

1 Theories of Punishment

1.1 Retributive theory

1.2 Preventative theory

1.3 Individual deterrence

1.4 General deterrence

1.5 Reformative / Rehabilitation theory

1.6 Combination Theory

2 South African Criminal Law

2.1 Introduction

3 Elements of Criminal Liability

3.1 Act or conduct

3.2 Compliance with the definitional elements of the crime

3.3 Unlawfulness

3.4 Culpability

3.5 Sequence of investigation into presence of elements

4 Crimes and delicts

5 Principle of Legality

5.1 Concept

5.2 Ius Acceptum

5.3 Ius Praevium

5.4 Ius Certum

5.5 Ius Strictum

5.6 Principle of Legality in Punishment

5.7 Summary

6 The Act

6.1 What constitutes an act?

6.2 Factors excluding voluntariness of an act

6.3 Omissions

7 Definitional Elements and Causation

7.1 Formally & Materially defined crimes

7.2 Causation

7.3 Principles applied to determine causation

7.4 Courts' approach to Legal Causation

7.5 Causation: Summary

8 Unlawfulness

8.1 Private defence

8.2 Necessity

8.3 Consent

8.4 Right of Chastisement

8.5 Obedience to Orders

8.6 Official Capacity

8.7 Triviality

9 Culpability

9.1 Criminal Capacity

9.2 Mental Illness

9.3 Youthfulness

10 Intention (*dolus*)

10.1 Forms of intention

10.2 Proof of intention: Direct or Indirect

10.3 Intention directed at the circumstances included in the definitional elements

10.4 Intention with regard to unlawfulness

10.5 Intention v Motive

11 Mistake

11.1 Mistake must be material

11.2 Mistake relating to the Chain of Causation

11.3 Aberratio ictus: Going astray of the blow does not constitute a mistake

11.4 Mistake relating to unlawfulness

12 Negligence (*Culpa*)

12.1 Definition of Negligence

12.2 Subjective Factors

12.3 Negligence and Intention

12.4 Conscious and Unconscious Negligence

12.5 Exceeding the bounds of Private Defence

13 The effect of intoxication on liability

13.1 Involuntary Intoxication

13.2 Voluntary Intoxication

13.3 Intoxication & Culpable homicide

13.4 Effect of intoxication on punishment

<u>14</u>	<u>The effect of provocation on liability</u>
<u>14.1</u>	<u>Effects of Provocation</u>
<u>14.2</u>	<u>Test in respect of provocation</u>
<u>14.3</u>	<u>Provocation and Negligence</u>
<u>15</u>	<u>Disregard of the requirement of culpability</u>
<u>15.1</u>	<u>Strict liability</u>
<u>15.2</u>	<u>Vicarious liability</u>
<u>15.3</u>	<u>Versari doctrine</u>
<u>16</u>	<u>The criminal liability of corporate bodies</u>
<u>16.1</u>	<u>Liability of corporate body for the acts of its director or servant</u>
<u>17</u>	<u>Glossary</u>

1. Theories of Punishment

1. Absolute

a) Retributive

2. Relative

a) Preventative

b) Deterrence

i. General deterrence

ii. Individual deterrence

c) Reformative

3. Combination

1.1 Retributive theory

Retribution is the restoring of the legal balance caused by the crime

Punishment is the payment of the account

Retribution ≠ vengeance (*lex talionis*)

Extent of the punishment must be proportionate to the extent of the harm done or of the violation of the law.

Punishment expresses society's condemnation of the crime

Theory explains the need for general requirement of liability known as “culpability” (mens rea) by presupposing free will.

1.2 Preventative theory

Theory says that the purpose of punishment is the prevention of crime.

Can overlap with deterrent and reformative theories.

Theory is only applied when a real possibility exists that the offender will again commit a crime: previous convictions point to repeat offenders.

1.2.1 Criticism

Difficult to determine whether offender will again commit crime.

1.3 Individual deterrence

Teach the individual person convicted of a crime a lesson which will deter him from committing crimes in the future.

1.3.1 Criticism

Undermined by high percentage of recidivists in our jails.

1.4 General deterrence

Theory says the purpose of punishment is to deter society as a whole from committing crime. Success of the theory depends not on the severity of the sentence, but on how strong the probabilities are that an offender would be caught, convicted and serve out his sentence.

1.4.1 Criticism

1. Is based upon the premise that man prefers the painless to the painful, and that he is a rational being who will always weigh the advantages and disadvantages of a prospective action before he decides to act.
2. There is no empirical proof of efficacy of theory.
3. If one applies this theory, it becomes permissible to impose a punishment which is not proportional to the harm inflicted when the offender committed the crime, but which is in fact higher than a sentence which is exactly proportional to the harm.

1.5 Reformative / Rehabilitation theory

Says that the purpose of punishment is to reform the offender as a person. Emphasis is placed on the person & personality of offender. Theory says an offender commits a crime because of some personality defect, or because of psychological factors flowing from his background

1.5.1 Criticism

1. Difficult for a court to ascertain how long it would take to reform an offender.
2. Theory does not necessarily imply that the period of imprisonment ought to be proportionate to the harm inflicted.
3. Effective only where the offender is a relatively young person.
4. Rehabilitation of the offender is more often than not an ideal rather than a reality.
5. Not necessary to wait for a person to commit a crime.
6. Depersonalizes the offender by not regarding him as a free moral agent.

1.6 Combination Theory

Theory applied in practice by the courts is the combination theory. Retribution forms the backbone.

Zinn 1969 describes factors court keeps in mind:

1. Crime
2. Criminal
3. Interests of society

2. South African Criminal Law

2.1 Introduction

SA law is not codified.

Our criminal procedure is codified in the Criminal Procedure Act 51 of 1977.

Before a person can be convicted the principle of legality must be proved, i.e. is whether the act is a crime.

Principle of legality is not an element of the crime.

3. Elements of Criminal Liability

1. Act or conduct
2. Compliance with the definitional elements of the crime
3. Unlawfulness
4. Culpability

3.1 Act or conduct

Requirement for an act/omission must be satisfied.

Conduct can lead to liability only if it is voluntary.

Omission can lead to liability only if the law imposed a duty on X to act positively and X failed to do so.

3.2 Compliance with the definitional elements of the crime

X's conduct must comply with or correspond to the definitional elements.

It must be conduct which fulfils the definitional elements, or by which these definitional elements are realised.

3.3 Unlawfulness

An act that complies with the definitional elements is not necessarily a crime due to grounds of justification that could exist, i.e. private defence (which includes self-defence), necessity, consent, right of chastisement and official capacity.

3.4 Culpability

X's conduct must be culpable.

1. Criminal Capacity

a) The ability to appreciate the wrongfulness of his act

b) The ability to act in accordance with such an appreciation

2. Act must be either intentional or negligent

3.5 Sequence of investigation into presence of elements

Criminal Liability =

(1) Act +

(2) Compliance with definitional elements +

(3) Unlawfulness +

(4) Culpability

4. Crimes and delicts

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

5. Principle of Legality

5.1 Concept

First question to be asked is whether the type of conduct allegedly committed by him is recognised by the law as a crime.

Principle of legality is contained in section 35(3)(1) of the Constitution of the Republic of South Africa 108 of 1996.

An accused may

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

5.2 *Ius Acceptum*

Conduct must be recognised by the law as a crime.

Only legislature and not the courts can create the law.

In SA *ius acceptum* refers to common & statutory law.

Implied by section 35(3)(l) of the constitution:

Provides that every accused has a right to a fair trial, which includes the right not to be convicted of an offence in respect of an act that was not an offence at the time it was committed

5.2.1 Common law crimes

Where there is no provision of the common law declaring certain conduct to be a crime, the courts have generally held that there can be no crime – and therefore no punishment.

5.2.2 Statutory crimes

An Act that creates a crime will best comply with the principle of legality if it expressly declares:

1. That that particular type of conduct is a crime, and
2. What punishment a court must impose upon a person convicted of such a crime.

When wording of an act is unclear the court should only assume that a new crime has been created if it appears unambiguously from the wording of the Act that a new crime has in fact been created.

Legal norm, a criminal norm and a criminal sanction in an Act.

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

An Act must specify a **criminal norm** in order for an act to be a crime.

If no **criminal sanction** is specified, punishment is assumed to be at the court's discretion.

Cases:

1. *Zinn* 1946
2. *Letoani* 1950
3. *Landman* 1960
4. *S v Francis* 1994

5.3 Ius Praevium

Crimes should not be created with retrospective effect, thus:

Nobody ought to be convicted of a crime unless at the moment it took place the type of conduct committed was recognised by the law as a crime.

The **Constitution** of the Republic of South Africa Act 108 of 1996 contains a provision which expressly sets out the ius praevium rule:

Section 35(3) of this Act provides that every accused has a right to a fair trial and paragraph (l) of this sub-section provides that this right to a fair trial includes the right not to be convicted of an offence in respect of an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

5.4 Ius Certum

Formulation of a crime must not be unclear or vague.

Constitution contains **no express provision** as regards the ius certum rule, however, section 35(3) will probably be interpreted to cover the ius certum rule.

5.5 Ius Strictum

Provisions creating crimes must be interpreted strictly.

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

Implies that a court is not authorised to extend a crime's field of application by means of analogy to the detriment of the accused.

Constitution contains **no express provision** as regards the ius certum rule, however, section 35(3) will probably be interpreted to cover the ius certum rule.

Principle of Legality in Punishment

Nulla poena sine lege - no penalty without a statutory provision or legal rules.

Application of principles of legality when determining punishment:

Ius acceptum: If no punishment is recognised or prescribed by statutory or common law, the court cannot impose the punishment.

Ius praeivium: If punishment is increased, it must not be applied to the detriment of the accused who committed a crime before the punishment was increased.

Ius certum: Legislature should not express itself vaguely when prescribing punishment.

Ius strictum: If prescribed punishment is ambiguous, court must interpret provision strictly.

Section 35(3)(n) of the Constitution contains a provision which incorporates the *nulla poena* rule. It provides that the right to a fair trial also includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishments for the offence have been changed between the time that the offence was committed and the time of sentencing.

1. Summary

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

6. The Act

“Act” is sometimes referred to as “positive conduct” or “commission” (or its Latin equivalent *commissio*) and an “omission” (or its Latin equivalent *omissio*) is sometimes referred to as “negative conduct” or “failure to act”. Punishment of omissions is more the exception than the rule, writers use “act” in a wide sense as referring to both an act and an omission.

6.1 What constitutes an act?

1. Thinking <> crime: some act (i.e. speaking re conspiracy) is required.
2. Act must be a human act or omission, except where a human creates a crime through the agency of an animal.
3. Act or conduct must be voluntary: “*The conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.*”

6.2 Factors excluding voluntariness of an act

Absolute force
Natural force
Automatism

6.2.1 Absolute force (*vis absoluta*)

X overpowers Y and forces Y to commit a crime: Y has not committed an act.

Not be confused with *relative force*: X holds a gun to Y’s head and tells Y to shoot Z = relative force.

Difference between absolute and relative force lies in the fact that absolute force excludes X’s ability to subject his bodily movements to his will or intellect, whereas this ability is left intact in cases of relative force.

6.2.2 Natural force

Wind propels X through Y's shop window: X has not committed an act.

6.2.3 Automatism

A person behaves in a "mechanical" fashion: reflex movements, somnambulism, etc.

Cases: *Dhlamini* 1955, *Mkhize* 1959, *Du Plessis* 1950

6.2.3.1 "Sane" & "Insane automatism"

Sane = no voluntary act performed by person

Insane = mental illness

Difference between sane & insane:

1. Onus of proof
 - a. Sane: onus of proving that the act was performed voluntarily lies on the state
 - b. Insane: Onus on proving mental illness rests on X
2. Outcome of the case
 - a. Sane: X leaves court a free person
 - b. Insane: X is dealt with in accordance with the relevant provisions of the Criminal Procedure act dealing with the orders which a court can make after finding that X was mentally ill.

Cases: *S v Henry* 1999

Defence of automatism does not succeed easily: court is very circumspect when dealing with these cases.

Antecedent Liability

Is someone knows about a condition, i.e. epilepsy, and kills someone while driving, the automatism defence cannot be used. Known as Antecedent Liability.

6.3 Omissions

6.3.1 General rule

An omission is punishable only if there is a legal duty on X to act positively.

Case: *Minister van Polisie v Ewels* 1975 (cf Cases).

6.3.2 Legal duty: specific instances

1. A **statute** may impose a duty on someone to act positively.
 - a) Tax return, not leave the scene of a car accident, etc.
2. A legal duty may arise by virtue of the **provisions of the common law**
 - a) An act of omission when discovering a planned act of treason is equivalent to an act of high treason.
3. A duty may arise from an **agreement**.
 - a) Railway crossing, *Pitwood*
4. Where a person accepts responsibility for the **control of a dangerous or potentially dangerous object**, a duty arises to control it properly.
 - a) Baboon escaped from cage, bit child, *Fernandez*
5. A duty may arise where a person stands in a **protective relationship** to somebody else.
 - a) Assault on a child, mother did nothing, *S v B* 1994
6. A duty may arise from a **previous positive act**.
 - a) Lighting dry grass, have to put it out
7. A duty may sometimes arise by virtue of the fact that a person is the **incumbent of a certain office**.
 - a) *Minister van Polisie v Ewels*(cf Cases); *S v Gaba*(cf Cases)
8. A legal duty may also arise by virtue of an **order of court**.
 - a) Not paying maintenance as stipulated by a court.

6.3.3 Defence of impossibility

The objective impossibility of discharging a legal duty is always a defence when the form of conduct with which X is charged is an omission.

6.3.3.1 Legal provision which is infringed must place a positive duty on X

Impossibility can be pleaded only if the conduct which forms the basis of the charge consists in an omission, i.e. X must report for military duty but fails to do so.

Cannot be raised in a case where a mere prohibition is infringed.

Cases: *Jetha* 1929, *Mostert* 1915.

6.3.3.2 It must be objectively impossible for X to comply with the relevant legal provision

The mere fact that compliance with the law is exceptionally inconvenient for X, or requires a particular effort on his part, does not mean that it is impossible for him to comply with the law

Cases: *Leeuw* 1975, *Hoko* 1941

6.3.3.3 X must not himself be responsible for the situation of impossibility

Cases: *Close Settlement Corporation* 1922

7. Definitional Elements and Causation

The definitional elements signify the concise description of the requirements set by the law for liability for a specific type of crime.

Contains the formula for determining which elements apply to a specific crime.

Definitional elements contain:

1. Description, i.e. possession, sexual intercourse, etc.
2. Circumstances in which act must take place, i.e. **forcible** entry
3. Characteristics of the person, i.e. **male** in rape
4. Nature of the object in respect of which the act must be committed, i.e. possession of **dagga**
5. Place (sometimes) where act has to be committed, i.e. park on a **yellow line**
6. Time (sometimes), i.e. on a **Sunday**

7.1 Formally & Materially defined crimes

Formally defined crimes:

Definitional elements proscribe a certain type of conduct irrespective of the result, i.e. rape, perjury

Materially defined crimes: (result crimes/consequence crimes)

Definitional elements do **not** proscribe a specific conduct, but any conduct which causes a specific condition, i.e. murder, arson, culpable homicide

7.2 Causation

In the vast majority of cases of materially defined crimes which come before the courts, determining whether X's act was the cause of the prohibited condition does not present any problems.

Problems in terms of causation usually arise in connection with murder & culpable homicide.

Question to ask is: did the act **precipitate** the death.

Cases: *Makali* 1950, *Hartmann* 1975

7.3 Principles applied to determine causation

7.3.1 Basic Principle

To determine whether there is a causal link between X's act and the prohibited condition 2 requirements must be met:

1. It must be clear that X's act was the factual cause of Y's death
2. It must be clear that X's act was the legal cause of Y's death

Thus:

Causal link = factual causation + legal causation

7.3.2 Factual Causation (*conditio sine qua non*)

An act without which the prohibited situation would not have materialised

Must be able to say: "**but for** the act, the prohibited condition would **not** have happened"

An act is a *conditio sine qua non* for a situation if the act cannot be thought away without the situation's disappearing at the same time.

Cases: *Makali* 1950, *Mokoena* 1979, *Minister v Polisie v Skosana* 1977

7.3.3 Legal Causation

Limits wide scope of factual causation.

When searching for the legal cause (or causes) of Y's death, a court eliminates those factors which, although they qualify as factual causes of Y's death, do not qualify as the cause (or causes) of Y's death according to the criteria for legal causation.

7.3.4 Theories of Legal Causation

7.3.4.1 Individualisation Theories

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

= Proximate cause

Objection:

2 or more conditions are often operative in equal measure.

Idea finds little support today (Case *Daniels* 1983).

7.3.4.2 Theory of Adequate Causation (Generalisation theory)

An act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that kind of situation.

It must be typical of such an act to bring about the result in question.

If this test can be met, it is said that the result stands in an “adequate relationship” to the act.

Cases: *Loubser* 1953

7.3.4.3 Novus actus interveniens

New intervening act.

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

Used to indicate that between X's initial act and the ultimate death of Y, another event which has broken the chain of causation has taken place, preventing us from regarding X's act as the cause of Y's death.

Some authorities regard legal causation as consisting in the absence of a *novus actus interveniens*.

According to this approach X's act is regarded in law as the cause of Y's death if it is a factual cause of the death and there is no novus actus interveniens between X's act and Y's death. (*S v Counter* 2003)

An act or an event can never qualify as a *novus actus* if X previously knew or foresaw that it might occur.

7.4 Courts' approach to Legal Causation

The Appellate Division has stated that in deciding whether a condition which is a factual cause of the prohibited situation should also be regarded as the legal cause of that situation, a court must be guided by **policy considerations** (*Daniels* 1983, *Mokgethi* 1990).

Courts strive towards a conclusion that is reasonable, fair & just.

Court may use one or more specific theories of legal causation.

7.4.1 Assisted Suicide

Grotjohn 1970:

The mere fact that the last act causing the victim's death was the victim's own, voluntary, non-criminal act did not necessarily mean that the person handing the gun to the victim was not guilty of any crime.

See Cases for *Mokgethi* & *Daniels*

7.5 Causation: Summary

Rules to determine causation:

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

8. Unlawfulness

Conduct is unlawful if it conflicts with the *boni mores* or legal convictions of society. In order to determine whether conduct is unlawful, one must therefore enquire whether the conduct concerned conflicts with the *boni mores* or legal convictions of society. The grounds of justification must be seen as practical aids in the determination of unlawfulness.

Satisfying the definitional elements is not the only general requirement for liability: next step is to determine whether act is unlawful.

Grounds of justification excludes unlawfulness, i.e.:

1. Private defence
2. Necessity
3. Consent
4. Official capacity
5. Parents' right of chastisement

Cannot define unlawfulness as absence of grounds of justification due to:

1. No limited number of grounds of justification
2. Each ground of justification has its limits

Cases: *Fourie* 2001, *Clark v Hurst* 1992

Unlawfulness is usually determined without reference to X's state of mind. Whether he thought that his conduct was lawful or unlawful is irrelevant. What he subjectively imagined to be the case comes into the picture only when the presence of culpability has to be determined.

8.1 Private defence

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

Defence can be used by people defending themselves as well as those defending others.

1. Private defence requirements:

- a) Requirements of attack
 - b) The attack must be unlawful
 - c) The attack must be against interests which ought to be protected
 - d) must be threatening but not yet completed

2. Requirements of defence:

- a) Defensive action must be directed against the attacker
- b) Defensive action must be necessary
- c) Defensive action must stand in a reasonable relationship to the attack
- d) Defensive action must be taken while the defender is aware that he is acting in private defence

8.1.1 Requirements of the attack

8.1.1.1 Attack must be unlawful

Private defence against lawful conduct is not possible.

Case: *Jansen* 1983 (duel with a knife)

In deciding whether the attack of Y (the aggressor) on X is unlawful, there are three considerations which should be left out of consideration:

1. The attack need not be accompanied by culpability.
 - a) If attacker does not have criminal capacity (i.e. child/insane) X can still rely on private defence (*S v K* 1956)
 - b) Where Y acts without intention because of a mistake, X can use private defence
 - c) Animals are not subject to the law and can therefore not act unlawfully.
2. The attack need not be directed at the defender (*Patel* 1959)
3. The attack need not necessarily consist in a positive act (commissio), despite the fact that it nearly always does.

8.1.1.2 The attack must be directed against interests which, in the eyes of the law, ought to be protected

Private defence can also be used to protect:

1. Property (*Ex parte die Minister van Justisie: in re S v Van Wyk* 1967)
2. Dignity (*Van Vuuren* 1961)
3. Preventing unlawful arrest (*Mfusen* 1923)
4. Preventing attempted rape (*Mokoena* 1976)

8.1.1.3 The attack must be threatening but not yet completed

X can attack Y only if there is an attack or immediate threat of attack by Y against him. Private defence is not a means of exercising vengeance; neither is it a form of punishment. For this reason X acts unlawfully if he attacks Y when Y's attack upon him is already something of the past.

8.1.2 Requirements of the defence

8.1.2.1 It must be directed against the attacker

8.1.2.2 The defensive act must be necessary

X can only rely on private defence if the ordinary legal remedies do not afford him protection.

Law sometimes defines a "duty to flee".

1. This must **not** be done if : The attacked person puts themselves in danger when fleeing
2. This **must** be done if: The only other alternative is to kill the attacker
3. This must **not** be done if: The attacked person is in their home or place of business
4. This must **not** be done if: The attacked person is an on-duty policeman.

8.1.2.3 There must be a reasonable relationship between the attack and the defensive act

There ought to be a certain balance between the attack and the defence.

Reasonable relationship between attack & defence is determined by:

1. The relative strength of parties
2. The sex of the parties
3. The ages of the parties
4. The means they have at their disposal
5. The nature of the threat
6. The value of the interest threatened
7. The persistence of the attack

The elements between which there need not be a proportional relationship:

1. There need not be a proportional relationship between the nature of the interest threatened and the nature of the interest impaired.
2. There need not be a proportional relationship between the weapons or means used by the attacker and the weapons or means used by the attacked party
3. There need not be a precise proportional relationship between the value or extent of the injury inflicted by the attacker and the value or extent of the injury inflicted by the defending party.

8.1.2.4 The attacked person must be aware of the fact that he is acting in private defence

No accidental private defence is possible.

8.2 Necessity

A person acts out of necessity and her conduct is therefore lawful if she acts in the protection of her own or somebody else's life, physical integrity, property or other legally recognised interest which is endangered by a threat of harm which has already begun or is immediately threatening and which cannot be averted in any other way; provided that the person who relies on the necessity is not legally compelled to endure the danger, and the interest protected by the act of defence is not out of proportion to the interest threatened by such an act.

Requirements for a plea of necessity

1. legal interest threatened (property, physical integrity)
2. may also protect another
3. emergency already begun but not yet terminated
4. may rely on necessity even if personally responsible for emergency
5. not legally compelled to endure danger
6. only way to avert danger
7. conscious of fact that emergency exists
8. not more harm caused than necessary

Only cases of relative compulsion may amount to situations of necessity.

8.2.1 Necessity v Private Defence

1. Origin
 - a. Private defence: unlawful attack
 - b. Necessity: unlawful human act or chance circumstances
2. Object at which the act is directed
 - a. Private defence: directed at unlawful human attack
 - b. Necessity: directed at interests of another innocent 3rd party or amounts to violation of a legal provision

If X acts in a situation of necessity, the act is lawful.

For a plea of necessity to succeed, it is immaterial whether the situation of emergency is the result of human action (i.e. coercion) or chance circumstances

Case: *S v Goliath* 1972

8.2.2 Restricted field of application

The attitude of our courts to the plea of necessity is often one of scepticism, and they also seek to restrict its sphere of application as far as possible (Case: *Mahomed* 1938)

8.2.3 Killing another person out of necessity

Until 1972, our courts usually held that the killing of a person could not be justified by necessity. In *Goliath* 1972, however, the Appeal Court conclusively decided that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion.

8.2.4 Test to determine necessity is objective

Whether X's act fell within limits of defence of necessity must be considered objectively. If X only thinks he is acting out of necessity, the act remains unlawful. May escape liability because of lack of culpability: putative necessity.

8.3 Consent

Consent may in certain cases render X's unlawful act lawful.

Volenti non fit iniuria (no wrongdoing is committed in respect of someone who has consented)

The criterion to be applied to determine whether consent excludes unlawfulness is the general criterion of unlawfulness, namely the *boni mores* (the legal convictions) of society, or public policy.

8.3.1 Different effects of consent

Crimes where consent does operate as a defence, but where the structure of the crime is such that consent forms part of the definitional elements, i.e. rape (you cannot consent to be raped, thus consent is part of the definitional elements of rape)

1. Crimes where consent is never recognized as a defence, i.e. murder,
2. Crimes where consent does operate as grounds for justification, i.e. theft, malicious injury to property
3. Crimes where consent sometimes operates as grounds for justification, i.e. assault
4. Crimes where consent sometimes operates as grounds for justification, i.e. assault

8.3.2 Requirements for a valid plea of consent

The consent must be,

1. given voluntarily (not submission: rape: *Volschenk* 1968)
2. given by a person who has certain minimum mental abilities (*S v C* 1952, *S v K* 1958)
 - a. to appreciate the nature of the act to which he consents, and
 - b. to appreciate the consequences of the act.
3. based upon knowledge of the true and material facts (*Flattery* 1877, *Williams* 1923); *error in persona* (*S v C* 1952; rape, sleeping, not husband)
4. given either expressly or tacitly
5. given before the commission of the act
6. given by the complainant herself

8.3.3 Presumed Consent

X commits an act which infringes on Y (thus complying with the definitional elements of a crime), X's conduct is justified when acting in defence or furtherance of Y's interests.

Requirements:

1. It must not be possible for X to obtain Y's consent in advance.
2. There must be reasonable grounds for assuming that, had Y been aware of the material facts, Y would not have objected to X's conduct (test is objective)
3. Reasonable grounds for assuming that Y would not have objected to X's conduct must have existed at the time that X performed the act.
4. At the time of performing the act, X must know that there are reasonable grounds for assuming that Y would not object to X's acts
5. X must intend to protect or further Y's interests.
6. X's intrusion into Y's interests must not go beyond conduct to which Y would presumably have given consent
7. It is not required that X's act should have succeeded in protecting or furthering Y's interests

8.4 Right of Chastisement

In accordance with section 10 of the Constitution legislation was passed in 1996 banning corporal punishment in schools (Section 10 of the South African Schools Act 84 of 1996). Case: *Christian Education South Africa v Minister of Education* 2000

Chastisement of a child by a parent is, justified only if it is moderate and reasonable (*Hiltonian Society v Crofton* 1952)

Depends on a child's:

1. Age
2. Gender
3. Build
4. Health
5. Nature of transgression
6. Nature and extent of punishment

(*Lekgathe* 1982)

8.5 Obedience to Orders

Whether or not an unlawful act can be justified by the fact that X was merely obeying orders.

3 Approaches:

1. Subordinate must display blind obedience to superior: thus OtO is always grounds for justification (i.e. Eichmann was only following orders)
2. O.t.O is never grounds for justification (not good for armed forces)
3. Middle ground: a soldier is compelled to obey an order only if the order is manifestly lawful. If it is manifestly unlawful, it must not be obeyed.

Deciding whether an order is lawful:

1. Consider content of the order and circumstances in which it was given
2. Does it fall within the normal scope of soldier's duty?

8.5.1 Defences for Obedience to Orders

Mistake relating to the nature of the order: If a subordinate knows the order is unlawful, obedience cannot be used for grounds of justification. Otherwise, subordinate did not know order was unlawful and may not be culpable.

Subordinate may be acting in necessity if a superior threatens him (see Necessity)

8.6 Official Capacity

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

Examples:

Searching a person at a custom point or airport checkpoint.

Destroying property according to a court order.

Grabbing a person when arresting him.

8.7 Triviality

If act is unlawful but trivial, court will not convict.

De minimis non curat lex.

Case: *Kgogong* 1980 (removal of small piece of paper seen as waste)

9. Culpability

Mens rea = fault.

The mere fact that a person has committed an unlawful act which complies with the definitional elements and which is unlawful is not yet sufficient to render him criminally liable: X's conduct must be accompanied by culpability.

Will be the case if he has committed the unlawful act in a blameworthy state of mind.

Unlawfulness v Culpability:

Unlawfulness: Agnostic to personal characteristics of perpetrator.

Culpability: Personal characteristics of perpetrator taken into consideration.

Person must be endowed with criminal capacity before person has acted culpably.

X must have acted either intentionally or negligently.

Thus:

culpability = criminal capacity + (intention or negligence)

The culpability and the unlawful act must be contemporaneous.

No crime is committed if culpability only existed prior to the commission of the unlawful act, but not at the moment the act was committed, or if it came into being only after the commission of the unlawful act. (Case: *Masilela* 1968)

9.1 Criminal Capacity

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

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

9.1.1 Criminal Capacity v Intention

The question whether X acted intentionally or negligently arises only once it is established that he had criminal capacity.

Criminal Capacity:

Connected with mental abilities

Intention:

Presence or absence of a certain attitude or state of mind

Not knowing something is unlawful means that X acted without **intention**, not that he is without criminal capacity.

9.1.2 Two psychological legs of test

1. Ability to appreciate wrongfulness (cognitive)
2. Ability to act accordance with such an appreciation (conative)

Cognitive:

1. Emphasis on insight and understanding
2. Insight
3. Ability to differentiate

Conative:

1. Self control
2. Ability to conduct oneself in accordance with what is right and wrong
3. Power of resistance

9.1.3 Defences excluding criminal capacity

9.1.3.1 Particular Defences

1. Mental illness
2. Youthfulness

Defence can only succeed if the mental inabilities are the result of particular circumscribed mental characteristics to be found in the perpetrator.

Subject to certain rules only applicable to these defences (mental illness by sections 77 to 79 of Criminal Procedure Act , youthfulness by arbitrary age)

9.1.3.2 General Defence

1. Defence of non-pathological criminal incapacity

Not dependent upon the existence of specific factors or characteristics of the perpetrator which lead to his criminal incapacity.

Defence may succeed without any need of proving that at the time of the commission of the act X was suffering from a mental illness.

Sufficient to prove that X lacked criminal capacity for only a relatively brief period and that the criminal incapacity was not a manifestation of an ailing or sick (pathological) mental disturbance.

Eadie 2002 casts doubt as to whether defence still exists.

Described in *Laubscher* 1988.

NPCI adopted in order to distinguish it from mental illness as described in section 78 of the CPA.

9.1.4 NPCI: before *Eadie* 2002

Not necessary to prove that X's mental incapacities resulted from certain specific causes.

If court is satisfied that X lacked criminal capacity, X must be found not guilty, irrespective of the cause of the inability.

Emotional collapse due to shock, fear, anger, concussion. Could stem from:

1. Intoxication
2. Provocation by Y or someone else

If X relies on this defence the onus of proving beyond reasonable doubt that X had criminal capacity at the time of the commission of the act rests upon the state. However, X must lay a foundation for the defence in the evidence.

Cases: *Campher* 1987, *Wiid* 1990

9.1.5 NPCI: after *Eadie* 2002

Court holds that "there is no distinction between non-pathological criminal incapacity owing to emotional stress and provocation, on the one hand, and the defence of sane automatism, on the other."

Thus, NPCI is seen as sane automatism: does not succeed easily and is rarely upheld.

9.1.6 NPCI: Current Law

Submitted that:

Eadie is applicable only where X alleges that his actions are as a result of provocation or emotional stress.

Eadie is not applicable where other causes, i.e. intoxication are used and NPCI can still be used.

If provocation or emotional stress are used as defence, defence should be treated as one of sane automatism.

9.2 Mental Illness

Criminal capacity may be excluded by the mental illness or abnormality of the accused.

Has been governed by legislation since 1977. Covered by section 78 of the Criminal Procedure Act 51 of 1977. Before 1977: McNaghten rules (English).

Burden of proving insanity rests on the party raising the issue.

Here: dealing with mental abnormality during commission of the act, not during trial: a court cannot try a mentally abnormal person: such a person must be detained in a psychiatric hospital or prison. If he becomes well again, he can then be tried for the crime.

9.2.1 Section 78

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

a) of appreciating the wrongfulness of his or her act or omission; or

b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

Above is known as mixed test, taking pathological & psychological into account.

Thus: 2 legs in test:

Pathological

(he suffers from) mental illness or mental defect

Psychological

He is incapable of:

i. Appreciating wrongfulness of his act (cognitive) **or**

ii. Acting in accordance with appreciation of wrongfulness (conative)

9.2.2 Pathological leg of test: Mental illness or mental defect

Pathological part of test for not being criminally responsible:

1. Refers to a pathological disturbance of the mental faculties: not anything temporary like drugs, alcohol, etc.

2. Must be determined by the court with the help of expert evidence given by psychiatrists.

3. Source of illness does not necessarily have to be of the mind: could also be organic nature, i.e. arteriosclerosis

4. The duration of the mental illness is not relevant. It may be of either a permanent or a temporary nature.

5. Although intoxication in itself does not constitute mental illness, the chronic abuse of liquor can lead to a recognised mental illness known as delirium tremens (*Bourke* 1916; *Holliday* 1924).

6. Mental defect:

a) Characterised by abnormally low intellect

b) Evident at an early age

c) Is of permanent nature

7. Mental illness

a) Manifests later in life

b) Not necessarily of a permanent nature

9.2.3 Psychological leg of test

1. the ability to distinguish between right and wrong (cognitive mental faculty)
 2. the ability to act in accordance with such an insight (conative mental faculty)
- (1) is not used much in practice: normally asked if (2) was complied with

To prove (2), all that is required is that X must have been incapable of acting in accordance with an appreciation of the wrongfulness of his act or omission.

May be the result of a gradual process of disintegration of the personality.

Cases: *Kavin* 1978

9.2.4 Verdict

If accused is found not guilty, court has discretion to recommend any of the following:

1. that X be detained and treated in one of the institutions mentioned in the Mental Health act 18 of 1973, until the hospital board of such institution discharges him
2. that X be treated as an outpatient in such an institution until the superintendent of that institution decides that she no longer needs treatment
3. that X be released on certain conditions
4. that X be released unconditionally

If (4), X must be not mentally ill at the time of the trial.

In serious cases:

1. If X has been charged with
 - a) Murder
 - b) Culpable homicide
 - c) Rape
 - d) Another charge involving serious violence
2. If the court considers it necessary in the public interest

the court may direct that X be detained in a psychiatric hospital or a prison until a judge in chambers makes a decision in terms of section 29 of the Mental Health Act 19 of 1973 about whether he should be released, and if so, whether the release should be unconditional or subject to certain conditions.

Section 29 provides that any one of a number of people may apply for X's release.

9.2.5 Diminished responsibility or capacity

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

Subsection confirms that the border-line between criminal capacity and criminal incapacity is not an absolute one, but a question of degree.

9.2.6 Differences between mental illness & NPCI

Defence of Mental Illness	Defence of non-pathological criminal incapacity
Set out in Statutory provision, section 78(1) of the Criminal Procedure Act	Forms part of common law
Result of a specific cause, namely "mental illness or defect" as set out in 78(1)	No specific cause: could have any cause: emotional collapse, fear, provocation, intoxication
Onus of proof rests on accused	Onus of proof rests on state to prove absence of Incapacity
Expert evidence of psychiatrists necessary	Expert evidence of psychiatrists not necessary
If defence succeeds, X goes to psychiatric hospital or Prison	If defence succeeds, X leaves the court a free person

9.3 Youthfulness

Children under 7 cannot have criminal capacity: can never lead to a conviction of any crime.

Between 7 & 14: children are rebuttably presumed to lack criminal capacity: may lead to a conviction of a crime, provided state rebuts the presumption of criminal incapacity beyond reasonable doubt.

Sometimes a child lacking criminal capacity is referred to as *doli incapax*.

Person lacking criminal capacity because of youth cannot be convicted as an accomplice to a crime: can however be used as an innocent instrument in the commission of a crime by another.

9.3.1 Test to determine criminal capacity of children

Same as general test for criminal capacity:

1. the ability to distinguish between right and wrong (cognitive mental faculty)
2. the ability to act in accordance with such an insight (conative mental faculty)

Courts investigate *capacity* of child (*Mbandla* 1986).

However: when children are under the influence of older persons, court has been loathe to convict children under 14 years.

9.3.2 Rebutting the presumption of criminal non-capacity

The closer a child is to 14, the weaker the presumption that he lacks criminal capacity.

It must be clear in the context of the case that X understood that what he was doing was wrong, not just that he knows the difference between right and wrong.

Easier to rebut with common law crimes such as assault & theft than technical statutory crimes.

Court must take into account: character of the crime, conduct of the child in determining whether state has rebutted the presumption.

10. Intention (*dolus*)

A person acts or causes a result intentionally if

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

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

Consists of cognitive & conative elements:

Cognitive element consists in X's knowledge or awareness of:

- The act
- The existence of all the circumstances set out in the definitional elements
- The unlawfulness

Conative elements: X directing his will towards a certain act or result

Test for intention is always subjective: not what X *should* have foreseen, but what he perceived the situation, what knowledge he had and whether he willed the consequences or foresaw it as a possibility.

Knowledge (part of definition): must cover all requirements of the crime as defined in statute, i.e. perjury: making a declaration which is false under oath in the course of a legal procedure... If X does not know he is making the statement as part of a legal proceeding, a material element of the crime is missing and X cannot be convicted of a crime.

10.1 Forms of intention

1. Direct intention (*dolus directus*)

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

2. Indirect intention (*dolus indirectus*) (*Kewelram* 1923)

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

3. *Dolus eventualis* (*Jolly* 1923; *Nsele* 1955)

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

Minimum requirement for *Dolus eventualis* is an **actual contemplation** by of the possible consequence in question.

Intention is not present because X "ought to have foreseen". X must have **foresaw** the possibility of a result ensuing.

10.2 Proof of intention: Direct or Indirect

Direct evidence, i.e. confession made in court, presents no problems.

Court may find that X acted intentionally on indirect proof of intent: thus infer from evidence and circumstances surrounding the events that X had intent.

Court must always be subjective when trying to determine intent.

Court must consider all circumstances of the court and try and place itself in X's position at the time of the act and try determine whether X appreciated or foresaw the result of his actions (*Mini* 1963, *Sigwahla* 1967)

10.3 Intention directed at the circumstances included in the definitional elements

If circumstances form part of the definitional elements, X must have knowledge of the circumstances. Applies particularly to formally defined crimes because question is not whether X's act caused a certain result, but whether the act took place in certain circumstances.

X need not be convinced that the said circumstance exists. In the eyes of the law, X will also be regarded as having the knowledge if he merely foresees the possibility that the circumstance or fact may possibly exist, and reconciles himself with that possibility. (*dolus eventualis*)

10.4 Intention with regard to unlawfulness

Knowledge of the unlawfulness of an act is knowledge of a fact, and is present not only when X in fact knows (or is convinced) that the act is unlawful, but also when he merely foresees the possibility that it may be unlawful and reconciles himself to this. (*dolus eventualis*)

Means that X must be aware that his conduct is not covered by a ground of justification and that the type of conduct he is committing is prohibited by law as a crime.

10.5 Intention v Motive

In determining whether X acted with intention, the motive behind the act is immaterial (*Peeverett* 1940). Motive may at most have an influence on the degree of punishment.

Laudable motives, sympathy, etc. does not exclude intention (*Hartmann* 1975).

If X did not want to commit the act, the result in no way affects the existence of his intention (*Hibbert* 1979).

11. Mistake

Mistake nullifies intention. If X was not aware of all the factors of intention (act; existence of all the circumstances set out in the definitional elements; unlawfulness), X could not have committed a crime.

The test to determine whether mistake excludes intention is subjective.

Mistake need not be reasonable: The question is not whether a reasonable person in X's position would have made a mistake. The test in respect of intention is subjective. No room for objective criterion such as reasonableness due to *Modise* 1966, *Sam* 1980. Thus X's characteristics, superstitions, etc need to be taken into account to determine whether intention is excluded due to mistake.

11.1 Mistake must be material

A mistake can exclude intention (and therefore liability) only if it is a mistake concerning an element or requirement of the crime other than the culpability requirement itself. These requirements are:

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

Error in objecto has to nullify a definitional element of the crime in order for it to be used as a defence. Killing the wrong person is still a crime, irrespective of the intention.

11.2 Mistake relating to the Chain of Causation

Can occur only in the context of materially defined crimes, i.e. murder.

In *Goosen* 1989 the Appellate Division held that a mistake relating to the causal chain of events may exclude intention, provided the actual causal chain of events differed materially from that envisaged by X.

This is pretty much rubbish, because *Nair* and *Lungile*, heard by the same court, did not rely on *Goosen* when they could have.

11.3 Aberratio ictus: Going astray of the blow does not constitute a mistake

No such thing as *aberratio ictus* rule: merely a description of a factual situation.

2 ways of dealing with this:

11.3.1 The transferred culpability approach

X wished to kill a person. Murder consists in the unlawful, intentional causing of the death of a person. Through her conduct X in fact caused the death of a person.

In the eyes of the law X intended to kill Z, because X's intention to kill Y is transferred to her killing of Z, even though X might perhaps not even have foreseen that Z might be struck by the blow.

Doctrine of transferred intent: X's intent in respect of Y's killing is transferred to her killing of Z.

11.3.2 The concrete culpability approach

Preferred method.

Apply the ordinary principles relating to intention: *dolus eventualis*.

Thus it is not murder but culpable homicide on *aberratio ictus*.

Reasons for preference:

1. Test for intention is subjective: thus difficult to imagine intent with *aberratio ictus*.
2. Transferred culpability amounts to *versari in re illicita* which has been rejected by our courts.

11.3.3 Aberratio ictus cases

Cases: *Mtshiza* 1970

Case decided that:

1. X will normally always be guilty of attempted murder in respect of Y – that is, the person she wished to, but did not, kill.
2. X's liability in respect of the person actually struck by her blow:
 - a. If she had foreseen that Z would be struck and killed by the blow, and had reconciled herself to this possibility, she had *dolus eventualis* in respect of Z's death and is guilty of murder in respect of Z.
 - b. If X had not foreseen the possibility that her blow might strike and kill someone other than Y, or, if she had foreseen such a possibility but had not reconciled herself to this possibility, she lacked *dolus eventualis* and therefore cannot be guilty of murder.
 - c. Only if it is established that both intention (in these instances mostly in the form of *dolus eventualis*) and negligence in respect of Z's death are absent on the part of X, will X be discharged on both a count of murder and one of culpable homicide

11.3.4 Difference between *aberratio ictus* & *error in objecto*

Error in objecto:

1. X believes the object against which she directs her action to be something or somebody different from what it in fact is.
2. Can exclude X's intention if the object, as X believed it to be, differs materially from the nature of the object as set out in the definitional elements.

Aberratio ictus:

1. Not a form of mistake
2. Person struck by the blow is not confused by X with the person originally aimed at

Cases: *Tissen 1979*; *Raisa 1979*

Examples:

1. *Error in objecto*: X believes he's shooting at a specific horse. Kills a different horse: malicious damage to property.
2. *Error in objecto*: X believes he's shooting at a horse. Kills a donkey: malicious damage to property.
3. *Error in objecto*: X believes he's shooting at a horse. Kills a human: cannot be convicted of murder: type of object envisaged by X differed materially.
4. *Aberratio ictus*: X shoots at a horse. Misses horse and kills a human: rules for *dolus eventualis* and negligence apply.
5. *Aberratio ictus*: X shoots at Y. Misses Y and kills Z: rules for *dolus eventualis* and negligence apply.

11.4 Mistake relating to unlawfulness

Before one can say that X has culpability in the form of intention (*dolus*), it must be clear that she was also aware of the fact that her conduct was unlawful. This aspect of *dolus* is known as knowledge (or awareness) of unlawfulness.

Cases: *Campher 1978*, *Collett 1991*.

Intention is "coloured" because it includes knowledge of unlawfulness.

No knowledge of unlawfulness is "uncoloured" because it carries no intention and is insufficient for liability.

2 subdivisions:

1. X must know that her conduct is **not covered by a ground of justification**.
2. X must know that her conduct, in the circumstances in which she acts thus, is **punishable by the law as a crime**.

11.4.1 Mistake relating to a ground of justification

Cases: *Sam 1980*; *Joshua 2003*; *De Oliveira 1993*

In a crime requiring intention (*dolus*) the state must prove beyond reasonable doubt that X acted with knowledge of unlawfulness

If intention (knowledge) does not extend to include the unlawfulness of the act, someone cannot be convicted of the unlawful act, i.e. shooting husband thinking it was intruder.

Knowledge of unlawfulness may also be present in the form of *dolus eventualis*. In such a case X foresees the possibility that her conduct may be unlawful, but does not allow this to deter her and continues her conduct, not caring whether it is lawful or not.

11.4.2 Mistake of Law

The important question here is whether a mistake relating to the law, or ignorance of the law (which is essentially the same) constitutes a defence to a criminal charge.

11.4.2.1 Position prior to 1977

Ignorance is no excuse.

Today this is an untenable fiction.

11.4.2.2 Present SA Law

De Blom 1977 changed the position.

Ignorance of the law excludes intention and is therefore a complete defence in crimes requiring intention. The effect of a mistake regarding the law is therefore the same as the effect of a mistake regarding a material fact: it excludes intention.

It is not only when X is satisfied that a legal rule exists that she is deemed to have knowledge of it: it is sufficient if she is aware of the possibility that the rule may exist, and reconciles herself with this possibility (*dolus eventualis*). Nor need she know precisely which section of a statute forbids the act, or the exact punishment prescribed: for her to be liable, it is sufficient that she be aware that her conduct is forbidden by law (generally).

Only in respect of the crimes requiring intention that actual knowledge of the legal provisions is required for liability.

11.4.2.3 Criticism of the *De Blom* Case

Commentators submit that only ignorance (or mistake) of the law which is unavoidable, or which is reasonable in the circumstances, should constitute a defence.

12. Negligence (*Culpa*)

A person's conduct is negligent if it falls short of a certain standard set by the law. This standard is, generally speaking, the caution which a reasonable person would exercise or the foresight which a reasonable person would have in the particular circumstances.

In crimes of negligence X is blamed for not knowing, not foreseeing or not doing something, although, according to the standards set by the law, he should have known or foreseen or done it.

Negligence always has a negative character: X does **not** know or foresee something, although he should, according to the norms of the law, have known or foreseen it.

Test for negligence is objective: that which a reasonable person would have known or foreseen or done in the same circumstances.

12.1 Definition of Negligence

A person's conduct is negligent if

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

12.1.1 Negligence may exist in respect of either a result or a circumstance

Certain formally defined crimes require intention and certain require negligence. The same applies to materially defined crimes: some require intention and some negligence.

In materially defined crimes requiring negligence it must be proved that X was negligent in respect of the causing of the result. In formally defined crimes requiring negligence it must be proved that X was negligent in respect of a circumstance.

Culpable homicide is pretty much the only common law crime that requires negligence.

A number of statutory crimes require culpability in the form of negligence.

Negligence must take into account not only the act, but also to all the circumstances and consequences set out in the definitional elements, as well as to the unlawfulness.

12.1.2 Reasonable person

1. Merely a fictitious person the law invents to personify the objective standard of reasonable conduct which the law sets in order to determine negligence
2. *bonus paterfamilias* or *diligens paterfamilias* = reasonable person
3. Avoid “reasonable man”: sexist
4. Reasonable person = ordinary, normal, average person
5. Concept embodies an objective criterion
6. Is subject to limitations of human nature: thus if someone commits an error of judgement, he is not necessarily negligent.

12.1.3 Reasonable foreseeability

The question whether the reasonable person would have foreseen the possibility of the particular circumstance existing or the particular result ensuing. In practice this is the most important leg or component of the test for negligence.

1. Foreseeability by the reasonable person and reasonable foreseeability by the accused are viewed as the same thing.
2. What must be foreseeable is the possibility that the result may ensue, and not the likelihood thereof
3. The test is whether the reasonable person in the same circumstances as those in which X found himself would have foreseen the particular possibility.

12.1.4 Taking of steps by a reasonable person to avoid the result ensuing

The requirement that the reasonable person would have taken steps to guard against the possibility of the result ensuing. Seldom of importance because the reasonable person who had foreseen the possibility of the result ensuing would also have taken steps to guard against the result ensuing.

In deciding whether the reasonable person would have taken steps to guard against the result ensuing, it may be necessary to balance the social utility of X's conduct against the magnitude of the risk of damage created by his conduct.

12.1.5 Negligence in respect of a circumstance

In formally defined crimes, the state can prove negligence by the existence of a certain circumstance, i.e. possession of an unlicensed firearm.

X is negligent in respect of a circumstance if a reasonable person in the same circumstances would have foreseen the possibility that the circumstance could exist.

12.2 Subjective Factors

Test for negligence is in principle objective.

Exceptions:

1. The negligence of **children** who, despite their youth, have criminal capacity, ought to be determined, by inquiring what the reasonable child would have done or foreseen in the same circumstances.
2. In the case of **experts** it must be asked whether the reasonable expert who embarks upon a similar activity would have foreseen the possibility of the particular result ensuing or the particular circumstance existing (i.e. heart surgeon)
3. If X happens to have **knowledge** of a certain matter which is **superior** to the knowledge which a reasonable person would have had on the matter, he cannot expect a court to determine his negligence by referring to the inferior knowledge of the reasonable person.

12.3 Negligence and Intention

In *Ngubane* the court held that intention and negligence are conceptually different and that these two concepts never overlap. On the other hand, the court held that it is incorrect to assume that proof of intention excludes the possibility of a finding of negligence.

12.4 Conscious and Unconscious Negligence

Actual cases of unconscious negligence are rare. Majority of reported cases are cases of unconscious negligence.

Conscious negligence: (*luxuria*)

X does foresee the prohibited result, but decides unreasonably that it will not ensue.

However, a reasonable person should foresee that the result may ensue.

Conscious negligence could thus equate to *dolus eventualis* if the person foresees the prohibited result but doesn't care either way what happens.

Conscious negligence is not a form of intention, but of negligence.

Unconscious negligence:

X does not foresee the prohibited result.

12.4.1 Dolus eventualis v Conscious Negligence

Dolus Eventualis:

X shoots at a duck and *hopes* the bullet won't hit a picnicker on the other bank

Thus: X foresees, and goes ahead anyway.

Conscious negligence: (*luxuria*)

X shoots at a duck and *bona fide believes* the bullet won't hit a picnicker on the other bank

Thus: X foresees but *believes* the result will not flow from his actions.

12.5 Exceeding the bounds of Private Defence

12.5.1 Application of principles of culpability

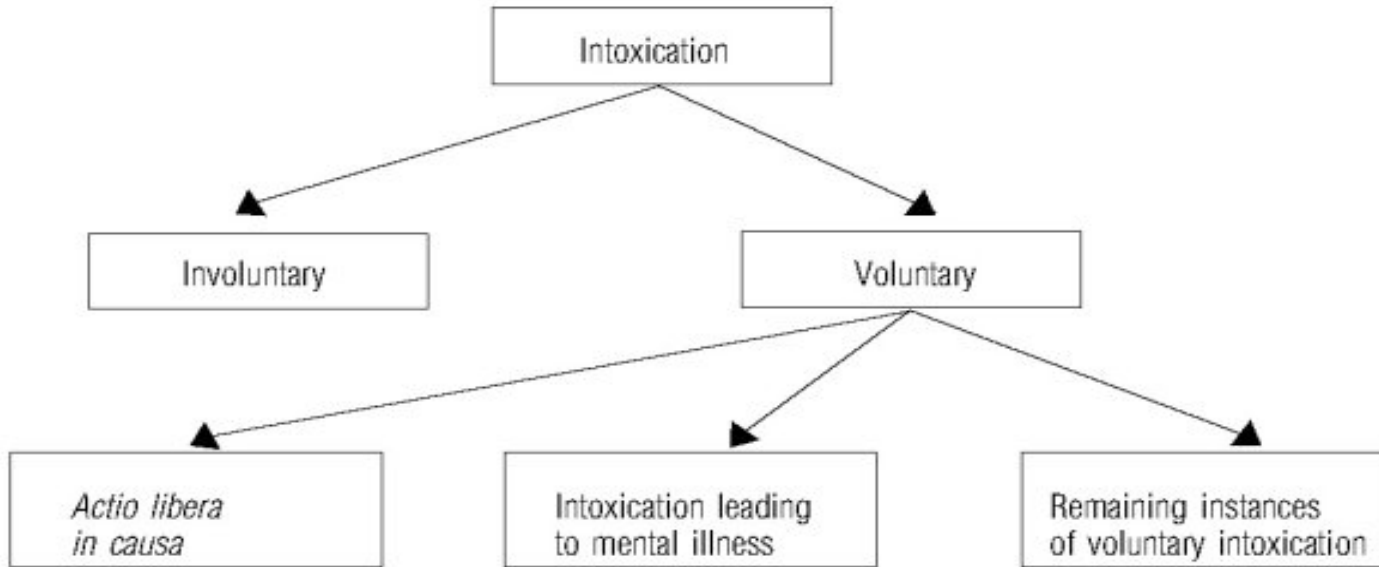
1. If the victim dies, the accused may be guilty of either murder or culpable homicide, depending upon his culpability. If the accused did not have any culpability, he should be found not guilty.
2. The ordinary principles relating to intention and negligence should be applied to all cases where the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

Case: *Ntuli* 1975

12.5.2 Killing another

12.5.3 Assault

13. The effect of intoxication on liability



13.1 Involuntary Intoxication

Intoxication brought about without X's conscious and free intervention: complete defence: *Hartyani* 1980.

13.2 Voluntary Intoxication

13.2.1 Actio libera in causa

Difficult to prove

Seldom encountered

Rules not in dispute

No defence whatsoever: may be ground for imposing heftier sentence.

X intends to commit a crime, but does not have the courage to do so, and takes a drink to generate the necessary courage.

Thus: when X was sober, necessary culpability existed.

13.2.2 Intoxication resulting in mental illness

Seldom encountered

Rules not in dispute

I.e. *delirium tremens*: mental illness: normal mental illness rules apply.

13.2.3 Voluntary intoxication

2 approaches:

Unyielding:

Holds that the community will not accept a situation in which a person who was sober when she committed a criminal act is punished for that act whereas the same criminal act committed by someone who was drunk is excused merely because she was drunk when she committed the act.

Lenient:

Holds that if one applies the ordinary principles of liability to the conduct of an intoxicated person there may be situations in which such a person should escape criminal liability, the basis of this being that because of her intoxication she either did not perform a voluntary act, or lacked either criminal capacity or the intention required for a conviction. Initially: intoxication never a defence; could only be used as mitigation of punishment.

1900 – 1981: somewhere in between unyielding & lenient.

1981 – 1988: Lenient due to *Chretien*.

1988 – present: somewhere in between unyielding & lenient due to enacted legislation.

13.2.3.1 Law before 1981

Never a complete defence.

Courts used “specific intent theory”:

According to which:

Crimes are divided into 2 groups:

“Specific intent”: murder & assault with intent to do GBH

“Ordinary intent”: culpable homicide, assault

Intent missing when intoxicated, thus no “specific intent”.

Intoxicated person could thus only be charged with assault/culpable homicide

13.2.3.2 Law after 1981

Chretien changed the law. Result of the case was:

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

The result of *Chretien* is that, as far as X's liability is concerned, intoxication may have one of the following three effects:

1. It may mean that the requirement of a voluntary act was not complied with.
2. It may exclude criminal capacity.
3. It may exclude intention.

12.2.3.3 Section 1 Act 1 of 1988

Reason for act:

Chretien resulted in intoxication qualifying as a complete defence.

Thus drunken people would be treated more leniently than sober people.

Resulted in criticism of the judgment: state passed Act.

Degrees of intoxication:

a. X is so drunk he **cannot perform a voluntary act**

b. X is very drunk and can perform a voluntary act but **lacks criminal capacity**.

c. X is very drunk, can perform a voluntary act, has criminal capacity but **lacks intention** required for a conviction.

If X is either (a) or (b), they cannot be convicted of the crime they are charged with, but can be charged as having committed a crime under the act and the sentence imposed will be the same as if the actual crime had been committed: thus, X kills Y while drunk as described in (b). X cannot be convicted of murder, but is instead convicted under the act and sentenced to life in prison.

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

The section further provides that when the court has to decide what punishment to impose for the statutory crime of which she had been convicted, the court is empowered to impose the same punishment it would have imposed had she been convicted of the crime she was originally charged with. In this way she is prevented from “walking out of court” unpunished.

Elements of crime created in the section (know very well)

Circumstances surrounding the consumption of liquor:

1. the consumption or use by X
2. of any substance
3. which impairs her faculties to such an extent that she lacks criminal capacity
4. while she knows that the substance has that effect

Circumstances surrounding the commission of the act:

5. the commission by X of an act prohibited under penalty
6. while she lacks criminal capacity and
7. who, because of the absence of criminal capacity, is not criminally liable

Expounding on the above:

1. Could be any substance, i.e. drugs (“any substance”)
2. (4) means that before convicting X of the crime, X must have consumed intentionally with knowledge of its effect.
3. Section does not discuss involuntary intake: probably limited to voluntary intake.
4. Section does not discuss people who cannot perform a voluntary act: will probably be dealt with the same as someone who lacks criminal capacity.
5. Crime is unique: the only crime where the state has to prove a **lack of criminal capacity** in order to get a conviction: all other require state to prove criminal capacity.
6. Subsection 2 allows state to convict X under the act even if X has not explicitly been charged with contravening the section. Thus: X charged with assault; X is convicted of contravening the section because evidence reveals X was intoxicated to the extent set out in the section.

13.3 Intoxication & Culpable homicide

If X is charged with murder uses intoxication as a defence, X will almost always be convicted of culpable homicide: Culpability required for a conviction of culpable homicide is negligence; because the test for negligence is objective (namely how the reasonable person would have acted), and because the reasonable person would not have indulged in an excessive consumption of alcohol.

13.4 Effect of intoxication on punishment

1. Intoxication can be taken into account by the court in sentencing X, resulting in a more lenient punishment.
2. Will not happen, however, in a crime where intoxication is an element of the crime (driving under the influence).
3. Court can impose a heavier punishment, i.e. a person knew that drinking made him aggressive
4. Where the form of culpability involved in the offence is negligence, consumption will be regarded as an aggravating factor.

14. The effect of provocation on liability

14.1 Effects of Provocation

1. May theoretically exclude X's voluntary act. (rarely in practice)
2. May exclude intention
3. May confirm the existence of X's intention
4. May serve as ground for mitigation of punishment after conviction

14.2 Test in respect of provocation

Provocation may be either words or conduct or both.

The act of provocation need not be unlawful: it can still help exclude criminal capacity or intention even if it was lawful.

Provocation can serve as a defence even if provocation was not directed at X but at Y, especially if there is a special relationship between X and Y (X kills Z who he catches in bed with his wife Y).

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15. The effect of provocation on liability

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15.3 Strict liability

Legislature sometimes creates crimes in respect of which culpability is not required.

Our courts say: when legislature creates a crime, but is silent about culpability, court can interpret the provision as requiring no culpability.

Thus: strict liability is found in statutory crimes only.

15.3.1 Principles applied in determining whether culpability required

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

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

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

15.3.1.1 Language & Context

Ordinary rules relating to the interpretation of statutes must be followed.

15.3.1.2 Object and scope of prohibition

If the Act deals with the public welfare / health and safety, it is an indication that the legislature intended to create strict liability: public welfare offenses thus relate to factories, mines, processors of food, etc.

According to our courts: when dealing with abovementioned, as much pressure as possible should be exerted on the manufacturers/companies in order to protect the public: thus: no culpability is required.

15.3.1.3 Nature and extent of punishment

If punishment is heavy: courts assume intention was not to create strict liability.

If punishment relatively light: courts assume intention was to create strict liability.

15.3.1.4 Ease with which provision can be evaded

If it is difficult for the state to prove culpability, people who contravene the provision could too easily get off by claiming they didn't know or forgot, undermining the provision: thus courts assume it was the intention of the legislature to create strict liability.

15.3.1.5 Reasonableness of holding that culpability is not required

The judge must ask himself whether the exclusion of the requirement of culpability will lead to inequitable results for the accused or for the state.

15.3.2 Form of culpability required

Intention or negligence is required for liability in respect of the prohibition involved.

Court decides which by interpreting the particular statute.

Court can say that:

1. Strict liability was created by legislature: no culpability required for offence: intention.
2. Strict liability was not created, but culpability in the form of negligence is required (middle way: court thinks prohibition can be evaded too easily if intention is required, but does not want to find that it was strict liability): negligence.

15.3.3 Constitutionality of strict liability

Could be unconstitutional due to:

1. Conflict with right to a fair trial (section 35(3))
 - a. Conflict with right to be presumed innocent (section 35(3)(h))
2. Conflict with the right to freedom and security of the person (section 12(1))

15.4 Vicarious liability

In exceptional circumstances, someone may be held liable for a crime committed by another.

Never for common-law crimes.

Legislature may expressly declare that certain people or categories of people will also be guilty of the commission of a crime, if, for example, they stand in a certain relationship to the real perpetrator, i.e. employer and employee: barman contravenes liquor act – employer guilty.

15.4.1 Reason for creation of vicarious liability

1. Encourages employer to ensure that employees' acts comply with the law.
2. Employer cannot hide behind employees' mistakes.
3. Employer gains financially from employees' work and delegates his actions to them, their actions are thus deemed to be his actions.

15.4.2 Test to determine vicarious liability

1. the language and context of the provision
2. the object and scope of the prohibition
3. the nature and extent of the punishment prescribed for contravening the prohibition
4. the ease with which the provision can be evaded if culpability is required
5. whether the employer gains financially by the employee's act
6. whether only a limited number of people (for example license holders), as opposed to the community in general, are affected by the provision.

If only a limited number of people are affected, it is more readily assumed that vicarious liability was created.

15.5 *Versari doctrine*

Versari in re illicita

The *versari* doctrine holds that if a person engages in unlawful (or merely immoral) conduct, she is criminally liable for all the consequences flowing from such conduct, irrespective of whether there was in fact any culpability on her part in respect of such consequences.

Thus according to the doctrine: X unlawfully shoots at birds on Y's farm and accidentally kills Y. X is then guilty of murder as he engaged in an illegal act and is responsible for all consequences flowing from it.

Cases in our law:

Wallendorf 1920 (doctrine confirmed)

Bernardus 1965 (doctrine rejected)

In *Bernardus* the court held that the *versari* doctrine was in conflict with the requirement of culpability and that the intention in respect of the assault could not serve as substitute for the negligence required in respect of death.

15.5.1 Foreseeability of death in case of assault

When assaulting someone, the possibility of death as a result of the assault is reasonably foreseeable. Thus a person committing an assault would be convicted of culpable homicide if he assault and kills someone.

In *Van As* 1976 this did not happen: X slapped Y (a fat person) who died: Y's death was not foreseeable X was not guilty of culpable homicide.

16. The criminal liability of corporate bodies

Some jurists are of the opinion that corporate bodies ought not be held liable because:

1. They cannot act with culpability
2. Only natural persons can act with a blameworthy state of mind
3. Abstract entities cannot act with any state of mind
4. Holding corporate companies liable would be a form of liability without culpability

But that's just them, and pretty much anywhere corporate bodies are held liable for their actions.

Governed by section 332 of the Criminal Procedure Act 51 of 1977.

16.1 Liability of corporate body for the acts of its director or servant

Section 332(1) provides:

An act by the director or servant of a corporate body is deemed to be an act of the corporate body itself, provided:

1. the act was performed in exercising powers or in the performance of duties as a director or servant, or
2. if the director or servant was furthering or endeavoring to further the interests of the corporate body.

A corporate body can commit both common and statutory crimes irrespective of whether intention or negligence is the form of culpability required (*Ex parte Minister van Justisie: in re S v SAUK* 1992).

Person committing the act is just as punishable as the corporate body.

Cases:

Joseph Mtshumayeli (Pty) Ltd 1971:

A was a transport company and B a bus driver employed by A. B caused an accident by allowing a passenger to drive the bus. Both A and B were convicted of culpable homicide.

Section 332(7) contains provisions which make people who are members of voluntary associations criminally liable for crimes committed by other members.

Cases:

Beylveld 1964.

Section 332(2)(c) prescribes that no punishment other than a fine may be imposed on a corporate body.

1. Glossary

<i>supra</i>	Above
<i>infra</i>	Below
<i>lex talionis</i>	retribution in the sense of vengeance, "an eye for an eye and a tooth for a tooth"
<i>ius acceptum</i>	"the law which we have received", or the rule that a court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime
<i>ius praeivum</i>	"previous law", or "the law which already exists", or the rule that a court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of its commission
<i>ius certum</i>	"clear law", or the rule that crimes ought not to be formulated vaguely
<i>ius strictum</i>	"strict law", or the rule that a court must interpret the definition of a crime narrowly rather than Broadly
<i>nulla poena sine lege</i>	"no punishment without a legal provision", or the application of the rules of legality to punishment
<i>ex post facto</i>	after the event
<i>actus reus</i>	an act which corresponds to the definitional elements and which is unlawful
<i>commissio</i>	commission, that is active conduct
<i>omissio</i>	omission, that is passive conduct or a failure to act positively
<i>vis absoluta</i>	absolute compulsion
<i>vis compulsiva</i>	relative compulsion
<i>conditio sine qua non</i>	literally "condition without which not", in practice an "indispensable prerequisite"
<i>novus actus interveniens</i>	a new intervening event
<i>boni mores</i>	the good morals of society; the legal convictions of society
<i>volenti non fit iniuria</i>	no wrongdoing is committed in respect of somebody who has consented
<i>error in negotio</i>	a mistake relating to the nature of the act
<i>error in persona</i>	a mistake relating to the identity (of the accused)

<i>negotiorum gestio</i>	presumed consent or spontaneous agency
<i>de minimis non curat lex</i>	the law does not concern itself with trivialities
<i>in loco parentis</i>	in the place of a parent
<i>contra bonos mores</i>	against the good morals or legal convictions of society
<i>mens rea</i>	literally "guilty mind"; in practice the culpability requirement
<i>lucidum intervallum</i>	lucid interval between periods of mental illness
<i>delirium tremens</i>	the name of a recognised form of mental illness caused by the chronic abuse of liquor
<i>dolus</i>	Intention
<i>dolus directus</i>	direct intention
<i>dolus indirectus</i>	indirect intention
<i>dolus eventualis</i>	a form of intention in which X foresees a possibility and reconciles himself to such possibility
<i>error in objecto</i>	mistake relating to the object
<i>aberratio ictus</i>	the going astray of the blow
<i>culpa</i>	negligence
<i>bonus paterfamilias</i>	literally "the good father of the family"; in practice "the reasonable person"
<i>diligens paterfamilias</i>	literally "the diligent father of the family"; in practice "the reasonable person"
<i>actio libera in causa</i>	the situation in which X intentionally drinks liquor or uses drugs to generate enough courage to commit a crime
<i>versari in re illicita</i>	literally "to engage in an unlawful activity"; in practice the rule (rejected by the Appellate Division) that if a person engages in an unlawful activity he or she is criminally liable for all the consequences flowing from the activity, irrespective of whether there was in fact culpability in respect of such conduct.