MODULE 6: CRIMINAL ACCOUNTABILITY
What is?
Criminal capacity
Unlawfulness
Diminished capacity

Unaccountability

Youth
Mental illness/ defect
Intoxication
Provocation, emotional stress and non- pathological unaccountability

[Criminal accountability/ Capacity]

1. Legality
2. Conduct
3. Causation
4. Unlawfulness

[Snyman: 149- 181 and 220- 244]

CRIMINAL ACCOUNTABILITY/ CAPACITY
(def) “To have criminal capacity a person must have the following mental abilities:
1. the ability to appreciate the wrongfulness of his conduct; and
2. the ability to conduct himself in accordance with such an appreciation of the wrongfulness of his conduct”

test for capacity

- If 1 is lacking, the person lacks criminal capacity and CANNOT be held criminally accountable of the unlawful act he has committed

- A person cannot form “intention” without criminal capacity

- Knowledge of unlawfulness and self-control are essential to form intention
NB NB NB NB NB!!

- NB to distinguish between:
  1. the test for capacity and
  2. the test for intention

- ALSO NB to distinguish between involuntary conduct and criminal capacity

**Involuntary Conduct:**

- When conduct cannot be controlled by the will it is involuntary

- If X’s conduct is involuntary it means that X is not the author of the act/omission – X did not commit the act, it happened to him

- If conduct is involuntary it **EXCLUDES CRIMINAL LIABILITY** and it is not necessary to deal with the other elements of a crime

- Some defences may exclude conduct and capacity. Eg. Intoxication (depending on the degree...case?)
To have knowledge of unlawfulness, a person must be able to distinguish between right and wrong.

The perpetrator must exercise self-control in order to perform the unlawful act.

Capacity is therefore closely linked to fault (prerequisite).

Capacity = presence of mental capabilities

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use of these mental capabilities = fault
From the definition of capacity it is clear that “capacity” has 2 legs:

**FIRST LEG**
- Ability to appreciate the wrongfulness of his act or omission

**SECOND LEG**
- Ability to act in accordance with such an appreciation of the wrongfulness of his action

### COGNITIVE
- Cognitive mental functions
- = Ability to differentiate
- Person’s reason or intellect
- Ability to perceive, to reason and to remember
- Emphasis is placed on a person’s insight and understanding

### CONATIVE
- Conative mental functions
- = Power of resistance
- A person is not an animal and can therefore control his behaviour
- Humans are able to make decisions, set goals and pursue them and can resist an impulse
- Emphasis is on self-control
Section 78(1) of the CPA provides the test for criminal capacity:

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

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

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

Shall not be criminally responsible for such act or omission.
WHAT?

= when the ability to distinguish between right and wrong and the ability to exercise self-control over behaviour are not totally absent, but are clouded or impeded as the result of one or other circumstance

- Provided for in S78(7) of the CPA

- ONLY INFLUENCES PUNISHMENT (mitigating factor)

Case law:
- S v Mnisi 2009 (2) SACR 227 (SCA)
The defence of unaccountability is mostly used in 1 of the following situations (where 1 of the following exists)

1. Youth
2. Mental illness
3. Intoxication
4. Provocation, emotional stress and non-pathological criminal unaccountability
Children and the mentally ill are treated alike under the common law.

### I  Minors under the age of 10 years
- Irrebuttable presumption that such a minor is criminally unaccountable
- Minor is considered doli incapax or culpae incapax (incapable of forming intention or negligence)

### II  Minors between 10 and 14 years
- Rebuttable presumption that minors between the ages of 10 and 14 are not criminally accountable
- *S v Lehnberg and Another:* "Jeugdigheid is onvolwassenheid, gebrek aan lewenservaring, onbesonnenheid en veral ‘n geestestoestand van vatbaarheid vir beïnvloeding, veral deur volwassenes”

### III  Minors of 14 years and older
- Treated the same as an adult
TEST FOR CRIMINAL ACCOUNTABILITY IN YOUTHS
☑ The test is not stipulated by statute, rather under common law
☑ Similar to the test for mental illness (think S78(1) of the CPA...)
☑ Youth is generally considered a mitigating factor (Lehnberg case)

TEST FOR REASONABLE YOUTH IN NEGLIGENCE CASES
In cases where a youth is charged with a crime of negligence, the norm against which the accused minor is measured is that of the “reasonable youth”

MINOR UNDER 18 YEARS IN COURT
☑ S254 CPA – a trial of such a person may be suspended to determine if the minor needs care
☑ If so, the trial is referred to Children’s Court and dealt with as a minor in need of care

CASE LAW:
S v F 1989 (I) SA 460 (ZH) SELF STUDY!!!
S v Pietersen 1983 (4) SA 904 E
Remember the common law presumption that all persons are normal (mentally healthy)

This means that prima facie proof exists that the accused was mentally normal at the time of committing the crime

This presumption is now a statutory one (s78 CPA)

The accused claiming criminal unaccountability due to mental illness must refute the presumption on a balance of probabilities
The amended s78(1A) of the CPA reads:

Every person is **presumed not to suffer from a mental illness** or mental defect so as not to be criminally responsible in terms of section 78(I), **until the contrary is proved** on a balance of probabilities.

The amended s78(1B) reads:

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is an issue, the **burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue**.
See this for background on the tests which have been used in criminal law regarding mental illness.

NB: the Rumpff Commission recommended an amendment to Criminal Law in 1967 (removal of “irresistible impulse”)

This lead to s78(1) of the CPA which provides for the 2 leg test for criminal capacity.

NOTE!!!

Kavin case accepted mental illness as a defence.

The s78(1) test is wider than the “irresistible impulse” test and makes provision for mental illness caused by gradual disintegration of the personality. This leads to a person becoming unable to distinguish between right and wrong.
**Some Important Points**

**“mental illness” and “mental disorder”**

1. Not defined in the Act
2. Person must however suffer from a known or identified mental illness
3. The illness is not of a pathological nature

**Mental “illnesses” which DO constitute insanity**

According to the Diagnostic and Statistical Manual of Mental Disorders (DSM) of the American Psychiatric Association (DSM), mental illnesses can be classified as:

1. Organic disorders
   - Caused by brain injuries
2. Mental retardation
   - Must have been present from a young age
3. Substance misuse
   - Psychoactive medication, alcohol or marijuana
4. Psychological disorders
   - Psychosis
5. Neurosis
6. Personality disorders
CASE LAW

❑ S v Kavin I978 (2) SA 721 W

❑ S v Stellmacher I983 (2) SA 181 SWA

❑ S v McBride I979 (4) SA 313 A

- SELF STUDY!!!
NOT regarded as a mental illness or disease which on its own leads to unaccountability.

Phychopathy combined with other mitigating circumstances may give rise to extenuation of punishment.

SELF STUDY!!! Page 79 of SG

- Mitigating factors
- Diminished accountability
Court must find accused NOT GUILTY and declare them a patient of the State - ito s78(6) CPA

S78(6) as amended, provides as follows:

Where the accused is charged with:
  - Murder;
  - Culpable homicide;
  - Rape; or
  - Charge involving serious violence

Or
Where the court considers it to be necessary in the public interest, the court can direct that the accused be:

1. detained in a psychiatric hospital or a prison pending the decision of a judge in chambers;
2. admitted to, detained and treated in an institution pending discharge by a hospital board;
3. treated as an outpatient at an institution pending certification by the superintendent stating that he or she need no longer be treated;
4. released subject to conditions the court consider appropriate; or
5. released unconditionally.

In other instances (not mentioned here) the court only has the options as set out in 2-5.

Iow detention in a psychiatric hospital/prison is not allowed.

What happens if the accused is not successful with a defence of mental illness?

Case resumes in normal manner.
Just for fun...

Psychopathy = personality disorder characterised inter alia by coldness, egocentricity, manipulativeness, criminality, less fear or empathy or remorse.

Tested by the Hare Psychopathy Test/Checklist...

How did you score?

Zero // around 5 // around 22 // 30 or above // 40
Someone with absolutely no psychopathic traits or tendencies would receive a score of zero.

People with no criminal backgrounds normally score around 5.

Many non-psychopathic criminal offenders score around 22.

A score of 30 or above qualifies a person for a diagnosis of psychopathy.

A prototypical psychopath would receive a maximum score of 40.
### Voluntary vs Involuntary drunkenness

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<thead>
<tr>
<th>Voluntary</th>
<th>Involuntary</th>
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<tbody>
<tr>
<td>➡️ Common law voluntary drunkenness is never a defence</td>
<td>➡️ Was and still is accepted as a valid defence</td>
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<tr>
<td>➡️ See Chretien case for current position</td>
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### Action libera in causa

- Fault is already present at the time of drinking
- Person thus use their drunken state as an instrument to commit a crime
- Will be held criminally liable
THE DEFENCE OF INTOXICATION

- See again
  1. the position BEFORE 1981 – Johnson case
     And
  2. the position after 1981 – Chretien case

- NB Criminal Law Amendment Act 1 of 1988

- Why? The Chretien case, although correct in law, left the community unsatisfied as it meant that a person who was found guilty of drunkenly committing a crime got of lighter than a person who committed the same crime soberly
The Amendment Act states:

I(I)Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty, which may be imposed in respect of the commission of that act.

(2)If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (I) were impaired by the consumption or use of any substance such accused may be found guilty of a contravention of subsection (I), if the evidence proves the commission of such contravention.

(3)Whenever it is proved that the faculties of a person convicted of any offence were impaired by the consumption of a substance when he committed that offence, the court may, in determining an appropriate sentence to be imposed upon him in respect of that offence, regard as an aggravating circumstance the fact that his faculties were thus impaired.
The effect of the Act...

= a person who commits a crime while unaccountably drunk (which is?) is found not guilty of THAT crime and rather found guilty of contravening S1(1) of the Act (this is a competent charge and thus need not be included in the charge sheet)

- Using alcohol prior to the criminal act is not a mitigating factor per se

- A valid defence on a charge of contravention of s1(1) is either:
  1. that you were unaware of the effects of the substance or
  2. you were forced to consume the substance
NB!!! The onus of proof is complicated in these cases:

- Usually: S must prove that A was not unaccountably drunk beyond reasonable doubt (sure A had capacity in spite of drinking)

- If the defence can show that it is reasonably possible that A was in fact unaccountably drunk, S must fall back on Act 1 of 1988

- NOW S must prove that A was in fact unaccountably drunk beyond reasonable doubt

- Should the defence show that there was a reasonable possibility that A was NOT unaccountably drunk, S fails in proving that A was in fact beyond a reasonable doubt unaccountably drunk, A could still be acquitted (September case)
**NOTE**

**Hartyani case:** if you raise the defence of involuntary alcohol intake, you must prove that on a balance of probability a reasonable possibility exists that there was no fault on your part when you consumed the alcohol (after the State has closed their case prima facie).

**Holiday case:** where drunkenness has lead to mental illness or disease, it is treated as such (Delirium tremens).
S78(2) also provided for “any other reason not to be criminally responsible”

Provocation:
RD Law – not a defence but mitigating factor
English law – now recognised as a defence

Described as: “a special kind of material form which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent as well as the act, beyond reasonable doubt”
The Mokonto case set out the working of provocation as follows:
1. provocation is relevant with respect to the question of intent
2. in crimes where specific intent is required, the test is subjective, namely what was going through the accused’s mind? [the Chretien case rejected the notion of “specific intent in cases regarding drunkenness but the SCA has yet to give judgement on this point]
3. provocation is relevant with respect to mitigation of punishment

This case was criticised however as provocation was used to emphasise intention
Mokonto had acted in putative self-defence and was not aware of the unlawfulness of his conduct. This could lead to a finding of a lack of intention

In certain cases intent may be reduced to negligence
In the Mayer case, Rumpff said: “the intensity of the anger is often so great that death, which would otherwise be murder, is judged as culpable homicide”
A crime committed during a tantrum may be seen as a crime committed during a state of diminished accountability.

The Arnold case referred to the Bailey case wherein it was stated:
“Dit is denkbaar dat die beskuldigde so vreesbevange kan word dat hy nie die gevolge van sy handelinge kan insien nie of kan insien dat wat hy doen wederegtelik is nie; in 'n uiterste geval kan hy selfs ontoerekeningsvatbaar word.”

iow – an emotional state (in casu fear) [without intoxication] could also lead to the loss of criminal capacity.

So not only youth, mental illness or intoxication could lead to incapacity, it could be caused by other factors also.
CASE LAW

S v Campher 1987 (I) SA 940 A

S v Wiid 1990 (I) SACR 561 A

S v Moses 1996 (I) SASV 701 (K)

S v Eadie 2002 (I) SACR 663 SCA