

## Unit 1:

### THE THEORIES OF PUNISHMENT

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

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

#### The four elements of criminal liability

##### **(1) Act or conduct :**

Assuming that the law regards the conduct as a crime, the first step in enquiring whether X is criminally liable is to enquire whether there was conduct on the part of X. By "conduct", we mean an act or an omission. Since the punishment of omissions is more the exception than the rule, this requirement of liability is mostly referred to as the "requirement of an act". The word "act", as used in criminal law, does not correspond in all respects with the ordinary everyday meaning of this word; more particularly, it should not be treated as synonymous with a muscular contraction or bodily movement. It should rather be treated as a technical term that is wide enough in certain circumstances to include an omission to act. For the purposes of criminal law, conduct can lead to liability only if it is voluntary. Conduct is voluntary if X is capable of subjecting his bodily or muscular movements to his will or intellect. For this reason, the bodily movements of, for example, a somnambulist (sleepwalker) are not considered by the law to amount to an "act". An omission (that

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

## **(2) Compliance with the definitional elements of the crime:**

The following general requirement for criminal liability is that X's conduct must comply with the definitional elements of the crime in question. What does "the definitional elements of the crime" mean? It is the concise definition of the type of conduct and the circumstances in which that conduct must take place in order to constitute an offence. By looking at these definitional elements, we are able to see how one type of crime differs from another. For example, the definitional elements of the crime of robbery are "the violent removal and appropriation of movable corporeal property belonging to another". Every particular offence has requirements that other offences do not have. A study of the particular requirements of each offence is undertaken in the second module. The requirement for liability, with which we are dealing here, is simply that X's conduct must comply with or correspond to the definitional elements; to put it differently, it must be conduct that fulfils the definitional elements, or by which these definitional elements are realised.

## **(3) Unlawfulness:**

The mere fact that the act complies with the definitional elements does not necessarily mean that it is also unlawful in the sense in which this word is used in criminal law. If a father gives his naughty child a moderate hiding in order to discipline him, or a policeman catches a criminal on the run by knocking him to the ground in a tackle, their respective acts are not unlawful and they will, therefore, not be guilty of assault, despite the fact that these acts comply with the definitional elements of the crime of assault. "Unlawful", of course, means "contrary to law", but "law" in this context means not merely the rule contained in the definitional elements, but the totality of the rules of law, and this includes rules that, in certain circumstances, allow a person to commit an act that is contrary to the letter of the legal prohibition or norm. In practice, there are a number of well-known situations where the law tolerates an act that infringes the letter of the definitional elements. These situations are known as grounds of justification. Well-known grounds of justification are private defence (which includes self-defence), necessity, consent, right of chastisement and official capacity. In the examples above, the act of the father who gives his son a hiding is justified by the ground of justification known as right of chastisement, while the act of the policeman is justified by the ground of justification known as official capacity.

## **(4) Culpability:**

The following, and last, requirement that must be complied with is that X's conduct must have been culpable. The culpability requirement means that there must be grounds upon which X may personally be blamed for his conduct. Here the focus shifts from the act to the actor, that is, X himself – his personal abilities and knowledge, or lack thereof.

The culpability requirement comprises two questions or two "sub-requirements". The first of these sub-requirements is that of criminal capacity. This means that at the time of the commission of the act, X must have had certain mental abilities. A person cannot legally be blamed for his conduct unless he is endowed with these mental abilities.

The mental abilities X must have are :

(1) The ability to appreciate the wrongfulness of his act (i.e. to distinguish between "right" and "wrong")

**AND**

(2) The ability to act in accordance with such an appreciation

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

The second sub-requirement (or "leg" of the culpability requirement) is that X's act must be either intentional or negligent. Intention is a requirement for most offences, but there are also offences requiring only negligence.

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

1. Conduct
2. that complies with the definitional elements of the crime
3. and that is unlawful
4. and culpable.

## **UNIT 2**

The main focus of this unit is the principle of legality and the content attached thereof including rules , application and creation of crime and punishment

## THE CONCEPT OF LEGALITY

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

The mere breach of a contract, for example, does not necessarily constitute a crime. It is only if a certain kind of conduct is defined by the law as a crime that there can be any question of criminal liability for that type of conduct. It is this very specific aspect of a person's conduct that lies at the root of the principle of legality

### **DEFINITION AND CONTENTS OF THE PRINCIPLE**

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

An accused may (1) not be convicted of a crime – (a) unless the type of conduct with which she is charged has been recognised by the law as a crime (b) in clear terms (c) before the conduct took place (d) without it being necessary to interpret the words in the definition of the crime broadly in order to cover the accused's conduct; and

(2) if convicted, not be sentenced unless the sentence also complies with the four requirements set out above

### **Rules embodied in the principle**

In order to facilitate reference to the different rules, we will give each of these rules a brief Latin label.

1. A court may find an accused guilty of a crime only if the kind of act performed is recognised by the law as a crime – in other words, a court itself may not create a crime. This is the *ius acceptum* rule.
2. A court may find an accused guilty of a crime only if the kind of act performed was recognised as a crime at the time of its commission. This is the *ius praevium* rule.
3. Crimes ought not to be formulated vaguely. This is the *ius certum* rule.
4. A court must interpret the definition of a crime narrowly rather than broadly. This is the *ius strictum* rule.

After an accused has been found guilty, the above-mentioned four rules must also be applied when it comes to imposing a sentence; this means that the applicable sentence (regarding both form and extent) must already have been determined in reasonably clear terms by the law at the time of the commission of the crime, that a court must interpret the words defining the punishment narrowly rather than broadly, and that a court is not free to impose any sentence other than the one legally authorised. This is the *nulla poena* rule, which can be further abbreviated to the *nulla poena* rule. Actually, all the different aspects of the principle of legality can be traced back to one fundamental consideration, namely that the individual ought to know beforehand precisely what kind of conduct is criminal, so that she may conduct herself in such a way that she will not contravene the provisions of the criminal law.

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

**In the discussion that follows, each of the five rules embodied in the principle will be analysed.**

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

In a country in which the criminal law is codified, the effect of the principle of legality is that only conduct that falls within the definition of one of the crimes expressly mentioned in the criminal code

is punishable. South African criminal law is not codified. Although many crimes are created by statute, some of the most important crimes, such as murder and assault, are not made punishable or defined in any Act. They are simply punishable in terms of the common law.

However, the fact that our criminal law is not codified does not mean that the principle of legality has no function in our law. In South African criminal law, the role of the principle of legality is the following: before a court can convict somebody of a crime, it must be clear that the kind of conduct with which she is charged is recognised as a crime in terms of either common law or statutory law. If this is not the case, a court cannot convict the person, even though the judge or magistrate is of the opinion that, from a moral or religious point of view, the conduct ought to be punishable. A court may not create a crime; only the legislature may do this. The rule described above may be described as the *ius acceptum* rule. The Latin word *ius* means “law” and “acceptum” means “which has been received”. A free translation of *ius acceptum* would read: “the law as it has been received up to date”.

In South Africa, the *ius acceptum* refers not only to the common law, but also to the existing statutory law. The *ius acceptum* principle is not referred to expressly in the Constitution. However, the provisions of section 35(3)(l) imply the existence of the *ius acceptum* rule. Section 35(3)(l) expresses the *ius praeivum* rule, which will be explained in the discussion of that principle below.

Briefly, this section provides that every accused has a right to a fair trial, which includes the right not to be convicted of an offence in respect of an act or omission that was not an offence at the time it was committed. However, this formulation of the *ius praeivum* rule implies that the *ius acceptum* rule should also be respected: If a court may not find a person guilty of an act or omission that was not an offence at the time it was committed (*ius praeivum*), it obviously implies that a court does not have the power to create a crime (*ius acceptum*). In other words, if a court had the power to create crimes, it would mean that a court also has the power to convict a person of a crime, even though the accused’s act did not constitute a crime at the time it was performed. It is convenient to discuss the application of this rule under two headings: firstly, the application of the rule to common-law crimes and, secondly, its application to statutory crimes.

Statutory crimes (i.e. crimes created in Acts of parliament) If parliament wishes to create a crime, an Act purporting to create such a crime will best comply with the principle of legality if it expressly declares

(1) that that particular type of conduct is a crime, and

(2) what punishment a court must impose upon a person convicted of such a crime. Sometimes, however, it is not very clear from the wording of an Act whether a section or provision of the Act has indeed created a crime or not. In such a case, the function of the principle of legality is the following: a court called upon to interpret such a section or provision should assume that a new crime has been created only if it appears unambiguously from the wording of the Act that a new crime has, in fact, been created. If the Act does not expressly declare that the conduct is a crime, a court should be slow to hold that a crime has been created.

This consideration or rule corresponds to the presumption in the interpretation of statutes that a provision in an Act that is ambiguous must be interpreted in favour of the accused (Hanid 1950 (2) SA 592 (T)). In this regard, it is feasible to distinguish between a legal norm, a criminal norm and a criminal sanction in an Act.

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

The difference may be illustrated by the following example.

A statutory prohibition may be stated in the following three ways:

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

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

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

Example (3) contains both a criminal norm and a criminal sanction; the criminal sanction is contained in the words “is punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine”. Before we can accept that a provision in an Act has created a crime, it must be clear that the provision contains a criminal norm. But what is the position if a statutory provision creates only a criminal norm, but stipulates nothing about a criminal sanction?

Apart from focusing upon the language used in the Act, a court must consider, in particular, the objectives of the particular legislation. If it is clear from the objectives of the legislation (expressed in the title and preamble to the Act) and the entire context of the Act that the intention was to create a crime or crimes, then a person may be charged with such (a) crime(s) and be found guilty, even if no penalty is prescribed in the particular Act. The imposition of punishment is then left to the discretion of the court, as has always been the position in the common law. It should be noted, however, that the legislature, when creating crimes, usually also includes penalty clauses. Of course, a statutory provision will best comply with the principle of legality if, apart from a criminal norm, it also contains a criminal sanction. The ideal is that the legislature stipulates the maximum punishment for the crime. (In the unlikely event that a statute creates a criminal sanction without a criminal norm, the court will deduce that the legislature did in fact intend to create an offence and that an offence was in fact created.)

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

Next, the principle of legality implies that nobody ought to be convicted of a crime unless, at the moment it took place, the type of conduct committed was recognised by the law as a crime. It follows that the creation of a crime with retrospective effect. This application of the principle of legality is known as the *ius praevium* rule.

Suppose somebody had committed a certain act in 1990, which, at that time, was completely innocent in the sense that it did not amount to a crime. Let's suppose that this innocent act consisted of catching a certain type of wild bird not belonging to anybody, and putting it in a cage. Let's suppose, further, that five years afterwards, in 1995, the legislature passed an Act dealing with the protection of wildlife, in terms of which it prohibited the catching of that type of bird and



expressly declared that anyone who caught such a bird had committed a crime. Suppose, further, that this Act of 1995 contained a section that read: "This Act is deemed to have come into operation on the first day of 1990." This would be an example of a law that has retrospective effect. Such legislation is usually referred to as *ex post facto* legislation. (*Ex post facto* means that the law was enacted after (post) the commission of the act.)

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

The Constitution of the Republic of South Africa, 1996 contains a provision that expressly sets out the *ius praevium* rule. Section 35(3) of this Act provides that every accused has a right to a fair trial, and paragraph (l) of this subsection provides that this right to a fair trial includes the right not to be convicted of an offence in respect of an act or omission that was not an offence under either national or international law at the time it was committed or omitted. This section forms part of Chapter 2 of the Constitution, which contains the Bill of Rights. This Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state (s 8(1)). This means that any legislation or law that violates the Bill of Rights may be declared null and void by a court. In *Masiya supra*, the Constitutional Court had to decide on the constitutional validity of the common-law definition of rape to the extent that it excludes anal penetration of a penis into the anus of a female. The court held that the common-law definition of rape be extended to include acts of non-consensual penetration of a penis into the anus of a female. The accused contended that the extended definition should not apply to him because it would constitute a violation of his rights in terms of section 35(3)(l) of the Constitution. Keeping in mind the *ius praevium* principle, the

The principle of legality as entrenched Constitutional Court ruled that the extended definition of the crime of rape be applied prospectively only. In other words, because the field of application of the crime was extended only after the accused had performed the prohibited act (i.e. non-consensual penetration of the anus of a female), he could not be convicted of rape, but only of indecent assault. The *Masiya* decision is discussed in detail in, once you have read the discussion of the case the facts of the case and the decision of the court will become clear to you

### 3) CRIMES OUGHT TO BE FORMULATED CLEARLY (IUS CERTUM)

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

An example of a criminal prohibition couched in unacceptably vague language and hailing from Nazi Germany in 1935 is the following: “Any person who commits an act which, according to the fundamental idea behind the penal law, and according to the good sense of the nation, deserves to be punished, shall be punishable.” The Constitution contains no express provision as regards the *ius certum* rule. However, it is probable that the provisions of section 35(3) (already mentioned above) will be interpreted in such a way that section 35(3) covers the *ius certum* rule as well. Such an interpretation of the section may be based either upon an accused’s right to a fair trial in general, or on the principle that if a criminal norm contained in legislation is vague or uncertain, it cannot be said that the accused’s act or omission amounted to a crime before the court interpreted the provision as one containing a criminal norm.

#### 4) CREATING CRIMES MUST BE INTERPRETED STRICTLY (IUS STRICTUM)

The fourth application of the principle of legality is to be found in the *ius strictum* rule. Even if the above-mentioned three aspects of the requirement of legality, namely *ius acceptum*, *ius praeivium* and *ius certum*, are complied with, the general principle can nevertheless be undermined if a court is free to interpret widely the words or concepts contained in the definition of the crime, or to extend their application by analogous interpretation. “*Ius strictum*” literally means “strict law”. Freely translated, it means “a legal provision that is interpreted strictly (i.e. the opposite of ‘widely’)”. There is a well-known rule in the interpretation of statutes that crime-creating provisions in statutes should be interpreted strictly. The underlying idea here<sup>21</sup> is not that the Act should be interpreted against the state and in favour of the accused, but only that where doubt exists concerning the interpretation of a criminal provision, the accused be given the benefit of the doubt. The *ius strictum* rule implies, further, that a court is not authorised to extend a crime’s field of application by means of analogy to the detriment of the accused. However, in *Masiya supra*, the Constitutional Court held that a High Court may, in exceptional circumstances, extend the field of application of a crime in order to promote the values enshrined in the Constitution. Note, however, that in this particular case, the accused was not prejudiced in that the extended definition was not applied to him. The background to the case is as follows: X was charged with the crime of rape. At that stage, the

common-law definition of rape was the unlawful, intentional sexual intercourse with a woman without her consent. The element of “sexual intercourse” required nothing less than penetration by the male genital organ into the vagina of the woman. At X’s trial, the evidence established that the victim, a nine-year-old girl, was penetrated anally (i.e. in the anus), and not in the vagina, as required for the crime of rape. The state advocated that X be convicted of indecent assault (a competent verdict on a charge of rape).

However, the regional magistrate held that the common-law definition of rape, according to which the crime is restricted to penile penetration of the vagina, should be declared unconstitutional and should be amended to include penile penetration of the anus. The regional magistrate accordingly convicted the accused of rape. In an appeal by the accused, the High Court confirmed the decision of the regional magistrate in a judgment reported as *S v Masiya 2006 (2) SACR 357 (T)*. The High Court (at par 61) explained that, in terms of the existing common-law definition of the crime, the non-consensual anal penetration of a girl (or a boy) amounted only to the (lesser) common-law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse was regarded as rape. The court questioned why the non-consensual sexual penetration of a girl (or a boy) per anum should be regarded as less injurious, less humiliating and less serious than the non-consensual sexual penetration of a girl per vaginam. The court was of the view that the common-law definition of rape was not only archaic, but also irrational, and amounted to arbitrary discrimination regarding which kind of sexual penetration was to be regarded as the most serious. The court was of the opinion that the conviction of rape did not amount to an unjustified violation of the accused’s fair-trial rights (e.g. the principle of legality, which, in sections 35(3)(l) and 35(3)(n) of the Constitution, is guaranteed as one of the rights of the accused), because non-consensual anal

The principle of legality as entrenched intercourse was already a crime and the accused knew that he was acting unlawfully. The court (at par 73) argued that it had never been a requirement that an accused, at the time of the commission of an unlawful deed, should know whether it is a common-law or a statutory offence, or what the legal/official terminology is when naming it. The fact that an extension of the definition of the crime of rape had been proposed in the Criminal Law (Sexual Offences) Amendment Bill of 2007, but that that Bill, at the time of the hearing of the case, had not yet become legislation, was a factor that convinced the court (at par 77) that it was the appropriate forum to extend the definition of the crime of rape. In extending the field of application of the crime of rape, the High Court relied upon certain provisions of the Constitution. These provisions empower the courts to develop the common law in order to give effect to a right in the Bill of Rights.

The relevant provisions are sections 8(3) and 39(2) of the Constitution. Section 8(3)(a) provides that a court – (a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right ... (our emphasis) Section 39(2) provides that When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (our emphasis). X once again appealed against his conviction of rape – this time to the Constitutional Court, on the ground of violation of his right to a fair trial. The Constitutional Court (at par 30) emphasised that the legislature is primarily responsible for law reform. However, section 39(2) of the Constitution empowers the courts to develop the common law in any particular case. Where there is a deviation from the spirit, purport and objects of the Bill of Rights (at par 33), the courts are, in fact, obliged to develop the common law by removing the deviation.

The Constitutional Court found that the common-law definition of rape was not unconstitutional, but that it needed to be adapted to comply with the provisions of the Bill of Rights. The Court focused only on the facts before it and on the particular rights of women that are violated by the restricted definition of the crime of common-law rape, namely the rights of women to dignity, sexual autonomy and privacy. The definition of the crime was extended in order to give effect to these rights in respect of women only. Of particular concern to the Court was the protection of these rights of young girls who may not be able to differentiate between the different types of penetration, namely penetration per anum or per vaginam. The Court remarked that although the consequences of non-consensual anal penetration may differ from those of non-consensual penetration of the vagina, the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter. Inclusion of penetration of the anus of a female by a penis in the definition of rape would therefore increase the extent to which vulnerable and disadvantaged women would be protected by the law. The Court was of the view that this approach would harmonise the common law with the spirit, purport and objects of the Bill of Rights. The Court held that the principle of legality is not a bar to the development of the common law. Such a conclusion would undermine the principles of the Constitution, which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution. However, when developing the common law, it is possible to do so prospectively only. The Court held that in that particular case, to develop the common law retrospectively would offend the constitutional principle of legality. One of the central tenets underlying the understanding of legality is that of foreseeability. The Court explained that this meant that the rules of criminal law should be clear and precise, so that an individual may easily behave in a manner that avoids committing crimes. In other words, fairness to the accused required that the extended meaning of the crime of

rape not apply to him, but only to those cases that arose after judgment in the matter had been handed down. X could therefore be convicted of indecent assault only, and not of rape.

***Please note the cases of Masiya & Mshumpa are particularly important***

### **Unit 3 : The Act**

#### The Act Requirements

Act or conduct must be voluntary an act or an omission is punishable only if it is voluntary.

The conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect. If conduct cannot be controlled by the will, it is involuntary, such as when a sleepwalker tramples on somebody, or an epileptic swings his hand while having an epileptic fit and hits someone in the face. If X's conduct is involuntary, it means that X is not the "author" of the act or omission; it was then not X who committed an act, but rather something that happened to X. The concept of a voluntary act should not be confused with the concept of a willed act. To determine whether there was an act in the criminal-law sense of the word, the question is merely whether the act was voluntary. It need not be a willed act as well. Conduct that is not willed, such as acts that a person commits negligently, may therefore also be punishable. This does not mean that a person's will has no significance in criminal law; whether he directed his will towards a certain end is indeed of the greatest importance, but this is taken into consideration only when determining whether the requirement of culpability (and, more particularly, culpability in the form of intention) has been complied with. From what has been said above, you will note that the concept of an "act" has a different, and more technical, meaning for a lawyer than for a layman. The layman may regard the muscular contractions of a sleepwalker or an epileptic as an "act", but a jurist or lawyer will not take this view, since such contractions do not constitute voluntary conduct

#### **Factors that exclude the voluntariness of the act**

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

a) Absolute force:

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

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

\*Refer to the diagram in your guide for clarification

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

#### B) Natural forces :

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

#### C) Automatism

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

Consult the diagram in your guide as well as the cases of *Mkize* 1959 (2) SA 260 (N) and *Du Plessis* 1950 (1) SA 297 (O), for further understanding

## **Sane” and “insane automatism”**

The courts often use the expressions “sane automatism” and “insane automatism”. The meaning of these expressions is as follows: “Sane automatism” refers to cases in which X relies on the defence that there was no voluntary act on his part because he momentarily acted “like an automaton”. This is the defence discussed above. X does not rely on mental illness (“insanity”) as a defence. (We will discuss the latter defence in a later study unit.) “Insane automatism” refers to cases in which X relies on the defence of mental illness (“insanity”) – a defence that we will discuss in a later study unit. In other words, he does not rely on the defence of absence of a voluntary act. Here, it is not a matter of the defence of “automatism” discussed above. The expression “insane automatism” is actually misleading, because it erroneously creates the impression that it involves the defence of automatism, whereas, in fact, it is a completely different defence, namely that of mental illness. (In the latest case law, there are indications that the courts may be moving away from the use of this misleading expression.)

### The difference between “sane” and “insane automatism”

Important for the following two practical reasons: The first difference relates to onus of proof.

If X relies on the defence of sane automatism, the onus of proving that the act was performed voluntarily rests on the state (*Trickett 1973 (3) SA 526 (T) 537*).

If, on the other hand, X raises the defence of insane automatism (i.e. the defence of mental illness), the onus of proving his mental illness rests upon X, and not on the state. (This will become clearer in the later discussion of the defence of mental illness.) The second difference relates to the eventual outcome of the case, namely whether X will leave the court as a free person.

A successful defence of sane automatism results in X’s leaving the court a free person, as he is deemed not to have acted.

A successful defence of insane automatism, on the other hand, results in the court dealing with X in accordance with the relevant provisions of the Criminal Procedure Act that address the orders that a court can make after finding that X was mentally ill at the time of the commission of the crime.

Although there are different types of orders that a court may make, in practice it mostly makes an order that X be detained in a psychiatric hospital for a certain period, which results in X’s losing his freedom – in other words, he does not leave the court as a free person. It may sometimes be very difficult to decide whether, in a given case, you are dealing with sane or insane automatism. If this

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

\*Read the judgment in: *Henry 1999 (1) SACR 13 (SCA)* to see how our courts handle this issue

### **Antecedent liability**

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

*In Victor 1943 TPD 77*, for example, X was convicted of negligent driving, despite the fact that the accident he had caused had been due to an epileptic fit: evidence revealed that he had already been suffering epileptic fits for the previous thirteen years, and that he had had insufficient reason to believe that he would not again suffer such a fit on that particular day.

### **OMISSIONS**

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

#### **Legal duty to act positively**

An omission is punishable only if there is a legal duty upon X to act positively. A moral duty is not the same as a legal one. When is there a legal duty to act positively? The general rule is that there is a legal duty upon X to act positively if the legal convictions of the community require him to do so. This was decided in *Minister van Polisie v Ewels 1975 (3) SA 590 (A) 597A-B*.



### Legal duty: specific instances

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

### **These specific instances are the following:**

#### A statute may impose a duty on somebody to act positively

Recently, the state has imposed several legal duties on individuals and institutions to report on persons who commit crimes. For example, there is a duty on a person who knows that the offence of corruption has been committed to report such knowledge to the police. The failure by an individual or accountable institution to report knowledge of the commission of certain financial crimes is also made

#### A legal duty may arise by virtue of the provisions of the common law.

Example: According to the provisions of the common law dealing with the crime of high treason, a duty is imposed on every person who owes an allegiance to the Republic and who discovers that an act of high treason is being committed or planned, to reveal this fact as soon as possible to the police. The mere (intentional) omission to do this is equivalent to an act of high treason.

#### The duty may arise from an agreement.

In an English case, *Pitwood* (1902) 19 TLR 37, the facts were that X and a railway concern had agreed that for remuneration, X would close a gate every time a train went over a crossing. On one occasion he omitted to do so and, in this way, caused an accident, for which he was held liable.

Where a person accepts responsibility for the control of a dangerous or potentially dangerous object, a duty arises to control it properly. In *Fernandez* 1966 (2) SA 259 (A), X kept a baboon and

failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died. X was convicted of culpable homicide.

A duty may arise where a person stands in a protective relationship to somebody else, for example a parent or guardian who has a duty to feed a child. In *B 1994 (2) SACR 237 (E)*, X was convicted of assault in the following circumstances: She was married and had a child, Y, who was two-and-a-half years old. Her marriage broke up and she began living with another man, Z. Z repeatedly assaulted Y. X was aware of these assaults, but did nothing to stop Z. As Y's natural mother, X had a legal duty to care for and protect Y and to safeguard his wellbeing. By omitting to prevent the assaults, she rendered herself guilty of assault upon Y. (Z was also convicted of the assault upon Y.)

A duty may arise from a previous positive act, such as where X lights a fire in an area where there is dry grass, and then walks away without the act putting out the fire to prevent it from spreading. We sometimes refer to this type of case as an *omissio per commissio* (an omission following a positive act that created the duty to act positively).

A duty may sometimes arise by virtue of the fact that a person is the incumbent of a certain office. It was held in *Minister van Polisie v Ewels 1975 (3) SA 590 (A)* that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the person being assaulted.

In *Gaba 1981 (3) SA 745 (O)*, X was one of a team of policemen who were trying to trace a certain dangerous criminal called "Godfather". Other members of the investigation team had arrested a suspect and questioned him in X's presence with a view to ascertaining his identity.

X knew that the suspect was in fact "Godfather", but intentionally refrained from informing his fellow investigation team members accordingly. Because of this omission, he was convicted of attempting to defeat or obstruct the course of justice.

Relying on *Minister van Polisie v Ewels* (supra), the court held that X had a legal duty to reveal his knowledge, and that this duty was based upon X's position as a policeman and a member of the investigating team.

A legal duty may also arise by virtue of an order of court.

Example: X and Y are granted a divorce, and the court that grants the divorce orders X to pay maintenance to Y in order to support her and the children born of their marriage. If X omits to pay the maintenance, he commits a crime.

## The defence of impossibility

As in the case of active conduct, X's omission must be voluntary in order to result in liability

An omission is voluntary if it is possible for X to perform the positive act.

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

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

The defence cannot be raised in cases where a mere prohibition, that is to say, a rule that places a "negative duty" on someone, is infringed. The result of this requirement is that the defence of impossibility can be pleaded only if the conduct that forms the basis of the charge consists in an omission. Where there is a simple prohibition, X will merely have to refrain from committing the prohibited act, which he is not compelled to perform. He should therefore not be allowed to plead that it was impossible for him not to perform the act. This defence may, for example, be pleaded successfully if X has failed to comply with a legal provision that placed a positive duty on him to attend a meeting or to report for military duty

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

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

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

requires a particular effort on his part, does not mean that it is impossible for him to comply with the law (Leeuw 1975 (1) SA 439 (0)). (3) X must not himself be responsible for the situation of impossibility

3. X must not himself be responsible for the situation of impossibility

The following topics are to help you focus on the most important sections in Unit 4 , as part of revision for this unit , please make sure you understand case law as well

### **THE DEFINITIONAL ELEMENTS**

The definitional elements signify the concise description of the requirements set by the law for liability for a specific type of crime. In this context, “requirements” does not mean the general requirements applying to all crimes (e.g. voluntary conduct, unlawfulness, criminal capacity and culpability), but the particular requirements applying only to a certain type of crime. The definitional elements of a crime contain the model or formula that enables both an ordinary person and a court to know which particular requirements apply to a certain type of crime. Snyman uses the expression “definition of the proscription” as a synonym for “definitional elements”, but we prefer the expression “definitional elements”. We can also explain the meaning of “definitional elements” as follows: all legal provisions creating crimes may be reduced to the following simple formula: “Whoever does X commits a crime.” In this formula, X is nothing other than the definitional elements of the particular crime. The definitional elements always contain a description of the kind of act that is prohibited (e.g. “possession”, “sexual penetration”, “the making of a declaration” or “the causing of a certain state of affairs”). The word “act”, as used in criminal law, always means “the act set out in the definitional elements”.

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

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

In the case of materially-defined crimes, on the other hand, the definitional elements do not proscribe a specific conduct, but rather any conduct that causes a specific condition.

Examples of this type of crime are murder, culpable homicide and arson. Let's consider the example of murder. Here, the act consists in causing a certain condition, namely the death of another person. In principle, it does not matter whether the perpetrator (X) stabbed the victim (Y) with a knife, shot her with a revolver or poisoned her. The question is simply whether X's conduct caused Y's death, irrespective of what the particular conduct leading thereto was. This category of crimes is sometimes concisely referred to as "result crimes".

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

### **The courts' approach to legal causation**

The courts do not single out a specific theory of legal causation as the only correct one to be applied in all circumstances. In the leading cases of Daniëls 1983 (3) SA 275 (A) and Mokgethi 1990 (1) SA 32 (A) 40–41, the Appellate Division stated that, in deciding whether a condition that is a factual cause of the prohibited situation should also be regarded as the legal cause of that situation, a court must be guided by policy considerations. The policy that the courts adopt is to strive to reach a conclusion that would not exceed the limits of what is reasonable, fair and just. In deciding what a reasonable and fair conclusion is, a court may make use of one or more of the specific theories of legal causation (such as proximate cause or novus actus). In fact, in most cases, the courts apply one of these theories. However, in Mokgethi supra, the Appellate Division held that it is wrong for a court to regard only one specific theory (e.g. proximate cause) as the correct one to be applied in every situation, thereby excluding from future consideration all the other specific theories of legal causation. A court may even base a finding of legal causation on considerations outside these specific theories

*\*Study the diagram in your guide for further clarification\**

### **Own view**

Theory of adequate causation is preferable, assuming for a moment that we are not bound by the courts' open-ended approach to legal causation; we submit that of the different specific theories of legal causation, the theory of adequate causation is the best to determine legal causation. We have already pointed out the criticism of the individualisation theories, and in Daniëls 1983 (3) SA 275 (A),

of the three judges of appeal who had to decide the issue of causation, two (Jansen JA and Van Winsen AJA) refused to accept that in our law, criminal liability is necessarily based on proximate cause (which is, perhaps, the best-known of the individualisation theories). We have also pointed out that the *novus actus* criterion does not differ essentially from the theory of adequate causation, both emphasising that a distinction should be drawn between consequences normally to be expected from the type of conduct in which X has engaged and consequences that we would not normally expect to flow from such conduct.

Legal causation – general It is exactly because of the wide scope of the *conditio sine qua non* test (i.e. the large number of factors that may be identified as a cause of Y's death in terms of this test) that it is necessary to apply a second criterion by which we may limit the wide range of possible causes of Y's death. This second criterion is usually described as the test to determine legal causation. The idea behind this second criterion is the following: When a court is called upon to decide whether X's conduct caused Y's death, the mere fact that X's conduct is a *conditio sine qua non* for Y's death is insufficient as a ground upon which to base a finding of a causal link. Other factors besides X's conduct may equally qualify as *conditio sine qua non* for Y's death. When searching for the legal cause (or causes) of Y's death, a court eliminates those factors that, although they qualify as factual causes of Y's death, do not qualify as the cause (or causes) of Y's death according to the criteria for legal causation (which will be set out hereunder). In the legal literature, certain specific tests to determine legal causation have evolved, such as those that determine the "proximate cause", the "adequate cause", or whether an event constituted a "*novus actus interveniens*". We will consider these more specific criteria for legal causation in a short while. At the outset, however, it should be emphasised that, generally, the courts are reluctant to choose one of these specific tests as a yardstick to be employed in all cases in which legal causation has to be determined, to the exclusion of all other specific tests. Sometimes they rely on one, and sometimes on another of these tests, according to whether a particular test would, in their opinion, result in an equitable solution. Sometimes they may even base a finding of legal causation on considerations outside these more specific tests. Before elaborating further on this open-ended approach to legal causation by the courts, we will first consider the different specific criteria that have been formulated to determine legal causation.

#### **Cases:**

Assisted suicide – the Grotjohn decision

The Daniëls decision

The Mokgethi decision

### **Causation: Summary**

*Please study this from your guide*

## **units 5 & 6**

When is conduct that corresponds to the definitional elements not unlawful?

Grounds of justification: There are a number of cases or situations, well-known in daily practice, where an act that corresponds to the definitional elements is, nevertheless, not regarded as unlawful. Unlawfulness is excluded because of the presence of grounds of justification. Some well-known grounds of justification are private defence (which includes self-defence), necessity, consent, official capacity and parents' right of chastisement.

The grounds of justification will subsequently be discussed one by one:

(a) All jurists agree that there is no limited number of grounds of justification. If this were so, how would they determine the lawfulness or unlawfulness of conduct that does not fall within the ambit of one of the familiar grounds of justification?

(b) It should be remembered that each ground of justification has its limits. Where an act exceeds these limits, it is unlawful.

### **What is the criterion for determining the limits of the grounds of justification?**

Legal convictions of society Opinions differ on the material content of the concept of unlawfulness. We do not intend discussing the philosophical arguments underlying the differences of opinion. The current approach (with which we agree) is the following: Conduct is unlawful if it conflicts with the boni mores (literally "good morals") or legal convictions of society.

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

section 1 of the Constitution, namely “human dignity, the achievement of equality and the advancement of human rights and freedoms”, are also of crucial importance in deciding this issue. In order to determine whether conduct is unlawful, we must therefore enquire whether the conduct concerned conflicts with the boni mores or legal convictions of society.

The grounds of justification must be seen as practical aids in the determination of unlawfulness. They merely represent those situations encountered most often in practice, which have therefore come to be known as easily recognisable grounds for the exclusion of unlawfulness. They do not cover the entire subject field of this discussion, namely of the demarcation of lawful and unlawful conduct.

In *Fourie 2001 (2) SACR 674 (C)*, the facts were the following: *This is an important case please know it in detail*

X was a regional court magistrate, resident in George. He had to preside at the sessions of the regional court in Knysna. The court’s sessions commenced at 9:00. Because of certain circumstances, he left George for Knysna in his motorcar somewhat late on that particular day. On the road between George and Knysna, he was caught in a speed trap, which showed that he had exceeded the speed limit of 80 km/h, which applied to that part of the road. On a charge of exceeding the speed limit, he pleaded not guilty. His defence was that although he exceeded the speed limit, his act was not unlawful. He argued that although not one of the recognised grounds of justification, such as private defence, was applicable to the case, his act should nevertheless be regarded as lawful on the following ground: the act was not in conflict with the legal convictions of the community, because by merely striving to arrive at the court on time, he drove his car with the exclusive aim of promoting the interests of the administration of justice. He did not seek to promote his own private interests, but those of the state and, more particularly, those of the administration of justice. The court dismissed this defence. If this defence had been valid, it would have opened the floodgates to large-scale unpunishable contraventions of the speed limits on our roads. Many people would then be entitled to allege that since they would otherwise be late for an appointment in connection with a service they render to the state, they are allowed to contravene the speed limit. In the course of the judgment, the court confirmed the principle set out above, namely that the enquiry into unlawfulness is preceded by an enquiry into whether the act complied with the definitional elements, and also that the test to determine unlawfulness is the boni mores or legal convictions of the community.

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



(1) an act that complies with the definitional elements and

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

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

### **Private defence requirements**

1. Requirements of attack The attack (a) must be unlawful (b) must be against interests that ought to be protected (c) must be threatening but not yet completed
2. Requirements of defence The defensive action (a) must be directed against the attacker (b) must be necessary (c) must stand in a reasonable relationship to the attack (d) must be taken while the defender is aware that he is acting in private defence

### Requirements of the attack

(1) The attack must be unlawful Private defence against lawful conduct is not possible. For this reason, a person acts unlawfully if he attacks a policeman who is authorised by law to arrest somebody. However, if the policeman is not authorised by law to perform a particular act, or if he exceeds the limits of his authority, he may lawfully be resisted. Can X rely on private defence if he kills Y in the course of a prearranged duel? In *Jansen 1983 (3) SA 534 (NC)*, X and Y decided to “settle their differences” in a knife duel. During the fight, Y first stabbed at X, and then X stabbed Y in the heart, killing him. The court held, quite justifiably, that X could not rely on private defence, and convicted him of murder. X’s averting the blow was merely part of the execution of an unlawful attack, which he had planned beforehand. In deciding whether the attack of Y (the aggressor) on X is unlawful, there are three considerations:

(a) The attack need not be accompanied by culpability. X can therefore act in private defence even if his act is directed against a non-culpable act by Y.

What does this mean?

(i) As will be explained in the exposition of the culpability requirement below, culpability implies, inter alia, that a person must be endowed with certain minimum mental abilities. If he has these mental abilities, he is said to have criminal capacity. Examples of people who lack these mental abilities and who, therefore, lack criminal capacity are people who are mentally ill (“insane”) and young children.

The requirement for private defence currently under discussion is merely that Y’s attack must be unlawful. Since even people who lack criminal capacity can act unlawfully, X can successfully rely on private defence, even if his defensive act is directed at the conduct of a mentally ill person or a young child. Thus if X is attacked by Y, he may defend himself against Y in private defence, even if the evidence brings to light that Y is mentally ill.

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

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

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

The attack must be directed against interests that, in the eyes of the law, ought to be protected. Private defence is usually invoked in protection of the attacked party’s life or physical integrity, but, in principle, there is no reason why it should be limited to the protection of these interests. Thus the law has recognised that a person can also act in private defence · in protecting property

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

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

The attack must be threatening but not yet completed X cannot attack Y merely because he expects Y to attack him at some time in the future. He can attack Y only if there is an attack or immediate threat of attack by Y against him; in this case, it is, of course, unnecessary that he wait for Y's first blow – he may defend himself by first attacking Y, with the precise object of averting Y's first blow (Patel 1959 (3) SA 121 (A)).

Private defence is not a means of exercising vengeance, neither is it a form of punishment. *For this reason, X acts unlawfully if he attacks Y when Y's attack upon him is already something of the past.* When automatic defence mechanisms are set up (such as a shotgun that will go off during the night if the shop is entered by a thief), there is, at the time when the device is set up, no immediate threat of attack, but the law recognises that to set up such mechanisms, which will be triggered the moment the threatened "attack" materialises, may constitute valid private defence in certain narrowly defined circumstances.

### **Requirements of the act of defence**

(1) It must be directed against the attacker If Y attacks X, X cannot direct his act in private defence against Z.

(2) The defensive act must be necessary The defensive act must be necessary in order to protect the interest threatened, in the sense that it must not be possible for the person threatened to ward off the attack in another, less harmful way (Attwood 1946 AD 331 340). If, on the termination of the lease, the obstinate lessee refuses to leave the house, the lessor is not entitled to seize him by the collar and forcibly remove him from the premises. The lessor can protect his right and interests by availing himself of the ordinary legal remedies, which involve obtaining an ejectment order from a court and, possibly, also claiming damages. The basic concept underlying private defence is that a person is allowed to “take the law into his own hands”, as it were, only if the ordinary legal remedies do not afford him effective protection. He is not allowed to arrogate to himself the functions of a judge and a sheriff. On the other hand, a threatened person need not acquiesce in an attack upon his person or rights merely because he will be able to claim damages afterwards. The present rule merely means that the threatened person may not take the law into his own hands summarily if the usual legal remedies afford him adequate protection. It would seem that our courts require an assaulted person to flee, if possible, rather than kill his assailant, unless such an escape would be dangerous.

(3) There must be a reasonable relationship between the attack and the defensive act Another way of expressing this requirement is by saying that the act of defence may not be more harmful than necessary to ward off the attack ) It stands to reason that there ought to be a certain balance between the attack and the defence. After all, a person is not entitled to shoot and kill someone who is about to steal his pencil. There should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place.

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

- the relationship between the parties
- the gender of the parties, their respective ages and physical strengths
- the location of the incident
- the nature of the weapon used in the attack
- the nature, severity and persistence of the attack the nature and severity of any injury likely to be sustained in the attack

- the nature of the means used to offer the defence
- the nature and extent of the harm likely to be caused by the defence In practice, whether this requirement for private defence has been complied with is more a question of fact than of law.

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

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

The following examples illustrate this point: If Y threatens to deprive X of a possession belonging to X, X is entitled to assault Y in private defence in order to protect his possession. This means that X may, in order to protect his own property, impair an interest of Y that is not of a proprietary nature, namely Y's physical integrity.

If Y threatens to rape X, X may defend her chastity even by killing Y (Van Wyk supra 497A-B). The nature of the interest protected and the interest impaired may therefore be dissimilar. However, this rule must be tempered by the qualification that in cases of extreme disproportion between interests, reliance on private defence may be unsuccessful (Van Wyk supra 498).

(b) There need not be a proportional relationship between the weapons or means used by the attacker and the weapons or means used by the attacked party. If the person attacked may not defend himself with a different type of weapon from the one used by the attacker, it follows 75 that the attacker has the choice of weapon, and such a rule would obviously be unacceptable.

(c) There need not be a precise proportional relationship between the value or extent of the injury inflicted by the attacker and the value or extent of the injury inflicted by the defending party. Unlike a referee in a boxing contest, we don't count the exact number of blows struck by the attacked party and then compare that with the number of blows struck by the assailant. Nevertheless, although there need not be a precise relationship, there must be an approximate relationship, which will be determined by the facts of each case. This requirement for private defence does not mean that the law, by requiring the attacked party to avail himself of the least harmful means, requires the attacked party to gamble with his life or otherwise expose himself to risks

Please make sure you study Steyn in detail as this is an important case for this unit

## **Definition of necessity**

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

## **Requirements for a plea of necessity**

Legal interest threatened may also protect another emergency already begun but not yet terminated may rely on necessity even if personally responsible for emergency not legally compelled to endure danger only way to avert danger conscious of fact that emergency exists not more harm caused than necessary

## **The requirements are the following:**

1. Some legal interest of X, such as her life, physical integrity or property, must be threatened. In principle, a person should also be able to protect other interests, such as dignity, freedom and chastity, in a situation of necessity.
2. A person can also act in a situation of necessity to protect another’s interest, for example where X protects Z from being attacked by an animal.
3. The emergency must already have begun or be imminent, but must not have terminated, nor only be expected in the future.
4. Whether a person can rely on the defence of necessity if she herself is responsible for the emergency is a debatable question. In our opinion, X should not be precluded from successfully raising this defence merely because she caused the emergency herself. If she were precluded, this would mean that if, because of X’s carelessness, her baby swallowed an overdose of pills, X would not be allowed to exceed the speed limit while rushing the baby to hospital, but would have to resign herself to the child’s dying
5. If somebody is legally compelled to endure the danger, she cannot rely on necessity. Persons such as police officials, soldiers and fire fighters cannot avert the dangers inherent in the exercise of their profession by infringing the rights of innocent parties. Another aspect of this rule is that a person cannot rely on necessity as a defence if what appears to her to be a threat is, in fact, lawful (human) conduct. Thus it was held in Kibi 1978 (4) SA 173 (EC) that if

X is arrested lawfully, he may not damage the police van in which he has been locked up in order to escape from it.

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

### **The different possible effects of consent**

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

1. There are crimes in respect of which consent does operate as a defence, but where such consent does not operate as a ground of justification. It forms part of the definitional elements of the crime instead. The reason absence of consent forms part of the definitional elements is that absence of consent by a certain party plays such a crucial role in the construction of the crime that this requirement is incorporated into the definitional elements of the crime. The best-known example in this respect is rape. Rape is possible only if the sexual penetration takes place without the person's consent. Absence of consent must, of necessity, form part of the definitional elements of the crime because it forms part of the minimum requirements necessary for the existence of a meaningful criminal prohibition.

2. There are crimes in respect of which consent by the injured party is never recognised as a defence. The best-known example is murder. Mercy killing (euthanasia) at the request of the suffering party is unlawful (Hartmann 1975 (3) SA 532 (C)).
3. There are crimes in respect of which consent does operate as a ground of justification. Well-known examples of such crimes are theft and malicious injury to property.
4. There is a group of crimes in respect of which consent is sometimes regarded as a ground of justification and sometimes not.

Unlike the law of delict, which, in principle, protects individual rights or interests, criminal law protects the public interest too; the state or community has an interest in the prosecution and punishment of all crimes, even those committed against an individual. The result is that, as far as criminal law is concerned, the individual is not always free to consent to impairment of her interests. This is why even physical harm inflicted on somebody at her own request is sometimes regarded by the law as unlawful and, therefore, as amounting to assault. The criterion to be applied to determine whether consent excludes unlawfulness is the general criterion of unlawfulness, namely the *boni mores* (the legal convictions) of society, or public policy. The best-known examples of situations in which consent may indeed justify an otherwise unlawful act of assault are those where injuries are inflicted on others in the course of sporting events, and where a person's bodily integrity is impaired in the course of medical treatment, such as during an operation.

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

Requirements for a valid plea of consent:

1. The consent must be given voluntarily
2. given by a person who has certain minimum mental abilities
3. based upon knowledge of the true and material facts
4. given either expressly or tacitly
5. given before the commission of the act
6. given by the complainant herself



1. **The consent must be given voluntarily**, without any coercion. Consent obtained as a result of violence, fear or intimidation is not voluntary consent. If, for example, X brandishes a revolver while demanding money from Y and Y hands over the money because she feels threatened, there is no valid consent to the giving of the money (Ex parte Minister of Justice: in re R v Gesa; R v De Jongh 1959 (1) SA 234 (A)). However, mere submission cannot be equated with voluntary consent (D 1969 (2) SA 591 (RA)). If a woman decides that it is futile to resist the strong, armed attacker who is about to rape her, and simply acquiesces in what he does to her (in other words, she does not expressly manifest her objection verbally or by physical acts), her conduct cannot be construed as consent to intercourse (Volschenk 1968 (2) PH H283 (D)). Note the interesting application of this requirement in McCoy 1953 (2) SA 4 (SR) (as illustrated below).
2. **The person giving the consent must be endowed with certain minimum mental abilities.** These abilities are the ability to appreciate the nature of the act to which she consents to appreciate the consequences of the act. For this reason, if a woman is mentally ill, under a certain age, drunk, asleep or unconscious, she cannot give valid consent to sexual intercourse, a minor adopted child was induced by threats and rewards over a long period by her adoptive father (a senior pastor of a church) to have sexual intercourse with him. For instance, he gave her permission to go out with friends, provided she afforded him certain “privileges” of a sexual nature. He also gave her liquor on numerous occasions in order to break down her resistance. The court explained that “in the context of sexual relations involving children, any appearance of consent to such conduct is deserving of elevated scrutiny, with particular attention to be paid to the fact that the person giving the consent is a child. The inequalities in the relationship between the child victim and the adult perpetrator are of great importance in understanding the construction, nature and scope of the child’s apparent consent to any sexual relations. These inequalities may most likely influence the child’s propensity to consent to sexual relations”. The court found that the accused (the pastor) had manipulated the complainant’s vulnerability and his stature in the community to his advantage. Because of the accused’s improper behaviour, the complainant’s consent was no real consent and the accused was accordingly found guilty of rape.
3. **The consenting person must be aware of the true and material facts regarding the act** to which she consents. A fact is material if it relates to the definitional elements of the particular crime. In the case of rape, for example, the person must be aware of the fact that it is sexual penetration to which she is consenting.

4. **The consent must be given before the otherwise unlawful act is committed.** Approval given afterwards does not render the act lawful.
5. In principle, consent must be given by the complainant herself. However, in exceptional circumstances, someone else may give consent on her behalf, such as where a parent consents to an operation to be performed on his or her child

## **THE RIGHT OF CHASTISEMENT**

The general rule Parents have the right to punish their children with moderate and reasonable corporal punishment in order to maintain authority and in the interests of the child's education. Teachers no longer have a right to impose corporal punishment Before the Constitution came into operation, not only parents, but also teachers and people in loco parentis ("in place of a parent"), such as people in charge of school hostels, had the right to punish the children in their charge with moderate and reasonable corporal punishment in order to maintain authority and discipline. However, in accordance with the letter and spirit of the Constitution (more particularly, the right to dignity (s 10); the right to "freedom and security of the person" and, thereunder, the right "not to be treated or punished in a cruel, inhuman or degrading way" (s 12) and the right of a child to be protected from maltreatment, neglect, abuse or degradation (s 28(1)(d)), legislation was enacted in 1996 banning corporal punishment administered at schools. Section 10 of the South African Schools Act 84 of 1996 provides that no person may administer corporal punishment at a school to a learner, and that any person who contravenes this provision is guilty of an offence and liable, on conviction, to a sentence that could be imposed for assault. In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), the Constitutional Court held that the prohibition of corporal punishment was part and parcel of a national programme to transform the education system and bring it in line with the Constitution. The state was further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people, especially children, from maltreatment, abuse or degradation (at 780 F-G). The court ruled that the ban on corporal punishment laid down in section 10 applies to all schools in South Africa, both state and private.

## **OBEDIENCE TO ORDERS**

In *S v Mostert* 2006 (1) SACR 560 (N), a traffic officer charged with the crime of assault relied on the defence of obedience to orders. The court held that obedience to orders entailed an act performed by a subordinate on the instruction of a superior, and was a recognised defence in law. Although the defence of obedience to orders usually arises in a military context, its application is not exclusive to

soldiers. For the proper functioning of the police and the protection services, it is essential that subordinates obey the commands of their superiors.

The court held that there were three requirements for this defence, namely

1. the order must emanate from a person in lawful authority over the accused;
2. the accused must have been under a duty to obey the order; an
3. the accused must have done no more harm than was necessary to carry out the order.

Regarding the second requirement, the test was whether the order was manifestly and palpably unlawful. Therefore, the court applied the principle laid down in the Constitution of the Republic of South Africa, 1996, namely that the defence of obedience to orders will be successful, provided the orders were not manifestly unlawful.

## **OFFICIAL CAPACITY**

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

## **U 7 + 8**

Culpability: meaning and component elements

The mere fact that a person has committed an act that complies with the definitional elements and that is unlawful does not make him criminally liable. An important requirement in that X's conduct must be accompanied by culpability must be satisfied. This means, that there must be grounds upon which, in the eyes of the law, he can be blamed for his conduct. This will be the case if he has committed the unlawful act in a blameworthy state of mind.

Once unlawfulness has been established we move onto the requirement of culpability, when we come to the question of culpability, the focus now shifts to the perpetrator as an individual, and the question we ask is whether this particular person considering his personal characteristics, aptitudes, gifts, shortcomings and mental abilities, as well as his knowledge – can be blamed for his commission of the unlawful act.

Unlawfulness may be excluded in certain circumstances e.g. private defence, however culpability cannot be excluded.

The Latin term mens rea is used to indicate culpability. The fact that X has criminal capacity, is not sufficient to indicate that he acted with culpability. There must be something more: X must have acted either intentionally or negligently. Intention and negligence are usually referred to as the “two forms of culpability”

### **The principle of contemporaneity**

The culpability and the unlawful act must be contemporaneous.

In order for a crime to have been committed, there must have been culpability criminal capacity either intention or negligence culpability on the part of X at the very moment when the unlawful act was committed.

The words at the very moment are of great relevance here as they show that at the time of the commission of the act X must have had culpability. The example in your study guide is a good one, although X wanted Y dead and planned to kill him, at the time he *actually did run over him he lacked intention*

### **CRIMINAL CAPACITY**

Refers to the mental abilities or capacities that a person must have in order to act with culpability and to incur criminal liability.

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

1. appreciate the wrongfulness of his act or omission and
2. act in accordance with such an appreciation of the wrongfulness of his act or omission If one (or both) of these abilities is lacking, the person concerned lacks criminal capacity and cannot be held criminally responsible for an unlawful act that he has committed while he lacked such ability

Both parts must be present for culpability to be present

The investigation into his criminal capacity is concerned with his mental abilities, whereas the enquiry into whether he acted intentionally or negligently is concerned with the presence or absence of a certain attitude or state of mind on the part of X. Intention deals with the attitude of X whereas criminal capacity deals with mental functioning

## **Defences excluding criminal capacity**

First, there are the two particular defences excluding criminal capacity, namely the defence of mental illness, which is dealt with statutorily in sections 77 to 79 of the Criminal Procedure Act 51 of 1977, and the defence of youthful age, which is also dealt with statutorily in section 7(1) of the Child Justice Act 75 of 2008.

These two defences are referred to as “particular defences” because they can succeed only if the mental inabilities are the result of particular circumscribed mental characteristics to be found in the perpetrator, namely a mental illness or mental defect as envisaged in section 78(1) of the Criminal Procedure Act (in the case of the defence of mental illness), or the perpetrator’s youthful age (in the case of the second particular defence). Furthermore, these two particular defences are subject to certain rules applicable only to them: for example, the defence of mental illness is specifically governed by sections 77 to 79 of the Criminal Procedure Act, which, inter alia, provide for special orders to be made by the court if the defence is successful (e.g. that X may not leave the court as a free person, but that he be detained in a psychiatric hospital). If X relies on his youthful age as a defence, as explained in section 7(1) of the Child Justice Act 75 of 2008, the question of his criminal capacity is, in terms of the Child Justice Act 75 of 2008, governed by certain arbitrary age limits. Apart from these two specific defences of criminal incapacity, there is also a general defence of criminal incapacity. This general defence is also known as “the defence of non-pathological criminal incapacity”. The success of this general defence is not dependent upon the existence of specific factors or characteristics of the perpetrator that led to his criminal incapacity. However, the judgment of the Supreme Court of Appeal in *Eadie 2002 (1) SACR 663 (SCA)* raises doubts about whether the defence of non-pathological criminal Defences excluding criminal capacity mental illness (“insanity”) youth non-pathological criminal incapacity still exists. In the meantime, until there is more clarity on this issue in our case law, we will assume that the defence still exists

### **THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY**

All the instances in which X relies on criminal incapacity as a defence, other than cases in which he relies on mental illness and youth, fall under this heading. We can also refer to this defence as the “general defence of criminal incapacity” in order to distinguish it from the particular defences of mental illness and youth, which also deal with criminal incapacity. In *Laubscher 1988 (1) SA 163 (A)*, the Appeal Court first described this defence as “non-pathological criminal incapacity”. The court adopted this description of the defence in order to distinguish it from the defence of mental illness created in section 78 of the Criminal Procedure Act.

The court stated that the defence created in section 78 applies to pathological disturbances of a person's mental abilities – in other words, the cases in which these disturbances can be traced to some illness of the mind. The defence of non-pathological criminal incapacity, on the other hand, may succeed without any need to prove that, at the time of the commission of the act, X was suffering from a mental illness. For this defence to succeed, it is sufficient to prove that X lacked criminal capacity for only a relatively brief period and that the criminal incapacity was not a manifestation of an ailing or sick (pathological) mental disturbance

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

If the criminal incapacity is the result of a mental illness as envisaged in section 78(1) of the Criminal Procedure Act, X's defence is one of mental illness in terms of that section; the merits of this defence are assessed with reference to the principles applying to that defence. If the criminal incapacity stems from youth, X's defence is the defence commonly called "youth". If the criminal incapacity is neither the result of mental illness in terms of section 78(1), nor of youth, it means that the defence of non-pathological criminal incapacity applies. For this defence to succeed it is not necessary to prove that X's mental inabilities resulted from certain specific causes; more particularly, it is not necessary to prove that they were caused by a pathological mental condition. If, on the evidence as a whole, the court is satisfied that at the time of the commission of the crime, X lacked the ability to appreciate the wrongfulness of his act or to act according to such an appreciation, he must be found not guilty, no matter what the cause of the inability. The cause may be what can be called an "emotional collapse", shock, fear, anger, stress or concussion. Such a condition may be the result of provocation by Y or somebody else, and this may, in turn, be linked to physical or mental exhaustion resulting from Y's insulting behaviour towards X, which strained his powers of self-control until these powers eventually snapped. Intoxication may also be a cause of the inability. The inability may, furthermore, be the result of a combination of factors, such as provocation and intoxication. If X relies on this defence, the onus of proving beyond reasonable doubt that X had criminal capacity at the time of the commission of the act rests upon the state. However, X must lay a foundation for the defence in the evidence. There should preferably be expert evidence by psychiatrists or clinical psychologists concerning X's mental abilities shortly before and during the commission of the act. However, the courts do not regard expert evidence as indispensable in order for the defence to succeed

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

case are the following: X, a keen hockey player, consumed a large quantity of liquor at a social function. Late at night, he got into his car and started driving home. Y, the driver of another vehicle, overtook X's 109 car and then drove very slowly in front of him so that X could not overtake him. X eventually succeeded in overtaking Y. Y then drove at a high speed behind X, with the lights of his car on bright. The two cars then stopped. X was very angry, got out of his car, grabbed a hockey stick, which happened to be in the car, and walked to Y's car. X smashed the hockey stick to pieces against Y's car, assaulted Y repeatedly pulled him out of his car and then continued to assault him outside the car, on the road. Y died as a result of the assault. This was a case of "road rage". On a charge of murder, X relied on the defence of non-pathological criminal incapacity. The court rejected his defence and convicted him of murder. The court discussed previous decisions dealing with this defence extensively and then held (in par 57 of the judgment) that there is no distinction between non-pathological criminal incapacity owing to emotional stress and provocation, on the one hand, and the defence of sane automatism, on the other. More specifically, the court said there is no difference between the second (conative) leg of the test for criminal capacity (i.e. X's ability to act in accordance with his appreciation of the wrongfulness of the act – in other words, his ability to resist temptation) and the requirement that applies to the conduct element of liability, namely that X's bodily movements must be voluntary. If X had alleged that, as a result of provocation, his psyche had disintegrated to such an extent that he could no longer control himself, it would have amounted to an allegation that he could no longer control his movements and that he, therefore, had acted involuntarily. Such a plea of involuntary conduct is nothing other than the defence of sane automatism. (In order to properly understand the court's argument, we advise you to refresh your knowledge of the defence of sane automatism by reviewing the discussion of this defence in 3.3.4 above.) The court does not hold that the defence of non-pathological criminal incapacity no longer exists, and, in fact, makes a number of statements that imply that the defence does still exist. Nevertheless, it declares that if, as a result of provocation, an accused person relies on this defence, his defence should be treated as one of sane automatism (a defence that can also be described as a defence by X that he did not commit a voluntary act). The court emphasises the well-known fact that a defence of sane automatism does not succeed easily and is, in fact, rarely upheld.

## **MENTAL ILLNESS**

Contents of section 78(1) The test to determine the criminal capacity of mentally abnormal persons is contained in section 78(1) of the Criminal Procedure Act 51 of 1977, which reads as follows: A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or

her incapable (a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission. Note that the words “shall not be criminally responsible” in this section actually mean “shall lack criminal capacity”.

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

**This requirement means the following:**

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



tremens If X committed the act while she was in this condition and the condition resulted in her lacking the required mental abilities, she may successfully rely on the defence.

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

Psychological leg of test: If the test to determine mental illness was formulated in such a way that everything depended upon whether, from a psychiatric point of view, X suffered from a mental illness, a court would be almost entirely in the hands of psychiatrists. However, the question for the lawyer is not merely whether a person was mentally ill, but also whether her mental disease resulted in the impairment of certain mental abilities. This brings us to the second leg of the test for criminal incapacity, contained in square B in the diagram. This part of the test is subdivided into two parts, which operate in the alternative. In this part of the test, we refer to the two psychological factors that render a person responsible for her acts, namely the ability to distinguish between right and wrong (cognitive mental faculty) and the ability to act in accordance with such an insight (conative mental faculty).

As far as the conative part of the test is concerned, all that is required is that X must have been incapable of acting in accordance with an appreciation of the wrongfulness of her act or omission. Such lack of self-control may be the result of a gradual process of the disintegration of the personality. Unlike the former test, which applied before 1977, the lack of self-control need not be the result of a so-called “irresistible impulse”

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

## **Verdict**

If the defence of mental illness is successful, the court must find X not guilty by reason of mental illness or mental defect, as the case may be (s 78(6)). The court then has a discretion (in terms of s 78(6)) to issue any one of the following orders: (1) that X be admitted to, and detained in, an institution stated in the order and treated as if she were an involuntary mental-health-care user contemplated in section 37 of the Mental Health Care Act 17 of 2002 (2) that X be released subject to such conditions as the court considers appropriate (3) that X be released unconditionally

## **YOUTH**

The Child Justice Act 75 of 2008 (which came into operation on 11 May 2009) deals with youth as a factor that may exclude criminal capacity.

Section 7 provides: A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence (s 7(1)).

A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity

(s 7(2)). Section 11(1) of the Act provides:

The State must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation

## **STUDY UNIT 9, 10, 11**

### **THE TWO ELEMENTS OF INTENTION**

Intention, in whatever form, consists of two elements, namely a cognitive and a conative element. The cognitive element consists in X's knowledge or awareness of the act (or the nature of the act) the existence of the definitional elements the unlawfulness of the act. The conative element consists in X's directing his will towards a certain act or result: X decides to accomplish in practice what he has previously only pictured in his imagination. This decision to act transforms what had, until then, merely been daydreaming, wishing or hoping into intention. In legal literature, intention is also known as *dolus*

## **DEFINITION OF INTENTION**

A person acts or causes a result intentionally if · he wills the act or result · in the knowledge – of what he is doing (i.e. the act), – that the act and circumstances surrounding it accord with the definitional elements, and – that it is unlawful.

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

Direct intention (dolus directus) Definition A person acts with direct intention if the causing of the forbidden result is his aim or goal.

### **Dolus eventualis**

**Definition** : A person acts with dolus eventualis if the causing of the forbidden result is not his main aim, but (1) he subjectively foresees the possibility that in striving towards his main aim, his conduct may cause the forbidden result and (2) he reconciles himself to this possibility

The second part of the definition of dolus eventualis (which requires that X must have reconciled himself to the possibility) is not always expressed in the same way. Instead of requiring that X must have reconciled himself to the possibility, it is often said that X must have been reckless with regard to the performance of the act or the causing of the result. In practice, however, the expressions “reconcile to” and “reckless towards” are used as synonyms

## **THE TEST FOR INTENTION IS SUBJECTIVE**

The test in respect of intention is purely subjective. The court must determine what the state of mind of that particular person – the accused (X) – was when he committed the act. When determining whether X had intention, the question is never whether he should have foreseen the result, but whether he actually foresaw it. To say that X “should have foreseen” says nothing about what X actually thought or foresaw; it is simply comparing his state of mind or conduct with another’s, namely the fictitious reasonable person. To do this is to apply the test in respect of negligence, which is objective. In deciding whether X had intent, the question is always: How did X perceive the situation, what knowledge did he have, and did he will the consequence or foresee it as a possibility

**PROOF OF INTENTION – DIRECT OR INDIRECT** How is intention proved in a court? Sometimes there may be direct evidence of intention: if, in a confession, in the course of being questioned at the

stage of explanation of plea or in his own evidence before the court, X admits that he acted intentionally, and if the court believes him, there is obviously no problem. However, in most cases, X does not make such an admission. How can the judge or magistrate then determine whether he acted with intent? X is, after all, the only person who knows what his state of mind was at the crucial moment when he committed the act. There is no rule to the effect that a court may find that X acted with intent only if he (X) admitted that he had intent (in other words, if there is direct proof of intent). It is, after all, a well-known fact that many accused who did actually have intent subsequently deny in court that they acted intentionally. A court may base a finding that X acted intentionally on indirect proof of intent. This means that the court infers the intent from evidence relating to X's outward conduct at the time of the commission of his act, as well as the circumstances surrounding the events.

When a court is called upon to decide, by means of inference from the circumstances, whether X acted intentionally, it must guard against subtly applying an objective instead of a subjective test to determine intent. It is dangerous for a court to argue as follows: "Any normal person who commits the act that X committed would know that it would result in the death of the victim; therefore X acted intentionally." Although the court (judge or magistrate) is free to apply general knowledge of human behaviour and of the motivation of such behaviour, it must guard against exclusively considering what a "normal", "ordinary" or "reasonable" person would have thought or felt in any given circumstances. The court must go further than this: it must consider all the circumstances of the case (such as the possibility of a previous quarrel between the parties), as well as all of X's individual characteristics that the evidence may have brought to light and which may have a bearing on his state of mind (such as his age, degree of intoxication, his possible irascibility, possible lack of education or low degree of intelligence). The court must then, to the best of its ability, try to place itself in X's position at the time of the commission of the act complained of and then try to ascertain what his (X's) state of mind was at that moment – that is, whether he appreciated or foresaw the possibility that his act could result in Y's death (Mini 1963 (3) SA 188 (A) 196; Sigwahla 1967 (4) SA 566 (A) 570)

### **Read De Oliviera case as example of approach in proving intention**

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

We have already pointed out that intention consists of two elements, namely knowledge and will. It is now necessary to explain the knowledge requirement, or the cognitive element, in more detail. In order to have intention, X's knowledge must refer to all the elements of the offence, except the

requirement of culpability. Such knowledge must refer to (1) the act, (2) the circumstances included in the definitional elements, and (3) the unlawfulness of the act. X must be aware of all these factors.

### **MISTAKE NULLIFIES INTENTION**

X must be aware of all the factors mentioned under (1), (2) and (3) above. If she is unaware of any of them, it cannot be said that she intended to commit the crime. If such knowledge or awareness is absent, it is said that there is a “mistake” or “error” on X’s part: she imagined the facts to be different from what they, in fact, were; in other words, mistake excludes or nullifies the existence of intention. The following are two examples of mistake relating to the act (or the nature of the act): (1) Within the context of the crime of malicious injury to property, X is under the impression that she is fixing the engine of somebody else’s motorcar that has developed problems, whereas what she is actually doing to the engine amounts to causing “injury” to it. (2) Within the context of the crime of bigamy, X thinks that she is partaking in her friend’s marriage ceremony in a church, whereas the service in which she is partaking is, in fact, her marriage ceremony.

### **MISTAKE NEED NOT BE REASONABLE**

Whether there really was a mistake that excludes intention is a question of fact. What must be determined is X’s true state of mind and conception of the relevant events and circumstances. The question is not whether a reasonable person in X’s position would have made a mistake. The test in respect of intention is subjective, and if we were to compare X’s state of mind and view of the circumstances with those of a reasonable person in the same circumstances, we would be applying an objective test in respect of intention, which is not warranted. To say that mistake can exclude intention only if it is reasonable is the same as saying that it is essential for a reasonable person to have made a mistake under those circumstances. Now that a subjective test in respect of intention has been accepted, there is no longer any room for an objective criterion such as reasonableness (Modise 1966 (4) SA 680 (GW); Sam 1980 (4) SA 289 (T)). Because the test is subjective, X’s personal characteristics, her superstitiousness, degree of intelligence, background and character may be taken into account in determining whether she had the required intention, or whether the intention was excluded because of mistake. The reasonableness of the mistake, at most, constitutes a factor that, from an evidential point of view, tends to indicate that there is indeed a mistake; however, it should not be forgotten that in exceptional circumstances, it is possible to make an unreasonable mistake

## **MISTAKE MUST BE MATERIAL.**

Not every wrong impression of facts qualifies as a mistake, thus affording X a defence. Sometimes X may be mistaken about a fact or circumstance and yet not be allowed to rely on her mistake as a defence. A mistake can exclude intention (and, therefore, liability) only if it is a mistake concerning an element or requirement of the crime other than the culpability requirement itself. These requirements are (1) the requirement of an act, (2) a requirement contained in the definitional elements, or (3) the unlawfulness requirement. To use any yardstick other than the above-mentioned one in determining whether a mistake may be relied on as a defence is misleading. This must be borne in mind, especially where X is mistaken about the object of her act. Such a mistake is known in legal literature as error in objecto. Error in objecto is not the description of a legal rule; it merely describes a certain kind of factual situation. It is therefore incorrect to assume that as soon as a certain set of facts amounts to an error in objecto, only one conclusion (that X is guilty or not guilty) may legally be drawn. Whether error in objecto excludes intention and is, therefore, a defence depends upon the definitional elements of the particular crime. Murder is the unlawful intentional causing of the death of another person. The object of the murder is, therefore, a human being. If X thinks that she is shooting a buck, when she is actually shooting a human being, she is mistaken about the object of her act (error in objecto), and this mistake excludes the intention to murder. Her mistake excludes intention because it is a mistake concerning the definitional elements of the crime in question (murder). Note that although, in the above example, X cannot be convicted of murder, it does not necessarily follow that she will go free. Although her mistake excludes intention, the circumstances may be such that she was negligent in shooting at a fellow human being. She would have acted negligently if a reasonable person in the same circumstances would have foreseen that the figure she was aiming at was not a buck, but a human being. (This will become clearer from the discussion below of the test for negligence.) If she had killed a person negligently, she would be guilty of culpable homicide.

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

Description of concept Aberratio ictus means the going astray or missing of the blow. It is not a form of mistake. X has pictured what she is aiming at correctly, but through lack of skill, clumsiness or other factors, she misses her target and the blow or shot strikes somebody or something else. (Please note the spelling of the word mistake aberratio. Students often spell it incorrectly in the examination. You spell it with one b but two r's.)

Two opposite approaches A perusal of this subject in the legal literature generally reveals two opposite approaches regarding the legal conclusions to be drawn. (a) The transferred culpability approach According to the one approach, the question whether X, in an *aberratio ictus* situation, had the intention to kill Z should be answered as follows: X wished to kill a person. Murder consists in the unlawful, intentional causing of the death of a person. Through her conduct, X actually caused the death of a person. The fact that the actual victim of X's conduct proved to be somebody different from the particular person that X wished to kill ought not to afford X any defence. In the eyes of the law, X intended to kill Z, because X's intention to kill Y is transferred to her killing of Z, even though X might perhaps not even have foreseen that Z might be struck by the blow. The Anglo-American legal system, which for the most part follows this approach, reaches this conclusion through an application of what is called the "doctrine of transferred malice". X's intent in respect of Y's killing is transferred to her killing of Z. (b) The concrete-figure approach There is, however, an alternative approach to the matter. Those who support this approach argue as follows: We can accept that X intended to kill Z only if it can be proved that X knew that her blow could strike Z, or if she had foreseen that her blow might strike Z and had reconciled herself to this possibility. In other words, we merely apply the ordinary principles relating to intention and, more particularly, *dolus eventualis*. If X had not foreseen that her blow might strike Z, she lacked intention in respect of Z's death and cannot be convicted of murder. X's intention to kill Y cannot serve as a substitute for the intention to kill Z. In order to determine whether X had the intention to kill the person who, or figure that, was actually struck by the blow, the question is not simply whether she had the intention to kill a person, but whether she had the intention to kill that particular (concrete) figure that was actually struck by the blow. Only if this last-mentioned question is answered in the affirmative can we assume that X had intention in respect of Z. According to this approach, what is crucial is not an abstract "intention to kill a person", but a concrete "intention to kill the actual victim".

Concrete-figure approach to be preferred Which one of these two approaches should you follow? To a certain extent, support for the transferred culpability approach can be found in South African case law before 1950 (e.g. *Koza* 1949 (4) SA 555 (A) and *Kuzwayo* 1949 (3) SA 761 (A)), but the weight of authority in the case law after this date supports the concrete-figure approach

## **Negligence**

In crimes of intention, X is blamed for knowing or foreseeing that his conduct is proscribed by the law and that it is unlawful. In crimes of negligence, X is blamed for not knowing, not foreseeing or not doing something, although – according to the standards set by the law – he should have known

or foreseen or done it. Intention always has a positive character: X wills or knows or foresees something. Negligence, on the other hand, always has a negative character: X does not know or foresee something, although he should – according to the norms of the law – have known or foreseen it

## **OBJECTIVE TEST**

The test for negligence is objective, except for a few less important exceptions

As we have seen above, the test for intention is subjective, since we have to consider what X's actual knowledge was or what he actually envisaged the facts or the law to be. When we describe the test for negligence as objective, we mean that we have to measure X's conduct against an objective standard. This objective standard is that which a reasonable person would have known or foreseen or done in the same circumstances. The test for intention is subjective because we have to determine what X's thoughts were as an individual (i.e. as a subject), or what he actually envisaged. Expressed very plainly: we have to ascertain "what went on in his (X's) head". The test for negligence, on the other hand, is described as objective, since here we are not concerned with what X actually thought or knew or foresaw, but only with what a reasonable person in the same circumstances would have foreseen or what he would have done. Here (in negligence), X's conduct is measured against "something" (a standard) outside himself – namely what a reasonable person would have foreseen or done.

## **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.

The concept of the reasonable person The expression "reasonable person" appears in both the first and second legs (points (1) and (2)) of the definition of negligence. Before considering the first two legs of the definition, it is necessary to explain what is meant by "reasonable person". (1) The reasonable person is merely a fictitious person that the law invents to personify the objective standard of reasonable conduct that the law sets in order to determine negligence. (2) In legal literature, the reasonable person is often described as the *bonus paterfamilias* or *diligens*



paterfamilias. These expressions are derived from Roman law. Literally, they mean the “diligent father of the family”, but in practice, this expression is synonymous with the reasonable person. (3) In the past, the expression “reasonable man” was usually used in legal literature, instead of “reasonable person”. Since 1994, when South Africa obtained a new Constitution that emphasises, inter alia, gender equality, the term “reasonable man” ought to be avoided because of its sexist connotation. (4) By “reasonable person”, we mean an ordinary, normal, average person. In *Mbombela* 1933 AD 269 273, the court described the reasonable person as “the man (sic) of ordinary knowledge and intelligence”. He is neither, on the one hand, an exceptionally cautious or talented person (*Van As* 1976 (2) SA 921 (A) 928), nor, on the other, an underdeveloped person, or somebody who recklessly takes chances. Accordingly, the reasonable person finds himself somewhere between these two extremes. In *Burger* 1968 (4) SA 877 (A) 879, Holmes JA expressed this idea in almost poetical language when he said: “One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of the racing driver. In short, a diligens paterfamilias treads life’s pathway with moderation and prudent common sense.”

### **Reasonable foreseeability**

Under this heading we discuss the first leg (i.e. point (1)) of the definition of negligence given above, namely whether the reasonable person would have foreseen the possibility of the particular circumstance existing or the particular result ensuing. In practice, this is the most important leg or component of the test for negligence. (1) The courts sometimes ask whether the reasonable person would have foreseen the possibility (of the result ensuing), and on other occasions, whether X ought reasonably to have foreseen the possibility. However, it is beyond doubt that both expressions mean the same thing: foreseeability by the reasonable person and reasonable foreseeability by the accused are viewed as the same thing. (2) What must be foreseeable is the possibility that the result may ensue, and not the likelihood thereof (*Herschell v Mrupe* 1954 (3) SA 464 (A) 471). (3) The test is whether the reasonable person in the same circumstances as those in which X found himself would have foreseen the particular possibility. This aspect of the test is very important. Our courts do not assess negligence in vacuo (“in a vacuum”), but in concreto, that is, in the light of the actual circumstances in which X found himself at the time he committed his act. Thus if the question arises whether X, a motorist, was negligent when he ran over and killed a pedestrian in a street during a heavy rainstorm, the question the court must ask is what a reasonable person who was driving in a street during a heavy downpour would have foreseen. It would be wrong to place the reasonable person behind the steering wheel of a motorcar on an occasion when the sun was shining brightly. If

X finds himself in a sudden emergency when driving his car, for example, and has to make a quick decision, which, in the event, results in somebody's death, the task of the court that has to decide whether he was negligent is, likewise, to enquire how the reasonable person would have behaved in a similar situation.

The intention must relate not only to the act, but also to all the circumstances and consequences set out in the definitional elements, as well as to the unlawfulness. The same principle applies to negligence. Actually, negligence in respect of the act plays a role only in formally-defined crimes. We will briefly consider negligence in these crimes below. In materially-defined crimes, negligence must relate to the particular result specified in the definitional elements of the crime concerned. In culpable homicide, the result specified in the definition of the proscription is somebody else's death. This means that if X is charged with culpable homicide and the question arises whether he was negligent, the question to be answered is not: "Would the reasonable person have foreseen the possibility that Y might be injured as a result of X's conduct?" The correct question is: "Would the reasonable person have foreseen the possibility that Y might be killed as a result of X's conduct?" (Bernardus 1965 (3) SA 287 (A) 296). Although it is well known that, because of the frailty of the human body, death may be caused by even a mild assault, it is wrong to say that the reasonable person will always foresee that even a mild assault, such as a slap, may cause Y's death. In certain exceptional cases, death resulting from a minor assault may not be foreseeable, such as where the victim had an unusual physiological characteristic such as a thin skull or a weak heart (Van As 1976 (2) SA 921 (A) 927).

### **The taking of steps by the reasonable person to avoid the result ensuing**

Under this heading we discuss the second leg (i.e. point (2)) of the definition of negligence given above, that is, the requirement that the reasonable person would have taken steps to guard against the possibility of the result ensuing. In practice, this second leg of the test for negligence is seldom of importance because, in the vast majority of cases, the reasonable person who had foreseen the possibility of the result ensuing (i.e. who has complied with the first leg of the test) would also have taken steps to guard against the result ensuing. However, there are cases in which the reasonable person who has foreseen the possibility will not take steps to guard against the result ensuing. This is where the foreseen possibility is far-fetched or remote, or where the risk of the result ensuing is very small, or where the cost and effort necessary to undertake the steps do not outweigh the more important and urgent purpose of X's act. In deciding whether the reasonable person would have

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

X's conduct differs from that of the reasonable person

We have now discussed the first two legs of the definition of negligence. It is not necessary to say much on the third leg of the test. It merely embodies the self-evident rule that X is negligent if his conduct differs from that which a reasonable person would have foreseen or guarded against. 11.5.6 Negligence in respect of a circumstance In the discussion thus far, the emphasis has been on negligence in respect of a result. Negligence in respect of a result is found only in materially defined crimes (result crimes). As was pointed out above, there are also certain formally defined crimes that require culpability in the form of negligence. Thus it was held in *Mnisi* 1996 (1) SACR 496 (T), for example, that the crime of possessing a firearm without a licence (currently a contravention of s 3 of the Firearms Control Act 60 of 2000) is one in respect of which the state need merely prove culpability in the form of negligence. This is a formally defined crime, since we are not dealing here with the causing of a certain result. To obtain a conviction, the state need not prove the causing of a certain result, but merely the existence of a certain circumstance, namely the possession by X of a firearm without his having a licence for it. What do we mean when we say that X was negligent, not in respect of a result, but merely in respect of a circumstance? X is negligent in respect of a circumstance if a reasonable person in the same circumstances would have foreseen the possibility that the circumstance could exist

### **EXCEEDING THE BOUNDS OF PRIVATE DEFENCE**

if X relies on private defence, but the evidence reveals that he has exceeded the bounds of private defence, he cannot rely on private defence and his conduct is unlawful. The question that we have not yet answered is: What crime does X commit in such a case? In order to answer this question, we must know what the two forms of culpability – intention and negligence – entail. We have now reached the stage where we have explained both these forms of culpability.

### **Application of principles of culpability**

The question arises how the principles relating to culpability must be applied in cases where the bounds of private defence are exceeded. As seen above, a person acting in private defence acts lawfully and his nonliability is based upon the absence of an unlawful act. Consequently, of what must he be convicted if he oversteps the bounds of private defence, such as when he inflicts more

harm upon the aggressor than is necessary to protect himself or the person he is defending, and his act is, therefore, unlawful? The answer to this question is clearly set out in *Ntuli 1975 (1) SA 429 (A)*. In this case, the accused killed an older woman with whom he had an argument, by striking her on the head with two hard blows. The trial court found that he had exceeded the bounds of private defence and convicted him of culpable homicide. On appeal, the finding was confirmed and the Appeal Court laid down the following important principles: (1) If the victim dies, the accused may be guilty of either murder or culpable homicide, depending upon his culpability. If the accused did not have any culpability, he should be found not guilty. (2) The ordinary principles relating to intention and negligence should be applied to all cases where the bounds of private defence have been exceeded

### **Killing Another**

X will be guilty of murder if he had the intention to murder Y. Before a court can find that he had such an intention, two requirements must be complied with: (1) It must be clear that X had, in fact, known that his conduct would result in Y's death, or that he had foreseen that this might happen and reconciled himself to this possibility. This is "colourless" intention in respect of death. (2) The intention referred to above, however, is not yet sufficient to warrant a conviction of murder. In the above discussion of intention – and especially of awareness of unlawfulness – we stated that the intention required for a conviction (i.e. *dolus*) must always be "coloured". This would be the case if, apart from intending to commit the unlawful act or causing the unlawful result, X also knew (or foresaw) that his conduct would be unlawful. Therefore, before a court can find that X intended to murder Y, it must, in the second place, be clear that he (X) knew that his conduct was also unlawful (in other words, that it exceeded the bounds of private defence), or that he foresaw this possibility and reconciled himself to it. In short, intention to murder consists in intention to kill plus the intention to kill unlawfully.

### **Revision : Units 12, 13 ,14**

### **INVOLUNTARY INTOXICATION**

It is necessary, firstly, to distinguish between voluntary and involuntary intoxication. By "involuntary intoxication", we mean intoxication brought about without X's conscious and free intervention, as in the following examples: X is forced to drink alcohol against her will; or X's friend, Y, without X's knowledge, pours alcohol or a drug into X's coffee, which results in X becoming intoxicated and committing a crime while thus intoxicated (as happened in *Hartyani 1980 (3) SA 613 (T)*). It is beyond

dispute that involuntary intoxication is a complete defence. The reason for this is that X could not have prevented the intoxication, and therefore cannot be blamed for it.

**VOLUNTARY INTOXICATION** As far as voluntary intoxication is concerned; three different situations have to be clearly distinguished: (1) the *actio libera in causa* (2) intoxication resulting in mental illness (3) the remaining instances of voluntary intoxication 1

### **Actio libera in causa**

The first situation is where X intends to commit a crime, but does not have the courage to do so and takes to drink in order to generate the necessary courage, knowing that she will be able to perpetrate the crime once she is intoxicated. In this instance, intoxication is no defence whatsoever; in actual fact, it would be a ground for imposing a heavier sentence than normal. At the stage when the person was completely sober, she already had the necessary culpability. The person's inebriated body later merely becomes an instrument used for the purpose of committing the crime. This factual situation – which is difficult to prove – is known as *actio libera in causa*.

We now take a look at the third instance of voluntary intoxication. This is the instance where alcohol is taken voluntarily, does not result in mental illness, and where X does not partake of the alcohol with the exclusive purpose of generating the courage to perpetrate a crime. The vast majority of cases where intoxication comes into the picture in the daily practice of our courts can be categorised under this third instance of voluntary intoxication. The controversy concerning the role of intoxication in criminal law has to do with these cases primarily. Unless otherwise indicated, all references to intoxication hereafter are references to intoxication in this category. It is this type of intoxication with which the courts are confronted daily. For example, X has a couple of drinks at a social gathering and then behaves differently from the way she would have behaved had she not taken any liquor: she takes offence too readily at a rude remark made by Y and then assaults Y, or damages property.

### The “lenient” and “unyielding” approach to voluntary intoxication

Throughout the years, there have been two opposing schools of thought regarding the effect that intoxication ought to have on criminal liability. On the one hand, there is the approach that may be described as the unyielding one, which holds that the community will not accept a situation in which a person who was sober when she committed a criminal act is punished for that act, whereas the same criminal act committed by someone who was drunk is excused merely because she was drunk

when she committed the act. This would mean that intoxicated people are treated more leniently than sober people. On the other hand, there is the lenient approach, which holds that if we apply the ordinary principles of liability to the conduct of an intoxicated person, there may be situations in which such a person should escape criminal liability, the basis of this being that because of her intoxication, she either did not perform a voluntary act or lacked either criminal capacity or the intention required for a conviction. In the course of our legal history, the approach towards the effect of intoxication has vacillated. Initially, in our common law, the rule was that voluntary intoxication could never be a defence to a criminal charge, but could, at most, amount to a ground for the mitigation of punishment. This is the unyielding approach. However, the pendulum has gradually swung away from the unyielding approach adopted in the common law towards the lenient approach, and throughout the twentieth century, right up until 1981, the courts applied a set of rules that enabled them to reach a conclusion somewhere in the middle, that is, between the unyielding and the lenient approach (see the discussion hereafter of the law prior to 1981). However, with the 1981 Appeal Court decision in *Chretien* 1981 (1) SA 1097 (A), the pendulum clearly swung in the direction of the lenient approach. This created the fear that intoxicated persons might too easily escape conviction, which, in turn, led to legislation in 1988 aimed at curbing the lenient approach towards intoxicated persons. At present, the pendulum is poised, somewhat awkwardly halfway between the lenient and the unyielding approach, owing to, inter alia, uncertainty regarding the interpretation of the 1988 legislation.

#### The law after 1981 – the decision in *Chretien* and the rules enunciated therein

The legal position as set out above was drastically changed by *Chretien* 1981 (1) SA 1097 (A). In this case, X, who was intoxicated, drove his motor vehicle into a group of people standing in the street. As a result, one person died and five people were injured. He was charged with murder in respect of the person who died and attempted murder in respect of the five persons injured. The court found that owing to his consumption of alcohol, X expected the people in the street to see his car approaching and move out of the way, and that, therefore, he had no intent to drive into them. On the charge of murder, he was convicted of culpable homicide, because the intention to kill had been lacking. X could not be found guilty on any of the charges of attempted murder owing to the finding that he did not have any intent to kill. The question arose, however, whether X should not have been found guilty of common assault on the charges of attempted murder. The trial court acquitted him on these charges. The state appealed to the Appellate Division on the ground that the trial court had interpreted the law incorrectly and that it should have found the accused guilty of assault. The Appeal Court found that the trial court's decision was correct. Summary of legal points decided by

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

The result of *Chretien* is that, as far as X’s liability is concerned, intoxication may have one of the following three effects: (1) It may mean that the requirement of a voluntary act was not complied with. (2) It may exclude criminal capacity. (3) It may exclude intention. The first-mentioned effect (the exclusion of the act) merely has theoretical significance: Such cases are hardly ever encountered in practice. If it should occur in practice, it would mean that X had acted in a state of automatism. The second effect may occur in practice, although a court will not readily find that X lacked criminal capacity owing to intoxication – especially in the absence of expert evidence (cf September 1996 (1) SACR 325 (A) 332). If X does succeed with a defence of intoxication, in practice this usually means that a court decides that, owing to intoxication, she lacked intention. (Intoxication may, of course, also have a fourth effect, namely to serve as a ground for mitigation of punishment; this effect, however, does not refer to X’s liability for the crime.

The crime created in section 1 of Act 1 of 1988 Reason for legislation It was pointed out above that the decision in *Chretien* resulted in intoxication qualifying as a complete defence. This judgment has been criticised. The criticism is that society does not accept a situation where a sober person is punished for criminal conduct, whereas the same conduct committed by a drunk person is pardoned, merely because she was drunk. This would mean that drunk people are treated more leniently than sober people. Society demands that drunk people not be allowed to hide behind their intoxication in order to escape the clutches of the criminal law. Reacting to this criticism of the

judgment, parliament, in the first Act it passed in 1988, enacted a provision that was clearly aimed at preventing a person raising the defence of intoxication from walking out of court a free person too readily. This provision is contained in section 1 of the Criminal Law Amendment Act 1 of 1988.

Contents of section 1: If X commits an act that would otherwise have amounted to the commission of a crime (i.e. which, “viewed from the outside”, without taking into account X’s subjective mental predisposition, would have amounted to the commission of a crime), but the evidence brings to light that, at the time of the performance of the act, she was, in fact, so intoxicated that she lacked criminal capacity, the court would, in terms of the Chretien judgment, first have to find her not guilty of the crime with which she has been charged (i.e. the crime she would have committed, had she not been drunk), but must then, nevertheless, convict her of the statutory crime created in section 1(1), that is, the crime known as “contravention of section 1(1) of Act 1 of 1988”. In other words, she is convicted of a crime, albeit not the same one as the one she had been charged with initially. The section further provides that when the court has to decide what punishment to impose for the statutory crime of which she had been convicted, the court is empowered to impose the same punishment it would have imposed had she been convicted of the crime she was originally charged with. In this way she is prevented from “walking out of court” unpunished.

#### **Elements of crime created in section**

The requirements for a conviction of contravening the section can be divided into two groups. The first group (indicated below by the letter A) refers to the circumstances surrounding the consumption of the liquor, which is the event that takes place first. This group of requirements comprises the following: A1 the consumption or use by X A2 of “any substance” A3 that impairs her faculties to such an extent that she lacks criminal capacity A4 while she knows that the substance has that effect The second group of requirements (indicated below by the letter B) refers to the circumstances surrounding the commission of the act “prohibited ... under penalty”, which is the event that takes place secondly. This group of requirements comprises the following: B1 the commission by X of an act prohibited under penalty B2 while she lacks criminal capacity and B3 who, because of the absence of criminal capacity, is not criminally liable

#### **THE EFFECT OF INTOXICATION ON PUNISHMENT**

In all the instances where X, notwithstanding her intoxication, is found guilty of the crime she is charged with, the intoxication can be taken into account by the court in sentencing her, resulting in a more lenient punishment. This is a daily practice in our courts. Nothing prohibits a court from using



intoxication as a ground for imposing a heavier punishment in certain circumstances, for example in the case of a person who knew, before she started drinking, that alcohol made her aggressive (Ndlovu 1972 (3) SA 42 (N); s 2 of the Criminal Law Amendment Act 1 of 1988). Where the form of culpability involved in the commission of the offence is negligence, the fact that the negligence was induced by the voluntary consumption of alcohol or drugs will generally be regarded as an aggravating factor.

### **Strict liability**

Culpability is required for all common-law crimes. Bearing in mind the necessity of culpability in a civilised legal system, it should also be a requirement for all statutory crimes. However, this is not the case. The legislature sometimes creates crimes in respect of which culpability is not required. Since culpability has become such a well-established principle of criminal liability, we would be inclined to assume that it could only be excluded by an express provision in a law. However, owing to the influence of English law, our courts have adopted the principle that even in those cases where the legislature, in creating a crime, is silent about the requirement of culpability, a court is free to interpret the provision in such a way that no culpability is required. It is in these cases that we can speak of strict liability. Strict liability is found in statutory crimes only.

### **Strict liability may be unconstitutional**

There is a possibility that the courts may decide that the whole principle of strict liability is unconstitutional (i.e. in conflict with the Bill of Rights enshrined in the Constitution). It may be in conflict with the right to a fair trial (s 35(3)) and thereunder, especially the right to be presumed innocent (s 35(3)(h)), as well as the right to freedom and security of the person (s 12(1)). Although this question has not yet come up directly for decision before the Constitutional Court, it did arise obiter (i.e. in passing) in Coetzee 1997 (1) SACR 379 (CC). One of the judges in this case, O'Regan J, made it fairly clear in her judgment (442h–i) that strict liability may be unconstitutional on the ground that “people who are not at fault [ie who lack culpability] should not be deprived of their freedom by the State ... Deprivation of liberty, without established culpability, is a breach of this established rule

### **Liability of corporate body for the acts of its director or servant**

Section 332(1) provides that an act by the director or servant of a corporate body is deemed to be an act of the corporate body itself, provided the act was performed in exercising powers or in the

performance of duties as a director or servant, or if the director or servant was furthering or endeavouring to further the interests of the corporate body. A corporate body can commit both common-law and statutory crimes, irrespective of whether intention or negligence is the form of culpability required (Ex parte Minister van Justisie: in re S v SAUK 1992 (4) SA 804 (A)). This does not mean that the “original culprit”, that is, the employee or servant, is exempt from liability. He is just as punishable as the corporate body

Persons involved in the crime can be subdivided into two broad categories, namely persons who participate and persons who do not participate. A person involved who participates is briefly described as a “participant”. A participant is anyone who does something, in whatever manner, whereby she furthers the commission of the crime. On the other hand, a person involved who does not participate is someone who, although she can be described as being involved in the crime, does not further the commission of the crime at all. There is only one group of persons that will fall into this category, namely accessories after the fact. An accessory after the fact is someone who, after the crime has already been completed, learns about the crime for the first time and then does something to protect the perpetrators of the crime or to help them to escape criminal liability for their acts. The best example of an accessory after the fact is the person who, after a murder has been committed, helps the murderers to dispose of the body by, for instance, throwing it in a river with a stone tied around its neck. An accessory after the fact cannot be a participant because her act does not amount to furthering the commission of the crime. After all, a person cannot further a crime if the crime (e.g. the murder in the above-mentioned example) has already been committed. In the next study unit we will return to the accessory after the fact and will deal with her liability in greater detail. First, however, we will consider the participant and note the various kinds of participants. The category of persons known as “participants” can, in turn, be divided into two subcategories, namely perpetrators and accomplices. The distinction between perpetrators and accomplices is of the utmost importance, so you must ensure that you understand it properly.

Definition of a perpetrator A person is a perpetrator if

1. her conduct, the circumstances in which it takes place (including, where relevant, a particular description with which she as a person must, according to the definition of the offence, comply) and the culpability with which it is carried out are such that she satisfies all the requirements for liability contained in the definition of the offence, OR
2. if, although her own conduct does not comply with that required in the definition of the crime, she acted together with one or more persons and the conduct required for a

conviction is imputed to her by virtue of the principles relating to the doctrine of common purpose.

Definition of an accomplice A person is an accomplice if,

1. although she does not comply with all the requirements for liability set out in the definition of the crime, and
2. although the conduct required for a conviction is not imputed to her in terms of the doctrine of common purpose, she engages in conduct whereby she unlawfully and intentionally furthers the commission of the crime by somebody else. The crucial words in this definition are: not comply with definitions, conduct not imputed in terms of the doctrine of common purpose and furthers crime.

Being a perpetrator of murder by virtue of the doctrine of common purpose

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

Although the doctrine is couched in general terms, in our law it has been applied mostly to the crime of murder. The crucial requirement of the doctrine is that the different accused should have had the same purpose. Once this is proven, the act of Z, who, for example, threw a heavy stone at Y, which struck her on the head, is imputed to X, who had a common purpose with Z to kill Y, but who threw a stone at Y, which missed her. In fact, Z's act is imputed to everyone who had the same purpose as she did, and who actively associated herself with the achievement of the common purpose, even though we cannot construe a causal connection between such a party's act and Y's death. It is, however, only Z's act that is imputed to the other party (X), not Z's culpability. X's liability is based upon her own culpability (Malinga 1963 (1) SA 692 (A) 694). The common-purpose doctrine as applied to cases of murder may indeed be regarded as nothing other than a mechanism applied to overcome the difficulties inherent in proving causation where a number of people together kill somebody else. If it is possible to base each participant's conviction of murder on an application of the general rules of liability (and, more particularly, on the ordinary principles of causation), it is, in our view, preferable to follow this option rather than resort to the common-purpose doctrine in order to secure a conviction. The reason for this predilection is the fear expressed in certain quarters that the latter doctrine, with its wide definition and scope, may, in certain circumstances, lead to

inequitable results, in that somebody who played only a comparatively minor role in the events may also be convicted of murder (Mshumpa 2008 (1) SACR 126 (EC)).

### **Proof of existence of common purpose**

The existence of a common purpose between two or more participants is proved in the following ways: On the basis of an express or implied prior agreement to commit an offence. Since people mostly conspire in secret, it is very difficult for the state to prove a common purpose based on a prior agreement. (See *S v Mbanyaru* 2009 (1) SACR 631 (C), where it was held that common purpose based on prior agreement was not proved in this case.)

Where no prior agreement can be proved, the liability arises from an active association and participation in a common criminal design (*Thebus* 2003 (2) SACR 319 (CC) 336)

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### **The judgment in *Safatsa***

The leading case on the doctrine of common purpose is *Safatsa* 1988 (1) SA 868 (A). In this case, the facts were the following: A crowd of about 100 people attacked Y, who was in his house, by pelting the house with stones, hurling petrol bombs through the windows, catching him as he was fleeing from his burning house, stoning him, pouring petrol over him and setting him alight. The six appellants formed part of the crowd. The court found that their conduct consisted, inter alia, of grabbing hold of Y, wrestling with him, throwing stones at him, exhorting the crowd to kill him, forming part of the crowd that attacked him, making petrol bombs, disarming him and setting his house alight. In a unanimous judgment delivered by Botha JA, the Appellate Division confirmed the six appellants' convictions of murder by applying the doctrine of common purpose, since it was clear that they all had the common purpose to kill Y. It was argued on behalf of the accused that they could be convicted of murder only if a causal connection had been proved between each individual accused's conduct and Y's death, but the court held that where, as in this case, a common purpose to kill had been proved, each accused could be convicted of murder without proof of a causal connection between each one's individual conduct and Y's death. If there is no clear evidence that the participants had agreed beforehand to commit the crime together, the existence of a common purpose between a certain participant and the others may be proven by the fact that he actively associated himself with the actions of the other members of the group.

### **Active association as proof of participation in a common purpose**

The existence of a common purpose between a certain participant and the other members of the group may be based upon a finding that the participant actively associated with the actions of the other members of the group. This happens frequently in practice. In *Mgedezi* 1989 (1) SA 687 (A)

705I–706C, the Appellate Division held that if there is no proof of a previous agreement between the perpetrators, an accused whose individual act is not causally related to Y’s death can be convicted of murder only on the strength of the doctrine of common purpose if the following *five requirements have been complied with*:

1. he must have been present at the scene of the crime.
2. he must have been aware of the assault on Y.
3. he must have intended to make common cause with those committing the assault.
4. he must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others.
5. he must have had the intention to kill Y or to contribute to his death. Thus, somebody who was merely a passive spectator of the events will not, in terms of this doctrine, be liable to conviction, even though he may have been present at the scene of the action.

Other principles that emerge from the case law are the following:

In murder cases, active association can result in liability only if the act of association took place while Y was still alive and at a stage before the lethal wound had been inflicted by one or more other persons (Motaung 1990 (4) SA 485 (A)). Active association with the common purpose should not be confused with ratification or approval of another’s criminal deed that has already been completed. Criminal liability cannot be based on such ratification (Williams 1970 (2) SA 654 (A) 658–659)

### **Liability on the basis of active association declared constitutional**

In Thebus 2003 (2) SACR 319 (CC), liability for murder on the basis of active association with the execution of a common purpose to kill was challenged on the grounds that it unjustifiably limits the constitutional right to dignity (s 10 of the Constitution), the right to freedom and security of a person (s 12(1)(a)) and the right of an accused person to a fair trial (s 35(3)). The Constitutional Court rejected these arguments and declared constitutional the common-law principle that requires mere “active association” instead of causation as a basis of liability in collaborative criminal enterprises.

One of the Court’s main arguments was the following: The doctrine of common purpose serves vital purposes in our criminal justice system. The principal object of the doctrine is to criminalise collective criminal conduct and thus to satisfy the need to control crime committed in the course of joint enterprises. In consequence crimes such as murder it is often difficult to prove that the act of each person, or of a particular person in the group, contributed causally to the criminal result.

Insisting on a causal relationship would make prosecution of collective criminal enterprises

ineffectual. Effective prosecution of crime is a legitimate, pressing social need. Thus, there was no objection to the norm of liability introduced by the requirement of “active association”, even though it bypassed the requirement of causation.

### **Common purpose and dolus eventualis**

For X to have a common purpose with others to commit murder, it is not necessary that his intention to kill be present in the form of dolus directus. It is sufficient if his intention takes the form of dolus eventualis; in other words, if he foresees the possibility that the acts of the participants with whom he associates may result in Y’s death, and reconciles himself to this possibility. Assume that X is charged with murder. The evidence brings to light that a number of persons, among them X, took part in a robbery or housebreaking, and that Z, one of the members in the group, killed Y in the course of the action. The question that arises is whether X and Z had a common purpose to kill Y. The mere fact that they all had the intention to steal, to rob or to break in is not necessarily sufficient to warrant the inference that all of them also had the common purpose to kill. A person can steal, rob or break in without killing anybody. Whether X also had the intention to murder must be decided on the facts of each individual case

In *Molimi 2006 (2) SACR 8 (SCA)*, the Supreme Court of Appeal held that conduct by a member of a group of persons that differs from the conduct envisaged in their initial mandate (common purpose) may not be imputed to the other members, unless each of the latter knew (dolus directus) that such conduct would be committed, or foresaw the possibility that it might be committed and reconciled themselves to that possibility (dolus eventualis). X1, X2 and Z were co-conspirators to a planned robbery of a big retail store (Clicks) in a shopping mall. X1, the store manager, informed X2 about the exact time at which a security officer (in the employ of Fidelity Guards) would arrive at the store to collect money. X1 encouraged X2 to employ the services of four armed men, who would confront the security guard and rob him of the money he had collected from the store. On the day in question, Z and three armed men dispossessed the security officer of the money and fled with the loot. As they fled, there was an exchange of gunfire between one of the robbers and the store’s security guard. They were both fatally wounded in the exchange

The gunfire attracted the attention of a bystander in the shopping mall. As the three other robbers ran in his direction towards the exit of the mall, they pointed their firearms at him, but did not shoot. He then drew his firearm and shouted at them to drop theirs. He pursued one of the armed men (Z), who had the loot in a bag. Z dropped the bag he was carrying and ran into another store for refuge. Once inside the store, Z turned around and pointed the gun at the bystander, who reacted

by shooting at him (Z). The bullet missed Z, but wounded an employee in the store. Z retreated further into the store and took a young man hostage. While holding the hostage, with a firearm pointed at the hostage's head, he ordered the bystander to surrender his firearm. The bystander responded by firing at him, but fatally wounded the hostage. Z eventually surrendered. X1, X2 and Z were all convicted in the High Court on seven counts, namely robbery; the murder of the security guard of the store in which the robbery took place (Clicks); the attempted murder of the employee who was wounded in the other store; the kidnapping of the hostage; the murder of the hostage held by Z in the other store; and two counts of the unlawful possession of firearms. X1 and X2 appealed to the Supreme Court of Appeal against their convictions. They conceded the existence and proof of a common purpose (between X1, X2 and Z) to rob the store, but argued that the actions of the bystander, which resulted in the kidnapping and death of the hostage and injury to an employee in the other store, were not foreseeable by them (X1 and X2) as part of the execution of the common purpose. The court held that the attempted murder of the employee in the other store was foreseeable, for, once all the participants in a common purpose foresaw the possibility that anybody in the immediate vicinity of the crossfire could be killed – regardless of who actually shot the fatal bullet – then *dolus eventualis* was present. It held, however, that the kidnapping of the hostage by Z and the hostage's eventual murder were acts that were so unusual and so far removed from what was foreseeable in the execution of the common purpose that these acts could not be imputed to X1 and X2. They were therefore acquitted on these charges (murder and kidnapping in respect of the hostage)

### **Joining-in**

Assume that X, acting either alone or together with others in the execution of a common purpose, has already wounded Y lethally. Thereafter, while Y is still alive, Z (who has not previously – expressly or tacitly – agreed with X to kill Y) inflicts a wound on Y, which does not, however, hasten Y's death. Thereafter, Y dies as a result of the wound inflicted by X. The person in Z's position is referred to as a joiner-in because he associated himself with others' common purpose at a stage when Y's lethal wound had already been inflicted, although Y was then (i.e. when Z joined the assault) still alive.

In order to portray the joining-in situation properly, it is important to bear the following in mind: Firstly, if the injuries inflicted by Z, in fact, hastened Y's death, there can be no doubt that there is a causal connection between Z's acts and Y's death, and that Z is, therefore, guilty of murder. (Therefore, Z is then not a joiner-in.)



Secondly, if Z's assault on Y takes place after Y has already died from the injuries inflicted by X or his associates, it is similarly beyond doubt that Z cannot be convicted of murder, since the crime cannot be committed in respect of a corpse. (Therefore, Z is then not a joiner-in.) Thirdly, if the evidence reveals a previous conspiracy between X (or X and his associates) and Z to kill Y, Z is guilty of murder by virtue of the doctrine of common purpose, since X's act in fatally wounding Y is then imputed to Z. (Therefore, Z is then not a joiner-in.) The joining-in situation presupposes the absence of a common purpose between X and Z.

### **Summary :**

The joiner-in is a person whose attack on Y did not hasten Y's death whose blow was administered at a time when Y was still alive who did not act with a common purpose together with the other persons who also inflicted wounds on Y. Note that the joiner-in is not a description of a category of participants other than perpetrators and accomplices. It is merely a convenient term to use when referring to person Z, as described in the set of facts mentioned above. Nobody denies that the conduct of the joiner-in is punishable.

The question is merely the following: Of what crime must he be convicted? Before 1990, there was great uncertainty in our law regarding the answer to this question. According to certain decisions and writers, the joiner-in had to be convicted of murder, but according to other decisions and writers, he could, at most, be convicted of attempted murder. In 1990, in *Motaung* 1990 (4) SA 485 (A), the Appellate Division considered the different views on the matter and, in a unanimous judgment delivered by Hoexter JA, ruled that the joiner-in could not be convicted of murder, but only of attempted murder. The judgment in *Motaung* is now the authoritative judgment on the liability of a joiner-in. One of the reasons advanced by the court for its ruling was the following argument: To hold an accused liable for murder on the basis of an association with the crime only after all the acts contributing to the victim's death have already been committed would involve holding him responsible ex post facto for such acts. The criminal law is firmly opposed to liability based on ex post facto, or retrospective, responsibility and does not recognise it in any other situation. It would therefore be contrary to accepted principle to recognise it here.

### **The most important principles relating to common purpose**

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

2. In the case of a charge of having committed a crime that involves the causing of a certain result (such as murder), the conduct imputed includes the causing of such result.
3. Conduct by a member of the group of persons having a common purpose that differs from the conduct envisaged in the said common purpose may not be imputed to another member of the group, unless the latter knew that such other conduct would be committed, or foresaw the possibility that it might be committed and reconciled himself to that possibility.
4. A finding that a person acted together with one or more other persons in a common purpose may be based upon proof of a prior agreement or proof of active association in the execution of the common purpose.
5. On a charge of murder, the rule that liability may be based on active association applies only if the active association took place while the deceased was still alive and before a mortal wound, or mortal wounds, had been inflicted by the person or persons who commenced the assault.
6. Just as active association with the common purpose may lead to liability, so dissociation or withdrawal from the common purpose may, in certain circumstances, lead to negative liability

**15+16**

**Accomplices:**

Technical and popular meaning of the word “accomplice” Confusion can easily arise about the meaning of the word “accomplice”. The reason for this is that the word can have two meanings, namely a technical (or narrow) meaning and a popular (or broad) meaning. The popular meaning is the meaning the word has in the everyday language of laypersons; according to this meaning, the word refers to anybody who helps the “actual” or “principal” perpetrator to commit the crime, or who furthers the commission in some way or another, without distinguishing between persons who qualify as perpetrators, as defined above (i.e. who comply with the definition of the crime or who qualify in terms of the doctrine of common purpose), and those who do not qualify as perpetrators. The popular meaning of this word is, accordingly, so wide that it may also refer to persons who are, technically speaking, perpetrators. The technical meaning of the word refers only to its narrower meaning as stated in the definition of “accomplice” above. According to this narrower meaning, an accomplice can never include a perpetrator, that is, somebody who complies with all the requirements for liability set out in the definition of the crime. In the discussion that follows, as well

as every time the word “accomplice” is used in legal terminology, it bears the technical (narrow) meaning as explained above.

Requirements for liability as an accomplice In order to be liable as an accomplice, the following four requirements must be complied with.

1. **Act** There must be an act (in the criminal-law sense of the word) by which the commission of a crime by another person is furthered or promoted. Furtherance can take place by way of aiding, counselling, encouraging or ordering (Jackelson 1920 AD 486). Merely being a spectator at the commission of a crime naturally does not amount to furtherance thereof (Mbande 1933 AD 382, 392-393).

The following are examples of conduct for which a person has been held liable as a accomplice:

(a) In Peerkhan and Lalloo 1906 TS 798, the conduct forbidden in the definition of the crime was the purchasing of unwrought gold. Lalloo bought the gold and was thus a perpetrator. Peerkhan bought no gold, but acted as interpreter, adviser and surety in connection with the transaction.

Consequently, his conduct did not comply with the definition of the crime (the purchase of gold), but nonetheless constituted furtherance of the purchase; accordingly, he was an accomplice.

(b) In Kazi 1963 (4) SA 742 (W), the forbidden conduct was the holding or organising of a meeting without the necessary permission. Kazi did not hold or organise the meeting, but nonetheless addressed it. It was held that his conduct rendered him guilty as an accomplice.

2. **Unlawfulness:** The act of furthering, as described above, must be unlawful. In other words, there must not be any justification for it.
3. **Intention:** The crime, which is committed by another person, must be furthered intentionally (Quinta 1974 (1) SA 544 (T) 547). Negligence is not sufficient. The shop assistant who inadvertently fails to close the shop window is not an accomplice to the housebreaking that follows. He will be an accomplice only if, knowing of the intended housebreaking and in order to help the thief, he does not close the window properly. In such a case, the thief need not be aware of the shop clerk’s assistance. It is therefore sufficient if the accomplice intentionally furthers the crime. It is not necessary for the perpetrator to have been conscious of the accomplice’s assistance. Mutual, conscious cooperation is, therefore, not a requirement (Ohlenschlager 1992 (1) SACR 695 (T) 768g–h).

4. Accessory character of liability: A crime must have been committed by some other person. Liability as an accomplice is known as “accessory liability”. No person can be held liable as an accomplice unless some other person is guilty as a perpetrator (Williams supra 63; Maxaba supra 1155). This implies that a person cannot be an accomplice to his own crime, that is, to a crime that he committed as a perpetrator

### **Is it possible to be an accomplice to murder?**

Case Book: Williams . You must know what the objection is to convicting a person of being an accomplice (as opposed to a co-perpetrator) to murder. In the Williams case, which you must read, it was accepted that a person can be an accomplice to murder, but this aspect of the judgment has been criticised by Snyman (Criminal Law). You must ensure that you know what the criticism is. In the light of the above-mentioned discussion, we are of the opinion that it is not possible to be an accomplice to murder.

### **ACCESSORIES AFTER THE FACT**

#### **Definition**

A person is an accessory after the fact to the commission of a crime if, after the commission of the crime, he unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or accomplice to, the crime to evade liability for his crime, or to facilitate such a person’s evasion of liability.

Requirements for liability of accessory after the fact In order to be convicted of being an accessory after the fact, the following requirements must be complied with:

1. Act or omission The accessory after the fact must engage in some conduct (act or omission) whereby he assists either the perpetrator or the accomplice to evade liability. Mere approval or condonation of the crime is not enough. It is possible for a person to be an accessory after the fact on the ground of an omission. This will be the case if there is a legal duty upon such a person to act positively. An example in this respect is where a police officer sees that a crime has been committed, but intentionally remains passive because he wants to protect the criminal who has committed the crime from detection. The mere approval or ratification of a crime after its commission is insufficient to construe a person as being an accessory after the fact to its commission.

2. After the commission of the crime X's act or omission must take place after the commission of the actual crime. If X's act takes place at a time when the crime is still in the process of being committed, he may qualify as a co-perpetrator or accomplice. If X had agreed, prior to the commission of the crime, to render assistance, X may, depending upon the circumstances, be a perpetrator himself if his conduct, culpability and personal qualities accord with the definition of the crime.
3. Enabling perpetrator or accomplice to evade liability The act must be of a certain nature. It must be such that it assists the perpetrator or accomplice to evade liability for his crime, or to facilitate such a person's evasion of liability. The protection or assistance given need not be successful. A person would therefore be guilty as an accessory after the fact even though the corpse that he helped to conceal by submerging it in a river is discovered by the police and recovered from the river, and the murderer is brought to justice.
4. Unlawfulness The act must be unlawful, which means that there must be no justification for it.
5. Intention The accessory after the fact must render assistance intentionally. He must know that the person he is helping has committed the crime. He must have the intention of assisting the perpetrator (or accomplice) to evade liability or to facilitate the evasion of liability (Morgan 1992 (1) SACR 134 (A) 174).

### **Accessory character of liability**

The liability of the accessory after the fact, like that of an accomplice, is accessory in character. There can be an accessory after the fact only if somebody else has committed the crime as perpetrator. As a result, you cannot be an accessory after the fact to a crime committed by yourself. In Gani 1957 (2) SA 212 (A), the Appeal Court convicted three persons of the crime of being accessories after the fact to the murder, on the strength of the following argument: If all three committed the murder, they are all three accessories after the fact because all three of them disposed of the corpse; if the murder was not committed by all of them, those who did not commit the murder are accessories after the fact in respect of the murder committed by the other(s), and the latter are accomplices to the crime of being an accessory after the fact. In Jonathan 1987 (1) SA 633 (A), the Appellate Division was invited to hold that Gani's case was wrongly decided, but the court confirmed Gani's case, adding that the "rule in Gani's case" may be regarded as an exception to the general rule that you cannot be an accessory after the fact in respect of a crime committed by yourself

## **Definition of rules relating to attempt**

A person is guilty of attempting to commit a crime if, intending to commit that crime, she unlawfully engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime.

A person is guilty of attempting to commit a crime, even though the commission of the crime is impossible, if it would have been possible in the factual circumstances that she believes exist, or will exist at the relevant time

Four different types of attempt We can distinguish four different types of attempt. They correspond to four different reasons that X has not completed the crime, despite having embarked upon the commission thereof.

### **Types of attempt are the following:**

1. Completed attempt. In this type of situation, X does everything she can to commit the crime, but for some reason the crime is not completed, for example where X fires at Y, but misses , where X fires at Y and strikes Y, but Y's life is fortunately saved by prompt medical intervention This type of situation is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above.
2. Interrupted attempt. In this type of situation, X's actions have reached the stage when they are no longer merely preparatory, but are, in effect, acts of execution when they are interrupted, so that the crime cannot be completed.

For example: X, intending to commit arson, pours petrol onto a wooden floor, but is apprehended by a policeman just before she strikes a match.

X, a prisoner intending to escape from prison, breaks and bends the bars in the window of his cell, but is apprehended by a warder before he can succeed in pushing his body through the opening.

This type of situation is described in the first paragraph of the definition of the rules relating to attempt given above.

3. Attempt to commit the impossible. In this type of situation, it is impossible for X to commit or complete the crime, either

because the means she uses cannot bring about the desired result, such as where X, intending to murder Y, administers vinegar to her in the firm, but mistaken, belief that the vinegar will act as a poison and kill Y, or because it is impossible to commit the crime in respect of the particular object of her actions, such as where X, intending to murder Y while he is asleep in bed, shoots him through the head, but Y, in fact, died of a heart attack an hour before. This type of situation is described in the second paragraph of the definition of the rules relating to attempt given above.

4. Voluntary withdrawal. In this type of situation, X's actions have already reached the stage when they qualify as acts of execution, when X, of her own accord, abandons her criminal plan of action, for example where, after putting poison into Y's porridge, but before giving it to Y, X has second thoughts and decides to throw the porridge away. This type of situation is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above

### **Completed attempt**

As a general rule, it may be assumed that if X has done everything she set out to do in order to commit the crime, but the crime is not completed, she is guilty of attempt. The following are examples:

- where X fires at Y, but the bullet misses her
- where X fires at Y and strikes Y, but Y's life is fortunately saved by prompt medical intervention
- where X, intending to infringe Y's dignity (conduct that, in principle, amounts to the commission of the crime known as *crimen iniuria*), writes a letter to Y that contains abusive allegations about Y and posts it, but the letter is intercepted by the authorities before it can reach Y This type of attempt is impliedly contained in the first paragraph of the definition of the rules relating to attempt given above. In that paragraph, conduct that has reached the "commencement of the execution" stage is required. If, as is the case in this type of attempt, X has done everything she set out to do in order to commit the crime, there can be no doubt that her acts are acts of execution, as opposed to preparation.

### **Interrupted attempt**

The majority of reported cases on attempt deal with this form of attempt. Whereas there is, as a rule, no difficulty in holding X liable for attempt in situations of so-called completed attempt

(described above), in cases of interrupted attempt it can often be difficult to decide whether X's conduct amounts to punishable attempt. Mere intention to commit a crime is not punishable. Nobody can be punished for her thoughts. A person can be liable only once she has committed an act, in other words, once her resolve to commit a crime has manifested itself in some outward conduct. However, it is not just any outward conduct that qualifies as a punishable attempt. If X intends to commit murder, she is not guilty of attempted murder the moment she buys the revolver; and if she intends to commit arson, she is not guilty of attempted arson the moment she buys a box of matches. On the other hand, it stands to reason that there does not have to be a completed crime before a person may be guilty of attempt. Somewhere between the first outward manifestation of her intention and the completed crime there is a boundary that X must cross before she is guilty of attempt. How to formulate this boundary in terms of a general rule is one of the most daunting problems in criminal law. In cases of this nature, we must, in fact, **differentiate between three different stages**:

1. stage, X's conduct amounts to no more than mere acts of preparation. For example, intending to kill her enemy, Y, X merely buys a knife at a shop. If this act of preparation is the only act that can be proved against her, she cannot be convicted of any crime.
2. stage, her acts have proceeded so far that they no longer amount to mere acts of preparation, but, in fact, qualify as acts of execution or consummation. For example, after searching for Y, she finds her and charges at her with the knife in her hand, although a policeman prevents her from stabbing Y. In this case, X is guilty of attempted murder.
3. stage, X has completed her act and all the requirements for liability have been complied with. For example, she has stabbed and killed Y. In this case, she is guilty of murder (the completed crime).

The distinction between the first and second stages is crucial in determining whether X is guilty of attempt. Again, the distinction between the second and third stages is crucial in determining whether X has merely committed an attempt or whether she has committed the completed crime.

The rule applied in cases of interrupted attempt Liability for attempt in this type of situation is determined by the courts with the aid of an objective criterion, namely by distinguishing between

- acts of preparation and
- acts of execution (or consummation).



If what X did amounted merely to preparation for a crime, there is no attempt. If, however, her acts were more than acts of preparation and were, in fact, acts of consummation, she is guilty of attempt. Although this test (namely to distinguish between acts of preparation and acts of consummation) may seem simple in theory, in practice it is often very difficult to apply. The reason for this is the vagueness of the concepts “preparation” and “consummation”. In applying this test, a court has to distinguish between “the end of the beginning and the beginning of the end”. Each factual situation is different and the test as applied to one set of facts may be no criterion in a different factual situation. In *Katz* 1959(3) SA 408 (C) 422, it was stated that “a value judgment of a practical nature is to be brought to bear upon each set of facts as it arises for consideration”.

### **Examples of the application of rule**

The most important cases in which the courts have enunciated this test (namely to differentiate between acts of preparation and acts of consummation) are *Sharpe* 1903 TS 868 and *Schoombie* 1945 AD 541. In the latter case, X had gone to a shop in the early hours of the morning and had poured petrol around and underneath the door, so that the petrol flowed into the shop. He placed a tin of inflammable material against the door, but his whole scheme was thwarted when, at that moment, a policeman appeared. The Appellate Division confirmed his conviction of attempted arson and, in the judgment, authoritatively confirmed that the test to be applied in these cases was to distinguish between acts of preparation and acts of consummation.

### **CONSPIRACY**

1. In South Africa, conspiracy to commit a crime is not a common-law crime, but a statutory crime. Section 18(2)(a) of the Riotous Assemblies Act 17 of 1956 criminalises conspiracies to commit crimes. The relevant parts of this section read as follows: Any person who ... conspires with any other person to aid or procure the commission of or to commit ... any offence ... shall be guilty of an offence.
2. This provision does not differentiate between a successful conspiracy (i.e. one followed by the actual commission of the crime) and one not followed by any further steps towards the commission of the crime. Theoretically, it is possible to charge and convict people of a contravention of this provision, even though the crime envisaged was indeed subsequently committed. Our courts have, however, quite correctly indicated that this provision should be utilised only if there is no proof that the envisaged crime was, in fact, committed (*Milne and Erleigh* (7) 1951 (1) SA 791 (A) 823; *Khoza* 1973 (4) SA (O) 25; *Mshumpa* 2008(1) SACR 126 (EC)).

3. Nobody is ever charged with or convicted of simply “conspiracy” and no more. The charge and conviction must be one of conspiracy to commit a certain crime (such as murder or assault)
4. The act in the crime of conspiracy consists in the entering into an agreement to commit a crime or crimes (Moumbaris 1974 (1) SA 681 (T) 687)
5. While the parties are still negotiating with one another, there is not yet a conspiracy.
6. The crime is completed the moment the parties have come to an agreement, and it is not necessary for the state to prove the commission of any further acts in execution of this conspiracy (Alexander 1965 (2) SA 818 (C) 822).
7. The conspiracy need not be express; it may also be tacit (B 1956 (3) SA 363 (EC) 365).
8. The parties need not agree about the exact manner in which the crime is to be committed (Adams 1959 (1) SA 646 (Sp C)).
9. The mere fact that X and Y both have the same intention does not mean that there is a conspiracy between them. There must be a definite agreement between at least two persons to commit a crime (Alexander 1965 (2) SA 818 (K) 821; Cooper 1976 (2) SA 875 (T) 879). This idea is often expressed by the statement that “there must be a meeting of the minds”. Thus, if X breaks into a house and Y, completely unaware of X’s existence and, therefore, also his plans, breaks into the same house on the same occasion, neither of them is guilty of conspiracy, even though they both have the same intention.
10. The conspirators need not be in direct communication with one another. If two or more persons unite in an organisation with the declared purpose of committing a crime or crimes, there is a conspiracy. Any person who joins such an organisation while aware of its unlawful aims, or remains a member after becoming aware of these aims, signifies – by her conduct – her agreement with the organisation’s aims, thereby committing conspiracy (Alexander supra 822; Moumbaris supra 687).
11. The intention requirement can be subdivided into two components, namely (a) the intention to conspire (b) the intention to commit a crime or to further its commission
12. It goes without saying that there can be a conspiracy only if more than one party is involved. You cannot conspire with yourself to commit a crime.
13. As far as the punishment for conspiracy is concerned, the section that criminalises conspiracy (i.e. s 18(2)(a) of Act 17 of 1956) provides that somebody convicted of conspiracy may be punished with the same punishment as the punishment prescribed for the commission of the actual crime envisaged. However, this provision must be interpreted as only laying down the maximum punishment that may be imposed for the conspiracy. In

practice, a person convicted of conspiracy to commit a crime normally receives a punishment that is less severe than the punishment that would have been imposed had the actual crime been committed. The reason for this is that conspiracy is only a preparatory step towards the actual commission of the (main) crime. In the case of conspiracy, the harm that would have been occasioned by the commission of the actual completed crime has not materialised. (For the same reason, the punishment for an attempt to commit a crime is, as a rule, less severe than that for the completed crime.)

## **INCITEMENT**

1. In South Africa, incitement to commit a crime is not a common-law crime, but a statutory crime. Section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 criminalises incitement to commit crimes. The relevant parts of this section read as follows: Any person who ... incites, instigates, commands or procures any other person to commit any offence ... shall be guilty of an offence.
2. As in the case of conspiracy, X ought to be charged with, and convicted of, incitement only if there is no proof that the crime to which she incited Y has indeed been committed. If the main crime has indeed been committed, X is a co-perpetrator or accomplice in respect of such crime (Khoza 1973 (4) SA 23 (O) 25).
3. Nobody is ever charged with or convicted simply of "incitement" and no more. The charge and conviction must be one of incitement to commit a certain crime (such as murder or assault).
4. The purpose of the prohibition of incitement to commit a crime is to discourage people from seeking to influence others to commit crimes (Zeelie 1952 (1) SA 400 (A) 405).
5. In some older decisions, the view was expressed that X can be guilty of incitement only if the incitement contains an element of persuasion; in other words, there must be an initial unwillingness on the part of Y, which is overcome by argument, persuasion or coercion (C 1958 (3) SA 145 (T) 147). However, in Nkosiyana 1966 (4) SA 655 (A), the Appellate Division held that no such element of persuasion is required. Read the latter decision in the Case Book: Nkosiyana 1966 (4) SA 655 (A).
6. In Nkosiyana supra, X had suggested to Y that they murder Mr Kaiser Matanzima of the Transkei. However, Y was, in fact, a policeman who suspected X of trying to murder Mr Matanzima and wanted to trap X. X was unaware of the fact that Y was a policeman. X was charged with incitement to commit murder. The Appellate Division held that the fact that Y was a policeman, who at no time was susceptible to persuasion, did not stand in the way of

a conviction of incitement. Incitement can, therefore, be committed even in respect of a police trap in which the police officer involved has no intention of ever committing the actual crime, but who simply wants to trap the inciter.

7. In *Nkosiyana supra*, an inciter was described as somebody “who reaches out and seeks to influence the mind of another to the commission of a crime”. Whether the other person (Y) is capable of being persuaded is immaterial. Neither do the means X uses to influence, or try to influence, Y carry any weight. The emphasis is therefore on X’s conduct, and not that of Y.
8. The incitement may take place either explicitly or implicitly.
9. If the incitement does not come to Y’s knowledge, X cannot be convicted of incitement, but may be guilty of attempted incitement, as in the case where X writes an inflammatory letter to Y, but the letter is intercepted before it reaches Y.
10. As far as the punishment for incitement is concerned, the section that criminalises incitement (i.e. s 18(2)(b) of Act 17 of 1956) provides that somebody convicted of incitement is punishable with the same punishment as the punishment prescribed for the commission of the actual crime envisaged. However, this provision must be interpreted as only laying down the maximum punishment that may be imposed for the incitement. In practice, somebody convicted of incitement to commit a crime normally receives a punishment that is less severe than the punishment that would be imposed had the actual crime been committed. The reason for this is that incitement is only a preparatory step towards the actual commission of the (main) crime. In the case of incitement, the harm that would be occasioned by the commission of the actual completed crime has not yet materialised