

**THE CONSTITUTIONAL VALIDITY OF SECTION 78(1B)
OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 WITH
REGARD TO SECTION 9 OF THE CONSTITUTION OF
THE REPUBLIC OF SOUTH AFRICA, 1996**

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by

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ABSTRACT

This study evaluates the constitutionality of section 78(1B) of the Criminal Procedure Act 51 of 1977 (CPA), which places the burden of proving criminal capacity on the party who raises the issue, against section 9 of the Constitution of the Republic of South Africa, 1996 (CRSA). In a legal system such as ours, that has a high regard for equality, any form of unequal treatment must be scrutinised, assessed and, if found to be unjust, rooted out. Even more so where the unequal treatment affects a marginalised minority group such as the mentally disabled.

This study weighs section 78(1B) against section 9(1) of the CRSA. It also weighs the section against section 9(3) of the CRSA. Attempts are made to justify possible infringements according to section 36 of the CRSA. An appropriate remedy is then ascertained.

This study also provides the historical development of section 78(1B) of the CPA – both in the common law and statute.

This study furthermore provides original guidelines and principles in assessing expert evidence where criminal capacity is placed in dispute due to a mental illness or defect of the accused.

The main findings are that section 78(1B) infringes on both section 9(1) and section 9(3), that it cannot be justified in terms of section 36 of the CRSA and that the appropriate remedy is the striking out of the whole section from the CPA.

Key words: Canadian law; Constitution; constitutionality; criminal capacity; Criminal Procedure Act; equality; equality before the law; expert evidence; justification; mental defect; mental illness; pathological criminal incapacity; psychiatry; psychology; section 78(1A); section 78(1B); severance; unconstitutional; unfair discrimination.

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CHAPTER 1

INTRODUCTION: THE MANIAC'S LOT

*Take all, but hear my earnest prayer,
'Tis breathed in tears, reject it not, -
Take all - but let me never share
the hopeless, soulless MANIAC'S lot.¹*

1.1 Introduction

It might be argued that the 'maniac's lot' that the poet, William B Tappan, refers to above finds resonance in section 78(1B) of the Criminal Procedure Act 51 of 1977 (CPA). The cause being that section 78(1B) of the CPA places a burden of proof on an accused who raises a defence of pathological criminal incapacity (formerly known as the defence of insanity). Were it not for his mental disability therefore, the 'maniac' would not have this burden.

Section 78(1B) of the CPA reads thus:²

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.

This chapter sets the stage for the process of assessing the constitutionality of this section. It will address certain preliminary issues, namely: whether section 78(1B), despite its neutral wording, applies to the Prosecution and the accused; whether the section applies to the mentally abled accused too; the need to properly assess psychiatric and/or psychological evidence and why this study will test section 78(1B) against the right to equality instead of the right to be presumed innocent. A short exposition of this study's proposed significance follows. Finally a description of the methodology employed in testing the section against the Constitution is provided.

¹ Excerpt from 'The Maniac' by WB Tappan *The Poems of William B. Tappan* (1834) 96.

² This subsection was inserted by sec 5 of the Criminal Matters Amendment Act 68 of 1998 (CMAA) and came into effect on 28 Feb 2002.

1.2 Section 78(1B): applicable to both sides in a criminal trial?

At first glance the wording of this section seems innocent. Whoever raises the issue of criminal responsibility³ must bear the burden of proof thereof. One would be inclined to think that if an accused does not raise the issue, then he acquires no burden of proof with regard to his criminal capacity and that the Prosecution keeps the burden of proof to prove all the requirements of criminal liability. This however is not the case.

Section 78(1B), along with section 78(1A),⁴ is merely the enactment of the long standing common law principle of the same effect. The principle, that in cases where pathological criminal incapacity is raised as a defence the accused must carry the burden of proof, was incorporated from the English law into the South African common law in the case of *R v Booth*.⁵ Since 1878 therefore the law has been that accused, who raise insanity⁶ as a defence, must prove their pathological criminal incapacity.

It is furthermore hard to see why the Prosecution would raise the issue of criminal capacity expressly. Even if they do not expressly raise the issue, they still carry the burden of proof to prove all the requirements of liability.⁷ Why focus a court's attention on the matter when the same results can be achieved by merely 'going about business as usual'?

There can therefore be little doubt that, despite the neutral wording of section 78(1B), it is only aimed at accused and that it has no effect on the Prosecution other than to lighten its

³ Confusion might occur with the use of this phrase. It seems that the courts use the terms 'criminal responsibility', 'criminal liability' and 'criminal accountability' as synonyms. However, the term 'criminal responsibility' in context of sec 78 of the CPA does not refer to liability as a whole, but only to the requirement of criminal capacity. To eliminate any possible confusion this study will refrain from using the phrase 'criminal responsibility' and will instead use the terms 'criminal liability' and 'criminal capacity'. The courts have also in some cases been careful to distinguish between the two possible meanings of 'criminal responsibility' e.g. *S v Hartyani* 1980 3 SA 613 (T) 618 and *S v Makete* 1971 2 SA 214 (T) 215D. Furthermore, in this study the terms 'accused with a mental illness or defect' and 'accused with mental disabilities' will be used as synonyms, even though the latter term usually refers to a much broader range of 'disabilities' than a mental illness or defect.

⁴ Sec 78(1A) reads as follows: 'Every person is presumed not to suffer from a mental illness or mental defect so as to not be criminally responsible in terms of section 78(1), until the contrary is proven on a balance of probabilities.'

⁵ (1878) Kotze 51.

⁶ The term 'insanity' had been used by the courts and authors alike for many decades. Due to developing sensitivity towards the mentally ill or disabled however this term now seems outdated and insensitive. As a result this study will only use the term 'insanity' where the context does not allow for more modern terms like 'pathological criminal incapacity' etc. Canadian law has redubbed this defence as 'the defence of not criminally responsible due to mental disorder'.

⁷ If no party raises the issue then the burden will be on the Prosecution to prove all requirements beyond a reasonable doubt. Thus, again the question: why would the State raise the issue?

burden of proof.⁸ The reason for the neutral wording was perhaps to disguise this very fact, should this section eventually be challenged.

1.3 Section 78(1B): applicable to all accused?

The Legislature seems to have broadened the common law principle that only mentally disabled accused (or accused who raise pathological criminal incapacity as a defence) receive a burden of proof. Section 78(1B) does not specifically refer to any type of accused, but instead uses the term 'criminal responsibility of an accused'. The shifting of the *onus* will therefore take place when the criminal capacity of an accused is raised – irrespective of whether the accused is mentally disabled or not. The focus, so it seems, is rather on the criminal capacity of an accused, than on his mental state.

But as soon as one considers the practical effect and the historical context of the provision, one will realise that it is primarily aimed at the mentally disabled accused that raise the issue of their criminal capacity. The neutral wording may act as a deterrent for the mentally abled accused – who would rather now base their defence on sane automatism⁹ than non-pathological criminal incapacity. However, the mentally disabled accused *must* place his criminal capacity in dispute because that is the requirement for liability that is affected by a mental illness or disability. A mentally ill or disabled accused therefore has no other choice than to place his criminal capacity in issue, whilst a mentally sound and able accused can evade the *onus*.

Burchell is also of the opinion that section 78(1B) *only* applies with respect to mentally disabled accused, despite the impartial wording of the section.¹⁰

Therefore, although the section is worded to ostensibly apply to all parties in a criminal trial, this is only the glossy exterior of the section. If one gives a moment of thought to the development of the provision and the practical realities, one will realise that section 78(1B) is aimed at the mentally disabled accused who place their criminal capacity in dispute with the defence of pathological criminal incapacity.

⁸ It is furthermore useful to note that Canadian law *prohibits* the Prosecution from raising the issue of criminal capacity: *R v Swain* (1991) 3 CRR 1 (SCC).

⁹ Especially also after the decision in *S v Eadie* 2002 (3) SA 719 (SCA) which equated the defence of *non-pathological* criminal incapacity to sane automatism.

¹⁰ See Burchell (*supra*) 390-391.

1.4 The need to properly assess psychiatric and/or psychological evidence

Sections 77(1) provides that if it appears to a court (at any stage of criminal proceedings) that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on - in accordance with the provisions of section 79.¹¹

Section 78(2) provides much the same, namely: 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 79.¹²

Section 79(1) requires an enquiry and a report on the mental well-being of the accused. Depending on the alleged crime, different experts are required. For charges of murder, culpable homicide, rape or compelled rape (in terms of Act 32 of 2007)¹³ or another charge involving serious violence, or if the court considers it to be necessary in the public interest or where the court in any particular case so directs the following experts must be involved:¹⁴

- the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court;
- by a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise;
- by a psychiatrist appointed for the accused by the court; and
- by a clinical psychologist - where the court so directs.

¹¹ That is, the accused is mentally disabled during the course of the trial.

¹² That is, the accused was mentally disabled during commission of the alleged crime.

¹³ Section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007.

¹⁴ Sec 79(1)(b) of the CPA.

In all other cases only the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court must be involved.¹⁵

Section 79(4) stipulates the content of the experts' report, namely that the report must include a description of the nature of the enquiry; a diagnosis of the mental condition of the accused; if the enquiry is under section 77(1) - a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence and if the enquiry is in terms of section 78(2) - a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause.

The Legislature recognised that divergent opinions might exist between the experts. If the experts are not unanimous in their findings, such fact must be mentioned in the report and each expert must then give his or her own finding on the matter.¹⁶

The CPA is however silent on how a court should then use such divergent findings, e.g. which opinion is correct? In an attempt to provide guidance, this study will provide some guidelines in how to correctly approach such expert evidence in chapter 3.

1.5 The right to equality *versus* the right to a fair trial

After assessing the interaction between psychiatry, psychology and the law, this study will address whether the placing of a burden of proof on the accused who suffers from a mental disability or defect, infringes on such an accused person's right to equality in terms of section 9 of the Constitution of the Republic of South Africa (CRSA). This study will consider whether an accused with a mental disability or defect is treated equal to an accused who does not suffer from such a disability or defect.

The Supreme Court of Appeal has already expressed its doubt on the constitutionality of section 78(1B) in the case of *S v Kok*¹⁷, but did not decide the matter. Scott JA expressed

¹⁵ Sec 79(1)(a) of the CPA.

¹⁶ Sec 79(5) of the CPA.

¹⁷ 2001 (2) SACR 106 (SCA) par [7].

himself thus '[w]hether this anomaly [that the accused receives a burden of proof] can be upheld in our modern law with the enactment of the new Constitution is doubtful.'¹⁸

The theory basis of this study will entail the marginalisation of people with mental disabilities. That is why consideration will only be given to the right to equality - as opposed to an accused person's right to be presumed innocent.¹⁹

A further reason for not testing section 78(1B) against the right to be presumed innocent, is because Canadian law found the reverse *onus* in cases of pathological criminal incapacity to be a justifiable limitation on the right to be presumed innocent.²⁰ As will be seen below²¹ the Parliamentary Portfolio Committee on Justice, who presented section 78(1B) to Parliament for approval, used this very case to ease concerns about its constitutionality. To circumvent simple referral to Canadian law as justification for the reverse *onus*, this study will test the section against the right to equality, as opposed to the right to be presumed innocent.

Much remains to be said of the question whether section 78(1B) infringes on section 35(3)(h) of the CRSA. An attack on section 78(1B), which is based on section 35(3)(h), will undoubtedly be very hard to ward off.

This study will however, as a subtext, rather be concerned with the 'maniac's lot' (of acquitting a burden of proof) than with procedural justice. As a result the right to presumed innocent will not be assessed in this study.

1.6 Significance of study

In a legal system such as ours, that has a high regard for equality,²² any form of unequal treatment must be scrutinised, assessed and - if found to be unjust - rooted out. Taking into consideration that a mentally disabled person can be an accused – unrepresented in

¹⁸ Long before the enactment of the CRSA the court in *R v Smit* 1950 (4) SA 165 (O) at 169 also commented on the possible unfairness of the *onus* resting on the accused in cases of 'insanity'. It did not however decide the matter because it viewed itself bound by precedent.

¹⁹ As provided for in sec 35(3)(h) of the CRSA.

²⁰ *R v Chaulk* [1990] 3 S.C.R. 1303. For an evaluation of this case see Chapter 6 under 'Considering *R v Chaulk*'.

²¹ Chapter 2 under 'The statutory development'.

²² Equality is one of the founding values of the Republic of South Africa – sec 1(a) of the CRSA – and also of the Bill of Rights – sec 7(1) of the CRSA.

certain cases – the concern for their equal treatment during the criminal justice process cannot be stressed enough.

If one keeps in mind that section 78(1B) of the CPA can result in an unrepresented and mentally disabled accused, who will have to prove that he lacked criminal capacity during the commission of the crime, then one cannot help but feel disquieted at a legal system that allows and enforces such unreasonableness. Even more so, if one considers that an accused that simply decided not to place his criminal capacity in issue will not acquire such burden of proof (irrespective of whether he too is unrepresented and mentally disabled).

The suspicion that this section is a draconian measure of limiting issues of criminal capacity cannot be avoided.

A further concern with the shifting of the burden of proof is the impact of section 119 of the CPA.²³ This section (if used by the Prosecution) allows the charge(s) to be put to an accused in a magistrate's court (to which the accused *must* plead in that court), despite the fact that the alleged offence(s) may *only* be tried by a superior court or despite the fact that the punishment for the alleged offence(s) exceeds the jurisdiction of the magistrate's court. The effect of this section is that the accused must plead in a magistrate's court without knowing that he carries a burden of proof (should he wish to raise the issue of his criminal capacity). He will then have to discharge his burden of proof in a superior court. This will be a problem especially with regards to unrepresented accused.

1.7 Methodology

In order to measure whether section 78(1B) of the CPA infringes on section 9 of the CRSA, this study will apply the method as set out in *Harksen v Lane NO*.²⁴ Here the Constitutional Court developed a multi-layered test which, firstly, tests if *irrational differentiation* occurs (thereby resulting in an infringement of section 9(1) of the CRSA) and then tests whether *unfair discrimination* occurs (thereby resulting in an infringement of section 9(3) of the CRSA).

²³ Or section 122A of the CPA, which provides for a plea in a magistrate's court on the charge(s), to be adjudicated however in a regional court.

²⁴ 1998 (1) SA 300 (CC) at par [53].

Although, in practice, it will only be necessary to prove an infringement of either section 9(1) or section 9(3), this study will test section 78(1B) against both sections 9(1) and 9(3). The reason being that different factors are taken into consideration and thus different arguments can be made concerning each section.

This study will then assess whether the infringements, if any exist, can be justified in terms of section 36 of the CRSA.

Finally this study will consider possible remedies should an unjustifiable infringement exist.

1.8 Conclusion

This chapter addressed certain preliminary issues.

It found that section 78(1B), despite its neutral wording, does in fact only apply to accused persons.

It found that section 78(1B) will in practice only apply to the mentally disabled accused and is not aimed at the mentally abled accused. Such accused have other defences at their disposal and, after recent developments in the law, will in all probability rather opt for those defences than raise criminal capacity as an issue.

The role and need to properly assess psychiatric and/or psychological evidence was then explained. It was advanced that, although section 79 of the CPA provides some instruction, further guidelines are vital in correctly assessing expert evidence.

This chapter then explained that this study will only test section 78(1B) against the right to equality, as provided for in section 9 of the CRSA. An assessment of whether section 78(1B) infringes on the right to be presumed innocent, as provided for in section 35(3)(h) of the CRSA, consequently falls outside the scope of this study. The reason advanced is that this study's subtext is the marginalisation of the mentally disabled, and not procedural justice.

It was then explained that this study's significance lies in the fact that our Constitution places equality as a founding value and that, as a result, the marginalisation of mentally disabled persons (where they are accused of crimes) cannot be tolerated. It was shown that the reverse *onus* can have serious implications where an unrepresented accused must plea in a lower court but will be tried in a court with higher standing.

Finally a description of the methodology employed in testing the section against the Constitution was provided. It was shown that the leading case(s) involving the interpretation of section 9 of the CRSA will be used.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF SECTION 78(1B) OF THE CPA

‘...we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction...’²⁵

2.1 Introduction

The Criminal Matters Amendment Act 68 of 1998 (CMAA), which inserted section 78(1B) into the CPA, was assented to on 28 September 1998. The CMAA however remained in abeyance for more than three years before it commenced on 28 February 2002.

But the reverse *onus* that section 78(1B) effects was merely the enactment of the common law, which had placed the *onus* of proving ‘insanity’ on the accused since 1878.

This chapter will set out the history of the reverse *onus* as it developed in the common law. The statutory development of section 78(1B) will then be discussed.

2.2 The common law development

2.2.1 The M’Naghten Rules

In 1843 one Daniel McNaughton attempted to assassinate the then Prime Minister of the United Kingdom, Sir Robert Peel. But McNaughton fired his pistol at the wrong person and fatally wounded Peel’s secretary, Edward Drummond. McNaughton was acquitted by a jury on ground of ‘insanity’. The acquittal enraged Queen Victoria - this assassination attempt was but one of a series aimed at the Queen, members of the royal family and the Queen’s ministers. An American case, *United States v Currens*²⁶ neatly summarised the Queen’s response as follows:

²⁵ Lord Chief Justice Tindal in *Queen v M’Naghten* (1843) 10 Cl & Fin 209.

²⁶ 290 F.2d 751 (1961) 763-764.

...public indignation, led by the Queen, ran so high that the Judges of England were called before the House of Lords to explain their conduct. A series of questions were propounded to them. Their answers, really an advisory opinion which were delivered by Lord Chief Justice Tindal for all fifteen Judges, save Mr Justice Maule, constitute what are now known as the M'Naghten Rules.

One of these M'Naghten Rules was the presumption of sanity from which the reverse *onus* flows.²⁷

It is notable that, unlike in the CPA, the Rules never expressly provided for the reverse *onus* – it was merely a logical extension of the presumption of sanity.

Also notable is the fact that, in 1843, the 'golden thread' of criminal procedure - namely that the burden of proving the guilt of an accused rests on the Prosecution – had not been established.²⁸ Placing the *onus* to prove a mental illness or defect on the accused was therefore not extraordinary at the time.

Finally, it is of secondary importance to realise that the M'Naghten Rules only allowed for the (current) first leg of the test for criminal capacity– i.e. the ability to distinguish between right and wrong. If this distinction could be proved then criminal capacity would have been established.

2.2.2 The M'Naghten Rules incorporated into the South African law

Principles based on the M'Naghten Rules were first incorporated into our law by Kotzé J in 1878 in the Supreme Court of Transvaal case of *R v Booth*²⁹ – 35 years after they had first been propounded by the Judges of England.

Curious perhaps is the way in which these Rules were incorporated. Kotzé J expressly informed the jury that the *onus* of proving a mental illness or defect rests on the accused – without providing authority or motivation. It is only later, in his direction to the jury where Kotzé J explains the test for criminal capacity, that he mentions the *M'Naghten* case for the first time – and here oddly, without making mention of the *onus*. Perhaps the context

²⁷ *Queen v M'Naghten (supra)* 210.

²⁸ JR Milton 'Law Commission Project 89: declaration and detention of state patients' (1998) 11 *South African Journal for Criminal Justice* 230. This golden thread was only established in 1935 in the House of Lords decision of *Woolmington v The Director of Public Prosecutions* [1935] AC 462.

²⁹ *Supra*.

allows an inference that he based his authority for the reverse *onus* on the *M'Naghten* case. But one would rather have wished, seeing what impact this incorporation had on South African law, that the judge would have expressly provided authority – and not by mere inference.³⁰

The Supreme Court of the Cape of Good Hope was the next court to take up the reigns in developing the reverse *onus*. In *Queen v Hay*³¹ Chief Justice de Villiers made certain profound variations on the M'Naghten Rules. Firstly he held that the question of whether a mental illness or defect exists is a question of *fact* and not of law – as was opined by the Judges of England in the *M'Naghten* case. Consequently it was for a jury, with the assistance of medical expert opinion, to assess whether an accused 'acted under the impulse of a delusion of intercourse with the devil'.³² The court also added the (current) second leg of the test for criminal capacity – i.e. the ability to act in accordance with the knowledge of right or wrong.³³ With regards to the *onus* however the court did not have much to say, apart from confirming the presumption of sanity.³⁴

In 1906 the scene again shifted back to the Transvaal where Chief Justice Innes, in *R v Smit*,³⁵ agreed with adding the (current) second leg of the test for criminal capacity. Again, no mention was made of the reverse *onus*, apart from asserting once more the presumption of sanity.

The next major development in the common law occurred in *R v Zulch*³⁶ in 1937. In this case the court concretely considered the reversed burden of proof – notably how heavy the burden should be. It held, with reliance on the Australian case of *Sodeman v R*,³⁷ that it should be proved on a 'preponderance of probability' that the accused was mentally

³⁰ It is perhaps not so unusual that Judge John Gilbert Kotzé (later Chief Justice of the Supreme Court of Transvaal, Attorney-General of Southern Rhodesia, Judge-President of the Eastern District Court of the Cape Colony, Judge of Appeal, Knight of the British Empire and political rival of president Paul Kruger) did not expressly refer to authority. It was a sign of the times that English law provided vital guidance when our criminal law was developed – even more so where the judge was trained in England (*in casu* the Honourable Society of the Inner Temple in London). See JG Kotzé *Biographical memoirs and reminiscences, Volume 1* (1934) and JG Kotzé *Biographical Memoirs and Reminiscences, Volume 2* (1940).

³¹ (1899) 16 SC 290.

³² *Queen v Hay (supra)* 293-298.

³³ *Queen v Hay (supra)* 301.

³⁴ As above.

³⁵ 1906 TS 783.

³⁶ 1937 TPD 400.

³⁷ [1936] 2 All ER 1138.

disordered.³⁸ This standard of proof was to remain in place until (and after) enactment of section 78(1B) of the CPA.

The Appellate Division finally joined its voice to the above cases in 1945 in the well-known case of *R v Ndhlovu*.³⁹ This case focussed on laying down the general standard of proof in criminal cases, but the court nonetheless easily accepted that the defence of ‘insanity’ was an exception to the general rule that the Prosecution should prove the guilt of an accused beyond a reasonable doubt.⁴⁰

Shortly after *Ndhlovu* the Appellate Division were offered the chance to focus their attention on the exception they had so readily accepted, when it heard the case of *R v Kaukakani*.⁴¹

Counsel for the accused made a commendable effort in attempting to convince the court to do away with the exception.⁴² He recognised that the common law, along with ancient English law, had initially placed the *onus* on the accused to prove any defence which would exclude liability. He emphasised that the law had then developed by placing the *onus* on the Prosecution to prove *all* the requirements for liability beyond a reasonable doubt and that *Ndhlovu* had only accepted the reverse *onus obiter*.⁴³

Counsel for the accused then argued that there was no legal or logical reason for excluding the defence of pathological criminal incapacity from that development – especially in light of the fact that there was no difference between the defences of ‘insanity’, provocation and drunkenness with regard to the capacity of a person to form a particular intent.

³⁸ *R v Zulch (supra)*. This case was also followed in (the then) Southern Rhodesia in *Rex v Sprighton* 1939 SR 34.

³⁹ 1945 AD 369.

⁴⁰ *R v Ndhlovu (supra)* 386. *R v Abrahams* 1945 GWLD 3 followed and applied this case shortly hereafter.

⁴¹ 1947 2 SA 807 (A).

⁴² *R v Kaukakani (supra)* 808 - 811.

⁴³ There seems to be some merit in the counsel’s argument. The court in *R v Ndhlovu (supra)* 381 actually held that the *onus* being on the Prosecution is a rule of general application. It referred to *R v Woolmington (supra)* with regards to the exception in cases of ‘insanity’, but *R v Woolmington* was discussed previously (373, 375-376) and only in connection with what had to be proven in a charge of murder. It is thus clear that when the court in *Ndhlovu* referred to the exception in cases of ‘insanity’, it did not consider the merit of such exception. Consequently the table was set for the same court (in fact, the very same Judge of Appeal, Davis AJA) in *R v Kaukakani* to consider the merits of the reverse *onus* apart from other issues (like what should be proven in a charge of murder).

Furthermore, the Prosecution carried the burden of proof in cases where provocation or drunkenness was raised as a defence. Yet in cases where the sanity of an accused was placed in dispute, the accused had to receive the burden of proof. Would it not have made logical sense, so the argument went, that where doubt existed as to the sanity of an accused, the Prosecution would then have been unable to prove all the requirements for liability – as it was in cases where provocation or drunkenness had been raised as a defence.

Counsel for the accused drove home the point with the next compelling argument. The presumption of sanity is merely an assumption, based on human experience, that a normal condition exists; and unless the assumption is placed in issue by the accused, it is taken to so exist. But why is the same reasoning then not also applied to provocation or drunkenness? Why is it not also assumed, based on human experience, that a normal condition (i.e. level-headedness or sobriety) exists in cases of provocation or drunkenness? Because surely, if one logically extends the presumption of sanity to the presumption that a man is presumed to be physically normal, and an accused then raise physical abnormality as proof of his innocence, *the Prosecution* would be expected to prove his normality beyond a reasonable doubt and not the accused.

It is very hard to comprehend why the Appellate Division, after such persuasive argument, decided to not only confirm the reverse *onus* in cases of pathological criminal incapacity, but also extend the reverse *onus* to cases where the defence of drunkenness was advanced.⁴⁴

But this was perhaps one way of dealing with such swaying argument – ‘if you allege that two cases are treated differently, then we will henceforth treat both cases the same, even if it means that *all* are to be treated harshly. At least this way all are treated the same’.

Another indication for this decision can arguably be found in the statement made by the court when it declared that the law it had just set down did not involve a “departure from an ‘orthodox’ view”.⁴⁵ Unwillingness to be unorthodox or deviate from the English precedent seems to have carried some weight with the court.

⁴⁴ *R v Kaukakani* (*supra*) 814 – 815. This expansion with regards to the reverse *onus* also in cases of drunkenness was criticised (and reform suggested) in *R v Innes Grant* 1949 1 SA 753 (A).

⁴⁵ *R v Kaukakani* (*supra*) 815.

The most important *ratio* for the court's decision to confirm the reverse *onus* is that, because in cases of both pathological criminal incapacity and drunkenness, the standard in assessing criminal capacity is 'purely subjective'.⁴⁶ If the *onus* had been on the Prosecution to prove criminal capacity, the result would have been that, even if the jury did not believe an accused's version that he was criminally incapacitated (due to pathological reasons or drunkenness), and they had a reasonable doubt as to the truthfulness of his version, they would be compelled to give the benefit of that doubt to the accused. The court viewed this burden on the Prosecution as 'unreasonably difficult, or even in some cases impossible'.⁴⁷

There is much to be critiqued about this decision, but suffice it to say for purposes of this chapter that one wonders what makes the standard less subjective in proving a particular intent than proving criminal capacity. The Prosecution has never objected that it found proving the subjective state of mind of an accused (i.e. the fault) 'unreasonably difficult, or even in some cases impossible'.

After *Rex v Kaukakani* the law had been laid down. Few cases hereafter questioned the position,⁴⁸ although many applied the reverse *onus*.⁴⁹

Finally in 2000 and 2001 concerns were again raised about the reverse *onus*, although both the Constitutional Court⁵⁰ and the Supreme Court of Appeal⁵¹ declined to address the issue head on.

Consequently, with regards to the common law through case law, South Africa has reached a point where concern alone for the constitutionality of the reverse *onus* is not enough. Courts should, sooner rather than later, decide the matter finally. Because, as will be seen below, if left to the Legislature, the reverse *onus* will remain part of South African law.

⁴⁶ *R v Kaukakani (supra)* 814.

⁴⁷ As above. Notably the Canadian Supreme Court, in deciding the constitutionality of the presumption of sanity in *R v Chaulk (supra)*, found the presumption to be justifiable for exactly the same reason.

⁴⁸ In fact the case of *R v Smit (supra)* seems to be the only reported case that raised some concern.

⁴⁹ Notably *R v Maphumulo (2)* 1960 1 SA 809 (N), *S v Steyn* 1963 1 SA 797 (W), *S v Mahlinza* 1967 1 SA 408 (A) (by Rumpff JA who interestingly later chaired a commission into the liability of mentally disabled persons), *S v Trickett* 1973 3 SA 562 (T) (here it was held that the law was by this stage 'trite'), *obiter* in the minority judgement in *S v Adams* 1986 4 SA 882 (A) and (in a post-constitutional era) *S v Kok (supra)* and *S v Manamela and Another (Director-General of Justice intervening)* 2000 3 SA 1 (CC).

⁵⁰ *S v Manamela and Another (Director-General of Justice intervening) (supra)*.

⁵¹ *S v Kok (supra)*.

2.3. The statutory development

In *S v Adams*⁵² Viljoen JA made the following statement in support of the reverse *onus*:

...at the moment [1986] I am a voice crying in the wilderness and until such time as this Court may review the law I have to accept that the *onus* to prove criminal responsibility [liability] is on the State.

He was in actual fact not crying in ‘the wilderness’. For the law had already deforested much of the ‘wilderness’ that constituted the burden of proof where criminal capacity was an issue – by then the law was firmly established that mentally ill accused should prove their own criminal incapacity. In fact, in 1968 already the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters⁵³ (chaired by Rumpff CJ) had already approved the reverse *onus*, thereby persuading the Legislature to leave the law unchanged in this regard.

It would later prove that it has since then been impossible to change the Legislature’s mind. In 1995 the South African Law Commission (SALC) again considered the reverse *onus*.⁵⁴ The SALC, after much scrutiny of the position (including the constitutional implications), came to the conclusion that the reverse *onus* is neither ‘reasonable nor justified’.⁵⁵ They recommended that the *onus* of proving criminal capacity should always rest on the Prosecution.⁵⁶

The Criminal Matters Amendment Bill⁵⁷ consequently flowed from these considerations. After some revision of the Bill, the Criminal Matters Amendment Act (CMAA) was enacted and the current section 78(1B) of the CPA inserted – in the exact opposite form from what the SALC had recommended.

⁵² *Supra* 902. He made this statement while pleading, in his minority judgement, that in cases where drunkenness is raised as a defence, the burden of proving criminal (in)capacity should be on the accused.

⁵³ RP 69/1967 para 10.53.

⁵⁴ South African Law Commission Report ‘The declaration and detention of persons as State patients under the Criminal Procedure Act 1977 and the discharge of such persons under the Mental Health Act 1973, including the burden of proof with regard to the mental state of an accused or convicted person’ Project 89 (1995)

⁵⁵ *Supra* para 8.38

⁵⁶ As above.

⁵⁷ [B93-97].

Between the CMAA becoming law and its commencement however, another report was given by the SALC.⁵⁸ They again recommended that the law be changed and that section 5 of the CMAA (which inserted section 78(1B) in the CPA) be deleted.⁵⁹ Parliament refused.

It might seem stubbornly odd that Parliament would twice refuse to heed the SALC's advice, thereby creating the impression that it did not even consider the matter because it obstinately kept the law unchanged.

This is not the case. The draft Bill prepared by the SALC, which provided for the *onus* to be on the Prosecution, was purposefully changed by the Parliamentary Portfolio Committee on Justice to state that the burden of proof 'shall be on the party who raises the issue'. The Criminal Matters Amendment Bill⁶⁰ was first presented to Parliament in this (changed) form. This version was then further amended to also provide for the current section 78(1A) of the CPA.⁶¹ From this can be seen that the Legislature, through the actions of the Portfolio Committee, had very pertinently wanted the presumption of sanity and the reverse *onus* to be contained in legislation – despite strong urgings not follow the traditional common law stance.

The reason for allowing the reverse *onus* to be enacted, despite some obvious (constitutional) concerns, was a deliberate game of chance. The Portfolio Committee recognised that sections 78(1A) and 78(1B) could be unconstitutional.⁶²

In their report to the National Assembly the Portfolio Committee advanced three reasons why this particular amendment should nonetheless be enacted.

⁵⁸ South African Law Commission Report 'The Application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing' Project 101 (2001).

⁵⁹ *Supra* paras 2.57-2.59. The SALC commented that deletion of sec 5 of the CMAA would not constitute a problem as this section was not yet operational.

⁶⁰ [B93-97].

⁶¹ Portfolio Committee Amendments to the Criminal Matters Amendment Bill [B93A-97]. The first version of the Bill, i.e. [B93-97], only made provision for the reverse *onus* (the current sec 78(1B)). The later amendment, i.e. [B93A-97], put the reverse *onus* in context by expressly providing for the presumption of sanity (the current sec 78(1A)). See also JR Milton 'Law reform: the Criminal Matters Amendment Act 1998 brings some sanity (but only some) to the defence of insanity' (1998) 12 *South African Journal for Criminal Justice* 46 for this development of the Bill.

⁶² Resolution [B93-97], Report of the Portfolio Committee on Justice on the Criminal Matters Amendment Bill [B93A-97] (National Assembly – sec 75), dated 13 August 1998, para 1.

These reasons were:

1. The presumption of sanity (and as logical extension thereof also the reverse *onus*) already existed in terms of the common law;⁶³
2. The Constitutional Court had left open the question whether, when a statute imposes a burden of proof on an accused to prove an element of a *defence*, rather than an element of an *offence*, it will be contrary to the Constitution.⁶⁴
3. Comparative law, notably Canadian law in the case of *R v Chaulk*,⁶⁵ had considered the presumption of sanity, the right to be presumed innocent and the proportional limitation of the right to be presumed innocent in context of this reverse *onus*. The Supreme Court of Canada, 'with a large majority, in a persuasive judgement', held that 'a Clause similar to the South African Clause was not unconstitutional' (to use the words of the Committee).⁶⁶

These reasons were persuasive enough for Parliament. The game of chance was that Parliament, rather than opt for the safer path of not enacting sections 78(1A) and 78(1B), decided instead to enact these sections – despite not having very conclusive authority on the constitutionality thereof.

The mere fact that the common law stance, which wholly developed in a pre-constitutional era, existed before the enactment does not automatically constitute a reason for its continued existence in a post-constitutional era.

Even more so if one considers section 7(2), read with sections 39(2) and 44(4), of the CRSA.⁶⁷ Can it be said that Parliament respected, promoted or fulfilled the objects of the Bill of Rights when they enacted section 78(1B) – despite having concerns that it might not

⁶³ As above.

⁶⁴ The case that the Portfolio Committee referred to was *S v Manamela and Another (Director-General of Justice intervening)* (*supra*) paras [30] – [31].

⁶⁵ [1990] 3 S.C.R. 1303, cited by the Portfolio Committee as '1 CRR (2d) 1' (the correct citation is actually '1991 1 C.R.R. (2d) 1'). The case can however also be found under any of the following citations: [1991] 2 W.W.R. 385; 119 N.R. 161; 62 C.C.C. (3d) 193; 2 C.R. (4th) 1. For a discussion of this case see chapter 6 under 'Considering *R v Chaulk*'.

⁶⁶ Resolution [B93-97], Report of the Portfolio Committee on Justice on the Criminal Matters Amendment Bill [B93A-97] (National Assembly – sec 75), dated 13 August 1998, para 3.

⁶⁷ Sec 7(2) of the CRSA states that the state *must* respect, protect, promote and fulfil the rights in the Bill of Rights (emphasis added). Sec 39(2) of the CRSA states that when interpreting any legislation, *and when developing the common law* or customary law, every court, tribunal or forum *must* promote the spirit, purport and objects of the Bill of Rights (emphasis added). Although parliament does not qualify as a court, tribunal or forum (i.e. a judicial body), the principle is nonetheless created that the Bill of Rights should be the guiding light when the common law is interpreted. This principle should also find resonance when the common law is interpreted (or developed) by a legislative body. Sec 44(4) of the CRSA states that parliament, when exercising its legislative authority, is bound only by the Constitution, and must act in accordance with, and within the limits, of the Constitution.

survive constitutional muster? If a possible infringement exists will the CRSA not be better respected, promoted and fulfilled if the provision is not enacted? To err, so the saying goes, on the side of caution – especially when infringement of a constitutionally enshrined right is concerned. Or, at the very least, for a closer inquiry to have taken place, i.e. a declaratory order by the Constitutional Court or at least open debate in Parliament on the issue. The first reason advanced by the Portfolio Committee does not hold water.

The second reason follows suit. The constitutionality of a provision can by no stretch of the imagination be inferred based on the Constitutional Court's refusal to decide on a matter which does not directly involve the doubted provision. It would be a tremendous blunder to think that a provision could possibly be constitutional based on a refusal to decide the matter. The fundamental difference between *obiter dicta* and *ratio decidendi* would then, in any event, be completely demolished.

Although foreign law can be a very insightful instrument in interpreting legislation, that is precisely the extent of its influence – it provides valuable insight, nothing more. It was rash for Parliament to enact a possible infringing enactment based on what a foreign court held. Parliament (or the Portfolio Committee) should have at least considered the foreign law in the context of *our* law. And although the Supreme Court of Canada found that the reverse *onus* was in fact proportional to an infringement of the presumption of innocence in Canadian law, this is not to say that it will automatically also be a proportional infringement in our law. Again, further inquiry was needed – a proper and well-reasoned comparative study was necessary to ascertain whether the reasoning in *R v Chaulk* would withstand scrutiny in our law.

A very important distinction from *R v Chaulk* can already be made; and this distinction places the application of that case in South Africa in serious doubt. The difference is that the constitutional right that was infringed in *R v Chaulk* was the presumption of innocence. Of course, much can be said for infringement of that right in our law too. But, as this study will illustrate, another right – the right to equality – is also infringed by the reverse *onus* (at least in our law). A completely new proportionality enquiry must therefore be held, and this renders *R v Chaulk* superfluous to a large extent.

2.3 Conclusion

This chapter evaluated the development of the presumption of sanity, and by extension the reverse *onus* contained in section 78(1B) of the CPA.

The development through the common law was firstly considered. It was found that South African law incorporated the presumption of sanity from English law in 1878. The presumption was founded on the position of an advisory opinion of all the Judges of England in the case of *R v M'Naghten*. These coarse principles were then polished by our courts until they became accepted and applied frequently.

The statutory development of the reverse *onus* was then considered. It was found that section 78(1B) was enacted contrary to the advice of the South African Law Commission. The Parliamentary Portfolio Committee on Justice deliberately discarded this advice in their report to Parliament.

The said committee justified enactment of section 78(1B) on three grounds: the reverse *onus* already formed part of the common law, the Constitutional Court declined to address the matter of whether a reverse *onus* infringes a fundamental right where such *onus* applies as part of a defence and the Canadian Supreme Court had found the reverse *onus* to be a justifiable limitation on the right to be presumed innocent.

These reasons were then criticised and it the conclusion is reached that Parliament had rashly enacted section 78(1B).

Despite the long development of section 78(1B), first through the common law and then through the legislative process, the fact remains that this section was built on very unsteady foundations from the start. Yet for some reason the reverse *onus* survived – and was consistently applied. Doubt as to the constitutionality of a provision, followed by obstinate enactment in spite of that doubt, does not bode well for the provision's continued existence should its constitutionality eventually be tested by a court.

CHAPTER 3

DEFINING THE INTERFACE BETWEEN PSYCHIATRY, PSYCHOLOGY AND THE LAW

*'Perhaps both classes [lawyers and experts in mental diseases] are apt, unless they are careful, to go a little wrong'*⁶⁸

3.1 Introduction

Imagine for a moment the setting is a High Court and, say, Judge Justinian is the presiding officer. The accused, Mrs Tristitia, was charged with culpable homicide. Her five-year old son, Filius, had found her firearm hidden under her pillow and started playing with it. A shot went off and Filius was killed. Neighbours alerted the police and the police found Mrs Tristitia laying, in a comatose state, on the lounge. She only regained consciousness after some medical treatment in a hospital. During her evidence she testified to being hijacked one month ago. She was gagged, bound up, transported for hours and finally raped by the hijacker.

Her defence was pathological criminal incapacity due to a 'nervous and/or mental breakdown' on the afternoon of the incident when her son died.⁶⁹ This breakdown was apparently triggered by a police vehicle and ambulance, sirens blaring, which raced past her home. She experienced various stress-related symptoms before she finally collapsed in the comatose state.

Three psychiatrists and a clinical psychologist (all appointed in terms of section 79(1)(b) of the CPA) testified as expert witnesses. One psychiatrist diagnosed Mrs Tristitia with Post Traumatic Stress Disorder (PTSD)⁷⁰ as result of the hijacking. Another diagnosed Adjustment Disorder with Mixed Anxiety and Depressed Mood (AD MADM).⁷¹ The third psychiatrist diagnosed Acute Stress Disorder, but, during cross-examination, conceded that the accused could also possibly suffer from either PTSD or AD MADM, and

⁶⁸ Innes CJ in *R v Smit* 1906 TS 785.

⁶⁹ She declined to advance lack of conduct (sane automatism) as a defence due to the operation of antecedent liability (by leaving her firearm under her pillow).

⁷⁰ I.e. according to Code 309.81 in the American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders 4th edition Text Revision* (2000) 463 (the DSM-IV)

⁷¹ I.e. according to Code 309.28 in the DSM-IV .

the he was as a result of his concession, unable to make a conclusive diagnosis. The clinical psychologist testified that more emphasis had to be attached to the accused's collapsed (or psychological breakdown) on the day of the incident. The clinical psychologist, after evaluating the symptoms prior to Mrs Tristitia's collapse came to the conclusion that she suffered a classical panic attack and might even suffer from a panic disorder.

The problem thus for Judge Justinian was that four experts had testified and four different diagnoses had been made. Which one was the correct one? How should he go about evaluating each expert's testimony in light of the myriad differences in each? How can he reconcile the psychiatric evidence with the psychological evidence? And after that, how should he utilise this evidence in reaching his (legal) conclusion?

And that is the problem which every court, dealing with pathological criminal capacity, faces. Presiding officers are expected to reconcile three different disciplines whilst, as a general rule, only being proficient in one of those. In essence the difficulty lies therein that a court is asked to make a legal finding based on clinical concepts.

This chapter will attempt to provide some useful guidance on how this problem can be eased, if not entirely overcome. It will first set out some general guidelines, which shows how one can overcome a problem such as Judge Justinian faced above. This chapter will then make use of a Supreme Court of Appeal decision⁷² which voiced a practical approach to evaluating expert evidence. The principles of this case, rooted in the field of medical negligence, will then be adapted in order to be used in the assessment of criminal capacity.

3.2 Articulating the problem and providing some foundational guidelines

The test to determine if criminal capacity is present or absent is stipulated in section 78(1B) of the CPA.⁷³ At the risk of tediousness, the test bears repeating: firstly, whether the mental illness or defect made the accused incapable of appreciating the wrongfulness of his or her act or omission; and secondly, whether the mental illness or defect made the

⁷² *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 3 SA 1188 (SCA).

⁷³ Burchell (*supra*) 360. CR Snyman *Strafreg 5e uitgawe* (2006) 168.

accused incapable of acting in accordance with this appreciation of wrongfulness.⁷⁴ Snyman labelled these two legs as *onderskeidingsvermoë* and *weerstandskrag* respectively.⁷⁵

What must also be said immediately is that criminal capacity constitutes a *legal* concept – not a medical one. Criminal capacity is a requirement for liability, not a diagnosis-based evaluation. Psychiatrists and psychologists do not evaluate whether a person had the ability to distinguish between right and wrong (right and wrong being legal concepts in themselves), nor do they assess whether the accused could act in accordance with such appreciation. Medical practitioners aim to make a diagnosis, not to judge conduct – they ‘treat, rather than condemn’.⁷⁶

The significance of this distinction is that legal practitioners, medical experts (and, daresay, even presiding officers) should realise that it remains solely in the judgement of the court to decide whether criminal capacity is present or absent. Medical experts therefore *cannot* testify that an accused lacked criminal capacity – that remains for the court to decide.

The medical experts can however, through clinically evaluating the accused’s functional ability to make autonomous and authentic decisions,⁷⁷ assist the court in reaching its conclusion on the issue of criminal capacity. This assistance can, for example, be evidence on which specific functions were inhibited or compromised due to the mental illness or defect.

To use the above example once more. If the above-mentioned principle is understood and applied then it does not matter that four different diagnoses were made – each diagnosis is merely the vehicle that the medical expert uses to testify on which functional abilities were effected. If each expert had testified, in some or other way, that every time the accused relived the events of her trauma, she lost the functional ability of reasoning or the ability to calm herself, then Judge Justinian would have been able to use this testimony in evaluating whether the accused had the ability to distinguish between right and wrong and

⁷⁴ Sec 78(1) of the CPA.

⁷⁵ Snyman (supra) 159.

⁷⁶ A Kruger ‘Hiemstra’s Criminal Procedure’ (2008) 13.

⁷⁷ South African Law Commission Discussion Paper 105 ‘Assisted decision-making: adults with impaired decision making capacity’ Project 122 (2004) para 4.2.

act in such accordance. This way of thinking is completely in sync with the general principles regarding expert evidence, i.e. that it remains for the court to reach its own conclusions, but assisted by the expert evidence.⁷⁸

The role of the medical experts should therefore not be over- or underestimated. Expert testimony remains crucial, in fact obligatory by virtue of the CPA, in enabling a court to make a finding on criminal capacity. But, in order for a court not to be drowned in oft difficult medical testimony, such evidence should be approached correctly.

It is submitted that where medical practitioners, required by section 79(1) of the CPA, give their expert evidence they should afford definite attention, consideration and focus to specifically which functional abilities, whether physical or of the psyche, were affected as result of the mental illness or defect.

It remains a difficult task for a court to decide whether an accused had criminal capacity, especially where the issue is expressly raised. It is not however an impossible task. An approach such as this approach will, it is submitted, enable a court to more conclusively (and probably with more certainty) reach a conclusion on the absence or presence of criminal capacity.

The guidance however does not end here. More direction can be found in a medical negligence case, where the Supreme Court of Appeal expounded the approach which should be followed when assessing expert evidence.⁷⁹

⁷⁸ Hoffmann and Zeffert 97, *R v Nksatlala* 1960 3 SA 543 (A) 546D, *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 3 SA 1188 (SCA) para [34].

⁷⁹ The approach has been followed, to some extent or another, in a number of consequent cases: *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 1 SA 515 (para [40] applied); *Van der Walt v De Beer* 2005 5 SA 151 (C) (para [34] applied); *Media 24 Ltd and Another v Grobler* 2005 6 SA 328 (SCA) (para [40] applied); *Louwrens v Oldwage* 2006 2 SA 161 (SCA) (para [39] applied); *Minister of Transport NO and Another v Du Toit and Another* 2007 1 SA 322 (SCA) (para [36] applied); *Springold Investments (Pty) Ltd v Guardian National Insurance Co Ltd* 2009 3 SA 235 (D) (para [40] applied); *Prinsloo v Road Accident Fund* 2009 5 SA 406 (SE) (the whole approach to expert evidence applied); *Mutual and Federal Insurance Co Ltd v Ingram NO and Others* 2009 6 SA 53 (E) (para [36] applied) and *Mutual and Federal Insurance Co Ltd v SMD Telecommunications CC* 2011 1 SA 94 (SCA) (the whole approach to expert evidence applied).

3.3 Further guidelines in assessing (medical) expert testimony

3.3.1 Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another: the facts

The Supreme Court of Appeal provided innovative guidance with regards to how a court should approach and assess expert medical evidence in *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* (hereafter referred to as the *Michael's case*).⁸⁰

This case actually revolved around aspects of medical negligence. Yet some of the more generic principles can perfectly fit into the context of expert medical testimony with regards to the determination of criminal capacity.

The facts of the *Michael's case*, in short, were that a boy of 17 underwent corrective nasal surgery (i.e. a rhinoplasty) due to injuries sustained while participating in sport. During his surgery the patient went into cardiac arrest. He sustained severe brain damage as a result of prolonged hypoxia and was left in a permanent vegetative state. His parents sued for damages. Both the claims in the High Court and the Supreme Court of Appeal were however dismissed because the plaintiffs were unable to prove negligence on either the anaesthesiologist's or the clinic's part.

In total five expert witnesses (all experts in the field of anaesthetics)⁸¹ testified – two for the plaintiff, one for the first defendant (the clinic) and two for the second defendant (the anaesthetist). All the experts held positions as professors at international or local universities.

3.3.2 Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another: the guidelines

The following principles, relevant to the current study, were expressed by the court:⁸²

⁸⁰ 2001 3 SA 1188 (SCA).

⁸¹ An interesting question arises: why, if it was testified that cocaine toxicity was the cause of the cardiac arrest (para [29]), was a pharmacologist (an expert on the effects of drug action) not called as an expert witness (by either party)? Such an expert would perhaps have been better able to testify on the effects of the 'cocktail of drugs' administered during the surgery by the anaesthetist. This matter however falls outside the scope of this study, but one's curiosity is nonetheless pricked.

⁸² *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another (supra)* paras [34] – [40]. These principles largely originate from a House of Lords decision from which the SCA quoted. The case is *Bolitho v City and Hackney Health Authority* [1998] AC 232 (also cited as [1997] UKHL 46; [1997] 4 All ER 771 or [1997] 3 WLR 1151). The

- Principle 1: the issue of reasonableness or negligence of conduct is one for the court itself to determine on the basis of the various (and often conflicting), expert opinions;
- Principle 2: the determination of reasonableness or negligence will not involve considerations of credibility, but rather the examination of the (expert) opinions and the analysis of their essential reasoning, in preparation of the court reaching its own conclusion on the issue(s) raised;
- Principle 3: what is required in the evaluation of expert evidence is to determine whether and to what extent their opinions are founded on logical reasoning;
- Principle 4: the court must be satisfied that the expert opinion has a logical basis, i.e. that the expert has considered comparative risks and benefits and has reached a 'defensible conclusion';⁸³
- Principle 5: a defendant can probably be held liable, despite the support of a body of professional opinion approving the conduct of the defendant, if that body of opinion is not capable of withstanding logical analysis (and is therefore not reasonable).
- Principle 6: the assessment of medical risks and benefits is a matter of clinical judgement which the court would not normally be able to make without expert evidence. It would therefore be wrong to decide a matter by simple preference where there are conflicting views on either side – and both are capable of logical support.

How then should a court decide on which opinion to accept if both are capable of logical support? An answer is provided by Carstens.⁸⁴ The author advances that this problem can be overcome by strictly applying the ordinary rules of evidence. That is, where conflicting opinions are all capable of logical support the court should assess whether the plaintiff has proven his or her case on a balance of probabilities. It is then that a court should assess the credibility and reliability of the expert witnesses.

layout used here is based on the summary provided by PA Carstens 'Setting the boundaries for expert evidence in support or defence of medical negligence: *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 3 SA 1188 (SCA)' (2002) *Tyskrif vir Hedendaagse Romeins-Hollandse Reg* 433.

⁸³ *Bolitho v City and Hackney Health Authority (supra)*. The relevant *dictum* at 242 reads: "In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

⁸⁴ Carstens (*supra*) 436.

- Principle 7: only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant's conduct falls to be assessed;
- Principle 8: it is important to keep in mind that expert scientific witnesses tend to assess likelihood (probabilities *versus* improbabilities) in terms of scientific certainty (usually expressed as a percentage), instead of assessing (as a court does) where the balance of probabilities lies on a review of all the whole evidence.

The court commented that the difficulty of assessing the expert evidence was worsened by the fact that all of the experts only had limited opportunity to practice – their primary function was to teach. This probably left counsel, so the court speculated, with little choice other than to elicit individual views on each expert's opinion, instead of being able to offer a generally accepted practice.⁸⁵

Accordingly a ninth principle can also be adduced:

- Principle 9: in order to provide the court with generally accepted practices, counsels should at least call one full-time practicing medical practitioner as an expert witness. Experts with only limited time to practice can however still provide valuable testimony with regards to other aspects of the case (like the clinical issues).

Carstens also mentions that in the event of conflicting expert opinion or different schools of thought (being advanced in testimony), it would appear that even a conflicting and minority school of thought or opinion will be acceptable – provided that such school of thought or opinion is in accordance with what is considered reasonable by that (specific) branch of the medical profession.⁸⁶ The learned author then refers to guidance proffered in the following, very aptly worded, statement by Wessels JA in *Van Wyk v Lewis*.⁸⁷

The Court cannot lay down for the profession a rule of practice. It must assume that the generally adopted practice is the outcome of the best experience and is that which is best suited to attain the most satisfactory results. This is not only common sense but it is supported by legal authority.

The court therefore recognised that it is not in a suitable position to prescribe what rules of practice another profession should adopt. If the particular profession laid down its own

⁸⁵ *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another (supra)* para [35].

⁸⁶ Carstens (*supra*) 435.

⁸⁷ 1924 AD 457.

generally accepted practice, a court should assume that it did so in order to 'attain the most satisfactory results'. A particular profession is after all in the best position to decide which practices works best for them.

Wessels JA later qualifies his above statement. He states that a court can only refuse to admit a prevailing practice of a particular profession if, in the court's opinion, the practice is so unreasonable *and* so dangerous that it would be contrary to public policy to admit it.⁸⁸ In other words, the practices of a particular profession are bound by public policy and the question of whether public policy has been breached is, in turn, answered by determining if the practice is unreasonable *and* dangerous.

For purposes of the issue at hand, these statements offer two additional principles, namely:

- Principle 10: where a court is confronted with conflicting schools of thought or opinions, it may accept the conflicting or minority opinion, if that opinion accords with what is considered reasonable by that specific branch of the medical profession;⁸⁹
- Principle 11: in evaluating whether a conflicting or minority opinion is considered reasonable by that specific branch of the medical profession, a court should be mindful that it should only refuse to admit such opinion if it is so unreasonable *and* so dangerous to be contrary to public policy.⁹⁰

The fact that these principles were laid down in and adduced from a civil case has not gone unnoticed. It is however submitted that these principles, if suitably adapted, can provide just as valuable guidance in the context of determining criminal capacity.

Accordingly, these principles will hence be adjusted in context of the assessment of criminal capacity.

⁸⁸ *Van Wyk v Lewis (supra)* 460.

⁸⁹ This principle in essence expands on Principle 6 above. Principle 6, in part, states that it is wrong to decide a matter (with conflicting views and both are capable of logical support) *by simple preference*. Principle 10 validates an acceptance of a minority opinion or school of thought, provided that it accords with what is considered reasonable by that specific branch of the medical profession.

⁹⁰ As stipulated in *Van Wyk v Lewis (supra)* 460.

3.4 Adapting the guidelines for the assessment of criminal capacity

From the onset it should be stressed that the following principles should not be read in isolation. Each principle either relies or expands on another principle – they are the jigsaw pieces which create the overall picture and it is therefore only when these principles are approached holistically that they will best be able to provide optimal guidance.

What follows is each principle, as extracted above from the *Michael's* case and surrounding literature, adapted to fit the depiction of an assessment of criminal capacity.

3.4.1 Principle 1: the issue of reasonableness or negligence of conduct is one for the court itself to determine on the basis of the various (and often conflicting) expert opinions

This principle can be adapted to read as follows: the issue of criminal capacity is one for the court itself to determine on the basis of the various (and often conflicting) psychiatric and/or psychological expert opinions.

This principle merely confirms the current stance of the courts, i.e. that the presence or absence of criminal capacity is determined by the court with assistance from expert evidence.

3.4.2 Principle 2: the determination of reasonableness or negligence will not involve considerations of credibility, but rather the examination of the (expert) opinions and the analysis of their essential reasoning, in preparation of the court reaching its own conclusion on the issue(s) raised

This principle can be altered to read: the determination of criminal capacity will not involve considerations of credibility (of the expert witnesses), but rather the examination of their opinions and the analysis of their essential reasoning, in preparation of the court reaching its own conclusion on the issue of criminal capacity.

3.4.3 Principle 3: what is required in the evaluation of expert evidence is to determine whether and to what extent their opinions are founded on logical reasoning

No adaptation is necessary for this principle.

The emphasis of this principle lies with the fact that courts should test the *logical* reasoning of the experts' opinions, i.e. whether the opinion accords with logic.

It should also be mentioned that counsels should be mindful of this fact when presenting expert evidence. Where evidence contains clinical terms, definitions, concepts *et cetera*, it can often be difficult for a court to follow the evidence – they were not involved prior to the case and therefore do not have the benefit of prior consultation with the expert witnesses (who would have explained to counsel, repeatedly if necessary, what these terms entail).

A court must, according to this principle, test the logical reasoning of the opinion expressed. When one is drowned with clinical evidence, this can exacerbate the task of testing the logic of the opinion. It should therefore be the task of counsel, when presenting expert evidence, to distil the expert's opinion from the necessary clinical evidence as far as possible.

3.4.4 Principle 4: the court must be satisfied that the expert opinion has a logical basis, i.e. that the expert has considered comparative risks and benefits and has reached a 'defensible conclusion'

This principle accentuates that an expert's opinion should be founded in logic. This logical foundation is further explained by requiring that the expert must have considered comparative risks and benefits. The expert's conclusion must also be defensible, which probably refers to the conclusion being able to withstand scrutiny under cross-examination.

The 'comparative risks and benefits' seems to refer, in a medical negligence context, to the risks and benefits that a medical practitioner considered before acting in a certain manner.⁹¹ Whether or not these risks and benefits were considered will impact on the reasonableness of the practitioners conduct. Consequently, if these risks and benefits were not considered, it will impact on the logical foundation of the practitioners conduct.

⁹¹ The SCA did not expand on what 'comparative risks and benefits' means, but if the original context of this statement is read in *Bolitho v City and Hackney Health Authority (supra)* 242-244 then it seems that it refers to the risks and benefits that a medical practitioner should have considered before acting in a certain manner, which will impact on the reasonableness of his conduct.

The Supreme Court of Appeal's equation of logic with reasonableness also occurred later in the *Michael's* case.⁹² Carstens however warns that such an approach could be problematic - logic and reasonableness are two different concepts.⁹³

It is submitted that, in the context of determining criminal capacity, a court should not consider comparative risks and benefits, because alleged negligent conduct is not in issue.

What a court should however consider (in assessing whether an expert's opinion has a logical foundation) is whether the expert has considered other possible diagnoses and why he or she decided to reject them in favour of his current diagnosis. This will, it is submitted, contribute to establishing a logical foundation.

This principle can accordingly be altered as follows: the court must be satisfied that the expert opinion has a logical basis, i.e. that the expert has considered other comparative diagnoses, the reasons for rejecting them and whether his or her chosen diagnosis constitutes a 'defensible conclusion'.

3.4.5 Principle 5: a defendant can probably be held liable, despite the support of a body of professional opinion approving the conduct of the defendant, if that body of opinion is not capable of withstanding logical analysis (and is therefore not reasonable).

Because civil liability is not the issue *in casu* this principle must be adapted. The same may be said of the conclusion that because the opinion cannot withstand logical analysis it is unreasonable.

Consequently the principle should be adapted to read as follows: an accused can probably be found criminally (in)capacitated if a body of professional opinion is not capable of withstanding logical analysis – despite the support of such body of professional opinion that approves (or agrees with) the diagnosis of the expert.

This principle subjects the expert's opinion (or diagnosis as the case may be) to logical analysis. If the opinion or diagnosis cannot endure logical analysis the court may still

⁹² *Michael and Another v Linksfield Park Clinic and Another (supra)* para [39]. See Principle 5.

⁹³ Carstens (*supra*) 434-435. The author states that '[l]ogic refers to a process of reasoning/rationality based on scientific or deductive cause and effect' whilst '[r]easonableness on the other hand is a value judgement indicative of or based on an accepted standard or norm'.

choose to reject such opinion or diagnosis – notwithstanding ‘a body of professional opinion’ approving or agreeing with the diagnosis.

3.4.6 Principle 6: the assessment of medical risks and benefits is a matter of clinical judgement which the court would not normally be able to make without expert evidence. It would therefore be wrong to decide a matter by simple preference where there are conflicting views on either side – and both are capable of logical support.

A slight adjustment in wording is all that is needed here: the assessment of the presence of a mental illness or defect is a matter of clinical judgement which the court would not normally be able to make without expert evidence. It would therefore be wrong to decide a matter by simple preference where there are conflicting views on either side – and both are capable of logical support.

It should be noted that the wording purposefully does not state: ‘the assessment of *criminal capacity* is a matter of clinical judgement...’ On the contrary, the assessment of criminal capacity is a matter that a court would be able to make, owing to the fact that it entails a legal evaluation and not a clinical one. The presence of a mental illness or defect however falls within the boundaries of clinical judgement.

As indicated above, where conflicting opinions are all capable of logical support the court should apply the normal rules of evidence. The court should in such a situation assess whether the accused (who, until the law is changed, carries the burden of proof) has proven criminal incapacity on a balance of probabilities. It is during this assessment that a court should also assess the credibility and reliability of the expert witnesses.

3.4.7 Principle 7: only where expert opinion cannot be logically supported at all will it fail to provide the benchmark by reference to which the defendant’s conduct falls to be assessed

A benchmark of what is considered reasonable conduct in certain circumstances (i.e. as part of assessing the presence of negligence in medical negligence cases) is not relevant for criminal capacity. However, just like illogical expert opinion fails to provide some benchmark to judge reasonable conduct, so too does illogical expert opinion fail to provide assistance in determining criminal capacity.

As a result the seventh principle should read: only where expert opinion cannot be logically supported at all will it fail to provide assistance in the assessment of criminal capacity.

3.4.8 Principle 8: it is important to keep in mind that expert scientific witnesses tend to assess likelihood (i.e. assessing probabilities and improbabilities) in terms of scientific certainty (usually expressed as a percentage), instead of assessing (as a court does) where the balance of probabilities lies on a review of the whole evidence.

This principle needs no alteration as psychiatric and psychological also constitute scientific fields and such experts will therefore also tend to assess ‘likelihood’ with reference to scientific certainty and not likelihood in terms of how the scales of probability lie.

In this context likelihood is also assessed in terms of a balance of probabilities. The burden of proof for the proving of pathological criminal incapacity has always been that of a balance of probabilities.⁹⁴

3.4.9 Principle 9: in order to provide the court with the generally accepted practice, counsels should at least call one full-time practicing medical practitioner as an expert witness. Experts with only limited time to practice can however still provide valuable testimony with regards to other aspects of the case.

The ‘generally accepted practice’ here refers to the method used to make the diagnosis. If an expert testifies that his or her diagnosis was reached by following ‘generally accepted practice’ then, according to this principle, it is to be preferred that such expert is in full-time practice. It makes logical sense that full-time practicing expert might be in a better position to indicate what methods are generally accepted by the profession.

Principle 10: where a court is confronted with conflicting schools of thought or opinions, it may accept the conflicting or minority opinion, if that opinion accords with what is considered reasonable by that specific branch of the medical profession

This principle is especially useful where psychiatric and psychological evidence collide. In such an event the guidelines as expressed above⁹⁵ should provide foundational guidance.

⁹⁴ *S v Manamela and Another (Director-General of Justice intervening)* (supra) para [30].

3.4.11 Principle 11: in evaluating whether a conflicting or minority opinion is considered reasonable by that specific branch of the medical profession, a court should be mindful that it should only refuse to admit such opinion if it is so unreasonable and so dangerous to be contrary to public policy.

The reference to ‘reasonable’ in this principle does not refer to the evaluation of negligence. Rather this reference refers to a court’s normal evaluation of the expert evidence. Here the conflicting or minority opinion is itself considered and not the conduct of a person (or in this context, criminal capacity of a person).

This principle then provides that a court should not reject an expert opinion based solely on the fact that it is a minority opinion or that it conflicts with other opinions. It should be assessed in exactly the same way and according to the exact same principles and guidelines as expressed above.

3.5 Conclusion

This chapter attempted to provide some useful guidance on how the problem of reconciling different expert evidence can be eased, if not entirely overcome. It first set out some general guidelines, which showed how one can overcome a situation where different diagnoses were made and still be able to make a well-reasoned and conclusive finding on criminal capacity.

This chapter then made use of a Supreme Court of Appeal decision⁹⁶ which voiced a practical approach to evaluating expert evidence. The principles of this case, which was actually rooted in the field of medical negligence, were then adapted in order to be used in the assessment of criminal capacity.

In laying down some general principles it was advanced that expert evidence should be approached correctly. One should remember that the court, and not the expert, decides whether the accused is criminally capacitated or not. This is because criminal capacity is a legal concept, constituting a legal question, and not a clinical one. As a result counsel

⁹⁵ Under ‘Articulating the problem and providing some foundational guidelines’ are useful once more and should be kept in mind.

⁹⁶ *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another (supra)*.

(whether they act on behalf of the Prosecution or the accused) should place the expert evidence within its correct boundaries. Experts should report on which functional abilities (whether physical or of the mind) were affected by the medical illness or defect. Once a court is armoured with this evidence it can use its legal-deductive prowess to make a finding on criminal capacity, i.e. whether, due to certain functional abilities being affected, the accused had the ability to distinguish between right and wrong and act in accordance with such appreciation.

The principles from the *Michael's* case are also very useful and provide further guidance (especially to courts) in how to approach expert evidence. Central to most of the principles is the rule that a court should analyse the *logic* of the expert opinion. In summary these principles are:

1. The issue of criminal capacity is one for the court itself to determine on the basis of the various (and often conflicting) psychiatric and/or psychological expert opinions.
2. The determination of criminal capacity will not involve considerations of credibility (of the expert witnesses), but rather the examination of their opinions and the analysis of their essential reasoning, in preparation of the court reaching its own conclusion on the issue of criminal capacity.
3. What is required in the evaluation of expert evidence is to determine whether and to what extent their opinions are founded on logical reasoning
4. The court must be satisfied that the expert opinion has a logical basis, i.e. that the expert has considered other comparative diagnoses, the reasons for rejecting them and whether his or her chosen diagnosis constitutes a 'defensible conclusion'.
5. An accused can probably be found criminally (in)capacitated if that body of opinion is not capable of withstanding logical analysis – despite the support of a body of professional opinion approving of (or agreeing with) the diagnosis of the expert.
6. The assessment of the presence of a mental illness or defect is a matter of clinical judgement which the court would not normally be able to make without expert

evidence. It would therefore be wrong to decide a matter by simple preference where there are conflicting views on either side – and both are capable of logical support.

7. Only where expert opinion cannot be logically supported at all will it fail to provide assistance in the assessment of criminal capacity.
8. It is important to keep in mind that expert scientific witnesses tend to assess likelihood (i.e. assessing probabilities and improbabilities) in terms of scientific certainty (usually expressed as a percentage), instead of assessing (as a court does) where the balance of probabilities lies on a review of the whole evidence.
9. In order to provide the court with the generally accepted practice, counsels should at least call one full-time practicing medical practitioner as an expert witness. Experts with only limited time to practice can however still provide valuable testimony with regards to other aspects of the case (like the clinical issues).
10. Where a court is confronted with conflicting schools of thought or opinions, it may accept the conflicting or minority opinion, if that opinion accords with what is considered reasonable by that specific branch of the medical profession
11. In evaluating whether a conflicting or minority opinion is considered reasonable by that specific branch of the medical profession, a court should be mindful that it should only refuse to admit such opinion if it is so unreasonable and so dangerous to be contrary to public policy.

It is certainly conceivable that, although both professions are indeed 'apt to go a little wrong',⁹⁷ they will be much less susceptible to error if both professions follow these guidelines and principles.

⁹⁷ To use the words of Chief Justice Innes in *R v Smit* 1906 TS 785.

CHAPTER 4

SECTION 78(1B) MEASURED AGAINST SECTION 9(1) OF THE CRSA

‘The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.’⁹⁸

4.1 Introduction

Section 9(1) of the CRSA provides that everyone is equal before the law and has the right to equal protection and benefit of the law.⁹⁹

Although an enquiry into compliance with section 9(1) is generally considered to precede compliance with section 9(3) (the determination of unfair discrimination)¹⁰⁰ it has been held that that this does not have to be so in every case – a court may directly enquire into the question of unfair discrimination.¹⁰¹

For purposes of this study however, the validity of section 78(1B) of the CPA will be measured against both sections 9(1) and 9(3).

This chapter will start by providing the test for compliance with section 9(1). The test will then be applied, step-by-step. The principles involved in each step will be discussed before they are applied to section 78(1B).

4.2 The test for compliance with section 9(1)

The test for compliance with section 9(1) was set out in *Harksen v Lane NO*.¹⁰²

⁹⁸ *Prinsloo v Van der Linde and Another* 1997 6 BCLR 759 (CC) para [25].

⁹⁹ Section 9 of the CRSA received its most intense interpretation in the following cases: *Brink v Kitshoff NO* 1996 4 SA 197 (CC), *Prinsloo v Van der Linde and Another* (supra), *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC), *Harksen v Lane NO* (supra), *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

¹⁰⁰ *Harksen v Lane NO* (supra) para [42]. Goldstone J stated that ‘the first enquiry’ involves section 9(1). See also C Albertyn ‘Equality’ in MH Cheadle et al *South African Constitutional Law The Bill of Rights 2nd edition* (2005) 4-14 and I Currie & J de Waal *The Bill of Rights Handbook 5th edition* (2005) 236.

¹⁰¹ Based on Ackermann J’s remark in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (supra) para [18].

¹⁰² *Supra* par [53](a).

Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1) [of the Interim Constitution]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

The first step of the test therefore determines whether a differentiation occurs. This is a logical place to start because the issue of differentiation forms the axle around which the equality-clause revolves – without it, there cannot be an issue of inequality.¹⁰³

The second step entails the determination of whether a legitimate government purpose for the differentiation exists. Finally, it must be established if a rational *nexus* between the differentiation and the government purpose exists. If no rational connection exists, the provision will be unconstitutional and no further enquiry is needed. However if such a connection does in fact exist then the rationality of the differentiation will save the provision from unconstitutionality. In such a case it will be necessary to then test the provision for unfair discrimination.

At the outset it must be said that section 9(1) is not a Herculean guard against inequality. This test for compliance with section 9(1) only requires a court to assess the reasons given by government for the differentiation (and only if differentiation exists) in order to determine whether the purpose of the differentiation is legitimate.¹⁰⁴ Once a legitimate purpose is established, a court will assess whether a rational connection exists between the purpose and the differentiation.¹⁰⁵

The Constitutional Court itself recognised that the section 9(1)-test is restricted solely to the determination of a rational relationship between the method (i.e. the disputed provision) and the objective (i.e. the government's purpose) – even if the objective could have been achieved in a different way.¹⁰⁶ A court may therefore neither consider if other methods, than the method in dispute, would have achieved the same goal, nor may it assess the fairness, reasonableness, appropriateness or efficacy of the chosen method.¹⁰⁷

¹⁰³ Currie & De Waal (*supra*) 236.

¹⁰⁴ Currie & De Waal (*supra*) 241.

¹⁰⁵ As above.

¹⁰⁶ *Prinsloo v Van der Linde (supra)* para [35] - [36], *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 2 SA 1 (CC) para [17].

¹⁰⁷ *Law Society of South Africa and Others v Minister of Transport and Another (supra)* para [32]. Currie & De Waal (*supra*) 241.

In the current context the section 9(1)-test would comprise of the following steps:

1. Does section 78(1B) of the CPA differentiate between mentally disabled and mentally abled accused?
2. If such differentiation exists, is there a legitimate government purpose for the differentiation?
3. Does a rational connection exist between the differentiation and the legitimate government purpose?

4.3 Application of the test to section 78(1B) of the CPA

The above described test will consequently be applied to section 78(1B) of the CPA.

4.3.1 Step 1: does section 78(1B) of the CPA differentiate between mentally disabled and mentally abled accused?

The concept of 'differentiation' lies at the core of determining whether the right to equality has been violated.¹⁰⁸ Differentiation naturally entails some form of different treatment.¹⁰⁹

Difference in treatment (or differentiation) does not however mechanically lead to discrimination.¹¹⁰ In fact, differentiation is an integral and necessary part of effective governance.¹¹¹ Hogg provides some useful examples of where differentiation in legislation is necessary: punishment for the convicted but not for the innocent, mandatory school attendance for children but not for adults and stricter regulations for food or drug manufacturers but less stringent regulations for automobile manufacturers.¹¹²

The rub lies therein that a court, when evaluating an alleged violation of section 9, must determine which differentiation (or difference in treatment) is legitimate and which is not.¹¹³

¹⁰⁸ *Prinsloo v Van der Linde and Another (supra)* para [23], *Harksen v Lane NO and Others (supra)* para 42, *Ernst & Young and Others v Beinash and Others* 1999 1 SA 1114 (W) 1141.

¹⁰⁹ Differentiation can either be caused by treating person(s) different or by failing to treat person(s) different - C Albertyn 'Equality' in Cheadle et al (*supra*) 4-32. This study however patently involves positive treatment, i.e. the placing of a burden of proof on an accused that raised the issue of criminal capacity.

¹¹⁰ *Prinsloo v Van der Linde (supra)* para [17]. C Albertyn & B Goldblatt 'Equality' in S Woolman et al *Constitutional law of South Africa 2nd edition* (2002) 35-17, C Albertyn 'Equality' in Cheadle et al (*supra*) 4-14 and Currie & De Waal (*supra*) 239.

¹¹¹ *Prinsloo v Van der Linde (supra)* para [24].

¹¹² PW Hogg *Constitutional law of Canada 3rd edition* (1992) para 52.6(b). C Albertyn 'Equality' in Cheadle et al (*supra*) 4-14 provides income classification for taxation purposes as a further example.

¹¹³ *Prinsloo v Van der Linde (supra)* para [17].

It was during this evaluation that the Constitutional Court drew a further distinction between two types of illegitimate differentiation: ‘mere differentiation’ (which will constitute a violation of section 9(1)) and unfair discrimination (resulting in a violation of sections 9(3) or 9(4)).¹¹⁴

This distinction is significant because different tests are used to determine whether treatment constitute mere differentiation or unfair discrimination. The validity of mere differentiation is tested by using the standard of rationality, whilst the validity of discrimination is tested by using the standard of fairness.¹¹⁵

If these principles are applied to section 78(1B) one will realise that the difference in treatment that this section effects lies therein that an accused who raises the issue of criminal capacity acquires the *onus* to prove such capacity, whilst accused who do not raise the issue do not acquire this burden.

As indicated above¹¹⁶ it is not hard to see that this difference in treatment will amount to differentiation between the mentally disabled accused and the mentally abled accused.

4.3.2 Step 2: is there a legitimate government purpose for the differentiation?

This step consists of a further multi-layered series of tests. The first enquiry under this step is to establish a government purpose for the disputed provision. Once such a purpose has been established one must test whether it is a *legitimate* purpose. In determining the legitimacy of the purpose one must delve yet deeper and assess whether the purpose is rational, whether it was enacted arbitrarily and whether it displays ‘naked preferences’. Courts however, in their judgements, seldom explicitly state their finding on each of these dissected steps. It will usually only state its conclusion whether the purpose is legitimate or not.

This study will however follow this dissected path in order to present a clear and well-reasoned argument.

¹¹⁴ *Prinsloo v Van der Linde (supra)* paras [25] - [28].

¹¹⁵ *Harksen v Lane NO (supra)* paras [42] – [51]. Different sections of the CRSA obviously also applies to each form.

¹¹⁶ Chapter 1, under ‘Section 78(1B): applicable to all accused?’.

i) *A government purpose for section 78(1B) of the CPA*

The preamble or long title of an Act is a useful place to find the government's purpose, because it sets out the objectives of the Act.¹¹⁷ It is furthermore not sufficient to identify a 'generic purpose' of the challenged provision.¹¹⁸ One has to identify a *specific* government purpose - for the generic purpose might withstand constitutional muster while the specific purpose might not.¹¹⁹

Another indication as to what this term entails is by using examples from case law. A selection of case law consequently follows which illustrates the distilled government purpose (without it being necessary to provide the surrounding context):

- *S v Ntuli*: preventing the courts from being flooded with patently pointless appeals (by sifting out those appeals with a reasonable prospect of success from those with no reasonable prospect of succeeding).¹²⁰
- *City Council of Pretoria v Walker*: equalising the provision of municipal services between the townships and affluent suburbs inside the municipality.¹²¹
- *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others*: establishing and maintaining a disciplined military force with a viable military justice system.¹²²
- *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others*: combatting harm caused by pornographic and violent materials.¹²³
- *Weare and Another v Ndebele NO and Others*: regulating gambling activities.¹²⁴

¹¹⁷ *Bhyat v Commissioner for Immigration* 1932 AD 129, LC Steyn *Die uitleg van wette* (1981) 147. This method was used in *Prinsloo v Van der Linde* (*supra*) para [35] to good effect.

¹¹⁸ *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) para [33], C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-19.

¹¹⁹ The necessity of establishing a specific government purpose is clearly illustrated in *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* (*supra*) para [33]. In this case the generic purpose was the regulation of the patrimonial consequences of marriage (which seems to be the overall objective of the Matrimonial Property Act 88 of 1984 in any event). The court however preferred the *specific* purpose of the disputed provision (sec 18(b) of Act 88 of 1984) above the generic purpose. The specific purpose was to avoid the futility of spousal claims for damages where the bodily injuries had been caused by the other spouse. The court found that the specific purpose was untenable and, although it did not specifically decide the issue, it seems that the generic purpose was accepted as legitimate.

¹²⁰ 1996 1 SA 1207 (CC).

¹²¹ 1998 2 SA 636 (CC). C Albertyn 'Equality' in Cheadle (*supra*) 4-16(1) fn 93.

¹²² 2002 1 SA 1 (CC) para [44].

¹²³ 2004 1 SA 406 (CC). C Albertyn 'Equality' in Cheadle (*supra*) 4-16(1) fn 93.

¹²⁴ 2009 (1) SA 600 (CC).

For purposes of determining a government purpose for section 78(1B) the long title of the CMAA, the Act that inserted section 78(1B) in the CPA, must be consulted. It states, in relevant part:

...to amend the Criminal Procedure Act, 1977, so as to further regulate the referral of an accused for enquiry into his or her capacity to understand proceedings or regarding the criminal responsibility of an accused concerning the offence with which he or she is charged; and to provide for matters connected therewith.

Section 78(1B) is not concerned with the referral of an accused. As a result the applicable part of the long title which can provide the aim is the following: to amend the CPA regarding 'the criminal responsibility of an accused concerning an offence with which he or she is charged'.

The generic purpose of section 78(1B), adducible from the long title, can therefore be *to regulate the criminal responsibility (i.e. capacity) requirement of accused persons*.

This aim seems logical in the context of the rest of section 78 – which regulates the criminal capacity of accused who were mentally ill or disabled at the time of commission of an offence. Sections 78(1A) and 78(1B) are incidental procedural arrangements related to the rest of section 78.¹²⁵

The Canadian case of *R v Chaulk*¹²⁶ also tested the constitutionality of the reverse *onus*. Lamer CJC, for the majority of the court, held that section 16(4) of the Canadian Criminal Code's purpose was that Parliament wished to 'avoid placing on the Crown the impossibly onerous burden of disproving insanity and to thereby secure the conviction of the guilty (who are not "sick") by defeating acquittals based on a doubt as regards [to] insanity'.¹²⁷

Because section 16(4) of the Canadian Criminal Code was the equivalent of section 78(1B) and because the Parliamentary Portfolio Committee on Justice relied on this case

¹²⁵ The fact that secs 78(1A) and 78(1B) are applicable to the mentally abled as well (at least on face value), does not detract from the fact that the rest of section 78 is only concerned with mentally ill or disabled accused.

¹²⁶ *Supra*.

¹²⁷ *R v Chaulk (supra)* 38. Lamer CJC later summarises the purpose as follows at 40: '[a]ccordingly, the objective of s. 16(4) is to avoid placing an impossible burden of proof on the Crown and to thereby secure the conviction of the guilty.'

in justifying section 78(1B)'s enactment,¹²⁸ it is highly probable that our Legislature had the same objective in enacting section 78(1B).

Consequently the specific government purpose for section 78(1B) can be stated to read: *to regulate the criminal responsibility (i.e. capacity) requirement of accused persons by avoiding the placing of the impossibly onerous burden of disproving a mental illness or defect on the Prosecution; and to thereby secure the conviction of the guilty (who do not have a mental illness or defect) by defeating acquittals based on a doubt as regards to the presence of a mental illness or defect.*

Important to note of this purpose is the fact that the *onus* is placed on the accused in order for the Prosecution to avoid having to disprove the presence of a mental illness or defect because this burden is, according to Lamer CJC, 'impossibly onerous'. In other words, if the accused wishes to allege the presence of a mental illness or defect the he must prove it, because it is seemingly too difficult for the Prosecution to disprove its absence.

Also important to note is that part of this purpose is to prevent sane, but guilty, accused being acquitted because a reasonable doubt exists as to the presence of a mental illness or defect. Thus, by placing the *onus* on the accused who alleges criminal incapacity, a guilty finding can still be made if the *accused* failed to prove the presence of a mental illness or defect on a balance of probabilities (because it would have been more probable, on the evidence presented, that the accused does not have a mental illness or defect).

The legitimacy of this purpose must consequently be assessed.

ii) *The legitimacy of the government's purpose: the test*

The question now remains whether this is a *legitimate* government objective. Albertyn and Goldblatt¹²⁹ state that in order to meet this legitimacy requirement, the government seemingly only has to show this purpose is neither arbitrary nor irrational. They state that legitimacy is equated with rationality and because of that the government does not have to

¹²⁸ See chapter 2 under 'The statutory development'.

¹²⁹ C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 4-15.

validate its purpose against 'substantive constitutional values or any conception of the 'general good'.¹³⁰

Justification for this use of rationality can also be found in a principle which forms part of the rule of law, that is, that public power should not be exercised arbitrarily.¹³¹ The court in *Prinsloo v Van der Linde*¹³² expressed this link with the rule of law by stating that a constitutional state should not govern arbitrarily and it should not show 'naked preferences'¹³³ that do not have a legitimate governmental purpose – for that would violate the rule of law.

The legitimacy of the government purpose will be assessed below. The rationality of the government purpose will first be assessed, followed by whether it is non-arbitrary. Finally it must be established that the government purpose does not show 'naked preferences'. If any of these elements of legitimacy is found wanting, the government purpose will be illegitimate and, therefore, a violation of section 9(1).

iii) *The legitimacy of the government's purpose: rationality*

The *Concise Oxford English Dictionary*¹³⁴ defines 'rational', the stem of rationality, as something based on or in accordance with reason or logic.

It is submitted that section 78(1B) does not make logical sense. Why would Parliament single out one requirement of criminal liability and place the burden of proof for that requirement on the accused? Why have Parliament chosen criminal capacity and not, for example, fault? Both utilise subjective measures in order to be established and are, as such, more difficult to prove. But what makes it more difficult to prove criminal capacity than fault – especially if one considers that (medical) experts are at hand to assist the court with the determination of criminal capacity, whilst no such expert assistance is (statutorily) possible for establishing fault?

¹³⁰ As above. Also *Van der Merwe v Road Accident Fund (Woman's Legal Centre Trust as Amicus Curiae)* (*supra*) para [48] and [58].

¹³¹ *Law Society of South Africa and Others v Minister of Transport and Another* 2011 1 SA 400 (CC) para [32]. C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-18, Currie & De Waal (*supra*) 243.

¹³² *Supra* para [25].

¹³³ Ackermann, O'Regan and Sachs JJ borrowed this term from an American legal writer, Cass Sunstein. He defines this term with the following words: 'the distribution of resources or opportunities to one group rather than another solely on the ground that those favored [*sic*] have exercised the raw political power to obtain what they want.' – CR Sunstein 'Naked preferences and the Constitution' (1984) *Columbia Law Review* 1689.

¹³⁴ C Soanes & A Stevenson (eds) *The concise Oxford English dictionary revised 11th edition* (2008) 1193.

Why should an accused, who certifiably suffers from a mental illness or disability, receive a burden of proof to prove his incapacity to distinguish between right or wrong or act in accordance with such appreciation? For the Prosecution's convenience? Surely this is an irrational expectation for the mentally ill or disabled accused.

Furthermore, if the purpose of section 78(1B) is to avoid an 'impossibly onerous' burden on the Prosecution, then the Legislature should not have enacted section 79 of the CPA. In this section the Legislature makes it much less difficult in establishing whether a mental illness or defect is present, thereby making the burden easier. The assistance of up to four independent¹³⁵ experts is not merely available, but *compulsory*. In a trial therefore a plethora of evidence will be available for the Prosecution to prove a mental illness or defect beyond a reasonable doubt. Also, if the guidelines provided in chapter 3 are used, then, it is submitted, the 'impossibly onerous' burden of proving a mental illness or defect will not be so onerous nor so difficult.

The argument that an accused can fake a mental illness or defect, thereby avoiding a conviction (i.e. that the guilty and sane then go free), also does not hold water. Such argument not only impugns the very science of psychiatry, but also insults the professionalism of every trained psychiatrist. If it were that easy to fake a mental illness or defect then we should re-train every psychiatrist in the country (for they would be incapable of making an accurate diagnosis). We should also then discard the current tried and tested methods of reaching a diagnosis (because they can easily be fooled and manipulated) and develop a completely new system of evaluating patients. Clearly, such argument is not only ludicrous in the extreme, but also embarrassing.

The irrationality of the government purpose continues. As highlighted above part of the government purpose is to place the onus on the accused in order to secure a conviction of an accused (that does not have a mental illness or defect), by avoiding acquittals based on a reasonable doubt as to the presence of a mental illness or defect.

In effect then, the Legislature wants to avoid acquittals due to the inability of the Prosecution to prove a requirement for liability beyond a reasonable doubt – despite the

¹³⁵ The experts are independent because the court has a discretion in their appointment. It is the court who appoints them, not the parties – sec 79(1) of the CPA. Even the psychiatrist appointed for the accused is appointed by the court (usually on recommendation by the accused) – sec 79(1)(b)(iii). If a court therefore has doubts about an expert's independence it can simply direct that another expert be appointed.

assistance that the Legislature affords in section 79 to prove this requirement. Why should the inability of the Prosecution to prove criminal capacity be remedied, but not the other requirements for liability? As has been illustrated, it is not so difficult to prove the presence of a mental illness or defect and this should not constitute a reason for legitimising the government purpose.

In any event, where is the logic (and by extension the rationality) in allowing an accused to be acquitted because conduct, unlawfulness, causality or fault could not be proven beyond a reasonable doubt, yet no acquittal may follow when his criminal capacity was not proven beyond a reasonable doubt? Instead, an accused should rather be convicted – possibly face imprisonment – than have the Prosecution exert more effort in proving criminal capacity.

If we tolerate the shifting of the Prosecution's *onus* because we would rather see innocent, but mentally disabled, persons convicted¹³⁶ than guilty men go free,¹³⁷ then we should start tearing down the rest of the foundations of our criminal justice system too. For is it not a fundamental maxim of our law, stated by Sir William Blackstone, that it is '*[b]etter that ten guilty persons escape than one innocent suffer*'?¹³⁸

Consequently, the government purpose is irrational.

iv) *The legitimacy of the government's purpose: arbitrariness*

The Appellate Division provided a generic definition for 'arbitrary conduct' in *Loxton v Kenhardt Liquor Licensing Board*: '[c]onduct is arbitrary when it is capricious or proceeds merely from the will, without being based on reason or principle'.¹³⁹ In *Johannesburg Liquor Licensing Board v Kuhn*, Holmes JA held much the same: '[a]rbitrariness connotes caprice¹⁴⁰ or the exercise of the will instead of reason or principle, without consideration of the merits'.¹⁴¹ In a constitutional context it has been held that 'arbitrary deprivation' in terms of section 25 of the CRSA will occur when the law (which deprives the property)

¹³⁶ I.e. by not being able to prove criminal incapacity on a balance of probabilities.

¹³⁷ Due to the Prosecution not being able to prove criminal capacity beyond a reasonable doubt.

¹³⁸ W Blackstone *Commentaries on the Laws of England* (1766-1769) 358. See also the much older example of this principle in Genesis 18:23-32.

¹³⁹ 1942 AD 314.

¹⁴⁰ The *Concise Oxford Dictionary* (*supra*) in turn defines caprice as 'a sudden and unaccountable change of mood or behaviour.'

¹⁴¹ 1963 4 SA 666 (A) 671.

does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.¹⁴²

Consequently it can be adduced that the purpose of section 78(1B) will have an element of arbitrariness if it is not based on reason or principle (but instead on caprices) and if it lacks solid motivation.

As indicated above, the reasoning behind section 78(1B) is seriously lacking in logic (i.e. reason). This lack of reason and motivation points to the conclusion that Parliament merely enacted the traditional (pre-constitutional) position of the common law, without fully considering whether section 78(1B) infringes on fundamental rights.¹⁴³

Another indication for this is Parliament's want of reason for twice ignoring the recommendations of the South African Law Commission not to enact section 78(1B) because it could infringe on constitutional rights.¹⁴⁴ And although the decision to ignore the recommendations involves a choice based on policy, it nevertheless indicates towards arbitrary (or unreasoned) government action. And even though policy making is not the arena of courts, where policy infringes on the CRSA, it will be invalid.¹⁴⁵

Some small measure of consideration on whether section 78(1B) might infringe on fundamental rights cannot constitute solid motivation. Nor does it indicate towards reasoned or considered government action. If the right to be equal before the law and to be entitled to equal protection and benefit of the law can be quashed by such half-hearted considerations during the legislative process then it is indeed a sad day for a constitutional democracy.

¹⁴² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para [100].

¹⁴³ As indicated in Chapter 2 under 'The statutory development' the Parliamentary Portfolio Committee on Justice, in its report to the National Assembly, justified concerns about possible constitutional infringements with mere reference to *R v Chaulk* (*supra*) which found the reverse *onus*, where criminal capacity was in dispute, a justifiable limitation on the right to be presumed innocent. No other steps were taken to specifically ascertain the constitutionality of sec 78(1B). Parliament accepted the report and approved enactment of sec 78(1B).

¹⁴⁴ See South African Law Commission Report 'The declaration and detention of persons as State patients under the Criminal Procedure Act 1977 and the discharge of such persons under the Mental Health Act 1973, including the burden of proof with regard to the mental state of an accused or convicted person' Project 89 (1995) paras 8.30-8.38 and South African Law Commission Report 'The Application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing' Project 101 (2001) paras 2.57-2.59.

¹⁴⁵ Sec 8(1), read with sec 2, of the CRSA.

Ackermann J's words in *S v Makwanyane and Another*¹⁴⁶ also come to mind:

Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.

It was established above that the government purpose is irrational. Naturally then section 78(1B) will also be 'incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way'. The arbitrariness of the government purpose therefore follows inevitably.

v) *The legitimacy of the government's purpose: naked preference*

The 'naked preference' that occurs here links with the presence of the arbitrary enactment of section 78(1B). It consists of the Prosecution opting not to prove criminal capacity in certain cases, whilst it has no problem proving it in other cases – solely based on whether an accused - a mentally disabled accused - raises the issue. The Prosecution therefore prefers, openly and without basis, that mentally disabled accused should prove their criminal incapacity, but only if they decide to raise the issue.

vi) *The legitimacy of the government's purpose: conclusion*

It cannot be said that the purpose of regulating the criminal capacity requirement by shifting the burden of proving criminal capacity, is rational. It would have been rational if the Prosecution had to prove all the requirements in each and every case – no matter who raises what issue. It would even have been rational if the provision provided that the burden of proving criminal capacity *always* lies with the accused.¹⁴⁷

The government purpose also constitute arbitrary government conduct because, although some small consideration has been given, no solid motivation exists for section 78(1B)'s enactment.

¹⁴⁶ 1995 3 SA 391 (CC) para [56].

¹⁴⁷ Rational perhaps (due to a sound basis of reason and logic underpinning such argument), but unconstitutional nonetheless (most probably as an infringement on the presumption of innocence).

Furthermore section 78(1B) shows naked preferences between mentally abled and mentally disabled accused.

For that reason it cannot be said that the purpose for section 78(1B) is legitimate. Section 78(1B) of the CPA fails compliance with section 9(1) of the CRSA at this stage.

4.3.3 Step 3: does a rational connection exist between the differentiation and the (legitimate) government purpose?¹⁴⁸

If a legitimate government purpose however existed then the question would be – how should one establish whether a rational *nexus* between the differentiation and a legitimate government purpose exists? In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*¹⁴⁹ the court provided the answer (and the reason for its answer) by deciding that:

[t]he question whether a decision is rationally related to the purpose for which the power was given calls for an *objective enquiry*. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational.

Once the illegitimacy of the government purpose has been established then it is not necessary to test further. Section 78(1B) fails to withstand constitutional scrutiny at this point.

There is however another reason why this step fails: the assessment of the legitimacy of a government purpose is equated with the assessment of the rationality thereof,¹⁵⁰ it is not necessary to again test for rationality. Once irrationality is established at any stage the enquiry ends.

This is so because rationality is the basis of the section 9(1)-test; in fact, it is the rationality of the differentiation which saves it from being unconstitutional. Once either the differentiation or the government's purpose for the differentiation is found to be irrational, it

¹⁴⁸ For purposes of complete argument this step is included and explained in this study.

¹⁴⁹ 2000 (2) SA 674 (CC) para [86] (emphasis added). Confirmed in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) paras [263], [284] and *Law Society of South Africa and Others v Minister of Transport and Another (supra)* para [33].

¹⁵⁰ See above under 'Step 2: is there a legitimate government purpose for the differentiation?'.

would make no logical sense to continue seeking a *rational* connection between such differentiation and purpose.

4.4 Conclusion

This chapter assessed whether section 78(1B) of the CPA is in conflict with section 9(1) of the CRSA.

The test for infringement of section 9(1) entails a twofold enquiry: does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose?

It was found that section 78(1B) differentiates between accused who raise the issue of criminal capacity and accused who do not raise this issue. The former accused acquires a burden of proof to prove criminal capacity whilst the latter acquires no such burden.

It was then found that although section 78(1B) does have a government purpose, this purpose is illegitimate. This was because the government purpose is irrational, arbitrary and shows 'naked preferences'.

Because the government purpose was found to be irrational there could be no question of whether a *rational* connection existed between the provision and the government purpose. Consequently the second leg of the section 9(1)-enquiry also failed.

Section 78(1B), therefore, constitutes irrational differentiation between mentally abled and mentally disabled accused and infringes on section 9(1) of the CRSA.

CHAPTER 5

SECTION 78(1B) MEASURED AGAINST SECTION 9(3) OF THE CRSA

‘The subsections dealing with unfair discrimination comprise the functional centre of the equality right.’¹⁵¹

5.1 Introduction

Even though section 78(1B) of the CPA was found to infringe section 9(1) of the CRSA, thereby rendering further evaluation unnecessary, this chapter will nonetheless also test section 78(1B) against section 9(3) of the CRSA – the prohibition of unfair discrimination-clause.¹⁵²

Section 9(3) of the CRSA provides:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 9(3) must be read with section 9(5) of the CRSA, which states:

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

This chapter will start by setting out the test for infringement of section 9(3). It will then discuss each step in the test, followed directly by an application of section 78(1B) to the applicable step. The test for infringement of section 9(3) entails an enquiry into three factors: discrimination, fairness and justification. The first two factors will be assessed in this chapter whilst the last will be considered in chapter 6 below.

5.2 The test for infringement of section 9(3)

Like the test for infringement of section 9(1), the Constitutional Court in *Harksen v Lane NO*¹⁵³ also set out the test for infringement of section 9(3). It reads:

¹⁵¹ C Albertyn & B Goldblatt ‘Equality’ in Woolman et al (*supra*) 35-42.

¹⁵² Sec 9(4) of the CRSA also prohibits unfair discrimination, but regulates the position between private actors.

¹⁵³ *Supra* para [53].

Does the differentiation [established under the evaluation of section 9(1)] amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2) [of the Interim Constitution].

Woolman et al provide a useful paring of this test and the same paring will be used for purposes of this study. The paring entails:¹⁵⁴

1. Does the differentiation amount to discrimination?
2. If so, is the discrimination unfair?
3. If so, can the unfair discrimination be justified in terms of section 36 of the CRSA?

The first step entails an evaluation of three further elements, namely: the presence of (direct or indirect) differentiation, the existence of a prohibited ground and some prejudice caused (to the affected person). If these three elements are present, then the differentiation will amount to discrimination.

The second step, i.e. the determination of unfairness, also uses three criteria, namely: the position of the complainants in society, the nature of the provision and the purpose sought to be achieved by it and the extent to which the discrimination has affected the rights or interests of the complainant and whether it has led to an impairment of their fundamental human dignity.

¹⁵⁴ C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-45. This paring is repeated in C Albertyn 'Equality' in Cheadle et al (*supra*) 4-32.

If the provision is found to be unfair, a justification is to be sought under section 36 of the CRSA.

This multi-layered approach of section 9(3) is a logical continuation of the equality evaluation. Under section 9(1) a differentiation must be established. Section 9(1) however pauses at this point and focuses on this differentiation by assessing the rationality of the differentiation (or the difference in treatment).

The section 9(3)-evaluation then takes up the reigns where section 9(1) paused. It goes a step further¹⁵⁵ and tests whether the differentiation qualifies as a specific type of differentiation, namely discrimination. The discrimination is then assessed by using the standard of 'fairness'. Only if the discrimination is found to be unfair will it infringe on section 9(3). As with any infringement on a right in the Bill of Rights, a justification enquiry must follow in accordance with section 36 of the CRSA. This justification enquiry will ensue in Chapter 6 below.

5.3 Applying the test to section 78(1B) of the CPA

The test for infringement of section 9(3) will accordingly be discussed and applied to section 78(1B) of the CPA.

5.3.1 Step 1: does the differentiation amount to discrimination?

It has already been found in Chapter 4 above¹⁵⁶ that section 78(1B) differentiates between accused who raise the issue of criminal capacity and accused who do not raise this issue. The former accused acquires a burden of proof to prove criminal capacity whilst the latter acquires no such burden.

¹⁵⁵ This further step is strictly speaking not necessary if the provision or conduct was found to be irrational under sec 9(1). Although an enquiry into compliance with sec 9(1) is generally considered to precede an enquiry into sec 9(3), it has been said that this does not have to be so in every case – a court may directly enquire into the question of unfair discrimination – as remarked by Ackermann J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (supra)* para [18]. This might be the case where discrimination patently occurs on one or more of the listed grounds. Because the test for unfair discrimination is less stringent than the test under sec 9(1), legal practitioners might opt to rather enquire directly into compliance with sec 9(3).

¹⁵⁶ Chapter 4 under 'Step 1: does section 78(1B) of the CPA differentiate between mentally disabled and mentally abled accused?'

What must be assessed in this step is whether that differentiation qualifies as ‘discrimination’.

In *Prinsloo v Van der Linde*¹⁵⁷ the Constitutional Court described discrimination as the unequal treatment of people *based on attributes and characteristics attaching to them*. Hence the listed grounds in section 9(3) - all of them can be described as attributes or characteristics attaching to people and, if an infringement is based on them, a complainant’s dignity will have been impaired.

Therein also lays the distinction with differentiation. Mere differentiation (which infringes on section 9(1) of the CRSA) does not have the potential to undermine human dignity (through unequal treatment based on a human attributes or characteristics). Mere differentiation is unconstitutional because it constitutes irrational behaviour through unequal treatment, thereby infringing the rule of law.¹⁵⁸ (Unfair) discrimination on the other hand means ‘treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity’.¹⁵⁹

For discrimination to be present therefore the differentiation must be able to prejudice the dignity of a human being. And that is where the listed grounds become applicable – differentiation based on any of those grounds have the potential to prejudice human dignity. Albertyn words it emphatically when she states that ‘[the courts] characterisation of these grounds as having the potential to undermine human dignity *has become the key distinguishing principle of discrimination* (as opposed to ‘differentiation’) in section 9(3) and (4)’.¹⁶⁰

It would seem that an understanding of discrimination as described above could be distilled into three elements:¹⁶¹

1. the presence of (direct or indirect) differentiation;
2. the existence of a prohibited ground; and
3. some prejudice caused (to the affected person).

¹⁵⁷ *Supra* para [31] (emphasis added).

¹⁵⁸ See Chapter 4 under ‘The legitimacy of the government’s purpose: the test’ for an exposition of the link between the prohibition of mere differentiation and the rule of law.

¹⁵⁹ *Prinsloo v Van der Linde (supra)* para [31].

¹⁶⁰ C Albertyn ‘Equality’ in Cheadle et al (*supra*) 4-32 (emphasis added).

¹⁶¹ C Albertyn ‘Equality’ in Cheadle et al (*supra*) 4-32.

Thus, all three of these elements must be present in order for section 78(1B) to qualify as discrimination. These elements will accordingly be discussed *seriatim*.

i) *The presence of direct or indirect differentiation*¹⁶²

The presence of a differentiation is necessary. This is only logical, because discrimination is a sub-species of differentiation - without differentiation there can be no talk of discrimination.

Such differentiation can either be direct or indirect – section 9(3) specifically provides for this fact. When the difference between direct and indirect differentiation is considered it is important to take note of a comment in *Pretoria City Council v Walker*,¹⁶³ the first case to consider the meaning of direct or indirect differentiation. Deputy President Langa (as he was then) stated:

The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) [of the Interim Constitution] evinces a concern for the *consequences rather than the form of conduct*. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2).¹⁶⁴

Therefore, irrespective of whether the differentiation is direct or indirect, a court should rather focus on the effect of the differentiation, than with how it came about (directly or indirectly). This is line with a substantive, rather than a formal, approach to the right to equality.

As a consequence the distinction between direct and indirect differentiation becomes of less importance.¹⁶⁵ When differentiation must be proven however, indirect differentiation might require more substantial proof than direct differentiation.

¹⁶² For matters of style, the term ‘direct or indirect *differentiation*’ will be used under this heading, as opposed to ‘direct or indirect *discrimination*’. The reason is that it seemed premature to speak of discrimination prior to evaluating whether a differentiation qualifies as discrimination (precisely the reason for evaluating these three elements). Only after all these elements have been found present assessed (and discrimination thereby established) should one speak of direct or indirect *discrimination*. This preference however makes little real difference and is merely a matter of being logically coherent.

¹⁶³ *Supra* para [32].

¹⁶⁴ Emphasis added. Sec 8(2) of the Interim Constitution is the equivalent of sec 9(3) in the CRSA, 1996.

¹⁶⁵ C Albertyn & B Goldblatt ‘Equality’ in Woolman et al (*supra*) 35-47.

This is because indirect differentiation seems neutral at face value, but has the *effect* or *consequence* of differentiating.¹⁶⁶

Direct differentiation on the other hand occurs where a provision *specifically* differentiates.¹⁶⁷ In other words, differentiation will be direct if there is a direct and explicit relationship between the distinction and the prohibited ground.¹⁶⁸

Section 78(1B) differentiates indirectly. The wording of the section is neutral, i.e. 'the party who raises the issue'. As argued above¹⁶⁹ however section 78(1B) has the *effect* of indirectly differentiating between mentally disabled and mentally abled accused.

ii) *The presence of a prohibited ground*

The second element in evaluating whether differentiation qualifies as discrimination is whether the differentiation is based on a prohibited ground. A prohibited ground can either be a listed ground or on a ground similar to such listed ground (an 'analogous ground').¹⁷⁰

The listed ground which seems applicable to section 78(1B) is the ground of 'disability'. It would seem common-sense that a mental disability can be brought home under the listed ground of 'disability', yet a total vacuum exists in our law as to such an interpretation. The absence of express recognition by any court or any of the foremost constitutional writers on this interpretation creates enough doubt to rather substantiate the interpretation that the listed ground of disability includes mental disabilities.

If one briefly considers some principles of constitutional interpretation then a reading that the listed ground of 'disability' may refer to any type of disability (be it physical or mental) is supported.

¹⁶⁶ C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-47.

¹⁶⁷ C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-47.

¹⁶⁸ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-33.

¹⁶⁹ Chapter 1 under the headings 'Section 78(1B): applicable to both sides in a criminal trial?' and 'Section 78(1B): applicable to all accused?'

¹⁷⁰ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-37. These analogous grounds was specifically mentioned by the court in *Harksen v Lane* (*supra*) para [53], when it laid down the sec 9(3)-test, i.e. 'If [the differentiation] is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground *is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner*' (emphasis added). This then is also the test for whether an analogous ground is present.

It was stated in the very first decision of the Constitutional Court, in *S v Zuma*,¹⁷¹ that a Constitution that embodies fundamental principles (such as ours) should, as far as its language permits, be given a broad construction. This stance was reaffirmed in *S v Makwanyane and Another*.¹⁷² The court also held, by quoting from a Canadian case, that an interpretation of the Bill of Rights should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Bill of Rights' protection.¹⁷³

The language used in section 9(3) surely permits an interpretation that includes mental disabilities – especially if the language is coupled with a broad interpretation. Furthermore, such an interpretation will be generous (rather than strictly legalistic) and will fulfil the aim of the equality right that people with disabilities, irrespective of the nature of their disability, be treated in a substantively equal manner. This interpretation also allows for 'the full benefit of the Bill of Rights' protection'.

Similar documents than the Bill of Rights in international and foreign law also provide another indicator that a mere mention of 'disability' includes reference to mental disabilities.¹⁷⁴

Article 1 of the United Nations Convention on the Rights of Persons with Disabilities¹⁷⁵ provides that persons with disabilities include those who have long-term physical, *mental*, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹⁷⁶

Section 15(1) of the Canadian Charter of Rights and Freedoms,¹⁷⁷ which had a major influence on the drafting of the CRSA and which is the Canadian equivalent of our section 9, provides that every individual is equal before and under the law and has the right to the

¹⁷¹ 1995 2 SA 642 (CC) para [17].

¹⁷² *Supra* para [9].

¹⁷³ As above.

¹⁷⁴ The use of international and foreign law in interpreting the Bill of Rights is expressly provided for in sec 39 of the CRSA.

¹⁷⁵ UN General Assembly (25 August 2006).

¹⁷⁶ Emphasis added. South Africa signed the Convention on 30 March 2007 and ratified it on 30 November 2007. It has however not been incorporated expressly by legislation as yet.

¹⁷⁷ Part 1 of the Constitution Act, 1982. Emphasis added. This section was quoted by the Constitutional Court in *Brink v Kitshoff* (*supra*) para [38]. The court however mentioned that each country's understanding and interpretation of the equality right is dependent on that country's unique history. This however poses no problem for an interpretation of section 9(3) to include mental disabilities, as the mentally disabled have since time immemorial been a disadvantaged group.

equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or *mental or physical disability*.

Section 10(1) of the Human Rights Code¹⁷⁸ of Ontario defines disability, *inter alia*, as ‘a condition of mental impairment or a developmental disability’ or ‘a mental disorder’.

On South African soil the Employment Equity Act¹⁷⁹ defines ‘people with disabilities’ as:

...people who have a long-term or recurring physical or *mental* impairment which substantially limits their prospects of entry into, or advancement in, employment.

These documents all indicate that the whenever an equality right is at hand, mention of ‘disability’ includes reference to mental disabilities. It would almost then seem that this interpretation is implicit in our Bill of Rights too, but that the drafters perhaps did not want to unnecessarily restrict interpretation. Other disabilities also exist which do not, strictly speaking, qualify as a physical or mental disorder (like learning difficulties or speech impediments).

A reading that reference to ‘disability’ in section 9(3) includes mental disabilities is therefore directly in line with the principles of constitutional interpretation (including section 39 of the CRSA) and should be construed to mean such.

Accordingly the presence of a prohibited ground (and more specifically the listed ground of disability) in section 78(1B) has been established. This element of discrimination is also present.

As a result of the discrimination being on a listed ground, section 9(5) of the CRSA enters the play. The presumption of unfairness thus applies and it will be for the party who alleges that the discrimination is fair to prove so.

¹⁷⁸ R.S.O. 1990, CHAPTER H.19. Section 1 of the Code provides that ‘every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.’ The definition of disability is then provided in sec 10(1) of the Code.

¹⁷⁹ 55 of 1998, sec 1. Emphasis added. This statute is included here because it does in fact involve the equality right, more specifically sec 9(2) of the CRSA (the affirmative action clause).

iii) *Some prejudice caused*

This element is limited to only demonstrating that some immediate harm flowed from the differentiation – it could be an imposition of a burden or the failure to accord a benefit.¹⁸⁰ It does therefore not involve considerations on the broader impact of discrimination on the complainants or historical context – these considerations will only come into play once the fairness of the discrimination is evaluated.¹⁸¹

It should further be mentioned that occasionally the Constitutional Court fails to consider this element entirely, but perhaps only because the prejudice is so obvious that it needs no discussion.¹⁸²

The immediate harm that flows from section 78(1B) of the CPA is the imposition of a burden of proof on an accused that raises the issue of criminal capacity. This harm constitutes the prejudice.

As a result the third and final element of discrimination has been established.

iv) *Step 1: does the differentiation amount to discrimination? – a conclusion*

It has been stated that in order for differentiation to also constitute discrimination, three elements must be present: a direct or indirect differentiation, a prohibited ground and some prejudice.

It has been shown that section 78(1B) indirectly differentiates, because the wording of the provision is neutral (and seemingly benign), but the impact, effect or consequence of the provision constitutes a difference in treatment (and thus also differentiation).

It has also been shown that section 78(1B) differentiates on a prohibited ground, namely the listed ground of disability. Motivation for why mental disabilities resort under the umbrella term 'disability' has also been provided.

¹⁸⁰ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-49.

¹⁸¹ As above.

¹⁸² As above.

Finally it has been shown that section 78(1B) causes the immediate harm of placing a burden of proof on an accused that raise the issue of criminal capacity. This qualifies as some prejudice caused.

Consequently section 78(1B) of the CPA not only constitutes differentiation but also discrimination.

5.3.2 Step 2: is the discrimination unfair?

At the onset it must be reiterated that section 9(5) of the CRSA finds application in this context, that is to say that the discrimination established above is presumed to be unfair. It will therefore be for the respondent to prove the fairness of the discrimination. This step will consequently be evaluated with this presumption in mind.

Once discrimination is established one must assess whether it has an unfair impact on the complainant.¹⁸³ It is particularly at this stage that a substantive approach to equality, rather than a formal one, is followed.¹⁸⁴ That is to say, equality of outcome is the aim - even if it means disparity of treatment. Sameness of treatment is therefore not at hand.¹⁸⁵

Central to the determination of substantive (un)fairness lies the value of dignity. Albertyn elaborates on some features which are crucial to the value of dignity in this context: the need for the state to treat every person with equal concern and respect, to avoid stereotyping and to protect those who are socially and economically marginalised and, as a result, relegated to the fringes of society.¹⁸⁶ Fairness is therefore considered using dignity as guiding light and in turn dignity, due to its elusive character, is determined by these features.

Harksen v Lane NO again provides vital assistance in determining whether discrimination will be fair or unfair. In summary the court provided the following three measurements for such evaluation:¹⁸⁷

¹⁸³ *Harksen v Lane NO (supra)* para [50].

¹⁸⁴ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-50.

¹⁸⁵ Currie & De Waal (*supra*) 232.

¹⁸⁶ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-50 – 4-51. She also substantiates every feature with examples from case law.

¹⁸⁷ *Harksen v Lane NO (supra)* para [51].

- The position of the complainants in society, which includes whether they have suffered in the past from patterns of disadvantage and whether the discrimination is on a specified ground;
- The nature of the provision and the purpose sought to be achieved by it. If its purpose is not aimed at prejudicing the complainants (but rather at achieving a worthy and important social goal) then the provision's purpose may have a significant bearing on whether the complainants have in fact suffered prejudice; and
- after regard of the above (and any other relevant factors), the extent to which the discrimination has affected the rights or interests of the complainant and whether it has led to an impairment of their fundamental human dignity.

Accordingly the discrimination contained in section 78(1B) of the CPA will be tested for unfairness by using these criteria, notwithstanding the fact that unfairness has already been presumed.

i) The position of the complainant in society

In 2001 disabled persons in South Africa (any kind of disability) only represented 5% of the population, of which mental disabilities constituted about a third of that percentage.¹⁸⁸

They were, and certainly still are, a minority group in this country. Stigmatisation and marginalisation of persons with a mental illness or defect is common knowledge. Society has since time immemorial preferred to lock the 'insane' away to be treated (or contained) in closed facilities.

The merit of this approach falls outside the scope of this study, but the indisputable fact nevertheless remains that persons with a mental illness or defect occupied the place in society of a marginalised minority – in fact, they still do.

ii) The nature of the provision and the purpose sought to be achieved by it

This criterion is used to validate, to a limited extent,¹⁸⁹ any discrimination established. It serves as a counterbalance to the other two criteria.

¹⁸⁸ Statistics South Africa 'Prevalence of disability in South Africa: Census 2001' (2005) 11.

In applying this criterion to section 78(1B), the nature of the reverse *onus* has been discriminatory since its inception into South African law. Its effect and purpose has never been ameliorated and neither did it have any other purpose than to shift the burden of proof onto the accused.

It cannot be said that the purpose of section 78(1B)¹⁹⁰ was not aimed at prejudicing the complainants because it sought to achieve a worthy and important social goal. There is little worth or importance in easing the Prosecution's burden of proof merely because it is difficult to prove a requirement for liability or because accused persons should be dissuaded from raising a defence of pathological criminal incapacity.¹⁹¹

And, as was shown above, section 78(1B) does not have a worthy or legitimate goal (government purpose) either.¹⁹²

Furthermore, the presumption of unfairness will tend to balance (if not outweigh) justification of the purpose of the provision sought under this criterion.

iii) *The extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity*

The extent of the prejudice on persons with a mental illness or defect is considerable. If one considers that if an accused fails to prove his or her criminal incapacity, he or she will in most likelihood be found guilty - and if the crimes are serious enough, even be incarcerated.

It must be said again that because of the operation of section 9(5), it will be presumed that the discrimination unfairly affects the rights or interests of the complainant.

¹⁸⁹ The true enquiry into any justification or validation will occur as part of an evaluation under section 36 of the CRSA. For this evaluation see Chapter 6 below.

¹⁹⁰ See chapter 4 under 'A government purpose for section 78(1B) of the CPA'

¹⁹¹ And as JR Milton (*supra*) 232 pointed out, albeit in context of the right to be presumed innocent, the issue here relates to a fundamental element of justice which should not be compromised by an unproven assumption that a reverse *onus* will prevent persons escaping justice by raising spurious pleas of pathological criminal incapacity. The same may be said in context of the right to equality. A Paizes 'A Closer Look at the Presumption of Innocence in our Constitution: What is an Accused Presumed Innocent of?' (1998) 11 *SA Journal of Criminal Justice* 409 fn 1 and again 412 fn 3, also states that sec 78(1B) should be regarded as unconstitutional, again in the context of the right to be presumed innocent, but he provides no support for this contention.

¹⁹² Chapter 4 above.

The discrimination also certainly has the potential to impair an accused's human dignity. Is it not already too much to ask any human being to carry the 'hopeless, soulless maniac's lot'?¹⁹³ Now the law expects him to also carry a burden of proof to prove his criminal incapacity due to a mental illness or defect. All this whilst a mentally abled accused has the entire spectrum of the criminal law at his disposal to find a defence, assured that the Prosecution must prove all the requirements for liability beyond a reasonable doubt (provided he opts not to raise the issue of criminal capacity).

One could not blame an accused person with a mental illness or defect for feeling less worthy, less dignified and less respected in the eyes of the criminal justice system, than an accused with no such illness or defect. The dignity of a mentally disabled accused is impaired by the discrimination brought about by section 78(1B).

iv) Conclusion on the fairness of section 78(1B)

The above three criteria are used to assess the impact that the discrimination will have on the complainants. And the impact of the discrimination is determinative in the enquiry into fairness.¹⁹⁴ These three criteria are furthermore viewed through a lens of presumed unfairness.

Persons with a mental illness or defect are a marginalised and disadvantaged minority in South Africa. Section 78(1B) has an extensive impact on accused with a mental illness or defect and has the potential to impair his or her human dignity. Section 78(1B) has no worthy or legitimate purpose.

As a result it must be said that the discrimination of section 78(1B) is unfair, because it has an unfair impact on accused persons with a mental illness or defect.

5.4 Conclusion

In this chapter it was evaluated whether section 78(1B) of the CPA amounts to unfair discrimination by applying the test as set out in *Harksen v Lane NO*.

¹⁹³ See fn 1.

¹⁹⁴ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-57.

This involved, firstly, the enquiry of whether the differentiation caused by section 78(1B) qualifies as 'discrimination'. A three-step enquiry led to the conclusion that the provision does in fact constitute discrimination. It was found that section 78(1B) discriminates indirectly on the listed ground of disability.

Secondly it was assessed whether the discrimination is unfair. Three indicators were used and it was found that section 78(1B) does indeed have an unfair impact on accused persons with a mental illness or defect.

Accordingly it can be concluded that section 78(1B) of the CPA constitutes unfair discrimination and an infringement of section 9(3) of the CRSA. This conclusion is fortified with the presumption that the discrimination will be unfair. It is submitted that, in light of all the above arguments, the presumption of unfairness cannot be disproved.

CHAPTER 6

SECTION 78(1B) MEASURED AGAINST SECTION 36 OF THE CRSA

*'[A] Court should be extremely cautious before upholding a justification of an act which limits the right to equality, particularly as the latter is one of the three values which form the foundation of the Constitution.'*¹⁹⁵

6.1 Introduction

Section 78(1B) of the CPA has been found to infringe on both section 9(1) and 9(3) of the CRSA.¹⁹⁶ What remains to be assessed is whether these infringements can be justified under section 36 of the CRSA.

Section 36(1) provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

This chapter will begin by addressing the relationship between sections 9 and section 36. As will be explained below, certain conceptual difficulties exist on whether justification can at all be sought for infringements of section 9. A short account of the conflicting interpretations of section 36 will then follow. This chapter will continue by setting out the multi-layered evaluation of section 36. Justification for the infringement of section 9 will then be sought. This chapter will be concluded with an evaluation of the Canadian case of *R v Chaulk* – which found the reverse *onus* to be a justifiable infringement on the right to be presumed innocent. It will be evaluated whether this case can be applied to the South African position, as was purported by the Parliamentary Portfolio Committee on Justice.

¹⁹⁵ *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality* 1999 2 SA 817 (C) 831B - 831C.

¹⁹⁶ See Chapters 4 and 5 respectively.

6.2 The relationship between section 9 and section 36 of the CRSA

Section 36 of the CRSA interacts differently with section 9(1) than with section 9(3). It seems that section 36 cannot be applied at all when infringement of section 9(1) has been established. Application of section 36 to infringements of section 9(3) will prove to be futile, because the outcome will be predictable (i.e. if found unfair, then it will also be unjustifiable).

One reason for these peculiar interactions, so it seems, is because certain evaluations that had to take place in order to establish an infringement (on either of the equality sections), is similar to (if not exactly the same as) the evaluations that take place under section 36.¹⁹⁷ It can be said that section 9 has its own built-in justification evaluations¹⁹⁸ and that further justification evaluations will prove useless as the same results will be achieved.

Another reason for these interactions is that a justification of infringements (of either of the equality sections) poses some logical and conceptual problems. Certain leading authors have expressed doubt as to whether an infringement of section 9(1) can at all be justified by section 36.¹⁹⁹

This doubt is founded in the illogical situation that, if such justification is possible, it would mean that a differentiation which is not rationally related to a legitimate government purpose (and therefore arbitrary and irrational) is still justifiable (and therefore acceptable).²⁰⁰ In effect then – an illegitimate government purpose or an irrational connection between the differentiation and the purpose will still constitute constitutionally valid state conduct. Where does this leave the rule of law? How can the rule of law be upheld if state conduct need not be rational, non-arbitrary and legitimate at all times? Consequently, as it has been put: '[i]t is more likely that measures that fail...s 9(1) will be found to be irretrievably unconstitutional.'²⁰¹

¹⁹⁷ These similar or same evaluations include the establishing of a legitimate government purpose, weighing the impact of the infringement on the complainant and the whole unfairness assessment.

¹⁹⁸ S Woolman 'Limitations' in Woolman et al (*supra*) 34-31. Other rights which also have these built-in justification evaluations are: secs 15(3), 24(b), 25(2), 25(3), 25(5), 26(2), 29(1)(b), 29(2), 30, 31(2) and 32(2).

¹⁹⁹ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-20; Currie & De Waal (*supra*) 237-238 and C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-23; S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-6.

²⁰⁰ Currie & De Waal (*supra*) 237-238.

²⁰¹ C Albertyn & B Goldblatt 'Equality' in Woolman et al (*supra*) 35-23.

Section 9(3) has a different type of relationship with section 36 - the argument for possible justification leans both ways. On the one hand we find much the same logical and conceptual difficulties as above. Here, so the argument goes, justification of unfair discrimination will have the effect that it would be acceptable in an open and democratic society (based on human dignity, equality and freedom) to unfairly discriminate against persons, where that discrimination is based on an attribute which have the potential to impair their human dignity.²⁰²

In further support of this stance, one can advance another conceptual problem. Any justification must happen in the context of an open and democratic society based on human dignity, equality and freedom. In other words, any justification should be compatible with a society (open and democratic) who adheres to the values of dignity, equality and freedom. How then will such a society justify limitation of an infringement on the right to equality, i.e. *validate an inequality*, when such justification is in direct conflict with its guiding values? Can it be said that a society, *inter alia* based on equality, can validate inequalities?²⁰³

The other side of the argument – i.e. that unfair discrimination can be justified - was stated by Kriegler J, in the minority judgement in *President of the Republic of South Africa v Hugo*.²⁰⁴ He emphatically stated that the factors taken into account during a section 36-enquiry are concerned with justification (despite unfairness), whilst the determination of unfair discrimination concerns fairness, and nothing else. The two enquiries should therefore not be confused. However, in the words of Woolman and Botha, '[m]erely stating that there is a difference between the two concepts is not the same as using them in a different manner.'²⁰⁵

Albertyn expands on this second stance when she states that an enquiry into unfairness involves a moral enquiry, largely concerned with remedying social and economic

²⁰² Currie & De Waal (*supra*) 237-238. S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-6 also state that an enquiry into unfair discrimination exhausts all meaningful enquiry into the justification of such infringement, and because of that fact a sec 36-enquiry should not ensue.

²⁰³ It needs mention here that there has been one case that found unfair discrimination to be justifiable under sec 36, namely *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality* 1999 2 SA 817 (C). Currie & De Waal (*supra*) 238 fn 34 (supported by S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-34) state that, based on the considerations that Davis J took into account, the judge's sec 36-enquiry should rather have taken the form of an enquiry into fairness. Especially since the same considerations were evaluated under the fairness-enquiry by the Constitutional Court in *City Council of Pretoria v Walker* (*supra*).

²⁰⁴ *Supra* para [77].

²⁰⁵ S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-34.

disadvantages.²⁰⁶ The crosshair of this test is aimed at the social, economic and political context surrounding the alleged infringement. The section 36-enquiry is different in that it measures the conclusion reached under the section 9(3)-enquiry (i.e. unfairness) against a range of defences and justifications (reasons) offered by the respondent.²⁰⁷ In other words, the unfairness of the discrimination is weighed up against the reasons offered in order to assess whether the infringement can be justified.

This reason is, it is submitted, merely splitting hairs. During the unfairness assessment the reasons for the discrimination are also taken into account in order to determine the impact that the discrimination has on the complainant. Furthermore the social, economic and political context surrounding the alleged infringement can just as easily be brought home under the assessment of the importance of the infringement,²⁰⁸ the nature and extent of the limitation,²⁰⁹ as well as the relation between the limitation and its purpose.²¹⁰ To pertinently separate the section 9(3)-evaluation and the section 36-evaluation for this reason seems incongruous.

Albertyn in any event concedes that it remains difficult to imagine a case where an unfair discrimination will be justifiable.²¹¹

The approach to be followed is as a result uncertain. It would seem callous to completely ignore section 36, but if the section 36-enquiry is applied it might lead to a repetition of previously established conclusions. The uncertainty is enforced if one looks at the Constitutional Court's approach to the section 36-enquiry where section 9 had been infringed.²¹²

This study will however attempt to apply section 36 to the infringements of section 9 – even if it is just to confirm the existence of the conceptual difficulties explained above.

²⁰⁶ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-60 – 4-61.

²⁰⁷ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-60 – 4-61.

²⁰⁸ Sec 36(1)(b) of the CRSA.

²⁰⁹ Sec 36(1)(c) of the CRSA.

²¹⁰ Sec 36(1)(d) of the CRSA.

²¹¹ C Albertyn 'Equality' in Cheadle et al (*supra*) 4-60 – 4-61.

²¹² In *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* (*supra*) para [63] the Court sought justification for an infringement of sec 9(1), but held that the absence of a legitimate government purpose made such an enquiry impossible. No consideration could as a result be given to the factors in sec 36. Furthermore, in *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) para 26, the court merely accepted, without formerly enquiring into the matter and in a single sentence no less, that the unfair discrimination was unjustifiable.

6.3 The conflicting interpretations of section 36

Perhaps it deserves mention that leading constitutional law authors disagree on the interpretation of section 36.

Halton Cheadle is of the opinion that the Constitutional Court incorrectly interpreted the application of section 36. His first contention is that the proportionality evaluation should only take place after a court is satisfied that the purpose of the infringing law is such that it justifies the limitation of the right.²¹³ Cheadle therefore advances a threshold requirement before the proportionality evaluation can take place, namely a court must be satisfied that the purpose of the infringing law is such that it justifies the limitation of the right.

His second contention concerns the factors to be weighed during the proportionality evaluation. Cheadle states that because the CRSA does not provide for a hierarchy of rights anymore (as the Interim Constitution in section 33(1) had done) it is incorrect to balance *the relative importance of the right* (which implies a hierarchy of rights) with *the infringing law*. Rather, a balancing must take place between *the importance of the purpose of the limiting law* on the one hand and *the rationality and extent of the limitation* on the other hand.²¹⁴

Cheadle's argument therefore only relates to how one should approach the proportionality evaluation of section 36 (i.e. by first complying with a threshold requirement) and to the factors which are to be weighed during the proportionality evaluation. He does not have concerns with the other foundational principles of the section 36-enquiry.

Stu Woolman and Henk Botha on the other hand state that the approach suggested by Cheadle seems 'hopelessly muddled'.²¹⁵ Firstly, they contend, if one were to accept that a right cannot be justified (ostensibly because it does not meet the threshold requirement as advanced in Cheadle's first contention) then it is the same as saying that no right, value, interest or good can limited such a right (which would of course be contrary to the purpose of section 36). They continue by saying (rather maliciously) that whatever worth Cheadle's '*faux travaux préparatoires*'²¹⁶ may have, they fail to engage in the actual practice of the

²¹³ MH Cheadle 'Limitation of Rights' in Cheadle et al (*supra*) 30-9.

²¹⁴ MH Cheadle 'Limitation of Rights' in Cheadle et al (*supra*) 30-9 – 30-12, but especially 30-12.

²¹⁵ S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-73.

²¹⁶ Loosely translated: false/incorrect preparatory works.

Constitutional Court.²¹⁷ Woolman and Botha then point to a contradiction where Cheadle states²¹⁸ that a court may accord more weight or require more justification for one right than for others. They again, rather impertinently, rebuke Cheadle: '[t]o accord more weight to one right than another means that it is more important, not that it is fat.'²¹⁹

Woolman and Botha therefore support the interpretation of section 36 according to the Constitutional Court's understanding of the section.

Finally it must be said that however compelling Cheadle's writings may be, the fact remains that Woolman and Botha are correct in stating that Cheadle's arguments are not the actual practice of the Constitutional Court. And whenever one is applying the law, it must be applied according to the current stance of the highest authority. This study will therefore apply the section 36-enquiry as it was laid down and interpreted by the Constitutional Court.

6.4 The test in section 36 of the CRSA

The test for justification under section 36 entails a two-stage enquiry:²²⁰

1. Has a right in the Bill of Rights been infringed?; and
2. If so, can such infringement be justified as a reasonable limitation of that right?

As is customary, reference to *Harksen v Lane NO* is once again necessary. The court held, in connection with the evaluation of section 36, that this 'will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof to the extent of its infringement of equality.'²²¹

The first step involves two further enquiries: a determination of the right's boundaries²²² (or stated otherwise, the protection applied for must fall within the ambit of a particular right)²²³

²¹⁷ S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-73.

²¹⁸ See MH Cheadle 'Limitation of Rights' in MH Cheadle et al (eds) '*South African Constitutional Law: The Bill of Rights*' (2002) 709 (the first edition of the work used in this study).

²¹⁹ S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-73.

²²⁰ MH Cheadle 'Limitation of Rights' in Cheadle et al (*supra*) 30-3.

²²¹ *Harksen v Lane NO* (*supra*) para [52].

²²² MH Cheadle 'Limitation of Rights' in Cheadle et al (*supra*) 30-3.

²²³ S Woolman & H Botha 'Limitations' in Woolman et al (*supra*) 34-4. These two authors exchanged a quaint *pas de deux* in their respective works about the wording of this step. The first author pointed out a mistake in the latter author's reasoning. The latter author corrected this mistake in the second edition of his work (the work used here), but only after he returned the favour of pointing out a mistake in the first authors original criticism.

followed by a proven assertion that the right has indeed been infringed. It is only after it has been established that an infringement exists that a section 36(1)-evaluation takes place.

This step took place in Chapters 4 and 5 respectively, where it has been found that section 78(1B) does in fact infringe on a right in the Bill of Rights, namely on section 9(1) and section 9(3). Consequently this step will not be repeated here and only the second step will be considered anew.

The wording of section 36 makes it clear how the second step of justification is to be approached. A law can limit a right in the Bill of Rights if:

1. that law is of general application; and
2. to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom (taking into account certain factors).

6.5 Can an infringement of section 9 be justified under section 36?

It must once again be reiterated that much uncertainty exists as to whether this step is at all necessary when section 9 of the CRSA has been infringed. A formal inquiry will however appease concerns that, despite the logical and conceptual difficulties, a justification enquiry should still be held.

6.5.1 Stage 1: is the law of general application?

Since it is the same law (i.e. section 78(1B) of the CPA) that infringes on both sections 9(1) and 9(3), this criteria will only have to be applied once. If the law is not of general application then no infringement can be justified.

This enquiry can be divided into two requirements, which are derived from the rule of law. The limitation must be authorised by law and must be general in its application.²²⁴

²²⁴ Currie & De Waal (*supra*) 168.

The first of these requirements require that the limitation is brought about by ‘law’ as opposed to policy or executive conduct. Law may be any form of legislation (whether original or delegated), common law or customary law.²²⁵

The reverse *onus* in cases where the criminal capacity of an accused is placed in dispute is patently authorised by law, namely by section 78(1B) of the CPA.

The second requirement is that the law must be of general application. This does not mean that a limiting law which does not apply to all people will not be of general application – the limiting law may be limited to a category of persons, *provided that its application is non-arbitrary*.²²⁶ It means that the limiting law must be sufficiently clear, accessible and precise to the extent that those who are affected by it can ascertain the extent of their rights and obligations.²²⁷

Section 78(1B) is sufficiently clear, accessible and precise to the extent that those who are affected by it can indeed ascertain the extent of their rights and obligations. The section is clear in that the reverse *onus* is patent on first reading. It forms part of the CPA – a readily accessible statute. It is also precise in that it limits the reverse *onus* to exactly one requirement of liability – criminal capacity. It is therefore possible for those affected to ascertain the extent of their obligations in this case.

The rule of law however requires more than clearness, accessibility and preciseness. It must also be non-arbitrary in its application.²²⁸

It is submitted that the justification enquiry receives its (first) fatal wound here. As shown above²²⁹ section 78(1B) constitutes arbitrary treatment of persons with mental disabilities. The provision not only lacks rationality, logic and solid reasoning but also brings about capricious treatment of accused persons who suffer from a mental illness or defect.

²²⁵ Currie & De Waal (*supra*) 169, HM Cheadle ‘Limitation of Rights’ in Cheadle et al (*supra*) 30-9.

²²⁶ HM Cheadle ‘Limitation of Rights’ in Cheadle et al (*supra*) 30-9 (emphasis added).

²²⁷ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para [47], Currie & De Waal (*supra*) 169.

²²⁸ S Woolman & H Botha ‘Limitations’ in Woolman et al (*supra*) 34-62; HM Cheadle ‘Limitation of Rights’ in Cheadle et al (*supra*) 30-9.

²²⁹ See Chapter 4 under ‘Step 2: is there a legitimate government purpose for the differentiation?’.

As a result it cannot be said that section 78(1B) fulfils the requirement that it must be a law of general application.

Strictly speaking then, the enquiry into justification should end here. For the sake of argument however, it will be assumed that this requirement has been fulfilled. This assumption does not detract from the conviction that section 78(1B) cannot be justified. It merely leaves the door open for further evaluation, namely the second step of the section 36-enquiry.

6.5.2 Stage 2: is the limitation on section 9 of the CRSA reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom?

The law regarding this stage will firstly be set out, after which an attempt will be made to apply these principles to section 78(1B).

i) The law

This step of the evaluation requires that the *reasons* for limiting a right in the Bill of Rights must be acceptable to an open and democratic society based on the values of human dignity, equality and freedom.²³⁰ There must also be sufficient proportionality between the harm done by the law (i.e. the infringement) and the benefits the limitation is designed to achieve (i.e. the purpose of the infringing law).²³¹

The scales are therefore weighted with the infringement on the one side and the purpose of the infringing law on the other side. If the scales can be brought into balance (that is to say, the limitation can be regarded as reasonable and justifiable) then sufficient proportionality will exist to justify a limitation. Very importantly however is the fact that section 36 expressly requires a court to take certain factors into account when the balancing is done. Those factors being: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means of achieving the purpose.²³²

²³⁰ Currie & De Waal (*supra*) 176.

²³¹ Currie & De Waal (*supra*) 176.

²³² Sec 36(1)(a) – (e).

These factors are not checklist-natured - rather they constitute factors used to indicate whether a limitation qualifies as reasonable and justifiable.²³³

Finally it must be stated that whenever a section 36-evaluation is enquired into, it is done with the specific context of the limitation firmly in mind. Section 36 therefore transfigures according to the circumstances of each case – of each specific limitation.²³⁴

ii) *Application to the infringement of section 9 of the CRSA*

As stated above the infringement on section 9 of the CRSA must be balanced against the purpose of section 78(1B).

The conceptual problem discussed above however manifests itself here. The purpose which comprises one of the balancing factors is the 'legitimate government purpose' sought for under the evaluation of an infringement of section 9(1).²³⁵

If the government purpose for a provision is illegitimate (or irrational) then it cannot be weighed - and consequently not justified.²³⁶

This stance makes logical sense. If a government purpose is illegitimate (and irrational) then it impugns the rule of law. And what would the purpose be of justifying a law that does not uphold the rule of law? A court would in effect undermine the very principles on which its own authority is based if it were to justify an illegitimate law.

Furthermore even if one were to accept that, in some bizarre universe, it is possible to justify an illegitimate government purpose then one is still faced with the problem that justifying unfair discrimination will mean that the discrimination was not unfair in the first

²³³ Currie & De Waal (*supra*) 178.

²³⁴ *S v Makwanyane* (*supra*) para [104]; Currie & De Waal (*supra*) 177.

²³⁵ *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* (*supra*) para [63]: '...the pursuit of a legitimate government purpose is central to a limitation analysis. The Court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted means to achieve the purpose.' For the enquiry into the existence of a legitimate government purpose see chapter 4 under 'Step 2: is there a legitimate government purpose for the differentiation?'

²³⁶ *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* (*supra*) para [63]: '...in this case there is no legitimate purpose to validate the impugned law. The absence of a legitimate purpose means that there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable.'

place.²³⁷ To correctly apply this stage will thus have the effect of negating the just established infringement – in turn rendering the use of section 36 completely unnecessary.

This abnormal conundrum makes proper application of section 36 in this case not only extremely difficult, but also useless. The same results will be achieved. And should different results be achieved then it makes no sense why section 36 was employed to begin with – no infringement existed in the first place.²³⁸

Consequently the conclusion has to be reached that the infringement that section 78(1B) of the CPA effects, cannot be justified.

Section 78(1B) remains unconstitutional.

6.6 Considering *R v Chaulk*

It has been mentioned above²³⁹ that the Parliamentary Portfolio Committee on Justice relied on the marathon case of *R v Chaulk*²⁴⁰ (*Chaulk*) to justify enactment of section 78(1B).

Chaulk evaluated the constitutionality of section 16(4) of the Canadian Criminal Code²⁴¹ – the equivalent of section 78(1A) of the CPA. These sections establish a statutory presumption of sanity.

The majority of the Supreme Court of Canada, in a judgement delivered by Chief Justice of Canada Antonio Lamer, found that the presumption of sanity infringed on the right to be

²³⁷ This will be the case because one uses the same considerations to establish unfairness and justification. During the unfairness assessment one chiefly considers the impact of the impugned provision on the complainant. This impact manifests itself in the assessment of whether the limitation is reasonable in an open and democratic society based on human dignity, equality and freedom, taking into consideration (especially) the nature and extent of the limitation (sec 36(1)(c) of the CRSA) and less restrictive means to achieve the purpose (sec 36(1)(e) of the CRSA).

²³⁸ That is to say, if one were to find that unfair discrimination is justifiable then one also necessarily finds that no unfairness existed in the first place – precisely because the same criteria are used in both evaluations, the evaluations are just worded differently.

²³⁹ See Chapter 2 under ‘The statutory development’.

²⁴⁰ [1990] 3 S.C.R. 1303.

²⁴¹ Sec 16(4) of the Canadian Criminal Code read: ‘Every one shall, until the contrary is proved, be presumed to be and to have been sane’. Due to amendments of the Canadian Criminal Code, the current equivalent of (the 1990) sec 16(4), is sec 16(2) of the Canadian Criminal Code. This section now corresponds to sec 78(1A) of the CPA, whilst the current sec 16(3) of the Canadian Criminal Code corresponds to sec 78(1B) of the CPA. The current sec 16(3) did not yet exist at the time of *Chaulk*. The reverse *onus* was therefore read as part of the presumption of sanity in sec 16(4).

presumed innocent, but the limitation could be justified. Accordingly it was found that the presumption of sanity was constitutional.

Closer scrutiny of this case is however unavoidable in light of the fact that the Parliamentary Portfolio Committee on Justice relied on the outcome of this case in order to justify enactment of sections 78(1A) and 78(1B).²⁴²

Hence, what follows are the grounds of the infringement, the reasons for justifications and some comments on the application of those reasons in South African law, all preceded by a brief exposition of the facts of *R v Chaulk*.

6.6.1 The facts of *R v Chaulk*²⁴³

On 3 September 1985 Robert Matthew Chaulk (15) and Francis Darren Morrisette (16) burglarised a home in Winnipeg (the capital of the Canadian province of Manitoba), plundered it for valuables and killed the sole occupant. A week later they turned themselves in, making full confessions.

The accused raised insanity as their defence. Expert evidence showed that both accused suffered from a paranoid psychosis which made them believe that they had the power to rule the world and that the killing was a necessary means to that end. Both accused were convicted of first degree murder by the court *a quo* and sentenced to life imprisonment.

An appeal to the Manitoba Court of Appeal, *inter alia* based on the constitutionality of section 16(4) of the Canadian Criminal Code, was unanimously dismissed. The constitutional challenge then ensued.

6.6.2 Grounds of the infringement

The court found that section 16(4) violates the presumption of innocence because it requires an accused to disprove sanity (or prove insanity) on a balance of probabilities. It permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

²⁴² See Chapter 2 under 'The statutory development'.

²⁴³ *R v Chaulk* (*supra*) 14 – 15.

The fact that the presumption of innocence was breached when an accused could still be convicted, despite a reasonable doubt as to his guilt, was laid down in another Canadian case, *R v Whyte*.²⁴⁴ The court approved and applied this view.²⁴⁵

The court also provides a second reason, namely the provision allows sanity (something which is essential to guilt) to be presumed. This violates the basic principle that the state bears the burden of proving guilt beyond a reasonable doubt.²⁴⁶

6.6.3 Justification for the infringement

The Canadian justification enquiry is similar to our own section 36-enquiry.²⁴⁷

The essential ground of justification, which Lamer CJC advanced in justifying the infringement, was that the reverse *onus* was essential to avoid 'placing on the Crown the impossible onerous burden of disproving insanity'.²⁴⁸

The court held that proving insanity was a virtually impossible task because, without the cooperation of the accused, evidence of mental illness would be almost impossible for the Prosecution to obtain. If the burden were on the Prosecution, there would be no way to ensure the accused's cooperation. The difficulties were expounded if one were to consider that the Prosecution would, without the reverse *onus*, be required to prove sanity at time of the offence and that the Prosecution will often not know that insanity is going to be raised until sometime after the offence takes place.²⁴⁹

²⁴⁴ [1988] 2 S.C.R. 3. This was also a Supreme Court of Canada case.

²⁴⁵ *R v Chaulk (supra)* 31 – 32.

²⁴⁶ *R v Chaulk (supra)* 38.

²⁴⁷ The court quoted the test for justification from the case of *R v Oakes* [1986] 1 S.C.R. 103 in the following words: "The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s. 1 was set out by this Court in *Oakes, supra*:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as "little as possible"; and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.'

As can be seen from this quotation, the Canadian justification enquiry can be divided into the following two broad enquiries: firstly, testing the objective and secondly, the proportionality test (i.e. establishing a rational connection, the extent of the infringement (as little as possible) and a balancing of the effects and the objective).

²⁴⁸ *R v Chaulk (supra)* 45.

²⁴⁹ *R v Chaulk (supra)* 38-40.

The justification of the reverse *onus* was therefore solely based on dispelling a *procedural* concern in the context of a trial,²⁵⁰ as opposed to balancing the infringement in light of the surrounding historical, political and legal contexts in which the inequality occurs (as should be done in the current case).

Puisse Justice Wilson, in her minority judgement, disagreed with Lamer CJC's justification.²⁵¹ She states that Lamer CJC does not identify any pressing and substantial concern to which the supposed impossible burden of proof has *in fact* given rise. The reverse *onus* is therefore, if one were to accept Lamer CJC's reasoning, a preventative measure designed to guard against a *possible* problem that might arise without the reverse *onus*.

Wilson J's concern is therefore aimed at the lack of actual evidence to the effect that the burden of disproving insanity (or proving sanity) is 'impossibly onerous'. She states her concern thus:

This prompts me to ask: do we wish to go down this path and justify infringements of guaranteed *Charter* rights on a purely hypothetical basis? And, in particular, do we wish to go down this path where such a fundamental tenet of our justice system as the presumption of innocence is at stake? I have serious reservations about adopting such a course even in cases where it could be said that the hypothesis was a strong one which I do not think it is in this instance...²⁵²

She also disagrees that the burden of proving sanity is almost impossible. She states that the proving of sanity does not take place in a vacuum, i.e. it is a matter of removing any doubt raised by the accused in the minds of the jury as to the presence of any of the elements of criminal capacity. The extent of the burden on the Prosecution will vary from case to case (depending on the evidence of insanity which the accused is able to produce). The Prosecution's task is simply to address any doubt raised by specific evidence adduced by the accused to support his or her insanity plea. She then compares the Prosecution's task to the kind of challenges where drunkenness is raised as a defence.²⁵³

²⁵⁰ As Lamer CJC put it: 'Section 16(4) is a purely evidentiary section whose objective is to relieve the Prosecution of the tremendous difficulty of proving an accused's sanity in order to secure a conviction' - *R v Chaulk (supra)* 38.

²⁵¹ *R v Chaulk (supra)* 75.

²⁵² *R v Chaulk (supra)* 77.

²⁵³ *R v Chaulk (supra)* 76.

6.6.4 Comments on *R v Chaulk*

It is submitted that *Chaulk* cannot be advanced in South Africa as justification for infringements of section 9 of the CRSA for the reasons advanced below.

Firstly, the constitutional issues in *Chaulk* involved the presumption of sanity *versus* the presumption of innocence – *and not the right to equality*. This difference is vital because complete different legal interests are involved. Procedural justice is ensured with the right to be presumed innocent, whilst the moral goal that all are equally deserving is ensured by the right to equality. The grounds of justification for the infringement of a procedural right cannot possibly be the same as for the justification for infringement on the equality right.

Even more so if one considers that the justification enquiry adapts itself according to the each specific limitation.²⁵⁴ A limitation on the right to be presumed innocent is necessarily different from a limitation on the right to equality – different legal interests are infringed upon. As a result the whole justification enquiry will also be different.

Secondly, in South Africa the task of establishing a mental illness or defect does not constitute an ‘impossible onerous burden of disproving insanity’. Lamer CJC expressed concern for the fact that it was very difficult to obtain the necessary evidence to prove sanity without the cooperation of the accused and that, if the burden were on the Crown, there would be no way to ensure such cooperation.²⁵⁵ Also, at the time that the *Chaulk* judgement was delivered, the Canadian Criminal Code did not provide for a method of forcing an accused to submit to psychiatric examinations unless fitness to stand trial was in issue.²⁵⁶ This fact influenced Lamer CJC’s view, because it certainly makes it more difficult to prove a mental illness or disability at time of commission of the offence if no order can be given for psychiatric assessment. Our law however differs.

²⁵⁴ *S v Makwanyane* (*supra*) para [104]; Currie & De Waal (*supra*) 177.

²⁵⁵ *R v Chaulk* (*supra*) 39.

²⁵⁶ Sec 672.11(a) and (b) of the Canadian Criminal Code has however since been amended after the judgement and now provides for an ‘assessment order’ in cases where fitness to stand trial is in issue (our sec 77(1) of the CPA) *and* where the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempted from criminal liability (our sec 78(2) of the CPA).

Sections 77(1)²⁵⁷ and 78(1)²⁵⁸ of the CPA authorises a court to order an enquiry into the mental condition of the accused. Where the alleged offence is of a serious nature, the enquiry must be held and reported on by three psychiatrists and a clinical psychologist.²⁵⁹

The enquiry into the presence or absence of a mental disorder is therefore easy to obtain, and the necessary evidence to prove sanity will be available in the expert's report (and if needed, presented as oral evidence). Certainly it cannot be said that this assistance still leaves an 'impossibly onerous burden'.

Furthermore, failure by the accused to cooperate during the enquiry will merely lead to the extinguishing of doubt as to the criminal capacity – not *vice versa*. If an accused raises the issue of criminal capacity (whilst not having the burden of proof) and then fails to cooperate during the enquiry, the issue will also fall away – it will have been a useless exercise. It can hardly be said that merely because the accused *mentioned* the possibility of criminal incapacity (because without the assessment report no proof exists as to the accused's mental condition), that a reasonable doubt as to the criminal capacity will be created.

Additionally, even with the burden of proof on the Prosecution the accused must still lay a basis for his or her defence. Uncooperative conduct during the enquiry will not form a basis for the accused's defence. It is therefore in the accused's own interest, no matter where the burden lies, to cooperate during the enquiry. This concern can therefore not constitute a valid reason to justify application of *Chaulk* in South Africa.

Thirdly, the argument still stands that it is as at least as difficult to prove fault as it is proving criminal capacity (as both are concerned with the subjective state of mind of the accused). Yet the burden of proof does not shift in the establishment of fault. Expert evidence is also at hand to assist the court (or the Prosecution for that matter) in the

²⁵⁷ Sec 77(1) of the CPA: if it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

²⁵⁸ Sec 78(2) of the CPA: 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.

²⁵⁹ Sec 79(1) of the CPA. For lesser alleged offences only one psychiatrist is needed to conduct the enquiry and to compile the report.

determination of whether criminal capacity is present, whilst no such statutory assistance is available in establishing fault.

Finally, in Canada all ‘indictable offences’²⁶⁰ in a superior court (i.e. courts similar to our High Courts) must be heard before a judge and a jury.²⁶¹ The judge instructs the jury on the relevant legal principles, but it is the jury who applies the law to facts. In South Africa this application is the presiding officer’s task. As a result much less room exists in South Africa for abuse of the system – spurious defences of pathological criminal incapacity will be judicially assessed *by a presiding officer* and not by a jury (with little or no legal qualifications or experience).

For these reasons *Chaulk* cannot be applied to the South African position and the Parliamentary Portfolio Committee on Justice, and by extension Parliament, erred in submitting this case as justification for enactment of section 78(1B).

6.7 Conclusion

This chapter began by addressing the relationship between sections 9 and section 36. It found that section 36 interacts differently with section 9(1) than with section 9(3).

It seemed that, due to certain logical and conceptual difficulties, it is impossible to apply section 36 to a limitation of section 9(1). This is because a legitimate government purpose is needed in order to comply with section 9(1). With no such purpose, section 9(1) will be infringed. Under the section 36-enquiry a *legitimate* government purpose must be weighed against the infringement, but if the purpose was found to be illegitimate, then there is nothing to be weighed.

Accordingly it was found that the infringement of section 9(1) of the CRSA by section 78(1B) of the CPA could not be justified.

The interactions between sections 9(3) and 36 are similar, but here arguments exist which advance that even if section 36 can be applied to justify unfair discrimination, the same results will necessarily be reached. It was confirmed that the results will in fact necessarily

²⁶⁰ I.e. more serious offences like murder or treason.

²⁶¹ Sec 471 of the Canadian Criminal Code. This peremptory provision applies unless the parties all agree otherwise.

be the same. In other words, if the discrimination was found to be unfair then it will also be unjustifiable. If different results are somehow obtained, then no unfairness existed to begin with.

As a result it was found that the infringement of section 9(3) of the CRSA by section 78(1B) of the CPA could not be justified.

This chapter also considered conflicting interpretations by some of the leading constitutional law authors, namely Halton Cheadle and Stu Woolman with Henk Botha. It considered both opinions and found that Woolman and Botha's opinion accord with the practice of the Constitutional Court. Accordingly their interpretation (or rather the Constitutional Court's interpretation) was followed in this study.

Finally this chapter evaluated the Canadian case of *R v Chaulk* – which found the reverse *onus* to be a justifiable infringement on the right to be presumed innocent. It was assessed whether this case could be applied to the South African position (as was suggested by the Parliamentary Portfolio Committee on Justice).

It was however found that it could not. Four reasons were advanced.

Firstly, different constitutional rights were tested for infringement. *Chaulk* tested the reverse *onus* against the right to be presumed innocent, whilst this study tested it against the right to equality. As a result of this the justification enquiry was completely different and a different result was therefore possible.

Secondly, in South Africa the task of establishing a mental illness or defect does not constitute an 'impossible onerous burden of disproving insanity'. Section 79 of the CPA regulates the position very efficiently and provides for the assistance of up to four experts.

Thirdly, the argument remains that it is as at least as difficult to prove fault as it is proving criminal capacity (as both are concerned with the subjective state of mind of the accused), yet the burden of proof does not shift in the establishment of fault.

Fourthly, the use of juries in Canada makes it possible for abuse of the defence of pathological criminal incapacity, as it is the juries who apply the law to the facts of each case (i.e. juries must ultimately decide whether an accused had criminal capacity or not).

In South Africa this is a legal question, answered by a presiding officer. This prevents abuse of the defence.

The Parliamentary Portfolio Committee on Justice, and by extension Parliament, therefore erred in submitting that the reasoning in *Chaulk* could serve as justification for enactment of section 78(1B).

CHAPTER 7:

THE APPROPRIATE REMEDY

*“Deciding on a remedy requires a much more pragmatic approach than that adopted in any of the other stages of Bill of Rights litigation. It is indeed the ‘art of the possible’.”*²⁶²

7.1 Introduction

Section 78(1B) of the CPA is unconstitutional. What remains to be considered is what relief is appropriate in order to remedy the fact of unconstitutionality.

This chapter will provide some of the applicable principles on constitutional relief. The appropriate remedy for the constitutional infringements will then be identified and motivated.

7.2 The applicable principles

Section 38 of the CRSA provides as follows, in relevant part:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief...

Section 172(1) of the CRSA states the following:

When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Section 38 governs remedies where the Bill of Rights was applied directly to law or conduct and, if the law or conduct was found to be inconsistent, overruled by the Bill of Rights.²⁶³

²⁶² Currie & De Waal (*supra*) 192.

It is clear from the wording of this section that a court has a wide discretion in establishing what relief will remedy the invalidity.²⁶⁴

Section 172 provides more specific guidelines in that it refers to declarations of invalidity, but the section also recognises that such order may possibly be of significance to the broader society. As a result thereof the net is again cast wider with the provision for an order that is 'just and equitable'.

Notable of section 172(1) is the fact that it is a peremptory provision – it obliges a court to make a declaration of invalidity where the law or conduct was found to be inconsistent with the CRSA.²⁶⁵

A declaration of invalidity is therefore the default remedy awarded in case of constitutional infringement. Other remedies are a declaration of rights, interdictory relief and (constitutional) damages. It is clear however that a declaration of rights, interdictory relief or damages will not be appropriate in the current circumstances because these remedies will not sufficiently address the marginalisation of the mentally disabled accused by section 78(1B).

Section 172(1) allows for the declaration of invalidity to be qualified by regulating the impact of the declaration. This is done by severing the unconstitutional provisions in a statute from the constitutional ones, by reading in missing words to cure the provision from its unconstitutionality, by controlling the retrospective effects of the declaration or by temporarily suspending the declaration (in order for the competent authority to remedy the unconstitutionality).²⁶⁶

Although 'reading down' does not constitute a remedy, but rather statutory interpretation in line with the Bill of Rights,²⁶⁷ it nonetheless presents itself as a possible solution to avoid

²⁶³ Currie & De Waal (*supra*) 190. The direct application of the Bill of Rights stand opposite to indirect application, which entails a situation where the Bill of Rights functioned as the objective normative value system in which common law or legislation was interpreted, developed or applied. This should not be confused with the vertical or horizontal application of the Bill of Rights, which refers to the parties affected by the CRSA.

²⁶⁴ This fact was confirmed by the Constitutional Court in both *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para [87] and *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para [27].

²⁶⁵ *In Re: The National Education Policy Bill No 83 of 1995* 1996 3 SA 289 (CC) para [16].

²⁶⁶ Currie & De Waal (*supra*) 199.

²⁶⁷ As required by sec 39(2) of the CRSA.

infringement in the first place, and it will as a result be considered alongside the remedy of a declaration of invalidity.

7.3 Identifying the appropriate remedy

The remedy of a declaration of invalidity will be considered below. It will also be assessed if the impact of such declaration needs to be controlled. Reading down, as a way to avoid constitutional infringement, will also be considered.

7.3.1 Reading down

As stated above, reading down is not a remedy but a method of constitutional interpretation, flowing from the obligation in section 39(2) of the CRSA, which avoids constitutional inconsistency. Reading down is however limited to what the text of the provision is capable of meaning.²⁶⁸

If the wording of section 78(1B) is considered then it is submitted that reading down cannot be applied with success.

In order for reading down to be applied, constitutional inconsistency must be avoided. In other words, section 78(1B) must be read in such a way that a shifting of the *onus* onto the accused is not possible. The phrase ‘...the burden of proof with reference to the criminal responsibility of the accused *shall be on the party who raises the issue*’ does not allow for an interpretation where it can be said that the accused does not receive the *onus*. The *onus* of proving criminal capacity is explicitly dependant on ‘the party who raises the issue’.

To read the section as if it means that only the Prosecution has the burden of proving criminal capacity is in direct conflict with the wording of the section. The text of the provision is therefore not reasonable capable of bearing such an interpretation.

As a result an interpretation of section 78(1B) which is consistent with the CRSA cannot be found and a remedy will have to be sought instead.

²⁶⁸ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (supra)* para [24].

7.3.2 Declaration of invalidity

A declaration of invalidity cannot be avoided due to the fact that section 78(1B) is unconstitutional.

However the matter does not end there. If section 78(1B) is simply declared invalid then certain difficulties still remain. For example, to what extent should section 78(1B) be declared invalid? Can certain parts be severed or must the whole section be severed from the CPA? And what about section 78(1A) that provides for the presumption of sanity (from which the reverse *onus* flows)? Should this section also be severed?

More refined consideration is therefore necessary in order to control the impact of a declaration of invalidity. Severance, reading in, retrospectivity and temporary suspension are all used to control this impact. It is however submitted that retrospectivity and temporary suspension will, in the current context, not be of much use to control the impact.

It is submitted that two remedies present themselves as appropriate remedies: severance of parts of section 78(1B) coupled with reading in and striking out²⁶⁹ of section 78(1B).

i) Severance coupled with reading in

The test for effective severance was laid down by the Constitutional Court in *Coetzee v Government of the Republic of South Africa*.²⁷⁰ The court stated that it must first be possible to sever the invalid provision (stated otherwise - to sever the bad from the good),²⁷¹ and secondly, the remains must still give effect to the legislative scheme (stated otherwise - the remains must still give effect to the purpose of the law).²⁷²

In severing the bad from the good (the first step), a court can either order actual severance (i.e. by striking out words or phrases) or notional severance (i.e. leaving the language intact, but subjecting it to a condition for proper application).²⁷³

²⁶⁹ A form of severance where the whole section is removed from the statute.

²⁷⁰ 1995 4 SA 631 (CC) para [16].

²⁷¹ Currie & De Waal (*supra*) 201.

²⁷² As above.

²⁷³ Currie & De Waal (*supra*) 201.

Reading in is usually utilised as a consequence of severance.²⁷⁴ Because severance of certain words or phrases can have the effect that the offending provision becomes incoherent, a remedy is needed to remove the incoherency. Reading in entails the adding of words to the provision in order to cure the provision from its unconstitutionality.

The guiding principle of reading in is that intrusion on the legislation should be kept to a minimum in order to sustain the separation of powers doctrine.²⁷⁵

Consequently the principles of severance and reading in will be applied to section 78(1B).

What is understood with the second step of severance is that the remains of section 78 as a whole, and not the remains of section 78(1B), must still give effect to the purpose of either section 78 or the CPA.

The second step of severance cannot, in the current context, mean that the purpose of section 78(1B) (as opposed to the whole of section 78) should remain intact. What would the purpose be of finding that section 78(1B) infringes section 9(1) of the CRSA (by having an illegitimate government purpose) if this purpose is then sought to be kept intact by the remedy which is supposed to cure the infringement in the first place? Such understanding of the second step of severance will render the constitutional enquiry, in the current context, pointless.

Thus, after severance, the CPA or section 78 should still give effect to their respective purposes.²⁷⁶ Severance should not, in other words, render a provision useless.

It is submitted that the second step in severing a provision will be satisfied, irrespective of whether the whole of section 78(1B) or just certain parts are severed.

This is because if section 78(1B) is altered or removed the purpose of providing for procedures and related matters in criminal proceedings (the CPA's purpose)²⁷⁷ or the

²⁷⁴ Currie & De Waal (*supra*) 204.

²⁷⁵ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (*supra*) para [74]; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (*supra*) para [64]; Currie & De Waal (*supra*) 204.

²⁷⁶ The purpose of the CPA can be found in the Act's long title: to make provision for procedures and related matters in criminal proceedings. The purpose of section 78 can be expressed as regulating the effect of a mental illness or defect, present at time of commission of the alleged offence, on the criminal capacity of the accused. These purposes should remain intact after severance.

purpose of regulating the effect of a mental illness or defect, present at time of commission of the alleged offence, on the criminal capacity of the accused (section 78's purpose), will remain intact.

Accordingly it must be evaluated if the first step of severance can be applied successfully to section 78(1B).

The words which must first be severed are:

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on ~~the party who raises the issue~~.

Such severance will however leave behind an incoherent provision, which provides:

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on.

Reading in must therefore be applied to remedy this incoherence. The severed words must be replaced (read in) with the following words: 'the State' (or alternatively: 'the Prosecution').

Section 78(1) will then read:

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the State.

The question however then arise of why such altered section 78(1B) is at all necessary if it now merely confirms the general rule that the *onus* in proving all the requirements for liability rests on the Prosecution. The answer is that, by leaving the altered section as part of the CPA, the common law position²⁷⁸ is expressly rejected and the position is re-aligned with this general rule.

²⁷⁷ See the CPA's long title. *Bhyat v Commissioner for Immigration (supra)*; Steyn (*supra*) 147 for authority that the long title expresses the purpose of the statute.

²⁷⁸ See chapter 2 under 'The common law development'.

Notional severance does not seem to add anything to the above position. In fact, it will detract from the remedy. If the wording of the section is to be left as it is then the only reasonable condition that can be attached is that: the burden of proof is on the party who raises the issue, *provided that only the State may raise this issue*.

The constitutional infringement seems to be removed at first glance, because the accused will not receive a burden of proof.

At a closer look such notional severance will however destroy the defence of pathological criminal incapacity. For if the accused is not allowed to raise the issue of criminal capacity then he or she cannot raise the defence of pathological criminal incapacity. Stated otherwise, by raising the defence of pathological criminal incapacity the accused *necessarily* places criminal capacity in issue – something that he or she is not allowed to do if this condition is laid down.²⁷⁹

As a result, notional severance will not constitute an appropriate remedy. Actual severance, coupled with reading in, will however provide a suitable remedy which will cure section 78(1B)'s unconstitutionality.

ii) Severance of the whole of section 78(1B)

The second suitable remedy is severance of section 78(1B) from the CPA.

The mentally disabled have suffered marginalisation for as long as civilised society has existed. If we, a country founded on the achievement of equality and the advancement of human rights,²⁸⁰ are to truly strive for the achievement of these values, then our most supreme law should, it is submitted, eradicate such intolerable legislation as section 78(1B) from our law. Not only will striking out of the whole section declare a more humanised and sensitive approach to the mentally disabled, it will also vocally contribute to eradicating the unequal treatment of marginalised groups in South Africa.

²⁷⁹ Notable of such condition is that it might then give rise to further constitutional infringement. The Supreme Court of Canada have also given judgement on this topic in *R v Swain (supra)* and held that it is unconstitutional for the Prosecution to raise the issue of an accused's criminal capacity. Although, as has been shown by this study, it is unwise to merely copy another country's position without reasoned consideration, this case nonetheless provides some convincing arguments.

²⁸⁰ Sec 1(a) of the CRSA.

It is submitted that, in order to remedy the unequal treatment brought about by section 78(1B), the Constitutional Court can take such severe action as striking out the whole of this offending provision.

iii) Section 78(1A)?

Section 78(1A) of the CPA provides that:

Every person is presumed not to suffer from a mental illness or mental defect so as to not be criminally responsible in terms of section 78(1), until the contrary is proven on a balance of probabilities.

Despite the above remedies the problem still remains that section 78(1B) originates from the presumption of sanity – encapsulated in section 78(1A). The removal of the reverse *onus* in section 78(1B) will just be replaced by a reverse *onus* flowing from the presumption of sanity, provided for in the phrase: ‘until the contrary is proven on a balance of probabilities’.

It is unclear why the Legislature then deemed it necessary to expressly enact section 78(1B) in the first place, thereby infringing on an accused’s right to equality.

However, it is submitted that section 78(1A) of the CPA will also be unconstitutional.

The unconstitutionality of section 78(1A) does not however flow from an infringement on the right to equality. No differentiation occurs – *all* persons are presumed to be sane.²⁸¹ Rather the unconstitutionality flows from an infringement of the rule of law in that it does not serve a legitimate (i.e. rational) government purpose.

Section 78(1A) has the same government purpose as section 78(1B) – a government purpose that was found to be illegitimate in chapter 4 above.²⁸² It is to be kept in mind that the requirement of a legitimate government purpose for all legislative enactments is not restricted to an enquiry of infringement of section 9(1) of the CRSA. This requirement is

²⁸¹ It is perhaps inaccurate to say that no differentiation occurs. Sec 78(1A) only relates to the criminal capacity enquiry in terms of sec 78(1). One can therefore state that the differentiation lies therein that accused who were mentally disabled at time of commission of the offence are *treated different* from accused who are unfit to stand trial (the sec 77-provision), in that the former are presumed sane, but not the latter.

²⁸² See chapter 4 under ‘Step 2: is there a legitimate government purpose for the differentiation?’.

seated in the rule of law, not in the right that everyone is equal before the law and entitled to equal protection and benefit of the law.²⁸³ This requirement merely finds application in section 9(1) as part of the rule of law.

Much can also be said of the fact that section 78(1A) might infringe on an accused's right to be presumed innocent (as guaranteed in section 35(3)(h) of the CRSA). Such infringement will not be justifiable in terms of section 36. The section 36-enquiry will fail because section 78(1A) does not, as stated above, have a legitimate government purpose. This requirement must be complied with if the law is to be of general application.²⁸⁴ In other words, because section 78(1A) is not a law of general application, it will not be justifiable in terms of section 36.

Consequently, even though section 78(1A) does not infringe on the right to equality, it does infringe on the rule of law, and is therefore inconsistent with the CRSA and invalid.

Because a fundamental right is not infringed, but rather a founding value of the CRSA,²⁸⁵ the infringement can also not be justified in terms of section 36.²⁸⁶

It is therefore submitted that section 78(1A) should also be severed from the CPA, irrespective of which other remedy is chosen. Such a step will accord with the authority granted in section 172(1) that a court must declare any law that is inconsistent with the Constitution²⁸⁷ invalid to the extent of its inconsistency.

7.4 Conclusion

This chapter established an appropriate remedy for the infringement brought about by section 78(1B) of the CPA.

It was stated that sections 38 and 172(1) of the CRSA authorise certain constitutional remedies, notably: a declaration of invalidity, a declaration of rights, interdicts and

²⁸³ Sec 9(1) of the CRSA. For the justification of the use of the rule of law in sec 9(1) see chapter 4 under 'Step 2: is there a legitimate government purpose for the differentiation?'.

²⁸⁴ See chapter 6 under 'Stage 1: is the law of general application?'. Notable is the fact that the requirement that the law must be of general application, is also seated in the principle of the rule of law.

²⁸⁵ Sec 1(c) of the CRSA.

²⁸⁶ See the wording of sec 36(1): 'A right in the Bill of Rights may be limited...' (emphasis added).

²⁸⁷ Notably: not only the Bill of Rights, but *the Constitution*.

constitutional damages. It was also stated that only a declaration of invalidity will provide an appropriate remedy as the other remedies will not sufficiently address the marginalisation of mentally disabled accused.

Reading down, as a possible solution to the unconstitutionality, was considered. It was found that this form of interpretation does not provide a solution, because the text of section 78(1B) is not capable of bearing another meaning than a reverse *onus*.

It was then concluded that a declaration of invalidity is the only suitable remedy in light of the peremptory wording of section 172(1). Closer scrutiny however proved unavoidable in order to address concerns about how the impact of such declaration could be controlled.

Severance, reading in, retrospectivity and temporary suspension are all methods used to control the impact. It was stated that only severance and reading in would be suitable in the current context.

In assessing how severance could control the impact of a declaration of invalidity, it was established that two forms of severance will provide appropriate relief.

Firstly it was found that severance and reading in would have to be coupled in order to avoid a disjointed provision. It was submitted that if the words: 'on the party who raises the issue' were struck out and replaced by 'the State', then section 78(1B) would be cured of unconstitutionality.

As a result thereof the section would read:

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the State.

It was also stated that notional severance, i.e. leaving the language intact, but subjecting it to a condition for proper application, would not render a suitable remedy.

The second possible remedy was to sever section 78(1B) from the CPA completely. This would have the added benefit of proclaiming in a stronger way that we, as a society who

strive for the achievement of equality and the advancement of human rights, do not only believe these values, but make them concrete in our actions.

It was then evaluated what the impact of section 78(1A) of the CPA will be if it is left untouched. It was found that this section, if left in place, will only replace the reverse *onus* which will be removed by severance of section 78(1B).

It was advanced that section 78(1A) will also be unconstitutional because it violates the rule of law by not having a legitimate government purpose. Consequently it was submitted that section 78(1A) should also be severed from the CPA. Such a step is authorised by section 172(1) of the CRSA.

It has been established that two possible remedies are possible for the curing of section 78(1B)'s invalidity. Both have their advantages. If severance coupled with reading in is chosen then it will expressly remedy the common law stance that has existed in South African law since 1878 when the *McNaghten Rules* were incorporated.

However if striking out of section 78(1B) is ordered then a much stronger statement can be made towards remedying the systematic marginalisation of the mentally disabled. And this is what is needed, more than an express correction of the common law stance. Especially considering the fact that striking out will have the same result in any event.

Consequently severing sections 78(1B) and 78(1A) of the CPA is advanced as the most appropriate remedy.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS: EASING THE MANIAC'S LOT

*O thou that hast strayed in a pathway of sorrow,
Where joy is a stranger and peril is near;
With regret for the past and no hope for the morrow,
The sigh thy companion, thy solace a tear-*

*There's bliss yet in store, let reflection still cheer thee,
There's rest for the weary, unfading and true;
On the ocean of life, though the billows are near thee,
Look afar where the haven of peace is in view!*²⁸⁸

8.1 Introduction

This study tested the constitutionality of section 78(1B) of the CPA against section 9 of the CRSA. It was anchored in the conviction that section 78(1B) imposed a too onerous burden on already heavily burdened mentally disabled people who, through fate or circumstance, had received the maniac's lot.²⁸⁹

It principally found that section 78(1B) of the CPA infringes on both section 9(1) and section 9(3) of the CRSA. It also found that these infringements could not be justified in terms of section 36 of the CRSA.

It also concluded that section 78(1A) of the CPA – the age-old presumption of sanity – is unconstitutional in South Africa, despite the fact that it passed constitutional muster in Canadian law.

As this study's swan song a summary of the conclusions reached in each of the preceding chapters will be provided in this chapter. It will end with the recommendations flowing from this study and some concluding remarks.

²⁸⁸ Excerpt from 'There's rest for the weary' by WB Tappan *The Poems of William B. Tappan* (1834) 67.

²⁸⁹ See fn 1.

8.2 Summary of chapters

8.2.1 Chapter 1

The first chapter of this study addressed some preliminary issues.

It set out to establish whether section 78(1B) of the CPA applies to the Prosecution *and* an accused. It was found that although section 78(1B) may apply to both parties, it is primarily aimed at accused persons.

Chapter 1 also found that section 78(1B) will in practice only affect the mentally disabled accused as opposed to a mentally abled accused. Mentally abled accused have other defences at their disposal and, after recent developments in the law, will rather opt for those defences than raise criminal capacity as an issue. Mentally disabled accused however only have one defence at their disposal, namely the defence of pathological criminal incapacity.

The role of and need to properly assess psychiatric and/or psychological evidence was then assessed. It was advanced that, although section 79 of the CPA provides some instruction, further guidelines are vital in correctly assessing expert evidence.

Chapter 1 then explained that this study only focussed on testing section 78(1B) against the right to equality, as provided for in section 9 of the CRSA. An assessment of whether section 78(1B) infringes on the right to be presumed innocent, as provided for in section 35(3)(h) of the CRSA, consequently fell outside the scope of this study. The reason advanced is that this study's subtext is the marginalisation of the mentally disabled, and not procedural justice.

It was then explained that this study's significance lay in the fact that our Constitution places equality as a founding value and that, as a result, the marginalisation of mentally disabled persons (where they are accused of crimes) cannot be tolerated. It was shown that the reverse *onus* can have serious implications where an unrepresented accused must plea in a lower court but will be tried in a court with higher standing.

Finally the methodology employed in testing section 78(1B) against the Constitution was provided.

8.2.2 Chapter 2

Chapter 2 evaluated the development of the presumption of sanity, and by extension the reverse *onus* contained in section 78(1B) of the CPA.

The development through the common law was firstly considered. It was found that South African law incorporated the presumption of sanity from English law in 1878 in the Transvaal Supreme Court case of *R v Booth*. The presumption was founded in English law. An advisory opinion of all the Judges of England in the case of *R v M'Naghten* established the reverse *onus* and it was these principles which were incorporated. These coarse principles were then polished by our courts until they became accepted and applied frequently.

The statutory development of the reverse *onus* was then considered. It was found that section 78(1B) was enacted contrary to the advice of the South African Law Commission. The Parliamentary Portfolio Committee on Justice deliberately discarded this advice in their report to Parliament.

The said committee justified enactment of section 78(1B) on three grounds: the reverse *onus* already formed part of the common law, the Constitutional Court declined to address the matter of whether a reverse *onus* infringes a fundamental right where such *onus* applies as part of defence and the Canadian Supreme Court had found the reverse *onus* to be a justifiable limitation on the right to be presumed innocent.

These reasons were then criticised and it was concluded that Parliament had rashly enacted section 78(1B).

8.2.3 Chapter 3

Chapter 3 attempted to provide some guidance on how the problem of reconciling different expert evidence could be eased, if not entirely overcome. It first set out some general guidelines, which showed how one can overcome a situation where different diagnoses

were made and, despite the probable difficulty, still be able to reach a well-reasoned and conclusive finding on criminal capacity.

The chapter first addressed these difficulties in general terms. It was stated categorically that the difficulties can be avoided if one keeps it in mind that the *court*, and not the expert, decides whether the accused is criminally capacitated or not. This is due to the fact that criminal capacity is a legal concept, constituting a legal question, and not a clinical one.

As a result counsel (whether they act on behalf of the Prosecution or the accused) should place the expert evidence within its correct boundaries. Experts should report on which functional abilities (whether physical or of the mind) were affected by the medical illness or defect. Once a court is armoured with this evidence it can use its legal-deductive skills to make a finding on criminal capacity, i.e. whether, due to certain functional abilities being affected, the accused had the ability to distinguish between right and wrong and act in accordance with such appreciation.

The chapter then continued more specifically by providing guidelines in approaching expert evidence. A Supreme Court of Appeal decision, *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*,²⁹⁰ was used. The principles of this case, which was actually rooted in the field of medical negligence, were adapted in order to be used in the assessment of criminal capacity.

Central to most of the principles is the rule that a court should analyse the *logic* of the expert's opinion. In summary these principles were:

1. The issue of criminal capacity is one for the court itself to determine on the basis of the various (and often conflicting) psychiatric and/or psychological expert opinions.
2. The determination of criminal capacity will not involve considerations of credibility (of the expert witnesses), but rather the examination of their opinions and the analysis of their essential reasoning, in preparation of the court reaching its own conclusion on the issue of criminal capacity.

²⁹⁰ *Supra*.

3. What is required in the evaluation of expert evidence is to determine whether and to what extent their opinions are founded on logical reasoning
4. The court must be satisfied that the expert opinion has a logical basis, i.e. that the expert has considered other comparative diagnoses, the reasons for rejecting them and whether his or her chosen diagnosis constitutes a 'defensible conclusion'.
5. An accused can probably be found criminally (in)capacitated if that body of opinion is not capable of withstanding logical analysis – despite the support of a body of professional opinion approving of (or agreeing with) the diagnosis of the expert.
6. The assessment of the presence of a mental illness or defect is a matter of clinical judgement which the court would not normally be able to make without expert evidence. It would therefore be wrong to decide a matter by simple preference where there are conflicting views on either side – and both are capable of logical support.
7. Only where expert opinion cannot be logically supported at all will it fail to provide assistance in the assessment of criminal capacity.
8. It is important to keep in mind that expert scientific witnesses tend to assess likelihood (i.e. assessing probabilities and improbabilities) in terms of scientific certainty (usually expressed as a percentage), instead of assessing (as a court does) where the balance of probabilities lies on a review of the whole evidence.
9. In order to provide the court with the generally accepted practice, counsels should at least call one full-time practicing medical practitioner as an expert witness. Experts with only limited time to practice can however still provide valuable testimony with regards to other aspects of the case (like the clinical issues).
10. Where a court is confronted with conflicting schools of thought or opinions, it may accept the conflicting or minority opinion, if that opinion accords with what is considered reasonable by that specific branch of the medical profession
11. In evaluating whether a conflicting or minority opinion is considered reasonable by that specific branch of the medical profession, a court should be mindful that it should only

refuse to admit such opinion if it is so unreasonable and so dangerous to be contrary to public policy.

These principles, read in the context of the general guidelines above, will certainly promote better judicial application in the determination of criminal capacity.

As expressed above, the government purpose for enacting section 78(1) was, partly, to avoid placing the difficult burden of disproving a mental illness or defect on the Prosecution. Alongside the arguments already advanced, one can further conclude that such a burden is far less difficult than it was made out to be. By using the above guidelines and principles the burden of disproving a mental illness or defect is no more difficult than proving fault – a burden that escapes reversal onto the accused.

8.2.4 Chapter 4

This chapter assessed whether section 78(1B) of the CPA is in conflict with section 9(1) of the CRSA.

The test for infringement of section 9(1) entailed a twofold enquiry: does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose?

It was found that section 78(1B) differentiates between accused who raise the issue of criminal capacity and accused who do not raise this issue. The former accused acquires a burden of proof to prove criminal capacity whilst the latter acquires no such burden.

It was then found that although section 78(1B) does have a government purpose, this purpose is illegitimate. This was because the government purpose is irrational, arbitrary and shows 'naked preferences'.

Because the government purpose was found to be irrational there could be no question of whether a *rational* connection existed between the provision and the government purpose. Consequently the second leg of the section 9(1)-enquiry also failed.

Section 78(1B), therefore, constitutes irrational differentiation between mentally abled and mentally disabled accused and infringes on section 9(1) of the CRSA.

8.2.5 Chapter 5

In this chapter it was evaluated whether section 78(1B) of the CPA amounted to unfair discrimination by applying the test as set out in *Harksen v Lane NO*.

This involved, firstly, the enquiry of whether the differentiation caused by section 78(1B) qualifies as 'discrimination'. A three-step enquiry, comprising of whether differentiation is present, whether the differentiation is based on a section 9(3)-listed ground and whether some prejudice has been caused by the differentiation, led to the conclusion that the provision does in fact constitute discrimination. It was found that section 78(1B) differentiates, on the listed ground of disability and that prejudice is caused because the accused receives a burden of proof which could lead to imprisonment if the accused fails to acquit the burden. Because the discrimination occurs on a listed ground section 9(5) of the CRSA comes into play and as a result the discrimination was presumed to be unfair.

Secondly it was assessed whether the discrimination was in fact unfair. Three indicators were used to assess unfairness, namely: the position of the complainant in society, the nature of the provision and the purpose sought to be achieved by it and the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity.

It was found that section 78(1B) does indeed have an unfair impact on accused persons with a mental illness or defect.

Accordingly it can be concluded that section 78(1B) of the CPA constitutes unfair discrimination and an infringement of section 9(3) of the CRSA. This conclusion was fortified by the presumption that the discrimination will be unfair.

8.2.6 Chapter 6

Chapter 6 began by addressing the relationship between sections 9 and section 36. It found that section 36 interacts differently with section 9(1) than with section 9(3).

It seemed that, due to certain logical and conceptual difficulties, it is impossible to apply section 36 to a limitation of section 9(1). This is because a legitimate government purpose is needed in order to comply with section 9(1). With no such purpose, section 9(1) will be infringed. Under the section 36-enquiry a *legitimate* government purpose must be weighed against the infringement, but if the purpose was found to be illegitimate, then there is nothing to be weighed.

Accordingly it was found that the infringement of section 9(1) of the CRSA by section 78(1B) of the CPA could not be justified.

The interactions between sections 9(3) and 36 were similar, but here arguments existed which advance that even if section 36 could be applied to justify unfair discrimination, the results would necessarily have been the same. In other words, if the discrimination was found to be unfair then it would also be found unjustifiable.

As a result it was found that the infringement of section 9(3) of the CRSA by section 78(1B) of the CPA could not be justified.

This chapter also considered conflicting interpretations by some of the leading constitutional law authors, namely Halton Cheadle and Stu Woolman with Henk Botha. It considered both opinions and found that Woolman and Botha's opinion accord with the practice of the Constitutional Court. Accordingly their interpretation (or rather the Constitutional Court's interpretation) was followed in this study.

Finally this chapter evaluated the Canadian case of *R v Chaulk* – which found the reverse *onus* to be a justifiable infringement on the right to be presumed innocent. It was assessed whether this case could be applied to the South African position (as was suggested by the Parliamentary Portfolio Committee on Justice).

It was however found that it could not. Four reasons were advanced.

Firstly, different constitutional rights were tested for infringement. *Chaulk* tested the reverse *onus* against the right to be presumed innocent, whilst this study tested it against the right to equality. As a result of this the justification enquiry was completely different and a different result was therefore possible if not likely.

Secondly, in South Africa the task of establishing a mental illness or defect does not constitute an ‘impossible onerous burden of disproving insanity’. Section 79 of the CPA regulates the position very efficiently and provides for the assistance of up to four experts.

Thirdly, the argument remained that it is as at least as difficult to prove fault as it is proving criminal capacity (as both are concerned with the subjective state of mind of the accused), yet the burden of proof does not shift in the establishment of fault.

Fourthly, the use of juries in Canada makes it possible for abuse of the defence of pathological criminal incapacity, as it is the juries who apply the law to the facts of each case (i.e. juries must ultimately decide whether an accused had criminal capacity or not). In South Africa this is a legal question, answered by a presiding officer. This prevents possible abuse of the defence.

It was concluded that the Parliamentary Portfolio Committee on Justice, and by extension Parliament, erred in submitting that the reasoning in *Chaulk* could serve as justification for enactment of section 78(1B).

8.2.7 Chapter 7

Chapter 7 established an appropriate remedy for the infringement brought about by section 78(1B) of the CPA.

It was stated that sections 38 and 172(1) of the CRSA authorise certain constitutional remedies. It was also stated that a declaration of invalidity will provide an appropriate remedy as other remedies will not sufficiently address the marginalisation of mentally disabled accused.

Reading down, as a possible solution to the unconstitutionality, was considered. It was found that this form of interpretation does not provide a solution, because the text of section 78(1B) is not capable of bearing another meaning than a reverse *onus*.

Closer scrutiny of the impact of a declaration of invalidity was however needed in order to address concerns about how such impact could be controlled.

In assessing how severance could control the impact of a declaration of invalidity, it was established that two forms of severance will provide appropriate relief.

Firstly it was found that severance and reading in would have to be coupled in order to avoid a disjointed provision. It was submitted that if the words: 'on the party who raises the issue' were struck out and replaced by 'the State', then section 78(1B) would be cured of unconstitutionality.

As a result thereof the section would read:

Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the State.

It was also stated that notional severance, i.e. leaving the language intact, but subjecting it to a condition for proper application, would not render a suitable remedy.

The second possible remedy was to sever section 78(1B) from the CPA completely. This would have the added benefit of proclaiming in a stronger way that we, as a society who strive for the achievement of equality and the advancement of human rights, do not only believe these values, but make them concrete in our actions.

It was then evaluated what the impact of section 78(1A) of the CPA will be if it is left untouched. It was found that this section, if left in place, will only replace the reverse *onus* which will be removed by severance of section 78(1B).

It was advanced that section 78(1A) will also be unconstitutional because it violates the rule of law by not having a legitimate government purpose. Consequently it was submitted that section 78(1A) should also be severed from the CPA. Such a step is authorised by section 172(1) of the CRSA.

It was finally concluded that complete severance of both section 78(1A) and 78(1B) will be the most appropriate remedy in this case due to the added benefit of making a much stronger statement towards remedying the systematic marginalisation of the mentally disabled.

8.3 Recommendations

This study recommends that section 78(1B) of the CPA be declared invalid and severed from the CPA. This will remedy the infringements brought about by this provision on section 9 of the CRSA.

This study further recommends that section 78(1A) of the CPA also be declared invalid and severed from the CPA. Apart from this provision also being unconstitutional, it will further prevent that the reverse *onus* remains intact despite the severing of section 78(1B).

8.4 Concluding remarks

It is the honest belief of the author of this study that a declaration of invalidity of section 78(1B) will take the South African law one step closer to addressing the plight of a marginalised minority. A minority that has, since time immemorial, been shoved to the outskirts of society – to be locked away in asylums and treated far from the public eye.

This study has made every effort to assist the South African law in, hopefully sooner rather than later, remedy some of the flagrant mistreatment of persons with mental disabilities.

This study attempted to proclaim to the mentally disabled, and in particular accused persons with a mental illness or defect, that ‘there’s rest for the weary, unfading and true’. That a ‘haven of peace’ might yet be in view, free from unsubstantiated and unnecessary burdens.

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