

South African criminal law is the body of national law relating to crime in South Africa. Broadly speaking, it defines as criminal such human conduct as threatens, harms or endangers the safety and welfare of people. It also sets out the punishment to be imposed on persons who engage in such conduct, provided they have criminal capacity and act unlawfully and with a guilty mind.^[1] In the definition of Van der Walt *et al*, a crime is "conduct which common or statute law prohibits and expressly or impliedly subjects to punishment remissible by the state alone and which the offender cannot avoid by his own act once he has been convicted."^[2] Crime involves the infliction of harm against society. The function or object of criminal law is to provide a social mechanism with which to coerce members of society to abstain from conduct that is harmful to the interests of society.

Criminal law (which is to be distinguished from its civil counterpart) forms part of the public law of South Africa,^[3] as well as of the substantive law (as opposed to the procedural).^[4] In South Africa, as in most adversarial legal systems, the standard of evidence required to validate a criminal conviction is proof beyond a reasonable doubt. The sources of South African criminal law are to be found in the common law, in case law and in legislation.

Punishment

The criminal justice system in South Africa is aimed at law enforcement, the prosecution of offenders and punishment of the convicted. Punishment is the authoritative infliction by the state of suffering for a criminal offence. There are numerous theories of punishment, whose two main purposes are

1. to justify the punishment imposed; and
2. to define the type and scope of different punishments.

The three main current theories in South Africa are

1. retributive or absolute, which justify punishment on the grounds that it is deserved;
2. utilitarian or relative, which justify punishment on the grounds that it is socially beneficial; and
3. combination or unitary, which fuse in various measures the other two.

Retributive theories

Retributive or absolute theories aim to restore the legal balance, upset by the crime. They generally take proportionality into account and consider the perpetrator's record of previous wrongdoing. They do not seek to justify punishment with reference to some future benefit which it may achieve, so it is incorrect to describe retribution as a "purpose of punishment;" it is rather, according to this theory, the essential characteristic of punishment.^[5]

Utilitarian theories

There are three types of utilitarian or relative theory of punishment, the first two of which are deterrence and prevention. These are connected, in that the former's goal is to prevent recidivism or repeat offending. The third is reformation.

Preventive

According to the preventive theory of punishment, the purpose of punishment is the prevention of crime. This theory can overlap with its deterrent and reformative counterparts, since both deterrence and reformation may be seen merely as methods of preventing crime. On the other hand, there are other forms of punishment (such as capital punishment and life imprisonment, and the castration of sexual offenders) which are in line with the preventive purpose, but which do not necessarily serve also the aims of reformation and deterrence.^[6]

Deterrent

There is an important distinction to be made between

- individual deterrence, which is aimed at the deterrence of a certain individual from the commission of further crimes; and
- general deterrence, which seeks to deter the entire community from committing crimes.

Individual deterrence may be said to be aimed primarily at the prevention of recidivism, or repeat offending, although the rate in South Africa is around ninety per cent,^[17] which would seem to suggest that it is not meeting with success.

Reformative

The third of the utilitarian or relative theories of punishment is the reformative theory, which is encapsulated by the judgment in *S v Shilubane*,^[18] where the court found "abundant empirical evidence" (although it cited none) that retributive justice had "failed to stem the ever-increasing wave of crime" in South Africa.^[19] The courts must therefore "seriously consider" alternative sentences, like community service, as viable alternatives to direct imprisonment.^[10] A reformatory approach would "benefit our society immensely by excluding the possibility of warped sentences being imposed routinely on people who do not deserve them."^[11]

Combination theories

The most-cited and -generally accepted of the combination theories is that laid out in *S v Zinn*,^[12] which provided a basic triad of sentencing considerations:

1. the crime;
2. the offender; and
3. the interests of society.^[13]

In *S v Makwanyane*,^[14] which eliminated capital punishment in South Africa, Chaskalson P provided a clearer combination of the other theories of punishment, laying emphasis on deterrence, prevention and retribution.^[15] *S v Rabie*,^[16] meanwhile, held that "punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."^[17]

The court in *S v Salzwedel*^[18] held that among the aggravating factors to be considered in sentencing was racial motivation in the commission of a serious offence, because racism subverted the fundamental premises of the ethos of human rights which now, after the negotiated settlement, permeated South Africa's processes of judicial interpretation and discretion. The court decided that a substantial term of imprisonment, for a murder committed out of racism, would give expression to the community's legitimate feelings of outrage. It would also send out a strong message that the courts would not tolerate and would deal severely with serious crimes perpetrated in consequence of racist and intolerant values inconsistent with the ethos of the Constitution.

In *S v Combrink*^[19] the court held that, given the public ire with sentences which appear to favour a particular group in society, the court must exercise judicial sensitivity in cases which appear to have racial or discriminatory connotations. The public interest against discrimination is not necessarily in discrimination between black and white, but rather between people in general who perceive others, with prejudice, to be different or inferior to them. In order properly to combat hate crimes, decision makers in the criminal justice system should be attuned to the fact that the effects go far beyond the victims, serving to traumatise whole communities and damaging South African society.

Principle of legality

According to the principle of legality, "punishment may only be inflicted for contraventions of a designated crime created by a law that was in force before the contravention."^[20] This is summed up in the dictum *nullum crimen sine lege*, "no crime without a law." This principle, "basic to criminal liability in our law," as the court

put it in *S v Smit*,^{[21][22]} is supplemented by that of *nullum crimen sine poena*, "no crime without punishment."^{[23][24]} In *R v Zinn*,^[25] although the court did not make the assumption that, if an enactment is to create a crime, it should provide either expressly or by reference for a punishment, it was thought "improbable that if the lawgiver had intended that the Besluit should create a crime, he would not have taken the precaution of inserting a penalty—more particularly as this is what appears generally to have been done."^[26] The court in *R v Carto* held that "to render any act criminal in our law, there must be some punishment affixed to the commission of the act," and that "where no law exists affixing such punishment there is no crime in law."^[27]

Another important principle is *nulla poena sine lege*, "no punishment without a law." To apply the principle of legality, it is important that the definitions both of common-law and of statutory crimes be reasonably precise and settled. Penal statutes should be strictly construed, and the law should be accessible.^[28] Finally, there is the dictum *nullum crimen, nulla poena sine praevia lege poenali*, "laws and punishments do not operate retrospectively."

Legality and the Constitution

The South African Constitution is committed to the principle of legality, with, for example, its provision that "every accused person has a right to a fair trial, which includes the right

1. "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; [and]
2. "to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."^[29]

In terms of the *ius certum* principle, the crime must not, as formulated, be vague or unclear, so that the subject may understand exactly what is expected of him. Although the Constitution does not expressly provide that vague or unclear penal provisions may be struck down, it is "quite possible and even probable," according to Snyman,^[30] that the first provision above will be interpreted in such a way that vaguely defined statutory crimes may be declared null and void. This "void-for-vagueness" rule may be based either on the right to a fair trial in general or on the principle that, if a criminal norm in legislation is vague and uncertain, it cannot be stated that the act or omission in question actually constituted an offence prior to a court's interpretation of the legislation.

It is also possible to base the operation of the *ius certum* provision on section 35(3)(a) of the Constitution, which provides that the right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it. In *S v Lavhengwa*^[31] it was held that the right created in section 35(3)(a) implies that the charge itself must be clear and unambiguous. This, according to the court, would only be the case if the nature of the crime is sufficiently clear and unambiguous to comply with the constitutional right to be sufficiently informed of the charge. It was further held that, to comply with the requirement of sufficient clarity, one should bear in mind

1. that absolute clarity is not required, and reasonable clarity is sufficient;^{[32][33]} and
2. that a court, in deciding whether a provision is clear or vague, should approach the legislation on the basis that it is dealing with reasonable people, not foolish or capricious ones.^{[34][35]}

It is not only statutory criminal provisions that may, on the ground of vagueness, be declared null and void in terms of the Constitution, but also provisions of common law that are vague and uncertain. In *S v Friedman*^[36] it was argued on behalf of the accused that the rule in regard to the crime of fraud (that the prejudice need be neither actual nor of a patrimonial nature) was unconstitutional on the ground of vagueness. Although the court rejected the argument, it is noteworthy that nowhere in its judgment did it call into question the principle that rules of common law may be declared null and void on the ground of vagueness.

Criminal liability

Probably the most important principle of criminal liability is captured in the dictum *actus non-facit reum nisi mens sit rea*, or "an act is not unlawful unless there is a guilty mind." To establish criminal liability, the State must prove, beyond a reasonable doubt, that the accused has committed

- voluntary conduct which is unlawful (*actus reus*); accompanied by
- criminal capacity; and
- fault (*mens rea*).

Conduct

Burchell lists the elements of unlawful conduct as

- conduct;
- causation; and
- unlawfulness.

For Snyman, it is the following:

1. conduct;
2. compliance with the definitional elements;
3. unlawfulness; and then
4. capacity and fault, which go together to establish culpability.

The conduct must

- be carried out by a human being;
- be voluntary; and
- take the form either of a commission or an omission.

Human act

The act must be a human act; it must be committed or carried out by a human being. This is self-explanatory.

Voluntariness

Automatism

The element of voluntariness is important in the first place because of the defence of automatism. As described in *A-G for Northern Ireland v Bratty*,^[37] automatism is any act which is performed by the muscles without any control of the mind, such as spasm, reflex or convulsion, or an act by a person who is unconscious because he is a sleep. Formerly the courts would draw a distinction between "sane" and "insane" automatism, although there has in recent years been a move away from this, because of the confusion it causes, given that the defence of "insane automatism" is actually nothing more or less than the defence of mental illness.

One example of automatism may be found in cases of epilepsy. In *R v Victor*,^[38] the appellant knew that he was prone to epileptic fits, but nevertheless drove a motor car. He suffered a fit while driving and collided with a pedestrian and another car. The court convicted him of negligence—not because he was epileptic but because he had chosen to drive when a reasonable person would have foreseen the likelihood of a fit.

The driver in *R v Schoonwinkel*^[39] was charged with culpable homicide, having collided with and killed a passenger in another car. The accused had suffered an epileptic fit at the time of the accident, rendering his mind a blank. The nature of his epilepsy was such that he would normally not have realised or foreseen the dangers of driving, having had only two previous minor attacks, the last a long time before the accident. This evidence, distinguishing this case from that of *Victor*, exonerated him from criminal responsibility.

In *R v Mkiye*,^[40] the accused was charged with the murder of his sister, whom he had stabbed to death. The court found, on a balance of probabilities, that he had suffered an attack known as "epileptic equivalent." He was therefore unconscious, without judgment or will or purpose or reasoning; the stabbing was a result of blind reflex activity. There was no intention to kill. The verdict, therefore, was "not guilty."

Another example of automatism may be found in cases of intoxication. The Appellate Division reiterated in *S v Johnson*^[41] that only voluntary conduct is punishable. This includes voluntary drunkenness which does not result in a mental disease: It is no defence in respect of an offence committed during such drunkenness.

In *S v Chretien*^[42] the Appellate Division held that voluntary intoxication may constitute an absolute defence, leading to a total acquittal, where, *inter alia*, the accused drinks so much that he lacks criminal capacity. Seven years later, the legislature intervened to limit the destructive consequences of this decision, enacting section 1(1) of the Criminal Law Amendment Act,^[43] in "a vain attempt to reflect public sentiment on intoxication." In so doing, however, "the Legislature simply compounded the problems."^[44]

Modelled on the German penal code, this provision created the special statutory offence of committing a prohibited act while in a state of criminal incapacity induced by the voluntary consumption of alcohol. It requires the prosecution to prove, beyond a reasonable doubt, that the accused is not liable for a common-law offence because of the lack of capacity resulting from this self-induced intoxication, "so requiring the prosecution to engage in an unfamiliar *volte face*." As Burchell explains,

If the intoxication, leading to an acquittal of the common-law offence, is only sufficient to impair intention (as on the facts of *Chretien*), rather than sufficient to impair capacity, then no liability can result under s 1(1), as lack of *capacity* resulting from intoxication has to be proved for a conviction under s 1(1). The section is in dire need of reform or replacement with a more appropriately worded section.^[45]

Force

Another defence is force, which may take the form either of *vis absoluta* (or absolute force) or *vis compulsiva* (or relative force). In *S v Goliath*,^[46] the Appellate Division found that, on a charge of murder, compulsion can constitute a complete defence. When an acquittal may occur on this basis will depend on the particular circumstances of each case. The whole factual complex must be carefully examined and adjudicated upon with the greatest care.

Commission or omission

Omission

An omission is punishable only if there is a legal duty upon someone to perform a certain type of active conduct. *Minister of Police v Ewels*,^[47] although a delictual case, expresses a general rule: An omission is to be regarded as unlawful conduct when the circumstances of the case are of such a nature not only that the omission incites moral indignation, but also that the legal convictions of the community demand that it be regarded as unlawful and that the damage suffered be made good by the person who neglected to perform a positive act.^[48] To make a determination as to whether or not there is unlawfulness, therefore, the question is not whether there was the usual "negligence" of the *bonus paterfamilias*; the question is whether, regard being had to all the facts, there was a duty in law to act reasonably. It was held by the court, on the facts of this case, that a policeman on duty, if he witnesses an assault, has a duty to come to the assistance of the person being assaulted.

A legal duty to act may exist

- where a statute or the common law places such a duty on a person (for example, to fill in a tax return);
- where prior conduct creates a potentially dangerous situation (so that, for example, where one has lit a fire in a bush, one ought to extinguish it); and
- where one has control of a potentially dangerous thing or animal.

In *S v Fernandez*,^[49] the court held that the appellant had been negligent in mending a cage from which a baboon had subsequently escaped, which subsequently bit a child, who subsequently died. The appellant must have foreseen the likelihood of an attack in the event of the baboon's escaping; he was, the court held, therefore rightly convicted of culpable homicide.

A legal duty to act may exist also

- where a special or protective relationship exists between the parties (as in the case of a lifesaver and a swimmer, or of a parent and a child); and
- where a person occupies a certain office which imposes on him a duty to act (like the office of policeman).

In *Minister of Police v Ewels*, a citizen was assaulted in a police station by an off-duty officer in the presence of other officers. They had a duty to prevent the assault; their failure to do so made the Minister of Police liable for damages.

In *Minister of Police v Skosana*,^[50] *there was a negligent delay in furnishing medical aid to the deceased, whose widow established, on a balance of probabilities, that he would not otherwise have died. She was granted damages.*

The police in *Minister of Law & Order v Kadir*^[51] had failed to collect information which would have enabled the seriously injured respondent to pursue a civil claim against the driver of the other vehicle. The Minister raised an exception, contending that there was no legal duty on the police to collect such information. The court *a quo* dismissed this argument, finding that the community would consider otherwise. On appeal, however, it was held that society understood that police functions relate to criminal matters—they are not designed to assist civil litigants—and would balk at the idea of holding policemen personally liable for damages arising out of a relatively insignificant dereliction. The respondent had not proved a legal duty.

In *S v Russell*,^[52] the accused had been warned of the danger of operating a crane under a live electric wire, but had failed to pass on the warning to his co-employees. This omission, constituting negligence, led to the death of one of them. He was convicted of culpable homicide.

As for the State's duty to protect persons from violent crime, there are a number of suggestive delictual cases.

The Constitutional Court, in *Carmichele v Minister of Safety & Security*,^[53] found that the State could be held delictually liable for damages arising out of the unlawful omissions of its servants. *In casu*, the conduct of the police and a prosecutor had resulted in the release of a person, charged with rape, on his own recognisance. This person had subsequently assaulted the complainant.

Snyman, for one, has noted the court's emphasis on section 39(2) of the Constitution, which provides that "every court [...] must promote the spirit, purport and objects of the Bill of Rights." This, he argues, "may perhaps one day open the way for holding an individual police officer liable for a crime such as culpable homicide flowing from her negligent omission to protect a person from the real possibility of harm."^[54]

In *Minister of Safety & Security v Van Duivenboden*,^[55] the Supreme Court of Appeal held that, while private citizens may be entitled to remain passive when the constitutional rights of other citizens are threatened, the State has a positive constitutional duty, imposed by section 7 of the Constitution, to act in protection of the rights in the Bill of Rights. The existence of this duty necessarily implies accountability. Where the state, represented by persons who perform its functions, acts in conflict with section 7, the norm of accountability must of necessity assume an important role in determining whether or not a legal duty ought to be recognised in any particular case.^[56]

This norm need not always translate constitutional duties into private-law duties, enforceable by an action for damages; there are other remedies available for holding the State to account. Where, however, the State's failure to fulfil its constitutional duties occurs in circumstances that offer no effective remedy other than an

action for damages, the norm of accountability will ordinarily demand the recognition of a legal duty, unless there are other considerations affecting the public interest which outweigh that norm.^[57]

The police in *Minister of Safety & Security v Hamilton*^[58] were negligent in their consideration and approval of an application for a firearm licence, accepting the correctness of information supplied by the applicant. They had a legal duty to "exercise reasonable care in considering, investigating, recommending and ultimately granting" such applications. Their failure properly to exercise this duty had resulted in the issuing of a firearm licence to an unfit person, who subsequently shot the respondent. The state was held to be delictually liable for the resultant damages.

In *Van Eeden v Minister of Safety and Security*,^[59] the appellant was assaulted, raped and robbed by a known dangerous criminal who had escaped from police custody. The court held that the state was obliged to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of the person, *inter alia* by protecting everyone from violent crime. It was also obliged under international law to protect women specifically from violent crime. In light of these imperatives, the court could no longer support the requirement of a special relationship between the plaintiff and the defendant for the imposition of a legal duty: The police have a duty to protect the public in general from known dangerous criminals in their custody.

Causation

Crimes of consequence should be distinguished from crimes of circumstance:

- A crime of **circumstance** is one in which it is the situation which is criminal, like the mere possession of an offensive weapon, rather than any result, like murder, which flows from the situation.
- A crime of **consequence** is one in which the conduct itself is not criminal, but in which the result of that conduct is. It is not unlawful merely to throw a stone; if it is thrown at and hits a person, however, it is. The precise nature of crime is contingent on the result: If the stone causes serious injury, the crime will be grievous bodily harm; if it kills a person, the crime could be murder or culpable homicide.

Causation is not a general element of liability. (The general elements of liability, [1], are conduct, unlawfulness, capacity and fault.) Causation describes the way in which the definitional elements of some crimes are met. According to Snyman, indeed, it forms part of the definitional elements itself.

There are two forms of causation, factual and legal, which have to be proven.

Factual causation

The *conditio sine qua non*, or the "but-for" theory, describes a condition without which something—that is to say, the prohibited situation—would not have materialised. In the case of a positive act, the theory holds that, but for that act, the unlawful consequence would not have ensued.

The question to be asked is this: Can the act be notionally or hypothetically eliminated, without the disappearance of the consequence, from the sequence of events which led to that consequence?

- If not, the accused's conduct was a factual cause of the consequence.
- If so, the accused's conduct did not factually cause the consequence.

In the case of an omission, the *conditio sine qua non* theory provides that, but for the omission, the consequence would not have ensued. In other words, if we notionally or hypothetically insert a positive act into the sequence of events, the consequence does not ensue.

In *Minister of Police v Skosana* (noted earlier), where there was a negligent delay in furnishing medical treatment to the deceased, his widow established, on a balance of probabilities, that he would not have died

"but for" that delay. Having thus proved that the delay was a *conditio sine qua non* of her husband's demise, the widow was found to be entitled to damages.

In *S v Van As*,^[60] while the police were locking a suspect in a patrol van, the young children in his company disappeared. The following morning, after a search in vain the night before, two of them were found dead from exposure. The police were charged with and convicted of culpable homicide. On appeal, however, the court held that, although it would have been reasonable to continue the search and to make further enquiries, it had not been proved beyond reasonable doubt that the children would have been found by a proper search. It had also not been so proved that the failure to institute such a search was responsible for the children's deaths.

Legal causation

The steps to take or questions to ask, in seeking to establish causation, are as follows:

- Having regard to all the facts and circumstances, was X's conduct the factual cause of Y's death?
- If so, was X's conduct also the legal cause of Y's death?

To determine whether or not it would be reasonable and fair to regard X's act as the cause of Y's death, the court may invoke the aid of one or more specific theories of legal causation:

- the "proximate-cause" criterion, also known as direct-consequences or individualisation theory;
- the theory of adequate causation; and
- the *novus actus interveniens* criterion.

Proximate cause[edit]

In terms of the proximate-cause criterion, the act of the accused may only be seen to be the legal cause of a particular result if it is the direct or proximate cause thereof.

S v Daniels provides what Synman describes as "the clearest" rejection of the theory of proximate cause in South African law.^[61] Two judges of appeal expressly refused to accept that only an act which is a proximate cause of death may qualify as its cause.^{[62][63][64]}

In *S v Tembani*,^[65] however, it seemed to the Witwatersrand Local Division to be "of overriding importance that the original wound inflicted by the accused was an operating and substantial cause of the death of the deceased."

The idea of a proximate cause was expressed negatively in *R v Mubila*,^[66] with the statement that there must be no *novus actus interveniens* between X's conduct and Y's death,^[67] as well as positively, in the contention that Y's death must follow directly from X's conduct.^[68]

Snyman, endorsing *Daniels*, describes proximate cause as "too vague and arbitrary to serve as a satisfactory criterion" for legal causation.^[69]

Adequate cause[edit]

In terms of the theory of adequate causation, an act is the legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation. This theory, as noted above, was invoked in *Daniels*.^[70]

There are a number of knowledge-based considerations:

- All of those factual circumstances which are ascertainable by a sensible person should be taken into consideration. The thin skull of the deceased, if he had one, would be an example.

- The extra or particular knowledge of the accused is not omitted. If the accused has knowledge in addition to that which an ordinary sensible person would possess, that knowledge is to be taken into account as well.
- The totality of human knowledge, including that which only a specialist possesses, must also be considered.
- Knowledge may even be considered which comes to light only after the occurrence or event.

In *R v Loubser*,^[71] Rumpff J declared that, in the eyes of the law, an act is the cause of a situation if, according to human experience, the situation will flow from the act.

Novus actus interveniens[\[edit\]](#)

A *novus actus interveniens* (or *nova causa interveniens*) is a new intervening act, or a new intervening cause: that is to say, an abnormal interposition or event which breaks the chain of causation. A number of factors are important, according to Burchell,^[72] in determining what kind of intervening act or event breaks the causal chain.

If an act or event is unlikely, in light of human experience, to follow the accused's act, it is more probable that it will be found to be a *novus actus interveniens*.

If the act of the accused is of a kind which is unlikely to cause death, the intervening act or event is considerably more likely to be regarded as a *novus actus interveniens*.

The accused need not be the sole cause of the consequence.

Voluntary conduct—conduct which free and informed—is more likely to be regarded as a *novus actus interveniens* than involuntary conduct.

An abnormal event, which would otherwise count as a *novus actus interveniens*, will not be so counted if it was foreseen by the accused (or, in cases of negligence, if it ought reasonably to have been foreseen), or if it was planned by him.

The victim's pre-existing physical susceptibilities are, by logical definition, never an intervening cause.

In determining whether or not medical intervention ranks as a *novus actus interveniens*, it is important to determine whether or not the intervention was negligent or in some other way improper.

Whether the withdrawal of a life-support system by a medical practitioner may be regarded as a *novus actus* arose in *S v Williams*, where it was held that such medical conduct did not break the causal sequence set in motion by the accused, who had inflicted those initial wounds on the deceased which had necessitated her being put on the respirator in the first place. The court distinguished between "ending a fruitless attempt to save life" and a positive act causing death.

In *S v Counter*,^[73] the appellant had shot the deceased, lodging a bullet in her buttock. Unbeknownst either to her or to her doctors, the bullet had penetrated her anal canal, causing virulent septicaemia and leading to the pneumonia from which she died two weeks later. It fell to the SCA to decide whether it was the shot fired or rather medical negligence which had caused the death:

The sequence of events from the time of the deceased's admission until her death was not interrupted by any causal factor which affected or changed the natural order of events, more particularly there was no intervention or omission by the persons responsible for her care [...]. It is inconceivable in these circumstances that the appellant should not be held responsible for the consequences of his actions, which led directly to his wife's death by stages entirely predictable and in accordance with human experience.

Finally, it has been held in various decisions that, where X encourages Y to commit suicide—suicide, in itself, is not punishable in South African law—or where X provides Y with the means to commit suicide, the

subsequent voluntary conduct of Y in committing suicide does not necessarily break the causal chain of events set in motion by X. Y's conduct, in other words, does not amount to a *novus actus interveniens*. If Y's suicide was foreseen, X may be guilty of murder; if her suicide was unforeseen, but reasonably foreseeable, X will be guilty of culpable homicide.

In *R v Motomane*,^[74] of whose judgment Snyman disapproves, the accused, charged with murder, had knifed a woman, thereby injuring a vein. The bleeding stopped, but a clot formed. The woman would probably have recovered in the ordinary course, but this course was interrupted when a medical practitioner decided to operate: a prudent decision but not a necessary one. The clot was disturbed during the operation; the woman bled to death. The court held that the causal chain had been broken and that the Crown had failed to prove that the accused was responsible for the death.

The court in *S v Tembani*,^[75] endorsed the approach of English law: If, at the time of death, the original wound is still an operating and substantial cause of death, then the death is a result of the wound, even if another cause was also operating. Death is not the result of the original wound if it is just the setting in which another cause operates. Only if the second cause is so overwhelming as to make the original wound merely part of the history may it be said that death does not flow from the wound.

In *S v Tembani*,^[76] it was held that the deliberate infliction of an intrinsically dangerous wound, from which the victim was likely to die without medical intervention, must generally lead to liability for an ensuing death, whether or not the wound was readily treatable, and even if the medical treatment given later was substandard or negligent—unless the victim had so recovered that at the time of the negligent treatment the original injury no longer posed a danger to his life.

The Appellate Division ruled in *Ex parte die Minister van Justisie: In re S v Grotjohn*^[77] that neither suicide nor attempted suicide constitutes an offence. Whether a person who instigates or assists in the commission of suicide, or puts another in a position to commit suicide, thereby commits an offence will depend on the facts of the particular case. The mere fact that the last act of the person committing suicide is that person's own, and is voluntary and non-criminal, does not necessarily mean that the other person cannot be guilty of any offence. Depending on the factual circumstances, the offence may be murder, attempted murder or culpable homicide.

In *S v Daniels*,^[78] X shot Y twice in the back with a firearm, whereupon Y fell to the ground. Still alive, he would nonetheless certainly have died unless he received medical treatment within about half an hour. This was highly unlikely, since the incident had occurred on a lonely road in the countryside. X threw the firearm to the ground near Y. Shortly thereafter Z appeared, picked up the firearm and killed Y with a shot through the ear.

Of the five judges of appeal, two held that X and Z had acted with a common purpose, and that their joint purpose was therefore the cause of death. According, however, to the interpretation of the evidence by the other three judges, X and Z had acted independently. None of the judges doubted that Z's act was a cause of death. The question for the three judges to decide was whether, assuming independence, X's act also amounted to a cause of death.

Two of the three held that there was indeed causal link, and that policy considerations did not demand that Z's act qualify as a *novus actus interveniens*, breaking the chain of causation between X's act and Y's death. This judgment is preferred by Snyman,^[79] since the two shots X fired into Y's back would in any event have caused his death, even had not Z also fired a shot into Y. Human experience showed that X's shots would have the tendency, in the ordinary course of events, to result in death.^[80]

Flexible criterion[\[edit\]](#)

In *S v Mokgethi*,^[81] the Appellate Division held that it is wrong to identify only one of these theories as the correct one, to be applied in all cases, and in so doing to exclude from consideration the other theories of legal causation. One should apply a flexible criterion: The over-riding consideration in the determination of legal causation is the demands of what is fair and just. In endeavouring to ascertain what is a fair and just

conclusion, a court may take into consideration the different theories of legal causation referred to above and use them as guides in reaching a conclusion.

Unlawfulness[[edit](#)]

Snyman notes that, even once conduct and compliance with the definitional aspects of the crime have been established, there are still two more very important requirements for liability: first unlawfulness and then culpability.^[82]

A finding of unlawfulness is based on the standard of objective reasonableness, which is in turn based on *boni mores* or the legal convictions of the community.

The following defences or grounds of justification, among others, will exclude unlawfulness:

- private defence;
- impossibility;
- superior orders;
- disciplinary chastisement;
- public authority; and
- consent.

Private defence[[edit](#)]

A person acts in private defence if he uses force to repel an unlawful attack by another upon his person or his property, or another recognised legal interest. In these circumstances, any harm or damage inflicted upon the aggressor is not unlawful.

Attack[[edit](#)]

The following are the requirements relating to the attack. There must be

- an attack, which had either commenced or was imminent; and
- which was unlawful;
- upon a legally protected interest.

In *R v K*,^[83] the court held that the assault need not be committed culpably. It is also possible to act in private defence against someone who lacks criminal capacity, such as a mentally disordered person.

Most often one acts in private defence in protection of life or limb, but there is no reason in principle why one cannot act in private defence in protection of other interests, such as one's property, as well. The Appellate Division in *S v Jackson*^[84] held that a person is justified in killing in self-defence not only when he fears that his life is in danger but also when he fears grievous bodily harm. In *R v Patel*,^[85] the same court ruled that a person has the same right to use force in defence of another from a threatened danger as he would have to defend himself, if he were the person threatened.

Defence[[edit](#)]

The defence must be

- directed against the attacker;
- necessary to avert the attack; and
- a reasonable response to the attack.

In *R v Zikalala*,^[86] the court held,

The evidence is that the hall was packed and that movement therein was difficult. But the observation places a risk upon the appellant that he was not obliged to bear. He was not called upon to stake his life upon "a reasonable chance to get away". If he had done so he may well have figured as the deceased at the trial, instead of as the accused person. Moreover, one must not impute to a person who suddenly becomes the object of a murderous attack that mental calm and ability to reason out *ex post facto* ways of avoiding the assault without having recourse to violence.^[87]

Test[edit]

The test for private defence is an objective one. If X thinks that he is in danger, but in fact is not, or if he thinks that someone is unlawfully attacking him, but in fact the attack is lawful, his defensive measures do not constitute private defence.

Where an accused is charged with murder, the court held in *S v Ntuli*,^[88] but convicted of culpable homicide, in that he exceeded the bounds of reasonable self-defence, an assault will have been involved if it is found that the accused realised that he was applying more force than necessary.

As to the means of defence being commensurate with the danger threatened, the court in *Ntsomi v Minister of Law & Order*^[89] found that it had to apply an objective test *ex post facto*. Where a policeman is attacked during the performance of his duty, the criterion of a reasonable policeman, compelled to act in the same circumstances, should be applied. A policeman attempting to effect a lawful arrest is not obliged to flee from an unlawful assault: The victim of such an assault is entitled, if he has no reasonable alternative, to defend himself with whatever weapon he has at hand.

Putative private defence[edit]

If the accused believes, erroneously but honestly, that his person or property is in danger, his conduct in defence of it is not private defence. His mistake, however, may remove the element of intention.

The accused in *S v De Oliveira*,^[90] who lived in a secure and burglar-proofed house in a dangerous area, was awakened one afternoon by the presence of several men outside the house on his driveway. He picked up his pistol, opened window and fired six shots. Two of them hit the men, one killing and the other injuring. There was no indication that an attack on the house was imminent. The accused failed to testify, and his defence of putative private defence failed. He was convicted of murder and of two counts of attempted murder.

Private defence of property[edit]

The following are conditions relating to the attack. There must be evidence that

- the **property** was
- **presently**
- in **danger** of damage or destruction
- that was **unlawful**.

The defence of property must be

- directed against the attacker;
- necessary to avert the danger; and
- a reasonable response to the attack.

In *Ex parte Die Minister van Justisie: in re S v Van Wyk*,^[91] the Appellate Division held that the onus is on the State to rebut private defence of property, just as it carries the onus to rebut private defence of person.

In *S v Mogohlwane*,^[92] the court held that, in determining whether or not it is a requirement that the property should not be of trivial value, it could be taken into account that the accused *in casu* was not richly endowed with earthly possessions. The State had not proved that there was a less dangerous and more effective means

or method reasonably available to the accused to defend himself against the act of robbery, so it was decided that the accused had acted in private defence and therefore lawfully.

Necessity[[edit](#)]

A person acts out of necessity, and his act is therefore lawful, if he acts in protection of his own or of somebody else's life, bodily integrity, property or some other legally recognised interest, endangered by a threat of harm which has commenced or is imminent, and which cannot be averted in any other way— provided that the person is not legally compelled to endure the danger, and provided that the interest protected is not out of proportion to the interest necessarily infringed by the protective act. It is immaterial whether the threat of harm takes the form of compulsion or emanates from a non-human agency such as force of circumstance.

Private defence and necessity are closely related: Both allow a person to protect interests of value to him, such as life, bodily integrity and property, against threatening danger. There are also differences between them:

- Private defence always stems from and is always directed at an unlawful human attack; necessity, on the other hand, may stem either from an unlawful human attack or from chance circumstances, such as an act of nature.
- Whereas, in cases of private defence, the act of defence is always directed at an unlawful human attack, in cases of necessity it is directed at either the interests of another innocent party or a mere legal provision.

Necessity may arise either from compulsion or from inevitable evil.

An example of compulsion is where Y orders X to commit a punishable act, such as setting ablaze Z's motor car, and threatens to kill X if he fails to comply. X duly complies. The emergency here is the result of unlawful human conduct; the act (of arson) is directed at an innocent third person, namely Z.

In the case of inevitable evil, the emergency situation is the result of non-human intervention, such as an act of nature (a flood, for example) or some other chance circumstance like a shipwreck. If a fire breaks out in Y's house, and X to escape has to break through a window, he may reply to a charge of malicious damage to property with a defence of necessity. If X's baby gets hold of a bottle of pills and swallows all of them, and X in rushing her to hospital exceeds the speed limit, he may also rely on necessity.

The Appellate Division in *R v Mahomed*^[93] cites some of the old authorities on the subject.^[94]

In *S v Bailey*,^[95] the Appellate Division found that a person is guilty of a crime in respect of which intention is a requirement where it is proved that

- he unlawfully and deliberately committed or caused the alleged act or consequence as contained in the definition of the crime;
- he acted under duress, in *bona fide* fear for his life;
- the duress was not so strong that a reasonable person in the position of the accused would have yielded to it; and
- there were no other possible grounds present for the exclusion of culpability.

Requirements[[edit](#)]

The mere danger of losing one's job does not give one the right to act out of necessity, held the court in *S v Canestra*.^{[96][97]} If one cannot exercise one's profession without contravening the law, one ought to find another profession.

In *S v Mtewtwa*,^[98] the court held that, where an accused's defence is one of compulsion, the onus is on the State to show that a reasonable man would have resisted the compulsion. There is no onus on the accused to satisfy the court that he acted under compulsion.

The SCA decided in *S v Lungile*^[99] that an essential element of the defence of compulsion is that the accused was in fact threatened, or that threatened harm was imminent or had commenced. The defence is not sustained by the suggestion that the accused was merely afraid of a co-perpetrator of the crime, but not actually threatened by him to participate therein. No threat, in such a case, was imminent or had commenced.

In *S v Bradbury*,^[100] a member of a gang reluctantly played a lesser role in a murder due to fear of reprisals if he refused. The Appellate Division found that there was a need for a deterrent to this kind of gangsterism. The decision of the trial judge to impose the death sentence was therefore not so unreasonable as to warrant the appeal court's intervention.

In *S v Lungile*, furthermore, it was held that a person who voluntarily joins a criminal gang, and participates in the execution of a criminal offence, cannot successfully raise the defence of compulsion when, in the course of such execution, he is ordered by one of the members of the gang to do an act in furtherance of such execution. As a general proposition, a man who voluntarily and deliberately becomes a member of a criminal gang, with knowledge of its disciplinary code of vengeance, cannot rely on compulsion as a defence.

The test here is objective: whether or not, in light of all the circumstances, a reasonable person could be expected to resist the threat.

In *S v Malan*,^[101] the accused (a farmer) had for many years suffered problems with stray animals causing damage to his land. Having exhausted all remedies, from impounding the animals to sending messages to their owner, to no avail, the accused shot and killed the animals when they yet again strayed on to his land. The court found that such conduct was not unreasonable in the circumstances; therefore it was lawful.

In the delictual case of *Peterson v Minister of Safety & Security*,^[102] the court cited^[103] Midgley and Van der Walt to the following effect:

The means used and measures taken to avert the danger of harm must not have been excessive, having regard to all the circumstances of the case.^[2]

Onus[edit]

In *S v Pretorius*,^[104] the court held that the onus of proof in a defence of necessity, as in self-defence, rests on the State, which must rule out the reasonable possibility of an act of necessity. It is not for the accused to satisfy the court that he acted from necessity.

In *S v Mtewtwa*, already cited to this effect, the court held that, where an accused's defence is one of compulsion, the onus lies on the State to show that a reasonable man would have resisted the compulsion. There is no onus on the accused to satisfy the court that he acted under compulsion.

Killing[edit]

R v Dudley & Stephens^[105] is a leading English criminal case which established a precedent, throughout the common-law world, that necessity is no defence to a charge of murder. It concerned survival cannibalism following a shipwreck and its purported justification on the basis of a custom of the sea.

Criminal law governs offences committed by prisoners of war. In *R v Werner*,^[106] a murder had been committed by POWs acting on the orders of a superior officer. The court held that the killing of an innocent person by compulsion is never legally justifiable.

In *S v Bradbury*, a member of a dangerous gang had reluctantly played a minor role in a planned murder, being influenced thereto by fear of reprisals of a serious nature on himself or his family should he refuse. The trial judge had imposed the death sentence on him. In an appeal against this sentence, the Appellate Division held that, weighing the influence of fear against the need for a deterrent to this kind of gangsterism, there was nothing so unreasonable in the trial judge's decision as to justify a finding that his discretion had not been judicially exercised.

In *S v Goliath*,^[107] the court held that, on a charge of murder, compulsion can constitute a complete defence. When an acquittal may occur on such a charge, on the ground of compulsion, will depend on the particular circumstances of each case. The whole factual complex must be carefully examined and adjudicated upon with the greatest care.

The defence of necessity on a murder charge was upheld in *S v Peterson*,^[108] since the state had not proved that a fictional reasonable person in the position of the accused would have offered resistance to the compulsion, including a threat against his life, which had been exerted by a co-accused.

Impossibility[edit]

The maxim *lex non-cogit ad impossibilia* may be translated to mean that the law does not compel anyone to do the impossible.

Defence[edit]

There must be a positive obligation imposed by law, which with it must be physically impossible to comply. In *R v Jetha*,^[109] the appellant had sailed for India on 11 October 1926; his estate was provisionally sequestrated on 13 October 1926. In March 1929, after his return, he was convicted of contravening section 142(a) of the Insolvency Act,^[110] in that he had failed to attend the first meeting of his creditors on 11 November 1926. The court, on appeal, held that, as the appellant did not know and could not have known of the date of the meeting until after it was held, and as it would have been physically impossible for him to attend even if he had known the date, there was no ground for the conviction.

The impossibility must not be the fault of the accused. In *R v Korsten*,^[111] an accused person took his cattle to be dipped in a township dip, but was prevented from dipping them by the township foreman, because he had not complied with a by-law which provided that no person should use the dipping tank except upon production of coupons previously purchased entitling him to do so. The accused's excuse for not having purchased such coupons was that he did not know that this was necessary. The court held that, inasmuch as the Animal Diseases Act^[112] imposed an absolute duty on the accused to dip his cattle, the facts above afforded no defence.

Superior orders[edit]

The question here is whether or not an otherwise unlawful act may be justified by the fact that the accused was merely obeying the orders of a superior. The Romans phrased it thus: "He is free from blame who is bound to obey."^{[113][114]}

Requirements[edit]

To succeed in a defence of superior orders, it must be shown

- that the order came from a person lawfully placed in authority over the subordinate;
- that the subordinate was under a duty to obey the order; and
- that he did no more than was necessary to carry out the order.

These requirements are set out in *S v Banda*.^[115]

In *Queen v Albert*,^[116] the court held that a child under fourteen years of age, who assists his father in committing a crime, is presumed to do so in obedience to his father's orders, and is not punishable, even if he knew that he was performing a forbidden act—unless, in the case of a child above seven years of age, the crime is "atrocious,"^[117] or so "heinous as obviously to absolve the person ordered to commit it from the duty of obedience."^{[118][119]}

In *S v Banda*, a distinction was drawn between an unlawful and a manifestly unlawful order. Where orders are so manifestly and palpably unlawful that a reasonable man in the circumstances of the accused (a soldier *in*

casu) would know them to be so, the duty to obey is absent, and the accused will be liable for acts committed pursuant to such orders.

In *Mostert v S*,^[120] the court held that the order must have emanated from someone lawfully placed in authority over the accused, and that the accused must have been under a duty to obey the given order; finally, the accused must have done no more harm than was necessary to carry out the order.

Public authority[\[edit\]](#)

When officers of the courts, or of the law or the State generally, and in certain circumstances even private persons, as duly authorised instruments of the State, commit crimes in the proper exercise of such authority (including acts of aggression upon life, person and property), they may be immune from punishment.^[121]

Diplomatic or consular immunity[\[edit\]](#)

This defence is to be found in the Diplomatic Immunities and Privileges Act,^[122] which sets out the immunities and privileges of diplomatic missions and consular posts, and of the members of such missions and posts.

Section 3 of the Act states that the Vienna Convention on Diplomatic Relations of 1961 is applicable to diplomatic missions and to the members of such missions; the Vienna Convention on Consular Relations of 1961 is applicable to consular posts and the members of such posts.

Section 4 provides that heads of state, special envoys or representatives from another state or government or organisation are immune from the criminal and civil jurisdiction of the courts. They enjoy the privileges accorded them by customary international law, which extends their immunity also to their families, and to members of their staff and their families. The Minister must keep a register of all persons who are protected by such immunity.^[123]

Consuls, be they career or honorary, are not diplomatic agents, but they are, according to international law, entitled to immunity from civil and criminal proceedings in respect of official acts.^[124]

Court authority[\[edit\]](#)

The person officially authorised to execute either the civil or the criminal judgment of a court commits no crime in so doing. This exemption does not extend to cases in which the court has no jurisdiction.^{[125][126][127][128][129]} If officials of the court act beyond their jurisdiction, their actions are unlawful, but they may nevertheless escape liability if they genuinely believe that they are acting lawfully.^[130]

For a crime for which negligence is sufficient for liability, if an official's belief was not only genuinely held, but also reasonable,^{[131][132]} he will not be liable. The fact that a person works as a court official may indicate that he ought to know the law relating to his sphere of activity,^[133] and is therefore negligent.^[134]

The test of intention is subjective, so the reasonableness or otherwise of the accused's belief is in principle irrelevant. If, however, that belief is patently unreasonable, especially because the accused's occupation requires him to know better, this could constitute a factor from which the court may reach the conclusion that an inference of knowledge of unlawfulness can be drawn.^{[135][136]}

The powers of public officers and private citizens to arrest, either with or without warrant, are set out in the Criminal Procedure Act (CPA).^[137] Provided that arrestors act within the limits of these powers, they are not liable for any assault or other crime necessarily committed to effect, or attempt to effect, the arrest.^[138]

The old section 49 of the CPA distinguished between

- deadly force and non-deadly force; and
- a person who resisted arrest and a person who fled.

No common-law balance was required; there was no need to consider alternative means. Lethal force was allowed in respect of Schedule 1 offences.

The old section 49 has been amended by section 7 of the Judicial Matters Second Amendment Act,^[139] which came into force in 2003. An important case necessitated the change. In Govender v Minister of Safety & Security,^[140] the SCA read down section 49(1), specifically the words "use such force as may in the circumstances be reasonably necessary [...] to prevent the person concerned from fleeing,"^[141] so as to exclude the use of a firearm or similar weapon, unless the person authorised to arrest a fleeing suspect, or to assist in arresting him, has reasonable grounds for believing

- that the suspect poses an immediate threat of serious bodily harm to him, or a threat of harm to members of public; or
- that the suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm.

When applying the reasonableness standard, the nature and degree of force used must be proportionate to the threat posed by the accused to the safety and security of police officers and others.

In Ex parte Minister of Safety & Security: In re S v Walters,^[142] the Constitutional Court accepted as constitutionally sound the interpretation of section 49(1)(b) in Govender. This saved section 49(1) from invalidation. Section 49(2), however, authorised police officers in the performance of their duties to use force where it might not be necessary or reasonably proportionate. This, the court found, was socially undesirable and constitutionally impermissible. The court declared section 49(2) inconsistent with the Constitution and therefore invalid, since it infringed the rights to dignity, life and security of person.

The court went on to state the law relating to the arrest of a suspect:

- The purpose of arrest is to bring before court for trial persons suspected of having committed offences.
- Arrest is not the only means of achieving this purpose, nor always the best.
- Arrest may never be used to punish a suspect.
- Where arrest is called for, force may be used only where necessary.
- Where force is necessary, only the least degree of force reasonably necessary may be used.
- In deciding what degree of force is both reasonable and necessary, all circumstances must be taken into account, including the threat of violence the suspect poses to the arrester or others, and the nature and circumstances of the offence the suspect is suspected of having committed—the force being proportional in all these circumstances.
- Shooting a suspect solely to carry out an arrest is permitted in very limited circumstances only. Ordinarily it is not permitted unless the suspect poses a threat of violence to the arrester or to others, or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm, and there are no other reasonable means of carrying out the arrest, whether at that time or later.
- These limitations in no way detract from the rights of an arrester, attempting to carry out an arrest, to kill a suspect in self-defence or in defence of any other person.

The new section 49(2) reads as follows:

If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing.

This is a statutory articulation of the reasonable or proportional test. The subsection goes on to say that "the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if s/he believes on reasonable grounds

- "that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- "that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- "that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm."

These are limits in addition to those discussed above.

Consent[[edit](#)]

- The complainant's consent in the circumstances must be recognised by law as a possible defence.
- The consent must be real, given voluntarily and without coercion.
- The consent must be given by a person capable in law of consenting.

Recognised by law[[edit](#)]

Consent is only a ground of justification in respect of some crimes. It is not a ground of justification in respect of treason, perjury and murder, but it is in respect of rape, theft and malicious injury to property. It is sometimes a ground of justification in respect of assault.

Death[[edit](#)]

In *R v Peverett*,^[143] the accused and one "S," at the latter's suggestion, decided to commit suicide by introducing into a closed motor car poisonous fumes from the exhaust pipe of the car. The accused made the necessary arrangements. He and "S" then sat in the car, and the accused started the engine. They both lost consciousness but were later removed from the car and eventually recovered. The accused was convicted of attempted murder, and his appeal was dismissed. The court held that the fact that "S" was free to breathe the poisonous gas or not as she pleased did not free the accused from criminal responsibility for his acts. The accused had contemplated and expected that, as a consequence of his acts, "S" would die; he therefore intended to kill her, however little he may have desired her death.

In determining legal liability for terminating a patient's life, in *Clarke v Hurst*,^[144] the court held that there is no justification for drawing a distinction between an omission to institute artificial life-sustaining procedures and the discontinuance of such procedures once they have been instituted. Just as, in the case of an omission to institute life-sustaining procedures, legal liability would depend on whether there was a duty to institute them, so in the case of their discontinuance liability would depend on whether or not there was a duty not to discontinue such procedures once they have been instituted. A duty not to discontinue life-sustaining procedures cannot arise if the procedures instituted have proved to be unsuccessful. The maintenance of life in the form of certain biological functions, such as the heartbeat, respiration, digestion and blood circulation, but unaccompanied by any cortical and cerebral functioning of the brain, cannot be equated with living in the human or animal context. If, then, the resuscitative measures were successful in restoring only these biological functions, they were in reality unsuccessful. Artificial measures, such as naso-gastric feeding, could consequently also be discontinued. It is appropriate and not in conflict with public policy in cases of this nature to make an evaluation of the quality of life remaining to the patient and to decide on that basis whether life-sustaining measures ought to be taken or continued.

Bodily harm[[edit](#)]

A participant in sport may validly consent only to those injuries which are normally to be expected in that particular sport. Voluntary participation in sport may also imply that the participant consents to injuries sustained as a result of acts which contravene the rules of the game—but only if such incidents are normally to be expected in that particular game.

Injuries inflicted in the course of initiation or religious ceremonies may be justified by consent only if they are of a relatively minor nature and do not conflict with generally accepted concepts of morality.

Sexual assault may be committed with or without the use of force or the infliction of injuries. Consent may operate as a justification for the act if no injuries are inflicted. Where injuries are inflicted, it has been held that consent may not be pleaded as a defence. Snyman has averred, however, that in such cases it would "seem to be more realistic" to enquire into whether the act is *contra bonos mores* or not. If the injury is slight, it is conceivable that the law may recognise consent to the act as a defence.

Real, voluntarily and without coercion[[edit](#)]

An *error in negotio* is an error in respect of the act; an *error in persona* is an error as to the identification of the other person.

Capable of consent[[edit](#)]

To consent to an otherwise unlawful act, the person consenting must have the ability to understand the nature of the act and to appreciate its consequences. This ability may be lacking due to

- youth;
- a mental defect; or
- intoxication, unconsciousness, etc.

Disciplinary chastisement[[edit](#)]

In *Du Preez v Conradie*,^[145] the court held that a parent has the right and power to chastise minor children. This includes the right to impose moderate and reasonable corporal punishment. A step-parent (to whom a divorced parent of the children is married) may exercise the same rights if requested to do so by the other parent, subject to the same limitations as on that parent. The parent and step-parent are not entitled to molest their children or to exceed the bounds of moderate and reasonable chastisement.

Section 35(1) of the Interim Constitution provides expressly that the rights entrenched in it, including section 10—"every person shall have the right to respect for and protection of his or her dignity"—and section 11(2)—no "person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment"—shall be interpreted in accordance with the values which underlie an open and democratic society based on freedom and equality. In determining, then, whether punishment is cruel, inhuman or degrading within the meaning of the Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution. The simple message to be taken from this, according to the Constitutional Court in *S v Williams*^[146] is that the state must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution. In the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution. The caning of juveniles *in casu* was accordingly ruled unconstitutional.

The Abolition of Corporal Punishment Act^[147] abolished judicial corporal punishment. The South African Schools Act^[148] abolished corporal punishment in schools. In *Christian Education South Africa v Minister of Education*^[149] a private Christian organisation administered a private school and believed that, in terms of its Christian principles, the physical chastisement of children at school was lawful. The organisation applied for an order exempting the school from section 10 of the Schools Act, arguing that the constitutional right to religious freedom allowed it to be so exempted. The Constitutional Court held that the requested order could not be granted. Even if one assumed that section 10 infringed upon parents' right to religious freedom, such infringement was justified, since even private schools exercise their functions for the benefit of the public interest.

Requirements[[edit](#)]

The requirements for the lawful parental chastisement of children are laid out *R v Janke & Janke*.^[150] It must be

- moderate and reasonable;
- in a manner not offensive to good morals; and
- not for other objects than correction and admonition.^[151]

Considerations^[edit]

Relevant considerations in adjudicating on the chastisement of children were laid out in *Du Preez v Conradie*.^[152]

- the nature of the offence;
- the condition of the child;
- motive;
- the severity of the punishment;
- the object used;
- age and sex of the child; and
- the build of the child.^[153]

Culpability^[edit]

The test for determining criminal capacity is whether the accused had

- the ability to appreciate the wrongfulness of his conduct; and
- the ability to act in accordance with that appreciation.

A defence in this area may relate to

- biological (pathological) factors, like
 - immature age; and
 - mental illness; or
- non-pathological factors, like
 - intoxication;
 - provocation; and
 - emotional stress.

Biological factors^[edit]

Youth^[edit]

Common law^[edit]

The common-law position is that a minor

- under seven years of age is irrebuttably presumed to lack criminal capacity, being *doli incapax*;
- of seven to fourteen years of age is rebuttably presumed to lack criminal capacity; and
- over fourteen years enjoys the same criminal capacity as adults, without any presumption of a lack of capacity.

In *R v K*,^[154] a charge of murder was brought against a child of thirteen. The presumption, which applies for adults, that he had intended the probable consequences of his actions was not here applicable. The State failed to prove that the child knew that his act (stabbing and thereby killing his mentally ill mother) was unlawful.

In *Director of Public Prosecutions, KZN v P*,^[155] the respondent, a fourteen-year-old girl, had been convicted of the murder of her grandmother. The passing of sentence was postponed for a period of 36 months, on the

condition that the respondent complied with the conditions of a sentence of 36 months' correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act.^[156] On appeal, the State argued that the sentence was too lenient, considering the gravity of the offence. It contended that, despite the young age of the respondent, direct imprisonment should have been imposed.

The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate. The strongest mitigating factor in favour of the respondent *in casu* was her youthfulness: She was twelve years and five months old at the time of the offence. A second factor was that she had no previous conviction. The aggravating factors, however, were overwhelming. The postponement of the passing of sentence was therefore inappropriate in the circumstances, and caused a sense of shock and a feeling that justice was not done.

Child Justice Act^[edit]

The Child Justice Act^[157] was assented to on May 7, 2009, and commenced on April 1, 2010. Among the purposes of the Act is

- to provide for the minimum age of criminal capacity of children; and
- to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system.

Part 2 of the Act deals with the criminal capacity of children under the age of fourteen years.

In terms of section 7, dealing with the minimum age of criminal capacity,

- a child who commits an offence while under the age of ten years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9, so there is an irrebuttable presumption that the child lacks capacity;^[158]
- a child who is ten years or older, but under the age of fourteen years, and who commits an offence, is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11, so there is a rebuttable presumption of lack of capacity.^[159]

The common law pertaining to the criminal capacity of children under the age of fourteen years was thereby amended.^[160]

In terms of section 11, dealing with proof of criminal capacity, the State must prove, beyond reasonable doubt, that a child who is ten years or older, but under the age of fourteen years, had the capacity

- 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.^[161]

Section 8 provides for review of the minimum age of criminal capacity:

In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in section 96(4) and (5).

Section 9 deals with the manner of dealing with a child under the age of ten years.

Mental incapacity^[edit]

Until 1977, the “defence of insanity” had its roots in English law, in particular the M’Naghten rules.

The CPA replaced these, however, with sections 77 to 79, which were implemented largely on the recommendation of the *Rumpff Commission: Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons & Related Matters*.^[162]

There are two questions to consider in respect of mental incapacity:

1. Is the accused fit to stand trial? This is a preliminary issue.^[163]
2. Did the accused have the requisite capacity when he committed the unlawful act?^[164]

Test of insanity^[edit]

The meaning or definition of “mental illness” or “mental defect” is provided in *S v Stellmacher*^[165] It is “a pathological disturbance of the accused’s mental capacity, and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.”^{[166][167]}

An affliction or disturbance is pathological if it is the product of a disease.

The criterion in *Stellmacher* identifies as mental illnesses (as opposed to mental defects) only those disorders which are

1. pathological; and
2. endogenous.

To be endogenous is to be of internal origin.^[168]

Section 78(1) of the CPA provides that a person whose act or omission constitutes an offence, and who suffers at the time from a mental illness or defect which makes him incapable

- of appreciating the wrongfulness of his act or omission,^[169] or
- of acting in accordance with that appreciation,^[170]

will not be criminally responsible for such act or omission.

The difference between the first contingency and the second is between the cognitive and the conative respectively.

- The cognitive refers to insight, or appreciation of the wrongfulness of an act.
- The conative refers to self-control, or acting in accordance with an appreciation of that wrongfulness.

S v Mahlinza^[171] lays out the general principles relating to criminal capacity and mental illness. One night, the accused *in casu*, a devoted mother, had taken off her clothing and placed it on a fire. She had then placed her baby and her six-year-old daughter on the fire, and stood at the door of the kitchen to prevent them from escaping. The baby was burnt to death; the six-year-old escaped with burns. The psychiatrist who examined the accused reported that she was laughing and was generally very rowdy, and could not give an account of herself or of her behaviour; she was disorientated and had no insight into her condition. The psychiatrist diagnosed a state of hysterical dissociation. She was charged with murder but found to be insane, and thus not guilty.

Rumpff JA (of the eponymous report) held that, whenever the issue of the accused’s mental faculties is raised, be it in respect of the trial or in respect of her criminal capacity, an investigation into her mental faculties is of primary and decisive importance. Should the investigation show that she did not have criminal capacity, the necessity for an investigation as to fault in the technical sense, and as to the voluntariness with which the offence was committed, falls away. The decision in each case depends on the particular facts and the medical evidence.^[172] Rumpff warned that it is both impossible and dangerous to attempt to lay down any general symptoms by which a mental disorder may be recognised as a mental “disease” or “defect.”

Burchell lays out a number of types of mental disorder:

- organic disorders, which are due to a general medical condition, and which are pathological and endogenous, and which therefore satisfy the criteria of the legal definition of insanity;
- substance-related disorders, which are not necessarily pathological, endogenous or permanent, so that persons suffering from them are not necessarily legally insane;
- schizophrenia and other psychotic disorders, which are pathological, endogenous and capable of depriving the sufferer of insight or self-control, and therefore satisfy the criteria of the legal definition of insanity;
- personality disorders, which are not a consequence of disturbance of the psychic state, but rather of patterns of behaviour learned during the formative years, and which are discussed further below,^[173] and
- mood and anxiety disorders:
 - Mood disorders are capable of depriving the sufferer of insight or self-control, and may therefore satisfy the criteria of the legal definition of insanity.
 - Anxiety disorders do not affect one's ability to distinguish reality from unreality, and therefore are not psychotic in nature. Dissociative orders, however, may deprive the sufferer of insight or self-control, and therefore may satisfy the criteria of the legal definition of insanity.^[174]

The Interim Report of the Booyesen Commission of Enquiry into the Continued Inclusion of Psychopathy as Certifiable Mental Illness and the Dealing with Psychopathic and Other Violent Offenders found that the “retention of psychopathy as a mental illness in the Mental Health Act is not only scientifically untenable, but it is also not effective in practice.”

In accordance with the recommendations of the Commission, section 286A of the CPA now provides for the declaration of certain persons as dangerous criminals, and section 286B for the imprisonment, for an indefinite period, of such persons.

Even before the Booyesen Commission, however, the courts were not prepared to accept psychopathy, in and of itself, as exempting an accused from criminal liability, or even as warranting a lesser sentence on account of diminished responsibility.

In *S v Mnyanda*,^[175] the accused was convicted of murder. In an appeal, he argued that his psychopathy should have been regarded as a mental illness, and thus as an mitigating factor.

The court found that the mere fact that an accused may be regarded as clinically a psychopath is not a basis on which he may be found to have diminished responsibility. Only when, in respect of a particular misdeed, it can be said that the psychopathic tendency was of such a degree as to diminish the capacity for self-control to such a point that, according to a moral judgment, he is less blameworthy, will the law recognise his diminished responsibility.

Procedural aspects[edit]

Originally, South Africa followed English law, using the “guilty but insane” formula, but in 1977 the verdict was changed to “not guilty by reason of mental illness or mental defect.”

Section 78(8)(a) of the CPA allows an appeal against such a finding.

Whether or not the verdict in insanity cases is tantamount to an acquittal, from which no appeal is allowed, and whether the State may appeal against a verdict of not guilty by reason of mental illness or defect—these conundrums have not yet been answered by the courts.

In the past, if a court found an accused to be “not guilty but insane,” it had to “direct that the accused be detained in a mental hospital or prison pending the signification of the decision of a Judge in chambers.”^[176]

These provisions were regarded as peremptory; there was no option but to commit the accused to an institution.

It is not difficult to see how the inevitable committal to an institution of a person who was found to be insane at the time of the offence, but who subsequently recovered, could lead to “great injustice.”^[177]

In *S v McBride*,^[178] the accused had been capable of appreciating the wrongfulness of his act, but he was unable, because of “an endogenous depression,” resulting in “impaired judgment,” to act in accordance with that appreciation. The court held that he was not criminally responsible for the killing. Although the accused had since recovered from his illness, to the extent of obtaining employment and “performing a function as a useful member of society,” the court considered itself bound to order his detention in a mental hospital.

In Burchell’s words, then, “we have the curious contradiction that a sane person is detained in a mental institution (or a prison) because he committed a crime for which, in law, he is not responsible and has accordingly been found ‘not guilty.’”^[179]

The South African Law Commission, recognising this injustice, proposed that such a person be committed to an institution only if he has not recovered or continues to pose a danger to himself or to society.

The legislature addressed the issue with the Criminal Matters Amendment Act,^[180] giving the court a discretion, if “it considers it to be necessary in the public interest,” in cases involving serious crimes, to order either detention in an institution, or the release, conditional or unconditional, of the subject.

Sections 46 to 48 of the Mental Health Care Act^[181] provide for periodic review of the mental-health status of State patients, application for their discharge and various provisions governing conditional discharge.

The range of orders that a judge may issue are set out in section 47(6):

- that the patient remain a State patient;
- that he be reclassified and dealt with as a voluntary, assisted or involuntary mental-health-care user;
- that he be discharged unconditionally; or
- that he be discharged conditionally.

Onus of proof^[edit]

South African law has adopted English law on the onus of proof in these matters: “Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved.”

Section 78(1A) of the CPA reiterates that every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.

In terms of section 78(1B), whenever the criminal responsibility of an accused is in issue, with reference to a commission or omission which constitutes an offence, the burden of proof will be on the party who raises the issue.

Almost always, therefore, it will be on the accused.

In *S v Kalogoropoulos*,^[182] the court held that an accused person who relies on non-pathological causes in support of a defence of criminal incapacity is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable doubt on that point. It is, ultimately, for the court to decide the issue of the accused’s criminal responsibility for his actions, having regard to the expert evidence and to all the facts of the case, including the nature of the accused’s actions during the relevant period.

Diminished responsibility^[edit]

Section 78(7) of the CPA provides that, if the court finds that the accused, at the time of the commission of the offence, was criminally responsible, but that his capacity to appreciate the wrongfulness of the act, or to act in accordance with an appreciation of that wrongfulness, was diminished by reason of mental illness or mental defect, the court may take that fact into account when sentencing him.

The accused had acted with diminished responsibility in *S v Mnisi*.^[183] On seeing his wife in an adulterous embrace with the deceased, the accused had lost control of his inhibitions and shot the latter.

On appeal, the SCA held that the trial court had not accorded sufficient weight to accused's diminished criminal responsibility. The fact that he had acted with *dolus indirectus* had also not been taken into account. Deterrence was of lesser importance in this case, the SCA held, as the evidence did not suggest that the accused had a propensity for violence; he was unlikely to commit such an offence again. In view of the accused's diminished criminal responsibility, general deterrence was also of lesser importance. His sentence of eight years' imprisonment was accordingly reduced to five.

Non-pathological criminal incapacity must be distinguished from mental illness. A person may suffer from mental illness, and yet nevertheless be able to appreciate the wrongfulness of certain conduct, and to act in accordance with that appreciation.^[184]

Non-pathological criminal incapacity[edit]

Intoxication[edit]

Intoxication may affect

- the act (rendering the conduct involuntary);
- capacity; or
- intention.

There are four types of intoxication:

1. involuntary;
2. intoxication leading to mental illness;
3. *actio libera in causa* (the principle that a person who voluntarily and deliberately gets drunk in order to commit a crime is guilty of that crime even though at the time he commits the prohibited conduct he may be blind-drunk and acting involuntarily); and
4. voluntary.

In *R v Bourke*,^[185] the accused was charged with rape, but acquitted as a result of intoxication. (He was, however, convicted of indecent assault.) The court noted three broad propositions in Roman-Dutch law:

1. "that, as a general rule, drunkenness is not an excuse for the commission of a crime, though it may be a reason for mitigation of punishment;"
2. that, "if the drunkenness is not voluntary, and is severe, it is an excuse;—that is, if the drunkenness was caused not by the act of the accused person but by that of another, and was such as to make him unconscious of what he was doing, then he would not be held in law responsible for any act done when in that state;" and
3. that, "if constant drunkenness has induced a state of mental disease, *delirium tremens*, so that, at the time the criminal act was done, the accused was insane, and therefore unconscious of his act, he is not responsible, but in such a case he can be declared insane."^[186]

The court held that absolute drunkenness is not equivalent to insanity. The essential difference is that the drunk person, as a rule, voluntarily induces his condition, whilst the mentally ill person is the victim of a disease: "It is therefore not unreasonable to consider that the person who voluntarily becomes drunk is responsible for all such acts as flow from his having taken an excess of liquor."

“To allow drunkenness to be pleaded as an excuse,” wrote Wessels J, “would lead to a state of affairs repulsive to the community. It would follow that the regular drunkard would be more immune from punishment than the sober man.”

In *S v Johnson*,^[187] the leading decision on intoxication prior to *S v Chretien*,^[188] an accused was found guilty of culpable homicide despite the fact that the court accepted the psychiatric evidence that the accused was so drunk that he did not know what he was doing at the time of the offence. This case therefore reaffirmed the principle in *Bourke* that voluntary drunkenness is no excuse.

In *Chretien*, the Appellate Division reconsidered *Bourke* and *Johnson*, and eradicated the traditional approach to voluntary intoxication, firmly adopting a course based on legal principle.

While under the influence of alcohol, Chretien had driven his car into a crowd of people standing in the street. One was killed; five were injured. On charges of murder and attempted murder, the trial court found the accused guilty of culpable homicide, but acquitted him of attempted murder.

The issue on appeal was whether, on the facts, the judge was correct in law to hold that the accused, on a charge of attempted murder, could not be convicted of common assault where the necessary intention for the offence had been influenced by the voluntary consumption of liquor.

The court accepted that, in his drunken state, the accused had expected that the people would move out of his way. There was some doubt, therefore, as to whether he had the requisite intention for common assault.

Friedman J found that he was bound by *Johnson*. By confining that decision to culpable homicide, however, and by categorising common assault as a crime requiring specific intent, he was able to avoid the effect of *Johnson* in respect of non-specific-intent crimes.

The judge thus brought to issue the question of whether, subjectively, the accused had the requisite intention for common assault of the five injured persons.

The State’s argument was that the trial court should have applied *Johnson* and found the accused guilty of common assault, even if he lacked *mens rea* on account of his intoxication.

The majority of the Appellate Division concluded that even common assault requires intention to assault. If this intention is lacking due to voluntary intoxication, there can be no conviction. It was found that Chretien had no intention.

Rumpff CJ held that the rule in *Johnson* was juridically impure, and that voluntary intoxication could be a complete defence to criminal liability. Rumpff stressed the importance of the degree of the accused’s intoxication:

- At one extreme is the person who is “dead drunk.”
- At the other is the person who is only slightly drunk.

The latter would have no defence; the former would be acquitted if he was so drunk that his conduct was involuntary, making him unable to distinguish right from wrong, or unable to act in accordance with that appreciation.

Voluntary intoxication was thus removed from the direct influence of policy considerations, and placed firmly on the basis of legal principle. The result is that it can now affect criminal liability in the same way, and to the same extent, as youth, insanity, involuntary intoxication and provocation.

Intoxication of a sufficient degree, therefore, can serve to exclude the voluntariness of conduct, criminal capacity or intention.

“While *Chetrien* cannot be faulted on grounds of logic or conformity with general principles,” writes Burchell, “the judgment might well have miscalculated the community’s attitude to intoxication. Should a person who commits a prohibited act while extremely intoxicated escape all criminal liability?”^[189]

In 1982, the Minister of Justice requested the Law Commission to consider the matter. In January 1986, after receiving extensive comment on a working paper, the Commission published a report and a draft Bill. Eventually the Criminal Law Amendment Bill was tabled in Parliament; it was passed and came into operation on March 4, 1988.

The Act^[190] contains two short sections, the first of which provides that

any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who [...] thus impaired commits any act prohibited by law [...], but is not criminally liable because his or her faculties were impaired [...], shall be guilty of an offence and shall be liable on conviction to the penalty [...] which may be imposed in respect of the commission of that act.^[191]

The elements of the offence of contravening the Act are as follows:

- consumption or use of any intoxicating substance by the accused;
- impairment of the accused’s faculties (to appreciate the wrongfulness of the act or to act in accordance with that appreciation) as a result of the consumption or use;
- knowledge that the substance has the effect of impairing his faculties;
- commission by the accused of any act prohibited by law while his faculties are so impaired; and
- absence of criminal liability because his faculties are so impaired.

There are two main components:

1. requirements relating to the consumption of the substance; and
2. circumstances surrounding the commission of the act.

In *S v Vika*,^[192] the appellant was convicted in a regional court on two counts of contravening this section. The prohibited acts were murder and attempted murder.

Regarding the appropriate punishment, the magistrate applied the provision that such a contravention could attract the same penalty as that which might be imposed for the unlawful act itself. He found that no substantial and compelling circumstances existed to justify a sentence of less than the fifteen years’ imprisonment stipulated in section 51(2) of the Criminal Law Amendment Act.

When the appellant appealed against the sentence, arguing that it was startlingly inappropriate, the High Court held that the magistrate seemed not to have appreciated the difference between the offences of which the appellant had been convicted, and the offences of murder and attempted murder. These amounted to misdirections, and entitled the court to interfere with the sentence.^[193]

It is important to remember, therefore, that to be convicted of an offence in terms of section 1(1) of the Criminal Law Amendment Act is to be convicted of a unique statutory offence, described in detail above, and not of the ordinary common-law offence.

Section 1(2) of the Criminal Law Amendment Act provides that, if in any prosecution of any offence it is found that the accused is not criminally liable, on account of the fact that his faculties were impaired by the consumption or use of any substance, he “may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.”

This subsection provides, in essence, that a contravention of section 1(1) will be regarded as a competent verdict on a charge of another offence.

Section 2 of the Act provides that, whenever it is proved that the faculties of a person were impaired by the consumption or use of a substance when he committed an offence, the court may, in determining an appropriate sentence, regard as an aggravating circumstance the fact that his faculties were so impaired.

The Law Commission was not in favour of this provision. As Burchell points out, “a court always has a discretion to impose an appropriate punishment and intoxication can be taken into account either as a mitigating or as an aggravating circumstance.” The section does indicate, with the word “may,” that the court retains its discretion, but Burchell thinks this superfluous.^[194]

Section 1(1) does not specify voluntary consumption. The Bill drafted by the Law Commission did, however, and therefore would have protected from a liability a person who has his drink “spiked” by another.

Under the Act, such a person would escape liability on the basis that he did not know that the substance he was drinking would have the effect it did. The Law Commission’s Bill, however, has “the advantage of also clearly leading to the acquittal of a person who was forced to drink an alcoholic or other concoction, which he knew would have the effect of impairing his faculties, but who had no control over his actions.”^[195]

Burchell suggests that “one way of avoiding this undesirable result is to interpret the words ‘consumes or uses’ as implying conduct directed by the consumer’s or user’s will and therefore importing voluntary intoxication”.^[196]

Another problem is that the Act refers only to a lack of criminal capacity. What about involuntary conduct and intention? “The wording of the draft bill prepared by the Law Commission,” writes Burchell, “is surely preferable,”^[197] since it refers simply to an impairment of “mental faculties,” without any restriction as to the consequence of this impairment. Chetrien had criminal capacity, but he was acquitted on the ground that there was reasonable doubt as to whether he possessed the requisite intention to commit the crimes wherewith he was charged. He would also escape liability under the Act, because his intoxication did not lead to lack of criminal capacity, but rather to lack of *mens rea*.

There is, finally, a problem in respect of onus. According to general principles, the burden of proving the presence of all the elements of the crime, beyond reasonable doubt, rests on the State. One of the elements that the State must prove beyond reasonable doubt, for a contravention of section 1(1), is that the accused is not criminally liable for his act, committed while intoxicated, “because his faculties were impaired,” or better say because he lacked capacity at the time he committed the act. “This,” as Snyman points out, “leads to the unusual situation that, in order to secure a conviction of contravening this section, the state must do that which X [the accused] normally does at a trial, namely try and persuade the court that X is not guilty of a crime. The state thus bears the burden of proving the opposite of what it normally has to prove.”^[198]

The problem in practical terms, Snyman observes, is that “it is difficult for the state to prove beyond reasonable doubt that because of incapacity resulting from intoxication, X cannot be held criminally liable for his act.”^[199] The courts have warned on multiple occasions that they will not easily conclude that the accused lacked capacity.

The difficulty arises when the two offences are used in the alternative. Snyman posits the following:

If X is charged with assault and the evidence shows that he was only slightly drunk at the time of the act, he will not escape the clutches of the criminal law, because he will then be convicted of assault and the only role the intoxication will play will be to serve as a ground for the mitigation of punishment. If the evidence shows that at the time of the act he was very drunk [...], so drunk that he lacked capacity, he would likewise not escape the clutches of criminal law, because he would then be convicted of contravening this section. However, if the evidence reveals that at the time of the act he happened to fall into the grey area between ‘slightly drunk’ and very drunk’, he will completely escape the clutches of criminal law; he will then ‘fall’ between the proverbial ‘two chairs’ and it would then be impossible to convict him of any crime. In this way the section could undoubtedly lose much of its effectiveness.^[200]

In *S v Mbele*,^[201] the accused was charged with theft in a magistrate's court. He contended that he had been under the influence of alcohol at the time of the offence; the State witness testified to the effect that he was "not quite all there." The magistrate could not find on the evidence that the accused had the necessary criminal responsibility, and gave him the benefit of the doubt that his version could possibly be true. Since he was "not criminally liable" for the crime, the magistrate found him guilty of a contravention of s 1(1) of the Criminal Law Amendment Act.

On review, the Witwatersrand Local Division held that, for a contravention of section 1(1), the State was required to prove that the accused's faculties were impaired at the time he performed the act, and that, as a result, he was not criminally liable. It was insufficient, therefore, for the State to take matters only so far as uncertainty as to whether his faculties were impaired to the necessary degree.

The court found that the State had not proven impairment of the accused's faculties. He could not be convicted, therefore, of the offence of contravening section 1(1). The conviction and sentence were accordingly set aside.

In *S v September*,^[202] the appellant stood trial in a Provincial Division on charges of murder, assault with intent to do grievous bodily harm, theft and malicious injury to property. The trial court found

- that, at the time of the commission of the offences, the appellant had been under the influence of liquor, and possibly also drugs;
- that he had consequently lacked criminal capacity; and
- that he was guilty, accordingly, of a contravention of section 1(1) of the Criminal Law Amendment Act.

On appeal, the appellant argued that the evidence was indeed of such a nature as to cast doubt on his criminal capacity, and that the trial court had correctly found that he could not be convicted of the charges laid against him. It was, however, further argued that positive proof was absent of a lack of criminal capacity, and that the appellant ought accordingly not to have been convicted on section 1(1).

The court stressed the fact that it was the task of the trial court, in every case, to decide whether the accused indeed lacked the requisite criminal capacity.

Three psychiatrists had testified as to the appellant's alleged state of intoxication, differing widely in their opinions. The trial court had accepted, without furnishing reasons for so doing, the evidence of the psychiatrist whose opinion it was that the appellant had lacked criminal capacity. This indicated that the trial court had not examined the question of the appellant's criminal capacity to the requisite extent. The evidence as a whole, therefore, had to be assessed anew.

After reassessing the evidence, the court found that no reasonable doubt had been cast on the appellant's criminal capacity. The evidence was furthermore sufficient to lead to the conclusion that the appellant, beyond reasonable doubt, was guilty of contravening the original counts. The court therefore set aside the convictions on section 1(1), and substituted convictions on the original charges.

Provocation and emotional stress^[edit]

Provocation may be a complete defence in South African law, and may exclude:

- the voluntariness of conduct (sane automatism), although this is very rare;
- criminal capacity; or
- intention.

Roman and Roman-Dutch law did not regard anger, jealousy or other emotions as defences for any criminal conduct; they were only factors in mitigation of sentence, and even then only if they could be justified by provocation.

Section 141 of the Transkei Penal Code of 1886 influenced the adoption by the courts of the view that provocation could never be a complete defence to a charge of murder; at most it could be a partial defence. The Code provided that killing which would otherwise have constituted murder could be reduced to culpable homicide if the person responsible acted in the heat of the moment, as a result of passion occasioned by sudden provocation. The decision to reduce a charge of murder to one of culpable homicide depended on an application of the criterion of the ordinary person's power of self-control; the test was objective, in other words.

S v Mokonto^[203] saw a change from the objective to a subjective test. The accused believed that the death of his two brothers had been brought about by the evil powers of a witch. When he confronted her, she declared that he would not "see the setting of the sun today," whereupon he struck her with a cane-knife, almost cutting off her head. He was convicted of murder.

On appeal, Holmes JA held that he had been provoked to anger by the deceased's threat, and that, therefore, the appropriate verdict should be one of culpable homicide. Holmes considered section 141 of the Transkeian Code, with its provision that "homicide which would otherwise be murder may be reduced to culpable homicide, if the person who causes death does so in the heat of passion caused by sudden provocation." The Code continues,

Any wrongful act of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

This did not correlate, Holmes found, with the Roman-Dutch notion that provocation is not a defence.

Holmes held that the objective "reasonable person" criterion is not in harmony with modern subjective judicial thinking. It is judicially recognised that intention to kill is purely a subjective matter. Since the test of criminal intention was now subjective, and since earlier cases of provocation applied a degree of objectivity, it might be necessary, he thought, to consider afresh the whole question of provocation.

On the other hand, he noted, the facts of a particular case might show that the provocation, far from negating an intention to kill, had actually caused it. The crime would then be murder, not culpable homicide.

The test for intention being subjective, it seemed to Holmes that provocation, which bears upon intention, must also be judged subjectively. In crimes of which specific intention is an element, therefore, the question of the existence of such intention is a subjective one: What was going on in the mind of the accused?

Provocation, Holmes held, is relevant to the question of the existence of such intention. Subjectively considered, it is also relevant to mitigation.

S v Laubscher^[204] dealt with the defence of non-pathological criminal incapacity. The accused was charged and convicted with the murder of his father-in-law, and with the attempted murders of his mother-in-law, his sister-in-law, his wife and his son. His defence was that he had acted involuntarily, since he had lacked criminal capacity at the time of the commission. This was due to a total but temporary psychological breakdown, or temporary disintegration of his personality.

In order to address the issue of the appellant's mental faculties at the time of the crime, the court had to look at the role of the defence in South African law. To be criminally liable, a perpetrator must, at the time of the commission of the alleged offence, have criminal liability. The doctrine of criminal capacity is an independent subdivision of the concept of *mens rea*. Therefore, to be criminally liable, a perpetrator's mental faculties must be such that he is legally to blame for his conduct.

The court set out the two psychological characteristics of criminal capacity:

1. the ability to distinguish right from wrong, and to appreciate the wrongfulness of an act;

2. the capacity to act in accordance with that appreciation, and to refrain from acting unlawfully.

In the present case, the defence was one of non-pathological incapacity.

Where a defence of non-pathological incapacity succeeds, the accused is not criminally liable; he may not be convicted of the alleged offence. He must be acquitted. Because he does not suffer from a mental illness, or from a defect of a pathological nature, he may not be declared a State patient either.

The appellant was an emotionally sensitive 23-year-old with the intelligence of a genius. He and his wife had married young, when she was pregnant, and had struggled financially, since he was still a student. Her parents contributed R80 per month toward their rent, and took the opportunity this afforded them to meddle in the couple's affairs. The appellant and his parents-in-law did not get along; he feared his father-in-law. Nor did things improve when the baby was born.

The parents took his wife to their farm and made arrangements, without the appellant's consent, to christen the baby. The wife did not return to the appellant afterwards, and upon reaching majority began to institute divorce proceedings.

One weekend, the appellant made arrangements with his wife to go away to his parents' home for the weekend with the child, and to some spend time together. She agreed. When he arrived at the farm to pick them up, however, she had apparently changed her mind, so he made arrangements to see his family the following week.

The appellant travelled with a loaded gun, since he was driving alone. He arrived at the farm to be told, again, that he would not be leaving with his wife and child. He went to a hotel, checked in, misspelled his name and other words on the necessary forms, and did not have dinner, although he did have rum and coke. He went back his in-laws' house and demanded to see his child. His mother-in-law told him he could not.

The appellant could recollect nothing more after this point. He was woken up the following morning in hospital, with no recollection of what he had done.

The appeal court agreed with the convictions on the first four counts, but held that, as to the fifth (the attempted murder of his child), the State had not proven beyond a reasonable doubt that the appellant had the necessary intention, in the form of *dolus eventualis*, to kill his child—especially in view of the fact that the whole object of his visit to the farm that evening had been to collect his child.

As regards to sentence, the court held that the appellant had without doubt been suffering from severe stress, and so his sentence was mitigated.

The accused was acquitted in the following cases: *S v Arnold*,^[205] *S v Nursingh*,^[206] *S v Moses*^[207] and *S v Wiid*.^[208]

S v Campher,^[209] together with *Wiid*, makes it clear that provocation may not only exclude the accused's intention to murder, but in certain extreme cases also his criminal capacity.

In *S v Potgieter*,^[210] the Appellate Division cautioned that, if the accused's version of events were unreliable, then the psychiatric or psychological evidence adduced in favour of the defence of non-pathological incapacity, which was inevitably based on the accused's version of events, would also be of doubtful validity.

Specific crimes[[edit](#)]

Crimes against the State[[edit](#)]

Treason[[edit](#)]

The common-law definition of "treason," found in *S v Banda*,^[211] is "any overt act committed by a person, within or without the State, who, owing allegiance to the State, having *majestas*," has the intention of

1. "unlawfully impairing, violating, threatening or endangering the existence, independence or security of the State;
2. "unlawfully overthrowing the government of the State;
3. "unlawfully changing the constitutional structure of the State; or
4. "unlawfully coercing by violence the government of the State into any action or into refraining from any action."

This definition would appear to be the one most frequently relied upon in South African courts.^[212]

Damage of property

Arson

A person commits arson if he unlawfully and intentionally sets fire to

- immovable property belonging to another; or
- his own immovable insured property, to claim the value of property from an insurer.

Elements

The elements of the crime are the following: (a) setting fire to (b) immovable property (c) unlawfully and (d) intentionally.

Requirements

Arson is only a particular form of the crime of malicious injury to property.^[213] The crime can be committed only in respect of immovable property:^{[214][215][216]} that is, "buildings and other immovable property."^[217] If movable property is set alight, the crime of malicious injury to property may be committed, provided that the other requirements are met. The crime is completed only at the moment that the property has been set alight.^{[218][219]} If the arsonist is caught at a stage before the property has been set alight, he is guilty of attempted arson only, provided that his conduct has, according to the general rules governing liability for attempt, proceeded beyond mere acts of preparation.^[220]

As in malicious injury to property, one cannot in principle commit arson in respect of one's own property. The courts, however, including the appellate division, in *R v Mavros*,^[221] have held that a person commits arson if he sets fire to his own property to claim its value from the insurer.^[222] In the estimation of Snyman, "It would have been better to punish this type of conduct as fraud instead of arson, but the courts will in all probability not depart from the appeal court's view."^[223]

Intention, and more particularly the intention to damage property by setting fire to it, thereby causing patrimonial harm to somebody, is also required.^{[224][225][226]} *Dolus eventualis* in this regard is sufficient.