

# Critical Criminal Law

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## About the book

Grant holds a PhD in Criminal Law. He taught criminal law for 14 years at the University of the Witwatersrand and is unquestionably a leader in the field. He is now a practicing Advocate and brings his practical experience to enliven the theory of criminal law. He remains affiliated to Wits Law School as a visiting Associate Professor of Law. His PhD thesis is about to be published by Juta and Co, SA. Grant is also the proud author of two of the chapters in the leading text on Criminal Procedure in South Africa: The Commentary on the Criminal Procedure Act.

Grant extracts and collates the principles that can sometimes be complex, in a way that allows for a clear understanding of the current law. This text will show that, to a very large extent, South African Criminal Law maps onto most ordinary intuitions about what is fair and just. Where it is not, Grant explains how this may be understood and the extent to which it may be reconciled with defensible principles. This analysis is crucial for understanding criminal law in SA, but what follows - where Grant subjects the law to a critical analysis - is what sets this work apart and makes it a necessary tool for anyone who wants to practice or to properly understand what criminal law is in South Africa and what it should be.

This text is live and will continue to be added to an updated. As it stands it covers all general principles with the exception of a chapter on attempt liability and three chapters on specific grounds of justification under unlawfulness (private defence, necessity, and consent). These four remaining chapters will be completed soon and hopefully included in the next revision service.

It is intended as a text of principles of criminal law. Above all though, one advantage of this text is that it is – and will always be – utterly up to date – at least to the last 6 months. Each year 2 revision services will be undertaken in July and January to bring the book up to speed with any new case law or statutory changes of any significance.

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## Copyright

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## Law to Date

This text states the law as it is on 31 January 2018. Its next revision service (RS2) is due end July 2018 to take account of any development to end June 2018.

## Acknowledgments

I wish to thank my father John Grant for showing me – at the age of about eight years old – how to steal train sets. This lesson triggered in me a moral dilemma that has driven me to question morality and law every day. I am thankful to my friends, teachers, lecturers, mentors, Merle Friedman, Roger Whiting, Andrew Paizes, Mark Leon, Thaddeus Metz, Eusibius McKaiser, Johnathan Klaaren, and Michael Greyling for giving me the tools to work on my moral and legal dilemmas and to live an examined life. Finally, I must thank my wonderful wife Michelle and my late mother June Grant, who have been my exemplars of moral icons.

PART I:

INTRODUCTION

## Chapter 01: Introduction

### Introduction

One is only criminally liable and subject to punishment if the following requirements are met.<sup>1</sup> It must be proved, beyond any reasonable doubt, that the accused committed some *wrongful conduct* which coincided in time<sup>2</sup> with a *culpable/guilty mental state*. For illustration purposes, it will be helpful to bear the definition of the crimes of murder and culpable homicide in mind. Murder is defined as the intentional unlawful killing of another human being. Culpable homicide is defined as the negligent unlawful killing of another human being. Notably, the two crimes are identical, except that murder requires intention, while culpable homicide requires negligence.<sup>3</sup>

Wrongful/Unlawful<sup>4</sup> conduct (also known as the *actus reus*) requires conduct, in the form of an act or omission, which is *voluntary* and is wrongful/unlawful. A *culpable mental state* (also known as *mens rea*) requires, on the current law, at least '*capacity*' and – at least for all serious crimes – some form of fault (intention or negligence).

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<sup>1</sup> Other ways of grouping requirements exist (CR Snyman *Criminal Law* 5th ed (2008) 33ff). However, this method is consistent with practice and captures all that is necessary. Snyman argues that a separate requirement of 'compliance with the definitional elements' is required since each crime prohibits particular conduct, not just any conduct (ibid 30 & 4). He is obviously correct. However, the enquiry into conduct must necessarily concern itself with conduct that is prohibited, and not just any conduct. When one enquires into whether conduct may be attributed to the accused, the question is – necessarily – whether the accused did what is prohibited under some crime. As Visser and Maré note '*conduct* in the criminal law refers not only to action or inaction, but to such action or inaction in all the relevant circumstances of the particular proscription in question' (PJ Visser & MC Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 46).

Snyman also prefers to combine the requirements of capacity and fault under the heading of culpability – though they remain separate requirements. De Wet and Swanepoel (J. C. De Wet *Strafreg* 4 ed (1985) 110; endorsed in *S v Laubscher* 1988 (1) SA 163 (A); *S v Calitz* 1990 (1) SACR 119 (A); *S v Wiid* 1990 (1) SACR 561 (A)) are of the view that capacity forms a separate independent requirement within *mens rea*. These views are apparently reconcilable within the framework proposed above.

<sup>2</sup> Known as the requirement of contemporaneity (see under the heading '*Contemporaneity*' on page 19).

<sup>3</sup> The difference is explained below under the heading 'Fault' (on page 18).

<sup>4</sup> In criminal law the term 'unlawful' is used instead of 'wrongful'. However, the term wrongful will sometimes be used here to assist in conveying the meaning of 'unlawful' conduct.

## Voluntariness

Conduct must be voluntary – without exception. Conduct is regarded as voluntary when it is controlled by an accused's will.<sup>5</sup> Involuntary conduct is also known as an automatism – from the notion of an automaton. So fundamental is this requirement that if it is absent the enquiry into liability ends – the accused cannot be liable.<sup>6</sup> 'In the context of a person who acts involuntarily there is no need to proceed any further in determining liability because such person will inevitably also lack capacity and, incidentally, mens rea (culpable mental state) as well. 'No-one doubts the all-embracing nature of the defence of automatism that swallows up all other defences.'<sup>7</sup>

## Unlawfulness

Unlawfulness is the requirement which is excluded when what one does is *justified*. One is justified in one's conduct when what one does is the right thing to do - all things considered.<sup>8</sup> Possibly the most well-known justification (known as a ground of justification) is self-defence – more technically known as private defence. Our law recognises that one's conduct is *justified* and therefore *lawful* in private defence when, in response to an unlawful imminent<sup>9</sup> or commenced attack upon a legally protected interest, one resorts to the use of necessary and reasonable force against the attacker.<sup>10</sup> Other grounds of justification recognised in our law include necessity (also known as compulsion or as duress in other jurisdictions), consent, and *de minimis*.<sup>11</sup> The list of grounds of justification that have been recognised is not closed so that new grounds of justification

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<sup>5</sup> *S v Chretien* 1981 (1) SA 1097 (A); J Austin *Lectures on Jurisprudence* 3rd ed (1869) 426, reported in W. Wilson *Criminal Law: Doctrine and Theory* (1998) 220; Andrew Ashworth *Principles of Criminal Law* 2nd ed (1997) 96-7; Jonathan Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 180; Ronald Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207; Deborah W. Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review. See also Leon 'Responsible Believers' (2002) 85 The Monist; Charles Taylor 'Responsibility for Self' In *Free Will* edited by Gary Watson 111-26 (1982); Gary Watson 'Free Agency' (1975) 72 Journal of Philosophy; Wolf 'Sanity and the Metaphysics of Responsibility' In *Free Will* edited by Kane (2002)).

<sup>6</sup> *S v Johnson* 1969 (1) SA 201 (AD); *S v Chretien* 1981 (1) SA 1097 (A); *R v Kemp* [1957] 1 QB 399 at 407; SHC 18; *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Victor* 1943 TPD 77.

<sup>7</sup> J Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 36. See also *S v Chretien* 1981 (1) SA 1097 (A).

<sup>8</sup> L Austin *Philosophical Papers* (1970); G P Fletcher *Rethinking Criminal Law* (1978); HLA Hart *Punishment and Responsibility* (1968) 13-4; *S v Trainor* 2003 (1) SACR 35 (SCA).

<sup>9</sup> Subject to the judgment in *S v Engelbrecht* 2005 (2) SACR 41 (WLD).

<sup>10</sup> *R v Zikalala* 1953 (2) SA 568 (A); *R v K* 1956 SA 353 (A); *R v Patel* 1959 (3) SA 121 (A); *S v Jackson* 1963 (2) SA 626 (A).

<sup>11</sup> *De minimis* is the defence that our law does not take account of trivialities.

may be recognised.<sup>12</sup> The ultimate test of unlawfulness, and for grounds of justification,<sup>13</sup> is the legal convictions of the community,<sup>14</sup> as informed by the values in the Constitution.<sup>15</sup>

### Causation

In addition to the above, causation is required for consequence crimes.<sup>16</sup> These are crimes where the conduct which is prohibited is the *causing* of some prohibited consequence. For instance, for murder,<sup>17</sup> the prohibited conduct is the *causing* of the death of another human being. In contrast, other crimes, known as circumstance crimes,<sup>18</sup> prohibit a particular state or circumstance, such as the possession of drugs. Notice the essential distinction is that, for consequence crimes, the conduct in question must cause some prohibited consequence whereas for circumstance crimes, this is not true. There is no need for anything to be caused by the possession of the drugs for that conduct requirement to be satisfied.

When an accused is charged with a consequence crime, the prosecution must prove that the conduct of the accused *caused* the prohibited consequence. Our courts adopt a two-phase enquiry<sup>19</sup> into causation. The first stage is an enquiry into factual causation, by means of the

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<sup>12</sup> On this point, as Snyman notes, all writers in criminal law agree (Snyman *Criminal Law* 5th ed (2008) 97).

<sup>13</sup> Which are merely crystallised and well recognised exceptions to unlawfulness, such as private or self-defence, necessity, and consent (ibid 97-8).

<sup>14</sup> *S v Chretien* 1981 (1) SA 1097 (A) 1103D-F; *S v Gaba* 1981 (3) SA 745 (O) 751; *Clarke v Hurst NO* 1992 (4) SA 630 (D); *S v Fourie* 2001 (2) SACR 674 (C) 681A-B. See also, in the context of the law of delict, *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) regarding the 'wrongfulness' of an omission. It may be worth noting that while different consequences may flow in the law of delict compared with the criminal law, 'the test for unlawfulness is identical in delict and criminal law' (Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 180). Van der Westhuizen argues that it is impossible for conduct to be wrongful in one field of law and yet lawful in another (Van der Westhuizen 'Noodtoestand as Regverdigingsgrond in die Strafreë' University of Pretoria 1979).

<sup>15</sup> Constitution of the Republic of South Africa 108 of 1996. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA); Snyman *Criminal Law* 5th ed (2008) 97-8.

<sup>16</sup> Also known as materially defined crimes (Snyman *Criminal Law* 5th ed (2008) 79).

<sup>17</sup> Defined as the unlawful intentional killing of another human being.

<sup>18</sup> Also known as formally defined crimes (Snyman *Criminal Law* 5th ed (2008) 79).

<sup>19</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34; *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) para 17; *S v Daniëls* 1983 (3) SA 275 (A) 324-5 & 31; *S v Mokgethi* 1990 (1) SA 32 (A) 39.



*conditio sine qua non* test.<sup>20</sup> The second stage is an enquiry into 'legal causation', based on policy considerations of reasonableness, fairness, and justice, as informed by various specific tests of legal causation.<sup>21</sup>

## Capacity

Capacity is the ability to appreciate the wrongfulness of one's conduct and to act in accordance therewith.<sup>22</sup> The capacity to appreciate the wrongfulness of one's conduct is known as the capacity for insight. The capacity to act in accordance with an appreciation of wrongfulness is known as the capacity for self-control. Capacity is present only when the accused possessed both capacities. That is, capacity requires the ability both to appreciate the wrongfulness of one's conduct, *and* the ability to act in accordance with an appreciation of the wrongfulness of one's conduct.

Capacity is fundamental to all criminal liability and there are no exceptions. It 'is an indispensable component of culpability...'<sup>23</sup> and therefore of criminal liability. While our law knows of an exception (known as strict liability – discussed below) to the rule that fault is always required in some form – this only excludes the requirement of fault (intention or negligence).

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<sup>20</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) 33-5, & 43-4; *S v Daniëls* 1983 (3) SA 275 (A) 324 & 31; *S v Haarmeyer* 1971 (3) SA 43 (A) 47; *S v Mokgethi* 1990 (1) SA 32 (A) 39. I anticipate that the judgement from *Lee v Minister of Correctional Services (Dudley Lee v Minister of Correctional Services)* CCT 20/12 ZACC 30) will not find application in the criminal law on the basis that it appears to disengage the enquiry into causation from an accused's conduct or does not alter our law.

This test effectively requires that one imagine away the conduct in question and consider whether the prohibited consequence would (hypothetically) not have occurred. If, upon imagining the conduct in question away, the prohibited consequence would (hypothetically) not have occurred, then the conduct in question is regarded as a factual cause.

<sup>21</sup> *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *S v Mokgethi* 1990 (1) SA 32 (A). *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) para 18 per Corbett CJ: 'factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice'. *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) paras 17– 9; *Smit v Abrahams* 1994 (4) SA 1 (A).

<sup>22</sup> Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 358; J M Burchell *South African Criminal Law & Procedure: General Principles* Vol 1 (1997); F Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967). These capacities are derived from the defence of pathological incapacity (formerly known as the insanity defence) contained in s 78 of the Criminal Procedure Act 51 of 1977 (Ronald Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 200).

<sup>23</sup> Snyman *Criminal Law* 5th ed (2008) 159.

## Fault

Most crimes, certainly all serious crimes, also require some form of 'fault'. Fault may take the form of either intention or negligence. Crimes that require no form of fault are known as 'strict liability offences'. Strict liability offences are offences for which no form of fault is required, that is, neither intention nor negligence is required.<sup>24</sup> Certain traffic offences are strict liability offences. It is not that fault is excluded but rather that fault is just irrelevant. Strict liability only affects whether fault is required and does not affect the requirements of conduct, unlawfulness, or capacity.<sup>25</sup>

Fault in the form of intention is required for all common law crimes,<sup>26</sup> except culpable homicide<sup>27</sup> and contempt of court by a newspaper editor,<sup>28</sup> for which negligence is sufficient. Intention in South African criminal law is widely defined to include *dolus eventualis* - constructive intention. *Dolus eventualis* exists when an accused foresees that his/her conduct poses a risk that the prohibited consequence could occur (or a prohibited circumstance could arise), reconciles him/herself to the risk, and persists.<sup>29</sup>

Negligence is judged by the reasonable person test. An accused is judged to have been negligent if his/her conduct deviates from the standard of conduct of a hypothetical reasonable person in the circumstances of the accused.<sup>30</sup>

One additional point – of great importance – must be observed. To incur liability, the accused's fault must extend to all the elements (requirements) of the *actus reus*.<sup>31</sup> Thus, where the form of fault required for an offence is intention (such as for murder), the accused must intend to kill

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<sup>24</sup> Ibid 245; Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 545.

<sup>25</sup> E M Burchell, J R L Milton & J M Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* 2nd ed Vol 1 (1983) 217; Jonathan Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 453.

<sup>26</sup> Crimes defined by judgments of courts – as opposed to crimes created and defined by parliament (known as statutory crimes).

<sup>27</sup> The unlawful *negligent* killing of another human being.

<sup>28</sup> *S v Harber* 1988 (3) SA 396 (A).

<sup>29</sup> *S v Ngubane* 1985 (3) SA 677 (A); *S v De Bruyn* 1968 (4) SA 498 (A). Academics have however been critical of this conception (R C Whiting 'Thoughts on dolus eventualis' (1988) 1 SACJ; Paul T. Smith 'Recklessness in Dolus Eventualis' (1979) 96 SALJ; Burchell, Milton & Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* 2nd ed Vol 1 (1983) 147ff).

<sup>30</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A); *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A).

<sup>31</sup> *S v De Oliveira* 1993 (2) SACR 59 (A); Andrew Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ.

another human being, but also, to do so unlawfully - that is, s/he must know or foresee<sup>32</sup> that s/he is unlawfully killing another human being. If the form of fault required is negligence, then it must be the case that the accused negligently<sup>33</sup> unlawfully killed another human being. As a result, an accused who is ignorant or mistaken as to the fact that s/he is killing another human being or that s/he is doing so unlawfully, has a valid and complete defence where the form of fault required is intention (murder). However, this defence will only be valid and complete where the fault required is negligence (culpable homicide), if the mistake is reasonable – the sort that a reasonable person may make.<sup>34</sup>

### Contemporaneity

Contemporaneity is the principle that requires that the accused's wrongful conduct must coincide in time with his/her culpable mental state.<sup>35</sup> It is often regarded as offering a possible defence in which an accused will point to a disjunction in time between his/her wrongful conduct and culpable mental state.<sup>36</sup> Moseneke J in *Thebus* observed:

The definitional elements or "the minimum requirements necessary to constitute a meaningful norm"[footnote omitted] for a common law crime are unique to that crime and are useful to distinguish and categorise crimes. Common minimum requirements of common law crimes are proof of unlawful conduct, criminal capacity and fault, all of which must be present at the time the crime is committed.<sup>37</sup>

The only apparent exception to this is known as antecedent liability - deriving from the principle of *action in libera causa*. Under this principle – which is in fact nothing more than an application of the requirement of contemporaneity<sup>38</sup> - an accused who ostensibly commits wrongful conduct at some time while lacking voluntariness, capacity, or fault, may yet incur liability for antecedent

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<sup>32</sup> Given that intention is widely defined in our law and includes *dolus eventualis* (see note 29 and associated text).

<sup>33</sup> Judged by the standard of the reasonable person (see note 30 and associated text).

<sup>34</sup> *R v Mbombela* 1933 AD 269; *S v De Oliveira* 1993 (2) SACR 59 (A).

<sup>35</sup> See *R v Chiswibo* 1961 (2) SA 714 (FC); *S v Masilela* 1968 (2) SA 558 (AD). See also *S v Goosen* 1989 (4) SA 1013 (A) though the judgement has been subjected to devastating criticism that it confused mistakes relating to causal sequence with mistakes relating to causal acts (Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ).

<sup>36</sup> See *R v Chiswibo* 1961 (2) SA 714 (FC); *S v Masilela* 1968 (2) SA 558 (AD).

<sup>37</sup> Emphasis added, *S v Thebus* 2003 (6) SA 505 (CC) para 37.

<sup>38</sup> This is the 'downside' to contemporaneity for an accused: that whenever these two elements *do* coincide in time, s/he is liable for the crime as having been committed at the time that the two elements do coincide.

(prior) conduct, if all (other) requirements of liability are present at the time of this antecedent conduct, including that this (antecedent) conduct must be causally linked to the prohibited consequence.<sup>39</sup> Antecedent liability therefore does not find application in the context of circumstance crimes – where it is unable to resolve the problem that an accused was involuntary in the prohibited circumstance. This is because circumstance crimes require that the accused must be voluntary in the circumstance and voluntarily *causing* the prohibited circumstance does not constitute a crime for the purposes of circumstance crimes.<sup>40</sup>

### Onus of Proof

It is well known that, in criminal trials, the prosecution bears the *onus* of proof, to prove its case, that the accused is guilty, beyond a reasonable doubt. This follows from the right to be presumed innocent in the Constitution. There is only one notable<sup>41</sup> exception to this – in respect of a defence of pathological incapacity,<sup>42</sup> in respect of which, the accused must raise more than a reasonable doubt to succeed with this defence. An accused who raises this defence must show, on *a balance of probabilities* (that it is more likely true than not) that s/he lacked criminal capacity because of a mental illness or intellectual disability. Incidentally, even other claims of incapacity (that is, for other reasons) do not place this burden of proof on an accused. Notably, whenever an offence which places such a burden on the accused has been brought to the attention of our Constitutional Court, it has struck the burden down as unconstitutional on the basis that any burden placed on an accused, which allows for his/her conviction, in the face of a reasonable doubt as to his/her

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<sup>39</sup> Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 70-1.

<sup>40</sup> Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 52.

<sup>41</sup> It is possible that other exceptions exist in respect of some obscure statutory offences. One such exception, which received an unexcepted endorsement of the Gauteng High Court may be found in section 1 (2) of the Intimidation Act 72 of 1982 – see *Moyo and another v Minister of Justice and Constitutional Development and Others* 2017 (1) SACR 659 (GP). The section provides as follows: 'In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution.' The leaned judge took the view that the risk of anyone being convicted because they fail to raise their defence on a balance of probabilities exists, but is minimised because the accused need only respond with this proof after the state has established a prima facie case. [73ff] This logic is difficult to follow and stands in stark contrast to the injunction in *S v Coetzee* – see below (note 43).

<sup>42</sup> Previously known as an 'insanity' defence. It is the defence that one lacks capacity because of a mental illness or intellectual disability.

guilt, violates the presumption of innocence.<sup>43</sup> It is to be expected that, if challenged, the burden placed on accused people who seek to raise the defence of pathological criminal incapacity, will meet a similar fate.

What though does it mean that the prosecution must prove that the accused is guilty, beyond a reasonable doubt? It means that the accused needs to only raise a reasonable doubt that s/he is guilty – even a single reasonable doubt – even in respect of a single requirement for liability. This is the extent of the onus on the prosecution. It ultimately gives effect to the deeply entrenched principle that, given the serious consequences of a conviction, an accused should be given the benefit of any doubt.

### Conclusion

In conclusion therefore, criminal liability attaches to conduct which is voluntary and unlawful if the accused had capacity and the relevant form of fault at the time of his/her conduct. In addition, if the crime is a consequence crime, the accused must have caused the prohibited consequence. All of this must be proved by the prosecution, beyond a reasonable doubt.

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<sup>43</sup> *S v Coetzee* 1997 (3) SA 527 (CC). Arguments that such a violation may be justified seem to rely on the risks associated with false claims and the difficulties of proof that a prosecution may encounter in having to prove that an accused possessed capacity (*Card, Cross and Jones Criminal Law* 19th ed (2010) 654-5 see *R v Chaulk* (1991) 1 CRR 1 (SCC) in which the Canadian Supreme Court considered the reverse burden a justified limitation on the presumption of innocence). Both arguments seem to be little more than an appeal to make the work of a prosecution easier – and for reasonable doubts that would otherwise exist, to be ignored.

## Chapter 02: Criminal Law in 4D

### Introduction

Criminal law can be confusing because conduct can be both reasonable and unreasonable, right and wrong, and things can exist or not, all at the same time. This might appear to be an indictment of criminal law as inherently contradictory, but it is not. It is an attempt to illuminate how all these things can be true at the same time - without contradiction.

The key is to recognise that the answers depend on the particular perspective or context from which the questions must be approached. It isn't even as simple as a reminder that there is (presumably) a world out there, of reality, and that we have no direct access to this reality - we can only perceive it. This is only part of what must be recognised. In the final analysis I will identify four different dimensions or perspectives from which questions in criminal law must be approached.

It is first necessary to sketch out the requirement of criminal liability in brief, before discussing the different perspectives/dimensions applicable to these requirements.

### Requirements

It may be useful to be reminded of the various requirements for liability (set out in more detail in the "Overview" (above),<sup>44</sup> as follows:

**Conduct:** The accused must have done something or failed to do something in circumstances where our law requires the victim to act (that is, in the face of a legal duty to act). This conduct must be voluntary: subject to the control of the accused's mind. In the case of crimes which are defined by the causing of a particular consequence (such as murder), the prosecution must also prove that you caused the prohibited consequence: that the accused caused the death of the victim.

**Unlawfulness:** conduct must be unlawful to attract criminal liability. This is the requirement that allows a court to take account of specific circumstances in which the conduct takes place and to judge whether the conduct (which is generally unlawful), was, in the specific circumstances, lawful and, therefore, without liability. This is ultimately tested by reference to the "legal convictions of the community" as informed by the values in the Constitution. These exceptional circumstances are regarded as grounds of justification. Self/private defence is a ground of justification. If someone

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<sup>44</sup> Under the heading "Chapter 01: Introduction" on page 13ff.

acts in self/private defence, his/her conduct is lawful - and cannot attract liability. Other grounds of justification include consent and necessity (also known as duress).

It is worth noting that in the context of omissions, which are only punishable if there was a legal duty to act on the accused, the question of whether such a legal duty existed is a question of unlawfulness. While our law presumes that positive conduct is unlawful, it presumes that omissions are ordinarily lawful. The question of whether any particular omission was actually unlawful is determined by the overarching ultimate tests of unlawfulness. Common scenarios in which our law regards an omission as unlawful is where the accused was in control of a dangerous animal or thing, in a protective relationship with the victim (such as a father or mother in respect of his/her child).

Capacity: the ability to appreciate the wrongfulness of his/her conduct and to act in accordance with this appreciation. This is where the defence formerly known as "insanity" (now known as pathological incapacity) is located. Our law also regards youth as a basis on which an accused may lack capacity. More recently, our law has recognised intoxication<sup>45</sup> and severe emotional stress<sup>46</sup> as conditions which may deprive an accused of capacity.

Fault: Crimes usually require some form of fault: intention or negligence. Our law accepts, exceptionally, crimes that require no fault - known as strict liability crimes. Most serious crimes require intention, such as murder, theft, fraud, robbery, and assault. Culpable homicide requires only negligence. Crimes that require no fault (strict liability offences) are exceptional and are ordinarily relatively minor - such as some traffic offences.

## Perspectives

The different possible perspectives are as follows – starting with what is possibly the most neglected.

### A. Objective Normative

Throughout our law, objective normative judgments are required. These are value judgments where the Court must exercise its discretion in determining what conduct was permitted in the specific circumstances - based on considerations of fairness and justice, ultimately guided by the values in the Constitution. Several areas exist where courts must make these value judgments, such as in considering whether an accused should be regarded as having killed the victim -

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<sup>45</sup> *S v Chretien* 1981 (1) SA 1097 (A).

<sup>46</sup> *S v Wiid* 1990 (1) SACR 561 (A); *S v Eadie* 2002 (1) SACR 663 (SCA).

causation is ultimately determined by reference to considerations of justice and fairness. Also, in considering whether conduct was justified (under the unlawfulness requirement) and in the context of negligence in deciding what the reasonable person would do. These normative or value judgments are questions of law and refine the law to apply to the particular circumstances - setting out what was permitted or prohibited in the particular circumstances. In the case of private/self-defence the value judgments (made by Courts) to date allow us to set out the requirements of the defence as follows:

1. You can only resort to force in response to an attack against you that is unlawful itself (you can't resort to force against someone who is acting lawfully, such as in the execution of a warrant of arrest against you);
2. It must have commenced or be imminent (It is possibly worth noting the ground breaking decision of Satchwell J in *Engelbrecht*<sup>47</sup> in which she accepted that it is enough if the attack was 'inevitable'.);
3. It must be an attack against a legally protected interest of yours or of another person (life, limb, or property of substantial value);
4. It must be necessary to resort to force;
5. That force must be directed at the attacker (not someone else); and
6. The extent of force must be necessary and reasonable - for instance, you cannot shoot someone for threatening you with a light assault.

These requirements are objective normative requirements. They are statements of law. When a case comes before court and a claim is made of private defence, the court will consider whether the objective reality (discussed under B) fits with the objective normative requirements in deciding whether to accept the defence.

It is worth noting that these normative judgements are not fixed. In particular, in the context of grounds of justification, which are judged by the "legal convictions of the community" as informed by the values in the Constitution, our courts could develop the requirements and, ultimately change what is permitted or prohibited, in a particular circumstance.

## B. Objective Reality

This perspective is appropriate to judge questions of whether, on the facts, the accused's conduct satisfies the conduct requirement and whether that conduct is, in the specific circumstances, unlawful. In the context of negligence, it is the question of whether the accused's (actual) conduct

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<sup>47</sup> *S v Engelbrecht* 2005 (2) SACR 41 (WLD).



fell short of the normative standard of the reasonable person. Under unlawfulness, once it is determined what is normatively permitted in the circumstances, the test for whether one's conduct was unlawful (that is, conformed with what is permitted) in those circumstances, is judged with regard to reality. Based on the value judgments to date, which require, for private/self-defence (as set out above under A), that one must be under an unlawful attack, the question becomes whether the accused was, in reality, under attack or not. Fundamentally, this question takes no account of what an accused was subjectively thinking (see below under D), nor what s/he ought to have been thinking - as we may expect of the reasonable person, in the circumstances (objectively constrained - see above under C).

Finally, a reality-based enquiry also determines the circumstances into which we must place the reasonable person for the purposes of an enquiry into negligence. One does not locate the reasonable person in circumstances that the accused thought s/he was in, but rather the actual circumstances of the accused .

### C. Objective Constrained

The reasonable person in the circumstances of the accused. This enquiry is the basis for the test of negligence (under fault). It is, at its essence, a comparison between the normative judgement (discussed under A) and the actual conduct of the accused (discussed under B). However, it is important to recognise that the normative judgment (under A) is constrained for the purposes of the test of negligence, by the circumstances of the accused. The reasonable person in the circumstances on the accused can only know what the circumstances permit, and only what is reasonable to know in the circumstances. Fundamentally, this standard permits for the reasonable person to make mistakes. For example, a reasonable person in circumstances in which someone starts shouting, then reaches into his/her pocket, produces a shiny object, and advances on him/her, may well believe that s/he is under attack. This belief may be, in reality, quite untrue: the person may have been calling to someone else, have produced his/her car keys, and be walking to his/her car, behind the accused. Nevertheless, the belief of the accused may be entirely reasonable. Thus, in the context of negligence, there is the ever present possibility of a reasonable mistake.

### D. Subjective

Question may be judged subjectively - in the sense of what the accused was actually thinking. Intention, voluntariness and capacity are judged subjectively. In this context the accused's

particular mental characteristics and vulnerabilities are relevant. These considerations could lead a court to conclude that the accused did not actually intend to say, kill, or to unlawfully kill, or that the accused lacked capacity. In this context reality and the reasonableness of the accused's beliefs are irrelevant.

Our courts sometimes refer to the standard of the reasonable person to assist them in determining what is permissible as justified (lawful). This is a dangerous practice because the test of the reasonable person is conventionally utilised in the context of negligence - in which the question is: what would the reasonable person do in the circumstances - in which the appropriate perspective is one which is constrained by the accused's circumstances (discussed under C). The reasonable person (in the circumstances of the accused) may be mistaken and so a mistake would be reasonable. On the other hand, in the context of unlawfulness, the question of whether an accused's conduct meets the normative requirements (discussed under A) are judged against reality (discussed under B). In this context, there is no room for error on the part of the reasonable person. If one adopts a reasonable person to answer questions of unlawfulness, it is possible to commit an error if this distinction regarding perspective is not observed: to judge conduct as justified based on a mistaken reasonable person. If one must resort to the use of the reasonable person in this context (of unlawfulness), as our courts sometimes do, it must be a reasonable person who is not mistaken and who, essentially, knows everything. This is difficult to conceive and seems prone to error.

In application to a charge of murder (defined as the intentional unlawful killing of another human being), self/private defence excludes the unlawfulness requirement. One cannot be convicted of murder for the intentional *lawful* killing of another human being.

As discussed, justifications are judged objectively (normative and on the (actual) facts) and an accused's subjective perceptions are irrelevant to any justification defence, including one of self/private defence.

However, an accused's perceptions and beliefs are relevant to determining whether the accused had intention. If, as in the Pistorius case, he was not actually under an imminent attack (for whatever reason), the accused cannot claim to be acting in self/private defence. It is worth pausing here to point out that even if you are under an imminent attack, the other requirements (set out above under A) must be satisfied for a valid claim to self/private defence. For Pistorius, none of these were true (in reality), and so he had no claim to self/private defence.

But if he believed he was under imminent attack (and that all other requirements were met), although he acted unlawfully, his intention would have been to act lawfully. This is a defence of

mistake, known as "putative self/private defence" - that is, supposed/mistaken self/private defence. It is important to recognise that the effect of this defence (of mistake) is that it does not exclude the unlawfulness requirement. Just because you are mistaken in thinking you were under attack (and acting lawfully) does not make it true that you were acting lawfully. Your conduct remains unlawful. But, the effect of a mistaken belief that you were under attack and acting lawfully will exclude your intention to act unlawfully. The defence of mistake therefore excludes intention. If that mistake is reasonable - one that a reasonable person in the (actual) circumstances of the accused may make - this reasonable mistake will exclude negligence with the effect that the accused cannot be convicted of culpable homicide.

Until now, our courts have refused to take account of disability of any kind in constructing the reasonable person against whom to compare the accused for the purposes of a negligence enquiry. Instead, if you do something that requires special skill and knowledge (for example, surgery and presumably owning a gun), you will be judged by the standard of the reasonable person who possesses the required skill and knowledge.

## Conclusion

In conclusion, one must identify the appropriate perspective from which to approach any enquiry in criminal law: Is it a subjective or objective enquiry. If objective, one must go further. It is not enough to correctly identify that an objective perspective is required – because there remain three options within objective enquiries: normative, constrained, and reality. Without observing and respecting these different perspectives, one is bound to become disorientated and confused.

## Chapter 03: Contemporaneity

### Introduction

It is a general rule of South African criminal law that an accused's unlawful conduct and culpable/guilty mental state must coincide in time precisely – they must exist 'contemporaneously'. Thus, as an example, if you accidentally killed your enemy (perhaps in a motor vehicle accident) and later congratulate yourself for achieving what you should have done a long time ago, your guilty state of mind does not coincide with your wrongful conduct and you cannot be convicted of murder. Similarly, if you decide one morning to kill your enemy (so that at that point in time you can be said to intend to kill him/her), but you are distracted by the day's events, at some point in the day, you reconcile with your enemy and no longer intend to kill him/her, and yet, later that day you accidentally kill your enemy (again, perhaps in a motor vehicle accident), your unlawful conduct and guilty mental state would again not coincide in time.

### Cases

A number of cases have come before our courts in which the accused cited the principle of contemporaneity.

#### Thabo Meli

In *R v Thabo Meli*<sup>48</sup> the four appellants had been convicted of murder in the High Court of Basutoland (now Lesotho). The appellants, in execution of a preconceived plan, had taken a man to a hut, given him some beer, and struck him over the head. Believing him to be dead they took his body, threw it over a cliff and framed the circumstances to appear to be an accident. The man had in fact not been dead but had only died subsequently from exposure as he lay unconscious at the foot of the cliff. The court held that:

It is said that the mens rea necessary to establish murder is intention to kill and that there could be no intention to kill when the accused thought that the man was already dead, so their original intention to kill had ceased before they did the act which caused the man's death. It appears to the Lordships impossible to divide up what was really one series of acts in this way. There is no doubt that the accused set out to do all these acts in order

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<sup>48</sup> [1954] 1 All ER 373 (PC).

to achieve their plan and as part of their plan; and it is much to refined a ground of judgment to say that because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before, in fact, it was achieved, they are to escape the penalties of the law.

The defence was rejected on the basis that accused had a preconceived plan to kill the victim. It is questionable whether this logic is sound. It is not clear how a 'preconceived plan' can stretch out a mens rea which existed at the time of the initial assault, but which the court seemed to accept had, in fact, changed and no longer amounted to an intention to kill.

### Chiswibo

In *R v Chiswibo*<sup>49</sup> the accused hit the deceased on the head with the blunt side of an axe which rendered the deceased unconscious though not dead. The accused genuinely believe that the deceased was dead and put his body down an ant-bear hole where the deceased died of asphyxiation. The appeal was upheld that the appellants were only guilty of attempted murder. The court distinguished this case from that of *Thabo Meli* on the basis that in that case the offence formed part of a preconceived plan to kill.

### Masilela

In *S v Masilela*<sup>50</sup> the accused assaulted the deceased by striking him on the head and strangling him with a tie. Thinking that the deceased was already dead, they left him on a bed and set fire to the bed and house. A post-mortem examination revealed in that deceased's neck had been broken, that some serious injuries had been inflicted to his head, and that he had been strangled. However the actual cause of death was carbon monoxide poisoning from the fumes of the fire. The accused were convicted of murder and the trial judge reserved a question of law as to whether the crime committed was in fact murder. It was argued on behalf of the accused that contemporaneity was not present; that in respect of the assault the intention for murder had been present but not the unlawful consequence of death, and in respect of the burning there had been the unlawful consequence required for murder but not the required intention. Ogilvie Thompson JA (Potgieter JA concurring) held:

... [T]hat the appellants by their deliberately intended actions caused the death of the deceased is indisputable. To accede, on the facts of the present case, to the contention

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<sup>49</sup> 1961 (2) SA 714 FC.

<sup>50</sup> 1968 (2) SA 558 A.

advanced on behalf of the appellants that, once they erroneously believe that they had achieved the object by strangling deceased, their proved intention to kill him fell away and can no longer support the charge of murder, would, in my opinion, be wholly unrealistic. [The inference is... inescapable that the injuries inflicted prior to the burning] were a material and direct contributory cause of the deceased's dying from carbon monoxide poisoning....

This is fundamental, and the logic could not be more different to that of *Thabo Meli*.<sup>51</sup> The logic of *Thabo Meli* is that the mens rea, which existed at the time of the initial assault, to kill the victim, somehow stretched forward in time (by virtue of the 'preconceived plan') when there was, in fact, no such intention. In *Masilela* the court recognised, not that the mens rea somehow stretches forward (per *Thabo Meli*), but that the actus reus could actually stretch back in time from the time of the prohibited conduct (death), to the time when the original mens rea to kill existed. This observes that prohibited consequences are, necessarily, preceded by the causes of that consequence. Subject to the rules relating to causation (to follow), if an original assault qualifies as a cause (in law), the original assault (if voluntary and unlawful) can represent the required actus reus required for murder. Given that mens rea existed at this former time, this, together with the actus reus (of causing death) at that time, allows for a conviction of murder. This logic seems sound.

Nevertheless, this does not undermine the general principle of contemporaneity. If an accused can show that there is a disjunction in time between the actus reus and mens rea, s/he has a valid defence. However, if the prosecution can show that the two did coincide, the defence cannot succeed.

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<sup>51</sup> Although the court here (in *Masilela*) did not see the difference: The conclusion which I have reached may, in a sense, be said to be an extension of the principle of *Thabo Meli*'s case ... in that in the present case the trial court was unable to find positively that there was a preconceived plan to kill the deceased. In my judgment, however, this court should... not hesitate to make that extension... even although... their intention to kill was conceived, not previously, but as 'a matter of improvisation in the course of the execution of the robbery'.

## Conclusion

It is worth observing that while contemporeneity offers an accused a possible defence, it is double edged. It allows for a conviction of an accused based on any point in time in respect of which the prosecution can show that the actus reus and mens rea coincided in time.<sup>52</sup>

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<sup>52</sup> This will have implications for 'antecedent liability' and 'state of affairs' (also known as 'situation crimes'). Contemporeneity appears to be what is truly in issue in respect of these and other problems in criminal law and offers a way to understand and solve them.

PART II:  
CONDUCT



## Chapter 04: Voluntariness

### Introduction

As discussed in the overview,<sup>53</sup> conduct must be voluntary.<sup>54</sup> Involuntary conduct is also known as automatism – from the notion of an automaton.

### Fundamental

So fundamental is this requirement that if it is absent the enquiry into liability ends – the accused cannot be liable.<sup>55</sup> There are no exceptions to this rule. If an accused's conduct was involuntary, s/he cannot incur liability. For all legal purposes, during a phase of involuntariness, the accused does not exist.

Burchell observes: 'In the context of a person who acts involuntarily there is no need to proceed any further in determining liability because such person will inevitably also lack capacity and, incidentally, *mens rea* as well. No-one doubts the all-embracing nature of the defence of automatism that swallows up all other defences.'<sup>56</sup>

### Definition?

Cross and Jones comment that voluntariness is best explained by illustration, by what has been recognised as instances of involuntariness.<sup>57</sup> This is also the approach of the American Law Institute.<sup>58</sup> Conditions which have been recognised to produce involuntary movements include

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<sup>53</sup> See Chapter 01.

<sup>54</sup> There is an inevitable overlap between this discussion in this context and again in the context of a comparison of this requirement and the capacity for self-control. The purpose of this discussion is to introduce a working definition of the concept of voluntariness.

<sup>55</sup> *S v Johnson* 1969 (1) SA 201 (AD); *S v Chretien* 1981 (1) SA 1097 (A); *R v Kemp* [1957] 1 QB 399 at 407; SHC 18; *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Victor* 1943 TPD 77.

<sup>56</sup> J Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica* 36. See also *S v Chretien* 1981 (1) SA 1097 (A).

<sup>57</sup> Rupert Cross & Philip Asterley Jones *An Introduction to Criminal Law* 3rd ed (1953) 34-5.

<sup>58</sup> Denno (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minnesota Law Review* 287) notes that the voluntariness requirement of the US Model Penal Code is not specifically defined, but that four instances of involuntariness are offered to illustrate that voluntariness is 'conduct that is within the control of the actor' (American Law Institute *Model Penal Code* (1985) § 2.01 at 215): '(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual' (ibid § 2.01 (2) at 212).

sleep and sleepwalking,<sup>59</sup> epileptic seizures,<sup>60</sup> and conduct in which the accused is subjected to overwhelming force,<sup>61</sup> 'blackout',<sup>62</sup> dissociation,<sup>63</sup> cerebral tumour,<sup>64</sup> arteriosclerosis,<sup>65</sup> concussion,<sup>66</sup> hypoglycaemia (low blood sugar),<sup>67</sup> and intoxication.<sup>68</sup> The concept of automatism<sup>69</sup> is often used as a reference to an instance of involuntariness, but it carries an indistinguishable meaning.

Voluntariness is best defined as conduct controlled by the accused's will. This definition is not peculiar in our law. It was adopted by Rumpff CJ in *Chretien*.<sup>70</sup> It is also the definition of Austin,<sup>71</sup> and endorsed by Ashworth.<sup>72</sup> It is also Burchell's first offering: conduct actually controlled by the accused's will.<sup>73</sup> This would appear to be reconcilable with his conception of voluntariness as conduct 'subject to the accused's conscious will'.<sup>74</sup> Louw adopts this definition on voluntariness: 'Conduct is voluntary where it is subject to the conscious will of the accused and, therefore,

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<sup>59</sup> *R v Dhlamini* 1955 (1) SA 120 (T); *Rex v Nhete* 1941 S.R. 1; American Law Institute *Model Penal Code* (1985) § 2.01.

<sup>60</sup> *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Mkize* 1959 (2) SA 260 (N); CR Snyman *Criminal Law* 6th ed (2014) 55; De Wet *Strafreg* 4 ed (1985) 17-8; Cross & Jones *An Introduction to Criminal Law* 3rd ed 34-5.

<sup>61</sup> Such as from another stronger person (CMV Clarkson *Understanding Criminal Law* (2005) 36; De Wet *Strafreg* 4 ed (1985) 17-8; JWC Turner *The Mental Element in Crimes at Common Law: The Modern Approach to Criminal Law* 204) or from forces of nature (De Wet *Strafreg* 4 ed (1985) 17-8; Jonathan Burchell *Principles of Criminal Law* 5th ed (2016) 73).

<sup>62</sup> *R v Du Plessis* 1950 (1) SA 297 (O).

<sup>63</sup> *S v Mahlinza* 1967 (1) SA 408 (A).

<sup>64</sup> *R v Charlson* [1955] 1 All ER 859.

<sup>65</sup> *R v Kemp* [1957] 1 QB 399 at 407; SHC 18.

<sup>66</sup> *R v Smit* 1950 (4) SA 165 (O); *R v Byrne* [1960] (2) QB 396.

<sup>67</sup> *S v Bezuidenhout* 1964 (2) SA 651 (A); *S v van Rensburg* 1987 (3) SA 35 (T).

<sup>68</sup> Involuntary intoxication: *S v Johnson* 1969 (1) SA 201 (AD); Voluntary intoxication: *S v Chretien* 1981 (1) SA 1097 (A). See the most recent case of mixed emotional stress and intoxication and a somewhat incredible conclusion – discussed below (under the heading "Capacity"): *S v Ramdass* 2017 (1) SACR 30 (KZD).

<sup>69</sup> From the notion of an automaton, that is, something acting as a robot.

<sup>70</sup> *S v Chretien* 1981 (1) SA 1097 (A) 1104.

<sup>71</sup> '[M]ovement of the body which follows our volition' (Austin *Lectures on Jurisprudence* 3rd ed (1869) 426, reported in Wilson *Criminal Law: Doctrine and Theory* (1998) 220).

<sup>72</sup> An act is voluntary if it is willed (Ashworth *Principles of Criminal Law* 2nd ed (1997) 96-7).

<sup>73</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 75. Burchell includes the qualification 'conscious' will. However, as discussed below, this concept can only cloud one's understanding. This qualification is therefore overlooked where it is employed.

<sup>74</sup> emphasis added *ibid* 71. This interpretation reads the words 'subject to' as a matter of fact. If this is wrong and it refers instead to a capacity, these instances are reconcilable with the second definition: conduct which could be controlled by the will.

involuntary when not subject to the conscious will.<sup>75</sup> Denno also endorses this formulation: 'Voluntary acts ...constitute conduct subject to an individual's control'.<sup>76</sup>

### Consciousness

It may be noted that the concept of consciousness is often used to qualify when conduct will be voluntary.<sup>77</sup> However, consciousness is itself a disputed concept, capable of a myriad of differing meanings.<sup>78</sup> In any event, it seems entirely unnecessary and undesirable to include the qualification that conduct must be controlled by the *conscious* will.<sup>79</sup> On such a definition, it is unlikely that most of what we do every day would qualify as voluntary. This is because it is arguable that most conduct is not produced by our conscious will – at least not if 'consciousness' is taken as a reference to awareness.<sup>80</sup> On this conception driving, playing the piano, or even walking would be involuntary conduct.

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<sup>75</sup> Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207.

<sup>76</sup> Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review.

<sup>77</sup> See in the definition above by Burchell (Burchell *Principles of Criminal Law* 4th ed (2013) 67, 8 & 71) and Louw (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207).

<sup>78</sup> Fenwick frames the conflict well and his observation bears repetition here at length: 'Where the [medical and legal] professions differ is on what constitutes an automatism and what constitutes unconsciousness, and this remains a point of conflict. It should be simple to define unconsciousness from the viewpoint of our experience and our behaviour. On closer examination, however, this whole area is more complex than it appears, because of the different uses of the word 'unconscious'. Since the development of the analytical school at the turn of the century, the psychiatric literature has been filled with references to the unconscious. Indeed, it is part of the teaching of orthodox psychoanalysis that man has, hidden within his consciousness, unconscious springs of action. Psychology adds another dimension to unconscious processes. It is now recognised that before an experience arises in consciousness, considerable preconscious processing of the sensory information has occurred. Thus, there are degrees of consciousness, but how can we tell at which level the individual should be responsible for his actions, or when they are so confused that they do not know what they are doing? From the psychological point of view, the conscious stands firmly and securely only on the preconscious, and is meaningless without it. If this is truly so, then no satisfactory legal definition of consciousness, which depends on subjective experience and observable behaviour, is possible, as consciousness is layered, and the layers are ill-defined. Indeed, theoretically, it must be impossible to decide at which layer consciousness ends and unconsciousness begins. The medical literature also refers to unconsciousness, but here the definitions are clearer and easier to quantify. For the medical definition is based on our understanding of brain function, and consciousness is quantified according to whether or not the higher functions of mind are obtunded or absent.' (P. Fenwick 'Automatism.' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 271 & 2).

<sup>79</sup> For a more detailed discussion please consult my PhD thesis (Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012) 88ff).

<sup>80</sup> Denno appears to frame consciousness as awareness (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 329).

### Absolute Force

Where an accused's movements were produced by overwhelming force (such as where a person, by superior physical force, overwhelms an accused and forces him/her to strike another person) the movements of the accused will be regarded as involuntary. The extent of the force is regarded as absolute in the sense that the accused was entirely overwhelmed and there is no semblance of choice on the part of the accused. Where force is absolute in this sense it is technically known as *vis absoluta*. All instances of involuntariness are of this nature, whether they arise from external forces or internal<sup>81</sup> forces, such as epilepsy.

Where force experienced by the accused was anything less than what may be said to be absolute (in that s/he could not exercise any choice at all) s/he may no longer make a claim to involuntariness. Where an accused makes a claim to have been subjected to compelling force (technically known as *vis compulsiva*) although the accused cannot claim involuntariness, s/he may claim the defence of necessity – colloquially known as duress or compulsion. It is the defence Z may raise if, for instance, X threatens to kill Z if s/he does not steal some other person's (Y's) property for X. If Z chooses to steal, rather than die, s/he may raise the defence of necessity to a charge of theft. Significantly, however much of a hard choice Z had to make (to steal or die), it is still a choice, and therefore s/he cannot rely on the defence of involuntariness, but on necessity. The defence has been conventionally regarded as undermining the unlawfulness requirement,<sup>82</sup> but it may, in exceptional circumstances, be better understood as undermining the mens rea requirement.<sup>83</sup>

### Sane and Insane Involuntariness/Automatism

Automatisms have been traditionally divided into sane and insane automatisms. Where a mental illness or intellectual disability is implicated as the source of an automatism/involuntariness, the automatism is regarded as pathological in that it invokes the provisions of a pathological incapacity defence<sup>84</sup> (formerly known as an insanity plea). This means that if an accused indicates that the

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<sup>81</sup> Although this distinction (between internal and external factors) breaks down on analysis (see James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012) available at [www.jamesgrant.co.za](http://www.jamesgrant.co.za))

<sup>82</sup> See the leading case on necessity: *S v Goliath* 1972 (3) SA 1 (A).

<sup>83</sup> This will be discussed further under Necessity (to follow).

<sup>84</sup> Provided for in s 78(1) of the Criminal Procedure Act: 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 intellectual disability which makes him or her incapable—

source or cause of his/her state of involuntariness was a 'mental illness or intellectual disability', s/he is regarded as having raised what was previously referred to as the 'insanity defence', now referred to as pathological incapacity. Presumably this treats the requirement of involuntariness as the equivalent to a defence of an incapacity to conduct oneself in accordance with an appreciation of wrongfulness.<sup>85</sup> Accused persons found not guilty by reason of pathological incapacity used to be subject to a mandatory committal to a mental institution – that is, courts had no discretion in this respect.

In the case of *Mahlinza*<sup>86</sup> the court found that conduct of the accused was involuntary, though it also found that this condition was due to a mental illness or intellectual disability, and therefore it was a so-called insane automatism. Under the law that applied then, the accused was committed to a mental institution on a mandatory basis. Now, however, courts have a wide discretion in disposing of an accused found not guilty because of mental illness or intellectual disability – ranging from committal to a mental institution to unconditional release (see Annexure A)<sup>1</sup>.

#### Proof of Involuntariness:

The prosecution bears the onus of proving every element of criminal liability beyond reasonable doubt – subject to the 'reverse burden' applied in cases of pathological incapacity.<sup>87</sup> Putting aside issues of pathological incapacity/involuntariness, once the prosecution has led evidence and that the accused committed prohibited conduct, the inference may be drawn that the accused did so voluntarily.

In *Henry*<sup>88</sup> the court, cited a passage from *Cunningham*<sup>89</sup> with approval:

"It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the State to establish this element beyond reasonable doubt.

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- (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.

<sup>85</sup> This seems to be the prevailing view in our law in that it was the approach adopted in the leading case of *S v Eadie* 2002 (1) SACR 663 (SCA) – which will be discussed later in the discussion of non-pathological incapacity. The case is discussed at detail in my PhD thesis (Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012) available at [www.jamesgrant.co.za](http://www.jamesgrant.co.za)).

<sup>86</sup> *S v Mahlinza* 1967 (1) SA 408 (A).

<sup>87</sup> Discussed in the Overview (Chapter 1).

<sup>88</sup> *S v Henry* 1999 (1) SACR 13 (SCA).

<sup>89</sup> *S v Cunningham* 1996 (1) SACR 631 (A).

(See e.g. *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Kensley* 1995 (1) SACR 646 (A))”

As was pointed out in the *Cunningham* case,<sup>90</sup> however, the State, in discharging this onus:

“is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, ... that this was attributable to some cause other than mental pathology.”

Thus, if the accused seeks to rely on a defence of involuntariness, s/he must produce evidence to raise a reasonable possibility that s/he acted involuntarily.

#### Working definition

In conclusion then, for present purposes and bearing the above in mind, voluntariness may be best understood as conduct controlled by the accused's will. The requirement of voluntariness will be revisited in the context of the discussion of the capacity to conduct oneself in accordance with an appreciation of wrongfulness.

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<sup>90</sup> 1996 (A) at 635J-636B.

## Chapter 05: Antecedent Liability

### Introduction

The importance and work done by the contemporaneity principle is most evident in the context of *antecedent liability*. Antecedent liability<sup>91</sup> arises where, although some requirement of the *actus reus* or *mens rea* is absent, and so the two cannot coincide in time (because they are not fulfilled), liability may arise at some other point where the requirements of the *actus reus* and *mens rea* are satisfied, and coincide in time. It derives from the rule that one is liable for liberating oneself in a cause which results in a prohibited consequence, known as *actio libera in causa* (liberation in a cause). However, it seems that the principle of antecedent liability goes further. Understood as a simple application of contemporaneity, its operation is extensive.

### The Reach of Antecedent Liability

The principle of antecedent liability finds particular application in the context of involuntariness, but there is no reason for it to be restricted to this context. The principle of contemporaneity is applicable to all criminal liability, and may be relied on either as a defence against a charge (where the accused is able to show a disjunction in time between his/her *actus reus* and *mens rea*) or as an alternative basis for liability, if the prosecution can point to some other time where these elements do coincide in time. It does not matter what requirement of liability an accused shows to be missing at any one point in time, s/he can be convicted if the prosecution is able to show that all the requirements are satisfied and coincide in time at some other point in time.

In the context of involuntariness, it is fundamental to understand that antecedent liability is not an exception to the rule that no liability can be imposed for movement during a state of involuntariness. It is a straightforward application of the contemporaneity principle in which we look to periods of time, usually antecedent to the onset of involuntariness (when the accused was, necessarily, voluntary), to find whether the other requirements of the *actus reus* (other than voluntariness – because it is necessarily satisfied) are also satisfied, together, and contemporaneously, with the *mens rea* requirements.

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<sup>91</sup> Sometimes referred to as *prior conduct*, although prior conduct is a recognised instance of a legal duty rendering an omission unlawful. Prior conduct should be left to refer to this instance of a legal duty so as to avoid confusion, and the term *antecedent liability* adopted here.

Consider, for instance, an individual, X, who is aware that s/he suffers from epilepsy and who, for some reason,<sup>92</sup> expects to suffer a seizure imminently. If s/he nevertheless drives his/her vehicle, well knowing (and therefore with *dolus eventualis*) that s/he may suffer a seizure, lose control of the vehicle, and possibly strike another vehicle or pedestrian, and that, ultimately, another person, Y, could be killed, and if this does, in fact, occur, X could be convicted of murder. Given that liability cannot be imposed for movement during a state of involuntariness, liability can nevertheless be imposed for conduct (causing death) prior to the onset of the state of involuntariness. Thus, the *actus reus* (unlawfulness assumed) would consist in anything that would qualify as a legally relevant cause of the death of Y, such as setting the vehicle in motion.

If, in the same circumstances, X does not (subjectively) foresee the possibility that someone may be killed, but the reasonable person would foresee this and guard against it, but X proceeds to drive anyway, killing Y in the process, X could be convicted of culpable homicide.

### Schoonwinkel

In *R v Schoonwinkel*<sup>93</sup> the accused was charged with culpable homicide for driving a motor vehicle negligently which collided with another vehicle in which a passenger was killed. The accused was an epilepsy sufferer though he had only ever suffered two minor attacks a considerable period previous to the collision. The defence showed that the accused had suffered an epileptic fit at the time of the collision and that his mind was blank. The court took the view that there was no basis on which it could hold that the accused should have anticipated having a seizure with the result that a person may be killed.<sup>94</sup>

Thus the accused was found not guilty of culpable homicide on the basis that it had not been shown that he ought to have realised the threat of danger posed by possible epileptic fits.

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<sup>92</sup> Such as in *R v Victor* 1943 TPD 77, where the accused experienced 'warning feelings' prior to the onset of a seizure.

<sup>93</sup> *R v Schoonwinkel* 1953 (3) SA 136 (C).

<sup>94</sup> The court stated: '... in the present case the nature of the epilepsy from which the accused suffers is such that he would normally not have realised the dangerous consequences attending upon him in the driving of a motor vehicle. The accused has only had two minor attacks, in one or both of which he was in bed. There is no evidence that the accused knew that, subject as he was to these attacks, it would be dangerous for him to drive his vehicle and the last attack he had was a considerable period before the date of the collision. We are not satisfied that the accused could or should have reasonably foreseen the danger of driving on the public road, even though he knew that he was subject to attacks or that he might have another fit in the future, and we therefore find him not guilty of the crime is charged'.



## Victor

In *R v Victor*<sup>95</sup> the accused suffered from epilepsy. His seizures were generally preceded by what he called a 'warning feeling' five or ten minutes before a seizure. The accused on the morning of the alleged offence had experienced just such a warning feeling yet proceeded to drive his car. He did suffer an epileptic seizure, lost control of the vehicle and collided with a pedestrian and another vehicle. The accused was charged with negligent or reckless driving. His defence was that his conduct was involuntary.

The court acknowledged that involuntary conduct is ordinarily exempt from liability, but that the accused had reason to anticipate his involuntariness when he set his vehicle in motion. Ultimately it concluded that driving in the circumstances was therefore negligent.

## Circumstance and Consequence crimes

Some conceptual difficulty may arise when the distinction between circumstance and consequence crimes is observed. The problem seems to arise, at least initially, because of the misconception that antecedent liability is somehow an exception to the rule that liability cannot be imposed for movement or otherwise during a phase of involuntariness. It is, as indicated above, not such an exception. There are no exceptions to this rule. It is, to reiterate, only an application of contemporaneity.

This, however, can be taken too far. Burchell, for instance, is adamant that antecedent liability cannot accommodate circumstance crimes.<sup>96</sup> While there is certainly a difference between the way antecedent liability 'accommodates' circumstance crimes and consequence crimes, antecedent liability may nevertheless be imposed for both consequence and circumstance crimes.

To understand how, one must recall what it is that forms the prohibited conduct for a consequence crime as opposed to a circumstance crime. For consequence crimes, it is the *causing* of a prohibited consequence. Thus, conduct that qualifies as a legally significant cause of prohibited consequence, if voluntary and unlawful, forms the *actus reus* in consequence crimes. A cause (such as stabbing the victim) may, of course, only produce death some time after the attack. The victim of a stabbing may die a few hours later, or days or months later. It does not matter that the victim dies during a time when the attacker is involuntary, so long as the attacker was voluntary when s/he attacked and stabbed the victim. So, for instance, if X voluntarily stabs Y in the chest

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<sup>95</sup> *R v Victor* 1943 TPD 77.

<sup>96</sup> J Burchell *Principles of Criminal Law* 4th ed (2013) 71.

at 20h00 one evening, but Y only dies, as a result of the stabbing, at 04h00 the next morning, while X is asleep, X can nevertheless be held liable on the basis of his voluntary act of stabbing the victim. It is worth observing that it is in the nature of consequence crimes, and consequences in general, that they are preceded by a virtually indeterminate chain or string of causes that stretch back in time, from the consequence, back into eternity. Thus, consequence crimes lend themselves to liability based on antecedent liability because the causation enquiry necessarily looks back in time, and may well identify conduct of the accused that qualifies as a legally significant cause of the consequence. If the conduct of the accused is antecedent to the onset of a state of involuntariness raised in the accused's defence, then the conduct is necessarily voluntary. Assuming this conduct is unlawful, it represents an *actus reus*, which, if accompanied by the required *mens rea*, can be the basis for a conviction – in our example, of murder.

Circumstance crimes are different because the conduct that is prohibited is a discrete state of being – and certainly not the causing of that state. This means that one cannot naturally enquire back in time to identify causes of the prohibited circumstance. This does not exclude the possibility of imposing antecedent liability in respect of circumstance crimes. It may well be more difficult for the prosecution, but it is not impossible. What is required is to identify whether the prohibited circumstance stretched back in time to a time prior to the onset of the state of involuntariness. At this time, conduct is, necessarily voluntary (antecedent to the onset of involuntariness) so that, if the prohibited circumstance existed already, assuming unlawfulness, the valid *actus reus* for liability may be identified. This *actus reus*, if contemporaneous with the required *mens rea*, is a basis on which an accused may be convicted of a circumstance crime. Consider the following scenario concerning the circumstance crime of being in possession of a prohibited substance. X has ordered a large quantity of heroine which he intends to sell on the street for a massive profit. He sits in his car awaiting the drop off, grows tired waiting on the delivery, and eventually falls asleep. The person carrying the drugs (Z) arrives to find X asleep at the wheel. Z does not want to carry the drugs any further, so he opens the unlocked passenger door and places the drugs on the passenger seat next to X. Shortly thereafter, the police notice the car and the sleeping occupant. They open the unlocked passenger door and discover the drugs. X is awoken and charged with possession of a prohibited substance. On these (admittedly artificial) facts, X enjoys a complete defence of involuntariness. He was never in voluntary possession of the drugs. If, however, he received the drugs, perhaps sampled some, and thereafter fell asleep, he could be convicted of possession of a prohibited substance, provided the prosecution can prove that X was indeed in possession while he was still voluntary.

Visser and McMaré reflect this view in commenting on the judgment in *Victor's* case. They argue that it is not sufficient that the accused caused the prohibited circumstance in order to incur liability. This would be to hold an accused liable for voluntarily 'causing' a prohibited circumstance – which would conflate consequence and circumstance crimes.<sup>97</sup> They argue that the judgment in *Victor's* case must be taken to have imposed liability on him for 'driving' (prior to the onset of the involuntariness) while he knew, or should have known, that he ought not to drive.

### Van Rensburg

Another case in which the accused was charged with a circumstance crime (negligent driving), but escaped liability because the court could find no negligence on the accused's part, is useful for analysis. In the case of *S v Van Rensburg*<sup>98</sup> the accused faced a conviction for negligent driving. He had had blood drawn for tests to establish whether he suffered from hypoglycaemia. The accused was not warned that if he did suffer from hypoglycaemia, he may well lose concentration and, ultimately, voluntariness. This is exactly what happened. He became drowsy, fell asleep, and collided with another car. The court found that he could not be held liable for negligent driving:

“... If the accused was aware that a sudden fall in his blood-sugar could take place, which might well possibly have happened, with the consequence that he would fall asleep or lose his ability to concentrate and nevertheless went ahead and drove then he would certainly not have acted like a reasonable driver and thus would be guilty of negligent driving.

... It has, in my opinion, not been proved beyond reasonable doubt that the accused, under these circumstances, should have foreseen that there would be a sudden fall in his blood-sugar and that he should have pulled off the road.”<sup>99</sup>

The reference to pulling off the road seems to indicate that the court would only have imposed liability for this circumstance crime prior to the onset of the involuntariness, but that, in this case, there was no period when the accused was voluntarily driving in circumstances when the reasonable person would have known that he ought not to be driving.

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<sup>97</sup> PJ Visser & MC Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 52.

<sup>98</sup> *S v Van Rensburg* 1987 (3) SA 35 (T).

<sup>99</sup> J Burchell & J Milton *Cases and Materials on Criminal Law* (1992).

## Conclusion

In conclusion, antecedent liability is a function of the contemporaneity principle. It operates in the context of consequence crimes by reminding us to consider possible causes (prior to the onset of involuntariness) of a prohibited consequence (which occurs subsequent to the onset of involuntariness). In the context of circumstance crimes, it requires that we consider whether the prohibited circumstance precedes the onset of involuntariness. If there exists such a legally significant cause (in the case of consequence crimes) or prohibited circumstance (in the case of circumstance crimes), then, assuming unlawfulness, the accused can be convicted if the required *mens rea* can be established contemporaneously.

## Chapter 06: Conduct

### Acts and Omissions

It is trite that an accused can only be punished for what s/he did, as opposed to what s/he merely thought – however evil those thoughts might be.<sup>100</sup> Our criminal law requires, at the very least, some objective physical manifestation of the accused's evil state of mind. And while this may take the form of mere words,<sup>101</sup> what is clear is that evil thoughts alone are not enough to attract liability. While positive conduct (acts/commissions)<sup>102</sup> are regarded as *prima facie* (that is, on the face of it/at first glance) unlawful, omissions are regarded as *prima facie* lawful. In order for an omission to be regarded as unlawful, the prosecution will have to convince the court that the accused was under a legal duty to act (making their failure to act (an omission) unlawful). It is helpful to recall that unlawfulness is the requirement which is excluded by grounds of justification, such as private defence, necessity, or consent. Where an accused succeeds in establishing a ground of justification, his/her conduct is (ultimately) regarded as lawful. For commissions (positive conduct), the accused can only raise a ground of justification to exclude a conclusion that his/her conduct was unlawful. However, in the case of omissions, an accused has two bases on which to avoid a conclusion that his/her conduct was unlawful: firstly that s/he was under no legal duty to act to start with; and additionally, that his/her conduct was justified in any event. For instance, while I may be under a legal duty to control my vicious dog, I may be justified in setting it on someone who attacks me – if I am entitled to act in private defence. The test, in our law, for whether a legal duty exists, is the *legal convictions of the community*, as informed by the values in the Constitution. The general rule that the legal convictions of the community direct whether a *legal duty* exists was expressed in the delictual case of *Minister van Politiesie v Ewels*.<sup>103</sup> In this case, the plaintiff was assaulted by the police sergeant in a police station charge office, under the control of the police, in the presence of several other police officers who did not intervene. The question which arose was whether the other officers (the by-standing police officers) were under any legal duty to intervene in the circumstances. Rumpff CJ (in a unanimous judgment): The premise is accepted that there is no general duty on a person to prevent harm to another, even

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<sup>100</sup> PJ Visser & MC Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) p 46; *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A).

<sup>101</sup> Such as for incitement.

<sup>102</sup> Such as striking, stabbing, or shooting someone.

<sup>103</sup> 1975 (3) SA 590 A.

if such person could easily prevent such harm, and even if one could expect, on purely moral grounds, that such person act positively to prevent damage. It is also, however, accepted that in certain circumstances there is a legal duty on a person to prevent harm to another. . . . It appears that the stage has been reached where an omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful. . . . [T]he policeman is not only a deterrent and a detective but also a protector. Plaintiff was assaulted in the police station under the control of the police and in the sight of a number of policemen, for whom it was possible, even easy, jointly, to prevent or stop the attack on the plaintiff. When all the circumstances are considered, I think that the duty of the policemen to assist the plaintiff was the legal duty. . . . This test (of the legal convictions of the community) must now be interpreted as informed by the values in the Constitution (*Carmichele v Minister of Safety and Security*).<sup>104</sup>

### Recognised Legal Duties

Though not a closed list, the following have been identified as instances in which a *legal duty* to act exists (which sometimes overlap):

1. Protective relationship: a duty to act may arise by virtue of a protective relationship. For example, a protective relationship exists which will give rise to a duty to act in the instance of a father in respect of his drowning child, or a mother to protect her child against assault (*S v B*;<sup>105</sup> *S v A*<sup>106</sup>); or a parent or guardian to feed his/her child; where a protective relationship with a child is assumed (that is, not a natural/biological relationship) a legal duty nevertheless arises to protect the child from harm: *R v Chenjere*;<sup>107</sup> an employer is under a duty to protect his/her employees from harm: *Silva's Fishing Corporation v Maweza*.<sup>108</sup> See also the Constitutional Court decision in *Carmichele v Minister of Safety and Security*<sup>109</sup> for recognition of the *possible* legal duty owed by police and prosecution officials to protect women, in particular, from

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<sup>104</sup> 2001 (4) SA 938 (CC).

<sup>105</sup> 1994 (2) SACR 237 (E).

<sup>106</sup> 1993 (1) SACR 600 (A).

<sup>107</sup> 1960 (1) SA 473 (FC).

<sup>108</sup> 1957 (2) SA 257 (AD).

<sup>109</sup> 2001 (4) SA 938 (CC).

violence; and see the subsequent Supreme Court of Appeal judgment in *Minister of Safety and Security v Carmichele*<sup>110</sup> for the actual recognition of this legal duty.

2. Statute: To file a tax return; report an accident to the police; to not leave the scene of an accident without rendering assistance to any injured. Legal duties may also arise out of the Constitution.
3. Public Office or Quasi Office: an office bearer who is placed in charge of another individual becomes duty-bound to protect that individual by virtue of his or her office. For instance, as noted in case of *Ewels*, the police are bound by duty to prevent an assault; a prison warden is under a duty to prevent prisoners from assaulting one another (*Mtati v Minister of Justice*);<sup>111</sup> a police officer is under a legal duty to obtain prompt medical attention for detainees in his or her charge (*S v Skosana*;<sup>112</sup> *S v van As*<sup>113</sup>). Another instance may be where a police officer is under a duty to inform the police of the commission of a crime by virtue of his/her public office. Quasi office refers to the office of a life-saver for instance. Again the values in the Constitution will inform the duties upon these officials – See *Carmichele*.
4. Contract: a legal duty to act may arise out of an agreement. Such an instant arose in the case of *Pittwood*<sup>114</sup> in which an individual agreed with a railway company that every time a train crossed a railway crossing he would close a gate as a service for remuneration. He omitted to do this on an occasion and an accident occurred.
5. Prior Conduct (*omissio per commissionem*): in circumstances in which an individual has created a potentially dangerous situation s/he incurs a legal duty to guard against any harm resulting. If I light a fire in an area where the flames may reach dry grass but I do not guard the fire carefully and I walk off without extinguishing it, then should the fire spread to a nearby building and incinerate the building, I will have, by omission, in spite of the legal duty upon me and thus unlawfully, performed the *actus reus* of arson. Such a case took place in England in 1983: In *R v Miller*<sup>115</sup> the accused lit a cigarette and thereafter fell asleep on a bed in someone else's house. He woke to discover that the mattress upon which he had been sleeping was smouldering. He did not do anything to

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<sup>110</sup> 2004 (3) SA 305 (SCA).

<sup>111</sup> 1958 (1) SA 221 (A).

<sup>112</sup> 1977 1 SA 31 (A).

<sup>113</sup> 1967 4 SA 594 (A).

<sup>114</sup> (1902) 19 TLR 37.

<sup>115</sup> [1983] All ER 978 (HL).

extinguish the fire and moved on simply to sleep in another room. The house ultimately was incinerated. The accused was convicted of arson.

6. Control of a potentially dangerous thing or animal: Where an individual assumes such control, s/he is obliged to guard that that the dangerous thing/animal causes no harm: this legal duty arises independently of any prior conduct. In *S v Fernandez*<sup>116</sup> a baboon under control of the accused escaped and killed a baby. The court found that the accused had failed in his legal duty to control baboon (thus his omission was unlawful) and since he was additionally found to be negligent, he was convicted of culpable homicide. In *R v Eustace*,<sup>117</sup> the accused was convicted of culpable homicide on the basis that he had failed in his duty to control his vicious dog.
7. Common law duties: duties may exist in the common law such as the duty to report to the police any treasonable act planned or committed.
8. Orders of court also give rise to duties to act, such as: return Y's property.

### Situation crimes

One may also be rendered liable *ostensibly* not by virtue of the commission or omission of an act, but on the basis of a prohibited situation (also known as a 'state of affairs'). Examples include the possession of a prohibited substance or material, or being drunk in public. 'Ostensibly', because it would seem be iniquitous to punish someone who had not voluntarily done anything or omitted to do something.<sup>118</sup> How then is a situation crime acceptable? On a closer analysis, it seems that they do not punish prohibited situations alone. Instead, they seem to punish an accused for some act/ommission that led to the prohibited situation, or some omission to put an end to such a situation. Thus the accused is punished not for the situation itself, but for an act/ommission that created the situation, or for an omission to terminate a prohibited situation – both of which, if voluntary, are reconcilable with general principles. A case in which the accused was punished for not terminating the prohibited circumstance is that of *S v Brick*.<sup>119</sup> In this case, the accused had received, via mail, unsolicited pornographic material (which was illegal to possess at the time). Some 24 hours later he had not discarded the material or reported the matter to the police. He was found guilty of possession of prohibited material on the basis that he had not

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<sup>116</sup> 1966 (2) SA 259 (AD).

<sup>117</sup> 1948 (3) SA 590 (AD).

<sup>118</sup> J. C. De Wet *Strafreg* 4 ed (1985); Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990).

<sup>119</sup> 1973 (2) SA 571 (A).



terminated the situation expeditiously. A case in which the matter of previous conduct arose is *R v van Achterdam*<sup>120</sup> in which the accused's was discovered in an intoxicated state, staggering around the garden of the complainant. The complainant was a police officer who dragged him out onto the street (a public place) where he arrested the accused for being drunk in a public place. The court quashed the conviction on the ground that it was not the accused's act which placed him in the prohibited circumstance/situation. This case illustrates that the prohibited circumstance is not enough to lead to conviction, rather, some voluntary act/omission on the part of the accused is necessary. Thus, in the final analysis and subject to all the other requirements of liability (including voluntariness, unlawfulness, capacity and fault), our law punishes positive conduct and omissions in the face of legal duty to act. It also *ostensibly* punishes situations – although such situations must have arisen out of some positive act or the failure to terminate the prohibited situation.

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<sup>120</sup> 1911 EDL 336.

## Chapter 7 Causation

### Introduction

Causation in law may pose some perplexing problems,<sup>121</sup> particularly where events take a strange and bizarre turn. It is a requirement which the state must prove where the accused is charged with a consequence crime. Crimes may be divided in essence, into two categories: circumstance crimes and consequence crimes. Circumstance crimes prohibit a particular state of being – a particular circumstance. For instance, parking in a prohibited zone is a circumstance crime. Nothing need follow from the state of being – it is the state of being which is prohibited. Consequence crimes on the other hand prohibit the causing of a particular consequence. Murder, for instance, is a consequence crime because it prohibits the *causing of death* of another human being. Other examples of consequence crimes include culpable homicide, arson, robbery, extortion, damage to property, and certain types of fraud.<sup>122</sup> For the purposes of this discussion however, the crime of murder will be used to illustrate the principles.

Therefore, the problem of causation only arises when a crime is defined in a way that the prohibited conduct is the causing of some consequence – the 'prohibited consequence'. The distinguishing feature between a circumstance and consequence crime is whether the crime in question prohibits not just a state of being, but an act or omission which results in a particular prohibited consequence.<sup>123</sup>

### Preliminary points

There are several preliminary points that must be observed in understanding causation and in particular in understanding causation in the context of murder.

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<sup>121</sup> Visser & Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 100.

<sup>122</sup> In respect of fraud it is only a consequence crime insofar as it is alleged that the accused, by the making of a misrepresentation, *caused* the complainant to act to his or her prejudice.

<sup>123</sup> While circumstance crimes appear on the authority of *Achterdam* (*Ball v. U.S.*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)) to simply require some form of voluntary causation and to therefore be similar to consequence crimes, Visser and Vorster (*Visser & Vorster's General Principles of Criminal Law Through the Cases* 3rd ed (1990) 52) argue that the circumstance crime of negligent driving cannot be committed simply by 'causing' the prohibited circumstance. They argue that prior conduct cannot apply to circumstance crimes because circumstance crimes are not 'caused'. The view adopted through-out this discussion will be confined to causation in respect of consequence crimes.

## Hastening Death

The first point is that, at least in the case of murder and, necessarily, culpable homicide, it is the hastening of death that is prohibited. This is because - as depressing as this might be - death is inevitable for all of us. For this reason the crime of murder cannot simply prohibit the causing of death in the abstract, but instead prohibits the causing of death sooner than it otherwise would have occurred. This is always therefore, the relevant question: whether the accused caused the victim to die sooner than he or she otherwise would have. Authority for this proposition may be found in the case of *Hartmann*<sup>124</sup> in which a medical doctor was charged with the murder of his 87-year-old father who for many years had suffered from cancer. The accused was very close to his father. The father was bedridden, suffered great pain, was emaciated and close to death. In order to relieve his father of further pain and the continuation of a pitiable condition, the accused administered a fatal injection. The court observed:

"It is true that the deceased was in a dying condition when this dose of pentothal was administered and that there is evidence that he may very well have died as little as a few hours later. But the law is clear that it nonetheless constitutes the crime of murder even if all that an accused has done is to hasten the death of a human being who was due to die in any event..."

The question then is whether the conduct in question hastened the onset of the prohibited consequence.

## Common Purpose

Secondly, if the state resorts to reliance in the doctrine of common purpose, then - for those individuals to which it applies - it becomes unnecessary for the state to prove causation - at least not between those individuals (as individuals) and the prohibited consequence. This statement is compound and complex for the sake of completeness, but it requires some explanation.

Common purpose is the doctrine which allows a court to regard conduct of each person in a group in a common purpose, to be the conduct of every other person in the group. In one sense then, the sum of the conduct of every participant in the common purpose, is the "groups" conduct, and every individual is regarded as having done what the group did. But this way of speaking is not sufficiently sensitive to the operation of common purpose to be accurate. There is no globular group conduct that is attributed to each participant. Instead, it is the individual conduct of each

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<sup>124</sup> *Lee v. U. S.*, 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977).

other member of the group, to the extent to which it was foreseen as, at least, possible during the execution of the common purpose.

In truth, there is no “group conduct”. It is only the case that individual (X) does, naturally, whatever he or she actually does, and, is regarded as having also done what anyone else did whom X forms a common purpose with.

The implications for causation are important to understand properly - in so far as the principles support a deviation from having to prove causation. The crucial point is that common purpose though magical in other ways, does not exempt the state from having to prove that someone alone or in combination with others in a common purpose, caused - in the case of murder - the death of the deceased. This follows from restricting the doctrine to what it permits - for conduct to be attributed. Our law is clear that where common purpose has been relied upon, then the state need not prove causation as against each accused,<sup>125</sup> but it remains the case that the state must still prove that someone or some combination of members of a group in the common purpose must have done something that satisfies the causation requirements.

Therefore, it is incorrect to regard causation as irrelevant in cases of common purpose. Rather, the satisfaction of causation is judged against the conduct of everyone who is in the common purpose. The significance of this, is that the state must still prove causation - just differently.

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<sup>125</sup> In *S v Safatsa (S v Safatsa and Others)* 1988 (1) SA 868 (A) the court the Appellate Division held that causation may be imputed together with conduct and that it is not at all necessary for the prosecution to prove that each individual accused in a common purpose caused the death of the victim. This ruling is prone to misunderstanding because it may be given two possible interpretations:

1. That causation is irrelevant in consequence crime when common purpose is invoked. This is a misunderstanding of what common purpose permits and of the *Safatsa* judgment.
2. The second, correct interpretation is that, although each individual accused need not have actually caused the death of the victim, s/he must be deemed to have caused it through the conduct that is imputed to him/her. this requires in turn, that the conduct which is imputed to the individual must satisfy the causation requirement, and that the actual conduct of someone in the common purpose, or of the group jointly, or of a sub-group of the group acting in common purpose, must satisfy the causation requirements. See Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 489.

## Two stage enquiry

Our courts now adopt a two-phase enquiry<sup>126</sup> into causation: firstly into factual causation, by means of the *conditio sine qua non* test,<sup>127</sup> and secondly into legal causation, based on policy considerations of reasonableness, fairness, and justice, as informed, however, by various specific tests of legal causation.<sup>128</sup>

## Factual Causation

The test of *conditio sine qua non* is the somewhat intuitive test – discussed above - of asking essentially whether one is dealing with a ‘condition [\*] without which not’: Without [the condition/event in question] would the prohibited consequence not have eventuated as soon as it did?

For an omission, one hypothetically varies the scenario by *adding* in what it is that the accused was supposed to do - based on what would be required to satisfy his/her legal duty (judged under the requirement of unlawfulness).<sup>129</sup>

So, instead of imagining away some positive act on the part of the accused, one imagines that the accused did what s/he was supposed to do, and considers whether the prohibited consequence would result. Authority for this may be found in the case of *S v van As*.<sup>130</sup> In this case, the police had arrested an adult and placed him in the police van. Some children who were in the care of the adult disappeared and could not be found. The police made some inquiries in an attempt to trace the children but did not find them. When the children were ultimately discovered they were dead. The charge against two policeman in this case was that they had omitted to care properly for the children and that this omission had caused the deaths. The Court held that there was no causation on the part of the officers. It found that even if the accused had

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<sup>126</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34; *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) para 17; *S v Daniels* 1983 (3) SA 275 (A) 324-5 & 31; *S v Mokgethi* 1990 (1) SA 32 (A) 39; C. R. Snyman *Criminal Law* 4 ed (2002) 74-5.

<sup>127</sup> *Minister of Police v Skosana* 1977 (1) SA 31 (A) 33-5, & 43-4; *S v Daniels* 1983 (3) SA 275 (A) 324 & 31; *S v Haarmeyer* 1971 (3) SA 43 (A) 47; *S v Mokgethi* 1990 (1) SA 32 (A) 39.

<sup>128</sup> *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) *S v Mokgethi* 1990 (1) SA 32 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) para 18 per Corbett CJ: ‘factors such as reasonable foreseeability, directness, the absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice’. Also *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA) paras 17– 9; *Smit v Abrahams* 1994 (4) SA 1 (A).

<sup>129</sup> See the section on omissions.

<sup>130</sup> 1967 4 SA 594 A.

acted in accordance with their legal duties and searched properly for the children, the children would have died anyway.

The question that must be asked is this: if the accused had conducted himself or herself as s/he should have, would the prohibited consequence have eventuated nevertheless.

Thus, for instance, had the father fed the child, would the child still have died as soon as the child did die? If the child would have died in any event, then the father's failure to feed the child is causally irrelevant.

#### Hypothetical Other Worlds

Enquiries into factual causation inevitably operate by requiring that one imagine a hypothetical world in which some event which occurred in this world, does not occur in the imagined hypothetical world. This may sound daunting at first and yet it is an exercise in which we engage on a daily basis when we try to make sense of the world in which we live. As we will see, a major component of the test for causation, known as the test for factual causation, requires this hypothetical variation of our worlds - and yet replicates the very familiar task of identifying what it is about our actual world that might be responsible for some or other consequence.

#### Presumptions

Once one recognises that one is hypothetically creating a parallel world, and then hypothetically varying one small aspect of it to "check" how things would have unfolded, one must also recognise that there is nothing objective or "scientific" about this enquiry. This is because in considering what *would* happen in this hypothetical world in which the circumstances have been varied, the answer depends on one's notion of how that world would continue. Even on what seems to be straight forward questions of factual causation, say, did X cause the death of Y by shooting him in the head, we presume – and sometimes we presume too much. We might be satisfied to answer without hesitation that, in the hypothetical parallel universe, if X had not shot Y, Y would not have died as soon as he did. But we don't know whether Y was about to have a stroke anyway that would have killed him instantly. We don't know whether Y was about to step in front of an oncoming train that would have killed him instantly. We don't know for instance – to take the most obvious scenario – whether someone else would not have shot the victim the victim in the head.

We also don't know what effect the small variation we imagine for the parallel universe will have and we are at risk of overlooking the possibility of creating universes which don't make sense. If X does not shoot Y, in the alternative universe, what does he do? Does he still point the gun?

Does Y at least still see the gun? Does Y get a fright – perhaps the sort that could cause a stroke or one to run into the path of an oncoming train?

At its very extreme – although short of being absurd – we can only assume that there was nothing else in the circumstances that would also have caused death – as soon as it occurred. We must always consider the possibility that, in the hypothetical world we imagine, the victim might die, as soon as s/he did, for some other reason. There are no objective truths in this domain because the hypothetical world is a creation of our own minds.

Consider the following example - based on the facts of a real life mining accident. Imagine that the driver of a mining vehicle is responsible to ensure that any passenger wears his or her seatbelt. The rule is so strict that the driver may not set the vehicle in motion unless the passenger is strapped in.

Now, imagine that the driver does check, notices that the passenger is not wearing her seatbelt, drives off anyway, and proceeds into the mine, down a steep incline. Imagine then that the driver drives negligently and loses control of the vehicle. The passenger is ejected from the vehicle, strikes a rock with her head, and dies some time shortly thereafter. One may already identify the failure of the driver to insist that the passenger wear her seat belt as a factual cause. One will have imagined a world in which the passenger was wearing her seatbelt, and was therefore not ejected from the vehicle, did not strike her head on a rock, and die following that head trauma.

This is probably true. But it omits to recognise that the variation in the hypothetical assumes perhaps too much. It assumes that the passenger would not have died, possibly even sooner, precisely if she had been strapped in. In the actual course of events, the vehicle only stopped, about some 60 meters on, when it slammed into the wall at a junction with another shaft. It slammed into the wall where the passenger had been seated and the part of that part of the cabin (in which the passenger had been sitting) was crushed. It gave rise to the following dilemma: the passenger may well have died anyway even if she was strapped in - and she may have even died sooner. There was no way of knowing how long it took for her to die once her head struck the rock when she was ejected. But it was possible - even reasonably possible - that she may well have died sooner if she had been strapped in. The point is only to recognise that conclusions as to what would have happened in varied alternative universes ought to be stated with some circumspection.

We would do well to at least recognise this by reporting our conclusion that the victim would *presumably* not have died as soon as s/he did in the absence of the conduct in question.

## Too wide

This enquiry into factual causation arguably throws the net of liability too widely by implicating, for instance, in a death by shooting, the gun metal manufacturer, and even the parents of the shooter by virtue of their responsibility for the very existence of the shooter. For that reason it is now supplemented (and the causes implicated narrowed) by a limiting second stage enquiry into legal causation.

## Legal Causation

It deserves some comment that the distinction between a 'theory' and a test is propounded and defended with great vigour, ultimately adding nothing to the discussion. I don't propose to detain the reader with a discussion of this distinction which I will treat as more apparent than real. I will use the concept of a 'test', by which I mean, and this is all I mean, a device by which one is guided to one answer or another *depending* on the considerations - the facts in any particular case.<sup>131</sup>

It is worth observing, before I discuss the individual tests of legal causation that, as mentioned above, since 1990, following the decision in *Mokgethi*,<sup>132</sup> legal causation is determined by reference to considerations of justice and fairness, taking account of, as factors only, the former tests of legal causation.

Four primary tests of legal causation (prior to *Mokgethi*) may be discerned: the *novus actus interveniens* test (also known as the nova causa test); the individualisation tests, the foreseeability test, and the test of adequate causation. I will discuss each in turn.

## Individualisation Tests

The individualisation tests attempt to identify a single cause that can be regarded as the ultimate cause. These tests seek, and are often identified by this purpose, the 'immediate cause', 'direct cause', 'effective cause' or 'decisive cause'.<sup>133</sup> They operate on the notion that a straw may

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<sup>131</sup> Anyone who seeks to do more, or less with the device will be dissatisfied and is free to develop such a device or mechanism.

<sup>132</sup> *S v Mokgethi* 1990 (1) SA 32 (A) 39.

<sup>133</sup> See *S v Hosiosky* 1961 (1) SA 84 (W) in which a pharmacist had dispensed a drug at ten times the strength prescribed by a doctor (5000mg, instead of 500 mg). The medication had been prescribed for a four year old child, to be taken in one dose, and the dose dispensed (of 5000mg) consisted in 20 tablets. The mother was perturbed that so many tablets would be prescribed for a four year old and queried this with the doctor who wrote the prescription. The doctor phoned the pharmacist and queried the



be identified as *the* straw which broke the camel's back. This notion though, is flawed. An event is the culmination of interminable former conditions. To return to the idiom – it is misleading: the camel's back is broken not by the last straw, but the combined weight of all the straw.

This was well recognised in the case of *Daniels* in which Jansen JA and Van Winsen AJA<sup>134</sup> clearly appreciated that more than one cause may operate to kill.

### Foreseeability Tests

These tests draw attention to whether the consequence was foreseeable to a normal person.<sup>135</sup> This test has fallen out of favour since it seems now well recognised that it conflates the inquiry into causation with that of fault – whether any conduct on the part of an accused was performed with the requisite guilty mind: intention or negligence.<sup>136</sup> The objection arises in the context of the risk of conflating enquiries into negligence with causation. However, the objection must apply equally to any suggestion that reference should be made to an accused's intention to determine causation.

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prescription, but was persuaded by the pharmacist that the medication had been properly dispensed. The mother gave the child the medication as directed and the child died. The pharmacist was charged with culpable homicide. In his defence it was argued that the conduct of the accused, in dispensing the incorrect dose, was not the effective and proximate cause of the death of the child. (p 88)

The accused submitted that the effective and proximate cause of the death of the child was the conduct of the doctor in confirming that the incorrect dose should be taken together, in one dose, or the conduct of the mother in administering the dose (p 88). The court rejected the argument as fallacious because the doctor, and following him, the mother, had acted on the assumption that the drug had been correctly dispensed.

The court concluded that the conduct of the accused was the effective and proximate cause of the death of the child, that he was negligent, and convicted him of culpable homicide.

It is not clear that this case is at all helpful. It singles out the conduct of the pharmacist as the primary cause, even if the doctor had also made an error. It is subject therefore to the criticism that it fails to appreciate that a prohibited consequence may, indeed must, have more than one cause. In this particular case, the reasoning doesn't extend much beyond the identification of the pharmacist's error as a factual cause: had the pharmacist not made this error, the doctor would not have made the error of confirming the pharmacist's error and the mother would not have administered an overdose. The court is right that nothing following upon the pharmacist's conduct undoes the error made by the pharmacist. But that is the logical nature of a *sine qua non*.

<sup>134</sup> *S v Daniels* 1983 (3) SA 275 (A) 332-3.

<sup>135</sup> Snyman *Criminal Law* 6th ed (2014) 87-8.

<sup>136</sup> *Ibid* 88; Jonathan Burchell *Principles of Criminal Law* 4th ed (2013) 112.

## Adequate Cause

The test of adequate causation proposes that conduct is a legally significant cause of a prohibited consequence if the prohibited consequence is probable in the ordinary course of events to follow from the conduct.

Snyman, who is a leading proponent<sup>137</sup> of the adequate cause theory, frames the test as follows:

'According to [the adequate causation] theory *an act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation.*'<sup>138</sup>

The question is, in essence, whether the type of conduct in question usually or typically leads to the type of consequence in question.<sup>139</sup>

## Novus Actus Interveniens

The test of novus actus interveniens (also known as novus actus interveniens) asks whether anything abnormal intervened between the sine qua non cause and the ultimate prohibited consequence such as to 'break the chain of causation'. If some event intervened and is abnormal, then it serves to break the chain of causation.

According to Burchell: 'The novus actus (or nova causa) interveniens test is expressed in terms of an 'abnormal', intervening act or event which serves to break the chain of causation. The normality or abnormality of an act or event is judged according to the standards of general human experience.'<sup>140</sup>

Snyman's definition is identical to Burchell's save for the inclusion, in Snyman's of a reference to whether the event was 'unsuspected'. According to Snyman, if the abnormal intervening event was foreseen by the accused, it cannot qualify as a NAI.<sup>141</sup> Snyman's authority for the proposition that the event must be unsuspected is the Appellate Division decision of

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<sup>137</sup> Snyman *Criminal Law* 6th ed (2014) 88ff.

<sup>138</sup> Ibid 85, original emphasis. This formulation of the adequate cause theory is adopted in Burchell op cit note 5 at 221 and was cited in *S v Daniëls* 1983 (3) SA 275 (A) by Jansen JA (at 331H).

<sup>139</sup> Ultimately Joubert restates the general enquiry: a cause is adequate if one may say that such a thing comes from doing such a thing: 'Adekwaat is die oorsaak, in alledaagse taal, as 'n mens kan sê: So iets kom van so iets.' (W A Joubert 'Oorsaaklikheid: Feit of norm?' (1965) *Codicillus* 6 at 10)

<sup>140</sup> B4, p 100. For a similar exposition see S6 p 86.

<sup>141</sup> Snyman *Criminal Law* 6th ed (2014) 93.

*Grotjohn*<sup>142</sup> and the provincial division decision of *Hibbert*.<sup>143</sup> However, to refer to fault in a determination of causation is unacceptable in criminal law on the basis, as described above,<sup>144</sup> that it conflates the two.

In addition, at the point in the judgment to which Snyman refers, the court is clearly referring to considerations that were applicable to a determination of fault. At the crucial part in the judgment that is referred to for this proposition, Steyn JA (for the unanimous court; Rumpff JA giving a separate but concurring judgment) said as follows – in relation to examples given by Matthaëus:

'Matthaëus De Criminibus 48.5.1 mentions e.g., as sicarii [murderer], inter alia, someone who dolo malo gives false evidence so that the appellant should be convicted of a capital crime, and also a magistrate who knowingly sentences an innocent person to death. From these examples it may be deduced that the fact that the hangman's lawful act is the immediate cause of the death does not diminish the causality or unlawfulness of the behaviour of the witness or magistrate. Where the act of the other person, as in these instances, is a calculated part of the chain of causation which the perpetrator started, an eventuality which the perpetrator foresees as a possibility and which he desires to employ to attain his object, or as something on which he may depend to bring about the desired result, the intention will also not be absent, and it would be contrary to accepted principles of law and to all sense of justice to allow him to take shelter behind the act as a *novus actus interveniens*. The fact that it is not a criminal act makes no difference.'<sup>145</sup>

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<sup>142</sup> Ibid 93 n69.

<sup>143</sup> 1979 4 SA 717 (D).

<sup>144</sup> Discussed above under the heading 'Foreseeability Tests' on page 57.

<sup>145</sup> *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A) 364; translation in Jonathan Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 147-8. The original is as follows: 'Matthaëus, De Criminibus, 48.5.1, noem, bv., as sicarii onder meer iemand wat dolo malo valse getuienis aflê sodat die beskuldigde weens 'n halsmisdaad veroordeel moet word, en ook 'n magistraat wat wetens 'n onskuldige tot die dood veroordeel. Uit hierdie voorbeelde is af te lei dat die feit dat die laksman se wettige daad die onmiddellike oorsaak van die dood is, niks afdoen aan die oorsaaklikheid of wederregtelikheid van die getuie of die magistraat se optrede nie. Waar die ander se handeling, soos in hierdie voorbeelde, 'n berekende deel is van die oorsaaklikheidsreeks wat die dader aan die gang gesit het, 'n gebeurlikheid wat hy voorsien as 'n moontlikheid en wil aanwend om sy doel te bereik, of as iets waarop hy staat kan maak om die beoogde gevolg teweeg te bring, sou opset ook nie ontbreek nie, en sou dit strydig met erkende regsbeginsels en met alle regsgevoel wees om hom agter die ander se handeling as later toetredende oorsaak te laat skuil. Dat dit nie 'n misdadige handeling is nie, kan hieraan geen verskil maak nie.' (at 364)

It is clear from this that the court actually observed the distinction between considerations of causation and fault. It first observes, that the examples given by Matthaeus do not diminish the causality of the agents under consideration. He goes on, on a separate point, to then make a statement relating to fault:

'Where the act of the other person, as in these instances, is a calculated part of the chain of causation which the perpetrator started, an eventuality which the perpetrator foresees as a possibility and which he desires to employ to attain his object, or as something on which he may depend to bring about the desired result, *the intention will also not be absent ...*'

It is crucial to observe that he uses the word 'also'<sup>146</sup> – that he was referring to another element of liability. Significantly, nowhere in his mention of considerations relevant to causation does he say anything about fault.

As mentioned, Snyman also relies on the decision in *Hibbert*<sup>147</sup> as authority for the proposition that knowledge of the intervening event will exclude it from operating as a NAI. Again, however, there is no support for this view in *Hibbert*.

Snyman does correctly reflect that Steyn CJ, in *Grotjohn*, did stipulate that in order to qualify as a NAI, an intervening act or event must be completely independent of the original conduct in question. The court insisted on complete independence between the original wound and the intervening event or act. However, if the intervening act or event is to be causally significant, it must also be a sine qua non of the death – it must itself, at least, hasten death. But since both the original and intervening act or event must be necessary, an impossible criteria is demanded by Steyn CJ. The problem is that, if two conditions are necessary, they become logically dependent on each other and cannot ever satisfy the requirement set down in *Grotjohn*.

In conclusion, it seems that the definition offered by Burchell is most accurate: a NAI is an abnormal intervening act or event.

### Critical Comparison of Adequate cause and Novus Actus Interveniens

The condition of normality ('according to human experience, in the normal course of events') features in both the adequate cause and novus actus interveniens tests. For this reason, the tests of adequate causation and novus actus interveniens appear at first to be equivalent.

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<sup>146</sup> The phrase in the original Afrikaans: 'sou opset ook nie ontbreek nie'.

<sup>147</sup> 1979 4 SA 717 (D).

Snyman regards them as practically equivalent<sup>148</sup> while Burchell views them as appearing to be markedly similar<sup>149</sup> and as simply the converse of one another ('simply two sides of the same coin').<sup>150</sup> Furthermore, in *Daniëls* Jansen JA considered satisfaction of the adequate cause test (of Snyman) to be equivalent to the absence of a novus actus interveniens.<sup>151</sup> To the extent to which these two tests are considered to be equivalent in that they will render identical answers, a closer analysis is required.

The two are actually quite distinct — indeed they operate from different paradigms and are diametrically opposed — though they may sometimes produce the same answer by coincidence.<sup>152</sup> This coincidence is one possible reason why it may erroneously be concluded that the novus actus interveniens test and the theory of adequate cause are equivalent.

The novus actus interveniens test is expressly concerned with the actual course of events and to what extent these events are to be regarded as extraordinary or abnormal. In terms of the novus actus interveniens test, an *actual* extraordinary course of events will exculpate the accused; while in terms of the adequate cause test, such an actual extraordinary course is rendered irrelevant since one is forced to consider only whether the consequence is to be expected in the 'normal [ordinary] course of events'.<sup>153</sup> This is so no matter what intervenes or how abnormal the actual course of events.

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<sup>148</sup> Snyman *Criminal Law* 6th ed (2014) 87; Snyman also states: 'Novus actus interveniens is actually a negative 'test' of causation: a causal relationship is assumed to exist if an act is a *conditio sine qua non* of a result and a novus actus is lacking.' (p 86).

<sup>149</sup> Burchell *Principles of Criminal Law* 4th ed (2013) 99.

<sup>150</sup> Ibid 106. See also Karin Alheit ('*S v Mokgethi* 1990 (1) SA 32 (A)' (1990) 3 *SACJ* 210) for an argument that both the adequate cause and novus actus interveniens, instead of the flexible test, could have been utilised interchangeably in *Mokgethi* to obtain (equivalent) desirable results.

<sup>151</sup> Jansen JA stated: 'Snyman Strafreg op 54–55 verg dat die handeling adekwaat ten opsigte van die gevolg moet wees (wat blykbaar onder andere daarop kan neerkom dat daar geen novus actus interveniens aanwesig moet wees nie ...).' (*Daniëls* supra note 2 at 331D-F). (Snyman Strafreg at 54-5 requires that the act must be an adequate cause of the result - which apparently means that there must be no *novus actus interveniens* ... . (Translation in Jonathan Burchell & John Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 98).

<sup>152</sup> See James Grant 'The Permissive Similarity of Legal Causation by Adequate Cause and Nova Causa Interveniens ' (2005) 122 SALJ.

<sup>153</sup> See *ibid*.

## Causation and Medical Intervention

The question of causation in criminal law is a field of controversy and complexity. It has eluded any firm solution, with our Courts settling for a 'flexible approach',<sup>154</sup> taking account of considerations of justice and fairness, in what appears to be a concession that the problem is insoluble, or at best, there is no single answer. One area in which the problem is most pronounced is that of medical intervention in the context of homicides (murder or culpable homicide).

There can be no question that when an accused inflicts an injury upon a victim that requires medical assistance, and where it is given, but the victim dies in any event, some attention is drawn to the medical intervention itself. Questions such as whether the victim would have died anyway, irrespective of the medical intervention given or whether the medical intervention contributed to the death of the victim by, for instance, hastening the death of the victim arise. As Snyman recognises,<sup>155</sup> these questions inevitably resolve down into a consideration of two factors: the severity of the wound and the quality of medical care given. The quality of the medical intervention may range from good care to negligent, grossly negligent, and ultimately, one may expect, to the bad faith, intentional (malevolent) hastening of death by a medical practitioner.

Snyman also recognises that a consideration of these factors determine whether the medical intervention interrupts the 'chain of causation' between the death of the victim and the conduct in question.<sup>156</sup>

This is because problems of causation are often resolved, or at least, guidance obtained, by reference to whether any new cause intervened between the conduct in question, and the prohibited consequence (death) that may be regarded as sufficiently abnormal to 'break the chain of causation'.

### The Question

Without having proceeded very far, already this sketches the framework within which the question of the effect of medical intervention on causation must be answered. It is perhaps useful to consider what is in question and in the framework for consideration and what does not. The question, to put it plainly, is whether our law does, or should, recognise that medical intervention can 'break the chain of causation' set in motion by an accused.

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<sup>154</sup> *S v Mokgethi* 1990 (1) SA 32 (A); *Road Accident Fund v Russel* 2001 (2) SA 34 (SCA).

<sup>155</sup> Snyman *Criminal Law* 6th ed (2014) 90.

<sup>156</sup> *Ibid.*

We are not concerned with the overall question of causation in law, which we appreciate adopts a two stage process of establishing factual causation by means of the *sine qua non* test, followed by an enquiry into legal causation. We are focused, in this article, on whether legal causation should be recognised in a scenario of common occurrence: Where a victim's death is hastened by the medical intervention.<sup>157</sup> We will briefly discuss the test of *sine qua non* below in order to attempt to demystify it because it does arise for consideration in other respects and a proper understanding of the test is crucial.

Also, the question is focused on the liability of the accused who inflicts the wound – which is the reason for the victim receiving medical attention. The question is not whether the doctor, nurse, or otherwise, who provides the medical intervention commits a delict or a crime. This too, is an inevitable question, when that is considered, but the liability of an accused can hardly depend,<sup>158</sup> upon whether another accused is also liable or not.<sup>159</sup> We are also, by virtue of the question that arises from the circumstances under consideration, whether the medical intervention interrupts the chain of causation, focused on one particular method of resolving questions of legal causation: of novus actus interventions (NAI).

This is so for three reasons: the very question is virtually a statement of the question of NAI – the circumstances beg the question: Did something interrupt the chain of causation? Secondly, other theories or solutions are ill equipped to answer this problem. Our law has now adopted a flexible approach to questions of legal causation,<sup>160</sup> into which all previous tests of theories are subsumed as mere factors for consideration in service of the overarching question: that is required by the interests of justice and fairness. However, as factors go, the competing theories or tests are unhelpful. This will be discussed at some length below and deserves its own discussion.

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<sup>157</sup> Hastening in this context must be understood to mean that the victim died sooner than s/he otherwise would have, if proper medical attention is given.

<sup>158</sup> Save in cases of complicity - which by its nature excludes the consideration of individual causation - as we saw in the judgments of Botha JA and Nicholas AJA *S v Daniels* 1983 (3) SA 275 (A).

<sup>159</sup> Regrettably this appears to be the approach of Carstens PA Carstens 'Judicial recognition of substandard medical treatment in South African public hospitals: The slippery slope of policy considerations and implications for liability in the context of criminal medical negligence (*S v Tembani* 2007 1 SACR 355 (SCA))' (2008) 23 SAPR/PL 23 and renders his analysis unhelpful in determining the criminal liability of the person who inflicted the initial wound. There can be no question that the quality of care given is relevant. What is not relevant is the legal consequences of that care for that person.

The issue before the Court was the liability of the accused, not the liability of whoever was responsible for a possible novus actus interveniens (*ibid* 174, 5, 7) Carstens is correct that a novus actus interveniens must be a factual cause (*ibid* 175 otherwise it is causally irrelevant), but whether it is also a legal cause is entirely irrelevant in respect of the accused's responsibility for the initial injury (*ibid* 174ff)

<sup>160</sup> *S v Mokgethi* 1990 (1) SA 32 (A) 39.

Thirdly, as will appear from the cases discussed, the test of NAI is, apparently by no accident - for the reasons set out above, *the* test which our courts have engaged in order to address the question under consideration.<sup>161</sup>

Finally, we are aware that if the chain of causation is regarded as interrupted, the accused who inflicts the initial wound may yet be convicted of attempted murder and receive the same penalty in any event. However, this does not appear to be a basis on which to avoid trying to answer the true and difficult question of when a court may or should regard the chain of causation as broken. The possibility of an attempted murder conviction will certainly not allow a court to avoid this difficult question.

### Medical Intervention<sup>162</sup>

#### Severity of Wound

Regarding the severity of the wound, we tend to think of wounds as either lethal or non-lethal. Lethal wounds are those which are of such a serious nature that they would ordinarily lead to death. Non-lethal wounds, on the contrary, are wounds which would not ordinarily lead to death. It is true, of course, that proper medical care is not equally available to all in SA. Nevertheless, the questions relating to medical intervention are whether such medical intervention *as is given* can break the chain of causation. For that reason we are necessarily dealing with scenarios in which medical intervention was obtained.<sup>163</sup> The problem arises because it transpires that the victim dies and the *quality* of the medical assistance is questionable. The question needs to take medical

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<sup>161</sup> This approach is evident even after *Mokgethi* - see *Tembani* para 28.

<sup>162</sup> I wish to acknowledge the helpful queries and comments by Professor Stephen Tuson on previous drafts of this paper.

<sup>163</sup> This is the sense which in Hart and Honoré use the word (p 242 note 75) in which account is taken of the circumstances of the accused whether medical assistance is given. They do distinguish three possible meanings for the concept lethal or mortal – of which this sense is the second: 'Here it is important to notice the different senses of the word 'mortal', of which three may be distinguished: (i) the word may simply refer to a type of injurious occurrence (a wound, blow, or dose) which is sufficient to cause the death of a person of average constitution under normal circumstances: here there is no necessary reference to any particular case. Thus we speak in general terms of so many grains of arsenic as a 'mortal dose'; (ii) a wound inflicted on a particular occasion may be called mortal if, given the circumstances including the constitution of the victim and likelihood of medical assistance, it is highly probable that it will cause his death; (iii) a wound inflicted on a particular occasion may be said to be mortal if in fact it causes the victim's death even though it was not mortal in either of the two preceding senses, e.g. a mere scratch which the victim neglected.' (p 241-242)



intervention as a given therefore, but set it against a spectrum relating to the quality of the care given: from good to bad faith (malevolent) improper care.

Yet still there is a (further) complication in the context of medical intervention: an injury which would otherwise be lethal may be treatable – in which case an otherwise lethal wound is not, all things considered, lethal. In the alternative, there are lethal injuries which are untreatable, and which remain lethal. Therefore we seem to have three categories of severity:

1. Non-lethal (because it is treatable);
2. Lethal (untreatable);
3. Non-lethal (in every sense – perhaps a small scratch which requires no medical assistance).

This leaves us with the three categories. But the third, in which the victim requires no medical assistance, seems dispensable. In these cases, medical intervention which is administered, where it is *unnecessary*, and where it kills the victim, it would virtually always have to be abnormal and unusual – and therefore a *novus actus interveniens*.

This would leave us with just two categories:

1. Non-lethal (treatable);
2. Lethal (untreatable).

In the leading case of *Tem bani*<sup>164</sup> Cameron JA was focused on an injury of the following severity: 'The infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention ...'.<sup>165</sup>

On the face of it, this seems to an injury which is lethal (from which a victim would ordinarily die). However, it seems that the qualification, that the victim would likely die *without* medical intervention, is to be interpreted to mean that, *with* medical intervention, the victim would live – and thus into category 1 - in which correct medical intervention could save the victim's life. The contrary interpretation, that the victim would die anyway, even with correct medical intervention, renders the qualification redundant – in this conception, the injury is so serious that the victim would die irrespective of whether there was medical intervention. This does not seem to be

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<sup>164</sup> *S v Tembani* 2007 (1) SACR 355 (SCA). In this case, the appellant inflicted a wound on his victim which without medical treatment would be fatal. Later medical treatment administered to the victim was negligent and possibly even grossly negligent. The court held that the quality of treatment received did not exempt the appellant/assailant from responsibility for the victim's death, and the appellant's murder conviction was confirmed. This decision was arrived at on the basis that it is not unusual or abnormal for a victim to receive negligent or substandard care at South African hospitals.

<sup>165</sup> *Ibid* para 25.

intended by Cameron.<sup>166</sup> It would appear that Cameron means no more than what he sets out in the introductory paragraph: 'The appeal turns on whether the assailant who inflicts a wound which without treatment would be fatal, but which is readily treatable ...'.<sup>167</sup>

Snyman, sets up two categories of serious injuries: 'injuries were of such a serious nature that the deceased would have died in any event, despite correct medical treatment ...'.<sup>168</sup> This seems naturally to fall into the subcategory of a victim whose injuries are lethal and good medical assistance would not save his/her life – and thus into category 2 (lethal – untreatable). He also refers to scenarios in which the injury is not so serious<sup>169</sup> – presumably these must be categorised as a category 1 injury (non-lethal – treatable).

Beyond this, he contemplates a scenario in which the injuries may be serious, but in respect of which, medical intervention may save the life of the victim<sup>170</sup> – this seems also to fall into category 1 (non-lethal (treatable)).

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<sup>166</sup> Also, in adopting this definition, from *R v Mubila* 1956 (1) SA 31 (SR) 33, Cameron distinguishes it from other possible understandings. He contrasts his conception with three scenarios identified by Hart and Honoré (*Causation in the Law*, 2<sup>nd</sup> ed, 1985, 241-242 & 353, discussed above in note 163) as follows:

'(i) sufficient to cause the death of a person of average constitution under normal circumstances; (ii) highly likely to cause the death of a particular victim, given his constitution and the likelihood of medical assistance; (iii) in fact causing death even though not mortal in senses (i) and (ii) (eg a scratch the victim neglected).' (p 10 note 10)

(In this analysis, any reference to 'categories' refers to my three categories outlined above in the main text, not to be confused with the three points from Hart & Honore that Cameron refers to) It is not clear how this first scenario can be contrasted with Cameron's conception or with the interpretation I put on it (that is, the sort of injury that would lead to death without medical assistance, but that with correct medical assistance, the victim would live). At best, this seems to be a reference to a scenario in which no medical intervention is available or where medical intervention (or the prospect of medical intervention) plays no role in the death, that is, it does not hasten it in any way. This falls off our radar.

The second seems to refer to the scenario in which medical assistance is likely – that the injury is so severe that correct medical assistance would not save the victim – that is, a category 2 injury (lethal and untreatable) as per my categories above). It is on this basis that I interpret the definition adopted by Cameron as a category 1 injury – as not being a reference to an injury which is so severe that the victim would die in any event, even with correct medical treatment (which would be a category 2 injury).

The third refers to an injury for which medical intervention is not required (which I discussed as my original category 3 injury – where I initially distinguish 3 degrees of severity), but have withdrawn as a valid category for consideration (given that medical intervention would, necessarily, be abnormal in the circumstances, discussed above).

<sup>167</sup> Tembani para 1.

<sup>168</sup> CR Snyman *Criminal Law* 5<sup>th</sup>ed (2008) 91-93, point 1.

<sup>169</sup> Points 2 and 3 *ibid*.

<sup>170</sup> *Ibid*, points 4.

## Quality of Medical Care

The view expressed by the Supreme Court of Appeal in *S v Tembani*<sup>171</sup> is that it should not be regarded as abnormal or unusual for a victim to receive negligent or sub-standard care in a hospital:

'In a country where medical resources are not only sparse but grievously maldistributed, it seems to me quite wrong to impute legal liability on the supposition that efficient and reliable medical attention will be accessible to a victim, or to hold that its absence should exculpate a fatal assailant from responsibility for death. Such an approach would misrepresent reality, for it presumes levels of service and access to facilities that do not reflect the living conditions of a considerable part, perhaps the majority, of the country's population. To assume the uniform availability of sound medical intervention would impute legal liability in its absence on the basis of a fiction and this cannot serve the creation of a sound system of criminal liability.'<sup>172</sup>

This is a sad indictment on our medical system, but probably a fair one. It is also one shared by Snyman,<sup>173</sup> Burchell,<sup>174</sup> and Carstens.<sup>175</sup>

### Can Medical Intervention serve as a *novus actus interveniens*?

The clearest exposition on this point can be found in *Tembani*, in which Cameron JA states: The deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, must in my view generally lead to liability for an ensuing death, whether or not the wound is readily treatable, and even if the medical treatment later given is sub-

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<sup>171</sup> *S v Tembani* 2007 (1) SACR 355 (SCA).

<sup>172</sup> *Ibid* para 27.

<sup>173</sup> Snyman 5<sup>th</sup> ed, p 92.

<sup>174</sup> Jonathan Burchell *Principles of Criminal Law* 4<sup>th</sup>ed (2014) 102-103.

<sup>175</sup> 'Economic realities such as a lack of resources, staff, infrastructure and poor working conditions, will certainly influence a court, on policy considerations, not to find that there is a new intervening act. Medical negligence is not determined "in the air" but with reference to the particular circumstances of each case. Economic realities and the circumstances relating to the locality where the medical treatment is administered can thus be seen as justifiable limitations against finding medical negligence to be a new intervening act. It is clear from the Tembani judgment that a court will not easily be swayed, in the face of a serious life-threatening wound which was initially inflicted by the perpetrator, to find that ensuing medical negligence, if not gross, will be a new intervening act.' (PA Carstens 'Medical negligence as a causative factor in South African criminal law: *Novus actus interveniens* or mere misadventure?' (2006) SAJCI 204-5).

standard or negligent, unless the victim so recovers that at the time of the negligent treatment the original injury no longer poses a danger to life.<sup>176</sup>

Cameron JA goes further, in an *obiter*, to state that even if the medical intervention was grossly negligent, he would not regard it as relieving the accused of responsibility of the subsequent death.<sup>177</sup>

When one takes account of the possibilities in respect of the quality of care and the possibilities in respect of the severity of the injury, the following 8 scenarios may be identified:

1. Non-Lethal (treatable) wounds, where the medical care given was:
  - A. Good/Proper care;
  - B. Negligent care;
  - C. Grossly negligent care;
  - D. Intentionally improper care.
2. Lethal (untreatable) wounds, where the medical care given was:
  - A. Good/Proper care;
  - B. Negligent care;
  - C. Grossly negligent care;
  - D. Intentionally improper care.

Into these categories one may locate our leading judgment (*Tembani*), and accommodate the judgments in *Counter*,<sup>178</sup> *Mabole*,<sup>179</sup> and *Williams*.<sup>180</sup> Other decisions<sup>181</sup> will be discussed but do not seem to assist in discerning a pattern. I will divide the analysis that follows into the two categories relating to the severity of the wound and discuss, within each category, the attitude of our courts beginning with good/proper treatment, followed by negligent, then grossly negligent care, ending with intentionally improper treatment. From this analysis, a pattern may be discerned – that the less serious the initial wound, and the more improper the medical treatment, the greater the likelihood that our courts will recognise a NAI.

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<sup>176</sup> *Tembani* para 25.

<sup>177</sup> '[W]hile the wound remains intrinsically fatal, even gross negligence should not permit escape from legal liability for its consequences.' Para 29 *Tembani* (footnote omitted).

<sup>178</sup> *S v Counter* 2003 (1) SACR 143 (SCA).

<sup>179</sup> *R v Mabole* 1968 (4) SA 811 (R).

<sup>180</sup> *S v Williams* 1986 (4) SA 1188 (A). The judgment in *S v Ramosunya* 2000 (2) SACR 257 (T) is unhelpful since, as Jordaan AJ recognised, neither the severity of the initial wound, nor the quality of care given in hospital could be established from available evidence (258ff). In the circumstances the accused was given the benefit of the doubt that, either there was no factual causation, or, if there was, that the medical intervention had broken the chain of causation. (p265)

<sup>181</sup> Such as *Dawood* 1972 (3) SA 825 (N), *S v Ramosunya* 2000 (2) SACR 257 (T), and

## 1 Non-Lethal (treatable) wounds

In *Mabole* the victim had suffered a stab wound and surgery had unblocked a blood clot, which then caused death. The court held that if medical attention is given in good faith and with reasonable efficiency, the accused could not complain of mistakes made in diagnosis and treatment.<sup>182</sup>

In *Dawood*<sup>183</sup> the court refused to recognise the negligent failure of hospital staff to provide more regular physiotherapy to the victim,<sup>184</sup> as a NAI. The victim had been assaulted and lost consciousness. He required an operation to release excessive blood from his brain. The victim remained unconscious for a protracted period thereafter, contracted pneumonia, followed by meningitis, which was the most immediate cause of his death. In the courts view, this failure did not introduce a new cause, such as if treatment had been given with unsterilised equipment. The judgment is based on a distinction between a failure to intervene with proper care as opposed to the intervention of improper care.<sup>185</sup> On this distinction, the negligent omission in this case was not a NAI. However, it seems to follow, on this logic, that no omission could qualify as a NAI which makes the distinction drawn seem rather artificial and unhelpful.

The facts in *Counter* were that the victim had been shot in her buttock. The medical intervention did not detect the bullet had perforated the victim's anal canal. A virulent infection ensued which hastened the victim's death. The court was not prepared to regard the medical intervention given to the victim as interrupting the chain of causation. It may also be authority for non-lethal injuries where negligent care is given on the basis that it is not clear that the medical care given could not be regarded as negligent, and that the court simply did not regard it as deviating sufficiently from the standard required so as to be regarded as abnormal and unusual.<sup>186</sup>

Regarding gross negligence and intentionally bad treatment, we may draw on what was said in *Tem bani* and *Counter*.<sup>187</sup>

From the discussion in *Tem bani*, it would seem to follow from Cameron's obiter that he would not recognise a *novus actus interveniens* *even* in the case of gross medical negligence, and that:

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<sup>182</sup> These mistakes are referred to by Carstens (2006 page 203) as 'medical misadventure' and do not amount to medical negligence, but are errors which are normal and form part and parcel of the risks inherent in any treatment or procedure.

<sup>183</sup> *S v Dawood* 1972 (3) SA 825 (N).

<sup>184</sup> Every 3-4 hours, rather than once a day.

<sup>185</sup> Page 828.

<sup>186</sup> Burchell, page 105.

<sup>187</sup> 2000 (2) SACR 241 (T).

1. He *would* recognise a *novus actus interveniens* in the case of intentionally improper treatment; but
2. He would certainly *not* do so in the case of good care.

The point is that intuitions seem to direct that the chances of recognising a *novus actus interveniens* increase with the impropriety of care: the more improper the treatment, the more likely the recognition of a *novus actus interveniens*.<sup>188</sup>

Jordaan J said in *Counter*: 'From the authorities it is clear that where there is an intentional or gross negligent intervening cause that changes the course of events so that it could be said that the original act can no longer be regarded as the cause of death, then there is a *novus actus interveniens*.'<sup>189</sup>

The qualification in *Tembani* relating to whether an injury is still operative, seems to relate to how treatable the injury is and seems to express the intuition that the more treatable an injury, the more appropriate it would be to recognise a NCI. This sentiment appears to be endorsed by Snyman.<sup>190</sup>

## 2 Lethal (untreatable) wounds

In *Williams* the court held that where an accused injures a victim so severely that the victim's life can only be sustained by a respirator, switching the respirator off cannot operate as a *novus actus interveniens*. A distinction was drawn between a positive act of killing and ending a fruitless attempt to save life.

There is, regrettably, no clear case authority for the category where the care given is negligent or grossly negligent.

Nor is there case authority where the care given is intentionally bad/malevolent. However, in our view, we may draw on the judgement of Trengrove and Nicholas (*obiter*) in *Daniëls*.<sup>191</sup> These two judges asked the question whether malevolent intervention which hastens the death of a victim who is in any event about to die could be regarded as a *novus actus interveniens*. They concluded that it could. Of course, in *Daniëls*, the court was not dealing with medical intervention – but we

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<sup>188</sup> These intuitions seem to be shared by Burchell (103).

<sup>189</sup> 2000 (2) SACR 241 (T) at 250. Snyman concurs that malevolent medical treatment should operate to break the chain of causation where the initial injury was non-lethal (S5, point 3 [update – with page no.]])

<sup>190</sup> S5: Compare point 1 on p 91 with point 4 on p 92. However, as discussed below, the adequate cause theory appears ill equipped to guide one in respect of differences in quality of care.

<sup>191</sup> *S v Daniëls* 1983 (3) SA 275 (A).

may adapt the facts of *Daniëls* to guide us as to what a court might find. We must consider what the court might have said if the victim, after having been shot twice in the back, was transferred to a medical facility. In translating the facts of *Daniëls*, (in terms of the severity of the wound question) we need to be aware that, on the facts, medical treatment to save the victim's life was unavailable - the victim was going to die about 30 minutes after the two shots to his back. This may lead one to think it appropriate to allocate the case to the category of non-lethal treatable injuries. However, we need to translate the facts to maintain the lethal nature of the injury. If the victim *were* in a medical setting, and was inevitably going to die regardless of the treatment given, we would have to treat this as a lethal non-treatable injury – a category 2 injury.

The quality of the treatment would have to be that of a malevolent doctor, giving intentionally improper treatment. If, as was done in *Daniëls*, we would treat the conduct of someone<sup>192</sup> who is under no obligation to save the life of the victim as a *novus actus interveniens*, then it seems we must do so where there is not only intentionally bad intervention, but a malevolent breach of the duty to save the victim's life. Therefore it seems that we should allocate this scenario, in relation to the quality of care, to that of intentionally bad treatment. We may extrapolate therefore, that, if one does a *novus actus interveniens* inquiry, we may treat *Daniëls* as an indication that our courts will regard malevolent medical treatment of a category 2 (lethal) injury, as a NAI.

### Grey Areas and Trends

It would seem that the best case for the recognition of a *novus actus interveniens* would be where the injury is treatable, but where the medical care given is intentionally improper. In the context of intentionally improper treatment given where the wound was untreatable it seems that the judgments in *Daniëls* that concerned themselves with whether a *novus actus interveniens* should be recognised, direct that, in this context, a *novus actus interveniens* should be recognised.<sup>193</sup> Given the apparent agreement in our law regarding the standard of medical intervention that is to be expected in our hospitals at the moment (which may be negligent), it seems that the remaining grey areas are to be found where the injury was treatable and treatment was grossly negligent,<sup>194</sup> and where the initial injury was untreatable, and the actual treatment given was negligent or grossly negligent.

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<sup>192</sup> Whoever fired the final shot into the victim's head.

<sup>193</sup> Discussed above on page 70ff.

<sup>194</sup> As will be discussed (see note 199 and associated text), Snyman and Cameron are at odds on this point.

When deciding whether medical treatment could serve to break the chain of causation it would appear that the answer depends on which theory of legal causation one applies. Let us consider how the *novus actus interveniens* test and adequate cause theory would apply. You may recall from above<sup>195</sup> that the two tests are at odds in that while the *novus actus interveniens* test takes account of any abnormal intervening event, the adequate cause theory ignores it.

So how would this apply to injuries which are either, as we have constructed them, non-lethal, or lethal, and in which the medical care given ranges from good to deliberately malevolent?

Adequate cause seems to ask:<sup>196</sup> Does the accused's act ordinarily lead to the death of the victim? Snyman seems to appreciate quite clearly that the effect of medical intervention begs the question of whether a *novus actus interveniens* ought to be recognised. He says:

If X assaults Y, who is then given the wrong medical treatment, which leads directly to his death, the question arises whether the medical treatment has interrupted the chain of causation.<sup>197</sup>

This is the question of whether the medical intervention ought to be recognised as a *novus actus interveniens*. However, framed in its conventional formulation we see that the focus of the adequate cause theory is the conduct in question. It ignores anything abnormal or unusual that *actually* occurs thereafter.<sup>198</sup> It is not at all clear how the adequate cause theory can have anything to say about whether medical intervention should break the chain of causation. It is only by distorting the question that the adequate cause test asks that it can purport to take into account anything but the accused's conduct in question.

So, for instance, in the context of a non-lethal injury (lethal but treatable) where medical treatment is intentionally bad or grossly negligent he argues that the chain of causation is interrupted, as follows: 'To use the terminology of the theory of adequate cause, one may say that one assumes or expects that medical treatment will not be performed intentionally incorrectly (ie, mala fide) or in a grossly negligent manner'.<sup>199</sup>

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<sup>195</sup> Discussed above, under the heading 'Critical Comparison of Adequate cause and Novus Actus Interveniens' on page 60ff.

<sup>196</sup> To be clear, adequate cause theory seems to permit this question to be formulated in numerous different ways – and as I have argued (James Grant 'The Permissive Similarity of Legal Causation by Adequate Cause and Nova Causa Interveniens ' (2005) 122 SALJ) to conform with the purpose of the enquirer.

<sup>197</sup> Snyman 5<sup>th</sup> ed 2008 p 91.

<sup>198</sup> See above.

<sup>199</sup> Snyman 5<sup>th</sup> ed, p 91-92. He confirms this view in his argument that Cameron JA went too far in suggesting that one should not recognise a *novus actus interveniens* even if medical negligence was grossly negligent: 'It is submitted that [this] view goes too far. Although medical services in South Africa are very strained and not always up to standard, it seems incorrect to assume that in the normal course of events one can expect medical services in this country that are grossly negligent.' (S 5ed, p 92)



The problem is, of course, adequate cause theory does not and cannot take account of what intervenes between the conduct in question and death. Adequate cause theory imposes the assumption of 'the normal course of events'. It cannot purport to take account of something outside of its self-imposed narrow perspective.

It makes some sense that Snyman would argue that if one has inflicted a lethal wound, that nothing that happens thereafter can break the chain of causation. Thus, in the context of a lethal injury where medical treatment is negligent, he supports the view of Cameron that a *novus actus interveniens* must not be recognised, saying '... it seems unjust to allow X, who has intentionally inflicted a lethal or at least very serious injury to Y, to argue afterwards that the subsequent improper medical care should rebound to his benefit and absolve him from full responsibility for his deed.'<sup>200</sup> But what must be recognised is that adequate cause demands this attitude, upon the infliction of a lethal injury, no matter what intervenes.

The focus is, by definition on the ordinary course of events. Once one decides that negligent treatment in our hospitals is to be expected, the question can only be: what do we expect of such a type of injury given the prospect of negligent conduct in our hospitals? If the answer is that we would expect the victim to die, the quality of the treatment cannot possibly matter, by definition. If a victim suffering with a superficial wound presented himself for treatment at a hospital, and the attending doctor decided to reap the victims liver for financial gain, we cannot pretend that the adequate cause theory somehow allows us to take account of this intentionally malevolent intervention. The question remains, according to adequate cause theory: do we expect a victim suffering from a superficial wound, who may receive negligent treatment, to die? It is not: do we expect a victim suffering from a superficial wound, who may receive negligent treatment, *but who actually receives bad/malevolent treatment*, to die? This second question allows adequate cause theory to masquerade as the *novus actus interveniens* test. If, in the ordinary course, we would not expect the victim to die from his injury (given the assumption of negligent medical treatment in the ordinary course), the theory of adequate cause cannot somehow take account of *actual* bad/malevolent treatment. This is the work of the *novus actus interveniens* test –and the reason why the two (AC theory, and the *novus actus interveniens* test) are incompatible.

If, in the alternative, the wound was of a serious nature, say, one that is lethal (as we have defined it – that is, untreatable), and on the assumption that negligent medical treatment is to be expected in our hospitals, the test of adequate cause would ask: is it to be expected that a victim suffering from a lethal wound, would die from negligent treatment? Already one may struggle with this

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<sup>200</sup> Snyman 5<sup>th</sup> ed, p 92.

question because, by virtue of its focus, the adequate cause theory can be regarded as having done its work – by categorising the wound as lethal – one from which an accused would ordinarily die despite medical intervention.

Thus the adequate cause theory seems to breakdown in any role designed to distinguish between the type of care actually given. This is not unexpected. As indicated, the focus of the adequate cause theory is the conduct in question, or at best, the original injury, assuming the ordinary course of events. It does not, indeed cannot, take account of what actually happened.

What about *novus actus interveniens*? This is the question that focuses our attention on whether anything abnormal and unusual *did* happen – which serves to break the chain of causation. If a victim's death was accelerated by medical treatment, the question becomes whether the medical care was unusual or abnormal. This in turn, sets us up to take account of whether the quality of the care received, was abnormal or unusual. It fits perfectly with the approach adopted in *Tembani* and thus with the leading judgment on the issue. It is not abnormal or unusual to receive negligent, and possibly even grossly negligent medical treatment – therefore no *novus actus interveniens* should be recognised. It is possibly worth stating that it is also not unusual or abnormal to receive good treatment – so again, no *novus actus interveniens* should be recognised. What may certainly be abnormal or unusual would be intentional malevolent medical treatment. This would seem to be an overriding consideration irrespective of whether the initial injury was treatable or not.

In the final analysis, it seems that there are two questions that one must answer for oneself before one embarks on an analysis of whether medical intervention may be regarded as breaking the chain of causation:

1. In truth, what model of legal causation does one subscribe to:
  - a. one in which an accused is liable for the ordinary consequences of his/her conduct (adequate cause theory); or
  - b. one in which an accused is liable for the actual consequences of his/her conduct, unless something unusual or abnormal intervened (the *novus actus interveniens* test).

If one opts for the former (adequate cause theory), then what occurs subsequently (to the injury inflicted by the accused) is irrelevant. Only if one opts for the latter (*novus actus interveniens* test) can what *actually* occurred be taken into account – and thus whether medical intervention breaks the chain of causation can be considered. Only if one opts for this view (*novus actus interveniens*), does the next question require an answer:

2. What quality of care may we expect of our hospitals? This question goes directly to whether the medical intervention can be regarded as abnormal and unusual – which is the essence of the enquiry into whether medical intervention can break the chain of causation.

Let us turn our attention back to the grey areas. It is important to recognise that even by asking this question, one has, perhaps even subconsciously, adopted an approach that takes account of the actual course of events – which requires a proper application of the *novus actus interveniens* test. Once this is recognised, the question becomes, what quality of medical intervention should be expected in our hospitals. If the answer is that 'only' negligent treatment can be expected, then grossly negligent treatment would constitute a *novus actus interveniens*. If grossly negligent treatment is to be expected, then it cannot be regarded as a *novus actus interveniens*.

By extrapolation, on the assumption that our courts are more likely to recognise a *novus actus interveniens* if the initial wound is non-lethal, it seems that if our courts would refuse to regard negligent or grossly negligent treatment given to a victim suffering a non-lethal wound (as we have seen in *Tembani*), they are more unlikely to do so where the initial wound was lethal.

## Conclusion

In conclusion it would seem that whether we regard medical intervention as breaking the chain of causation, requires, of course, that we identify from the facts at least whether we are dealing with a lethal or non-lethal injury, and then what the quality of the medical care given was. But possibly before the answers to these questions matter, we need to be honest with ourselves. We need to declare what quality of care is to be expected in our country, and, possibly, more importantly, given one's preferred view of legal causation, whether that even matters.

PART III:  
UNLAWFULNESS

## Chapter 08: Unlawfulness – Introduction

### Introduction

Unlawfulness is required for all offences, both common law and statutory offences.<sup>201</sup> It is the requirement under which the question of whether an omission to act was unlawful because the one failed to act in the face of a legal duty to act.<sup>202</sup> Unlawfulness is also the requirement which is excluded when what one does is *justified*. One is justified in one's conduct when what one does is the right thing to do<sup>203</sup> – all things considered.<sup>204</sup> Possibly the most well-known justification (known as a ground of justification) is self-defence – more technically known as private defence. Our law recognises that one's conduct is *justified* and therefore *lawful* in private defence when, in response to an unlawful imminent<sup>205</sup> or commenced attack upon a legally protected interest, one resorts to the use of necessary and reasonable force against the attacker.<sup>206</sup> Other grounds of justification recognised in our law include necessity (also known as compulsion or as duress in other jurisdictions), consent, and de minimis.<sup>207</sup> The list of grounds of justification that have been recognised are not closed so that new grounds of justification may be recognised.<sup>208</sup> This is crucial and bears repeating: new grounds may be recognised.

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<sup>201</sup> CR Snyman *Criminal Law* 5 ed (2008) 95; J Burchell *Principles of Criminal Law* 3 revised ed (2006) 229.

<sup>202</sup> Minister van Polisie v Ewels 1975 (3) SA 590 (A).

<sup>203</sup> George Fletcher explains by contrasting a justification with an excuse: 'The notions of justification and excuse have, by now, become familiar figures in our structured analysis of criminal liability. Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act' (GP Fletcher *Rethinking Criminal Law* (2000) 759). See also L Austin *Philosophical Papers* (1970) 123–4; HLA Hart *Punishment and Responsibility* (1968) 13–4.

<sup>204</sup> S v Trainor 2003 (1) SACR 35 (SCA) paras 12–3 endorsing CR Snyman *Criminal Law* 4 ed (2002) 107 & 9 on the extent of factors to consider for private defence.

<sup>205</sup> Subject to the judgment in S v Engelbrecht 2005 (2) SACR 41 (WLD).

<sup>206</sup> R v Zikalala 1953 (2) SA 568 (A) 572; R v K 1956 SA 353 (A) 359; R v Patel 1959 (3) SA 121 (A); S v Jackson 1963 (2) SA 626 (A) 629.

<sup>207</sup> De minimis is the defence that our law does not take account of trivialities.

<sup>208</sup> On this point, as Snyman notes, all writers in criminal law agree (CR Snyman *Criminal Law* 4 ed (2002) 97).

## Ultimate test

The ultimate test of unlawfulness, and for grounds of justification,<sup>209</sup> is the legal convictions of the community,<sup>210</sup> as informed by the values in the Constitution.<sup>211</sup> It is a balancing exercise in which competing interests and values are weighed.<sup>212</sup> Furthermore, the form in which the defences have currently been recognised cannot be regarded as fixed and must also be subject to development in light of the demands of the legal convictions of the community as informed by the values in the Constitution.<sup>213</sup>

## Pervasive

It is also important to note that unlawfulness is a pervasive and ever-present requirement of all criminal liability under South African law. It is required for every crime, without exception, and

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<sup>209</sup> Which are merely crystallised and well recognised exceptions to unlawfulness, such as private or self-defence, necessity, and consent, *de minimis*. CR Snyman *Criminal Law* 4 ed (2002) 97–8.

<sup>210</sup> *S v Chretien* 1981 (1) SA 1097 (A) 1103D-F; *S v Gaba* 1981 (3) SA 745 (O) 751; *Clarke v Hurst* NO 1992 (4) SA 630 (D) 652; *S v Fourie* 2001 (2) SACR 674 (C) 681A-B. See also, in the context of the law of delict, *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) regarding the 'wrongfulness' of an omission. It may be worth noting that while different consequences may flow in the law of delict compared with the criminal law, 'the test for unlawfulness is identical in delict and criminal law' (PJ Visser & MC Maré *Visser & Vorster's General Principles of Criminal Law Through the Cases* 3 ed (1990) 180). Van der Westhuizen argues that it is impossible for conduct to be wrongful in one field of law and yet lawful in another (Van der Westhuizen 'Noodtoestand as Regverdigingsgrond in die Strafreg', LLD thesis, University of Pretoria (1979)).

<sup>211</sup> See *Carmichele v Minister of Safety and Security* (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC) para 43; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 17; *Van Eeden v Minister of Safety and Security* (Women's Legal Centre Trust, as amicus curiae) 2003 (1) SA 389 (SCA) para 12; CR Snyman *Criminal Law* 4 ed (2002) 97–8.

<sup>212</sup> J Burchell *Principles of Criminal Law* 3 revised ed (2006) 227.

<sup>213</sup> See for instance the development of the defence of private defence in the case of *Engelbrecht* (note 15 above); see also J Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ 1, in which the significance of the decision in *Engelbrecht* is discussed. While Snyman notes that each currently recognised ground has its limits and that if the accused exceeds these limits, his/her conduct becomes unlawful (CR Snyman *Criminal Law* 4 ed (2002) 97), this must be subject, as for all questions of unlawfulness, to where the legal convictions of the community, as informed by the values in the Constitution, direct where the limits are placed. Limits, or requirements, for any recognised defence that were set in, say, 1950, or at the very least, in the pre-democratic era cannot possibly be slavishly applied. If we did so we would ignore the overarching test for unlawfulness. It is for this reason that there is some doubt as to whether the use of lethal force in the protection of property (recognised in *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A)) remains lawful (see J Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4 ed vol 1 (2011) 141–4). It may well be lawful, but this is yet to be confirmed out of respect for the changing nature of the legal convictions of the community, particularly as informed by the Constitution.

where it is not expressed in the definition of an offence, it is regarded as a 'silent' requirement and is simply read-in.<sup>214</sup> Another point worth noting is that when offences are created, it is not at all conventional to stipulate all possible defences, certainly not those defences which must be read in as a function of the requirement of unlawfulness. As Snyman notes: 'Normally the legislature does not add words such as "unless the accused acted in self-defence, necessity, an official capacity or in obedience to orders"'.<sup>215</sup> The reason is – as Snyman goes on to explain – that there are criteria that go beyond the definitional requirements of the offence – beyond the 'letter of the law'.<sup>216</sup> These are value judgments based, as discussed, on the legal convictions of the community as informed by the Constitution.

### Extensive Effect

It is necessary also to appreciate the work that unlawfulness does. This is necessary not only to appreciate the work that unlawfulness does alone, but also the work that it does when combined with the fault requirement (intention or negligence).<sup>217</sup> It is not, as mentioned, a fixed set of defences of fixed criteria. Looking at the existing defences, one may be misled into thinking that this is the case, or that at least, the criteria for the defences already recognised are fixed and that whether an accused will have resort to the defence will be a simple question of fact. This is a mistake that is easy to make. It is fostered by the familiar practice that usually whether a defence is available to a particular accused is a question of fact. For instance, if an accused is claiming private defence there will be the inevitable question of whether the accused was under attack – as a question of fact. However this doesn't mean that, even if it is unsaid, a normative decision has not been made. Indeed, in each and every case, a normative decision must be made – to require that the accused was under attack.

### Reasonable Person Test

This is, again, because unlawfulness is ultimately determined by reference to the legal convictions of the community, as informed by the Constitution, but it is also inherent in the yardstick to which

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<sup>214</sup> CR Snyman Criminal Law 4 ed (2002) 95; J Burchell Principles of Criminal Law 3 revised ed (2006) 229.

<sup>215</sup> CR Snyman Criminal Law 4 ed (2002) 99.

<sup>216</sup> Ibid.

<sup>217</sup> See Chapters on Fault and in particular on Mistake.

our courts often resort: reasonableness<sup>218</sup> and the reasonable person. Courts often ask whether the accused acted as the reasonable person would have.<sup>219</sup> This practice has its dangers<sup>220</sup> but one may observe that this practice serves a normative (legal) and factual function. Inherent in the question of whether the accused acted as the reasonable person are two questions, the first of which is often not properly appreciated:

- 1) What would the reasonable person do? This is the normative question and sets the standard in law required of the accused.
- 2) Did the accused do what the reasonable person would do? This is the question of fact as to whether the accused lived up to the standard in law, required of him, decided in the first question.

The normative judgment that must be made is open to re-evaluation even in the case of possibly the most familiar defence of all: private defence. A close reading of the judgment

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<sup>218</sup> Referring to the question, under wrongfulness/unlawfulness, of whether to recognise a legal duty to act, but which seems applicable to all questions of wrongfulness/unlawfulness, Ackermann and Goldstone JJ, for the unanimous Constitutional Court, stated: 'The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court' (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 42.

<sup>219</sup> *S v Goliath* 1972 (3) SA 1 (A) 26; *S v Peterson* 1980 (SA) SA 938 (A); *S v Motleleni* 1976 (1) SA 403 (A) 406C; *S v Ntuli* 1975 (1) SA 429 (A) 436; *S v De Oliveira* 1993 (2) SACR 59 (A) 63; *R v Patel* 1959 (3) SA 121 (A) 123; *R v Jack Bob* 1929 SWA 32. See also J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 207.

<sup>220</sup> Primarily, in respect of questions of fact, of conflating the prospective objective test of the reasonable person applicable in the context of negligence, with the ex post facto objective test appropriate to questions of unlawfulness (JC Van Der Walt & JR Midgley *Principles of Delict* (2005) 71; J Neethling, JM Potgieter & PJ Visser *Law of Delict* 5 ed (2006) 141–2). In the context of negligence, the reasonable person knows only what he/she would know given his/her circumstances (*S v Goliath* 1972 (3) SA 1 (A) 11; *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A)). This is because we must locate the reasonable person in the circumstances of the accused and the reasonable person cannot know what the circumstances do not permit him/her to know. If, by virtue of the accused's circumstances into which one hypothetically places the reasonable person, the reasonable person could not know that, for instance, the gun that is pointed at him/her is only a toy, we must conclude that the reasonable person may well think he/she is under attack. It would therefore be reasonable for the accused to think that he/she is under attack. The test under unlawfulness is significantly different by virtue of the perspective that one is required to adopt. Unlawfulness is determined by reference to reality – whether the accused was, in fact, under attack. It does not matter how reasonable, from a prospective perspective, it may be for the accused to believe he/she was under attack. The question, under unlawfulness, is whether he/she was, in fact, under attack. Therefore, the test of the reasonable person in the context of unlawfulness is liable to error and must, where it is relied on, be employed bearing in mind the appropriate perspective – that the reasonable person for the purposes of unlawfulness, somehow, knows everything (at least all the material facts; see J Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ).



in *Engelbrecht*<sup>221</sup> reveals a re-evaluation of the normative question and of the standard, in law, required of the accused in that case. Satchwell J in that case, dramatically developed the law when she recognised that a reasonable person may respond against an 'inevitable' attack,<sup>222</sup> rather than what the law had previously required: an imminent or commenced attack.<sup>223</sup>

Unlawfulness is therefore open to development according to the legal convictions of the community as informed by the Constitution, and this requires that a normative judgment must be made in every case as to whether the accused did what is right.

#### No exceptions – not excluded by strict liability

As mentioned above,<sup>224</sup> unlawfulness is a requirement for all offences, and while our law does recognise strict liability offences<sup>225</sup> as a rare exception,<sup>226</sup> absolute liability, which would exclude the requirement of unlawfulness is unknown in our law.<sup>227</sup> Given that unlawfulness gives expression to the rights in the Constitution, and given that the Constitution is the supreme law,<sup>228</sup> it is doubtful that absolute liability could ever be recognised in our law. Absolute liability would require that conduct, which is permitted under some right or rights in the Constitution, is nevertheless penalised under the criminal law. This would amount to an obvious limitation upon a right or rights in the Bill of Rights and would need to be reasonable and justifiable in an open and democratic society.<sup>229</sup> In addition, it would have to be a law of general application,<sup>230</sup> which is, at least, in tension with the purpose of justifications: to allow for exceptions based on the particular circumstances.

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<sup>221</sup> *S v Engelbrecht* 2005 (2) SACR 41 (WLD).

<sup>222</sup> *Ibid* para 349.

<sup>223</sup> This is not readily apparent from the judgment and requires a close analysis of the decision in which questions of law and fact are properly separated. See J Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ).

<sup>224</sup> See above.

<sup>225</sup> See reference to 'liability offences' above.

<sup>226</sup> J Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4 ed vol 1 (2011) 453.

<sup>227</sup> *Ibid*.

<sup>228</sup> Section 2 of the Constitution.

<sup>229</sup> Section 36(1) of the Constitution.

<sup>230</sup> *Ibid*.

PART IV  
CAPACITY

## Chapter 09 Responsibility: Introduction

### Introduction

Questions of responsibility have manifested most directly under the requirement of capacity, but also under the closely associated requirement of voluntariness. The discussion that follows will therefore focus on the requirements of capacity and voluntariness.

### Capacity

Rumpff<sup>231</sup> stipulates the functions which are possessed by 'normal'<sup>232</sup> people and which render them responsible for their conduct:

Two psychological factors render a person responsible for his voluntary acts: firstly, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil, (insight) *before* committing the act.<sup>233</sup>

As indicated above, the South African criminal law requirement of capacity is that the accused must, at the time of the offence, have been able to appreciate the wrongfulness of his/her conduct, and to act in accordance with that appreciation of wrongfulness.<sup>234</sup> The capacity to appreciate the wrongfulness of one's conduct is known as the capacity for insight. The capacity to act in accordance with an appreciation of wrongfulness is known as the capacity for self-control. Capacity

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<sup>231</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967).

<sup>232</sup> 'Society—and the jurist—proceed on the assumption that a "normal" person is criminally responsible. Thus Gardiner and Lansdown state in their work *South African Criminal Law and Procedure* 6th ed. vol. 1. p. 87 "Where through disease or defect of intellect a person has been deprived of the power of bringing to bear upon his conduct the functions of a normal rational mind, there can be no criminal responsibility.'" (ibid 6 para 2.5)

<sup>233</sup> Ibid 45 par 9.30 original emphasis.

<sup>234</sup> J M Burchell *South African Criminal Law & Procedure: General Principles* Vol 1 (1997); Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967); Burchell *Principles of Criminal Law* 5th ed (2016) 251. These capacities are derived from the insanity plea contained in s 78 of the Criminal Procedure Act 51 of 1977 (Ronald Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 200).

is present only when the accused possessed both capacities. That is, capacity requires the ability both to appreciate the wrongfulness of one's conduct, *and* the ability to act in accordance with an appreciation of the wrongfulness of one's conduct.

### Recognised Grounds of Incapacity

South African criminal law now accepts four sources or bases for incapacity: youth,<sup>235</sup> mental illness or defect,<sup>236</sup> intoxication,<sup>237</sup> and severe emotional stress.<sup>238</sup> The defence of incapacity due to mental illness or defect is known as the pathological incapacity defence. The defence of incapacity due to severe emotional stress has come to be known as the defence of non-pathological criminal incapacity.<sup>239</sup>

### Conclusion

In the chapters that follow I will critically analyse each of the two capacities required (chapters 14 & 15) and turn to critically consider the sources for incapacity accepted in our law (chapters 16 & 17). The conclusion at every step is that it is virtually impossible to say what our law actually is and that it is difficult, within the existing framework, to suggest what it ought to be.<sup>240</sup>

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<sup>235</sup> Children under the age of 10 years are irrebuttably presumed to lack criminal capacity and cannot be prosecuted for any offence (s7(1) Child Justice Act 75 of 2008). Children between 10-14 years of age are rebuttably presumed to lack criminal capacity – the state may rebut this presumption (s7(2) *ibid*).

<sup>236</sup> s 78 of the Criminal Procedure Act 51 of 1977.

<sup>237</sup> *S v Chretien* 1981 (1) SA 1097 (A).

<sup>238</sup> *S v Wiid* 1990 (1) SACR 561 (A); *S v Eadie* 2002 (1) SACR 663 (SCA).

<sup>239</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 26; Burchell *Principles of Criminal Law* 5th ed (2016) 328.

<sup>240</sup> For anyone looking for possible solutions, please see James Grant 'The Responsible Mind in South African Criminal Law' – forthcoming shortly to be published by Juta.

## Chapter 10 Capacity to Appreciate the Wrongfulness of One's Conduct

### Introduction

Our law has not yet decided what it means by the term 'appreciation of wrongfulness'.<sup>241</sup> It is not clear whether it refers to a moral standard or to a legal standard. If it refers to a moral standard, then it is not clear to what or whose standard of morality it refers. If it is a legal standard, it is not clear whether it refers to the general prohibition of particular conduct (*illegality*), or to whether, though it is generally prohibited, it remains in the specific circumstances, *unlawful*.

The case of James Hadfield in 1800 offers the clearest and most common example of implications of these different possible interpretations.<sup>242</sup> Hadfield, who had suffered head trauma, came to believe that he could save the world if he died a martyr. In his mind, suicide was forbidden as a sin. He therefore shot at King George III, in the knowledge that an attempt on the King's life was a capital offence for which he expected to be executed. He would therefore die a martyr and save the world. Clearly Hadfield knew that his conduct was illegal, but his purpose was to save the world, and thus his objective was ultimately, at least from his perspective, moral. Hadfield was found not guilty.

Hadfield's case poses the epitome of the dilemma: he knew it was illegal; indeed it was because it was illegal that he did it. Yet he believed he was acting morally, that he was saving the world. Our intuitions seem to indicate that it does not seem fair to punish Hadfield.<sup>243</sup> His case illustrates the importance of some clarification being given to the phrase 'knowledge/appreciation of wrongfulness', since if a legal interpretation is given to the phrase, if (and when) another Hadfield confronts us, he will be responsible, whereas under a moral interpretation, he would not be responsible.

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<sup>241</sup> Snyman *Criminal Law* 6th ed (2014) 167; A Kruger *Mental Health Law in South Africa*. (1980); Burchell *Principles of Criminal Law* 5th ed (2016) 261. As discussed below (see on page 92), English law is guided by one obiter (*R v Windle* [1952] 2 All ER 1 1 & 2). The position in the US is not yet resolved (Wayne R. LaFave *Criminal Law Abridged* 4 ed (2003) 384).

<sup>242</sup> F. McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 20-1; Slovenko *Psychiatry and Criminal Culpability* (1995) 47-8; Burchell *Principles of Criminal Law* 5th ed (2016) 287-8.

<sup>243</sup> This intuition appears to underlie the prominence of the case in discussions on the matter.

### Does it matter what it means?

The ability to appreciate the wrongfulness of one's conduct is central to all of capacity. It is not only central to the requirement that an accused must be able to appreciate the wrongfulness of his/her conduct. It is also central to the capacity for self-control: the capacity to *act* in accordance with an appreciation of wrongfulness. Thus any lack of clarity or incoherence on this matter will permeate both sub-requirements of capacity. Some<sup>244</sup> have expressed the view that this question is of little if any practical importance because virtually all cases of incapacity due to mental illness/defect are decided based upon the second leg of capacity: the capacity to act in accordance with an appreciation of wrongfulness.<sup>245</sup> However, we cannot pretend that we need not finally determine what we mean by an 'appreciation of wrongfulness' because few, if any, cases have turned on whether an accused had the capacity to appreciate the wrongfulness of his/her conduct.<sup>246</sup> In order to judge whether an accused had the capacity to act in accordance with an appreciation of wrongfulness, we must be clear what we mean by the term. Regrettably, it would seem that the law is not at all clear on what it requires.

### M'Naghten Rules

The M'Naghten rules themselves, which are at the foundation of the English, US and South African formulations of the wrongfulness element, are somewhat ambiguous on what is meant by the requirement of knowledge of wrongfulness. There is a clear contradiction in the rules – perhaps as a prelude to the confusion that would follow:

At first, the judges state:

[W]e are of opinion that notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, *he is nevertheless punishable,*

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<sup>244</sup> For instance Snyman *Criminal Law* 6th ed (2014) 168.

<sup>245</sup> Ibid. Snyman's qualification regarding mental illness or defect does not seem to restrict the general logic of his argument to pathological incapacity only. As noted (see text on page 86) few, if any cases of any claim to incapacity have turned on the first leg: the capacity to appreciate the wrongfulness of one's conduct.

<sup>246</sup> The judgement in *Wiid* is a notable exception where some doubt was expressed by Goldstone AJA as to the accused's capacity to appreciate the wrongfulness of her conduct (*S v Wiid* 1990 (1) SACR 561 (A)). However, the court seems to finally conclude the matter based on a lack of capacity for self-control (and/or involuntariness).

*according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.*<sup>247</sup>

Here the rules appear to offer a legalistic approach - if the accused knew he was offending the law, he is punishable. However, they go on to stipulate the core of the M'Naghten test and then appear to contradict the notion that knowledge of wrongfulness refers only to illegality:

[I]t must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.... *If the accused was conscious that the act was one that he ought not to do and that act was at the same time contrary the law of the land, he is punishable ...*<sup>248</sup>

Here knowledge of wrongfulness is given another meaning: that an accused would only be punishable if he knew his act was contrary to law (the legalistic approach), and that '*the act was one that he ought not to do*'. The rules themselves contain an internal conflict.<sup>249</sup> They therefore offer no guidance except perhaps a warning to expect confusion to follow.

### Moral Standard?

The law regarding criminal capacity in South Africa, together with several of the prominent tests for criminal responsibility in the US,<sup>250</sup> have opted for the word 'appreciation' instead of the word 'knowledge' of the M'Naghten rules. This may be taken to mean that a more emotional

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<sup>247</sup> Emphasis added; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 8.

<sup>248</sup> Emphasis added; *ibid*.

<sup>249</sup> Smith, Laird, Ormerod and Hogan do not appear to note this as a contradiction (David Ormerod *Smith & Hogan Criminal Law* (2005) 263; J.C. Smith, K. Laird, D. Ormerod *et al. Smith and Hogan's Criminal Law* (2015) 301ff) while it seems plain to LaFare (*Criminal Law Abridged* 4 ed (2003) 384).

<sup>250</sup> The American Law Institute Model Penal Code: 'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to *appreciate* the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.' (American Law Institute *Model Penal Code* (1962) § 4.01 ).

The federal test: a) It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense. (18 U.S.C. § 17)

understanding is required, and therefore, that the requirement of appreciation of wrongfulness is a reference to a moral standard.<sup>251</sup>

The problem here is somewhat trite: morality is complex, multilayered and relative. Of course, individual morality may differ from that of the community within which s/he lives, which may in turn differ from the morality of the larger society within which both are located.

Discrete groups within societies may maintain their own notions of right and wrong (conduct norms<sup>252</sup> or focal concerns<sup>253</sup>) which are in conflict with those of the dominant culture. Research on homicidal violence by Wolfgang prompted him to note:

Our analysis implies that there may be a subculture of violence which does not define personal assaults as wrong or antisocial; in which quick resort to physical aggression is a socially approved and expected concomitant of certain stimuli.<sup>254</sup>

Control theories in criminology represent the prospect that while individuals may generally be committed to rules, they may employ neutralisation techniques to strip their conduct of wrongfulness.<sup>255</sup> Such techniques may include denial of responsibility, condemning the agents of social-control, and an appeal to higher loyalties.<sup>256</sup> It is even possible that no one does anything

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<sup>251</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 262. It appears from the Rumpff Commission Report that 'appreciate' was meant as a cognitive criteria, to refer to an accused's ability to understand the difference between right and wrong, (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) paras 9.30-9.1), where cognition 'include[s] perceiving, thinking, reasoning, remembering, insight, conceiving' (ibid para 9.). The American Law Institute's Model Penal Code adopts the word 'appreciate' in contradistinction to the previous 'know' which indicates a departure from a strict cognitive element to take account of an accused's personality and emotional state at the relevant time (D. Hall *Criminal Law and Procedure* (1992) 253). It may also be said to relate to an accused's conative capacities (R. Sadoff 'Legislation in the United States' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 308).

<sup>252</sup> Thorsten Sellin *Culture, Conflict and Crime* Vol Bulletin no. 41 (1938).

<sup>253</sup> Walter Miller 'Lower Class Culture as Generating Milieu of Gang Delinquency' (1958) 14 *Journal of Social Issues*.

<sup>254</sup> M.E. Wolfgang *Patterns in Criminal Homicide* (1958/1975).

<sup>255</sup> Stephen E Brown, Esbensen Finn-Aage & Gilbert Geis *Criminology: Explaining Crime and Its Context* 4 ed (2001) 349.

<sup>256</sup> GM Sykes & D Matza 'Techniques in Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review*.



that he or she can truly appreciate to be wrong. The research of Donald McCabe in 1992<sup>257</sup> seems to indicate that people may never consider their conduct to be wrongful since they justify their conduct by reference to neutralisation strategies – they consider their conduct to be somehow justified, entitled or excused. The notion that he was somehow exempt from ordinary morality by virtue of a higher purpose was what permitted Dostoevsky's Raskolnikov to murder in *Crime and Punishment*.<sup>258</sup>

There is, of course, no universally accepted definition of 'wrong' - even in philosophy. While many may regard Kant's categorical imperative as the clearest or most persuasive expression of what is right and wrong, there exists other compelling notions. For Kant, conduct is right if one would want it to set a universal law according to which everyone should act,<sup>259</sup> and that one should never treat another person as a means to an end, but as an end.<sup>260</sup> Perhaps most prominent amongst these alternatives is utilitarianism - that right is defined in terms of what will produce the greatest good for the greatest number.<sup>261</sup>

In psychology, Kohlberg drew on the philosophy of Kant,<sup>262</sup> and developed a theory of moral development which may explain much of the complexity of moral reasoning. This theory has arguably dominated concerns with morality within psychology since the late 1960's and it still dominates the field in the guise of neo-Kohlbergian theory.<sup>263</sup> Even if I understand that what I am doing is wrong on one level, I may consider it to be right on another level. I might steal, knowing that it is wrong to violate another's property rights, or to break the formal law of the land, but still think I am entitled and right because I am poor and, though I have tried, I am unable to care for

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<sup>257</sup> Donald L. McCabe 'The influence of situational ethics on cheating among college students.' (1992) 62 *Sociological Inquiry* reported in Neuman *Social Research Methods: Qualitative and Quantitative Approaches* 4th ed (2000) 22.

<sup>258</sup> Fyodor Dostoevsky *Crime and Punishment* (1866/1987).

<sup>259</sup> Emmanuel Kant *Groundwork of the Metaphysics of Morals* (1785) 421.

<sup>260</sup> *Ibid* 429.

<sup>261</sup> John Stuart Mill *Utilitarianism* (1863).

<sup>262</sup> At least, through the work of Piaget (M. Killen & J. Smetana *Handbook of Moral Development* (2005) 158ff; W. Crain *Theories of Development: Concepts and Applications*. 3rd ed (1992) 118-36; T. Monchinski *Critical Pedagogy and the Everyday Classroom* (2008) 73).

<sup>263</sup> S. J. Thoma 'Research on the Defining Issues Test' In *Handbook of Moral Development* edited by M Killen and Smetana (2006). 'The most extended explication of the developmental perspective [comprising most psychological explanations of morality] is the theory of moral judgment advanced by the late Harvard psychologist Lawrence Kohlberg ...' (L. S. Wrightsman, M. T. Nietzel & W. H. Fortune *Psychology and the Legal System* 3 ed (1994) 52).

myself and those who are dear to me. This is the conflict that was set by Lawrence Kohlberg<sup>264</sup> in the now classic *Heinz* dilemma:

In Europe, a woman was near death from a special kind of cancer. There was one drug that the doctors thought might save her. It was a form of radium that a druggist in the same town had recently discovered. The drug was expensive to make, but the druggist was charging 10 times what the drug cost him to make. He paid \$400 for the radium and charged \$4 000 for a small dose of the drug. The sick woman's husband, Heinz, went to everyone he knew to borrow the money and tried every legal means, but he could only get together about \$2 000, which is half of what it cost. He told the druggist that his wife was dying, and asked him to sell it cheaper or let him pay later. But the druggist said, 'No, I discovered the drug and I'm going to make money from it.' So having tried every legal means, Heinz gets desperate and considers breaking into the man's store to steal the drug for his wife.<sup>265</sup>

Kohlberg's research showed that people reason about moral problems at different levels of cognitive complexity. From the responses received to moral dilemmas such as that of Heinz, he constructed a six-stage theory of moral reasoning subdivided by three levels. Lower stages reflect the reasoning of a child's initial morality in which the orientation is egocentric and dependent upon others. Later stages become less egocentric and more independent.<sup>266</sup>

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<sup>264</sup> L. Kohlberg 'Development of Moral Character and Moral Ideology' In *Review of Child Development Research* edited by M. Hoffman and L. Hoffman (1964); L. Kohlberg 'Moral Development' In *International Encyclopedia of the Social Sciences*. 489-94 (1968); L. Kohlberg 'Stage and Sequence: The Cognitive Developmental Approach to Socialisation' In *Handbook of Socialization, Theory and Research*. edited by D. A. Goslin (1969); L. Kohlberg & K. Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment*. edited by A. Colby and L. Kohlberg (1987).

<sup>265</sup> Kohlberg & Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment*. edited by Colby and Kohlberg (1987) 1; L. Kohlberg & D. Candee 'The Relationship of Moral Judgment to Moral Action' In *Essays on Moral Development* edited by L. Kohlberg (1984).

<sup>266</sup> Due to its prominence (see footnote 263) a brief summary of the theory follows: Each level comprises two stages which describe a sequence of moral development within each level. Morality in level one is referred to as 'preconventional/premoral morality' in which morality resides externally, is imposed from above and is dependent upon consequences. The first stage (stage one) within level one is the obedience and punishment orientation (or heteronomous morality) in which observation is compelled by the threat of punishment. The second stage (stage two) within level one is the stage of individualism, instrumental purpose and exchange and is determined by what serves the interests of the self; how one can attain reward as opposed to avoid punishment.

Kohlberg's theory reveals that something might be right on one level, such as that it is in the interests of one's family, and yet wrong on another level, such as that if one were caught one may be punished. Indeed, it may be right and wrong even within the same level of reasoning – based on different reasons. For instance, it might be right to steal to save one's wife, but wrong because one may dishonour one's family, or be unable to provide further for them if one is caught and punished.<sup>267</sup> Obeying the law may be motivated by a desire to avoid punishment, maintain law and order, or to observe someone's human rights.

Consider the real life dilemma of unemployed Joseph Coyle who found \$1.2 million lying in bags on a street. The bags had fallen out of a security truck. Coyle became manic: he gave \$900 000 away, went on a spending spree and hid \$105 000 in his boots. Diagnosed as suffering bi-polar disorder, he was found not guilty by reason of pathological incapacity (insanity). He had been unable to decide whether it was right or wrong to return the money. For him, there were two wrongs and two rights - it was both wrong and right to return the money, and wrong and right to keep it.<sup>268</sup>

The point is that it makes little sense to speak of whether a person can appreciate the wrongfulness of their conduct. The person may very well appreciate that it is wrong, but also

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The second level is referred to as the level of conventional/role conformity morality in which moral values reside in performing the right role and maintaining the social order. The first stage within this level (stage three) is that of mutual interpersonal expectations, relationships and interpersonal conformity (alternatively referred to as the good-boy/good-girl) orientation in which morality is determined by an attitude of approval seeking. The second stage within level two (stage four) is that of the social system and conscience (or authority and social-order-maintaining) orientation which is directed by a sense of the value for maintaining the social system as a duty.

Level three is the level of postconventional/principled morality in which individuals reason upon the basis of principles underlying rules and laws. Morality becomes internal and autonomous. The first stage of level three (stage five) is that of social contract or utility and individual rights in which norms of right and wrong are defined in terms of laws or institutionalised rules for their apparent rational basis. The second stage of level three (stage six) is the morality of universal ethical principles in which morality is directed by self-chosen ethical principles which are assumed to found the law, but which predominate where the law conflicts with these personal principles (Kohlberg & Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment*. edited by Colby and Kohlberg (1987); James Grant 'Kohlberg's Theory of Moral Reasoning' In *Developmental Psychology* edited by Derek Hook, Jacki Watts and Kate Cockcroft (2002)). Stage six's existence as a separate stage above and beyond the scope of stage five is, however, questionable (Kohlberg & Kauffman 'Theoretical Introduction to the Measurement of Moral Judgment.' In *The Measurement of Moral Judgment*. edited by Colby and Kohlberg (1987)).

<sup>267</sup> Reasons both ways here are notably family based and would probably fall within stage three reasoning. See footnote 266.

<sup>268</sup> Slovenko *Psychiatry and Criminal Culpability* (1995) 72.

appreciate that it is right – on another level – upon which basis s/he decides to operate. Even at its most abstract level, one must recognise that there may well be a vast difference between what any individual understands/appreciates to be wrong by society's standards, and his/her own.<sup>269</sup>

To the extent that the test of capacity is subjective,<sup>270</sup> if the term 'appreciation of wrongfulness' is regarded as a moral standard, the test becomes virtually ineffectual. It may reduce to asking whether an accused could appreciate that what he or she is doing is morally wrong. Considering that it is entirely possible that no one ever truly appreciates – or even 'knows' – at every (moral) level, that what they are doing is wrong, a moral standard may offer no standard at all – or at least, no standard against which anyone would appear responsible.

It would seem therefore that some objectivity must be introduced into the standard against which the criminal law tests responsibility. We must consider whether a legal standard would not solve the problem.

### Legal Standard?

Possibly the most forceful argument in favour of a legal interpretation was made in *Windle* in which Lord Goddard CJ pronounced:

Courts of law can only distinguish between that which is in accordance with the law and that which is contrary to law ... The law cannot embark on the question and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law...

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<sup>269</sup> *R v Chaulk* (1991) 1 CRR 1 (SCC); Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 43. See also the case of *Stapleton* which held that the ability to understand the difference between right and wrong may be understood as whether the accused could understand this distinction as a reasonable person would. This is consistent with the ultimate standard proposed by Grant (see James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012)). However, to the contrary, the *Stapleton* court also held that the standard may sometimes be whether the accused could understand that his/her conduct is prohibited in law (*Stapleton v R* (1952) 86 CLR 358 374-5).

<sup>270</sup> Though at least the veracity of the claim will be determined by reference to objective considerations (*S v Eadie* 2002 (1) SACR 663 (SCA)).

In the opinion of the court there is no doubt that in the M'Naghten Rules 'wrong' means contrary to law and not 'wrong' according to the opinion of one man or of a number of people on the question whether a particular act might or might not be justified.<sup>271</sup>

This statement however has only guiding force even in England because it was made obiter.<sup>272</sup> The argument made by Goddard CJ is compelling. It may be supplemented with the argument that a legal interpretation sets a concrete standard, which would permit for certainty.<sup>273</sup> Furthermore that a moral interpretation would prevent the criminal law from holding an accused accountable whose conduct was pursued as a personal moral project.

Legal norms are binding even though they may not be regarded as being buttressed by a moral norm. This is the reason why a person may be legally culpable even when he does not feel that he has done anything blameworthy. People who regard their private religious, political or moral convictions as more important than the provisions of the law and who knowingly transgress these provisions, cannot escape liability on the ground of their personal convictions.<sup>274</sup>

This approach may fit neatly with the acceptance in South African law of the defence of ignorance of the law,<sup>275</sup> contrary, in general, to the English<sup>276</sup> and US<sup>277</sup> law. Mistakes of fact and mistakes relating to the factual basis of unlawfulness had long been recognised in our law.<sup>278</sup> However, in 1977 our Appellate Division<sup>279</sup> recognised that mistakes or ignorance of the law (the abstract prohibition) would be treated the same as mistakes of fact. Thus, if appreciation of wrongfulness was interpreted to require knowledge of the abstract prohibition, capacity for this would integrate neatly.

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<sup>271</sup> *R v Windle* [1952] 2 All ER 1 1 & 2.

<sup>272</sup> An inessential component of a judgment which does not form part of the reasons for the judgment (*obiter dictum*) and is therefore not binding on other courts as precedent.

<sup>273</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 261.

<sup>274</sup> Snyman *Criminal Law* 6th ed (2014) 148. Regrettably Snyman also expresses the contrary view elsewhere (ibid 167).

<sup>275</sup> *S v De Blom* 1977 (3) SA 513 (A). This case recognised the defence of ignorance or mistake relating to the abstract prohibition.

<sup>276</sup> David Ormerod *Smith & Hogan Criminal Law* 12th ed (2008) 318; Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 445.

<sup>277</sup> LaFave *Criminal Law Abridged* 4 ed (2003) 290; *Posters 'N' Things, Ltd. v. United Satets* 511 U.S. 513, 114, S.Ct. 1747, 128 L.Ed.2d 539 (1994).

<sup>278</sup> *R v Mbombela* 1933 AD 269; *S v De Oliveira* 1993 (2) SACR 59 (A).

<sup>279</sup> *S v De Blom* 1977 (3) SA 513 (A).

Nevertheless, the problem of Hadfield's case must be recalled.<sup>280</sup> On a purely legal standard, Hadfield would be punished and that simply does not seem right. Snyman himself shares this intuition – contrary to the view just quoted.<sup>281</sup> The neat fit between the requirement of knowledge of the abstract prohibition and the capacity for it does not solve the problem. Hadfield not only had the capacity for this, he actually knew it was proscribed in law. Thus it seems that to construe appreciation of wrongfulness to refer to a legal standard is inappropriate, and the opposite – a moral standard also seems inappropriate. At least, an unqualified moral standard seems inappropriate not only because it lacks clarity and certainty, but also the degree of objectivity that is required to make it a standard. Is there a standard that provides all that is required?

One final possibility should be observed. It may be argued that the standard should not relate to the abstract prohibition but to its unlawfulness.<sup>282</sup> That is, it should not refer to an abstract general standard but rather take account of the actual situation in which the accused finds him/herself (unlawfulness). While there exists authority for the proposition that wrongfulness refers to the abstract prohibition,<sup>283</sup> it may be understood as a reference to unlawfulness; indeed, even the M'Naghten rules may be understood to have meant this.<sup>284</sup>

Murder, for instance, is prohibited as the *unlawful* intentional killing of another human being. Unlawfulness forms a requirement for liability and relates to whether, in a given situation, an intentional killing of another human being may be permitted as *justified* and therefore lawful. For instance, it is well recognised that, subject to specific requirements, one may intentionally kill

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<sup>280</sup> Discussed above on page 85.

<sup>281</sup> Snyman *Criminal Law* 6th ed (2014) 167.

<sup>282</sup> In the sense described above (on page 85).

<sup>283</sup> In the M'Naghten rules (see footnote 247) and *Windle* (see footnote 271).

<sup>284</sup> Slovenko argues that the M'Naghten rules do not require that an individual know right from wrong generally: '... it asks whether he knew what he was doing was wrong or, perhaps, thought he was right in doing it—that is, using the example of self-defense, whether he was under a delusion that he was legitimately acting in self-defense.' (Slovenko *Psychiatry and Criminal Culpability* (1995) 20). He bases his argument on the requirement within the M'Naghten rules, in reference to 'partial delusions', that the lawbreaker 'must be considered in the same situation as to responsibility as if the act in respect to which the delusion exists were real' (ibid). Correctly he notices that this requirement appears to be asking whether the accused knew that s/he was without a ground of justification - that is had no knowledge of unlawfulness.

In a previous edition of *Principles of Criminal Law*, Burchell even makes reference to the test as 'the capacity to appreciate the *unlawfulness* of conduct' (Burchell *Principles of Criminal Law* 3rd Revised ed (2006) 443 emphasis added), though it would appear that he meant it as 'appreciation of illegality' (per *De Blom (S v De Blom 1977 (3) SA 513 (A))*).

another human being in self defence, particularly in defence of one's life.<sup>285</sup> This is ultimately judged by the standard of the legal convictions of the community as informed by the values in the Constitution.<sup>286</sup> This may bridge the excessive relativity of a purely moral standard and avoid the undesirable consequences in cases such as Hadfield's. It sets the standard as an objective moral standard – that of the society within which one lives. As Burchell notes, '[f]ew would dispute that the criminal law, both common and statutory law, should reflect the values and consensus of society.'<sup>287</sup>

However this standard is determined objectively – as a question of law and fact<sup>288</sup> – based on an *ex post facto* analysis of facts. The *ex post facto* analysis may include facts of which the accused was mistaken and even facts that s/he cannot possibly have known, and certainly facts which the accused cannot be expected to know.<sup>289</sup> For instance, it remains unlawful to kill someone in self-defence where they were pointing a gun at you and told you they were going to shoot you, where it transpires that the assailant's gun was a toy – a carefully constructed replica gun. Therefore, though this standard is a normative standard and takes account of the circumstances of the accused, its perspective is one that is independent of what may, in fairness, be expected of any particular accused. It would ask whether an accused had the capacity to know/appreciate a standard that is determined by factors that the accused may be unable to know/appreciate. It is therefore self-contradictory, and would set an incoherent standard. It does not make sense to ask whether an accused could know that it was unlawful even if it would be unlawful based on what s/he could not know.

## Conclusion

An appreciation of wrongfulness may therefore refer to some standard of immorality, to the abstract prohibition of conduct, or to unlawfulness. Nevertheless, our law has, any the face of all of these options, adopted none. Yet none of these appears entirely suitable. In this state and from

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<sup>285</sup> *R v Zikalala* 1953 (2) SA 568 (A); *R v K* 1956 SA 353 (A); *R v Patel* 1959 (3) SA 121 (A); *S v Jackson* 1963 (2) SA 626 (A)

<sup>286</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Clarke v Hurst NO* 1992 (4) SA 630 (D); *S v Chretien* 1981 (1) SA 1097 (A); *S v Gaba* 1981 (3) SA 745 (O).

<sup>287</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 116.

<sup>288</sup> James Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ.

<sup>289</sup> *S v Goliath* 1972 (3) SA 1 (A); *S v Ntuli* 1975 (1) SA 429 (A); *S v Motleleni* 1976 (1) SA 403 (A); *S v De Oliveira* 1993 (2) SACR 59 (A).

within this framework, it does not seem inappropriate to observe that not only can one not say what the law is, it is also difficult to suggest what it ought to. There are regrettably no answers here – only unanswered questions.



## Chapter 11: Capacity to Conduct oneself in accordance with an Appreciation of Wrongfulness and Voluntariness

### Introduction

The problem with the requirement of the capacity to conduct oneself in accordance with an appreciation of wrongfulness is to know what this is and what it is not. In particular, how our law does or may distinguish it from the requirement of voluntariness is exceedingly unclear.

The Rumpff Commission report distinguished three categories of human functions:<sup>290</sup>

1. Cognitive (intellectual, mental);
- Conative (volitional - according to which humans are capable of controlling their behaviour by exercising their will); and
- Affective (feelings and emotions).

In the view of the Commission, these functions are generally integrated<sup>291</sup> but sometimes disintegrated under certain circumstances.<sup>292</sup>

It is notable that the M'Naghten rules contain no reference to a conative impediment. The M'Naghten test may be described as a test of ignorance on the basis that disordered defendants are excused for being ignorant of the nature, quality, or wrongfulness of their conduct.<sup>293</sup>

The English law – following M'Naghten - did not and still does not take account of a conative deficit under its pathological incapacity defence. Questions of conative function are dealt with under the requirement of voluntariness – though if a mental disorder is implicated the accused is found to be insane.<sup>294</sup>

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<sup>290</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) paras 9.7 & 9..

<sup>291</sup> Ibid para 9.10.

<sup>292</sup> Ibid paras 9.11-9.29.

<sup>293</sup> Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 28.

<sup>294</sup> *Bratty v Attorney General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523 (psychomotor epilepsy); *R v Kemp* [1957] 1 QB 399 at 407; SHC 18 (arteriosclerosis); *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673 (psychomotor epilepsy).

The Rumpff report,<sup>295</sup> which established the parameters of our pathological incapacity defence, gave expression to a conative deficiency defence (previously in the guise of the irresistible impulse defence).<sup>296</sup>

A necessary question is whether this requirement may be distinguished from voluntariness.

### Logic of this discussion

What follows is a complex discussion which requires some guidance as to what to expect. The logic of the discussion that follows is to attempt to establish what the capacity to conduct oneself in accordance with an appreciation of wrongfulness (the capacity for self-control) means and how it may be distinguished from voluntariness. To achieve this I will:

1. Consider how the capacity for self-control has been described;
2. Consider what we might mean by the requirement of voluntariness;
3. Discuss how the capacity for self-control is supposed to be distinguished from the other conative function requirement (voluntariness) and conclude that it cannot be sustainably distinguished - unsurprisingly, because the concept of voluntariness remains elusive; and
4. Examine the appropriateness of various factors which have been regarded as indicating the presence of conative functioning.

I will conclude that we have resorted to relying on a forbidden meaning of self-control, the concept of voluntariness remains elusive, that there does not appear to be any sustainable basis to distinguish between the capacity for self-control and voluntariness and that only one conative function may be discerned. Furthermore, I will conclude that we must be careful not to confuse this conative requirement with a cognitive requirement, not to obfuscate matters by employing the term 'consciousness', and not to mistake goal-directedness and the absence of a 'trigger' as indicating proper conative functioning.

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<sup>295</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967).

<sup>296</sup> *R v Koortz* 1953 (1) SA 371 (A). Our law had come to recognise that a conative deficiency need not manifest in impulsive conduct (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.90; *S v Kavin* 1978 (2) SA 731 (W); Burchell *Principles of Criminal Law* 5th ed (2016) 291).

### Capacity for self-control defined?

In formulating the requirements for responsibility, the Rumpff Commission report indicates what should be understood by the requirement of capacity for self-control:

By self-control is to be understood a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive.<sup>297</sup>

One may recall that the irresistible impulse test was dropped in favour of this new conative test of 'capacity to act in accordance with an appreciation of wrongfulness' because our law does not require sudden impulsive conduct.<sup>298</sup> However, this understanding has certainly prevailed in conceptions of the capacity for self-control as conduct that an accused could not resist<sup>299</sup> or was unable to refrain from committing.<sup>300</sup> This is also the conception of De Wet and Swanepoel which has been adopted in numerous Appellate Division decisions starting with *Laubscher*.<sup>301</sup> Crucially, the question of whether an accused had capacity for self-control is answered by reference to his/her '*weerstandskrag*' – literally meaning: power of resistance.<sup>302</sup>

Joubert in *Laubscher* stated:

Om strafregtelik aanspreeklik te wees, moet 'n dader onder andere ten tyde van die pleeg van die beweerde misdaad toerekeningsvatbaar wees. Toerekeningsvatbaarheid is derhalwe 'n voorvereiste vir strafregtelike aanspreeklikheid. Die leerstuk van toerekeningsvatbaarheid is 'n selfstandige onderafdeling van die skuldleer, volgens De Wet en Swanepoel *Strafreg* 4de uitg op 110. Om toerekeningsvatbaar te wees, moet 'n dader se geestesvermoëns of psigiese gesteldheid sodanig wees dat hy regtens vir sy gedrag geblameer kan word. Die erkende psigologiese kenmerke van toerekeningsvatbaarheid is:

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<sup>297</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.33.

<sup>298</sup> See footnote 296.

<sup>299</sup> *S v Kavin* 1978 (2) SA 731 (W) 741.

<sup>300</sup> *S v McBride* 1979 (4) SA 313 (W) 319.

<sup>301</sup> *S v Laubscher* 1988 (1) SA 163 (A).

<sup>302</sup> Author's translation. Note however that Burchell and Milton translate this as 'the power to refrain from acting unlawfully' and differently later as 'the capacity for self-control'. (Translation by Jonathan Burchell & John Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 315-6; See footnote 303.)

1. Die vermoë om tussen reg en verkeerd te onderskei. Die dader het die onderskeidingsvermoë om die regmatigheid of onregmatigheid van sy handeling in te sien. Met ander woorde, hy het die vermoë om te besef dat hy wederregtelik optree.

2. Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die *weerstandskrag* (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.

Ontbreek een van hierdie twee psigologiese kenmerke dan is die dader ontoerekeningsvatbaar, bv waar hy nie die onderskeidingsvermoë het om die ongeoorlooftheid van sy handeling te besef nie. Insgelyks is die dader ten spyte daarvan dat hy wel die onderskeidingsvermoë het tog ontoerekeningsvatbaar waar sy geestesvermoë sodanig is dat hy nie die *weerstandskrag* het nie.<sup>303</sup>

This conception was subsequently adopted and endorsed – for unanimous courts - by Goldstone AJA in *Wiid*<sup>304</sup> and Eksteen JA in *Calitz*.<sup>305</sup>

It would seem therefore that capacity for self-control is understood in our law to refer to whether the accused could resist or refrain from the conduct in question. Yet it is not clear what this means. What is it that must be wrong? One may note from the attempts at defining voluntariness that at least some description of the relevant impediment is offered.

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<sup>303</sup> Emphasis added; *S v Laubscher* 1988 (1) SA 163 (A) 166-7: 'To be criminally liable, a perpetrator must inter alia at the time of the commission of the alleged offence have criminal capacity. Criminal capacity is therefore a prerequisite for criminal liability. The doctrine of criminal capacity is an independent subdivision of the concept of *mens rea*, according to De Wet and Swanepoel *Strafreg* 4th ed at 110. To be criminally accountable, a perpetrator's mental faculties must be such that he is legally to blame for his conduct. The recognised psychological characteristics of criminal capacity are:

'1. The ability to distinguish between right and wrong. The perpetrator has the capacity to distinguish between the wrongfulness or otherwise of his conduct. In other words, he has the capacity to appreciate that his conduct is unlawful.

2. The capacity to act in accordance with the above appreciation in that he has the power to refrain from acting unlawfully; in other words, that he has the ability to exercise free choice as to whether to act lawfully or unlawfully.

If either one of these psychological characteristics is lacking, the actor lacks criminal capacity, eg where he does not have the insight to appreciate the wrongfulness of his act. By the same token, the perpetrator lacks criminal capacity where his mental powers are such that he does not have the capacity for self-control.' (Translation by Burchell & Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 315-6).

<sup>304</sup> *S v Wiid* 1990 (1) SACR 561 (A) 563.

<sup>305</sup> *S v Calitz* 1990 (1) SACR 119 (A) 126.

## Voluntariness Defined?<sup>306</sup>

Cross and Jones comment that voluntariness is best explained by illustration, by what has been recognised as instances of involuntariness.<sup>307</sup> This is also the approach of the American Law Institute.<sup>308</sup> Conditions which have been recognised to produce involuntary movements include sleep and sleepwalking,<sup>309</sup> epileptic seizures,<sup>310</sup> and conduct in which the accused is subjected to overwhelming force,<sup>311</sup> 'blackout',<sup>312</sup> dissociation,<sup>313</sup> cerebral tumour,<sup>314</sup> arteriosclerosis,<sup>315</sup> concussion,<sup>316</sup> hypoglycaemia (low blood sugar),<sup>317</sup> and intoxication.<sup>318</sup> The concept of automatism<sup>319</sup> is often used as a reference to an instance of involuntariness, but it carries an indistinguishable meaning.

Despite the importance of voluntariness, it remains an elusive concept, without definition, at least

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<sup>306</sup> There is an inevitable overlap between this discussion in this context and the earlier discussion in the context of an attempt to introduce a working definition of the concept of voluntariness.

<sup>307</sup> Rupert Cross & Philip Asterley Jones *An Introduction to Criminal Law* 3rd ed (1953) 34-5.

<sup>308</sup> Denno (Deborah W. Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minnesota Law Review* 287) notes that the voluntariness requirement of the US Model Penal Code is not specifically defined, but that four instances of involuntariness are offered to illustrate that voluntariness is 'conduct that is within the control of the actor' (American Law Institute *Model Penal Code* (1985) § 2.01 at 215): '(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual' (ibid § 2.01 (2) at 212).

<sup>309</sup> *R v Dhlamini* 1955 (1) SA 120 (T); *Rex v Nhete* 1941 S.R. 1; American Law Institute *Model Penal Code* (1985) § 2.01.

<sup>310</sup> *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Mkize* 1959 (2) SA 260 (N); Snyman *Criminal Law* 6th ed (2014) 55; De Wet *Strafreg* 4 ed (1985) 17-8; Cross & Jones *An Introduction to Criminal Law* 3rd ed 34-5.

<sup>311</sup> Such as from another stronger person (Clarkson *Understanding Criminal Law* (2005) 36; De Wet *Strafreg* 4 ed (1985) 17-8; JWC Turner *The Mental Element in Crimes at Common Law: The Modern Approach to Criminal Law* 204) or from forces of nature (De Wet *Strafreg* 4 ed (1985) 17-8; Burchell *Principles of Criminal Law* 5th ed (2016) 73).

<sup>312</sup> *R v Du Plessis* 1950 (1) SA 297 (O).

<sup>313</sup> *S v Mahlinza* 1967 (1) SA 408 (A).

<sup>314</sup> *R v Charlson* [1955] 1 All ER 859.

<sup>315</sup> *R v Kemp* [1957] 1 QB 399 at 407; SHC 18.

<sup>316</sup> *R v Smit* 1950 (4) SA 165 (O); *R v Byrne* [1960] (2) QB 396.

<sup>317</sup> *S v Bezuidenhout* 1964 (2) SA 651 (A); *S v van Rensburg* 1987 (3) SA 35 (T).

<sup>318</sup> Involuntary intoxication: *S v Johnson* 1969 (1) SA 201 (AD); Voluntary intoxication: *S v Chretien* 1981 (1) SA 1097 (A).

<sup>319</sup> From the notion of an automaton, that is, something acting as a robot.

in the sense that no one definition enjoys acceptance.<sup>320</sup> Clarkson in his *Understanding Criminal Law* laments that '[t]he real problem ... has been to define the term "voluntary"'.<sup>321</sup> Morse notes:

Although many forensic psychiatrists and psychologists (and lawyers) assume that they possess a good account of involuntariness and of so-called pathologies of the will and volition, no satisfactory and surely no uncontroversial account of any of these topics exists in the psychiatric, psychological, philosophical, or legal literatures. Indeed, most articles on such topics offer no genuine empirical or philosophical theory of the will, voluntariness, or the other central variables in the argument.<sup>322</sup>

The problem is not that no definition has been proposed. It is rather that too many divergent definitions have been proposed. Some appear similar at first but a closer look shows them to be quite different. Many refer to phenomena that are scarcely discernible, or at least require a relationship between components of oneself that would require a strange array of entities inhabiting one's person.

At least five distinct definitions may be discerned from the literature and common law. They are distinguishable primarily by whether they hold voluntariness to be a question of capacity or of fact, and whether the required relationship must exist between the person and his/her will, or between the person's will and his/her conduct.

I will begin with a definition that holds that conduct is voluntary when it is controlled by the accused's will. This definition is not peculiar in our law. It was adopted by Rumpff CJ in *Chretien*.<sup>323</sup> It is also the definition of Austin,<sup>324</sup> and endorsed by Ashworth.<sup>325</sup> It is also Burchell's first offering:

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<sup>320</sup> Scott and Jones *An Introduction to Criminal Law* (3<sup>rd</sup> ed. p. 34-35, cited in *R v Mkize* 1959 (2) SA 260 (N)); Andrew Skeen 'Criminal Law' In *The Law of South Africa* edited by W. A. Joubert and T. J. Scott (1996).

<sup>321</sup> Clarkson *Understanding Criminal Law* (2005) 36.

<sup>322</sup> S. J. Morse 'Causation, Compulsion, and Involuntariness' (1994) 22 *Bulletin of the American Academy of Psychiatry and the Law* 166. Petty observes from a psychological perspective, '... no comprehensive 'meta'-model for understanding self-control deficits as yet exists.' Chris Petty 'The Psychopathology Of Self-Control In The Context Of Criminal Capacity In South African Law' (unpublished Master's dissertation University of Stellenbosch 1998) 10.

<sup>323</sup> *S v Chretien* 1981 (1) SA 1097 (A) 1104.

<sup>324</sup> '[M]ovement of the body which follows our volition' (J Austin *Lectures on Jurisprudence* 3<sup>rd</sup> ed (1869) 426, reported in W. Wilson *Criminal Law: Doctrine and Theory* (1998) 220).

<sup>325</sup> An act is voluntary if it is willed (Andrew Ashworth *Principles of Criminal Law* 2<sup>nd</sup> ed (1997) 96-7).

conduct actually controlled by the accused's will.<sup>326</sup> This would appear to be reconcilable with his conception of voluntariness as conduct '*subject* to the accused's conscious will'.<sup>327</sup> Louw adopts this definition on voluntariness: 'Conduct is voluntary where it is subject to the conscious will of the accused and, therefore, involuntary when not subject to the conscious will.'<sup>328</sup> Denno also endorses this formulation: 'Voluntary acts ...constitute conduct subject to an individual's control'.<sup>329</sup>

But other prominent definitions exist. The second may be regarded as a variation on the first. Whereas the first relates to whether the accused's conduct was – in fact – controlled by his/her will, the second frames this as a question of capacity: could the accused direct his/her conduct in accordance with his/her will? Snyman frames the test as follows: 'whether the person concerned was capable of subjecting his bodily movements or his behaviour to the control of his will.'<sup>330</sup> One problem here is the distinction drawn between the accused and his or her will and conduct. It sets the accused apart from them, as if s/he was something apart from them. This is difficult to conceive.

Visser and Maré offer a slight variation on this: conduct is voluntary where the accused's will is *able* to exercise effective control. Here the will is directly responsible for exercising the capacity to control conduct. This is perhaps the closest conception to that which appears to prevail in respect of capacity for self-control: whether the accused could - was able to - resist or refrain from the conduct in question.<sup>331</sup>

This seems to address the problem inherent in the definition above, which distinguishes the accused from his/her will and conduct. But it proposes that conduct is voluntary even where it did not follow the will of the accused – so long as the will could compel it to obey. This seems to contemplate that, so long again as the will could prevail, conduct should be regarded as voluntary even where it is completely contrary to the accused's will. It seems most odd to call conduct

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<sup>326</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 75. Burchell includes the qualification 'conscious' will. However, as discussed below (under 0 Consciousness on page 115), this concept can only cloud one's understanding. This qualification is therefore overlooked where it is employed.

<sup>327</sup> emphasis added *ibid* 71. This interpretation reads the words 'subject to' as a matter of fact. If this is wrong and it refers instead to a capacity, these instances are reconcilable with the second definition: conduct which could be controlled by the will.

<sup>328</sup> Ronald Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207.

<sup>329</sup> Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review.

<sup>330</sup> Snyman *Criminal Law* 6th ed (2014) 55.

<sup>331</sup> See above under the heading Capacity for self-control defined? on page 99ff.

voluntary where an accused does something which s/he has no reason to do or even has reasons to the contrary, on the basis that s/he would have done so if s/he had a good reason to do so. If an accused can act independently of his or her will, then what is it that guides his/her conduct? Responsibility requires that we do what we want, not that we do what we might want or might do what we want.<sup>332</sup>

Botha JA defined voluntariness in *Johnson*<sup>333</sup> as the ability to make a decision. There are several points of concern with this definition. In addition to what was argued above regarding the capacity for control by the will, which is equally applicable here, there is the problem of the place of decisions in voluntary conduct. Presumably we are concerned with whether the conduct of an accused follows upon what s/he has chosen to do. Even if the accused did choose a particular course of action, that choice would not make his/her conduct voluntary. It is the exercise of the choice that makes it voluntary. Here we find the notion that conduct is voluntary where the accused is able to choose a course of action, even though this choice may exert no control over his/her conduct.

Burchell offers another two possible definitions. His third offering is that conduct is voluntary if an accused controlled his conscious will.<sup>334</sup> This is also evident in his discussion of the impact of *Eadie*<sup>335</sup> – where he states that ‘the voluntariness enquiry is focused on whether the accused *actually did* act voluntarily i.e. control his or her conscious will.’<sup>336</sup> Here we find the notion that conduct is voluntary where the accused – as some entity separate from his/her will – controls his/her will, even though his or her will exerts no control over his/her conduct.

Burchell's fourth definition frames voluntariness as the capacity for what is required in his third offering (control over his conscious will) - that voluntariness consists in the subjective *capacity* of the accused to control his conscious will (i.e. act voluntarily).<sup>337</sup> The problems that plague the

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<sup>332</sup> See James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012).

<sup>333</sup> *S v Johnson* 1969 (1) SA 201 (AD).

<sup>334</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 73. Here Burchell is distinguishing between involuntariness and impossibility, noting that an accused may avail him/herself of the defence of impossibility even where s/he is voluntary – in that s/he has control over his/her conscious will.

<sup>335</sup> *S v Eadie* 2002 (1) SACR 663 (SCA).

<sup>336</sup> Original emphasis Burchell *Principles of Criminal Law* 5th ed (2016) 71.

<sup>337</sup> Emphasis added *ibid* 75. At this point he is in the company of Paizes: “Involuntariness” describes a state in which one is unable to control one’s conscious will.’ (Paizes “Mistake as to the Causal Sequence”



second and third definitions are again applicable here. Responsibility requires that we do what we want, not simply that we do want or that we are able to want.<sup>338</sup>

A fifth possible conception appears in the recent judgment of *S v RM* 2018 (1) SACR 357 (GP) in which the court (Fabricius J) dismissed the defence of non-pathological incapacity with reference to whether there was evidence of “premeditation” [166]. However the question of voluntariness relates, properly understood, to whether an accused could control his or her conduct and not what or whether she or he was thinking. An accused who wishes he had the courage to strike a particular victim, but only does so as part of a subsequent psychomotor epileptic seizure, cannot be regarded as having struck the victim voluntarily.

It appears that voluntariness is plagued by too many divergent definitions and that the concept remains elusive. I turn next to consider whether anything may be gleaned from attempts to distinguish capacity for self-control from voluntariness.

### Distinction?

One possible basis for distinction is in terms of basic foundational elements of liability.<sup>339</sup> Traditionally voluntariness is required as part of the conduct requirement under the wrongful conduct requirement (*actus reus*). On the other hand, capacity for self-control is part of capacity which is traditionally regarded as falling under the wrongful mental state requirement (*mens rea*). Therefore, on this traditional categorical approach, the requirements are distinct because they fall under different elements. The point of this argument would presumably be to attribute different criteria to each. For instance, one may then wish to argue that because voluntariness falls under the *actus reus* that it is a question of objective fact whereas capacity for self-control would be a question of subjective mental state.<sup>340</sup> But it is not clear that even if this is so, that it ought to be so – that is, whether it is correct to attribute these abstract characteristics to the different elements or, if so, whether the requirements have not been miscategorised. That is, if upon analysis of the

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and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 511fn37.)

<sup>338</sup> See James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012).

<sup>339</sup> See under Chapter 1: Overview

<sup>340</sup> On the basis that unlawful conduct is concerned with objective considerations related to the 'act', whereas culpability relates to personal considerations relating to the 'actor' (Snyman *Criminal Law* 6th ed (2014) 31).

two requirements it appears that they cannot be given these divergent attributes, then their categorisation must fall into question rather than illuminating their differences. For instance, Denno considers voluntariness to be a 'crucial first step in establishing *mens rea*',<sup>341</sup> and the US Model Penal Code takes voluntariness to be 'a preliminary requirement of culpability'.<sup>342</sup>

Navsa in *Eadie* states: 'In my view the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement.'<sup>343</sup> Snyman dismisses the argument with contempt:

How can the "mental element", that is, the requirement of culpability form part of the requirement of the act? One has to wonder whether the learned judge understands the basic building blocks of criminal liability – the difference between wrongdoing and culpability, [footnote omitted] or to use the term favoured by the courts, between *actus reus* and *mens rea*.<sup>344</sup>

However it seems that Navsa is quite right – if we understand that, what makes conduct voluntary is that it is controlled by the person's will.<sup>345</sup> It is not peculiar to regard conduct as voluntary where the accused does what s/he wants. This requires a clear relationship and overlap or connection between the accused's conduct and his/her 'mental element'.

Another possible basis for distinction may be the proposition that voluntariness is an *absolute* all-encompassing conative impediment, whereas the incapacity for self-control is *relative* and only relates to some particular act. This distinction may appear from examples of involuntariness where a person is struck on the head and rendered comatose – apparently lacking *all* bodily control and is therefore involuntary.<sup>346</sup> On the other hand, a kleptomaniac or a young child for instance lacks control only in respect of his/her various acts of taking without paying.<sup>347</sup> An attempt may be made to distinguish these scenarios on this basis alone – that the taking without paying shows

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<sup>341</sup> Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 289.

<sup>342</sup> American Law Institute *Model Penal Code* (1962) 1985 2.01 216.

<sup>343</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 58.

<sup>344</sup> Snyman *Criminal Law* 6th ed (2014) 162-3.

<sup>345</sup> See James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012).

<sup>346</sup> *R v Du Plessis* 1950 (1) SA 297 (O).

<sup>347</sup> Burchell 'A provocative response to subjectivity in criminal law' (2003) Acta Juridica 36; Snyman *Criminal Law* 6th ed (2014) 54.

only a lack of capacity to act in accordance with an appreciation of wrongfulness.<sup>348</sup> However it is clear that, by definition, the kleptomaniac or young child acts involuntarily – at least in respect of the act of taking. The kleptomaniac or child *must* be unable to control some part of his/her body with which the conduct in question is committed. The only possible basis left for this distinction to succeed is if voluntariness is an *absolute* all-encompassing conative impediment whereas the incapacity for self-control is *relative* and only relates to some particular act.

However there is no reason to insist that involuntariness must be absolute, while incapacity for self-control must be relative and restricted. We would not say that someone whose leg goes into spasm only lacks capacity for self-control. If my hand is grasped by a stronger person and I am forced by overwhelming force to strike another person with my hand, we say I was acting involuntarily even though I had full control of my body except my arm.<sup>349</sup> Snyman endorses the view that a person, who is chained to a pole and therefore unable to move from the pole, is involuntary.<sup>350</sup> Thus voluntariness clearly requires that conduct be entirely voluntary. If some part – at least any part forming the conduct in question – is involuntary, we regard the accused's conduct as involuntary. Therefore this basis for distinction appears to fail.

The most prominent attempts at distinguishing the two concepts (voluntariness and capacity for self-control) appear in the leading texts on criminal law, Burchell<sup>351</sup> and Snyman.<sup>352</sup>

## Burchell

Burchell argues:

Strictly speaking, there are two stages in assessing the requirement of voluntariness. First, is the accused capable of controlling his or her conscious will, and secondly, was the conduct in question in fact controlled by his or her conscious will? If the first question is answered in the negative there is no need to examine criminal liability any further. The first question involves a subjective [footnote omitted] enquiry into criminal capacity, defined as the ability to appreciate the wrongfulness of conduct (the cognitive element)

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<sup>348</sup> Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica* 36; Snyman *Criminal Law* 6th ed (2014) 156.

<sup>349</sup> See footnote 61.

<sup>350</sup> Snyman *Criminal Law* 6th ed (2014) 161n62.

<sup>351</sup> Burchell *Principles of Criminal Law* 5th ed (2016).

<sup>352</sup> Snyman *Criminal Law* 6th ed (2014) 158.

and the ability to act in accordance with this appreciation (the conative element). It is this latter aspect of capacity which is in issue here.<sup>353</sup>

Burchell's submission appears – at first – simple. Voluntariness concerns whether the accused's conduct was – in fact – controlled by his/her will;<sup>354</sup> whereas capacity for self-control concerns whether the accused had this capacity – that is, did the accused have the ability to control his/her conduct in accordance with his/her will. Voluntariness is a question of fact, whereas capacity for self-control is a question of ability: whether the accused could control his or her conduct. But Burchell's formulation is susceptible to so many variant interpretations that it is not at all clear what Burchell takes each concept to mean<sup>355</sup> and therefore his distinction is most unclear.<sup>356</sup>

Nevertheless, taking Burchell's distinction at face value, is this valid or helpful? On this distinction, it would hold that even though an accused's conduct may be voluntary, the accused may nevertheless have lacked the capacity for self-control. To put it more plainly: the fact that the accused did not control him/herself, does not mean that s/he *could* not control him/herself. However, if conduct was not – in fact – controlled by the accused's will, it is involuntary and the

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<sup>353</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 252.

<sup>354</sup> Discussed as the first of Burchell's definitions of voluntariness *ibid* 71 – see under the heading 0 Voluntariness Defined? on page 34.

<sup>355</sup> As discussed under the heading 0 Voluntariness Defined? particularly on page 34ff.

<sup>356</sup> A closer analysis reveals a perplexing lack of clarity in this distinction and what is meant by either voluntariness and involuntariness, and capacity and incapacity for self-control. It seems that six options are available on Burchell's argument (the second level assumption (discussed below) is italicised):

1. That the accused could control his/her conscious will:
  - a. *His conscious will could control his/her conduct;*
    - i. and his/her conscious will controlled his/her conduct;
    - ii. but his/her conscious will did not control his/her conduct;
  - b. *His conscious will could not control his/her conduct and therefore did not.*
2. That the accused could not control his/her conscious will:
  - a. *His conscious will could control his/her conduct;*
    - i. and his/her conscious will controlled his/her conduct;
    - ii. but his/her conscious will did not control his/her conduct.
  - b. *His conscious will could not control his/her conduct and therefore did not.*

It is unclear what Burchell means by someone controlling their conscious will - it appears to contemplate a plethora of mental phenomena in precarious, if any, relationship with one another - a sort-of multiple personality perhaps. It proposes that I am different from my conscious will and I sometimes control it, whereas sometimes it is controlled by something else. So perplexing is the distinction that Louw refers to the precise pages on which this distinction appears in Burchell and Milton (the previous edition of Burchell (*supra*)) for authority that the two concepts are *indistinct*. (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 211)

accused has no capacity. If the conduct is voluntary – it is controlled by the accused's will and therefore the accused must, necessarily, have this capacity. These two concepts cannot be separated. Why is this? Questions of fact and capacity are not always inter-related, or at least, not identical. But there is a reason why they are so inter-related in this context that they are inter-dependent. It is because one cannot incur liability without voluntariness. The moment voluntariness is absent, the enquiry ends – his or her capacity for self-control becomes irrelevant.<sup>357</sup> Thus actual control is always required and actual control in turn reveals that the accused be able to exert such control. If liability could be imposed for the ability to control one's conduct alone, then this distinction would be worthwhile. However, it is trite law that it cannot – voluntariness is always required.<sup>358</sup>

Burchell also tries a different line.<sup>359</sup> He submits that the two concepts are not equivalent because of the following example:

A starving child of 8 years-of-age, who lives in abject poverty, takes a loaf of bread from a café without paying for it. His conduct is apparently purposive (voluntary) and, if he has been told in school that stealing is wrong, his conduct is accompanied by an appreciation of its wrongfulness (the first part of the capacity test). But does the child have the ability to act, not only in accordance with his conscious will, but also in accordance with the perceived wrongfulness of his conduct?<sup>360</sup>

Thus Burchell proposes that the child acts voluntarily but lacks the capacity for self-control in respect of the theft of the loaf of bread. This example appears to operate on the logic of the distinction traditionally drawn by Snyman, discussed below:<sup>361</sup> Voluntariness is about whether the accused has the capacity to control his physical movements, and capacity for self-control is about whether the accused had the capacity to resist temptations to commit a criminal offense.

Regarding Burchell's example, while Burchell reserves the concept of incapacity for self-control for the conative impediment in respect of the bread, one may as easily use the concept of

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<sup>357</sup> See above.

<sup>358</sup> *S v Johnson* 1969 (1) SA 201 (AD); *S v Chretien* 1981 (1) SA 1097 (A); *R v Kemp* [1957] 1 QB 399 at 407; SHC 18; *R v Schoonwinkel* 1953 (3) SA 136 (C); *R v Victor* 1943 TPD 77.

<sup>359</sup> Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica*.

<sup>360</sup> *Ibid* 36.

<sup>361</sup> On page 110ff.

involuntariness in respect of the child's inability<sup>362</sup> to control his/her conduct relative to the bread. All that is required to lift any appearance of distinction here is to recognise that voluntariness must extend to all of the accused's conduct.<sup>363</sup> The child's conduct is involuntary because s/he cannot control his/her conduct in some respect. As discussed above,<sup>364</sup> where any part of the conduct involved in taking the bread cannot be controlled we must say that the child acted involuntarily in that respect. Furthermore, as argued above,<sup>365</sup> if some part – at least any part forming the conduct in question – is involuntary, we regard the accused's conduct as involuntary. This argument therefore does not disclose any basis for distinction.

Burchell submits yet another argument. He argues that the conative impediment referred to under incapacity for self-control involves a choice on the part of the accused whereas involuntariness does not.<sup>366</sup> The problem with this distinction is that it replicates the distinction between involuntariness and necessity (commonly known as duress). As Burchell himself notes: 'the defence of necessity involves a choice of evils rather than a predicament where compliance with the law is impossible'.<sup>367</sup> Involuntariness is recognised to arise out of absolute force (*vis absoluta*), whereas necessity is a defence that the accused may raise when subject to relative compelling force (*vis compulsiva*) in which the accused nevertheless makes choices – though tough choices.<sup>368</sup> It seems that this distinction is misplaced.<sup>369</sup>

## Snyman

Snyman's<sup>370</sup> approach is different to that of Burchell – at least mostly.<sup>371</sup> Voluntariness is about

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<sup>362</sup> Presuming for the current context only that the relevant conative impediment is an inability – following the example given.

<sup>363</sup> Discussed above, on page 106ff.

<sup>364</sup> On page 106ff.

<sup>365</sup> On page 106ff.

<sup>366</sup> Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica* 39.

<sup>367</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 164.

<sup>368</sup> *S v Goliath* 1972 (3) SA 1 (A); Snyman *Criminal Law* 6th ed (2014) 55.

<sup>369</sup> Unless Burchell is suggesting – though this is not made explicit – that incapacity for self-control should be treated as identical to instances of necessity.

<sup>370</sup> Snyman *Criminal Law* 6th ed (2014) 158 & 62.

<sup>371</sup> In support of Burchell's argument regarding the child stealing the loaf of bread (discussed on page 109ff), Snyman raises 'even more proof': the lifeguard who is chained to a pole and therefore cannot save someone from drowning. (ibid 161n62) The first point that must be derived from this example is that it is even more proof why the first example (of the child and the loaf of bread) fails. In respect of what the lifeguard does – except moving away from the pole, the lifeguard is voluntary. However, the lifeguard is involuntary relating to moving from the pole and yet Snyman renders this as an instance of involuntariness.

whether the accused has the capacity to control his physical movements and capacity for self-control is about whether the accused had the capacity to resist temptations to commit a criminal offense. Furthermore if someone is incapable of controlling their body, they are also necessarily incapable of resisting committing an offence; the converse is not true however, if someone is incapable of resisting the commission of an offence, they are not necessarily incapable of controlling their bodily movements.

Is this valid or helpful? It appears not, since that would require that a person who cannot resist the temptation to commit an offence (which must manifest through bodily movement of some form) may yet retain control over their bodily movements. As argued above,<sup>372</sup> one must, in order to commit the wrongful conduct element of a crime (the *actus reus*) do something with one's body. Thus if one cannot resist doing whatever it is that constitutes the *actus reus* with one's body, one necessarily cannot control one's body and one acts involuntarily. As argued above regarding Burchell's example of the child and the loaf of bread – which Snyman endorses<sup>373</sup> - the child's conduct is involuntarily because s/he cannot or does not control his/her conduct in some respect.<sup>374</sup> If some part – at least any part forming the conduct in question – is involuntary, we regard the accused's entire conduct as involuntary.<sup>375</sup>

Hoctor supports the distinction drawn by Snyman, as follows:

In the landmark case which marked the genesis of the [non pathological incapacity] defence, *S v Chretien* 1981 (1) SA 1097 (A), Rumpff CJ set out the respective elements of criminal liability in unequivocal terms. The learned judge pointed out that where intoxication resulted in involuntary conduct, there was no question of fault or criminal capacity (1104F-G). This distinction was re-emphasized later in the judgment (at 1106E-G):

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This reinforces the argument made above that the accused must act entirely voluntarily to be regarded as voluntary for the purposes of the conduct in question. Moving on to address this example, for this reason, it would appear that Snyman correctly identifies this lifeguard as involuntary. However there appears nothing illogical or anomalous to also say that the lifeguard was unable to act in accordance with his/her insights – this seems self-evident.

<sup>372</sup> Discussed above on page 106ff.

<sup>373</sup> Snyman *Criminal Law* 6th ed (2014) 161n62.

<sup>374</sup> Discussed above on page 106ff and on page 109ff.

<sup>375</sup> Discussed above on page 106ff.

'Na my mening is iemand wat papdronk is en wat onbewus is van wat hy doen, nie aanspreeklik nie omdat 'n spierbeweging in die toestand gedoen nie 'n strafregtelike handeling is nie. Indien iemand 'n handeling verrig (meer as 'n onwillekeurige spierbeweging) maar so besope is dat hy nie besef wat hy doen nie of dat hy die ongeoorlooftheid van sy handeling nie besef nie, is hy nie toerekeningsvatbaar nie.<sup>[376]</sup>

This clear exposition of the distinction between the impact of intoxication on voluntariness, as opposed to capacity, set the tone for the bulk of the case law which followed ...<sup>377</sup>

However, it is not at all clear from anything that Rumpff CJ said, in particular the extract cited, that he was distinguishing voluntariness from capacity for self-control. Rumpff CJ said that where involuntariness is established, there can be no question of capacity or fault – these questions become irrelevant. As discussed above,<sup>378</sup> this view (that once involuntariness is recognised the question of capacity becomes irrelevant) does not sustain a distinction between voluntariness and capacity for self-control.

This failure to distinguish is consistent with the Rumpff Commission report where the view is expressed that one has self-control where one is acting voluntarily (that is, not as an automaton).<sup>379</sup>

## Judiciary

Perhaps out of recognition that no distinction can be sustained, presently our judicial approach is to treat a claim of incapacity for self-control (incapacity to conduct oneself in accordance with an

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<sup>376</sup> In my opinion someone who is soaked-drunk (dead-drunk) and does not know what he is doing, is not responsible because a muscle movement in that condition is not criminally recognised conduct. If someone does something (more than an involuntary muscle movement) but is so drunk that he does not know what he is doing, or does not know the unlawfulness of his conduct, he is not responsible. (Authors Translation)

<sup>377</sup> Shannon Hoctor 'Road rage and reasoning about responsibility' (2001) 14 SACJ 195.

<sup>378</sup> On page 108.

<sup>379</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.26.



appreciation of wrongfulness) as a claim to involuntariness, or at least to treat the two concepts as identical. This has been clear in *Wiid*,<sup>380</sup> *Henry*,<sup>381</sup> *Kali*,<sup>382</sup> *Kok*,<sup>383</sup> *Francis*,<sup>384</sup> and *Laubscher*.<sup>385</sup>

Navsa in *Eadie* also rejects Snyman's distinction as follows:

The view espoused by *Snyman* and others, and reflected in some of the decisions of our Courts, that the defence of non-pathological criminal incapacity is distinct from a defence of automatism, followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law.<sup>386</sup>

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<sup>380</sup> *S v Wiid* 1990 (1) SACR 561 (A). In the case of *S v Wiid*, the court does not clearly distinguish these concepts, in that the two concepts seem to be used interchangeably: 'Na my mening, indien al die feite in ag geneem word, bestaan daar redelike twyfel oor die vraag of die appellante willekeurig opgetree het. Dat sy bewustelik en opsetlik die oorledene wou doodskiet is nie met appellante se persoonlikheid en karaktertrekke te versoen nie. Dit is die effek van haar eie getuienis en word deur Gillmer en Plunkett gestaaf. Haar oorblywende en steeds sterk liefde vir die oorledene rym nie met die doelbewuste doodmaak van die oorledene nie. Die feit dat sy sewe skote geskiet het, is aanduidend van onbeheersde optrede.' (ibid 569). (In my opinion, if regard is had to all the facts of the case, there exists a reasonable doubt as to whether the appellant acted *voluntarily*. A conscious and deliberate desire to kill the deceased cannot be reconciled with the appellant's personality and character. That is the effect of her evidence and it is supported by both Gillmer and Plunkett. Her love for the deceased was still strong and cannot be reconciled with her conscious killing of him. The fact that she fired seven shots bears witness to the fact that she had lost her *self-control*.' (Translation from Burchell & Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 329 emphasis added). This failure to distinguish was noted by van Oosten (F. F. W. van Oosten 'Non-pathological Criminal Incapacity versus Pathological Criminal Incapacity.' (1993) 6 SACJ 139fn84).

<sup>381</sup> *S v Henry* 1999 (1) SACR 13 (SCA).

<sup>382</sup> In the Bisho High Court case of *Kali* the court rejected a defence of incapacity for self-control on the basis that the conduct of the accused did not reflect uncontrollable or *involuntary* conduct (*S v Kali* [2000] (2) All SA 1812 (Ck) 204E-F).

<sup>383</sup> In *Kok* Scott JA (in a unanimous judgment) used the term automatism (involuntariness) and the phrase incapacity for self-control interchangeably. For example, though the defence was 'sane automatism' the court determined that it would examine the claim on the standard appropriate to a claim of non-pathological incapacity (*S v Kok* 2001 (2) SACR 106 (SCA) para7-8).

<sup>384</sup> In the trial court in *Eadie* (*S v Eadie* 2001 (1) SACR 172 (C)) the court was more direct in that, after noting the argument of Snyman that the two defences are distinct, noted that the case of *S v Francis* 1999 (1) SACR 650 (SCA) considered the two defences as equivalent, and endorsed the view of a psychiatrist who failed to distinguish the two as being in impeccable company (*S v Eadie* 2001 (1) SACR 172 (C) 178A-D).

<sup>385</sup> *S v Laubscher* 1988 (1) SA 163 (A). The defence in *Laubser* was lack of voluntariness, which is then immediately accepted by the court as the defence of lack of capacity for self-control (ibid 166).

<sup>386</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 60.

Navsa concludes by insisting that: 'It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism.'<sup>387</sup>

### Analysis of Considerations

An examination of cases and literature concerned with conative functioning (voluntariness and capacity for self-control) reveals that our courts and academic authors regard several considerations as indicative of the presence of a conative function. Several of these appear misplaced and require some analysis and discussion.

#### Conative/Cognitive Requirement?

Of primary concern is the very common trend to mistake cognitive functioning for conative functioning; that a person can think does not show that they can or do execute what they want to do and what they decide to do.<sup>388</sup>

Some of this misconception is explicit. For instance, in *Henry*, Scott JA remarked: It is trite law that a *cognitive or voluntary act* is an essential element of criminal responsibility.<sup>389</sup>

Scott JA also refers to involuntariness as a 'loss of *cognitive* control or *consciousness*' or the 'absence of *awareness* and *cognitive* control.'<sup>390</sup> In *Kok* it is particularly apparent where Scott JA dismisses a claim of involuntariness on the basis that the accused 'knew what he was doing'.<sup>391</sup> Navsa in *Eadie* observes that conative impairment can only be recognised where 'one's cognitive functions are absent...' <sup>392</sup> and not where the accused has shown a 'presence of mind'.<sup>393</sup> Denno notes how - in the US - involuntariness described as unconsciousness refers to thoughtless activity and hence to a cognitive deficiency.<sup>394</sup>

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<sup>387</sup> Ibid para 70.

<sup>388</sup> Ashworth reminds us that voluntariness is not a cognitive concern (*Ashworth Principles of Criminal Law* 2nd ed (1997) 98).

<sup>389</sup> Emphasis added; *S v Henry* 1999 (1) SACR 13 (SCA) 19.

<sup>390</sup> Emphasis added; *ibid* 20.

<sup>391</sup> *S v Kok* 2001 (2) SACR 106 (SCA) 15-6.

<sup>392</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 43.

<sup>393</sup> *Ibid* para 66.

<sup>394</sup> Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minnesota Law Review* 283-5.

This double existence serves only to further obscure what may qualify as a conative impediment.<sup>395</sup> As will be discussed in what follows, it also often lures courts into finding voluntariness to be present where cognition is present, as if it establishes proper conative functioning. The two are perhaps related, but not equivalent. Cognition is necessary but insufficient for conation.<sup>396</sup> As Snyman notes, voluntariness requires both that an accused 'must be capable of making a decision about her conduct (act or omission) *and* to execute this decision.'<sup>397</sup>

### Consciousness

One concept that often appears in definitions of voluntariness is 'consciousness'.<sup>398</sup> But it is problematic because it has a variety of meanings. It may refer to:

1. some form of awareness;<sup>399</sup>
2. awareness of awareness;<sup>400</sup>
3. some level of arousal (in the sense of being asleep or awake);
4. unconscious motivational factors in the psychoanalytic sense;<sup>401</sup>

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<sup>395</sup> Ashworth is critical of dwelling on cognition, whereas the essence of automatism is lack of volition. (Ashworth *Principles of Criminal Law* 2nd ed (1997) 98)

<sup>396</sup> Discussed elsewhere.

<sup>397</sup> Emphasis added; Snyman *Criminal Law* 6th ed (2014) 54.

<sup>398</sup> Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minnesota Law Review*; *S v Johnson* 1969 (1) SA 201 (AD); *R v Mkize* 1959 (2) SA 260 (N); *S v Henry* 1999 (1) SACR 13 (SCA) 20; *S v Cunningham* 1996 (1) SACR 631 (A) 635; *S v Eadie* 2002 (1) SACR 663 (SCA) para 42; Burchell *Principles of Criminal Law* 5th ed (2016) 75. Navsa JA in *Eadie* states: '... the State has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Put differently, the acts must not have been involuntary.' *S v Eadie* 2002 (1) SACR 663 (SCA) para 58.

<sup>399</sup> Denno appears to frame consciousness as awareness (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 *Minnesota Law Review* 329).

<sup>400</sup> In the sense of the problem of what is mind. This is what Armstrong submits is lacking in the driver who drives in a state of automatism - the instance of driving for a long period with the result that one is acting automatically (David M. Armstrong 'Nature of Mind' In *Materialism and the Mind-body Problem* edited by David M. Rosenthal (1971) 76).

<sup>401</sup> Pollard, a Detroit police officer, was judged not guilty on the basis that he was compelled by unconscious motivations to punish himself for his absence from his home when his wife and child were killed (reported in L. Reznick *Evil or Ill: Justifying the Insanity Defence* (1997) 104).

Bromberg testified as a forensic expert psychiatrist in defence of a man who gunned down his wife when she rejected his attempts at reconciliation. The killing was witnessed by a taxi-driver who heard the accused say: 'roll her over and see if she is dead'. (W. Bromberg *The Uses of Psychiatry in the Law: A Clinical View of Forensic Psychiatry*. (1979)) The accused explained that he had suffered hallucinations:

5. information processing (sensory perhaps) which occurs at a an 'unconscious' preconscious level;
6. the presence of cognition, or self-awareness.<sup>402</sup>

Fenwick frames the conflict well and his observation bears repetition here at length:

Where the [medical and legal] professions differ is on what constitutes an automatism and what constitutes unconsciousness, and this remains a point of conflict. It should be simple to define unconsciousness from the viewpoint of our experience and our behaviour. On closer examination, however, this whole area is more complex than it appears, because of the different uses of the word 'unconscious'. Since the development of the analytical school at the turn of the century, the psychiatric literature has been filled with references to the unconscious. Indeed, it is part of the teaching of orthodox psychoanalysis that man has, hidden within his consciousness, unconscious springs of action. Psychology adds another dimension to unconscious processes. It is now recognised that before an experience arises in consciousness, considerable preconscious processing of the sensory information has occurred. Thus, there are degrees of consciousness, but how can we tell at which level the individual should be responsible for his actions, or when they are so

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'While I was seeing babies cut up and so forth, I also saw a man put in a coffin and put in the cement. Some of the men they cut, they, I mean by the gang that was doing all this made them stand over a bucket and bleed in it before putting tape on them.' (ibid 51)

Bromberg offers his psychodynamic interpretation of the accused's mental state:

'The theme of fear of passivity, of loss of maleness and being transformed into a woman ("bleed into a bucket"), clearly showed the dynamics behind the murder. Even more significant were his associations as to what the taxi driver witness testified he had heard: "Roll her over and see if she is dead." The accused had no memory of this remark; in fact, he had an amnesia for the shooting. The remark was interpreted as a condensation of two ideas: aggressive impulses towards women and a defense against his unconscious fear of being a woman. In the delirium, the remark meant: "Roll her over and see if she is a woman" (i.e., "Am I a woman?"). The cold tone ascribed to the accused by the taxi driver at the time could be recognized as an isolation of affect, that is, a separation of emotion from the underlying idea. In such situations, the ego cannot stand so revolting an idea and hence shuts off the emotion that ordinarily would accompany the horrifying idea of being turned into a woman.' (ibid)

<sup>402</sup> Denno, in a variation to conceiving consciousness as referring to awareness (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review 329), also considers it 'a term that typically refers to the sum of a person's thoughts, feelings, and sensations, as well as the everyday circumstances and culture in which those thoughts, feelings and sensations are formed'. (ibid 273-4 & 311).

This is the sense in of being that was famously addressed by Nagel in his discussion of 'what it is like to be a bat' (Thomas Nagel 'What is it Like to Be A Bat' (1974) 83 Philosophical Review 160).

confused that they do not know what they are doing? From the psychological point of view, the conscious stands firmly and securely only on the preconscious, and is meaningless without it. If this is truly so, then no satisfactory legal definition of consciousness, which depends on subjective experience and observable behaviour, is possible, as consciousness is layered, and the layers are ill-defined. Indeed, theoretically, it must be impossible to decide at which layer consciousness ends and unconsciousness begins. The medical literature also refers to unconsciousness, but here the definitions are clearer and easier to quantify. For the medical definition is based on our understanding of brain function, and consciousness is quantified according to whether or not the higher functions of mind are obtunded or absent.<sup>403</sup>

It may mean a variety of different things. The use of the concept of consciousness can only lead to confusion.

### Goal directedness

An argument is sometimes made that where an accused conducted him/herself in a goal-directed manner, s/he acted with the necessary conative functioning.<sup>404</sup> Goal-directedness has been argued to show conative functioning on the basis that complex apparently goal-directed conduct 'is not easy to reconcile with the hypothesis of automatic involuntary conduct, i.e., with a set of bodily movements over which the agent has no control.'<sup>405</sup>

Several recent convictions have been based on an accused's apparent goal-directedness at the

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<sup>403</sup> P. Fenwick 'Automatism.' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 271 & 2.

<sup>404</sup> See *S v Eadie* 2002 (1) SACR 663 (SCA) particularly para 66. Louw sets out his conception of voluntariness as premised upon goal-directedness thus: 'There are many instances where conduct may be involuntary but generally these are indicated by a lack of what is termed goal-directed behaviour. In other words, where the accused is able to direct his actions towards specific tasks, his actions must have been subject to his conscious will.' (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 207)

<sup>405</sup> McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 80.

time of the offence.<sup>406</sup> In *Eadie*<sup>407</sup> Navsa JA confirms the reasoning of the trial judge as having been correct to consider the focused and goal-directed conduct of the appellant as indicating 'presence of mind'.<sup>408</sup> We see here the misdirection that reliance on goal-directedness produces. Navsa observes that a conative impediment can only be recognised where 'one's cognitive functions are absent and consequently one's actions are *unplanned and undirected*'.<sup>409</sup> It is again the mistake of taking cognitive functioning to represent conative functioning (voluntariness).<sup>410</sup>

The Rumpff Commission<sup>411</sup> expressed the view that goal-directedness somehow showed volition: 'When a man kills his friend in a fit of rage, his behaviour does not spring from any blind impulsive drive or uncontrollable emotion. He is performing a *goal-directed* act.'<sup>412</sup>

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<sup>406</sup> In the case of *Kensley* in which the accused had been intoxicated and apparently suffered emotional stress upon discovery that he had been or had proposed being intimate with two transvestite men who he took to be women. His defence of non-pathological incapacity failed on the basis that, amongst other things, the court accepted forensic psychiatrist Dr Greenberg of Valkenberg's assertion that the accused had conducted himself in a goal-directed manner during his shooting spree. He shot one friend in the head execution style killing him and wounded another for not warning him that the transvestites were not women – as he had thought. He shot and killed another acquaintance in the head, and wounded one of the transvestites. The court concluded that his *goal-directed*, purposeful (conscious) conduct indicated that he did not lack capacity for self-control. (*S v Kensley* 1995 (1) SA 646 (A) 659).

In *S v Els* the accused raised the defence that her conduct was involuntary to a charge of murdering her husband. The facts appeared to indicate that she was subject to spousal abuse and was possibly suffering severe emotional stress and a degree of intoxication. The court rejected her defence of involuntariness on the basis, amongst other things, of complex *goal-directed behaviour* before the shooting (*S v Els* 1993 (1) SA 723 (O)).

In *Henry* Scott JA (Streicher JA and Ngoepe AJA concurring) dismissed the appellant's claim on the basis that: '... no factual basis was established which served to displace the natural inference of voluntariness arising from the appellant's apparently *goal-directed* behaviour.' (emphasis added; *S v Henry* 1999 (1) SACR 13 (SCA) 24).

See also *S v Potgieter* 1994 (1) SACR 61 (A) 73-4; *S v Kok* 2001 (2) SACR 106 (SCA) per Scott JA (Streicher JA and Navsa JA concurring); *S v Kali* [2000] (2) All SA 1812 (Ck) in which apparent goal-directedness on the part of the accused was taken to exclude a claim of involuntariness; and in *S v Seroba* *S v Seroba* 2015 2015 (2) SACR 429 (GJ) in which the court appeared to find that the accused possessed capacity for self-control because he did not wander around aimlessly (ibid para 90).

<sup>407</sup> *S v Eadie* 2001 (1) SACR 172 (C); *S v Eadie* 2002 (1) SACR 663 (SCA) para 66.

<sup>408</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 66.

<sup>409</sup> Emphasis added; ibid para 43.

<sup>410</sup> Discussed above under the heading Conative/Cognitive Requirement? on page 114.

<sup>411</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967).

<sup>412</sup> Emphasis added; ibid para 9.26.

Significantly though, what remains unexplained is how goal-directedness establishes that conduct was indeed controlled or even subject to control. The Commission explains that behaviour may be controlled by the exercise of the will - apparently '[t]hrough insight, reasoning and abstract thinking'.<sup>413</sup> It does not explain how the function of cognition (as evidenced in goal-directedness) permits for the exercise of the will<sup>414</sup> or the pursuit of one's goal.<sup>415</sup>

Also, goal-directedness may not necessarily indicate voluntariness at all since people who suffer epileptic seizures<sup>416</sup> and somnambulists,<sup>417</sup> for instance, may well achieve what may be regarded as goal-directed behaviour and yet they are not regarded as acting voluntarily.

Our courts have sometimes been awake to the prospect that goal-directedness does not necessarily show voluntariness. The decision of the court in *Nursingh* was premised upon an assumption that goal-directedness did not exclude the possibility of incapacity.<sup>418</sup> Scott JA in *Henry* observed that: The difficulty is that unconscious behaviour may appear to be goal-oriented particularly if the conduct in question is something that the automaton has done repeatedly before.<sup>419</sup>

In the case of *S v Kevin* the accused killed his wife and two children in order to save them from this world with the purpose that they (and he, once he had committed suicide) would be reunited in heaven. Though the court accepted that the killings required careful deliberate and goal-directed

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<sup>413</sup> Ibid para 9.25.

<sup>414</sup> Ibid para 9.7.

<sup>415</sup> Ibid para 9.25.

<sup>416</sup> Walsh describes a form of epileptic seizure where goal-directedness may be present: 'Psychomotor attacks where the principal symptoms are confusion and automatic behaviour. Confusional automatisms may be merely a 'mechanical' prolongation of the behaviour in which the patient was engaged at the onset of the attack, or the automatisms may represent new behaviour beginning during the attack. Many forms of automatisms have been given descriptive labels, e.g. ambulatory automatisms, in which the patient may carry out co-ordinated movements of some complexity during the attack and for a varying time after the seizure, verbal automatisms, gestural automatisms, and the like.' (K. Walsh *Neuropsychology: A Clinical Approach*. 3rd ed (1994) 123-4)

<sup>417</sup> Glanville Williams recognises that somnambulism may be accompanied by purposive conduct and cites an instance in which a sleepwalker whose eyes were apparently shut, turned without hesitation when a door was shut, and found another door through which he passed. (Glanville Williams *Criminal Law* 2nd ed (1961) 12fn4).

<sup>418</sup> Significantly the court (Squires J) accepted that: '[I]t is a characteristic of [a] dissociated state of mind that it does not affect the motor functions of the person acting under the emotion or impulse.' (*S v Nursingh* 1995 (2) SACR 331 (D) 336).

<sup>419</sup> *S v Henry* 1999 (1) SACR 13 (SCA) 23.

conduct, it nevertheless refused to hold that the accused could control his conduct. Accordingly he was found not guilty (though by reason of pathological incapacity).<sup>420</sup>

Rumpff CJ, delivering the unanimous judgment of the Appellate Division in *S v Chretien*, after noting that intoxication is a matter of degree commented:

If one starts with the person who can be described as dead drunk, it is actually still a matter of degree. If he is so drunk that he lies performing involuntary muscle movements with his arm or foot and someone should be hit and injured by such involuntary movement, there would in any event be no question of an act, in the same way as a sleepwalker's movements cannot constitute an act. ... That is one side of the spectrum. The other side, by contrast, would be the situation where an accused consumes a small amount of liquor which has a negligible effect on his mental faculties. In between lies a great variety of cases in which acts were committed under the influence of alcohol, *acts which ostensibly indicate the achievement of a goal or a result*, but which raise the question to what extent the intoxicated person realised the seriousness of his conduct and to what extent his inhibitions were diminished.<sup>421</sup>

It is notable that Rumpff CJ framed incapacity for self-control as a substantial disintegration of one's inhibitions.<sup>422</sup> He clearly therefore recognised that a substantial degree of intoxication may

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<sup>420</sup> *S v Kavin* 1978 (2) SA 731 (W).

<sup>421</sup> In translation by Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 364. The original appears as follows: 'As begin word by iemand wat as "smoordronk" beskryf word, is dit ook eintlik nog 'n kwessie van graad. Is hy so dronk dat hy "papdronek" is en net êrens lê en onwillekeurige spierbewegings met sy arm of voet doen en iemand sou deur so 'n onwillekeurige beweging getref en beseer word, sou daar in elk geval geen sprake wees van 'n handeling nie. Dit sou net so min 'n handeling wees as die liggaamsbeweging van 'n slaapwandelaar. In die strafreg is 'n handeling alleen dan 'n handeling wanneer dit deur die gees beheer word. In die geval van die onwillekeurige spierbeweging van 'n papdronek is daar geen sweem van beheer nie en is dit dus nie eers nodig om oor skuld te filosofeer nie. Daar is net geen plek vir skuld nie. Ook toerekeningsvatbaarheid kom nie hier ter sprake nie. Dit is die een kant van die spektrum. Die ander kant, daarteenoor, sou die geval wees waar 'n beskuldigde 'n geringe hoeveelheid drank gedrink het wat geen noemenswaardige uitwerking op sy geestesvermoëns gehad het nie. Tussenin lê 'n groot verskeidenheid van gevalle waarin wel handelinge plaasgevind het onder invloed van drank, handelinge wat oënskynlik die bereiking van 'n doel of gevolg aandui, maar waarby die vraag ontstaan tot watter mate die besopene die erns van wat hy doen besef het en tot watter mate sy inhibisies verminder is.' (*S v Chretien* 1981 (1) SA 1097 (A) 1104 emphasis added).

<sup>422</sup> It may be noted that Rumpff CJ's conception of incapacity is somewhat untraditional, though it appears nevertheless that it was the various requirements of capacity to which he made reference as indicated by the following: 'It is only when a person, who commits a consequence crime, is so intoxicated that he does not realise that he is acting unlawfully, or that his *inhibitions have substantially disintegrated*, that he can



impair an accused's conative functioning, despite that s/he may continue to act in a goal directed manner.

Schopp notes:

Although the paradigmatic cases of automatism are those involving convulsions, reflexes, or other movements that are apparently performed without any conscious direction, *the defense also applies to those who perform complex actions in coordinated, directed fashion, but with substantially reduced awareness.*<sup>423</sup>

Ultimately, it would seem that goal directedness is an inappropriate consideration for establishing proper conative functioning.

### Trigger

Our courts have often rejected claims of incapacity due to the apparent absence of a 'trigger' for the alleged episode of involuntariness.<sup>424</sup> In *S v Ingram* the Appellate Division rejected an incapacity defence on the basis that there had been no triggering event - the circumstances which prevailed at the relevant time were not novel in that the accused had endured them previously:

The appellant had on previous occasions failed to isolate and restrain the deceased. There is no rational reason why on this particular occasion such failure should have operated as a trigger mechanism when it had not done so before.<sup>425</sup>

This reasoning does not address the possibility that the accused may have lacked capacity on the previous occasions but engaged in different conduct on those occasions - it does not establish that s/he possessed capacity on all such occasions.

Furthermore, this requirement does not recognise that a trigger may be a relatively minor event which represents the 'final straw' for an accused in whom tension had built up over a protracted

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be regarded as lacking criminal capacity.' (translation by Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 365). The original appears as follows: 'Eers dan wanneer 'n persoon, wat 'n gevolghandeling pleeg, so besope is dat hy nie besef nie dat wat hy doen ongeoorloof is, of dat sy inhibisies wesenlik verkrummel het, kan hy as ontoerekeningsvatbaar beskou word.' (*S v Chretien* 1981 (1) SA 1097 (A) 1106).

<sup>423</sup> Emphasis added; Schopp *Automatism, Insanity, and the Psychology of Criminal Responsibility* (1991) 71.

<sup>424</sup> *S v Cunningham* 1996 (1) SACR 631 (A); *S v Henry* 1999 (1) SACR 13 (SCA); *S v Eadie* 2002 (1) SACR 663 (SCA).

<sup>425</sup> *S v Ingram* 1995 (1) SACR 1 (A) 7.

period. This was recognised in *Nursingh*<sup>426</sup> and endorsed by Navsa JA in *Eadie*.<sup>427</sup> 'The trigger was one that apparently had built up from years of physical, emotional and sexual abuse'.

Snyman observes that a long duration of build-up might be required and a trigger may be the equivalent of a drop of water which causes the bucket to overflow:

The chances of X's succeeding with this defence if he became emotionally disturbed for only a brief period before and during the act, are slender. It is significant that in many of the cases in which the defence succeeded or in which the court was at least prepared to consider it seriously, X's act was preceded by a very long period – months or years – in which his level of emotional stress increased progressively. The ultimate event which led to X's firing the fatal shot can be compared to the last drop in the bucket which caused it to overflow.<sup>428</sup>

Hence it appears that we may never know that previously the equivalent circumstances to those of the alleged offence did not cause an episode of incapacity. We may also never know what may constitute a 'trigger' for any particular accused since it must be recognised that it may be objectively insignificant. The logic therefore of requiring a trigger event does not appear well-founded.

## Conclusion

In the final analysis, there appears to be no sustainable distinction between voluntariness and capacity for self-control and it seems that only one conative requirement may be discerned. However, it is not at all clear what is required of any conative function, certainly it is not clear what it should mean.

In the search for some meaning we have resorted to relying on a forbidden meaning of capacity for self-control – that of resistibility.<sup>429</sup> Yet it is not clear what it means. Also, the concept of voluntariness remains elusive, and there does not appear to be any sustainable basis to distinguish

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<sup>426</sup> *S v Nursingh* 1995 (2) SACR 331 (D).

<sup>427</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 48.

<sup>428</sup> C. R. Snyman *Criminal Law* 4 ed (2002) 166. This point was not repeated in the latest edition of his text (Snyman *Criminal Law* 6th ed (2014) 158), where the discussion is now centred upon the judgement of Navsa JA in *Eadie* (*S v Eadie* 2002 (1) SACR 663 (SCA)). However, there is nothing to indicate that Snyman now disagrees with this statement.

<sup>429</sup> See discussion regarding the move away from the 'resistibility' test to the test of whether an accused could conduct him/herself in accordance with an appreciation of wrongfulness on page 99ff.

between the capacity for self-control and voluntariness. Only one conative function may be discerned. Finally we must be careful not to confuse this conative requirement with a cognitive requirement. We must not obfuscate matters by employing the term 'consciousness', and we must be careful not to mistake goal-directedness and the absence of a 'trigger' as indicating proper conative functioning. There are regrettably no answers here – only unanswered questions.

## Chapter 12: Pathological Non-Responsibility

### Introduction

The defence of non-responsibility, in the US, England and South Africa has traditionally depended upon the youth<sup>430</sup> of an accused, or whether the accused suffers from a so-called pathological mental condition. This pathological mental condition in England is known as a disease of the mind, in the US as a mental disease or defect, and in South Africa as a mental illness or defect. Where the defence of non-responsibility is due to a pathological mental condition, it is known, traditionally, as the insanity defence, now as the defence of pathological incapacity. An pathological incapacity defence usually<sup>431</sup> results in a commitment to a mental health institution.

In England and SA, together with a few states in the US,<sup>432</sup> lesser claims to non-responsibility are recognised in the form of diminished responsibility. These claims, if successful, may result in a lesser conviction and sentence. For instance, in England and a few jurisdictions in the US, a successful claim of diminished responsibility would reduce a conviction from murder to manslaughter.<sup>433</sup> In South Africa, a successful claim of diminished responsibility permits a court to

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<sup>430</sup> The criminal responsibility of children is governed by presumptions related to their age. These presumptions may be rebuttable or irrebuttable. A rebuttable presumption is one which the prosecution can 'rebut' or disprove. However, an irrebuttable presumption is one that the prosecution cannot disprove. A child younger than ten is irrebuttably presumed to lack capacity, and a child between ten and fourteen is rebuttably, presumed to lack capacity (ss 7 & 11 of the Child Justice Act 75 of 2008).

<sup>431</sup> Though in SA the court must enquire into the appropriateness of a committal and has a discretion as to disposition, ranging from committal to unconditional release (Criminal Matters Amendment Act 68 of 1998).

<sup>432</sup> Including Hawaii (*S v Perez*, 976 P.2d 379 (Haw. 1999.)) and Oregon (*S v Counts*, 816 P.2d 1157 (Or. 1991)) (Joshua Dressler *Understanding Criminal Law* 5th ed (2009) 368 & 73-78). In *S v Cacambile* 2018 (1) SACR 8 (ECB) the court (Strech J with Van Zyl DJP concurring) objected to the use of the terms "psychiatric hospital" or "institution" and encouraged lawyers to use the term "mental hospital" instead. The court also objected to the use of the term "disposal" - regarding the the possible referral of an accused possible observation or detention - on the basis that it was disrespectful. It is not clear how the terms "psychiatric" or "institution" is disrespectful. Psychiatry is a recognised discipline concerned with mental health. As for "institution", similar concerns may be expressed over the concept of "hospital". The term "disposal" is derived from the well entrenched and apparently unremarkable use of the term "disposition" to describe the process of referring a person found to lack capacity or triability. These terms will therefore continue to be adopted in this text for the wide acceptance they enjoy and without meaning any offence.

<sup>433</sup> Ibid.

take account of this in sentencing.<sup>434</sup>

South Africa has gone further though. Starting in 1980, deriving from the leading case of *Chretien*<sup>435</sup>, South African courts began to recognise that complete non-responsibility may be recognised in the absence of youth and mental illnesses or defect. This defence has become known as non-pathological criminal incapacity and, if successfully raised, results in an acquittal and an unconditional discharge. Non-pathological criminal incapacity may arise out of any non-pathological condition. However, it is usually based upon a claim of provocation, severe emotional stress, intoxication, or a combination of these.

The various sources of non-responsibility require analysis to extract what they mean and the work that they do. Ultimately, it must be considered whether any particular source should be required. This chapter focuses on these various sources, beginning briefly with youth, then 'so-called' pathological criminal incapacity, and then moving on to non-pathological criminal incapacity in the next chapter.<sup>436</sup>

The jurisprudence of the pathological incapacity defence in the US, England and South Africa has been driven by assassinations or attempted assassinations of Prime Ministers and Presidents. We have that in common and – to a very large extent – we have the M'Naghten rules of insanity (pathological incapacity) in common.<sup>437</sup>

In all jurisdictions, a pathological incapacity defence may only be claimed where some form of mental disorder/pathology may be implicated as having caused an impediment in the functioning

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<sup>434</sup> 'If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.' s 78(7) of the Criminal Procedure Act 51 of 1977. See *S v Romer* 2011 (2) SACR 153 (SCA).

<sup>435</sup> *S v Chretien* 1981 (1) SA 1097 (A).

<sup>436</sup> Chapter 17.

<sup>437</sup> In the US the attempt on the life of Ronald Reagan by John Hinckley prompted the federal government and many states to revert back to a M'Naghten style insanity defence (*United States v Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981); W. J. Chambliss & T. F. Courtless *Criminal Law, Criminology, and Criminal Justice: A Casebook*. (1992) 157; P. W. Low *Criminal Law Revised* 1st ed (1990) 224; H. J. Steadman, M. A. McGreevy, J. P. Morrissey *et al. Before and After Hinckley: Evaluating Insanity Defense Reform* (1993)).

of the individual accused or defendant.<sup>438</sup>

I will argue that this requirement of pathology is an (almost) meaningless obstacle placed in the way of a plea of pathological incapacity. It serves only to give covert expression to myths, false intuitions, and some valid concerns – but which are better addressed elsewhere. It may be noted that the requirement is also – to a large extent – redundant. We need to consider these concerns and identify which are valid. We then need to consider where the valid concerns may be better addressed. I will take each of these accusations in turn: that the term is (almost) meaningless; that any meaning it has is improper or unfounded; and that it is mostly redundant anyway.

### Meaningless

No formal definition of mental illness or defect exists – neither in the statute<sup>439</sup> that governs the defence of pathological incapacity, nor in the common law.

One may expect that what is recognised as a mental disorder<sup>440</sup> for the purposes of the civil law would also count as a mental disorder for the purposes of the criminal law. However, this is not so. A determination of mental disorder in terms of civil law does not translate into a mental illness/defect in the criminal law.<sup>441</sup>

A mental disorder, as required by the criminal law, is an undefined 'legal' concept.<sup>442</sup> The Rumpff Commission explains:

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<sup>438</sup> I will adopt the term the South African term the 'accused' instead of the defendant.

<sup>439</sup> s78 Criminal Procedure Act 51 of 1977. See also Lirieka Meintjes-Van der Walt 'Making a muddle into a mess?: The Amendment of s78 of the Criminal Procedure Act' (2002) 15 SACJ 243.

<sup>440</sup> I use this term as a generic reference to the pathological mental state required under South African, English, and US law.

<sup>441</sup> Snyman *Criminal Law* 6th ed (2014) 166; See *S v Mahlinza* 1967 (1) SA 408 (A) 416-7; *S v Mnyanda* 1976 (2) SA 751 (A); cf *R v Mkize* 1959 (2) SA 260 (N).

<sup>442</sup> *S v Mahlinza* 1967 (1) SA 408 (A) 416: 'suiwer juridiese begrippe' (purely legal concepts, Authors' translation).

In respect of the English position, particularly, the notion of a Disease of the Mind, see McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 63; *Bratty v Attorney General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523 412; Clarkson *Understanding Criminal Law* (2005) 101 & 3; Ormerod *Smith & Hogan Criminal Law* (2005) 256-8; Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 296ff.

In respect of the US position see Hall *Criminal Law and Procedure* (1992) 317; J. Dressler *Understanding Criminal Law* 2nd ed (1997).

A source of criticism on the part of psychiatrists is the use in the law of words like 'insanity', 'mental disease', etc. We consider these terms still to be indispensable in law. The law does not attempt to define them, but uses them to denote in a single word a particular condition of the mental faculties of a person which is important from a legal point of view.<sup>443</sup>

Thus, there exists no formal definition of the required threshold criteria. It is a legal concept, independent of medical or scientific considerations. We must trust that judges will know it when they see it. Off course, this is law without any rule or principle for guidance. It is an obvious source of arbitrariness and unequal treatment.

### Improper or Unfounded Concerns

Despite the insistence that these concepts should go undefined, a definition of mental illness/defect<sup>444</sup> has crept into use in South African law.<sup>445</sup>

In the case of *Stellmacher*<sup>446</sup> it was held that a mental illness/defect consists in:

... a pathological disturbance of the accused's mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.<sup>447</sup>

The *Stellmacher* definition has been recognised as requiring that a mental illness/defect must be

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<sup>443</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.73.

Rumpff JA adopted this view in *Mahlinza*: 'By virtue of the fact that a Court has to decide each case on the facts and the psychiatric evidence, it seems to me that it is impossible - and also hazardous - to attempt to identify a general symptom whereby a mental disorder may be diagnosed as a pathological mental disorder.' (*S v Mahlinza* 1967 (1) SA 408 (A) 417; translation by Burchell & Milton *Cases and Materials on Criminal Law* 2nd ed (1997) 272-3).

<sup>444</sup> Burchell distinguishes between mental illness and mental defect on the basis 'that the terms were not used as synonyms in s 78 of the Criminal Procedure Act 1977' (Burchell *Principles of Criminal Law* 5th ed (2016) 283note59). Mental defect is regarded as referring specifically to intellectual deficiency {Burchell, 2016 #855; Kruger *Mental Health Law in South Africa*. (1980)}. However, the definition offered in *Stellmacher* (discussed below) refers to both mental illness and defect without distinction and it seems therefore that the definition applies to both concepts.

<sup>445</sup> E. Du Toit, F. J. De Jager, A. Paizes *et al. Commentary on the Criminal Procedure Act* Vol RS 34 (2005); Snyman *Criminal Law* 6th ed (2014) 165-6; Burchell *Principles of Criminal Law* 5th ed (2016) 276.

<sup>446</sup> *S v Stellmacher* 1983 (2) SA 181 (SWA).

<sup>447</sup> *Ibid* (translation by Jonathan Burchell & John Milton *Principles of Criminal Law* 2nd ed (1997) 278).

a pathology and it must be of endogenous origin.<sup>448</sup>

Popular parlance distinguishes non-pathological from pathological (mental illness/defect) incapacity on the basis that non-pathological incapacity is temporary - hence the expression 'temporary insanity'. However, our law has held the duration of the disorder not to be a relevant consideration in respect of whether a condition constitutes a mental illness/defect.<sup>449</sup> Therefore duration cannot distinguish the legal concepts of non-pathological from mental illness/defect incapacity.

### Dubious Foundation

Before analysing the value of this definition, it is revealing to trace its foundation which appears to be less than sound. 'Figure 1' (below) is included to assist in tracing the authority for the *Stellmacher* requirements. The definition set out in *Stellmacher* has been adopted in texts on criminal law<sup>450</sup> and, as noted, the authority is cited as the *Stellmacher* case. The *Stellmacher* case adopted the definition out of Hiemstra's *Suid-Afrikaanse Strafproses*<sup>451</sup> which, in turn, only offers authority for the portion of the definition requiring that the mental condition must be a pathology. In this respect Hiemstra cites the Rumpff Commission Report<sup>452</sup> and the *Mahlinza* case.<sup>453</sup> The Rumpff Commission Report, at the paragraph cited,<sup>454</sup> does not provide clear authority for the

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<sup>448</sup> Burchell & Milton *Principles of Criminal Law* 2nd ed (1997); Du Toit, De Jager, Paizes, Skeen & van der Merwe *Commentary on the Criminal Procedure Act* Vol RS 34 (2005); Johann Kriegler & Albert Kruger *Suid-Afrikaanse Strafproses* 6 ed (2002) 215; Snyman *Criminal Law* 6th ed (2014) 165; Burchell *Principles of Criminal Law* 5th ed (2016) 280&2. There is some contradiction though in the demand that a mental illness/defect be of endogenous origin, and yet that the cause of it 'does [not] matter' (ibid 281).

<sup>449</sup> *S v Mahlinza* 1967 (1) SA 408 (A) 417; *S v Campher* 1987 (1) SA 940 (A) 965; *S v Laubscher* 1988 (1) SA 163 (A) 167; *R v Holliday* 250. In respect of the English law, see *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673 172.

<sup>450</sup> Previously in Burchell & Milton *Principles of Criminal Law* 2nd ed (1997); C. R. Snyman *Criminal Law* 3 ed (1995); J. C. Kriegler *Hiemstra's Suid-Afrikaanse Strafproses* 5 ed (1993) and now in Snyman *Criminal Law* 6th ed (2014) 166; Du Toit, De Jager, Paizes, Skeen & van der Merwe *Commentary on the Criminal Procedure Act* Vol RS 34 (2005); Kriegler & Kruger *Suid-Afrikaanse Strafproses* 6 ed (2002); Burchell *Principles of Criminal Law* 5th ed (2016) 280-1.

<sup>451</sup> V G Hiemstra *Suid-Afrikaanse Strafproses* 3rd ed (1981) 174.

<sup>452</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.4.

<sup>453</sup> *S v Mahlinza* (1) SA 408 (A).

<sup>454</sup> 'When the question of insanity or mental disease arises, i.e. of any pathological disturbance of the mental faculties, the judge has to be assisted by the psychologist and the psychiatrist.' (Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 9.4).



requirement of pathology, since its emphasis is on the need for a judge to obtain the assistance of a psychologist and psychiatrist in determining whether an accused suffered from a pathology. However, it is in the introduction that the Rumpff Commission appears to assume its definition<sup>455</sup> of mental illness or defect, there referred to as mental derangement, including the element of pathology.

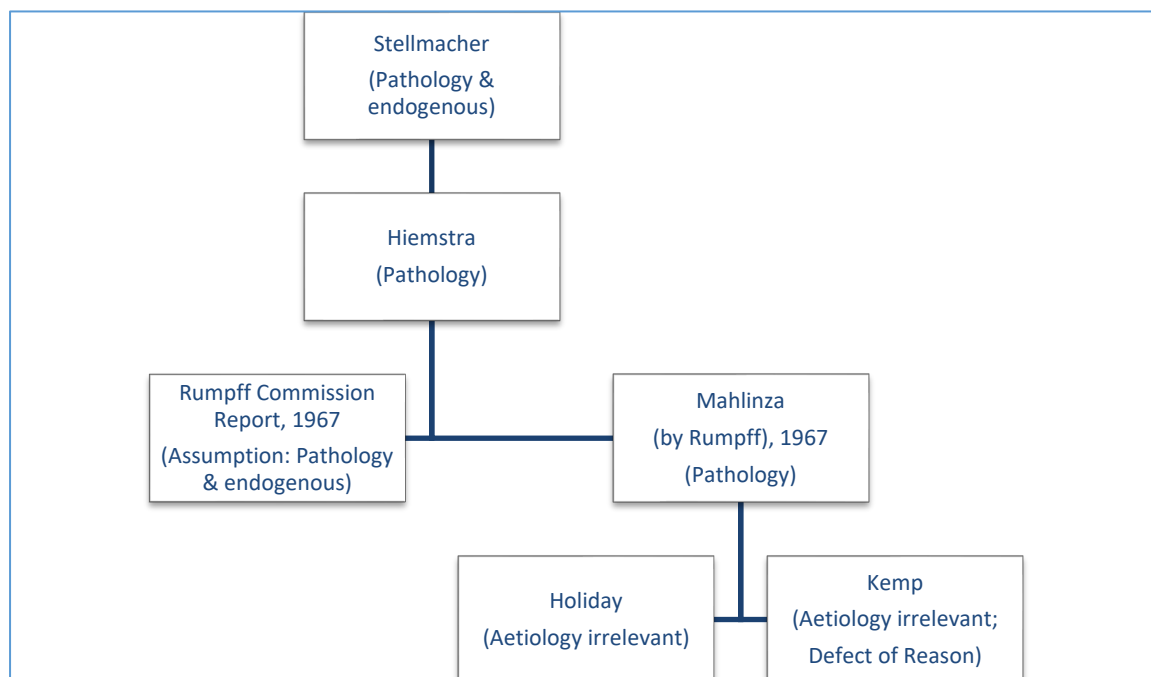


Figure 1: Stellmacher Requirements

As for the authority that may be gleaned from the judgment in the *Mahlinza* case - this was delivered by Rumpff JA<sup>456</sup> at the same time that the learned judge chaired the Rumpff Commission. The Commission cites no authority for the definition of mental illness/defect it adopted and appears to have merely assumed a definition.

'We have taken the expression in the terms of reference 'persons ... suffering from some form of mental derangement' to mean persons suffering from a morbid or pathological mental disorder, i.e. some form of mental disease or permanent mental defect. Persons whose mental faculties have been temporarily impaired, for instance by drugs, are

<sup>455</sup> Discussed below – see on page 132.

<sup>456</sup> Beyers JA and Ogilvie Thompson JA concurring.

therefore not deemed to be included under the terms of reference.’<sup>457</sup>

That the definition is an assumption appears to be declared by the words ‘[w]e have taken the expression in the terms of reference ‘persons ...suffering from some form of mental derangement’ to mean ...’.<sup>458</sup>

The part of the judgement in *Mahlinza* referred to by Hiemstra notes only, in respect of the requirement of pathology, that it is unwise to attempt to define ‘insanity’, except that while the cause of the mental disorder is unimportant, the disorder must be pathological.<sup>459</sup> In this respect one is referred to *Holiday*<sup>460</sup> and an extract from the judgement of *Kemp*,<sup>461</sup> to the effect that the law is not concerned with the cause or origin of a disorder, but with the state of mind of the accused. This certainly does not stipulate that ‘pathology’ is a requirement for a mental illness/defect. Furthermore, further analysis of Devlin J’s judgement in *Kemp* reveals that the judge regards any condition which caused a defect of reason to be a disease of the mind simply because it caused a defect of reason. The decision in *Holiday*, at the point cited, also does not specify pathology as a criterion, but instead, contrary to the *Stellmacher*/Hiemstra definition, states that the cause of the mental disorder is irrelevant to the extent that even voluntary alcohol consumption would not disqualify a disorder from being a mental illness/defect for the purpose of a pathological

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<sup>457</sup> Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) 1.

<sup>458</sup> *Ibid.*

<sup>459</sup> *S v Mahlinza* 1967 (1) SA 408 (A) 418.

<sup>460</sup> *R v Holliday* 1924 AD 250 257.

<sup>461</sup> Devlin J framed his conception of a disease of the mind as follows:

‘It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be a matter of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused is, not how he got there...

The law is not concerned with the brain but with the mind, in the sense that ‘mind’ is ordinarily used, the mental faculties of reason, memory and understanding. ... In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent. There is no warranty for introducing those considerations into the definition in the McNaghten Rules. Temporary insanity is sufficient to satisfy them.

Hardening of the arteries is a disease which is shown on the evidence to be capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning, understanding and so on, and so is in my judgment a disease of the mind which comes within the meaning of the Rules.’ (*R v Kemp* [1957] 1 QB 399 at 407; SHC 18 408)

incapacity defence.<sup>462</sup> Thus the judgement in *Mahlinza* provides, in my view, an unsound foundation for the requirement of pathology.

What is particularly noticeable is the similarity between the Rumpff Commission definition and the definition being adopted presently from *Stellmacher*.

<i>Stellmacher</i>	<i>Rumpff Commission</i>
... a pathological disturbance of the accused's mental capacity and not a mere temporary mental confusion ...	a morbid or pathological mental disorder, i.e. some form of mental disease or permanent mental defect.
... and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.	Persons whose mental faculties have been temporarily impaired, for instance by drugs, are therefore not deemed to be included under the terms of reference.

The similarity suggests that the *Stellmacher* definition is little more than a restatement of the unfounded Rumpff commission definition.

Thus the basis for the requirement of pathology is unsound or a mere assumption, and the requirement of an endogenous origin is ultimately contradicted by the authority cited (particularly *Holiday*), or, at best, completely unfounded.

## Pathology

Even if one were to engage with the concept of pathology as a requirement, it is unfortunately little more than a distraction. At first it begs the question: what is a pathology? Neither the Oxford dictionary definition, the law, nor social sciences have any straightforward answer to this question.

## In English

The Oxford Dictionary of English<sup>463</sup> defines a pathology as a disease, which is in turn defined as a disorder. A disorder is defined as an illness. Thus an illness or defect must be a pathology, which

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<sup>462</sup> *R v Holliday* 1924 AD 250 257. The court was apparently unanimous on this point, Kotzé JA delivering a concurring judgement (see *ibid* 259-60).

<sup>463</sup> "Oxford Dictionary of English." Oxford University Press, 2003.

is a disease, which is a disorder, which is an illness. Ultimately the definition is circular: an illness is a pathology, which is an illness.

### In Law

It is even arguable that the reference to pathology in the *Stellmacher* definition was really a reference to the origin of the disorder. This may be noted from Burchell's discussion of the criterion of 'pathology': that a disorder is not a pathology where it resulted from 'socio-cultural patterns of behaviour that have been learned or taught ....'<sup>464</sup>

He continues: It would seem to follow that defect of reason caused simply by youth, stupidity or cultural immaturity is not insanity since it is not a result of disease but some social, cultural or temporal condition.<sup>465</sup>

The real concern appears to be with the source of the disorder, and in particular, that it should not be recognised where it arose from environmental (cultural, social, economic) factors. As will be discussed, there appears no basis for this bias.<sup>466</sup>

### In the Social Sciences

In the social sciences, the concept of 'pathology' (known as psychopathology) is rather controversial.<sup>467</sup> The main difficulty is that there is no universally accepted norm in respect of psychological functioning. Carson, Butcher, and Mineka observe the following:

... But what is the norm? In the case of physical illness, the norm is the structural and functional integrity of the body as a workable biological system; here, the boundary lines

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<sup>464</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 281.

<sup>465</sup> Ibid. It must be observed that the term 'defect of reason' forms part of the English law under the M'Naghten rules and is not required under South African Law.

<sup>466</sup> See O Endogenous Origin on page 148ff.

<sup>467</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxx; World Health Organisation *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992); Ann M. Kring, Sheri L. Johnson, Gerald C. Davison *et al. Abnormal Psychology* 11th ed (2010); Mark Zimmerman & Robert L. Spitzer 'Classification in Psychiatry' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Benjamin James Sadock, Virginia Alcott Sadock and Pedro Ruiz (2009) 1108ff; James N. Butcher, Susan Mineka & Jill M. Hooley *Abnormal Psychology* 12th ed (2004); American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders DSM-5* ed (2013) 20ff; Ronald J. Comer *Abnormal Psychology* 8th ed (2014) 2ff.

between normality and pathology are usually (but not always) clear. For psychological disorder, however, we have no ideal, or even universally 'normal,' model of human mental and behavioral functioning to use as a base of comparison. Thus we find considerable confusion and disagreement as to just what is or is not normal, a confusion aggravated by changing values and expectations in society at large.<sup>468</sup>

The problem is that societal norms are relative. What is regarded as abnormal in one culture may well be regarded as normal in another.<sup>469</sup> Further, what is normal for one gender or age group may be abnormal for another.<sup>470</sup> Thus deviance in itself does not necessarily indicate psychopathology.<sup>471</sup>

The problem is complex. While there must be real concerns not to 'over-pathologise' behaviours within particular cultures and genders, there must be equal concern not to 'under-pathologise' behaviour. Just because particular behaviour may be typical or usual in a culture or gender, does not mean that it represents healthy psychological functioning.<sup>472</sup> The question in this context becomes what behaviour or mental phenomena to regard as abnormal that would otherwise be regarded as normal. For South Africa, a heteronymous society, and for criminal responsibility in particular, the realisation that psychopathology is a relative notion is clearly imperative.

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<sup>468</sup> R. C. Carson, J. N. Butcher & S. Mineka *Abnormal Psychology and Modern Life* 10th ed (1998) 6. See also Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 5.

<sup>469</sup> D.H. Barlow & V.M. Durand *Abnormal Psychology: An Integrative Approach* (2014) 3-4; Jeffrey S. Nevid, Spencer A. Rathus & Beverly Greene *Abnormal Psychology in a Changing World* 4th ed (1999) 6; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxiii-xxxiv; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 14-5. The APA state: 'The boundaries between normality and pathology vary across cultures for specific types of behaviors. Thresholds of tolerance for specific symptoms or behaviors differ across cultures, social settings, and families. Hence, the level at which an experience becomes problematic or pathological will differ. The judgment that a given behavior is abnormal and requires clinical attention depends on cultural norms that are internalized by the individual and applied by others around them, including family members and clinicians.' (ibid 14).

<sup>470</sup> R Macklin 'Mental Health and Mental Illness: Some Problems and Concept Formation' In *Biomedical Ethics and the Law* edited by J. M. Humber and R. F. Almeder (1979) 139; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 13 & 5.

<sup>471</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi; ibid xxii; Nevid, Rathus & Greene *Abnormal Psychology in a Changing World* 4th ed (1999).

<sup>472</sup> Thomas A. Widiger & Stephanie Mullins-Sweatt 'Classification' In *Handbook of Clinical Psychology, Adults* edited by Michel Hersen and Alan M. Gross (2008) 360

### *Deviance, Dysfunction, Distress and Danger*

Beyond deviance, a variety of other indicators have been suggested as indicating the presence of a psychopathology.<sup>473</sup> These indicators include dysfunction, distress, and danger.<sup>474</sup> They are regarded, together with deviance, as merely suggestive of the presence of a psychopathology. This is because each of these indicators is itself relative. A state of distress may signify an appreciation of the human condition. It is distressing that we all will die one day. Many, if not most people, face social and financial hardships. Regarding danger, as we live our lives, we constantly pose danger to others and ourselves. Driving or being driven, swimming, and exposing oneself to the sun are all mundane activities that are dangerous. Regarding dysfunction, a similar point may be made because of the difficulty in establishing an ideal standard for psychological functioning. However, if one were able to stipulate what that standard was, the concept of dysfunction would no longer be relative.

Further, psychopathologists do not agree on the significance of the indicators. For example, Comer<sup>475</sup> refers to the four indicators discussed above as significant, while the WHO<sup>476</sup> and Holmes<sup>477</sup> do not include danger in their list of indicators. Nevid, Rathus, and Greene<sup>478</sup> consider as significant, in addition to the original four discussed, the indicator that 'perception or interpretation of reality is faulty'.<sup>479</sup> The DSM<sup>480</sup> does not include deviance as an express criterion or basis for the recognition of a disorder.<sup>481</sup> While for Zimmerman and Spitzer deviance seems

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<sup>473</sup> Comer *Abnormal Psychology* 8th ed (2014) 2ff; Kring, Johnson, Davison & Neale *Abnormal Psychology* 11th ed (2010) 4-8.

<sup>474</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994); World Health Organisation *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992); Comer *Abnormal Psychology* 8th ed (2014) 2ff.

<sup>475</sup> Comer *Abnormal Psychology* 8th ed (2014) 2ff.

<sup>476</sup> World Health Organisation *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (1992).

<sup>477</sup> D. S. Holmes *Abnormal Psychology* 3 ed (1997).

<sup>478</sup> Nevid, Rathus & Greene *Abnormal Psychology in a Changing World* 4th ed (1999).

<sup>479</sup> *Ibid* 6.

<sup>480</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994); American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 20. See definitions on page 140.

<sup>481</sup> However, because the APA recognise that mental disorder is relative to culture and gender, deviance from the 'norm' is ultimately relied upon (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 14 & 5). It is clear from the DSM-5 that however much the APA may eschew reliance upon deviance from the norm as a basis for diagnosis, it is clear that it is inescapable. The APA state: 'The symptoms in our diagnostic criteria are part of the relatively limited

central.<sup>482</sup> The significance of danger appears to have changed for the APA from the previous edition of the DSM where it was significant, to a position under the DSM-5, where it is not.<sup>483</sup>

As Comer comments after considering the value of the indicators discussed:

Efforts to define psychological abnormality typically raise as many questions as they answer. Ultimately, a society *selects* the general criteria for defining abnormality and then uses those criteria to judge particular cases.<sup>484</sup>

Definitions of psychopathology are plagued therefore by disagreement and relativity. Disagreement in respect of what may indicate its presence. Relativity in that each definition is based on a different standard or perspective.

Of the four factors, dysfunction does appear to have gained prominence. Kendall and Hammen<sup>485</sup> regard the indicator of dysfunction as the only significant factor for diagnosis. Wakefield developed a prominent<sup>486</sup> definition of mental disorder, as follows:

I argue that a disorder is a harmful dysfunction, wherein harmful is a value term based on social norms, and dysfunction is a scientific term referring to the failure of a mental mechanism to perform a natural function for which it was designed by evolution. Thus, the concept of disorder combines value and scientific components.<sup>487</sup>

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repertoire of human emotional responses to internal and external stresses that are generally maintained in a homeostatic balance without a disruption in normal functioning. It requires clinical training to recognize when the combination of predisposing, precipitating, perpetuating, and protective factors has resulted in a psychopathological condition in which physical signs and symptoms exceed normal ranges.' (ibid 19). They continue: '... in the absence of clear biological markers or clinically useful measurements of severity for many mental disorders, it has not been possible to completely separate normal and pathological symptom expressions contained in diagnostic criteria.' (ibid 21)

<sup>482</sup> 'In contrast to most medical disorders, mental disorders are manifested by a quantitative deviation in behavior, ideation, and emotion from a normative concept.' (Zimmerman & Spitzer 'Classification in Psychiatry' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Sadock, Sadock and Ruiz (2009) 1109).

<sup>483</sup> See definitions below on page 140.

<sup>484</sup> Emphasis added, Comer *Abnormal Psychology* 8th ed (2014) 5.

<sup>485</sup> P. Kendall & C. Hammen *Abnormal Psychology* (1995) 63.

<sup>486</sup> Andrew M. Pomerantz *Clinical Psychology: Science, Practice, and Culture* 3 ed (2014) 152.

<sup>487</sup> Jerome C. Wakefield 'The concept of mental disorder: On the boundary between biological facts and social values.' (1992) 47 *American Psychologist* 373.

Significantly, the latest American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders definition of mental disorder gives prominence to the concept of dysfunction.<sup>488</sup> I will argue that this prominence is not misplaced and that it is precisely what is in issue in questions of criminal responsibility.

### *Diagnostic and Statistical Manual of Mental Disorders*

The Diagnostic and Statistical Manual of Mental Disorders (DSM)<sup>489</sup> represents the consensus that does exist on a definition of psychopathology and specific mental disorders to the extent that expert professionals agree:

[Expert professionals' rules] are stated in the *Diagnostic and Statistical Manual*, 4th Edition (called DSM-IV), which is the most widely accepted system in the United States and around the world for classifying psychological problems and disorders. The World Health Organisation publishes another manual used worldwide, the *International Classification of Diseases* (ICD), in many respects similar to the DSM.<sup>490</sup>

The DSM, now in its 5<sup>th</sup> edition (the DSM-5),<sup>491</sup> lists the disorders that have crystallised out of its definition referring to distress, dysfunction, and danger. It specifies the mental disorders that are currently generally accepted and provides for each a set of defining criteria. The criteria in the main comprise symptoms and signs. Symptoms are a patient's subjective description of their disorder. Signs are objective observations that may be made by a diagnostician, either directly or indirectly. Diagnosis of any particular disorder requires that the diagnostician establish the presence of the specified criteria, assisted by text descriptions of the disorder or group of disorders.<sup>492</sup> In respect of the origin of disorders (aetiology),<sup>493</sup> only rarely does it comment, and

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<sup>488</sup> See the definition set out below on page 140.

<sup>489</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013).

<sup>490</sup> Kendall & Hammen *Abnormal Psychology* (1995) 63 original emphasis. See also Tracey-Lee Austin & Alban Burke 'Introduction' In *Abnormal Psychology: A South African Perspective* edited by Alban Burke (2009) 13; Pomerantz *Clinical Psychology: Science, Practice, and Culture* 3 ed (2014) 153.

<sup>491</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013).

<sup>492</sup> Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004); American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 21.

<sup>493</sup> Aetiology is a technical term used in psychopathology to refer to the source or cause of, or process giving rise to, a disorder.



even then, its approach is atheoretical.<sup>494</sup>

The DSM-IV TR defined mental disorder as follows:

A clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering, death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioural, psychological, or biological dysfunction in the individual.<sup>495</sup>

Mental disorder is defined in the DSM-5 as follows:

A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a *dysfunction* in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behaviour (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a *dysfunction* in the individual, as described above.<sup>496</sup>

Significantly, it should be noted that the consideration of danger has been dropped from the DSM-

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<sup>494</sup> Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 7. Post Traumatic Stress Disorder (PTSD), is the notable exception (Richard J. McNally 'Posttraumatic Stress Disorder' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Benjamin James Sadock, Virginia Alcott Sadock and Pedro Ruiz (2009) 2650). The DSM postulates that the cause of PTSD is the experience of an extraordinary trauma (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994); American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) 463 & 7). The DSM-5 is however, to some extent, organised on the basis of apparently shared aetiology (A. Burke *Abnormal Psychology: A South African perspective* (2012) 19).

<sup>495</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi.

<sup>496</sup> Emphasis added; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 20.

5, whereas under the DSM-IV-TR 'a significantly increased risk of suffering, death, pain, disability, or an important loss of freedom'<sup>497</sup> was a valid basis for the recognition of a mental disorder. The emphasis now falls on dysfunction.

Though the DSM represents consensus in the field, it is not uncontested. Various criticisms have been levelled at the DSM of which the primary one relates to the model it has adopted for diagnoses: a categorical model.<sup>498</sup> The model derives from the biomedical model in terms of which disorders are conceptualised as discrete phenomena.<sup>499</sup> These discrete phenomena may be categorised according to the underlying core of each as well as the distinct boundary that is presumed to separate one disorder from another.<sup>500</sup> Critics have argued that the clinical reality is that the disorders from which people actually suffer are not distinct phenomena.<sup>501</sup> The result is often a diagnosis of several (comorbid) disorders as if the person diagnosed has more than one disorder, instead of one disorder with features that straddle the presently accepted categories.<sup>502</sup> The DSM-5 now recognise this<sup>503</sup> and appear to offer the inclusion of 'dimensional measures' as, at least, a partial solution.<sup>504</sup> Dimensional measures are included following from the following observation:

the boundaries between many disorder "categories" are more fluid over the life course than DSM-IV recognized, and many symptoms assigned to a single disorder may occur, at varying levels of severity, in many other disorders. These findings mean that DSM, like other medical disease classifications, should accommodate ways to introduce dimensional approaches to mental disorders, including dimensions that cut across current categories.<sup>505</sup>

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<sup>497</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxi.

<sup>498</sup> Ibid.

<sup>499</sup> Pomerantz observes: '... the DSM reflects a medical model of psychopathology in which each disorder is an entity defined categorically and features a list of specific symptoms'. (Pomerantz *Clinical Psychology: Science, Practice, and Culture* 3 ed (2014) 154)

<sup>500</sup> Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 130.

<sup>501</sup> Ibid.

<sup>502</sup> Ibid; Barlow & Durand *Abnormal Psychology: An Integrative Approach* (2014) 92. The possibility of the diagnosis of co-morbid disorders is clearly contemplated by the APA in the DSM-5 (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 21).

<sup>503</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 5-6

<sup>504</sup> Ibid 5

<sup>505</sup> Ibid

It is not clear whether these dimensional measures will be adequate to resolve the problems inherent in a categorical approach.

Another criticism of the DSM diagnostic categories is the potential reification of disorders so that they are regarded as existing in reality<sup>506</sup> rather than being an aid to understanding and communication.<sup>507</sup> A further criticism of the DSM is that it sacrificed validity (reflecting accurately a disorder) for the sake of reliability (inter-diagnostician agreement).<sup>508</sup> In the preface to the DSM-5 this preference is made clear:

Reliable diagnoses are essential for guiding treatment recommendations, identifying prevalence rates for mental health service planning, identifying patient groups for clinical and basic research, and documenting important public health information such as morbidity and mortality rates. As the understanding of mental disorders and their treatments has evolved, medical, scientific, and clinical professionals have focused on the characteristics of specific disorders and their implications for treatment and research.

While DSM has been the cornerstone of substantial progress in reliability, it has been well recognized by both the American Psychiatric Association (APA) and the broad scientific community working on mental disorders that past science was not mature enough to yield fully validated diagnoses—that is, to provide consistent, strong, and objective scientific validators of individual DSM disorders.<sup>509</sup>

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<sup>506</sup> This perspective is reinforced in the DSM-5 where it is noted that '[a different (dimensional)] approach should permit a more accurate description of patient presentations and increase the validity of a diagnosis (i.e., the degree to which diagnostic criteria reflect the comprehensive manifestation of *an underlying psychopathological disorder*). (Emphasis added; *ibid*)

<sup>507</sup> Barlow & Durand *Abnormal Psychology: An Integrative Approach* (2014) 92. Lewis describes how '[she] had to fit what [she] saw into the models [she] had been taught.' (Dorothy Otnow Lewis *Guilty by Reason of Insanity: Inside the Minds of Killers ...* (1998) 135).

<sup>508</sup> Barlow & Durand *Abnormal Psychology: An Integrative Approach* (2014) 92.

<sup>509</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders DSM-5* ed (2013) 5. The emphasis on reliability as opposed to validity is apparent throughout the preface, such as: "New diagnoses and disorder subtypes and specifiers were subject to additional stipulations, such as demonstration of *reliability* (i.e., the degree to which two clinicians could independently arrive at the same diagnosis for a given patient). Disorders with low clinical utility *and* weak validity were considered for deletion (Emphasis added; *ibid* 7ff). Notably, a disorder was only considered for deletion if it was both low in clinical utility *and* validity. Thus, a disorder which was weak in validity would be retained if it was considered clinically useful. Field trials were designed to improve on reliability while validity will be attended to in future: 'It is anticipated that future clinical and basic research studies will focus on the validity of the revised categorical diagnostic criteria and the underlying dimensional features of these disorders ...' (*ibid* 7-8)

This is not insignificant. To clarify, a valid measurement is accurate in the sense that it measures what it claims to measure.<sup>510</sup> A bathroom scale measures the mass of a person and is only a valid measure of mass if it accurately measures the mass of a person. A reliable measurement is one that is consistent. If a person's mass has not changed, a reliable bathroom scale will show the same measurement every time. These two criteria are crucial for any worthwhile instrument. An instrument which gave preference to validity over reliability is not ideal, but at least conceivable and somewhat useful. This would be a bathroom scale that varies in its measurement notwithstanding that the subject's mass has not changed. However, an instrument that gives preference to reliability over validity is hard to conceive and must be of questionable utility. This would be a scale that sometimes may, at best, on occasion, measure the mass of a person, on other occasions, it measures the temperature, or the speed or position of a certain unknown star. Even if this scale gave a consistent reading, it would be useless. The same arguably applies to the DSM.<sup>511</sup>

One must ask the question how useful a diagnosis is, upon which mental health practitioners may agree, if they cannot be sure what it is they are agreeing upon nor that such a thing even exists.

Rosenhan showed, in his now classic studies, that the diagnosis of mental disorder is prone to substantial error.<sup>512</sup> He conducted a study in which eight pseudo-patients (mentally healthy individuals) were presented to mental institutions as disordered. None was detected as faking. Further, he conducted another study in which a mental institution was informed that fake patients would present themselves at that institution and staff were requested to rate the likelihood that any patient presenting him or herself was a fake patient. In this study 21 per cent (41/193) of patients were rated with a high degree of confidence by at least one member of staff, to be fake patients, when actually no fake patients presented themselves.

Haysom, Strous and Vogelmann remark:

If nothing else, the critics of psychiatric diagnosis have served to warn society of the potential manipulation of diagnostic labels, and of the doubt which should exist in their

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<sup>510</sup> Comer *Abnormal Psychology* 8th ed (2014) 84.

<sup>511</sup> Burke *Abnormal Psychology: A South African perspective* (2012) 30.

<sup>512</sup> D. L. Rosenham 'On Being Sane in Insane Places' (1973) 179.

intrinsic heuristic value.<sup>513</sup>

Another significant criticism of the authority of the DSM emerges from its treatment of homosexuality as a disorder. Homosexuality was included as a mental disorder in the second edition of the DSM<sup>514</sup> while subsequent editions have declassified it. The point is not simply that homosexuality was categorised as a disorder, but more than that. It reveals a deep flaw in not just what is classified, but how disorders are classified and by what criteria. It reveals that socio-cultural and political factors play a role in the identification of behaviour or mental phenomena as mental disorders. The indictment is that it is not clear that the DSM or any nomenclature can ever be free of extraneous factors.

Although it is the leading attempt to define and describe mental disorders, it cannot be denied that the DSM-5 was born in controversy.<sup>515</sup>

Beyond the criticisms of the DSM as a diagnostic tool within psychology and psychiatry, there is yet another problem. The law does not regard the DSM as indicating which disorders should be recognised as mental illnesses or defects.<sup>516</sup> That is, many disorders recognised in the DSM as mental disorders (such as personality disorders<sup>517</sup> and kleptomania)<sup>518</sup> are not recognised in law as mental disorders for the purposes of an pathological incapacity plea. The Washington Supreme Court stated in 1993 that the DSM (referring then to the DSM-III-R) is an evolving and imperfect

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<sup>513</sup> N. Haysom, M. Strous & L. Vogelmann 'The Mad Mrs Rochester' Revisited: The Involuntary Confinement of the Mentally Ill in South Africa.' (1990) 6 South African Journal of Human Rights 358.

<sup>514</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 2 ed (1968).

<sup>515</sup> Pomerantz *Clinical Psychology: Science, Practice, and Culture* 3 ed (2014) 166ff.

<sup>516</sup> Burchell notes that only some disorders recognised in the DSM-IV qualify as mental illnesses or defects for the purposes of the insanity defence (Burchell *Principles of Criminal Law* 5th ed (2016) 284).

Slovenko remarks: '... the DSM—in whole or in part—is useful and is a common basis for assessing accountability, but the law is not limited to it in defining mental illness.' (Slovenko *Psychiatry and Criminal Culpability* (1995) 59).

<sup>517</sup> 'These disorders are not a consequence of disturbance of the psychic state but rather patterns of behaviour learned during formative years' (Burchell *Principles of Criminal Law* 5th ed (2016) 286). Psychopathy (Antisocial Personality Disorder) is not recognised as a disease of the mind in the US on the basis that a psychopath differs only insofar as s/he engages in repetitive antisocial or criminal acts and so only in the *quantity* of such conduct rather than the *quality* of his or her mental functioning (LaFave *Criminal Law* Abridged 4 ed (2003) 380 citing the *Report of the Royal Commission on Capital Punishment* (1953) §§394-402).

<sup>518</sup> Petty 'The Psychopathology Of Self-Control In The Context Of Criminal Capacity In South African Law' (unpublished Master's dissertation University of Stellenbosch 1998) 7.

document, that it is not sacrosanct, and is even in part a political document.<sup>519</sup>

The APA itself warns, in the preface of the DSM, against unconsidered adoption of the various disorders described for forensic purposes. Under the discussion relating to the definition of a mental disorder, the following appears:

This definition of mental disorder was developed for clinical, public health, and research purposes. Additional information is usually required beyond that contained in the DSM-5 diagnostic criteria in order to make legal judgments on such issues as criminal responsibility, eligibility for disability compensation, and competency (see "Cautionary Statement for Forensic Use of DSM-5" elsewhere in this manual).<sup>520</sup>

The cautionary statement referred to, appears under the heading "Cautionary Statement for Forensic Use of DSM-5" and is repeated at length here due to its importance:

Although the DSM-5 diagnostic criteria and text are primarily designed to assist clinicians in conducting clinical assessment, case formulation, and treatment planning, DSM-5 is also used as a reference for the courts and attorneys in assessing the forensic consequences of mental disorders. As a result, it is important to note that the definition of mental disorder included in DSM-5 was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals. It is also important to note that DSM-5 does not provide treatment guidelines for any given disorder.

When used appropriately, diagnoses and diagnostic information can assist legal decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination. By providing a compendium based on a review of the pertinent clinical and research literature, DSM-5 may facilitate legal decision makers' understanding of the relevant characteristics of mental disorders. The literature related to diagnoses also serves

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<sup>519</sup> *In re Petition of Andre Young* 122 Wash. 2d 1, 857 P.2d 989 (1993).

<sup>520</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 20. A similar though more extensive warning appeared in the DSM-IV and DSM-IV TR (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) xxiii-xxiv; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxii-xxxiii).

as a check on ungrounded speculation about mental disorders and about the functioning of a particular individual. Finally, diagnostic information about longitudinal course may improve decision making when the legal issue concerns an individual's mental functioning at a past or future point in time.

However, the use of DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. In most situations, the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability). For the latter, additional information is usually required beyond that contained in the DSM-5 diagnosis, which might include information about the individual's functional impairments and how these impairments affect the particular abilities in question. It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability.

Use of DSM-5 to assess for the presence of a mental disorder by nonclinical, nonmedical, or otherwise insufficiently trained individuals is not advised. Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the etiology or causes of the individual's mental disorder or the individual's degree of control over behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.<sup>521</sup>

Nevertheless, social scientists and forensic experts find themselves in a bind. To what shall they refer to inform whether to label a condition a disorder or not, or in particular, a mental illness or

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<sup>521</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* DSM-5 ed (2013) 25. Again, a similar statement appeared in the DSM-IV and DSM-IV TR American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) xxvii; American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: Text Revision* 4 TR ed (2000) xxxvii.

defect.

It is worth setting this caution against what – according to Comer – it is that a diagnosis offers:

When clinicians decide, through diagnosis, that a client's pattern of dysfunction reflects a particular disorder, they are saying that the pattern is basically the same as one that has been displayed by many other people, has been investigated in a variety of studies, and perhaps has responded to particular forms of treatment. They can then apply what is generally known about the disorder to the particular individual they are trying to help. They can, for example, better predict the future course of the person's problem and the treatments that are likely to be helpful.<sup>522</sup>

However, the caution appears to contradict this directly. Careful analysis of the forensic caution reveals that a diagnosis discloses nothing. It does not imply that the person diagnosed manifests any particular feature associated with the diagnosis, nor does it imply that the person suffered any particular impediment or disability, even if the central feature of the disorder is the particular impediment or inability in question. Ultimately, if one wants to know if any person suffered any particular impediment or inability at any time, an inquiry to determine that question must be done. In line with this, the argument will be made that concern with diagnosis and labelling is at best a waste of time and that if an impediment is in question, that impediment must be the focus of any enquiry.

## Conclusion

The requirement that, for a pathological incapacity defence, a mental disorder must qualify as a 'pathology' appears therefore to be unsound or a mere assumption; to beg the question or to be circular; to really be a reference to the origin of a disorder; and ultimately, if taken as a reference to psychopathology, offers no clear uncontested criterion – except perhaps for the consideration of whether the accused could be considered 'dysfunctional'.

I have acknowledged that the concept of dysfunction may be regarded as relative because of the difficulty in defining a standard of ideal functioning. Nevertheless, this consideration appears now to be the most prominent consideration in psychopathology – qualified by appropriate considerations of what may be considered adequate functioning for an individual within any

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<sup>522</sup> Comer *Abnormal Psychology* 8th ed (2014) 99.



particular context.

As suggested above however, I will argue that there is no value in determining whether, for legal purposes – at least for the criminal law, any person suffers with what may be regarded as a mental disorder, a mental illness or a mental defect. These are all meaningless labels that only serve to permit unfounded inferences.

### Endogenous Origin

As indicated above, the *Stellmacher*<sup>523</sup> decision introduced the requirement that the mental disorder in question, must have arisen internally. The disorder must be of endogenous origin.<sup>524</sup> It would seem that the social sciences are inevitably best placed to say what is of endogenous origin.

### Social Sciences

In the social sciences, the issue of causation, known as aetiology, of psychopathologies is highly contested.<sup>525</sup> Various models have been put forward to explain the causes of psychopathology: bio-medical, psychodynamic, humanistic-existential, behavioural, cognitive, socio-cultural and family systems. Each of these will be briefly surveyed.

It is notable that none of these models, not even the bio-medical model, requires that the (ultimate) cause of psychopathology must come from within a person.

The bio-medical model is concerned with the biological bases of psychology. Mental disorders are attributed to anatomical or neurochemical problems in the brain.<sup>526</sup> For this reason, it is often

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<sup>523</sup> *S v Stellmacher* (2) SA 181 (SWA) (translation by Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 278).

<sup>524</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 282; Du Toit, De Jager, Paizes, Skeen & van der Merwe *Commentary on the Criminal Procedure Act* Vol RS 34 (2005); Kriegler & Kruger *Suid-Afrikaanse Strafproses* 6 ed (2002) 215; Snyman *Criminal Law* 6th ed (2014) 166.

As indicated above, there is some contradiction though in the demand that a mental illness/defect be of endogenous origin, and yet that the cause of it 'does [not] matter' (Burchell *Principles of Criminal Law* 5th ed (2016) 281).

<sup>525</sup> Comer *Abnormal Psychology* 8th ed (2014) 48; Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004).

<sup>526</sup> Comer *Abnormal Psychology* 8th ed (2014) 49ff.

criticised as being reductionist.<sup>527</sup> Central to this model is the notion that disorders are 'real' phenomena that can be discovered. The model holds that in time science will develop sufficiently so that the physiological cause of all disorders will be discovered. However, even within this model there is no insistence that the (ultimate) cause of a brain problem must arise from within the person. It is well recognised that ingesting chemicals or being struck on the head may well lead to a brain disorder and, in turn, a mental disorder.

The psychodynamic model began with the work of Freud's psychoanalytic approach. Psychoanalysis explains human personality and psychopathologies in terms of early childhood experiences and unconscious forces. Psychoanalysis proposes that pathologies are due to conflicts within one's mind raging out of control.<sup>528</sup> Unresolved intrapsychic conflict ultimately results in psychopathology.<sup>529</sup> However, on the basis that all people experience intrapsychic conflict, Macklin<sup>530</sup> comments that psychoanalysis cannot clearly distinguish those who are pathological from those who are not. For psychoanalysis, everyone is to some degree, disordered.

The humanistic-existential model concerns the human potential to rise to philosophical challenges such as self-awareness, values, meaning, and choice, and to incorporate these into one's life.

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<sup>527</sup> At the philosophical root of this criticism is that it seems difficult to attribute subjective sensations, such as being conscious, to objective matter. See Nagel 'What is it Like to Be A Bat' (1974) 83 *Philosophical Review*.

<sup>528</sup> Jacki Watts & Derek Hook 'Freud's psychoanalytic theory of development and personality' In *Developmental Psychology* edited by Jacki Watts, Kate Cockroft and Norman Duncan (2009) 62-3; S Freud *The ego and the id* (1923); S Freud *Beyond the pleasure Principle* (1920); Holmes *Abnormal Psychology* 3 ed (1997); W. W. Meissner 'Classical Psychoanalysis' In *Kaplan and Sadock's Comprehensive Textbook of Psychiatry* edited by Benjamin James Sadock, Virginia Alcott Sadock and Pedro Ruiz (2009) 788ff. In a particularly lucid explanation, Watts states: 'Fixations, at a particular psychosexual stage, result in a particular 'tone' or thematic conflictual pathology. Evidence of fixation indicates a lack of the resolution between the press of the Id and the Ego and Superego's capacities to deal with the press of the Id at that particular psychosexual stage e.g. oral, anal, Oedipal conflicts. The strength of the ego to mediate the conflict is significant. Where psychic functioning is more primitive the Ego has aligned with the Id diminishing the functioning of the Superego. Such functioning results in psychotic states where internal reality predominates and the reality principal is compromised. When the ego and superego align then neurosis characterizes psychic functioning placing severe repression on the Id. Obsessive compulsive states would be an example. Psychopathic states are underpinned by a weak ego which is unable to mediate between the Id and the Superego. The Id impulses hold sway driven by the pleasure principle. Social morality has no meaning and as such sadism may be a source of pleasure for the Psychopath.' (Jacki Watts Personal Communication 2 July 2011)

<sup>529</sup> Kendall & Hammen *Abnormal Psychology* (1995).

<sup>530</sup> Macklin 'Mental Health and Mental Illness: Some Problems and Concept Formation' In *Biomedical Ethics and the Law* edited by Humber and Almeder (1979) 145.

From a humanist perspective, psychopathology results where individuals avoid their responsibility to fulfil their potential. From an existentialist perspective, psychopathology results where individuals fail to face their existence and give meaning to their lives.<sup>531</sup>

The behavioural model regards behaviour as a response to stimuli in one's environment.<sup>532</sup> The probability of the repetition of specific behaviour is governed by the reinforcement of that behaviour. Thus, for the behavioural model, psychopathology results from maladaptive learning.<sup>533</sup>

The cognitive model is concerned with the role of thinking and information processing in explaining human behaviour.<sup>534</sup> The emphasis here shifts from the behavioural perspective of a direct relationship between one's environment and its effect upon one's mind, to recognising the impact of an individual's thoughts.<sup>535</sup> Mental disorder is regarded as arising out of maladaptive thinking, irrational beliefs, and interpretations which may be traced to unexamined beliefs, faulty learning, the drawing of incorrect inferences, and failing to distinguish between imagination and reality.<sup>536</sup>

The socio-cultural model focuses on environmental stresses that an individual may endure.<sup>537</sup> Societal stress such as poverty and discrimination lead to mental disorder. The family systems model proposes that family interaction directs the development of an individual's sense of reality and personal identity. Faulty communication or structural imbalances within a family are regarded as the cause of psychopathology.<sup>538</sup>

Thus, various factors have been implicated as causing mental disorder. These causes range from brain disorder, unresolved intrapsychic conflicts, failures to fulfil one's potential or give meaning to one's life, maladaptive learning, maladaptive thinking and irrational beliefs, to faulty communication and structural imbalances within a family. As noted though, no school of thought regards the cause of a disorder as exclusively 'internal' or 'external'.

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<sup>531</sup> Comer *Abnormal Psychology* 8th ed (2014) 68; Kendall & Hammen *Abnormal Psychology* (1995).

<sup>532</sup> I. G. Sarason & B. R. Sarason *Abnormal Psychology: The Problem of Maladaptive Behavior* 8th ed (1996).

<sup>533</sup> Kendall & Hammen *Abnormal Psychology* (1995).

<sup>534</sup> Nevid, Rathus & Greene *Abnormal Psychology in a Changing World* 4th ed (1999).

<sup>535</sup> D. L. Rosenhan & M. E. P. Seligman *Abnormal Psychology* 2nd ed (1989).

<sup>536</sup> Kendall & Hammen *Abnormal Psychology* (1995); Kring, Johnson, Davison & Neale *Abnormal Psychology* 11th ed (2010) 45-8; Comer *Abnormal Psychology* 8th ed (2014) 62ff.

<sup>537</sup> Comer *Abnormal Psychology* 8th ed (2014) 70ff.

<sup>538</sup> David Sue, Derald Wing Sue & Stanley Sue *Understanding Abnormal Psychology* 9th ed (2010) 56.

A complicating factor is that causes may range along a spectrum from remote to more direct, proximate causes. Some, such as genetic factors, may predispose an individual, placing him/her at risk. Others represent more immediate precipitating factors such as stressors in an individual's environment. All are factors in a causal chain, whether remote or proximate. Although some factors may be regarded as 'external' (meaning presumably environmental factors) they may represent precipitating factors which combine with other predisposing factors to produce a pathology. Butcher, Mineka and Hooley capture the problem well:

Although understanding the causes of abnormal behaviour is clearly a desirable goal, it is enormously difficult to achieve because human behaviour is so complex. Even the simplest of human behaviours, such as speaking or writing a word, is the product of literally thousands of prior events - only some of which are understood, and then frequently only in the vaguest of ways. Understanding a person's life in causal terms, even an utterly 'adaptive' life, is an incomplete project of enormous magnitude; when the life is a maladaptive one, we can assume the task is even more difficult.<sup>539</sup>

In the social sciences, psychopathologists appear to regard the problem of the origin of any mental condition as a complex interaction of factors<sup>540</sup> and certainly do not seem to be prepared to regard any condition as caused exclusively by 'internal' or 'external' factors.

### In Law

The English law requires, for recognition of a 'disease of the mind', that the cause thereof must be 'internal'.<sup>541</sup> Analysis of some prominent English cases reveals the difficulty of adopting this criterion.

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<sup>539</sup> Butcher, Mineka & Hooley *Abnormal Psychology* 12th ed (2004) 56.

<sup>540</sup> Barlow & Durand *Abnormal Psychology: An Integrative Approach* (2014) 29ff; Sue, Sue & Sue *Understanding Abnormal Psychology* 9th ed (2010) 34ff.

<sup>541</sup> D. Ormerod, J.C. Smith & B. Hogan *Smith and Hogan's Criminal Law* (2011) 297 and 8ff; *R v Burgess* [1991] 2 QB 92; *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673; *R v Quick* [1973] QB 910, [1973] 3 All ER 347; Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 296&338ff; *R v Hennessy* [1989] 2 All ER 9, CA. Claydon notes: 'In English law the division in automatism cases between automatism and insane automatism rests, in reality, on whether the episode is deemed by the court to have an internal or external cause.' (Lisa Claydon 'Are there lessons to be learned from a more scientific approach to mental condition defences?' (2012) 35 91)

In the case of *Quick*,<sup>542</sup> the court held that the accused's condition, hypoglycaemia, was transitory and caused by the external condition of medication. However, the accused had used insulin to treat his diabetes. The problem is this: the insulin may be regarded as 'external', but his need for it, his diabetes, was 'internal'. Wasik,<sup>543</sup> apparently appreciating the complexity of causation, raises the question of what the outcome would have been had the diabetes, as an 'internal' factor, been regarded as the cause. He concludes that pathological incapacity would have been the only defence, implying that *Quick's* condition would then have amounted to a disease of the mind.

In the leading case of *R v Sullivan*<sup>544</sup> causation is said not to matter.

If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.<sup>545</sup>

However, somewhat perplexingly, it is also stated at another place that it does matter if the cause is external. It is not a disease of the mind if the 'impairment ... results from some *external*/physical factor such as a blow on the head causing concussion ....'<sup>546</sup>

In 1991, on the reasoning that an internal cause indicates a disease of the mind, the court in *R v Burgess*<sup>547</sup> found a somnambulist (sleepwalker) to be not guilty by reason of pathological incapacity holding sleepwalking to be a disease of the mind due to its endogenous origin (and tendency to recur).<sup>548</sup>

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<sup>542</sup> *R v Quick* QB 910, [1973] 3 All ER 347.

<sup>543</sup> M. Wasik 'Insanity, diminished responsibility and infanticide: legal aspects.' In *Principles and Practice of Forensic Psychiatry* edited by R. Bluglass and P. Bowden (1990) 257.

<sup>544</sup> *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673.

<sup>545</sup> *Ibid* 172.

<sup>546</sup> *Ibid* 172 emphasis added.

<sup>547</sup> *R v Burgess* 2 QB 92. For Meintjes-Van der Walt this reveals the artificial meaning given to mental illness or defect for the purposes of a pathological incapacity defence. (Meintjes-Van der Walt 'Making a muddle into a mess?: The Amendment of s78 of the Criminal Procedure Act' (2002) 15 SACJ 248).

<sup>548</sup> Notably, in *Parks* the Supreme Court of Canada held that somnambulism is not rendered a disease of the mind by virtue that it may be regarded as arising internally (*R. v. Parks*, [1992] 2 S.C.R. 871; See Richard Card *Card, Cross and Jones Criminal Law* 19th ed (2010) 658). In the cases of *Parks* and *Luedecke* (*R. v. Luedecke*, ONCA 716 (CanLII); 236 CCC (3d) 317) the courts were far more concerned

Some of the conditions recognised in South African law as constituting mental illnesses/defects do not comply with the requirement of endogenous source. Schizophrenia, which is legally accepted as a 'mental illness'<sup>549</sup> is regarded, within psychology, as the product of environmental socio-cultural factors, psychological factors, and/or biological and genetic factors, but usually as an interaction of all these phenomena.<sup>550</sup> Also, 'reactive' depression – depression due to some external environmental event – has been recognised as a mental illness.<sup>551</sup>

Further, one must ask, would brain injury resulting from a motor vehicle accident be disqualified because its original is external?<sup>552</sup> Similarly for a blow on the head with a stick.<sup>553</sup> Also, what if addiction is the cause of the use of alcohol, where is the cause then?

Wasik observes that the 'difficulty with the "external factors" doctrine is that it seems to create arbitrary distinctions'<sup>554</sup> while Smith, Laird, Ormerod, and Hogan state: 'distinguishing between external and internal causes is an unsatisfactory and deficient way of addressing the true mischief – the likelihood of the danger posed by uncontrolled recurrence of the mental condition leading to a lack of capacity.'<sup>555</sup>

Thus, the aetiology of psychopathology does not seem to permit causal factors to be regarded as exclusively endogenous or exogenous as the law presently requires and even if it did, the requirement of endogenous source appears to be applied selectively.

There appears therefore nothing in the *Stellmacher* requirements of pathology and endogenous origin to validly and reliably define a mental disorder for the purposes of a pathological incapacity

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with the 'dangerousness' of the offender (see note 568) – discussed below under O Dangerousness on page 154ff.

<sup>549</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 285.

<sup>550</sup> Ronald J. Comer *Abnormal Psychology* 8th ed (2013) 434.

<sup>551</sup> *S v Kavin* 1978 (2) SA 731 (W); Burchell *Principles of Criminal Law* 5th ed (2016) 285-6.

<sup>552</sup> For this insight I am indebted to Peter Jordi of the School of Law, University of the Witwatersrand, Johannesburg.

<sup>553</sup> Burchell states: '... a malfunctioning of the mind which is caused by a *blow on the head* resulting in concussion ... is not an "illness" or "disease" of the mind since it is exogenous in its origin.' (My emphasis, Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 288)

<sup>554</sup> Wasik 'Insanity, diminished responsibility and infanticide: legal aspects.' In *Principles and Practice of Forensic Psychiatry* edited by Bluglass and Bowden (1990) 257.

<sup>555</sup> Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 338.

defence. If the real issue is dangerousness, then this must be addressed.

### Dangerousness

Analysis of what ultimately drives the pathological incapacity plea appears to be the notion of dangerousness.<sup>556</sup>

Lord Denning in the leading English case of *Bratty* made it clear that dangerousness was central to the recognition of a disease of the mind:

It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal.<sup>557</sup>

In McAuley's view, '[t]he fact is that defendants who are abnormally susceptible to shock or stress are dangerous in a way that the normally susceptible defendant is not, and seem naturally to attract the insanity defence for that reason.'<sup>558</sup> As mentioned above, Smith, Laird, Ormerod, and Hogan note that where a mental condition arises from an 'internal' cause, it is expected to recur more likely.<sup>559</sup> They go on, as noted above, to criticise the internal/external bases of distinguishing disorders since it obscures the true mischief – the likelihood of danger posed by uncontrolled recurrence of the mental condition.<sup>560</sup> Clarkson endorses the view that dangerousness is the true mischief: '... illness could cause him to act in the same way again; he is thus regarded as potentially dangerous and perhaps in need of restraint. ... The defendant is potentially dangerous and it is important that the courts retain the power to exercise control (for example, hospitalisation) over him. The pathological incapacity verdict triggers this power of control.'<sup>561</sup>

The American Law Institute holds the view that the pathological incapacity plea offers the advantage that it may facilitate commitment when the individual is dangerous to the community

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<sup>556</sup> I do not propose to take a view here on whether mental disorder predisposes one to be more dangerous or not. I am well aware that dangerousness is exceedingly difficult to determine and that mental disorder may not make a person more dangerous than other 'normal' people. My purpose here is to show that our Courts rely on this issue as a primary determinant of whether to regard someone as suffering from a mental illness/defect.

<sup>557</sup> *Bratty v Attorney General for Northern Ireland* [1963] AC 386, [1961] 3 All ER 523 412.

<sup>558</sup> McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 77n48.

<sup>559</sup> Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 338.

<sup>560</sup> *Ibid* 338ff.

<sup>561</sup> Clarkson *Understanding Criminal Law* (2005) 100-1.

because the condition is recurrent.<sup>562</sup> Denno observes: '... [o]ther countries, such as England, consistently classify as pathological incapacity violent conduct that may be considered sane but involuntary ... The predominant justification stems from fears about dangerousness.'<sup>563</sup> Milton recognises that in respect of disposal, a mandatory committal<sup>564</sup> to a mental institution triggered by a successful pathological incapacity defence is premised on concerns with dangerousness.<sup>565</sup> In *Jones v United States*<sup>566</sup> the United States Supreme Court endorsed the notion that pathological incapacity acquittees out to be considered dangerous.<sup>567</sup> The Supreme Court of Canada has held that the purpose of the pathological incapacity defence – and thus whether a disorder is a 'disease of the mind' or not – is the protection of society against recurrent danger.<sup>568</sup>

It would appear that dangerousness is the concern underlying the recognition of a mental illness or defect required for a pathological incapacity defence. It is therefore the ultimate basis for the distinction between pathological and non-pathological incapacity.

One final point requires to be observed regarding attempts to glean some definition of the mental disorder requirement – that it is, in any event, almost entirely redundant.

### Redundancy

The requirement of a mental disorder is supposed to qualify and distinguish a pathological incapacity defence from any other defence of non-responsibility. A pathological incapacity defence, as indicated above,<sup>569</sup> requires that the accused suffered from a mental disorder which manifested in various functional impediments – was unable to know the wrongfulness of his conduct or was

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<sup>562</sup> American Law Institute *Model Penal Code* (1985) 219-20. Denno notes of the American Law Institute: 'Certainly, the MPC drafters emphasized concerns about recurring dangerousness as a reason why a defendant's condition might be considered insane rather than sane but involuntary.' (Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review n381).

<sup>563</sup> Denno 'Crime and Consciousness: Science and Involuntary Acts' (2002) 87 Minnesota Law Review n381.

<sup>564</sup> Provided for prior to the discretion granted by the Criminal Matters Amendment Act of 1998.

<sup>565</sup> John Milton 'Law Commission Project 89: Declaration and Detention of State Patients' (1998) 11 SACJ 228 &33.

<sup>566</sup> *Jones v. United States* 463 U.S. 354 (1983) 365.

<sup>567</sup> Discussed in Stephen J. Morse 'Mental Disorder and Criminal Law' (2011) 101 Journal of Criminal Law and Criminology 960.

<sup>568</sup> *R. v. Parks*, [1992] 2 S.C.R. 871. See also *R. v. Luedecke*, ONCA 716 (CanLII); 236 CCC (3d) 317 para 6ff.

<sup>569</sup> See Chapters 14 & 15.



unable to conduct him/herself accordingly. The structure of the defence is particular. It requires that a mental disorder results in various functional impediments.<sup>570</sup> There is a significant tendency, however, to operate in reverse – to define the mental disorder required by reference to whether the relevant functional impediments presented.

This may be observed in the leading English case of *R v Sullivan*:

*If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.*<sup>571</sup>

In the US this approach is also common.<sup>572</sup> The second part of the M'Naghten test (not knowing the nature and quality or that the deed is wrong) is relied upon to identify the first part (what constitutes a disease of the mind).

In respect of South African law, Burchell's survey of which mental disorders qualify as a 'mental illness or defect' is undertaken by an explicit consideration of whether any particular condition may possibly cause the relevant functional impediments.<sup>573</sup> This approach is circular and renders the requirement of a mental disorder redundant.

## Conclusion

Therefore it appears that the requirement of pathology is an (almost) meaningless obstacle placed in the way of a plea of pathological incapacity. It serves only to give covert expression to some myths, false intuitions, and is also – to a large extent – redundant. There are regrettably no answers here – only unanswered questions.

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<sup>570</sup> McAuley *Insanity, Psychiatry and Criminal Responsibility* (1993) 62.

<sup>571</sup> *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673 172 emphasis added.

<sup>572</sup> *State v. Elsea*, 251 S.W.2d 650 (Mo.1952); *State v. Johnson*, 233 Wis. 668, 290 N.W. 159 (1940); LaFave *Criminal Law Abridged* 4 ed (2003) 377. See also Slovenko *Psychiatry and Criminal Culpability* (1995) 12; A. S. Goldstein *The Insanity Defense* (1967) 87.

<sup>573</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 284-7.

## Chapter 13 Non-pathological Non-Responsibility

### Introduction

Non-pathological non-responsibility has been recognised as arising out of severe emotional stress (traditionally known as the defence of 'provocation'),<sup>574</sup> intoxication,<sup>575</sup> or a combination of these factors.

The defence consists, in theory, in the absence of either one of the functions required for capacity: the ability to appreciate the wrongfulness of one's conduct or the ability to act in accordance with that appreciation. A common example of a state of severe emotional stress which may exclude responsibility is that of a person who discovers his/her spouse in an act of adultery.<sup>576</sup>

As may be noted from the discussion regarding the development of the defence,<sup>577</sup> no qualifying mental state is required. 'Non-pathological' criminal incapacity may, supposedly, arise from any cause or mental state whatsoever.<sup>578</sup>

### 'Provocation' in England and the USA

The defence of provocation (as it is known) in England, if successful, reduces a possible murder conviction to one of manslaughter. It is contained in sections 54 and 55 of the Coroners and

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<sup>574</sup> *S v Van Vuuren* 1983 (SA) SA 12 (A); *S v Campher* (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 561 (A). While the defence is traditionally known as 'provocation', this label is a misnomer. It is rather the *effect* of provocation which is the foundation for this defence and not the provocation itself. Provocation is merely a cause of the state of interest: the state of anger, rage or fear, amongst others. Provocation is often seen to be distinct from severe emotional stress. Provocation is regarded as the offensive behaviour of another person, whilst severe emotional stress is regarded as arising from an adverse environment. No clear distinction exists in this regard in SA law (Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 288. This point does not seem to be addressed in the latest edition of this text (Burchell *Principles of Criminal Law* 5th ed (2016)). Further it does not appear possible to draw a clear distinction between the conduct of human agents and the environment. People live in environments which seem best understood as composed partly, but inextricably, of other people. Ultimately, since it is the emotional state which is of interest, the source of the state should be regarded as irrelevant (Burchell & Milton *Principles of Criminal Law* 2nd ed (1997) 288). Hence the concept of severe emotional stress will be preferred and employed here to refer to an emotional state, induced by stress of any origin, which may render an individual not responsible. It is this state which has been held by our courts to deprive a person of criminal capacity in certain circumstances.

<sup>575</sup> *S v Chretien* 1981 (1) SA 1097 (A).

<sup>576</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 327note5; Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 520; Dressler *Understanding Criminal Law* 2nd ed (1997) 491.

<sup>577</sup> See Development of the Defence in South Africa on page 163ff.

<sup>578</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 328.

Justice Act 2009.<sup>579</sup> Section 54 provides:

(1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if —

- (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
- (b) the loss of self-control had a qualifying trigger, and
- (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1) (a), it does not matter whether or not the loss of control was sudden.

(3) In subsection (1) (c) the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge. ...

The defence consists of a ‘subjective’ and an ‘objective’ element, both of which have proved controversial. The subjective element is that the accused must establish that s/he actually lost his/her self-control due to provocation. The objective element is that a ‘a person of D's sex and age, with a normal degree of tolerance and self-restraint’ would also have been provoked and would have acted, to the same extent, as the accused did.

The defence was contained, for a long time in s 3 of the Homicide Act of 1957,<sup>580</sup> qualified by the definition of provocation in *R v Duffy*,<sup>581</sup> even though the *Duffy* definition was superseded by the definition contained in s 3 of the Homicide Act of 1957. On appeal before the Court of Criminal Appeal in *Duffy*, Lord Goddard CJ endorsed the definition of provocation offered by Devlin J in his jury instruction in the trial court, as follows:

Provocation is some act, or series of acts, done (or words spoken) which would cause in

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<sup>579</sup> Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 506ff.

<sup>580</sup> As follows: ‘Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on the reasonable man.’

<sup>581</sup> *R v Duffy* [1949] 1 All ER 932.

any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind.<sup>582</sup>

In the US, the law on provocation (as it is known) refers to a defence which entitles an accused to be convicted of voluntary manslaughter if the killing s/he committed was in the 'heat of passion', was caused by 'adequate provocation', and was committed before a reasonable 'cooling time' had expired.<sup>583</sup> The defence is primarily concerned with excluding 'malice aforethought', the presence of which would lead to a murder conviction. Malice aforethought manifests in a cool deliberate killing which may be excluded by rage.<sup>584</sup> It is a defence which applies '... to those instances in which people act without thinking ...'.<sup>585</sup> As in the English law, the defence includes subjective and objective elements.

### Subjective element in England

The subjective element in English law is that the accused must have been provoked and lost her/his self-control. Under the influence of *Duffy's* case, and until the new defence was enacted,<sup>586</sup> the defence required that the loss of self-control must be 'sudden and temporary'.<sup>587</sup>

Decided under the 'old law' of provocation, the cases of *Ahluwalia*<sup>588</sup> and *Thornton*<sup>589</sup> affirmed the requirement, from *Duffy*, that the provocation must be 'sudden'. Both cases concerned women who killed their violent and abusive husbands. The defence seems to have failed (in both cases) because an inference was drawn, based upon the time delay, of deliberation.<sup>590</sup> The cases established that the longer the time period that expires between the provocation and the conduct of the accused, the less likely it becomes that the defence will succeed. Apparently then, to succeed, provocation must have prevented the accused from deliberating. As discussed above, this approach appeared to conflate cognitive and conative functioning.

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<sup>582</sup> Ibid 932.

<sup>583</sup> LaFare *Criminal Law* Abridged 4 ed (2003) 755ff.

<sup>584</sup> D. T. Skelton *Contemporary Criminal Law* (1998) 64.

<sup>585</sup> Hall *Criminal Law and Procedure* (1992) 117.

<sup>586</sup> In terms of s 54 & 55 of the Coroners and Justice Act 2009, set out under the heading "Provocation" in England and the USA' on page 157ff.

<sup>587</sup> *R v Ahluwalia* [1992] 4 All ER 889; *R v Thornton (No 2)* [1995] 2 All ER 1023; Clarkson *Understanding Criminal Law* (2005) 124.

<sup>588</sup> *R v Ahluwalia* [1992] 4 All ER 889.

<sup>589</sup> *R v Thornton (No 2)* [1995] 2 All ER 1023.

<sup>590</sup> D. Bloy *Criminal Law: Lecture Notes* 2nd ed (1996) 190; Ormerod *Smith & Hogan Criminal Law* (2005) 448-9.

Under the new law, the provocation need not be 'sudden' and appears to have resolved the problem which followed on the requirement that the loss of control must be sudden. However, the new law contains the proviso that the defence cannot succeed where it if the accused 'acted in a considered desire for revenge'. It is not clear whether this qualification will not counteract the release of the defence from the requirement of a 'sudden' loss of control.<sup>591</sup> Again, at the very least, this requirement seems to redirect the enquiry back to a cognitive concern. Beyond that, one must wonder why it should be impossible to claim a loss of control where one has lost control even if motivated by vengeance.

### Subjective element in the USA

The requirement that the killing be committed during the 'heat of passion' refers to the emotional disturbance that the accused must have experienced.<sup>592</sup> The accused must, on account of his/her emotional state, have lost control of her/his ordinary restraints. This is a subjective enquiry. The concept of 'passion' is not limited to anger but includes fear,<sup>593</sup> jealousy,<sup>594</sup> and 'wild desperation'.<sup>595</sup> The court in *Borchers* quoted a dictionary, with apparent approval, defining passion to include any 'violent, intense, high-wrought, or enthusiastic emotion'.<sup>596</sup> Also, subjectively, the accused must act before s/he has cooled off.<sup>597</sup> This requirement restricts the defence to acts which are sudden and immediate to the provocation. It has been somewhat relaxed in that it has been accepted that some time may pass between the provocation and the killing. In *Berry*<sup>598</sup> the accused lay in wait in the victim's apartment for some 20 hours after being provoked for the very last time. As noted above,<sup>599</sup> the defence of provocation is restricted '... to those instances in which people act without thinking ...'.<sup>600</sup> Again, the point must be observed that this approach appears to conflate cognitive and conative functioning.

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<sup>591</sup> Smith, Laird, Ormerod & Hogan *Smith and Hogan's Criminal Law* (2015) 510ff

<sup>592</sup> LaFave *Criminal Law Abridged* 4 ed (2003) 777.

<sup>593</sup> *LaPierre v State* 734 P.2d 997, 1001 (Alaska Ct App. 1987).

<sup>594</sup> *People v Berry* 556 P. 2d 777, (Cal. 1976).

<sup>595</sup> *People v. Borchers* 325 P.2d 97, (Cal. 1958).

<sup>596</sup> *Ibid* 102.

<sup>597</sup> *Ibid* 787-8.

<sup>598</sup> *People v Berry* 556 P. 2d 777, (Cal. 1976).

<sup>599</sup> 'Provocation' in England and the USA on page 157ff.

<sup>600</sup> Hall *Criminal Law and Procedure* (1992) 117.

### Objective element: the Reasonable Person

The objective elements of the English and US approaches require that beyond having actually lost self-control, a 'reasonable person' would also have lost control. This requirement is obsolete in our law since it turned away from the English approach in 1971.<sup>601</sup>

This objective standard is concerned with a comparison of the accused's conduct in his/her state of lacking self-control, with a standard of a reasonable person. Padfield asks the obvious and yet profound question: '[W]ho is the reasonable man?'<sup>602</sup> The relevance of the brief discussion that follows is to see that the US and England struggle with the question of how to construct the test of the reasonable person so as to be fair. Notably the discussion continues at the level of what characteristics of the accused to attribute to the reasonable person.

Anglo-American common law identifies the reasonable person as being of average disposition,<sup>603</sup> not exceptionally belligerent,<sup>604</sup> sober,<sup>605</sup> of normal mental capacity.<sup>606</sup> While it appears agreed that the age and sex of the accused will be attributed to the reasonable person,<sup>607</sup> 'mental infirmity' may not be attributed.<sup>608</sup> However, in *Humphreys*<sup>609</sup> and *Dryden*<sup>610</sup> the court directed that an accused's traits and characteristics, which may even amount to a psychological illness or disorder, should be attributed to the reasonable person.

In 2000 in the case of *Smith*,<sup>611</sup> the English House of Lords sought to take a definitive step towards resolving the confusion which reigned in English law. It is debatable whether they succeeded.<sup>612</sup> It came very close to obliterating the objective standard of the reasonable person specified in s 3 of the Homicide Act.<sup>613</sup> The defendant (accused) had killed a friend during a heated quarrel over some stolen tools. The defendant suffered with severe clinical depression. The question arose whether this depression could be attributed to the reasonable person against whose conduct the defendant's conduct was to be compared. The majority of the court held that

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<sup>601</sup> Discussed on page 163.

<sup>602</sup> N. Padfield *Criminal Law* (1998) 158.

<sup>603</sup> *Maher v. People* 10 Mich. 212 (1862).

<sup>604</sup> *Mancini v Director of Public Prosecutions* [1941] 3 All E.R. 272.

<sup>605</sup> *Regina v McCarthy* [1954] 2 All E.R. 262.

<sup>606</sup> *Rex v. Lesbini* [1914] 11 Crim. App. 7.

<sup>607</sup> *R v Camplin* [1978] 2 All ER 168; *R v Morhall* [1995] 3 All ER 659.

<sup>608</sup> *Luc v The Queen* [1996] 2 All ER 1033 - though the court was not unanimous in this finding.

<sup>609</sup> *R v Humphreys* [1995] 4 All ER 1008.

<sup>610</sup> *R v Dryden* [1995] 4 All ER 987.

<sup>611</sup> *R v Smith* [2000] 4 All ER 289, [2000] Crim LR 1004, HL.

<sup>612</sup> Clarkson *Understanding Criminal Law* (2005) 127.

<sup>613</sup> *Ibid.*

'everything' was to be taken into account in that the issue was 'what could reasonably be expected of a person with the accused's characteristics'.<sup>614</sup> On the contrary though, it cautioned that certain characteristics are not to be taken into account: male possessiveness and jealousy, obsession, a tendency to violent rages or childish tantrums, violent disposition, quarrelsome or choleric temperament, drunkenness or other self-induced lack of control, exceptional pugnacity or excitability.<sup>615</sup> Thus, while permitting 'all' characteristics to be taken account of, it excluded from consideration those characteristics which are especially likely to undermine the accused's self-control.<sup>616</sup>

Significantly, in *Weller*<sup>617</sup> the jury was permitted to take account of obsessiveness and jealousy, contrary to the instructions of *Smith*.<sup>618</sup> The court in *Rowland*<sup>619</sup> held that clinical depression could be taken account of, but emphasised that self-intoxication could not; nor could 'an unusually volatile, excitable or violent nature'. Again, the problem is that this attempts to permit a consideration of subjective characteristics of an accused, but excludes a consideration of those which may have a particular bearing on self-control.

Clarkson laments: 'Possibly the only thing that commentators agree upon is that the present law is little short of a mess.'<sup>620</sup>

Since then, the Coroners and Justice Act 2009 came into effect. As indicated above, the objective standard against which the accused's conduct is to be compared is that of 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.' Furthermore, that 'the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.'<sup>620</sup> The problem of attempting to permit a consideration of subjective characteristics of an accused, but to exclude a consideration of those which may have a particular bearing on self-control. In the US, the defence requires that the provocation be adequate. This is an objective enquiry and is concerned with comparing the accused's conduct with what is expected of a reasonable person.

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<sup>614</sup> *R v Smith* [2000] 4 All ER 289, [2000] Crim LR 1004, HL per Lord Slynn.

<sup>615</sup> *Ibid* per Lords Hoffmann and Clyde.

<sup>616</sup> Clarkson *Understanding Criminal Law* (2005) 128.

<sup>617</sup> *R v Weller* [2004] 1 Cr App R 1.

<sup>618</sup> In *AG for Jersey v Holley* [2005] UKPC 23 the Privy Council held that *Smith* had been wrongly decided. In *R v James and Karimi* [2006] EWCA Crim 14, [2006] 1 Cr App R 29 the Court of Appeal, somewhat controversially, endorsed the decision in *Holley* over that *Smith* – which is a House of Lords decision.

<sup>619</sup> *R v Rowland* [2003] EWCA Crim 3636.

<sup>620</sup> Clarkson *Understanding Criminal Law* (2005) 129.

The concern here is with whether the reasonable person would (or may<sup>621</sup>) have lost her/his self-control in the circumstances of the accused at the moment of her/his conduct. The origin of this objective enquiry is the English law which defined adequate provocation as the amount that would excite 'the mind of a reasonable man'.<sup>622</sup> From this standard, US courts distilled a number of fixed categories: aggravated assault or battery, mutual combat, commission of a serious crime against a close relative of the accused, illegal arrest, and, the often-cited instance of a husband catching his wife committing adultery.<sup>623</sup> In some states, only these fixed categories are recognised as presenting 'legal adequacy'.<sup>624</sup> Only if the court finds that legally recognised adequate provocation existed, may it refer the matter to the jury for further deliberation.<sup>625</sup> This rather inflexible approach has been replaced in many states by leaving the matter of what is adequate provocation to the jury to be judged on a standard of what would enrage an ordinary person and deprive him/her of the ability to reflect, deliberate, or judge.<sup>626</sup>

As may be noted from the previous discussion, the problem of the standard of the reasonable person (with which conduct is to be compared) is what characteristics of the accused to attribute to the reasonable person.<sup>627</sup> This is the same dilemma that faces South African law in respect of the standard of the reasonable person in determining whether an accused was negligent.

## Development of the Defence in South Africa

### History of the Defence

South African law before 1971<sup>628</sup> followed an approach to what was known as the defence of provocation, which did not follow general principles. Specific rules were instead developed. These specific rules derived from England and are similar to those which pertain in England at present. The English approach, discussed below, was imported into South Africa by the enactment of s

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<sup>621</sup> Hall *Criminal Law and Procedure* (1992) 117.

<sup>622</sup> *Regina v Welsh* 11 Cox Crim. Cas 336 (1869) 338.

<sup>623</sup> Dressler *Understanding Criminal Law* 2nd ed (1997) 491.

<sup>624</sup> Low *Criminal Law Revised* 1st ed (1990) 342.

<sup>625</sup> *Ibid* 491.

<sup>626</sup> *Maher v. People* 10 Mich. 212 (1862); *Addington v. United States* 165 U.S. 184 (1897) jury instruction apparently approved; *Fields v. State* 52 Ala. 348 (1875); American Law Institute *Model Penal Code* (1962); Bloy *Criminal Law: Lecture Notes* 2nd ed (1996); Skelton *Contemporary Criminal Law* (1998); Hall *Criminal Law and Procedure* (1992).

<sup>627</sup> *R v Camplin* [1978] 2 All ER 168; *R v Morhall* [1995] 3 All ER 659; *Luc v The Queen* [1996] 2 All ER 1033; *R v Dryden* [1995] 4 All ER 987..

<sup>628</sup> *S v Mokonto* 1971 (2) SA 319 (A).



141 Transkeian Penal Code of 1886. The material provisions of s 141 read:

Homicide which would otherwise be murder may be reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool. Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.

The defence consists, as do the English and US defences, in a 'subjective' and an 'objective' element. As discussed above,<sup>629</sup> these requirements proved controversial. The subjective element requires that the accused establish that s/he lost her self-control due to provocation. The objective element is that an 'ordinary person' would also have been provoked and would have lost his/her self-control. Provocation was a partial defence - it reduced murder to culpable homicide (or in English terminology, it reduces murder to manslaughter).

As mentioned, in 1971, the case of *Mokonto*<sup>630</sup> represented a turning point for the law of provocation. The court confined the Transkeian doctrine (and thus the English conception) of provocation to the territory of Transkei. It adopted a more principled approach to liability where provocation has been raised. That is, where provocation is raised in defence against a murder charge, the court is required to consider whether, on the evidence presented, the prosecution has excluded all reasonable possibilities that the accused laboured under such emotional stress that s/he lacked the intention required. It also cautioned that provocation and emotional stress may prove, rather than exclude intention.

### Recent Developments

Until 1981, South Africa only recognised criminal non-responsibility arising out of youth or mental illness or defect (as contemplated in s 78 of the Criminal Procedure Act 51 of 1977). In 1981 the Appellate Division in the case of *Chretien*<sup>631</sup> accepted that criminal incapacity may also arise out of intoxication. This development set the stage for other 'non-pathological' conditions to be regarded as incapacitating.

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<sup>629</sup> 'Provocation' in England and the USA on page 157ff.

<sup>630</sup> *S v Mokonto* 1971 (2) SA 319 (A); Confirmed in *S v Bailey* 1982 (3) SA 772 (A) 796.

<sup>631</sup> *S v Chretien* 1981 (1) SA 1097 (A).

The first tentative step in this direction was taken by Diemont AJA in *Van Vuuren*.<sup>632</sup> Diemont AJA ventured the following dicta:

... I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress. *In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing.* Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is—what evidence is there to support such a conclusion?<sup>633</sup>

By 1990 the Appellate Division, in the case of *S v Wiid*,<sup>634</sup> accepted that criminal incapacity may arise out of severe emotional stress.

#### Eadie – The End of Non-pathological Incapacity?

The judgment of Navsa JA in *Eadie*<sup>635</sup> is undoubtedly now the touchstone of the law on non-pathological incapacity.<sup>636</sup> This decision has had a chilling effect on the practical availability of the defence, even though it remains available in theory.<sup>637</sup> Commentators have welcomed the decision, but have rejected the reasoning as unsound.<sup>638</sup>

Navsa does not consider the capacity for the appreciation of wrongfulness but focuses his judgment on the capacity for self-control. He limits claims of incapacity for self-control to automatism (involuntariness): 'It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism.'<sup>639</sup>

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<sup>632</sup> *S v Van Vuuren* 1983 (SA) SA 12 (A).

<sup>633</sup> Emphasis added; *ibid* 17.

<sup>634</sup> *S v Wiid* 1990 (1) SACR 561 (A).

<sup>635</sup> *S v Eadie* 2002 (1) SACR 663 (SCA).

<sup>636</sup> Burchell *Principles of Criminal Law* 5th ed (2016) 328.

<sup>637</sup> Snyman *Criminal Law* 6th ed (2014) 160; Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 204.

<sup>638</sup> Snyman *Criminal Law* 6th ed (2014) 161ff; Burchell *Principles of Criminal Law* 5th ed (2016) 332; See, in respect of the trial court decision, Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ.

<sup>639</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 70.

Snyman and Burchell criticise the judgement for failing to distinguish between capacity for self-control and voluntariness.<sup>640</sup> As discussed above, Snyman and Burchell argue that these two requirements of criminal liability are distinct and must not be confused. Upon analysis however, their submissions do not appear to offer a sustainable distinction. On the other hand, Louw endorses the view that these two requirements are indistinguishable.<sup>641</sup> As Snyman notes though,<sup>642</sup> Navsa is somewhat ambivalent as to the lack of distinction between these two requirements of criminal liability: he regards the two requirements as identical, and yet requires that both are retained.<sup>643</sup>

What appears to be the real problem with Navsa's judgement is that he seems to assume that we are restricted to a defined, limited and rare phenomenon if only automatism is recognised as excluding capacity for self-control. However, Navsa does not observe the fierce controversy that reigns in respect of what signifies an automatism. He insists that anything short of automatism somehow allows for an excuse which would bring the administration of justice into disrepute where an accused has merely succumbed to temptation since '[o]ne has free choice to succumb to or resist temptation'.<sup>644</sup> Navsa's comments merely beg the question - did a particular accused have 'free choice to succumb to or resist temptation'?<sup>645</sup> What is most disappointing is that he does not even recognise the controversy that this question entails - it is the ultimate question of whether any human being, and in particular, the specific accused, has free-will.<sup>646</sup>

Navsa notes how courts have on occasion been too lenient:

The time has come to face up to the fact that in some instances our Courts, in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim

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<sup>640</sup> Snyman *Criminal Law* 6th ed (2014) 161ff; Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica*; C. R. Snyman 'Criminal Justice in a New Society' *ibid*; Burchell *Principles of Criminal Law* 5th ed (2016) 329.

<sup>641</sup> Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 202ff.

<sup>642</sup> Snyman *Criminal Law* 6th ed (2014) 163.

<sup>643</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 57. Pantazis and Friedman note that Navsa adopts the view that there is no distinction between capacity for self-control and voluntariness, and yet Navsa argues that capacity for self-control should not be jettisoned. However, they state: 'The reasoning for the continued usefulness of the second part of the capacity enquiry is not clearly expressed.' (Angelo Pantazis & Adrian Friedman 'Criminal Law' In *Annual Survey of South African Law* (2002) 818). Louw asks rhetorically: 'Why ask the same question twice?' (Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 204).

<sup>644</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 60.

<sup>645</sup> *Ibid*.

<sup>646</sup> See Error! Reference source not found.on page 174ff.

of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with the approach of the decisions of this Court. Mitigating factors should rightly be taken into account during sentencing. When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred.<sup>647</sup>

One possible interpretation of parts of the judgement is that Navsa introduced an objective criterion into the enquiry into capacity, which was previously an entirely subjective enquiry.<sup>648</sup> Louw, for instance, identifies the following passage as indicating that 'Navsa JA explicitly introduced an objective test in determining loss of control':<sup>649</sup>

I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction.<sup>650</sup>

It would seem however that this passage, together with the rest of the judgment, does not introduce an objective requirement. This passage, as Louw himself states, identifies the *misapplication* of the subjective test as the problem.<sup>651</sup> Fortunately Louw does go on to state that a different approach can be argued. That is, that Navsa was concerned here to remind other courts to draw inferences carefully, particularly inferences concerned with an accused's state of mind in which the accused's own account will feature strongly.<sup>652</sup> Burchell refers instead to the passage in which Navsa states – in what appears to beg the question: 'One has a free choice to succumb to or resist temptation.' Burchell notes how this may possibly be interpreted to mean

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<sup>647</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) 61.

<sup>648</sup> Snyman *Criminal Law* 6th ed (2014); Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica*; C. R. Snyman 'Criminal Justice in a New Society' *ibid*.

<sup>649</sup> Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 202.

<sup>650</sup> *S v Eadie* 2002 (1) SACR 663 (SCA) para 64.

<sup>651</sup> Louw 'S v Eadie: The end of the road for the defence of provocation?' (2003) 16 SACJ 202.

<sup>652</sup> *Ibid* 203.

that our courts must now refuse claims of non-responsibility on policy grounds.<sup>653</sup> Instead Burchell,<sup>654</sup> concludes that Navsa was concerned here with how inferences should be drawn. Burchell goes even further:

The *Eadie* judgement did not, and from the point of view of precedent could not have, blatantly introduced hitherto non-existent objective elements into the defence of lack of capacity.<sup>655</sup>

Pantazis and Friedman<sup>656</sup> unequivocally identify Navsa's concern as being that inferences of involuntariness should be carefully drawn. There appears no basis on which to conclude that Navsa intended to introduce any objective test for capacity. However, what is notable is that several commentators have argued that an objective normative component ought to be introduced into concerns with capacity.<sup>657</sup> These arguments will be endorsed and addressed below in the context of the proposed new form that the defence of non-responsibility ought to take.<sup>658</sup>

Ultimately, Navsa's comments reduce to little more than an insistence that courts should not recognise incapacity unless there is incapacity.<sup>659</sup> His judgment begs the question as to when a

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<sup>653</sup> Louw goes further to argue that Navsa JA clearly saw this as an introduction of an objective test since he realised that he was inviting criticism – by what Louw apparently mistakenly attributes to Navsa: 'Critics may describe this as policy yielding to principle (*sic*)' (ibid). Since principle was that the test was hitherto entirely subjective, this statement cannot support the argument made by Louw. If anything, this statement means that the subjective approach shall prevail. What Navsa did say may, at first, appear to support Louw's submission. However, in its full context, it seems little more than a practical guide: 'Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence.' (*S v Eadie* 2002 (1) SACR 663 (SCA) para 64).

<sup>654</sup> Burchell 'A provocative response to subjectivity in criminal law' (2003) *Acta Juridica* 38.

<sup>655</sup> Ibid 43.

<sup>656</sup> Pantazis & Friedman 'Criminal Law' In *Annual Survey of South African Law* (2002) 818.

<sup>657</sup> Snyman 'Criminal Justice in a New Society' (2003) *Acta Juridica*; J Burchell 'A provocative response to subjectivity in criminal law' ibid 39ff & 43 following Tadros; Tadros 'The Characters of Excuse' (2001) 21 *Oxford Journal of Legal Studies*; Snyman *Criminal Law* 6th ed (2014) 150; Sivakalay Pather 'Provocation: Acquittals provoke a rethink' (2002) 15 *SACJ*; Burchell *Principles of Criminal Law* 5th ed (2016) 331.

<sup>658</sup> See Error! Reference source not found. Error! Bookmark not defined. ff.

The model of responsibility proposed will certainly introduce a normative component but on a different basis to other suggestions.

<sup>659</sup> This seems tautologous and necessarily true, until one notes that there are those who argue that incapacity should sometimes not be recognised even where the accused had no capacity (Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 *SACJ* 216; Snyman *Criminal Law* 6th ed (2014) 161).

lack of free will should be recognised. He has also not recognised that involuntariness is a concept which offers no more clarity than incapacity for self-control.<sup>660</sup> The judgment is at best unhelpful.

### *S v Ramdass*

*S v Ramdass*<sup>661</sup> is – to my knowledge – the first case, at least at the level of the High Court, to find in favour of a claim of no-pathological criminal incapacity or a mixture of non-pathological incapacity and intoxication, since *Eadie*.

The facts of *Ramdass* were briefly that the accused had established a sufficient foundation for the absence of criminal capacity and that the totality of the evidence created a reasonable doubt as to his criminal capacity.

The accused had killed<sup>662</sup> his girlfriend and was found afterwards in Umhlanga Rocks. He claimed that he had no recollection of what had happened to the deceased or how he ended up in Umhlanga Rocks. He said, however, that he had been drinking alcohol the previous afternoon and had, in addition, smoked crack cocaine. If it was he who had killed the deceased then, he maintained, he did so without realising what he was doing and without the intention to kill her.

The accused's defence amounted to a lack of criminal capacity in that the consumption of the alcohol and drugs had rendered him unable to appreciate the unlawfulness of his conduct or to act in accordance with such an application. As Ploos van Amstel J explained, this defence has been available to an accused in circumstances of severe intoxication since the decision in *S v Chretien* 1981 (1) SA 1097 (A)

Ploos van Amstel J (at [29]) was 'conscious of the need for caution in finding too readily that a person who had killed someone is not criminally responsible because he acted involuntarily or without criminal capacity', since, as Rumpff CJ recognised in *Chretien*, this may bring the administration of justice into disrepute. The judge concluded, however, that the accused had established a sufficient foundation for the absence of criminal capacity and that the totality of the evidence created a reasonable doubt as to his criminal capacity. Some of the evidence that prompted this finding included: evidence that their relationship was good and that the accused and the deceased were planning to marry; there was no evidence of a motive to kill her; he was

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<sup>660</sup> Above.

<sup>661</sup> 2017 (1) SACR 30 (KZD).

<sup>662</sup> Without meaning to imply that he had done so voluntarily.

regarded by those who knew him as a gentle and humble person, so that his conduct was completely out of character; the evidence relating to the consumption of alcohol and the smoking of crack cocaine; his amnesia following the incident; the fact that he was found in Umhlanga Rocks the following morning, made no effort to avoid those who were looking for him, and seemed genuinely to have believed that they were interested in some other matter unrelated to the murder of his girlfriend; and the fact that he had wanted to plead guilty until counsel advised him that, on his version, he might well not be guilty. There was, moreover, no expert evidence to suggest that it was likely that he killed her well knowing that what he was doing was wrong. He could, accordingly, not be convicted of murder.

However, we must ask whether, on the prevailing authority of *S v Eadie* ((1) SACR 663 (SCA)), the accused in *Ramdass* did indeed lack criminal capacity. *S v Eadie* is applicable to all claims of incapacity outside of a claim to pathological incapacity. It is therefore applicable to *Ramdass*. The following ratio – whether one agrees with it or not – is the prevailing law:

It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism.<sup>663</sup>

It would appear from the judgement in *Ramdass* that the Court was not concerned with determining whether the accused was in a state of automatism. On the facts – as far as one may surmise - it seems difficult to reconcile the complex conduct of driving a motor vehicle safely for a considerable distance with being in a state of automatism – at least on the law as it is.

### Non-pathological Incapacity versus Pathological (Mental Illness/Defect) Incapacity

The defence of non-pathological criminal incapacity is available where an accused lacks any of the relevant functions: the ability to appreciate the wrongfulness of his/her conduct and the ability to act in accordance therewith. As indicated above, the defence is not qualified by the requirement of any particular mental disorder or condition.

#### Defining the 'non-condition'

No specific mental state or condition is required, except that the mental state of the accused must:

1. not constitute a mental illness/defect – as defined by the *Stellmacher* definition;
  - deprive the accused of some functional capacity.

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<sup>663</sup> Navsa JA for a unanimous court, at paragraph 70.

Our courts have accepted that such a condition may consist in an 'emotional storm',<sup>664</sup> 'acting ... subconsciously',<sup>665</sup> or a 'total disintegration of the personality'.<sup>666</sup> The psychological/psychiatric foundation for these concepts is, however, left unexplained. As a result, confusion has followed. Louw notes:

[P]rior to the intoxication decision of *S v Chretien* 1981 (1) SA 1097 (A), the question of criminal capacity seldom arose in our courts. In fact, it was an inquiry usually limited to the mentally ill and to the very young. In the past 20 years it has shifted from the periphery of our law to a fully developed defence available to those who kill when provoked.

Despite this shift, its precise nature has not been clarified in law. This lack of clarity has been exacerbated by confusing decisions of our courts. This confusion is partly a result of the development of the defence of incapacity, particularly its extension to cases involving provocation and mental stress, and partly a result of its application in practice.<sup>667</sup>

Can some sort of defining criteria be identified?

### Non-pathological

On the basis that the definition of the pathological mental condition required for a pathological incapacity defence is unclear, it is to be expected that the boundary between pathological and non-pathological non-responsibility will also be vague. So vague is the boundary that it is possible to conceive of a state of severe emotional stress as a pathological condition, in spite of any attempt to restrict pathological conditions to those arising from within.<sup>668</sup>

The Canadian case of *Rabey v The Queen*<sup>669</sup> illustrates how it is possible to regard a state of severe emotional stress as a disease of the mind (the Canadian equivalent of South Africa's 'mental illness/defect'). The male accused had attacked a fellow female student in whom he had developed a romantic interest. When he discovered that she did not reciprocate his romantic inclinations, he attacked her with a rock and tried to strangle her. He claimed that he had suffered severe emotional shock, was in a dissociative state, and lost control of his behaviour. The question arose whether his state of severe emotional stress constituted a disease of the mind or was to

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<sup>664</sup> *Rex v Kennedy* 1951 (4) SA 431 (A); discussed in Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) para 4.40ff.

<sup>665</sup> *S v Arnold* 1985 (3) SA 256 (C).

<sup>666</sup> *S v Laubscher* 1988 (1) SA 163 (A).

<sup>667</sup> Louw 'S v Eadie: Road Rage, Incapacity and Legal Confusion' (2001) 14 SACJ 206-7.

<sup>668</sup> Merryll Vorster Personal Communication 13 June 2011; Merryll Vorster 'An analysis of the amnesias with specific reference to "non-pathological sane automatism" ' University of the Witwatersrand 2002).

<sup>669</sup> *Rabey v. The Queen* 1980 54 CCC (2d) 1 (SCC).



be regarded as a non-pathological condition. The court declared:

In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a 'disease of the mind.' To hold otherwise would be to deprive the concept of an external factor of any real meaning. In my view, the emotional stress suffered by the respondent as a result of his disappointment with respect to Miss X cannot be said to be an external factor producing the automatism within the authorities, and the dissociative state must be considered as having its source primarily in the respondent's psychological or emotional make-up. I conclude, therefore, that, in the circumstances of this case, the dissociative state in which the respondent was said to be, constituted a 'disease of the mind.'<sup>670</sup>

The judgment seems to turn on the notion of causation (an external or internal cause), which as noted,<sup>671</sup> is quite unhelpful. The condition of the accused constituted a disease of the mind according to the court on the basis that it had 'its source primarily in the respondent's psychological or emotional make-up'. This approach begs the question: where else could the source of a condition of severe emotional stress lay other than (primarily) in an accused's psychological or emotional make-up? One may be reminded of the dilemma posed by the facts of *Quick*.<sup>672</sup> In *Quick*, if one identified his diabetes as the cause of the defendant using insulin, it would appear that a disease of the mind ought to have been recognised – contrary to the decision. Likewise in *Rabey*. If the rejection by his romantic interest was regarded as the cause, it would seem that – on the causation argument – a disease of the mind should not have been recognised. Again we see that the argument regarding the origin of a condition offers no real guidance. While the mental disorder requirement of pathological incapacity remains undefined, no clear distinction can be drawn between pathological and non-pathological non-responsibility.

### Duration

Popular parlance distinguishes non-pathological from pathological (mental illness/defect) incapacity on the basis that non-pathological incapacity is temporary - hence the expression 'temporary insanity'. However, our law has held the duration of the disorder not to be a relevant

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<sup>670</sup> Ibid 7.

<sup>671</sup> Above.

<sup>672</sup> *R v Quick* [1973] QB 910, [1973] 3 All ER 347.

consideration in respect of whether a condition constitutes a mental illness/defect.<sup>673</sup> Therefore duration cannot distinguish the legal concepts of non-pathological from mental illness/defect incapacity.

### Dysfunction and Deviance

Although no specific mental disorder is required, the mental state required must be such that the accused is dysfunctional; that is, lacks either or both of the abilities to appreciate the wrongfulness of his/her conduct, or to act in accordance therewith. This state of dysfunction represents a mental abnormality – on the law's conception of what constitutes normal mental functioning: human beings possess free will and are capable of distinguishing between right and wrong and of resisting temptation to do wrong.<sup>674</sup> It is therefore dysfunctional and deviant. In psychopathology,

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<sup>673</sup> *S v Mahlinza* 1967 (1) SA 408 (A) 417; *S v Campher* 1987 (1) SA 940 (A) 965; *S v Laubscher* 1988 (1) SA 163 (A) 167; *R v Holliday* 1924 AD 250. In respect of the English law, see *R v Sullivan* [1984] AC 156, [1983] 2 All ER 673 172.

<sup>674</sup> Snyman states: '...Freedom of will must, for the purposes of criminal liability, be construed as man's ability to rise above the forces of blind causal determinism; that is his ability to control the influence which his impulses and passions and his environment have on him. In this way he is capable of meaningful self-realisation: of directing and steering the course of his life in accordance with norms and values - something which an animal is incapable of doing since it is trapped by the forces of instinct and habit. For the purposes of criminal law in general, and of determining culpability in particular, one should merely be able to say that, in the particular circumstances and in the light of our knowledge and experience of human conduct, X *could* have behaved differently; that, had he used his mental powers to the full, he *could* have complied with the provisions of the law. The normal sane person who is no longer a child may therefore be held responsible for his deeds and be blamed for his misdeeds. This is also the reason why young children and mentally ill people are not punished when they perform unlawful acts.' (Snyman *Criminal Law* 6th ed (2014) 147).

'Before a person can be said to have acted with culpability, he must have had criminal capacity [footnote omitted] an expression often abbreviated simply to "capacity". A person is endowed with capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as the mentally ill (the "insane") and very young children cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which *normal adult people* have.' (emphasis added, CR Snyman *Criminal Law* 6th ed (2014) page 155).

The Rumpff Commission report notes: 'Society—and the jurist—proceed on the assumption that a "*normal*" person is criminally responsible. Thus Gardiner and Lansdown state ... "Where through disease or defect of intellect a person has been deprived of the power of bringing to bear upon his conduct the functions of a normal rational mind, there can be no criminal responsibility.'" (emphasis added; Rumpff *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* (1967) par 2.5).

'Through insight, reasoning and abstract thinking, man is capable of setting himself a goal which he can pursue voluntarily and deliberately. Such a goal may well constitute a far stronger motivating force in his behaviour than any physiological or social drive. Emotions can, of course, influence a person's goals and

dysfunction is a prominent consideration in identifying a mental pathology. Yet, our law does not recognise this as a mental illness/defect.

## Conclusion

The English and US defence is a dual subjective objective test. The subjective component appears to conflate conative and cognitive functioning. The objective component appears to be stuck in the double bind regarding how to construct an objective standard (a reasonable person) that remains an objective standard, but is fair.

Following on the failure of our law to define the 'pathological' condition required for a pathological incapacity defence,<sup>675</sup> it follows that the distinction between pathological and non-pathological non-responsibility is ill defined. The leading case on non-pathological non-responsibility (*Eadie*) has only focused attention on the problem of when a particular accused lacks responsibility. There are regrettably no answers here – only unanswered questions.

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motivation, but intense emotions are subject to volitional control and are not necessarily blind impulses.' (ibid para 9.25).

'Two psychological factors render a person responsible for his voluntary acts: firstly, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil, (insight) *before* committing the act.' (original emphasis; ibid para 9.30).

<sup>675</sup> Discussed above.

PART V

FAULT

## Chapter 14 Fault

### Introduction

Fault may take the form of either intention, or negligence. It is required – in one form or another - for all common-law crimes. Common law crimes are those crimes which have been defined by our courts over time, including, murder, culpable homicide, assault, theft, fraud, robbery. Common law crimes may be contrasted with statutory crimes which are defined by the legislature. Of all common-law crimes, only culpable homicide and possibly contempt of court by a newspaper editor<sup>676</sup> require fault in the form of only negligence. All other common law crimes require fault in the form of intention.

In general, common law crimes account for all serious crimes. However, the crime of rape is now the exception since it was abolished as a common-law crime and enacted under a reformed definition, as a statutory crime.<sup>677</sup> Nevertheless, the crime of rape continues to require fault in the form of intention, as it did when it was a common law crime.

Also, in general, criminal liability is governed by the principle *actus non facit reum, nisi mens sit rea*. This may be translated as that an act does not render a perpetrator criminally liable unless he was conscious of its illegality. It means that conduct is not punishable unless it was accompanied by a guilty mind: No punishment without fault. It is abbreviated as *mens rea* (guilty mind) and is used to refer to the requirement that wrongful thought must accompany wrongful conduct.

### Strict liability

While this principle reflects a strongly held value of the criminal justice system, and it may be regarded as the default position,<sup>678</sup> our legislature has created crimes – as they are at liberty to do<sup>679</sup> – which require no form of fault at all. These crimes are known as strict liability offences. Examples include certain traffic offences.

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<sup>676</sup> *S v Harber* 1988 (3) SA 396 (A). It is not clear whether this position will be permitted to prevail under the Constitution.

<sup>677</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>678</sup> Our courts are a hostile to strict liability and will only deviate from the principle of no liability without fault if there are clear and convincing indications (*S v Arenstein* 1964 (1) SA 361 (A); *S v Qumbella* 1966 (4) SA 256 (A).

<sup>679</sup> Subject to the constraints imposed by the Constitution.

To understand these offences properly, one must understand that it is not that fault must be absent, instead fault is simply irrelevant. This means that whether or not one had intention or was negligent in respect of certain prohibited conduct, the prosecution does not have to prove any form of fault in order to obtain a conviction. This exception – of strict liability – to the principle that fault must accompany all wrongful conduct to attract criminal liability, continues in our law. It's continued existence, is of course, however, subject to constitutional challenge.

### Versari in re illicita

Historically, one other exception to the principle that fault is required existed in our law, under the doctrine of *versari in re illicita* - known as the versari doctrine. It is important to stress that this doctrine is no longer part of our law. It was rejected in 1962 in the case of *S v Van der Mescht*.<sup>680</sup> In terms of versari a person who engages in unlawful activity is criminally liable for all the unlawful consequences of this activity even though he or she does not harbor the required fault (intention or negligence) in respect of those consequences. Thus the purely accidental and innocent unlawful consequences of an unlawful activity were punishable.

Although the doctrine has been rejected from our law, it is important to consider how and when the doctrine applied in order to be able to identify an attempt to justify liability on versarian grounds. It is also important to be able to identify when liability would be versarian so that one may also know whether the imposition of criminal liability would not be versarian.<sup>681</sup>

In the case of *R v Wallendorf* 1920 AD 383 the accused had assaulted a person. It transpired that the person was a policeman who was undercover. The accused did not know that the person he assaulted was a policeman. The evidence established that the accused was guilty of an assault upon the person of the policeman – as an ordinary person - and thus had engaged in unlawful activity. In addition, the accused was charged and convicted of the statutory offence of obstructing a policeman in the performance of his duty. The accused appealed citing the *mens rea* doctrine in his defence – that fault was required. The question before the court was whether, because the accused had been engaged in unlawful activity, he could be convicted of any unlawful consequence arising therefrom. The Court held, as follows:

"... whether or not the accused were aware of the fact that Mooney was a constable, they were guilty of committing an assault upon him... there may be sufficient proof of a guilty mind if it is shown that the accused intended to commit crime even though it be one

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<sup>680</sup> *S v van der Mescht* 1962 (1) SA 521 A.

<sup>681</sup> As will be seen in the context of mistakes, the identification of versarian liability plays a central role

different from that with which he is charged. In such a case the person who deliberately breaks the law must take the risk of his offence turning out to be of a more serious nature than he had intended."

In the case of *R v Matsepe* 1931 AD 150 the accused drove a truck negligently - that is, in the manner in which the reasonable person would not have – and collided with a tree. The accused did not know that a child had stowed away on the back of the truck. The presence of the child was thus not foreseen nor even reasonably foreseeable (in respect of negligence). therefore, in respect of the presence of the child on the truck and of the child's death, the accused had no form of fault, neither intention nor negligence.

Nevertheless the accused was convicted of culpable homicide in the trial court. A question of law was reserved for the Appellate Division (now the Supreme Court of Appeal) concerning whether an accused could be found guilty of culpable homicide due to his negligence where it was found that the accused had no knowledge of the presence of the deceased at the time of the accident. The court declared that:

" ... all the authorities were agreed that if a person is engaged in an unlawful act and kills another he is liable for culpable homicide...as the accused in driving as he did, was clearly engaged in an unlawful act, or at all events in doing a lawful act in an unlawful manner, it is no answer to say that he did not know or could not have known that the child was on the wagon."

The relevance of this case is that despite the accused harboring no intention nor being negligent in respect of the child's death he was nevertheless convicted of culpable homicide.

In 1962 however the *versari* doctrine was slated as outdated, out of step and obsolete and was abolished. In *S v van der Mescht* 1962 (1) SA 521 A the accused and another were in possession of unwrought gold amalgam which they sought to melt on a stove in order to extract gold. This possession was an offence in itself. The heating of the amalgam produced mercurial gases which fatally poisoned the accused's accomplice and four children who were in the house at the time. The trial court convicted the accused of culpable homicide because he was negligent in not foreseeing the possibility of death. The Appellate Division held, by a majority, that the prosecution had failed to prove that the deaths were attributable to the accused's negligence.

The question then arose whether the court was prepared to impose liability based on the *versari* doctrine. The Court (Steyn CJ, with Botha JA concurring, Hoexter JA dissenting) said the following – repeated at length here because of its importance:

“... the question is whether the Appellant was correctly convicted of culpable homicide purely on the basis that he caused the death of the deceased by his unlawful conduct, without negligence having been proved. Certain judgments of our courts, this court included [referring to Matsepe and Wallendorf], have decided this question in the affirmative ...

[Steyn CJ declared these judgments to have been wrongly decided].

I find it impossible, with respect, to reconcile myself with criminal liability based on the doctrine of *versari in re illicita*, where no proof of the accused's fault in regard to specific crime in question is required.... [T]he *versari...* doctrine is in any event and outdated legal concept which has for many years now been out of step with more contemporary views regarding criminal liability for offenses of which *mens rea* is an essential element...

[It is] in conflict with contemporary notions of justice, in cases where the absence of fault on the part of the perpetrator in regard to a prohibited consequence would otherwise preclude criminal liability....

The fact that the death of the deceased resulted from the commission by the appellant of an unlawful act, namely the unlawful melting of the amalgam, and does not justify, in the absence of fault on the part of the appellant *vis a vis* such a result, a conviction of culpable homicide. The appeal must accordingly succeed. The conviction and sentence are set aside.”

The *versari* doctrine was therefore abolished. There is one other case in the story of the demise of the *versari* doctrine, of which one should take account: *S v Bernardus* 1965 (3) SA 287 (A). This case is not important because it confirmed the judgement in *Van der Mescht*, abolishing *versari*, but because it may easily be misunderstood as reversing that decision – whereas it does not.

In *S v Bernardus* the accused had thrown a stick with a large knob on the one end (known as a “kierie”) at the deceased from a distance of about 9 to 11 paces away. The point of the stick (on the opposite end to the knob) penetrated the skull of the deceased by some 10 to 12 centimeters, killing him. It appeared on the facts that the accused had intended only to assault the deceased. The trial court however found the accused guilty of culpable homicide and the following question of law was reserved for decision by the Appellate Division:



"Is a person guilty of culpable homicide were he unlawfully assaults another and in so doing causes his death, but under circumstances in which he could not reasonably have foreseen the death?"

It should be noted that the question posed to the Appellate Division was whether it was correct to disregard the requirement of negligence, on the basis only that the consequence had arisen out of unlawful conduct for which the accused had the requisite fault.

Again the court, in emphasising that there can be no punishment without fault, rejected the *versari* doctrine as outdated. The court found that the intention in respect of an assault could not be regarded as a substitute for negligence in respect of death (for culpable homicide) without violating the principle of no punishment without fault - the principle of *mens rea*.

The court did however confirm the conviction and punishment for culpable homicide of the accused, not on the basis of *versari*, but on the basis that it regarded the accused as having actually been negligent in respect of the deceased's death.

Thus *versari* as an exception to the requirement of fault was abolished in 1962 in *van der Mescht*, which was confirmed in 1965. The remaining exception – of strict liability – however, continues to apply.

## Chapter 15 Intention

### Introduction

Intention in law has a technical meaning. It includes more than what may ordinarily be understood by the term. It extends beyond what a person may have as his/her purpose (*dolus directus*), and beyond even what is not one's purpose but which is foreseen as inevitable (*dolus indirectus*). It extends to what is neither one's purpose nor foreseen as inevitable, but to what is nevertheless foreseen as a (real) possibility - *dolus eventualis*.

### Subjective inquiry

At least two different perspectives are distinguished in criminal law: the subjective and the objective. The objective perspective refers to the world outside as it exists in reality. The subjective perspective is concerned with a person's actual thoughts and internal perspective on the world. It is well accepted that people see things differently and that people sometimes make mistakes – where their internal perspective places them at odds with the world outside.<sup>682</sup>

Intention is an inquiry into the subjective state of mind of an accused at the time of the offence. As mentioned, since intention is concerned, ultimately with what an accused foresaw, it is not with the accused ought to or should have foreseen.

It is not concerned with what is foreseeable or reasonably foreseeable. It is also nonsense to speak of an accused having reasonably foreseen - because this conflates the objective test perspective of what is reasonable with the purely subjective concern of the test for intention. An accused either foresaw something or did not – it is irrelevant whether the accused ought to have foreseen and whether this foresight was reasonable or not.

Because intention is concerned with the internal subjective state of mind of an accused, proof of intention is not straightforward. There can be no "direct" evidence of intention except perhaps if an accused person is prepared to admit to having held the required intention. Otherwise intention is inferred from the circumstances and all other available evidence to determine what it is that the accused "must have" been thinking. In this way, the law relies on the "must have" inference in determining intention. A court in finding that an accused had the required intention, must conclude

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<sup>682</sup> For a detailed discussion of the operation of the different perspectives accepted in criminal law see the note on Criminal law in 4D on this website.

that the accused “must have” been thinking, say P (I intend to unlawfully kill) rather than, say Q (I do not intend to kill) or R (I intend to lawfully kill).

In this way, our courts convert objective considerations, which may include what a reasonable person would have thought, or what the accused ought to have thought. However, there is no automatic connection between these objective considerations and the conclusion as to the subjective state of mind of an accused. It is entirely possible for a court to be persuaded that a reasonable rational person would have realised something, but for that court to nevertheless conclude that the particular accused failed to realise this. This is possible of course because the court may be persuaded that the accused person at the relevant time was not, for instance, paying proper attention or, that the particular accused is, put plainly, stupid.<sup>683</sup>

### Intention and motive

Intention and motive are to some extent distinct concepts. Motive – in the sense of what motivates an individual – is distinct from intention in the forms of *dolus indirectus* and *dolus eventualis* which are concerned instead with what an individual foresees or expects.

Some authorities on criminal law insist that motive is completely irrelevant to criminal liability – but this is not strictly true. Motive may well coincide with intention in the form of *dolus directus* because this form of intention concerns what the accused desired which may coincide with what motivated the accused.

Also, motive may render an otherwise unlawful act lawful and thus not punishable at criminal law. An example would be a father who exceeds the speed limit when driving his child to a hospital in order to save his child's life (an instance of the defence of necessity).

Beyond this, however, motive is only relevant to sentencing.

### Types of intention

#### Dolus directus

*Dolus directus*, as mentioned, is present where an accused desires a consequence or circumstance in that it is his or her aim an object to achieve such consequence or circumstance.

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<sup>683</sup> The conclusion that a particular accused is of sub- normal intelligence and on that basis did not realise or foresee something may be found in the famous cases of *R v Mbombela* 1933 AD 269 and *S v Goosen* 1989 (4) SA 1013 (A).

The classic example of a person who acts with *dolus directus* is the assassin. When an assassin points his rifle at a person and pulls the trigger, it is his or her aim and objective to unlawfully kill that person.

#### *Dolus indirectus*

*Dolus indirectus*, as mentioned is present where, though it is not the aim or objective of the accused, the circumstance or consequence is foreseen as substantially inevitable.

The case of *R v Kewelram* 1922 AD 213 illustrates the point. The accused was a businessman who attempted to defraud his insurance. He set fire to his stock inside a building with a view to claiming fraudulently for its replacement value from his insurance company. He foresaw in the process the inevitable destruction of the building in which the stock was stored. He therefore had *dolus directus* in respect of his stock and *dolus indirectus* in respect of the building. He was convicted of arson in the trial court. The Appellate Division rejected his appeal and found that the inference of wrongful intention to burn the building had been correct.

#### *Dolus eventualis*

*Dolus eventualis* (also known as legal intention) has an official 'legal' definition,<sup>684</sup> and one proposed by academics<sup>685</sup> critical of the official legal definition.

Legal definition:

1. Did the accused foresee (any) risk of the prohibited consequence/circumstance;
2. Did the accused reconcile him/herself to that risk (also referred to as consenting to the risk or taking the risk into the bargain); and
3. Proceed.

The academic definition:

1. Did the accused foresee the real or substantial risk of the prohibited consequence/circumstance; and
2. Proceed.

The differences are profound and have arisen out of objections which academics have levelled at the legal definition over time.

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<sup>684</sup> *R v Horn* 1958 (3) SA 457 (AD); *S v Mini* 1963 (3) SA 188 (AD); *S v De Bruyn* 1968 (4) SA 498 (A); *S v Ngubane* 1985 (3) SA 677 (A); *S v Humphreys* 2013 (2) SACR 1 (SCA); *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SA 431 (SCA).

<sup>685</sup> In particular, Paizes (1988) SALJ 636; Loubser and Rabie (1988) SACJ 425; Smith (1970) 96 SALJ 923; Whiting (1988) 1 SACJ 440.

On the legal definition, the foresight of any degree of risk is sufficient. Academics point out that this would put a person on track to be held to have had intention in the form of *dolus eventualis* if, in the course of some conduct, s/he had foreseen even a slight risk of the prohibited consequence/circumstance. So, for instance, they point out that this would be the case where someone were to recognize that there is a slight risk every time s/he drives his/her car, of having an accident and of someone being killed. They object that, if this were to happen, a court could find against that person on the first requirement. The academics suggest that this requirement should only be satisfied if the person concerned foresaw a real or substantial risk of the prohibited consequence/circumstance.

In their view, the requirements for *dolus eventualis* should be regarded as satisfied if, in the face of the recognition of this real/substantial risk, a person were to proceed. Noticeably, they omit the requirement stipulated in the legal definition that the accused must have reconciled to or accepted the risk.

This is significant because it is this requirement which the Court in Ngubane believed did the work which the academics are concerned should be done by qualifying the extent of the foresight of risk required.

Jansen JA held in Ngubane that it does not matter whether a remote or substantial risk is foreseen, but whether the person reconciled or consented to the risk.

“In principle it should not matter in respect of *dolus eventualis* whether the agent foresees (subjectively) the possibility as strong or faint, as probable or improbable ... provided his state of mind in regard to that possibility is 'consenting', 'reconciling' or 'taking into the bargain'. ...”

This, Jansen JA explained is because, it is unlikely that any person would accept a risk which is slight and the converse, that a person is likely to have accepted a real or substantial risk before proceeding.

The academic response is twofold. Jansen JA has logic backward in that it is precisely when someone foresees that a risk is slight or remote that they do accept it and reconcile to it. According to Whiting “if a person sees the risk as only very slight, he is surely more likely to reconcile himself to it or take it into the bargain than if he sees it as substantial”.<sup>686</sup>

Also, Jansen JA makes another logical error in failing to appreciate that the requirement of reconciliation or acceptance of the risk is redundant. If one foresees a risk of a prohibited consequence or circumstance and persist in the face of it, one must have accepted the risk. Again,

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<sup>686</sup> Whiting (1988) 1 SACJ 440.

Whiting states "[i]t is superfluous, because by acting with foresight of the possibility that a result will ensue, one necessarily reconciles oneself to the possibility that it will ensue and takes this possibility into the bargain."<sup>687</sup> These academics argue that it is logically impossible to have foreseen a risk and to proceed in the face of the risk, and not to have accepted the risk.

On this point the Courts disagree. Jansen JA in Ngubane indicated that, in the courts view, it was possible to foresee a risk, to consider it and to possibly adjust one's conduct so that one no longer believes that the risk would eventuate, and to proceed without having reconciled with or consented to the risk. On Jansen JA's view then, it is possible to foresee something as true, but not to believe it is true. This would seem to propose a very special kind of split mind. One that can both foresee something and yet deny it. The academics<sup>688</sup> point out that Jansen JA has lost track of his own logic. They explain that the reason that there appears to be a lack of reconciliation with the risk is because, in what he proposes as the reconsideration or readjustment component, the person comes to no longer foresee the risk of the prohibited consequence/circumstance. Jansen JA, they say, had unwittingly returned, in his analysis, to the first question, and concluded that there was no longer any foresight of risk. It is for that reason that when the person proceeds, s/he may be said to proceed without having accepted or reconciled to a risk – because s/he does not foresee one.

The logic of the academic formula appears eminently superior and has the attraction that it is simpler and more elegant.

Nevertheless, the Ngubane formula has prevailed and what is perhaps somewhat disconcerting is that it has prevailed as if it was not in any way controversial or questionable. The most recent judgement to endorse - specifically - the requirement of reconciliation in the legal formula proposed by Jansen JA in Ngubane is the case of Humphreys.<sup>689</sup>

This case is a tragedy for several reasons. The facts of Humphreys are briefly as follows. The accused was a taxi driver. On the day in question, he was driving a group of children to school. At a point, he approached a railway crossing. The crossing had closed - the traffic lights were red and the booms were down - indicating that a train was coming. Traffic had begun to back up in front of the boom. Instead of joining the que of vehicles waiting for the train to pass and the boom to rise, this taxi driver switched to driving on the wrong side of the road and into the level crossing on the wrong side of the road. His plan was to drive diagonally to the left, over the tracks, and to

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<sup>687</sup> Whiting (1988) 1 SACJ 440.

<sup>688</sup> See in particular, Smith (1970) 96 SALJ 923.

<sup>689</sup> *S v Humphreys* 2013 (2) SACR 1 (SCA).

switch back to the left side of the road so that he could pass out the other side of the level crossing. However, as he crossed over the tracks the taxi was hit by a train. Ten children were killed. The driver survived and was charged with the murder of the ten children. He was convicted and appealed.

The court held, in a unanimous judgement given by Brand JA (Cachalia JA, Leach JA, Erasmus AJA and Van der Merwe AJA concurring), that the accused had foreseen the risk of being struck by a train and of children being killed. Adopting the definition as it was set out in Ngubane, Brand JA went on to consider whether the accused had reconciled to this risk. The court considered whether the accused was suicidal or indifferent to whether he died. It found that he was not, and therefore, it concluded, that the accused had not reconciled to the risk.

“An inference that the appellant took the death of his passengers into the bargain when he proceeded with his action would unavoidably require the further necessary inference that the appellant also took his own death into the bargain. Put differently, the appellant must have been indifferent as to whether he would live or die. But there is no indication on the evidence that the appellant valued his own life any less than the average person or that it was immaterial to him whether or not he would lose his life. In consequence I do not think it can be said that the appellant had reconciled himself with the possibility of his own death. What must follow from this is that he had not reconciled himself with the occurrence of the collision or the death of his passengers either. In short, he foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialise.”<sup>690</sup>

He was acquitted of murder and the convictions substituted with convictions for culpable homicide.<sup>691</sup>

There are two remarkable aspects to this judgment. First, there is no acknowledgment that there was any question that Ngubane was right.<sup>692</sup> This is despite the fact that not only had numerous articles been written on the topic, but every textbook on criminal law reflected that there was controversy on the issue - and not an insignificant controversy.

Secondly, it is difficult to follow the logic by which in order to have reconciled with the risk that the taxi could be struck by a train and children killed, the taxi driver would have to be suicidal or indifferent to death. This logic assumes that only suicidal people or those otherwise indifferent to

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<sup>690</sup> Paragraph 18.

<sup>691</sup> Paragraph 20.

<sup>692</sup> Paragraph 15.

whether they live or die take risks accepting they may die. It is respectfully submitted that this does not follow and that if one applies the logic suggested by the academics in proposing their formula of *dolus eventualis* (above), one would have to conclude that the accused, who the court held did foresee the risk of death of the children, must have accepted the risk because he proceeded. He took that risk and so, he must have accepted it.

Instead, it would seem, the issue ought to have been whether he foresaw a sufficient degree of risk that, having accepted that risk and proceeded, the law ought to treat his mental state as one of intention. If one considers whether he foresaw the real or substantial risk of being hit by a train when driving through the level crossing at exactly the time that traffic was stopped because of the danger posed by an oncoming train, perhaps the question should have been, not whether he was suicidal, but whether he was severely intellectually deficient. There seems on the facts to be no suggestion of this.

The case of Pistorius<sup>693</sup> followed in 2015 and the Supreme Court of Appeal once again adopted the conventional legal definition of *dolus eventualis* espoused in Ngubane.

#### *Sufficient*

*Dolus eventualis* is sufficient for any common law offence, even murder. In *S v Sigwahla* 1967 4 SA 566 A the court said:

"... the following propositions are well settled in this country:

The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus* ..."

*Dolus eventualis* may however not be sufficient for various statutory offences which may require that *dolus directus* exists. An example of this may be found in sections of the Internal Security Act 74 of 1982<sup>694</sup> concerning sabotage and subversion. These sections required *dolus directus* in that one only offends the section when it is an offender's aim and object to achieve the prohibited circumstance or consequence.<sup>695</sup>

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<sup>693</sup> *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SA 431 (SCA).

<sup>694</sup> Strangely – because it is unquestionably an apartheid piece of legislation - still in force (at the time of writing (April 2017)).

<sup>695</sup> See *Minister of Law and Order v Pavlicevic* 1989 (3) SA 679 A; *S v Nel* 1989 (4) SA 845 (A).



### Dolus indeterminatus?

Dolus indeterminatus is a category of dolus that indicates that the dolus was general, that is, not directed at any particular individual. Dolus determinatus, on the other hand is specific to a particular person. Both of these are categories into which the three forms of dolus fall – so that there are actually 6 different types of dolus, thus:

Dolus	Directus	Indirectus	Eventualis
Determinatus	Assassin – in respect of an identified victim, for example, a prime minister.	Assassin – in respect of the inevitable death of a second identified victim, who will die because h/she is standing in front of the prime minister.	Duck hunter – where he identifies the potential victim, if he misses the duck, he will strike a particular person.
Indeterminatus	A suicide bomber – his/her aim and objective to kill, but the victims are unidentified persons who may happen to be on a bus.	A suicide bomber – whose aim and objective is to blow up a building, but s/he foresees that it is inevitable that unidentified people who may happen to be in the building will die.	Duck hunter - but here his potential victim is unidentified – he recognizes that his bullet may strike 'someone' on the opposite bank.

## Conclusion

In conclusion, intention is a subjective enquiry. It is widely conceived in our law and includes where an accused foresees the risk of a prohibited consequence or circumstance, reconciles to that risk, and proceeds.

## Chapter 16 Negligence

### Introduction

Negligence – also known as culpa – is a lesser form of fault relative to intention. It is easier for the prosecution to prove and it usually attracts a lesser sentence than a conviction for the same conduct where the form of fault is intention. So, a conviction for culpable homicide would ordinarily attract a lesser sentence than for murder.

It is judged by reference to objective considerations – how one ought to conduct oneself - with account being taken of a few limited circumstances.

It is helpful to understand that intention and negligence are not mutually exclusive.<sup>696</sup> It is not necessary for the prosecution to prove that intention was absent before it can proceed to prove negligence.

### Possible offences

Negligence is a sufficient form of fault for two common law crimes: culpable homicide and contempt of court by newspaper editors<sup>697</sup> - that is a conviction for contempt of court may be based on negligence where an editor of a newspaper publishes matter that constitutes contempt (such as publishing restricted material).

Alternatively, statutory offences for which negligence is sufficient fault are numerous, an example is that of negligent driving. For the purposes of our discussion we will confine ourselves to the common law offence of culpable homicide: the negligent unlawful killing of another human being.

### The Test

Negligence is judged by the reasonable person test. An accused is judged to have been negligent if his conduct deviates from the standard of conduct of a hypothetical reasonable person in the circumstances of the accused.<sup>698</sup> The test for negligence in criminal law is derived from the civil

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<sup>696</sup> *S v Ngubane* 1985 (3) SA 677 (A).

<sup>697</sup> *S v Harber* 1988 (3) SA 396 A – although, as indicated above, this position is susceptible to Constitutional attack given that is a pre constitutional judgment and the rights now enjoyed by the media under the Constitution.

<sup>698</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A); *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A).

law of delict case of *Kruger v Coetzee*.<sup>699</sup> In *Kruger v Coetzee*, Holmes JA (for a unanimous court) framed the test for negligence, for the purposes of delict,<sup>700</sup> as follows:

'For the purposes of liability *culpa* arises if—

- (a) a *diligens paterfamilias* [the diligent father of the family] in the position of the defendant—
  - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.<sup>701</sup>

He went on to observe that the test for negligence had been conceived in these terms for the past fifty years.<sup>702</sup> This test for negligence, as stated by Holmes JA, has been translated from the civil law of delict, into criminal law, and remains the test for negligence in criminal law today.<sup>703</sup>

Various adaptations have been required to translate the test from delict into criminal law. These reflect that:

Negligently causing harm and patrimonial loss is not punishable in criminal law;<sup>704</sup>

Foresight of the actual prohibited consequence is required in criminal law.<sup>705</sup> For instance, on a charge of culpable homicide,<sup>706</sup> it is required that the reasonable person would foresee the death of the victim, and not mere injury;<sup>707</sup>

In addition to punishing the unlawful causing of a prohibited consequence (such as death), criminal law also punishes an accused for, unlawfully and negligently, *being* in a prohibited circumstance;<sup>708</sup>

Furthermore, criminal law requires, for negligence, that the reasonable person must have foreseen that his conduct is proscribed, that is, prohibited in law.<sup>709</sup>

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<sup>699</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.

<sup>700</sup> Known as 'tort' in other jurisdictions. It is the civil law in terms of which one person may claim compensation from another for harm or loss caused by that other.

<sup>701</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.

<sup>702</sup> *Ibid.*

<sup>703</sup> Snyman *Criminal Law* 6 ed (2014) 205; J Burchell *Cases and Materials on Criminal Law* 3 ed (2007) 482; Burchell *Principles of Criminal Law* 5 ed (2016) 419.

<sup>704</sup> Burchell *Cases and Materials on Criminal Law* 3 ed (2007) 482.

<sup>705</sup> *Ibid.*

<sup>706</sup> The negligent unlawful killing of another human being.

<sup>707</sup> *S v Van As* 1976 (2) SA 921 (A).

<sup>708</sup> Burchell *Cases and Materials on Criminal Law* 3 ed (2007) 482; Snyman *Criminal Law* 6 ed (2014) 205; R Whiting 'Negligence, fault and criminal liability' (1991) 108 *SALJ* 433.

<sup>709</sup> *S v De Blom* 1977 (3) SA 513 (A); Burchell *Principles of Criminal Law* 5 ed (2016) 416.

To account for these differences, the test for negligence, for the purposes of the criminal law, must read as follows:

For the purposes of liability negligence arises if—

- (a) a reasonable person, in the circumstances of the accused—
  - (i) would foresee the reasonable possibility of his conduct causing a consequence which is prohibited in law, or that being in those circumstances is prohibited in law;<sup>710</sup> and
  - (ii) would take reasonable steps to guard against such occurrence;<sup>711</sup> and
- (b) the accused failed to take such steps.<sup>712</sup>

### The Reasonable Person

In the case of Burger 1975 A, Holmes gave his now classic exposition of this person:

“*Culpa* and foreseeability are tested by reference to the standard of a *diligens paterfamilias* ('that notional epitome of reasonable prudence' ...) in the position of the person whose conduct is in question.

One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.”

In Mbombela 1933 AD the reasonable person was described as "of ordinary intelligence, knowledge and prudence".

In this case, the accused was somewhere between 18 to 20 years old. The court regarded him as being of rather limited intelligence. He lived in a rural village and believed in the existence of evil spirits called "Tokoloshes". It was widely believed, in his village, that a Tokelosh occasionally

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<sup>710</sup> It appears possible to reduce this requirement to the question of whether the reasonable person would foresee the reasonable possibility (as is currently the case) that his conduct is prohibited in law. This would capture both the factual requirement – that the reasonable person would foresee the fact that a consequence may follow or what his circumstances are; but also the required knowledge of law – that the consequence or circumstance is prohibited. Nevertheless, the extended formulation is most familiar to South African criminal law and will be adopted for the purposes of discussion.

<sup>711</sup> I omit any adaptation regarding negligence in respect of prohibited circumstances (where the reasonable person, in the circumstances of the accused would foresee the reasonable possibility that his circumstances may be prohibited (see Snyman *Criminal Law* 6 ed (2014) 206; Burchell *Principles of Criminal Law* 5 ed (2016) 416) on the basis that further enquiries (regarding reasonable steps) appear to be redundant (Whiting 'Negligence, fault and criminal liability' (1991) 108 *SALJ* 433 n 15).

<sup>712</sup> See Snyman *Criminal Law* 6 ed (2014) 206; Burchell *Principles of Criminal Law* 5 ed (2016) 424.

took the form of a little old man with small feet. Further it was believed, and this belief was shared by the accused, that to look the spirit in the face would be fatal.

On the day in question, some children who had been playing outside of a hut, which they believed to be empty, reported in terror to the accused that they had seen something inside this hut that had two small feet like those of a human being. The accused concluded that the form was that of a Tokelosh. He took his hatchet and in the dim light attacked what he thought was the "Tokelosh", striking it several times with the hatchet. On investigation, however, the object turned out to be his nine-year-old nephew. He was convicted of murder, sentenced to death, and appealed.

His defence was that he had not intended to kill a human being since he genuinely believed the object to be a Tokelosh. This belief was accepted as genuine by the Appellate Division and it overturned the conviction for murder. The crucial question that confronted the court was whether the accused's belief in the Tokelosh was reasonable.

De Villiers JA stated (for a unanimous court) – repeated here at length for its importance in our law:

"The 'reasonable man' is in this connection the man of ordinary intelligence, knowledge and prudence. It follows that mistake of fact is not reasonable if it is due to lack of knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited. The particular point, however, which is raised by the question reserved, is whether there is only one type of 'reasonable man' who is to be taken as the legal standard, or whether in a case like the present, another type of reasonable man is to be conceived of, viz., 'an ordinary native aged 18 years and living at home in his kraal'. I have no doubt that by the law of this country there is only one standard of 'reasonable man.' I say this for several reasons. Thus in the present case if the standard were taken to be 'an ordinary 18 year old native living at home in his kraal,' then in each and every case the standard would have to be varied so as to suit the description of the particular accused. In other words, there would be no standard, and all that the jury would have to enquire into would be whether a person with the mental and moral and temperamental and racial idiosyncrasies of the accused, could reasonably fall into such a mistake of fact. In short, the only question would be, really, whether the accused's mistake of fact was *bona fide*, and the element of reasonableness would be practically eliminated ... It seems to me, therefore, that the standard to be adopted in deciding whether ignorance or mistake of fact is reasonable, is

the standard of the reasonable man, and that the race, or the idiosyncrasies, or the superstitions or the intelligence of the person accused do not enter into the question."

On the basis that the reasonable person is not superstitious, the court concluded that the mistake was unreasonable. It convicted the accused of culpable homicide and sentenced him to 12 months hard labour.

In the case of *S v Van As* 1976 (2) SA 921 A the court (Rumpff CJ, Galgut JA and Kotze AJA concurring) appeared<sup>713</sup> to take a stride toward a more subjective approach in which the capacities are to be taken account of in testing for negligence - the court is to consider not only what the accused should have foreseen and done, but what the accused could and should have foreseen and done:

"... In criminal law, when death follows upon an unlawful assault, it must be proved, before there can be a finding of culpable homicide, that the accused could and must reasonably have foreseen that death could intervene as a result of the assault. The expression 'must have foreseen' is used in the sense of 'ought to have foreseen'. ... The question is, therefore, simple: could and should the accused reasonably have foreseen that the deceased could have died as a result of the slap.

In the application of the law he is viewed 'objectively', but in essence he is viewed both 'objectively' as well as 'subjectively' because he represents a particular group or type of persons who are in the same circumstances as he is, with the same ability for knowledge. If a person, therefore, does not foresee what other persons in the group could and should have foreseen, then the element of *culpa*, viz, omission to foresee, is present. ..."<sup>714</sup>

However, the Appellate Division decision (Jansen JA, Corbett JA, Miller JA, Trengrove JA, and Viljoen JA concurring) of *S v Ngubane* 1985 (3) SA 677 (A) rejected the notion that *Van As* had subjectivised the test and restricted the test to essentially that of an objective concern, "albeit somewhat individualised":

"It is also said that recent cases disclose a swing to the subjective approach ... and that the case of *S v Van As* 1976 (2) SA 921 (A) confirms this. It is, however, unnecessary for present purposes to express any opinion on this view, save for mentioning that there may be some doubt as to whether the phrase 'redelikerwyse kon en moes voorsien het'

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<sup>713</sup>Disputed by the *Ngubane* court.

<sup>714</sup> Translation from Jonathan Burchell & John Milton *Cases and Materials on Criminal Law* (1992) at page 395.

['reasonably could and should have foreseen'], used in *S v Van As*, connotes anything more than the conventional objective standard, albeit somewhat individualised."

Thus, our law is harnessed with a "somewhat individualised" objective test for negligence which has been taken to be essentially an objective test. Whilst the test for negligence is in principle objective, certain qualifications should be borne in mind.

#### Qualifications

Three qualifications to the otherwise objective test are recognised. Only the first has the effect of making the reasonable person more like the accused and of lowering the standard.

The first qualification is that the test is only 'subjectivised' in the accused's favour,<sup>715</sup> by considering what the reasonable person would do *in the same circumstances* in which the accused found him/herself.<sup>716</sup> It is only the *external* circumstances of the accused that may be attributed to the reasonable person and not any 'internal' circumstances.<sup>717</sup> The standard of the reasonable person does not take account of any disabilities on the part of the accused.

In *S v Southern*<sup>718</sup> the accused was a bus driver who had been charged with culpable homicide in consequence of the death of 11 of his passengers. The deaths occurred during an accident in which he lost control of the bus while he was driving down a steep hill. It appeared in evidence that the bus's breaks had failed. In this case, the test applied was how the reasonable bus driver would have driven a bus full of people down a hill without breaks. The accused was found not guilty because he had not been negligent.

Secondly, the person operating in a field in which special knowledge or skill is required, will be judged by the standard of the reasonable expert in that field. This has the effect of raising the standard.

Thus, a surgeon is required to observe the standard of a reasonable surgeon and so also the driver of a car is required to observe the standard of a reasonable driver. Where the conduct of an expert is in question, his or her conduct will be judged, as mentioned, on the basis of the conduct of a reasonable expert. A person would be held to have been negligent in respect of the death of another human being if that person performed a surgical operation upon another and the reasonable surgeon in the circumstances would have foreseen the risk of harm, guarded

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<sup>715</sup> That is, that the standard is lowered.

<sup>716</sup> *S v Southern* 1965 (1) SA 860 (N); *R v Mbombela* 1933 AD 269; *S v Ngubane* 1985 (3) SA 677 (A).

<sup>717</sup> Compare *S v Ngema* 1992 (2) SACR 651 (D); Burchell *Principles of Criminal Law* 5 ed (2016) 417.

<sup>718</sup> *S v Southern* 1965 (1) SA 860 (N).



against it and the person operating did not guard against the harm as the reasonable person would have.<sup>719</sup>

In *S v Mahlahela* 1966 (1) SA 226 AD the accused was a traditional healer who had been convicted of culpable homicide arising out of the death of a girl who drank a poisonous herb potion which the traditional healer had administered.

The court held that the accused's conduct was to be judged by the standard of a reasonable person with special knowledge of herbs. The accused in the circumstances should therefore have realised the risk of life involved in drinking potion and guarded against it and yet had not. Therefore, he was guilty of culpable homicide.

The Latin maxim *imperitia culpa adnumeratur* is often cited in this respect. Literally translated it means: lack of skill amounts to negligence. It should be noted however that it is not the lack of skill which amounts to negligence but unreasonably engaging in an activity which requires skill when one lacks that skill.

Thirdly, even in a circumstance in which the accused had no special qualification or experience in any specific field he or she may be required to observe a higher standard of care if he or she happens to have specific knowledge relating to a particular circumstance. This, again, has the effect of raising the standard. Generally one would not be negligent and so not liable to a conviction of culpable homicide in a situation in which a person who was walking calmly on the pavement suddenly ran out into the road in front of your vehicle.

However, if you were driving a car and you noticed that a person walking along the pavement is someone you know and who you know is blind, this knowledge will be attributed to the reasonable person. If this person suddenly stepped into the road and you knocked him/her over and killed him/her, your conduct will be judged against that of the reasonable driver who knew that a pedestrian nearby was blind.

## Criticism

This test has been subjected to criticism for setting a standard that is unattainable for some.<sup>720</sup> For many the solution lies in taking account of the more subjective personal 'internal' attributes

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<sup>719</sup> See *R v van Schoor* 1948 (4) SA 349 C and *S v Mahlahela* 1966 (1) SA 226 AD.

<sup>720</sup> See in particular the judgment in *S v Melk* 1988 (4) SA 561 (A): that an illiterate person cannot be judged on the standard of the literate person and a shepherd's conduct cannot be judged on the standard of a university professor. See also Whiting 'Negligence, fault and criminal liability' (1991) 108 *SALJ*; DA Botha 'Culpa – A form of mens rea or a mode of conduct' (1977) 94 *ibid*; R Louw '*S v Ngema* 1992 (2) SACR 651 (D) The reasonable man and the tikoloshe' (1993) 6 SACJ.

of the accused and attributing them to the reasonable person.<sup>721</sup> However, the more the subjective attributes of the accused are attributed to the reasonable person, the more like the accused the reasonable person becomes. The more like the accused the reasonable person becomes, the less unreasonable his conduct appears. Taken to its logical end, if all characteristics of the accused are attributed to the reasonable person, the reasonable person becomes identical to the accused. Where the reasonable person is identical to the accused, their conduct would necessarily coincide and the accused's conduct is rendered, necessarily, reasonable.<sup>722</sup> In effect, there would be no standard against which to compare the conduct of the accused. On the other hand, some account must be taken of the characteristics or circumstances of the accused so that his conduct is not compared with some impossible standard.

However, our law also should not penalise those who do not observe this standard because – however hard they try – they cannot. It is unfair to judge a person by this objective standard if he cannot observe the standard.<sup>723</sup> Botha endorses the view that it is manifestly unfair and unjust to inflict punishment upon an accused for failing to act as a reasonable person if he could not act as a reasonable person.<sup>724</sup> Louw argues that an accused can only be measured against what would be reasonable for him to do, given his own capabilities.<sup>725</sup> Hart notes: [I]n a civilised system only those who *could have* kept the law should be punished.<sup>726</sup>

This solution – of balancing objective and subjective attributes – inevitably involves a double compromise. It requires a compromise on the standard that we demand of everyone in society, and also on the extent to which we are prepared to take account of what we can expect of any individual accused.

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<sup>721</sup> De Wet *Strafreg* 4 ed (1985); Botha 'Culpa – A form of mens rea or a mode of conduct' (1977) 94 *SALJ*; Louw '*S v Ngema* 1992 (2) SACR 651 (D) The reasonable man and the tikoloshe' (1993) 6 SACJ; Whiting 'Negligence, fault and criminal liability' (1991) 108 *SALJ*.

<sup>722</sup> Lord Hobhouse noted: 'if one adds all the characteristics of the defendant to the notional reasonable man, the reasonable man becomes "reincarnated" in the defendant' (*R v Smith* [2000] Crim LR 1004, HL). See also CMV Clarkson *Understanding Criminal Law* (2005) 128; Snyman *Criminal Law* 6 ed (2014) 210.

This view is echoed in South African law regarding the standard of the reasonable person. See *R v Mbombela* 1933 AD 269; Snyman *Criminal Law* 6 ed (2014) 209–10.

<sup>723</sup> This normative imperative appears equally applicable to strict liability offences.

<sup>724</sup> Botha 'Culpa – A form of mens rea or a mode of conduct' (1977) 94 *SALJ*.

<sup>725</sup> Louw '*S v Ngema* 1992 (2) SACR 651 (D): The reasonable man and the tikoloshe' (1993) 6 SACJ 363–4.

<sup>726</sup> Original emphasis Hart *Punishment and Responsibility* (1968) 189.

Even Whiting's powerful motivation for a subjective standard of the reasonable person retains a degree of objectivity – 'the good citizen'.<sup>727</sup> However much we may wish to subjectivise the standard, we must maintain a degree of objectivity. We must maintain an objective standard in order that there exists a standard to which we must aspire and against which we may be judged. This cannot be compromised. Yet, it is unfair to judge a person by this objective standard if he cannot observe the standard. This is a double bind. Louw states that '[w]hatever future progressive modifications there may be, the objective test ... will always lead to an unsatisfactory compromise because the accused will always be judged against someone else's standards'.<sup>728</sup> An alternative possible solution to subjectivising the standard of the reasonable person is to make it subject to an enquiry into capacity.<sup>729</sup> This is the basis upon which the test of the reasonable person may be made fair and just. We cannot subjectivise the standard because an objective standard is required. The answer appears to lie in whether the accused can be expected to observe the standard. However, as I will argue in the chapters on capacity, the test of capacity itself must be reconceptualised.<sup>730</sup>

Thus, for a finding of negligence, it must be the case that the accused acted unreasonably – in a manner that the reasonable person would not. However, if an accused did not act as the reasonable person, he can only be blamed for this if he *could* have acted reasonably – in the sense described under capacity.<sup>731</sup> Thus, for a finding of negligence, it must be the case that the accused did not act reasonably, but could have.<sup>732</sup> If the accused *did not* act reasonably but *could not* have acted reasonably, s/he is not responsible for his/her negligence.

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<sup>727</sup> Whiting 'Negligence, fault and criminal liability' (1991) 108 *SALJ* 449.

<sup>728</sup> Louw '*S v Ngema* 1992 (2) SACR 651 (D): The reasonable man and the tikoloshe' (1993) 6 SACJ 364. Snyman observes: 'Before X can be blamed for his failure to comply with the required standard, his personal knowledge and abilities must be taken into consideration. He can be blamed only if one could have expected of him as an individual to comply with the required standard, and this will be the case only if X, taking into account his personal abilities, knowledge and experience, *could* have complied with the required standard.' (original emphasis; Snyman *Criminal Law* 6 ed (2014) 206).

<sup>729</sup> James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012).

<sup>730</sup> James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012).

<sup>731</sup> This would introduce an internal limiting factor on offences for which – controversially – no fault is required (strict liability offences). Liability, in the absence of actual fault, could only be incurred where the accused was at least capable of fault.

<sup>732</sup> This concept is not entirely unknown to our courts. Rumpff CJ in *S v Van As* 1976 (2) SA 921 (A) 927–8 formulated the test of negligence to include the question of whether the accused could act as the reasonable person. However, Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) 687 has cautioned that

### Degree of negligence:

The degree of the accused's negligence is irrelevant to questions of criminal liability. The slightest negligence is sufficient for criminal law.<sup>733</sup> Similarly contributory negligence on the part of the victim is also no defence.<sup>734</sup>

Contributory negligence on the part of the victim or negligence which was slight is only relevant to sentencing and maybe raised in mitigation of sentence.

### Guarding against risk:

The mere fact that an accused brings about a consequence which a reasonable person would have foreseen does not render him negligent in relation to that result. It is necessary also that the reasonable person in the circumstances would have guarded against the happening of the consequence and that the accused failed to guard against the consequence as the reasonable person would have.

Authority for this may be found in the leading case on negligence of *Kruger v Coetzee*. The facts were that a horse belonging to the defendant strayed on to a main country road through an open gate and caused a motor accident. A delictual claim for damages arose out of the accident. The defendant had foreseen the possibility of the horse straying through the gate and causing an motor vehicle accident<sup>735</sup> and he had taken certain steps to avoid this happening. A temporary road had been constructive across the defendant's land to enable employees of the local authority to access a construction site and the gate in question was the gate from the main road to the temporary road. The employees of the local authority had been leaving the gate open and though the defendant had complained to the local authority the employees continued to leave the gate open on occasion.

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this should not be taken to indicate a swing towards a subjective standard of negligence. However, at that point, Rumpff was concerned to preserve the objective standard of negligence.

See also the case of *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A), in which the negligence of a child was judged by reference to the child's capacity for negligence – judged subjectively.

<sup>733</sup> R v Meiring 1927 AD 41.

<sup>734</sup> R v Lennett 1917 CPD 444.

<sup>735</sup> The reliance by the court on the actual foresight of the defendant is slightly at odds with what is required – only that the reasonable person would have foreseen the risk. Nevertheless, the present concern is with the second question in the enquiry – whether the defendant did all that the reasonable person would have.

The defendant was not held liable on the basis that it had not been shown that he had been negligent because it had not been established that a reasonable person would have taken any further steps to prevent an accident.

Though this was a civil case, if a death had resulted from the accident and a criminal charge of culpable homicide had ensued, again the accused would not be liable on the same premise.

Thus, considerations of inconvenience and expense feature in respect of considering whether the reasonable person would have guarded against the harm. In the above case (*Kruger v Coetzee*) the defendant could have taken further steps such as posting a 24-hour guard on the gate but this step was not considered reasonable -- that is one which a reasonable person would have taken.

Social utility, such as whether the conduct was urgent or laudable, is a further consideration which is considered in establishing whether the reasonable person would have guarded against the harm.

#### Foresight of actual consequence

The question whether the reasonable person in the circumstances of the accused would have foreseen the possibility of the occurrence of a prohibited consequence or the existence of a prohibited circumstance must be qualified to reflect the particular prohibited consequence or circumstance. For the crime of culpable homicide, the prohibited consequence of death must be reasonably foreseeable. This principle was expounded in the case of *S v van As* (1976 A).<sup>736</sup> In this case the accused had been involved in an altercation with the victim who was a very fat man. The accused had delivered a hard slap against the cheek of the victim. The victim fell backwards struck his head on the cement floor, became unconscious and died. The trial court convicted the accused of culpable homicide. The Appellate Division altered the conviction to assault since it had not been established that the victim's death was reasonably foreseeable.

Rumpff CJ (*Gulgut JA* and *Kotze AJA* concurring) stated:

"In criminal law, when death follows upon an unlawful assault, it must be proved, before there can be a finding of culpable homicide, that the accused could and must reasonably have foreseen that death could intervene as a result of the assault. The expression "must have foreseen" is used in the sense of "ought to have foreseen". If it is proved that the accused ought reasonably to have foreseen that death was a possible result and that the causation requirement has been satisfied the case is concluded. ... The question is, however, ... could and should the

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<sup>736</sup> *S v Van As* 1976 (2) SA 921 (A).

accused reasonably have foreseen that the deceased could have died as a result [of the assault]. That foreseeability of serious bodily harm usually, but not always, goes hand in hand with foreseeability of death is correct, but it will certainly depend on the nature of the injuries inflicted in a particular case whether there was a reasonable foreseeability of death or not."

Thus, for a finding of negligence, the particular prohibited consequence or circumstance must have been foreseen.

## Conclusion

The test for negligence is as follows – from the case of *Kruger v Coetzee*:

- (a) a reasonable person, in the circumstances of the accused—
  - (i) would foresee the reasonable possibility of his conduct causing a consequence which is prohibited in law, or that being in those circumstances is prohibited in law; and
  - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the accused failed to take such steps.

The standard of the reasonable person remains, on our current law (following *S v Ngubane*), an objective one. It is somewhat subjectivised by reference, for the purposes of lowering the standard, to the circumstances in which the accused acted.

It is submitted that the only way that the necessary standard may be maintained and, at the same time, do fairness to an accused where that particular accused fails to observe the standard because s/he cannot observe the standard, would be to subject the test for negligence to the test for capacity – although a reformulated test for capacity.<sup>737</sup>

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<sup>737</sup> James Grant 'The Responsible Mind in South African Criminal Law' (unpublished PhD Thesis University of the Witwatersrand, Johannesburg 2012).

PART VI

PRINCIPLES AT WORK

## Chapter 17

### Introduction

Ignorance or mistake may operate to exclude liability in South African criminal law. The concept of ignorance may be distinguished from that of mistake on the basis that ignorance implies a lack of knowledge whereas mistake would seem to refer to an erroneous decision based on either erroneous information or a lack of information – such as in the case of ignorance. In South African criminal law it is the mistake – erroneous decision – which is of interest and not the reason for the erroneous decision. For that reason this chapter will primarily concern itself with mistakes with reference, on occasion, to ignorance where relevant.

### General Principles

The principles of mistake are applicable to both mistakes of fact, and mistakes of law.<sup>738</sup> The principles are as follows:

1. Where the form of fault required for a conviction of the crime in question is intention, a (genuine) mistake as to a material requirement of the unlawful conduct requirements, or to the abstract prohibition,<sup>739</sup> will exclude liability;
2. Where the form of fault required for a conviction of the crime in question is negligence, a (genuine and) reasonable mistake as to a material requirement of the unlawful conduct requirements, or to the abstract prohibition, will exclude liability;
3. Where no fault is required for a conviction of the crime in question, a mistake, however reasonable, and however extensive, will not exclude liability.

Several preliminary points require discussion. They will be identified here and discussed below.

For a mistake to be operative – that is, to have an effect – it must, in the context of a mistake of fact, relate to a material requirement of the wrongful conduct. Where the form of fault required is intention a tradition has developed which suggests that the mistake must be genuine. However, this reference should not be treated as an additional requirement, but only as a convention adopted to distinguish between an operative mistake where the fault required is intention as opposed to negligence.

Where no fault is required, a mistake cannot assist the accused.

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<sup>738</sup> Since *S v De Blom* 1977 (3) SA 513 (A) in which mistake of law was recognised as a valid defence.

<sup>739</sup> That it is prohibited in law as a crime.



## The Effect of a Mistake

It is important to understand the effect of a mistake. It is a well recognised principle that the fault requirement of a crime must extend to all the material requirements of that crime.<sup>740</sup>

mistakes operate to break the link that must exist between the fault requirement and the other requirements.

A mistake does not, of course, change the objective reality. A mistake for instance, that one is killing an animal and not a human being does not, of course, turn the human being into an animal. The effect of the mistake is instead to break the link that must exist for liability to be incurred, between the fault requirement and the wrongful conduct requirements and ultimately the abstract prohibition<sup>741</sup> itself. Once that link is broken the fault requirement cannot extend as it must to all the other requirements and it is then the fault requirement which is not satisfied. Therefore, to use the example of murder, if an accused believed that he or she was killing an animal instead of a human being, his or her intention would not extend to the killing of another human being and therefore the requirement of intention would not be satisfied.

If a crime charged requires neither intention nor negligence, then a mistake on the part of the accused can have no effect. This is because, if no fault is required, no fault can be excluded. The effect ultimately is that a mistake in the context of a no fault (strict liability) offence is irrelevant.

## Material mistake

In the context of a mistake of fact,<sup>742</sup> and depending on the form of fault required, a mistake can only be operative if it relates to a material requirement of the wrongful conduct requirements. So, for the purposes of a charge of murder, material requirements include that another human being is killed and not merely injured, that it is another human being who is being killed and not for, instance an animal. Therefore, if an accused person is mistaken in that he or she thinks that he or she is only going to injure another human being, or perhaps, neither kill nor injure another human being, this would be an operative mistake which would exclude intention and therefore liability for murder.

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<sup>740</sup> Andrew Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 493. *R v Mbombela* 1933 AD 269.

<sup>741</sup> That it is a crime.

<sup>742</sup> As will be discussed below, a mistake of law must also be material in the sense that there will be certain mistakes – such as to the precise statute and section number under which conduct is made an offence – that will be immaterial.

On the other hand, if an accused were mistaken as to, perhaps the colour of the clothing being worn by the victim, this would be an immaterial mistake of fact and be inoperative. It is worth noting at this point, that a mistake as to the identity of the victim<sup>743</sup> is immaterial and in operative in our law.<sup>744</sup>

If the fault requirement of the particular crime charged requires only negligence however, then the accused will need to show that the mistake which he or she made was a reasonable one – a mistake which a reasonable person in the circumstances of the accused, might have made.

A clear and classic example of a material mistake of fact occurred in the case of Mbombela.<sup>745</sup> In Mbombela the accused attacked and killed what he thought was a “tokelosh” (an evil spirit which – reportedly - sometimes manifests as a small human being). It transpired that it was instead his nine-year-old niece. He was charged with murder and convicted in the trial court. On appeal the then Appellate Division (now the supreme Court of Appeal) accepted that the accused intended not to kill a human being and therefore he could not be convicted of murder. However it then turned to consider whether the mistake that the accused had made was – for the purposes of excluding negligence – a reasonable mistake. As discussed in the chapter on negligence, the court took the view that the accused’s mistake was not reasonable in the circumstances. It therefore convicted him of culpable homicide. Although this case may deservedly be criticised for its view on the standard of the reasonable person,<sup>746</sup> its application of the principles relating to mistake cannot be faulted.

### “Genuine” Mistake

A convention has arisen in terms of which when discussing whether a mistake excludes intention, it is necessary to establish whether the mistake was genuine. The problem with this convention is that it suggests that one may make a mistake in a non-genuine way. This would require that people are somehow able to pretend to be mistaken. The problem is – of course – that if one is only pretending to be mistaken, then one is simply not mistaken. At worst then this convention can lead to a spurious enquiry into whether a person was mistaken and yet not mistaken but at best, the qualification is redundant.

It has probably survived because it assists in distinguishing, for some, between a mistake which may operate to exclude intention as opposed to a mistake which may operate to exclude negligence. It is conventionally said that, in order to exclude negligence, not only must a mistake be genuine, but it must also be reasonable. Understood properly however, this only means that in order to exclude negligence, not only must the accused have been mistaken, but that mistake must be reasonable. It would seem that this

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<sup>743</sup> In the sense of the name of the particular human body which one intends to kill. If one takes aim at a particular human body a mistake as to the name by which that person goes, is immaterial and inoperative. The name by which a person goes is at most an immaterial attribute..

<sup>744</sup> *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SA 431 (SCA). This will be discussed further below in the context of error in objecto and aberratio ictus.

<sup>745</sup> *R v Mbombela* 1933 AD 269. For a full discussion of *Mbombela* see the chapter on Negligence.

<sup>746</sup> Discussed in the chapter on negligence.

qualification should be avoided because it is unnecessary, because it adds yet another distraction from the real issues, and most certainly implies an indefensible conception of the human mind.

### Error in objecto and aberratio ictus

There is a fundamental difference between an error in objecto and an aberratio ictus. In the case of error in objecto, the object at which the attack is directed is the object upon which it falls. The mistake relates to the nature or some other attribute of the object – material or immaterial. In cases of aberratio ictus, the object at which the attack is directed is missed and in some cases the attack falls upon some other object. The question that arises in these cases (of aberratio ictus) is whether to simply transfer any fault that may have been directed at the original object onto the object actually struck, or whether to insist that fault must extend to the actual object struck in the same way as principles would otherwise dictate.

### Error in objecto

An error in objecto occurs, as discussed above, where one strikes one's intended target, but one is mistaken in some way, either as to a material or immaterial attribute, relating to the object against which one directs one's attack.<sup>747</sup>

So, for instance if a person (X) had taken aim with a gun at what he or she thought was a rabid dog and had fired with the intention of killing the dog, whereas it transpires that the dog was really a small child, X cannot be convicted of murder because he or she did not intend to kill a human being. Whether he or she can be convicted of culpable homicide will depend on how reasonable a mistake it was to think that the small child was a rabid dog. This is the easy case. The more difficult case is where X aims with a gun at another human being, who he mistakenly thinks is Y. He fires his gun and kills that particular human being. However, it transpires that the particular human being that was killed is Z and not Y. The question here is whether it ought to matter that X killed Z and not Y. The key to answering this question is to understand that the mistake that was made related only to the name of the human being who was killed. The name of the human being as an immaterial attribute.<sup>748</sup> The human being – the human body – that X intended to kill is the particular human body that X did kill. The name of the human being killed is and must be in the same category as the colour of that human being's clothing – an immaterial and irrelevant attribute.

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<sup>747</sup> *R v Mbombela* 1933 AD 269 is authority for this proposition.

<sup>748</sup> *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SA 431 (SCA). For an in-depth discussion of the topic in the context of the Pistorius case, see the post on the site jamesgrant.co.za: Unsuccessful Attempts to Justify Judge Masipa's Errors (Revised & Expanded).

## Aberratio Ictus

In the case of aberratio ictus one does not strike the target against which one directs one's attack – and in this context our law then enquires whether one's fault extends to the actual object or victim upon whom one's strike falls.

So, in cases where, for instance, X intended to shoot a dog, but misses the dog and strikes a human being, there is little controversy – there can be no conviction for murder or attempted murder. There was never any intention to kill any human being. In the converse though, where X intended to kill a human being, but misses that human being and strikes and kills a dog, there is a failed attempt to kill a human being and therefore attempted murder. These scenarios are perhaps the easier ones to solve. The more difficult scenario arises where P, intending to shoot and kill Q, fires his gun at Q, but misses Q and strikes and kills R. The question that arises is whether P can be convicted for the murder of R.

In these cases there can be no question that a conviction of attempted murder is appropriate in respect of the original victim - the accused attempted to kill another human being and failed. This is a classic attempt. The more interesting and difficult question is whether the accused can be convicted also of the murder of the actual victim – arising in particular from the intention to kill the original victim.

The law that used to be applied in these cases is known as the transferred intent approach. There was little question under this approach that the intention that was directed at the original victim should simply be transferred and treated as if it was directed at the actual victim.<sup>749</sup>

It seems however that our law has abandoned this approach and has moved to what has come to be known as the concrete intent approach.

On this approach, our law has come to insist on the application of general principles. An accused can only be convicted of the murder of the actual victim if the accused had intention which extended to the actual victim.<sup>750</sup> This intention may take any form – including *dolus eventualis*. Therefore the question becomes whether, in shooting at the original victim, the accused foresaw the (real) risk of striking and killing the actual victim, and having reconciled to this risk, proceeded.

The move began in 1970, with the pronouncement of Holmes JA in his minority judgment in *Mtshiza*.<sup>751</sup> This case concerned an appeal against sentence only and was not against a conviction. The other two judges in the case adopted a different approach, though reaching the same conclusion.

The facts of the case are that the appellant was engaged in a drunken brawl. He had drawn a knife and attacked a man who had provoked him. Despite aiming his blow at the provocateur, the knife came to rest in the chest of his own friend who had stepped forward to intervene. The friend died and the appellant

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<sup>749</sup> *R v Koza* 1949 (4) SA 555 (AD); *R v Kuzwayo* 1949 (3) SA 771 (AD).

<sup>750</sup> *Mtshiza* 1970 (3) SA 747 AD.

<sup>751</sup> 1970 (3) SA 747 AD.

was convicted of culpable homicide. The appellant appealed against only the sentence imposed. Holmes JA said the following:

“the judgments of the courts in the cases of Kuzwayo and Koza were decided before the Appellate Division rejected the *versari* doctrine in the Bernadus case (1965 AD) and could no longer be supported on the basis that they were premised on the *versari* doctrine which was now rejected.”

Ultimately the appeal against the sentence was upheld.

This judgment of Holmes found favour into subsequent provincial Division cases: *Raisa* 1979 (4) SA 541 (O) and *Tissen* 1979 (4) SA 293 (T).

In *S v Tissen* 1979 (4) SA 293 (T) the accused had fired several shots at one person in a crowded street. A bullet had ricocheted off the street and struck another person. The court held that the accused could not be convicted of an assault on the person struck by the ricocheting bullet except where he had intention in respect of that particular victim. On the facts, particularly that the accused shot at his desired victim in a crowded street, the accused was found guilty of assault on the basis that he harboured *dolus eventualis* of the general variety in respect of the actual victim.

In the case of *S v Raisa* 1979 (4) SA 541 (O) the accused had attempted to stab a woman while she was holding her child. The woman protected herself by holding up the child in front of her and the accused stabbed the child. He had been convicted of assault with intent to do grievous bodily harm in a Magistrate's court.

On appeal, the Court held that the accused could only be found guilty of assault on the child where there was evidence that he entertained foresight in respect of injuring the child. The court was not satisfied that the accused had intention to injure the child and it set-aside the conviction in respect of the child and remitted the matter back to the magistrate.

The case of *S v Mavhungu* 1981 (1) SA 57 (AD) it is the last word on the topic in South African law and appears to be appellate division (now the supreme Court of Appeal) authority for the adoption of the concrete intent approach. However, on closer analysis, it would seem that this judgement can at best be regarded as *obiter* because the court, although adopting the concrete intent approach to the problem before it, conceded that the problem before it was not one of *aberratio ictus*.

The facts of this case are briefly as follows. The appellant, X, and three others (L, M, and N), conspired in a common purpose to kill Y (who was N's mother in law). Their purpose was ultimately to use Y's body parts for *muti* (a form of medicine). N reported to the others that Y was due to be at N's home that evening and that they could execute their plan then and there. X was due to attend at N's home to execute the plan that evening but was waylaid. Ultimately when he arrived at N's home to do the job, he encountered N, leaving her home, proclaiming to have done the deed. It transpired however, that N had not killed Y, but some other person, Z.

The accused (X) had been convicted of murder of the deceased and had been sentenced to death. In an appeal, the accused submitted that the only appropriate verdict was not murder but accessory after the fact in respect of the murder of the deceased.

The court itself took the view that these facts did not present a scenario of *aberratio ictus* - but, as mentioned, nevertheless dealt with it as if it were such a problem. It declared its support for the view of Holmes JA in *Mtshiza*. The court held that the accused could only be found guilty of murder if the prosecution could establish that he had entertained *dolus* in respect of the death of the actual victim. On reviewing the evidence the court concluded that the accused's *dolus* extended only to the mother-in-law. In the result, the Appellate Division set-aside the verdict of murder and the attendant death sentence and convicted the accused of accessory after the fact to murder.

It seems therefore that the trend is strongly against the transferred intent approach in favour of a concrete intent approach. There can be no question that the concrete intention approach is in line with general principles and ought to prevail.

### Versari or bad luck

It is perhaps worth considering whether the problem with the transferred intent approach is that it is *versarian* or there is some other basis on which it is objectionable. One other possible basis on which the transferred intent approach may be objectionable is if it seeks to impose liability simply on the basis of fortuity: luck or in particular bad luck. There can be no question in our law that one cannot attract criminal liability simply because of fortuity. Imagine a scenario in which a person is driving his/her car as the reasonable person would and a pedestrian rushes out in front of the car, and that despite taking reasonable measures to avert the pedestrian, the person strikes and kills the pedestrian. This is the clearest case of a pure accident where no fault attaches to the driver and the death is regarded as regrettable but fortuitous. I will argue that the true basis upon which liability cannot be imposed in cases of *aberratio ictus*, is because to do so would be to impose liability based on fortuity.

To return to the example: P, intending to shoot and kill Q, fires his gun at Q, but misses Q and strikes and kills R - the question that arises is whether P can be convicted of the murder of R. Notice, at one level, it remains true to say that P intentionally and unlawfully killed another human being. The only difference is that P killed R instead of Q. There appears, on this level, little to distinguish this scenario and that of an error in objecto where the identity of the victim is irrelevant. However, it is crucial to notice that there is a fundamental difference: the particular human being – human body – at which the blow was directed, is not the human body which was killed. This might seem insignificant at first until one observes that there can be little to distinguish this scenario where the shot misses the original victim and, fortuitously, strikes a tree behind the original victim or falls ultimately to the ground - from where the shot misses and fortuitously strikes another human being. The crucial point is that if it is in truth only fortuity that determines whether

another human being is struck and killed or the bullet falls harmlessly to the ground or strikes a tree, then to impose liability for murder based on this fortuity is to punish for murder for bad luck.

If this is the true basis on which the transferred intent approach is objectionable, as I suggest it is, it not only brings clarity to why this approach is objectionable but also gives clarity going forward, to whether any form of liability in cases of *aberratio ictus* ought to be imposed. Perhaps its true value is in its ability to explain the proper response to situations where the accused intended to kill a person and did kill a person in circumstances of error in *objecto* as opposed to *aberratio ictus*.

It avoids the difficulty of having to account for the fact that in scenarios of *aberratio ictus*, the “identity” of the victim<sup>752</sup> is in some way relevant, whereas in cases of error in *objecto*, it is not.

As explained in the context of error in *objecto*,<sup>753</sup> the law attaches liability on the basis that the name of the individual is an immaterial attribute. In the context of *aberratio ictus*, to transfer intent to kill from an intended original victim to an actual victim in respect of whom there was no such intention to kill would be *versarian*. However, it would at the same time impose liability for murder based solely on fortuity - that the blow which missed the original intended victim happened, by chance, to strike another human being.

If we applied the same objection – to the imposition of liability based on fortuity – to scenarios of error in *objecto*, we would have to ask whether it is only by fortuity that the blow came to strike a human being. The answer to this is an unqualified no. The accused intended to kill a human being and killed a human being. The name or identity, however conceived, of the human being killed is irrelevant.

As indicated above, when understood as a problem of fortuity, the only question - in scenarios of *aberratio ictus* - is whether it is only by fortuity that the actual victim was killed. If, it was not by fortuity alone, and that some form of fault attached to the actual victim then the natural consequences follow.

### Mistake of law

Until 1977, ignorance or mistake of law was no excuse: *ignorantia iuris neminem excusat*. In that year the case of *S v De Blom*<sup>754</sup> came before our Appellate Division (now the Supreme Court of Appeal) which changed the law in this respect completely. The facts of this case are briefly that the appellant had been convicted of contravening exchange control regulations. She had been convicted of contravening regulation (3)(1)(a) (the “money regulation”) in that she removed \$40,000 in banknotes from the republic without the requisite permission from the Treasury. She had hidden the banknotes in her luggage and her defence on this count was that she did not know that permission was required.

Furthermore, she was convicted of contravening regulation (10)(1)(b) (the “jewelry regulation”) in that she removed jewelry in excess of the value of R600.00 without the requisite permission from the Treasury. The jewelry removed was worth approximately R14,000.00. She had worn a lot of the jewelry on her

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<sup>752</sup> That it was this person (human body) rather than that person (human body) that was killed.

<sup>753</sup> Where one person – following the example above – say Z, is killed in the mistaken belief that Z is Y.

<sup>754</sup> *S v De Blom* 1977 (3) SA 513 (A).

person and carried the rest in a bag. Again, her defence was that she was unaware that consent was required to remove her jewelry from the Republic. Rumpff CJ, for a unanimous court (Jansen JA, Rabie JA, Muller JA, Joubert AJA concurring) stated:

"At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law" has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present-day concept of *mens rea* in our law."

...

"If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when *culpa* only, and not *dolus*, is required as *mens rea*, that there is a reasonable possibility that juridically she could not be blamed, ie that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her in connection with the question with whether or not permission was required to take money out. Should there be, on the evidence as a whole, ie including the evidence that the act was committed, a reasonable doubt whether the accused did in fact have *mens rea*, in the sense described above, the State would not have proved its case beyond a reasonable doubt."<sup>755</sup>

Thus, to paraphrase the court: if *dolus* is required as the form of fault for an offence, an accused cannot be convicted if a reasonable possibility exists that he or she did not know that his or her conduct was criminal. Further, where the form of fault required is negligence, an accused cannot be convicted where there exists a reasonable possibility that the accused made a reasonable mistake.

The court held that fault was required for a conviction under these various regulations although it did not declare what form of fault was required. The court proceeded on the basis that either intention or negligence was required and that deciding what form of fault was required was unnecessary.

On the facts of this particular case, in respect of the conviction for contravening the money regulation, the court found that even if the regulation required *dolus*, the accused had been properly convicted since "she knew that she needed permission to take money out of the country and that such permission had not been obtained" - on the basis that, amongst other things, she had hidden the money.

In respect of her conviction for contravening the jewelry regulation, the court found that on the facts that she was a person who possessed a lot of jewelry and wore more jewelry than the average woman. It noted also that she had, on previous occasions, taken jewelry out of the country and returned with it and that

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<sup>755</sup> *S v De Blom* 1977 (3) SA 513 (A) 532. Translation by Jonathan Burchell *Cases and Materials on Criminal Law* 3rd ed (2007) 462.



she intended returning with this jewelry.<sup>756</sup> It concluded therefore that it was reasonably possibly true that she had not been aware that permission was required (thus negating *dolus*). Also, that even if negligence was sufficient for this crime, her mistake had not been shown to be unreasonable in the circumstances. With this, the defence of mistake of law was recognised in our law and continues to be recognised. Ignorance of the law is now indeed a valid defence.

### Extent of Mistake

The accused is not required to know the specific provisions of the law he is alleged to have contravened in order that a conviction follow.

Where the fault required is intention, it is sufficient if the accused foresaw a (real) possibility that his/her conduct may be prohibited by law and (having reconciled him/herself) proceeds; it is not required that his/her foresight extend to the particular legal provisions.

Where the fault required is negligence, it will be present if the accused is unreasonably in error of the law.

### Negligence

The De Blom judgment declared that a mistake of law, where *dolus* is the form of fault required for an offence, would negative the fault requirement. It also established that a mistake of law, where the requisite fault is *culpa*, would negative the existence of fault where the mistake was reasonable. The court held that the prosecution had failed to establish that the appellant's ignorance or mistake of law was unreasonable.

The effect of this mistake on a charge in respect of which negligence is sufficient is not straightforward. The mistake or ignorance must be reasonable. The problem arises as to what is a 'reasonable' mistake, or 'reasonable' ignorance. It must, of course, be a mistake a reasonable person, in the circumstances of the accused, would make.

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<sup>756</sup> It is perhaps worth noting that the court here seems to have attributed to the reasonable person the understanding of the accused, that one may travel with a substantial amount of jewellery. This appears to subjectivise the standard of the reasonable person beyond taking account of the immediate external circumstances of the accused. This decision predated *S v Ngubane* 1985 (3) SA 677 (A) – but what is perhaps worth noting is that Jansen JA (in *Ngubane*) did not expressly overrule this flourish. Perhaps the argument could be made that, in the context of a mistake of law, the standard of the reasonable person must be subjectivised to take account of the understanding that the accused had developed although, in my view, this is to start on the slippery slope discussed in the chapter on negligence.

Ordinarily, the reasonable person has no special knowledge or skill,<sup>757</sup> other than that which is demanded by the task in which the accused engages.<sup>758</sup>

However, the court in *De Blom* qualified the position of an accused seeking to rely on a reasonable mistake of law. It adopted a passage from an article by Botha, discussing the implications for our law of the decision in the case of *Tsochlas*,<sup>759</sup> as follows:

In our case law there are at present at least two guidelines for determining *culpa* in respect of the lawfulness of the wrongdoer's conduct. In *Wandrag's case* [1970 (3) SA 151 (0)] the Court held that an employer in the building industry could reasonably be expected to keep abreast of the law relating to the employment of employees in the building industry. If he neglects to do this, his consequent ignorance of the law may give rise to the blame of carelessness. The same will presumably apply to a person in the modern state, where numerous facets of a legal subject's conduct are regulated by legal provisions, who is *occupied in a specific field*. It can surely reasonably be expected of a garage owner to be acquainted with legislation regulating his *sphere of operations* and it can surely be expected of an angler to ascertain what the regulations affecting angling are. A person who wants to conclude a transaction in respect of diamonds and who knows that the diamond industry is strictly controlled by legislation, can justly be blamed if he, like *Tsochlas* [*S v Thochlas* 1974 (1) SA 565 (0) *sic*], fails to obtain legal advice and consequently acts unlawfully.<sup>760</sup>

This appears to have been applied in the case of *S v Du Toit*<sup>761</sup> in which the accused (a motorist) had been convicted in the magistrates court of contravening certain regulations restricting the transporting of petrol other than in a petrol tank. At that particular time there was a shortage of petrol in South Africa and the regulations had been widely publicised. The accused had raised the defence of mistake of law - that he did not know that he was acting illegally. The Court dismissed the appeal. It confirmed that the regulation required fault in the form of negligence only and held

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<sup>757</sup> *S v Southern* 1965 (1) SA 860 (N); *R v Mbombela* 1933 AD 269; *S v Ngubane* (note 9).

<sup>758</sup> In circumstances in which an unskilled person has engaged in an activity that requires special skill and knowledge, such as medical surgery, the conduct of the accused is compared to that of a reasonable person who possesses the requisite skill (*R v Van Schoor* 1948 (4) SA 350 (C); *S v Van As* 1976 (2) SA 921 (A)). Additionally, our law may attribute actual knowledge an accused has, to the reasonable person, for the purposes of comparison (*ibid*; *S v Ngema* 1992 (2) SACR 651 (D)).

<sup>759</sup> *S v Tsochlas* 1974 (1) SA 565 (A).

<sup>760</sup> Emphasis added; DA Botha 'Verbytbare regsonkunde en die Skultsoort Culpa' (1975) 28 THRHR 50-1. Translation by Burchell (note 72) 461-2.

<sup>761</sup> 1981 (2) SA 33 C.

that the accused's mistake of law had been unreasonable and therefore negligent. The court was of the opinion that the appellant, as a motorist, ought to have familiarised himself with the provisions.

Thus a person may be expected to know the law relating to his/her specific field of occupation or sphere of operation. Yet, as Burchell notes, we are not left with any great deal of clarity regarding what will be considered one's sphere of operation or activity, and then, what will fall within that specific field of occupation or sphere of operation.<sup>762</sup>

### Obtaining legal opinion

Where a crime may be committed negligently, it is not a defence to argue that one's conduct was based on legal advice which had indicated that the conduct in question was not prohibited in law as a crime.

In the case of *S v Waglines (Pty) Ltd and Another*<sup>763</sup> the appellant had been convicted of contravening the road transportation act on the basis that they were not in possession of the requisite permit to transport certain packing material. They had obtained and relied upon advice of a transport consultant and of an experienced attorney.

The Court held – in line with the admonition from *De Blom* - that, where an offence is committed by negligence a person has a duty to acquaint himself with the true legal position, particularly in respect of the trade in which he is engaged.

In an extraordinary finding, the court held that the reasonable person of average intelligence and sophistication is aware that lawyers in judges differ on their views in respect of the same points. Such a person could not take for granted the correctness of all legal advice he receives.

The court held that the appellant had failed to investigate the relevant laws and that the advice that they had received did not discharge their duty to acquaint themselves with the true legal position. They had failed, the court held, on the basis that the reasoning of the advice received was patently bazaar and was so obviously erroneous that it should not have been trusted.

Similarly in the cases of *S v Longdistance (Natal) (Pty) Ltd*<sup>764</sup> and *S v Claasens*<sup>765</sup> the courts again emphasised that the public is required to second-guess lawyers who are ostensibly qualified to give legal advice.

In *Longdistance* the court took the view that one ought to evaluate the advice one receives against one's common sense. In *Classens* the Court required that one evaluate the advice based on whether the lawyer is clearly out of his/her depth.

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<sup>762</sup> Jonathan Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 444.

<sup>763</sup> 1986 (4) 1135 (N).

<sup>764</sup> 1990 (2) SA 277 (A).

<sup>765</sup> 1992 (2) SACR 434 (T).

This implies, it seems, that the law is rational in that an application of commonsense would detect erroneous advice at odds with what the law actually is. This appears to be a most dubious assertion especially in the light of the concession made in the case of *Waglines* that not even lawyers or judges agree about what the law is.

### Mistake as to Unlawfulness

The type of mistake under consideration here relates to the unlawfulness requirement contained within the definition of a criminal prohibition. For instance, in the context of the crime of murder, a relevant mistake would put the link between the intention requirement and the unlawfulness requirement in question in the definition of murder: intentional unlawful killing of another human being.

In order to properly understand this issue one must draw a distinction between the unlawfulness requirement in the sense described immediately above – as a requirement within the criminal prohibition of murder – and the criminal prohibition itself. The criminal prohibition, also known as the abstract proscription, refers to the fact that it is a criminal offence to commit murder – to “intentionally and unlawfully kill another human being”. If one is mistaken as to whether it is a criminal offence to intentionally and unlawfully kill another human being one makes a mistake of law. One may also however be mistaken as to the internal requirement of the abstract prohibition – of unlawfulness - and this mistake may be one of fact or of law.<sup>766</sup>

It is helpful to recall what it is that the unlawfulness requirement represents. Conduct is judged unlawful according to the court’s conception of the legal convictions of the community, as informed by the Bill of Rights in the Constitution.<sup>767</sup> It is under this requirement that conduct, which may ordinarily be prohibited as unlawful, may be permitted as justified in the circumstances. Several grounds of justification have been recognised, including private defence (which includes self-defence),<sup>768</sup> necessity (better known as duress),<sup>769</sup> and consent.<sup>770</sup>

Furthermore, South African criminal law punishes omissions only where the accused has failed to act in the face of a *legal* duty to act. Whether a legal duty to act exists in a particular circumstance is also a

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<sup>766</sup> James Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ.

<sup>767</sup> Constitution of the Republic of South Africa, 1996. See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

<sup>768</sup> *S v De Oliveira* 1993 (2) SACR 59 (A); *S v Mokonto* 1971 (2) SA 319 (A); *Ex parte Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A).

<sup>769</sup> *S v Goliath* 1972 (3) SA 1 (A).

<sup>770</sup> *Clarke v Hurst NO* 1992 (4) SA 630 (D); *S v Collett* 1978 (3) SA 206 (RA); *S v Robinson* 1968 (1) SA 666 (A).

question of unlawfulness to be determined, again, by the court's conception of the legal convictions of the community, as informed by the Bill of Rights in the Constitution.<sup>771</sup>

Therefore, mistake as to unlawfulness would be a mistake as to whether one's conduct was justified or whether, in the context of an omission, one was under a legal duty to act.

Our law recognises that one's conduct is *justified* and therefore *lawful* in private defence when, in response to an unlawful imminent<sup>772</sup> or commenced attack upon a legally protected interest, one resorts to the use of necessary and reasonable force against the attacker.<sup>773</sup> So, if X resorts to force against Y in the mistaken belief that Y was about to attack X, then X would have the defence of mistake as to unlawfulness available to him or her. If the accused can show that s/he was mistaken in thinking s/he was entitled to act in private defence, this mistake will exclude intention.<sup>774</sup> If that mistake is shown to have been reasonable, it will also exclude negligence. This defence is technically known as putative private defence. It is not real private defence because there was – objectively speaking – no real attack and private defence cannot be claimed. However the accused is said to have acted in putative private defence – meaning only perceived private defence. It is in fact *misperceived* private defence but is understood to convey that the accused's defence is that he or she was mistaken and so puts his or her fault in issue. In a case such as this, where X's mistake was that he or she thought that he or she was under attack – whereas he or she was not – this is a mistake of fact. In *R v Hele*<sup>775</sup> the accused stabbed a person to death in a mistaken belief that this person was armed with a knife and was about to stab him. The court acquitted the accused of both murder and culpable homicide on the basis that it accepted that he was mistaken and that his mistake was reasonable.

In *S v Pistorius* the accused had shot and killed his girlfriend through the door of the toilet in his house. He claimed that, amongst other things, he had mistakenly believed he was under attack and had acted in putative private defence. He was acquitted of murder in the trial Court.<sup>776</sup> The state appealed on a question of law and the Supreme Court of Appeal rejected the defence in its entirety, as follows:<sup>777</sup>

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<sup>771</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

<sup>772</sup> Subject to the judgment in *S v Engelbrecht* 2005 (2) SACR 41 (WLD).

<sup>773</sup> *R v Zikalala* 1953 (2) SA 568 (A) 572; *R v K* 1956 SA 353 (A) 359; *R v Patel* 1959 (3) SA 121 (A); *S v Jackson* 1963 (2) SA 626 (A) 629.

<sup>774</sup> As stated in *S v De Oliveira* 1993 (2) SACR 59 (A): "...the only issue was whether the State had proved beyond all reasonable doubt that the appellant subjectively had the necessary intent to commit the crimes of which he was convicted, in other words, that he did not entertain an honest belief that he was entitled to act in private defence." (page 64).

<sup>775</sup> (1947) 1 SA 272 (E); see also *S v Ntuli* 1975 (1) SA 429 (AD); *S v De Oliveira* 1993 (2) SACR 59 (A);

<sup>776</sup> *S v Pistorius* 2014 JDR 2127 (GP).

<sup>777</sup> *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SA 431 (SCA).

“The immediate difficulty that I have with the accused’s reliance upon putative private defence is that when he testified, he stated that he had not intended to shoot the person whom he felt was an intruder. This immediately placed himself beyond the ambit of the defence, although as I have said, his evidence is so contradictory that one does just not know his true explanation for firing the weapon. His counsel argued that it had to be inferred that he must have viewed whoever was in the toilet as a danger. But as was pointed out in *De Oliveira*, [footnote omitted] the defence of putative private defence implies rational but mistaken thought. Even if the accused believed that there was someone else in the toilet, his expressed fear that such a person was a danger to his life was not the product of any rational thought. The person concerned was behind a door and although the accused stated that he had heard a noise which he thought might be caused by the door being opened, it did not open. Thus not only did he not know who was behind the door, he did not know whether that person in fact constituted any threat to him. In these circumstances, 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 (which the accused said he elected not to fire as he thought the ricochet might harm him) . . .”.<sup>778</sup>

In the result, the Supreme Court of Appeal substituted a murder conviction for the culpable homicide conviction.<sup>779</sup>

Note also that it is entirely possible though that an accused could make a mistake as to whether, in law, force is permitted in a particular circumstance, or the extent of force that is permitted, and therefore make a mistake in the context of unlawfulness, but a mistake which is, properly understood, a mistake of law.<sup>780</sup> This distinction may seem utterly unnecessary to draw. However there may be you where the distinction is important such as where a court must decide what – in law – was permitted in the particular circumstances as opposed to what the circumstances were. The distinction is important because only a judge may decide what in law was permitted whereas assessors may not and may only concern themselves with questions of fact and what the circumstances were.<sup>781</sup>

### Mistake as to Causal Sequence or Act

Until 1989 our law was clear that a mistake as to the causal sequence by which a prohibited consequence is caused is irrelevant. That is, a mistake relating to how – the manner by which – one’s conduct produces

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<sup>778</sup> Emphasis added; paragraph 53.

<sup>779</sup> A further appeal by the accused to the Constitutional Court was rejected.

<sup>780</sup> See James Grant 'The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ.

<sup>781</sup> Grant ('The Double Life of Unlawfulness: Fact and Law' (2007) 20 SACJ) submits that this distinction was not observed in the case of *S v Engelbrecht* 2005 (2) SACR 41 (WLD) in that a vital opportunity to develop the law was lost.

the intended result is not a factor an accused could raise in his or her defence to exclude fault. To understand this problem it is necessary to observe that one may distinguish quite clearly between two different types of mistake both of which at first seem to qualify as mistakes as to causal sequence. The two types of mistake are, on the one hand, a mistake as to causal sequence (MACS), and on the other, a mistake as to causal act (MACA).<sup>782</sup>

Imagine the following two scenarios. In both, X intends to unlawfully kill Y by poisoning. The first is a scenario of a MACS, as follows: X puts a poison pill in Y's food and serves it to Y. X expects and intends that the pill will be swallowed and the contents will be absorbed into Y's body, and that Y will die from poisoning. One may imagine, quite legitimately, that X does not intend or even foresee that death could result in any other way. X does not care how death is actually produced, but does not foresee it being caused in any other way other than by poisoning.

Now, imagine further that Y begins to eat, but the pill becomes lodged in Y's throat and Y chokes to death. Notice, crucially the accused has done that act by which s/he intends to kill. It is only the way in which that act causes death that is not, at least, foreseen. Intuitions seem to direct that this mistake must be irrelevant to the imposition of liability.

Consider, in the alternative, the same scenario, except that, as X is about to present the food (containing the poison pill) to Y, X knocks Y with his (X's) elbow - imagine that this caused Y to fall from his/her chair, to knock his head on the ground, and to die from brain trauma. Imagine too that this was not foreseen as a possibility. Crucially, in both cases X intended to unlawfully kill Y, and in both X does kill Y. However, in the second scenario (death by brain trauma) Y has not yet done that deed by which s/he intends to kill. X has not yet presented the poisoned food to Y to eat. Intuitions relating to this second scenario may direct one to a different conclusion - that this mistake on the part of X should somehow count in his defence at least against a conviction of murder. He may be guilty of an attempt to murder, but there seems to be something that precludes us from concluding that X, in this scenario, murdered Y.

It is submitted<sup>783</sup> that these two scenarios ought to attract different intuitive responses, that these intuitions manifested correctly in our law until the case of *Goosen* in 1989,<sup>784</sup> and the decision in this case has introduced bad and even dangerous precedent.

Until the case of *Goosen* (1989 AD) our law<sup>785</sup> was clear that a MACS could not be raised as a defence. In *S v Masilela*<sup>786</sup> Rumpff JA stated:

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<sup>782</sup> I must credit much or even most of the insights expressed here to Andrew Paizes - arising out of his article Andrew Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 493. To the extent to which I deviate from his views on the topic, my views are possibly wrong.

<sup>783</sup> Following Paizes.

<sup>784</sup> *S v Goosen* 1989 (4) SA 1013 (A).

<sup>785</sup> *R v Lewis* 1958 (3) SA 107 (A); *S v Msiza* 1984(2) PH H116 (A); *S v Masilela* 1968 (2) SA 558 AD; *S v Daniels* 1983 (3) SA 275 (A).

<sup>786</sup> 1968 (2) SA 558 AD.

"In my opinion in cases like the present where the actor and the no-one else causes the death, mistake on the actor's part as to precisely how and when the death will come about is not a factor on which he can rely .... [in this situation] the actor has meant to bring about death and has caused such death. In [this situation] he has, in his mind, been mistaken about the precise way in which and time when death results. His mistake ... regarding the precise way in which and time when, pathologically speaking, death results is, in my opinion, completely irrelevant."

The facts of *S v Goosen* 1989 (4) SA 1013 (A) are briefly as follows. The accused, A, together with B, C, and two others (D & E) planned to rob P by cutting his car off at a stop street, and by threatening him with a machine gun, make him hand over his money. In execution of this plan A drove his gang and cut P off as he waited at a stop street in his car. B got out, took up position in front of P's car, and pointed the machine gun at P. C then got out and went over to P who was sitting in the driver's seat of his car. C struck P on the jaw causing P's head to jolt back and P to lose control of his vehicle. P's vehicle began to roll forward threatening to crush B between the two cars. B had to dive out of the way. However, as B jumped, and this - a crucial piece of evidence - was accepted by the court, he involuntarily<sup>787</sup> pressed the trigger and shot P, killing him.

A, the accused, was convicted of murder on the basis of an application of common purpose and was sentenced to death. The matter went on appeal to the Appellate Division (now the Supreme Court of Appeal).

Van Heerden JA (Nestadt JA, and Kumleben JA concurring) began by conceding that our courts until that point had not been prepared to accept the defence of mistake as to causal sequence. He painstakingly goes on to confine each precedent to its particular facts or to otherwise distinguish it from the present case, and then turns to pronounce:

My conclusion is, therefore, that *dolus* is lacking where an accused's foresight of the causal sequence differs markedly from the actual causal sequence. In other words, in a consequence-crime, intention must be aimed at bringing about the result in materially the same way as it in actual fact occurs. Because in the case of *dolus directus* the accused desires a result and is indifferent as to how it occurs, it can be expected that a deviation will not readily be regarded as material.

He holds that a sequence "differs markedly" when:

"[It] is a deviation where the actual causal sequence differs from the sequence contemplated to such an extent that it cannot reasonably be said that the accused had envisaged the former."

Finally, he concludes:

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<sup>787</sup> The actual word used in the judgement here is "onwillekeurig" – which translates into the English: involuntary. However, if this were the finding of the court, there would have been no conduct on the part of B, and so no conduct to attribute to the others in the common purpose. It seems that this is not what the court meant because it did attribute the conduct to the others. However, this error is worth noting because if one does not read over this error, the entire judgment fails – perhaps as it should.



"I deal finally with the question whether the appellant's foresight of the causal sequence which could lead to the deceased's death differs materially from the actual events. I am of the view that it does. The appellant had foreseen the possibility that [B] might fire at the deceased intentionally and thereby fatally injure him. What in fact happened was that [B] pulled the carbine's trigger involuntarily. Causing death by means of intentional conduct obviously differs markedly from involuntary conduct ..."

Thus a defence of mistake as to causal sequence was recognised in our law. It is true that the court restricted the defence to instances where intention took the form of *dolus eventualis*. However, the reasoning for this distinction is not clear.

Van Heerden JA's reasoning is that this defence should not avail someone who acts with *dolus directus* because, when someone acts with *dolus directus*, he or she is indifferent as to the sequence of events. By necessary implication then, Van Heerden JA takes the view that when someone acts with *dolus eventualis* he or she is not indifferent as to the sequence of events - supposedly then someone who acts with *dolus eventualis* cares or is somehow concerned with how it is that his or her conduct, for instance, kills the victim. Van Heerden JA gives no reason for thinking that it is only when a person kills with *dolus eventualis* that he or she cares or is somehow concerned that the victim should die in roughly the way that he or she intends or foresees it. This distinction does not seem to be sustainable.

Up to this point one may already take the view that the judgement is flawed on the basis that it seeks to attribute involuntary conduct which is in truth no conduct at all and so not attributable, and it operates on the flawed distinction that a person acting with *dolus eventualis* cares how his or her victim dies. These are perhaps the more obvious basis on which to criticise this judgement.

Paizes<sup>788</sup> criticises the judgement to a far deeper level and shows that the confusion runs far deeper. Paizes appears, at first, to be kind in that he argues that van Heerden ultimately arrived at the right conclusion. However the sting in his argument is that van Heerden only arrived at the correct conclusion by committing two fundamental errors which only by coincidence produced the right conclusion. He argues that the fundamental errors have created precedent in our law which are perhaps even dangerous.

Paizes reveals by painstaking analysis that whereas van Heerden believed he was confronted with a mistake as to causal sequence, he was instead in fact confronted with a mistake as to causal act. That this is so may be recognised when one recalls the basis on which one may distinguish a mistake as to causal sequence from a mistake as to causal act. The answer, is produced by asking the question, whether the accused had done that deed by which he or she intended or foresaw he or she may kill. In the context of the facts of Goosen's case, in which everyone had foreseen the possibility that the victim may be killed by a deliberate shooting, one must ask whether there had yet been a deliberate shooting. The answer to this

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<sup>788</sup> Andrew Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 493.

is an unequivocal no. The deed had not yet been done and therefore the mistake that was made in Goosen's case was a mistake as to causal act. As Paizes argues, it is appropriate to recognise a defence of mistake as to causal act - and it is for this reason that he concludes that Van Heerden JA's conclusion is correct.

However, as Paizes points out, having miscategorised the mistake that was made as one as to causal sequence, the learned judge ought not to have recognised the defence, ought to have followed precedent on the matter, and by recognising a defence, has created a dangerous precedent. It is, as Paizes points out, now a valid defence to complain that your victim did not die in the manner in which you intended or foresaw that s/he would.

All that can be said of this case in conclusion, is perhaps only that we are fortunate that no case of mistake as to causal sequence has presented itself before our courts. If and when it does, any decision which follows Goosen's case will have to be appealed as an error of law.

## Intoxication

Intoxication is recognised in South African criminal law as the basis for a defence. This remains the case despite legislation which has attempted to alter the position. However, even though intoxication is recognised as the basis of a defence, the principles of our criminal law are sufficiently robust so that, even if one escapes liability for "conduct" once drunk, one may nevertheless trigger liability for one's conduct before one became drunk or for one's conduct in getting drunk. Two points should be observed first. By intoxication I am referring to intoxication by any means: alcohol or drugs.

Secondly, I am not dealing here with offences in respect of which being intoxicated is a requirement for the offence, such as, being in control of a motor vehicle while intoxicated. Instead I am dealing with the question of whether liability for other offences, such as assault, murder or culpable homicide can be imposed, where, because of intoxication, a requirement of liability is absent. Intoxication was recognised as a defence, or rather, accepted as a basis for a defence in 1981 in *S v Chretien* (AD).<sup>789</sup>

Until the case of *Chretien*, our law applied what was known as the "specific intent" approach, which allowed for the conviction of a person for a *lesser* crime even if, because of intoxication, an element or requirement of criminal liability of the lesser crime was absent.

For instance, in 1969 in *S v Johnson* (AD)<sup>790</sup> the accused was convicted of culpable homicide even though the court accepted that he was so drunk that his conduct was involuntary. The point was that the courts

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<sup>789</sup> *S v Chretien* 1981 (1) SA 1097 (A).

<sup>790</sup> *S v Johnson* 1969 (1) SA 201 (AD).

took issue with the *reason* for the defence raised - that a drunk person should not be less liable to the criminal law than a sober person.

The problem was that this approach was utterly contrary to the principles of criminal law - that if someone is to be convicted of an offence, all the requirements must be met - it should not matter why a requirement is not met.

### Chretien

In *S v Chretien* the accused was at a party at a house where he got very drunk. He left in his car, and had to navigate the road in front of the house which was still crowded with party goers. He drove into the crowd, killing one and injuring five. He was charged with culpable homicide of the one he had killed, and attempted murder of the five he had injured.

As discussed elsewhere, culpable homicide is the negligent unlawful killing of another person. Murder is the intentional unlawful killing of another human being. Attempted murder also requires intention. You must intend to murder, even though, for some reason, you fail.

The trial court convicted the accused in *Chretien* on the culpable homicide charge. This was not controversial or at odds with the law of the time. What was controversial and at odds with the prevailing law (of specific intent) was the court's findings on the attempted murder charges.

On the specific intent approach, an accused charged with attempted murder, which requires intention, could be convicted of common assault, even though this offence (common assault) requires intention and even though the accused, because of intoxication, had no intention to assault.

In response to these charges, the accused argued that, because he was intoxicated, he truly believed that the people in the road would move out of the road. This was a claim of a lack of intention to kill or assault. It is crucial to note that the court accepted this - that the accused did expect the people in the road to move and did not have any intention to kill or assault.

The scene was set for a conviction of common assault - following the specific intent approach. However, the trial court found that it could not convict the accused of common assault because it could not convict someone of a crime which required intention when the accused did not harbour the required intention. It acquitted him of the five charges of attempted murder and of common assault. This decision was confirmed by the Appellate Division (now the Supreme Court of Appeal). The Appellate Division agreed that principle must prevail. If a crime requires intention, an accused cannot be convicted of the offence in the absence of intention.

It is crucial to recognise that *Chretien* did not recognise intoxication as a defence, but only that, if an accused lacks a requirement for criminal liability because of intoxication, this reason (intoxication) will be irrelevant.

This is crucial to recognise because the ordinary principles continue to apply. If one, despite being drunk, does foresee the risk of harm, accepts the risk and proceeds, one has *dolus eventualis*. The point is that being drunk, in itself, is not a defence.

The decision in *Chretien* was an endpoint in the development of SA criminal law in accordance with principles rather than considerations of policy and expedience, of arbitrary rules and equally arbitrary exceptions.

It led in turn to further development in the areas of involuntariness and incapacity and is the basis for the recognition in our law of the defence of non-pathological criminal incapacity (also known as temporary insanity).<sup>791</sup>

### Criminal Law Amendment Act (1 of 1988)

The *Chretien* case was not received well by the legislature and in 1988 it intervened - enacting the Criminal Law Amendment Act (1 of 1988) by creating a crime (in s 1 (1)) of being not guilty of any offence. More specifically, it created the offence of being not guilty of an offence because of intoxication. It is however crippled by its ill-considered structure and the bad choice of wording. It is so badly worded that it places a criminal onus on the prosecution to prove that, as alluded to above, an accused is not guilty of any offence.<sup>792</sup>

The section provides as follows:

“(1) Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty, except the death penalty, which may be imposed in respect of the commission of that act.

(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.”

Despite being a response to the *Chretien* case in which the accused escaped because he lacked intention, the Act targets an accused who escapes liability because of a lack of capacity. In other words, the Act does not even address itself to the problem it was created to solve.

Even worse, it places the prosecution in the invidious position that, while on the main charge of, say, assault, it has to prove, beyond reasonable doubt that the accused had capacity, if the court was not

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<sup>791</sup> *S v Wild* 1990 (1) SACR 561 (A); *S v Eadie* 2002 (1) SACR 663 (SCA).

<sup>792</sup> Andrew Paizes 'Intoxication Through the Looking-Glass' (1988) 105 South African Law Journal 776-88.

convinced and acquitted the accused, the prosecution had to, under s 1(1) of the Criminal Law Amendment Act, return to court and contradict everything it had argued up to that point regarding capacity. It must argue that the accused lacked capacity beyond all reasonable doubt.<sup>793</sup> Thus it has to go from arguing that the accused had capacity beyond all reasonable doubt, to arguing that the accused actually lacked capacity beyond all reasonable doubt.

Understandably then, while there have been convictions under this Act, there have been few, if any, convictions that have withstood the scrutiny of a review or appeal. It was bound to fail in any event given that its premise is to impose liability on someone who, on fundamental principles of criminal law, is not guilty of any crime.

### Antecedent Liability

This does not mean that one may rely on intoxication without consequence. This is because if all the requirements for liability line up and are present at the time that you start drinking, you may be convicted of committing the offence at that moment in time. This is known, originally as the doctrine of *actio libera in causa* (to liberate oneself in a cause), and now, as antecedent liability.<sup>794</sup> There is no magic in this although it is often misunderstood. It is often misunderstood to be an exception to the rule that all requirements must be met for liability to be imposed. It is not an exception, instead it is actually an application of the principles that all requirements must all be present - but that whenever they are, you incur criminal liability. Let's assume I decide to get very drunk, park my car on a hill above a busy road that I know will be packed with pedestrians when I leave, I leave the car unlocked because I know that when I return I will be too drunk to unlock the door and I go and get drunk. If, then, on my return, I manage to stumble into the car and release the handbrake, after which I pass out, I cannot escape liability for, at least culpable homicide, even though, at the moment my car knocks into and kills pedestrians, I was in a state of involuntariness. Our law will look backward in time for antecedent liability. Whether there was a moment in time, when I was acting voluntarily, possibly when I returned to the car, or even when I left the car, which is causally linked to the death of the pedestrians and at which time I was negligent - for culpable homicide. Arguably, there are two such moments: when I returned to the car and when I left it. It is even arguable that I may have foreseen the possibility of causing the death of pedestrians and therefore I could be guilty of murder - again, not because of anything I did after I passed out - but because of what I did and thought before that.

Thus, in theory, intoxication in our law is a valid defence, although subject to the virtually crippled Criminal Law Amendment Act. However, this is no licence to drink and misbehave, because doing so naturally attracts attention to what you thought and did before you became too drunk to be accountable to the

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<sup>793</sup> S v Lange 1990 (1) SACR 199 W; S v Mbele 1991 (1) SA 307 (W); S v September 1996 (1) SACR 325 (A).

<sup>794</sup> See the chapter on Antecedent Liability.

criminal law. If you expect that you will misbehave or even if you ought to know that you may, you would make yourself a candidate for antecedent liability.

## Chapter 18 Fault in Statutory Offences

### Introduction

As indicated in previous chapters, under the principle *actus non facit reum nisi mens sit rea*, fault is generally required for criminal liability. No common-law offenses of strict liability exist. However, the exception of strict liability continues to exist in our law in the context of statutory offences. Furthermore, it is often not clear when a statutory offence is created, whether it requires fault and if so, then in what form. In what follows I shall try to set out how our courts approach this problem.

### Strict liability

Strict liability is liability where no fault is required. That is, the prosecution does not have to establish that the accused entertained any form of fault secure a conviction. It is also not the case that the prosecution must prove that there was no fault. Fault is simply irrelevant. It is an exception to the principle of no liability without fault. Where, in a statutory offence, it is not clear whether fault is required, our Courts prefer to interpret the statute so as to require fault.<sup>795</sup> Strict liability is also at risk of being struck down as unconstitutional in that it, arguably:

1. Violates the right to a fair trial since it deprives the accused of a defence which would avail him/her in an equitable justice system. In *S v Coetzee*<sup>796</sup> O'Regan J recognised fault as a fundamental requirement for liability in democratic societies.<sup>797</sup> According to Kentridge J in *Coetzee*,<sup>798</sup> fault is an element of fundamental justice and is universally recognised as an essential requirement for liability, though it is not indispensable in that strict liability may sometimes be legitimate. Kentridge AJ in *S v Zuma*<sup>799</sup> stated that strict liability violates the right to a trial in accordance with “notions of basic fairness and justice”.
2. Violates the presumption of innocence, particularly in that s/he may be convicted where a reasonable doubt exists in respect of their guilty mind.
3. Violates the right to equality in that different categories of offenders are treated differently.

As mentioned, no common law offenses of strict liability exist. However, the legislature is at liberty (subject to a constitutional challenge) to exclude fault as a requirement of a statutory crime. Therefore, all strict liability offences are statutory offences, such as speeding offences.

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<sup>795</sup> *S v Qumbella* 1966 (4) SA 256 (A); *S v Arenstein* 1964 (1) SA 361 A.

<sup>796</sup> 1997 (3) SA 527 CC.

<sup>797</sup> Paragraphs 162-177.

<sup>798</sup> Paragraphs 94-95.

<sup>799</sup> 1995 (1) SACR 568 (CC).

## Strict Liability May be Express or Tacit

The requirement of fault and the particular form of fault required, that is intention or negligence, may be made by the legislature to appear expressly in the statute by the use of various words such as: intentionally, maliciously, knowingly, or negligently, amongst others.

However, our courts do appear prepared to interpret a statute which is silent on the matter of fault, as tacitly excluding the requirement of fault. Our courts are reluctant though to conclude that an offence is one of strict liability.

In *S v Qumbella*<sup>800</sup> the Court said: “the legislature must make strict liability appear plainly”. Indeed the Appellate Division has even set up the requirement of fault as a presumption. In *S v Arenstein*<sup>801</sup> the court said: “The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary not to have intended innocent violations thereof to be punishable.”

The case of *S v Arenstein*<sup>802</sup> stipulates that a court should consider the following features of a statute for clear and convincing tacit indications to oust the presumption of no punishment without fault:<sup>803</sup>

- a) language and context;<sup>804</sup>
- b) scope and object;<sup>805</sup>
- c) nature and extent of penalty;<sup>806</sup>
- d) ease with which prohibition may be averted.<sup>807</sup>

## Compromise

As noted, whilst fault is generally a requirement for criminal liability, Parliament is at liberty to exclude fault as a requirement - though this liberty is constitutionally questionable. The Appellate Division (now the Supreme Court of Appeal) has given an indication that it may prefer the so-called middle course in which

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<sup>800</sup> 1966 (4) SA 256 (A).

<sup>801</sup> 1964 (1) SA 361 A.

<sup>802</sup> 1964 (1) SA 361 (A).

<sup>803</sup> It is regrettable that an application of these factors may well lead to contradictory conclusions so that the law – at least in this respect – may be accused of being vague and speculative.

<sup>804</sup> The language is to be interpreted to give effect to the intention of the legislature, by for example considering the meaning given to the same words used elsewhere in the statute.

<sup>805</sup> If the statute, by its scope and object, creates a “public welfare offence” (an offence which relates primarily to industry or technology) such as mining operations, factories, public transport, such offences tend to be interpreted as strict liability offences.

<sup>806</sup> Where an offence attracts severe punishment, it will tend to be interpreted as requiring fault. However, if it attracts a slight punishment, such as in the case of “regulatory offences” which are not morally reprehensible (for example, TV licence offences), a court may interpret the provision as one of strict liability.

<sup>807</sup> If fault will be particularly difficult to establish, the tendency is that it will be regarded as a strict liability offence.



instead of concluding that the legislature intended to exclude fault and thereby finding in favour of strict liability, it will find that fault is required in the form only of negligence.<sup>808</sup> This is a compromise situation in terms of which the arguably iniquitous approach of punishment without fault is averted, while still requiring of individuals a particular standard of care in their endeavors.

### Which form of Fault

Once it is determined that the legislature did not exclude fault it remains to be decided what form of fault the legislature intended to apply. The default in this respect is *dolus* (intention), that is, a court will regard a tacit fault requirement as a requirement of *dolus*. However, exceptional circumstances may convince a court that *fault* in the form of *culpa* (negligence) was intended by the legislature.<sup>809</sup> Negligence may be declared as the requisite fault requirement where:

1. the legislature may be regarded as requiring a high standard of care in respect of a particular activity;<sup>810</sup>
2. if the legislation is directed against a dangerous and prevalent social problem;
3. if the problem concerned is one which is ordinarily committed negligently (such as negligent driving); and
4. beyond these factors, the same factors which pertain to a determination of whether fault is excluded or not, are again relevant to a consideration of the form of fault required. In this context, these factors indicate that negligence will suffice, where, in the context of whether fault is required, they would indicate in favour of strict liability. Therefore, these considerations indicate for strict liability, failing which, they indicate in favour of *culpa*. They are, as before:
  - e) Language and context;
  - f) Scope and object;
  - g) Nature and extent of penalty; and
  - h) Ease with which prohibition may be averted.

### Illustration

The case of *Amalgamated Beverage Industries Natal (Pty) LTD v Durban City Council*<sup>811</sup> illustrates the operation of these factors. In this case, a company which bottled and distributed soft drinks had sold a contaminated drink (in that the bottle contained a bee) to a supermarket. The company had been convicted in a magistrate's court of contravening a Durban City Council by-law which read:

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<sup>808</sup> See Jansen JA in *S v Ngwenya* 1979 (2) SA 96 A at page 100.

<sup>809</sup> *S v Ngwenya* 1979 (2) SA 96 A

<sup>810</sup> In *S v Melk* 1988 (4) SA 561 (A) the court determined that *dolus* was required; that the legislature had not required such a high degree of care that *culpa* would suffice.

<sup>811</sup> 1994 (3) SA 170 (A); also reported at 1994 (3) SA 646 (A).

“18. No person who carries on any business involving the manufacture, preparation, storage, handling or distribution of food shall in connection with such business—

...

(c) cause or permit any article of food or drink which is not clean, wholesome, sound and free from any foreign object, disease, infection or contamination to be kept, stored, sold or exposed for sale or introduced into the city for purposes of sale.”

The magistrate's court determined that the by-law imposed strict liability, which view was confirmed on appeal in the Provincial Division. The company had conceded that it had sold a contaminated drink to a supermarket in Durban, but argued that the by-law was not a strict liability offence so that it could not be convicted without fault having been established. It appealed to the Appellate Division (now the Supreme Court of Appeal). The Court (Hefer JA, Eksteen JA, and Kriegler AJA concurring; Botha JA and Nienaber JA dissenting) decided the matter as follows. On the basis of the context and language, Hefer JA interpreted the words “cause or permit” to require fault in that it was more consistent with the presence of fault than with its absence.<sup>812</sup>

In respect of the scope and object of the offence, the court noted that though the offence seeks to prevent danger to the public (a public welfare offence), this objective should not be “overrated”.<sup>813</sup> Most penal statutes, Hefer JA held, concern the protection of the public. According to Hefer JA, public welfare offences need to be considered in the light of other determinants such as the ease with which liability may be evaded if fault is required. The court held that liability will not easily be evaded if fault in the form of *culpa* is required. In respect of the nature and extent of the penalty the court conceded that the offence did not impose a heavy penalty, but that there were not clear and convincing indications that the legislature had dispensed with fault.<sup>814</sup>

It summarised its conclusions thus:

“Summarising what has hitherto been said we have, on the one hand, an *actus reus* which logically implies knowledge of the contamination of the food and is at least more consistent with the presence than the absence of *mens rea* [referring to fault] in that form. On the other hand we have the scope and object of the legislation. But we have seen that this object may generally be attained if *mens rea* [fault] in the form of *culpa* were to be an essential ingredient of the offence, and moreover that members of the affected class will not necessarily escape liability for the acts and omissions of their employees. The prescribed penalty is admittedly not a heavy one but, nevertheless, I find myself unable to say that there are sufficiently clear and convincing indications that the legislature intended to dispense with *mens rea* [fault].”<sup>815</sup>

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<sup>812</sup> 176 A-C.

<sup>813</sup> 179 C-G.

<sup>814</sup> 179 G.

<sup>815</sup> At page 179 E-G.

The court decided therefore that culpa was required and that the company had been negligent in that it had not adopted the standard of care that it should have, in that in the final inspection stage, too much was required of its inspectors.

### Onus of proof

Despite an earlier deviation,<sup>816</sup> the law now concerning the onus of proof in statutory offences is that it rests with the state even if the legislature is silent in respect of fault and a court nevertheless concludes that fault is required.<sup>817</sup>

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<sup>816</sup> R v Wallendorf 1920 AD 383.

<sup>817</sup> S v Jassat 1965 3 SA 423 A; S v Qumbella 1966 4 SA 356 A; S v De Blom 1977 3 SA 513 A.

## Chapter 19 Participation in crime

### Introduction

Our law recognises a variety of ways in which a person may involve him/herself in crime. One may, for example strangle someone to death with one's own hands, stone someone to death jointly with one or more others, keep a lookout while others rob and kill someone, hire someone to kill for you, incite others to commit murder, loan someone a gun with which to kill another, or assist someone to dispose of the dead body, amongst other things.

### Socii criminis

This term was used before the leading case on the topic of participation in crime of Williams<sup>818</sup> was decided. It was used to refer vaguely to both perpetrators and accomplices, except those offenders that could be regarded as principal offenders (also called actual/main/direct perpetrators). The term means "partners in a crime". Each socii criminis is a *socius criminis* (singular). The term relies on the distinction between principal offenders and other participants, which is a distinction that is at least difficult to draw. It also does not distinguish between perpetrators and accomplices, which is an important distinction. The term was rendered obsolete in the case of Williams and its further use is discouraged to avoid confusion.

### Categories

In order to conceptualise the degree of the participation in crime, our law distinguishes three categories of offenders:

- a. Participants (involved before or during the crime):
  - i. Perpetrators;
  - ii. accomplices; and
- b. Non-Participants (involved after the crime):

Accessories after the fact.

This distinction was adopted by our Appellate Division (now the Supreme Court of Appeal) in 1980 in the case of Williams<sup>819</sup>

A Perpetrator is an offender whose conduct (which may be imputed to him according to the doctrine of common purpose or agency) and mens rea (wrongful mental state) satisfies all the requirements of the definition of the crime.

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<sup>818</sup> 1980 1 SA 60 A.

<sup>819</sup> Ibid.

An accomplice is someone who does not satisfy all the requirements for liability as described in the definition of the prescription (which cannot be rectified by an application of the common purpose doctrine or agency) but s/he nevertheless unlawfully and intentionally furthers the commission of the offence by somebody else.

An Accessory after the fact is someone who unlawfully and intentionally, after the commission of the offence, assists a perpetrator or accomplice to escape liability.

## Perpetrators

A perpetrator is an offender who satisfies the definitional elements of the crime in question and harbors the necessary fault. Where there is more than one perpetrator, the perpetrators are referred to as co-perpetrators.

There are three forms of perpetrators:

- 1) Personal:<sup>820</sup> where the offender personally satisfies the definitional elements of the crime;
- 2) By imputation through:
  - (a) Agency;
  - (b) common purpose.

### Imputation

The conduct of an offence may be attributed to an accused where s/he personally does not satisfy the definitional elements, but either commits the conduct through another who is somehow procured (known as agency) or through others in a common purpose.

#### Agency

Conduct may be imputed where the accused ("principal") commits the unlawful conduct element of the offence through another whom he has procured - according to the principle *qui facit per alium facit per se* (he who acts through another, acts himself/herself). An example of this sort of liability would be where someone hires an assassin to kill someone.

It is not necessary that the agent must have mens rea in respect of the offence or even that s/he is assisting the "principal". Also, the agent may be entirely innocent or even lack capacity. Thus, if I procure a person to collect a sack of potatoes for me from a stall, under the false pretense that I have paid for it, I commit the act of collection through the agent, even though the agent performs the act in good faith.

#### Common Purpose

The so-called doctrine of common purpose allows a court to regard the conduct of every person in a common purpose, to be the conduct of every other person in that common purpose.<sup>821</sup> The effect is that, for any person in a common purpose, our law takes the view that s/he did, naturally, what s/he actually did him/herself, but also what everyone else who s/he is in the common purpose with did. If A and B are in a common purpose to kill P, and, in pursuit of the common purpose, A holds P while B stabs P to death, our law will recognise that A held P, but also regard A as having stabbed P. For B, the same will apply, that

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<sup>820</sup> This concept is my invention for the sake of the utility that it offers.

<sup>821</sup> Jonathan Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 489; Andrew Paizes "Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 493 496.

## Chapter 19 Participation in crime/Perpetrators

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not only did B stab P, but that B also held P. The point is that, under common purpose, you do not have to do 'the deed' yourself. You merely need to enter into a common purpose with someone who does.

### Forms of Common Purpose

Common purpose may take one of two forms: prior agreement or active association.

#### *Prior Agreement*

Common purpose by prior agreement arises out of agreement between the participants before the commission of the offence. This agreement comprises the group's 'mandate' which contemplates the objective of the group's criminal endeavors. It may be express (what was specifically agreed to) or implied (what was merely contemplated).

#### *Extent of Mandate*

The extent of the mandate is determined by reference to what is contemplated in the prior agreement. Where there exists a common purpose to commit a crime other than murder, such as robbery, a killing will be attributable as part of the common purpose if it was foreseen as a possibility that 'someone' may be unlawfully killed in the execution of their plan.<sup>822</sup> Thus the extent of the mandate and therefore whether conduct falls into the mandate and is attributable is determined by what the accused foresaw and therefore indirectly by the accused's intention.<sup>823</sup>

#### *Active Association*

Common purpose may also arise spontaneously, in the absence of a prior agreement – known as active association.<sup>824</sup>

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<sup>822</sup> Holmes JA in *S v Madlala* 1969 (2) SA 637 (A) 640-1. The court in *S v Nzo* 1990 (3) SA 1 (A) (Hefer JA, Nestadt JA concurring, Steyn JA dissenting), adopted Holmes's dictum in *Madlala*: '... the parties to a common purpose are liable for every foreseen offence committed by any of them in the execution of the design ...' (ibid 7).

<sup>823</sup> Intention in South African criminal law is widely defined to include *dolus eventualis* - constructive intention. *Dolus eventualis* exists when an accused foresees that his/her conduct poses a risk that the prohibited consequence could occur (or a prohibited circumstance could arise), reconciles him/herself to the risk, and persists. (*S v Ngubane* 1985 (3) SA 677 (A); *S v De Bruyn* 1968 (4) SA 498 (A)). Academics have however been critical of this conception (R C Whiting 'Thoughts on dolus eventualis' (1988) 1 SACJ; Paul T. Smith 'Recklessness in Dolus Eventualis' (1979) 96 SALJ; E M Burchell, J R L Milton & J M Burchell *South African Criminal Law and Procedure: General Principles of Criminal Law* 2nd ed Vol 1 (1983) 147ff).

<sup>824</sup> *S v Safatsa and Others* 1988 (1) SA 868 (A) 898.

## Chapter 19 Participation in crime/What Common Purpose is Not

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### Requirements for Active Association

The requirements for active association were set out in *S v Mgedezi*.<sup>825</sup> These requirements have now been endorsed by the Constitutional Court in *Thebus*.<sup>826</sup>

In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the [offence]. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the [offence]. Fifthly, he must have had the requisite mens rea ...<sup>827</sup>

## What Common Purpose is Not

### Liability Clouds

There is a troubling tendency by some to treat the formation of a common purpose as the relevant conduct in question.<sup>828</sup> This treats common purpose liability as creating some form of 'liability cloud'.<sup>829</sup> There are a number of problems with this.

It is effectively to treat common purpose as an instance of antecedent liability – having derived from *actio libera in causa*. But there is no magic in the operation of antecedent liability. It is simply an application of the contemporaneity principle – which requires that all elements of criminal liability (the actus reus and mens rea) must coincide in time.<sup>830</sup> Burchell reiterates:

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<sup>825</sup> *S v Mgedezi and Others* 1989 (1) SA 687 (A) 705ff.

<sup>826</sup> *S v Thebus* 2003 (6) SA 505 (CC) para 50.

<sup>827</sup> *S v Mgedezi and Others* (note 11) 706. It seems that the fifth requirement of mens rea seems to be better understood as a requirement for liability, rather than for common purpose.

<sup>828</sup> This appears to have been the approach of the court in *Nkwenja (S v Nkwenja* 1985 (2) SA 560 (A)) regarding the finding of culpable homicide of two assailants who agreed to rob the occupants of a car, and in so doing, one assailant struck and killed one of the occupants. Proceeding on the basis that the two had a common purpose, the court found that, at the time of their conduct of entering into the common purpose, they were negligent in respect of the death of the occupants, and thus liable for a conviction of culpable homicide. This all seems straightforward at first, except, upon analysis, it unravels spectacularly. I must credit these insights to Andrew Paizes.

If, as the Court concluded, there was no foresight of the death of either of the occupants at either the time of the formation of the common purpose, or its execution, a killing could not have been fallen in to the mandate of the common purpose (see note 822). As such, there could not be convictions for any form of homicide. The case is therefore a poor lesson in the proper application of common purpose. It is nevertheless useful because it reveals an instance in which the formation of the common purpose is treated as conduct upon which a court may attach criminal liability.

<sup>829</sup> I use this phrase as a bookmark to which I will cross refer the reader.

<sup>830</sup> See the Chapter on Contemporaneity.



## Chapter 19 Participation in crime/Common Purpose and Mens Rea

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The basis of *actio libera in causa* liability is a prior voluntary act (accompanied by the requisite fault element) which is causally linked to the unlawful consequence. All of the elements of criminal liability are present. [The *actio libera in causa* form of liability is, therefore, neither a form of strict liability nor an application of the rejected *versari* doctrine.]<sup>831</sup>

The problem will inevitably be that this conduct is too remote from the prohibited consequence for it to offer a viable basis for liability. The formation of a common purpose is, of course, conduct, but it is unlikely conduct, which, in the context of consequence crimes, can be regarded as sufficiently closely connected to any prohibited consequence – as required by *Mokgethi*.<sup>832</sup>

Also, that the accused had not yet done any act by which s/he intended to kill.<sup>833</sup> Presumably an accused does not foresee that, upon entering into an agreement to kill the victim, that the act of agreement may kill the victim – presumably the accused expects that the execution of the agreement will kill the victim.

Furthermore, the formation of a common purpose is personal conduct - conduct which is not imputed. It would be plainly wrong to treat the conduct committed by each common purpose perpetrator, in the formation of the common purpose, as imputed to all others in the common purpose who must perform their own conduct in forming a common purpose. A related problem is that, if common purpose served as some mechanism to analyse the actual conduct of the accused in the formation of common purpose – as the conduct in question – it would serve no purpose. Ordinary principles of liability apply. As Paizes notes:

"The whole point about the doctrine of common purpose in a 'consequence crime' is that a remote party (as the appellant was in this case), in respect of whom there is no causal nexus between his own conduct and the prohibited result (in this case the death of the victim), has, in appropriate cases, attributed to him the conduct of an immediate party that is so linked to that result."<sup>834</sup>

Thus the work that common purpose does is to attribute to each member of a common purpose, the conduct of the others. When invoking common purpose, this is the conduct in question.

### Common Purpose and Mens Rea

Beyond this problem, it is worth noting that common purpose only attributes conduct. It does not affect the enquiry into culpability which, as I have argued above, must be applied to the (attributed) conduct in

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<sup>831</sup> Jonathan Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 71.

<sup>832</sup> *S v Mokgethi* 1990 (1) SA 32 (A).

<sup>833</sup> *S v Goosen* 1989 (4) SA 1013 (A) Andrew Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 493.

<sup>834</sup> Andrew Paizes 'Common Purpose by Active Association: Some Questions and Some Difficult Choices' (1995) 112 SALJ 563; Andrew Paizes 'Mistake as to the Causal Sequence' and 'Mistake as to the Causal Act': Exploring the relation between Mens Rea and the Causal Element of the Actus Reus.' (1993) 110 SALJ 493.

## Chapter 19 Participation in crime/Common Purpose and Mens Rea

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question. The enquiry into capacity and fault proceeds without interference, as one would ordinarily, as if common purpose has not been used to establish the accused's conduct.<sup>835</sup>

### Accomplices

Where the specific requirements of an offence are not met (in that the conduct element is lacking) and one may therefore not be held liable as the perpetrator, one may nevertheless be liable as an accomplice if one unlawfully and intentionally furthers the crime committed by someone else. Accomplice liability, generally<sup>836</sup> arises out of the peculiarity of the definitions of some offences.

### *Eiehandige misdade (own hands crime).*

It is almost invariably the case that accomplice liability is the only form of liability possible where the crime in question is an *eiehandige misdaad* (own hands crime). "Own hands" crimes are specifically defined so that they can only be committed by or with one's own hands or body. For this reason, liability for an own hands crime cannot be imputed. Therefore, where one assists another in the commission of an own hands crime, even if it would trigger the law which would otherwise permit for imputation, one can only at most be convicted as an accomplice. A person who does not commit the particular conduct described in the definition of the prescription but s/he nevertheless promotes or facilitates the commission of the offence, is an accomplice. Examples include bigamy, incest, perjury, driving under the influence. In *R v Jackelson*,<sup>837</sup> at a time when it was an offence for a black person to be in possession of liquor, a white man who assisted a black man to possess liquor, incurred accomplice liability.

Rape used to be an *eiehandige misdaad* until it was redefined as a statutory offence and appears to be capable of commission by "causing".<sup>838</sup> Nevertheless, the case law on rape as an *eiehandige misdaad* is a

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<sup>835</sup> 'It is ... only X's *act* which is imputed to Z, not X's culpability. Z's liability is based upon his own culpability (intention).' (Original Emphasis, CR Snyman *Criminal Law* 5th ed (2008) 266). 'The liability of an associate in a common purpose to commit an unlawful act depends upon his own culpability (intention).' (ibid 268).

'[S]o far as the fault element (*mens rea*) is concerned, the liability of an individual participant in a common purpose is assessed in the same way as an individual who is not a party to a common purpose. ... There is, therefore, nothing special about common-purpose liability in regard to fault (*mens rea*). (Original Emphasis, Burchell (note 7) 504).

'Now the liability of a *socius criminis* is not vicarious but is based upon his own *mens rea*. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his socius would commit the act in question in the prosecution of their common purpose.' (Original Emphasis; *S v Malinga and Others* 1963 (1) SA 692 (AD)).

<sup>836</sup> Although I am unable to think of an exception.

<sup>837</sup> *R v Jackelson* 1920 AD 486e

<sup>838</sup> The offence of rape is now contained in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32 of 2007), as follows: Rape.—Any person ("A") who unlawfully and

## Chapter 19 Participation in crime/Common Purpose and Mens Rea

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useful source of the principles applicable to eiehandige misdade. For instance, in *R v M*,<sup>839</sup> the court held that a woman who assists a man to commit rape was, at most, an accomplice to the rape.

It is perhaps regrettable that an opportunity to recognise the development in the law on rape was missed recently. In *S v Phetoe* 2018 (1) SACR 593 (SCA) the court took the view that the mere presence of an accused at the scene of a rape was inadequate to qualify the accused as an accomplice. This is of some concern because it seems to contemplate that - even after the amendment to the definition of rape - one may still be an accomplice to rape. It is submitted that this must be wrong because, on the new definition of rape (under s 3 of the Sexual Offences Amendment Act), rape is now a consequence crime. Thus, if one qualified as an accomplice, one would invariably also have caused the relevant penetration - and therefore be a (personal) perpetrator.

### Dependence

The liability of a perpetrator is not dependent upon the guilt of another perpetrator.

In *R v Parry* 1924 AD the accused was charged, together with H, with murdering H's wife. H was found at trial to have been insane and was therefore not guilty due to mental illness. The accused contended that he too should be acquitted on the basis of the absence of a guilty principal offender. The court convicted the accused of murder on the basis of his own wrongful conduct and state of mind, as a perpetrator.

In contrast, accomplice liability is dependent. There can be no accomplice liability without a perpetrator who commits the crime. In *Williams, Joubert JA* said:

“An accomplice's liability is accessory [meaning dependent] in nature so that there can be no question of an accomplice without a perpetrator or co-perpetrator who commits the crime. A perpetrator complies with all the requirements of the definition of the relevant crime. Where co-perpetrators commit the crime in concert, each co-perpetrator complies with the requirements of the definition of the relevant crime. On the other hand, an accomplice is not a perpetrator or co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which furthers the commission of the crime....”

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intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.

Sexual penetration is defined, in the Act, as follows: “sexual penetration” includes any act which causes penetration to any extent whatsoever by—

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person,

<sup>839</sup> *R v M* 1950 (4) SA 101 (T).

## Chapter 19 Participation in crime/Common Purpose and Mens Rea

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The perpetrator need not be tried and convicted, however it is necessary that he or she, if located and prosecuted, could be convicted.<sup>840</sup> Hence, an insane person's conduct cannot be the basis for accomplice liability.<sup>841</sup>

### Furthers

According to *Williams*,<sup>842</sup> there must be a causal relationship between the assistance of the accused and the commission of the offence by the perpetrator in the sense of "furtherance". One furthers the commission of offence where one, for instance, assists in, encourages, permits (by placing one's possessions at the disposal of another,<sup>843</sup> advises in, or orders, the commission of the (main) offence.

### Unlawful

The furtherance must be unlawful in that there must be no ground of justification for the conduct of the accused. An omission to prevent a crime only qualifies as unlawful furtherance if the legal duty exists according to which one ought to have acted, such as the duty between employer and employee.<sup>844</sup> Hence, accomplice liability is not incurred by an ordinary person for failing to report that a crime is about to be committed. This is because he or she is under no obligation in that respect. The position is different however in respect of the crime of treason and various other relatively new statutory obligations<sup>845</sup> – relating especially to domestic violence and the welfare of children.<sup>846</sup>

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<sup>840</sup> R v Rasool 24 AD 44.

<sup>841</sup> This is known as "streng aksessoriteit" (literally meaning: strict accessoriness however - beware though that we are talking of accomplice liability). Whiting (R C Whiting 'Principals and accessories in crime' (1980) 97 SALJ 199) submits that, taken to its logical extreme, an individual who somehow manages to procure an insane person to commit rape (which was then an eiehandige misdaad), would be neither a perpetrator, nor an accomplice. He argues therefore for "beperkte aksessoriteit" (literally meaning: limited accessoriness) – in terms of which the mens rea of the perpetrator would not be required - in the same way as qui facit (agency liability) does not require mens rea on the part of the agent.

<sup>842</sup> S v Williams 1980 (1) SA 60 (A).

<sup>843</sup> R v Jackelson 1920 AD 486.

<sup>844</sup> R v Shikuri 1939 AD 225. In this case an employer was held liable as an accomplice to failing to stop after an accident where he failed to control his employee to do so.

<sup>845</sup> Which this text cannot list in any exhaustive manner.

<sup>846</sup> Such as the obligation on a caregiver of a child to report suspected ill-treatment of a child. Section 110(1) of the Children's Act 38 of 2005 provides: "Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official."

## Chapter 19 Participation in crime/Order of inquiry

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### Intentional

Accomplice liability may only be incurred by intentionally unlawfully furthering the commission of a crime. Negligence is not sufficient. Dolus eventualis is sufficient. Accomplice liability is therefore incurred where one assists/furtheres, having foreseen the (real) possibility (and having reconciled oneself to) the furtherance of the commission of a crime. This intention must extend to all the elements of that (main) crime, including its unlawfulness and illegality.<sup>847</sup>

The requirement of intention for accomplice liability does not alter according to the fault required for the perpetrator's offence. Even if the perpetrator's offence is one of strict liability, accomplice liability can only be incurred with intention.

### Order of inquiry

The proper order of the enquiry is to first consider whether an accused satisfies the requirements as a:

1. Personal perpetrator;
2. perpetrator by agency;
3. perpetrator by common purpose;
4. accomplice;
5. accessory.

Only if an accused's conduct does not fall into one of the categories of perpetrator, should his liability be considered as a possible accomplice, failing which, only then should the question of accessory liability be considered.

The reason for the order is that it is possible that an accused qualifies under more than one category, however, his true criminal liability is the worst case scenario.

### Causation

It is necessary to observe that the requirement of causation sometimes determines what role a particular accused played. The effect of causation varies according to the type of participation in question so that it is not possible to set out general universal rules at this point.

### Causation and agency liability

In respect of agency liability, if one procures another to commit an offence, one causes that offence to be committed, and therefore, in respect of consequence crimes of which causation is an element, the procurement itself is causal. Thus, to the extent to which this causation will be recognised as both factual

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<sup>847</sup> In the sense that the accomplice must foresee the risk that the (main) conduct which s/he is assisting may be prohibited in law as an offence (*S v De Blom* 1977 (3) SA 513 (A)).

## Chapter 19 Participation in crime/Causation and Accomplice Liability

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and legal causation, one personally complies with the conduct element and therefore it is unnecessary to rely on the principle of agency because one would qualify as a personal perpetrator.

### Causation and Accomplice Liability

Snyman<sup>848</sup> submits that the same applies in respect of accomplice liability. He submits that to further a consequence crime is to cause the prohibited consequence. Therefore Snyman argues that if one furthers the commission of a murder, one is (assuming the other requirements) also a murderer. He argues that one cannot be an accomplice to murder.

However, even if the assistance was a *sine qua non*, it would not necessarily qualify as a legal cause.<sup>849</sup> Also, Appellate Division (now the Supreme Court of Appeal) authority is against this argument. In *Williams* (1980 AD) the court recognised that the causal conduct of the accused made him liable as an accomplice only.<sup>850</sup>

### Common Purpose

While common purpose relieves the prosecution of proving individual causation,<sup>851</sup> it is not relieved of having to prove that actual conduct of someone in the common purpose, or of the group jointly, or of a sub-group of the group acting in common purpose, must satisfy the causation requirement.<sup>852</sup> Thus, properly understood, however dogmatic common purpose may seem, it nevertheless requires that someone or some group within the common purpose, satisfies the causation requirement.

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<sup>848</sup> CR Snyman *Criminal Law* 6th ed (2014).

<sup>849</sup> See the Chapter on causation.

<sup>850</sup> Snyman criticizes the judgement as wrong, but this would require that the court considered the causal nexus established, as a legally relevant cause.

<sup>851</sup> See the Chapter on Causation.

<sup>852</sup> In *S v Safatsa* (*S v Safatsa and Others* (note 10)) the court the Appellate Division held that causation may be imputed together with conduct and that it is not at all necessary for the prosecution to prove that each individual accused in a common purpose caused the death of the victim. This ruling is prone to misunderstanding because it may be given two possible interpretations:

3. That causation is irrelevant in consequence crime when common purpose is invoked. This is a misunderstanding of what common purpose permits and of the *Safatsa* judgment.
4. The second, correct interpretation is that, although each individual accused need not have actually caused the death of the victim, s/he must be deemed to have caused it through the conduct that is imputed to him/her. this requires in turn, that the conduct which is imputed to the individual must satisfy the causation requirement, and that the actual conduct of someone in the common purpose, or of the group jointly, or of a sub-group of the group acting in common purpose, must satisfy the causation requirements. See Jonathan Burchell *South African Criminal Law & Procedure: General Principles of Criminal Law* 4th ed Vol 1 (2011) 489.

## /Eiehandige misdade

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### Eiehandige misdade

The conduct requirement of an *eiehandige misdade* (own hands crimes) cannot be satisfied by imputation. This is because – as discussed above<sup>853</sup> – these crimes can only be committed with a person's own hands or body.

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<sup>853</sup> Under the heading "*Eiehandige misdade* (own hands crime)." on page 237ff.

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## ANNEXURES

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### **Annexure A: 78(6) Mental illness or intellectual disability and criminal responsibility**

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(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability not criminally responsible for such act—

- (a) the court shall find the accused not guilty; or
- (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or intellectual disability, as the case may be, and direct—
  - (i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—
    - (aa) detained in a psychiatric hospital;
    - (bb) temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public, pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;
    - (cc) admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
    - (dd) released subject to such conditions as the court considers appropriate;
    - (ee) released unconditionally; or
    - (ff) referred to a Children’s Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children’s Act, 2005; or
  - (ii) in any other case than a case contemplated in subparagraph (i), that the accused be—
    - (aa) admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
    - (bb) . . .;
    - (cc) released subject to such conditions as the court considers appropriate;
    - (dd) released unconditionally; or
    - (ee) referred to a Children’s Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children’s Act, 2005.



ANNEXURES/Eiehandige misdade

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[Most recently amended in 2017 – See Commentary on the Criminal Procedure Act for a discussion of these amendments]