LAW OF DELICT
DEL 314

2012
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UNIT 1: INTRODUCTION TO THE LAW OF DELICT


LEARNING OUTCOMES

After completion of Unit 1, you should be able to do the following:

- Describe the role of the law of delict.
- Explain the meaning and implication of the *res perit domino* principle.
- Name and describe the instances in which the *res perit domino* principle will not apply.
- Determine where the law of delict fits into the whole system of law.
- Explain why the law of delict is part of the law of obligations.
- Define a delict.
- List the five elements of a delict.
- Distinguish between the generalising and casuistic approaches to the law of delict.
- Name the most important delictual actions and distinguish between them.
- Name the differences/similarity between a delict and a breach of contract.
- Name the differences/similarities between a delict and a crime.
- Write brief notes on the historical development of the action for pain and suffering.
- Explain how the Bill of Rights (Chapter 2 of the Constitution) influences the law of delict and is applicable to it.

READINGS

- *Dendy v University of the Witwatersrand and Others* 2005 5 SA 357 (W).
- *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).
1. DELICT: GENERAL NATURE AND PLACE IN THE LEGAL SYSTEM

Study

- Paragraph 1 of chapter 1 of the textbook and footnotes 5, 6, 9, 12 and 14.
- The first 11 lines of chapter 7 and footnote 3 on that page.

The following diagram indicates where the law of delict fits into the whole system of law:

A delict is defined in paragraph 1 as the act of a person who in a wrongful and culpable way causes harm to another.

This means that all five of the elements of a delict must be present to hold someone liable for a delict. If any one of the elements (the act, wrongfulness, fault, causation, or harm) is absent, there can be NO delictual liability. Strict liability (see footnote 12) only finds application in a few exceptional circumstances. Each of these elements is discussed fully in the next six units.
Here is an example of what the relevant paragraphs of a combined summons must contain on the ground of, for example, assault (an infringement of a person’s physical mental integrity):

1
(Contains particulars of the plaintiff: name, address, etc.)

2
(Contains particulars of the defendant.)

3
On the 1st of January 2001 in Bloemfontein, the defendant intentionally and wrongfully hit the plaintiff with a fist.

4
As a result of this behaviour of the defendant, the plaintiff suffered damages to the amount of R5 000.

Do you recognise the five elements?

In the law of delict – as a general rule – a person will only have a cause of action against another if all five the elements of a delict are present. These elements are the facta probanda of a delict. (Facta probanda are all the facts the plaintiff must prove to succeed with the claim.)

The following diagram contains a brief but full distinction between the three most important delictual actions, and you must know this off by heart (and understand it)

<table>
<thead>
<tr>
<th></th>
<th>Actio legis Aquiliae</th>
<th>Actio iniuriarum</th>
<th>Action for pain and suffering</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Applied when wrongfulness is situated in infringement of:</strong></td>
<td>➢ real rights</td>
<td>➢ personality rights: corpus (fama) and (dignitas)</td>
<td>➢ personality rights: corpus</td>
</tr>
<tr>
<td></td>
<td>➢ personal rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>➢ immaterial property rights (patrimonial loss)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Fault requirement</strong></td>
<td>Intent/negligence</td>
<td>Intent</td>
<td>Intent/negligence</td>
</tr>
<tr>
<td><strong>Type of damage claimed</strong></td>
<td>Damages</td>
<td>Satisfaction</td>
<td>Compensation</td>
</tr>
<tr>
<td><strong>Transmissibility of action</strong></td>
<td>Actively and passively transmissible before and after litis contestatio</td>
<td>Actively and passively heritable after litis contestatio</td>
<td>Actively and passively heritable after litis contestatio</td>
</tr>
</tbody>
</table>

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Activity 1

1. Explain why the elements of a delict can also be named the *facta probanda* of a delict.
2. Name the elements of a delict.
3. The *causation* element of a delict is in reality divided into two elements. Name them.
4. Explain the advantages that the generalising approach to the law of delict has over the casuistic approach.
5. The generalising approach is subject to an important qualification: a distinction is made between two categories of delicts. Name the categories.
6. Translate into English: *damnum iniuria datum* and *iniuria*.
7. Distinguish fully between the three pillars (most important actions) of the law of delict (by way of a diagram or otherwise).
8. Explain the difference between active and passive transmissibility of a delictual action. (See Chapter 7, footnote 3.)
9. Give three examples of delicts in the category *damnum iniuria datum* and five examples of delicts in the category *iniuria*.

2. DELICT AND BREACH OF CONTRACT

Study paragraph 2 of Chapter 1 of the textbook.

Activity 2

1. What is the similarity between a delict and a breach of contract?
2. Why is it necessary to distinguish between a delict and breach of contract?
3. Can the same act constitute both a delict and a breach of contract?

3. DELICT AND CRIME

Study paragraph 3 of Chapter 1 of the textbook.

Activity 3

1. What is the similarity between a delict and a crime?
2. Name the differences between a delict and a crime.
3. Can the same act be both a delict and a crime? Explain with reference to some examples. (See footnotes 30 to 32.)
4. HISTORICAL DEVELOPMENT OF DELICTUAL LIABILITY

Read paragraphs 4.1 to 4.3. These paragraphs are not for examination purposes.

Study paragraph 4.4.

Note the difference between Roman law, Roman-Dutch law, and South African law with regard to the protection of the physical-mental integrity of a person.

Activity 4

1. Describe the historical development of the action for pain and suffering.
2. Name the recognised injuries to personality for which compensation can be claimed with the action for pain and suffering in South African law.

5. THE LAW OF DELICT, THE CONSTITUTION, AND FUNDAMENTAL (HUMAN) RIGHTS

Study

- Paragraph 5 and footnote 147 and 161 in the textbook and the following judgements in the Case book.
- Fose v Minister of Safety and Security 1997 3 SA 786 (CC).
- Dendy v University of the Witwatersrand Johannesburg 2005 5 SA 357 (W).
- Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC).

The introductory part in paragraph 5 is done in Public Law. As it is very important for the law of Delict, it is also briefly dealt with in this course.
<table>
<thead>
<tr>
<th>Activity 5</th>
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<tr>
<td>1. Is Chapter 2 (the Bill of Rights) of the Constitution also applicable to the law of delict?</td>
</tr>
<tr>
<td>2. Langa CJ said the following: “the Bill of Rights in this respect merely emphasises the .... principles already at play in the common law”: Briefly explain the implications of this statement.</td>
</tr>
<tr>
<td>3. Can there be a lawful limitation of a fundamental right?</td>
</tr>
<tr>
<td>4. Explain the role of the courts when developing the common law, in view of the Constitution. Refer to applicable case law.</td>
</tr>
<tr>
<td>5. Explain the difference between the direct vertical and direct horizontal application of the Constitution.</td>
</tr>
<tr>
<td>6. Name the fundamental rights entrenched in Chapter 2 of the Constitution that are relevant to the law of delict.</td>
</tr>
<tr>
<td>7. Give an example of where two fundamental rights are in conflict and explain how it should be dealt with.</td>
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<tr>
<td>8. What is the worth of the entrenchment of fundamental rights in the Bill of Rights?</td>
</tr>
<tr>
<td>9. Is the right to fama (good name) entrenched in the Constitution? Explain briefly. (See footnote 147.)</td>
</tr>
<tr>
<td>10. Is an infringement of a fundamental right <em>per se</em> also a delict? Discuss, and refer to applicable case law.</td>
</tr>
<tr>
<td>11. Explain the indirect application of the Bill of Rights to the law of delict.</td>
</tr>
</tbody>
</table>
UNIT 2: CONDUCT

LEARNING OUTCOMES

After completion of Unit 2, you should be able to do the following:

- Define an act.
- Name the requirements (characteristics) of an act, and apply them to factual examples.
- Explain the nature of a defence of automatism.
- Distinguish between a *commissio* and an *omissio*.

READINGS

1. **NATURE AND CHARACTERISTICS OF CONDUCT**

Study paragraph 2 and footnote 2, 7 and 11 of the textbook.

Conduct is a prerequisite for delictual liability.

**Activity 1**

1. Briefly criticise the contention in *Gijzen v Verrinder* that an act is not a requirement for delictual liability. Also mention the example to which the court referred. (See footnote 2.)
2. Name the characteristics of an act.
3. After being ordered to do so, A’s dog bites B. Is there an act present for the purpose of delictual liability?
5. Which rule can, according to Neethling *et al.*, be used to determine whether a human act can be attributed to a juristic person for the purpose of *ex delicto* liability?
6. When will conduct be voluntary?
7. Does voluntariness mean that a person must have willed or desired his or her conduct? Explain with reference to an example.
8. Can an infant or a mentally ill person act voluntarily?

2. **DEFENCE OF AUTOMATISM**

Study

- Paragraph 3 and footnotes 21 and 24 of the textbook.
- Read footnotes 18 and 22 to 38.

**Activity 2**

1. What is meant by a “defence of automatism”?
2. Name the conditions that may cause a person to act involuntarily.
3. Explain the difference between absolute compulsion (*vis absoluta*) and relative compulsion (*vis compulsiva*) by referring to examples. (See footnote 21.)
4. Write short explanatory notes on the concept *actio libera in causa*.
5. X has been a diabetic for 20 years. He is fully aware of how to control his blood-sugar levels by eating at regular intervals and taking his medication. He neglects to eat and then drives a car. He lapses into a coma as a result of low blood-sugar and collides with Y’s vehicle. Can X sustain delictual liability?
6. Who bears the burden of proof for a defence of automatism? Refer to applicable case law.
7. Which element of a delict is excluded by automatism? Give the views of both Van der Merwe and Olivier and Neethling *et al.*
3. COMMISSION AND OMISSION

Study paragraph 4.

Activity 3

1. Why is it important to distinguish between a commission and an omission?
2. What is the meaning of *culpa in faciendo*?
3. Distinguish between an omission and *culpa in faciendo* with reference to examples from case law.
UNIT 3:
WRONGFULNESS:
BASIC PRINCIPLES

DELICT

- Wrongfulness
- Fault
- Conduct
- Causation
- Damage
INTRODUCTION

Wrongfulness is probably the central element: it contains the essence of a delict, namely, that the wrongdoer must have acted in a legally reprehensible, unlawful, or unreasonable manner.

The layout of Unit 3 is as follows:

| Unit 3.1: Introduction; Act and Consequence; the Basic Test for Wrongfulness (Boni Mores). |
| Unit 3.2: Wrongfulness as Infringement of a Right. |
| Unit 3.3: Wrongfulness as Breach of a Legal Duty. |

READINGS

- All cases referred to are in the case book (2007).
- Minister van Polisie v Ewels 1975 SA 102 (A).
- Cape Town Municipality v Bakkerud 2000 3 SA 1049 SCA.
- Minister of Safety and Security v van Duivenboden 2002 6 SA 431 (SCA).
- Administrator, Transvaal v Van der Merwe 1994 4 SA 347 (A).
- Van Eeden v Minister of Safety and Security 2003 1 SA 389 (SCA).
- Telematrix (Pty) Ltd t/a Matrix Vehicle Trading v Advertising Standards Authority SA 2006 1 SA 461 (SCA).
- Road Accident Fund v Mtati 2005 6 SA 215 (SCA).
UNIT 3.1: INTRODUCTION; ACT AND CONSEQUENCE; THE BASIC TEST FOR WRONGFULNESS (BONI MORES)

LEARNING OUTCOMES

After completing Unit 3.1, you should be able to do the following:

- Describe the dual investigation involved when determining wrongfulness.
- Explain the relationship between wrongfulness, an act, and its harmful consequence.
- Explain why the concepts "boni mores" and "the legal convictions of the community" are used synonymously.
- Describe the characteristics of the boni mores test and its operation.
- Discuss the practical application of the boni mores criterion.

1. INTRODUCTION

Study paragraph 1 and footnote 4 and 8 of Chapter 3.

To determine wrongfulness, a dual investigation must be done:

- Did the act cause a harmful result?
- Did the harm occur in a legally reprehensible or unreasonable manner?

Only if the answer to both questions is “Yes” will wrongfulness be present. A harmful consequence in itself is insufficient to constitute wrongfulness.

Example: X breaks the window of Y’s house to rescue an old lady who suffers a heart attack inside. Surely, a harmful result is present: the window is broken, but X did not act in an unreasonable way, and therefore, wrongfulness is absent. X will not be liable for the damage to Y’s window. (This is a case of necessity, which will be dealt with in Unit 4). Legal norms are applied to answer the second question.

Activity 1

1. Explain the following statements:
   1.1 "The determination of wrongfulness essentially entails a dual investigation."
   1.2 “Wrongfulness should be determined objectively and ex post facto.”
2. **ACT AND CONSEQUENCE**

**Study**
- Paragraph 2 of the textbook. This paragraph deals with the first step of the dual investigation into wrongfulness.

The main features of this paragraph are the following:
- In the law of delict an act can only be wrongful with reference to a consequence;
- An act and its consequence are always separated by time and space; and
- The application of the above principles to case law.

<table>
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<tr>
<td>1. X races down Bloemfontein's main street at 120 km/h, but causes nobody any damage. Did X act delictually wrongfully? Briefly explain.</td>
</tr>
<tr>
<td>2. Suppose that in <em>Pinchen v Santam Insurance Co Ltd</em> 1963 2 SA 254 (W), it was proved that the unborn baby's brain damage was factually caused by the motorcar accident. Would it then have been necessary to employ the <em>nasciturus</em> fiction in order to grant a delictual action to the child? Briefly explain and refer to recent case law.</td>
</tr>
</tbody>
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3. **THE LEGAL CONVICTIONS OF THE COMMUNITY (BONI MORES) AS THE BASIC TEST FOR WRONGFULNESS**

**Study** paragraph 3 of the textbook and footnotes 20, 24, 36-39, 42, 57 and 60.

In this paragraph, we begin to deal with the second step of the dual investigation into wrongfulness, namely, whether the loss was caused in a legally reprehensible way.

The main features of paragraph 3 are as follows:

a) The description of the *boni mores* test; and
b) The balancing of interests (paragraph 3.1).
This paragraph is extremely important; it describes the way the *boni mores* test operates:

- *Ex post facto* (after the event, looking backwards);
- BALANCING OF INTERESTS;
- *All* relevant circumstances taken into account;
- *Factors* influencing the balancing process;
- Convictions of specific community;
- At a specific time.

c) A delictual criterion (paragraph 3.2).
d) An objective criterion (paragraph 3.3); the role of the adjudicator and of subjective factors.
e) Practical application of the *boni mores* criterion (paragraph 3.4).

- Vague test and seldom necessary to apply directly.

Reasons:

1. Infringement of interests indicates wrongfulness.
   a) Actual infringement is *prima facie* wrongful.
   b) Legally reprehensible? A further investigation may reveal a justification (legal excuse).

2. Existing legal norms: more precise methods have been developed.

- *Boni mores* test as supplementary criterion (when applied directly?)
  
  1. The textbook declares that this basic test is *seldom* applied directly, but do not be misled; “seldom” in this paragraph means *whenever wrongfulness is in dispute*.

  2. There are two main ways in which it is applied directly. (See textbook (a) and (b) and the examples given under each in paragraph 3.4.).

  3. Remember that the *boni mores* test is used in instances of both:
     3.1 positive conduct (commissions) (normally, the question will be whether a subjective right has been infringed), and
     3.2 omissions (the question will be whether there was non-compliance with a legal duty to act positively).

The wrongfulness or the lawfulness of the conduct does not appear clearly from the facts – therefore, a balancing or weighing up of interests must be done. The scale appears to be in this position: △△△.
UNIT 3.2:
WRONGFULNESS AS INFRINGEMENT OF A RIGHT

LEARNING OUTCOMES

After studying Unit 3.2, you should be able to explain the importance of the "doctrine of subjective rights" for the determination of wrongfulness.

1. WRONGFULNESS AS INFRINGEMENT OF A RIGHT

Study

- Paragraph 4 of the textbook and footnotes 89, 92 and read footnotes 96 and 97.
You are familiar with the content of most of this unit, as you made an in-depth study of subjective rights in your first year. It is, however, essential that you refresh your memory on this. Paragraph 4.5 is specifically important and should be studied supplementary to this note.

In the previous unit (paragraph 3.4), we saw that the *boni mores* test is seldom applied directly, because more precise methods have been developed to determine the legal convictions of the community.

One of these methods is the view that wrongfulness is present where a subjective right has been infringed. This is the method most often used in practice to determine wrongfulness. But mostly it is applied tacitly, and it also produces the least difficulties. The reason: in these instances, wrongfulness is NOT IN DISPUTE! The dispute will normally be whether the next element, namely, fault, is present.

Regarding wrongfulness, the scale is in this position: ![scale]

This method to determine wrongfulness is used when there is a clear infringement of a subjective right by way of a commission (positive act). There is also a dual investigation that must be done – study this in paragraph 4.5.

Remember, the presence of wrongfulness must be determined in each case. In the instance under discussion, it is only done tacitly – because wrongfulness is not in dispute, but fact of wrongfulness is still determined.

**Activity 1**

1. What is the fundamental premise of the doctrine of subjective rights?
2. Is infringement of a subjective right the only test for wrongfulness? Supply case law to support your answer. (See footnote 89.)
3. Briefly describe the dual relationship that characterises every subjective right.
4. “The subject-object relationship confers the holder of a right” with certain powers. Name these powers.
5. “Every subjective right that someone is entitled to has a correlative legal duty for someone else.” What does this statement mean?
6. Name the different categories into which subjective rights are classified, and indicate (with reference to an example in each instance) the objects of each category.
7. Discuss the importance of the judgement in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1997 4 SA 376 (T) for the determination of the wrongfulness element.
8. Explain in which instances wrongfulness will be determined by asking whether a subjective right has been infringed.
9. Describe the dual investigation that is necessary to determine whether a subjective right has been infringed.
UNIT 3.3:
WRONGFULNESS AS
BREACH OF A LEGAL DUTY

LEARNING OUTCOMES

After you have studied Unit 3.3, you should be able to do the following:

- Explain the relationship between subjective rights, legal duties, and wrongfulness.
- Explain the principles applicable when determining whether an omission is wrongful or not, and apply them to a factual situation.
- Name and describe the crystallised factors that may play a role in the determination of the wrongfulness of an omission.
- Explain how the wrongfulness of a breach of a statutory duty will be determined.

1. GENERAL

Study

- Paragraph 5.1 of the textbook.
- *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA).

In the previous unit (in paragraph 3.4: Existing legal norms and doctrines), we saw that one method of determining wrongfulness is that infringement of a subjective right would amount to wrongfulness and the other that non-compliance with a legal duty to act would be wrongful. In this unit, we are dealing with the latter. Paragraph 5.1 contains an explanation of the instances where wrongfulness is determined in this way.

Activity 1

1. Explain why it is sometimes more appropriate to determine wrongfulness by asking whether a legal duty has been breached than by asking whether a subjective right has been infringed. Refer to applicable case law.
2. Does the determination of wrongfulness by the use of breach of a legal duty entail a new test? Briefly explain.
3. Some judgements describe the legal duty in regard to wrongfulness as “a legal duty not to act negligently”. Briefly criticise this.
2. LIABILITY FOR AN OMISSION

This is a long paragraph with a lot of additional reading (prescribed judgements).

Study: Paragraph 5.2 (including subparagraphs 5.2.1 to 5.2.8) of the textbook.


3. JUDGEMENTS

Study the following (in case book):

- Minister van Polie v Ewels 1975 3 SA 102 (A). (See also paragraph 5.2.1 plus footnotes.)
- Cape Town Municipality v Bakkerud 2000 3 SA 1049 SCA. This case is important; the Supreme Court of Appeal laid down principles regarding the liability of municipalities (paragraph 5.2.1).
- Administrator, Transvaal v Van der Merwe 1994 4 SA 347 (A). (See paragraph 5.2.2 and footnotes 168 to 171.)
- Minister of Safety and Security v van Duivenboden 2002 6 SA 431 (SCA).
- Van Eeden v Minister of Safety and Security 2003 1 SA 389 (SCA).

This unit is extremely important; in legal practice, wrongfulness is often in dispute in instances of omissions. The reason: liability on the ground of an omission is exceptional.

Paragraph 5.2, firstly, emphasises the general rule that a person does not act delictually wrongfully where he or she fails to act positively to prevent harm to another. Secondly, the way to determine the wrongfulness of an omission is discussed.

Normally, the boni mores test – the balancing/weighing up of interests – will have to be done because wrongfulness will be in dispute. At first glance, the scale will normally be $\Delta I = \Delta$. The same boni mores test with which you are (so) familiar by now must be applied. However, now the question is not whether a subjective right was infringed, but whether a legal duty rested on the defendant and he or she failed to comply with that duty. (He or she failed to act positively to avert the harm of the plaintiff.)

When determining the wrongfulness of an omission, there are seven so-called crystallised factors that may indicate the existence of a legal duty to act positively to prevent harm. These factors are discussed from paragraph 5.2.1 to paragraph 5.2.7. Remember that the factors mentioned in Unit 3.1 (paragraph 3.1) are used supplementary to the crystallised factors. Sometimes there are no crystallised factors present in a factual situation, but the omission can still be wrongful. The summary in paragraph 5.2.8 explains this situation where only the factors in paragraph 3.1 are used in the balancing process.
It will all depend on the circumstances: when wrongfulness is in dispute, the scale appears to be in this position: △ /// △.

So a balancing/weighing up of interests must be done. In another situation, one or more crystallised factors may be present, and wrongfulness will not be in dispute. (The scale is: △ /// △.)

Normally, in the case of an omission, wrongfulness will be in dispute, and the crystallised factors (if any are present) as well as the other factors (mentioned in paragraph 3.10) are taken into account in the balancing process.

See the Bakkerud, Van Eeden-, and Carmichele cases.

**Activity 2**

1. In *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596, it was stated: "As a point of departure it is accepted that there is in general no legal duty on a person to prevent harm to another." Briefly discuss this statement.
2. Name seven (crystallised) factors that may indicate the existence of a legal duty to act positively to prevent harm.
3. With reference to case law, describe the main features of the historical development of the so-called "prior conduct" requirement in determining liability for an omission. Also indicate the present legal position regarding the role "prior conduct" plays.
4. Discuss the importance of *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 SCA regarding the liability of a municipality for an omission.
5. Briefly discuss the role that the following factors play in the determination of delictual liability on the ground of an omission. Refer to examples and applicable case law when discussing:
   a) Control of a dangerous object;
   b) Rules of law;
   c) A special relationship between the parties;
   d) A particular office;
   e) Contractual undertaking for the safety of a third party; and
   f) Creation of the impression that the interests of a third party will be protected.
6. The courts increasingly use the interaction of multiple (constitutional and common law) factors to determine whether a legal duty to prevent damage exists in a specific case. Explain this interaction with reference to a court case and name the relevant factors.
7. Are constitutional imperatives indispensable for a finding that there is a legal duty on the state? Explain briefly and refer to examples from case law.
8. X, a champion swimmer, is walking alongside a river and sees a small child drowning. He fails to rescue the child. As a result of his omission, the child suffers serious brain damage and becomes quadriplegic. Was there a legal duty on X to rescue the child? Discuss, and refer to case law.
9. The Provincial Administration controls various nature reserves in the province. Since it is a natural resource, the public is encouraged to visit the reserves. Camping sites were established alongside the dams where people fish. There are various animals in the reserve, including dangerous animals such as rhinos and buffaloes. There is no fence separating the campsites and fishing spots from the rest of the reserve.

One weekend Peter Peters (PP) and his family camp alongside the dam. Late that night PP walks to the toilet facilities and encounters a buffalo, which immediately charges at him. PP fortunately escapes with his life, but is seriously injured. He claims his medical expenses of R300 000.00 as well as for pain and suffering from the Provincial Administration.

Suppose that the Province’s failure to erect the necessary fences is an omission. The only element in dispute is wrongfulness.

a) How will the fact that an omission is present influence the test for wrongfulness? Explain.

b) Application: identify five “factors” in the above set of facts that could (or could not) indicate wrongfulness. Motivate your answer by briefly stating each one’s relevance to the set of facts, and also furnish applicable case law for each.

10. Study prescribed cases in the case book.

4. BREACH OF A STATUTORY DUTY

Study paragraph 5.3 of the textbook.

Activity 3

1. X, who traded in the vicinity of a mining compound, applied for an interdict against Y, who ran a similar trade on claim land at the entrance of the compound. X based his application, inter alia, on the fact that trading on claim land was prohibited by statute. What must X prove, according to McKerron, in order to establish that Y’s conduct was wrongful?

5. WRONGFULNESS AS THE REASONABLENESS TO HOLD THE DEFENDANT LIABLE

Read paragraph 6 of the textbook. A short class discussion will be done on this.
UNIT 4:  
WRONGFULNESS:  
GROUNDS OF JUSTIFICATION  

INTRODUCTION

In the previous unit, you dealt with the ways in which one can determine whether wrongfulness is present in a given set of facts. This unit is still concerned with the element of wrongfulness. The different grounds of justification will be studied. Grounds of justification are special circumstances in which conduct that appears to be wrongful (because a harmful result is present) is, in fact, lawful (because there is no violation of a legal norm). Refresh your memory by reading the introduction to Unit 3.1 of your study guide.

If a ground of justification is present, wrongfulness is excluded and, thus, also delictual liability.

The layout of Unit 4 is as follows:

| Unit 4.1: | Introduction; Private Defence as Ground of Justification. |
| Unit 4.2: | Necessity as Ground of Justification. |
| Unit 4.3: | Provocation as Ground of Justification. |
| Unit 4.4: | Consent as Ground of Justification. |
| Unit 4.5: | Statutory Authority; Official Capacity, Execution of an Official Command, and Power to Discipline. |
| Unit 4.6: | Abuse of Right and Neighbour Law; Nuisance. |

READINGS

- *Ex parte Die Minister van Justisie: In re S v van Wyk* 1967 1 SA 488 A (as summarised in footnote 398).
- *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) (as discussed in footnote 529 of your textbook).
- *Castell v De Greeff* 1994 4 SA 408 (C) (as discussed in footnote 530 of your textbook).
- *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) (as discussed in footnotes 532 and 539 of your textbook).
- *Boshoff v Boshoff* 1987 2 SA 694 (0) (as discussed in footnote 536).
UNIT 4.1: INTRODUCTION; PRIVATE DEFENCE AS GROUND OF JUSTIFICATION

LEARNING OUTCOMES

After completing Unit 4.1, you should be able to do the following:

- Explain the concept “ground of justification” by referring to an example.
- Describe the connection between the boni mores or reasonableness criterion and grounds of justification.
- Define private defence, and give an example.
- Name and apply the requirements for private defence to a set of facts.

1. INTRODUCTION

Study paragraph 7.1 and footnotes 325 and 332 of the textbook.

Activity 1

1. What is a ground of justification? Briefly explain by referring to an example.
2. What is the connection between the boni mores (or reasonableness) criterion and grounds of justification?
3. Who bears the onus to prove the existence of a ground of justification?
2. PRIVATE DEFENCE

Study

- Paragraph 7.2 and footnotes 333, 334, 361, 365, 368, and 398.
- *Ex parte Die Minister van Justisie: In re S v van Wyk* 1967 1 SA 488 A as summarised in footnote 398 and see Case book.

Activity 2

1. Define private defence, and give an example.
2. Why would it be incorrect to use the term “self-defence” as a synonym for “private defence”?
3. Briefly criticise the way in which the existence of private defence was determined in *Mugwena v Minister of Safety and Security* 2006 4 SA 150 (SCA).
4. Name the requirements for the attack in case of private defence.
5. Will a defensive action against an attack by a dog constitute (private) defence (“noodweer”)? Explain.
6. B points a revolver at A with the apparent intention of shooting A, whereupon A produces his own firearm and shoots B. Afterwards it appears that B only intended to frighten A and merely pointed a water pistol at A. Did A act in (private) defence? Explain. (See footnote 361.)
7. A threatens B that one day he is going to kill B. B considers going and killing A.
   7.1 Will B succeed with private defence as a ground of justification if he kills A?
   7.2 What will your advice to B be if he is threatened in this way? (See also footnote 365.)
8. Name the requirements for the defence and also two considerations that are not requirements in case of private defence.
9. A is able to protect his interests by taking flight. He, however, decides not to flee, but to defend himself. Will he succeed with private defence as a ground of justification?
10. Is it a requirement for private defence that the interests must be commensurate? Discuss.
11. May a person protect his possessions by even killing the attacker? Discuss and refer to authority. (See footnote 398.)
UNIT 4.2: 
NECESSITY AS 
GROUND OF JUSTIFICATION

LEARNING OUTCOMES

After completing Unit 4.2, you should be able to do the following:

- Define necessity, and give an example.
- Distinguish between (private) defence and necessity.
- Name and apply the guidelines to determine whether necessity is present in a given set of facts.
- Distinguish between necessity and impossibility.

1. NECESSITY

Study paragraph 7.3 and footnotes 410, 423, 429, 430, 443 and 447.

Activity 1

1. Define necessity.
2. Briefly criticise the way in which the existence of necessity was determined in Crown Chickens v Rocklands Poultry & Rieck 2007 2 SA 118 (SCA).
3. Distinguish between private defence and necessity.
4. Name all the guidelines to determine whether necessity is present.
5. X’s toddler swallows a number of pills. X believes his child’s life is in danger and speeds to the hospital. On his way, he bumps Y’s car. Afterwards it appears that the pills were harmless to the child and could in no way cause any damage. Will X succeed with necessity in defending himself against Y’s claim for the damage to his car? (See guideline (b) and footnote 423.)
6. Does the principle of commensurability (proportionality) of interests apply in the case of necessity? (See guideline (g) and footnote 443.)
7. Can one take another innocent person’s life to save one’s own and then successfully rely on necessity? Discuss with reference to case law.
8. If the defendant can escape from the emergency by fleeing, must he flee, or will he be able to rely on necessity as an excuse when injuring another’s interests?
9. The concept “impossibility may play a role in excluding liability when applied to different elements of a delict …”. Explain this statement and refer to examples.
UNIT 4.3: PROVOCATION AS GROUND OF JUSTIFICATION

LEARNING OUTCOMES

After completing Unit 4.3, you should be able to do the following:

- Define provocation.
- Give an opinion on the correct legal basis for the defence of provocation.
- Distinguish between private defence and provocation.
- Name and explain the requirements for provocation as a defence in the case of respectively physical assault, defamation, and insult.

1. PROVOCATION

Study paragraph 7.4 and footnotes 461, 465, 466, 469, 473 and 486.

2. JUDGEMENTS

Study


Bester v Calitz 1982 3 SA 864 (0) in the Case book, plus footnote 466.
There is no unanimity regarding the correct legal basis for provocation as a defence. The three views are as follows:

1. The provocation must be regarded as a ground excluding fault. Authority for this view can be found in footnote 465, for example, the case of Winterbach v Masters and the authors Van der Merwe and Olivier. According to this view, provocation will only be a defence if it is serious enough to affect the defendant's mental capacity. This means that provocation will only be taken into account where the defendant was “blind with anger”, so angry that he lacked accountability. Fault may then be excluded.

In criminal law, provocation as a complete defence can only succeed in these circumstances.

2. Provocation merely serves to mitigate or reduce to nothing the damages recoverable. According to Boberg, this is what happens in practice, but he offers no theoretical explanation. Although the practical effect is correctly stated, it is unsatisfactory not to give a theoretical explanation and to separate theory and practice in this way.

3. Provocation can constitute a ground of justification, thus excluding wrongfulness. This is the view preferred by Neethling et al and was followed in the case of Bester v Calitz (see footnote 466).

According to this view, there can be instances where retaliation will be reasonable in the light of the provocative conduct. In paragraphs 7.4.2 and 7.4.3, the requirements that must be met to constitute a ground of justification are stated.

Activity 1

1. Explain the concept of provocation by referring to examples (see footnote 461).
2. What is the correct legal basis for the defence of provocation? Discuss. (See note on the three views above in this guide.)
3. Explain the difference between private defence and provocation. Refer to examples from the case law. (See also footnote 469.)
4. X slaps Y because Y swore at X. Can X rely on provocation as a complete defence? Explain.
5. X hits Y in the face with a fist because Y jabbed him in his ribs with his elbow, cracking one of his ribs. Can X's conduct satisfy the requirements for provocation as a complete defence? Discuss.
6. Name the requirements for provocation as a defence in cases of defamation and insult.
7. Explain the concept compensatio with reference to provocation.
UNIT 4.4:  
CONSENT AS  
GROUND OF JUSTIFICATION  

LEARNING OUTCOMES

After completing Unit 4.4, you should be able to do the following:

- Define consent.
- Explain the maxim *volenti non fit iniuria*.
- Distinguish between the two forms of consent with reference to examples.
- Understand the terminology used in connection with consent and related concepts.
- Name the characteristics and requirements for valid consent, and apply them to a set of facts.
- Distinguish between consent and a *pactum de non petendo*.

1. CONSENT

Study

Paragraph 7.5 and footnotes 502, 505, 511, 513, 514, 518, 523, 529, 530, 532, 536, and 539.

2. JUDGEMENTS

Study the following:

- *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) as discussed in footnote 529 of your textbook.
- *Castell v De Greeff* 1994 4 SA 408 (C) as discussed in footnote 530 of your textbook.
- *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) as discussed in footnotes 532 and 539 of your textbook.
- *Boshoff v Boshoff* 1987 2 SA 694 (0) as discussed in footnote 536 of your textbook.

All of these cases are also noted in the Case book and can be consulted. For examination purposes, the information in the footnotes on these cases will be sufficient.

This ground of justification is judged with great circumspection.
The following diagram distinguishes between the different concepts and must be studied in conjunction with paragraph 7.5.1 and footnote 502. The meaning and effect of the following defences:

1. Volenti non fit iniuria.
2. Voluntary assumption of risk.
3. Contributory negligence.

- **Volenti non fit iniuria**
  - Consent to injury:
    - Wrongfulness excluded.
    - Complete defence.

- **Voluntary assumption of risk**
  - Consent to risk of injury:
    - Wrongfulness excluded.
    - Complete defence.
  - Contributory intent:
    - Fault (negligence of defendant cancelled).
    - Complete defence.

**Contributory negligence:**
Plaintiff’s claim reduced in accordance with his degree of contributory negligence (expressed in percentage).
- Not complete defence.
Activity 1

1. Describe the two forms of consent, and give an example of each.

2. Explain the meaning of the following concepts and their relation to one another, as well as the effect of each as a defence (by way of a diagram or otherwise):
   2.1 *Volenti non fit iniuria.*
   2.2 Consent to injury.
   2.3 Consent to the risk of injury.
   2.4 Voluntary assumption of risk.
   2.5 Contributory intent.
   2.6 Contributory negligence.

3. Name the characteristics of consent.

4. Name the requirements for valid consent.

5. A, an employee of B, transgresses at work. B gives her the choice: either she consents to a hiding or is fired. She chooses the first, and B gives her the hiding. She institutes a claim against him. Will B succeed with a defence of consent? Briefly discuss. (See footnote 523.)

6. The Provincial Administration controls various nature reserves in the province. Since it is a natural resource, the public is encouraged to visit the reserves. Camping sites were established alongside the dams where people fish. There are various animals in the reserve, including dangerous animals such as rhinos and buffalo. There is no fence separating the campsites and fishing spots from the rest of the reserve. One weekend Peter Peters (PP) and his family camp alongside the dam. Late that night PP walks to the toilet facilities and encounters a buffalo, which immediately charges at him. PP fortunately escapes with his life, but is seriously injured. He claims his medical expenses of R300 000,00 as well as for pain and suffering from the Provincial Administration. Suppose there were a sign at the entrance to the nature reserve that read: “The wild animals are dangerous.” Based on this, the Provincial Administration raises the defence of *consent to risk of injury.* With reference to the requirements of such defence, explain if it could succeed in this set of facts.

7. Discuss and indicate the importance of the following judgements:
   7.1 *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T)
   7.2 *Castell v De Greeff* 1994 4 SA 408 (C).
   7.3 *Santam Insurance Co. Ltd. v Vorster* 1973 4 SA 764 (A)
   7.4 *Boshoff v Boshoff* 1987 2 SA 694 (O)

8. Define a *pactum de non petendo,* and distinguish between such a *pactum* and *consent* to harm. Supply case law.
UNIT 4.5:
STATUTORY AUTHORITY;
OFFICIAL CAPACITY,
EXECUTION OF AN OFFICIAL
COMMAND, AND POWER TO
DISCIPLINE

LEARNING OUTCOMES

After completing Unit 4.5, you should be able to do the following:

- Explain the principles to determine whether a statute authorises an infringement of interests.
- Explain the principles underlying official capacity as a ground of justification.
- Explain when execution of a wrongful command can constitute a defence.
- Briefly discuss power to discipline as a ground of justification.

1. STATUTORY AUTHORITY

Study paragraph 7.6 and footnotes 557, 560 and 561.

Activity 1

1. Name the guidelines applied by the court to determine whether the legislature intended to authorise an infringement of interests.
2. Which considerations are taken into account to determine whether the permitted act fell within the boundaries of the authorisation?

2. OFFICIAL CAPACITY

Study

- Paragraph 7.7 and footnotes 568 and 570 in the textbook.
- Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 1 SA 461 (SCA).

Activity 2

1. Is there a need for official capacity as a ground of justification? (See footnote 568 and Telematrix-case.)
2. When will a judicial officer exceed his or her official capacity? Refer to an example from the case law. (See footnote 570.)
3. EXECUTION OF AN OFFICIAL COMMAND

Study paragraph 7.8 and footnote 579 in the textbook.

The following diagram summarises this ground of justification.

```
Official Command
    /\  
   /   \ 
  Lawful Wrongful
  / \      /  
Relying on official capacity as ground of justification. S v Banda
Three requirements
a)  b)  c)
No absolute duty: Two approaches
Compromise (fn 579) Wrongful is always wrongful
Obeying manifestly wrongful order is WRONGFUL. Obeying not manifestly wrongful order is LAWFUL.
```

(Judgement of the reasonable man)

Activity 3

1. Explain whether execution of a wrongful official command can constitute a defence.
4. POWER TO DISCIPLINE

Study paragraph 7.9 and footnotes 588, 590 and 602.

The factors that must be considered were set out in *R v Jancke and Jancke* 1913 TPD 382. Only know this case as authority, but you need not read it.

**Activity 4**

1. A, the parent of B, writes a letter to C, the headmaster of the school, stating that A gives permission that C may administer corporal punishment to his son, B. B is very naughty. Will it be justified for C to give B a hiding?

2. A, the parent of B, writes a letter to C, the headmaster, stating that C may not compel B to acknowledge his transgression and apologise to the school during hall gathering. C compels B to do so. A institutes a claim on behalf of his son on the grounds of injury to his reputation and dignity. Can C succeed with a defence that he acted lawfully in performance of his power to discipline, or was this power excluded by A’s letter to C?

3. Discuss the factors that must be borne in mind when the power to discipline is exercised.

**UNIT 4.6: ABUSE OF RIGHT AND NEIGHBOUR LAW; NUISANCE**

**LEARNING OUTCOMES**

After completing Unit 4.6, you should be able to do the following:

- Explain the underlying notion of the so-called doctrine of abuse of right.
- Explain why the concept of abuse of right may be questioned.
- Explain why it can be stated that the doctrine of abuse of right entails the basic question of wrongfulness.
- Explain the principles developed in the field of neighbour law and the concept of abuse of right, and apply them to a set of facts.
- Discuss applicable case law.
- Explain the concept “nuisance”.
1. **ABUSE OF A RIGHT**

Study:
Paragraph 8 and footnotes 606, 609, 619, 623, 629 and 631 of the textbook.

2. **JUDGEMENTS**

Study:
*Gien v Gien* 1979 2 SA 1113 (T) as discussed in footnote 631.

<table>
<thead>
<tr>
<th>Activity 1</th>
</tr>
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<tbody>
<tr>
<td>1. What is the underlying notion of the so-called doctrine of abuse of right?</td>
</tr>
<tr>
<td>2. Why can the notion “abuse of right” be questioned on theoretical grounds? Explain briefly. (See footnote 606).</td>
</tr>
<tr>
<td>3. “The doctrine of abuse of rights entails the basic question whether or not the defendant acted wrongfully.” Explain.</td>
</tr>
<tr>
<td>4. Name and explain the main principles that must be considered to determine whether there was an abuse of rights in a given set of facts.</td>
</tr>
<tr>
<td>5. Discuss the role of <em>malice</em> in determining the reasonableness of the actor’s conduct with reference to the doctrine of abuse of rights. Refer to examples from the case law.</td>
</tr>
<tr>
<td>6. Discuss <em>Gien v Gien</em> 1979 2 SA 1113 (T).</td>
</tr>
</tbody>
</table>

3. **NUISANCE**

Study paragraph 9.

<table>
<thead>
<tr>
<th>Activity 2</th>
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<tr>
<td>1. Describe the concept “nuisance”, and give a few examples.</td>
</tr>
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</table>
INTRODUCTION

While wrongfulness is probably the central element of a delict, fault is the element you will encounter the most in practice. It is essential that you know and understand every aspect of this chapter.

The layout of Unit 5 is as follows:

Unit 5.1: General; Accountability; Intent.
Unit 5.2: Negligence.
Unit 5.3: Contributory fault.

READINGS

- Kruger v Coetzee 1966 2 SA 428 (A).
UNIT 5.1: GENERAL; ACCOUNTABILITY; INTENT

LEARNING OUTCOMES

After completing Unit 5.1, you should be able to do the following:

- Distinguish between the two main forms of fault.
- Explain why it is important for the law of delict to distinguish between intent and negligence.
- Define accountability, and explain why it can be seen as the basis of fault.
- Know and explain the factors influencing accountability.
- Define intent, and identify the two elements thereof.
- Distinguish between the different forms of intent, and explain each by referring to an example.
- Determine the presence and form of intent in a given set of facts.
- Explain the role of mistake when determining the presence of intent.
- Distinguish between motive and intent.
- Explain whether intent is present where the wrongdoer is mistaken as to the causal chain of events.

1. GENERAL

Study
Paragraph 1 and footnote 6 of the textbook.

_Gouda Boerdery BK v Transnet_ 2005 5 SA 490 SCA.
Fault is a general requirement for delictual liability. There are, however, a few exceptions where there can be liability without fault. This is dealt with in the last chapter of the textbook.

There are divergent views on the true nature of fault. With regard to:
- **intent**, we will follow the view of De Wet and Swanepoel (footnote 2): that “it is a reprehensible disposition with which a person acts” (**subjective test**);
- **negligence**, we will follow the view of Van der Merwe and Olivier (footnote 2): “Something for which a person is legally blamed for” (**objective test**).

Fault can only be present if a person has acted wrongfully; therefore:
- **wrongfulness is determined first, and then fault**. (See footnote 6).

Why is it necessary to distinguish between intent and negligence in the law of delict?

- Actio legis Aquiliae
- Action for pain and suffering

Negligence suffices for liability

Actio iniuriarum

Intent generally required

(See diagram in Unit 1.)

Negligence is the lesser form of fault and easier to prove (objective test) than intent (subjective test). In practice, the plaintiff needs to prove only negligence for the first-mentioned two actions.

Only in instances where the actio iniuriarum is used for infringements of personality rights intent will generally be required. Intent, therefore, plays the more restricted role in the law of delict, and negligence is the more important form of fault. In criminal law, it is vice versa.

### Activity 1

1. Distinguish between the two main forms of fault.
2. Why is it necessary to distinguish between intent and negligence in the law of delict? Explain.
3. Which is determined first: negligence (fault) or wrongfulness? Explain and refer to case law. (See footnote 6 and cases on reading list).

### 2. ACCOUNTABILITY

**Study** paragraph 2 and footnote 10.

In criminal law the Child Justice Act, 75 of 2008 changed the common law position. A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence. There is a rebuttable presumption that a child who is 10 years or older, but under the age of 14 years lacks criminal capacity. This Act did not change the common law position – as is set out in Neethling et al – in regard to the laws of delict.

### Activity 2

1. Define accountability, and explain why it can be seen as the basis of fault.
2. When must the defendant have been accountable?
3. Name and briefly discuss each factor influencing accountability.
3. INTENT

Study paragraph 3 and footnotes 50 and 51.

Activity 3

1. Define intent, and identify the two elements thereof.
2. Identify and briefly describe the different forms of intent.
3. Distinguish between *dolus eventualis*, negligence, and *luxuria*.
4. X places a powerful time bomb in a busy shop. It explodes an hour later, injuring five people. Did X act with intent with reference to the victims’ injuries? Explain.
5. X takes Y’s car while erroneously thinking that Y has given consent. Did X act intentionally?
6. “There are conflicting opinions as to what form of mistake excludes intent.” Briefly discuss this statement.
7. Distinguish between *motive* and *intent*.
8. A causes damage to B in a *manner different* from that foreseen by him. Is there intent on the part of A?

UNIT 5.2: NEGLIGENCE

LEARNING OUTCOMES

After completing Unit 5.2, you should be able to do the following:

- Give the test for negligence as stated in *Kruger v Coetzee* 1966 2 SA 428 (A) verbatim.
- Describe and apply each and every aspect of the test for negligence to a given set of facts.
- Explain related aspects:
  - Whether negligence and intention can overlap.
  - The difference between negligence and an omission.
  - The so-called “duty of care” doctrine.
  - Proof of negligence and the maxim *res ipsa loquitur*.
- Differentiate fully between the test for negligence and the test for wrongfulness.

1. NEGLIGENCE

Study paragraph 4 and footnotes 98, 99, 101, 105, 106, 108, 116, 120, 121, 122, 126, 136, 142, 143, 144, 145, 148, 149, 155 and 171. (Before you go any further, mark these footnotes in your textbook.)

Judgements:

Study the following (in the case book):

Due to the demands of legal practice, this unit and the next unit (on contributory fault) contain what are probably the most important aspects of the law of delict; these aspects are encountered the most in practice. Now keep your head cool and your heart strong.

Firstly, you must get a comprehensive picture of the aspects involved in the test for negligence. Secondly, we will deal with these aspects individually.

2. REASONABLE-PERSON TEST

Study paragraph 4.1, the test for negligence (as stated in Kruger v Coetzee); know this test off by heart.

Study Kruger v Coetzee in the Case book.

When testing for negligence in a particular situation, I suggest the following modus operandi (it need not be in the same sequence, as long as all the aspects are dealt with):

First you give the test as stated in Kruger v Coetzee and then deal with the four aspects of the test:

1. The diligens paterfamilias (discussed in paragraph 4.5).
2. In the position of the defendant (in paragraph 4.7, negligence is judged in light of the surrounding circumstances).
3. Foreseeability of harm (paragraph 4.6).
4. Preventability of harm (also paragraph 4.6).

Remember, there is only one way to test for negligence (unlike in the case of wrongfulness), and the reasonable-person test as described in Kruger v Coetzee is used.
Before we deal with the test, first three preliminary aspects:

3. - CAN NEGLIGENCE AND INTENTION OVERLAP?
- NEGLIGENCE AND AN OMISSION AND
- ORINARY AND GROSS NEGLIGENCE

Study paragraphs 4.2, 4.3 and 4.4.

Activity 1

1. Can negligence and intention overlap?
2. Is it of importance for the law of delict to distinguish between ordinary and gross negligence?
3. When will a person’s conduct be grossly negligent? Refer to case law.
4. Distinguish between negligence and an omission.

4. THE TEST: THE REASONABLE PERSON: CHARACTERISTICS

Study
Paragraph 4.5.1 and Weber v Santam Versekeringsmaatskappy Bpk.

Activity 2

1. Is the reasonable person test for negligence static in nature?
2. Discuss the characteristics of the reasonable person, and refer to case law.

➢ CHILDREN

Study
➢ Eskom Holdings v Hendricks 2005 5 SA 503 SCA.
Does the fact that the wrongdoer is a child influence the test for negligence? This question only arises where a child is seven years and older. A child under the age of seven is irrebuttably presumed \textit{culpae incapax}. (See also the note in regard to criminal law under “Accountability”.)

\textit{Note: a comparison between criminal law and the law of delict on negligence in regard to children:}

\textbf{Criminal law}

The reasonable-child test is applied.
\textit{S v T} 1986 2 SA 112 (O) (footnote 81).

\begin{center}
\begin{tabular}{ll}
Reasonable person standard & \\
\hline
Standard lowered & \\
Reasonable child standard & \\
\end{tabular}
\end{center}

\textbf{Criticism:}

Accountability and negligence are not completely kept apart.

\textbf{Law of delict (paragraph 4.5.2)}

Before 1965: the reasonable-child test was applied.

After 1965: the reasonable-person test is applied.

Four Appellate Division cases confirm this view:

1. \textit{Jones v Santam Bpk} (see text and footnotes 98 and 99).
   (The court, however, incorrectly tested first for negligence and then for accountability. It should have been vice versa.)

2. \textit{Roxa v Mtshayi} – the court confirmed that the reasonable-person test must be applied. The court correctly tested first for accountability, then for negligence.

The court also set out the steps that should be followed:

1. First test for **accountability – SUBJECTIVELY**. Take the particular situation into account and also all the relevant characteristics of the particular child: intelligence, maturity, background, education, ability, impulsiveness, irresponsibility, and be careful not to place “an old head on young shoulders”.

   If the child is found to be accountable, then:

2. Test for **negligence – OBJECTIVELY** with the reasonable-person test, and ignore the fact that a child is involved.


**Criticism:**

1. According to Neethling, the reasonable-child test would be more acceptable (see textbook).

2. The problem with contributory negligence – see footnotes 101 and 106.

In most cases where the negligence of a child has to be determined, the facts are that a motorcar driver collides with a child. A claim is instituted against the driver. If the driver is found to be negligent, he raises a defence of contributory negligence on the part of the child. It must then be determined whether the child was negligent, and, if so, the damages claimed will be reduced according to the degrees of negligence of the respective parties (driver and child). We will deal with contributory negligence in Unit 5.3.

**Activity 3**

1. How is the negligence of a child determined? Support your answer with case law.

**Experts**

**Study**

- Paragraph 4.5.3, footnote 116. See footnote 110 for examples.
- *Durr v ABSA Bank*.

**Activity 4**

1. How is the negligence of an expert determined? Support your answer with case law.
2. Write short declaratory notes on the maxim *imperitia culpae adnumeratur*.
5. NEGLIGENCE, FORESEEABILITY, AND PREVENTABILITY OF DAMAGE

Study

Paragraph 4.6, footnotes 120, 121, 122, 126, 136, 142, 143, 144, 145, 148 and 149.
Minister of Safety and Security v Carmichele 2004 3 SA 305 (SCA).
Eskom Holdings v Hendricks 2005 5 SA 503 SCA.
Minister of Safety and Security v Mohofe 2007 4 SA 215 SCA. (not in Case Book).
Hawekwa Youth Camp and Another v Byrne 2010 6 SA 83 (SCA) (nie in Vonnisbundel).
Transnet Ltd t/a Metrorail and Another v Witter 2008 6 SA 549 (HHA). (not in Case Book).
Checkers Supermarket v Lindsay 2009 4 SA 459 (SCA). (not in Case Book).
Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk 2010 6 SA 342 (GNP) (nie in Vonnisbundel).

This paragraph deals with the crux of the test for negligence as stated in Kruger v Coetzee, namely, the foreseeability and preventability of harm.

Note that negligence on the part of the defendant will be present if the reasonable person would have foreseen the damage and would have taken steps to prevent the damage, and the defendant did not take preventative steps. There may be instances where the reasonable person would have foreseen damage, but would not have taken steps to prevent the harm. There will then be no negligence present – both the foreseeability and preventability aspects must be present.

With regard to (a) foreseeability, there are diverging views:

1. Abstract approach
   - Was harm to others in general reasonably foreseeable?
   - Liable for a specific consequence? Answered with reference to legal causation (and footnotes 120, 121, and 122).

2. Concrete approach (relative)
   - Wrongdoer is only negligent with reference to a consequence if that specific consequence was reasonably foreseeable (and footnote 126).
   - Supporters of this approach (traditionally) declared legal causation unnecessary.

3. The view of Neethling et al.
   - Concrete approach and legal causation. See textbook for reasons to support the concrete approach.

Do not forget to study (b) preventability. See textbook.
Activity 5

1. Briefly explain the difference between the abstract and the concrete approaches regarding the test for negligence.
2. Which approach should be accepted – the abstract or the concrete approach? Critically discuss.
3. What is the broad guideline regarding the foreseeability of harm?
4. Discuss the factors that may be taken into account to determine whether a reasonable person would have taken steps to prevent damage (in the test for negligence). Illustrate each factor by referring to an example from the case law.
5. Discuss *Eskom Holdings v Hendricks* 2005 5 SA 503 SCA.
6. Discuss how the negligence element was dealt with in the *Carmichele* case.
7. Discuss the following cases:
   - *Hawekwa Youth Camp and Another v Byrne* 2010 6 SA 83 (SCA) (nie in Vonnisbundel).
   - *Transnet Ltd t/a Metrorail and Another v Witter* 2008 6 SA 549 (HHA). (not in Case Book).
   - *Checkers Supermarket v Lindsay* 2009 4 SA 459 (SCA). (not in Case Book).
6. NEGLIGENCE JUDGED IN THE LIGHT OF THE SURROUNDING CIRCUMSTANCES

Study

Paragraph 4.6 and footnotes 155 and 171.

Activity 6

1. Negligence must be judged in the light of the surrounding circumstances. Name and briefly explain the factors that should be taken into account in this investigation.

2. Is conduct contrary to a statutory provision per se negligent? Discuss.

3. Thabo is a ten-year-old boy. He has sound judgement and performs well at school, where he shows a keen interest in general sciences. Thabo and his friends often go to visit Uncle Nick (UN) and his wife, who are childless. When visiting UN, they have the opportunity of swimming in their swimming pool. UN stores the chlorine and hydrochloric acid (which he uses to clean the swimming pool) under the swimming pool pump’s canopy.

   Thabo is aware of the fact that one can make a “bomb” by throwing pieces of zinc into a bottle filled with hydrochloric acid. One Sunday afternoon, while all the adults are asleep, Thabo “takes” UN’s hydrochloric acid and builds a “bomb”. While he is struggling with the lid of the bottle, the bottle explodes in his hands. Thabo is seriously injured.

   The bottle of hydrochloric acid has, on its outside, a warning (printed in big red letters) to the effect that the acid is a dangerous substance that must be kept out of reach of children.

   Thabo’s father institutes a claim against UN for medical expenses and, on behalf of Thabo, a claim for injury to personality, which Thabo has allegedly suffered.

   Answer the following questions:

   3.1 Did UN act negligently? Indicate fully how you would test for this.

   3.2 On behalf of UN, a defence of contributory negligence is raised. Briefly explain how Thabo’s possible (contributory) negligence will be determined.

       (See the answers to activities for this unit.)

7. “DUTY OF CARE”

Study paragraph 4.8.

Activity 7
1. Explain the content of the so-called “duty of care” doctrine, and give the points of criticism levelled against this doctrine.

8. PROOF OF NEGLIGENCE

Study paragraph 4.9.

Activity 8
1. Who has the onus to prove negligence?
2. Explain the meaning and role of the maxim *res ipsa loquitur*.

9. RELEVANCE OF NEGLIGENCE

Read paragraph 4.10.

10. WRONGFULNESS AND NEGLIGENCE

Study paragraph 4.11.

It is very important to note the differences between the test for wrongfulness and the test for negligence. The factors of importance are noted in paragraph 4.11. A further difference linked with those in the textbook is:

(f) Wrongfulness is an ex post facto test. It involves looking backwards after the event and is, thus, branded as a diagnostic test. Negligence is a foreseeability test: looking forward and asking what would have been foreseeable. It is, therefore, branded as a prognostic test.

Activity 9
1. Differentiate between the test for negligence and the test for wrongfulness. (Name and describe all the differences.)
2. Explain the difference between the test for wrongfulness and the test for negligence in case of an omission by referring to applicable case law.
UNIT 5.3:
CONTRIBUTORY FAULT

LEARNING OUTCOMES

After completing Unit 5.3, you should be able to do the following:

- Explain the difference between fault and contributory fault and the importance of contributory fault.
- Describe the common law position regarding contributory fault.
- Explain the contents and effect of the Apportionment of Damages Act, 34 of 1956, and apply its provisions to a given set of facts.
- Explain the different meanings of “voluntary assumption of risk”.
- Explain the requirements for contributory intent with reference to case law.
- Illustrate the connection between the doctrine of voluntary assumption of risk and the so-called “rescue cases” by referring to examples.

This unit is very important for legal practice – as already mentioned in Unit 5.2.

1. INTRODUCTION; THE COMMON LAW POSITION AND THE APPORTIONMENT OF DAMAGES ACT

Study paragraphs 5.1, 5.2, and 5.3.1.

| Activity 1 |
|---|---|
| 1. | Explain the difference between fault and contributory fault, and indicate the importance of contributory fault for legal practice. |
| 2. | Describe the common law position regarding contributory fault. |
| 3. | The Apportionment of Damages Act, 34 of 1956, changed the common law and now regulates contributory fault in our law. Briefly give the contents of sections 1(1)(a) and 1(1)(b), and also indicate the effect thereof on the common law position. |

2. THE APPORTIONMENT OF DAMAGES ACT

Study
- Paragraph 5.3.2 to 5.3.12 of the textbook and footnote 264.
- General Accident Versekeringsmaatskappy SA Bpk v Uijjs 1993 4 SA 228 (A).
- Paragraph 5.3.2 deals with the meaning of fault.
The different **combinations of fault and contributory fault** given in this paragraph will probably be easier to memorise by way of the following diagram. You should, however, consult the textbook for detail.

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contributory negligence</strong></td>
<td><strong>Negligence</strong></td>
</tr>
<tr>
<td>Section 1 of Act 34/1956 applies; not a complete defence, but plaintiff’s damages will be reduced.</td>
<td></td>
</tr>
<tr>
<td><strong>Contributory negligence</strong></td>
<td><strong>Intent</strong></td>
</tr>
<tr>
<td>No defence for defendant (intent cancels out the negligence according to common law rule).</td>
<td></td>
</tr>
<tr>
<td><strong>Contributory intent</strong></td>
<td><strong>Negligence</strong></td>
</tr>
<tr>
<td>Plaintiff forfeits his or her claim (intent cancels out the negligence according to common law).</td>
<td></td>
</tr>
<tr>
<td><strong>Contributory intent</strong></td>
<td><strong>Intent</strong></td>
</tr>
<tr>
<td>According to <em>Minister van Wet en Orde v Ntsane</em>, it is doubtful whether a defence of contributory intent may be raised in terms of the Act. In <em>Greater Johannesburg Transitional Metropolitan Council v ABSA</em>, the court held section 1(1)(a) applicable if there is intent on both sides.</td>
<td></td>
</tr>
</tbody>
</table>
Activity 2

1. Give the different combinations of fault and contributory fault, and briefly state the legal position in each instance.

2. John invites his friend, Peter, for a test flight in his newly restored Tiger Moth aeroplane. Peter, who loves adventure, accepts the invitation. While in the air, John decides to give Peter the adventure of his life by attempting a few tricks with the aeroplane. John’s flying abilities fall short; the aeroplane’s wing hits a tree, ploughs a few metres over the ground, and miraculously stops in one piece. John sustains minor injuries. Peter, however, who on impact with the ground was flung from the aeroplane, is seriously injured. Peter institutes a delictual action against John, claiming R150 000 for damages he allegedly suffered.

John raises two defences:

2.1 John’s first defence is that he has not yet completed his training as a pilot and has not yet been taught all the know-how. Can such a defence succeed?

2.2 Alternatively, John raises the defence of contributory negligence:

a) Peter did not buckle up as requested by John. On behalf of John, it is alleged that Peter would not have been flung from the aeroplane if he had buckled up, and evidence shows that he would then only have suffered R100 000 damages. Aviation rules require that a person should use his or her safety belt. Can such a defence succeed? Support your answer by means of case law.

b) Assume that John’s second defence succeeds and the court finds that Peter was 30% negligent. Is John automatically 70% negligent? Explain by referring to case law.

c) Assume further that the court finds John 70% negligent. Calculate Peter’s damages.

(See the answers to activities for this unit.)

3. Who has the onus to prove contributory negligence?

4. How must damages be divided between a contributory negligent plaintiff and joint wrongdoers? Explain the two views in the South African law.

5. Does the Apportionment of Damages Act apply in instances of breach of contract? Refer to an example from the case law.

6. Why is it necessary to determine whether the plaintiff’s negligent act was committed before or after the damage-causing event?
3. Voluntary Assumption of Risk and Contributory Fault (Intent)

Study paragraph 5.4 and footnote 293. It is specifically important to master the terminology. You have already encountered these concepts when you studied consent as a ground of justification in a previous unit.

Activity 3

1. John invites his friend, Peter, for a test flight in his newly restored Tiger Moth aeroplane. Peter, who loves adventure, accepts the invitation. While in the air, John decides to give Peter the adventure of his life by attempting a few tricks with the aeroplane. John's flying abilities fall short; the aeroplane's wing hits a tree, ploughs a few metres over the ground, and miraculously stops in one piece. John sustains minor injuries. Peter, however, who on impact with the ground was flung from the aeroplane, is seriously injured. Peter institutes a delictual action against John, claiming R150 000 for damages he allegedly suffered. John raises the following defence:

Voluntary assumption of the risk:
1.1 Explain the meaning of such a defence (defences).
1.2 Name the requirements of this defence (defences), and explain whether it (they) can possibly succeed in these circumstances. Refer to relevant case law.
(See the answers to activities for this unit.)

2. Distinguish between consent to the risk of injury, contributory intent, and contributory negligence by referring to the facts in:
2.1 Lampert v Hefer 1995 2 SA 507 (A); and
2.2 Netherlands Insurance Co of SA Ltd v Van der Vyver 1968 1 SA 412 (A).

3. Explain the arguments in favour of the recognition of contributory intent as a defence.

4. X negligently sets a house on fire. Y runs into the burning house to salvage his jacket. Y is injured by the flames.
4.1 Will X be liable for Y's injuries? Explain.
4.2 Will your answer be different to that in 3.1 if Y runs into the burning house to rescue a baby? Explain.

In this unit, you studied the fault element and also contributory fault as a defence. It is very important that you achieve all your learning outcomes.
INTRODUCTION

This unit deals with the fourth element, namely, causation. A causal nexus between the conduct and damage is required for a delict. A person cannot be liable if he or she has not caused any damage.

The layout of Unit 6 is as follows:

<table>
<thead>
<tr>
<th>Unit 6.1: General and Factual Causation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unit 6.2: Legal Causation</td>
</tr>
</tbody>
</table>

READINGS

- S v Mokgethi 1990 1 SA 32 (A).
UNIT 6.1: GENERAL AND FACTUAL CAUSATION

LEARNING OUTCOMES

After completing Unit 6.1, you should be able to do the following:

- Distinguish between the concepts of factual and legal causation.
- Explain the contents of the conditio sine qua non theory, and illustrate its operation by applying it to an example.
- Explain the criticism levelled against the conditio sine qua non theory.
- Explain whether the conditio sine qua non test can be applied to determine causation in case of an omission.
- Explain the view of Neethling et al. on the correct method to determine factual causation.

1. GENERAL

Study paragraph 1 of the textbook and footnote 3.

Activity 1

1. Distinguish between factual and legal causation.

2. FACTUAL CAUSATION

Study paragraph 2 of the textbook.

Activity 2

1. Explain the conditio sine qua non theory, and illustrate its operation by applying it to an example.
2. Explain the criticism levelled against the conditio sine qua non theory.
3. Can the conditio sine qua non test be applied in case of an omission? Refer to relevant case law and the view of Neethling et al.
4. Should the hypothetical positive conduct (when applying the conditio sine qua non theory to an omission) be judged objectively or subjectively? Explain briefly and also refer to the view of Neethling et al.
5. Neethling et al declares that the court usually determines a factual causal nexus correctly. How do the courts determine a factual causal nexus?
6. According to Neethling et al knowledge and experience are required for the determination of a factual causal nexus. Explain briefly.
UNIT 6.2:
LEGAL CAUSATION

LEARNING OUTCOMES

After completing Unit 6.2, you should be able to do the following:

➢ Describe the function and operation of legal causation.
➢ Explain why it would be incorrect to describe legal causation as the only mechanism to limit liability in delict.
➢ Name and briefly give the contents of the best-known theories for determining legal causation.
➢ Give a detailed description and explanation of the flexible approach, and illustrate its operation by referring to examples from the case law.
➢ Explain the meaning and function of a novus actus interveniens, and apply it to a given set of facts.
➢ Explain the meaning of the so-called “egg-skull cases” and how liability is determined in these instances.
➢ Discuss the prescribed case law.

1. LEGAL CAUSATION

Study paragraph 3 and footnotes 82, 85, 87, 100, 130, 139, 155, 223, 232, and 237.

2. JUDGEMENTS TO STUDY

S v Mokgethi 1990 SA 32 (A).
Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC).

Paragraph 3.2 should be studied very well – the whole paragraph. The flexible approach as well as the relation between the flexible approach and the other theories is explained in this paragraph.

The main aspects of paragraphs 3.3 to 3.6 that you should know are indicated in the summary below. You should refer to the textbook to understand the cryptic notes. Paragraphs 3.7 and 3.8 must be studied in the textbook.
Adequate causation (paragraph 3.3)

- **Definition:** The consequence must be “adequately” connected to the conduct.
- It is adequate if, according to human experience, the act will usually cause the damage.
- Of **German origin** (footnote 118).
- Case law (footnote 119): *R v Laubser; S v Daniëls.*
- **Writers:** Joubert, Snyman (footnote 120).

Direct consequences (paragraph 3.4)

- **Definition:** The defendant is liable for all direct consequences of his or her act – thus, not limited to foreseeable consequences.
- The consequences need NOT follow each other directly in time and space.
- Of **English origin** – Polemis – case footnote 130.
- **Limitations** (see also footnote 139) (very wide liability).
- Rejected in *The Wagon Mound No. 1* case (English).
- Van der Walt and Midgley argue that it finds application in so-called egg-skull cases.
- **Writer:** McKerron.

Fault (paragraph 3.5)

- **Definition:** The defendant is only liable for those consequences in respect of which he or she had fault. See footnote 155 (Boberg).
- Supporters of this theory believe that legal causation as an independent element of a delict is unnecessary.
- This applies, in particular, regarding the CONCRETE approach to NEGLIGENCE. (NB: see Unit 5.2.)
- Intent and negligence CANNOT serve as criteria for legal causation; there is a fundamental difference between legal causation and the two forms of fault.
- **Intent:** Van der Merwe and Olivier: “A wrongdoer is only liable for those consequences covered by his intent.”
- But what if the consequence occurs exactly as foreseen by the defendant, but where intent results in too wide liability? See the examples on these pages.
- See also where intent EXCLUDES liability, where it should not: *Brown v Hoffman.*

- **Negligence:**
  - Abstract versus concrete approach.
  - Distinction between questions of wrongfulness and fault (on the one hand) and legal causation (on the other) must NOT be disposed of merely because in most cases the latter can be answered with reference to the former.
  - In the event of additional consequences, blameworthiness has already been established, and it is pointless to ask these questions again; the main question is: “For which of these should the defendant be liable?”
  - Thus: keep concepts distinct.
Liability without fault:

The distinction between legal causation and fault is emphasised in cases of strict liability.

*Thandani* case – confirmed legal causation as a separate requirement for delictual liability.

Reasonable foreseeability (paragraph 3.6)

- Now also plays a subsidiary role.
- Content uncertain.
- Description: Van Rensburg – defendant should be liable unless the result was particularly improbable.
- The foreseeability and preventability test to determine negligence differs from the foreseeability test of legal causation.

Paragraphs 3.7 and 3.8 must be studied in the textbook.

**Activity 1**

1. Describe the function and operation of legal causation.
2. Why would it be incorrect to describe legal causation as the only mechanism to limit delictual liability?
3. Name the best-known theories for determining legal causation.
4. Fully explain the flexible approach, and illustrate its operation by referring to examples from the case law.
5. Compare the way in which legal causation was determined in the following: *Smit v Abrahams* 1994 4 SA 1 (A) and *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A). In your answer, you need only refer to relevant facts. (See the answers to activities for this unit.).
6. How was causation dealt with in the *Carmichele* case?
7. Write brief explanatory notes on the following:
   - 7.1 Adequate theory
   - 7.2 Direct consequences theory
   - 7.3 Fault theory
   - 7.4 Reasonable foreseeability theory
8. Explain the meaning and function of a *novus actus interveniens* by using the facts of *Mafesa v Parity Versekeringsmaatskappy* (see footnote 83).
9. A is seriously injured in an accident caused by the negligent conduct of B. Medical evidence shows that A suffers from a rare bone disease and that his injuries are much worse as a result of the disease than what would normally have been the case. Will B, in principle, be liable for this harm to A? Briefly explain.
You have studied the element of causation. You know by now that the causation element actually consists of two different elements:

1. **Factual causation**
   
   Did the defendant’s *conduct cause the harm*?
   
   ESTABLISHES LIABILITY.

2. **Legal causation**
   
   For which of the damages *caused by his or her* (wrongful and culpable) *conduct must the wrongdoer be held liable*?
   
   LIMITS LIABILITY.

This is the way in which you must explain the difference between factual and legal causation.
UNIT 7: DAMAGES

INTRODUCTION

Damage is the fifth and last element of the delict with which we will be dealing. There must be some loss or damage for a delict to exist.

The main concern of the plaintiff in a delictual claim is: “How much am I going to get?” This unit is, therefore, very important to the legal practitioner.

The damage element is complex enough to be studied as a subject on its own. Chapter 6 deals with the basic principles of damage and the assessment of the quantum of damages.
LEARNING OUTCOMES

After completion of Unit 7, you should be able to do the following:

- Describe the different forms of compensation.
- Define damage.
- Explain the extent of the concept of damage.
- Explain the contents of the juridical doctrine of patrimony.
- Distinguish between the different forms of patrimonial loss.
- Explain how the existence and extent of damage can be determined.
- Name the forms of prospective loss and the requirements that must be met to recover prospective loss.
- Explain the “once and for all” rule and its implications, and apply it to a set of facts.
- List the exceptions to the “once and for all” rule.
- Explain the meaning of “cause of action”.
- Write short explanatory notes on the collateral source rule.
- Give a detailed account of the positive law regarding which benefits are seen as res inter alios acta and which are not.
- Explain the principles regulating the plaintiff’s duty to mitigate his or her loss.
- Explain the nature, object, and form of damages.
- Explain the principles of assessment of damages in case of damage to property.
- Explain whether damages for loss of income or support earned illegally can form the basis of a delictual claim.
- Explain the principles regarding onus of proof.
- Name the forms of injury to personality with regard to “physical-mental integrity” recognised in practice.
- Explain the principles laid down in case law regarding the unconscious plaintiff’s claim for injury to personality.
- Name the four aspects relevant to the assessment of damages in the case of non-patrimonial loss.
- Write short explanatory notes on the claim satisfaction in case of an iniuria.

READINGS

- Rudman v Road Accident Fund 2003 2 SA 234 (SCA).
- Collins v Administrator Cape 1995 4 SA 73 (C).
1. THE COMPENSATORY FUNCTION OF THE LAW OF DELICT AND THE CONCEPT OF DAMAGE

Study paragraphs 2 and 3 (only 3.1 and 3.2) of the textbook. (Read paragraphs 3.3, 3.4, and 3.5.)

Activity 1

1. Explain the following concepts:
   1.1 Compensation for damage ("skadevergoeding"); and
   1.2 Satisfaction
2. Define damages.
3. Does damage include patrimonial and non-patrimonial loss? Explain.

2. PATRIMONIAL LOSS

Study paragraph 4 and footnotes 82, 85, 101, 123, 153, 163, 205, 241, 266, 275 and 279 in the textbook.

Judgement to study:

Study Rudman v Road Accident Fund 2003 2 SA 234 (SCA).
The latest case law on res inter alios acta is:
- Erasmus Ferreira & Ackermann v Francis 2010 2 SA 228 (HHA).
- Makhuvela v Road Accident Fund 2010 1 SA 29 (GSJ)
(You need not study these two cases!)
Activity 2

1. According to the juridical doctrine of patrimony, certain elements are identified. Explain.

2. Distinguish between the following:
   2.1 *Damnum emergens* and *lucrum cessans*.
   2.2 Damage to property and pure economic loss.
   2.3 Direct and consequential loss.
   2.4 General and special damage

3. A comparative method is necessary to determine damage. Explain the difference between the sum-formula approach and the concrete concept of damage and briefly motivate which method should be used.

4. When is the decisive moment for assessing damage?

5. Name the different forms of prospective loss.

6. Which requirements must be met in order to claim for prospective loss? Give an example.

7. Set out the formulation and practical implications of the "once and for all" rule. Name the exceptions to the "once and for all" rule.

8. Study the examples of causes of action and the "once and for all" rule in paragraph 4.7.4 once more. Every example can form the basis of an examination question. These are also the examples mostly encountered in practice.

9. Write short explanatory notes on the collateral source rule and compensating advantages, and illustrate your notes with an example.

10. Name the benefits that will be regarded as *res inter alios acta* (and not taken into account to reduce the plaintiff’s damages).

11. Name the benefits that must be taken into account in reducing the plaintiff’s damages.

12. Are the following benefits *res inter alios acta*? Briefly motivate your answer:
   a. Sick leave and medical benefits paid by a medical fund
   b. Insurance money and a pension payable to dependants whose breadwinner has been killed (see (d) and footnote 163)
   c. The adoption of a child who claims for loss of support on account of the death of his parents

13. What does the duty of mitigation entail in the law of delict?

14. Due to John’s negligent driving, Peter is injured and his car damaged.
   15.1 How many causes of action are there in the above set of facts? Explain.
   15.2 Briefly explain how Peter’s damages (for the purpose of the damage to his car) should be assessed.

15. Explain why it is important to differentiate between loss of income and loss of earning capacity.

16. Explain the principles regarding onus of proof.

3. NON-PATRIMONIAL DAMAGE

Study
Paragraph 5.

Judgement to study:

_Collins v Administrator Cape_ 1995 4 SA 73 (C).

Paragraph 5.3 can be summarised as follows:

<table>
<thead>
<tr>
<th>Objective Element</th>
<th>Subj ective Element</th>
</tr>
</thead>
<tbody>
<tr>
<td>(External manifestation of impairment)</td>
<td>(Losses exist in the mind of the person (his reaction))</td>
</tr>
<tr>
<td>Losses do not primarily exist in the mind of the person</td>
<td></td>
</tr>
<tr>
<td>Examples:</td>
<td></td>
</tr>
<tr>
<td>! Defamation - reputation lowered</td>
<td></td>
</tr>
<tr>
<td>! Shortened life expectancy</td>
<td></td>
</tr>
<tr>
<td>(Feelings of person are of secondary importance)</td>
<td></td>
</tr>
<tr>
<td>Physical feeling</td>
<td>Affective feeling</td>
</tr>
<tr>
<td>Pain &amp; suffering</td>
<td>Bitterness</td>
</tr>
<tr>
<td>Despondency (insult)</td>
<td>Despondency (insult)</td>
</tr>
</tbody>
</table>

**Third category**

Objective and subjective elements are in balance.

Example: disfigurement;
Loss of amenities of life.

Paragraph 5.6 can be summarised as follows:

Injury to personality in respect of physical-mental integrity.

A. Which forms of injury to personality with regard to physical-mental integrity are recognised in practice?

_Study_ paragraph 5.6.1 (there are five).
B. These impairments are divided into two groups:

1. **Subjective “group”:**
   * Pain and suffering.
   * Emotional shock.
   Loss exists only in the mind of the person – where it is experienced.

2. **Objective “group”:**
   * Disfigurement.
   * Loss of amenities of life.
   * Shortened life expectancy.
   Loss is objectively ascertainable without regard to the person’s emotions. The consciousness of the injured person plays a secondary role.

C. Theories in regard to the nature of physical-mental injury: see paragraph 5.6.2 in the textbook. (Read)

D. The person is unconscious. Can he or she claim for injury to personality? (Paragraph 5.6.3.) (Person is in a permanent vegetative state – a so-called “cabbage” case. A distinction must be made between the “cabbage” cases and the “twilight” cases. In the latter cases some sort of communication is sometimes possible.

1. **Southern Ins Ass v Bailey 1984 1 98 (A)**
   The appellate division supported a flexible approach. The function to be served by the award is one of the factors to be considered.

2. **Gerke v Parity Ins. Co. 1966 3 SA 484 (W)**
   **Reyneke v Mutual & Federal Ins Co 1991 3 412 (W)**
   * Followed English law (Wise v Kay).
   * Strict functional approach was rejected.

   (The personal functional theory means that damage only exists in so far as it can be compensated with a sum of money. Compensation is only awarded if it would serve a useful purpose to the injured person himself.)

   The courts followed the following principles:
   a) * Pain and suffering.
      * Shock.

      No compensation. Losses exist only in the mind of the person, and he or she does not experience it.

   b) * Disfigurement.
      * Loss of amenities of life.
      * Shortened life expectancy.

      Compensation is awarded if losses objective/ascertainable, but the quantum will be less because it is not experienced subjectively.
3. **Collins v Administrator Cape 1994 4 SA 73 (C)**

- Followed a strict **functional** approach.
- Rejected *Gerke and Reyneke* cases.
- No compensation if it serves no useful purpose to the injured person.
- Court says that the other view would import a penal element to our delictual action.

4. **According to Neethling:**

- The existence of injury should not be confused with its compensability.
- In South African law, we have an “objective” satisfaction also, which signifies a **symbolic redress** of the harm (as in Germany and Australia).
- Unconsciousness, therefore, influences the **quantum**.
- Boberg supports this view.

Study paragraph 5.7 in the textbook.

**Activity 3**

1. Name the different rights to personality.
2. With reference to the general nature of non-patrimonial loss, there are objective and subjective elements. Explain these.
3. Which forms of injury to personality with regard to physical-mental integrity are recognised in practice?
4. A is seriously injured in an accident caused by the negligent conduct of B. A is unconscious, and according to medical practitioners, he will never regain consciousness. A delictual claim is instituted on behalf of A. Will a claim for injury to personality succeed? Explain with reference to case law.
5. Name the four aspects relevant to the assessment of damages in the case of non-patrimonial loss.
6. Write short explanatory notes on the claim for satisfaction in case of an *iniuria*. 
UNIT 8:
DELICTUAL REMEDIES

INTRODUCTION

Luckily, you have already encountered the three most important delictual actions (also known as the three pillars of the law of delict) in Unit 1. To refresh your memory, please take another good look at the diagram containing the full distinction between the three most important delictual actions in Unit 1. (You are, however, supposed to know this diagram off by heart – and understand it!)

1. LEARNING OUTCOMES

After completion of Unit 8, you should be able to do the following:

- Explain the requirements for, and field of application of, the three most important delictual actions.
- Describe the field of application and different forms of the remedy *amende honourable*.
- Distinguish between the delictual actions and an interdict.
- Explain the forms and requirements of an interdict.
- Explain what is meant by “concurrence of remedies”.
- Explain the concurrence of the three most important delictual actions, and give examples from the case law.
- Explain the concurrence of each of the delictual actions and the contractual action.
- Explain the meaning and role of exclusionary clauses.
- State the legal position regarding the prescription of a delictual debt.

READINGS

- *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A).
2. GENERAL AND INTERDICT

Study paragraphs 1 and 2 of the textbook and footnotes 3, 18, 20 and 21.

Activity 1

1. Explain what is meant by “transmissibility” of the delictual actions.
2. Briefly describe the field of application and different forms of the amende honourable remedy. Refer to applicable case law.
3. Distinguish between the delictual actions and an interdict.
4. Explain the forms and requirements for an interdict.

3. CONCURRENCE OF REMEDIES AND PRESCRIPTION

Study paragraphs 3 and 4. Read footnotes 87-97.

The latest case law on breach of promise and the concurrence of the actio iniuriarum and the contractual action is Van Jaarsveld v Bridges 2010 4 SA 558 (SCA). The principles as set out in Neethling et al are confirmed. (You need not study this case.)

Activity 2

1. Explain the concurrence of the following remedies:
   1.1 Actio legis Aquiliae and the actio iniuriarum.
   1.2 Actio legis Aquiliae and the action for pain and suffering.
   1.3 Actio iniuriarum and contractual action.
   1.4 Action for pain and suffering and contractual action.
   1.5 Actio legis Aquiliae and contractual action.
2. Name the factors that play a role in determining the prejudiced party's choice of whether to claim ex contractu or ex lege Aquilia.
3. What are the meaning and the role of an exclusionary clause?
4. Write short explanatory notes on the prescription of a delictual debt.

As stated in Unit 1, it is imperative to know and understand the role and ambit of the three most important delictual actions. The interdict, being a speedy remedy, which can be urgently applied for – even after hours – to a judge in chambers, is also a very important remedy in legal practice.
UNIT 9: JOINT WRONGDOERS

INTRODUCTION

This unit covers the short, compact Chapter 8, but please do not underestimate these few pages! Every word is important and of practical significance.

LEARNING OUTCOMES

After completion of Unit 9, you should be able to do the following:

- Define joint wrongdoers.
- Explain the general principles regarding joint wrongdoers as contained in section 2 of the *Apportionment of Damages* Act, and apply them to a given set of facts.
- Explain the principles and apply them where prejudice is suffered by a spouse as a result of the conduct of the other spouse and a third party in case of a:
  1. marriage in community of property; and
  2. marriage out of community of property.
- Explain the principles where prejudice is suffered by a person (usually a dependant) as a result of the death or injury of another (the breadwinner) through the conduct of the deceased or injured (breadwinner) and a third party.

READINGS


1. GENERAL AND SPECIAL CASES

In ABSA Brokers (Pty) Ltd v RMB Financial Services and Others 2009 6 SA 549 (SCA) the importance of the section 2(2) notice was emphasised again (see p. 267 and footnotes 12 and 13 of the text book).

Study Chapter 8, paragraphs 1 and 2 and footnotes 4, 11, 12, 13 and 14.
Activity 1

NB: the answers to all these questions are in the answers to activities for this unit. Study them well!

1. Define joint wrongdoers.

2. Due to the negligent conduct of both John and Thabo, Thabo and his friend, Sue, are injured. Thabo suffers R100 000 damages and Sue R150 000. Both Thabo and Sue institute actions against John for the damages they have suffered. Advise John, and explain the legal position to him with regard to:
   2.1 Thabo’s claim of R100 000 and
   2.2 Sue’s claim of R150 000.
   2.3 Suppose the facts are as stated above, except that Thabo and Sue are married in community of property. Explain the position regarding Sue’s claim of R150 000 according to:
      a) the common law position; and
      b) the present position.

3. Due to the negligent conduct of both Vuyo and Peter, Peter is killed. Peter was married to Betty. Betty institutes a claim for loss of support against Vuyo.
   3.1 What would the position be according to
      a) the common law and
      b) the Apportionment of Damages Amendment Act 58 of 71 (the present position)?
   3.2 What would the position be if Peter is not killed, but injured, in the above set of facts?