



<u>FACULTY</u>	: Law
<u>DEPARTMENT</u>	: Private Law
<u>CAMPUS</u>	: APK
<u>MODULE</u>	: LDL41Y0 Law of Delict
<u>SEMESTER</u>	: First
<u>EXAM</u>	: 16 July 2019

<u>DATE</u>	: 16 July 2019	<u>SESSION</u>	: 08:30-10:30
<u>ASSESSOR(S)</u>	: Prof M Njotini		

MEMO

SECTION A**Question 1**

- 1.1 A delict is defined as the act of a person that in a wrongful and culpable way causes harm to another. Thus, the mere fact that a person has caused another to suffer damage is insufficient to constitute a delict for which he or she may be held liable. To found liability in delict further requirements or elements must be met. These are an act, wrongfulness, fault, causation, and harm.

Thus, delictual remedies are different substantially from criminal sanctions. Delictual remedies are compensatory in character, compensating or indemnifying the aggrieved party for the harm the wrongdoer has caused. By contrast, criminal sanctions are of a penal nature, and are intended to punish the criminal for his transgressions against the public interest. (2)

- 1.2 The constitutional provisions relating to the interaction between human rights and the law of delict are the right to property (section 25 of the Constitution), the right to life (section 11 of the Constitution), the right to freedom and security of the person (section 12 of the Constitution), the right to privacy (section 16 of the Constitution), the right to human dignity (section 10 of the Constitution), the right to equality (section 9 of the Constitution), the right to freedom of expression (section 16 of the constitution), the right to freedom of religion, belief and opinion (section 15 of the Constitution), the right to freedom of association (section 18 of the Constitution), the limitation clause (section 36 of the Constitution) and the interpretation clause (section 39 of the Constitution).

The Constitution provides that fundamental rights may be limited by law of general application. However, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The essence of this is that there is no such a thing as absolute rights. In this limitation, factors, for example the nature of the right, importance of the purpose of the limitation, nature and extent of the limitation, relation between the limitation and its purpose and less restrictive means to achieve the purpose, are taken into account. In addition, the Constitution stipulates that when interpreting the provisions of Chapter 2, courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In

doing so, it must take into account international law and may have regard to comparable foreign law. In addition, it must develop the common and customary law. In terms of *DE v RH* 2015 (5) SA 83 (CC) the power to develop the common law must be exercised in accordance with the provisions of section 39(2) of the Constitution. These provisions require that common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. Therefore, where the common law deviates with the spirit, purport and object of the Bill of Rights, courts have a general duty to develop the common law to eliminate deviation.

As regards section 18 of the Constitution, *Taylor v Kurtstag NO and Others* 2005 (12) BCLR 1269 (W) describes as “the right to choose or associate.” The latter applies to an individual or a group of individuals. (4)

- 1.3 In terms of the law of delict, an act or conduct becomes delictually wrongful when it infringes a legally recognised interest (interest worthy of protection) in a legally reprehensible manner. (1)

1.4

1.4.1 The fundamental premise of the doctrine of subjective rights is that wrongfulness consists of the infringement of a subjective right. (2)

1.4.2 The nature of a subjective right is determined by the nature of the object of the particular right. Thus, rights are categorised and named with reference to the different types of legal objects to which the rights relate, for example, real rights, personal rights, immaterial property rights and personal immaterial property rights. (3)

1.4.3 A dual relationship is necessary to determine whether a subjective has been infringed. Firstly, one must determine whether the holder of a right was disturbed in the use and enjoyment of his or her right, that is, whether the subject-object relationship has in fact been disturbed. If so, one must establish secondly whether the infringement complained of took place in a legally reprehensible way (violation of a norm). If this is established, the conduct is wrongful. (2)

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

Whereas, the criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person, the bonus paterfamilias. Thus, the defendant is negligent if the reasonable person in his or her position would have acted differently; and according to the courts, the defendant would have acted differently if the lawful causing of damage was reasonably foreseeable and preventable. (4)

(20)

Question 2

2.1 C.

2.2 D.

2.3 A.

2.4 D.

2.5 C.

2.6 C.

2.7 C.

2.8 D.

2.9 D.

2.10 A.

2.11 B.

2.12 B.

2.13 B.

2.14 D.

2.15 D.

2.16 A & B.

2.17 A.

1.18 D.

2.19 D.

Question 3

3.1

3.1.1 This form of intent is referred to as *dolus eventualis*. It is present where the wrongdoer, while not desiring a particular result, foresees the possibility that he may cause the result and reconciles himself to this fact, that is, he or she nevertheless performs the act which brings about the consequence in question. This form of intent is defined by stating that the wrongdoer foresees a consequence but recklessly carries on with his or her conduct. Thus, the question is whether the wrongdoer actually subjectively foresaw the possibility of the consequence. The fact that a particular result was reasonably foreseeable, may clearly be of fundamental importance in deciding whether the actor actually foresaw the result. The objective foreseeability test may provide evidentiary material for determining what was actually foreseen by the wrongdoer. Where the wrongdoer alleges that he or she did not foresee consequences that are reasonably foreseeable, he or she must demonstrate factual circumstances that make his or her versions reasonably acceptable. (10)

3.1.2 Indeed, the answer will be different. The form of intent will now become *dolus indirectus* or indirect intention. It is present where a wrongdoer directly intends one consequence of his or her conduct but at the same time has knowledge that another consequence will unavoidably or inevitably also occur. The cause of the second consequence is accompanied by indirect intent. In law, the wrongdoer is said to have intent in respect of the second consequence which he or she has not desired or which was not his or her immediate object. (5)

3.2 Knowledge of wrongfulness as a requirement of intent indicates that it is insufficient for the wrongdoer merely to direct his or her will at causing a particular result. Thus, the wrongdoer must also know (realise) or at least foresee the possibility that his or her conduct is *wrongful*, that is, contrary to law or constituting an infringement of another's right(s)). A mistake sometimes made, particularly by lay persons, is to describe any desired conduct or willed consequence as "intentional"; intent is actually a technical legal term referring to a willed act which in addition is subjectively known to be wrongful. (5)

Question 4

- 4.1 In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. (2)
- 4.2 In *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* the court stated that to “qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity”. (2)
- 4.3 In *S v Ngubane* 1985 (3) SA 677 (A), the court held that, for the purposes of criminal law (although it must be accepted that the law of delict will also be influenced by this decision) intent and negligence may be present simultaneously. The court answered the question of whether someone who on the evidence has intentionally killed another may be convicted of culpable homicide (for which negligence is required) and not only of murder, in the affirmative. (2)
- 4.4 The criterion our courts use to apportion the damages is the reasonable person test for negligence. The implication is that, as section 1(1)(a) applies only to damage caused partly by the fault of the plaintiff and partly by that of the defendant, the Act cannot apply where liability does not depend on the defendant’s fault. Thus, the Act does not apply in the case of strict liability. (4)

(10)

Total: [70]