

CHAPTER 1

CONCEPTUALIZATION AND PROBLEM STATEMENT

1 Introduction and orientation

“Where law ends, discretion begins.
And the exercise of discretion may mean either
beneficence or tyranny, either justice or injustice,
either reasonableness or arbitrariness.”

(Davis, 1984)

There is a growing awareness of the need for exploring the fundamental goals of the legal profession as opposed to the professions of psychiatry and psychology. The social, ethical and legal implications of their interaction within a constitutional framework have become a critical issue. Within the context of the defence of criminal incapacity the interface between law and medicine is a subject of considerable debate and controversy.

Presently the defence of criminal incapacity is becoming a popular defence, but many substantive, procedural and evidential questions about this defence remain unresolved. One area in particular where the defence of criminal incapacity becomes controversial is the question as to the role that mental health professionals, and more particular, psychiatrists and psychologists, should play in the assessment, evaluation and support of this defence.¹ The defence of criminal incapacity and the role of psychiatric and psychological evidence present a multifaceted challenge to the South African criminal justice system. This study is aimed at providing a dissemination of the interaction between law, psychiatry and psychology within the framework of the defence of criminal incapacity.

¹ The defence of criminal incapacity is embodied in sections 77–79 of the Criminal Procedure Act 51 of 1977 (hereafter the “Criminal Procedure Act”). In terms of these sections only a psychiatrist and psychologist are mentioned with reference to mental health professionals conducting a psycho-legal assessment. See also Snyman, CR “Criminal Law” 5th ed. (2008) at 159–178.

The defence of criminal incapacity necessarily manifests in one of two particular defences, being “non-pathological criminal incapacity” and “pathological criminal incapacity.”² Non-pathological criminal incapacity, in brief, denotes those situations of incapacity not attributable to a mental illness or mental defect or a pathological disturbance of the mental faculties, whereas “pathological” criminal incapacity means “emanating from a disease”.³ It is precisely within this distinction between these two classifications of criminal incapacity where the interface between law and mental health becomes blurred, as will clearly be explained later.

Psychiatrists and psychologists are generally sceptical as to the validity and necessity of the defence of non-pathological criminal incapacity.⁴ In terms of the Criminal Procedure Act, expert evidence from a psychiatrist or psychologist is not imperative in cases where the defence of non-pathological criminal incapacity is relied upon.⁵ A court in the latter instance merely retains a discretionary power to refer an accused for observation.⁶

In cases where pathological criminal incapacity is raised, a court is obliged to refer an accused for observation in terms of the Criminal Procedure Act. In the case of pathological criminal incapacity, expert psychiatric and psychological evidence is thus provided for within a legislative framework, whereas the same does not inadvertently apply to cases of non-pathological incapacity, where expert evidence is not a prerequisite for the defence to succeed. The question that arises is whether this distinction with reference to the necessity of psychiatric and psychological evidence in support of a defence of criminal incapacity, is a valid

² Van Oosten, FFW “Non-pathological criminal incapacity versus pathological criminal incapacity” SACJ (1993) at 127. The terms “non-pathological” and “pathological” criminal incapacity will be discussed later in this chapter. See also Kaliski, SZ “Psycholegal Assessment in South Africa” (2006) at 38.

³ Snyman (2008) *supra* note 1 at 163.

⁴ *S v Eadie* 2002 (1) SACR 663 (SCA). At 669 Navsa JA stated the following in respect of psychiatric evidence led by Dr Sean Kaliski: “It is clear from his evidence that he is sceptical of the defence in question. In 90 percent of the cases in which he testified the defence was the same as the one raised in the present case. In his experience the defence has never been successfully established”.

⁵ See s 78(2) of the Criminal Procedure Act 51 of 1977. This section will be discussed comprehensively in chapter 2 *infra*.

⁶ Such a referral occurs in terms of s 79 of the Criminal Procedure Act. This section could also be construed as the foundational principle for empowering the interaction of law with the fields of psychiatry and psychology.

one. Should expert evidence, and more particularly, the need for expert evidence, be dependent on the alleged cause of criminal incapacity? Can a defence of criminal incapacity ever be successfully established in the absence of psychiatric and psychological evidence in support thereof?

The author submits that, due to the inherent nature and complexity of the defence, expert evidence should be a prerequisite in any case where the defence of criminal incapacity is raised, regardless of the cause of the incapacity.

Requiring expert evidence is, however, not the only obstacle. In order for psychiatric and psychological evidence to render value in cases of criminal incapacity, the defence of criminal incapacity in all spheres should be acknowledged within the medical profession. If the defence of non-pathological criminal incapacity is not fully recognized and comprehended within the medical field, it suffices to state that the expert evidence in support of such defence will lack probative value. Within the domain of pathological criminal incapacity, the threshold requirement for the defence is “mental illness” or “mental defect”. The question to be asked is: What constitutes a mental disease or defect?⁷ According to Slovenko a proper definition of mental disease or defect is problematic as a result of the simultaneous need to have the concept governed by legal concepts of responsibility and blame, and also to have it governed by medical criteria of mental disorder.⁸ The concept of mental disease or mental defect is fundamental to the practice of psychiatry. The term “mental illness or defect” is a legal term and not a medical term.⁹ Thus what a psychiatrist or a psychologist might deem as a mental disorder or mental illness, will not necessarily be in line with statutory requirements for the presence of a “mental illness” or “mental defect”.¹⁰ The question that arises is: Should the process of defining a “mental illness” or “mental defect” be a legal prerogative or essentially a medical one?

⁷ Slovenko, R “Psychiatry in law – Law in Psychiatry” (2002) 189 at 248; Slovenko, R “Psychiatry and Criminal Culpability” (1995) at 133.

⁸ Slovenko (2002) *supra* note 7 at 247.

⁹ Louw, R “Principles of Criminal Law: Pathological and Non-pathological criminal incapacity” in Kaliski (ed)(2006) *supra* note 2 at 47.

¹⁰ Louw in Kaliski (ed)(2006) *supra* note 2 at 46.

The Mental Health Care Act¹¹ defines mental illness as:

“‘Mental illness’ means a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis.”

Psychiatrists and psychologists usually assess an accused in terms of the diagnostic criteria as set forth in the Diagnostic and Statistical Manual of Mental Disorders.¹² The Diagnostic and Statistical Manual of Mental Disorders, however, contains the following *caveat*:¹³

“The purpose (of the DSM) is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigations to diagnose, communicate about, study, and treat the various mental disorders. It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological gambling or Paedophilia does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments.”

This *caveat* provides an example of one of the areas where law and medicine go separate ways. Incorporating psychiatric methodologies and diagnostic categories into the framework of the defence of criminal incapacity presents substantive as well as evidentiary obstacles. One of the core areas where the latter statement proves to be true is with reference to the battered woman who kills her abusive partner.¹⁴ The legal position of an abused woman who kills her abusive partner is

¹¹ 17 of 2002. This definition is not binding in a criminal trial. See Louw in Kaliski (ed)(2006) *supra* note 2 at 46.

¹² American Psychiatric Association. “Diagnostic and Statistical Manual of Mental Disorders” DSM-IV edition revised. Hereafter “DSM-IV”.

¹³ DSM-IV p xxiii. See also Slovenko (2002) *supra* note 8 at 258.

¹⁴ For purposes of this discussion the term “battered woman” will be used as this is the term generally used to refer to situations of the battered woman syndrome. Reference to this term should not be construed as being gender specific.

an area within the South African criminal justice system that is clouded with controversy.¹⁵ This controversy becomes evident especially in cases where a woman is charged with the murder of her abusive partner or husband in a non-confrontational situation. Criminal incapacity is one of the defences available to an abused woman who kills her abusive partner.

The phenomenon of battered women who kill their abusive husbands or partners is increasing rapidly. The majority of battered women who kill, do so in the wake of defending themselves against an attack by their partners.¹⁶ A smaller percentage of women who kill their abusers are more passive or hire third parties to carry out the killings on their behalf.¹⁷

The former group of women generally rely on the defence of private defence. It is, however, the latter group that currently pose a challenge to the criminal justice system. If the defence of non-pathological criminal incapacity is available to battered women, the question that arises is why this defence is not achieving more success in practice? The battered woman syndrome is not classified as a mental disorder in terms of the DSM-IV which excludes reliance on pathological criminal incapacity. Because of the fact that non-pathological incapacity is not caused by a mental illness or mental defect but rather by some altered mental state, the accused cannot rely on a known mental illness as a defence.¹⁸

Due to the fact that battered woman syndrome is not a recognized mental illness in terms of diagnostic criteria, the only possible route at this stage is for the battered woman to introduce evidence in support of a claim that she suffers from

¹⁵ See *S v Campher* 1987 (1) SA 940 (A); *S v Engelbrecht* 2005 (2) SACR 41 (WLD); *S v Ferreira* 2004 (2) SACR 454 (SCA); *S v Wiid* 1990 (1) SACR 561 (A).

¹⁶ Ludsin, H and Vetten, L "Spiral of Entrapment – Abused women in Conflict with the Law" (2005) at 7.

¹⁷ Ludsin and Vetten (2005) *supra* note 16 at 11. See also *S v Ferreira* 2004 (2) SACR 454 (SCA).

¹⁸ Carstens, PA and Le Roux J "The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband" (2000) SACJ at 180. See also Strauss, SA "Nie-Patologiese ontoerekeningsvatbaarheid as verweer in die Strafreg: 'n Nuwe uitdaging vir deskundige mediese getuienis" (1995) SAPM at 14.

post-traumatic stress disorder.¹⁹ Browne²⁰ notes that most battered women who kill do not appear to be mentally ill. Ludsin and Vetten summarise the difficult plight of the battered woman by stating:²¹

“Women suffering from BWS or PTSD, however, may find that their disorders are too pathological for a finding of non-pathological criminal incapacity and yet not sufficiently pathological for insanity. They could be excluded from both defences on the basis of such diagnosis.”

This quote strikingly summarizes the difficult situation that battered women find themselves in and accordingly emphasizes the need for research in this regard. The central issue with reference to the battered woman syndrome controversy centres not so much in searching for the most appropriate defence for the battered woman, but rather on the expert psychiatric and psychological evidence in support of such defence. In the absence of such evidence, it is submitted that any defence relied upon in support of the battered woman syndrome will be difficult to prove. In the light of psychiatric scepticism regarding non-pathological criminal incapacity the problem is further exacerbated. The question that accordingly arises is whether psychologists and more importantly, forensic psychologists with experience and training in respect of the battered woman syndrome, would not serve a more vital role in explaining the intrinsic phenomena associated with the battered woman syndrome.²²

Walker also states that the evidence, and more specifically, the expert evidence, has a crucial bearing on the outcome of any homicide case in which the accused

¹⁹ Ludsin and Vetten (2005) *supra* note 16 at 168; Walker, LE “The Battered Woman” (1979) at 265-270; Carstens and Le Roux (2000) *SACJ supra* note 18 at 185–186.

²⁰ Brown, A “When Battered Women kill” (1987) at 176.

²¹ Ludsin and Vetten (2005) *supra* note 16 at 168.

²² In *S v Kensley* 1995 (1) SACR 646 (A) the court on appeal referred to the following evidence of a psychiatrist who testified: “The main thrust of Dr G’s work and experience is forensic psychiatry. He made it clear that he was *au fait* with the content of the term “criminal capacity” but that that, and the word ‘automatism’ in relation to persons not suffering from any pathology were legal terms not psychiatric ones ... He was satisfied that at the time of the events in question, the appellant suffered from **no pathology recognized in psychiatry**, he knew what he was doing and was capable of controlling his actions” (at 652i–653b).

is a battered woman.²³ Walker notes that in her experience as an expert witness, admissibility issues concerning expert evidence are problematic.²⁴ She explains:²⁵

“The informed expert witness is the only person, in these cases, qualified to point out that the psychological reality of these women justifies their actions.”

Walker takes the view that battered women kill because they perceive it as the only way to escape a physically life-threatening and emotionally and psychologically unbearable situation.²⁶

It is submitted that expert psychological evidence plays a pivotal role in support of battered woman syndrome.

Ludsin and Vetten state:²⁷

“Abused women who kill who are charged with murder need to provide expert testimony of the psychological effects of abuse on women generally, and the accused particularly, in order to provide the factual foundation for a defence or mitigation of sentence. Without this information, it may be impossible for a court to understand how a woman’s actions fit within any of the defences or why her circumstances justify mitigation of sentence.”

Ludsin and Vetten state that the context in which abused women resort to killing their abusive partners, is crucial in aiding and assisting courts in understanding the multifarious circumstances trapping abused women within abusive relationships.²⁸ It is accordingly the role of the expert witness to take this information and apply it

²³ Walker, LE “Terrifying Love – Why Battered Women kill and How society responds” (1989) at 267. Dr Lenore Walker is referred to as the “mother” of the Battered woman syndrome.

²⁴ Walker (1989) *supra* note 23 at 266.

²⁵ Walker (1989) *supra* note 23 at 267.

²⁶ *Ibid.*

²⁷ Ludsin and Vetten (2005) *supra* note 16 at 192.

²⁸ Ludsin and Vetten (2005) *supra* note 16 at 93.

to the specific circumstances of the case in order for the court to properly and adequately understand the abused woman's actions.²⁹

From the above it is clear that expert evidence in support of the battered woman syndrome is pivotal. The battered woman syndrome and the crucial necessity of expert evidence in support thereof will also be used as an example in this study to canvass the need for expert evidence in support of the defence of non-pathological criminal incapacity as battered women will in many instances of abuse that results in killing, rely on the defence of non-pathological criminal incapacity as a defence. The Criminal Procedure Act currently affords a court a discretionary capacity to refer an accused person for observation when reliance is placed on the defence of non-pathological criminal incapacity.³⁰ A question that arises is whether provision should not be made in terms of a diagnostic framework for the battered woman syndrome? This will inevitably provide for the defence of pathological criminal incapacity in terms of which a court is obliged to refer an accused for observation by medical experts.³¹

A contributory factor to the controversial nature of the defence of criminal incapacity, specifically with reference to non-pathological criminal incapacity, lies in the acknowledgement of the fundamental differences between the professions of psychiatry and psychology.

Psychiatrists are primarily orientated to assess, evaluate and treat mental disorders as classified in the Diagnostic and Statistical Manual of Mental Disorders IV.³² Psychiatry is thus a medical specialty. Within the defence of criminal incapacity, psychiatry will play a pivotal role in support of the defence of

²⁹ *Ibid.*

³⁰ S 78(2). This section will be discussed in detail in chapter 2 *infra*.

³¹ Carstens and Le Roux (2000) *SACJ supra* note 18 at 189. It is interesting to note that Walker states that she was asked whether there were any typologies or classification systems which list battered women as a category. She replied that the DSM revision group, which is authorised to develop the then new DSM III were considering including it as a new category. Walker also notes that there was debate about listing various subcategories under the Post Traumatic Stress Disorder diagnosis. See Walker (1989) *supra* note 23 at 269–270. The current DSM-IV does, however, not contain these subcategories. The question can be asked whether the time has not arrived for medicine to meet law halfway in this regard.

³² Kaliski (2006) *supra* note 2 at 377.

pathological criminal incapacity. Psychiatry is also probably one of the most complex fields of medical specialisation.³³ Psychologists, and more specifically, clinical psychologists, are more involved with the emotional and psychological factors that contribute to mental states.³⁴

Tredoux also states that the main difference between psychiatry and psychology is that psychiatry is a medical specialisation which is more likely to approach psychological problems and phenomena from a biological and chemical treatment perspective.³⁵ According to Tredoux, psychiatry is generally interested in a narrower range of mental and behavioural phenomena than psychology.³⁶

With the abovementioned distinction in mind, the question that inevitably falls to be determined is whether the particular type of mental health professional who presents expert evidence in a case where criminal incapacity is raised, does not necessarily determine the quality and probative value of the testimony? Is a psychologist not a more appropriate mental health professional to evaluate a battered woman as battered woman syndrome is not a listed category constituting a mental illness?

Law and Medicine are probably two of the oldest professions. The investigation and exploration of the human mind is fascinating and intriguing, but also highly specialized and complex. This becomes evident whenever the defence of criminal incapacity is raised. Because of the complexity of this defence, the interface between law and medicine in the support and assessment of this defence becomes a zone of conflict.

Redmayne states:³⁷

³³ Carstens, PA and Pearmain, D "Foundational Principles of South African Medical Law" (2007) at 745. (Hereafter referred to as "Carstens and Pearmain").

³⁴ Kaliski (2006) *supra* note 2 at 378.

³⁵ Tredoux, C, Foster, D, Allan, A, Cohen, A and Wassenaar, D "Psychology and Law" (2005) at 8. (Hereafter "Tredoux *et al*").

³⁶ *Ibid.*

³⁷ Redmayne, M "Expert Evidence and Scientific Disagreement" (1997) *U C Davis L. Rev* at 1027.

“The relationship between Science and Law (is) ... a marriage of opposites, ... a conflict between rival systems, ... a clash of cultures.”

A possible reason for the conflict could be traced to the challenges posed by system specialization.³⁸

The disciplines of psychiatry, psychology and law have different traditions and methods of reasoning.³⁹ Kaliski notes:⁴⁰

“Clinicians and Lawyers are like long-married couples that still struggle to understand each other despite their mutual dependence.”

Kaliski in addition notes that the interaction of mental health professionals within the legal domain has shaped the development and interpretation of the law and its practice.⁴¹ Kaliski is of the view, and this view is supported, that forensic mental health issues are currently contributing to the difficulties in achieving a successful interface between the professions of law and medicine.⁴²

In respect of the conflict between psychology and law, Tredoux states:⁴³

“Psychology and law are disciplines that are, from several vantage points, worlds apart. One is a Maverick johnny-come-lately, born out of sheer curiosity in the nineteenth century European laboratories, and always ready to tackle apparently imponderable questions with empirical methods. The other is an august order that traces its lineage to the writings of the ancients, and steers itself through a profound reverence for authority, an anachronism perhaps in a world dominated by Sciences and technologies.

³⁸ Wolff, N “Interactions between Mental Health and Law Enforcement Systems, Problems and Prospects for Cooperation” *Journal of Health Politics, Policy and Law* (1998) at 133 as accessed on <http://jhppl.dukejournals.org/cgi/content/abstract/23/1/133>. [Accessed on 2008/07/03].

³⁹ Mandalo, MJ “Towards a Standard for the admissibility and Evaluation of Psychiatric Evidence in War Crimes” (2000) LLM dissertation Georgetown University Law Centre at 10.

⁴⁰ Kaliski (2006) *supra* note 2 at 1.

⁴¹ *Ibid.*

⁴² *Ibid*

⁴³ Tredoux *et al* (2005) *supra* note 35 at iii.

These are strange but habitual bedfellows. Their interaction are many, and take various forms.”

The disciplines of psychiatry, psychology and law have somewhat different traditions and methodologies and have as such often been referred to as “a highly neurotic, conflict ridden ambivalent affair”.⁴⁴ Rix⁴⁵ takes the view that some of the causes of the uneasiness between medicine and law can be identified as lack of proper communication, different models, unrealistic expectations and role conflict. Rix in addition states that mental health professionals and legal practitioners come from different backgrounds.⁴⁶ Mental health professionals have their medical model and legal practitioners have their legal model.⁴⁷ Rix indicates that a possible cause of the conflict between law and medicine could also be traced to the fact that the medical model is both holistic and deterministic as opposed to the legal model that is essentially based on free will.⁴⁸

Melton, Petrilla, Poythress and Slobogin state that there are various attitudinal differences between medicine and law specifically pertaining to the perception that

⁴⁴ Redding, R “Psychology and the law: How common-sense Psychology can inform Law and Psycholegal Research” (1998) U. Chi. L. Sch. Roundtable 107 at 111 as quoted in Mandalo (2000) *supra* note 39 at 10. With reference to the value of psychiatry, Mandalo also states: “It can define for the law those mental functions that need to be studied for a meaningful and sophisticated understanding of the operations of the human mind. In this interaction, it can seek the answers to questions related to diagnosis and treatment of mental disorders and pose the behavioral questions that biology needs to answer if we are to have an advanced understanding of the functioning of mental processes.”

⁴⁵ Rix, KJ “Psychiatry and the Law: Uneasy Bedfellows” (2006) *Medico-legal Journal* vol 74 Part 4, 148–159 at 148.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Rix (2006) *supra* note 45 at 149. Determinism is a doctrine in terms of which the fate of human beings is determined by factors beyond their control. An individual’s destiny, according to this doctrine is already decided for him. Within the criminal law context this entails that the individual’s psychological make-up establishes whether he or she will be a criminal or not. A person’s psychological make-up is thus the inevitable product of the cells of one’s body. See Strauss, SA “Doctor, Patient and the law: A Selection of Practical Issues” 3rd ed (1991) at 121–135. The extreme form of determinism argues that all mentally ill persons are incapable of making free choices because of their unconscious and neurotic impulses and if all criminal behaviour is equated with mental illness, the criminal is sick and not responsible for his actions. Rix (2006) *supra* note 45 at 149. Opposite to the doctrine of determinism stands the doctrine of indeterminism according to which the human will is essentially free and is not predestined to any particular line of conduct. Human beings are accordingly responsible for their conduct. The traditional system of criminal justice is based on this premise. See Strauss (1991) *supra* note 48 at 121. See also Strauss, SA “Rechtsaspekte van geestesversteurdheid – Legal aspects of mental disorder” (1971) *THRHR* at 1. See also Snyman (2008) *supra* note 1 at 157.

often exists that lawyers tend to be concerned mainly with the sanctity of legal principles in the abstract and with the protection of civil liberties for persons.⁴⁹ Mental health professionals, on the other hand, are often perceived as paternalistic and prone to be motivated by a need to help and to cure regardless of the effect this has on liberty.⁵⁰

Melton *et al* also state that one of the main problem areas between law and mental health can be found in the differing interpretations they support pertaining to the role of probability assessments.⁵¹ Although the Sciences are inherently probabilistic in their understanding of truth, the law demands at least the appearance of certainty as the result of the magnitude and irrevocability of decisions that have to be delivered in law.⁵²

Strauss notes that law is essentially a normative science that would generally aim to establish its own norms for defining legally relevant facts, but that modern science should be fully acknowledged in all spheres of law.⁵³ Strauss notes further that psychiatry is in essence a therapeutic science and that neither the law nor the medical profession should be granted the sole prerogative of determining the definition and assessment of criminal responsibility.⁵⁴ Strauss correctly states that a balance has to be struck between law and medicine.⁵⁵

The relationship between psychiatric concepts and legal concepts is indicative of how psychiatry and the law are increasingly making an advance in speaking in the

⁴⁹ Melton, G, Petrilla, J, Poythress, N, Slobogin, C “Psychological Evaluations for the Courts – A Handbook for Mental Health Professionals and lawyers” 3rd ed (2007) at 6. (Hereafter Melton *et al*).

⁵⁰ Melton *et al* (2007) *supra* note 49 at 6.

⁵¹ Melton *et al* (2007) *supra* note 49 at 11.

⁵² Melton *et al* (2007) *supra* note 49 at 11 express the following caution: “There is a danger that, because of the law’s preference for certainty, experts will overreify their observations and reach beyond legitimate interpretations of the data in order both to appear “expert” and to provide usable opinions. Similarly, legal decision-makers may discard testimony properly given in terms of probabilities as “speculative”, and may defer instead to experts whose judgments are expressed in concrete opinions of what did or will happen. The result is a less properly informed court. The risk of distorting the fact-finding process is particularly great in the behavioral Sciences ...” (at 11).

⁵³ Strauss (1971) *THRHR supra* note 48 at 8.

⁵⁴ Strauss (1971) *THRHR supra* note 48 at 8.

⁵⁵ *Ibid*.

same or similar terms. Mandalo notes that the law is essentially aimed at achieving social policy goals and the protection of the community against those who violate societal norms.⁵⁶ Psychiatry, on the other hand, is primarily concerned with the causes of human behaviour.⁵⁷ These fundamental differences in these disciplines pose serious obstacles for the legal system. Mandalo correctly notes that “the intersection of psychiatry and law is a very difficult and delicate balance.”⁵⁸

Samuels notes that there is frequently a degree of tension between doctors and legal professionals which is not always negative, but more often than not there exists a level of ignorance, frustration, aggression and rejection which can be prejudicial and counterproductive to the interests of the accused, the public as well as these two professions respectively.⁵⁹

The purpose and aim of this study is to enhance the understanding of the interface between psychiatry, psychology and law within the context of the defence of criminal incapacity. This study aims at providing a framework for a more cooperative dialogue between law and medicine when the defence of criminal incapacity has to be determined. This study will provide a contribution to the current legal jurisprudence on contemporary issues and also serve as a dissemination of important research findings in respect of the role of expert

⁵⁶ Mandalo (2000) *supra* note 39 at 12.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* See also Dahl, P “Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials” (1985) *Cal. L. Rev* at 411.

⁵⁹ Samuels, A “Mental Condition as a defence in Criminal Law: A lawyer addresses medical men” (1988) *Med-Sci. Law* vol 28 no 1. See also Bromberg, W “Psychiatrists in Court: The psychiatrist’s view” (1969) *American Journal of Psychiatry* no 125 1343–1347 at 1343 where it is stated with reference to the different philosophical approaches: “The one must find ‘blame’ and subsequent punishment for the offender, the other wishes to help the individual.” See also Glueck, S “Law and Psychiatry – Cold War or *Entente Cordiale*” (1962) as quoted in the “Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters” RP 69/1967 paragraph 1-12 (hereafter “The Rumpff Report”) where he states: “Lawyers tend to look upon psychiatrists as fuzzy apologists for criminals, while psychiatrists tend to regard lawyers as devious and cunning phrasemongers.” Kriegler, J and Kruger, A “Hiemstra - Suid-Afrikaanse Strafproses” 6th ed (2007) at 204 (hereafter “Hiemstra”) state: “Die psigiatrie sien die mens as ‘n geheel en dinamies, die psigiatrie wil behandel, nie veroordeel nie. Die Straffreg wil weet of dit regverdigbaar is om ‘n persoon strafbaar te hou vir sy daad.”

psychiatric and psychological evidence in support of the defence of criminal incapacity.

A further crucial issue at the crossroads of law, psychiatry and psychology is the weight and probative value attached to the expert evidence of the particular psychiatrist or psychologist.

Within the domain of the defence of criminal incapacity, psychiatrists and psychologists testifying in respect of these defences are expert witnesses. Expert evidence is a form of opinion evidence which is generally inadmissible unless the subject enquiry and the facts in dispute are of such a nature that the Court is in need of assistance from experts in the field in order to arrive at an informed judgment. The question as to the admissibility of such evidence is dependent on the relevance of such opinion.⁶⁰ The exclusion of opinion evidence is predicated upon the premise of protecting the function of the fact-finder or judicial authority and accordingly that a witness delivering an opinion should not usurp the function of the Court.⁶¹ The latter theory is also often referred to as the “Ultimate issue” principle.⁶² This principle entails that a witness cannot express an opinion about final issues which only the Court can decide upon.⁶³ The question to be asked is whether the “ultimate issue” principle is of any relevance when considering the admissibility of expert opinion? The fact remains that it is still within the Court’s own discretion to decide what weight should be attached to such evidence. Within the domain of the defence of criminal incapacity, expert witnesses can educate jurors about scientific or other technical or specialised information that is unlikely to be known by jurors and that will help them decide a case more fairly. In this type of testimony, the expert is not specifically addressing whether an accused did

⁶⁰ Schwikkard, PJ and Van der Merwe, SE “Principles of Evidence” (2009) at 83-103; Zeffert, DT and Paizes, AP “The South African law of Evidence” (2009) at 309.

⁶¹ Schwikkard and Van der Merwe (2009) *supra* note 60 at 83.

⁶² *Ibid.*

⁶³ Schwikkard and Van der Merwe (2009) *supra* note 60 at 83; Zeffert and Paizes (2009) *supra* note 60 at 309-310; *R v Vilbro and Another* 1957(3) SA 223 (A); *Holtzhauzen v Roodt* 1997 (4) SA 766 (W); *S v Kalogoropoulos* 1993 (1) SACR 12 (A) at 22 D-E.

or did not do something, but rather educating the Court about expert knowledge relevant to the disputed facts.⁶⁴

A further aim of this study is to conduct an examination of the rules of opinion evidence and more specifically, expert evidence within the domain of the defence of criminal incapacity. The proper role and place of the psychiatrists and psychologists serving as expert witnesses within the ambit of psycholegal assessments will be carefully analysed and dissected followed by scientifically substantiated recommendations for improving the roles of these professions with reference to the defence of criminal incapacity. Rules regarding the admissibility, reliability and validity of expert psychiatric and psychological evidence will be scrutinized.

Probably one of the most important cornerstones of this study will be a thorough exposition of the Constitutional relevance of this topic.⁶⁵ In order for this study to render a valuable contribution to current South African legal jurisprudence, the Constitutional relevance of this research will be addressed throughout this study.⁶⁶

With reference to the Constitutional underpinning of this study, the following quote from Burchell is important:⁶⁷

⁶⁴ Sales, BD and Shuman, DW “Experts in Court – Reconciling Law, Science and Professional knowledge” (2005) at 3.

⁶⁵ Constitution of the Republic of South Africa 108 of 1996.

⁶⁶ Specifically with reference to chapter 2 of the Constitution – “Bill of Rights”. Various fundamental rights contained in the Bill of Rights will be addressed in this study. The relevant sections are:

S 8 “Application”

S 9 “Equality”

S 10 “Human dignity”

S 12 “Freedom and Security of the Person”

S 14 “Privacy”

S 32 “Access to information”

S 35 “Arrested, detained and accused persons”

S 36 “Limitation of Rights”

S 39 “Interpretation of Bill of Rights”

These sections, or the relevant portions thereof, will be discussed throughout this study where applicable.

⁶⁷ Burchell, J “Criminal Justice at the Crossroads” (2002) *SALJ* 579 at 590.

“The values carved in Constitutional Stone provide the template for the system of criminal justice both in its existing and any future form. There is no question about the applicability of the Bill of Rights in the 1996 Constitution to the Criminal law.”

The Rumpff report correctly asserts that it is essentially required from the psychologist and psychiatrist, on the one hand, to display a sense of responsibility in respect of the views of society and the purpose and essence of punishment. On the other hand, it is required of the jurist and the public to display a sense of acknowledgment for the development of psychiatric and psychological knowledge.⁶⁸

2 Conceptualization

Before a clear demarcation of the various aspects pertaining to expert evidence in support of the defence of criminal incapacity can be embarked upon, a precise definition of the essential concepts that will be encountered in this study, will be provided.

2.1 Criminal Capacity

In the criminal law *mens rea* (culpability or fault) on the part of the perpetrator is a prerequisite for criminal liability. *Mens rea* within this context refers to a blameworthy state of mind with which a perpetrator acts.⁶⁹

In the Roman law as well as the Roman-Dutch law the principle of *nulla poena sine culpa* prevailed that entailed that there would be no punishment without *mens rea*.⁷⁰

⁶⁸ Rumpff Report *supra* note 59 at paragraph 1.20.

⁶⁹ Rumpff Report *supra* note 59 at paragraph 2.1. See also Du Plessis, JR “The Extension of the Ambit of Ontoerekeningsvatbaarheid to the Defence of Provocation – A Strafrekwetenskaplike Development of Doubtful Practical Value” (1987) SACJ vol 104 at 539. Du Plessis notes at 539 that criminal capacity or “Toerekeningsvatbaarheid” as it is described in the article has several different translations such as criminal accountability, criminal responsibility, criminal capacity, the ability to attract criminal liability and criminal imputability. Du Plessis also notes that the term is derived from the German term “Zurechnungsfähigkeit”.

Criminal law is further concerned with the question of responsibility which entails the accountability of a specific individual for a crime by reason of his or her *mens rea*.⁷¹ *Mens rea* presupposes the presence of mental faculties that enable the person refrain from acting with the necessary *mens rea*.⁷²

Before it can be said that a person acted with culpability, he or she must have possessed the necessary criminal capacity.⁷³ Criminal capacity is accordingly an important prerequisite for criminal liability.⁷⁴

In LAWSA⁷⁵ the following is stated:

“South African criminal law is based on the doctrine of indetermination. It proceeds from the premise that the human will is essentially free and that people can accordingly be held liable for their unlawful conduct. Criminal responsibility, however, forms the basis of and is an absolute prerequisite for criminal liability for any offence. More particularly, criminal responsibility is generally viewed as being a prerequisite for *mens rea*.”

It was not until the nineteenth century that the question of responsibility or criminal capacity was regarded as a separate doctrine.⁷⁶

Visser and Maré note:⁷⁷

⁷⁰ Rumpff Report *supra* note 59 at paragraph 2.1.

⁷¹ Rumpff Report *supra* note 59 at paragraph 9.1.

⁷² Rumpff Report *supra* note 59 at paragraph 9.1.

⁷³ Snyman (2008) *supra* note 1 at 159; Burchell, J and Milton, J “Principles of Criminal Law” (2005) at 358.

⁷⁴ Hiemstra (2007) *supra* note 59 at 202; *S v Laubscher* 1988 (1) SA 163 (A); *S v Lesch* 1983 (1) SA 814 (EPD).

⁷⁵ Joubert, WA and Faris, JA “The Law of South Africa” 2nd ed vol 6 (2004) at 61 paragraph 72. (Hereafter “LAWSA”).

⁷⁶ Rumpff Report *supra* note 59 at paragraph 2.7. See also De Wet, JC and Swanepoel, HL “Strafreg” (1975) at 106 where it is noted: “Eers in die negentiende eeu is die leerstuk van toerekeningsvatbaarheid as ‘n selfstandige onder-afdeling van die skuldleer erken, altans deur Vastelandse kriminaliste.”

⁷⁷ Visser, PJ and Maré, MC “Visser and Vorster’s General Principles of Criminal Law through the Cases” 3rd ed (1990) at 305.

“In our opinion criminal accountability is a separate element of every offence: It may well be directly connected to culpability but it does not form part of culpability.”

De Wet and Swanepoel draw a clear distinction between criminal capacity and *mens rea*.⁷⁸

“Die toerekeningsvatbaarheidsvraag het te doen met die persoon se geestesvermoëns, en is ‘n selfstandige vraag naas die vraag of die persoon met die een of ander gesindheid gehandel het. Om skuld te hê moet die persoon toerekeningsvatbaar wees en met ‘n bepaalde gesindheid handel.”

It is accordingly clear from the above that the concept of criminal capacity should be distinguished from culpability.⁷⁹

Snyman defines criminal capacity as follows:⁸⁰

“A person is endowed with capacity if he has the mental abilities required by the law to be held responsible and liable for his unlawful conduct.”

and further:

“The mental abilities which a person must have in order to have criminal capacity, are:

- (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.”

Criminal capacity is defined in LAWSA in similar terms:⁸¹

⁷⁸ De Wet and Swanepoel (1975) *supra* note 76 at 106-107.

⁷⁹ In *S v Adams* 1986 (4) SA 882 (A) at 889 Viljoen JA also noted that criminal capacity is a prerequisite for criminal liability and should be distinguished from intention. See also *S v Lesch* 1983 (1) SA 814 (EPD) at D–E.

⁸⁰ Snyman (2008) *supra* note 1 at 160.

⁸¹ LAWSA (2004) *supra* note 75 at 62 paragraph 73.

“Criminal responsibility or criminal capacity (*toerekeningsvatbaarheid*), is a concept relating to the mental ability of an accused at the time of the alleged offence. An accused is generally said to be criminally responsible if at the time of the alleged offence his or her mental ability was such that he or she could distinguish between right and wrong and act in accordance with the insight.”

Burchell and Milton state:⁸²

“Persons are responsible for their criminal conduct only if the prosecution proves, beyond reasonable doubt, that at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities of insight and for self-control.”

The Rumpff report states that psychology perceives the composition of the human personality as:⁸³

“... a dynamic integration of psychophysical functions by which purposeful behaviour is made possible. This means in the first place that mind and body constitute a whole: the mental functions are very closely integrated with the physiological and biochemical reactions in the body.”

As such the physical changes within the body can alter mental functions and conversely, mental processes can result in physical changes.⁸⁴ The Rumpff report in addition notes that the majority of physical reactions are reflexive and the individual will in most instances have no control over these reactions.⁸⁵ The Rumpff report, however, states the following:⁸⁶

⁸² Burchell and Milton (2005) *supra* note 73 at 358.

⁸³ Rumpff Report *supra* note 59 at paragraph 9.7.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

“But when it comes to a voluntary muscular activity it is a different matter altogether, for then the person is able to control his behaviour by exercising his will. The normal personality is therefore not the slave of morbid urges or impulses welling up within him. He is able deliberately to inhibit them.”

The Rumpff report distinguishes three categories of mental function that are of relevance to the concept of criminal capacity: the cognitive, conative and affective mental functions.⁸⁷

- (i) Cognitive functions: these functions include one’s ability of perceiving, thinking, reasoning, remembering, insight and conceiving.
- (ii) Conative or Volitional functions: these functions relate to a person’s ability or capacity to control his or her behaviour by the voluntary exercise of his or her free will.
- (iii) Affective functions: these functions relate to the capacity for emotional feelings such as anger, hatred, mercy or jealousy.⁸⁸

According to the Rumpff report in the conduct of a normal person the cognitive, conative and affective functions form an integrated unit.⁸⁹

With reference to the psychological foundation of responsibility, the Rumpff report states:⁹⁰

“Two psychological factors render a person responsible for his voluntary acts: first, the free choice, decision and voluntary action of which he is capable, and secondly, his capacity to distinguish between right and wrong, good and evil (insight) before committing the act.”

⁸⁷ Rumpff Report *supra* note 59 at paragraph 9.9; Burchell, J and Milton, J “Cases and Materials on Criminal Law” 3rd ed (2007) at 336; Hiemstra (2007) *supra* note 59 at 204. See also Snyman (2008) *supra* note 1 at 161-162; Burchell and Milton (2005) *supra* note 73 at 358.

⁸⁸ Burchell and Milton (2005) *supra* note 73 at 358.

⁸⁹ Rumpff Report *supra* note 59 at paragraph 9.10.

⁹⁰ Rumpff Report *supra* note 59 at paragraph 9.30.

As such the two psychological factors which render a person responsible for his voluntary actions, namely free choice and the capacity to distinguish between right and wrong, are factors which have resulted in the fundamental two psychological criteria of criminal responsibility, namely insight and self-control or powers of resistance, being established in numerous legal systems.⁹¹

The Rumpff report defines “self-control” as:⁹²

“... a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive.”

A person, whose cognitive or conative capacities were significantly impaired, will accordingly not be held criminally liable.⁹³

Burchell and Milton state the following:⁹⁴

“Therefore the test for determining whether an accused had criminal capacity is whether the accused had the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation.”

In *S v Laubscher*⁹⁵ Joubert J A confirmed the definition of criminal capacity by stating the following:⁹⁶

⁹¹ Rumpff Report *supra* note 59 at paragraph 9.32. See also Van Oosten (1993) *SACJ* at 127. See also Snyman (2008) *supra* note 1 at 160-162; *S v Johnson* 1969 (1) SA 201 (A) at 204 E; *S v Lesch* 1983 (1) SA 814 (O) at 823 A-B; *S v Campher* 1987 (1) SA 940 (A) at 965 D-E; *S v Calitz* 1990 (1) SACR 119 (A) at 126 D; Burchell and Milton (2005) *supra* note 73 at 358.

⁹² Rumpff Report *supra* note 59 at paragraph 9.33.

⁹³ Burchell and Milton (2005) *supra* note 73 at 358.

⁹⁴ *Ibid.*

⁹⁵ *S v Laubscher* 1988 (1) SA 163 (A).

⁹⁶ At 166 G–167 A. See also *S v Eadie* (1) 2001 (1) SACR 172 (CPD) at 177 C-H; *S v Lesch* 1983 (1) SA 814 (O) at 823 A-B; *S v Calitz* 1990 (1) SACR 119 (A) at 126 D; *S v Mahlinza* 1967 (1) SA 408 (A) at 414 G-H.

“Om toerekeningsvatbaar te wees, moet ‘n dader se geestesvermoëns of psigiese gesteldheid sodanig wees dat hy regtens vir sy gedrag geblameer kan word. Die erkende psigologiese kenmerke van toerekeningsvatbaarheid is:

1. Die vermoë om tussen reg en verkeerd te onderskei. Die dader het die onderskeidingsvermoë om die regmatigheid of onregmatigheid van sy handeling in te sien. Met ander woorde, hy het die vermoë om te besef dat hy wederregtelik optree.
2. Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die *weerstandkrag* (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.

Ontbreek een van hierdie twee psigologiese kenmerke dan is die dader ontoerekeningsvatbaar, bv. waar hy nie die onderskeidingsvermoë het om die ongeoorlooftheid van sy handeling te besef nie. Insgelyks is die dader tog ontoerekeningsvatbaar waar sy geestesvermoë sodanig is dat hy nie die weerstandkrag het nie ten spyte daarvan dat hy wel die onderskeidingsvermoë het.”⁹⁷

For purposes of this study, criminal capacity will be defined as:

⁹⁷ See also *S v Mahlihza* 1967 (1) SA 408 (A) at 414 G–H; *S v Chretien* 1981 (1) SA 1097 (A) at 1106 E–F; *S v Van Vuuren* 1983 (1) SA 12 (A) at 17 G–H; Lambrechts, H “‘n Ondersoek na nie-patologiese ontoerekeningsvatbaarheid en die regverdiging vir die voortbestaan van gesonde outomatisme en aan-verwante verwerre in die Suid-Afrikaanse Strafreë” (2005) - Unpublished LLD thesis University of the Free State at 24; Nel, PW “Toerekeningsvatbaarheid in die Suid-Afrikaanse Strafreë” (2008) - Unpublished LLM dissertation at 7–10. See also *S v Lesch* 1983 (1) SA 814 (EPD) at 823 A–H. See also Burchell, EM and Hunt, PMA “South African Criminal Law and Procedure – General Principles of Criminal Law” (1997) vol 1 at 35 where they state: “The accused must have the requisite criminal capacity (or capacity for fault) before he or she can be convicted. Capacity means the capacity to appreciate the wrongfulness of the conduct and the capacity to act in accordance with that appreciation.” See also De Wet, JC and Swanepoel, HL “Die Suid-Afrikaanse Strafreë” (1960) 2nd ed at 99 where it is stated: “Vandag word in ons reg, net soos in die Nederlandse, Duitse, Oostenrykse en Switserse reg, die houding ingeneem dat die geestesvermoëns, waarop dit aankom, die vermoë is om tussen reg en onreg te onderskei en die vermoë om ooreenkomstig daardie insig te handel.”

- (i) The mental ability to distinguish between right and wrong, and
- (ii) the mental ability of appreciating the wrongfulness of an act or omission, and
- (iii) the mental ability of acting in accordance with an appreciation of the wrongfulness of an act or omission.⁹⁸

2.2 Non-Pathological Criminal Incapacity

Non-pathological criminal incapacity denotes those situations where an accused relies on the defence of criminal incapacity where the cause of the incapacity was not attributable to some term or manifestation of a mental illness or other pathological disturbance of the mind.

Snyman defines non-pathological criminal incapacity as follows:⁹⁹

“Non-pathological criminal incapacity’ refers to cases in which X alleges that, although he lacked capacity at the time of the act, the incapacity was not attributable to a pathological (‘emanating from a disease’) mental disturbance.”

In *S v Laubscher*¹⁰⁰, the term “non-pathological criminal incapacity” was coined for the first time by Joubert J A:¹⁰¹

“Afgesien van statutêre ontoerekeningsvatbaarheid kan ‘n mens ook nie-patologiese ontoerekeningsvatbaarheid van ‘n tydelike aard ten tyde van die pleeg van die misdaad kry wat aan ‘n nie-patologiese toestand, d.w.s.

⁹⁸ This definition also denotes the current defence of pathological criminal incapacity as set forth in section 78(1) of the Criminal Procedure Act 51 of 1977. This defence will be discussed comprehensively in chapter 3 *infra*. See Bergenthuin, JG “Die algemene toerekeningsvatbaarheids-maatstaf” (1985) *De Jure* 273 at 282 where criminal capacity is defined: “Iemand wat ‘n handeling verrig wat ‘n misdryf uitmaak en wat ten tye van so ‘n verrigting nie oor die vermoë beskik om – (a) die ongeoorlooftheid van sy handeling te besef nie, of (b) ooreenkomstig ‘n besef van die ongeoorlooftheid van sy handeling op te tree nie, is nie vir so ‘n handeling strafregtelik toerekenbaar nie.”

⁹⁹ Snyman, CR “Criminal Law” (2002) at 163.

¹⁰⁰ *S v Laubscher* 1988 (1) SA 163 (A).

¹⁰¹ At 167 F–H.

nie aan 'n geestesongesteldheid of geestesgebrek in die vorm van 'n patologiese versteuring van sy geestesvermoëns toe te skryf is nie, te wyte sodat hy nie die onderskeidingsvermoë óf die weerstandskrag (wilsbeheervermoë) gehad het nie.”

Synonymous terminology that have also been used by our courts to describe this condition are also “non-pathological criminal incapacity of a temporary nature”¹⁰² as well as “temporary mental disturbance”.¹⁰³

In *S v Arnold*¹⁰⁴, Burger J noted:¹⁰⁵

“It is therefore logical to say that it is not only youth, mental disorder or intoxication which could lead to a state of criminal incapacity, but also incapacity caused by other factors such as extreme emotional stress.”

In *S v Gesualdo*,¹⁰⁶ Borchers J held:¹⁰⁷

“For many years the courts of this country and of others have accepted that a sane individual (i.e. one free from mental illness), who can distinguish between right and wrong, may be subjected to such mental or emotional pressures that he may not be able to control his actions.”

In *S v Kok*¹⁰⁸, Scott JA stated the following in respect of the distinctive nature of the defence of non-pathological criminal incapacity:¹⁰⁹

¹⁰² *S v Campher* 1987 (1) SA 940 (A) at 954 F–G the phrase “tydelike aantasting van die geestesvermoëns” was used.

¹⁰³ As translated from the phrase “tydelike geestesversteuring”. In *S v Campher supra* note 102 the terminology of “tydelike verstandelike beneweling” was also used (at 965 H and 966 F–G). See also Van der Merwe, FW “Nie-Patologiese Ontoerekeningsvatbaarheid as Verweer in die Suid-Afrikaanse Strafreg” (1996) - Unpublished LLM dissertation Unisa at 15. See also *S v Calitz* 1990 (1) SACR 119 (A) at 127 D-I.

¹⁰⁴ *S v Arnold* 1985 (3) SA 256 CPD.

¹⁰⁵ At 264 C – D.

¹⁰⁶ *S v Gesualdo* 1997 (2) SACR 68 (WLD).

¹⁰⁷ At I-J.

¹⁰⁸ *S v Kok* 2001 (2) SACR 106 (SCA).

¹⁰⁹ At 110 H-J.

“At common law a distinction has been drawn in the past between lack of criminal capacity arising from a pathological disturbance of the mental faculties, whether temporary or permanent, on the one hand, and lack of criminal capacity arising from some non-pathological cause which is of a temporary nature on the other.”

In *S v Eadie*¹¹⁰, Griesel J held that traditionally in our common law there existed only two distinct categories of persons who lacked criminal incapacity, namely children under the age of seven years and persons who were found to be insane.¹¹¹ Since the 1980's, however, the latter categories have been extended first in respect of intoxicated persons and later to persons who acted under severe provocation.¹¹² The latter category became known as non-pathological criminal incapacity which Griesel J described as follows:¹¹³

“Such incapacity can arise from a variety of causes, which have variously been described as ‘emotional collapse’, ‘emotional stress’, total disintegration of the personality, or it may be attributed to factors such as shock, fear, anger or tension.”

Hoctor supports an alternative definition to the abovementioned description, by stating the following:¹¹⁴

“In South African law a two-fold classification exists for incapacity, based on the source of the incapacity. Where the incapacity is due to mental illness, it is classified as pathological incapacity. All other sources of incapacity – the sources identified up to this point in South African law are youthfulness, intoxication, provocation and emotional stress – fall within the classification of non-pathological incapacity.”

Van der Merwe also states:¹¹⁵

¹¹⁰ *S v Eadie* 2001 (1) SACR 172 (CPD).

¹¹¹ At 177 D-F. See also *S v Eadie* (2) 2002 (1) SACR 663 at 673 J–674 G.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Hoctor, S “Road rage and reasoning about responsibility” (2001) *SACJ* vol 14 195 at 199.

“Dit gaan dus om die persoon se geestesvermoë of geestestoestand ten tye van die pleeg van die beweerde misdaad. Bogenoemde geestestoestand moet van ‘n tydelike aard wees (wat nie aan ‘n geestessiekte of –afwyking toe te skryf is nie) ...”

Strauss defines non-pathological criminal incapacity as follows:¹¹⁶

“Dit word nou as ‘n selfstandige verweer in strafsake erken en kom daarop neer dat ‘n heftige gemoedsbeweging in uiterste omstandighede ‘n beskuldigde volkome van strafregtelike aanspreeklikheid kan onthef selfs wanneer ‘n ernstige misdaad soos moord hom ten laste gelê is en hy beslis nie geestesongesteld is nie.”

Snyman further states the following:¹¹⁷

“... ontoerekeningsvatbaarheid wat nie te wyte is aan ‘n patologiese toestand nie, maar aan ‘n tydelike wanfunksionering van die dader se geestesvermoëns, welke wanfunksionering ‘n verskeidenheid van oorsake kan hê, soos provokasie, dronkenskap, skok, emosionele spanning of vrees.”

In *S v Eadie*¹¹⁸, Navsa J A held:¹¹⁹

“In our law, criminal incapacity due to mental illness is classified as pathological incapacity. Where it is due to factors such as intoxication, provocation and emotional stress, it is termed non-pathological incapacity.”

¹¹⁵ Van der Merwe, RP “Sielkundige Perspektiewe op Tydelike Nie-patologiese Ontoerekeningsvatbaarheid” (1997) *Obiter* 139 at 139.

¹¹⁶ Strauss (1995) *SAPM supra* note 18 at 14.

¹¹⁷ Snyman, CR “Die Verweer van nie-patologiese ontoerekeningsvatbaarheid in die Strafreg” (1989) *TRW* at 4; Meintjes-Van der Walt, L “Making a muddle into a mess?: The Amendment of s 78 of the Criminal Procedure Act” (2002) *SACJ* at 242; Carstens and Le Roux (2000) *SACJ supra* note 18 at 180.

¹¹⁸ *S v Eadie* 2002 (1) SACR 663 (SCA).

¹¹⁹ At 673 J–674 A.

For purposes of this study non-pathological criminal incapacity will be defined as: The temporary inability or incapacity of a person to distinguish between right and wrong in order to appreciate the wrongfulness of his or her conduct and the inability or incapacity to act in accordance with such an appreciation as a result of factors that are not attributable to a mental illness in the form of a pathological disturbance of a person's mental faculties.

2.2.1 Emotional Stress

Aristotle (384 – 322 BC) provides one of the earliest definitions of emotion by stating:¹²⁰

“Emotion is that which leads one's condition to become so transformed that his judgment is affected, and which is accompanied by pleasure and pain. Examples of emotion include anger, fear, pity, and the like, as well as opposites of these.”

As Reily¹²¹ correctly observes, emotion is very important as it displays a person's character. This is achieved in a negative sense to the extent that a person's character reveals an inability to control impulsive behaviour. If a person's moral training and ethical principles are strong, the stronger his or her control over his or her emotion will be.¹²²

The term “emotional stress” is frequently encountered within the ambit of the defence of non-pathological criminal incapacity and a proper understanding of this term is thus necessary. The term is usually phrased within the context of either “emotion” or “stress”.

¹²⁰ As quoted in Reily, A “The heart of the matter: Emotion in Criminal Defences” (1997) *Ottawa Law Review* vol 29 p 117 at 123. For a discussion on the interaction between law and emotion see Maroney, T “Law and Emotion: A Proposed Taxonomy of an Emerging Field” (2006) *Law and Human Behaviour* at 119–142 where it is argued that the legal relevance of emotion is significant and also deserving of close scrutiny and assessment.

¹²¹ Reily (1997) *supra* note 120 at 123.

¹²² *Ibid.*

Black defines emotion as:¹²³

“A strong feeling of hate, love, sorrow and the like arising within a person and not as a result, necessarily, of conscious activity of the mind.”

Stress is defined as:¹²⁴

“the consequence of the failure to adapt to change. It is, in medical terms, the consequence of the disruption of homeostasis through physical or psychological stimuli. Less simply: it’s the condition that results when person-environment interaction leads someone to perceive a painful discrepancy, real or imagined, between the demands of a situation on the one hand and their social, biological, or psychological resources on the other. Stressful stimuli can be mental, physiological, anatomical or physical.”

Low defines emotional stress as follows:¹²⁵

“... emotional stress suggests a build-up of stressful circumstances over a period of time.”

Low also states correctly that the concepts of provocation and emotional stress should be distinguished.¹²⁶ It is submitted that this view is correct.

In *McClellan v Commonwealth*¹²⁷ the concept of “extreme emotional disturbance” was defined as follows:

¹²³ Black, HC “Black’s Law Dictionary” (1990) 6th ed at 524.

¹²⁴ Wikipedia Encyclopaedia as accessed on <http://en.wikipedia.org/wiki/stress> - (medicine) [accessed on 2009/03/02].

¹²⁵ Low in Kaliski (ed) (2006) *supra* note 2 at 51.

¹²⁶ Low in Kaliski (ed) (2006) *supra* note 2 at 51.

¹²⁷ *McClellan v Commonwealth* 715 SW 2d 464 at 468–469 (k y 1986).

“Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefore, the reasonableness of which is to be determined from the viewpoint of a person in the defendant’s situation under circumstances as defendant believed them to be.”¹²⁸

In *S v Arnold*¹²⁹ Dr Gittelsohn, a psychiatrist on behalf of the accused, stated the following in respect of the accused’s emotional state:

“His conscious mind was so ‘flooded’ by emotions that it interfered with his capacity to appreciate what was right or wrong and, because of his emotional state, he may have lost the capacity to exercise control over his actions.”

Burchell and Hunt note that emotional stress usually involves an accumulation of events over a reasonable period of time as opposed to an isolated event and is often the result of surrounding circumstances.

Burchell and Hunt further state:¹³⁰

“In principle, the origin of the stressful condition in which the individual is placed does not matter, but it may affect the intensity of the ultimate condition. The stressful condition which causes an individual to lack criminal capacity could be caused by, for instance, insulting or oppressive conduct

¹²⁸ See also *Hudson v Commonwealth* 979 SW 2d 106, at 108 (1998) and *Dean v Commonwealth* 777 SW 2d 900 at 909 (Ky 1989).

¹²⁹ *S v Arnold* 1985 (3) SA 256 (CPD) at 263 C–D.

¹³⁰ Burchell, EM and Hunt, PMA “South African Criminal Law and Procedure – General Principles of Criminal Law” (1997) 3rd ed at 211 (Hereafter “Burchell and Hunt”).

of another person, by pre-menstrual stress suffered by a woman or by overwhelming and debilitating social conditions.”¹³¹

Emotional stress for purposes of this study will denote a temporary state of mind inflamed or disturbed as a result of stressful circumstance accumulating over a period of time resulting in a person lacking either the capacity to appreciate the wrongfulness of his or her actions or the capacity to act in accordance with such an appreciation.

2.2.2 Provocation

When an accused person is charged with murder the evidence often reveals that the accused’s conduct was immediately preceded by provocative behaviour by another which in effect gave rise to the accused’s aggressive conduct.¹³² The question which will be addressed in this study is to what extent provocation has a bearing on criminal capacity.

The term “provocation” is deduced from the Latin phrases “provocatio” and “provocare” which is defined¹³³ as the:

“act of provoking, something that provokes, arouses or stimulates.

Tredoux *et al* define provocation as follows:¹³⁴

“The act of inciting another to do something by words or behaviour, and accompanying extreme emotional state.”

In criminal law, provocation is a defence by either excuse or exculpation alleging a sudden or temporary loss of control as a result of another’s provocative conduct

¹³¹ Burchell and Hunt (1997) *supra* note 130 at 211.

¹³² Snyman (2008) *supra* note 1 at 234.

¹³³ Definition extracted from the Merriam-Webster Online Dictionary <http://www.merriam/webster.com/dictionary/provocation> [accessed on 2008/07/21].

¹³⁴ Tredoux *et al* (2005) *supra* note 35 at 424.

sufficient to justify either an acquittal, a mitigated sentence or a conviction for a lesser charge.¹³⁵

Black defines provocation as follows:¹³⁶

“The act of inciting another to do a particular deed. That which arouses, moves, calls forth, causes, or occasions. Such conduct or actions on the part of one person towards another as tend to arouse rage, resentment, or fury in the latter against the former, and thereby cause him to do some illegal act against or in relation to the person offering the provocation.”

And further:¹³⁷

“There must be a state of passion without time to cool placing defendant beyond control of his reason. Provocation carries with it the idea of some physical aggression or some assault which suddenly arouses heat and passion in the person assaulted.”

The Oxford Dictionary of Law defines provocation as:¹³⁸

“Conduct or words causing someone to lose his self control.”

Burchell and Milton state that provocation of a sufficient degree can have a bearing on criminal liability in the sense that it can lead to a complete defence to any type of criminal conduct.¹³⁹

According to Burchell and Milton provocation can exclude either the voluntariness of conduct, criminal capacity or intention.¹⁴⁰

¹³⁵ Wikipedia Encyclopaedia <http://en.wikipedia.org/wiki/provocation> - (legal) [accessed on 2008/07/21].

¹³⁶ Black, HC “Black’s Law Dictionary” (1990) 6th ed at 1225.

¹³⁷ Black *supra* note 136 at 1225.

¹³⁸ Oxford Dictionary of Law 6th ed 2006.

¹³⁹ Burchell and Milton (2005) *supra* note 73 at 425.

¹⁴⁰ Burchell and Milton (2005) *supra* note 73 at 235.

Bergenthuin defines provocation as follows:¹⁴¹

“The concept ‘provocation’ indicates a situation in which a provoker elicits the anger or wrath of the provoked by means of provocative, challenging or defiant behaviour, and the latter in reaction to the provocative behaviour commits a criminal act.”

2.2.3 Battered Woman Syndrome

“Week by week and month by month, women are kicked, beaten, jumped on until they are crushed, chopped, stabbed, seamed with vitriol, bitten, eviscerated with red hot pokers and deliberately set on fire – and this sort of outrage, if the woman dies, is called ‘manslaughter’: if she lives it is common assault.”¹⁴²

One of the central themes of this study will be to evaluate the controversy surrounding the battered woman syndrome within the ambit of the defence of criminal incapacity. The widespread occurrence of physical, sexual and psychological abuse of women by men in intimate relationships will be addressed with specific emphasis on the role that psychiatrists and psychologists play in educating judges as to the world of violence inhabited by battered women who are accused of murdering their abusive husbands or partners.

Walker correctly states:¹⁴³

“There is a continuing debate within the feminist community about the proper role of an expert witness in trials of battered women who kill.”

¹⁴¹ Bergenthuin, JG “Provokasie in die Suid-Afrikaanse Strafreë” (1986) *De Jure* at 98. See also Bergenthuin, JG “Provokasie as verweer in die Suid-Afrikaanse Strafreë” (1985) - Unpublished LLD thesis (UP) at 3–4.

¹⁴² Letter from Mrs Fenwick Miller to the Daily News, reported by the Pall Mall Gazette, 2 October 1988 as quoted in Horder, J “Provocation and Responsibility” (1992) at 188.

¹⁴³ Walker (1989) *supra* note 23 at 10.

For many centuries men had the right to abuse and beat their wives.¹⁴⁴ It is a trite fact that women continue to be abused at an increasing rate.¹⁴⁵ What is even more shocking is the fact that many abused women remain in abusive relationships.¹⁴⁶

In assessing and understanding the complex emotional and social landscape inhabited by battered women, expert evidence plays a pivotal role.¹⁴⁷

In order to understand the discussions pertaining to battered women in the course of this study, it is necessary to define the concept of “battered woman syndrome.”

Walker defines a battered woman as follows:¹⁴⁸

“A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.”

Moore states that the majority of material on battered woman syndrome relate to the physical abuse suffered by women which denotes:

“... deliberate, severe and repeated physical injury ... with the minimal injury being severe bruising.”¹⁴⁹

¹⁴⁴ Pistorius, M “Fatal Females – Women who kill” (2004) at 15.

¹⁴⁵ Reddi, M “Battered woman syndrome: some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers” (2005) *SACJ* 259 at 260.

¹⁴⁶ Reddi (2005) *SACJ supra* note 145-259 at 260.

¹⁴⁷ Ludsin and Vetten (2005) *supra* note 16 at 12.

¹⁴⁸ Walker (1979) *supra* note 19 at XV.

¹⁴⁹ Moore, D “Battered Women” (1979) at 8.

Moore correctly states that recognition should also be given to the psychological damage which one person can do to another by using fear, guilt or other forms of psychological abuse.¹⁵⁰

Dershowitz provides a more liberal and constitutionally sound definition of “Battered person’s syndrome” and states:¹⁵¹

“This condition is a modified version of the battered woman syndrome, expanded to include male victims of long-term physical or sexual abuse, that was first articulated by psychologist Lenore Walker in her book *The Battered Woman*.”

According to Dershowitz the battered person’s syndrome originates from the cycle of abuse that individuals are subjected to in abusive contexts at the hand of their spouses.¹⁵²

The continuous and unpredictable nature of this abuse eventually results in the individual developing a condition known as “learned helplessness.”¹⁵³ The latter makes the abused person feel that he or she is not in control of the situation and accordingly powerless.¹⁵⁴

Dershowitz also states:¹⁵⁵

“Misdiagnosing this important psychological problem to fit into a political agenda will delay its proper treatment and cure. The problems of spousal

¹⁵⁰ Moore (1979) *supra* note 149 at 8. Moore also correctly observes that the terms “battered women”, “battered wives”, “battered spouses” and “battered partners” could also be used interchangeably. This approach also applies to this study. Emphasis will mainly be placed on most battered women as the area with the most controversy.

¹⁵¹ Dershowitz, AM “The Abuse Excuse – and other cop-outs, Sob stories and evasions of Responsibility” (1994) at 322.

¹⁵² Dershowitz (1994) *supra* note 151 at 322.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ Dershowitz (1994) *supra* note 151 at 313.

abuse and violence are far too serious to be turned into divisive ‘we versus them’ political or gender issues.”

The Oxford Dictionary of Law defines battered woman syndrome as follows:¹⁵⁶

“A psychological syndrome suffered by a person (typically a woman) as a result of prolonged and extreme physical and emotional abuse by her partner.”

The Britannica Concise Encyclopaedia describes battered woman syndrome as a psychological and behavioral pattern displayed by female victims.¹⁵⁷

The medical dictionary defines battered woman syndrome slightly differently:¹⁵⁸

“A pattern of signs and symptoms, such as fear and a perceived inability to escape, appearing in women who are physically and mentally abused over an extended period by a husband or other dominant individual.”

Schuller and Vidmar state that the term battered woman syndrome is descriptive in the sense that it refers to a pattern of responses and perceptions typical to women who have been subjected to abuse by their partner.¹⁵⁹

Reddi states that battered woman syndrome refers to a pattern of psychological and behavioural symptoms evident in women living in abusive relationships.¹⁶⁰

¹⁵⁶ Oxford Dictionary of Law (2006) 6th ed at 53 where “battery” is defined in the Oxford Dictionary as: “the intentional or reckless application of physical force to another person.”

¹⁵⁷ Britannica Concise Encyclopaedia (2007) <http://www.encyclopedia.com/doc/1B1-356756.html> [accessed on 2008/07/16].

¹⁵⁸ As defined on <http://www.answers.com/topic/battered-woman-syndrome-cat=health> [accessed on 2008/07/16].

¹⁵⁹ Schuller, R and Widmar, N “Battered Woman Syndrome Evidence in the Courtroom – A Review at the Literature” (1992) *Law and Human Behavior* vol 16 no 3 273 at 274.

¹⁶⁰ Reddi (2005) *SACJ supra* note 145 at 260. Reddi takes the view that “battered woman syndrome” is merely a legal defence strategy that is implemented to account for battered women’s experiences. See also *S v Engelbrecht* 2005 (2) SACR 41 (W); *S v Ferreira* 2004 (2) SACR 454 (SCA); Burchell and Milton (2005) *supra* note 75 at 451-454. The battered woman syndrome will be extensively discussed in chapter 2 *infra*.

For purposes of this study “battered woman syndrome” will mean a pattern of signs and symptoms displayed by a woman as a result of physical or psychological abuse by a husband or partner over an extended or prolonged period of time.

2.3 Pathological criminal incapacity

“Do you imagine that Orestes grew mad after the parricide, and was not distracted and haunted by execrable furies before he warmed the pointed dagger in his mother’s blood? Nay, from the time that you supposed him out of his senses, he really did nothing that you can blame.”¹⁶¹

Pathological criminal incapacity relates to the situation where a person’s incapacity to appreciate the wrongfulness of his or her actions, or to act in accordance with such an appreciation is caused by “mental illness” or “mental defect” as envisaged in section 77–78 of the Criminal Procedure Act.¹⁶²

Pathological criminal incapacity is also more commonly referred to as the “insanity” defence.

Snyman defines pathological criminal incapacity as follows:¹⁶³

“The defence of mental illness is limited to situations where X suffered from a pathological disturbance of his mental abilities. ‘Pathological’ means ‘emanating from a disease’.”

Burchell and Milton state the following:¹⁶⁴

¹⁶¹ Horace as quoted in Roche, P “The Criminal mind ... A study of communication between the Criminal Law and Psychiatry” (1958) at 82.

¹⁶² 51 of 1977. Snyman (2008) *supra* note 1 at 170. See also Van der Merwe, FW “Nie-Patologiese Ontoerekeningsvatbaarheid as Verweer in die Suid-Afrikaanse Strafreë” (1996) - Unpublished LLM dissertation Unisa at 134.

¹⁶³ Snyman (2008) *supra* note 1 at 162.

¹⁶⁴ Burchell and Milton (2005) *supra* note 73 at 370.

“Mental disease or defect may deprive persons of the capacity to appreciate the wrongfulness of their conduct. It may also deprive them of the capacity to control their conduct. A person who suffers from a mental condition that has such effect is said to be insane.”

Burchell and Milton explain that the requirement which entails that the illness should be pathological means that any mental disorders which are the result of a disease will qualify as a mental illness as envisaged in section 78.¹⁶⁵

At this stage there is no formal definition of mental illness. In *S v Stellmacher* Mouton J held that “mental illness” denotes:¹⁶⁶

“a pathological disturbance of the accused’s mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli such as alcohol, drugs or provocation.”

In *S v Laubscher*¹⁶⁷ Joubert J A referred to pathological criminal incapacity as:

“... statutêre, ontoerekeningsvatbaarheid ...”

Louw notes the following:¹⁶⁸

“Pathological incapacity is due to an intrinsic brain disorder, such as mental illness or mental handicap.”

Van Oosten states the following:¹⁶⁹

¹⁶⁵ Burchell and Milton (2005) *supra* note 73 at 375.

¹⁶⁶ *S v Stellmacher* 1983 (2) SA 181 (SWA) at 187 H; Burchell and Milton (2005) *supra* note 73 at 375; Visser and Mare (1990) *supra* note 77 at 327. See also Strauss (1991) *supra* note 48 at 127–134.

¹⁶⁷ *S v Laubscher* 1988 (1) SA 163 (A) at 167 E–I.

¹⁶⁸ Louw in Kaliski (ed) (2006) *supra* note 2 at 38.

¹⁶⁹ Van Oosten, FFW “The insanity defence: its place and role in the criminal law” (1990) SACJ at 1.

“Section 78(1)’s first defence relates to a disturbance of the accused’s cognitive and the second to a disturbance of his conative functions. Together they constitute a mixed test of criminal incapacity that consists of a combination of the psychiatric and psychological tests and requires both mental illness or defect and the impairment of the accused’s mental faculties in the manner described by the two defences.”

In *S v Eadie*¹⁷⁰, Navsa J A made the following remark:¹⁷¹

“In our law, criminal incapacity due to mental illness is classified as pathological incapacity.”

For purposes of this study pathological criminal incapacity is defined as the incapacity to appreciate the wrongfulness of an act or omission, or the incapacity to act in accordance with such an appreciation as a result of a pathological disturbance of the mental faculties due to a mental illness or mental defect.

2.4 Diminished criminal capacity

Section 78(7) of the Criminal Procedure Act reads as follows:¹⁷²

“If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.”

The Rumpff report notes that diminished responsibility exists when it is established that a normal accused person committed an act under circumstances which renders the act less reprehensible for example in a situation of provocation or

¹⁷⁰ *S v Eadie* 2002 (1) SACR 663 (SCA).

¹⁷¹ At 673 J.

¹⁷² 51 of 1977.

temptation.¹⁷³ The doctrine of diminished criminal incapacity accordingly entails that where it is established that an accused's criminal capacity was diminished or impaired, such diminished capacity will be taken into account in the mitigation of punishment.

The Rumpff report notes:¹⁷⁴

“In such cases no problems arise as to the nature of the punishment or treatment because one is really dealing here with grounds for mitigation of punishment in respect of a person who is otherwise held to be completely responsible.”

Du Toit *et al* note that diminished responsibility is closer related to punishment than to criminal responsibility.¹⁷⁵

According to Snyman section 78(7) reaffirms that the dividing line between criminal capacity and criminal incapacity is not absolute but rather denotes a question of degree.¹⁷⁶ A person may thus be suffering from a specific mental illness or mental defect, yet still retain the capacity to appreciate the wrongfulness of his conduct and be able to act in accordance with such appreciation.¹⁷⁷ Snyman correctly describes the situation as follows:¹⁷⁸

“If it appears that, despite his criminal capacity, he finds it more difficult than a normal person to act in accordance with his appreciation of right and

¹⁷³ Rumpff Report *supra* note 59 at paragraph 8.3.

¹⁷⁴ Rumpff Report *supra* note 59 at paragraph 8.3.

¹⁷⁵ Du Toit, E, De Jager, F, Paizes, A, Skeen, A and Van der Merwe, S “Commentary on the Criminal Procedure Act” (2007) (hereafter “Du Toit *et al*”) at 13–23. See also *S v Mnyanda* 1976 (2) SA 751 (A) at 766–7.

¹⁷⁶ Snyman (2008) *supra* note 1 at 176–177. The Rumpff Report *supra* note 59 at paragraph 8.1 also states: “Practical experience also teaches however – and psychology and psychiatry confirm this – that there are gradations of normality and that it is difficult in some cases to draw a dividing line between normality and abnormality for the purposes of the law.” See also Burchell and Milton (2005) *supra* note 73 at 400 where it is stated that there are varying degrees of mental abnormality and accordingly the borderline between mental illness which is sufficient to satisfy the requirements for reliance on the insanity defence and that which does not, is not clear.

¹⁷⁷ Snyman (2008) *supra* note 1 at 176-177.

¹⁷⁸ *Ibid.*

wrong, because his ability to resist temptation is less than that of a normal person, he must be convicted of the crime (assuming that the other requirements for liability are also met) but these psychological factors may be taken into account and may then warrant the imposition of a less severe punishment.”

LAWSA defines diminished criminal responsibility as follows:¹⁷⁹

“Diminished responsibility is determined with reference to the mental ability of the accused. If, for example, the court finds that at the time of the commission of an act the accused was criminally responsible for the act but that the accused’s capacity to appreciate its wrongfulness or to act in accordance with an appreciation of its wrongfulness was diminished by reason of mental illness or mental defect, he or she is said to have diminished responsibility.”

Section 78(7) in its current form only provides for diminished criminal capacity if an accused’s mental faculties were diminished by reason of mental illness or mental defect.

In *S v Laubscher*¹⁸⁰ Joubert J A held the following:¹⁸¹

“Die Wetgewer hou in art 78(7) ook rekening met verminderde toerekeningsvatbaarheid waar ‘n dader bevind word om ten tyde van die pleeg van die misdaad wel strafregtelik toerekeningsvatbaar te wees maar sy onderskeidingsvermoë of weerstandskrag (wilsbeheervermoë) was

¹⁷⁹ LAWSA (2004) *supra* note 75 at 63. See also *S v Mnyanda* 1976 (2) SA 751 A at 766 F; *S v Lehnberg* 1975 (4) SA 553 (A). See also the more recent judgment in *S v Mnisi* 2009 (2) SACR 227 (SCA) at 231 A-B where Boruchowitz AJA held: “The appellant does not seek to rely upon the defence of temporary non-pathological criminal incapacity but rather upon diminished responsibility which is not a defence but is relevant to the question of sentence. The former relates to a lack of criminal capacity arising from a non-pathological cause which is of a temporary nature whereas the latter presupposes criminal capacity but reduces culpability”. The latter judgment will be discussed in more detail in chapter 2 *infra*. See also Carstens, PA “Criminal liability and sentencing for murder committed with diminished criminal capacity due to provocation” (2010) *De Jure* 388-394.

¹⁸⁰ *S v Laubscher* 1988 (1) SA 163 (A).

¹⁸¹ At 167 J – 168 B.

vanweë 'n patologiese versteuring verminder. Dit speel geen rol by die strafregtelike aanspreeklikheid nie maar dit kan wel by vonnisoplegging in aanmerking geneem word. ... Want dit is ook moontlik om *nie-patologiese verminderde toerekeningsvatbaarheid te kry wat weens 'n nie-patologiese toestand die dader se onderskeidings-vermoë of weerstandskrag (wilsbeheervermoë) ten tyde van die pleeg van die misdaad verminder het.*¹⁸²

It is submitted that diminished criminal capacity should also apply to cases of criminal incapacity attributable to non-pathological causes. In the light of the current controversy surrounding the defence of non-pathological criminal incapacity, this could possibly provide a more clinical and judicially sound approach to cases of non-pathological criminal incapacity as the diminished criminal capacity will only have a bearing on punishment and will not result in a finding of criminal non-responsibility.

Burchell and Hunt state that where provocation or emotional stress are unsuccessfully invoked as defences by an accused, the existence of some form of provocation or emotional stress at the time of the commission of the crime or before may constitute a factor which diminishes the accused's responsibility and which could accordingly result in a reduction in sentence or punishment.¹⁸³

Van der Merwe states that the doctrine of diminished criminal capacity can be divided into three sub-components, namely:¹⁸⁴

- (a) Diminished criminal capacity in its narrow sense relating to the current section 78 (7) where the diminished criminal capacity is due to a mental illness or mental defect;

¹⁸² Emphasis added.

¹⁸³ Burchell and Hunt (1997) *supra* note 130 at 219. See also *S v Shapiro* 1994 (1) SACR 112 (A) at 120 E-G and *S v Di Blasi* 1996 (1) SACR 1 (A). As will be indicated in chapter 2 below, the doctrine of diminished criminal capacity could also be utilised productively within the "battered woman syndrome" context.

¹⁸⁴ Van der Merwe, DP "Die begrip verminderde toerekeningsvatbaarheid en die implementering daarvan" (1983) *TRW* at 175–176.

- (b) Diminished criminal capacity in a broader sense in which even a non-pathological state can also lead to diminished criminal capacity for example youth, intoxication, provocation, anger or fear;
- (c) Diminished culpability (“strafbaarheid”) as a result of other factors.

Once it is established that an accused person possessed the necessary criminal capacity and all of the other requirements for criminal liability are present, the accused has to be convicted. A court can, however, find that despite the presence of criminal capacity, the accused’s criminal capacity was diminished. Diminished criminal capacity will accordingly not affect the criminal liability of the accused, but will play a role in the sentencing process.¹⁸⁵ Diminished criminal capacity will accordingly serve as an extenuating circumstance in imposing a lesser sentence.¹⁸⁶

In *R v Hugo Schreiner J* stated the following:¹⁸⁷

“...A mind which, though not diseased so as to provide evidence of insanity in the legal sense, may be subject to delusion, or to some erroneous belief or some defect, in circumstances which would make a crime committed under its influence less reprehensible or diabolical than it would be in the sense of a mind of normal condition. Such a delusion, erroneous belief, or defect, would appear to us to be a fact which may in proper cases be held to provide an extenuating circumstance.”

Strauss notes that although section 78 (7) deals essentially with diminished responsibility as a result of mental illness or mental defect, a finding of extenuating

¹⁸⁵ See Nel (2008) *supra* note 97 at 17.

¹⁸⁶ *R v Biyana* 1938 (EDLD) at 310. See also Fradella, HF “From insanity to Diminished Capacity” (2007) where it is stated at 59 that diminished capacity is not a defense but rather relates to the admissibility of evidence pertaining to the accused’s mental state. Diminished responsibility allows either a jury or a judge to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act.

¹⁸⁷ *R v Hugo* 1940 (WLD) 285 at 288. See also Nel (2008) *supra* note 97 at 17.

circumstances may be made by a court even in cases where it has not been established that the accused was mentally ill or defective.¹⁸⁸

2.5 Automatism

The primary requirement for criminal liability is that there must be “conduct” on the part of an accused.¹⁸⁹ The term “conduct” refers to an act or omission.¹⁹⁰ Snyman notes that the word “act” is frequently used in a wide sense to refer to both an act and omission since punishment for omissions very seldom occurs.¹⁹¹ The requirement of an act forms the basis of criminal liability. One of the core requirements of an act is that it should be voluntary as only voluntary human conduct is punishable.¹⁹²

With regards to voluntariness, Snyman notes:¹⁹³

“conduct is voluntary if X is capable of subjecting her bodily movements to her will or intellect.”

The term voluntariness should further be clearly distinguished from the term “willingly”, as the latter term merely indicates the accused’s wishes to conduct herself in a particular manner.

Burchell and Milton state:¹⁹⁴

“This principle is expressed by the requirement that for purposes of the criminal law, a human act must be voluntary in the sense that it is subject to the accused’s conscious will. Where for some reason or another the person

¹⁸⁸ Strauss (1991) *supra* note 48 at 134; *S v M* 1985 (1) SA, (A). See also Tredoux *et al* (2005) *supra* note 35 at 417.

¹⁸⁹ Snyman (2008) *supra* note 1 at 51; Burchell and Milton (2005) *supra* note 73 at 178. See also generally *S v Cunningham* 1996 (1) SACR 631 (A); *S v Trickett* 1973 (3) SA 526 (T).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.* See also *S v Johnson* 1969 (1) SA 201 (A) at 204; *S v Kok* 1998 (1) SACR 532 (N) at 545 D-E; *S v Henry* 1999 (1) SACR 13 (SCA) at 19.

¹⁹³ Snyman (2008) *supra* note 1 at 54. See also Tredoux *et al* (2005) *supra* note 35 at 413.

¹⁹⁴ Burchell and Milton (2005) *supra* note 73 at 179.

is deprived of the freedom of his will, his actions are “involuntary” and he cannot be held criminally liable for them.”

Conduct is generally deemed to be involuntary if it occurs during a state of automatism.¹⁹⁵ Automatism generally refers to the situation where a person’s conduct is involuntary in that he or she acts in a mechanical fashion. Examples of such mechanical behaviour are sneezing fits, somnambulism, sleepwalking and epileptic fits.¹⁹⁶

Snyman describes automatism as follows:¹⁹⁷

“... the muscular movements are more reminiscent of the mechanical behaviour of an automaton than of the responsible conduct of a human being whose bodily movements are subject to the control of her will. It really does not matter much in what terms the conduct is described; the question is simply whether it was voluntary, in other words, whether the person concerned was capable of subjecting her bodily movements of her behaviour to the control of her will.”

The Oxford Concise Medical Dictionary describes automatism as follows:¹⁹⁸

“Behaviour that may be associated with epilepsy, in which the patient performs well-organised movements or tasks while unaware of doing so. The movements may be simple and repetitive, such as hand clapping, or they may be so complex as to mimic a person’s normal conscious activities.”

Fenwick provides an all-encompassing definition of automatism by stating:¹⁹⁹

¹⁹⁵ Burchell and Milton (2005) *supra* note 73 at 180.

¹⁹⁶ Snyman (2008) *supra* note 1 at 55. See also *S v Dhlamini* 1995 (1) SA 120 (T); *S v Mkize* 1959 (2) SA 260 (N); *R v Schoonwinkel* 1953 (3) SA 136 (C); *S v Majola* 2001 (1) SACR 337 (N).

¹⁹⁷ Snyman (2008) *supra* note 1 at 56.

¹⁹⁸ Oxford Concise Medical Dictionary 5th ed. (1998).

“An automatism is an involuntary piece of behaviour over which the individual has no control. The behaviour itself is usually inappropriate to the circumstances, and may be out of character for the individual. It can be complex, coordinated and apparently purposeful and directed, though lacking in judgment. Afterwards the individual may have no recollection, or only partial and confused memory, for his actions. In organic automatisms there must be some disturbance of brain functions, sufficient to give rise to the above features. In psychogenic automatisms, the behaviour is complex, coordinated and appropriate to some aspect of the patient’s psychopathology. The sensorium is usually clear, but there will be severe or complete amnesia for the episode.”

In *R v Zulch*²⁰⁰, Maritz J summarized the defence of automatism as follows:²⁰¹

“Now, according to Dr Vermooten, the form of mental disorder from which the accused suffered when he killed his child was hysterical automatism, which may be described as an automatic condition which is uncontrolled, which has no volition.”

Bluglas and Bowden define automatism as follows:²⁰²

“Any act which is done by the muscles without any control of the mind, such as a spasm, reflex or convulsion, or an act by a person who is unconscious because he is asleep.”

Automatism is accordingly the term generally used to refer to involuntary conduct as a result of some form of impaired consciousness.

¹⁹⁹ Fenwick, P “Brain, mind and behaviour” *British journal of psychiatry* (1993) at 163. See also Vorster, M “An analysis of the Amnesias with specific reference to ‘Non-Pathological Sane Automatism’” (2002) - Unpublished PhD thesis University of Witwatersrand at 33.

²⁰⁰ *R v Zulch* 1937 (TPD) 400.

²⁰¹ At 403. See also Nel (2008) *supra* note 97 at 21.

²⁰² Bluglas, R and Bowden, P “Principles and Practice of forensic Psychiatry” (1990) at 72. See also McSherry, B “Criminal responsibility, fleeting states of mental impairment, and the power of self-control” (2004) *International Journal of Law and Psychiatry* at 449.

In *Bratty v Attorney-General for Northern Ireland* automatism was conceptualized as:²⁰³

“connoting the state of a person who, though capable of action, is not conscious of what he is doing ... It means unconscious involuntary action, and it is a defence because the mind does not go with what is being done.”

The World Book Medical Encyclopaedia defines automatism as follows:²⁰⁴

“Automatism is a condition in which a person performs acts without conscious knowledge or later memory of what he or she is doing. Although the person appears to be functioning normally, he or she does not manifest personality, and behaviour may be abnormal. The condition normally represents a hysterical trance. It may also follow some severe trauma or an attack of certain forms of epilepsy. Sleep-walking is one example of automatisms.”

It is thus clear that the requirement that an act should be voluntary is essential in every criminal trial. There can be no question of criminal liability in the absence of a voluntary human act. The necessity for a discussion of the defence of automatism in the course of this study flows from confusion that often exists as to the distinction between automatism and criminal incapacity as will be illustrated in chapter 2 of this study. It is from the outset of utmost importance to note that the defences of automatism and criminal incapacity relate to different requirements of criminal liability and as such are two distinct defences that should clearly be separated.

There are various classifications of the different forms of automatisms.²⁰⁵ For purposes of this study, however, only the distinction between sane and insane automatism will be illustrated.

²⁰³ *Bratty v Attorney-General for Northern Ireland* (1961) 3 All E.R 523. See notes 192 and 196 *supra* for South African case law pertaining to automatism.

²⁰⁴ World Book Medical Encyclopaedia 7th ed (1997).

2.5.1 Sane automatism

Sane automatism generally occurs when a person acts involuntarily as a result of external factors. The involuntariness of the conduct does not have a pathological foundation coupled with some biological cause. As a result of these external factors the person is incapable of controlling his or her actions and accordingly the act which is performed is not regarded by law as a voluntary act.

Schapp states the following.²⁰⁶

“At first glance, it appears that sane automatism differs from insane automatism in that the latter is caused by a disease of the mind, whereas the former is the product of a temporary impairment from external physical factors.”

Snyman notes that the term sane automatism generally refers to the situation where a person who is mentally sane, acts involuntarily as a result of for example an epileptic fit.²⁰⁷ Snyman states that the use of the terminology of “sane” and “insane” automatism is confusing and that automatism should be limited to involuntary conduct not attributable to any form of mental illness.²⁰⁸ In cases of

²⁰⁵ For a comprehensive classification see Vorster (2002) *supra* note 199 at 33. Vorster differentiates between “organic automatisms” and “non-organic automatisms”. Examples of the latter are:

- Organic automatisms – epilepsy, somnambulism (“sleepwalking”), hypoglycaemia, alcohol and drugs, transient global amnesia.
- Non-organic automatisms – this form of automatism most frequently results from emotional stress and is also referred to as “hysterical dissociation”. Another example is psychogenic automatism.

²⁰⁶ Schapp, RF “Automatism, insanity and the psychology of criminal responsibility: A philosophical enquiry” (1991) at 79. See also Tredoux *et al* (2005) *supra* note 35 at 425 where sane automatism is defined as: “The state of acting involuntarily due to non-pathological factors.”

²⁰⁷ Snyman (2008) *supra* note 1 at 56.

²⁰⁸ Snyman (2008) *supra* note 1 at 56. In *S v Kok* 2001 (2) SACR 106 (SCA) 109 at 110 D-E it was noted that the term “sane automatism” is not a psychiatric term but rather used to refer to automatism arising from causes other than mental illness.

sane automatism the onus of proof is on the state to prove that the act was voluntary.²⁰⁹ If the defence is successful the accused goes free.

Strauss notes that the defence of automatism is approached by courts with great caution.²¹⁰ Strauss states the following in this regard:²¹¹

“To raise a defence of sane automatism there must be evidence strong enough to create doubt as to the voluntary nature of the alleged *actus reus* (unlawful act).”

In *S v Trickett* Marais J noted:²¹²

“This defence is commonly recognised as being ‘automatism’, which however according to the Courts may be either of a sane or of an insane nature.”

LAWSA notes the following:²¹³

“If a sane person who is in a state of automatism commits an act which would otherwise be criminal, he or she has a complete defence and is entitled to an acquittal. ... A defence of sane automatism will be successful only if there is sufficiently cogent evidence to raise a reasonable doubt about the voluntary nature of the *actus reus*, and if there is medical or other expert evidence to show that the involuntary or unconscious nature of the

²⁰⁹ Snyman (2008) *supra* note 1 at 56. See also *S v Cunningham* 1996 (1) SACR 631 (A) at 635; *S v Henry* 1999(1) SACR 13 (SCA) at 19 I-J. See also *S v Trickett* 1973 (3) SA 526 (TPD) where Marais J states (at 530 C–D): “On the other hand, if the defence calls into question the voluntary nature of the act constituting the offences without relying in any way upon a pathological mental condition to “explain” or “prove” the absence of a free exercise of will, or even to render acceptable the bona fides of the accused in raising such a defence, it would seem that the onus of proving the presence of a voluntary misdeed would be upon the prosecution.”

²¹⁰ Strauss (1991) *supra* note 48 at 130.

²¹¹ Strauss (1991) *supra* note 48 at 130. See also LAWSA (2004) *supra* note 75 at 68.

²¹² *S v Trickett supra* at 532 E–F. See also Kaliski (2006) *supra* note 2 at 107.

²¹³ LAWSA (2004) *supra* note 75 at 68. See also Tredoux *et al* (2005) *supra* note 35 at 404. See also Lambrechts, H “n Ondersoek na nie-patologiese ontoerekeningsvatbaarheid en die regverdiging vir die voortbestaan van gesonde outomatisme en aanverwante verwerre in die Suid-Afrikaanse Strafreg” (2005) - Unpublished LLD thesis University of the Free State at 39.

actus reus is quite possible due to causes other than mental illness or mental defect.”

For purposes of this study sane automatism will be defined as the temporary inability to act voluntarily where the cause of such inability cannot be ascribed to pathological causes or a mental illness.

2.5.2 Insane automatism

Insane automatism generally occurs when a person acts involuntarily and the involuntariness of conduct is brought about by an internal factor such as a mental illness.

Snyman notes that in the case of insane automatism a person’s unconscious conduct is attributable to some form of mental pathology.²¹⁴

Burchell and Milton describe insane automatism as follows:²¹⁵

“A condition of insane automatism results from a pathological mental condition which requires the accused under both the common and statute law to prove this pathological condition on a balance of probabilities.”

Tredoux defines insane automatism as follows:²¹⁶

“The state of acting involuntarily due to pathological factors, such as mental illness or brain disorder.”

In case of insane automatism or involuntary conduct attributable to mental illness, the onus is on the accused to prove on a balance of probabilities that he or she

²¹⁴ Snyman (2008) *supra* note 1 at 56.

²¹⁵ Burchell and Milton (2005) *supra* note 73 at 139. See also Strauss (1991) *supra* note 48 at 130.

²¹⁶ Tredoux *et al* (2005) *supra* note 35 at 419.

suffered from a mental illness at the time of the alleged crime.²¹⁷ The finding in the case of a successful defence of insane automatism will also differ from the finding in cases of sane automatism. Where the involuntary behaviour was attributable to pathological causes, the accused will be dealt with in terms of section 78(6) of the Criminal Procedure Act which states that the accused should be found not guilty and that a court then retains a discretion to remand the accused to a psychiatric institution.²¹⁸ A special verdict in terms of section 78(6) will be ordered.²¹⁹

For purposes of this study insane automatism is defined as the inability to act voluntarily where such involuntariness is caused by some form of pathology or mental illness.

2.6 Expert evidence

Expert evidence, as indicated above, is a form of opinion evidence which is generally inadmissible unless the subject enquiry and the facts in dispute are of such a nature that the court is in need of assistance from experts in the relevant field in order to derive at an informed judgment. The question as to the admissibility of such evidence depends upon the relevance of such opinion.²²⁰

As early as 1554 Saunders described the importance of expert evidence as follows:²²¹

“If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of the science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not

²¹⁷ Snyman (2008) *supra* note 1 at 57.

²¹⁸ *Ibid.*

²¹⁹ See *S v Mahlinza* 1967 (1) SA 408 (A). See also Schapp (1991) *supra* note 204 at 75–76; Snyman (2008) *supra* note 1 at 57 and LAWSA (2004) *supra* note 75 at 68.

²²⁰ Schwikkard and Van der Merwe (2009) *supra* note 60 at 83; Zeffert and Paizes (2009) *supra* note 60 at 289.

²²¹ As quoted in Banks, NK “Trials and Tribulations: Social Science Evidence, Expert Witnesses, The Voice of Authority and the Discourse of Ideology in the Courts” (1999) *Murdoch University Electronic Journal of Law* vol 6 at 1.

dismiss all other sciences, but our own, but we approve of them and encourage them as things worthy of commendation.”

The general rule of common law was that the opinions, beliefs and inferences of a particular witness were inadmissible to prove the truth of an issue believed or inferred if such matters were relevant to facts in issue of a particular case.²²²

In South Africa the general rule is that any opinion expressed on an issue which the court can decide upon without hearing such an opinion is in principle inadmissible due to the irrelevance of such opinion.²²³ One of the motivations behind the opinion-rule is sometimes regarded as the protection of the function of the tribunal of fact and that a witness should not be permitted to express opinions on ultimate issues which only a court may decide upon.²²⁴ The latter is also often referred to as the “ultimate issue” principle.

According to Dennis, the rule against opinion evidence is based on three main principles:²²⁵

- Witness’s opinions are unnecessary and superfluous;
- The reception of opinions raises collateral issues which could result in confusion of the fact-finder. These issues include the qualifications of the witness, the basis for delivering an opinion and so forth;
- There is an inherent danger that the witness delivering an opinion will usurp the function of the court.

In *R v Vilbro* Fagan CJ stated the following pertaining to the opinion-rule:²²⁶

“It simply endeavours to save time and avoid confusing testimony by telling the witness: ‘The tribunal is on this subject in possession of the same

²²² Murphy, P “Murphy on Evidence” (2008) at 361.

²²³ Schwikkard and Van der Merwe (2009) *supra* note 60 at 83.

²²⁴ Schwikkard and Van der Merwe (2009) *supra* note 60 at 84. See also Zeffert and Paizes (2009) *supra* note 60 at 309.

²²⁵ Dennis, I “The Law of Evidence” (2007) 3rd ed at 847.

²²⁶ *R v Vilbro* 1957 (3) SA 223 (A.D.) at 228.

materials of information as yourself, thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary and merely cumpers the proceedings’.”

According to Zeffert *et al* opinion evidence is accepted if it is established to be relevant, and rejected if irrelevant.

There are, however, two exceptions to the general rule against the admission of opinion evidence:

- Opinion evidence is desirable and admissible where it consists of inferences to be drawn pertaining to issues where specialized skill or knowledge is required which falls outside the experience and skill of the trier of fact;²²⁷
- In cases of “lay” opinion or “non expert” opinion where it is not feasible for the witness to separate the observed facts from the inferences that the witness drew from such facts.²²⁸

For purposes of this discussion and study, the emphasis will fall on expert evidence.

Kenny states the following with regard to expert evidence:²²⁹

“Expert evidence differs from ordinary evidence on matters of fact in that it is not based on the use of untutored senses or on the observation of the average man, but on specialized training, experience out of the common and or theoretical information of a recondite kind.”

Zeffert *et al* describe expert evidence as follows:²³⁰

²²⁷ Dennis (2007) *supra* note 225 at 847; Murphy (2008) *supra* note 222 at 361–362.

²²⁸ Dennis (2007) *supra* note 225 at 847; Zeffert and Paizes (2009) *supra* note 60 at 309-311.

²²⁹ Kenny, A “The Psychiatric expert in court” (1984) *Psychological Medicine* at 293 as quoted in Meintjes–Van der Walt, L “Expert Evidence in the Criminal Justice Process: A comparative Approach” (2001) at 63.

²³⁰ Zeffert and Paizes (2009) *supra* note 60 at 309-312.

“The opinion of expert witnesses is admissible whenever, by reason of their special knowledge and skill, they are better qualified to draw inferences than the judicial officer. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.”

Murphy provides the following description as to expert evidence.²³¹

“It is an ancient rule of the common law that on a subject requiring special knowledge and competence, evidence is admissible from witnesses who have acquired, by study or practice, the necessary expertise on the subject. Such witnesses are known as “experts”. The evidence is justified by the fact that the court would be unable, unaided, to draw proper inferences and form proper opinions from such specialised facts as might be proved, and even perhaps to judge what facts have been satisfactorily proved.”

Meintjes-Van der Walt states that expert witnesses are permitted to testify if they have specialized knowledge, skill, training or experience which will enable them to provide information and express opinions that are generally not available to the average person.²³²

Slovenko correctly notes that expert testimony is admissible due to the fact that special skill and experience are needed in order to understand certain matters.²³³ In many cases a court will have difficulty to reach an informed decision due to the difficulty of a particular issue and accordingly the opinion of those skilled in the subject at issue may be required to render assistance.²³⁴

²³¹ Murphy (2008) *supra* note 222 at 364. See also Schwikkard and Van der Merwe (2009) *supra* note 60 at 90-103; *Ruto Flour Mills Ltd v Adelson* (1) 1958 (4) SA 235 T; *S v Gouws* 1967 (4) SA 527 (E).

²³² Meintjes-Van der Walt (2001) *supra* note 229 at 64.

²³³ Slovenko (2002) *supra* note 7 at 11–12.

²³⁴ Slovenko (2002) *supra* note 7 at 12.

A party seeking to present the opinion of a witness as an expert opinion must satisfy the court that the witness not only possesses specialist knowledge, training, skill and experience, but also that the expert witness can assist the court in deciding the core issues.²³⁵

In *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft for Schädlingsbekämpfung Mbh* the following was stated:²³⁶

“(T)here are, however, cases where the court is by reason of lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence. In such cases, the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact.”

Sales and Shuman indicate that experts can be used to provide facts and opinion that will be necessary to aid in resolving a disputed factual issue in a case.²³⁷ Expert witnesses can also be used to educate judges as to scientific or other technical or specialized information that is unlikely to be within the knowledge and experience of judges, but will aid in deciding a case more fairly.²³⁸

Within the domain of the defence of criminal incapacity, expert evidence of psychiatrists and psychologists and more specifically forensic psychiatrists and psychologists is essential in the assessment of the validity and merits of the defence. It is submitted that issues pertaining to criminal incapacity will in most cases not fall within the knowledge and experience of the judicial authority due to

²³⁵ Schwikkard and Van der Merwe (2009) *supra* note 60 at 92-96. In *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569 it was stated: “It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable ... The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on knowledge or experience of others who themselves are shown to be acceptable experts in that field.”

²³⁶ *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft for Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A) at 370 F–H.

²³⁷ Sales and Shuman (2005) *supra* note 64 at 5.

²³⁸ *Ibid.*

the scientific entity thereof which results in the necessity of psychiatrists and psychologists in this regard.

Mental health expert witnesses are defined by Meintjes-Van der Walt and Allan as follows:²³⁹

“Mental health expert witnesses, who for example, can be psychiatrists, psychologists, social workers or occupational therapists, can be defined as specialists who are specifically instructed to undertake evaluations of people, form opinions based on their findings, write reports and, if required, give evidence during which they express opinions and provide the facts on which their opinions are based. As such they are consultants the court uses when it needs information and opinions about the mental functioning of a person that is beyond the knowledge of the court. Their function is to help the court, and not to further the cause of a particular side in the case.”

Sales and Shuman provide the following dramatic statement pertaining to forensic assessment:²⁴⁰

“... whereas diagnosis in clinical settings is an evolving phenomenon that the clinician can modify as therapy proceeds, forensic assessment, in most instances, is a snapshot described on the witness stand. Finally, although the questions sought to be answered in clinical settings are defined by the clinician and patient, the questions raised in the forensic setting are defined by the law without regard to their grounding in constructs that respond to clinical or scientific knowledge.”

For purposes of this study expert evidence is defined as evidence of opinion supplied by an individual who by means of specialised knowledge, skill or

²³⁹ Allan, A and Meintjes-Van der Walt, L “Expert Evidence” in Kaliski (ed) (2006) *supra* note 2 at 343. Social workers and occupational therapists are excluded. In terms of the Mental Health Care Act 17 of 2002 a “mental health care practitioner” means a psychiatrist or registered medical practitioner or a nurse, occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services.

²⁴⁰ Sales and Shuman (2005) *supra* note 64 at 9.

experience can assist the trier of fact in determining the factual issue of criminal capacity.

2.7 Psychiatry

“Psychiatry, more than any other branch of medicine, forces its practitioners to wrestle with the nature of evidence, the validity of introspection, problems in communication, and other long-standing philosophical issues.”²⁴¹

The term psychiatry was coined by Johann Christian Reil in 1808 and derives from the Greek word “psyche” which means “soul” or “mind” and “*iatros*” which means “healer” or “doctor”.²⁴²

Psychiatry is a field of medicine focused specifically on the human mind, aiming to study, prevent and treat mental disorders in humans.

The Wikipedia encyclopaedia defines the practice of psychiatry as follows.²⁴³

“Psychiatry is a medical specialty which exists to study, prevent, and treat mental disorders in humans. Psychiatric assessment typically involves a mental status examination and taking a case history, and psychological tests may be administered. Physical examinations may be conducted and occasionally neuro-images or other neurophysiologic measurements taken. Diagnostic procedures vary but official criteria are listed in manuals, the most common being the ICD from the World Health Organization and the DSM from the American Psychiatric Association. Psychiatric medication is a central treatment option which is largely unique to psychiatry along with rarer procedures such as Electroconvulsive therapy. Psychotherapy is also

²⁴¹ Guze, SB “Why Psychiatry is a Branch of Medicine” (1992) at 4.

²⁴² Wikipedia Encyclopaedia <http://en.wikipedia.org/wiki/Psychiatry> [accessed on 2008/08/26]. The word “psyche” derives from the ancient Greek for “soul” and “butterfly”. It is interesting to note that the butterfly features on the coat of arms of the Royal College of Psychiatrists. See also James, FE “Psyche” *Psychiatric Bulletin* (1991) at 429–431.

²⁴³ Wikipedia Encyclopaedia <http://en.wikipedia.org/wiki/Psychiatry> [accessed on 2008/08/26].

a major treatment option in psychiatry, although it is also the speciality of other mental health professionals.”

The practice of psychiatry is one branch of medicine that is both complex and very controversial.²⁴⁴ The practice of psychiatry in South Africa is mainly regulated by legislation in the form of the Mental Health Care Act.²⁴⁵

Kaliski states the following pertaining to the practice of psychiatry:²⁴⁶

“Psychiatry is a medical specialty. After completing the medical undergraduate degree (usually MB Ch.B/MB B. Ch.) the aspiring psychiatrist has to complete a one year internship in a general hospital. After at least two years of further general practice (including one year of community service) the doctor enters into a four-year registrar training programme under the auspices of an academic department of psychiatry, while working full time in a state psychiatric hospital. Throughout the four years the registrar will work in six-month rotations in various specialised areas, such as acute and emergency psychiatry, child and adolescent psychiatry, old age psychiatry, neuropsychiatry, psychotherapy units, liaison and consultation for the medically ill that require psychiatric care etc. Ultimately, the registrar has to write examinations that are administered in two parts, one for basic neurosciences and psychology, and two for neurology and clinical psychiatry. The universities offer a degree (a M. Med) and the College of Psychiatry a fellowship (PC Psych (SA)) to successful candidates. Either is sufficient for registration with the Health Professions Council (HPC) as a specialist psychiatrist.”

²⁴⁴ See Carstens and Pearmain (2007) *supra* note 33 at 745. See also *R v Von Zell* 1953 (3) SA 301 (A) at 311A-B where Van den Heever JA referred to psychiatry as an “empirical and speculative science with rather elastic notation and terminology, which is usually wise after the event.” See also Carstens, PA “Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op grond van Nalatigheid” (1996) - Unpublished LLD thesis University of Pretoria at 522.

²⁴⁵ 17 of 2002 which commenced on 15 Dec ember 2004. See also Carstens and Pearmain (2007) *supra* note 33 at 745.

²⁴⁶ Kaliski (2006) *supra* note 2 at 377 “Appendix: Mental Health Practitioners”.

In the course of this study the pivotal importance of psychiatrists will be illustrated with reference to the defence of criminal incapacity. As the defence of criminal incapacity becomes more popular, there is a growing awareness of the fundamental need for psychiatrists to evaluate persons raising this defence in order to assess the merits of such defence.

Madalo describes psychiatry as follows:²⁴⁷

“Modern psychiatry applies knowledge from the biological and social sciences to the care and treatment of patients suffering from disorders of mental activity and behaviour”

Mandalo in addition notes that psychiatry is faced with a novel challenge in the sense that it can define for the law those mental functions which need to be assessed to ensure a meaningful and sophisticated understanding of the mechanics of the human mind.²⁴⁸

Bazon made a very striking remark by stating:²⁴⁹

“Psychiatry, I suppose, is the ultimate wizardry. My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry. ... The discipline of psychiatry has direct relevance to cases involving human behaviour. One might hope that psychiatrists would open up their reservoirs of knowledge in the courtroom.”

In terms of the Mental Health Care Act a psychiatrist is a “Mental Health care practitioner” who has been trained to provide mental health care, treatment and

²⁴⁷ Madalo (2000) *supra* note 39 at 8.

²⁴⁸ *Ibid* at 10.

²⁴⁹ As quoted in Greenspan, EL “The Role of the psychiatrist in the Criminal Justice System” (1978) *Am Psychiatry Assoc. J* vol 23 p 137 at 138–139.

rehabilitation services and is accordingly registered as such in terms of the Health Professions Act 54 of 1974.²⁵⁰

Kaliski defines a psychiatrist as follows:²⁵¹

“Psychiatrists are primarily orientated to assess and treat mental disorders (as described in the DSM-IV), and in the first instance should be consulted to exclude the presence of these disorders, or comment on treatment strategies. Often the psychiatrist will be able to comment on so-called normal behaviour in various contexts, especially as it pertains to the disorders under discussion. Generally psychiatrists use the same methods of examination as other medical specialists (including blood tests, brain scans, cerebro-spinal fluid tests, EEG’s etc. and prefer to use biological treatments (together with psychotherapy). Many psychiatrists have additional expertise in the various psychotherapies (such as psychoanalysis, cognitive behavioural therapy etc.), or in sub-specialties such as child psychiatry. *It is always crucial to ascertain each psychiatrist’s actual area of expertise.*”²⁵²

Freckelton and Selby state that a psychiatrist is a qualified medical practitioner specialising in the diagnosis, treatment and prevention of mental illness and related disorders.²⁵³

According to Kisker, the psychiatrist as a physician is qualified to diagnose and assess the more serious mental illnesses as well as those organic in origin.²⁵⁴ As such the psychiatrist’s main priorities will lie either in the physical aspects of

²⁵⁰ See S1 of the Mental Health Care Act. See also Carstens and Pearmain (2007) *supra* note 33 at 745.

²⁵¹ Kaliski (2006) *supra* note 2 at 377; Carstens and Pearmain (2007) *supra* note 33 at 745-746.

²⁵² Emphasis added. One of the main arguments of this study will entail the view that the area of specialization of a particular psychiatrist plays a pivotal role in the assessment of the probative value of the expert evidence presented by such practitioner.

²⁵³ Freckelton, I and Selby, H “Expert evidence in Criminal Law” (1999) at 572.

²⁵⁴ Kisker, SW “The Disorganised Personality” (1964) at 20 as quoted in Carstens and Pearmain (2007) *supra* note 33 at 746–747. See also Tredoux *et al* (2005) *supra* note 35 at 424 where a psychiatrist is defined as: “A medical specialist who treats mental and psychological disorders or illnesses.”

mental disease or in the psychological phenomena associated with such conditions.²⁵⁵ The psychiatrist is ultimately responsible for assessing and interviewing hospitalised patients and stating the most appropriate treatment they should receive and as soon as the most appropriate treatment has been decided upon, the psychiatrist is in charge of supervising the treatment.²⁵⁶ Kisker in addition notes:²⁵⁷

“The psychiatrist also is likely to be involved in research studies, functions, hospital and clinic administration and community relations. ... A psychiatrist ordinarily is consulted when the personality breakdown is severe, when it is suspected that the condition has an organic cause, when the disorder is so serious that hospital care is needed, and when court commitment to a hospital is involved.”

There are various sub-specialties to the practice of psychiatry, for example child and adolescent psychiatry, biological psychiatry etc.²⁵⁸ For purposes of this study emphasis will be placed mainly on the practice of forensic psychiatry.

2.8 Forensic psychiatry

Forensic psychiatry is a subspeciality of psychiatry. It encompasses and deals with the interaction between law and psychiatry.²⁵⁹ Within the domain of the defence of criminal incapacity, forensic psychiatrists will be involved mainly in the assessment of an individual’s competency or fitness to stand trial, the evaluation and assessment of the existence of a mental illness or mental defect and also with regard to sentencing recommendations.²⁶⁰

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ See Kermani, E “Handbook of Psychiatry and the Law” (1989); Carstens and Pearmain (2007) *supra* note 33 at 746.

²⁵⁹ Wikipedia Encyclopaedia <http://en.wikipedia.org/wiki/Forensic-psychiatry> [accessed on 2008/07/15]. See also generally Brakel, SJ and Brooks, AL “Law and psychiatry in the Criminal Justice System” (2001); Power, DJ, Curran, P and Hughes, JM “Criminal Law and Forensic Psychiatry” (1996). See also Lacoursiere, RB “Forensic Psychiatry: Less Typical Applications” (1999) *Washburn Law Journal* at 29-40.

²⁶⁰ See chapter 3 below.

Faulk defines forensic psychiatry as follows:²⁶¹

“Forensic means pertaining to, connected with, or used in courts of law. A forensic psychiatrist’s work may be said to start with the preparation of psychiatric reports for the court on the mental state of offenders suspected of having a mental abnormality.”

The principal difference between a psychiatrist and a forensic psychiatrist entails that a psychiatrist is a medical doctor who has completed several years of additional training in the analysis, diagnosis, and treatment of mental disorders, whereas a forensic psychiatrist is a psychiatrist who has additional training and/or experience related to the various interfaces of mental health with law.²⁶²

Levy states the following pertaining to forensic psychiatry:²⁶³

“Forensic psychiatry is the application of psychiatric clinical knowledge and research to the practice of law where the criminal defendant’s mental status is at issue. The forensic psychiatrist is an expert at making diagnostic and prognostic judgments that are informed by scientific research and clinical experience about whether a plaintiff’s subjectively experienced emotional distress and/or functional impairment can be plausibly related to the alleged accident, injury or tort.”

Gunn and Taylor list the following forensic psychiatry skills:²⁶⁴

- The assessment of behavioural abnormalities.
- The writing of reports for courts and lawyers.
- The giving of evidence in court.

²⁶¹ Faulk, M “Basic Forensic psychiatry” (1994) at 1.

²⁶² Reid Psychiatry <http://www.reidpsychiatry.com/reidfaq.html> as [accessed on 2008/07/15].

²⁶³ Levy, M “Shrink in the courtroom: Forensic Psychiatry and Law” published in San Francisco Attorney Magazine December 2000–January 2001.

²⁶⁴ Gunn, J and Taylor, PJ “Forensic Psychiatry-Clinical, Legal and Ethical issues” (1993) at 3 (hereafter “Gunn and Taylor”).

- Understanding and using security as a means of treatment.
- The treatment of chronic disorders especially those which exhibit behavioural problems such as severe psychoses and personality disorders.
- Knowledge of mental health law.
- Skill in the psychological treatments of behaviour disorders.

Within the context of the defence of criminal incapacity the forensic psychiatrist will mainly be consulted and utilised for purposes of conducting a psycholegal assessment of the accused in order to ascertain the mental stage of the accused. The forensic psychiatrist will also be required to write a report and give evidence in court.

Gunn and Taylor accordingly define forensic psychiatry as follows.²⁶⁵

“Forensic psychiatry is the prevention, amelioration and treatment of victimization which is associated with mental disease.”

2.9 Clinical psychology

Clinical psychology can be described as the scientific study and application of psychology with the aim of understanding, preventing and relieving psychologically-based distress or dysfunction in order to promote subjective well-being and personal development.²⁶⁶ Although clinical psychologists are mainly involved in psychological assessments and the practice of psychotherapy, they also engage in research, teaching, consultation and forensic testimony.

The field of clinical psychology is often confused with the field of psychiatry. These two professions generally have similar goals, for example the alleviation of mental distress, but they are distinct in the sense that psychiatrists are physicians with the appropriate medical degrees.²⁶⁷ Psychiatrists focus on medication-based

²⁶⁵ Gunn and Taylor (1993) *supra* note 264 at 2.

²⁶⁶ Wikipedia Encyclopaedia <http://en.wikipedia.org/wiki/Clinical-psychology> [accessed on 2008/09/05].

²⁶⁷ Wikipedia Encyclopaedia *supra* note 259 at 1.

solutions whereas clinical psychologists are trained in psychological assessment by means of various assessment tools.²⁶⁸

As psychiatrists are physicians they tend to use the medical model to assess psychological problems and some rely on psychotropic medications as the chief method of addressing these problems. Clinical psychologists, on the other hand, do not prescribe medication.

In South Africa the practise of psychology is regulated by a Professional Board established in terms of the Health Professions Act.²⁶⁹

In terms of the Health Professions Act the following “psychological acts” may only be performed by registered psychologists:²⁷⁰

- (a) The evaluation of behaviour or mental processes of personality adjustments of individuals or of groups of persons, through the interpretation of tests for the determination of intellectual abilities, aptitude, interests, personality make-up or personality functioning, and the diagnosis of personality and emotional functions and mental functioning deficiencies according to a recognised scientific system for the classification of mental deficiencies;
- (b) The use of any method or practice aimed at aiding persons or groups of persons in the adjustment of personality, emotional or behavioural problems or at the promotion of positive personality change, growth and development, and the identification and evaluation of personality dynamics and personality functioning according to psychological scientific methods;

²⁶⁸ Wikipedia Encyclopaedia *supra* note 259 at 4. These measures generally fall within one of several categories, including:

- Intelligence and achievement tests
- Personality tests – these tests of personality aim to describe patterns of behaviour, thoughts and feelings.
- Neuropsychological tests
- Clinical observation – such assessment investigates certain core areas such as general appearance and behaviour, mood and affect, perception, comprehension, orientation, insight, memory and content of communication.

²⁶⁹ Act 54 of 1974. See also Tredoux *et al* (2005) *supra* note 35 at 13.

²⁷⁰ See section 37(2)(a)–(h). See also Tredoux *et al* (2005) *supra* note 35 at 13.

- (c) The evaluation of emotional, behavioural and cognitive processes or adjustment of personality of individuals or groups of persons by the usage and interpretation of questionnaires, tests, projections or other techniques or any apparatus, whether of South African origin or imported, for the determination of intellectual abilities, aptitude, personality make-up, personality functioning, psycho-physiological functioning or psychopathology;
- (d) The exercising of control over prescribed questionnaires or tests or prescribed techniques, apparatus or instruments for the determination of intellectual abilities, aptitude, personality make-up, personality functioning, psycho-physiological functioning or psychopathology;
- (e) The development of and control over the development of questionnaires, tests, techniques, apparatus or instruments for the determination of intellectual abilities, aptitude, personality make-up, personality functioning, psycho-physiological functioning or psychopathology;
- (f) The use of any psychotherapeutic method, technique or procedure to rectify, relieve or change personality, emotional, behavioural or adjustment problems or mental deficiencies of individuals or groups of people;
- (g) The use of hypnosis and hypnotherapy;
- (h) The use of any psychological method or counselling to prevent personality, emotional, cognitive, behavioural and adjustment problems or mental illnesses of individuals or groups of people.

The Professional Board for psychology deals with the administration and regulation of Psychology as a profession and is regulated by a larger body, namely the Health Professions Council of South Africa (HPCSA).²⁷¹

²⁷¹ Tredoux *et al* (2005) *supra* note 35 at 10.

Table 1: Central areas of academic psychology²⁷²

Area	Focus	Proponents/ theorists
Developmental psychology	The development of human cognition and emotion from gestation to adulthood	Jean Piaget Anna Freud
Social psychology	Social and group processes underlying such phenomena as conformity, obedience, ethno-centrism/racism, crowd violence	Stanley Milgram Henri Tajfel
Physiological/biological psychology	Biological and bodily processes (especially those of the brain and nervous systems) that are implicated in, and influence human behaviour	Frank Borchers Karl Pribram Aleksandr Luria
Cognitive psychology/cognitive science	Human processing, storage and retrieval of information (e.g. memory, perception, problem-solving, decision-making)	Ulric Neisser Jerry Fodor Ann Treisman
Clinical psychology	The study, assessment and treatment of psychological problems, distress and illness	Sigmund Freud Karen Horney
Health psychology	The promotion and maintenance of physical health, as well as the prevention of illness, through psychological means	Joseph Matarazzo Aaron Antonovsky
Industrial psychology	The study and practice of business and organisational matters from a psychological perspective. Particularly focused on the recruitment, training and assessment of work personnel	Frederick Taylor Hugo Münsterberg Douglas McGregor
Educational psychology	The application of psychology to education; the study of learning as a phenomenon, and the enhancement of different kinds of learning and teaching strategies	B F Skinner Lev Vygotsky

The areas of psychology referred to in the table above often reflect the differences in approach and underlying philosophy. For instance, it is not unusual to find developmental psychologists who disagree about how the cognitive development

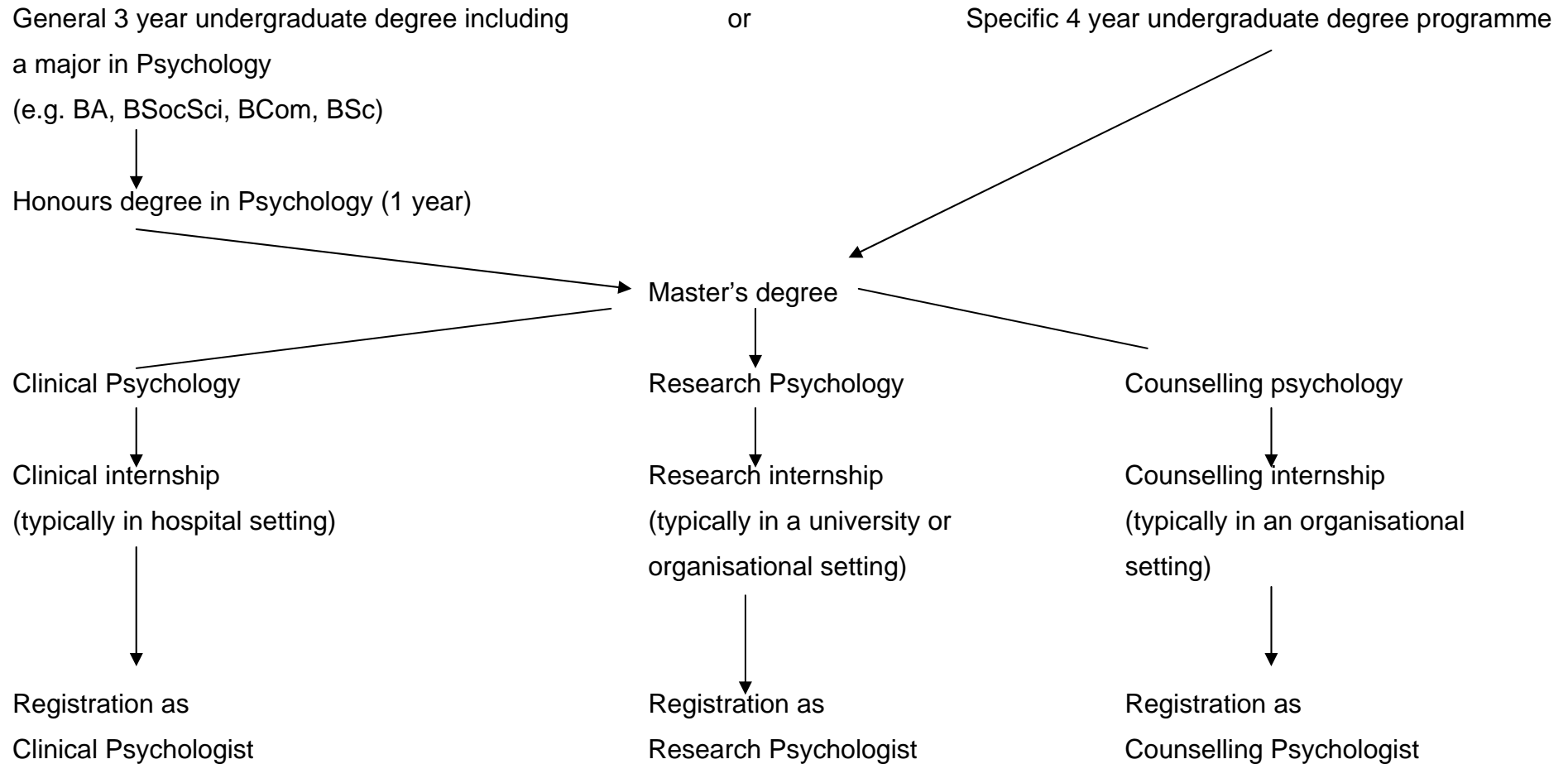
²⁷² Tredoux *et al* (2005) *supra* note 35 at 7.

of children should be researched, or what is ultimately “true” (rather than socially constructed) about the development of children.

There are various subspecialties of psychology of which clinical psychology is one example.²⁷³

²⁷³ See Table 1 as extracted from Tredoux *et al* (2005) *supra* note 35 at 7.

Table 2: Some common routes to registration as a psychologist²⁷⁴



²⁷⁴ See Table 2 as extracted from Tredoux *et al* (2005) *supra* note 35 at 12.

With regards to the educational background of a clinical psychologist, Lay²⁷⁵ explains that in South Africa, in order to qualify as a psychologist, a person is required to complete a university undergraduate degree in social sciences in conjunction with a three-year major in Psychology.²⁷⁶ Thereafter, they will be required to complete a one-year Honours, followed by a Masters Degree in Psychology.²⁷⁷ Students at the Honours level will start to specialise in specific fields such as Clinical, Counselling, Educational, or Industrial psychology.²⁷⁸ The Masters course usually takes two years during which the first year is an academic year during which potential clinical and counselling psychologists will receive specialised training in the psychodynamic understanding of human functioning.²⁷⁹ The latter will include topics such as developmental psychology, personality theory, psychopathology, psychological assessment, psychotherapy, counselling, and neuro-psychology.²⁸⁰ The second year will involve a one-year practical internship at a designated institution such as a psychiatric hospital or counselling centre and as part of their Masters they are also required to complete a short thesis or dissertation. A recent requirement is a one-year community placement before the individual can practise as fully qualified psychologists. Thereafter, the individual is required to register with the HPCSA.²⁸¹

Lay notes that psychologists are more concerned with the emotional and psychological factors that contribute to mental states.²⁸² Lay also states that psychological assessments generally proceed with interviews that correspond to those conducted by psychiatrists with similar conclusions.²⁸³

Lay states the following with regard to the expertise of a clinical psychologist:²⁸⁴

²⁷⁵ Lay, S in Kaliski (2006) *supra* note 2 at 378-379 "Appendix: Mental Health Practitioners". See also Table 2 by Tredoux *et al* (2005) *supra* note 35 at 12.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

Psychologists have additional expertise in being able to administer and interpret psychometric tests. These consist of predetermined items that are conducted in an objective and standardised fashion. Psychometric tests generally comprise of three categories:

- *Intellectual assessment.* The most well-known are IQ tests. But there are many other tests that attempt to overcome biases that culture and education cause, which is a critical issue in assessment in this country.
- *Personality assessment.* These comprise of either objective tests in which the examinee answers questions on a questionnaire that is scored, or projective tests, an unstructured test in which the examinee is shown pictures or inkblots (Rorschach test) and asked to construct narratives about these.
- *Neuropsychological tests:* These are batteries of tests designed to detect changes in the brain, mostly of a cognitive, volitional and emotional nature. These are very specialised tests and should only be administered and interpreted by a psychologist who has received additional training in neuropsychology.

Within the context of the defence of criminal incapacity, the Criminal Procedure Act²⁸⁵ currently provides for the presentation of expert evidence by a clinical psychologist in the event of a criminal incapacity enquiry. During the course of this study the role of the clinical psychologist within the context of the psycholegal assessment process will be evaluated as well as the probative value of expert evidence presented by a clinical psychologist in support of a defence of criminal incapacity.

2.10 Forensic psychology

Another sub-speciality of psychology that will be addressed during the course of this study is the field of forensic psychology and its impact on the defence of criminal incapacity. The motivation for including the practice of forensic psychology

²⁸⁵ See section 79(1) of the Criminal Procedure Act 51 of 1977.

in this study lies mainly in the distinction between a forensic and a therapeutic evaluation.

Melton *et al* indicate that the various dimensions distinguishing a therapeutic from a forensic assessment are the following:²⁸⁶

- *Scope.* Rather than the broad set of issues a psychologist addresses in a clinical setting, a forensic psychologist addresses a narrowly defined set of events or interactions of a non-clinical nature.
- *Importance of client's perspective.* A clinician places primary importance on understanding the client's unique point of view, while the forensic psychologist is interested in accuracy, and the client's viewpoint is secondary.
- *Voluntariness.* Usually in a clinical setting a psychologist is dealing with a voluntary client. A forensic psychologist evaluates clients by order of a judge or at the behest of an attorney.
- *Autonomy.* Voluntary clients have more latitude and autonomy regarding the assessment's objectives. Any assessment usually takes their concerns into account. The objectives of a forensic examination are confined by the applicable statutes or common law elements that pertain to the legal issue in question.
- *Threats to validity.* While the client and therapist are working toward a common goal, although unconscious distortion may occur, in the forensic context there is a substantially greater likelihood of intentional and conscious distortion.
- *Relationship and dynamics.* Therapeutic interactions work toward developing a trusting, emphatic therapeutic alliance; a forensic psychologist may not ethically nurture the client or act in a "helping" role, as the forensic evaluator has divided loyalties and there are substantial limits on

²⁸⁶ Melton *et al* (2007) *supra* note 49 at 44. See also Shapiro, DL "Forensic Psychological Assessment – An Integrative Approach" (1991) at 1-4; Nicholson, RA and Norwood, S "The Quality of Forensic Psychological Assessments, Reports and Testimony: Acknowledging the Gap between promise and Practice" (2000) *Law and Human Behaviour* at 9; Barlow, DH and Durand, UM "Abnormal Psychology – An Integrative Approach" (1995) at 77-116.

confidentiality he can guarantee the client. A forensic evaluator must always be aware of manipulation in the adversary context of a legal setting. These concerns mandate an emotional distance that is unlike a therapeutic interaction.

- *Pace and setting.* Unlike therapeutic interactions which may be guided by many factors, the forensic setting with its court schedules, limited resources, and other external factors, place great time constraints on the evaluation without opportunities for re-evaluation. The forensic examiner focuses on the importance of accuracy and the finality of legal dispositions.

Forensic psychology can be defined as the interface between psychology and the legal system. It is a subspeciality of applied psychology concerned with the collection, examination and presentation of psychological evidence for judicial purposes.²⁸⁷ The practice of forensic psychology comprises the understanding of applicable law in order to conduct legal evaluations and interact appropriately with judges, attorneys and other legal professionals. A very important aspect of forensic psychology is the ability to testify in court and reformulating psychological findings into legal language of the court in order to provide information in such a way that it can be understood.²⁸⁸ A forensic psychologist can be trained in clinical, social, organizational or any other branch of psychology.

Forensic psychologists are frequently appointed by the court to assess an accused's competency or fitness to stand trial as well as the accused's state of mind at the time of the offence. Forensic psychologists also provide sentencing recommendations, treatment recommendations as well as any additional information the judge requests including information pertaining to mitigating factors and the assessment of future risk.²⁸⁹

²⁸⁷ Wikipedia Encyclopaedia <http://en.wikipedia.org/wiki/Forensic/psychology> [accessed on 2008/07/15].

²⁸⁸ *Ibid.*

²⁸⁹ See also Tredoux *et al* (2005) *supra* note 35 at 63–86.

A forensic psychologist is thus any psychologist who by virtue of training or experience may assist a court or a trier of fact in arriving at a just and fair decision.²⁹⁰

Davies, Hollin and Bull elaborate further on the definition of forensic psychology by stating:²⁹¹

“It is often said that forensic psychology is a broad church embracing a variety of studies at the interface of psychology and the law. However, to pursue the analogy a little further, it is a church with two main aisles: *legal psychology* covering the application of psychological knowledge and methods to the process of law and *criminological psychology* dealing with the application of psychological theory and method to the understanding (and reduction) of criminal behaviour. In a nutshell, legal psychology deals with evidence, witnesses and the courts while criminological psychology focuses on crime and criminals.”

Other terms used to refer to forensic psychology are “psychology and law” and “legal psychology”.

Gudjonsson and Haward define forensic psychology as:²⁹²

“... that branch of applied psychology which is concerned with the collection, examination and presentation of evidence for judicial purposes.”

Arrigo and Shipley state the following pertaining to the practice of forensic psychology and its role and place:²⁹³

“The expanse of the field is rooted in its sundry models of instruction and practice. Clinical practitioners emphasize the assessment, diagnosis, and

²⁹⁰ See <http://www.geocities.com/Athens/7429/forensicpsychprep.html> [accessed on 2008/07/15].

²⁹¹ Davies, G, Hollin, C and Bull, R “Forensic Psychology” (2008) at xi.

²⁹² Gudjonsson, GH and Haward, LRC “Forensic Psychology: A guide to Practice” (1998) at 1.

²⁹³ Arrigo, BA and Shipley, SL “Introduction to Forensic Psychology: Issues and Controversies in Law, Law Enforcement and Corrections” (2005) at xvii.

treatment of different civil and criminal forensic populations. Law/psychology practitioners emphasize the development of the legally trained specialist whose overlapping skills in courtroom processes and human behaviour make for a formidable expert in the treatment and policy arenas. Law-psychology-justice practitioners emphasize the development of a cross-trained specialist whose integrative knowledge base in psychology, criminology, organizational analysis, policy studies, and law readies the person for the increasing demands of a multifaceted profession. If appropriately prepared, this specialist moves skilfully among those in the psychotherapeutic, management, and advocacy communities.”

According to Arrigo and Shipley forensic psychologists are primarily concerned with crime and justice.²⁹⁴

Howitt provides the following definition of forensic psychology.²⁹⁵

“Forensic psychology literally is psychology to do with the courts of law. The term *forensic* and *forum* have the same Latin origins. A forum is merely a room for public debate, hence the word forensic. Criminal psychology is mainly to do with psychological aspects of criminal behaviour and includes issues such as origins of criminality.”

Reference to criminal psychology is specifically included in this section as this concept will also be addressed during the course of this study.

It is important to note that a forensic psychologist views an accused from a different point of view than the traditional clinical psychologist as indicated above. Traditional psychological tests and interview procedures are not always sufficient when applied in a forensic setting. Unlike the more traditional applications of

²⁹⁴ Arrigo and Shipley (2005) *supra* note 293 at xviii.

²⁹⁵ Howitt, D “Introduction to forensic and Criminal Psychology” (2006) at 2.

clinical psychology informed consent is not required when the assessment is ordered by the court.²⁹⁶

Kaliski and Zabow state the following:²⁹⁷

“Forensic evaluations do not usually occur within fiduciary relationships, and may be best characterised as ‘examiner-examinee’ relationships. ... Unlike the usual doctor-patient relationship, in which there has to be concern that the individual’s autonomy is respected, care taken that no harm befalls him or that his best interests are served, the psycholegal relationship may be beholden to the greater needs of the community.”

3 Problem statement and hypotheses

During the course of an extensive literature study pertaining to “the role of expert evidence in support of the defence of criminal incapacity” certain controversial and problematic questions were identified which will form the cornerstone and foundational framework of the present study. These problematic hypotheses can be formulated as follows:

- What is the precise role and place of expert evidence within the framework of the defence of criminal incapacity?
- What role does psychiatry and psychology play in the assessment and evaluation of the defence of non-pathological criminal incapacity?
- What is the precise role and value of psychiatry and psychology during the assessment of battered woman syndrome evidence?
- What is the current status of a battered woman/spouse who kills her/his abusive partner? Can the defence of criminal incapacity be invoked, and if

²⁹⁶ Wikipedia Encyclopaedia *supra* n 217.

²⁹⁷ Zabow, T and Kaliski, SZ “Ethical Considerations” in Kaliski (ed) (2006) *supra* note 2 at 359.

so, should the defence be one of non-pathological or pathological criminal incapacity?

- What influence does the South African Constitution have on the defence of criminal incapacity? What is the Constitutional relevance of the burden of proof in relation to the defence of pathological criminal incapacity?
- How do psychological and psychiatric sciences contribute towards proving the defence of criminal incapacity?
- What are the probative value, reliability and validity of forensic assessments in the judicial process?
- What is the role of forensic psychiatry and psychology in support of the defence of criminal incapacity?
- Who is qualified to provide expert testimony in support of a defence of criminal incapacity?
- What ethical considerations should apply during a psycholegal assessment?
- What is the current standard in respect of the concept of “mental illness” and “mental defect” and how does this impact on the sustainability and merits of the defence of pathological criminal incapacity?
- Should the Criminal Procedure Act, in its current form, be amended with reference to specific problem areas, in order to provide more clarity and legal certainty in respect of the defence of criminal incapacity?
- What should the mental health expert witness expect in the court and what impact could his or her testimony have?

4 Central theoretical statement

During the course of this study the author will attempt to verify the following central theoretical statement:

Mental health experts, and more specifically, forensic mental health experts, play a pivotal and essentially crucial role in the assessment and proof of the merits and validity of the defence of criminal incapacity. There is a fundamental need for carefully trained specialists with a proper understanding of the mechanics of law, the sciences of psychology and psychiatry respectively, and the complexities of human behaviour to assist the court in cases where the defence of criminal incapacity is raised. The role of the mental health expert in support of the defence of criminal incapacity is dual functional in the sense that it is in the first place pivotal to have the assistance of such an expert and in the second place it is important that the expert be adequately trained and experienced in the particular field of mental health concerned.

5 Methodology

This study will entail a theoretical and investigative exposition of the role of expert evidence in support of the defence of criminal incapacity.

In order to address the abovementioned hypotheses, the present study will be conducted as follows:

Chapter 2

This chapter will critically address the role of expert evidence in respect of the defence of non-pathological criminal incapacity. This chapter will deal extensively with the defence of non-pathological criminal incapacity with a discussion pertaining to the origin, development, recent controversies pertaining to this defence with an assessment of the role that expert evidence has played in support of this defence as well as the future role of expert evidence in support of this

defence. This chapter will also evaluate the plight of the battered woman within the current legal system with recommendations on how the battered woman could possibly be accommodated within the ambit of the defence of non-pathological criminal incapacity.

Chapter 3

This chapter will critically address the defence of pathological criminal incapacity as well as address the role of expert evidence in respect of this defence better known as the defence of mental illness or “insanity”. This chapter will also address the problem areas specifically with reference to the definition of “mental illness” and “mental defect” and the lack of clarity as to the precise meaning that should be attached to these words. The impact of the Diagnostic and Statistical Manual of Mental Disorders (“DSM IV”) on the definition of “mental illness” and “mental defect” will also be evaluated. It is further clear that the definition of “mental illness” and “mental defect” ascribed by psychiatrists differ markedly from the meaning ascribed to these terms in section 77–79 of the Criminal Procedure Act 51 of 1977. This “gap” will also be discussed critically.

Chapter 4

This chapter will discuss the rules of the Law of Evidence relating to expert evidence within the ambit of the “opinion rule”. The evidentiary principles relating to scientific evidence will also be discussed in this chapter. This chapter will also discuss the role of the psychiatrist and the psychologist within the context of the defence of criminal incapacity as these two experts will be the main role players during the presentation of expert evidence in support of this defence with reference to section 77–79 of the Criminal Procedure Act 51 of 1977. This chapter will also address the sustainability of the “ultimate issue” principle pertaining to expert evidence in the light of our current Constitution of the Republic of South Africa, 1996. The various ethical dilemmas encountered within the forensic assessment process will also be assessed critically.

Chapter 5

In this chapter a comparative perspective will be provided pertaining to a *capita selecta* of principles of expert evidence in the United States of America. The ethical codes of the practices of forensic psychiatry and psychology in the United States of America will also be assessed.

Chapter 6

This chapter will contain a summary of the research conducted and valuable recommendations flowing from the research will be presented.

“More and more we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts – the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light.”²⁹⁸

²⁹⁸ Benjamin Nathan Cordozo “What medicine can do for Law”. Address before the New York Academy of Medicine, November 1, 1928 as quoted in Allen, RC, Ferster, EZ and Rubin, JG “Readings in Law and Psychiatry” (1968) at 1.