the words "cause or permit" to be interpreted as importing *mens rea*. Strict liability can occasionally produce undesirable results but these results that come about in exceptional circumstances are mild in comparison to the much greater potential harm that may eventuate from holding that *mens rea* is an element of the offence and this depriving the by-law of much of its effectiveness.

3) STATUTES GIVING NO EXPRESS INDICATION AS TO REQUIREMENT OF *MENS REA*

Common law offences - *mens rea* (intention) is required
Statutory offences - it varies depending on the whim of the legislature:

1) Presume *mens rea* is a requirement if the statute is silent
2) All strict liability offences must explicitly state *mens rea* is not required.

- A large majority of statutes give no indication regarding *mens rea*
- In the absence of clear and convincing indications to the contrary it is **presumed** that the Legislature never intended innocent violations to be punishable but rather fault be an element of criminal liability
- This is fortified by the appearance in statutes in question of fault words may indicate some certainty that it is the legislature's intention that innocent violations of statute should not be punishable

Reverse Onus

- Despite deviation (*R v Wallendorf*) the law now concerning the *onus* of proof in statutory offences is that the onus rests with the state even if the statute is silent in respect of fault and the court nevertheless concludes that fault is required (*S v Jassat; S v Qumbella; S v De Blom*)

✓ Example: Drugs and Drug Trafficking Act: a dealer would procure a harsher sentence than a consumer but the difficulty comes in distinguishing between a dealer and a consumer. Therefore there is a presumption that dealers will

have a certain amount and the onus rests on the accused to show they are not a dealer if they have that prescribed amount.

- There is a maxim that the **"role of a judge is to interpret the law and not to make it"**
- The onus of proof is generally on the state but in some instances it rests on the accused. Proving culpability rests on the state and this was extended for statutory crimes (*S v De Blom*)

CASE: *S v Coetzee 1997, CC*

- **Facts**: The question was whether s332(5) of the Criminal Procedure Act was in line with the Interim Constitution. The sections provided: "where an offence has been committed, whether by performance of any act or by the failure to perform any act, for which a corporate body is or was liable to prosecution, any person who was at the time of commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence **unless it is proved** that he did not take part in the commission of the offence and that he could not have prevented it and shall be liable to prosecution therefor, either with the corporate body or apart therefrom, and shall on conviction be personally liable therefore".
- The provision provided for **reverse onus** which in a way usurped the duty of the prosecution to prove beyond reasonable doubt that an offence was committed. It further infringed the right of an accused person to be presumed innocent, as envisaged in **s25(3)** of the Constitution.
- **Court held**: Since this involved false representation *mens rea* was an element and the Court held this provision failed to comply with the necessary requirements of **reasonableness, justifiability and necessity** as required by **s33(1)** of the Constitution, and it was as such unconstitutional (right to administrative action).

CASE: *R v H 1944, AD*

- **Facts**: The appellant was convicted of having had illegal carnal intercourse with a black woman but he contended he thought she was coloured.
- **Court held**: He was found guilty on the basis that *mens rea* was an essential ingredient of the offence. **Negligence may constitute sufficient proof of *mens rea* even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person to be circumspect**

CASE: *S v Du Toit 1981, CPD*

- It is difficult to prove the state of mind then it means more people can avail themselves from that defence
- **Where one is engaged in a sphere of activity, there must be knowledge of the rules and regulations related to that sphere.**

CASE: *S v Jassat 1965, AD*

- **Facts**: The appellant was charged with a violation of a notice issued with regard to his duty of reporting to the police station (link to *R v Arenstein*). He

was a medical doctor and had arranged with his mother and secretary to remind him to report to the station at the relevant times. He also indicated that on the day in question he failed to report he had a particularly busy schedule so he 'overlooked his duty' to report to the station. The provincial division dismissed his appeal from the magistrate but he appealed to the AD

- **Court held**: Steyn JA said the appellant had been negligent because he had failed to report to the station.
- Rumpff JA: forgetting to comply with the order was negligent
- Willems JA: steps to prevent such an occurrence were insufficient and he failed to adhere to a **high degree of circumspection.**
- The legislation aimed at protecting against a dangerous and negligent social evil

CASE: S v *Qumbella 1966, AD*

- **Facts**: The appellant was given orders to burn whilst in prison not allowed to look at them, even when outside prison was not allowed. But in a factor, he did not know where he was, not supposed to be there. Claimed he did not know.
- **Issue**: Whether or not he violated his orders?
- **Court held**: The basic principle is that *actus non facit reum, nisi mens sit rea*. Current judicial thinking is recognizing more fully the scope and operation of this fundamental rule of our law and although the Legislature has the power to override it and make the duty to comply with its behests thus making innocent violations punishable, such an infringement on individual freedom should appear plainly so that "he who runs may read".
- It was not unreasonable because he did try to get the orders but was not given the opportunity to do so.

Quembela	*Jassat* and *Arenstein*
Forgetfulness but reasonable look whether it Had made attempts	To determine form of *mens rea* required, requires a high degree of circumspection as in these cases

NEGLIGENCE

- Where a court decides an offence is not of strict liability the starting point is to consider intention, however in exceptional situations *mens rea* in the form of *culpa* is required.
- To diminish the harsh effect of the strict liability doctrine the courts have been prepared to accept that an accused should escape liability if he can adduce evidence that his contravention of the statute was not negligent.
- Determining the requirement of negligence avoids strict liability while giving effect to the imposition of stricter standards of care in relation to public welfare legislation.
- ***R v H***: *"Negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person to be circumspect..."*

- Culpa may be the fault element of a statutory offence even though negligence is not the gist of the offence.
- ❖ In determining whether *culpa* is the fault element it is unnecessary to search for words indicating negligence but rather the enquiry is if the Legislature required so **high a degree of circumspection** that despite the **absence of express provision** it must have intended that mere omission to exercise that **degree of care which the law expects which the law expects of a *bonus paterfamilias***, is sufficient to render one guilty of the offence.

DETECTING FAULT OR STRICT LIABILITY OF AN OFFENCE

- To determine whether the Legislature contemplated negligence as the fault element of an offence the courts have invoked the following considerations:

Common law offences - *mens rea* (intention) is required
Statutory offences - it varies depending on the whim of the legislature:

1) Presume *mens rea* is a requirement if the statute is silent
2) All strict liability offences must explicitly state *mens rea* is not required.

(1) Language

- It may serve to indicate negligence by use of words or phrases such as "negligently" or "without due care"
- The language is to be interpreted to give effect to the intention of the legislature by for example, considering the meaning given to the same words used elsewhere in the statute

(2) Scope and Object

- In some instances the object will be to punish careless, reckless or negligent behaviour and in such cases negligence is required.
- If the object is to create and impose duties of care and circumspection, negligence will be sufficient
- If it creates a "public welfare offence", an offence relating primarily to industry or technology, such as mining operations, factories, public transport etc, those offences must be interpreted as strict liability offences.

(3) Implementation

- The fact implementation of a statute will be facilitated by negligence being sufficient for liability rather than intention, indicates negligence is the appropriate fault requirement

(4) Penalty

- Severity of the penalty imposed indicates negligence rather than intention
- Where a statute attracts severe punishment it will be interpreted as requiring fault however if it attracts slight punishment such as "regulatory offences" which are not morally reprehensible (ie TV licenses) a court may interpret it as strict liability.

(5) Reasonableness

- The fact negligence involves an objective test of liability affects the question of reasonableness or requiring negligence as the form of fault for particular offences.
- This is because the application of an objective standard may result in hardship so unjust as to make it unlikely that Parliament could have intended any such result.
- Reasonableness of excluding culpability: Courts take into account the inequitable results of the accused and the State

Also to be considered are those factors outlined by *S v Arenstein:*

1. Language or other context of the prohibition or injunction
2. Scope and object of the statute
3. Nature and extent of the penalty
4. Ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of *mens rea*

If it has been determined that **negligence** was the required form of *mens rea*, to test if the accused was negligent the test of *Kruger v Coetzee* must be applied.

APPLICATION

X moves to the suburbs and celebrates by slaughtering a cow. His neighbours call the police and it eventuates that X has contravened by-laws for that area. X says he was unaware of that law.

1) Look at the statute: does it require *mens rea*? Consider the factors
2) Weigh up these factors and apply And then draw a conclusion and use cases
3) Once it has been concluded that *mens rea* is a requirement THEN mistake of law can be considered (because if there is no fault there can be no consideration of mistake of law)
4) Apply for mistake of law: (*S v De Blom; S v du Toit; S v Waglines; S v Rabson* etc)

Criminal Capacity

YOUTH

The common law divides children into three groups:

Under 7 years of age

Conclusive, irrebuttable presumption that they are *culpae* and *doli incapax* and they have no criminal capacity

7 - 14 years of age

Exempt from criminal liability but there is a rebuttable presumption that they are *culpae* and *doli incapax*.

14 and above

Same criminal liability as an adult

The Child Justice Bill wants to change criminal capacity to the age of 10.

INSANITY

The test is set out in s78(1) of the Criminal Procedure Act:
"a person who commits an act which constitutes an offence and at the time of commission one suffers from a mental illness which makes him incapable of appreciating the wrongfulness..."

Criteria for Mental Illness

Insight: mental disorder must be pathological, must be a disease of the mind, mental abnormalities that are bright

Special Factors Bearing on *Mens Rea*

INTOXICATION

INTOXICATION

Voluntary **Involuntary** **Leading to Mental Illness**

- Excludes voluntariness; intention and capacity
- Common law intoxication (*Chretien*) excludes voluntariness
- Voluntary intoxication was not a defense although it could be a mitigating factor.
- Involuntary intoxication was and still is a defence
- If constant intoxication has induced mental illness to the extent that it affects the functioning of the brain, the accused is not accountable for his actions and can be declared insane.
- Where a specific intent is required such as for murder, intoxication could serve as a mitigating factor to reduce the crime to a crime that is less serious crime such as culpable homicide.
- Specific intent is reduced to ordinary intent
- Specific intent → ordinary intent
- Voluntary intoxication thus served as a mitigating factor rather than a defence.

CASE: *R v Fowlie 1906*

- The appellant was charged with malicious damage to property (a horse) and raised drunkenness as a defence. The evidence showed he was not sober but also unaware of his conduct. The charge was reduced.

CASE: *R v Bourke 1016 TPD*

- The accused was charged with rape and evidence showed he was under the influence of liquor. The jury found that although he was unconscious he was found guilty of indecent assault (instead of rape). It is not an acquittal it is a conviction but intoxication is a mitigating factor and according to the specific intent rule it is not a defense it is only a mitigating factor
- "to allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community...the regular drunkard would be more immune from punishment than a sober person'.

Effect of involuntary Intoxication

- It refers to a situation where a person becomes intoxicated as a result of administration of some substance without his knowledge
- It is a defence as it is due to external influence.

CASE: *S v Hartyani 1980*

- **Facts**: The accused was charged with driving under the influence of alcohol as he had voluntarily consumed four beers but then drank coffee in the belief it would sober him. However, he was unaware that the person who made his coffee put a substantial amount of brandy in the coffee; he thought it was just very sweet. He subsequently became intoxicated and drove in a drunken state.
- **Court held**: From the facts it appeared he was unaware of the brandy and so did not appreciate the wrongfulness of his conduct. Because that extent of intoxication was involuntary he was not accountable for it.

Intoxication leading to Mental Illness

- Chronic abuse of alcohol may lead to a state of ***delirium tremens***. Here the rules regarding mental illness are followed:
- In terms of s78(6) of the Criminal Procedure Act the accused may be acquitted owing to a lack of criminal capacity but it ordered to be detained in a state psychiatric injury.
- Most intoxication cases fall under voluntary intoxication.

CASE: *S v Johnson 1969*

- **Facts**: The accused was 18 years old and was charged with being drunk in public for which he was detained in a cell with the deceased who was an elderly man in a deep sleep. The accused killed the deceased by striking him on the head with a bucket. The trial court found the accused was so drunk he was not conscious of his conduct, this because he had consumed nine glasses of brandy, however he was convicted of culpable homicide.
- **Court held**: Court found he was so drunk he was not conscious of his actions but convicted him of culpable homicide. Upon appeal, Botha JA reiterated that before there **can be criminal liability** for an act or omission the act or omission must have been voluntary and quoted van der Linden: "Although all crimes must consist in a free and voluntary act we cannot count thereunder those crimes which could be committed by persons who are asleep or so-called somnambulists", this was with reference to *Dhlamini*. Reference was also made to *R v Mkize* wherein the accused was acquitted for killing his sister because he had an epileptic seizure and he was "unconscious at the critical moment and did not act voluntarily". Botha JA held that although severe intoxication does constitute involuntary action, it should not, on the grounds of policy, apply where there is **self-induced intoxication unless it causes a type of insanity.** Since the fundamental requirement of criminal liability was lacking, he would have been acquitted if his unconscious state had resulted from a cause other than voluntary drunkenness.
- **Legal principle**: **Voluntary intoxication cannot serve as a defence except where it leads to insanity.** Note: this judgement was made in light of the policy/unyielding approach, but this decision was rejected by Rumpff JA in *S*

v Chretien. Voluntary intoxication could not serve as a defence, only as a mitigating factor

- The court followed a **policy/unyielding approach** before 1981, whereby intoxicated persons would not be acquitted because of a state they brought on themselves as this gave the impression drinking was acceptable.
- The lenient/principled approach was followed in *S v Chretien*:

CASE: *S v Chretien 1981*

- **Facts**: The accused had attended a party at which he drank a great deal of liquor and the party broke up in some circumstances of discontent. While under the influence he drove his car into a crowd of people who had been at the party but were, at the time, standing in the street, leaving one person dead and 5 injured. The accused argued he was too intoxicated to appreciate the consequences of his acts and that he expected people in the street to move away. The accused was charged with 5 counts of attempted murder and 1 count of murder but he was found guilty of culpable homicide only, not even common assault instead of the attempted murder charges.
- **Issue**: Could a charge of attempted murder or charge of common assault lead to conviction where the accused's necessary intention for the offence had been influenced by voluntary consumption of alcohol?
- **Court held**: The court distinguished between three degrees of intoxication:
- **(1) dead drunk** - whereby a person lies performing involuntary muscle movements and if someone is hit it is involuntary
- **(2) moderately drunk** - a person lacks criminal capacity (ability to distinguish between right and wrong and act in accordance with such appreciation) due to intoxication then he is acquitted but it is a question of fact
- **(3) slightly drunk** - whereby there is no intention (lack of intention and lack of foresight) but there is likely negligence The court also stated there are instances where a person is intoxicated but realizes what is happening and may act in a seemingly rational manner at the critical moment yet does not remember afterwards (*R v Fowlie*), but in such cases there may be criminal capacity as the mere fact that a person forgets does not mean lack of criminal capacity.
- In a quote from Judge Curlwesis the court noted that it would be dangerous in the public interest **to encourage the idea that drunkenness in any way excuses a crime and Rumpff JA agreed with this but** said it was preferable to accept that **if it appears from evidence that the accused was so intoxicated he in fact had no appreciation of what he was doing, then public policy does not require the legal principle to be deviated from and the accused be punished purely because he voluntarily reached that state of intoxication.** (This does not account for instances where people drink in order to commit crimes - note *actio libera in causa*). The question posed was answered in the affirmative, therefore it could lead to a conviction if a person was intoxicated.

- **Legal principle**: If a person lacks criminal capacity (ability to distinguish between right and wrong and act in accordance with that appreciation) due to intoxication, then there cannot be liability.
- Voluntary intoxication was removed from the direct influence of public policy and it is now determined firmly on the basis of legal principles.
- NOTE: The court used a principled approach which is more lenient than the policy approach.

- Since rejection of the specific intent rule in ***S v Chretien*** in 1981, intoxication of a sufficient degree may serve to exclude completely the intention of the accused to commit a crime.
- Evidence of intoxication, whether induced by consumption of alcohol or taking drugs or both, may serve to create a reasonable doubt as to whether the accused possess the requisite foresight of the possibility of the unlawful circumstance existing or even knowledge or foresight of the unlawfulness of the conduct in question.
- It does not necessarily follow that it one is acquitted he/she cannot be guilty under *Chretien,* because there could be liability under s1(1) of the Criminal Law Amendment Act:

CRIMINAL LAW AMENDMENT ACT 1 OF 1988

1. Acts punishable under influence of certain substances to be punishable.-

(1) Any person who consumes or uses any substance which **impairs his or her faculties** to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while **knowing** that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but **is not criminally liable because his or her faculties were impaired** as aforesaid, **shall be guilty** of an offence and shall be liable on conviction to the penalty which may be imposed in respect of the commission of that act.

(2) **If** in any prosecution for any offence it **is found that the accused is not criminally liable** for the offence charged on account of the **fact that his faculties** referred to in subsection (1) were **impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1),** if the evidence proves the commission of such contravention.

2. Commission of an offence while faculties were impaired may be an aggravating circumstance.

Whenever it is proved that the faculties of a person convicted of any offence were impaired by the consumption of alcohol or use of a substance when he committed that offence, the court may, in determining an appropriate sentence to be imposed upon him in respect of that offence, regard as an aggravating circumstance the fact that his faculties were thus impaired.

Elements of this offence:

1) Consumption or use of any intoxicating substance by the accused
2) Impairment of the accused's faculties to appreciate wrongfulness of the act and act in accordance with that appreciation
3) Knowledge that the substance used has the ability to impair
4) Commission by the accused of any act prohibited by law whilst his or faculties so impaired
5) Accused is not criminally liable because his/her faculties are so impaired.

- However, guilt must be proved beyond reasonable doubt and reference should be had to the maxim: ***nulle poena sine lege*** (cannot punish a person unless statute provides punishment)
- The question is, does the legislation resuscitate *Chretien* or does it create a new offence?
- One argument is that the legislature over-reaches and the new offence should be limited to violent crimes and not for crimes against property. However, the act aims to punish any act
- Therefore, s1(1) creates a **separate crime** which is very unsatisfactory:
    a. It can criminalize conduct of an intoxicated person negatively by denying it as a defence or it can be used positively in that a crime is created for which intoxication is used as an element.
    b. It does not do what it purports to do, which is resuscitate *Chretien*, as it creates a crime where it is not necessary.
- Snyman agrees s1(1) creates a new defence and argues that voluntary intoxication is not use. Therefore, it is not clear whether that section is limited to involuntary intoxication and intoxication due to mental illness (the reach of the section is blurred)
- Paizes: it is limited to voluntary intoxication ("while knowing...") and is therefore aimed at catching only those that are voluntarily intoxicated.

<u>Thus:</u>

1) If an accused is involuntarily intoxicated he may escape liability under the Act as he did not have knowledge of the substance and the words "consumes or uses" is interpreted to imply conduct directed by the will of the accused and thus applies to voluntary intoxication.
2) An accused who has criminal capacity but lacks intention (such as *Chretien*) to commit a crime may escape liability depending on the state being able to prove if he was suffering from an impairment of his faculties to appreciate the wrongfulness of his act and to act in accordance with that appreciation.
3) An accused who as a result of intoxication lacks criminal capacity is covered in this section
    - Chretien had capacity but he was acquitted of attempted murder and common assault because in his drunken state he thought the other persons would move out the way and this cast **reasonable doubt** as to whether he possessed the required intention for the crimes. Chretien would have escaped liability under the Act because his intoxication led not to lack of criminal capacity but rather to lack of *mens rea*.

- Note: if a person commits a prohibited act in an extreme state of blind drunkenness where he is acting involuntarily he falls within the ambit of the Act because a person who is acting involuntarily also lacks criminal capacity.

CASE: *S v Lange*

- The accused had been charged with housebreaking with intent to steal and theft and raised the defense of intoxication which succeeded on this charge. However, the question arose as to whether he accused had correctly been convicted of contravening s1(1) of the Criminal Law Amendment Act 1988. The court confirmed the conviction of the accused contravening this section.
- "The purpose of this Act is to accommodate the sense of justice of the society in respect of the judicial treatment of intoxicated persons for actions committed by them while they are in that condition, in cases where such condition was brought about by the **voluntary** use of intoxicating liquor and drugs" To achieve this purpose it was considered necessary to enact a provision which deviates to some extent from the pure jurisprudential approach. Although the legislature has criminalized the unlawful acts of an involuntary intoxicated person it has not shifted the onus. The general rule that the onus rests on the prosecution to prove all the elements of the offence beyond reasonable doubt prevails. The State must therefore prove those 5 elements that Snyman has identified.
- An accused just needs to have a general knowledge that alcohol has an intoxicating effect.

- The section therefore catches people who are voluntarily intoxicated and one problem arises from the section: "impairment of the accused's faculties to appreciate wrongfulness of his acts"
- Snyman holds that according to general principles of criminal liability there are three grounds in which a person may escape liability:

1) When he/she is unable to perform an involuntary act
2) Lacks capacity
3) Lacks intention

- However, because the section is silent on (1) and (3), Snyman suggests the legislation is not intended to punish people on the basis of automatism.
- The section punishes any act, whether or not the act is formally or materially defined as a crime and so suggests it will only apply to formally defined crimes, including consequence crimes.

Common law (*S v Chretien*)	**Statute**
Prove intoxication for acquittal	Prove intoxication for conviction

Evidence given at common law.....provides for a conviction under s1(1).

Therefore, to escape liability it would have to be shown that the accused is sufficiently intoxicated to be acquitted at common law but is not sufficiently intoxicated to be convicted under the Act.

LACK OF CAPACITY UNDER THE ACT

- Intoxication is an element of liability under the Act and unless it is proven beyond reasonable doubt that the accused was so drunk as to exempt him from ordinary liability, he would escape liability.
- It prosecution proves beyond reasonable doubt that the accused was so drunk he lacked criminal capacity → guilty under the Act
- If prosecution fails to prove beyond reasonable beyond reasonable doubt that the accused was so drunk he lacked criminal capacity → not guilty under Act
- Therefore, to secure conviction under s1(1) the prosecution must prove that the accused lacked criminal capacity

CASE: S *v Mbele 1991*

- **Facts**: The accused was charged in a magistrate court for theft and argued he was under the influence of alcohol at the time of commission of the alleged offence. It was **reasonably possible** that he was intoxicated and the magistrate was unsure if the accused thus had the necessary criminal capacity.
- **Issue**: Was the accused liable under s1(1)?
- **Court held**: The matter went on review and the HC held that the conviction based on s1(1) should be set aside because for liability under that provision the State must prove that [mainly] (1) the accused's faculties were impaired and (2) he was not criminally liable because his faculties were so impaired. However the state was uncertain on these points and so did not prove beyond reasonable doubt.
- Fleming JA: it may be acceptable that a person escaping a conviction under common law can escape liability under s1(1) too. It is not the role of judges to fill the vacuum that is created by s1(1) so courts should not apply broad interpretation to the Act in order to fill any gaps.
- The mere fact an accused is acquitted at common law is insufficient to prove liability under s1(1) because the acquittal would establish it is reasonably possible that the accused lacked capacity.
- **Legal principle**:

CASE: *S v September 1996*

- The appellant was charged with murder, assault GBH, theft and malicious injury to property and the trial court found that the appellant, at the time of commission of the offences, was under influence of liquor and possibly drugs as well and that he lacked criminal capacity due to his state of intoxication, however that he was guilty under s1(1) of the Criminal Law Amendment Act.
- The court discussed principles and said there was no difference between this case and *S v Mbele*: the act is worded in such a way that it does not affect all those who are acquitted as a result of their impaired state. S1(2) provides that the faculties of the accused must have been impaired by the substance and evidence must prove this and so the effect is that the provision cannot be used in cases where the accused is acquitted of the offence charged on grounds of insufficient evidence of criminal capacity. Therefore if an accused

is acquitted on grounds of reasonable doubt as to criminal capacity then s1(2) is not applicable because a finding of impairment of his faculties is absent and there is no positive evidence so a contravention is not proved.

- The state must prove beyond reasonable doubt that he had criminal capacity or the accused canot be found guilty under common law or s1(1).

    - The accused must know that the substance consumed will impair his/her criminal capacity and foresight of the effect of the substance will suffice.
    - What is required is only a **general knowledge or understanding that the intake will impair** his/her faculties.
    - Should the accused **know of or foresee possibility** of committing a prohibited act while incapacitated? Hence, should *mens rea* extend to the element of knowledge that that consumption/intake has the effect of impairing faculties? Here, negligence must be considered, because a person cannot say they were unaware that drinking alcohol would impair his/her faculties.

PRACTICAL EXAMPLE

A drinks 20 litres of Vodka and he has intercourse with B without her consent, so he is charged with rape. A argues successfully that his faculties were impaired and he did not appreciate the wrongfulness of his act and hence is not criminally liable. He is acquitted on the rape charge on grounds of lacking criminal capacity (common law) however for liability under s1(1) the prosecution must prove:

1) He consumed or used intoxicating substance → vodka
2) Impairment of his faculties as a result of that consumption
3) He knew the substance has the effect of impairing his faculties
4) He committed the offence of rape which is prohibited by law whilst his faculties were impaired
5) That he is not criminally liable for committing rape because his faculties were so impaired.

Once all these elements have been proved the court will find him guilty and convict of a penalty which may be imposed in respect of the crime of rape, but intoxication is considered an aggravating factor in sentencing.

Evaluation

The Act reflects the need of present society but there are still a number of flaws in the Act

The drafting is poor and the scope of the legislation should be limited (to violent crimes), but it currently extends to non-violent crimes of theft, dishonesty, public indecency etc and this has the effect that an accused may be charged with theft as well as contravention of s1(1)

PROVOCATION

- This is a non-pathological condition (insanity is a pathological condition)

- It includes any form of severe emotional stress by the accused which **erodes** the accused's **mental state** and so deprives a person of (1) appreciating the wrongfulness of his/her conduct and/or to act in accordance with that appreciation.
- In South African law provocation of a sufficient degree may affect criminal liability and can in some cases lead to a complete defence.

It excludes:

1) Voluntariness of conduct (automatism)
2) Criminal capacity
3) Intention

There are two parts to provocation:

- Before 1950 it had its own separate doctrine whereby it was governed by a separate set of rules and now post-1950 there is a **general principles approach** whereby provocation is a set of facts which must be tested against the general principles of criminal law.
- Previously provocation could negative liability with regard to specific intent (reduce to ordinary intent)
- The defence can be referred to as provocation, anger or "diminished capacity"

- An accused who acts voluntarily and with criminal capacity might nevertheless escape criminal liability on the basis that as a result of provocation he or she lacks the intention to commit a crime.
- Provocation may heighten the intention to commit a crime and in common assault it will rarely exclude intention.
- Where a consequence such as death results, provocation may exclude intention.

Pre-1950

- Previously the Transkeian Penal Code was followed and where provocation was an issue s141 provided that even if killing was intentional it would be reduced to a conviction of culpable homicide.
- More recently the courts have invoked the **specific intent rule** which was to effect that where provocation or intoxication negated the specific intent required for some crimes (murder, assault GBH) the accused could be acquitted of the crime requiring specific intent but convicted of a lesser offence (culpable homicide or common assault)
- It must have been proved that the provocation consisted of wrongful act or insult with the result that the accused lost his power of self-control and the act or insult was of such a nature that the reasonable person also would have lost control.

CASE: *R v Butulezi 1925*

- A policeman killed his wife after finding her with her lover and the court applied the separate doctrine approach so there was no acquittal but only a reduction in the conviction.

CASE: *R v Thibani 1949*

- The trial court held the accused guilty of murder and sentenced him to death because he killed his wife while quarrelling with her based on the suspicion she was having an affair. He was reckless and the court held provocation was not a defence.

Principled approach (post-1950)

CASE: *S v Mokonto 1971*

- *This is the leading case on provocation using the general principles approach*
- Facts: The appellant was convicted of murder and had the belief that the death of his two brothers was because of evil powers of the deceased, as he believed her to be a witch. Upon confronting her she told him he would not see the setting of the sun and so he killed her in fear of his life.
- Court held: The accused's belief in witchcraft was unreasonable and a plea of self-defence also failed, however with regard to provocation it did not **negate intent** but it actually gave rise to it. Holmes JA in an obiter said that the Penal Code should be restricted to the territory for which it was made and it was made.

- After *S v Chretien*, the question arose whether provocation could exclude criminal capacity and in *S v Van Vuuren* this question was answered in the affirmative.
- *S v Arnold; S v Campher, S v Laubscher* all point out that provocation can exclude criminal capacity in applying the general principles approach.

CASE: *S v Arnold 1985*

- **Facts**: Accused was charged with the murder of his wife by shooting her in the head but stated he was in state of severe emotional stress and so had acted subconsciously. The court considered a number of factors that the indicated severe emotional stress:
- The deceased had shouted "you and your f****** son, all you think about is your son" (son was from a previous marriage and had a hearing disability)
- Accused suffered financial difficulties
- Relationship with the deceased had deteriorated due to bad influence from the mother-in-law
- **Court held**: The accused was acquitted of murder

Acquittal for murder (ie the approach in *S v Arnold*) was also used in:

- ***S v Nursingh*** (emotional stress from sexual abuse)
- ***S v Moses*** (deceased disclosed HIV+ status)

- The courts found that there was evidence of provocation which excluded criminal capacity, however the courts did not consider liability for culpable homicide.
- The standard of the reasonable person must be applied to determine this, and it must be asked whether the death was reasonably foreseeable
- The accused could therefore be acquitted if there was sufficient and compelling evidence that could create a reasonable doubt regarding criminal capacity.

CASE: *S v Laubscher 1988*

- To be criminally liable a perpetrator must at the time of the commission of the alleged offence have criminal capacity and so the perpetrator's mental faculties must be such that he is **legally to blame** for his conduct: he must be able to distinguish between right and wrong and act in accordance with that appreciation. By the same token, the perpetrator lacks criminal capacity where his mental powers are such that he does not have the capacity for self-control

CASE: *S v Eadie 2002**

- **Facts**: The accused was involved in a road rage incident and ultimately attacked the deceased with a hockey stick and repeatedly punched and stamped on the deceased's head. The accused stated that when he assaulted the deceased he could feel himself shout but did not hear any sound, he could see things clearly while others were blurred and he felt as if he was in a fish bowl. He also told the court he was suffering from emotional stress which led to loss of control.
- **Court held**: **Even though the test of capacity might remain in principle, subjective, it had to be approached with caution.**
- The accused could not successfully raise the defence of non-pathological incapacity where he had battered another person to death in a fit of road rage and cautioned that courts must **not readily accept the *ipse dixit*** (mere assertion) of the accused regarding provocation and stress
- A court is entitled to draw a **legitimate inference** from what "hundreds of thousands" of other people would have done under the same circumstances (objective circumstances)
- The drawing of such inference could result in the court disbelieving the accused who simply says he was under emotional stress and so lacked capacity or acted involuntarily.

There are three possible interpretations stemming from this case:

1) Reasoning by inference
2) Objective test of capacity
3) Subjective test of capacity

1) Reasoning by inference

- Court should test the accused's evidence about his state of mind, not against his prior or subsequent behaviour, according to the court's experience of human behaviour and social interaction.
- If this is properly and consistently applied it will determine whether the claim of provocation was justified and the courts draw an inference from what hundreds of thousands of other people would have done and also sends a message that a defence of non-pathological incapacity will be scrutinized carefully.
- In assessing an accused's evidence about state of mind the court weighs up that evidence against his/her actions, the surrounding circumstances and then consider it against human experience, societal interaction and societal norms

2) Objective test of capacity

- Navsa JA in *Eadie* stated: "it is absurd to postulate that succumbing to temptation ("the devil made me do it" reasoning) may excuse one from criminal liability.
- One has free choice to succumb to it or resist temptation. If one succumbs one must face the responsibility for the consequences"
- The court therefore shifted from a subjective assessment to an objective approach and there is emphasis of reasonable norms and level-headed behaviour

3) Subjective test of capacity

- The test must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused's conduct in the circumstances and against the standard of persons falling into a particular group
- The question is whether the accused could have acted differently and if he could not have acted differently hen his conduct would inevitably and always be involuntary or not controlled by the conscious will
- The question of whether the accused could have acted differently implies an evaluation of the accused's conduct against another extrinsic standard of conduct.
- At the same time, an inquiry should be conducted as to why the accused acted the way he did and this requires subjective assessment
- However, "different" conduct resulting from road rage cannot be encouraged by law.

Evaluation

- It would seem the test for criminal capacity is whether the accused person could reasonably be expected to have acted differently, taking into account the provocation they received or the emotional stress they acted under
- It has been argued that the accused in *S v Moses* (who killed his partner after the partner revealed an HIV+ status) should not have been acquitted of

murder because he could reasonably have been expected to have acted differently and in accordance with an appreciation of wrongful conduct

- In terms of *Eadie*, capacity remains subjectively tested in principle but practically the test must accommodate the reality that the policy of law with regard to provoked killings must be one of **reasonable restraint**
- **Therefore**, *S v Eadie* advocates for a middle course: **capacity should be tested subjectively and objectively.**