- The allocation of marks may vary from half a mark to 10 marks per question.
- The questions asked in the assignments give you a good idea of the type of questions to be expected in the examination. **However, there are no multiple-choice questions in the examination.** The study outcomes in the study manual will also be helpful.

The following questions were taken from an old examination paper and provide further examples:

**Question 1**

X and Y go to a party. In the course of the evening X consumes an entire bottle of rum. Y notices that X is drinking too much, but nevertheless accepts X's offer to drive her home. On the way to Y's home, X loses control of the vehicle and collides at high speed with a tree. Y sustains back injuries for which she is hospitalised for a period of two weeks. Y wishes to recover her medical expenses from X.

Answer the following questions with reference to the above set of facts:

1.1 X avers that he did not act voluntarily, for purposes of delictual liability. Identify his defence and briefly discuss the merits thereof. (3)

1.2 Assume that the court finds that X had acted. X now avers that Y consented to the risk of injury. Discuss the merits of his defence. Lampert v Hefer case. (5)

1.3 Assume that X's reliance on consent to the risk of injury fails. Did X act intentionally? Briefly discuss. (3)

1.4 Assume X did not act intentionally. Did he act negligently? Briefly discuss with reference to case law. (3)

Sv Nguboane – D Intention + Negligence may present simultaneously

1.5 Assume X had indeed acted negligently. X now avers that Y had contributory intent in respect of her damage. Discuss the merits of this assertion and indicate what the effect of a successful reliance on this assertion would be. (5)

1.6 Assume that X's defence of contributory intention fails. X now avers that, since Y did not fasten her seatbelt, she was contributory negligent in respect of her own injuries. Discuss the merits of this defence and indicate what the effect of a successful reliance on this defence would be. Y not neg wrt damage causing event ie accident (6)

s 1(1)(a)

but neg ~~wrt~~ ~~bec~~ increased / damage - bec no seatbelt · f sustained more serious injuries than would've - cannot bona fide forget to wear. **[25]**

: fault wrt damage

**Question 2**

Write a short note on the role of subjective factors in the determination of wrongfulness. [5]

**Question 3**

Write notes on the general criterion for the determination of wrongfulness and two doctrines that

may be regarded as more concrete applications thereof. [10]

**Question 4**

Can a defendant rely on private defence if she kills another person in order to protect her property? Discuss with reference to case law. **[10]**

**Question 5**

"The test for negligence is an objective one." Is this statement valid? Discuss with reference to case law. Refer in your answer to the application of the negligence test to children and experts. **[10]**

**Question 6**

Discuss the importance of the decision in *S v Mokgethi* 1990 (1) SA 32 (A) in respect of factual and legal causation. (Do not discuss the facts of the case.) **[10]**

**Question 7**

7.1 Write brief notes on the determination of wrongfulness in a defamation case. (4)

7.2 Name and briefly describe (in one sentence each) the two theories that are used to justify the existence of liability without fault. (2)

7.3 What is meant when it is said that an employer is held vicariously liable for a delict committed by the employee? Explain briefly in one sentence. (1)

7.4 Name the three requirements that must be met before an employer will be held vicariously liable for a delict committed by an employee. (3)

**[10]**

We trust that you are finding this module interesting and stimulating, and we wish you every success with your final preparation for the examination.

This tutorial letter was compiled by Dr JC Knobel, Prof A Roos and Mrs L Steynberg. (Revised by Prof Roos for the second semester) Aug 2000

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# 1 COMMENTARY ON ASSIGNMENT

You are probably aware of the fact that the completion of an assignment is no longer a prerequisite for examination admission. We trust, however, that you nevertheless completed the assignment and that it proved to be a valuable exercise. Now the learning experience proceeds to a next phase. As you know, this assignment is a self-evaluation assignment. This tutorial letter contains model answers and references to the pages or paragraphs where the answers may be found. Sentences and words in square brackets **[ ]** do not form part of the model answers, but contain additional remarks which we wish to bring to your attention. Evaluate your answers with reference to the model answers and award a mark to yourself. This mark does not influence your final mark at the end of the year. The purpose of the exercise is to give you an opportunity to evaluate your own work with reference to the same marking schedule that your lecturers would have used had this assignment been an examination. We feel that this self-evaluation will be of more value to you than simply receiving a mark from us. You now have an opportunity to reconsider thoroughly what you have written, and in this way the learning experience continues. We trust that you will gain insight into the way in which we shall be evaluating your answers in the final examination.

**QUESTION 1**

State (a) the wrongfulness criterion and (b) the test for negligence respectively, and discuss the differences between them. **(10)**

**Answer:**

(a) The general criterion of wrongfulness is the *boni mores* or the legal convictions of the community. **[1]** Two more concrete applications of the *boni mores* are (i) the infringement of subjective rights, as recognised in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* [1977 4 SA 376 (T)] **[1]** and (ii) breach of a legal duty, as applied in, for instance, *Minister of Police v Ewels* [1975 3 SA 590 (A)]. **[1]**

(b) The test for negligence, according to *Kruger v Coetzee* [1966 2 SA 428 (A)] **[1]** is whether a reasonable person **[½]** in the position of the defendant/ alleged wrongdoer **[½]** would have foreseen **[½]** the possibility of harm or damage to another, **[½]** would have taken steps to prevent or limit that harm, **[½]** and whether the defendant failed to take such steps. **[½]**

Both tests are objective, and both are concerned with whether the conduct of the defendant was reasonable. Apart from the difference already mentioned, the two tests differ principally in terms of the factors that must be considered when applying the tests. When the wrongfulness criterion is applied, the courts consider all the facts and circumstances that were really present when the alleged delict was committed, and the consequences that really ensued. **[1]** When the test for negligence is applied, the courts consider all the fact and circumstances of which the wrongdoer knew, plus those the reasonable person in the wrongdoer's position would have been aware of, at the time at which the alleged delict was committed. **[1]** One can say that wrongfulness is determined on the basis of realities, and negligence on the basis of probabilities. **[1]** A further difference is that wrongfulness is said to qualify the act / conduct, whereas negligence is said to qualify the defendant / wrongdoer. **[1]**

[Neethling, Potgieter and Visser *Law of Delict* (2001) 37 *et seq*; 128 *et seq*; 153 *et seq*. Full marks can be obtained by getting 10 marks of the 11 marks indicated.]

**QUESTION 2**

In a certain town, the paved sidewalks are in a poor condition due to erosion. Several holes and furrows have developed in the sidewalks. The municipality neglects to repair the sidewalks, despite requests to this effect by several of the residents. One day Mrs M, an aged resident, inadvertently steps into a hole in the sidewalk, falls, and suffers serious injuries for which she is hospitalised for a month. Mrs M wishes to recover damages from the municipality in a delictual action. Discuss only whether the conduct of the municipality was wrongful. Refer in your answer to relevant case law.

The conduct of the municipality takes the form of an omission. Since the decision in *Halliwell v Johannesburg Municipal Council* [1912 AD 659], **[1]** the courts maintained that an omission could not be wrongful on its own, but had to be preceded by positive conduct creating a new source of danger. **[1]** This rule was known as the *omissio-per-commissionem* rule or the prior-conduct rule. **[1]** The rule was applied in several cases in which municipalities were the defendants - the so-called municipality cases. However, the rule was criticised for its unsatisfactory application by the courts. In *Regal v African Superslate (Pty) Ltd* [1963 1 SA 102 (A)] the Appellate Division held that prior conduct was not necessary for an omission to be wrongful. **[1]** However, the case concerned an application for an interdict, and not an action for damages. In *Minister van Polisie v Ewels* [1975 3 SA 590 (A)] the Appellate Division declared that prior conduct was not a prerequisite for an omission to be wrongful. **[1]** The question was whether the alleged wrongdoer had a legal duty to act, **[1]** and whether such a legal duty existed or not, had to be determined with reference to the legal convictions of the community (the *boni mores*). **[1]** Prior conduct could be a factor pointing towards the existence of a legal duty, but it was not an absolute requisite for the existence of a legal duty. **[1]** In *Van der Merwe Burger v Munisipaliteit van Warrenton* [1987 1 SA 899 (NC)] the judgment in the *Ewels* case was applied to a municipality case. **[1]**

Applying the discussed principles and case law to the given facts, we can conclude that a legal duty rested on the municipality to maintain the sidewalks in a safe condition. Accordingly, the omission of the municipality was wrongful. **[1]**

[Neethling, Potgieter and Visser *Law of Delict* (2001) 57 *et seq*. Because of the time and space limitations that will apply in an examination, only a few of the landmark cases were discussed. Bonus marks could be awarded for reference to eg *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 2 SA 256 (A); *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A); and others.]

**QUESTION 3**

Although the test for negligence is in principle uniform for all defendants, the test is adapted in the case of (a) children and (b) experts. Discuss with reference to relevant case law.

(a) In respect of children, it was held in *Jones v Santam Bpk* [1965 2 SA 542 (A)] that the criterion for negligence remains objective and uniform. **[1]** According to this approach it must first be determined whether the child met the required standard of care of the reasonable person, and, second, it must be asked whether the child was *culpae capax* (accountable). **[1]** When answering the first question, the childhood of the wrongdoer is irrelevant, but when answering the second question - concerning the wrongdoer's accountability - subjective qualities like the child's intellect, maturity, experience, insight and so forth must be taken into account. **[1]**

This approach has been criticised as follows:

(i) A reasonable-child test would be more acceptable because one cannot realistically measure a child against an adult's standard. **[½]**

(ii) It must first be determined whether a person is accountable before testing for negligence. **[½]**

In a subsequent decision in *Roxa v Mtshayi* [1975 3 SA 761 (A)] the Appellate Division followed the correct order by testing first for accountability and then for negligence. **[1]** However, in *Weber v Santam Versekeringsmaatskappy Bpk* [1983 1 SA 381 (A)] the Appellate Division confirmed the decision in the *Jones* case. **[1]** In the *Weber* case it was stated that the accountability of a child should be determined with reference to the specific situation in which he found himself, and that if this approach was implemented with insight, most of the criticism against the *Jones* case would disappear. **[1]**

(b) In respect of experts, the criterion for negligence is that of the reasonable expert in that particular field, **[1]** such as a reasonable doctor, a reasonable pilot, and so forth. A specialist cannot be measured by the standard of a general practitioner, and therefore a neurosurgeon will, for instance, be tested by a reasonable-neurosurgeon test, and not by a more general reasonable-doctor test. **[1]** [A bonus mark could be obtained by mentioning *Van Wyk v Lewis* 1924 AD 438 as authority.]

In conclusion, the test for negligence remains that of the reasonable person in the case of child wrongdoers, whereas in the case of expert wrongdoers, the test is adapted to that of the reasonable expert in that particular field. **[1]**

[Neethling, Potgieter and Visser *Law of Delict* (2001) 133 *et seq*]

**TOTAL ASSIGNMENT : [30]**

# 2 EXAMINATION

## 2.1 Examination paper

Please note the following information on the examination paper:

- ❒ The question paper is a **fill-in paper**. Spaces are provided for your answers, and you will hand in the entire paper after you have answered the questions.
- ❒ The paper is in **both English and Afrikaans**. The Afrikaans version of a question follows directly after the English version.
- ❒ The duration of the examination is **two hours**, and the paper counts **100 marks**.
- ❒ The allocation of marks may vary from half a mark to 10 marks per question.

## 2.2 A previous examination paper

The following questions were taken from a previous examination paper as examples.

### QUESTION 1

1.1 Write brief notes on the similarities and differences between breach of contract and delict. **(5)**

1.2 Write brief notes on the indirect application of the Bill of Rights to the law of delict. **(5)**

Total question 1: **[10]**

### QUESTION 2

X is involved in an accident whilst driving his car. When he regains consciousness, he has no recollection of how the accident took place. He is hospitalised, and during treatment for head injuries the doctors determine that he suffered an epileptic fit at the time of the accident. The car of Y, the other person involved in the accident, is badly damaged. Can it be said that it was an act on the part of X that damaged Y's car? Will it make a difference to your answer if X had been receiving treatment for epilepsy before the accident, but had failed to take his medicine for several days before the accident took place? Discuss. **(10)**

Total question 2: **[10]**

### QUESTION 3

In a certain town, the paved sidewalks are in a poor condition due to erosion. Several holes and furrows have developed in the sidewalks. The municipality neglects to repair the sidewalks, despite requests to this effect by several of the residents. One day Mrs M, an aged resident, inadvertently steps into a hole in a sidewalk, falls, and suffers serious injuries for which she is hospitalised for a month. Mrs M wishes to recover damages against the municipality in a delictual action. Discuss only whether the conduct of the municipality was wrongful. Refer in your answer

to relevant case law. **(10)**

Total question 3: **[10]**

## QUESTION 4

X stops at a busy filling station to have the petrol tank of his car filled up. While waiting for a pump attendant, he sees another person driving off and throwing a cigarette butt out through the car window. An explosion takes place, and the next moment there is a fire in the driveway close to one of the petrol pumps. X realises that the cigarette butt has ignited some petrol that has been spilt there. Having a quick look around, X sees a hosepipe which is usually used to wash cars. He opens the tap widely and sprays water on the fire. However, the water does not extinguish the fire. Rather, the burning petrol starts to float on top of the water, and is driven by the force of the water stream from the hosepipe to a position under a car belonging to Y, another customer at the filling station. Y's car catches fire, and by the time the pump attendants have managed to extinguish the fire with foam fire extinguishers, the car is badly damaged. Y wants to recover the damage to his car from X. Answer questions 4.1 and 4.2 in respect of this set of facts.

4.1 Was X's conduct wrongful? Discuss with reference to the test(s) for wrongfulness and a possible defence that X might want to raise. **(10)**

4.2 Now assume that X had indeed acted wrongfully. Was X negligent? Discuss with reference to the test for negligence and a possible defence that X might want to raise. **(10)**

Total question 4: **[20]**

## QUESTION 5

5.1 When is a child accountable? Discuss. **(4)**

5.2 How is the negligence of a child wrongdoer determined? Discuss. **(6)**

Total question 5: **[10]**

## QUESTION 6

X gives Y a lift in her car. Whilst driving, X talks continuously on her cell-phone, and also touches up her make-up. She collides with a tree. Y, who had not fastened her seat-belt, is injured in the accident. She is hospitalised and incurs hospital costs of R10 00. It transpires that if Y had fastened her seat-belt, her hospital costs would have totalled R6 000. Y institutes a damages claim of R10 000 against X. X approaches you for legal advice. Advise X, referring to applicable legislation and case law. (Assume for the purpose of your answer that the provisions of the Road Accident Fund are not applicable to this set of facts.) **(10)**

Total question 6: **[10]**

## QUESTION 7

7.1 "X's conduct is a condition without which Y's damage would never have arisen." Discuss this statement critically. **(4)**

7.2 What is the criterion to determine legal causation? Discuss. **(6)**

Total question 7: **[10]**

**QUESTION 8**

8.1 Define private defence. **(2)**

8.2 Define intent. **(2)**

8.3 Define damage. **(2)**

8.4 What is meant by the "once-and-for-all" rule? **(2)**

8.5 What is meant by the "sum-formula approach"? Explain briefly. **(2)**

Total question 8: **[10]**

**QUESTION 9**

9.1 Name four specific forms of damnum iniuria datum. **(2)**

9.2 How do the courts determine whether defamatory statements are wrongful? Discuss. **(4)**

9.3 Name the requirements for the actio de pauperie. **(4)**

Total question 9: **[10]**

**TOTAL FOR PAPER: [100]**

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We trust that you find your study of this module interesting and stimulating, and wish you every success with your final preparation for the examination.

This tutorial letter was compiled by Prof JC Knobel

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