

Law of Delict

Study Guide Questions and Answers

2013

Q&A

All the self-assessment questions, answered

Study unit 1 (no questions)

Study Unit 2 – Introduction to the law of delict

Define a delict

A delict is the act of a person that in a wrongful and culpable way causes harm to another.

List the five elements of a delict

- Act
- Wrongfulness
- Fault
- Causation
- Harm

Name the three actions that are described as the pillars of our law of delict

- Actio legis Aquiliae
- Actio iniuriarum
- Action for pain and suffering

Indicate which types of compensation can be recovered with the above actions

- Actio legis Aquiliae: Damages for the wrongful and culpable (intentional or negligent) causing of patrimonial damage (*damnum iniuria datum*).
- Actio iniuriarum: Satisfaction (*solatium* or sentimental damages) for the wrongful and intentional injury to personality.
- Action for pain and suffering: Compensation for injury to personality as a result of the wrongful and negligent (or intentional) impairment of bodily or physical-mental integrity.

Indicate which other group of delictual actions is available in our law

Liability without fault

Name another remedy – not an action – that may be employed in delictual cases, and explain how its function differs from that of the delictual actions

Interdict. A court order to prevent the causing or continued causing of damage. Can be issued by the court in absence of proof of the elements of fault, causation, or damage.

Write brief notes on the differences and/or similarities between a delict and a breach of contract

- Similarities: As with a delict, a breach of contract is normally an act by one person (contracting party) which in a wrongful and culpable way causes damage to another (contracting party).
- Differences: Breach of contract is only constituted by the non-fulfilment by a contractual party of a contractual personal claim or an obligation to perform. A delict is constituted by the infringement of any legally recognised interest of another party, excluding the non-fulfilment of a duty to perform by a contractual party. The primary remedy for breach of contract is directed at the enforcement, fulfillment, or execution of the contract (with a claim for damages playing a secondary part). Delictual remedies are primarily directed at damages (or satisfaction), and not at fulfillment.

Write brief notes on the differences and/or similarities between a delict and a crime

- Similarities: The law takes cognisance of wrongful and culpable acts in the sphere of public law, and criminal law in particular. Delicts pertain to wrongful and culpable acts too.
- Differences: Crimes are a part of public law, whereas delicts are a part of private law. Public law is directed at upholding the public interest, whereas private law is directed at the protection of individual interests. Delictual remedies are compensatory character, whereas criminal sanctions are of a penal nature.
- The same act may found delictual as well as criminal liability. Crimes and delicts do not always overlap. A delict is not necessarily a crime, and vice versa.

Name the fundamental rights relevant to the law of delict that are entrenched in Chapter 2 of the Constitution

The right to property, the right to life, the right to freedom and security of the person, the right to privacy, the right to human dignity, the right to equality, the right to freedom of expression, etc.

Explain in a short essay how Chapter 2 of the Constitution may influence the law of delict directly

Direct vertical application means that the state must respect the fundamental rights and may not infringe them, except insofar as such infringement is reasonable and justifiable according to the limitation clause.

Direct horizontal application entails that the courts must give effect to an applicable fundamental right by applying, and where necessary, developing the common law insofar as legislation does not give effect to that right, except

where it is reasonable and justifiable to develop the common law to limit the right in accordance with the limitation clause.

Explain in a short essay how Chapter 2 of the Constitution may influence the law of delict indirectly

The term ‘the indirect operation of the Bill of Rights’ means that all private law rules, principles, or norms – including those regulating the law of delict – are subjected to, and must therefore be given content in the light of the basic values of Chapter 2. Therefore policy factors such as reasonableness, fairness, and justice may play an important part.

Study unit 3 – The act

Define conduct

A voluntary human act or omission

Name the three characteristics of an act

- Only an act of a human being.
- If the human action is performed voluntarily.
- Conduct may be in the form of a positive act (commission) or an omission.

Can an animal act for the purposes of the law of delict?

No.

X encourages his dog to bite Y. Does X act?

Yes. Where a human uses an animal as an instrument in the commission of a delict, a human act is still present.

Can a juristic person (like a company) act? Explain briefly

Yes, if it acts through its organs (humans).

What does the concept of voluntary conduct mean?

If the action is susceptible to control by the will of the person involved, it is voluntary. Voluntariness implies that the person in question has sufficient mental ability to control his muscular movements. Voluntariness does not mean that the person must have *willed* or *desired* his conduct (eg forgetting to warn vs being unconscious and not being able to warn). Voluntariness also does not mean that a person's conduct should be rational or explicable.

X forgets to warn others that an electric current has been switched on. As a result of his omission, somebody is electrocuted. Does X act voluntarily? Explain briefly

Yes he does act voluntarily. Voluntariness does not mean the conduct must be willed or desired. It means that the person's actions must be susceptible to control by his will, and that the person in question has sufficient mental ability to control his muscular movements. X is in principle able to control his muscular movements.

Can an *infans* or mentally retarded person act voluntarily?

Yes, although the doer may escape delictual liability because of lack of accountability or because fault is absent.

Name the conditions that can result in a person's being unable to act voluntarily

Absolute compulsion, sleep, unconsciousness, a fainting fit, an epileptic fit, serious intoxication, a blackout, reflex movements, strong emotional pressure, mental disease, hypnosis, a heart attack, and certain other conditions.

With reference to examples, distinguish between absolute compulsion, and relative compulsion (*vis compulsiva*)

In cases of absolute compulsion, the defendant will not have been able to offer resistance (X pushes knife into Y's hand, takes hold of the hand holding the knife and forces it into Z's chest). In cases of relative compulsion, the defendant will have been able to decide whether to offer resistance or not (X points pistol at Y and orders him to damage Z's vehicle, and X does so, having made the choice).

Write a short note on the concept of *actio libera in causa*, giving an example

If the defendant intentionally created the situation in which he acts involuntarily in order to harm another, the defence of automatism will not succeed. This is known as an *actio libera in causa*. The defendant will be held liable for his culpable conduct in creating the state of automatism, which resulted in damage to the plaintiff.

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

Conduct is defined as a voluntary human act or omission. "Voluntary" means that the person must be able to control his/her muscular movements by means of his/her will. Body movements need not be willed to be voluntary, nor do they need to be rational or explicable. The defence of automatism excludes voluntariness, and this means that the relevant movements were mechanical and the person could not control them by his/her will. Factors that can induce a state of automatism include blackout and epileptic fit. According to the *Molefe v Mahaeng*, the defendant does not bear the onus to prove that he was in a state

of so-called sane automatism. The onus is on the plaintiff to prove that the defendant acted voluntarily. If we apply these principles to the facts supplied in the question, we can conclude that X did not in fact act voluntarily when the damage to the car was caused. However, the situation will indeed change if X had been receiving medical treatment for diagnosed epilepsy, but failed to take his medication on that particular occasion. A person cannot rely on automatism if he/she intentionally placed himself/herself in a mechanical state; this is known as the *actio libera in causa*. Furthermore, a person cannot rely on automatism if he/she negligently placed him/herself in a mechanical state. In the adapted facts, X was probably negligent, or could even have had intention in the form of *dolus eventualis*. A reliance on automatism would fail in that case.

On whom does the burden of proof for automatism rest?

In respect of “sane” automatism, the onus is on the plaintiff to prove that the defendant has acted voluntarily, and, therefore, not mechanically (*Molefe v Mahaeng*). However, if the defendant raises the defense of automatism resulting from mental illness as a defence, such a defendant will probably bear the onus to prove absence of conduct.

“The difference between a commission and omission is not of importance for the purposes of the law of delict.” Do you agree with this statement? Discuss briefly

Conduct may be in the form of an omission or commission. Although the difference between the two concepts should not be overemphasised, one distinction of importance is that liability for omission is in general more restricted than liability for a commission. For policy considerations, the law is hesitant to find that there was a legal duty on someone to act positively and so to prevent damage to another.

Study unit 4 – Wrongfulness: introduction, link with act and consequence

Describe the two steps involved in an inquiry into wrongfulness

- Firstly, it must be ascertained whether the defendant's act was in fact the cause of a harmful result to another person.
- Secondly, it must be ascertained whether the causing of harm took place in an unreasonable or legally reprehensible way.

X races down Pretoria's main street during peak hour at 200 km/h without causing anybody any damage. Can X's conduct be described as delictually wrongful? Discuss briefly

No. An act on its own, without having a consequence of the infringement of a legally recognised interest in a legally reprehensible or unreasonable manner, can never be held to be delictually wrongful.

X plants a bomb in a busy shop. Before the bomb can explode and cause damage, it is discovered and rendered harmless. Was X's act delictually wrongful? Explain briefly

No. Act had no harmful result. (As above)

X fires a missile from Pretoria to Perth, Australia. Can X's conduct be regarded as delictually wrongful before the missile has found its target and caused damage? Explain briefly

No. The act had no harmful result, and therefore wrongfulness cannot be present.

In *Pinchin v Santam Insurance*, suppose it could have been proved that the unborn baby's brain damage was, in fact, caused by the motorcar accident. Would it then have been necessary to use the *nasciturus* fiction to show that the child had an action on the ground of delict? Explain briefly

No. An act and its consequence are always separated by time and space. It is not necessary that the act be classified as lawful or unlawful immediately after its completion. Only when the harmful consequence takes place may the defendant's act, long since committed, be classified as wrongful.

Is there an exception to the principle that wrongfulness can only be ascertained after a harmful consequence has been caused? Explain

Yes. For the purposes of an interdict, wrongfulness can also be determined with reference to a harmful consequence which has not yet been caused, but which the applicant is trying to prevent by applying for an interdict.

Study unit 5 – Wrongfulness: the legal convictions of the community (*boni mores*) as basic test for wrongfulness

Briefly describe the general or basic test for wrongfulness

The *boni mores* test is an objective test based on the criterion of reasonableness. The basic question is whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or in an unreasonable manner.

Cite the factors that can play a role in the process of balancing interests to determine wrongfulness

The nature and extent of the harm; subjectively foreseen harm reasonable foreseeability of harm; the possible value to the defendant or to society of the harmful conduct; the costs and effort of steps which could have been taken to prevent loss; the degree of probability of the success of preventative measures; the nature of the relationship between the parties; the motive of the defendant; economic considerations; etc.

“The *boni mores* criterion is a criterion of the law of delict.” What is meant by this statement? Explain briefly

In applying the *boni mores* criterion, we are concerned with whether the community regards the act as delictually wrongful, not socially, morally, ethically, or religiously right or wrong. Also, the *boni mores* test is not determined by the question of whether a particular act should be considered wrongful for the purposes of public interest, because delict is concerned with individual interests.

When applying the *boni mores* criterion, can a judicial official rely on his/her own personal opinion of right and wrong exclusively? Explain briefly

No. In his role as interpreter of the legal convictions of the community, a judge nevertheless does not elevate his personal viewpoint regarding right and wrong to the sole measure of wrongfulness. A judge who does that, impermissibly makes the law whilst his main task is to apply the law.

Write a short note on the role of subjective factors in determining wrongfulness

Subjective factors, such as the defendant's mental disposition, knowledge, and motive, normally do not play a role in determining wrongfulness.

"Owing to the fact that wrongfulness is established by a criterion of objective reasonableness, the defendant's motive plays absolutely no role in the determination of wrongfulness." Is this statement correct? Discuss briefly

In the area of so-called neighbour law, a defendant's improper motive ("malice") may play a role in deciding whether he acted wrongfully. Eg defendant who plants deciduous trees along the boundary of his property for the sole purpose of injuring his neighbour by causing leaves to fall onto his nearby threshing-floor, will render his apparently reasonable conduct wrongful.

Is it correct to say that the defendant's intent can sometimes determine the wrongfulness of his conduct? Discuss briefly

It is incorrect to suggest that a defendant's intent sometimes determines the wrongfulness of his conduct. Consciousness of wrongfulness is an element of the technical-legal concept of intent. Improper motive and intent have different meanings. Intent may be present even in the absence of improper motive (eg euthanasia).

Assume the defendant knew that his conduct would harm the plaintiff. Can this subjective knowledge play a role in determining wrongfulness of his behaviour? Discuss briefly with reference to an example

This subjective knowledge is taken into consideration in cases of, eg, the causing of so-called pure economic loss and omissions.

Is it necessary to apply the general *boni mores* test in every case where wrongfulness must be determined? Explain briefly

It is seldom necessary to make direct use of this general and comparatively vague test to determine wrongfulness. In general, if a factual infringement has taken place, this can already be an indication of, or pointer to, the wrongfulness of the conduct: in other words, it can constitute *prima facie* wrongfulness, or create a presumption of wrongfulness.

What is the connection between the *boni mores* test and the viewpoint that wrongfulness lies in the infringement of a subjective right or non-compliance with a legal duty?

Infringement of a subjective right and breach of a legal duty as a test for wrongfulness may be regarded as two practical applications of the general *boni mores* test.

Briefly explain the role that the “reasonable person” plays in the application of the *boni mores* test

Whether the defendant acted in violation of the legal convictions of the community in the particular circumstances, is determined by asking whether the reasonable person (of normal intelligence and development) would have regarded the relevant infringement of interests as legally reprehensible in the circumstances. The reasonable person therefore embodies or represents the legal convictions of the community.

Describe, with reference to examples, the cases where the *boni mores* test is applied as a supplementary criterion to determine wrongfulness

Two main ways the general *boni mores* or reasonableness criterion is applied as a supplementary test for wrongfulness.

- Firstly, in novel cases where there is no clear legal norm or ground of justification involved.
- Secondly, for the purposes of refinement, especially in assessing wrongfulness in borderline cases

Study unit 6 – Wrongfulness: wrongfulness as infringement of a subjective right

Is infringement of a subjective right the only test for wrongfulness?

No. It is one example of the practical application of the *boni mores* test. Another example would be non-compliance with a legal duty to act.

Briefly distinguish between a legal subject and a legal object with reference to examples

All people are legal subjects and holders of subjective rights. The holder of a subjective right has a right to something (the legal object). For example, a legal subject has a right to his car (legal object).

Briefly describe, with reference to examples, the dual relationship that characterises every subjective right

The holder of a subjective right has a right to something, enforceable against other people. Firstly there is a relationship between the legal subject and the legal object, and secondly there is a relationship between the legal subject and all other legal subjects. The legal subject has a right to his car (legal object) – the subject-object relationship – enforceable against other persons – the subject-subject relationship.

What is the content of the subject-object relationship in the case of a subjective right?

The holding of the right confers powers or enjoyment, use, and disposal in respect of the legal object.

What is the content of the subject-subject relationship in the case of a subjective right?

The holder of the subjective right can uphold his powers over a legal object against all other legal subjects, and a duty rests on all other legal subjects not to infringe the relationship between the holder of the right and the object of his right.

“For every right to which a person is entitled, somebody else has a corresponding legal duty.” Briefly discuss the meaning of this statement with reference to an example

Every right has a correlative duty. If I have a right to something, other persons have a duty not to infringe my right. As owner, I have a right to my car, and all other people simultaneously have a legal duty to honour my right by eg not damaging or stealing my car.

On what basis are subjective rights divided into categories and named?

Rights are categorised and named with reference to the different types of legal objects to which the rights relate.

Name the different classes into which subjective rights are divided and indicate, with reference to examples, the objects of each category of subjective right

- Real rights
 - Tangible objects such as a farm, pen, car, compressed air in a cylinder
- Personality rights
 - Aspects of personality such as good name, physical integrity, honour, privacy, and identity
- Personal rights
 - Acts and performances such as delivery by the seller, payment by a debtor, rendering of services by an employee
- Immaterial property rights
 - Intangible products of the human mind which are expressed in one or other outwardly perceptible form, such as invention, a poem, or a work of art
- Personal immaterial property rights
 - Intangible products of the human mind which are connected with personality, such as earning capacity and creditworthiness)

Has the development of the doctrine of subjective rights reached its conclusion? Discuss briefly

Nothing prevents further development or evolution of this doctrine. The recent acknowledgement of new personality rights to privacy and to identity bears testament to this. Even new categories of rights may be recognised, such as personal immaterial property rights, which were identified and described relatively recently.

How do subjective rights originate? Briefly discuss with reference to an example

Subjective rights arise when the law recognises existing individual interests as being worthy of protection.

What requirements must the object of an individual interest fulfill before it can also be a legal object in terms of the doctrine of subjective rights?

Two conditions must be met.

- Firstly, it must be of value – that is relatively scarce – to the holder of the right;
- Secondly, it must have such a measure of independence that it is possible to dispose of it and enjoy it.

Briefly discuss the nature of the dual investigation that is necessary to establish whether a subjective right has been infringed

To determine whether a right has been infringed:

- Firstly one must determine whether the relationship between the holder of the right and the subject of the right has been infringed.
- Secondly, whether the infringement complained of took place in a legally reprehensible way.

Briefly describe, with reference to examples, when the subject-object relationship has, in fact, been infringed

Such a violation occurs mostly by means of an action impacting directly on the legal object itself: the defendant, eg, crashes into the plaintiff's car, or infringes the plaintiff's physical integrity by slapping his face, or injures the plaintiff's dignity by addressing humiliating words to him, or violates the plaintiff's right to privacy by peeping at him in his bathroom.

What requirement must be fulfilled before factual infringement of the subject-object relationship can amount to violation of a subjective right? Discuss briefly

The actual interference must take place in a legally impermissible manner. The norm or standard used to determine whether an actual violation of the subject-object relationship is legally impermissible or not remains the general reasonableness criterion, which is established with reference to the legal convictions of the community, ie the *boni mores*.

Study unit 7 – Wrongfulness: wrongfulness as a breach of a legal duty

Give two instances where the *boni mores* test finds practical application in existing rules of law and legal doctrines

Two examples of the practical application of the *boni mores* yardstick (the test for determination of wrongfulness which is an investigation into the legal convictions of the community) are to be found in the view that wrongfulness amounts to the infringement of subjective rights, or the non-compliance with a legal duty to act.

What is the connection between the general test for wrongfulness (the *boni mores* test) and the views that wrongfulness lies in either the infringement of a subjective right or in the failure to fulfill a legal duty?

Infringement of a subjective right and breach of a legal duty as a test for wrongfulness may be regarded as two practical applications of the general *boni mores* criterion.

What is the correlative of the statement that a holder of a right has a right to his legal objects?

Other persons have a duty not to infringe that right.

Write short notes on the concepts of “legal duty” and “duty of care” and indicate which of the two concepts is preferable when translating the concept *regsplig*

It is preferable to use the term “legal duty” in English instead of “duty of care”. The term “duty of care” may lead to confusion, as it is traditionally employed to denote more than one meaning. Sometimes it relates to wrongfulness: to the existence of a legal duty to take steps to prevent loss; on the other occasions it relates to negligence: to the duty to take reasonable care by foreseeing and preventing loss. This sometimes results in a failure to distinguish between two fundamentally different elements of delict: wrongfulness, and fault.

Study unit 8 – Wrongfulness: liability owing to an omission; breach of a statutory duty

Briefly discuss the juridical importance of the difference between a “commission” and an “omission”

Liability for an omission is in general more restricted than liability for a positive act (a commission). For policy considerations, the law is hesitant to find that there was a legal duty on someone to act positively and so prevent damage to another.

“As point of departure it is accepted that there is no general legal duty on a person to prevent the suffering of a loss by another” (Minister van Polisie v Ewels). Briefly discuss this statement

As a general rule, a person does not act wrongfully for the purposes of the law of delict if he omits to prevent harm to another person. Liability only follows if the omission was in fact wrongful, and this will be the case only if a legal duty rested on the defendant to act positively to prevent harm from occurring and he failed to comply with that duty. The question of whether such a duty existed is answered with reference to the criterion of the legal convictions of the community and legal policy.

Mention 7 factors that can indicate that a legal duty existed to prevent prejudice in the case of an omission

- Prior conduct (the *omissio per commissionem* rule)
- Control of a dangerous object
- Rules of law
- A special relationship between the parties
- A particular office
- Contractual undertaking for the safety of a third party
- Creation of the impression that the interests of a third party will be protected

With reference to case law, briefly sketch the historical development of a so-called prior conduct requirement for liability for an omission. Indicate what role prior conduct plays in the determination of liability for an omission according to the current legal position

A person acts *prima facie* wrongfully when he creates a new source of danger by means of positive conduct (commission) and subsequently fails to eliminate that danger (omission). The view that “prior conduct” is an indispensable requirement for liability for omissions prevailed in our law for a long time. However in 1957 the “prior conduct” requirement was rejected in a minority decision in favour of the preferred view that “prior conduct” was but one of

several considerations which might indicate the existence of a legal duty. This more flexible approach was later accepted by the Appellate Division, and eventually expressed in *Minister van Polisie v Ewels*. In this judgment, the generally accepted view that wrongfulness is in principle determined by the legal convictions of the community has now been applied to omissions. The view that “prior conduct” is but one of several considerations which might indicate the existence of a legal duty, is the current legal position.

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

This question deals with the wrongfulness of an omission. The basic question to determine whether an omission is wrongful is whether a legal duty to act was present and was breached. This is determined with reference to the legal convictions of the community, or the *boni mores*. Factors which may serve as indications that a legal duty rested on the defendant include: prior conduct (*omissio per commissionem*); control of a dangerous object; rules of law; a special relationship between the parties; particular office; contractual undertaking for the safety of a third party; and creating of an impression that the interests of a third person will be protected.

In the so-called municipality cases, prior conduct was considered to be a prerequisite for the wrongfulness of an omission. Prior conduct refers to positive conduct that created a new source of danger, preceding subsequent omission to protect others from being harmed by this new source of danger. In *Minister van Polisie v Ewels*, the court finally held that the existence of a legal duty is determined by the *boni mores*, and whereas the presence of prior conduct is a strong indication of the presence of wrongfulness, it is not a prerequisite thereof. Interplay of different factors may also indicate the presence of a legal duty. If these principles are applied to the given facts, we can probably conclude that the omission of the municipality was indeed wrongful.

Briefly discuss the role that the following case played in the so-called *omissio per commissionem* rule: *Minister van Polisie v Ewels*

See previous answer. This case represents the most important turning point in the history of the so-called prior conduct requirement for liability for an omission.

According to our present legal position, is “prior conduct” still a requirement for liability for an omission in the “municipality cases”

Any doubt about the applicability of the decision in the *Ewels* case (that prior conduct is not indispensable for the existence of a legal duty) to the “municipality cases”, was removed by the Supreme Court of Appeal in *Cape Town Municipality v Bakkerud*. The court held that the legal convictions of the community could even in the absence of “prior conduct” (or a statutory duty) place a legal duty on a municipality to, for instance, repair roads or sidewalks or to warn against danger. Whether this is the case, depends on the circumstances and must be determined ad hoc.

“The approach to liability for an omission in the *Ewels* case can result in legal uncertainty.” Do you agree with this statement? Discuss briefly

According to *Amicus Curiae*, the approach laid down in the *Ewels* case gives too much discretion to the courts and may result in legal uncertainty. However there is no doubt that the approach favoured in the *Ewels* case is correct, if one looks at subsequent decisions in the courts.

Briefly discuss the role that control over a dangerous object plays in the determination of delictual liability on the ground of an omission

Control over a dangerous or potentially dangerous object can be a factor in determining whether a legal duty rested on the person in control, to prevent someone from being injured by the particular situation. Two questions are relevant:

- Firstly, whether there was actual control and;
- Secondly, whether, in light of inter alia such control, a legal duty rested on the defendant to take steps to prevent damage resulting from his or her omission to exercise proper control.

There is dry grass on P’s farm. P fails to cut the grass. A fire breaks out in the grass and spreads to his neighbour, Q’s farm, where it causes some damage. Can P be held liable for Q’s damage? Briefly discuss with reference to liability for an omission

Liability for an omission follows only if the omission was in fact wrongful, and this will be the case only if a legal duty rested on P to act positively (by cutting his grass) to prevent harm from occurring, and P failed to comply with that duty. One of the factors that can indicate that a legal duty existed to prevent prejudice in the case of an omission is control of a dangerous object. Firstly, there must be actual control, and secondly, in light of such control there must be a legal duty on the defendant to take steps to prevent damage resulting from his omission to exercise proper control. P owns the potentially dangerous object of property with grass that could spread fire, so he has control over it. P can probably be held liable for Q’s damage because it will probably be considered

that proper exercise of control of this object would be necessary with reference to the legal convictions of the community.

In certain instances rules of law place an obligation upon a person to perform certain acts. With reference to examples and case law, discuss the role that such rules of law can play in determination of liability for damage that has resulted from a failure to perform the prescribed acts

In certain instances, the law (either common law or statute) places an obligation upon a person to perform certain acts. As an example, common law obliges the owner of lower land to provide lateral support for his neighbour's land, and owners of neighbouring land in local communities who light controlled fires on their property are obliged to obey certain statutory precepts. If the neighbour suffers damage as a result of their failure to perform this duty, their conduct is prima facie wrongful. The conduct (omission) will be wrongful, not due to the non-compliance with the statutory legal duty per se, but rather because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his right. Reasonableness is determined with reference to the legal convictions of the community and legal policy.

May a special relationship between parties be an indication that the one had a legal duty towards the other to prevent damage? Briefly discuss with reference to examples

Yes. The existence of a contractual relationship may indicate such a legal duty. Other examples are the relationship between a policeman and a citizen, an officer of the law and a prisoner, an employer and an employee, parent and child, doctor and patient.

May a specific office held by a person be an indication that he/she has a legal duty to prevent another from incurring loss? Discuss briefly

Yes. Sometimes the person's occupation or the office he holds places a legal duty upon him to conduct himself in a particular manner in relation to the public or certain people.

Discuss, with reference to an example, the role that a contractual undertaking for the safety of a third party can play in the determination of a legal duty to prevent loss

Where A enters into a contract with B in which A undertakes to take steps to ensure the safety of C, A is placed under a legal duty towards C. If A then fails to take those steps and C suffers damage as a consequence, the legal duty is violated and A acts wrongfully in relation to C. This explains why an appointed life-saver has a legal duty to rescue swimmers at a swimming pool or a beach.

Is the existence of a legal duty always based on the presence of a single factor?

No. The existence of a legal duty may often be ascribed to a single factor, but in other cases several factors play a part.

X, a champion swimmer, is walking along the riverside when he sees a child drowning. He fails to rescue the child from the water. Owing to his failure to act, the child suffers serious brain damage and becomes a quadriplegic. Did a legal duty rest on X to save the child? Discuss with reference to case law

In the final analysis of whether a legal duty existed, we are dealing with the determination of the reasonableness of the defendant's failure to act in view of all the circumstances of the case. It is not imperative that the omission in question falls into one of the crystallised categories.

This well-known example of the champion swimmer may serve as an example. In determining whether a duty rested on the swimmer to rescue the child, the swimmer's conduct cannot be classified under any of the stereotyped categories that indicate a legal duty. Consequently, recourse must be had to the general test for wrongfulness. By means of the *boni mores* test, a balancing process must take place between, on the one hand, the interests of the swimmer (eg, inconvenience and damage to his clothes) and, on the other hand, the interests of the child (serious violation of his physical integrity) and the child's parent or guardian (great financial cost brought about by the child's handicap). Public interest also plays a part here. In view of all these circumstances, it must be decided whether the swimmer's omission, in the words of the *Ewels* case, evokes not merely moral indignation but should also be regarded as wrongful according to the legal convictions of the community and that he should subsequently render compensation for the damage suffered. In this example, it will probably be decided that a legal duty rested on the swimmer to take steps to rescue the child. However, the scales may favour the defendant-swimmer if, eg, it should appear that there were crocodiles in the vicinity and that he would place his own life in danger were he to rescue the child; the law no longer requires that a person regard another's life as more important than his own.

What must the plaintiff prove, according to McKerron, in order to establish that a breach of statutory duty by the defendant was wrongful?

In order to establish wrongfulness, the plaintiff must prove the following:

- a) That the relevant statutory measure provided the plaintiff with a private law remedy;
- b) That the plaintiff is a person for whose benefit and protection the statutory duty was imposed;

- c) That the nature of the harm and the manner in which it occurred are such as contemplated by the enactment;
- d) That the defendant in fact transgressed the statutory provision; and
- e) That there was a causal nexus between the transgression of the statutory provision and the harm.

Study unit 9 – Wrongfulness: grounds of justification – defence

What is a ground of justification? Briefly discuss with reference to an example

Grounds of justification are special circumstances in which conduct that appears to be wrongful (because an actual violation of interests is present) is rendered lawful (since there is no violation of a norm).

What is the connection between grounds of justification and the general test for wrongfulness (the *boni mores*, or legal conviction of the community)?

In reality, grounds of justification are nothing more than practical expressions of the *boni mores* or reasonableness criterion with reference to typical factual circumstances that occur regularly in practice.

Define “defence” with reference to an example

Private defence, or defence, is present when the defendant directs his actions against another person’s actual or imminently threatening wrongful act in order to protect his own legally recognised interests or such interests of someone else. For example, A acts in defence if he hits B over the head to prevent B from stabbing A with a knife.

Can self-defence be used as a synonym for defence? Discuss briefly

No. Self-defence is a form of defence. However, the term self-defence is too narrow to be used as a synonym for defence, because an act in defence may also be executed in defence of someone else and of property.

X’s vicious dog attacks Y. Y shoots the dog in order to defend himself against the dog’s attack. Can it be said that Y acted in defence? Would your answer have been different if it appeared that X had incited his dog to attack Y? Discuss briefly

No, because the attack must consist of a human attack, it means that aggression by an animal does not qualify as an attack. Because an animal cannot act for the purposes of delict, defensive action against attack by an animal does not constitute defence. In such a case, necessity may be an appropriate ground of justification.

One may indeed act in defence against a person who uses his animal merely as an instrument of attack, such as someone who incites his dog to attack another. In such an instance, the act of defence is in reality directed against human conduct (attack).

X, a plain-clothes policeman, arrests Y in the execution of a legitimate warrant of arrest. Y believes that X is not a policeman and resists arrest. Is Y acting in defence? Discuss briefly

Because the attack has to be wrongful, the test here is objective. An objective test deals with the facts as they appear *ex post facto* and not with the defending person's subjective impression of the events. If the defending person subjectively believes that he is in danger or that the attack is wrongful, but in reality it is not, his defensive action does not constitute private defence and he acts wrongfully. Someone who acts wrongfully because he incorrectly believes that he is acting in private defence can still escape liability if he did not have fault (intent or negligence).

A directs his pistol at B and threatens to shoot him. B grabs A's arm to prevent A from shooting him. To loosen his arm from B's grip, A jabs B in the ribcage with his elbow and cracks one of B's ribs. B institutes a claim against A for the medical treatment of the injury to his rib. A alleges that he acted in defence because he wanted to escape B's grasp. Will A succeed with his appeal on defence? Discuss briefly

A will not succeed. The attack must be wrongful. In the given example, the "attack" by B against which A defended himself was not wrongful, but lawful, because B himself acted in defence against A's initial wrongful attack.

Can a person act in defence in circumstances where the person has the alternative of protecting his interest by fleeing? Discuss briefly

If the interest may be protected in some other, less detrimental way, the act of defence is wrongful. Case law seems to be of the opinion that a person must flee, unless such flight exposes him to danger, such as a shot in the back, or if such flight would result in a policeman abandoning his duty to arrest a criminal. Perhaps the requirement that there must be danger connected to flight is too narrow. It should also not be expected of him to flee where flight will cause an infringement of the interests of the attacked person, such as an impairment of dignity resulting from the humiliation caused by flight.

A, a policeman, enters B's premises without a valid warrant of arrest. B grabs A, pulls him into the house, and punches him a few times. Is B acting in defence? Discuss briefly

The act of defence must not be more harmful than is necessary to ward off the attack. The value of the interests may differ. One may infringe a more valuable interest to protect one of a lesser value. However, there an extreme imbalance is unacceptable. The interests need not be similar in character, however, extreme

imbalance is unacceptable. Also, the defence must be necessary to protect the right, and if the interest may be protected in some other, less detrimental way, the act of defence is wrongful. In this case I believe B's act of defence is wrongful.

Does the requirement of commensurateness of interests apply in the case of defence? Discuss

No. The value of the interests may differ, and the interests need not be similar in character. However, if an extreme imbalance of interests is the case, the defensive act is unlawful.

In the case of defence, can a person protect his property by killing the attacker? Discuss with reference to the majority decision by the appeal court in *Ex parte die Minister van Justisie: in re S v Van Wyk*

Yes. All the judges in the case agreed that one may in principle rely on the doctrine of defence when one has killed or injured another in order to protect one's property. The next question to be answered in the case was whether the bounds of defence were exceeded. The cardinal question to be answered in order to determine whether someone exceeded the bounds of defence, is whether the steps actually taken by him constituted the only reasonable method of warding off the attack. In this case, the majority found that Van Wyk had not exceeded the bounds of defence because all other methods of defence were not practical. They held that the setting up of the gun was the only reasonable possibility if Van Wyk wished to protect his property.

Study unit 10 – Wrongfulness: grounds of justification – necessity

Define necessity

A state of necessity exists when the defendant is placed in such a position by superior force (*vis maior*) that he is able to protect his interests (or those of someone else) only by reasonably violating the interests of an innocent third party.

X offers to take Y's dog for a walk. X notices his sworn enemy, Z, approaching him and incites Y's dog to attack and bite Z. Z draws his pistol and shoots Y's dog dead on the spot. Y institutes the *actio legis Aquiliae* against Z. Will Z be able to raise private defence or necessity as a defence? Give a reason for your answer with reference to the basic difference between defence and necessity

Z will be able to raise necessity as a defence against Y. Necessity must be clearly distinguished from private defence. The distinction is that when acting in defence the actor's conduct is directed at an attack by the wrongdoer. When acting out of necessity, his conduct violates the interests of an innocent party. The fact that X incited the dog means that the act was actually a human act by X using the dog as an instrument, however, the dog is a legal object of Y's, and therefore by killing the dog Z violated Y's (an innocent party) subjective right to his dog.

Name, point by point, the different guidelines that can be considered to establish whether there was a state of necessity

- The question at issue is whether a state of necessity really exists, not whether it has been caused by human action, animals, or forces of nature.
- The possible existence of a state of necessity must be determined objectively.
- The state of necessity must be present or imminent.
- The defendant need not only protect his interests, but may also protect the interests of others.
- Not only life or physical integrity, but also other interests, such as property may be protected out of necessity.
- A person may not rely on necessity where he is legally compelled to endure the danger.
- In general, the interest that is sacrificed may not be more valuable than the interest that is protected.
- Homicide may be justified by necessity (*S v Goliath*)
- The act of necessity must be the only reasonably possible means of escaping the danger

Can a person base his defence on necessity where he was personally responsible for the state of necessity? Discuss briefly

There is authority for both the view that a state of necessity created by the defendant excludes a plea of necessity, and for the view that a person may rely on necessity even though he has created the state of necessity. The latter view appears to enjoy most support. Proponents of the view argue that the conduct creating the emergency and the defensive act should be kept apart. If the conduct creating the emergency constitutes a crime or causes damage, the defendant should be held liable for it; nevertheless, such conduct should not preclude him from acting out of necessity in order to escape from the emergency.

A's three-year-old child swallows a handful of pills. On the way, he bumps B's car. Afterwards it appears that the pills did no damage to the child. B institutes the *actio legis Aquiliae* because of the damage to his car. A's defence is that he was acting in a state of necessity. Will A succeed with this defence? Discuss briefly

The possible existence of a state of necessity must be determined objectively. It must, therefore, be determined whether, seen objectively, the danger (state of necessity) actually existed, or whether it was only subjectively present in A's mind. If the latter situation is the case, then A did not act in a state of necessity and his actions were therefore wrongful (unless another ground of justification exists). Fear on the part of A may either have a bearing on his accountability or on the aspect of fault, but not on the wrongfulness of his conduct. This does not, however, mean that he will necessarily be held liable for the damage, since all the elements of a delict must be present to incur liability.

When is *negotiorum gestio* present? Discuss with reference to an example

It is present where a person attends to the interests of another without the latter's permission: eg it would be lawful to break down one's neighbour's door in his absence in order to switch off the water when the pipes in his roof have burst and the house has been flooded.

X, Y, and Z are stranded on a small, uninhabited island. There is fresh water on the island, but nothing to eat. Z is already very weak. To stay alive, X and Y kill Z and eat him. Did X and Y act wrongfully? Would it make a difference to your answer if X and Y were picked up by a rescue boat one day later and, according to the evidence of a doctor on board the rescue boat, they were healthy enough to have survived several days without food, thus making the killing of Z unnecessary? Discuss with reference to case law.

The question arising in the given facts is whether taking an innocent life in order to save another life/other lives may be justified in necessity. The definition of necessity is as follows: a person acts in necessity if he is placed in such a position by a superior force that he can only protect his interests or those of another person by harming an innocent third person. A principle applicable here provides that the interests must be commensurate (unlike defence); in other words, the interest that is sacrificed must not be more valuable than the interest that is protected. The question of whether an innocent life may be sacrificed to save another life is related to this principle. English case law originally answered this question in the negative, and this position was followed in our law. However, *S v Goliath*, by implication, answered this question in the affirmative. The facts were that if X told Y that if Y did not help X to kill Z, X would kill Y. Y thereupon helped X to kill Z and relied on necessity during the court proceedings. The court said that most people value their own life more highly than that of another person and that necessity could justify homicide. The minority judgment held that fault could have been excluded, but not wrongfulness.

Applying these principles, the defendants may rely on necessity and a strong argument could be made that they did not act wrongfully on the strength of the *Goliath* case.

The answer would be different if it transpired that they would have been rescued in time. The state of necessity must really objectively be present. The defendants' conduct would therefore have been wrongful. However, their misguided impression that they were acting in necessity (known as putative necessity) may exclude fault on their part.

Can a defendant rely on necessity where he was legally compelled to endure the danger? Briefly discuss with reference to an example

No. The fact that the law compels him to endure the state of necessity means that he lacks the power to avoid it. In this connection, eg, a landowner may not alter the natural flow of water on his land so that it causes damage to others, even where his own interests are threatened by flood waters.

Is it a prerequisite that a defendant, who can escape from danger by fleeing, should flee, rather than prejudice another's interests?

The act of necessity must be the only reasonably possible means of escaping the danger. If the defendant can escape from the emergency by fleeing, he must do so.

X, brandishing a hunting knife, tells Y that if Y does not help him kill Z, X will kill Y. Y hits X over the head with a blunt object. X suffers a severe concussion. What ground of justification may Y raise if X institutes a delictual action against Y? Substantiate your answer

The facts are of such a nature that we must consider two grounds of justification, namely private defence and necessity. Private defence is present when the defendant directs his actions against another person's actual or imminently threatening wrongful act in order to protect his own legitimate interests or such interests of someone else. Private defence will be present if the following requirements are met: (1) the defence must be directed against the aggressor; (2) the defence must be necessary to protect the threatened right and this implies that there must be no reasonable alternative to the act of the defence; and (3) the act of defence must not be more harmful than is necessary to ward off the attack. Requirement (3) implies that there must be a measure of proportionality between the attack and the defending act, although absolute proportionality is not required; the value of the protected interest and the sacrificed interest may differ; the interests need not be similar in character; and the means of defence employed by the defender need not be similar to those of the attacker.

Necessity, on the other hand, exists when the defendant is placed in such a position by a superior force that he is able to protect his interests or those of someone else only by reasonably violating the interests of an innocent third party. The most important difference between private defence and necessity is the fact that private defence is directed at an attack by a wrongdoer, whereas when acting out of necessity, the interests of an innocent third party are prejudiced. In other words, if the plaintiff was an attacker, private defence may be applicable, whereas if the plaintiff was an innocent person, necessity may be applicable. From the above it is clear that private defence is the appropriate ground of justification in our set of facts. Y harmed the interests of X, and X was certainly no innocent third person. On the contrary, X had directed wrongful attacks or imminently threatening attacks on both Z and Y. If, on the other hand, Y had assisted X to harm Z, and Z somehow survived and instituted a delictual claim against Y, it would have been appropriate to consider whether necessity was applicable (compare the facts of *S v Goliath*).

Study unit 11 – Wrongfulness: grounds of justification – provocation

Explain the meaning of the concept of provocation with reference to examples

Provocation is present when a defendant is provoked or incited by words or actions to cause harm to the plaintiff.

Example: X insults Y and Y returns the insult. Alternatively X assaults Y, whereupon Y assaults X. Should X now institute a claim against Y, Y relies on provocation: he claims that X provoked (enticed) him and that for this reason X's claim should fail.

Is provocation a ground of justification or a ground of exclusion for fault? Briefly discuss with reference to case law

In our opinion, provocation is a ground of justification, which renders the defendant's conduct lawful. The defence of provocation is assessed by objectively weighing the provocative conduct against the reaction to it, using the criterion of reasonableness (*boni mores*). This is clearly the same criterion that is used for determining wrongfulness, therefore the assumption that provocation excludes wrongfulness and not fault. Another opinion is that provocation may affect the defendant's mental capacity so as to exclude fault, and also that the plaintiff's claim for damages may be diminished or even extinguished as a result of the provocative conduct.

Explain, with reference to an example, the difference between provocation and private defence

The main difference is that conduct resulting from provocation is basically an act of revenge that takes place after the termination of the provocation, whereas an act of defence takes place in defence of a wrongful act that has not yet been terminated.

A swears at B, C's friend. C starts swearing back at A. Can C's conduct fulfill the requirements for provocation? Discuss briefly

Yes. It is irrelevant that the provocative words were not aimed directly at C; he need only prove that those words motivated him to retaliate against them.

Assume that the facts are the same as in the previous question, but that in this case B slaps A's cheek. Can B's conduct fulfill the requirements for provocation? Discuss briefly

As a general rule, provocation is not a complete defence where provocative words preceded a physical attack. Such provocation may nevertheless have the

effect of mitigating damages. However, in the given facts, B will most probably not succeed in proving provocation.

Without any warning, X slaps Y hard on the face. When Y tries to hit back at X, the latter runs away. When Y encounters X an hour later, Y is still so angry and therefore strikes X's cheek. X feels deeply injured and institutes the *actio iniuriarum* against Y on the ground of physical assault. Can Y succeed with provocation as a ground of justification? Discuss briefly.

Y's defence of provocation will fail because his counter-attack did not follow immediately on X's attack.

Write a short note on the meaning of the concept *compensatio*

This principle means that where two persons have defamed or insulted each other in such a manner that the one instance of defamation or insult is not out of proportion to the other, the two *iniurariae* cancel or neutralise each other.

Study unit 12 – Wrongfulness: grounds of justification – consent

Briefly explain the meaning of the following concepts (using examples where possible). Also explain the similarities and differences between them, as well as their effect on the possible liability of the defendant: a) consent to injury; b) consent to the risk of injury; c) *volenti non fit iniuria*; d) voluntary assumption of risk; e) contributory intent; f) contributory negligence

- a) Consent to injury
The injured party consents to specific harm: A, eg, consents to B's removing his appendix; C consents to D's using his pen; E consents to his barber, F, cutting his hair.
- b) Consent to the risk of injury
The injured party consents to the risk of harm caused by the defendant's conduct: A consents to the risk that the operation, performed by B on him, may have a side-effect; a participant in sport consents to the risks involved in such a sport: a rugby player accepts the risk that he may be injured in a tackle; a boxer that a blow may paralyse him; etc. Should the risk contained in the operation or the sports injuries in fact ensue, the injured person will not be able to hold the defendant delictually liable, because he has consented to the risk of such harm.
- c) *Volenti non fit iniuria*
The principle that a defendant is not liable where the injured person has consented to injury or the risk thereof. This maxim is used as a common concept to describe both forms of consent (consent to injury and consent to risk of injury).
- d) Voluntary assumption of risk
Sometimes used to imply consent to the risk of injury (a ground of justification) and sometimes to refer to contributory intent (a ground excluding fault or culpability). Voluntary assumption of risk in both its forms (consent to the risk of injury, and contributory intent) constitutes a complete defence excluding delictual liability.
- e) Contributory intent
A ground excluding fault or culpability. It constitutes a complete defence excluding delictual liability. A distinction must be made between contributory intent and:
- f) Contributory negligence
This is not a ground of justification, nor is it a complete defence excluding delictual liability. The claim of the plaintiff who is guilty of contributory negligence may be reduced by the court in accordance with the degree of his contributory negligence.

List the characteristics of consent as a ground of justification

- Consent to injury is a unilateral act. Therefore the consent need not necessarily be made known to the defendant.
- Consent is a legal act that restricts the injured person's rights. To qualify as a legal act, the consent must be apparent, or manifest, in other words it must be brought to light. Consent will not be held to exist if it is not evident.
- Consent may be given either expressly (eg by words), or tacitly (eg by conduct).
- Consent must be given before the prejudicial conduct; "approval" given after the act is not consent, but may amount to an undertaking not to institute an action against the defendant (a *pactum de non petendo*).
- As a rule, the prejudiced person himself must consent; only in exceptional circumstances may consent to prejudice be given on behalf of someone else.

List the requirements for legally valid consent

- Consent must be given freely or voluntarily.
- The person giving the consent must be capable of volition – intellectually mature enough to appreciate the implications of his acts and must not be mentally ill or under the influence of drugs that could hamper the functioning of his brain. Does not mean he must have full legal capacity to act.
- The consenting person must have full knowledge of the extent of the (possible) prejudice – especially where consent to the risk of harm is concerned.
- The consenting person must realise or appreciate fully what the nature and extent of the harm will be.
- The person must in fact subjectively consent to the prejudicial act.
- The consent must be permitted by the legal order; in other words, the consent must not be *contra bonos mores*.

X's secretary, Y, commits an offence. X gives her a choice: either Y agrees to a hiding, or she will be fired. Y chooses the former option and X gives her the hiding. Y institutes the *actio iniuriarum* against X. Will X succeed with a defence based on consent? Briefly discuss

No, X will not succeed. Consent must be given freely or voluntarily. Should the person be forced in some way to "consent" to the prejudice, valid consent is absent. Also, consent to bodily injury is, in principle, *contra bonos mores*.

Anna would like to have her earlobes pierced so that she can wear fashionable earrings. Andrew, her boyfriend, who is a third-year law student, offers to do this for her. She is only too happy to accept this offer. The procedure goes quite well, but a few days later the wounds have turned septic and medical treatment is necessary. Anna ends the relationship and institutes a delictual action for

infringement of personality interests and to recover medical costs against Andrew. Andrew wishes to raise consent as a ground of justification. What are the merits of his defence? Substantiate your answer

This question deals with consent as a ground of justification, that is, a defence that eliminates the element of wrongfulness. Two types of consent are known, namely consent to injury and consent to the risk of injury, but the applicable principles are largely the same. From the facts it is clear that Anna accepted Andrew's offer to have her ears pierced; therefore, at face value, it appears that Anna may have consented to the risk of injury. However, to determine whether this is really so, we need to consider the requirements of consent: (a) consent must be given freely and voluntarily; (b) the person giving consent must be capable of volition; (c) the person must have full knowledge of the nature and extent of the prejudice; (d) the person must realise or appreciate fully what the harm entails, in other words, she must understand it; (e) the person must in fact subjectively give the consent; and (f) the consent (not the harm consented to, but the consent itself) must not be *contra bonos mores*. Consent to bodily injury is usually *contra bonos mores*. Exceptions are recognised in two instances. Firstly, in the course of medical treatment, a person may consent to bodily injury without the consent being *contra bonos mores*. *Castell v De Greef* constitutes authority for this form of consent. Organised sport is the second class of exception where consent to (the risk of) bodily injury is not *contra bonos mores*. *Boshoff v Boshoff* is an example of this. Furthermore, if the bodily injury is of a minor nature, consent to such injury may also be allowed. If we apply these principles to the facts, we may argue that the harm caused was bodily injury, that it was not trivial in nature or very minor in nature, because septic wounds can be serious, and that the consent was therefore *contra bonos mores* and thus invalid. On the basis of this argument, Andrew's conduct was wrongful and, if all the other delictual requirements are also present, Anna would be successful with her claim. On the other hand, if Anna was unaware of the possible complications of ear piercing, it could be argued that she did not have full knowledge of the nature and extent of the harm or the risk thereof; on this account, it is possible to conclude that she did not consent. Hence Andrew's conduct is wrongful and Anna's claim may succeed.

Briefly discuss the importance of the decisions in *Boshoff v Boshoff* and *Castell v De Greef* for consent as a ground of justification

In *Boshoff v Boshoff*, the plaintiff was struck on the head by his opponent's racket during a squash game, resulting in an injury to his eye. The court rejected the plaintiff's claim for damages on the ground that he had consented to the risk of injury and that the consent was not *contra bonos mores*.

In *Castell v De Greef*, the test in the court *a quo* for the extent of the doctor's duty to inform the patient of any material risks connected to the treatment was established as the reasonable doctor test. In an appeal, the reasonable patient

test was preferred: the doctor's duty to inform is to be established with reference to the needs and expectations of the particular patient rather than the insights of the medical profession (as with the reasonable doctor test).

The *Boshoff* and the *Castell* case are both authorities for the exception to the general principle that consent to bodily injury is *contra bonos mores*.

Briefly discuss the *pactum de non petendo* with reference to an example

A *pactum de non petendo* is a contractual undertaking not to institute an action against the actor, ie, not to hold the actor liable. In these cases, there is no doubt that the actor committed a delict, but the prejudiced person undertakes not to hold the actor liable. Wrongfulness is thus not excluded in such cases; only the resultant action is.

Study unit 13 – Wrongfulness: grounds of justification – statutory authority, official capacity, official command, and power to discipline

Discuss the guidelines applied by the court to determine whether legislature intended to authorise an infringement of interests

- i. If the statute is directory, it is clear that an infringement of private interests is authorised. The injured person is consequently not entitled to compensation unless the statute specifically provides for it.
- ii. If the statute is not directory but permissive, and if the statute makes no provision for the payment of damages, there is a presumption that the infringement is not authorised. (If provision is made for compensation, it is generally accepted that the injured party is entitled to that compensation only.)
- iii. The presumption referred to in (ii) falls away if the authority is entrusted to a public body acting in the public interest.
- iv. If the authorised act is circumscribed and localised (eg, building a dam in a certain place or constructing a railway line between two specific points), there is a presumption that the infringement is authorised.
- v. If the authorisation is permissive and general, not localised, and does not necessarily entail an infringement of private interests, the only possible inference is that the legislature did not intend that private interests should be infringed.

Discuss the considerations to be borne in mind when determining whether the act authorised by the legislator has exceeded the bounds of authority

To determine whether the permitted act fell within the boundaries of the authorisation, the following are taken into account:

- i. It must not have been possible for the defendant to exercise the powers without infringing the interests of the plaintiff. (The onus is on the defendant)
- ii. The defendant's conduct must have been reasonable; in other words, it must not have been possible to prevent or limit the damage by other reasonably feasible measures or methods.

Briefly discuss official capacity as a ground of justification

Certain public officials, such as law enforcement officers and judicial officers, are obliged by law to perform certain acts. Should they cause damage in the process, their conduct will be justified and consequently they will not be liable. Should such an official exceed his authority, he acts unreasonably and therefore wrongfully and may be held liable.

X, an officer in the defence force, orders Y, a private under his command, to shoot Z and kill him (X believes that Z is on the point of throwing a hand grenade at some innocent bystanders). Y shoots and wounds Z. Afterwards it appears that X made a mistake and that Z merely wanted to blow his nose. Z institutes a claim against Y. Y raises official command as ground of justification. Can Y succeed with this defence? Discuss briefly

A soldier must obey all lawful orders and, in doing so, must do no more harm than is necessary to execute the particular order. Where, however, orders are obviously beyond the scope of the authority of the officer issuing them, and are so manifestly and palpably illegal that a reasonable man in the circumstances of the soldier would know them to be manifestly and palpably illegal, he is justified in refusing to obey such orders.

If the soldier, however, obeys such a manifestly and palpably illegal order, then he will not succeed in the defence of official command.

In the given example, X's command was, objectively viewed, illegal (wrongful).

The fact that X suspected (subjectively) that Z intended to kill the bystanders does not render the command lawful: putative defence is not a defence.

Therefore Y acted by executing a wrongful command. The next question is, therefore, whether the command by X was manifestly and palpably illegal. This is not clear from the given facts, but if that were the case, then Y would not succeed with his defence.

Briefly discuss the factors that must be taken into consideration when determining whether chastisement was moderate and reasonable

According to case law, the following factors must be considered when determining whether the punishment was moderate and reasonable:

- a) The nature and seriousness of the transgression;
- b) The degree of punishment or force inflicted;
- c) The physical and mental condition of the person punished;
- d) The gender and age of the child;
- e) The physical disposition of the child;
- f) The means of correction, and
- g) The purpose and motive of the person inflicting the punishment.

Can a teacher rely on power to discipline after having meted out corporal punishment to a pupil?

No. The South African Schools Act prohibits corporal punishment in all schools. This form of punishment may therefore not be meted out by school principals, teachers, and persons in charge of school hostels.

Study unit 14 – Wrongfulness: abuse of rights; nuisance

What notion underlies the so-called doctrine of abuse of rights? Explain briefly

The notion that the exercise of a right or a power may take place in a manner or in circumstances which render such exercise wrongful; in other words, that the actor may exercise his rights in a legally impermissible manner and thus “abuse” them.

Is the following statement correct: “A property owner can do exactly as he pleases on his property”? Briefly discuss with reference to case law

No. In *Gien v Gien* it was expressed that the absolute power of an owner is limited by the restrictions imposed thereupon by the law. These restrictions can either flow from the norms of the law or they may consist of restrictions imposed by the rights of other persons.

What role does malice (*animus vicino nocendi*) play in the doctrine of the abuse of rights? Discuss, referring to common law and case law

In considering the reasonableness of the wrongdoer’s conduct, his mental disposition plays an important role (*Gien* and *Regal* cases). The presence of malice on his part may be a strong indication of the unreasonableness of his conduct. Although the reasonable utilisation of a person’s property cannot be termed unreasonable merely because of an intention to prejudice another, in many instances it is extremely difficult to determine to what extent a wrongdoer promoted his own reasonable interests. In such a case, the wrongdoer’s own, subjective view of the reasonableness of his conduct may be an important aid: if he did not consider his conduct to be a reasonable way of advancing his interests (and this will necessarily be the case where his exclusive aim is to injure the prejudiced person), he can hardly complain if his conduct is considered unreasonable.

For this reason, conduct with the exclusive aim of harming a neighbour (*animus vicino nocendi*) (eg the conduct of a person who builds a chimney with the exclusive purpose of obstructing his/her neighbour’s view) is, as a general rule, wrongful. In other words, an improper motive renders an act, which would have been lawful but for such motive, wrongful if it prejudices a neighbour without benefiting the actor in any way (*Gien* case). Where the wrongdoer harms his neighbour in advancing his own reasonable interests, he does not act wrongfully, even if he has the improper motive to harm his neighbour in the process. Improper motive in itself is therefore insufficient to convert lawful conduct into a wrongful act. However, where the wrongdoer acts unreasonably (eg where the benefit that he derives from his conduct is exceptionally slight,

but, on the other hand, the nature of his conduct is very far-reaching and the harm caused to his neighbour relatively serious), he exceeds the bounds of reasonableness and acts wrongfully, despite the fact that he had no intention to harm his neighbour. Any use to which an actor puts his property, in which he fails to advance his reasonable interests, is thus wrongful, whatever his motive may be.

Briefly give the main principles (or primary guidelines) that can be used to determine whether there was an abuse of rights in a particular case

- a) As a general rule, the owner of immovable property may use his property as he sees fit, as long as he acts within the bounds placed by the law on his powers of ownership.
- b) Given that an owner is not completely free to utilise his property as he wishes, his interests in exercising his right of ownership must be weighed against the interests of his neighbour.
- c) The basic question is still one of wrongfulness; it concerns the reasonable or unreasonable utilisation by the defendant of his property.
- d) Where the benefit which the actor derives from his conduct is exceptionally slight but, by contrast, the nature of his conduct is very drastic and the harm caused to his neighbour is relatively serious, he exceeds the bounds of reasonableness and acts wrongfully. Such an unreasonable act is wrongful despite the fact that the actor did not intend to harm his neighbour; any use of property which fails to advance reasonable interests is thus wrongful, whatever the motive of the actor may be.
- e) Where the actor harms his neighbour in the process of advancing his own reasonable interests, he does not act wrongfully even if he intends (or has the improper motive of) harming his neighbour in the process. Improper motive is in itself insufficient to convert lawful conduct into a wrongful act.

X and Y are neighbours. Because X does not like Y, X builds a large shed on his property in order to spoil Y's beautiful view. It appears that X did indeed need a shed, but that he could easily have built it elsewhere. Did X act wrongfully? Briefly discuss with reference to case law

To establish whether X's conduct was wrongful towards Y, it must be determined whether X exceeded his capacity as owner (whether he "abused" his right). This question must be answered in terms of what is reasonable and fair. This question must be answered in terms of what is reasonable and fair. The following guidelines may play a role in considering the reasonableness of X's conduct:

- a) X acts lawfully if it is found that he harmed Y in the process of furthering his own reasonable interests, even if he had the motive of harming his neighbour, Y, in the process. Therefore, improper motive in itself is insufficient to convert lawful conduct into a wrongful act.
- b) If, on the other hand, it is found that X acted unreasonably (eg because the benefit that X would derive from building the shed on the particular spot would be exceptionally slight, while the nature of his conduct and the harm caused to Y would be relatively serious), he exceeds the bounds of reasonableness and acts wrongfully (even if he had no motive to harm Y). Any use to which a owner puts his property, in which he fails to advance his reasonable interests, is wrongful, whatever his motive may be.
- c) If it is not possible to determine whether X's conduct was reasonable or unreasonable, X's own subjective view (in so far as it can be ascertained) of the reasonableness of his conduct may be an important aid: if he himself does not consider his conduct to be a reasonable way of advancing his interests (and this will necessarily be the case where his exclusive aim is to injure Y), he can hardly complain if his conduct is considered unreasonable.

X's conduct was probably lawful: the prejudice suffered by Y as a result of the building of the shed was probably, proportionally, not unreasonably greater than the benefit derived by X from building the shed on that particular spot. In addition, it was not X's exclusive aim to harm Y. Consequently, X did indeed further a reasonable interest of his own and thus acted lawfully.

Give a few examples of nuisance that have occurred in practice

Examples of nuisance include repulsive odours; smoke and gases drifting over the plaintiff's property from the defendant's land; water seeping onto the plaintiff's property; leaves from the defendant's trees falling onto the plaintiff's premises; slate being washed down-river onto the plaintiff's land; a disturbing noise; a blinding light being directed onto a neighbouring property; de-stabilising a common wall by piling soil against it; an excessive number of golf balls landing on a neighbouring property; overhanging branches and foliage; an electrified fence on top of a communal garden wall; blue wildebeest transmitting disease to cattle on neighbouring ground; and occupants of structures on neighbouring land allegedly causing a nuisance.

Study unit 15 – Fault: general; accountability; intent

Name the two forms of fault

- Intention (*dolus*)
- Negligence (*culpa* in the narrow sense)

X, Y's archenemy, corners Y unexpectedly with the intention of shooting him with his shotgun. However, Y is much quicker than X and draws his own firearm. Before wounding X in the chest, Y relishes the opportunity that X has afforded him to take a shot at him (X). Can we assert that Y's conduct is accompanied by fault (intent) in this case?

A person can be legally blameworthy – that is, to be at fault – only for wrongful conduct. As Y's conduct can be regarded as an act of self-defence (a ground of justification) he was protecting his own life against an immediate wrongful attack, and his conduct was lawful. Y's reprehensible state of mind is therefore irrelevant, because wrongfulness is absent.

Complete the following table by indicating which form of fault can/should be present when instituting each action:

Actions	Intent	Negligence
<u><i>Actio legis Aquiliae</i></u>	Need not be present, but if it is then it will suffice for liability*	Must be present for liability unless intent is present
<u><i>Actio iniuriarum</i></u>	Generally required for liability**	Generally insufficient for liability**
<u>Action for pain and suffering</u>	Need not be present, but if it is then it will suffice for liability	Must be present for liability unless intent is present

* The assumption is that it is easier to prove negligence (objective test) than it is to prove intent (subjective test). Therefore, when instituting a claim based on the *actio legis Aquiliae*, a person will usually not try to prove the more difficult form of fault, namely intent, but rather negligence.

** We say “generally” because there are exceptions where the *actio iniuriarum* can be instituted without having to prove intent. See, for instance, the liability of the press for defamation – this will be studied later.

When is a person accountable?

A person is accountable (*culpa capax*) if he has the necessary mental ability to distinguish between right and wrong and if he can also act in accordance with such appreciation.

Discuss the possible effect of the following factors on accountability: (a) youth; (b) mental disease or illness; (c) intoxication; and (d) provocation

a) Youth

Child who has not completed 7th year is always lacking capacity.
Child over seven but under 14 – rebuttable presumption lacking capacity.

b) Mental disease or illness

Where, because of a mental disease or illness, a person cannot at a given moment distinguish between right and wrong, or where he is able to make such a distinction but cannot act in accordance with his appreciation of the distinction, he is *culpa incapa*.

c) Intoxication

Intoxicated persons may also be *culpa incapa*. However, the mere consumption of liquor or use of drugs may in a given situation be a negligent act for which the defendant may be held responsible.

d) Provocation

Where a person under provocation loses his temper and becomes passionately angry, he may be said to lack accountability and will thus not be blamed for his (“intentional”) conduct. However, as already stated, provocation in our law is often regarded as a ground of justification.

Define intent with reference to its two elements

An accountable person acts intentionally if his will is directed at a result, which he causes while conscious of the wrongfulness of his conduct.

The two elements are: direction of the will, and consciousness (knowledge) of wrongfulness.

Name and briefly describe the three forms of intent with reference to examples

1. Direct intent (*dolus directus*)

This form of intent is present where the wrongdoer actually desires a particular consequence of his conduct. Eg X decides to shoot and kill Y in order to take Y’s money. The execution of this plan is accompanied by direct intent because it is X’s desire or plan that Y should die.

2. Indirect intent (*dolus indirectus*)

This form of intent is present where a wrongdoer directly intends one consequence of his conduct but at the same time has knowledge that another consequence will unavoidably or inevitably occur. The causing of the second consequence is accompanied by indirect intent. Eg X desires to shoot and kill Y who is standing behind a closed window. The bullet aimed at Y first shatters a windowpane and then fatally wounds Y. In respect of Y’s death, it is clear that X had direct intent; but the same

cannot be said about the destruction of the windowpane – X definitely did not desire to break the window. Nevertheless, X realised that it was an inevitable or necessary consequence of his shooting Y and therefore in relation to the breaking of the window, indirect intent is present.

3. *Dolus eventualis*

This form of intent is present where the wrongdoer, while not desiring a particular result, foresees the possibility that he may cause the result and reconciles himself to this fact; ie, he nevertheless performs the act which brings about the consequence in question. The wrongdoer must have actually subjectively foreseen the possibility. Eg X wants to kill his enemy Y. Z is standing next to Y when X takes aim. X actually foresees the possibility that his shot may miss Y and hits Z. The conclusion is that X shot Z intentionally, even though he did not desire this consequence or foresee it as a necessary consequence of his conduct.

Note, however, that although a distinction is made between the different forms of intent, it is irrelevant which one is present in a particular case. As a rule, no specific consequences are attached to a given form of intent. The fact that the law distinguishes between different forms of intent is important in understanding how wide the concept of intention is in the law.

A breaks the windscreen of B's car in order to steal his car radio. Because it was not A's aim to break the windscreen (his aim was to steal the radio), he did not have intent in respect of breaking the windscreen. Is this statement correct? Discuss briefly

This statement is incorrect. B had indirect intent. In acting, he intended to steal the radio but at the same time had knowledge that another consequence, the breaking of the window, would unavoidably or inevitably occur as a result of his conduct. He therefore had indirect intent with regard to the breaking of the window.

A plants a limpet mine in a busy shop and disappears. An hour later the limpet mine explodes and three people are injured. Because A did not know who his victims were (or how many there would be), he did not have intent in respect of their injuries. Is this statement correct? Discuss briefly

This statement is incorrect. Any form of intent which has a specific person or object in mind is referred to as definite intent (*dolus determinatus*). Any form of intent which has no specific person or object in mind is referred to as indefinite intent (*dolus indeterminatus*). A has therefore has indefinite intent, if it can be shown that he has either direct intent, indirect intent, or *dolus eventualis*, in the situation.

What does the concept "consciousness of wrongfulness" mean?

Knowledge of wrongfulness as a requirement of intent indicates that it is insufficient for the wrongdoer to merely direct his will at causing a particular result. He must also know (realise) or at least foresee the possibility that his conduct is wrongful (ie contrary to law or constituting an infringement of another's rights).

Discuss mistake as a ground for exclusion of fault

A mistake with regard to any matter that has a bearing on the wrongfulness of the actor's conduct, will exclude intent on his part because it will exclude his knowledge of wrongfulness, which is a requirement of intent. It is submitted that, in accordance with new developments in the field of criminal law, it must be accepted as a general rule that for the purposes of delictual liability any mistake with regard to either a relevant fact or to the law excludes intent.

Distinguish between intent and motive

In general, motive indicates the reason for someone's conduct and must not be confused with intent. Intent is a technical legal term that denotes willed conduct which the wrongdoer knows is wrongful. Motive, on the other hand, refers to the reason why a person acts in a particular way. A person may thus, despite the fact that in his opinion he has a good motive, still act with intent (eg where he kills another in order to spare him suffering). By contrast, intent may be absent in the case of a person who has a bad motive but believes his conduct is lawful.

Does a person act intentionally if the result occurred in a manner that differed from what he envisaged?

This deals with mistake concerning the causal chain of events. If there is a material deviation from the planned or foreseen causal nexus, intention is absent. If there is an immaterial deviation from the planned or foreseen causal nexus, intention is present.

Study unit 16 – Fault: negligence

State the test for negligence with reference to its formulation in *Kruger v Coetzee*

For the purposes of liability culpa arises if –

- a) a *diligens paterfamilias* 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.

Can negligence and intent overlap? Discuss briefly

According to Van der Merwe and Olivier's definition, intention and negligence are mutually exclusive. However there are decisions in which it was stated that if intent is present, negligence is included in the intent.

It was decided that where a person has intentionally killed another, they may be convicted of culpable homicide for which negligence is a requirement. One may argue that the intentional causing of harm to another person is contrary to the standard of care which the reasonable person would have exercised and that negligence is thus simultaneously present. This view is preferred.

Is it necessary to differentiate between ordinary and gross negligence? Discuss briefly

Sometimes it is important to differentiate between ordinary and gross negligence. Although it makes no difference for Aquilian liability whether the defendant acted with slight or gross negligence, some statutory provisions limit liability to instances of "gross negligence", and some contractual exclusionary clauses also refer to this concept.

Differentiate between negligence and omission

Negligence as a form of fault (culpability) must not be confused with an omission, which is a form of conduct. An omission can indeed be performed intentionally or negligently; moreover, a positive act can be negligent.

Write short notes on the general characteristics of the reasonable person (*diligens paterfamilias*)

The reasonable person is merely a fictitious person. The reasonable person is not an exceptionally gifted, careful, or developed person; neither is he

underdeveloped, nor someone who recklessly takes chances or who has no prudence. There is only one abstract, objective criterion, and that is the Court's judgment of what is reasonable, because the Court places itself in the position of the *diligens paterfamilias*.

"Since 1965, South African case law has followed a new approach in respect of the negligence of child wrongdoers". Discuss

See discussion of the following question.

Danny, a thirteen-year-old boy, kicks a rugby ball in a suburban garden. The ball breaks the window of a neighbouring house and smashes a priceless vase from the Ming dynasty. Was Danny negligent? Discuss with reference to case law

Before *Jones NO v Santam Bpk*, the negligence of a child used to be determined with reference to a reasonable child standard. In the *Jones* case, the court held that the test for negligence remains objective, and the reasonable person test (also known as the *diligens paterfamilias* test) must be employed in the case of a child wrongdoer. The youthfulness of the child wrongdoer is not specifically considered here. However, during the inquiry into the accountability of the child, his youthfulness is taken into account. The *Jones* case was criticised on two accounts: firstly, many are of the opinion that a reasonable adult standard for a child wrongdoer is unfair; secondly, the court put the cart before the horse by testing for negligence first and thereafter accountability. In *Roxa v Mtshayi* the court followed the correct order. In *Weber v Santam Versekeringsmaatskappy*, the *Jones* case was confirmed in essence and the court said that if the principles were applied with insight, the criticism would fall away. In *Eskom Holdings Ltd v Hendricks*, the court reiterated that in each case it must be determined whether the child had attained the emotional and intellectual maturity to appreciate the danger to be avoided and to act accordingly. In respect of accountability, a child of seven or younger is irrebuttably presumed to be *culpa incapax*, whereas a child over seven, but under fourteen, is rebuttably presumed to be *culpa capax*.

Whether Danny in our question would be held to have been negligent would depend on all the circumstances of the case. If he was old enough to be accountable, he was probably negligent, because, taken at face value, his conduct deviated from that of a reasonable person in the circumstances.

How is the negligence of experts determined? Discuss briefly

In the case of an expert such as a dentist, surgeon, electrician, etc the test for negligence in respect of the exercise of the expert activity is the test of the so-called reasonable expert; in other words, the reasonable dentist, reasonable surgeon, reasonable electrician, etc.

Discuss the concept *imperitia culpa adnumeratur*

Literally, this means that ignorance or lack of skill is deemed to be negligence. The principle embodied in this maxim applies where a person undertakes an activity for which expert knowledge is required while he knows or should reasonably know that he lacks the requisite expert knowledge and should therefore not undertake the activity in question.

Study unit 17 – Fault: negligence – foreseeability and preventability of damage

Define negligence

The defendant is negligent if the reasonable person in his position would have acted differently; and according to the courts the reasonable person would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable.

On which two legs does the test for negligence stand?

- The reasonable foreseeability of damage.
- The reasonable preventability of damage.

Describe the two divergent views on the nature of the foreseeability test for negligence and briefly indicate your preference

- Abstract (or absolute) approach
The question of whether someone acted negligently must be answered by determining whether harm to others was in general reasonably foreseeable; in other words, the question of whether his conduct in general created an unreasonable risk of harm to others must be asked. This view of negligence enjoys little support among academics and is not generally accepted by our courts.
- Concrete (or relative) approach
This approach to the test of foreseeability is based on the premise that a person's conduct may only be described as negligent in respect of a specific consequence or consequences; therefore, it is a prerequisite for negligence that the occurrence of a particular consequence must be reasonably foreseeable.

My preference is the concrete approach. It is only when the consequences of an act are considered that one can judiciously decide what steps or precautions (if any) the reasonable person would have taken in order to guard against such consequences.

What general/broad guideline can be used for the application of the foreseeability test for negligence? Discuss briefly

One may accept as a broad guideline that the foreseeability of harm will depend on the degree of probability of the manifestation of the harm (or how great the chance or possibility is that it will occur). Therefore, the greater the possibility that damage will occur, the easier it will be to establish that such damage was (reasonably) foreseeable. (Of course, the contrary is also true).

Name the four considerations that play a role in the preventability aspect of the test for negligence, according to Van der Walt and Midgely.

- i. The nature and extent of the risk inherent in the wrongdoer's conduct.
- ii. The seriousness of the damage if the risk materialises and damage follows.
- iii. The relative importance of the object of the wrongdoer's conduct.
- iv. The cost and difficulty of taking precautionary measures.

Discuss *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* in connection with the preventability aspect of the negligence test

In this case the defendant was employed by the plaintiff to erect a roof on top of a silo. During welding operations the defendant's servants ignited bales of stover against the silo. The court held that although the risk of the stover being ignited by the welding was not very great, the damage which was likely to result from burning stover would be fairly extensive. The reasonable person would thus have taken steps to prevent the damage from occurring.

Compare *Gordon v Da Mata* and *City of Salisbury v King* in connection with the preventability aspect of negligence

In *Gordon v Da Mata*, the plaintiff slipped on a cabbage leaf on the floor of the defendant's greengrocery. The cabbage leaf had fallen on the floor while the defendant's assistant was slashing off cabbage leaves. The court held that a reasonable person would definitely have taken steps to prevent leaves from falling onto the floor by collecting them in a receptacle because this would not have required much trouble or high cost.

In *City of Salisbury v King*, the court had to decide whether it was negligent to leave potentially slippery vegetable matter lying on a market floor. The plaintiff slipped on a piece of vegetable on the floor of a large market while the sale of vegetables was in progress. The court held that the mere presence of vegetable matter on a market floor did not in itself indicate negligent conduct; it would be unreasonable, expensive, and unrealistic to expect the immediate removal of vegetable matter as it fell onto the floor.

In respect of the so-called "slippery-shop-floor cases", the following general rule applies: "The duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude".

Study unit 18 – Fault: negligence judged in the light of the surrounding circumstances; negligence and duty of care; proof of negligence; relevance of negligence; wrongfulness and negligence

“The negligence of an act must always be judged in the light of the circumstances of the particular case”. Discuss this statement and name the factors that play a role when evaluating the circumstances of the case

It is a well-known principle of our law that all the relevant circumstances of a case must be considered as a whole when deciding whether a wrongdoer's conduct was negligent. The following are examples of factors that should be taken into account in this investigation:

- a) Greater care is required when someone works with things that are inherently dangerous, like a loaded firearm, dynamite, etc.
- b) Greater care is also expected when a person deals with individuals who suffer from disability or incapacity.
- c) Where a person has to take a decision in a situation of sudden emergency and there is insufficient opportunity to consider all the consequences of his actions, imminent peril must be taken into account in deciding whether he is negligent. This situation is usually referred to as the “doctrine of sudden emergency”.
- d) Generally speaking, a person acts according to the standard of a reasonable person when he relies on the fact that another person will act in a reasonable way.
- e) Another factor concerns the customs, usages, and opinions of the community. Generally, a wrongdoer will be able to defend himself successfully against an allegation of negligence by proving that he acted in accordance with normal practices.
- f) In certain circumstances, the appropriate standard of care required for conduct is not entirely left to the discretion of the court (by applying the reasonable person test) because there is also a specific statutory provision which applies.

“The same degree of care is always required of a person, regardless of whether he is dealing with ‘normal’ or disabled people”. Is this statement correct? Discuss briefly

No. Greater care is expected when a person deals with individuals who suffer from disability or incapacity.

A, who is wearing a pair of shorts, smokes a pipe while driving his car. An ember falls from his pipe and burns his bare leg. At the same time a bee, which has flown in through the open window,

stings him on his upper lip. While trying to get rid of the ember and to kill the bee, A collides with B's parked car. In the action brought by B against A, A alleges that in the light of the particular circumstances of the case, he did not act negligently. Discuss the merits of A's defence.

This deals with the doctrine of sudden emergency. According to case law, three requirements must be satisfied in a case of sudden emergency for a wrongdoer's conduct not to amount to negligence, in other words, to meet the standard of the reasonable person:

- i. The wrongdoer must have faced a situation of imminent peril.
- ii. The wrongdoer must not have caused the perilous situation by his own negligence or imprudence.
- iii. The wrongdoer must not have acted in a grossly unreasonable manner.

I believe that A's defence will succeed, because the perilous situation was caused through his own negligence or imprudence. He did not act as a reasonable person and he cannot claim that he was not negligent on the basis of the doctrine of sudden emergency.

A enters an intersection while the traffic light is green for him and collides with B's vehicle, which enters the intersection against the red light. The first time that A notices B's car is at the moment the two cars collide. B concedes that he was negligent, but alleges that A was also negligent because A did not look where he was going and did not take steps to avoid the collision. Discuss the merits of B's allegation

B will probably not succeed. Generally speaking, a person acts according to the standard of the reasonable person when he relies on the fact that another person will act in a reasonable way. Where negligent conduct on the part of another driver is reasonably foreseeable – as is frequently in modern traffic – a person may not always rely on other road-users acting reasonably. In general, however, a person need not take steps to guard against the recklessness or the gross negligence of others.

A is driving at 60km/h during a downpour one night when he crashes into B's vehicle. The speed limit is 60km/h. B alleges that the fact that A was driving at 60km/h amounts to negligence. A's defence is that he did not exceed the speed limit and was therefore not negligent. Will A succeed with his defence? Discuss briefly

In certain circumstances, the appropriate standard of care required for conduct is not entirely left to the discretion of the court, because there is also a specific statutory provision which applies. It must be pointed out, however, that the mere adherence to a statutory rule does not necessarily prevent a person from acting

negligently. Where there is eg a speed restriction of 100km/h and X drives at 95km/h under circumstances where he should have driven much slower, like a slippery road surface, X cannot be heard to say that he did not act negligently because he stayed within the speed limit. To hold otherwise would be to adopt too mechanical an approach to negligence and for this reason the test of the reasonable person still applies (and the court may use its discretion). A will therefore probably not succeed with his defence.

How is negligence determined according to the duty-of-care approach, and what criticism can be leveled against this approach?

According to this approach, one must first establish whether the defendant owed the plaintiff a duty of care (the “duty issue”), and thereafter whether there was a breach of this duty (the “negligence issue”). If both questions are answered in the affirmative, negligence is said to be present.

The duty of care approach is foreign to the principles of Roman-Dutch law, which form the basis of our law of delict, and from a historical viewpoint the application of these principles must be rejected. More importantly, it is an unnecessary and roundabout way of establishing what may be established directly by means of the reasonable person test for negligence, ie whether the reasonable person would have foreseen and guarded against damage. Moreover, the use of the duty of care doctrine may confuse the test for wrongfulness (breach of legal duty) with the test for negligence.

On whom does the duty to prove the defendant’s negligence rest?

On the plaintiff. Where there is a statutory presumption of negligence, the onus rests on the defendant to rebut the presumption of negligence in order to escape liability.

A collision takes place between the vehicles of A and B after A’s vehicle crosses over onto the wrong side of the road. The collision therefore takes place on what is the wrong side of the road for A. Indicate how B may apply the *res ipsa loquitur* doctrine to assist in proving A’s negligence

On the ground of the maxim *res ipsa loquitur* (the facts speak for themselves), the court may infer negligence on the part of the defendant. B proves that the accident took place on the wrong side of the road for A. Should A fail to come forward with another explanation, the court may, on the proven facts, infer that A was probably negligent. This does not mean that a presumption of negligence on the part of A arises. There is no shift on the onus of proof and there is not even a *prima facie* case in favour of B. The phrase is merely an argument on the probabilities that a plaintiff, who may have little evidence at his disposal, may use in order to convince the court that the defendant acted negligently.

Describe the test for wrongfulness and the test for negligence and name the factors that may be applied to distinguish between the two tests

Wrongfulness is determined by means of an objective reasonableness criterion, while the test for negligence is that of the objective reasonable person. Therefore an objective criterion of reasonableness is used in determination of both wrongfulness and negligence. The following factors are of importance in distinguishing the essential difference between the test for wrongfulness and the test for negligence:

- a) In the test for wrongfulness, the reasonableness of the defendant's conduct is determined in the light of the legal convictions of the community;
In the case of negligence, the reasonable person's conduct is determined with reference to the reasonable foreseeability and preventability of damage.
- b) Wrongfulness qualifies conduct (it is concerned with the legal reprehensibility of conduct);
Negligence qualifies the defendant or wrongdoer (it is usually seen as determining the legal blameworthiness of the defendant for his wrongful conduct).
- c) Wrongfulness is determined on the basis of actual facts;
Negligence is determined on the basis of probabilities.
- d) Wrongfulness is determined before negligence;
Negligence presupposes wrongfulness.
- e) The test for wrongfulness is narrower than the test for negligence.

B holds a revolver to A's head and commands A to kill the sleeping C with a knife. A obeys B, fearing for his life. Afterwards, it appears that the revolver is a toy and that A's life was never in danger. Did A act (a) wrongfully and (b) negligently? Discuss with reference to the tests for wrongfulness and negligence and refer to case law

A did act wrongfully because his defence of necessity would fail on the *ex post facto* evidence, however he did not act negligently because a reasonable person would probably act in the same way. Although both the test for wrongfulness and the test for necessity are objective and based on reasonableness, wrongfulness is determined on the basis of actual facts whereas negligence is determined on the basis of probabilities.

In *S v Goliath*, A's life was threatened by B and under B's compulsion and out of fear of B, he assisted B in killing C. The court held that compulsion may be a defence to the killing of a human being, but was not prepared to express an opinion on the question of whether compulsion is a ground of justification or a ground excluding fault. This approach is correct, because a decision as to whether compulsion will exclude wrongfulness or fault will depend entirely on the relevant facts of each case. If it appears that, in view of all the facts which came

to light after the incident, A's life would have been endangered if he did not assist B, necessity as a ground of justification is present; in other words, A's conduct was reasonable in terms of the *boni mores* and thus lawful. Should it appear later that A's life was not in danger, as it was in this case above, then conduct in necessity is absent and the causing of C's death is unreasonable and thus wrongful. The question of whether compulsion may nevertheless exclude fault then arises (because wrongfulness is determined before fault). Suppose that out of compulsion, A believed that his life would have been endangered if he did not assist in killing C. In determining whether A was negligent, the reasonable person must be placed in A's position at the time of the commission of the act and, taking into account A's (incomplete) knowledge and insight, supplemented by the knowledge and insight that he should reasonably have had, one must decide on the probabilities how the reasonable person would have acted. If the reasonable person's conduct would have differed from A's, A's conduct was negligent. But if the reasonable person would – in the case of putative necessity – not have acted differently from A, there was no negligence and A will not be liable. The conclusion is that because of the differences between the test for wrongfulness and the test for negligence, a defendant may be said to have acted unreasonably for the purposes of wrongfulness but reasonably (like the reasonable person) for the purposes of negligence.

Briefly discuss the difference between wrongfulness and negligence in the case of an omission

An omission is unreasonable and thus wrongful where, according to the *boni mores* test, a legal duty rested on the defendant to act positively in order to prevent harm and he neglected to comply (fully) with such a duty. However, where a defendant did attempt (albeit unsuccessfully) to comply with such a duty and his attempt coincided with what the reasonable person would have done, his (unreasonable) wrongful act is not accompanied by (unreasonable) negligent conduct (damage could not reasonably be prevented) and he will escape liability. The case of *Minister of Forestry v Quathlamba (Pty) Ltd* may be cited as an example. Fire broke out on X's land without any fault on his part. Despite his attempts to extinguish the fire, it spread to Y's land and caused damage. The court held that there is a legal duty on a landowner to control a fire on land under his control. Because the fire caused damage to Y, it may be said that X did not fully comply with his duty and his conduct (omission) was thus wrongful (unreasonable). The court nevertheless correctly held that X acted in accordance with the standard of the reasonable person in attempting to extinguish the fire and that he was thus not liable. Despite the wrongfulness of his conduct in not complying fully with his legal duty, he escaped liability because of the absence of negligence.

Study unit 19 – Fault: contributory fault

Briefly distinguish between the concepts fault and contributory fault

While fault refers to the defendant's conduct, contributory fault refers to the conduct of the plaintiff.

Give a short summary of the common-law position regarding contributory fault

The general rule in Roman-Dutch law was that fault on the part of the plaintiff precluded him from claiming damages from the defendant who was also to blame for causing the damage, unless one was more to blame than the other.

In English law, initially the “all-or-nothing” rule was in force, whereby the plaintiff was precluded from claiming any damages if there was negligence on both sides. However, the court in *Davies v Mann* adopted a new approach and it was held that since the defendant had the “last opportunity” to avoid the harm (a collision with the plaintiff's donkey on a road), the plaintiff's negligence was ignored and the defendant incurred full liability for damage. The so-called last opportunity rule was also initially accepted in our courts. Over time however, the rule did not show to work well in practice and resulted in such an untenable situation that the legislature was compelled to intervene.

Briefly summarise the contents of sections 1(1)(a) and 1(1)(b) of the Apportionment of Damages Act and give a short explanation of how these provisions have changed the common-law position

- 1(1)(a): Where there is partial fault on both parties, the plaintiff's claim shall not be defeated, but should be equitably reduced
- 1(1)(b): Damage for the purpose of paragraph (a) shall be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

The effect of these provisions is to abolish the “all-or-nothing” principle of common law and to allow the court to apportion the damage of each party in accordance with their relative degrees of fault.

A intentionally drives into B's car. B is found to have acted negligently. B institutes a claim against A for the damage to his car. A alleges that the claim should be reduced in light of B's negligence. Will A's plea be successful? Discuss briefly

At common law, the position was such that a defence could not be sustained where a defendant acted intentionally and it must be accepted that the statutory provisions under discussion do not change this principle. Consequently, a

defendant who has intentionally caused harm to the plaintiff will not be able to ask for a reduction in damages because of contributory negligence. In this case, A, the defendant, acts intentionally and B, the plaintiff, acts negligently. Because A acted intentionally, he will fail with his plea that B's claim should be reduced in the light of B's negligence.

A intentionally drives into B's car. B is found to have acted negligently. A institutes a claim against B for the damage to his car. B alleges that A's claim cannot succeed in the light of A's conduct. Will B's plea be successful? Discuss briefly

Here the plaintiff A loses his claim against the negligent B because A acted intentionally.

A and B both intentionally drive their cars into each other. A institutes a claim against B. Can the Apportionment of Damages Act be applied in this situation?

In light of the wording used in the long title of the Act and the heading of section 1 (where reference is made to negligence only), as well as to the historical background of the Act, it would appear that the legislature intended to make provision only for the defence of contributory negligence and not the defence of contributory intent. The Supreme Court of Appeal has not yet conclusively decided this issue, but has, on occasion, expressed its doubt whether a defence of contributory intent may be raised in terms of the Act. However, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*, the court held that section 1(1)(a) was applicable where both the plaintiff and the defendant had acted with intent.

Does the Apportionment of Damages Act apply in the case of liability without fault? Discuss briefly

No. As section 1(1)(a) applies only to damage caused partly by fault of the plaintiff and partly by fault of the defendant, the Act cannot apply where liability does not depend on the defendant's fault. Thus the Act does not apply in the case of liability without fault (strict liability).

Explain, with reference to the developments in case law, how damage caused by a negligent defendant and a contributorily negligent plaintiff should be apportioned between the two parties

The method of determining who should bear what portion of the damage involves a comparison of the respective degrees of negligence of the parties involved. Each party's degree of negligence is determined by expressing its deviation from the standard of the reasonable person as a percentage; the two percentages are then compared in order to allocate responsibility in respect of the damage.

Prior to the decision in *Jones NO v Santam Bpk*, the Appellate Division accepted that once the plaintiff's degree of negligence had been established, it was unnecessary to inquire into the extent to which the defendant's conduct had deviated from the standard of the reasonable person. If the court had established, eg, that the plaintiff had been 40% negligent (his conduct deviated 40% from the standard of the reasonable person), it was thought to follow automatically that the defendant was 60% negligent. However, in the *Jones* case, a completely new approach to determining the degree of fault shown by the plaintiff and defendant was followed. According to this decision, the fact that the plaintiff was, eg, 30% negligent, does not automatically imply that the defendant was 70% negligent. In order to establish the respective degrees of negligence, the carefulness of the conduct of each party must be measured separately against the standard of the reasonable person. It is, eg, possible that the plaintiff's conduct deviated 70% from this norm while the defendant's conduct deviated 80%. In this case, the ratio between the plaintiff's and the defendant's degree of fault is 70:80 (7:8 (15)). The plaintiff's degree of fault is thus $7/15 \times 100/1 = 46,7\%$, and the defendant's 53,3%. The plaintiff thus receives compensation for only 53,3% of the damage because he is 46,7% to blame for his loss.

Despite the reasonably clear guidelines in the *Jones* case, it would appear from the decision in *AA Mutual Insurance Association Ltd v Nomeka* that the Appellate Division confirmed the approach followed prior to *Jones*, ie that the degree of the plaintiff's fault automatically determines the degree of fault of the defendant. This is an unsatisfactory situation and when the opportunity arises, the SCA should in the interests of legal certainty reject one approach and confirm the other. It is submitted that the approach in the *Jones* case is preferable and that it should be confirmed.

A further issue that is relevant is the view of the Appellate Division in *General Accident Versekeringsmaatskappy SA Bpk v Uijs* that the extent of a plaintiff's fault is merely one of a number of factors which the court may take into account in order to reduce the plaintiff's damages in a just and equitable manner.

A and B were both negligent in respect of A's damage. A was 40% negligent. Is the following statement correct: "B is then, of necessity, 60% negligent"? Briefly discuss with reference to case law.

See previous answer. This statement represents the so-called *Nomeka* approach.

On whom does the burden of proving contributory negligence rest? Discuss briefly

Where a defendant raises the defence of contributory negligence on the part of the plaintiff, he has to prove such a defence on a balance of probabilities. The defendant usually pleads contributory negligence as an alternative to the

complete denial of negligence. However, the Appellate Division has held that contributory negligence may be taken into account even where the defendant has not expressly pleaded such a defence.

X gives Y a lift in her car. While driving, X talks continuously on her cellphone and also touches up her makeup. Eventually X loses control and drives into a tree. Y, who had not fastened her seatbelt, is injured in the accident. She is hospitalised and incurs hospital costs of R10 000. It transpires that if Y had fastened her seat belt, her hospital costs would have amounted only to R6000, Y institutes a damages claim of R10 000 against X. X approaches you for legal advice. Advise X, referring to applicable legislation and case law. (Assume, for the purpose of your answer, that the provisions of the Road Accident Fund are not applicable to this set of facts.)

From the given facts, we can conclude that the defendant has been negligent, but the plaintiff appears to have been negligent too. Thus we must consider whether contributory negligence was present. Contributory negligence is negligence on the part of the plaintiff, and it is a defence that the defendant can raise. The Apportionment of Damages Act is applicable. This Act provides that a contributorily negligent plaintiff's damages be apportioned. The court will determine the degree of deviation from the reasonable person standard shown by the conduct of both the defendant and plaintiff, express the deviations as percentages, and use these percentages as a basis for the apportionment. According to the *Smit* and *Nomeka* cases, the percentages of negligence attributed to the defendant and plaintiff respectively will always add up to 100%. According to *Jones*, both percentages must be assessed independently, which could mean that, eg, a defendant may be 80% negligent while the plaintiff is 30% negligent. According to Neethling and Potgieter, the approach in *Jones* is to be preferred.

According to *King v Pearl Insurance Co Ltd*, a defence of contributory negligence could not succeed where the plaintiff omitted to wear a crash helmet while driving a scooter, but had not been negligent in respect of causing the accident. However, in *Bowkers Park Komga Cooperative Ltd v SAR and H*, the court held that contributory negligence did not refer to negligence in respect of the damage-causing event, such as a motorcar accident, but to negligence in respect of the damage itself, and this was confirmed by the Appellate Division in *Union National South British Insurance Co Ltd v Vitoria and General Accident Versekeringsmaatskappy SA Bpk v Uijls*. Therefore, failure to wear a seatbelt would constitute contributory negligence if it contributed to the plaintiff's damage.

Applying these principles to the facts, we can conclude that Y was contributorily negligent and that her damages will be apportioned. She will be awarded R6000 plus a portion of the R4000 damage to which she contributed, taking into account her and X's respective degrees of negligence.

Does contributory negligence pertain to the damage-causing event or the damage itself? Explain

It pertains to the damage itself. See above.

Study unit 20 – Fault: voluntary assumption of risk and contributory fault (contributory intent)

Give the different meanings of the concept “voluntary assumption of risk”

In the discussion of wrongfulness, reference was made to the meaning of consent to injury and consent to the risk of injury as a ground of justification (*volenti non fit iniuria*), which negates wrongfulness. Such consent is sometimes referred to as voluntary assumption of risk. Voluntary assumption of risk, however, also has a different meaning. In respect of contributory fault, voluntary assumption of risk is a ground that cancels fault and is not a ground of justification. Assumption of risk in this sense implies that the requirements for a ground of justification are absent.

Distinguish between consent to the risk of injury and contributory intent

When a plaintiff or injured party is well aware of the danger but nevertheless willfully exposes himself to it, he acts intentionally in respect of the prejudice that he suffers, and blame in the form of contributory intent attaches to him. However, to fulfill the other requirement of intent, ie consciousness of wrongfulness, his conduct must also be “consciously unreasonable”, ie, not directed towards the achievement of a lawful goal.

What is meant by “contributory intent”? Explain its effect briefly

Where a plaintiff does act with contributory intent, the fault of the defendant (in the form of negligence) is eliminated by the contributory intent of the plaintiff. Although the defendant is also at fault, he is not held liable towards the plaintiff because the plaintiff himself acts intentionally. The contributory intent (at least *dolus eventualis*) or assumption of risk by the plaintiff therefore cancels the defendant’s fault.

Do our courts accept the defence of contributory intent for the purposes of the Apportionment of Damages Act?

There is little authority for the so-called defence of contributory intent in our law where the defendant acted negligently, and it would appear that our courts are not prepared to recognise it in terms of the Act. Nevertheless, the principle that the conscious taking of an unreasonable risk by the plaintiff cancels fault on the part of the defendant, is a principle of common law, and functions independently of the Act.

The Appellate Division has on occasion expressed its doubt about whether the defence of contributory intent may be raised in terms of the Act. However, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a*

Volkskas Bank it was held that a defence of contributory intention could succeed where both the plaintiff and the defendant acted with intention.

Discuss *Lampert v Hefer* inasmuch as the decision is of importance for the defence of contributory intent

In this case, the plaintiff took her seat as a passenger in the sidecar of the defendant's motorcycle, well aware that the defendant was so intoxicated that he was incapable of maintaining proper control of it. An accident occurred in which the plaintiff sustained injuries and the defendant was killed. The plaintiff claimed damages from the defendant's estate.

The provisions of the Apportionment of Damages Act which at the time were not promulgated would today materially affect the legal position in such circumstances if the plaintiff were guilty of contributory negligence (in which event her remedy would not be completely excluded), or if she consented to the injury (a ground of justification) or acted with contributory intent which cancels fault (in which case she has no action). Contributory intent was present and the court held that therefore the remedy was not available to her.

For the purpose of his judgment, the judge discussed contributory intent and contributory negligence, and stated that these two defences may overlap. He based this conclusion on the great confusion that exists among writers and in our case law on the concept "voluntary assumption of risk". However, where there is an actual assumption of risk, the injured party chooses freely, with full knowledge of the danger, to run the risk – which is not a negligent but an intentional exposure to the risk. In this sense, there is thus no overlap with contributory negligence. Where, however, the injured party should have been aware of the danger, but was not, there is clearly no assumption of risk, but only contributory negligence. The two defences can therefore be clearly distinguished, provided the concept of risk assumption is properly formulated.

In practice, does it make a difference whether the plaintiff has acted negligently or intentionally, or whether he has given consent to the risk of injury? Discuss

If the plaintiff gave consent to the risk of injury, the defendant goes free, because consent is a ground of justification, which excludes wrongfulness, and thus excludes delictual liability. On the other hand, contributory negligence is not a complete defence, but the claim of the plaintiff who bears contributory negligence may be reduced by the court in proportion to the degree of his contributory negligence. If the plaintiff acted with contributory intent, the results depend on the form of fault on the part of the defendant. If the defendant was negligent, the defendant goes free. If the defendant acted with intent, the contributorily intentional plaintiff's claim will be reduced if the *Greater Johannesburg* case is followed.

Can contributory intent and contributory negligence overlap? Discuss briefly with reference to case law

See above. Yes, they can overlap.

Discuss contributory intent and consent to the risk of injury with reference to the facts and decision in *Netherlands Insurance Co of SA Ltd v Van der Vyver*

In this case, Appellate Division had another opportunity to direct its attention to two forms of *volenti non fit iniuria*, ie, consent to the risk of injury (a ground of justification) and contributory intent or voluntary assumption of risk (which cancels fault). In this case, O was suspected of infidelity by his wife. She hired a private detective, V, to spy on her husband. V followed O in his care to a lonely spot in the veld. O had a woman with him in his car. When V approached O's car, O started to drive off. V leapt onto the bonnet in order to obscure O's view and to make him stop. O accelerated, however, and began to swerve from side to side, clearly with the object of dislodging V, who was clinging on for dear life. Six kilometres further, O succeeded in dislodging V. V sustained injuries and claimed compensation from the insurer of O's motorcar. In the court *a quo*, Boshoff J found that O was 50% negligent and V 50% negligent. V, therefore, only obtained half his damages.

On appeal it was held that O had acted with intent and not only negligently. The court rejected O's defence that V had consented (as a ground of justification) to the risk of injury. The court then considered O's defence that V had contributory intent. Referring to this defence, Van Blerk JA declared: "No authority from our case law was cited for the statement that contributory intent is an independent defence, nor was reference made to any of the authoritative sources of our law recognising it". The Appellate Division was therefore not prepared in principle to acknowledge such a defence.

X negligently sets a house alight. Y runs into the burning house to save his jacket and is injured in the flames. Y institutes a claim against X on the ground of his personal injuries. What defences can X raise against the claim? Discuss briefly

The test for negligence is the reasonable foreseeability and the reasonable preventability of damage.

X is not liable for Y's injuries, because they were not reasonably foreseeable: it is clearly not reasonably foreseeable that another person would expose himself to the risk of either serious injury or loss of life just to recover a jacket.

X could not raise the defence of contributory intent because Y's action was not directed towards an unlawful goal.

What is the importance of *Greater Johannesburg Transitional Council v ABSA Bank t/a Volkskas Bank* in respect of contributory intent? Discuss briefly

In cases where a plaintiff intentionally contributed towards his own loss while the defendant was merely negligent, the plaintiff forfeits his claim. In cases where the defendant caused his own loss intentionally and the plaintiff's unreasonable conduct was also intentional, the wording and historical background of the Apportionment of Damages Act would make it appear that the legislature intended to make provision only for the defence of contributory negligence in terms of it. The Appellate Division has on occasion expressed doubt about whether a defence of contributory intent may be raised in terms of the Act. However, in the *Greater Johannesburg* case, it was held that a defence of contributory intention could succeed where both the plaintiff and the defendant acted with intention.

Study unit 21 – Causation: general; factual causation

Briefly distinguish between factual and legal causation

Factual causation deals with whether an act can be identified as a cause of damage, based on facts. Such a factual causal nexus may, however, extend a very long way.

Legal causation deals with the determination of which harmful consequences actually caused by the act the wrongdoer should be held liable for.

While rushing to catch a train, X bumps into Y, a frail old lady. Y falls and breaks a leg. She is admitted to hospital and her leg is set in plaster. She is then given a set of crutches and is discharged from the hospital. A week later, while using her crutches, Y slips on a smooth floor, falls again, and breaks her arm. Is there a factual causal link between X's conduct and Y's broken arm? Discuss

The generally accepted test for factual causation is the *conditio sine qua non* test, or “but for test”. This entails mentally eliminating, or thinking away, the conduct. If the damage then also disappears, a factual causal link is present between the conduct and the damage. This test is subject to much criticism. Among others, it is said to be based on circular logic and is, at best, a way to express the existence of a causal nexus that has been determined in another way. Neethling and Potgieter argue that evidence and human experience are sufficient to determine whether one fact flowed from another fact, and that a so-called test of factual causation is superfluous. However, the courts consistently state that the *conditio sine qua non* is the test of factual causation. If we apply the test to the facts, we must conclude that if X had not bumped Y, she would not have broken her arm, and therefore a factual causal link is present between X's conduct and Y's damage.

Study unit 22 – Causation – legal causation: general; the flexible approach; adequate causation; direct consequences

What is meant by the concept “legal causation”

The question of legal causation arises when determining which harmful consequences caused by the wrongdoer’s wrongful, culpable act he should be liable for. In other words, which consequences should be imputed to him.

Briefly distinguish between factual and legal causation

Factual causation deals with whether an act can be identified as a cause of damage, based on facts. Such a factual causal nexus may, however, extend a very long way.

Legal causation deals with the determination of which harmful consequences actually caused by the act the wrongdoer should be held liable for.

Give two synonyms for “legal causation”

- Limitation of liability.
- Imputability of harm.

What is meant by the following statement: “It would be incorrect to describe legal causation as the only mechanism for limitation of liability in delict”. Discuss briefly

In a sense, the limitless liability which could have been brought about by factual causation in itself is “limited” by the other elements of a delict which establish liability. For example, the liability of an actor who in fact causes damage, but who does not act wrongfully, or who acts wrongfully but not negligently, is “limited” by (the absence of) the elements of wrongfulness and fault respectively. However, legal causation as an independent element arises specifically where it appears that the wrongdoer’s conduct was wrongful and culpable with reference to at least certain consequences, but where additional consequences result and the question arises whether he should be liable for those additional consequences.

Name five theories of legal causation

1. The flexible approach, based on policy considerations, reasonableness, fairness, and justice.
2. The theory of adequate causation.
3. The “direct consequences” criterion.
4. The theory of fault.
5. The reasonable foreseeability criterion.

Describe the flexible approach to legal causation, as formulated by the Appellate Division

The present approach of the courts to legal causation has been set out fairly extensively by the Appellate Division in a criminal case, *S v Mokgethi*, and was thereafter confirmed in several cases dealing with private law.

In *S v Mokgethi*, Van Heerden JA held that there is no single and general criterion for legal causation that is applicable in all instances. A flexible approach is accordingly suggested:

The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness, and justice. (However, the existing criteria for legal causation – such as direct consequences and reasonable foreseeability – may play a subsidiary role in determining legal causation within the framework of this elastic approach.

Briefly set out the facts of *S v Mokgethi* and state the views for which the case serves as authority

(The views for which the case can be considered as authority are set out in the prescribed textbook – which you have to buy – fuck capitalism ;-))

In this case the deceased was a bank teller, and was shot between the shoulder blades by one of the appellants during a robbery. The deceased did not die immediately, but only six months later. The deceased had become a paraplegic as a result of the shot and had to make use of a wheelchair. His condition improved to such an extent that he later resumed his work at the bank. He was, however, later readmitted to hospital suffering from serious pressure sores and septicaemia, which had developed because he had failed to change his position in the wheelchair frequently, as he had been advised to do by the medical practitioners who treated him. The Appellate Division held that the wounding of the deceased could not be regarded as the juridical (legal) cause of the deceased's death for the purposes of a charge of murder.

What is the relationship between the flexible approach to legal causation and the traditional causation theories?

Whether one regards reasonable foreseeability or any other test for legal causation as a subsidiary test, or simply as a factor, in determining legal causation, the Appellate Division's formulation and application of the flexible approach makes it clear that these tests or factors merely function as aids in answering the basic question of imputability of harm. The other theories should be regarded as pointers or criteria reflecting legal policy and legal convictions about when damage should be imputed to a person.

Briefly explain the content and operation of adequate causation as a test for legal causation

According to this theory, a consequence which has in fact been caused by the wrongdoer is imputed to him if the consequence is “adequately” connected to the conduct. The connection is termed “adequate” if, according to human experience, in the normal course of events the act has the tendency of bringing about that type of consequence.

Name an advantage that the theory of adequate causation may have over reasonable foreseeability as a test for legal causation

As a criterion for legal causation, it can be more easily distinguished from negligence (where a reasonable foreseeability criterion is also applied), than the criterion of reasonable foreseeability.

Briefly explain the content and operation of direct consequences as a test for legal causation

According to this theory, an actor is liable for all the “direct consequences” of his negligent conduct. In other words, liability is not necessarily limited to the foreseeable consequences of his conduct. A consequence need not follow the cause immediately in time and space to be a “direct consequence” thereof. The theory has been limited to direct physical consequences. Additionally, the consequence must not have been broken by a so-called *novus actus interveniens* (independent intervening conduct or event).

How has the direct consequences theory been influenced by the foreseeable plaintiff doctrine? Discuss briefly

The possible wide effects of this theory has been limited by the “foreseeable plaintiff” doctrine. According to this, an actor does not act negligently towards a plaintiff unless it is reasonably foreseeable that the particular plaintiff will be injured. Accordingly, the actor is not liable to an unforeseeable plaintiff, even though the harm has flowed directly from the actor’s conduct, and despite the fact that it is foreseeable that other persons may have been injured.

Do direct consequences still have a possible role to play in our law? Discuss briefly

The theory was unequivocally accepted in only two reported cases in South African law. It may, therefore, be stated with certainty that the theory does not serve as a general test for the imputability of harm, but, like the other tests (such as reasonable foreseeability), fulfills a subsidiary role in establishing legal causation in terms of the prevailing flexible approach.

Formulate your own set of facts, similar to that in the *Alston* or *Mokgethi* case, and indicate how the Supreme Court of Appeal would solve the problem of legal causation

The facts of the *Alston* case were as follows:

The plaintiff suffered a brain injury in a motorcar accident which was attributable to the negligence of the driver of a car insured by the defendant. As a result of the brain injury, the plaintiff started to suffer from manic depression, for which he was treated with parstellin, an acknowledged remedy for this condition. According to medical knowledge at that time, there was no reason to believe that the use of parstellin presented any danger. However, when the plaintiff ate cheese after taking parstellin, he suffered a stroke, resulting in additional loss of (as was claimed) R900. It appeared afterwards that eating cheese after taking parstellin is extremely dangerous and may even lead to death.

The facts of the *Mokgethi* case were as follows:

The deceased was a bank teller, and was shot between the shoulder blades by one of the appellants during a robbery. The deceased did not die immediately, but only six months later. The deceased had become a paraplegic as a result of the shot and had to make use of a wheelchair. His condition improved to such an extent that he later resumed his work at the bank. He was, however, later readmitted to hospital suffering from serious pressure sores and septicaemia, which had developed because he had failed to change his position in the wheelchair frequently, as he had been advised to do by the medical practitioners who treated him.

The SCA would use the flexible approach to determine whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness, and justice. The adequate causation and direct consequences approach may play a subsidiary role in determining legal causation within the framework of this elastic approach.

Whilst running to catch a train, X bumps into Y, a frail old lady. Y falls and breaks a leg. She is admitted to hospital and her leg is set in plaster. She is then given a set of crutches and is discharged from the hospital. A week later, while using her crutches, Y slips on a smooth floor, falls again, and breaks her arm. Is there a legal causal link between X's conduct and Y's broken arm? Discuss

The test for legal causation is the so-called flexible approach, as formulated in *S v Mokgethi*. In this case, a bank robber shot a teller. The teller was rendered a paraplegic and was discharged from hospital in a wheelchair. Subsequently, the paraplegic man failed to shift his body position in the chair frequently and developed pressure sores, eventually dying from the complications arising from them. The question that arose was whether the shot fired by the robber was the legal cause of the teller's death. According to the court, the main question in

respect of legal causation is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness, and justice. Several other legal causation theories exist, such as adequate causation, direct consequences, foreseeability, and *novus actus interveniens*. None of these criteria is suitable to be applied in all situations. They may, however, be used as subsidiary aids when employing the flexible approach. In the *Mokgethi* case, the court held that the shot was not the legal cause of the death.

If these principles are applied to the facts in the question, the conclusion is probably that Y's broken arm was too remote and should not be imputed to the wrongdoer. It could also be argued that a so-called *novus actus interveniens*, that is, a new intervening act, was constituted by Y's second fall, and this strengthens the conclusion that there is no legal causal link between X's conduct and Y's broken arm.

Study unit 23 – Causation – legal causation: fault

Briefly explain how the adherents of the fault-in-relation-to-the-loss approach try to solve the question of imputability on the basis of fault

According to this approach, the wrongdoer is liable only for the consequences in respect of which he had fault.

Supporters of the fault-in-relation-to-the-loss approach declare that legal causation as an independent element of delict is unnecessary; and that the questions of fault and imputability of loss are disposed of simultaneously. In particular, this would apply where the so-called concrete approach to negligence is followed. As stated, according to this approach, negligence is determined by inquiring whether the wrongdoer should reasonably have foreseen and prevented loss of the nature experienced in the particular case. It is then argued that negligence contains all the elements necessary for limiting liability.

What is the difference between the question of fault and the question of imputability?

The question of fault deals with the inquiry into whether a person should be blamed for his wrongful conduct. The question of imputability deals with the question of whether certain consequences of his wrongful and culpable conduct should be imputed to him.

The question of whether liability for a particular consequence should be imputed to a wrongdoer differs fundamentally from the question of whether the law should blame the wrongdoer for his wrongful conduct (in other words whether he had fault).

Sight must never be lost of the fundamental difference between the question of fault and the question of legal causation. Where intent has been established, it is illogical for the purposes of legal causation to inquire whether the wrongdoer acted negligently with reference to further consequences which flowed from his intentional conduct. Likewise, it is illogical after it was found that the wrongdoer had acted negligently, to inquire with reference to further consequences whether the wrongdoer should have acted differently. After all, it has already been decided that he should have acted differently. In the event of further consequences (where legal causation is specifically relevant), the wrongdoer's blameworthiness is no longer at issue (at that stage its existence is a fact) and the pertinent question is whether he should be held liable for the further consequences of his blameworthy conduct.

Van der Merwe and Olivier are of the opinion that a person is liable for the consequences that were implicit in his intent. Furthermore, it is traditionally explained that "intended consequences... can never be too remote". Is this a valid statement? Briefly explain with the aid of an example

No. The fact that both these approaches are too simplistic is evident from the case where a foreseen consequence occurs exactly as foreseen by the defendant but where intent fails to hold him liable. The following example illustrates this view:

X knows that his old granny, Y, nominated him in his will. He wants to expedite her death so that he may inherit. He cunningly persuades her to undertake a dangerous road trip, in expectation that she might die during it. As suggested, Y, takes the trip, and drives in bad weather and crashes and dies, as X envisaged. There is without doubt a factual causal nexus between X's conduct and Y's death. Wrongfulness is also present as a result of the infringement of Y's bodily integrity without a ground of justification, as well as X's evil motive. In other words, the law will hardly consider X's causing of Y's death as lawful. Intent, in addition, is present if (i) the wrongdoer X actually foresaw that his conduct would (possibly) lead to the consequence involved, and (ii) actually foresaw that the consequence in the circumstances would (possibly) be wrongful (and, in addition, reconciled himself with these possibilities). The view that the wrongdoer is liable for the consequences which are covered by his intent and that the "intended consequences can never be too remote", now necessitates the conclusion that X, in the absence of a ground of justification, will be liable for Y's death. Nevertheless, the vast majority of jurists would probably be of the opinion that it would be unreasonable to hold X liable for Y's death under these circumstances.

With reference to the facts in *Brown v Hoffman*, explain why intent does not succeed as a criterion for limitation of liability

In *Brown v Hoffman*, the defendant punched the plaintiff three times and the plaintiff suffered severe injury. It was argued on behalf of the defendant that liability was limited to the extent of the defendant's intent. As the defendant had not intended to cause the serious injuries, it was argued that he could not be held liable for damages falling outside his intent and compensation for "general damages" such as pain and suffering could not be claimed from him. In addition, it was argued on behalf of the defendant that, although an actor who has caused damage to another in a negligent manner may be held liable for those consequences of his conduct which were reasonably foreseeable, the defendant in this case should not incur such a wide liability, because the plaintiff had limited his action to the *actio iniuriarum* (for which negligence is not sufficient).

Van Rhyn J rejected this argument, stating:

"I cannot agree with an interpretation which upon analysis, in circumstances like those *in casu*, results in our law attaching a lesser responsibility to one who injures someone intentionally, than one who causes the same injuries negligently.

The decision of the court justifies the deduction that intent cannot serve as a criterion for legal causation.

Which two approaches to imputability of damage does Boberg distinguish between in the case of negligence? Is his explanation valid? Explain briefly

Depending on whether one prefers the abstract or concrete approach to negligence, the question of legal causation is answered differently. Since it is sufficient, according to the abstract approach, if damage in general is reasonably foreseeable, the question of whether a wrongdoer is liable for a specific consequence has to be determined separately by applying one or other of the different criteria for legal causation and not with reference to the question of whether the wrongdoer had been negligent with reference to that specific consequence.

However, according to Boberg, the concrete (relative) approach renders an investigation into legal causation unnecessary, because wrongfulness and negligence are determined with reference to a specific consequence. According to this approach, it is unnecessary to undertake an independent investigation into imputability of damage, because the concrete test for wrongfulness and negligence supposedly contains all the elements necessary to keep liability within acceptable limits.

It is true that the question of limitation of liability or legal causation is (tacitly) answered in most cases during the investigation into wrongfulness and negligence. Nevertheless, sight must not be lost of the fundamental distinction between on the one hand, the question of wrongfulness and fault, and on the other hand, imputability of harm or legal causation merely because in most cases the latter question is disposed of within the framework of the former question. The fact remains that the question of whether a wrongdoer should be held liable for a “remote consequence”, is completely different from the question of whether the wrongdoer’s conduct was unreasonable according to the legal convictions of the community (the question of wrongfulness), from the question of whether the wrongdoer should be legally blamed because he foresaw and reconciled himself with the consequence and the possible wrongfulness thereof (the question of intent), and from the question of whether injury was foreseeable with such a degree of probability that the reasonable man would have taken steps to avoid injury (the question of negligence). Wrongfulness, fault, factual causation, and legal causation (imputability of harm) should be clearly distinguished. Anyone who, eg, drags an element of wrongfulness into the requirement of fault or damage, or an element of wrongfulness or fault into the requirement of imputability, is unavoidably caught up in the net of his own confusion of ideas.

“Legal causation is concerned with a completely different question to that of fault”. Explain this statement with reference to an example of liability without fault

In *Thandani v Minister of Law and Order* it was confirmed that legal causation – quite apart from fault on the part of the wrongdoer – is a separate requirement

for delictual liability. This case dealt with the possible liability of the defendant for wrongful arrest and detention, a delict for which fault is not required – in other words, an example of strict liability. According to the court, a solution to the problem of liability *in casu* depended on whether the requirement of causation was satisfied. Since this was a case of strict liability, the question of fault apparently played no part with regard to the limitation of liability. *In casu* Van Rensburg J employed both the direct-consequences and the reasonable-foreseeability approaches – but obviously not the basis of fault – to find that legal causation was present in the facts considered by him.

Study unit 24 – Causation – legal causation: reasonable foreseeability; *novus actus interveniens*; so-called egg-skull cases (the *talem qualem* rule)

Describe the relationship between reasonable foreseeability and the flexible approach for legal causation

Reasonable foreseeability has been used in a number of decisions as a criterion for legal causation, but in terms of the prevailing flexible approach, it plays a subsidiary role, just like all the other traditional tests for legal causation. This implies that reasonable foreseeability should not be seen as the single, decisive criterion for establishing liability.

According to Van Rensburg, how must reasonable foreseeability, as a criterion for imputability, be approached?

According to Van Rensburg, in the application of this criterion, the general rule should apply that “an alleged wrongdoer is normally liable for all the consequences of his culpable, wrongful act, except for the consequences that were highly improbable”.

What is a *novus actus interveniens*?

A *novus actus interveniens* (new intervening cause) is an independent event which, after the wrongdoer’s act has been concluded, either caused or contributed to the consequence concerned.

What is the approach of the Appellate Division in *S v Mokgethi* to the role of a new intervening cause in respect of legal causation?

The court held that the omission by the victim (his conduct) to move around in his chair and thus prevent sores from developing was a *novus actus interveniens* and therefore his sores were the factual cause of his death but not the legal cause of his death.

What are the ways in which a *novus actus interveniens* can occur?

A *novus actus interveniens* may be brought about by the (culpable) conduct of the plaintiff himself, by the (culpable) conduct of a third party, or by natural forces such as wind and rain. It is important to note that an event will qualify as a *novus actus interveniens* only if the event was not reasonably foreseeable. If the intervening cause was indeed reasonably foreseeable at the moment of the act (or if it reasonably formed part of the risks inherent in the conduct of the defendant) such an event may not be considered to be a *novus actus interveniens* that may influence imputability of harm to the actor.

Briefly explain what is meant by the concept of an egg-skull case

“Egg-skull cases” arise where the plaintiff, because of one or other physical, psychological, or financial weakness, suffers more serious injury or loss as a result of the wrongdoer’s conduct than would have been the case if the plaintiff had not suffered from such a weakness. Most jurists agree that, in such a case, the wrongdoer should also be liable for the harm which may be ascribed to the existence of the weakness concerned – this principle is reflected in the maxim “you must take your victim as you find him”, and is also identified as the *talem qualem* rule.

Given an from case law of an egg-skull case

Wilson v Birt is an example of an egg-skull case. In this case the plaintiff was injured when employees of the defendant, in demolishing scaffolding around a building in a negligent manner, caused a pole to fall down which struck the plaintiff on the back of his head or neck. A few years earlier, the plaintiff had been stabbed in the forehead with a knife and in the ensuing operation to extract a piece of the blade; a portion of the plaintiff’s skull bone was removed. At this spot the skin became attached to the brain. The blow of the pole against the rear of the head or neck therefore caused a more serious brain injury than otherwise would have been the case. The court decided that the defendant was liable for the full extent of the injury, despite the fact that the injury may have been partially attributed to the existing weak spot on the plaintiff’s head.

“Most jurists agree that in an egg-skull case the wrongdoer must also be liable for the harm which may be ascribed to the presence of the weakness. However, there is no agreement on how the liability of the wrongdoer for such harm should be explained, or which criterion for legal causation should be used to express liability in legal terms”. In light of this statement, give an overview of the approaches suggested by Van Rensburg, Van der Walt and Midgely, as well as by Van der Merwe and Olivier, and then give your own point of view in this regard

According to Van Rensburg, in these cases, liability may still be explained with reference to the reasonable foreseeability norm. He is of the opinion that, as a result of the particular circumstances present in these cases, the precise manner in which the consequences occur need not be foreseeable with the same degree of probability that applies in normal cases.

Van der Walt and Midgely link the egg-skull rule to the “direct consequences” theory, and believe responsibility embraces any harm flowing from a latent physical condition of the plaintiff, however unforeseeable or abnormal. The wrongdoer must “take the victim as he finds him”.

Van der Merwe and Olivier, who strictly adhere to fault as a criterion for imputability of harm, contend that “the reasonable man cannot be expected to foresee the unforeseeable”, and declare that the notion that “you must take your victim as you find him” should be rejected insofar as the reasonable person would not have foreseen the consequence concerned and that the injured party should bear the loss himself.

The most acceptable approach to the so-called “egg-skull” cases is made possible by a flexible criterion for legal causation. The basic question is not whether the damage was a direct consequence or reasonably foreseeable, but whether, in light of all the circumstances of the case, amongst others the egg-skull situation, the damage should reasonably be imputed to the defendant.

Study unit 25 – Damage: patrimonial loss and non-patrimonial loss

What does the concept “compensation for damage” mean?

“Damages” is a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as future patrimonial, and, where applicable, non-patrimonial damage. Money is thus intended as the equivalent of damage.

What does the concept “satisfaction” mean?

If damage or loss is incapable of being compensated because money cannot be a true equivalent of the impaired interest(s), satisfaction becomes relevant as a function of the law of delict. Satisfaction implies the reparation of damage in the form of injury to personality by *inter alia* effecting retribution for the wrong suffered by the plaintiff and by satisfying the plaintiff’s and/or the community’s sense of justice. Usually, satisfaction operates through the mechanism of the defendant being ordered to pay a sum of money to the plaintiff in proportion to the wrong inflicted on him.

What is meant by the statement that a wide concept of damage must be adopted? Answer briefly

This means that damage is a comprehensive concept which consists of patrimonial as well as non-patrimonial loss (injury to personality).

Define patrimonial loss

Patrimonial loss is the detrimental impact on any patrimonial interest deemed worthy of protection by the law.

In terms of the juridical concept of patrimony, it consists of all of a person’s patrimonial rights (namely subjective rights with a monetary value), his expectations to acquire patrimonial rights, and all legally enforceable obligations (or expectations) with a monetary value.

What is the content of the comparative methods whereby patrimonial loss is established?

- The sum-formula approach
Entails the comparison of an actual current patrimonial sum with a hypothetical current patrimonial sum (the person’s current patrimonial position after the event, and his hypothetical patrimonial position that would have been the current position if the event had not taken place).
- Concrete concept of damage
The difference between the patrimonial position of the prejudiced person before the wrongful act, and thereafter is compared. Damage is the

unfavourable difference.

It is suggested that our law should adopt and follow the concrete concept of damage, except in instances of prospective loss, liability for misrepresentation and loss of profit.

At what moment is the damage determined for purposes of compensation for damages?

According to current authority, the date of commission of a delict is generally the decisive moment for assessing damage (and this includes future loss). The date of commission of a delict is the earliest date on which all the elements of a delict are present. This does not mean that the full extent of the damage should have occurred, if all the other requirements of a delict are present, the date on which the first damage is manifested is used (if there is a series of harmful consequences caused by the delict).

What does the “once and for all” rule mean?

In claims for compensation and satisfaction arising out of a delict, the plaintiff must claim damages for all damage already sustained or expected in future insofar as it is based on a single cause of action.

The plaintiff must, generally within three years, institute an action in which he claims damages for all damage sustained as well as that expected in future. A plaintiff who has sued with or without success for a part of his damage may not thereafter sue for another part if both claims are based on a single cause of action.

What are the practical implications of the “once and for all” rule in the light of prescription, future damage, and the instituting of more than one claim on the ground of a single cause of action?

See previous answer.

Explain compensating advantages in one sentence

Compensation received from a third party for damage incurred.

Briefly explain what is meant by the plaintiff's duty to mitigate

This means that the plaintiff has a duty to take reasonable steps to limit the initial loss or to prevent further damage, so that the damage does not accumulate. The defendant is obliged to take all reasonable steps to limit the damage caused by the defendant's delict.

A plaintiff who has taken reasonable steps to mitigate loss may also recover damages for any loss caused by such reasonable steps.

Where the plaintiff has reduced his damages by taking reasonable steps in mitigation, the defendant is only liable to compensate him for the actual loss he sustained, even if the plaintiff did more than the law required of him. The onus of proving that the plaintiff did not properly fulfill his duty to mitigate rests on the defendant.

Explain the concept “non-patrimonial loss”

Non-patrimonial damage is the detrimental impact (change in or factual disturbance of) personality interests deemed worthy of protection by the law and which does not affect the patrimony.

Just as patrimonial damage is defined as a reduction in the utility of patrimonial interests, non-patrimonial loss is described with reference to interests of personality. There are rights of personality in regard to the following: physical-mental integrity, liberty, reputation, dignity, privacy, identity, and feelings.

Study unit 26 – Delictual remedies

Name the three actions that form the pillars of the South African law of delict

1. *Actio legis Aquiliae*
2. *Actio iniuriarum*
3. Action for pain and suffering

Discuss the transmissibility (heritability or cedability) of the three better-known delictual actions

The Aquilian action is actively as well as passively heritable; similarly, a claim under this action is freely cedable. *Litis contestatio* has no effect in this regard (unlike the position in respect of the *actio iniuriarum* and the action for pain and suffering).

The *actio iniuriarum* and the action for pain and suffering are actively and passively heritable only after *litis contestatio*. The claim, therefore, lapses if the plaintiff or defendant dies before *litis contestatio*. Claims under these actions are also not cedable, in any case not before *litis contestatio*.

What is the aim and function of an interdict in the law of delict?

To avert an impending wrongful act or prevent the continuation of a wrongful act that has already commenced.

What are the two forms that an interdict can take?

1. Prohibitory interdict (prohibits wrongdoer from committing wrongful act at all or from continuing with a wrongful act).
2. Mandatory interdict (requires positive conduct on the part of the wrongdoer to terminate the continuing wrongfulness of an act that has already been committed).

Name and discuss the three requirements for the granting of an interdict

1. There must be an act by the respondent.
Which could already have commenced or be merely threatening – may be a commission or an omission.
2. The act must be wrongful.
Wrongfulness in this regard means that there must be a threat to or an infringement of a recognised subjective right. This does not imply that where such a right is absent, wrongfulness in respect of an interdict cannot also lie in the breach of a legal duty.
3. No other remedy must be available to the applicant.

When does a concurrence of remedies occur?

One and the same act may in principle result in several – different or alternative – remedies.

An act from which various claims arise, each of which places a distinctive action at the plaintiff's disposal gives rise to different remedies. They may be similar (eg only delictual) or dissimilar (eg delictual as well as contractual).

By contrast, an act from which only one or more claims arise but which offers a choice between different remedies, results in alternative remedies (eg a choice between a contractual and a delictual action).

What is an exclusionary clause?

Parties to a contract may restrict their liability – contractual as well as delictual – through the so-called exclusionary (exemption) clause. The precise restriction on the wrongdoer's liability will depend on the interpretation of the clause concerned, and such interpretation will influence the question of what remedies the prejudiced party has at his disposal.

Write a short note on the prescription of remedies in respect of the law of interdict

According to the Prescriptions Act, a delictual debt prescribes (and the delictual action is thus also extinguished) three years after it originated. With regard to "third party" claims under the Road Accidents Fund, the period is two (or three) years.

When does the period of prescription commence?

The period of prescription commences the moment all the elements of a delict are present and the creditor has knowledge (or ought reasonably to know) of the identity of the wrongdoer and the facts of the case.

Study unit 27 – Joint wrongdoers

What is a joint wrongdoer according to the Apportionment of Damages Act?

Joint wrongdoers are defined as persons who are jointly or severally liable in delict for the same damage.

Briefly explain how the court deals with joint wrongdoing today in terms of the Apportionment of Damages Act

Joint wrongdoers are *in solidum* (jointly) liable for the full damage. The plaintiff therefore has the right to sue whichever joint wrongdoer he chooses for the full amount of damages. Joint wrongdoers may also be sued in the same action. If so, the court may order that the joint wrongdoers shall be jointly or severally liable, and that the payment by one of them shall absolve the others from any liability to the plaintiff. If the court is satisfied that all the joint wrongdoers are before it, it may apportion the damages among them on the basis of their relative degrees of fault, and may give judgment against every wrongdoer for his part of the damages. Where a plaintiff or a defendant in an action notifies a joint wrongdoer of the action before *litis contestatio*, the defendant may claim recourse (contribution) from that joint wrongdoer if he (the defendant) has paid the full amount of damages to the plaintiff as a result of a judgment against him. The right of recourse or recovery of such a defendant is directed at claiming an amount which, taking into account the respective degrees of fault of the joint wrongdoers, is considered to be fair. If the plaintiff recovers only part of his damages from a joint wrongdoer, he may sue any other wrongdoer for the balance. If a joint wrongdoer pays more than is justified by the degree of his fault, he may exercise his right of recourse against any of the other joint wrongdoers.

X and Y break into Z's shop and steal the entire stock of Z's famous ginger beer. Z arrives at the scene just as they start to run away. Z recognises X. The police find X only after he and Y have drunk all the ginger beer. Z wants to claim damages from X. Can Z claim the whole amount of damages from X? How can X improve his own position?

Z can claim the whole amount of damages from X. The plaintiff has the right to sue whichever joint wrongdoer he chooses for the full amount of damages. X may claim recourse from Y.

Say Z above has recognised both X and Y. Can he sue both of them in the same action? Who will be liable to pay the damages?

Yes he can. Joint wrongdoers may be sued in the same action. The court may order that the joint wrongdoers shall be jointly or severally liable, and that

payment by one of them shall absolve the others from any liability to the plaintiff. If the court is satisfied that all the joint wrongdoers are before it, it may apportion the damages among them on the basis of their relative degrees of fault, and may give judgment against both of them for their part of the damages.

Study unit 28 – Psychological lesions (emotional shock)

Explain what is meant by “psychological lesion”

A psychological lesion (psychiatric injury or psychological disturbance) may be described as any recognisable harmful infringement of the brain and nervous system of a person.

Give an overview of the legal position in respect of emotional shock prior to the appeal court decision in *Bester v Commercial Union Versekeringsmaatskappy*

Prior to *Bester*, the South African law of delict lacked clear principles in this field. The courts consistently sought guidance from English law. This resulted in the imposition of two artificial restrictions on liability for emotional shock:

1. The shock (or psychological disturbance) must have originated from a physical injury or resulted in harm to the physical constitution; and
2. The aggrieved party himself must have been in personal danger of being physically injured.

The first restriction concerns the element of wrongfulness, while the second constitutes negligence or legal causation.

Write notes on the way in which *Bester v Commercial Union Versekeringsmaatskappy* influenced delictual liability for causing psychological lesions

Bester v Commercial Union Versekeringsmaatskappy replaced the two former restrictions on liability for causing psychological lesions, with two new principles. A physical injury was held to be not absolutely necessary to found liability. Physical and psychological harm were equated. To be actionable, the harm caused by the shock must be reasonably serious. The requirement of personal danger was similarly rejected and replaced by the yardstick of reasonable foreseeability of harm.

With reference to an example, briefly discuss the requirement that the damage resulting from psychological injury be reasonably serious to be actionable

“Insignificant emotional shock of brief duration and with no material impact on the well-being of the person” will not be actionable. The harm caused by the shock must be reasonably serious to be actionable. For example, in one case, compensation was awarded for shock sustained as a result of the rape of the plaintiff’s daughter. Although the plaintiff was not physically harmed, she was held to have suffered significant emotional shock and trauma, and to still be continuing to suffer.

What restrictions were imposed on the ordinary delictual principles that should have been applied in respect of liability for psychological lesions prior to the *Bester* case? Do these restrictions still apply today? Discuss briefly

See answer above, which discusses two artificial restrictions that were imposed.

Name the factors that can influence the question of the reasonable foreseeability of psychological injury

The following factor may play a role in determining whether the psychiatric injury was reasonably foreseeable:

The fact that the psychological lesion resulted from the physical injury, was connected with such injury, or sustained together with it; the fact that the plaintiff was in personal danger of being physically injured; the fact that the plaintiff was informed of the death or injury of a close relative; and the fact that the plaintiff personally witnessed the death or injury of someone with whom the plaintiff had a close relationship.

The so-called “thin skull” rule finds application in the case of liability for psychological injury. What does this statement mean? Discuss briefly

According to this rule (“thin skull” or *talem qualem* rule), a defendant cannot escape liability by proving that the plaintiff was particularly susceptible to the prejudicial consequences of the shock and that the consequences were therefore not reasonably foreseeable.

Is liability excluded where the prejudiced party who suffered shock did not personally witness the disturbing incident, but learnt of it? Briefly discuss with reference to case law

Liability is not necessarily excluded. Examples of liability in cases where the prejudiced party did not personally witness the disturbing event but merely learnt of it include: Case where plaintiff learnt of the death of her loved one; case where defendant, fully aware of the untruth of the information, told the plaintiff that he had shot and killed the plaintiff’s cousin.

Study unit 29 – Injury or death of another person; pure economic loss; negligent misrepresentation; interference with a contractual relationship; unlawful competition; manufacturer's liability

What is meant by “pure economic loss”? Discuss with reference to case law

On the one hand, pure economic loss may comprise patrimonial loss that does not result from damage to property or impairment of personality (eg where an insurance broker, the defendant, omitted to nominate the plaintiff as beneficiary of a policy taken out by her spouse in the place of another person, as a result of which the plaintiff forfeited the proceeds of the policy at the death of her spouse).

On the other hand, pure economic loss may refer to financial loss that does flow from damage to property or impairment of personality, but which does not involve the plaintiff's property or person; or if it does, the defendant did not cause such damage or injury (eg A negligently damages a cable that provides electricity to B's (plaintiff) factory. B suffers consequential loss of production).

Name five other specific forms of *damnum iniuria datum*

1. Injury or death of another person
2. Negligent misrepresentation
3. Interference with a contractual relationship
4. Unlawful competition
5. Manufacturer's liability

Study unit 30 – The right to physical integrity; the right to a good name or *fama*; rights relating to *dignitas*

Define the concept of defamation

Defamation is the intentional infringement of another person's right to his good name. To elaborate, defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name, or reputation.

Name the requirements for the delict of defamation

- Publication of words or behaviour
- Words or behaviour must have a defamatory effect
- Infringement of a person's right to his good name (wrongful in the opinion of the reasonable person)
- Intent

It is not an element of defamation that the defamatory allegation must be false.

In which of the following situations can it be said that, according to the courts, the publication of (defamatory) words has taken place? Substantiate your answer

- Two Japanese tourists in South Africa start arguing and, in front of a group of South Africans, the one calls the other a liar and a thief
- Mr X tells his wife, Mrs X, that Mrs Y, who works at the office with him, stole some money
- Mr X tells Mr Y that his wife, Mrs Y, stole some money at the office

Publication did take place in (c), but not in (b), and probably not in (a). In (a) the South Africans probably did not understand the defamatory nature of the remarks (uttered in Japanese); and in (b) the communication of defamatory words took place between spouses.

Discuss in detail the test to determine wrongfulness in the case of defamation

Wrongfulness in respect of defamation lies in the infringement of a person's right to good name (*fama*). The test that is applied is whether, in the opinion of the reasonable person with normal intelligence and development, the publication has the tendency to lower the esteem in which the plaintiff is held by the community. It is very important to remember that this reasonable person test is not the reasonable person test used to determine negligence. This reasonable

person test is an objective one, and is actually just a convenient way of expressing the *boni mores* or reasonableness criterion, which is, of course, the normal test for wrongfulness. It is also clear that the words used need not actually lower the plaintiff's reputation or the esteem in which he is held – the reasonable person (as a concretisation of the *boni mores*) must merely think that the words will probably have that effect.

Mention the most important grounds of justification that are relevant in the case of defamation

Privelege, truth and public interest, and fair comment.

Identify the ground of justification that a defendant in a defamation case may use in each of the following situations:

- a) P is a patient of doctor D. P develops breast cancer and D has to perform a mastectomy. The operation leaves P scarred, and she lays a complaint against the doctor with the Medical and Dental Council, which decides that the doctor acted as a reasonable doctor would have in the particular circumstances. D then accuses P of defaming him

Relative privilege will be applicable here, since the supervisory body (the Medical and Dental Council) has a duty to hear patients' complaints about their doctors, and a patient that feels aggrieved surely has a right to complain to the Council. Remember that the defence of relative privilege is only a provisional defence, and the doctor can always prove that the patient acted with improper motive, in which case the ground of justification falls away.

- b) During a court case in which S is accused of stealing money from her employer, a witness W testifies that he saw S taking money from the storeroom. S is later acquitted and wants to sue W for defamation

Here, too, relative privilege is the relevant ground of justification, since all defamatory remarks made during a judicial proceeding are privileged, as long as the remarks are relevant and supported by reasonable grounds.

- c) G and F are members of a town council. Both of them want to be the mayor of the town. During a public meeting that G arranges in order to address the townsfolk, F reveals that G was expelled from a university years ago because he was found guilty of cheating during an examination. G wants to sue F for defamation

The relevant defence will be truth and public interest. Surely it must be in

the public interest to know about the dishonesty of a person running for public office. However, the fact that past transgressions should not be raked up after too long a time is also a factor that should be considered when deciding whether the defence should be upheld.

Define privilege

Privilege exists where someone has a right, duty, or interest to make specific defamatory assertions and the person or people to whom the assertions are published have a corresponding right, duty, or interest to learn of such assertions.

Distinguish between the two forms of privilege as grounds for justification for defamation

A distinction must be made between absolute and relative privilege. In the case of absolute privilege, the defendant is protected absolutely in the sense that liability for defamation is completely excluded. Three instances are regulated statute. Eg, in terms of the Constitution, members of parliament are given complete freedom of speech during the debates or other proceedings of parliament.

By contrast, in the case of relative privilege, the defendant enjoys only provisional or conditional protection. This protection falls away as soon as the plaintiff proves that the defendant exceeded the bounds of the privileged occasion.

Write a note on absolute privilege

See previous answer.

Describe relative privilege and discuss the different fixed categories of relative privilege that have already been developed in our law

In the case of relative privilege, the defendant enjoys only provisional or conditional protection. This protection falls away as soon as the plaintiff proves that the defendant exceeded the bounds of the privileged occasion.

A few categories of this privilege have developed in our law. They are the following:

- a) Discharge of a duty, or furtherance of an interest. This category may be present where a person has a legal, moral, or social duty or a legitimate interest in making defamatory assertions to another person who has a corresponding duty or interest to learn of the assertions.
- b) Judicial or quasi-judicial proceedings. This category concerns defamatory statements made during the course of judicial or quasi-judicial proceedings and applies to all participants therein.
- c) Privileged reports.

Write notes on the ground of justification known as “truth and public interest” in the case of defamation

The *prima facie* wrongfulness of the defendant’s conduct will be cancelled if he proves that the defamatory remarks were true and in the public interest. The defendant need only prove that the remarks are substantially – and not literally – true, ie, that the sting of the charge is true. What is in the interest of the public will depend on the *boni mores*.

Write brief notes on media privilege as a ground of justification

This ground of justification concerns the reasonable publication of false or untrue defamatory statements by the media. Because media privilege deals with the publication of untruths, this defence must be applied with caution. When determining the reasonableness of publication, the *boni mores* must be applied (not merely the public interestedness).

Write brief notes on political privilege as a ground of justification

This defence is analogous to media privilege and entails the reasonable publication of (false or untrue) defamatory allegations on the political terrain. The factors that can play a part here in determining the reasonableness (or otherwise) of publication agree with those applicable to media privilege, with one exception, ie that the publication must be made “with the reasonable belief that the statements are true”.

Write notes on the ground of justification known as “fair comment” in the case of defamation

The *prima facie* wrongfulness of a defamatory publication may be set aside if the defendant proves that the defamation forms part of a fair comment on facts that are true and in the public interest. Thus there are four requirements:

- a) The defamation must amount to comment and not the assertion of an independent fact. The test is that of the reasonable person.
- b) The comment must be fair (by reference to *boni mores*).
- c) The facts on which the comment is based must be true.
- d) These facts must be in the public interest.

Discuss *animus iniuriandi* as a requirement for defamation

Animus iniuriandi or the intent to defame means “the mental disposition to will the relevant consequences, with the knowledge that the consequence will be wrongful”. If one of these elements is absent, there is no question of intent to defame. If it is certain that the publication is defamatory and that it relates to the plaintiff, there is, apart from the presumption of wrongfulness, also a

presumption that the defamation was committed intentionally. The burden of rebutting the presumption is on the defendant.

Discuss the grounds excluding intent in the case of defamation

Mistake: If a person is unaware of the wrongfulness of his defamatory publication because for whatever reason he *bona fide* thinks or believes that his conduct is lawful, consciousness of wrongfulness, which is an essential element of intent, and therefore also intent, are absent as a result of his mistake. His mistake therefore rebuts the presumption of *animus iniuriandi* and in this way becomes a ground excluding intent.

Jest: If the defendant proves that he published the defamatory words in jest, in circumstances where his will was not directed at the infringement of the prejudiced person's right to good name, directing of the will as essential requirement of intent is absent and he should be able to rebut the presumption of *animus iniuriandi*. The courts, however, incorrectly fail to follow this approach. For a successful plea of jest, the courts require that the (reasonable) bystander should also have regarded the words as a joke. If that is indeed the case, the defendant is not liable; if not, the defendant is held liable, evidently irrespective of the actual absence or presence of *animus iniuriandi*.

Is intent a requirement for liability of the press and other media in the case of defamation? Discuss

Although *animus iniuriandi* is traditionally required for defamation, negligence has, over the course of time, been accepted as the fault requirement for certain forms of defamation. In the first place, liability based upon negligence has been recognised for distributors and sellers of printed matter (eg newspapers and magazines) containing defamatory matter. Secondly, there are judgments on the liability of the press for defamation recognising non-intentional but negligent mistake as a ground for liability. Thirdly, a general principle was introduced in *National Media Ltd v Bogoshi* that negligence is sufficient for defamation by the mass media. Finally, there is case law that wants negligence recognised for all instances of actionable defamation, and not only in respect of the mass media.

Name five other forms of personality infringement

1. The right to *corpus* or body
2. Seduction
3. Wrongful deprivation of liberty or wrongful arrest
4. Malicious deprivation of liberty
5. Malicious prosecution
6. Attachment of property
7. The right to dignity
8. The right to privacy
9. The right to identity
10. Breach of promise

11. Adultery
12. Abduction, enticement, and harbouring.

Explain what the right to dignity is and, briefly, how it is infringed

A person's dignity is recognised in our law as an independent personality right within the concept of *dignitas*. A person's dignity embraces his subjective feelings of dignity or self-respect. Infringement of a person's dignity accordingly consists of insulting that person. There are an infinite number of ways in which a person may be insulted. To be classified as wrongful, the behaviour must not only infringe the subjective feelings of dignity (factual infringement of a legal object), but must at the same time be *contra bonos mores*.

Explain what the right to privacy is and, briefly, how it is infringed

Privacy is an individual condition of life characterised by seclusion from the public and publicity, the extent of which is determined by the individual himself. This implies an absence of acquaintance with the individual or his personal affairs in this state. Accordingly, privacy can only be infringed by unauthorised acquaintance by outsiders with the individual or his personal affairs.

There are two ways in which such acquaintance may occur: firstly, when an outsider himself becomes acquainted with the individual or his personal affairs (which may be described as intrusion) and secondly, where the outsider acquaints third parties with the individual or his personal affairs which, although they are known to the outsider, remain private.

Explain what the right to identity is and, briefly, how it is infringed

Identity is that uniqueness which identifies each person as a particular individual and as such distinguishes him from others. Identity manifests itself in various *indicia* by which the person involved can be recognised: ie, facets of his personality which are distinctive of or peculiar to him, eg his life history, his character, his name, his creditworthiness, his voice, his handwriting, his outward shape, etc. Identity is thus infringed if *indicia* thereof are used in a way that does not reflect the person's true (own) personality image.

Two forms of wrongful identity infringement, which have developed into two independent "torts" in American law, are the public falsification of the personality image ("false light tort") and the economic misappropriation of identity *indicia* (especially for advertising purposes).

Study unit 31 – General: Damage caused by animals

Discuss in detail the requirements for success with the *actio de pauperie* with reference to case law, as well as the defences that can be raised against the action

Requirements:

1. The defendant must be the owner of the animal when the damage is inflicted (mere control over the animal is insufficient).
2. The animal must be a domestic animal.
3. The animal must act *contra naturam sui generis* when inflicting the damage (contrary to what may be expected of a decent and well-behaved animal of its kind).
4. The prejudiced person or his property must be lawfully present at the location where the damage is inflicted.

Defences:

Vis maior, culpable or provocative conduct on the part of the prejudiced person, culpable conduct on the part of an outsider, and provocation by another animal. Apart from these, the defence of *volenti non fit iniuria* in the form of voluntary assumption of risk is also available to the defendant.

In which instances is the *actio de pastu* applied?

With this action, damages are claimed from the owner of an animal which caused loss by eating plants.

Name the requirements for the *actio de pastu*

1. The defendant must be the owner of the animal when the damage is caused.
2. The animal must cause damage by eating plants.
3. The animal must act of its own volition when causing the damage.

Answer the following questions in respect of each of the factual situations described below:

- a) B is delivering mail to A's house and A's dog bites her.
- b) B plans to visit her friend, C, who is looking after A's house. C mentions to B that there is a vicious dog on the premises, but promises to have the dog locked up before B arrives. B arrives at the appointed time, but on entering the premises, the dog comes running around the corner of the house and bites her leg.
- c) A's cattle graze on B's crops after one of A's employees left the gate between A and B's farm open.

- i. What action is available to B in order to recover the damages?
- ii. Against whom does B institute the action?
- iii. How would you substantiate your answer?
 - a) (i) The *actio de pauperie*
(ii) Against the owner A
(iii) All the requirements for the action are met (see above).
 - b) (i) The *actio legis Aquiliae* and the action for pain and suffering.
(ii) Against C
(iii) The owner cannot be liable in terms of the *actio de pauperie*. C is liable because of her negligence. The plaintiff must therefore institute ordinary delictual actions for patrimonial loss (medical costs, etc) and pain and suffering.
 - c) (i) The *actio de pastu*
(ii) Against A
(iii) All the requirements for the action are met (see above). Negligence of a third party (the employee) does not exclude the owner's liability.

Study unit 32 – Vicarious liability

Describe the concept “vicarious liability”

Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. This liability applies where there is a particular relationship between two persons.

Name three relationships to which vicarious liability applies

1. Employer – employee
2. Principal – agent
3. Motorcar owner – motorcar driver
4. State – public school

Name the requirements for an employer to be vicariously liable for a delict of his employee

1. There must be an employer – employee relationship at the time when the delict is committed.
2. The employee must commit a delict.
3. The employee must act within the scope of his employment when the delict is committed.

Name the requirements for vicarious liability that arises from the motorcar owner – motorcar driver relationship

1. The owner must request the driver to drive the vehicle or supervise his driving.
2. The vehicle must be driven in the interest of the owner.
3. The owner must retain a right (power) of control over the manner in which the vehicle is driven.

Study smart.