There are two forms of fault:
1. Intention
2. Negligence

Intention = dolus

Negligence = culpa in the NARROW sense of the word

Fault = culpa in the BROAD sense of the word

[1. Legality
2. Conduct
3. Causation
4. Unlawfulness
5. Capacity]

6. Fault

[Seeman: 152-153, 181-220 and 245-250]
Fault is a blameworthy or reprehensible state of mind – De Wet and Swanepoel

Mens rea – English law

Fault is a reproach which strikes the perpetrator by law – Van der Merwe and Olivier

Bloody hands – Me
Intention – subjective test (place yourself in their shoes... what the person was thinking or feeling or perceived)

Negligence – objective test (looking at the situation from the outside... the reasonable man)
Fault is almost never dealt with as a single term and it is rather used as \textit{INTENTION} or \textit{NEGLIGENCE}.

\textbf{Def:} “state of mind of an accountable perpetrator to want to perform an unlawful act within the knowledge that it is unlawful”

Two very distinct elements to intention from this definition:
1. will (cognitive)
2. knowledge of unlawfulness (conative)
CASE LAW

- S v Hartman 1975 (3) SA 532 C
- S v De Oliveira 1993 (2) SACR 59 (A)
1. dolus directus
2. dolus indirectus
3. dolus eventualis
4. dolus indeterminatus or alternativus
1. Dolus Directus

= direct intention or actual intention

A wants to kill B. He takes his bow and arrow and kills B.

The intention to kill and the object of getting rid of B coincide
2. Dolus Indirectus

= indirect intention or intention with the knowledge of certainty
Where the accused FORESAW THE UNLAWFUL CIRCUMSTANCES OR THE CONSEQUENCES AS CERTAIN or substantially certain to occur

- A wants to kill B. He goes to Bs house, knocks on the door and waits for B to ask who it is before A shoots an arrow through Bs door at B.

- A had dolus directus in respect of Bs death AND dolus indirectus with respect to the damage caused to the door (injury to property)
- Although the object was to kill B, A knew that it would not be possible to kill B by shooting the arrow through the door without damaging the door
IN OTHER WORDS A had intention with knowledge of certainty
3. Dolus Eventualis

= intention with knowledge of possibility
Where the accused FORESEES THE POSSIBILITY THAT THE PROHIBITED CONSEQUENCES might occur in substantially the same manner in which it actually does occur or the prohibited circumstance exist and he or she accepts this possibility into the bargain

➢ A wants to kill B. He goes to Bs house, knocks on the door and waits for B to ask who it is in order to shoot him BUT he hears B talking to C who is also inside the house. A foresees that he might also shoot C BUT reckless of this knowledge of possibility, A shoots arrows through the door and kills both B and C.

☐ A had dolus directus in respect to Bs death AND dolus indirectus in respect to the damage to the door AND dolus eventualis in respect to Cs death
☐ It was not the object to kill C neither was it certain BUT he FORESAW THE POSSIBILITY AND RECKLESSLY PROCEEDED
4. Dolus Indeterminatus or Dolus Alternativus

= unspecified or indifferent intention
The accused does not have a specific victim in mind

- A wants to make a political statement and randomly shoots arrows into a crowd, killing B, C, D and E.

A foresaw the possibility of killing people and recklessly proceeded

[NOTE!!! Dolus indeterminatus could be considered a subdivision of dolus eventualis OR of dolus directus]
[keep in mind intention consists of “the will” and “the knowledge of unlawfulness”]

- Persons often commit unlawful acts without being aware of the unlawful nature of the conduct
- In other cases, people commit crimes but defend themselves by saying they didn’t know they were committing a crime

The lack of knowledge (error) of unlawfulness is classified into 2 groups:
1. with respect to the factual circumstances of the deed; or [error of fact]
2. with respect to the legal aspects concerning the deed [error of law]

[NOTE!!! The distinction is not absolute as the law regarding a certain aspect is also a fact so an error of law is also an error of fact]
BUT
When A shoots C, his neighbour who he hates and it turns out he actually shot D, his neighbour who he likes, there has been NO substantial error of fact since A still had knowledge of the unlawfulness (the fact) of his actions

A further requirement to exclude intention is that the error must be bona fide

The substantial, bona fide error must also be reasonable (objective)

ERROR OF FACT

☐ You cannot be found guilty of an intentional crime where knowledge of unlawfulness and intention are excluded by a substantial error

☐ An error is substantial when it relates to an element of the (specific) crime

Eg. Murder = “intentionally and unlawfully causing the death of another person”

A shoots a cow from a distance. On closer inspection it appears it is B in a cow suit on his way to a furry. A did not intend to shoot B en thus it is a substantial error of fact. He thought he was shooting a cow, not a person

BUT

When A shoots C, his neighbour who he hates and it turns out he actually shot D, his neighbour who he likes, there has been NO substantial error of fact since A still had knowledge of the unlawfulness (the fact) of his actions
Before 1977 this was not accepted in our law and the maxim “ignorantia juris neminem excusat” was strictly upheld otherwise everyone would use the excuse of being ignorant of the law.

In 1977 the Appellate Division of the Supreme Court decide it could be an excuse as long as it was bona fide and reasonable.

If a person commits an error of law intentionally or negligently it cannot serve as a defence.

CASE LAW
S v De Blom
ABERRATIO ICTUS

= going astray of a blow

Not the same as error of fact

- NOT when A aims his gun at B and shoots. It turns out that it is not B but C who was aimed at and shot.

- Why? The object which was aimed at was hit and thus the perpetrator only erred in respect to the identity of the object = error in objecto
Illustration through CASE LAW

S v Mkansi 2004 (1) SASV 281

S v Raisa 1979 (4) SA 541 O
Aberratio ictus decisions are often influenced by the doctrine of versari in re illicit

A person committing an unlawful act is responsible for all the unlawful actions flowing from that original action

IRRESPECTIVE of whether or not he foresaw them or whether the reasonable man would have foreseen them

REJECTED IN THE DECISIONS OF S V VAN DER MESCHT AND IN S V BERNARDUS

[NOTE!!! This doctrine is connected to negligence]
NEGLIGENCE

CASE LAW

S v Van der Mescht 1962 (I) SA 521 A

S v Bernardus 1965 (3) SA 287 A

S v Ngema 1992 (2) SACR 649 D
A person’s conduct is negligent if:

i. the reasonable person in the same circumstances would have foreseen the possibility
   * that the particular circumstances might exist, or
   * that his conduct might bring about the particular result

ii. the reasonable person would have taken steps to guard against such a possibility; and

iii. the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person
WHY IS NEGLIGENCE PUNISHABLE?
Because a person did NOT exert their mental powers to avoid unlawful behaviour - De Wet and Swanepoel. A person does not properly use their brain and alertness (het niet behoorlijk gebruiken van...verstand en oplettendheid) – Van der Linden.

Negligence may thus be described/ defined as:
“a Blameworthy careless state of mind”
THE TEST FOR NEGLIGENCE IS OBJECTIVE AND IS CALLED THE REASONABLE PERSON TEST.

- Diligens Paterfamilias
- Prudent Person
- Notional Epitome of Reasonable Prudence
- The Embodiment of Social Judgements
- Common Morality and Common Sense to the Activities of the Common Man
In SA it is difficult to determine this reasonable person due to our diverse and heterogeneous population. (Race and personal traits and superstition and intelligence is irrelevant)

[NOTE!!! The Ngema case, which was self study, tested negligence against the reasonable person of the same background, educational level, culture, sex and race as the accused]

Some subjectivity sneaks into testing negligence (in the Mahlalela case) as:
1. regard is given to the specific circumstances in which the accused found himself
2. regard is given to the specific expertise of the accused
3. regard is given to the age of the accused
In consequence crimes the test is whether or not the reasonable person would have foreseen the possibility of the consequences and prevented those consequences in the circumstances wherein the accused found himself.

In non consequence crimes the test is whether or not the reasonable person would have abstained from the action in the circumstances wherein the accused found himself.
The belief in witchcraft does not exclude fault but it may be a mitigating factor influencing sentencing

Cases which support this:
- Mathoka and Others
- Lukhwa en ‘n Ander

See website
A herbalist was charged with murder. He gave a child herbs and beer to drink and the child died due to the poisonous content of the mixture. It was concluded that the defendant should have foreseen the death of the child, all the more as he was an expert on herbs. He was therefore found guilty of culpable homicide.

In the Mahlalela case it was held that when deciding a witchdoctor's negligence, his specific knowledge of poisonous plants etc should be taken into account.
= the perpetrator who commits an unlawful act is held liable for all the unlawful consequences flowing from the action
Irrespective of whether or not they foresaw this or not
Irrespective of whether the reasonable person would have foreseen this

BERNARDUS CASE: eggskull cases – a person is ONLY guilty of culpable homicide if the reasonable person would have foreseen that the deceased could die from the assault

SELF STUDY!!! Compare the majority decisions of the Van der Mescht case and of the Bernardus case and read the entire discussion on page 107 and 108 of the SG in depth!
Rumpff (minority judgement, Bernardus case) stated that the reasonable person must foresee that persons around him could possibly have thin sculls and could die from a minor assault:

“hy sou na my mening ook skuldig gewees het indien die stok die oorledene se skedel nie binnegedring het nie, maar wel getref het, en die dood veroorsaak sou gewees het deur die feit dat die oorledene ‘n buitengewone dun skedel gehad het”

REMEMBER that when it comes to negligence, it is only important that the CONSEQUENCE was reasonably foreseeable and not the actual manner in which it could happen.

An act could also be negligent for the purpose of a statutory crime eg. negligent driving.

The fact that a deceased was also negligent in the case of culpable homicide does not lessen the negligence of the accused.

= mitigating
In the Ngubane case it was the tests for negligence and intent do not necessarily include one another but they could exist next to each other on the same set of facts.

Ngubane attacked and stabbed his girlfriend and was charged with culpable homicide. On trial he pleaded guilty but later said he did not intend to plead guilty. A plea of not guilty was recorded. He was found guilty of murder on the evidence presented during the hearings. He appealed.

The question was whether you could be found guilty of CH even where murder is proven. In other words, is it possible for intention and negligence to overlap?

Ngubane was found guilty of CH on appeal.
This is where a person was held liable for contravening a statutory provision even where fault had not been proven by the State.

Obviously in conflict with the maxim nulla poena sine culpa (no punishment without fault) and non facit reum nisi mens sit rea (the act does not render the perpetrator culpable unless he was conscious of its wrongfulness).

Only applied to cases of statute crimes where the legislator had not mentioned the requirement of fault (intent/negligence) since common law crimes always require fault.

ABSOLUTE / STRICT LIABILITY

SELF STUDY!!! Page 112 and 113. Go through this in depth!
Fault thus became a matter of interpretation

How do you determine the form of fault which must be proven to convict an accused?

1. the language and context of the prohibition
2. the ease with which the provision could be evade when intention is the only required form of fault
3. the reasonableness or not thereof if negligence is regarded as the sufficient form of fault
4. the degree of caution required by the law
   * the purpose and scope of the statute; and
   * the nature of the punishment which could be imposed

[Attorney General Cape v Bestall]
CASE LAW

Amalgamated Beverages Industries, Natal (PTY) Ltd v The City Council of the City of Durban 1992 (2) PHH 34 N
In some cases where negligence is alleged, the doctrine of sudden emergency is raised.

The accused is not negligent if he suddenly finds himself in a dangerous situation which was not self-created and then makes an accident.

Recognition is thus given to the fact that even the reasonable person would act strangely on an emergency situation.
SIMULTANEOUSNESS OF CONDUCT AND FAULT IN THE COMMISSION OF A CRIME

This relates to the argument that the elements of conduct and fault must be present simultaneously to give rise to a crime.

- A hits B on the head in order to knock him unconscious so he can rob B. B however falls down dead but A is not aware of this - A did not intend to kill B, but the killing action was present.
- A decides to throw B in a dam to drown him – he now has the intention to kill despite the killing action being absent since B is already dead.
- In this case, A is guilty of robbery and attempted murder.

WHY?
the end