CHAPTER 2
THE DEFENCE OF NON-PATHOLOGICAL CRIMINAL INCAPACITY: ASSESSING THE FUNDAMENTAL NEED FOR EXPERT EVIDENCE AND LEGAL CERTAINTY

“One is tempted to define man as a rational animal who always loses his temper when he is called upon to act in accordance with the dictates of reason.” (Oscar Wilde [1854–1900] in “The Critic as Artist” [1891])

1 Introduction

Over the past two to three decades, South African criminal law has viewed the emergence of a defence currently labelled as non-pathological criminal incapacity.1

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

Whenever the defence of pathological criminal incapacity is raised, expert psychiatric and psychological evidence is statutorily provided for within the context of the accused being sent for observation.2

The latter observation can be conducted either if it appears to a court that the accused is not capable of understanding the proceedings in order to make a proper defence, or if it appears that the accused’s mental state at the time of the commission of the alleged crime is questionable.

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2 See Section 77-79 of the Criminal Procedure Act, 51 of 1977 (hereafter “The Criminal Procedure Act”). These sections pertaining to pathological criminal incapacity will be discussed extensively in chapter 3 below.
If, however, the defence is one of non-pathological criminal incapacity, expert evidence is not a prerequisite in order to rely on the defence and does not fulfil an indispensable function.3

In S v Volkman Hockey AJ remarked as follows:4

“Clearly, the legislature made a distinction between allegations of criminal incapacity based on mental illness or mental defect, on the one hand, and such incapacity based on ‘any other reason’ on the other. Where there is an allegation or appearance of mental illness or mental defect, the court is obliged (‘the court shall’) to direct that, the accused is referred for observation in terms of section 79 of the Act. If, however, there is an allegation of lack of criminal responsibility for any other reason, other than mental illness or mental defect, the court has a discretion whether to refer the accused for observation or not. Non-pathological incapacity falls within the latter category. Entrusting the court with discretion in cases of non-pathological incapacity is not surprising.”

In terms of section 78(2) of the Criminal Procedure Act, a court retains a discretionary power to refer an accused for observation whenever the defence of non-pathological criminal incapacity is the defence in question. This referral can be made upon a request by either the accused, the State or the court. The problematic issue pertaining to expert evidence in support of the defence of non-pathological criminal incapacity, lies not so intensely with the referral of an accused for observation but rather with the expert mental health professionals conducting the observation. It is a known fact that the facilities for purposes of a forensic evaluation in State hospitals are limited and accordingly not every accused can be referred randomly.5 The problem with the defence of non-pathological criminal incapacity is that psychiatrists are generally sceptical and

3 Snyman, CR "Criminal Law" (2002), 4th ed at 166; S v Calitz supra note 1 at 119-121; S v Laubscher supra note 1 at 166-167; S v Lesch supra note 1; S v Kalogoropoulos supra note 1 at 211; S v Van der Sandt 1998 (2) SACR 627 (W) at 636 G.
4 S v Volkman 2004 (4) All SA 697 (C) at 699.
5 Statistics obtained on 24 November 2008 during an interview with Dr P de Wet, a psychiatrist at Weskoppies Hospital of Weskoppies Mental Institution revealed that even though approximately 46 beds are available, only approximately 38 can be allocated to accused persons due to a lack of staff at the particular institution.
non-responsive to this defence due to the fact that the causes of non-pathological criminal incapacity are external factors and not a known mental illness or mental defect or some form of pathology, in which psychiatrists are trained, as clearly explained in the previous chapter.

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

Strauss correctly states:6

“\[Dans die praktiek kan dit vir ’n deskundige uiters moeilik wees om met ’n eenvoudige ‘ja’ of ‘nee’ te antwoord. Daar moet in gedagte gehou word dat ons in dié gevalle juist nie ‘n handboek-diagnose van geestespathologie het waarby die geskiedenis van die beskuldigde of die identifisering van bepaalde syndrome aanduidend kan wees van bepaalde bevindinge oor sy vermoëns nie.\]”

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

The problem in respect of expert evidence pertaining to the defence of non-pathological criminal incapacity is further exacerbated by the fact that mental health professionals do not, generally, draw a distinction between the defence of

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sane automatism or involuntariness of conduct, on the one hand, and “lack of self-control” that relates to the second leg of the test for criminal capacity, on the other. From a medical point of view “lack of self-control” and automatism are one and the same defence. From a legal perspective, automatism or involuntariness of conduct and “lack of self-control” are two distinct and separate defences relating to different requirements for criminal liability.

Louw correctly states:

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

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

In the midst of the war between law and medicine pertaining to the defence of non-pathological criminal incapacity, stands the battered woman. For purposes of this chapter reference will be made to battered women and the battered woman syndrome. This should, however, be construed to also refer to the “battered spouse” or “battered partner” and is not intended to be portrayed as being gender specific.
kills her abusive spouse or partner and has been raised successfully in the past.\footnote{Snyman (2008) supra note 1 at 165; S v Wiid supra note 1 at 561.}

The heated debate between law and medicine as to the merits and existence of the defence of non-pathological criminal incapacity, to some extent casts doubt on the availability of this defence to a battered woman. The question that arises is whether psychologists, and more specifically forensic psychologists, are not in a better position to provide expert evidence in cases where battered woman syndrome evidence is presented in the light of the fact that psychiatrists do not welcome the defence of non-pathological criminal incapacity. Should the defence of non-pathological criminal incapacity not be based on a different form of expert evidence as opposed to pathological criminal incapacity?

One of the most controversial decisions in the history of the defence of non-pathological criminal incapacity is the decision in \textit{S v Eadie}.


This decision casts doubt on the future existence and place of the defence of non-pathological criminal incapacity. The decision also did not provide clarity as to the role of expert evidence pertaining to this defence. This decision and its impact on the defence of non-pathological criminal incapacity will be assessed in detail in this chapter.

In this chapter the author will examine the defence of non-pathological criminal incapacity with specific reference to the origin, development and future place of this defence. The Constitutional aspects pertaining to this defence will also be discussed. The role of mental health professionals in the assessment of this defence will be dealt with extensively. The presentation of battered woman syndrome evidence in support of this defence will also be evaluated within the context of the battered woman who kills her abusive partner or spouse with possible recommendations for reform.
2 Mode of discussion

The primary objective of this chapter is to provide an analysis of the current role and place of expert evidence in support of the defence of non-pathological criminal incapacity with a careful dissemination of the critical issues in respect of this defence. The first part of this chapter will focus on the origin and development of the defence of non-pathological criminal incapacity with a discussion of the most important case law pertaining to this defence. The probative value of expert evidence in these cases will be carefully scrutinised. Only a *capita selecta* of origins of non-pathological criminal incapacity will receive attention in this chapter. The specific origins of non-pathological criminal incapacity that will be discussed and assessed against the backdrop of the role of expert evidence in support of this defence are provocation, emotional stress and intoxication as these are the reasons most commonly encountered in practice for raising the defence of non-pathological criminal incapacity. For purposes of this chapter youthfulness will not be discussed. The second part of this chapter will be devoted to a discussion of the “battered woman” and the presentation of battered woman syndrome evidence in support of a defence of non-pathological criminal incapacity. The researcher acknowledges that the current chapter will be exposed to criticism levelled towards the length, and possibly, the layout of the chapter. The following reasons are, however, advanced as justification for the length and layout of the chapter:

- The defence of non-pathological criminal incapacity is largely uncodified and as such almost exclusively founded in case law.
- In order to adequately assess the proper role and place of expert evidence in support of the defence of non-pathological criminal incapacity, an in depth analysis and dissemination of decisions dealing with the latter defence was inescapable in order to address the role and probative value of expert evidence in support of this defence.
- Between the defences of pathological- and non-pathological criminal incapacity, the defence of non-pathological criminal incapacity is by far the defence which is most controversial and clouded with numerous anomalies with specific reference to the need for expert evidence as well as the debate relating to the continued existence of this defence within our
current criminal justice system. The latter inadvertently exacerbates the need for an in depth analysis.

- The specific causes of non-pathological criminal incapacity addressed in this chapter, are addressed within the context of the defence of non-pathological criminal incapacity and more specifically, within the context of the role, place of, and the need for expert evidence in support of the defence of non-pathological criminal incapacity. Accordingly, these causes of non-pathological criminal incapacity are addressed in this chapter and not in separate, independent chapters as the main theme of the study entails the role and place of expert evidence in support of the defence of criminal incapacity and not the causes of criminal incapacity and more specifically, non-pathological criminal incapacity.

- Academic opinions advanced in respect of the various decisions pertaining to the defence of non-pathological criminal incapacity will be encapsulated subsequent to the discussion of each decision. In this manner the latter will serve to integrate the various views held in all the decided case law.

3 Constitutional foundation

“The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with sun beam in the whole volume of human nature, by the hand of divinity itself; and can never be erased or obscured by mortal power.” (Alexander Hamilton [1775])

3.1 Introductory remarks

On 8 May 1996 the Constitutional Assembly adopted the current Constitution of the Republic of South Africa, which commenced on 4 February 1997. Within a
new constitutional dispensation South Africa has come a long way in facing various constitutional challenges. An assessment of the role of expert evidence in support of the defence of criminal incapacity will have limited value if not addressed against the backdrop of our current Constitution. Accordingly, before embarking on a discussion of the role and place of expert evidence in support of the defence of non-pathological criminal incapacity, the author will first discuss the Constitutional foundation of the topic.

The Constitution is currently the Supreme law of South Africa.\textsuperscript{14} A Constitution, in short, can be conceptualized as a formal written instrument or “social contract” representative of the people of the country and “accorded public assent through ratification by means of a special procedure”.\textsuperscript{15}

\textit{principles form the bright constellation which has gone before us, and guided our steps through the age of revolution and reformation.”} See also Devenish, GE “A Commentary on The South African Constitution” (1998) at 3-10; Steytler, N “Constitutional Criminal Procedure – A commentary on the Constitution of the Republic of South Africa, 1996” (1998).

Section 1 of the Constitution states:

“1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution.

(d) ...”

Section 2 of the Constitution states:

“2. This Constitution is the Supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled.” See also Carstens, PA and Pearmain, D “Foundational Principles of South African Medical Law” (2007) at 21.

In S v Makwanyane 1995 (3) SA 391 (CC) 487 Mahomed J observed:

“In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.” See also at 498 where it is stated: “The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive.” See also Carstens and Pearmain (2007) supra at 21-22. See also Devenish, GE “The South African Constitution” (2005) at 31-34.

Devenish, (2005)\textit{ supra} note 13 at 1. The Shorter Oxford English Dictionary (1992) 408 defines the term “Constitution” as: “the system or body of fundamental principles according to which a nation, state, or body politic is constituted or governed.” In Attorney-General\textit{ v Dow} 1994 (6), (Bot) 7B-C, Amisah JP stated:

“(a) written constitution is the legislation or compact which establishes the State itself. It paints in broad strokes on a large canvass the institutions of that State, allocating powers,
Chapter 2 of the Constitution contains the Bill of Rights. It protects the negative and positive rights of all people against the government of South Africa, including its executive, legislative and judicial branches.\textsuperscript{16}

Cheadle, Davis and Haysom state the following in respect of a Bill of Rights:\textsuperscript{17}

“A bill of rights is a particular feature of modern democratic constitutions. Its function is not only to ensure the perpetuation of democratic governance, but also to articulate the fundamental values that must animate the three branches of government in the realisation of the kind of society contemplated by that government. A bill of rights limits the exercise of power by defining the limits of legislative freedom. It engages in a particular way with the legal system – a bill of rights is really no more than a set of rules that govern the content of other rules.”

Section 7 of the Constitution reads as follows:

“7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote, and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”

The German Constitution played a huge role in the origin and development of section 7 (1) of the Constitution.\textsuperscript{18} Subsection (1) contains the basic principles of defining relationships between the institutions and the people within the jurisdiction of the State, and between the people themselves.”

\textsuperscript{16} Section 8(1) states: “The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of State.”

\textsuperscript{17} Cheadle, Davis, and Haysom, (2002) supra note 13 at 2. In Carmichele v Minister of Safety and Security and Another 2001 (10) 995 (CC) Ackermann and Goldstone JJ stated at para 54:“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.”

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the Bill of Rights and confirms the democratic values of human dignity, equality and freedom.

The State is obliged to “respect, protect and fulfil these rights.”\textsuperscript{19} In \textit{S v Makwanyane and Another}\textsuperscript{20} it was stated that “Respect for life and dignity, which are at the heart of section 11 (2) (of the interim Constitution) are values of the highest order under our Constitution”. Sub-section (1) accordingly reaffirms the basic principles enunciated in section (1) of the Constitution namely that South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non racialism and non sexism.\textsuperscript{21}

Sub-section (2) imposes duties on the State to give content to the rights in the Bill of Rights.\textsuperscript{22}

In the light of the fact that the Bill of Rights is the cornerstone of democracy in South Africa and the values of human dignity, equality and freedom being of paramount importance, it is necessary to reflect on the specific fundamental rights


\textsuperscript{19} Section 7(2). See also Devenish (2005) \textit{supra} note 13 at 45. In Rail Commuter Action Group \textit{v Transnet Ltd t/a Metrorail} (2002) 3A11 SA 741 at par 20 Nugent JA stated: “(t)he State is obliged by the terms of section 7 of the 1996 Constitution not only to respect but also to ‘protect, promote and fulfil the rights in the Bill of Rights’ and section 2 demands that the obligations imposed by the Constitution must be fulfilled.”

\textsuperscript{20} \textit{S v Makwanyane and Another} 1995 (6) BCLR 665 (CC) at par 111. See also Cheadle, Davis, and Haysom, (2002) \textit{supra} note 13 at 14. See also \textit{Ferreira v Levin NO and Others v Vryenhoek and Others v Powell NO and Others} 1996 (1) BCLR 1 (CC); \textit{National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others} 1998 (12) BCLR 1517. In \textit{S v Jordan} (Sex Workers Education and Advocacy Task force as Amici Curiae) 2002 (6) SA 642 (CC) the Court, at 670 stated:“The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge.”

\textsuperscript{21} Cheadle, Davis and Haysom, (2002) \textit{supra} note 13 at 16.

\textsuperscript{22} See \textit{Strydom v Minister of Correctional Services and Others} 1999 (3) 342 (W); \textit{Carmichele v Minister of Safety and Security and Another} 2001 (10) BCLR 995 (CC).
Section 8 of the Constitution plays a pivotal role in respect of the defence of non-pathological criminal incapacity. The defence of non-pathological criminal incapacity is to a large extent a common law defence, except for limited statutory reference to this defence. During the course of this chapter it will be indicated that there are numerous controversies and huge uncertainty pertaining to the defence of non-pathological criminal incapacity and the future of this defence is dubious. The exact role and place of expert evidence in support of this defence is also uncertain.


25 See section 78 (2) of the Criminal Procedure Act 51 of 1977.
The question that inevitably arises is whether this defence is not in need of development. Has the time not arrived for the common law to be developed to the extent that legislation does not give effect to various rights in the Bill of Rights in respect of this defence?

It is accordingly important to briefly discuss aspects pertaining to section 8 of the Bill of Rights. In terms of section 8 all law is subject to the provisions of the Bill of Rights. It binds the State and also natural and juristic persons.26

The Bill of Rights regulates the relationship between an individual and the State and also the relationship between individuals or private persons. The latter is also referred to as the so-called vertical and horizontal application of the Bill of Rights.27

The most prominent feature of a Constitution is to restrain the State in respect of laws that are enacted. Accordingly the constitutionality of a particular law enacted by the legislative sphere of the State can be challenged on the basis that it conflicts with the Bill of Rights.28 The relation between the citizen and the State is referred to as a “vertical” relation whereas the relation between private persons is referred to as a “horizontal” relation.29 For purposes of this study the vertical application of the Bill of Rights is of more importance as it concerns the State as opposed to the accused.

In terms of section 8 (1) the Bill of Rights “applies to all law”. The latter entails that any legal norm, irrespective of whether it is a statutory provision or a rule in terms

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26 Cheadle, Davis and Haysom (2002) supra note 13 at 19; Davis, Cheadle and Haysom (1997) supra note 18 at 30-33. See also Du Plessis and Others v De Klerk and Another 1996 (5) BCLR 658 (CC); Carmichele v Minister of Safety and Security and Another 2001 (10) BCLR 995 CC; Mandela v Falati 1994 (4) BCLR 1 (W). See also De Waal, Currie and Erasmus (2001) supra note 13 at 45.
29 See Cheadle, Davis and Haysom (2002) supra note 13 at 21 where it is stated that both the interim and final Constitutions were primarily vertical in nature. See also Davis, Cheadle and Haysom (1997) supra note 18 at 43. See Du Plessis & Others v De Klerk and Another 1996 (3) SA 850 (CC) where Mahomed DP stated: "I am not persuaded that there is, in the modern State, any right which exists which is not ultimately sourced in some law, even if it be no more than an unarticulated premise of the common law and even if that common law is constitutionally immunised from legislative invasion ..." (para 7a). See also Devenish “The South African Constitution” (2005) at 46.
of the common law or customary law, may be challenged once it is established that it infringes a right in the Bill of Rights.\textsuperscript{30}

Accordingly, the impact of section 8 (1) can be summarised as follows:

- **Legislation** – if any legislation does not adhere or conform to the Bill of Rights, it must be declared invalid. For purposes of this study, it is necessary to evaluate the provisions in the Criminal Procedure Act pertaining to the defence of criminal incapacity in order to assess the constitutionality or unconstitutionality thereof. Before making a finding of invalidity, a court should attempt to reconcile the particular legislation with the Bill of Rights.\textsuperscript{31}
- **Common Law** – if a particular common law rule infringes a right in the Bill of Rights, a court must declare it invalid. The High Courts, Supreme Court of Appeal and the Constitutional Court have inherent powers to develop the common law in order to bring it in line with the Constitution.\textsuperscript{32}

Section 8 (1) further binds all organs of State in all spheres of government to comply with the provisions of the Bill of Rights.\textsuperscript{33}

Section 8 (1) binds the legislature in each sphere of State to the Bill of Rights. Accordingly, Parliament, the provincial legislatures and the municipal councils are,
within their legislative capacities, bound by the Bill of Rights.\textsuperscript{34} The legislatures are bound in both their legislative and non-legislative functions.\textsuperscript{35}

Section 8 (1) further binds executives in all spheres of government – national, provincial and municipal.

Section 8 (2) provides for the application of the Bill of Rights to the exercise of private power. Private persons will accordingly be bound to the extent that the rights are applicable to them having regard to the nature of the right and the duty imposed by it.\textsuperscript{36}

The section that is of particular importance for this study is section 8 (3). This section imposes an obligation on a court, once it has been established that a provision of the Bill of Rights applies to a natural person, to apply or develop the common law to the extent that legislation does not give effect to that right and that a court may also develop rules of the common law to limit the right, provided that it is done in accordance with the limitation clause.\textsuperscript{37}

In the light of the fact that the defence of non-pathological criminal incapacity is mainly a common law defence with limited statutory recognition, the question that falls to be answered is whether the common law in this respect should not be developed in terms of section 8 (3)?

\textsuperscript{34} Cheadle, Davis and Haysom (2002) supra note 13 at 34-35. See also S v Thebus 2003 (6) SA 505 (CC).
\textsuperscript{35} Cheadle, Davis and Haysom (2002) supra note 13 at 34. See also Speaker of the National Assembly v De Lille and Another 1999 (11) BCLR 1339 (SCA) where the non-legislative conduct of the National Assembly came under the spotlight. The Cape High Court held that the National Assembly was subject to the Constitution and bound by the Bill of Rights. See also De Lille v Speaker of the National Assembly 1998 (3) SA 430 (C) where the High Court held: “The National Assembly is subject to the Supremacy of the Constitution. It is an organ of State and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution” (paragraph 25). See also De Waal, Currie and Erasmus “The Bill of Rights Handbook” 4\textsuperscript{th} ed (2001) at 47.
\textsuperscript{36} Cheadle, Davis and Haysom (2002) supra note 13 at 36; De Waal, Currie and Erasmus (2005) supra note 13 at 20-23.
\textsuperscript{37} Section 36, Currie, De Waal and Erasmus (2005) supra note 13 at 50-54; Devenish (2005) supra note 13 at 46-47; Davis, Cheadle and Haysom “Fundamental Rights in the Constitution – Commentary and Cases” (1997) at 45.
De Waal, Currie and Erasmus indicate that there are three ways in which the Bill of Rights can apply in a legal dispute:\textsuperscript{38}

- The Bill of Rights may operate as a yardstick against which ordinary law is tested.
- The Provisions of the Bill of Rights may also be beacons that must guide the interpretation and application of the ordinary law and legal reform.
- The Bill of Rights may govern legal disputes directly.

De Waal, Currie and Erasmus distinguish between the direct and indirect application of the Bill of Rights:\textsuperscript{39}

“Direct application. The reach of Bill of Rights (beneficiaries, duties and time) demarcates the types of legal disputes to which the Bill of Rights applies as directly applicable law. Within this demarcated area, the Bill of Rights overrides ordinary law and any conduct that is inconsistent with the Bill of Rights and, subject to considerations relating to justiciability and constitutional jurisdiction, it generates its own set of remedies. This form of application is termed the direct application of the Bill of Rights.

Indirect application. At the same time, the Bill of Rights contains a set of values that must be respected whenever ordinary law is interpreted, developed or applied. This form of application is termed the indirect application of the Bill of Rights. When indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies. The special rules contained in the Constitution that deal with the procedural issues of standing and the jurisdiction of the courts are also irrelevant. Rather, the Bill of Rights respects the procedural rules and remedies of ordinary law, but demands furtherance of the values of the Bill of Rights through the operation of ordinary law.”

\textsuperscript{38} De Waal, Currie and Erasmus (2005) \textit{supra} note 13 at 32-35.
\textsuperscript{39} Currie, De Waal and Erasmus (2001) \textit{supra} note 13 at 35-37. See also Currie, De Waal and Erasmus (2005) \textit{supra} note 13 at 32. See also \textit{Carmichele v Minister of Safety and Security 2001} (4) SA 938 (CC) at paragraph 56.
It should also be borne in mind that in practice the indirect application of the Bill of Rights to the law must always be determined before its direct application to law or conduct.\textsuperscript{40}

Section 39 (2) of the Bill of Rights states the following:


dfrac{(2)}{39} \text{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."

Section 39 (2) pertains to the indirect application of the Bill of Rights.

In \textit{S v Thebus},\textsuperscript{41} Moseneke J stated the following:\textsuperscript{42}


dfrac{(2)}{39} \text{Since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity. Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency. The Bill of Rights enshrines fundamental rights which are to be enjoyed by all people in our country. Subject to the limitations envisaged in s36, the State must respect, protect, promote and fulfil the rights in the Bill of Rights. The protected rights therein apply to all law and bind all organs of State including the judiciary."

Moseneke J also distinguished two instances that could give rise to a need for the development of the common law:\textsuperscript{43}


dfrac{(2)}{39} \text{It seems to me that the need to develop the common law under S39 (2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the

\begin{footnotesize}
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\item \textsuperscript{40} \textit{Ibid.}
\item \textsuperscript{41} \textit{S v Thebus} 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC).
\item \textsuperscript{42} Paragraph 24.
\item \textsuperscript{43} Paragraph 28. See also Burchell and Milton (2005) \textit{supra} note 1 at 114-115.
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inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so it grows in harmony with the ‘objective normative valve system’ found in the Constitution.”

In the *Pharmaceutical Manufacturers* case, Chaskalson P stated that:

“The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the ‘spirit, purport and objects of the Bill of Rights.’ This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.”

The question that falls to be answered is whether the defence and the law relating to the defence of non-pathological criminal incapacity is in need of development. The second question to be answered is how this development should be implemented? Can the law pertaining to the defence of non-pathological criminal incapacity be developed by means of a direct application of the Bill of Rights in terms of section 8 (3) or by means of an indirect application in terms of section 39 (2), in order to harmonise the law pertaining to this defence with the spirit, purport and objects of the Bill of Rights?

During the course of this chapter, the author will indicate that the application of the defence of non-pathological criminal incapacity and the role of expert evidence in support of this defence have not been consistent. The future role and place of this

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44 See also *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC), 1995 (2) SACR 761 (CC), 1995 (12) BCLR 1593 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

45 *Pharmaceutical Manufacturers Association of SA and Another, In re Ex parte President of Republic of South Africa and Others* 2000 (2) SA 674 (CC). See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) specifically paragraph 27–29.
defence is currently a highly controversial and problematic issue. The need accordingly arises for the development of the law relating to this defence in order to create clarity and legal certainty in this regard.

The defence of non-pathological criminal incapacity is mainly a common-law defence. The only vague reference to such a defence is found in section 78 (2) of the Criminal Procedure Act where reference is made to “.. in any other case” for purposes of referral for observation in terms of section 79 where the criminal responsibility of an accused is in issue.46

The fact that the law relating to the defence of non-pathological criminal incapacity is founded mainly in the common-law, coupled with the controversy surrounding this defence as well as the uncertain role and place of expert evidence in support of this defence, clearly indicates that change is needed.

3.2 Development of the common law in terms of the indirect application of the Bill of Rights: section 39(2)

Before a court may resort to direct application of the Bill of Rights, it must first consider the indirect application of the Bill of Rights.47 In terms of section 39 (2) there is a general obligation on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.48 When interpreting any statutory provision, the Bill of Rights has to be positively enhanced with specific reference to the values enshrined in S1.49 In terms of statutory law, indirect application of the Bill of Rights will entail that a court must attempt to

46 See S78 (2) – this section will be discussed in more detail below.
47 Currie, De Waal and Erasmus (2005) supra note 13 at 64. See also S v Mhlungu 1995 (3) SA 867 (CC) where Kentridge AJ held: (paragraph 59) “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.” See Zantsi v Council of State, Ciskei 1995 (4) SA 615 (CC) at paragraph 8.
48 Ibid.
49 This was also provided for in the Interim Constitution Act 200 of 1993 where section 35 (3) stated: “(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.”
interpret legislation in conformity with the Bill of Rights before declaring the particular legislation in conflict with the Bill of Rights and accordingly invalid.\textsuperscript{50}

In terms of the common law the principle of developing the common law in conformity with the Bill of Rights is affirmed.\textsuperscript{51}

Cheadle, Davis and Haysom state that section 39 (2) is applicable in at least two ways:\textsuperscript{52}

“It firstly mandates that all legislation must be interpreted to be congruent with the Constitution. Where this proves to be impossible, the legislation stands to be set aside as being unconstitutional. ... A second, albeit related, purpose is that a constitutionally orientated approach to legislative interpretation is now mandated. In some cases a literal approach to interpretation may well provide a result which is in harmony with the spirit, purport and objects of the Constitution.”

When interpreting the Criminal Procedure Act and the provisions pertaining to the defence of non-pathological criminal incapacity, a court or forum must promote the spirit, purport and objects of the Bill of Rights. This obligation also exists when developing the common law.

In \textit{Govender v Minister of Safety and Security}\textsuperscript{53}, the Supreme Court of Appeal held the following pertaining to constitutional challenges to legislation:\textsuperscript{54}

(a) to examine the objects and purport of the Act or the section under consideration;
(b) to examine the ambit and meaning of the rights protected by the Constitution;

\textsuperscript{50} Currie, De Waal and Erasmus (2005) \textit{supra} note 13 at 64; Cheadle, Davis and Haysom (2002) \textit{supra} note 15 at 743-746.
\textsuperscript{51} Idem.
\textsuperscript{52} Cheadle, Davis and Haysom (2002) \textit{supra} note 13 at 746.
\textsuperscript{53} \textit{Govender v Minister of Safety and Security} 2001 (4) SA 273 (SCA). See also Currie, De Waal and Erasmus (2005) \textit{supra} note 13 at 65.
\textsuperscript{54} Paragraph 11.
(c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, i.e. by protecting the rights therein protected;
(d) if such interpretation is possible, to give effect to it, and
(e) if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.

As was stated above, the defence of non-pathological criminal incapacity has very little statutory reference and recognition. It could be argued that section 78(2) does not adequately give effect to an accused’s right to “adduce and challenge evidence” in terms of section 35(3)(i) of the Bill of Rights because of the fact that there is no obligation on a court to refer an accused for observation in terms of section 79 of the Criminal Procedure Act when reliance is placed on this defence. Accordingly, when interpreting section 78(2) of the Criminal Procedure Act, this particular section currently does not promote the spirit, purport and objects of the Bill of Rights as the role of expert evidence in support of this defence is dubious and vague.

In the light of the fact that the defence of non-pathological criminal incapacity and the role of expert evidence in support thereof is mainly common-law based, the focus should be placed on attempting to develop the common-law rules pertaining to this defence in order to harmonise it with the spirit, purport and objects of the Bill of Rights.

In S v Thebus, Moseneke J stated:

“The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution.”

55 Section 35 (3) (i) of the Constitution. This right will form one of the cornerstones of this study.
As were stated above, Moseneke J distinguished two instances when development in terms of section 39 (2) is called for:\(^\text{57}\)

(a) when a rule of the common law is inconsistent with a constitutional provision,
(b) when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects.

It is accordingly submitted that the existing principles of the common law relating to the defence of non-pathological criminal incapacity are in need of change in order for the law to give better effect to the Bill of Rights. Currie, De Waal and Erasmus note that when the common law is developed, it should be done on a case-by-case basis.\(^\text{58}\)

It is also important to note that section 173 of the Constitution reads as follows:

“173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

One of the landmark decisions pertaining to the development of the common law, is the decision of *Carmichele v Minister of Safety and Security*.\(^\text{59}\) It is necessary to briefly focus on this case for purposes of the present discussion.

The facts of this decision were as follows. The applicant, Alix Jean Carmichele (the applicant), was viciously attacked and injured by one Francois Coetzee. The attack took place at the home of one Julie Gosling at Noetzie just outside Knysna.

The applicant brought a delictual action in the High Court for damages against the Minister for Safety and Security and the Minister of Justice and Constitutional

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\(^{57}\) See also Currie, De Waal and Erasmus (2005) *supra* note 13 at 67; *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC).

\(^{58}\) Currie, De Waal and Erasmus (2005) *supra* note 13 at 69. See also *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at paragraph 63; *Shabalala v Attorney-General Transvaal* 1996 (1) SA 725 (CC).

\(^{59}\) *Carmichele v Minister of Safety and Security* 2002 (1) SACR 79 (CC); See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (1) SA 481 (SCA).
Development. She claimed that members of the South African Police Service and the public prosecutors at Knysna had negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm.

The High Court held that there was no evidence upon which a court could reasonably find that the said duty had existed and that the police or public prosecutors had acted wrongfully. Accordingly, absolution from the instance was ordered. The applicant appealed to the Supreme Court of Appeal, but the Appeal was dismissed. The applicant then launched an application for leave to appeal to the Constitutional Court. Before the Constitutional Court the applicant contended that the police and prosecutors had owed her a duty to safeguard her constitutional rights to life, the respect for and protection of her dignity, freedom and security and privacy.  

It was also contended that the police and prosecution services were among the primary agencies of the State responsible for the discharge of its constitutional duty to protect the public in general and women in particular against violent crime, and that, on the facts of the instant case, the applicant was entitled to damages in delict for their failure to do so.

The applicant also submitted that the High Court and the Supreme Court of Appeal had erred in not applying the relevant provisions of the (interim) Constitution in determining whether the police and prosecutors had been obliged to protect her. Counsel for the applicant relied in particular on the constitutional obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights as stated in section 35 (3) of the Interim Constitution and section 39 (2) of the Constitution of the Republic of South Africa.

In delivering judgment, the Constitutional Court made important findings pertaining to section 39 (2) of the Constitution and the duty of courts to develop the common law that is of importance for the present discussion. The relevant portions of the

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60 At paragraph 25.
61 At paragraph 30.
judgment could also apply to an argument in favour of the development of the common law principles pertaining to the defence of non-pathological criminal incapacity.

With regards to the development of the common law, Ackermann and Goldstone JJ held the following:64

“It needs to be stressed that the obligation of courts to develop the common law, in the context of the S 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in S 39(2) read with S 173 that where the common law as it stands is deficient in promoting the S 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a ‘general obligation’ because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under S 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.

It was implicit in the applicant’s case that the common law had to be developed beyond existing precedent. In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the S 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of S 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the S 39(2) objectives. Possibly because of the way the case was argued before them, neither the High Court nor the SCA embarked on either stage of the above inquiry.”

And further:65

64 Paragraph 39-40.
“The influence of the fundamental constitutional values on the common law is mandated by S 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”

Ackermann and Goldstone JJ also held that the proper development of the common law in terms of section 39(2) is dependent on proper interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, the Constitutional Court.66

Ackermann and Goldstone JJ accordingly referred the case back to the High Court in order for the trial to continue67.

The Carmichele decision is a landmark decision in the sense that it opens the door for development of existing common law that may fall short of the spirit, purport and objects of the Bill of Rights. Even though the court in Carmichele did not expressly lay down a set formula for such development to take place, it nevertheless confirmed the importance of the development of the common law in order to harmonise it with the Bill of Rights.

Currently the defence of non-pathological criminal incapacity is clouded with controversy and confusion. The approach towards expert evidence in support of this defence, as will be indicated, has not been consistent.68 Due to the vagueness, uncertainty and confusion, it could be argued that the common law principles pertaining to this defence fall short of the spirit, purport and objects of the Bill of Rights. It is accordingly submitted, against the backdrop of the

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65 Paragraph 54. See also Amod v Multilateral Motor Vehicle Accidents Fund 1998 (4) SA 753 (CC) paragraph 33 where it was stated: “The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a ‘constitutional manner’ are of particular importance.” See also Christian Education South Africa v Minister of Education 1999 (2) SA 83 (CC) at paragraph 8.
66 Paragraph 55.
67 Paragraph 84.
68 See S v Laubscher supra note 1 and S v Calitz supra note 1 which will be discussed comprehensively below.
Carmichele decision, that the law relating to the defence of non-pathological criminal incapacity is in desperate need of development.

### 3.3 Development of the common law in terms of the direct application of the Bill of Rights: section 8(3)

Section 8(3) of the Constitution imposes a duty on a court when applying a provision of the Bill of Rights to a natural or juristic person, to apply, and if necessary, develop the common law to the extent that legislation does not give effect to that right and also grants a court a discretionary function to develop rules of the common law to limit such right provided it is effected in accordance with the limitation clause contained in section 36.⁶⁹

It is accordingly necessary to evaluate the application of this section in relation to the development of the defence of non-pathological criminal incapacity as a defence.

Section 9 of the Constitution reads as follows:

“9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) 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.

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(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of Subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

Section 35(3)(i) of the Constitution states:70

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70 Section 35(3)(i) is of pivotal importance to the current study. Section 35, however, reads as follows:

Arrested, detained and accused persons

35. (1) Everyone who is arrested for allegedly committing an offence has the right –
(a) to remain silent;
(b) to be informed promptly –
(i) of the right to remain silent; and
(ii) of the consequences of not remaining silent;
(c) not to be compelled to make any confession or admission that could be used in evidence against that person;
(d) to be brought before a court as soon as reasonably possible, but not later than –
(i) 48 hours after the arrest; or
(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right –
(a) to be informed promptly of the reason for being detained;
(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
(f) to communicate with, and be visited by, that person’s –
(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counsellor; and
(iv) chosen medical practitioner.

(3) Every accused person has a right to a fair trial, which includes the right -
(a) to be informed of the charge with sufficient detail to answer it;
(b) to have adequate time and facilities to prepare a defence;
(c) to a public trial before an ordinary court;
(d) to have their trial begin and conclude without reasonable delay;
(e) to be present when being tried;
(f) to choose, and be represented by, a legal practitioner, and to be informed of his right promptly;
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
(i) to adduce and challenge evidence;
(j) not to be compelled to give self-incriminating evidence;
“(3) Every accused person has a right to a fair trial, which includes the right
- ............
  (i) to adduce and challenge evidence.”

It could be argued that an accused person raising the defence of non-pathological criminal incapacity does not enjoy equal benefit and protection of the law due to the vagueness and uncertainty pertaining to this defence. It can further be argued that, as a result of the fact that expert evidence is not a prerequisite in order to rely on this defence, an accused’s right to a fair trial and more specifically, the right to adduce and challenge evidence, is prejudiced.

Accordingly, when applying these rights to an accused person, the question that falls to be answered is whether the common law should not be developed to the extent that legislation does not give effect to these rights.

It should also be borne in mind that section 8(3) also provides for the development of the common law to limit such rights. Expert evidence could, for example, be statutorily provided for in support of the defence of non-pathological criminal incapacity, but it could be limited by requiring an accused to establish a sufficient basis for such defence.

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
(o) of appeal to, or review by, a higher court.
(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.
See also Cheadle, Davis and Haysom (2002) supra note 13 at 630 and specifically 661, Currie, De Waal and Erasmus (2005) supra note 13 at 644.
Cheadle, Davis and Haysom provide the following reasons underlying the peremptory instruction that courts must develop the common law to give effect to particular rights:\footnote{Cheadle, Davis and Haysom (2002) supra note 13 at 42.}

- The harmonisation of the common law with the rights in the Constitution promotes and ensures the integrity and coherence of the legal system as a whole and of the common law in particular.
- The provision ensures a rule-based response to conduct infringing constitutional rights.
- As soon as a common law rule is established, any further conduct in breach of the rule does not give rise to constitutional litigation. Any further disputes will be governed by the newly developed common-law rule.
- The “piecemeal” development of the common-law is what courts have done since the establishment of the courts in South Africa and is what they do well.

The precise manner in which the common law is to be developed remains questionable. The appropriate way would be by means of legislation or in the case of non-pathological criminal incapacity, the amendment of Sections 77-79.

In the \textit{Carmichele}-case, Ackermann and Goldstone JJ stated:\footnote{Carmichele v Minister of Safety and Security supra note 57 at paragraph 36. See also Currie, De Waal and Erasmus (2005) supra note 13 at 74.}

\begin{quote}
“In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the legislature and not the Judiciary.

....... 

We would add, too, that this duty upon Judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the Court to develop the common law under section 39(2).”
\end{quote}
3.4 Other rights in the Bill of Rights relevant to the defence of non-pathological criminal incapacity

3.4.1 Human dignity

Section 10 of the Constitution states:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

The right to human dignity is a cornerstone value of the Bill of Rights and accordingly all the individual rights are founded on this value.\(^{73}\)

Haysom states the following in respect of the right to dignity:\(^{74}\)

“It serves to reinforce other rights and to underwrite their importance. It is, also, a critical tool in interpreting or giving purpose and meaning to those other fundamental rights, a tool of which the Constitutional Court has made frequent use.”

Haysom also notes that the right to dignity is useful in resolving conflict between different rights and aids in harmonising the competing claims of freedom, equality and democracy.\(^{75}\)

In *S v Makwanyane*\(^{76}\) it was held by O’Regan J:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.”

\(^{73}\) Cheadle, Davis and Haysom (2002) *supra* note 13 at 123.

\(^{74}\) Haysom in Cheadle, Davis and Haysom (2002) *supra* note 13 at 123.

\(^{75}\) *Ibid*.

Devenish also notes that human dignity is the most important right in the Constitution and that it accordingly enjoys vertical and horizontal application.\textsuperscript{77}

The respect for human dignity requires that the exercise of any power, specifically the power of government, must be in line with and based on the inherent worth of human beings. The legality of any official conduct is required to be assessed according to whether human dignity was violated in any way.\textsuperscript{78}

In the light of the fact that the right to dignity is recognised as a foundational right as well as a core value in human rights jurisprudence, it goes without saying that any law pertaining to the defence of non-pathological criminal incapacity should be considered and applied and also enacted with respect for the inherent dignity of both the accused person and also the victim. The right to dignity will particularly feature in respect of the battered woman who kills her abusive husband or partner. Haysom states that dignity implies respect for a sphere of autonomy for every human being, to be protected from unlawful invasions of a person’s autonomy to make choices. The latter is one of the problematic aspects with reference to the battered woman who kills her abusive spouse or partner as prolonged abuse is clearly a direct infringement of the most core and foundational right of every human being.

3.4.2 Freedom and Security of the Person

Section 12(1) of the Constitution states:

\begin{quote}
12. (1) Everyone has the right to freedom and security of the person, which includes the right –
\begin{enumerate}
\item not to be deprived of freedom arbitrarily or without just cause;
\item not to be detained without trial;
\end{enumerate}
\end{quote}

\textsuperscript{77} Devenish (2005) \textit{supra} note 13 at 61.
\textsuperscript{78} Devenish (2005) \textit{supra} note 13 at 63. See also \textit{S v Williams} 1995 (7) \textit{BCLR} 861 (CC) at paragraphs 35-37.
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way, and
(e) not to be treated or punished in a cruel, inhuman or degrading way.”

In Bernstein and Others v Bester NO and Others O'Regan J described the concept of freedom and liberty as follows:79

“The conception of freedom underlying the Constitution must embrace that interdependence without denying the value of individual autonomy. It must recognise the important role that the State, and others, will play in seeking to enhance individual autonomy and dignity and the enjoyment of rights and freedoms.”

Section 12(1)(c) contains the right to be free from all forms of violence. This right specifically relates to battered women who kill their abusive spouses. Prolonged and incidental abuse negates this right to a particular battered woman.

Section 12(1)(d) seeks to protect persons from seven different modes of conduct: torture, cruel treatment, cruel punishment, inhuman treatment, inhuman punishment, degrading treatment as well as degrading punishment.80 This section is also important when hearing battered woman syndrome evidence in the sense that a battered woman who was abused over a prolonged period, was subjected to serious human rights violations. The latter can especially play a role during sentencing.

It is interesting to note that Haysom refers to the case of Denmark v Greece where it was held that inhuman treatment deals with such treatment that causes severe

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79 Bernstein and Others v Bester NO and Others 1996 (4) BCLR 449 (CC) at paragraph 150. See also Cheadle, Davis and Haysom (2002) supra note 13 at 155; Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others 1996 (1) BCLR 1 (CC). See also Devenish (2005) supra note 13 at 70-77.
80 Cheadle, Davis and Haysom (2002) supra note 13 at 162. See also S v Williams and Others 1995 (7) BCLR 861 (CC) at 869.
mental or physical suffering that is unjustifiable.\footnote{Denmark v Greece (3321-3/67;3344/67 YB 12 bis) as discussed by Haysom in Cheadle, Davis and Haysom (2002) supra note 13 at 166.} The particular treatment must attain the minimal level or degree of severity if it is to be classified as “inhuman”.\footnote{Ibid.}

Accordingly, the evaluation of this minimum is relative and dependent on all circumstances of the case such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.\footnote{Ibid.} The latter findings can be of assistance in the assessment of inhuman treatment in the scenario of the battered woman.

### 3.4.3 Privacy

Section 14 of the Constitution states:

> “14. Everyone has the right to privacy, which includes the right not to have -
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized, or
> (d) the privacy of their communications infringed.”

Section 14(d) is of particular importance to the defence of non-pathological criminal incapacity. The problematic issue is to what extent communications between an accused and a mental health practitioner is privileged and whether statements by an accused during such assessment can be used in a subsequent trial to determine the accused’s mental state at the time of the alleged crime.\footnote{See the conflicting opinions in S v Leaner 1996 (2) SACR 347 (C) and S v Kok 1998 (1) SACR 532 (NPD) as discussed in paragraph 12 infra.}

The common law acknowledges the right to privacy as an independent personality right that forms part of the “dignitas”.\footnote{Currie, De Waal and Erasmus (2005) supra note 13 at 316.}

In *Bernstein v Bester*,\footnote{Ibid.} Ackermann J mentioned examples of breach of privacy that included entry into a private residence, the reading of private documents,
listening in to private conversations and the disclosure of private facts in breach of a relationship of confidentiality.

The extent to which communications between an accused and a mental health practitioner are protected and the question as to whether statements made by an accused are privileged will be assessed in this chapter with reference to the defence of non-pathological criminal incapacity.

3.4.4 Access to information

Section 32(1) reads as follows:

“32. (1) Everyone has the right of access to:
(a) any information held by the State, and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.”

The right to freedom of information is founded on the idea that people are entitled to have access to information in the possession of the State that has an impact on them. Currenty, the Promotion of Access to Information Act serves to give effect to Section 32(1) of the Constitution.

Bernstein v Bester NO 1996 (2) SA 751 (CC) at paragraph 68; Currie, De Waal and Erasmus (2005) supra note 13 at 316. See also National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) 1517 (CC) where the Constitutional Court stated at paragraph 32: “Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.” See also Cheadle, Davis and Haysom (2002) supra note 13 at 185.

The Promotion of Access to Information Act, Act 2 of 2000. See also Cheadle, Davis and Haysom (2002) supra n13 583-584. In Shabalala and Others v Attorney-General of the Transvaal and Another 1995 (12) BCLR 1593 (CC), the Constitutional Court had to consider whether the common-law privilege in respect of police dockets, as laid down in R v Steyn 1954 (1) SA 324 (AD) was in line with the Constitution and also whether the common-law rule which prohibits an accused or his or her legal representative from consulting with a State witness in the absence of permission of a prosecuting agency is in line with the Constitution. Mohomen, DP held the following: (paragraph 55)
(a) It is difficult to conceive of any circumstances in which the prosecution can justify withholding from the accused access to any statement or document in the police docket which favours the accused or is exculpatory.
This right could find application when an accused person raising the defence of non-pathological criminal incapacity requires certain information held by the State in order to conduct the defence of non-pathological criminal incapacity.

3.4.5 Right to a fair trial

Section 35(3)(i) states that every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence. This section is pivotal to

(b) The unilateral claim of the prosecution in its justification of a refusal to allow access on the grounds that such access might defeat the objects of the protection in items 3 and 4 of paragraph 40 above cannot be sufficient in itself.
(c) Sufficient evidence or circumstances ought to be placed before the judicial officer to enable the Court to apply its own mind in assessing the legitimacy of the claim. It is for the Court to decide what evidence would be sufficient in a particular case and what weight must be attached thereto.
(d) Inherently there might be some element of uncertainty as to whether the disclosure of the relevant documents might or might not lead to the identification of informers or to the intimidation of witnesses or the impediment of the proper ends of justice. The judgment of the prosecuting and investigating authorities in regard to the assessment of such risks might be a very potent factor in the adjudication process. What the prosecution must therefore be obliged to do (by a proper disclosure of as much of the evidence and material as it is able) is to establish that it has reasonable grounds for its belief that the disclosure of the information sought carries with it a reasonable risk that it might lead to the identity of informers or the intimidation of witnesses or the impediment of the proper ends of justice.
(e) If the State is unable to justify its opposition to the disclosure of the relevant information on these grounds, its claim that a refusal of access to the relevant documents is justified, should fail.
(f) If, in the special circumstances of a particular case, the Court needs access to disputed documents concerned in order to make a proper assessment of the legitimacy of the prosecution’s claim and any insight in that document might reasonably defeat the object of the protection which the prosecution is anxious to assert, the Court would be entitled to examine such a document for this purpose without affording to the accused an opportunity of any knowledge of its contents but making proper allowance for that factor in the ultimate act of adjudication.
(g) Even where the State has satisfied the Court that there is a reasonable risk that the disclosure of the statements or documents sought might impair the protection and the concerns referred to...or in any way impede the proper ends of justice, it does not follow that access to such statements in such circumstances must necessarily be denied to the accused. The Court still retains a discretion. There may be circumstances where the non-disclosure of such statements might carry a reasonable risk that the accused may not receive a fair trial and might even wrongly be convicted. The Court should exercise a proper discretion in such cases by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied.)

See also Currie, De Waal and Erasmus (2005) supra note 13 at 688. The complete section 35 has already been cited in note 63 above. See also Currie, De Waal and Erasmus (2005) supra note 13 at 782. It has been held that there rests an obligation on a presiding officer to assist an unrepresented accused in respect of his or her right to adduce and challenge evidence. See generally S v Simxadi 1997 (1) SACR 169 (C); S v Sishi (2000) 2 All SA 56 (N); S v Dyani 2004 (2) SACR 365 (E). See also Cheadle, Davis and Haysom (2002) supra n13 661; Devenish (2005) supra note 13 at 173-177.
this chapter. In the light of the fact that expert evidence is not a prerequisite in order to rely on the defence of non-pathological criminal incapacity, it could be argued that an accused relying on this defence is prejudiced, particularly if expert evidence which is crucial, is not advanced on behalf of the accused. Expert evidence, if submitted, advanced by the accused as well as the State will provide more clarity pertaining to the factual issues before the court and will also give recognition to the fundamental right of an accused to adduce and challenge evidence.

Section 35(3)(h) states:

“Every accused person has a right to a fair trial, which includes the right – (h) to be presumed innocent, to remain silent, and not to testify during the proceedings, ...”

Section 35(3)(h) in effect refers to three rights: the right to be presumed innocent, the right to remain silent and the right not to testify.90

Schwikkard states that the presumption of innocence is used to refer to two different factors:91

- a rule regulating the standard of proof;
- a policy directive that the subject of a criminal investigation should be regarded as innocent throughout the trial regardless of the possible outcome.

These rights are aimed at reaffirming the State’s onus to prove the liability of an accused beyond reasonable doubt. The right to be presumed innocent is

91 Schwikkard, PJ in Currie, De Waal and Erasmus (2005) supra note 13 at 748. In Ferreira v Levin NO: Vryenhoek v Powell NO 1996 1 BCLR 1 (CC) at paragraph 246 Sachs J states: “the right to silence, the right not to be a compellable witness against oneself, the right to be presumed innocent until proven guilty and the refusal to permit evidence of admissions that were made freely and voluntarily, are all composite and mutually re-enforcing parts of the adversarial system of criminal justice that is deeply implanted in our country and resolutely affirmed by the Constitution.”
regarded as one of the essential rights in any criminal justice system. With reference to the defence of non-pathological criminal incapacity the application of the presumption of innocence becomes relevant in determining the burden of proof. The question whether the reverse onus provision applicable to the defence of pathological criminal incapacity should also apply to non-pathological criminal incapacity will also be addressed below.

The presumption of innocence is infringed whenever an accused is required by a statutory or common law presumption to prove or disprove on a balance of probabilities either an element of or a defence to an offence. The latter currently applies to the defence of pathological criminal incapacity but not to non-pathological criminal incapacity.

It is submitted that the burden of proof should be the same in respect of both these defences. It is further submitted that the reverse onus provision should also apply to the defence of non-pathological criminal incapacity. Steytler notes that the relation between the reverse onus and the purpose it serves is very important – it should be rational. It could be argued that the reverse onus provision is necessary to curb abuse of the defence of criminal incapacity and that there are no other less restrictive means to achieve this goal. Unfortunately reverse onuses have been unsuccessful largely due to the fact that the State could not indicate that less restrictive means could be employed to achieve the purpose.

Schwikkard correctly notes that the normative value accorded to the presumption of innocence as a fundamental right has been emphasised by the court’s insistence that any justification for infringing the presumption of innocence would have to be “clear, convincing and compelling.”

93 Steytler (1998) supra note 13 at 322; S v Bhulwana; S v Gwadiso 1995 (12) BCLR 1579 (CC); S v Coetzee 1997 (4) BCLR 437 (CC) at paragraph 226.
95 Steytler (1998) supra note 13 at 325; S v Pineiro 1993 (2) SACR 412 (Nm).
96 Schwikkard in Currie, De Waal and Erasmus (2005) supra note 13 at 751; S v Mbatha 1996 (2) SA 464 (CC) at paragraph 14.
For purposes of this discussion the right to remain silent and the right not to testify will not be discussed.

3.4.6 Limitation of rights

Constitutional rights and freedoms are not absolute and can accordingly be restricted. Section 36 contains the set criteria to determine when a particular right in the Bill of Rights can be restricted or limited.

Section 36 reads as follows:

“36. (1) 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.
(2) Except as provided in Subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

A particular law may accordingly limit a right contained in the Bill of Rights if it is a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It is thus necessary, when applying or relying on any particular right in the Bill of Rights, to bear in mind that such right is not absolute and can be curbed in terms of Section 36.

97 Currie, De Waal and Erasmus (2005) supra note 13 at 168; Devenish (2005) supra note 13 at 179. See also Cheadle in Cheadle, Davis and Haysom (2002) supra note 13 at 695 where it is stated: “An express limitation clause also provides a matrix for assessing the justifiability of a limitation.”
Cheadle states that a limitation clause “provides a template not only for the courts but, more importantly, for the legislature, and it provides a common platform for dialogue between the courts and the legislature.”

4 Reflections on the history and development of the defence of non-pathological criminal incapacity

4.1 Position before S v Chretien

Up to 1981, it was generally accepted that criminal capacity could be excluded or diminished if the cause of the incapacity was mental illness, youthfulness, intoxication and provocation. Snyman submits that before 1981, intoxication and provocation were only regarded as partial defences.

4.2 Position after S v Chretien

The legal standing in respect of the defence of criminal incapacity was dramatically changed by the decision laid down by Rumpff CJ in S v Chretien.

The facts of the decision were briefly that the accused had attended a party at which there was a good deal of drinking which eventually broke up in circumstances of some discontent. While under the influence of alcohol, the accused had driven his car into a crowd of people who had been at the party and

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100 1981 (1) SA 1097 (A).


102 Snyman (1989) TRW supra note 1 at 1-15. See also Van Oosten (1993) SACJ supra note 1 at 127 where he states: “However, the development, in recent times, of intoxication and provocation as fully fledged defences which may, inter alia, negative criminal capacity has drastically changed the picture for better and for worse. Suddenly there were four criminal incapacity defences instead of two and the possibility of more in the offing.” See also Bergenthuin (1986) De Jure supra note 1 at 98.
who were standing in the street. One person was killed and five were injured. On charges of murder and attempted murder, the trial court found the accused guilty of culpable homicide but acquitted him of attempted murder and even common assault.

The following question of law was reserved for decision by the Appellate division:103

"Whether on the facts found proven by the court the learned judge was correct in law in holding that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol."

The most important findings pertaining to criminal incapacity were the following where Rumpff CJ state:104

"Na my mening is dit verkiesliker om te aanvaar dat indien dit uit die getuienis blyk dat ’n beskuldigde werklik so besope was dat hy inderdaad nie besef het wat hy gedaan het nie, die publieke beleid (die regsoortuiging van die gemeenskap) nie vereis dat van die suiwer regswetenskaplike benadering afgesien moet word nie en dat die beskuldigde ’n straf moet ondergaan bloot omdat hy vrywillig ’n toestand bereik het waarin hy juridies nie kan handel nie of ontoerekeningsvatbaar is."

Rumpff CJ also states that when a person is so intoxicated that he or she does not appreciate the unlawfulness of his or her actions or when his or her inhibitions were crushed, he or she will be deemed to have lacked criminal capacity and if

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103 At 1102 C-D. See also Burchell and Milton (2007) supra note 1 at 362-368.
there is reasonable doubt, the accused should be afforded the benefit of the doubt.\textsuperscript{105}

Rumpff CJ also observes:\textsuperscript{106}

\begin{quote}
"Na my mening is iemand wat papdronk is en wat onbewus is van wat hy doen, nie aanspreeklik nie omdat ‘n spierbeweging in die toestand gedoen nie ‘nStrafregtelike handeling is nie. Indien iemand ‘n handeling verrig (meer as ‘n onwillekeurige spierbeweging) maar so besope is dat hy nie besef wat hy doen nie of dat hy die ongeoorloofdheid van sy handeling nie besef nie, is hy nie toerekeningsvatbaar nie maar ek wil herhaal dat ‘n hof alleen op grond van getuienis wat dit regverdig tot die konklusie, of redelike twyfel, sal kom dat wanneer iemand inderdaad ‘n handeling (of omissie) begaan het wat ‘n misdaad is, hy dermate besope was dat hy nie toerekeningsvatbaar is nie.”
\end{quote}

The question of law which was reserved, was answered in the affirmative.

The practical importance of the decision in \textit{Chretien} for purposes of this study, is that it opened the door for the defence currently labelled non-pathological criminal incapacity. Although this decision did not lay down any principles pertaining to the role of expert evidence in support of this defence, it nevertheless established a foundation for a defence, later to be coined non-pathological criminal incapacity.\textsuperscript{107}

The practical implications of this decision were that a person who is so intoxicated that his/her muscular movements are involuntary, there is no act and accordingly no criminal liability.\textsuperscript{108} In exceptional circumstances a person can be so drunk that he/she lacks criminal capacity in which event such a person will also escape criminal liability. A court will, however, not lightly infer that an accused as a result of intoxication acted involuntarily or lacked criminal capacity or lacked intention. A different approach may lead to the administration of justice being discredited.\textsuperscript{109}

\begin{flushright}
\textsuperscript{105} At 1106 B.
\textsuperscript{106} At 1106 E-G.
\textsuperscript{107} See \textit{S v Laubscher supra} note 1 at 166 F-G; Snyman (2002) \textit{supra} note 1 at 158.
\textsuperscript{108} Snyman, CR “Criminal Law Casebook” (2003) 3\textsuperscript{rd} ed at 126.
\textsuperscript{109} \textit{Ibid}.
\end{flushright}
After the *Chretien*-decision the question accordingly arose as to whether, apart from defences such as youthfulness or mental illness, there could perhaps be a general defence of criminal incapacity. A number of subsequent decisions have answered this question affirmatively.\(^{110}\)

5 **Reflections on a general defence of criminal incapacity: description of cause of mental inability irrelevant**

The defence of criminal incapacity is currently divided into two categories, namely pathological and non-pathological criminal incapacity.

A court will always first attempt to establish whether the defence is one of pathological criminal incapacity, in other words, whether the accused at the time of the commission of the crime was suffering from some known pathology in the form of a mental illness, or not. This will determine whether the court is statutorily obliged to send an accused for observation in terms of section 79 of the Criminal Procedure Act. If, according to the court, an accused was not suffering from a mental illness or mental defect and the defence is not one of pathological criminal incapacity, a court retains a discretion whether to refer an accused for observation.\(^{111}\)

The need for expert assistance and evidence is accordingly determined not by the criminal incapacity itself, but by the cause of the incapacity.

The question that inevitably arises is whether the time has not arrived to establish a general defence of criminal incapacity with mental illness as one factor which could have an influence on criminal capacity. It is submitted that a general defence of criminal incapacity will not only create legal certainty, but will provide a

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\(^{110}\) See *S v Arnold* supra note 1; *S v Campher* supra note 1; *S v Laubscher* supra note 1. These decisions will be discussed comprehensively in this chapter with the emphasis on the role of expert evidence. See also Snyman TRW (1989) *supra* note 1 at 1. See also *S v Shivute* 1991 (1) SACR 656 (Nm) at 660; *S v Ingram* 1995 (1) SACR, (A) at 4 h-i; *S v Van der Sandt* 1998 (2) SACR 627 (W) at 636a; Van Oosten (1993) SACJ *supra* note 1 at 146.

\(^{111}\) See section 78(2) of the Criminal Procedure Act. See also Van Oosten SACJ (1993) *supra* note 1 at 146-147.
more judicially sound approach to the application of the defence of criminal incapacity.

Bergenthuin correctly states that one of the main reasons why criminal capacity has not yet attained complete recognition as a requirement for criminal liability, is because a general criteria for the establishment of criminal capacity has not been formulated.\textsuperscript{112}

With the recognition of criminal capacity as a prerequisite for criminal liability, be it as a distinct and separate element of a crime or as a requirement for culpability, a person who lacks criminal capacity will not be held liable due to the recognition of criminal capacity as an element or prerequisite for a crime.\textsuperscript{113}

Bergenthuin summarises the problem with regards to a lack of a general defence of criminal incapacity as follows:\textsuperscript{114}

"Die gebrek aan ‘n algemene toerekeningsvatbaarheidskriterium wat die toepassing van pragmatiese reëls binne alle begrensing van kasuïstiek noodsaak, skep egter juist die gevaar dat ‘n ontoerekeningsvatbare persoon wel strafregtelik aanspreeklik mag staan, omdat die feitestel waarvolgens sy geval beoordeel word nie binne ‘n bekende presedent tuishoort nie."

Bergenthuin correctly observes that upon close scrutiny of the Chretien-decision,\textsuperscript{115} there is no indication that intoxication, for example, should be singled

\textsuperscript{112} Bergenthuin, JG “Die algemene toerekeningsvatbaarheidsmaatstaf” De Jure (1985) at 273, Bergenthuin, (1985) supra note 1 at 577.

\textsuperscript{113} Bergenthuin (1985) supra note 1 at 274.

\textsuperscript{114} Ibid. Bergenthuin takes the view that the root of the problem pertaining to the lack of a proper general criteria for the assessment of criminal capacity, lies in the application of the psychological theory of culpability which focuses on the subjective state of mind of the accused as opposed to the normative theory which is aimed at the evaluation of the convictions of the community. Bergenthuin submits that the acceptance of the normative theory of culpability will provide more clarity as to the position of criminal capacity (at 277). See also generally S v Bailey 1982 (3) SA 772 (A).

\textsuperscript{115} S v Chretien supra note 1.
out as a ground for criminal incapacity. Accordingly other grounds can also exclude criminal capacity.\textsuperscript{116}

In \textit{S v Campher},\textsuperscript{117} Viljoen AJ stated:\textsuperscript{118}

“Die beginsels van ontoerekeningsvatbaarheid behoort te geld of die geestesversteuring of gemoedsomwentelingookal deur drank of ‘n heftige emosie veroorsaak is. Die verskillende geestestoestande behoort nie gekompartementaliseer te word nie; die beginsel moet slegs nagekom word deur kriteria vir ontoerekeningsvatbaarheid toe te pas afgesien van die vraag of die beskuldigde se aberrase tydelik of permanent van aard was.”

In the same decision, Boshoff AJA states:\textsuperscript{119}

“Die afwesigheid van toerekeningsvatbaarheid is nie beperk tot gevalle waar die dader aan ‘n geesteskrankheid ly nie. Dit is ook denkbaar en bestaanbaar by gevalle van tydelike verstandelike beneweling.”

It is submitted that the views of Viljoen AJ and Boshoff AJ (acting) are correct. Although this is a relatively older decision, the need for change and development pertaining to the defence of non-pathological criminal incapacity, has not changed. It is submitted that there is a need for the development of a general defence of criminal incapacity where the reliance placed on this defence will not be determined by the alleged cause of incapacity, but rather on the lack of criminal capacity itself. Any factor which causes a person to lack the ability to appreciate the wrongfulness of his or her actions or to act in accordance with an appreciation of wrongfulness, will be relevant in determining the existence or lack of criminal capacity.

\textsuperscript{116} See \textit{S v Van Vuuren} 1983 (1) SA 12 (A), where severe emotional stress was acknowledged as a ground for exclusion of criminal capacity. See also Bergenthuin (1985) \textit{supra} note 1 at 281.

\textsuperscript{117} \textit{S v Campher} 1987 (1) SA 940 (A).

\textsuperscript{118} At 955 A-C.

\textsuperscript{119} At 965 H.
Louw advances the following arguments in favour of a general defence of criminal incapacity:120

- From a juridical point of view, such development is “pure”. It is “pure” in the sense that it is in line with the nature of fault as well as the role of fault and criminal capacity in relation to the definition of crime. Louw submits that it is a logical development and scientifically accountable also taking into account the convictions of society.
- The development of such defence will provide a new defence to accused persons who are mentally sound.
- “Sane” criminal incapacity also differs from voluntary intoxication in that “sane” incapacity cannot be deemed a manifestation of the accused’s will. The accused did not desire the particular state and in cases of provocation it is usually the victim who induced or caused the situation.

Louw also advances the following arguments against the development of a general defence of criminal incapacity:121

- It is not the primary role of the law to serve science and logic. As Louw correctly states, this view is positivistic and it reduces the law to a set of rules. It should further be borne in mind that when interpreting legislation or developing the common law, a court is obliged to promote the spirit, purport and objects of the Bill of Rights.122
- It is expected of a normal person to curb his or her emotions and urges. Accordingly, the defence will be open to abuse. It is, however, true, as Louw correctly states, that each person’s level of tolerance in respect of anger and emotional resistance is different and it is in any event difficult to establish whether an accused at a given moment, lost control of him/herself.
- The recognition of a general defence of criminal incapacity will result in punishment losing its reformative and preventative functions in that an

120 Louw, PF “Die algemene Toerekeningsvatbaarheidsmaatstaf” SACJ (1987) at 368.
121 Louw (1987) SACJ supra note 120 at 369.
122 Section 39(2) of the Constitution as discussed above.
emotionally unstable accused will not be taught to keep his or her emotions intact.

By developing a general defence of criminal incapacity the aim is to provide legal certainty and a clear set of rules and norms to be applied in each case where this defence is raised. The development of such defence presupposes the additional establishment of strict rules and requirements when relying on this defence. By requiring an accused to establish a solid foundation for the defence, abuse of this defence will be curbed. It is also at this point where expert evidence plays a pivotal and vital role. Due to the biological-psychological nature of the test for criminal incapacity and the intrinsic nature of this defence, the *ipse dixit* of an accused that he or she lacked criminal capacity, should never be sufficient. Expert evidence should be a prerequisite to support such an averment. In order to attain a more balanced and just view, it should be required that both defence and State retain their own experts. By establishing a general defence of criminal incapacity, the emphasis will accordingly not fall so severely on the cause of the incapacity, but rather on the lack of criminal capacity itself. Such development will also be more in line with our Constitutional values. The further development and implementation of the concept of diminished criminal capacity will further guarantee a just and fair outcome where criminal incapacity is raised.\(^{123}\)

In order to rely on the defence of non-pathological criminal incapacity it is not necessary to prove that the accused's inability was the result of any specific cause or pathological state.\(^{124}\) The only requirement that needs to be satisfied is that the court should be convinced on the evidence as a whole that, at the time of the act, the accused was incapable of appreciating the wrongfulness of his or her act or of acting in accordance with such an appreciation, irrespective of the cause of the inability.\(^{125}\)

The cause of the inability may be “emotional collapse”, “emotional stress”, “total disintegration of the personality” or various other causes such as shock, fear,

\(^{123}\) This concept is discussed in more detail below.

\(^{124}\) Snyman (2002) *supra* note 1 at 164-165.

\(^{125}\) *Ibid.*
tension or provocation. The cause could also be as a result of provocation by somebody else, and the provocation could also be linked to physical or mental exhaustion as a result of insulting behaviour over a long period of time, which increasingly strained the accused’s powers of self-restrain, until these powers eventually snapped.126

Snyman states:127

“Different psychiatrists or judges may use different expressions to describe the cause of X’s incapacity, but the exact description of the cause of the condition is not important. What is important is not the cause of the inability or the description of this cause, but the inability itself.”

6 Lack of criminal capacity to be distinguished from sane automatism

It is from the outset of utmost importance to distinguish clearly between conduct that is involuntary, on the one hand, and the lack of criminal capacity, with specific reference to the lack of the ability to act in accordance with an appreciation of the wrongfulness of the conduct (the conative mental ability), on the other. Even though these two inquiries relate to different requirements of criminal liability, they have vicariously been conflated by courts as well as mental health practitioners.128

Criminal conduct must be voluntary. Conduct is voluntary if the accused’s muscular movements are controlled by the accused’s conscious will or intellect.129

126 Ibid.
127 Ibid.
128 Burchell and Milton (2005) supra note 1 at 436-437; S v Eadie supra note 1 at paragraph 57. See also comments by Dr Kaliski in S v Eadie supra note 1 paragraph 43; S v Francis 1999 (1) SACC 650 (SCA) at 652G-H.
129 Burchell and Milton (2005) supra note 1 at 139; Snyman, (2008) supra note 1 at 51; 162. See also S v Chretien supra note 1 where Rumpff CJ at 1106 E-G stated: “Na my mening is iemand wat papdronk is en wat onbewus is van wat hy doen, nie aanspreeklik nie omdat ’n spierbeweging in dié toestand gedoen nie ’n strafregtelike handeling is nie. Indien iemand ’n handeling verrig (meer as ’n onwillekeurige spierbeweging) maar so besope is dat hy nie besef wat hy doen nie of dat hy die ongeoorloofdeheid van sy handeling nie besef nie, is hy nie toerekeningsvatbaar nie.” This quotation also serves to clearly illustrate the differentiation between the defences of automatism and criminal incapacity.
The requirement of conduct in the form of an *commissio* or *omissio* is the first basic element of liability.  

Snyman also notes that the concept of an act performs two important roles in the construction of liability:

- it forms the basis of liability
- it serves to limit the scope of liability.

As the basic element in the establishment of criminal liability, all the other elements or requirements for liability are qualified by the act. An investigation into the element of unlawfulness is accordingly premature if it has not yet been established whether there has been an act which corresponds with the definitional elements of a crime.

In respect of the second role fulfilled by the act, the act must be formulated in such a way that it excludes from the inquiry conduct or events which are irrelevant. 

Automatism is the defence which is raised when it is alleged that an accused’s behaviour was not voluntary. Involuntary conduct refers to the inability of a person to subject his muscular movements to his will or intellect and accordingly relates to the question of whether a person has committed an act in the criminal law sense of the word. According to Snyman the crucial aspect here is whether a person is capable of controlling his physical movements through his will. If a sane person commits an act in a state of automatism which act would otherwise

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132 *Ibid*.
133 *Ibid*.
134 *Ibid*.
136 Snyman (2008) *supra* note 1 at162. See also *S v Mkize* 1959 (2) SA 260 (N) at 266; *S v Ngang* 1960 (3) SA 363 (T) 366; *S v Stellmacher* 1983 (2) SA 181 (SWA) 185 A – B; Burchell and Milton (2005) *supra* note 1 at 179 - 180.
137 *Ibid*. 

126
be criminal, he or she will have a complete defence and will as such be entitled to an acquittal.138

Such acquittal will be founded on the rule that only a voluntary human act in the form of a commission or omission can lead to criminal liability.139

In order for the defence of sane automatism to succeed, there has to be sufficiently cogent evidence in order to raise reasonable doubt as to the voluntary nature of the actus reus and also medical or expert evidence to indicate that the involuntary nature of the actus reus is due to a cause other than a mental illness or mental defect.140

Where the defence of sane automatism is raised, the onus falls on the State to prove beyond reasonable doubt that the act was committed voluntarily.141 In discharging the onus, the State is assisted by the natural inference that in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily.142

In S v Henry Scott JA noted:143

“It is trite law that a cognitive or voluntary act is an essential element of criminal responsibility. It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the State to establish this element beyond reasonable doubt.”

138 LAWSA (2004) supra note 12 at 68. See also R v Dhlamin 1955 (1) SA 120 (T) at 121; S v Nursing 1995 (2) SACR 331 (D).
141 LAWSA (2004) supra note 1 at 68. See also S v Cunningham supra note 1 at 635J-636G.
142 As expressed by Scott JA in S v Cunningham supra note 1 at 635 j-636 g. See also S v Eadie 2002 (1) SACR 663 (SCA) 681 F-H.
143 S v Henry 1991 (1) SACR 13 (SCA) at 19 I-J; S v Kalogoropoulos 1993 (1) SACR 12 (A); S v Kensley 1995 (1) SACR 646 (A) at 658i-J; S v Trickett 1973 (3) SA 526 (T) at 532; Schmidt, CWH “Laying the foundation for a defence of Sane Automatism” SALJ (1973) vol 90 at 329.
When the defence of sane automatism is raised, a proper foundation has to be established. Expert evidence may be necessary to lay the factual foundation for this defence but ultimately the decision rests with the court, taking into account the medical evidence as well as all the facts of the case.\textsuperscript{144}

It is also necessary to take note of the fact that automatism can take two forms, namely sane and insane automatism.\textsuperscript{145} Insane automatism relates to involuntary behaviour attributable to a mental illness or mental defect. Accordingly, in the latter event, the principles applicable to criminal incapacity due to mental illness or mental defect must be applied.\textsuperscript{146}

The inability of a person to subject his muscular movements according to his or her will or intellect should not be confused with the inability to act in accordance with an appreciation of the wrongfulness of the act, or better known, as the absence of the conative component of the capacity inquiry.\textsuperscript{147} If a person is unable to subject his muscular movements according to his will or intellect, it means that the requirement of an act or conduct was absent.\textsuperscript{148} The defence in the latter will be automatism as discussed above.

If, on the other hand, a person is unable to act in accordance with an appreciation of the wrongfulness of the act, he or she does have the power of subjecting his or her bodily movements to his or her will, but is incapable of resisting the commission of a crime.\textsuperscript{149} The appropriate defence in this instance will be lack of criminal capacity due to the absence of the conative component of the capacity inquiry.

\textsuperscript{144} LAWSA (2004) supra note 1 at 68. See also S v Di Blasi supra note 1 at 7B-D where the court held that the accused is required to establish a factual foundation for the contention that non-pathological factors induced a state of diminished criminal capacity.


\textsuperscript{146} LAWSA (2004) supra note 1 at 68; Snyman (2008) supra note 1 at 56. For a detailed distinction between the concepts of “sane” and “insane” automatism, see chapter 1 above.

\textsuperscript{147} Snyman (2008) supra note 1 at 162.\textsuperscript{148} Snyman (2008) supra note 1 at 162; Van Oosten (1993) SACJ supra note 1 at 126.\textsuperscript{149} \textit{Ibid.}
It is of pivotal importance that these two defences be retained as two distinct defences pertaining to different requirements of criminal liability. An inquiry into an accused’s criminal capacity will only be conducted once it has been established that the accused acted voluntarily and unlawfully. The distinction between these two defences is not always welcomed by the medical profession. The consequence of this is that the expert evidence advanced in support of, for example, criminal incapacity, will inadvertently lack probative value, if the defence is not understood and entertained by the mental health professional testifying in support of it.

In *S v Eadie*, Navsa JA stated the following:150

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

The abovementioned statement is unfortunate. Not only does it create confusion, but it also dismisses trite legal principles that have long been applied.

Le Roux also correctly submits that sane automatism excludes the conduct element of a crime due to the fact that it excludes voluntariness.151 On the other hand, a person can lack criminal capacity either due to a lack of appreciation of

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150 *S v Eadie* 2002 (1) SACR 663 (SCA) at 689 B-C. Navsa JA refers to an article by Louw, R “*S v Eadie*: Road Rage, Incapacity and Legal Confusion” (2001) SACJ at 206. See also Louw, R “*S v Eadie*: The end of the road for the defence of provocation?” SACJ (2003) vol 16 at 200; Snyman, CR “The tension between legal theory and policy considerations in the general principles of Criminal Law” (2003) *Acta Juridica* at 1-22. These articles will be discussed later in this chapter when the decision in *S v Eadie* supra is analysed.

the wrongfulness of an act or due to the inability of acting in accordance with an appreciation of the wrongfulness of an act.

In various decisions the courts have consistently distinguished clearly between sane automatism and non-pathological criminal incapacity\(^\text{152}\).

In \textit{S v Stellmacher}\(^\text{153}\) the accused had been on a strict diet for a period of several weeks. On the particular day in question he had eaten nothing and had performed strenuous physical labour. He went to the local hotel at six o’clock in the afternoon and consumed at least half a bottle of brandy. There was, in the bar, a strong reflection in his eyes of the setting sun through an empty bottle. As a result of the latter, he lapsed into an automatic state during which he fired at persons in the bar, killing one person. The expert evidence relating to the accused’s condition was that the automatism was attributable to hypoglycaemia and/or epilepsy of a relatively short duration and that the accused’s fasting and drinking may have precipitated these conditions.\(^\text{154}\) Mouton J, however, held that the evidence indicated that the accused lacked criminal capacity when he committed the act that constituted the crime.\(^\text{155}\) The question which accordingly arose was whether the accused had suffered from a mental illness as contemplated by section 78 of the Criminal Procedure Act.

Mouton J, citing Hiemstra, held that a mental illness or mental defect related to a pathological disturbance of the accused’s mental faculties and not a mere temporary aberration of the accused’s mental capacity not attributable to a mental illness.\(^\text{156}\)

The court accordingly held that the State had not proved, beyond reasonable doubt, that the accused’s behaviour was indicative of a pathological disturbance of his mental faculties not attributable to a temporary aberration of the mental capacity which was not due to a mental illness.

\(^{152}\) See \textit{S v Moses supra} note 1 at 713 B.

\(^{153}\) See \textit{S v Stellmacher 1983 (2) SA 181 (SWA)}. See also Burchell and Milton (2007) \textit{supra} note 1 at 355; Snyman (2008) \textit{supra} note 1 at 171-172; Louw in Kaliski (ed)(2006) \textit{supra} note 1 at 37.

\(^{154}\) See the evidence of Drs Van Rensburg, Gouse and Grove at 183 B-G.

\(^{155}\) At 187 A.

\(^{156}\) At 187 H.
Accordingly, the court held that a foundation had been established for a defence of criminal incapacity not induced or caused by mental illness. The accused was acquitted.

The relevance and importance of this decision lies in the fact that the court, irrespective of the expert evidence indicating a state of automatism, held that the evidence revealed a state of non-pathological criminal incapacity although the latter terminology was not used by the court.

In *S v Arnold* the facts were briefly as follows. The accused had an unstable childhood and, in the course of his adult life, more than one unsuccessful relationship with women. He was later divorced from his first wife and then married the deceased. He had two sons from his first marriage, aged 16 and 11 years. The younger one had a serious disability – he was hard of hearing. The accused had a very deep love for his boy probably as a result of his disability. The accused was also infatuated with the deceased. Some witnesses also described it as him being besotted with her. Shortly after the marriage the deceased’s mother came to stay with them. She was a divorcée, who was receiving treatment for a hysterical condition. There was an unusually close relationship between the deceased and her mother. A psychiatrist also described it as pathological. The deceased developed a hostile attitude towards her husband’s disabled son. As a result the accused had to arrange for the child to be placed in what the court referred to as “a home for committed” children. This step distressed the accused deeply. The relationship between the accused and the deceased became strained, yet he still loved her very much. The facts reveal that the deceased was a beautiful woman, well aware of the fact that she was most attractive to men, whose attentions she enjoyed. She had a pleasant but immature personality with histrionic tendencies. The accused himself was highly

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157 At 188 A-B.
159 At 258 D.
160 At 1258 E-F.
emotional and, according to the court “experience[d] the most intense feelings, far more than is normal”\textsuperscript{161}. On the day the deceased was killed, the accused took his son to the home for committed children. Earlier the same day he had argued with the deceased. The accused always carried a gun with him. On this particular day the accused had his gun with him. It was practice entering the house to put the gun down in a secure place and on this occasion he had the gun in his hand but because of the position taken up by the deceased he was unable to put it down. During the verbal exchanges that ensued, he held the gun in his hand, hitting it against the couch to emphasize points made by him. During the conversation the gun went off, the bullet going in the opposite direction from where the accused was standing, but missing the deceased. The conversation continued. The deceased told the accused that she wanted to return to singing, dancing and cabaret. By cabaret she meant strip dancing. While she was discussing the strip dancing she intended to do after leaving the house, the deceased bent forward displaying her bare breasts. This was described by the court as “obviously an act of provocation”\textsuperscript{162}. The deceased was then shot and fell to the ground. The accused testified that he did not remember aiming the gun and pulling the trigger. The accused was upset, took the deceased in his arms and called the police.

It is now important to focus on the expert evidence presented in this case.

On behalf of the defence, Dr Gittelson, a psychiatrist, gave expert evidence. The state did not call any psychiatrist nor contest the opinions expressed by Dr Gittelson. His evidence was based upon very thorough investigation. He saw the accused the day after the fateful event and in all had interviewed him for a period of 19 hours. He also investigated the background of the deceased and the mother-in-law. In this he had valuable information from prior reports by psychologists on the two people. All of the information the accused provided Dr Gittelson with, indicated that he was truthful in all that he said to him including that he could not remember certain vital events. When asked whether the accused could appreciate the wrongfulness of his act, he replied that normally the accused was not deficient in this respect, but that at the relevant time the last thing in his

\textsuperscript{161} At 259 B-C.
\textsuperscript{162} At 261 G-H.
mind was the question as to whether what he did was right or wrong\textsuperscript{163}. His conscious mind was so “flooded” by emotions that it interfered with his capacity to appreciate what was right or wrong and, because of his emotional state, he may have lost the capacity to exercise control over his actions\textsuperscript{164}.

Dr Gittelson also said that it may be that the accused had acted subconsciously at the crucial time because of the emotional storm and hence that he did not know what he was doing but that the severity of the storm was a question of degree and that he could not say whether in fact the accused was conscious of what he was doing or not. The legal questions the court had to decide upon were:

(a) Did the accused perform an act in the legal sense?  
(b) If he did perform a legal act, did he have the necessary criminal capacity at the time of the act?  
(c) If he did have the necessary criminal capacity, did he have the requisite intention?

The court found the accused not guilty as it could not find beyond reasonable doubt that when the accused killed the deceased he was acting consciously and not subconsciously.

It is also of interest to note that the court also recognised that not only youthfulness, mental disorder and intoxication could give rise to criminal incapacity, but also other factors, such as extreme emotional stress\textsuperscript{165}.

What is of importance for this study is the pivotal role that the testimony of Dr Gittelson played in this area. Upon a careful investigation of the case report it becomes apparent that the evaluation of the accused by Dr Gittelson played a crucial role in the outcome of the case. It is true that this judgment has been

\begin{footnotesize}
\begin{itemize}
\item At 263 B-D.
\item \textit{Ibid}.
\item At 264 C-D.
\end{itemize}
\end{footnotesize}
criticized.\textsuperscript{166} This case serves as an illustration of the indispensible role that the psychiatrist plays in proving criminal capacity or incapacity, as the case may be.

This case further serves as authority for the argument in favour of a clear distinction between the defences of sane automatism and non-pathological criminal incapacity. In this case Burger J dealt with each of the questions of law mentioned above separately and distinctly, again reaffirming the essential need for distinguishing between these two defences.\textsuperscript{167}

In \textit{S v McDonald}\textsuperscript{168} the appellant was convicted of murder and attempted murder in a regional court and was sentenced to fifteen and five years’ imprisonment respectively. This case mainly dealt with sane automatism as a defence. The charges arose from a shooting incident that occurred involving the appellant’s ex-wife’s new partner (the deceased) and his ex-wife’s brother-in-law as a result of a quarrel as to the appellant’s visitation of his two sons as stated in their divorce agreement. The facts revealed that on the day of the shooting the appellant was supposed to collect his two sons for visitation whereupon he was told that one of the two was still at the cinema.

The appellant admitted firing the shots which killed the deceased but denied that he had fired consciously and deliberately and denied that, at the time of so firing, he was capable of forming the intention to kill or that he had the necessary intention. He contended that the shooting had occurred at a time when he was “experiencing a dissociative episode or state of mind (sane automatism)\textsuperscript{169}. The appellant made a statement in terms of section 115(2) of the Criminal Procedure Act which was amended before his evidence to state that he had acted “in a state of episodic behavioural dyscontrol” (which equated to the legal defence of temporary non-pathological criminal incapacity)\textsuperscript{170}.

\textsuperscript{166} See Snyman (1985) \textit{SALJ supra} note 1 at 244-251.
\textsuperscript{167} See in particular 263 G – 264 H. See also \textit{S v Els} 1993 (1) \textit{SACR} 723 (O) at 735 B where the court clearly differentiated between the defences of automatism and non-pathological criminal incapacity. This decision will be discussed in more detail below. See also generally \textit{S v Kok} 1998 (1) \textit{SACR} 532 (N).
\textsuperscript{168} 2000 (2) \textit{SACR} 493 (N).
\textsuperscript{169} At 495 B-C.
\textsuperscript{170} At 499 E-F.
The facts of this decision will not be elaborated upon as it is more the findings of the court pertaining to expert evidence of psychologists that are of significance to the present discussion.

In this case the defence called a psychologist, Mr Neville Alexander Hodgson. He formed the opinion that, at the time of the shooting, the appellant was probably in a dissociative state. The appellant was consequently unaware of his actions at the critical time and would not have remembered that he had shot the deceased and the complainant. Professor Lourens Schlebusch, a lecturer and clinical psychologist, also testified for the defence.

The state, in rebuttal, called the evidence of Ms Brenda Ann Bosch, a registered clinical psychologist. She formed the view that the appellant, probably on account of the trauma surrounding the shooting incident, suffered from a state of retrograde dissociative amnesia, which entails lacking the ability to recall matters after the event.\textsuperscript{171} According to her assessment, the appellant was aware of his actions at the relevant time but probably did not recollect it subsequently.

The experts were unanimous in their conclusion that the appellant's condition at the relevant time was not attributable to any pathological factors.

In delivering judgment, Naidu AJ noted the following:\textsuperscript{172}

“Our law now accepts that extreme emotional distress can lead to a state of criminal incapacity which means that a person in this state is unable to appreciate the wrongfulness of his actions and to act accordingly.”

Pertaining to the required foundation to be established by the person or accused raising the defence Naidu AJ opined as follows:\textsuperscript{173}

\textsuperscript{171} At 499 h-i.
\textsuperscript{172} At 500 B.
\textsuperscript{173} At 500 I-J-501 A.
“It seems logical therefore that in an endeavour to ‘lay the foundation’ in cases of non-pathological criminal incapacity, some medical evidence of an expert nature will be necessary. The court, however, is the final arbiter regarding the voluntariness or otherwise of the act complained of and a person’s responsibility for his actions. In its deliberations the court will have to take cognizance of not only the medical evidence but also of all the facts of the case, more particularly the nature of the accused’s actions during the relevant period.”

Naidu AJ continued to state that, in his view, although the evidence of the psychologists in cases of this nature might elucidate a useful analysis of the state of mind of the accused person, it should not displace the court’s function which entails assessing, in the light of all the evidence and probabilities, whether a sufficient foundation has been established for a finding that the accused at the relevant time lacked the requisite criminal capacity.

All of the experts in this case agreed that for sane automatism to avail a person, there had to be a “trigger” of extraordinary significance. Naidu AJ held that in this case the identifiable trigger mechanism required for the defence of automatism or episodic behaviour dyscontrol was absent and accordingly held that the evidence revealed conscious behaviour on the part of the appellant. The appeal was therefore dismissed.

The *McDonald* decision also illustrates the difference between the defences of sane automatism and non-pathological criminal incapacity as the plea explanation of the accused was pertinently amended from a defence of sane automatism to one of non-pathological criminal incapacity.

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174 At 501 I-J where the court also refers to the case of *S v Kok* 1998 (1) SACR 532 (N) at 545 I-J where Combrink J held: “... where the defence of sane automatism was raised, it was not the court’s function to find which of two opposing psychiatric opinions was to be preferred. However, psychiatric evidence was not of such vital importance in such a case, because at the end of the day it was for the court to decide on the evidence whether the defence had been made out.”

175 At 502 L.

176 At 507 C-E.
It is true that there are points of similarity between these two defences. These relate to the foundation that has to be established, the fact that the defence is subject to close scrutiny by the courts as well as the need for expert evidence in support of both defences. They are nevertheless separate and distinct defences relating to different requirements for liability.

7 Burden of proof

One of the most fundamental distinctions between the defences of pathological and non-pathological criminal incapacity, lies in the burden of proof for the specific defence.

In the case of non-pathological criminal incapacity, the onus of proof falls on the State to prove beyond reasonable doubt that the accused had criminal capacity at the time of the commission of the crime.\(^{177}\) This is in line with the rule that, for a conviction, the State must prove all the requirements for liability beyond reasonable doubt.

The legal position pertaining to the burden of proof in cases of non-pathological criminal incapacity can be captured as follows:

- Whenever an accused person relies on the defence of temporary non-pathological criminal incapacity, the State bears the onus of proving that the accused had the required criminal capacity at the relevant time.\(^{178}\)
- In discharging the onus, the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily result in criminal liability, does so consciously and voluntarily.\(^{179}\)

\(^{177}\) Snyman (2002) *supra* note 1 at 165; S v Calitz *supra* note 1 at 126H – 127C; S v Wild *supra* note 1 at 564 B-G; S v Francis 1999 (1) SACR 650 (SCA) at 652 C-H.

\(^{178}\) Snyman (2002) *supra* note 1 at 165; S v Eadie *supra* note 1 at 666 a-d; S v Scholtz *supra* note 1 at 445 C-E; S v Rittman 1992 (2) SACR (Nm) 117 D-E; Strauss (1995) *SAPM supra* note 1 at 15; Carstens and Le Roux (2000) *SACJ supra* note 1 at 180; “Hiemstra” (2007) *supra* note 1 at 224; Meintjes Van der Walt (2002) *SACJ* at 244-245; S v Moses 1996 (1) SACR 701 (C).

\(^{179}\) S v Eadie *supra* note 1 at 666 A-D; See S v Cunningham *supra* note 1 at 635 G-J.
• An accused person who raises the defence of non-pathological criminal incapacity, is required to lay a factual foundation for it, sufficient at least to create a reasonable doubt as to whether the accused had criminal capacity.\textsuperscript{180}

• Evidence in support of such defence should be carefully scrutinised. In \textit{S v Gesualdo}\textsuperscript{181}, Borchers J noted:\textsuperscript{182}
  
  “It goes without saying that a defence of this nature must be carefully scrutinised by the court, and that a court would be unlikely to find that such state may have existed only by virtue of the accused’s \textit{ipissima verba}.”

• It is for the court to decide the question of the accused’s criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused’s actions during the relevant period.\textsuperscript{183}

Snyman also notes that it must appear from an accused’s own evidence or that of witnesses called by him, by his or her plea explanation at the beginning of the trial or from questions posed by him or her or his or her legal representative, that the defence relied upon is one of non-pathological criminal incapacity.\textsuperscript{184}

\textsuperscript{180} \textit{S v Trickett} supra note 1 at 537 D-E where it was held that in order to rely on the defence of automatism the following requirements need to be satisfied:

\begin{enumerate}
  \item there must be evidence sufficiently cogent to raise a reasonable doubt as to the voluntary nature of the \textit{actus reus} alleged in the indictment, and,
  \item there must, in addition, be medical or other expert evidence to show that the involuntary or unconscious nature of the \textit{actus reus} was quite possibly due to causes other than mental illness or disorder. This evidence would then rebut the presumption of voluntariness and accordingly the issue will be decided solely on the facts and if there is doubt as to whether the act was voluntary or involuntary, the doubt must redound to the benefit of the accused.
\end{enumerate}

Although this defence was one of automatism, it is submitted that the rules pertaining to the foundation that has to be established, is in principle the same or similar. See also Schmidt 1973 \textit{SALJ} 330, \textit{S v Shivute} 1991 (1) SACR 656 (NM) at 660 C-H.

\textsuperscript{181} \textit{S v Gesualdo} 1997 (2) SACR 68 (WLD).

\textsuperscript{182} At 74 F-H. See also Snyman (2002) \textit{supra} note 1 at 166; \textit{S v Potgieter} \textit{supra} note 1 at 72-73; \textit{S v Di Blasi} \textit{supra} note 1 at 7C.

\textsuperscript{183} \textit{S v Eadie} \textit{supra} note 1 at 666 A-B; \textit{S v Scholtz} \textit{supra} note 1 at 445 C-E.

\textsuperscript{184} Snyman (2002) \textit{supra} note 1 at 160. See also \textit{S v Di Blasi} \textit{supra} note 1 at 7B-C where Vivier AJ states:

“It is for an accused person to lay a factual foundation for his defence that non-pathological causes resulted in diminished criminal responsibility, and the issue is for the court to decide.”

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In cases where the defence of pathological criminal incapacity is raised, the onus rests on the accused to prove on a balance of probabilities that he or she suffered from a mental illness at the time of the commission of the crime.\textsuperscript{185}

The position pertaining to the burden of proof in cases of pathological criminal incapacity thus differs markedly from the onus of proof in cases of non-pathological criminal incapacity. The question that inevitably falls to be answered is whether this distinction is compatible with the Constitution? It is submitted that uniformity is needed in respect of the onus of proof where the defence of criminal incapacity is raised, regardless of the cause of the alleged incapacity.

In 1998, section 78 of the Criminal Procedure Act was amended and section 78 (1B) was inserted, which reads as follows:

“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.”

\textsuperscript{185} Snyman (2008) supra note 1 at 175; Burchell and Milton (2005) supra note 1 at 394-395. This is also in line with section 78 (1A) of the Criminal Procedure Act which states: “Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.” See also S v Cunningham supra note 1 at 635G, where Scott JA stated: “Criminal responsibility presupposes a voluntary act (or omission) on the part of the wrongdoer. Automatism therefor necessarily precludes criminal responsibility. As far as the onus of proof is concerned, a distinction is drawn between automatism attributable to a morbid or pathological disturbance of the mental faculties, whether temporary or permanent, and so-called ‘sane’ automatism which is to some non-pathological cause and which is of a temporary nature. In accordance with the presumption of sanity the onus in the case of the former is upon the accused and is to be discharged on a balance of probabilities. Where it is sought to place reliance on the latter, the onus remains on the State to establish voluntariness of the act beyond reasonable doubt … In discharging the onus upon it the State, however, is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged \textit{actus reus} and, if involuntary, that this was attributable to some cause other than mental pathology. It follows that in most if not all cases, medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned. But ultimately it is for the court to decide the issue of the voluntary nature or otherwise of the alleged act and indeed the accused’s criminal responsibility for his actions. In doing so it will have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused’s actions during the relevant period.”
Following a liberal construction of section 78 (1B), the logical inference to be drawn is that in all cases where the defence is one of criminal incapacity, the onus of proof will fall on the accused.

Burchell and Milton, however, submit that such conclusion is not what the legislature intended.\textsuperscript{186}

According to Burchell and Milton the amended legislation is aimed at regulating matters pertaining to pathological criminal incapacity and not non-pathological criminal incapacity.\textsuperscript{187} Du Toit \textit{et al} also hold the view that section 78 (1B) does not relieve the State of its burden of proof where the accused relies on the defence of non-pathological criminal incapacity.\textsuperscript{188} Schwikkard correctly notes that there are various ways in which the problematic issue pertaining to the burden of proof in cases of pathological as opposed to non-pathological criminal incapacity can be resolved.\textsuperscript{189} The latter can be effected by either eliminating the reverse onus in respect of these two defences or applying it to both.

Milton notes, with reference to the Criminal Matters Amendment Act of 1998, that the reverse onus in respect of the defence of criminal incapacity “involves a form of unconstitutional discrimination in that the onus is reversed only in the case of insanity and not where the defence is one of non-pathological criminal incapacity.”\textsuperscript{190}

The question that arises is whether the reverse onus should not apply to both the defences of pathological and non-pathological criminal incapacity. The earlier discussion of a general defence of criminal incapacity could also apply with reference to the burden of proof. With the establishment of a general defence of criminal incapacity there will also be one set of rules pertaining to the burden of proof.

\textsuperscript{186} Burchell and Milton (2005) \textit{supra} note 1 at 390-391.
\textsuperscript{187} \textit{Ibid}.
\textsuperscript{188} Du Toit \textit{et al} (2007) \textit{supra} note 1 at 13-20.
\textsuperscript{190} Milton, J “Law reform: The Criminal Matters Amendment Act 1998 brings some sanity (but only some) to the defence of Sanity” (1999) \textit{SACJ} 12 at 46. See also Schwikkard (2007) \textit{supra} note 189 at 87.
proof as a distinction will not be made based on the cause of incapacity, but rather focus on the incapacity itself with one particular burden of proof to satisfy.

In *S v Campher* Viljoen AJ noted the following:\(^{191}\)

“... die onus is in die geval van gewone dronkenskap, anders as by ‘insanity’, op die Staat geplaas. ... Net so onrealisties as die onderskeiding tussen tydelike aberrasie vanweë drankinnname en ‘n geestessiekte as gevolg van drank is die onderskede tussen sieklike outomatisme en gesonde outomatisme waarvolgens die uitsprakereg die bewyslas in eersgenoemde geval op die beskuldigde rus en in laasgenoemde geval op die Staat. Dit egter net terloops.”

In *S v Adams* Viljoen JA stated:\(^{192}\)

“Had the Rumpff commission been consistent it would, I suggest with respect, have come to the conclusion that in all cases in which a defence of lack of criminal capacity is raised the onus is on the accused. ..., correctly in my opinion, that in all cases in which criminal responsibility, whether it be by reason of insanity or any other cause such as intoxication, of an accused is an issue, the onus ought to be the same.”

In *S v Kok* Scott JA remarked *obiter* that it is doubtful whether the anomaly pertaining to the distinction between pathological and non-pathological criminal incapacity in respect of the burden of proof, can be upheld in our modern law with the enactment of the new Constitution.\(^{193}\)

It is submitted that the burden of proof in cases of pathological and non-pathological criminal incapacity should be the same.

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\(^{191}\) *S v Campher* supra note 1 at 954H – 955A. See also De Villiers, DS “Evidence Through the Cases” (2007) 3\(^{rd}\) ed at 451.

\(^{192}\) *S van Adams* 1986 (4) SA 822 (A) at 897-902. The latter case dealt with the possession of dangerous weapons.

\(^{193}\) *S v Kok* 2001 (2) SACR 106 (SCA) at 110H – 111A.
Schwikkard states, and it is submitted that this view is correct, that in the light of the fact that the legislature in section 78(2) clearly refers to both pathological and non-pathological criminal incapacity, it would be more appropriate to interpret section 78 (1B) as referring to both pathological and non-pathological criminal incapacity.\textsuperscript{194}

Snyman takes the view that an accused person, in cases where non-pathological criminal incapacity is raised, should also bear the burden of proof.\textsuperscript{195} According to Snyman, the following arguments could be advanced in favour of such burden falling on the accused:

- There is a general presumption that all persons are sane. Accordingly, if a person raises the defence of criminal incapacity, regardless of the cause, he or she should carry the burden of proving such criminal incapacity.
- By placing the burden of proof on the accused, the abuse of this defence will be curbed.
- Of all the people present during the trial, the accused is in the best position to convey his or her mental state at the time of the act.

It remains an undeniable fact that a reverse onus provision will \textit{prima facie} infringe upon section 35(3)(h)\textsuperscript{196} of the Constitution which contains the presumption of innocence. It is, however, submitted that given the fact that this defence of non-pathological criminal incapacity could easily be abused, a reverse onus will ensure that a proper factual basis is established in order to rely on this defence. It is submitted that a reverse onus also applying to the defence of non-pathological criminal incapacity will constitute a reasonable and justifiable limitation in terms of the limitation clause contained in section 36 of the Constitution, in respect of the right to be presumed innocent. The importance of the purpose of the limitation, which is to curb potential abuse of this defence, is extremely important.

\textsuperscript{194} Schwikkard (2007) \textit{supra} note 189 at 88-90.

\textsuperscript{195} Snyman (1989) TRW \textit{supra} note 1 at 1-15. See also Van der Merwe, FW “Nie-patologiese ontoerekeningsvatbaarheid as verweer in die Suid-Afrikaanse Strafreg” (1996) unpublished LLM dissertation (Unisa) at 34.

\textsuperscript{196} Section 35(3)(h) reads as follows: “35. (3) Every accused person has a right to a fair trial, which includes the right - ... (b) to be presumed innocent, to remain silent, and not to testify during the proceedings.”
It should also be borne in mind that if the defence of non-pathological criminal incapacity is successfully raised, it will result in the acquittal of an accused. Whether the alleged criminal incapacity was caused by provocation, emotional stress or whatever factor, the accused will walk out of the courtroom a free person. Accordingly, the purpose of such burden and thus the limitation of this fundamental right in the Constitution is to ensure that this defence is subjected to stringent measures in order to prevent abuse of this defence. An accused will thus have to prove his or her criminal incapacity on a balance of probabilities. In order to discharge this onus, the accused has to lay a proper foundation for his or her defence.

Although expert evidence of a psychiatric or psychological nature is not required in order to establish such foundation, it is doubtful whether this defence will succeed in the absence thereof.197

8 Defence of non-pathological criminal incapacity ought not to succeed easily

Due to fears that this defence can easily be abused, a court will generally approach this defence of non-pathological criminal incapacity with great care and also scrutinize the evidence in support of such a defence with great caution.198

In S v Kensley, Van den Heever JA held the following:199

- The *ipse dixit* of an accused that in a given situation, he was unable to control himself, will not lead to an acquittal.
- Evidence upon which a defence of “sane criminal incapacity due to intense emotion” is founded, will be treated with circumspection.

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197 Snyman (1989) *TRW* supra note 1 at 15.
198 Snyman (2002) *supra* note 1 at 166; Carstens and Le Roux *SACJ* (2000) *supra* note 1 at 101-102; S v Potgieter *supra* note 1 at 72-73; S v Di Blasi *supra* note 1 at 7; S v Henry *supra* note 1 at 20C.
199 S v Kensley 1995 (1) SACR 646 (A) at 658 G-J; S v Gesualdo *supra* note 1 at 74 G-H; S v Eadie *supra* note 1 at 666 A-D; S v Scholtz 2006 (1) SACR 442 (EPD) at 445 B-I; *LAWSA supra* note 12 at 71.
Snyman submits that it is unlikely for an accused to succeed with the defence of non-pathological criminal incapacity if he or she was emotionally disturbed for only a brief period before and during the act.\textsuperscript{200} Snyman notes that in many of the cases where this defence succeeded, the accused’s conduct was preceded by a prolonged period of severe emotional stress.\textsuperscript{201}

It is thus clear that the courts approach this defence with caution and circumspection.

9 Expert evidence

The central cornerstone and foundation of this chapter and the present study, is the role of expert evidence in support of the defence of criminal incapacity. It is therefore necessary to take a closer look at the current role and place of expert evidence in support of the defence of non-pathological criminal incapacity.

9.1 Traditional approach in respect of expert evidence

The traditional approach in respect of expert evidence in support of the defence of non-pathological criminal incapacity, is that it does not fulfil an indispensable function and that the defence can succeed in the absence of such evidence.\textsuperscript{202} It is, however, doubtful whether this defence will ever be successfully established in the absence of expert evidence.

Snyman correctly submits that it is very important for an accused who relies on the defence of non-pathological criminal incapacity to adduce expert evidence in order to corroborate his or her alleged incapacity at the time of the commission of the act as it is difficult for a court to determine an accused’s mental abilities at the time of

\textsuperscript{200} Snyman (2002) \textit{supra} note 1 at 166.

\textsuperscript{201} \textit{Ibid}.

\textsuperscript{202} Snyman (2002) \textit{supra} note 1 at 166; Snyman (1989) TRW \textit{supra} note 1 at 14-15; Van Oosten (1993) \textit{SACJ} \textit{supra} note 1 at 141; Du Toit et al (2007) \textit{supra} note 1 at 13-17. See also \textit{S v Volkman} 2005 (2) SACR 402 (CPD).
the commission of the act in the absence of such evidence. Expert evidence in this regard will form part of the foundation that an accused has to establish in support of such defence.

According to the traditional approach, the court is in a position to decide on its own, taking into account the medical evidence and all the facts of the case, the issue of the accused’s alleged criminal incapacity.

According to the traditional approach expert evidence is thus not a prerequisite for a successful reliance on this defence.

In *R v Harris* it was held:

“... it must be borne in mind that ...in the ultimate analysis, the crucial issue of appellant’s criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the court itself. In determining that issue the court – initially the trial court, and, on appeal, this court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.”

In a few decisions it was held that expert evidence does not fulfil an indispensable function and is not essential in support of the defence of non-pathological criminal incapacity. The decisions in *Laubscher, Calitz* and *Lesch* all illustrate this traditional approach to expert evidence and will briefly be discussed. In *S v Laubscher* the appellant was a 23-year old medical student. He was highly intelligent and emotionally very sensitive. He embarked on a relationship with one C, who later became pregnant whereafter they married. The appellant’s parents-

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203 Snyman (2002) *supra* note 1 at 166.
205 *R v Harris* 1965 (2) SA 340 (A).
206 At 365 B-C.
207 See *S v Calitz* supra note 1; *S v Lesch* supra note 1. These decisions will be extensively assessed below.
208 1988 (1) SA 163 (AD).
in-law did not accept him and were cold and aloof towards him. On the day the fatal shooting occurred the appellant had arranged to collect C and their child. When he went to fetch C, however, she told him that she no longer wished to go with him and he was told to leave the house. He left the house but later returned demanding that he be given the child. He fired into various rooms of the house with his pistol and killed C’s father.

At his trial for murder and attempted murder, it was contended on behalf of the appellant that he had suffered a total psychological breakdown or disintegration of his personality of a temporary nature and that he acted involuntarily. The court, per Joubert JA, held that although the appellant’s actions had been irrational, he had acted voluntarily in that he had the powers of discernment and restraint so that he had not been criminally unaccountable, but rather suffered diminished responsibility. With regard to diminished responsibility the court noted:

“Want dit is ook moontlik om nie-patologiese verminderde toerekeningsvatbaarheid te kry wat weens nie-patologiese toestand die dader se onderskeidingsvermoë of weerstandkrag ten tye van die pleeg van die misdaad verminder het.”

With reference to the expert evidence the following can be noted:

The expert witnesses who testified were Dr Zabow who testified on behalf of the State and Dr Zabow and Prof Weyers for the defence. The one expert, Dr Zabow, was of the opinion that the accused did not lack capacity but had diminished capacity. Prof Weyers could not state with certainty that a total disintegration of personality did in fact occur. Dr Marais testified that the accused lacked criminal capacity.

The court per Joubert JA noted the following with respect to expert evidence:

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209 At 168 B-C.
210 At 171J-172F.
“Dit moet in gedagte gehou word dat psigiatriese getuienis oor ‘n beskuldigde se ongesteldheid of geestesgebrek in die vorm van ‘n patologiese versteuring ten tyde van die pleeg van die misdaad waar dit handel oor sy statutêre ontoerekeningsvatbaarheid ‘n onmisbare funksie vervul om ‘n hof behulpsaam te wees met sy beslissing waar ‘n paneel psigiaters ‘n ondersoek ingevolge art 79(4)(d) uitgebring het. Artikel 78(3) magtig die hof waar sodanige bevinding eenparig is en nie bestry word nie om die aangeleentheid aan die hand van ‘n verslag sonder die aanhoor van verdere getuienis te beslis. In so ‘n geval laat die hof hom lei deur die eenparige bevinding van die paneel psigiaters..... Aangesien dit hier oor ‘n nie-patologiese toestand van die appellant ten tyde van die pleeg van die beweerde misdade handel het die psigiatriese getuienis nie so ‘n onmisbare funksie vervul nie omdat die verhoorhof aan die hand van die aanvaarde feite self in staat was om die omskrywing van die begrip ‘totale persoonlikheidsdisintegrasie’ daarop toe te pas en dan tot ‘n bevinding te raak of die appellant nie-patologies ontoerekeningsvatbaar of slegs nie-patologies verminderd toerekeningsvatbaar was.”

The court in this case was thus reluctant to place too much reliance on the role of expert evidence.

In *S v Calitz*211 the appellant was a sergeant of the South-West Africa Police Service. The facts were briefly that the appellant paid a visit to the “kraal” of the deceased to ascertain whether there were any terrorists in the nearby vicinity. The appellant had during the course of arriving at the “kraal”, drove over three poles that had a ritual symbolism for the deceased. An argument arose between the appellant and the deceased whereafter the appellant assaulted the deceased, resulting in the deceased’s death. The appellant relied on the defence of non-pathological criminal incapacity. It was contended on behalf of the appellant that he suffered from temporary mental incapacity as a result of being in a state of raging anger at the time of the commission of the assault.

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211 *S v Calitz* 1990 (1) SACR 119 (A).
In support of his defence of criminal incapacity, counsel for the appellant relied on the expert opinion and testimony of two expert psychiatrists, Dr AH Potgieter as well as Dr AJ Plomp. Both experts were of the opinion that appellant suffered from temporary mental incapacity. Dr Potgieter described the mental state of the appellant as “tydelike bewussynsvernouing of beneweling” with a total loss of self-control\textsuperscript{212}. Dr Potgieter also confirmed that in the event of the appellant being able to provide a detailed recollection of the events, his opinion would fall away. Dr Plomp described the memories as “afleidings”\textsuperscript{213}. Dr Plomp described temporary mental incapacity as “n toestand waarin oorweldigende emosie so prominent is dat dit die rasionele denke, oordeel en geheue heeltemal oorskadu”\textsuperscript{214}. Some of the appellant’s versions of the events are described by Dr Plomp as “growwe detail”\textsuperscript{215}.

The appellant was in fact able to recall quite a lot of detail relating to the assault which was not consistent with the defence of temporary mental incapacity\textsuperscript{216}.

Dr J Fourie testified for the State. His opinion was that the appellant was able to distinguish between right and wrong and was able to act in accordance with such appreciation\textsuperscript{217}. Dr Fourie conducted a consultation with the appellant and stated that the appellant’s acts were voluntary and goal directed acts. He also stated that usually, when someone gets angry and acts with rage, he will not be able to recall or remember all the details of his actions.

The court per Eksteen JA stated:\textsuperscript{218}

"Waar die hof met twee botsende psigiatriese menings te make het, kan dit kwalik verwag word om die een bo die ander te verkies. Op stuk van sake is die hof ‘n leek op die gebied van psigiatrie, en kan hom dus nie gesaghebbend uitspreek oor botsende psigiatriese teorieë nie."

\textsuperscript{212} At 125 B-C.
\textsuperscript{213} At 125 D-E.
\textsuperscript{214} At 125 C-D.
\textsuperscript{215} At 125 F-H.
\textsuperscript{216} The role of amnesia in the defence of non-pathological criminal incapacity will be discussed extensively in paragraph 16 below.
\textsuperscript{217} At 125 I-J.
\textsuperscript{218} At 126 I-J.
The court also referred to the *dictum* in the *Harris* case and with reference to the *Laubscher* case held that expert evidence did not play an indispensable function in this case\(^{219}\). The court rejected the evidence of Dr Potgieter and Dr Plomp with regard to describing the appellant’s recollection of the events as “afleidings”. The court held that someone suffering from temporary mental incapacity will not be able to give such a detailed description of the events\(^{220}\). Accordingly, the defence of non-pathological criminal incapacity was rejected.

In *S v Lesch*\(^{221}\) the accused’s defence was based upon a lack of capacity to act in accordance with the appreciation of the unlawfulness of his conduct. From the facts it appeared that the accused had been telephoned at work by his daughter, who told him that their neighbour, who had in the past adopted a threatening and aggressive attitude, had uttered certain threats directed at both her and the accused. The accused went home shortly thereafter, where he discussed the matter briefly with his daughter. He then proceeded to fetch a revolver, which he concealed in his pocket. He then, despite his daughter’s admonitions, left the house with the revolver in order to confront his neighbour. The confrontation took place in his neighbour’s garden. The evidence was that his neighbour addressed certain remarks at the accused, whereupon the accused repeatedly shot and killed his neighbour. Thereafter the accused, *inter alia*, approached an acquaintance (one J) with the request that, since he was not in a fit state to drive, he should take him to the police. According to J the accused was in a state of shock. According to the police, to whom the accused made a statement, he was, however, calm and tranquil.\(^{222}\) In his statement to the police he did not refer to any loss of self-control. It was common cause that the accused did not suffer from any mental disease or defect at the time of the commission of the offence. The crux of his defence was that the conduct attributed to him could not be imputed to him as he, as a consequence of a rage reaction, did not have the capacity to act in accordance with his admitted awareness of the unlawfulness of his conduct.\(^{223}\) The psychiatric

\(^{219}\) At 126 D-127B.
\(^{220}\) At 127 G.
\(^{221}\) 1983 (1) SA 814 (O).
\(^{223}\) At 816 C-D.
evidence by Dr Wolf was to the effect that the accused’s emotions had, at the time of the commission of the offence, attained an “orgasmic climax”, so that there was no self-control, although he realised what he was doing and what the consequences of his act would be\textsuperscript{224}.

Dr Wolf, a psychiatrist in private practice, was called to testify on behalf of the accused. He based his expert opinion upon statements obtained from witnesses, a summary of the facts supplied by the State, the post-mortem report and facts pertaining to the accused’s background. According to the case report Dr Wolf was not present when the accused testified\textsuperscript{225}.

Dr Wolf conducted various consultations with the accused. During these interviews the accused was serious, he gave a clear version of the events and his memory and concentration were not impaired. Dr Wolf, however, came to the conclusion that the accused was unable to control himself\textsuperscript{226}.

The accused’s behaviour is described in the report as follows:

“Toe hy die oorledene fisies sien, het dit alles daartoe bygedra dat hy, om die getuie se woorde te gebruik, ‘n orgastiese hoogtepunt bereik het, sodat daar geen selfbeheer meer was nie, alhoewel beskuldigde se geestesvermoëns sodanig was dat hy besef het wat hy gedoen het en wat die gevolge van sy handelinge was. Volgens hierdie getuie was die beskuldigde in dieselfde posisie as ‘n persoon wat in ‘n motor sonder remme op ‘n afdraend aan die loop gaan.”\textsuperscript{227}

Dr Wolf testified that the accused’s lack of self-control was as a result of his emotions at the relevant time. He also testified that a person’s cognitive, conative and affective functions formed an integrated part of a person’s personality\textsuperscript{228}. During cross-examination Dr Wolf concurred with the view that his opinion is

\textsuperscript{224} At 822 A-B.  
\textsuperscript{225} At 821 F.  
\textsuperscript{226} At 821 H.  
\textsuperscript{227} At 822 A-B.  
\textsuperscript{228} At 822 C-D.
based on the presupposition that the accused’s version of the events is truthful. When asked whether the accused had the capacity to act in accordance with the appreciation of the wrongfulness of his act, Dr Wolf answered in the affirmative. The very same question was later again put to Dr Wolf, but only in different terminology. Dr Wolf was asked whether the accused could control himself upon which he answered in the negative.

The crux of Dr Wolf’s testimony was to the effect that the accused lacked self-control as a result of an emotional storm.

It was also held by the Court that the evidence pertaining to the events giving rise to the emotional storm, the accused’s behaviour before, during and after the act as well as evidence pertaining to the accused’s memory of the events during the commission of the crime were all pivotal in determining whether the accused did experience an emotional storm at the relevant time. The accused, however, never testified that he lacked self-control.

As to the argument that the accused lacked self-control, the court per Hatting AJ held, taking into consideration the facts of the case, that the accused did beyond reasonable doubt, have the capacity to realise that his actions were wrongful and he had the capacity to act in accordance with his appreciation. The court also held that provocation did not exclude intention to murder, but rather contributed to the formation of this intention. The accused was accordingly convicted of murder.

In both the Laubscher and Calitz decisions it was held that expert evidence does not play a vital role in support of the defence of non-pathological criminal

229 At 822 F-G.
230 At 823 A-B. The court also affirms that the State bears the onus of proving the accused’s guilt beyond reasonable doubt and also that criminal capacity is a prerequisite to incur criminal liability.
231 At 824 B-C.
232 At 824 D-E. See also R v Kennedy 1951 (4) SA 431 (A) at 434 H as well as 435 A where the court stated per Hatting AJ: “It appears from the evidence and is in fact generally accepted that there is at present no known method by which a medical expert, by examination of a person who has been found to be of psychopathic personality, can ascertain whether at the critical period he was suffering from such an emotional storm. This can only be decided of the events which are said to have led up including his own evidence as to his recollection of what happened in the commission of the act and thereafter.”
233 At 825 C-E.
incapacity. The latter approach accords with the traditional view in respect of expert evidence where this defence is raised. It is submitted that the traditional approach is outdated and inconsistent with section 35(3)(1) of the Constitution which guarantees an accused person the right to a fair trial which includes the right to adduce and challenge evidence.

The decision in Lesch clearly illustrates the basic principle that the expert merely serves to assist the court in its finding. One cannot help but note that Dr Wolf’s testimony in this case did not carry as much weight as the surrounding circumstances of the case. In this case the evidence of the expert merely assisted the court, but the facts of the case were, however, such that the court could make a decision on its own. It is, however, still important to put the expert in the witness box as the expert’s opinion is necessary and pivotal in order to ascertain the accused’s state of mind at the time of the commission of the crime.

It is also submitted that arguments in favour of expert evidence in cases of this nature are not directed towards a possible acquittal for an accused but merely serves as a tool by which courts can properly determine the facts before them. The issues in cases where non-pathological criminal incapacity is raised as a defence are often very complex and thus beyond the understanding of the court. In order for justice to prevail it is necessary to obtain expert psychiatric evidence.

9.2 Essential need for expert evidence in support of the defence of non-pathological criminal incapacity

It is submitted that there is an essential and fundamental need for expert evidence when the defence of non-pathological criminal incapacity is raised. In the light of the fact that this defence is approached by the courts with great caution and scrutiny, the presentation of expert evidence in support of this defence becomes crucial.\(^{234}\)

Strauss submits that the defence of non-pathological criminal incapacity presents a challenge to psychiatrists and mental health professionals.\textsuperscript{235}

Strauss correctly states the following:\textsuperscript{236}

“Daar moet in gedagte gehou word dat ons in dié gevalle juist nie ‘n handboek-diagnose van geestespatologie het waarby die geskiedenis van die beskuldigde of die identifisering van bepaalde syndrome aanduidend kan wees van bepaalde bevindinge oor sy vermoëns nie.”

It is accordingly necessary to illustrate the pivotal need for expert evidence in support of the defence of non-pathological criminal incapacity as enunciated in case law.

In \textit{S v Campher}\textsuperscript{237} the facts were briefly as follows. The appellant was charged with and convicted of the murder of her husband. She appealed against the conviction. The facts disclosed that the deceased and the appellant had a very unhappy marriage. The deceased had a very violent personality and became angry very easily. The deceased had on various occasions assaulted the appellant and also caused her severe emotional stress. On the day the shooting occurred, the appellant and the deceased had various arguments. The deceased thereafter went out to see to his doves which he kept in a cage outside the house. While outside the deceased called the appellant to join him outside in order to render assistance in the cage. She abided by this command. He then demanded that she hold a lock while he drills a hole with his electric drill. In order to drill the hole properly, she had to lie in a very awkward and difficult position in order to avoid the lock from shifting. As a result of this the hole turned out to be skew. The deceased then screamed at the appellant and threatened her. She then ran to the house with him following. She removed the firearm which she kept in her bedside table drawer. He forced her back to the cage and ordered her to pray for it to become straight. She then shot him. In the court \textit{a quo} three defences were

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{235} Strauss (1995) SAPM \textit{supra} note 1 at 15.
\item \textsuperscript{236} Ibid.
\item \textsuperscript{237} \textit{S v Campher} 1987 (1) SA 940 (A). See also Snyman (1989) TRW \textit{supra} note 1 at 8-9; Rumpff (1990) \textit{Consultus supra} note 1 at 19-22.
\end{enumerate}
\end{footnotesize}
raised, namely that the appellant acted as a result of provocation, the second related to the fact that she lost self-control and the third was that she acted in self-defence. The second and third defences were rejected by the trial court.

On appeal Viljoen AJ held that the appellant’s behaviour was not indicative of provocation, but rather that the behaviour of the deceased towards the appellant and the children as well as the physical strain she had to endure all caused a total breakdown in the appellant. Her behaviour was indicative of desperation and helplessness. The defence of non-pathological criminal incapacity was, however, never explicitly raised in this case and no expert medical evidence in this regard was presented in support of such defence.

Viljoen AJ also held that the criteria set forth in section 78(1) of the Criminal Procedure Act can also apply to cases where the incapacity was the result of causes other than mental illness or mental defect.238

In the court a quo the appellant was convicted of murder and the court accordingly held that the State had proved beyond reasonable doubt that the appellant had the necessary intention to kill the deceased and that her subjective state of mind, although subjected to severe provocation, was to kill the deceased.

On appeal Viljoen AJ held that the question was not whether the appellant had the necessary intention to kill the deceased, but rather whether she had the capacity to appreciate the wrongfulness of her conduct, and if so, whether she also had the capacity to act in accordance with such appreciation.239 Viljoen AJ also noted the absence of psychiatric evidence in this case.240

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238 At 954 F-G where it is stated by Viljoen AJ: “Dat die gelding van art 78 van Wet 51 van 1977 so ingekort is, beteken egter nie dat die kriteria wat in ons reg ontwikkel het en nou in die artikel vasgelê is, nie op tydelike aantasting van die geestesvermoëns toegepas kan word nie.”

239 At 955 I-J.

240 At 956 B-C where it is stated by Viljoen AJ: “In hierdie saak is daar soos ek alreeds opgemerk het, geen deskundige psigiatriese getuenis geleë nie ... As leek op hierdie gebied meen ek egter dat die feit dat die appellante na die tyd besef het dat sy die oorledene geskiet het, die Hof nie verhinder om tot die bevinding te gemaak dat die appellante se emosies so breekpunt bereik het en haar so oorweldig het dat sy nie op die kritieke oomblik kon weerstand bied nie.” This statement is clearly indicative of the need for expert evidence in this case.
Viljoen AJ held that the State had not proved beyond reasonable doubt that the appellant had the necessary criminal capacity and that the conviction should be set aside. This was held despite the absence of psychiatric evidence.\(^\text{241}\)

Jacobs AJ on the other hand, held that the appellant was correctly convicted and accordingly dismissed the appeal as far as the conviction was concerned. The appeal succeeded with regard to sentence.

Jacobs AJ also held that the defence of criminal incapacity, specifically pertaining to the second leg of the test, whether the appellant had the capacity to act in accordance with the appreciation of the wrongfulness of the act, will only be suggested if such incapacity was as a result of a mental illness or mental defect.\(^\text{242}\)

With regard to expert evidence Jacobs AJ held:\(^\text{243}\)

“Die feit dat mnr Van Oosten wat namens die appellante by die verhoor verskyn het geen psigiatriese getuienis aangebied het nie en self blykbaar nie appellante se getuienis vertolk het as sou dit daarop neerkom dat sy weens ‘n onweerstaanbare drang (‘irresistible impulse’) verhinder was om haar optrede te beheer nie, maak dit vir hierdie Hof uitsiglik, en wat myself betref onmoontlik, om ‘n afleiding te maak dat die appellante weens enige skielik opvlammende impulsiewe drang wat onweerstaanbaar was nie in staat was om haar handelinge in te rig of te kontroleer ooreenkomstig haar insigte nie.”

\(^{241}\) See also Snyman (1989) \textit{TRW supra} note 1 at 8.

\(^{242}\) This defence was previously referred to as the “irresistible impulse” defence. Jacobs AJ at 960 states: “Ek is in elk geval van mening dat die sogenaamde onweerstaanbare drang maatstaf wat in ons reg voor 1977 erken en toegepas is, heettemal deur artikel 78(1)(b) van die Strafproseswet 51 van 1977 vervang is en dat, net soos voor die inwerkingtreding van die voormelde artikel van die Wet, ‘n persoon wat oor die vermoë beskik om die ongeooorloofdheid van sy handeling te besef maar nie oor die vermoë beskik om ooreenkomstig ‘n besef van die ongeooorloofdheid van sy handeling te ontwikkel nie, slegs dan strafregtelik onoorloofbaar is vir so ‘n handeling nie indien sy onvermoë om sy handeling ooreenkomstig sy besef in te rig die gevolg is van geestesongesteldheid of gebrek.” See also Burchell and Hunt (1997) \textit{supra} note 1 at 206.

\(^{243}\) At 960 D-E.
Boshoff AJ agreed with Jacobs AJ and held that the appellant was correctly convicted and also dismissed the appeal with regard to the conviction. Boshoff AJ was, however, of the opinion that the defence of criminal incapacity is not limited to cases where the accused suffered from a mental illness or mental defect.244

Boshoff AJ also held245 that when the cause of the criminal incapacity is attributable to a mental disturbance not caused by a mental illness, the subsequent finding by the court should be in favour of the accused if reasonable doubt exists regarding the existence or not of criminal capacity.

With regards to expert evidence Boshoff AJ held:246

“Daar is ook geen psigiatriese of klinies-sielkundige getuienis wat enigsins kan aantoone dat die appellante wel ’n geestesversteuring gehad het wat die gevolg kon gehad het om die ongeoorloofdheid van haar handeling te besef nie of om ooreenkomstig ’n besef van die ongeoorloofdheid van haar handeling op te tree nie. ……. maar volgens my beskeie mening is ’n Hof nie sonder die hulp van psigiatriese of klinies-sielkundige getuienis in die vermoë om te kan oordeel of sy op enige stadium aan ’n geestesversteuring gely het wat die vereiste gevolge vir ontoerekeningsvatbaarheid gehad het nie.”

This decision is a clear example of the need for expert psychiatric evidence in cases where non-pathological criminal incapacity is raised. In the first instance, the appellant’s defence which was nothing other than a lack of criminal capacity as a result of lack of self-control due to severe emotional and physical abuse was never properly canvassed. Secondly, no expert evidence pertaining to the appellant’s conduct at the time of the shooting or as an explanation for her behaviour was ever put before the court. Upon close scrutiny of the facts of the

244 At 955 H “Die afwesigheid van toerekeningsvatbaarheid is nie beperk tot gevalle waar die dader aan ’n geesteskrankheid ly nie. Dit is ook denkbaar en bestaanbaar by gevalle van tydelik verstandelike beneweling.”
245 At 966 H-I.
246 At 966 J- 967 A-C.
decision certain portions of evidence by the appellant indicates a need for a proper psychiatric evaluation.247

This case serves as an example of the consequences that follow if proper expert psychiatric or psychological evidence is absent. All three of the judges on appeal recognized the intense need for expert psychiatric evidence to be placed before the court. This will enable the court to draw informed inferences from all of the objective facts of the case in order to render an objective, informed decision. Psychiatric testimony would have put the court in a better position as to the appellant’s behaviour. The absence of expert evidence in this case was thus a substantial flaw. It is not to say, however, that the eventual verdict of the court would have been different, but with a proper defence of non-pathological criminal incapacity together with a solid foundation established by expert psychiatric evidence, the court would have been in a better position to determine the factual issues before it.

Rumpff248 in his commentary on the Campher-decision also emphasises the need for psychiatric evidence:

“Die reg het respek vir die psigiatriese wetenskap en ‘n hof sal die bevindings van daardie wetenskap aanvaar indien bevind word dat die feite van die saak wel ‘n psigiatriese opinie regverdig. Daar is dus gevalle waar die psigiatriese opinie aanvaar sal word en gevalle waar die opinie nie aanvaar sal word nie. Dit doen geen afbreuk aan die feit nie dat ‘n hof wat moet besluit of ‘n beskuldigde se geestestoestand hom ontoerekeningsvatbaar maak altyd in ‘n moordsaak psigiatriese getuienis sal wil aanhoor.”

247 At 946 C where the statement of the appellant is quoted: “Maar hier binnekant my was besig ‘n storm om los te kom. Ek kan net nie meer nie, want ek het gevoel dat hy besig was om my af te takel. Ek was vir hom ‘n vloerlap. Hy het op my getrap net omdat hy lus kry ... Ek kan dit nie verwerk het nie. Ek kon dit glad nie verwerk het nie.” And further at 947 C-D: “Ek het op my knieë gestaan. Ek het gehuil en al wat ek weet, dit was ‘n krisistyd in my lewe. Een van die dinge ..., ek was emosioneel af. Ek het gevoel hoe gaan ek af en af. Dis of ek in ‘n sluik ingaan in ‘n diep, donker put. Ek het gevoel of ek kan flou word, en ek as kind van God het gefeit daar ... En vir my was hy soos ‘n monster voor my, en al wat ek weet, is nadat ek uit die hok uit is, het ek besef ek het hom geskiet.” These words could also possibly be indicative of depression within the accused at the time of the act. With proper expert evidence, this could have been established.

In the Campher-decision the majority of the Appellate division (Viljoen AJ and Boshoff AA) had, in respect of expert evidence, thus confirmed the principle that proof that an accused suffered from a mental illness or defect is not a prerequisite for the successful reliance on the defence of absence of criminal capacity.

In S v Wiid the appellant was charged with murder of her husband and accordingly convicted. In her plea explanation at the outset of the trial, her defence was canvassed as follows:

“2. Op 3 Desember 1987 het my verhouding met die oorledene ‘n breekpunt bereik en was ek in ‘n hoogs gespanne toestand.
4. Oorledene het ook gedreig om my te vermoor.
5. Alhoewel ek erken dat ek my man doodgeskiet het, kan ek dit nie onthou nie.
6. Toe ek oorledene geskiet het, het ek as gevolg van verskeie faktore waarskynlik onbewustelik opgetree en nie besef dat my handeling wederregtelik is nie.
7. Ek was ook nie in staat om enige beheer oor my gemelde handeling uit te oefen nie. Derhalwe was my handeling nie strafregtelik toerekenbaar nie.
8. My ontoerekeningsvatbaarheid was tydelik van aard en is nie aan enige permanente of tydelike geestesongesteldheid of gebreke (soos in artikel 78 van die Strafproseswet bedoel) toe te skryf nie.”

The appellant thus relied on the defence of non-pathological criminal incapacity. The judgment contains important ratio decidendi pertaining to the defence of non-pathological criminal incapacity.
The facts disclosed that the appellant and the deceased were married for 32 years and had a daughter and a son. The appellant loved the deceased. The deceased had, during the course of their marriage, various extra-marital relations. This caused the appellant severe emotional stress. The deceased also abused the appellant frequently. The deceased had a violent personality.

On the day of the shooting, the appellant suspected that the deceased was visiting one Ms Bets Bekker, with whom he had an affair, but convinced the appellant three days before that he had ended it. The appellant phoned her friend, Ms Harmse, with a request to pay her a visit. When the deceased returned later the evening an altercation broke out between him and the appellant. The deceased wanted to record their altercation on tape but the deceased assaulted the appellant as a result of which the tape recorder fell on the floor. The appellant sustained a broken nose and front tooth. Her ear was also swollen and blue. Her glasses were also broken during the assault and her mouth and nose bled extensively. The deceased then went to the bedroom. The appellant then shot the deceased. When questioned by the police, the appellant had a very vague recollection of the events. In the trial court the two expert witnesses testified on behalf of the appellant.

Mr Gillmer, a psychologist, testified that the appellant absolutely adored the deceased. He stated the following:255

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254 At 564 A-G. At C-D the court quotes S v Mahlinza 1967 (1) SA 408 (A): “Indien die vraag ontstaan of die ontoerekeningsvatbaarheid van ‘n beskuldigde die gevolg is van geesteskrankheid of van ‘n geestesversteuring wat nie deur geesteskrankheid veroorsaak is nie, en indien daar ‘n grondslag gelê word in die getuienis vir ‘n beroep op ontoerekeningsvatbaarheid nie deur geesteskrankheid veroorsaak nie, moet uitsluitel gegee word ten gunste van die beskuldigde indien daar ‘n redelike twyfel oor die oorsaak van sy ontoerekeningsvatbaarheid bestaan.” And at E-F: “Hoewel by gesonde outomatisme die bewyslas op die staat rus, moet die beskuldigde eers die fondament vir die verweer lê. Daar moet getuienis van die kant van die beskuldigde wees wat sterk genoeg is om twyfel te laat ontstaan oor die vrywilligheid van die beweerde daad of versuim. Dit moet gerugsteun word deur geneeskundige of ander deskundige getuienis wat aanton dat die onwillekeurige gedraging heel moontlik te wyte was aan oorsake anders as geestesongesteldheid of geestesgebrek. As aan die einde van die verhoor daar twyfel bestaan of die gedraging wilkeurig was of nie, moet die beskuldigde die voordeel van die twyfel geniet.”

255 At 567 D-E.
“Subject to the neuropsychological findings, it would certainly seem feasible that this personality, in the circumstances described by the accused, could have had an impairment of psychological functioning such as to render her temporarily unable to bring proper judgment to bear upon the situation in which she found herself at the time of the shooting.”

A second psychologist, Dr R P Plunkett, also testified on behalf of the appellant. In this testimony he referred to the following factors:\textsuperscript{256}

“1) The intake of sedatives and alcohol as well as the fact that the appellant didn’t eat.
2) The severe assault on the appellant by the deceased, especially the blows to the head.
3) The threats by the deceased that he would kill the appellant.”

According to Dr Plunkett, the combination of these factors, as well as the general state of anxiety which the appellant experienced, resulted in the appellant being in “a state of ... complete lack of responsibility at that time”. He also expressed the opinion that the appellant was not able to distinguish between right and wrong.

The trial court, not having much regard of the expert evidence, held that the appellant killed the deceased intentionally. The trial court rejected the evidence by the appellant as to her version of the events.\textsuperscript{257} The trial court held that the appellant had the capacity to appreciate the wrongfulness of her conduct and that she had the capacity to act in accordance with such appreciation.

On appeal, Goldstone JA took a different approach. In his judgment, Goldstone JA took into account the evidence of Mr Gillmer and Dr Plunkett and found that there was a reasonable possibility that the appellant was not acting consciously when she shot the deceased. It was found that there was reasonable doubt as to whether she shot the deceased intentionally in a goal directed manner. According to the court such behaviour was in dire contrast to the personality and character of

\textsuperscript{256} At 567 F-G.
\textsuperscript{257} See 568 A-J and 569 A.
the appellant. The fact that she fired seven shots was indicative of uncontrolled
behaviour. The court held that there was reasonable doubt as to the appellant’s
criminal capacity at the relevant time and that she should be afforded the benefit of
the doubt. The appellant was accordingly acquitted.

It is striking from this judgment that the approach followed with regard to expert
evidence in the trial court stands in dire contrast to the view of the Appellate
division in this respect. This decision is important as it illustrates the need for
expert evidence and that such evidence fulfils an indispensable function when
ascertaining an accused’s behaviour at the time the alleged crime was committed.

This decision also illuminates the prejudicial effect if expert evidence is not
properly assessed and evaluated.

10 Referral in terms of section 78(2) and 79 of the Criminal Procedure Act
where the defence of non-pathological criminal incapacity is raised

Before 2002, the Criminal Procedure Act did not provide for a referral in terms of
section 79 if the defence of non-pathological criminal incapacity was raised.258

The Criminal Matters Amendment Act259, however, changed matters in respect of
the defence of non-pathological criminal incapacity.

Section 78(2) was amended and currently reads as follows:

“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

258 See S v Volkman 2005 (2) SACR 402 (CPD) at 405l – 406G.
259 Section 78(2) was introduced by section 5(C) of the Criminal Matters Amendment Act 68 of
1998 which came into operation on 28 February 2002.
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."

Certain phrases of the abovementioned section require closer scrutiny:

- "... any other reason ..." – this is a clear reference to non-pathological causes of criminal incapacity – these could include provocation, emotional stress, shock, intoxication etcetera. It is submitted that this phrase should be interpreted in its wide sense.
- "... shall ..." – there is a clear obligation on a court to refer an accused for observation if the defence of pathological criminal incapacity is raised.
- "... may ..." – this word has the effect of affording a discretion to a court when the defence of non-pathological criminal incapacity is raised, to decide whether or not to refer an accused for observation. The question could be asked as to whether this word has any function. Should a referral not be compulsory in both cases of pathological and non-pathological criminal incapacity? The term “shall” should then be used to refer to criminal incapacity due to a mental illness or mental defect and criminal incapacity as a result of “any other reason.”

If an accused is referred for observation, such referral will be conducted and reported on in accordance with section 79 of the Criminal Procedure Act. It should be noted that such referral could be effected at the request of the accused, the State as well as the court.

Section 79 reads as follows:

"79  Panel for purposes of enquiry and report under sections 77 and 78
(1) Where a court issues a direction under section 77 (1) or 78 (2), the relevant enquiry shall be conducted and be reported on –
(a) where the accused is charged with an offence other than one referred to in paragraph (b), by the medical superintendent of a

See S v Volkman supra note 258 at 405 F-G.
psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; or

(b) where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 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 –

(i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court;

(ii) by a psychiatrist appointed by the court and who is not in the full-time service of the State;

(iii) by a psychiatrist appointed for the accused by the court; and

(iv) by a clinical psychologist where the court so directs.

(2) (a) The court may for the purposes of the relevant enquiry commit the accused to a psychiatric hospital or to any other place designated by the court, for such periods, not exceeding thirty days at a time, as the court may from time to time determine, and where an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.

(3) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or, as the case may be, the clerk of the court in question, who shall make a copy thereof available to the prosecutor and the accused.

(4) The report shall –

(a) include a description of the nature of the enquiry; and

(b) include a diagnosis of the mental condition of the accused; and
(c) if the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or

(d) if the enquiry is in terms of section 78(2), include 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.²⁶¹

In S v Volkman²⁶² the court had to interpret and apply section 78(2). The facts of the case were as follows. The accused, Ernest Heinrich Volkman, was charged with murder. He subsequently indicated that he intended raising the defence of non-pathological criminal incapacity as a defence. The State then applied for the accused to be observed for reasons other than pathological causes. The defence did not object to this request but requested the court that the observation takes place at daytime.

The court, per Hockey AJ, ordered the referral of the accused to Valkenberg Psychiatric Hospital for the purposes of conducting an enquiry and for a report to be prepared in accordance with section 79. Such report had to specifically include a finding as to whether the capacity of the accused to appreciate the wrongfulness of the act for which he was charged, or to act in accordance with an appreciation of the wrongfulness of the act, was, at the time of the commission thereof, affected by a non-pathological condition or by any other cause. The accused’s bail conditions were also amended to make provision for the accused to report to the Medical Superintendent every Monday to Friday from 08h30 to 17h00. The State then brought another application to the extent that the accused be admitted for observation on a full-time basis as opposed to observation during daytime hours only.

²⁶¹ Section 79 will be discussed comprehensively in Chapter 3 below. Section 79(1) was amended by the new Sexual Offences Act 32 of 2007 which commenced on 16 December 2007. Only the portions relevant to the defence of non-pathological criminal incapacity are discussed here.

²⁶² S v Volkman supra note 258.
In respect of the distinction between non-pathological and pathological criminal incapacity, Hockey AJ held:

“Clearly, the legislature made a distinction between allegations of criminal incapacity based on mental illness or mental defect, on the one hand, and such incapacity based on ‘any other reason’ on the other. Where there is an allegation or appearance of mental illness, or mental defect, the court is obliged (‘the court shall’) to direct that the accused be referred for observation in terms of S79 of the Act. If, however, there is an allegation of lack of criminal responsibility for any reason other than mental illness or mental defect, the court has a discretion whether to refer the accused for observation or not. Non-pathological incapacity falls within the latter category. Entrusting the court with discretion in cases of non-pathological incapacity is not surprising.”

Hockey AJ also notes that psychiatric evidence is not indispensable, but that the court should be mindful of the helpful role of such evidence.

Professor Kaliski, who gave evidence on behalf of the State, stated that the conditions at Valkenberg Psychiatric Hospital to which the accused would be subjected if he was to be referred for observation, were appalling and abject. Professor Kaliski accordingly stated that these conditions were undignified and in violation of basic human rights of patients.

The main consideration in this case was whether it would have been in the interest of justice to order that the accused be referred for observation in terms of section 78 (2) for a period of 30 days as requested by the State considered against the backdrop of the inhumane conditions at Valkenberg Psychiatric Hospital.

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263 At 405 F-G (paragraph 8).
264 At 406 F-H (paragraph 13). See also S v Henry supra note 1 at 20 F-G.
265 At 408 C (paragraph 23).
Hockey AJ held that the granting of an order for referral would infringe the accused’s rights to human dignity and freedom and also the rights to be detained under conditions that are consistent with human dignity, including adequate accommodation as afforded by section 35 (2) (e) of the Constitution.\textsuperscript{266}

Hockey AJ accordingly held that in the light of the fact that psychiatric evidence is not a prerequisite to counter the defence of non-pathological criminal incapacity and having regard to the extremely unpleasant and degrading conditions that the accused would have been subjected to if the order is granted, that it would not be appropriate to grant the order as requested by the State.\textsuperscript{267}

Hockey AJ also referred to the evidence by Dr Panieri Peter that was given during the first application, stating that it may be possible to compile a report in terms of section 79 of the Criminal Procedure Act if the accused was seen only in daytime. Hockey AJ held that in the light of the wide discretion the court has under section 78 (2) and 79 (2) as well as the appalling conditions at Valkenberg Psychiatric Hospital, that the first order, although unusual, was justified in that it afforded the State the opportunity to have a report compiled by a panel constituted in terms of section 79 (1) (b) of the Criminal Procedure Act, whilst at the same time “mitigating the inroad that this process would have on the human rights of the accused.”\textsuperscript{268} Hockey AJ noted that such an order would, to a certain extent, solve the problems of over-crowding at State psychiatric hospitals. The application to have the accused admitted in terms of section 78 (2) was accordingly dismissed.

This decision reaffirms the existence in our current criminal justice system of the defence of non-pathological criminal incapacity. Even though the court to a certain extent adhered to the traditional approach in respect of expert evidence, it still opened the door for a referral for observation to take place in cases of non-pathological criminal incapacity – even providing for alternative times during which such observation can be conducted.

\textsuperscript{266} At 408 H-I (paragraph 26).
\textsuperscript{267} At 409 D-E (paragraph 30).
\textsuperscript{268} At 410 B-C (paragraph 37).
If a general defence of criminal incapacity should be followed, no distinction will be drawn between an accused being referred as a result of an alleged mental illness or mental defect being present and an accused who lacked criminal capacity as a result of non-pathological causes. The focus will fall on the alleged lack of criminal capacity which has to be determined. This will possibly have the effect that alternative arrangements pertaining to time-schedules will not be possible as espoused in the *Volkman*-decision.

In the alternative, the current distinction between a referral for observation as a result of an alleged mental illness or mental defect, on the one hand, and for “... any other reason ...” should be adhered to. In both cases, however, referral should be made compulsory. In cases where the alleged cause of incapacity was due to non-pathological causes, it could be argued that due to the fact that such accused will in some cases not pose a threat to the safety of the community or society, different time-schedules could perhaps be imposed. This will aid in preventing overcrowded hospitals.

Meintjes-Van der Walt also states that section 78 (2) of the Criminal Procedure Act provides for those pleading sane automatism or non-pathological criminal incapacity, to also be sent for observation.\(^{269}\) The report in terms of this observation is drawn up by a team of court-appointed experts.\(^{270}\)

Meintjes-Van der Walt states the following advantages of court-appointed experts:

- crystallising the issues in dispute;
- reducing the length of hearings;
- saving money for the parties and the court system;
- levelling the playing fields between parties of unequal resources.

It is submitted that if a referral for observation is compulsory for both the defences of non-pathological and pathological criminal incapacity, it will be to the advantage of both the State as well as the accused. Compulsory referral will be to the benefit

\(^{269}\) Meintjes-Van der Walt (2002) *SACJ* *supra* note 1 at 247.

\(^{270}\) *Ibid.*
of the State in the sense that it will be easier to obtain a referral in order to ascertain the accused’s alleged lack of criminal capacity. It will also be to the advantage of the accused and his or her constitutional right in terms of section 35 (3) (1) to adduce and challenge evidence – expert evidence will then be compulsory. Section 79 also provides for a team of court-appointed experts to conduct the evaluation.

In the Law Commission Report that preceded the amendment of section 78 (2) it was agreed that the basis which an accused person has to lay in respect of non-pathological criminal incapacity, should consist of psychological or psychiatric evidence.271

It was also stated that the State is confronted with the following dilemmas:

- there is no presumption which comes to its rescue;
- the accused only has to raise a reasonable possibility of criminal incapacity;
- there is no provision in the Criminal Procedure Act which comes to the rescue of the State in order to counter the plea of non-pathological criminal incapacity;
- although it was stated repeatedly by the Rumpff Commission that the normal person should control his urges, an ability which the normal mentally healthy person is capable of, the courts have sometimes successfully recognised this defence.272

The Law Commission report stated the following advantages if an accused is indeed referred for observation:273

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• such observation is conducted under ideal circumstances and all relevant additional information can be collected,
• the court procedure does not have to be delayed for days with evidence and questions which are only of importance to the psychiatrist, which adds greatly to the costs both for the State and the accused;
• the interests of the community are served due to the fact that the best evidence pertaining to the defence can be put before the court only by means of such observation.

It was also submitted in the report that the defence of criminal incapacity refers in particular to the mental abilities of the accused and that the psychiatrist not only has a role to play, but is also accountable to the community.\textsuperscript{274} It was stated, and it is submitted that this view is correct, that psychiatric evidence is indispensable and that the psychiatrists themselves wish to fulfil their roles with the necessary responsibility, but that there is no adequate provision for this in the present Criminal Procedure Act. This was, however, to a certain extent relieved by the current Section 78 (2). It was also submitted that the State is at a disadvantage if the plea of non-pathological criminal incapacity is raised if the experts of the State have not assessed the accused\textsuperscript{275}.

The abovementioned argument in favour of compulsory referral for observation has merit. The problematic issues in respect of expert evidence in support of the defence of non-pathological criminal incapacity could be relieved by the mere deletion of the word “may” and substituting it with the word “shall”.

The latter approach will be more in line with our current constitutional dispensation and provide legal certainty in respect of the role of expert evidence in support of the defence of non-pathological criminal incapacity.

\textsuperscript{275} \textit{Ibid.}
11 Principles of expert evidence through the cases

The defence of non-pathological criminal incapacity is mainly a common law defence finding its roots in case law. In the light of the fact that there are no clear-cut rules pertaining to the role and probative value of expert evidence in support of the defence of non-pathological criminal incapacity, an in-depth look at the approaches followed in respect of expert evidence in the various cases dealing with this defence, is needed. The following discussion will be devoted to an in-depth analysis of principles that became clear in case law relating to the role of expert evidence. The methodology that will be applied will include a discussion of the particular case, the views espoused by the various expert witnesses followed by a brief analysis of the particular case.

11.1 Expert evidence should consist of scientific and specialized knowledge

In S v Kalogoropoulos\(^{276}\) the facts were briefly as follows. This Greek tragedy, as aptly referred to by the court, involved a number of people, namely Athanasious Kalogoropoulos, the appellant, Dafni, his wife, Dimitra, his 13-year old daughter, Macheras, the appellant’s business partner and friend, Charitomeni, the wife of Macheras, Dora, the housemaid in the appellant’s home, Julia, Dora’s cousin, Stefanos, husband of Dafni’s sister and Stergiou, husband of the appellant’s sister.

On the day of the fateful events, the appellant drove past his home and saw Macheras’s car parked in the yard. He thought at that stage that Macheras was visiting Dafni with improper intentions. When he confronted them about it he became more suspicious. The appellant then went to his house and questioned Dora, the housemaid, about visitors. Dora insisted that no one had visited the home earlier that day. The appellant, however, still suspected that a love affair existed between his wife and Macheras and was overcome with jealousy and despair. He then consumed half a bottle of vodka and went back to his shop. He also carried a revolver with him. He had a habit of always carrying a revolver with him. At the shop the appellant also consumed whisky. He then took out his

\(^{276}\) S v Kalogoropoulos 1993 (1) SACR 12 (A).
revolver and accused Dafni and Macheras who had in the meantime returned to the shop, of having had sexual relations that afternoon. They denied it. A heated altercation then arose in the course of which Dafni and the appellant swore at each other. The appellant threatened to shoot Dafni. Macheras then moved towards the appellant but was pushed back onto his chair. Charitomeni then entered and the appellant waved his revolver to and fro, pointing it between Dafni and Macheras. A shot then went off, hitting Dafni and wounding her. Charitomeni then shouted “You have killed her!”

Further shots were fired in rapid succession. Two of them struck Macheras in the chest, killing him. Another shot hit and wounded Charitomeni. The appellant then left the building and drove home. He went inside, opened the safe where the firearms were kept and armed himself with a pistol. He asked Dimitra, his daughter, where Dora was and was informed that she was in her room. The appellant then went into the yard, where he shot the family dog, firing two shots. He then went into Dora’s room and fired two shots, killing her.

The appellant was charged in the court a quo as follows:

Count 1: Murder – the killing of Macheras.
Count 2: Murder – the killing of Dora.
Count 3: Attempted murder – the wounding of Dafni.
Count 4: Attempted murder – the wounding of Charitomeni.

He was convicted and sentenced as follows:

Count 1: Culpable homicide – 5 years’ imprisonment, to run concurrently with sentence on count 2.
Count 2: Murder – 8 years’ imprisonment.
Count 3: Common assault – 2 years’ imprisonment, to run concurrently with sentence on count 1.

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277 At 14G.
278 At 15 D-F.
279 At 15 E-F.
Count 4: Common assault – 2 years' imprisonment, to run concurrently with sentence on count 1.\textsuperscript{280}

The appellant appealed against the convictions on counts 1, 2 and 4 and against the sentences on all counts. The statement of the appellant that was put before the trial court explaining his behaviour on the day of the fateful events included, amongst other submissions, the following:

(a) The accused suffered from retrograde amnesia and that he was informed at the hospital and thereafter that he had committed the acts which resulted in the charges against him.

(b) The events were a culmination of numerous other provocative acts by the accused's wife who habitually and derisively referred to the 21 years difference in their ages, rejected him both publicly and privately, spurned, ridiculed and taunted him with increasing intensity, and, knowing that he was jealous and deeply in love with her, fanned his jealousy by her conduct.

(c) The accused contented that as a result of liquor which he had consumed in a short period of time, more particularly having regard to the provocation referred to above, he was unable:

(i) to form the required intention to commit the alleged crimes; and

(ii) to appreciate the wrongfulness of his actions or act in accordance with such appreciation; and

(iii) to engage in any purposeful behaviour.\textsuperscript{281}

The appellant's defence was thus one of non-pathological criminal incapacity. On appeal the court had to consider whether the appellant’s defence of criminal incapacity should succeed or whether the evidence before the trial court warranted the rejection of the appellant’s defence of lack of criminal capacity.

In regard to this defence the trial court heard the evidence of two psychiatrists, Dr B Jeppe, called by the appellant, and Dr M Vorster, called by the State.

\textsuperscript{280} At 15 C-F. A detailed exposition of the facts is provided as the facts of the case are complex and many people were involved.

\textsuperscript{281} At 15 H-I and 16 A-D.
Dr Jeppe and Dr Vorster agreed that the appellant experienced genuine amnesia as from the moment when the first shot was fired. Dr Jeppe was of the view that as from that moment the appellant was “totally unable to exert proper control over his actions” and that this condition subsisted when he shot Dora.

Dr Vorster, however, differentiated between the shooting in the office and the shooting of Dora. Her view was that in the office, more or less from the time the first shot was fired, the appellant was unable to act in accordance with an appreciation of the wrongfulness of what he was doing, but that when he left the office, he was once again “in control”, and that he was not experiencing a “loss of control” when he shot Dora.

Expert evidence was also received regarding the appellant’s blood alcohol level both at the time of the shooting in the office and at the time of shooting Dora, which proved to be about 0.24 gram per 100 ml.

The evidence of the two psychiatrists was carefully scrutinized by Botha JA on appeal and for purposes of this discussion it is important to discuss the court’s approach thereto.

The doctors agreed that the appellant did not suffer from any mental illness or mental defect. Psychologically he was perceived as a normal individual with normal intelligence and sound judgment. Dr Jeppe stated the following about the appellant’s personality:

“..... (he is) rather a timid individual, especially in regard to his relationship with ... his wife, by whom he appeared to feel emasculated, although he appeared to be desperately attached to her.”

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282 At 20 H-I.

283 At 20 I-J Jacobs JA states: “In this regard we are not hampered, nor assisted, by findings of credibility or reliability on the part of the trial judge. It is common cause that both the psychiatrists were well qualified to give expert evidence in their field, and that they did so in good faith, honestly and without bias. We are in a good position to assess the evidence on its merits as was the court a quo”.

284 At 21 A-B.
Dr Vorster stated:285

“....... in his personality he feels a little inadequate”; “he was able to assert himself, but in terms of his relationship with his wife, his feeling of inadequacy made that assertion more difficult.”

The doctors were also unanimous that the appellant genuinely suffered from amnesia as claimed by him. According to them the appellant had what is generally known as an alcoholic blackout. It differs vitally from automatism. Dr Vorster stated that in automatism there is no conscious thought, but as to a blackout she said:286

“A blackout or a blank out, as Dr Jeppe used the term, occurs in people who are either heavy drinkers or alcoholics, where they act quite normally and they are quite normal, but afterwards have no memory for what they have done. So, during the time that they are performing the actions, they are conscious, they are voluntary. They perform any kind of actions, but the only difference is that afterwards they cannot remember what they have done. So during the time that they have performed those actions, they are liable for everything they are doing, because there is conscious thought.”

And further:

“... The salient point about blank out is that the person is quite normal. They are simply not laying down memory banks. So, they could be doing any kind of work, any kind of task.”

Dr Vorster, when cross-examined about the appellant’s alleged lack of control at the time when he shot Dora, repeatedly refuted the notion that the appellant’s blackout had anything to do with the question of control. She stressed that it merely explains the memory loss and that it was not a factor to be taken into

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285  At 21 B-C.
286  At 21 D-E.
account in regard to the question of control at all. Consequently, according to the expert evidence in this case, the appellant’s amnesia had no direct bearing at all on the issue of his criminal capacity.

Botha JA states\textsuperscript{287} that eventhough psychiatric evidence in cases of non-pathological criminal incapacity is not as indispensable as in cases where criminal incapacity is attributed to pathological cases, an accused person is required to establish a foundation sufficient at least to create reasonable doubt as to the existence or not of criminal capacity. Ultimately it is for the court to assess the accused’s criminal responsibility taking into account the expert evidence and all other relevant facts including the accused’s actions during the relevant period\textsuperscript{288}.

It is important to also take note of the court’s view as to the value of the psychiatric evidence tendered.

Botha JA held that both Dr Jeppe and Dr Vorster, in expressing their views as to the appellant’s mental state at the relevant time, focused attention mainly on the appellant’s loss of control and that the evidence on the record indicated that the opinions expressed pertaining the appellant’s control over his actions did not purport to rest on the exercise of any specialised scientific or technical procedures or expertise. Botha JA held\textsuperscript{289} the expression ‘loss of control’ was not put as a term of art peculiar to the discipline of psychiatry or perhaps psychology. It was not suggested that the views expressed were derived from arcane knowledge of the workings of the human mind to which psychiatrists alone have access by virtue of their training or experience. Instead, what the doctors presented in their evidence was to take the facts deposed to in the trial and to draw inferences therefrom as to the appellant’s control over his actions, or the lack of it. Botha JA held that drawing inferences as to the mental state of a person’s mind from objective facts relating to his/her conduct was an exercise which was not unique to

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\textsuperscript{287} At 21H-22A.
\textsuperscript{288} Ibid.
\textsuperscript{289} Ibid.
\end{flushright}
the psychiatric or psychological professions. Botha JA in addition held that courts of law perform the exercise daily, and in addition stated:

“In the circumstances of the case I perceive no cause for this court to have any hesitancy in considering the opinions of the psychiatrists on their merits, in accordance with our own experience of, and insight into, human behaviour, and deciding itself upon the inferences that are to be drawn from the objective facts relating to the appellant’s actions.”

As illustrated in the discussion of the facts above, it can be seen that the facts of this case can be divided into two stages – that is the shooting at the office and the shooting that took place at the appellant’s home afterwards when the appellant shot Dora and the dog.

The two psychiatrists were divided in opinion as to whether the appellant lacked self-control at the time when he shot Dora. Dr Jeppe was of the opinion that the appellant was not fully aware of the occurring events and that he could not fully control his behaviour. Dr Vorster contended that these subsequent actions were not actions of a person who lacked self-control. The court agreed with the views and conclusion of Dr Vorster, but noted that it would have rejected Dr Jeppe’s evidence even if Dr Vorster had not given voice to her disagreement.

The court accordingly held that all of the appellant’s actions after he left the office, and the whole of his outward conduct then, proclaim that he was well aware of what he was doing and that he was well in control of himself. The court found that there was no foundation of fact for the notion that the appellant, when he shot

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290 Ibid.
291 Ibid.
292 At 22 H-I.
293 At 23 B-F. It is interesting to take note of Dr Vorster’s answers to certain questions posed to him by the court at 23 E: “Would that not indicate that there was this, this loss of control that was present at the office, continued right up to the time of the shooting at the dog and the shooting of the late Dora Seleke? - No, it is not the time period that impresses me. It is his activities during that time. Had he had a continued loss of control, in fact one would have expected random shootings of everybody he met. Not intentional actions as have been described over the past few days” and further by Dr Vorster: “I am not saying Mr Kalogoropoulos was not angry at that point. What I am saying was that he had not lost control.”
294 At 23 I-J.
Dora, was unable to control his actions and thus that he was unable to act in accordance with his appreciation of the wrongfulness of his conduct.

It is now important to focus on the approach followed in respect of the evidence of the psychiatrists pertaining to the shooting at the office.

Dr Jeppe stated the following:\textsuperscript{295}

“It is my opinion that as a result of emotional stress, extending over many months, intensified by the excessive use of alcohol and brought to a climax by a tremendous emotional blow, the accused was precipitated into a state of dissociation in which he had a diminished awareness of what was going on and he became totally unable to exert proper control over his actions on the evening of Tuesday, 16 February 1988, which eventuated in the death of George Macheras and Dora Seleke and the injuries to Dafni Kalogoropoulos and Charitomeni Macheras.”

A huge obstacle in Dr Jeppe’s evidence was that he made mention of “diminished awareness.”\textsuperscript{296} It is clear that this statement is not an indication of either an inability to appreciate wrongfulness, or an inability to act in accordance with such appreciation.

Dr Vorster testified the following:\textsuperscript{297}

“I think we have a build-up of anger here. We have a build-up of alcohol and therefore we have a gradual build-up of loss of control. While he was

\textsuperscript{295} At 24 D.
\textsuperscript{296} He also later testified at 24 F: “He was shattered psychologically, my lord, by what he thought had happened, that he had killed his wife, because he had heard the shout, you have killed her. And of course the effect of the alcohol blurred his control in any event. I believe that the combination of the two, my lord, made it, diminished his ability to be fully aware of what was happening and certainly his ability to control his behaviour.”
\textsuperscript{297} At 25 B-F. With reference to Charitomeni’s shout: “I think he had his finger on the trigger at that stage. It was at that point where he lost control and that is exactly why he carried on shooting and did not stop. If he had been controlled, he would have then stopped. ... He was no longer able to act in accordance with his appreciation of wrongfulness. ... As to the anger, the extreme anger, as I see it at the office, was with all the shouting and swearing and the arguing, jealousy, all combined, to make him lose control.”
pointing the firearm between two of the victims, there we still see that the accused is in control."

The court stated the only two facts gleaned from Dr Vorster’s evidence, differentiating the shooting at the office from the shooting of Dora, were that the appellant kept on shooting and the fact that there were shouting, swearing and arguing.

The court, however, rejected Dr Vorster’s opinion in this regard. It was held that immediately before the shooting at the office the appellant was in control of himself and immediately thereafter he was again in control of himself. Thus on the face of his conduct before and after, the court found that it is inconceivable that in the brief interval in between he was deprived of self-control. The firing at the office stopped when the revolver was empty but was resumed when the appellant fetched a replacement and found his next victim. It was found that the appellant shot Dora (and the dog) because he was angry and emotionally upset, but while in a frame of mind where he could exert self-control. The court held that there was no foundation in fact for differentiating between the appellant’s state of mind during the couple of seconds that it took him to fire the shots in the office, and his state of mind before and after that episode. The defence of criminal incapacity was accordingly rejected.

- Reflections on the Kalogoropoulos-decision

This case deserves careful scrutiny as the court’s approach to the evidence presented by the two psychiatrists is of importance. It is clear that the court did not attach too much weight to the expert evidence. The reason for this could perhaps be found in the fact that they only drew inferences from the facts which the court itself, without the assistance of the experts, could have done. Experts in cases of this nature should thus try not to merely draw inferences only, but should also “astonish” the court with experience, skill, specialized techniques and expertise in order to better assist the court in reaching its conclusion on the facts. Expert evidence should accordingly be scientifically reliable in order to carry sufficient weight.
11.2 Value of expert evidence dependent on the cogency and truthfulness of the accused's version of the events

A case that also cast a spotlight on the pivotal importance of expert psychiatric evidence is the case of *S v Potgieter*\(^{298}\). The facts of this case are as follows:

The appellant, a 36-year old woman, stood trial in the South Eastern Cape Local Division of the Supreme Court on a charge of murder. The State alleged that she had intentionally and unlawfully killed the deceased, Badian Stow Bosch, hereafter “the deceased”, with whom she was living as her husband. Her defence was that when she shot him she did so in a state of “sane automatism”, or impelled by an irresistible impulse and that she therefore lacked the legal capacity to commit a criminal act. This defence was rejected as false in the court *a quo* and the appellant was found guilty as charged.

The appellant was married to Jan Potgieter. They had three children, a boy, Brandon, and two daughters, Cyndee and Shannon. She eventually met the deceased which led to her subsequent divorce, terminating the marriage with Jan Potgieter which had not been a happy one. She later moved in with the deceased. She had been awarded custody of the three children. The deceased said that he did not want them in the way and they were placed in a boarding school. The deceased was unpleasant towards the children. He drank excessively, was foul mouthed and often assaulted the appellant by hitting her. She remained with him because she continued to love him despite his conduct, was materially dependent on him and hoped that his repeated promises to behave decently would be kept. The appellant later gave birth to a boy, Tyrone. On the particular Sunday the appellant and the deceased again had words after which he assaulted her. She phoned her sister-in-law as well as a friend telling them that the deceased assaulted her. The appellant’s friend offered her accommodation, but she declined the offer.

She then telephoned a locksmith and explained to him that she needed money and a gun from a locked safe for a journey she proposed taking on the Monday morning. Mr Britz arrived and opened the safe and, according to the appellant, handed the pistol and ammunition to her. She removed the pistol from its holster and placed one of the magazines in it and put the gun in her handbag. According to the evidence of the locksmith, she did not tell him about the pistol and he did not see her remove the weapon from the safe. He was at no stage involved in removing the pistol and did not see her do so. She then went to the police station to lay a charge of assault and to seek police protection. At the police station she was informed that, because a detective was not on duty on a Sunday, she should return the next day to make a statement. She then returned to her home.

The appellant’s version of the events that took place that evening was the following. She went upstairs to put the baby to bed. After putting him to bed, she took the pistol in its holster from the handbag and left the handbag in the child’s room with the spare magazine containing live cartridges still in it. She put the pistol, still in its holster, on the vanity slab.

She woke up at some stage during the night with the baby crying. She heard loud music downstairs. Without turning on any lights upstairs she went downstairs to see what was going on and to prepare another bottle for the baby. She found the deceased in a lounge chair looking at the static pattern on the television screen. The loud music came from the television set. She asked him to turn the music down but he ignored her. She went back upstairs to the baby’s room and gave him his bottle and settled him. As she reached her room, the deceased arrived at the doorway at more or less the same time. She asked him please to turn down the music. He grabbed her by the upper arms and threw her against the wall between the bedroom and bathroom. Her last recollection of the incident was of him shouting something at her as she saw his blurred image moving away from her towards the bedroom window. She remembered nothing further until she heard a “loud bang” and she realised that she had shot her husband299.

299 At 69 E-F.
The detective on duty drew a series of sketches depicting the possible positions of the deceased when the shot was fired. He was trained to undertake such a task and had the necessary experience. The injuries, taken in conjunction with certain other undisputed evidence, proved beyond any doubt that the deceased at the time he was hot, was lying in bed.

In her plea explanation, the appellant’s defence was canvassed as automatism, alternatively lack of criminal capacity. 300

The court, per Kumleben JA, noted that the reliability and truthfulness of the alleged offender is in the nature of the defence a crucial factor in laying a proper foundation. 301

The court also quoted the dictum from R v H302 in which the following was held:

“Defences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the court, will not necessarily relieve the court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question.”

Kumleben JA also held that the ipsi dixit of an accused person that the act was involuntary and unconsciously committed, based on evidence tendered in support of such assertion, will generally be accepted unless it can be proved that such evidence “cannot reasonably be true”303.

300 At 72 D-H. “3. ... the accused pleads that at the time of the alleged crime she acted involuntarily in that she acted without being able to appreciate the wrongfulness of her act and therefore acted in a state of automatism; alternatively she acted whilst suffering from, and subject to, an irresistible impulse and whilst unable to act in accordance with an appreciation of the wrongfulness of her act. The accused therefore pleads that she is not criminally accountable or responsible for the said act. 4. The unaccountability set out in para 3 above was non-pathological of nature, was of a temporary nature and was not due to any permanent or temporary mental illness or defect as envisaged by Act 51 of 1977.”

301 The court also referred to the judgments of Kalogoropoulos supra note 1; Laubscher supra note , Calitz supra note 1 and Wild supra note 1 as discussed supra.

302 1962 (1) SA 197 (A) at 208 A-C.

303 At 73 E.
The judgment also cited Hiemstra:304

“Daar moet getuienis van die kant van die beskuldigde wees wat sterk genoeg is om twyfel te laat ontstaan oor die vrywilligheid van die beweerde daad of versuim. Dit moet gerugsteun word deur geneeskundige of ander deskundige getuienis wat aantoont dat die onwillekeurige gedraging heel moontlik te wyte was aan oorsake anders as geestesongesteldheid of geestesgebrek. As aan die einde van die verhoor daar twyfel bestaan of die gedraging willekeurig was of nie, moet die beskuldigde die voordeel van die twyfel geniet.”

Kumleben JA also stated.305

“The need for careful scrutiny of such evidence is rightly stressed. Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. Thus – as one knows – stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person 'snaps' and a conscious act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an involuntary act has been committed. The facts – particularly those summarised thus far – must therefore be closely examined to determine where the truth lies.”

Kumleben JA found that the appellant was not a truthful witness in many respects. Kumleben JA accordingly held, on an appraisal of all the evidence, the following:306

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304 See 73 G-H of the judgment.
305 At 73 J-74 B.
306 At 80 J-81 H.
• The appellant was in many respects an untruthful witness. This finding was based on improbabilities and contradictions in her own evidence, and on the discrepancies between her testimony and that of the locksmith, Britz, whose evidence was not challenged and whose veracity was beyond question.

• It may be accepted that the appellant was assaulted by the deceased that Sunday. Whether such assaults took place at times in the manner described by the appellant was questionable.

• The pistol was not taken from the safe because she was leaving for Durban the next morning and it was not removed openly in the presence of Britz.

• The pistol when it was used that night was not taken from the vanity slab.

• The deceased was asleep at the time the shot was fired or, if not asleep, had not assaulted the appellant as described by her seconds before lying down.

It was held that the appellant’s account of what took place over the pertinent period could not reasonably have been true. It was found that the factual foundation on which to consider the validity of the defences that were raised, namely automatism and irresistible impulse, had been absent. Dr Potgieter, who testified on behalf of the appellant, testified and based his opinion on the assumption that the appellant’s evidence was truthful in all material respects. He readily conceded that if his opinion was to be rejected by the court his opinion no longer held.

It is also pointed out that Dr Potgieter accepted the appellant’s account virtually without qualification or reservation. As the court notes initially, after consulting with the appellant and reflecting on the matter, Dr Potgieter concluded that automatism was the probable explanation of her conduct. After attending the trial and listening to the evidence in court, he became more certain of his diagnosis: he altered his conclusion of “waarskynlik” to “heel waarskynlik” in the light of her testimony. He was asked on what grounds he had any reservation at all – why he could not express his final conclusion as a certainty. His reply to this was that it was only the appellant’s contradiction about where she had put the storeroom key.

307 At 81 E.
308 At 81 E-F.
309 At 81 F-H.
that had cast doubt in his mind as to her honesty and reliability. Kumleben JA, however, held that it was not only in this one respect that the appellant’s evidence had been defective. It is important to take note of Kumleben JA's comments as to the expert evidence put forward in this case.310

Dr Potgieter, who as already mentioned testified on behalf of the appellant, testified that from his research on the subject of automatism and his study of the authorities on the subject, he extracted certain criteria which, if satisfied, pointed to or established automatism311.

Dr Kaliski was of the view, based on his observations of the appellant’s behaviour at Valkenberg Psychiatric Hospital and her evidence in court, that she was “a lot tougher than what we give her credit for” and that within limits she was capable of standing up for herself312. Her own evidence of what she had endured at the hands of the deceased over a long period of time tended to confirm this.

Amongst the criteria relied upon by Dr Potgieter were the facts that the appellant had no past history of acts of violence and that the killing was not planned beforehand during the course of the Sunday. He also referred to her subsequent reaction and emotional condition when she realised that she had killed the deceased.

Dr Kaliski, with some scepticism and reservations, accepted that these facts were consistent with automatism but stressed that they are as consistent with one being provoked or driven to act violently and consciously and thereafter becoming distraught, even hysterical, in the realisation of what had happened and its implications313.

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310 At 82 B Kumleben JA held: “In the light of my conclusion that the necessary factual basis is wanting, it is strictly speaking unnecessary to comment on the psychiatric evidence. I do, however, propose to do so and review it on the supposition that the evidence of the appellant is acceptable as regards to the pertinent period: more particularly, on the assumption that the pistol was on the vanity slab and that the position of the deceased when shot can be reconciled with her story.” See 82 C-J and 83 A-J of the judgment.
311 At 82 C.
312 At E-F.
313 At 82 H-J. Dr Kaliski in addition observed the following: “Some people when they snap, they smash up a place, some people when they snap, they assault other people. When under provocation, having given a long background of say stress, whatever, when under provocation
The state of amnesia was a further factor referred to by Dr Potgieter and Dr Kaliski pointed out that in respect to amnesia, “when a person acts in a state of automatism, there must be an amnesia”, but that the opposite was not always true. According to Dr Kaliski, psychogenic amnesia, which he described as “forgetting the disagreeable” after the event, is relatively common in a situation similar to that with which the appellant was confronted.314

It was also noted that the fact or assumption of amnesia depended upon the appellant being truthful when she said that she remembered nothing. The latter is not a condition which is easily capable of objective proof. The next question that required expert evidence was whether there had been any simulation on the part of the appellant.

Dr Potgieter stated315:

“Ek gaan net opsommend sê dat my opinie nadat ek die konsekwentheid opmerk van wat sy vir my ten tye van ons aanvanklike konsultasies gegee het en wat ek hier in die Hof in gehoor het laat by my geen twyfel dat ten opsigte van die gebeure van daardie spesifieke oomblik van die automatisme absoluut konsekwent weergegee is volgens alle inligting tans tot my beskikking.”

But later he remarked316:

“... simulasie kan nooit totaal uitgeskakel word nie. Uitsers onwaarskynlik.”

And further317:

a person snaps and smashes up things and then afterwards says: ‘I don’t know what came over me, that is just not me, I don’t even remember doing it’ we are quite happy to say that person had just lost his temper. When the same person goes through the same sequence, but instead of destroying items in the environment, he assaults (fatally) somebody, we somehow feel compelled to give it a different name, we want to call it dissociative state or something else.”

314 At 83 A-B.
315 At 83 C-D.
316 At 83 D-E.
“... Ek kan nie glo dat die beskuldigde psigiatres so gesofistikeer is dat sy sulke tipiese fenomene soos terugflitse kan simuleer nie.”

The above conclusion was in part based on Dr Potgieter’s general conclusion that the appellant was truthful in all respects.

Dr Kaliski, on the other hand, apart from the assessment of the truthfulness of the appellant as a witness, did not accept her description of the final scene as consistent with automatic behaviour. He pointed out that in her account to him, she said that the deceased “shoved her against the wall, the back of her head hit the wall, he was saying things, he then went down on the bed and she heard an explosion, she had not left the room, she cannot remember fetching the gun. She remembers running down the steps to get her ex-husband”. Dr Kaliski, focusing his attention on the final episode, disputed the conclusion of Dr Potgieter that the appellant acted involuntarily.

Dr Kaliski also pointed out at various stages during his evidence that the actions of the appellant, from the time she was pushed against the wall, were not of a routine or automatic nature. They involved a number of relatively complicated and “goal-directed” steps resulting in a single lethal shot being discharged. She had to locate the pistol at a place where it was not normally kept, that is, on the vanity slab. She had to remove it from the holster, she had to cock the pistol and release the safety catch and thereafter in relative darkness she had to aim at the target on the bed.

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317 Ibid.
318 At 83 G-H.
319 At 83 H-84 B. Dr Kaliski states the following: “If I may proceed to the actual automatism or automatic behaviour, you know you can get lost and lost in definitions M’ Lord, but the central point to be made about an automatism, the behaviour has to be automatic. And this is where we, this is the actual crux of it. ... That yes, behaviour can be complex but it is apparently purposeful. I think the word used in Afrikaans was ‘klaarblyklik’. And in this article by Prof Henning who is the author in London, in his introduction to the concepts of defining automatism, he says that the first thing to go in automatism is a person’s higher order functions which he described as the higher order function of reasoning, judgment and intelligence. What this means is the person’s ability to meaningfully interact with his environment, his awareness of what he is doing, and to actually act in a very precise goal – directed fashion in the environment, must be diminished.”
320 At 84 B-C.
Kumleben JA accordingly held:

“I must confess to difficulty in accepting that all this could have been done automatically and on this issue, if it were necessary, I would accept Dr Kaliski’s conclusion in preference to that of Dr Potgieter. In expressing this view, I take into account Dr Potgieter’s over-sanguine view, as I see it, of the appellant’s honesty and the comments made in regard to his criteria which, again as I see it, places them in a perspective which reduces their cogency to a material extent. During the hearing of the appeal, I should mention, no separate argument was advanced in respect of the alternative defence of irresistible impulse. It was correctly accepted that should the appellant’s evidence be rejected, this defence would also fail. In the result I consider that the conviction must stand …”321

The Appellate Division exercised mercy in setting aside the sentence of seven years’ imprisonment. The court held that the trial court had erred in imposing what it regarded as an exemplary sentence in the light of the increased prevalence of this sort of offence: in doing so the court had overstressed the retributive element. The case was accordingly remitted to the trial court to sentence the appellant afresh after due compliance with the provisions of section 276A(1)(a) of the Criminal Procedure Act.

• Reflections on the Potgieter-decision

The decision in the Potgieter-case is interesting in many respects. The importance of expert psychiatric evidence is once again emphasised. It is further important to take note of the divergent opinions capable of being advanced within a factual situation similar to the Potgieter-case.

321 At 84 D-F.
Burchell\textsuperscript{322} also correctly submits that the important message conveyed in Potgieter's case is that the defence of non-pathological incapacity will be very carefully scrutinised by courts and, if the version of the facts presented by the accused is found to be unreliable or untruthful, the psychiatric evidence based on the supposed truthfulness of the accused's version of the facts must also fall away.

One of the major obstacles that arise in the psychiatric evaluation of any person, whether that person has raised the defence of pathological incapacity (insanity) or non-pathological incapacity, is that the psychiatric evaluation takes place before the full evidence has been heard in court.\textsuperscript{323} Burchell correctly asserts that in the interests of the pursuit of truth, it would be better to allow the psychiatrist who has given evidence of the mental state of the accused an opportunity to re-assess his opinion after hearing all the other evidence.\textsuperscript{324}

Burchell\textsuperscript{325} correctly suggests two practical solutions that could be of assistance to courts that are called upon to consider the defence of non-pathological criminal incapacity:

(a) A judge hearing a matter involving the defence of non-pathological incapacity based on provocation and emotional stress would be entitled and, in fact, strongly encouraged, to require the State to lead psychiatric or psychological evidence in order to test evidence on the question of capacity led by the defence against evidence of capacity led by the State.

In the Potgieter-case the abovementioned suggestion becomes evident in the court's evaluation of Dr Kaliski's evidence weighed against the evidence of Dr Potgieter. On a scale of probabilities it was evident that the court attached more weight to the evidence of Dr Kaliski, appointed by the prosecution in rebuttal, than to Dr Potgieter's evidence presented in support of the appellant's defence of automatism.

\textsuperscript{322} Burchell (1995) SACJ supra note 1 at 38-39.
\textsuperscript{323} Burchell (1995) SACJ supra note 1 at 39.
\textsuperscript{324} Ibid.
\textsuperscript{325} Burchell (1995) SACJ supra note 1 at 41-42.
A court in such a case is under no obligation to accept either the psychiatric evidence adduced by the defence or the State, but access to a balanced view is preferable to access to a one-sided perspective only.\textsuperscript{326}

(b) The evidence referred to in (a) above should, if possible, be heard after the factual issues of the case, particularly with regard to the credibility of the accused’s story, have been canvassed. Burchell also submits that despite the difficulties in separating the issues of credibility and capacity, it would be wise to entrench the procedure in all cases involving psychiatric evidence in criminal trials or, at least, to offer the expert witnesses an opportunity to re-evaluate their evidence, if necessary, at the end of the fact-gathering stage of the trial.

As indicated by Kumleben JA in the \textit{Potgieter}-case, the weight attached to psychiatric evidence depends on the cogency of the accused’s version of what happened, and accordingly the hearing of the psychiatric evidence should be postponed until after the accused’s version has been tested in cross-examination and also in the presence of the particular psychiatrists.\textsuperscript{327}

This case also illustrates the importance of both the State and the accused presenting expert evidence.

\subsection*{11.3 Expert evidence well established}

In \textit{S v Nursingh}\textsuperscript{328} the accused was charged with three counts of murder. The charges followed upon him shooting and killing his mother and maternal grandparents with whom he had been living. On the day of the killings, the accused, at that stage, a university student, and his friend, Aman Soni, cut down a

\begin{flushright}
\textsuperscript{326}Ibid.\textsuperscript{326}
\textsuperscript{327}Ibid.\textsuperscript{327}
\textsuperscript{328}\textit{S v Nursingh} 1995 (2) SACR 331 (D). See also Coetzee, LC “Criminal Capacity – sane automatism – evidence of prolonged sexual abuse of accused by his mother – accused having personality profile which predisposed him to violent emotional reaction wherein he would not be able to distinguish right from wrong – \textit{S v Nursingh} 1995 (2) SACR 331 (D)”\textit{Codicillus} (1996) at 96-98.
\end{flushright}
mango tree and removed the branches. As a reward for this chore, the accused obtained permission from his mother to go to a concert he had wished to attend. The reason attendance of this concert was so important to the accused was due to the fact that this was the first time in his life he had asked a girl to accompany him on a date.

That same evening, Aman Soni was at the house of the accused and his family. The accused had invited Soni to go out with him that evening. Soni waited upstairs in the accused’s room while the accused went down to ask his mother’s permission to go out. Soni heard the sound of voices in argument at first and then the mother’s voice raised to a screaming pitch and then the sound of shots followed. (It later appeared that three shots had struck the accused’s mother and grandfather and four shots struck the accused’s grandmother). Soni ran downstairs, taking a knife of the accused that was lying about, in case he thought he should be in any danger. There he found the accused standing in the doorway and the mother of the accused on the floor. He touched the accused on the shoulder. The accused reacted by jumping, as though startled. According to Soni, the accused first looked dazed and not quite aware of what was going on and then started crying. Soni went to the body of the grandfather, felt the grandfather’s chest to see whether he was still alive and then in a state of panic told the accused “let’s get out of here”\textsuperscript{329}. Soni ran to get the keys to the family motorcar and, while looking for them, the accused joined him, “babbling and not saying anything sensible.”\textsuperscript{330} The two of them then drove to the vicinity of the University. When Soni asked the accused what they were going to do, the accused just continued crying. Soni testified during the trial that he was not sure whether his question had even been heard. They discarded the pistol alongside the road, where it was later found.

The defence put forward on behalf of the accused was that, by reason of his peculiar family circumstances and upbringing, he had a personality make-up which predisposed him to a violent emotional reaction in the event of other events occurring that would push that predisposition into a state of eruption. Put

\textsuperscript{329} At 337 F-G.  
\textsuperscript{330} At 332 G.
differently it would mean that at the moment and when those circumstances occurred to trigger off this disruption of his mind, it would become so clouded by an emotional storm that he would not have the mental ability to distinguish between right and wrong and act in accordance with that insight.\textsuperscript{331} The defence of the accused was thus one of non-pathological criminal incapacity.

The peculiar circumstances which were relied on were those relating to the accused’s upbringing. It was submitted that these led to his condition prior to the shooting, and that they consisted of a prolonged, continuous and at times severe physical, psychological and sexual abuse, mainly at the hands of his mother. This fashioned and produced a personality replete with inner conflicts, mainly centred on a fear of separation and abandonment. This made him, on the one hand, intensely dependent on his mother but with, on the other hand, a latent anger and resentment at that dependence.\textsuperscript{332} He feared separation from her and the home that he knew, but would also feel trapped by conflicting inclinations to be close at some times and to be distant at other times, compliant or rebellious, wanting to exercise some independence but afraid to do so because withdrawal from that situation would mean isolation.

Turning to expert evidence, the case was put forward on the basis of expert evidence from a psychiatrist and a psychologist, one of whom had actual experience in dealing with this nature of occurrence, and the other experience in dealing with cases of sane automatism. Both these witnesses had qualified themselves by examination of the accused and consideration of the known circumstances of the case, and were of the conclusion that what happened on the evening in question was a singular combination of circumstances that faced the accused, with his vulnerability of make-up, with a sudden and immediate threat to him of devastating proportions.\textsuperscript{333} Within the context of the previous history of abuse, it triggered off his state of altered consciousness, which manifests itself in a

\textsuperscript{331} At 332 G-H.
\textsuperscript{332} At 332 I-J.
\textsuperscript{333} At 333 B-C.
markedly reduced or even a wholly incomplete, awareness of normality, with accompanying loss of judgment and self-control\textsuperscript{334}.

The psychiatrist identified the resulting mental state as a separation of intellect and emotion, with temporary destruction of the intellect, a state in which, although the individual’s actions may be goal directed, he would be using no more intellect than a dog biting in a moment of response to provocation. According to the psychiatrist, it was a syndrome and a profile that was well-known and documented in contemporary psychiatric literature and research\textsuperscript{335}.

The psychologist described the accused’s state as “an acute cataclysmic crisis”\textsuperscript{336}. According to the psychologist it is a known and identified mental trauma that occurs in the context of a particular relationship of people like husband and wife or parent and child. It occurs in people with a particular emotional vulnerability. According to the psychologist, when such a person has that vulnerability incited by some stimulus, it results in an overwhelming of the normal psychic equilibrium by an all-consuming rage, resulting in the disruption and the displacement of logical thinking. It accordingly manifests itself in an explosion of aggressiveness that frequently leads to homicide.

According to Squires J both these experts meant to state the same thing, which is conflict in a particular relationship, which leads to an unbearable tension, which is released in this violent way by some trigger event. Both experts were of the view that such an occurrence was not a pathological one. It is a non-recurring event, particularly if the cause of it is removed. It is further characterised by an inability to remember what happened, although that particular aspect is the result of the fact that the cognitive reading ability of the mind is not registering during the relevant period and therefore there are no recollections.

During the course of the judgment Squires J noted\textsuperscript{337} that where an accused person relies on non-pathological causes in support of a defence of criminal

\textsuperscript{334} At 333 C-D.
\textsuperscript{335} At 333 D-E.
\textsuperscript{336} At 333 E-F.
\textsuperscript{337} At 334 B-C.
incapacity, he or she is required to establish a factual foundation for it in evidence, sufficient at least to create a reasonable doubt on the issue as to whether he had the requisite mental capacity. At the end of the day, it is for the court to decide the issue an individual’s criminal responsibility for his or her actions, taking into account the expert evidence, and all the facts of the case, including the accused’s actions before, during and after the relevant phase.

The state did not call any expert evidence in behavioural science or psychiatric medicine to dispute or challenge the existence of the phenomenon described by the expert witnesses for the defence.

Squires J found that the most serious aspect in this case had been the sexual abuse. The evidence established the existence of a bed for the accused in his mother’s bedroom, in a house where there had been ample space for each occupant to have his or her own room. The accused also experience sexual aversion. Squires J noted as to the latter:338

“The psychiatric rationalisation of this in the light of the accused’s evidence was not only unchallenged but seems to us to be cogent and compelling. That is, that one cannot be averse to something, unless it has been previously experienced and associated with negative, repulsive feelings.”

Squires J also states:339

“It is also reinforced by the need to carefully scrutinise defences of this sort because of the ease with which they can be raised and the potential for mischief if they are upheld without sufficient and proper cause.”

After having regard to the evidence of Aman Soni, whom the court found to be a truthful witness, the court held that the accused’s startled reaction at Soni’s touch, his dazed appearance, babbling, incoherent talking, increasing panic at the realisation of what had happened, and the desire to distance himself from

338 At 335 I.
339 At 336 I.
knowledge and acceptance of it, were all part of the profile established by temporary inability of control explained by both the psychiatrist and psychologist. 340

The court considered it impossible that a normally meek, obedient, loving, dutiful child would suddenly go berserk and slaughter his whole family, thereby bringing upon himself the very thing he feared most – separation from them – unless some unimaginable pressure pushed him to do so.

With regard to the expert evidence, Squires J noted 341 that the court was very impressed by the expert evidence. It explained in sensible, intelligible terms a phenomenon which lawyers, and probably most laymen, suspect. The experts accepted that they could be misled by the accused or anyone in that particular situation, but they were aware of that possibility and took steps to guard against it. By reason of comparing what the accused said and testing it against the surrounding circumstances they found his explanation to be supported and they were satisfied and even convinced that the accused was truthful and that this tragedy had occurred for the reasons which they explained.

Accordingly, the court held that a sufficient factual foundation had been laid which at least established a reasonable doubt as to the accused’s criminal capacity at the time of the shooting. The accused was acquitted on all counts.

- **Reflections on the *Nursingh* decision**

It is abundantly clear by the statements by Squires J that much weight was attached to the expert evidence by the psychiatrist and psychologist in this case. It not only emphasises the intense need for expert evidence in cases of this

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340 At 338 B-C.
341 At 338 I-J-339 A. See also 339 A-C where Squires J held:

“In our law a man is responsible only for wrongful acts that he knows he is committing. Before he can be convicted of an offence, he must have the intellectual or mental capacity to commit it. That means an ability to distinguish between right and wrong and act in accordance with that appreciation. If that is lacking then obviously it follows he does not have the necessary capacity and it is for the prosecution to prove that he knew what he was doing.”
nature, but also indicates the importance of such evidence being led by both the prosecution as well as the defence. In this case the State did not lead any evidence of an expert nature, such as evidence of behavioural scientists, psychiatrists or psychologists to rebut the case of the accused. One would expect the prosecution to at least call one expert, whether it is a psychiatrist or psychologist to also conduct an examination and evaluation of the accused. The latter will either confirm or deny aspects pertaining to the truthfulness, credibility and consistency of evidence presented by the accused. The Potgieter-decision serves as an illustration of the importance of expert evidence being presented by both prosecution and defence.

According to Louw\(^\text{342}\), the court in the Nursingh-judgment conflated the capacity test with intention as well as automatism. He refers to the following statement by the court:\(^\text{343}\)

> “The primary issue in the matter is whether, at the time and in the circumstances, in which he fired those ten shots, he had the mental ability or capacity to know what he was doing and whether what he was doing was wrongful. If he did, then a second issue fails to be considered, which is whether he could have formed the necessary level of intention to constitute the offence of murder.”

According to Louw, the court is incorrect in its formulation of the capacity test in referring to the capacity of the accused to know what he was doing and the capacity to know what he was doing was wrongful. The test for capacity is thus not defined correctly. Louw also refers to other references by the court where the court confuses intention and capacity.\(^\text{344}\)

And also states:\(^\text{345}\)


\(^{343}\) At 332 E-F.

\(^{344}\) At 339 A-B. See note 341 supra.

\(^{345}\) At 339 D.
“That explosion (the shooting of the three deceased) was not the result of a functioning mind, so all its consequences can be regarded as unintentional.”

It should be borne in mind that the capacity enquiry precedes the intention enquiry and that if capacity is absent the enquiry ends and no further investigation as to intention is undertaken. Accordingly, intention and capacity should not be conflated as they are two distinct concepts. Capacity is also not an element of a crime whereas intention is an element of a crime.

11.4 Personality and character of the accused irrelevant when assessing the merit of the defence of non-pathological criminal incapacity

In *S v Kensley*\(^{346}\) the appellant stood trial in the Cape Provincial Division of the Supreme Court on two counts of murder, three of attempted murder, and a contravention of section 39(1)(m) of the Arms and Ammunition Act 75 of 1969, that is, handling a firearm while under the influence of liquor\(^{347}\). He initially pleaded not guilty to all of these offences, claiming to have suffered from amnesia, alternatively that he had temporarily lacked criminal capacity at the relevant time. The latter was not as a result of any mental illness or mental defect as contemplated by section 78(1) of the Criminal Procedure Act, but was attributable to non-pathological factors, namely a combination of severe emotional stress and intoxication. He was convicted of culpable homicide, murder, two counts of attempted murder as well as the charge under the Arms and Ammunition Act. The facts can be summarised as follows:

Adelaide de Sousa, then 18 years old, regarded Yolanda Jallahrs, then 16, as her best friend. Yolanda had been friends with two transvestites, usually called Brooke and Adele. Their actual names were Deon Brown and Adiel Bekko. They, however, dressed and disguised themselves as women and admitted to being homosexual. These four left for the Westridge City nightclub in the early hours of the morning of Saturday 20 May 1989. The four cadged a lift and arrived there

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\(^{346}\) *S v Kensley* 1995 (1) SACR 646 (A). See also Boister, N “General principles of liability – case discussions – Non-pathological Criminal Incapacity” (1995) SACJ vol 8(3) at 367-368.

\(^{347}\) This Act has since be repealed by the Firearms Control Act 6 of 2000.
before closing time. Adelaide then saw an acquaintance, Randall Adams, and asked for transport home. He was there on his motorcycle, so he went to his friend, the appellant, who had arrived earlier by car, and asked him to oblige. It also appeared from the facts that the appellant and the woman, Celeste, with whom the appellant had a relationship and by whom he had a child, were experiencing problems that evening. The appellant agreed to provide a lift. The group moved off to Yolanda’s home in Mitchells Plain, the appellant in his car with Shaun, his other friend, and the two genuine and two ostensible females, Randall following them on his motorcycle. The appellant and Yolanda went off on Randall’s motorcycle to go and get appellant’s tape recorder to provide music in the car. Two further car trips were undertaken, once to buy something to eat and later on to get another bottle of rum. On that particular occasion Shaun drove the appellant’s car. The appellant was in the back seat petting Yolanda who had quite a lot to drink by then. The appellant suggested that they should go to the beach. He transferred his amorous attentions to Brooke, and on arrival at the beach, the pair of them left the car and disappeared into the bushes. Randall took a long swim. At about seven in the morning, they decided to return to Yolanda’s home.

On the way to Yolanda’s home, an argument arose among those seated in the back of the car about the fact that the transvestites were men, not women. It became progressively heated. When the car came to a halt the appellant and the two transvestites disembarked. The appellant was angered by the fact not only that they were men, but that his friends, Shaun and Randall, had kept him in the dark about this fact. Randall walked with Brooke and Adele intending to take Adelaide into the house when he heard a shot go off. He saw the appellant standing in the street at the car with the pistol in his hand. Then the appellant pointed the firearm at them. They scattered towards the house, Randall went over the garden wall and received a glancing wound in the back. Brooke, by then trying to gain entry to the house, turned and was shot in the stomach. Shaun came into the premises via the gate and knelt behind the wall. Adele heard him plead with the appellant not to shoot, but did not see the actual execution. Randall, as he lay wounded in the garden, saw the appellant follow Shaun in, repeatedly demanding to know why he had not been told that the two “girls” were men. He was extremely
angry, spoke in disjointed phrases, pointed the pistol at Shaun’s head and despite Randall’s shouted protest, fired.

Yolanda’s death was the subject of the first count of murder, Shaun’s of the second. The wounding of Randall and Brooke led to a conviction on two of the three counts of attempted murder. On the third count, based on the evidence of only Adele, who admitted to have been very drunk, the appellant was acquitted.

An order was made in terms of section 79 of the Criminal Procedure Act. The ensuing unanimous report in terms of section 79(4)(b), (c) and (d) was to the effect that the appellant was not mentally ill, nor certifiable in terms of the Mental Health Act and fit to stand trial in terms of section 77(1). It is accordingly important to closely scrutinize the expert evidence led in this case.

Dr Greenberg, leader of the panel of experts who had contributed to the assessment of the appellant after the period of observation conducted earlier at the Valkenberg Psychiatric Hospital, was called to testify for the state. Dr Greenberg was called as an expert witness in relation to the defence raised by appellant of non-pathological criminal incapacity at the time of the offences charged. The main thrust of Dr Greenberg’s work and experience is forensic psychiatry. He made it clear that he was familiar with the content of the term “criminal capacity” but that this term as well as the word “automatism” in relation to persons not suffering from any pathology was legal terms and not psychiatric ones. He further explained that psychiatrists do recognise as pathology which could exclude “criminal capacity” as defined in law, outside factors such as a blow to the head, which would not render the recipient certifiable in terms of the Mental Health Act.

He was satisfied that, at the time of the events in question, the appellant suffered from no pathology recognised in psychiatry, he knew what he was doing and was capable of controlling his actions. Though his judgment had been impaired by the consumption of alcohol, his criminal responsibility was still intact. Dr Greenberg

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348 At 652 E.
349 At 652 f.
provided reasons for doubting – though not excluding the possibility – that the appellant had developed amnesia subsequent to the events of the morning. He was of the opinion that poor recollection of the events that occurred could have been due to alcohol, to involuntary suppression of the memory, a defence mechanism precipitated by extreme stressful events, or to malingering. He explained that in the appellant’s case it was not due to any pathology, whether as understood by lawyers or by psychiatrists. There was no history of any loss of memory on previous occasions when the appellant had consumed alcohol, or at all. He explained\(^\text{350}\) that, had the appellant told someone that he had dreamed that he walked along the beach with a woman who turned out to be a man:

“... this could be explained in terms of a subjective recall of his experience, that is that he ...subjectively perceives the events as a dreamlike state because he was intoxicated and because he was emotionally laden ... but ... this is in fact memory recall of events which took place in ... circumstances of alcohol intoxication and related stress factors.”

Dr Greenberg regarded any subsequent amnesia irrelevant to the crucial issue as to whether the appellant at the time of the shootings was capable of appreciating the difference between right and wrong, and of acting in accordance with that appreciation. He stated that alcohol does not cause a person to behave in a particular way, it merely disinhibits him and lessens his concern with the consequences of his behaviour. In the same way factors such as anger or sexual arousal may motivate behaviour or explain how such behaviour could happen, so that the person might have certain impulses, which he would be able to control but choose not to control. He further stated that the liquor the appellant had consumed as well as his rage described by the witnesses, would not have robbed him of his freedom of choice but would have impaired his judgment, probably severely, as to the social consequences of his actions. The appellant’s comments during and immediately after the crucial events and his actions were all consistent with complex goal directed behaviour showing that the higher functions of the brain were involved.

\(^\text{350}\) At 653 D.
Under cross-examination Dr Greenberg\(^{351}\) testified:

“There were factors which were important in the eventual behaviour of the accused ... These factors were the alcohol, the sexual disinhibition or ... probable sexual arousal, the anger of being deceived, the stress in the (appellant’s) personal life at the time surrounding these alleged offences, both financial and personal. I think these factors are all relevant in terms of the (appellant’s) mental state. However, in terms of his criminal responsibility, or his capacity to be responsible or appreciate his actions and act accordingly ... (this) was still intact.”

He also testified that for total loss of control due to intoxication, the intoxicated person would be so far gone that he would lack the ability to indulge in goal directed activity. When Dr Greenberg was asked as to the fact that the appellant’s conduct had been contrary to what was regarded as being his normal personality, Dr Greenberg said that little could be deduced from that. He concluded by saying that the situation in which the appellant had found himself that morning, was in itself not normal. With regards to the appellant’s allegation of amnesia, no direct evidence was presented by the defence to counter that of the State as to the events on which the charges were based.\(^{352}\)

The main defence witness was Dr AF Teggin, a psychiatrist in private practice who assessed the appellant psychiatrically. Ms Park, a clinical psychologist in private practice, also performed an assessment on the appellant. The appellant was referred to Ms Park by Dr Teggin for a personality assessment. She spent between three and a half and four hours with the appellant in the course of two consultations. Her description of the appellant was as follows: \(^{353}\)

“.......an emotionally restricted person who could tend to conform to the needs and expectations of others rather than experience ease in expression of his

\(^{351}\) At 653 H-J.  
\(^{352}\) At 656 F.  
\(^{353}\) At 657 D-E.
own feelings and emotional life; ... who used ... alcohol as a coping situation
to cope with emotional stresses in any better way ...

His lifelong emotional suppression generated an escalation of unexpressed
anger and resentments, which under normal situations remained within
strong conscious control."

The appellant’s conduct was described by the State witnesses to be in complete
contradiction to this personality profile.

During cross-examination, Ms Park conceded that she had not consulted any
collateral sources of information but relied on what the appellant himself had told
her, that the team at Valkenberg Psychiatric Hospital had had better opportunities
of assessing than she had and that her impression was that, though able at the
time of the events in question to distinguish between right and wrong, the
appellant “actually experienced quite a considerable degree ... (of) loss of
control.”354 She expressed the possibility that the loss of control might have been
total.

Dr Teggin met the appellant on three separate occasions, the duration of such
sessions being approximately three to four hours. He had perused Ms Park’s
report as well as that of Dr Greenberg. He submitted that the question of amnesia
was a totally separate issue from that of criminal capacity and that the alleged
dream to which the appellant testified was probably a partial memory.355

The major discrepancy between his and Dr Greenberg’s evidence, lies in the fact
that in Dr Teggin’s view a person may consume alcohol to a point where even
though aware of his surrounding circumstances, he loses self-control without
necessarily being stuporous or comatose. Due to the fact that the appellant’s
conduct had been quite out of character, he was of the view356 that the
disinhibitory effect of alcohol brought this to the fore:

354 At 657 F.
355 At 657 G.
356 At 657 I.
“... a lot of emotional reactions which are not related in any way to the events of that evening but had in fact been bottled up over months, if not years.”

He further accepted the possibility in theory that in a situation of extreme anger an individual might be aware of what he is doing and that it is wrong, but in the same time lose all ability to control his actions. In Dr Teggin’s view, the appellant was probably aware of what he was doing but lacked control. Such loss of control may range from partial to total. Although it was for the court to determine where the appellant’s loss lay within that range, Dr Teggin was of the view that:

“... on the probabilities ... the accused was not able to stop himself.”

In the course of the judgment Van den Heever JA noted that the onus in cases where criminal capacity falls to be assessed burdens the State to prove beyond reasonable doubt that an accused could not only distinguish between right and wrong but also that he or she was capable of acting in accordance with that distinction and those decisions cannot be construed in such a manner that the ipse dixit of an accused that in the given situation he or she was unable to control himself must lead to an acquittal.

Van den Heever in addition held:

“Criminal law for purposes of conviction – sentence may well be a different matter – constitutes a set of norms applicable to sane adult members of society in general, not different norms depending on the personality of the offender. Then virtue would be punished and indiscipline rewarded: the

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357 When Dr Teggin was asked as to why he refers to that as a theoretical possibility he stated: “Where I see that in its commonest situation is men who beat up their wives, usually in a situation of alcohol intoxication coupled with feelings of jealousy which may be morbid jealousy. And I have often had this described to me by such men who are extremely remorseful thereafter and will describe how they were carried away in rage and were beating their wife in a goal-directed way, inflicting damage to her, but completely unable to stop themselves.”

358 At 658 D.

359 At 658 F-J.

360 Ibid.
short tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do ...

It follows that the evidence, on which a defence of sane criminal incapacity due to intense emotion is based, should be viewed with circumspection.”

Van den Heever JA held that from the evidence it was clear that the appellant was very angry. It was also held that the evidence painted a picture of goal-directed behaviour which was sufficiently complicated as was also pointed out by Dr Greenberg and which required conscious intellectual effort. It was further found that Dr Teggin’s evidence that the appellant’s goal-directed behaviour showed impaired control rather than total loss of control was founded primarily on the fact that the appellant’s conduct was completely out of what he perceived to be the appellant’s character.361 It was held that one cannot state what his “normal” reaction should be in a totally abnormal situation.

The court accordingly held that in the circumstances the State had discharged its onus and the appellant had been correctly convicted. The court held further that the trial court had not erred in imposing the sentence or in holding that a non-custodial sentence would not take adequate account of the appellant’s misconduct or satisfy the natural indignation of society at such conduct. The appeal was dismissed.

• Reflections on the Kensley-decision

This decision serves as a confirmation that the ipse dixit of an accused is not sufficient for a successful reliance on the defence of non-pathological criminal incapacity. A proper foundation has to be established. It goes without saying that

361 At 659 G.
in order to establish a sound factual foundation, expert psychiatric evidence is of pivotal importance.

Another important aspect of the *Kensley*-decision is that Van den Heever JA noted that the expert called on behalf of the appellant, Dr Teggin, based his opinion to a great extent on what he perceived to be the character of the appellant. Dr Teggin also stated that the appellant’s conduct on the day of the shooting had been atypical in that he had never reacted this way. It is clear from the report that this evidence was hardly convincing. The court favoured the evidence of Dr Greenberg. Van den Heever JA, as mentioned above, also noted that Criminal Law cannot set different norms depending on the personality of the offender.

Boister\textsuperscript{362} submits that what Van den Heever JA appears to have been saying in the *Kensley*-decision is that an offender’s personality defects will not be operative in establishing a defence of non-pathological criminal incapacity. Instead, his lack of self-control in difficult situations is tested against the assumed capacity of the rest of the members of society to control themselves in such situations – his subjective inability is measured against a normative standard. The question that could be asked is whether the subjective enquiry into criminal capacity should pave a way for a normative evaluation – that is where the conduct of the accused is measured against a standard of reasonableness – thus how a reasonable person would have acted under the same emotional stress.

\textbf{11.5 Sane automatism distinguished from non-pathological criminal incapacity – expert evidence should pertain to the particular defence raised}

In *S v Moses*\textsuperscript{363} the important role of expert evidence was again emphasised. This case provides an excellent example of the weight attached to expert evidence as well as the principle of the court properly weighing the expert evidence of the

\textsuperscript{362} Boister (1995) SACJ supra note 346 at 368.

\textsuperscript{363} *S v Moses* 1996 (1) SACR 701 (C).
defence to that of the State in reaching an informed decision. The facts were the following:

The accused, Mr Christopher Ralph Moses, aged 24, was indicted on two charges, namely murder and robbery. He pleaded not guilty to both. His plea statement in terms of section 115 of the Criminal Procedure Act was handed to the court. In his plea he admitted that he killed Gerhard Pretorius, the deceased, on 27 January 1995. He stated that he was extremely provoked by the deceased who told him that he (the deceased) had AIDS just after they had unprotected anal intercourse. He was provoked to an extent that he lost control over his actions. He thus raised provocation and more specifically non-pathological criminal incapacity as a defence. The accused was acquitted on the robbery charge as there was insufficient evidence in that regard.

The deceased was killed by the accused on Friday 27 January 1995 at his flat in Sea Point. His body was discovered by Mr Hawtey, the caretaker at Selbourne Flats, Rocklands Road, Sea Point on Tuesday 31 January 1995. The following facts were common cause:

(a) That the deceased and the accused were homosexual lovers;
(b) that the deceased was HIV positive even though there was no evidence that he had full blown AIDS;
(c) that the post-mortem examination on the corpse of the deceased was performed by Professor Knobel on 1 February 1995;
(d) that the deceased suffered no further injuries subsequent to the infliction of the wounds until such time as an autopsy was performed on the deceased; and
(e) that the deceased died as a consequence of an incised wound of the throat through the larynx and an extensive head injury and the consequences thereof.364

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364 At 702 F-H.
The accused was one of seven children. After he matriculated he obtained a bursary to study law and also obtained entrance at the University of the Western Cape. He could not complete his studies due to the fact that both of his sisters fell pregnant and consequently he had to support his family.

The accused was sexually abused by his father as a child. He also testified that when he was young he was “daddy’s little boy”, his favourite in the family. He did not, however, reveal this abuse to his mother because he feared that his father would assault his mother as he did on previous occasions. The accused was also a child prostitute for a long period. When his father passed away, the accused was overcome by feelings of anger and betrayal towards his father. It was also common cause that the accused was homosexual. When he divulged this to his mother at the age of 21, she was very upset about it and told him to leave the common home and never return again. The accused was very angry about this as he felt that he had sacrificed his future for his family. Thereafter he went into a rage and literally smashed his mother’s house. He also tried to cut his wrists as he did not feel like living anymore and he felt that his family had not appreciated what he had done for them. The accused also at one stage smashed his car. The result was that the car was a write-off. After he had been kicked out, the accused was practically homeless. Sometimes he would sleep in the streets and at one stage he also stayed in a shack.

The accused met the deceased at the beginning of November 1994. They developed a relationship. It was physical to a point, but there was no physical penetration. The deceased showed love and concern and the accused saw the deceased as an escape route from his past. The deceased indicated to the accused that he wanted to go overseas at the end of 1995 or beginning of 1996. The accused then proposed to buy a car from the deceased, but the accused had no money at that stage. The deceased was willing to sell the car to the accused if the accused would sleep with him. The accused and the deceased signed an agreement of sale in terms of which the car was sold to the accused for R12 000.

365  At 702 I-J.
366  At 703 I-J.
On the night in question both the accused and the deceased went to the deceased’s flat. The accused went to the deceased’s flat in order to provide the deceased with his part of the deal, which was sexual intercourse. The deceased consumed liquor and the accused only a soft drink. They kissed and hugged whereafter they proceeded to the bedroom. The deceased anally penetrated the accused. This was a very painful experience to the accused to the extent that he pushed the deceased off. The deceased then suddenly blurted out that he had Aids. Thereafter the accused became very angry as he thought that he would die a horrible death. He testified that he was not sure of everything that went through his mind but he was angry and he felt much betrayed as he had loved the deceased. He then reached for an ornament next to the door. As he picked it up the ornament broke and he let it go. He was angry at that time because he hated the deceased for abusing his trust and not confiding in him that he had Aids. The experience of that night reminded him of how he was sexually abused by his father in the past. He then ran to the lounge and picked up a black cat ornament. He went back to the deceased in the bedroom. At that time the deceased was motioning backwards towards the bed as the accused moved in. The accused hit him on the head with the cat. As he hit the deceased the thoughts were still flooding his mind. He was thinking of how he was going to die a horrible death and that his future had come to an end. He even thought of not living anymore. He did not feel in control of things at that stage. He testified that he could see what he was doing, but that he could not control himself. The accused struck the deceased twice with the black cat ornament. The accused then ran to the kitchen and got hold of a small knife. He ran back to the deceased’s bedroom. The deceased at that time was in the process of getting up. The accused stabbed the deceased in his side while the latter attempted to get up. The deceased moved his hand as if to strike him. The accused then ran back to the kitchen and got hold of a big knife. Thereafter he ran back to the deceased’s bedroom and cut the deceased’s throat and wrists.

The accused testified that when he cut the deceased’s throat and wrists, he could see what he was doing but he could not stop himself. The accused also

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367 At 705 G-H.
368 Ibid.
testified that after seeing that the deceased was dead he was shocked at what he did. After a while he got into the car and drove off. As he drove towards Hout Bay, he picked up a hitchhiker near Camps Bay, Mr Laubscher. He asked Mr Laubscher whether or not he was willing to engage in oral sex with him. Mr Laubscher refused and the accused dropped him off and drove home.

With regards to the credibility of the accused, the court per Hlope J was satisfied that he made a favourable impression and that his evidence was favourable, reliable and truthful.369

In support of the defence of non-pathological criminal incapacity flowing from extreme provocation, the defence led two expert witnesses, namely Mr Yodaiken, a clinical psychologist and Dr Gittleson, a psychiatrist. It is necessary to first discuss Mr Yodaiken’s evidence.370

Mr Yodaiken testified that he is a practising clinical psychologist who has been practising as such for 20 years. He is used to forensic work and has appeared in custody matters, murder trials and fraud cases. He testified that he had conducted various interviews with the accused, Mr Moses, amounting to at least ten hours of quality time.371 He also told the court that three psychometric tests were conducted with the accused. These were Thematic Apperception Tests, which was administered by Ms DC Hargovan (also a clinical psychologist), the Milton Clinical Multi-axial Inventory-II as well as the Rorschach Ink Blot Test. The psychometric results revealed that the accused derived from a dysfunctional family background characterised by violence, sexual abuse, absence of boundaries and insufficient parental controls. The accused displayed a rage from a very early age when he was about two or three. He also testified that the accused suffered from a borderline personality disorder. Mr Yodaiken further observed that the accused’s relationships were characterised by a strong need for affection with a fear of rejection. As soon as he believes that he is being rejected, he reacts with rage.

369 At 708 B-F.
370 At 708 H-J and 709 A-I.
371 At 708 G-J.
Mr Yodaiken further testified that the accused is extremely impulsive and has difficulty in controlling his impulses\textsuperscript{372}. He was clearly a disturbed personality who suffered due to his background. When provoked his controls do break down and he discharges in a raged and uncontrolled manner. As a result of his personality structure, the accused would be easily provoked particularly when he himself is vulnerable as a result of stress, anxiety, depression or when he is affectionately attached to another. Mr Yodaiken stated that the difference between a normal personality and the accused lies in the vulnerability to the stimulus and the emotional and impulse controls\textsuperscript{373}. In the accused’s case he was likely, if and when extremely provoked, to have known what he was doing but would have been unable to stop himself.

Mr Yodaiken told the court that the accused had formed an attachment with the deceased during the two months in which they had known each other\textsuperscript{374}. The deceased was kind, considerate and caring. He provided the accused with many of the experiences which he had longed for and the accused attached affectionately to him. In this attachment, which is characteristic of his personality, he had come to idealise the deceased who he perceived to be the ideal person. When the deceased accordingly told him that he had Aids, this would have completely destroyed the image and trust that the accused had built up of the deceased and, in the light of the accused’s personality, the impact of this was in all likelihood so devastating that it collapsed his controls.

Mr Yodaiken did not contend that the accused was acting in a state of automatism during the killing. When asked to comment on the different weapons used to inflict injuries on the deceased, he stated that to him the two acts, that is hitting the deceased with a blunt object and the stabbing, were in fact one\textsuperscript{375}.

\textsuperscript{372} At 709 B-C.
\textsuperscript{373} At 709 C-E.
\textsuperscript{374} At 709 E-F.
\textsuperscript{375} At 709 H-I.
It is now important to take a look at Dr Gittleson's evidence. Dr Gittleson compiled a comprehensive report. His evidence corroborated that of Mr Yodaiken in material respects. Dr Gittleson told the court that immediately prior to the killing the accused was feeling sad. Dr Gittleson testified that he believed that the accused knew what he was doing at the time of the killing. He would have had the capacity to foresee that the deceased would be killed. However, his capacity to exert the normal degree of control over his actions and also to consider his behaviour in the light of what was wrong was significantly impaired at the time of the killing.

Dr Gittleson further testified that the accused was in a state of rage and the reason for the rage was that he felt devastated by what the deceased had told him. He was also extremely hurt by the manner in which the deceased had made love to him. It left him in pain, abused and not loved by the deceased. He also testified that less consciously the accused was reacting not just with a sense of rage at what the deceased had done, but the deceased's conduct also triggered feelings that belonged to his relationship with his father. Dr Gittleson stressed that it was a combination of the factors alluded to above together with the “extraordinary stimulus”, namely being told by the deceased that he had Aids, which led to a state of rage reaction.

Dr Gittleson described the extraordinary stimulus as follows:

“It was not a trigger that would be part of a normal living. I don’t know how many people have experienced the situation where they have been first of all made to feel bad about a sexual experience they have just had. He felt abused. He felt that he was not gentle, not caring, unloving and then to be told by his partner that the partner has Aids. I mean I find that extraordinary. I don’t think that many people have ever been in such a situation. ... I think everybody would react with varying degrees of anger, and just how much anger depends on that individual person.”

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376 At 709 J and 710 A-J.
377 At 710 G.
Dr Gittleson testified further that when a person is in a state of rage one’s capacity to retain control is definitely impaired\textsuperscript{378}. With specific reference to the accused, it was possible for a state of rage to have continued to such a degree that loss of control or partial loss of control, lasted throughout the time that the killing took place. During the killing the accused’s capacity to stop himself and to control his behaviour in accordance with what he knew was right and wrong, was impaired. Dr Gittleson also stated that a rage episode would rarely last for longer than minutes and that once that episode of minutes is over, a person can quite quickly revert to a relatively normal level of functioning.

Against the evidence of Mr Yodaiken and Dr Gittleson, was the evidence of Dr Jedaar, the state psychiatrist attached to the forensic unit at Valkenberg Psychiatric Hospital. After the defence led expert evidence, the State applied to reopen its case in order to lead expert evidence in rebuttal in which event Dr Jedaar testified. Dr Jedaar’s evidence was the following:\textsuperscript{379}

He testified that a person can never lose control except in a state of automatism, or other pathological states. He testified that the ability to appreciate the wrongfullness of an act is a cognitive function. Conduct in a state of automatism is automatic, involuntary, reflexive, uncontrolled, unconscious and not goal-directed or motor-controlled where the person is in a dissociative state. A state of automatism also requires a trigger event which unleashes an overwhelming response and automatism is followed by total amnesia because of the fact that the person is not able to register his conduct during the state of automatism.

Dr Jedaar concluded that the accused had the cognitive appreciation of the wrongfullness of his conduct in the killing of the deceased and was intellectually aware of the right-or wrongfullness of his conduct. Dr Jedaar stated that the accused’s conduct during the killing was not uncontrolled or involuntary and the killing was not committed during a state of automatism. Dr Jedaar referred to the accused’s conduct at the time of the killing and testified that each and every one of the acts amounted to conscious goal-directed and controlled behaviour which was

\textsuperscript{378} At 710 H-I.
\textsuperscript{379} At 711 C-J.
not consistent with a dissociative state and accordingly did not fulfil the criteria for sane automatism. With regard to the evidence of Dr Jedaar the court per Hlope J held the following:

“The problem with Dr Jedaar’s evidence, with respect, is that it flies in the face of South African law. According to our modern law, criminal capacity has two legs, namely the ability to decide between right and wrong (that is the cognitive appreciation), and the ability to act in accordance with that appreciation. Mr Moses’ defence is that, due to extreme provocation, he was unable to control himself. It was never part of his defence that he could not appreciate what he was doing. He could appreciate what he was doing but he could not stop. He was provoked to an extent that he lost control over his actions, that is non-pathological criminal incapacity which is a recognised defence in South African law.”

The court held the following with regard to the weight attached to the expert evidence:

“In our view the evidence of Mr Yodaiken and that of Dr Gittleson is preferable to that of Dr Jedaar. Both defence experts are independent and have investigated the accused’s background extensively and spent far more quality time than Dr Jedaar. Dr Jedaar, as has been pointed out above, also made important concessions such as that the accused is suffering from a personality disorder. He conceded that a person who suffers from such

380 With reference to the accused’s conduct Dr Jedaar referred to the following acts:
(1) Attempting to pick up an ornament in the bedroom.
(2) Running to the lounge to find another weapon.
(3) Picking up the black cat ornament.
(4) Returning to the bedroom with the ornament.
(5) Forcing open the door of the bedroom.
(6) Hitting the deceased twice with the ornament.
(7) Running to the kitchen to find another weapon.
(8) Picking up a knife in the kitchen.
(9) Returning to the bedroom with the knife.
(10) Stabbing the deceased with the knife.
(11) Running back to the kitchen to locate yet another weapon.
(12) Finding a larger knife.
(13) Returning to the bedroom with the knife.
(14) Cutting the deceased’s neck and wrists.
381 At 712 A-B.
382 At 712 H-I.
personality disorder would have a fluctuation of mood state with frequent
expressions of anger.

... the main problem with Dr Jedaar’s evidence is that it flies in the face of
South African law and that the bulk thereof was directed at showing that the
accused did not act in a state of sane automatism at the time of the killing.
That is not the issue. To a large extent therefore, his evidence was not much
help to this court. We therefore have no hesitation in rejecting Dr Jedaar’s
evidence and accepting that of the defence experts.

In our view a proper basis for accepting defence experts’ evidence has been
laid.”383

With regard to criminal incapacity Hlope J noted that it has repeatedly been
reiterated that defences such as amnesia, automatism and non-pathological
criminal incapacity should be carefully scrutinised384. The fact that the latter
defences are supported by medical evidence, although of great assistance to the
Court, will not necessarily relieve the Court from its duty of scrutinising them
carefully. The latter is due to the fact that such medical evidence is often based
upon the hypothesis that the accused has given a truthful account of the events in
question385.

The court rejected the State’s argument to the effect that the accused did not act
in a state of sane automatism and held that it bared no relation to the case.

The court in this case takes a firm stance that the test for criminal capacity is
purely subjective:386

“Thus the law is clearly to the effect that where provocation and emotional
stress are raised as defence, it is a subjective test of capacity without any
normative evaluation of how a reasonable person would have acted under

383 At 712 J-713 A.
384 At 713 B.
385 Ibid.
386 At 714 B.
the same strain and stress. What matters is what was going through the accused’s mind at the relevant time.”

The court accordingly made the following findings\textsuperscript{387}:

(a) That the accused has a history of poor control and anger.
(b) That the accused killed a person whom he cared for and saw as a “way out” of his past. He clearly had no motive to kill the deceased and it was not a premeditated killing.
(c) The killing itself was a crystallisation of a number of factors such as the suppressed anger relating to the accused’s dysfunctional family background and sexual abuse by his father, equating the deceased with his father and the sense of betrayal, the accused’s vulnerability at the time of the killing, his symptoms of severe depression and the belief that he would die a horrible death.
(d) The expert evidence by Dr Gittleson and Mr Yodaiken and the vital concessions made by Dr Jedaar supported a finding that it was reasonably possibly true that the accused lacked capacity at the time of the killing.
(e) The State had failed to discharge the onus resting on it to prove beyond reasonable doubt that the accused had the requisite criminal capacity.
(f) The accused was acquitted.

It is clear that this case did not centre on the first leg of the inquiry into criminal capacity. The guilt or innocence of the accused rather focused on the question as to whether the accused could control his action or not. Accordingly it focused on the conative function of the mind.

- Reflections on the Moses-decision

Various authors have commented on the Moses-decision given by Hlope J. The main arguments will be summarized.

\textsuperscript{387} At 714 D-H.
It is interesting that Boister\textsuperscript{388} discusses the importance that the psychologist and psychiatrist, who gave expert testimony on behalf of the appellant, attached to the effect the deceased’s revelation of his HIV status had on the accused. When the deceased told the accused that he had Aids it completely destroyed the trust and image that the accused had built up of the deceased. As Boister notes, the defence psychiatrist described it as a combination of factors coupled with the “extraordinary stimulus” of being told by the deceased that he had Aids which led to a state of rage reaction.\textsuperscript{389} The psychiatrist called by the State was, however, of the opinion that a person can never lose control except in a state of automatism, and it was clear that the accused was not operating in a state of automatism. Accordingly, if one views this contention it means that while the accused was still able to function cognitively or understand what he was doing, he was also functioning cognitively or executing a choice when he chose to kill the deceased.\textsuperscript{390} This argument thus denies the defence of criminal incapacity. Hlope J, however, noted:

“... it flies in the face of South African law.”\textsuperscript{391}

According to Boister\textsuperscript{392} the court’s circular reasoning in this regard ignores the fact that the defence of temporary non-pathological mental incapacity is rooted in psychology. Boister notes that the crucial aspect of the defence of temporary non-pathological criminal incapacity is not its psychological validity but its legal validity.\textsuperscript{393}

According to De Vos\textsuperscript{394} the judgment in Moses seems to conflate two different scenarios: on the one hand, the case where an accused, owing to his volatile and emotional nature, acts criminally because of a lack of sufficient self-control, and, on the other where an accused through a long series of events, finds him or herself in a state where there has been a complete disintegration of his or her mental capacity.

\textsuperscript{389} At 710 G (as quoted in the discussion of the decision in Moses supra).
\textsuperscript{390} Boister (1996) SACJ supra note 388 at 372.
\textsuperscript{391} At 712 A.
\textsuperscript{392} Boister (1996) SACJ supra note 388 at 373.
\textsuperscript{393} Boister (1996) SACJ supra note 388 at 373.
\textsuperscript{394} De Vos, P “S v Moses 1996 (1) SACR 701 (C) – Criminal capacity, provocation and HIV” (1996) SACJ at 354.
controls and therefore a lack of criminal capacity. According to De Vos the reason for this confusion can be found in the court’s misunderstanding of the true nature of the second leg of the criminal capacity test, in other words the conative aspect of criminal capacity. According to De Vos, this conative function of the mind which, when affected, excludes capacity, must be distinguished from the affective function of the mind which, when affected, does not automatically have any influence on the criminal capacity of the perpetrator. The affective function relates to a person’s feelings and emotions and range from the pleasurable or unpleasant, barely perceptible, feelings of hopeful anticipation or disappointment to the most intense emotions of hatred, fury and jealousy. Where a person’s affective function has been influenced by provocation or other factors it will not have a direct bearing on the criminal capacity of the accused. De Vos contends that the court failed to make a distinction between uncontrollable actions (which must lead to acquittal) and actions which are controllable, but which the accused failed to control. He accordingly submits that a person can only lack criminal capacity if it is found by the court that his actions were uncontrollable due to a complete disintegration of his emotions.

According to De Vos the fact that Moses ran to the lounge and picked up the ornament, the fact that he later went to the kitchen to fetch a knife and again later went back to the kitchen to fetch a bigger knife, were all clear indications that a volitional element was present in Moses’ actions. De Vos notes:

“Never before in a South African court has a man been acquitted of murder where he flew into a sudden fit of rage and then systematically set about killing his victim. Never before, in the long line of cases in which the non-pathological criminal incapacity defence was developed, has a person been acquitted who became emotionally disturbed for only a brief period before and during the act. In case after case in which the defence was raised, or in which the court was prepared at least to consider it seriously, X’s act was preceded by a very long period — months or years — in which his level of emotional stress increased progressively.”

395  Ibid.
396  At 358.
According to De Vos, the acceptance of the Moses-decision will give rise to a great danger that the non-pathological criminal incapacity defence will be abused by quick tempered individuals who would claim that they lacked criminal capacity as a result of being provoked\textsuperscript{397}. Volatile members of society could then accordingly be acquitted for acts perpetrated in a state of rage when the law should in effect aim to punish those who fail to control their impulses and infringe upon the rights of others in the process\textsuperscript{398}.

According to De Vos the court erred in its acquittal of Moses on the basis of an absence of non-pathological criminal incapacity. He submits that from the evidence of the expert witnesses, which was Dr Gittleson and Mr Yodaiken, Moses had diminished self-control and therefore diminished capacity, and should have been convicted\textsuperscript{399}. He refers to the testimony of Mr Yodaiken who testified that the impact of the deceased telling the accused that he was HIV positive was in all likelihood so devastating that it collapsed his controls and although he might have known what he was doing, he would have been unable to stop himself. According to Dr Gittleson, his capacity to exert the normal degree of control over his actions and also to consider his behaviour in the light of what was wrong was significantly impaired at the time of the killing. According to De Vos Moses was acquitted because his control over his actions was significantly impaired, not because it was completely absent\textsuperscript{400}.

De Vos’s argument holds merit if one views the evidence of Moses after the revelation of the deceased’s HIV status. It must be borne in mind that the psychiatrist and psychologists testifying in a matter such as this, can probably very seldom state a definite yes or no, in this case whether Moses’s control over his actions was completely absent or sufficiently impaired, in order for the second leg to fall away and subsequently to result in the absence of criminal capacity. Each case has to be considered on its own merits. It is a pity that the expert evidence put forward on behalf of the State was not canvassed in a more appropriate

\begin{footnotes}
\item[397] De Vos (1996) \textit{SACJ supra} note 394 at 358.
\item[398] \textit{Ibid}.
\item[399] De Vos (1996) \textit{SACJ supra} note 394 at 359.
\item[400] De Vos (1996) \textit{SACJ supra} note 394 at 359-360.
\end{footnotes}
manner. “Significantly impaired” could, however, also be construed as sufficiently enough to render the second leg of the capacity test to fall away. The latter is merely an alternative perspective to gather more clarity as to the approach most probably applied by the court in this regard. It should also be borne in mind that this illustrates the principle that the court should draw its own inferences from the psychiatric evidence tendered. The psychiatrist or psychologist tendering expert evidence are merely assisting the court in delivering judgment and are not appointed to deliver judgment on final issues which only the court can decide upon.

With reference to both the Nursingh-decision as well as the Moses-decision in respect of the provocation defence, Louw\(^{401}\) takes the view that in both these cases the series of goal-directed acts constituted only one act in each case. In the Nursingh-judgment the court noted:\(^{402}\)

“... nor was it possible ..., to distinguish between the three killings on the basis that the mother had caused, provoked the reaction more than the others. It was one and the same eruption, that resulted in the three separate acts. It is really as though one explosion achieved all three deaths.”

In the Moses-decision the court noted:\(^{403}\)

“Mr Yodaiken did not contend that the accused was acting in a state of automatism during the killing. On being asked to comment on the different weapons used to inflict injuries on the deceased, he stated that to him the two facts, that is hitting the deceased with a blunt object and the stabbing, were in fact one. The accused was in an annihilatory rage, a rage which tends to damage or destroy.”

Louw notes that there are at least fourteen instances or factors indicative of goal-directed behaviour.\(^{404}\) According to Louw it is outrageous to describe all of these

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\(^{401}\) Louw (2001) SACJ supra note 1 at 212-213.
\(^{402}\) S v Nursingh supra note 1 at 339 C-D.
\(^{403}\) S v Moses supra note 1 at 709 H-I.

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acts as one in both the *Nursingh* as well as the *Moses*-decisions. According to Louw, the correct finding in both of these cases might have been to find that the accused’s capacities were diminished but not absent. Louw also refers to the evidence of the expert, Dr Gittleson, where he stated that the accused’s capacity to exert normal control over his actions and also to consider his behaviour in the light of what was wrong, was significantly impaired at the time of the killing. The word “impaired” in this context, as stated above, does lead to a possible inference of diminished capacity, rather than lack of capacity. What is further distinctive of this decision is that it is the first case in which a provocation defence resulted in an acquittal where there was no long-term abuse of the accused preceding the killing, either by the deceased or at all. In most of the previous judgments, the final provocative act was the final incident in a long history of abuse.

It should be stressed once again, that in cases involving the defence of criminal incapacity, both the State as well as the defence should retain psychiatric experts to properly assess the accused in order to enlighten the court as to the frame of mind, emotional make-up as well as the particular personal characteristics of the accused at the time of the crime. In the *Moses*-decision, the expert evidence from the State was not strong enough to oppose the expert evidence of the defence. Louw’s article will be discussed more elaborately at a later stage when the *Eadie*-judgment is discussed as this article is canvassed on the backdrop of the decision by Navsa JA.

**11.6 Criminal incapacity should not be confined to a state where mental illness or mental defect is present – emotional factors can also lead to a lack of criminal capacity**

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405 At 710 C-D. Louw (2001) *SACJ* supra note 1 at 215.
406 Louw (2001) *SACJ* supra note 1 at 215 and also 216 where he notes: “The acquittal in *Moses* leaves us with a dangerous precedent. In future, whenever a person flies into an “annihilatory rage” and kills somebody, irrespective of the reason for the rage and the relationship between the accused and the relationship between the accused and the deceased, the killing will be permissible. This subjects society to the whims of the short-tempered. This is wrong. If we follow *Moses* then, unlike in *Eadie*, those who kill in circumstances of road rage, can expect to be acquitted.”
In S v Gesualdo\textsuperscript{407} the facts were as follows. The accused was charged with the murder of Hugo Fernandez. The accused and the deceased were both Spanish speaking Argentinean immigrants who had come to South Africa in search of a better life and met soon after the accused’s arrival in South Africa. The accused had left his wife and four children in Argentina when he came to South Africa and he cared for them deeply. The evidence revealed that the deceased was a dynamic person with many ideals for the making of large sums of money. The accused and the deceased decided to venture into business together. They intended to manufacture a certain type of slipper, buttons and babies’ dummies. The concept of the slipper was that of the accused and accordingly the sample from which they intended to work was supplied by him. Pursuant to the manufacturing he took time off from work to prepare designs and also borrowed money and expended his own savings in developing the project. The relationship between the accused and the deceased, however, deteriorated. A witness, Mr Molina, who was employed by the deceased, stated that the deceased’s greed destroyed the project. The deterioration of their relationship was aggravated by the fact that the deceased was determined to cut the accused out of the slipper project. The deceased registered what was referred to as a patent for the slippers in his own name and, when confronted by the accused, stated that the accused did not have any funds to pay for the registration and had thus been excluded from it\textsuperscript{408}. This was done despite the fact that the accused had already invested considerable funds of his own in the development of the project.

As the business relationship between the two deteriorated, so too did the accused’s composure and mental state. They had engaged in public arguments and the deceased resorted to foul language. There were stormy conversations on the telephone. The deceased had threatened the accused, which resulted in the accused visiting the police for assistance. Two days before the shooting the accused was involved in a discussion with the deceased and became very angry. In the presence of a witness, Mr Molina, he said he would visit the deceased at his factory the following day and that whatever happened, Mr Molina should not get

\textsuperscript{407} S v Gesualdo 1997 (2) SACR 68 (W). See also Boister, N “General Principles of Liability” (1997) SACJ at 315-318.
\textsuperscript{408} At 71 C-E.
involved. Mr Molina further testified that the accused’s anger had been building up progressively as a result of the deceased’s behaviour\textsuperscript{409}. The two experts, Mr Carr and Dr Vorster, testified that the accused’s condition at that stage could be described as deranged\textsuperscript{410}.

The accused testified that on the morning of the shooting he drove around aimlessly. He had his firearm on him. From the time he arrived at work he recalled breaking a machine but recalls nothing of the shooting incident. Mr Molina testified that the accused entered the deceased’s premises carrying a packet in his hand. He pulled a firearm from it and pointed it at the deceased. The deceased taunted the accused and challenged him to discharge the firearm. The accused shot and killed the deceased and pointed the firearm at Mr Molina before running away. The accused was found several hours later wandering around and he did not appear to comprehend why he was being arrested. Mr Molina testified that the accused at the time of the shooting “... seemed totally out of his mind.”\textsuperscript{411}

Mr Molina also explained that he believed that the accused was very angry and not in control of himself. The accused was thereafter referred for psychiatric observation for a period of thirty days which was later renewed for a further thirty days. He was examined repeatedly by Dr Vorster and another psychiatrist. The two psychiatrists had no difficulty in certifying the accused free from mental illness and fit to stand trial.

Dr Vorster, who was in court throughout the proceedings together with Mr Carr, who examined the accused much later, agreed with many of Mr Carr’s findings. The most important findings of Dr Vorster were:\textsuperscript{412}

- No mental illness existed but the accused was in such a state, or so emotionally overwrought, that Dr Vorster was of the view that at the time of

\begin{itemize}
  \item No mental illness existed but the accused was in such a state, or so emotionally overwrought, that Dr Vorster was of the view that at the time of
\end{itemize}

\textsuperscript{409} At 71 H-I.
\textsuperscript{410} At 72 C-D.
\textsuperscript{411} At 73 C.
\textsuperscript{412} At 74 B-E.
the shooting he was in a state of diminished responsibility. She could not state the degree thereof.

- There was no reason to doubt the accused’s honesty, and it was accepted that he was suffering from amnesia which extended to early on the morning prior to the shooting. It was stated that it does not follow from this fact that he was not criminally responsible for his actions at the state of shooting for the amnesia could have been psychogenic. It may thus have had its origin in psychological causes and may have intervened after the shooting as a mental reaction thereto.

- The accused has a repressive personality. Mr Carr’s evidence on the other hand was that this manifests itself as a person who is calm and mild on the surface, who avoids confrontation and may seem tolerant and passive, but who represses these feelings to the extent that when the last straw is laid on the camel’s back, he may suddenly explode with unexpected and extreme violence.

- The accused demonstrated great remorse for what he had done.

The court, per Borchers J, held that the central issue in this case was whether the accused had criminal capacity and was thus responsible for his actions at the time of the shooting. Borchers J noted:\textsuperscript{413}

\begin{quote}
“It is for the accused to lay some basis for the defence of lack of criminal capacity, whereupon the State assumes the onus of proving beyond reasonable doubt that the defence is not reasonably possibly true. Any reasonable doubt which exists on an overview of all the evidence, including that of the expert witnesses, must redound to the accused’s favour.”
\end{quote}

And further:

\begin{quote}
“It goes without saying that a defence of this nature must be carefully scrutinised by the court, and that a court would be unlikely to find that such state may have existed only by virtue of the accused’s \textit{ipsissima verba}. \textsuperscript{413}
\end{quote}

\textsuperscript{413} At 74 F-G.
Nonetheless, this defence is on the same footing as any other defence available to the accused. He carries no onus to prove it.”

It was found that a sufficient basis had been laid in this case.

Mr Carr, who testified on the accused’s behalf, agreed that the accused suffered from no mental illness nor any physical cause which could have resulted in his losing control of himself\(^\text{414}\). He was of the view that it was possible that the accused, at the time of the shooting, had been able to draw the necessary distinction between right and wrong and was thus, to some extent, aware of what he was doing but, he said, it was possible that the accused had not been able to act in accordance with this distinction because, due to emotional causes, he had lost control of himself. He motivates this view by stating that the act itself was out of character with the accused’s usual behaviour though not unexpected in a person with a repressive personality. He stated that the background and build up to the offence had resulted in the accused’s emotions being too high for his rational thought processes to contain them.\(^\text{415}\) Borchers J held that the accused was a truthful witness.\(^\text{416}\)

Dr Vorster was called by the State at the close of the defence’s case in order to present her view on the accused’s state of mind at the time of the shooting. Her views were the following:\(^\text{417}\)

- The accused was not in a state of automatism as he was capable of performing complex actions, taking decisions, and the acts he performed were goal-directed.
- Dr Vorster expressed the view that the accused was in a position to distinguish between right and wrong.

Dr Vorster and Mr Carr differed in opinion as to whether the accused was able to act in accordance with his appreciation of the wrongfulness of his conduct. Mr

\(^{414}\) At 74 B-C.
\(^{415}\) At 75 A-C.
\(^{416}\) At 76 H.
\(^{417}\) At 76 J-77 C.
Carr was of the view that the accused was under such mental oppression that he was unable to control his actions. Dr Vorster, however, stated that a person who suffers from no mental illness and from no physical defects, such as concussion or hypoglycaemia, and who can distinguish between right and wrong, can *ipso facto* control his actions. She stated that this is because he is not in a state of altered consciousness or unconsciousness. With regard to Dr Vorster’s evidence, Borchers J noted:

“While conceding that Dr Vorster is a leading authority in her field, we believe that there is a possible logical hiatus in her reasoning. If it is possible that a person who can distinguish between right and wrong may by virtue of mental illness not be capable of acting in accordance therewith, it seems to us that psychological factors may have the same results. This question was put to Dr Vorster and she responded by saying that psychological factors, such as extreme emotion, cannot cause a person to lose consciousness. But this answer begs the question for it is clear that the accused did not lose consciousness, or act in a state of automatism. The question is whether, while acting consciously, he was able to control what he did. If the human mind is capable of unconsciously creating a retrograde amnesia because the mind cannot tolerate an appreciation of what it had done, it seems to us to be possible that it may also be unable to exercise control over a person’s conscious actions in certain circumstances.”

Dr Vorster stated the reason she was of the view that a person, who suffered from no mental illness and no physical defect such as concussion or hypoglycaemia, and who could not draw a distinction between right and wrong, could not be held to have lost control of his actions, was due to the fact that she could advance no medical, scientific or psychiatric reason for such loss of control. Borchers J held:

418 At 77 D.  
419 At 77 E-F.  
420 At 77 H.  
421 At 77 I.
“We find this evidence very difficult to accept. For many years the courts of this country and of others have accepted that a sane individual (i.e. one free from mental illness), who can distinguish between right and wrong, may be subjected to such mental or emotional pressures that he may not be able to control his actions. He is unable, in other words, to act in accordance with the distinction which he can draw. The law reports abound with decisions to this effect ...”

It was accordingly held that the State had failed to prove that the accused had the mental capacity to commit a criminal act at the time he fired the shots and he was accordingly found not guilty and discharged.

- **Reflections on the Gesualdo-decision**

In this case the role of the two experts is once again brought to the fore. The two experts who testified did not doubt the genuineness of the accused’s amnesia. The psychologist who testified in support of the accused’s case stated that he was to some extent aware of what he was doing and able to distinguish between right and wrong but was unable to act in accordance with that distinction due to the fact that he had lost control of himself. He did not at any stage contend that the accused acted in a state of automatism. Dr Vorster, who testified on behalf of the state, testified that the accused had not acted in a state of automatism as he was capable of taking complex decisions and his actions were goal-directed. The court, similar to the Moses-case, rejected the view of the State psychiatrist on the basis that it flew in the face of previous decisions laid down by the court, where it was held that persons who could distinguish between right and wrong and who had not acted automatically may nevertheless, because of emotional stress, have lost control of their actions to such an extent that they would escape criminal liability.

It is clear that there were thus competing interpretations of the accused’s behaviour. Both the psychologists testifying for the defence as well as Mr Carr and Dr Vorster believed that it was possible that the accused at the time of the shooting satisfied the first leg of the test for criminal capacity – the capacity to
appreciate the wrongfulness of his conduct. There were conflicting views as to the second leg of the test. Mr Carr contended that because the accused’s emotions were too “high for his rational thought – processes to contain them” \(^422\) he was not able to act in accordance with this appreciation. Dr Vorster contended that once the first leg of the test was satisfied, and the accused did not suffer from any pathological condition, the second leg of the test must inadvertently also be satisfied in every case. Her argument in support of the latter contention was that she could advance no medical, scientific or psychiatric reason for such loss of control.

Borchers J noted:\(^423\)

“... In effect, she stated that because she could not find any medically accepted cause for such condition, in her view it did not exist.”

Borchers J, however, differed from this view:\(^424\)

“If it is possible that a person who can distinguish between right and wrong may by virtue of mental illness not be capable of acting in accordance therewith, it seems to us that psychological factors may have the same result.”

The court also stated that South African and other courts have for many years accepted that a person free from mental illness who can appreciate the wrongfulness of his conduct, may be subject to such emotional pressures that he may not be able to control himself in accordance with this appreciation.\(^425\)

What is abundantly clear from Borchers J’s judgment is that the expert evidence tendered by Mr Carr was preferable to the evidence presented by Dr Vorster. Borchers J also made it clear that lack of self-control, in other words the absence

\(^422\)  At 75 A-B. Boister (1997) SACJ supra note 407 at 317.

\(^423\)  At 77 H.

\(^424\)  At 77 E.

of the second leg of criminal capacity, can derive from non-pathological factors in cases where the first leg has been established.

11.7 Lapse of time between commission of crime and mental health assessment – a factor to take into account when assessing the value of expert evidence

A case which serves as an excellent example of conflicting medical opinions within the domain of criminal capacity is the case of *S v Kok*. The facts of the case were the following:

The appellant was charged in the Natal Provincial Division with two counts of murder and one count of attempted murder. At the time of the alleged offences the appellant was a superintendent in the South African Police Service and head of the public order policing unit at Port Shepstone. He pleaded not guilty but was convicted on all three counts by Combrink J and sentenced to ten years’ imprisonment on each of the murder counts and to five years’ imprisonment on the attempted murder charge. The appellant appealed against both conviction and sentence.

From the evidence it appeared that a dispute had arisen between the appellant’s wife and Mrs Botha, the wife of a colleague of the appellant, about the return of two tablecloths. Mrs Botha had instituted proceedings in the Small Claims Court against the appellant’s wife for the return of the tablecloths and was awarded R600 in damages. One afternoon, whilst the appellant was discussing important club matters with two colleagues over a few drinks, he received a call from his wife to the effect that the sheriff was at their house making an inventory. The appellant then returned home and found his wife and disabled son, who suffered from cerebral palsy and who was confined to a wheelchair, in a very distressed state. The appellant collected his pistol and then proceeded to the police station where he removed a R1 rifle, ammunition, hand grenade and a combat jacket from a safe and loaded it into the boot of his car where there had already been a shotgun with

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426 *S v Kok* 2001 (2) SACR 106 (SCA). See also *S v Kok* 1998 (1) SACR 532 (NPD).
a pistol grip. The appellant then proceeded to the home of Mr and Mrs Botha, entered their house and then shot and killed them both. Their son, Marius, emerged from the bathroom and the appellant pointed the shotgun at him but he ran into his bedroom and escaped through a window after breaking the window pane. The appellant fired the shotgun through the bedroom door but the deceased’s son escaped unscathed. The defence raised by the appellant was that, at the relevant time, he lacked the necessary criminal capacity.

In support of this defence reliance was placed to a large extent on the evidence of Dr Futter, a practising psychiatrist, who first saw the appellant a little over a month after the incident. His diagnosis of the appellant was that the appellant was suffering from major depression as well as a condition known as post-traumatic stress disorder.427

He described this disorder as a disorder which has its origin in the person concerned experiencing, witnessing or being confronted by an event or events involving actual or threatened death or serious injury or a threat to his or her physical integrity with a response of intense fear, helplessness or horror.428 The symptoms were said to include recurrent and intrusive distressing recollections of the event, dissociative flash-back episodes, intense psychological distress upon exposure to internal and external cues that symbolize or resemble an aspect of the traumatic event or events, persistent avoidance of such stimuli and persistent symptoms of increased arousal indicated by irritability, outbursts of anger, hyper vigilance and the like.429

According to Dr Futter a further feature of the disorder was “dissociative re-enactments” of the traumatic event or events during which the person in question in effect “acted” in a state of automatism. Based largely on what the appellant recalled and revealed during the course of a number of consultations, Dr Futter concluded that the only explanation for the appellant’s bizarre conduct was that it had to be seen as a “dissociative behavioural re-enactment” of what the police

427  At 109 C-D.
428  At 109 E.
429  At 109 F.
called “house penetrations” which related to a procedure adopted when forcibly entering a house or building with the object of apprehending possibly dangerous occupants.\(^\text{430}\) The appellant’s defence was rejected in the court \textit{a quo}. The trial court, however, found that the appellant acted in a state of “diminished capacity”.

On appeal, Scott JA referred to the evidence of Dr Futter to the effect of a “dissociative re-enactment” arising from a post-traumatic stress disorder as correlating with the legal concept of automatism and also stated that Dr Futter pointed out that the cause of the suggested dissociative disorder or behaviour was not a psychotic disorder.\(^\text{431}\) Dr Futter contended that as all mental disorders were not psychotic illnesses, it was therefore not correct to presume that, because an automatism flows from a mental disorder, the automatism had to be categorised as “insane or psychotic”. In other words provided the automatism is not caused by a psychotic illness or disorder it should be regarded as “sane automatism”. Scott JA was doubtful with regards to this opinion. With reference to section 78(6) of the Criminal Procedure Act\(^\text{432}\), Scott JA stated\(^\text{433}\) that this section makes no reference to “sane automatism”. It was held that this is not a psychiatric term and no more than a useful tag to describe automatism arising from some cause other than a “mental illness” or “mental defect” within the meaning of the section. There is also no indication in the said section that requires the mental illness which results in an absence of criminal responsibility to be an illness of a kind which is categorised as psychotic, such as schizophrenia, before a court is required to direct the accused to be detained in a psychiatric hospital or prison. The only requirement that has to be present is a “mental illness” or “mental defect” which results in the absence of criminal responsibility.\(^\text{434}\) Dr Futter described post-traumatic stress disorder as a mental illness with a pathology that can be demonstrated. The treatment includes the use of various anti-depressants. He was also of the opinion that the appellant should continue with his psychiatric treatment which included both medication and psychotherapy.

\(^{430}\) At 109 H.
\(^{431}\) At 110 A.
\(^{432}\) Which will be discussed in chapter 3 below.
\(^{433}\) At 110 D-F.
\(^{434}\) At 110 F. See also \textit{R v Burgess} (1991) 2 All ER 769 (CA) at 774 C-F.
Scott JA noted:\footnote{At 110 H.} \footnote{At 110 I-J.} \footnote{\textit{Ibid.}} \footnote{\textit{Ibid.}} \footnote{At 114 J.} \footnote{At 115 A.} “... I think, that if the correct finding of the court \textit{a quo} would have been that the appellant was not criminally responsible for the shooting by reason of the condition suggested by Dr Futter, the appropriate order would not have been an acquittal but one in terms of section 78(6) of the Act.”

Scott JA noted that at common law a distinction has been drawn in the past between lack of criminal capacity arising from a pathological disturbance of the mental faculties, whether temporary or permanent, on the one hand and lack of criminal capacity arising from some non-pathological cause of a temporary nature on the other\footnote{At 110 I-J.}. In terms of the presumption of sanity the burden of proof in the case of the former was upon the accused and was to be discharged on a balance of probabilities whilst in the case of the latter, the burden remained on the State to prove criminal capacity beyond reasonable doubt\footnote{Ibid.}. Scott JA notes: “Whether this anomaly can be upheld in our modern law with the enactment of the new Constitution is doubtful.”\footnote{Ibid.}

The day after the shooting, the appellant was sent for observation in terms of section 77 of the Criminal Procedure Act. He was assessed by Dr Dunn, who is the principal psychiatrist at the Midlands Hospital, Pietermaritzburg. Dr Dunn rejected the evidence of Dr Futter in its entirety.\footnote{At 114 J.} When he examined the appellant shortly after the event he observed obvious symptoms of stress which he categorised as “situational, occupational and social”. He found no indication of major depression or post-traumatic stress disorder. He also rejected the notion that the post-traumatic stress disorder could arise from what was described as a “loose and diffuse series of unhappy experiences.”\footnote{At 115 A.} As far as the behaviour of the appellant at the relevant time was concerned, Dr Dunn emphasised its goal-oriented nature and pointed to the account of the incident which the appellant had given him shortly after the event and which not only differed from that given to Dr
Futter but which was also inconsistent with the latter’s hypothesis. In Dr Dunn’s opinion the appellant was not re-enacting some previous event at the time of the shooting. He accepted that the appellant was under a great deal of stress and was suffering from what is colloquially called “burn-out”. Dr Dunn accordingly rejected\textsuperscript{441} the notion that the appellant lacked cognitive control at the relevant time or that he was unable to distinguish right from wrong and act accordingly.

Scott JA held:\textsuperscript{442}

“As correctly observed by the court \textit{a quo} the ultimate inquiry was whether the appellant was criminally responsible for his actions. This is an issue that had to be determined, not by the psychiatrists, but by the Court in the light of all the evidence\textsuperscript{443}. What immediately strikes one is the contrast between the version given to Dr Dunn and the version given more than a month later to Dr Futter and thereafter repeated by the appellant in evidence. The former, which was the appellant’s recollection shortly after the incident, makes it clear that his mood upon arrival at the Bothas’ house was both belligerent and confrontational. Indeed, he recalled going to the front door armed with his shotgun. There can be no doubt he was upset by the emotional state of his wife and his son. He said he lost his temper as a result of something Mrs Botha did or said and then fired first at Mrs Botha and then at her husband. Loss of temper, that is to say a failure to control one’s emotional reactions, is not to be confused with a loss of cognitive control.”

Scott JA accordingly rejected Dr Futter’s contentions as to house penetration and the re-enactment of a house penetration in a dissociative state. The court held that the appellant did have the necessary criminal capacity at the time of the incident and also that the defence of so-called “sane automatism” also had to be rejected. The appeal against sentence also failed.

- Reflections on the \textit{Kok}-decision

\textsuperscript{441} At 115 E-F.
\textsuperscript{442} At 115 G-J.
\textsuperscript{443} This statement by Scott JA is a reiteration of the “ultimate issue” doctrine which will be discussed extensively in Chapter 4 below.
This case is a clear example of two conflicting opinions within the medical profession pertaining to whether the accused or appellant possessed the necessary criminal capacity at the time of the crime.

What is evident from the judgment by Scott JA is that a clear distinction is drawn between pathological and non-pathological criminal incapacity. It is a pity that the court did not shine more light on the contentious issue of burden of proof with regards to the defence of non-pathological criminal incapacity. Scott JA also warns that the decision as to the presence or absence of criminal capacity is to be determined by the court and not the psychiatrists. It is, however, true that the expert evidence in this case played a cardinal role in deliberating as to the accused’s state of mind at the time of the incident. Much weight was attached to the opinion of Dr Dunn.

What is also apparent from this judgment is that a lapse of time can influence the value of expert testimony in the sense that Dr Futter examined the appellant a month after the incident. This lapse of time between the commission of the crime and the eventual assessment can result in the accused’s emotional frame of mind changing due to factors such as remorse setting in which could lead to inferences such as those derived at by Dr Futter. On the other hand, Dr Dunn assessed the appellant the day after the incident at a point in time where the appellant’s true mental state could probably have been ascertained more accurately.

11.8 Accused’s conduct after the commission of the crime

In S v Van der Sandt\textsuperscript{444} the facts were as follows: The accused was charged in the Local Division with murder and theft. He pleaded not guilty. On the charge of murder, the accused relied on the defence of non-pathological criminal incapacity in that, as a result of his mental confusion, he had been unable to distinguish between right and wrong and also that he had been unable to conduct himself in accordance with his appreciation.

\textsuperscript{444} S v Van der Sandt 1998 (2) SACR 627 (WLD).
The accused and the deceased were engaged. They lived together in a flat. The relationship was romantic and generally there was no suggestion that there had ever been any noticeable disharmony between them. The accused told various blatant lies to the deceased and her mother, particularly as to past achievements in an attempt to impress the deceased. One day, after the deceased and the accused had returned from a camping trip, the accused decided to reveal the truth about himself to the deceased. Although the deceased was initially only moderately upset, after a while she abandoned her engagement ring and told the accused that she “no longer wanted him”\textsuperscript{445}. He pleaded for a second chance, whereupon the deceased calmed down. Shortly thereafter the deceased again lost her temper and told the accused to pack his things and leave her. The accused was scared, as the deceased meant the world to him, and he would do anything to retain her affection. Thereafter, according to the evidence of the accused, he remembered nothing. When he again regained his senses, he was standing in the bathroom, with blood on his hands. He suspected that something bad had happened. The deceased was lying on a bed in the bedroom.

She had serious head injuries, which had been inflicted with a metal pipe, and of which she eventually died. After the accused had attempted to make the deceased comfortable on the bed and had clumsily attempted to bandage her wounds, he left the scene in the deceased’s car. He then withdrew money from her bank account and fled to Natal. The withdrawal of the money formed the basis of the theft charge. Before he left, he called the deceased’s mother from a public telephone, and requested her to have an ambulance sent to the flat. After his arrival in Natal the accused decided to commit suicide, but after he had spoken to his mother over the telephone he surrendered himself to the police.

In respect of the accused’s mental state at the time of the incident, Mr Kobus Truter, a clinical psychologist, tendered evidence on behalf of the accused, and Mrs Annelies Kramer, also a clinical psychologist, testified on behalf of the State. The two psychologists unanimously held that the accused did not suffer from any

\textsuperscript{445} At 634 D-E.
mental illness or mental defect at the time of the incident. They also unanimously found that the accused had the capacity to distinguish between right and wrong and also to act in accordance with such appreciation. In the course of the judgment delivered by Labuschagne J, certain general principles applicable to the defence of non-pathological criminal incapacity were once again canvassed.

It was held by Labuschagne J that two material psychological characteristics arose for consideration, namely the accused’s ability to distinguish between right and wrong and to conduct himself in accordance with the ability to distinguish between right and wrong, in that he possessed the power to resist the temptation to act unlawfully. If either of those psychological characteristics was absent, the actor lacked criminal capacity. In general, the law presumed that a person had the requisite criminal capacity. The court also held that the onus to prove all the required elements of the crime charged, in a case where the defence of non-pathological criminal incapacity is raised, rests on the State. Although no onus is placed on the accused in cases of this nature, it is still required of the accused to establish a factual foundation for such defence. This defence should also be viewed with caution.

It was held that ultimately it was the court’s task, with reference not only to any expert evidence, but to the totality of the evidence, to make a finding about the question whether or not a particular accused was criminally liable.

It was also held that where the case was concerned with a mental illness or mental defect in the form of a pathological disturbance, psychiatric evidence was indispensable, but in the case of a defence of non-pathological criminal incapacity that was not so: the court was in the latter instance itself able to determine, on the evidence as a whole, whether the defence had been established. The accused’s

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446 At 637 E-F.
447 At 635 E-H. The court reaffirms the quote from the S v Laubscher decision supra note 1 by Joubert JA at 166 G-167 A.
448 At 635 I. See also S v Shivute supra note 1 at 660 F.
449 At 636 A. See also S v Calitz supra note 1 at 119 I; S v Wiid supra note 1 at 564E-F.
450 At 636 B. See also S v Ingram 1995 (1) SACR 1 (A) at 4 1-5 B where Smalberger JA held: “A matter such as the present calls for a careful consideration of the evidence.” See also S v Kensley supra note 1 at 658 G.
451 At 636 F.
criminal liability had to be considered in the light of the facts and circumstances which gave rise to the incident in question, as well as the accused’s conduct before, during and after the attack upon the deceased, and of the evidence of the psychologists.\textsuperscript{452}

The court per Labuschagne J held that the accused had the capacity to distinguish between right and wrong. This view was supported by both Mrs Kramer and Mr Truter. Mr Truter, however, later changed his evidence and stated that the accused could not distinguish between right and wrong and did not have the capacity to act in accordance with such appreciation. In the light of the lengthy consultations Mr Truter had with the accused as well as other factors, the court rejected this statement. The court also indicated certain aspects of the accused’s behaviour that indicated goal-directed conscious behaviour.\textsuperscript{453} The court also held

\textsuperscript{452} At 636 F-H. Labuschagne J also refers to the judgment of \textit{S v Kok}, an unreported decision case nr 22/97, dated 11 August 1997 where Borchers J laid down the requirements for a defence of an emotional storm: “In order therefore to ascertain whether such person was capable of distinguishing between right and wrong, and of acting in accordance with that distinction, Dr Stevenson postulates that certain features must be present for such conclusion to be reached, or at least for that conclusion to be reasonably possible for that is all that the law requires for an acquittal. These factors are really based upon a common sense approach to the problem. They are firstly, that there must be some trigger to cause the emotional storm, and, if such exists, one asks the question whether it was indeed of sufficient magnitude, secondly, that there should be a period of amnesia, which should commence with the trigger and not precede it, thirdly, that the actions performed during the period of amnesia should be involuntary, uncontrolled and not goal-directed, and fourthly, that when sufficient self-control and volition return to the person he should be bewildered and not know what had passed immediately before. Dr Stevenson cautioned that a defence of this nature should be carefully scrutinized, and so did Mr McKelsey for the state ... In order to test whether the alleged condition in fact existed, Dr Stevenson spoke of an objective test, “a template” he called it, derived from a summary of cases against which the conduct of the actor in the present case should be measured. I have some sympathy for this approach, for conduct may depart so radically from the norm that a court may conclude that the evidence tendered by an accused is so unreasonable, objectively speaking, that it cannot be accepted as being reasonably possible true. But a court should in my view guard against the tendency to tick factors off a given list. Its task is to ascertain whether in any given case it is reasonably possible that that person’s thought processes were so disturbed that it cannot be said that he had criminal capacity.” What is worrying from Dr Stevenson’s evidence with regard to criminal capacity is that it seems to relate more to the requirements of the defence of automatism, than that of capacity. Words such as “trigger”, “involuntary” and “uncontrolled” refers to the defence of automatism. It is pivotal that the defences of automatism and criminal incapacity be kept apart as two distinct defences each with its own criteria and requirements.

\textsuperscript{453} At 638 C-H. The court considered the following as indicative of goal-directed behaviour:

1. On the accused’s account he realized immediately upon entering the bathroom and seeing the blood on his hands that something had happened.
2. He clumsily attempted to bandage her wounds.
3. He made her comfortable on the bed.
4. He fled from the scene in the deceased’s vehicle.
5. He went to withdraw money in order to escape.
that the accused possessed the capacity to act in accordance with an appreciation of the wrongfulness of his actions. It was accordingly held that the accused had the necessary criminal capacity as well as intention in the form of dolus eventualis and he was convicted of murder.\textsuperscript{454} The accused was acquitted on the charge of theft.

With regard to the amnesia\textsuperscript{455}, the court held that in totality of all the evidence, the accused as a result of the gruesome nature and trauma of the incident, could not recall the incident and that he was most probably suffering from post-traumatic amnesia\textsuperscript{456}. The latter is, however, the result of the accused’s conduct and will not exclude criminal liability. The court also noted that irrational conduct is not necessarily indicative of an absence of self-control\textsuperscript{457}.

- Reflections on the \textit{Van der Sandt}-decision

This case is discussed due to its applicability to the defence of criminal incapacity. It is, however, evident that the role of the two psychologists was not over-emphasised and it does not provide a helpful tool with regard to value attached and the role of experts within the domain of this defence. The expert evidence did, however, still assist the court, at least, to understand the personality makeup and characteristics of the accused and his behaviour before, during and after the incident.

12 The impact of section 79(7) on the defence of non-pathological criminal incapacity

\textsuperscript{454} At 640 the court sets out the factors indicating that the accused had the capacity to act in accordance with an appreciation of the wrongfulness of his actions. See also \textit{S v Laubscher supra} note 1 at 173 A-B; \textit{S v Els} 1993 (1) SACR 723 (O) at 724 E and \textit{S v Kensley supra} note 1 at 653 b-654 b.

\textsuperscript{455} The role of amnesia will extensively be discussed in paragraph 16 below.

\textsuperscript{456} At 638 H-J.

\textsuperscript{457} \textit{Ibid.}
In the midst of the uncertainty surrounding the role and place of expert evidence in support of the defence of non-pathological criminal incapacity, the contentious issue pertaining to the admissibility of statements made by an accused during an enquiry into his or her mental condition, arises.

Section 79(7) of the Criminal Procedure Act states:

“A statement made by an accused at the relevant enquiry shall not be admissible in evidence against the accused at criminal proceedings, except to the extent to which it may be relevant to the determination of the mental condition of the accused, in which event such statement shall be admissible notwithstanding that it may otherwise be inadmissible.”

The question that has to be considered is whether statements by an accused during an enquiry in terms of section 79 of the Criminal Procedure Act, is admissible as evidence against the accused in order to determine the mental condition of the accused. When the defence relied on is one of pathological criminal incapacity, such statements are admissible. However, there is some uncertainty as to whether the same applies to the defence of non-pathological criminal incapacity. If one considers the amended section 78(2), the inference could be drawn that the same rule should apply to both pathological as well as non-pathological criminal incapacity. The latter would be dependent upon a proper construction of the term “mental condition”. It could be argued that mental condition should be restricted only to cases where the defence is one of pathological criminal incapacity.

In *S v Kok*\(^{458}\) Combrink J held that the exception contained in section 79(7) which renders admissible evidence of any statement made by an accused during an enquiry, had to be interpreted restrictively.\(^{459}\)

\(^{458}\) *S v Kok* 1998 (1) SACR 532 (NPD).
\(^{459}\) At 543 G-544 H. See also *S v De Beer* 1995 (1) SACR 128 (SE) where Kroon J held that section 79(7) had to be interpreted restrictively so that the exception operates only where the statements are relevant to the mental condition for which the accused was referred for observation. See also *S v Forbes and Another* 1970 (2) SA 594 (C) and *S v Webb* (1) 1971 (2) SA 340 (T). These decisions will be discussed in chapter 3 below.
It was also held that if an accused raises the defence of lack of criminal responsibility by reason of non-pathological factors, such as alcohol, drugs or provocation, any statements made by him during the enquiry in terms of chapter 13 of the Criminal Procedure Act would not be rendered admissible in terms of the exception in section 79(7).\footnote{At 544 G. See also Du Toit (2007) \textit{et al supra} note 1 at 13-29.} Combrink J stated that the reason for the latter is not only as a result of a restrictive interpretation to be afforded to the term “mental condition” but also because the enquiry itself was irrelevant to the defence raised and that the accused should never have been referred for observation.\footnote{Ibid.} The situation was, however, changed by the amended section 78(2) in terms of which an accused can now, within the discretion of the court, be referred for observation.

It is, however, interesting that Combrink J states the following:\footnote{At 544 D-E.}

“\begin{quote}
In the vast majority of cases the Court has no idea of what possible mental illness or defect the accused may be suffering from or for that matter whether he is suffering from a non-pathological condition. That is the task of the psychiatrist conducting the inquiry.
\end{quote}"

The abovementioned quote illustrates the fundamental need for expert evidence – whether the defence raised is one of pathological or non-pathological criminal incapacity.

In \textit{S v Leaner}\footnote{S v Leaner 1996 (2) SACR 347 (C).} the court followed an alternative approach in respect of section 79(7). The accused was charged with murder and raised the defence of non-pathological criminal incapacity alleging that he had acted under severe provocation and anger. He was accordingly referred to a psychiatric hospital for observation.

During the trial the defence objected to the leading of evidence by a doctor on the basis of section 79(7) of the Criminal Procedure Act. It was contended on behalf
of the defence that the term “mental condition” should be interpreted restrictively and should be limited to a consideration of mental illness and accordingly to a pathological disturbance of the accused’s mental faculties.

Traverso J dissented from previous decisions, in which it was held that section 79(7) should be interpreted restrictively,\(^{464}\) and held that even though sections 77, 78 and 79 of the Criminal Procedure Act formed an integrated unit, it was clear that the sections distinguished between “mental illness and mental defect” on the one hand, and “mental condition”, being an all-inclusive term, on the other.\(^{465}\) It was therefore held that if a restrictive interpretation was afforded to the term “mental condition” it would presuppose that the enquiry would necessarily reveal a mental illness or mental defect and that this was not the intention with subsection (2). Traverso J held that there was no reason why a witness cannot be questioned on the content of a statement made by the accused during an examination that was relevant to the determination of his or her mental condition irrespective of whether it revealed a state of mental illness or mental defect.\(^{466}\) Traverso J also noted that it should be borne in mind that there is also the defence of non-pathological criminal incapacity which, even though not constituting a recognised “mental illness” or “mental defect” also constitutes a valid defence. If a restrictive interpretation is followed it would entail that if it is established during the course of an enquiry that the accused is not suffering from a “mental illness” or “mental defect”, but from a non-pathological condition, evidence regarding the content of the statements made to a psychiatrist during the course of the enquiry that are in fact indicative of such non-pathological condition, would be inadmissible.\(^{467}\)

It was accordingly held that in accordance with a proper construction of section 79(7), only a statement by an accused during an enquiry which is not relevant for purposes of establishing his or her mental state, will be inadmissible. The statements were thus allowed.

\(^{464}\) S v De Beer supra note 459 as referred to by Traverso J at 357 B.

\(^{465}\) At 357 C-D.

\(^{466}\) At 358 F.

\(^{467}\) At 358 H–359 G.
The abovementioned decisions were decided before the amendment to section 78(2) came into effect. It is submitted that in the light of the current section 78(2) referring also to criminal incapacity for “... any other reason”, the term “mental condition” should be construed to also include non-pathological states.

Accordingly the exception contained in section 79(7) should apply to the defence of non-pathological as well as pathological criminal incapacity. The latter approach would be more in line with the intention of the legislature with the amendment of section 78(2) and would create uniformity between the defences of pathological and non-pathological criminal incapacity. It is submitted that any statement by an accused having a direct bearing upon the mental condition into which an enquiry is being conducted, should be admissible.468

13 Provocation and non-pathological criminal incapacity

Before embarking on a discussion of the role of provocation pertaining to the defence of non-pathological criminal incapacity, it is necessary to briefly discuss the manner in which provocation can affect criminal liability.

13.1 General background on provocation as a defence

When an accused is charged with murder or assault the evidence often reveals that the accused’s conduct was preceded by some form of insulting or provocative

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468 See S v Forbes and Another 1970 (2) SA 594 (C) at 599 A-B where Theron J states: “It seems to me highly undesirable that any statements made by the accused persons in the course of enquiries into their mental condition held in terms of the Mental Disorders Act – whether such statements constitute confessions of the crimes with which they are charged or admissions falling short of confessions – should ever be allowed to be put before the Court in evidence for the purpose of establishing the truth of any facts referred to in such statements, save possibly facts having a direct bearing upon the mental condition into which the enquiry is being conducted.” (emphasis added).
behaviour on the part of the victim which gave rise to aggressive conduct by the accused.469

The term provocation has not yet been clearly defined.

According to Bergenthuin it comprises of two elements:470

(i) provocative and challenging behaviour of the provoker (objectively viewed),
(ii) the specific state of mind of the accused (subjectively viewed).

According to Burchell and Hunt the general approach in most legal systems is that provocation is not a complete defence.471 The most obvious reason for this could be found in the principle that people are expected to keep their emotions intact. The Roman and Roman Dutch Law only regarded anger, jealousy and other emotions as mitigating circumstances.472

The underlying reason for this principle was the acknowledgment that severe provocation could lead a person to act in the heat of the moment and without direct intention.473

According to Snyman there are two approaches to the effect of provocation:474

(i) Separate doctrine approach: According to this approach provocation should be regarded as a completely separate doctrine with its own unique and

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470 Bergenthuin (1985) supra note 1 at 20-21. See also S v Mokonto 1971 (2) SA 319 (A) at 324 where Holmes JA states: “Provocation and anger are different concepts, just as cause and effect are. But in criminal law, the term provocation seems to be used as including both concepts, throwing light on the accused’s conduct.”
472 Burchell and Hunt (1997) supra note 1 at 202; Bergenthuin (1985) supra note 1 at 21.
distinctive principles. According to this approach an accused’s liability should not be determined by applying the ordinary principles of liability such as act, unlawfulness, criminal capacity and intention, but rather in terms of the application of a distinct set of rules which apply only to provocation.475

(ii) General principles approach: In terms of this approach, provocation constitutes nothing more than a set of facts which must be evaluated in the same way as any other set of facts by simply applying the ordinary principles of liability such as compliance with the definitional elements of a crime, which is unlawful and whether he had the required criminal capacity and intention or negligence.

Before 1970 the separate doctrine approach mostly prevailed because of section 141 of the old Transkeian Penal Code of 1886.476 During this period provocation was never regarded as a complete defence which would lead to an acquittal.

In S v Mokonto Holmes JA held the following:477

(i) Section 141 of the Transkeian Penal Code should be limited to the territory for which it was passed.

(ii) In crimes of which a specific intention is an element, the question of the existence of such intention is a subjective one.

(iii) Provocation, inter alia, is relevant to the question of the existence of such intention.

475 Snyman (2008) supra note 1 at 235 submits that the policy consideration in respect of this approach is that the law expects adult, mentally healthy people to control their emotions and tempers and that all people should be treated in the same way. See also S v Kensley supra at 658 G-I.

476 Snyman (2008) supra note 1 at 236; Burchell and Hunt (1997) supra note 1 at 203. Section 141 of the Transkeian Penal Code entailed the following: “Homicide which would otherwise be murder may be reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool. Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.” See also S v Kruv 1959(3) SA 392 (A).

477 S v Mokonto 1971 (2) SA 319 (A) 325; Visser and Maré (1990) supra note 158 at 394-397. See also R v Thibani 1949 (4) SA 7210 (A).
(iv) Provocation, subjectively assessed, is relevant to extenuation or mitigation of punishment.

After 1970, the general principle approach gradually became popular. During this period it became a well-established principle that provocation could also exclude criminal capacity as the focus shifted to the accused’s subjective criminal capacity and frame of mind.

In cases where provocation excludes criminal capacity, an accused will be acquitted completely and an accused may not be convicted of culpable homicide. Snyman submits that after the decision in S v Eadie the general principles approach cannot be followed anymore.

Currently, provocation can affect criminal liability as follows:

(i) It can exclude the voluntariness of conduct giving rise to the defence of automatism.
(ii) It can exclude criminal capacity.
(iii) It can exclude intention, or
(iv) It may operate as a mitigating factor for purposes of punishment.

Van Niekerk states that a crime committed under extreme anger can only exonerate an accused if such anger is regarded by the court as reasonable under the circumstances and states the following with regard to the position of provocation:

- Provocation can give rise to temporary insanity in the sense that a person cannot control himself – a rare but not impossible situation.

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478 Snyman (2008) supra note 1 at 236.
479 Ibid. See also S v Mokonto1971 (2) SA 319 (A); S v Wiid supra note 1.
480 S v Eadie supra note 1. This section will be discussed below.
481 Snyman (2008) supra note 1 at 236.
482 Burchell and Milton (2005) supra note1 at 425; Snyman (2008) supra note 1 at 237-239; S v Lesch supra note 1 at 825 A-826 A.
• Provocation can be a factor which will be considered in determining the existence of intention to commit a crime – in many cases such provocation will include intention.
• Even where there is intention, a court will still regard such provocation as a mitigating circumstance.

It is therefore clear that the defence of non-pathological criminal incapacity and provocation can sometimes overlap. If the evidence indicates that an accused as a result of provocation, suffered emotional strain to such a degree that at the time of the commission of the act he or she lacked the ability to appreciate the wrongfulness of the act or to act in accordance with such appreciation, the accused must be found not guilty.\footnote{Snyman (2008) supra note 1 at 237.} On a charge of murder the latter will also have the effect that the accused cannot be convicted of a lesser crime such as culpable homicide. Snyman submits that only in exceptional cases will a court be willing to acquit an accused on the basis of lack of criminal capacity as a result of provocation.\footnote{Ibid.} Snyman also submits that it is advisable that the defence leads expert evidence.\footnote{Ibid.} The question that arises is what, if any, effect does provocation have on the criminal capacity of an accused? Should provocation succeed as a complete defence therefore excluding criminal capacity \textit{in toto} or should it only be regarded as a “partial defence” in the sense that provocation will only be considered as a mitigating factor during sentencing and the imposition of an appropriate punishment? Should expert evidence be compulsory in support of a claim of lack of criminal capacity due to provocation?

Prior to 1981 it was accepted that provocation could at most amount to a partial defence. If the defence was accepted the accused would be found guilty to a less serious offence that was a competent verdict to the offence charged.\footnote{Snyman (1989) TRW \textit{supra} note 1 at 5; Van Oosten (1993) \textit{supra} note 1 at 138-139; Bergenthuin (1985) \textit{supra} note 1 at 300.} In \textit{S v Chretien}\footnote{\textit{S v Chretien} \textit{supra} note 1 at 1103 H-1104 A.} it was held that also provocation could in some cases constitute a
complete defence. The “specific intent” theory was also rejected in *S v Chretien*.\(^{490}\)

In *S v Van Vuuren* Diemont AJA stated the following:\(^{491}\)

“\[I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress. In principle there is no reason for limiting the enquiry to the case of he may be too drunk to know what he is doing. Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is – what evidence is there to support such a conclusion?\]”

The first reported case in which provocation succeeded as a complete defence was in *S v Arnold*.\(^{492}\) Snyman criticises this decision and takes the stance that neither emotional stress nor any form of provocation should ever be allowed as a complete defence on a charge of murder.\(^{493}\) Snyman submits that lack of criminal capacity should only be regarded as a defence when operating in conjunction with the defences of youth, mental illness or intoxication.\(^{494}\) Snyman submits further that the following policy considerations should be borne in mind, underlying the rule that provocation can never be a complete defence:\(^{495}\)

- The law expects people to keep their emotions intact.
- The mere fact that some people are short-tempered, emotional or impatient should not afford them an excuse.

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\(^{490}\) *S v Chretien* supra note 1 at 1103 H-1104 A.

\(^{491}\) *S v Van Vuuren* 1983 (1) SA 12 (A) at 17G-H. See also *S v Arnold* supra note 1; Snyman (1985) SACJ supra note 1 at 240.

\(^{492}\) *S v Arnold* supra note 1; Van Oosten (1993) *supra* note 1 at 140; Visser and Maré (1990) *supra* note 158 at 400. The facts and decision of *S v Arnold* has already been discussed *supra* and will not be repeated here.

\(^{493}\) Snyman (1985) SACJ *supra* note 1 at 251.

\(^{494}\) Ibid.

\(^{495}\) Ibid.
In two High Court decisions[^496] and one Supreme Court of Appeal decision[^497] accused persons were completely acquitted after raising the defence of non-pathological criminal incapacity based on evidence of provocation or emotional stress experienced by the accused persons at the time of, or before the commission of the act. These decisions indicated a willingness by the courts to accept that provocation could in some instances provide a complete defence.

Burchell and Milton also note that this revolutionary approach to provocation created the possibility of a complete acquittal if sufficient, compelling evidence was adduced in support of the defence to create reasonable doubt as to the existence of criminal capacity.[^498] The question that arises is whether these acquittals were founded on the court’s approach to provocation or whether the evidence, which inadvertently included expert evidence, led to a successful plea of non-pathological criminal incapacity?

It is submitted that expert evidence should be a prerequisite when reliance is placed on provocation as ground for excluding criminal capacity.

Africa states[^499] that in cases of non-pathological criminal incapacity, which also includes provocation, there are difficulties inherent in a retrospective evaluation. Ultimately it is for the court to decide whether or not evidence can adequately be utilised[^500].

### 13.2 The controversial decision of *S v Eadie* 2002 (2) SA 719 (SCA)[^501]

[^496]: *S v Nursingh* supra note 1 and *S v Moses* supra note 1. These decisions and the facts of these cases have already been discussed in this chapter and will not be repeated here. See also Burchell and Milton (2005) *supra* note 1 at 428.

[^497]: *S v Wiid* supra note 1.


[^500]: *Ibid*.

Probably one of the most controversial decisions dealing with the interface between provocation and incapacity is the case of *S v Eadie*. This decision changed the approach to provocation in respect of non-pathological criminal incapacity drastically. In this discussion the facts and decision of this case will first be provided whereafter the commentary of various authors pertaining to this decision will be discussed as well as the possible effect of this decision on the future existence of the defence of non-pathological criminal incapacity. The role of expert evidence in *S v Eadie* will also be addressed. The facts of this decision were as follows:

The appellant, a keen sportsman and competitive hockey player, had on Friday 11 June 1999, accompanied by his wife, attended a function of the Fish Hoek Hockey Club held in Cape Town. During the course of the evening he consumed at least seven bottles of beer. After the function the appellant and his wife joined another couple for a late meal at a restaurant in Rondebosch, where he consumed at least two more bottles of beer and two Irish coffees. In the early hours of Saturday morning the appellant and his wife drove home in their Volkswagen Jetta, stopping at his mother’s house to pick up their two young children. They drove along Ou Kaapseweg in a southerly direction towards Fish Hoek. As they travelled home with the children asleep on the back seat they became aware of the headlights of a motor vehicle coming up behind them. The deceased, Kevin Andrew Duncan, was the driver and also the sole occupant of this vehicle, a Toyota Corolla. He drove right up to the Jetta, overtook them, and in the process flashed his headlights, which were on bright. The deceased then slowed down considerably. The appellant remained behind him for a short distance. When the deceased reduced his speed to approximately 40 km/h the appellant overtook him. The deceased increased his speed and once again drove up close to the Jetta’s rear bumper, keeping his headlights on bright. The appellant accelerated but could not put distance between them. The Toyota then overtook the Jetta once more and the entire process was again repeated – the deceased slowed down and the appellant overtook him but could not get away. At this stage the appellant became angry and concerned as to his family’s safety. At a set of traffic lights the appellant stopped the Jetta and the Toyota stopped behind him. The appellant emerged from the Jetta, took a hockey stick from behind the driver’s seat, and
walked towards the Toyota. The appellant’s wife drove off in the Jetta. The deceased remained seated behind the steering wheel of the stationery Toyota. The appellant initially intended to smash the Toyota’s headlights but changed his mind and decided to smash the windscreen. When he approached the Toyota the deceased opened the driver’s door, prompting him to divert his attention from the windscreen and to lunge at the deceased with the hockey stick, which eventually broke into two parts as it struck the vehicle. The appellant became extremely angry. The appellant then opened the driver’s door of the Toyota. The appellant punched the deceased against the head whilst he was still in the Toyota and continued the assault by punching him repeatedly. He then pulled the deceased out of the vehicle and into the road. The deceased fell. The appellant repeatedly and savagely stamped on the deceased’s head with the heel of his shoe. The appellant broke the deceased’s nose by stamping on it with his heel. The appellant testified that whilst he was assaulting the deceased he could feel himself shouting but did not hear any sound. He could see some things whilst others were blurred. He testified that whilst perpetrating the assault he felt that he was “going, going, going”.

Mr Graham Hill, a motorist who drove past the scene, witnessed a great part of the attack on the deceased and testified on behalf of the State. He testified that the appellant used the hockey stick as a weapon, jabbing it at the deceased while the deceased was still in the Toyota. The appellant’s wife returned to the scene a short while after her initial departure and drove him home. Upon arrival at home the appellant almost immediately decided to return to the scene. There was no one else at the scene. The appellant established that the deceased was dead. Thereafter a tow-truck arrived driven by one Mr Jan Eksteen. Mr Eksteen saw that the jeans worn by the appellant was bloot-spattered. The appellant told Mr Eksteen that he was at the scene attempting to assist the deceased, deliberately creating the impression of an innocent bystander. When the police arrived at the scene the appellant repeated this explanation for his presence at the scene.

502 At paragraph 6.
When he departed from the scene he removed the hockey stick from the scene and later disposed of it by throwing it into bushes some distance away. The appellant was later requested by the police to return to the scene to point out the position of the hockey stick. He was also requested to bring along with him the blood-spattered jeans he wore. The appellant presented the police with different jeans from the pair he wore at the time of the assault on the deceased. This later became evident when Mr Eksteen pointed it out to the police. The appellant then disclosed the truth and was arrested. Blood-alcohol tests conducted on the appellant revealed that the appellant's blood-alcohol levels were significantly higher than the legal limit. The post-mortem examination performed on the deceased established that the deceased sustained significant fractures of the facial bones and skull and these injuries were noted as caused by the application of a considerable degree of blunt force.

The appellant stood trial in the Cape Provincial Division of the High Court, before Griesel J, on a charge of murder and on a charge of obstructing the ends of justice. In respect of the second charge it was averred that after the commission of the murder the appellant disposed of a hockey stick which he used in the attack on the deceased so that it could not be found by the police, and further, that he attempted to mislead the police by falsely showing them a pair of jeans other than the blood-spattered pair he was wearing at the relevant time. The appellant admitted that he assaulted and killed the deceased. He relied on the defence of temporary non-pathological criminal incapacity resulting from a combination of severe emotional stress, provocation and a measure of intoxication, thus placing in dispute whether at the material time he could distinguish between right and wrong and act in accordance with that distinction. The appellant’s defence was rejected and he was convicted on both charges. On the murder charge the appellant was sentenced to 15 years’ imprisonment, five years of which were conditionally suspended. On the charge of obstructing the ends of justice the appellant was sentenced to imprisonment for nine months. The appellant appealed against this conviction of murder.

The primary issue in this appeal was whether the appellant lacked criminal capacity at the time he killed the deceased. It was conceded on behalf of the
appellant that at the relevant time he was able to distinguish between right and wrong. It was contested that he was able to act in accordance with the appreciation. In the alternative it was submitted on behalf of the appellant that the State failed to prove beyond reasonable doubt that the appellant had the necessary intention to kill the deceased and that the proper verdict would be culpable homicide.

With regard to the defence raised, Navsa JA started by noting:503

“"It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this court that:

(i) in discharging the onus the State is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;
(iii) evidence in support of such a defence must be carefully scrutinised;
(iv) it is for the court to decide the question of the accused’s criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused’s actions during the relevant period."

At the trial, expert evidence of a psychologist and two psychiatrists, who all conducted interviews with the appellant, was presented to the court. The evidence tendered by the three experts will accordingly be summarised.

Mr Stephen Lay, a psychologist employed at Valkenberg Psychiatric Hospital’s forensic unit, testified in support of the State’s case. His assessment of the appellant established the following:504

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• The appellant was someone who bottled up his emotions and who had personality problems, which gave rise to difficulties in his employment, family and other relationships.
• There were no indications of post-traumatic stress syndrome as a result of prior traumatic events in the appellant’s life which could have resulted in the appellant’s behaviour towards the deceased.
• In assaulting the deceased, the appellant was motivated by anger.
• The intake of alcohol played a role in the appellant’s conduct.
• The appellant’s actions were rational, purposeful and goal-directed.
• The appellant had the necessary cognitive ability to have realised that the deceased had fallen after the first blow.
• The appellant had a full recall of the events.
• The appellant had not “lost control” at the time he perpetrated the assault on the deceased. This term is also used much too loosely and is vague.
• Mr Lay did not accept that the appellant lacked criminal capacity when he assaulted and killed the deceased.

Dr Sean Kaliski, a psychiatrist and head of the forensic psychiatric unit at Valkenberg Psychiatric Hospital, also testified in support of the State’s case. His evidence was as follows:505

• The appellant was able to appreciate the wrongfulness of the acts perpetrated by him and to act accordingly.
• Dr Kaliski is sceptical of the defence of non-pathological incapacity.
• According to Dr Kaliski the defence has never been successfully established.
• Dr Kaliski saw no difference in a defence of sane automatism and non-pathological incapacity.
• A person who acts in a state of sane automatism would typically have been subjected to a great deal of stress producing a state of internal tension

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504 At 696 C-H.
505 At 696 I-670 A-J.
building to a climax which in most cases is reached after the person concerned has endured ongoing humiliation and abuse.

- The climax is triggered by an event unusual in its intensity or unpredictable in its occurrence.
- When one acts in this state one’s cognitive functions are absent.
- Acts perpetrated in this state may appear to be purposeful but will typically be out of character.
- When the period of automatism has passed the person concerned regains his senses and is usually bewildered and horrified by the results of such actions. There would be no effort to escape from the scene.
- Persons acting in this manner usually claim amnesia.
- If the appellant did not know what he was doing his actions would have been less goal-directed.
- The appellant’s assertion that he “lost control” must be carefully examined. The expression itself is used too loosely. It is common for people to lose their temper and to commit regrettable acts when they should have known better.
- The appellant did not show any signs of post-traumatic stress disorder following a prior incident.
- Even though the appellant had in the past not engaged in acts involving the degree of violence seen in the attack on the deceased, he nevertheless had a history of engaging in regrettable conduct and acting impulsively.
- The appellant was subjected to provocation and other stressors but faced no more than that faced by scores of people who do not resort to this kind of behaviour.
- Dr Kaliski accepted that courts have held that in certain circumstances a combination of factors such as stress, provocation and alcohol may cause a person to lack criminal capacity. His experience, however, led him to believe that temper and rage disinhibit people but do not rob them of control.
- Dr Kaliski stated that he may be willing to concede the validity of a defence of non-pathological criminal incapacity due to stress and provocation in the face of compelling facts.
Dr Ashraf Jedaar, a psychiatrist employed at Valkenberg Psychiatric Hospital’s forensic unit, testified in support of the appellant’s case. He testified the following:506

- In his view the appellant’s description of the sensations experienced by him during the attack on the deceased is indicative of an altered state of consciousness, also referred to in psychiatry as a dissociative state. It indicated a heightened emotional state, which affected his cognitive functions and led to an inability to control his behaviour.

Dr Jedaar testified:507

“So although there was a perception or at least a recognition that there was an injury inflicted on the deceased, he was unable to control the continued assault on the deceased due to his disturbed cognition.”

- Dr Jedaar considered it important that the appellant was concerned about the safety of his family.
- Dr Jedaar differed from Dr Kaliski and stated that a defence of sane automatism differs from the defence asserted by the appellant in that a person acting in a state of sane automatism has an absolute absence of cognitive control due to intense emotional arousal whereas the appellant had intact but disturbed cognition due to emotional factors.
- Dr Jedaar was of the view that the appellant’s purposeful, goal-directed and well-coordinated behaviour masks the fact that his cognition had been disturbed.
- Dr Jedaar concluded that due to the effect of the alcohol consumed by the appellant, his personality and the provocation by the deceased, he reached a point where his emotional state was such that his actions were involuntary.
- Dr Jedaar conceded that in this heightened emotional state the appellant would have been able to make decisions about what and whom he wanted to attack. The appellant lost his power to render decisions from the time that

506  At 671 B-J.
507  At 671 E.
the hockey stick broke due to the perceived threat from the deceased. This was the trigger that deprived him of the power of decision-making.

- The thrust of Dr Jedaar's evidence was to the effect that the appellant was unable to control his actions at the relevant time.
- Dr Jedaar also testified that persons who have not had their cognitive ability disturbed might well experience the sensations experienced by the appellant.
- Counsel for the State referred Dr Jedaar to his evidence in another case in which he testified that it is only possible within the context of mental illness that a person can be driven by an irresistible impulse. 508
- Dr Jedaar distinguished his evidence in this case from that in the former by stating that the appellant was acting with his cognitive faculties intact but distorted. Accordingly he conceded that the assault was the result of the appellant's heightened emotional state and not from a conscious decision.

In the court a quo Griesel J referred to the confusion between the defences of temporary non-pathological criminal incapacity and sane automatism 509. He noted that courts have scrutinised the asserted defences with circumspection 510. He noted that the appellant's behaviour at the relevant time was focused and goal-directed and took into account against the appellant his deceitful behaviour after the incident. Griesel J was of the view that the appellant's clear account of events established conscious behaviour. He further stated that neither the court nor the psychiatrists could rely on the appellant's version relating to his defence of criminal incapacity. Griesel J held that the appellant did not lose control but that he merely lost his temper 511. Griesel J also held that in the light of the savage and sustained nature of the attack on the deceased and also that it was directed at the head of the deceased, that the appellant had the necessary intention to kill 512.

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508 See S v Moses supra note 1 at 711 E: “A person can never lose control except in a state of automatism or other pathological states. Even in a state of rage or extreme anger. I am still of the same belief that you still have the cognitive ability to weight the expression of that rage.” The evidence presented by Dr Jedaar is discussed in detail supra, but Hlope J held: “… it flies in the face of South African Law.”

509 At 178 A.
510 At 178 D-E.
511 At 182 H-I.
512 At 185 A.
On appeal the appellant’s counsel submitted that the court confused the defence of automatism and the defence of non-pathological criminal incapacity and that Griesel J failed to appreciate that since the appellant was able to distinguish between right and wrong, his cognitive abilities were in place and goal-directed behaviour could be expected. It was contended that the learned judge misdirected himself when he took into account against the appellant that his behaviour was focused and goal-directed.\textsuperscript{513} It was submitted that the correct finding would have been to the effect that the appellant was unable to control himself as a result of the emotional stress and provocation he was subjected to.

With respect to Dr Kaliski’s evidence, Navsa JA held:\textsuperscript{514}

“Dr Kaliski equated automatism with the defence asserted by the appellant in the present case and his explanation makes it clear that in his view the only circumstance in which one could ‘lose control’ is where one’s cognitive functions are absent and consequently one’s actions are unplanned and undirected.”

Dr Jedaar’s testimony in this case stands in contrast to his testimony presented in the \textit{Moses}-decision.\textsuperscript{515} Navsa JA stated: “Jedaar, as we can see, has undergone a conversion since he testified in that case.”\textsuperscript{516} Navsa JA also discussed the views of Louw\textsuperscript{517} with regard to the question of automatism versus non-pathological criminal incapacity. Louw in his article submits:\textsuperscript{518}

“However, in one respect, capacity appears to be similar to conduct. This relates to the second leg of the capacity inquiry whether the accused was able to control himself in accordance with his appreciation of right and wrong. In other words, capacity is absent where the accused lacks self-control. It is far from clear in our law when self-control is absent.”

\textsuperscript{513} At 673 B-C.
\textsuperscript{514} At 683 B.
\textsuperscript{515} See \textit{S v Moses supra} note 1 at 711 E.
\textsuperscript{516} At 686 A.
\textsuperscript{517} Louw (2001) \textit{supra} note 1 at 207-208.
\textsuperscript{518} \textit{Ibid}. 255
In Louw’s view the decisions in the *Nursingh* and *Moses* cases added to the confusion and a decision needs to be rendered as to whether automatism and non-pathological criminal incapacity are two identical or distinct defences.519

Louw also submits that logic dictates that we cannot draw a distinction between automatism and lack of self-control. He argues that if the two were distinct it would be possible to exercise conscious control over one’s actions (the automatism test) while simultaneously lacking self-control (the incapacity test). Louw submits further that if there is no distinction, the second leg of the test as set out in the *Laubscher*520 case should fall away – capacity would then be determined solely on the basis of whether the person is able to appreciate the difference between right and wrong.521

Navsa JA held the following:522

> “I agree with Ronald Louw that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation. Decisions of this court make that clear. I am, however, not persuaded that the second leg of the test expounded in *Laubscher*’s case should fall away. It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence. However, the result is the same if an accused’s verified defence is that his psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton – his acts would then have been unconscious and involuntary. In the present contest, the two are flip sides of the same coin.”

And further:

519  At 688 D where Navsa JA refers to the article of Louw (2001) *supra* note 1.
520  *S v Laubscher supra* note 1 at 166G-167A.
521  At 688 G-I.
522  At 689 B-C. See also *S v Scholtz* 2006 (1) SACR 442 (EPD) where a part of this dictum was again referred to. The latter decision will be discussed *intra*. 256
“Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one’s actions it appears notionally possible.”

Navsa JA noted that the view espoused by Snyman and others, and reflected in some of the decisions of our courts, entailing that the defence of non-pathological criminal incapacity is a distinct and separate from a defence of automatism, followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one’s emotions, does injustice to the fundamentals of any “self-respecting system of law”.

Navsa JA noted that such approach proclaimed that someone who gives in to temptation may be excused from criminal liability, because he may have been so overcome by the temptation that he lost self-control giving rise to a variation on the theme: ‘the devil made me do it’.

And further:

“No self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation.

... When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred.”

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523 At 689 I.
524 At 689J-690A.
525 Ibid.
526 At 690C-G (paragraphs 60-61)
With regards to a possible objective criterion to be used in assessing capacity, Navsa JA agreed that the greater part of the problem could be traced to the misapplication of the test for criminal capacity and a too-readily acceptance of the accused’s *ipse dixit* concerning his state of mind. Navsa JA noted that it is desirable to test an accused’s evidence about his state of mind, not only against his prior and subsequent conduct but also against the court’s experience of human behaviour and social interaction.

The court per Navsa JA made the following findings:

- It was common cause that the appellant did not at the relevant time act in a state of automatism.
- The appellant intended to be violent and destructive.
- The appellant’s deceitful behaviour immediately after the event should count against him.
- Dr Kaliski’s approach to the defence relied upon is to be preferred to that of Dr Jedaar.
- The dismissal of Dr Jedaar’s view of non-pathological criminal incapacity by the court in *Moses*, appears to be an explanation for the change in his approach to this particular defence.
- Dr Jedaar’s evidence revealed a number of inconsistencies and unsatisfactory explanations.
- The appellant lost his temper and not control over his actions.
- The appellant had the intention to kill.

Navsa JA concluded by stating:

“It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered. In future, courts must be careful to rely on sound

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527 At 691 C-D.
528 *Ibid*.
529 At 691 F-692 F.
530 At 693 G-H.
evidence and to apply the principles set out in the decisions of this court. The message that must reach society is that consciously giving in to one’s anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law.”

The appeal was dismissed. This decision laid down by Navsa JA has been the subject of debate by many leading authors in Criminal Law. It is now necessary to discuss the various academic opinions and discussions advanced in respect of the *Eadie*-judgment.

### 13.2.1 Academic opinion advanced in respect of the *Eadie*-decision

According to Burchell and Milton⁵³¹ the Roman and Roman-Dutch law did not regard anger, jealousy or other emotions as excuses for any criminal conduct, but only as factors relevant to mitigation of sentence. It was only at a later stage when the partial excuse rule was rejected⁵³² when a new approach emerged in terms of which evidence of provocation became relevant, not only to the existence of intention, but also in respect of criminal capacity. The courts started accepting that any factor, albeit intoxication, provocation or emotional stress, could impair criminal capacity, which is assessed essentially subjectively, and lead to an acquittal.⁵³³

Eventually the concept of provocation was broadened to include emotional stress and the courts also started to distinguish between the concepts of non-pathological and pathological criminal incapacity.

As was discussed in the preceding sections, in three High Court decisions and one Supreme Court of Appeal decision, the defence of non-pathological criminal incapacity was raised successfully and the accused persons were acquitted.⁵³⁴

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⁵³² See *S v Bailey* 1982 (3) SA 772 (A) at 796.
⁵³⁴ See Burchell and Milton (2005) *supra* note 1 at 428. See also *S v Wiid supra* note 1; *S v Arnold supra* note 1; *S v Nursingh supra* note 1 and *S v Moses supra* note 1.
These acquittals were based on evidence of provocation or emotional stress experienced by the accused persons at the time of, or before, the killing which consequently resulted in the finding that criminal capacity had not been proved beyond reasonable doubt. Accordingly an accused person was afforded a possibility of a complete acquittal if sufficient, compelling evidence adduced in his or her favour could create a reasonable doubt regarding criminal capacity.535

It was, however, cautioned that, if the accused’s version of events was unreliable, the psychiatric or psychological evidence adduced in favour of the defence of non-pathological incapacity, which was inevitably based on the accused’s version of events, would also lack credibility.536

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

According to Burchell and Milton537 the judgment of the Supreme Court of Appeal in *S v Eadie*, is open to three possible interpretations:

(a) The first interpretation which according to Burchell and Milton is the most likely to find resonance in future courts, focuses only on the accepted process of judicial inference of the presence or absence of subjective capacity from an examination of objective facts and circumstances.

(b) The second interpretation implies a possible restriction of the ambit of the defence of lack of capacity (with specific reference to a lack of conative capacity) to a situation where automatism is present and involves a redefining of the actual subjective criterion of capacity, shifting the entire test of capacity from the subjective to the objective domain.

536 See *S v Potgieter* *supra* note 1.
(c) The third interpretation is that Navsa JA did not replace the entire existing subjective test of capacity with an objective test in provocation cases, but in fact identified an essential objective aspect in an otherwise subjective test of capacity that, as Burchell and Milton state, had always been lurking there, but had not received proper judicial recognition.

According to Burchell and Milton this third interpretation constitutes an intermediate position between (a) and (b) above and could develop the common law without infringing the principle of legality or necessitating lengthy legislative reform. Support for the first interpretation can be found in the judgment by Navsa JA where he states:538

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

According to Burchell and Milton Navsa JA was not talking about revising the test for capacity, but rather applying it correctly, using permissible inferences from objective facts and circumstances.539 Accordingly, courts must not too readily accept the accused's own evidence regarding provocation or emotional stress and a court is entitled to draw a legitimate inference from what hundreds of thousands of other people would have done under the same circumstances. This inference would also result in a more cautious approach when an accused simply states that he or she lacked capacity or acted involuntarily under provocation or emotional stress.

538 At 691 B-C paragraph 64. This part of the judgment was also quoted above during the exposition of the judgment.

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

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

Inferential reasoning is resorted to most frequently when there is an absence of direct evidence and reliance is placed on circumstantial evidence. Evidence of the state of a person’s mind or his or her capacity is most frequently circumstantial, or cannot be substantiated by direct evidence, apart from the evidence presented by the person himself or herself.

Burchell and Milton submit that psychiatric or psychological evidence as to a person’s state of mind or criminal capacity is notoriously unreliable, because it is essentially based on the accused’s ipse dixit which leads to the need for inferential reasoning.

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540 At 672 I.
541 Burchell and Milton (2005) supra note 1 at 432.
542 Ibid.
543 Burchell and Milton (2005) supra note 1 at 434.
544 Burchell and Milton (2005) supra note 1 at 436. See also Navsa JA’s comments on the Moses and Gesualdo decisions in S v Eadie (2) supra note 1 at paragraphs 49 and 50.
It is submitted that psychiatric and psychological evidence as to a person’s state of mind, plays a pivotal role in cases where the defence of criminal incapacity is raised. Even if the subjective test for capacity imports objective circumstances from which inferences can be deduced, psychiatric and psychological evidence will assist the fact-finder in order to better evaluate whether the accused’s reliance on the defence of incapacity is merely fiction or whether it is reasonably possibly true that the accused lacked criminal capacity at the relevant time when the said crime was committed.

Psychological factors which have a bearing on a person’s mental faculties which could result in criminal incapacity have to be assessed by practitioners trained in the discipline. Evidence in this regard has to be placed before the court in order to arrive at an informed decision.

With respect to the second interpretation, (b) set out above, Burchell and Milton correctly state that, in essence, the conative inquiry into criminal capacity relates to the capacity to act voluntarily or rationally and the voluntariness inquiry is focused on whether the accused actually did act voluntarily and control his or her conscious will. If a particular person lacks the capacity to act voluntarily in particular circumstances there would be no reason to inquire into whether he or she in fact acted voluntarily because an acquittal on the basis of non-pathological incapacity would result.545

Navsa JA states in his judgment “... there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation.”546

Burchell and Milton, however, submit that it would be tendentious and incorrect to take this quotation out of its context and conclude that the entire defence of provocation, in its form of lack of capacity as opposed to involuntary conduct, virtually ceases to exist after Eadie. In the context of a person who acts involuntarily, there is no need to proceed any further in determining liability

545  Ibid.
546  At 689 B paragraph 57.
because such person will inevitably also lack capacity and, incidentally, *mens rea* as well.\(^{547}\)

With regards to the third interpretation, (c) mentioned above, Burchell and Milton state that the second part of the capacity test involves an inquiry, in essence, as to whether the accused could have acted differently.\(^{548}\) If the second leg of the capacity inquiry is regarded as “the capacity to act differently”, then the inquiry must imply an evaluation of the accused’s conduct against some other standard of conduct, extrinsic to the accused himself or herself. In other words, the test for capacity must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused’s conduct within the specific circumstances and against the standard of persons falling into a particular grouping. This criterion is not applicable to insane persons and persons suffering from mental illness or defect. Accordingly, the subjective test not only takes account of the accused’s subjective mental condition but also, in determining the conative aspect of capacity, the court must inquire whether the accused could reasonably be expected to have acted differently. This inquiry provides for a comparison of the accused’s conduct with the societal norms of sobriety and level-headedness. Burchell and Milton further submit that the central matter is not only whether the accused person in fact lacked criminal capacity, subjectively assessed\(^{549}\). The central issue is whether these accused persons could reasonably be expected to have acted differently, even taking into consideration the provocation they received or the emotional stress they endured.\(^{550}\) They also state that it would be timely if the courts were to acknowledge openly this hidden, but nevertheless implicit, normative aspect of the second part of the capacity inquiry\(^{551}\).

Burchell and Milton further submit that the judgment in *Eadie* provides courts with a salutary reminder of how the legitimate process of inferential reasoning can help to bring some common sense back into the judicial approach to cases where

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\(^{549}\) Burchell and Milton (2005) *supra* note 1 at 443.

\(^{550}\) *Ibid*.

\(^{551}\) *Ibid*. 

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provocation or emotional stress are raised as defences. They also state that the *Eadie*-judgment did not impart non-existent objective elements into the defence of lack of criminal capacity. It could not have been introduced without specifically, rather than by implication, over-ruling various previous decisions where criminal capacity was in issue. The conative, or second part, of the capacity inquiry, which entails the subjective assessment of capacity of the accused to act in accordance with his or her appreciation of the unlawfulness (or wrongfulness) of his or her conduct inevitably contains an evaluative dimension.

It is a pity that more could not be gathered as to the value attached to expert evidence in support of the defence of criminal incapacity as displayed in *Eadie*. In retrospect it almost seems as though the expert evidence in *Eadie* contributed more to confusion than to clarity. It is submitted that importing a normative or objective element to the subjective enquiry as discussed by Burchell and Milton and also by Navsa JA in *Eadie*, could be of much help to courts in the assessment of the validity of the defence of non-pathological criminal incapacity. In this regard expert evidence will also play a pivotal role in assessing not only the accused’s conduct at a relevant stage, but also in the presentation of evidence of the characteristics, emotional makeup and profile of a person within the same circumstances and surrounding circumstances that the particular accused found himself or herself at the time of the crime.

It is clear from the judgment in *Eadie*, as delivered by Navsa JA, that there is, according to this judgment, no distinction between non-pathological criminal incapacity due to emotional stress or provocation, on the one hand, and the defence of sane automatism on the other. According to the court, there is no difference between the second (conative) leg of the test for criminal capacity, which connotes the accused’s ability to act in accordance with the appreciation of the wrongfulness of the act, and the requirement which applies to the conduct element namely that a person’s bodily movements must be voluntary. If an accused alleges that, as a result of provocation, his or her psyche had

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552 Burchell and Milton (2005) *supra* note 1 at 444.
553 *Ibid*.
disintegrated to such an extent that he or she could no longer control himself or herself, it amounts to an allegation of inability to control bodily movements and, therefore, involuntary conduct.\textsuperscript{555} Snyman submits, and this view can respectfully be supported, that the Supreme Court of Appeal was correct in dismissing the appeal and confirming the accused’s conviction of murder.\textsuperscript{556} Snyman submits that the argument followed by the court in arriving at its conclusion is wrong: “The judgment is a good example of a correct decision arrived at for the wrong reasons.”\textsuperscript{557}

As Snyman correctly submits, there is indeed a difference between the ability to control muscular movements, on the one hand, and the ability to act in accordance with insight into right and wrong, on the other. The test for determining whether somebody performed a voluntary act is merely to ascertain whether that person was capable of subjecting his or her muscular movements to his or her will or intellect. The person must be capable of making a decision about the conduct and of executing this decision.\textsuperscript{558} The ability to act in accordance with an appreciation of right or wrong is something different. Here the person does perform a voluntary act, but lacks the (conative) ability to set himself or herself a goal, to pursue it, and to resist impulse or desires to act in a manner contrary to what his or her insights into right and wrong reveal to him or to her.\textsuperscript{559} A person may thus have the ability to perform a voluntary act yet at the same time lack the ability to act in accordance with his or her appreciation of the wrongfulness of conduct. Snyman also indicates that to regard these two distinct tests as one, is furthermore incompatible with the provisions of both section 78(1) of the Criminal Procedure Act, dealing with the test for criminal responsibility of people alleged to be mentally ill, as well as section 1 of the Criminal Law Amendment Act,\textsuperscript{560} which creates the offence of "statutory intoxication". Snyman, respectfully, correctly states that by rejecting the basic difference between the test to determine the presence of a voluntary act and the conative test for capacity, some of the keystone concepts of criminal liability

\textsuperscript{555} Snyman (2003) \textit{Acta Juridica supra} note 545 at 1.
\textsuperscript{556} See also Snyman (2006) \textit{supra} note 1 at 164.
\textsuperscript{557} Snyman (2003) \textit{Acta Juridica supra} note 545 at 15.
\textsuperscript{558} \textit{Ibid}.
\textsuperscript{559} \textit{Ibid} Snyman (2006) \textit{supra} note 1 at 164.
\textsuperscript{560} Act 1 of 1988.
are losing their meaning.\textsuperscript{561} It accordingly does not make sense to approach reliance upon the absence of one element of liability as reliance on another element of liability.\textsuperscript{562}

Snyman also indicates that the court’s equation of the inability to perform a voluntary act with the inability to act in accordance with an insight into right and wrong is irreconcilable with the same court’s statement in the earlier case of \textit{Chretien}\textsuperscript{563} where it was held that if someone commits an act, but he is so intoxicated that he does not know what he is doing or that what he is doing is unlawful, he does not have criminal capacity.

Snyman also refers to Navsa JA’s statement that the phenomenon of sane people temporarily losing “cognitive control” is rare.\textsuperscript{564} Control within this context refers to the conative mental function, not to the cognitive function. The cognitive function refers to a person’s reason or intellect which refers to his or her ability to distinguish between right and wrong.

Another pivotal observation by Snyman as to why the court’s equation of the conative leg of the test for capacity with the requirement that the act must be voluntary cannot be supported is the fact that it is not only a positive act that may form the basis of criminal liability, but also an omission. Both a positive act as well as an omission must be voluntary to render a person liable for a crime.\textsuperscript{565} Accordingly, if the court is correct in equating the two abilities, then the same principles must apply \textit{mutatis mutandis} to omissions: the requirement that the omission must be voluntary must then be the same as the ability to act in accordance with one’s insight into right and wrong. It follows that the defences of automatism (involuntary conduct) and conative inability are not the same.

Snyman also indicates that the whole concept of criminal capacity with reference to Germany and Switzerland, hails to Continental Law, and one of the

\textsuperscript{561} Snyman (2003) \textit{Acta Juridica supra} note 545 at 17.
\textsuperscript{562} Snyman (2006) \textit{supra} note 1 at 166.
\textsuperscript{563} \textit{S v Chretien supra} note 1 at 1106 F.
\textsuperscript{564} Snyman (2006) \textit{supra} note 1 at 166.
\textsuperscript{565} Snyman (2003) \textit{Acta Juridica supra} note 545 at 19.
fundamentals of liability in these systems is the distinction which is drawn between muscular movements performed in a state of automatism, on the one hand, and loss of self-control which denotes the absence of the conative leg of the test for capacity, on the other.\(^{566}\)

Louw\(^{567}\) in his first article where he discussed the *Eadie*-judgment and also the article that Navsa JA refers to in the judgment in *Eadie*\(^ {568}\) takes the view that a major obstacle in this case as well as with reference to the second leg of the capacity enquiry, is the fact that there is no clear understanding of the nature of “lack of self-control”. He states that the problem might lie in the fact that it is a legal construction without a psychological foundation. Louw is of the opinion that according to logic, we cannot draw a distinction between automatism and lack of self-control and that in the event of the two being distinct defences, it would be possible to exercise control over one’s actions. Louw further submits that if there is not distinction, then the second leg of the capacity inquiry should fall away\(^ {569}\):

“Capacity should then be determined solely on the basis of whether a person is able to appreciate the difference between right and wrong. Once an accused is shown to have capacity, the accused may then raise involuntariness as a defence. We will then also have a sounder principle and body of law to rely on in assessing the defences.”

Navsa JA, however, in the *Eadie*-judgment, differed from Louw by stating:\(^ {570}\)

“I am, however, not persuaded that the second leg of the test expounded in *Laubscher’s* case should fall away.”

Louw in his second article submits that the motivation for the statement by Navsa JA in terms of which there is no distinction between sane automatism and provocation lies in the following statement by Navsa JA:\(^ {571}\)

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567 Louw (2001) *SACJ* *supra* note 1 at 206-216.
568 At 689 B-C paragraph 57.
569 Louw (2001) *SACJ* *supra* note 1 at 211.
570 At 689 B paragraph 57.
“... When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions ...”

Louw in his second article agrees with the fact that the following statement by Navsa JA is impossible:572

“Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one’s actions it appears notionally possible.”

Louw, however, states that the second leg of the capacity test should be eliminated completely. The first leg of the capacity test should accordingly be linked to the 
\textit{mens rea} inquiry573.

According to Louw, where an accused might not appreciate the difference between right and wrong, he would lack the capacity to form an intention. This would then expose the accused to a negligence inquiry where he would be acquitted. According to Louw this would re-introduce provocation as a “partial defence”. Louw further submits that it should first be asked whether the accused was acting voluntarily (self-control). If it is established that he was, then it should be asked whether he has the capacity to form intention. An accused who acted involuntarily will then be acquitted as there was no \textit{actus reus}. However, if it is established that the accused did perform a voluntary act, the next question to be asked is whether the accused was able to distinguish between right and wrong such that he or she was able to form intention. If he is able to, he will be found

571 At 690 E-G paragraph 61. This part of the judgment was also quoted in the discussion of the facts of and decision \textit{supra}. See also Louw (2003) \textit{SACJ supra} note 1 at 201-202.
572 Louw (2003) \textit{SACJ supra} note 1 at 205; \textit{S v Eadie supra} note 1 at 689 I paragraph 59.  
573 \textit{Ibid}.
guilty, if he is not he will not necessarily be acquitted, but may still be liable on the basis of negligence.574 Louw concludes by stating:575

“If the non-pathological capacity test were eliminated as an inquiry separate from the inquiry into the actus reus and mens rea, the problems of the provocation defence would be resolved without having to artificially introduce an objective test.”

It is submitted that the view expounded by Louw is problematic. It will not only lead to confusion but will also be contrary to the principle of legality.

As Le Roux576 correctly points out, sane automatism is a defence excluding the voluntariness of an act. Voluntariness merely refers to the fact that a person’s muscular movements are controlled by the will. A person can lack criminal capacity either as a result of a lack of the capacity to appreciate the nature and the wrongfulness of an act or omission (absence of the cognitive function) or as a result of a lack of the ability to act in accordance with such appreciation (absence of the conative function).

Involuntaryness of an act and lack of self-control are not the same. Le Roux also correctly submits that where a person (the accused) assaults another person until the victim eventually dies, the conduct of the accused is indicative of the fact that the accused focused on the deceased in such a manner that he did in fact act voluntarily. In the latter situation, an accused did in fact exercise control over his muscular movements and acted voluntarily. Le Roux correctly states that where a person temporarily lacks criminal capacity as a result of an inability to act in accordance with the appreciation of the wrongfulness of the conduct such a person, nevertheless still acts voluntarily. The lack of criminal capacity accordingly does not have a bearing on the voluntariness of the conduct of the accused.

574 Louw (2003) SACJ supra note 1 at 206.
575 Ibid.
Hoctor also correctly submits that lack of conative capacity does not result in involuntary behaviour. Hoctor notes:

“This tendency to mistakenly conflate these two concepts, giving rise to the perception that they are practically indistinguishable, has no doubt recently been aided by the South African Criminal Law Reports’ unfortunate way of reporting these matters.”

Hoctor also correctly states that sane automatism relates to the *actus reus*, whereas capacity forms part of the *mens rea* inquiry.

Another aspect addressed in the *Eadie*-decision which is perhaps not of so much importance for this discussion, but nevertheless relevant, is whether the test for criminal capacity should be objective or provide for a normative element. Navsa JA stated that the “greater part of the problem lies in the misapplication of the test.” Navsa JA also stated:

“It appears to me to be justified to test the accused’s evidence about the state of mind, not only against his prior and subsequent conduct but also against the court’s experience of human behaviour and social interaction.”

The abovementioned statement does indeed suggest an objective element to the current subjective test of criminal incapacity. Navsa JA, however, did not explicitly state whether the test should in future take an objective turn. It is, however, submitted that, as stated above, an objective or normative test could be of assistance and much value in cases where the defence of non-pathological criminal incapacity presents obstacles. Coupled with a strong body of expert evidence the court could be placed in a better position to render an appropriate judgment on the facts before it. In the *Moses*-decision *supra* it was unequivocally held that the test for capacity is subjective.

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578 Hoctor (2001) SACJ *supra* note 1 at 204.
579 At 691 C paragraph 64.
580 At 691 C paragraph 64.
581 *S v Moses supra* note 1 at 714 B-C.
Burchell and Milton\textsuperscript{582} suggest that the conative or second part of the capacity inquiry contains an evaluative or normative dimension. Burchell and Milton state:

“It would seem that a court can only judge whether an accused had the capacity to control irrational conduct (or, perhaps more accurately, whether he or she could have acted differently) by assessing his or her conduct against a standard outside of the accused’s own capacities or capabilities.”

Louw\textsuperscript{583} takes the view that the introduction of an objective policy-based test for provocation does not make legal sense. It should be borne in mind that non-pathological criminal incapacity relates not only to provocation, but also to emotional stress, intoxication etcetera and it is submitted that a normative assessment could be useful in all of these instances not only determining whether an accused should be convicted or not, but even with reference to sentencing as well as a finding of diminished responsibility.

Snyman also supports the recognition of an objective element to the test for capacity and more specifically with reference to \textit{mens rea}\textsuperscript{584} and also with reference to ignorance of the law and intoxication.\textsuperscript{585}

\textbf{13.2.2 The future of the defence of non-pathological criminal incapacity}

The question that was raised after the \textit{Eadie}-decision was whether this defence was abolished or not? Snyman\textsuperscript{586} is of the opinion that the defence was for all practical purposes abolished, but does still exist in situations where a person

\begin{itemize}
\item \textsuperscript{582} Burchell and Milton (2005) \textit{supra} note 1 at 445.
\item \textsuperscript{583} Louw (2003) \textit{SACJ supra} note 1 at 203.
\item \textsuperscript{584} Snyman (2008) \textit{supra} note 1 at 237 and 169; Snyman (2006) \textit{supra} note 1 at 167. Compare Burchell and Milton (2005) \textit{supra} at 431 where it is stated: “The \textit{Eadie} judgment signals a warning that in future the defence of non-pathological incapacity will be scrutinized most carefully”. The latter view is supported by the author and it submitted that the \textit{Eadie} decision merely illustrates that in future an accused relying on this defence will have to establish a much stronger foundation for the defence and consequently the defence will be viewed with much more scrutiny than in the past. The latter inadvertently proclaims the essential need for expert evidence.
\item \textsuperscript{585} Snyman (2003) \textit{Acta Juridica supra} note 545 at 22.
\item \textsuperscript{586} Snyman (2006) \textit{supra} note 1 at 167.
\end{itemize}
alleges that he or she lacked capacity as a result of factors not directly linked to provocation such as shock, stress, fear, panic or tension. Many of these “mental states” are so closely linked to provocation that they cannot really be separated from it. Snyman submits that the field of application for the defence of non-pathological criminal incapacity is a limited one.

Navsa JA states:

“It is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity. The law, if properly and consistently applied, will determine whether that claim is justified.”

It is submitted that this statement by Navsa JA indicates that the defence does still exist. It is a pity that the law was not better applied in the Eadie-decision.

Hoctor also states the following in respect of the Eadie-decision:

“... the reflection of the apparently increasing tendency to conflate sane automatism and non-pathological incapacity is unwelcome. Not only is such a development retrogressive in that it is clearly unscientific (the concepts incontestably relate to different elements of criminal liability), it is also unwarrantable in that courts have typically not struggled to draw a distinction between these two concepts.”

The intended purpose behind the Eadie-decision remains a grey area. It seems clear that the court intended to send a warning to society to not succumb to their emotions and lose their temper in the heat of the moment and then seek to rely on the defence of non-pathological criminal incapacity to exonerate them from criminal liability. It is submitted that this goal could be achieved successfully by measuring the accused’s conduct against the established test for criminal

589 At 691 E paragraph 65.
590 Hoctor (2001) SACJ supra note 1 at 205.
capacity. An accused’s conduct, like *Eadie*, should be measured firstly to ascertain whether he or she acted voluntarily. It is clear that *Eadie* acted as such. Then the unlawfulness of the conduct should be assessed whereafter, before *mens rea* is determined, his or her criminal capacity should be determined – measured against the two legs of the capacity enquiry. Where an accused is found to have had the necessary capacity, but that it was impaired or diminished, a proper finding should be one of diminished capacity in which event the diminished capacity will only have a bearing on sentence.

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

### 13.2.3 The role of expert evidence in provocation as per the *Eadie*-decision

It is also necessary and relevant to look at the psychiatric evidence presented in the trial court in the original judgment passed by Griesel J.591 It is again common cause that the defence raised by the appellant in the trial court was one of non-pathological criminal incapacity. The reason for elaborating on the aspect of expert evidence is firstly to ascertain if this in part did not play a role in the confusion that arose as to the distinction between the defences of sane automatism and non-pathological criminal incapacity. Secondly, it indicated the gap between law and medicine, specifically with reference to psychiatry and the definitions ascribed to concepts such as “automatism” and “criminal capacity”. Thirdly, it serves to illustrate that no matter how one views the scenario of non-pathological incapacity, expert evidence does play a pivotal role both in support of

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591 *S v Eadie* 2001 (1) SACR 172 (CPD); *S v Eadie* 2001 (1) SACR 185 (CPD) hereafter referred to as *S v Eadie* (1).
the defence and also in support of rebuttal of the defence by the State. In the absence thereof a court merely has the *ipse dixit* of the accused to rely on.

In *S v Eadie* (1) Griesel J also stated that there appears to be confusion between the defence of temporary non-pathological criminal incapacity, on the one hand, and sane automatism, on the other.\(^{592}\) It was also stated by Griesel J: \(^{593}\)

“At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity.”

And further\(^{594}\):

“It has been repeatedly emphasised by our Courts, including the Supreme Court of Appeal, that reliance on phenomena such as automatism, amnesia and temporary non-pathological criminal incapacity must be carefully scrutinised and approached with circumspection.”

In delivering judgment, Griesel J dealt with the aspect of the psychiatric evidence separately.\(^{595}\) The following aspects are worth mentioning.

The essence of the accused’s defence was that at a certain stage during the events he “lost control” and was unable to stop himself. All three experts agreed that one has to look at the overall picture in order to make an assessment of his criminal capacity. In respect of the question of “losing control”, both Dr Kaliski and Mr Lay had great difficulty with the concept, which is not a psychological term.\(^{596}\)

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\(^{592}\) At 178 A.

\(^{593}\) At 178 B.

\(^{594}\) *Ibid*.

\(^{595}\) At 178 F – 180 I.

\(^{596}\) At 179 A-J. Dr Kaliski in addition noted:

“I’d like to make two points; the first point is that I think one should just concentrate on the sequence of actions during the offence. If the man didn’t know what he was doing right, he wouldn’t have been aiming his blows specifically at the deceased because he didn’t know what he was doing. He would have been flailing about almost indiscriminately and the deceased would have been caught, by chance, by blows that were aimed at nothing in particular. ..., one can only deduce that if the blows were aimed solely at the deceased he
In response to a question put forward on behalf of the State Dr Kaliski testified the following:

When asked whether Dr Kaliski wanted to comment on Dr Jedaar’s contention that the appellant (accused in this case) was not able to act in accordance with his appreciation of what is right and wrong Dr Kaliski stated:

“I just want to know why, for what reason? What were the reasons advanced for that?

..., I think that this man was depressed, he was under a lot of pressure, he was feeling irritable, he was profoundly intoxicated – let’s not forget that – he perceived what he thought to be a provocation and he lost his temper.”

Dr Jedaar at the trial conceded that the behaviour of the accused at the critical time was consistent with someone making conscious decisions. He relied heavily on the allegations by the accused as to his altered sensory experiences during the attack. These sensations were indicative of a heightened state of arousal and Dr Jedaar stated that the accused may not have been in control of his actions at the relevant time. According to Dr Kaliski the symptoms described did not indicate loss of control and they are common in states of high arousal, especially when someone is extremely angry.

must have known what he was doing. ... The second point about being out of control, I don’t know, this term is used so loosely and colloquially in the courts that I just want to make a few points. It is a common human characteristic to lose one’s temper and when one loses one’s temper one does highly regrettable things. One feels very funny about it, even afterwards and I’m sure every single person in this court has at some stage lost his of her temper and has either done something very regrettable or damaged something or even hurt someone. When they’ve thought about it afterwards they couldn’t quite remember clearly what had happened, but it had happened. The interesting thing about losing one’s temper and doing regrettable things is that you often, people often do it in situations where they know they should know better. ... People lose their tempers. As for how does one determine if someone is out of control, well the question is if you are out of control you are incapable of directing your actions purposefully and in a goal-directed fashion, you are totally out of control. If one nevertheless have a focused set of actions, albeit under the influence of anger, one cannot say you are totally out of control, all that one can say is that you have suspended your control for that period, you don’t care about consequences any longer.”

This clearly illustrated the unfortunate gap between law and medicine. This could probably have been a contributing cause to the confusion in this case in respect of a proper distinction between sane automatism and non-pathological criminal incapacity.
Griesel J held:\textsuperscript{597}

“The fact of the matter is that in the final analysis the crucial issue of appellant’s criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the court itself.”

And further:\textsuperscript{598}

“In considering the issue of criminal capacity the court must have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of the accused as a witness and the nature of his proved actions throughout the relevant period. By the very nature of things, he is the only person who can give direct evidence as to his level of consciousness at the time of the commission of the offence. His \textit{ipse dixit} to the effect that his act was involuntarily and unconsciously committed or, as in the present case, that he had ‘lost control’, must therefore be weighed and considered in the light of all the circumstances and particularly against the alleged criminal conduct viewed objectively.”

Griesel J also noted that the actions, thoughts and recollections of the accused before, during and shortly after the attack on the deceased are indicative of focused, goal-directed behaviour.\textsuperscript{599}

\textsuperscript{597} At 180 D.
\textsuperscript{598} At 180 G-I.
\textsuperscript{599} At 181 B-H Griesel J mentions the following actions by the accused indicative of goal-directed behaviour:

- After he stopped at the intersection he took his hockey stick from behind his seat.
- He decided to smash the headlights. He thereupon decided to smash the windscreen instead as he would inflict more damage on the deceased.
- During the whole attack he was fully conscious, to the extent that he was able to give literally a blow-by-blow account of the attack on the deceased.
- He returned to the scene after dropping his family off. He then gave a false explanation as to the presence of blood on his jeans as well as the reasons for his presence at the scene.
- He took the hockey stick and disposed of it a considerable distance away.
- He went home, took off his blood-spattered jeans and hid them.
- When requested to return to the scene with the pair of jeans worn earlier, he took with him a different pair and tried to persuade police that the jeans were in fact the right pair.
- All the witnesses who had seen him on the scene described his behaviour as normal.
Griesel J held that the accused was someone who did not hesitate to resort to lies and deceit as a way to evade criminal liability as a result of which neither the court nor the psychiatrists could rely with confidence on the version of the accused in evaluating the testimony in respect of the defence of criminal incapacity. His evidence that he lost control was therefore rejected. It was held that the accused succumbed to what has become known as “road rage”. It was held as stated above that he did not lose control, he rather lost his temper. Griesel J also distinguished this case from the decision delivered in *S v Wiid*.601

Griesel accordingly held that the accused had the necessary criminal capacity and acted intentionally in that he did in fact foresee the possibility of his actions causing the death of the deceased, yet he consciously accepted that risk by continuing his attack on the deceased. In deriving of the later conclusion, Griesel J considered the savage and sustained nature of the attack and the seriousness of the injuries inflicted upon the deceased. He also considered the fact that the entire attack was directed at the head of the deceased, even when the latter was lying defenceless at the feet of the accused.

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

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600 At 182 G-I.
601 See *S v Eadie (1)* supra note 1 at 183 A-E.
What is more problematic of the appeal judgment delivered by Navsa JA is that he stated that the second leg of the criminal capacity enquiry should not fall away. This indeed should be the case. But then after this finding, Navsa JA states:

“It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence.”

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

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

The facts in *Eadie* merely indicate that reliance placed on the defence of non-pathological incapacity was unsuccessful as a result of the particular set of facts and surrounding circumstances. Any person who acted in a similar way would probably also have failed to establish the defence. This, however, does not mean that it is the end of the road for the defence of non-pathological criminal incapacity. Dr Kaliski stated that he may be willing to concede the validity of a defence of non-

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602 At 689 B-C.
pathological criminal incapacity due to stress and provocation in the face of “compelling facts”. Each case has to be considered on its own merits.

The precise role and impact of the expert evidence portrayed in the Eadie-decision is difficult to assess.

It is clear that Dr Kaliski’s evidence was taken in high regard by Navsa JA and preferred to the evidence by Dr Jedaar. It is a pity that the evidence tendered by Dr Kaliski contributed in part to the finding that there exists no difference in a defence of sane automatism and non-pathological criminal incapacity. Dr Jedaar’s evidence did not carry much weight as his views were viewed by the court to stand in dire contrast to those advanced by him in a prior decision. The question can be asked whether the situation would have been different had another psychiatrist other than Dr Jedaar, testified not in persuading the court to a different finding on the facts, but to clarify some of the confusion with regards to a proper distinction between the defences of sane automatism and non-pathological criminal incapacity.

What is apparent from the expert evidence is that there is a gap between law on the one hand and psychiatry and psychology on the other. This becomes clear from the expert evidence stating that “loss of control” is not a clinical term but a legal one. The medical perspective of sane automatism and non-pathological incapacity is not always in line with the legal perspective. This causes tension between law and medicine in cases where these defences are raised and this reduces the value of expert evidence.

Hoctor states the following with regard to the expert testimony tendered in Eadie:

“Ultimately therefore, given the deficiencies of their reasoning, the imprecision of their terminology, and the resultant negative consequences for

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603 At 670 J-671 A.
604 Hoctor (2001) SACJ supra note 1 at 205.
legal clarity, those who comprise the ‘company’, in which Dr Kaliski finds himself are in fact not only peccable, but culpable.”

This view is perhaps too drastic. The conclusion that can be made as to the value that expert evidence played in *Eadie* is that it indicates that law and medicine are two completely different disciplines that view a set of facts from different perspectives. We need experts to address the court as to the mental states and attributes of an accused in order to assess the facts and circumstances properly. There is a gap between law and medicine as is evident in *Eadie*, which has to be addressed in order to obtain maximum benefit from expert evidence in cases of this nature.

Van der Merwe also notes:

“Dit is belangrik om aan te dui en te verduidelik hoe die aanloop tot en die omstandighede van die gebeure op die beskuldigde ingewerk het en wat die uitwerking daarvan op die spesifieke persoon (met sy unieke persoonlikheid) was. Daarom is dit verkieslik om van deskundige getuies gebruik te maak om aan te dui hoedat die persoon op daardie kritieke tydstip nie kon onderskei tussen reg en verkeerd nie, en/of hy nie oor die nodige weerstand of selfbeheer beskik het nie.”

### 14 INTOXICATION AND NON-PATHOLOGICAL CRIMINAL INCAPACITY

#### 14.1 General background on intoxication as a defence

Intoxication may, under certain circumstances, deprive an accused of the ability to appreciate the wrongfulness of his or her conduct or the ability or capacity to act in accordance with such appreciation. Intoxication can have numerous effects on

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605 Van der Merwe, RP “Sielkundige perspektiewe op tydelike nie-patologiese ontoerekeningsvatbaarheid” (1997) Obiter 138 at 144.
one’s person. Intoxication may result in conditions such as impulsiveness, diminished self-criticism, over estimation of a person’s abilities and underestimation of dangers.\textsuperscript{607}

Burchell and Milton note that intoxication\textsuperscript{608} “removes and weakens the restraints and inhibitions which normally govern conduct and impairs the capacity to distinguish right from wrong, or to act in accordance with that appreciation.”

Curtin and Lang state the following pertaining to the effect of alcohol:\textsuperscript{609}

> “Among the properties of alcohol that define it as a ‘psychoactive substance’ are its ability to alter psychological processes that include emotion and cognition.”

Goldman, Brown and Christiansen also take the following view:\textsuperscript{610}

> “If any characteristic has been seen as a central, defining aspect of alcohol use, it is the presumed capacity of alcohol to alter anxiety, depression and other moods.”

Many crimes, particularly crimes of violence, are committed when an accused is in a state of extreme or partial intoxication, usually as a result of the voluntary consumption of alcohol or drugs or a combination of the two.


\textsuperscript{608} Burchell and Milton (2005) supra note 1 at 403.


The availability of a specific defence or defences to criminal liability founded on intoxication may have a pivotal effect on the perception of whether justice has been done.\(^{611}\)

It is important to distinguish clearly between voluntary and involuntary intoxication:

Voluntary intoxication denotes the conscious consumption of alcohol or some drug or intoxicating substance. The individual must know or foresee that the substance may impair his or her awareness and understanding.\(^{612}\)

Involuntary intoxication refers to intoxication resulting from ignorant or unconscious consumption of an intoxicating substance by the accused or such consumption brought about by an absolute force over the accused. Intoxication can also be deemed involuntary if for example brought about by the use of prescribed drugs taken within the ambit of the doctor's instructions that is usually not liable to cause unpredictability or aggressiveness.\(^{613}\) Involuntary intoxication is a complete defence to any crime due to the fact that the accused could not have prevented it.\(^{614}\)

The leading authority pertaining to the multiple effect of voluntary intoxication on criminal liability is the decision of the appellate division in *S v Chretien*.\(^{615}\)


\(^{613}\) Ibid.


\(^{615}\) S v Chretien supra note 1; Snyman (2008) supra note 1 at 224; Burchell and Milton (2005) supra note 1 at 405; Burchell and Milton (2007) supra note 1 at 362; The facts of *S v Chretien* supra note 1 are discussed in paragraph 4 supra. See also Badenhorst, CHJ “Vrywillige dronkenskap as verweer teen aanspreeklikheid in die Strafreg – ‘n suier regswetenskaplike benadering” (1981) at 148; Badenhorst, CHJ “S v Chretien – vrywillige dronkenskap en straffregtelike aanspreeklikheid” (1981) TSAR at 185. See also S v Baartman 1983 (4) SA 393 (NC); S v D 1995 (2) SACR 503 (C); S v Planagan 2003 (2) SACR 98 (E); S v Hartyani 1980 (3) SA 613 (T); R v Holiday 1924 AD 250; R v Innes Grant 1949 (1) SA 753 (A); S v Johnson 1969 (1) SA 201 (A); S v Kelder 1967 (2) SA 644 (T); S v Lange 1990 (1) SACR 1999 (W); S v Lombard 1981 (3) SA 198 (A); S v Maki 1994 (2) SACR 414 (E); S v Mbele 1991 (1) SA 307 (W); S v Mpumagathe 1989 (4) SA 169 (E); S v Mula 1975 (3) SA 208; S v Ndhlolo (2) 1965 (4) SA 692 (A); S v Pienaar 1990 (2) SACR 18 (T); S v Saaiman 1967 (4) SA 440 (A).
The legal position pertaining to intoxication as set forth by Rumpff CJ in *S v Chretien* is as follows:

(i) If a person is so drunk that his muscular movements are involuntary, there is no act or conduct on his or her part, and accordingly although the condition can be ascribed to the use of an intoxicating substance, he or she cannot be found guilty of a crime.\(^{616}\)

(ii) A person may also as a result of the excessive use of alcohol completely lack criminal capacity and accordingly not be criminally liable\(^{617}\) - this will be the case where the person is so intoxicated that he or she is no longer aware of what he or she is doing or where his or her inhibitions were substantially affected.

(iii) The “specific intent theory” was rejected.\(^{618}\) Intoxication could also exclude ordinary intent. It was due to the latter principle that voluntary intoxication was held in this case to be a complete defence.

(iv) It was also held by Rumpff CJ that a court should not lightly infer that, as a result of intoxication, an accused acted involuntarily or was not criminally responsible or that intention was absent as this would bring the administration of justice into discredit.\(^{619}\)

Snyman correctly summarises the four effects that intoxication could have:\(^{620}\)

(a) Intoxication might result in an accused acting involuntarily in which case he or she will not be guilty of a crime;

(b) Intoxication may cause an accused to lack criminal capacity in which case he or she will not be guilty of a crime;

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\(^{617}\) At 1104 E and 1106 E-F of the judgment.

\(^{618}\) At 1103 H – 1104 A Snyman (2008) *supra* note 1 at 225 states that the “specific intent theory” entailed that crimes could be divided into two groups: those that required “specific intent” and those that required only “ordinary intent”. If an accused was charged with a crime requiring a “specific intent”, the intoxication could have the effect of excluding the “specific intent”. The accused could then not be convicted of the “specific intent” crime with which he or she was charged, but with a less serious crime that required only an “ordinary intent”.

\(^{619}\) At 1105 H-1106 D; Snyman (2008) *supra* note 1 at 225.

\(^{620}\) Snyman (2008) *supra* note 1 at 226.
(c) If, despite intoxication an accused was able to perform a voluntary act and also had criminal capacity, the intoxication may result in the accused lacking intention required for the particular crime. In the latter instance the accused will not necessarily escape the clutches of the criminal law – the evidence might reveal that he or she was negligent, in which case he or she might be convicted of a crime requiring culpability in the form of negligence;

(d) Intoxication may also serve as a ground for the mitigation of punishment.

Before the decision in *S v Chretien*, voluntary intoxication was not regarded as a complete defence. After *S v Chretien* it became clear that voluntary intoxication could in certain circumstances constitute a complete defence. What is of more importance for purposes of this thesis, is the fact that intoxication could also exclude criminal capacity. The question that arises is what role does expert evidence portray in cases where intoxication is the cause of non-pathological criminal incapacity?

In response to the lenient approach followed in *S v Chretien* regarding voluntary intoxication, the legislature enacted the Criminal Law Amendment Act 1 of 1988.

Section 1 of Act 1 of 1988 reads as follows:

“(1) Any person who consumes or uses any substance which impairs his or her faculties to appreciate the wrongfulness of his or her acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his or her faculties were impaired as

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621 See *S v Johnson* 1969 (1) SA 201 (A) at 205 C-E where Botha JA states: “Maar volgens ons reg blyk dit dat vrywillige dronkenskap, wat nie geesteskrankheid tot gevolg het nie, in die algemeen geen verweer is teen ‘n aanklag weens ‘n wandaad gedurende sodanige dronkenskap begaan nie.” See also Van Oosten (1993) *SACJ* *supra* note 1 at 134; *R v Bourke* 1916 TPD 303; *R v Holiday* 1924 AD 250; *R v Taylor* 1949 (4) SA 702 (A).

foresaid, shall be guilty of an offence and shall be liable on conviction to
the penalty which may be imposed in respect of the commission of that
act.

(2) If in any prosecution for any offence it is found that the accused is not
criminally liable for the offence charged on account of the fact that his
faculties referred to in (1) were impaired by the consumption or use of
any substance, such accused may be found guilty of such a
contravention of sub-section (1) if the evidence proves the commission
of such contravention.”

The decision in S v Chretien was criticised severely in the sense that it was difficult
to accept a situation where a sober person is punished for criminal conduct whilst
the same conduct performed by an intoxicated person is condoned merely as a
result of being intoxicated. The need accordingly arose to enact legislation in the
terms as indicated above by means of Act 1 of 1988.

What is of importance is that this Act clearly recognises intoxication as a ground
excluding criminal capacity. The section refers to impairment of an accused’s
“faculties to appreciate the wrongfulness of his acts or to act in accordance with
that appreciation.”623 The Act does, however, not cover instances where
intoxication excludes intention.624 The Act does, however, include the situation
where an accused is so intoxicated that he or she was unable to perform a
voluntary act.

Snyman submits the following:625

“………intoxication resulting in automatism is surely a more intense form of
intoxication than that resulting in lack of criminal capacity, if, therefore the
legislature intended to cover the latter situation, it is inconceivable that it

624 Ibid.
625 Snyman (2008) supra note 1 at 231; Paizes (1988) SACJ supra note 620 at 785; Burchell and
Milton (2005) supra note 1 at 410. See also S v Ingram 1999 (2) SACR 127 (WLD) where
Cloete J at 131 a-b states:
“... for a conviction in terms of the section it matters not whether the appellant was without
criminal capacity or was acting as an automaton. The first case is clearly covered by the
section.”
could have intended to exclude the former, more serious, form of intoxication."

The burden of proving all of the elements of the offence beyond reasonable doubt created in Act 1 of 1988 falls on the State. One of these elements entails that the State has to prove that an accused is not criminally liable for his or her act because he or she lacked criminal capacity.

According to Paizes the elements of this defence are:626

(i) The consumption or use of an intoxicating substance;
(ii) Impairment of the accused's faculties;
(iii) The accused’s knowledge of its effect;
(iv) The commission by the accused of a prohibited act while his faculties are impaired.

The abovementioned elements present numerous procedural difficulties for the State:627

- In order to secure a conviction of contravening section 1, the State is required to establish exactly that which the accused is normally required to establish, namely that the accused is not guilty of a crime. The State thus has to prove the opposite of what it normally has to prove. The State accordingly either has to establish, beyond reasonable doubt, the presence of criminal capacity for a conviction on the offence charged or lack of criminal capacity in order to secure a conviction in terms of section 1.
- The State must prove lack of criminal capacity.
- The State must prove lack of criminal capacity beyond reasonable doubt.628

It is submitted that expert evidence will also play a vital role in cases where the State seeks a conviction in terms of section 1 of Act 1 of 1988. The reason for this

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628 See S v September 1996 (1) SACR 235 (A); S v D 1995 (2) SACR 502 (C).
lies in the fact that the State has to prove that the accused is “not criminally liable”. Paizes correctly notes that non-liability is very different from non-conviction.\(^{629}\) If an accused is, for example, acquitted on a charge of assault, it merely indicates that the court was not convinced of his or her guilt beyond reasonable doubt – it does not mean he or she is “not liable”.\(^{630}\)

Paizes observes the following:\(^{631}\)

“After seeking to establish X’s liability beyond reasonable doubt, the State now has to prove his non-liability beyond a reasonable doubt. An intoxicated wrongdoer will, therefore, escape the clutches of the criminal law if neither his liability nor his non-liability can be established on the stringent criminal standard or proof.”

In \textit{S v Mbele}, Flemming J held:\(^{632}\)

“Dit is derhalwe onvoldoende as die Staat sake net so ver voer dat daar onsekerheid is of die beskuldigte se vermoëns ‘aangetas is’ en ‘aangetas was’ tot die nodige mate.”

It is clear that mere uncertainty as to whether an accused lacked criminal capacity is not sufficient for the State to discharge its onus. It is at this stage where expert evidence becomes pivotal to the State. The State will have to lead expert evidence of a high degree in order to prove lack of criminal capacity due to intoxication beyond reasonable doubt.

In \textit{S v Griessel}\(^{633}\) Muller AJA also held that a finding that the accused had “possibly” not known what he was doing was not sufficient to sustain a conviction under section 1(1) and accordingly a positive finding was required that the accused was not criminally responsible as a result of his consumption of alcohol when he committed the act complained of.

\(^{629}\) Paizes (1988) \textit{SACJ} \textit{supra} note 619 at 781; \textit{S v Lange} 1989 (1) \textit{SACR} 199 (W).

\(^{630}\) \textit{Ibid}.

\(^{631}\) \textit{Ibid}.

\(^{632}\) \textit{S v Mbele} 1991 (1) \textit{SA} 307 (WPD) at 311 C-D; Snyman (2008) \textit{supra} note 1 at 232; \textit{S v Mphungatje} 1989 (4) \textit{SA} 139 (O).

\(^{633}\) \textit{S v Griessel} 1993 (1) \textit{SACR} 178 (O) at 181 D-E.
In *S v V* Van Reenen J made the following important findings:634

“In omstandighede waar die bepalings van art. 1(1) van Wet 1 van 1988 moontlik toepaslik kan wees is dit die hof se plig om op sterkte van de skundige getuienis – wat nie in die onderhawige saak aangebied was nie – asook al die ander feite van ‘n besondere saak, insluitende die beskuldigde se betroubaarheid as ‘n getuie en die aard van sy bewese handelinge gedurende die tersaaklike periode, te besluit of hy toerekeningsvatbaar was al dan nie.”

Van Reenen J also held that it is wrong to assume that a court will only in exceptional cases find that an accused lacked criminal capacity as a result of intoxication.635  Van Reenen J noted that the normal standard of proof in criminal cases should also apply to proof of incapacity for the purposes of the statutory crime.636  Snyman also submits that the courts ought not to require an unrealistically high degree of proof of criminal incapacity.637

As far as the procedural aspects of section 1(2) of Act 1 of 1988 is concerned the following should be noted:

(i) Statutory intoxication is a competent verdict on any offence charged.638

(ii) If any portion of a sentence flowing out of a conviction is suspended, the condition of suspension should refer to a future contravention of the actual offence – there should be a relationship between the offence of which the accused has been convicted and the one referred to in the condition of suspension.639

634  *S v V* 1996 (2) SACR 290 (C) at 294H - J.  See also *S v September* supra at 328.  See also Louw, R “Recent cases – Criminal Law Amendment Act 1 of 1988” SACJ (1997) at 104.
636  Ibid.
638  *S v Mphungatje* 1989 (4) SA 139 (EPD) at 143 H; *S v D* *supra* note 626 at 509 G-J.
639  *S v Oliphant* 1989 (4) SA 169 (EPD).
(iii) When convicting an accused of the statutory crime, the description of the conviction of the initial charge the accused would have been convicted on had he or she not been intoxicated, should be stipulated.640

14.2 The role of expert evidence in cases of intoxication

Expert evidence in cases of intoxication plays a pivotal role especially for the State seeking a conviction in terms of section 1 of Act 1 of 1988. Peter submits that there is a very strong link between a person being intoxicated and becoming a victim of violent crime.641 Peter also states that, when individuals become intoxicated, they often behave offensively and provocatively and behaviour may be ambiguous and unpredictable.642

Peter observes the following pertaining to the psychological effects of intoxication643 that as intoxication intensifies there is reduction in psychological efficiency and motor control, usually contrary to the sense of “subjective superiority” the person may feel. Thinking becomes slowed and superficial, and impaired judgment and reasoning occur. The abilities of learning, attention and concentration become impaired, and perceptual acuity decreases. Muscle control is impaired, with delay in reaction times, and later dysarthria (slurred speech), motor incoordination and ataxia (unsteady broad-based gait) or nystagmus (fast eye movements) can occur. There is generally a progressive loss of restraint and self-control, often resulting in disinhibited, unfavourable behaviour.

In respect of the standard of proof required in terms of section 1 of Act 1 of 1988, Snyman correctly submits that if there is sufficient expert evidence pertaining to the accused’s criminal incapacity, the court’s task of assessing the question of whether the accused lacked criminal capacity is made easier.644

640 S v Flanagan (2003) (2) SACR 98 (ECD) at 102 A-B; S v Maki 1994 (2) SACR 414 (E) at 416 A-C; S v Pietersen 1994 (2) SACR 434 (C) at 439.
642 Ibid.
643 Peter in Kaliski (ed)(2006) supra note 1 at 133.
644 Snyman, CR “n Koel ontvangs vir ‘Statutêre Dronkenskap’ “(1990) TSAR 504 at 509.
Snyman correctly submits the following:645

“Die hof volg maar ’n ietwat robuuste benadering, deurdat hy gewoonlik sonder die hulp van deskundige getuienis en sonder om altyd veel hulp van ander getuies te kry, tot ’n besluit aangaande die beskuldigde se toerekeningsvatbaarheid kom.”

In S v Edley646 the appellant had been charged with and convicted of contravening section 140 (1)(a) of Ordinance 21 of 1966 in that he drove a motor vehicle on a public road while under the influence of intoxicating liquor. The question the court, per Miller J, was called to decide upon was whether the State had discharged its onus to prove, not only that the appellant had taken alcohol and was under the influence of alcohol, but that, as a result of the consumption of alcohol, his judgment or skill was affected by the consumption of alcohol.

The State did not lead any expert evidence.

A policeman and three laymen who arrived within a very short time at the scene of the accident in which the appellant was involved gave evidence pertaining to the appellant’s condition. Their testimony was moderate in describing his condition. The defence presented evidence by a medical practitioner, Dr Gantovnik, who had treated the appellant for hypertension the day after the accident.

Miller J held that in some cases the onus resting on the State can be discharged by the State without the aid of medical evidence.647

Miller J noted:

“It seems to me that the more gross and manifest the physical manifestations of intoxication noted by credible and reliable laymen are, the more readily may medical evidence be dispensed with and that the more equivocal the

645 Ibid.
646 S v Edley 1970 (2) SA 223 (NPD). See also S v Mhetoa 1968 (2) SA 773 (O).
647 At 226 C.
physical manifestations or indications of intoxication may be, the greater would be the need for the State to lead medical evidence of the accused’s condition at the relevant time.”

It was held that the court was unable, without the support of medical or other scientific evidence, to find that the accused’s judgment was impaired and that the State had not discharged its onus to satisfy the court beyond reasonable doubt that the alcohol he consumed had the effect of impairing his (appellant’s) judgment.

This decision did not deal directly with the defence of criminal incapacity but it nevertheless illustrates the importance of expert evidence being presented especially by the State in cases pertaining to intoxication. It is submitted that any qualified mental health professional can testify with regards to the effect of intoxication on an accused’s ability to appreciate the wrongfulness of his or her act or to act in accordance with such appreciation.

In S v Van Zyl\textsuperscript{648} the appellant was charged in a magistrate’s court with assault with intent to do grievous bodily harm. His defence was that at the time of the incident, due to the cumulative effect of the taking of two anti-histamine tablets and alcohol, he temporarily lacked criminal capacity. The magistrate held that the State had not succeeded in proving the appellant’s criminal responsibility and convicted the appellant of section 1(1) of Act 1 of 1988 in respect of which he had not been charged but which was a competent verdict in terms of the provisions of section 1(2) of Act 1 of 1988, and sentenced the appellant to a fine of R160 or 40 days imprisonment\textsuperscript{649}. An appeal to a Provincial Division was unsuccessful. In a further appeal it was contended on behalf of the appellant that it was an element of the offence of contravention of section 1(1) of Act 1 of 1988 that the accused at the time of the act in question was not criminally responsible and that in the present case there was reasonable doubt pertaining to the appellant’s criminal

\textsuperscript{648} S v Van Zyl 1996 (2) SACR 22 (A).
\textsuperscript{649} At 24J-25A.
capacity and that neither the offence charged nor the statutory offence had been proved\textsuperscript{650}.

The State, on the other hand, contended that the accused had the required criminal capacity and was accordingly criminally liable to the offence charged\textsuperscript{651}. The State requested that the conviction in terms of the statutory offence be substituted with a conviction of the original offence.

It is necessary to reflect on the expert evidence advanced in this case. Two experts presented expert evidence, namely Dr G Muller on behalf of the State and Dr Finkelstein on behalf of the defence. Their expert opinion were founded on the effect of Polaramine tablets and alcohol on the central nervous system. From the outset Howie JA stated that although this was important, the central issue was the appellant’s ability to appreciate the wrongfulness of his actions and to act in accordance with such appreciation\textsuperscript{652}.

Howie JA made the following important finding\textsuperscript{653}:

“Die vraag was dus of die uitwerking van die tablette en alkohol die redelijke moontlikheid geskep het dat die appellant nie die ongeoorloofdheid van sy optrede besef het nie of dat sy inhibisies totaal verdwyn het. Wat derhalwe ter sprake gekom het, was die aard en werking, nie van die liggaam nie, maar van die mens se denkvermoë en gedrag. Dit synde die geval sou mens deskundige getuienis van ‘n psigiater of ten minste ‘n sielkundige verwag het om werkelik in ‘n posisie te wees om te oordeel of appellant se toerekeningsvatbaarheid nadelig geaffekteer was.”

Dr Muller testified that both the anti-histamine tablets and alcohol had a sedative effect\textsuperscript{654}. Dr Muller stated that the appellant’s conduct was not a normal reaction to anti-histamine tablets and that the conduct of the appellant was typical of a

\begin{footnotes}
\textsuperscript{650} At 25 E-F.
\textsuperscript{651} At 25 F-G.
\textsuperscript{652} At 32 B-C.
\textsuperscript{653} At 32 C-D.
\textsuperscript{654} At 32 G.
\end{footnotes}
person who consumed too much alcohol and displayed conduct opposite to his normal behaviour. Dr Muller never referred to the concept of criminal capacity, but merely disagreed with Dr Finkelstein’s contention that there was a possibility that the appellant could not distinguish between right and wrong and act in accordance with such appreciation. Accordingly, Dr Muller’s evidence was not of great assistance to the court.

Dr Finkelstein’s evidence also provided no assistance to the court as he could not conclusively or with reasonable certainty provide an opinion in respect of the appellant’s criminal capacity or lack thereof. When asked whether the appellant could distinguish between right and wrong, Dr Finkelstein stated:

“It’s probably difficult to say whether he had the consciousness at that stage to realise whether he was doing something wrong. Because he could be under the influence of two drugs, which act on the central nervous system in whatever way, that there might be an altered consciousness. In which case he may not possibly be aware that he was – he – he may be aware that he’s doing it, but might not be aware that it is either right or wrong.

Do you ... (intervention) – He ...  
Regard that as a reasonable possibility. - It’s a reasonable possibility. Or, let’s say, it’s a reasonable speculation.”

The abovementioned quotation is one example of the inconsistent evidence presented by Dr Finkelstein. This could be attributed either to the fact that the expert is presenting testimony on a fact not really in issue or that the expert is not an expert on the effects of intoxication on the criminal capacity of the accused.

Howie JA rejected the evidence of Dr Finkelstein and stated:

“Die getuienis van dr Finkelstein – die hoeksteen van die verweer – verg nie veel bespreking nie. Dit is ongelukkig dat hy besluit het, of uitgenooi is, om ‘n mening te waag op ‘n onderwerp buite die perke van sy professionele en

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655 At 33 G-H.
656 At 36 G-I.
The court held that on the accepted evidence it was not reasonably possible that the appellant did not appreciate the unlawfulness of his action and that the State had proved his criminal responsibility and that he was guilty of assault.

The court per Howie JA held the following in respect of section 1(2) of Act 1 of 1988:

(i) Although the Criminal Procedure Act did not provide for a contravention of the statutory offence to be a competent verdict, section 1(2) of Act 1 of 1988 provided for this in unequivocal terms.

(ii) Section 1(2) was not intended to cover the situation where the statutory offence was charged in a substantive charge, but was aimed to provide for the situation where the prosecution in respect of another offence charged failed for the reasons stated in section 1(2).

(iii) The legislature accordingly provided for a built-in automatic alternative charge.

(iv) The provisions of section 1(2) were not to be distinguished from any provisions of the Criminal Procedure Act which provided for competent verdicts.

The appellant was convicted of assault.

This decision reaffirms the fundamental need, also when intoxication is the cause of non-pathological criminal incapacity, for properly qualified mental health professionals to present expert evidence. The role of the mental health professional is dual functional, in the sense that, in the first place, there is an...
essential need for expert evidence and secondly, it should pertain to the defence of criminal incapacity and be relevant thereto.

In *S v Scholtz*\(^{659}\) the appellant was charged and convicted in the magistrate’s court of theft of use, malicious injury to property, culpable homicide driving whilst under the influence of alcohol, failure to stop after an accident and failure to ascertain damages and injuries after an accident. On an appeal against conviction and sentence, it was contended on behalf of the appellant that the State had failed to establish beyond reasonable doubt that the accused had criminal capacity at the time of the commission of the said crimes. It was further contended that the appellant was also not guilty of a contravention of section 1 of Act 1 of 1988 due to the fact that the reasonable possibility that the appellant had criminal capacity was also not proved by the State beyond reasonable doubt.

Froneman J held that in order to successfully raise the defence of non-pathological incapacity, the reasonable possibility must exist that the accused was not able to distinguish between right and wrong or that he was unable to act according to this appreciation\(^{660}\). The mere raising of the defence that the accused did not know what he was doing or that he could not act according to this knowledge, was not sufficient\(^{661}\). In this case no expert evidence was presented relating to the possible effect of alcohol on the accused’s ability to distinguish between right and wrong or to act in accordance with such appreciation. The accused merely contended that he could not remember what happened.

Froneman J held\(^{662}\):

> “... in die afwesigheid van verdere getuienis wat die feitelike grondslag kan bied om die afleiding van bewustelike en vrywillige optrede te ontsenu, die appellant se beroep op ontoerekeningsvatbaarheid nie kan slaag nie. Daar was geen sodanige verdere getuienis nie.”

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\(^{660}\) At 444 H.

\(^{661}\) At 444 H-445 C.

\(^{662}\) At 445 H-I.
The case was remitted to the trial court for a reconsideration of sentence.

This case further serves to illustrate the importance of expert evidence in support of the defence of non-pathological criminal incapacity.

Haque and Cumming\textsuperscript{663} state that a clinical assessment that will aid a court will require a thorough history of the events with a special focus on the accused’s account of the event and the consumption of intoxicants in the period prior to the offence.

Expert evidence inadvertently plays a pivotal role also with reference to the cumulative effects of intoxication on the criminal capacity of an accused. According to Peter\textsuperscript{664} alcohol and substance abuse present the expert witness with a nexus of challenges as it is pivotal to have a clear understanding of their neuro-behavioural effects as well as an in depth appreciation of what the law and the courts require. In addition it is also crucial to have an ability to apply these insights in an assessment that almost always relates to a retrospective assessment and therefore subject to “the vagaries of what the examinee and witnesses can remember, rather than what can be ascertained by some objective means”.\textsuperscript{665}

15 Battered woman syndrome and non-pathological criminal incapacity

\textit{Battered Woman Syndrome}

\textit{The moon faded behind clouds,}
\textit{as they drifted in the wind.}
\textit{Streetlights flicker on and off,}
\textit{and no other light can be found.}

\textit{Alcohol was the scent on his breath,}
\textit{his mind was always out of place.}


\textsuperscript{664} Peter in Kaliski (ed)(2006) supra note 1 at 144.

\textsuperscript{665} Peter in Kaliski (ed)(2006) supra note 1 at 144.
He is aggressive when he drinks, and takes his anger out on her.

Her fingers carefully on the trigger, tears and blood fall at her feet. In a dream world, he won't know, until he awakes, if he ever does.

Nerves send shivers down her spine, hesitating and breathing heavily. Her mind carries her into memories, when she felt pain, anger and hate.

He cut her with a broken bottle, she bleeds from under her left eye. Tonight she will put an end to this, for everything he has ever done.

When push comes to shove, she was always facing down. Shouts and screams echoing, a gun shot puts it to silence.

The streetlights flicker on and off, flashing lights rush to her home. The moon crawls out of darkness, and the moonlight shines again.”

(Darren 2006)

15.1 General background on battered woman syndrome
The Battered Woman Syndrome has become highly controversial, particularly when used in support of a defence of non-pathological criminal incapacity and the ground of justification of private defence\textsuperscript{666}.

Abuse against women is currently a worldwide societal phenomenon. The legal context of women who kill their abusive partners has given rise to a plethora of academic commentary, specifically aimed at addressing the criminal law’s treatment of women who kill their abusive partners. Research indicates that one in every four women will experience abuse within an intimate relationship in their lifetime.

Abused women are more commonly referred to as “battered women”. The terminology of “Battered Woman Syndrome” was first coined by a prominent expert on battered women, Dr Lenore Walker, who described battered woman syndrome as “a pattern of psychological and behavioural symptoms found in women living in battering relationships.”

It is important to note that the “Battered Woman Syndrome” is not, and has never been, a legal defence in its own right.

Battered woman syndrome evidence is described by Slovenko as “syndrome evidence” which constitutes “a cluster of systems in criminal cases, either to

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

668 See Walker, LE “The Battered Woman Syndrome” (1984) at 95 – 97. For a detailed exposition of the term “Battered Woman Syndrome” see chapter 1 above. The definition of “Battered Woman Syndrome” will accordingly not be discussed in this section.

establish that a particular traumatic event or stressor actually occurred or to explain the behaviour of the victim.”670

Battered woman syndrome evidence is accordingly used in order to explain a battered woman’s experiences and the specific psychological effects of battering and abuse on the woman671. The psychosocial context of battering or abuse and its impact on battered women is relevant within the following contexts672:

• In circumstances where a battered woman is tried for a crime and relies on a defence of private defence, automatism or lack of criminal capacity.
• When a battered woman has been charged or convicted of a crime, and evidence of battering or its effects is adduced in support of mitigation of sentence673.
• Other instances, for example to prove a pattern of coercive control674.

Battered woman syndrome has also featured in numerous decisions pertaining to the defence of non-pathological criminal incapacity675. Although the terminology of “Battered Woman Syndrome” was not specifically used in these decisions, the evidence presented by expert witnesses in these decisions and the facts indicative of abuse, either physical or psychological, boils down to manifestations of the “Battered Woman Syndrome.”

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670 Slovenko, R “Psychiatry and Criminal Culpability” (1995) at 209. Slovenko notes that recently in criminal cases expert testimony about a diversity of trauma syndromes such as the battered spouse, battered child, rape trauma and incest trauma is offered to prove, on the basis of the symptoms, that a particular stressor or crime actually happened. See also Slovenko, R “Psychiatry in Law – Law in Psychiatry (2002) at 135.
671 Reddi (2005) SACJ supra note 1 at 98.
673 See S v Ferreira 2004 (2) SACR 454 (SCA).
675 S v Campher supra note 1; S v Smith supra note 1; S v Wiid supra note 1; S v Potgieter supra note 1.
Ludsin and Vetten indicate that expert evidence in cases where abused women kill their abusive spouses or partners is essential and pivotal in order to provide clarity on the following aspects\(^{676}\):

- Understanding why abused women do not leave their abusers.
- Why women’s options to put an end to the abuse are very limited and often non-existent.
- The psychological impact of abuse on battered women.

Expert testimony pertaining to the social context and effects of domestic violence as well as the history of the abusive relationship are pivotal in order to provide an abused woman or battered woman with a fair trial\(^{677}\).

Moas similarly states\(^{678}\).

“A woman’s actions can be fairly judged only if understood in the light of her experiences with the deceased and how these experiences shaped her perspectives.”

In the preceding part of this chapter, the author discussed the defence of non-pathological criminal incapacity with specific reference to its origin, development and the controversial role of expert evidence in support of this defence. Non-pathological criminal incapacity is one of the defences available to a battered woman who kills her abuse spouse or partner. In this part of the chapter, the author will contextualise the psychosocial dynamics of an abusive relationship and, in particular, the fundamental need for expert evidence in support of the defence of non-pathological criminal incapacity on the backdrop of the battered woman who kills her abusive spouse or partner.

\(^{676}\) Ludsin and Vetten (2005) *supra* note 1 at 12.
15.2  The psychosocial dynamics of an abusive relationship

15.2.1  Domestic violence and manifestations of abuse

The preamble to the Domestic Violence Act\textsuperscript{679} summarises the plight of the battered woman. In South Africa, domestic violence is currently a common phenomenon\textsuperscript{680}. Domestic violence occurs in all cultures, and people of all races, ethnicities and religions can be perpetrators of domestic violence. Within the context of the battered woman, the battered woman is typically the victim of domestic violence at the hands of her abusive husband or partner\textsuperscript{681}.

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\textsuperscript{679} Act 116 of 1998. See \textit{Omar v Government of the Republic of South Africa and Others} (Commission for Gender Equality, Amicus Curiae) 2006 (1) SACR 359 (CC) at 363 – 364 paragraph 13 where Van der Westhuizen J states: “The high incidence of domestic violence in our society is utterly unacceptable. It causes severe psychological and social damage. There is clearly a need for an adequate legal response to it. Whereas women, men and children can be victims of domestic violence, the gendered nature and effects of violence and abuse as it mostly occurs in the family, and the unequal power relations implicit therein are obvious. As disempowered and vulnerable members of our society, women and children are most often the victims of domestic violence.” In \textit{S v Baloyi (Minister of Justice and Another Intervening)} 2000 (1) SACR 81 (CC) (2000) (2) SA 425, 2000 (1) 86) Sachs J stated at paragraph 11: “All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.” See also \textit{Stark} (2007) \textit{supra} note 674 at 84. See also Gelles, RJ and Strauss, MA “Intimate Violence: The Definitive Study of Causes and Consequences of Abuse in the American Family” (1988) at 14 where they define violence as an “act carried out with the intention or perceived intention of causing physical pain or injury to another person.”

The preamble to Act 116 of 1998 interestingly reads as follows: “RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective; AND HAVING REGARD to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all forms of Discrimination Against Women and the Rights of the Child.”


It is interesting to quote the words of an anonymous abused woman who recently wrote to Dr Louise Olivier, Clinical Psychologist, in the \textit{You} magazine pleading for help and advice:

“Afraid to leave abusive husband

I’m 41 and have been married for 22 years. The first few years were happy even though he had affairs. Then he accused me of having affairs. Things got worse when he stopped working in March 2008. He beats me if I go anywhere without telling him. He insists on taking me everywhere. He reads my diaries and checks my cellphone. He’s badmouthing me at work. He stabbed me because I didn’t tell him I was going to town to buy our children shoes.”
Domestic violence entails any controlling or abusive behaviour that harms the health, safety or well-being of a person or child in the care of such person. It further includes any form of actual or threatened physical, sexual, emotional, verbal and psychological abuse which is regarded as being a pattern of degrading or humiliating conduct, including repeated ridicule, threats or possessiveness and jealousy or serious invasion of privacy.\(^\text{682}\)

According to Walker, women are battered by partners they are married to or with whom they live or whom they date.\(^\text{683}\) Even though the majority of reported abuse is inflicted by men on women, there are also reports of women abusing their partners.\(^\text{684}\) Walker notes the following pertaining to abuse:\(^\text{685}\):

“The goal of woman abuse is usually to exert power and control over the victim. Most physical and sexual abuse is accompanied by psychological intimidation and bullying behaviour used to maintain power and control over the woman. The pattern of abuse usually has an obsessional quality to it rather than a lack of control by the batterer.”

Domestic violence within the context of the battered woman usually encompasses one or more of the following manifestations of abuse which include, but is not limited to, the following:

- **Physical abuse**\(^\text{686}\)

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\(^{683}\) Walker, LE “Abused Women and Survivor Therapy – A Practical guide for the Psychotherapist” (1994) at 56. Walker notes that an intimate relationship is “one in which there is a close, loving, romantic, emotional bond, usually including sex.”

\(^{684}\) Walker (1994) *supra* note 683 at 57. Statistics obtained from POWA suggest that 95% of the time, it is women who are the victims of domestic violence.


\(^{686}\) See Ewing (1987) *supra* note 666 at 8 where it is noted that in Walker’s study of 435 battered women, she observed that two-thirds of the battering incidents included pushing, slapping,
“For most of my married life I have been periodically beaten by my husband. What do I mean by ‘beaten’? I mean that parts of my body have been hit repeatedly, and that painful bruises, swelling, bleeding wounds, unconsciousness and combinations of these things have resulted.” (Letter from a Battered Woman as quoted in Moore, D “Battered Woman” 1979).

This form of abuse is most prevalent within the context of domestic violence and includes the following:

- Slapping;
- Shoving;
- Hitting;
- Torture;
- Stabbing;
- Beating;
- Assault with a weapon and/or murder\(^{687}\).

Within the ambit of battered women who murdered their abusive husbands or partners and relied on the defence of non-pathological criminal incapacity, this form of abuse was most prevalent in all of the cases.

Threats of physical violence is often regarded as sufficient to gain control of the woman as long as she truly believes that her partner will beat her in order to get what he wants or to punish her for disobeying him\(^{688}\).

Walker notes\(^{689}\):

\(^{687}\) Statistics provided by POWA (People Opposing Women Abuse) [accessed on 2009-03-16], Woman Abuse Fact Sheet [accessed on 2009-03-16].

\(^{688}\) Walker (1994) supra note 683 at 57, Dobash and Dobash (1992) supra note 666 at 1 – 15. Walker notes that some battered women have been chained to bedposts, locked in houses with the windows and doors hailed shut, kept inside coffin-like boxes and some even kept under surveillance at gunpoint.
“Whether imprisonment is enforced by physical means or not, most women know that the batterer is willing to use physical force to get what he wants. These women soon learn to obey rather than face the escalating violence that inevitably follows if they fight back.”

In *S v Campher*[^690^], the evidence of the accused was summarised as follows:

“Sy het verder verduidelik dat hy het nie genoeë geneem as sy enigsins teëgepraat het nie – hy het baie woede en geword as sy dit gedoen het. Hy het sy humeur verloor en haar geslaan as sy dit gedoen het.”

In *S v Potgieter*[^691^] evidence similarly stated:

“He reacted by hitting her. She fell from the bed and he started kicking her where she lay ...”

In *S v Wiid*[^692^] the following was observed from the appellant’s evidence:

“Op daardie stadium het die oorledene die appellante ‘n hele aantal klappe teen die kop toegedien.”

- **Sexual abuse**

This form of abuse includes the following:

[^689^]: Walker (1994) *supra* note 683 at 57. See also Dobash and Dobash (1992) *supra* note 666 at 2 where they quote the words of numerous women from various countries who stated: “I was always terrified. My nerves were getting the better of me ... He knew this and I think he loved it.” “The fear of not knowing what he would do – I feared for my life.” “I remember the tension of becoming aware that I had to notice what I was saying all the time, to make sure I didn’t offend him. I had become afraid of him.” See also Dobash, RE and Dobash, RP “Violence against Wives” (1979) at 111.

[^690^]: *S v Campher* 1987 *supra* note1 at 945 A-B.

[^691^]: *S v Potgieter* 1994 *supra* note 1 at 63 H.

[^692^]: *S v Wiid* *supra* note 1 at 566 A-B. See also *S v Engelbrecht* 2005 (2) SACR 41 (WLD) at 61 A-H – this decision will be discussed in more detail below as well as *S v Ferreira* 2004 (2) SACR 454 (SCA).
• Any act of a sexual nature that is not desired;
• Forcing the woman to participate in sexual practices of an offensive or degrading nature\textsuperscript{693};
• Rape.

Sexual abuse and sexual assault are examples of the most brutal and severe expressions of masculine violence towards women\textsuperscript{694}.

Sexual violence is generally used as a broad conceptualization of male violence or in narrow terms to refer to assaults and intrusions that have an explicit sexual content\textsuperscript{695}. Sexual abuse within a battering or abusive relationship is usually accompanied by physical and psychological abuse\textsuperscript{696}. Battered women sometimes subject themselves to the abusive partner’s unwanted sexual desires as a way of calming him down and to protect themselves from further abuse\textsuperscript{697}.

Walker notes\textsuperscript{698}:

“The coercion and violence that accompanies sex may include forced shaving of pubic hair, mutilating the genitals, stabbing the breasts, brutal anal rapes, holding the woman’s head down on the man’s erect penis to force oral sex, inserting objects in her vagina and anus, punching her pregnant abdomen, and kicking at the vagina and other vulnerable areas.”

This quote, as shocking and disturbing as it is, illustrates the sexual perversity of some abusive men\textsuperscript{699}.

\textsuperscript{693} S v Engelbrecht \textit{supra} note 689 at 61 A-B; S v Ferreira \textit{supra} note 689 at 463 E-G.
\textsuperscript{695} Kelly and Radford in Dobash and Dobash (1998) \textit{supra} note 694 at 57.
\textsuperscript{696} Walker (1994) \textit{supra} note 683 at 57.
\textsuperscript{697} Ibid.
\textsuperscript{698} Ibid.
\textsuperscript{699} See S v Visser unreported decision case number cc 545/07. This case will be discussed in detail below.
Walker notes that women are sometimes coerced into sex with other people and often with children\footnote{Ibid.}.

- **Emotional and Psychological abuse**

In terms of the Domestic Violence Act, “emotional, verbal and psychological abuse” constitutes a pattern of degrading or humiliating conduct towards a complainant which include:

- repeated insults, ridicule or name calling;
- repeated threats to cause emotional pain\footnote{See S v Ferreira supra note 689 at 463 F-G - 464 D-G.};
- repeated exhibition of obsessive possessiveness or jealousy which constitutes an invasion of privacy.

According to Mills there are various typologies of emotional abuse within an abusive relationship to which a battered woman is subjected which includes the following\footnote{Mills, LG “Killing her Softly: Intimate Abuse and the Violence of State Intervention” (1999) Harvard Law Review 550 at 586.}:

- **Rejection** – this occurs where the abusive husband or partner subjects the woman to criticism, punishment or harsh judgment including threats of punishment if the woman opposes him or attempts to assert her own opinion.
- **Degradation** – this manifestation of emotional abuse occurs when the batterer or abusive partner publicly humiliates the battered woman or when, for example, he criticizes her parenting skills.
- **Terrorization** – this occurs when the batterer induces fear or anxiety in the battered woman often manifested in threats of abuse if the battered woman does not comply with the demands of the batterer.
- **Social isolation** – this form of abuse occurs when the batterer discourages the battered woman from taking part in social activities. Mills states that this is often accomplished by either:
physically preventing the battered woman from visiting friends or family, or
degrading the battered woman in public so that she will rather avoid being
embarrassed in public\textsuperscript{703}.

- **Missocialization** – this occurs when the batterer coerces the battered woman
to become involved in antisocial behaviour or illegal activities. According to
Mills batterers often force women to commit crimes for them, for example
engaging in prostitution for the batterer’s financial benefit\textsuperscript{704}.

- **Exploitation** – exploitation is also often used by the batterer to coerce the
battered woman into criminal activity such as prostitution.

- **Emotional Unresponsiveness** – this dynamic can be traced by a batterer’s
detachment from the battered woman by ignoring her and accordingly it can
be defined rather as an omission on the part of the batterer as opposed to a
commission\textsuperscript{705}.

- **Close confinement** – this occurs when the batterer restricts the battered
woman’s physical mobility. This form of confinement can be achieved in a
variety of ways, for example confining the battered woman to closet a or
room.

As soon as serious violence has been used on a woman, she may react with
similar terror to less serious abuse or even the threat of abuse\textsuperscript{706}. The abusive
partner sometimes also attempt to control every aspect of the woman’s life by, for
example, subjecting her to constant scrutiny by means of questioning her, telling
her how she should spend her time and subjecting her to constant surveillance\textsuperscript{707}.

Walker illustrates\textsuperscript{708} the escalating effect of abuse on a woman and explains that
there is a point in most abusive relationships at which a woman recognizes the
possibility that she will be killed by the batterer. As soon as that point is reached,

\textsuperscript{706} Walker (1994) *supra* note 683 at 58.
\textsuperscript{707} Walker (1994) *supra* note 683 at 58 – 59. Walker states that some forms of harassment such
as surveillance, sleep deprivation and periods of intense, prolonged questioning are similar to
methods applied by torturers and could constitute a form of torture. See also Pope, KS and
Garcia-Petniemi, RE “Responding to victims of torture: Clinical issues, professional
responsibilities, and useful resources” (1991) *Professional Psychology: Research and
Practice* 221, 269 – 276.
\textsuperscript{708} Walker (1994) *supra* note 683 at 59.
the woman is more prone to react to threats or actual violence with a greater sense of terror and understanding of its dangerous consequences.

15.2.2 Myths and misconceptions surrounding the battered woman

It is important to take note of the various myths that surround the battered woman. Expert evidence pertaining to the battered woman syndrome is commonly presented with the specific aim of dispelling these myths.

Walker correctly states

“It is important to refute all the myths surrounding battered women in order to understand fully why battering happens, how it affects people, and how it can be stopped.”

It is accordingly important to briefly analyse some of the most important myths surrounding the battered woman.

- Myth: The Battered Woman Syndrome affects only a small percentage of the population

Research suggests that one in every four women is in an abusive relationship. Research further supports the assumption that a woman is killed every six days by her intimate male partner in South Africa. Walker notes that battering of women is an extremely underreported crime. Experts tend to suggest that between one-half and two-thirds of all marriages will experience at least one incident of abuse during the course of the relationship. The frequency of domestic violence

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709 Walker (1979) supra note 666 at 18.
710 Ibid.
is thus clearly underestimated. The lack of comprehension of the precise
dynamics of an abusive relationship and the frequency of occurrence “undermines
society’s ability to deal with the legal and moral complexities arising from the
abusive relationship.”

Battering should not be regarded as isolated incidents arising from minor disputes,
but should be viewed as a pattern of repeated abuse from which the battered
woman frequently sees her escape.

- **Myth: Battered women choose abusive relationships because they are masochistic**

Masochism within the context of the battered woman means that she experiences
some form of pleasure when beaten or assaulted by her husband or partner. This
myth has the negative result of displacing the blame for the battering or
abuse on the battered woman and also perpetuating the violent behaviour of the
male.

- **Myth: Women abuse happens to uneducated working class women**

Walker indicates that lower-class women have more frequent contact with the
community and accordingly signs of abuse will become evident and visible as
opposed to middle and upper class who often fear making their abusive
relationships public as a result of fear of social embarrassment. The fact,
however, remains that abuse against women can affect women of all races,
classes, language groups as well as educational groups.

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where a study of over 400 battered women was conducted and Browne (1987) *supra* note 666
at 2 and 3 where it is stated: “... the privacy of the middle-class life-style preserves an illusion
of greater domestic tranquility ...” but this was “only an illusion.”


716 *Ibid.* Research by POWA *supra* suggests that this myth blames and stigmatises women and
provides an excuse for abuse.

717 Walker (1979) *supra* note 666 at 22; POWA *supra* note 710 at 5.

Introduction” in Battered Women 7, 15 – 16 in Flemming, J “Stopping Wife Abuse” (1979) at
Myth: Women could leave their abusive partners if they wanted to

“Surely all women are born knowing the men they love could kill them in a minute, that we are kept alive by kindness, that we are always in peril. This is the source of our desire for obedience, for the inherited knack, the alert readiness – even in women who rage or live their lives in solitude – for giving in.”719 (Mary Gordon “The Company of Women” [1980] 245)

Probably the most difficult myths about battering or abusive relationships to dispel, is the question as to why the woman doesn’t just leave or escape from the abusive relationship.

Browne notes the following720:

“Denial and minimization are consequences of escalating fear that allow a woman to remain in her violent home and make it difficult for her to see the ‘forest for the trees’.”

Various factors721 motivate an abused woman to remain in an abusive relationship. These include circumstantial factors such as:

- Economic dependence – Martin722 correctly states that often battered women, who in many of the cases are housewives, do not have the financial means in order to leave an abusive relationship.

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720 Browne (1993) supra note 666 at 47.

“In addition, battered women, when they want to leave the relationship, are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling that they will not be believed.”

The New Jersey court also found Walker’s explanation of external factors that motivate battered women to remain in an abusive relationship such as financial constraints, limited child care options, and the general lack of support from society for women, as helpful in dispelling myths as to why women would want to stay in such relationships. (at 372)

Fear of greater physical danger to herself and her children if the abused woman and her children attempts to leave.

Fear of being hunted down and suffering worse abuse than before.

Fear of emotional damage to the children or losing custody over children.

Lack of employment opportunities.

Social isolation as a result of a lack of support from family and friends.

Fear of getting involved with the legal process.

Fear of the abuser stalking or harrassing her.

Emotional factors, such as:

- Insecurity within the battered woman as to her own ability to cope on her own.
- Loyalty, although displaced, to the abuser.
- Denial – “It’s really not that bad. Other people have it worse.”
- Love for the abuser.
- Shame and humiliation.
- Unfounded optimism that the abuser will rehabilitate.
- Personal, religious and cultural beliefs.
- Guilt – the woman believes that the cause of the violence is some inadequacy on her part.
- Demolished self-esteem.

Of all the factors playing a role in inducing an abused woman to stay in an abusive relationship, fear is the most common and important factor.

Martin notes:\footnote{Martin (1976) \textit{supra} note 666 at 76.}

“Fear immobilizes them, ruling their actions, their decisions, their very lives.”

According to Pistorius, a possible explanation for the fact that a battered woman would remain in an abusive relationship could also be traced to the Victorian “ideal
woman” perspective. According to the latter ideology women are expected to be unselfish, self-sacrificing and they will accordingly rather make excuses for their abuser’s behaviour instead of making an end to the relationship. According to Ludsin women remain in an abusive relationship for a variety of reasons including economic and emotional dependence.

Alsdurf and Alsdurf state that according to Dr Constance Doran, the founding director of Fuller Theological Seminary’s SAFE (Stop Abusive Family Environments) Programme, there are both external sociological as well as internal psychological motivations for a woman to stay in an abusive relationship.

Doran advances the following explanation for why a woman remains in an abusive relationship:

“It’s very much like what victims of political terrorism experience: a psychological numbing process goes on, so that the person is able to tolerate the violent situation as well as possible. Victims tend to minimize the risk they are experiencing. An extension of this may occur when the victim actually becomes a supporter or advocate of her captor. ... The whole process of becoming psychologically paralyzed is significant in keeping women in abusive situations.”

It is accordingly clear that battered women remain in abusive relationships for various reasons sometimes incomprehensible to the lay person who does not understand the dynamics of the abusive relationship that the battered woman finds herself in. Expert evidence is pivotal in dispelling this myth and providing clarity as to the exact reasons for remaining in an abusive relationship.

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725 Ibid.
726 Ludsin (2003) supra note 666 at 7. See also Alsdurf, J and Alsdurf, P “Battered into Submission – The Tragedy of Wife Abuse in the Christian Home” (1989) at 34 where they state that factors such as guilt, fear, religion, helplessness or just a lack of options motivate battered women to stay with their abusive husbands.
727 Alsdurf and Alsdurf (1989) supra note 726 at 14-34.
728 Ibid.
729 The role of expert evidence in cases of battered woman syndrome will be extensively discussed in paragraph 15.3 below.
• **Myth: Stress and/or substance abuse causes battering**

Despite the fact that there is often a link between intoxication or drinking and battering, research suggests that abuse occurs whether or not the abusive husband or partner was drinking or not\(^{730}\). It is important to note that stress, substance abuse and battering are all separate issues and should be understood as such\(^{731}\).

• **Myth: Battered women deserve to get beaten**

The myth suggests that the battered woman should seek answers for her abusive husband or spouse’s violence in her own behaviour\(^{732}\).

Walker summarises the problematic nature of this myth by stating\(^{733}\):

“... philosophically this myth robs the men of responsibility for their own actions. No one could deserve the kind of brutality reported in these pages.”

15.2.3 **The psychological profile of the battered woman versus the batterer**

It is important to concisely summarise the psychological profiles of both the battered woman and the abusive husband or partner.

In order to successfully introduce expert evidence of the battered woman syndrome it is necessary to indicate that the woman exhibited characteristics of a

\(^{730}\) POWA *supra* note 710 at 4; Mather (1988) *Merc. L. Rev. supra* note 663 at 549.

\(^{731}\) *Ibid*. See also Walker (1989) *supra* note 666 at 114 where she indicates that the presence of alcohol increases the risk for serious injury or assault. See also Walker (1994) *supra* note 683 at 67.


\(^{733}\) Walker (1979) *supra* note 666 at 29 – Walker conducted a study of battered women that indicated that batterers lose self-control because of their own internal reasons, not because of what the woman did or did not do.
battered woman at the time of the killing and also that the abusive husband or partner displayed the characteristics of a batterer.

Walker personifies the typical psychological profile of a battered woman as opposed to the batterer as follows\textsuperscript{734}:

<table>
<thead>
<tr>
<th>Battered Woman</th>
<th>Batterer</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Has low self-esteem\textsuperscript{735}</td>
<td>1. Has low self-esteem.</td>
</tr>
<tr>
<td>2. Believes all the myths about battering relationships.</td>
<td>2. Believes all the myths about battering relationships.</td>
</tr>
<tr>
<td>3. Is a traditionalist about the home, strongly encourages family unity and the prescribed feminine sex-role stereotype.</td>
<td>3. Is a traditionalist believing in male supremacy and the stereotyped masculine sex role in the family.</td>
</tr>
<tr>
<td>4. Accepts responsibility for the batterer’s actions.</td>
<td>4. Blames others for his actions.</td>
</tr>
<tr>
<td>5. Suffers from guilt, yet denies the terror and anger experienced by her.</td>
<td>5. Is pathologically jealous\textsuperscript{736}.</td>
</tr>
<tr>
<td>6. Presents a passive face to the</td>
<td>6. Presents a dual personality\textsuperscript{737}.</td>
</tr>
</tbody>
</table>


\textsuperscript{735} See S v Potgieter supra note 1 at 64 G-H where the accused stated: “it’s so humiliating that it is not worth living if I’m such a bad useless person.”

\textsuperscript{736} See S v Engelbrecht supra note 1 at 61 A-C where Satchwell J summarises evidence of the deceased’s harassment and stalking of the accused: “... telephone calls to Mrs Engelbrecht at work by Mr Engelbrecht sometimes two or three times per day and sometimes in a disguised voice; Mr Engelbrecht coming into the hospital wards, casually and the data office looking for Mrs Engelbrecht while she was working; Mr Engelbrecht stalking and spying on her; peering in hospital doors and windows and standing across the street to watch Mrs Engelbrecht at work and during smoke breaks during both the day and the night ...”

See also Walker (1994) supra note 683 at 60 where she states that jealousy, overpossessiveness and intrusiveness often results in the isolation of the battered woman. She may cease normal social activities, neglect seeing her friends and family and tends to become a prisoner in her own home. During the times when the battered woman is allowed to engage in social activities, the abuser controls and monitors with whom the battered woman has contact and all aspects of such contact and accordingly as a result of the woman becoming increasingly isolated, she becomes more vulnerable to the abuser. See also Moore (1979) supra note 666 at 15 – 16.

\textsuperscript{737} S v Potgieter supra note 1 at 65 g where it is stated: “The pattern of inconsistent and deplorable behaviour continued. Initially he was kind and considerate, saying he wanted to marry her in August. But he soon reverted to his former misconduct.”
outside world and has the power to manipulate her environment enough to prevent further violence or even being killed.


8. Uses sex as a means of establishing intimacy.

9. Believes that no one will be able to assist her in the difficult situation that she finds herself in except herself.

7. Experiences severe stress reactions as a result of which he uses drinking and wife battering to cope.

8. Frequently uses sex as an act of aggression to enhance self-esteem

9. Does not believe his violent behaviour should have negative consequences.

According to Browne, the only markable difference between battered women who kill as opposed to battered women who do not, lies in the perceptions of violence\(^\text{738}\). According to Browne women who eventually killed their abusive husbands or partners perceived them as being more violent more frequently which caused more severe physical injuries as opposed to battered women who did not kill\(^\text{739}\).

15.2.4 The cycle of violence

According to Walker violent relationships are cyclical in nature and typically consist of three stages\(^\text{740}\).

\(^{738}\) Browne (1979) as discussed in Walker (1989) supra note 666 at 103.

\(^{739}\) Ibid.

**Phase one: The tension-building stage**

During this phase the abusive male engages in minor battering incidents and verbal abuse. The battered woman will then attempt to calm the batterer by employing various strategies such as becoming nurturing and compliant\(^{741}\). The battered woman will attempt to be as passive as possible in order to avoid further violence. According to Walker, the woman believes that what she does and how she reacts will prevent the abuser’s anger from escalating. Within this phase, the battered woman is often in denial as to her own feelings of anger as a result of being physically or psychologically abused. The tension between the battered woman and the batterer escalates to a point where it becomes more difficult to successfully apply their coping techniques and the tension between the two eventually becomes unbearable\(^{742}\).

**Phase two: The acute battering incident**

At some point during phase one, the tension build-up between the battered woman and the batterer becomes intolerable and consequently more serious violence becomes inevitable. The cause of phase two is often an internal or external event in the life of the battering male, but provocation for more serious violence is often provided by the woman who can no longer tolerate or control her phase-one anger and anxiety. Phase two is accordingly characterized by the uncontrollable discharge of the tensions that have built up during phase one\(^ {743}\). According to Walker, the anticipation of what might happen during this phase causes severe psychological stress for the battered woman who often displays signs of anxiety, depression and also complains of psychophysiological symptoms\(^ {744}\).

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\(^{741}\) Ibid.

\(^{742}\) Ibid.

\(^{743}\) Walker (1979) supra note 666 at 59; Dutton (2007) supra note 674 at 75.

\(^{744}\) Ibid.
Walker describes the acute-battering phase as follows\textsuperscript{745}:

“During the acute phase – set apart from minor battering incidents by its savagery, destructiveness, and uncontrolled nature – the violence has escalated to a point of rampage, injury, brutality, and sometimes death.”

\textit{Phase three: Kindness and loving behaviour}

This phase of the cycle of violence is characterized by extreme contrition and loving behaviour on the part of the abusive male. The abusive male behaves in a charming and loving manner constantly asking for forgiveness with promises to seek professional help, to stop drinking as well as to refrain from further violence. During this phase of loving contrition, the battered woman is often victimized psychologically.\textsuperscript{746} Walker notes that during this phase, the battered woman and the batterer become interdependent on each other – she for his caring behaviour, and he for her forgiveness.\textsuperscript{747} In some cases phase three may last as long as several months, but within an abusive relationship, the affection and contrition of the man will eventually fade and phase one of the cycle will start afresh.\textsuperscript{748}

It is important to take note of the cycle of violence within an abusive relationship in order to comprehend the psychosocial dynamics of the relationship. Expert evidence pertaining to the cycle of violence within an abusive relationship is also pivotal in order to understand why a battered woman reacted in a particular way, for example by murdering her abusive partner or husband. In order to provide a practical exposition of the cycle of violence, the table of Dutton is important. The cycle theory of violence has been used to explain why the battered woman believed that her abusive husband or partner presented a threat of imminent harm when she attacked him.\textsuperscript{749}

\textsuperscript{745} Walker (1989) \textit{supra} note 666 at 43; Dutton (2007) \textit{supra} note 674 at 75 – 77.
\textsuperscript{746} Walker (1989) \textit{supra} note 666 at 45.
\textsuperscript{747} Ibid. See also Dutton (2007) \textit{supra} note 674 at 78. According to Dutton a process of “traumatic bonding” begins to operate between the battered woman and the abusive partner or husband. Dutton states: “This process is an attachment to the abuser formed by the prior power differential in the relationship coupled with intermittent abuse.”
\textsuperscript{748} Lenkevich (1999) \textit{William and Mary Journal of Women and the Law} \textit{supra} note 666 at 308.
Burke similarly concludes the following pertaining to the cycle theory of violence:\footnote{Ibid.}

“Expert testimony describing the cycle theory is said to explain the reasonableness of a domestic violence victim’s perception that serious harm was ‘imminent’ despite the fact that her abuser was seemingly calm or even sleeping when she killed him.”

Walter’s research on Battered Woman Syndrome and accordingly the cycle of violence has also been held to assist the court in explaining the effect of the Battered Woman Syndrome on the woman’s behaviour throughout the relationship and explaining why the woman entered the relationship, remained in the abusive relationship and failed to escape sooner.\footnote{See Lenkevich (1999) William and Mary Journal of Women and the Law supra note 666 at 308 – 309; State v Kelly, 478 A-2d 364, 375 – 376 (N.J. 1984). In the latter case Walker’s work on Battered Woman Syndrome was taken into high regard.}

The cyclical nature of the abuse together with the loving behaviour displayed by the abusive husband or partner during phase three reinforces the hope that these women experience that their abusers will reform and accordingly keeps them entrapped in the relationship.\footnote{Ibid.}

15.2.5 The theory of learned helplessness

escape from an abusive relationship. Walker designed the theory of learned helplessness to explain the passive behaviour of battered women.\textsuperscript{754}

The theory of learned helplessness was originally developed by experimental psychologist Martin Seligman who placed dogs in cages from which they could not escape and subjected these dogs to electric shocks randomly and at variable times. According to Seligman these dogs quickly learned that there was nothing they could do to control the shocks. Eventually the dogs in the experiment completely ceased all voluntary attempts to escape. When the procedure was changed by researchers in order to teach the dogs to escape, they remained entirely passive, refusing both to escape or to avoid the administered electric shocks. Upon closer scrutiny, however, it became evident that these dogs were not passive, but had instead developed coping skills in order to minimize the pain, by lying in their own fecal matter in a part of the electrical grid that received the least amount of electricity. Accordingly, once these dogs learned how to escape in this manner, their “learned” helplessness which was to trade the unpredictability of escape for the more predictable coping strategies, disappeared.\textsuperscript{755}  Mather notes that if animals or humans are continuously exposed to situations in which they have no control over outcomes, these experiences weaken their capacity to react in a situation in which they could have some control.\textsuperscript{756}

Within humans, and accordingly battered women, Seligman discovered that even if a battered woman has control over a particular situation, but believes that she does not, she will rather respond to that situation with coping strategies, than trying to escape. Battered women are repeatedly exposed to painful events over which they have no control, for example psychological or sexual abuse, and

\textsuperscript{754} Walker (1979) supra note 663 at 45; Walker (1989) supra note 663 at 49.
\textsuperscript{755} Ibid. According to Martin Seligman, there are three components to learned helplessness:
(a) motivational impairment ("passivity")
(b) intellectual impairment (lack of problem-solving ability)
(c) emotional trauma (increased feelings of helplessness, incompetence, frustration and depression)
Seligman also identified a similarity between learned helplessness and clinical depression. See Barnett and LaViolette (1993) supra note 666 at 103.
\textsuperscript{756} Mather (1988) Merc. L. Rev. supra note 663 at 554. According to Mather there is a view that some battered women lose their ability to “save” themselves due to the fact that they feel they have no control over the battering situation.
respond to these stressors with classic symptoms of learned helplessness.\textsuperscript{757} Walker notes that battered women within this context becomes passive, lose their motivation to respond and start believing that nothing they do will change their fate.\textsuperscript{758} Similar to Seligman’s experiment with the dogs, battered women eventually refrain from avoiding the painful stressors and fail to cease opportunities for escaping.\textsuperscript{759} Walker states that the theory of learned helplessness has three components.\textsuperscript{760}

- information about what will happen
- cognitive representation as to what will happen
- behaviour toward what happens.

If a person does have control over response outcome variables but believes he/she does not, he or she is likely to respond with learned helplessness.

If a battered woman is repeatedly abused, similarly to electrical shocks, the woman’s motivation to respond becomes diminished and she becomes more passive and her cognitive capacity to perceive success is altered.\textsuperscript{761} Accordingly the battered woman subjectively believes nothing she does will alter her circumstances. Walker states:\textsuperscript{762}

“Battered women don’t attempt to leave the battering situation, even when it may seem to outsiders that escape is possible, because they cannot predict their own safety ...”

People suffering from learned helplessness are more likely to choose behavioural responses that will have the highest predictability of an effect within the known, or familiar, situation, they avoid responses – like escape, for instance – that launch them into the unknown.”

\textsuperscript{757} Ewing (1987) supra note 666 at 20 – 21; Walker (1989) supra note 666 at 51.
\textsuperscript{758} Ibid.
\textsuperscript{759} Ibid.
\textsuperscript{760} Walker (1979) supra note 666 at 47.
\textsuperscript{761} Ibid.
\textsuperscript{762} Walker (1989) supra note 666 at 50; Johann and Osanka supra note 666 at 62 – 63.
The battered woman accordingly fails to leave not because of an inherent desire to stay, but because of a lack of cognitive capacity in respect of her escape options.763

Walker identifies seven factors associated with the development of learned helplessness:764

1. A pattern of violence – this pattern refers to the cycle theory of violence with an increased frequency and severity of abuse;
2. Sexual abuse of the woman;
3. Jealousy, overpossessiveness and isolation of the woman;
4. Threats to hurt or kill the woman;
5. Psychological torture;
6. Violence correlates;
7. Alcohol or drug abuse by either the man or woman.

Understanding these factors and comprehension of the psychological concept of learned helplessness, will provide an explanation of the psyche and psychological disposition of the battered woman and reasons for the decisions the battered woman took and the motivation for remaining in an abusive relationship.

15.2.6 The theory of coercive control

“It was as if he transplanted his brain into mine. I started to think like him. Dirk made me believe that we were untouchable and that we could do what we wanted.”765

“Dirk was my god. He made me believe he was almighty and that he was in control ...”766

764 Walker (1989) supra note 666 at 52.
766 Pretoria News 14 March 2009. These quotations were extracted from the evidence by the accused in the currently controversial and highly publicised trial of S v Visser case number CC
Another theory of explaining the nature and effects of domestic abuse, is the theory of coercive control.767

A domestic assault is often part of a much larger system of controlling, coercing, intimidating and violent behaviours employed by an abusive partner to control the 

545/09 also often referred to as the “Barbie trial”. See unreported judgment S v Visser supra note 853 at 58. The facts of the case in S v Visser are the following:

Cézanne Visser, better known as “advocate Barbie” faced fourteen charges against her which includes fraud, the incitement of minors to commit indecent acts, indecent assault, rape, possession of child pornography, the manufacturing of child pornography as well as the possession of drugs. The case was heard in part in the Pretoria High Court when Patel J in April 2007, passed away. The case again commenced on 16 February 2009. Cézanne Visser initially stood trial on all of the charges together with her former lover and fiancé, Dirk Prinsloo. Dirk Prinsloo, however, left the country in 2006 and was one of Interpol’s most wanted criminals. On 12 June 2009 Dirk Prinsloo was arrested in Balarusia for attempted robbery in a bank. He also faced charges of theft, hooliganism and torture. On 1 February 2010 he was subsequently convicted of theft, bank robbery and hooliganism and sentenced to thirteen years in jail. Visser, who was a bright student and obtained her law degrees with distinction, moved in with Prinsloo shortly after she failed her Bar examination and subsequently joined the independent bar. Visser testified that when she had met Prinsloo, she was naive and eventually got trapped in his sex web. Some of the charges against Visser relate to occasions where she and Prinsloo performed indecent acts with minor girls they had collected from an orphanage in Pretoria for so-called “weekend-visits”. According to the evidence these girls were provided with drinks, often “Milo”, that contained sedative drugs after which indecent sexual acts were performed on them by Prinsloo. Prinsloo also subjected Visser to various forms of brutal and sadistic sexual abuse. Visser, according to her testimony, also suffered immense psychological and emotional abuse at the hands of Prinsloo. Visser’s defence relates to the battered woman syndrome but also more specifically to the coercive control that Prinsloo exerted over her. Her defence also encapsulates manifestations of the Stockholm-syndrome, and the compliant victim syndrome which will be discussed below. See Beeld 16 February 2009; 17 February 2009, 19 February 2009; 20 February 2009; Rapport 22 February 2009, 27 February 2009; Beeld 28 February 2009; Rapport 1 March 2009; Beeld 10 March 2009; Pretoria News 10 March 2009; Beeld and Pretoria News 11 March 2009; Beeld and Pretoria News 12 March 2009; Pretoria News 14 March 2009; Beeld 18 March 2009; Beeld and Pretoria News 17 March 2009; Rapport 15 March 2009; Beeld 19 March 2009; Beeld 20 March 2009; Beeld and Pretoria News 21 March 2009; Beeld and Pretoria News 27 March 2009; Beeld and Pretoria News 28 March 2009; You magazine 26 March 2009 10 – 11. See also Rapport 29 March 2009; Rapport 5 April 2009; Pretoria News 18 June 2009; Beeld 16 June 2009; Rapport 14 June 2009; Beeld 18 June 2009; Pretoria News 19 June 2009; Beeld 24 June 2009; Beeld 26 June 2009; Beeld 29 June 2009; Pretoria News 29 August 2009; Beeld 7 October 2009; Pretoria News 7 October 2009; Pretoria News 8 October 2009; Beeld 8 October 2009; Beeld 10 October 2009; Rapport 11 October 2009; Beeld 10 February 2010; Pretoria News 10 February 2010; Pretoria News and Beeld 12 February 2010. See also page 58 of the unreported judgment where Eksteen AJ notes that Visser’s love for Prinsloo comprised of various aspects including: “A. Vrees vir die man; B. Afhanklikheid van hom; C. Die mag wat hy oor haar gehad het” and also page 63 where Eksteen AJ notes the following in respect of Visser’s defence: “Sy beweer sy was vasgevang in Dirk Prinsloo se mag. Sy het in haar binneste gevoel dit is nie reg nie, maar dit was nie sterk genoeg om teen Prinsloo se mag in opstand te kom nie. “Ek het nie gedink wanneer hierdie goed gebeur nie” het beskuldigde gesê.”

victim. Stark indicates that according to evidence, violence in abusive relationships is an ongoing phenomenon rather than episodic in nature.\textsuperscript{768}

According to Stark there is a general perception that abused women stay in an abusive relationship and develop mental health and behavioural problems due to the fact that exposure to severe forms of violence induces syndromes such as Post Traumatic Stress Disorder and Battered Woman Syndrome which prevents the woman from escaping from the abusive relationship.\textsuperscript{769} Stark, however, indicates that only a small percentage of abuse victims display these symptoms and many of them do not develop psychological problems.\textsuperscript{770}

This dominant approach to domestic violence accordingly fails to adequately address two important facts:

- the entrapment of victims in relationships where ongoing abuse is virtually inevitable;
- the development of a problem profile that distinguishes abused women of every other class of assault victim.\textsuperscript{771}

Stark states the following:\textsuperscript{772}

"Work with battered women outside the medical complex suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation and control that extends to all areas of a woman's

\begin{flushleft}
\textsuperscript{768} Herman, JL “Trauma and Recovery” (1992) at 74; Stark, E “Symposium on reconceptualizing violence against women by intimate partners” (1995) 58 Albany Law Review 973; Stark, E “Coercive Control” justiceformothers.com/Documents/coercivecontrol.pdf [accessed on 23-03-2009]. See also Okun, L “Woman Abuse: Facts Replacing Myths” (1986) at 86. \textsuperscript{769} Ibid. \textsuperscript{770} Ibid. \textsuperscript{771} Ibid. \textsuperscript{772} Stark, E “Re-presenting woman battering: From battered woman syndrome to coercive control” (1995) Albany Law Review 973 at 5 as quoted in Ludsin and Vetten (2005) supra note 666 at 61 – 62. See also Stark (2007) supra note 767 at 57 where he states that protecting women from severe assaults has resulted in the substitution of physical abuse with coercive control. 
\end{flushleft}
life, including sexuality, material necessities, relations with family, children and friends, and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of the battered woman arises from the deprivation of liberty implied by coercion and control as it does from violence induced trauma.”

Coercive control is a model of abuse that includes various strategies employed by an abusive partner to dominate women in their personal life. According to Stark coercive control “describes an ongoing pattern of sexual mastery by which abusive partners, almost exclusively males, interweave physical abuse with three equally important tactics: intimation, isolation and control.”

Stark notes that it is important to distinguish the coercive control model from the traditional domestic violence model. Stark highlights the following essential differences:

- The domestic violence model typically emphasizes the familial, cultural and psychological foundations of abusive behaviour. The coercive control model on the other hand, views the dynamics in abusive relations on the backdrop of the historical battle for women’s liberation and men’s motivation for preserving their traditional privileges in personal life amidst this battle.
- Domestic violence laws generally follow an incident-specific approach and accordingly measure the severity of abuse against the level of force or injuries inflicted. The coercive control model, on the other hand, is predicated on the premise that most battered women who seek help experience “coercion” as “ongoing” rather than merely “repeated” and that the most important aspect of these assaults lies in their frequency or even their “routine” nature, rather than its severity which results in a “cumulative” effect found in no other assault crime.

773 Stark, E “Coercive Control” at justiceformothers.com/Documents/coercivecontrol.pdf [accessed on 23-05-2009]. Coercive control is also sometimes referred to as coerced persuasion; conjugal, patriarchal or intimate terrorism, emotional or psychological abuse; indirect abuse or emotional torture.
774 Ibid. See also Stark (2007) supra note 767 at 5.
• Physical harm and psychological trauma, that are generally very important phenomena in the domestic violence model, remain important in the coercive control model, but its theory of harms substitutes the violation of physical integrity with an emphasis on infringements of “liberty” that includes the deprivation of rights and resources essential to personal autonomy.\textsuperscript{775}

• In the coercive control model, what men do to women is less important than what they prevent women from doing for themselves.

With increasing efforts by women to ensure their equality in a previously male dominant society, men find it more difficult to ensure women’s obedience and dependence through the application of violence alone. Accordingly, in the face of reality, men have expanded their oppressive techniques to encompass a range of constraints on women’s autonomy formerly imposed by law, religion, and women’s exclusion from the economic, cultural and political mainstream, “in essence trying to construct a ‘patriarchy in nature’ in each individual relationship, the course of malevolent conduct known as coercive control.”\textsuperscript{776}

The theory of coercive control originated in the experiences of people who lived in situations of captivity or people who were taken hostage and displayed symptoms of the “Stockholm-syndrome” or “traumatic bonding.”\textsuperscript{777}

According to Herman, captivity “brings the victim into prolonged contact with the perpetrator, and creates a special type of relationship, one of coercive control.”\textsuperscript{778} The motivations for this behaviour are the following:\textsuperscript{779}

• Complete control over the victim;
• Making the victim acquiesce in her domination;
• Due to the fact that it appears that the victim accepts this abusive treatment, the likelihood of outside assistance is reduced.

\textsuperscript{775} Ibid.
\textsuperscript{776} Ibid.
\textsuperscript{777} Ludsin and Vetten (2005) supra note 666 at 67; Stark (2007) supra note 767 at 198, 203. The concepts of “Stockholm-syndrome” and “traumatic bonding” will be discussed below.
\textsuperscript{778} Ibid.
\textsuperscript{779} Ibid.
Coercive control can also in some cases result in the victim identifying with the abuser. The latter entails that the abused woman will attempt to view the world through the eyes of the abuser in an attempt to prevent further harm and danger.\footnote{Ludsin and Vetten (2005) supra note 666 at 67. Ludsin and Vetten note that the essential difference between abused women and prisoners is that women do not need to be captured or detained within the relationship as they remain within the relationship out of love for the abusive partner. Accordingly they will be less inclined to offer resistance than other captives as a result of their commitment to the relationship. The shocking reality is, however, that when affection has faded, many women may have been made captive through economic dependence, physical force and social, psychological and legal subordination. See also Herman (1992) supra note 767 at 74.}

The main reason for incorporating a discussion of the theory of coercive control into the present discussion, is that it could provide an alternative approach to assessing the situation where an abused woman kills her abusive husband or partner. It will be illustrated below that various techniques of coercive control were present in case law pertaining to battered women even though it was never identified as such, as the concept of coercive control is relatively novel despite the fact that the manifestations thereof have always been present in abusive relationships.

Stark correctly states:\footnote{Stark (2007) supra note 767 at 14 – 15.}

“Viewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its major components, dynamics and effects, including the fact that it is neither “domestic” nor primarily about “violence”. Failure to appreciate the multidimensionality of oppression in personal life has been disastrous for abuse victims.”

Stark accordingly conceptualizes coercive control as follows:\footnote{Stark (2007) supra note 767 at 15.}

“Coercive control entails a malevolent course of conduct that subordinates women to an alien will by violating their physical integrity (domestic violence),
denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation), and appropriating or denying them access to the resources required for personhood and citizenship.”

According to Stark some of the rights abusers deny women are already protected within the public sphere, such as the right to physical integrity, but other harms entailed in coercive control are gender-specific infringements of adult autonomy that have no counterpart in public life and remains invisible to the law.\textsuperscript{783}

Stark states that\textsuperscript{784} the combination of these big and little indignities most adequately explains why women suffer and respond as they do within abusive relationships, and also why so many women become entrapped, why some battered women kill their partners as well as the reasons as to why they are prone to develop a range of psychosocial problems and exhibit behaviours that are contrary to basic common sense behaviour.

15.2.6.1 Methodology and techniques of coercive control

Ludsin and Vetten state that through the systematic and repetitive infliction of psychological trauma together with violence, terror and helplessness become part of the abused woman and her sense of self is slowly eliminated.\textsuperscript{785}

According to Stark, coercion implies the use of force or threats to compel or dispel a particular response.\textsuperscript{786}

Accordingly, apart from inflicting immediate pain, injury, fear or death, coercion also causes long-term physical, behavioural or psychological trauma.

According to Stark, control consists of various forms of deprivation, exploitation, and command that compel obedience in an indirect manner by monopolizing

\textsuperscript{783} Ibid.

\textsuperscript{784} Stark (2007) supra note 767 at 15 – 16.

\textsuperscript{785} Ludsin and Vetten (2005) supra note 666 at 68. See also Okun, L “Woman Abuse: Facts replacing Myths” (1986) at 119.

\textsuperscript{786} Stark (2007) supra note 767 at 228.
important resources, dictating choices, microregulating the woman's behaviour, restricting her options and depriving her of support essential to the execution of independent judgment.\textsuperscript{787}

Stark notes\textsuperscript{788} that control may be implemented by means of specific acts of prohibition such as keeping the victim from going to work or denying the victim access to a car or phone.

Despite the fact that violence is one of the essential features of coercive control, it need not necessarily recur constantly or in the same brutal degree on every occasion.\textsuperscript{789} An abusive partner can use violence only when necessary and to the extent that is required to instill fear and obedience into the victim. Thereafter mere threats of violence will suffice to render the woman into compliance.\textsuperscript{790}

Threats of violence may also sometimes extend to the abused woman's children and her family and result in fear and anxiety.\textsuperscript{791} Ludsin and Vetten state that in order to understand what will make an abusive partner happy and so reduce further harm and violence, the abused woman often attempts to get inside the abuser's head.\textsuperscript{792}

Accordingly the woman becomes sensitive to the abuser's moods and whims as well as submissive to his demands. In attempting to view aspects in the light that

\textsuperscript{787} \textit{Ibid.}
\textsuperscript{788} \textit{Ibid.} Stark in addition notes at 228: “Control may be implemented through specific acts of prohibition or coercion, as when a victim is kept home from work, denied access to a car or phone, or forced to turn over her paycheck. But its link to dependence and/or obedience is usually more distal than coercion and so harder to detect, making assigning responsibility a matter of working back from its effects through a complex chain of prior events. The result when coercion and control are combined, is the condition of unreciprocated authority often identified as domination and victims such experience as entrapment.”
\textsuperscript{789} Ludsin and Vetten (2005) \textit{supra} note 666 at 68.
\textsuperscript{790} Ludsin and Vetten (2005) \textit{supra} note 666 at 68; Herman (1992) \textit{supra} note 768 at 77. See also Forward (2002) \textit{supra} note 666 at 44 where she states that one of the most frightening and therefore one of the most successful tactics an abuser can use to gain control carries with it the implied threat of physical attacks. See also Stark (2007) \textit{supra} note 767 at 250 where he states that threats violate the person's right, physical and psychic security. Stark notes that in an English study, 79.5 % of the women reported that their partner threatened to kill them at least once, and 43.8 % did so often. In addition 60 % of the men threatened to have the children taken away, 36 % threatened to hurt the children, 32 % threatened to have the woman committed, 82 % threatened to destroy things that the woman cared for.
\textsuperscript{791} Ludsin and Vetten (2005) \textit{supra} note 666 at 69.
\textsuperscript{792} \textit{Ibid.}
the abuser does, the abused woman adopts the abuser’s outlook and believes that she is the cause for the abuse and that she deserves it. \textsuperscript{793} This is also referred to as the “identification with the aggressor” and eventually results in the woman’s identity being defined by the abusive partner. \textsuperscript{794}

As a result of the woman in effect losing her identity to an extent, leaving the abusive relationship becomes increasingly difficult.

Ludsin and Vetten state: \textsuperscript{795}

“Undermining the victim’s self-image, identity, integrity and inviolability is another way of reshaping her thoughts, values and identity. This may take various forms including humiliating, revilling and verbally abusing her.”

Severe emotional and psychological abuse breaks down the woman’s personality and eventually makes her believe that such degradation defines who she is. According to Ludsin and Vetten, women are often induced into taking responsibility for the abuse by means of forcing the woman to make false “confessions”. \textsuperscript{796} These include forcing the woman to admit to transgressions, non-existent sexual relationships or even a confession that the woman is to be blamed for the abuse. These admissions are sought to justify the abuser’s abuse and results in further breakdown in the woman’s identity and self-esteem causing her to feel responsible and deserving of abuse. \textsuperscript{797}

\textsuperscript{793} Ibid.

\textsuperscript{794} Ibid. See also Graham, DLR, Rawlings, E I and Rigsby, PK “Loving to Survive: Sexual Terror men’s violence and Women’s lives” (1994) at 37 – 39.

\textsuperscript{795} Ludsin and Vetten (2005) supra note 666 at 70.

\textsuperscript{796} Ibid.

\textsuperscript{797} Ludsin and Vetten (2005) supra note 666 at 70. According to Ludsin and Vetten, these forced confessions are often accompanied by other methods employed to instill a misplaced guilt in the victim with the aim of rendering her to feel responsible for abuse, these include:

- Guilt by association in the sense that the woman is scorned if she associates with people the abuser doesn’t approve of, such as friends or family.
- Guilt by intention in holding the woman culpable for having motives which could result in behaviour harmful to the abuser.
- Guilt for negative attitudes towards the abuser or for doubting his decisions.
- Guilt for having knowledge which could incriminate the abuser.
- Guilt for taking actions which is harmful to the abuser, regardless of the fact that harm was not intended for example where the woman was delayed on her way home and could not prepare dinner.
In terms of coercive control, sexual coercion is often a prominent feature of the exercise of control. Stark notes that women are frequently forced to have sex against their will often or all the time.\(^798\) According to Ludsin and Vetten sexual abuse serves not only as a means of control, but also constitutes a form of degradation.\(^799\) In situations of coercive control, an abuser may also regulate what the woman eats, when she sleeps and what she should wear.\(^800\) Coercive control can also comprise of various monitoring and surveillance tactics which may include phoning or arriving at the woman’s place of work in order to ensure that she is indeed at work or checking the calls made from her cell phone.\(^801\)

Isolation is another prominent feature of the coercive control model. Controllers generally isolate their partners with the aim of preventing disclosure, instill dependence and also to restrict the woman’s skills and resources in order to prevent the woman from seeking help and support.\(^802\) The abusive partner will accordingly isolate the woman from her friends, family and other support systems and limit her contact with others to those who support the controller’s or abuser’s perspectives.\(^803\)

Friends and family often become the controller’s co-conspirators and sometimes reject the woman’s claims of abuse with disbelief, furthering the woman’s

- Guilt for not supporting the coercive controller’s interests – in these relationships women are expected to stand up and abide their abusive partners, regardless of the nature of the abuser’s actions.
- Guilt for personal faults.

See also Stark (2007) supra note 767 at 250 – 271; Okun (1986) supra note 785 at 130 – 132. Stark (2007) supra note 767 at 243. See also S v Visser supra note 766 where Visser testified that her ex-lover, Prinsloo, had sex on various occasions per day. See Beeld and Pretoria News 11 March 2009. Visser states: “Ek weet nie hoe hy dit kon regkry nie, maar dit was baie.”

Ludsin and Vetten (2005) supra note 666 at 71; Herman (1992) supra note 768 at 79. Ludsin and Vetten (2005) supra note 666 at 72. See also S v Visser supra in Beeld and Pretoria News 27 February 2009 where Visser testified that when she and her former lover, Dirk Prinsloo, went out, he laid out the skimpy outfits she had to wear. She also testified that while he had wholesome meals, she was forced to go to the gym and lived on protein shakes as Dirk hated fat.

Ludsin and Vetten (2005) supra note 666 at 72. Stark (2007) supra note 767 at 255. Stark notes that in coercive control surveillance entails a range of monitoring tactics and is armed at establishing that the abuser is omnipotent and omnipresent. See also S v Engelbrecht supra note 1 at paragraph 49.


Ludsin and Vetten (2005) supra note 666 at 72.
Isolation of the woman can be very traumatic and damaging for the woman, who for example, after an abusive incident, will receive little or no support from family and friends. The only means of support left in such a situation, will be the abuser himself which will inadvertently strengthen his power and weaken the woman's strength and capacity to leave the abusive relationship.

Eventually the abusive partner becomes omnipotent and omnipresent with complete power over the abused woman. Herman encapsulates this control in the following dramatic terms:

“The repeated experience of terror and reprieve, especially within the isolated context of a love relationship, may result in a feeling of intense, almost worshipful dependence upon an all powerful, godlike authority. The victim may live in terror of his wrath, but she may also view him as the source of strength, guidance and life itself. The relationship may take on an extraordinary quality of specialness. Some battered women speak of entering a kind of exclusive, almost delusional world, embracing the grandiose belief system of their mates and voluntarily suppressing their own doubts as proof of loyalty and submission.”

15.2.6.2 The Stockholm syndrome

Another theory used within abusive relationships to explain powerful emotional attachments between an abused woman and her abusive partner, is the so-called Stockholm syndrome. The Stockholm syndrome is addressed in this study as it is often present within abusive relationships and evidence pertaining to this syndrome often forms part of Battered Woman Syndrome evidence advanced in support of criminal incapacity.

\[804\] Stark (2007) supra note 767 at 263. Stark notes that the abuser’s family may also conspire in a woman’s isolation. See also Ludsin and Vetten (2005) supra note 666 at 72.


\[806\] Herman (1992) supra note 768 at 92 as quoted in Ludsin and Vetten (2005) supra note 666 at 72 – 73.

The Stockholm syndrome is a psychological response often observed in abducted hostages, in which the hostage displays signs of loyalty to the hostage taker, regardless of the danger or risk they find themselves in. The syndrome is named after the Norrmalmstorg robbery of the kreditbanken at Norrmalmstorg, Stockholm, Sweden in which the bank robbers held bank employees hostage from August 23 to August 28 1973. The victims became emotionally attached to their victimizers and eventually even defended their captors after they were freed from their six-day ordeal.\(^{808}\)

In terms of the Stockholm syndrome captives begin to identify with their captors initially as a defensive mechanism, out of fear of further violence. Stockholm syndrome is also commonly encountered in abusive relationships and is accordingly used as a model of explaining why an abused woman did not leave her abusive husband.

Every syndrome has symptoms or behaviours, and Stockholm syndrome is no exception. While a clear-cut list has not been established due to varying opinions by researchers and experts, several of these features will be present.\(^{809}\)

- Positive feelings by the victim toward the abuser/controller;
- Negative feelings by the victim toward family, friends, or authorities trying to rescue/support them or win their release;
- Support of the abuser’s reasons and behaviours;
- Positive feelings by the abuser toward the victim;
- Supportive behaviours by the victim, at times helping the abuser;
- Inability to engage in behaviours that may assist in their release or detachment.

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\(^{808}\) *Ibid.* The term “Stockholm syndrome” was coined by the criminologist and psychiatrist Nils Bejerot, who provided assistance to the police during the robbery.

It has been found that four situations or conditions are present that serve as a foundation for the development of Stockholm syndrome. These four situations can be found in hostage, severe abuse, and abusive relationships.\textsuperscript{810}

- The presence of a perceived threat to one’s physical or psychological survival and the belief that the abuser would carry out the threat;
- The presence of a perceived small kindness from the abuser to the victim;
- Isolation from perspectives other than those of the abuser;
- The perceived inability to escape the situation.

According to Ludsin and Vetten this traumatic bond develops over time and by the time women realise that the abuse is inescapable, the emotional bond created by the domestic violence is very strong.\textsuperscript{811} The Stockholm syndrome produces an unhealthy bond with the controller and abuser. It is the reason many victims continue to support an abuser even after a relationship has ended. It could also be used to explain why abused women continue to see “the good side” of an abuser and appear sympathetic to someone who has mentally and most often, psychologically abused them.

15.2.7 The Compliant victim of coercive persuasion or “brainwashing”

“Emotional abuse is a devastating, debilitating heart and soul mutilation. The deepest lasting wound with any abuse is the emotional wound.” (Robert Burney)

An alternative explanation as to why women often submit themselves to abuse at the hands of an abuser or even commit crimes against third parties while under the overwhelming influence of an abusive partner is the so-called “defence” of “brainwashing”.\textsuperscript{812}

\textsuperscript{810} Ibid.
\textsuperscript{812} Chapman, FE “The Compliant Victim of the Sexual Sadist and the Proposed Canadian Defence of Coercive Persuasion”. Paper submitted at The International Society for the Reform
According to Chapman, brainwashing which is also known as coercive persuasion, mind control, thought control, thought reform and coercion, has not been acknowledged as a valid defence. Chapman states that brainwashing is exceptionally difficult to define as it relates to both reason and emotion. Brainwashing is also terrifying as it causes fears of losing self-control, of being used and dominated by another and losing one’s own self and identity.

15.2.7.1 The History of Brainwashing

According to Chapman, the Czars adapted the concept of brainwashing, from the French who in turn adopted it from the Church. The inquisitorial technique of brainwashing dates back more than 700 years to some decretals of Innocent II and consequently it was the inquisitorial technique which was made more relentless by the power of an authoritarian State that the Chinese coined as brainwashing. The term brainwashing was used by Chinese informants to describe the Communist takeover and their programme of re-education they called “szu-hsiang kai-tsao” which, if loosely translated, means “ideological reform” or “thought reform.”

15.2.7.2 Brainwashing defined

Brainwashing has been defined as the “forcible application of prolonged and intensive indoctrination sometimes including mental torture in an attempt to induce someone to give up basic political, social, or religious beliefs and attitudes and to
Abusers brainwash their victims using methods similar to those of prison guards who recognize that physical control is never easily accomplished in the absence of the cooperation of the prisoner. The most effective means of gaining such cooperation is through subversive manipulation of the mind and feelings of the victim, who then becomes a psychological as well as a physical prisoner.

General methods used to achieve brainwashing include:

- The “death of self” where everything previously known is taken away.
- The so-called “transition” phase where the victim is tortured to the point of nervous collapse – the captives are then shown kindness leading to a “rebirth” where they submit themselves to saying whatever is required to survive while beginning to believe their conditional responses.
- Finally, the repetition of questions and demands together with the fatigue and stress of the interrogation served an educative as well as a spirit-breaking motive. According to Okun, many techniques are employed by abusive partners in the course of brainwashing which include imprisonment or confinement, social isolation, beatings, torture, starvation or malnourishment, sleep deprivation, threats of murder or torture, humiliation, complete control of the use of time and space and coerced false confessions.

The popular methodology of brainwashing entails a total change from one belief system to another not being aware of the continuum of conversion. The term coercive persuasion is also often preferred and can be defined as follows.

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822 Okun (1986) supra note 785 at 87.

823 Ibid.

824 Ibid. Coercive persuasion attempts to force people to change beliefs, ideas, attitudes or behaviours by applying psychological pressure, undue influence, threats anxiety, intimidation and/or stress. Coercive persuasion attempts to overcome critical thinking and informed choice. Critical thinking, values, ideas, relationship, attitudes and conduct are undermined by hypnotic communication, covert threats and intimidation strategies. See “Prevent and
“... a person is subjected to intense and prolonged coercive tactics and persuasion in a situation from which that person cannot escape. It may lead to the committing of illegal or antisocial acts and to conversion to the coercive power’s system of political or religious beliefs.”

According to Meerloo brainwashing entails taking possession of both the simplest and also most complicated nervous patterns of man.825

According to Meerloo, various factors are needed to effect this conversion, including physical pressure, moral pressure, fatigue, hunger and “confusion by seemingly logical syllogisms.”826 The abused person under these circumstances explains this as the total “confusion” in which “nothing had any meaning” by means of mental disintegration or “depersonalization.”827

15.2.7.3 Brainwashing and the Battered woman

“This delay in revealing brainwashing left the public with a twisted conception of it. People still think it has something to do only with prisoners of war, and possibly foreigners put under arrest ... Brainwashing only incidentally concerns military prisoners or foreigners.”828

Steinmetz correctly states the following as to research on the Battered Woman Syndrome.829

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826 Ibid.
827 Ibid.
“Our burgeoning body of knowledge about family violence requires such a reformulation of the dynamics of wife battering in order to resolve discrepancies between previously held assumption and recent findings.”

This quote could also apply today where current reform is needed in respect of the battered woman. The theory of brainwashing could be used in order to explain why a battered woman committed crimes against third parties. This could be constructed on the backdrop of the defence of non-pathological criminal incapacity as it could be argued that the woman as a result of this coercive persuasion or “brainwashing” could not distinguish between right or wrong or act in accordance with such appreciation. Brainwashing within the context of the battered woman is constructed to the effect that despite the existence of mens rea, the woman is morally blameless due to the fact that her will was no longer hers.\footnote{Chapman (2008) supra note 812 at 9.} Within the South African context, however, criminal capacity precedes the enquiry as to mens rea. Brainwashing could also have a bearing on criminal capacity. According to Warburton, persons with a low self-esteem are more susceptible to coercion, but that no two persons will respond similarly to the same coercive persuasion.\footnote{Warburton (2003) supra note 819 at 84 as discussed in Chapman (2008) supra note 812 at 9.} Warburton identifies the following similarities between the battered woman syndrome and brainwashing:\footnote{Ibid.}

- Both involve a person coerced to act in a manner in which he or she would not have acted if not under such influence;
- Expert evidence is necessary to explain concepts and dispel myths;
- Lay witness evidence is often useful to support the expert’s assertion that the actor exhibited signs of coercion;
- They are most effective when used for mitigation purposes.

According to Chapman there is a shocking similarity between prisoners of war and the experiences of battered women.\footnote{Chapman (2008) supra note 812 at 10.} Abusive partners will typically propose to maintain power over an abused or battered woman by applying “brainwashing"
techniques similar to those used on prisoners of war, hostages or members of a cult.\footnote{834}{ Mega, LT, Mega, JL, Mega BJ and Harris, BM “Brainwashing and Battering Fatigue: Psychological Abuse in Domestic Violence” (2000) 61 North Carolina Medical Journal 260 as discussed in Chapman (2008) supra note 812 at 10.}

Mega et al state the following:\footnote{835}{Ibid.}

“Common features of brainwashing include isolation, humiliation, accusation, and unpredictable attacks. The abusive environment produces real and anticipated fear, which contributes to the battered woman’s belief that her situation is hopeless and that she must depend on her abuser. She develops coping strategies to deal with her oppressive environment, but eventually exhibits symptoms of ‘battering fatigue’, similar to the battle fatigue of soldiers in combat who, like battered women, live in fear of being killed or severely injured.”

With respect to thought reform which is an essential aspect of brainwashing, Okun\footnote{836}{Okun (1986) supra note 785 at 132 and also at 87 where he states ten similar phenomena between battered women and concentration camp prisoners. They are the following:
1. Guilt feelings with a sense of deserving victimization;
2. Significant loss of self-esteem;
3. Detachment of emotion from incidents of severe violence;
4. Failure to observe the controller’s rules because of the arbitrariness of the punishment;
5. Extreme emotional reactions;
6. Difficulty planning for the future and delaying gratification;
7. Fear of escaping the coercive situation
8. Child-like dependency on the controllers;
9. Imitation of the controller’s aggressiveness and adoption of their values;
10. Maintenance of the honest belief that the controller or abuser is kind and caring.} states that the intended results of both thought reform and woman abuse are also similar. Thought reform is intended to produce a psychological breakdown causing the prisoner to become malleable. The latter is said to induce a personality change in the prisoner, brainwashing him into compliance with his captors. In woman abuse, the process involves a male captor (the batterer) breaking a woman’s spirit and shaping her to his will.
Similar to brainwashed captives, battered women are also subjected to verbal abuse, beatings and physical confinement.837

There are also differences between brainwashing and woman abuse. These differences are the following:838

- Battered women will generally not have a strong inclination not to cooperate with their husband or partner once they are married. Thought reform prisoners who are subjected to imprisonment and abuse would generally be more susceptible to resist their coercive controllers.
- In the case of battered women, the abuser often fulfils the function of abuser as well as the victim’s source of love and support. Accordingly verbal, physical, and sexual humiliations from a husband or lover will have a much graver impact as opposed to similar behaviour by a foreign individual which will be accomplished with much more difficulty.

Okun839 also states that the fact that the batterer often is simultaneously the most rewarding and most dangerous person in the battered woman’s life poses tremendous psychological difficulties for the victim. In the final analysis of coercive persuasion, those who are battered tend to perceive the abuser as their savior and protector.

15.2.7.4 The compliant victim of the sexual sadist

In this section the author will illustrate the effects of brainwashing on women with a discussion of a case of an abused woman who fell prey to a sexual sadist.840

840 “Sexual sadism” is a pathological disturbance or sexual deviancy which will not be discussed in this chapter, but in chapter 3 below pertaining to pathological criminal incapacity. Ebing states that sadism is the experience of sexual pleasurable sensations produced by acts of cruelty, bodily punishment inflicted on one’s own person or when witnessed in others, be they animals or human beings. It may also entail an innate desire to humiliate, hurt, wound or even destroy others in order thereby to create sexual pleasure in one’s self. See Van Kraft-Ebing, R “Psychopathia sexualis: With Especial Reference to the Antipathic Sexual Instinct: A medico-forensic Study” (1933) 80 as quoted in Chapman (2008) supra note 812 at 14.
Women who are victims of a sexual sadist will typically be victims of coercive persuasion or brainwashing. The reason why this topic is addressed in the current study pertaining to non-pathological criminal incapacity, is that it offers an alternative perspective to the plight of battered women and it also places emphasis on the vital role of mental health professionals in the assessment of these women who are deemed to be convicted of crimes whilst they might have a valid defence.

Abused women involved in sexual and violent crimes have been referred to as "compliant victims" in order to illustrate their submissive cooperation in their own and others' victimization. These relationships are typified by the most brutal forms of sexual violence and comprises of the complete transformation of the woman’s sense of self and also her behaviour in response to intimate contact, sexual fantasies and desires of the sadistic male. Hazelwood, Warren and Dietz state that a battered woman of a sexual sadist experiences a process of coercion similar to brainwashing. Accordingly these women experience a process of manipulation of various rewards and punishments within a context of social isolation which “can alter self concept, expectations, and behaviours among at least some victims.” To the average lay observer these women seem to be experiencing abuse despite the opportunities they have of escaping.

Hazelwood, Warren and Dietz state that in this form of domestic violence the “captor” seeks compliance as well as opportunities for continued abuse. Chapman indicates that the motivation for the woman to submit herself to the acts of the abuser is not simply to please him and in some instances the women become assimilated into the sexual aggression of their partners. Hazelwood, Warren and Dietz further note that the woman’s response to the paraphilic interest


842 Ibid.


844 Ibid. See also Chapman (2008) supra note 812 at 15.

845 Ibid.

846 Ibid.

of the man could be conceptualized by the gradual assimilation of behaviour that integrates the sadist’s sexual fantasies into her own behaviour.848

What is striking is that most women within these abusive relationships are successful professionally when they meet the abuser.849 Sexual sadists, however, prefer professional women as they have the desire to prove that they can transform a woman from an individual who comes from a nice middle class family and reduce her to a “sexual slave” willing to join them in any act no matter how degrading or humiliating.850 These relationships are also categorized with physical, emotional and psychological and sexual abuse.851

A further intrinsic and prominent feature of abuse within this context relates to the process of transformation women undergo from relatively normal patterns of living to complete bizarre, destructive and dangerous forms of exploitation and perversion.852

There is a striking pattern of coercive persuasion among women within these relationships of abuse. Five factors are present in most women:853

1. **Selection of a vulnerable woman** – the men generally sought naive, passive and vulnerable women which the sadist would be able to use for his own need for dominance, control and sexual desires.

2. **Seduction of the targeted woman** – Hazelwood, Warren and Dietz state that all of the women they studied indicated that the abuser was charming,

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851 Chapman (2008) *supra* note 812 at 20 – 21 notes that the research suggests that the physical abuse on women in these relationships is shocking. In a study conducted on various women in these relationships, most of the women were frequently beaten by the abuser or with objects. One woman was tied with adhesive tape over her entire body while being beaten. All of the women were sexually abused, sometimes with foreign objects. A wide range of degrading acts were performed on them including ejaculating on their face or mouth, being urinated on, forced enemas, sex with third parties and sex with kidnapped parties. All of the women suffered psychological as well as emotional abuse. All of the women were verbally abused in order to lower their self-esteem.
considerate, and unselfish when they met and all of the women entered into the relationship quickly regardless of the fact that they identified a sinister side to the abusers.

3. **Shaping sexual behaviour** – shaping of the woman’s sexual behaviour was dependent on readiness of the woman to engage in alternative sexual acts, and the abuser typically express gratitude for the participation in these activities or disappointment if she did not participate. The sexual sadist typically persuades the woman to engage in sexual activity beyond her normal repertoire.

4. **Social isolation** – the sadist become possessive and jealous of activities that does not include him and rejects the woman’s friends and family thereby isolating her.

5. **Punishment** – psychological and physical abuse constitutes the final step in the transformation process. Hazelwood, Warren and Dietz state:

> “Having met, seduced and transformed a ‘nice’ woman into a sexually compliant and totally dependent individual, the sadist has validated his theory of women. The woman is now a subservient inferior being who has allowed herself to be recreated sexually and has participated in sexual acts that no decent woman would engage in, thereby confirming that she is a ‘bitch’ and deserving of punishment.”

The degradation, humiliation, emotional and psychological suffering that women within these abusive situations endure, “illustrates the exploitative and inhumane behaviour that one person can intentionally inflict on another.”

The problematic issue pertaining to the compliant victim is that she remains compliant for so long despite the abuse. In most cases of the compliant victim, the sadist selected a woman of higher status and transformed her into a sexually and

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psychologically compliant slave.\textsuperscript{855} Vulnerable women are prime targets for the sexual sadist. The dynamics in other kinds of brainwashing or “mind control” also feature in these contexts. The sadist isolates the woman, physically abuses her, deprives her of sleep, degrades and humiliates her.\textsuperscript{856} Hazelwood, Warren and Dietz similarly conclude:

“The pleasure in complete domination over another person is the very essence of the sadistic drive.”

Expert evidence in cases of this nature will be crucial to explain why the woman engaged in criminal activities with the abusive partner who can also very well be a sexual sadist. The coercive control model for explaining attachment and bonding within an abusive relationship has always been present, yet it is relatively new in terms of the recognition of this theory in explaining the behaviour of abused women.

The theory of coercive control in the face of the compliant victim of the sexual sadist is also currently a highly controversial aspect within the South African context.

When applying the abovementioned principles pertaining to the abused woman as a compliant victim of sexual sadistic abuse, there are striking resemblances to the evidence tendered in the highly controversial trial of Cézanne Visser.\textsuperscript{857}

The facts of this case are as follows:

Cézanne Visser (“Visser”) met Dirk Prinsloo (“Prinsloo”) at the age of 23. Prior to meeting Prinsloo, Visser failed her bar examination and was also the victim of a failed relationship. Soon after she met Prinsloo, she moved in with Prinsloo. A romantic relationship arose between Visser and Prinsloo. Initially Prinsloo showered Visser with gifts and compliments and also referred to her as his

\textsuperscript{855} \textit{Ibid.}
\textsuperscript{856} \textit{Ibid.}
\textsuperscript{857} \textit{S v Visser} case number CC 545/07. See also note 766 \textit{supra}. 
“princess”. Soon after Visser moved in with Prinsloo she was exposed to having oral sex with him. At that stage she was still naive as to aspects involving sex, but thought that what Prinsloo expected of her, was normal. At the time when she met Prinsloo, Visser testified that she had an extremely low self-esteem and was very vulnerable. Prinsloo soon displayed signs of sex addiction. Visser testified that Prinsloo watched pornographic films every morning at breakfast. Prinsloo requested Visser to have tattoo’s engraved on her body and also to have breast enlargements. Prinsloo did not get on well with Visser’s parents and eventually on his demand, they got a protection order in terms of the Domestic Violence Act 116 of 1998 against Visser’s parents which prohibited any means of contact between the parents and Visser. Prinsloo also controlled what Visser ate and the clothes she had to wear. Prinsloo requested that Visser go on a protein-shake diet to the exclusion of other food, as he “hated cellulite”. When asked why she tolerated this Visser testified “I wanted to please Dirk”. Visser testified that sex with Prinsloo was brutal and without love and that she was subjected to degrading acts with foreign objects such as cucumbers, carrots and a firearm and was also forced into acts with dogs. Visser testified that she was once forced to have sex in a chapel. Visser stated:

“Hy het bo-op my geklim en seks met my gehad. Dit was brutaal. Hy het my hare gepluk terwyl hy my in die gesig gespoeg het.”

Visser testified that Prinsloo instructed her to have threesome sessions with other women and that she (Visser) had to recruit prostitutes for him (Prinsloo). Prinsloo also provided Visser with a book called “The Story of O” which entailed a story of a man who subjected his wife to bizarre and brutal sex. She (Visser) also had to pierce her body and she testified:

“Dirk thought it was pretty. It was how his slut had to look.”

Prinsloo also fantasised about having sex with young girls. Some of the charges against Prinsloo and Visser relate to young girls they fetched from an orphanage

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858  Beeld, 27 February 2009.
under the guise of wanting to treat the girls for weekend-visits at their home. The one girl was 15 years old, the other girl 11 years. The charges relate to various sexual offences including indecent assault, rape and incitement of a minor into sexual acts.

Visser admitted performing oral sex on Prinsloo in front of the 15-year old girl and having sex with Prinsloo in front of the 11-year old girl. When asked why she performed these acts, Visser stated:\(^{860}\)

“I said it before and I say it now, Dirk spoke and I did. I have no idea why, but that is how it was.”

Prinsloo subjected Visser to various forms of degradation such as to drink his urine and smear his faeces on her. The latter was her punishment if she did not behave as Prinsloo wanted her to. Visser also testified that Prinsloo was addicted to sex. Accordingly, Prinsloo displays signs of sexual sadism, whilst Visser displays signs of the typical compliant victim. Visser also testified that kinky sexual acts were as normal as “brushing teeth”. Visser testified that she was a victim in a relationship which was not normal.

In support of Visser’s defence that she suffered from Battered Woman Syndrome, Professor Jonathan Scholtz, head of clinical psychology at Weskoppies Hospital, testified that although Prinsloo initially appeared to be Visser’s knight in shining armour, charming her and purporting to save her from an abusive family situation, he systematically and deliberately took control of her and shaped her to his needs. Scholtz further stated that Visser’s parents’ unhappy marriage, the values installed in her during childhood and her low esteem made her the perfect target for Prinsloo.

Scholtz testified that while Visser was highly intelligent, she was naive and mentally immature. According to Scholtz, Prinsloo took complete control over Visser – her appearance, what she ate, when she slept and with whom she spoke.

\(^{860}\) Pretoria News 10 March 2009.
She was exposed to perverse acts with multiple people. Scholtz testified that in his opinion, Visser was subjected to severe domestic abuse and coercive control. Scholtz indicated that Prinsloo was a sexual sadist, a paedophile and suffered from other sexual deviations. According to Scholtz sexual sadists often displayed various disorders, collected pornography and had serious personality disorders such as narcissism.\textsuperscript{861}

Visser was subsequently convicted on eleven of the fourteen charges on 6 and 7 October 2009.\textsuperscript{862} In delivering judgment, Eksteen AJ ultimately rejected Visser’s defence of having been under the “spell” or coercive control of Prinsloo.\textsuperscript{863} It was in addition held that Prinsloo was often not present when Visser exposed herself to

\begin{itemize}
  \item She was exposed to severe domestic abuse and coercive control.
  \item Visser's defence of being under the "spell" or coercive control of Prinsloo was rejected.
  \item Prinsloo was often not present when Visser exposed herself.
\end{itemize}

\textsuperscript{861} Beeld and Pretoria News 27 March 2009; 28 March 2009; Rapport 5 April 2009. The author sourced the information from his personal attendance of the trial. See page 79 of the unreported judgment of \textit{S v Visser supra} note 761 where it is noted that Professor Scholtz found that Visser was exposed to “severe domestic abuse and coercive control” and her capacity to act in accordance with her appreciation of the wrongfulness of her actions was severely compromised. Professor Scholtz in addition elaborated on the phenomenon of the battered woman syndrome and noted that it comprises more than mere physical violence and also included coercive control and intimidation. Professor Scholtz described the bond which develops between the woman and her aggressor as “ambivalent” and noted that such bond comprises two components:

\begin{itemize}
  \item A. Die vrees vir die magsoeker;
  \item B. Die adoratie of verliefdheid
\end{itemize}

Professor Scholtz described this bond as “traumatic bonding” or “paradoxical attachment” and defined coercive control as: “…. die proses waartydens die wil van die vrou onderwerp word aan die wil van die man. ‘n Vrou in die situasie van vrees of dwang en belonging kan iets doen sonder dat die teenwoordigheid van die magsoeker ‘n vereiste is om ‘n handeling uit te voer (page 81 of the unreported judgment).

\textsuperscript{862} Visser was convicted on counts of fraud; on three counts of soliciting a fifteen year old to commit indecent acts by showing the child her private parts, by showing her pornography and conducting sexually explicit conversations with her; one count of indecent assault of an eleven year old orphan by showing pornography to her, by demonstrating to her how a vibrator worked, exposing herself to the child and having sex with Prinsloo in her presence; one count of being a beneficiary to the indecent assault of a twenty year old woman; one count of indecent assault of an adult woman by fondling her breasts and private parts and suggesting that she have sex with her and Prinsloo; one count of indecent assault on a fourteen year old drug addict who was drugged and fondled; one count of indecent assault of a twenty year old woman who was fondled after being given drugs which induced drowsiness; one count of possession of child pornography; one count of manufacturing child pornography relating to her committing indecent acts on a child, of which pictures were taken. Visser was acquitted on one count of indecent assault on an eleven year old as it was held that the child was not forced to take off her clothes during an incident at the swimming pool of the residence of Prinsloo and Visser; one count of possession of 13.2g of dagga and one count of manufacturing child pornography pertaining to a fourteen year old girl as it could not be ascertained whether pictures were indeed taken. See also Pretoria News 8 October 2009 at 1 and Beeld 8 October 2009 at 1. It is to be noted that at the stage of completion of this chapter, the Visser-judgment had not yet been reported.

\textsuperscript{863} Pretoria News 8 October 2009 at 1 and Beeld 8 October 2009 at 1. See page 110 of the unreported judgment where Eksteen AJ held: “Daar is geen sprake dat beskuldigte willoos gehandel het nie. Die hof het geen twyfel om vanweë die inherente onwaarskynlikhede en onbetroubaarheid van haar relaas, beskuldigde se weergawe as vals te verwerp……….”
Eksteen AJ found that Visser did not follow everything Prinsloo instructed her to do and held that Visser sought to hide behind Prinsloo’s conduct to justify her own conduct with specific reference to Visser claiming that Prinsloo was manipulative and as a result she had no will of her own. Eksteen held that it was improbable that Visser was caught in Prinsloo’s web as she had freedom of movement and there was also evidence to the effect that Visser could stand up to Prinsloo. Eksteen AJ in addition held the following:

- Visser was a willing partner in the sexual abuse of the three children and the three young women;
- Visser willingly participated in the various sexual acts perpetrated on the victims at the Prinsloo home and she embraced the new life Prinsloo offered her;
- Visser took the initiative in locating some of the victims;
- Visser’s conduct was aimed at obtaining children and women to sexually abuse for her and Prinsloo’s own gain;
- Visser and Prinsloo had sex in front of some of the children to solicit them to commit indecent acts;
- Visser was aware of the fact that medication was utilised by Prinsloo to drug some of the victims and that their drinks were spiked;
- Many of the acts against the children were committed in the absence of Prinsloo;

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864 Ibid.
865 Ibid. Eksteen AJ stated: “She accepted little or any of the blame herself. She is, everytime, the victim of the conduct of others. She blames everyone else, except herself.” (Pretoria News 8 October 2009). See page 95 of the unreported judgment where Eksteen AJ states: “min of enige blaam aanvaar beskuldigde self. Sy is telkens die slagoffer van ander se optrede”.
866 Ibid. Eksteen AJ specifically referred to the evidence of one of the witness, Laurie Pieters, a former friend of Visser, who on various occasions offered help to Visser specifically with reference to Pieters offering Visser a home to stay. Pieters in addition testified that Prinsloo “…was a coward and a bully. His bark was worse than his bite”. See pages 92-94 of the unreported judgment. See also pages 97-100 of the unreported judgment where Eksteen AJ states that Visser’s freedom of movement was not constricted by Prinsloo and that it was improbable that she was caught in his “web”.
867 Ibid. See pages 124-139 of the unreported judgment.
868 Ibid. These acts include the following:
- Demonstrating the use of a vibrator on herself in front of an eleven year old;
- Fondling the child’s private parts;
- Inviting the child to remove all her clothes at the swimming pool;
- Offering to have the child’s private parts waxed;
• Visser went to an orphanage and informed management that she and Prinsloo were married in order to persuade them to allow the children to visit them for weekends.
• Visser took the children home well-knowing what fate awaited them there.

On 24 February 2010 Visser was sentenced to an effective term of seven years’ imprisonment. Leave to appeal to the Supreme Court of Appeal in Bloemfontein against her conviction was rejected on 13 May 2010 by Judges Mohamed Navsa and Belinda Van Heerden. Visser has currently resumed serving her sentence.

• Reflections on the Visser-decision
The Visser-decision not only gave rise to immense publicity, but also shed light on the age old phenomena of abuse within an intimate relationship. The aspects of coercive control, Stockholm-syndrome and the compliant victim of the sexual sadist were brought to the fore and even though their value within this decision remains dubious, the emphasis placed on these phenomena could be seen as a positive step towards taking cognisance not only of the visible or physical aspects of abuse within intimate relationships, but also the invisible and often concealed forms abuse conducted behind closed doors. Abuse encapsulates numerous manifestations of which physical abuse is but one example. It is crucial to also acknowledge the various other manifestations of abuse such as coercive control, the Stockholm syndrome and the compliant victim – theory as these are manifestations frequently encountered within abusive relationships often underscored for its impact and intensity. Every abusive relationship will have its own distinctive semantics distinguishing it from other abusive relationships. The fact that the defence as put forward in the Visser-decision was rejected should not

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869 See Pretoria News 25 February 2010 at 1; Beeld 25 February 2010 at 1 and Rapport 28 February 2010 at 1.
870 See Pretoria News 14 May 2010 at 1 and Pretoria News 17 May 2010 at 1. For purposes of the current study, expert evidence adduced during the sentencing of Visser will not be addressed. Eksteen AJ refused to grant leave to appeal on the merits and Visser’s legal team had to petition to the Supreme Court of Appeal which petition failed.
871 See also S v Engelbrecht supra note 1 and S v Ferreira supra note 1 as discussed below where traits of coercive control were present.
be construed as closing the door for this defence in cases where abused partners subjected to coercive control and manipulation commits crimes whilst under such control or manipulation. What becomes abundantly clear is that courts will approach such defences with circumspection thus necessitating the need for effective expert testimony in support thereof. It could further be argued that the defence in the Visser-decision contributed to mitigation of sentence. The distinguishing factor of the Visser-decision as opposed to other cases dealing with abuse, such as the Engelbrecht and Ferreira-decisions, is the fact that Visser’s actions were not directed against her abuser, but primarily against innocent third parties or victims. Usually within an abusive relationship the abused partner retreats and directs his or her actions against the abuser. The conduct of Prinsloo towards Visser was, however, at certain stages so vile and shocking that it could be argued that the probabilities indicate that she must have been subjected to some form of control by Prinsloo. Whether such control was of such a nature and degree in order to render Visser powerless to Prinsloo, however, remains questionable. The undeniable fact is, however, that no matter how much empathy a court retains for a victim of abuse such as Visser, the court also has a duty in upholding justice for the innocent victims and also protecting the interests of minor children and their right to be protected from all forms of sexual abuse. It is submitted that the latter could be construed as one of the overriding factors negating Visser’s defence.

It is accordingly clear that Visser and Prinsloo fit the profile of the sexual sadist and compliant victim discussed above. Whether a defence founded on these principles will succeed will depend on the circumstances and evidence presented.

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872 Which will be discussed below.
873 Visser’s testimony to this effect included the following: that Prinsloo on various occasions forced her to take part in threesomes with prostitutes; Prinsloo inserted various objects into her private parts; Prinsloo forced Visser to have sex in a chapel and swear at God whilst spitting in her face; Prinsloo forced Visser to perform acts on dogs; Prinsloo did not hesitate to ejaculate in her mouth; Prinsloo urinated in her mouth and forced her, in order to obtain forgiveness, to collect his faeces and rub it over her body and lick it off her hands. These are examples of some of the horrific acts Visser was subjected to. It could be argued that a woman in her sound and sober senses would not allow such acts to be performed on her. At page 121 of the unreported judgment Eksteen AJ also notes: “Die aanvaarde getuienis binne en buite beskuldige se relasie dui onomwonde dat Prinsloo moontlik met ‘n proses van isolasie of “coercive control” besig was. Die aanvaarde getuienis dui na die Hof se oordeel nie daarop dat beskuldigde tydens die pleeg van die ten las gelegde misdrywe ten volle onder die mag of dominansie van Prinsloo was nie.”
In conclusion, Ludsin and Vetten encapsulate the theory of coercive control as follows:

“Coercive control theory explains many features of abusive relationships that puzzle people – such as the woman’s loyalty and attachment to her partner in the face of her great fear of him. It illustrates how these features exist not only in situations of domestic violence but also in other situations where people are held captive. Like others who have been prisoners of war, political prisoners, hostages, or cult survivors, battered women have been subjected to ongoing processes of intimidation and abuse that systematically degrade their sense of self over time and isolate them from others.”

15.3 The role of expert evidence in cases of battered woman syndrome

Central to all of the theories explaining why an abused woman reacted to abuse in the particular way she did, stands the mental health expert called to assess the battered woman. The rules pertaining to expert evidence and admissibility of expert evidence as a form of opinion evidence will be explored comprehensively in Chapter 4 below. This section will accordingly only encapsulate the role of the expert witness in respect of the assessment of the battered woman syndrome. Within the context of the battered woman who eventually kills her abusive partner, the mental health expert who will typically be a psychologist or a psychiatrist will have to assist the court in explaining the battered woman’s dilemma and why she eventually resorted to deadly force instead of exploring alternative options. Expert evidence is generally presented to combat the existing myths about battered women and not to address the ultimate issue of guilt or innocence. Expert evidence on the battered woman syndrome entails the psychological traits that

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874 Ludsin and Vetten (2005) supra note 666 at 75.

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typify battered women as well as their perceptions of the potential dangerousness of the abuser's potential violence.\textsuperscript{875}

According to Ewing\textsuperscript{876}, expert evidence pertaining to the battered woman syndrome, consists of two components:

\begin{itemize}
  \item In the first instance, the expert describes the battered woman syndrome. This will typically relate to the three-stage cycle of violence explained by Walker which entails the “tension-building” stage, the “acute battering” stage and the stage of “loving contrition” as discussed above\textsuperscript{877}. The expert will then elaborate on how physical and psychological abuse increase as the cycle is repeated. The expert will then explain the psychological consequences for the battered woman which include learned helplessness, depression and could also, as discussed above, entail a discussion and explanation of coercive control present in the abusive relationship. The expert will similarly indicate how economic and social factors, for example


1. Most battered women experience psychological changes inducing them to believe that they are unable to control their fate and that they are unable to put an end to the abuse. They may become depressed and “learned helplessness” may ensue.
2. Battered women often show “high tolerance for cognitive inconsistency” in that they express two ideas that appear to be inconsistent with one another by for example claiming that the abuser was violent while drunk, but later recall an episode during which he was not drunk but was nevertheless abusive.
3. Battered women often experience a sense that alternatives are not available to them. They experience an inability to stop the violence and believe there is no escape from the relationship.

Expert evidence is accordingly necessary to clarify these issues.

\textsuperscript{876} Ewing (1987) supra note 666 at 51. See also Veinsrerderis, ME “The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-defense By Battered Women” (2000) University of Pennsylvania Law Review 613 where he states that during the “cycle” of abuse, the woman falls victim to a “cumulative terror” of violence, fearing harm even during the peaceful interlude between episodes of abuse. See also Walker (1979) supra note 663 at 56 – 70.

\textsuperscript{877} See paragraph 15.2.4 above.
lack of financial resources and inadequate support from the police, prevent women from escaping the abusive environment.

- In the second instance, the expert presents evidence that the battered woman suffered from battered woman syndrome and explains the woman’s perceptions and behaviour at the time of the killing.

Hudsmith\textsuperscript{878} notes that as a result of the non-traditional nature of a battered woman’s resort to the use of deadly force, the reasonableness of her perceptions of danger may not always be transparent. Expert evidence is accordingly crucial to explain the dynamics of the abusive relationship and the effect the violence may have on a battered woman’s perceptions of danger.\textsuperscript{879}

Potential uses of expert evidence pertaining to the Battered Woman Syndrome are the following.\textsuperscript{880}

\begin{footnotes}

\item[879] Ewing (1989) \textit{supra} note 666 at 53; Hudsmith (1986) \textit{supra} note 666 at 985; Mather (1988) \textit{supra} note 666 at 574 – 576. See also \textit{State v Kelly}, 478 A.2d 364, (1984) at 377 where the New Jersey Supreme Court stated the following in respect of expert evidence: “Experts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave. To some, this misconception is followed by the observation that the battered wife is masochistic, proven by her refusal to leave despite the severe beatings, to others, however, the fact that the battered wife stays on unquestionably suggests that the beatings could not have been too bad for it they had been, she certainly would have left. The experts could clear up these myths, by explaining that one of the common characteristics of a battered wife is her inability to leave despite such constant beatings, her “learned helplessness”, her lack of anywhere to go, her feeling that if she tried to leave, she would be subjected to even more merciless treatment, her belief in the omnipotence of her battering husband, and sometimes her hope that her husband will change his ways.”

\item[880] Johann and Osanka (1989) \textit{supra} note 666 at 159 – 160; Walker (1989) \textit{supra} note 666 at 322 – 327; Ludsin and Vetten (2005) \textit{supra} note 666 at 93; Ewing (1987) \textit{supra} note 666 at 52 – 60; Roberts, JW “Between the Heat of Passion and Cold Blood: Battered Woman’s Syndrome as an excuse for Self-Defense in Non-Confrontational Homicides” (2003) 27 \textit{Law and Psychology Review} 135 at 149 and 151 where Roberts quotes an extract from the decision in \textit{Ex parte Haney}, 603 50.2d at 412 (Ala. 1992) where the court states: (at 414) “expert testimony on the battered woman syndrome would help dispel the ordinary lay person’s perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any “common sense” conclusions by the jury that if the beatings were really that bad the woman would have left her husband earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage.”
\end{footnotes}
• To introduce the court to a class of persons – battered women, and their profile. Experts can also explain the cycle of violence, learned helplessness and also coercive control and other dynamics in respect of battering relationships.

• To provide the trier of fact with an explanation as to why the mentality and personality make-up and behaviour of battered women differ from the lay person’s perspective of how someone would react towards an abusive partner.

• To indicate to the court that the accused and the victim were involved in an abusive relationship.

• To explain why the woman remained in the abusive relationship.

• To refute popular myths and misconceptions concerning battered women, including:
  
  o The myth that these women are masochistic.
  
  o The myth that these women stay with their abusers because they enjoy beatings.
  
  o The myth that these women could freely leave these abusive relationships, if they really wanted to.

• To provide the court with an opinion of the accused’s state of mind at the time of the commission of the crime.

• To rebut the implication of premeditation or planning.

• To support a defence of not guilty as a result of mental illness or mental defect.

• Battered Woman Syndrome evidence can be used in support of diminished responsibility and mitigation of sentence.

The function of expert evidence on battered women is to provide the court with an alternative perspective or social framework for understanding the particular woman’s beliefs and actions. Expert evidence will also attempt to dispel any myths or misconceptions the court may have as to the psychosocial dynamics and

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881 See “Myths and Misconceptions about battered women” above at paragraph 15.2.2.
882 See chapter 3 below. This chapter will address the defence of insanity also with reference to the battered woman and exploring this defence as an alternative defence available to the battered woman.
consequences of abuse. In most instances the expert will explain the general research findings regarding battered women and also provide a clinical opinion that the particular accused displays signs of the syndrome or suffers from the syndrome.

Non-pathological criminal incapacity is one defence available to a battered woman who kills her abusive husband or partner. The rules and legal principles pertaining to this defence have already been outlined earlier in this chapter. The main obstacle in respect of expert evidence in support of the defence of non-pathological criminal incapacity is that it is not compulsory to advance expert evidence in support of this defence. Within the context of the battered woman who kills her abusive partner, the prejudicial effect of the absence of expert evidence has already been illustrated by means of the Campher-decision above. Women who kill their abusers often do not do so in the midst of immediate confrontation. It is often only after a specific incident when a woman resorts to deadly force. Reliance on the defence of non-pathological criminal incapacity becomes difficult as a result of the non-confrontational killing of the abusive partner. The latter has resulted in abused women relying on alternative defences, often unsuccessful. This section will illustrate the importance of expert evidence in cases where battered women eventually killed their abusers. It is from the outset important to keep in mind that expert evidence should not only be advanced in order to exonerate the accused, but also in mitigation of sentence and also generally to provide the battered woman with a fair and just trial. Expert evidence also plays a pivotal role in explaining the theories enunciated above, such as learned helplessness and coercive control and the presence thereof in an abusive relationship and how such presence eventually resulted in the battered woman killing her abuser. The reason why these theories were explained in relative detail above, is to indicate its inherent complexity which will inadvertently lead to


885 See paragraph 9.2 above.
confusion or misapprehension if not properly explained by a trained expert in the field.

Typical partner killings by abused women have been described\(^{886}\) as follows:

“Domestic homicides committed by women tend to be defensive and victim-precipitated. Typically, battered women who kill do so in response to an attack or following a threat from the abuser to harm another, usually a child. Some kill whilst the abuser sleeps after an attack, convinced that it will continue when he awakens. They kill because they feel there is simply no other way out. After previous failed attempts, they lose hope of escaping. The violence, tension and fear reach a point where death seems inevitable: a choice between suicide and homicide.”

Ludsin and Vetten indicate that there are four main types of evidence that should be advanced on behalf of a battered woman who killed her abusive partner:\(^{887}\)

- Evidence pertaining to the history and pattern of abuse that the battered woman endured during the relationship with the abuser.
- Evidence pertaining to other violent acts of the abuser that the accused was aware of.
- Social context evidence.
- Evidence in respect of other violent acts of abuse performed against the accused.

The history and pattern of abuse between the battered woman and the deceased are important aspects in support of a defence raised by a battered woman to a charge of murder or in support of mitigation of sentence.\(^{888}\) This history and pattern of abuse are important factors in explaining the battered woman’s mental


\(^{887}\) Ludsin and Vetten (2005) supra note 666 at 187.

\(^{888}\) Ibid.
state at the time of killing her abusive husband or partner. The history and pattern of abuse could also be used to assist in explaining the cumulative effect of fear, stress and/or provocation that induced non-pathological criminal incapacity or diminished criminal capacity.

Ludsin and Vetten state:

“Expert testimony regarding the psychological effects of abuse ... should discuss the importance of the history and pattern of abuse to the woman’s perceptions as they relate to her state of mind or other elements of the defences.”

The history of the deceased’s violence against others also assists in explaining the woman’s reasonable fear of death or serious bodily harm which could ensue from the abuser. Social context evidence advanced by a battered woman who kills her abuser either in support of a defence or in support of mitigation, can be divided into two subcategories:

1. The first category explains how women are treated by the government, courts, family members and society in general. This type of evidence accounts for a woman’s limited options for escaping the abusive relationship.

Ludsin and Vetten (2005) supra note 666 at 189; Schuller and Vidmar (1992) supra note 883 at 276 where they state: “The violence that battered women faces is continual and is at the hands of an intimate partner rather than a stranger. Furthermore, the woman is generally not on equal physical grounds with the batterer. As a result, when she strikes back, her actions cannot be the same as a fight between ‘two equals’, and usually this is reflected in the circumstances surrounding the killing.” See also Roberts (2005) supra note 666 at 143 – 144; Veinsrdereris (2000) supra note 876 at 613; Ewing (1989) supra note 666 at 52 – 54.

Ludsin and Vetten (2005) supra note 666 at 189. See also Alsdurf and Alsdurf (1989) supra note 726 at 114; Dobash and Dobash (1992) supra note 663 at 6 state: “When the man dies, it is rarely the final act in a relationship in which she has repeatedly beaten him. Instead, it is often an act of self-defence or a reaction to a history of the man’s repeated attacks”. See also Dobash, RE and Dobash, RP “Violence Against Wives” (1979) at 31 – 74; Browne (1987) supra note 666 at 109 – 130; Mather (1988) supra note 666 at 547 – 555.

Ludsin and Vetten (2005) supra note 666 at 189. Ludsin and Vetten state that legal practitioners representing women who killed their abusers should gather as much information as to the nature, duration and extent of abuse as possible. This information should provide a detailed account of the specific incidents of abuse.

Ludsin and Vetten (2005) supra note 666 at 190.

This evidence elucidates the woman’s frame of mind and attempts to place the court within the frame of mind of the battered woman. This evidence could also substantiate the credibility of the accused who claims non-pathological criminal incapacity or diminished criminal capacity.894

2. The second category of social context evidence relates to psychosocial evidence. This type of evidence specifically pertains to the psychological effects of abuse on women.

Ludsin and Vetten895 state that evidence of the psychology of batterers promotes the reasonableness of the effects of abuse on women, whilst evidence of social judgment explains that which motivates abused women to kill. Battered women who kill their abusers need to provide expert evidence pertaining to the psychological effects of abuse on women in general and also with specific reference to the accused in order to establish the factual foundation for the defence of non-pathological criminal incapacity.896 In Lavallee v The Queen, the Canadian Supreme Court per Wilson J explained the importance of this type of evidence and held the following:897

“Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or the jury) can be forgiven for asking; why would a woman put up with this kind of treatment? Why would she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self-

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894 Ludsin and Vetten (2005) supra note 666 at 192.
896 Ibid.
897 Lavallee v The Queen (1990), SCR 85 (55 ccc) (3d) 97 (SCC). See also S v Engelbrecht supra note 1 paragraph 27. See also Reddi (2005) SACJ supra note 666 at 267. See also R v Malott (1998), SCR 123 at 140 – 141 where Justice L Heureux-Dube states: “The expert evidence is admissible, and necessary, in order to understand the reasonableness of a battered woman’s perceptions ... that she had to act with deadly force in order to preserve herself from death ...”
respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called battered wife syndrome. We need help to understand it and help is available from trained professionals.”

Within the context of non-pathological criminal incapacity, the effects of abuse on the woman are vital in order to provide clarity why she lost control at the time of the act. Evidence of prior acts of violence committed against the battered woman should also be tendered in expert testimony pertaining to the psychological effects of abuse on the particular woman, also with specific reference to the defence of non-pathological criminal incapacity.

There are generally three categories into which battered woman syndrome cases fall where the abused woman kills her abuser:

- Confrontational homicide
- Non-confrontational homicide
- Contract killing

These three categories will accordingly be addressed below.

Confrontational killings occur when the abuse victim kills her abuser during the course of an assault. Examples of confrontational killings have already been illustrated in paragraph 9.2 above by means of the Campher, Potgieter and Wiid-decisions. In the case of non-pathological criminal incapacity, expert evidence

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898 Ludsin and Vetten (2005) supra note 666 at 193. Ludsin and Vetten also state that expert evidence can counter the presumption of goal-directed behaviour that normally leads to the suggestion of full criminal capacity. See also Lenkevich (1999) supra note 666 at 318.

899 Ludsin and Vetten (2005) supra note 666 at 196; Ludsin and Vetten (2005) supra note 666 at 196 note that when the defence of non-pathological criminal incapacity is raised, legal practitioners need to ascertain the following:
- Why the woman killed her husband
- Whether there was a triggering event
- How the woman reacted before, during and after the killing
- When the incapacity started
- Whether she regained capacity at any point between when she first lost criminal capacity and when she killed.

900 See S v Campher supra note 1; S v Wiid supra note 1 and S v Potgieter supra note 1. The facts and decisions of these cases will not be repeated here.
will be adduced to illustrate that the battered woman at the time of the killing lacked the capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation as a result of the abuse suffered by the abuser.\textsuperscript{901}

Non-confrontational homicide is typically the situation where a battered woman kills her abusive spouse or partner and prior to the killing the abuse ceased for a brief period.\textsuperscript{902} Cases of non-confrontational homicide presents a challenge for the defence of non-pathological criminal incapacity as it will be difficult to prove that the abused woman lacked the capacity to understand the wrongfulness of her actions or to act in accordance with an appreciation of the wrongfulness for the period between the last incident of abuse and the eventual killing. The question to be asked is whether the defence of non-pathological criminal incapacity should be viewed in a strict sense and be construed as incident specific, or whether the actions of the battered woman should not be viewed within the complete psychosocial context of the abuse suffered during the abusive relationship. Accordingly the question which will fall to be assessed is whether the abused woman in the light of the various forms of abuse suffered during the abusive relationship, had the ability to appreciate the wrongfulness of her actions and to act in accordance with such appreciation. The role of the expert becomes inescapable. An example of non-confrontational homicide can be found in the case of S v Engelbrecht.\textsuperscript{903}

\textsuperscript{901} See S v Wiid supra note 1. This is one of the few reported decisions in which an abused woman who killed her abuser relied successfully on the defence of non-pathological criminal incapacity.


\textsuperscript{903} S v Engelbrecht 2005 (2) SACR 41 (WLD); Ludsin and Vetten (2005) supra note 666 at 103 – 116; Burchell and Milton (2005) supra note 1 at 196 – 220; Snyman (2008) supra note 1 at 105; Karsten (2007) supra note 663 at 129; Vetten, L “Addressing Gender Bias in the sentencing of Men and Women Convicted of killing their Intimate Partners” (October 2002) in
Jaco (hereinafter referred to as the deceased) and Anne-Marie Engelbrecht (hereinafter referred to as the accused) married each other on 23 January 1993. On 29 June 2002 the accused killed the deceased. The evidence revealed that the accused had suffered an abusive childhood in which she, her mother as well as her three siblings, were violently assaulted by their father on a regular basis. The accused and the deceased met each other when she was a student nurse and he was a security guard at Paardekraal Hospital. The couple later had a daughter, C, aged four years at the time of the killing. The evidence revealed that throughout their marriage the accused was subjected to serious forms of abuse at the hands of the deceased, including physical, emotional, verbal and psychological abuse. It was apparent from the evidence that the deceased had an obsessive and jealous personality which caused him to behave extremely violent and aggressive towards the accused which culminated in the deceased assaulting the accused on various occasions. The deceased monitored the whereabouts and behaviour of the accused constantly. The evidence further revealed that the deceased stalked the accused, physically assaulted her on a regular basis and forced her to take part in and perform various humiliating and diminutive acts with him. The evidence also revealed psychological abuse perpetrated by the deceased, who exhibited a pattern of humiliating conduct including repeated insults, ridicule and name-calling, threats to cause emotional and physical pain as well as repeated exhibitions of possessiveness and jealousy. On the day on which the accused killed the deceased, she had been subjected to verbal, sexual and emotional abuse by the deceased. The facts also revealed that on the particular day the deceased had phoned the accused at her work and requested that she purchase a package at a sex shop. The accused found this very embarrassing and humiliating but nevertheless complied with the request out of fear. The deceased also viewed a pornographic video at a time when C, their daughter, would be exposed to it. During the course of the evening the deceased struck C and assaulted the accused. When they challenged his authority and control, he reacted violently towards them. The particular manner in which the deceased

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struck C had alarmed the accused as it was more aggressive than on previous occasions. The deceased also locked C in a bedroom and prevented the accused from comforting her which resulted in the accused experiencing a feeling of total disempowerment and helplessness. The deceased then repeatedly threatened to kill the accused. The deceased had been drinking and when he later went to sleep the accused had used thumb cuffs to secure his hands behind his back and placed a plastic bag over his head which was tied to him with the belt of her dressing gown. The deceased subsequently suffocated as a result of this treatment. The cause of death was recorded in the post mortem report as being consistent with asphyxiation or smothering or suffocation. The accused was charged with murder. The accused pleaded not guilty to the charge of murder contending that she had been in an abusive relationship with the deceased and had sought to extricate herself from it, including having approached the police, family violence courts and having attempted to move out of the common home and seek a divorce.

It was argued on behalf of the accused that the normative theory of culpability should be developed in a manner consistent with the Constitution of the Republic of South Africa 1996, as none of the existing defences comprehensively articulate the variety of experiences that constitute the phenomenon of intimate murders. In terms of such a defence an accused woman is tested against a standard of reasonableness which in appropriate circumstances negatives the blameworthiness of her conduct. The defence submitted that this case is indicative of the inadequacies of the psychological theory of culpability which enjoys hegemony in our criminal law and argued for the recognition and application of a normative dimension to the evaluation of culpability. The normative dimension imports a value judgment to the evaluation of the state of mind of the accused at the time she had the intention to kill her abusive husband. It was argued that the accused’s actions should not be regarded as blameworthy because the law could not fairly have expected the accused to have acted differently and, notwithstanding her intention, to have refrained from killing her abusive husband in response to his own criminal violations. Considerations of

904 At paragraph 15.
reasonableness would, in the circumstances of the abuse suffered by her and the failure of the legal system to protect her, absolve her of blameworthiness in her intention to kill. The accused’s defence was premised on the proposition that while it may be theoretically possible for the accused to have avoided killing her husband, it is not “reasonable” to have expected her to have done so. It was argued that reasonableness could be located under both culpability and unlawfulness, excuse and justification.

It is interesting to note that the defence of criminal incapacity was never relied on as a defence in this case.

The two experts who presented expert evidence in this case were Mr Leonard Carr, a clinical psychologist and Ms Lisa Vetten, Gender Coordinator for the Centre for the Study of Violence and Reconciliation.

The evidence revealed that where there is a pattern of violence and psychological denigration, the interludes between violent episodes may be just as stressful as actual assaults. Assaults become more frequent and the incessant periods between assaults become exhausting and terrifying and render the victim with anxiety and fear.905 It was submitted906 that the level of violence within a relationship, the frequency and severity of assaults and the extent of injuries are not always indicative of the true nature and extent of the subordination of the woman. It is accordingly always present in the mind of the abused woman that the violence may be repeated with greater levels of injury.

Ms Vetten testified as to the cycle theory of abuse developed by Walker as well as the theory of “learned helplessness”.907 Ms Vetten also explained the theory of coercive control and testified that the accused felt like a prisoner in her own home and that the deceased’s constant invasion in her life and work, resulted in a "monopolisation of her perceptions."908

905 Paragraph 52.
906 Paragraph 53.
907 These theories are explained at length in paragraphs 15.2.4 and 15.2.5 above.
908 Paragraphs 181 and 182.
Ms Vetten testified:

“So successful were the deceased’s attempts to control Mrs Engelbrecht that she began restricting her own activities. She avoided speaking to men, including her neighbours, for fear the deceased would suspect something was going on ... The deceased did not need to assault Mrs Engelbrecht very severely or very often. Those occasions when he did use violence were sufficient to instill fear in Mrs Engelbrecht.”

Ms Vetten also testified that the deceased abused the accused physically, sexually, verbally and psychologically and the abuse intensified during the course of the relationship. According to Ms Vetten, the pattern of coercion and control to which the accused was subjected, extended to every aspect of her existence, resulting in her isolation and entrapment within the relationship. The accused had been depersonalized and dehumanized, experiencing herself as no more than a thing. According to Ms Vetten, the breaking point was when the deceased hit C.

Mr Carr also testified that the level of threat within the mind of the accused was not based on the level of force that she was confronted with at any given moment, but very well rested on the potential for violence which had been demonstrated by the deceased.

Mr Carr concluded by stating that, when the threat of abuse spread so blatantly onto her daughter, her need to protect her child, her lack of concern for any consequences for herself and her own abused inner child fighting back for the first time in her life, in conjunction with her fatigue and burnout, her sense of isolation, and abandonment from the outside world which offered her no help, she reached

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909 Paragraphs 185 and 186. See also paragraph 191 where she (Ms Vetten) states: “She began to believe that she would always be with him and that he had a hold over her. Her return was therefore not voluntary and could be construed as a kind of resignation to captivity.”
910 Paragraph 200.
911 Paragraph 201.
912 Paragraph 202.
913 Paragraph 203.
914 Paragraph 213.
the boundaries of her capacity and in a situation of do or die, she killed her husband to save her own physical life and “psychological self”.

With regard to the need for expert evidence, Satchwell J reiterated the importance of opinion evidence by experts such as psychologists and social workers. In this regard the court emphasised the importance of expert evidence by stating the following:  

- The matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge.
- The witness must be a person with experience or skill to render him or her an expert in a particular subject.
- The guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the court.
- The expertise of any witness should not be elevated to such heights that the court’s own capabilities and responsibilities are abrogated.
- The opinion offered to the court must be proved by admissible evidence, either through facts within the personal knowledge of the expert or on the basis of facts proven by others.
- The opinion of such a witness must not usurp the function of the court.

Satchwell J also held that expert evidence on both the social context of domestic violence and on the specific effects of abuse on the psyche of an abused woman who kills, is essential. Expert evidence can assist the court to understand the unequal power relations in an abusive relationship which impact on the woman’s ability to leave and the manner in which she resorts to violence; why abused women often do not leave the abusive relationship; and the process leading to the point at which she becomes psychologically unable to adjust to and accommodate the ever-present danger of abuse. Such evidence is necessary to refute widely recognized myths and misconceptions concerning battered women that would interfere with judge or juror ability to assess the woman’s actions fairly.

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915 Paragraph 26.
916 Paragraph 28.
917 Paragraph 28.
The court proceeded to summarise the principles upon which expert testimony should properly be admitted in cases such as this:\footnote{Paragraph 29. See also Chapter 4 below dealing explicitly with expert evidence.}

- Expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.
- There are stereotypes, for instance, that battered women are not really beaten as badly as they claim otherwise they would have left the relationship, alternatively, that women enjoy being beaten because they have a masochist strain in them – which stereotypes may adversely affect consideration of a battered woman’s claim to have acted in self-defence in killing her mate and expert evidence can assist in dispelling these myths.
- Expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she “reasonably apprehended” death or grievous bodily harm on a particular occasion.
- Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.
- By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life.

Satchwell J also stated\footnote{Paragraph 31.} that both Mr Carr and Ms Vetten contributed to the court’s understanding of the behaviour of the deceased, the impact of these experiences upon the deceased as well as the various and variable responses in relation thereto.

It was generally accepted that the “reasonableness” test in relation to justification defences was the criterion used to ascertain the legal convictions of the
In conducting an enquiry a court should be driven by the values and norms underpinning the Constitution. The approach to the “legal convictions” test should be founded on the values of the Constitution, namely “human dignity, equality and freedom”. Premeditation of the defensive act was not necessarily inconsistent with reliance placed upon that ground of justification. The defence implemented by the abused woman had to be necessary to protect the threatened interest: the execution of the defensive act had to be the only way in which the attacked party could avert the threat to her rights or interests. The latter has to be decided on the facts of each case. To the extent that the abused woman’s failure to leave the abusive relationship earlier could be used in support of the proposition that she had been free to leave at the final moment, expert evidence could provide useful insights. Judgment should not be passed on the fact that an accused battered woman stayed in the abusive relationship. There ought to be a balance between the attack and the defence. In determining proportionality, account should be taken of the particular circumstances of each case, which included the parties’ relative ages, relative strengths, gender socialisation and experience, the nature, duration and development of their relationship including power relations on an economic, sexual, social, familial, employment and socio-religious level; the nature, extent, duration and persistence of the abuse; the purpose of and achievements of the abuser; the impact upon the body, mind, heart, spirit of the victim; the effect on others who are aware of or implicated in the abuse.

The court held that the deceased in casu had inflicted multiple forms of domestic violence upon the deceased. These forms included bodily manhandling and beating, verbal insults and threats, sexual violation and ridicule, attempts to isolate her from others, electronic monitoring and physical surveillance, sleep deprivation, enforcement of trivial demands, economic restrictions, physical, psychological and emotional humiliation and degradation, both publicly and privately, as well as ever

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920 Paragraph 330.
921 Paragraph 350.
922 Paragraph 351.
923 Paragraph 355.
924 Paragraph 356.
925 Paragraph 357. See also Snyman (2008) supra note 1 at 98-106; Burchell and Milton (2005) supra note 1 at 452-454.
926 Ibid.
present control and domination.\textsuperscript{927} In the pattern of violence and cycle of abuse which comprised the accused and deceased’s relationship, the interludes between violent or cruel episodes could be as stressful as the actual assaults. Domestic violence had accordingly been imminent or inevitable.\textsuperscript{928} It was held\textsuperscript{929} that the enquiry as to whether the actions of the accused were necessary to protect her and her daughter’s interests, regard had to be had to the family and home context of the cyclical nature of the violence, the effectiveness of the “law of the land” in enforcing the law and protecting its subjects and the possibilities of flight, which included the obtaining of refuge.

The majority of the court accordingly held that the accused had not afforded the legal system, the South African Police Service and society a fair chance of helping her.\textsuperscript{930} The minority decision of the court, per Satchwell J, found that the accused did attempt to and did partially succeed in utilising the services of the institutions and individuals legally charged with protection of herself and C but that they were unsuccessful in doing so and that she was reasonable in losing faith in and abandoning further approaches thereto. Nevertheless, the majority of the court held that it had not been objectively reasonable in all the circumstances for the accused to kill the deceased when she did.\textsuperscript{931} The court held\textsuperscript{932} that the killing had been premeditated and planned and that the accused had suffered from and operated under a state of diminished criminal capacity on the night of killing her husband.

As to the arguments by the defence in support of a general defence of reasonableness instead of an individual defence known as private defence, the court held that it would be difficult to comprehend how such a general defence could be utilised without making the same enquiries and applying the same criteria which had been applied in terms of the defence of private defence. No competing criteria had been suggested to determine “reasonableness” as a more general defence and accordingly the court declined the invitation to develop the

\textsuperscript{927} Paragraphs 361 and 379.
\textsuperscript{928} Paragraph 398.
\textsuperscript{929} Paragraph 399.
\textsuperscript{930} Paragraph 402-408.
\textsuperscript{931} Paragraph 402-408.
\textsuperscript{932} Paragraphs 418 and 448.
\textsuperscript{933} Paragraphs 305, 386 and 456.
law in that direction without further proposals and debate as to the value of such a development. The court further declined the invitation to develop a new approach to culpability based on reasonableness or to develop an objective approach to a subjective state of mind. The accused was accordingly found guilty of murder.

The accused was sentenced to be detained until the rising of the court.

Although this decision did not deal with the defence of non-pathological criminal incapacity, as also expressed by Satchwell J, but rather related to other defences, the principles pertaining to the fundamental need for expert evidence in cases of this nature, should be welcomed. This case reaffirms the essential need for expert evidence. Interestingly, it is the first case in which expert evidence was tendered pertaining to specifically the “battered woman syndrome”. In the case law discussed earlier in the chapter pertaining to abused women, the evidence was never coined in terms of the presence of battered woman syndrome. This case illustrates how experts can educate courts as to various theories explaining why women endure abuse despite alternative options available to them.

In cases of contract killings where an abused woman makes use of the services of a third party to kill her abusive husband, it goes without saying that the battered woman will most probably not be able to rely on the defence of non-pathological criminal incapacity. Expert evidence pertaining to the abuse she suffered will, however, still play a pivotal role in terms of sentencing. The latter was specifically established in the decision of S v Ferreira. The facts of the decision are as

933 Paragraph 470.
934 See paragraph 455 – 456.
935 See also Schneider, EM “Describing and changing: Women’s Self-defense work and the problem of Expert testimony on Battering” (1986) 311 – 326 at 312 in Weisberg, K “Applications of feminist legal Theory to Women’s Lives: Sex, Violence, Work and Reproduction” (1996) where it is stated:
“Judges and jurors may accept the appropriateness of woman abuse as part of the marital relationship, assume that the woman deserved or was responsible for the brutality, and blame her for not ending the relationship. Expert testimony can present a different picture by demonstrating that the battered woman was a victim.”

follows: The first appellant together with the second and third appellants, were sentenced to life imprisonment for murder. The murder involved the killing of Cyril Parkman. The first appellant had been living with him in an intimate relationship for more than seven years. During the period of their relationship, the deceased repeatedly and extensively abused the first appellant mentally and physically. She eventually caused the other appellants, young black men then aged 22 and 20 respectively, to kill the deceased.

Due to the fact that the murder was premeditated, the trial court was obliged in terms of Section 51 (3) of the Criminal Law Amendment Act 105 of 1997 to impose life imprisonment unless there were “substantial and compelling circumstances” present in which event a lesser sentence could be imposed. The trial court held that the evidence established none. The experts who presented expert evidence were Ms Kailash Bhana and Ms Lisa Vetten, employees of the

4. See also the decision of S v Marais 2010 (2) SACR 606 (SCA). The facts of the latter case also related to very severe domestic violence. The applicant was charged together with five other people for the murder of her husband. The essence of the charge entailed that the applicant had arranged for the murder of her husband by engaging the other accused to commit a so-called “contract murder”. During her trial the applicant raised the defence that she was a battered woman who had been suffering at the hands of her deceased husband for many years. She had eventually reached a point where she could no longer stand the abuse, assaults and what she perceived as repeated rape by her husband. She then arranged that her husband be given a “hiding” which hiding was not planned to kill the deceased, but to scare him in the hope that he would thereafter treat her better and with more respect. The High Court eventually rejected her defence as improbable and untrue. The issue before the Constitutional Court entailed that the applicant challenged her conviction and sentence on the basis that the trial court breached her right to a fair trial as guaranteed in terms of section 35 of the Constitution when it had dismissed her defence of being a battered woman and consequently found her guilty. The Constitutional Court, however, held that the applicant’s dissatisfaction with the trial court’s finding does not in itself amount to a constitutional issue (paragraph 15). The application for leave to appeal to the Constitutional Court was accordingly dismissed. The court in addition had to decide as to whether to receive further evidence pertaining to the battered woman syndrome. It was held that once an application for leave to appeal had been disposed of, the High Court that had finally determined the matter was rendered functus officio and ceased to have the power to entertain an application to lead further evidence, unless the matter was remitted to it by the Supreme Court of Appeal. It was further held that once the Supreme Court of Appeal had refused an application for leave to appeal, it was not open to the High Court or the Supreme Court of Appeal to consider an application to receive further evidence. It was held that as this case did not raise a constitutional issue, the Constitutional Court held no power to either to reopen the case for further evidence or to remit the matter to the High Court or the Supreme Court of Appeal (Paragraphs 17-22).

Section 51 (3) reads as follows:
"If any court ... is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those sub-sections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence". See also S v Dodo 2001 (3) SA 382 (CC) and S v Malgas 2001 (2) SA 1222 (SCA).
Centre for the Study of Violence and Reconciliation in Johannesburg, the former as social worker, the latter as gender coordinator. These experts opined that the first appellant’s reaction to the abuse, including her decision to have the deceased killed, fitted a well-known pattern of behaviour of abused intimate partners in terms of which the mind of the abused partner is eventually so overborne by maltreatment that no realistic avenue of escape other than homicide was possible. The facts reveal that the deceased hired the first appellant as his housekeeper. Initially she stayed in the staff quarters on his farm but after three months he requested her to move in with him as he stated he was in love with her. The deceased was like a father to the first appellant. The relationship deteriorated and the deceased became abusive and eventually violent towards the first appellant.

The deceased treated the first appellant as an unpaid servant. He gave her daily tasks, including heavy manual work. Whenever she failed to complete her daily task he punished her. Her punishment included being locked in a room without food, sometimes for up to two weeks at a time. She survived because a farm worker smuggled food to her. During the course of the relationship the assaults became more violent. The deceased made excessive sexual demands and sexually abused the first appellant. The first appellant was also subjected to constant criticism and demeaning verbal abuse often of a sexually degrading nature. The deceased isolated the first appellant and made her totally financially dependent on him. The appellant left the deceased on four occasions whereafter the deceased persuaded her to return. The appellant called for police assistance on three occasions. They only arrived once and said the deceased was drunk and that the appellant should sober him up.

The turning point in the abusive relationship for the appellant was two weeks before the murder. The deceased assembled fifteen of the black labourers and called the appellant outside. When she did he told her to remove her underwear and show her genitals to the men. She refused. That evening the deceased

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938 Paragraph 10.
939 Paragraph 18.
940 Paragraphs 22 and 23.
941 Paragraph 24.
raped the appellant and threatened that he would hire black men to rape the appellant should she ever try to leave him again. The appellant appraised this threat with extreme fear. The appellant believed that leaving the deceased was not an option, as he would, in her mind, find her eventually. In the mind of the appellant death was the only way of escaping and getting her life back. The murder was committed by the second and third appellants by means of strangulation. The appellant paid them R5 700 each.

Ms Vetten stated that the forms of abuse suffered by the first appellant and her psychological and behavioural responses were consistent with case studies in this country and overseas.\textsuperscript{942} She testified\textsuperscript{943} that the appellant eventually felt trapped and isolated:

\begin{quote}
"The pattern of coercion and control to which she was subjected appears to have extended to every aspect of the existence, resulting in her entrapment within the relationship. The effects of the abuse upon Ms Ferreira were ultimately nothing short of disastrous …
\end{quote}

I am common with other abused women I have worked with who used third parties to kill their abusive partners. Ms Ferreira’s decision was based on her personal inability to use physical violence against the deceased. Being personally unable to defend herself against Mr Parkman she turned to others. The decision to kill Mr Parkman appears to have been a desperate act of self-preservation aimed at maintaining what little physical and psychological integrity Ms Ferreira felt she still possessed."

The court was impressed with the expert evidence tendered during the trial and Howie J stated\textsuperscript{944} that the experts conveyed an explanation as to why abused women, subjectively, feels unable to escape by any other route than by homicide. Howie JA held\textsuperscript{945} that on the day the deceased raped the first appellant she was subjected to intolerable degradation. Together with the rape came the threat to

\textsuperscript{942} Paragraph 29.
\textsuperscript{943} Paragraph 29.
\textsuperscript{944} Paragraph 35. Ludsin and Vetten (2005) supra note 666 at 175.
\textsuperscript{945} Paragraph 39.
have her raped by black men. Accordingly, given her personal history and the stage to which her life had come, the reason for her killing him rather than leaving was adequately established by the evidence.

Howie JA was of the opinion\textsuperscript{946} that her decision to kill and to hire others for that purpose is explained by the expert witnesses in accordance with what experience and research has shown that abused women do and it is an aspect which has to be judicially assessed not from a male perspective or an objective perspective but by the court's placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence. In addition Howie JA held that only by judging the case on the latter basis can the offender’s equality right under S 9(1) of the Constitution be given proper effect.

The Supreme Court of Appeal accordingly overturned the first appellant’s sentence, ultimately suspending her sentence for three years in light of the time she had already served. The court concluded that the abuse the first appellant suffered at the hands of the deceased was substantial and compelling circumstances which justified deviating from the mandatory life sentence.\textsuperscript{947}

• Reflections on the Ferreira-decision

It is striking from this judgment that the words “battered woman” were never used. Instead the word “abused” was preferred. It is submitted that this is correct as the terminology of “battered woman” should be substituted with “abused partner syndrome” as the former could be construed as gender-specific and abuse-specific in the sense that the inference could be drawn that “battered” only refers to physical abuse which most often is only one form of abuse present in an abusive relationship.

\textsuperscript{946} Paragraph 40. The court concluded that the woman’s constitutional rights to dignity, freedom from violence and to bodily integrity had been violated by her abuser. See also Ludsin and Vetten (2005) \textit{supra} note 666 at 174 – 175.

\textsuperscript{947} Paragraph 43.
The Ferreira-decision further highlights the importance of expert evidence also with reference to sentencing and mitigation of sentence. It is clear that the expert evidence was gladly accepted by the court and of much assistance to the court.

The court in this case accepted the fact that the first appellant honestly believed that there was no other means of escaping the abuse other than killing the abuser. Howie J stated.\(^\text{948}\)

“This is not a case where the first appellant’s motive was anything other than to end the relationship so as to preserve her bodily integrity.”

In respect of the moral blameworthiness of contract killers Howie J questioned whether hiring killers increased an accused’s moral blameworthiness. Howie J stated.\(^\text{949}\)

“The criterion for determining moral blameworthiness, it is said, is subjective. This means one must look solely at what an accused believed and intended when deciding for purposes of sentence whether moral blameworthiness has been reduced.”

What is of most importance also for purposes of the defence of non-pathological criminal incapacity, is the hypothetical scenario the court canvassed\(^\text{950}\) to illustrate situations where there is a time span between the last incident of abuse and the eventual killing of the abuser. This hypothesis can be explained as follows: Three women, A, B and C, are victims of abuse and guilty of the murder of their respective abusive partners in the subjective belief that there was no alternative way to protect their rights to bodily integrity and freedom from violence. Each case is characterized by a long history of substantially similar abuse and a triggering event which instilled that belief. A committed the offence a day later, by herself. B committed it one week later, by herself. C, feeling mentally and physically weak, hired contract killers two weeks later. The court questioned whether any of these

\(^{948}\) Paragraph 40. Ludsin and Vetten (2005) *supra* note 666 at 175.

\(^{949}\) Paragraph 44.

three women is more morally blameworthy than the other which would justify different sentences to murder.

Howie J answered this question as follows.\(^{951}\)

“It seems to me that the true question to be answered is whether the threat from which each sought to escape was still, subjectively perceived to be real and present danger (albeit not imminent enough to escape criminal liability altogether) at the time of the offence.”

An abused woman relying on the defence of non-pathological criminal incapacity, who subjectively believed threats to be real and present, could argue that at the time of killing her abuser, she lacked the capacity to act in accordance with an appreciation of the wrongfulness of her actions. In the alternative, that her capacity to either appreciate the wrongfulness of her actions or to act in accordance with such appreciation, was significantly diminished at the time of the killing.\(^ {952}\) Central, however, to proving the latter, stands the mental health expert. The Ferreira-decision portrays the value of well-established expert evidence in cases of abused women.

Ludsin indicates that the Ferreira-decision is welcoming for the following reasons.\(^ {953}\)

- It highlights the importance of the proper understanding of women’s experiences with violence and specifically their motivations for killing when determining whether any mitigating circumstances exist at the sentencing stage.
- It demonstrates how women who kill their abusers in non-confrontational situations may be able to prove putative private defence.\(^ {954}\) The court specifically evaluated the common question in cases of abuse as to why the

\(^{951}\) Paragraph 45.

\(^{952}\) Diminished criminal capacity will be discussed below.


\(^{954}\) \textit{Ibid.} The defence of private defence in respect of battered women who kill their abusers was not addressed in this Chapter as it relates to a different element of criminal liability, namely unlawfulness.
woman did not just leave the abuser by assessing possible alternatives available to the first appellant. The court per Howie J noted the threat of harm would have continued even if the first appellant left as the deceased’s threats entailed that she would be raped if she left. The two options available to the first appellant were the police and a civil protection order.\footnote{\textit{Ibid.}} Despite the availability of these two options, the court concluded that the first appellant subjectively believed she had no choice but to kill to escape further abuse.\footnote{Paragraph 59.} The most important aspect is that the court supported this conclusion with expert evidence of experts who founded their opinions on research on domestic violence as well as international research.\footnote{Paragraphs 30 and 35.} 

- Abused women who kill using a hired killer as well as women who do not kill in the midst of a confrontation, are accorded some understanding by the law.

The decision in \textit{Ferreira} also affirms the importance of an abused woman’s fundamental rights that are infringed in cases of abuse and that these rights deserve protection. These rights include the right to human dignity, bodily integrity and freedom and security of the person and also not to be treated or punished in a cruel, inhumane or degrading way.\footnote{See paragraph 3.4 \textit{supra}.}

From a psychological perspective, Madikizela and Foster indicate\footnote{Madikizela, PG and Foster, D “Psychology and Human Rights” in Tredoux \textit{et al} (eds) (2005) \textit{supra} note 1 at 367 – 368; Arrigo, BA and Shipley SL “Introduction to Forensic Psychology – Issued and Controversies in Law, Law Enforcement and Corrections” (2005) at 82 – 83; Bartol, CR and Bartol, AM “Criminal Behaviour – A Psychological Approach” 7\textsuperscript{th} ed (2005) at 322 – 323.} that the \textit{Ferreira}-decision is significant for establishing a new trend in South Africa that is predicated on protecting the rights of accused persons according to the dictates of a Constitution that is founded on human rights principles. Expert evidence in cases of abused women, should, however, be presented rigorously and with precision.\footnote{\textit{Ibid.}}
Madikizela and Foster in addition state that other victims’ experiences of abuse and their reactions thereto, will differ, as well as the behaviour exhibited as a result of the abuse and that it is “these nuances that a rigorous investigation should capture in order to lend credibility to a defence based on an analysis of the dynamics of domestic violence and the range of legal and psychological factors associated with it.”

Ludsin in addition recommends that within the context of domestic violence, the accused should be allowed to introduce any or all of the following evidence to establish loss of self-control:

(a) Evidence that the accused is or has been the victim of acts of physical, sexual or psychological harm or abuse at the hands of the abuser,

(b) Expert evidence regarding abusive relationships, the nature and effects of physical, sexual or psychological abuse and response thereto, the relevant facts and circumstances that form the basis for such opinion as well as any other expert evidence important and relevant to a claim of diminished capacity.

In this section the pivotal and essential role of expert evidence in respect of abused women was clearly illustrated and contextualized on the backdrop of the various manifestations of abuse and the various explanations advanced as to why women endure abuse rather than escaping the abusive relationship. The complexity of the issue and also the fact that expert evidence in cases of non-pathological criminal incapacity fulfils an indispensable function, contrary to the traditional approach in terms of which expert evidence does not fulfil an indispensable function, was elucidated. The presentation of expert evidence will ensure the accused’s right to adduce and challenge evidence and also lead to a fair and a just trial provided that the State also presents experts to challenge the

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961 Ibid.
expert evidence advanced on behalf of the accused. In cases where non-pathological criminal incapacity is raised by abused women, the full purport of their constitutional rights infringed during the abuse, will also receive due recognition in line with a Constitutional State founded on the values of human dignity, equality and freedom.

16 Amnesia and non-pathological criminal incapacity

“Memory is what we are: if we lose our memories, we lose our identity and sense of self.” (Ford, 1996)

Amnesia is generally a state of mind in which a person tends to suffer from partial or complete memory loss. Amnesia is also often referred to as a short-term memory condition in which the memory is disturbed. The role of amnesia is addressed in this study as it frequently comes to the fore in respect of both non-pathological as well as pathological criminal incapacity.

Vorster notes that memory is a complex function which is not limited to a certain area of the brain, but entails various parts functioning in conjunction with each other and that memory can be divided into three processes: registration, storage and retrieval.


According to Vorster, the following factors may affect each stage of the process:

- **Registration** – levels of arousal – any factors that could have a bearing on this.
  - relationship of importance of information to the self
  - emotional state
  - intelligence and filtering processes
- **Storage** – structure and physiology of the brain
- **Retrieval** – emotional factors
During amnesia there is a defect in one or more of these stages.

Rubinsky and Brandt define amnesia as:965

“... a behavioural syndrome marked by a severe inability to acquire and retain new permanent memories (anterograde amnesia) often coupled with some degree of impairment in the retrieval of previously acquired memories (retrograde amnesia).”

Kaplan and Sadock define amnesia as the “partial or total inability to recall past experiences.”966

According to Kaplan and Sadock, amnesia can be sub-divided into two categories:967

- Anterograde – loss of memory for or pertaining to events occurring after a point in time;
- Retrograde – loss of memory for or pertaining to events occurring before a point in time.

According to Schacter, there are four types of amnesia:968

- Chronic organic amnesia – “... pathological forgetting that is associated with a wide variety of neurological dysfunctions, including head injury, encephalitis, ruptured aneurysm, Korsakoff’s disease, anoxia, Alzheimer’s

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965 Rubinsky and Brandt (1986) supra note 963 at 33; Hoctor (2000) SACJ supra note 963 at 274.
967 Kaplan and Sadock (2003) supra note 966 at 286.
disease” – patients typically display signs of both anterograde as well as retrograde amnesia.

- Functional retrograde amnesia – “... memory loss of one’s name and personal past that is produced by severe psychological and emotional trauma ...
- Multiple personality amnesia – “... memory deficits observed in patients with multiple personality disease: Any one of the patient’s personalities may have little or no access to memories acquired by another ...
- Limited amnesia – “... a pathological inability to remember a specific episode, or small number of episodes, from the recent past ...”

It is important to briefly discuss the sources of amnesia relevant to the discussion of non-pathological criminal incapacity. Rubinsky and Brandt also note that a specific manifestation of amnesia plays an important role in the different criminal defences. According to Rubinsky and Brandt, the most prominent causes of amnesia are alcoholism, epilepsy, head injury and psychogenic amnesia.

16.1 Sources of Amnesia

16.1.1 Alcohol

There are mainly two instances in which alcohol could affect a person who subsequently claims amnesia at a later stage:

- Where acute ingestion of alcohol causes amnesia during the period of intoxication, or
- Where long-term alcoholism results in a chronic memory disorder.

Acute alcohol intoxication produces a state in which new information is inefficiently stored, and old information is difficult to retrieve. Short-term memory is

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969 Rubinsky and Brandt (1986) supra note 963 at 36.
970 Ibid. See also Hoctor (2000) SACJ supra note 963 at 275-278; Van Rensburg and Verschoor (1989) TRW supra note 963 at 50-54.
impaired during intoxication with the severity of impairment being positively correlated with the level of alcohol in the blood.\textsuperscript{973} Rubinsky and Brandt state that as soon as blood-alcohol levels rise, the information processing strategies used by alcoholics as well as social drinkers alternate from sophisticated strategies founded on semantic associations, to more primitive, idiosyncratic strategies.\textsuperscript{974}

Information gathered whilst a person is intoxicated is often only recalled when a person is in a similar physiological state. After a bout of heavy intoxication, there may be anterograde amnesia pertaining to events that occurred during this period of the so-called alcoholic “blackout”.\textsuperscript{975}

Whenever a blackout arises, remote and immediate memory remain intact, but a short-term memory loss occurs in the sense that the intoxicated person is unable to recall events that occurred in the preceding five or ten minutes.\textsuperscript{976} Van Rensburg and Verschoor\textsuperscript{977} state that a person with alcoholic amnesia is clearly aware of what he is doing from moment to moment while intoxicated, but as a result of a lack of retention of information her or she is unable to recall the events at a later stage.

\textbf{16.1.2 Epilepsy}

Cases dealing with individuals with epilepsy usually involve those with complex partial seizures.\textsuperscript{978} There are mainly three types of epileptic seizures: grand mal, petit mal and psychomotor seizures.\textsuperscript{979}

\textsuperscript{972} Rubinsky and Brandt (1986) \textit{supra} note 963 at 36; Hoctor (2000) \textit{SACJ supra} note 963 at 275.

\textsuperscript{973} \textit{Ibid}.


\textsuperscript{975} Rubinsky and Brandt (1986) \textit{supra} note 963 at 37-38.

\textsuperscript{976} Hoctor (2000) \textit{SACJ supra} note 963 at 275.

\textsuperscript{977} Van Rensburg and Verschoor (1989) \textit{TRW supra} note 963 at 51; Hoctor (2000) \textit{SACJ supra} note 963 at 275; \textit{R v H} 1962 (1) SA 197 (A).

\textsuperscript{978} Rubinsky and Brandt (1986) \textit{supra} note 963 at 38.

\textsuperscript{979} Van Rensburg and Verschoor (1989) \textit{supra} note 963 at 51. According to Van Rensburg and Verschoor “Grand Mal” seizures are associated with convulsions which can result in injury on the part of the person suffering the seizure whereas “Petit Mal” seizures are fleeting moments of unconsciousness, which usually lasts a few seconds. See also Hoctor (2000) \textit{SACJ supra} note 963 at 276.
Rubinsky and Brandt state that[880] criminal cases pertaining to individuals with epilepsy usually relate to those with complex partial (‘psychomotor’) seizures. These complex partial seizures are often associated with abnormal electrical discharges from limbic structure underlying the temporal lobes, and accordingly they were once termed “temporal lobe epilepsy”.[881] Whilst experiencing a complex partial seizure, the individual does not experience a convulsion, but rather suffers a ‘clouding’ of consciousness and may engage in automatic behaviour and as such “(h)e behaves in quasi-purposeful ways, yet is unresponsive to the environment and is not storing new information. When the episode is over, the events which transpired during the ictus are not remembered”.[882]

According to Van Rensburg and Verschoor epileptic amnesia can be characterised as being well defined.[883] The person can generally recall all activities undertaken until the point where the seizure occurred.[884] Epileptic amnesia covers the period surrounding the attack but does not relate to the person’s past.[885]

Rubinsky and Brandt note that the interface between epilepsy-related cognitive impairments and criminal behaviour remain uncertain. They observed that physicians and legal professionals who have written on the medicolegal aspects of amnesia emphasising epilepsy, have often conflated the states of amnesia, automatism, and impaired consciousness.”[886]

16.1.3 Head trauma

An accused person who commits a crime while in clear consciousness and full possession of his or her mental capacities and, either in the course of the act or subsequent thereto, sustains an injury to the head may suffer from retrograde amnesia for the act and events prior to it, as well as anterograde amnesia (post-
traumatic amnesia) afterwards. It is, however, true that courts are generally not very sympathetic to claims of amnesia if during the initiation of the act and at the time of the trial there is no anterograde amnesia.

16.1.4 Psychogenic amnesia or “dissociative amnesia”

“I have done that’ says my memory. ‘I cannot have done that’ says my pride and remains adamant – at last memory yields.” (Nietzsche)

Psychogenic amnesia can be defined as a sudden inability to remember important information. Rubinsky and Brandt state that memory loss in respect of psychogenic amnesia is too extensive to be described by ordinary forgetfulness and is typically confined to incidents that took place before or surrounding the critical event or events. The memory impairment could accordingly be classified as the retrograde type. The memory loss in these instances can be for a certain period of time or for the rest of the person’s life.

Psychogenic amnesia is commonly known to be a method of suppressing unpleasant memories, but it could also be a reflection of a certain personality type predisposed to this type of memory loss.

Psychogenic amnesia is often the result of an “emotional block”. A person may experience an incident which he or she does not want to remember or experience a traumatic event and escape from this by forgetting. Emotional trauma in

987 Rubinsky and Brandt (1986) supra note 963 at 39; Hoctor (2000) supra note 963 at 276. See also S v Cunningham 1996 (1) SACR 631 (A) at 639 B-C.
989 Rubinsky and Brandt (1986) supra note 963 at 41.
990 Ibid.
991 Ibid.
993 Van Rensburg and Verschoor (1989) supra note 963 at 46.
respect of the commission of the crime can thus bring about psychogenic amnesia.

According to the DSM-IV, the diagnostic features unique to dissociative (psychogenic) amnesia are the following:994

- The essential feature of dissociative amnesia is an inability to recall important personal information, usually of a traumatic nature.
- It constitutes a reversible memory disturbance in which memories of personal experience cannot be retrieved verbally.
- Dissociative amnesia most commonly manifests as a retrospectively reported gap or series of gaps in recall for aspects of the individual’s life history.
- It does not occur exclusively during the course of dissociative identity disorder, dissociative fugue, post traumatic stress disorder, acute stress disorder, or somatization disorder and is not due to the direct physiological effects of a substance.
- The symptoms induce clinically significant distress or impairment in social, occupational or other important areas of functioning.

Psychogenic amnesia usually starts abruptly, usually after the occurrence of serious psychosocial stress.995 It usually also ends abruptly with complete recovery and it seldomly repeats itself.996

According to the DSM-IV there are distinct types of psychogenic amnesia:997

(i) Localized amnesia – the individual fails to recall events that occurred during a circumscribed period of time, usually the first few hours after a profoundly traumatic event;
(ii) Selective amnesia – a person can recall some, but not all, of the events during a specified period of time;

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996 Van Rensburg and Verschoor (1989) supra note 963 at 47.
(iii) Generalized amnesia – failure of recall relates to the person's entire life;
(iv) Continuous amnesia – this form of amnesia is defined as the inability to recall events subsequent to a specific time up to and including the present.

It is extremely difficult to distinguish psychogenic amnesia from simulated amnesia, which renders the assessment of amnesia problematic.

In *S v Henry*[^998] the defence that was raised by the appellant was one of sane automatism. The court nevertheless made important findings which could also be of importance to the defence of non-pathological criminal incapacity as well as the concept of psychogenic amnesia.

The appellant, a television technician in his late thirties, was charged in the Cape Provincial Division with two counts of murder and a third count of pointing a firearm in contravention of the Arms and Ammunition Act 75 of 1969. The first count of murder related to the killing of the appellant’s ex-wife (“Mrs Henry”) and the second to the killing of his ex-mother-in-law (“Mrs Symon”). The complainant in the alleged statutory offence was Mrs Symon’s fiancé, Mr Thomas Davids.

The appellant and the first deceased were divorced in 1993 and both became involved in relationships with new partners. They saw little of each other. There were three daughters born of the marriage, to which the appellant had access in terms of the decree of divorce. The first deceased adopted a flexible attitude to the appellant’s rights of access, and, especially in regard to the youngest of the daughters, Robyn, who had maintained a close relationship with her father, and accordingly permitted him greater access than provided for in the decree. Robyn spent the weekend of 27-29 January 1995 with the appellant. During the evening of Sunday 29 January, when she was scheduled to return home, Robyn telephonically requested the first deceased for permission to remain with the appellant until the following morning. However, the first deceased indicated that she wanted her daughter to return home that evening. Two further requests, one voiced by the appellant himself, were similarly dismissed. The appellant then

drove Robyn to her mother’s house. He told Robyn to wait in the car. He announced himself at the door and, after he had spoken to his two elder daughters, entered the house, intending yet again to seek the first deceased’s permission for Robyn to remain with him until the following morning. He was in possession of a firearm, which was strapped down in its holster. When he encountered the first deceased there was a confrontation. According to the appellant she shouted at him to leave the house and started pushing him out. He also remembered her grabbing at the holster, and a struggle taking place. Thereafter, according to the appellant, he became enraged, and “just heard this noise zinging in my ears and there was shouting going on”\textsuperscript{999}. He also claimed that he had heard “banging noises” and that he had seen “this blur coming towards (him)\textsuperscript{1000}. What he remembered after this was looking for the exit, because he knew something must have taken place. He stormed by mistake into the second deceased’s room, where he saw Mr Davids and pointed his firearm at him.

When the appellant returned to his vehicle he told his daughter, Robyn, that he had killed her mother. He then drove to a family member whom he also informed that he had shot his ex-wife. He then informed the police in Houtbay but thereafter claimed to have been suffering from amnesia with regard to the preceding events. The appellant raised the defence of sane automatism, claiming that he had no recollection of the shooting or of pointing the firearm at Mr Davids. The defence was rejected by the trial court and the appellant was convicted as charged.

On appeal, it was held per Scott JA\textsuperscript{1001} firstly that it is trite law that a cognitive or voluntary act is an essential element of criminal responsibility. It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the State to establish this element beyond reasonable doubt.

\textsuperscript{999} At 19 b-c.
\textsuperscript{1000} At 19 c-d.
\textsuperscript{1001} At 19 I-J.
Scott JA stated\(^{1002}\) that it has been repeatedly emphasised in the past that defences such as non-pathological automatism require careful scrutiny and circumspection. The *ipse dixit* of the accused to the effect that his act was involuntarily and unconsciously committed must accordingly be weighed up and assessed against the backdrop of all the circumstances and particularly against the alleged criminal conduct viewed objectively.\(^{1003}\) Scott JA in addition held that criminal conduct arising from an argument or some other emotional conflict is frequently preceded by some sort of provocation and such loss of temper is a common occurrence and in appropriate circumstances it might possibly mitigate, but it will not exonerate.\(^{1004}\) Scott JA held that non-pathological loss of cognitive control or consciousness as a result of some emotional stimulus and resulting in involuntary conduct, i.e. psychogenic automatism, is most uncommon\(^{1005}\) and in respect of expert evidence Scott JA held: “Generally speaking expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent or inconsistent as the case may be, with involuntary conduct which is non-pathological and emotion-induced. These, for example, may relate to such matters as the nature of the emotional stimulus which it is alleged served as a trigger mechanism for the condition or the nature of the behaviour or aspects of it which may be indicative of the presence or absence of awareness and cognitive control”.

Scott JA discussed the occurrence of psychogenic amnesia and noted that it generally refers to the subconscious repression of an unacceptable memory. It was held that whilst it is generally accepted that automatism results in amnesia it does not follow that the converse is true. In other words, amnesia is not necessarily indicative of automatism and an accused person may therefore genuinely have no subsequent recollection of a voluntary act giving rise to criminal

\(^{1002}\) At 20 C-I. See also *S v McDonald* 2000 (2) SACR 493 (NPG) where a clinical psychologist for the State presented expert evidence to the effect that the appellant on account of the trauma surrounding the shooting which was the reason of the charge against the appellant, suffered from a state of retrograde dissociative amnesia – lacking the ability to recall matters after the event.

\(^{1003}\) *Ibid.*

\(^{1004}\) *Ibid.*

\(^{1005}\) *Ibid.*
responsibility and consequently expert evidence may be of assistance to the court in explaining the accused’s behaviour.\textsuperscript{1006}

Scott JA in addition noted ultimately, however, it is for the court to decide the true nature of the alleged criminal conduct which it will do not only on the basis of the expert evidence but in the light of all the facts and the circumstances of the case."

The only question in this case was whether the appellant was “acting” in a state of psychogenic automatism at the relevant time and accordingly could not commit an act or acts giving rise to criminal liability.

Although this case did not deal specifically with non-pathological criminal incapacity, it is interesting to note the aspects of expert evidence pertaining to the facts.

Mr Reyner van Zyl, a clinical psychologist of Cape Town, who gave evidence on behalf of the appellant, was of the view that the appellant was indeed in a state of psychogenic automatism at the time of the shooting.\textsuperscript{1007} Dr Jedaar, who was called by the State in rebuttal, took the opposite view holding that the appellant had not been in a state of psychogenic amnesia.\textsuperscript{1008}

It appears from the evidence that there was no difference of opinion between Mr Van Zyl and Dr Jedaar as to the nature of the stimulus or trigger mechanism that was required to induce a state of psychogenic automatism. There had to be some emotionally charged event or provocation of extraordinary significance to the person concerned and the emotional arousal that it caused had to be of such a nature as to disturb the consciousness of the person concerned to the extent that it resulted in unconscious or automatic behaviour with consequential amnesia. Dr Jedaar testified that there was nothing that he could find in the appellant’s account of what had been said on the fatal evening or in the appellant’s account of his own emotions at the time to suggest a stimulus of the kind required to trigger a state of

\textsuperscript{1006} Ibid.
\textsuperscript{1007} At 21 A.
\textsuperscript{1008} At 21 B-C.
automatism. Mr Van Zyl suggested that what triggered the appellant’s state of automatism was his intense frustration arising from Mrs Henry’s refusal to let him have Robyn for the extra night. This explanation, however, did not carry much weight.

Initially Dr Jedaar confined his evidence to certain general observations regarding automatism as he had not interviewed the appellant. At the request of the appellant’s counsel the case was later postponed to enable Dr Jedaar to interview the appellant and investigate the matter further. Dr Jedaar subsequently testified that when he interviewed the appellant, the latter told him that he recalled grappling with Mrs Henry for possession of the firearm and that he feared that if she gained possession of it she would use it against him. According to Dr Jedaar, his subjective experience immediately prior to the shooting was not one of anger or rage, but one of fear. According to Dr Jedaar, this was wholly at variance and inconsistent with an emotional stimulus of a kind that would induce automatism.

Another aspect of the appellant’s behaviour upon which the State relied in order to demonstrate that he was acting consciously was what Dr Jedaar described as “avoidance behaviour”. By this he referred to the appellant’s hurried departure from the scene which on his own version took place even before he had found out what had happened. Dr Jedaar considered this to be wholly inconsistent with the behaviour of a person who had just had an episode of automatism. He testified that he would expect such a person to be in a bewildered and confused state. The court accordingly held, on the facts, both objectively and on the appellant’s own account of his emotions, revealed nothing to suggest a stimulus of the kind required to trigger a state of automatism.

It was held by Scott JA that in the absence of evidence of an identifiable trigger mechanism, and in the light of indications of conscious behaviour inconsistent with automatism, that the evidence did not reveal a reasonable possibility that the

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1009 At 21 D-F.
1010 At 22 B-C.
1011 At 22 H-I.
1012 At 23 E-F.
1013 At 23 E-G.
1014 At 23 F-G.
appellant was in a state of automatism at the relevant time. The appeal accordingly had to be dismissed.

- **Reflection on the *Henry*-decision**

The court per Scott JA notes that the incidence of psychogenic automatism, which entails the non-pathological loss of cognitive control due to an emotional stimulus, is rare. The court also states that automatism often results in amnesia but that the converse is not always true. Psychogenic amnesia, which entails the subconscious suppression of unacceptable memories of the event is a relatively common occurrence. It is accordingly possible for a person to suffer from amnesia whilst the preceding conduct was completely voluntary.\(^{1015}\)

Now that the clinical aspects of amnesia have been discussed, it is necessary to discuss the legal approach to claims of amnesia.

### 16.2 The legal approach to amnesia

In *R v H*\(^{1016}\) the court expressed great caution in respect of amnesia:

“(D)efences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question.”

It is generally accepted that mere amnesia or loss of memory does not constitute a valid defence.\(^{1017}\)

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\(^{1015}\) See Le Roux (2000) *De Jure supra* note 1 at 192.

\(^{1016}\) *R v H* 1962 (1) SA 197 (A) at 208 B. See also *S v Piccione* 1967 (2) SA 334 (N) at 336, *S v T* 1986 (2) SA 112 (O) at 124 A-D where it was held that the accused's amnesia was not attributable to involuntary or unconscious behaviour, but rather the desire to avoid the unpleasant. See also Ellis (1986) *De Jure supra* note 958 at 348.

\(^{1017}\) Strauss (1991) *supra* note 1 at 129; Ellis (1986) *De Jure supra* note 963 at 348; *S v Piccione* 1967 (8) SA 334 (N) at 336; *R v Johnson* 1970 (2) SA 405 (R); Kaliski (2006) *supra* note 1 at
It is, however, true that the assessment of amnesia is extremely difficult with specific reference to the establishment of the authenticity thereof. It remains an undeniable fact that expert evidence from forensic mental health professionals will play a pivotal role in establishing the validity of a claim of amnesia. Rogers and Cavanaugh\(^{1018}\) expound on the difficulties encountered during the assessment of amnesia:

“Much of forensic practice is predicated on the successful reconstruction of the criminal or civil issue in question. The assessment process is greatly complicated when the evaluatee claims partial or total amnesia regarding his/her thoughts, emotions, perceptions, and behaviour. Of these, only occasionally can behaviour be fully reconstructed. The others are interpersonal phenomena which, at best, can be inferred from observed behaviour. This is problematic both for forensic clinicians attempting to address comprehensively specific legal standards, and for participating attorneys in the effective presentation and advocacy of their cases.”

In *S v Pederson\(^{1019}\)* the appellant was convicted in a regional court of the murder of his wife. On the day of the murder the appellant, who apparently suspected that the deceased was committing adultery, made enquiries as to her whereabouts, and was heard to say that he was going to kill her. The deceased was warned about this threat, but ignored it. On the morning of the murder the deceased returned to her flat. While she was there the appellant stabbed her as a result of which she died. The appellant’s defences at the trial were:

108. See also *Bratty v Attorney-General for Northern Ireland* (1961) 3 A11 ER 523 (HL) at 532 G-H:
   “The term ‘involuntary act’ is, however, capable of wider connotations and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence for him to say ‘I don’t know what happened, I cannot remember a thing’ ... Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time.”
   See also *S v Van Zyl* 1964 (2) SA 113 (A) at 120; *S v Cunningham* 1996 (1) SACR 631 (A) at 635 J–636A.

1018 Rogers and Cavanaugh (1986) *supra* note 963 at i.

1019 *S v Pederson* 1998 (2) SACR 383 (NPD). See also Reddi, M “General principles of liability” (1999) SACJ 87-91.
• that he had not acted voluntarily when he stabbed the deceased;
• even if there had been a voluntary act, that he had not at the time of the stabbing been capable of forming the intention of killing the deceased.

The court made important observations pertaining to amnesia. The Court per Marnewick AJ stated that a decisive feature of cases where the accused had been held not to have acted voluntarily, was that the accused in those matters had truly retained no memory of the events concerned.\textsuperscript{1020} This was crucial, as true absence of memory was a strong indication that an accused had acted involuntarily. Marnewick AJ explained\textsuperscript{1021} that retrograde loss of memory is a device employed by the psyche to suppress unpleasant memories and an individual can only have a memory of an incident or event if he had a sufficient intellectual capacity at the time of the incident or even have exercised a measure of control over his or her conduct.

Expert evidence by Dr LG Pillay, a psychologist, was advanced in support of the appellant’s defences. He testified\textsuperscript{1022} that the appellant had probably suffered an “acute catathymic crisis”:

“Okay, what I’m suggesting is Mr Pederson does have the experience, encoded in his memory. What I’m contending is his ability to recall being affected by the nature of the trauma itself.”

Later in his evidence Dr Pillay stated that he disagrees that Mr Pederson suffered from true amnesia. Dr Pillay opined that the memory was still present but that Mr Pederson was not able to recall it. Dr Pillay diagnosed the appellant’s condition as post-traumatic amnesia due to the fact that the appellant’s mind was unable to accept or integrate the experience, thus suppressing it. He stated that this was used as a defence mechanism to protect the individual from total disintegration.\textsuperscript{1023}

\textsuperscript{1020} At 390 G.
\textsuperscript{1021} At 390 G-H.
\textsuperscript{1022} At 397 A-B.
\textsuperscript{1023} At 396 I-J.
In evaluating the appellant’s amnesia Marnewick AJ explained that for the defence of sane amnesia to succeed, the absence of control by the mind over the actions of the appellant must have been present and that mere loss of memory is not and it has never been a defence to a charge of murder and such loss of memory should form part of a wider concept to be relevant at all. Retrograde amnesia, on the other hand, falls in a category of its own as it is premised on the very basis that the accused had some memory of the relevant events, but has since lost such memory. According to Marnewick J the statements of Dr Pillay destroyed the defence based on the absence of a voluntary or conscious act. For the events to be in the appellant’s memory it would have been necessary for his cognitive functions to remain operative to a sufficient extent to record as memory the events which are witnessed and perceived by his senses and if the cognitive functions of his mind were intact to that extent, there is sufficient control of his mind over his actions to constitute his acts as voluntary acts in terms of the criminal law.

Dr B Gilmer, a clinical psychologist called by the State in rebuttal, was of the opinion that Dr Pillay’s opinion was dependent on the veracity of the appellant’s own evidence. He explained that a catathymic episode requires a “splitting off of emotion, thought and action.”

According to Dr Gilmer this did not occur with the appellant as there was a coherency between the appellant’s emotions, thoughts and actions which ruled out the existence of a catathymic episode or emotional storm.

It was accordingly held on the facts, including the evidence of Dr Pillay’s evidence as to the nature of the appellant’s alleged amnesia, that the appellant’s conduct before and after the stabbing of the deceased, as well as the poor impression that the appellant made as a witness, that the magistrate had rightly found that the

1024 At 396 G-H.
1025 Ibid.
1026 At 397.
appellant had acted voluntarily when he stabbed the deceased. The appeal against conviction was dismissed.

In S v Van der Sandt1028 Labuschagne J held that the accused suffered from post-traumatic amnesia created as a defence mechanism as a result of the gruesome and traumatic nature of the crime. Such amnesia, it was held, does not exclude criminal liability.

In S v Majola1030 the appellant had been convicted of murder in a regional court and sentenced to 15 years' imprisonment in terms of the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The evidence revealed that he had stabbed his lover, who was eight months pregnant, with a penknife in her throat. The appellant’s only defence was that he was unable to recall what had happened and that he thus did not remember stabbing the deceased. Penzhorn AJ rejected this as a self-serving piece of evidence which was contradicted by the evidence of the State witnesses to the effect that the appellant simply came in and embarked on his aggressive path. Penzhorn AJ in addition held that even if the appellant really did not remember, it did not assist him in the light of the evidence, which was before the court. It was held that no factual foundation was established for a defence of criminal incapacity, sane or insane automatism, but simply that the appellant could not remember what had happened. It was accordingly held that apart from a bare claim of amnesia there was simply nothing before the court indicative of unconscious or involuntary behaviour. The appeals against conviction and sentence were dismissed.

What becomes abundantly clear from case law where amnesia was either raised as a sole defence or in support of a defence is that it is and should be carefully scrutinized by courts.

1027 At 395 G-H as well as 399 G-J.
1028 S v Van der Sandt 1998 (2) SACR 627 (W) – the facts of this decision have already been discussed earlier in this chapter.
1029 At 638 i-j. See also Du Toit et al (2007) supra note 1 at 13-16 – 13-17; S v Calitz supra note 1 at 120 d-e; S v Els 1993 (1) SACR 723 (E) at 730 d-e; Reddi (1999) supra note 1014 at 88.
1030 S v Majola 2001 (1) SACR 337 (NPD).
1031 At 340 E-F.
1032 At 341 A.
It is also clear that amnesia is most often raised in support of a claim of involuntary conduct or put differently, a defence of automatism.1033

Morse correctly states1034 that behavioural conditions such as amnesia do not require special legal treatment, but should instead be regarded as evidentiary factors which should be assessed when adjudicating more general legal doctrines.

It is important that courts approach the defence of amnesia with scrutiny and circumspection even where medical evidence is advanced in support of such claim, since medical evidence is often based upon the assumption that the accused has provided a truthful account of the relevant facts in question.1035

Amnesia does not constitute a valid defence and will not affect criminal liability unless it is connected to either automatism or criminal incapacity.1036 It is clear that, when a person acts in a state of automatism, there is usually true amnesia, but the opposite is not always true.1037 Where the defence is one of lack of criminal capacity, the presence of amnesia will also not be the decisive factor.

In S v Chretien Rumpff CJ stated:1038

“Een van die probleme in verband met dade gepleeg in dronkenskap is natuurlik dat die beskonkene wel weet wat hy doen terwyl hy dit doen, maar dikwels later vergeet het wat hy gedoen het. Die bloe feit dat hy vergeet het wat hy gedoen het, maak hom nie ontoerekeningsvatbaar nie.”

In assessing whether an accused’s conduct was involuntary, it is clear that courts distinguish clearly between “true absence of memory” and “retrograde loss of memory after the event.”1039

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1033 Hoctor (2000) supra note 963 at 282. See also generally S v Henry supra note 1, as discussed above.
1035 Hoctor (2000) supra note 963 at 279; S v Moses supra note 1 at 713 A-C; S v Gesualdo supra note 1 at 74 G-H.
1036 Hoctor (2000) supra note 963 at 280; S v Piccione 1967 (2) SA 334 (N) at 335 C-D.
1037 Hoctor (2000) supra note 963 at 280; S v Potgieter supra note 1 at 83 A-B.
1038 S v Chretien 1981 (1) SA 1097 (A) at 1108 C-D.
1039 Hoctor (2000) supra note 963 at 284.
In *S v Gesualdo* the court took into account the fact that the accused had amnesia in supporting the finding that the accused lacked conative capacity at the time of the commission of the crime.\textsuperscript{1040} Evidence of amnesia could also be advanced in support of a finding of diminished criminal capacity.\textsuperscript{1041}

### 16.3 Malingering or “simulated amnesia”

One of the main considerations underlying the reluctance of courts to accept claims of amnesia is the fact that many accused persons claiming amnesia are doing so deceptively. This problem is further exacerbated by the fact that there are no reliable procedures to distinguish true amnesia from simulated or feigned amnesia.\textsuperscript{1042}

Van Rensburg and Verschoor state\textsuperscript{1043} that it is difficult to distinguish simulated amnesia from psychogenic amnesia. In cases of psychogenic amnesia a person simulates amnesia but he or she does generally not realise the reason for it except for gaining sympathy.\textsuperscript{1044} In cases of simulated amnesia a person simulates amnesia in order to escape serious problems encountered at that point in time.\textsuperscript{1045} Research suggests, however, that simulators or malingerers tend to overplay their role and perform less successful on memory tests than true amnesics.\textsuperscript{1046}

Rubinsky and Brandt note that statements concerning malingered amnesia within the legal literature which are at odds with neuropsychological knowledge tend to impair the courts’ ability to effectively assess claims of amnesia.\textsuperscript{1047}

Kaliski correctly states\textsuperscript{1048} that amnesia should only be regarded as a supportive indicator that, for example, an automatism occurred, and not as an excuse in itself.

\textsuperscript{1040} *S v Gesualdo* 1997 (2) SACR 68 (W).
\textsuperscript{1041} Hoctor (2000) *supra* note 963 at 285.
\textsuperscript{1042} Rubinsky and Brandt (1986) *supra* note 963 at 42.
\textsuperscript{1043} Van Rensburg and Verschoor (1989) *TRW* *supra* note 963 at 49.
\textsuperscript{1044} Ibid.
\textsuperscript{1045} Ibid.
\textsuperscript{1046} Rubinsky and Brandt (1986) *supra* note 963 at 43.
\textsuperscript{1047} Ibid.
\textsuperscript{1048} Kaliski (2006) *supra* note 1 at 106.
Peter also cautions\(^{1049}\) that within the psycholegal context, malingering should always be borne in mind, especially when the amnesia conveniently shuts out important events. An accused person will typically have a detailed and specific recall for events up to and soon after the crime, with a period of so-called amnesia.\(^{1050}\) In such cases the nature and quality of the accused’s actions should be carefully assessed.

### 16.4 Assessment of amnesia

During the assessment of amnesia it is pivotal to evaluate the accused's conduct before, during and after the commission of the crime in order to ascertain whether he or she was aware of what he or she was doing.\(^{1051}\)

Kaliski provides the following guidelines for the assessment of amnesia:\(^{1052}\)

- Amnesia is a symptom that may be indicative of a disorder, but is not a diagnosis and accordingly amnesia cannot be raised as a defence.
- There should exist an identifiable cause or reason for the amnesia, such as a blow to the head or intoxication.
- The pattern of the amnesia should be assessed with as much detail as possible. Anterograde amnesia should be more serious than retrograde amnesia. Kaliski also notes that persons claiming severe amnesia for events that took place relatively long ago but with a relatively intact short-term memory are usually malingering.
- Memory for the triggering event may vary – where the alleged reason for the amnesia was a head injury, the person will lack memory for the moment of injury due to the fact that it will be submerged in the retrograde as well as the anterograde (post-traumatic amnesia). When the alleged cause is emotional events the triggering event is usually recalled.

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\(^{1049}\) Peter in Kaliski (ed)\(^{1}\) supra note 1 at 136.

\(^{1050}\) Ibid.


• Intoxication, especially when an alcohol “blackout” is present, generally results in either an *en bloc* memory loss which entails lack of memory of events for the period of intoxication or *fragmentary amnesia* which entails some “islets of recall” in a general sea of amnesia.

• An accused may have a valid reason for having amnesia, but nevertheless be criminally accountable for his actions during the commission of the alleged crime.

The role of mental health professionals in the assessment of claims of amnesia is pivotal. It is, however, true that the interface of law and medicine during the assessment of amnesia is also often blurred and conflated.

Rubinsky and Brandt note\(^{1053}\) that there are “glaring gaps between psychological knowledge about amnesia, especially of the psychogenic variety, and knowledge needed by courts in determining the effect of alleged memory disorders on legal responsibility.” There are also marked gaps between psychological knowledge about amnesia and judicial application of such knowledge and principles.\(^{1054}\) Most instances of psychogenic amnesia tend to be more the result of the crime and not the cause thereof.

Claims of amnesia in support of defences such as automatism or criminal incapacity should be assessed by courts with caution and scrutiny.

The distinct cooperation between law and medicine in respect of the assessment of amnesia is summarised by Rubinsky and Brandt as follows:\(^{1055}\)

> “Psychologists who testify as experts should expend greater energy in efforts to clearly and completely present relevant and timely scientific knowledge. Emphasis should be placed on elucidating both what is currently known and what is not currently known about amnesia. In return, legal professionals

\(^{1053}\) Rubinsky and Brandt (1986) *supra* note 963 at 43.

\(^{1054}\) *Ibid*.

\(^{1055}\) Rubinsky and Brandt (1986) *supra* note 963 at 43.
should attempt to understand and to apply correctly neuropsychological research findings to amnesia cases.”

With sufficient cooperation between law and behavioural sciences in claims of amnesia, there will be less interdisciplinary confusion.

17 Diminished criminal capacity

Diminished criminal capacity is currently not a partial defence in South Africa, but merely serves in support of mitigation of sentence.1056 The concept of diminished criminal capacity has already been addressed in chapter 1.

Section 78(7) of the Criminal Procedure Act provides for diminished criminal capacity in cases where pathological criminal incapacity is raised.1057 The question to be asked is whether the time has not arrived for legislative reform providing for statutory non-pathological diminished criminal incapacity as well? Despite the absence of statutory reference, various decisions have recognised diminished criminal capacity in cases of non-pathological criminal incapacity.1058

The most recent decision pertaining to non-pathological diminished criminal capacity, is the case of Director of Public Prosecutions v Venter.1059 The facts of the decision are as follows: The Director of Public Prosecutions appealed against sentence in terms of section 316B of the Criminal Procedure Act. The respondent was convicted in the court a quo on one count of attempted murder and two counts of murder. He was sentenced to eight years’ imprisonment for the attempted murder. On one count of murder he was sentenced to ten years’ imprisonment and on the other count to fifteen years’ imprisonment of which five years were suspended. The complainant in the attempted murder count was the

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1056 Burchell and Milton (2005) supra note 1 at 400 – 401. Burchell and Milton interestingly indicate that in England and Scotland diminished responsibility operates in dual nature of both a plea in mitigation as well as being a partial defence. See also Snyman (2008) supra note 1 at 176, Strauss (1991) supra note 1 at 133.

1057 See chapter 1 for a discussion of this section.

1058 See generally S v Campher supra note 1 at 964C-E; S v Di Blasi supra note 1; S v Ingram 1995 (1) SACR (1) (A) at 8d-i; S v Laubscher 1988 supra note 1 at 173F-G; S v Shapiro 1994 (1) SACR 112 (A) at 123c-f; S v Smith 1990 (1) SACR 130 (A) at 135b-e.

1059 Director of Public Prosecutions v Venter 2009 (1) SACR 165 (SCA).
respondent’s wife, Millie, and the deceased in the murder counts were Millize, the respondent’s five-year old daughter and Janco, his four-year old son. The incident took place on 26 April 2006 in the family home in Hoedspruit, Limpopo.

On the day of the incident, the respondent had attended a function with members of his unit at O’Hagans where he consumed three beers. He later accompanied his wife to another function where he drank another three beers. On their arrival at home that evening the respondent confronted his wife about his discomfort at her having danced with her boss, at the abovementioned function. An argument arose between them where the respondent’s wife told him that, should he be convicted on certain charges he was facing regarding the rape and murder of a fourteen-year old girl in Burundi, she would divorce him and take their children with her. The argument escalated to the point where the children became unsettled. She (the complainant) asked for the car keys telling him that she wanted to leave so that he could calm down, but he refused to give it to her. The complainant and the two children ran out the back entrance with the respondent following them into the street. Janco was at that stage holding on to the complainant, crying. The respondent then took Janco back to the house. The complainant and Millize followed. The respondent returned shortly thereafter, after smoking a cigarette, and said “My bolla, dankie vir alles wat julle vir my beteken het.” The next moment the complainant heard Janco scream and a shot went off. She and Millize ran into the house and saw the respondent carrying a R4 rifle. She tried to wrestle the rifle from him but he pulled the trigger, hitting her in the stomach. When Millize ran away he also shot her.

In mitigation of sentence the respondent testified as to his unhappy childhood. He was also arrested on charges of rape and murder involving a fourteen-year old girl in Burundi. As a result of the Burundi episode he had to attend sessions with a clinical psychologist. He also displayed suicidal tendencies. He testified that he was very emotional on the day of the incident and that seeing his wife dance with the colonel upset him tremendously. The respondent claimed that he could not

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1060 Paragraphs 10 – 12.
remember what had happened and accordingly remembered waking up in hospital and being informed by the policeman guarding him that his children had died.\textsuperscript{1061}

Mlambo JA held that temporary non-pathological diminished responsibility was recognised in law, and was especially relevant to sentence.\textsuperscript{1062} Properly understood, Mlambo JA held, this state of mind can be stated to be diminished capacity to appreciate the wrongfulness of one’s actions and/or to act in accordance with an appreciation of that wrongfulness.\textsuperscript{1063} It was further held\textsuperscript{1064} that in a number of cases, whilst the state of mind was rejected as a defence, it was found that it had an overwhelming effect on the conduct of the accused to such an extent that very lenient sentences were imposed. In this case the respondent had started consuming alcohol as early as 11 am on the day of the incident. It was also established that he was diagnosed during clinical psychological assessments as displaying suicidal tendencies before the incident, while a psychiatric report compiled afterwards stated that he was experiencing ongoing stress from the Burundi incident as well as domestic problems.\textsuperscript{1065}

Mlambo JA held\textsuperscript{1066} that it was quite possible that the respondent had become consumed by the threatened break up of his marriage and separation from his wife and children and losing some sense of objectivity. Mlambo JA further held that this should not be viewed in isolation as there was uncontested testimony from his wife that she had stood by him throughout his incarceration in Burundi and that she had constantly reassured him of her support up to the day of the incident. There was further undisputed evidence that he had sobered up by the time he had committed the offences and clearly the alcohol intake had played a minimal role, if any, in his conduct.\textsuperscript{1067}
The following statement by Mlambo JA encapsulates the tragedy of this set of facts:1068

“In casu we have a father who shot and killed his 4-5 year old son and daughter, respectively. He perpetrated these dastardly deeds within the confines of their home where they should be at their safest. The respondent abdicated his role as protector and provider to his wife and children and became a predator and turned their safe sanctuary into a killing field. It chills one’s blood when one learns how the tearful Janco had clung to his mother in the street before the respondent picked him up and returned to the house with him and that the little boy had followed the respondent into one of the bedrooms not knowing he was walking to his death. ... In my view the court a quo underplayed the seriousness of the offences viewed within the context of the respondent as a husband and father.”

Mlambo JA held1069 that society views the respondent’s conduct in a very serious light and that within the context of this case the injunction to protect children from violent crimes assumes a prominent role. Mlambo JA held that this called for a sentence cognisant of the respondent’s personal circumstances and also the seriousness of the offences and the need for deterrence.1070 The appeal was successful and the sentences on the charges of murder were replaced with a sentence of 18 years’ imprisonment.

Cloete JA, however, dissented and held that the respondent was acting with substantial diminished responsibility when he committed the offences. Cloete JA stated:1071

“If I had any doubt, I would propose that the sentences be set aside and the matter be remitted to the court a quo for expert evidence to be led on the issue, for to do otherwise could result in the imposition of a sentence not in accordance with justice.”

1068 Paragraph 29.
1069 Paragraph 30.
1070 Paragraph 31.
1071 Paragraph 45.
This statement could also act in favour of the general argument that expert evidence is crucial in these cases.

Cloete JA in addition held that it is pivotal to distinguish between temporary non-pathological criminal incapacity, which is a defence because it excludes culpability, and diminished responsibility, which is not a defence but is relevant for sentencing as it reduces culpability.

Cloete JA further remarked that the fact that the defence of temporary non-pathological criminal incapacity fails, or is not raised, does not necessarily entail that the accused must be sentenced if he/she was acting normally. A person who acted with diminished responsibility is guilty, but his/her conduct is morally less reprehensible due to the fact that the criminal act was performed when the accused was not fully in control and therefore acting with impaired judgment.

Cloete JA held in a dissenting judgment that the sentences imposed by the trial court were not shockingly inappropriate and that the appeal should be dismissed.

This decision serves the important role of reaffirming both the defence of non-pathological criminal incapacity as well as the principles relating to diminished non-pathological criminal capacity, despite the horrific nature of the facts.

In S v Di Blasi also increased the sentence of the accused on appeal as in the Venter-decision. The facts of this case were that the accused felt aggrieved and revengeful after his wife had instituted divorce proceedings against him in the United Kingdom. He felt aggrieved and insulted and decided to kill her. In a state of depression and anger he pursued her to South Africa from the United Kingdom. The accused watched and followed his wife and when the opportunity presented itself, he shot her in the street in front of her flat. He fired three shots, two of which killed her. After a failed suicide attempt he was arrested and brought to trial. The

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1072 Paragraph 47.
1073 Paragraph 51.
1074 S v Di Blasi 1996 (1) SACR 1(A)
court *a quo* sentenced the accused to four years’ imprisonment on the murder charge. The Attorney-General appealed against this sentence. It was common cause at his trial that he had had the necessary criminal capacity to be held responsible for the killing of the deceased, but it was argued in mitigation of sentence that he acted with diminished criminal capacity due to non-pathological causes. Two experts, Dr Venter and Dr Zabow, testified that he suffered from a temporary non-pathological emotional disintegration at the relevant time.\(^{1075}\)

Vivier JA accordingly indicated the essential steps to be followed in cases of non-pathological in criminal incapacity as well as diminished non-pathological criminal capacity. They are the following:

- **Diminished criminal capacity** is the diminished capacity to appreciate the wrongfulness of the particular act in question or to act in accordance with the appreciation of the wrongfulness.\(^ {1076}\)
- The accused is required to lay a factual foundation for his defence that non-pathological causes had diminished his criminal capacity.\(^ {1077}\)
- In making a finding about capacity the court must have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused’s actions during the relevant period.\(^ {1078}\)
- The court must subject the evidence of the accused person in support of a defence of non-pathological incapacity to careful scrutiny.\(^ {1079}\)

The court per Vivier JA held that the murder was premeditated, cold and calculated.\(^ {1080}\)

It was held that he did not act with diminished criminal capacity and his conduct was indicative of a clear moral blameworthiness and it was in the best interest of society to increase his sentence to fifteen years’ imprisonment.\(^ {1081}\)

\(^{1075}\) At 6 E – 7 A.
\(^{1076}\) At 7 B.
\(^{1077}\) At 7 C.
\(^{1078}\) At 7 C.
\(^{1079}\) At 7 F.
\(^{1080}\) At 8 D-E.
\(^{1081}\) At 11 D.
These two decisions illustrate that the circumstances of each case will dictate whether a court will make a finding of diminished non-pathological criminal capacity. These decisions discussed above need to be contrasted with decisions in which the courts have been willing to render a finding of diminished capacity.

In *S v Mnisi*, the appellant was convicted upon a plea of guilty on a count of murder and sentenced to eight years' imprisonment. The facts of the case were that the appellant shot and killed the deceased, Joshua Hlatswayo, on 11 August 2001.

Prior to the incident the appellant's wife and the deceased were involved in an adulterous relationship. The appellant resented this and found her actions to be extremely humiliating and degrading. His wife, after he confronted her about this adulterous relationship, promised that she would no longer see the deceased but she did not keep her promise. On the day of the incident the appellant found his wife and the deceased embracing each other in a car. The appellant immediately drew his firearm and shot the deceased. The appellant stated that when he found his wife in the embrace of the deceased all the hurt and pain he had suffered through the adulterous affair flooded his mind and provoked him to the extent that he momentarily lost control of his “inhibitions” and he shot the deceased.

The argument of the appellant was that the trial court had not given due consideration to the fact that the appellant acted with diminished criminal capacity as a result of provocation and emotional stress which preceded the shooting and accordingly that the shooting occurred when the appellant's powers of restraint and self-control were diminished.

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1083 Paragraph 2.
Boruchowitz AJA held\(^{1084}\) that the appellant did not rely on the defence of non-pathological criminal incapacity but rather upon diminished capacity which is not a defence but relevant to the question of sentence.

Boruchowitz AJA further held that whether an accused acted with diminished capacity must be determined in the light of all the evidence, expert or otherwise.\(^{1085}\) The accused is accordingly required to lay a factual foundation which gives rise to the reasonable possibility that the accused acted with diminished capacity. Such evidence should also be carefully scrutinised in the light of all the circumstances. Boruchowitz AJA indicated\(^{1086}\) that the statement by the appellant established a sufficient factual foundation that he acted with diminished capacity when he committed the offence. It was further held that the trial court placed undue emphasis on the element of deterrence as an object of punishment. The appeal was accordingly upheld and the sentence was replaced with a sentence of five years’ imprisonment.

Carstens correctly notes that it is regrettable that the accused in the Mnisi-decision decided to invoke a plea of guilty and not to rely on the defence of non-pathological criminal incapacity or non-pathological automatism, as it could have resulted in a reassessment of the much debated and controversial Eadie-decision.\(^{1087}\) Carstens in addition notes, and this view is supported, that expert evidence is not only pivotal in support of the defences of non-pathological criminal incapacity and sane automatism due to provocation, but should also be advanced in respect of of an accused relying on diminished criminal capacity due to provocation as such diminished criminal capacity is a question of degree which should also be assessed by experts.\(^{1088}\) Carstens submits hat when an accused pleads guilty to a charge of murder and relies on diminished criminal capacity, the court should consider noting a plea of not guilty and order the State to prove the charge against the accused beyond reasonable doubt. The latter procedure will inadvertently result in the prosecution and defence to adduce expert evidence in

\(^{1084}\) Paragraph 4.
\(^{1085}\) Paragraph 5.
\(^{1086}\) Paragraph 6.
\(^{1088}\) Ibid.
respect of the accused’s criminal capacity at the time of the commission of the offence and will empower the court to assess whether such criminal capacity was diminished as well as the degree of such impairment.\textsuperscript{1089}

Another decision where the court took diminished criminal capacity into account is \textit{S v Smith}.\textsuperscript{1090} In this case the appellant, a twenty-year old woman, shot the deceased with whom she had been romantically involved in an emotional relationship for almost a year. During the course of the relationship the deceased had left his wife on a number of occasions for the appellant telling her that he loved her but had on each occasion become reconciled with his wife. On the day of the incident the appellant was informed by the deceased’s wife that she and the deceased had become reconciled. The deceased’s conduct caused the appellant severe emotional stress. At her trial on a charge of murder the appellant pleaded that the shots had been fired when she was under extreme emotional stress and that she lacked criminal capacity. This defence, however, failed and the appellant was convicted of murder with extenuating circumstances. In an appeal against the conviction and sentence, the court per Kumleben JA held the following:\textsuperscript{1091}

“... it is nevertheless clear that her shooting of the deceased was the final result of a prolonged period of sustained and mounting mental strain, of which the deceased was the cause. Whether it was the result of anger, frustration or humiliation, or more than one of these emotions, is immaterial. What is plain is that they must have substantially reduced her power of restraint and self-control. This fact, though highly relevant to the question of sentence, cannot affect her criminal liability. The conviction of murder was, in my view, fully justified.”

Taking into account that the appellant was a first offender who had never, apart from the day of the incident, acted violently, the court held that there was no need for a sentence which would serve as a personal deterrent.\textsuperscript{1092} The sentence of six

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\textsuperscript{1089} \textit{Ibid.}
\textsuperscript{1090} \textit{S v Smith} 1990 (1) SACR 130 (A).
\textsuperscript{1091} At 135 F – G.
\textsuperscript{1092} At 136 B.
\end{flushright}
years was replaced with a sentence of three years’ imprisonment and the appeal was accordingly upheld in part.

The case law discussed above illustrates that the circumstances of each case will dictate whether a finding of diminished criminal capacity will be justified or not. The two recent decisions of the Supreme Court of Appeal in Mnisi and Venter illustrate that the defence of non-pathological criminal incapacity still firmly exists in our current criminal law. These two decisions further confirm the important alternative to a defence of non-pathological criminal incapacity – diminished non-pathological criminal capacity which, as was illustrated, was successful in numerous decisions in imposing a lesser sentence taking into account that the accused’s capacity to appreciate the wrongfulness of his or her actions and/or to act in accordance with such appreciation was significantly diminished at the time of the commission of the act in question. Diminished criminal capacity could also serve an important role in cases where abused women kill their abusive partners in non-confrontational situations as was illustrated in the discussion above pertaining to the Ferreira-decision. The Di Blasi-decision illustrated that the procedural aspects pertaining to reliance sought on diminished criminal capacity are substantially in accordance with the defence of non-pathological criminal

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1093 See also S v Larsen 1994 (2) SACR 149 (A) where the appellant shot her husband to whom she had been married for 20 years. The evidence revealed that the deceased assaulted and abused the appellant on various occasions. The appellant was sentenced to five years' imprisonment. On appeal the court per Nicholas AJA held that since the appellant had been sentenced, correctional supervision had become available as a sentencing option and that the appellant might not fall into the category of persons who ought to be removed from society by a sentence of imprisonment. The court accordingly ordered that the matter be remitted to the trial court for sentencing afresh after compliance with the provisions of section 276 A (1) (a) of the Criminal Procedure Act 51 of 1977. See also S v Shapiro 1994 (1) SACR 112 (A) where the Attorney-General of Witwatersrand in terms of section 316 B of the Criminal Procedure Act appealed against a sentence of seven years' imprisonment, of which four years were conditionally suspended. The respondent (accused) had shot the deceased who was a drug addict and a drug dealer in cold blood in the foyer. The trial court rejected the respondent's reliance on the defence of non-pathological criminal incapacity but accepted that the respondent suffered from a non-pathological reduced criminal responsibility. Dr Eriksson, a psychiatrist, stated the following in respect of the respondent: (at 120 I – J) "It is my opinion that at the time of the alleged incident the accused experienced a decreased ability to appreciate the moral, ethical, social and legal consequences of his act. His ability to appreciate the wrongfulness of his act was therefore, in my opinion, diminished." Nicholas AJA held that although the crime with which the respondent was charged is viewed with abhorrence, right-thinking members of the community would not condign punishment in a case where the accused had acted with substantially reduced criminal responsibility. It was accordingly held that the sentence was not inappropriately lenient and the appeal was dismissed. See also S v Ingram 1995 (1) SACR 1 (A) where Smalberger JA considered correctional supervision an appropriate sentence. See also generally S v Meyer 1981 (3) SA (A).
incapacity. The crucial aspect in the latter regard relates to the foundation that has to be established. It is submitted that such foundation will inadvertently have to be substantiated with a proper body of expert evidence. The Ferreira-decision illustrated the essential value of expert evidence in establishing substantial and compelling circumstances to deviate from mandatory sentences in cases of premeditated murder. The same applies to cases of diminished criminal capacity. Only with proper expert evidence will a court be able to evaluate allegations that an accused’s capacity to appreciate the wrongfulness of his or her actions or to act in accordance with such appreciation were substantially diminished to the extent that a lesser sentence is justified. The expert evidence of the accused or appellant in the case where the accused lodges an appeal against sentence, should also preferably be challenged by the State in order to ensure a just and fair trial.

18 Conclusion

In this chapter the author illustrated the role of expert evidence in cases where the defence of non-pathological criminal incapacity is raised as a defence. The merit and value of the defence of non-pathological criminal incapacity was also assessed. The author further evaluated controversies surrounding the presentation of Battered Woman Syndrome testimony also with specific reference to abused women who kill their abusive husbands or partners. The following conclusions can be drawn from the research presented in this chapter:

- The defence of non-pathological criminal incapacity in its current status is in need of reform.
- In order to create legal certainty, legislative reform is needed to firmly establish this defence in our criminal justice system.
- Due to the fact that the defence of non-pathological criminal incapacity is founded mainly on common law principles, development could be
constructed in terms of section 39(2) of the Constitution by means of the indirect application of the Bill of Rights.

- The probative value attached to and the application of expert evidence in cases of non-pathological criminal incapacity has not been consistent. The inherent inconsistency could be traced to the fact that expert evidence is not a prerequisite in order to rely on this defence.

- Expert evidence and referrals in terms of section 78(2) of the Criminal Procedure Act 51 of 1977 should be compulsory whenever criminal incapacity is relied on, regardless of the alleged cause of incapacity, provided a sufficient foundation is established for reliance on the defence of criminal incapacity.

- The onus of proof in cases of non-pathological criminal incapacity should fall on the accused.

- Recent Supreme Court of Appeal decisions confirm the existence of the defence of non-pathological criminal incapacity.

- The author illustrated the fundamental distinction between non-pathological criminal incapacity and sane automatism despite some evidentiary similarities between these two defences.

- The current common law rule entailing that expert evidence in cases of non-pathological criminal incapacity does not fulfil an indispensable function is inconsistent with the constitutional right of an accused in terms of section 35(3)(i) to adduce and challenge evidence. In this sense the common law should be developed in order to promote the spirit, purport and objects of the Bill of Rights as stated in section 39(2) of the Constitution. The procedure and rules relating to such development was discussed comprehensively in paragraph 3.3 supra.

- Upon a careful analysis of the role of expert evidence in case law pertaining to the defence of non-pathological criminal incapacity as well as analysis of the cases pertaining to abused women who killed their abusive partners, it could be argued that the defence of non-pathological criminal incapacity is founded more in the field of psychology than psychiatry.

- Due to the fact that the defence of criminal incapacity, whether non-pathological or pathological, lies inherently within the psyche of the accused,
the assessment of this defence cannot properly be conducted in the absence of expert evidence.

- Diminished non-pathological criminal capacity should be incorporated and provided for within the framework of section 78(7) of the Criminal Procedure Act.

In the following chapter the defence of pathological criminal incapacity and the role of expert evidence in support of such defence will be discussed.

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