
An analysis of the S v Lotter and Others Judgment with reference to the defence of non-pathological criminal incapacity based on coercive persuasion

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by
Eunette Beukes, 27232418

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Prof. P Carstens
at the University of Pretoria
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Summary

In March 2012, the Durban High Court found three accused guilty of murder on two of the accused's parents. The Lotter case was covered extensively by the media, because of its unusual story: The two Lotter siblings claimed that they were brainwashed by the sister's boyfriend as he had made them believe that he was the third son of God. As the siblings' defences they decided to use the controversial defence of non-pathological criminal incapacity. This dissertation gives an extensive outline of case law that has covered this defence. While attempting to define this defence, the courts have limited its uses to such an extent, that it appears to be abolished. Viewpoints of academic authors have been considered to assist the reader in defining new borders for this defence. Redefinition is necessary in light of the Constitution of the Republic of South Africa.

Concepts such as 'coercive persuasion' are explained in terms of psychological, psychiatric and legal backgrounds. Other countries have taken measures to restrict the use of coercive persuasion, specifically religious coercive persuasion. We therefore compare South Africa's lack of legislation to those countries that have adopted anti-coercive persuasion legislation as the Constitution permits that foreign law may be taken into account when interpreting and developing the law. There is also a discussion on the role of expert evidence in a South African court, specifically the psychologist, as well as discussion on Post-Traumatic Stress Disorder and the Battered Partner/Spouse/ Wife syndrome in context of coercive persuasion.

Coercive persuasion is viewed in terms of the defence of non-pathological criminal incapacity – as a prevailing factor that discredits the second (conative) leg of the capacity test: The ability to act in accordance with right and wrong. Defences such as automatism and private defence are also considered in context of coercive persuasion.

By analysing the case of Cézanne Visser along with the other cases that considered the defence of non-pathological criminal incapacity, one is able to view that the Lotter case is not the first case that mentions a person coercively persuaded by her partner to commit crimes. After the discussion of the Lotter case (the facts and judgment are covered in detail), similarities are drawn between the two women that were coercively persuaded by their partners. An alternative judgment and sentence reveals that the Lotter case had an opportunity to develop the defence, in context of coercive persuasion, and in light of the Constitution, but failed to do so.

The recommendations that follow are based on the defective dialogue that occurs between psychologists and psychiatrists, the unnecessary absence of expert evidence in court, the transformation of the defence of non-pathological criminal incapacity, a development of the term ‘coercive persuasion’ for purposes of the court when considering cases that deals with religious practices and the lack of legislative protection for women who murder their abusive husbands.

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1. Chapter One: Contextualisation of the defence of non-pathological criminal incapacity based on coercive persuasion

a) Introduction

The defence of non –pathological criminal incapacity is a controversial defence that has been used in South African case law without much success. Various factors have been dedicated to this defence such as emotional pressure, alcohol and provocation.

In March 2012, a judgment was handed down by the Durban High Court that included three accused of which two were siblings (Lotter) who murdered their parents. They claimed that the sister’s boyfriend had convinced them that it was the will of God to murder their parents, as the boyfriend was the third son of God. The court held that all three were guilty of the murder of both parents. This judgment sparked immense reaction under the media and the South African society.

This dissertation will investigate the phenomenon of coercive persuasion as a factor that allows for the success of the defence of non-pathological criminal incapacity based on the Lotter case.

b) Problem statement

Criminal capacity consists of two requirements: The first is whether an accused can distinguish between right and wrong (cognitive) and the second is whether the accused can act in accordance with such an appreciation (conative). In this case, the judge referred to the Lotter siblings as being coercively persuaded by Mathew Naidoo.¹ The focus will be on whether an accused can be coercively persuaded to such an extent that they lack criminal capacity through a defence of non –pathological criminal incapacity that was caused by coercive persuasion.

c) Methodology

This dissertation’s main aim is to provide alternative judgments for the Lotter siblings based on the fact that their defence of non-pathological criminal incapacity should have succeeded

¹ *S v Lotter and Others* (CC43/09) [2012] ZAKZDHC 50 (13 March 2012) at 30 :

Although the ordinary man in the street may find that this belief by accused Nos[sic] 1 and 3 is laughable and ridiculous, as I have said earlier on we have the expert testimony that thousands of people have been conned by charismatic leaders into believing that they had these supernatural powers from God that could change the world, change their lives and change everything around them.

in the interest of justice and as development of the defence in light of the Constitution of South Africa.

An analytical approach will be adopted when discussing the background and development of the defence of non-pathological criminal incapacity, the history of coercive persuasion (specifically religious conversion) and the judgment of the Lotter siblings.

There will also be a comparative approach where the coercive persuasion legislation, or lack thereof, in South Africa, is compared to the coercive persuasion legislation in France and Spain. There will also be a comparison made between the Lotter case and the Cézanne Visser case.

d) Proposed structure and hypotheses

In chapter one I will give an outline of each of the chapters that will follow in the rest of my dissertation. Each chapter will discuss a hypothesis:

- The defence of non-pathological criminal incapacity is a common law defence that needs to be developed in line with the Constitution. Section 8 (3)(a) of the Constitution states the common law needs to be developed if legislation does not give effect to a right, section 39(1) (c) states that the courts may consider foreign law and section 39(2) states that common law needs to be developed. Other countries, such as France, have legislation that prohibits one person to coercively persuade another. By failing to recognise a defence of non-pathological criminal incapacity based on brainwashing, one fails to uphold the Constitution – the supreme law of our country.
- Within the last two decades, the definition and requirements of criminal capacity and the defence of non- pathological criminal incapacity have been debated and explained in various judgments –there are various cases and authors who attempt to define one comprehensive definition. If this defence still exists, it will only apply to very specific circumstances as it will be scrutinised by courts.
- Coercive persuasion or brainwashing is a term that is foreign to our courts, yet it can be the prevailing factor when used in the defence of non-pathological criminal incapacity. A layout of the social impact of coercive persuasion, specifically in context of religion, and possible requirements that the accused needs to proof before a foundation of defence of non-pathological criminal incapacity based on brainwashing can succeed in court.

Chapter one contains an outline of the research study and serves as introduction.

In chapter two, the phenomenon of coercive persuasion or brainwashing will be discussed and its place in *The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*. This will include a brief history of coercive persuasion, its influence in religious and cultic groups and the requirements of other defence theories (beside the defence of non-pathological criminal incapacity) that are based on coercive persuasion. There is also an outline of foreign case law based on the prevention of coercive persuasion - section 39(1)(c) of the Constitution states that our courts may take foreign case law into consideration. The chapter will then turn to a local approach and view the role of expert evidence and the psychologist in South African courts. It will also mention the Post-Traumatic Stress Disorder and Battered Wife/Spouse/Partner syndrome in context of coercive persuasion.

In chapter three, I will discuss the element of criminal capacity and how it is defined. I will use the cases that dealt with non-pathological criminal incapacity to further elaborate and define the requirements of criminal capacity and the defence of non-pathological criminal incapacity. There will be academic criticism on the case that caused for the almost/definite abolishment of the defence of non-pathological criminal incapacity. The chapter will focus on the case of Cézanne Visser and whether the coercively persuaded victim will be able to commit illegal activities in the absence of the controller. Other defences that can be used in context of coercive persuasion will be discussed – automatism and private defence.

In chapter four, I will discuss the Lotter judgement and how it should have led to the Lotter siblings' acquittal based on the fact that they had lacked criminal capacity. By analysing the surrounding circumstances prior to the death of their parents, I will indicate how they did not act in accordance with the appreciation between right and wrong. An alternative sentence will also be discussed. There will be a discussion on the Constitutional rights that were not recognised in the court case. Similarities will be drawn between the two women – Nicolette Lotter and Cézanne Visser.

My fifth and final chapter will be a summary of all chapters and recommendations on various aspects mentioned in the dissertation.

2. Chapter Two: An analysis of coercive persuasion

a) Introduction

Before one can place coercive persuasion as an element which will lead to non-pathological criminal incapacity, one needs to understand the psychology and history of coercive persuasion as well as the role of psychologist as expert witness in the South African courts. In this chapter a brief outline of the history of coercive persuasion will be discussed specifically religious persuasion. Certain countries have illegalised religious coercive persuasion and the specifications of those laws will be mentioned. There will also be a brief discussion on a hypothetical defence of coercive persuasion and its requirements and criticisms. The discussion will turn to the role of expert evidence (specifically those of psychologists) in the South African courts as well certain personality disorders and syndromes that relate to coercive persuasion.

b) Brief background

This term was first coined by Edward Hunter in 1950 when he started investigating why the American Troops, which were sent to North Korea converted to communism after they had been prisoners of war. He used the Chinese word *hsi-nao* or *xi-nao* which translated to ‘cleansing of the mind’.²

There are various explanations for the term coercive persuasion in context of psychology and psychiatry. *The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* refers to brainwashing or thought reform as an example of a Dissociative Disorder.³ A dissociative disorder can be classified as ‘...a disruption in the usually integrated functions of consciousness, memory, identity or perception.’⁴ The *DSM-IV* describes that one of the examples of dissociative state disorder is when a person is exposed

² Taylor K *Brainwashing: The Science of Thought Control* (2004) 4-5; Winn D *The Manipulated Mind: Brainwashing, Conditioning and Indoctrination* (2000) 1.

³ *American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorder* (2000) 532.

⁴ *Id* at 519; Another possibility could also be Dissociative Trance Disorder of which the crucial feature ‘...is an involuntary state of trance that is not accepted by the person’s culture as a normal part of a collective cultural or religious practice and that causes clinically significant distress or functional impairment.’ This dissertation will not focus on this disorder as it is included in the list of proposed disorders that still needs further empirical study. See *DSM-IV* (2000) 759,784 – 785.

to ‘...periods of prolonged and intense coercive persuasion (e.g. brainwashing, thought reform, or indoctrination while captive).’⁵

The Oxford English Dictionary provides a simpler definition:

The systematic and often forcible elimination from a person's mind of all established ideas, esp. political ones, so that another set of ideas may take their place; this process regarded as the kind of coercive conversion practised by certain totalitarian states on political dissidents...the action of pressurizing or persuading a person into a belief considered undesirable.⁶

Various authors have written on the topic and their explanation of how coercive persuasion works will be discussed. Denise Winn refers to Edgar Schein, a psychologist that worked with the soldiers in Korea.⁷ Schein’s theory was that the techniques used on the soldiers were not unknown, but a collaboration of techniques used for weakening one’s resistance. These techniques included: ‘...group discussion, self-criticism, interrogation, rewards and punishments, forced confessions, exposure to propaganda and information control.’⁸ There is usually a build-up or a pattern that would have led a soldier to being coercively persuaded – they would have been deprived of sleep and food. With this, they would be experience constant fear of death or further suffrage.⁹ Their moral and norm system will be questioned by their captors and undermined by their interrogators and all ties they had with the fellow soldiers would be destroyed due to the mistrust that will occur among them. The soldiers would also have to attend classes and participate. This led to soldiers conforming to Communism due to the fact that it was the only system that remained constant.¹⁰

Schein believed that one had to use these techniques collaboratively to achieve an effect, but Lawrence Hinkle believed success in brainwashing is dependent on physical stress that influences one’s mentality.¹¹ A lack of nutrition, water and salt combined

⁵ *Id* at 532; It has been stated that in the cases of *S v Nursingh* 1995 2 SACR 331(D); *S v Wiid* 1990 1 SACR 561(D) and *S v Moses* 1996 1 SACR 701 (C) the accused was in a highly dissociative state by Cohen A and Malcolm C in Tredoux (et al)(eds) *Psychology and Law* (2005) 65.

⁶ <http://0-www.oed.com.innopac.up.ac.za/view/Entry/22549> (accessed 02-10-2012).

⁷ Schein E *The Chinese indoctrination program for prisoners of war: a study of attempted “brainwashing” Psychiatry* (1956) as referred to by Winn (2001) 7.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Hinkle L *The Manipulation of Human Behaviour* (1961) as referred to by Winn (2001) 13.

with physical work and unhygienic surroundings that led to vomiting and diarrhoea causes disturbances in the brain. A deficiency of carbohydrates (the only substance the brain can use for energy) and a deprivation of vitamin B, leads to a malfunction of the vital organs that can deteriorate the brain and its functions.¹² As the mind deteriorates, the person would progressively become delirious and confusion sets in to such an extent that he would testify of events that are true, which never happened. Hinkle states that: ‘His intellectual functions, his judgement and his insight decline to a similar degree.’¹³

Joost Meerloo, (a psychologist that coined the term ‘menticide’) explains the processes of brainwashing.¹⁴ His theory is based on the subconscious guilt of human beings and their need to conform to a tradition – to be a complete individual, human being makes them scared and as a result they fear freedom.¹⁵ Meerloo used the theory that was created by Ivan Pavlov and his experiments with his dogs. Pavlov rang a bell when the dogs would receive their food. He made the dogs associate food with the ringing bell and after a period of setting a pattern, the dogs would salivate every time they heard the bell. This is referred to as conditioning and Meerloo found it most effective to work on humans if their senses are restricted.¹⁶ Meerloo indicates four phases that occurs before a human being would surrender to an enemy: The first phase is the ‘Artificial Breakdown and Deconditioning’ where the prisoner’s ego is weakened.¹⁷ This could be done either with physical torture, isolation or breaking the prisoner down mentally. The second phase is ‘Submission to and Positive Identification with the Enemy’ and this entails a surrender of the prisoner.¹⁸ Meerloo states that this phase is often accompanied with hysterical laughter or an outburst of tears and that the enemy can prolong this phase if he acts paternally by giving gifts or sweets.¹⁹ The third phase is ‘Reconditioning to the New Order’ where the prisoner is taught his new ideology.²⁰ The prisoner will be re-educated and therefore this phase is the actual ‘brainwashing’. The final phase is ‘Liberation from the Totalitarian Spell’ which is the part where the

¹² *Ibid.*

¹³ Winn (2001) 14.

¹⁴ The Oxford English Dictionary refers to menticide as ‘The undermining or destruction of a person’s mind or will, esp. by systematic means (regarded as a characteristic activity of totalitarian regimes’ and it is referred to in Meerloo J *Mental Seduction and Menticide* (1957) 28.

¹⁵ Winn (2001) 15.

¹⁶ Winn (2001) 16.

¹⁷ Meerloo J *The Rape of the Mind* (1956) 90 – 92.

¹⁸ *Id* at 91.

¹⁹ *Ibid.*

²⁰ *Ibid.*

prisoner leaves the enemy's side and returns to his previous life.²¹ The coercive persuasion will wear off and guilt and depression may follow as a result of his unpatriotic behaviour.

Robert Lifton also developed a process through which he was able to explain coercive persuasion.²² He differed in subjects as he interviewed civilians (Westerners, intellectuals who were Chinese) that lived in China when Communism took over.²³ Lifton was of the opinion that the single, most important aspect coercive persuasion was the '...penetration by psychological forces of the environment into the inner emotions of the individual person...'.²⁴ Of all the prisoners Lifton interviewed, two are specifically mentioned: Dr Charles Vincent and Father Luca. Lifton recognised a ten-step process which led to a confession and rebirth under the new ideology. Some of the steps are similar to those that Meerloo identified. First of all, was 'Assault on identity' where prisoners were told that they do not have an identity, which they always thought they had for e.g. they will tell a doctor he has never been one.²⁵ The next step is 'Guilt' and an atmosphere of accusation is created to such an extent that the prisoners believe they need to be punished.²⁶ The next step is 'Self- betrayal' and in this step, the prisoner breaks off his allegiance to associates and friends he had known up until that stage in his life and was compelled to become acquainted with new people. This betrayal of friendship did not influence the actual friendships as much as the prisoner felt he betrayed his identity.²⁷ All of the previous processes led to the 'Breaking point' in which the entire identity of the prisoner was wrecked. Once this point has been reached, the stage of 'Leniency' sets in and the prisoner's feelings of destruction are overthrown by the leniency that is expressed by the enemy. While there is break from interrogation, the prisoner relives a new identity and the feeling of obliteration disappears. The prisoner holds onto this identity and the process of reforming is introduced.²⁸ The step into further reform is 'The compulsion to confess' and the prisoner will confess to the

²¹ *Ibid.*

²² Winn (2001) 19.

²³ *Ibid.*

²⁴ Lifton R *Thought Reform and the Psychology of Totalism* (1989) as referred to by Meerloo J *The Rape of the Mind* (1956) 91.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Winn (2001) 20.

guilt that has built up.²⁹ One can only embrace the new identity once the guilt from the previous identity has been acknowledged. This leads to ‘The channelling of guilt’ where the prisoner realises that the guilt that he experienced up until now is a result of the wrong ideology that he followed. The prisoners adopt the new ideology through ‘Re-education and logical dishonouring’.³⁰ Re-education entails judgement and disapproval of the lives of their previous ideology. This process will give them the identity which they yearned for – they will enjoy the benefits of a group in their lives, all unresolved questions will be answered and complete tranquillity will set in. This is known as the ‘Progress and Harmony’ phase.³¹ The final phase is the ‘Final confession and rebirth’ and the prisoners will confirm the identities which they have been re-born into and detest the ideology which they have left behind.³²

Lifton states that certain personality traits are more susceptible to the re-birth of one’s identity and these include: an accessible and negative identity, prone to guilt, an outsider of a specific culture or community that leads to identity confusion and an emotional unsteadiness that is extreme to either side.³³ Winn states this is the common conclusion that all the previous writers agree to: stable personalities and identities are less prone and take longer to be influenced by coercive persuasion.³⁴ The negative side to this is that once they have adopted the new ideologies, they are more likely to stay converted.

c) Religious coercive persuasion

Part of the background is the explanation and existence of religious coercive persuasion. William Sargant states that religions have always used methods to modify brain functions – these methods include ‘Fasting, chastening of the flesh by scourging and physical discomfort, regulation of breathing, disclosure of awesome mysteries, drumming, dancing, singing, inducement of panic fear, weird or glorious lighting, incense, intoxicant drugs...’.³⁵ The fundamental principle behind religion is to expunge a set of previous ‘wrong’ beliefs and

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Id* at 21.

³⁵ Sargant W *Battle for the Mind* (1957) 91 – 144.

replace it with new ‘correct’ beliefs. Sargant is of the opinion that this process will be successful if the person that needs conversion is made suggestible by means of tension.³⁶ High levels of stress (it can be from opposite emotions – hate, fear, excitement etc.) will lead to impaired judgement and the new belief system may be implanted.³⁷ He explains that there is a fine balance that needs to be kept when increasing stress – if the subject is exposed to too much stress, the brain may disrupt both the old and new pattern or he may return to his previous mode of thinking. If the right amount of stress is applied, one will be able to remove it and the new belief system will remain.³⁸ This process will differ from individual to individual, but will not likely succeed with mentally ill persons as their personality, brain and emotional imbalance causes them to be too disconnected and therefore an outsider will not be able to control it.³⁹

Sargant refers to the father of the Methodist Church, John Wesley and states that Wesley’s conversion method was not one of intellectual argument, but rather an emotional uproar.⁴⁰ Wesley would raise the emotions of his congregation by convincing them that if they did not convert, they will burn in the fires of hell. The congregation was a group and this rendered the sense of urgency felt among them, more effective.⁴¹ The urgency, stress and emotional toll that a person has to endure for hours, or day after day will disturb his brain patterns to such an extent that the possibility of accepting the new beliefs (and avoid hell at all costs) seems like the only possibility.⁴²

One can also use the methods such as drumming, singing and rhythmic dancing that will further suggestibility as a person will tire himself in such a frenzy that he will collapse of physical and emotional exhaustion.⁴³ Once they are conscious again, a belief will be installed in them that they are converted and free of sin as all evil has left them. The success of conversion lies in the emotional involvement of those that ‘need’ or want conversion and if this avoided, one will be less suggestible as the stress will be kept to a minimum. If there is emotional involvement and the brain has been rendered unstable, the following two

³⁶ *Id* at 92.

³⁷ *Id* at 145.

³⁸ *Ibid.*

³⁹ Winn (2001) 27.

⁴⁰ Sargant (1957) 97.

⁴¹ *Ibid.*

⁴² *Id* at 98.

⁴³ *Id* at 106.

characteristics will follow: Suggestibility and impaired judgment.⁴⁴ The impaired judgment can be so severe that conversion can lead to children denouncing their parents if the parents do not agree with the new doctrine the children have adopted.⁴⁵

James Brown disagrees with Sargent by stating that the conversion is not a result of brainwashing, but that people convert themselves.⁴⁶ He states that there is an obvious insufficient belief system that resulted in a mental conflict, which urges people to change their religious beliefs.⁴⁷ He does agree with Sargent that a sense of guilt (Sargent referred to hell fire) and sex plays significant roles in religious conversion and therefore the majority of conversion take place between the ages of 12 and 25.⁴⁸ This seems plausible due to the fact that adolescence is a period in which singular individuality has not been achieved yet and one's mind is less made up about what beliefs to accept.

He states that fundamentalist Christian religions use three methods that lead to suggestibility: The first is teaching beliefs by means of repetition; the second is warnings of hell and thirdly is the encouragement of emotions such as fear and guilt.⁴⁹ Besides these methods, Brown suggests that conversion will be induced in people (especially those of a neurotic nature) because they have a fear of complete freedom and total individuality.⁵⁰ People tend to convert to a certain community. The conversion does not take over the basic personality of the person, but it fills a void that wants to be filled or it replaces a part of the person that the person is displeased with. He concludes that when a person accepts a new belief, he will do so as the result of new belief will satisfy the same function as the old belief or the conformation to the belief feels normal.⁵¹

d) Coercive persuasion and the law

There are a few authors who believe that a defence of coercive persuasion should exist for those people who fall victim to 'brainwashing'. A defence of coercive persuasion has been

⁴⁴ *Id* at 143.

⁴⁵ This was reality in the reign of Adolf Hitler. Children were urged to denounce their parents if they made any negative remarks about Hitler as told by Sachs RH *Evolution of Memory, Volume I: Historical Revisionism as Seen in the Words of George Jürgen Wittenstein* (2011) 46.

⁴⁶ Winn (2001) 30.

⁴⁷ Brown JAC *Techniques of Persuasion: From Propaganda to Brainwashing* (1963) 224.

⁴⁸ ED Starbuck *The Psychology of Religion* (1899) 228 and Thouless RH *An Introduction to Psychology and Religion* (1931) 8 as referred to by Brown (1963).

⁴⁹ Brown (1963) 231.

⁵⁰ *Id* at 240.

⁵¹ *Id* at 290.

used by a number of court cases including those of Patty Hearst, the Manson family and to an indirect extent –the Lotter and Visser case.

Richard Delgado writes that a defence of coercive persuasion should exist for those people that have been influenced by abnormal circumstances to commit crimes that they would ordinarily not have committed.⁵² He refers to ten factors that have to be used in conjunction with one another to prove the likelihood that a person was influenced to such an extent that one can conclude a person is truly coercively persuaded:

(1) Isolation of the victim and total control over his environment (2) control of all channels of information and communication (3) physiological debilitation by means of inadequate diet, insufficient sleep and poor sanitation (4) assignment of meaningless tasks, such as repetitious copying of written material (5) manipulation of guilt and anxiety (6) threats of annihilation by seemingly all-powerful captors, who insist that the victim's sole chance for survival lies in identifying with them (7) degradation of and assaults on the pre-existing self (8) peer pressure, often applied through ritual "struggle sessions" (9) required performance of symbolic acts of self –betrayal, betrayal of a group norms and confession and (10) alternation of harshness and leniency.⁵³

If any person has been coercively persuaded to commit a crime and has sufficient and reliable evidence to lay a basis for this defence, the first problem that a person will have to overcome is the fact that no such defence exists.

Delgado states that if one looks at *actus reus* (the act) of the crime⁵⁴, coercive persuasion leads one to think that the victim falls into a state of hypnosis.⁵⁵ This is not true, as the victim of coercive persuasion acts voluntary, yet he is so severely influenced by another, that he commits a crime. He further proposes that a defence of coercive persuasion will fall into the category of *mens rea* (fault)⁵⁶ and suggests the following three elements to a defence of coercive persuasion that will exclude fault: First of all,

⁵² Delgado R in Corrado ML (ed) *Defendant Justification and Excuse in Criminal Law: A Collection of Essays* (1994) 467-487.

⁵³ *Id* at 468.

⁵⁴ Burchell refers to act as the voluntary commission or omission of an act, by a human being in Burchell J *Principles of Criminal law* (2006) 178.

⁵⁵ Delgado (1994) 473.

⁵⁶ Burchell refers to fault as the moral and ethical stance on how blameworthy a person is - the guilty mind is the literal translation in Burchell (2006) 455.

coercive persuasion must have actually occurred, secondly is the defendant's unlawful action was the proximate result of that coercive persuasion and thirdly is the exculpation for the act committed is morally justified.⁵⁷ Delgado accepts that these elements will be difficult to prove, since misuse will occur if we compare those who have been truly coerced to those who simply adopted a lifestyle involved in crime. He therefore proposes six further conditions that should all be met for the defence to succeed:

(1)The defendant's mental state results from unusual or abnormal influences (2) the mental state represents a sharp departure from the individual's ordinary mode of thinking (3) the state is imposed on the subject rather than self-induced or consciously selected (4) the criminal act benefit the captors (5) the actor, when apprised of the manner in which he came to hold his beliefs, rejects them and sees them as unauthentic or foreign and (6) the actor evidences symptoms typical of the coercively persuaded personality.⁵⁸

Even with these factors included, most cases will be difficult to prove as the burden of proof remains very high in cases where a defence of coercive persuasion is raised. There is always the possibility that defendants will misuse the defence. Delgado refers to others objections such as the fact that judges will not be persuaded that coercive persuasion exists at all and psychiatrists and psychologists know too little of the topic to give expert evidence.⁵⁹ There is also an objection that if this defence should succeed, 'deprogramming' will be set as a punishment and that will allow the state to coercively persuade people into certain political beliefs.⁶⁰ In a responding article, Joshua Dressler raised his concern about Delgado's proposition of a defence of coercive persuasion.⁶¹ The first criticism is on Delgado's analysis of fault and Dressler states that the victim possesses intent to commit the specific crime.⁶² The reason the victim commits the crime is not caused by his own emotions, but by an external person, that makes him angry or mad at something he would not normally have been – but his decision on what to

⁵⁷ Delgado (1994) 477.

⁵⁸ *Id* at 478-479.

⁵⁹ *Id* at 480.

⁶⁰ *Id* at 486.

⁶¹ Dressler J in Corrodo ML (ed) *Justification and excuse in the Criminal law: A Collection of Essays* (1994) 497-513.

⁶² *Id* at 504.

do with those emotions, is still his own intent.⁶³ On *actus reus*, he criticises Delgado for comparing an act under coercive persuasion with hypnotism, as hypnotism is shown according to surveys, that personal traits of a person plays a larger role in the outcome of acts, than the actual hypnotism itself.⁶⁴

Dressler also criticises the fact that the defence of coercive persuasion is so narrow that it would only apply to those that were indoctrinated to commit a crime and not those that were merely converted to a specific religious or political belief. If the person in control, only coercively persuades the victim to believe that a certain group is wrong, but it can be proofed that the controller did not encourage a crime committed against that group, then the defence will fail.⁶⁵

Dressler's last criticism is on the ambiguity of the defence because it is not properly defined. There are only factors and elements mentioned that can lead to the success of the defence and even those elements are very general in nature.

e) Foreign laws that regulate coercive persuasion

From the 1970s Europe felt uneasy about sects and cults that came to life. The reason for the concern was due to the fact that many of the new age religions led to mass suicide of their members. James Richardson and Massimo Introvigne refer specifically to the Jonestown Massacre (1978)⁶⁶ and the Solar Temple Massacre (1994)⁶⁷ and how these events led to

⁶³ *Ibid.*

⁶⁴ *Id* at 506.

⁶⁵ *Id* at 508.

⁶⁶ <http://brainz.org/10-most-notorious-suicide-cults-history/> (accessed: 10/10/2012); Taylor (2004) 31-32. Jonestown was started by Reverend Jim Jones in 1977 in the jungle of Guyana. He claimed to be the Messiah and used coercive persuasion strategies to control his community. A group of relatives sceptical about this communist community with their racial and equality ideals were led by a Californian Congressman, Leo Ryan, to Guyana. Ryan was ambushed and murdered when he landed in Guyana and this led to the realisation of the self-destructive plan. Jones' followers followed through as they were exhausted from the bad diet and physical labour and drank a cyanide soup. This was the largest mass suicide in history with 912 people dying.

⁶⁷ http://brainz.org/10-most-notorious-suicide-cults-history (accessed: 10/10/2012) The Order of the Solar Temple was a secret society that was based on the myth of the Knights Templar. It was started by Joseph Di Mambro and Luc Jouret in 1984 in Geneva. There are two events that are associated with the OTS: First is the murder of a three month old boy from Canada, because it was believed that he was the Anti-Christ, the second is a mass suicide in October 1994 in which 48 adults and children were shot dead in a Swiss underground chapel.

certain European countries enforcing legislation that would prevent the use of coercive persuasion.⁶⁸

Richardson and Introvigne refer to an interpretative model that have been adopted by various reports that represent the basis of cults and sects: The first stage is that ‘Cults or Sects are Not Religions’ – by claiming that a group is a cult or a sect, one will not be infringing the right to religion.⁶⁹ The second stage is called ‘Brainwashing and Mind Control’ and it illustrates the notion that a religion is joined out of free will and there is no need for coercive persuasion to recruit members. The third stage is ‘Apostates’ and this refers to the manner in which countries approach coercive persuasion. There are various academic sources that criticise the existence, factors, elements and inner workings of coercive persuasion, yet countries are reluctant to use these sources – they prefer the opinions of former members.⁷⁰ The last stage that is linked to the third stage is ‘Anti – cult Organisations’ and these organisations work with coercively persuaded ex-members of the cult or sect. Countries prefer using anti-cult organisations as they have practical experience, rather than theoretical knowledge.⁷¹

One of the European countries that were especially uneasy with non – traditional religions was France. In 2000, they drafted a Picard Draft Law which contained clauses that outraged human rights and activists groups.⁷² These articles included that all corporations that exploit the mental or physical state of those involved in their activities must be dissolved. No sect was allowed to have a church, advertisement or seat within 200 m of a hospital, retirement house and schools. If a person or organisation was found to mentally manipulate a person, they penalty would have been F200 000 or 2 years penalty and these amounts may be claimed from the cults group or individuals.⁷³ The French government decided that the offense of mental manipulation was not an appropriate offence and an extension was made to section 313- 4 of the Penal Code which reads:

There shall be a penalty of three years imprisonment or a fine of 2,500,000francs
in respect of the fraudulent abuse of ignorance or disability of a minor or a person

⁶⁸ Richardson JT and Introvigne M “Brainwashing” Theories in European Parliamentary and Administrative Reports on “Cults” and “Sects” (2001) 40 *Journal for the Scientific Study of Religion* 143-168; Religion is a constitutional right that is protected in South African under section 15 of The Constitution of the Republic of SA 1996.

⁶⁹ *Id* at 144.

⁷⁰ *Id* at 145.

⁷¹ *Ibid.*

⁷² *Id* at 153.

⁷³ *Id* at 154.

whose specific vulnerability, due to his or her age, illness, disability, physical or psychological handicap, or pregnancy, is apparent and known to the perpetrator of the said abuse, of or a person in a state of psychological or physical dependency⁷⁴ resulting from serious or repeated pressure or from techniques likely to impair his or her judgement, leading the said minor or other person to an act or omission which are seriously harmful to him or her, “When the offence is committed by the legal or de facto leader of a group which is pursuing activities with the aim or effect of creating, maintaining or exploiting the psychological or physical dependence of persons taking part in these activities, the penalties shall be increased to five years’ imprisonment and a fine of 5,000,000 Francs.⁷⁵

The wording of this section is quite similar to the offence of mental manipulation which was removed as it was inappropriate to human right groups and activists.⁷⁶

Spain also had to undergo changes in its policy towards sects and cults. In past judgments, Spain decided in favour of the Children of God/ The Family group with criticism that followed.⁷⁷ There was a void in the Spanish legal system which was filled with Section 515 number 3 of the Spanish criminal code that read:

‘Unlawful associations shall be punishable, the following being deemed so:

3. Those that, even having a lawful end as their object use violence by means or alternation or control of personality to achieve these’⁷⁸

Although coercive persuasion is not called by its name, there is a strong suggestion of referring to brainwashing if the words ‘alteration or control of personality’ are considered.⁷⁹

⁷⁴ *Ibid*; <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc02/EDOC9612.htm> (accessed: 10/10/2012) does not state ‘dependency’ but rather ‘a state of subjection either psychological or physical’

⁷⁵ http://religiousfreedomwatch-ru.org/uploads/dvorkin_apparatus3_about-picard_law_EN.pdf-French Republic Government Gazette (accessed: 10/10/2012).

⁷⁶ *Ibid*.

⁷⁷ *Id* at 148.

⁷⁸ Spanish Criminal Code 2011 Title XXI: On felonies against the Constitution Chapter IV Sub-chapter: On felonies committed when exercising the fundamental rights and public liberties guaranteed by the Constitution -<http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html> (accessed:10/10/2012).

⁷⁹ Richardson and Introigne (2001) 148.

f) Expert evidence in the South African courts

The psychological aspects of coercive persuasion, specifically religious persuasion have been discussed in the previous paragraphs. The proceeding paragraphs will deal with the expert witness that will need to testify about coercive persuasion in court and certain syndromes and disorders that are relevant to coercive persuasion.

A general rule in the proceedings of a South African court is that the witnesses are not allowed to express opinions. The exception to this is the evidence of expert witnesses.⁸⁰ The expert witnesses will usually not have had any previous contact with the accused and will therefore have no opinion on the event leading to the court case. Only after they have met the accused and analysed the accused, will the expert witness be able to give an opinion.⁸¹ The expert witness will testify his evaluation in court, whereas other witnesses are not allowed to give an evaluation. This evaluation in court also provides that the expert witness must prepare beforehand – this includes literature, review documents etcetera.⁸² These documents will be used in court and the expert witness will present the evidence during evidence in chief. The opposing party is allowed to cross-examine the expert witness to determine if the expert witness is credible in his qualifications and experience or whether the expert witness' findings are objective and scientifically sound.⁸³ The court is not obliged to accept the expert witness' report or finding(s) – if it assists the court it may be taken into account with other factors such as the facts of the case. When considering how much weight will be awarded to the expert witness' testimony, the court takes six factors into account: the expert's competency to assess the accused, the credibility of the witness towards the expert witness, whether the opinion of the expert is linked to the facts of the case, how credible the facts are that the expert used to base his report on, the facts and the opinion must be correspond with each other and the reasons between the correspondence of the facts and the opinion.⁸⁴

Expert witnesses need to keep certain ethical aspects in mind if they are giving testimony in court. Lawyers will choose the expert that will benefit their case – it is therefore wise for an expert witness to keep his distance from the lawyer and make sure he receives all information

⁸⁰ Allan A and Meintjie-Van der Walt L in Kaliski S (ed) *Psycholegal Assessment in South Africa* (2006) 343.

⁸¹ *Id* at 346.

⁸² *Id* at 348.

⁸³ *Id* at 350-351.

⁸⁴ *Id* at 352.

regarding the case (whether it is detrimental or beneficial to the case).⁸⁵ It might also seem as if an expert witness is impartial if he receives payment for his services. This becomes more problematic if he receives instructions from one specific law firm or a specific company on a regular basis. The advice the authors state is to circulate to other law firms or companies and do not fully rely on the instructions of one specific group.⁸⁶ The expert witness must also be aware not to use the court as a laboratory. Irrelevant of the passion that the expert witness feels towards certain theories and ideologies, they must simply testify of those theories that are scientifically acknowledged.⁸⁷

i. **Post -Traumatic Stress Disorder and Battered Wife/Spouse/Partner Syndrome**

In light of the Lotter siblings and the psychological and psychiatric changes they experienced during their time with Naidoo, two other phenomena need to be discussed: the *DSM –IV* recognised disorder, Post-Traumatic Stress Disorder (PTSD) and Battered Wife/Spouse/Partner syndrome (BWS).⁸⁸ PTSD and BWS have been known to be intertwined and the disorder is very likely to follow after BWS has occurred.⁸⁹ PTSD is a disorder that is caused by a (a) traumatic event where the victim experiences fear or helplessness brought on by experiencing injury on themselves or others. The event which was the trigger is (b) re-experienced in dreams and thoughts. This usually leads to symptoms where the victim attempts to (c) ‘numb... their responsiveness’ such as becoming estranged from family and friends, the victim cannot see a future and then they have (d) ‘persistent symptoms of increased arousal’ such as a startled response amongst others and these symptoms last more than one month.⁹⁰ The reason that PTSD is a result of BWS syndrome is due to the traumatic stress of violence done to him or her by his or her spouse. The domestic abuse by a partner has been equated to ‘torture’ as both shares a characteristic of ‘coercive control’.⁹¹ The authors refer to Judith Lewis Herman and states that domestic abuse violates the same rights as those associated with male ‘trauma’ and therefore both torture and

⁸⁵ *Id* at 353.

⁸⁶ *Id* at 354.

⁸⁷ *Ibid*.

⁸⁸ A syndrome is a ‘...cluster of signs...’ that appear during a specific event, but there are usually various theories around the syndrome. It is not as scientifically recognised as the disorders presented in the *DSM –IV* as stated by Allan A in Tredoux *et al* (eds) (2005) at 299- 300

⁸⁹ Gobodo-Madikizela and Foster in Tredoux *et al* (eds) (2005) 368.

⁹⁰ *DSM –IV* (2000) 463 -468.

⁹¹ Gobodo-Madikizela (2000) at 364; *S v Engelbrecht* 2005 2 SACR 41 (WLD) 64.

domestic violence share a similar goal – ‘...to impose power and to reduce victims to conditions of slavery.’⁹² Every person who undergoes this type of violence has his or her Constitutional rights infringed such as: section 10 – Human dignity and section 12 (c) – The right to be free from all forms of violence either by public or private sources.⁹³

The authors also refer to Walker who stated that the battered spouse/partner develops ‘learned helplessness’ – which reflects why the battered spouse is not able to leave the abusive spouse and the battered spouses, do not possess the ability to retaliate.⁹⁴ As will be discussed in Chapter 4, there was domestic violence between the Lotter siblings and Mathew Naidoo. The ‘normal’ pattern of battered partners and the abusers would be that the battered partner would murder the abuser.⁹⁵ The Lotter case was exceptional in this pattern as the battered siblings did not murder their abuser, but murdered their parents, whom he coerced them to murder.⁹⁶ Except for BWS and PTSD, Cohen and Malcolm has indicated that there might be one other disorder that can be attributed to battered spouses who cause murders and that is dissociative disorder.⁹⁷ A cycle can therefore be sketched: an abuser abuses his partner/spouse over a period of time. The battered spouse develops ‘learned helplessness’ as the abuse continues. Due to the abuse, a disintegration of that person’s personality develops – their personality, consciousness, memory and the way their environment functions is disintegrated as the coercive control and abuse of the abuser continues. The dissociative disorder develops. As a climax is reached of severe stress and a total disintegration of the personality – one of two things may happen: the battered spouse murders his abuser (if there is no third party the abuser used to focus the battered spouse attention on) or the battered spouse causes harm to a third party to please the abuser. Once the crime is committed and the battered spouse is separated from the abuser (either by murder or prison), PTSD sets in from the traumatic abuse the battered spouse had to endure. The only other source that will be able to explain these phenomena and how it influences the victim/murderer/battered spouse is the expert witnesses who are psychologists or a psychiatrist.

⁹² *Id* at 365.

⁹³ Constitution of the Republic of South Africa 108 of 1996; *Ibid*.

⁹⁴ *Id* at 366; *S v Engelbrecht* 2005 2 SACR 41 (WLD) 64.

⁹⁵ *S v Wiid* 1990 1 SACR 561 (A); *S v Potgieter* 1994 1 SACR 19 (A); *S v Nursingh* 1995 2 SACR 331 (D); *S v Ferreira* 2004 (2) SACR 454 (SCA); *S v Steyn* 2010(1) SACR 411 (SCA).

⁹⁶ The unreported case of Cézanne Visser, which will be discussed in chapter 3, followed the same unusual pattern. Instead of murdering her sexual abuser, she followed his instructions and caused sexual harm to other third parties.

⁹⁷ Cohen and Malcolm in Tredoux *et al*(eds) (2005) above at n4.

ii. The psychologist in a South African court

This dissertation will focus primarily on the role of psychologists in the court, due to the fact that a psychologist was used in the Lotter case. There will be a brief discussion on the psychiatrists in the paragraphs below.

Cohen and Malcolm state that although psychology is not a science that can be measured in exact quantities, psychologists always need to promote high standards of quality work and objectivity to ensure that the psychological community and court views them as credible witnesses.⁹⁸ Part of being an expert witness, is preparing a report for the court (the report will vary depending on the defence that is used). This report has three phases: Pre-assessment (in this phase background information is obtained), Assessment phase (the information is assessed) and the Post-assessment phase (the report is written and the evidence is presented in court).⁹⁹ Before this process starts, Cohen and Malcolm advise psychologists to strongly consider whether they are truly objective in this trial. If the psychologist has already had a relationship with the accused (whether it is in a personal/therapeutic manner) then the objectivity of the expert evidence will be affected.¹⁰⁰ Any information that the court will accept will not be impartial. The psychologist must also ensure that he does not answer the ultimate question to which he is giving an opinion on for e.g. Did the accused have the cognitive/conative ability intact? He should only provide enough information to the court on the state of mind of the accused in order for the court to make the final judgment on the ultimate issue.¹⁰¹

Apart from being objective, there are other criteria that the psychologist must adhere to according to Allan: The first is that the expert needs to be a specialist.¹⁰² In this criterion, one needs to determine whether the psychologist has the relevant qualifications and if his qualifications is relevant to the one the court needs to make a judgment on. One also needs to determine if he has practical experience in the field and whether the theories he follows and the practice he has conveys, is scientifically recognised in the international community of psychologists.¹⁰³ The ultimate reason for the psychologist being present is to assist the court

⁹⁸ *Id* at 67.

⁹⁹ *Id* at 70-80.

¹⁰⁰ *Id* at 70; Africa in Tredoux *et al*(eds) (2005) at 384.

¹⁰¹ *Id* at 83.

¹⁰² Allan A in Tredoux *et al* (eds) (2005) at 289.

¹⁰³ *Id* at 291.

and therefore the knowledge that it teaches the court must be helpful rather than general; otherwise it is a time-wasting and futile exercise.¹⁰⁴ The second criterion is that the psychologist needs to lay a basis for their opinion.¹⁰⁵ As the accused needs to lay a basis for their defence by using expert evidence, the psychologist needs to lay a basis by using the reports, scientific journals and textbooks, their own knowledge and experience and other research. The last criterion is one already mentioned in the paragraph above and it states that experts should not offer an ultimate opinion on the ultimate question in the case.¹⁰⁶

According to Africa, there are three reasons why psychologists knowledge would be sought in a court: to determine whether a person is fit to stand trial, to make a retrospective evaluation (if the person's defence is pathological criminal incapacity) if the accused was criminally responsible at the time of the offence being committed or whether the person had been influence by external factors to such an extent that the accused had neither the ability to distinguish between right and wrong or was not able to act in accordance with the appreciation thereof (if the defence is one of non-pathological criminal incapacity).¹⁰⁷

Considering the defence of non-pathological criminal incapacity that will be discussed in the next chapter, there is a problematic situation if psychiatrists are called in as expert witnesses to lay a foundation for this defence. Carstens and Le Roux refer to the scepticism that exists in psychiatrists when recognising this as defence.¹⁰⁸ The reason for the scepticism is that psychiatrist's work with patients/accused that needs to be diagnosed with a mental illness or mental defect (an organic brain disease such as dementia or psychosis).¹⁰⁹ Factors that make a person act in non-pathological criminal incapacity are not mental illnesses, but external factors such as provocation, intoxication etcetera. Carstens and Le Roux refer to the case of *S v Kensley*.¹¹⁰ The accused lost his temper when he discovered that the two ladies that he approached in a sexual manner were transvestites. He became so furious that he shot them as well as friends of his that were in the surrounding area. He was charged with two counts of

¹⁰⁴ *Id* at 293.

¹⁰⁵ *Id* at 294.

¹⁰⁶ *Id* at 296.

¹⁰⁷ Africa (n99) above at 384 ; Africa refers to the second part of the capacity test as 'self-control', yet still refers to the first part of the test as cognitive, see Africa (n99) at 395.

¹⁰⁸ Carstens P and Le-Roux J "The defence of non –pathological incapacity with reference to the battered wife who kills her abusive husband" 2000 SACJ 180 -189.

¹⁰⁹ Kaliski S in Kaliski S (ed)*Psycholegal Assessment* (2006) at 97;The Mental Health Care Act 17 of 2002 refers to mental illness as ' 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 a diagnosis' in section 1 (xxi)

¹¹⁰ Carsten and Le Roux (2000) 182-183;1995 1 SACR 646 (A).

murder and two counts attempted murder. His defence was that of non-pathological criminal incapacity, but the court rejected as it had accepted the evidence of the psychiatrist as expert evidence. The psychiatrist held that the accused did not suffer from any illness or disease that can be recognised in psychiatry.¹¹¹

There is clearly a problem with such a statement since the psychiatrist would not have found the accused to have any mental illness or defect as he was not suffering from any permanent organic brain disease. If he had non-pathological criminal incapacity, it would have been a temporary trigger that would have made him lose control.

Carstens and Le Roux also refer to BWS and how it could possibly be diagnosed as PTSD.¹¹² While referring to characteristic (a) to (d) under heading (i) above, one can relate the characteristics of BWS to PTSD. The traumatic event is the constant violence the victim is exposed to, the battered victim will then re-experience the trauma through nightmares and the constant alertness of violence will occur again, the battered victim will eventually withdraw completely from family and friends and will attempts to talk away any signs of abuse and finally, then constant arousal will appear in the form of hyper alertness or trouble sleeping.¹¹³

g) Conclusion

Coercive persuasion is a phenomenon that can affect all individuals irrelevant of how strong a personality is. It affects those with weak, unstable identities - outsiders of their community more easily. If a personality is strong and stable, it is less likely to be converted. One specific type of conversion that is a threat to certain European societies is religious conversion – it is deemed such a threat that laws have been enforced that prohibits coercive persuasion and declared it a criminal offence. This a important consideration as section 39(1)(c) of the Constitution states that courts may take foreign law into account when Interpreting the Bill of Rights.¹¹⁴

To prove coercive persuasion in a court, one needs to use expert evidence such as psychiatrists and psychologists. When referring to the defence of non-pathological criminal incapacity, there is a defective dialogue between the psychiatrist and the psychologist as the psychologist can testify about external factors that will lead to a disintegration of the

¹¹¹ *Id* at 183.

¹¹² *Id* at 184.

¹¹³ *Id* at 196.

¹¹⁴ Constitution of the Republic of South Africa 108 of 1996.

cognitive abilities, while psychiatrists are sceptic about the defence as it does not affect the accused mentally, on a permanent basis.

There are however certain disorders that can link the psychiatry and the psychology. Coercive persuasion has similar characteristics to BWS and there is a possibility that this can be reconciled with PTSD as well as Dissociative Disorder. If one is able to read coercive persuasion with PTSD and Dissociative Disorder, there is a possibility that psychiatrists would be able to testify about coercive persuasion in a court room as it would be disorders that are recognised by the *DSM-IV*. If psychologists and psychiatrists are able to testify about the same phenomenon, but on their own terms, then there would be a better chance of convincing the courts that coercive persuasion can be a factor when using the defence of non-pathological criminal incapacity.

This dissertation will now proceed to an analysis of the defence of non-pathological criminal incapacity.

3. Chapter Three: An analysis of criminal incapacity and the defence of non-pathological criminal incapacity

a) Definition of criminal capacity

The defence of non-pathological criminal incapacity influences the element of capacity. Before one discusses the defence, one needs to refer to the definition of capacity. Jonathan Burcell refers to a person who has criminal capacity as one that has the ‘... psychological capacities for insight and self –control.’¹¹⁵

He refers to the Rumpff Commission of Inquiry’s report of 1967 where it was stated that the human personality is divided into three categories: The cognitive function (this function regulates understanding, reason and thinking, distinguishing between right and wrong), the conative function (the ability to exercise a free will in terms of what was understood under the cognitive function) and the affective function (emotions and feelings).¹¹⁶

The last function plays an insignificant role, if any role in the determination of capacity. South African courts rely on the cognitive and conative function to determine if a person has criminal capacity. If either one of these functions are absent in a person, that person will not be held criminally liable for his actions. Snyman states that a person will have criminal capacity if

‘(a) [he has] the ability to appreciate the wrongfulness of his conduct (cognitive) and

(b) the ability to conduct himself in accordance with such appreciation of the wrongfulness of his conduct (conative).’¹¹⁷

Burchell states that the test for criminal capacity, using the factors mentioned above, is a two-fold question: First, did the accused have the capacity to appreciate the wrongfulness of his act? If yes, does the accused have the capacity or ability to act in accordance with the appreciation thereof?¹¹⁸

¹¹⁵ Burchell J *Principles of Criminal Law* (2006) 358.

¹¹⁶ *Ibid.*

¹¹⁷ Snyman *Criminal Law* (2008) 160.

¹¹⁸ Burchell (2006) 358.

This test has been codified in the Criminal Procedure Act 51 of 1977 in section 78(1):

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

- (a) of appreciating the wrongfulness of his or her act or omission; or
 - (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
- shall not be criminally responsible for such an act or omission.’

If an accused states that he does not have criminal capacity, he has to lay a foundation or a basis for his defence. The state needs to prove, beyond reasonable doubt, that the accused had criminal capacity at the time of the act.¹¹⁹

b) Defence of non-pathological criminal incapacity

The difference between pathological incapacity and non-pathological incapacity is the source from where the incapacity emanates from. Pathological incapacity is a result of an internal disturbance. Snyman refers to pathological disturbance as ‘emanating from disease’.¹²⁰ Non-pathological incapacity refers to external stimuli that influence a person to such an extent, that he can distinguish right from wrong, but he is not able to control his or her actions that show the appreciation of wrongfulness. Over the years the South African Courts have become acquainted with external stimuli such as intoxication, extreme provocation and emotional stress.

One can also use the *DSM-IV* to define the defence of non-pathological criminal incapacity from a psychiatric background. One possibility would be that a person has Borderline Personality Disorder (BPD).¹²¹ The criteria for this disorder includes five or more of these characteristics: The first criteria is ‘frantic efforts to avoid real or imagined abandonment’; the second is ‘a pattern of unstable and intense interpersonal relationships characterised by

¹¹⁹ *Ibid.*

¹²⁰ Snyman (2008) 163. Examples of pathological criminal incapacity could be a result from, amongst others, severe depression and schizophrenia.

¹²¹ *DSM-IV* (2000) 706; In the case of *S v Moses* (n150) the accused who successfully used the defence of non-pathological criminal capacity was diagnosed with Borderline Personality Disorder.

alternating between extremes of idealization and devaluation’; the third criteria is an ‘identity disturbance: markedly and persistently unstable self-image or sens of self’; the next is an ‘impulsivity in at least two areas that are potentially self-damaging (e.g. spending, sex, substance abuse, binge eating)’; the fifth criterion is ‘recurrent suicidal behaviour, gestures, or threats, or self-mutilating behaviour’; the sixth criterion is ‘affective stability due to marked reactivity of mood’; the next criterion is ‘chronic feeling of emptiness’; the second last criterion is ‘inappropriate, intense anger or difficulty controlling anger’ and the last criterion is ‘transient, stress-related paranoid ideation or severe dissociative symptoms.’¹²²

These criteria can be applied to victims who have been abused in a relationship. These victims will go to extremes to make sure that their spouse does not abandon them (criteria one).¹²³ They have unstable personalities and negative self-images (criteria three). They devalue themselves due to reasons such as failed relationships, promiscuous pasts and whatever reason the abuser says they are useless for (criteria two). The victims will experience a chronic feeling of emptiness (criteria seven) due to the abuse they have undergone and the fact that they are usually detached from their families and friends. With severe abuse, they will experience paranoia and dissociative symptoms as their sense of individuality will disappear (criteria nine). Every cycle of domestic violence has coercive control marked to it.¹²⁴ As it was stated above, coercive persuasion is known as Dissociative Disorder according to the *DSM-IV*.¹²⁵ One will therefore be able to explain the defence of non-pathological criminal incapacity with Dissociative Disorder since this disorder is linked to BPD, coercive control and abused spouses/partners/wives (a group that is regularly associated with the use of the defence of non-pathological criminal incapacity).

The defence can also be explained in terms of PTSD through a construction of BWS as indicated by Carstens and Le-Roux in the previous chapter.¹²⁶ Therefore a psychiatrist will be able to Borderline Personality Disorder, Dissociative Disorder and Post-Traumatic Stress Disorder to explain the defence of non-pathological criminal incapacity based on coercive persuasion/control or abused spouses/partners/wives.

We will look at case law that considered the defence of non-pathological incapacity and focus on the courts’ criticism on it.

¹²² *DSM-IV (2000)* 710.

¹²³ See *S v Lotter* at 53 below ; *S v Engelbrecht* 2005 2 SACR 41 (WLD) 69.

¹²⁴ *S v Engelbrecht* 2005 2 SACR 41 (WLD) 65.

¹²⁵ See above at para 2.b at 6.

¹²⁶ See para 2.f.ii at 22-23.

c) History of case law in which non-pathological criminal incapacity was discussed

Before 1981, an accused could not have use the defence of non-pathological criminal incapacity, but merely pathological criminal incapacity due to a form of a mental illness.¹²⁷

The defence of non –pathological criminal capacity was first coined and explained in the case of *S v Laubscher*.¹²⁸ Joubert AJ stated that a person needs to have both legs of criminal capacity (toerekeningsvatbaarheid) before he can be held responsible for his or her actions:

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 wederegterlik optree.
2. Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die weerstandskrag (wilsbeheervemoë) het om die versoeking om wederegterlik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.¹²⁹

This quote has been used in almost all cases that require an analysis of the defence of non-pathological criminal incapacity. The first case in which this defence succeeded was *S v Wiid*.¹³⁰ Wiid shot her abusive husband after it was revealed that he was having an extra-marital affair. The day of the shooting she had little to eat; she drank a glass of wine and used sleeping, hormonal and calming tablets.¹³¹ Her defence was that she had temporal absence of

¹²⁷ In *S v Chretien* 1981 1 SA 1097 (A) it was accepted that as there are various degrees of intoxication and these degrees could impair intention or criminal capacity or voluntary act. Therefore, not having criminal capacity was beyond mental illness, in the least it included intoxication. See Louw R in Kaliski (ed) (2006) 50-51.

¹²⁸ 1981 SA 163 (A) at 166F – 167 A.

¹²⁹ *Ibid*.

¹³⁰ 1990 1 SACR 561 (A).

¹³¹ *Id* at 13.

criminal capacity (which was not a result of mental illness).¹³² She used two psychiatrists – the first gave witness that her judgment had deteriorated to a certain degree and the second stated that the combination of factors (pills, alcohol, lack of food, the abuse suffered by her before the shooting and the deceased’s threat to kill her) led to a state where she was not able to act in accordance with the appreciation between right and wrong.¹³³ The court accepted the expert evidence and acquitted her based on the fact that there was at least doubt whether she had capacity.¹³⁴ The fact that she shot the deceased seven times was also an indication that she acted uncontrollably.

The defence was also used in *S v Calitz*.¹³⁵ This case involved a sergeant (that lost his temper) in an argument with a civilian after the accused drove over the deceased holy poles. The sergeant used a pole to assault the deceased and in the process killed him. In this case, three psychiatrists were used – one for the state and two for the defence. The defence psychiatrists’ both testified that if a person lost his judgment and suffered from a temporal mental collapse, he would not be able to remember detail.¹³⁶ They both stated that detail included remembering the pole length and the order of events were detailed descriptions. The state psychiatrist used this flaw and stated that the accused had a clear and vivid memory and this was not reconcilable with the fragmented memory that a person with true lack of judgment has. The court agreed and stated that the accused did not have a short, impulsive reaction as he remembered too much detail.¹³⁷

Except for an accused’s recollection of detail, the court also considers ‘...the circumstances leading up to the shootings and the appellant’s conduct before, during and after...’ the act of the crime as stated in *S v Kalogoropulos*.¹³⁸ The accused was charged with the murder of his business partner and their housemaid and the attempted murder of his wife and his business partner’s wife. The court stated that the question of whether criminal capacity was present, not only depends on the circumstances, but also on the expert evidence given. In this case, two psychiatrists were used. The court stated that when one uses the defence of non-pathological criminal incapacity, one needs to lay a foundation for the defence by using the

¹³² *Id* at 5.

¹³³ *Id* at 24-25.

¹³⁴ *Id* at 34.

¹³⁵ 1990 1 SACR 119-129.

¹³⁶ *Id* at 125.

¹³⁷ *Id* at 127.

¹³⁸ 1993 1 SACR 12(A) 1-44.

facts of the case and the expert evidence.¹³⁹ The psychiatrists did not assist in laying a proper basis for the defence. The court said that they merely drew conclusions from the facts to determine whether the accused had lost control, and this was an exercise that a court regularly does.¹⁴⁰ The court had to place a lot of emphasis on the calculated and planned conduct of the accused, as the expert evidence were inferences drawn from the facts rather than an analysis of psychiatric evaluation of criminal capacity. One psychiatrist elaborated only on the defence of sane automatism.

Another important aspect is ‘The reliability and truthfulness of the alleged offender...’ as stated in *S v Potgieter*.¹⁴¹ This case deals with a regularly abused wife that killed her spouse after he abused her, by throwing her against a wall. The court stated that one needs to believe that the evidence of the accused is reasonably true. Once again, two psychiatrists stepped in to give expert evidence (mainly on the defence of sane automatism). The court criticised one of them by stating that the defence of automatism (for which a factual foundation must also be laid by expert evidence) will not succeed as the accused was not acting in a state of automatism (as the psychiatrist testified). The psychiatrist finding was also based upon his assumption that the accused was being truthful at all times.¹⁴² Therefore it can be held, that if an accused is untruthful, the evidence given by the expert witness that is based on what the accused told him, will be scrutinized by the court.

There are very few cases in which the defence of non-pathological criminal incapacity succeeded. *S v Wiid* was already discussed and the second case, to follow seven years later, was *S v Nursingh*.¹⁴³ The accused was a university student that killed his mother, grandmother and grandfather. He had been physically, psychologically and sexually abused by his mother and this gave him a ‘...personality make-up which predisposed him to a violent emotional reaction.’¹⁴⁴ The unconventional relationship with his mother (he slept in her room whilst having his own) led to a highly dependent relationship that was filled with resentment. The events that led to the trigger of the killing was that he had to get his mother’s permission (by cutting down a mango tree) to go to a concert with a girl. When he asked her permission, an argument followed which led to the shooting. A psychologist and a psychiatrist that

¹³⁹ *Id* at 37.

¹⁴⁰ *Id* at 38-39.

¹⁴¹ 1994 1 SACR 61 (A) 1-90.

¹⁴² *Id* at 67.

¹⁴³ 1995 2 SACR 331 (D) 332 – 339.

¹⁴⁴ *Id* at 332.

examined the accused gave expert evidence. The psychologist testified that if a person had undergone the type of abuse as the accused had, one event can lead to a combination of circumstances, to such an extent that his conscious is altered so far from normal, that the accused will lose his judgment and self-control.¹⁴⁵ The psychiatrist testified that there is a ‘...separation of intellect and emotion, with temporary destruction of the intellect...’ which means that the accused mechanic actions will be goal –directed, but he would react similarly to a dog being provoked.¹⁴⁶ The State made an argument that the accused was able to shoot accurate, but the court referred back to the psychiatrist argument that the actions can be goal-directed, even though there is no appreciation behind the shooting.¹⁴⁷ Similar to the *Kalogoropulos* case, this court also placed emphasis on the conduct of the accused – before, during and after the act. It was especially, the post conduct (accused was startled, he had a dazed appearance, babbling, panic as soon as he realised what he had done and the refusal to accept his conduct) that convinced the court he was not in control of his own mind and therefore he could not control himself for a temporary period.¹⁴⁸

The court warns that one should scrutinise the non – pathological criminal incapacity defence since it can be misused if accepted too readily.¹⁴⁹ The court accepted that a factual foundation has been laid and there was reasonable doubt if the accused had criminal capacity. This foundation was laid with excellent expert evidence (they were thanked in the judgment) that explained technical terms in a basic manner and they accepted that they could have been deceived by the accused, but they took the necessary steps to prevent this from happening.¹⁵⁰

If expert evidence is given, but the accused’s plea explanation is untested, it would seem that it reduces the weight that the court attaches to the expert evidence as it was shown in the case of *S v Di Blasi*.¹⁵¹ In this case, the accused shot his ex-wife as he did not want to divorce her. The accused stated that ‘...he had acted with diminished criminal responsibility as a result of non-pathological causes of a temporary nature namely a partial emotional and psychological disintegration...’¹⁵² Two psychiatrists evaluated the accused and both testified that the accused was severely depressed about his collapsed marriage, that his emotions of anger,

¹⁴⁵ *Id* at 333.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Id* at 338.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Id* at 336.

¹⁵⁰ *Id* at 338.

¹⁵¹ 1996 1 SACR 1 (A) 1-34.

¹⁵² *Id* at 15.

bitterness, depression made him unable to realise the implications of his actions and it impaired his judgment.¹⁵³ The court stated that one can not only look at the expert evidence, but also the objective facts and the nature of the accused actions during the period of the crime.¹⁵⁴

The last case that succeeded with the defence of non-pathological criminal incapacity was *S v Moses*.¹⁵⁵ The accused killed his partner with a blow against the head (with a cat statue) and a stab wound in his throat and chest, after his partner told him that he had HIV/ AIDS, while they were having unprotected sexual intercourse. The accused had been sexually and physically abused by his father and his mother had told him to leave home when he revealed that he was gay. When he met the deceased, the accused described him as an ideal person that could help the accused away from his past.¹⁵⁶ The accused stated that he lacked criminal capacity due to provocation and two expert witnesses testified – a psychologist and a psychiatrist. Both of them testified that the accused suffered from borderline personality disorder.¹⁵⁷ The psychologist testified that the accused had a very impulsive nature and it was easier to provoke him than a normal personality. He further testified that when the accused was told by the deceased about the AIDS, the accused trust was destroyed to such an extent that he had completely lost control and went into annihilation mode.¹⁵⁸ The psychiatrist testified that the circumstances prior to the killing (accused lack of sleep, depression, self-medication on Somnil and Grandpa headache powders, suicidal tendencies, loss of appetite, agitation with small things) together with the pain he felt of being betrayed and the memories that returned of his father's sexual abuse led to a trigger of 'extraordinary stimulus'.¹⁵⁹ This trigger would influence any person to a certain degree and the ability to retain control over one's action will be impaired.¹⁶⁰

Except for the two expert witnesses on behalf of the accused, there was also a psychiatrist for the accused. His evidence did not help the court as he testified that the accused did not act in a state of sane automatism, while the accused's defence was one of non-pathological criminal

¹⁵³ *Id* at 17-18.

¹⁵⁴ *Id* at 19.

¹⁵⁵ 1996 1 SACR 701 (C) 701 – 714.

¹⁵⁶ *Id* at 704.

¹⁵⁷ *Id* at 708-709.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Id* at 710.

¹⁶⁰ *Ibid*.

incapacity.¹⁶¹ The court held that a foundation for the defence had been laid by the experts and it took into consideration the facts of the case with the accused's actions. The court made a 'subjective enquiry' into the accused's mind to determine what the accused was feeling or thinking at the time of the action.¹⁶² The court expressed the view that the accused had '...no motive or reason to kill the deceased and this was...not a premeditated killing.'¹⁶³

From the Moses case (specifically the psychiatrist for the state) one can see that expert witnesses are not always able to assist the court in explaining the psychological and pathological effects of an accused. The reason for this is that expert witnesses do not fully comprehend the legal difference between the element of act and the defence of sane automatism versus the element of capacity and the defence of non-pathological criminal incapacity.

Yet, it would seem that the courts are also confused about these concepts. Two specific cases can be referred to in this matter. The first is *Francis v State* where the appellant shot one person in the elbow and shot the deceased.¹⁶⁴ The defence the accused used was '... a state of non-pathological criminal incapacity ("sane automatism") with the results that he was unable to distinguish right from wrong; or, if he could, that he was unable to control his actions.'¹⁶⁵ The accused led no expert witnesses in the form of a psychologist or a psychiatrist. The state called a psychiatrist which testified that the accused actions were purposeful and he was able to distinguish right from wrong, yet the court did not appreciate the full reasoning behind his opinion as the judge stated:

I do not propose giving further details of his reasons, because he speaks of things on which the court in the end will have to decide for itself. It should be added that this being a case of "sane automatism" there is no need of an expert to explain any actual pathology.¹⁶⁶

It would seem that, although previous case law confirm that expert witnesses are essential (together with the facts of the case and the conduct of the accused before, during and after the act); there are cases where the court is reluctant to accept expert witnesses to explain the

¹⁶¹ *Id* at 712.

¹⁶² *Id* at 714.

¹⁶³ *Ibid*.

¹⁶⁴ 1999 1 SACR 650 (SCA) 1 – 32.

¹⁶⁵ *Id* at 2.

¹⁶⁶ *Id* at 24.

mind-set of the accused. In the Frances' case the court did not go into detail to define and develop the defence of non- pathological criminal incapacity, therefore the confusion of the defence's distinction was not too severe.

The confusion truly started at the case of *Eadie v S*.¹⁶⁷ The accused in this case used a hockey stick to beat a passenger in another car to death, because the deceased provoked the accused whilst driving (this case is referred to as the road- rage case). The defence that accused used was '...temporary non-pathological criminal incapacity resulting from a combination of severe emotional stress, provocation and a measure of intoxication.'¹⁶⁸ A psychologist and a psychiatrist testified on behalf of the state. The psychologist determined that the actions of the accused and been '...rational, purposeful and goal-directed' and he had poor impulse control rather than a lack of criminal capacity.¹⁶⁹

The psychiatrist also stated that the accused was aware of what he was doing. For him, there was no difference between sane automatism and the defence of non-pathological criminal incapacity and therefore referred further to the defence as one of sane automatism.¹⁷⁰

A psychiatrist testified on behalf of the accused and he disagreed with psychiatrist who testified on behalf of the state with the fact that the defence of sane automatism is different from the defence of non-pathological criminal incapacity. The psychiatrist for the accused testified that a person acting in a state of sane automatism has no cognitive control due to emotional stimuli whereas a person who lacked criminal capacity had disturbed cognition due to emotional factors.¹⁷¹ This psychiatrist was the same one that testified on behalf of the state in the *Moses* case.

The court referred to previous judgments as handed down by the court *a quo*, as well as various case law, in which the defence of non –pathological criminal incapacity was discussed. The judge stated that at least four cases had equated the defence of non – pathological criminal incapacity with sane automatism.¹⁷² He stated that the State psychiatrist who had the view that sane automatism was equal to non-pathological criminal incapacity was correct in his finding. The psychiatrist view was that if a person lost control, it means

¹⁶⁷ 2002 1 SACR 663 (SCA).

¹⁶⁸ *Id* at 2.

¹⁶⁹ *Id* at 11-12.

¹⁷⁰ *Ibid*.

¹⁷¹ *Id* at 15.

¹⁷² *Id* at 39 ;The four cases referred to are *S v Potgieter* 1994 1 SACR 61 (A), *S v Henry* 1999 1 SACR 31 (SCA), *S v Cunningham* 1996 1 SACR 631 (A) and *S v Francis* 1999 1 SACR 650 (SCA).

that his cognitive functions are absent and therefore unplanned and not goal-directed.¹⁷³ The court also confirmed that one has to look at the accused's actions before, during and after the act took place.¹⁷⁴ The courts' final source that it mentions to verify that defence of sane automatism needs to be equated with the defence of non-pathological criminal incapacity is an article by Ronald Louw called 'S v Eadie: Road rage, Incapacity and Legal Confusion'.¹⁷⁵ Louw claimed that the capacity should be defined only by looking at the first leg of the *Laubscher* test: If a person is able to distinguish between right and wrong.¹⁷⁶ Should the 'second leg' need a defence, Louw stated that the defence of involuntariness can be used. The court agreed that there should be no distinction between sane automatism and non-pathological criminal incapacity, specifically the second leg of capacity (conative – act in accordance with the appreciation of the difference between right and wrong).¹⁷⁷

The next case that will be discussed (in which Eadie was not mentioned at all) is the *DPP, Transvaal v Venter* case.¹⁷⁸ The accused was charged with two counts of murder (he shot both his children) and one count of attempted murder (he shot his wife but she survived). The defence he used was one of temporary non-pathological diminished criminal responsibility. The court described this as having '...diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of that wrongfulness.'¹⁷⁹ There was a psychiatric report of a panel of three psychiatrists that stated that the accused had suicidal tendencies, he was very stressed about a case that had been brought against him on the rape of a girl in Burundi and he was under the influence of alcohol at the time of the act.¹⁸⁰

The minority judgment stated that one needs to distinguish between the defence of non-pathological criminal incapacity and diminished responsibility as referred to by Snyman.¹⁸¹ Although a person has the capacity to distinguish between right and wrong and acts in accordance with such an appreciation (but he is less able than a normal person to resist temptation caused by provocation, stress or alcohol) he will be criminally liable, but he should not receive the most severe punishment. If a person lacks non-pathological criminal

¹⁷³ *Id* at 40.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Id* at 49.

¹⁷⁶ *Id* at 52.

¹⁷⁷ *Ibid.*

¹⁷⁸ 2009 1 SACR 165 (SCA) 165-192.

¹⁷⁹ *Id* at 173.

¹⁸⁰ *Id* at 179.

¹⁸¹ *Id* at 182.

incapacity, he cannot be deemed criminally liable at all. The minority judgment further stated that if the defence of non-pathological criminal incapacity fails, a person should not be sentenced as a normal acting person.¹⁸² If his defence fails, but the same factors lead to that person acting with diminished responsibility, the sentence should be less than prescribed as the accused was not in complete control of his judgment.¹⁸³

One of the majority judgment judges stated that when one is dealing with a case that relates to a pathological condition, then one needs expert evidence to guide the court. If a court deals with factors that has different weight attached to them, ‘...the insight of psychiatrists and psychologists might at times be helpful [but] they are not indispensable...’¹⁸⁴.

i. An academic view on *Eadie*

There are various criticisms about the *Eadie* case. Snyman has four criticisms against it: The first is that the court in *Eadie* indicates that the court should not abolish the defence as the accused did not show any lack of capacity. This opens up the issue – but if the accused does show that he did lack capacity? Snyman states that one can possibly acquit the person on the basis that he lacked capacity but he states that the answer remains uncertain.¹⁸⁵

His second criticism is that the court failed in differentiating between voluntariness of an act and the second leg of the capacity (the ability to act in accordance with appreciation between right and wrong). A person acting with non-pathological criminal capacity is still able to control his body movements, but he is ‘...unable to resist the temptation to act in a way that differs from what his insights have taught him.’¹⁸⁶ If these two elements are reconciled, it would render the two-fold test indicated in section 78(1) of the Criminal Procedure Act futile as the definition would only contain the first leg of the capacity test.

His third criticism is that the court refers to the conative leg as something that can be read as equal to a voluntary act, but also something that is important to consider when determining criminal capacity. Snyman states that the court does not to know what criminal capacity is.¹⁸⁷

¹⁸² *Id* at 185.

¹⁸³ *Ibid.*

¹⁸⁴ *Id* at 191.

¹⁸⁵ Snyman (2008) 166.

¹⁸⁶ *Id* at 167.

¹⁸⁷ *Id* at 168.

His final criticism was that the court does not know the difference between *actus reus* and *mens rea* as the court equates the mental ability of the act with the physical act.¹⁸⁸

When considering if the defence of non-pathological criminal incapacity has been abolished, Snyman states that it has been abolished if there is capacity due to provocation. If there is a scenario where provocation (and other factors linked to it like shock, panic, fear, stress etcetera) does not form part of the equation, then the defence might still exist. The problem is that most factors are related to provocation and up and until now, no condition has been has not had a link to provocation. This condition would be extremely rare and this might lead to the defence only having theoretical application. Snyman also states that the court leans more towards an objective approach regarding capacity than the subjective approach that has been used in the past.¹⁸⁹

Burchell states that there are three ways in which *Eadie* could be approached: The first is that courts in the future would use a subjective approach with regard to the accused together with the objective facts and circumstances.¹⁹⁰ This is currently the manner in which courts has approached the test of capacity. The reason for this interpretation is based on the fact that the court in *Eadie* did not state that there was a fault with the principle, but that there was a fault with the application of the principle.¹⁹¹

The second interpretation is that the court would merge the second conative leg of capacity with that of automatism and that the court should take an objective view on the accused state of mind.¹⁹² This is the most radical approach although the court in *Eadie* does state that they are not convinced that the second leg of the *Laubscher* test should fall away.¹⁹³

The third interpretation (Burchell favours this interpretation) is one where the first and second interpretation could be reconciled. This approach entails that the court should judge the accused state of mind in an objective manner whilst having a subjective approach.¹⁹⁴ The

¹⁸⁸ *Ibid.*

¹⁸⁹ *Id* at 169.

¹⁹⁰ Burchell (2006) at 430.

¹⁹¹ *Id* at 433; The court in *Eadie* specifically referred to the cases of *Moses* (n 148) and *S v Arnold* 1985 3 SA 136 (C) – In the *Arnold* case the accused killed his wife after a prolong relationship that caused him severe emotional stress. The accused called a psychiatrist as expert witness and the State had no expert witnesses. The court concluded that the accused had to be acquitted as he had no criminal capacity due to the severe emotional stress.

¹⁹² *Id* at 430.

¹⁹³ *Id* at 438.

¹⁹⁴ *Id* at 430.

subjective part would be to enquire if a particular grouping would act in a particular manner to which the accused belong to (for e.g. children, women who are abused). The accused's action will then be judged according to those group standards.¹⁹⁵ Burchell also refers to Tadros and states that one must look at the 'target of the law'.¹⁹⁶ The example given, is if a person is cowardice and commits unlawful acts, because he is scared of a criminal gang, then his actions may be accused as it is not the target of the law to punish one who is cowardice. However if a person murders another in a road rage fit, then he would be punished as it is the target of the law to '...encourage restrained conduct on the road.'¹⁹⁷ One must see if the accused could have acted differently in specific circumstances – for example, if a person loses his temper due to provocation and kills another due to the fact that he did not restrain himself; he disregards the average values of those in his particular grouping. If however, a battered spouse kills her partner because the partner has abused her over a period of time, then Burchell states that '...she could not have acted differently due to a characteristic... that is not the target of the law.'¹⁹⁸

With regards to the issue of the merging of automatism and the second leg of capacity, Burchell recommends that one takes the following approach:

The second part of the capacity test (ie the conative part) involves an inquiry, in essence, into whether the accused had acted differently? If, *in no circumstances*, could he or she have acted differently, then his or her conduct would have inevitably and always be involuntary, or not controlled by the conscious will. Only if there was a *choice* facing the accused, would conative capacity come into play and the capacity inquiry implies a choice.¹⁹⁹

The South African legal system is still confused about the *Eadie* case. It would seem that case law after it sometimes ignored its existence for fear that they would need to justify the *Eadie* decision.

¹⁹⁵ *Id* at 441.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Id* at 442.

¹⁹⁹ *Id* at 440.

ii. The other coerced woman: Cézanne Visser

The last case to be discussed is the unreported case of *S v Visser*.²⁰⁰ This case can be directly compared to the Lotter case, especially the circumstances surrounding Nicolette Lotter. At the end of the next chapter (after the facts of the Lotter case has been discussed) I will draw a comparison between these two women and the similar elements that were present in both cases.²⁰¹ Cézanne Visser was accused of fourteen charges against her which included: fraud, incitement of minors to commit indecent acts, crimen injuria, indecent assault, rape, the possession of child pornography, manufacturing of child pornography and the possession of marijuana.²⁰² Her defence was one of non-pathological criminal incapacity based on the fact that she did not have a will of her own.²⁰³ These acts were committed against employees of her boyfriend/fiancée, Dirk Prinsloo, and various minors that they were able to get from children's homes (they convinced the children's home to have the children stay over at weekends). Some of the minors and the employees (the accused's mother was also a victim) would be drugged with Ryphonol (date rape drug) and indecent acts such as ejaculating on them, raped by Prinsloo and taking nude photos of them would be committed. Visser would perform oral sex on Prinsloo in front of her mother and the minors and stated: 'As sy penis styf is, dan sal sy hom enige tyd bevredig. Dit maak nie saak of sy by 'n jol is of voor enigiemand nie.'²⁰⁴ The accused would show the minors the use of a 'vibrator', walked around naked, have sexual intercourse in front of the minors and would touch the minors on inappropriate places on their bodies.²⁰⁵ The accused would also perform acts of oral sex on Prinsloo in full view of the employees. The employees testified that Prinsloo was an aggressive man that verbally and sexually abused his employees as well as the accused. There was restraining order/interdict against the accused's mother as Prinsloo felt that the mother did not approve of their relationship.²⁰⁶ The accused had undergone two breast enlargement surgeries, had various piercings in her vagina and nipples, went to the gym every

²⁰⁰ Unreported case in the North Gauteng High Court, Pretoria, case number CC545/07.

²⁰¹ See below para (i) at 60-61.

²⁰² *Id* at 1-8.

²⁰³ '...dat aan die einde van die dag die beskuldigde nie meer 'n wil van haar eie gehad het nie.'; *Id* at 8.

²⁰⁴ *Id* at 11.

²⁰⁵ *Id* at 16.

²⁰⁶ *Id* at 35.

day, followed a diet that Prinsloo had worked out for her and had tattoos of his name on her lower back – this was done to improve their sex life.²⁰⁷

The accused testified that Prinsloo respected her when they met and he promised that he would care for her. She passed both of her law degrees with distinction but failed to pass the Bar exam in her pupillage year due to a relationship break-up. She met Prinsloo when she joined the Independent Bar and they immediately had a very sexual relationship which she thought was normal as she was in love. She was a virgin when they met. Prinsloo was obsessed with alternative sex and he would insert various objects such as bottles, cucumbers and carrots into her vagina. They also had regular threesomes with prostitutes and he would sometimes photograph these scenes. He had sadistic intercourse with her, drugged her to the extent that could not remember the night before but only felt pain in her anus, vagina and on her bum and saw photos afterward of dogs licking her vagina. She was not allowed to have hair on her body and if she refused he would verbally abuse her. He was an atheist and he once took her to a chapel where he had very ‘rough’ intercourse with her, spitted in her face and she had to scream ‘fuck you god’ as they had intercourse. She stated that she felt as if her brain had been removed and his brain was inserted in her head.²⁰⁸ Even when he drugged her mother and had intercourse with her mother, she stated that she was shocked but conditioned not to ask any questions. Various photographic evidence was submitted that showed her eating his excrement, rubbing excrement over her body and drinking his urine – she stated that she did this to keep him happy, since if he was unhappy, it felt like her world collapsed.²⁰⁹

In spite of the fact that she was an advocate, she believed him when he declared on holiday that they were married in common law. She stated that she acted like a robot and believed he was a god. She also called him ‘god’ and felt like she had lost her own identity. If they had arguments he would physically abuse her by choking her.²¹⁰

The accused was sent for observation in terms of section 77 and 78 of the Criminal Procedure Act 51 of 1997. It was held that she was able to understand court proceedings and was diagnosed with BWS. She had been exposed to very serious physical and sexual abuse,

²⁰⁷ *Id* at 41.

²⁰⁸ *Id* at 41-43.

²⁰⁹ *Id* at 45.

²¹⁰ *Id* at 57-64.

‘severe domestic abuse and coercive control.’²¹¹ It was stated that she was able to act in accordance with right and wrong, but it had been severely compromised and only had diminished responsibility. The psychologist that testified with regard to the report stated the difference between cognitive (think), affection (feelings) and conative (do) and stated that the accused thoughts were constricted and the most important part is the affection. Emotions can further restrict emotions and this can affect the conative and act. He also stated that BWS did not only mean physical abuse, but also coercive control, isolation and intimidation. According to the witness, it would not be out of the ordinary if the victim remained in the relationship, struggle to get away from the relationship and constantly returned to such a relationship.²¹²

The psychologist described the process of coercive control as one where the will of the women is subject to that of the man and therefore if she lives in fear/intimidation or for reward – she can do anything for him without the controller being present. The controller need not point a gun against her head and force her to commit an act – she will do any act if she knows that she will be rewarded or he will be kept satisfied. This makes her the compliant victim and the psychologist described this as a process where the controller has all the power and he dominates her while she stays submissive. The controller will choose a victim that is in a very fragile state of mind or has a fragile and unstable identity. He would then be able to motivate her until she feels confident (Prinsloo selected Visser as she was academically performing weak and had an unsuccessful love relationship).²¹³

The controller will systematically influence the victim to commit acts contrary to her moral standards such as perverse sexual intercourse and she will lose her dignity and self-respect. As she loses her self-respect, she will commit acts that serve as her punishment for being such a weak/promiscuous person. As this escalates, the period sets in when she commits criminal activities without him being present.²¹⁴ He concludes that Visser did not intend to groom the children by showing them pornographic videos or having sexual intercourse in their presence – her intention was to keep Prinsloo happy. Visser knew that sexual deeds would have been committed against the minors, but this was not her intention. Her intention

²¹¹ *Id* at 79.

²¹² *Id* at 78-80.

²¹³ *Id* at 81-82.

²¹⁴ *Id* at 83.

was to make sure Prinsloo is happy and it made him happy to commit sexual deeds with the children.²¹⁵

The court stated that it was improbable that she was so under the influence of Prinsloo due to various factors.²¹⁶ The court placed emphasis on the fact that as an advocate and one who has knowledge of the law, she was not able to follow Prinsloo as she stated she did – she believed that they were married in common law even though he was still married at the time. The court also did not believe that she suffered from ‘traumatic amnesia’ and that she was simply saying ‘I can’t remember’ as it pleases her.²¹⁷ The court stated that she was hiding behind Prinsloo and the deeds he committed to justify her own behaviour and there was no mention that she was not able to control her will at any stage.²¹⁸

The court stated that one cannot consider the expert evidence of the psychologist in isolation and the other witnesses’ testimonies also need to be taken into account. It does admit that Prinsloo was busy isolating her to have coercive control over her.²¹⁹ The court did not believe that she did not have conative leg of the capacity test intact and found her guilty on ten of the thirteen charges.²²⁰

iii. Absence of the controller

One of the main arguments for those against the idea of a defence based on coercive persuasion is that the controller cannot control the victim if he is not present. If the controller was absent in a situation where illegal activities were committed by the victim, the argument is that the victim acted to her own benefit and not because it would satisfy the controller. Controlling the victim was therefore only possible, if the controller was immediately present and was forcing/urging the victim to commit the illegal act.²²¹ Phillip Stevens refers to the Visser case and states that if one considers the perverse and despicable acts that were done to her by Visser, one has to consider the amount of control that Prinsloo had over her.²²² The

²¹⁵ *Id* at 84.

²¹⁶ She was able to freely move around, she had a friend and kept contact with her mom, therefore she was not isolated. She had arguments with him and therefore did not blindly follow him. It was improbable that she had to call him god, when he called her goddess; *id* at 97 – 101.

²¹⁷ *Id* at 101.

²¹⁸ *Id* at 110.

²¹⁹ *Id* at 121.

²²⁰ *Id* at 122-139.

²²¹ See n236 below for the view of the psychologist in the *Lotter* case.

²²² Stevens GP (2011) *The role of expert evidence in support of the defence of criminal incapacity*, unpublished LLD thesis, University of Pretoria at 351.

psychologist in her case stated that Visser would have done any act for Prinsloo if it meant that he would be happy. Her intentions were not to sexually assault the minors directly, but to please him. Stevens states that one cannot measure the power that Prinsloo had over Visser, but that irrespective of how much power the courts perceived Prinsloo to have, the court must still weigh the interests of the community and the victims against those of the accused.²²³

When discussing an alternative judgment below for the Lotter case, I will state that the amount of control that Naidoo had over the siblings was so severe that they followed his command, even though he was not constantly present during the murder.²²⁴

d) Alternative defences

The main defence discussed in this dissertation is the defence of non-pathological criminal incapacity, but there are other defences which have been used interchangeably with this defence or in the alternative thereof. For purposes of this dissertation there will be a discussion on automatism and private defence to determine if these defences could have been utilised instead, with reference to the Lotter case.

i. Sane Automatism

Automatism is a defence that an accused uses if that person has not acted voluntarily. The movements of the person are mechanical and they are not controlled by free will.²²⁵ One has to distinguish between ‘sane automatism’ and ‘insane automatism’. Sane automatism refers to a ‘temporary mental confusion of short duration due to external stimuli’ and insane automatism refers to a ‘mental illness causing pathological disturbance of a person’s mental ability of long duration’.²²⁶ The distinction is of no importance for criminal liability, but for the burden of proof and the effects differ should the court decide on an acquittal. For sane automatism the burden of proof lies on the state to prove that the act was voluntary and if the accused is acquitted he/she is a free person.²²⁷ If the defence is one of insane automatism, then the burden of proof lies on the person alleging this i.e. the accused and if the person is

²²³ *Ibid.*

²²⁴ See below at 59.

²²⁵ Snyman (2008) at 55.

²²⁶ *S v Stellmacher* 1983 2 SA 181.

²²⁷ Snyman (2008) at 56.

acquitted, he or she is dealt with in accordance to section 78(6) of the Criminal Procedure Act and may be committed to a psychiatric hospital at the discretion of the court.²²⁸ Snyman states that one should be aware when using the distinction of sane and insane automatism as there is confusion, because insane automatism is the equivalent of the defence of mental illness – in a time before the South African law knew the concept of criminal capacity. Snyman refers to an epileptic fit as an example of sane automatism.²²⁹ The confusion is evident when one considers Kaliski's view when he gives examples of sane and insane automatism. His examples for insane automatism are epilepsy, hypoglycaemia owing to a medical illness, such as insulinoma, neoplasms and transient global amnesia. He refers to hypoglycaemia owing to administration of insulin, sleepwalking, head injury and Dissociative disorder (psychogenic automatism) as examples of sane automatism.²³⁰

²²⁸ *Id* at 57; Section 78(6) states: (6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act—

(a) the court shall find the accused not guilty; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty, by reason of mental illness or mental defect, as the case may be, and direct—

(i) in a case where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 29 (1) (a) of the Mental Health Act, 1973 (Act No. 18 of 1973);

(bb) admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973), pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act;

(cc) treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused—

(aa) be admitted to, detained and treated in an institution stated in the order in terms of Chapter 3 of the Mental Health Act, 1973 (Act No. 18 of 1973), pending discharge by a hospital board in terms of section 29 (4A) (a) of that Act;

(bb) be treated as an out-patient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;

(cc) be released subject to such conditions as the court considers appropriate; or

(dd) be released unconditionally.

²²⁹ Snyman (2008) at 56.

²³⁰ Kaliski (n108) at 108; Burchell states that the issue of whether epilepsy falls into either category is an open matter in Burchell (2006) at 180; In the *DSM-IV*, Dissociative Amnesia was formerly known as Psychogenic Amnesia and its criteria is '(A) The Predominant disturbance is one or more episodes of inability to recall important information, usually of a traumatic or stressful nature...(B) The disturbance does not occur exclusively during the course of Dissociative Identity Disorder, Dissociative Fugue, PTSD... and is not due to the direct physiological effects of a substance or a neurological or other medical condition (C) The symptoms cause clinically significant distress or impairment in social, occupational or other important areas of functioning *DSM-IV* (2000) at 520-524.

Proving sane automatism is difficult as the courts view it with intense circumspection.²³¹ In *S v Henry* the court stated that there must be a trigger mechanism of an extreme nature for the defence to succeed. The bar was raised in the case of *S v McDonald* when it was held that that the trigger mechanism must be of an extraordinary nature. As with the defence of non-pathological criminal incapacity the court will view the actions of the accused before, during and after the event occurred.²³²

In the set of facts where a person was coercively persuaded to kill another by a third person, the defence of automatism will not succeed if one takes the view of Snyman into account. Coercive persuasion is a mental activity whereby a person eliminates one person's standards or beliefs via torture and isolation and replaces it with their own set of standards or living into the victim. If the victim decides to harm others it would be that they are so mentally influenced that it seems correct to harm the third parties. They are still able to control their movements as their movements have not become mechanical. They are mental robots, but not physical robots.

If one takes the view of Kaliski into account, one might be able to use expert evidence and create a defence of sane automatism based on coercive persuasion. In the previous paragraphs Kaliski stated that Dissociative disorder (psychogenic automatism) is an example of sane automatism. One can make an argument that a person's standards, beliefs and identity were so suppressed by the controller (the psychogenic element), that the victim was not able to control himself or herself when they committed the crime (the automatism element).²³³ Expert evidence will be used to lay a basis for the defence and the state would then need to prove that there was indeed voluntary conduct.

The next defence that we could consider would be that of private defence.

²³¹ *S v Henry* 1999 1 SACR 13 (SCA); *S v McDonald* 2000 2 SACR 493 (N); *S v Kok* 1998 1 SACR 532 (N); *Eadie v S*(n160).

²³² In the *Henry* it was also held that psychogenic amnesia i.e. amnesia that occurs after a person has experienced a traumatic event is not equivalent to true amnesia. If a person has psychogenic amnesia, it does not necessarily mean that he acted involuntary in Snyman (2006) at 57.

²³³ Psychogenic amnesia refers to 'amnesia suffered from psychiatric illness -...in those circumstances, loss of past memories and identity may be prominent despite normal ability to learn and remember new information Shmerling RH Forget what you heard about amnesia <http://0www.intelihealth.com.innopac.up.ac.za/IH/ihtIH/WSIHW000/35320/35323/345689.html?d=dmthMSContent> (accessed: 20-12-2012).

ii. Private defence

Snyman refers to private defence as

‘A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else’s life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack.’²³⁴

This defence excludes unlawfulness when determining criminal liability.

When using the private defence, there are certain conditions that have to be met for the attack and for the defence in order to succeed. The conditions for the attack are that (a) there was an attack;(b) upon legally protected interest; and (c) that the attack was unlawful.²³⁵

The conditions pertaining to the defence are that there must be evidence that show that the defence was (1) necessary to prevent the attack; (b) the response was reasonable; and (c) it was directed towards the attacker.²³⁶

If one (A) had been coercively persuaded by a person,B, to attack another third party,C, it would be difficult for A to use private defence as a defence. First of all the conditions of the attack would have to be met. Take the facts of the *Lotter* case.²³⁷ If the parents attacked the Lotter siblings (let us assume verbally) about their new beliefs or religion (as it is right in terms of section 15 of the Constitution and it is not in the scope of Freedom of expression to express hate towards a religion in terms of section 16(2) (c) of the Constitution) one would struggle to prove that the abuse was unlawful. If one has

²³⁴ Snyman (2008) at 102; Also used in *S v Engelbrecht* 2005 2 SACR 41 (W); Burchell’s definition: A person who is a victim of an unlawful attack upon a person, property, or another legal recognised interest may resort to force to repel such attack. Any harm or damage inflicted upon the aggressor in the course of such private defence is not unlawful Burchell (2006) at 230.

²³⁵ Burchell (2006) at 233-237; The attack must have commenced and imminent and not yet completed. The protected interest would entail to protect a human life, personal freedom, sexual integrity, chastity and dignity. One is allowed to defend a third providing that there is a relationship between the third party and the defendant or accused.

²³⁶ *Id* at 237- 242; If the defendant has the possibility of retreating or escaping and this will not place him in a worse position then the defendant must do so. The defence must be proportional to the attack.

²³⁷ See Chapter 4.

proven unlawfulness, the defence has to be reasonable or necessary to prevent the attack.

One can perhaps use the defence if the parents had made an offensive remark towards Naidoo and the siblings, being coerced under into thinking he is the son of God, defends his dignity. If the parents had then laid a charge of assault, it would be possible to prove that they were protecting his dignity.²³⁸ The main key is that the attack on the attacker needs to be proportional and to kill the parents would not be a proportional act.²³⁹

Therefore it would be difficult to prove the proportionality of the attack was justifiable.

e) Conclusion

Once an accused uses the defence of non-pathological criminal incapacity, he has to lay a basis for his defence by using expert witness. There are cases like Venter and Francis where the court has indicated that expert evidence plays a minute role in the decision of the judgments. Although when one perceives the cases where this defence has succeeded like Wiid, Nursingh and Moses one cannot help but notice the amount of detail included in the judgment of what was testified by the expert witnesses.

The state must then prove that the accused had capacity beyond reasonable doubt. Factors that will benefit the state is how much detail an accused can remember – the more he remembers, the easier it would be to prove capacity. If the accused is deemed untruthful by the court, the expert evidence he used will also carry little weight as the expert witness will testify on facts from the accused, which the psychiatrist deemed truthful. The court will also focus on the conduct of the accused before, during and after the act.

Coercive control is not often seen in South African case law, yet it has made its appearance in cases like *S v Visser*. It is a controversial topic as to whether a party can control another party to such an extent that the controlled party would commit illegal acts in the absence of the controller for the sole reason that these acts would please the controller. As the court considers this, all factors above must still be taken into account.

²³⁸ See the facts of *R v Van Vuuren* 1961 3 SA 305 (E).

²³⁹ In *Ex parte die Minister van Justisie: in re S v Van Wyk* 1967 1 SA 488 (A) the court held that private defence would be successful for a shopkeeper who had set up a shotgun in his shop that was triggered by a thief (his shop had repeatedly been broken into and he went to extreme measures to safeguard it). The court stated that where a person's possession and his life and limb were threatened by an intruder, the intruder may be killed.

There are other defences that an accused can use when faced with charges where he or she was not able to control their acts/minds, including the defence of sane automatism, or defences that deem attacks justifiable such private defence. When using these defences, the court will always scrutinise the defence for fear of misuse. These defences could have been used as alternative defences in the *Lotter* case of which the facts and judgment will be discussed in the next chapter.

4. Chapter Four: Coercive persuasion in South African Case Law: *S v Lotter*

a) Introduction

In the previous chapter, there is a review on the defence of non-pathological criminal incapacity and the various factors of the defence that have been introduced to the courts. In this chapter, an outline will be given of the facts, judgment and expert evidence of the *S v Lotter and Others* case.²⁴⁰ This dissertation's inference is that the unique circumstances of this case should have led to an acquittal of two of the accused or mitigating circumstances that should have led to a non-custodial sentence.

b) *S v Lotter and Others* judgment

For purposes of this dissertation, the focus will be on the *Lotter* siblings, Hardus and Nicolette and to a lesser extent that of Mathew Naidoo. All three of the accused were charged with murder, in terms of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997.²⁴¹

All of the accused pleaded not guilty under section 115 of the Criminal Procedure Act 51 of 1997. Hardus' defence was that he lacked criminal capacity and he acted under duress on instructions of Naidoo.²⁴² Nicolette did not want to indicate the basis for her defence, but the court stated that her defence was the same as her brother's defence. The court referred to it as '... [they] raised as a defence, that they were influenced by [Naidoo] to such an extent that they were not exercising free will.'²⁴³ This was also the issue that the court had to decide on.

²⁴⁰ (CC43/09) [2012] ZAKZDHC 50 (13 March 2012) 1-31.

²⁴¹ Section 51(1) states that if a person is convicted of an offence as referred to in Part I of Schedule (Premeditated Murder) the sentence is life imprisonment.

²⁴² *Lotter* above n1.

²⁴³ *Id* at 3.

The court relied mainly on the evidence of Professor Schlebusch, a clinical psychologist that testified on behalf of the Lotter siblings. The Lotter siblings indicated that they were severely influenced by Naidoo as they believed him to be the third son of God as Naidoo claimed. Naidoo denied this allegation, but the court stated that there was sufficient corroboration in the siblings' versions to convince the court that Naidoo did portray himself as such.²⁴⁴ Schlebusch testified that this type of coercive persuasion (the court referred to it as brainwashing) has been used in large groups to all types of people (including professionals such as doctors or lawyers).²⁴⁵ Those who are affected will do anything that their 'controller' tells them to do and for those people not affected, these acts will seem stupid.²⁴⁶

The court indicated that it was possible for Naidoo to have such an influence on Nicolette as she was '...fertile ground in which such thought processes could have been inculcated.'²⁴⁷ The court referred to her as a troubled person as she believed her maid practiced witchcraft on her, she was being sexually violated (spiritually) and her hair was being ripped off her head. The court accepted the fact that she truly believed these things and she did not disclose it to Prof. Schlebusch at the time of her consultation with him as she was scared she would be sent to a mental institution.²⁴⁸ The court believed that when Naidoo met Nicolette, he could see her vulnerability and he took advantage thereof.²⁴⁹

As for Hardus, Naidoo was able to win him over as Hardus was a loner. Hardus had no friends as he was mocked at school. Naidoo told Hardus about events that Naidoo could not have been aware of and the power that Naidoo had over Nicolette (a person Hardus loved and trusted) convinced Hardus completely.²⁵⁰ Hardus also pitied Naidoo as he told Hardus that he had been victimised by white people during apartheid and his family treated him badly. Naidoo became the brother to Hardus that Hardus never had.

In the judgment, there is not a lengthy discussion on the defence of non-pathological criminal incapacity. The case of *Eadie v S* is not referred to directly although the judge states that the '...defence of non-pathological mental deficiency or incapacity which is often referred to as

²⁴⁴ *Id* at 5-6.

²⁴⁵ *Id* at 8.

²⁴⁶ *Ibid*; See para 3.b.ii above.

²⁴⁷ *Id* at 9.

²⁴⁸ *Id* at 10.

²⁴⁹ *Id* at 11.

²⁵⁰ *Id* at 12.

sane automatism.²⁵¹ Only two cases are referred to: *S v Di Blasi* and *S v Harris*.²⁵² From both these cases the judge took a paragraph that stated the court has to decide, taking into consideration the facts from the case and not just the expert evidence, if a person had criminal capacity.²⁵³

The judge turned to the report that was written by the expert witness.²⁵⁴ Prof. Schlebusch testified that it would have been difficult for Hardus to act in contradictory manner other than the manner that Naidoo instructed him too. He also testified that it would not have been impossible to act in an alternative manner although this would be difficult.²⁵⁵ The judge then referred to the report by Prof Schlebusch that was written on Nicolette. The quote used by the judge was verbatim to the one referred to in the report except that her variables were that ‘her inordinately stressful relationship with her boyfriend, Mr Mathew Naidoo, at the time of her dysfunctional religious beliefs...’²⁵⁶ Prof Schlebusch was of the opinion that she was able to distinguish between right and wrong and could act in accordance with the appreciation thereof.

Both the Lotter siblings had indicated that they knew killing was wrong and it was a crime and they appreciated it, but they continued with the killing as Naidoo had ‘...inculcated in them the belief that their parents were evil and had to be destroyed in the interests of the work of God...’²⁵⁷ The judge looked at the reluctant actions of Hardus prior to the murder (he did not want to use the sap at the botanical gardens to poison his father and he was not able to stun gun his mother unconscious) and concluded that he was able to appreciate right from wrong and act in accordance with such appreciation.²⁵⁸ These actions gave Hardus criminal responsibility at the commission of the offence. The court also looked at the actions of

²⁵¹ *Id* at 16.

²⁵² 1965 (2) SA 340 (A).

²⁵³ *Id* at 16-17.

²⁵⁴ Medico-legal report: Mr Hardus J Lotter compiled by Professor Lourens Schlebusch 10/08/2011 The judge specifically referred to page 19 of the report which stated: “This refers to the defendant’s mental state at the time of the alleged offence. The clinician has to determine, as I did, whether the accused at the time of the alleged offence was unable to appreciate the nature and quality of his actions or did not know that the actions were wrong, by reason of mental illness or otherwise. Given this, and despite the fact that the patient is currently fully mentally competent as described in this report, aspects of his behaviour during the alleged offence do not fall within the realms of his usual conduct and can therefore not be considered to be free of transient dysfunctional behaviour. This could be aetiologically, that is causally, associated with several variables, including the inordinate stress he was exposed to and his dysfunctional religious beliefs as noted earlier and as further discussed in the report.”

²⁵⁵ *Lotter* above n14 at 18.

²⁵⁶ *Ibid*; refer to the report in 248.

²⁵⁷ *Id* at 19.

²⁵⁸ *Id* at 20.

Nicolette (she was able to think on her feet and took control of the stun gun when Hardus was reluctant, take the needle and inject it into her mother's vein which Naidoo was supposed to do, she threatened her brother to strangle her father) as well as the fact that she testified that she was not able to act contradictory to Naidoo's instruction, because he would abuse her as it was against the will of God.²⁵⁹ The court felt that she was able to challenge his instructions as she was able to ask him if he will not ask God for a lesser punishment for Hardus, when Hardus pleads guilty to the murders. The court concluded that she too was able to know the difference between right and wrong and was able to act in accordance with the appreciation thereof.²⁶⁰

At best, the control that Naidoo had over the siblings would lead to diminished criminal capacity.²⁶¹

The court turned to Naidoo and inquired whether he was involved in the murder of the deceased. The court found the testimony of the siblings to be truthful and reliable as they had both written down the same version in detail and it corroborated each other.²⁶² The court did not trust any evidence Naidoo represented as he thought himself cleverer than the police and the council - he was arrogant and boastful towards council. He had change his plea from guilty to not guilty and then stated that he had not all participated in the murder, but he pleads guilty as he helped cover up the murder and the court was not able to enter a plea of guilt.²⁶³ Naidoo had also bought all the equipment for the murders such as the syringes, cable ties, Taser and surgical gloves. The court concluded that he was present at the time of the crime even though he claimed that he was influenced by the police to make an admission which was not true.²⁶⁴ He had told Nicolette where to stab her mother and therefore he knew how many stab wounds there were, despite the fact that he stated that he could not look at the bodies of the deceased as it pained him too much to see someone he called mother and his 'buddy' dead on the floor. At one stage he also admitted that he stabbed the deceased and the court found that there is reason for this is as well. Naidoo needed Nicolette to not be guilty as she will not inherit portion of the inheritance bequeathed to her in her parents' will. Therefore the 'fall guy' had to be Hardus. Naidoo would then state that the police unduly influenced him to

²⁵⁹ *Id* at 21.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Id* at 22.

²⁶³ *Id* at 23-24.

²⁶⁴ *Id* at 27.

admit guilt and he would be free with Nicolette.²⁶⁵ The court accepted the evidence that Naidoo completely controlled the siblings' finances. If they objected to the control, he abused them.²⁶⁶ The court termed Naidoo a pathological liar and a con artist.²⁶⁷

The judge concluded that Naidoo obtained information from the siblings and used it in other circumstances to make them believe that he knows about events in which he was absent, he could forecast the future and he had powers from God. The court further stated that any person not involved would deem the actions of the Lotter siblings ridiculous but there are testimonies of thousands of people that have been misled by charismatic leader that made people believe that they have supernatural powers from God and could change the world. 'In the end that (sic) they were all sold something that was useless and many of them lost their lives for their stupidity and their beliefs.'²⁶⁸ The court found all three accused guilty of murdering the Lotter parents.

c) The sentence

When the court had to decide on the appropriate sentence, the court first noticed that the Lotter siblings were very young.²⁶⁹ The pre-meditated murder of someone usually constitutes life imprisonment unless there are compelling and circumstantial evidence that will lessen the sentence. For the Lotter siblings being under the control of Naidoo, he inculcated them into believing their parents are evil and it is the will of God to kill them.²⁷⁰

Counsel for the accused argued that the court should have been alerted when Naidoo asked if he could be sent for mental observation. The court stated that there was no basis for this as the accused denied that he wrote the letters that depicted him as a 'demented or overly-religious person' and therefore one cannot rely on evidence that you testify is not your evidence.²⁷¹ The court also stated that Naidoo had shown no remorse and it was not possible to rehabilitate him as Naidoo did not admit his guilt and it would be impossible to rehabilitate a person that believes he had not offended.²⁷² Naidoo's argument was also rejected that he grew up alone (because his mother had worked long hours) because he lived with other family members. His youth was also not a mitigating factor as he portrayed himself as mature

²⁶⁵ *Ibid.*

²⁶⁶ *Id* at 28.

²⁶⁷ *Id* at 29.

²⁶⁸ *Id* at 30.

²⁶⁹ (CC43/09) [2012] ZAKZDHC 51 (19 March 2012) 1-9.

²⁷⁰ *Id* at 2.

²⁷¹ *Id* at 3.

²⁷² *Id* at 4.

person, superior to everybody, arrogant with letters addressed to mock the police and the Lotter parents. He was the mastermind that had a plan from the start with the Lotter siblings: from telling his mother that Nicolette had been molested by her father and that why she needed to be prayed for, to stealing the money from stolen cards and PINs from the Lotter parents, sending threatening text messages and letters which should have led the police to believe that someone was after the Lotter family long before (one letter referred to an incident of eight years ago), buying all the tools for the murder and planning an alibi for himself. The court found that there was no mitigating factor to deviate from the prescribed sentence for Naidoo.²⁷³

Mitigating factors for Hardus included that the motive for the killing was not the money, he was a loner that he had no friends and he was easily influenced by his sister and Naidoo. He had no reason to doubt it when his sister confirmed that Naidoo was truly (portraying to be) an angel, a demon and the third son of God as he looked up to her and trusted her. He had also attempted to resist killing his parents on two circumstances and he was shunned and convinced to go through with it.²⁷⁴ He was also abused by Naidoo.

Nicolette also had no motive to kill her parents for the money. In addition to that, she was an abused woman and Prof. Schlebusch stated she suffered from ‘the abused woman syndrome.’²⁷⁵ Naidoo had physically and sexually abused her – to such an extent that he made her to drink his urine. The court was convinced that if she would do something that low, it seems plausible that she would do anything to please him.

The court further stated that the chances of either of the two siblings ever repeating a violent crime is nothing, but that society would expect a punishment that is more severe than correctional supervision or a suspended sentence for the death of two people that were an asset to society.²⁷⁶ The sentence must also deter others in future from thinking that a defence in the belief of witchcraft or the occult, will allow people not to be criminally liable.²⁷⁷ The evidence given in a case must extend beyond that which the accused testify themselves, as was the position in this case, where there was enough information to show that the Lotter siblings were influenced to the extent, which they testified to.

²⁷³ *Id* at 5-6.

²⁷⁴ *Id* at 7.

²⁷⁵ *Id* at 8.

²⁷⁶ *Ibid*.

²⁷⁷ *Ibid*.

Hardus was sentenced to ten years imprisonment for each of the murders, to run concurrently and his non-parole period is six years. Nicolette received twelve years for each of the murders, to run concurrently and her non-parole period is eight years. Their life sentences will be the thoughts of their deeds for the rest of their lives. Naidoo received two counts of life imprisonment, to run concurrently.²⁷⁸

d) Background of the Lotter Family

When one looks at the Lotter case, certain ‘abnormalities’ arise from the facts. These ‘abnormalities’ are better explained when one looks in depth into the Lotter family history and the background of the Lotter siblings. This background is given in *Innocent Acts of Evil* – a book written by their first attorney as told by Hardus Lotter.²⁷⁹ Nicolette Lotter’s belief in the *tokoloshe* began with tales from her grandmother when she was a child.²⁸⁰ Her grandmother was schizophrenic and had suffered from depression as a result of the cancer which led to her uterus being removed in her forties. Nicolette firmly believed in African spirits and demons her whole life.

While the children were growing up, their mother had accused their father of adultery. He denied these allegations and their parents made peace with each other. Their mother started working again and the children felt neglected. This made all three children a little bit dysfunctional – both daughters became religion obsessed (the other daughter joined the Shofar church and had condemned her family as they did not belong to and accepted the church) and Hardus retreated to his room with his computer.²⁸¹ Their parents were also believers in God and were part of the NG church.

Nicolette had anorexia nervosa which became worse after her mother accused her father of adultery. She became more paranoid and after the affair accusation, she believed that demons and evil spirits were attacking her home and her family. When Nicolette was 16, she and a friend had gone to a secret ‘model shoot’. When they arrived, they discovered it was a nude model shoot. She gave into the pressure and during the shoot; one of the men undressed and suggested (by pushing her head down) that she has to give him oral sex. She refused and he alternatively suggested that she must masturbate him. She was scared of being raped and did so. At this stage, she had a boyfriend, and when she told him of her experience, he broke off

²⁷⁸ *Id* at 9.

²⁷⁹ See in general Grundlingh D *Innocent Acts of Evil* (2011).

²⁸⁰ *Id* at 16.

²⁸¹ *Id* at 21-23.

the relationship. A few days later, he wanted to continue the relationship, providing that they have sex. She agrees, but he is verbally abusive towards her for another year, until her mother forces her to break off the relationship with him.²⁸² She continues to have eight sexual partners, a few casual one-night stands, smokes cigarettes and experiments with drugs until she is eighteen and went to the Durban Institute of Technology to study music. She makes friends with a Christian, realises that she has strayed from God and gives up alcohol, drugs and sex. She offers her services to the church, but the pastor notices her as a high-strung and unstable personality and encourages her to focus on her studies.²⁸³

Two years in higher education, Nicolette has started a Christian Jazz band named 'Rebirth'. That year Clementia started working for Nicolette's parents. Nicolette did not want the maid to work in her room or undress in her house as she could not stand the smell of her. Clementia was angry at these comments and she planted 'Sangoma gifts' all over their house like dead frogs, geckos, chicken bones, dry snake skins and threads of wool, as she knew Nicolette was extremely superstitious. Nicolette fasted to get rid of the demons, anointed their house with oil and holy water and became very skinny. After five years, she decides to ask her church, Westville Baptist Church to help her get rid of the spirits. Her mother contacted the church and stated that Nicolette wants attention and they must ignore her outcries of being cursed by the *tokoloshe*. Nicolette feels betrayed and believes that the church and her family are controlled by African magic. She contacts various other church groups, but nobody is willing to help. She attempts to make peace with the maid, buys her gifts, but their problems return and Nicolette is convinced that the maid is cursing her by using the banknotes that Nicolette gave her for taxi money. Nicolette is also aware that the maid's son is a Sangoma.

She joins the Christian Revival Church as this church focuses on demons and possession. The pastors pray with her and Clementia, but this is not effective. In 2007, she drifts away from her friends as they dislike her talks of demons all the time. She hears voices when she is alone in her room and believes that these are spirits and that there are spirits who are spiritually and physically raping her at night.²⁸⁴ She did not touch any kitchen utensils as the maid had touched them and she washed her clothes in her bathroom. Nicolette heard of an Indian exorcist living in Phoenix and went to her. She told the exorcist about all the demons

²⁸² *Id* at 42-43.

²⁸³ *Id* at 47.

²⁸⁴ *Id* at 52-54.

and spirits that she was afraid of and the exorcist exorcised these demons from her home and body at a price. The exorcist introduced Mathew Naidoo to Nicolette and he captured her attention by saying he is able to read her thoughts. He told her everything that she told the exorcist (the exorcist denied that she had told Mathew anything) and she was convinced he was able to read her mind and that this was a gift from God.²⁸⁵ They started dating even though her father was not fond of the idea that she was seeing an Indian man. Mathew convinced her of many things: he had three personalities – one was the human, the one a prophet and healer and the last, a rebellious personality.²⁸⁶ She also has a guardian angel called Balance and the angel is able to communicate through Mathew, who is a vessel, with Nicolette.

He started physically and emotionally abusing her when they ran into an ex-boyfriend of hers. He said that he wanted to leave her, but he does not as the angel Balance has told him, that she is important in the eyes of God.²⁸⁷ Their relationship continues in a spiral of arguments, sometimes accompanied by physical violence that leads to making up with sex. When she does something that he is displeased with, he will ‘transform’ into God and tell her that she must do as Mathias/Mathew says – he is the third son of God. After three months of being in the relationship, he quits his job and becomes the manager of her jazz band. He is in control of her bank account.²⁸⁸ He lived in her room without her parents knowing it. On one occasion, a music producer made contact with her to record her band. This made Mathew furious and in an argument to manipulate her, he stated that he had given up his job to help her, he states that her father is working with the maid and that her father is the one that has been raping her at night.²⁸⁹ He forces her to get rid of all her CD’s, diaries, items from her ex-boyfriends and all clothing that is considered too revealing. He orders her to cut off her blond hair and to wear less make-up, even though she wears it to cover up the blue marks he gave her.

When he abused her, he blamed it on his other rebellious personality that comes out and harms to her – this personality or demon’s name was Mathain and it killed her cat.²⁹⁰ His techniques of punishing her became more vile as the relationship continues – he makes her sleep naked on a tile floor; he sodomises her and penetrates her vaginally which gives her a

²⁸⁵ *Id* at 72-74.

²⁸⁶ *Id* at 82.

²⁸⁷ *Id* at 92-93.

²⁸⁸ *Id* at 102.

²⁸⁹ *Id* at 104.

²⁹⁰ *Id* at 110.

rash; they shared everything including a tooth brush; he urinates on her head as a form of blessing; scratches, bites and squeezes her nipples till she cries from pain; urinates in her mouth and forbids her to brush her teeth.²⁹¹

Mathew spent a lot of time at the Lotter's house during the day and befriended Hardus. One has to keep in mind that Hardus did not have friends; he kept to himself and spoke mainly to his parents and his sister. Mathew told Hardus events of Hardus' past that Mathew could not know about and Nicolette denied that she had told Mathew. He convinced Hardus of his prophetic and spiritual powers and that they were part of the Twelve Knights of God's Will.²⁹² Mathew reduces the siblings' trust in each other by telling Hardus of his sister sexual history – Hardus has less respect for his sister and she is too ashamed to argue with Mathew. Hardus stopped going to church with his parents as it was his sole purpose to understand the teachings of Mathew.²⁹³

When the parents left one December, Mathew tightened his grip further around the Lotter siblings. He had made Nicolette lose her position as a waitress as he was causing scenes at the restaurant. She found a new position and worked during the day. While she was away, Mathew had Hardus pray and study the Bible for hours. He would order them to pray over him throughout the night and if he got violent and a demon possesses his body, it was their fault as they were not praying hard enough.²⁹⁴ Slowly Mathew started convincing Hardus that his parents were Satanists as they did not fight for the rights of black and Indian people during Apartheid and that the Lotter family dates back to the Bible times when a Lotter back then turned his back on the will of God.²⁹⁵

When Nicolette lost her second job (her managers did not want a person working there with scars and blue marks on her face), money became very tight. Her band had not done well, since Mathew took over. He was rude to the clients and used the stage to portray his 'comedy showcase' – which was unsuccessful and the band lost regular gigs.

Mathew was extremely gluttonous and used all their money to buy food and especially, take-aways. As the air became intense because he was not able to get money from them, he physically abused both of them. They made plans to get money: stole from their mother's

²⁹¹ *Id* at 113.

²⁹² *Id* at 120-121.

²⁹³ *Id* at 126.

²⁹⁴ *Id* at 159.

²⁹⁵ *Id* at 149-150.

purse and committed credit card fraud with their father's card. He had a plan to send threatening messages to the Lotter couple and then have Hardus kidnapped. The SAPS became involved and their parents suspected Mathew. This made Mathew decide that they should be killed and he encouraged both siblings further that their parents are Satanists and it will be God's will to kill them.²⁹⁶

e) The psychological report on Hardus Lotter

When Hardus was sent for psychological evaluation, the psychologist had findings which were not specifically referred to in the judgment.²⁹⁷ Prof Schlebusch found that due to the consistent coercive persuasion that Hardus was exposed to (which included mind control, religious construction and remoulding), he became psychologically trapped to such an extent that he did not have any allegiance with his parents.²⁹⁸

There are various factors that played a role in the crime that he had committed – he was hyper religious but his religious beliefs were dysfunctional (he knew the difference between right and wrong, yet he had to kill his parents) and the stress that he felt before the event, led to a '...socio-cultural/religious decompensation and behavioural dyscontrol'.²⁹⁹

It was stated that his behaviour was out of character and that these acts of coercive persuasion could manifest in three ways: It could interrupt his life flow, it can be a short event or various short events with a single intention or could be more prolonged and cause further psychopathology.³⁰⁰

f) An alternative judgment

When one considers the second chapter of this dissertation and the background together with the facts of the Lotter case, a feeling exists that justice did not prevail for the Lotter siblings. One can criticise the Lotter case on a few points. The judge accepted and relied on the expert evidence by Prof. Schlebusch. It was also stated that there were thousands of other expert evidence and this tacitly implied that the court believed this evidence and fully relied on it. It

²⁹⁶ *Id* at 224.

²⁹⁷ Schlebusch (2011) 19.

²⁹⁸ *Id* at 21.

²⁹⁹ *Ibid* .

³⁰⁰ *Id* at 22.

cannot be said that the court did not agree with the expert evidence given or felt at any stage that the evidence was misleading as the expert evidence was not able to indicate whether the Lotter siblings had non-pathological incapacity. Beyond the expert evidence on coercive persuasion, Prof Schlebusch also testified that Nicolette had suffered from battered wife syndrome and the court did not reject this evidence. The court did not explain the syndrome, but it was not rejected, and therefore also tacitly accepted.

Prof. Schlebusch actions are also questionable. He stated that Nicolette had full capacity, yet it might not have been his objective opinion. As indicated above, a psychologist that testifies as a witness needs to be objective.³⁰¹ Nicolette had several sessions with the psychologist when her parents were still alive, but he was not able to get any useful information out of her. This might have made him frustrated and therefore he had preconceived ideas about her. The fact that he stated she had full capacity must have had an adverse effect on her case.

The court was aware that both siblings had unstable or negative identities. Nicolette suffered from anorexia nervosa, was an exceptionally unstable teenager, she was an Afrikaans, white girl that believed in African witchcraft (*tokoloshe*, *sangoma*, and evil spirits amongst others), overly religious and hopped from church to church to find an exorcist. Hardus was a loner, he had no friends, and he kept to his PC and TV. He was very shy, sensitive, introverted and it would be easy to influence him. He was teased at school and felt like he did not fit in into his community or society.³⁰² The judge stated that there was no chance that either of them would commit such a violent crime again and that they had no motive to murder their parents except for the fact that they had been persuaded into the crime by Naidoo. It was also stated, during the sentence that their own lifelong sentence would be the fact that they knew they killed their parents (and it was not a justified killing). On the issue of unstable identities, one has to wonder why the court did not refer Nicolette for observation in terms of section 78(2) and 79 of the Criminal Procedure Act which states that the court may direct the matter, if it is of the opinion that accused is not criminally responsible due to mental illness or defect.³⁰³ It is quite

³⁰¹ See para 2.f.ii as stated by Cohen and Malcolm

³⁰² *Id* at 9.

³⁰³ S 78 (2) If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

obvious that she does not have conventional beliefs or personality and this enquiry could have given clarity as to her unconventional views.³⁰⁴

Their defences were not phrased as a defence of non-pathological criminal incapacity, but it can be deduced from the judgment that it was the defence referred to.³⁰⁵ Their defence was that they were influenced to such an extent by Naidoo ‘...that they were not exercising their own free will acting as they did.’³⁰⁶ The Rumpff - report stated that when a person’s conative functions are impaired, it will affect their ability to exercise free will.³⁰⁷ When one views the history of judgments in which this defence arose, one can clearly see that the courts are reluctant to use it for fear of misuse. It would also seem that the courts are more reluctant to declare this defence successful, as it was further confused by *S v Eadie*. Take into consideration: the influence that Naidoo had over them (as the court declared that he was the mastermind behind everything from the theft, abuse, poisoning of their father, planning of the murder, setting alibis for after the murder), the unstable and negative identities that the siblings had, their lack of motive to kill their parents except for the fact that it God’s will and God had told them through Naidoo to kill their parents and the fact that they still continued with the ‘God’s plan even after they had been arrested (Hardus had given an untrue confession and only after realising that Naidoo had betrayed them by showing the police where all the evidence was buried, did he realise the truth after 15 hours. Nicolette only stopped believing that Naidoo was the son of God after the police organised that she would ‘bump’ into him, after she gave a confession, and Naidoo revealed to her that he does not believe in God).³⁰⁸ In chapter three, I refer to Snyman when he states that the defence of non-pathological criminal incapacity can still exist providing it was caused by a condition other than provocation.³⁰⁹ It is my submission that the coercive persuasion that Naidoo caused is far enough removed from provocation to render this as a rare condition by which the defence of non-pathological criminal incapacity can succeed.

They were able to lay a basis for their defence by using the expert witness, Prof. Schlebusch. The court accepted the expert witness’ testimony. The court also stated that the two of them

³⁰⁴ Her grandmother was diagnosed with schizophrenia and Nicolette herself was reported as being depressed. If it was found that she lacked capacity based on a defence of pathological criminal incapacity. This begs the question if an accused can be coerced to such an extent that it affects their capacity. This question will not be answered for purposes for this dissertation. Refer to the sections 77,78 and 79 of the Criminal Procedure Act.

³⁰⁵ *S v Lotter* at 3.

³⁰⁶ *Ibid.*

³⁰⁷ Burchell (2010) 358.

³⁰⁸ Grundlingh (2011) 343-364.

³⁰⁹ Refer to 37 above.

(the Lotter siblings) were credible witnesses. When one considers these factors, it has to be stated that alternative judgments seem more warranted in the interest of justice.

The expert witness stated that he believed that Nicolette knew the difference between right and wrong and was able to act in accordance to such appreciation. It is submitted that the judge erred in that finding as she was not only a victim of coercive persuasion, but also a battered partner. She was the most unstable sibling and experienced paranoid stress before, during and after the crime. She had dysfunctional beliefs and did not eat. She was exceptionally vulnerable and endured physical, sexual, mental, emotional and verbal abuse. She was bombarded with guilt from Naidoo and pressure to obtain money for him. All these factors and the ones mentioned above, leads to extraordinary stimulus that indicated that her conative function (her free will) was impaired. Even though the expert witness stated that her conative function was intact, the court must look at the facts of the case and the expert evidence and must decide in the end whether a person had criminal capacity.

The expert witness stated that it would have been very difficult (but not impossible) for Hardus to act contrary to the instructions of Naidoo due to the thought reform that was caused by Naidoo. It is submitted that the judge erred in this part of the judgment as well. When one considers the weak personality that Hardus has and the influence that was not only caused by Naidoo but by his sister, the reluctance that Hardus had shown at the Botanical gardens and when the actual murders was committed does not prove that he had his full capacity intact. He was under constant pressure from both of the other parties. These factors, as the psychologist report stated, led to an act that was out of character for Hardus.³¹⁰

The next factor to consider was the fact the fact that Naidoo was not permanently present in during the murder.³¹¹ Naidoo controlled the siblings in various ways – he had full control over their finances and they lied, stole and worked to give up all their savings for him to spend. He verbally and physically abused both of them and he controlled their day-to-day patterns (he made them pray and read from the bible through the night). He sexually abused Nicolette in a perverse and vile manner and she allowed all of it. If one considers all these different controlling mechanisms and the fact that the siblings did not refuse any of them, for the sake of keeping him satisfied, then one cannot look past the fact that they would have

³¹⁰ See above para 2.b and 2.c for a full explanation of how weak personalities place under stress are more susceptible to conversion. The fear of freedom and total individuality could be other reasons that have led Hardus to fall more easily for Naidoo's plan.

³¹¹ See above at 41.

done anything he commands of them whether he was present or not. For the siblings, killing their parents went beyond keeping Naidoo satisfied – it was a matter of heaven or hell. He had convinced them that their parents were Satanists and if they did not kill them it was a betrayal to their religion. They were overly and obsessively religious (even more so after Naidoo) and can therefore not be judged according to an ordinary person with balanced beliefs.

My main submission would therefore be that neither of the siblings had their second leg, the conative function, intact and their defence of non-pathological criminal incapacity based on coercive persuasion should have succeeded.

g) An alternative sentence

The alternative criticism looks at the factors the court considered when it decided on a sentence. The factors that were relied on were their youth, the fact that they had no motive such as inheritance, the abuse that they suffered under Naidoo and the fact that they took instructions from him.

The court stated although there was no chance that they would commit such violent crimes again, society would be appalled if they received correctional supervision or a suspended sentence.

In the case of *S v Zinn* it was stated that when considering a sentence the court has to take into account the seriousness and circumstances of the crime, the personal circumstances of the offender and the interests of society.³¹² The purposes of punishment are deterrence, retribution, prevention and rehabilitation.³¹³

There are factors that the court overlooked or did not rely heavily on. The first is that the Lotter siblings are not a threat to society. They are ideal candidates for rehabilitation and the chances of them committing any serious crimes are nil. Society does not need to be deterred or prevented from committing a crime in these circumstances as these circumstances are exceptionally unique. It can be said that retribution has already prevailed as both the siblings felt extreme remorse for killing their parents and therefore a moral punishment exists: they will always have to live with the fact that they killed their parents.

³¹² 1969 2 SA 537 (A) at 540G-H.

³¹³ Terblanche S *Guide to sentencing in South Africa* (2007) 155- 171.

The second factor would be that the court overlooked the personal circumstances of the siblings. They were both productive and educated members of society. Both of them had harmless personalities. They did not have any violent tendencies whilst they were growing up and both would have been able to benefit from psychological therapy and rehabilitation to make them fully functioning members of society again.

The court has shown its reluctance to accept the defence of non-pathological criminal incapacity in the past. It is commonly known that this is due to the misuse that can prevail. When one looks at the subtext, it seems that the court is reluctant as it is afraid of the judgment that would come from society and the media. Therefore the main emphasis of the sentence is on the interest of society. In the *Lotter* case, all factors were set aside and the interest of society was placed at the centre of the sentence. There was not a value judgment made on the expert evidence, the facts of the case, the personal circumstances of the offenders and their defences, but a sentence was given that would please society.

It is therefore my secondary submission that the sentence was too harsh and a suspended sentence or correctional supervision with the compulsory rehabilitation and psychological therapy should have been considered. They had a support group (extended family and pastors from previous churches) that support them in prison and could have supported them in their sentencing. The court could have also made a restorative justice order which would have included family group conferencing and community service.

h) Lack of recognition of the Constitution of RSA

The Constitution was not referred in the case of *S v Lotter*. Various sections could have been used by the court to develop the defence of non-pathological criminal incapacity. The first is section 8(3) which stated that the common law must be developed in terms of the Bill of Rights if the legislation does not give effect to that right.³¹⁴

It is also stated in section 39(1)(c) that courts may take foreign law into account when interpreting the Bill of Rights and section 39(2) indicates that when one develops legislation or common law, the spirit, purport and the object of the Bill of Rights must be promoted. The court could have developed this defence in light of the foreign law that has been mentioned in

³¹⁴ Constitution of the Republic of South Africa, 108 of 1996.

Chapter 2.³¹⁵ The defence of non-pathological criminal incapacity has not been developed to its full potential and therefore accused persons did not have the benefit of utilising it.

The court stated that people who believe in witchcraft or the occult should be deterred from committing similar acts as these beliefs would not suffice in a person escaping liability.³¹⁶ Although not the issue at hand, this statement does not reflect the right of equality as stated in section 9 of the Constitution, as people would be indirectly discriminated against based on their religion. If one is not able to construct a defence that excuses criminal liability that was caused by the instructions or belief in a religion, then there is indirect unfair discrimination against the right to freedom of religion. The result would be that one can choose a religion, but if there is a lack of judgment and the religion convinces you to do an act that would be to the benefit of the church/yourself/God, you would always be liable even if you did not have the capacity to appreciate what you were doing.

i) Similarities between the Nicolette Lotter and Cézanne Visser case

In the previous chapter, the *S v Visser* case was discussed.³¹⁷ Since the facts and judgment of the Lotter case has been discussed above, one can draw similarities between the Lotter case (specifically Nicolette Lotter) and Cézanne Visser:

- Both women had unstable or weak/fragile personalities in spite of the fact that they were very educated – Visser's was caused by poor performance in her Bar exam and Lotter was due to the fact that she was an outsider in her community (as a white, Afrikaans, NG-church raised girl believed in African spirits), she had anorexia, she was paranoid and had felt guilty about her sexual past.
- Both women consider their lovers as gods – Visser saw Prinsloo as her god in a sexual context and Lotter believed Naidoo was the third son of the Christian God and that God spoke through him.
- Both were abused physically, but were abused sexually in an abnormally sexual manner e.g. drinking urine or excrement.
- Both had undergone major wardrobe and physical changes – Visser coloured her hair, went to a gym, had piercings in her private parts, had two breast implant surgeries,

³¹⁵ See above para 2.e.

³¹⁶ *S v Lotter* (sentencing) at 8.

³¹⁷ See above 37-40.

and wore provocative clothing. Lotter had to cut her hair, wore no make-up and threw her clothes out that Naidoo considered too provocative.³¹⁸

- Both women used a defence of non-pathological criminal incapacity – Visser stated that she did have a will of her own and Lotter stated that she acted under duress, although the court stated that they were not able to exercise their own will. As soon as the facts unravelled, one clearly traces the presence of coercive persuasion caused by physical and even more severe sexual abuse.
- In both of the cases, the court admitted that coercive control exists. Both cases stated that if the accused had to be acquitted, because of a defence of non-pathological criminal incapacity based on coercive persuasion, it would show an underemphasise in other factors such as the other witness (Visser) and the community (Lotter).³¹⁹
- Although neither of the accused was able to be acquitted on the defence of non-pathological criminal incapacity, they were able to get mitigating sentences, therefore show that courts are reluctant to allow these defences for acquittal, but are willing to give a lesser sentence than the prescribed sentence.

j) Conclusion

The court in the *S v Lotter* case accepted all the expert evidence and all the testimonies of the Lotter siblings, yet it failed to acknowledge that there was a reasonable possibility that they did not have criminal capacity at the time of the crime. It would have been justified for the court to recognise and accept their defence of non-pathological criminal incapacity based on coercive persuasion and acquitted them. The other alternative was a less harsh sentence as the interests of society was overemphasised in the sentence.

It would have been possible for the court to develop the defence of non-pathological criminal incapacity in terms of the Constitution, yet it seems as if courts fear to define the border of non-pathological criminal incapacity after *Eadie*.

In both the *Lotter* and the *Visser* case, we have unconventional facts and a defence that is based on a phenomenon that is foreign to South African courts. Although the court agrees

³¹⁸ In *S v Engelbrecht* 2005 2 SACR 41 (WLD) 65 the court explained that the victim is controlled by the abuser as he destroys her autonomy 'through monitoring and controlling her body and bodily functions. He supervises what she eats, when she sleeps, and what she wears'.

³¹⁹ The theory of coercive control was also referred to in *S v Engelbrecht* (n318).

that coercive control exists, it is reluctant to admit that it can be a factor (that is not related to provocation) that would allow for the defence to succeed.

5. Chapter Five: Conclusion and Recommendations

The three previous chapters contains a layout on the defence of non-pathological criminal incapacity, an explanation of coercive persuasion and an analysis of the *S v Lotter* and others case with its alternative judgments.

The second chapter which dealt with coercive persuasion explained the term coercive persuasion (sometimes referred to as brainwashing) as it was coined in 1950 by Edward Hunter. Various authors are discussed and the phenomenon of religious brainwashing is also referred to. There is also a definition of coercive persuasion as perceived by the *DSM-IV*. All authors come to a similar conclusion: the weaker the personality/the more negative the identity/unstable the victims of coercive persuasion, the more susceptible those people are to being converted. The unstable, weak, negative identities are inclined to stay converted for a shorter period of time than those who have stable and strong personalities. All personalities can be coerced – not one personality is immune against it. It is only a matter of time for different personalities. The fear of having civilians coercively persuaded into cults or alternative religions are so severe that countries such as France and Spain have enforced legislation that prevents a cult from converting an individual by altering his/her personality. This chapter also deals with PTSD and BWS as well as the role of the expert witness in a South African court.

The third chapter dealt with the defence of non-pathological criminal incapacity and the history of case law which shows the courts' reluctance to accept such a defence. This defence is also analysed from a psychiatric viewpoint and can be defined as Dissociative Disorder, BPS and PTSD. The defendant needs to lay a basis for this defence by using expert evidence and they have to prove that there is a reasonable possibility that they (the accused) did not have criminal capacity at the time of the offence. If the court accepts the expert evidence and accepts that the defendants are credible witnesses, there is a better chance that the defence will succeed. The final decision does however depend on the court as they take the events before, during and after the crime into account.

In the fourth chapter, the *S v Lotter and Other* judgment and sentencing was discussed with a full background of the Lotter siblings. The court accepted the Lotter siblings as credible witnesses and accepted the evidence from their expert witness. The court rejected their defence of non-pathological criminal incapacity based on the fact that Hardus showed

reluctance to kill his parents, Nicolette was able to control a situation in the murder scene where Hardus was reluctant and Naidoo was absent and she asked Naidoo if he could not ask God for a lesser sentence for Hardus, when he was still their ‘fall guy’. The underlying feeling that one gets is that the court did not accept their defence and granted them imprisonment, because society would expect this from the court. The main submission in this dissertation was that the court erred in its judgment as it did not reject the defence, because a foundation was not laid properly – it rejected the defence, because of society’s opinion and for its fear of misuse. The court did not take the Constitution into consideration as it did not develop the defence in line with the Bill of Rights. The court could have considered foreign law and the principle of equality which ensures citizens that they will not be discriminated against based on religion. As a secondary submission, the court could have granted a lesser sentence (such as a suspended sentence or correctional supervision) as the Lotter siblings are not a threat to society. The sentence the court imposed was too harsh as there was too much emphasis on the opinion of society. Justice did not prevail accordingly in this case.

The recommendations that I would submit pertaining to the Lotter case is that the defence of non-pathological criminal incapacity based on coercive persuasion could have been successful in the *Lotter* case. Coercive persuasion is far removed from provocation and can be proved by expert witnesses. Psychiatry would be able to explain coercive persuasion in terms of PTSD and Dissociative disorder and psychology would be able to explain it in terms of human behaviour.

Other recommendations that I would suggest:

- I would suggest that as part of psychiatric and psychological training at a tertiary institution; or legislation that forms part of the Criminal Procedure Act for expert witnesses (limited to psychiatrists and psychologists) – a course/subject/workshop that explains the basic principles of criminal law (specifically terms such as act, sane automatism, insane automatism, capacity, defence of non-pathological capacity). The aim of this would be to provide clarity of certain legal terms versus medical terms – psychiatrists and psychologists must be able to understand what defences the court is referring to.
- My second recommendation would be legislation that would make it compulsory for both sides of a case to use at least a psychiatrist and a psychologist to lay a basis for their defence and counter argument. One could make use of state psychiatrists and

psychologists if the accused is not able to afford these expert witnesses. The reason for this recommendation is to provide the court with additional sources and clarity, that will equate to a judgment, not only consisting of legal principles and facts, but a psycholegal background.

- My recommendation pertaining to the defence of non-pathological criminal incapacity is that the defence still exists as interpreted by the third suggestion as stated by Burchell.³²⁰ The courts can consider the accused from an objective-subjective approach i.e. looking at the accused in a subjective group (e.g. battered women) and analysing him/her objectively according to that group. Therefore provocation will still be rendered a factor by which the defence can succeed (although the chances are almost nil), but battered wives/spouses/partners have a chance of acquittal if there is enough evidence of prolonged abuse and exhaustion of all other resources.
- In the alternative to my third recommendation, I would request the Law Commission/Human Rights group/ University *amicus curiae* or any other party that has an interest in the development of criminal law in light of the Constitution to make an ex parte application in Constitutional Court for the development of the defence of non-pathological criminal incapacity in terms of section 35(3)(b) of the Constitution that states: ‘Every accused person has a right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence.’ If the Constitutional Court can develop the defence in accordance with the Constitution with more specific boundaries, then it enables an accused to prepare for a defence of non-pathological criminal incapacity.
- My next recommendation pertains to the battered wives/spouses/partners. Considering the amount of domestic violence there is in South Africa and the amount of cases that have surfaced of women killing their husbands, because of abuse, I would suggest that the Law Commission look into a form of legislation that would protect the accused-victims.³²¹ I would suggest that the commission bases the legislation on a model that

³²⁰ Refer to para 2(b) at 37-38.

³²¹ Statistics SA released this as part of the *Victims of Crime Survey 2011* (November 2011) at 4:

‘Assault and sexual offences are difficult to capture in a household survey because of their sensitivity, and as a result they are normally under-reported. The results show that most perpetrators were known people from areas other than the area of residence of the victim (selected individuals). Nearly a third (29,9%) of the victims of assault were attacked by a known community member in their area, their spouse or partner (20,9%), while only 10,5% stated that the perpetrator(s) was an unknown community member. When it comes to sexual offences, 38,4% of victims were victimised by a known community member(s) in the area of residence. In 2010, most incidents of assault (35,7%) occurred at home, while 18,6% occurred in the streets outside

is similar to the model the *amicus curiae* suggested in *S v Engelbrecht*.³²² Women can be afforded a chance on acquittal if it has been shown that they have been abused over a long period and they have limited their sources. It might also serve as a deterrent for abusive partners.

- I would also suggest that the Law Commission make an inquiry into coercive persuasion, especially in the context of religion and domestic violence. There are various religions practised in South Africa and some of them develop from culture and custom. Religion is protected under section 15 of the Constitution, but it is difficult to state which of these are religions and which are cults. Various crimes are committed every year which are associated with religion such as muti – murders and terrorist attacks. There needs to be a clearer understanding of coercive persuasion and the control that it has over the victims that become the accused. It also needs to be inquired in terms of domestic violence as the abuser can use his power over his abused power to make her/him commit illegal activities. The abused partner will yield under this control because of fear/indoctrination or reward.

When one views cases of the future (similar to those of the Lotter) these recommendations have to be taken into account, with the purpose of creating

offices/shops. A third (33,6%) of sexual offences (including sexual assault, rape and domestic sexual abuse) occurred in a field or in parks, followed by 29,8% that took place at home. It was recorded that 18,5% of sexual offences took place at someone else's home. One fifth (20,6%) of the victims who were assaulted thought that the motive was jealousy; a further 17,4% thought money or other financial motives or sudden personal anger motivated the assault, whilst 12,1% asserted that they were assaulted because of long-term personal anger. <http://www.statssa.gov.za/publications/P0341/P03412011.pdf> (accessed: 01/05/2013).

³²² 2005 2 SACR 41 (WLD) at 91: If a person ('the victim') acts with lethal force against another ('the abuser'), and the victim;-

1. has been subjected to forms of domestic violence as defined in the Domestic Violence Act, 1998, by the abuser over a sustained period of time, and which forms of domestic violence, through a pattern of coercive control, has reasonably induced a state of psychological and or physical captivity in the mind of the victim; and
2. has reasonably explored reasonable avenues of escape from the abuser, the reasonableness thereof being determined with reference to inter alia:

-2.1. reasonable attempts to end contact between the victim and abuser; and

2.2. reasonable attempts to gain the assistance and/or protection of the police or other institutions or family and friends; and

2.3. any other relevant fact; and

3. reasonably apprehended the threat of death or serious injury to him/herself, a family member, or some other legitimate and commensurate interest at the hands of the abuser if he/she did not so act, notwithstanding that such threat was not discernibly imminent; and

4. has had his/her conative power to act in accordance with his/her appreciation of right and wrong greatly weakened or severely eroded by virtue of the domestic violence perpetrated by the abuser; then the victim will not be held liable for the killing of the abuser since the law cannot expect the victim to have endured the threat of the possibility

of a sacrifice of his/her life or other commensurate interest; the victim's conduct will not be unreasonable.

improved and clear judgments that will promote justice and sound jurisprudence. This dissertation's aim is to provide recommendations that would ensure that justice will prevail.

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