

Unravelling the entrapment enigma: Reflections on the role of the mental health expert in the assessment of battered woman syndrome and coercive control advanced in support of a defence of non- pathological criminal incapacity (1)

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OPSOMMING

Die ontsyfering van die verstrikkingsraaisel: Perspektiewe rakende die rol van die geestesdeskundige tydens die assessering van die mishandelde vrou-sindroom en dwang-beheer aangevoer ter ondersteuning van die verweer van nie-patologiese ontoerekeningsvatbaarheid

Mishandeling binne die konteks van intieme verhoudings is tans 'n algemene verskynsel. Wanneer die mishandelde party hom- of haar egter tot kriminele optrede wend ten einde te ontsnap uit sodanige verhouding, word die situasie gekompliseerd. Daar is tans 'n aantal verwerpe binne die konteks van die materiële strafreg tot die beskikking van 'n party wat aangekla word, of staan te word, as gevolg van misdadige optrede binne die konteks van mishandeling binne 'n intieme verhouding. Nie-patologiese ontoerekeningsvatbaarheid is een sodanige verweer. In hierdie artikel evalueer die outeur die rol van die geestesdeskundige in die assessering van 'n beskuldigde wat hom of haar beroep op die verweer van nie-patologiese ontoerekeningsvatbaarheid as gevolg van misdadige optrede voortspruitend uit mishandeling binne 'n intieme verhouding. Die outeur oorweeg die meriete van laasgenoemde verweer en gevolglik die beskikbaarheid daarvan vir 'n mishandelde party binne die konteks van die omstrede Appèlhofbeslissing in *Eadie*. Die outeur kontekstualiseer verder die wesenlike rol van die geestesdeskundige teen die agtergrond van die mishandelde vrou-sindroom en die meer onlangse verskynsel van dwangbeheer wat aangevoer kan word ter ondersteuning van die verweer van nie-patologiese ontoerekeningsvatbaarheid. Ten slotte bereik die outeur die gevolgtrekking dat die leerstukke van die mishandelde vrou-sindroom en dwangbeheer slegs deur behoorlik gekwalifiseerde geestesdeskundiges geassesseer kan word. Verder word aanbeveel dat sowel die Staat as die beskuldigde in sodanige geval deskundige getuienis moet aanvoer ten einde die meriete van laasgenoemde verweer te evalueer. Die belangrike rol van deskundige getuienis in die geval van verminderde nie-patologiese toerekeningsvatbaarheid vir doeleindes van vonnisoplegging word ook toegelig.

“The general aim of law is to serve human justice rather than, solely, to achieve a logically perfect application of abstract rules” (The Honourable Albert Tate, 1980).¹

¹ As quoted in Hudsmith “The admissibility of expert testimony on battered woman syndrome in battered women’s self-defense cases in Louisiana” 1986 *Louisiana LR* 979.

1 INTRODUCTION

She was assaulted every day of her marriage, sometimes so severely that she could not walk. Her husband was always angry upon returning home after work. He was frequently dissatisfied with the food she had cooked for him and would throw it into the kitchen sink and open a tap over it. As a result of his dissatisfaction he would punish her by beating and kicking her. He promised her that he would ensure that no man would ever want her if she divorced him. In order to keep his promise he tied her to a bed and assaulted her so severely with objects that she had to undergo a hysterectomy due to internal injuries. This is a brief prelude to the abuse suffered by Elsie Morare who was sentenced to 21 years imprisonment for the murder of her abusive husband.²

Abuse within intimate relationships has been a phenomenon since time immemorial. For many centuries men had the right to abuse and beat their wives.³ Abused women are more commonly referred to as “battered women” and their psychological reactions to abuse are commonly referred to as the “battered woman syndrome”.⁴ Whenever a battered woman kills her abusive partner, she faces the following challenges within our criminal justice system: the defences available to battered women are very limited; abuse is often assessed only in terms of physical abuse without adequate recognition of the other manifestations

2 See Karsten *Headline murders – Slayings which shook South Africa* (2007) 89–90 where the story of Elsie Morare is discussed together with the tales of various other women who killed their abusive husbands in a last desperate attempt to escape from an abusive relationship. The author (Karsten) in addition relates the letter written by Sharla Sebejan who wrote: “He swore at me for putting too much milk in his tea. I was a robot and he pressed the buttons. He put a rag in my mouth so that the children would not hear my cries when he assaulted me.” Another woman, Meisie Kgomo, wrote: “He used a panel-beating hammer on me. He stabbed me with a knife.” Maria Scholtz, who was sentenced to prison for twenty years for murdering her abusive husband, was controlled by her husband through sex. Whenever he brought items home such as food, he demanded payment. Maria had to pay with her body. Rape within the marriage was no crime. She wrote in a letter: “He refused to pay the children’s school fees and locked up the food in the cupboards. He fondled me while the children were watching.” These are but a few examples of victims who fell prey to abuse within intimate relationships. In this article, the author addresses such abuse from the perspective of the abused or “battered” woman who kills or commits a criminal offence as a result of such abuse by her husband or partner. Reference to the abused or “battered” woman should, however, not be construed as being gender specific and accordingly refers to any victim of abuse, whether male or female, within an intimate relationship.

3 Pistorius *Fatal females – Women who kill* (2004) 15.

4 Walker *The battered women* (1979) XV, Moore *Battered women* (1979) 8; Hudsmith 980. Walker (1979) XV defines a battered woman as follows: “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.” See also Dershowitz *The abuse excuse – and other cop-outs, sob stories and evasions of responsibility* (1994) 322 where a more liberal and Constitutionally sound definition of “battered person’s syndrome” is given as follows: “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*.”

of abuse; and the role of mental health experts is frequently underscored and under-estimated.

Non-pathological criminal incapacity is one of the defences available to the battered woman who kills her abusive spouse or partner.⁵

The Battered Woman Syndrome has become highly controversial, particularly when used in support of a defence of non-pathological criminal incapacity and the ground of justification of private defence.⁶ The legal context of women who

5 See generally in respect of non-pathological criminal incapacity Snyman *Criminal law* (2008) 162–165. See also *S v Wiid* 1990 1 SACR 561 (A) where the defence of non-pathological criminal incapacity was raised successfully.

6 Burchell and Milton *Principles of criminal law* (2005) 451–454; Peter “Domestic violence” in Kaliski *Psycholegal assessment in South Africa* (2006) 146–161; Ludsin and Veten *Spiral of entrapment. Abused women in conflict with the law* (2005) 98–169; Pistorius (2005) 1–59; Burchell and Milton *Cases and materials on criminal law* (2007) 403–424; Arrigo and Shipley *Introduction to forensic psychology, issues and controversies in law, law enforcement and corrections* (2005) 74; Johann and Osanka *Representing battered women who kill* (1989) 27–46; Walker *Terrifying love – Why battered women kill and how society responds* (1989) 42–99; Ewing *Battered women who kill – Psychological self-defense as legal justification* (1987); Bartol and Bartol *Criminal behaviour – A psycho-social approach* 316–317; Walker *Abused women and survivor therapy – A practical guide for the psychotherapist* (1994) 55–80; Burchell and Hunt *South African criminal law and procedure – General principles of criminal law* (1997) 212; Horder *Provocation and responsibility* (1992) 186; Karsten *Dodelike vroue – Wanneer passie in bloed eindig* (2007) 129–145; Barnett and LaViolette *It could happen to anyone – Why battered women stay* (1993) x–xx; Moore (1979) 33–100; Martin *Battered wives* (1976) 9–43; Walker *The battered woman* (1979) 11–165; Dershowitz 3–47; Walker *Women and mental health policy* (1984); Reddi “Battered woman syndrome: Some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers” 2005 *SACJ* 259; Wolhuter “Excuse them though they do know what they do – the distinction between justification and excuse in the context of battered women who kill” 1996 *SACJ* 151; Mather “The skeleton in the closet: The battered woman syndrome, self-defense, and expert testimony” 1988 *Mercer LR* 545; Schuller and Vidmar “Battered woman syndrome evidence in the courtroom” 1992 *Law and Human Behaviour* 273; Hudsmith 1987 *Louisiana LR* 979; Blackman “Potential uses for expert testimony: Ideas toward the representation of battered women who kill” 1986 *Women’s Rights Law Reporter* 227; Rogers “Prosecutorial use of expert testimony in domestic violence cases: From recantation to refusal to testify” 1998 *Columbia J of Gender and Law* 67; Ludsin “*Ferreira v The State*: A victory for women who kill their abusers in non-confrontational situations” 2004 *SAJHR* 642; Sigol and Perrino “Battered women who kill: Variables affecting simulated jurors’ verdicts” 2005 *J of Family Violence* 403; Schuller and Rzepa “Expert testimony pertaining to battered woman syndrome: Its impact on jurors’ decisions” 2002 *Law and Human Behavior* 655; Labuschagne “Die mishandelde vrou sindroom, die redelike persoon-standaard en die grense van noodweer – *R v Malott* (1998) 121 CCC (3d) 456 (SCC)” 1998 *THRHR* 538; Carstens and Le Roux “The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband” 2000 *SACJ* 180; Schuller and Cripps “Expert evidence pertaining to battered women: The impact of gender of expert and timing of testimony” 1998 *Law and Human Behavior* 17; Reddi “Violence against women: Tears of triumph for women in South Africa?” in Hoctor and Schwikkard (eds) *The exemplary scholar: Essays in honour of John Milton* (2007) 64–79; Burke “Rational actors, self-defense and duress: Making sense, not syndromes, out of the battered woman” 2002 *North-Carolina LR* 211; Roberts “Between the heat of passion and cold blood: Battered woman’s syndrome as an excuse for self-defense in non-confrontational homicides” 2003 *Law and Psychology R* 135; *S v Ferreira* 2004 2 SACR 454 (SCA); *S v Campher* 1987 1 SA 940 (A); *S v Smith* 1990 1 SACR 130 (A); *S v Wiid* 1990 1 SACR 56A (A); *S v Potgieter* 1994 1 SACR 61 (A); *S v Engelbrecht* 2005 2 SACR 41 (W).

kill their abusive partners has given rise to a plethora of academic commentary, specifically aimed at addressing the criminal law's treatment of women who kill their abusive partners. Research indicates that one in every four women will experience abuse in an intimate relationship in their lifetime.⁷ The term "Battered Woman Syndrome" was coined by a prominent expert on battered women, Dr Lenore Walker, who described battered woman syndrome as a pattern of psychological and behavioural symptoms found in women living in battering relationships.⁸ It is important to note that the "Battered Woman Syndrome" is not, and has never been, a legal defence in its own right.⁹ Battered woman syndrome evidence is described by Slovenko as "syndrome evidence" which constitutes "a cluster of systems in criminal cases, either to establish that a particular traumatic event or stressor actually occurred or to explain the behaviour of the victim".¹⁰ Battered woman syndrome evidence is accordingly used in order to explain a battered woman's experiences and the specific psychological effects of battering and abuse on the woman.¹¹ The psychosocial context of battering or abuse and its impact on battered women is relevant within the following contexts:¹²

- In circumstances where a battered woman is tried for a crime and relies on a defence of private defence, automatism or lack of criminal capacity.
- When a battered woman has been charged or convicted of a crime, and evidence of battering or its effects is adduced in support of mitigation of sentence.¹³
- Other instances, for example, to prove a pattern of coercive control.¹⁴

Battered woman syndrome has also featured in numerous decisions pertaining to the defence of non-pathological criminal incapacity.¹⁵ Although the term "Battered Woman's Syndrome" was not specifically used in these decisions, the evidence presented by expert witnesses in these decisions and the facts indicative of abuse, either physical or psychological, boil down to manifestations of the "Battered Woman Syndrome".

7 Statistics obtained from www.settlement.org/downloads/woman-Abuse-factsheet.pdf (accessed 2009-03-16). Statistics further indicate the following: 38 % of sexually assaulted women were assaulted by their husbands, common-law partners, or boyfriends; 21 % of women abused in an intimate relationship are abused during pregnancy; 40 % of women with disabilities have been or are in an abusive relationship; only 26 % of woman abuse incidents are reported to the police; and in an average year, 78 women are killed by their husbands or partners.

8 See Walker (1984) 95–97. For a definition of the term "Battered Woman Syndrome" see fn 4 above.

9 Reddi 2005 *SACJ* 260; Ludsin and Vetten 98; Johann and Osanka (1989) 27.

10 *Psychiatry and criminal culpability* (1995) 209. Slovenko notes that recently in criminal cases expert testimony about a diversity of trauma syndromes such as the battered spouse, battered child, rape trauma and incest trauma is offered to prove, on the basis of the symptoms, that a particular stressor or crime actually happened. See also Slovenko *Psychiatry in law – law in psychiatry* (2002) 135.

11 Reddi 2005 *SACJ* 98.

12 *Ibid*; Ludsin and Vetten 98; Carstens and Le Roux 182; Schuller and Rzepa 655.

13 See *S v Ferreira* 2004 2 *SACR* 454 (SCA).

14 See Dutton *The abusive personality – Violence and control in intimate relationships* (2007) 74–122; Dutton *The abusive personality – Violence and control in intimate relationships* (1988) 32–93C; Stark *Coercive control – How men entrap women in personal life* (2007) 112.

15 *S v Campher supra* fn 6; *S v Smith supra* fn 6; *S v Wiid supra* fn 6; *S v Potgieter supra* fn 6.

Ludsin and Vetten¹⁶ indicate that in cases where abused women kill their abusive spouses or partners, expert evidence is essential and pivotal in order to provide clarity on the following aspects: understanding why abused women do not leave their abusers; why women's options to put an end to the abuse are very limited and often nonexistent; and the psychological impact of abuse on battered women.

Expert testimony pertaining to the social context and effects of domestic violence as well as the history of the abusive relationship are pivotal in order to provide an abused woman or battered woman with a fair trial.¹⁷

Moas similarly states:¹⁸ "A woman's actions can be fairly judged only if understood in the light of her experiences with the deceased and how these experiences shaped her perspectives."

Non-pathological criminal incapacity, as stated above, is one of the defences available to a battered woman who kills her abusive spouse or partner. In this article, the author contextualises the psychosocial dynamics of an abusive relationship and, in particular, the fundamental need for expert evidence in support of the defence of non-pathological criminal incapacity against the backdrop of the battered woman who kills her abusive spouse or partner or commits any other offences as a result of abuse within an intimate relationship. In addition, the merits and validity of the defence of non-pathological criminal incapacity are assessed.

2 THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY AND THE BATTERED WOMAN – AN INSTRUMENT OF HELP OR DOOM?

Over the past two to three decades, South African criminal law has seen the emergence of a defence currently labelled as non-pathological criminal incapacity.¹⁹

16 Ludsin and Vetten 12.

17 Ludsin *South African criminal law and battered women who kill: Discussion document II* (2003) (research report written for the Centre for the Study of Violence and Reconciliation) 8.

18 "Domestic violence – Competing conceptions of equality in the law of evidence" 2001 *Loyola LR* 127.

19 Snyman *Criminal law* (2008) 162–169; Snyman *Strafreg* (2006) 161–167; Snyman *Criminal law* (2002) 163–167; Burchell and Milton 358–369, 403–454; Kaliski 34–57; Tredoux, Foster, Allan, Cohen and Wassenaar *Psychology and law* (2005) 400–407 (Tredoux *et al*); Ludsin and Vetten 155–167; Strauss *Doctor, patient and the law – a selection of practical issues* (1991) 134–135; Pistorius 15–58; Strauss "Nie-patologiese ontoerekeningsvatbaarheid as verweer in die strafreg: 'n Nuwe uitdaging vir deskundige, mediese getuies" 1995 *SAPM* 14–15/34; Snyman "Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg" 1989 *TRW* 1–15; Van Oosten "Non-pathological criminal incapacity versus pathological criminal incapacity" 1993 *SACJ* 127–147; Louw "Die algemene toerekeningsvatbaarheidsmaatstaf" 1987 *SACJ* 362–370; Bergenthuin "Die algemene toerekeningsvatbaarheidsmaatstaf" 1985 *De Jure* 275–282; Burchell and Hunt 35–36 153–161 201–219; Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (2007) 13–17–13–19 (Du Toit *et al*); Burchell and Milton (2007) 336–437; Kriegler and Kruger *Hiemstra – Suid-Afrikaanse strafproses* (2008) 13–14–13–24; Bergenthuin "Provokasie in die Suid-Afrikaanse strafreg" 1986 *De Jure* 98–109; Carstens and Le Roux 180–189; St Q Skeen and Hoctor "Criminal law" 6 *LAWSA* (2010) para 85; *S v Chretien* 1981 1 SA 1097 (A); *S v Van Vuuren* 1983 1 SA 12 (A); *S v Arnold* 1985 3 SA 256 (C); *S v Adams* 1986 4 SA 882 (A); *S v Campher* 1987 1 SA 940 (A); *S v Wiid* 1990 1

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Before 2002, the defence of non-pathological criminal incapacity was frequently raised and in two High Court decisions²⁰ and one Supreme Court of Appeal decision²¹ the accused were completely acquitted after raising the defence of non-pathological criminal incapacity based on evidence of provocation or emotional stress experienced by them at the time of, or before the commission of the act. The latter approach to provocation specifically created the possibility of a complete acquittal if sufficient, compelling evidence was adduced in support of the defence to create reasonable doubt as to the existence of criminal capacity.²² In 2002, however, the Supreme Court of Appeal delivered judgment in the highly controversial decision of *S v Eadie*²³ which effectively casts a shadow

SACR 561 (A); *S v Potgieter* 1994 1 SACR 61 (A); *S v Kalogoropoulos* 1993 1 SACR 12 (A); *S v Kensley* 1995 1 SACR 646 (A); *S v Nursingh* 1995 2 SACR 331 (D); *S v Di Blasi* 1996 1 SACR 1 (A); *S v Cunningham* 1996 1 SACR 631 (A); *S v Francis* 1999 1 SACR 650 (SCA); *S v Henry* [1999] All SA 290 (SCA), 1999 1 SACR 13 (SCA); *S v Kok* 2001 2 SACR 106 (SCA); *S v Eadie* 2002 3 SA 719 (SCA), 2002 1 SACR 663 (SCA); *S v Moses* 1996 1 SACR 701 (C); *S v Gesualdo* 1997 2 SACR 68 (W); *S v Smith* 1990 1 SACR 130 (A); *S v Rittman* 1992 2 SACR 110 (NMHC); *S v Calitz* 1990 1 SACR 119 (A); *S v Engelbrecht* 2005 2 SACR 41 (W); *S v Ferreira* 2004 2 SACR 454 (SCA); *S v Laubscher* 1988 1 SA 163 (A); *S v Leaner* 1996 2 SACR 247 (C); *S v Nursingh* 1995 2 SACR 331 (D); *S v Scholtz* 2006 1 SACR 442 (E); *S v Volkman* 2005 2 SACR 402 (C); Boister "Case discussions, liability – non-pathological criminal incapacity" 1995 *SACJ* 367; Burchell "Non-pathological incapacity: evaluation of psychiatric testimony" 1995 *SACJ* 37; De Vos "Criminal capacity, provocation and HIV" 1996 *SACJ* 354; Hoctor "Road rage and reasoning about responsibility" 2001 *SACJ* 195; Le Roux "Strafregtelike aanspreeklikheid en die verweer van tydelike nie-patologiese ontoerekeningsvatbaarheid – verlies van konatiewe geestesfunksie onderskei van blote verlies van humeur – *S v Eadie* (1) 2001 (1) SACR 172" 2002 *THRHR* 478; Le Roux "Strafregtelike aanspreeklikheid en die verweer van nie-patologiese oftewel gesonde outomatisme" *De Jure* 2000 190; Louw "*S v Eadie*: Road rage, incapacity and legal confusion" 2001 *SACJ* 206; Louw "*S v Eadie*: The end of the road for the defence of provocation?" 2003 *SACJ* 200; Meintjes-Van der Walt "Making a muddle into a mess? The amendment of section 78 of the Criminal Procedure Act" 2002 *SACJ* 242; Rumpff "Feite of woorde" 1990 *Consultus* 19; Snyman "Is there such a defence in our criminal law as 'emotional stress?'" 1985 *SALJ* 240; Snyman "The tension between legal theory and policy considerations in the general principles of criminal law" 2003 *Acta Juridica* 1; De Wet and Swanepoel *Strafreg* (1975) 105–135.

20 *S v Nursingh supra* fn 19 and *S v Moses supra* fn 19. See also Burchell and Milton 428.

21 *S v Wiid supra* fn 6.

22 Burchell and Milton 428; Snyman (2008) 237.

23 *S v Eadie supra* fn 19. The salient facts of the decision were briefly as follows: The appellant, a keen sportsman and competitive hockey player, had together with his wife attended a function at a hockey club in Cape Town. The appellant had during the evening consumed alcohol. On the way home in the early hours of the morning, the appellant and his wife became aware of a vehicle behind them flashing its headlights at them. The deceased, Kevin Andrew Duncan, was the driver of the other vehicle. The deceased drove right up to the appellant, overtook him and then slowed down considerably. When the deceased reduced his speed, the appellant overtook him. The deceased then increased his speed and once again drove up close to the appellant, keeping its headlights on bright. The appellant accelerated but could not put distance between them. The latter process was repeated and at a set of traffic lights, the appellant got out of his vehicle, took a hockey stick and approached the deceased. When he approached the deceased who was still in his vehicle and after the hockey stick broke as a result of it striking the vehicle, the appellant punched the deceased repeatedly, pulled him out of the vehicle and savagely stamped on the deceased's head with the heel of his shoe. The *post mortem* examination performed on the deceased revealed that the deceased sustained significant fractures of the facial bones and skull and

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over the defence of non-pathological criminal incapacity. The latter decision was particularly instructive as it changed the approach to provocation in respect of non-pathological criminal incapacity drastically.

The decision by Navsa JA in *Eadie* was particularly problematic in respect of the application of the general principles of criminal liability to the set of facts. Dealing with the defences of sane automatism and non-pathological criminal incapacity, Navsa JA held that²⁴

“there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation . . . It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence. However, the result is the same if an accused’s verified defence is that his psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton – his acts would then have been unconscious and involuntary. In the present contest, the two are flip sides of the same coin”.

The appeal was eventually dismissed and Navsa JA concluded by stating:²⁵

“It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism . . . The message that must reach society is that consciously giving in to one’s anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law.”

The first problematic aspect of *Eadie* which inadvertently affects the position of the battered woman relying on the defence of non-pathological criminal incapacity relates to the question as to whether this defence still exists after *Eadie*. The second critical aspect of *Eadie* relates to the fact that Navsa JA inherently conflated the defence of sane automatism and non-pathological criminal incapacity. In terms of the former, the enquiry to a large extent turns on the specific approach followed in respect of provocation and the effect of provocation on criminal liability.²⁶ Snyman submits that after *Eadie*, the defence of non-

that these injuries were caused by the application of a considerable degree of blunt force. The appellant admitted that he assaulted and killed the deceased. He relied on the defence of temporary non-pathological criminal incapacity resulting from a combination of severe emotional stress, provocation and a measure of intoxication. The trial court rejected his defence and he was convicted of murder. The appellant was also convicted in the trial court of obstructing the ends of justice. The appellant appealed against his conviction of murder.

24 689B–C. See also 689I where Navsa JA held: “Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one’s actions it appears notionally possible.”

25 693G–H.

26 See Snyman (2008) 235 where the two approaches in respect of the effect of provocation are explained as follows: *The separate doctrine approach*: According to this approach provocation should be regarded as a completely separate doctrine with its own unique and distinctive principles. According to this approach an accused’s liability should not be determined by applying the ordinary principles of liability such as act, unlawfulness, criminal capacity and intention, but rather in terms of the application of a distinct set of rules which apply only to provocation. *The general principles approach*: In terms of this approach, provocation constitutes nothing more than a set of facts which must be evaluated in the same way as any other set of facts by simply applying the ordinary principles of liability such as compliance with the definitional elements of a crime, which is unlawful, and whether he had the required criminal capacity and intention or negligence. Snyman (2008) 236 in addition indicates that prior to 1970, the separate doctrine approach mostly

pathological criminal incapacity due to provocation has effectively been abolished.²⁷ It is trite [is it really trite – I thought there were differences of opinion on the matter?] that the effect of provocation can either be to exclude the voluntariness of conduct inherently, giving rise to the defence of automatism; or it can exclude criminal capacity; or it can exclude intention or alternatively it may operate as a mitigating factor to be considered during sentencing.²⁸ As Snyman correctly notes, the court in *Eadie* did not indicate what the rules pertaining to the effect of provocation on liability are in our law.²⁹ It is also unclear whether the test for criminal capacity is still subjective or whether Navsa JA held in favour of an objective dimension being imported in respect of the test for criminal capacity.³⁰

In *Eadie*, Navsa JA reviewed the jurisprudence on provocation and emotional stress, and indicated that, although the test of criminal capacity might still be essentially subjective, the test had to be approached with caution.³¹

According to Burchell and Milton³² the judgment of the Supreme Court of Appeal in *Eadie* is open to three possible interpretations:

- (a) The first interpretation, which is the most likely to find resonance in future courts, focuses only on the accepted process of judicial inference of the presence or absence of subjective capacity from an examination of objective facts and circumstances.
- (b) The second interpretation implies a possible restriction of the ambit of the defence of lack of capacity (with specific reference to a lack of conative capacity) to a situation where automatism is present and involves a redefining

prevailed in terms of s 141 of the Transkeian Penal Code of 1886. After 1970, the general principles approach gradually became popular. It also became a well-established principle that provocation could also exclude criminal capacity as the focus shifted to the accused's subjective criminal capacity. See also *S v Mokonto* 1971 2 SA 319 (A) 325.

27 (2008) 237. Cf Burchell and Milton 431 who state: "The *Eadie* judgment signals a warning that in future the defence of non-pathological incapacity will be scrutinized most carefully."

28 See also Van Niekerk "A witch's brew from Natal – some thoughts on provocation" 1972 *SACJ* 169 174 who states that a crime committed under extreme anger can only exonerate an accused if such anger is regarded by the court as reasonable under the circumstances and states the following with regard to the position of provocation: Provocation can give rise to temporary insanity in the sense that a person cannot control himself – a rare but not impossible situation; provocation can be a factor which will be considered in determining the existence of intention to commit a crime – in many cases such provocation will include intention; and even where there is intention, a court will still regard such provocation as a mitigating circumstance.

29 Snyman (2008) 237.

30 See *Eadie supra* 691B–C para 64 where Navsa JA held: "I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence."

31 See in particular 691A–F.

32 430. See also Burchell "A provocative response to subjectivity in the criminal law" 2003 *Acta Juridica* 23.

of the actual subjective criterion of capacity, shifting the entire test of capacity from the subjective to the objective domain.

- (c) The third interpretation is that Navsa JA did not replace the entire existing subjective test of capacity with an objective test in provocation cases, but in fact identified an essential objective aspect in an otherwise subjective test of capacity that, as Burchell and Milton states, had always been lurking there, but had not received proper judicial recognition.

According to Burchell and Milton this third interpretation constitutes an intermediate position between (a) and (b) above and could develop the common law without infringing the principle of legality or necessitating lengthy legislative reform. They submit that Navsa JA was not talking about revising the test of capacity, but rather applying it correctly, using permissible inferences from objective facts and circumstances.³³ Accordingly, courts must not too readily accept the accused's own evidence regarding provocation or emotional stress and a court is entitled to draw a legitimate inference from what hundreds of thousands of other people would have done under the same circumstances. This inference would also result in a more cautious approach when an accused simply states that he or she lacked capacity or acted involuntarily under provocation or emotional stress.

What also becomes apparent from Navsa JA's judgment³⁴ is the distinction between instances of provocation that have accumulated over a period of time and those instances where a person merely loses his or her temper. A gradual disintegration of one's power will be more condonable than a sudden loss of temper.³⁵ The evidence adduced by an accused who, as a result of a sudden flare of temper, kills someone, would have to be sufficiently cogent to create reasonable doubt in his or her favour, before a court would consider acquitting him or her. The court would then be entitled to factor an evaluation of the accused's version against judicial expectations of behaviour into the sequence of inferential reasoning, leading to a conclusion on the credibility of the accused's evidence.³⁶

Accordingly a realistic way for a court to rein in the application of the purely subjective concept of capacity, short of engaging in judicial legislation in order to render the test objective in nature, would be to fall back on the drawing of legitimate inferences of the presence or absence of subjectively assessed capacity from objective circumstances.³⁷

Inferential reasoning is resorted to most frequently when there is no direct evidence and circumstantial evidence is relied on. Evidence of a person's state of mind or his or her capacity is most frequently circumstantial, or cannot be substantiated by direct evidence, apart from the evidence presented by the person him- or herself.³⁸

Burchell and Milton submit that psychiatric or psychological evidence as to state of mind or criminal capacity is notoriously unreliable, because it is

33 Burchell and Milton 431.

34 672 I.

35 Burchell and Milton 432.

36 *Ibid.*

37 *Idem* 434.

38 *Idem* 436.

essentially based on the accused's *ipse dixit* which leads to the need for inferential reasoning.

It is submitted that psychiatric and psychological evidence as to a person's state of mind, plays a pivotal role in cases where the defence of criminal incapacity is raised. Even if the subjective test for capacity imports objective circumstances from which inferences can be deduced, psychiatric and psychological evidence will assist the fact-finder in order to better evaluate whether the accused's reliance on the defence of incapacity is merely fiction or whether it is reasonably possibly true that the accused lacked criminal capacity at the relevant time when the said crime was committed.

It is submitted that in most instances where battered women resort to homicide to escape from an abusive relationship, it is the result of the cumulative effect of abuse over a prolonged period of time which resulted in the gradual disintegration of the powers of restraint of the battered woman. This situation is to be distinguished from a sudden "flare" of emotion and loss of temper as encountered in *Eadie*. What further becomes apparent upon closer scrutiny of cases where battered women resort to killing their abusive partners, is that it more often than not occurs within a non-confrontational setting which results in the battered woman not being able to rely on the defence of private defence.³⁹

It is interesting that with regard to the third interpretation (c) mentioned above, Burchell and Milton state that the second part of the capacity test involves an inquiry, in essence, as to whether the accused could have acted differently.⁴⁰ If the second leg of the capacity inquiry is regarded as "the capacity to act differently", the inquiry must imply an evaluation of the accused's conduct against some other standard of conduct, extrinsic to the accused him- or herself. In other words, the test of capacity must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused's conduct within the specific circumstances and against the standard of persons falling into a particular grouping. The criterion is not applicable to insane persons and persons suffering from mental illness or defect. Accordingly, the subjective test not only takes account of the accused's subjective mental condition but also, in determining the conative aspect of capacity, the court must inquire whether the accused could reasonably be expected to have acted differently. This inquiry provides for a comparison of the accused's conduct with the societal norms of sobriety and level-headedness. Burchell and Milton further submit that the central matter is not only whether the accused person, in fact, lacked criminal capacity, subjectively assessed. The real issue is whether these accused persons could reasonably

³⁹ For purposes of this discussion, the emphasis is on the defence of non-pathological criminal incapacity and accordingly private defence as a defence available to the battered woman is not addressed. In respect of private defence, see the recent judgment of *S v Steyn* 2010 1 SACR 411 (SCA) where the Supreme Court of Appeal upheld the appellant's plea of "self-defence" after it had been rejected in the court *a quo*. The appellant shot and killed her former husband when he threatened her with a knife. The facts revealed that the husband had for years abused the appellant, both mentally and physically, and had also assaulted her earlier that evening. The appellant relied on the plea of self-defence. The High Court, having regard to the various mitigating circumstances, sentenced the appellant to three years' imprisonment, wholly suspended on certain conditions. The appellant appealed against her conviction alone and on appeal it was held that the appellant's plea of self-defence ought to have been upheld.

⁴⁰ Burchell and Milton 440.

be expected to have acted differently, taking into consideration the provocation they received or the emotional stress they endured.⁴¹ They also state that it would be timely if the courts were to acknowledge openly this hidden, but nevertheless implicit, normative aspect of the second part of the capacity inquiry.

It is submitted that importing a normative or objective element to the subjective enquiry as discussed by Burchell and Milton and also by Navsa JA in *Eadie*, could be of much help to courts in the assessment of the validity of the defence of non-pathological criminal incapacity. In this regard expert evidence will also play a pivotal role in assessing not only the accused's conduct at a relevant stage, but also in the presentation of evidence of the characteristics, emotional make-up and profile of a person within the same circumstances and surrounding circumstances that the particular accused found him- or herself in at the time of the crime.

The second aspect which is clear from *Eadie* is that there is no distinction between non-pathological criminal incapacity due to emotional stress or provocation, on the one hand, and the defence of sane automatism on the other.⁴² According to the court, there is no difference between the second (conative) leg of the test for criminal capacity, which connotes the accused's liability to act in accordance with the appreciation of the wrongfulness of the act, and the requirement which applies to the conduct element that a person's bodily movements must be voluntary. Accordingly, if an accused alleges that, as a result of provocation, his or her psyche had disintegrated to such an extent that he or she could no longer control him- or herself, it amounts to an allegation of inability to control bodily movements and, therefore involuntary conduct.⁴³ Snyman submits, and this view can be supported, that the Supreme Court of Appeal was correct in dismissing the appeal and confirming the accused's conviction of murder.⁴⁴ Snyman submits that the argument followed by court in arriving at its conclusion is wrong. "The judgment is a good example of a correct decision arrived at for the wrong reasons."⁴⁵

As Snyman correctly submits, there is indeed a difference between the ability to control muscular movements, on the one hand, and the ability to act in accordance with insight into right and wrong, on the other. The test for determining whether somebody performed a voluntary act is merely to ascertain whether that person was capable of subjecting his or her bodily movements to his or her will or intellect. The person must be capable of making a decision about the conduct and of executing this decision.⁴⁶ The ability to act in accordance with an appreciation of right or wrong is something different. Here the person does perform a voluntary act, but lacks the (conative) ability to set himself or herself a goal, to pursue it, and to resist impulses or desires to act in a manner contrary to what his or her insights into right and wrong reveal.⁴⁷ A person may thus have the ability

41 *Idem* 443.

42 The battered woman could also rely on the defence of sane automatism, but this defence is particularly difficult to prove. For purposes of this article, the emphasis is on the defence of non-pathological criminal incapacity as stated above.

43 Snyman 2003 *Acta Juridica* 1.

44 See also Snyman (2006) 164.

45 Snyman 2003 *Acta Juridica* 15.

46 *Ibid.*

47 *Ibid.*

to perform a voluntary act yet at the same time lack the ability to act in accordance with his or her appreciation of the wrongfulness of the conduct in question. Snyman also indicates that to regard these two distinct tests as one, is furthermore incompatible with the provisions of both section 78(1) of the Criminal Procedure Act, dealing with the test for criminal responsibility of people alleged to be mentally ill, and section 1 of the Criminal Law Amendment Act,⁴⁸ which creates the offence of “statutory intoxication”. Snyman correctly states that by rejecting the basic difference between the test to determine the presence of a voluntary act and the conative test for capacity, some of the keystone concepts of criminal liability are losing their meaning.⁴⁹ It accordingly does not make sense to approach reliance upon the absence of one element of liability as reliance on another element of liability.⁵⁰

It is submitted that the facts of *Eadie* provide an example of a person losing his temper as a result of provocation. It is upon a consideration of the facts and the surrounding circumstances that the defence of criminal incapacity could not avail the appellant. It is further submitted that the defences of criminal incapacity and automatism are two distinct defences each with its own distinct requirements. Those two defences cannot coincide. As was stated by the psychiatrists, “loss of control” is not a psychological term, which renders their evidence in this regard contentious and speculative. Loss of conative ability, the ability to act in accordance with the appreciation of the wrongfulness of the act, can never be equated with conduct that is involuntary. Voluntariness refers to the muscular movements that are controlled by a person’s will or intellect.⁵¹

What is more problematic of the judgment imposed by Navsa JA is that he stated that the second leg of the criminal capacity enquiry should not fall away. This indeed should be the case. But then after this finding, Navsa JA stated:⁵² “It appears logical that when it has been shown that an accused has the ability to

48 Act 1 of 1988.

49 Snyman 2003 *Acta Juridica* 17.

50 Snyman (2006) 166. See also Le Roux 2002 *THRHR* 478 who correctly points out that automatism is a defence excluding the voluntariness of an act. Voluntariness merely refers to the fact that a person’s muscular movements are controlled by the will. A person can lack criminal capacity either as a result of a lack of the capacity to appreciate the nature of the wrongfulness of an act or omission (absence of the cognitive function) or as a result of a lack of the ability to act in accordance with such appreciation (absence of the conative function). Involuntariness of an act and lack of self-control are not the same. Le Roux also correctly submits that where a person (the accused) assaults another person until the person eventually dies, the conduct of the accused is indicative of the fact that the accused focused on the deceased in such manner that he did in fact act voluntarily. In the latter situation, an accused did in fact exercise control over his muscular movements and acted voluntarily. Le Roux correctly states that where a person temporarily lacks criminal capacity as a result of an inability to act in accordance with the appreciation of the wrongfulness of the conduct, such a person nevertheless still acts voluntarily. The lack of criminal capacity accordingly does not have a bearing on the voluntariness of the conduct of the accused. See also Hoctor 2001 *SACJ* 202.

51 See also *S v Arnold supra* fn 19 where a clear demarcation was established between involuntariness of conduct on the one hand, and lack of criminal capacity on the other hand. See also *S v Moses (supra* fn 19) 712A–B and 712H–I where Hlope J specifically rejected the evidence of one of the experts who testified that one can never lose control except in a case of automatism.

52 689B–C.

appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence.”

Someone who is acting involuntarily can *per se* not distinguish between right and wrong as he or she is not “acting” or performing an act in the legal sense required in order to incur criminal liability. If it is found that a person did not perform a voluntary act, he or she is acquitted on that basis. By the time the enquiry turns to criminal capacity, it has already been established that the particular accused has in fact acted voluntarily. If it is established that a person could not distinguish between right and wrong, he or she could be acquitted on the basis of a lack of criminal capacity. There cannot be a return to the enquiry into voluntariness when it has already been established that the accused acted voluntarily.

It is submitted that road rage is a serious phenomenon of our time and the public needs to take cognisance of the fact that such behaviour will not be tolerated. Courts should, however, be cautious not to unnecessarily confuse aspects of the material criminal law pertaining to the various defences available to an accused in order to teach the public a lesson.

The facts in *Eadie* merely indicate that reliance placed on the defence of non-pathological incapacity was unsuccessful as a result of the particular set of facts and surrounding circumstances. Any person acting in a similar way would probably also have failed to establish the defence. This, however, does not mean that it is the end of the road for the defence of non-pathological criminal incapacity. Dr Kaliski, one of the experts who presented expert testimony, stated that he may be willing to concede the validity of a defence of non-pathological criminal incapacity due to stress and provocation in the face of “compelling facts”.⁵³ Each case has to be considered on its own merits.

The intended purpose behind *Eadie* remains a grey area. It seems clear that the court intended to send a warning to society to not succumb to their emotions and lose their temper in the heat of the moment and then seek to rely on the defence of non-pathological criminal incapacity to exonerate them from criminal liability. It is submitted that this goal could be achieved successfully by measuring the accused’s conduct against the established test for criminal capacity. An accused’s conduct, like that of *Eadie*, should be measured firstly to ascertain whether he or she acted voluntarily. It is clear that *Eadie* acted as such. Then the unlawfulness of the conduct should be assessed whereafter, before *mens rea* is determined, his or her criminal capacity should be determined – measured against the two legs of the capacity enquiry. Where an accused is found to have had the necessary capacity, but that it was impaired or diminished, a proper finding should be one of diminished capacity in which event the diminished capacity will only have a bearing on sentence.

The fact remains that the defences of sane automatism and non-pathological criminal incapacity are two oceans that will never meet. To conflate these two defences in order to ensure that a person does not walk out free from a crime where the circumstances indicate goal-directed behaviour, creates unnecessary confusion and doubt in our current criminal justice system, that could have been avoided had the established principles of criminal law been applied. To negate the existence of the defence of non-pathological criminal incapacity would be

53 670J–671A.

detrimental to our criminal law system as it would lead to one of the requirements for criminal liability to fall away in part.

In view of the arguments advanced above, it is submitted that the defence of non-pathological criminal incapacity will still be available to a battered woman provided that a solid foundation is established for such defence.⁵⁴ In light of the judgment in *Eadie*, the defence of non-pathological incapacity will be viewed with much more scrutiny than in the past, which proclaims the need for a well established body of expert evidence.⁵⁵

3 THE CONTROVERSIAL ROLE OF EXPERT EVIDENCE IN SUPPORT OF THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY

This ubiquitous defence has not only given rise to much controversy and debate, but has also resulted in a head-on conflict between the fields of behavioural sciences, on the one hand, and the law, on the other. The heart of this conflict could be traced to the fundamental recognition and understanding of the merits and nature of the defence of non-pathological criminal incapacity. The probative value of expert evidence in support of a defence of non-pathological criminal incapacity is currently a highly controversial anomaly.

Whenever the defence of pathological criminal incapacity is raised, expert psychiatric and psychological evidence is statutorily provided for within the context of the accused being sent for observation.⁵⁶

The latter observation can be conducted either if it appears to a court that the accused is not capable of understanding the proceedings in order to make a proper defence, or if it appears that the accused's mental state at the time of the commission of the alleged crime is questionable. If, however, the defence is one of non-pathological criminal incapacity, expert evidence is not indispensable or a prerequisite for relying on the defence.⁵⁷

54 The requirement of a foundation being established for the defence of non-pathological criminal incapacity is trite. Such foundation will, however, have to be more solid in view of *Eadie*. See also *S v Cunningham* (*supra* fn 19) 635G–J; *S v Scholtz* (*supra* fn 19) 445C–E; *S v Wiid* (*supra* fn 6) 564B–G; *S v Rittman* (*supra* fn 19) 117D–E; *S v Gesualdo* (*supra* fn 19) 74F–H; *S v Di Blasi* (*supra* fn 19) 7C; *S v Moses* (*supra* fn 19) 713A–B.

55 See *S v McDonald* (*supra* fn 19) 500I–501A. See also *Director of Public Prosecutions, Transvaal v Venter* 2009 1 SACR 582 (SCA) 173b–174h where the Supreme Court of Appeal held that “temporary non-pathological diminished responsibility” was still recognised in our law.

56 See ss 77–79 of the Criminal Procedure Act 51 of 1977. For purposes of this article, the emphasis is on the defence of non-pathological criminal incapacity.

57 *Snyman* (2002) 166; *S v Calitz* (*supra* fn 19) 119–121; *S v Laubscher* (*supra* fn 19) 166–167; *S v Lesch* *supra* fn 19; *S v Kalogoropoulos* (*supra* fn 19) 211; *S v Van der Sandt* 1998 2 SACR 627 (W) 636G. See also *S v Volkman* [2004] 4 All SA 697 (C) 699 where Hockey AJ remarked: “Clearly, the legislature made a distinction between allegations of criminal incapacity based on mental illness or mental defect, on the one hand, and such incapacity based on ‘any other reason’ on the other. Where there is an allegation or appearance of mental illness or mental defect, the court is obliged (‘the court shall’) to direct that the accused is referred for observation in terms of section 79 of the Act. If, however, there is an allegation of lack of criminal responsibility for any other reason, other than mental illness or mental defect, the court has a discretion whether to refer the accused for observation or not. Non-pathological incapacity falls within the latter category. Entrusting the court with discretion in cases of non-pathological incapacity is not surprising.” For a definition of

In terms of section 78(2) of the Criminal Procedure Act, a court retains a discretionary power to refer an accused for observation whenever the defence of non-pathological criminal incapacity is raised. This referral can be made on request by either the accused, the State or the court. The problematic issue pertaining to expert evidence in support of the defence of non-pathological criminal incapacity lies not so intensely with the referral of an accused for observation, but rather with the expert mental health professionals conducting the observation. The problem with this defence is that psychiatrists are generally sceptical and non-responsive to this defence due to the fact that the causes of non-pathological criminal incapacity are external factors and not a known mental illness, mental defect or some form of pathology in which psychiatrists are trained.

Accordingly, when conducting a forensic assessment, a psychiatrist will examine an accused in order to establish whether the accused suffers, or suffered at the time of the commission of the crime in question, from a known mental illness, mental defect or some pathological disturbance that rendered the accused incapable of appreciating the wrongfulness of his or her actions or acting in accordance with such appreciation. In almost all cases of non-pathological criminal incapacity, the latter will be absent which results in this particular portion of expert evidence not adding probative value in support of this defence or even disproving the defence if the referral was requested by the State.

Strauss correctly states:⁵⁸

“In die praktyk kan dit vir ’n deskundige uiters moeilik wees om met ’n eenvoudige ‘ja’ of ‘nee’ te antwoord. Daar moet in gedagte gehou word dat ons in dié gevalle juis nie ’n handboek-diagnose van geestespatologie het waarby die geskiedenis van die beskuldigde of die identifisering van bepaalde sindrome aanduidend kan wees van bepaalde bevindinge oor sy vermoëns nie.”

This type of expert evidence will most probably not survive cross-examination by the State to disprove the defence and also, if the referral was requested by the State, it could be attacked by the defence on grounds relating to reliability and validity.

The problem with evidence pertaining to the defence of non-pathological criminal incapacity is further exacerbated by the fact that mental health professionals do not, generally, draw a distinction between the defence of sane automatism or involuntariness of conduct, on the one hand, and “lack of self-control” that relates to the second leg of the test for criminal capacity⁵⁹ on the

non-pathological criminal incapacity, see Snyman (2002) 163 where the defence is defined as follows: “[N]on-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.” See also *S v Laubscher* (*supra* fn 19) 167F–H where the defence of non-pathological criminal incapacity was coined for the first time in the following manner by Joubert JA: “Afgesien van statutêre ontorekeningsvatbaarheid kan ’n mens ook nie-patologiese ontorekeningsvatbaarheid van ’n tydelike aard ten tyde van die pleeg van die misdaad kry wat aan ’n nie-patologiese toestand, d.w.s. 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 of die weerstandkrag (wilsbeheervermoë) gehad het nie.” See also *S v Arnold* (*supra* fn 19) 264C–D; Snyman 1989 *TRW* 4.

⁵⁸ 1995 *SAPM* 15.

⁵⁹ See *S v Moses* (*supra* fn 19) 711C–D where Dr Jedaar, the State psychiatrist, stated: “A person can never lose control except in a state of automatism, or other pathological states.

other.⁶⁰ From a medical point of view “lack of self-control” and automatism are one and the same defence. From a legal perspective, automatism or involuntariness of conduct and “lack of self-control” are two distinct and separate defences relating to different requirements for criminal liability.⁶¹

Louw correctly states:⁶² “It is at this point that law and psychology appear to part ways. Lack of self-control appears to be a legal contraction not readily amenable to psychological analysis.”

Accordingly, the precise demarcation and distinction between the defences of sane automatism and non-pathological criminal incapacity have given rise to much debate which affects the probative value of expert evidence in support of these defences. In light of the fact that the courts have not been consistent in their approach towards the proper weight attached to expert evidence and the rules regulating the admission of such evidence in cases of non-pathological criminal incapacity, very little guidance is provided towards a proper standard for admitting such evidence in cases where the defence is one of non-pathological criminal incapacity.

In the middle of the war between law and medicine over the defence of non-pathological criminal incapacity, stands the battered woman.⁶³ Non-pathological criminal incapacity is one of the defences available to the battered woman who kills her abusive spouse or partner and has been raised successfully in the past.⁶⁴

A battered woman who eventually kills her abusive husband or partner more often than not resorts to such action in a desperate attempt to escape abuse suffered over a period of time.

The psychological and emotional make-up of a battered woman in such scenario will differ from one battered woman to another. The specific manifestations of abuse within each intimate relationship will also differ. The fact, however, remains that the psychological and emotional effects of abuse on a battered woman can only be assessed by competent and experienced experts, as the psychosocial dynamics of an abusive relationship can be so complex as to fall beyond the knowledge and experience of the court.⁶⁵ A battered woman relying on the defence of non-pathological criminal incapacity from the outset faces the dilemma of her expert evidence lacking probative value due to the traditional approach in respect of expert evidence in support of such defence entailing that such expert evidence does not fulfil an indispensable function.⁶⁶ It is submitted that expert evidence should, as in the case of pathological criminal incapacity, be a prerequisite whenever reliance is placed on the defence of non-pathological criminal incapacity with specific reference to the battered woman who kills her

Even in a state of rage or extreme anger I am still of the same belief that you will have the cognitive ability to weight the expression of that rage.”

⁶⁰ See the discussion of *S v Eadie supra*.

⁶¹ Snyman (2008) 51 162; Burchell and Milton 139; Le Roux 2008 *THRHR* 478.

⁶² “Principles of criminal law: Pathological and non-pathological criminal incapacity” in Kaliski 52.

⁶³ For purposes of this article, reference is made to battered women and the battered woman syndrome. This should, however, be construed to also refer to the “battered spouse” or “battered partner” and is not intended to be portrayed as being gender-specific.

⁶⁴ Snyman (2008) 165; *S v Wiid (supra fn 6)* 561.

⁶⁵ The psychosocial dynamics of an abusive relationship are addressed below.

⁶⁶ See Snyman (2002) 166; Van Oosten 1993 *SACJ* 141.

abusive partner. Due to the fact that most battered women will not suffer from a known pathology or mental illness, it could be argued that psychologists could play a more vital role in explaining the battered woman's actions in respect of the defence of non-pathological criminal incapacity. In light of the fact that this defence is approached by the courts with caution and scrutiny, the presentation of expert evidence in support of this defence becomes crucial.⁶⁷

Expert evidence plays a pivotal role in explaining the psychosocial dynamics of an abusive relationship, dispelling the myths associated with battered women and also explaining the often "invisible" traits and manifestations of abuse.

(to be continued)

⁶⁷ Carstens and Le Roux 182; Strauss 1995 *SAPM* 15; Hiemstra (2007) 222. Strauss 1995 *SAPM* 15 correctly notes: "Daar moet in gedagte gehou word dat ons in dié gevalle juis nie 'n handboek-diagnose van geestespatologie het waarby die geskiedenis van die beskuldigde of die identifisering van bepaalde sindrome aanduidend kan wees van bepaalde bevindinge oor sy vermoëns nie." It is interesting to note that in the older decision of *S v Campher supra* fn 6 where the appellant was charged of and convicted of the murder of her abusive husband, the lack of expert evidence was frowned upon by Boshoff AJ where it was held: "Daar is ook geen psigiatriese of klinies-sielkundige getuienis wat enigsins kan aantoon dat die appellante wel 'n geestesversteuring gehad het wat die gevolg kon gehad het om nie die ongeoorlooftheid van haar handeling te besef nie of om ooreenkomstig 'n besef van die ongeoorlooftheid van haar handeling op te tree nie . . . maar volgens my beskeie mening is 'n Hof nie sonder die hulp van psigiatriese of klinies-sielkundige getuienis in die vermoë om te kan oordeel of sy op enige stadium aan 'n geestesversteuring gely het wat die vereiste gevolge vir ontoerekeningsvatbaarheid gehad het nie" (966J–967). See also *S v Wiid supra* fn 6 where an abused woman relied on the defence of non-pathological criminal incapacity after she had killed her abusive husband after years of abuse. In the court *a quo* she was convicted of murder. On appeal, Goldstone, JA took a different approach, taking into account the evidence presented by two experts, set the conviction aside and held that there was reasonable doubt as to the appellant's criminal capacity at the relevant time and that she should be afforded the benefit of the doubt. The appellant was accordingly acquitted. The decision could serve as a yardstick for battered women relying on the defence of non-pathological criminal incapacity and also stresses the fundamental need for expert evidence in support of such defence.