



Introduction to CRIMINAL LAW

CRW1501

UNISA



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Introductory lesson

Literature and methods of study

1. GENERAL

Welcome to the first module in Criminal Law, CRW1501. We trust that you will enjoy studying this module. Criminal law is an interesting and topical law subject to study. Our aim is to assist you as much as we can in mastering this module. In this introductory lesson, we draw your attention to the subdivision of criminal law into two modules and provide some advice on how to study the material.

Please refer to the tutorial letters, due dates and log on to myUnisa frequently (at least once a week).

2. COURSE OUTCOMES

This course should enable you to:

- **Identify and describe the arguments that may serve as a justification for convicting and sentencing a person for a crime.**
- **Analyse and solve criminal law-related problems by identifying, describing and applying the relevant legal principles.**
- **Understand the status of customary or indigenous criminal law in relation to South African criminal law.**

3. SUBDIVISION OF CRIMINAL LAW INTO TWO MODULES

The CRW1501 module deals with the general principles of criminal law, while the module CRW2603 deals with specific crimes. You will not understand the content of the CRW2603 module unless you have a proper understanding of the general principles of criminal law discussed in the CRW1501 module. Therefore, you are advised to study and pass CRW1501 before you start studying CRW2603.

4. LITERATURE

There are **no prescribed or recommended books** for this module. These lessons (units) are sufficient for the purposes of studying the CRW1501 module. Therefore, you do not need to buy any other textbooks. You will, however, notice that throughout the lessons we refer to Snyman's textbook on criminal law. **We do this for reference and further reading purposes only.**

The reference for this textbook is as follows:

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoorntje) (LexisNexis, Durban 2020)

Whenever you see “Snyman’s Criminal Law” under the heading of a paragraph, it means that the content is based on the textbook *Snyman’s Criminal Law* as referred to above. The numbers in brackets (e.g. 5–10) refer to the page numbers in this textbook.

5. METHOD OF STUDY

● ***Subdivision of study material in the lessons***

You will notice that the material is subdivided into 11 lessons. A lesson is a unit or part of the syllabus that deals with a certain topic. You can divide the time you have at your disposal (from the time you enrol until the time you write your examination) into 11 timed lessons and then study one lesson per time unit. This is a 12-credit module, which means 120 notional hours are required for you to study this module effectively. You should therefore devote about five (5) to ten (10) hours of active study to each lesson. We also suggest that you make your own summary of each lesson for revision purposes.

● ***Content of lessons***

Each lesson is normally subdivided as follows:

- A list of **learning outcomes** that you should keep in mind when studying the lesson.
- A short paragraph serving as an **introduction or background** to the discussion that follows.
- The actual **exposition of the topic covered** in the lesson; this makes up the bulk of the lesson.
- Several **activities** which take the form of short-answer questions, multiple-response questions, quizzes and problem questions. You should preferably first try to answer these activities yourself before looking at the answers in the feedback section. If you try to learn the answers, without doing the activities yourself, you will not do well in this module. You must engage with the study material and do the activities yourself; only use the feedback to assess your own answers.
- A **glossary** containing a list of important words and phrases from foreign languages (mostly latin), with their translations into english and isizulu. Please note that you will also have access to a criminal law multilingual glossary on the myunisa semester module site. This multilingual glossary includes a list of terms that are frequently encountered in criminal law and have been translated from english into afrikaans, isizulu and sepedi.
- A concise **summary** of the most important principles set out in the topic of the lesson.
- A **discussion forum** at the end of each lesson which will be offered online, and allow you to engage with other students studying this module.
- A **url or link** to a youtube video which is based on the lesson.

- **What the icons represent**

An icon is a small picture or other graphic symbol that conveys a certain message. We use the following icons in this study guide:



This icon means: "Beware of the following typical mistake often made by students!"



This icon means: "Note the following hint or advice on how to study a certain part of the material or how to answer a question in the examination!"

If a sentence or sentences are printed against a grey-coloured square background (also called a "screened block"), the sentence or sentences contain a definition that you should know so well that you will be able to write it down word for word without referring to your study guide. The last icon (the screened block) refers to the definitions you should know for the examination, because we expect you to know the definitions of certain concepts and crimes for the examination. These definitions usually consist of only one sentence (although the sentence may, admittedly, sometimes be rather long). **By "know", we mean that you must be able to write down the definition without reference to your study guide, almost exactly as it appears in the study guide.** The best way would be to memorise the definition, but you may also give us your own version of it. However, experience has taught us that students who do not memorise the definition, but rather try to paraphrase it, often lose marks because their version omits important information.

To assist you in identifying the definitions that you should know for the examination (as explained above), we have "screened" them off so that they are more conspicuous. We will therefore not warn you repeatedly that you should know certain definitions well for the examination; simply watch out for the screened block. When you see it, you should learn the definition appearing in it so well that you will be able to rewrite it almost word for word without referring to your study guide.

- **Important advice on how to study**



We would like to give you a brief "lecture" on how to study this module.

- You need to work diligently to pass this module. Students of criminal law often underestimate the subject because it deals with human actions that are real and often dramatic, such as stealing, killing, raping, kidnapping and damaging property. **We advise you not to underestimate this subject.** Some of the concepts in criminal law are among the most difficult to master in the field of law. Do not be misled into thinking that because you regularly read about murder, rape, robbery, or other crimes in the newspapers, you can read the lessons superficially. In the examination, too, you cannot rely only on the type of broad general knowledge that laypersons have of criminal law.

You need to devote some time each week to engage with the study material by reading to understand it. Underline key phrases and then make summaries in the form of tables or mind maps. Thereafter, you need to consolidate your learning by doing the activities and then assessing your answers.

- Try to **understand** the principles of criminal law, such as causation, private defence, and intention, so that you can apply them to actual cases. Merely memorising page upon page of the lessons, without understanding the principles underlying the topics discussed, is of little use. Only a proper understanding of the basic principles of criminal law will enable you to answer difficult multiple-choice questions (or MCQs) and problem questions satisfactorily. You will encounter a few problem questions and multiple-choice questions in the weekly discussion forums on the myUnisa module site. A problem question is one in which you are not asked directly to discuss a particular topic, but in which we give you a set of facts and expect you to state whether one of the persons mentioned in the set of facts has committed a particular crime, or whether he or she can rely on a particular ground of justification. You must also be able to substantiate your answers with theoretical knowledge, which you will know only by learning the required facts and principles.
- A sound piece of advice is that you should not move on to a new principle until you have mastered the preceding one on which it is based. The study material is sequential and, like a building, is built from the ground up; therefore, you have to learn the foundations (basics) and then build upon these as you reach for new heights. The study material has been “scaffolded” or structured to guide you in the most effective way. Taking shortcuts and leaving out sections of the study material as you attempt to “spot” questions will backfire and prevent you from climbing the ladder of success in mastering this module.
- We advise you to **make your own notes** or **summaries** while studying the specific topics.
- Although it is important that you understand the principles underlying a particular topic, a knowledge of the principles (or framework of a topic) **only** is insufficient; you also need to state **some particulars** regarding the principle (such as **illustrations of its application**, the **authority** on which these principles are based or possible **exceptions** thereto). You need to know your work very well and then you also have to apply the appropriate knowledge to answer the required questions in detail. That is why practising answering questions is so important, as is the self-assessment thereof.
- Students often ask us how important it is to remember the **names of cases**. Let’s clarify this matter at the outset: It would be impossible to memorise the names of all cases referred to in the lessons and we do not expect you to do so. However, it is a fact that cases count among a law student’s best friends, and since it is a good policy not to forget the names of your best friends, we would advise you to concentrate on remembering the names of the **most important, leading** cases. As we progress through the course, we will draw your attention to some of the most important decisions.



- However, please do **not** waste valuable time by trying to memorise the case references. A case reference is the set of dates, letters and numbers following the name of the case, for example **1996 (2) SA 270 (A)**. In this reference, 1996 refers to the year in which the judgment was reported (i.e. published); the (2) refers to the volume number of the particular year; and the 270 is the page in the book where the judgment begins. It is absolutely unnecessary to try to memorise these numbers and letters, and we do not expect you to know them. The lecturers' primary aim in the examination is not only to test your memory, but especially your comprehension and insight. Bear in mind that proper comprehension and insight are also based on knowledge of the facts, so you must start by learning the facts.

- Please bear in mind that these tutorial letters form an important part of the study material, which you are required to master; sometimes a tutorial letter may even amend the lessons. So always read your tutorial letters and make the required notes.
- You must study all the lessons, including the topics that are discussed towards the end. Your knowledge of some of these last topics may make the difference between failing and passing the examination! So, we are warning you not to neglect the **last portions of the study guide**. We often find that in the examination, students do reasonably well in questions based on topics that are discussed in the first few lessons, but they often prove to have only a very superficial knowledge – or none at all – of topics discussed towards the end. This shows us that some students do not leave sufficient time to finish studying ahead of the examination.

- ***General principles and specific crimes***

A study of criminal law comprises a study of both the general principles of criminal law and the most important specific crimes. By “general principles of criminal law”, we mean those rules that normally apply to all, or at least most, crimes. Examples include rules about the meaning of concepts such as intention or negligence, or rules about when an accused person may rely on defences such as insanity, intoxication, provocation or self-defence.

A study of the “specific crimes”, on the other hand, comprises an analysis of the different specific crimes by identifying and discussing the different requirements applicable to each specific crime.

In this module, CRW1501, we discuss only the general principles of criminal law. In the second module in Criminal Law, CRW2603, we discuss the most important specific crimes, such as murder and culpable homicide. However, in the first module, these two crimes are defined and referred to at times as examples to illustrate the general principles. The reason for this is that the distinguishing factors between these two crimes are intention and negligence. These two crimes are used to illustrate the difference between crimes requiring intention and those requiring negligence. To follow the discussion of the general principles from the beginning, it is therefore necessary to know what the definitions of these two crimes are.

Murder is the unlawful, intentional causing of the death of another human being.

Culpable homicide is the unlawful, negligent causing of the death of another human being.

The only difference between these two crimes, therefore, is that whereas intention is required for murder, negligence is required for culpable homicide.

Hint: You are required to learn the definitions of **murder** and **culpable homicide**.

- **Abbreviations**

- In the course of the lessons, we will refer to your prescribed textbook as Snyman's *Criminal Law*. In the lessons, all references to *Snyman's Criminal Law* are to the **7th edition** of this book (2021).
- With regard to the **mode of citation** of cases, the following method is applied: In accordance with modern usage, we do not cite the full official name of cases, for example *S v Williams en 'n Ander* 1970 (2) SA 654 (A), but simply the name, followed by the case reference: *Williams* 1970 (2) SA 654 (A). This is the modern "streamlined" method of citing cases.
- In the discussions that follow, we will often refer to the perpetrator or accused person simply as **X**, and to the complainant or victim of the crime as **Y**.
- We often use the Latin words *supra* and *infra*. *Supra* means "above" and *infra* means "below".

- **Language: equal treatment of genders**

In our discussions in the lessons, we try to adhere to the principle of equal treatment of the genders. We do this in the following way: In lessons beginning with even numbers (e.g. 2, 4, 6), the female form is used, while in all lessons beginning with odd numbers (e.g. 1, 3, 5), the male form is used. There are necessarily certain exceptions to the rule. In cases such as the following, we do **not** change the genders: first, in the descriptions of sets of facts in reported decisions; secondly, where we quote legislation (which, for the most part, is drawn up in the masculine form directly; and thirdly, in the explanatory notes to existing drawings (which, for practical reasons, unfortunately cannot be changed) depicting males.

GLOSSARY

TERM	ENGLISH	ISIZULU
<i>supra</i>	above	<i>ngenhla</i>
<i>infra</i>	below	<i>ngezansi</i>

Learning unit 1

Introductory topics



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Describe the history and sources of south african criminal law.
- Outline the status of customary or indigenous criminal law in south africa.
- Broadly outline the four elements of criminal liability and the logical sequence of investigation into these elements.
- Recognise or describe what the four general elements of, or requirements for, criminal liability are.
- Differentiate between crimes and delicts.

1.1 HISTORY OF SOUTH AFRICAN CRIMINAL LAW

(Snyman's Criminal Law 6-8)

- We are not going to discuss the history of South African criminal law in detail. The historical overview below will provide you with a foundation to work from, as it provides the origin and, hence, the basis of criminal law. In this study guide we emphasise certain important legal aspects, with a focus on the general principles of criminal law.

The term “the common law of South Africa” refers to those rules of law not contained in an Act of parliament or in legislation by some other (subordinate) legislative body.

The rules of substantive criminal law – that is, the rules that we will discuss in this course – are, for the most part, not contained in any Act of parliament. Stated differently, we can say that our criminal law – including the general principles of our criminal law – is not **codified** (i.e., summarised in a “code”). Our criminal procedure, on the other hand, that is, those rules stipulating how an accused must be brought to trial and how the trial must proceed, is codified in the Criminal Procedure Act 51 of 1977. There is no Act of parliament stating that a person may not murder or steal or rape, or stipulating when an accused person may successfully rely on defences such as intoxication or youth or provocation. In order to know what the law is regarding crimes or defences such as these, we must turn to the common law. Next, we will briefly explain what the common law is.

The **common law of South Africa is Roman-Dutch law**. By Roman-Dutch law, we mean the system of law that originated in Rome about 2 500 years ago, then spread to Western Europe during and after the Middle Ages. Roman law was received in the Netherlands from the late 13th century up to the end of the 16th century and was applied after 1652 in the Cape by the officials of the Dutch East India Company. It was later accepted and

applied in all those colonies and regions of Southern Africa that formed the Union of South Africa in 1910.

The most important sources of Roman-Dutch criminal law are the works of such eminent jurists as Damhouder, Matthaeus, Voet, De Groot, Huber, Van Leeuwen, Van der Linden, Moorman, Carpzovius and Van der Keessel. They lived and wrote their books between the 16th and 18th centuries.

After the annexation of the Cape by England in the 19th century, English law did not replace Roman-Dutch law. Instead, English law exerted a considerable influence on our Roman-Dutch common law, particularly in the area of specific crimes. The influence of English law on the general principles of criminal law in South Africa is less evident. Apart from the influence of English law, our Roman-Dutch criminal law was further amended and supplemented by legislation.



ACTIVITY 1.1.1 (Short-answer question based on the history of SA criminal law)

Read the question below and then write down your answer.

Explain the meaning of the term “common law”. (4)

Answer:

The term “the common law of South Africa” refers to those rules of law not contained in an Act of Parliament or in legislation by some other (subordinate) legislative body. (1)

The common law of South Africa is Roman-Dutch law. By Roman-Dutch law we mean that system or law which originated about 2 500 years ago in Rome, spread during and after the Middle Ages to Western Europe, was received from the late 13th up to the end of the 16th century in the Netherlands, applied after 1652 at the Cape by the officials of the Dutch East India Company, and which was later accepted and applied in all those colonies and regions of Southern Africa which formed the Union of South Africa in 1910. (2)

After the annexation of the Cape by England, English law exerted a considerable influence on our common law. Roman-Dutch criminal law was also considerably influenced by English criminal law. Our common law was further amended and supplemented by legislation. (1)

1.2 THE SOURCES OF OUR CRIMINAL LAW

(Snyman’s Criminal Law 5–9)

Note: You are required to know and understand the meaning of the following legal terms printed in **bold**.

Legislation: If there is an Act (legislation) dealing with a specific crime or other topic relevant to criminal law, the courts must apply such Act. However, in the discussion under the previous heading, we pointed out that the most important crimes in our law are not

set out in any legislation; rather, they form part of our common law. As far as legislation is concerned, there is one piece of legislation that towers above all others in importance, namely the **Constitution of the Republic of South Africa, 1996**. Chapter 2 of the Constitution contains a **Bill of Rights**.

- All rules of law, irrespective of whether they are contained in legislation or in common law, must be compatible with this Bill of Rights.
- If a rule is incompatible with the Bill of Rights, it may be declared null and void.
- Among the rights set out in the Bill of Rights are the following:
 - the right to equality before the law (s 9)
 - the right to life (s 11)
 - the right to privacy (s 14)
 - the right to freedom of expression (s 16)
 - the right to freedom of movement (s 21)
 - the right to a fair trial (s 35)

In the course of our exposition of the rules of criminal law, we will refer to the effect of some of these rights from time to time.

The rules of common law: We have already explained the meaning of the term “common law”. The contents of the common law can be found in the primary sources of the common law, that is, **the writings of the Roman-Dutch authors** that we have referred to above.

Case law: The role of our courts in describing and developing our criminal law is extremely important. Since South Africa follows the principle of judicial precedent, a lower court is, in principle, bound to follow the interpretation placed upon a law by a higher court. If a practitioner wishes to find the common law of a particular point of law, it is seldom necessary to refer to the writings of the Roman-Dutch writers that we have referred to earlier because all the most important rules of common law have found their way into the reported (i.e., published) law reports. The latter is referred to as our “**case law**”. We will elaborate on this later.



ACTIVITY 1.2.1 Multiple-response question based on the sources of our criminal law)

Read the question below and then choose the correct options.

What are the three sources of South African criminal law? [3]

Answer:

- (A) **Civil law**
- (B) **Foreign law**
- (C) **Legislation (correct)**
- (D) **Common law (correct)**

1.3 CUSTOMARY (OR INDIGENOUS) CRIMINAL LAW

(Snyman's Criminal Law 18-22)

One of the effects of the colonial period in South Africa is that customary or indigenous laws which were considered as incompatible with the European concepts of justice, morality or public policy were “filtered” out. Ever since the colonial period therefore, customary or indigenous laws have always been judged according to a Western system of values.

One of the difficulties in accessing customary law is that it is largely an unwritten or oral system of law. Efforts from the colonial era to reduce customary law to writing in the form of codes have been unsuccessful since such codes changed the form and content of unwritten laws and tended to overgeneralise them. In other words, very specific and localised rules of customary law, which only applied to certain tribes, were generalised as applicable to all tribes.

A further problem relating to customary law is that there is no consensus between the “official” customary law that was reduced to writing in codes and in the records of anthropologists and lawyers, and the “non-official” customary law which is lived and practised by the people and applied in informal and traditional tribunals.

When it comes to criminal law, unique challenges exist since there is no clear distinction between crimes and delicts in customary criminal law. Customary criminal law is also based on duty whereas the national criminal law is based on rights. In the national criminal law, the attribution of blame or fault is based on observable facts. In customary criminal law, on the other hand, blame is not always based on observable facts, but could consider supernatural causes of harm.

Further differences also exist between the national criminal law and customary law. In the national criminal law, crimes must be defined precisely and clearly in terms of the constitutional principle of legality. A similar principle does not, however, exist in customary criminal law. Moreover, procedural safeguards which exist in the national criminal law, such as the presumption of innocence and the right to legal representation, have no equivalents in customary criminal law.

Despite these differences between the national criminal law and customary law, the South African Constitution recognises customary law (see s 21(1) of the Constitution). South African courts must apply customary law where it is applicable and do so subject to the Constitution (s 21(3) of the Constitution).

Recent case law has provided some examples of practices that were alleged to form part of customary law that were held to be incompatible with the Constitution.

In the case of *Dalindyebo* 2016 (1) SACR 329 (SCA), the paramount chief of the *abaThembu* tribe appealed his conviction on several charges of attempted murder, culpable homicide and assault which flowed from “disciplinary measures” that he had imposed on his subjects. While the court recognised the customary law principle which demanded that a chief must maintain law and order and protect his people, he still had to have due re-

gard for their dignity. The court held that the chief's conduct could not be condoned in terms of the South African Constitution. This case illustrates that despite the recognition of customary law by the South African Constitution and our courts, it is still subservient to the Constitution.

In the case of *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (2) SACR 367, the court confirmed that the Constitution recognises customary law as an independent and original source of law. However, the court found that customary law needed to be developed and adjusted to align it with the Constitution and the Bill of Rights.

Despite the recognition of customary law by our Constitution and our courts, principles of customary law must conform to constitutional principles and the rights enshrined in the Bill of Rights.



ACTIVITY 1.3.1 (Short-answer question based on customary or indigenous criminal law).

Read the question below and then write down your answer.

Why is customary law difficult to access? Explain.[3]

Answer:

Customary or indigenous law is difficult to access because:

It is largely an unwritten or oral system of law. (1)

Written codes from the colonial era changed the form and content of unwritten laws and tended to overgeneralise them. (1)

There is no consensus between "official" customary law that was reduced to writing in codes and in the records of anthropologists and lawyers, and the "non-official" customary law which is lived and practised by the people and applied in informal and traditional tribunals. (1)

1.4 THE ONUS OF PROOF IN CRIMINAL CASES

For the benefit of those of you who are just beginning your legal studies, we would like to provide a brief explanation of the term "onus of proof in criminal matters". The general rule in criminal matters is that the onus (burden/duty) is on the state (i.e. the prosecution or state prosecutor) to prove the accused's guilt beyond reasonable doubt. Put differently, an accused is presumed to be innocent until the state has succeeded in proving his or her guilt beyond reasonable doubt. The state must therefore prove that the accused's conduct and state of mind complied with all the requirements (or "elements") of the crime charged. Section 35(3)(h) of the Bill of Rights in the Constitution expressly provides that every accused has a right to be presumed innocent. There are, however, exceptions to the general rule that the onus of proof rests on the state to prove all the elements of the crime. In the Law of Evidence module, the term "onus of proof" will be explained in detail.

All of this means that a student will be mistaken if, in writing an assignment or examination answer, he or she alleges the following: "The accused must prove that he did not have the intention to commit the crime." In principle, the accused need not prove anything; it is the state that has to prove that the accused has committed the crime. It would also be incorrect to allege that the court must prove a certain requirement of liability. Neither the accused nor the court has to prove X's guilt; it is the state (prosecution) that has to prove it.



ACTIVITY 1.4.1 (Quiz based on the onus of proof in criminal cases)

Read the following statement and then choose the correct option from the list of options provided (either A, B, C or D):

The general rule in criminal matters is for the state to prove the accused's guilt:.....

- (A) on a balance of probabilities
- (B) beyond reasonable doubt
- (C) on a balance of doubt
- (D) beyond reasonable probability

Answer:

Correct option: B

1.5 CRIMINAL LIABILITY: A SUMMARY

1.5.1 General

The discussion that follows may be viewed as a very concise summary of the first part of the study guide. When investigating the various crimes, we find that they all have certain characteristics in common.

Before a person can be convicted of any crime, the following requirements must be satisfied:

- The very first question to be asked in determining somebody's criminal liability is whether the type of conduct forming the basis of the charge is recognised in our law as a crime. A court may not convict a person and punish him merely because it is of the opinion that his conduct is immoral or dangerous to society, or because, in general terms, "the person deserves" to be punished. On the contrary, it must be beyond dispute that X's alleged type of conduct is recognised **by the law** as a crime. This obvious principle is known as the "**principle of legality**".

Although this requirement must be borne in mind, it is never regarded as an element of a crime in the sense that the accused, by his conduct and subjective attributes, must comply with this requirement. This consideration is emphasised by the fact that in more than 99 per cent of criminal cases, the accused is charged with a crime that is so well known (e.g., murder, culpable homicide, or theft) that the court will not waste its time investigat-

ing whether there is such a crime in our law as the one with which the accused is being charged. Only in exceptional cases is it necessary for the court to study, for example, a statute in order to ascertain whether what the accused is charged with really constitutes a crime. This is another reason why the principle of legality is not regarded as an “element” of a crime.

We will now proceed to consider the four elements of each crime.

1.5.2 The four elements of criminal liability

The four elements of criminal liability are:

- the act or conduct
- compliance with the definitional elements of the crime
- unlawfulness
- culpability

The four elements of criminal liability will be examined in more detail below.

(1) Act or conduct

Assuming that the law regards the particular conduct of person X as a crime, the first step in enquiring whether X is criminally liable is to enquire whether there was conduct on the part of X. By “conduct”, we mean an act or an **omission. Since the punishment of omissions is more the exception than the rule, this requirement of liability is mostly referred to as the “requirement of an act”.**

The word “act”, as used in criminal law, does not correspond in all respects with the ordinary everyday meaning of this word; in particular, it should not be regarded as being synonymous with a muscular contraction or bodily movement. The word “act” should rather be treated as a technical term that is wide enough in description to include an **omission to act**, in certain circumstances.

For the purposes of criminal law, conduct can lead to liability only if it is voluntary. Conduct is voluntary if X is capable of subjecting his bodily or muscular movements to his will or intellect. For this reason, the bodily movements of, for example, a person who is sleepwalking are not considered by the law to amount to an “act”.

An omission – that is, a failure by X to act positively – can lead to liability only if the law imposed a duty on X to act positively in those particular circumstances and X failed to do so.

(2) Compliance with the definitional elements of the crime

The next general requirement for criminal liability is that X’s conduct must **comply with the definitional elements of the crime** in question.

What does “the definitional elements of the crime” mean? It is the concise definition of the type of conduct and the circumstances in which that conduct must take place in

order to constitute an offence. By looking at these definitional elements, we are able to see how one type of crime differs from another. For example, the definitional elements of the crime of robbery are “the violent removal and appropriation of movable corporeal property belonging to another”.

Each particular offence has unique requirements. A study of the particular requirements of each separate offence is undertaken in the second module CRW2603. The requirement for liability with which we are dealing here is simply that X’s conduct must comply with, or correspond to, the definitional elements. In other words, X’s conduct must **fulfil** the definitional elements.

(3) Unlawfulness

The mere fact that the act complies with the definitional elements does not necessarily mean that it is unlawful in the sense in which this word is used in criminal law. If a policeman gets hold of a criminal on the run by knocking him to the ground in a tackle, his act is not unlawful, and the policeman will therefore not be guilty of assault, despite the fact that his act complies with the definitional elements of the crime of assault.

“Unlawful”, of course, means “contrary to law”, but “law” here means not merely the rule contained in the definitional elements, but the totality of the rules of law, and this includes rules that, in certain circumstances, allow a person to commit an act that is contrary to the “letter” of legal prohibition or norm. In practice, there are a number of well-known situations where the law tolerates an act that infringes the “letter” of the definitional elements. These situations are known as grounds of justification. Well-known grounds of justification are private defence (which includes self-defence), necessity, consent, and official capacity. In the example above, the act of the policeman is justified by the ground of justification known as official capacity.

(4) Culpability

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

The culpability requirement comprises two questions or “sub-requirements”, namely:

- **criminal capacity**
- **intentional or negligent act**

Each of the above will be clarified next.

The first of these sub-requirements is that of **criminal capacity** (often abbreviated merely to “capacity”). This means that at the time of the commission of the act, X must have had certain mental abilities. A person cannot legally be blamed for his conduct unless he is endowed with these mental abilities. The mental abilities X must have are:

- (1) the ability to appreciate the wrongfulness of his act (i.e. to distinguish between “right” and “wrong”) and
- (2) the ability to act in accordance with such an appreciation

Examples of categories of people who lack criminal capacity are mentally ill (or “insane”) persons and young children.

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

To briefly summarise, we can say that the four general requirements for a crime are the following:

- (1) **conduct**
- (2) that **complies with the definitional elements of the crime**
- (3) and is **unlawful**
- (4) and **culpable**

The following section deals with the sequence of the investigation into the presence of the elements of liability.

1.5.3 Sequence of investigation into the presence of elements of liability

It is important to understand that the investigation into the presence of the four requirements for, or elements of, liability set out above must follow a certain sequence (i.e., the order of one following after another), namely the sequence in which the **requirements for the presence of the elements of liability were set out above**. If the investigation into whether there was (voluntary) conduct on the part of X reveals that there was, in fact, no such conduct, it means that X is not guilty of the crime in question and the matter is concluded. It is then unnecessary to investigate whether the further requirements, such as unlawfulness and culpability, have been complied with.

An investigation into whether the conduct complied with the definitional elements is necessary only when it is clear that the conduct requirement has been complied with. Again, only if it is clear that the conduct has complied with the definitional elements is it necessary to investigate the question of unlawfulness, and only if the latter requirement has been complied with is it necessary to investigate whether X’s act was also culpable. An inquiry into a later requirement in terms of the sequence outlined above, therefore, presupposes (assumes) the existence of the previous requirements. The following analogy, illustrated in figure 1, explains the sequence of the requirements for the presence of elements of liability.

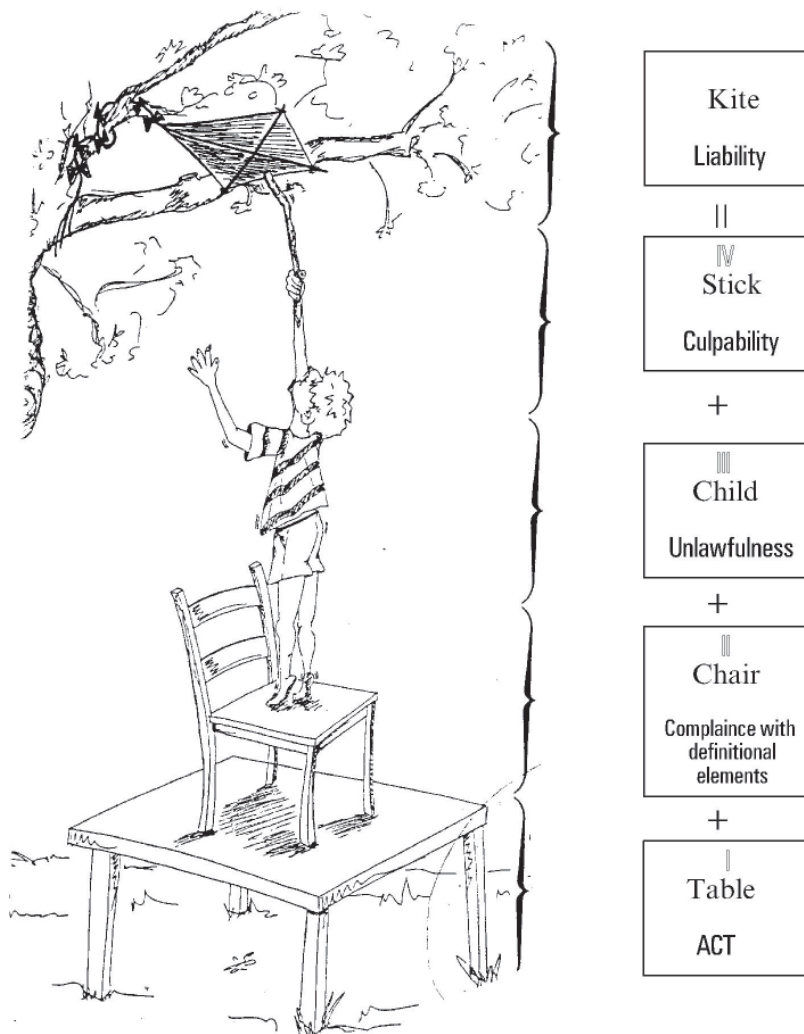


Figure 1.1: How a boy whose kite got stuck high up in the branch of a tree manages to retrieve it

The basic rule relating to the sequence of the requirements may be illustrated by means of the story of a boy whose kite got stuck high up in the branch of a tree. The boy was much too short to reach that branch of the tree. So, in order to retrieve the kite, he

- first moved a table to a position just beneath the branch;
- secondly, he placed a chair on the table;
- thirdly, he climbed onto the chair, armed with a long stick; and
- fourthly, he reached out with the stick to poke the kite and loosen it from the branch; in this way he succeeded in freeing the kite from the branch.

The inquiry into criminal liability proceeds along similar lines. Drawing the conclusion that a person is guilty of a crime is like retrieving the kite from the tree. The kite represents criminal liability.

- The table (the first or bottom agent) represents the requirement of an act.
- The chair (second agent) represents the requirement that there must be compliance with the definitional elements.

- The boy (third agent) represents the unlawfulness requirement.
- The stick (fourth agent) represents the culpability requirement.

Successfully reaching out with the stick towards the kite presupposes the existence of all four objects or “agents” needed to get to it. If the first “agent”, namely the table, cannot be found or does not exist, it is to no avail that, for instance, the fourth agent (the stick) is waved about in an effort to reach the kite. If we apply this metaphor to the principles of criminal liability, it follows that it is a waste of time to inquire whether X had the **intention** to commit an offence (fourth requirement) if it transpires that there was not even an **act** (first requirement) on his part.

Thus, the inquiry must always start from the bottom and proceed upwards, not the other way around. Every “agent” (table, chair, boy, stick) rests upon that or those “agents” below it (except, of course, the one right at the bottom, namely the table). The moment it becomes clear that any one of the four elements is missing (that is, has not been complied with), it follows that there is no criminal liability (that is, the kite cannot be retrieved) and it becomes unnecessary to inquire into the existence of any possible further elements or requirements (that is, “agents” that are above them).

Let’s now test your understanding of these concepts in the following activity.



ACTIVITY 1.5.4 (Multiple-response question based on the elements of criminal liability and the sequence of investigation into the presence of criminal liability)

Read the following facts and answer the questions that follows:

Assume X is charged with having assaulted Y. The evidence relied upon by the prosecution to prove the charge reveals that one night, while X was sleepwalking, he trampled on Y, who was sleeping on the floor. Has X committed assault? Choose the correct answer from the list of options below:

- (A) Yes. Since X was sleepwalking, his act was voluntary.
- (B) No. Since X was sleepwalking, his bodily movements were not subject to his will.
- (C) Yes. Since X was sleepwalking, he voluntarily assaulted Y.
- (D) No. Since X was sleepwalking, his act was not voluntary.

Correct answer: D



ACTIVITY 1.5.5 (Multiple-response question based on criminal liability: a summary)

What are the four elements of criminal liability?

[4]

Answer:

- (A) common law

- (B) the act or conduct (correct)
- (C) compliance with the definitional elements of the crime (correct)
- (D) unlawfulness (correct)
- E) culpability (correct)
- (F) reasonableness

1.6 CRIMES AND DELICTS

(Snyman's Criminal law 3-5)

Both crimes and delicts are unlawful, blameworthy acts or omissions. However, delicts are unlawful acts or omissions which result in damage to another person and a right on the part of the injured person to compensation. The injured party may institute an action for damages against the offender. A crime, on the other hand, is unlawful, blameworthy conduct which is punishable by the state.

The most important differences between a crime and a delict can be summarised as follows.

Table 1.6.1: Differences between a crime and a delict

	Crimes	Delicts
1	Directed against public interests.	Directed against private interests.
2	Form part of public law.	Form part of private law.
3	State prosecutes.	Private party institutes action.
4	Result in the imposition of punishment by the state.	Result in the guilty party being ordered to pay damages to the injured party.
5	State prosecutes perpetrator, irrespective of the desires of the private individual (i.e. the victim).	Injured party can decide whether or not he wishes to institute action and claim damages.
6	Trial governed by rules of criminal procedure.	Trial governed by rules of civil procedure.



ACTIVITY 1.6.1 (Quiz based on Crimes and delicts)

Read the following statement and then choose the correct option from the list of options provided (either A, B, C or D):

Both crimes and delicts are unlawful, blameworthy acts or ...

- (A) incidents
- (B) omissions
- (C) doubts
- (D) probabilities

Correct option: B

Below is a summary of lesson 1.

1.7 SUMMARY

History of South African criminal law

- “The common law” refers to those rules of law not contained in an Act of parliament or in rules of legislation by some other (subordinate) legislative body.
- The common law of South Africa is Roman-Dutch law.
- After the annexation of the Cape by England in the 19th century, English law exerted a considerable influence on our Roman-Dutch common law, particularly in the area of specific crimes.

Sources of South African criminal law

The three sources of South African criminal law are:

- legislation
- common law
- case law

Customary or indigenous criminal law

Customary law is difficult to access because:

- It is largely an unwritten, oral system of law.
- Efforts to reduce customary law to writing have not been successful because of a tendency to overgeneralise.
- There is also a difference between the “official” customary law and the actual, lived customary law.

Customary criminal law differs from the national criminal law in the following respects:

- There is no clear distinction between crimes and delicts in customary criminal law as there is in the national criminal law.
- Customary criminal law is based on duty whereas the national criminal law is based on rights.
- In customary criminal law, blame could be based on facts that are not observable, such as supernatural causes of harm, whereas in the national criminal law, the attribution of blame or fault is based on observable facts.
- In the national criminal law, crimes must be defined precisely and clearly in terms of the constitutional principle of legality. A similar principle does not, however, exist in customary criminal law.
- Procedural safeguards which exist in the national criminal law, such as the presumption of innocence and the right to legal representation, have no equivalents in customary criminal law.
- Customary law enjoys constitutional recognition and courts must apply customary law where it is applicable, provided it is not in conflict with the Constitution and the Bill of Rights.

Criminal liability

- The four elements of criminal liability are:
 - (a) act or conduct
 - (b) compliance with definitional elements
 - (c) unlawfulness
 - (d) culpability
- The investigation into the presence of the four elements of liability follows a specific sequence, namely the sequence (the order) in which those elements were mentioned in the above bullet point.

Crimes and delicts

- There are six differences between a crime and a delict (see table 1.6.1 above).



STUDY HINT: Make your own summary of this lesson for revision purposes.



1.8 DISCUSSION FORUM 1

This discussion forum is based on Lesson 1. You should have read and understood the content of this lesson and watched the YouTube video. You should also have worked through the reflections and completed the activities before attempting to answer the questions.

Post your answer on the forum (by clicking [reply](#)).

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/question on sources of South African criminal law

Briefly explain the extent to which English law influenced the Roman-Dutch common law in South Africa. [3]

Discussion/question on sources of South African criminal law

Briefly explain the importance of legislation as a source of South African criminal law. [5]

Discussion/question on customary (or indigenous) criminal law

What are some of the main differences between customary criminal law and national criminal law? [4]

Discussion/questions on the four elements of criminal liability

Briefly discuss each of the four elements of criminal liability. [8]

Should the investigation into the presence of the four elements of liability follow a prescribed sequence? Explain. [6]

Discussion/question on crimes and delicts

What are the differences between a crime and a delict? Your answer should be in tabular format (in the form of a table). [12]



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 1

Video link: <https://youtu.be/Q7q3PbAxMq4>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoorntje) (LexisNexis, Durban 2020)

Learning unit 2

The principle of legality

(Snyman's Criminal Law 31-42)



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Describe the concept of legality.
- Define the principle of legality.
- Identify and discuss the rules contained in the principle of legality.
- Apply the rules contained in the principle of legality.

2.1 BACKGROUND

Intervention by the criminal law may be traumatic for a person who has been accused of a crime. Criminal law can easily be used as a tool of suppression or oppression, as occurred during the Middle Ages. It is therefore important that mechanisms exist to protect the rights of the individual against abuse by organs of the state. The principle of legality is one such mechanism which plays an important role in this regard, as the principle is based on principles of constitutional democracy and fairness.

2.2 THE CONCEPT OF LEGALITY

In order to determine whether a person is criminally liable, the first question that has to be asked is whether the conduct allegedly committed by such a person is recognised by the law as a crime. Certain conduct could be wrong from a moral or a religious point of view but may not be prohibited by law. Moreover, even if the conduct is prohibited by law, it may still not be a crime. For example, where X breached the terms of a contract that she had entered into with Y, X may be liable for breach of contract, which is a civil action, but not a crime.

Only if certain conduct is defined by the law as a crime, whether in the common law or in statutory law, can there be any question of criminal liability for this conduct. This is the basis of the principle of legality. It is expressed in the maxim, "no crime will exist without a law".



ACTIVITY 2.2.1 (Short-answer question based on the concept of legality)

Read the question below and then write down your answer.

Briefly explain the concept of legality.

[3]

Answer:

In order to determine whether a person is criminally liable, the first question to be asked is whether the type of conduct allegedly committed by this person is recognised by the law as a crime. Certain conduct may be wrong from a moral point of view and thus not forbidden by law. (1)

Even if conduct is forbidden by law, it does not necessarily mean that it is a crime – it could lead to a civil action and damages or it could lead to administrative measures being taken. (1)

Only when conduct is defined by the law as a crime can there be any question of criminal liability. This is the root of the principle of legality – that is, there can be no crime without a legal provision. (1)

The principle of legality will be defined next.

2.3 DEFINITION OF THE PRINCIPLE OF LEGALITY

The following definition contains the most important aspects of the principle of legality:

An accused may

(1) not be convicted of a crime -

- (1) unless the type of conduct with which he/she is charged has been recognised by the law as a crime
- (2) in clear terms
- (3) before the conduct took place
- (4) without it being necessary to interpret the words in the definition of the crime broadly in order to cover the accused's conduct; and

(2) if convicted, not be sentenced unless the sentence also complies with four requirements set out above under 1(a) to (d).



ACTIVITY 2.3.1 (Short-answer question based on the concept of legality)

Read the question below and then write down your answer.

Define the principle of legality.

[5]

Answer:

An accused may

(1) not be convicted of a crime- ...

- (e) unless the type of conduct with which he/she is charged has been recognised by the law as a crime
- (f) in clear terms

- (g) before the conduct took place
 - (h) without it being necessary to interpret the words in the definition of the crime broadly in order to cover the accused's conduct; and
- (2) if convicted, not be sentenced unless the sentence also complies with four requirements set out above under 1(a) to (d). **(5)**

The rules or content of the principle of legality will be explained below.

2.4 RULES OR CONTENT OF THE PRINCIPLE OF LEGALITY

If the principle of legality is analysed closely, we find that it contains the following rules:

- (1) A court can convict and punish an accused for a crime only if the conduct is recognised by the law (statutory or common law) as a crime. In other words, courts cannot create new crimes. The conduct must also have some penalty attached to its commission.
- (2) The conduct of the accused person must have been recognised as a crime at the time of its commission. This rule is referred to as the "prohibition on retrospectivity" and is confirmed as part of South African law by virtue of its inclusion in the South African Constitution.
- (3) Crimes have to be defined in clear and precise language. In other words, crimes cannot be defined vaguely.
- (4) A court of law must interpret the wording in the definition of a crime strictly or narrowly. This rule applies to both common-law and statutory crimes.
- (5) Once an accused person has been found guilty, the above four rules also have to apply to sentencing.



ACTIVITY 2.4.1 (Short-answer question based on the rules or content of the principle of legality)

Read the question below and then write down your answer.

Question:

List the rules that are contained in the principle of legality.....[5]

If the principle of legality is analysed closely, one finds that it contains the following rules:

- (a) A court can only convict and punish an accused for a crime if the conduct is recognised by the law (statutory or common law) as a crime. Courts, in other words, cannot create new crimes. The conduct must also have some penalty attached to its commission. **(1)**
- (b) The conduct of the accused person must have been recognised as a crime at the time of its commission. This rule is referred to as the "prohibition on retrospectivity" and is confirmed as part of South African law by virtue of its inclusion in the South African Constitution. **(1)**
- (c) Crimes have to be defined in clear and precise language. In other words, crimes cannot be defined vaguely. **(1)**

- (d) A court of law must interpret the wording in the definition of a crime strictly or narrowly. This rule applies to both common-law and statutory crimes. **(1)**
- (e) Once an accused person has been found guilty, the above four rules also have to apply to sentencing. **(1)**

2.5 THE PRINCIPLE OF LEGALITY IN PUNISHMENT

In the discussion thus far, we have focused on the application of the principle of legality to crimes and the definitions of crimes. When dealing with the imposition of punishment, all rules that are contained in the principle of legality are equally applicable. The application of the principle of legality to punishment (as opposed to the existence of the crime itself) is expressed in the maxim, “no penalty without a statutory provision or legal rules”.

The constitutional recognition of the principle of legality will be looked at next.



ACTIVITY 2.5.1 (Quiz based on the principle of legality in punishment)

Read the following statement and then choose the correct option from the list of options provided (either A, B, C or D). Try not to look at the answer provided until you have written down your answer:

Question:

The application of the principle of legality to punishment (as opposed to the existence of the crime itself) is expressed in the maxim ...:

- (A) no crime without law
- (B) no law without crime
- (C) no penalty without common law
- (D) no penalty without a statutory provision or legal rules

Correct answer: D

2.6 CONSTITUTIONAL RECOGNITION OF THE PRINCIPLE OF LEGALITY

The principle of legality is recognised in the South African Constitution, 1996:

Section 35(3)(l) provides that every accused person has the right to a fair trial, which includes the right not to be tried for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

Section 35(3)(n) provides that an accused person has the right to the benefit of the least severe punishment if the punishment prescribed for the offence was changed between the time that the offence was committed and the time of sentencing.



ACTIVITY 2.6.1 (Quiz based on the constitutional recognition of the principle of legality)

Question:

Read the following statement and then choose the correct option from the list of options provided (either A, B, C or D).

The principle of legality is recognised in:

- (A) The Criminal Procedure Act, 51 of 1977
- (B) The South African common law
- (C) Sections 35(3)(l) and 35(3)(n) of the South African Constitution, 1996
- (D) Roman-Dutch common law

Correct answer: C

2.7 SUMMARY

Remember the following:

- The concept of legality.
- The definition of legality.
- The five rules contained in the principle of legality.
- The principle of legality as it applies to punishment.
- The constitutional recognition of the principle of legality.



2.8 DISCUSSION FORUM 2

This discussion forum is based on Lesson 2. You should have read through and understood the content of this lesson and worked through all the reflections and activities before attempting to answer the questions.

Post your answer on the forum (by clicking **reply**).

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/questions based on the definition of legality and the rules or content of the principle of legality

- Do the following laws meet the requirements of the principle of legality? Briefly explain your answers.

A law prohibiting smoking in restaurants comes into effect on 1 February 2024. The next day X, the owner of a restaurant, lays a charge against Y because Y smoked in her restaurant on 31 December 2023. [2]

Parliament enacts a law which provides that it is a crime if a person does not conduct themselves properly in public. [2]

- (1) Parliament enacts a law which provides that any person who commits an act that could possibly harm good relations between people is guilty of a crime and could be subject to a fine of R500 or a term of imprisonment not exceeding three months. [2]



STUDY HINT: Make your own summary of this lesson for revision purposes.



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 2

Video link: <https://youtu.be/POJCrncP7sl>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoorntje) (LexisNexis, Durban 2020)

Learning unit 3

The act



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Demonstrate your understanding of the legal meaning of the word “act” as used in criminal law by recognising conduct that might not qualify as an act and by applying appropriate criteria to decide whether or not such conduct qualifies as an act.
- Demonstrate your understanding of the factors that exclude the voluntariness of an act by recognising situations where the voluntariness of an act is excluded.

3.1 BACKGROUND

In Lesson 1, we stated that the four cardinal requirements of liability for a crime are (1) an act, (2) compliance with the definitional elements, (3) unlawfulness and (4) culpability.

In this lesson we will discuss the first of these requirements, namely the act, as well as related topics. The requirement of an act, which corresponds with the definition of the proscription, is sometimes also referred to by the term “conduct”.

3.2 INTRODUCTION

(Snyman’s Criminal law 43-45)

Once it is clear that the type of crime with which X is charged is recognised in our law (in other words, once it is clear that the principle of legality has been complied with), the first requirement for determining criminal liability is the following: there must be some **conduct** on the part of X. By “conduct”, we mean an **act or omission**. An “act” is sometimes referred to as “positive conduct” or “commission”, while an “omission” is sometimes referred to as “negative conduct” or “failure to act”.

3.3 THE ACT

3.3.1 “Conduct”, “act” and “omission”

Technically, the term “act” does not include an “omission”. In fact, an act is the exact opposite of an omission, and no general concept embraces them both. The two concepts

differ like night and day, because **doing** something is exactly the opposite of **not doing** something. However, we may use the word “conduct” to refer to both instances.

Therefore, to be technically correct, we would always have to speak of “an act or an omission” or “an act or a failure to act” when referring to this first basic element of liability. Since such expressions are cumbersome, and since **the punishment of omissions is the exception rather than the rule**, writers on criminal law have become accustomed to using the word “act” in a wide sense to refer to both an act and an omission – in other words, as a synonym for “conduct”. Normally, this use of the word “act” in a non-technical, non-literal sense does not lead to confusion. From the context of the statement, the reader would normally be able to determine whether the writer is using the word “act” loosely as a term referring to either an act or an omission, or whether he is using it in the strict, technical sense of “active conduct” only.

In this study guide, the word “act” will mostly be used in its wide, non-literal sense (in other words, referring to both a commission and an omission). This is the abbreviated way of referring to this basic element of criminal liability.

3.3.2 Thoughts not punishable

Merely thinking about doing something, or even a decision to do it, is not punishable. Before there can be any question of criminal liability, X must have started converting his thoughts into actions. This does not mean that only the completed crime, with all the harm already done, is punishable. As will be seen, an attempt to commit a crime is also punishable, but even then, some act is required that goes beyond a mere idea or a decision to do something. Even uttering words may be sufficient to constitute a crime, as is evident from the fact that incitement and conspiracy are punishable.

3.3.3 Act must be a human act or omission

The act must be **a human act**; in other words, the perpetrator of the act must be a human being. In ancient societies and during the Middle Ages, animals and even inanimate objects, such as beams that fell on people’s heads, were sometimes “tried” and “punished”, but this cannot happen today in the South African (or any other modern) legal system. **A human being can, however, be punished if he commits a crime through the agency of an animal, for example where he urges his dog to bite someone** (*Eustace* 1948 (3) SA 859 (T); *Fernandez* 1966 (2) SA 259 (A)).

3.3.4 Act or conduct must be voluntary

(*Snyman’s Criminal Law* 46-49)

3.3.4.1 General

An act or an omission is punishable only if it is voluntary.

The conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.

If conduct cannot be controlled by the will, it is involuntary, such as when a sleepwalker tramples on somebody, or an epileptic swings his hand while having an epileptic fit and hits someone in the face. If X's conduct is involuntary, it means that X is not the "author" of the act or omission; it was therefore not X who committed the act, but rather something that **happened to X**.

The concept of a voluntary act should not be confused with the concept of a willed act. To determine whether there was an act in the criminal-law sense of the word, the question is merely whether the act was voluntary. It need not be a willed act as well. Conduct that is not willed, such as acts that a person commits negligently, may therefore also be punishable. This does not mean that a person's will has no significance in criminal law: whether he directed his will towards a certain end is indeed of the greatest importance, but this is taken into consideration only when determining whether the requirement of culpability (and, more particularly, culpability in the form of intention) has been complied with.

From what has been said above, you will note that the concept of an "act" has a different, and more technical, meaning for a lawyer than for a layperson. The layperson may also regard the muscular contractions of a sleepwalker or an epileptic as an "act", but a jurist or lawyer would not take this view, since such contractions do not constitute voluntary conduct.



ACTIVITY 3.3.4.1 (Short-answer questions based on the act)

Describe the concept of an "act". (3)

Answer:

An act can be described as voluntary human conduct (in the form of an act or an omission to act). Mere thoughts are not punishable. Thoughts must have been converted into actual deeds. (3)

Briefly explain the requirement that the act must be a human act or omission..... (3)

Answer:

The act must be a human act; in other words, the perpetrator of the act must be a human being. (1) In ancient societies and during the Middle Ages, animals and even inanimate objects, such as beams that fell on people's heads, were sometimes "tried" and "punished", but this cannot happen today in the South African (or any other modern) legal system. (1) A human being can, however, be punished if he commits a crime through the agency of an animal, for example where he urges his dog to bite someone (Eustace 1948 (3) SA 859 (T); Fernandez 1966 (2) SA 259 (A)) (1).

3.3.4.2 Factors that exclude the voluntariness of the act

The following factors have the effect that the conduct is not regarded as voluntary in the eyes of the law and, therefore, does not qualify as an act in the criminal-law sense of the word.

A. Absolute force

Firstly, the voluntary nature of an act may be excluded by absolute force (*Hercules* 1954 (3) SA 826 (A) 831 (G)).

Reminder: In the introductory lesson, we stated the following: “In the discussions that follow, we will often refer to the perpetrator or accused person simply as X, and to the complainant or victim of the crime as Y”.

The following scenario, depicted in figure 3.1, is an example of **absolute force**.



Figure 3.1: Person Z (big man) forces person X's (female) hand holding the knife into person Y's (smaller man) chest

The female, X, is standing at the kitchen table cutting an apple with a knife. X is standing between two men, Z and Y, who are arguing over which one of them deserves to marry X. Z, who is much bigger and stronger than X, grabs X's hand that is holding the knife and presses it, with the blade pointing downward, into Y's chest. The result is that Y dies of the knife wound.

Because of X's weaker physique, she would have been unable to defend herself, even if she had tried. Therefore, X performed no act and had no control over her actions; it was Z who performed the act, simply using X's hand as a tool.

In terms of the issue of involuntary conduct, specifically absolute force, the question now arises: Has X committed murder or culpable homicide? What do you think?

The answer is no, because there was no voluntary conduct on her (X's) part.

The scenario depicted in figure 3.1 must be distinguished from one involving **relative force**, where X is indeed in a position to refrain from committing the harmful act but is confronted with the prospect of suffering some harm or injury if he does not commit it. The following scenario is an example of relative force:

Some gang members are arguing in the street. Z orders X, who is holding a gun, to shoot and kill Y. Z threatens to kill X if he (X) refuses to comply with the order issued by Z.

If X then shoots Y, there is indeed an act, but X may escape liability on the ground that his conduct was justified by necessity (to save his own life, as Z had threatened to kill him if he did not carry out the order to kill Y).

(The facts in *Goliath* 1972 (3) SA 1 (A) and *Peterson* 1980 (1) SA 938 (A) were materially similar to those given in the above example of relative force. *Goliath's* case will be discussed below under the ground of justification known as necessity.)

The above two scenarios are good representations to clarify the difference between the terms “absolute force” and “relative force”. The main difference between absolute and relative force lies in the fact that absolute force excludes X’s ability to subject his bodily movements to his will or intellect, whereas this ability to subject his bodily movements to his will or intellect is left intact in cases of relative force. Relative force is therefore aimed at influencing X to behave in a certain way, although it remains possible for him to behave differently.

B. *Natural forces*

Secondly, the voluntary nature of an act may be excluded if a person was propelled by natural forces, thereby causing damage to others. Examples of natural forces are strong winds and flowing water. The following scenario will clarify the effect a natural force can exert and the effect thereof for any persons involved: If a hurricane blows X through Y’s shopwindow, X has committed no act for which he may be punished.

C. *Automatism*

i **Meaning of “automatism”**

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

The following scenario illustrates the concept of involuntary conduct in the form of automatism: While walking in his sleep, X tramples on Y’s head, while Y is sleeping on the floor. Does X commit assault?

Answer: No, because there has been no voluntary conduct on X's part.

The following are examples (from our South African case law) of involuntary behaviour in the form of automatism.

- In *Dhlamini* 1955 (1) SA 120 (T), X and several other people were sleeping on the floor of a room. X dreamt that he was being attacked and that he had to defend himself. When Y stooped down to pick up a mat near X, X (while still asleep and dreaming) stabbed and killed Y with a knife. X was not convicted of any crime.
- In *Mkize* 1959 (2) SA 260 (N), X stabbed and killed Y with a knife while he (X) was having an epileptic fit and, according to the court, acted "as a result of blind reflex activity". He was acquitted on a charge of murder.
- In *Du Plessis* 1950 (1) SA 297 (O), X was charged with driving a motorcar negligently, thereby injuring a pedestrian. He was 72 years old and, according to medical evidence (which the court accepted) at the time of the accident, had experienced a "mental blackout" as a result of low blood pressure. He was found not guilty.

ii "Sane" and "insane automatism"

The courts often use the expressions "sane automatism" and "insane automatism". The meanings of these expressions are as follows:

"Sane automatism" refers to cases in which X relies on the defence that there was **no voluntary act** on his part because he momentarily acted "like an automaton" or robot. This is the defence discussed above. X does not rely on mental illness ("insanity") as a defence. (We will discuss the latter defence in a later study unit.)

"Insane automatism" refers to cases in which X relies on the **defence of mental illness** ("insanity"), which we will also discuss in a later study unit. In other words, he does not rely on the defence of absence of a voluntary act. In this case, we are not dealing with the defence of "automatism" as discussed above. The expression "insane automatism" is misleading because it erroneously creates the impression that we are dealing with the defence of automatism, whereas, in fact, it is a completely different defence, namely that of mental illness. (In the latest case law, there are indications that the courts may be moving away from the use of this misleading expression.)



ACTIVITY 3.3.4.2 (Multiple-answer question based on factors that exclude the voluntariness of the act)

Choose four (4) examples of conduct from the list below which can fall under the heading of "automatism". **4)**

- *Good thoughts*
- *Reflex movements such as heart palpitations (Correct)*
- *A sneezing fit (Correct)*
- *Somnambulism or sleepwalking (Correct)*
- *Muscular movements such as an arm movement of a person who is asleep, unconscious, or hypnotised, or having a nightmare, an epileptic fit, or the so-called "black-out" (Correct)*
- *Improper thoughts*

3.4 OMISSIONS

(Snyman's Criminal Law 49-52)

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

An omission is punishable only if there is a legal duty upon X to act positively. A moral duty is not the same as a legal one. So when is there a legal duty to act positively?

The general rule is that **there is a legal duty upon X to act positively if the legal convictions of the community require him to do so.** This was decided in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A–B.

Let's consider the following example.

X, a strong and healthy adult male, is standing next to a public swimming pool in which Y, a child, is drowning. X fails to rescue Y (assume that X is neither Y's father, nor guardian, nor a lifesaver on duty.) X could have saved Y's life merely by stretching out his arm to Y and pulling him out of the pool, but X failed to do this.

Can X be held criminally liable for Y's death on the ground of his omission? Answer: Although, as far as we are aware, there has not yet been a reported decision in which our courts have given a specific ruling on the question that arises in this specific set of facts, we submit that in such a case X does indeed have a legal duty to act positively, since the legal convictions of the community require X to act positively in these circumstances.

The general rule set out above, in terms of which we should consider the legal convictions of the community, is relatively vague and, therefore, not always easy to apply in practice. In legal practice, **a number of specific instances** are generally recognised in which a legal duty is imposed upon X to act positively.

These specific instances are the following:

(1) A **statute** may impose a duty on somebody to act positively. The following are examples:

- Section 61 of the National Road Traffic Act 93 of 1996 imposes a duty not to leave the scene of a car accident, but to render assistance to the injured and to report the accident to the police.
- Recently, the state has imposed several legal duties on individuals and institutions to report on persons who commit crimes. For example, there is a duty on a person who knows that the offence of corruption has been committed to report such knowledge to the police (see section 20 of the Prevention and Combating of Corrupt Activities Act 12 of 2004).
- The failure by an individual or accountable institution to report knowledge of the commission of certain financial crimes is also made punishable in terms of various provisions of the Financial Intelligence Centre Act 2001.

- (2) A legal duty may arise by virtue of the provisions of the **common law**. Remember: "common law" means those rules of law that are not contained in legislation. Example: According to the provisions of the common law dealing with the crime of high treason, a duty is imposed on every person who owes allegiance to the Republic of South Africa and who discovers that an act of high treason is being committed or planned, to reveal this fact as soon as possible to the police. The mere (intentional) omission by an individual to report an act of high treason to the police is equivalent to an act of high treason by that person. In effect, if you fail to act on the information, you will be charged with high treason.
- (3) The duty may arise from an **agreement**. In an English case, *Pitwood* (1902) 19 TLR 37, the facts were that X and a railway company had agreed that for remuneration, X would close a gate every time a train went over a crossing. On one occasion X omitted to do so and thus caused an accident, for which he was held liable.
- (4) Where a person **accepts responsibility for the control of a dangerous or potentially dangerous object**, a duty arises to control it properly. In *Fernandez* 1966 (2) SA 259 (A), X kept a baboon and failed to repair its cage properly, with the result that the animal escaped and bit a child, who later died. X was convicted of culpable homicide.
- (5) A duty may arise where a person stands in a **protective relationship** to somebody else, for example a parent or guardian who has a duty to feed a child. In the case of B 1994 (2) SACR 237 (E), X was convicted of assault in the following circumstances: She was married and had a child, Y, who was two-and-a-half years old. Her marriage broke up and she began living with another man, Z. Z repeatedly assaulted Y. X was aware of these assaults, but did nothing to stop Z. As Y's natural mother, X had a legal duty to care for and protect Y and to safeguard his well-being. By omitting to prevent the assaults, she rendered herself guilty (together with Z) of assault upon Y.
- (6) A duty may arise from a **previous positive act**, such as where X lights a fire in an area where there is dry grass and then walks away without putting out the fire to prevent it from spreading. We sometimes refer to this type of case as **an omission** following on a positive act that created the duty to act positively.
- (7) A duty may sometimes arise by virtue of the fact that a person **holds a certain office**. It was held in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) that a policeman who sees somebody else being unlawfully assaulted has a duty to come to the assistance of the person being assaulted.

In the case of *Gaba* 1981 (3) SA 745 (O), it was held that there is a legal duty on a police official who is a member of an investigating team to disclose information to the rest of the team. Since the accused failed to disclose the identity of a dangerous criminal to the team, he was convicted of attempting to defeat or obstruct the course of justice. Relying on *Minister van Polisie v Ewels* (*supra*), the court held that X had a legal duty to reveal his knowledge, and that this duty was based upon X's position as a policeman and a member of the investigating team.

- (8) A legal duty may also arise by virtue of an **order of court**. Example: X and Y are granted a divorce and the court that grants the divorce orders X to pay maintenance to Y to

support her and the children born of their marriage. If X omits to pay the maintenance, he commits a crime.



ACTIVITY 3.4.1 (BASED ON OMISSIONS)

Below is a partially completed table where you must fill in the missing words in the second column that describe the other specific instances of a legal duty to act positively. In the third column, write one or more words (including, where applicable, the names of cases) describing the application of the relevant legal duty. You must now complete the particulars for the remaining five instances.

Start by creating a table as outlined below.

Answer:

NUMBER	SPECIFIC INSTANCES OF A LEGAL DUTY	KEYWORDS (AND WHERE APPLICABLE, THE NAMES OF CASES) DESCRIBING THE APPLICATION OF THE RELEVANT LEGAL DUTY
1	<i>statute</i>	<i>income tax or motor accident</i>
2	<i>common law</i>	<i>high treason – report to police</i>
3	<i>agreement</i>	<i>railway crossing – Pittwood</i>
4	<i>accepts responsibility for the control of a dangerous or potentially dangerous object</i>	<i>baboon – Fernandez</i>
5	<i>protective relationship</i>	<i>Parent-guardian – feed child – the case of S v B</i>
6	<i>previous positive act</i>	<i>lighting a fire</i>
7	<i>holds a certain office</i>	<i>assault – Minister van Polisie v Ewels–Gaba</i>
8	<i>order of court</i>	<i>divorce – maintenance</i>

3.5 SUMMARY

- (1) The first general requirement of criminal liability is that there must **be conduct (an act or omission)** on the part of X.
- (2) Conduct is voluntary if X is capable of subjecting his bodily movements to his will or intellect.

- (3) Factors that exclude the voluntary nature of an act are absolute force, natural forces, and automatism.
- (4) Acts committed in a situation of automatism are committed in a mechanical fashion, such as in the following instances: reflex movements, sleepwalking, muscular movements such as an arm movement while a person is asleep or when a person suffers an epileptic fit.
- (5) The examples mentioned in (4) are all cases of sane automatism, where a sane person momentarily behaves involuntarily. Sane automatism should be distinguished from insane automatism. In the latter case, the positive action is the result of a mental illness or defect, and X will be dealt with in accordance with the rules relating to mental illness.
- (6) An omission is punishable only if X is under a legal duty to act positively. The general rule is that there is a legal duty to act positively if the legal convictions of the community require X to do so.
- (7) In practice, a number of specific instances are recognised in which there is a legal duty to act positively. There are eight such instances. See the list above in 3.4.



3.6 DISCUSSION FORUM 3

*Post your answer on the forum (by clicking **reply**).*

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/questions based on the voluntary nature of conduct

- **List three factors that exclude the voluntary nature of an act.** [3]
- **Briefly explain the requirement that the act or omission must be voluntary.** [4]
- **Briefly explain the difference between absolute force and relative force.** [3]

Discussion/question based on omissions

- **"An omission to act is only punishable if there is a legal duty upon a person to act positively." List the instances in which a person has a legal duty to act positively.** (8)



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 3

Video link <https://youtu.be/PIIURzzg8MY>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoctor) (LexisNexis, Durban 2020)

Learning unit 4

The definitional elements and causation



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Identify the particular requirements that apply to a certain type of crime (in other words, the “definitional elements” of a specific crime).
- Deduce from the definitional elements of a specific crime whether that crime is a materially defined crime or a formally defined crime.
- Determine whether a certain act is the cause of a certain proscribed result and, more particularly, whether a certain act is a factual cause of a result by applying the *conditio sine qua non* theory.
- Determine whether a certain act is a legal cause of a result by applying the various theories of legal causation.

4.1 BACKGROUND

In the previous lesson we discussed the first element of criminal liability, namely the requirement of an act. In this lesson we will discuss the second element of criminal liability. In terms of this element, the act or conduct **must comply with the definitional elements of the particular crime with which X is charged**. Therefore, we will first consider the meaning of the concept “definitional elements”. Thereafter, we will discuss a very important requirement that forms part of the definitional elements of certain (note: **not all**) crimes, namely the causation requirement.

4.2 THE DEFINITIONAL ELEMENTS

(Snyman’s Criminal law 59-65)

The definitional elements refer to the precise description of the requirements set by the law for liability for a specific type of crime. In this context, “requirements” do not refer to the general requirements applying to all crimes (e.g., voluntary conduct, unlawfulness, criminal capacity and culpability), but the particular requirements applying only to a certain type of crime. **The definitional elements of a crime constitute the model or formula by means of which both an ordinary person and a court of law may determine which particular requirements apply to a certain type of crime.** Snyman uses the expression “definition of the proscription” as a synonym for “definitional elements”. We prefer the expression “definitional elements” and we will refer to this term in the module.

We can also explain the meaning of “definitional elements” in the following way: All legal provisions creating crimes may be reduced to the following simple formula: **Whoever does X, commits a crime.** In this formula, X simply represents the definitional elements of the particular crime.

The definitional elements always contain a description of the **kind of act** that is prohibited (e.g. possession, sexual penetration, the making of a declaration or the causing of a certain state of affairs). The word “act”, as used in criminal law, always means “the act set out in the definitional elements”.

However, the definitional elements are not limited to a mere description of the type of act required. After all, the law does not prohibit possession, sexual intercourse or the making of a declaration as such, but it does prohibit the following:

- The possession of certain, circumscribed articles (such as pornographic photographs of minor children).
- Sexual penetration between people who, on account of a certain type of blood relationship (or consanguinity), may not marry each other (incest).
- The making of a statement that is false and is made under oath in the course of a judicial process (perjury).

Thus, the definitional elements contain not merely a description of the kind of **act** (possession, sexual penetration) that is prohibited, but also a **description of the circumstances** in which the act must take place, for example:

- The particular **way** in which the act must be committed (e.G. “Forcibly”, in the case of robbery).
- The characteristics of the **person** committing the act (e.G. “A person who owes allegiance”, in the case of high treason).
- The nature of the **object** in respect of which the act must be committed (e.G., Possession of “movable corporeal property”, in the case of theft).
- A particular **place** where the act has to be committed in certain circumstances (e.G., Parking “on a yellow line”, in the case of a traffic violation).
- A particular **time** when or during which the act has to be committed (e.G., “On a sunday”).

In the second Criminal Law module (CRW2603), the most important specific crimes will be discussed, so that is where we will discuss the definitional elements of each separate crime in some detail.

Do not confuse the “definitional elements” with “the definition of the crime”.

- The definition of the crime contains the definitional elements, as well as a reference to the requirements of unlawfulness and culpability.
- The definitional elements, on the other hand, do not contain a reference to the requirements of unlawfulness and culpability.

Example:

The **definitional elements** of murder are “to cause somebody else’s death”.

The **definition of murder** is “the unlawful, intentional causing of somebody else’s death”.

Make sure that you understand the difference between the previous two sentences. X’s act must be a realisation or fulfilment of the definitional elements.

At this stage of the inquiry, you have to ascertain whether the requirements set out in the definitional elements relating to, for example, the subject, object, time, place or method of execution of the act have been complied with.

The term “causation” will be examined next.



ACTIVITY 4.2.1 (Short-answer question based on the definitional elements)

Explain the meaning of the term “definitional elements of the crime”. [2]

Answer:

The definitional elements of a crime refer to the precise description of the requirements set by the law for liability for a specific type of crime. (1)

The definitional elements of a crime contain the model or formula with the aid of which both an ordinary person and a court may know what particular requirements apply to a certain type of crime, namely, “whoever does ‘X’, commits a crime”. In this formula, “X” is nothing other than the definitional elements of the particular crime. (1)

4.3 CAUSATION

(Snyman’s Criminal Law 65-78)

4.3.1 The difference between formally and materially defined crimes

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

Let’s consider the example of rape: Here the act consists simply in sexual penetration. The result of this act (e.g., the question of whether or not the woman who was raped became pregnant or HIV-positive) is irrelevant for the purposes of determining liability for the crime, although it may be of importance in determining a fit and proper sentence.

In the case of **materially defined crimes**, on the other hand, the definitional elements do not proscribe a specific conduct, but rather any conduct that **causes** a specific condition. Examples of this type of crime are murder, culpable homicide and arson. Let’s consider

the example of murder: Here the act consists in causing a certain condition, namely the death of another person. In principle, it does not matter whether the perpetrator (X) stabbed the victim (Y) with a knife, shot Y with a revolver or poisoned Y. The question is simply whether X's conduct caused Y's death, regardless of the particular conduct that led to that outcome.

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



ACTIVITY 4.3.1 (Short-answer question based on formally and materially defined crimes)

Distinguish between materially and formally defined crimes.[4]

Answer:

In the case of formally defined crimes, the definitional elements proscribe or forbid a certain type of conduct, irrespective of what the result of the conduct is. Examples of crimes falling under this category are rape (the sexual penetration of another person without the person's consent) and perjury (making a false statement under oath). (2)

In the case of materially defined crimes, on the other hand, the definitional elements do not proscribe a specific conduct but any conduct which causes a specific condition. Examples of this type of crime are murder (the causing of death of another person), culpable homicide (the negligent causing of death of another person) and arson (setting immovable property on fire). (2)

4.3.2 The issue of causation

When dealing with materially defined crimes, the question that always arises is whether there is a **causal link** between X's conduct and the prohibited result (e.g., Y's death). Please note the spelling of the word "causal", which is derived from the word "cause".

In the vast majority of cases of materially defined crimes that come before the courts, determining whether X's act was the cause of the prohibited condition does not present any problems. If X shoots Y in the head with a revolver or stabs Y in the heart with a knife, and Y dies almost immediately, and if nothing unusual occurs (such as a bolt of lightning), which might be shown to have occasioned the death, nobody will doubt that X has caused Y's death. However, the course of events might sometimes take a strange turn, in which case it might become difficult to decide whether X's act was the **cause** of Y's death.

Consider, for example, the following two scenarios:

- (1) X, wishing to kill Y, shoots at her, but misses. In an attempt to escape X, Y runs into a building. However, shortly before she runs into the building, Z, who has nothing to

do with X, has planted a bomb inside the building because Z bears a grudge against the owner of the building. The bomb explodes, killing Y. Consider the question: Is X's act the cause of Y's death?

- (2) X assaults Y and breaks her arm. Z, who has witnessed the assault, decides to help Y by taking her to hospital for treatment. She helps Y get onto the back of her bakkie and drives off. However, Z drives recklessly and Y becomes so afraid that Z will have an accident that she jumps off the back of the moving vehicle. In jumping off the vehicle, she bumps her head against a large stone and dies as a result.

Consider the question: Who has caused Y's death: Is it X, Z or perhaps even Y herself through her own conduct?

Determining causation in situations such as the two scenarios described above is one of the most difficult matters in criminal law. However, the courts have developed certain basic principles concerning this matter, which they regularly apply.

In order to keep the discussion that follows within manageable bounds, the question of causation will be discussed only in the context of the crimes of murder and culpable homicide, since problems in connection with causation in criminal law mostly arise in the context of these two crimes.

4.3.3 The principles to be applied in determining causation

4.3.3.1 Basic principle

The basic principle relating to causation applied by the courts is the following: In order to find that there is a causal link between X's act and the prohibited condition (hereafter referred to as Y's death) – that is, in order to find that X's act caused Y's death – **two requirements** must be met. Firstly, it must be clear that X's act was the **factual cause** of Y's death and, secondly, it must be clear that X's act was the **legal cause** of Y's death. The definitional elements and causation are summarised in figure 4.1 below:

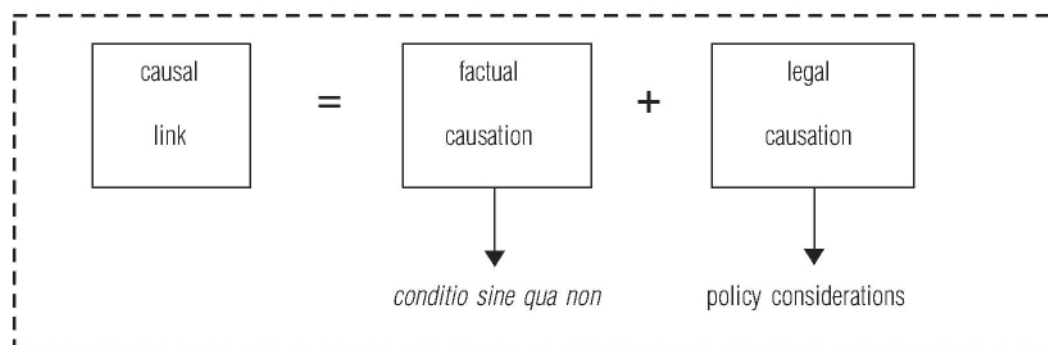


Figure 4.1: The definitional elements and causation

Based on figure 4.1, the following explanations clarify the definitional elements and causation:

X's act is the **factual cause** of Y's death if it is a *conditio sine qua non* for Y's death, that is, if there is "but-for causation" or a "but-for" link between X's act and Y's death. (We

will explain this in a moment.) If this requirement has been met, we can speak of factual causation.

X's act is the **legal cause** of Y's death if, in terms of policy considerations, it is **reasonable and fair** that X's act may be considered the cause of Y's death. If this requirement has been met, we can speak of legal causation.

Next, we will explain the above concepts in more detail.

4.3.3.2 Factual causation – *conditio sine qua non*

X's act is the factual cause of Y's death if it is a *conditio sine qua non* for Y's death. (The word "*conditio*" is pronounced "kon-dee-tee-ho", not "kon-dee-show".) *Conditio sine qua non* literally means "a condition or antecedent (*conditio*) without (*sine*) which (*qua*) not (non)"; in other words, an antecedent (act or occurrence) without which the prohibited situation would not have materialised. A convenient English equivalent of this concept is "but-for" causation. For an act or event to be a "**but-for**" cause, we must be able to say that **but for** the occurrence of the act or event, the prohibited condition would not have happened.

Another way of stating the same test (i.e. the *conditio sine qua non* test) is by asking what would have happened if X's act had not occurred. If it is clear that in such a case, the result (Y's death) would not have materialised, then X's act is a factual cause of Y's death.

Definition of *conditio sine qua non* theory:

An act is a *conditio sine qua non* for a situation if the act cannot be thought away without the situation disappearing at the same time. Therefore, in applying this formula, a court must, for a moment, assume that the act in question had not occurred (i.e. "think away" the act) and then consider whether the result would nevertheless have occurred.



ACTIVITY 4.3.1 (Short-answer question based on factual causation)

To determine whether you understand the application of this theory, we suggest that you turn back to the discussion under 4.3.2 above and consider whether X's act in the two sets of facts (examples (1) and (2)) described under that subheading can be regarded as the *conditio sine qua non*, or the factual cause, of Y's death. What is your answer? Yes, or no?

ANSWER TO ACTIVITY 4.3.3.2.1

If your answer is "no", it means you do not understand the application of this theory. The correct answer is that X's act in both examples qualifies as the factual cause of Y's death. We advise you to make sure that you fully understand the application of this theory before you read any further. At a later stage in this lesson, we will consider these examples again.

That the conditio sine qua non test must be applied in order to determine factual causation is clearly borne out by the case law. (The relevant cases are Makali 1950 (1) SA 340 (N), Mokoena 1979 (1) PH H 13 (A) and Minister van Polisie v Skosana 1977 (1) SA 31 (A) 44.

In Daniels 1983 (3) SA 275 (A), the Appeal Court decided that factual causation is determined on the basis of the conditio sine qua non theory.

If we applied only the conditio sine qua non test (or theory), we could identify a seemingly vast number of events as a cause of Y's death. If X stabs Y with a knife and kills her, then it is not only the stabbing that is conditio sine qua non for Y's death, but also, for example, the manufacture of the knife, its sharpening, its sale by the shop owner, and so forth. Even negative factors or antecedents will constitute causes of Y's death, for example the fact that Y did not evade X's blow, or the fact that Z neglected to warn Y of X's evil intention. We could even allege that if it were not for X's parents, X would not have been born and existed and, therefore, the parents are also a cause of Y's death. The same could be said about X's grandparents, and we could go on in this vein all the way back to Adam and Eve! (Indeed, some commentators have cynically referred to the conditio sine qua non formula as "Adam and Eve causation".)

4.3.3.3 Legal causation – general

It is exactly because of the wide scope of the *conditio sine qua non* test (i.e. the large number of factors that may be identified as a cause of Y's death in terms of this test) that it is necessary to apply a second criterion by which we can limit the wide range of possible causes of Y's death. This second criterion is usually described as the test to determine legal causation. The idea behind this second criterion is the following: When a court is called upon to decide whether X's conduct caused Y's death, the mere fact that X's conduct is a *conditio sine qua non* for Y's death is insufficient as a ground upon which to base a finding of a causal link. Other factors besides X's conduct may equally qualify as *conditiones sine qua non* for Y's death. When searching for the legal cause (or causes) of Y's death, a court eliminates those factors that, although they qualify as factual causes of Y's death, do not qualify as the cause (or causes) of Y's death according to the criteria for legal causation (which will be set out hereunder).

In the legal literature, certain specific tests to determine legal causation have evolved, such as those that determine the "proximate cause", the "adequate cause", or whether an event constituted a "*novus actus interveniens*". We will consider these more specific criteria for legal causation shortly. For now, however, we need to emphasise that, generally, the courts are reluctant to choose only one of these specific tests as a yardstick to be employed in all cases in which legal causation must be determined, to the exclusion of all other specific tests. Sometimes they rely on one of these tests, and sometimes on another, according to whether a particular test would, in their opinion, result in an equitable solution. Sometimes, courts may even base a finding of legal causation on considerations outside these more specific tests. Before elaborating further on this open-ended approach to legal causation by the courts, we will consider the different specific criteria that have been formulated to determine legal causation.

4.3.3.4 Theories of legal causation

The three most important specific tests or theories to determine legal causation, which we will briefly discuss hereunder, are the following: the individualisation theories, the theory of adequate causation, and the *novus actus interveniens* theory.

a. **The individualisation theories**

According to the individualisation theories (or tests), we must look – from among all the conditions or factors that qualify as factual causes of the prohibited situation (Y's death) – for the one that is the **most operative** and regard it as the legal cause of the prohibited situation. The objection to this approach is that two or more conditions (or factual causes) are often operative in equal measure, for example where X bribes Z to commit a murder, which Z commits while W stands guard to warn Z, should the police arrive. In a situation such as this, where three different people have acted, we cannot regard the act of one (or only the act of X) as the only cause of death, to the exclusion of the acts of the other two (Z and W). Today, the idea behind this test finds little support, and in Daniels 1983 (3) SA 275 (A), the majority of the Appeal Court judges who discussed the question of causation refused to accept that an act can be the legal cause of a situation only if it can be described as the "proximate cause" or the most operative and most applicable cause (see 314C, 331A and 333G of the report).

b. **The theory of adequate causation**

Because of the vagueness and ineffectiveness of the individualisation theories, many writers have refused to attempt to solve problems of legal causation by looking for the decisive, most effective, most applicable, or proximate condition. Instead, they have preferred to base a causal relationship on generalisations that may be made by an **ordinary person** regarding the relationship between a certain type of event and a certain type of result, and on the contrast between the normal and the abnormal course of events. This theory is known as the **theory of adequate causation** and, according to this theory, an act will be a legal cause if, according to normal human experience, the act has a tendency to bring about that type of effect. The court applied this test in Loubser 1953 (2) PH H190 (W). If, for example, Y is shot with a gun, an ordinary person would normally expect Y to be seriously injured or even killed.

c. **Novus actus interveniens**

This expression means "new intervening event" and is used to indicate that between X's initial act and the ultimate death of Y, another event – which has **broken the chain** of causation – has taken place, preventing us from regarding X's act as the cause of Y's death.

Examples:

- X inflicts a non-lethal wound on Y's head. Y is taken to hospital by ambulance. On the way to hospital, owing to the reckless and negligent driving of the ambulance driver, the ambulance is involved in an accident in which Y is killed.
- X inflicts a non-lethal wound on Y's head. Y is taken to hospital by ambulance. Y is fatally struck by lightning right in front of the hospital entrance).

- X administers a poison to Y that will slowly kill her. Shortly thereafter, Z, who also bears a grudge against Y and acts completely independently of X, shoots Y, killing her. It is then Z's act, and not that of X, that is the cause of Y's death.

Some authorities regard legal causation as simply consisting in the absence of a *novus actus interveniens*. **According to this approach, X's act is regarded in law as the cause of Y's death if it is a factual cause of Y's death and there is no *novus actus interveniens* between X's act and Y's death** (*S V Counter* 2003 (1) SACR 143 (SCA)).

Unfortunately, our case law contains no precise description of the requirements with which an act must comply to qualify as a *novus actus* (or *nova causa*). In our view, the following definition of a *novus actus interveniens* is a fair reflection of that which our courts understand by this concept. An act is a *novus actus interveniens* if it constitutes an **unexpected, abnormal, or unusual occurrence**; in other words, an occurrence that, according to general human experience, deviates from the normal course of events, or that cannot be regarded as a probable result of X's act.



ACTIVITY 4.3.3.4.1 (Problem/short-answer question based on legal causation)

Read the following facts and then answer the question that follows:

X wishes to kill Y. X shoots at Y, but the bullet misses Y. Y then runs into a building to escape X. However, Y does not know that Z, who has nothing to do with X, has planted a bomb in the building. The bomb goes off and Y is killed. Explain whether X is the legal cause of Y's death. (10)

Answer to 4.3.3.4.1:

The basis of the tests for legal causation is to establish a causal link between X's act and the result (Y's death). One could use one of several tests or theories to establish whether X was the legal cause of Y's death. (1)

In terms of the individualisation theory, one must seek out the most operative of all factors which were the factual cause of Y's death and regard this as the legal cause of Y's death. In the scenario above, therefore, one would regard the most operative of all causes as being the bomb which was placed in the building by Z and which killed Y. In terms of this theory therefore, X is not the legal cause of Y's death. (3)

According to the adequate cause theory, one would have to find a causal link between X's act and Y's death (the result) based on generalisations which an ordinary person would make between an act and its eventual result or consequence. A certain type of act would lead to a certain result. Therefore, according to ordinary human experience, shooting at a person (X's act) would result in that person's death (Y's death). Therefore, in terms of this theory of legal causation, there could be a causal link between X's act and Y's death. (3)

*Finally, in the *novus actus interveniens* theory, there must be a new intervening event between X's conduct and the death of Y (or the result) that breaks the chain of causation. In terms of this theory, the bomb placed in the building by Z could be considered a *novus actus interveniens* which breaks the chain of causation between*

X's act (shooting at Y) and the result (Y's death). In terms of this theory, therefore, there would not be a causal link between X's act and Y's death. (3)

4.3.4 The courts' approach to legal causation

The courts do not single out a specific theory of legal causation as the only correct one to be applied in all circumstances. In the leading cases of *Daniels* 1983 (3) SA 275 (A) and *Mokgethi* 1990 (1) SA 32 (A) 40–41, the Appellate Division has stated that in deciding whether a condition that is a factual cause of the prohibited situation should also be regarded as the legal cause of that situation, a court must be guided by **policy considerations**.

The policy that the courts adopt is to strive towards a conclusion that would not exceed the limits of what is reasonable, fair and just. In deciding what is a reasonable and fair conclusion, a court may make use of one or more of the specific theories of legal causation, such as "proximate cause" or *novus actus*. In fact, in most cases, the courts apply one of these theories. However, in *Mokgethi supra*, the Appellate Division held that it is wrong for a court to regard only one specific theory (e.g. "proximate cause") as the correct one to be applied in every situation, thereby excluding from future consideration all the other specific theories of legal causation. A court may even base a finding of legal causation on considerations outside these specific theories.

4.3.5 Own view – theory of adequate causation preferable

Assuming for a moment that we are not bound by the courts' open-ended approach to legal causation, we submit that of the different specific theories of legal causation, the **theory of adequate causation** is best suited to determine legal causation. We have already pointed out the criticism of the individualisation theories, and in *Daniels* 1983 (3) SA 275 (A), of the three Judges of Appeal who had to decide the issue of causation, two (Jansen JA and Van Winsen AJA) refused to accept that in our law, criminal liability is necessarily based on "proximate cause" (which is, perhaps, the best-known of the individualisation theories). We have also pointed out that the *novus actus* criterion does not differ essentially from the theory of adequate causation, both of which emphasise that a distinction should be drawn between consequences **normally expected** from the type of conduct in which X has engaged and consequences that we would not normally expect to flow from such conduct.

4.3.6 Examples from decisions

Please note that you do not have to study the information in this subsection (4.3.6 a, b and c) for the examination. You are required to read this discussion only so that you can apply your knowledge to these real-life events.

a. Assisted suicide – the Grotjohn decision

What would the position be if X encourages Y to commit suicide, or if X provides Y with the means of doing so, and Y does indeed commit suicide? In this kind of situation, the

last act that led to Y's death was her (Y's) own conscious and voluntary act. Does this mean that there is no causal link between X's conduct and Y's death?

Before 1970, there were several inconsistent decisions regarding this question, but the decision of Grotjohn 1970 (2) SA 355 (A) brought more clarity to the issue.

In this case, X provided Y, his crippled wife, with a loaded rifle so that she could shoot and kill herself, should she wish to do so; she subsequently went ahead and did so. X was acquitted. The state appealed to the Appellate Division on a question of law and the Appellate Division held that the mere fact that the last act causing the victim's death was the victim's own, voluntary, non-criminal act did not necessarily mean that the person handing the gun to the victim was not guilty of any crime. It would therefore be incorrect to assume that there can be no causal link in this kind of situation. If Y's final act is the realisation of the very purpose X had in mind, Y's act can never be regarded as a *novus actus* (Hibbert 1979 (4) SA 717 (D)).

b. The *Mokgethi* decision

In *Mokgethi* 1990 (1) SA 32 (A), X shot a bank teller (Y) in the back during a robbery, as a result of which Y became a paraplegic and was confined to a wheelchair. Y's condition improved to such an extent that later he resumed his work at the bank. His doctor instructed him to regularly shift his position in his wheelchair in order to prevent pressure sores from developing on his buttocks. However, he failed to shift his position often enough, with the result that serious pressure sores and accompanying septicaemia developed, causing Y's death. He died about six months after he had been shot.

The court decided that the wounding of Y had been a *conditio sine qua non* of his death, but that it could not be regarded as a legal cause of his death. In other words, there was factual causation, but no legal causation. The court decided that in this case, none of the ordinary theories of legal causation (absence of a *novus actus interveniens*, the individualisation theories and the theory of adequate causation) could be applied satisfactorily; on a basis of policy considerations, the court had to determine whether a sufficiently close link existed between the act and the result. However, the court added that in applying the more "flexible criterion", namely policy considerations, the above-mentioned theories of legal causation could have a subsidiary value.

The court applied this rule to the facts and found that Y's own unreasonable failure had been the immediate cause of his death and that X's act had been too **remote from the result** to lead to criminal liability. Therefore, X was found guilty of attempted murder only.

c. Negligent medical treatment – the *Tembani* decision

In *S v Tembani* 2007 (1) SACR 355 (SCA), X had been convicted of murder. The evidence showed that he had shot the victim (Y) twice with the intention to kill. One bullet entered her chest and penetrated her right lung, diaphragm and abdomen, perforating the duodenum. Y was admitted to hospital on the night of the shooting. The medical personnel cleaned the wounds and gave her antibiotics. The next day she vomited and complained of abdominal pains. Those were signs that she was critically ill. She was nevertheless left insufficiently attended to in the ward, and four days later contracted an infection of the

abdominal lining. Only at that stage was she treated sufficiently. However, it was already too late to save her life. She died 14 days later of septicaemia, resulting from the gunshot wound to the chest and the abdomen.

X appealed against his conviction of murder. The question before the Supreme Court of Appeal was whether an assailant who inflicts a wound that is easily treated, but – without treatment – would be fatal, can escape liability for the victim's death because the medical treatment that the victim received was substandard and negligent. The court had no problem finding that X's act was the factual cause (*conditio sine qua non*) of Y's death. The court, however, had to determine whether X was also the legal cause of Y's death. The crucial issue before the court was whether **negligent medical care can be regarded as a new, intervening cause that exempts the original assailant (X) from liability.**

The court (at par 25) held that the **deliberate infliction by X of an intrinsically dangerous wound to Y, from which Y was likely to die without medical intervention, must generally lead to liability by X for the ensuing death of Y. In the court's view, it was irrelevant whether the wound was readily treatable, and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y's death. The only exception would be if Y had recovered to such an extent at the time of the negligent treatment that the original injury no longer posed a danger to her life.**

According to the court (at par 26), this approach was justified on the following two policy considerations: Firstly, an assailant who deliberately inflicted an intrinsically fatal wound consciously embraced the risk that death might ensue. The fact that others might fail, even culpably, to intervene to save the injured person did not, while the wound remained fatal, diminish the moral culpability of the perpetrator. Secondly, in a country where medical resources were not only sparse, but also badly distributed, it was quite wrong to impute legal liability on the supposition that efficient and reliable medical attention would be accessible to a victim, or to hold that its absence should exculpate an assailant inflicting an intrinsically fatal wound from responsibility for the victim's death. The court held that in South Africa, improper medical treatment was neither abnormal nor extraordinary. Therefore, negligent medical treatment did not constitute a *novus actus interveniens* that exonerated the assailant from liability, while the wound was still intrinsically fatal. The conviction of X for murder was therefore upheld.

The court distinguished this case from the *Mokgethi* decision (*supra*), where the eventual fatal septicaemia was caused, not by the original wound, but by the deceased's own unreasonable failure to follow medical instructions.



ACTIVITY 4.3.7 (Short-answer questions based on causation)

In each of the following sets of facts/scenarios, consider whether X's act is the cause of Y's death and give reasons for your answer:

- 4.3.7.1 Y feels depressed and threatens to commit suicide. X, who harbours a grudge against Y, hands her a loaded firearm, stating that she can shoot

and kill herself if she so wishes. Y takes the firearm from X and shoots and kills herself.

- 4.3.7.2 X, who is very poor, reads a newspaper report about a man who had been caught & killed by a crocodile in a river in Botswana. She persuades her uncle, Y, who is very rich and whose heir she is, to go on a safari to Botswana. She also encourages her uncle to take a boat trip on the river, hoping that he will also be killed by a crocodile. Y goes on the safari. He also goes out on a canoe on the river. A hippo overturns the canoe, Y falls into the water and a crocodile catches and kills him.
- 4.3.7.3 X tries to stab Y, intending to murder her. Y ducks and receives only a minor cut on the arm. However, infection sets in, so Y visits a doctor. The doctor gives her an injection and tells her to come back the following week for two more injections. The doctor warns Y that she may die if she fails to come back for the other two injections. Y fails to go back to the doctor, reasoning that her body is strong enough to fight the infection. She dies as a result of the infection.
- 4.3.7.4 X shoots Y in the chest, intending to murder her. The bullet wound is of such a serious nature that Y will die if she does not receive medical treatment. Y is admitted to hospital, but because the nursing staff is on a general strike, she receives inadequate medical treatment and the wound becomes infected. Although she is eventually treated for the infection, she dies after a period of two weeks.

ANSWERS TO ACTIVITY 4.3.7

- 4.3.7.1 *You probably recognise these facts as being similar to those in the Grotjohn case. In that case, the Appellate Division held that the mere fact that the last act was the victim's own voluntary act did not mean that there was no causal relationship between X's act and Y's death. X's act (in the Grotjohn case) was a *conditio sine qua non* of Y's death. Y's last act (her suicide) was not a *novus actus interveniens* – an unexpected or unusual event in the circumstances. The court ruled that if X's act was the factual cause of Y's death, an unusual event that took place after X's act, but before Y's death, cannot break the causal link if X had previously planned or foreseen the unusual turn of events.*
- 4.3.7.2 *X's act can be regarded as a *conditio sine qua non* of Y's death, because if X had not persuaded Y to go on the safari, Y would not have undertaken the trip. Therefore, there was factual causation. However, there was no legal causation. An application of the theory of adequate causation leads to the same conclusion: being killed by a crocodile is not an occurrence that, according to general human experience, is to be expected in the normal course of events during a safari. Merely **hoping** (as X did) that the disastrous event would take place cannot be equated with the situation where X planned or foresaw the occurrence of the event before it took place. According to the criterion of policy considerations applied in the Mokgethi decision, we can*

also argue that it would not be reasonable and fair to regard X's act as the legal cause of Y's death.

4.3.7.3 If you have read the Mokgethi case, you will immediately recognise these facts, which were used as an illustration by the court in its judgment. It is clear that X's act is the factual cause of Y's death: if X had not stabbed Y, she would never have contracted the infection. In terms of the Mokgethi decision, we may argue, however, that X's act was not the legal cause of Y's death. Y's failure to go back to the doctor was unreasonable and created an unnecessary life-threatening situation, so, legally speaking, there was not a sufficiently close link between the original stab wound inflicted by X and the death of Y.

4.3.7.4 These facts are similar to those in the Tembani case. It is clear that X's act is the factual cause of Y's death (a *conditio sine qua non*). According to the court in Tembani, X's act can also be seen to be the legal cause of Y's death. X deliberately inflicted an intrinsically dangerous wound on Y, which, without medical intervention, would probably cause Y to die. It is irrelevant whether it would have been easy to treat the wound, and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y's death. The only exception would be if at the time of the negligent treatment, Y had recovered to such an extent that the original injury no longer posed a danger to her life.



ACTIVITY 4.3.8 (Quiz based on causation)

Read the following statement and then choose the correct answer (either A, B, C or D):

The three most important specific tests or theories to determine legal causation, are the following:

- (A) the individualisation theory, the condition sine qua non theory, and the *novus actus interveniens* theory
- (B) the individualisation theory, the theory of adequate causation and the *novus actus interveniens* theory
- (C) the individualisation theory, the theory of the reasonable person, and the *novus actus interveniens* theory
- (D) the individualisation theory, the theory of unlawfulness, and the *novus actus interveniens* theory

Correct answer: B

4.4 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>conditio sine qua non</i>	indispensable condition or prerequisite	<i>isimo esimqoka, esiyinsika yomthetho</i>

<i>novus actus interveniens</i>	a new intervening event /a factual causation cannot be proved	<i>ukungenelela kwesehlakalo esisha/ imbangela yesenzo esithize angeke yaqinisekiswa</i>
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4.5 SUMMARY

The rules to be applied in determining causation may be summarised as follows:

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



STUDY HINT: Make your own summary of this study unit for revision purposes.



4.6 DISCUSSION FORUM 4

Post your answer on the forum (by clicking **reply**).

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/question based on the definitional elements of a crime

- Explain the difference between the definitional elements of the crime and the definition of a crime. [4]

Discussion/questions based on causation

- Explain what you understand by the concept of factual causation. [5]

- Explain what you understand by the concept legal causation. [5]
- Explain what you understand by the theory of novus actus interveniens. [4]



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 4

Video link: <https://youtu.be/pB2iuLgkFos>

REFERENCE

Snyman CR Snyman's Criminal Law 7 ed (updated by SV Hoor) (LexisNexis, Durban 2020)

Learning unit 5

Unlawfulness I



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Demonstrate your understanding of the application of the general criterion of unlawfulness (i.e. The boni mores or legal convictions of society) in solving a dispute about the unlawfulness of a particular act that complies with the definitional elements of a crime, but not with the requirements of any recognised ground of justification.
- Determine whether certain conduct falls within the scope of a generally recognised ground of justification, with reference to the general criterion of unlawfulness.
- Apply the rules pertaining to the ground of justification known as private defence to the facts of a particular case.

5.1 BACKGROUND

In lesson 1, we stated that the four cardinal requirements of liability for a crime are:

- (1) act or conduct
- (2) compliance with the definitional elements
- (3) unlawfulness
- (4) culpability

We have already dealt with the first two of these requirements. In this lesson we begin our discussion of the third requirement, namely unlawfulness. We shall first discuss the meaning of “unlawfulness” and, thereafter, the first ground of justification, namely private defence.

5.2 THE MEANING OF “UNLAWFULNESS”

(Snyman's Criminal Law 79-85)

5.2.1 General

The mere fact that there is an act that corresponds to the definitional elements does not mean that the person who performs the act is liable for the particular crime. Therefore, satisfying the definitional elements is not the only general requirement for liability. The next step in the determination of liability is to inquire whether the act that complies with the definitional elements is also **unlawful**.

A layperson will probably be of the opinion that once it is clear that the requirements for liability set out thus far (namely that the law prohibits certain conduct as criminal and that X has committed an act that falls within the definitional elements) have been complied with, X will be liable for the crime and may be convicted. However, a person trained in the law will realise that there are still two very important further requirements that must be complied with, namely the requirements of **unlawfulness and culpability**.

The reason why a layperson is likely to be unaware of the latter two requirements is because they are “unwritten” or “invisible” in the sense that what is understood by “unlawfulness” and “culpability” does not ordinarily form part of the “letter” or “visible part” of the legal provision in question, namely the definitional elements. Therefore, if you consult the definition of a crime in a statute, you will normally not come across the word “unlawful”, neither can you expect to find words that express the culpability requirement, such as “intentional” or “negligent”. Nevertheless, a court will never convict a person of a crime unless it is convinced that the act that complies with the definitional elements is also unlawful and accompanied by culpability, in other words, that the so-called unwritten or invisible requirements have also been complied with.

5.2.2 Acts that comply with the definitional elements are not necessarily unlawful: examples

An act that complies with the definitional elements is not necessarily unlawful. This will immediately become clear if you consider the following examples:

- (1) In respect of murder, the definitional elements are “the killing of another human being”. Nevertheless, a person is not guilty if they kill somebody in **self-defence**; their act is not unlawful in that case.
- (2) X inserts a knife into Y’s body. Although his act may satisfy the definitional elements of assault, it is not unlawful if X is a medical doctor who is performing an operation on Y with Y’s permission or **consent**, to cure him of an ailment.
- (3) X exceeds the speed limit while driving his motor car. His conduct satisfies the definitional elements of the crime of exceeding the speed limit. However, if he does so to get his seriously ill child to hospital for emergency treatment (necessity), his conduct is not unlawful (*Pretorius* 1975 (2) SA 85 (SWA)).

There are many other examples of conduct that satisfies the definitional elements but is nevertheless not unlawful. It is very common for an act that seems to fall within the letter of the law (i.e. corresponds to the definitional elements) to prove, upon closer inspection, to be not contrary to the law, as the examples above illustrate. In these cases, the law tolerates the violation of the legal norm.

5.2.3 The content of unlawfulness

When is conduct that corresponds to the definitional elements not unlawful? In other words, what precisely is meant by “unlawful” and what determines whether an act is unlawful?

(1) Grounds of justification

There are several well-known cases or situations where an act that corresponds to the definitional elements of a crime is, nevertheless, not regarded as unlawful. Unlawfulness is excluded because of the presence of grounds of justification. Some well-known **grounds of justification** are private defence (which includes self-defence), necessity, consent, and official capacity.

At this point, it would be tempting simply to define unlawfulness as “the absence of a ground of justification”. However, such a purely negative definition of unlawfulness is not acceptable for two reasons:

- (a) Jurists agree that the number of grounds of justification is unlimited. If this is the case, how can we determine the lawfulness or unlawfulness of conduct that does not fall within the ambit of one of the familiar grounds of justification?
- (b) Each ground of justification has its limits. Where an act exceeds these limits, it is unlawful. So what is the criterion for determining the limits of the grounds of justification?

The answers to these questions are found under the next subheading.

(2) Legal convictions of society

Opinions differ on the material content of the concept of unlawfulness, but we do not intend discussing the philosophical arguments underlying the differences of opinion here. The current approach (with which we agree) is the following:

Conduct is unlawful if it conflicts with the boni mores (literally “good morals”) or legal convictions of society (*Fourie* 2001 (2) SACR 674 (C) 678).

The law must continually strike a balance between the conflicting interests of individuals themselves, or between the conflicting interests of society and the individual. If certain conduct is regarded as unlawful by the law, this means that, according to the legal convictions (or *boni mores*) of society, certain interests or values protected by the law (such as life, property or dignity) are regarded as more important than others (*Clark v Hurst* 1992 (4) SA 630 (D) 652–653). The contents of the Bill of Rights in Chapter 2 of the Constitution must obviously play an important role in deciding whether conduct is in conflict with public policy or the community’s perception of justice. The values mentioned in section 1 of the Constitution, namely “human dignity, the achievement of equality and the advancement of human rights and freedoms”, are also crucial in deciding this issue.

Therefore, in order to determine whether conduct is unlawful, we must inquire whether the conduct concerned conflicts with the boni mores or legal convictions of society. The grounds of justification must be seen as practical aids in the determination of unlawfulness. In effect, they merely represent those situations encountered most often in practice, which have therefore come to be known as easily recognisable grounds for the exclusion of unlawfulness. They do not cover the entire subject-field of this discussion, namely the demarcation of lawful and unlawful conduct.

In *Fourie* 2001 (2) SACR 674 (C), the facts were the following: X, a regional-court magistrate, was caught exceeding the speed limit on his way to court. He pleaded not guilty. X's defence was that even though he had exceeded the speed limit, his act was not unlawful, despite none of the established grounds of justification being applicable to his conduct. X argued that his conduct should be regarded as lawful because it was not in conflict with the legal convictions of society. By trying to arrive in court on time, his only aim was to promote the interests of the administration of justice. He did not seek to promote his own private interests, but those of the state, and, more particularly, those of the administration of justice.

The court dismissed this defence. If this defence were valid, it would open the floodgates to numerous unpunishable contraventions of the speed limits on our roads. Many people would then be entitled to allege that, since they would otherwise be late for an appointment in connection with a service they render to the state, they are allowed to contravene the speed limit. In the course of the judgment, the court confirmed the principle set out above, namely that the inquiry into unlawfulness is preceded by an inquiry into whether the act complied with the definitional elements, and also that the test to determine unlawfulness is the *boni mores* or legal convictions of the community.

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

(1) an act that complies with the definitional elements and (2) an act that is unlawful.

The act described in (1) is not necessarily unlawful; it is only "provisionally" unlawful. Students often confuse the two concepts. One of the reasons for the confusion is that, for the layperson, the word "unlawful" probably means only that the act is an infringement of the "letter" of the legal provision in question (i.e. the definitional elements). You may overcome this possible confusion by always using the expression "without justification" as a synonym for "unlawful": an act complying with the definitional elements is unlawful only if it cannot be justified.

5.2.4 Unlawfulness distinguished from culpability

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

We will now proceed to a discussion of the different grounds of justification. The rest of this lesson is devoted to a discussion of the first ground of justification, namely private defence. In the next lesson we will deal with the remaining grounds of justification.



ACTIVITY 5.2.5 (Short-answer question based on unlawfulness)

When will conduct be regarded as unlawful? [3]

Conduct is unlawful if it conflicts with the boni mores (literally the "good morals") or legal convictions of society. (1)

This means that according to the legal convictions of society, certain interests or values protected by the law (such as life, property, or dignity) are regarded as more important than others. (1)

The grounds of justification must be seen as practical aids that represent those situations encountered most often in practice, which have therefore come to be known as easily recognisable grounds for the exclusion of unlawfulness. (1)



ACTIVITY 5.2.6 (Quiz based on unlawfulness)

Read the following statement and then choose the correct answer (either A, B, C or D):

Grounds of justification must be seen as:

- (A) practical aids in the determination of legality
- (B) practical aids in the determination of unlawfulness
- (C) practical aids in the determination of lawfulness
- (D) practical aids in the determination of culpability

Correct answer: B

5.3 PRIVATE DEFENCE

(Snyman's Criminal Law 85-95)

5.3.1 Definition of private defence

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

(Don't feel discouraged if, when reading the definition for the first time, it seems to be complicated, or if you do not immediately understand all the details it contains. We will explain the details of this ground of justification below. By the time you come to the end of the discussion of this ground of justification, you ought to understand all the content of this definition.)

This ground of justification is commonly referred to as "self-defence", but this description is too narrow, since not only persons who defend themselves, but **also those who defend others**, can rely upon this ground of justification. A person acting in private defence acts lawfully, provided his conduct complies with the requirements of private defence and he does not exceed its limits.

For purposes of classification, it is convenient to divide the requirements and the most important characteristics of private defence into two groups. The first group comprises those requirements or characteristics with which the attack against a person acting in private defence must comply; the second comprises the requirements with which the defence must comply.

In order to assist you in your studies, we will first summarise the requirements in the following diagram. This is the framework of the knowledge you should acquire.

Private defence requirements

(1) Requirements of attack

The attack

- (a) must be **unlawful**
- (b) must be **against interests that ought to be protected**
- (c) must be **threatening**, but not yet completed

(2) Requirements of defence

The defensive action

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

We will now elaborate on the abovementioned private defence requirements.

5.3.2 Requirements of the attack

(1) The attack must be unlawful

Private defence against lawful conduct is not possible. For this reason, a person acts unlawfully if he attacks a policeman who is authorised by law to arrest a person. If the policeman is not authorised by law to perform a particular act, or if he exceeds the limits of his authority, he may lawfully be resisted.

Can X rely on private defence if he kills Y in the course of a prearranged duel? In Jansen 1983 (3) SA 534 (NC), X and Y decided to “settle their differences” in a knife duel. During the fight, Y first stabbed at X, and then X stabbed Y in the heart, killing him. The court held, quite justifiably, that X could not rely on private defence, and convicted him of murder. X’s act of averting the blow was merely part of the execution of an unlawful attack that he had planned beforehand.

In deciding whether the attack of Y (the aggressor) on X is unlawful, there are three considerations. These **three considerations**, marked (a) to (c) below, are the following:

- (a) The attack **need not be accompanied by culpability**. X can therefore act in private defence, even if his act is directed against a non-culpable act by Y. If, for example, Y was mentally ill, or a child, when he attacked X, X could rely on private defence to defend himself (K 1956 (3) SA 353 (A)).
- (b) **The attack need not be directed at the defender**. X (the “defender”) may therefore also act in private defence to protect a third person (Z), even if there is no family or protective relationship between X and Z (*Patel* 1959 (3) SA 121 (A)). **Figure 5.1 depicts what happened in the aforementioned case:** the criminal, Y, initially attacked the lady, Z, whereupon the “hero”, X, appeared on the scene and, in defence of Z, attacked Y, thereby preventing him from continuing with his attack upon Z. As will be pointed out later, the defensive act must be directed against the attacker, in this case, Y.

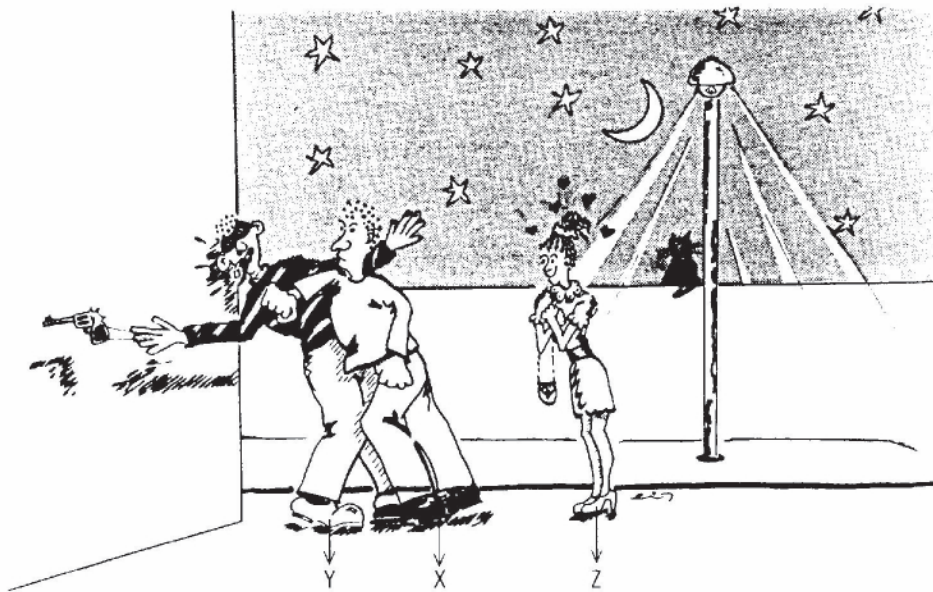


Figure 5.1: Criminal Y is attacked by Hero X as he defends victim Z

- (c) The attack need **not necessarily consist in a positive act**, even though it nearly always does. Although it is unlikely to occur very often, an omission may also qualify as an “attack”, provided the other requirements for private defence are present. An example in this respect is that of a convict who assaults prison warders and escapes when his term of imprisonment has expired, but he has not yet been released.

(2) The attack must be directed against interests that, in the eyes of the law, ought to be protected

Private defence is usually invoked in protection of the attacked party’s life or physical integrity, but, in principle, there is no reason why it should be limited to the protection of these interests. Therefore, the law has recognised that a person can also act in private defence

- in protecting property (*Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A))
- in protecting dignity (*Van Vuuren* 1961 (3) SA 305 (EC))

- in preventing unlawful arrest (Mfuseneni 1923 NPD 68)
- in preventing attempted rape (Mokoena 1976 (4) SA 162 (0))

As far as protection of property is concerned, the most important decision in our case law regarding private defence is *Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 (1) SA 488 (A). The Appeal Court held that, in extreme circumstances, a person is entitled to kill another person in defence of property, but also had to comply with most of the requirements of private defence referred to above. However, the constitutionality of this rule has been questioned by legal writers.

As far as protection of dignity is concerned, it was held in *Van Vuuren (supra)* that a person may rely on private defence to defend someone's dignity. In this case, Y insulted X's wife in public, whereupon X dealt Y a few blows. The court held that X was not guilty of assault. There was a distinct possibility that Y would have continued insulting X's wife, and X wanted to prevent this.

(3) The attack must be threatening, but not yet completed

X cannot attack Y merely because he expects Y to attack him at some time in the future. He can attack Y only if there is an attack or immediate threat of attack by Y against him; in this case, it is, of course, unnecessary that he wait for Y's first blow – he may defend himself by first attacking Y, with the precise object of averting Y's first blow (Patel 1959 (3) SA 121 (A)). Private defence is not a means of exercising vengeance, neither is it a form of punishment. For this reason, X acts unlawfully if he attacks Y when Y's attack upon him is already something of the past.

You can also refer to the case of *Mogohlwane* 1982 (2) SA 587 (T), where Y tried to take a paper bag containing clothes, a pair of shoes and some food from X. X resisted, but Y threatened X with an axe and therefore gained possession of the bag. X immediately ran to his house, some 350 metres away, fetched a table knife, returned to Y and tried to regain his property. When Y again threatened X with the axe, X fatally stabbed Y with his knife in order to prevent him (Y) from escaping with his bag of possessions. The court decided that X acted in private defence: the attack on X was not completed, because when X ran home and fetched the knife, it was part of one and the same immediate and continued act of resistance. X was a poor man and the contents of the bag were of value to him. If Y had run off with the bag, X would never have seen it again.

5.3.3 Requirements of the defence

(1) It must be directed against the attacker

If Y attacks X, X cannot direct his act in private defence against Z.

(2) The defensive act must be necessary

The defensive act must be necessary in order to protect the interest threatened in the sense that it must not be possible for the person threatened to ward off the attack in another, less harmful way (*Attwood* 1946 AD 331 340).

For example, if, at the end of a lease, a stubborn tenant refuses to leave the rented premises, the lessor is not entitled to seize him by the collar and expel him from the premises forcibly. The lessor may protect his rights and interests only by using the ordinary legal remedies, which involve obtaining an ejectment order from a court and, possibly, claiming damages.

The basic concept underlying private defence is that a person is allowed to “take the law into his own hands” only if the ordinary legal remedies do not afford him effective protection. It would seem that our courts require an assaulted person to flee, if possible, rather than kill his assailant – unless such an escape would be dangerous. For criticism of this attitude, read the discussion in *Snyman’s Criminal Law* 88-90.

(3) There must be a reasonable relationship between the attack and the defensive act

Another way of expressing this requirement is by saying that the act of defence may not be more harmful than necessary to ward off the attack (*Trainor* 2003 (1) SACR 35 (SCA)).

It stands to reason that there ought to be a certain **balance between the attack and the defence**. After all, a person is not entitled to shoot and kill someone who is about to steal his pencil! There should be a reasonable relationship between the attack and the defensive act in the light of the particular circumstances in which the events take place. If, for example, the attacked party could have overcome the threat by using his fists or by kicking the assailant, he may not use a knife, let alone a firearm.

In order to decide whether there was a reasonable relationship between the attack and the defence, factors such as the following should be taken into consideration:

- The relative **strength** of the parties (if x is strongly built, but y, the aggressor, is weakly built, x ought normally to be able to overcome y’s attack without resorting to extreme measures.)
- The **sex/gender** of the parties.
- The **ages** of the parties.
- The **means** they have at their disposal.
- The **nature of the threat**.
- The **value of the interest** threatened.
- The **persistence of the attack**.

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

There is no such thing as inadvertent or accidental private defence. Private defence cannot succeed as a defence in cases where it is pure coincidence that the act of defence was, in fact, directed at an unlawful attack. Example: X decides to kill Y, whom he dislikes, and shoots and kills him while he is sitting in a bus together with other passengers. Only afterwards is it discovered that Y was an urban terrorist who was on the point of blowing up the bus and all its passengers by means of a hand grenade. If X had not killed Y in time, he (X) himself would have been killed in the explosion. X would, however, not be allowed to rely on private defence in such circumstances. (There is, thus far, no direct authority in our case law dealing with this requirement for private defence.)

5.3.4 The test for private defence

The question whether X's acts fell within the limits of private defence must be considered objectively, that is, in the light of the actual facts, and not according to what X (at the time) took the facts to be. **A person cannot rely on private defence if it appears that he was not, in fact, exposed to any danger, but merely thought that he was.**

Example: Y goes out one evening to play cards with his friends. On his way home, he loses his keys, perhaps because he has had one or two drinks too many. Arriving at his home, he decides not to wake his wife, X, by knocking on the door, but rather to climb through an open window. His wife wakes up and, in the dark, sees a figure climbing through the window. She does not expect it to be her husband and takes it to be a burglar. She seizes a pistol and fires at the "burglar" (her husband), killing him. X cannot rely on private defence because, from an objective point of view, she did not find herself in any danger. She merely **thought** she was in danger. We can refer to this type of situation as putative private defence. (The word "putative" is derived from the Latin word *putare*, which means "to think". Thus "putative private defence" means defence that existed only in X's thoughts.) This is not actual private defence. However, the fact that X cannot rely on private defence does not mean that she is therefore guilty of murder. She may, as a defence, rely on **absence of culpability, because she was mistaken and because her mistake excluded the intention to murder her husband**. We will return to this point later.

Whether there actually was danger or an attack warranting the exercise of private defence must be determined objectively *ex post facto* (after the event). Here the rule is that the court should not act as an armchair critic but should try to visualise itself in the position of the attacked person at the critical moment, when he possibly had only a few seconds to make a decision that was of vital importance to him.

5.3.5 Exceeding the limits of private defence

If X is attacked by Y, but in retaliating, he exceeds the limits of private defence (e.g. because he causes the attacker more harm or injury than is justified by the attack), he himself becomes an attacker and acts unlawfully. Whether he is then guilty of a crime such as murder, assault or culpable homicide will depend on his culpability, in other words, his possible intention or negligence (see study unit 11).



ACTIVITY 5.3.5 (Short-answer question based on private defence)

Assume that X, who is sleeping in his home, is woken up in the middle of the night by Y, an armed burglar, who approaches his room or that of a family member. X shoots at Y in order to protect his family. Y dies as a result of the shot. Can X's conduct be justified on the grounds of private defence?

ANSWER TO ACTIVITY 5.3.5

It would be unfair to expect X first to ask Y to identify himself and state the purpose of his visit to decide what, objectively, the appropriate defensive measures would

be in the circumstances. It would also be unfair to expect X first to try to arrest Y and then call the police. Experience tells us that even a moment's hesitation by X in such circumstances might be fatal to X. To deny X the right to shoot in such circumstances is to require him to gamble with his life or with the lives of the other people in the house.

Even if a court holds that X cannot rely on private defence because, objectively, there was a less harmful way in which he could have overcome the danger, the court would, in most cases refuse to convict X of murder if he shot and killed Y: although X acted unlawfully, he lacked intention because he honestly believed that his life or the lives of his family members were in danger. This means that there was no awareness of unlawfulness on his part and therefore no intention. He was mistaken about the unlawfulness of his action and therefore lacked intention. This will become clearer later in the study guide where, as part of the discussion of intention, we discuss the effect of mistake relating to unlawfulness. However, X may still be found guilty of culpable homicide if the reasonable person would have acted differently in the circumstances. Refer to Lesson 11 of this study guide.



ACTIVITY 5.3.6 (Quiz based on private defence)

Read the following statement and then choose the correct answer (either A, B, C or D):

The attack in private defence is usually directed against:

- (A) interests that, in the eyes of the law, ought to be protected
- (B) interests that a reasonable person would normally protect
- (C) interests that a reasonable person would sometimes protect
- (D) interests that a reasonable person would always protect

Correct answer: A

5.4 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>boni mores</i>	good morals	<i>ukuziphatha okuhle</i>
<i>putare</i>	to think	<i>ukucabanga</i>

5.5 SUMMARY

- (1) Once it is clear that X has committed an act that complies with the definitional elements, the next step in inquiring into the question of criminal liability is to determine whether X's act was also unlawful.
- (2) Conduct is unlawful if it is in conflict with good morals (*boni mores*) or the legal convictions of society.

- (3) The grounds of justification are practical aids for determining unlawfulness. They represent situations often encountered in practice that have come to be known as easily recognisable grounds for the exclusion of unlawfulness.
- (4) Definition of private defence: see definition above.
- (5) The requirements with which the attack and the act of defence must comply in order to succeed with a plea of private defence: see the summary above.
- (6) In *Ex parte die Minister van Justisie: in re S v Van Wyk*, the Appeal Court held that X may, in extreme circumstances, even kill another in private defence to protect his (X's) property. The constitutionality of this rule has been questioned by legal writers.
- (7) Putative private defence occurs when X thinks that he is in danger, but, in fact, he is not. This is not actual private defence, but it may exclude X's culpability.



STUDY HINT: Make your own summary of this lesson for revision purposes.

5.6 DISCUSSION FORUM 5



Post your answer on the forum (by clicking reply).

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/questions based on private defence

- State the requirements with which the attack and the act of defence must comply to form the basis of a successful plea of private defence. In your answer, you need only list the requirements of the attack and the defence, not discuss them. [7]
- Explain putative private defence by means of a practical example. [5]
- List some of the interests that can be protected when invoking private defence as a ground of justification. [5]
- In order to decide whether there was a reasonable relationship between the attack and the defence in private defence, several factors should be taken into consideration. List these factors. [7]



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 5

Video link: <https://youtu.be/sCXJf6jhp7Y>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoor) (LexisNexis, Durban 2020)

Learning unit 6

Unlawfulness II



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Demonstrate a deeper understanding of unlawfulness by evaluating an accused's conduct to decide whether or not it complies with the requirements of the grounds of justification known as necessity, consent, obedience to orders, triviality and official capacity.

6.1 BACKGROUND

As pointed out in the previous lesson, the discussion of unlawfulness is spread over two lessons. In the previous lesson we discussed the meaning of the concept of unlawfulness and, thereafter, the first ground of justification, namely private defence.

In this lesson we discuss the remaining grounds of justification, namely necessity, consent, obedience to orders, official capacity and triviality.

Please note that in terms of the common law, the disciplinary chastisement (or corporal punishment) of a child by a parent or teacher was justified if it was moderate and reasonable. However, neither teachers nor parents have the right to punish their children, or children in their charge, anymore. After the coming into effect of the South African Constitution, legislation was enacted in 1996 which bans disciplinary chastisement in schools. Several court decisions have held that the defence of reasonable and moderate chastisement of children by their parents is not constitutionally viable since it undermines a child's rights to dignity and equal treatment under the law.

6.2 NECESSITY

(Criminal Law 95-102)

6.2.1 Definition of necessity

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

Although this definition does not cover every aspect of this ground of justification, it does contain the most important elements.

6.2.2 Distinction between private defence and necessity

The two grounds of justification known as necessity and private defence are closely related. In both cases, the perpetrator (X in the examples to follow) protects interests that are of value to her, such as life, physical integrity, and property, against threatening danger. The differences between these two grounds of justification are the following:

- (1) **The origin of the situation of emergency. Private defence** always results from an unlawful (and therefore human) attack; **necessity**, on the other hand, may result from either an unlawful human act or from chance circumstances, such as natural occurrences.
- (2) **The object at which the act of defence is directed. Private defence** is always directed at an unlawful human attack; **necessity** is directed at either the interests of another innocent third party or merely amounts to a violation of a legal provision.



ACTIVITY 6.2.2.1 (Short-answer question based on the Distinction between private defence and necessity):

Distinguish between private defence and necessity. [5]

Answer:

The two grounds of justification known as necessity and private defence are closely .. related. In both cases, the perpetrator (X) protects interests which are of value to her, such as life, physical integrity and property, against threatening danger. The distinctions between these two grounds of justification are the following:

*(a) the **origin** of the situation of emergency: Private defence always stems from an unlawful (and therefore human) attack; necessity, on the other hand, may stem either from an unlawful human act, or from chance circumstances, such as natural occurrences. (2)*

*(b) the **object** at which the act of defence is directed: Private defence is always directed at an unlawful human attack; necessity is directed at either the interests of another innocent third party or merely amounts to a violation of a legal provision. (2)*

The following scenarios are examples of situations in which X's conduct is justified because she is acting in a situation of necessity:

Examples of necessity

- (1) **Refer to figure 6.1, which depicts the following scenario:** A fire breaks out in a building while X is on the third storey. In order to save her life, she jumps out of the window, landing on the roof of a luxury motor car. The roof of the car is severely damaged. X is charged with malicious injury to property in respect of the car. She

cannot be convicted because she can successfully rely on the defence (ground of justification) of necessity. The damage was caused while committing an act to save her life; the fire that led to her jumping out of the building constituted an immediate threat to her life; there was no other way of escape out of the building; and the interest that she infringed (namely the car owner's interest of not having his car's roof damaged) was not more important than the interest that she sought to protect (namely her own life).

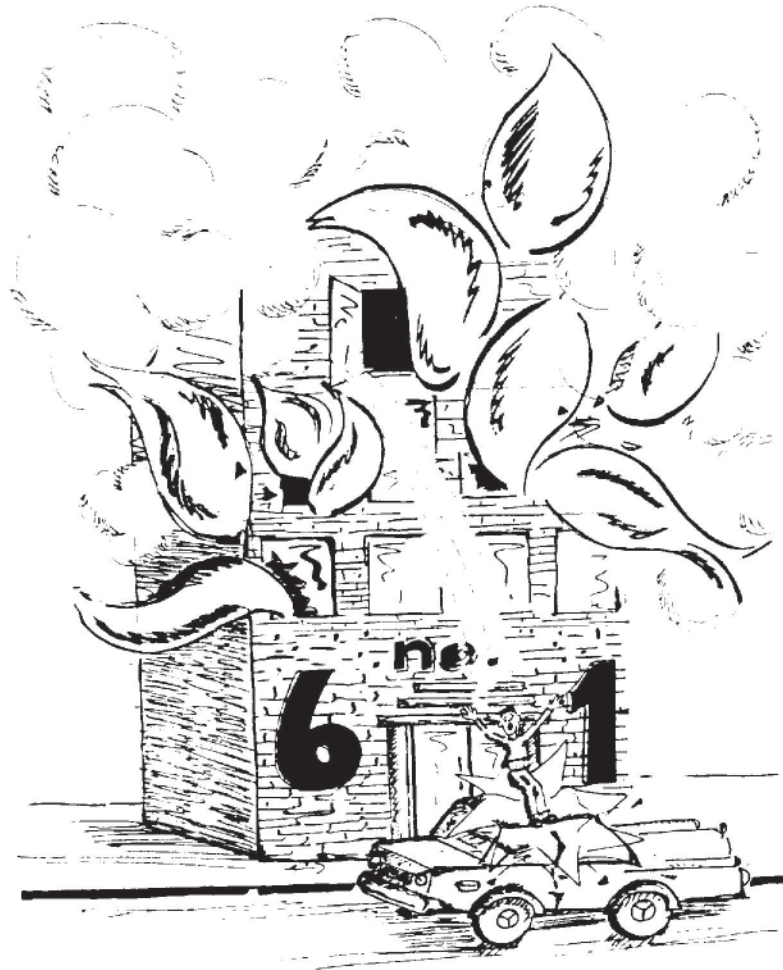


Figure 6.1: X jumps to escape a burning building and lands on a car's roof, causing it severe damage, but saving her life in the process

- (2) While X is in Y's backyard, Z attacks her (X) with a knife. X is unable to ward off the attack because she is slightly built and unarmed, whereas Z is strong and armed with a knife. There is only one possible way to escape, namely, to kick down part of the fence (which belongs to Y) and then run away through the gap in the fence. This is exactly what X does. If X is subsequently charged with malicious injury to property because she broke a fence belonging to Y, she can successfully rely on the defence of necessity. In this example, the emergency situation arose from an unlawful act, but the act of defence is directed not against the attacker, but against the interests of an innocent third party, namely Y.
- (3) The facts of *Goliath* 1972 (3) SA 1 (A) are as follows: Z orders X to kill Y and threatens to kill X if she does not carry out the order. There are no means of escape for X, so

she kills Y. X was found not guilty. This type of situation is known as “compulsion” or “coercion”.

- (4) The ship on which X is a passenger sinks during a storm. X ends up in the ocean, clinging to a piece of driftwood. Another shipwrecked passenger, Y, tries to cling to the same piece of driftwood. However, the piece of wood cannot support the weight of both of them, so X pushes Y down under the water to drown her in order to save her own life. Here, the reason for the emergency was an act of nature and the act of defence was directed against the life of an innocent person.
- (5) The facts in *Pretorius* 1975 (2) SA 85 (SWA) are as follows: X’s baby swallows a large number of headache tablets. X rushes the child to the hospital by car for emergency treatment. While driving to the hospital, she exceeds the speed limit. On a charge of exceeding the speed limit, X relies successfully on the defence of necessity. Here, strictly speaking, the reason for the situation of emergency was a series of chance circumstances; the act committed out of necessity was directed not against some person’s interests but amounted merely to a violation of a legal provision, namely the prohibition on speeding.

Above we explained various scenarios or situations in which X’s conduct is justified because she was acting in a situation of necessity.

If X acts in a situation of necessity, she acts lawfully.

For a plea of necessity to succeed, it is immaterial whether the situation of emergency is the result of **human action** (e.g., coercion) or **chance circumstances** (such as famine, a bolt of lightning or a flood). Neither does it matter whether X’s act by means of which she tries to escape the emergency is directed against the interests of another human being or amounts merely to a violation of a legal provision. All that matters is whether X found herself in a situation of emergency when she acted.

6.2.3 Restricted field of application

Private defence can readily be justified on ethical grounds, since there is always an unlawful attack, and the attacker simply gets what she deserves. On the other hand, justifying necessity is more difficult. Here, X finds herself in a situation where she **must choose between two evils**: she must either suffer personal harm or break the law, and the choice she must make is often debatable. It is precisely for this reason that there must be strict compliance with the requirements for necessity before the defence can be successful. The attitude of our courts to the plea of necessity is often one of scepticism, and they also seek to restrict its sphere of application as far as possible (*Mahomed* 1938 AD 30 36; *Damascus* 1965 (4) SA 598 (R) 602).

6.2.4 Absolute compulsion, relative compulsion, and necessity

In the case of **absolute compulsion**, X does not commit a voluntary act: for example, Z, who is much stronger than X, grabs X’s hand, which is holding a knife, and stabs Y. The

reason for X's non-liability is then not necessity, but the absence of a voluntary act (as this term is understood in the law). (Consult the discussion earlier in this study guide on the requirements for an act.)

In the case of **relative compulsion**, there is indeed a voluntary act on the part of X: Y threatens to kill X if X does not kill Z. In this case, X is free to choose to be killed herself. **Only cases of relative compulsion may amount to situations of necessity.**



ACTIVITY 6.2.4.1 (Short-answer question based on absolute compulsion, relative compulsion, and necessity)

Distinguish between absolute and relative compulsion and indicate which of the two constitutes necessity. [4]

Answer:

In absolute compulsion, X does not commit a voluntary act. For example, Z, who is stronger than X, grabs X's hand in which X is holding a knife and stabs Y. X's non-liability is not based on necessity, but on the absence of a voluntary act. (2)

In relative compulsion, there is indeed a voluntary act on the part of X. For example, Y threatens to kill X if X does not kill Z. X is free not to kill Z but fears for his own life and chooses to kill Z. This is a situation of relative compulsion and amounts to a situation of necessity. (2)

6.2.5 Requirements for a plea of necessity

Although the requirements for a successful plea of necessity resemble, to some extent, the requirements for a successful plea of private defence, they are not the same in all respects. To assist you in your studies, we will begin by summarising the requirements in the following diagram:

Requirements for a plea of necessity

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

We will now elaborate on each of the above-mentioned requirements:

- (1) Some **legal interest** of X, such as her life, physical integrity, or property, must be threatened. In principle, a person should also be able to protect other interests, such as dignity, freedom, and chastity, in a situation of necessity.

- (2) A person can also act in a situation of necessity to protect **another person's interest**, for example where X protects Z from being attacked by an animal.
- (3) The emergency must **already have begun or be imminent**, but must **not have been terminated**, nor be expected in the future only.
- (4) Whether a person can rely on the defence of necessity if she herself is responsible for the emergency is a debatable question. In our opinion, X should not be prevented from successfully raising this defence merely because **she caused the emergency herself**. If she were prevented, this would mean that if, because of X's carelessness, her baby swallowed a handful of pills, X would not be allowed to exceed the speed limit while rushing the baby to hospital but would have to resign herself to the child's dying (compare the facts in Pretorius supra). The two acts, namely the creation of danger and rescue from it, should be separated. If the first act amounts to a crime, X can be punished for it, for example where she sets fire to a house and then must break out of the house to save her own life.
- (5) If somebody is **legally compelled** to endure the danger, she cannot rely on necessity. Persons such as police officials, soldiers and firefighters cannot avert the dangers inherent in the exercise of their profession by infringing the rights of innocent parties. Another aspect of this rule is that a person cannot rely on necessity as a defence if what appears to her to be a threat is, in fact, lawful (human) conduct. Thus, it was held in Kibi 1978 (4) SA 173 (EC) that if X is arrested lawfully, he may not damage the police van in which he has been locked up in order to escape from it.
- (6) The act committed in necessity is lawful only if it is the **only way** in which X can avert the threat or danger. Where, for example, Z orders X to kill Y and threatens to kill X if she does not obey, and it appears that X can overcome her dilemma by fleeing, she must flee and, if possible, seek police protection (Bradbury 1967 (1) SA 387 (A) 390).
- (7) X must be **conscious** of the fact that an emergency exists, and that she is therefore acting out of necessity. There is no such thing as a chance or accidental act of necessity. If X throws a brick through the window of Y's house in order to break in, and it later appears that by so doing, she has saved Z, who was sleeping in a room filled with poisonous gas, from certain death, X cannot rely on necessity as a defence.
- (8) The harm occasioned by the defensive act must not be out of proportion to the interest threatened, and therefore X must **not cause more harm** than is necessary to escape the danger. It is this requirement that is the most important one in practice, and it can also be the most difficult to apply. The protected and the impaired interests are often of a different nature, for example where somebody damages another's property in protecting her own physical integrity. One of the most important – and also the most problematic – questions arising in respect of the requirement under discussion is whether a person is entitled to kill someone

else in a situation of necessity. Because of its complexity, this question will be discussed separately below.



ACTIVITY 6.2.5.1 (Short-answer question based on the requirements of the plea of necessity)

While walking in the street, X sees a dog attacking Y, an old person. X and Y do not know each other, but in order to protect Y, who cannot defend herself, X hits the dog with her wooden walking stick. The dog dies as a result of a head injury inflicted by X. X is charged with malicious injury to property in respect of the dog.

What is the appropriate defence in these circumstances – private defence or necessity?

FEEDBACK ON ACTIVITY 6.2.5.1

*X can rely on the defence of **necessity**. In a situation of necessity, a person may also protect the interests of somebody else, even though there is no particular relationship between the parties. If you protect yourself or another person against an animal's attack, you act in a situation of necessity and not in private defence. Private defence is possible only against an unlawful attack, and only a human being can act unlawfully.*



ACTIVITY 6.2.5.2 Quiz based on the requirements of the plea of necessity)

Read the following statement and then choose the correct option (either A, B, C or D):

The act committed in necessity is lawful only if it is:

- (A) the least destructive way in which X can avert the danger
- (B) the only way in which X can avert the threat or danger
- (C) the simplest way in which X can avert the danger
- (D) the quickest way in which X can avert the danger

Correct answer: B

6.2.6 Killing another person out of necessity

Possibly the most perplexing question relating to necessity as a ground of justification is whether a threatened person may kill another in order to escape from the situation of emergency. Naturally, this question arises only if the threatened person finds herself in mortal danger. This mortal danger may arise from compulsion, for example where Y threatens to kill X if X does not kill Z, or from an event not occasioned by human intervention, for example where two shipwrecked persons vie for control of a wooden beam that can keep only one of them afloat and, therefore, one of them eventually pushes the other away in an attempt to survive.

Until 1972, our courts usually held that the killing of a person could not be justified by necessity (*Werner* 1947 (2) SA 828 (A); *Mneke* 1961 (2) SA 240 (N) 243; *Bradbury* 1967 (1) SA 387 (A) 399).

In *Goliath* 1972 (3) SA 1 (A), however, the Appeal Court conclusively decided that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion. In this case, X was ordered by Z to hold on to Y so that Z might stab and kill Y. X was unwilling throughout, but Z threatened to kill him if he refused to help him. The court inferred, from the circumstances of the case, that it had been impossible for X to run away from Z. Z would then have stabbed and killed X. The only way in which X could have saved his own life was by yielding to Z's threat and assisting him in the murder. In the trial court, X was acquitted on the ground of compulsion and, on appeal by the state on a question of law reserved, the Appeal Court held that compulsion could, depending upon the circumstances of a case, constitute a complete defence to a charge of murder. (The court refused to state whether the defence is based on justification or absence of culpability.)

The Appeal Court added that a court should not lightly arrive at such a conclusion and that the facts would have to be closely scrutinised and judged with the greatest caution. One of the decisive considerations in the court's main judgment, delivered by Rumpff JA, was that we should never demand of an accused more than is reasonable; that, considering everyone's inclination to self-preservation, an ordinary person regards his life as being more important than that of another; and that to demand of X that he should sacrifice himself, therefore, amounts to demanding more of him than is demanded of the average person.

If, in a case such as *Goliath*, the defence of necessity is rejected, for example because X could have fled, or because the harm he inflicted in warding off the threat was disproportionate to the threat, the extent of the threat may be taken into account as a mitigating factor when punishment is imposed.

Figure 6.2 is a representation of the following scenario depicting **the killing of another in a situation of necessity (compulsion)**. Z (on the left) orders X (in the middle) to shoot and kill Y (on the right), threatening to kill X, should he refuse to obey the order. (Assume that the circumstances are such that it is impossible for X to escape the situation of necessity by, for example, running away or attacking Z.) If X executes the order and kills Y, he is, according to the Appellate Division decision in *Goliath*, not guilty of murder (or any other crime), since he acted in necessity.

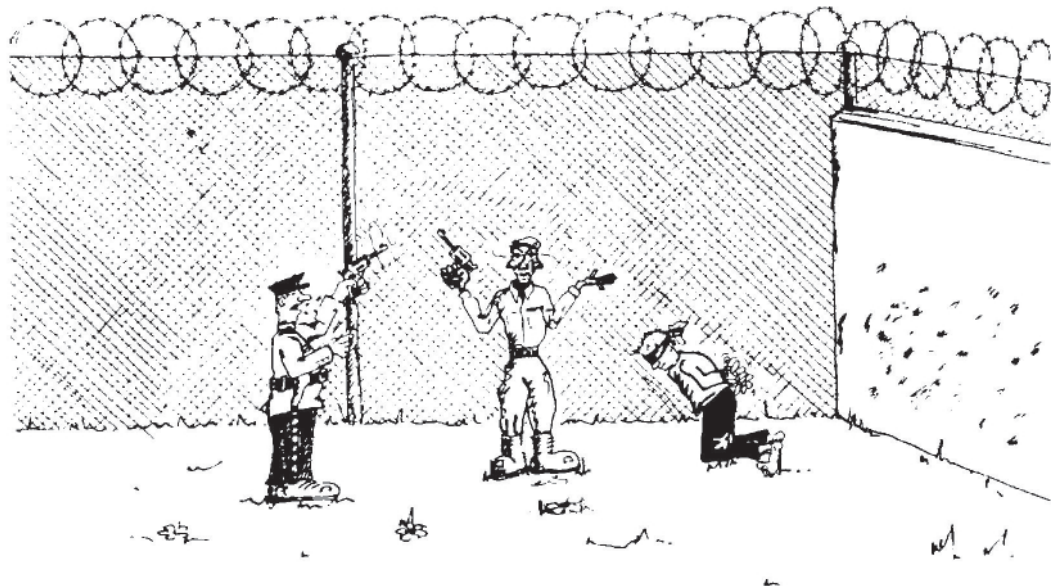


Figure 6.2: Scenario depicting the killing of another in a situation of necessity (compulsion)

However, in the case of *Maimela v Makhado Municipality and Another* 2011 (2) SACR 339 (SCA), the court accepted necessity as a ground of justification where X had discharged his pistol into a crowd of striking workers in circumstances of necessity. Hundreds of strikers armed with knobkerries had surrounded X while he was lying on the ground and had hit him. Fearing for his life, X fired shots randomly into the crowd to scare them. One person was killed, and the other shot in the face. The main issue was whether X, who relied on necessity, had acted reasonably. According to the Court, X's life was in danger, and there can be no greater harm than a threat to a person's life. Had X not fired the shots, he would in all probability have been killed. In the circumstances, **X had acted reasonably.** The court ruled that while due regard must be had to the victim's right to life, **denying a person the right to act in circumstances of necessity by killing to protect his life would be to deny that person his or her right to life.**

The term "consent" will be examined next.

6.3 CONSENT

(Snyman's Criminal Law 102-106)

6.3.1 Introduction

Consent by the person who would otherwise be regarded as the victim of X's conduct may, in certain cases, render X's otherwise unlawful conduct lawful. To generalise about consent as a ground of justification in criminal law is possible only to a limited degree, since consent can operate as a ground of justification only in respect of certain crimes, and then only under certain circumstances.

The idea that consent may render an act not unlawful is sometimes expressed in the phrase “no wrongdoing is committed in respect of somebody who has consented to the act concerned”.

6.3.2 The different effects that consent may have

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

The four different groups of crimes are the following:

- (1) There are crimes in respect of which consent does operate as a defence, but whose rigid structure is such that the **consent does not operate as a ground of justification, but forms part of the definitional elements** of the crime. The reason why absence of consent forms part of the definitional elements is that absence of consent by a certain party plays such a crucial role in the construction of the crime that this requirement is incorporated in the definitional elements of the crime. The best-known example in this respect is rape. Rape is possible only if the sexual penetration takes place without the person’s consent. Absence of consent must, of necessity, form part of the definitional elements of the crime, because it forms part of the minimum requirements necessary for the existence of a meaningful criminal prohibition.
- (2) There are crimes in respect of which consent by the injured party is **never recognised as a defence**. The best-known example is **murder**. Mercy killing at the request of the suffering party is unlawful (*Hartmann* 1975 (3) SA 532 (C)). The Supreme Court of Appeal (SCA) in *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* 2017 (3) SA 152 (SCA) distinguished mercy killing from physician-assisted euthanasia (PAE). The court held that to terminate the life of a terminally ill patient out of compassion for their suffering, and not upon the request of the patient, is mercy killing. Such conduct constitutes the crime of murder, and such a consideration was not a justification against a charge of murder. The SCA acknowledged that as the law currently stood in relation to PAE (or instances where the termination of life by a medical practitioner followed upon a request made by the patient), **consent is not a valid ground of justification available to the medical practitioner who brings about the death of the deceased patient**. For the legal position to change, it was necessary that the principle that consent cannot be a ground of justification to a charge of murder be appropriately challenged to allow for justification of the conduct of a medical practitioner in instances of euthanasia (PAE).
- (3) There are crimes in respect of which consent **does operate as a ground of justification**. Well-known examples of such crimes are **theft and malicious injury to property**.
- (4) There is a group of crimes in respect of which consent is **sometimes regarded as a ground of justification and sometimes not**. These crimes fall halfway between

categories (2) and (3) mentioned above. An example of a crime that falls into this category is **assault**.

6.3.3 When consent may operate as a ground of justification in assault

The criterion to be applied to determine whether consent excludes unlawfulness is the general criterion of unlawfulness, namely the **boni mores (the legal convictions of society), or public policy**. The best-known examples of situations in which consent may indeed justify an otherwise unlawful act of assault are those where injuries are inflicted on others in the course of **sporting events**, and where a person's bodily integrity is impaired in the course of **medical treatment**, such as an operation. Other examples of "impairments of bodily integrity", such as a kiss, a handshake or even a haircut, occur so often in everyday life that non-liability is taken for granted.

The reason why a medical doctor cannot be charged with assaulting a patient upon whom she performs an operation is the patient's consent to the operation (assuming that it has been given). If it was impossible for the patient to consent because of unconsciousness or mental illness, for example, the doctor's conduct may nevertheless be justified by necessity or **presumed consent**.

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

6.3.4 Requirements for a valid plea of consent

In those crimes in which consent may operate as a ground of justification (in other words, the type of crimes numbered (3) and (4) above under 6.3.2), the consent must comply with certain requirements in order to be valid, that is, in order to afford X a defence. We now consider these requirements. To assist you in your studies, we will first summarise the requirements for this ground of justification in the following framework:

The consent must be:

- (1) given **voluntarily**
- (2) given by a person who has **certain minimum mental abilities**
- (3) based upon **knowledge of the true and material facts**
- (4) given **either expressly or tacitly**
- (5) given **before the commission of the act**
- (6) given **by the complainant herself**

Let's now consider each of these in more detail.

- (1) **The consent must be given voluntarily, without any coercion.** Consent obtained as a result of violence, fear or intimidation is not voluntary consent. If, for example, X brandishes a revolver while demanding money from Y, and Y hands

over the money because she feels threatened, there is no valid consent to the giving of the money (*Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A)).

However, **mere submission** cannot be equated with voluntary consent (D 1969 (2) SA 591 (RA)). If a woman decided that it is futile to resist the strong, armed attacker who is about to rape her, and simply acquiesces in what he does to her (i.e. she does not expressly manifest her objection verbally or by physical acts), her conduct cannot be construed as consent to intercourse (*Volschenk* 1968 (2) PH H283 (D)).

(2) **The person** giving the consent must be endowed with certain minimum mental abilities. These are the ability:

- to appreciate the nature of the act to which she consents, and
- to appreciate the consequences of the act.

For this reason, if a woman is mentally ill, under a certain age, drunk, asleep or unconscious, she cannot give valid consent to sexual intercourse (C 1952 (4) SA 117 (O) 121; K 1958 (3) SA 420 (A); SM 2013 (2) SACR 111 (SCA)).

(3) **The consenting person must be aware of the true and material facts regarding the act to which she consents.** A fact is material if it relates to the definitional elements of the particular crime. In the case of rape, for example, the person must be aware of the fact that it is sexual penetration to which he or she is consenting. In an old English decision, *Flattery* (1877) 2 QBD 410, a woman thought that X, a quack surgeon, was operating on her to cure her of her fits, whereas he was, in fact, having sexual intercourse with her. In another decision in England, *Williams* [1923] 1 KB 340, a woman thought that X, her singing teacher, was performing a surgical operation on her to improve her breathing ability when singing, whereas, in fact, he had sexual intercourse with her. In both these cases, X was convicted of rape, the court refusing to recognise the existence of any "consent" to intercourse.

This type of mistake is a mistake relating to the nature of the act and is referred to as a mistake regarding the type of act.

In C 1952 (4) SA 117 (O), a woman was sleeping one hot summer's night and woke to find a man having sexual intercourse with her. She thought that the man was her husband, and allowed him to continue, but then discovered that the man was, in fact, not her husband, but another man, namely X. X was convicted of rape. The court stated that consent that prevents sexual intercourse from amounting to rape required not only a mental state of willingness in respect of the type of act, but also willingness to perform the act with the particular man who, in fact, has intercourse with the woman.

This type of mistake is a mistake, not regarding the nature of the act, but regarding the identity of X. This type of mistake is referred to as a mistake regarding the identity of the perpetrator.

- (4) **The consent may be given either expressly or tacitly.** There is no qualitative difference between express and tacit consent.
- (5) **The consent must be given before the otherwise unlawful act is committed.** Approval given afterwards does not render the act lawful.
- (6) **In principle, consent must be given by the complainant herself.** However, in exceptional circumstances, someone else may give consent on her behalf, such as when a parent consents to an operation being performed on his or her child.



ACTIVITY6.3.4.1 (Short-answer question based on the requirements of consent)

Read the following fact and then answer the question that follows: X is a well-built young man. He threatens to stab Y, a frail old woman, if she does not hand her cellphone over to him. Y meekly hands the cellphone over to X. Can X rely on the ground of justification of consent? Explain your answer..... (2)

No, X cannot rely on consent in this case. The consent must be given voluntarily, without coercion. Consent obtained as a result of violence or intimidation (as is the case with the old lady handing over her cellphone meekly to X) is not voluntary consent. (2)

6.4 OBEDIENCE TO ORDERS

(Snyman's Criminal law 112-116)

Obeying the orders of a superior may serve as a valid ground of justification where X obeys an order given by a superior and commits an offence. This ground of justification is relevant in the case of the armed forces and the police service. The accused person will succeed in his defence only if the following **requirements** have been met:

- (1) The order must be lawful.
- (2) The order must be given by a competent person.
- (3) The accused must do only what he was ordered to do.

- (1) **The order must be lawful:** the accused (X) must have obeyed a lawful order when he committed the offence. In the case of *R v Smith* (1900) 17 SC 561, it was held that should an order be "manifestly unlawful", then the subordinate is not compelled to obey it. Should the subordinate obey such an order, he would be acting unlawfully. Section 199(6) of the Constitution of the Republic of South Africa, 1996, confirms this principle and provides that no member of any security service may obey a manifestly illegal order.

The test approved in the *Smith* case was applied in the case of *S v Banda* 1990 (3) SA 466 (B), where members of the former Bophuthatswana defence force were charged with high treason after trying to overthrow the Bophuthatswana government. Their defence was based on obedience to orders from their superiors. This defence was rejected, however, on the basis that the orders were manifestly unlawful. It was held that any reasonable person in the position of the accused

would have known that the order was unlawful. The court therefore applied an objective test.

Where an order falls beyond the scope of a person's normal rights and duties, especially within the realm of the security services, it is suggested that this order is unlawful. Where an order is clearly unlawful, the defence will not succeed, and X will be found guilty of the offence with which he was charged.

- (2) **The order must be given by a competent person:** the person who gives the order must be authorised by law to give such an order and the person (X) who carries out the order must also be recognised in law as being obliged to obey the order (*S v Andreas* 1989 (2) PH H35 (SWA)).
- (3) **The accused must do only what he was ordered to do:** if X relies on this ground of justification, he cannot have caused more harm than is necessary in carrying out the order (*R v Mayers* 1958 (3) SA 793 (R)). For example, if X is a police official who is ordered to arrest Y, X cannot violently assault Y in the process of arresting him. In this case, X would have caused more harm than is necessary in effecting an arrest.

In *S v Mostert* 2006 (1) SACR 560 (N), a traffic officer charged with the crime of assault relied on the defence of obedience to orders. The court held that obedience to orders entailed an act performed by a subordinate on the instruction of a superior, and was a recognised defence in law. Although the defence of obedience to orders usually arises in a military context, its application is not exclusive to soldiers. For the proper functioning of the police and the protection services, it was essential that subordinates obey the commands of their superiors. The court held that there were three requirements for this defence, namely (1) the order must emanate from a person in lawful authority over the accused; (2) the accused must have been under a duty to obey the order; and (3) the accused must have done no more harm than was necessary to carry out the order. Regarding the second requirement, the test was whether or not the order was manifestly and palpably unlawful. Therefore, the court applied the principle laid down in the Constitution of the Republic of South Africa, 1996 (section 199(6)), namely that the defence of obedience to orders will be successful, provided the orders were not manifestly unlawful.



ACTIVITY 6.4.1 (Problem/scenario question based on the ground of justification obedience to orders)

X, a member of the South African Police Service, is charged with assault with intent to do grievous bodily harm. The facts before the court are that she had instructed a German shepherd dog to attack a beggar loitering in a park. The defence argued that X's act was justified because her superior officer had instructed her to get rid of all the beggars in the park by setting the police dogs on them. Based on the scenario above, can X rely on this line of reasoning?

FEEDBACK ON ACTIVITY 6.4.1

As per the case of Smith, X cannot rely on the ground of justification known as obedience to orders in these circumstances. The order to get rid of beggars in a park by setting police dogs on them, was manifestly unlawful and, therefore, X's conduct is also unlawful.



ACTIVITY 6.4.2 (Quiz based on obedience to orders)

Read the following facts, then choose the correct option: X is a police official who is ordered by his superior to arrest Y. X goes to Y's home, shoots at all the windows and then breaks down the door prior to arresting Y.

- (A) X can rely on the ground of justification of obedience to orders since he obeyed the order of his superior.
- (B) X cannot rely on the ground of justification of obedience to orders since he caused more harm than necessary in carrying out the order.
- (C) X cannot rely on the ground of justification of obedience to orders since he obeyed a manifestly unlawful order.
- (D) X can rely on the ground of justification of obedience to orders but must explain why he destroyed Y's home.

Correct answer: B

6.5 OFFICIAL CAPACITY

(Snyman's Criminal Law 107-108)

6.5.1 Definition

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

6.5.2 Examples of the application of official capacity as a ground of justification

The following are examples of cases in which X's act, despite initially seeming to be unlawful (since it complies with the definitional elements of the relevant crime), emerges – upon closer scrutiny – not to be unlawful because it is justified by the ground of justification known as official capacity:

- Possessing drugs amounts to the commission of a crime. Nevertheless, the clerk of the court whose official duty it is to exercise control over exhibits at a court will not be guilty of unlawfully possessing drugs if she exercises control over drugs that are exhibits in a current court case.
- To touch or search another person inappropriately without her consent amounts to the commission of crimes such as assault, indecent assault or *crimen iniuria*. Nevertheless, X does not commit any crime in the following circumstances, despite the fact that she has searched Y without Y's consent: X is a member of the security personnel at a custom-post or international airport. It is her duty to physically search people cross-

ing international borders in order to ascertain whether they have hidden prohibited articles (such as drugs or weapons) on their bodies or in their clothing.

- To physically grab another without her consent amounts to assault. Nevertheless, X does not commit assault in the following circumstances, despite the fact that she has grabbed Y: X is a police official. Y has committed an offence in X's presence. X attempts to arrest Y for the commission of the offence. Y resists arrest and runs away from X. X runs after Y and succeeds in apprehending her by tackling her to the ground.
- Arresting a criminal or suspect is an example of an act performed in an official capacity, which is often encountered in practice. The question of who may effect an arrest and under what circumstances are matters forming part of the course in Criminal Procedure and will not be discussed here. However, it is important to note that section 49 of the Criminal Procedure Act 51 of 1977 provides that people who attempt to arrest a criminal or suspected criminal may, in certain narrowly defined circumstances, kill the suspect if the latter resists the attempt or if she attempts to flee.



ACTIVITY 6.5.3 (Short-answer question based on official capacity)

X is a security officer at OR Tambo International Airport. She conducts a physical search on Y, a female passenger who is about to board a flight to London. Y complains that X had no right to touch her. Which ground of justification can X rely on? Explain. (4)

Answer:

When X is a security officer at an airport or customs post, and when she searches Y, X is not guilty of assault or crimen inuria. (2)

X can rely on the ground of justification of official capacity according to which acts that would otherwise be unlawful, are justified by such office. (2)

6.6 TRIVIALITY

(Snyman's Criminal law, 121-122)

If X commits an unlawful act but the extent or degree to which he contravenes the law is minimal or trifling, a court will not convict him of the crime in question (where for example, X has stolen a cheap plastic pen or pencil). This is because of the existence of the maxim that a court will not concern itself with trifling matters. This principle was applied in the case of *Kgogong* 1980 3 SA 600 (A), where X was convicted of theft for having taken a small piece of worthless wastepaper. The Appeal Court overruled X's conviction for theft because of triviality. Whether triviality will succeed as a ground of justification will depend on the circumstances of each case.



ACTIVITY 6.6.1 (Short-answer question based on triviality)

If X is charged with the crime of theft for having stolen a pencil, which ground of justification could she rely on? Explain this ground of justification. [2]

Answer:

X may rely on the ground of justification of triviality. This is because of the maxim that a court will not concern itself with trifling matters (this principle was applied in the case of Kgogong 1980 3 SA 600 (A)).

6.7 GLOSSARY

LEGAL TERM	ENGLISH	isiZULU
<i>boni mores</i>	good morals	<i>ukuziphatha okuhle</i>

6.8 SUMMARY

- (1) Although private defence and necessity are closely related, the following are important differences between them:

Private defence	Necessity
Arises from human conduct.	Arises from either human conduct or non-human intervention (i.e. chance circumstances).
Directed against an unlawful attack.	Directed against the interests of an innocent third party or consists in the violation of a legal provision.

- (2) Only relative compulsion qualifies as necessity – in the case of absolute compulsion, there is no act.
- (3) The requirements for a successful plea of necessity: see the discussion above.
- (4) In *Goliath* 1972 (3) SA 1 (A), it was held that necessity can be raised as a defence against a charge of murdering an innocent person in a case of extreme compulsion.
- (5) In *Maimela v Makhado Municipality and Another* 2011 (2) SACR 339 (SCA), the court held that denying a person the right to act in circumstances of necessity by killing to protect his life would be to deny that person his or her right to life.
- (6) The requirements for a successful plea of consent: see the requirements highlighted in the discussion above.
- (7) An act in obedience to an unlawful order may be justified only if the order is not manifestly unlawful, the order must be given by a competent person and the accused must only do what she has been ordered to do.

- (8) An act that would otherwise be unlawful is justified if the person holds a public office that authorises her to perform such an act, provided she performs the act in the execution of her official duties.
- (9) If X commits an unlawful act but the extent or degree to which she contravenes the law is minimal or trifling, a court will not convict her of the crime in question. Whether triviality will succeed as a complete ground of justification will depend on the circumstances of each case.



6.9 DISCUSSION FORUM 6

*Post your answer on the forum (by clicking **reply**).*

Comment (give feedback) on one or two of your fellow students' answers.

- **Discussion/problem/scenario question based on necessity**

Read the following facts and then answer the question that follows: X is walking home one evening when he notices smoke coming out from under the door of a house. X knows that an elderly couple live in the house. X breaks open the front door of the house and rescues the couple. A few days later, the owner of the house lays a charge of damage to property against X. Which ground of justification can X rely on? Discuss in detail with reference to the requirements of this ground of justification. [10]

- **Discussion/short-answer question based on consent**

In cases where consent is raised as a ground of justification, it must comply with several requirements. List these requirements. (NB. You do not have to discuss each requirement – only list them). [6]

- **Discussion/short-answer question based on obedience to orders**

List the three requirements of obedience to orders as a ground of justification with reference to the case of *S v Mostert* 2006 (1) SACR 560 (N). [3]

- **Discussion/short-answer question based on official capacity**

Give two examples of conduct that will not be regarded as unlawful since it is justified by the ground of justification known as official capacity. [4]



STUDY HINT: Make your own summary of this lesson for revision purposes.



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 6

Video link: <https://youtu.be/CuOJtoRKD3g>



LINK TO LESSON 6B

Video link: <https://youtu.be/1O791t6Xeak>

REFERENCE

Snyman CR Snyman's Criminal Law 7 ed (updated by SV Hooft) (LexisNexis, Durban 2020)

Learning unit 7

Culpability and criminal capacity



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Demonstrate your understanding of the broader concept of culpability.
- Demonstrate your understanding of the principle of contemporaneity.
- Distinguish criminal capacity from intention by demonstrating an understanding of the two tests used for this purpose.
- Demonstrate your understanding of the defence of non-pathological criminal capacity.

7.1 BACKGROUND

By now, we have examined three of the four elements of criminal liability, namely

- (1) the act (conduct)
- (2) compliance with the definitional elements
- (3) unlawfulness

Please note the following important information: In this lesson we will begin to explain the fourth and last general element of liability, namely culpability. The requirement of culpability contains many aspects, and the discussion of this requirement (or element) will start in this lesson (lesson 7) and then continue in lessons 8, 9, 10 and 11.

In this lesson, we will commence with a general explanation of the requirement of culpability. Thereafter, we will discuss the requirement of criminal capacity, which will be followed by a discussion of the general defence of criminal incapacity (better known as the defence of “non-pathological criminal incapacity”).

7.2 THE REQUIREMENT OF CULPABILITY IN GENERAL

(Snyman’s Criminal law 127-129)

7.2.1 Introduction

The mere fact that a person has committed an act that complies with the definitional elements and is unlawful is not sufficient to render him criminally liable. One very important general requirement remains to be satisfied:

X's conduct must be accompanied by **culpability**. This means that there must be grounds upon which, in the eyes of the law, X can be blamed for his conduct. This will be the case if he has committed the unlawful act in a **blameworthy state of mind**.

X can be blamed for his conduct only if the law could have expected him to avoid or shun the unlawful act or not to proceed with it. This has the following consequences:

- A mentally ill ("insane") person or a six-year-old child who has committed an unlawful act cannot be blamed for that act, since they cannot be expected to act lawfully.
- X's conduct cannot be described as blameworthy if, on leaving a gathering, X takes a coat, which he genuinely believes to be his own, from the row of pegs in the entrance hall of the building. The coat, in fact, belongs to Y, although it is identical to X's coat. But for the requirement of culpability, X would be guilty of theft. If the requirement of culpability could be proved/satisfied, X would be guilty of theft. In these circumstances, however, X is unaware that his conduct is unlawful.

7.2.2 Culpability and unlawfulness

Only after the unlawfulness of the act has been established is it necessary to determine whether culpability is present, since it would not make sense to attach blame to lawful conduct. The unlawfulness of the act is determined by criteria that are applicable to everybody in society, whether rich or poor, clever or ignorant, educated or uneducated, young or old. This is the reason why it is just as unlawful for somebody who is poor to steal as it is for somebody who is rich. The criteria employed to ascertain the unlawfulness of an act disregard the personal characteristics of the perpetrator.

However, when we come to the question of culpability, the picture changes and the focus now shifts to the perpetrator as an individual: the question we must now ask is whether this **particular person – considering his personal characteristics, aptitudes, gifts, talents, shortcomings, mental abilities and knowledge – can be blamed for his commission of the unlawful act**.

As pointed out in the previous lesson, the unlawfulness of the act may be excluded by **grounds of justification** (such as private defence and consent). Culpability, on the other hand, may be excluded because X lacked criminal capacity, or by some other ground excluding culpability, such as mistake. This will become clearer in the course of the discussion that follows.

"Grounds of justification" refer only to defences that exclude the unlawfulness of the act, whereas "defence" denotes any ground that excludes liability and includes, for instance, automatism, impossibility, the defence of absence of a causal link, the grounds of justification, criminal incapacity, and mistake.

Students often mistakenly use the term "ground of justification" as a synonym for any defence that X may raise – even a defence that is aimed at excluding his culpability. This should be avoided.



Read the following statement and then choose the correct option (either A, B, C or D):

It is necessary to determine whether X acted with culpability:

- (A) only after the unlawfulness of the act has been established
- (B) prior to the unlawfulness of the act being established
- (C) immediately after it has been established that X's conduct is a crime
- (D) once it is established that X's conduct complies with the rules of legality

Correct answer: A

7.2.3 Terminology

In practice, the Latin term *mens rea* is mostly used to denote culpability. Another term sometimes used in place of *mens rea* is "fault". Although these terms are generally used by our courts, we prefer to use the expression "culpability".

7.2.4 Criminal capacity and forms of culpability

Before it can be said that a person acted with culpability, it must be clear that such a person was endowed with criminal capacity. The term "criminal capacity" refers to the person's **mental ability**. This will become clearer in the discussion of criminal capacity to follow. You will see that mentally ill persons and young children, for example, lack criminal capacity. Before X can be blamed for his conduct, he must at least have the mental ability referred to above.

Moreover, the mere fact that X has criminal capacity, as described above, is not sufficient to warrant an inference that he acted with culpability; there must be something more: X must have acted either intentionally or negligently. Intention and negligence are usually referred to as the "two forms of culpability". If X (who has criminal capacity) carries away somebody else's property but is unaware of the fact that the property belongs to somebody else and thinks it belongs to him, it cannot be said that he "intentionally" removed another's property. Therefore, X cannot be convicted of theft, since, as you will see later, the form of culpability required for theft is intention, and the mistake that X made has the effect of excluding intention and, therefore, also culpability.

In short, the **content of the concept of culpability** may be summarised briefly as follows:

Culpability = criminal capacity + either intention or negligence



ACTIVITY 7.2.4.1 (Multiple-answer question based on criminal capacity and forms of culpability)

Choose the correct answers. Culpability consists of:

- criminal capacity (correct)

- legality
- unlawfulness
- intention (correct)
- negligence (correct)

7.2.5 The principle of contemporaneity

(Snyman's Criminal law 129-130)

The culpability and the unlawful act must be contemporaneous. This means that, in order for a crime to have been committed, there must have been culpability on the part of X **at the very moment** when the unlawful act was committed. No crime is committed if culpability existed only prior to the commission of the unlawful act, but not at the moment the act was committed, or if it came into being only after the commission of the unlawful act.

Example: X wishes to shoot his mortal enemy, Y. On the way to the place where the murder is to be committed, X accidentally runs down and kills a pedestrian. It turns out that, unbeknown to X, the pedestrian was, in fact, Y. In these circumstances, although there is undoubtedly a causal connection between X's act and Y's death, X could not be convicted of murdering Y, since at the time of the accident, X lacked the necessary intention to kill.



ACTIVITY 7.2.5.1 Short-answer question based on the principle of contemporaneity)

State in one sentence the meaning of the principle of contemporaneity.
[2]

Answer:

In order for a crime to have been committed, there must have been culpability on the part of X "at the very moment" when the unlawful act was committed. (2)

7.2.6 Classifications in the discussion of culpability

From the discussion thus far, it is clear that the concept of culpability has many different aspects. Because of the scope of the culpability requirement, it is not feasible to discuss it in one lesson only. Therefore, we will spread the discussion of this requirement over a number of lessons: the rest of this lesson will deal with a discussion of **criminal capacity** in general, as well as the first defence of criminal incapacity, which is known as the defence of non-pathological criminal incapacity. Thereafter, in lesson 8, we will deal with the other two defences that exclude criminal capacity, namely mental illness, and youth. Lessons 9 and 10 deal with intention and lesson 11 deals with negligence.

7.3 CRIMINAL CAPACITY

(Snyman's Criminal law 136-139)

7.3.1 Definition

The term "criminal capacity" refers to the mental abilities or capacities that a person must have in order to act with culpability and to incur criminal liability.

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

(1) appreciate the wrongfulness of his act or omission, and

(2) act in accordance with such an appreciation of the wrongfulness of his act or omission.

If one (or both) of these abilities is lacking, the person concerned lacks criminal capacity and cannot be held criminally responsible for an unlawful act that he has committed while he lacked such an ability.

7.3.2 The test to distinguish criminal capacity from intention

Criminal capacity is the indispensable prerequisite to the existence of culpability in any of its forms. The question whether X acted intentionally or negligently arises only once it has been established that he had criminal capacity. An investigation into X's criminal capacity is independent of, and covers quite a different field from, the investigation into whether he acted intentionally or negligently. The investigation into his **criminal capacity** concerns his **mental abilities**, whereas the inquiry into whether he acted **intentionally or negligently** concerns the **presence or absence of a certain attitude or state of mind on the part of X**. More particularly, an investigation into X's intention comprises an investigation into his **knowledge**. Criminal capacity has nothing to do with X's knowledge; it concerns his mental abilities.



ACTIVITY 7.3.2.1 (Short-answer questions based on the distinction between criminal capacity and intention)

Explain the difference between the concepts of criminal capacity and intention. [4]

Answer:

Criminal capacity is the indispensable prerequisite to the existence of culpability in any of its forms. The question whether X acted intentionally or negligently arises only once it is established that he had criminal capacity. (1)

An investigation into X's criminal capacity is independent of, and covers quite a different field from, the investigation into whether X acted intentionally or negligently. The investigation into X's criminal capacity concerns his mental abilities, whereas

the inquiry into whether X acted intentionally or negligently concerns the presence or absence of a certain attitude or state of mind on the part of X. (2)

More particularly, an investigation into X's intention comprises an investigation into his knowledge. Criminal capacity has nothing to do with X's knowledge; it concerns his mental abilities. (1)

7.3.3 Two psychological legs of the test

It is apparent from the above definition of criminal capacity that this concept comprises two psychological components (legs): firstly, X's ability to appreciate the wrongfulness of his act or omission and, secondly, his ability to conduct himself in accordance with such an appreciation of the wrongfulness of his act or omission.

This is summarised in figure 7.1.

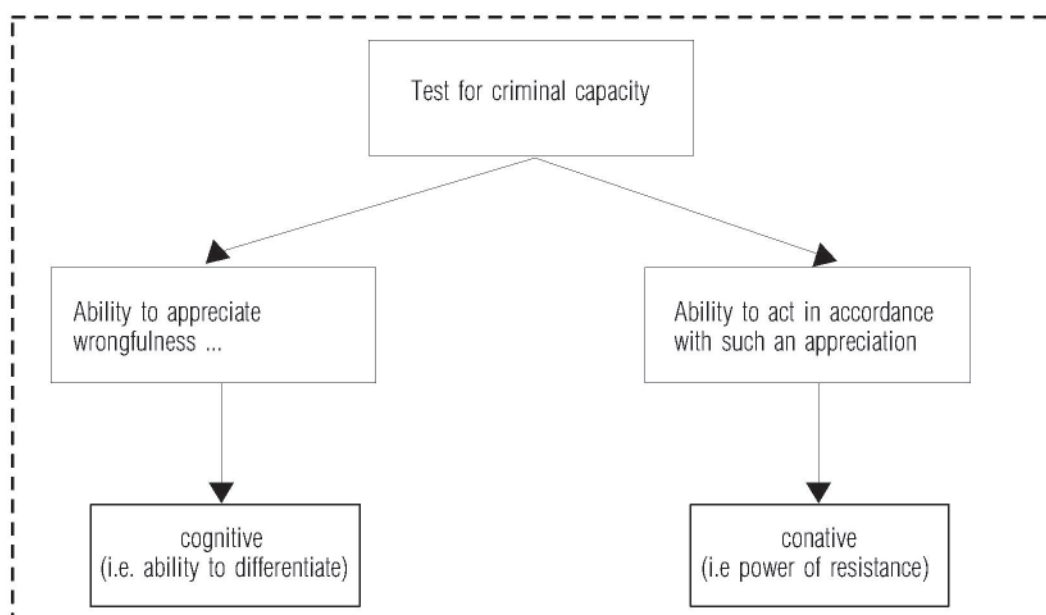


Figure 7.1: The two psychological components/legs of the test for criminal capacity

Referring to figure 7.1, the first component (or first leg of the test) may be expressed in various ways: besides the expression "ability to appreciate the wrongfulness of the act", we can also speak of the "ability to appreciate the unlawfulness of the act" or "the ability to distinguish between right and wrong". Normally, it does not matter which of these expressions you use, since they are simply synonyms.

The two psychological components mentioned above refer to two different categories of mental functions.

- The first function, namely the ability to distinguish between right and wrong, lawfulness and unlawfulness, forms part of a person's **cognitive** mental function. This function is related to a person's reason or intellect, in other words, his ability to perceive, to reason and to remember. Here the emphasis is on a particular person's **insight and understanding**. The second psychological component, which is incorporated in the second leg of the test to determine criminal capacity, refers to a person's ability to

conduct himself in accordance with his insight into right and wrong. This is known as a person's **conative** mental function. This function relates to a person's ability to control his behaviour in accordance with his insights, which means that, unlike an animal, he is able to make a decision, set himself a goal and pursue it; he is also able to resist impulses or desires to act contrary to what his insights into right and wrong have revealed to him. Here the keyword or idea is "**self-control**".

In a brief summary of the above, note that the cognitive and conative functions amount to insight (**ability to differentiate**) and self-control (**power of resistance**) respectively. These two functions render a person responsible for his conduct.

7.3.4 Defences excluding criminal capacity

First, there are the two **particular defences** excluding criminal capacity, namely:

- The defence of **mental illness**, which is dealt with statutorily in sections 77 to 79 of the criminal procedure act 51 of 1977.
- The defence of **youthful age**, which is also dealt with statutorily in terms of the child justice amendment act, 28 of 2019 (which took effect on 19 august 2022).

These two defences are referred to as "particular defences" because they can succeed only if the mental incapacities are the result of particular circumscribed mental characteristics to be found in the perpetrator, namely a mental illness or mental defect as envisaged in section 78(1) of the Criminal Procedure Act (in the case of the defence of mental illness), or the perpetrator's youthful age as envisaged in the Child Justice Amendment Act, 28 of 2019 (in the case of the second particular defence).

Furthermore, these two particular defences are subject to certain rules that are applicable only to them: for example, the defence of mental illness is specifically governed by sections 77 to 79 of the Criminal Procedure Act, which among other things, provides for special orders to be made by the court if the defence is successful (e.g. that X may not leave the court as a free person, but that he be detained in a psychiatric hospital). If X relies on his youthful age as a defence in the Child Justice Amendment Act, 28 of 2019 the question of his criminal capacity is, in terms of this act, governed by certain arbitrary age limits.

Apart from these two **specific defences** of criminal incapacity, there is also a **general defence** of criminal incapacity. This general defence is also known as "**the defence of non-pathological criminal incapacity**". The success of this general defence is not dependent upon the existence of specific factors or characteristics of the perpetrator that led to his criminal incapacity. However, the judgment of the Supreme Court of Appeal in *Eadie* 2002 (1) SACR 663 (SCA) raises doubts about whether the defence of non-pathological criminal incapacity still exists. In the meantime, until there is more clarity on this issue in our case law, we will assume that the defence still exists. **This matter is discussed in more detail in 7.4 below.**



ACTIVITY 7.3.4.1 (Short-answer question based on defences excluding criminal capacity)

List two particular defences, excluding criminal capacity.

[2]

Answer:

- *mental illness (1)*
- *youthful age (1)*

7.4 THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL CAPACITY

(Snyman's Criminal law 139-148)

7.4.1 Introduction

In all instances where X relies on criminal incapacity as a defence (other than cases in which he relies on the defences of mental illness or youth), they will fall under the heading of non-pathological criminal incapacity. This defence may also be referred to as a "general defence of criminal incapacity" to distinguish it from the particular defences of mental illness and youth (which also fall under criminal incapacity).

In the case of *Laubscher* 1988 (1) SA 163 (A), the Appeal Court first described this defence as "non-pathological criminal incapacity" to distinguish it from the defence of mental illness. The court held that the defence of mental illness applied to cases where X was suffering from an illness of the mind. However, in the defence of non-pathological criminal incapacity, X did not have to prove that he was suffering from a mental illness at the time of commission of the act. For X's defence to succeed, it only had to be proved that X lacked criminal capacity for a short or temporary period and that such criminal incapacity was not as a result of a pathological mental disturbance. If it could be shown that X, for a short period during the commission of his act (owing, for example, to an "emotional breakdown"), was unable to act according to his insights into right and wrong, the defence would succeed. Until 9 February 2002, there was no doubt that the defence of non-pathological criminal incapacity existed in our law. On that date, however, the Supreme Court of Appeal delivered a judgment in *Eadie* 2002 (1) SACR 663 (SCA) that casts some doubt on whether this defence is still recognised in our law. Let us briefly look at the law before the judgment in *Eadie*.

7.4.2 The law before 2002 (when the *Eadie* judgment was delivered)

If X's criminal incapacity is neither the result of a mental illness (as per section 78(1) of the Criminal Procedure Act), nor as a result of youth, then the defence of non-pathological criminal incapacity applies. For this defence to succeed it is not necessary that X's criminal incapacity at the time of his act was caused specifically by a mental illness. If on the evidence before it, a court finds that X lacked the ability to appreciate the wrongfulness of his act, or to act according to such an appreciation, X must be found not guilty, no matter what the cause of X's criminal incapacity. The cause of X's criminal incapacity

or inability could be an “emotional breakdown”, extreme shock, fear, anger, stress, or provocation by someone else, which caused X to “snap” and lose control. X’s inability or incapacity could also have been caused by intoxication or by a combination of factors. If X relied on this defence, the onus of proving beyond a reasonable doubt that X had criminal capacity, rests upon the state. X could lay a foundation for his defence by means of expert evidence by a psychiatrist or clinical psychologist. The two important decisions in which this defence was recognised and applied are *Campher* 1987 (1) SA 940 (A) and *Wiid* 1990 (1) SA SACR 561 (A).

7.4.3 The judgment in *Eadie*

In *Eadie* 2002 (1) SACR 663 (SCA), the Supreme Court of Appeal delivered a judgement which casts doubt about whether there is still such a defence in our law.

The **facts** in this case are the following: X, a hockey player, consumed a large quantity of liquor at a party. Late at night, he got into his car and started driving home. Y, the driver of another vehicle, overtook X’s car and then drove very slowly in front of him so that X could not overtake him. X eventually succeeded in overtaking Y. Y then drove at a high speed behind X, with the lights of his car on bright. The two cars then stopped. X was very angry, got out of his car, grabbed a hockey stick that was in his car, and walked to Y’s car. X smashed the hockey stick against Y’s car, assaulted Y, pulled him out of his car, and then continued to assault him. Y died as a result of the assault. This was a case of “road rage”. On a charge of murder, X relied on the defence of non-pathological criminal incapacity. The court rejected his defence and convicted him of murder.

After referring to earlier judgments which dealt with this defence, the court held that there is no distinction between non-pathological criminal incapacity owing to emotional stress and provocation and the defence of sane automatism. X’s defence of non-pathological criminal incapacity was therefore rejected. The court found that if X alleged that as a result of provocation his psyche had deteriorated to such an extent that he could not control himself, it amounted to alleging that he could not control his bodily movements and had therefore acted involuntarily. Such a defence of involuntary conduct amounted to a defence of sane automatism (please refer to the defence of sane automatism in Lesson 3 of this study guide). The court did not hold that the defence of non-pathological criminal incapacity no longer exists, but declared that if X relied on this defence as a result of provocation, his defence should be treated as one of sane automatism (i.e. a defence by X that he did not commit a voluntary act).

7.4.4 The present law

After the decision in *Eadie*, it is unlikely that X would succeed with a defence that as a result of non-pathological criminal incapacity due to provocation or emotional stress, he had acted voluntarily, but merely lacked criminal capacity. He would have to prove instead that he had acted involuntarily.

Until there is more clarity in our law, we submit the following: before 2002, the defence of non-pathological criminal incapacity was not only limited to cases in which X as a re-

sult of provocation or stress, temporarily lacked criminal capacity. It also applied to cases where X temporarily lacked criminal capacity due to intoxication, fear or shock. The *Eadie* judgment should only be applicable to cases in which X alleges that he lacked criminal capacity due to provocation or emotional stress. In these cases, X's defence should be treated as one of sane automatism. If, however, X alleges that he temporarily lacked criminal capacity due to, for example, intoxication, the defence of non-pathological criminal incapacity still exists.



ACTIVITY 7.4.5 (quiz based on the defence of non-pathological criminal incapacity)

Read the following statement and then choose the correct answer from the list of options (either A, B, C or D). In all instances where X relies on criminal incapacity as a defence (other than cases in which he relies on the defences of mental illness or youth), they will fall under the heading of: [2]

- (A) pathological criminal incapacity
- (B) non-pathological criminal incapacity
- (C) the particular defences of criminal incapacity
- (D) the specific defences of criminal capacity

Correct answer: B



ACTIVITY 7.4.6 (quiz based on the defence of non-pathological criminal incapacity).

Read the following statement and then choose the correct answer from the list of options (either A, B, C or D). In the case of *Eadie* 2002 (1) SACR 663 (SCA), X's defence of non-pathological criminal incapacity was rejected by the court. The court held that X should have instead relied on the defence of: [2]

- (A) pathological criminal incapacity
- (B) sane automatism
- (C) provocation
- (D) sane intoxication

Correct answer: B

7.5 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>mens rea</i>	literally "guilty mind"	<i>Ukubonakala unecala</i>

7.6 SUMMARY

- (1) "Culpability", as an element of criminal liability, means that there are grounds upon which, in the eyes of the law, the perpetrator (X) can be reproached or blamed for his conduct.
- (2) Culpability consists of criminal capacity plus either intention or negligence.
- (3) The culpability and the unlawful act must be contemporaneous.
- (4) Definition of the concept of criminal capacity - see definition above.
- (5) Criminal capacity is based upon two psychological components or legs, namely the cognitive and the conative legs.
- (6) The cognitive component deals with a person's insight and understanding and is present if X has the ability to appreciate the wrongfulness of his act or omission.
- (7) The conative element deals with X's self-control and is present if X has the ability to conduct himself in accordance with his appreciation of the wrongfulness of his act or omission.
- (8) There are two particular defences that exclude criminal capacity. These are the defences of mental illness (governed by section 77-79 of the Criminal Procedure Act 51 of 1977) and youth (governed by section 7(1) of the Child Justice Act 75 of 2008).
- (9) There is also a general defence of non-pathological criminal incapacity which can exclude criminal capacity. Until 2002, there was certainty that this defence existed in our law. However, since the judgment in *Eadie* in 2002, some uncertainty exists whether this defence is still applicable, since X's defence of non-pathological criminal incapacity based on provocation was rejected (the court found that X should have relied on a defence of sane automatism instead).
- (10) The *Eadie* judgment should only be applicable to cases in which X alleges that he lacked criminal capacity due to provocation or emotional stress. In these cases, X's defence should be treated as one of sane automatism.
- (11) In all other cases where X relies on a defence of absence of criminal capacity (e.g., on the basis of intoxication), the defence of non-pathological criminal incapacity should apply.



7.7 DISCUSSION FORUM 7

Post your answer on the forum (by clicking **reply**).

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/questions based on culpability and criminal capacity

- Briefly explain how culpability is established. [2]
- Define the concept of criminal capacity. [3]
- What are the two components of the test used to determine whether a person is endowed with criminal capacity? [4]
- In the case of *Laubscher* 1988 (1) SA 163 (A), the Appeal Court first described the defence of “non-pathological criminal incapacity” and distinguished it from the defence of mental illness. Explain how the court distinguished between these two defences. [5]



STUDY HINT: Make your own summary of this lesson for revision purposes.



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 7

Video link: https://youtu.be/PKxv_RZ1nzA

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoor) (LexisNexis, Durban 2020)

Learning unit 8

Criminal capacity – mental illness and youth



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Demonstrate your understanding of the defence of mental illness.
- Demonstrate your understanding of the defence of youth.

8.1 BACKGROUND

In lesson 7 we pointed out that

Culpability = criminal capacity + either intention or negligence

In lesson 7 we began discussing the concept of criminal capacity. We have already analysed this concept and pointed out that there is a general defence which can exclude criminal capacity and two particular defences that can exclude criminal capacity (namely the defences of mental illness and the defence of youth). In this lesson we will discuss these two defences.

8.2 MENTAL ILLNESS

(Snyman's Criminal law 149-156)

8.2.1 Introduction

Criminal capacity may be excluded by the mental illness or abnormality of the accused (X). The defence of mental illness was previously known as the defence of “insanity”, but the latter term is not used in modern law since it is no longer favoured in modern psychology. We prefer to use the term “**mental illness**”.

Since 1977, the whole subject of mental illness as a defence in criminal law has been governed by legislation and, more specifically, by section 78 of the Criminal Procedure Act 51 of 1977. This is one of the few defences in our criminal law that is regulated by statute (the other defences, such as private defence and necessity, are governed by common law).

8.2.2 Contents of section 78(1) of the Criminal Procedure Act 51 of 1977

The test to determine the criminal capacity of mentally abnormal persons is contained in section 78(1) of the Criminal Procedure Act 51 of 1977, which reads as follows:

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

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

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

shall not be criminally responsible for such act or omission.

Note that the defence of mental illness above is raised because, **at the time that X committed the crime**, she was suffering from a mental illness. The words “shall not be criminally responsible” in the section above actually mean “shall lack criminal capacity”.

8.2.3 Analysis of section 78(1)

According to the test in section 78(1) of the Criminal Procedure Act 51 of 1977, the test for mental illness as a defence excluding criminal capacity has two “legs” or aspects: the first is a biological or pathological leg relating to a mental illness or defect. The second part of the test is a psychological aspect.

- *Pathological or biological aspect of the test (mental illness or defect):*

In terms of this part of the test, the accused must be suffering from a mental illness or defect. Note the difference in the two terms:

- A **mental defect** is usually present from an early age and is characterised by a very low intellect and an inability to acquire basic social and behavioural skills. It is also of a permanent nature.
- A **mental illness** usually develops later in life and does not have to be permanent.

Note the similarity in the two terms: Both the terms “mental illness” and “mental defect” mean that the accused must be suffering from a **pathological disturbance** that is a **sickness or disease**. In other words, the accused cannot be suffering merely from a temporary illness that was brought on by alcohol, drugs, or external stimuli.

The court determines the accused’s mental illness or defect with the aid of expert evidence provided by a psychiatrist. It should be noted that the mental illness does not have to have originated in the accused’s mind; it could have had an organic origin, as is the case with arteriosclerosis (hardening of the arteries). It could also have been of a temporary or a permanent nature. However, if it was of a **temporary nature**, the accused should not have committed the act while she was having a **lucid interval or a temporary period of sanity**.

While intoxication itself is not a mental illness, the chronic abuse of liquor could lead to a recognised mental illness known as delirium tremens. This could lead to a lack of criminal capacity.

- *Psychological leg of test:*

In this part of the test, the court has to determine whether the accused could

- appreciate the wrongfulness of her act (in other words, distinguish between right and wrong)

AND

- act in accordance with such an understanding, in other words, whether she was able to act in accordance with an appreciation of her act or omission. This lack of self-control and resistance may develop gradually as the personality disintegrates; it need not be a sudden urge or impulse.

Refer to the discussion on criminal capacity earlier on in this guide, where we discussed the above two factors. Should you wish to read further, you may consult the case of *Kavin* 1978 (2) SA 731 (W).

8.2.4 Onus of proof

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

8.2.5 Verdict

If the defence of mental illness is successful, the court must find X not guilty by reason of mental illness or defect, as the case may be. X can then either be admitted to an institution or be released subject to conditions that the court considers appropriate; or she could be released unconditionally. If, however, X was charged with a very serious or violent offence, such as murder, rape, or culpable homicide, then she could be detained in a psychiatric hospital or prison until a judge makes an order for her release or for her retention in the institution.

8.2.6 Mental abnormality at the time of the trial

(Snyman's Criminal law 155-156)

Up to this point, our discussion of mental illness has referred to instances where X's mental condition at the time of commission of the alleged crime is a central issue. There are instances, however, where it is not X's mental condition at the time of the commission of the crime that is an issue but where X or her legal representative alleges that she is mentally abnormal **at the time of her trial**. A court cannot try and convict a mentally ill person. Such persons cannot give proper evidence and are unable to properly brief

their legal representatives. Since X's mental inability at the time of her trial is a procedural matter, it will be discussed in more detail in the course on Criminal Procedure.



ACTIVITY 8.2.7 (Short-answer question based on mental illness)

Discuss the concept of a “mental illness or defect”, as per section 78(1) of the Criminal Procedure Act 51 of 1977. [6]

Answer:

In section 78(1) of the Criminal Procedure Act, 51 of 1977, the first part of the test for a lack of criminal capacity refers to a “mental illness or defect”. (1)

A mental defect is usually present from an early age and is characterised by a very low intellect and an inability to acquire basic social and behavioural skills. (1)

It is of a permanent nature. (1)

A mental illness usually develops later in life and does not have to be permanent. (1)

Both mental illness and defect mean that the accused must be suffering from a pathological disturbance which is a sickness or a disease. (1)

In other words, the accused cannot be suffering merely from a temporary illness brought on by alcohol, drugs, or external stimuli. (1)



ACTIVITY 8.2.8 (Multiple-answer question based on mental illness)

What are the possible orders that a court may make if X succeeds with her defence of mental illness? [3]

Answers:

- X is not guilty by reason of mental illness or defect. (correct)
- X can be admitted to an institution. (correct)
- X can be released subject to conditions that the court considers appropriate. (correct)
- X is guilty by reason of mental illness or defect. (incorrect)
- X could be released unconditionally. (correct)
- If X was charged with a very serious crime (such as rape or murder), he could be detained in a psychiatric hospital pending an order from a judge for his release or his retention. (correct)
- X could be awarded a sum of money as damages. (incorrect)

8.3 YOUTH

(Snyman's Criminal law 156-158)

The **Child Justice Amendment Act 28 of 2019** (which took effect on 19 August 2022) has amended the regulations regarding the minimum age for criminal capacity of criminal intent in children from **10 years to 12 years**.

Section **7** of this Act provides:

A child who commits an offence while under the age of 12 years does not have criminal capacity and cannot be prosecuted for that offence (s 7(1)).

A child who is 12 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity (s 7(2)).

Section **11(1)** of the Act provides:

The State must **prove beyond reasonable doubt** the capacity of a child who is 12 years or older but under the age of 14 to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation.



ACTIVITY 8.3.1 (Quiz based on youth)

Read the following statement and then choose the correct answer from the list of options (either A, B, C or D). A child who commits an offence while under the age of 12 years:

- (A) has criminal capacity and therefore may be prosecuted for that offence
- (B) has no criminal capacity but may be prosecuted for that offence
- (C) does not have criminal capacity and cannot be prosecuted for that offence
- (D) does have criminal capacity but may not be prosecuted for that offence (2)

Correct answer: C



ACTIVITY 8.3.2 (Short-answer question based on youth)

X, an 11-year-old girl, is charged with stealing a laptop from school. Explain the defence that X may X rely on. 2]

Answer:

Since X is 11 years old, she will be able to successfully rely on a defence of youth to a charge of theft in terms of to section 7 The Child Justice Amendment Act 28 of 2019 which took effect in August 2022. (2)

8.4 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>delirium tremens</i>	a form of mental illness caused by the chronic abuse of liquor	<i>Isimo sejwayezi esibangelwa utshwala</i>
<i>arteriosclerosis</i>	hardening of the walls of an artery of a person because of aging	<i>Ukuguga/ukuqina kwemithambo ngenxa yokuguga/yokukhula komuntu</i>

8.5 SUMMARY

Mental illness

- (1) The test to determine the criminal capacity of mentally abnormal persons is contained in section 78(1) of the Criminal Procedure Act 51 of 1977 (see definition above).
- (2) The defence of mental illness can be raised EITHER because, at the time of the commission of the offence, X was mentally ill OR it can be raised at the time of the trial because X is mentally abnormal at the time of the trial.
- (3) The test to determine the defence of mental illness is contained in section 78(1) of the Criminal Procedure Act (see definition above).
- (4) The above test has two legs: a pathological or biological aspect and a psychological aspect.
- (5) If the defence of mental illness is successful, the court can make one of several verdicts, depending on the circumstances (see discussion above).

Youth

- (1) Youth is the second defence that can be raised to exclude the criminal capacity of the accused.
- (2) The **Child Justice Amendment Act 28 of 2019** (which took effect on **19 August 2022**) amended the regulations regarding the minimum age for criminal capacity of criminal intent in children from **10 years to 12 years**.
- (3) A child who commits an offence while under the age of 12 years is irrebuttably presumed to lack criminal capacity and cannot be prosecuted for that offence (s 7(1)).
- (4) A child who is 12 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity.
- (5) The State must prove beyond reasonable doubt the capacity of a child who is 12 years or older but under the age of 14 to appreciate the difference between right and wrong

at the time of the commission of an alleged offence and to act in accordance with that appreciation.



8.6 DISCUSSION FORUM 8

*Post your answer on the forum (by clicking **reply**).*

Comment (give feedback) on one or two of your fellow students' answers.

Discussion/questions based on mental illness

- Explain the test used by our courts to determine a lack of criminal capacity based on a mental illness or defect. [5]
- Discuss the concept of a mental illness or defect as per section 78(1) of the Criminal Procedure Act 51 of 1977. [6]

Discussion/question based on youth

- X is a 13-year-old girl. She is charged with stealing a pair of jeans from a shop. Will X be able to rely on a defence of youth? Briefly explain your answer. [3]



STUDY HINT: Make your own summary of this lesson for revision purposes.



THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON

LINK TO LESSON 8

Video link <https://youtu.be/N981LV0lbfc>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoorntje) (LexisNexis, Durban 2020)

Learning unit 9

Intention I



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Explain the requirement of intention by outlining the two elements of intention (inherent in all of its three forms).
- Determine whether an accused has acted with.
 - (1) direct intention
 - (2) indirect intention
 - (3) *dolus eventualis*
- Distinguish between motive and intention.

9.1 BACKGROUND

In Lesson 7, we pointed out that culpability rests on two pillars, namely criminal capacity and a form of culpability. There are two forms of culpability, namely intention and negligence. This may be explained in the following way:

The first pillar of the requirement of culpability, namely criminal capacity, has been discussed in the previous two lessons. In this and the next lesson, we will be discussing intention as a form of culpability. Negligence will be discussed in the last lesson (Lesson 11).

9.2 THE TWO ELEMENTS OF INTENTION

Intention, in whatever form, consists of two **elements**, namely a **cognitive** and a **conative** element. The **cognitive** element consists in X's **knowledge or awareness** of

- the act (or the nature of the act)
- the existence of **the definitional elements**
- the **unlawfulness** of the act

The **conative** element consists in X's **directing his will towards a certain act or result**. For example, X decides to accomplish in practice what he has previously only pictured in his imagination. This decision to act transforms what had, until then, merely been "daydreaming", "wishing" or "hoping" into intention. In legal literature, intention is also known by the Latin term *dolus*.

ACTIVITY 9.2.1 (Quiz based on intention)



Read the following statement and then choose the correct answer (either A, B, C or D).

The cognitive element of intention consists of:

- (A) X's unlawful conduct
- (B) X's knowledge or awareness
- (C) X's lawful conduct
- (D) X's unintentional conduct

Correct answer: B

ACTIVITY 9.2.2 (Quiz based on intention)



Read the following statement and then choose the correct answer (either A, B, C or D). The conative element of intention consists of:

- (A) X's knowledge of the unlawfulness of his act
- (B) X directing his will towards a certain act or result
- (C) X's awareness of his act or conduct
- (D) X's motive for his conduct

Correct answer: B

9.3 DEFINITION OF INTENTION

A person acts or causes a result **intentionally** if

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

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

$$\boxed{\text{culpability}} = \boxed{\text{criminal capacity}} + \boxed{\text{either intention or negligence}}$$

9.4 THE DIFFERENT FORMS OF INTENTION

(Snyman's Criminal law 160-167)

There are three forms of intention, namely

- direct intention (*dolus directus*)
- indirect intention (*dolus indirectus*)
- what is usually described as *dolus eventualis*

In a crime requiring intention, the intention requirement is satisfied if X had any one of these forms of intention. In other words, there is no crime requiring intention in respect of which, for example, only *dolus directus* is required, just as there is no crime requiring intention in respect of which, for example, only *dolus eventualis* is required.

We will now take a closer look at these various forms of intention.

9.4.1 Direct intention (*dolus directus*)

Definition

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

Example:

X wants to kill Y. X takes his revolver, presses it against Y's head and pulls the trigger. The shot goes off and strikes Y in the head. Y dies instantly.

Remark:

Note that the reason (or the motive) why the person performs the act or causes the result is irrelevant. In the example above, therefore, it makes no difference whether X kills Y because he hates him, or because Y is dying of a terminal illness and X wishes to relieve him from the pain he is experiencing.

9.4.2 Indirect intention (*dolus indirectus*)

Definition

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

Example:

- (1) X shoots at a target through a closed glass window. His main purpose is to hit the target, but he realises that by doing this, he must necessarily also shatter the windowpane. If he decides nevertheless to act in order to attain his main purpose, he naturally also

will those consequences that he realises must invariably accompany his main purpose. If he shoots at the target and shatters the windowpane, he cannot say that he never intended to shatter the windowpane.

- (2) X's merchandise is insured and is stored in Y's building. To obtain the insurance money, X sets the merchandise on fire, fully realising that the building itself must, of necessity, catch alight. When this happens, the building burns down. X may be charged with arson because he had the intention to set the building on fire (see *Kewelram* 1922 AD 213).

Remark:

This form of intention is present when a person visualises what he wants to achieve and realises that in order to achieve it, something else will necessarily be caused, but nevertheless proceeds with his conduct.

9.4.3 Dolus eventualis

Definition

A person acts with *dolus eventualis* if the causing of the forbidden result is not his main aim, but

- (1) he subjectively **foresees** the **possibility** that, in striving towards his main aim, his conduct may cause the forbidden result and
- (2) he **reconciles** himself to this possibility.

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

Dolus eventualis is extremely important in criminal law and you should be able to define it properly in the examination and in assignments. Remember the words that have been printed in bold in the definition, namely **foresees**, **possibility** and **reconciles**.

Examples of *dolus eventualis*:

- (1) X disconnects sections of a railway track in order to derail a train. He does not desire to kill other people, because his immediate goal is to commit sabotage and, in this way, to express the resentment he feels towards the state. He is nevertheless aware of the possibility that people may die if the train is derailed and he reconciles himself to this possibility. If he succeeds in derailing the train and people die, it is futile for X to allege that he did not intend to kill people (facts analogous to those in *Jolly* 1923 AD 176).
- (2) X wants to burn down a building. He foresees the possibility that Y may be inside it, but nevertheless proceeds with his plan and sets fire to the building. Y is indeed inside the building and dies in the flames. In the eyes of the law, X intentionally caused Y's death.

(3) X and Z undertake a joint robbery. X knows that Z is armed with a loaded revolver. He also knows that Z may use this weapon if the people whom they want to rob offer resistance. They go to a shop, which Z enters while X stands watch outside. The proprietor of the shop (Y) resists Z, causing Z to shoot and kill Y. In the eyes of the law, not only Z, but also X had the intention to kill, and is guilty of murder (*Nsele* 1955 (2) SA 145 (A)).

The following paragraph presents an interesting argument and is illustrated by the use of an example.

Should a court consider whether X acted with *dolus eventualis* and decide that this was not the case, the decision will normally be based on the consideration that X had not foreseen the possibility. However, it is quite possible for the court to conclude that although X had foreseen the possibility, he had not reconciled himself to it.

The following is an example of when a court may reach this conclusion (i.e. that although X had foreseen the possibility, he had not reconciled himself to it):

X is shooting game. He knows that behind the game, between the trees, there is a hut, which is inhabited, and that the inhabitants may be walking around outside between the trees. He thus foresees the possibility that if he shoots and misses the buck he is aiming at, the bullet may hit one of the inhabitants. However, he decides that this will not happen, since he is a very good marksman and has, in the past, shot similar buck from the same distance without missing. He pulls the trigger. The shot misses the buck and hits a person, Y, who is standing outside the hut between the trees, killing him. In this example, X did not act with *dolus eventualis*, since the second part of the test, which deals with “reconciling himself to the possibility”, has not been complied with. However, in this example, X would in all probability be guilty of culpable homicide, since he acted negligently in shooting after he had become aware of the possibility that there might be people behind the buck.

In *Humphreys* 2013 (2) SACR 1 (SCA), X was a minibus driver who was transporting school children. He had driven over a railway crossing and his vehicle was hit by a train. Several children died in the accident. The accused was convicted of murder. On appeal the issue before the Supreme Court of Appeal was whether X had intention in the form of *dolus eventualis*. The court found that the accused did not have *dolus eventualis*. The court held that although the X had foreseen the possibility of harm, he did not reconcile himself to the possible consequences of his actions (the deaths of the children). X’s conviction of murder was therefore set aside on appeal.

A similar approach was followed in the case of *Ndlazi* 2014 (2) SACR 256 (SCA). X, a taxi driver, collided with a newspaper stand on the pavement, drove into a stop sign and knocked over and killed a pedestrian. He was convicted of murder. On appeal to the Supreme Court of Appeal, the court found that although X had foreseen the possibility that by driving on the pavement he could kill pedestrians, he did not reconcile himself with this possibility. X believed he would avoid pedestrians by turning right, and then, back on to the road. The second element of *dolus eventualis* was therefore not established. X was therefore convicted of culpable homicide.

In *Maarohanye* 2015 (1) SACR 337 (GJ), X and Y, while driving under the influence of drugs, lost control of their vehicles and caused the deaths of four pedestrians. Two pedestrians were maimed. X and Y were convicted of murder and attempted murder based on intention in the form of *dolus eventualis*. On appeal, the court held that the intake of drugs which caused “a sense of euphoria” in X and Y, indicated the absence of *dolus eventualis*. X and Y had therefore neither foreseen the possibility that they may cause the deaths or injuries of pedestrians, nor reconciled themselves with such eventualities. Their convictions for murder were therefore set aside and they were found guilty of culpable homicide (culpable homicide will be discussed in lesson 11, which deals with negligence).

You should note that the minimum requirement for *dolus eventualis* is an **actual** contemplation by X of the possible consequence in question. The court must make such a finding. It is not sufficient merely to find that X must have foreseen the possibility of a consequence; *dolus eventualis* is present because X actually foresaw the possibility of a result ensuing.

ACTIVITY 9.4.4 (Short-answer question based on the forms of intention)



List the three forms of intention.

[3]

Answer:

Direct intention (1)

Indirect intention (1)

Dolus eventualis (1)

9.5 THE TEST FOR INTENTION IS SUBJECTIVE

(*Snyman's Criminal law* 167-168)

The test in respect of intention is purely subjective. The court must determine **what the state of mind of that particular person – the accused (X) – was when he committed the act**. When determining whether X had intention, the question is never whether he **should** have foreseen the result, but whether he foresaw it as an actual fact. To say that X “should have foreseen” says nothing about what X actually thought or foresaw; it is simply comparing his state of mind or conduct with another’s, namely the fictitious reasonable person. Doing this involves applying the test in respect of negligence, which is objective (refer to lesson 11 where negligence is discussed).

ACTIVITY 9.5.1 (Short-answer question based on the test for intention)



Explain why it is said that the test for intention is subjective.

Answer:

The test in respect of intention is purely subjective since the court must determine what the state of mind of that particular person – the accused (X) – was when he committed the act. (1)

When determining whether X had intention, the question is never whether he should have foreseen the result, but whether he foresaw it as an actual fact. (1)

To say that X "should have foreseen" says nothing about what X actually thought or foresaw; it is simply comparing his state of mind or conduct with another's, namely the fictitious reasonable person. (1)

To do this is to apply the test in respect of negligence, which is objective. (1)

In deciding whether X had intent, the question is always: How did X perceive the situation, what knowledge did he have, and did he will the consequence or foresee it as a possibility? (1)

9.6 PROOF OF INTENTION – DIRECT OR INDIRECT?

The question is often asked: How is intention proved in a court? A court may prove intention either directly or indirectly. In certain cases, there may be direct proof of intention, for example, where X confesses that he intentionally killed Y. Where there is no direct proof of intention, a court may infer or find that X acted intentionally from indirect proof. The following are examples of indirect proof that may lead a court to infer or find that X acted intentionally:

- X's outward conduct or behaviour at the time of the act.
- Statements made by other witnesses.
- The type of weapon used by x.
- The seriousness of the injury inflicted by x.
- Whether the injury was fatal or not.
- Factors involving general human experience.

The court cannot apply an objective test to determine intent by, for example, considering what a normal person would have done or felt in the given circumstances. The court must try and place itself in the accused's position at the time of the act and ascertain his state of mind at the time – that is, whether he appreciated or foresaw the possibility that his act could result in Y's death (*Mini* 1963 (3) SA 188 (A) 196; *Sigwahla* 1967 (4) SA 566 (A) 570).

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

We have seen that intention comprises two elements, namely directing your will towards doing (or not doing) an act and knowledge of the circumstances of the crime. The knowledge element will be discussed in more detail here.

For X to have intention, X should have had knowledge of all the elements of the crime, except culpability. This knowledge has to refer to the act, the circumstances included in the definitional elements of the crime and the unlawfulness of the act. X has to be aware of all these factors.

9.8 INTENTION DIRECTED AT THE CIRCUMSTANCES IS INCLUDED IN THE DEFINITIONAL ELEMENTS

X must have knowledge of the circumstances in the definition of a crime. This rule applies mostly to formally defined crimes. In these crimes, it is not the result or consequence that is important, but the fact that a particular act or conduct took place in certain circumstances.

Examples:

- (1) In the crime of unlawful possession of drugs, the object that X possesses must be a drug and X must be aware that it is a drug. If X thinks that the substance that Y has given him to keep is sugar, then X lacks intention.
- (2) In the crime of theft, the most common form is for X to remove Y's property. X must know that the thing he removes is Y's property. X must not think that the property is his (i.e. X's) own.

X's having knowledge of a fact need not require him to be convinced of a fact. If X merely foresees the possibility that a fact exists, and reconciles himself to that possibility, then X has intention in the form of *dolus eventualis*, which would be sufficient.

9.9 INTENTION WITH REGARD TO UNLAWFULNESS

Knowledge of unlawfulness means that X must know that his conduct is not covered by a ground of justification. Once again, X does not have to actually know this. He could merely foresee the possibility and still have intention in the form of *dolus eventualis*.

ACTIVITY 9.9.1 (Knowledge as an element of intention)



For X to have intention, X should have had knowledge of all the elements of the crime, except culpability. Briefly discuss this statement. [6]

Answer:

For X to have intention, X should have had knowledge of all the elements of the crime except culpability. (1)

This knowledge must refer to the act, the circumstances included in the definitional elements of the crime and the unlawfulness of the act. (2)

As regards X's knowledge of the circumstances in the definition, this rule applies mostly to formally defined crimes where the fact that a particular act or conduct took place is of importance. (2)

Knowledge of unlawfulness means that X must know that his conduct is not covered by a ground of justification. (1)

9.10 THE DISTINCTION BETWEEN MOTIVE AND INTENTION

(Snyman's Criminal law 169)

Intention must not be confused with the **motive** for committing a crime.

- In order to determine whether X **had intention**, his motive is immaterial. For this reason, X will still be guilty of theft if he steals from the rich to give to the poor. At most, having a good, moral or laudable motive may influence the degree of punishment.
- Similarly, where X administers a fatal drug to his father to release him from a long and painful illness, X is still guilty of murder, since he had the intention to cause the death of another human being. **X's motive**, namely to relieve his father from pain, is not material and does not influence his intention.

ACTIVITY 9.10.1 (Short-answer question on intention and motive)



Since intention must not be confused with the motive for committing a crime, X will be guilty of theft if he steals from the rich to give to the poor. Discuss. [4]

Answer:

Intention must not be confused with the motive for committing a crime. (1)

In order to determine whether X had intention, his motive is immaterial. (1)

For this reason, X will still be guilty of theft if he steals from the rich to give to the poor. (1)

At most, having a good, moral or laudable motive may influence (or lessen) the degree of punishment. (1)

9.11 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>dolus</i>	Intention	<i>inhloso</i>
<i>dolus directus</i>	direct intention	<i>inhloso ngqo</i>
<i>dolus indirectus</i>	Indirect intention	<i>inhloso engaqondile</i>
<i>dolus eventualis</i>	Awareness of the likely outcome of a murdering action	<i>Ukuqhubeka nesenzo sokubulala noma uqonda imiphumela yalesenzo</i>

9.12 SUMMARY

- (1) Culpability = criminal capacity + either intention or negligence.

- (2) A person acts or causes a result **intentionally** if he **wills** the act or result, while **aware** that the act and the circumstances in which it takes place accord with the definitional elements and that the act is unlawful.
- (3) There are three forms of intention, namely direct intention (*dolus directus*), indirect intention (*dolus indirectus*) and *dolus eventualis*. A definition of each of these forms of intention was given above and you need to learn them. In a crime requiring intention, the intention requirement is satisfied if X had any one of these forms of intention.
- (4) Intention, in whatever form, consists of two elements, namely a *cognitive* and a **conative** element. The cognitive element refers to X's **knowledge**, while the conative element refers to his **will**.
- (5) As far as the element of knowledge in intention is concerned, X must have knowledge of (a) the act, (b) the circumstances set out in the definitional elements, and (c) the unlawfulness of the conduct.
- (6) The test for determining whether X had intention is subjective. This means that the court must ask itself what X, in fact, thought or willed at the critical moment. In determining whether X had intention, the question is never "what X should have known or thought", or "what X ought to have known or thought", or "what a reasonable person in the same circumstances would have known or thought".
- (7) A court may prove intention either directly or indirectly.
- (8) **Intention** must not be confused with the **motive** for committing a crime. In order to determine whether X **had intention**, his motive is immaterial.

9.13 DISCUSSION FORUM 9



Discussion/questions based on intention

- Explain each of the three forms of intention and illustrate each form by means of an example. [6]
- Read the following facts and then answer the question that follows: X wants to kill Y. Y is seated in an office behind a closed glass window. X's main purpose is to shoot Y, but he realises that he will also shatter the windowpane if he shoots at Y. X pulls the trigger and shoots Y. The windowpane shatters. Which form of intention does X have with regard to the windowpane? Explain. [4]
- Where there is no direct proof of intention, a court may infer or find that an accused acted intentionally from indirect proof. List some of the factors that a court can take into consideration when trying to prove intention. [6]



STUDY HINT: Make your own summary of this lesson for revision purposes.

THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON



LINK TO LESSON 9

Video link: <https://youtu.be/9Q0bZlak5SU>

THE LINK TO SECOND LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON



LINK TO LESSON 9B

Video link: <https://youtu.be/B6ivKsGWg1U>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hoorntje) (LexisNexis, Durban 2020)

Learning unit 10

Intention II – Mistake



LEARNING OUTCOMES

Having finished this lesson, you should be able to:

- Explain your further understanding of the requirement of intention by expressing an informed opinion on whether or not an accused has made a material mistake (be it a mistake relating to the object, the chain of causation, the unlawfulness of the act or of the definitional elements) that excludes intention.
- Explain *aberratio ictus* by identifying an example of *aberratio ictus*.

10.1 MISTAKE NULLIFIES INTENTION

(For a discussion of mistake in general, see *Snyman's Criminal law* 170).

In the previous lesson we explained that intention must relate to:

- (1) the act
- (2) all the circumstances set out in the definitional elements, and
- (3) the unlawfulness of the conduct

X must be aware of all these factors. If she is unaware of any one of them, it cannot be said that she intended to commit the crime. If such knowledge or awareness is absent, it is said that there is a “mistake” or “error” on X’s part: she imagined the facts to be different from what they, in fact, were. In other words, mistake excludes or nullifies the existence of intention.

The following are two examples of **mistake relating to the act** or the nature of the act:

- (1) Within the context of the crime of malicious injury to property, X thinks that she is fixing the engine of somebody else’s car that has developed problems, whereas what she is, in fact, doing to the engine amounts to causing “injury” to it.
- (2) Within the context of the crime of bigamy, X thinks that she is participating in a communion service in a church, whereas the service in which she is participating is, in fact, a marriage ceremony!

The following are two examples of **mistake relating to circumstances set out in the definitional elements**:

- (1) X is hunting game at dusk. She sees a figure that she thinks is a buck, and shoots at it. It turns out that she has killed a human being. She will not be guilty of murder, since she did not intend to kill a human being.
- (2) Within the context of the statutory crime of unlawfully possessing drugs, X thinks that the container containing powder that she received from a friend is snuff, which she can use as a cure for a certain ailment, whereas, in fact, it contains matter listed in the statute as a drug that may not be possessed.

The following are two examples of **mistake relating to unlawfulness**:

- (1) X believes that she is in a situation of private defence because Y is threatening her with a revolver, whereas Y is merely joking and the “revolver” is, in fact, a toy.
- (2) X believes that there is no legislation or legal rule that prohibits her from possessing a rhinoceros horn, whereas such legislation does, in fact, exist.

We will discuss mistake relating to the unlawfulness of the conduct in more detail below.

10.2 MISTAKE NEED NOT BE REASONABLE

(*Snyman's Criminal law* 170-171)

Whether there really was a mistake that excludes intention is a question of fact. What must be determined is X's true state of mind and perception of the relevant events and circumstances. The question is not whether a reasonable person in X's position would have made a mistake. The test in respect of intention is subjective, and if we were to compare X's state of mind and view of the circumstances with those of a reasonable person in the same circumstances, we would be applying an objective test in respect of intention, which is not warranted. Now that a subjective test in respect of intention has been accepted, there is no longer any room for an objective criterion such as reasonableness (*Modise* 1966 (4) SA 680 (GW); *Sam* 1980 (4) SA 289 (T)).

Because the test is subjective, X's personal characteristics, her superstitions, beliefs, degree of intelligence, background and character may be taken into account in determining whether she had the required intention, or whether the intention was excluded because of mistake.

ACTIVITY 10.2.1 (Short-answer question based on mistake)



Briefly explain why a mistake does not have to be reasonable to exclude intention. [3]

Answer:

The question is not whether a reasonable person in X's position would have made a mistake. (1) The test in respect of intention is subjective, and if one compares X's state of mind and view of the circumstances with those of a reasonable person in the same circumstances, one is applying an objective test in respect of intention, which is not warranted. (1) Now that a subjective test in respect of intention has been accepted, there is no longer any room for an objective criterion such as reasonableness. (1)

10.3 MISTAKE MUST BE MATERIAL

(Snyman's Criminal law 171-172)

Not every wrong impression of facts qualifies as a mistake, thus affording X a defence. Sometimes X **may be mistaken about a fact or circumstance, and yet not be allowed to rely on her mistake as a defence**. A mistake can exclude intention (and therefore liability) only if it is a mistake concerning an element or requirement of the crime other than the culpability requirement itself. These requirements are:

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

It is misleading to use any yardstick other than the above-mentioned one in determining whether a mistake may be relied on as a defence. This must be borne in mind, especially **where X is mistaken about the object of her act**. Such a mistake is known in legal literature as *error in objecto*. Whether the mistake is material or not depends on the definition of the crime.

Let's take the crime of murder as an example. Murder is defined as the unlawful, intentional causing of the death of another human being. If X is out hunting and thinks she is shooting at a buck, when she is actually shooting at Y, then X has made a mistake with regard to the object of her act (*error in objecto*). If X shot and killed Y, X had no intention to commit murder, since she was mistaken with regard to a definitional element of the crime of murder. However, it does not mean that if X had no intention to commit murder, she would escape liability completely. If the court finds that X acted negligently, then X could very well be convicted of culpable homicide.

An example of where a mistake is **not** material is the following: Suppose X intended to kill Y, but X mistook her victim's identity and shot Z instead. Since murder is defined as the unlawful, intentional killing of another human being, it is immaterial whether X killed Z or Y. The fact is that X killed another human being and the victim's identity is not relevant or material. For this reason, X would still be guilty of murder in this example.

ACTIVITY 10.3.1 (Quiz based on mistake)



Read the following statement and then choose the correct option (either A, B, C or D): Regarding the requirement that mistake must be material, where X is mistaken about the object of her act, such a mistake is known in legal literature as an:

- (A) Error in subjection
- (B) *Error in objecto*
- (C) *Error in subjecto*
- (D) Error in objection

Correct Answer: B

10.4 MISTAKE RELATING TO THE CHAIN OF CAUSATION

(Snyman's Criminal law 172-174)

This form of mistake occurs only in the context of materially defined crimes, where the accused, X, believes that the result will be brought about in a certain manner. The result does, in fact, ensue, but in a manner that differs from that foreseen by X.

For example, X kills Y by pushing Y off a bridge into a turbulent, fast-flowing river. X expects Y to die by drowning. Y does die, but not by drowning. Y dies because she hits her head on one of the concrete pillars of the bridge as she is falling off. In this example, X has made a mistake with regard to the chain of causation. In the leading case on the subject, *S v Goosen* 1989 (4) SA 1013 (A), it was held that **mistake with regard to the chain of causation does exclude intention, but only if the actual chain of causation differed materially from the chain of causation subjectively foreseen by the perpetrator**. The court did not, however, provide clear guidelines as to a material and an immaterial mistake relating to the chain of causation.

ACTIVITY 10.4.1 (Quiz based on mistake relating to the chain of causation)



Read the following facts and then choose the correct answer from the list of options (either A, B, C or D). X kills Y by pushing Y off a bridge into a turbulent, fast-flowing river. X expects Y to die by drowning. Y does die, but not by drowning. Y dies because she hits her head on one of the concrete pillars of the bridge as she is falling off.

- (A) This is an example of a material mistake.
- (B) This is an example of where mistake nullifies the intention.
- (C) This is an example of a mistake relating to the chain of causation.
- (D) This is an example of an error in objecto.

Correct answer: C

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

(Snyman's Criminal law 175-178)

This is not a form of mistake, but a term that refers to situations where the bullet shot by the accused goes astray and does not strike the intended victim; or the accused (X) aims a blow at Y, but mistakenly strikes a third party (Z) instead. The bullet going astray or the misdirected blow could be due to the accused's clumsiness or lack of skill. Let's consider the following example:

Suppose X wants to kill Y. She shoots at Y, but the bullet is deflected by a stone, misses Y and hits Z instead. South African courts have laid down the following guidelines with regard to these *aberratio ictus* situations:

- It will be accepted that X had intention to murder Z if X foresaw that the shot or blow could hit and kill Z, but X reconciled herself to this possibility (in other words, X had *dolus eventualis*), or
- X knew that her shot or blow could hit and kill Z (*dolus directus*).
- As regards Y, the person that X initially wanted to murder, X could be charged with the attempted murder of Y.

South African courts therefore require a concrete intention to kill the victim in *aberratio ictus* situations. In certain other Anglo-Saxon legal systems, the accused (X) in *aberratio ictus* situations, would still be found guilty of murdering Z, since X had the intention to kill Y and this intention was “transferred” to the killing of Z. The transferring of intention is known as the doctrine of “transferred malice” or “transferred culpability”. However, this doctrine has been rejected in South African law.

Look at the following examples of *aberratio ictus*:

- (1) Intending to shoot and kill his enemy, Y, X holds the gun and fires a shot at Y. However, the bullet strikes a round iron pole, ricochets (bounces off) and strikes Z, who is a few paces away, killing him. This is illustrated in figure 10.1.

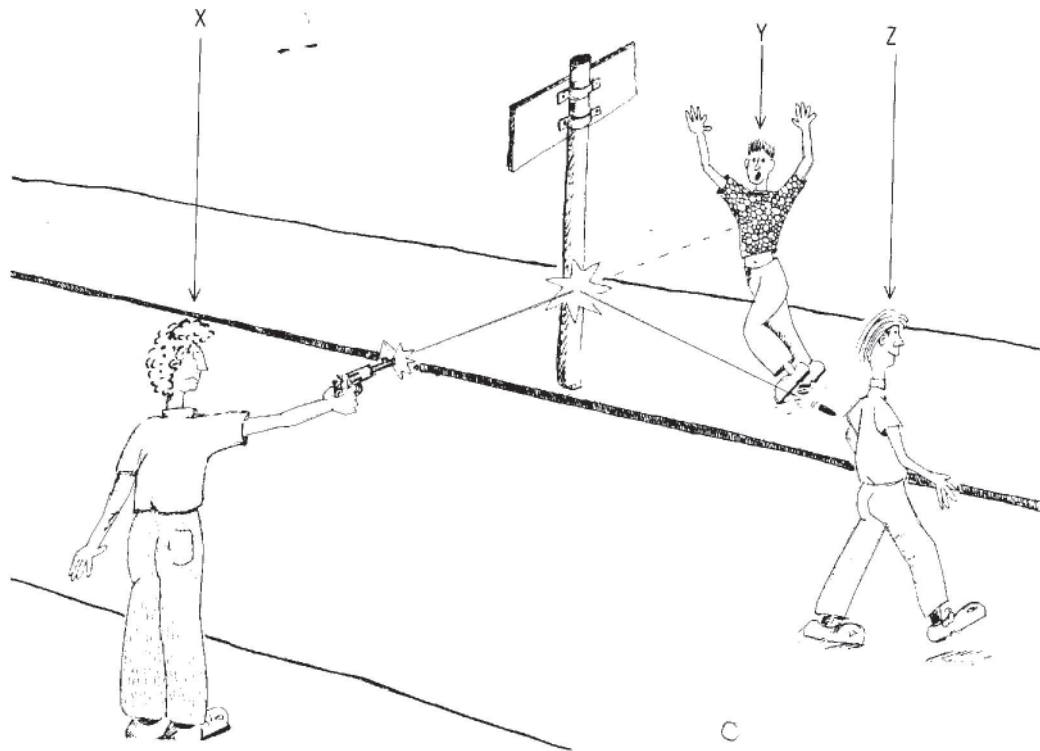


Figure 10.1: X aims at Y and the bullet ricochets off the iron pole, killing Z

- (2) X wishes to kill his enemy, Y, by throwing a javelin at him. He throws a javelin at Y, but just after the javelin has left his hand, Z unexpectedly runs out from behind a bush and in front of Y and the javelin strikes Z, killing him.

- (3) Intending to kill her enemy, Y, X places a poisoned apple at a spot where she expects Y to pass by, expecting Y to pick up the apple and eat it. However, Z, and not Y, passes the spot, picks up the apple, eats it and dies.

What all these examples have in common is that the blow aimed at Y went awry/astray and struck somebody else, namely Z. In order to decide whether X has committed murder in these types of situations, it is necessary to ascertain whether X can be said to have had **intention** in respect of Z's death.

ACTIVITY 10.5.1 (Quiz based on aberratio ictus)



Read the following facts, then choose the correct option (either A, B, C or D): Suppose X wants to kill Y. X shoots at Y, but the bullet is deflected by a stone, misses Y and hits Z instead.

- (A) This is an example of error in subjecto.
- (B) This is an example of aberratio ictus.
- (C) This is an example of error in objecto.
- (D) This is an example of dolus indirectus.

Correct answer: B

10.6 MISTAKE RELATING TO UNLAWFULNESS

(Snyman's Criminal Law 178-182)

Before it can be said that X has culpability, she must be aware of the fact that her conduct is unlawful. This is known as knowledge or awareness of unlawfulness. Knowledge of unlawfulness can be divided into two categories: X must know that her conduct is not covered by a ground of justification, and she must also know that her conduct is punishable by the law as a crime.

10.6.1 Mistake relating to a ground of justification

The following example illustrates a mistake relating to a ground of justification.

When Y returns home late one evening, he realises that he has lost his front-door key. He does not want to disturb his wife, so he climbs through the bedroom window. Y's wife, X, is woken by the noise of someone entering through the window. She believes that it is a rapist who has been attacking women in the area. She shoots and kills the person, only to discover later that it was, in fact, her husband. She has acted unlawfully because she cannot rely on private defence. The test for private defence is objective and, in this case, her state of mind is not relevant. Although she intended killing another human being, she will not be guilty of murder because her knowledge of intention did not extend to include the unlawfulness of her act. She thought she was acting in private defence and acting lawfully. This is known as **putative** private defence. (See *Joshua* 2003 (1) SACR 1 (SCA).)

In *Sam* 1980 (4) SA 289 (T), X was charged with pointing a firearm at Y in contravention of a statute. However, the evidence revealed that X pointed the firearm at Y in the honest, yet erroneous, belief that Y was a thief whom he had caught red-handed. X was acquitted, the court holding that in a crime requiring intention (*dolus*), the state must prove beyond reasonable doubt that X acted with knowledge of unlawfulness, and found that X had lacked such knowledge.

There have also been a number of cases in which it was held that X was not guilty of rape because he had been under the impression that Y had consented to intercourse (*Mosago* 1935 AD 32; *K* 1958 (3) SA 420 (A)), and that X did not commit theft because she believed that Y (the owner of the property) had consented to her taking the property (*Kinsella* 1961 (3) SA 519 (C) 532; *De Jager* 1965 (2) SA 616 (A) 625).

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

In the case of *De Oliveira* 1993 (2) SACR 59, the court ruled that the test for putative private defence is purely subjective, whereas the test for private defence is objective.

In *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA), the court applied an objective instead of a subjective test to determine whether X had lacked knowledge of unlawfulness. X had shot four shots through a bathroom door, and thereby killed his girlfriend, Y, who was standing behind the door. He was charged with murder but convicted by the trial court of culpable homicide only on the basis that he had lacked intention in the form of *dolus eventualis* but was nevertheless negligent.

In an appeal by the state on a point of law, the Supreme Court of Appeal found X guilty of murder. The court held that the trial court had applied the principles of *dolus eventualis* incorrectly and found X guilty on the basis that, at the time that he had fired the shots, X in fact, did foresee the possibility that he may cause the death of the person behind the door and reconciled himself to such possibility. The court then also dealt with X's defence that he had believed that his life was threatened by the person behind the door and that he was acting in private defence. The defence of putative private defence was rejected by the Supreme Court of Appeal on the basis that X had provided no factual basis for his purported belief that the person behind the door was about to attack him. The court relied on the ***De Oliveira*** ruling that the test for putative private defence is purely subjective, whereas the test for private defence is objective (para [52], citing Smalberger JA in ***De Oliveira*** 63*i* to 64*b*).

However, the Supreme Court of Appeal then stated that "the defence of putative private defence requires rational but mistaken thought" and that "although he may have been anxious, it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy-calibre firearm, without taking even that most elementary precaution of firing a warning shot". We submit that the Supreme Court of Appeal had erred in applying an objective test to determine whether X had lacked knowledge of unlawfulness. The mere enquiry should have been whether X had laid a factual founda-

tion that he *honestly believed* that he was acting in defence against an attack. Whether such a belief was irrational was therefore irrelevant since the test is purely subjective.

ACTIVITY 10.6.1 (Quiz based on mistake relating to unlawfulness)



Read the following facts and then choose the correct option (either A, B, C or D): Where X foresees the possibility that her conduct may be unlawful, but does not allow this to deter her and continues with her conduct, not caring whether it is lawful or not, knowledge of unlawfulness may be present in the form of:

- (A) dolus directus
- (B) dolus indirectus
- (C) dolus eventualis
- (D) error in objecto

Correct answer: C

10.6.2 Mistake of law

Here, X's knowledge of **the law**, and not of the facts, is relevant. The important question is whether X's mistake relating to the law, or ignorance of the law, can be a defence on a criminal charge. Whereas it is inconceivable for an accused to allege that she did not know that murder, rape and theft are crimes, there are certain technical, statutory offences that are not well known and of which not everyone is aware.

Prior to 1977, South Africa followed the English approach, where ignorance of the law was no excuse, and everybody was presumed to know the law. However, in the case of *S v De Blom* 1977 (3) SA 513 (A), the Appeal Court had to decide whether X had been truly ignorant of certain exchange control regulations. The court held that in light of the present-day view of culpability, the rule that ignorance of the law is no excuse has no application in South African law.

Thus, according to this case, ignorance of the law excludes intention and is a complete defence in crimes requiring intention. The effect of a mistake of law is the same as a mistake regarding a material fact: it excludes intention.

De Blom's case has been severely criticised, and critics have submitted that only ignorance or mistake of the law that is unavoidable or reasonable under the circumstances should amount to a defence. Thus, if X worked in a field where there are certain, specific legal rules, the onus would be on her to acquaint herself with these rules first. These specialised spheres could include such diverse matters as dealing in diamonds and managing funeral parlours or butcheries. Police officials are also expected to know the law, since they have to arrest, detain and search individuals, as well as seize property. It would therefore be inconceivable for a police official to rely on the defence of ignorance of the law.



Read the following scenario and answer the question.

X, a 30-year-old illiterate and unsophisticated member of an indigenous tribe in a remote area of the Limpopo Province, comes to Johannesburg to look for her friend. This is the first time that she has left her rural home. In her community back home, it is customary to smoke dagga from an early age for medicinal and recreational purposes, so X brings some dagga along with her to Johannesburg. The taxi that she is travelling in is stopped by the police near Pretoria. All the travellers are searched for drugs. X is found to be in possession of dagga and arrested. X tells you (her lawyer) that nobody had ever told her that it is against the law to transport dagga. As X's lawyer, what defence would you raise on her behalf? Explain your defence and then look at the feedback below.

Answer:

Your defence would be that X lacked intention because she had made a mistake as regards the law. She was under the impression that her conduct did not constitute a crime.

10.7 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>error in objecto</i>	To kill a person/thing with an impression that he/she or it is someone/something other than his/her object	<i>Ukubulala umuntu/into ngephutha</i>
<i>aberratio ictus</i>	To kill a person mistakenly/unintentionally	<i>Ukubulala umuntu ngeshwa/ngokungahlosile</i>

10.8 SUMMARY

- (1) The intention must relate to the act, the circumstances contained in the definitional elements and the unlawfulness of the conduct. X must be aware (have knowledge) of all these factors. If she is unaware of any of these factors, it cannot be said that she intended to commit the crime. X is then **mistaken** as to the existence of these factors.
- (2) Mistake need not be reasonable to exclude intention. The test to determine whether mistake has excluded intention is subjective.
- (3) In order to exclude intention, the mistake must be material. Mistake is material if it relates to the act, the circumstances set out in the definitional elements or the unlawfulness of the conduct.
 - (a) *Aberratio ictus* or the going astray or missing of the blow refers to a set of facts in which X aims a blow at Z, the blow misses Z and strikes Y instead. This is not a form of mistake.

- (b) In order to determine whether, in such a set of facts, X is guilty of an offence, we should merely apply the normal principles with regard to intention and negligence.
- (4) Absence of awareness of unlawfulness excludes intention.
- (5) Awareness of unlawfulness implies that X is aware
 - (a) that her conduct is not covered by a ground of justification and
 - (b) that the type of conduct she engages in is actually regarded by the law as constituting an offence.
- (6) The effect of the decision in *De Blom* is that ignorance of the law, or a mistake about, the law excludes intention.



10.9 DISCUSSION FORUM 10

Explain the concept of *error in objecto* by means of a practical example. [5]

Consider the following scenario and answer the question: X is out hunting. He sees what he thinks is a buck and decides to shoot. He aims his gun and pulls the trigger. It later appears that what X thought was a buck, was actually Y, another human being. Discuss fully whether X's mistake can exclude the intention to commit murder. [5]

Consider the following scenario and answer the question: X wants to kill Y. He aims his gun and pulls the trigger. However, it later appears that the person that X shot and killed was not Y, but Z. Discuss fully whether X's mistake can exclude the intention to commit murder. [5]

Consider the following scenario and answer the question: Suppose X wants to kill his enemy, Y, by shooting an arrow at him. X shoots the arrow at Y, but just as the arrow leaves X's hand, Z runs out from behind a bush in front of Y and the arrow strikes and kills Z. Can X be found guilty of murdering Z? What about X's criminal liability in relation to Y? Explain. [6]

Consider the case of *S v De Blom* 1977 (3) SA 513 (A), where it was held that ignorance of the law excludes intention and is a complete defence in crimes requiring intention. What are some of the criticisms of this judgment? [5]



STUDY HINT: Make your own summary of this lesson for revision purposes.

THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON



LINK TO LESSON 10

Video link: <https://youtu.be/Ley23F1tdu0>

REFERENCE

Snyman CR *Snyman's Criminal Law* 7 ed (updated by SV Hocter) (LexisNexis, Durban 2020)

Learning unit 11

Negligence



LEARNING OUTCOMES

Having completed this lesson, you should be able to:

- Apply the requirement of negligence by expressing an informed opinion as to whether an accused has acted with negligence.
- Use the reasonable person test and the concepts of the reasonable person, reasonable foreseeability and the taking of reasonable steps to determine negligence.

11.1 ORIENTATION

You have already learnt that

$$\boxed{\text{culpability}} = \boxed{\text{criminal capacity}} + \boxed{\text{either intention or negligence}}$$

We have already discussed the concepts of criminal capacity and intention. In this lesson we will be discussing negligence.

On the topic of negligence in general, you may refer to *Snyman's Criminal Law* 182-192.

It is not only intentional, unlawful acts also that are punishable. Sometimes the law also punishes unlawful acts that are committed unintentionally, such as if X acts or causes the result negligently. Generally, a person's conduct is negligent if it falls short of a certain standard set by the law. This standard is, generally, the caution that a reasonable person would exercise or the foresight that a reasonable person would have in the particular circumstances.

In crimes of intention, X is blamed for knowing or foreseeing that his conduct is proscribed by the law and that it is unlawful. In crimes of negligence, X is blamed for **not** knowing, **not** foreseeing, or **not** doing something, although – according to the standards set by the law – X **should** have known or foreseen or done something. Intention always has a positive character: X wills or knows or foresees something. Negligence, on the other hand, always has a **negative** character: X does **not** know or foresee something, although he **should**, according to the norms of the law, **have** known or foreseen it.

Whereas in legal literature, intention is often referred to as *dolus*, negligence is referred to as *culpa*.

ACTIVITY 11.1.1 (Quiz based on negligence)



Read the following statement and then choose the correct option (either A, B, C or D):
It is not only intentional, unlawful acts that are punishable. The law also punishes:

- (A) unlawful acts that are committed lawfully
- (B) unlawful acts that are committed unintentionally
- (C) unlawful acts that are committed wilfully
- (D) unlawful acts that are committed unlawfully

(2)

Correct answer: B

11.2 OBJECTIVE TEST

The test for negligence is objective, except for a few minor exceptions, which we will refer to later.

As you have already seen above, the **test for intention is subjective**, since we must consider what X's actual knowledge was or what he actually envisaged the facts or the law to be. The test for intention is subjective because we have to determine what X's thoughts were, as an individual (i.e., as a **subject**), or what he actually envisaged. Expressed very plainly: we must ascertain "what went on in his (X's) head".

On the other hand, when we describe the **test for negligence as objective**, we mean that we must measure X's conduct against an **objective standard**. This objective standard is that which a **reasonable person** would have known or foreseen or done in the same circumstances. This test is described as objective, since here we are not concerned with what X actually thought or knew or foresaw, but only with what a reasonable person in the same circumstances as X, would have thought, foreseen or done. In determining negligence, X's conduct is measured against an **external** standard (i.e., one that is **outside of him**), namely what a reasonable person would have thought, foreseen or done in those particular circumstances.

ACTIVITY 11.2.1 (Quiz based on the test for negligence)



Read the following statement and then choose the correct option (either A, B, C or D): Generally, the test for negligence is:

- (A) relative
- (B) objective
- (C) subjective
- (D) intentional

(2)

Correct answer: B

11.3 DEFINITION OF “NEGLIGENCE”

A person's conduct is negligent if

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

11.4 ABBREVIATED WAY OF REFERRING TO NEGLIGENCE

An abbreviated way of referring to negligence (in respect of either a result or a circumstance) is simply to say that **the person concerned (X) did not conduct himself as the reasonable person would have conducted himself in the same circumstances.**

11.5 DISCUSSION OF THE DEFINITION OF “NEGLIGENCE”

11.5.1 *Negligence may exist in respect of a result or a consequence*

To understand the definition of “negligence”, it is necessary to go back to the definition of “**formally and materially defined crimes**”. We discussed this under the topic of causation above in lesson 4. Formally defined crimes forbid certain acts or omissions, or circumstances, no matter what the result. On the other hand, in materially defined crimes (“result” crimes or “consequence” crimes), conduct that causes a certain, specific result, or consequence, is forbidden. Certain formally defined crimes require intention and others require negligence. The same applies to materially defined crimes. In materially defined crimes that require negligence, it is necessary to prove that the accused (X) was negligent in respect of the result, whereas in formally defined crimes, X must have been negligent in respect of the circumstances (the act or the omission).

Culpable homicide is the most important **materially defined crime** that requires negligence. It forbids the causing of a certain, specific result, namely, the death of another person. **Culpable homicide can be defined as the unlawful, negligent causing of another's death.** Apart from a form of the crime of contempt of court, culpable homicide is the only other **common-law crime** that requires negligence as a form of culpability. Several **statutory crimes** exist, most of which are formally defined crimes, which require negligence as a form of culpability, for example, the crime of negligent driving of a motor vehicle in terms of section 63 (1) of the National Road Traffic Act 93 of 1996 and the crime of unlawful possession of a firearm in terms of section 3 of the Firearms Control Act 60 of 2000.

If you examine the definition of “negligence” above (see 11.3), you will notice that it refers to **negligence in respect of both a circumstance (point 1(a)) and a result (point 1(b))**. In the discussion that follows, we will be concentrating on **negligence in respect of causing a result**. This is because **culpable homicide** is the most important crime requiring negligence and because it is a materially defined crime. Towards the end of this study unit, however, we will briefly refer to **formally defined crimes**, that is, those crimes that require negligence in respect of a circumstance.



ACTIVITY 11.5.1.1 (Quiz based on Negligence may exist in respect of a result or a consequence)

Read the following statement and then choose the correct answer from the list of answers (either, A, B, C or D): The most important materially defined crime that requires negligence is:

- (A) Murder
- (B) Rape
- (C) Assault
- (D) Culpable homicide

[2]

Correct answer: D

11.5.2 The concept of the reasonable person

Before considering the first two parts of the definition of negligence, it is necessary to explain what is meant by the term “reasonable person”.

- The reasonable person is merely a fictitious person invented by the law to measure the objective standard of reasonable conduct that the law sets to determine negligence.
- In the past, the expression “reasonable man” was used in South African legal literature. However, since 1994, when South Africa received a new Constitution that emphasises gender equality, the term “reasonable man” has been avoided because of its sexist connotation.
- The reasonable person is an ordinary, normal, average person. In *Mbombela* 1933 AD 269 at 273, the court described the reasonable person as someone of “ordinary knowledge and intelligence”. He or she is neither exceptionally cautious, nor intelligent (*Van As* 1976 (2) SA 921 (A) 928), nor someone who recklessly takes chances. The reasonable person therefore does not run away from every foreseeable danger; he or she may sometimes take reasonable risks.
- The concept of the reasonable person embodies an objective criterion. The personal characteristics of the person, such as his or her gender, race, emotional stability, education, superstitions, and beliefs, are not taken into account.
- However, if X is involved in a field which requires specialised knowledge or skills, X’s negligence is determined with reference to the reasonable person who does have such specialised knowledge or skills (*Shivute* 1991 SACR 656 (Nm)). This is when the objective test becomes more subjective in nature.
- The reasonable person is not perfect. He or she is an ordinary human being who can make mistakes or errors of judgement.

11.5.3 Reasonable foreseeability

Under this subheading we will discuss the **first leg** (i.e., point (1)) of the definition of negligence given in 11.3 above, that is, the question whether the reasonable person would have **foreseen** the possibility of the particular result ensuing (or the particular circumstance existing). In practice, this is the most important leg or component of the test for negligence.

- (1) Whether the court asks if the reasonable person would have foreseen the possibility of the result ensuing, or whether X ought reasonably to have foreseen the possibility, **both expressions have the same meaning**: foreseeability by the reasonable person and reasonable foreseeability by the accused are viewed as the same thing.
- (2) What must be foreseeable is the **possibility** that the result may ensue, and not the **likelihood** of the result (*Herschell v Mrupe* 1954 (3) SA 464 (A) 471).
- (3) The test is whether the reasonable person **in the same circumstances as those in which X found himself** would have foreseen this possibility. Thus, if the question arises whether X, a motorist, was negligent when he ran over and killed a pedestrian **during a heavy rainstorm**, the question the court must ask is what a reasonable person who was driving **during a heavy rainstorm** would have foreseen. It would be wrong to place the reasonable person behind the steering wheel of a motor car when the sun was shining brightly.
- (4) In the discussion of intention earlier, you saw that the intention **must relate not only to the act, but also to all the circumstances and consequences set out in the definitional elements, as well as to unlawfulness. The same principle applies to negligence**. In materially defined crimes, negligence must relate to the specific result or consequence in the definitional elements. In culpable homicide, the specific result in the definitional elements is the death of another person. So, for example, if X is charged with culpable homicide, the question to be answered is not whether X foresaw the possibility that Y might be injured, but whether X foresaw the possibility that Y might be killed because of X's conduct (*Bernadus* 1965 (3) SA 287 (A) 296).

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

Under this subheading we discuss the **second leg** (i.e., point (2)) of the definition of negligence given in 11.3 above, that is, the requirement that the reasonable person would have taken steps to guard against the possibility of the result ensuing.

In practice, this second leg of the test for negligence is seldom of importance because, in most cases, **the reasonable person who had foreseen the possibility of the result ensuing (i.e., who has complied with the first leg of the test) would also have taken steps to guard against the result ensuing**. However, there are cases in which the reasonable person who has foreseen the possibility will **not** take steps to guard against the

result ensuing. This is where the foreseen possibility is far-fetched or remote, or where the risk of the result ensuing is very small, or where the cost and effort necessary to undertake the steps do not outweigh the more important and urgent purpose of X's act.

11.5.5 X's conduct differs from that of the reasonable person

We have now discussed the first two legs of the definition of negligence. It is not necessary to say much about the **third leg** of the test. It merely embodies the self-evident rule that **X is negligent if his conduct differs from that which a reasonable person would have foreseen or guarded against.**

11.5.6 Negligence in respect of a circumstance

Thus far the emphasis has been on negligence in respect of a **result** (or consequence). In other words, we have looked at negligence in respect of materially defined crimes (result crimes). As we pointed out above, there are also certain **formally defined crimes that require culpability in the form of negligence**. Thus, it was held in *Mnisi* 1996 (1) SACR 496 (T), for example, that the **crime of possessing a firearm without a licence** (currently a contravention of section 3 of the Firearms Control Act 60 of 2000) is one in respect of which the state needs merely to prove culpability in the form of negligence. This is a formally defined crime, which does not require the causing of a certain result. To obtain a conviction, the state need not prove the causing of a certain result, but merely the existence of a certain circumstance, **namely the possession by X of a firearm without a licence**. What do we mean when we say that X was negligent, not in respect of a result, but merely in respect of a circumstance?

X is negligent in respect of a circumstance if a reasonable person in the same circumstances would have foreseen the possibility that the circumstance could exist. In *Duma* 1970 (1) SA 70 (N), for example, X was charged with unlawfully possessing a firearm. He was caught in possession of a firearm without having a licence to possess it. The question was whether he had committed the crime negligently. X's story, which the court accepted, was that he believed, in good faith, that he had picked up a toy revolver and that he had then put it in his pocket. The court held that, to prove negligence, the state must prove "that, although the appellant genuinely believed that he had picked up a toy, a reasonable man in his position would not have held that belief but would have known, or at least suspected, that it was a firearm and would have made certain of its nature". The court held that the state had not proved this and the court accordingly acquitted X.

11.6 SUBJECTIVE FACTORS

Although the test to determine negligence is an objective one, namely the foreseeability of the result or the circumstances by a reasonable person, the following exceptions exist:

- (1) **Children.** In determining the negligence of children who have criminal capacity, their conduct is compared with what the **reasonable child** would have done or foreseen in the same circumstances.

- (2) **Experts.** In the case of experts (e.g., a heart surgeon), their conduct must be measured against the conduct of the **reasonable expert** in the same circumstances.
- (3) **Persons with superior knowledge.** The same rules that are applied to children and experts apply to a person who has superior knowledge of a matter or a situation. In such a case, the person cannot be compared with the ordinary reasonable person but must be compared with a **reasonable person with such superior knowledge**.

ACTIVITY 11.6.1 (Quiz based on subjective factors)



Read the following statement and then choose the correct answer from the list of answers (either, A, B, C or D): Although the test to determine negligence is an objective one, namely the foreseeability of the result or the circumstances by a reasonable person, the following list of exceptions exist where subjective factors may be taken into account:

- (A) Adults, academics, and persons with superior knowledge
- (B) Adolescents, experts, and persons with superior knowledge
- (C) Children, experts, and persons with superior knowledge
- (D) Seniors, persons with superior knowledge and children

[2]

Correct answer: C

11.7 NEGLIGENCE AND INTENTION

In the case of *Ngubane* 1985 (3) SA 677 (A), the Appeal Court held that **intention and negligence are two different concepts that never overlap**. However, proof of intention does not completely exclude negligence. The facts of some cases are such that they may reveal that although X acted intentionally, his conduct did not measure up to that of the reasonable person (and a finding of negligence in such a case cannot be completely excluded).

11.8 CONSCIOUS AND UNCONSCIOUS NEGLIGENCE

On this subject, it is sufficient to say that **almost all cases involving negligence are cases of unconscious negligence**. Our case law does, however, draw a distinction between conscious and unconscious negligence (*Ngubane* 1985 (3) SA 677 (A) 685A-F; *Maritz* 1996 (1) SA 405 (A) 416).

ACTIVITY 11.8.1 (Quiz based on unconscious and conscious negligence)



Read the following statement and then choose the correct answer from the list of answers (either, A, B, C or D): Almost all cases involving negligence are cases of:

- (A) unconscious negligence.
- (B) conscious negligence.
- (C) absent negligence.

Correct answer: A

11.9 CONCLUSION OF THE MODULE

Now that you have reached the end of the module, you should have a clear understanding of the discipline of criminal law.

To recap what we said in the introductory part of the module:

A study of criminal law comprises a study of both the general principles of criminal law and the most important specific crimes.

By “general principles of criminal law”, we mean those rules that normally apply to all, or at least most, crimes. Examples include rules about the meaning of concepts such as intention or negligence, or rules about when an accused person may rely on defences such as insanity, intoxication, provocation, or self-defence.

A study of the “specific crimes” comprises an analysis of the different specific crimes by identifying and discussing the different requirements applicable to each specific crime.

In this module, CRW1501, we discussed only the general principles of criminal law. In the second module in Criminal Law, CRW2603, we will discuss the most important specific crimes, including the crimes of murder and culpable homicide, which we only defined and then referred to as examples in this first module. The reason we did so was because the distinguishing factors between these two crimes are intention and negligence, and these two crimes were used to illustrate the difference between crimes requiring intention and those requiring negligence. Therefore, to enable you to follow the discussion of the general principles from the beginning, it was necessary for you to know the definitions of these two crimes.

Murder is the unlawful, intentional causing of the death of another human being.

Culpable homicide is the unlawful, negligent causing of the death of another human being.

The only difference between these two crimes, therefore, is that, whereas intention is required for murder, negligence is required for culpable homicide.

We wish you all the best in the examination and in your further studies.

11.10 GLOSSARY

LEGAL TERM	ENGLISH	ZULU
<i>Dolus</i>	intention (to deceive intentionally)	<i>Inhloso (ukukhohlisa ngokuhlosile)</i>
<i>Culpa</i>	negligence	<i>Ukunganaki/ubudedengu</i>

11.11 SUMMARY

- (1) The test to determine negligence is (barring certain exceptions) objective.
- (2) Definition of negligence – see the definition above.
- (3) An abbreviated way of referring to negligence is to say that X acted in a way that differed from the way the reasonable person would have acted in the same circumstances.
- (4) The crux of the test to determine whether X was negligent in a materially defined crime (i.e., a result crime) is the following: Would the reasonable person in the circumstances have foreseen that the particular consequence or result could ensue?
- (5) The crux of the test to determine whether X was negligent in a formally defined crime is the following: Would the reasonable person in the circumstances have foreseen that the circumstance in question could exist?
- (6) The reasonable person is an ordinary, normal, average person. He or she is not an exceptionally cautious person who would never take reasonable risks.
- (7) In order to determine whether the reasonable person would have foreseen the reasonable possibility that the circumstance may exist, or the consequence ensue, the reasonable person must be placed in the same circumstances as those in which X found himself at the time of the commission of the act.
- (8) Apart from inquiring whether the reasonable person would have foreseen a certain possibility, we must also, in order to determine negligence, inquire whether the reasonable person would have taken steps to guard against the possibility of the result ensuing.
- (9) Although the test for negligence is objective, subjective factors are taken into account in the case of (a) children, (b) experts and (c) persons with superior knowledge.
- (10) Proof of intention does not completely exclude negligence.
- (11) In most cases involving negligence, the accused was unconsciously negligent.

11.12 DISCUSSION FORUM 11



- The test for negligence is described as “objective”, whereas the test for intention is described as “subjective”. Discuss the main differences between the two tests. [6]
- What is the abbreviated way in which we may refer to negligence? [2]
- Explain and discuss the concept of the reasonable person. [10]
- Although the test for negligence is an objective one, subjective factors may sometimes be considered. Briefly discuss some of these subjective factors. [6]



STUDY HINT: Make your own summary of this lesson for revision purposes.

Now take **all** your summaries of all the study units and make a concise summary of the whole module. It should form a coherent whole. Make sure that you have achieved all the learning outcomes and have done all the activities.

THE LINK TO LECTURE/YOUTUBE VIDEO BASED ON THIS LESSON



LINK TO LESSON 11

Video link: <https://youtu.be/xlEBx1s1k3I>

REFERENCE

Snyman CR *Snyman's Criminal Law 7 ed* (updated by SV Hocter) (LexisNexis, Durban 2020)