

**NON-PATHOLOGICAL INCAPACITY – REASSESSING THE
DEFENCE OF PROVOCATION AND EMOTIONAL STRESS IN
SOUTH AFRICA**

By

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PREFACE

The work in this thesis was performed at the University of KwaZulu-Natal, from February 2011 to December 2015. The project was supervised by Prof. S.V. Hocter.

As the candidate's supervisor I, Prof. S.V. Hocter I agree/do not agree to the submission of this thesis.

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ABSTRACT

The relationship between provocation and the criminal law can be categorised as a necessary but troubled union. Historically, anger was considered as a ground mitigating punishment in Roman law with the law distinguishing between crimes that were committed on impulse and those that were committed with premeditation. This attitude continued into the Middle Ages; however, anger was considered as a complete defence in certain circumstances. The attitude of the Roman-Dutch writers was that anger could only be regarded as a factor mitigating punishment in cases where the anger was justified and was not a ground which excluded capacity.

Since 17th century English law, provocation has been recognised as having an impact on the criminal liability of the accused who killed while “passions were aroused”. Serious crimes such as murder, committed while in a state of anger brought on by serious provocation were considered less serious than those committed in “cold blood” or with premeditation. Historically, the basis for this leniency is rooted partly in the need for the concession to human frailty in cases where provocation leads to a loss of self-control. This basis for a defence of provocation continues in jurisdictions such as England and Canada.

However, despite this leniency, the general approach in jurisdictions such as England and Canada is that a provoked act cannot excuse the agent from criminal liability completely, but only partially, as fundamentally, individuals are expected to exercise control over their emotions and their actions. Achieving this balance between the recognition of human frailty and enforcing a standard of acceptable behaviour in society, is where the controversy in jurisdictions such as England and Canada emerges.

On this fundamental level, the provocation defence emerges as one of the most contentious defences in modern times and has remained that way for many years in jurisdictions such as South Africa, England and Canada. The dilemma in England and Canada centres around ensuring that there is room for a concession to human infirmity on the one hand, while simultaneously ensuring that unacceptable standards of behaviour are not condoned by the law. An important basic principle in most modern

legal systems is that acts of vengeance, which are argued to be the main motivation behind retaliation to provocation, should not only be discouraged but punished. It is due to these considerations of policy that the provocation defence in England and Canada exists only as a partial defence to murder.

This approach is in stark contrast to the approach in South African law, where the law during the past quarter of a century, has gone far enough to allow provocation and emotional stress to operate as a complete defence. This dynamic approach is based on the psychological or principle-based approach to criminal liability which is based on the legal principle that unless an individual possesses the capacity or the fair opportunity to regulate his behaviour in accordance with the requirements of the law, the consequences of his behaviour should therefore not apply.

The formulation of this innovative approach has been the source of debate which has focused on the purely subjective test for criminal capacity. The defence of non-pathological incapacity due to provocation and emotional stress has occupied an important role in South African criminal law as it accommodates those individuals who kill out of anger, emotional stress, fear, shock and emotional collapse provided that the accused did not possess criminal capacity at the time of the killing.

The principle-based approach to provocation and emotional stress, though logical and in line with interests of justice and fairness has been under scrutiny since its development with commentators arguing that the defence of non-pathological incapacity due to provocation and emotional stress is inherently problematic and should, primarily on grounds of policy, be limited to prevent the “hot-head” from being acquitted. This point has been argued by commentators in South Africa who believe that South African law should align itself with Anglo-American systems who take a more stringent stance in relation to provocation.

It is with these arguments in mind that the notorious leading case of Eadie is assessed. It was hoped that the case of Eadie would provide much-needed clarity and offer a solution to the problem of perceived facile acquittals. It is submitted that the Eadie judgment failed in both respects. The study assesses this judgment and the reasons for its deficiencies. At present, the defence of non-pathological incapacity due to

provocation and emotional stress is in a state of limbo as confusion and controversy dominate. The cause of this disarray has emanated from the notorious landmark judgment by the Supreme Court of Appeal in Eadie.

The Eadie judgment has brought about drastic and far-reaching repercussions to the criminal law to the extent that the defence of non-pathological incapacity due to provocation and emotional stress may have been abolished. The judgment itself has had varied interpretations with some academics welcoming its pronouncements, while others have been critical of certain aspects. This study considers the various interpretations and opinions put forth by academic commentators of the Eadie judgment in order to assess the precise significance of the exact import of the Eadie judgement and whether the changes made in this controversial case are warranted.

Furthermore, this study evaluates and critically assesses the basis and justification for the defence in South African criminal law. In achieving this aim, the landmark judgment of Eadie is assessed to determine the extent to which the judgment goes in revising the traditional approach of the courts to provocation and emotional stress.

In achieving the goal of this inquiry, which is to re-assess the defence of non-pathological incapacity due to provocation and emotional stress, the development of this defence was traced in South African law to determine if a coherent rationale exists underpinning the defence. The most important objective of this study is thus to assess whether the law governing the defence of non-pathological incapacity due to emotional stress and provocation in South Africa is in need of reform in light of the controversy and criticisms attacking the inherent nature of this defence.

Furthermore, a comparative analysis is conducted with the respective provisions governing the provocation defence in Canadian law as well as English law, which is one of the common-law parent systems of South African law. It is important to gain an understanding of the basis of the defences in each jurisdiction; therefore, the origins of the defence of provocation in each jurisdiction are traced.

The comparative analysis seeks to determine whether the approach to provocation in these jurisdictions is preferred to the principled approach in South African law and

whether South Africa should place a greater emphasis on policy considerations in its treatment of provocation. Should South African law follow England and Canada by limiting the defence to a partial one the critical analysis of the different approaches will aid in identifying the pitfalls inherent in adopting aspects of these alternative models. The most important objective of this study is thus to assess whether the law governing the defence of non-pathological incapacity due to emotional stress and provocation in South Africa is in need of reform.

In tracing the development of the law in South Africa, a historical survey of South African law and the development the defence of non-pathological incapacity due to provocation and emotional stress reveals somewhat of a turbulent past. Due to the differing influence of different parent systems of law, namely Roman and Roman-Dutch on the one hand and English law on the other, South African law took time to formulate its own unique approach to provocation. Emotions such as anger were historically never considered a complete defence to a killing in South African law.

From this standpoint, the law moved on from considering the effect of provocation on criminal intention which was objectively assessed. Ultimately, the law progressed to a stage where intention is assessed subjectively as the focus fell on the state of mind of the accused. These developments eventually led to the re-assessment of the approach to provocation.

The Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, popularly known as the Rumpff Commission Report was highly influential in popularising the notion of criminal capacity which was subjected to investigation by the Commission. The recommendations of the Commission gave rise to s 78(1) of the Criminal Procedure Act of 1977 which governs mental illness. However, the test formulated was extended to encompass non-pathological incapacity. The Rumpff Commission Report identified two essential components of criminal capacity that is cognitive and conative capacity. The concept of self-control was defined in the Rumpff Commission Report.

The popularization of this notion of criminal capacity eventually changed the landscape of how provocation and emotional stress is treated today. The emergence of the doctrine

“toerekeningsvatbaarheid” or criminal capacity marked the broadening of the defence which began towards the latter part of the twentieth century when it was accepted that factors such as intoxication, emotional stress and provocation could in circumstances impair criminal capacity. These factors are not the cause of a mental defect, thus the notion of non-pathological incapacity was developed. The courts recognised that criminal incapacity could result from non-pathological causes and the defence of non-pathological incapacity based on provocation and emotional stress emerged.

Notably, the Rumpff Commission identified a third category, that of affective functions, which govern an individual’s feelings and emotions. Provocation and emotional stress are categorised as affective functions, the Rumpff Commission cautioned against allowing affective functions excluding criminal liability in cases where volitional control and insight were present. Despite this warning South African law has allowed affective functions to impinge upon the inquiry into criminal capacity where cognitive or conative functions are affected.

The case of Laubscher set out the classic two-stage test for the defence of non-pathological incapacity, which is: (1) the ability to distinguish between the wrongfulness or otherwise of his conduct, (2) the capacity to act in accordance with such an appreciation. The Laubscher case provided a theoretical framework for the defence and stated that in terms of legal principle, non-pathological incapacity could lead to an acquittal; the defence of non-pathological incapacity gained an autonomous independent existence from the defence of pathological incapacity. The court emphasised that in order for an accused to be criminally accountable, the accused’s mental faculties must be such that he is legally to blame for his conduct. The law distinguishes between conduct which is uncontrolled and that which is uncontrollable; it is uncontrolled actions which attracts criminal liability as the conduct is blameworthy.

In the last two decades, the law’s treatment of provocation and emotional stress has undergone major development with the defence of non-pathological incapacity due to provocation and emotional stress becoming a legitimate, fully-fledged defence. However, a controversial aspect of the provocation defence in South African law is the fact that criminal capacity is completely subjectively assessed.

There have been certain contentious acquittals in cases such as Arnold, Moses and Nursingh which further fuelled debate on the acceptability of a defence based on provocation and emotional stress and highlighted the risk of facile acquittals. However, the acquittals in these cases unearthed problems relating to application of principle rather than the principle itself. In each case the presence of a series of goal-directed acts on the part of the accused indicated the presence of cognitive capacity, volitional control and insight on the part of both accused were present therefore indicating that capacity was not lacking. It is submitted that these cases were wrongly decided which consequently brought the defence of non-pathological incapacity due to provocation and emotional stress into disrepute. However, it is clear that the acquittals in these cases were a direct result of failure of the courts to properly apply the fundamentals of the defence to the facts.

A significant feature of Nursingh is that the prosecution did not lead expert testimony to rebut the expert evidence led by the defence. In Arnold, the State did not lead expert psychiatric evidence either in support of its case or challenge the opinions of the evidence led by the defence witness. This may have created an unbalanced view for the court.

In an attempt to bring clarity to this area of the law and to quell public outrage arising from the acquittals in Arnold, Nursingh and Moses, the court in Eadie effected fundamental changes in the form of a policy brake to the principles underpinning the defence of non-pathological incapacity, which, in a drastic turn of events, has led to uncertainty regarding whether the defence of non-pathological incapacity still exists.

There are two major difficulties arising from the Eadie judgment. First, there is undoubtedly the court's conflation of the defence of non-pathological incapacity with the defence of sane automatism; the ramifications of this conflation are tremendous and far-reaching. It is submitted, with respect, that the court in Eadie has demonstrated a failure to understand the distinct attributes and purpose of both defences of non-pathological incapacity and the defence of sane automatism. In terms of legal principle, there is a distinct difference between making a decision and having the ability to execute the decision. A person may be capable of voluntary conduct but may lack the

ability to set goals and may not have the ability to pursue these goals or to resist impulses to act contrary to what his insights tell him is right and wrong.

In addition, the subjective test for capacity is substituted by the objective standard in the form of the test for sane automatism. The result is that the test for voluntariness occurs twice, firstly to determine if the accused acted voluntarily, and secondly once cognitive capacity is determined, in lieu of the test for conative capacity. This new development results in unnecessary duplication and complication. This amounts to the integration of a totally different defence, sane automatism, into the defence of non-pathological incapacity. Hence the test for capacity is defeated and thus becomes redundant. The conflation of the two defences creates difficulties not only in application, but the presence of automatism also erodes the test for capacity; there is a clear misunderstanding since the lack of capacity does not necessarily mean voluntary conduct is not present.

The rejection of the difference between the test to determine voluntariness and the test for conative capacity will lead to the basic concepts of criminal liability losing their significance. Furthermore, the negation of the existence of the defence is detrimental to the criminal law system as it results in the partial elimination of the element of criminal capacity. It is submitted that the defence serves an important need in society and erosion of the defence is not in the interests of justice as it deprives individuals such as the battered woman of a defence; it is submitted that victims of abuse who kill their abusers stand a greater chance of succeeding when pleading non-pathological incapacity due to provocation and emotional stress.

The second major problem with the Eadie judgment relates to the introduction of an objective test into the inquiry for criminal capacity. There have been proposals by academics to bring South African criminal law in line with other jurisdictions in Anglo-America by incorporating an objective test into the defence, mainly to prevent abuse of the defence. However, it is submitted that this study has revealed that the incorporation of an objective test is not only unnecessary, but will be detrimental to the proper functioning of the defence, as there are clear problems concerning the application of an objective standard in the form of a reasonable or ordinary person.

This conclusion can be deduced after analysing the results of the comparative analysis. Jurisdictions such as Canada and England have a strong bias for the use of an objective test which is considered to be an essential safeguard within the defence. The model of the reasonable man or ordinary person is favoured to determine if the reasonable man would have lost control in the same way as the accused.

There is difficulty in deciding what attributes to assign to the fictional reasonable/ordinary person. This has led to inconsistent judgments and confusion in both England and Canada. The objective test is arguably one of the most problematic aspects of the provocation defence in England and Canada. There is a common problem of interpretation and application of the objective test.

The difficulties associated with the objective test was one of the main problems identified with the now abolished provocation defence in terms of section 3 of the Homicide Act of 1957. Clearly, England and Canada have struggled with creating a balance in respect of the problem of accommodating human weakness while simultaneously ensuring that a person's right not to be killed by enraged individuals is protected. This delicate balance has seemed elusive and almost impossible to achieve. This indicates that fundamentally, that the rationale for the objective test is flawed and application of this rigid standard is practically unworkable since the courts are unable to effectively apply a stringent objective standard; a just and fair result cannot be obtained especially considering the nature and differing effects of provocation on different individual.

This strongly indicates that the use of an objective test in trying to uncover what was going on in the mind of a human being is fundamentally illogical and application of this standard will be difficult to interpret and to apply to the facts, besides being extremely unfair and unjust. The use of "reasonable man" or the "ordinary man" to determine acceptable behaviour has been justifiably described as "oxymoronic".

In light of the introduction of an objective test in Eadie, it is submitted that the use of an objective test within the defence of provocation constitutes an unjust imposition of dominant cultural values. This criticism is key especially in light of the history and

racial and socio-economic diversity in South Africa, furthermore, social and economic backgrounds may differ immensely from person to person and it is unfair and unjust to apply a uniform standard which cannot take cognisance such differences.

Furthermore, it is correctly argued that an objective test subverts the principle upon which the concept of justification on which the criminal law is based, that individuals are autonomous moral agents who possess the right to freedom of action, therefore it is in light of this principle they are held responsible for their actions. Therefore, in terms of this argument the introduction of an objective test for conative capacity can be subjected to constitutional challenge for unjustifiably infringing on the right to dignity, granted by section 14 of the 1996 Constitution, furthermore, the right to freedom and security of the person in terms of section 12(1) (a) of the 1996 Constitution.

The comparative analysis has revealed that there are other problems with the provocation defence in England and Canada. The restrictive nature of the defence in both jurisdictions have led to problems of gender discrimination by not encompassing persons such as the battered woman. The requirement of loss of self-control is a large part of the problem in both England and Canada since it is predicated on the angered states and is dependent on the “eruptive” moment. This leaves little room for other causes of loss of self-control such as fear, thereby automatically excluding cases involving cumulative provocation from the ambit.

A coherent rationale for the defence in England and Canada does not exist and there is debate regarding whether the defence is a justification or an excuse. This is the cause of the problem as in terms of policy, the actions of an accused can neither be partially justified or partially excused, since a degree of blameworthiness exists.

Though the current defence in England has undergone reformation and now accommodates loss of self-control emanating from fear, the new provisions may still prove problematic, as fear and loss of self-control in English law may be incompatible as killing arising out of fear usually lacks the traditional eruptive moment. The notion of self-control in the respective defences is flawed and is the primary cause of gender discrimination against abused persons such as the battered woman in England and Canada.

It is argued that the defence of non-pathological incapacity due to provocation and emotional stress in South Africa has avoided these problems for several reasons. Firstly, there is a solid theoretical framework underpinning the notion of loss of self-control which derives much of its content from the Rumpff Commission Report, and the case of Laubcher which provides guidance on the application of the test for capacity.

The recognition of affective functions causing lack of criminal capacity in South African law has brought persons such as the battered women within the scope of the defence and has avoided the problems relating to gender discrimination, therefore it is submitted that this was a positive and forward-thinking development in South African law.

Therefore, it is submitted that the Eadie judgment is problematic on several levels and has brought tremendous confusion and uncertainty to the defence of non-pathological incapacity due to provocation and emotional stress. Judicial intervention is necessary in order to bring clarity and restore the defence of non-pathological incapacity due to provocation and emotional stress in terms of the two stage test delineated by Laubscher by over-ruling Eadie. It is submitted that the fears of easy acquittals are unfounded, proper application of the established principles governing the defence are adequate safeguards for preventing facile acquittals. However, there is one short-coming of the defence, this relates to the uncertain role of expert evidence.

It is submitted that analysis of South African case law reveals that there is lack of clarity regarding the role of expert evidence in cases involving non-pathological incapacity due to provocation and emotional stress. There is uncertainty surrounding the necessity of the expert testimony, though it has been stated that the success of the defence is unlikely if expert testimony is not led in support of the defence. Due to the nature of this defence, which may involve killings arising from trauma, especially when abused persons are involved such as the battered women, the law should be reviewed with the view of making referrals for psychiatric evaluation and counselling mandatory. Providing a structure regulating expert evidence will assist in ensuring that case law is consistent.

Furthermore, from the assessment of case law it is clear that an imbalance of expert evidence on the part of the prosecution may deprive the court of a balanced view and result in inconsistent case law. Thus, it is proposed that expert testimony should be mandatory. This, according to Burchell, will ensure that the court obtains a balanced, well-informed view, which will work to prevent facile acquittals and ensure consistent outcomes of cases. The defence of non-pathological incapacity is lacking in this respect; consultation and review of this area is required with the view to formulating a structure that could form part of the provisions of the Criminal Procedure Act of 1977.

Furthermore, it has correctly been argued by Burchell that expert evidence should be led after evidence relating to the accused's version of events has been heard. Expert witnesses would thus have an opportunity to re-evaluate their evidence after hearing the facts of the case as well as hearing the accused's version being tested at cross-examination. This is important since the psychiatric evidence is largely based on the cogency of the accused's version of events.

It is submitted that these proposals will ensure that established principles which were eroded by Eadie are restored while addressing a clear void in respect of the lack of clarity and framework delineating the role of expert testimony.

The defences in both England and Canada are based on the misguided need to accommodate human frailty and predicated on the problematic concept of loss of self-control which favours angered states, there this concept lacks effective content. This is the reason that determining the rationale for the partial defence in both jurisdictions has proved tricky. The defence in both England and Canada falter in this respect.

It is submitted that it is unwise to adopt the foreign models of the provocation defence such as the English and Canadian model. The defence of non-pathological incapacity is a simple formulation which lacks the unnecessary complexities and unfair rigidity of both the English and Canadian codified provisions. A coherent rationale exists which provides for a solid basis for providing an acquittal based on blameworthiness.

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CHAPTER 1: INTRODUCTION

Provocation and emotional stress are powerful emotions. In South Africa the criminal law recognises that these emotions may impact criminal liability by resulting in the temporary loss of criminal capacity. This is the nature of the defence of non-pathological incapacity due to provocation and emotional stress. This defence is arguably one of the most debated defences in South African criminal law; since the very notion of permitting provocation to function as a defence excluding criminal liability is on a basic level controversial. The controversy surrounding a defence based on provocation stems from the principle that an individual cannot use the loss of temper to justify or excuse the killing of another human being.¹

This attitude towards provocation and emotional stress in South African law is considered to be a revolutionary one as it offers the accused a complete acquittal if sufficient and compelling evidence is adduced on behalf of the accused which creates a reasonable doubt regarding the presence of criminal capacity.² In terms of this defence, provocation or severe emotional stress has been recognised to deplete an individual's power of self-control thereby causing a disintegration of criminal capacity.³ The result of loss of criminal capacity is that an individual loses the ability to appreciate the wrongfulness of his or her conduct or to act in accordance with such appreciation.⁴

¹ S.V. Hoorer "A Peregrination through the law of Provocation" in Joubert (ed) Essays in honour of CR Snyman (2008) at 110; Kemp et al Criminal Law in South African Criminal Justice (2012) at 169; C.R. Snyman Criminal law 6th ed (2014) at 159 notes that the term of "non-pathological incapacity" has been given by the courts to describe circumstances where mental illness or immature age is not pleaded. This term was first formulated in S v Laubscher 1988 (1) SA 163 (A) in order to differentiate the defence from mental illness as contained in section 78(1) of the Criminal Procedure Act, see discussion in Chapter 2 at 46.

² J.M. Burchell Principles of Criminal law 4th ed (2013) at 324.

³ P.A. Carstens and J Le Roux "The defence of non-pathological incapacity with reference to the battered wife who kills her husband" (2000) South African Journal of Criminal Justice 180 at 182.

⁴ P.A. Carstens and J. Le Roux supra (n 3) at 182; C.R. Snyman Criminal law 4th ed (2002) at 237-239 states that the effect of provocation in the current law is: firstly, it may exclude capacity, secondly, it may exclude intention, thirdly, it may confirm the presence of intention and finally, provocation may act as a ground mitigating punishment. The fact that an accused was insulted does not mean that the

Louw states that the terms emotional stress and provocation are used synonymously; however, “emotional stress” indicates a build-up of stress over a period of time as opposed to “provocation” which suggests a once-off incident that sparks the agent into action. Furthermore, Hoctor notes that the factors relating to provocation are usually inextricably tied to provocation, it is on the basis of this view that the following study proceeds.⁵

This defence is not restricted to incapacity arising out of provocation, it encompasses situations where an agent has been provoked to commit an action by emotions such as jealousy, mercy,⁶ anger⁷ or fear;⁸ however, the critical element is that in order to escape criminal liability, the provoked person must have suffered a total collapse of criminal capacity.⁹

This is a novel approach which was developed in the last three decades of the 20th century by the South African courts who acknowledged that evidence of provocation had an impact on criminal capacity as well as being relevant to proving the existence of intention.¹⁰

However, Snyman states that a scenario where provocation actually causes loss of criminal capacity is rare.¹¹ Courts are aware of the dangers of this defence and will

provocation automatically comes to his aid, the insult must have had the effect of excluding the criminal capacity of the accused.

⁵ R. Louw “S v Eadie: The end of the road for the defence of provocation?” (2004) 16 South African Journal of Criminal Justice 200 at 200-201, Hoctor supra (n 1) at 111.

⁶ See S v Hartmann 1975 (3) SA 532 (C), in this case the accused, killed his father who was suffering from terminal cancer.

⁷ In S v Mokonto 1971 (2) SA 319 (A), Holmes JA stated at 324F-G that “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 an accused’s conduct”, see discussion in Chapter 2 at 29.

⁸ See S v Campher 1987 (1) SA 940 (A) discussed in Chapter 2 at 44 and S v Wiid 1990 (1) SA 561 (A) discussed in Chapter 2 at 48.

⁹ Burchell supra (n 2) at 324, Snyman supra (n 1) at 160.

¹⁰ Burchell supra (n 2) at 54.

¹¹ Snyman supra (n 1) at 165.

approach the defence with great caution.¹² The meaning of provocation has not been precisely defined in South African law; however, Bergenthuin states that provocation contains two elements:¹³

1. The provocative and confrontational behaviour of the provoker, which is assessed objectively; and
2. The actual state of mind of the provoked which is assessed subjectively.

The general approach in many legal systems is that that a provoked act cannot totally excuse the agent from criminal liability as, fundamentally, individuals are expected to exercise control over their emotions and their actions.¹⁴ Furthermore, it has been recognised that in most cases, retaliation to the provocative conduct is a vengeful act.¹⁵ Thus, on a basic level, modern criminal justice systems do not justify these perceived acts of vengeance. Individuals must rely on the justice systems for recourse rather than resorting to personal retribution.

Allowing provocation as a defence poses many legal as well as moral dilemmas; these controversies are the reason for the defence being extensively argued between academics for many years in South Africa and in jurisdictions such as England and Canada.

In South Africa, the courts have also struggled in deciding what role, if any, provocation should occupy in criminal law. Another difficulty seems to be the application of these principles; controversial cases are evidence of these difficulties.¹⁶ Arguably much of the confusion and controversies relates to the subjective nature of the capacity inquiry.¹⁷

¹² Snyman *supra* (n 1), see S v Kensley 1995 (1) SACR 646 (A), see discussion in Chapter 2 at 50.

¹³ G.P. Stevens “The role of expert evidence in support of the defence of criminal incapacity” (2011) LLD, University of Pretoria at 241 citing J.C. Bergenthuin “Provokasie as Verweer In die Suid-Afrikaanse Strafreë”, Unpublished LLD University of Pretoria, (1985) at 20-21.

¹⁴ Snyman *supra* (n 1) at 235 fn 345.

¹⁵ J.M. Burchell and J. Milton Principles of Criminal Law 2nd ed (revised reprint 2000) at 278.

¹⁶ S v Nursingh 1995 (2) SACR 331 (D), S v Arnold 1985 (3) SA 256 (C) and S v Moses 1996 (1) SACR 701(C), see discussion in Chapter 2 at 52 and in Chapter 5 at 213.

¹⁷ J.M. Burchell “Criminal justice at crossroads” (2002) 119 South African Law Journal 579 at 591.

These problems have been exacerbated by the leading case of Eadie which has plunged the defence into a state of uncertainty.¹⁸

The differing views regarding this defence have led to much confusion in respect of its application and therefore this study will reassess this defence in the South African context by investigating the large body of legal literature available on this subject both locally and internationally. A comparative analysis of other jurisdictions; namely England and Canada, will provide insight as to how the defence operates in other countries.

However, before delving into the substantive laws of each of the compared jurisdictions, it is important to gain an understanding of the theoretical basis of the defence in each jurisdiction. Thus, it is necessary to trace the origins of the defence of provocation in each jurisdiction, and to assess the rationale behind the developments in each legal system.

This study will trace the development of the provocation defence in England, from the common law to its current form in terms of the Coroners and Justice Act 2009. Analysis of the evolution of the provocation defence in English law will aid in gaining a deeper understanding of reasons behind certain developments relating to the defence. This is especially pertinent to this study since English law is one of the parent systems of both South African law as well as Canadian law.

The provocation defence has developed over many centuries, its origins regarded as ancient; the defence in English law underwent a number of different changes over time.¹⁹ The provocation defence earned a place in English law primarily due to the law's recognition of human frailty and the role that "passion" plays in disrupting the ability to reason in the provoked killer.²⁰

¹⁸ S v Eadie 2002 (1) SACR 663 (SCA); S v Eadie (1) 2001 SACR 172 (C), see discussion in chapter 2 at 57 and critical analysis in chapter 5 at 225.

¹⁹ A.Reed "R v Baillie: Provocation as a concession to human frailty" (1997) 61 Journal of Criminal Law at 439, see discussion in Chapter 3 at 74 of the provocation defence in English law.

²⁰ A. Clough "Loss of self-control as a defence: the key to replacing provocation" (2010) 74 The Journal of Criminal Law at 118.

In Canada, the provocation defence is codified under section 232 of the Canadian Criminal Code.²¹ The defence embodied in section 232 recognises the relationship between emotion and capacity for self-control.²² The defence of provocation may only be considered after the jury has ruled that the accused has committed second degree murder.²³ The element of intention is an essential part of the defence.²⁴ The defence of provocation is only available for a charge of murder and can only be used when all the elements of murder are established.²⁵

The provocation defence in Canada is not without controversy, mainly due to the origins of the defence being rooted in mitigating violent reactions to marital infidelities.²⁶ It has been trenchantly argued that the provocation defence contains archaic phrases designed to excuse acts performed in the heat of passion and therefore should be abolished for allowing deadly rage and violent responses to be treated with leniency.²⁷ The provocation defence has been criticised for its perceived out-dated approach, especially where spousal homicides are concerned.²⁸

²¹ *Criminal Code* R.S.C. 1985 c.C-46 (The Code), see discussion in Chapter 4 at 164 of the provocation defence in Canadian law.

²² A. Reilly “The Heart of the Matter: emotion in criminal defences” (1997-1998) 29 Ottawa Law Review at 131.

²³ S.Anand “A provocative perspective on the influence of anger on the *mens rea* for murder: The Alberta Court of Appeal’s Interpretation of *Parent in Walle*” (2008) Criminal Law Quarterly at 29.

²⁴ Anand *supra* (n 23) at 34.

²⁵ M.E. Hyland., “R v Thibert: Are there any ordinary people left?” (1997) Vol: 28:1 Ottawa Law Review at 146.

²⁶ K.Roach Criminal Law 2nd ed (2000) at 248.

²⁷ *Ibid.*

²⁸ N.W Renke “Calm like a Bomb: An assessment of the partial defence of provocation” (2010) 47:3 Alberta Law Review at 730.

1.1. Objectives of the study

The following research questions are considered in this study:

In assessing the defence of non-pathological incapacity due to emotional stress and provocation in South African law, this study will evaluate and critically assess the basis and justification for the defence in South African criminal law.

In achieving this aim, the landmark judgment of Eadie²⁹ will be assessed to determine the extent the judgment goes in revising the approach of the courts to provocation and emotional stress as a complete defence to criminal liability. This investigation will seek to determine if the test for non-pathological capacity should be entirely subjective or whether an objective evaluation should be included to determine if a loss of self-control has been suffered in cases where provocation or emotional stress have been raised as a defence.

The comparative study with England and Canada is critical to this investigation, the objectives of the comparative analysis will determine if alternate models of the provocation defence are worth incorporating into South African law. The underlying rationales for the provocation defence in England and Canada is different to that of the defence in South African law; hence, this study seeks to assess how well provisions governing the defence work to serve the purposes intended.

The basis of the provocation defence is commonly challenged. This study aims to assess the importance and the desirability of the provocation defence in South African law, especially in light of the fact that, unlike the comparative jurisdictions, successfully pleading the provocation defence in South Africa may lead to a total acquittal. This study aims to assess this controversial aspect to determine if it is in the interests of justice to allow a complete defence or whether South African law should follow other jurisdictions by limiting the defence to a partial one.

The most important objective of this study is thus to assess if the law governing the defence of non-pathological incapacity due to emotional stress and provocation in South Africa is in need of reform.

²⁹ S v Eadie supra (n 18).

Before proceeding with the comparative analysis, it is important to examine the justification for using the specified systems in this investigation. Furthermore, it is useful to identify the legal structures in the compared legal systems.

1.2. Justification of choice of comparative systems

South African law consists of a hybrid system of law with roots in English and Roman-Dutch law.³⁰ English law has been largely influential on South African criminal law, especially in the formative years of development of the definition and detail of the criminal law.³¹ English law has influenced and continues to influence South African criminal law and therefore should not be ignored.³² It therefore makes sense to trace the development of both English law and Canadian law in respect of the provocation defence to assess how these jurisdictions treat provocation as a defence in criminal law. In this study a comparative analysis will be conducted with English law and Canadian law. English law is one of the parent systems of South African law and Canadian law and is therefore similar in many respects; however, there are also major differences.

English law infiltrated the existing Roman-Dutch criminal law during the 19th century; Snyman notes that this change was inevitable and welcome, as the common law at the time was deficient in certain respects.³³ There were problems with the Roman- Dutch system such as contradictions in expositions of the law by the various Roman- Dutch writers, and descriptions of certain crimes were vague with little focus on the various elements of a crime. Furthermore, these problems were exacerbated by the language barrier as few legal practitioners were able to read and write Latin correctly.³⁴

The adoption of English law into South Africa was facilitated by the adoption of the Transkeian Penal Code of 1886, also known as the “Native Territories’ Penal Code” which contained a criminal code for the Transkei and adjacent areas.³⁵ The Code

³⁰ Burchell supra (n 2) at 8.

³¹ Burchell supra (n 2) at 8.

³² Snyman supra (n 1) at 8.

³³ Snyman supra (n 1) at 8.

³⁴ Snyman supra (n 1) at 8.

³⁵ Koyana :The influence of the Transkeian Penal on South African Criminal Law (1992) states that the code was passed by Parliament of the Cape of Good Hope in 1886 and formed part of the Cape

exerted a tremendous amount of influence on the South African criminal law more especially in 1910 after the formation of the union. The Code facilitated the integration of English law into South African law.³⁶ Koyana states that the Code was to some extent “a careful blend of western and customary law principles.”³⁷

Snyman notes that the provisions of this code were almost an exact copy of a criminal code written by Sir James Stephen who introduced a bill in the British parliament, although this bill was never adopted into English law.³⁸ The influence of English law is quite discernible in the labelling and subdivision of specific offences along with the requirements for crimes.³⁹

Canada is one of the jurisdictions which have also inherited common law principles from England.⁴⁰ Therefore, it would be interesting to investigate how jurisdictions who built legal systems on a similar foundation currently treat provocation and to analyse what impact it should have on criminal liability.

Provocation in English law and Canadian law is regarded as a partial defence resulting in a charge of murder being reduced to manslaughter; unlike South African law where a person can be totally acquitted if provocation negates criminal capacity.

Provocation in English law is dealt with differently in comparison to South African law.

colonial authorities governing the Xhosa-speaking population who resided between the Great Kei and Mtamvuna Rivers. However, soon enough the Code became the authority that governed all individuals residing in the Transkeian Territories despite the race or ethnicity of the individual, see discussion in Chapter 2 at 21 and 30.

³⁶ Koyana supra (n 34) at v.

³⁷ Koyana supra (n 34) at v.

³⁸ Snyman supra (n 1) at 8.

³⁹ Snyman supra (n 1) at 8.

⁴⁰ E.Colvin and S.Anand Principles of Criminal law 3rd ed (2007) at 2-3 states that in 1867, during the time of the Confederation, the criminal law governing the British North American colonies were acquired from England and Wales by the respective colonies. The criminal law principles consisted of statutes and common law along with respective amendments. In terms of the principles of colonial law, the mode of acquiring the English law hinged on whether the colony was conquered or considered a settlement. In conquered colonies English law was not automatically accepted. During the 19th century, the decisions by English courts were still authoritative outside England. The vast majority of criminal law developed till the 18th and 19th century was built on judicial precedent.

However, certain issues and problems with the defence are common in all three jurisdictions, for example, the test to determine loss of self-control is as perplexing in Canadian law and English law as it is in South African law. Canadian law and English law are examples of jurisdictions which have codified the defence. Investigation of the pitfalls and advantages of codification will be conducted to determine if South Africa should follow a similar model.

There is a large body of literature and case law available in Canadian law and English law to conduct a comparative analysis. Investigating the application and scope of the defence in both Canada and England will be pivotal to this study. It is also relevant to study the effects of the defence of provocation on society and what limits should be imposed to ensure that the defence is not abused. Furthermore, the tests to determine provocation in both these jurisdictions have both an objective and subjective nature; this is useful and will aid in determining how South African courts should formulate a test that will ensure a correct application of the defence.

1.3. Legal Structures in the Compared Systems

1.3.1. South African Law

The courts within the Republic of South Africa are vested with judicial authority of the Republic derived from section 165 of the Constitution of the Republic of South Africa, 1996.⁴¹ In South Africa, the court structure can be divided into two categories; the superior courts, which consist of the Constitutional Court, the Supreme Court of Appeal and the High Courts, the lower courts encompass the Regional courts, Magistrate's courts and Small Claims courts.⁴²

The Constitutional Court⁴³ is the highest court in South Africa. Decisions made by this court cannot be overturned or challenged by any other court. It was established in 1994 as a result of the Interim Constitution of 1993, with the first sitting in February 1995. The establishment of the Constitutional Court brought an end to the legal doctrine of

⁴¹ Department of Justice and Constitutional Development of South Africa website <http://www.justice.gov.za/about/sa-courts.html> (accessed on 2015/06/24).

⁴² Ibid.

⁴³ The Constitutional Court is located on Constitutional Hill in the city of Johannesburg, South Africa. See www.constitutionalcourt.org.za (accessed on 2015/06/24).

parliamentary sovereignty in terms of which the Acts of Parliament could not be challenged and courts were responsible for enforcing these laws.⁴⁴

The Constitutional Court consists of eleven judges who are considered guardians of the human rights of all individuals in South Africa and who preside over matters relating to the interpretation of the Constitution, prescribing scope of application and possesses the authority to determine laws that are unconstitutional and therefore invalid.

In terms of legislation, Chapter 2 of the Constitution, 1996, which contains the Bill of Rights, towers above all other legislation in terms of importance, in that, if any law is considered to be contrary to the provisions of the Constitution, such provision can be declared null and void.⁴⁵

The Supreme Court of Appeal⁴⁶ possesses appellate jurisdiction and presides over matters emanating from the High Courts. Apart from the Constitutional Court, no other court may change the decision of the Supreme Court of Appeal. The decisions by the Supreme Court of Appeal are binding on all other courts in South Africa; this is in terms of judicial precedent.

The High Courts, which were formerly known as the ‘Supreme Courts’, possess general jurisdiction to preside over cases which are within the geographical area in which they are situated. Decisions of the High Court are binding over the decisions of the lower Magistrate’s Court within their geographical jurisdiction. The High Courts may also hear appeals or reviews originating from the Magistrate’s courts. The Magistrate’s courts are lower courts and consist of regional courts and district courts. Unlike the District Magistrate’s courts, the Regional Magistrates courts preside over criminal matters only; these matters are usually of a more serious nature. A Regional

⁴⁴ Snyman supra (n 1) at 9.

⁴⁵ Ibid.

⁴⁶ The Supreme Court of Appeal sits in Bloemfontein, where the Chief Justice presides over matters along with a certain number of Judges of appeal, see website www.supremecourtofappeal.gov.za/index.htm (accessed on 2015/06/24).

Magistrate's court may hand down a sentence of life imprisonment for serious offences such as rape and murder in terms of the Criminal Law Amendment Act 105 of 1997.

The District courts preside over the less serious cases, and may not try cases involving murder, rape or treason. District Magistrates courts may not impose a sentence of imprisonment exceeding three years or issue a fine exceeding R120 000.

1.3.1.1. Sources of South African law

There are three main sources of South African criminal law; the first is legislation, which occupies the first place since legislation receives priority over the provisions at common law. South African criminal law is not codified so the second source is the common law; common law refers to provisions which are not contained in any legislation promulgated by parliament; however, the common law is still a binding authority. The common law has its roots in Roman law which emerged approximately 2500 years ago in Rome.⁴⁷

The third main source comprises of case law; the courts provide a vital role in developing the criminal law through the common law. South Africa follows the principle of judicial precedent as it is in England. In terms of the principle of judicial precedent, a lower court is bound by the decisions of a higher court; Snyman states that the common law and case law may overlap since the common law derives its content mainly from reported case law.⁴⁸

South African criminal law has to a large extent also been influenced by English law, German criminal law and the Bill of Rights of the Constitution of the Republic of South Africa. The operation of the Constitution had a far-reaching influence on the entire country, the Parliament of South Africa was no longer sovereign and all law must be consistent with the Bill of Rights. Snyman states that the Constitution created a "new human rights culture" where the substantive criminal law amongst other laws are

⁴⁷ Snyman supra (n 1) at 6.

⁴⁸ Snyman supra (n 1) at 5-6, in terms of the case law, the courts provide a vital role in developing the criminal law in through the common law. South African follows the principle of judicial precedent as it is in England. In terms of the principle of judicial precedent, a lower court is bound by the decisions of a higher court; Snyman states that the common law and case law may overlap since the common law derives its content mainly from reported case law.

influenced by the rights contained in the Bill of Rights of the Constitution of South African, 1996.⁴⁹

1.3.2. English Law

The Supreme Court replaced the House of Lords as the highest court in the United Kingdom in 2009.⁵⁰ The Supreme Court may hear appeals from the Court of Appeal and the High Court (in limited circumstances). Beneath the Supreme Court is the Court of Appeal which has appellate jurisdiction.⁵¹

The Appeal Court is divided into two divisions, that is, the Civil and Criminal Divisions. The Criminal Division has the jurisdiction to hear appeals from the Crown Court against conviction and sentence. Cases which are referred by the Home Secretary and questions on points of law posed by the Attorney General may also be heard. The Court of Appeal has the power to order a retrial as well as to adjust sentences handed down by lower courts. The Court of Appeal is followed by the High Court of Justice and the Crown Court which possess appellate jurisdiction and original jurisdiction.⁵²

The High Court consists of three divisions, the Chancery Division, the Family Division, and the Queen's Bench Division. The High Courts are courts of first instance in certain instances and may hear appeals.⁵³

The Crown Court, which has the jurisdiction to hear all indictable offences, hears appeals from the lower Magistrate Courts. These include sentencing and appeals along with the hearing of serious criminal offences such as murder, rape, robbery and cases

⁴⁹ Snyman supra (n 1) at 9.

⁵⁰ <https://www.judiciary.gov.uk/> (accessed on 2015/06/24).

⁵¹ <http://www.justispublishing.com/current/editorial-policies/terms/uk-court-structure/> (accessed on 2015/06/24).

⁵² <http://www.justispublishing.com/current/editorial-policies/terms/uk-court-structure/> (accessed on 2015/06/24).

⁵³ <http://www.justispublishing.com/current/editorial-policies/terms/uk-court-structure/> (accessed on 2015/06/24).

sent for sentencing and appeals. Rulings by the Crown Court may be appealed to the Criminal Division of the Court of Appeal.⁵⁴

The lower courts are the Magistrates' courts; the Magistrates' court is in most cases a court of first instance depending on the seriousness of the offence. The Magistrates' court handles summary criminal cases and committals to the Crown Court. Criminal decisions of the Magistrates' Courts may be appealed to the Crown Court.⁵⁵ There are two possible paths of appeal from the magistrates court, the common route is to the Crown Court. Alternatively, an appeal can be made to the Divisional Court of the Queen's Bench Division of the High Court.⁵⁶

1.3.2.1. Sources of English Law

The main source of English criminal law is the common law.⁵⁷ Many important and grave offences such as murder and manslaughter were derived from the common law rather than statute, besides offences, many of the English law defences is also founded by common law principles, these include the defences of insanity, intoxication and automatism.⁵⁸ Ashworth notes that doctrines that determine criminal liability such as intention and recklessness which are foundational to criminal law are still governed by the common law; this point illustrates that judges retain a significant role in the development of the criminal law.⁵⁹

The other prominent source of English law is contained in statute, in the form of thousands of different statutory offences.⁶⁰ Ormerod notes that another source of English

⁵⁴ M. Jefferson Criminal law 9th ed (2009) at 18. Appeal against conviction is based on the ground that the conviction was "unsafe". The grounds of appeal can be on a point of law, or on a point of fact or both. Appeal against sentence may also be instituted.

⁵⁵ <http://www.justispublishing.com/current/editorial-policies/terms/uk-court-structure/> (accessed on 2015/06/24).

⁵⁶ Jefferson supra (n 54) at 18.

⁵⁷ A. Ashworth Principles of Criminal Law 6th ed (2009) at 8. These writers include Coke and Hale during the seventeenth century, and during the eighteenth century writers such as Hawkins, Foster and Blackstone influenced the common law.

⁵⁸ D.Ormerod Smith and Hogan's Criminal Law 13th ed (2011) at 16-17.

⁵⁹ Ashworth supra (n 57) at 8.

⁶⁰ Ormerod supra (n 58) at 17.

criminal law is the law of the European Union which has been influential in many areas of mainstream criminal law.⁶¹

Another important source of English criminal law is the international law which exerts some influence on domestic criminal law.⁶² Other sources of English law include the enactment of the Human Rights Act 1998 which is considered to be highly significant in the progression of the criminal law as criminal courts are obliged to consider the import of the Human Rights Act 1998 (in terms of section 2 of the Act) when applying the criminal law.⁶³

1.3.3. Canadian Law

The court structure in Canada can be described as having four levels with the Supreme Court of Canada being at the top and the Provincial/Territorial courts being on the lowest rung.⁶⁴

Firstly, the Supreme Court of Canada is the highest court and the final court of appeal in Canada. The Supreme Court of Canada possesses jurisdiction to preside over all matters, in all areas of the law, ranging from constitutional law and administrative law to criminal law and civil law. Apart from these functions, the Supreme Court of Canada also may act as a special advisor to the Federal Government. In certain instances, the government may need assistance by the Supreme Court of Canada to interpret the Constitution or any other law for that matter.⁶⁵

The Provincial/Territorial courts of Appeal together with the Federal Court of Appeal come after the Supreme Court in order of importance. The provincial/territorial superior courts are below the Federal Court of Appeal and the provincial/territorial courts of appeal.

⁶¹ Ormerod supra (n 58) at 18-19.

⁶² Ormerod supra (n 58) at 21 states that an example of this influence is illustrated in the case of Jones [2006] UKHL 16 where the appellant argued that the definition of crime in terms of section 3 of the Criminal Law Act 1967 should be interpreted in a manner that encompasses the crime of aggression which is recognised in international law.

⁶³ Ormerod supra (n 58) at 21.

⁶⁴ The Government of Canada, Department of Justice website see <http://www.justice.gc.ca/eng/csjsjc/ccs-ajc/page3.html>. (accessed on 2015/06/24).

⁶⁵ <http://www.justice.gc.ca/eng/csjsjc/ccs-ajc/page3.html> (accessed on 2015/06/24).

These courts deal with more serious crimes and also take appeals from Provincial/Territorial court judgments. The Provincial/Territorial Superior court, though on the same level of the Federal Court handles matters of a different nature. On the lowest level are Provincial/Territorial courts which handle the great majority of cases that come into the criminal court system.⁶⁶

1.3.3.1. Sources of Canadian Law

One of the primary sources of Canadian law is statute; at the heart of the Canadian criminal law lies the federal Criminal Code⁶⁷ which contains most of the criminal law federally enacted.⁶⁸ The Criminal Code is considered to be the main source of substantive and procedural criminal law. The Criminal Code was enacted in 1869 with the intention of consolidating the English common law crimes which governed Canada and the Colonial regulations.⁶⁹ Statute has priority over case law and will overrule case law if in conflict. Judges are under a duty to apply statute in circumstances where it exists, even where existing case law also exists.

The Federal Parliament and the Provincial Legislatures derive their powers in criminal matters from the provisions of the Canadian Charter of Rights and Freedoms, which is Part 1 of the Constitution, Act 1982, and therefore a potential source of criminal law in Canada.⁷⁰ The substantive elements of criminal offences are subject to the assurance of specified fundamental freedoms in terms of section 2 and section 15 which contain equality rights.⁷¹

⁶⁶ <http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/page3.html> (accessed on 2015/06/24).

⁶⁷ Colvin and Anand *supra* (n 40) at 1, See Clarke et al Criminal Law and the Canadian Criminal Code (1977) at 12-13; the Criminal Code consists of twenty five sections, offences are divided into two classifications, that is: indictable offences and secondly offences which may be punished by summary conviction.

⁶⁸ Colvin and Anand *supra* (n 40) at 1.

⁶⁹ Clarke et al *supra* (n 67) at 12.

⁷⁰ D.Stuart Canadian Criminal Law A Treatise 4th ed (2001) at 14.

⁷¹ Colvin and Anand *supra* (n 40) at 18; See R v Big M Drug Mart Ltd., [1985] 1 S.C.R 295 (S.C.C) where the Supreme Court of Canada struck down the Lords Day Observance Act, a federal law, on the basis that it enforced a religious morality and thus was contrary to the guarantee of freedom of religious in terms of section 2(a) of the Canadian Charter of Rights and Freedoms. Colvin and Anand

There have been attempts to reform the provocation defence using Charter litigation.⁷² In the case of Cameron, the accused challenged the constitutionality of the objective standard based on the argument that the test was contrary to the constitutionally-mandated subjective test for *mens rea* for the charge of murder. The court stated “the objective component of the statutory defence of provocation serves a valid societal purpose...and cannot be said to be contrary to the principles of fundamental justice.”⁷³

The chapters’ which follow trace the development of the defence of provocation in each of the three jurisdictions, namely, South Africa, England and Canada.

at 18 fn 63 state that the Charter has limited the use of authority to enforce standards of religious morality.

⁷² Colvin and Anand *supra* (n 40) at 386.

⁷³ R v Cameron (1992), 71 C.C.C (3d) 272 (Ont.C.A.).

CHAPTER 2: DEVELOPMENT OF THE DEFENCE OF PROVOCATION AND EMOTIONAL STRESS AS A FORM OF NON-PATHOLOGICAL INCAPACITY IN SOUTH AFRICAN LAW

2.1. The evolution of the provocation defence in South African law⁷⁴

The development of the provocation defence in South African law is fascinating, since it reveals an evolution of the law in its approach to emotions such as anger and stress forming the basis of a defence to criminal liability. The movement of the law towards treating provocation and emotional stress as factors which, in the face of compelling evidence, may create reasonable doubt as to the presence of criminal capacity is not only novel but revolutionary.⁷⁵

The formation of the defence of non-pathological incapacity due to provocation and emotional stress is considered to be a fairly recent controversial development in South African law.⁷⁶ Snyman states that the law's treatment of the defence of provocation is a strong indication of the conflict between legal theory and practical demands of the criminal justice system.⁷⁷

Essentially, the law has recognised that a person who suffered no mental illness or defect at the time of killing can be acquitted if evidence shows a suffering of loss of self-control due to provocation and severe emotional stress at the time of commission of the killing.⁷⁸ The causes of non-pathological incapacity or “emotional collapse” can be attributed to emotions such as fear, shock and anger.⁷⁹

⁷⁴ The structure of Chapter 2, as well as the discussion of the defence of provocation and emotional stress as a form of non-pathological incapacity together with the development of the defence is adopted from Hoctor *supra* (n 1) at 110-133.

⁷⁵ Burchell *supra* (n 2) at 324.

⁷⁶ Carstens and Le Roux *supra* (n 3) at 180.

⁷⁷ C.R. Snyman “The tension between legal theory and policy considerations in the general principles of criminal law” (2003) *Acta Juridica* 1 at 11.

⁷⁸ Carstens and Le Roux *supra* (n 3) at 180.

⁷⁹ Carstens and Le Roux *supra* (n 3) at 181.

This approach, though innovative, is innately controversial. The reason behind the controversy stems from the the argument that the criminal law is founded on the legal principle that all persons must be treated equally. Hence, if the law allows a defence based on losing one's temper then this goes against this principle. It is contended that essentially this amounts to the law offering a defence to a person who failed to control his temper while punishing the individual who was able to control himself.⁸⁰

It has been argued that this amounts to a distinction between the undisciplined and the disciplined, which is unjustified. The law expects the same standard of behaviour from all adult mentally competent members of society. This principle ties in with the objective nature of law according to Snyman, that all individuals should receive the same standard of treatment.⁸¹

Besides the allowance of a complete defence based on provocation, which in itself is highly controversial, South African law sets itself apart from other jurisdictions in terms of the manner in which criminal capacity is tested. There is a distinct shift from the initial adoption of a combination of subjective and objective standards to a complete emphasis of subjectivity.⁸² The reasoning behind the movement towards a pure subjective approach will be investigated and will be one of the main focal points of this chapter.

Snyman states that before 1987, South African courts refused to recognise a defence based on anger and caused by provocation to become a fully-fledged absolute defence that leads to a complete acquittal.⁸³ It is interesting to note that historically Roman-Dutch and Roman writers considered anger as a factor which may mitigate punishment and therefore did not accept that anger alone could serve as an excuse for criminal

⁸⁰ Snyman *supra* (n 1) at 159.

⁸¹ Snyman *supra* (n 1) at 159.

⁸² J.R. Du Plessis "The law of culpable homicide in South African law (with reference to the law of manslaughter in English law and the law relating to negligent killing in German law)" (1986) Phd, University of Pretoria at 246.

⁸³ Snyman *supra* (n 1) at 159.

conduct.⁸⁴ Crimes that were committed on impulse were considered to be different to premeditated crimes, the latter being punished more harshly.⁸⁵

During the Middle Ages, this approach to anger and its impact on criminal liability continued and on occasion anger could operate as a complete defence.⁸⁶ Crimes that were planned were considered more serious and received harsher punishment. Anger was not regarded as an excuse but if a crime was committed while in “the heat of the moment” then the accused could be regarded as not having had direct intention.⁸⁷

South African courts adopted the approach of the English and applied the “specific intent” doctrine as opposed to the Roman-Dutch principle of considering anger as a factor which at most may mitigate punishment in cases where it was justified. In terms of the “specific intent” doctrine,⁸⁸ if an accused is charged with a crime requiring a specific intent, such as assault with intent to do grievous bodily harm, the specific intent required can be negated by provocation or intoxication and results in reducing the charge to a lesser one such as common assault.⁸⁹

The case of Pascoe⁹⁰ illustrates the operation of the specific intent doctrine. The accused

⁸⁴ J.M. Burchell “A provocative response to subjectivity in the criminal law” (2003) Acta Juridica 23 at 23.

⁸⁵ Hoctor supra (n 1) at 110-111.

⁸⁶ J.C. de Wet De Wet & Swanepoel Strafrege 4ed (1985) at 131.

⁸⁷ See Burchell and Milton supra (n 15) at 279 for a discussion of the background of provocation and emotional stress as forms of non-pathological incapacity.

⁸⁸ J.M. Burchell “Intoxication and the criminal law” (1981) 98 SALJ at 177; See R v Bulani 1938 EDL 205 for an example of the application of the specific intent doctrine (cited by Hoctor supra (n 1) at 113 fn 21.

⁸⁹ C.R.M. Dlamini “The changing face of provocation” (1990) 3 South African Journal of Criminal Justice 126 at 130 notes that the specific intent theory was introduced into South African law in 1906 in the case of R v Fowlie 1906 TS 505. Later on this doctrine was accepted in R v Bourke 1916 TPD 303; R v Ngobese 1936 AD 296; R v Innes Grant 1949 (1) SA 753 and in the latter case of S v Johnson 1969 (1) SA 201 (A).

⁹⁰ Pascoe 2 SC 427, at 427, in instructing the jury the court stated:

“I must tell that no person is justified by the law of this Colony in killing his wife, even if he sees her in the act of adultery. It is quite true it would not be murder, but culpable homicide. The law recognises the frailty of human nature, and so where a man in a sudden transport of passion kills his

was charged with murder of his wife and her suspected lover. The court instructed the jurors that this was a case of culpable homicide and not murder due to the circumstances.⁹¹ Similarly, in the case of Udiya⁹² where the killing resulted upon the discovery of an adulterous affair, the killing was deemed culpable homicide as opposed to murder. In the case of Tsoyani,⁹³ the accused was charged with assault with intent to do grievous bodily harm but was found guilty of common assault. The court justified the verdict by citing the provocation suffered by the accused.

However, the overriding reason behind the adoption of the English approach over the Roman Dutch approach may have not been due to doctrinal preferences, but rather a convenient way to avoid the severe sentencing regime wherein murder, despite the existence extenuating circumstances, would be punishable by the mandatory death penalty for murder which was introduced in the year 1917.⁹⁴

De Wet⁹⁵ states that judges were tempted to convict on the lesser charge of culpable homicide when considering the facts, the killing was less blameworthy, especially in light of the introduction of the Criminal Procedure Act of 1917 was passed and which punished murder with death.⁹⁶ South African courts applied the “separate doctrine” approach before 1970 to the defence of provocation.⁹⁷

The “specific intent”⁹⁸ doctrine adopted from English law is evident when the court in Potgieter stated that:

“One of the circumstances under which a charge of murder may be reduced to culpable homicide is where there has been great provocation, resulting in justifiable heat of mind which prevents the accused from forming an actual intention which he would have been able to form had these

wife upon discovering that she is unfaithful, and in the act of committing adultery, it is a case of culpable homicide and not murder.”

⁹¹ Hoctor supra (n 1) at 112.

⁹² R v Udiya 1890 NLR 222.

⁹³ R v Tsoyani 1915 EDL 380 at 382.

⁹⁴ Burchell supra (n 2) at 323, De Wet supra (n 86) at 134.

⁹⁵ De Wet supra (n 86) at 134.

⁹⁶ De Wet supra (n 86) at 134, Snyman Strafreg-Vonnisbundel: Criminal law Case Book (1991) at 108.

⁹⁷ Hoctor supra (n 1) at 113.

⁹⁸ See R v Bulani supra (n 88) which illustrates the operation of the “specific intent” doctrine.

circumstances of provocation not existed”.⁹⁹

However, this rule has been the object of criticism both in Anglo-American literature and in South Africa due to the difficulty of determining which crimes require a specific intent and which crimes do not.¹⁰⁰

The specific intent doctrine has been criticised for two main reasons: firstly, that a person who cannot form a specific intent cannot form a general intent and, secondly, that there is no clear distinction between crimes of specific intent and crimes of general intent in South African law.¹⁰¹ Furthermore, the doctrine was considered to be in conflict with the legal principle that an individual should not be convicted for an offence that he is not criminally responsible for.¹⁰²

The courts initially leaned towards this policy-based partial excuse rule in cases of provoked killings which led to the conviction of the middle verdict of culpable homicide. This approach was made possible by the adoption of section 141 of the Transkeian Penal Code of 1886¹⁰³ by the Appellate Division in the case of Butelezi¹⁰⁴ where the court stated that the Transkeian Penal Code correctly reflected South African law on matter of provocation.¹⁰⁵

This provided a means to circumvent the mandatory death penalty for murder. Section 141 of the Code is pertinent for consideration in the present context since it introduced a mixture of subjective and objective factors into the test for intention in cases involving provocation. The classic example which would fall under section 141 would involve a

⁹⁹ R v Potgieter 1920 EDL 254 at 256 discussed by Hoctor supra (n 1) at 113 fn 18.

¹⁰⁰ Burchell supra (n 88) at 178.

¹⁰¹ Du Plessis supra (n 82) at 547; In S v Johnson supra (n 90) at 205D the court stated “...in the case of a crime for which a specific intent is a requirement, such as murder drunkenness can be relied on to rebut the presence of such a specific intent...”.

¹⁰² Dlamini supra (n 89) at 131.

¹⁰³ Also known as the Native Territories Penal Code, see discussion in Chapter 1 at 7 and at 30.

¹⁰⁴ R v Butelezi 1925 AD 160; at 197 Kotze JA states that in terms of the doctrine of reduction, and the application of the specific intent doctrine “[o]ur law and that of England are in agreement...”.

¹⁰⁵ Burchell and Milton supra (n 15) at 279.

husband discovering his wife in the act of adultery and who reacts by killing the wife's lover.¹⁰⁶

2.1.1 The provocation defence and the ordinary person test

In terms of this approach, the effect of provocation was that it could reduce a conviction of murder to culpable homicide provided that the provocation consisted in a wrongful act/insult in which an ordinary person in the accused's position would have lost his power of control.¹⁰⁷ In terms of this Code, provocation was a partial defence.

Intention at this stage was judged objectively; in terms of s 141 of the Transkeian Penal Code, the question was not whether the accused lacked intention for murder, but whether an "ordinary fictitious person"¹⁰⁸ would have lacked intention as a result of provocation. The Transkeian Penal Code had aspects of objectivity and subjectivity. This Code was criticized for its objective test to determine intention instead of a subjective test.¹⁰⁹

The Code acknowledged the defence while ensuring that the accused did not receive a total acquittal. This in effect introduced an objective test into South African law where a conviction of murder could be reduced to a form of intentional culpable homicide.¹¹⁰ An important note is that at this stage provocation was never regarded as a complete defence to a crime.¹¹¹

¹⁰⁶ Burchell and Milton supra (n 15) at 280.

¹⁰⁷ R v Mbombela 1933 AD 269.

¹⁰⁸ E.M Burchell and P.M.A Hunt South African Criminal Law and Procedure Vol I General Principles of Law (1970) at 374: "The reasonable person is the embodiment of all qualities which we demand of a good citizen, a device whereby to measure the criminal's conduct by reference to community values".

¹⁰⁹ Dlamini supra (n 89) at 136.

¹¹⁰ Hoctor supra (n 1) referring to R v Hercules 1954 (3) SA 826 (A) at 352F-H; where the court stated that the law does recognize a middle ground or hybrid situation wherein intention is present but that intention may be excusable to a certain extent.

¹¹¹ Snyman supra (n 2) 235-237.

Section 141 of the Transkeian Penal code provided the following: ¹¹²

“Homicide which would otherwise be murder may be reduced to culpable homicide if the person who caused death does so in the heat of passion occasioned by sudden provocation.”

Furthermore:

“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.”

However, eventually it was decided that provocation did not depend on mechanical rules, but is a factor which aids in determining the state of mind of the accused at the time of the committing the act in question. ¹¹³

Dlamini states that this approach was “eminently pragmatic”. The justification behind the defence in this form was founded in social policy, that every person in society is under a duty to control their emotions. ¹¹⁴ Dlamini notes that at one time this section was considered to be a correct reflection of South African law; however, as time progressed the approach changed and focus on the accused mind at the time of the commission of the act took focus. One of the main criticisms of this section was the use of an objective test for *mens rea*. ¹¹⁵

This provision was criticised in Mokonto ¹¹⁶ for applying an objective test where a subjective test was required. Furthermore, Burchell and Milton state that this approach was based on expediency and not on logic or principle since an intentional killing if unlawful, must lead to a conviction. ¹¹⁷

The objective test prevailed in most cases ¹¹⁸ and remained in force in South African

¹¹² Native Territories Penal Code Act 24 of 1886 (c).

¹¹³ Dlamini supra (n 89) at 136.

¹¹⁴ Dlamini supra (n 89) at 132.

¹¹⁵ Dlamini supra (n 89) at 132.

¹¹⁶ R v Mokonto supra (n 7).

¹¹⁷ Burchell and Milton supra (n 15) at 280.

¹¹⁸ R v Tshabalala 1946 AD 1961; R v Attwood 1946 AD 331; R v Blokland 1946 AD 940, R v Zwane 1946 NPD 396. On certain occasions, the courts did apply a subjective test, finding that the accused

law until the case of Thibani.¹¹⁹ In this case, the court placed an emphasis on the accused's state of mind and a subtle move towards a subjective test for the defence of provocation began in South African law.¹²⁰ The court stated that provocation had assumed its proper place as a “special kind of material from which in association with the rest of the evidence, the decision must be reached whether or not the crown has proved the intent, as well as the act beyond reasonable doubt”.¹²¹

2.2. The swing towards a subjective test for criminal intention

Despite the Appellate Division in Kennedy¹²² adopting a completely objective test to the provocation defence, the approach towards *mens rea* gradually began to change from an objective test to a subjective one; this was one of the most far-reaching developments in South African criminal law.¹²³ The move towards the subjective approach was noticeable since 1951 in cases such as Mkize,¹²⁴ Hercules,¹²⁵ Bougarde¹²⁶ and Morela.¹²⁷

Further support in the case of Molako¹²⁸ of a subjective test was evident in the assessment of the effect of provocation on the accused, however, the court emphasised that a sane person must be held responsible for the ordinary consequences of his conduct and this principle should not be compromised. Furthermore, the court also

was guilty of culpable homicide rather than murder because provocation excluded intent, see the cases of R v George 1938 CPD and R v Cebekulu 1945 (2) PH H 176 (A).

¹¹⁹ R v Thibani 1949 (4) SA 720 (A).

¹²⁰ Hoctor supra (n 1) at 114 states that Schreiner JA was influenced by the English case of R v Woolmington 1935 AC 462 and the South African case of R v Ndhlovu 1945 AD 369.

¹²¹ Thibani supra (n 119) at 731; CR Snyman “Is there such a defence in our law as criminal law as “emotional stress?” (1985) SALJ at 246, according to Snyman, provocation was never considered to be a complete defence; the statement by Schreiner JA that provocation had assumed its proper place meant that it was considered to be a factor that assists the court in deciding if intention to kill was present.

¹²² R v Kennedy 1951 (4) SA 431 (A).

¹²³ E.M. Burchell “Recent developments in South African Criminal Law” (1959) Acta Juridica 98 at 99.

¹²⁴ R v Mkize 1951 (3) SA 28 (AD) at 33.

¹²⁵ R v Hercules supra (n 110) at 831.

¹²⁶ R v Bougarde 1954 (2) S.A 5 (C) at 8.

¹²⁷ R v Morela 1947 (3) SA 147 (AD) at 154.

¹²⁸ R v Molako 1954 3 SA 777 (O).

expressed concern regarding difficulties with the evidentiary aspects accompanied with a subjective test for provocation.¹²⁹

South African law on provocation took another development in the Federal Supreme Court case of Tenganyika,¹³⁰ where an attempt to create a solution which would satisfy principle and policy was made using a two-stage test.

In terms of the first stage, the test, it must be investigated whether, despite the existence of provocation (and in the context of other evidence), the accused (subjectively assessed) possessed the requisite “intent to kill”.¹³¹

If the intent to kill was not present then the accused would be acquitted of murder, and found guilty of culpable homicide. If however, the accused is found to have had intent to kill, then the second stage of the test investigates whether, on an objective assessment, the reasonable person would have lost his self-control in the circumstances. If the answer to this question is in the affirmative, then the court will reduce the crime of murder to one of culpable homicide despite the presence of “intent to kill”.¹³²

Hocor notes that the approach in Tenganyika¹³³ has received academic support by certain South African writers^{134 135}. This two-leg test comprised of an objective and subjective element¹³⁶ whilst still providing a measure of leniency in the form of a lesser conviction of culpable homicide, this was welcomed in some quarters over the test in Thibani.¹³⁷ The approach in Tenganyika¹³⁸ was followed in the cases of Bureke,¹³⁹

¹²⁹ R v Molako supra (n 128) at 718 B-G.

¹³⁰ R v Tenganyika 1958 (3) SA 7 (FSC) at 11G H; 13 A E; discussed by Hocor supra (n 1) 115.

¹³¹ Hocor supra (n 1) at 115.

¹³² Hocor supra (n 1) at 115.

¹³³ R v Tenganyika supra (n 130).

¹³⁴ E.M. Burchell “Provocation: subjective or objective?” (1958) SALJ 246; JvZ Steyn “The basis of provocation re-examined” (1958) SALJ 383.

¹³⁵ Hocor supra (n 1) at 115.

¹³⁶ R v Tenganyika supra (n 130) at 11G H, 13 A E.

¹³⁷ R v Thibani supra (n 119).

¹³⁸ R v Tenganyika supra (n 130).

¹³⁹ R v Bureke 1960 (2) SA 49 (FSC).

Howard¹⁴⁰ and Nangani.¹⁴¹

However, this approach was criticised in the case of Krull,¹⁴² where Schreiner JA slammed the approach in Tenganyika¹⁴³ for mixing objective and subjective factors in both stages of the test and stated that the responsibility of the trial court in provocation cases is:

“...to examine all the evidence which throws light on the mental state of the accused at the time of the killing in order to see whether, having regard to the effect of provocation and intoxication on his powers of understanding and self-control, but excluding mental abnormalities short of insanity and excluding normal personal idiosyncrasies, he had intention to kill”.¹⁴⁴

In Krull,¹⁴⁵ Schreiner JA refused to assess a provoked and intoxicated person by the standard of the man on the bus, rather, it was held that in cases where a drunk person is provoked, the court is under a duty to consider subjectively if there was intention to kill, taking into account the fact that the accused was intoxicated and provoked.¹⁴⁶

Furthermore, the court stated that “idiosyncrasies such as hot-headedness and timidity should be excluded from the inquiry into the effect of provocation on the accused’s state of mind”.¹⁴⁷ It was held that mental illness such as insanity could not be linked with an inquiry into provocation. The court stated that on a charge of murder where there is evidence of provocation only one inquiry is necessary and that is to determine if the accused had intended to kill, if the answer is in the affirmative, then he should be found guilty of murder possibly with extenuating circumstances. In cases where intention to kill is negated by provocation, a conviction of culpable homicide is made possible.

The court was emphatic in stating that the objective element in the examination of provocation cases was imperative for practical purposes. The court stated that “hot-

¹⁴⁰ S v Howard 1972 (3) SA 227 (R).

¹⁴¹ S v Nangani 1982 (3) SA 800 (ZS).

¹⁴² R v Krull 1959 (3) SA 392 (A).

¹⁴³ R v Tenganyika supra (n 130).

¹⁴⁴ R v Krull supra (n 142) at 400A.

¹⁴⁵ R v Krull supra (n 142).

¹⁴⁶ C.J.R Dugard “Provocation: No more rides on the sea point bus – recent cases” (1966) 83 South African Law Journal at 262.

¹⁴⁷ R v Krull supra (n 142) at 396, see discussion by Dugard supra (n 146) at 262.

headed individuals should not be allowed to give free reign to their emotions”.¹⁴⁸

Burchell correctly argues that the use of the words “mental abnormalities short of insanity” and the exclusion of “normal personal idiosyncrasies” indicate that conduct is actually objectively assessed.¹⁴⁹ Hoctor states that the conflation of subjective and objective factors still occurred despite the court’s effort to separate the two and thus this approach “smacks of inconsistency, and cannot be reconciled with the approach in Thibani¹⁵⁰”.¹⁵¹

The Krull¹⁵² approach was however affirmed in Lubbe¹⁵³ where the court stated that despite the test for provocation being subjective, the prosecution could not adduce evidence that the accused did not easily lose self-control and hence unlikely to have lost self-control in the circumstances in question.¹⁵⁴

However, despite the difficulties in constructing a subjective standard in in Krull¹⁵⁵ the movement towards a completely subjective method of judging provocation was picking up speed.¹⁵⁶

This is evident in the case of Magondo,¹⁵⁷ where the court stated that since criminal intention was now being subjectively assessed there was a necessity to reassess the law relating to provocation as well. Mangondo¹⁵⁸ and Lubbe¹⁵⁹ raised the question of whether to test provocation subjectively or objectively. This is more specifically noted, if the reasonable man in the position of the accused would have to lose self-control, or if

¹⁴⁸ R v Krull supra (n 142) at 396FF.

¹⁴⁹ E.M. Burchell supra (n 134) at 386.

¹⁵⁰ R v Thibani supra (n 119).

¹⁵¹ Hoctor supra (n 1) at 116.

¹⁵² R v Krull supra (n 142).

¹⁵³ S v Lubbe 1963 (4) S.A 459 (W).

¹⁵⁴ S v Lubbe supra (n 153) at 465.

¹⁵⁵ R v Krull supra (n 142).

¹⁵⁶ Hoctor supra (n 1) at 116.

¹⁵⁷ S v Mangondo 1963 (4) SA 160 (A).

¹⁵⁸ S v Magondo supra (n 157).

¹⁵⁹ S v Lubbe supra (n 153).

the accused himself suffered a loss of self-control which led to the exclusion of intention.¹⁶⁰ The subjective test for intention was given firm support in the case of Dlodlo,¹⁶¹ where the Appellate Division fully accepted the subjective test to determine intention in murder cases and where the defence of provocation was raised.

In this case, the appellant attended a “beer drink” where the deceased incited the accused into an argument. After the “beer drink” the deceased followed the accused home and challenged him to a fight which was declined by the accused. The deceased persistently followed the accused to his home even to the point of entering the accused’s home. The accused forcefully ejected the deceased twice. On the third attempt, the accused stabbed the deceased fatally.¹⁶²

The court held:

“The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury”.¹⁶³

The Appellate Division thus affirmed the subjective test for intention in cases involving provocation. The court stated that the onus was upon the prosecution to prove beyond a reasonable doubt that when the accused inflicted the injury he “as a fact appreciated, subjectively, the possibility of death resulting therefrom”.¹⁶⁴

The court stated:

“The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury”.¹⁶⁵

The courts began to understand that in determining the presence of intention, the

¹⁶⁰ E.M. Burchell supra (n 134) at 27.

¹⁶¹ S v Dlodlo 1966 2 SA 401 (A).

¹⁶² B. Van Niekerk “A witch’s brew from Natal- some thoughts on provocation” (1972) 89 SALJ at 169.

¹⁶³ S v Dlodlo supra (n 161) at 405.

¹⁶⁴ S v Dlodlo supra (n 161).

¹⁶⁵ Dugard supra (n 146) at 264.

workings of the mind of the accused needed to be investigated and a subjective assessment was the only fair method. Emphasis was placed on state of mind, in the case of Delport,¹⁶⁶ the court stated that in cases where the presence of intention was in dispute:

“...it is self-evident that the trier of a fact is required to have regard to all the evidential material which, in the light of our available knowledge of how the human faculty of volition functions, is relevant to the determination of the state of mind of the accused concerned”.

The case of Mokonto¹⁶⁷ is considered to be an important milestone in the development of the law of provocation as it sounded “the death knell for the objective approach to provocation in relation to intent”.¹⁶⁸

The facts of this case concern witchcraft, the appellant a young Zulu man was found guilty of murder with extenuating circumstances of killing a woman known to his tribe as a witchdoctor. The woman had prophesised that the accused “would not see the setting sun”. The appellant became extremely fearful as the woman also predicted that his brothers would die and astoundingly the brothers did indeed die. Fearful that that he would meet the same fate, the accused decided to kill the woman in order to avert his impending doom. He then went about to kill the woman by gruesomely decapitating her to ensure she “would not rise again” and chopped off her hands since these were the hands that handled the *muti* (medicine believed to have supernatural powers) responsible for the deaths of the appellant’s brothers.

Holmes JA stated that this case:

“illustrates the dead influence of witchcraft which still holds in thrall the minds of some Bantu, notwithstanding the coming of Western civilization to Natal some 150 years ago”¹⁶⁹

The accused pleaded self-defence and a defence based on provocation as an alternative plea. The Appellate Division rejected the accused's defence that his conduct fell within the confines of self-defence.

¹⁶⁶ S v Delport 1968 (1) PH H172 (A).

¹⁶⁷ S v Mokonto supra (n 7).

¹⁶⁸ Hoctor supra (n 1) at 117; Van Niekerk supra (n 162) at 169.

¹⁶⁹ S v Mokonto supra (n 7) at 320.

The court examined the alternative defence based on provocation and stated that:

“the facts of a particular case might show that the provocation, far from negating an intention to kill, actually caused it. The crime [then] would be murder, not culpable homicide...However, depending on the circumstances; such provocation could be relevant to extenuation”.¹⁷⁰

In respect of section 141 of the Transkeian Penal code, the court stated that this provision encompassed an objective approach to provocation which was incompatible with the “subjective approach of modern judicial thinking”,¹⁷¹ which excludes the doctrines that an individual is presumed to have intended the reasonable and probable consequences of his act,¹⁷² and the *versari in re illicita* doctrine.¹⁷³

The court further emphasised that provocation no longer reduced murder to the lesser charge of culpable homicide and in reference to the case of Dlodlo¹⁷⁴ the court stated that provocation may, instead of disproving intention, actually aid in proving intention.¹⁷⁵

Furthermore, it was held that section 141 of the Transkeian Penal Code should be restricted to the district in which it was passed and that provocation is important to the subjective enquiry into the presence of intention and investigating what was in the appellant’s mind at the time of the killing. Depending on the circumstances, provocation could be relevant to extenuation and mitigation.¹⁷⁶ The Appellate Division confirmed the conviction of murder with extenuating circumstances, the original sentence of five years imprisonment was confirmed.

Hector notes that the court explicated the law relating to provocation in the context of the specific intent doctrine which was applicable during this era.¹⁷⁷ In the case of De

¹⁷⁰ S v Mokonto supra (n 7) at 326.

¹⁷¹ Hector supra (n 1) at 117.

¹⁷² S v Mokonto supra (n 7) at 325.

¹⁷³ S v Mokonto supra (n 7) at 324.

¹⁷⁴ S v Dlodlo supra (n 161).

¹⁷⁵ S v Mokonto supra (n 7) at 326.

¹⁷⁶ S v Mokonto supra (n 7) at 326.

¹⁷⁷ Hector supra (n 1) at 118.

Blom,¹⁷⁸ the Appellate Division held that the intention inquiry consisted of an investigation into the accused's subjective knowledge of unlawfulness.¹⁷⁹ However, this case was criticised for declaring an honest mistake (regardless of how unreasonable) a defence in law where the offence committed required the element of *dolus*. If the crime in question required *mens rea* in the form of culpa then the mistake or ignorance must have been reasonable in order to negative the required culpability.¹⁸⁰

2.3. The emergence of criminal capacity

It is quite evident that up to this point the courts grappled with provocation and how, or if, it should impact criminal liability. Besides this dilemma, the other consideration centred on how this defence should be assessed (that is, either objectively or subjectively).

Provocation was traditionally viewed as impacting on the presence of intention. However, the concept of criminal capacity or "*toerekeningsvatbaarheid*" started gaining momentum in South African law, especially in relation to provocation.

The court's acknowledged that evidence of provocation could not only impact intention, but also criminal capacity. The notion of criminal capacity or imputability entered South African law in 1967.¹⁸¹ Criminal capacity or "*toerekeningsvatbaarheid*"¹⁸² is one of the cornerstones in the system of concept jurisprudence known as "strafregwetenskap".¹⁸³

¹⁷⁸ S v De Blom 1977 (3) SA 513 (A).

¹⁷⁹ J.M. Burchell "Unravelling compulsion, draws provocation and intoxication into focus." (2001) 14 South African Journal of Criminal Justice at 363 at 369.

¹⁸⁰ K. Amirthalingam "Distinguishing between ignorance and mistake in the criminal law in defence of the De Blom principle" (1995) 8 South African Journal of Criminal Justice at 12.

¹⁸¹ C.R. Snyman "Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg" (1989) Tydskrif vir die Regwetenskap 1; Snyman notes that the notion of criminal capacity was adopted from German law. The notion is derived from the German term "Zurechnungsfähigkeit" or "Schuldfähigkeit".

¹⁸² J.R. Du Plessis "The extension of the ambit of ontoerekeningsvatbaarheid to the defence of provocation- a strafregwetenskaplike development of doubtful practical value" (1987) 104 SALJ 539 at 539 notes that the term "toerekeningsvatbaarheid" has several translations in English such as criminal imputability and criminal responsibility.

¹⁸³ Du Plessis supra (n 182) at 539.

This concept was unknown in South African law before the 1960's, even in jurisdictions such as England or in Anglo-American law the notion is foreign.¹⁸⁴

Criminal capacity was virtually unknown in the sources of South African common law until it infiltrated from the Continental Legal systems, more specifically German law.¹⁸⁵ The notion of criminal capacity was a relatively new concept in South African criminal law, before its introduction, South African courts linked provocation with *mens rea*, that is, the possibility of provocation negating the element of intention.¹⁸⁶

The notion of criminal capacity came to the fore in South African criminal law when it was the subject of investigation by *The Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters*.¹⁸⁷

The Rumpff Commission made recommendations which led to the creation of section 78(1) of the Criminal Procedure Act¹⁸⁸ which sets out the defence of mental illness in South African law. The exposure emanating from investigation of Rumpff Commission acted like a catalyst in the development of the element of criminal capacity in South African criminal law. In 1967, the same year as the release of the Rumpff Report, in the Appellate Division case of Mahlinza,¹⁸⁹ it was held that criminal capacity was an essential element in determining criminal liability.¹⁹⁰

¹⁸⁴ Snyman supra (n 121) at 246.

¹⁸⁵ Snyman supra (n 181) at 1.

¹⁸⁶ F.F.W. Van Oosten "The psychological fault concept versus the normative fault concept: Quovadis South African Criminal law?" (1995) 58 Tydskrif vir Hedendaagse Romeinse-Hollandse Reg 361 at 141.

¹⁸⁷ RP 69/1967.

¹⁸⁸ Act 51 of 1977.

¹⁸⁹ S v Mahlinza 1967 (2) SA 408 (A).

¹⁹⁰ S v Mahlinza supra (n 189) at 414 G-H.

2.3.1 Essential components of criminal capacity

In South African criminal law, criminal capacity is seen to have two essential components:

a) Cognitive capacity, which relates to the individual's ability to think. Thus the ability to comprehend, reason and perceive is encompassed within cognitive capacity. Of importance is the person's ability to distinguish between right and wrong.¹⁹¹ Hence, when cognitive capacity is lacking, the actor behaves without adequate insight into his or her behaviour.

b) Conative capacity refers to an individual's ability to control his or her behaviour. Self-control or powers of resistance was defined in the Rumpff Commission Report as:

“...a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive”.¹⁹²

In normal, non-criminal persons the idea of committing an unlawful act arouses aversion. Only where very strong motives are present to promote the execution of such an act, even though present, arouses no aversion at all, so that such insight cannot operate as a counter-motive, there is no self-control.¹⁹³

If either type of capacity is lacking, the element of criminal capacity will be negated and the accused cannot be held criminally liable. The test which has been developed by the Rumpff Commission relates to incapacity arising out of mental illness; however, it has been extended to incapacity arising out of intoxication, provocation and emotional stress. Hoctor states that the courts have indeed appropriated the s 78(1) test in evaluating non-pathological incapacity.¹⁹⁴ Besides the two types of capacity identified by the Rumpff Commission, a third type of mental function exists, that of affective

¹⁹¹ Rumpff Commission Report supra (n 187) at par 9.9.

¹⁹² Rumpff Commission Report supra (n 187) at para 9.33.

¹⁹³ Rumpff Commission Report supra (n 187) at para 9.33.

¹⁹⁴ Hoctor supra (n 1) at 119.

functions.¹⁹⁵

Affective functions relate to an individual's emotions or feelings. Affective functions may:

“range from the pleasurable or the unpleasant barely perceptible, feelings of hopeful anticipation or disappointment to the most intense emotions of hatred, fury, jealousy, etc. Intense emotions may sometimes create such strong tensions in the internal muscular organs, as well as in the external skeletal muscles that a person involuntarily contracts his muscles—fist clenching, trembling of the limbs etc.,—and may resort to unconsidered action.”¹⁹⁶

However, unlike cognitive and conative capacity, affective emotional disturbances do not exclude criminal liability.

The commission stated that:

“in our opinion, however, the fact remains that as an adult personality he is capable, or ought to be capable of volitional control of the expression of his emotions.”¹⁹⁷

This applies in cases where an accused person shows evidence of volitional control and insight into their conduct. In circumstances where the affective functions impact negatively on the cognitive or conative capacity then only may criminal liability be excluded.

There has been some debate regarding in the sequence in which elements of criminal liability should be tested: should the test for criminal capacity precede the test for voluntary conduct?¹⁹⁸ Hoctor states that it is of high importance that elements of voluntary conduct and criminal capacity are not confused.¹⁹⁹

In the case of Mkize, Jansen JA held that in instances where there is an absence of voluntary conduct, “there is no need to investigate the presence or absence of *mens rea* because it is “necessarily excluded; nor is it necessary to investigate whether the person

¹⁹⁵ Rumpff Commission Report supra (n 187) at para 9.9.

¹⁹⁶ Rumpff Commission Report supra (n 187) at para 9.9.

¹⁹⁷ Rumpff Commission Report supra (n 187) at para 9.19.

¹⁹⁸ Hoctor supra (n 1) at 120.

¹⁹⁹ Hoctor supra (n 1) at 120.

has criminal capacity”.²⁰⁰ This is in contrast with the case of Mahlinza²⁰¹ where it was stated that the inquiry into capacity was of extreme importance, where it is shown that criminal capacity is lacking, there would be no need to enquire further into fault or voluntariness of the accused's conduct.²⁰²

Academics have stated that the approach in Mkize²⁰³ and Chretien²⁰⁴ should be followed; the test for a voluntary act ought to precede any other inquiry so as to avoid an overlap between the “act” and “capacity” elements.²⁰⁵ Hoctor notes that there are also divergent views in respect to the distinction between criminal capacity and fault.

Van der Merwe²⁰⁶ summarises three different positions:

1. That the concepts are totally different and capacity remains a requirement in the case of no fault liability.
2. In theory the concepts are different; however, both are constituent parts of the culpability element.
3. Two concepts are indistinguishable since a person if capable of forming an intention will obviously possess criminal capacity, essentially the same inquiry.

Van der Merwe notes that the psychological approach was followed in the landmark case of Chretien,²⁰⁷ where capacity and fault are separate elements. The capacity inquiry is a preliminary one, conducted before the inquiry into *actus reus* and *mens rea*. Therefore, South African law follows position that both concepts are distinct but are both constituent parts of the culpability element.²⁰⁸

It is important when explicating the notion of criminal capacity to clearly distinguish it

²⁰⁰ S v Mkize supra (n 124) at 265E-F.

²⁰¹ S v Mahlinza supra (n 189).

²⁰² S v Mahlinza supra (n 189) st 414H-415A. discussed by Hoctor supra (n 1) at 120.

²⁰³ S v Mkize supra (124).

²⁰⁴ S v Chretien (1981) 1 SA 1097 (A).

²⁰⁵ Hoctor supra (n1) at 120.

²⁰⁶ D.P. van der Merwe “Toerekeningsvatbaarheid v "specific intent"- die Chretien beslissings” (1981) Orbiter 142 at 148.

²⁰⁷ S v Chretien supra (n 204).

²⁰⁸ S v Chretien supra (n 204).

from fault. The inquiry to ascertain the presence of criminal capacity is whether the accused had the capability of “something” and whether that “something” actually existed is only ascertained in the inquiry into fault.²⁰⁹

2.4. The defence of non-pathological incapacity due to provocation and emotional stress

The landmark case of Chretien²¹⁰ indirectly played a pivotal role in the development of the defence of non-pathological incapacity as a result of provocation and emotional stress.²¹¹ The Chretien²¹² case provided a foundation for the defence of non-pathological incapacity.²¹³ Prior to the case of Chretien,²¹⁴ the question of incapacity seldom occurred. Louw notes that it was usually reserved for cases involving mental illness and youth. Within the last two decades it has “shifted from the periphery of our law to a fully developed defence available to those who kill when provoked”.²¹⁵

Before the year 1981, the position in South Africa in regard to criminal capacity was that it could only be excluded by youthfulness and mental illness, before this turning point, provocation and intoxication was only regarded as partial defences at most.²¹⁶

The decision in Chretien²¹⁷ dramatically altered the legal landscape of the in the area of criminal incapacity specifically in relation to voluntary intoxication,²¹⁸ but also later

²⁰⁹ Hoctor supra (n 1) at 121.

²¹⁰ S v Chretien supra (n 204).

²¹¹ Hoctor supra (n 1) at 121.

²¹² S v Chretien supra (n 204).

²¹³ Stevens supra (n 13) at 119.

²¹⁴ S v Chretien supra (n 204).

²¹⁵ R. Louw “S v Eadie: Road rage, incapacity and legal confusion” (2001) 14 SACJ 206 at 207.

²¹⁶ Burchell supra (n 2) at 54, Burchell and Milton supra (n 15) at 262-263 discussing the case of S v Johnson supra (n 89) which was the leading case on intoxication before S v Chretien supra (n 204). In terms of S v Johnson supra (n 89) an accused could be found guilty of culpable homicide despite expert evidence indicating that the accused may have suffered the loss of criminal capacity at the time of the commission of the offence.

²¹⁷ S v Chretien supra (n 204), see discussion in Burchell supra (n 88)

²¹⁸ Burchell and Milton supra (n 15) at 261 state that in terms of Roman-Dutch law, voluntary intoxication was not recognised as a defence and as a general rule it was not recognised in South African law either. This approach was largely influenced by public policy. In the case of R v Bourke 1916 TPD

impacted the areas of non-pathological incapacity due to provocation and emotional stress and its potential to exclude criminal capacity.²¹⁹ The field of application of the concept of criminal capacity was increased to encompass the defence of intoxication.²²⁰

In 1985 Snyman queried:

“Yet the question remained: could one not argue by analogy that, just as extreme intoxication may negative criminal capacity, extreme provocation could have the same effect?”²²¹

In the case of Chretien²²², the accused attended a party where he consumed a sizeable amount of alcohol. The accused being intoxicated drove his car into a crowd of people who attended the party and who were gathered on the road. The result was that five people injured while one person was killed. The accused was charged with murder and attempted murder. The trial court held that the accused was guilty of culpable homicide and acquitted him on the charges of murder and attempted murder. The court held that in light of the explanation given by the accused, which was that due to his intoxicated state, he expected the individuals to move out of the path of the vehicle. The court doubted that the requisite *mens rea* for the charge of attempted murder and common assault was satisfied therefore acquitted the accused on these charges.

On appeal, the state contended that the trial court should have applied that the Johnson case, the Appellate Division dealt with the question of whether the court a quo was correct in acquitting the accused of common assault where the requisite intention may have been adversely impacted due to the voluntary consumption of alcohol. The Appellate Division held that that ruling of the trial court was correct and that intention must be proven where the charge of common assault is concerned.²²³

303 where the court stated that “to allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community...the regular drunkard would be more immune from punishment than the sober person.”

²¹⁹ Stevens supra (n 13) at 117.

²²⁰ Snyman supra (n 121) at 247.

²²¹ Snyman supra (n 121) at 247.

²²² S v Chretien supra (n 204).

²²³ Burchell supra (n 88) at 182-183.

The Appellate Division addressed two important areas of law:

Firstly, the court dealt with the judgment of Johnson²²⁴ and stated that the decision in this case was *juridies onsuiver* (judicially impure). The reason for this criticism was its policy-driven conviction, despite the court a quo finding that at the time of the commission of the act, the accused acted mechanically.²²⁵ Secondly, the court stated that the “specific intent” doctrine was contrary to that of South African law.²²⁶

Before the Chretien decision, the “specific intent” rule was followed, Snyman states that Rumpff CJ limited the rejection of the “specific intent” theory to cases of intoxication.²²⁷ The Court applied a principled approach to the problem of voluntary intoxication, holding that the intoxication could exclude liability by negating various elements of liability: this includes the element of criminal capacity at the time of acting, the requirement of fault in the form of intention, and the requirement that the act was voluntary.²²⁸

The court distinguished between diminished responsibility and the lack of capacity.²²⁹ The state of intoxication was described as being characterised as an acute blunting of accused’s capacity to appreciate the moral quality of the act in question, together with a severe lapse of inhibition.²³⁰ It was further stated that the position in South African law needed greater circumspection.²³¹

Furthermore, it was emphasised by the court that only in exceptional circumstances will it be found that the effect of the intoxication was such as to exclude the accused's capacity to know that what he is doing is unlawful or such as to result in a fundamental disintegration of the accused's inhibitions and consequently that the accused lacked

²²⁴ S v Johnson supra (n 89).

²²⁵ S v Chretien supra (n 204) at 1104A.

²²⁶ S v Chretien supra (n 204) at 1104A.

²²⁷ Snyman supra (n 121) at 247 discussing S v Chretien supra (n 204)

²²⁸ Snyman supra (n 121) at 247 discussing S v Chretien supra (n 204) at 1104E-F and 1104H and 1106F-G.

²²⁹ S v Chretien supra (n 204).

²³⁰ S v Chretien supra (n 204) at 1106B-C.

²³¹ S v Chretien supra (n 204).

capacity.²³² The Court, in relation to amnesia, stated that an accused person who alleges amnesia will not be considered to have lacked criminal capacity unless there is credible evidence to support this plea.²³³

The court's absolute acceptance of the principled approach to liability was controversial, as not everyone believed that the legal convictions of the community will tolerate the scenario.²³⁴ The Chretien²³⁵ case is considered to be a case decided in accordance with legal principle and logic.²³⁶

Since the decision in Chretien,²³⁷ a new approach to provocation as a defence was followed. The judgment raised pertinent questions relating to the exclusion of the basic elements of liability – in the same way intoxication does. Questions arose regarding whether the same approach in Chretien²³⁸ could be applied to cases involving extreme provocation and emotional stress as a form of non-pathological incapacity.²³⁹ However, Rumpff CJ emphasised the principles must be applied in a correct manner and in order for voluntary intoxication to succeed as a defence, sufficient evidence would be necessary to avoid criminal liability.²⁴⁰

The Chretien²⁴¹ case played a significant role in the development of the defence of non-pathological incapacity due to provocation and emotional stress and created somewhat of a snowball effect in that the cases which, following its precedent, embraced the principled approach in Chretien.²⁴²

²³² S v Chretien supra (n 204).

²³³ S v Chretien supra (n 204).

²³⁴ Hoctor supra (n 1) at 122-123.

²³⁵ S v Chretien supra (n 204).

²³⁶ Hoctor supra (n 1) at 122-123.

²³⁷ S v Chretien supra (n 204).

²³⁸ S v Chretien supra (n 204).

²³⁹ S v Chretien supra (n 204) discussed by Snyman supra (n 121) at 247.

²⁴⁰ S v Chretien supra (n 204) at 1105-1108.

²⁴¹ S v Chretien supra (n 204).

²⁴² S v Chretien supra (n 204).

In the case of Bailey,²⁴³ the court recognised that an emotional state, induced by fear and not coupled with intoxication could lead to a lack of criminal capacity. The Appellate Division stated that it was possible for the accused to have become so fearful due to threats that he could lack criminal capacity.²⁴⁴ The court confirmed the absence of the concept of excuse and took the stance that it cannot regard unlawful and intentional killings anything other than murder; hence, degrees of blameworthiness in relation to the element of intention are not recognised.²⁴⁵

In the year 1983, a new chapter in the development provocation began with the case of Van Vuuren.²⁴⁶ The court dealt with a defence of lack of *mens rea* as a result of provocation and intoxication.

The defence relied on the principles set out in Chretien,²⁴⁷ in regard to incapacity arising out of provocation, the court stated that:

“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 for the man 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”.²⁴⁸

The court therefore stressed the importance of evidence in arriving at the conclusion that criminal capacity was lacking. Furthermore, in the case of Lesch²⁴⁹ the defence of

²⁴³ S v Bailey 1982 3 SA 772 (A).

²⁴⁴ S v Bailey supra (n 243) at 796 C-D.

²⁴⁵ S v Bailey supra (n 243) discussed by Wolhuter L “Excuse them though they do know what they do – the distinction between justification and excuse in the context of battered women who kill” (1996) 9 SACJ 151 at 155.

²⁴⁶ S v Van Vuuren 1983 (2) SA 12 (A) at 17G-H.

²⁴⁷ S v Chretien supra (n 204).

²⁴⁸ S v Van Vuuren supra (n 246) At 17G-H.

²⁴⁹ S v Lesch 1983 (2) SA 814 (O) , in this case the accused shot and killed his neighbour who made a habit of insulting and threatening the accused and his daughter for whom he had “exceptionally tender feelings”(at 817H-818A). On the day of the killing the accused was informed by his daughter that the

non-pathological incapacity based on provocation was raised. The court (per Hatting AJ) adopted a traditional approach to the defence of provocation and recognised that loss of self-control could not only be caused by provocative words or conduct but also emotional stress.²⁵⁰

The accused stated that while shooting his neighbour (the deceased) realised what he was doing was wrong but due to his anger he could not act accordingly.²⁵¹ The court confirmed the murder conviction in this case as it felt that the provocation did not negate any of the elements of the liability since the accused behaviour indicated that he was thinking rationally throughout the chain of events and therefore the court could not accept that the accused could not have refrained from shooting the deceased if he so desired.²⁵²

It is evident that the court adopted the same systematic approach as that in Chretien,²⁵³ which established the existence of voluntary conduct, criminal capacity and intention as essential elements. The court held that instead of negating the element of intention due to provocation, it contributed to the forming of intention.²⁵⁴

The importance of the cases of Van Vuuren²⁵⁵ and Lesch²⁵⁶ are that the courts in both cases accepted that provocation and emotional are important factors when determining if the element of criminal capacity was lacking.²⁵⁷ The Rumpff Commission²⁵⁸ report

deceased insulted and threatened her. The accused arrived home and took his firearm and confronted the deceased regarding the incident involving his daughter. The deceased behaved rude and aggressive towards the accused. In response the accused shot the deceased who fell to the ground. The accused then fired three more shots which fatally wounded the deceased. After the shooting, the accused requested a neighbour to take him to a police station.

²⁵⁰ S v Lesch supra (n 249).

²⁵¹ S v Lesch supra (n 249) at 819A-B.

²⁵² S v Lesch supra (n 249) at 825A-G.

²⁵³ S v Chretien supra (n 204).

²⁵⁴ S v Lesch supra (n 249).

²⁵⁵ S v Van Vuuren supra (n 246).

²⁵⁶ S v Lesch supra (n 249).

²⁵⁷ Burchell and Milton supra (n 15) at 281.

²⁵⁸ Rumpff Commission Report supra (n 187).

played a vital role in the development of the defence of non-pathological incapacity as it formed a crucial part of the judgment in the case of Lesch.²⁵⁹

In Lesch and Van Vuuren it was accepted that provocation could be a complete defence despite the defence failing on the facts. The case law indicated that at this point, the courts were approving of a defence based on provocation and it was not long before the defence succeeded.²⁶⁰

In the case of Arnold,²⁶¹ decided in 1984, the defence of non-pathological incapacity based on provocation and emotional stress was successful. However, this case generated debate regarding the decision to allow emotional stress or any other form of provocation to operate as complete defence. The court acknowledged that emotional factors could contribute to a lack of capacity thereby leading to an acquittal as a result of provocation. Snyman is a fierce critic of this case and argues that the court erred in acquitting the accused. In this case the accused, a 41-year-old man, was charged with killing his wife, an attractive 21-year-old woman. Defence counsel led psychiatric testimony to support the assertions that at the time of the killing, the accused's mind overflowed with emotions and as a result may have lost the ability to control his actions or that he may have acted subconsciously when shooting his wife.²⁶²

The court posed the following legal questions:

- (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?²⁶³

The court accepted the evidence led by the defence as being truthful. Expert testimony by a psychiatrist was led supporting the assertions that the accused was subjected to tremendous emotional stress.

²⁵⁹ S v Lesch supra (n 249) at 823F-824B.

²⁶⁰ S v Lesch supra (n 249), S v Van Vuuren supra (n 246).

²⁶¹ S v Arnold supra (n 16), see discussion of the criticisms in Chapter 5 at 213.

²⁶² S v Arnold supra (n 16) at 263 C-E, see discussion in Snyman supra (n 121)

²⁶³ S v Arnold supra (n 16) at 35.

The psychiatrist testified that:

“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.”²⁶⁴

The defence placed voluntariness of the accused's conduct and criminal capacity at issue. The psychiatrist further stated:

“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”.²⁶⁵

The accused was found not guilty as the court (per Burger J) accepted his version of events. The court stated that it could not be found that when the accused killed he was acting consciously and not subconsciously,²⁶⁶ however, if indeed he was acting consciously it had not been proven beyond a reasonable doubt that criminal capacity was present. In support of this finding, the court cited the cases of Van Vuuren²⁶⁷ and Bailey²⁶⁸ and stated that the defence of criminal incapacity was not limited to factors such as intoxication, youth and mental disorder and the defence of incapacity extends to “severe emotional distress” as well.²⁶⁹

Hector states that a “puzzling” feature of this judgment is that the court found it reasonably possible that the accused was acting in a state of sane automatism at the time of the shooting and proceeded to hold that it was reasonably possible that the accused was lacking capacity at the time of the death of this wife.²⁷⁰

However, the court was mindful of the need to proceed with caution when accepting that the accused lacked capacity, the court was of the opinion that due to the “most unusual” of facts in the case, the killing of the “accused’s wife was a variance

²⁶⁴ S v Arnold supra (n 16) at 263C-D.

²⁶⁵ S v Arnold supra (n 16) at 263D-E.

²⁶⁶ S v Arnold supra (n 16) at 263H.

²⁶⁷ S v Van Vuuren supra (n 246).

²⁶⁸ S v Bailey supra (n 243).

²⁶⁹ S v Arnold supra (n 16) at 264 G-H.

²⁷⁰ Hector supra (n 1) at 125 discussing S v Arnold supra (n 16) at 264D.

with the whole conduct of the accused both before and after” indicated that the accused may not have had control of his conduct.²⁷¹

The next case significant to the development of the defence of non-pathological incapacity due to provocation and emotional stress was the Appellate Division case of Campher.²⁷² This judgement was in turn cited in Laubscher²⁷³ which was extremely significant in the defence of provocation as it set the test for non-pathological incapacity. In the case of Campher,²⁷⁴ the court examined whether provocation and emotional stress could be the basis of a defence excluding liability. Hoctor states that the case of Campher²⁷⁵ is remarkable in that the three judges all delivered differing judgments, resulting in separate majority findings on the facts and on the law.²⁷⁶ This case was particularly more complex since the defence failed to raise the possibility that at the time of the killing, cognitive capacity may have been lacking along with the fact that defence counsel failed to lead expert psychiatric evidence.

²⁷¹ S v Arnold supra (n 16) at 264 G-H discussed by Hoctor supra (n 1) at 124-125.

²⁷² S v Campher supra (n 8).

²⁷³ S v Laubscher supra (n 1) at 167 A-B,167E.

²⁷⁴ S v Campher supra (n 8) the accused was the subject of tremendous emotional abuse by her husband (the deceased). During the marriage the accused was assaulted and taunted by the deceased, she was compelled to send her children from a previous marriage to live with her former husband. She was forced into cleaning the deceased's pigeon coops and sit at the bedside of the deceased during the nights to protect the deceased from bad spirits which he (the deceased) believed haunted him. On the day of the shooting, the deceased awoke in bad mood. He argued with the deceased and forced her to help him fit a bolt-lock into the pigeon coop. Since the accused was sleep-deprived due to the fact that she was forced to sit by the deceased's bed-side to ward of “evil spirits”, she did not hold the bolt fitting to the satisfaction of the deceased. This resulted in the hole not being drilled straight. This angered the deceased who then threatened the accused with a screwdriver. The accused then ran into the house and attempted to lock the deceased out of the house, this attempt was unsuccessful. The accused took hold of a pistol, despite being armed; the deceased was not afraid and proceeded to force the accused back to the pigeon coop. Still armed with the gun, the accused was forced on her knees and violently urged to pray for the hole in the wooden frame of the pigeon hole to become straight. The accused then shot the deceased.

²⁷⁵ S v Campher supra (n 8).

²⁷⁶ Hoctor supra (n 1) at 125.

Viljoen JA stated that since the appellant based her defence on the lack of self-control, in an attempt to negate the element of intention, this amounted to an argument of lack of conative capacity. Viljoen JA proceeded to deal with the case on this basis.²⁷⁷

Viljoen JA further stated that the test contained in s 78 of the Criminal Procedure Act was not limited to cases where incapacity was due to pathological disturbances but also applied to mental incapacity arising out of non-pathological factors. Viljoen JA further noted that the enquiry into criminal capacity is distinct from the enquiry into intention; hence, criminal capacity should be assessed before intention. Only if a person is found to possess criminal capacity, should an enquiry into intention follow.²⁷⁸

Viljoen JA found that the appellant did indeed lack conative capacity at the time of the shooting and as a result failed to control the urge to kill her abusive husband and should thus be acquitted.²⁷⁹ It was stated that the accused laboured under the impulse which she could not resist, that being the impulse to destroy the “monster” (her abusive husband). This impulse resulted in the accused being unable to act in accordance with the distinction between right and wrong.

Hence, according to Viljoen JA, the actions of the accused were not imputable at the time of the shooting. Jacobs JA on the other hand felt that appellant failed to properly plead the lack of capacity, hence it made it difficult to conclude that she did not possess capacity at the time of the killing. Moreover, it was held that the test in s 78 of the Criminal Procedure Act only applied to cases where the accused lacked self-control due to pathological factors. As Jacobs JA held that the appellant did not lack self-control due to non-pathological factors, he dismissed the appeal against conviction.²⁸⁰

Boshoff AJA was in agreement that the appeal against conviction should be dismissed, furthermore, that the lack of criminal capacity not only emanated from mental illness but could also be caused by a “temporary clouding of the mind”.²⁸¹

²⁷⁷ Hoctor supra (n 1) at 125.

²⁷⁸ S v Campher supra (n 8) at 955C-F.

²⁷⁹ S v Campher supra (n 8) at 958I.

²⁸⁰ S v Campher supra (n 8) at 960D-E.

²⁸¹ Hoctor supra (n 1) at 126.

Although the appeal did not succeed and the appellant was found guilty, this judgment was significant as it confirmed the existence of the defence of non-pathological incapacity arising from provocation and emotional stress. Out of the three judges, two accepted that a defence of incapacity is not limited to section 78 of the Criminal Procedure Act.²⁸²

Du Plessis states that as a statement of law Campher²⁸³ is unsatisfactory due to the divergent views taken by the judges on the law and on the facts. If the view of the majority gains acceptance then it would result in the weakening of the law of culpable homicide.²⁸⁴

By the mid-1990's, the defence of non-pathological incapacity based on provocation and emotional stress was well established in South African law. The defence developed along the principle that if any element of criminal liability is not proved beyond a reasonable doubt then the accused cannot be found guilty of crime that he is charged with. This is in accordance with the principle-based or psychological approach to criminal liability. This approach is based on the principle which requires that "unless a man has the capacity and fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him".²⁸⁵ However, although the defence was accepted, it was never intended to "provide blanket exculpation for irate or distraught accused".²⁸⁶

The crucial case which set out the test for the defence of non-pathological incapacity is the case of Laubscher.²⁸⁷ In this case, the Appellate Division finally produced a

²⁸² S v Campher supra (n 8) at 965C-D.

²⁸³ S v Campher supra (n 8).

²⁸⁴ Du Plessis supra (n 182) at 550.

²⁸⁵ H.L.A Hart Punishment and responsibility (1968) at 181 cited by Hoctor supra (n 1) at 111.

²⁸⁶ Hoctor supra (n 1) at 131.

²⁸⁷ S v Laubscher supra (n 1). In this case the accused was charged with the murder of his father-in-law (count 1) and attempted murder of four other relatives, (count 2, 3, 4 and 5) including his wife and son. The accused pleaded not guilty to all counts but was convicted of murder with extenuating circumstances and sentenced to six years' imprisonment. The accused appealed his conviction and sentence, placing in issue temporary lack of criminal capacity at the time of commission of the alleged crime. The accused alleged that he suffered a total psychological breakdown or temporary

theoretical framework to add to the foundations that had been laid down in the previous cases.²⁸⁸ The court distinguished between statutory criminal incapacity and incapacity caused by non-pathological causes which may be momentary in nature.

Although the court held that the accused did possess criminal capacity although diminished to a degree, non-pathological incapacity could in principle lead to an acquittal.²⁸⁹

The court (per Joubert JA) delineated the recognised psychological characteristics of criminal capacity as follows:

“To be criminally liable, the perpetrator must at the time of the commission of the alleged offence have criminal capacity. Criminal capacity is a prerequisite for criminal liability. The principle of criminal capacity is an independent subdivision of the doctrine of *mens rea*. . To be criminally accountable, a perpetrator's mental faculties must be such that he is legally to blame for his conduct. The recognised psychological characteristics of criminal capacity are: (1): the ability to distinguish between the wrongfulness or otherwise of his conduct. In other words, he has the capacity to appreciate that his conduct is unlawful. (2) The capacity to act in accordance with the above appreciation in that he has the power to refrain from acting unlawfully; in other words, that he had the ability to exercise free choice as to whether to act lawfully or unlawfully. If either one of these psychological characteristics is lacking, the perpetrator lacks criminal capacity, [for example] where he does not have the insight to appreciate the wrongfulness of his act. By the same token, the perpetrator lacks criminal capacity where his mental powers are such that he does not have the capacity for self-control”.²⁹⁰

disintegration of his personality. The court confirmed the conviction in regard to count 1,2,3 and 4; however, in respect of count 5, the conviction and sentence of one year imprisonment was set aside. The court held “that the appeal succeeds to the extent that the sentences imposed by the court a quo on count 1,2,3 and 4 are substituted by the following: (i) On count 1, six years imprisonment of which half is suspended for a period of five years on condition that the appellant is not convicted during the period of suspension of an offence of which violence against a person is an element and in respect of which he is sentenced to imprisonment without the option of a fine. (ii) On counts 2,3 and 4 each, one years imprisonment which is ordered to run concurrently with the sentence on count 1”(translated by Burchell and Milton Cases and Materials 2nd ed (2000) at 314-322).

²⁸⁸ Hoctor supra (n 1) at 126.

²⁸⁹ S v Laubscher supra (n 1) at 167H-I.

²⁹⁰ S v Laubscher supra (n 1) at 166D-167A , translated by S. Krause “Defences available to battered women who kill their abusers – A comparative analysis” (2009) PhD, University of KwaZulu-Natal at 73; see L.M. Van Der Walt “Making a muddle into a mess?: The Amendment of s78 of the Criminal Procedure Act” (2002) 15 SACJ 242 at 244.

In Laubscher²⁹¹ in drawing the distinction between non-pathological incapacity and pathological incapacity, Joubert JA stated:

“to be criminally accountable, a perpetrator’s mental faculties must be such that he is legally to blame for his conduct”.²⁹²

The court emphasised that there was no need to specify the particular type of the condition which led to non-pathological incapacity.²⁹³ The court cemented the existence of the defence by using the term “nie-patologiese ontoerekeningsvatbaarheid” (non-pathological incapacity). This formulation of the defence in Laubscher²⁹⁴ remains the classic statement on the matter to this day.²⁹⁵

However, despite the recognition of the defence in Laubscher,²⁹⁶ some time had passed before it was successfully raised in the Appellate Division.

The issue of emotional stress serving as a complete defence emerged in the case of Wiid,²⁹⁷ the appellant who was convicted of murder in a court *a quo* for the killing of her husband. The deceased abused the appellant numerous times during their marriage. On the day of the killing, the appellant was assaulted severely. There were some indications that the appellant suffered a concussion as a result of the assault. After the assault, the appellant shot the deceased several times killing him. The appellant was convicted of murder with extenuating circumstances and sentenced to five years’ imprisonment which was suspended in totality.

The appellant appealed against her conviction. She alleged that her relationship with the deceased “reached breaking point” as a result of an assault on the accused by the

²⁹¹ S v Laubscher supra (n 1).

²⁹² S v Laubscher supra (n 1) at 166G-167A, translated by Krause supra (n 290) at 73.

²⁹³ Krause supra (n 290) at 73.

²⁹⁴ S v Laubscher supra (n 1).

²⁹⁵ Hoctor supra (n 1) at 127; See S v Calitz (1990) 2 SACR 119 (A) where a general test for capacity was given recognition despite the fact that in this case the defence was not successful.

²⁹⁶ S v Laubscher supra (n 1).

²⁹⁷ S v Wiid supra (n 8).

deceased shortly before the killing. The appellant alleged that the deceased also threatened her.

The appellant further stated that she did not have any recollection of the killing and may have acted unconsciously and did not appreciate the unlawfulness of her conduct. Furthermore, she was not able to exercise self-control over her conduct and therefore not criminally accountable. The appellant further stated that her loss of criminal capacity was temporary and not due to any permanent or temporary mental illness or defect in terms of section 78 of the Criminal Procedure Act.

The court found that that a reasonable doubt existed as to the voluntariness of the appellant actions. The court could not reconcile the fact that the appellant loved the deceased yet could have consciously fired seven shots at him. The court accepted the possibility that the appellant may have not been fully conscious when the shots were fired. Therefore, the court found that the appellant lost self-control. The court was thus of the view that a reasonable doubt existed as to whether the appellant possessed criminal capacity at the time of the killing and thus the accused should be given the benefit of such doubt. The appeal thus succeeded.²⁹⁸

The court (as per Goldstone AJA) cited Laubscher,²⁹⁹ using the formulation of the test in that case. The court held that the state failed to prove that the Appellant possessed criminal capacity beyond a reasonable doubt at the time of the killing, and was therefore acquitted on this basis thus the defence of non-pathological incapacity was acknowledged and succeeded as a result of the application of this principle. The source of dysfunction of the appellant's conscious mind was not relevant to determine liability; the importance was placed on the fact that her capacity to appreciate the wrongfulness of her conduct or to act in accordance with such appreciation was disturbed.³⁰⁰ The Appellate Division placed emphasis on the onus of the State to disprove the defence beyond a reasonable doubt where a factual foundation of the defence had been laid.

²⁹⁸ S v Wiid supra (n 8), See discussion by H.Ludsin “Notes and Comment- Ferreira v The State: A victory for women who kill their abusers in non-confrontational situations” (2004) 20 South African Journal on Human Rights 642 at 175-176.

²⁹⁹ S v Laubscher supra (n 1).

³⁰⁰ S v Wiid supra (n 8).

In the case of Smith³⁰¹ the issue “emotional storm” and its bearing on criminal capacity was also addressed. The court stated:

“I assume for the present purposes that what was described as an “emotional storm” or “emotional flooding of the mind” can result in loss of criminal capacity, that is that such an emotional disturbance could result in a person being, in the words of section 78, incapable of appreciating the wrongfulness of her act or of acting in accordance with appreciation of such”.³⁰²

The cases of Wiid³⁰³ and Smith³⁰⁴ both give recognition to the effect that emotional stress can cause a complete lack of criminal capacity. The court in Wiid³⁰⁵ recognised a general test for the defence of criminal incapacity.

In the case of Kensley³⁰⁶ the accused was convicted of two counts of murder and another two counts of attempted murder. On the night in question, the accused consumed alcohol and began making sexual advances to two transsexual men not knowing that they were in fact transsexual. Upon discovering that they were men not women, the accused lost his temper and shot them. The accused claimed that he could not remember the shooting and he was unable to exercise control over himself. The defence of non-pathological incapacity was rejected by the Appellate Division. The court emphasised the responsibility of criminal law to ensure that law must encourage just behaviour and guard against applying different rules for different individuals. In the case of provocation serving as a defence, an enraged state can be used as an excuse for criminal behaviour.

³⁰¹ S v Smith 1990 (2) SACR 130 (A).

³⁰² S v Smith supra (n 301) at 134J-135A.

³⁰³ S v Wiid supra (n 8).

³⁰⁴ S v Smith supra (n 301).

³⁰⁵ S v Wiid supra (n 8).

³⁰⁶ S v Kensley supra (n 12), see further the cases of S v Ingram 1995 (1) SACR 1 (A) at 4-5 and S v Kalogoropoulos 1993 (1) SACR 12 (A) where the court placed emphasis on the requirement that the accused must lay a factual foundation in order for the defence of non-pathological incapacity to succeed.

Van den Heever JA stated:

“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 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.”³⁰⁷

In the case of Gesualdo³⁰⁸ the court in this case emphasised that the defence of non-pathological incapacity is one of law and not of psychology.³⁰⁹ In this case, the accused was charged with murdering the deceased, a fellow immigrant from Argentina. The accused led in evidence that the deceased had exploited him financially and abused him personally when confronted about the exploitation.³¹⁰ The accused was stressed and angry on the day of the killing. He claimed that he felt betrayed and powerless. The accused personal circumstances contributed to his stress and anxiety, as he was a foreigner who struggled to communicate in a different language, this was exacerbated by the fact that he was away from his family. On the day of the killing, the accused came up to the deceased; a witness described the accused as being angry and appearing out of control. The deceased challenged the accused and said “are you going to kill me?”

The accused then fired five shots at the deceased after apparently being driven over the edge by the deceased’s arrogant behaviour. The accused suffered total amnesia and was later found wandering the streets in a totally uncomprehending state. When he was informed of the killing he wept. After psychiatric evaluation the accused was certified fit to stand trial and found not to be mentally ill. He was found to have amnesia after the killing and experienced a deep sense of remorse for killing the deceased. The accused was found to have a repressive personality and hence was capable of angry outbursts or bouts of rage.³¹¹ The court found that the defence had laid a factual foundation for the

³⁰⁷ S v Kensley supra (n 12) at 658g-i.

³⁰⁸ S v Gesualdo 1997 (2) SACR 68 (W).

³⁰⁹ For discussion see N.Boister “General principles of Liability” (1995) 10 SACJ 367.

³¹⁰ S v Gesualdo supra (n 308) at 70b-72f.

³¹¹ S v Gesualdo supra (n 308) at 74a-e.

defence after considering the accused's amnesia, his remorse and general behaviour. The defence contended that the accused did not satisfy the second leg of the capacity test.³¹²

The court stated:

“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.”

Borchers J relied on the leading cases at the time, Kalagoropoulos³¹³ and Wiid³¹⁴ and Moses³¹⁵ and stated that the defence of non-pathological incapacity was one of law and not psychology.³¹⁶ Instances where the defence of provocation and emotional stress due to non-pathological incapacity being successful were arguably few and far between, this until the notorious cases of Nursingh³¹⁷ and Moses^{318 319}.

In the case of Nursingh³²⁰ the accused, a university student was charged with three counts of murder after he shot and killed his mother and his maternal grandparents. The accused alleged that at the time of the shooting he suffered an “emotional storm” which was as a result of prolonged and severe sexual, psychological and physical abuse mainly by his mother.³²¹ The defence stated that this abnormal upbringing created a personality make-up which was predisposed to violent eruptions of anger when faced with certain circumstances. The defence attempted to lay a factual foundational basis for the defence of non-pathological incapacity based on emotional stress and provocation by relying on expert evidence of psychiatrist and psychologists. Expert witnesses on behalf of the defence were of the opinion that the accused suffered an altered state of consciousness

³¹² S v Gesualdo supra (n 308) at 77d.

³¹³ S v Kalagoropoulos supra (n 306).

³¹⁴ S v Wiid supra (n 8).

³¹⁵ S v Moses supra (n 16).

³¹⁶ S v Gesualdo supra (n 308).

³¹⁷ S v Nursingh supra (n 16).

³¹⁸ S v Moses supra (n 16).

³¹⁹ For critical analysis of S v Nursingh supra (n 16) and S v Moses supra (n 16) see chapter 5 at 213.

³²⁰ S v Nursingh supra (n 16).

³²¹ The defence led evidence of prolonged sexual abuse by his mother, two undisputable aspects which led support to these allegations were; the accused had a bed in his mother's room despite having his own separate room, secondly, the accused's recent experience of sexual aversion.

at the time of the shooting. This altered state of consciousness allegedly deprived the accused of an awareness of normality. He had a mental state where his intellect and emotions were separated.³²²

The psychiatrist stated that despite the accused's goal-directed behavior “he would be using no more intellect than a dog biting in a moment of response to provocation”. The court accepted that accused's series of goal-directed acts constituted only one act in each case.³²³

According to the psychiatrist this syndrome is well documented in psychiatric research and literature. This state was brought about by provocation by his mother, and together with his personality make-up and years of abuse triggered a state of altered consciousness.³²⁴

The psychologist on behalf of the defence stated further that the accused suffered an

“...acute catathemic crisis resulting in an overwhelming of the normal psychic equilibrium by an all-consuming rage , resulting in the disruption and the displacement of logical thinking manifesting itself in an explosion of aggression that frequently leads to homicide”.³²⁵

Expert witnesses stated that in certain relationships, conflict leads to “unbearable tension”. The built-up tension is released in a violent way when triggered by a certain event.³²⁶ This type of an occurrence is not caused by a pathological defect and “ordinary motor movements of the body can take place with normal efficiency”.³²⁷

The prosecution did not lead expert testimony to challenge the defence raised by the accused in this case. The accused was subsequently acquitted on all three counts of murder. Squires J stated that the accused succeeded in laying a factual foundation strong enough to cast a reasonable doubt on the presence of criminal capacity.³²⁸

³²² S v Nursingh supra (n 16) at 333D-E.

³²³ S v Nursingh supra (n 16) 333D-E.

³²⁴ S v Nursingh supra (n 16).

³²⁵ S v Nursingh supra (n 16) at 333e-h.

³²⁶ S v Nursingh supra (n 16) at 333I.

³²⁷ Burchell and Milton supra (n 15) at 285-286 discussing S v Nursingh supra (n 16) at 333I.

³²⁸ S v Nursingh supra (n 16).

Burchell states that it is difficult to find fault with the judgment of Squires J in Nursingh³²⁹ judgment, since evidence was heard and the learned judge formed the opinion that there was a reasonable possibility that the accused was being truthful and that the expert psychologist and psychiatrist testimony led by the defence, although uncontested, was compelling. Since the test for criminal capacity is subjective, when doubt emerges as to the presence of capacity, the accused must be given the benefit of that doubt and receive an acquittal.³³⁰

Apart from the controversial case of Nursingh,³³¹ the case of Moses³³² is also viewed as controversial for the acquittal of the accused as well as debate regarding the manner in which of the principles underpinning the defence of non-pathological incapacity due to provocation and emotional stress were applied.

In this case, the accused was charged with the murder of his homosexual lover together with one count of robbery. The accused stated that on the day of the killing he and deceased had unprotected intercourse. The accused stated that he had become extremely attached to the deceased throughout their three month relationship. After engaging in their first act of intercourse, the accused testified that the deceased informed him that he had AIDS; the accused was at first in disbelief but noticed that the deceased was serious. The accused realized that the deceased was telling the truth and was horrified at the deceased's revelation especially after engaging in unprotected intercourse. The accused, who has a history of violent behaviour, stated that he felt betrayed as he loved the deceased deeply.³³³

In his testimony, the accused stated that he was not sure of all the thoughts that were running through his mind at the time of the incident, but does recall an overwhelming feeling of anger and fear of dying a horrible death as a result of contracting the HIV virus from the deceased. The accused said that he felt deep hate towards the deceased

³²⁹ S v Nursingh supra (n 16).

³³⁰ Burchell and Milton supra (n 15) at 286.

³³¹ S v Nursingh supra (n 16).

³³² S v Moses supra (n 16).

³³³ S v Moses supra (n 16) at 705c, e-f.

for abusing his trust by urging him to have intercourse, which was unprotected; even though the deceased knew that he was HIV positive.³³⁴

The accused also stated that the deceased's betrayal brought back memories of sexual abuse he endured when he was a child. Upon the deceased's shocking revelation, the accused flew into a rage and successively attacked his lover with an ornament, a small knife and also a larger knife.³³⁵

Similarly to the Nursingh³³⁶ case, the defence led expert testimony from psychologists and psychiatrists in an attempt to cast a reasonable doubt regarding the presence of criminal capacity.

Expert witnesses testified that the accused was in an “annihilatory rage”³³⁷ and as a result, he experienced a collapsing of controls which deprived him of the requisite capacity and therefore should not be held criminally liable for the killing of the deceased.³³⁸

The court stated:

“Dr.Gittleston testified that he believed Mr. Moses knew what he was doing at the time of the killing. He would have had the capacity to foresee that Gerhard would be killed. However, his capacity to exert normal control over his actions and also to consider his behavior in the light of what was wrong was significantly impaired at the time of the killing.”³³⁹

The court further stated:

“Dr.Gittleston testified further that in a state of rage one’s capacity to retain control is definitely impaired. With specific reference to the accused, it was possible for a state of rage to have continued to such a degree that the loss of control or partial loss of control lasted throughout the time that the killing took place. Despite the killing, the accused’s capacity to control his behavior in accordance with what he knew was right and wrong, was impaired. While he knew that it was

³³⁴ S v Moses supra (n 16) at 705i.

³³⁵ S v Moses supra (n 16) at 705i.

³³⁶ S v Nursingh supra (n 16).

³³⁷ S v Moses supra (n 16) at 709h-i

³³⁸ S v Moses supra (n 16) at 708G-711A.

³³⁹ S v Moses supra (n 16) at 710c-d.

wrong in principle, his awareness of the wrongfulness of what he was doing at the time was also impaired”.³⁴⁰

Expert psychiatric evidence being led by the prosecution was dismissed by the court (as per Hlophe J) that described it as being unhelpful and therefore chose to accept the expert testimony of the defence experts instead.³⁴¹

On this basis, the court acquitted the accused due to the lack of criminal capacity at the time of the killing. This judgment has received criticism for the possible impact it might have on future cases. The Moses³⁴² judgment has been criticized for allowing the defence of non-pathological incapacity based on provocation to prevail in a situation where the killing did not arise after a long history of abuse or emotional stress.³⁴³

The court stated that the accused’s self-control was “significantly impaired”, this description has been criticized for being ambiguous since it fails to indicate whether the accused suffered a total absence of self-control or simply a form of diminished self-control.³⁴⁴ The distinction is of great importance as diminished self-control affects sentence³⁴⁵ whereas a total lack of self-control would lead to an acquittal as it directly affects liability.³⁴⁶

³⁴⁰ S v Moses supra (n 16) at 710h-i.

³⁴¹ Hoctor supra (n 1) at 133 discussing S v Moses supra (n 16) at 712a-j.

³⁴² S v Moses supra (n 16).

³⁴³ Hoctor supra (n 1) at 133.

³⁴⁴ S v Moses supra (n 16) at 710H-I the court stated “Dr.Gittleson testified further that in a state of rage one's capacity to retain control is definitely impaired. With specific reference to the accused, it was possible for a state of rage to have continued to such a degree that the loss of control or partial loss of control lasted throughout the time that the killing took place. Despite the killing, the accused's capacity to control his behaviour in accordance with what he was right and wrong, was impaired. While he knew that it was wrong in principle, his awareness of the wrongful of what he was doing at the time was also impaired.”

³⁴⁵ Speirs “Should provocation/emotional stress be regarded as a complete defence to criminal liability” (2002) Responsa Meridiana 65 at 72.

³⁴⁶ Louw supra (n 215) at 214-215; De Vos, P. “S v Moses 1996 (1) SACR 701 (C) Criminal capacity, provocation and HIV” (1996) 9 SACJ 354 at 359.

Louw for one has criticized the judgment for not providing sounder reasons for its finding, referring to case and academic authority not being cited. Louw has criticized the court for its acceptance of the psychiatric testimony where it was stated that the killings could be regarded as “one and the same eruption”.³⁴⁷³⁴⁸ Furthermore, Louw stated that “the analogy of the intellect required of a dog when biting a human being accurately firing ten bullets is a strained one”.³⁴⁹

The Moses³⁵⁰ judgment, like Nursingh,³⁵¹ attracted a lot of critical scrutiny and raised old fears about a defence based on the inability to control intense emotions.³⁵²

2.5. The leading case of Eadie

The case of Eadie³⁵³ is a landmark case in the area of non-pathological incapacity due to provocation and emotional stress and has redefined the South African law and the principles governing the defence. Arguably the two most controversial aspects of the judgment relate to conflation of the defences of sane automatism with non-pathological incapacity and secondly, the apparent introduction of an objective test into the capacity inquiry.³⁵⁴

This case related to “road rage”. The exact ambit of this term is not clear but it is understood that it encompasses a number of volatile emotions such as aggression, frustration and the feeling of authority and power whilst driving and the mixture of emotions create a stressful condition which leads to road rage.³⁵⁵

³⁴⁷ S v Moses supra (n 16) at 339c-d.

³⁴⁸ Louw supra (n 215) at 209.

³⁴⁹ Louw supra (n 215) at 213.

³⁵⁰ S v Moses supra (n 16).

³⁵¹ S v Nursingh supra (n 16).

³⁵² Hoctor supra (n 1) at 131, see discussion in Chapter 5 at 213.

³⁵³ S v Eadie supra (n 18).

³⁵⁴ See Chapter 5 at 225 for a critical analysis of S v Eadie supra (n 18).

³⁵⁵ S.V Hoctor “Road rage and reasoning about responsibility” (2001) 14 SACJ at 195 at 196.

The case of Eadie³⁵⁶ was heard in the Provincial Division of the Cape High Court where the accused pleaded not guilty to murder and defeating/obstructing the course of justice. The accused raised the defence of non-pathological incapacity primarily due to provocation and road rage.³⁵⁷ The court was given the opportunity to consider the impact of road rage on criminal liability.³⁵⁸

In this case the accused, who after a night out with his family and after consuming a considerable amount of alcohol, was driving home when he saw the deceased driving behind his motor vehicle. The deceased who was also in a state of intoxication, overtook the appellants' motor vehicle and then slowed his vehicle down to such an extent that the accused could not overtake the vehicle. After a while the accused managed to overtake the deceased's vehicle. The deceased then began to increase his speed and drove close-up the rear of the accused's vehicle. The deceased also had the lights of his car on bright. Despite accelerating, the accused failed to put a distance between his vehicle and that of the deceased. The accused eventually overtook the deceased's vehicle; however, the previous pattern repeated itself. This enraged the accused further.

Eventually, the vehicles stopped at a set of traffic lights. The accused, who was seething with anger, stepped out of his vehicle with his hockey stick in hand. He approached the deceased's vehicle then smashed the hockey stick to pieces against the deceased's vehicle. The accused then proceeded to pull the deceased out of his vehicle and then started his fatal assault on the deceased.

The assault consisted of kicking the deceased and punches to the head. The accused admits to dragging the deceased out of the vehicle and stamping his face with the heel

³⁵⁶ S v Eadie supra (n 18).

³⁵⁷ S v Eadie supra (n 18) at para 1

³⁵⁸ Hoctor supra (n 355) at 196 states that prior to the Eadie case South African courts did not have the opportunity to consider implications of a defence based on road rage. In the case of S v Sehlako 1999 (1) SACR 67 (W) at 72b-c the court stated as per Borchers, J. "Each and every person who drives a vehicle can expect to be involved in a collision at some or other time. It is wholly unacceptable that such a person, even if he is the cause of such collision, can be executed on the scene by the other driver. In my view even where an accused personal circumstances are extremely favourable ...they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by the other irate drivers".

of his foot. The accused in a fit of road rage killed the deceased. The accused was subsequently charged with murder of the deceased. The defence of non-pathological incapacity was raised by the appellant.

The court as per Griesel J assessed the psychiatric evidence adduced by the State and the defence and assessed credibility of the accused as a witness, after assessing the circumstances, the court convicted the accused of murder and defeating the course of justice. The accused was sentenced to nine months' imprisonment.³⁵⁹ The court stated that it could not hold that the accused's version that he was unable to control his actions at the time of the killing as reasonably possibly the light of the evidence.³⁶⁰

The court held that argument put forward by the defence that the accused lacked conative capacity and in the alternative, a lack of intention to kill due to heightened emotional arousal could not be sustained.³⁶¹ Counsel for the defence stated that the accused lacked the ability to control his actions due to a culmination of emotional stress, provocation, intoxication on his mind.³⁶²

The significant aspect of this judgment was the court's conflation of the defence of sane automatism and criminal incapacity. This judgment has drawn criticisms for conflating the two notions.³⁶³

The court further stated that after examination of the accused's actions indicated "focused goal-directed behaviour".³⁶⁴ The accused's denial of his role in the assault of the deceased and attempts to hide the hockey stick indicated deceit.³⁶⁵ These factors, taken into consideration undermined the accused's version of events as well as the

³⁵⁹ S v Eadie supra (n 18) at 184d-e.

³⁶⁰ S v Eadie supra (n 18) at 184d-e.

³⁶¹ S v Eadie supra (n 18) at 184e-185b).

³⁶² S v Eadie supra (n 18) at 174a-b.

³⁶³ Hoctor supra (n 1) at 134, Louw supra (n 5) at 205; See chapter 5 at 226 for further discussions of the conflation of the defence of sane-automatism with the defence of non-pathological incapacity in S v Eadie supra (n 18).

³⁶⁴ S v Eadie supra (n 18) at 181a.

³⁶⁵ S v Eadie supra (n 18) at 181d-h and 182g.

reliability of the accused as a witness.³⁶⁶ The court found that the accused did not lose control but lost his temper after succumbing to road rage.

The court outlined the defence of criminal incapacity by stating:

“In our common law there were only two categories of persons who lacked criminal capacity, namely children under the age of seven years of age and persons who were insane. Since the early 1980’s; however, the defence of criminal incapacity has been extended to other categories of persons; first to the intoxicated and later also those acting under extreme provocation. The last mentioned category has come to be described in the jargon as “non-pathological criminal incapacity...”.³⁶⁷

Griesel J stated further that:

“There appears to be some confusion between the defence of temporary non-pathological criminal incapacity, on the one hand, and sane automatism, on the other. The academic writers... point out that they are in fact two distinct and separate defences. 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”.³⁶⁸

This pronouncement was a significant one, according to the court the defence of sane-automatism was equated with the defence of criminal incapacity. The trial court rejected the accused defence and he was sentenced to fifteen years imprisonment, five of the fifteen years were conditionally suspended.

The accused subsequently appealed both the conviction and sentence.³⁶⁹ The Supreme Court of Appeal in reaffirming the decision of the High Court stated that based on the facts of the case the accused could not successfully raise the defence of non-pathological incapacity as he merely lost his temper and not control of his senses.³⁷⁰

The central issue of the appeal involved the alleged lack of criminal capacity suffered by the accused at the time the killing was committed. The accused admitted that at the

³⁶⁶ S v Eadie supra (n 18) at 182g-h.

³⁶⁷ S v Eadie supra (n 18) at 177d-c.

³⁶⁸ S v Eadie supra (n 18) at 178 A-B.

³⁶⁹ S v Eadie supra (n 18).

³⁷⁰ S v Eadie supra (n 18) at 182II-J.

time of the killing he was able to distinguish between right and wrong (cognitive capacity); however, he contested that he was not able to act in accordance with the appreciation of right and wrong, thus lacking conative capacity.

Navsa JA proceeded by stating:

“It is well established that when an accused person raises a defence of temporary non-pathological 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.”³⁷¹

The state led evidence at trial by psychologist Stephen Lay who assessed the accused and observed:³⁷²

1. The accused acted rationally and purposely and performed goal directed acts and possessed cognitive ability.
2. The accused did not suffer a lack of criminal capacity when the deceased was killed
3. The accused did not suffer a loss of self-control at the time of the killing. The evidence indicated that the accused displayed poor impulse control
4. The accused’s actions were brought on by anger and alcohol did play a role in the accused’s conduct.

Psychiatrist Dr Sean Kaliski, a sceptic of the defence of non-pathological incapacity due to provocation and emotional stress testified in support of the State and made the following findings:³⁷³

³⁷¹ S v Eadie supra (n 18) at para 2.

³⁷² S v Eadie supra (n 18) at para 13.

³⁷³ S v Eadie supra (n 18) at para 14-16.

1. The accused possessed both cognitive and conative functions at the time of the fatal assault.
2. The defence of non-pathological incapacity has never been successfully established and can be equated with the defence of sane automatism.
3. Factors such as emotional stress may disinhibit a person however it could not have the effect of depriving a person of control.
4. If presented with compelling facts, the defence of non-pathological incapacity due to provocation and emotional stress may be valid.

Dr Ashraf Jedaar testified in support of the accused's and testified in respect of the following findings:³⁷⁴

1. The accused suffered an altered state of consciousness or dissociative state which indicated a heightened emotional state and may have affected cognitive functions thus resulting in the inability to exercise control over ones actions.
2. The accused was concerned for the safety of his family
3. The defences of sane automatism and non-pathological incapacity are different in that sane automatism deprives an individual of complete cognitive control arising from exceptional emotional arousal.
4. The consumption of alcohol, together with the personality make up of the accused and the effect of the provocation by the deceased resulted in the accused reaching a stage where his actions were involuntary. While in this "heightened emotional state" the accused would have been able to make decisions regarding what and whom he wanted to assault.

One of the main features of the Eadie³⁷⁵ judgment is that the court drew no distinction between the defences of non-pathological incapacity due to emotional stress and provocation and the defence of sane automatism³⁷⁶, the court stated:

³⁷⁴ S v Eadie supra (n 18) at para 17-20.

³⁷⁵ S v Eadie supra (n 18).

³⁷⁶ Sane automatism will only succeed as a defence if there is enough cogent evidence that creates a reasonable doubt regarding the voluntary nature of the *actus reus* together with expert evidence that indicate that the *actus reus* is involuntary in nature due to a cause which is not due to a mental illness or defect. The defence of sane automatism requires a proper foundation to be established, although

“I agree with Ronald Louw that there is no distinction between the sane automatism and non-pathological incapacity due to emotional stress and provocation. Decisions of this Court make it clear. I am however, not persuaded that the second leg of the test expounded in Laubsher’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.”³⁷⁷

Ultimately, according to the court the second leg of the test for criminal capacity, that is the test for conative capacity, and the test to determine if conduct was voluntary is the same. Furthermore, Navsa JA seemed dissatisfied with the way the principles of the defence have been applied and was especially critical of the decisions of Moses³⁷⁸ and Nursingh^{379, 380}.

The court adds to the confusion by accepting the findings in Nursingh,³⁸¹ stating that the combination of factors was extreme and unusual.³⁸² Despite the court’s criticisms of the defence of non-pathological incapacity due to emotional stress and provocation, the court admits that such a state is notionally possible.³⁸³ There has been differing

expert evidence may be required to create a factual foundation, ultimately the court has the final decision in making this determination- LAWSA (2004) at 68 cited by Stevens supra (n 13) at 127.

³⁷⁷ S v Eadie supra (n 18) at para 57.

³⁷⁸ S v Moses supra (n 16).

³⁷⁹ S v Nursingh supra (n 16).

³⁸⁰ S v Eadie supra (n 16) at para 48-49.

³⁸¹ S v Nursingh supra (n 16).

³⁸² S v Eadie supra (n 18) at para 47-48; Hoctor supra (n 1) at 137 criticises the reasoning of the court in regard to the acceptance of the result and psychiatric evidence in S v Nursingh supra (n 16) especially since the decisions in S v Arnold supra (n 16), S v Moses supra (n 16) and S v Gesualdo supra (n 307) were rejected by the court. Hoctor, argues that an inconsistent criterion has been applied by the court which “ultimately subverts the rationale of the decision in Eadie especially since the Nursingh case has received widespread criticism from academic writers and from Navsa JA in Eadie who has admitted that the Nursingh judgment “leaves one with a sense of disquiet”.”

³⁸³ S v Eadie supra (n 18) at 59, at para 71 “There is no doubt that in the present case the appellant was provoked and that the deceased behaved badly. The deceased and the appellant had no business being on the road in their state of insobriety. The deceased’s aggressive and provocative behaviour did not entitle the appellant to behave as he did. It must now be clearly understood that an accused can only

academic opinion regarding another aspect of the judgment, that is whether the court introduced an objective test into the test for criminal capacity. The court stated that although in principle the test for capacity remains subjective, the test must be applied cautiously.³⁸⁴

The court highlighted its concerns by stating:

“I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused’s ipse dixit concerning his state of mind. It appears to me to be justified to test the accused’s evidence about his state of mind, not only against his prior and subsequent conduct but also against the court’s experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused’s evidence about his state of mind and as necessary brake to prevent unwarranted extensions of the defence”.³⁸⁵

Navsa JA cited Burchell’s comments regarding policy considerations and the provocation defence in expressing concern that defence was being misused.³⁸⁶ The court further emphasised the need for the law to move away from a subjective approach to fault to a more objective method of establishing the element. In this regard, Navsa JA contended that the conduct of an accused should be weighed against “human experience, societal interaction and societal norms”.³⁸⁷

The court further expressed its opinions regarding the impact of allowing a person who succumbed to temptation from escaping criminal liability. The court described this situation as an absurdity and that it is not the mark of a self-respecting system of law make such an allowance.³⁸⁸ The court proceeded to trace the development of the defence of non-pathological incapacity by chronologically detailing the previous case

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 the future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of this Court. This 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. For these reasons mentioned earlier in this judgment the appeal is dismissed.”

³⁸⁴ Burchell *supra* (n 2) at 28.

³⁸⁵ *S v Eadie* *supra* (n 18) at 64.

³⁸⁶ *S v Eadie* *supra* (n 18) at para 51.

³⁸⁷ *S v Eadie* *supra* (n 18) at para 45.

³⁸⁸ *S v Eadie* *supra* (n 18) at para 60.

law which dealt with the defence, along with an analysis of criticisms by academic writers who have addressed the manner in which the test for criminal capacity has been applied.³⁸⁹

In an attempt to clear confusion, the court referenced previous cases dealing with the defence of non-pathological incapacity; the court cited the cases of Potgieter³⁹⁰, Cunningham³⁹¹ and Henry.³⁹² However, the defences in these cases were in fact sane automatism.

The court stated:

“It is clear from the decisions in the Potgieter, Henry, Cunningham and Francis cases that the defence of [non-pathological criminal incapacity] has been equated with the defence of automatism.³⁹³

³⁸⁹ S v Eadie supra (n 18) at para 25.

³⁹⁰ S v Potgieter 1994 (1) SACR 61 (A) at 73-4:Kumleben JA in respect of evidence adduced by the accused in support of a defence of non-pathological incapacity stated: “Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact that 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 manifestation of certain emotions, such as fear, panic, guilt and shame may be present after either a deliberate or involuntary act has been committed. The facts...must therefore be closely examined to determine where the truth lies”.

³⁹¹ S v Cunningham 1996 (2) SACR 631 (A) at 638j-639a dealt specifically with the defence of automatism. The defence of sane automatism was rejected due to the defence failing to lay a factual foundation for this defence. “From the judgments of this court referred to in the preceding paragraphs it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test in Laubscher’s case, from which an inference can be drawn that the act in question was not consciously directed, or put differently that it was involuntary act”.

³⁹² S v Henry supra (n 391) at 19I-J the court stated “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”.

³⁹³ S v Eadie supra (n 18) at para 42, See discussion by Hoctor supra (n 1) 135-137.

The court critiqued the defence in the cases of Arnold,³⁹⁴ Moses³⁹⁵ and Gesualdo³⁹⁶ and stated that the operation of the defence in these cases were misconceived and out of line with existing authority by stating: “the approach adopted by this court in the decisions discussed earlier was not followed in these three cases”.³⁹⁷

In respect of this statement, Hoctor argues that it is evident that the problem the court has with each of the cases is that it was accepted that a person who, despite acting consciously, was not able to act in accordance with the appreciation of what is right and wrong due to provocation.³⁹⁸

However, as Hoctor notes, this position has been accepted in the views expressed in Van Vuuren,³⁹⁹ Campher,⁴⁰⁰ Laubscher,⁴⁰¹ Wiid,⁴⁰² Calitz⁴⁰³ and Kalagoropoulos^{404 405}. Furthermore, other than the case of Kensley,⁴⁰⁶ the remaining cases mentioned relate to either automatism rather than incapacity, or the approach adopted is either inconsistent with each other or divergent in their approach towards the defence of non-pathological incapacity.⁴⁰⁷

The court per Navsa JA held:⁴⁰⁸

1. The appellant did not act in a state of automatism at the time of the killing, this being common cause.
2. The appellant possessed the intention to act in a violent and destructive manner.

³⁹⁴ S v Arnold supra (n 16).

³⁹⁵ S v Moses supra (n 16).

³⁹⁶ S v Gesualdo supra (n 308).

³⁹⁷ S v Eadie supra (n 18) at para 47-48.

³⁹⁸ Hoctor supra (n 1) at 137.

³⁹⁹ S v Van Vuuren supra (n 246) discussed in para 30 of S v Eadie supra (n 18).

⁴⁰⁰ S v Campher supra (n 8) discussed at par 31 of S v Eadie supra (n 18).

⁴⁰¹ S v Laubscher supra (n 1) discussed at para 32 of S v Eadie supra (n 18).

⁴⁰² S v Wiid supra (n 7) discussed at para 34 of S v Eadie supra (n 18).

⁴⁰³ S v Calitz supra (n 295) discussed at para 33 of S v Eadie supra (n 18).

⁴⁰⁴ S v Kalagoropoulos supra (n 306).

⁴⁰⁵ Hoctor supra (n 1) at 137.

⁴⁰⁶ S v Kensley supra (n 12).

⁴⁰⁷ Hoctor supra (n 1) at 137.

⁴⁰⁸ S v Eadie supra(n 18) at para 66-71.

3. The appellant acted deceitfully after the killing and this should count against him.
4. The approach of Dr Kaliski to the defence of non-pathological incapacity is preferred to that of Dr Jedaar.
5. The evidence by Dr Jedaar revealed inconsistencies and explanations which were unsatisfactory.
6. The court in Moses dismissed the evidence of Dr Jedaar and this might explain the apparent change of approach to the defence.
7. The appellant suffered a loss of temper and not a loss of control over his actions.
8. The appellant possessed the intention to kill.

2.6. In the aftermath of Eadie

After the landmark decision of Eadie,⁴⁰⁹ Hoctor notes that the cases following the Eadie⁴¹⁰ decision, cite the case but not in the context of the substantive law.⁴¹¹ In the case of Thusi⁴¹² which, like Eadie,⁴¹³ involved a killing arising from road rage. The court took cognisance of comments made in Eadie⁴¹⁴ regarding the stringent approach of the law to those individuals who consciously killed after succumbing to anger.⁴¹⁵

In the case of Beukes⁴¹⁶ the court in citing Eadie,⁴¹⁷ held that the defence of non-pathological incapacity could only be successful if voluntary conduct was absent.⁴¹⁸ For instance, in the case of Khumalo⁴¹⁹, though the court referenced the paragraphs 61, 64 and 65 of the Eadie⁴²⁰ judgment in respect of the value placed on the ipse dixit of the accused, the court did not examine the possible implications of the substantive law.

⁴⁰⁹ S v Eadie, supra (n 18).

⁴¹⁰ S v Eadie supra (n 18).

⁴¹¹ S.V Hoctor "Recent cases -General principles and specific crimes" (2009) 22 South African Journal of Criminal Justice 246 at 253.

⁴¹² S v Thusi 2003 JDR 0027 (T).

⁴¹³ S v Eadie, supra (n 18).

⁴¹⁴ S v Eadie, supra (n 18).

⁴¹⁵ S v Thusi supra (n 410).

⁴¹⁶ S v Beukes 2003 JDR 0788.

⁴¹⁷ S Eadie supra (n 18).

⁴¹⁸ S v Beukes supra (n 414) at para 60-61.

⁴¹⁹ S v Khumalo 2004 JDR 0433.

⁴²⁰ S v Eadie supra (n 18).

In the case of Scholtz⁴²¹ the court applied the same rationale by placing the enquiry into criminal capacity into the policy driven framework of the Eadie^{422, 423}. In making a finding regarding liability of the accused, the court referenced paragraphs 57 and 58 of Eadie⁴²⁴ and determined that Navsa JA's comments were a warning against the inclination to interpret the two stages of the test as two distinct defences.⁴²⁵

Furthermore, in the case of Mate⁴²⁶ the court, although referencing Eadie in the context of psychiatric evidence and the court's approach to expert testimony, chose to cite the test for non-pathological incapacity in the Ingram⁴²⁷ which adopted the traditional two stage test that was set out in the case of Laubscher,⁴²⁸ rather than Eadie.⁴²⁹

A similar observation can be made in Volkman⁴³⁰ where the court referred to test laid down in Laubscher⁴³¹ in the context of discussing s 78 of the Criminal Procedure Act 51 of 1977, rather than the Eadie⁴³² case.

Though the Supreme Court of Appeal has mentioned Eadie⁴³³ in the context of sentencing⁴³⁴ and proof,⁴³⁵ it has yet to tackle the defence of non-pathological incapacity in the light of the approach in the Eadie⁴³⁶ decision. However, the most

⁴²¹ S v Scholtz 2006 (1) SACR 442 (E) at para 61.

⁴²² S v Eadie supra (n 18).

⁴²³ Hoctor supra (n 411) at 253.

⁴²⁴ S v Eadie supra (n 18).

⁴²⁵ S v Scholtz supra (n 421) at para 444h-445b.

⁴²⁶ S v Mate 2005 JDR 0151.

⁴²⁷ S v Ingram supra (n 306).

⁴²⁸ S v Laubscher supra (n 1).

⁴²⁹ S v Eadie supra (n 18).

⁴³⁰ S v Volkman 2005 (2) SACR 402 (C).

⁴³¹ S v Laubscher supra (n 1).

⁴³² S v Eadie supra (n 18).

⁴³³ S v Eadie supra (n 18).

⁴³⁴ See S v Karolia 2006 (2) SACR 75 (SCA) and S v Ntshasa 2011 (2) SACR 269 (FB).

⁴³⁵ See S v Crossberg 2008 3 All SA 329 (SCA) at para 147.

⁴³⁶ S v Eadie supra (n 18).

recent confirmation of the Eadie⁴³⁷ judgment comes from the case of Marx.⁴³⁸ This case is significant because the court endorsed the finding in Eadie,⁴³⁹ Sangoni J stated that court's conflation of the concept of sane automatism and non-pathological incapacity was binding authority.⁴⁴⁰

In the case of Humphreys,⁴⁴¹ the Supreme Court of Appeal referenced paragraph 16 of Eadie⁴⁴² in discussing emotional stimulus that may give rise to the defence of sane automatism. It was stated that in the absence of expert evidence, the court will need to assess what emotional stimulus could have triggered the unusual condition of a total loss of cognitive control. In this respect, the court stated that such triggers have been located in situations giving rise to provocation, stress and frustration.

⁴³⁷ S v Eadie supra (n 18).

⁴³⁸ S v Marx 2009 (1) All SA 299 (E), in the case the accused was convicted of murdering his wife. On the day of the killing, the accused's wife (the deceased) returned home from work in an irate mood and confrontational with the accused. She told the accused that she intended on filing for divorce and admitted having an extra-marital affair with her lover. The accused was devastated by hearing this and pleaded with the deceased to reconsider the divorce; the accused also told the deceased that he would commit suicide. The deceased allegedly encouraged the deceased to commit suicide. The accused remembered kneeling on the floor with the revolver in his hand while he claimed the deceased encouraged him to kill himself. At this point the accused claims he his memory was interrupted and the next moment he had a recollection of was a vague memory of feeling as though someone was pulling the gun away from his head. The accused claims that he could not comprehend what the first shot was, whether it was a reconstruction or a drama. After this, the accused could not remember the two shots that were fired at the deceased after that. When the accused regained control of his senses he remembers that his children had awoken from their sleep and questioned him about what was happening. The accused told them that he did not know and then proceeded to take them out of the house without them knowing that their mother was dead. The court found that the defence did not lay a proper factual foundation for the defence of sane automatism which it alleged that the accused acted under.

⁴³⁹ S v Eadie supra (n 18).

⁴⁴⁰ Discussed by Hoctor supra (n 1) at 253-254.

⁴⁴¹ S v Humphreys 2015 (1) SA 491 (SCA).

⁴⁴² S v Eadie supra (n 18).

2.7. Evidential requirements

There is a presumption in law that an accused person possesses the required criminal capacity in cases where there is no evidence, suggesting mental illness. This presumption applies equally to cases where the accused was intoxicated or in an enraged state.⁴⁴³

Although the State bears the onus of proving the presence of criminal capacity beyond a reasonable doubt, the accused is however, under a duty to lay an evidential foundation for the defence which must be sufficient enough to create a reasonable doubt on the point.⁴⁴⁴

In Cunningham, the court mentioned that the State in discharging this onus:

“is assisted by the nature inference that in the absence of exceptional circumstance 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 *actus reus* and if involuntary, that this was attributable to some cause other than mental pathology”.⁴⁴⁵

In regard to evaluation of the defence, supporting evidence in the form of expert testimony is not essential for succeeding, but is advisable in order to corroborate the alleged incapacity at the time of the commission of act; expert evidence is a useful aid to the court since it may shed light on the accused’s mental abilities.⁴⁴⁶

However, cases such as Campher⁴⁴⁷ and Calitz⁴⁴⁸ indicate that expert evidence is not regarded as crucial for the defence to succeed.⁴⁴⁹ It is also unclear if expert evidence is

⁴⁴³ Hoctor supra (n 1) at 128 citing S v Shivute 1991 (2) SACR 656 at 660e, S v Kensley supra (n 12) at 660b-c

⁴⁴⁴ Hoctor supra (n 1) at 129, S v Eadie supra (n 18) at para 2, S v Kalogoropoulos supra (n 306), S v Di Blasi 1996 (1) SACR 1 (A) 631 (A) at 635g-j.

⁴⁴⁵ S v Cunningham supra (n 391) at 635j-636a, S v Eadie supra (n 18) at para 2.

⁴⁴⁶ See S v Wiid supra (n 8) and S v Arnold supra (n 16). See further Snyman supra (n 3) at 166 for a general discussion on expert evidence in cases involving the defence of non-pathological incapacity.

⁴⁴⁷ S v Campher supra (n 8).

⁴⁴⁸ S v Calitz supra (n 295).

required to lay a foundation for the defence. Van Oosten notes that certain dicta indicate that the courts explicitly require expert evidence in the form of psychiatric or psychological evidence for the defence of provocation to succeed.⁴⁵⁰ This is arguably another advantage of raising the defence of non-pathological incapacity over pathological since in the latter defence success hinges on psychiatric evidence.⁴⁵¹

In respect of non-pathological incapacity and psychiatrist observation, the court possesses the discretion on whether to refer the accused for observation in terms of section 79 of the Criminal Procedure Act.⁴⁵²

Hocor states that a court will view the evidence on which the defence of non-pathological incapacity due to provocation and emotional stress is based on with circumspection and such a defence will be more carefully scrutinised. This applies more to cases where the only evidence is the *ipse dixit* of the accused since the trustworthiness of this evidence depends on the authenticity of the factual foundation.⁴⁵³

⁴⁴⁹ See further S v Eadie supra (n 18) at 180e-g, S v Kok 1998 (2) SACR 532 (N) at 545j-546a, S v Laubscher supra (n 1) at 172E-F and S v Volkman supra (n 430) at para 11 and 13.

⁴⁵⁰ Van Oosten supra (n 186) at 141 citing Boshoff AJA in S v Campher supra (n 8) at 966J-967C; S v Wiid supra (n 8) at 564e-f.

⁴⁵¹ Van Oosten supra (n 186) at 146 argues that an accused raising the defence of non-pathological incapacity is at a distinct advantage to an accused raising pathological incapacity in that the latter defence the accused is under the onus of proving the lack of capacity on a balance of probabilities.

⁴⁵² Hocor supra (n 1) at 129.

⁴⁵³ Hocor supra (n 1) at 130 citing S v Kensley supra (n 12) at 658g-h and S v Gesualdo supra (n 308) at 74g-h where the court stated that it “would be unlikely to find that such a state [incapacity] may have existed only by virtue of the accused’s *ipsissima verba*”. See Carstens and Le Roux supra (n 3) at 182.

2.8. Concluding summary

A historical survey of South African law and the development the defence of non-pathological incapacity due to provocation and emotional stress reveals somewhat of a turbulent past. Due to the influence of different parent systems of law, namely Roman and Roman-Dutch law and English law; South African law took a few years to formulate its own unique approach to provocation. Emotions such as anger were historically never considered a complete defence to a killing in South African law or any other jurisdiction.

From this standpoint, the law moved from considering the effect of provocation on criminal intention which was objectively assessed. Ultimately, the law progressed to a stage where intention is assessed subjectively as the focus fell on the state of mind of the accused. These developments eventually led to the re-assessment of the approach to provocation. The advent of a purely subjectively assessed element in criminal capacity changed the landscape of how provocation is treated today.

The emergence of the doctrine “toerekeningsvatbaarheid” marked the broadening of the defence which began towards the latter part of the twentieth century when it was accepted that factors such as intoxication, emotional stress and provocation could in certain circumstances impair criminal capacity.⁴⁵⁴

These factors are not the cause of a mental defect, thus the notion of non-pathological incapacity was born. The courts recognised that criminal incapacity could result from non-pathological causes and defence of non-pathological incapacity based on provocation and emotional stress emerged. In the last two decades, the defence has undergone major development and became a legitimate defence available to those who killed while under emotional stress and provocation. Arguably, one of the most interesting and debatable aspects of the provocation defence in South African law, is the subjective assessment of criminal capacity.

⁴⁵⁴ Hoctor supra (n 1) at 118.

There have been certain contentious acquittals in cases such as Arnold,⁴⁵⁵ Moses⁴⁵⁶ and Nursingh⁴⁵⁷ which further fuelled debate on the acceptability of a defence based on provocation and emotional stress. Furthermore, in an attempt to bring clarity to this area of the law, the leading case of Eadie⁴⁵⁸ has effected fundamental changes to the principles underpinning the defence of non-pathological incapacity which, in a drastic turn of events, has led to uncertainty regarding whether the defence of non-pathological incapacity still exists. The cases decided after Eadie⁴⁵⁹ have not applied the law in light of the changes made in the Eadie⁴⁶⁰ decision, thus the uncertainty emanating from Eadie⁴⁶¹ still persists and the full import of this case has not been clarified.

⁴⁵⁵ S v Arnold supra (n 16).

⁴⁵⁶ S v Moses supra (n 16).

⁴⁵⁷ S v Nursingh supra (n 16).

⁴⁵⁸ S v Eadie supra (n 18).

⁴⁵⁹ S v Eadie supra (n 18).

⁴⁶⁰ S v Eadie supra (n 18).

⁴⁶¹ S v Eadie supra (n 18).

CHAPTER 3: THE DEFENCE OF PROVOCATION IN ENGLISH LAW

3.1. Introduction

In England the defence of provocation exists as an independent partial defence and applies to a charge of murder only. The requisite *mens rea* element must be therefore be proven by or conceded by the accused. The defence essentially serves to reduce a killing which would otherwise be considered murder, to the lesser charge of manslaughter. The English position is that provocation is on a fundamental level insufficient to qualify as a complete defence.⁴⁶²

The provocation defence is not without immense controversy and as a result has undergone reformation in recent times.⁴⁶³ The defence originally existed as a common-law defence for centuries until the enactment of section 3 of the Homicide Act of 1957 which modified the defence at common law.⁴⁶⁴ The enactment of the Coroners and Justice Act 2009 abolished the partial defence in terms of section 3 of the Homicide Act 1957 and the common law, and has brought about significant changes to the defence.⁴⁶⁵

The new defence, in terms of ss 54-56 Coroners Act 2009, is called loss of self-control. In terms of the new defence, it is not mandatory that the defence be left with the jury in every case. This is in terms of s 54(6) which states that the defence should only be left with the jury if “sufficient evidence is adduced to raise an issue with respect to the defence”, which is dependent on “evidence being adduced on which, in the opinion of

⁴⁶² A.J. Ashworth “The Doctrine of Provocation” (1976) 35(2) Cambridge Law Journal at 292; M.J. Allen, “Provocation’s Reasonable Man: A plea for self-control” (2000) 64 Criminal Law Review at 216; See R v Hussain and Hussain (2010) EWCA Crim. 94 where the court stated that in cases involving assault, provocation can be considered in determining sentence only and cannot provide a defence to the assault.

⁴⁶³ Ormerod *supra* (n 58) at 506.

⁴⁶⁴ J.Herring Criminal Law Text, Materials and Cases, 6th ed (2014) at 237, voluntary manslaughter is applied to killings which would be considered murder if extenuating circumstances were absent, essentially the law acknowledges the despite that presence of *mens rea* and *actus reus* the accused is not deserving of a murder conviction.

⁴⁶⁵ Section 54 of the Coroners and Justice Act 2009 abolished the provocation defence and in its place is ss 54 and 55 containing the new loss of control defence.

the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply". It is likely that trial judges will leave the defence to the jury in cases where evidence could satisfy the test in terms s 54(6), this applies in cases where the defence chooses, for strategic reasons, not to plead loss control as a defence.

Evidence indicating loss of control may present itself in the case presented by the Crown; however, if such evidence is lacking, there is an evidential burden on the defence. If evidence of loss of control is absent in the case presented by the Crown and if the defence fails to discharge the evidential burden, then the judge is entitled to withdraw the defence from the jury's consideration. The burden of proof rests on the Crown; therefore, evidence which is likely to create a reasonable doubt, in the opinion of the jury, as to whether the defendant lost his self-control, is sufficient.⁴⁶⁶

The essential components of the new defence are:

1. that a loss of self-control was suffered;
2. the loss of self-control was attributed to a qualifying trigger;
3. an individual of the same sex and age of the defendant, with a normal degree of tolerance and self-restraint would have reacted in the same way as the defendant did.⁴⁶⁷

Historically, the defence of provocation in English law has its roots in the common law dating back before the 17th century. During the 17th century the defence started to "assume a recognizable form and function".⁴⁶⁸ The provocation defence developed and evolved over many centuries with its purpose being in the law's duty to acknowledge and accommodate human frailty. However, it is also argued that the other reason for this partial defence is that it serves to avoid the mandatory sentence of life imprisonment for a conviction of murder, it has even been argued that this is the only need that it serves, and if the fixed life term for murder was abolished the partial defences would be "superfluous".⁴⁶⁹

⁴⁶⁶ Ormerod supra (n 58) at 509-510.

⁴⁶⁷ Herring supra (n 464) at 238, See Dawes [2013] EWCA Crim. 322.

⁴⁶⁸ Ashworth supra (n 462) at 292.

⁴⁶⁹ G. Mousourakis "Culpable Homicide and the Provocation Defence in English Law: A Historical and Contemporary Analysis" (2009) 42(1) Housei Riron at 39.

In terms of the rationale for the defence, it is thought to be based on both excusative and justificatory considerations; however, ascertaining its precise rationale in English law has been elusive.⁴⁷⁰ Although the principles of justification and excuse⁴⁷¹ are different, the common element between both principles is that if either is not proved, then neither can a conviction nor punishment follow.⁴⁷²

The provocation defence is and has always been a controversial area within the criminal justice system and has been described as a perennial problem.⁴⁷³ Horder argues that provocation has had a remarkable impact on criminal responsibility even before modern times.⁴⁷⁴ Its continued impact on criminal responsibility alludes to its importance in the criminal law system and society itself; therefore, the tracing of its origins and the study of the evolution of its underlying principles is an important first step in understanding the nature of the defence as it stands currently.

3.1.1. Tracing the development of the provocation defence in English law

In the early stages of its development, English law categorized killings based on the circumstances in which they were committed. The reigning monarch exercised jurisdiction over all felonies, this was done to support the authority of the monarchy. In 1278 the Statute of Gloucester was enacted and in terms of this law, if the reason for the

⁴⁷⁰ G. Mousourakis “Emotion, choice and the rationale of the provocation defence” (1990) 30 Cambrian Law Review 21 at 21.

⁴⁷¹ J. Horder “Between provocation and diminished responsibility” (1999) 10 Kings College of Law Journal at 143 states that in murder cases the distinction between the pleas of provocation and diminished responsibility in law represents an ethical distinction between partial excuse for wrongdoing in provocation cases and partial denial of responsibility in cases involving diminished responsibility. The boundary between the two defences is difficult to draw. Horder argues that in certain cases this boundary has been blurred and certain cases of diminished responsibility have been wrongly categorised as provocation.

⁴⁷² Hart *supra* (n 285) at 14.

⁴⁷³ Allen *supra* (n 462) at 216.

⁴⁷⁴ J. Horder Provocation and responsibility (1992) at 5; Mousourakis *supra* (n 469) at 39-40.

killing was self-defence or *se defendendo*, then the matter could be referred by the trial judge to the monarch who had the authority to grant a royal pardon.⁴⁷⁵

Certain homicides received the death penalty while others were not subject to state punishment. Killings that were considered heinous involved concealment of the act and those committed during an open fight were considered less heinous as they could be remedied by compensation to the deceased's family.⁴⁷⁶

The distinguishing of killings on this basis began to fade away during the 13th century and most classes of homicides were grouped under a single capital crime of culpable homicide.⁴⁷⁷ The term murder or *murdrum* emerged to describe killings committed in secret which were considered especially reprehensible and thus deserved to be punished by death.⁴⁷⁸ As the 14th century approached, it became common practice for justices to use the term "murder" when referring to killings committed during an ambush.⁴⁷⁹

As time passed, the law recognized that certain homicides should be treated more seriously than others. Parliament felt threatened over the generous granting of royal pardons and so in 1390 legislation⁴⁸⁰ was enacted which sought to limit this in cases involving homicides committed while "lying in wait, assault or malice aforethought". Essentially, the class of crime that was excluded from receiving royal pardons were the premeditated felonies.⁴⁸¹

The enactment of legislation aimed to regulate the granting of royal pardons in homicide cases; however, differentiating between homicides committed with malice aforethought and those without became difficult.⁴⁸² It was during this period that

⁴⁷⁵ Horder supra (n 474) at 5-6 states that non-felonious homicides included justifiable and excusable homicides. The finding of justifiable homicides resulted in an acquittal, see further Mousourakis supra (n 467) at 40.

⁴⁷⁶ Mousourakis supra (n 469) at 39-40.

⁴⁷⁷ Mousourakis supra (n 469) at 40.

⁴⁷⁸ Mousourakis supra (n 469) at 40.

⁴⁷⁹ Mousourakis supra (n 469) at 40.

⁴⁸⁰ Stat.13 Ric II stat.2, C.1 discussed by Mousourakis supra (n 469) at 41.

⁴⁸¹ Horder supra (n 474) at 10.

⁴⁸² Mousourakis supra (n 469) at 40.

English law recognized for the first time that a killing committed with premeditation was different to that committed on impulse or by sudden chance (also known as *par chaude melle*).⁴⁸³

However, during the 15th century judges gradually reverted to grouping all types of felony homicides under a single undivided offence as it was done during the 13th and 14th century where the law returned to using the terms excusable, justifiable, and “felonious” to describe homicides.⁴⁸⁴ During the 16th century, culpable homicide was recognized as being distinct from a killing committed in self-defence. The law recognized felonious homicides arising from wanton negligence during this period.⁴⁸⁵

3.1.2. The recognition of manslaughter

The 16th century saw the restriction of the “self-informing jury” who dominated the manner in which evidence was received and restricted judicial legal determination, “the age of nearly unlimited jury control was passing; the age of the law and the bench was commencing”.⁴⁸⁶

By the early 16th century, manslaughter was considered to be distinct from murder.⁴⁸⁷ This development can be attributed largely to a practice which is referred to as “benefit of the clergy”. Benefit of the clergy gave the right to clerks of holy orders accused of crimes to request to be tried by ecclesiastical courts. If the request of the clerk was successful then the matter could be handled by the ecclesiastical courts where the accused had a better chance of receiving a more lenient sentence and a better chance of an acquittal.⁴⁸⁸

⁴⁸³ Mousourakis supra (n 469) at 41.

⁴⁸⁴ Mousourakis supra (n 469) at 41.

⁴⁸⁵ Horder supra (n 474) at 11.

⁴⁸⁶ T.A. Green “The jury and the English law of Homicide, 1200-1600” (1979) 74 Michigan Law Review 414 at 499 cited by Coss, G. “God is a righteous judge, strong and patient: and God is provoked everyday” A brief history of the doctrine of provocation in England” (1991) 13 Sydney Law Review at 573.

⁴⁸⁷ Mousourakis supra (n 469) at 41.

⁴⁸⁸ Mousourakis supra (n 469) at 41.

However, the practice of “benefit of the clergy” became abused over time. Persons accused of serious crimes relied on the “benefit of the clergy” and this reliance started to undermine the credibility of secular criminal law of that era.⁴⁸⁹ As a result of this problem, statutes were enacted to remove the availability of “the benefit of the clergy” in homicides committed with malice prepensed.⁴⁹⁰

Homicides were divided into 3 categories:

1. Homicides committed with malice aforethought, this type was considered the most heinous type of homicide and thus received the harshest punishment.
2. Secondly, those homicides committed without malice, this was known as “chance medley manslaughter” by the year 1510.
3. The third type of homicide was those eligible for royal pardon, known as per infortunium or committed by accident.

Mousourakis states that there was a fourth category, that is, those that entitled the accused to a full acquittal.⁴⁹¹

After the promulgation of a statute in 1547, the “benefit of the clergy” could not apply to those individuals found guilty of homicides involving malice prepensed.⁴⁹² The benefit of the clergy however could still be used by those convicted. The enactments of a statute in 1547 led to homicides being distinguished on the presence or the lack of premeditation. The emergence of manslaughter or chance medley manslaughter, which categorised hot-blooded killings committed without premeditation, resulted in judges eventually regarding this type of killing as a form of provocation which was sufficient to reduce murder to manslaughter.⁴⁹³

⁴⁸⁹ Horder supra (n 474) at 11.

⁴⁹⁰ Mousourakis supra (n 469) at 41 citing 4 Hen VIII, C2, 23 Hen VIII, C.1. S.3 and E. Coke The Third Part of the Institutes of the Laws of England (1628) at 47 defines malice aforethought as: “Malice prepensed is, when one compasseth to kill, wound, or beat another, and doth it sedate animo. This is said in law to be malice forethought, prepensed, malitia praecogitata.”

⁴⁹¹ Mousourakis supra (n 469) at 41-42.

⁴⁹² Mousourakis supra (n 469) at 42.

⁴⁹³ See Salisbury’s case (1553) Plowd Comm. 100 discussed by Horder supra (n 474) at 14-15 who states that the significance of this case is that confirms as a matter of law that the sight of a master being assaulted amounted to provocation that would result in “hot-blooded chance medley” and the killing of the provoker by the servant .

Manslaughter came to mean that the homicide was committed deliberately although committed on the spur of the moment.⁴⁹⁴

“This term is used to define cases where, although a person has killed with aforethought, he did so pursuant to a suicide pact, while provoked or while suffering from diminished responsibility. The existence of one of these circumstances reduces liability from murder to manslaughter.”⁴⁹⁵

The law began to acknowledge that although intention to kill was present, the killing occurred on impulse when the accused was overcome with anger and this factor made the homicide excusable, unlike a killing committed in cold blood.⁴⁹⁶

Those individuals convicted of manslaughter received sentences involving the forfeiture of assets, shorter periods of incarcerations and “burning in the hand”.⁴⁹⁷ Problems soon arose involving the task of distinguishing between homicides committed with chance medley manslaughter and malice aforethought.⁴⁹⁸

Jurors found making this distinction complex especially when determining if malice was present or not. Malice was presumed to exist in cases where the accused was not provoked. The role of provocation in separating manslaughter from murder became prominent.⁴⁹⁹

⁴⁹⁴ Coke supra (n 490) at 47, 55-56 termed manslaughter a voluntary killing “not of malice forethought but upon some sudden falling out. There is no difference between murder and manslaughter, but that the one is upon malice forethought, and the other upon a sudden occasion and therefore is called chance medley.” at 55; Jefferson supra (n 54) at 457 notes that manslaughter is not defined in Statute, in the case of Church [1996] 1 QB 59 (CCA), Edmund Davies J stated that “there has never been a complete and satisfactory definition of manslaughter”. The term is a catch-all offence in circumstances where the accused is the cause of the killing but does not have malice aforethought or a defence to the murder.

⁴⁹⁵ R. Card Cross and Jones Cases and Statutes on criminal law 6 ed (1977) at 215.

⁴⁹⁶ Mousourakis at supra (n 469) 42.

⁴⁹⁷ Mousourakis supra (n 469) at 43; from the time of Henry VII, individuals were branded or stigmatised using a hot branding iron for all offences which received the benefit of the clergy, this involved burning a symbol onto the skin of an accused, the thumbs of an individual were usually branded in order to prevent a person from using the benefit of the clergy more than once.

⁴⁹⁸ Mousourakis supra (n 469) at 43.

⁴⁹⁹ Mousourakis supra (n 469) at 43.

In 1604, the Statute of Stabbing⁵⁰⁰ was enacted due to killings arising from disputes regarding James I accession to the throne in 1603.⁵⁰¹ This enactment further aided in making provocation the decisive factor when making the determination of which homicides are manslaughter and which are murder.⁵⁰² The Statute of Stabbing removed the benefit of the clergy where the victim was stabbed without drawing a weapon and in cases where there was no evidence of premeditation.⁵⁰³

The scope of the Statute of Stabbing resulted in the application of the new law being problematic. To solve this problem judges devised a solution whereby certain criteria would be used to determine if certain conduct amounted to provocation or not.⁵⁰⁴ It is important to note that even at this point in English law, provocation was not considered a complete defence and at most it could reduce murder to manslaughter.⁵⁰⁵

The work of Sir Edward Coke was considered to be fundamental to the development of criminal law, published in 1628 the *Third part of the Institutes of the Laws of England* led to the shift in focus from the victim to the perpetrator.

Coke canvassed the idea of manslaughter by stating:

“There is no difference between murder and manslaughter, but that the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called chance medley”.⁵⁰⁶

Coke was instrumental in defining malice aforethought and the concepts of “blood cooling” and its relation to heat of passion in manslaughter.⁵⁰⁷ Chance medley was

⁵⁰⁰ (1604) 1 JacI c8.

⁵⁰¹ Coss supra (n 486) at 573.

⁵⁰² Coss supra (n 486) at 573.

⁵⁰³ Mousourakis supra (n 469) at 44 discussing the Statute of Stabbing – Stat.2 Jac.VI, C.8 (1604) where it was stated “Every person ...which shall stab or thrust any person or persons that hath not then any weapon drawn , or that hath not then first stricken the party , which shall so stab or thrust shall thereof die within the space of six months then following , although it cannot be proven that the same was done of malice aforethought,...shall be excluded from the benefit of his clergy, and suffer death as in the case of wilful murder.”

⁵⁰⁴ Mousourakis supra (n 469) at 57.

⁵⁰⁵ Mousourakis supra (n 469) at 57.

⁵⁰⁶ Coke supra (n 490) at 55 cited by Coss supra (n 486) at 573.

defined as follows: “Homicide is called chance medley...for that it is done by chance (without premeditation) upon a sudden brawl, shuffling, or contention”.⁵⁰⁸

Coss notes that Coke did not state much regarding provocation, other than making a passing reference to malice being implied in cases not involving provocation. The law at the time developed rules which put parties on equal footing example manslaughter by chance medley.

However, certain dilemmas remained:

“When the mischief is the taking of inordinate vengeance for comparatively trifling injuries ...the question is what degree of provocation is to mitigate the legal denomination of the homicide caused by it”.⁵⁰⁹

The advent of the 17th century saw an increase in judicial activity.⁵¹⁰ In Royley’s Case⁵¹¹ the Court allowed a verdict of manslaughter to an accused, who killed the deceased after the deceased gave his son a bloody nose. This case received criticism on the basis that the provocation was not serious enough.⁵¹² Mousourakis states that the true basis of the defence of provocation was the recognition that the law must be lenient and compassionate to certain individuals who were provoked, human frailty must be acknowledged and accommodated by law.⁵¹³

⁵⁰⁷ Mousourakis supra (n 469) at 57.

⁵⁰⁸ Mousourakis supra (n 469) at 57.

⁵⁰⁹ Coss supra (n 486) at 574 citing Sir James Fitzjames Stephen “History of the Criminal law in England (vol III) (1883) at 60.

⁵¹⁰ See Watts v Brains (1600) Cro Eliz 778;78 ER 1009, which involved a stabbing two days after a fight, the court stated: “If one make a wary or distorted mouth, or the like countenance upon another, and the other immediately pursues and kills him, it is murder : for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel.

⁵¹¹ (1612) Cro Jac 296; 79 ER 254.

⁵¹² Coss supra (n 486) at 574 citing criticisms by Sir Michael Foster *Crown Law, Discourse II of Homicide* (1972) at 294.

⁵¹³ Mousourakis supra (n 469) at 45 citing E.H East “To have received such provocation as the law presumes might in human frailty heat the blood to a proportionate degree of resentment, and keep it boiling to the moment of the fact: so that the part may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive.” A treatise of Pleas of the Crown,(1803) 238.

Furthermore, it was acknowledged that provocation had the effect of creating a disruption in the accused's ability to reason and causes a temporary clouding of judgment.⁵¹⁴ Furthermore, in order to gain leniency from the law, the accused's conduct must have been in proportion to the type of provocative act. If the accused's actions were not in proportion then the existence of malice would still be presumed.

Ashworth states that during the 17th century, transformation of the defence of provocation occurred within a rigidly structured law governing homicides. It was during the 17th century that the basis for the modern doctrine of provocation was laid. There are two developments during this period which are significant; the first is affirmation that the defence did not apply to cold-blooded, calculated, killings committed out of revenge but rather that the defence applied to the provoked, hot-blooded, killing. The second important development was the gradual categorisation of four types of provocation.⁵¹⁵

Furthermore, the 17th century was important since it revealed an important link between virtue and honour, and how this explains the concept of anger, which has been the core of the provocation defence for many years. Horder states that without an appreciation of nature and significance of virtues that are linked, the doctrine of provocation will be not understood.⁵¹⁶ Evidence indicating presence of provocation started being accepted in rebuttal of the implication of malice. This was based on the theory that this evidence indicated that the reason for the killing was not due to an underlying hatred for the deceased but from passion which consumed the provoked killer.⁵¹⁷

The 18th century saw two significant cases being reported, the first, Mawgridge⁵¹⁸ set out certain fundamentals of the modern defence. In this case the deceased and the defendant were involved in an argument which included physical assault and resulted in the accused killing the deceased with a sword. The accused in this case pleaded not guilty but was nevertheless convicted of murder. The court decided that the defendant could not rely on provocation.

⁵¹⁴ Mousourakis supra (n 469) at 45.

⁵¹⁵ Ashworth supra (n 462) at 292.

⁵¹⁶ Horder supra (n 474) at 23-24,40.

⁵¹⁷ Ashworth supra (n 462) at 292.

⁵¹⁸ Mawgridge (1707) Kell 119, discussed by Ashworth supra (n 462) at 292.

The court set out basic principles of the defence:

Lord Holt CJ:

“no words of reproach or infamy are sufficient to provoke another to such a degree of anger as to strike , or assault the provoking party with a sword , or to throw a bottle at him , or strike him with any other weapon that may kill him; but if the person provoking be thereby killed, it is murder”.⁵¹⁹

Lord Holt CJ stated which types of acts would however qualify as sufficient provocation:

- “1. Angry words followed by an assault;
2. The sight of a friend or relative being beaten;
3. The sight of a citizen being unlawfully deprived of his liberty and;
4. The sight of a man in adultery with the accused's wife.”

The second case was that of Oneby,⁵²⁰ where the principles set out in Mawgridge⁵²¹ were scrutinised. The court stated there was enough time for the accused’s passion to cool and his words and actions indicated a measure of deliberation.

The court stated that in order for the crime of murder to be reduced to manslaughter:

“such a passion, as for the time deprives him of his reasoning faculties; for if it appears , reason has resumed its offices, if it appears he...deliberates...before he gives the fatal stroke...the law will no longer under that pretext of passion exempt him from the punishment ...he justly deserves”.⁵²²

An accused person would be convicted of homicide in England if intention to kill or to cause serious bodily harm was proved. In English law the majority of unlawful homicides which do not fall under the umbrella of murder are categorized as manslaughter, a less serious crime.⁵²³ There are two types of manslaughter, involuntary manslaughter and voluntary manslaughter.⁵²⁴

⁵¹⁹ Mawgridge supra (n 518) at Kel.135.

⁵²⁰ Oneby (1727) 2 Ld Raym 1485; 92 ER 465.

⁵²¹ Mawgridge supra (n 518).

⁵²² Oneby supra (n 520) at 1496; 92 ER at 472 discussed by Allen supra (n 462) at 218.

⁵²³ Mousourakis supra (n 469) at 46.

⁵²⁴ Ormerod supra (n 58) at 505.

3.1.3. Voluntary manslaughter and provocation

The verdict of voluntary manslaughter is a unique charge in that the accused cannot be charged with voluntary manslaughter but can be found guilty of it.⁵²⁵ Although all the elements for murder are required, special circumstances may reduce murder to manslaughter.⁵²⁶ The difference between voluntary and involuntary manslaughter is the presence of *mens rea*.⁵²⁷

In terms of the verdict of voluntary manslaughter the accused person has committed a guilty act (*actus reus*) with intention (*mens rea*), but, a partial defence to the crime is permitted due to the presence of mitigating circumstances. Liability is thereby reduced and the homicide becomes manslaughter rather than murder.⁵²⁸

In terms of this type of partial defence, the accused person will be charged with murder and only during the trial will the opportunity to plead voluntary manslaughter arise.⁵²⁹ Apart from provocation, two other types of voluntary manslaughter exist, suicide pacts and diminished responsibility.⁵³⁰

An accused person who is successful in pleading a partial defence such as provocation will receive a sentence which is at the discretion of the presiding officer, who will take into account the circumstances in which the homicide occurred. Essentially, the defence of provocation is intended to reduce the accused criminal liability for murder only.⁵³¹

The judge has the discretion of imposing a sentence which is harsh or lenient because of the conviction of voluntary manslaughter. Since voluntary manslaughter is considered less heinous than murder, the accused is spared the mandatory life sentence for murder.⁵³²

⁵²⁵ C. Elliott and F. Quinn Criminal Law 7th ed (2008) at 71-72.

⁵²⁶ Elliott and Quinn *supra* (n 525) at 71.

⁵²⁷ Elliott and Quinn *supra* (n 525) at 71-72.

⁵²⁸ Jefferson *supra* (n 54) at 457-458.

⁵²⁹ Jefferson *supra* (n 54) at 457-458.

⁵³⁰ Jefferson *supra* (n 54) at 457-458.

⁵³¹ Elliott and Quinn *supra* (n 525) at 71-72.

⁵³² Elliott and Quinn *supra* (n 525) at 71-72.

Voluntary manslaughter is more serious than involuntary manslaughter because of the presence of the *mens rea* of murder.⁵³³ An individual cannot be charged with voluntary manslaughter but will be charged with murder and if one of three mitigations is applicable, then the verdict is voluntary manslaughter.⁵³⁴

Certain cases⁵³⁵ decided during the 18th and 19th century reflected a gradual shift from emphasis on the wrongfulness of provocative conduct to focus on the requirement of loss of self-control.⁵³⁶ During this period a different approach to anger was conceived and this was different to the philosophical foundations of the early modern-day defence. The doctrine of provocation was changed to a focus on anger and this was interpreted as a loss of self-control. The courts began focusing on the mind-set of the accused and the approach that extreme anger can be overpowering to the extent that the power of reason or rational thinking may have been excluded.⁵³⁷

⁵³³ Jefferson *supra* (n 54) at 458.

⁵³⁴ Jefferson *supra* (n 54) at 458.

⁵³⁵ See Ayes (1810) R & R 166 where the judge directed the jury regarding drunkenness and that it did not amount to an extenuation of the offence; Lynch (1832) 5 C & P 324, 325 issue concerned cooling of passions in an individual such as the accused with a low intellect; Hayward (1833) 6 C & P 157, 159 the court stated that the facts indicated presence of judgment and reason rather than “ungovernable passion”; Fisher (1837) 8 C & P 182 this case highlighted the necessity of defence that the killing be committed on the spot, in this case the killing was committed two days after the provocation and was therefore denied; Kelly (1848) 2 C & K 814.

⁵³⁶ Mousourakis *supra* (n 469) at 46 and notes that despite this shift courts during this period still continued to recognise and enforce the categories of provocation that were laid down by authorities during the 17th and 18th century.

⁵³⁷ Horder *supra* (n 474) at 72.

3.1.4. Emergence of the modern doctrine of provocation

The late 19th century saw an important milestone which contributed significantly to the development of the modern doctrine of provocation, that is, the notion of the “reasonable person”. The standard provided by the “reasonable person” provided a uniform, universal criteria of self-control against which a provoked person’s reaction could be judged against.⁵³⁸

In the case of Welsh,⁵³⁹ considered to be one of the first cases wherein the reasonable person was referred to, Keating J stated:

“in law it is necessary that there should be a serious provocation in order to reduce the crime to manslaughter, as for instance, a blow and a severe blow- something which might naturally cause an ordinary and reasonable minded person to lose his self-control”.⁵⁴⁰

This case highlighted the importance of the criminal law considering not only the moral culpability of the accused, but also giving cognisance to the social danger which his actions create.⁵⁴¹

3.1.5. Emergence of the reasonable man test

After these milestones, the defence of provocation further evolved, this took place during the early 20th century in the cases of Alexander⁵⁴² and Lesbini⁵⁴³ where the concept of the reasonable man played a significant role in the area of provocation, with the courts in both cases emphasising that the reasonable man test in Welsh⁵⁴⁴ should not be weakened.

⁵³⁸ Mousourakis supra (n 469) at 46.

⁵³⁹ Welsh (1869) 2 Cox CC 336, the court stated “Malice aforethought means intention to kill. Whenever one person kills another intentionally, he does it with malice aforethought. In point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does appear, the malice aforethought implied in the intention remains.”

⁵⁴⁰ Welsh supra (n 539) at 338.

⁵⁴¹ Coss supra (n 486) at 582.

⁵⁴² Alexander (1913) 109 LT 745.

⁵⁴³ Lesbini (1914) 3 KB 116.

⁵⁴⁴ Welsh supra (n 539) see discussion by Coss supra (n 486) at 582.

In Lesbini, the court stated that in all cases the provocation must be strong enough to affect the mind of the reasonable man. The court did not accept the view that a lower standard of provocation should be applied to those individuals who suffered from mental impairment and Lord Reading CJ stated:

“The Court of Criminal Appeal is not minded in any degree to weaken the state of the law which makes a man who is not insane responsible for the ordinary consequences of his action”.⁵⁴⁵

The standard of the reasonable man was given full recognition in this case. In order for the provocation defence to succeed, two crucial conditions must be satisfied. Firstly, the accused must have actually have suffered a loss of self-control during the commission of the killing. Secondly, the provocative act committed by the victim must have had the same effect on the reasonable person, that is, the act must have in all likelihood caused the reasonable person to have suffered a loss of self-control.⁵⁴⁶

The “reasonable relationship” rule was set out in Mancini.⁵⁴⁷ The doctrine of manslaughter due to *chance medley* took a back seat in the case of Semini⁵⁴⁸ due to the emergence of the doctrine of provocation.⁵⁴⁹

3.1.6. Sudden and temporary loss of self-control

In 1949, the case of Duffy⁵⁵⁰ contributed significantly to the development of the defence, especially in relation to how the courts assessed the loss of self-control

⁵⁴⁵ Lesbini supra (n 543).

⁵⁴⁶ Mousourakis supra (n 469) at 48 notes that during this period, the question of whether the deceased’s actions amounted to provocation was not a question in law hence it was not for the jury to decide but solely for the judge.

⁵⁴⁷ Mancini v D.P.P [1942] A.C.1 (House of Lords) In this case the court stated the requirement that mode of retaliation must be reasonable: “It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the powers of self-control, as the result of which he commits the unlawful act which causes death...The test to be applied is that of the provocation of the reasonable man, as was laid down in R v Lesbini [1914] 3 K.B.1116...it is of particular importance...to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from risking use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear reasonable relationships to the provocation if the offence is to be reduced manslaughter...”

⁵⁴⁸ Semini [1949] 1 KB 405.

⁵⁴⁹ Coss supra (n 486) at 587, see 81 for discussion of chance medley.

requirement in relation to the length of time between the last act of provocation and the killing. The case also generated a fair amount of controversy in years to come, especially in relation to the utility of the provocation defence to battered women who killed their abusers. In this case the defendant killed her abusive husband while he was asleep with a hatchet and a hammer.

In his direction to the jury, Devlin J offered the classic definition for provocation:

“Provocation is some act, or series of acts, done by the dead man to the accused which cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind”.

The words “sudden and temporary” have been interpreted to mean that a requirement of contemporaneity must accompany the loss of control; therefore, the reaction by the accused must occur immediately after the provocation.⁵⁵¹ This has been argued to be the very essence of provocation; Horder states that loss of self-control “by its nature leads to a sudden and immediate reaction to the stimulus of provocation.”⁵⁵² Smith and Hogan have stated that the words “sudden and temporary” serve to indicate to the jury that there should be no time for the accused to have reflected or even think in the interval between the last act of provocation and the killing.⁵⁵³

The requirement of sudden and temporary loss of self-control was a significant aspect of this case and became a staple in the common law due to the definition of provocation laid out in Duffy⁵⁵⁴ for many years which also unfortunately led to the “immediacy” dilemma.⁵⁵⁵ Horder has argued that the “immediacy” dilemma flowed from the

⁵⁵⁰ Duffy (1949) 1 All ER 932.

⁵⁵¹ R. Holton and S. Shute “Self-control in the modern provocation defence” (2007) Vol 27 (1) at 49 at 64.

⁵⁵² Horder *supra* (n 474) at 68.

⁵⁵³ J.C. Smith Smith and Hogan Criminal Law Cases and Materials 7th ed (1999) at 355.

⁵⁵⁴ Duffy *supra* (n 550).

⁵⁵⁵ B. Mitchell “Years of provocation, followed by a loss of control” in L. Zedner and J.V. Roberts. Principles and values in criminal law and criminal justice Essays in Honour of Andrew Ashworth (2012) at 113.

subjective test since the requirement that the violent reaction occur immediately after the final act of provocation may favour men, for whom a quick retaliation to an insult is typical and acceptable. The requirement of sudden and temporary loss of control was criticised by writers such as Ashworth for its “bias towards those with short tempers and prejudicing those with a slow burning temperament despite the intensity of emotion being similar”.⁵⁵⁶

The court addressed the issue of revenge killings and stated that revenge killings indicated that the defendant had the mind to formulate a desire for revenge which indicated that the defendant contemplated his actions and it is unlikely that a “sudden loss of self-control” was experienced. The requirement that the loss of self-control must be sudden ensured that killers who committed a planned murder could not find refuge in the provocation defence.

The application of the reasonable man test is illustrated by the notorious case of Bedder.⁵⁵⁷ This case is notorious for its strict application of the reasonable man test and the fact that the jury is not entitled to consider the physical peculiarities of the accused.⁵⁵⁸ In this case, the accused killed a prostitute who he had propositioned for sexual intercourse; the prostitute taunted the accused about being sexually impotent and kicked him in the groin. The accused retaliated and stabbed the deceased. The jury was instructed to consider the effect of the provocation (the prostitute's taunts and kick in the groin) on the reasonable man. The accused was convicted of murder and appealed to the Court of Criminal Appeal and afterwards to the House of Lords.

The House of Lords held that the jury must take into account the circumstances of the accused, including the taunts of sexual impotence on the reasonable man, however the reasonable man was by all accounts was not impotent, the condition of sexual impotence could not be attributed to the reasonable man since the reasonable man

⁵⁵⁶ J.Horder “Reshaping the subjective element in the provocation defence” (2005) 25 Oxford Journal of Legal Studies 123 at 123-124.

⁵⁵⁷ Bedder v DPP (1954) 2 All ER 201.

⁵⁵⁸ Elliot and Quinn supra (n 525) at 76; See further Card supra (n 495) at 220.

would be indifferent to taunts about sexual impotence, especially if he did not suffer from the disorder.⁵⁵⁹

The courts at this point were faced with a dilemma regarding which characteristics of the accused could be given to the reasonable man. Since the advent of the Homicide Act, courts wanted to determine how far the common law could be changed in terms of the characteristics of the reasonable man and if the reasonable person should be imbued with certain characteristics of the accused.⁵⁶⁰

Bedder⁵⁶¹ was considered bad law; Ashworth for one argues that it is impossible to assess the gravity of provocation without considering the characteristics of the accused which were the subject of the taunts in question.⁵⁶²

The principles of the defence at common law eventually made their way into legislation, and the reasonable man test and the requirement of loss of self-control became the core of the defence in terms of the Homicide Act of 1957. The Royal Commission on Capital Punishment 1953 received submissions regarding the problems with the reasonable man test, concerns surrounded the unfairness of the test in circumstances where an accused is mentally abnormal, of low intellect or for other reasons may be more susceptible to provocation and therefore it would be unjust to judge such an individual by the same

⁵⁵⁹ Bedder at supra (n 557) at 278-279 Lord Simonds L.C stated: “My Lords, no other conclusion was open to the Court of Criminal Appeal, nor is any other conclusion open to your Lordships in view of the recent cases in this House of Mancini and Holmes. The relevant part of the former decision is accurately stated in the headnote in these words: “the test to be applied is that of the effect of provocation on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did” Viscount Simon, L.C in a speech in which all their Lordships concurred, referred ([1941] 3 ALL E.R. 272, at p 277) with approval to the decision of the Court of Criminal Appeal in R v Lesbini. It is worth recalling that, in that case, the court said ([1914] 3 K.B. 1116 at p.1120): “We agree with the judgment of Darling, J”., in R v Alexander and with the principles enunciated in R v Welsh, where it is said that “there must exist such an amount in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion”.

⁵⁶⁰ Ashworth supra (n 462) at 301.

⁵⁶¹ Bedder supra (n 557).

⁵⁶² Ashworth supra (n 462) at 301.

standards of the “ordinary Englishman”.⁵⁶³ In an attempt to reform the law governing the defence, the Legislature intervened and enacted section 3 of the Homicide Act⁵⁶⁴ after recommendations for revision of the defence were received from the Royal Commission on Capital Punishment.⁵⁶⁵

The Royal Commission on Capital Punishment removed the restriction of “mere words” enforced by Holmes,⁵⁶⁶ however, the objective standard in the form of the reasonable man was prescribed. In this respect, the dual requirements of the provocation doctrine were stressed, the first being that the accused must have actually been provoked and secondly, the accused must have acted in the manner that the reasonable man would have.⁵⁶⁷

In addition to this, there was importance placed on time lapse between the last act of provocation and the retaliation, furthermore, the retaliation must have been proportional.⁵⁶⁸ In addition, the role of judge changed in that the jury was made the sole authority on how the objective test was to be applied.⁵⁶⁹

3.2. THE HOMICIDE ACT OF 1957

Section 3:

When on a charge of murder there was evidence on which the jury could find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

⁵⁶³ Report of the Royal Commission on Capital Punishment 1949-1953 (Cmd.8932) at para 141, discussed by Allen supra (n 47) at 221.

⁵⁶⁴ Hansard , House of Commons Debates , Vol 560,col 1156 (15 November 1956).

⁵⁶⁵ Report of the Royal Commission on Capital Pubishment supra (n 563) discussed by Allen supra (n 47) at 221.

⁵⁶⁶ Holmes v DPP (1946) AC 588.

⁵⁶⁷ Holmes supra (n 556) at 126.

⁵⁶⁸ Coss supra (n 486) at 590.

⁵⁶⁹ Coss supra (n 486) at 590.

The common law definition of provocation was modified by section 3 of the Act.⁵⁷⁰ The elements of the defence were defined in terms of the principles at common law but remained subject to requirements set out in section 3 of the Homicide Act.⁵⁷¹ The accused must have executed the acts with the *actus reus* of murder and must have possessed malice aforethought. If intention was lacking then the defence could not be pleaded.⁵⁷²

Section 3 of the Homicide Act consisted of two parts, a subjective part and an objective one. The provocation defence hinged upon two elements which were interrelated: the wrongful act of provocation and the impaired volition or loss of self-control.⁵⁷³

The purpose of section 3 of the Homicide Act was intended to lessen the harshness of the common law of provocation. It recognised the dual test for provocation that is the accused must have suffered a loss of self-control and the reasonable man must have reacted to the provocation in the same manner as the accused.⁵⁷⁴

The provision brought about changes in respect of the nature of the provocative act; firstly it abolished the previous rule of the common law pertaining to what can or cannot amount to provocative conduct. In terms of the Homicide Act, “things said” alone could amount to provocation if the jury was of the opinion that a reasonable man would have been provoked.⁵⁷⁵ Hence, section 3 of the Homicide Act had the effect of extending the scope of provocation so that it included words and not only deeds.⁵⁷⁶

Furthermore, the “proportionality rule” was made into a factor to be considered rather than a prerequisite when applying the reasonable man test.⁵⁷⁷ The requirement of reasonable retaliation accompanying loss of self-control was argued to be

⁵⁷⁰ Allen *supra* (n 462) at 220.

⁵⁷¹ D. Ormerod. Smith and Hogan Cases and Materials 10th ed (2009) at 648, See Bruzas [1972] Crim. LR 367 (Crown Court).

⁵⁷² Jefferson *supra* (n 54) at 459.

⁵⁷³ Mousourakis *supra* (n 469) at 21.

⁵⁷⁴ C.M.V. Clarkson and H.M. Keating. Criminal Law: Text and Materials (1984) at 551.

⁵⁷⁵ Reed *supra* (n 19) at 441 citing Phillips v R (1968) 2 AC 130 at 137.

⁵⁷⁶ Ormerod *supra* (n 571) at 649.

⁵⁷⁷ D.W Elliot and C.Wells Elliot and Woods Casebook on Criminal law 4th ed (1982) at 401.

contradictory.⁵⁷⁸ This provision authorised that a third person could be the provoker and it was not mandatory that the victim must have been the source of the provocation.⁵⁷⁹

In cases where there was evidence suggesting that the accused lost self-control in response to provocation, regardless of how trivial it appears to the judge; the judge was bound to leave the question to the jury to decide if the reasonable man would have reacted as the accused did.⁵⁸⁰ The power of the judge to instruct the jury on the characteristics of the reasonable man was removed and the jury possessed the sole task of applying the reasonable man test.⁵⁸¹

When provocation was pleaded, the jury would be asked to deliberate whether the accused was indeed provoked to lose self-control. If this was established then the jury would have been tasked to take into account everything both done and said and assess the impact that this might have had on the reasonable man.⁵⁸² This applied even in cases where the accused did not raise the defence of provocation, if after evidence is admitted and the jury forms the impression that the accused might have been provoked to lose self-control.⁵⁸³

Section 3 did not state the whole of the law in regard to the defence of provocation, there were gaps and an example of this was the description of what amounts to provocation and the effect of pleading the defence successfully.⁵⁸⁴

3.2.1. The nature of the provocative act

In terms of the common law, judges could rule as a matter of law on what amounted to provocation. The alleged provocation had to be inherently objectionable.⁵⁸⁵ In terms of section 3, words alone qualified as a provocative act. Section 3 limited which activities

⁵⁷⁸ Elliot and Wells supra (n 577) at 401.

⁵⁷⁹ R v Davies (1975) 1 All ER 890.

⁵⁸⁰ Camplin (1978) 2 All ER 168.

⁵⁸¹ Ormerod supra (n 58) at 509.

⁵⁸² D. Bloy Lecture Notes. Criminal Law 2nd ed (1996) at 143-144.

⁵⁸³ Bloy supra (n 582) at 143-144.

⁵⁸⁴ Ormerod (n 58) at 506.

⁵⁸⁵ C.Elliot. "What future for voluntary manslaughter?" (2004) 68 Journal of Criminal Law at 254.

constituted provocation to “things said” or “done”.⁵⁸⁶ The “mere circumstances” of the accused did not constitute provocation in terms of section 3 of the Act.⁵⁸⁷ For instance, if a novelist, who had discovered that her manuscript had been destroyed by a dog and subsequently lost control and killed a person, these circumstances would not have entitled her to the defence.⁵⁸⁸ It has been argued that the word “provoked” became a misnomer since provocation simply meant “caused”.⁵⁸⁹

In terms of this provision, the acts or words which comprised the provocative act need not have been unlawful, this is illustrated in the notorious case of Doughty⁵⁹⁰ where it was held that even the persistent crying of a baby qualified as a provocative act, furthermore provocation could even occur in circumstances where the provocative act was not directed at the accused.

The decision in Doughty⁵⁹¹ was controversial, since it is argued that a crying baby is at most a natural event, which cannot give rise to provocation, if a person becomes enraged, it does not necessarily mean that he was provoked.⁵⁹² Section 3 of the Homicide Act removed the requirement set out in the case of Duffy⁵⁹³ requiring that the provocative act must have emanated from the deceased.

In the case of Davies,⁵⁹⁴ the defendant killed his wife in the presence of her lover and the question arose of whether the trial judge should have directed the jury to consider provocation from another source other than the deceased. The Court of Appeal held that since the promulgation of section 3, “everything both done and said” implied that all sources of provocation, whether committed by the deceased or not, may be considered.

⁵⁸⁶ Elliot supra (n 585) at 254.

⁵⁸⁷ Elliot and Quinn supra (n 525) at 72.

⁵⁸⁸ Elliot and Quinn supra (n 525) at 72.

⁵⁸⁹ Elliot and Quinn supra (n 525) at 72.

⁵⁹⁰ Doughty (1986) 83 Cr App R 319.

⁵⁹¹ Doughty supra (n 590).

⁵⁹² Jefferson supra (n 54) at 467.

⁵⁹³ Duffy supra (n 550).

⁵⁹⁴ Davies supra (579).

Section 3 of the Homicide Act thus removed the restriction imposed by the common law that the provocation must have emanated from the deceased. The court further stated that it is apparent that section 3 uses a different test to consider whether a reasonable man would act as the accused did.

The Court of Appeal, after quoting from section 3 stated:

“...It is to be observed that the reasonable man test, if one may so describe it, prescribed by the section is quite different from the reasonable man test prescribed by Devlin J in R v Duffy in Devlin J’s direction, both in regard to the particular defendant and in regard to the hypothetical reasonable man, the question was whether the provocation did or would cause a loss of self-control which would prevent the individual from being the master of his mind.”

The new test was intended to reflect not only whether the reasonable man would have lost his self-control, but it also considers whether the reasonable man would have retaliated in the same manner as the accused.

In the case of Johnson,⁵⁹⁵ the issue of self-induced provocation was addressed.

The accused induced the provocation but it was held that this did not prevent the defence from being made out. This case involved a fight in a night club between the accused and deceased. The accused threatened the deceased and his girlfriend which resulted in physical retaliation by the deceased. The accused was in possession of a knife which he then used to stab the deceased. The accused was convicted of murder and appealed on the ground that the judge was obligated to direct the jury on the provocation which was the reaction of the deceased to the accused’s own aggression. The appeal was successful and the accused was convicted of manslaughter.⁵⁹⁶

In Edwards,⁵⁹⁷ the case involved blackmail by the accused to his victim who attacked him with a knife. A struggle ensued and resulted in the accused fatally stabbing the person he tried to blackmail.

⁵⁹⁵ Johnson (1989) 89 Cr App R 148.

⁵⁹⁶ Johnson supra (n 595).

⁵⁹⁷ Edwards v R [1973] AC 648, [1973] 1 All ER 152, [1992] 3 WLR 893.

The Privy Council held that the accused could only rely on the defence of provocation if the deceased's reaction to the blackmail was severe when compared to the blackmail itself. The Privy Council stated that self-induced provocation could not be relied on in circumstances where the accused's reaction was predictable. It could be relied upon where the reaction went to "extreme lengths".⁵⁹⁸ Jefferson argues that this was inconsistent with section 3 which stipulated that any evidence must be left to the jury and hence the source of the events which led to the killing was not relevant.⁵⁹⁹

The issue of mistaken belief was addressed in the case of Brown,⁶⁰⁰ where the defence was successful even though the accused, a soldier, killed the deceased with a sword because he was under the impression that the deceased belonged to a gang attacking him. The mistake was one of fact. This applies to an accused who was drunk, as in the case of Letenock,⁶⁰¹ where the accused was drunk when he mistakenly believed he was under attack. The conviction for murder was quashed since the reasonable person in the same position as the accused may have acted in the same way.

In the case of Humphreys,⁶⁰² the accused at the age of sixteen went into a life of prostitution. The accused lived with the deceased, her boyfriend at the time, who pimped the accused out to other men and also subjected her to various forms of abuse. One evening the accused met the deceased along with his sons at a pub, the deceased asked his sons if they would be "all right for a gang-bang". The accused feared that the deceased would rape her. On the night of the killing, the accused slit her wrists, the deceased taunted the accused to the effect that she had not done a good job, hearing this accused stabbed the deceased, fatally wounding him.

⁵⁹⁸ Edwards supra (n 597).

⁵⁹⁹ Jefferson supra (n 54) at 467.

⁶⁰⁰ Brown (1776) 168 ER 177.

⁶⁰¹ Letenock (1917) 12 Cr App R 221 (CCA).

⁶⁰² Humphreys [1995] 4 All ER 1008, CA The accused's parents divorced when she was still a young child. She was subsequently raised by her mother and step-father who were alcoholics. The accused developed anti-social behaviour and engaged in self-mutilation by slitting her wrists and made frequent attempts to commit suicide. She received psychiatric treatment.

The accused was convicted of murder, however ten years later her appeal was allowed, the Court of Appeal stated that there was misdirection at the original trial on the law of provocation and thereby substituted the conviction to manslaughter resulting in the accused's immediate release from incarceration.

The Court of Appeal stated that the misdirection concerned the trial judge's direction to the jury to only consider the provocative acts made by the deceased relating to the accused slashing her wrists when determining if she was provoked and if her reaction was reasonable.⁶⁰³ This was incorrect as the whole history should have been considered. This included the abuse inflicted upon the accused by the deceased, the comments made by the deceased at the pub, and the fact that the deceased took in another woman despite being the accused's boyfriend. These events constituted cumulative provocation and therefore the entire period of the cumulative provocation should have been considered.⁶⁰⁴

3.2.2. The subjective test

The requirements for the subjective test were set out by Devlin J in Duffy⁶⁰⁵.⁶⁰⁶ The first limb of the qualified defence of provocation under the Homicide Act was predominantly subjective. It sought to assess if there was evidence that the accused was provoked to lose self-control and kill.⁶⁰⁷ This condition contributed to the excusing element of the provocation defence which was based on the foundation that a person who lost self-control was less responsible for conduct that ensued.⁶⁰⁸ The subjective test also served to differentiate between those actions that were uncontrolled reactions to provocation and those that were deliberate.⁶⁰⁹

⁶⁰³ Humphreys supra (n 602).

⁶⁰⁴ Humphreys supra (n 602).

⁶⁰⁵ Duffy supra (n 550).

⁶⁰⁶ B. Fitzpatrick and A. Reed "Provocation: A controlled response" (2000) The Transnational Lawyer Vol.12 at 66.

⁶⁰⁷ Ashworth supra (n 57) at 240.

⁶⁰⁸ Ashworth supra (n 57) at 240.

⁶⁰⁹ Ashworth supra (n 462) at 314.

In terms of the first requirement of the subjective test, there must have been a provocative act, and secondly, there must have been a causal link to the sudden and temporary loss of self-control.⁶¹⁰ If the defendant possessed self-control at the time of the killing, then the evidence required for the defence to succeed does not exist.⁶¹¹

The defence may be denied in cases where there was “cooling off time” or where the defendant had a sufficient amount of time after the provoking incident to “reflect”.⁶¹² However, the jury may exercise its discretion and decide that despite the presence of a significant time lapse between the last act of provocation and the killing, the defendant still acted under provocation.⁶¹³ Ashworth has argued that without this element, there would be no method of differentiating between planned revenge killings and those that are genuine. Ashworth contends that the “genuinely provoked killer” would have suffered a disturbance in his state of mind and this disturbance would prevent the calculation of revenge.⁶¹⁴

The definition of provocation provided by Devlin J in Duffy⁶¹⁵ put the requirement of loss of self-control at the heart of the provocation defence; this view was given approval by section 3 of the Homicide Act.⁶¹⁶ Holton and Shute state in terms of the loss of self-control element, the accused is not required to lose control of their body or even fail to understand what actions are being performed.⁶¹⁷ The agent thus remains an agent possessing intention and driven by desire if applicable. However, what is crucial is that there is a loss of self-control over the mental elements that drive the actions. Hence, in terms of Devlin J’s “classic definition” loss of self-control meant “to lose a certain kind of mastery over one’s mind”.⁶¹⁸

⁶¹⁰ J.C. Smith and B.Hogan Smith and Hogan Criminal law 8th ed (1996) at 452.

⁶¹¹ *Ibid.*

⁶¹² Smith *supra* (n 652) at 452.

⁶¹³ Clarkson and Keating *supra* (n 574) at 541.

⁶¹⁴ Ashworth *supra* (n 462) at 240.

⁶¹⁵ Duffy *supra* (n 550).

⁶¹⁶ Holton and Shute *supra* (n 551) at 50-51.

⁶¹⁷ Holton and Shute *supra* (n 551) at 50-51.

⁶¹⁸ Holton and Shute *supra* (n 551) at 52.

3.2.3. The loss of self-control must be “sudden and temporary”

The requirement that the loss control must be sudden was laid down in the case of Duffy⁶¹⁹. It was a controversial qualification but was considered important to prevent accused persons who killed out of revenge from relying on the defence. The accused in Duffy did not have a defence because a “cooling-off” period existed.⁶²⁰ Although, section 3 did not contain the word “sudden”, the requirement was considered to be a vital part of the provocation defence.⁶²¹ Ashworth states that the nature of the subjective criteria represents the widely held view that crimes committed on impulse and on the sudden should garner leniency when compared to premeditated crimes.⁶²²

Holton and Shute contend that although the definition seems to impose an element of contemporaneity, the requirement of loss of self-control does not require this. The reason being is that opportunity for retaliation may have not occurred, and it is incorrect to assume that once loss of self-control has occurred, a response will follow immediately. Certain individuals might possess a “slow fuse” hence a person might “smoulder” for a period of time before actually losing self-control.⁶²³

The requirement of contemporaneity was a central issue in the case of Ahluwalia⁶²⁴ where Lord Taylor CJ stated that the phrase “sudden and temporary loss of self-control” encompassed a vital ingredient of the provocation defence in a clear and understandable

⁶¹⁹ Duffy supra (n 550).

⁶²⁰ Duffy supra (n 550).

⁶²¹ Ashworth supra (n 462) at 316.

⁶²² Ashworth supra (n 462) at 315.

⁶²³ Holton and Shute supra (n 551) at 64.

⁶²⁴ R v Ahluwalia [1992] 4 All ER 889 (CA); In this case, the appellant, an Asian woman was forced in to an arranged marriage with the deceased. During the marriage she was abused over several years. The deceased regularly assaulted her and subjected her to threats to her life. The deceased taunted the appellant with the fact that he was involved in an extra-marital affair. On the day of the killing the deceased threatened to assault the appellant and burn her face with an iron. Later that night, the appellant poured gasoline which was purchased beforehand into a bucket, which would make throwing the gasoline easier, she then lit a candle and carried the gasoline upstairs. She also carried an oven glove for self-protection together with a stick. She proceeded to the room in which her husband was sleeping in and threw the petrol into the room and then lit the stick with the candle and threw into the room setting the room alight. The deceased suffered serious burns and eventually succumbed to his injuries and died some days after.

term. It was stressed that this requirement underlines that the defence is concerned with those individuals who, at the time when they acted violently, were not the masters of their minds.

Time lapse between the provocative act and the reaction to the provocation was required to be considered since time for reflection may indicate that after the provocative act impacted on the defendants mind, the defendant regained self-control. Time lapse could also indicate if the acts committed were premeditated or spurred on by revenge, which would go against the ethos of the provocation defence.⁶²⁵

The Court of Appeal in Ahluwalia⁶²⁶ approved the position in Duffy⁶²⁷. Section 3 of the Act had not eroded the requirement that the loss of self-control must be sudden and temporary. The greater the delay between the provocative act and the killing, the stronger the evidence of premeditation becomes, the chances of succeeding with the defence diminishes. Counsel for the defence implored the court to depart from the immediacy requirement stating that it is not a rule of law.

However Lord Taylor CJ stated:

“Counsel’s argument in support of this ground for appeal amounted in reality to an invitation to this court to change the law. We are bound by the previous decisions of this court to which reference has been made; unless we are convinced that they were wholly wrong...It must be a matter for Parliament to consider any change”.⁶²⁸

An important point made by the court was that the requirement of sudden and temporary did not mean that the response to the provocation should be immediate, but it serves to indicate if the reaction was premeditated. In this light, a significant delay between the provocation and the killing was detrimental to the accused’s plea.⁶²⁹

⁶²⁵ P.Hungerford-Welch and A. Taylor Source Book on Criminal Law (1997) at 663-664.

⁶²⁶ Ahluwalia supra (n 624).

⁶²⁷ Duffy supra (n 550).

⁶²⁸ Ahluwalia supra (n 624) at 896.

⁶²⁹ Ahluwalia supra (n 624) at 896.

The requirement of “sudden and temporary loss of self-control” also appeared in the case of Holmes⁶³⁰ and was considered to be the overriding tenet of the subjective limb of the defence.⁶³¹

However, since the promulgation of section 3 of the Act, this rule was relaxed and it was acknowledged that if an accused did have time to calm her emotions, this factor is only one element that must be considered when determining if the accused regained self-control.⁶³² The meaning of “temporary” was suggested to indicate whether the defendant could use the defence of insanity if the loss of self-control was not temporary.⁶³³

The notion that “the conscious formation of a desire for revenge means that a person had time to think” was further expanded in the case Ibrahms and Gregory.⁶³⁴ In this case, the approach of Duffy⁶³⁵ was approved; the court stressed the requirement of a sudden explosion of temper. The “cooling-off period” between the provocative act and the killing is indicative that the loss of control was not “sudden”.

The court stated that the careful planning of the attack did not indicate a sudden explosion of temper or a loss of self-control. Based on the facts, the killing resembled that of a revenge killing. The court ruled that the trial judge was correct and the appeal

⁶³⁰ Holmes supra (n 566).

⁶³¹ Jefferson supra (n 54) at 461.

⁶³² Jefferson supra (n 54) at 463.

⁶³³ Jefferson supra (n 54) at 463.

⁶³⁴ R v Ibrahms and Gregory (1982)74 Cr App R 154, CA; the fact of this case involved the appellants who, together with a young woman were bullied by a person called “Monk”. Attempts to gain protection by the police failed. The appellants, fearing further bullying, hatched a plan to get Monk drunk and coerce him to go to bed. The woman was then responsible for sending a signal to the defendants who would then attack Monk with the intention of breaking his hands and legs. However, things did not go as they planned and Monk was killed by the assault. The appellants were subsequently convicted of murder and lodged an appeal on the basis that the judge had wrongly decided to remove the provocation defence from the jury.

⁶³⁵ Duffy supra (n 550).

was rejected.⁶³⁶ The court stated that “nothing happened on the night of the killing which caused the accused to lose self-control”, it was argued that this could suggest that the provocative act should have occurred immediately before the suffering of loss of self-control; however, section 3 clearly stated that the court must take account of “everything”.⁶³⁷

Lawton LJ (in reference to the speech of Lord Diplock in Camplin⁶³⁸) stated

“That history shows that, in the past at any rate, provocation and loss of self-control tended to be regarded by the courts as taking place with a very short interval of time between the provocation and the loss of self-control...”⁶³⁹

And

“In our judgment, Lord Diplock clearly thought that the loss of self-control must occur at or about the time of the act of provocation...”⁶⁴⁰

The court further cited with approval part of the direction of the court in Duffy⁶⁴¹

“Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation...”⁶⁴²

And

“...[the appellants] were masters of their minds when carrying [their plan] out, because they worked out the details with considerable skill; and in pursuing the plan as they did on the Friday night they were still masters of their own minds. They were doing what they had planned to do

⁶³⁶ Ibrahms and Gregory supra (n 634) at 159 the court as per Lawton LJ stated “Here the last act of provocation was on Sunday, 7 October. It was not in any way suggested that the dead man had provoked anybody on the night of his death. In fact when Gregory and Ibrahms went into the bedroom he was asleep. The first blow he received was inflicted on him by Gregory, and it dazed him but did not knock him unconscious. He was able to sit up in bed, and he was then attacked by Ibrahms. Nothing happened on the night of the killing which caused Ibrahms to lose his self-control. There having been a plan to kill Monk, his evidence that when he saw him all the past came to his mind does not, in our judgment, provide any evidence of loss of self-control.”

⁶³⁷ Ibrahms and Gregory supra (n 634).

⁶³⁸ Camplin supra (n 580).

⁶³⁹ Ibrahms and Gregory supra (n 634) at 159.

⁶⁴⁰ Ibrahms and Gregory supra (n 634) at 159.

⁶⁴¹ Duffy supra (n 550).

⁶⁴² Ibrahms and Gregory supra (n 634) at 160.

...It follows...that McNeil J was right in ruling that there was no evidence of loss of self-control...⁶⁴³

The appeal was subsequently rejected and the court stated that although the provocation extended over a period of time, it was vital that it culminated into a sudden explosion of temper and this was not the case in Ibrahms and Gregory.⁶⁴⁴

In the case of Pearson⁶⁴⁵ the Court of Appeal ruled that despite evidence of premeditation there was evidence of provocation. The court stated that the cooling-off period was a piece of evidence used to determine if the defendant lacked self-control. The court held that the trial judge should have directed the jury to consider the threats made by the deceased not only to the accused but also to his brother when making a decision regarding loss of self-control.

The case of Cocker⁶⁴⁶ illustrates that the loss of control must be caused directly by loss of temper. In this case the defendant killed his terminally ill wife who suffered tremendous pain due to her illness. The deceased pleaded with the defendant to end her life and he eventually succumbed to her requests and smothered her with a pillow. Although this was a “mercy killing”, the judge in this case withdrew the defence of provocation from the jury, which resulted in the defendant being convicted of murder. However, the jury was not happy with the judge's decision to withdraw the provocation defence. The Appeal Court ruled that the judge acted correctly since the requirement of anger and loss of temper was not met. The defendant had merely succumbed to his wife's pleas. The controversial aspect of the requirement for a sudden and temporary

⁶⁴³ Ibrahms and Gregory surpa (n 634) at 160.

⁶⁴⁴ Ibrahms and Gregory supra (n 634).

⁶⁴⁵ R v Pearson (1992) Crim. LR 193, CA In this case the defendant (aged 17) and his brother Malcolm (16) were charged with the murder of their father. Their parents divorced and Malcolm stayed with his father whereas the accused stayed with his mother. Both brothers suffered physical abuse at the hands of their father however because of the living arrangements Malcolm endured more physical abuse. On the day of the killing, the deceased threatened the brothers with violence, William (the defendant) retorted and struck his father with a sledgehammer, Malcolm then picked up the sledgehammer and inflicted further blows to the deceased.

⁶⁴⁶ Cocker (1989) Crim. LR 740 CA 76.

loss of control may be unfair or discriminatory to women who kill their partners after suffering prolonged periods of abuse.⁶⁴⁷

In the case of Thornton,⁶⁴⁸ despite the judge leaving the issue of provocation to the jury, the defendant was nevertheless convicted of murder. The defence subsequently lodged an appeal on the basis that the requirement of sudden loss of self-control was unfair, especially in the circumstance where the defendant had experienced a long period of relentless provocation. It was submitted that the long periods of provocative conduct may have weakened the self-restraint of the defendant, which could impact on the level of self-control.

The Appeal Court nevertheless confirmed that the judge had acted correctly by leaving the issue of sudden and temporary loss of self-control to the jury. The court stressed that the requirement of loss of control was an essential part of the provocation defence and could only be changed through promulgation of new legislation.⁶⁴⁹

Beldam LJ in dismissing the appeal stated:

“the essential feature is that provocation produces a sudden or impulsive reaction leading to a loss of self-control...there is no suggestion that she reacted suddenly and on the spur of the moment...to the provocative statements made by the deceased”.⁶⁵⁰

In Baillie⁶⁵¹ the appellant’s conviction was later quashed by admission of new evidence.

⁶⁴⁷ Cocker supra (n 646).

⁶⁴⁸ Thornton (1992) 1 All ER 316 the defendant, Sara Thornton was the victim of years of abuse at the hands of the deceased, her alcoholic husband. One night of the killing, the deceased was asleep on the couch. The defendant asked the deceased to go to bed. The deceased retorted by verbally abusing the defendant calling her a prostitute and threatened to kill the deceased if she had been unfaithful to him. The defendant then proceeded to the kitchen where she looked for a weapon which she could use for her own protection; she found a large carving knife which, she sharpened. She went to the deceased and again asked if he would go to bed. The deceased refused and then threatened to kill the defendant in her sleep. Upon hearing this, the defendant stabbed her husband thereby causing his death.

⁶⁴⁹ Thornton supra (n 648) at 316.

⁶⁵⁰ Thornton supra (n 648) at 316 discussed by S. Edwards “Anger and fear as justifiable preludes for loss of self-control” (2010) 74 The Journal of Criminal Law 223 at 226.

⁶⁵¹ Baillie [1995] 2 Cr App R 31 CA.

In terms of the Homicide Act, the requirement of loss of self-control was considered a vital part of the provocation defence. The sudden and temporary requirement pertained to the loss of self-control and not the provocation itself,⁶⁵² the “immediacy” requirement thus proved contentious in the cases aforementioned as it precluded the battered women especially from accessing the provocation defence.⁶⁵³

3.2.4. Capacity for self-control

What constitutes loss of self-control had been confined to include indignation or anger and excluded other emotional states such as grief, fear or terror and was not recognised to affect loss of self-control.⁶⁵⁴ The amount of loss required and the reasons for such loss were considered by the courts.

In Acott⁶⁵⁵ Lord Steyn stated:

“A loss of self-control caused by fear, panic, where bad temper or circumstances for example, slowing down of traffic due to snow) would not be enough”.⁶⁵⁶

And

“There must be some evidence tending to show that the killing might have been an uncontrolled reaction to provoking conduct rather than an act of revenge. Moreover, although there is no longer a rule of proportionality as between provocation and retaliation, the concept of proportionality is nevertheless still an important factual element in the objective inquiry”.⁶⁵⁷

The case of Rossiter⁶⁵⁸ illustrates this point when Russell LJ stated:

“We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling upon it”.⁶⁵⁹

⁶⁵² Smith and Hogan supra (n 610) at 453.

⁶⁵³ Smith and Hogan supra (n 610) at 453.

⁶⁵⁴ S. Edwards “Descent into murder: provocation’s stricture – the prognosis for women who kill men who abuse them” (2006-2007) Vol.71 (4) The Journal of Criminal Law 342 at 344.

⁶⁵⁵ Acott [1997] 1 All ER 706, HL.

⁶⁵⁶ Acott supra (n 655) at 712-713.

⁶⁵⁷ Acott supra (n 645) at 712-713.

⁶⁵⁸ Rossiter (1992) 95 Cr App R 326.

⁶⁵⁹ Rossiter supra (n 658) at 332, the court further stated at 333:” “We are firmly of the view that; however, well-intentioned in what was otherwise a full and careful direction to the jury, on this occasion Boreham J fell into error in failing to leave the issue of provocation for the jury’s determination. There was, in our judgment, sufficient evidence in the case taken as a whole to demand that that course be taken. It follows that this conviction for murder cannot stand”.

Edwards interprets the phrase “however tenuous” to apply to both the degree of loss of self-control as well as the evidence of the provocation by the deceased.⁶⁶⁰

The Court of Appeal in Thornton⁶⁶¹ confirmed that cumulative provocation should be considered and the lack of the trial court to consider this evidence resulted in a re-trial for the accused in Thornton (No2)⁶⁶². A nexus exists between the notional characteristics and self-control and this is demonstrated in the cases of Ahluwalia⁶⁶³ and Thornton (No.2)⁶⁶⁴, notional attributes of battered woman syndrome was acknowledged to have an effect on the capacity for self-control.⁶⁶⁵

These two cases illustrate that abuse and an understanding of its impact on abused woman led to the following:

1. An expansion of the time lapse requirement;
2. The meaning of “sudden loss” being developed to accommodate a slow burn reaction when describing how battered woman respond and react to prolonged periods of abuse consisting of threats of violence as well;
3. It has been accepted that the last act of provocation need not be the most severe but could be “milder” when judged in the light of cumulative acts and abuse and threats.⁶⁶⁶

In Thornton (No.2)⁶⁶⁷ Lord Taylor CJ emphasised that the nexus between the characteristics of the reasonable man and the defendant’s capacity for self-control could not be ignored:

The court as per Lord Taylor of Gosforth CJ held as follows:

“[S]ince reliance is placed upon the appellant’s suffering from a “battered woman syndrome”, we think it right to reaffirm the principle. A defendant, even if suffering from that syndrome, cannot

⁶⁶⁰ Edwards (n 654) at 344.

⁶⁶¹ Thornton supra (n 548).

⁶⁶² R v Thornton (No.2) [1996] 2 ALL ER 1023 CA.

⁶⁶³ Ahluwalia supra (n 617).

⁶⁶⁴ Thornton (No.2) supra (n 662).

⁶⁶⁵ Edwards supra (n 654) at 346.

⁶⁶⁶ Edwards supra (n 654) at 346.

⁶⁶⁷ Thornton (No.2) supra (n 662).

succeed in relying on provocation unless the jury consider she suffered or may have suffered a sudden and temporary loss of self-control at the time of the killing. The severity of such a syndrome and the extent to which it may have affected a particular defendant will no doubt vary and it is for the jury to consider”.⁶⁶⁸

And

“...it may form an important background to whatever triggered the *actus reus*. A jury may more readily find there was a sudden loss of control triggered by even a minor incident, if the defendant had endured abuse over a period, on the “last straw” basis”.⁶⁶⁹

Furthermore, in respect of the debate regarding flexibility of capacity for self-control, Edwards argues that the dissenting “voices: in the famed case of Holley⁶⁷⁰ are representative of the large body of opinion in both the judicial and academic thinking who believe that capacity for self-control should be flexible”.⁶⁷¹ Lord Hoffman emphatically stated that the provocation defence should fit a logical pattern and which a jury should be able to understand and most importantly achieve justice.⁶⁷²

In criticism of the majority’s stance, Lord Carswell stated that the approach taken was “illogical, inexplicable and unjust”.⁶⁷³ In their joint dissenting, Lord Carswell, Lord Hoffmann and Lord Bingham stated that in certain circumstances the objective characteristics and the capacity for self-control cannot be separated.

Lord Hoffmann stated:

“consideration of the gravity of the provocation cannot and rationally and fairly be divorced from consideration of the effect of the provocation on the particular defendant in relation to both limbs of the defence. Otherwise one is not comparing like with like, and is losing sight of the essential question whether, in all the circumstances, the defendant's conduct was to some degree excusable”⁶⁷⁴

⁶⁶⁸ Thornton (No.2) supra (n 662) at 1030.

⁶⁶⁹ Thornton (No.2) supra (n 662) at 1030.

⁶⁷⁰ Her Majesty’s Attorney General for Jersey Appellant v Dennis Peter Holley (2005) UKPC 23, Privy Council.

⁶⁷¹ Edwards supra (n 654) at 345.

⁶⁷² Holley supra (n 670) at 75.

⁶⁷³ Holley supra (n 670) at 75, discussed by Edwards supra (n 654) at 345.

⁶⁷⁴ Holley supra (n 670) at 66.

This fixed standard for capacity of self-control as set down in Holley⁶⁷⁵ left a margin of uncertain pertaining to two aspects, firstly, whether mental were afflictions excluded from the considerations of the attributes of the reasonable man where such affliction was the subject of the gravity of the provocation. Secondly, in circumstances where the mental affliction was alleged to have influenced the capacity for self-control it was uncertain if the affliction depended upon as affecting the capacity of the loss of self-control.⁶⁷⁶

The ruling in Holley⁶⁷⁷ had cast a shadow on the criminal law in the area of capacity for self-control and resulted in the reduction of the number of provocation cases that were pleaded.⁶⁷⁸ Furthermore, the cases of Ahluwalia,⁶⁷⁹ Humphreys⁶⁸⁰ and Thornton (No.2)⁶⁸¹ presented a dilemma for the Court of Appeal in respect of battered woman syndrome and the controversy surrounding the laws perceived inability to bring victims of abusive relationships within its ambit.

3.2.5. The objective test⁶⁸²

The objective test under section 3 of the Homicide Act existed in the form of the hypothetical reasonable man. The test examined what the reaction of the reasonable person would have been had he been in the position of the accused. The objective test in the form of the reasonable man has attracted “unremitting criticisms” from academics.⁶⁸³ Before the enactment of section 3 of the Homicide Act, the characteristics of the reasonable person were judicially controlled, the reasonable person was deemed to possess normal capacities for self-control.⁶⁸⁴

⁶⁷⁵ Holley supra (n 670).

⁶⁷⁶ Edwards supra (n 654) at 349.

⁶⁷⁷ Holley supra (n 670).

⁶⁷⁸ Edwards supra (n 654) at 352.

⁶⁷⁹ Ahluwalia supra (n 624).

⁶⁸⁰ Humphreys supra (n 602).

⁶⁸¹ Thornton (No.2) supra (n 662).

⁶⁸² In terms of section 3 of the Homicide Act 1957.

⁶⁸³ Ashworth supra (462) at 292, at 299 Ashworth states that the laws main concern is the determine whether the accused exercised a reasonable amount of self-restraint; however, the words “reasonable” and “man” has unfortunately diverted focus away from this important requirement.

⁶⁸⁴ A.P. Simester and G.R. Sullivan Criminal law theory and doctrine 2nd ed (2004 revised) at 350.

However, the exact ambit of the objective test under section 3 of the Homicide Act was uncertain due to the fact that the provision was not intended to be a complete statement of the law on the provocation defence.⁶⁸⁵ The objective test was an evaluation of two aspects; firstly the standard of the reasonable man assesses the gravity of the provocation⁶⁸⁶ and secondly if it was in proportion to the provocation, also known as the proportionality requirement.⁶⁸⁷

Allen states that the changes to the objective test brought about by the enactment of section 3 were unforeseen, allowing words as provocation which resulted in insults directed at a particular feature or impairment of the accused being constituted as provocation.⁶⁸⁸ Hence, the position adopted in Bedder⁶⁸⁹ could not be maintained. After the court establishes that the accused was provoked to lose self-control, then it proceeds to consider if the accused would have acted in the same manner as the defendant. The objective leg determines if the reasonable person would have been provoked to act in the same manner as that of the accused, if presented with the same circumstances. The reaction to the provocation must be in proportion to the provocative act itself.⁶⁹⁰

In the case of Acott,⁶⁹¹ the accused was charged with the murder of his mother. The deceased was found dead due to tremendous injuries sustained. The defence argued that the deceased had fallen accidentally. The prosecution argued that the accused had lost his temper and killed his mother. The prosecution alleged that the accused lost his temper due to a heated argument with the deceased, together with the deceased being an alcoholic coupled with the accused being unemployed and dependent on his mother for money.⁶⁹²

⁶⁸⁵ Ashworth supra (n 462) at 297.

⁶⁸⁶ Ashworth supra (n 462) at 298.

⁶⁸⁷ Elliot and Quinn supra (n 525) at 77.

⁶⁸⁸ Allen supra (n 462) at 222-223.

⁶⁸⁹ Bedder supra (n 557).

⁶⁹⁰ Allen supra (n 462) at 223.

⁶⁹¹ Acott supra (n 655).

⁶⁹² Acott supra (n 655).

In this case, the judge did not direct the jury in regard to the defence of provocation; this resulted in the defendant being convicted of murder. The House of Lords stated that where it was determined that on a charge of murder there is evidence that would indicate that a person charged was indeed provoked to lose control, the responsibility of determining if the accused acted in the same manner as the reasonable person, did fall to the jury.⁶⁹³

The House of Lords stated that in cases where there is no specific evidence of provocation, only speculative indications, the judge would be correct if he decided not to direct the jury on the defence of provocation.⁶⁹⁴

A bone of contention in English law has always been the characteristics of the reasonable man.⁶⁹⁵ The controversy surrounds which character traits of the accused could be given to the reasonable man when determining if the reasonable man would have acted in the same manner as the accused did. The truth of the matter is that ordinary people do not react to provocation by committing homicide. Hence, imbuing the reasonable man with “ideal” qualities would theoretically be ridiculous and lead to the defence failing dismally.

Ashworth states that the objective test represents a clumsy attempt at incorporating the element of partial justification on the defence of provocation. The “clumsy” part is the “reasonable man” test which according to Ashworth is an “anthromorphic (and male) standard which might be taken to suggest a paragon of virtue if it were not for the context of partially exculpating a killing by such a person”⁶⁹⁶

The fear of making an objective test more subjective is what caused the controversy. Prior to the promulgation of section 3 of the Homicide Act, judges would assume the sole responsibility to direct the jury in respect of the attributes of the reasonable person, the personal characteristics of the accused was not taken into account.⁶⁹⁷

⁶⁹³ Acott supra (n 655).

⁶⁹⁴ Acott supra (n 655).

⁶⁹⁵ Ormerod supra (n 58) at 523.

⁶⁹⁶ Ashworth supra (n 57) at 254.

⁶⁹⁷ Clough supra (n 20) at 120.

Twenty two years after the promulgation of the Homicide Act, the House of Lords examined the matter in the case of Camplin.⁶⁹⁸ This case is considered to be a watershed in the law of provocation.⁶⁹⁹ In this case, the accused, a 15-year-old boy at the time of the killing, alleged that he was drinking alcohol when the deceased homosexually assaulted him. After the assault, the deceased laughed at him. This caused him to lose self-control. He then took a chapatti pan and struck the deceased over the head causing the deceased to die.

The House of Lords directed that the jury establish how the “reasonable man” of the same age and sex of the accused, would react to the acts of provocation by the deceased, would the reasonable man of the age and sex of the accused have lost control and killed the deceased.

The court stated:

“The reasonable man is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did”.⁷⁰⁰

The reasonable man was described as:

“for the purposes of the law of provocation the “reasonable man” has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today”.⁷⁰¹

The court explained further:

“a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him”.⁷⁰²

⁶⁹⁸ Camplin supra (n 580).

⁶⁹⁹ C.D. Freedman “Restoring order to the reasonable person test in the defence of provocation” (1999) 10 The Kings College Law Journal at 29.

⁷⁰⁰ Camplin supra (n 580) at 717E-F.

⁷⁰¹ Camplin supra (n 580) at 717.

⁷⁰² Camplin supra (n 580) at 717.

The case of Camplin⁷⁰³ sparked debate on whether only the age and sex of the accused could be taken into account when applying the reasonable man test, or whether the case of Camplin⁷⁰⁴ would open the doors to other characteristics being considered, such as mental disorders in the form of depression. The critical question was to what degree the House of Lords subjectivised the reasonable man test. In this respect, Lord Diplock in directing the jury stated that there are two types of characteristics which the reasonable person might be ascribed; there are universal qualities which these encompass age or sex and the second type is personal idiosyncrasies such as impotence.⁷⁰⁵

The approach in Camplin⁷⁰⁶ softened the perceived harshness of the objective test by allowing age and gender to be attributed to the reasonable person. This approach did generate some controversy as to where the line to be drawn in respect of which subjective characteristics should be considered and which should not.⁷⁰⁷

After the reassessment of the reasonable man test in Camplin,⁷⁰⁸ Bedder⁷⁰⁹ was considered bad law.⁷¹⁰ However, this led to two opposing views being adopted in this regard between the Court of Appeal and the Privy Council regarding the further subjectivising of the objective test to individuals whose mental state may impact on capacity for self-control.⁷¹¹

In the case of Newell,⁷¹² the Court of Appeal followed New Zealand law on the subject and extended the list of excluded characteristics by adding chronic alcoholism. The

⁷⁰³ Camplin supra (n 580).

⁷⁰⁴ Camplin supra (n 580)

⁷⁰⁵ Elliot and Wells supra (n 577) at 397.

⁷⁰⁶ Camplin supra (n 580).

⁷⁰⁷ K. Campbell "Objective standards in provocation and duress" (1996-1997) 7 The Kings College Law Journal 75 at 76.

⁷⁰⁸ Camplin supra (n 580).

⁷⁰⁹ Bedder supra (n 557).

⁷¹⁰ Elliot and Quinn supra (n 525) at 76.

⁷¹¹ Freedman supra (n 699) at 26.

⁷¹² R v Newell (1980) 71 Cr.App. R.331, in this case the appellant was a chronic alcoholic who killed a friend by battering him to death. The appellant alleged that the victim made disparaging remarks about

result being a limitation on personal characteristics, relevance will only be given where the provocative act was directed at that characteristic itself. The court held that only permanent traits such as race, disability and ethnic origin may be considered, transient characteristics such as exhaustion and intoxication may not be considered.

This approach was criticised in Morhall as being overly restrictive, the House of Lords held that the jury should be allowed to take account of any characteristic which is relevant to the assessment of the gravity of the provocation.⁷¹³ The court stated further that in order for a characteristic to be considered, it must have been the target of the provocation.

The court referred to a passage from the New Zealand Court of Appeal case of McGregor⁷¹⁴ where North J. stated that:

“...there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test.”

It is argued that according to this extract from McGregor, a characteristic such as race will only be relevant if the provocative act was directed at the race of the accused.

Another important judgment comes from the House of Lords, the case of R v Smith (Morgan).⁷¹⁵ In this case the accused, Morgan Smith, received a visit from the deceased, James McCullagh, who was an old friend of the accused. The accused and the deceased were both alcoholics and had on the evening of the killing consumed alcohol. The accused harboured some grievances against the deceased. The accused suspected the deceased of stealing his tools which the accused needed as a carpenter. The two spent the evening arguing and drinking alcohol. Eventually, the accused took a knife and stabbed the deceased and caused his death.

In his defence, the accused claimed that he was provoked to an extent that he lost self-control and killed the deceased. The defence stated that the accused suffered from

the appellant's former girlfriend along with making uninvited homosexual advances. The court directed the jury to assume the remarks were directed to a person who was sober and assess if they would be provoked in the same manner as the deceased. See discussion in Elliot and Wells supra (n 568) at 397.

⁷¹³ Morhall [1995] 3 All ER 659 supra (n 725) discussed by Ashworth supra (n 57) at 255.

⁷¹⁴ The Queen v McGregor [1962] N.Z.L.R 1069.

⁷¹⁵ R v Smith (Morgan) (2000) 4 ALL ER 289. House of Lords.

depression which decreased his ability to control his actions, hence more likely to commit a violent act. The main issue in this case was whether the objective test would allow that the reasonable man test could be given the mental illness of depression.

The trial judge directed that the jury could not take into account the depression when evaluating the reasonable man test. The defendant was subsequently convicted of murder. An appeal was lodged to the Court of Appeal where the appeal succeeded.⁷¹⁶ The Court of Appeal stated that the jury should have been directed to consider the depression of the accused when the objective test of the provocation defence was evaluated.

However, an appeal to the House of Lords was dismissed because it was held that the Court of Appeal was correct in its interpretation of the law regarding the reasonable man test.⁷¹⁷ Furthermore, the House of Lords stated that the jury may take into account other characteristics of the accused other than age and sex when applying the reasonable man test and that in certain cases account must be taken of abnormalities of the accused when applying the reasonable man test.⁷¹⁸

Lord Hoffman stated:

“The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in any appropriate case be told, in whatever language will best convey the distinction that this is a principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of the control which society could reasonably have expected of him and which it would be unjust not to take into account. If the jury takes this view, they are at liberty to give effect to it”.⁷¹⁹

The House of Lords emphasized that the jury is sovereign and interpretation of the reasonable man test remained their responsibility. Only in exceptional circumstances should the jury be directed by the judge on which characteristics of the accused to exclude from the application of the reasonable man test. Lord Hoffman however did

⁷¹⁷ Smith (Morgan) at 53.

⁷¹⁸ *Ibid* at 53.

⁷¹⁹ Smith (Morgan) supra (n 715) at 20.

state that the jury should be directed to exclude characteristics such as jealousy.⁷²⁰ Lord Hoffman stated that the term reasonable person test may be confusing to the jury as many of the characteristics that can be given to the reasonable man may render him abnormal.⁷²¹

This case reached to the very basis of criminal liability. The concern of the majority was not only focused on the practical troubles associated with the objective test but also with the perceived confusion within the stringent doctrine which ignored the concept of capacity for self-control when assessing provocation. In effect, “the law imposed a “straightjacket” which required a strict demarcation between the respective defences to murder which was not warranted by reality”.⁷²²

In the case of Weller,⁷²³ the case of Smith (Morgan)⁷²⁴ was interpreted as being the authority the subject of the objective test. The Court of Appeal stated that it is for the jury to decide which characteristics to consider when applying the objective test. It is not for the judge to decide. The judge may give guidance on the importance or weighting of the characteristic; however, it must be made clear to the jury that the final decision is in their hands. The characteristic of jealousy may also be taken into account if the jury feels that it is of importance.

The requirement of proportionality was an important aspect of the defence under the Homicide Act, in the case of Brown,⁷²⁵ the Court of Appeal held in respect to application of section 3, that “a jury should be instructed to consider the relationship of the accused’s acts to the provocation” and “a jury might find that the accused’s act was so disproportionate to the provocation alleged that no reasonable man would have

⁷²⁰ Smith (Morgan) supra (n 715) at 20.

⁷²¹ Smith (Morgan) supra (n 715) at 20.

⁷²² K. Kerrigan “Provocation: the fall (and rise) of objectivity” (2006) 44-52 Journal of Mental Health law at 48 discussing Smith (Morgan) supra (n 707) at 168: Lord Hoffman “I think it is wrong to assume that there is a neat dichotomy between the ordinary person contemplated by the law of provocation and the “abnormal person” contemplated by the law of diminished responsibility...”

⁷²³ R v Weller [2003] EWCA Crim 815, [2004] Crim LR 724 Court of Appeal, Criminal Division.

⁷²⁴ Smith (Morgan) supra (n 715).

⁷²⁵ Brown supra (n 593) at 229.

acted”⁷²⁶ Ashworth argues that the main criticisms of the proportionality requirement emanated from the reasoning that the reasonable man would continue to behave reasonably despite suffering a loss of self-control.⁷²⁷

3.2.5.1. The Privy Council’s approach to the objective test

The Privy Council took a conflicting approach to the objective test when compared to the approach by the House of Lords in the Smith(Morgan) case.⁷²⁸ The Privy Council distinguished between characteristics which are described as “control characteristics” and “response characteristics”. Control characteristics have an effect on the defendant’s self-control and could not be taken into account in the objective test. The response characteristics are the main subject of the provocative act and could be taken into account.⁷²⁹

In the case of Luc Thiet Thuan v R⁷³⁰, the appellant was charged with the murder of his former girlfriend in Hong Kong. It was alleged that the accused had visited the deceased to collect money that was borrowed from him. At the deceased's flat, the deceased began comparing him to her current boyfriend, insulting his sexual performance. The defendant claimed that this led to him losing his control and he then killed her.

The defence stated that when the accused was younger he fell and injured his head which caused brain damage. This brain damage caused the accused to have little self-control or impulse control. During the trial, when the judge directed the jury, he neglected to make any reference to the appellant's brain injury. On this basis, the appellant lodged an appeal with the Privy Council to assess whether an accused person with his characteristics and brain injury would have acted in the same manner that the appellant did. The appeal was dismissed by the Privy Council on the basis that allowing

⁷²⁶ Brown supra (n 593) at 229.

⁷²⁷ Ashworth supra (n 462) at 303.

⁷²⁸ Smith (Morgan) supra (n 715), decisions of the House of Lords are binding whereas the decisions of the Privy Council are only persuasive for English courts.

⁷²⁹ See discussion in Elliot and Quinn supra (n 525) at 79, the authors explain by using the example of a boy with big ears, if he is taunted about his ability to play football and kills, his big ears should not be considered a relevant characteristic. The taunt will have the same effect on a boy who doesn’t have big ears.

⁷³⁰ Luc Thiet Thuan v R (1996) 3 WLR 45, PC.

evidence of “purely mental peculiarities” will compromise the distinction between provocation and diminished responsibility.⁷³¹

Since the accused reacted to the deceased's insults about sexual inadequacy, he reacted to a “control characteristic” and could not be taken into account. If the taunts regarded the appellant's brain injury, then this would have amounted to a “response characteristic” and could have been taken into account in determining what the response of the reasonable man would be.⁷³²

The Privy Council was reluctant to change its position on the objective element of the provocation defence and had chosen not to bring itself in line with the House of Lords following the Smith (Morgan)⁷³³ case.⁷³⁴

In Morhall⁷³⁵ the issue was whether the characteristics of the defendant could be taken into account when assessing the defendant's capacity for self-control. The defence asserted that the gravity of the provocation was greater to the defendant by virtue of the fact that he was a glue sniffer. However, the House of Lords reversed the decision by the Court of Appeal and substituted a conviction of manslaughter. It was held that only the characteristics which have a bearing on gravity of the provocation could be considered as part of the reasonable person test. Glue-sniffing could be considered as a characteristic since it was the subject of the taunt; however, it could not be considered to form part of the assessment for capacity for self-control, due to public policy. This case

⁷³¹ Luc Thiet Thuan supra (n 730).

⁷³² Luc Thiet Thuan supra (n 730).

⁷³³ Smith (Morgan) supra (n 715).

⁷³⁴ A. Ashworth “A commentary on the A-G for Jersey v Holley” [2005] Crim LR 970 at 44 states that Lords Bingham and Hoffman invoked the true rationale underlying the partial defence of provocation which is essentially “a human concession to human infirmity and imperfection”.

⁷³⁵ Morhall supra (n 713) in this case the defendant who was a glue sniffer, killed the deceased with a dagger after being head butted and taunted repeatedly about his addiction. The accused was convicted of murder and subsequently appealed to The Court of Appeal (1993) 98 Cr. App R 108 wherein the appeal was dismissed after it was held that being a glue sniffer, an abuser of solvent was incompatible with the ideology of the reasonable man and therefore could not be included in the objective leg of the test and hence the statutory defence could not be raised due to the circumstances.

reaffirmed the approach in Camplin⁷³⁶ where Lord Diplock ruled that the hypothetical person was expected to possess the same capacity for self-control that is to be expected from an ordinary person who is the same sex and age of the defendant.⁷³⁷

In the case of Paria v The State⁷³⁸, the Privy Council gave an interpretation of the word “characteristic” which formed part of the objective test. In the case of Holley,⁷³⁹ the defendant, an alcoholic, was involved in a heated argument with his girlfriend. In the course of the argument the deceased said to the defendant “you haven't got the guts” after which the defendant killed the deceased using an axe. During the trial, the defence adduced medical evidence to support a claim that the defendant’s alcohol addiction was a disease and should be considered as being a characteristic attributable to the reasonable man and should impact an assessment of capacity for self-control.⁷⁴⁰ This direction was qualified by excluding drunkenness when assessing capacity for self-control. The defence was unsuccessful and the accused was subsequently charged with murder.

This conviction was appealed, with the Court of Appeal of Jersey reducing the conviction to manslaughter on the basis that the trial judge had misdirected the jury.⁷⁴¹ The Court of Appeal considered alcohol addiction as a characteristic which should be considered in the reasonable person test as well as in an assessment of capacity for self-control. This reasoning was not acceptable to the Attorney-General for Jersey and an application to the Privy Council was lodged regarding the question of whether the gravity of the provocation was to be considered together with the defendant’s specific characteristic. The second enquiry surrounds the assessment of self-control and whether a uniform objective standard of self-control should be used in this assessment.

The Privy Council by a majority of six Lords (Lords Bingham, Hoffman and Carswell dissenting) held that the gravity of the provocation should be considered together with

⁷³⁶ Camplin supra (n 580).

⁷³⁷ Edwards supra (n 654) at 347.

⁷³⁸ Paria v The State (2003) UKPC 36.

⁷³⁹ Holley supra (n 670).

⁷⁴⁰ Holley supra (n 670).

⁷⁴¹ Holley supra (n 670).

the defendant's specific characteristic and that a uniform objective standard of loss of self-control should be used to judge loss of self-control.⁷⁴²

In the case of Mohammed (Faquir)⁷⁴³ the court followed the approach of the Privy Council in Holley⁷⁴⁴ rather than the House of Lords approach taken in Smith(Morgan)⁷⁴⁵.

The Court of Appeal stated:

“Although Holley is a decision of the Privy Council, and the Morgan Smith a decision of the House of Lords, neither side has suggested that the law of England and Wales is other than as set out in the majority opinion given by Lord Nicholls in Holley and we have no difficulty in proceeding on that basis.... Indeed the law is once again as it used to be before the decision in Smith (Morgan)”.⁷⁴⁶

An interesting development occurred in the case of James and Karimi⁷⁴⁷ where it was held that the ruling made by the Privy Council in Holley⁷⁴⁸ was binding⁷⁴⁹ and was considered to be the law and was to be preferred to the majority judgment in the House of Lords case of Smith (Morgan)⁷⁵⁰

⁷⁴² Holley supra (n 670) at 22: “Under the statute the sufficiency of the provocation (“whether the provocation was enough to make a reasonable man do as the defendant did”) is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendants’ response met the “ordinary person” standard prescribed by the statute is the question of whether, having regard to all the circumstances, the jury consider loss of self-control was sufficiently excusable. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether they defendant’s conduct is “excusable”.”

⁷⁴³ Mohammed (Faquir) (2005) EWCA Crim 1880,(2005) All ER (D) 154 (Jul).

⁷⁴⁴ Holley supra (n 670).

⁷⁴⁵ Smith (Morgan) supra (n 715).

⁷⁴⁶ Mohammed (Faquir) supra (n 743).

⁷⁴⁷ R v James, R v Karimi (2006) EWCA Crim 14, (2006) 1 All ER 759.

⁷⁴⁸ Holley supra (n 670).

⁷⁴⁹ Edwards supra (n 654) at 343 citing J.Elvin “The doctrine of Precedent and the Provocation Defence: A comment on R v James (2006) 69 MLR 819, states that this was due to the unusual composition of its members.

⁷⁵⁰ Smith (Morgan) supra (n 715).

3.2.6. Burden of proof

The responsibility of the judge was to determine if there is evidence to show that the accused was provoked to lose self-control and kill. Once this was established, then the jury was responsible for determining if the provocation was enough to make a reasonable person do as the accused did. Before the advent of the Homicide Act, the judge would tell the jury what characteristics the reasonable man possessed without taking consideration of the traits of the accused. The accused was not required to prove his defence to the jury; the prosecution had the onus of discharging the burden of disproving the defence beyond a reasonable doubt.

3.2.7. The role of the judge and the jury

Since the enactment of the Homicide Act, what were previously regarded as rules of law were downgraded to mere factors, an example of this is the proportionality requirement. If the reaction to the provocation was disproportionate in the circumstances, the accused could still have a defence provocation.⁷⁵¹ The function of the judge was now transferred to the jury.

In this regard, Lord Diplock in Camplin⁷⁵² stated:

“Until the 1957 Act there was a condition precedent: the deceased’s conduct had to be of a kind capable in law of constituting provocation. The House so held in Mancini...Section 3 abolished all previous rules as to what could or could not amount to provocation”.⁷⁵³

Furthermore, factors such as the cooling-off time is being remade into a rule of law, the case of Thornton⁷⁵⁴ is an example of this. The role of the judge would thus be to instruct the jury that the accused must have may have lost self-control and that this is to be judged against the reasonable person test who must be attributed the characteristics under Camplin⁷⁵⁵ “and its progeny”.⁷⁵⁶

In respect of the first leg of the defence, the assessment of whether the accused was provoked to lose self-control, the question arose of whether the judge is entitled to

⁷⁵¹ Jefferson supra (n 54) at 484.

⁷⁵² Camplin supra (n 580).

⁷⁵³ Camplin supra (n 580) at 705.

⁷⁵⁴ Thornton supra (n 648).

⁷⁵⁵ Camplin supra (n 580).

⁷⁵⁶ Jefferson supra (n 54) at 485.

withdraw the issue from the jury if in the discretion of the judge, no reasonable jury would find that accused was indeed provoked.

The case of Whitfield⁷⁵⁷ and Camplin⁷⁵⁸ addressed this issue. In Whitfield⁷⁵⁹, the defendant killed his wife and sister-in-law after an argument. The wife confessed to the defendant that he was in fact not the father of their child. Upon hearing this revelation, the defendant then threatened to commit suicide. The wife replied “see if I care”.

The Court of Appeal held that the trial judge was wrong to withdraw the issue from the jury, on the basis that no reasonable jury would find that the accused was provoked.⁷⁶⁰

In the case of Johnson⁷⁶¹, the Court of Appeal approved the case of Cascoe⁷⁶² where it was stated:

“Whether the issue is raised at the trial or not, if there is evidence which might lead the jury to find provocation, then it is the duty of the court to leave that issue to the jury”.

The court emphasised that this principle applied even if the evidence is “very thin indeed”. This principle was approved in Camplin⁷⁶³ and by the Court of Appeal in Newell.⁷⁶⁴ Hence, even if the only evidence is the version of events put forward by the accused, the issue of loss of self-control remains with the jury.⁷⁶⁵ If the defence attempts not to adduce evidence of provocation, due to a fear of undermining the main defence, then it is the duty of judge to instruct the jury regarding provocation.⁷⁶⁶

As in the case of Dhillon,⁷⁶⁷ where the defence claimed that the killing was simply an accident, in Sawyer⁷⁶⁸ the accused raised self-defence. This applied even if the defence

⁷⁵⁷Whitfield (1976) 63 Cr App R 39.

⁷⁵⁸Camplin supra (n 580).

⁷⁵⁹Whitfield supra (n 757).

⁷⁶⁰Whitfield supra (n 757).

⁷⁶¹Johnson supra (n 595).

⁷⁶²Cascoe (1970) 54 Cr App R 401.

⁷⁶³Camplin supra (n 580).

⁷⁶⁴Newell supra (n 712).

⁷⁶⁵Jefferson supra (n 54) at 458.

⁷⁶⁶Jefferson supra (n 54) at 458.

⁷⁶⁷Dhillon [1997] 2 Cr App R 106 (CA).

and prosecution regarded a direction in terms of provocation unnecessary. This of course applied where the facts gave rise to the defence of provocation.⁷⁶⁹

Hence, if evidence indicated provocation; it should be left to the jury regardless of the weight of such evidence and if in the judge's opinion a reasonable jury would not find that the defendant was provoked.⁷⁷⁰

In the case of Smith (Morgan),⁷⁷¹ Lord Hoffman recommended that the judge should move away from directing the jury in respect of the reasonable man test. The reason for such recommendation was that the complex nature of the objective inquiry could become confusing. Attributing characteristics of a "reasonable" person may pose difficulty especially when such characteristics may not suit the fictitious reasonable man.

Lord Hoffman stated

"By such a combination, they have produced monsters like the reasonable obsessive, the reasonable depressive alcoholic and even (with all respect to the explanations of Lord Goff... in R v Morhall..) the reasonable glue sniffer".⁷⁷²

The case of Stewart⁷⁷³ is an example of judicial proactivity. In this case the court stated that even if defence counsel did not raise the defence, regardless of the reason, and if the evidence indicates that the accused may have been provoked, it is the responsibility of the judge to direct the jury to decide if evidence suggests that the accused was provoked. This applied even if the evidence of provocation, either words or acts, is slight or tenuous. The judge had to specify to the jury to consider which evidence might support the conclusion that the appellant lost self-control. The trial judge concluded that the evidence indicated a possible "frenzied attack" and should thus have been put to the jury to counteract the element of premeditation which the prosecution depended upon.⁷⁷⁴

⁷⁶⁸ Sawyer [1989] Crim LR 906 (CA).

⁷⁶⁹ Jefferson supra (n 54) at 485.

⁷⁷⁰ Jefferson supra (n 54) at 485.

⁷⁷¹ Smith (Morgan) supra (n 715).

⁷⁷² Smith (Morgan) supra (n 715), see discussion in Elliot and Quinn supra (n 525) at 78.

⁷⁷³ Stewart [1995] 4 All ER 999 (CA).

⁷⁷⁴ Bloy supra (n 574) at 146.

The Court of Appeal in Stewart⁷⁷⁵ ruled that the trial judge was correct in referring the matter to the jury despite that counsel did not raise the matter. It was the responsibility of the judge to assess whether, after reviewing the evidence, whether a reasonable possibility existed that a jury might conclude that the defendant had been provoked to lose self-control, even if the judge did not believe that a reasonable person would have reacted in the same manner as the defendant.⁷⁷⁶

In the case of Jones,⁷⁷⁷ it was also stated that there should be full direction on the law if the defence of provocation is raised on the facts, even if counsel objects.⁷⁷⁸ In the case of Wellington,⁷⁷⁹ the trial judge concluded that due to lack of evidence that the defendant lost self-control, the matter could not be referred to the jury as provocation. The Crown conceded that if evidence of loss of self-control was present, then the judge was under an obligation to refer it to the jury but the factual foundation was not laid. This ruling was further supported by the Court of Appeal.

In Cambridge,⁷⁸⁰ the Court of Appeal held that the trial judge is obliged to leave provocation to the jury despite counsel deciding not to rely on the defence. Lord Taylor CJ stated that it was not up to the judge to “conjure up a speculative possibility of a defence that is not relied on and is unrealistic”.

In commenting on Rossiter,⁷⁸¹ the accused was a battered wife who killed her husband by stabbing. The accused inflicted two serious wounds and seventeen superficial wounds. The defence of provocation was not raised by counsel. The Court of Appeal quashed the conviction of murder and a conviction of manslaughter was substituted as the trial judge neglected to put the defence to the jury, despite evidence indicating that the accused might have been attacked with a rolling pin, almost strangled and almost

⁷⁷⁵ Stewart supra (n 773)

⁷⁷⁶ Bloy supra (n 582) at 146.

⁷⁷⁷ Jones [1987] Crim LR 701.

⁷⁷⁸ Burgess [1995] Crim LR 425 (CA).

⁷⁷⁹ Wellington (1993) Crim LR 616.

⁷⁸⁰ Cambridge [1994] 2 All ER 760 at 765(b).

⁷⁸¹ Rossiter supra (n 658) cited by Bloy supra (n 582) at 146.

bludgeoned with a mitre block. The reference of Russell LJ to “material capable of amounting to provocation; however, tenuous it may be” described the provocative act either in words or acts and not the evidence of their existence.

The cases of Robinson⁷⁸² and Dryden⁷⁸³ make the point that only where evidence of provocation is totally lacking can the defence be withdrawn from the jury.⁷⁸⁴

The case of Cocker⁷⁸⁵ illustrated the difference between loss of self-control and loss of restraint. The defendant smothered his wife eventually after losing restraint and not self-control.

Lord Lane CJ stated that:

“This was almost ...the very opposite of provocation. It was his giving way to her entreaties and acting ...perfectly in self-control..., however terrible that act was in its meaning”.⁷⁸⁶

Jefferson states that the cases of Cocker⁷⁸⁷ and Acott⁷⁸⁸ demonstrate possible limitations on the discretion of the jury that is the nature of the subjective nature of the first leg, in Cocker the question was not whether the reasonable person would have killed but whether the accused in question did in fact suddenly and temporarily lose control.⁷⁸⁹

In the case of Acott, Lord Steyn stated:

⁷⁸² Robinson [1965] Crim LR 491 (CA).

⁷⁸³ Dryden [1995] 4 All ER 987 (CA) this case attracted media attention due to the act being committed in front of the press and film crews. On the day of the incident, following a dispute on planning, the local authority employees proceeded to demolish certain buildings erected by the appellant. The appellant then shot and killed the one of the planning officials and attempted to kill the solicitor who represented the local council and ended up shooting a police officer and a BBC newsman. There was disagreement between the Crown and defence counsel regarding the appellants responsibility for the acts. The defence of diminished responsibility was considered but eventually rejected. The jury was directed to consider the defence of provocation.

⁷⁸⁴ Discussed by Jefferson supra (n 54) at 486.

⁷⁸⁵ Cocker supra (n 646).

⁷⁸⁶ Cocker supra (n 646) at 740, discussed by Jefferson supra (n 54) at 486.

⁷⁸⁷ Cocker supra (n 646).

⁷⁸⁸ Acott supra (n 655).

⁷⁸⁹ Jefferson supra (n 54) 486 discussing Cocker supra (n 646).

“Insufficient material for a jury to find that it is a reasonable possibility that there was specific provoking conduct resulting in a loss of self-control, there is simply no issue of provocation to be considered by the jury”⁷⁹⁰

In the case of Marks,⁷⁹¹ it was stated that if the victim had not done or said anything which resulted in the defendant losing self-control then there was no provocative act. In Miao,⁷⁹² the trial judge held that evidence indicating provocation was insufficient and the accused was then convicted of murder. The Court of Appeal reconsidered the question of how much evidence would be required and held that a speculative possibility was sufficient. The Court of Appeal applied Acott⁷⁹³ in confirming the decision of the trial court. There was evidence that the defendant was provoked; however, he did not lose self-control. Furthermore, there was only a speculative possibility of provocation and this was not enough for referral to the jury. Jefferson states that where evidence that loss of self-control was suffered, the case of Whitfield⁷⁹⁴ and Camplin⁷⁹⁵ applied with “full force”.⁷⁹⁶

Jefferson argues that “the effect of shift from law to fact, from withdrawal of the issue to leaving it to the jury, meant that the role of the judge was narrow, narrower than in other areas of the law.” Jefferson attributes the change of the judge’s role to that fact that the jury cannot be controlled as was the case under the law pre-1957 and the aim was to prevent inconsistent verdicts. Therefore, in this light, the role of the judge had been reduced to this: “if there is any evidence of provocation, the defence must be left to the jury.”⁷⁹⁷

⁷⁹⁰ Acott supra (n 655) at 306.

⁷⁹¹ Marks (1998) Crim LR 676.

⁷⁹² Miao [2003] EWCA Crim. 3486 the defendant admitted to killing his partner during an argument, he asserted that he was accused of having an affair and had been assaulted by the deceased. During the argument the accused was shouting and in an attempt stop the shouting he put his hands over her mouth, the deceased then bit his hand. The defendant then placed his hand over the throat of the deceased which resulted in the fatality.

⁷⁹³ Acott supra (n 655).

⁷⁹⁴ Whitfield supra (n 757).

⁷⁹⁵ Camplin supra (n 580).

⁷⁹⁶ Jefferson supra (n 54) at 487.

⁷⁹⁷ Jefferson supra (n 54) at 487.

3.2.8. Assessment of the former provocation defence in terms of Section 3 of the Homicide Act of 1957

Section 3 supplemented the common law defence of provocation; however, this co-existence contributed to many problems relating uncertainty of the operation of the provocation defence.⁷⁹⁸ The provocation defence of provocation has always occupied a controversial place in the English legal system and often criticized for various reasons over the years, it is in light of these problems pertaining to the provocation defence which led two Law Commissions⁷⁹⁹ and the Ministry of Justice⁸⁰⁰ to undertake an in-depth evaluation of the defence along with an impact assessment⁸⁰¹ wherein the impact of the changes on the criminal justice system was considered.

The aim of this evaluation as stated by the Ministry of Justice was to “ensure that the law in this area is just, effective and up-to-date, and produces outcomes which command public confidence”.⁸⁰² The Law Commission was concerned that the old defence was a “confusing mixture of common law rules and statute”.⁸⁰³

The Law Commission in its Consultation Paper⁸⁰⁴ was concerned with two issues:

Firstly, it was questioned if it is morally sustainable for a defence based on sudden anger to find a partial defence to a murder charge. In essence the Law Commission found the defence of provocation to be fundamentally problematic and unsatisfactory. One of the problems identified was that the defence lacked a moral foundation.⁸⁰⁵

⁷⁹⁸ Wells *et. al.* Reconstructing Criminal law-text and materials 4th ed (2010) at 779.

⁷⁹⁹ Law Commission Report *Partial Defences to Murder* (2004) No 290. and Law Commission Report *Murder, manslaughter and Infanticide* (2006) No.304.

⁸⁰⁰ Ministry of Justice, *Murder manslaughter and infanticide: proposals for reform of the law* (Consultation paper CP19/08) (2008). See further the Ministry’s response to consultation in the U.K., Ministry of Justice, *Murder, Manslaughter and infanticide: proposals for reform of the law. Summary of responses and Government position* –(Response to Consultation Paper CP(R) 19/08) (2009)

⁸⁰¹ Ministry of Justice, *Murder, Manslaughter and infanticide: proposals for reform of the law. Impact Assessment* (2008).

⁸⁰² Ministry of Justice, *Murder, Manslaughter and infanticide: proposals for reform of the law.* (Consultation Paper CP19/08/) at 10.

⁸⁰³ *Murder, Manslaughter and Infanticide* (2006) *supra* (n 594) at 85.

⁸⁰⁴ Law Commission Consultation Paper *Partial Defences to Murder*. (2003) Paper No.173.

⁸⁰⁵ Law Commission Consultation Paper *Partial Defences to Murder*. (2003) Paper No.173.

Secondly, the emotion of anger was given importance over other emotions and this was identified as a flaw in the defence since anger does not provide a moral justification or excuse for killing.⁸⁰⁶ The defence thus operated to provide an ill-tempered person with a defence and verdict of manslaughter whereas a well-tempered individual received a murder conviction. Elliot argues that other credible emotions such as compassion were ignored.⁸⁰⁷ The Law Commission therefore questioned if it was sustainable to provide a partial defence for individuals who kill while in an angered state and not to individuals who kill out of a feeling of despair.⁸⁰⁸

Furthermore, other problematic areas were that the defence encompassed revenge killings and the objective test was identified as being contradictory since the reasonable man does not kill and this further supported the argument that the provocation lacked a moral basis. The Consultation Paper⁸⁰⁹ was followed by a report on *Partial Defences to Murder* in 2004.⁸¹⁰ In this report, the Law Commission rejected calls for abolishment of the defence of provocation but acknowledged that there was need of reform.⁸¹¹ Furthermore, the defects of the defence could not be remedied by judges alone but legislative intervention was necessary.⁸¹²

In the first report⁸¹³ three problems with the old law were identified by the Law Commission. Firstly, there was a concern that the defence of provocation had become too “loose”, meaning that even when the provocative act was trivial, the judge was obliged to leave the issue to the jury.

The Law Commission also felt that as long as there was a mandatory life sentence for murder, proposals for reform would be in vain. The judge had no discretion in choosing

⁸⁰⁶ Ibid

⁸⁰⁷ Ibid at para .4.163-4.164, see discussion in Elliot and Quinn supra (n 525) at 254.

⁸⁰⁸ Ibid at para 4.166 and 4.167.

⁸⁰⁹ *Partial Defences to Murder* (2003) supra (n 804).

⁸¹⁰ *Partial Defences to Murder* (2004) supra (n 799).

⁸¹¹ *Partial Defences to Murder* (2004) supra (n 799) at 3.33.

⁸¹² *Partial Defences to Murder* (2004) supra (n 799) at 3.34.

⁸¹³ *Partial Defences to Murder* (2004) supra (n 799) at para 3.21.

the length of sentence following a conviction for murder, the definitions for the partial defences would be stretched to accommodate the defendant in order for discretion in sentencing.⁸¹⁴

Secondly, the concept of “loss of self-control” was becoming problematic, especially in its relation to the battered woman. There was a growing perception that the defence was inherently gendered by being biased towards men and discriminatory towards women who kill an abusive partner. This has resulted in the defence being “stretched” in order to bring cumulative provocation within its borders. The criticisms of gender discrimination is attributed to the historical origins of the defence, this was one of main factors which influenced the process of reformation.

In response to the criticisms of gender bias towards men, the Law Commission recommended that a further leg to the provocation defence should be added that will allow killings resulting from fear of violence. The justification for recommending that the defence should cover killings committed out of fear as well as anger came from psychiatric evidence which shows that anger and fear have a similar effect and are usually present together during the commission of a violent act.⁸¹⁵

In the past, the slow burn cases had to be “shoehorned” into the old provocation defence, so by widening the scope of the defence this would not be necessary.⁸¹⁶ The “immediacy” requirement proved arguably the most controversial.⁸¹⁷ It has been contended that the requirement stipulating that the loss self-control to be sudden and temporary was discriminatory against women who are more likely to experience a loss of self-control in a different form when compared to their male counterparts, who are known to react to provocation by lashing out in state of rage immediately.⁸¹⁸

⁸¹⁴ Ibid at para 3.20.

⁸¹⁵ *Partial Defences to Murder* (2004) supra (n 799) at para 3.26-3.30.

⁸¹⁶ Discussed by Edwards supra (n 650) at 228.

⁸¹⁷ Edwards supra (n 650) at 225-226.

⁸¹⁸ A. Ashworth and J. Horder *Principles of Criminal law* 7th ed (2013) at 254; Edwards supra (n 650) at 225-226.

The reaction of a woman to extreme provocation is described as “a snapping in slow motion, the final surrender of frayed elastic”.⁸¹⁹ Another description for the manner in which women could experience a loss of control came from Lord Lane who states that the delayed reaction is not a cooling down, but actually a time to reflect on the events and then heating up.⁸²⁰

Research indicates that a woman who is a victim of abuse would kill using a knife in about 82 per cent of cases, increasing the chances of a murder conviction.⁸²¹ Furthermore, during and after the killing the woman would be in a state of calm rather than being enraged. Men on the other hand kill their female partners through the application of force in an enraged state.⁸²² This predicament effectively forced the battered woman to rely on the defence of diminished responsibility which served as the only means to escape a murder conviction along with a mandatory life sentence of imprisonment.⁸²³

However, it was also contended that if the immediacy requirement was relinquished the defence then becomes a safe haven for revenge killers.⁸²⁴ This potential problem therefore highlighted the need for a moral basis for the provocation defence which was lacking; it was argued that this provided a good basis for the abolishment of the provocation defence.⁸²⁵

It has also argued that if the provocation defence is opened up to battered woman who kill, this provides a licence to kill. Ensuring justice for those who kill due to cumulative provocation and sudden loss of self-control is difficult. Section 3 of the Homicide Act was considered to be deficient in providing a defence for victims of abuse.⁸²⁶

⁸¹⁹ Kennedy Eve was framed: women and British justice (1992) at 201 cited by Elliot and Quinn supra (n 525) at 85.

⁸²⁰ Elliot and Quinn supra (n 525) at 85.

⁸²¹ Edwards supra (n 650) at 226-227.

⁸²² Edwards supra (n 654) at 357.

⁸²³ B. Mitchell and R. Mackay “Loss of control and diminished responsibility: monitoring the new partial defences” (2011) 3 Archbold Review 3, 5-6 at 2.

⁸²⁴ Edwards supra (n 650) at 226.

⁸²⁵ Elliot and Quinn supra (n 525) at 86.

⁸²⁶ Edwards supra (n 654) at 361.

The courts did succumb to extent the criticisms of gender discrimination against the battered and softened their stance. This softened approach is seen in the cases of Ahluwalia⁸²⁷ and Thornton^{828, 829}. However, despite the legal developments in these cases, it was still argued that the provocation defence did not adequately accommodate the abused woman who kills because of the requirement that the loss of self-control be sudden and temporary.⁸³⁰

The focus of the defence has always been loss of self-control; however, the Law Commission recommended a shift of focus to that of “justifiable sense of being seriously wronged”.⁸³¹

The Commission recommended that the defence be available only where evidence of gross provocation was present which caused the defendant to feel a “justifiable sense of being wronged” or fear of serious violence towards the defendant or another would also be accepted. The latter would be available in circumstances where excessive force was used in self-defence. If reasonable force was used, then the defendant would be able to rely on a complete defence.⁸³²

The new defence recommended by the Law Commission encompassed victims of long-term abuse who kill their abusers.⁸³³ The defence would not be available where the killing was due to jealousy or to preserve family honour or due to infidelity.⁸³⁴ If the defendant initiated the provocation, then the defence would also not be available, for

⁸²⁷ Ahluwalia supra (n 624).

⁸²⁸ Thornton supra (n 648).

⁸²⁹ In Thornton, supra (n 648) the concept of “battered woman’s syndrome” was recognised and acknowledged as a factor that could be taken into account when deciding if the loss of self-control was sudden and temporary.

⁸³⁰ Edwards supra (n 650) at 226.

⁸³¹ *Partial Defences to Murder* (2004) supra (n 799) at para 3.68.

⁸³² *Partial Defences to Murder* (2004) supra (n 799) at para.

⁸³³ *Partial Defences to Murder* (2004) supra (n 799).

⁸³⁴ *Partial Defences to Murder* (2004) supra (n 799).

example, if the deceased was insulted first. If the deceased's conduct was innocent, then the defence would not be available either.⁸³⁵

The third problem identified related to the objective test and the concerns that the reasonable man test had become too subjectivised as a result of the case of Smith (Morgan)^{836, 837}. In its subsequent report *Murder, Manslaughter and Infanticide* (2006), the Law Commission approved the stance taken by the minority in Morgan (Smith)⁸³⁸ and the majority in Holley⁸³⁹.⁸⁴⁰ The Commission felt that a distinction must be drawn between the factors only relating to a defendant's general capacity for self-control and those that have a bearing on the gravity of the provocative act.⁸⁴¹ The only exception should be the defendant's age.⁸⁴²

Furthermore, in its second report the Law Commission proposed that the defence should undergo a total reformulation in regard to the structure of murder and manslaughter with the creation of first and second degree murder.⁸⁴³

In cases where defence of provocation is successful, the new provision should operate to reduce the defendant's liability from first degree-murder to that of second-degree murder. The effect would be that the defendant would still receive a conviction of murder not one of manslaughter, although it would still be a less serious offence than murder. The sentence would be a discretionary life sentence.⁸⁴⁴

Furthermore, proposals that the definition of provocation be limited, the Commission recommended that "all circumstances" be restricted to circumstances relevant to the

⁸³⁵ *Partial Defences to Murder* (2004) supra (n 799).

⁸³⁶ Smith (Morgan) supra (n 715).

⁸³⁷ Norrie, A. "The Coroners and Justice Act 2009-Partial Defences to Murder (1) Loss of control" (2010) Criminal Law Review at 276.

⁸³⁸ Smith (Morgan) supra (n 715).

⁸³⁹ Holley supra (n 670).

⁸⁴⁰ *Murder, manslaughter and Infanticide* (2006) supra (n 799).

⁸⁴¹ *Murder, Manslaughter and Infanticide* (2006) supra (n 799).

⁸⁴² Norrie supra (n 837) at 277.

⁸⁴³ *Murder, Manslaughter and Infanticide* (2006) supra (n 799).

⁸⁴⁴ *Murder, Manslaughter and Infanticide* (2006) supra (n 799) at para 1.9.

defendants characteristics only. This excluded the capacity for self-control from this consideration.⁸⁴⁵

In this regard, the new law reflects the Law Commission's view; however, the sex of the defendant has been added along with age in terms of the general characteristics that should be taken into account in the objective test.⁸⁴⁶

The Law Commission recognised, in relation to the "age" characteristic that "mental age is a complex subject"⁸⁴⁷ and that in many cases those who kill can be considered as emotionally immature.⁸⁴⁸ However, scrutiny of psychiatric and psychological evidence shedding light on emotional maturity would complicate matters and may undermine the operation of the objective test. It was also noted that the English courts' refused to take into account the physical and temperamental distinctiveness of the accused.⁸⁴⁹

3.3. The new defence in the terms of the Coroners and Justice Act 2009

The Coroners and Justice Bill contained dramatic changes brought to the defence previously known as the provocation defence for England and Wales in over fifty years.⁸⁵⁰ The Bill was given Royal assent on 12 November 2009. On 4th October 2009, the provisions regarding the provocation defence came into operation.⁸⁵¹ The Coroners and Justice Act 2009 has abolished the common law defence of provocation together with section 3 of the Homicide Act of 1957 and has replaced it with a defence based on loss of self-control.

⁸⁴⁵ *Murder, Manslaughter and Infanticide* (2006) supra (n 799) at para 5.11.

⁸⁴⁶ Norrie supra (n 837) at 277.

⁸⁴⁷ Norrie supra (n 837) at 281 argues that capacity for self-control is an aspect of maturity and not age. Age is merely a way of estimating maturity. Adults of similar ages may have different levels of maturity similarly children of similar ages may also differ in maturity.

⁸⁴⁸ *Partial defences to Murder* (2004) supra (n 799) at 3.130 discussed by Norrie supra (n 823) at 281-282.

⁸⁴⁹ M. Sornarajah "Commonwealth innovations on the law of provocation" (1975) 24 *Int'l & Comp. L.Q.* at 185.

⁸⁵⁰ K. Reid "The media and uninformed law reform: the case of the provocation defence" (2011) 75 (3) *J.Crim.L* 185-193 at 1, see discussion in Chapter 5 at 298

⁸⁵¹ Reid supra (n 850) at 1.

Section 56 of the Act states:

56 Abolition of common law defence of provocation

- (1) The common law defence of provocation is abolished and replaced by sections 54 and 55.
- (2) Accordingly, the following provisions cease to have effect—
 - (a) Section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury);
 - (b) Section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) (questions of provocation to be left to the jury).

THE REQUIREMENT OF LOSS OF SELF CONTROL IN TERMS OF SECTION 54

- 54 (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—
 - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
 - (b) The loss of self-control had a qualifying trigger, and
 - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to 'D'.
- (2) For the purposes of subsection (1) (a), it does not matter whether or not the loss of self-control was sudden.
- (3) In subsection (1)(c) the reference to ‘the circumstance of D’ is a reference to all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
- (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
- (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.
- (8) The fact that one part to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.⁸⁵²

⁸⁵² Coroners and Justice Act 2009, Part 2, Chapter 1.

“the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

Section 55 Meaning of “qualifying trigger”

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control has a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
 - (a) constituted circumstances of an extremely grave character, and
 - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) In determining whether a loss of self-control had a qualifying trigger—
 - (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
 - (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
 - (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.
- (7) In this section references to “D” and “V” are to be construed in accordance with section 54.

3.3.1. Requirements of the loss of self-control defence

The new defence is now called the “loss of self-control manslaughter” defence rather than the provocation defence.⁸⁵³ The new provision applies only to a charge of murder only.⁸⁵⁴ If the defence is successful then the accused will be guilty of manslaughter.

There are three main hurdles that must be satisfied if the defence is to be successful. Firstly, there must be loss of self-control which was caused by the defendant's acts or

⁸⁵³ Edwards *supra* (n 650) at 224.

⁸⁵⁴ In terms of s 54(1) of the Coroners and Justice Act 2009; Herring *supra* (n 464) at 239 states that for offences involving provocation such as assault, the provocation may be considered during sentencing but cannot be considered a defence.

omissions. Secondly, the loss of self-control must be attributed to a qualifying trigger. Thirdly, a person of the defendant's sex and age, possessing normal powers of tolerance and self-control, in the same circumstance as the defendant, must have reacted to the qualifying trigger in a similar manner to the defendant.⁸⁵⁵

3.3.1.1. The subjective test: the requirement of loss of self-control

The loss of self-control is tested subjectively and may be best explained by basing it on whether the accused lost his capacity to maintain his actions in line with considered judgment or if normal capacity to reason was lost. The defendant must have lost self-control in fact and in assessing this requirement the jury is allowed to take into account all related circumstances such as the nature of the qualifying trigger, the conditions in which the qualifying trigger occurred and the sensitivity of the defendant.⁸⁵⁶

However, Ormerod notes that in the current defence the meaning of this requirement is undefined. It can be assumed that loss of self-control may be judged in the same way as it was by the old law on provocation since no changes were made to the nomenclature, thus outward visible signs of an outburst⁸⁵⁷ or the defendant being noticeably enraged may continue to be the basis for loss of self-control.⁸⁵⁸ Angered states may continue to be the leitmotif of the loss of self-control. An accused person will continue to express themselves in the traditional formulaic terms such as "spin round quickly"⁸⁵⁹ and "went berserk".⁸⁶⁰ The experience of the common law may still be relied upon and loss of control will be founded upon moral indignation⁸⁶¹ or "imperfect justification".⁸⁶²

⁸⁵⁵ Herring supra (n 464) at 240.

⁸⁵⁶ Ormerod supra (n 58) at 511-512.

⁸⁵⁷ Holton and Shute supra (n 551) at 49.

⁸⁵⁸ Ormerod supra (n 58) at 512, Edwards supra (n 650) at 223-241.

⁸⁵⁹ Phillips supra (n 566).

⁸⁶⁰ R v Richens [1993] 4 All ER 877, the phrase "going beserk" was part of the trial judges direction on provocation; In R v Campbell [1997] 1 Cr App R 199 the defendant allegedly "went beserk" and this was deemed to be sufficient grounds for a retrial on the basis of provocation.

⁸⁶¹ Edwards supra (n 650) at 224.

⁸⁶² Edwards supra (n 650) at 224 discussing the theory of "imperfect justification" by Norrie supra (n 823) at 278.

The requirement of loss of control has always occupied a controversial place in English law, so much so that the Law Commission made a drastic recommendation of abolishing the requirement of loss of self-control due to the perceived difficulty in interpreting which led to difficulties in application.

The Commission recommended that the condition of loss of self-control be done away and this will in turn solve the problem of gender bias towards males and discrimination towards women.⁸⁶³ It was contended that abolishing the requirement for the loss of self-control would solve the problem of having to stretch the defence to bring in “slow burn” cases within its ambit.⁸⁶⁴

The requirement of loss of self-control was dogged by criticism that it lacked meaning and was a source of confusion as it was never fully explained in English law.⁸⁶⁵

However, the reform of the defence does not go so far and loss of self-control still remains an important part of the new defence. The Government retained this requirement due to concerns of abuse of the defence and the potential difficulty in assessing if a killing was premeditated.

In response to the Commission’s recommendations the Government expressed the following justification:

“We understand this reasoning but remain concerned that there is a risk of the partial defence being used inappropriately, for example in cold-blooded, gang related or “honour killings”. Even in cases which are less obviously unsympathetic, there is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence.”⁸⁶⁶

⁸⁶³ *Murder, Manslaughter and Infanticide* (2006) supra (n 799) at para 5.19 discussed by Norrie supra (n 837) at 276-277.

⁸⁶⁴ Norrie supra (n 837) at 277.

⁸⁶⁵ S. Yeo “English reform of provocation and diminished responsibility: whither Singapore” (2010) *Singapore Journal of Legal Studies* 177-191 at 184; Mitchell and Mackay supra (n 823) at 1.

⁸⁶⁶ Ministry of Justice, *Murder, Manslaughter and Infanticide*, (2008) supra (n 800) at 36.

Mitchell and Mackay state that “not only has the requirement been preserved; it has been placed at the heart of the new plea!”⁸⁶⁷

Another major reason for not only retaining the loss of self-control requirement but also making it an integral part of the new defence was to prevent those defendants who killed out of considered desire for revenge to unfairly benefit from the defence.

The Government reinforced its view stating:

“The Government believes that it is important that the partial defence is grounded in a loss of self-control. We are not persuaded by the arguments for removing the requirement that the defendant must have lost self-control when they killed: we believe that the danger of opening this up to cold blooded killing is too great”.⁸⁶⁸

However, Yeo criticizes the law-makers for retaining the loss of self-control requirement, and states that it makes the new defence “unattractive” due to the misplaced explanation for partially excusing the excessive force used by a defendant and for excluding deserving cases from its ambit.⁸⁶⁹

Ormerod states that loss of control requirement may lead to several other issues. The loss of control is still presumably required to be temporary otherwise the case would become one of insanity. Furthermore, in regard to the retention of the loss of control requirement, the government may have narrowed the availability of the defence to the battered woman since it may be difficult to show how loss of control arose out of a killing committed while the deceased slept.⁸⁷⁰

⁸⁶⁷ Mitchell and Mackay supra at (n 823) at 2.

⁸⁶⁸ Ministry of Justice, *Murder, Manslaughter and Infanticide: Summary of Responses and Government Position* (2009) at 62.

⁸⁶⁹ S. Yeo. “English Reform of Partial Defences to Murder: Lessons for New South Wales” (2010) 22 *Current Issues Crim.Just.* 2 at 14-15.

⁸⁷⁰ Ormerod supra (n 58) at 513, see discussion in Edwards supra (n 650) at 223.

3.3.1.2. Removal of the of the suddenness requirement in terms of 54(2)

The current law removes the requirement of immediacy (sudden and temporary loss of self-control) which was introduced into the common law as a result of the famous definition by Devlin J in Duffy⁸⁷¹ where the requirement of immediacy was placed at the heart of the provocation. This resulted in the “immediacy dilemma” since it created a clear obstacle in the way of those who killed their abusers out of fear or self-preservation.⁸⁷²

The new provision relinquishes the “suddenness” requirement; this was done to address the perceived prejudice of the old defence towards cases involving cumulative provocation. The requirement of sudden loss of self-control has been abandoned by the new provision thus solving the “immediacy dilemma” which proved tremendously troublesome to battered woman.

In the case of Dawes the court stated:

“Provided that there was a loss of control, it does not matter whether the loss was sudden or not. A reaction to circumstances of extreme gravity may be delayed. Different individuals in different situation do not react identically, nor respond immediately. The defendant may therefore be able to rely on loss of control even though the qualifying trigger occurred sometime previously. So, if V says something gravely provocative and D thinks about it, gradually getting more and more upset, and then some time later D loses self-control and kills V, then the defence could be used. However, do not forget section 54 (4), which makes it clear that if D acted out of a desire for revenge he or she cannot rely on the defence of loss of self-control. The longer the time after the trigger the more likely it is that the jury will decide that the trigger did not cause the loss of control”.⁸⁷³

It is submitted that this change goes a long way in addressing the unfairness of the old provocation and this is undoubtedly a positive development; however, it is further submitted that though being a positive development overall, this may create a potential problem in that it will be difficult to differentiate between case involving revenge and deserving ones.

⁸⁷¹ Duffy supra (n 550).

⁸⁷² Edwards supra (n 650) at 225.

⁸⁷³ Dawes supra (n 467).

Furthermore, the abandonment of the “immediacy” requirement has increased accessibility to the defence and generally widens the scope of the defence; arguably this may have potentially opened the defence to abuse, especially by those who killed out of revenge.⁸⁷⁴ One of the difficulties that come with this change is that it will be difficult to assess when and if loss of self-control occurred will lack and thus has arguably made the defence so wide that it has become “superfluous”.⁸⁷⁵

It is submitted that this fear is unfounded, since time lapse will still play a pivotal role in the defence especially when sifting out revenge killings.⁸⁷⁶ Premeditated killings may still be distinguished from “provoked” killings despite the removal of the immediacy requirement on the basis that in the cases involving cumulative provocation involve acts committed with the intention of fulfilling a goal, with disregard to one owns well-being. Whereas, premeditated killings involve carefully calculated act with the intention of escaping criminal liability.⁸⁷⁷ There are certain differences in evidence which may indicate premeditation, for instance sharpening a knife in a rational state must be differentiated from wearing gloves to prevent fingerprints which indicates careful calculation.⁸⁷⁸

Hence, despite the removal of immediacy requirement, large lapses of time between the provocative act and the killing will be given weight along with other evidence and may still work against the accused. Lapses of time will have an impact on how evidence will be assessed and what will pass as evidence of loss of self-control.⁸⁷⁹

The Government stated that it was intent on preventing under serving cases with large time lapses from succeeding. Therefore, the addition of an explanatory note confirms that the court may consider delays between the incident and the killing when assessing the issue of loss of self-control.⁸⁸⁰

⁸⁷⁴ Edwards supra (n 650) at 226.

⁸⁷⁵ C. Withey “Loss of control, loss of opportunity” (2011) 4 Crim.L.R. 263-279 at 12.

⁸⁷⁶ Edwards supra (n 650) at 226.

⁸⁷⁷ Clough supra (n 20) at 119.

⁸⁷⁸ Clough supra (n 20) at 119.

⁸⁷⁹ Edwards supra (n 650) at. 226.

⁸⁸⁰ Coroners and Justice Act 2009: explanatory note 337.

Though, loss of self-control is not required to be sudden or immediate which assists the persons such as the “battered woman” though the lapse of time will still be assessed. The removal of the immediacy requirement was not only a good development but more importantly in the interests of justice.

Historically, the requirement of loss of self-control in provocation cases was inextricably linked to “suddenness”, however the societal changes have necessitated this development. It is submitted that the removal of the immediacy requirement will not open the defence to abuse since the requirement the loss of self-control is a hurdle in itself and remains an adequate safeguard against unmeritorious cases.

Although this direction was praised as being a model of clarity by the Appeal Court, objections emerged concerning two specific areas. The first question regarded whether the common law was being correctly interpreted. Secondly, such an interpretation was directly discriminatory against women, who may kill their partner out of self-defence or self-preservation.⁸⁸¹ In terms of the new provision, Edwards argues that loss of self-control has been approached with an all-or-nothing attitude but the removal of the “temporary” requirement leaves this question unintentionally open.⁸⁸²

3.3.2. The qualifying triggers to loss of self-control

In a bid to remedy problems of the previous defence, the new defence recognises different “triggers” of loss of self-control. The defendant must be able to show that the loss of self-control is attributed to a qualifying trigger in terms of section 55. Herring states that this point is made clear in the case of Acott⁸⁸³ where the accused killed his mother while in a frenzy; however he could not explain why he lost control.⁸⁸⁴

The judge therefore correctly refused to leave the defence of provocation with the jury. The main point is that there must be evidence of a provocative situation. This case was decided under the old law but this principle is still applicable in terms of the new Act.

⁸⁸¹ Edwards supra (n 650) at 225.

⁸⁸² Edwards supra (n 650) at 224.

⁸⁸³ Acott supra (n 648).

⁸⁸⁴ Herring supra (n 464) at 241.

Under the old provision a defendant could raise the defence if the provocation arose out of something “done” or “said”, Herring notes that the new defence is narrower in that the provocation can only fall in one of the three prescribed categories.⁸⁸⁵

These are:

- a) Fear of serious violence
- b) A tremendously provocative act
- c) A fear of serious violence combined with a tremendously provocative act.⁸⁸⁶

3.3.2.1. “Fear” qualifying trigger section 55 (3)

The Consultation Paper broadened the scope of the new partial defence to recognise that fear as well as anger can undermine self-control.⁸⁸⁷ The Law Commission recommended that a new law be enacted, one which would accommodate fear as well as anger, but in a way in which the requirement for loss of self-control was forsaken.⁸⁸⁸ The new defence allows for the loss of self-control triggered by fear as well as anger and is intended for bring women who kill their abusive partners within the partial defences.

In terms of the “fear” qualifying trigger, it must be shown that indeed the defendant was fearful of violence even if the violence itself did not occur. Hence, if the defendant was under a misapprehension that violence was impending, this will still amount to a qualifying trigger. Furthermore, the fear must be of serious or severe violence, fear of a minor assault will not qualify. An important aspect of this provision is that loss of self-control must have emanated from the fear of serious violence, if the defendant reacted to the threat of violence in a calm manner, that is without losing control, and killed the attacker then the requirements of this provision are not satisfied. In this circumstance, where self-control remained intact, the defendant may rely on the defence of self-defence instead.⁸⁸⁹

⁸⁸⁵ Herring supra (n 464) at 241.

⁸⁸⁶ Herring supra (n 464) at 241.

⁸⁸⁷ *Murder, manslaughter and Infanticide* (2006) supra (n 799) at 5.48.

⁸⁸⁸ *Murder, manslaughter and Infanticide* (2006) supra (n 799) at 5.47 -5.60.

⁸⁸⁹ Herring supra (n 464) at 242.

Fear has been included as a trigger and this indicates that the scope has been broadened to include battered women who kill their abusive partners. An abused woman can attribute either anger or fear as a cause of loss of self-control.⁸⁹⁰ The recognition of fear has been welcomed as it provides *prima facie* assistance to victims of abuse such as the battered women.⁸⁹¹

However, it is also argued that women are more emotional than men and this might work to discriminate against men. Despite this criticism, it is submitted that the recognition of fear as an emotion which may undermine self-control is a welcome improvement, especially in the light of the previous defence which was considered discriminatory against women.

The acknowledgement of fear contributing to loss of self-control is a breakthrough in the quest for gender equality in English law, however other problems persist and the law is still far from ideal. Section 54(2) of the Act, rids the defence of the problems and controversies related to this requirement.

3.3.2.2. “Circumstances of an extremely grave character” -Section 55(4) (a)

In terms of the qualifying trigger in term of section 55 (4), the accused must have lost self-control due to things done or said which constituted circumstances of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged.

Furthermore, the Act does not explain the exact meaning of “circumstances of an extremely grave character”; however, Herring states that this requirement should be interpreted to mean that the circumstances faced by the defendant was unusual and thus cannot be classified as forming part of “ordinary” human tribulations. For example, being harassed at a supermarket or being cheated in a queue will not satisfy the requirement of this section.⁸⁹²

⁸⁹⁰ Norrie supra (n 837) at 285.

⁸⁹¹ Mitchell and Mackey supra (n 823) at 2.

⁸⁹² Herring supra (n 464) 250-251.

The requirement of “extremely grave character” in s55 (4) (a) informs the jury that the provocative act must be exceptional. Yeo states that the latter part of the clause places a significant limitation of the types of provocative acts that can be allowed.⁸⁹³

In the case of Dawes⁸⁹⁴ the Court of Appeal emphasised that the ending of a romantic relationship would not usually be considered as a qualifying trigger. In the case of Hatter,⁸⁹⁵ which was heard at the same time as Dawes, the Court of Appeal ruled that the ending of a romantic relationship will not normally constitute circumstances of an extremely grave character may not entitle the accused to feel a justifiable sense of being seriously wronged.

3.3.2.3. “Justifiable sense of being seriously wronged” section 55 (4) (b)

This requirement is intended to replace the old requirement of a “provoked loss of self-control”.⁸⁹⁶ In terms of the requirement that the defendant must have had a justifiable sense of being seriously wronged, this will be assessed by an objective test to decide if in fact the defendant was justified in feeling wronged.⁸⁹⁷ Hence, the defendant's feeling of being seriously wronged does not automatically satisfy this requirement.⁸⁹⁸ In the case of Bowyer⁸⁹⁹ the court stated that the break-up of a relationship will not entitle the accused to feel a justifiable sense of being seriously wronged.

Cases such as the infamous Doughty⁹⁰⁰ will be excluded from the ambit of the new defence due to the clever wording of this provision requiring justifiable sense of being seriously wronged. For instance, a traffic ticket will not amount to a justifiable sense of being seriously wrong, even if the traffic officer was less than courteous. The new

⁸⁹³ Yeo supra (n 855) at 10 state that the requirement that the accused must have felt a justifiable sense of being seriously wronged was proposed by the Law Commission in *Murder, manslaughter and infanticide* supra (n 799) at para 5.62-5.66 since the provocation defence at common law placed little restriction on the permissible types of provocation that could be considered by the jury.

⁸⁹⁴ Dawes supra (n 467).

⁸⁹⁵ Hatter (2013) WLR (D) 130.

⁸⁹⁶ Ashworth and Horder supra (n 818) at 257

⁸⁹⁷ Dawes supra (n 467), see further Hatter supra (n 895)

⁸⁹⁸ Herring supra (n 464) at 243.

⁸⁹⁹ Bowyer (2013) WLR (D) 130.

⁹⁰⁰ Doughty supra (n 590).

provision has narrowed the defence and covers a limited range of cases, thus trivial insults and distresses will not meet the requirements of this section.⁹⁰¹

The defendant must have a sense of being a victim of a serious injustice. This provision contains an objective, judgmental element which is in contrast with the purely subjective test of the old defence which tested if the defendant was provoked to lose self-control.⁹⁰²

This provision does not cover circumstances alone, for instance, being stranded in traffic cannot be categorised as “things done or said”.⁹⁰³ In the case of Clinton⁹⁰⁴ the court stated that it is important that the defendant must have felt wronged, and if even if faced with circumstances of an extremely grave character, he did not become distressed then this does not amount to a qualifying trigger. Herring notes that this is an important point, since the lack of distress could mean that self-control was not lost.⁹⁰⁵

3.3.2.4. Sexual infidelity is not a qualifying trigger - s.55 (6) (c)

The reason behind the exclusion of sexual infidelity amounting as a qualifying trigger is that juries may show sympathy and leniency to men who killed their partners upon discovering sexual infidelity. The government stated:

“it is quite unacceptable for a defendant who has killed an unfaithful partner to seek to blame the victim for what occurred. We want to make it absolutely clear that sexual infidelity on the part of the victim can never justify reducing a murder to manslaughter. This should be the case even if sexual infidelity is present in combination with a range of other trivial and common place factors.”⁹⁰⁶

⁹⁰¹ Herring supra (n 464) 244.

⁹⁰² Ashworth and Horder supra (n 818) at 257.

⁹⁰³ Herring supra (n 464) at 243-244.

⁹⁰⁴ Clinton [2012] EWCA Crim. at 2.

⁹⁰⁵ Herring supra (n 464) at 244.

⁹⁰⁶ Ministry of Justice, *Murder, Manslaughter and Infanticide: proposals for reform of the law-summary of responses and government position, response to consultation paper*. CP (R) (19/08) (2009) at para 32.

Section 55 (6) (c) explicitly states that “the fact that a thing done or said constituted sexual infidelity is to be disregarded”. In this regard Leigh notes that the Act does not expressly say that sexual infidelity in itself does not amount to a qualifying trigger.⁹⁰⁷

In the case of Clinton⁹⁰⁸ the court stated that sexual infidelity should not on its own constitute a qualifying trigger, however evidence proving sexual infidelity may be admitted due to relevance of the circumstances wherein the accused acted legally to the qualifying trigger.⁹⁰⁹

The court stated:⁹¹⁰

“where sexual infidelity is integral to and form an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsection 55(3) and (4), the prohibition in section 55(6) (c) does not operate to exclude the defence.”

Herring notes that the Court of Appeal was not keen on section 55(6)(c) which excluded sexual infidelity from being categorised as a qualifying trigger.⁹¹¹ The court further stated that this exclusion might result in “anomalies”⁹¹² and “produce surprising results”.⁹¹³

⁹⁰⁷ L.H Leigh “Loss of control: the significance of sexual infidelity and other matters.” (2012) Arch. Rev at 2.

⁹⁰⁸ Clinton supra (n 904).

⁹⁰⁹ Clinton supra (n 904) at 34-35; in this case the accused’s wife confessed her infidelity to the accused and described her sexual escapades with detail. In response the accused told the deceased that he would commit suicide as a result to which his wife responded that he did not have the “balls”. The accused using a baton beat the deceased over the head and then strangled her. Due to the provocation being sexual infidelity, the trial judge did not allow reliance on the loss of control defence. The accused appealed against the conviction.

⁹¹⁰ Clinton supra (n 904) at 39.

⁹¹¹ Herring supra (n 464) at 244.

⁹¹² Clinton supra (n 904) at 20.

⁹¹³ Clinton supra (n 904) at 2.

Furthermore, Mitchell argues that the meaning of sexual infidelity itself has not been defined in the Act.⁹¹⁴ The Clinton case highlighted other uncertainties, for example, it is uncertain if sexual flirting could be considered as sexual infidelity. Furthermore, another potential problematic aspect of the new provision is that “sexual infidelity” has not been officially defined in the new defence nor has it been explained its relation to the requirement of “seriously wronged”^{915 916}.

It is submitted that achieving a delicate balance when enacting a provision pertaining to a controversial defence is a tremendously difficult task, and unfortunately this balance has not been achieved. The reason for this criticism is that the defence now prejudices the male gender since the new provision expressly excludes sexual infidelity from the ambit of the defence.⁹¹⁷

Sexual infidelity is considered to be the “paradigmatic example of provocation”.⁹¹⁸ Hence, the exclusion is quite controversial. It is submitted that men especially will be harshly judged and this may result in further misuse of the law. Herring argues sexual infidelity is considered to be a factor which may cause a loss of self-control, thus it is artificial to pretend that sexual infidelity that it does not.⁹¹⁹ Leigh contends that the new defence has excluded strong and complicated emotional reactions to which sexual infidelity may result.⁹²⁰

Furthermore, this exclusion might confuse a jury who may deem sexual infidelity to be a qualifying trigger. Further confusion is probable in cases where diminished responsibility and loss of self-control are pleaded in the alternative since it will be odd for a jury to consider sexual infidelity in terms of diminished responsibility while excluding it in terms of loss of self-control.⁹²¹

⁹¹⁴ Mitchell and Mackay supra (n 823) at 2.

⁹¹⁵ Section 55 (4) of the Coroners and Justice Act 2009.

⁹¹⁶ Leigh supra (n 907) at 2 discussing Clinton supra (n 904).

⁹¹⁷ See criticisms in Edwards supra (n 650) at 230.

⁹¹⁸ Edwards supra (n 650) at 230.

⁹¹⁹ Herring supra (n 464) at 248.

⁹²⁰ Leigh supra (n 907) at 2.

⁹²¹ Herring supra (n 464) at 248.

3.3.2.5. “Considered desire for revenge”- SECTION 54(4) (1)

The new defence is denied to an accused person who acted in a considered desire for revenge. The government was of the opinion that this addition was necessary in order to ensure that the defence was not being abused by the “honour killing” cases or for gang murders.⁹²² Edwards states that wording of the Act indicates that revenge killings committed on impulse and those committed after a “considered desire” may be treated differently.⁹²³ It is for the courts to determine how to judge time lapse in cases where loss of self-control caused by anger and loss of self-control caused by fear.

The jury may conclude that the defendant had no sufficient reason to regard the deceased's conduct as gross provocation, or indeed that the defendant's attitude in regarding the conduct as provocation demonstrated as an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilized society.⁹²⁴

3.3.3. The Objective Test in s 54(1)(c)

In order for the loss of control defence to succeed, the defendant must not only show that a loss of control resulted from a qualifying trigger but also that a “person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstance of D might have reacted in the same or in a similar way to D” this requirement in terms of section 54 (1) (c) is governed by an objective test.⁹²⁵

The requirement of this section exists in two parts. Part one describes the type of provocation that will be recognized by the Act and part two pertains to the reaction of a person possessing a normal degree of tolerance and self-restraint to the provocative act.⁹²⁶

⁹²² Ministry of Justice (2009) *Murder, Manslaughter and Infanticide: proposals for reform of the law (Summary of responses and Government Position)* Response to Consultation CP(R) 19/08 Ministry of Justice London.

⁹²³ Edwards supra (n 650) 225-226.

⁹²⁴ *Partial Defences to Murder* (2004) supra (n 799) at para 3.70.

⁹²⁵ In terms of section 54 (1) (c) of the Coroners and Justice Act 2009.

⁹²⁶ Yeo supra (n 869) at 10.

3.3.3.1. Meaning of "circumstances" of the defendant referred to in 54 (1) (c)

The use of the word “circumstances” as opposed to “characteristic” in the Homicide Act is seen as a welcome change. The use of the word “circumstance” is significant as it allows the defendant’s history to be considered, especially in cases where the defendant was abused by the deceased. The jury is allowed to view the qualifying trigger in the light of the defendant’s background. The defendant may show that due to his or her experience the wrong in question was more serious to them.

The Act does not necessitate that the defendant’s religious and cultural background be considered in determining how the reasonable person would behave when faced with the same circumstances as the defendant; so, it remains to be seen if these factors can be taken into account under the term “all other circumstances”. These factors may be classified as characteristics or personal attributes; hence, the law needs to clarify how closely related “circumstances” is from “characteristics”.⁹²⁷

It must be noted that a defendant may not use their unique circumstance or characteristics to impact their level of self-control. In the case of Clinton the court emphasised that sexual infidelity by itself could not amount to a qualifying trigger but it would play a role in determining “circumstance” when testing if a person with a normal degree of self-restraint and tolerance would have reacted as the defendant did.⁹²⁸

3.3.3.2. “Normal degree of tolerance and self-restraint”

This requirement is intended to prevent defendants using this defence when the loss of control suffered may have been due to their own intolerance or abnormally low levels of self-restraint. Therefore, the defence will apply if a defendant reacted in the same way to a qualifying trigger as a person who possessed a normal degree of tolerance and self-restraint. This test is stringent as the defence will be denied to a person who possessed abnormally low levels of self-restraint and tolerance due to factors outside of their control, for instance in cases involving mental illness, the defendant will still be

⁹²⁷ Clough supra (n 20) at 125.

⁹²⁸ Herring supra (n 464) at 251.

required to have displayed self-restraint and tolerance expected of an ordinary person of their age and sex.⁹²⁹

Commentators have criticised this provision, specifically the objective test that will be used to determine capacity for self-control and determining what a normal degree of tolerance and self-restraint is. Miles correctly argues that in the case of the battered woman whose qualifying trigger was fear, and if the degree of force used is objectively excessive, the defendant will be deprived of the defence on the basis that an ordinary person with [a normal degree of] tolerance and self-restraint would not have used disproportionate force.⁹³⁰

It is further argued that it is difficult to foresee how this requirement will function since degrees of tolerance and self-restraint are extremely subjective in nature and should be judged subjectively.⁹³¹

Norrie, however, rejects the distinction made between those characteristics that pertain to the provocation and those that relate to the ability to exercise self-control since the two are not distinct.⁹³² If characteristics such as age justify different degrees of self-control, then the same principle should apply to other characteristics that could impact the response to provocation.⁹³³

In respect of “tolerance”, this requirement is intended to handle cases where the defendant was provoked due to his own intolerance beliefs or philosophies. Herring uses the example of a boy telling his homophobic father that he is homosexual, and upon hearing this information the father kills his son in a fit of rage. In this

⁹²⁹ Herring supra (n 464) at 250 states that a defendant in these circumstances would rather raise the defence of diminished responsibility instead.

⁹³⁰ J. Miles “Coroners and Justice Act 2009: A dogs breakfast of Homicide Reform” (2009) Archbold News 8, Legislative Comment at 32.

⁹³¹ Withy supra (n 875) at 12 is correct in stating that the problems of ambiguity which troubled the previous law still persist. The wording of the new provisions is open to interpretation and parliament has squandered the opportunity to give much needed clarity in this area of law; Yeo supra (n 865) at 177 states that apart from these criticisms, the defence has been improved, there is better clarity and the law has been brought in line with the standards of modern society and scientific thinking.

⁹³² Norrie supra (n 837) at 307.

⁹³³ Norrie supra (n 837) at 307.

circumstance the father will not be able to rely on the defence due two reasons. Firstly, the sexual orientation of the son could not have caused the father to feel a “justifiable sense of being seriously wronged” and therefore cannot amount to a qualifying trigger. Secondly, the fact that the killing was committed by a father against his son is not consistent of a person possessing a normal degree of tolerance or restraint. The father (defendant) would be considered to be an intolerant person.⁹³⁴

The requirement of “self-restraint” is an indication that the law expects all individuals to exercise self-control, thus restraint should be shown even in the face of extreme insults or provocative behaviour. However, the law through this defence recognises that even a person with a normal degree of tolerance and self-restraint may kill in the face of a terrible wrong.⁹³⁵

An important note is that the provision states that it must be shown that a person of normal tolerance and self-restraint might have reacted in the same situation, thus if the jury are unsure on how the normal person would have reacted then the defendant should be allowed to utilise the defence.

3.3.3.3 “a person of D’s sex and age...” in terms of 54(1) (c)

Interestingly, the “reasonable man” test is not mentioned in the new defence of loss of self-control.⁹³⁶ The new provision in terms of section 54(1)(c) follows the Camplin⁹³⁷ approach and retains a test of ordinariness/reasonableness for the provocative act along with the D's response to it, even though terms like “reasonable man” or “ordinary person” do not feature considerably in the new Act.

The new provision solves the dispute in *Smith (Morgan)*⁹³⁸ and *Holley*⁹³⁹ regarding which characteristics of the defendant to take into account other than sex and age. The

⁹³⁴ Herring supra (n 464) at 250 states that similarly an intoxicated person would be required to show the same level of self-control of a non-intoxicated person.

⁹³⁵ Herring supra (n 464) at 251.

⁹³⁶ D.A. Thomas “R v Brook: sentencing-manslaughter by reason of provocation” (2012) 10 Crim.L.R 801.

⁹³⁷ Camplin supra (n 580).

⁹³⁸ *Smith (Morgan)* supra (n 715).

characteristic of “age” refers to “youthful immaturity” and is based on the underlying rationale that it would be unfair to expect a young person to display the same emotional and mental maturity of an older person. This characteristic is fairly uncontroversial unlike the characteristic of the “sex” of the accused.⁹⁴⁰

Self-restraint will be judged in accordance with the defendant’s age; however, the addition of “sex” has garnered criticism from commentators who view it as a form of gender discrimination. The addition of “sex” as a requirement suggests that the law expects different degrees of tolerance and restraint from men and women.⁹⁴¹ The addition of “sex” as a characteristic may imply women possess a higher degree of tolerance or restraint than men, this stereotype propagates the stereotype that women who kill may be wicked. Yeo notes that this may have been the reason for the Law Commission excluding this characteristic in its proposed reformulation of the defence.⁹⁴²

However, if this inclusion was not an oversight, then it may have been a deliberate attempt by the Government to possibly account for a lower threshold of capacity for tolerance and self-restraint by an abused woman who kills her abusive partner. However, regardless of the intention behind the inclusion of “sex”, the result is that Government has failed to understand the social reality that females who kill their abusive partners are ordinary or normal women who have been pushed to breaking point.⁹⁴³

Furthermore, this provision is discriminatory against men who may also have found themselves to be victims of abuse at the hands of their domestic partner. The

⁹³⁹ Holley supra (n 670).

⁹⁴⁰ Yeo supra (n 869) at 11, Ormerod supra (n 58) at 523 states that this new objective criteria bears some similarity to the test in terms of the section 3 of the Homicide Act 1957, which was the cause of confusion and resulted in a few too many visits to House of Lords namely Camplin supra (n 580), Smith (Morgan) supra (n 715).

⁹⁴¹ Herring supra (n 464) at 251.

⁹⁴² *Murder, Manslaughter and infanticide* (2006) supra (n 799) at 5.11-5.38 discussed by Yeo supra (n 869) at 11.

⁹⁴³ Yeo supra (n 869) at 11-12.

government is criticised for not requiring a single standard of tolerance and self-restraint for both males and females.⁹⁴⁴

3.3.4. Battered woman and the new loss of control defence

Historically, one of the main areas of contention within the provocation was the issue of discrimination against women. The previous provocation defence could not accommodate the cases of slow burn and courts were resorting to “stretching” the law in order to serve justice.⁹⁴⁵

Edwards argues that the law needed to develop in two ways; the first, must strive to liberate the abused woman from being constructed through a “psychological prism”.⁹⁴⁶ This construct did a disservice to the battered woman as the psychological effects of abuse and its effect on conduct are given paramount importance and other features of an abused woman’s “symptomatology” are over looked.⁹⁴⁷

Secondly, the nature of the violence perpetrated against the woman should be the focus rather than the woman’s subjective reaction.⁹⁴⁸ Under the old defence, the battered woman would need to convince a jury that by virtue of the fact that she was an abused person; her knowledge of the perpetrators propensity for violence resulted in her anticipating another violent attack and a reaction in self-defence was in the circumstances reasonable.⁹⁴⁹

The Holley⁹⁵⁰ decision resulted in the defendant being put in the position of proving to the jury that conduct was reasonable.⁹⁵¹ This was the unfortunate predicament of the

⁹⁴⁴ Yeo supra (n 869) at 12 states that the Australian High Court should be lauded for applying a single standard of tolerance and self-restraint to both sexes in the case of Stingel v The Queen (1990) 171 CLR 312.

⁹⁴⁵ Norrie supra (n 837) at 276.

⁹⁴⁶ Edwards supra (n 654) at 350.

⁹⁴⁷ Edwards supra (n 654) at 350.

⁹⁴⁸ Edwards supra (n 654) at 350.

⁹⁴⁹ Edwards supra (n 654) at 351 proposes that battered woman’s syndrome should be re-framed in terms of its focus and terminology.

⁹⁵⁰ Holley supra (n 670).

⁹⁵¹ Edwards supra (n 654) at 351.

battered woman.⁹⁵² In terms of the new loss of control defence, the battered women seeking to raise the defence either in terms of section 55(3) or 55(4)(a) and (b), the jury must be satisfied that the defendant was justified in feeling a sense of being seriously wronged.

This might create a potential problem for the battered woman if reliance on section 55(4) is made, due to the fact that if last qualifying trigger, either a threat or a minor insult was said, this on its own may not be considered as extremely grave in character. Furthermore, this coupled with time lapse; the jury might not consider the killing justifiable when application of the objective test is made.

Edwards argues that the battered woman may be better served by formulating an argument around the concept of cumulative fear in terms of section 55 (3) and (4). However, fear will only suffice if the violence suffered by the defendant is of a severe nature.⁹⁵³ The mind of the battered woman is different, and reaction to violence perpetrated against her does not depend on the severity of the last beating so to speak. The mind of the battered woman is fixated on the severity of the threat the abuser poses to her life. Hence, the reaction of the battered woman cannot be considered an “over reaction” at all.⁹⁵⁴

The issue of capacity for self-control was also contentious and the case of Holley⁹⁵⁵ considered whether the capacity for self-control is a variable or a fixed standard, and made it clear that the capacity for self-control was fixed.⁹⁵⁶ This directly impacted battered woman who found themselves in a quandary of trying to convince a jury that the force used to kill was reasonable in these circumstances.⁹⁵⁷

⁹⁵² Edwards supra (n 654) at 351.

⁹⁵³ Edwards supra (n 650) at 233.

⁹⁵⁴ Edwards supra (n 650) at 233 argues that the Law Commission failed to appreciate this aspect when description of the lethal response of the battered woman to threats and violence which it did not consider severe, was termed as “over reaction” and “excessive”.

⁹⁵⁵ Holley supra (n 670).

⁹⁵⁶ See discussion of impact of Holley supra (n 670) and the changes to capacity for self-control in light of women who kill their abusive male partners in Edwards supra (n 650).

⁹⁵⁷ Edwards supra (n 650) at 235.

A literal interpretation of Holley⁹⁵⁸ indicated that capacity for self-control excluded any pre-existing emotional state and declaring that self-control will be fixed, significantly impacted on how the provocation defence is pleaded and its outcome.⁹⁵⁹ The use of a weapon was not understood and the formulation of set rules gave judges no room to adjust sentences where appropriate and this was unjust.⁹⁶⁰

Edwards argues that the new provision leaves the battered woman at the mercy of the jury assessment of “justifiable” and ultimately failing at the final hurdle.⁹⁶¹ The jury’s assessment will require an application of an objective test of what is justifiable and what the defendant considered justified and weighed in the light of the circumstances of the defendant.

Some of the other areas (section 51(c)) of confusion the Act potentially creates are in regard with determining the capacity for self-control, judged objectively on threshold of what a normal degree of tolerance and self-restraint is. Loss of control triggered by anger as well as loss of control triggered by fear will be judged by this standard. The criticism of this provision mainly concerns the defence of the battered woman whose reaction objectively assessed will be considered to be excessive since an ordinary person with a normal degree of tolerance and self-restraint would not have used excessive force.⁹⁶² This objective assessment of capacity for self-control will arguably cause the battered woman to fail in her defence.

3.3.5. Procedural aspects

The first area of concern was that the provocation defence allowed unmeritorious cases to be left with the jury, specifically those were the alleged provocative conduct relied upon was not of a serious nature. In terms of procedure, the new provision deals with this concern by restoring power back to the judge in regard to the issue of provocation in terms of section 54(6) of the Act.⁹⁶³

⁹⁵⁸ Holley supra (n 663).

⁹⁵⁹ Edwards supra (n 654) at 346.

⁹⁶⁰ Edwards supra (n 654) at 361.

⁹⁶¹ Edwards supra (n 650) at 235.

⁹⁶² Miles supra (n 930) at 32.

⁹⁶³ Ashworth and Horder supra (n 818) at 256.

The Commission recommended that the judge must be the gatekeeper of provocation and must be in more control of the case; this recommendation was incorporated in the Coroners and Justice Act under s 54(6). The Commission made proposals changing the role of the judge by recommending that judges be empowered to withdraw the defence if in their discretion no reasonable jury would accept it.⁹⁶⁴

Section 54(6) readdresses the judge's role, in terms of the new Act; the wording "justifiable sense of being seriously wronged" implies that the jury is directed to assess what is morally or politically acceptable. Under the new law, the judge has more power and may use his discretion to remove an unworthy case from the jury. Norrie notes that in terms of this provision, power of removal possessed by the judge, the matter is removed from the "actual" jury and will be considered by an "ideal" jury.⁹⁶⁵

The new provision in terms of section 54 of the Act has changed the role of the judge by returning the power to determine if evidence of provocation exists and if a jury could reasonably conclude that there was loss of control. The new partial defence restores this vital power to the judge which includes assessment of whether a qualifying trigger exists and if the defendant indeed lost self-control and if this loss was justifiable. Edwards notes that the threshold required is that of "reasonably conclude" rather than a "speculative possibility" required under the old defence.⁹⁶⁶

The judge has the power to remove cases from jury consideration.⁹⁶⁷ In terms of the common law, it was the judge's discretion to decide which acts amounted to provocation and which did not.⁹⁶⁸ Provocative acts had to be inherently objectionable. In terms of the previous defence, this limitation was removed, resulting in a wide range

⁹⁶⁴ *Murder, Manslaughter and Infanticide* (2004) supra (n 799) at para 5.11, Edwards supra (n 654) at 358 notes that this was the position before the enactment of the Homicide Act 1957 which took the power from judges to withdraw provocation from the jury in relation to the reasonable man leaving only a residual power to withdraw the defence if it was decided that there was no evidence indicating loss of self-control.

⁹⁶⁵ Norrie supra (n 837) at 288.

⁹⁶⁶ Edwards supra (n 650) at 239.

⁹⁶⁷ Ormerod supra (n 58) at 510.

⁹⁶⁸ Elliot and Quinn supra (n 525) 71.

of conduct being regarded as provocative conduct. Judges were deprived of authority to rule on the adequacy of provocation.⁹⁶⁹

The Law Commission stated that for example, a case involving a racist killing in retaliation to a supposed provocation would be a case where:

“the jury may conclude that the defendant had no sufficient reason to regard it as gross provocation, or indeed that the defendant's attitude ... demonstrated an outlook ... offensive to the standards of a civilized society”.⁹⁷⁰

Norrie states in these circumstances no well-directed and fair-minded jury would find that gross provocation had indeed occurred and the situation would call for the judge to withdraw the case for the jury's consideration.⁹⁷¹ The concept of the ideal and properly directed jury has been incorporated into the Coroners and Justice Act under s 56(6)⁹⁷². Furthermore, in regard to cases involving sexual infidelity, the Law Commission was the view that this issue must not be left to the jury by the judge.⁹⁷³

⁹⁶⁹ Ashworth *supra* (n 57) 254.

⁹⁷⁰ *Partial Defences to Murder* (2004) *supra* (n 799) at para.3.70 discussed by Norrie *supra* (n 837) at 280.

⁹⁷¹ *Partial Defences to Murder* (2004) *supra* (n 799) at para.3.71 discussed by Norrie *supra* (n 837) at 280.

⁹⁷² S.56(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

⁹⁷³ *Partial Defences to Murder* (2004) *supra* (n 799) at para.3.145 discussed by Norrie *supra* (n 837) at 280.

3.3.6. Expert evidence

The value of expert evidence has been acknowledged by English courts and over many centuries experts have provided a prominent role as witnesses on medical, scientific and literary matters.⁹⁷⁴ However the famous case of Turner⁹⁷⁵ had the effect of excluding expert psychological and psychiatric testimony in numerous cases over a period of twenty years where the accused was not suffering from a pathological mental disorder which at the time of the commission of the act in question. The so-called “Turner rule” has been used to exclude expert evidence in cases involving duress and provocation amongst others.⁹⁷⁶

⁹⁷⁴ A.M Coleman and R.D. Mackay “Legal issues surrounding the admissibility of expert psychological and psychiatric testimony” (1993) *Children, Evidence and Procedure* (Clark, N.K. and Stephenson, G.M. eds.) Issues in Criminological and legal Psychology, No. 20 (The British Psychological Society) 46-50 at 46.

⁹⁷⁵ R v Turner (1975) Q.B 834, C.A. In this case the appellant was convicted of murder and sentenced to life imprisonment by the trial judge after killing his girlfriend with a hammer. The appellant claimed that he was deeply in love with the deceased, however on the day of the killing she confessed that she was pregnant and he was not the father. Apparently, she had sexual relations with two other men and upon confessing the alleged deeds she grinned. Upon hearing this confession, the appellate flew into blind rage which was overwhelming. It was at this point he took hold of a hammer and struck the deceased.

One of the defences raised by the appellant was provocation. The defence based their appeal on the fact that the trial judge ruled psychiatric evidence inadmissible. The psychiatric evidence in question details the strong emotional bond the appellant shared with the deceased and this could have led to an explosive outburst even though he did possess a mental disorder. This according to the defence was consistent with the defence of provocation. However the appeal nevertheless was dismissed.

⁹⁷⁶ Colman and Mackay *supra* (n 974) at 47 are critical of the rule in R v Turner supra (n 975), state that the logic underpinning this principle is based on an interpretation of the relationship between psychology and common sense which is ultimately a fallacy, however this reasoning can be explained by a chain of four propositions. Firstly, expert evidence in the form of psychological or psychiatric evidence is inadmissible in cases that do not deal with a mental disorder, even if relevant. Secondly, the reason for this is that expert evidence is not a substitute for common sense of the jurors when matters relating to common knowledge or experience are in question. Thirdly, this is due to the belief that an expert’s view of normal human behaviour is not more important or valuable than the ordinary juror, however the danger of expert testimony is that it may result in more weight attached to the findings of the expert than their own. Fourthly, this presumption rests on the belief that the normal reasonable person is capable of understanding normal reasonable behaviour due to their shared common knowledge and experience. Essentially expert testimony may not provide an insight that may

Lord Justice Lawton stated:⁹⁷⁷

“If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness had impressive qualifications does not by that fact alone make his opinion on matters of human nature any more helpful than the jurors themselves; by there is a danger that they may think it does”.

Furthermore, it was held that:

“jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life”.⁹⁷⁸

This rule hinges on the assumption that certain psychological functions and occurrences are a matter of common knowledge and experience and therefore a jury will be able to comprehend matters without the assistance of expert testimony.⁹⁷⁹

The basis of this common law principle dates back to the year 1782 in the case of Folkes v Chad where it was held that an expert’s opinion may only be admissible if it provides that court with information that may be outside the common knowledge and experience of the jury.⁹⁸⁰

In the case of Emery⁹⁸¹ the Court of Appeal relaxed the rule in Turner⁹⁸² to the effect that expert testimony is permitted when it relates to a condition which “is complex and it is not known by the public at large.”

correct or further such an understanding. Finally, this rests on the presumption that normal human behaviour is ultimately transparent.

⁹⁷⁷ R v Turner supra (n 975) at 841.

⁹⁷⁸ Turner supra (n 975) at 841 discussed by Colman and Mackay supra (n 974) at 47.

⁹⁷⁹ R.D. Mackay and A.M. Coleman “Equivocal rulings on expert psychological and psychiatric evidence: turning a muddle into a nonsense” (1996) Criminal Law Review 88 at 88.

⁹⁸⁰ Folkes v Chadd (1972) 3 Doug KB 157 discussed by Colman and Mackay supra (n 974) at 47.

⁹⁸¹ Sally Lorraine Emery (1993) 14 Cr.App.R. (S.) 394.

⁹⁸² Turner supra (n 975).

The rule in Turner⁹⁸³ has attracted criticisms from commentators who believe that although expert psychiatric and psychological evidence should be limited, the scope of admissible evidence should be widened to include abnormal and usual states of mind that cannot be categorised as mental illness and may not be understood by a lay person even with common sense.⁹⁸⁴ It is thus argued that expert testimony can be very useful in such cases as it may aid in understanding the mind-set of the accused at the time of commission of the offence.⁹⁸⁵

3.4. Concluding summary

The role of provocation and its impact on criminal responsibility has always occupied a contentious place in English law. Historically, the basis of the provocation was to accommodate human frailty of the provoked killer who lost the ability to reason when overcome by passion; therefore, the law shows a measure of leniency to the accused in the form of a manslaughter conviction. Arguably, the same justification of the defence that is the accommodation of human infirmity still applies currently.

During these formative years, the law initially began with differentiating between killings depending on the circumstances in which they were committed in. Premeditated killings were considered more heinous than those committed on impulse or on the spur of the moment. The emergence of manslaughter signified that the law considers killings arising out of provocation to be more excusable despite the presence of intention. The law in this area took many decades to reach its current point in the form of the Coroners and Justice Act 2009.

The defence has its roots in the common law dating back to the 17th century. As the common law defence of provocation developed, the doctrine of provocation emerged. Importance was placed on two elements of the defence, the requirement of loss of self-control and the reasonable man test. The law placed importance on both elements, these elements are considered to be vital aspects of the provocation defence even in its current format.

⁹⁸³ Turner supra (n 975).

⁹⁸⁴ Colman and Mackay supra (n 974) at 49.

⁹⁸⁵ Mackay and Coleman supra (n 979) at 95.

The loss of self-control is considered to be problematic and the source for much of the criticisms troubling the provocation for many years. In famous case of Duffy,⁹⁸⁶ the court stipulated that the loss of control must be sudden. This gave rise to many controversies as the main problem which ensued was accommodating the abused women who kill within a defence predicated on sudden loss of self-control. Emphasis was placed on angered states and the law did not recognise other causes of loss of self-control.

In light of the repercussions that could result from allowing a defence based on an angered state, the courts increasingly placed importance on the use of an objective standard to measure the accused's behaviour against; this was in the form of the "reasonable man". The "reasonable man" test was seen as an essential aspect in the provocation defence; however, the interpretation and application proved extremely troublesome for many years to come. This centred on the number of attributes of the accused that should be given to the reasonable man.

In light of the problems associated with the application of the objective test and its perceived harshness, section 3 of the Homicide Act was enacted with the intention of modifying the defence at common law. In terms of this legislation, the requirements for the defence were divided into two parts, a subjective test which determined if the accused lost self-control and the objective test determined the impact of the loss of self-control on the reasonable man.

However, the enactment of this defence did not solve the difficulties of the provocation defence at common law; in fact the defence attracted more criticisms, especially targeted to the loss of control requirement and gender bias towards men and the problematic objective test which was difficult to apply and interpret.

This prompted review of the law by the Law Commission and the Ministry of Justice which resulted in the eventual abolishment of the defence at common law together with section 3 of the Homicide Act and the enactment of the loss of control defence in terms of the Coroners and Justice Act 2009. The Law Commission stated that a coherent and

⁹⁸⁶ Duffy supra (n 550).

logical rationale was lacking in the provocation defence and the theoretical underpinning of the defence was problematic. The requirement of loss of self-control and the objective test were identified as troublesome areas.

The Coroners and Justice Act contains certain new features which are intended to solve the dilemma's plaguing the previous defence. Notably, the law recognises fear as qualifying trigger to loss of self-control. This was done to redress past prejudice against women who fell outside the ambit of the previous provocation defence. The new defence has dispensed with the requirement that the loss of self-control must be sudden. This is considered a welcome change especially in terms of recognising the different ways in which men and women lose self-control, the defence has been refined to accommodate other emotional states rather than a complete focus on angered states.

However, the new provision has received criticism for being vague and leaving certain important concepts and requirements undefined. The loss of control requirement remains controversial and has been criticised for being obscure. In Dawes,⁹⁸⁷ the court emphasised that that loss of control is a subjective question which pertains to the defendant's state of mind.⁹⁸⁸ This is in contrast to the case of Jewell,⁹⁸⁹ where it was held that loss of control means a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning.

In respect of the new objective test, though no mention is made of the notorious "reasonable man", the new provision retains its objective nature. Furthermore, the recognition of "sex" as a factor to be considered indicates that different degrees of tolerance and self-restraint is expected of the different sexes, this may prove to be problematic and lead to further gender discrimination. Furthermore, the law excludes sexual infidelity from being a qualifying trigger, this requirement is considered to be discriminatory towards men.

⁹⁸⁷ Dawes supra (n 467).

⁹⁸⁸ Dawes supra (n 467) at 54.

⁹⁸⁹ Jewell (2014) EWCA Crim 414 at 23.

The new defence in terms of the Coroners and Justice Act is an improvement of the old provocation defence though what is clear is that the loss of self-control requirement and the objective test are staples of the defence despite being identified as problematic by many commentators. Only time will tell whether this reformation of the defence, was a success.

CHAPTER 4: THE DEFENCE OF PROVOCATION IN CANADIAN LAW

4.1. Introduction

In Canada, the provocation defence exists as a partial defence to murder only, and therefore if the plea is successful, the accused will be convicted of the lesser charge of manslaughter.⁹⁹⁰ The defence is codified under section 232 of the Canadian Criminal Code.⁹⁹¹ Essentially, the provocation defence represents the law's recognition of the relationship between emotion and its impact on capacity for self-control.⁹⁹²

Furthermore, the defence of provocation can be considered as a way in which the law takes mercy upon an accused. Hence, it is intended to provide some leniency in circumstances where the accused is considered to be less blameworthy.⁹⁹³ The defence is considered to be one that establishes society's tolerance for murder in situations involving a loss of temper to such a large degree that it becomes acceptable.⁹⁹⁴ Therefore, the provocation defence in Canada operates on a fundamental level as a mitigatory feature of the criminal law with the aim to circumvent the harshness of a murder conviction and more importantly, the penalty of life imprisonment for a conviction of murder.⁹⁹⁵

⁹⁹⁰ A.M. Lunny "Provocation and Homosexual Advance: "Masculinized Subjects As Threat, Masculinized Subjects Under Threat" (2003) 12 Social and Legal Studies 311 at 312.

⁹⁹¹ *Criminal Code* R.S.C. 1985 c.C-46 (The Code); Canadian Criminal Code originates from 19th century English law; S. Yeo "The Symbiosis between Criminal Codes and the Common Law" (2012-2013) 24 National Law School of India Review 75 at fn 4 states that the Canadian Code was based on James Stephen's draft Codes as amended by the English Royal Commission of 1879, Yeo states that Canada is one example of a jurisdiction wherein legislation in the form of a Code and the common law co-exist.

⁹⁹² Reilly *supra* (n 22) at 131.

⁹⁹³ C. Dick "A Tale of two Cultures: Intimate Femicide , Cultural Defences, and the Law of Provocation" (2011) 23 Canadian Journal of Women and the Law at 522-523

⁹⁹⁴ W. Gorman "Provocation : The jealous husband defence" (1999) 42 Criminal Law Quarterly 480 at 481

⁹⁹⁵ T. Quigley "Deciphering the Defence of Provocation" (1989) University of New Brunswick Law Journal at 11.

The defence of provocation may only be considered after the jury has ruled that the accused has committed second-degree murder.⁹⁹⁶ The element of intention is therefore an essential part of the defence.⁹⁹⁷ The defence of provocation is only available for a charge of murder and can only be used when all the elements of murder are established.⁹⁹⁸ Provocation can be used to reduce murder to manslaughter and can also be used as a mitigating factor during sentencing for manslaughter.⁹⁹⁹

It is important to note that provocation is not a justification of the killing; hence, an accused cannot be exonerated; criminal liability and the criminal sanction still apply.¹⁰⁰⁰ There has been debate on whether the defence of provocation is a justification or excuse; Da Silva argues that this is “a rare point of near-consensus in contemporary criminal law theory.”¹⁰⁰¹

Berman contests the current view and states that “[a] defence is a justification if it renders the actor’s conduct not morally wrongful; whereas, it is an excuse if it renders morally wrongful conduct not blameworthy”.¹⁰⁰² Husak also states that the provocation defence exists as a partial justification which reduces the wrongfulness of an act as opposed to partial excuse which reduces the blame attributed to the accused, although

⁹⁹⁶ Anand supra (n 23) at 29.

⁹⁹⁷ Anand supra (n 23) at 34.

⁹⁹⁸ Hyland supra (n 25) at 146.

⁹⁹⁹ R v Stone [1999] 2 S.C.R. 290, the Crown in this case argued against this “double benefit” however the Supreme Court asserted that this was not a double benefit and emphasised the need to consider provocation during sentencing for manslaughter. The court at 237 stated: “To give s.232 full effect, provocation must be considered in sentencing in cases where this section of the Code has been invoked. The sentencing judge was therefore correct in considering provocation as a mitigating factor in the present case. The argument that the provocation factor was spent because it had already served to reduce the legal character of the crime overlooks the purpose of s.232 and therefore must fail.”

¹⁰⁰⁰ L. Stuesser “The “Defence” of “Battered Woman Syndrome” in Canada” (1990) 19 Manitoba Law Journal at 208.

¹⁰⁰¹ M. Da Silva “Quantifying Desert Prior to the Rightful Condition: Towards a Theoretical Understanding of the Provocation Defence” (January 2013) Canadian Journal of Law and Jurisprudence 49 at 60.

¹⁰⁰² N.M Berman “Justification and Excuse, Law and Morality” (2003) 53 Duke LJ 1 at 8.

not enough to eliminate liability altogether.¹⁰⁰³ A partial justification reduces the wrongfulness of conduct while partial excuse reduces the blame of the accused, but only to a limited degree which is insufficient to exclude liability totally.¹⁰⁰⁴

There are three types of exculpatory defences, justification, excuses and exemptions. Justifications focus on the wrongfulness of conduct whereas excuse focuses on blameworthiness of the actor.¹⁰⁰⁵ In terms of the doctrine of provocation, the killing of another human while under effects of provocation remains criminally wrong.¹⁰⁰⁶

Roach argues that the provocation defence does not easily fit into the excuse/justification framework.¹⁰⁰⁷ The conduct of the accused is excused partially out of compassion to human frailty; however, the loss of control cannot always be excused. The requisite elements must be considered holistically and must indicate that the accused had a justifiable sense of being wronged. This must not be interpreted to mean that the victim is responsible for their own demise nor that the law condones the accused's conduct, it simply means that the law recognises that due to human frailty, a person acted inappropriately and disproportionality in response to conduct that was "sufficiently serious wrongful act or insult."¹⁰⁰⁸

In the case of Manchuk, the Supreme Court explained the concepts of justification and excuse in the context of provocation and stated that:

"provocation ...neither justifies nor excuses the act of homicide. But the law accounts the act and the violent feelings which prompted it less blameable because of the passion aroused by the provocation...though still sufficiently blameable to merit punishment- and it may be punishment of high severity- but not the extreme punishment of death."¹⁰⁰⁹

¹⁰⁰³ N.D.Husak "Partial Defences" (1998) 11 Canadian Journal of Law and Jurisprudence at 167.

¹⁰⁰⁴ Husak supra (n 1003) at 169.

¹⁰⁰⁵ Thornton supra (n 648) at 167.

¹⁰⁰⁶ M.B Baker "Provocation as a Defence for Abused Women who kill" (1998) 11 Canadian Journal of Law and Jurisprudence 193 at 199.

¹⁰⁰⁷ Roach supra (n 26) at 247.

¹⁰⁰⁸ Tran (2010) SCC 58, (2010) 3 S.C.R. 350 at para 22.

¹⁰⁰⁹ Manchuk (1938) S.C.R 18 at 19-20.

The provocation defence in Canada is not without controversy, mainly due to the origins of the defence being rooted in mitigating violent reactions to marital infidelities.¹⁰¹⁰ It has been argued that the provocation defence contains archaic phrases designed to excuse acts performed in the heat of passion and therefore should be abolished for allowing deadly rage and violent responses to be treated with leniency.¹⁰¹¹

The provocation defence has been criticised for its perceived out dated approach, especially where spousal homicides are concerned.¹⁰¹² The controversy relates to the perceived role that the provocation defence has played in excusing male violence against women has attracted immense criticisms.¹⁰¹³ These criticisms centre on the law's perceived bias towards the emotions of anger and jealousy, thus, it has been argued that abusive husbands are more likely to receive benefit of the defence and this cannot be accepted.¹⁰¹⁴

Frequency of spousal battery in Canada, in a 1980 estimate, revealed that one out of ten Canadian women was battered by her partner every year.¹⁰¹⁵ Later studies reveal that the number of battered women in Canada could be as much as one million instances of abuse in a single year. The problem lies with a lack of understanding of the true nature of the defence and accepting that the provocation defence is not a licence to kill because of jealousy.¹⁰¹⁶

In 1998, in the consultation paper "Reforming Criminal Code Defences" released by the Department of Justice in Canada, it was reported that out of the 115 reported murder cases wherein the provocation defence was raised; 62 of these cases involved domestic homicides and alarmingly 55 of the 62 cases involved men killing their spouses.¹⁰¹⁷

¹⁰¹⁰ Roach supra (n 26) at 248.

¹⁰¹¹ Roach supra (n 26) at 248.

¹⁰¹² Renke supra (n 28) at 730.

¹⁰¹³ I. Grant "Intimate Femicide: A Study of sentencing trends for men who kill their intimate partners" (2009-2010) 47:3 Alberta Law Review 779 at 807.

¹⁰¹⁴ Grant supra (n 1013) at 807.

¹⁰¹⁵ T. Quigley "Battered Women and the Defence of Provocation" (1991) 55 Saskatchewan Law Review 223 at 223.

¹⁰¹⁶ Quigley supra (n 1015) at 223.

¹⁰¹⁷ Gorman supra (n 994) at 480.

For these reasons, critics of the defence advocate that the defence should be limited to exceptional and rare cases where the loss of self-control was extreme and justifies murder being excused.¹⁰¹⁸ It has been argued that the notion of protecting one's honour has been replaced by "heat of passion" and the boundaries of the defence have been widened to the extent that infidelity or even an attempt to end a relationship may force the basis of a defence of provocation.¹⁰¹⁹

4.2. Development of the defence of provocation in Canada

The defence of provocation currently codified under section 232 of the Criminal Code originated as a common law defence in England during the 17th and 18th century.¹⁰²⁰ The defence assumed a recognisable form during the 16th century with the emergence of the concept of chance medley killings.¹⁰²¹ Canadian criminal law originates from 18th and 19th century English law.¹⁰²² In jurisdictions where the law derived from the English law, the provocation defence underwent immense developments.

During the 1800's the defence evolved from a focus on defending ones honour to the focus on the loss of self-control.¹⁰²³ Canadian law contains a mixture of common law and statute. Canadian law is governed by a single criminal code and together with the Canadian Charter of Rights and Freedoms produces a common law system which functions alongside the statute.¹⁰²⁴

Historically, the provocation defence served three functions; firstly, it acknowledged that certain intentional killings were less blameworthy where the killer was

¹⁰¹⁸ Gorman supra (n 994) at 480.

¹⁰¹⁹ C. Forell "The meaning of equality: Sexual harassment, Stalking and provocation in Canada, Australia, and the United States" (2005) 28 Thomas Jefferson Law Review 151 at 161-162.

¹⁰²⁰ For a historical survey of the origins and development of the provocation defence in English law see chapter 3 at 74.

¹⁰²¹ Renke supra (n 28) at 730.

¹⁰²² Yeo supra (n 991) at 76, see discussion in Chapter 3 at 86 for development of the defence during the 18th and 19th century English law.

¹⁰²³ B.C. Ramsey "Provoking change: Comparative insights on feminist homicide law reform" (2010) Vol.100: 1 The Journal of Criminal Law and Criminology 33 at 54-55.

¹⁰²⁴ Yeo supra (n 991) at 77.

provoked.¹⁰²⁵ However, this concession did not mean escape from punishment; the doctrine still required punishment although to a less harsh extent. Secondly, the defence was intended to provide assistance to those accused that killed due to provocation from escaping a conviction of murder and the death penalty. Thirdly, the provocation defence served the purpose of rebutting the rule of malice aforethought.¹⁰²⁶

In 1879, the Royal Commission was appointed to consider the law relating to indictable offences and a Draft Criminal Code for England was formulated.¹⁰²⁷ Provocation as a defence was contained in section 176; the categorical approach was abandoned by its drafters as a generalised approach was favoured instead.¹⁰²⁸ The Code employed the objective standard of the ordinary person to determine loss of self-control.¹⁰²⁹

Stalker states that the foundations of the Code were developed at common law, and the criminal law in Canada has developed “in the shadow of an overarching, but certainly not all-inclusive, statute. Canadian criminal law has had to forge its own legal process because of the curious interaction between Code and common law.”¹⁰³⁰

¹⁰²⁵ Renke supra (n 28).

¹⁰²⁶ Renke supra (n 28) at 731; see Chapter 3 at 77-78 for discussion of malice aforethought.

¹⁰²⁷ United Kingdom Royal Commission Appointed to Consider the Law Relating to Indictable Offences. Appendix to the Report of the Commissioners containing the Draft Code (London: Her Majesty’s Stationery Office 1979) discussed by Renke supra (n 28) at 733.

¹⁰²⁸ Renke supra (n 28) at 733.

¹⁰²⁹ Renke supra (n 28) at 733.

¹⁰³⁰ M.A. Stalker “Self-defence and consent: The use of common law developments in *Canadian Criminal Code* analysis” (1994) 32 Alberta Law Review 484 at 485.

4.2.1. Section 176 of the Draft Criminal Code for England:¹⁰³¹

“Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

Any wrongful act or insult of such a nature as to be sufficient to deprive an 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 self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be deemed to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person;

Provided also, that an arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.”

England did not enact the Draft Code,¹⁰³² however, it was not a wasted effort as the formulation of the Code provided the basis for Canadian Criminal Code in 1892.¹⁰³³

The provocation defence was codified under section 229 and was a reflection of section 176 of the Draft Code.¹⁰³⁴

Forell notes that unlike the United States and Australia, the 1982 Canadian Charter of Rights and Freedom provides for gender equality free from government discrimination. Hence, one would expect Canada to lead the way in providing substantive equality, especially where the defence of provocation, stalking and sexual harassment is concerned.¹⁰³⁵ Although these provisions have undergone some amendments since inception, the founding principles have stood the test of time and have remained unchanged since.¹⁰³⁶ The codified defence remained centered on the role of passion in

¹⁰³¹ *The Draft Criminal Code for England* 1892, S.C. c.29.

¹⁰³² Renke supra (n 28) at 733.

¹⁰³³ *Criminal Code* 1892, S.C 1892. C 29 section 229(1)-(4), .Renke supra (n 28) at 732.

¹⁰³⁴ Renke supra (n 28) at 733.

¹⁰³⁵ Forell supra (n 1019) at 153.

¹⁰³⁶ *Criminal Code* 1892, S.C 1892. C 29 section 229(1)-(4) was re-enacted with minimal changes as section 261 of the *Criminal Code* ,R.S.C 1906,c.146.In 1927 the section went unchanged under *Criminal Code* , R.S.C 1927, c.36.The section was re-enacted under section 203 with a change in wording during the period 1953-54 revision of the *Criminal Code* S.C. 1953-54,c.51.This slightly revised version was re-enacted without changes in 1970 *Criminal Code*,R.S.C 1970, c.C-34 and finally the current version under section 232(1)-(4) in *Criminal Code* R.S.C. 1985,c. C-46.

causing loss of self-control. Furthermore, the provision accommodated verbal insults as well as physical insults.¹⁰³⁷

Significantly, the provision eliminated declarations stating that wives were the property of their husbands.¹⁰³⁸ It is contended by commentators that in a 21st century Canada there should not be a place for “antiquated notions of what constitutes insult and honour.”¹⁰³⁹ Although, it has been argued that these oppressive conceptualizations were not actually abolished but simply elided, they “moved from the express to the implicit, shifted from the judges to the silent work of the jury...”¹⁰⁴⁰ The current provocation defence exists as a common law defence and is codified in terms of section 232 of the *Criminal Code*:

4.2.2. Section 232(1)-(4) in Criminal Code R.S.C. 1985,c. C-46

232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section, the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section on who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

¹⁰³⁷ Gorman supra (n 994) at 735.

¹⁰³⁸ Gorman supra (n 994) at 735.

¹⁰³⁹ T.Mitchell “A history lesson about provocation” (2011) March/April Today's Trial 4-6 at 5.

¹⁰⁴⁰ Mitchell supra (n 1039) 2.

4.2.3. Operation of Section 232(1)-(4)

The defence of provocation embodied in section 232 of the Code remains largely unchanged,¹⁰⁴¹ despite the evolutionary nature of society's values.¹⁰⁴² The development of the defence through the ages illustrates that the defence is influenced to a large extent by the societal context.¹⁰⁴³

In the English case of Semini, Lord Goddard C.J gave a summary on the relationship between the provocation defence and social context:

“At a time when society was less secure and less settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken today when life and property are guarded by an efficient police force and social habits have changed.”¹⁰⁴⁴

Section 232 makes specific reference to emotion and describes emotion in terms of time, temperature and control. These are characteristic of a mechanical understanding of emotion. Emotion in this context is given relevance because of its relationship to capacity for self-control.¹⁰⁴⁵ Anger has been the only emotion which has traditionally been linked to loss of self-control. Loss of self-control due to anger has traditionally been described by external outward signs of rage.¹⁰⁴⁶

4.2.3.1. Provocation applies to a murder charge only

In the case of Campbell¹⁰⁴⁷ the Ontario Court of Appeal confirmed that the defence is only available for a charge of murder and offences such as attempted murder do not fall within the ambit of section 232 of the Code.¹⁰⁴⁸

Justice Martin for the Court in relying on the wording of section 232 of the Code stated:

“Absence of provocation is not part of the *actus reus* of murder in the sense that absence of consent is part of the *actus reus* of rape. The defence of provocation exists with respect to a charge of murder even though all the elements of the definition of murder have been established; it is an

¹⁰⁴¹ Mitchell supra (n 1039) at 2-3.

¹⁰⁴² Gorman supra (n 994) at 490.

¹⁰⁴³ Tran supra (n 1008) at 17.

¹⁰⁴⁴ Semini supra (n 548) at 409.

¹⁰⁴⁵ Reilly supra (n 22) at 131.

¹⁰⁴⁶ Reilly supra (n 22) at 137.

¹⁰⁴⁷ Campbell (1977) 38 C.C.C. (2d) 6 (Ont.CA).

¹⁰⁴⁸ Stuart supra (n 70) at 534-535.

allowance made for human frailty which recognizes that a killing, even an intentional one, is extenuated by the loss of self-control caused by adequate provocation, and is less heinous than an intentional killing by a person in possession of his self-control. It is unnecessary to invoke the defence of provocation until all the elements of murder have been proved.”¹⁰⁴⁹

In respect of other offences, provocation may be used as a mitigating factor during sentencing. The reason for this limitation is due largely in part to the mandatory life imprisonment sentence for a conviction of murder.¹⁰⁵⁰

4.2.4. Elements of the defence

Section 232 of the Code consists of a subjective test and objective test.¹⁰⁵¹ Although there are other requirements set out in section 232 of the Code, the subjective and objective criteria form the foundation of the defence.¹⁰⁵²

In the case of Thibert, the majority stated:

“First, there must be a wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of self-control as the objective element. Second, the subjective element requires that the accused act upon that insult on the sudden and before there was time for his passion to cool.”¹⁰⁵³

Stuart states that if the section 232 is analysed more closely it is clear that there are four essential requirements.¹⁰⁵⁴

1. Existence of a wrongful act or insult
2. sufficient to deprive ordinary person of self-control
3. The provocation must be sudden
4. The retaliation by the accused must have occurred “on the sudden” and in the heat of passion.

¹⁰⁴⁹ Campbell supra (n 1047) discussed by Stuart supra (n 70) at 534-535.

¹⁰⁵⁰ C.A. Nelson “Enraged or Engaged: the implications of racial context to the Canadian provocation defence” (2001-2002) University of Richmond law Review at 1007.

¹⁰⁵¹ Stuart supra (n 70) at 535.

¹⁰⁵² Tran supra (n 1008) at 23.

¹⁰⁵³ Thibert (1996) 1 S.C.R 37 at 18.

¹⁰⁵⁴ Stuart supra (n 70) at 535.

The four elements make up a two test inquiry that is used to determine if provocation existed or not; both the subjective and objective tests must be satisfied for the defence to be successful.¹⁰⁵⁵

4.2.5. The Objective test

4.2.5.1. “Existence of a wrongful act or insult”

In terms of s.232 (2) the wrongful act or insult must be sufficient to deprive an ordinary person of self-control. This aspect of the objective leg of the defence is considered to be two-fold. Firstly, there must have been a wrongful act and secondly the wrongful act or insult must have been sufficient to deprive an ordinary person of self-control.¹⁰⁵⁶ The defence of provocation is unique in that the criminal responsibility of the accused is dependent on the conduct of another, in most cases it is the victim, however it is not compulsory that the act in question emanate from the victim.¹⁰⁵⁷

Stuart argues that the meaning of “wrongful” has never been properly decided. In the case of Schwartz¹⁰⁵⁸ the Supreme Court interpreted “wrongful” to mean legally wrong as opposed to morally wrong, although this case involved the defence of insanity rather than provocation.¹⁰⁵⁹

However, one definition put forward defines “wrongful act” as an act which, if assessed objectively and without concern for the rights of all affected parties, would still amount to “wrongful” and not necessarily criminal.¹⁰⁶⁰ The courts have declared acts such a slap on the face,¹⁰⁶¹ a sudden swipe¹⁰⁶² an assault with a weapon¹⁰⁶³ and an unsolicited homosexual advance¹⁰⁶⁴ as amounting to “wrongful act” in terms of this section.¹⁰⁶⁵

¹⁰⁵⁵ Stuart supra (n 70) at 535.

¹⁰⁵⁶ Stuart supra (n 70) at 535.

¹⁰⁵⁷ Stuart supra (n 70) at 536-537.

¹⁰⁵⁸ Schwartz (1988) 2 S.C.R 443.

¹⁰⁵⁹ Stuart supra (n 70) at 536.

¹⁰⁶⁰ Nelson supra (n 1050) at 1020 citing Grant et al The law of Homicide (1992) at 6-7 and 6-9.

¹⁰⁶¹ Taylor v The King (1947) S.C.R 462 (Can.)

¹⁰⁶² Parnell (1983) 9 C.C.C 3d 353 (Ont. C.A).

¹⁰⁶³ Demaria (1984) 1 O.A.C. 348 (Ont, C.A).

¹⁰⁶⁴ Hill (1986) 1 S.C.R. 313.

¹⁰⁶⁵ Nelson supra (n 1050) at 1020.

Nelson criticises the current scope of the requirement of “wrongful act” in regard to unsolicited homosexual advances and puts forward the solution of limiting the provocation to an “unlawful act” rather than “wrongful”. This would ensure that men who kill their female partners or who raise homosexual advance as a form of wrongful act would no longer have a legitimate claim.¹⁰⁶⁶

Unlike the categorical approach in early English law,¹⁰⁶⁷ the statutory form of the defence accommodates provocation in the form of insults as well as physical assaults.¹⁰⁶⁸

In respect of cumulative provocation, the objective test may be used to adapt the provocation defence to the facts of the case where cumulative provocation was indicated.¹⁰⁶⁹ Cumulative provocation has been defined as “connected series of provoking incidents, the gravity of each of which is increased by what has gone before.”¹⁰⁷⁰

In the case of Daniels,¹⁰⁷¹ the trial judge did not direct the jury to consider the history of the killing; consideration was only given to the circumstances immediately preceding the stabbing.

On appeal, the Northwest Territories Court as per Laycraft J.A held that the trial judge misdirected the jury and stated:

“In my opinion it was [an] error to limit the events which the jury were to apply to the objective test to the events which took place in the Beaver House. The norm was not the reaction of an ordinary person looking for her husband who is told to “F-off”. Rather the proper test was the reaction of an ordinary person looking for her husband after the long series of assaults and indignities of this case, who then hears the fatal words from one of the persons responsible.”¹⁰⁷²

¹⁰⁶⁶ Nelson supra (n 1050) at 1021.

¹⁰⁶⁷ Ibid

¹⁰⁶⁸ Gorman supra (n 994) at 735.

¹⁰⁶⁹ E.Colvin Principles of Criminal Law (1986) at221.

¹⁰⁷⁰ Colvin supra (n 1069) at 221.

¹⁰⁷¹ Daniels [1983] N.W.T.R .193, 7 C.C.C (3d) 542, 47 A.R 149 (C.A).

¹⁰⁷² Daniels supra (n 1071) at 555.

The court emphasised that the objective test was being adapted to consider the external events that triggered the violent reaction. It is not being adapted to consider personal attributes of the accused.

In the case of Conway,¹⁰⁷³ the court expanded on the general principle in set out Daniels¹⁰⁷⁴ in regard to cumulative provocation.

The Ontario Court of Appeal stated:

“[P]resent acts or insults, in themselves insufficient to cause an ordinary man to lose self-control, may indeed cause such loss of self-control when they are connected with past events and external pressures of insult by acts or words and accordingly in considering whether an ordinary man would have lose self-control [a jury] must consider an ordinary man who had experienced that same series of acts or insults as experienced by the appellant...”¹⁰⁷⁵

In respect of the meaning of “insult”, the courts have at times used the definition of “insult” provided by the Oxford dictionary¹⁰⁷⁶:

“an act, or the action , of attacking or assailing; an open and sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour , scornful utterance or action intended to wound self-respect ; an affront; indignity.”¹⁰⁷⁷

In the case of Murdoch,¹⁰⁷⁸ the court held that an “insult” will always be wrongful and hence no matter how trivial an insult may be, it will satisfy this aspect of the test.¹⁰⁷⁹

The wrongful act or insult must be of such a nature that it deprived an ordinary person of self-control and assesses if the accused lost self-control. A common act or casual verbal insult is not sufficient to cause provocation and hence will not be considered as a “wrongful act or insult” in terms of the act.¹⁰⁸⁰

¹⁰⁷³ Conway (1985),17 C.C.C (3d) 481.

¹⁰⁷⁴ Daniels supra (n 1071).

¹⁰⁷⁵ Conway supra (n 1073) at 487.

¹⁰⁷⁶ Stuart supra (n 70) at 536.

¹⁰⁷⁷ Taylor supra (n 1061).

¹⁰⁷⁸ Murdoch (1978) 40 C.C.C (2d) 97. (Man.C.A).

¹⁰⁷⁹ Gorman supra (n 994) at 487.

¹⁰⁸⁰ Clark et al supra (n 67) at 58-59.

In the case of Clarke,¹⁰⁸¹ the court stated:

“in my opinion such words are not capable of being construed as an insult by an ordinary person”.

And

“However, assuming that I am wrong, and such words can be construed as an insult, then they are not of such a nature as to be sufficient to deprive an ordinary person of the power of self-control”.

In regard to cases involving a misunderstanding or misconception, the court in Thibert,¹⁰⁸² stated that “wrongful act or insult” does not have to be an illegal act. The wrongful act or insult must have emanated from the victim and not a third party. An accused person who mistakenly was under the impression that the victim was the source of the provocation may still plead the provocation defence.¹⁰⁸³

In the case of Manchuk¹⁰⁸⁴ the court per Chief Justice Duff stated:

“acts of provocation committed by a third person, which might be sufficient to reduce the offence to manslaughter if the victim had in fact participated in them, may have the same effect where the offence against the victim is committed by the accused under the belief that the victim was a party to those acts, although not implicated on them in fact.”

If in the circumstances that the accused was under the wrong impression, the misunderstanding would be relevant to the accused’s subjective state. Renke states that “there is no capitulation to the accused’s point of view, since the jury must assess the alleged provocation to determine whether it was sufficient to deprive an ordinary person of the power of self-control.”¹⁰⁸⁵

However, the application of the objective test may prove problematic in this scenario as there is confusion on whether it applies to the accused misconception of the alleged provocative act or what was actually said and done by the deceased.¹⁰⁸⁶

¹⁰⁸¹ Clarke (1975) 22 C.C.C. (2d) 1. Affirmed 5 N.R. 599 (S.C.C).

¹⁰⁸² Thibert supra (n 1053).

¹⁰⁸³ Thibert supra (n 1053) at 23.

¹⁰⁸⁴ Manchuk supra (n 1009) at 21.

¹⁰⁸⁵ Renke supra (n 28) at 742.

¹⁰⁸⁶ Renke supra (n 28) 742.

In the case of Hansford¹⁰⁸⁷ the Court of Appeal took the approach that the application of the objective test should be applied to the actual conduct of the deceased and not the accused's perception.

The court stated:

“Mistake of fact can be relevant to the objective branch of provocation because it is open to the accused to say that any ordinary person would have misinterpreted the facts which confronted the accused. However, the requirement for normalcy in the objective test must apply, not only to the reaction by an ordinary person to such events but, also to how the ordinary person would have interpreted such events.”

Renke states that the approach adopted in Hansford¹⁰⁸⁸ has been rejected by many commentators who favour the approach that the act alleged provocative act must be assessed from the point of view of the accused.¹⁰⁸⁹

The court in Thibert adopted this approach and stated:

“When the deceased held [the accused's] wife by her shoulders in a proprietary and possessive manner and moved her back and forth in front of him while he taunted the accused to shoot him, a situation was created in which the accused could have believed that the deceased was mocking him and preventing him from his having the private conversation with this wife which was so vitally important to him.”¹⁰⁹⁰

Renke argues that the court in Thibert¹⁰⁹¹ neglected to consider if the accused alleged interpretation of the deceased's conduct was reasonable when considering the circumstances.¹⁰⁹² Furthermore, an assessment of how the ordinary person would have reacted when considering the accused's interpretation of the alleged provocative act is the sensible approach since the accused understanding of what transpired governs the effect of the provocative act.¹⁰⁹³

¹⁰⁸⁷ Hansford (1987), 75 A.R 86 (C.A) at para 8.

¹⁰⁸⁸ Hansford supra (n 1087).

¹⁰⁸⁹ Renke supra (n 28) at 742.

¹⁰⁹⁰ Thibert supra (n 1053) at 23.

¹⁰⁹¹ Thibert supra (n 1053).

¹⁰⁹² Renke supra (n 28) at 742-743.

¹⁰⁹³ Renke supra (n 28) at 742-743.

Renke does concede that the approach in Hansford¹⁰⁹⁴ provides protection against an accused person who had an understanding of the alleged provocative act, which cannot be reasonably linked to what was actually said.¹⁰⁹⁵ It may not be necessary for the objective approach to afford such protection in these circumstances since if the accused's conduct is shown to be unreasonable, evidence in this regard would go against accepting it.¹⁰⁹⁶

The requirement of a wrongful act or insult in section 232 is governed by three further rules. Section 232(3)(b) having been criticised in Galagay¹⁰⁹⁷ for being ambiguous, courts have given it a restrictive meaning since a wide interpretation would result in provocation caused by an insult being doomed to fail since a private insult is not illegal. Secondly, section 232(3)(b) has also been criticised for being convoluted and an unnecessary prohibition against a bogus defence of provocation.

In the case of Squire¹⁰⁹⁸ the Court of Appeal stated that this provision applied to a situation where there was no authentic defence of provocation and the pleading of the provocation defence was merely "colourable". Thirdly, section 232(4) excludes an illegal arrest.

4.2.6. Ordinary person test

This aspect of the provocation defence is most contentious of the entire defence.¹⁰⁹⁹ The objective test is considered to be the cornerstone of the defence; this belief is based on the principle that all members of society have a right to demand certain minimum standards of behaviour.¹¹⁰⁰

The court in the landmark case of Hill explained the purpose of the objective standard stating:

"The law fixes a standard for all which must be met before reliance may be placed on the provocation defence. Everyone, whatever his or her idiosyncrasies, is expected to observe that

¹⁰⁹⁴ Hansford supra (n 1087).

¹⁰⁹⁵ Renke supra (n 28).

¹⁰⁹⁶ Renke supra (n 28) at 743.

¹⁰⁹⁷ Galagay (1972) 6 C.C.C (2d) 539 (Ont.C.A.).

¹⁰⁹⁸ Squire (1975) 26 C.C.C. (2d) 219 (Ont.C.A.).

¹⁰⁹⁹ Nelson supra (n 1050) at 1024.

¹¹⁰⁰ Gorman supra (n 994) at 480.

standard. It is not every insult or injury that will be sufficient to relieve a person from what would otherwise be murder. The “ordinary person” standard is adopted to fix the degree of self-control and restraint expected of all in society.”¹¹⁰¹

The legal concept of the ordinary person is considered to reflect the “normative dimensions of the defence; that is, behaviour which reflects society’s norms and values and which will ultimately attract the laws compassion.”¹¹⁰² The jury is responsible for determining if the wrongful act or insult was sufficient to deprive an ordinary person of self-control. This requirement poses a major obstacle to the accused in the form of an objective test.¹¹⁰³

The interpretation of the objective test has been the source of controversy in the provocation defence in Canadian law.¹¹⁰⁴ The application has been met with many difficulties, with the main problem centred on the extent to which personal attributes unique to the accused should be considered when applying the objective test.¹¹⁰⁵

The traditional objective test has been shown to be problematic especially in adapting to different social circumstances.

Grant poses the following question:

“What kind of person might be ordinary? Is the ordinary male enraged by a homosexual advances, sexual touching’s, misogynist statement, the display of pornography? Is she feminist or anti-feminist? Is the ordinary white person enraged by a racist statement? The ordinary person of colour? Is the ordinary Black women enraged by the idea that she is fit only for domestic work or that she has an insatiable sexual appetite? Does the ordinary male insist on a total control of his spouse so that signs of independence are enraging? Is he enraged by infidelity or by the ending of a relationship, by a physical attack? Is he committed to sexual quality or not? Are the commonplace reminders of sexual and racial hierarchies provocation, or instead the not-so-commonplace rebellions against inequality? Would a “nagging” wife provoke an ordinary person, but not a racist sexual harasser?”¹¹⁰⁶

¹¹⁰¹ Hill supra (n 1064) at 336.

¹¹⁰² Tran supra (n 1008) at 30.

¹¹⁰³ Gorman supra (n 994).

¹¹⁰⁴ Renke supra (n 28) at 746-747.

¹¹⁰⁵ Renke supra (n 28) at 747, Tran supra (n 1008) at para 31.

¹¹⁰⁶ Grant supra (n 1013) at 6-12 to 6-14 cited by Nelson supra (n 1050) at 1026.

The objective test has undergone modification and expansion over the years to the extent taking into account certain characteristics or allowing the provocation to be put into relevant context, for instance in cases of racism, is not an impossible task.¹¹⁰⁷

The traditional approach of the courts in Canada was to follow the narrow application of the objective test set down by the English courts in cases such as Bedder.¹¹⁰⁸

However, this approach required the court to disregard relevant contextual circumstances when pronouncing on the case.¹¹⁰⁹ The restrictive interpretation of the objective test is evident in the case of Wright, where the court held that the accused's relationship with his father could not be considered when applying the objective test despite the fact that it was a major source of the provocation alleged.¹¹¹⁰ At this stage, subjective factors such as the character, temperament and idiosyncrasies of the accused was not be considered when applying the ordinary person test, at this point in law the courts placed reliance on the English case of Bedder.¹¹¹¹ Furthermore, in the case of Parnekar,¹¹¹² the court held that the ordinary person is not the accused and cannot be given the same attributes or circumstances of accused. In this case the accused was a black person and provoked by a racial slur.

However, this restrictive approach followed by the court in Bedder¹¹¹³ was later overruled in the case of Camplin.¹¹¹⁴ The courts recognised a deficiency in the law where relevant contextual circumstances were ignored in making a finding.¹¹¹⁵ In the Supreme Court case of Hill¹¹¹⁶ adopted a broader approach in conceptualising the

¹¹⁰⁷ Nelson supra (n 1050) at 1026.

¹¹⁰⁸ Bedder supra (n 557), See chapter 3 at 88 for a discussion of this case.

¹¹⁰⁹ Tran supra (n 1008) at 31.

¹¹¹⁰ Wright (1969) S.C.R 335, at 341 Fauteux J stated "on the first branch of the enquiry, the jury should be directed that no consideration should be given to the peculiar or abnormal characteristics with which the accused may personally be invested.

¹¹¹¹ Bedder supra (n 557).

¹¹¹² Parnekar (1973) 21 C.R.N.S 129 S.C.C at 132.

¹¹¹³ Bedder supra (n 557).

¹¹¹⁴ Camplin supra (n 580), See Chapter 3 at 110 for discussion of this case.

¹¹¹⁵ Hyland supra (n 25) at 151.

¹¹¹⁶ Hill supra (n 1064).

ordinary person; the court accepted the new wider interpretation of Camplin¹¹¹⁷ although its pronouncements in regard to the role of the trial judge were rejected.¹¹¹⁸

Prior to Hill, the Supreme Court of Canada interpreted the objective test more restrictively.¹¹¹⁹ The case of Hill was ground breaking as it changed the nature of the objective standard in the provocation defence by allowing consideration of the accused's age and sex.¹¹²⁰

In this case the accused, the accused was 16 years old when he stabbed the deceased after making unwanted homosexual advances. At the trial, the accused raised the defence of provocation and self-defence. The trial judge directed the jury to not consider the particular mental make-up of the accused when making the enquiring into if the provocative act was enough to deprive an ordinary person the power of self-control.

The court held that the jury could only consider subjective factors when deciding if the accused acted all of a sudden before there was time for the passions to cool. The trial judge denied the defence counsels request that the jury be instructed to consider if there was wrongful act or insult sufficient to deprive an ordinary person of the age and sex of the accused the power of self-control.¹¹²¹ Subsequently, the accused was found not guilty of first-degree murder but guilty of second-degree murder.¹¹²²

The accused appealed the conviction to the Ontario Court of Appeal. The Appellate Court ordered a new trial on the basis that the trial judge erred in not instructing the jury to take into consideration the Hill's age and sex when applying the objective test.¹¹²³

The Crown appealed to the Supreme Court and succeeded, the conviction of murder was reinstated. The court allowed a more flexible objective test wherein some of the accused

¹¹¹⁷ Camplin supra (n 580).

¹¹¹⁸ Stuart supra (n 70) at 539.

¹¹¹⁹ Hyland supra (n 25) 151.

¹¹²⁰ Hill supra (n 1064).

¹¹²¹ Hill supra (n 1064).

¹¹²² Hill supra (n 1064).

¹¹²³ Hill supra (n 1064).

individual characteristics could be considered and Stuart states that the courts partial softening of the previously restrictive interpretation of the objective standard was welcome.¹¹²⁴

In Hill, Dickinson C.J stated that the less restrictive approach is basically a matter of common sense and elaborated...

“...the “collective good sense” of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult. To this extent, particular characteristics will be ascribed to the ordinary person. Indeed, it would be impossible to conceptualise a sexless or ageless ordinary person. Features such as sex, age or race do not detract from a person’s characterisation as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test for provocation.”¹¹²⁵

The scope of the objective test was reviewed in the controversial case of Thibert,¹¹²⁶ the accused’s wife was involved in an extra-marital affair with her colleague. The accused had come to know of the affair as his wife confessed. Despite his wife’s declaration, the accused was committed to his marriage and tried to reconcile. After a period of two months the accused’s wife eventually left the accused and did so via a telephone call to the accused to inform him of her decision to leave. The accused persuaded his wife to meet him at a restaurant the following morning. The accused’s wife attended the meeting along with her lover. At the meeting the accused made further attempts at reconciliation; however, it was to no avail since the wife of the accused remained unrelenting.

At this point the accused made a threat to his wife’s lover saying:

“I hope you intend on moving back east or living under assumed names.... Because as long as I have got breath in my body I am not going to give up trying to get my wife back from you, and I will find you wherever you go.”¹¹²⁷

¹¹²⁴ Stuart supra (n 70) at 544.

¹¹²⁵ Hill supra (n 1064) at 331.

¹¹²⁶ Thibert supra (n 1053).

¹¹²⁷ Thibert supra (n 1053) at 41.

After this encounter, the accused called the work-place of his wife and again pleaded for her to return. After his failed attempt, he decided to go to her work-place and speak to her “away from the influence” of the deceased. This was important to the accused since he had successfully managed to convince his wife to stay with him on an earlier occasion. Before leaving his house, the accused retrieved his rifle (which was loaded) and kept it in the back of his car, thinking that he might have to kill the deceased.¹¹²⁸

However, in his testimony the accused stated that a few miles from home he discarded that thought and instead use the rifle just to scare and thereby get his wife to come back to him. The accused then proceeded to his wife's workplace and followed her when she went to the bank where he insisted that they find some private location to talk.¹¹²⁹ Although his wife agreed, she returned to her workplace out of fear of her husband. The accused followed his wife into the parking lot. While he was attempting to persuade his wife to go somewhere to talk, the deceased arrived and attempted to lead the wife back into the building.

The accused, upon seeing this removed the rifle from his the car. The deceased was given some assurance by the accused's wife that the rifle was not loaded. The deceased started walking towards the accused, placing his hands on accused's wife's shoulders swinging her back and forth, saying, “Come on big fellow, shoot me? You want to shoot me? Go ahead and shoot me.”¹¹³⁰ The deceased kept coming towards the accused, disregarding the accused's warning to stay back. The accused then fired the rifle killing the deceased. The accused testified that his “his eyes were closed as he tried to retreat inward and the gun discharged”.

The accused was charged with first-degree murder of his wife's lover. In his defence, he stated that the provocative act occurred when the deceased held his wife possessively and moved towards him despite being warned to stay back while uttering “Come on big fellow, shoot me? You want to shoot me? Go ahead and shoot me.”

¹¹²⁸ Thibert supra (n 1053) at 45.

¹¹²⁹ Thibert supra (n 1053) at 46.

¹¹³⁰ Thibert supra (n 1053) at 48.

At trial the judge left the defence of provocation with the jury, but the judge did not instruct the jury that the Crown was under the onus of disproving beyond a reasonable doubt that the accused had acted under provocation. The accused was found guilty of second-degree murder but appealed the conviction to the Alberta Court of Appeal on this basis.

The Court of Appeal dismissed the appeal on the basis that there was no air of reality to support leaving the defence to the jury; hence, the failure of the trial judge to instruct the jury on this basis did not prejudice the accused.

The case came before the Supreme Court the issue centred around the question on whether evidence existed to warrant leaving the defence to the jury in the first place. As a rule, the Judge must be content that there exists some evidence that the wrongful act or insult was sufficient to cause an ordinary person to lose control and that this did in fact cause the accused to lose self-control. If such evidence is not shown, then the Judge is under no obligation to put the defence to the jury.

The Supreme Court held that such evidence did exist and this entitled the accused to a new trial.¹¹³¹

Cory J explained how the ordinary person test should be interpreted:

“I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence.”¹¹³²

The court reiterated the sentiments in Hill¹¹³³ stating that the objective test serves to ensure that the criminal law encourages reasonable and responsible behaviour.¹¹³⁴

The judgment of Thibert has been widely criticised, since it is argued that the nature of the objective standard has been changed so drastically that it resembles the subjective standard. One of the main controversies plaguing the Thibert judgment surrounds the

¹¹³¹ Thibert supra (n 1053).

¹¹³² Thibert supra (n 1053) at 4.

¹¹³³ Hill supra (n 1064).

¹¹³⁴ Thibert supra (n 1053) at 46.

Courts decision that a greater number of the accused's characteristics should be taken into account when applying the ordinary person standard.¹¹³⁵

The court stated:

“if the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age and sex, and must share with the accused such other factors as would give the act or insult in question special significance.”¹¹³⁶

Furthermore, Cory J analysed previous case law regarding the ordinary person test and stated:

“In summary then, the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.”¹¹³⁷

The revised interpretation of the ordinary person test in Thibert has been met with criticisms, especially if gender of the accused is placed in the context of the wrongful act or insult. Currently, it is somewhat uncertain if gender is relevant to judge the wrongful act or insult in context or if it relevant to determine the level of self-control expected from the ordinary person.

Gorman states that the court in Thibert¹¹³⁸ lost sight of the fact that accused provoked the incident and not the deceased. It was the accused who forced a volatile confrontation with bringing a weapon.¹¹³⁹ Furthermore, the court's interpretation of “confrontation” is wrong, since there was no confrontation or insult, the words “*shoot me*” cannot be considered an insult which permitted a killing. The interpretation of insult is problematic and gives permission to jealous husbands to act on their jealousy and anger.¹¹⁴⁰

¹¹³⁵ R. Sahni “R v Thibert and The Defence of Provocation” (1997) 55:1 University of Toronto Faculty of Law 143 at 148.

¹¹³⁶ Thibert supra (n 1053) at 46-47.

¹¹³⁷ Thibert supra (n 1053) at 19.

¹¹³⁸ Thibert supra (n 1053).

¹¹³⁹ Gorman supra (n 994) at 483.

¹¹⁴⁰ Gorman supra (n 994) at 488.

However, the Thibert judgment has received some praise specifically for endowing the ordinary person with characteristics that can place the act or insult in context; however, there are worries that by making the gender of the accused relevant, violence against woman by men may be excused and is thus problematic.¹¹⁴¹

Such an approach is dangerous as stated in the case of Young:

“It would set a dangerous precedent to characterize terminating a relationship as an insult or wrong act capable of constituting provocation to kill. The appellant may have been feeling anger, frustration and sense of loss, particularly if he was in a position of emotional dependency on the victim as his counsel asserts, but this is not provocation of a kind to reduce murder to manslaughter. The appellant says he does not remember where or when he picked up the knife, but he was obviously armed with it when he left the apartment.”¹¹⁴²

Interestingly, the cases of Hill¹¹⁴³ and Camplin¹¹⁴⁴ warned against considering factors that are unique to the accused; however, Cory.J referred to the cases of Daniels¹¹⁴⁵ and Conway¹¹⁴⁶ to support his view that the courts will allow consideration of the past relationship between the accused and the victim.¹¹⁴⁷

Sahni states that the interpretation by Cory J of Daniels¹¹⁴⁸ and Conway¹¹⁴⁹ is problematic for two reasons. Firstly, in both cases, the courts allowed background events to be considered in the objective test. However, the court used these cases to demonstrate that the courts will consider the relationship between the accused and the victim even when there were no instances of provocation between them.¹¹⁵⁰

Secondly, in application of the ordinary person test, the court allowed evidence that showed particular idiosyncrasies together with the mental and emotional state of the

¹¹⁴¹ Roach supra (n 26) at 255-256.

¹¹⁴² Young (1993), 78 C.C.C. 3d 538 at p.542.

¹¹⁴³ Hill supra (n 1064).

¹¹⁴⁴ Camplin supra (n 580).

¹¹⁴⁵ Daniels supra (n 1071).

¹¹⁴⁶ Conway supra (n 1073).

¹¹⁴⁷ Sahni supra (n 1135) at 148.

¹¹⁴⁸ Daniels supra (n 1071).

¹¹⁴⁹ Conway supra (n 1073).

¹¹⁵⁰ Sahni supra (n 1135) at 148.

accused. By applying the ordinary test in this manner the court went against the warnings in Camplin¹¹⁵¹ and Hill¹¹⁵² and this may be problematic.¹¹⁵³

Sahni is of the opinion that in determining the ordinary person standard, consideration of relationships that may have the potential create provocative acts or insults widens the objective test problematically.¹¹⁵⁴ Besides acknowledging the existence of infidelity, the court in addition considered the mental condition and emotional state of the accused: “At the time of the shooting [the accused] was distraught and had been without sleep for some 34 hours.”¹¹⁵⁵

In another significant case, the trial court in Tran¹¹⁵⁶ accepted the defence of provocation and held that the Crown had failed to disprove the elements of the defence beyond a reasonable doubt. The accused was consequently acquitted of second-degree

¹¹⁵¹ Camplin supra (n 580).

¹¹⁵² Hill supra (n 1064).

¹¹⁵³ Sahni supra (n 1135) at 148.

¹¹⁵⁴ Sahni supra (n 1135) at 148.

¹¹⁵⁵ Sahni supra (n 1135) at 149.

¹¹⁵⁶ Tran supra (n 1008) at 148, the accused, Tran was estranged from his wife. The couple were estranged for a few months prior to the killing. The appellant had relinquished his set of keys to the matrimonial home; however, the appellant deceitfully kept another set of keys. On the afternoon of the killing, Tran entered his wife’s bedroom armed with a knife through a half closed door. He surprised his wife who was in bed with her lover. Tran immediately proceeded with an attack on the couple, scratching the deceased’s eyes accompanied by kicking and punching. Tran also attacked his wife in the same fashion. Tran left the bedroom and went to the kitchen and retrieved two other butcher knives. He used the knives to stab the deceased in the chest. The deceased pleaded with Tran for an opportunity to talk but to no avail. Tran continued to yell angrily. Tran stopped his attack to call his Godfather to whom he uttered “I caught them.” Tran then resumed his fatal attack on the deceased. Ms Tran tried to shield the already wounded deceased who was already having trouble breathing. Tran then grabbed his estranged wife and asked “Are you beautiful?” he then slashed her across her face causing a deep cut from her right ear across her right cheek. The deceased at this point tried to crawl out the room but was soon followed by Tran who followed him and stabbed him with both knives. Ms Tran tried to close the bedroom door but Tran forced himself back inside. He saw his Godfather arrive from the window, he proceeded outside the room and stepped on the deceased’s chest and stomach. He then resumed stabbing the deceased in his chest and then stepped on his face. Tran then slashed his own hands with one of the knives and then put the knife in the hands of the deceased who was lying motionless. The autopsy revealed that the deceased was stabbed 17 times.

murder and convicted of manslaughter. The Crown appealed to the Court of Appeal Alberta ¹¹⁵⁷ and was successful, the Appeal Court held unanimously that the defence had no evidential foundation in the first place. The conviction of manslaughter was set aside and substituted with second-degree murder. The accused subsequently appealed the conviction to the Supreme Court. The appeal was unsuccessful.

The Supreme Court was in agreement with the Appeal Court that the defence lacked an “air of reality”. The court stated that the trial judge proceeded on the wrong legal principles regarding the requirements of defence of provocation and this resulted in in the trial court erroneously finding that the defence had no evidential basis.¹¹⁵⁸ The Supreme Court held that the accused did not suffer an “insult” within the meaning of section 232 of the Criminal Code.

The conduct of accused’s wife and the deceased could not constitute an insult within the ordinary meaning of the word; in the circumstances of the case.

The court stated that

“nothing done by the complainant or the victim come close to meeting the definition of insult. Their behaviour was not only lawful, it was discreet and private and entirely passive vis-à-vis [the appellant]. They took pains t keep their relationship hidden... Their behaviour came to his attention only because he gained access to the building by falsely saying he was there to pick up his mail”

¹¹⁵⁹

The evidence regarding Tran’s prior knowledge about his wife’s relationship with the deceased “belied any notion that this supposed “insult” would have struck “upon a mind unprepared for it” as required by law”.¹¹⁶⁰ Furthermore, there was no air of reality to the accused “acting on the sudden at the time of killing”. The court stated that there was nothing sudden about his discovery and it was actually the deceased and accused’s wife who were surprised by Tran’s appearance. The factual findings made by the trial judge shows that accused not only suspected his wife’s affair but also spied on the couple’s activities and eavesdropped on conversations.¹¹⁶¹

¹¹⁵⁷ Tran supra (n 1008).

¹¹⁵⁸ Tran supra (n 1008) at 6.

¹¹⁵⁹ Tran supra (n 1008) at 44.

¹¹⁶⁰ Tran supra (n 1008) at 18.

¹¹⁶¹ Tran supra (n 1008) at 45.

In Tran, the court commented that the terms “reasonable person” and the “ordinary person” have been used interchangeably.¹¹⁶² However, the term “reasonable person” defines the standard of behaviour that is expected of a person in the eyes of the law, conduct which complies with standards placed by the law and therefore will not attract legal liability. The term “ordinary person” suggests the normative nature of the defence and behaviour of the ordinary person reflects society’s norms and values, behaviour of ordinary person will attract the laws mercy. In this sense the term “ordinary person” is more appropriate.¹¹⁶³

The court cautioned against adopting subverting the logic of the objective standard when applying the more flexible ordinary test. The court stated that care must be taken not to make the ordinary person into the accused and these defeats the purpose of the test. Furthermore, the subjectivising the objective test disregards the cardinal principle which criminal law is responsible for, that is to set acceptable standards of behaviour. The objective standard encourages reasonable and non-violent behaviour and this is the reason that criminal law endorses the objective standard.¹¹⁶⁴ The objective standard must be informed by contemporary norms of behaviour and these included fundamental core values such as commitment to equality.

Furthermore, that in certain cases giving the ordinary person certain characteristics of the accused was a matter of common sense. An example would be where the provocative act was a racial slur; in this instance giving the ordinary person racial characteristics would be appropriate. An instance where it would be inappropriate would be where the ordinary person was given the characteristic of homophobia where the accused was the recipient of a homosexual advance.¹¹⁶⁵

The court stated:

¹¹⁶² Tran supra (n 1008) at 30 in reference to Hill supra (n 1064) at 331.

¹¹⁶³ Tran supra (n 1008) at 30.

¹¹⁶⁴ Hill supra (n 1064) at 324.

¹¹⁶⁵ Tran supra (n 1008) at 34.

Similarly, there can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property”... nor indeed for any form of killing based on such inappropriate conceptualization of “honour”.¹¹⁶⁶

In regard to the circumstances of the accused, the court stated that the particular circumstances will also be relevant in determining the proper standard against which the accused’s conduct should be judged. The court stated that this was a matter of common sense and it would be impossible to conceptualise the reaction of the ordinary person by disregarding relevant context.

The court further elaborated:

...there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose.¹¹⁶⁷

The issue of considering the accused’s cultural background in the objective test surfaced in the case of Ly.¹¹⁶⁸ The defendant was charged with murder of his partner because he suspected her of being unfaithful to him. Ly strangled his lover because he alleged that he was provoked by her alleged affair and as a result lost face in the community. The accused was born and raised in Vietnam and alleged that in his community it is a great dishonour for one’s wife to be unfaithful.

The defence argued on appeal that the accused must be judged against the objective standard of the ordinary Vietnamese man. The jury was asked to disregard the defendant’s cultural background and the alleged attitude regarding woman and infidelity. The court stated that it would only be appropriate to consider the accused’s nationality if the provocative act was one of a racial slur.¹¹⁶⁹ The court confirmed the conviction of second-degree murder as a result.

¹¹⁶⁶ Tran supra (n 1008).

¹¹⁶⁷ Tran supra (n 1008) at 35.

¹¹⁶⁸ Ly (1987) 33 C.C.C 3d 31 (B.C.C.A.).

¹¹⁶⁹ Ly supra (n 1168) at 38.

The issue of considering an accused's cultural background in applying the objective test again surfaced in the case of Nahar,¹¹⁷⁰ where the accused, a Sikh man, killed his wife after being rejected. The accused alleged that his wife was involved in extra-marital relationships with other men and her acts violated the "shared expectations of the Sikh community and the Indo-community at large, as the proper conduct of a married woman and as to the importance attached to these expectations."¹¹⁷¹ When the accused confronted the deceased about her behaviour, she confessed and told the accused that he could not stop her. Upon hearing this, the accused stabbed his wife in the chest and neck.

The accused at trial raised provocation but was nevertheless convicted of second-degree murder. Justice Fraser did not consider the accused's cultural background as being important and stated that the accused's commitment to the values of the Sikh community was questionable. On appeal, the defence asserted that the trial court erred in not considering the accused's cultural background. However, the appeal court did not make this finding on the basis that it was unclear if the trial court had taken account of the accused's background.

The court did however state that the accused's cultural background was relevant to the ordinary person test despite the provocation not being an ethnic slur. This is in contrast with the finding in Ly.¹¹⁷²

In applying Thibert,¹¹⁷³ the court stated the consequences of the accused's upbringing and traditional values must be taken into account when determining the gravity of the provocative insult as well as determining loss of self-control.¹¹⁷⁴ However, ultimately the court found against the accused.

¹¹⁷⁰ Nahar. (2004) BCCA 77,193 B.C.A.C 217, the accused in this case immigrated to Canada in 1995 and entered into an arranged marriage. The marriage was relatively unhappy with the deceased acquiring her own apartment.

¹¹⁷¹ Nahar (2002) BCSC 928 at para 4.

¹¹⁷² Ly supra (n 1168).

¹¹⁷³ Thibert supra (n 1053).

¹¹⁷⁴ Nahar supra (n 1170).

In the case of Humaid¹¹⁷⁵ the court was also faced with the issue of cultural background and the objective test, in this case, the accused was charged with first-degree murder of his wife. At trial the accused pleaded that he lacked the requisite intention for murder, alternatively he had been provoked in terms of section 232 of the Criminal Code. The trial judge stated that the comment regarding “little pill” made by deceased constituted an “insult” within the meaning of section 232. Furthermore, when considered holistically, the evidence showed that the defence had an air of reality and should be put to the jury.

The trial judge gave the following instructions to the jury:

“Our law adopts the standard of an “ordinary person” to fix the level or degree of self-control and restraint expected of all in Canadian society. So on this element of provocation; you need to consider whether what is alleged here as provocation is beyond tolerance of an ordinary person. In this exercise, certain background facts pertaining to Mr. Humaid as I have just mentioned may be necessary considerations. However, these considerations must not include peculiar, idiosyncratic traits arising from Mr. Humaid’s Muslim faith or specific to his culture.”¹¹⁷⁶

The appellate court held that an insult that specifically targets the accused culture or religion may require that the aspects of religion and cultural background to be included into the ordinary person test.

The case of Humaid¹¹⁷⁷ is significant because it exposes the complex risks associated with cultural and religious claims in criminal courts. This case is said to have exposed

¹¹⁷⁵ Humaid (2006) S.C.C.A No 232 227 O.A.C. 398 at 148 The accused and the deceased had been married for a period of 20 years, both spouses were engineers. During the marriage the accused had been unfaithful to his wife resulting in a brief separation. The accused testified that the deceased agreed to give the marriage another chance after embarking on pilgrimage to atone for his infidelity. The accused’s allegation of provocation centred around the deceased’s relationship with a male business associate. The accused testified that he viewed this relationship as inappropriate. In a conversation with the deceased, the accused stated that he perceived certain remarks made by the accused to being an admission of sexual infidelity. The accused states that he blacked-out and alleged that he could not remember stabbing the deceased. At trial the defence adduced evidence through an expert on Islamic culture and religion stating that Islamic culture was male dominated and preoccupied with the notion of family honour. Female infidelity was not tolerated.

¹¹⁷⁶ Humaid supra (n 1170) at para 73.

¹¹⁷⁷ Humaid surpa (n 1175).

the cultural politics of the ordinary person standard in a similar manner to which gender politics were exposed in Thibert¹¹⁷⁸ and Stone¹¹⁷⁹.¹¹⁸⁰

In the case of Parent,¹¹⁸¹ the Supreme Court of Canada ordered a new trial after finding that the trial judge misdirected the jury by suggesting that anger, even if not amounting to provocation can be used to reduce the conviction from murder to manslaughter by excluding the element of intention.¹¹⁸² The court based its findings on the principle that the traditional elements of the defence of provocation must be established in order for the defence to be employed.¹¹⁸³

Gorman states the Supreme Court was correct in finding that anger alone is insufficient for provocation to be raised. The “threshold test” demands that the constituent elements of the defence must be established to a sufficient degree before it should be put to the jury.

Unlike Thibert, the court held that there was an air of reality to the defence and thus has virtually legitimised a “stand-alone defence” based on anger caused by the ending of a marriage.¹¹⁸⁴ The finding in this case is thus welcome as it sends a clear message that a meaningful threshold test must be applied especially where the killing was a spousal

¹¹⁷⁸ Thibert supra (n 1053).

¹¹⁷⁹ Stone supra (n 999).

¹¹⁸⁰ W.C.R. Cairns “Culture, Religion and the Ordinary Person: An Essay on R v Humaid” (2009/2010) 41:1 Ottawa Law Review 16 at 16.

¹¹⁸¹ Parent (2001) 154 C.C.C (3d) 1, 41 C.R (5th) 199, [2001] 1 S.C.R. 761, in this case the accused was married to the deceased for a period of 24 years and had operated a grocery shop together. In 1992 the deceased initiated divorce proceedings. The divorce process was long. The grocery shop suffered financially and the accused was forced to sell his share in the business. The accused suspected that the deceased would attempt to buy the shares so he attended the sale. The accused in fact did meet the deceased at the sale and was asked to talk by the deceased. The two left the room to talk. The accused at trial alleges that the deceased stated “I told you that I would wipe you out completely”. The accused alleges that upon hearing this he felt a hot flush rising and then shot the deceased (with the loaded gun he usually carried). The deceased was shot six times.

¹¹⁸² Parent supra (n 1181) at para 19 discussed by Gorman “Notes and Comments R v Parent” (2001-2002) 42 Criminal Law Quarterly 480 at 412.

¹¹⁸³ Gorman supra (n 1182) at 412.

¹¹⁸⁴ Gorman supra (n 1182) at 413.

homicide and anger and jealousy is not enough for the defence of provocation to be raised successfully.¹¹⁸⁵

Trotter noted that the outcome of the case of Parent¹¹⁸⁶ suggests that anger alone is insufficient to vitiate the intent for murder.¹¹⁸⁷ The author poses a question of whether trial judges are to remain silent on this evidence and its application outside section 232, or should they instruct juries not to consider evidence of anger in this manner.¹¹⁸⁸

Trotter notes that the court needs to revisit this issue and clarify the broad implications of the judgement. Critics of the defence say it promotes violence; however, Renke says it accounts “for the complexity of being human.”¹¹⁸⁹ However, Stuart contends that if this argument were to be accepted, then section 232 would need to be amended to provide for a complete acquittal in the case of any offence.¹¹⁹⁰ It has been contended that that if section 232 is founded on the lack of power of self-control, it is inconsistent with founding requirement that the act be voluntary.¹¹⁹¹

¹¹⁸⁵ Gorman supra (n 1182) at 415.

¹¹⁸⁶ Parent supra (n 1182).

¹¹⁸⁷ G.Trotter “Anger, Provocation, and the intent for murder: A comment on R. v. Parent” (2002) 47 McGill L.J. 699 at 669.

¹¹⁸⁸ Trotter supra (n 1187) at 690.

¹¹⁸⁹ Renke supra (n 28).

¹¹⁹⁰ Stuart supra (n 70) at 535.

¹¹⁹¹ R.L. Berger “Provocation and the Involuntary Act” (1967) 12 McGill L.J. at 202 cited by Stuart supra (n 70) at 534.

4.2.7. The role of self-control in the defence

In the legal concept of self-control, emotion is understood to be a powerful, irrational internal force which the individual cannot control.¹¹⁹² The underlying rationale behind the defence of provocation is that the provocative behaviour committed by another induced an angered state to the extent that self-control was lost. This justifies the aggressive response to the provocation because it is made on impulse, “with understanding of its character, but without consideration and rejection of alternative courses of action.”¹¹⁹³

The role of passion in causing loss of self-control remains an integral part of the provocation defence. When loss of self-control is experienced, on a technical level it suggests that conduct is involuntary and therefore an excusing defence is unnecessary because *actus reus* is lacking. However, it is assumed that a strong enough link exists between mind and body to find voluntariness. Essentially, the mind is directing the body but other courses of action cannot be chosen.¹¹⁹⁴

4.2.8. The subjective test¹¹⁹⁵

Once the jury has determined that the provocation would have deprived the ordinary person of the self-control, then they must move to assess the subjective aspect of the defence. Quigley notes that the subjective test is easier to pass than the objective test.¹¹⁹⁶

Section 232(1) expressly requires that the provocation be sudden. The law has limited the time frame in which the provocation defence operates in this respect. The requirement in subsection (2) that the homicide must be committed “in the heat of passion caused by sudden provocation” and “on the sudden and before there was time

¹¹⁹² Reilly *supra* (n 22) at 138.

¹¹⁹³ Colvin *supra* (n 1069) at 221.

¹¹⁹⁴ Colvin *supra* (n 1069) at 221

¹¹⁹⁵ Colvin *supra* (n 1069) at 197 states that a subjective test means that “liability is to be imposed only on a person who has freely chosen to engage in the relevant conduct, having appreciated the consequences or risks of that choice, and therefore having made a personal decision which can be condemned and treated as a justification for the imposition of punishment.”

¹¹⁹⁶ Quigley *supra* (n 995) at 26.

for his passion to cool”. Elements of deliberation will result in the defence failing due to the subjective test not being satisfied.

Essentially, the retaliation by the accused must have occurred “on the sudden” and in the heat of passion even if the act or insult was considered sufficient to deprive an ordinary person of self-control.¹¹⁹⁷ The purpose of the requirements in the subjective test is primarily to ensure that acts of revenge can be distinguished from those that were provoked. Both the act of provocation and the retaliation of the accused must have occurred on the sudden. The killing by the accused must have been committed with intention and “before there was time for his passion to cool”.¹¹⁹⁸

This aspect of the defence in terms of section 232 of the Code is tested subjectively by applying individual factors such as idiosyncratic personality traits and temperament; this includes factors such as intoxication.¹¹⁹⁹ In Hill, Chief Justice Dickson stated that the subjective test assesses the mind-set of the accused and the jury should assess if the reaction of the accused to the provocation was committed on the sudden and before there was time for passions to cool.¹²⁰⁰ The court further stated that in determining if the accused reacted as a result of the provocation, the jury are entitled to consider the mental state and psychological temperament of the accused.¹²⁰¹

The subjective test is used to determine what occurred in the mind of the accused at the time of the killing. All factors can thus be considered.¹²⁰² Although the objective components may seem more difficult; the accused may still fail the subjective test if the killing involved deliberation which negates the requirement of acting on the sudden and in the heat of passion.¹²⁰³

¹¹⁹⁷ Roach supra (n 26) at 260.

¹¹⁹⁸ Hill supra (n 1064).

¹¹⁹⁹ Stuart supra (n 70) at 542.

¹²⁰⁰ Hill supra (n 1064) at 115.

¹²⁰¹ Hill supra (n 1064) at 115.

¹²⁰² Nelson supra (n 1050) at 1056.

¹²⁰³ Roach supra (n 26) at 260.

The main significance of the subjective requirement is to determine how fast the accused reacted. A causal connection between the provocative act and the killing must exist. Hence, the accused must not have acted only because there was provocation but he must have been provoked. The retaliation must not be calculated.¹²⁰⁴

It is a requirement that the accused's disturbed mental state caused by the provocation must have remained till the killing. If the evidence shows that the accused may have regained self-control sometime after the provocative act then the defence of provocation would not be available to the accused since the adverse effect of the provocative act on the accused's self-control no longer existed.¹²⁰⁵

In the case of Faid,¹²⁰⁶ the Supreme Court of Canada, per Justice Dickson, stated that there are two key elements that are essential for the defence of provocation to be successful and these are: a) The accused must have killed the victim "in the heat of passion" and (b) the killing must be brought on by "sudden provocation".

In this case, the killing arising from provocation was described as "impulsively in hot blood".¹²⁰⁷ The time limit put in place is to ensure that the defence cannot be abused by the "calculating revenge killer (however, sorely provoked)".¹²⁰⁸

In the Supreme Court in Tripodi¹²⁰⁹ the court stress that both the provocation and the retaliation must be sudden. In this case the accused had earlier learnt of his wife's infidelity and abortion but only lost self-control when the victim confessed; it was held that the defence was not available because he was not taken by surprise.

¹²⁰⁴ Nelson supra (n 1050) at 1058.

¹²⁰⁵ Hill supra (n 1064) at para 72.

¹²⁰⁶ Faid (1983) 33 C.R (3d) 1 (S.C.C.).

¹²⁰⁷ Faid supra (n 1206) at 523.

¹²⁰⁸ Faid supra (n 1206) at 523.

¹²⁰⁹ Tripodi (1955) S.C.R 438.

The court stated:

“Suddenness must characterise both the insult and the act of retaliation...I take...[sudden provocation] to mean that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame.”¹²¹⁰

The issue of “passions aflame” occurred in the case of Malott,¹²¹¹ the Ontario Court of Appeal stated that the accused could not qualify for the provocation defence since her actions showed a lack of passion.

In Faid,¹²¹² the accused was in a volatile relationship with the deceased where the accused was often provoked, it was held that evidence must show that despite the history of the relationship the accused’s loss of self-control was brought upon by the last provocative act, it must have been the “last straw”.¹²¹³ The court stated that the provocative act must have induced the breakdown of the accused’s self-control.¹²¹⁴

In the case of Salamon, the defence was unsuccessful since the accused had resumed a domestic argument. The Supreme Court of Canada stated that the accused cannot have instigated the provocation and then claim to be a victim of provocation. The accused must have acted on the sudden. Furthermore, the retaliation must be a heated response to the provocation.¹²¹⁵

The suddenness requirement is criticised for working against women specifically since they are less likely to kill “on the sudden” and “in the heat of passion”.¹²¹⁶ Hence, these requirements create problems for women to use the defence.¹²¹⁷ Gorman contends that

¹²¹⁰ Tripodi supra (n 1209) at 443.

¹²¹¹ Malott (1997) 121 C.C.C (3d) 457 (S.C.C) The accused in this case was a battered woman and purposefully obtained a gun to kill her husband.

¹²¹² Faid supra (n 1206).

¹²¹³ Daniels supra (n 1071).

¹²¹⁴ Faid supra (n 1206) at 276.

¹²¹⁵ Salamon [1959] S.C.R 404, 123 C.C.C 1, 30 C.R . 1.

¹²¹⁶ Nelson supra (n 1050) at 1059 notes that in England and Australia the law on provocation has been reformed in order to better serve the battered woman. Australia has changed the “on the sudden requirement” to include a “cooling off” period. (New South Wales Crimes Act Section 23).

¹²¹⁷ Nelson supra (n 1050) at 1059.

the subjective test is unworkable, and instead of considering the individual characteristics of the accused, juries should be directed to assess if the accused was provoked and if the provocation was of such a nature that it could be excused.¹²¹⁸

Furthermore, the loss of self-control must be attributed to the wrongful act or insult. A loss of self-control is thus not sufficient on its own. Sudden impulse is seen as the key to provocation, as it allows the recognition of an isolated nature of events and the defendant's sudden reaction to it, Gorman thus argues that in Thibert¹²¹⁹, it was the sudden impulse element which was lacking.¹²²⁰

Gorman states that the accused's conduct in Thibert¹²²¹ was the antithesis of a sudden loss of control.¹²²² The loss of control exhibited by defendant was not sufficient to meet this requirement as the "loss of control must be sudden, unexpected, temporary and exceptional". In this light, the accused's anger was neither exceptional nor temporary.¹²²³ The case of Thibert resulted in the history of relationship being considered provided that there are elements which indicate a sudden act or insult.¹²²⁴

Gorman emphatically states that the key to the provocation is the requirement of "sudden impulse" should form an integral part of the defence of provocation which recognises the isolated of the event and takes cognisance of the accused sudden response to it.¹²²⁵ Murder, as heinous as it is, is excused because of the temporary and complete loss of self-control. The exceptional nature of the event is essential and excused because in the eyes of the law such an occurrence would be improbable. Gorman states that the conduct of the accused in Thibert was the "antitheses of a sudden loss of control brought on by an unexpected and exceptional event".¹²²⁶

¹²¹⁸ Gorman supra (n 994) at. 496-497.

¹²¹⁹ Thibert supra (n 1053).

¹²²⁰ Gorman supra (n 994) at 496.

¹²²¹ Thibert supra (n 1053).

¹²²² Gorman supra (n 994) at 496-497.

¹²²³ Gorman supra (n 994) at 496.

¹²²⁴ Roach supra (n 26) at 261.

¹²²⁵ Gorman supra (n 994) at 496.

¹²²⁶ Gorman supra (n 994) at 496.

However, Stuart is critical of the requirements that the retaliation be “on the sudden before there was time for his passion to cool”¹²²⁷ and “in the heat of passion”¹²²⁸ stating that these provisions are vague.¹²²⁹

Dick contends that the assessment of the subjective component in Thibert is problematic, since it is shocking that the court could conclude that the killing met the requirement of “on the sudden”.¹²³⁰ The defendant knew of his wife’s affair for a few months prior and was aware of her desire to leave the marriage. Furthermore, the fact that he sought out his wife at the work place of the deceased indicates that there was nothing sudden about the situation. Despite these factors, the defence succeeded.¹²³¹

Provisions such as section 232(1) which require that the retaliation occur while “in the heat of passion “ and section 232 (2) that the action occur “on the sudden and before there was time for his passion to cool” are criticised for being repetitive and vague. For instance, in some cases a time lapse of a four to five minutes between the provocation and the retaliation was a critical in determining if that the defendant had not acted while provoked.¹²³²

This begs the question of whether a few minutes less would have made the difference to the outcome. Stuart states that flexibility is required and an assessment of how timeously that particular accused would have reacted.¹²³³ Stuart argues that the requirements of sudden provocation and sudden reaction which are difficult to apply and the “their wisdom can be seriously questioned”¹²³⁴.

Thornton stated that in the context of pure retributivism, subjectivism makes perfect sense in view of criminal culpability and by reviewing three theses with differing views

¹²²⁷ In terms of section 232(2) of the Criminal Code.

¹²²⁸ In terms of section 232(1) of the Criminal Code.

¹²²⁹ Stuart supra (n 70) at 542.

¹²³⁰ Dick supra (n 993) at 540.

¹²³¹ Dick supra (n 993) at 540.

¹²³² Stuart supra (n 70) at 542.

¹²³³ Stuart supra (n 70) at 542-543.

¹²³⁴ Stuart supra (n 70) at 544.

on subjectivity and objectivity he noted that the authors' rejected pure retributivism for crime and punishment; however failed to argue their cases convincingly in a different way.¹²³⁵ Anand and Roach noted that both the England and Canadian justice systems still do not respond to homicide in a principled and rational manner as there is a great deal of uncertainty and there is need for judges to explain the law of homicide to juries due to the seriousness of the crimes.¹²³⁶

4.2.9. Role of the judge and burden of proof

The actions of the accused are judged by the jury who are a representation of the society. The jury is not required to decide on the reasonableness or the proportionality of the accused's retaliation to the alleged provocation, since, the accused did kill a person and that is not reasonable or proportional in the circumstances wherein no other mitigating circumstances existed.

The focus of the jury is to determine if the ordinary person would have lost self-control due to the wrongful act or insult as the accused did.¹²³⁷ The accused bears no burden of proving the defence, only a tactical burden on whether the defence of provocation should be raised or not.¹²³⁸ The trial judge may only put the defence to the jury once it is determined that "an air of reality" on the evidence exists.

In the case of Power, the accused shot and killed the deceased after a fight ensued with one of the accused's friends.¹²³⁹ The Newfoundland Court of Appeal held that there was no air of reality to the defence of provocation since none of the elements of the then section 215 existed.¹²⁴⁰ Furthermore, the circumstances could not be considered exceptional to "justify finding that the wrongful act or insult could emanate from a third

¹²³⁵ Thornton supra (n 648) at 160.

¹²³⁶ S. Anand and K. Roach "Inertia, uncertainty and Canadian homicide law: an introduction to the special issue" (2009-2010) 47: 3 Alberta Law Review 643 at 644.

¹²³⁷ Stuart supra (n 70) at 537-538.

¹²³⁸ Stuart supra (n 70) at 537-538.

¹²³⁹ Power (1980) 36 Nfld.& P.E.I.R., 446 (Nfld ,C.A).

¹²⁴⁰ Power supra (n 1224) at 449-450.

party, there being no association whatsoever between the victim, the provoker and the provoked.”¹²⁴¹

In the case of Ivany the Newfoundland Court of Appeal again dealt with this issue and concluded that:

“The section requires the provoking act to be such as to deprive an ordinary person of power of self-control. To hold that words which merely got on the nerves of someone could be sufficient to raise a defence of provocation in its criminal context would, I suggest, extend the concept some distance beyond its intent. No reasonable jury could conclude the appellant was stirred to the “heat of passion” entitling him to a reduction of responsibility for his homicidal act on the basis of words which he could not remember and which he merely described as getting on his nerves”¹²⁴²

In the case of Faid, the Supreme Court held that this is a “preliminary question to be decided by the judge as a question of law”.¹²⁴³ The court stated that evidence must exist on which a “reasonable jury” and acting “judicially” could determine that provocation existed.¹²⁴⁴ It is the responsibility of the trial judge to determine if some evidence exists which have a bearing on each element of the defence, which may show that a properly directed jury acting reasonably could make a finding in favour of the accused.¹²⁴⁵

The question of when to put the defence to the jury is a question of law and requires a reconsideration of the application of the standard threshold test.¹²⁴⁶ Determining if an act amounted to provocation is the responsibility of the jury and the trial judge is not entitled to make this determination. The trial judge is however under a duty to determine at the outset if the defence has an evidential foundation.¹²⁴⁷

The accused is not under a “persuasive” burden. It is not a requirement that the defence must be proved on a balance of probabilities. If a reasonable doubt is created by the

¹²⁴¹ Power supra (n 1224) at 449-450.

¹²⁴² Ivany (1991), 89 Nfld & P.E.I.R. 13 (Nfld.C.A) at 17-18.

¹²⁴³ Faid supra (n 1206) at 522.

¹²⁴⁴ Faid supra (n 1206) at 522.

¹²⁴⁵ Renke supra (n 28) at 733.

¹²⁴⁶ Gorman supra (n 994) at 483.

¹²⁴⁷ Renke supra (n 28) at 739.

prosecution regarding the availability of provocation, the accused must be convicted of manslaughter. The crown bears the onus of proving that provocation has not been established beyond a reasonable doubt, this is done by showing that some or all of the elements of the defence have not been established by evidence.¹²⁴⁸

Gorman has praised the approach adopted by the Appeal Court in Power¹²⁴⁹ and Ivany¹²⁵⁰ as the threshold test was set to higher standard and provocation could only be left with the jury in exceptional circumstances. This approach made it clear that provocation is a defence to a murder charge and must be limited. This is in contrast to Thibert,¹²⁵¹ where the “any evidence” test seems to have been used.¹²⁵²

In Thibert the court stated:

“...before the defence of provocation is left to the jury, the trial judge must be satisfied (a) that there is some evidence to suggest that the particular wrongful act or insult alleged by the accused would have caused an ordinary person to be deprived of self-control...”¹²⁵³

And

“...the trial judge must still determine if there is any evidence upon which a reasonable jury properly instructed and acting judicially could find that there had been provocation. If the trial judge is satisfied that there is such evidence, then the defence must be put to the jury to determine what weight, if any, should be attached to that evidence.”¹²⁵⁴

Gorman argues that the threshold for leaving the defence to the jury has been set at such a low level that it would be difficult to imagine a case where the trial judge could ever refuse especially where the deceased uttered an insult or committed an act prior to being killed. If “shoot me” was considered to be sufficient then arguably nothing could be insufficient.¹²⁵⁵ Gorman argues that unfortunately the Supreme Court of Canada has taken the issue out of the trial judge’s hands.¹²⁵⁶

¹²⁴⁸ Renke supra (n 28) at 739.

¹²⁴⁹ Power supra (n 1139).

¹²⁵⁰ Ivany supra (n 1242).

¹²⁵¹ Thibert supra (n 1053).

¹²⁵² Gorman supra (n 994) at 486.

¹²⁵³ Thibert supra (n 1053).

¹²⁵⁴ Thibert supra (n 1053).

¹²⁵⁵ Gorman supra (n 994) at 485.

¹²⁵⁶ Gorman supra (n 994) at 484.

Burnett noted that in the case of Tripodi¹²⁵⁷ where five judges in the Ontario Court of Appeal and four judges in the Supreme Court of Canada could be an “insult” if the accused had forgiven his wife.¹²⁵⁸ It was noted that in the face of divergence of opinion Kellock J. has not found an insufficiency of evidence but rather than a confession of adultery to a husband that already knows cannot provide the grounds for provocation.¹²⁵⁹ Sankoff said that he was troubled by the majority’s view that the remarks were predictable and therefore not provocative as it seems to him as a stretch that an ordinary person would not be surprised.¹²⁶⁰

The Federal Department of Justice released its Consultation paper in 1998 found that out of 115 murder cases in which provocation was raised, 62 involved domestic homicides and 55 of these involved men killing women,¹²⁶¹ indicates that the defence of provocation is being used at a disproportionate rate; this is alarming and are grounds for concern relating to utilization and development of the defence.¹²⁶²

4.2.10. Expert evidence

The general approach in Canada was that expert evidence was inadmissible,¹²⁶³ the reason being was that Canadian courts were apprehensive about admitting expert evidence in cases where the ordinary person could understand the subject matter without the assistance of an expert.¹²⁶⁴

Expert evidence is generally inadmissible in respect of the standard of loss of self-control and the ordinary person. Quigley states that this poses a possible problem in regard to different degrees of self-control with persons of different ages. Jurors will lack

¹²⁵⁷ Tripodi supra (n 1209).

¹²⁵⁸ J.T. Burnett “Cases and Comments: Regina v. Tripodi” 91956) 14 Fac. L. Rev 48 at 53.

¹²⁵⁹ Burnett supra (n 1258) at 53.

¹²⁶⁰ Burnett supra (n 1258) at 53.

¹²⁶¹ Federal Department of Justice, *Reforming Criminal Code Defences* (1998).

¹²⁶² Gorman supra (n 994) at 415.

¹²⁶³ Quigley supra (n 995) at 29.

¹²⁶⁴ Kelliher v Smith (1931) S.C.R. 672, 684 (Can) cited by L.A.Wannop “Battered woman syndrome and the defence of battered women in Canada and England” (1995-1996) 19 Suffolk Transnational law Review 251 at 266.

guidance in deciding what degree of self-control to expect and may resort to stereotypes in making a determination.¹²⁶⁵ This restrictive rule is based on two rules; the first is the “ultimate issue” rule which works to prevent an expert from expressing his view on an issue which ultimately the jury must decide. The second rule is the “common knowledge rule” as laid down in the influential English case of Turner^{1266 1267}.

The courts have generally struggled with identifying criteria for admitting expert evidence; this problem is present in jurisdictions such as England, Australia, New Zealand as well as Canada.¹²⁶⁸

The United States was the first to allow expert evidence cases involving the battered women syndrome. After these jurisdictions such as Canada, Australia and New Zealand followed the lead of the United States and began admitting evidence relating to battered women syndrome.¹²⁶⁹ The admissibility of expert evidence in cases involving battered women syndrome has been the source of debate in Canada, especially in light of the criticisms of gender discrimination towards women. Expert evidence may be led to show the emotional makeup of the accused made him or her more prone to provocation.¹²⁷⁰

The general approach in Canada expert evidence must satisfy a twofold precondition test in order to be admitted. Firstly, the expert opinion must be of value to the ordinary person, secondly, the expert must be qualified to give opinion through experience, qualification or in practice.¹²⁷¹ Expert evidence will only assist the accused in terms of satisfying the subjective test, that is assessment of suddenness of retaliation and if loss of self-control actually occurred.

¹²⁶⁵ Quigley supra (n 995) at 29.

¹²⁶⁶ Turner supra (n 975) see discussion in chapter 3 at 158.

¹²⁶⁷ J.B Robertson :Battered woman syndrome: expert evidence in action” (1998) Vol.9 No.2 Otago Law Review 277 at 296.

¹²⁶⁸ Lyons v The Queen (1987) 2. S.C.R 309,306.

¹²⁶⁹ Quigley supra (n 995) at 29.

¹²⁷⁰ Nelson supra (n 1050) at 1056.

¹²⁷¹ Stuesser supra (n 1000) at 198-199.

In the landmark case of Lavallee¹²⁷² which involved the battered woman syndrome and the defence of self-defence, the Supreme Court of Canada allowed the admission of the expert evidence and stated:

“How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why should a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-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 woman syndrome”. We need to understand it and help is available from trained professionals”¹²⁷³

Although this case did not involve the pleading of the provocation defence, it is relevant and important in respect of the courts treatment of expert evidence in relation to battered women syndrome, which is used as the basis for the provocation defence in jurisdictions such as England and South Africa. The court emphasised that expert evidence was necessary in order to shed light on the mental state of the accused and explain the battered women syndrome to the jury. The court stated that this was an aspect of human behaviour which was not common knowledge to the jury and therefore required assistance from an expert.

Evidence in support of battered women syndrome is referred to as syndrome evidence and usually consists of forensic psychiatric and psychological evidence which is intended to explain the behaviour of the accused or the provoker. Syndrome evidence may explain the impact of long-term violence on an individual. Syndrome evidence is therefore important in cases involving cumulative provocation.¹²⁷⁴

4.2.11. Concluding summary

The provocation defence in Canada was originally derived from 16th and 17th English law. The provocation defence became part of Canadian law when it was adopted and codified in the Criminal Code of Canada. The defence currently exists in the form of section 232 of the Criminal Code of Canada and remains largely unaltered since

¹²⁷² Lavallee (1990) 1 S.C.R. 852.

¹²⁷³ Lavallee supra (n 1272) at 871-8722.

¹²⁷⁴ Robertson supra (n 1267) at 282.

inception. The basis for the provocation defence exists as a concession to human frailty and provides for a conviction of the lesser verdict of manslaughter.¹²⁷⁵

However, a main criticism of the provocation defence is centred on this fact, that the law has failed to evolve alongside the changing social context in which it is rooted. This is especially notable in light of the fact that historically the provocation was recognised to cause loss of self-control and served to benefit men who killed after discovering their spouse in the act of adultery.¹²⁷⁶ Jealousy was considered the rage of a man and adultery was considered “the highest invasion of property”.¹²⁷⁷

Early provocation cases commonly involved the killing of a male rival, the view of wives being the property of their husbands was strong belief. Furthermore, the provocation defence has been described as being one of the most male-biased areas of criminal law since it involves reduction of the severity of punishment for convicted killers who in many cases are men.¹²⁷⁸

Killing while in the “heat of passion” is the most common basis of provocation replacing honour killings. Unfortunately, this basis has been extended so drastically that ending a romantic relationship and sexual infidelity has amounted to provocation in terms of s231 of the Code.¹²⁷⁹ Ultimately, one of the foremost criticisms of the provocation defence in Canada is that the law and the courts have remained accommodating of men who kill their female partners in a fit of rage and jealousy.¹²⁸⁰

These criticisms also extend to the law not accommodating the battered women within the provocation defence, this is attributed to requirements in terms of the subjective test that the retaliation to the provocation be sudden, this does not accommodate the battered

¹²⁷⁵ Dick supra (n 993) at 522.

¹²⁷⁶ Mitchell supra (n 1039) at 2-3.

¹²⁷⁷ Mawgridge supra (n 518), see discussion in Chapter 3 at 83.

¹²⁷⁸ Forell supra (n 1019) at 161.

¹²⁷⁹ Forell supra (n 1019) at 162.

¹²⁸⁰ Forell supra (n 1019) at 163 notes that Australia has taken the lead in modifying provocation and has denied the defence in many instances to men who kill their intimate partners while enraged, See *S v Stingel* supra (n 944) , Hart v The Queen (2003) 27 W.A.R 441 (Western Australia); R v Yasso (2004) WL 177776623.

woman who does not lose control suddenly but is delayed in her reaction where her passions had time to cool.¹²⁸¹ The subjective and objective components are the basis of the defence. The underlying rationale of the ordinary person standard is to prevent individuals from using self-generated excuses as a basis of the defence.¹²⁸²

However, the objective test and characteristics of ordinary person are considered to the most problematic aspects of the defence, with some critics calling for the scrapping of the objective requirement.¹²⁸³ The uncertainty of which characteristics to attribute to the ordinary man have been the subject of debate for years, furthermore the concept is complex and without direction, a jury might disregard relevant factors or consider the wrong factors.¹²⁸⁴ Other problems relate to evidentiary aspects in that the trier of fact is not allowed to assess expert evidence relevant in making a determination on the objective test.¹²⁸⁵

The case of Thibert has been the source of controversy due to the court broadening the scope of the objective test, giving an individuated and contextual definition of the ordinary person test.¹²⁸⁶ The result is that the objective test has lost its objective nature. The subjective test is also seen to be problematic; this element is criticised for its suddenness requirements governing the provocative act and the retaliation which results in women, specifically the abused women being deprived of the provocation defence.¹²⁸⁷ This makes the provocation defence in Canada inherently unfair. Generally, the view of the provocation defence in Canada is that the provision is an out-dated provision based on sexist doctrines; furthermore, the provision are overly complex formulation that makes it difficult for judges and juries to understand certain technical aspects of the defence.¹²⁸⁸

¹²⁸¹ Wannop supra (n 1250) at 266.

¹²⁸² Nelson supra (n 1035) at 1024.

¹²⁸³ Quigley supra (n 1015) at 253.

¹²⁸⁴ Quigley supra (n 1015) at 252.

¹²⁸⁵ Quigley supra (n 1015) at 253.

¹²⁸⁶ Roach supra (n 26) at 255.

¹²⁸⁷ Quigley supra (n 1015) at 253.

¹²⁸⁸ Quigley supra (n 995) at 12, Renke supra (n 28) at 749.

CHAPTER 5: COMPARATIVE ANALYSIS

5.1. Critical analysis of the defence of non-pathological incapacity due to provocation in South African Law

5.1.1. Introduction

The recognition of the effect of provocative conduct on criminal liability dates back centuries. Provocation is recognised for its role in arousing passion in the provoked and depriving the accused of the ability of rational reasoning resulting from a loss of self-control. It is clear that the defence of provocation is controversial in South Africa as well as in England and Canada. However, it must be noted that despite the controversial nature of a defence based on provocation, the aforementioned jurisdictions continue to retain and preserve this defence. It must therefore be argued that the continued existence of the provocation defence indicates that this defence is important and serves a legitimate purpose in society in general.

Historically, the underlying rationale for a defence based on provocation has been the law's concession to human frailty, the concept of loss of self-control being has and continues to play a prominent feature in the respective provisions in England, Canada and South Africa.

This concluding section will re-assess the troubled defence of non-pathological incapacity due to provocation and emotional stress in South African law using a comparative study along with analysis of the controversial landmark judgment of Eadie.¹²⁸⁹ The purpose of this investigation is to determine what the current status of this troubled defence is in the South African criminal law system.

The provocation defence in South Africa has been troubled by a few controversial decisions such as Arnold,¹²⁹⁰ Moses¹²⁹¹ and Nursingh,¹²⁹² however, it is submitted that

¹²⁸⁹ S v Eadie supra (n 18), see discussion in chapter 2 at 57 and at 225 below.

¹²⁹⁰ S v Arnold supra (n 16), see discussion in chapter 2 at 42 and at 213 below.

¹²⁹¹ S v Moses supra (n 16), see discussion in chapter 2 at 54 and forthcoming discussion at 213.

the Eadie¹²⁹³ judgment has significantly contributed to the confusion and uncertainty currently besieging the defence. The judgment of Navsa JA has garnered differing opinions regarding the precise import of the judgment. This indicates the extent of the confusion generated and as a result, the defence of non-pathological incapacity due to provocation and emotional stress has remained in a state of limbo ever since.¹²⁹⁴

A critical analysis of the judgment will assist in deciphering this case; this will allow for a correct assessment of the implications of the court's pronouncements on the provocation defence. The importance of this analysis is to determine if the defence of non-pathological incapacity due to provocation and emotional stress serves a legitimate purpose, and to assess how the changes to the defence will impact upon the criminal law and society in general. The critical question remains whether the changes brought about by Eadie¹²⁹⁵ result in an improvement to the defence of non-pathological incapacity arising from provocation and emotional stress or not.

In conducting this analysis, it is important to pin-point the starting point of the problematic developments which may have had a negative impact on the defence. This study will seek to assess and analyse the problems associated with the defence of non-pathological incapacity due to provocation and emotional stress as it functioned before the landmark judgment of Eadie.¹²⁹⁶ It is critically important to delve into the root of the problems associated with the defence of non-pathological incapacity due to provocation and emotional stress before Eadie¹²⁹⁷ in order to determine the extent to which the court effected the correct solutions to these problems.

It is submitted that in tracing the evolution of of the defence of non-pathological incapacity due to provocation and emotional stress, there is a strong indication that the

¹²⁹² S v Nursingh supra (n 16), see discussion in chapter 2 at 54 and forthcoming discussion 213.

¹²⁹³ S v Eadie supra (n 18).

¹²⁹⁴ Snyman supra (n 77) at 20-21 has criticised the Eadie judgment for its unsound reasoning, see further Hoctor supra (n 1) at 110, Louw supra (n 5) at 206 and Kemp supra (n 1) at 176-178.

¹²⁹⁵ S v Eadie supra (n 18).

¹²⁹⁶ S v Eadie supra (n 18).

¹²⁹⁷ S v Eadie supra (n 18).

difficulties with the provocation defence began with the cases in Arnold,¹²⁹⁸ Moses¹²⁹⁹ and Nursingh.¹³⁰⁰ Analysis of these cases will expose the reasons behind the controversy regarding the provocation defence which preceded the Eadie¹³⁰¹ judgment. The circumstances under which the killings in the aforementioned cases occurred raised questions not only regarding the correctness of the findings, but also the desirability of a defence based on provocation and emotional stress.¹³⁰² In the South African context, allowing the provocation defence to operate as a complete defence is contentious.¹³⁰³

Analysis of the provocation provisions in England and Canada reveal that the inherent nature of a defence based on provocation is contentious, thus the controversy surrounding provocation as a defence is not limited to South Africa. The problems relating to the provocation defence have led to calls for the reformation of the defence in Canada,¹³⁰⁴ in England the defence has undergone reformation due to criticisms of the previous formulation of the defence.¹³⁰⁵

However, it must be noted that the South African defence of non-pathological incapacity due to provocation and emotional stress differs markedly from the provisions in England and Canada. Most notably, is the fact that in England and Canada provocation is at most a partial defence, whereas in South African law the successful pleading of provocation and emotional stress can lead to a total acquittal if criminal capacity was lacking.

¹²⁹⁸ S v Arnold supra (n 16).

¹²⁹⁹ S v Moses supra (n 16).

¹³⁰⁰ S v Nursingh supra (n 16).

¹³⁰¹ S v Eadie supra (n 18).

¹³⁰² Hoctor supra (n 1) at 131-133, Louw supra (n 5) at 205 in respect of the S v Moses supra (n 16) and S v Nursingh supra (n 16) states that "It is in acquittals such as in S v Nursingh 1995 (2) SACR 331 (D) and S v Moses 1996 (1) SACR 702 (C) that disquiet and controversy have been caused in respect of the provocation defence".

¹³⁰³ J.M. Burchell "Heroes, poltroons and persons of reasonable fortitude-juristic perceptions on killing under compulsion" (1988) 1 South African Journal for Criminal Justice 18 at 31, Burchell supra (n 2) at 324-323, Hoctor supra (n 1) at 110.

¹³⁰⁴ See discussion in chapter 4 at 167.

¹³⁰⁵ See discussion in chapter 3 at 127.

In this concluding chapter, it is proposed to firstly examine, the provisions in England¹³⁰⁶ and Canada¹³⁰⁷ that govern the respective provocation defences. The assessment of the utility and functioning of the provocation defence in England and Canada follows, the focus of this analysis will be on the objectively assessed requirements within the respective provisions governing the provocation defence in English and Canadian law.

The aim of the comparative analysis is primarily to gain insight into how the defence operates in different jurisdictions; specifically the role and functionality of the objective test in assessing the defence of an accused person raising provocation as a defence and to determine the possible shortcomings of this manner of assessment. This analysis seeks to determine if the South African law can benefit from the incorporation of aspects of the defence as set out in these foreign models. A critical analysis of the relevant provisions governing the respective defences in England and Canada will aid in this pursuit.

5.1.2. Pre-Eadie: the problematic cases of Nursingh, Moses and Arnold

In the South African context, the defence of non-pathological incapity due to provocation and emotional stress has for many years been the subject of criticisms.¹³⁰⁸ However, it is submitted that tensions surrounding the defence reached its breaking point following the acquittals in Nursingh¹³⁰⁹ and Moses¹³¹⁰ and Arnold.¹³¹¹ These three cases will be discussed in this chapter as these cases deserve some focus since, it is submitted, the controversy of these judgments were instrumental in the reformulation of the defence by the court in Eadie,¹³¹² as it highlighted important policy considerations related to a defence based on provocation and emotional stress.

¹³⁰⁶ In terms of ss 54-56 of the Coroners Act 2009, see Chapter 3 at 74 for discussion of the provocation defence in English law.

¹³⁰⁷ In terms of the section 232 of the Canadian Criminal Code, see Chapter 4 at 164 for discussion of Canadian law.

¹³⁰⁸ See discussion by Hoctor *supra* (n 1) at 149-160.

¹³⁰⁹ S v Nursingh *supra* (n 16).

¹³¹⁰ S v Moses *supra* (n 16).

¹³¹¹ S v Arnold *supra* (n 16).

¹³¹² S v Eadie *supra* (n 18).

The acquittals in Nursingh,¹³¹³ Moses¹³¹⁴ and Arnold¹³¹⁵ generated fierce debate regarding the desirability of a defence based on provocation and emotional stress since the acquittals in these cases created the perception that success in pleading the defence seemed certain.¹³¹⁶ In the case of Nursingh,¹³¹⁷ which involved multiple killings, the acquittal of the accused was surprising. In respect of Moses¹³¹⁸ and Nursingh,¹³¹⁹ intense academic debate has focused on the whether the acquittal of the accused was justified in the light of the facts of the respective cases.¹³²⁰

Regarding Nursingh, Burchell states:

“...one cannot help but feel a measure of disquiet about the conclusion that an intelligent person, albeit under a good deal of stress, can shoot his mother and grandfather by firing three bullets into their bodies and his grandmother by firing four bullets into her body , and escape criminal liability completely.”¹³²¹

The acquittal of the accused led detractors of the defence to challenge the very basis and the nature of the defence. This case rekindled old fears of a defence based on provocation and emotional stress providing for facile acquittals.¹³²²

The controversy regarding the provocation defence deepened after the acquittals in both the Nursingh¹³²³ and Moses¹³²⁴ cases causing outrage and disbelief amongst certain commentators who questioned the correctness of the decision to acquit.¹³²⁵

¹³¹³ S v Nursingh supra (n 16).

¹³¹⁴ S v Moses supra (n 16).

¹³¹⁵ S v Arnold supra (n 16).

¹³¹⁶ See Louw supra (n 215) for critical analysis of S v Moses supra (n 16) and S v Nursingh supra (n 16).

¹³¹⁷ S v Nursingh supra (n 16).

¹³¹⁸ S v Moses supra (n 16).

¹³¹⁹ S v Nursingh supra (n 16).

¹³²⁰ Louw supra (n 215) at 208-209, J.M Burchell “non-pathological incapacity – evaluation of psychiatric testimony’ (1995) 8 South African Journal of Criminal Justice 37 at 39-40.

¹³²¹ Burchell supra (n 1320) at 40-41.

¹³²² Hoctor supra (n 1) at 131.

¹³²³ S v Nursingh supra (n 16).

¹³²⁴ S v Moses supra (n 16).

¹³²⁵ Louw supra (n 215) at 213, Burchell supra (n 1320) at 40-41.

It is submitted that a problematic feature in these cases is that the courts have shown a lack of understanding when applying the distinct elements of criminal liability, for instance, in the case of Arnold¹³²⁶ there is indication of unsound reasoning by the court in certain respects,¹³²⁷ firstly, the court made the finding that the accused acted while in a state of sane automatism after concluding that the presence of voluntary conduct was not proved beyond a reasonable doubt.¹³²⁸

In respect of this finding, critics of this case such as Snyman contend that upon analysis of the facts, it is apparent that the accused acted voluntarily when he handled the firearm before firing the fatal shot. The handling of this firearm amounts to negligent conduct therefore the court should have convicted the accused of negligence rather than acquitting.¹³²⁹ The court then stated that it was reasonably possible that the accused lacked criminal capacity.¹³³⁰ The court stated further that the accused acted in a state of sane automatism and therefore declined to make a finding regarding the presence of intention.

In essence, the court demonstrated a lack of understanding of the principles of criminal liability by confusing the elements of capacity, voluntary conduct and not understanding when the inquiry into intention comes into play, since once conduct is deemed involuntary, the inquiry into the presence of capacity and intention is superfluous.¹³³¹ Furthermore, the court seemed to use the term “sane automatism” interchangeably when referring to lack of capacity. This case highlights the problem that the courts have at times failed to maintain the distinction between the defences of sane automatism and non-pathological incapacity due to provocation and emotional stress.

¹³²⁶ S v Arnold supra (n 16).

¹³²⁷ Hoctor supra (n 1) at 124-125.

¹³²⁸ S v Arnold supra (n 16) at 263G-H.

¹³²⁹ Snyman supra (n 121) at 251.

¹³³⁰ S v Arnold supra (n 16) at 264D.

¹³³¹ Hoctor supra (n 355) at 201 notes that despite the courts “discordant reasoning” it approvingly cites the reasoning of Rumpff CJ in Chretien supra (n 204) differentiating between the concepts of sane-automatism and criminal capacity.

In respect of the Nursingh¹³³² judgment, another troubling feature relates to legal imprecision in regard to the court's definition of criminal capacity, which is not correct and is not in line with precedent which states that the test for criminal capacity consists of two legs where the assessment considers if the accused had the capacity to distinguish between right and wrong and if he had the capacity to act in accordance with such an appreciation.¹³³³

The following statement by the court illustrates this argument:

“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.”¹³³⁴

The court in Nursingh confused the elements of criminal capacity and intention as it stated:¹³³⁵

“Now, although the onus is on the state to show that the accused had the necessary criminal capacity to establish and found the *mens rea* necessary to commit an offence, where an accused person relies on non-pathological causes in support of a defence of criminal incapacity, then he is required to lay a factual foundation for it in evidence, sufficient at least to create a reasonable doubt on the issue as to whether he had the mental capacity.”¹³³⁶

Criminal capacity is considered a distinct element of liability;¹³³⁷ the court complicates matters by conflating the elements of criminal capacity and intention¹³³⁸:

“That explosion [the shooting of the three deceased] was not the result of a functioning mind, and so all its consequences can be regarded as unintentional.”¹³³⁹

The capacity and intention elements cannot be conflated since there can be no intention if the capacity element is lacking; it is a preliminary inquiry which results in an accused

¹³³² S v Nursingh supra (n 16).

¹³³³ Louw supra (n 215) at 208.

¹³³⁴ S v Nursingh supra (n 16) at 332E-F, discussed by Louw supra (n 215) at 208.

¹³³⁵ S v Nursingh supra (n 16) at 334B-C, discussed by Louw supra (n 215) at 208.

¹³³⁶ Louw supra (n 215) at 208.

¹³³⁷ Louw supra (n 215) at 208.

¹³³⁸ Louw supra (n 215) at 209.

¹³³⁹ S v Nursingh supra (n 16) at 339D.

person being acquitted if the element is negated, the court erred in not recognising that criminal capacity is a distinct element of liability.¹³⁴⁰

The court stated:

“In our law a man is responsible 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”.¹³⁴¹

Louw is correct in criticising the Nursingh¹³⁴² judgment for lacking in sound reasoning.¹³⁴³ The tendency of the court’s to confuse the elements of capacity and intention is unacceptable and indicates that the problems with the defence is actually not with defence itself but with incorrect application of principle.¹³⁴⁴

One of the other main sources of controversy surrounding both Nursingh¹³⁴⁵ and Moses¹³⁴⁶ is that there are indications that accused in both cases did not suffer a total loss of criminal capacity since both demonstrated volitional control and insight in the commission of the killings, therefore commission of goal-directed acts in both these cases seems apparent upon assessment of the facts of both cases, yet the court in both instances determined that capacity was lacking. It is submitted that on the facts of both cases, clear goal-directed acts were committed and this indicates that the accused in both cases may have not suffered complete loss of self-control and therefore possessed criminal capacity.

These two cases highlight the problem that there may be confusion regarding the application of the requirement of loss of self-control and that the courts in both these cases struggled to interpret this notion and apply the requirements to facts of the case.

¹³⁴⁰ Louw supra (n 215) at 209.

¹³⁴¹ S v Nursingh supra (n 16) at 339A-B, discussed by Louw supra (n 215) at 209.

¹³⁴² S v Nursingh supra (n 16).

¹³⁴³ Louw supra (n 215) at 209.

¹³⁴⁴ Hoctor supra (n 1) at 164.

¹³⁴⁵ S v Nursingh supra (n 16).

¹³⁴⁶ S v Moses supra (n 16).

The courts may have erred in correctly applying the test of conative capacity to the facts of Nursingh¹³⁴⁷ and Moses¹³⁴⁸ resulting in problematic acquittals.¹³⁴⁹

In respect of Moses¹³⁵⁰ it is submitted that this judgment is problematic in two main respects. Firstly, the assessment of “goal-directed” behaviour was a central issue and the courts findings in this regard are questionable. It is submitted that the judgment is disturbing for several reasons but the collapsing of the series of goal-directed acts into one is highly problematic.

Louw correctly asserts that on the facts of the case, to deem the series of acts committed by the accused to being just one is outrageous, since at the very least the killing involved two stabbings with two different knives, by deeming these acts to be just one the court essentially solved the “problem” of goal directed behaviour.¹³⁵¹

It is submitted that Louw is correct in his assertions and therefore the reasoning by the court is indeed unsound. The court accepted that the series of goal directed acts actually

¹³⁴⁷ S v Nursingh supra (n 16).

¹³⁴⁸ S v Moses supra (n 16).

¹³⁴⁹ Krause supra (n 290) at 330, Louw supra (n 215) at 213.

¹³⁵⁰ S v Moses supra (n 16).

¹³⁵¹ Louw supra (n 215) at 214 points out 14 instances of goal directed acts committed by the accused and these are:

The accused attempted to pick an ornament in the bedroom;

- Consciously returning to the lounge for another weapon;
- Grabbing the black cat ornament with intent on using it as a weapon
- Returning to the bedroom with the weapon (black cat ornament)
- Forcefully opening the bedroom door;
- Use of the ornament to hit the deceased twice
- Returning to the kitchen to find yet another weapon
- Selection of a knife in the kitchen
- Return to the bedroom with the knife in hand
- Use of the knife to stab the deceased
- Then returning to the kitchen for another knife
- Selection of another larger knife in the kitchen
- Return to the bedroom with larger knife
- Slitting the deceased’s neck and wrist

constitute a single act; unfortunately the court did not elaborate extensively on the reasoning behind this conclusion and simply stated that:

“Mr.Yodaiken [defence witness] 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 the two acts, namely the hitting of the deceased with a blunt object and the stabbings, were in fact one action. The accused was in an annihilatory rage which tends to damage or destroy.”¹³⁵²

It is submitted that judging the two stabbings in the Moses¹³⁵³ case as a single act cannot be accepted since it involved two separate weapons, there was a definite thought process, that is insight, the accused made the conscious decision to seek out anything that could be used as a weapon; he purposefully sought out knives because he wanted to harm the deceased violently, this indicates the presence of self-control. It is submitted that the accused possessed the presence of mind and possessed the determination to go to the kitchen and search for another knife thus performed and accurately executed a series of clear goal-directed behaviour which strongly indicates the presence of criminal capacity.

Similarly to Nursingh,¹³⁵⁴ the court seemingly justified the accused’s actions by labelling the rage in the case of Moses¹³⁵⁵ as an “annihilatory”. Furthermore, the commission of the series of acts and this suggests that the court failed in differentiating between acts that were controlled and uncontrollable.¹³⁵⁶ Furthermore, rage, may mean that the accused made a decision to control certain actions and does not necessarily indicate that the actions were uncontrollable.¹³⁵⁷ The differentiation between uncontrolled and uncontrollable actions is thus crucial. The court’s collapsing of these acts into one is bewildering and this reasoning ultimately led to the acquittal which with respect, is based on illogical reasoning.¹³⁵⁸

¹³⁵² S v Moses supra (n 16) at 709H-I.

¹³⁵³ S v Moses supra (n 16).

¹³⁵⁴ S v Nursingh supra (n 16).

¹³⁵⁵ S v Moses supra (n 16).

¹³⁵⁶ De Vos supra (n 346) at 358.

¹³⁵⁷ De Vos supra (n 346) at 358.

¹³⁵⁸ Louw supra (n 215) at 214.

In Moses¹³⁵⁹ the accused went about systematically killing the deceased and was rewarded with an acquittal, this despite the lack of prolonged abuse, at the hands of the deceased, preceding the killing. This fact separates the circumstances of the accused from other cases in South African where the defence was successful.¹³⁶⁰ This begs the question, what made the killing in Moses¹³⁶¹ special or different from other cases involving the murder.¹³⁶²

In assessing the technical aspects of the Nursingh¹³⁶³ judgment, the subject of “goal-directed” behaviour also emerges as a main area of contention. One of the main areas of dissatisfaction in this case is that the act of killing three people was considered to be a single act by the court.¹³⁶⁴

In this regard the court stated:

“it is not possible to distinguish between the three killings on the basis that the mother had caused and 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.”¹³⁶⁵

¹³⁵⁹ S v Moses supra (n 16).

¹³⁶⁰ Louw supra (n 215) at 215.

¹³⁶¹ S v Moses supra (n 16).

¹³⁶² Hoctor supra (n 1) at 133 notes that in terms of this argument, the defence should only succeed in cases involving a prolonged period of emotional stress prior to the killing. See further De Vos supra (n 346) at 358 and Louw supra (n 215) at 215.

¹³⁶³ S v Nursingh supra (n 16).

¹³⁶⁴ Louw supra (n 215) at 213.

¹³⁶⁵ S v Nursingh supra (n 16) at 339C-D and at 336F-H the court said: “The State’s real argument was that there were sufficient signs of deliberate conduct in such evidence as there is of the actual shooting, to show that the accused must have been capable of ordered, rational thought and action, which belies his claim not to have known what happened until his friend Soni, intervened. Without going into details of that case, it is enough to say that he professes that he was unable to remember anything more than red rage. But, Mr. Macadam pointed to the accuracy “of” the shooting, the different situation in the room of the three deceased, the instruction to Soni to keep the grandfather quiet, the decision to leave the house, dispose of the pistol and then concoct and execute a plan to divert suspicion for the deed elsewhere. That all showed a train of conduct that required a conscious awareness of what was going on and an ability to respond to circumstances. That showed, so it was argued that his intellect was working, that is to say his cognitive function of the brain, and if that was the case, he was not incapable of knowing what he was doing and that what he was doing was wrong.”

Significantly, the court did not distinguish each killing from each other and described the three separate acts were part of a single explosion. The eruption suffered by the accused indicated to the court that a loss of self-control was experienced and indicated lack of criminal capacity. However, critics such as Louw have emphatically slammed the reasoning of the court and argue that the collapsing of the shooting into one act is untenable and that the court should not have accepted psychiatric evidence to this effect.¹³⁶⁶

Louw is correct for criticising the reasoning of the court in collapsing the three killings into a single act.¹³⁶⁷ Despite the commission of several goal-directed acts, the court viewed the killing as an explosion thus arriving at the conclusion that the killing constituted one act. It is submitted that the outward show of anger and rage by the accused did not necessarily mean that he lost self-control. Therefore, it is submitted that it was the responsibility of the court to do a more thorough investigation into the state of accused's mind by requiring additional expert evidence to aid in its investigation.

It is submitted that the Nursingh¹³⁶⁸ case illustrates that there is no problem with substantive principles of the defence of non-pathological incapacity due to provocation and emotional stress but the problem lies with poor decisions which arise from improper application of legal principles governing the defence. Furthermore, the problem of legal imprecision in this judgment has unjustifiably given rise to criticism of the defence of non-pathological incapacity due to provocation and emotional stress.

Indeed, it is submitted that although the provocation was severe, the reaction to the provocation did not indicate a complete loss of self-control, but it did indicate that the accused made a conscious choice in deciding not to act in accordance with his appreciation between right and wrong, this was brought on by the fact that that the accused was extremely angry with the deceased and desired revenge, and such revenge was extracted through a prolonged period of torture.

¹³⁶⁶ Louw supra (n 215) at 213.

¹³⁶⁷ Louw supra (n 215) at 214.

¹³⁶⁸ S v Nursingh supra (n 16).

The case of Moses¹³⁶⁹ is an example of a case where the principles of the defence were incorrectly applied, and resulted in a situation where a person, who savagely killed while in an “annihilatory rage” was allowed to plead non-pathological incapacity due to provocation and emotional stress and was acquitted.¹³⁷⁰ The Moses¹³⁷¹ judgment was problematic because it allowed for enraged individuals to use the provocation defence to escape criminal liability.¹³⁷² Louw argues that if Moses¹³⁷³ is followed, then, unlike Eadie,¹³⁷⁴ those who kill in circumstances of road rage can expect to be acquitted.¹³⁷⁵

It is submitted that it is not the purpose of the defence to aid individuals who kill out of rage and vengeance as the purpose of the defence is to aid persons who suffered a total lack of criminal capacity. Society should never be at the mercy of the short-tempered.¹³⁷⁶ It is submitted that it is misconception that the defence of non-pathological incapacity due to provocation and emotional stress is intended for serving the short-tempered in any event.

Furthermore, another point is that the accused was pre-disposed to angered states and the court should have taken cognisance of this.¹³⁷⁷ Other evidence indicates that the accused was a short-tempered individual who “snapped” when faced with emotional stress.¹³⁷⁸ Though the court was aware of this pattern of behaviour, it still accepted that provocation by the deceased caused a lack of criminal capacity.¹³⁷⁹

This finding is, with respect incorrect; the court erred in acquitting the accused. Furthermore, the deceased’s conduct, before, during, and after the committing of the

¹³⁶⁹ S v Moses supra (n 16).

¹³⁷⁰ Louw supra (n 215) at 216.

¹³⁷¹ S v Moses supra (n 16).

¹³⁷² De Vos supra (n 346) at 358.

¹³⁷³ S v Moses supra (n 16).

¹³⁷⁴ S v Eadie supra (n 18).

¹³⁷⁵ Louw supra (n 215) at 216.

¹³⁷⁶ Louw supra (n 215) at 216.

¹³⁷⁷ S v Moses supra (n 16).

¹³⁷⁸ S v Moses supra (n 16).

¹³⁷⁹ S v Moses supra (n 16).

killing further supports the assertion that the accused's controls did not collapse; the court should have at most made a finding that the accused suffered a state of diminished capacity.¹³⁸⁰

Other areas of dissatisfaction with the Moses¹³⁸¹ judgment concern the court failing to draw a distinction between diminished capacity and total lack of capacity.¹³⁸² The court's failure to consider that the accused may have suffered a state of diminished capacity rather than a complete lack of capacity is alarming.

Furthermore, the court implied that either state, that is, diminished capacity or lack of capacity can lead to a complete acquittal which is incorrect.¹³⁸³

“...his 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 killing”¹³⁸⁴

And

“Despite 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. While he knew that it was wrong in principle, his awareness of the wrongfulness of what he was doing at the time was also impaired”¹³⁸⁵

It is submitted that examination of case law demonstrates that there are problems with misapplication of the law to the facts of the cases in Nursingh¹³⁸⁶ and Moses.¹³⁸⁷ It is further submitted that the problems lie with application of legal concepts rather than with the concepts themselves. Due to the misapplication of legal principles, cases such as Moses¹³⁸⁸ and Nursingh¹³⁸⁹ have plunged the defence of non-pathological incapacity due to provocation and emotional stress in an unfavourable light thus resulting in the perceived need for reformation and even abolition of the defence. Commentators were

¹³⁸⁰ Louw supra (n 215) at 215.

¹³⁸¹ S v Moses supra (n 16).

¹³⁸² Louw supra (n 215) at 215.

¹³⁸³ Louw supra (n 215) at 215.

¹³⁸⁴ S v Moses supra (n 16) at 710c-d.

¹³⁸⁵ S v Moses supra (n 16) at 710h-i.

¹³⁸⁶ S v Nursingh supra (n 16).

¹³⁸⁷ S v Moses supra (n 16).

¹³⁸⁸ S v Moses supra (n 16).

¹³⁸⁹ S v Nursingh supra (n 16).

not happy with the new direction of the law whereby a complete acquittal could result out of provoked behaviour.¹³⁹⁰

It is submitted that the cases of Nursingh¹³⁹¹ and Moses¹³⁹² are problematic and created the perception that a defence based on provocation and emotional stress is intrinsically problematic, however upon closer analysis it is clear that these concerns are unfounded as the problem of facile acquittals are not due to the lack of safeguards within the defence, both Moses¹³⁹³ and Nursingh¹³⁹⁴ unearthed a lack of understanding of legal principle, specifically application of conative capacity; it is in this light that both decisions are questionable .

In the light of the troublesome cases in Arnold,¹³⁹⁵ Nursingh¹³⁹⁶ and Moses,¹³⁹⁷ it was necessary that Eadie¹³⁹⁸ provide much needed guidance to the courts on the proper application of principle and clarify possible points of confusion, with the aim of preventing problematic acquittals. It is submitted that the Eadie¹³⁹⁹ judgment failed in both respects. The forthcoming section will assess this judgment and the reasons for its deficiencies.

¹³⁹⁰ Burchell supra (n 2) at 324-325.

¹³⁹¹ S v Nursingh supra (n 16).

¹³⁹² S v Moses supra (n 16).

¹³⁹³ Moses supra (n 16).

¹³⁹⁴ S v Nursingh supra (n 16).

¹³⁹⁵ S v Arnold supra (n 16).

¹³⁹⁶ S v Nursingh supra (n 16).

¹³⁹⁷ S v Moses supra (n 16).

¹³⁹⁸ S v Eadie supra (n 18).

¹³⁹⁹ S v Eadie supra (n 18).

5.1.3. Analysis of Eadie

The case of Eadie¹⁴⁰⁰ has been the subject of much debate for many years due to the far-reaching implications of the judgment on the defence of non-pathological incapacity due to provocation and emotional stress. Snyman has stated that the judgment is “one of the most enigmatic judgments of the Supreme Court of Appeal in the field of the general principles of criminal law during the past half century.”¹⁴⁰¹ It must be noted that the judgment itself has had varied interpretations with some academics welcoming its pronouncements,¹⁴⁰² while others have been strongly critical of certain aspects of the judgment.¹⁴⁰³ These views will be interrogated in this chapter.

Firstly, it is submitted that the court in Eadie¹⁴⁰⁴ was correct in confirming the accused’s conviction for murder by dismissing the appeal.¹⁴⁰⁵ However, it is unfortunate that the judgment is often considered as a “good example of a correct decision arrived at for the wrong reasons.”¹⁴⁰⁶

¹⁴⁰⁰ S v Eadie supra (n 18).

¹⁴⁰¹ Snyman supra (n 1) at 161.

¹⁴⁰² Snyman supra (n 1) at 164 welcomes the courts recognition of the need for an objective factor within the concept of culpability; Louw supra (n 5) at 206 states that “Navsa JA’s judgment is an extremely thorough one in which he systematically traces the development of the defence of non-pathological incapacity due to emotional stress and provocation.”; Burchell supra (n 17) at 587 fn44, at 592 at fn 73 states that “the judge of appeal took the bold and encouraging step of emphasising the significant role of objective norms of behaviour as a barometer against which to test the accused’s alleged lack of criminal capacity in a road rage situation”

¹⁴⁰³ Hoctor supra (n 1) at 110 states that “despite the well-established nature of the defence of non-pathological incapacity, the law has been thrown into flux by the decision of the Supreme Court of Appeal in *S v Eadie*, which constitutes a serious erosion of the notion of criminal capacity..” , Louw supra (n 5) at 206 praises the judgment for bringing clarity to the defence criticises the possible introduction of an objective test and states “But (Navsa JA) goes too far when he introduces an objective test as well. This may be a hint at a swing towards a more normative approach to our law criminal law heralded by public sentiment aghast at the country’s alarming crime rate, but it is not in line with our general principles. It ought to be reviewed.” Snyman supra (n 1) at 161-163 and Burchell supra (n 2) at 327 are critical of the courts conflation of the distinct concepts of conative capacity and voluntariness.

¹⁴⁰⁴ S v Eadie supra (n 18).

¹⁴⁰⁵ S v Eadie supra (n 18).

¹⁴⁰⁶ Snyman supra (n 77) at 14

It is submitted that the best way to interpret the judgment is to understand the overall intention of the court. The Eadie¹⁴⁰⁷ judgment is, according to Snyman an example of the tension between legal theory and policy considerations. However it is submitted that in this case the purely “theoretical approach”¹⁴⁰⁸ suffered a defeat at the hands of the “policy approach”.¹⁴⁰⁹ The “policy approach” taken by the court is evident when analysing the reasoning of the court, the quest of the court was undoubtedly to restrict the operation of the defence non-pathological incapacity due to provocation and emotional stress spurred on by policy driven considerations, the following analysis of Eadie¹⁴¹⁰ will address these submissions.

5.1.3.1. Problematic conflation: non-pathological incapacity = sane automatism

It is submitted that there are two major difficulties arising from the Eadie¹⁴¹¹ judgment, the first, is undoubtedly the courts conflation of the defence of non-pathological incapacity with the defence of sane automatism.¹⁴¹² The ramifications of this conflation are tremendous and far-reaching.¹⁴¹³

¹⁴⁰⁷ S v Eadie supra (n 18).

¹⁴⁰⁸ Snyman supra (n 77) at 12 in terms of the “theoretical approach” the provocation defence is treated in terms of pure legal theory in contrast with the practical demands of criminal justice. This approach entails that the enquiry is restricted to assessing the accused’s mind at the moment when the unlawful act was committed. This determines if criminal capacity was present and if it is indeed shown to be present then it must be enquired if intention was present. If this approach is followed the test into determining liability in cases involving provocation is entirely subjective. This excludes an objective assessment in the form of the reasonable person. In terms of this approach provocation and in severe cases can operate as a complete defence in that it leads to an acquittal and not just a lesser conviction.

¹⁴⁰⁹ Snyman supra (n 77) at 12-13 states that in terms of the policy approach the defence of provocation is not restricted to the accused’s subjective state of mind but extends further to include an objective standard. The underlying rationale for the imposition of an objective standard is that the law expects individuals in society to control their tempers, therefore the those that chose not to control their emotions would not receive preferential treatment from the law, if the law makes this distinction then this amounts to the law holding the evenly tempered individual to a stricter standard. This approach is in line with that followed in Anglo-American law

¹⁴¹⁰ S v Eadie supra (n 18).

¹⁴¹¹ S v Eadie supra (n 18).

¹⁴¹² S v Eadie supra (n 18) at para 57, 70.

¹⁴¹³ Hoctor supra (n 1) at 148,166-168, Snyman supra (n 77) at 20-22.

It is submitted that while it is true that the defence of non-pathological incapacity due to provocation and emotional stress has had its controversies; namely the application of principle in cases of Arnold,¹⁴¹⁴ Nursingh,¹⁴¹⁵ Moses¹⁴¹⁶ it is the conflation of the defence of non-pathological incapacity with the defence of sane automatism by the court in Eadie¹⁴¹⁷ that has added the most uncertainty regarding the nature and operation of the defence. Burchell is correct in arguing that that the court has added to the confusion by redefining the fundamental general criminal requirement governing the element of criminal capacity by blurring the distinction between the concepts of conative capacity and the element of voluntariness.¹⁴¹⁸ The effects of this approach are not limited just to this defence but have the potential to cause a ripple effect on other areas of law as well.¹⁴¹⁹

The fundamental problem with this conflation is that it consists of the fusing of two distinct elements of criminal liability which changes the legal principle; this new development is not limited to cases involving provocation but may extend to cases involving emotional stress and other cases where the presence of criminal capacity is disputed.¹⁴²⁰

The court has demonstrated a lack of understanding of the element of capacity since the defence of sane automatism and non-pathological incapacity are governed by two different elements of criminal liability and confusing the two is indeed unscientific and retrogressive.¹⁴²¹

In terms of legal principles the two defences are fundamentally distinct, sane automatism relates to the ability to exercise control over muscular movement of an individual and assesses if the muscular movements were subject to the will of an

¹⁴¹⁴ S v Arnold supra (n 16).

¹⁴¹⁵ S v Nursingh supra (n 16).

¹⁴¹⁶ S v Moses supra (n 16).

¹⁴¹⁷ S v Eadie supra (n 18).

¹⁴¹⁸ Burchell supra (n 2) at 327.

¹⁴¹⁹ Snyman supra (n 77) at 22.

¹⁴²⁰ Burchell supra (n 2) at 327.

¹⁴²¹ Hoctor supra (n 355) at 205.

individual, while the defence of non-pathological incapacity relates to the ability to act in accordance with insight into right and wrong are different.¹⁴²² Essentially, the crux of the matter is that even though a person performs a voluntary act he may still lack the ability to act in accordance with his appreciation of right and wrong.¹⁴²³ The two tests are distinct in nature because they test two different elements of criminal liability.¹⁴²⁴

Ultimately, a person may still lack capacity even where the conduct is voluntary. Hence, voluntariness of an act cannot and should not be equated with self-control. If it is accepted that there is no difference between the two defences, then the result is that an accused person would have to show involuntary conduct in order for the defence of lack of conative capacity to succeed.¹⁴²⁵

Equating the test into voluntariness with the test into conative capacity is irreconcilable in the light of the same courts statement in Chretien¹⁴²⁶ where it was held that if a person, due to the effects of intoxication, is not able to differentiate between right and wrong and also does not have the capacity to act in accordance with this appreciation, then the individual does not possess criminal capacity.¹⁴²⁷

The purpose of the test to determine if conduct was voluntary is to assess if the individual was capable of directing muscular movement according to will and intellect.¹⁴²⁸ Principally, there is a distinct difference between making a decision and having the ability to execute the decision.¹⁴²⁹ An important point made by Snyman is that a person capable of performing voluntary conduct may still lack the ability to set goals and may not have the ability to pursue these goals or resist impulses to act contrary to what his insights tell him is right and wrong.¹⁴³⁰

¹⁴²² Hoctor supra (n 1) at 145.

¹⁴²³ Snyman supra (n 77) at 15-16.

¹⁴²⁴ Snyman supra (n 77) at 17.

¹⁴²⁵ Hoctor supra (n 1) at 195.

¹⁴²⁶ S v Chretien supra (n 204) at 1106 F, see Chapter 2 at 35 for discussion of this case.

¹⁴²⁷ Snyman supra (n 77) at 17.

¹⁴²⁸ Snyman supra (n 77) at 15.

¹⁴²⁹ Snyman supra (n 77) at 15.

¹⁴³⁰ Snyman supra (n 1) at 162-163.

This is illustrated by the example of children between the ages of ten and fourteen, who are able to control their muscular movements and therefore are capable of voluntary action, are usually found to be lacking the criminal capacity to resist temptation to perform unlawful actions; this is often the case when older offenders are involved. Snyman notes that the courts have traditionally acknowledged this sound principle and therefore the reasoning in Eadie¹⁴³¹ is inconsistent with this approach as it presupposes the element of voluntary conduct by an individual who not able to act in accordance with his appreciation of right and wrong.¹⁴³²

The ramifications of this view, as espoused by the court in Eadie¹⁴³³ is adverse and as Snyman correctly argues results in the rejection of the difference between the test to determine voluntariness and the test for conative capacity will lead to the basic concepts of criminal liability losing their significance. The court in Eadie¹⁴³⁴ essentially has approached the defence based on the lack of criminal capacity due to provocation as the same as a defence based on the lack of a voluntary act. The reasoning of the court is contradictory to the fundamental principles on which criminal liability is based.¹⁴³⁵

Burchell in an initial analysis of Eadie, describes the court's comment regarding the interrelationship between the defences of automatism and lack of capacity as "a difficult feature of the judgment" but concedes that at times the court seemingly regards the second leg of the capacity inquiry as being equivalent to the inquiry into voluntariness. Burchell submits that this "cautious" separation is warranted. The test for conative capacity tests the capacity to act voluntarily whereas the voluntariness inquiry is centred on the ability of the accused to control his conscious will.¹⁴³⁶

Furthermore, it must be born in mind that though in practice the two tests will, in most circumstances lead to the same result , this does not mean that the two tests should

¹⁴³¹ S v Eadie supra (n 18).

¹⁴³² Snyman supra (n 1) at 162.

¹⁴³³ S v Eadie supra (n 18).

¹⁴³⁴ S v Eadie supra (n 18).

¹⁴³⁵ Snyman supra (n 1) at 162.

¹⁴³⁶ Burchell supra (n 84) at 34-35 discussing S v Eadie supra (n 18).

merge on a theoretical basis. Snyman states that it is not unusual to find two tests leading to the same result, but nevertheless retaining their distinct nature.¹⁴³⁷

The court in Eadie¹⁴³⁸ stated that it acknowledged that the new approach to the defence meant a critical reinterpretation of the formulation of the defence of non-pathological incapacity formulated in the case of Laubscher¹⁴³⁹ as it stated:

“It appears to me to be clear that Joubert JA was concerned to convey, in the second leg of the test set [out] in the Laubscher case that the State has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Put differently, the acts must not have been involuntarily.”¹⁴⁴⁰

And

“It is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test in *Laubscher’s* case, from which an inference can be drawn that the act in question was not consciously directed, or put differently, that it was an involuntary act.”¹⁴⁴¹

However, despite this acknowledgement, the departure from precedent is unjustified and baseless. The court in Eadie¹⁴⁴² although mentioning the case of Chretien,¹⁴⁴³ failed to discuss the landmark judgment which clearly delineates the distinct nature of concepts of automatism, capacity and fault.¹⁴⁴⁴

¹⁴³⁷ Snyman supra (n 77) at 17 notes that a few examples can be found, firstly, the objective test in the test for assessing negligence is to a great extent the same as the inquiry into unlawfulness in regard to delict and crime, however the two tests nevertheless are considered distinct and kept separate. Another example can be found in the case of legal causation where the test to determine if result objectively assessed was foreseeable is the same as the inquiry into negligence, however the principle is that these two tests relate to two distinct elements in law. Furthermore, the inquiry into determining if a causal link existed in terms of the theory of adequate causation is similar in many respects to the test to determine negligence.

¹⁴³⁸ S v Eadie supra (n 18).

¹⁴³⁹ S v Laubshcer supra (n 1).

¹⁴⁴⁰ S v Eadie supra (n 18) at para 58.

¹⁴⁴¹ S v Eadie supra (n 18) at para 42.

¹⁴⁴² S v Eadie supra (n 18) at para 29-30 the court “in the quest for greater clarity and precision” dealt with previous decisions where the defence of non-pathological incapacity was considered and therefore cited S v Van Vuuren supra (n 246) where it made reference to S v Chretien supra (n 204).

¹⁴⁴³ S v Chretien supra (n 204).

¹⁴⁴⁴ S v Chretien supra (n 204) at 1104F-G and 1106E-G, discussed by Hoctor supra (n 1) at 145.

The reason behind the deliberate snubbing of the basis in Chretien¹⁴⁴⁵ could be because the court disagreed with the very principles delineated in the judgment. It is submitted that the court in Eadie¹⁴⁴⁶ has failed to understand the distinct attributes and purpose of the defences of non-pathological incapacity and the defence of sane automatism.

Furthermore, the court in Eadie¹⁴⁴⁷ states the approach taken is influenced by the previous decisions of the Supreme Court of Appeal¹⁴⁴⁸ However, it is submitted that the conflation of two distinct defences is not in line with precedent and this statement is therefore incorrect. This conflation is most troubling when one considers the ramifications on the defence of non-pathological incapacity due to provocation and emotional stress. Snyman is correct in questioning if the defence based on the lack of criminal capacity continues to exist after the pronouncements in Eadie¹⁴⁴⁹ when it essentially becomes the defence of sane automatism.¹⁴⁵⁰

According to Snyman, it may have been the intention of the Supreme Court of Appeal to abolish the defence but doing so would go against its own approach; hence, to avoid “losing face for changing its tune” the court went about redefine the defence in terms of which leads the reader to think that it was merely refining the defence to determine if the “boundaries of the defence... have been inappropriately extended.”¹⁴⁵¹ The Eadie¹⁴⁵² judgment only makes when it is assumed that certain mental states where non-pathological incapacity is caused by factors other than intoxication or provocation.¹⁴⁵³

¹⁴⁴⁵ S v Chretien supra (n 204).

¹⁴⁴⁶ S v Eadie supra (n 18).

¹⁴⁴⁷ S v Eadie supra (n 18).

¹⁴⁴⁸ S v Eadie supra (n 18).

¹⁴⁴⁹ S v Eadie supra (n 18).

¹⁴⁵⁰ Snyman supra (n 77) at 21.

¹⁴⁵¹ Snyman supra (n 77) at 21 discussing para 3 of S v Eadie supra (n 18).

¹⁴⁵² S v Eadie supra (n 18).

¹⁴⁵³ Snyman supra (n 77) at 22.

Navsa JA in addressing the conflation of the above defences in the judgment by Griesel J in Eadie¹⁴⁵⁴ acknowledged that the conflation has been criticised and specifically quotes Louw in support for this argument.¹⁴⁵⁵

The court placed reliance on the testimony of Dr Kaliski, a witness for the State along with this statement by Louw:

“Logic...dictates that we cannot draw a distinction between automatism and lack of self-control. If the two were distinct, it would be possible to exercise conscious control over one’s action (automatism test) while simultaneously lacking self-control (the incapacity test)”¹⁴⁵⁶

However, in respect of the courts reliance on the arguments of Louw and Dr Kaliski, Hoctor correctly points out that neither of these sources on whom Navsa JA based his findings on are compelling since, for one, Dr Kaliski, (a sceptic of the defence) concedes that despite being extremely critical of the defence of non-pathological incapacity, he accepts that where supporting evidence exists, the defence may be valid.¹⁴⁵⁷ Secondly, it is in the context of the lack of clarity regarding the notion of self-control that Louw puts forth this solution and the courts adoption of this view should have taken cognisance of this.¹⁴⁵⁸

Navsa JA was aware of the consequences of equating the two defences and 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

¹⁴⁵⁴ S v Eadie (2001) supra (n 18).

¹⁴⁵⁵ S v Eadie supra (n 18) at para 55.

¹⁴⁵⁶ S v Eadie supra (n 18) referring to Louw supra (n 215) at 210-211 where Louw states that there is no actual distinction between automatism and a lack of self-control, the second leg of the capacity inquiry should fall away and capacity should be determined only on the basis of the whether a person is able to appreciate the difference between right and wrong.

¹⁴⁵⁷ S v Eadie supra (n 18) at para 16: “Kaliski accepted that courts have held that in certain circumstances a combination of factors such as stress, provocation an the disinhibiting effects of alcohol may cause a person to lack criminal capacity .His experience, however, led him to conclude that temper an rage disinhibits people but does not rob them of control. 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 fact of compelling facts.”

¹⁴⁵⁸ Hoctor supra (n 1) at 143.

raise involuntariness as a defence. In the present contest [sic] the two are flip sides of the same coin.¹⁴⁵⁹

Navsa JA stated that an accused should be able to plead his case either on the basis that he acted as an automaton or alternatively on the basis that he acted involuntarily.¹⁴⁶⁰ The court recommended, in regard to the former, that the investigation into the mental component is not unconnected to the investigation into the involuntariness component.

Louw presumes that these two components come together during the inquiry into criminal capacity and is not persuaded by the argument against the separation of the two components, that is the physical and the mental.¹⁴⁶¹ In regard to this argument proposing the elimination of the second leg of the capacity inquiry, the court stated that it was “not persuaded” that this aspect of the capacity inquiry should be eliminated.¹⁴⁶² Although the court has demonstrated a lack of understanding of the criminal theory and despite its antipathy towards the notion of conative capacity, it ultimately takes the approach that the two inquiries have an independent existence, since the court stated that it was not persuaded that the second leg of the capacity should fall away.¹⁴⁶³

Louw’s justification for the separation of the mental and physical components of the capacity test was that it “will enhance the clarity and certainty of that inquiry”.¹⁴⁶⁴ Accordingly, Louw criticises the court in Eadie¹⁴⁶⁵ for retaining the physical and mental components of the capacity inquiry and dismissing the argument for elimination of the second leg as being an “over-refinement” which serves to “maintain a more scientific approach to the law”.¹⁴⁶⁶

It is submitted that the separating the mental and the physical component of the capacity enquiry will not bring clarity and certainty to the capacity test, rather this will result in

¹⁴⁵⁹ S v Eadie supra (n 18) at para 57.

¹⁴⁶⁰ S v Eadie supra (n 18) at para 57.

¹⁴⁶¹ Louw supra (n 5) at 204.

¹⁴⁶² S v Eadie supra (n 18).

¹⁴⁶⁴ Louw supra (n 5) at 205.

¹⁴⁶⁵ S v Eadie supra (n 18).

¹⁴⁶⁶ Louw supra (n 5) at 205 citing S v Eadie supra (n 18) at para 58.

an erosion of the capacity element. The second leg of the capacity inquiry is in fact an important and fundamental component of the capacity inquiry.¹⁴⁶⁷ As Burchell correctly argues, the two component elements of the different defences differ from each other in that one tests if the accused had the capacity to act unlawfully (cognitive control) and the second tests if the accused “actually acted unlawfully” in the defence of sane-automatism. The inquiries into capacity or rationality and *mens rea* are inherently distinct and should not be confused.¹⁴⁶⁸

Furthermore, the court’s conflation of the conative leg and the test for automatism is problematic for another reason, it is not only positive actions which may form the basis of criminal liability but an omission also suffices. It is a requirement that both omissions and commissions must be voluntary in order to form the basis for criminal liability. Hence, the same rule must apply *mutatis mutandis* to omissions as well.¹⁴⁶⁹ The requirement of voluntary conduct must then be the same as the capacity to act in accordance with the appreciation into right and wrong.

Snyman uses the example of a life-saver who has been physically detained and is therefore prevented from rescuing a drowning swimmer. This omission on the part of the lifesaver cannot form the basis of criminal liability for the death of a swimmer since the omission itself was involuntary in that the lifesaver was unable to subject his bodily movement in accordance to his will power. It is therefore ridiculous to postulate that the reason for this non-liability was that the capacity to act in accordance with the appreciation of right and wrong of the omission for the simple reason that the omission was not wrongful and not because conative capacity was lacking.

The same rules that apply to omission applies to positive actions since both forms of conduct form the basis of criminal liability and the defences of automatism cannot therefore be equated with conative control.¹⁴⁷⁰ Furthermore, one of the fundamental aspects of criminal liability in Continental legal systems is that there is a clear distinction between muscular movements committed while in a state of automatism and

¹⁴⁶⁷ Burchell supra (n 2) at 327-328.

¹⁴⁶⁸ Burchell supra (n 2) at 328.

¹⁴⁶⁹ Snyman supra (n 77) at 19.

¹⁴⁷⁰ Snyman supra (n 77) at 19.

acts committed when loss of self-control is suffered, that is when conative capacity is absent.¹⁴⁷¹

Snyman argues that by discarding the fundamental difference between the test to determine voluntariness and the test of conative capacity leads to the keystone doctrines of criminal liability being stripped of their significance. This process of merging the two tests results in the mental element in crime becoming a component of the test into the existence of voluntary conduct.¹⁴⁷² This approach is unsustainable although put forth in Eadie.¹⁴⁷³ Burchell argues that the courts “Delphic utterance” in this regard further exacerbates the confusion already created by the court on whether the scope of the defence of provocation is limited to cases involving sane automatism.¹⁴⁷⁴

Apart from the problematic conflation of two distinct defences, the Eadie¹⁴⁷⁵ judgment is beset by other inconsistencies and confusion, especially where the element of conative capacity is concerned.

The court, despite being unaccepting of the notion of conative capacity still maintains that the traditional two stage test for criminal capacity and states:

“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 to be notionally possible”¹⁴⁷⁶

The retention of the test (although fundamentally reinterpreted) indicates that the court considers that such a situation is possible and avoids nullifying the large body of contrary precedent which has developed since the landmark case of Chretien¹⁴⁷⁷.¹⁴⁷⁸ However, Hoctor correctly contends that retention of the second leg of the capacity inquiry may be meaningless since it is negated by a totally different defence of sane

¹⁴⁷¹ Snyman supra (n 77) at 20.

¹⁴⁷² Snyman supra (n 77) at 17.

¹⁴⁷³ Snyman supra (n 77) at 17 discussing S v Eadie supra (n 18).

¹⁴⁷⁴ S v Eadie supra (n 18) discussed by Burchell supra (n 2) at 327.

¹⁴⁷⁵ S v Eadie supra (n 18).

¹⁴⁷⁶ S v Eadie supra (n 18) at para 59, discussed by Hoctor supra (n 1) at 148.

¹⁴⁷⁷ S v Chretien supra (n 204).

¹⁴⁷⁸ Hoctor supra (n 1) at 148.

automatism and the result is that the accused's ability to act in accordance with the appreciation of right and wrong will not be evaluated.¹⁴⁷⁹

Furthermore, the subjective test for capacity is substituted by the objective standard in the form of the test for sane automatism.¹⁴⁸⁰ The result is that the test for voluntariness occurs twice, firstly to determine if the accused acted voluntarily, and secondly once cognitive capacity is determined, in lieu of the test for conative capacity.¹⁴⁸¹ This new development is illogical and has twisted the clear principled reasoning of the criminal law resulting in a muddle of confusion.

It is true that this confusion could have been prevented had the court in Eadie¹⁴⁸² applied the established criminal law principles which, it is submitted, were not in need of reform in the first place.¹⁴⁸³

5.1.3.2. Implications of the conflation

The revision of the test for conative capacity is unwelcome as it will have direct implications on those individuals who have a genuine need for the defence non-pathological incapacity due to provocation and emotional stress.

It is submitted the changes brought about by Eadie¹⁴⁸⁴ are especially prejudicial towards the battered woman or any victim of abuse who suffers a loss of self-control kills her abuser, since due to the conflation of the concepts of conative capacity and sane automatism, the accused would have to prove that her actions were involuntary. It seems that loss of self-control resulting from provocation and emotional stress is therefore no longer acknowledged as a result of this judgment.

It is submitted that by drastically limiting the scope of the defence of non-pathological incapacity due to provocation and emotional stress the court has dealt a blow towards

¹⁴⁷⁹ Hoctor supra (n 1) at 148.

¹⁴⁸⁰ Hoctor supra (n 1) at 148.

¹⁴⁸¹ Hoctor supra (n 1) at 148.

¹⁴⁸² S v Eadie supra (n 18).

¹⁴⁸³ Hoctor supra (n 1) at 164.

¹⁴⁸⁴ S v Eadie supra (n 18).

victims of abuse such as battered woman by depriving these individuals of society without a suitable defence. This is a travesty of justice. The victim of abuse such as the battered woman, who does not allege that her actions were involuntary, must have the option of a defence based on lack of capacity; furthermore, the defence of sane automatism is narrower and more difficult to prove.¹⁴⁸⁵

Therefore, it is submitted that the negation of the existence of the defence is detrimental to the criminal law system as it results in the partial elimination of the element of criminal capacity.¹⁴⁸⁶ The one consolation is that there is a place for the defence of non-pathological incapacity based on provocation in South African law although severely tempered.¹⁴⁸⁷

It is submitted that the integration of a totally different defence, sane automatism, into the defence of non-pathological incapacity results in the test for capacity being defeated, thus rendering it redundant. The conflation of the two defences creates difficulties not only in application but the presence of automatism also erodes the test for capacity ; there is a clear misunderstanding regarding the place and purpose of the capacity element since the lack of capacity does not necessarily mean voluntary conduct is not present.¹⁴⁸⁸

The Eadie¹⁴⁸⁹ judgment contains other problematic features; there are certain glaring inconsistencies which reveal discord in the reasoning of the court. The court's acceptance of the acquittal in that in Nursingh¹⁴⁹⁰ while rejecting the reasoning in Arnold,¹⁴⁹¹ Moses¹⁴⁹² and Gesualdo¹⁴⁹³ is an example.

¹⁴⁸⁵ S.V. Hoctor "Tracing the origins of the defence of non-pathological incapacity in South African criminal law" (2011) 17 Fundamina 70 at 82.

¹⁴⁸⁶ Hoctor supra (n 1485) at 81- 82.

¹⁴⁸⁷ Hoctor supra (n 1) at 148.

¹⁴⁸⁸ Snyman supra (n 77) at 15.

¹⁴⁸⁹ S v Eadie supra (n 18).

¹⁴⁹⁰ S v Nursingh supra (n 16).

¹⁴⁹¹ S v Arnold supra (n 16).

¹⁴⁹² S v Moses supra (n 16).

¹⁴⁹³ S v Gesualdo supra (n 308).

Hoctor correctly points out that Navsa JA¹⁴⁹⁴ described the accused in Nursingh¹⁴⁹⁵ as having displayed “goal directed actions” when he aimed and shot at his mother and grandparents multiple times, and that he was not acting as an automaton, thus he could not have relied on the new approach formulated by the court in Eadie¹⁴⁹⁶ and hence should have been found guilty of murder based on the new approach.¹⁴⁹⁷

Although, the court acknowledged the enormity of the “deed” in Nursingh¹⁴⁹⁸ and despite stating that the killing creates a sense of disquiet, the court nevertheless felt that the evidence proved that the intellect of the accused in Nursingh¹⁴⁹⁹ was destroyed and the goal-directed actions performed by the accused were limited to the multiple shootings. Furthermore, the court explains that the trigger was an accumulation of physical, emotional and sexual abuse over a period of a few years and this combination of factors were extreme and unusual.¹⁵⁰⁰

In regard to the Moses¹⁵⁰¹ judgment, the court felt strongly that “the unsatisfactory state of affairs” allowed the accused to succeed in pleading the defence. The court attributes this “problem” to the misapplication and misreading of the previous decisions of the court.¹⁵⁰²

It is submitted that from the interpretation of the above statement, that the court is dissatisfied with the manner in which the defence of non-pathological incapacity has been applied and this misapplication of law over recent times has led to individuals who did not exhibit automatic behaviour, being acquitted and the problem of inconsistent application of the law has led to wrongly decided cases leading to unjust results and this may bring the law into disrepute. Evidently, the court is of the opinion that if an accused did not exhibit automatic behaviour, then they are undeserving of an acquittal.

¹⁴⁹⁴ S v Eadie supra (n 18) at para 48.

¹⁴⁹⁵ S v Nursingh supra (n 16).

¹⁴⁹⁶ S v Eadie supra (n 18).

¹⁴⁹⁷ Hoctor supra (n 1) at 137.

¹⁴⁹⁸ S v Nursingh supra (n 16).

¹⁴⁹⁹ S v Nursingh supra (n 16).

¹⁵⁰⁰ S v Eadie supra (n 18) at para 48.

¹⁵⁰¹ S v Moses supra (n 16).

¹⁵⁰² S v Eadie supra (n 18).

It is submitted that the court has either misunderstood the nature of the defence of non-pathological incapacity due to provocation and emotional stress or does not accept that such a state can possibly exist without being in a state of automatism. When an individual is unable to resist an urge or to exercise self-control, then he does not possess conative capacity and cannot act in accordance with the distinction between right and wrong or decide whether to succumb to temptation.

According to Hoctor the apparent disregard for existing precedent in Eadie¹⁵⁰³ is hard to explain, and a possible explanation is that the court disagrees with the operation of the defence and speculates that this approach “amounted to a sort of judicial ground-clearing for the theoretical edifice which was to follow”.¹⁵⁰⁴ If it was the intention of the court was to re-define the defence then the court should have clarified its decision to depart from existing law.¹⁵⁰⁵

The intention of the court was to redefine the defence in order to demonstrate that there is little allowance in our law for such a defence based non-pathological incapacity due to provocation and emotional stress. However in order to effect such a drastic change to the defence of provocation due to non-pathological incapacity the court sought to justify its reasoning by using legal theory to justify rejecting the basic difference between the inquiry into voluntariness and conative capacity. The intention of the court was to show that there is little or no place for this defence in South African law; however, as Snyman correctly argues this back-fired and proved that the opposite is true.¹⁵⁰⁶

The Supreme Court of Appeal has not addressed the question on whether the defence of non-pathological incapacity continues to exist after Eadie,¹⁵⁰⁷ Snyman states that in effect the defence has been abolished, not only in circumstances where provocation has caused the incapacity, but may also extend to cases where incapacity was caused by

¹⁵⁰³ S v Eadie supra (n 18)

¹⁵⁰⁴ Hoctor supra (n 1) at 138.

¹⁵⁰⁵ Hoctor supra (n 1) at 138.

¹⁵⁰⁶ Snyman supra (n 77) at 15.

¹⁵⁰⁷ S v Eadie supra (n 18).

stress, shock, concussion, panic or fear since these states are closely tied to emotional stress brought on by provocation and which may be difficult to separate.¹⁵⁰⁸

This development by the Eadie¹⁵⁰⁹ judgment results in the disintegration of defence of non-pathological incapacity based on provocation and emotional stress. It follows that only if it is proved that provocation and emotional stress caused the accused to act involuntarily will liability be excluded.¹⁵¹⁰

5.1.3.3. Affective functions and criminal capacity

In the following emphatic statement by the court in Eadie¹⁵¹¹ the court further raised an important issue, which warrants interrogation. The court attacked the basis of the defence of non-pathological incapacity due to provocation and emotional stress which allows affective functions of the mind to impinge on the inquiry into criminal capacity and stated:

“[t]he view espoused by Snyman and others, and reflected in some of the decisions of our courts, that the defence of non-pathological criminal incapacity is distinct from a defence of automatism, followed by an explanation that the former defence is based on 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 violence to the fundamentals of any self-respecting system of law.”¹⁵¹²

The courts view on affective functions is in line with the influential report by The Rumpff Commission where it was emphasised that emotional disturbances resulting from affective functions should not operate to exclude criminal capacity unless cognitive or conative functions were lacking.

The Commission stated:

“The uncontrolled emotional outbursts to which some people are liable sometimes adduced as a ground for non-responsibility, it being alleged that the person was acting on an irresistible, uncontrollable impulse. Admittedly severe emotional tension can evoke involuntary muscular reactions- trembling, palpitations, fainting fits, vomiting-but where there is volitional action,

¹⁵⁰⁸ Snyman supra (n 1) at 164.

¹⁵⁰⁹ S v Eadie supra (n 18).

¹⁵¹⁰ Hoctor supra (n 1) at 149.

¹⁵¹¹ S v Eadie supra (n 18).

¹⁵¹² S v Eadie supra (n 18) at para 60 (author’s emphasis); see discussion in Snyman supra (n 77) at 19.

volitional control is possible, unless the facts prove that there was disintegration of the other functions as well. Emotional impulsiveness or lability there does not, in our opinion, exclude responsibility, especially if the behaviour of the person concerned gives or has given evidence of insight and volitional control".¹⁵¹³

However, it is submitted that the Commission emphasised that emotional impulsiveness or lability should not generally exclude criminal responsibility but it could, and it is submitted it should, exclude criminal responsibility if insight and self-control are also lacking. It is thus submitted that on a fundamental level it does not matter what causes lack of capacity, but the fact that capacity is lacking is the crux of the matter.¹⁵¹⁴ In this light, Hoctor correctly argues that any distinction between provocation or emotional stress forming the basis of a defence of non-pathological incapacity should only affect matters relating to evidence.¹⁵¹⁵

Snyman, in addressing the court's view, argues that the court's statement above amounts to a unacceptable exaggeration, and argues that the courts in Germany recognise disturbances of affective functions such as an emotional breakdown, anger, fear or panic as a basis which criminal culpability may be excluded if at the time of commission of the act and owing to an extreme disturbance of consciousness or mental deviation, is not able to appreciate the unlawfulness of the act or of acting in accordance with such an appreciation.¹⁵¹⁶

Furthermore, section 10 of the Austrian penal code and section 10 of the Swiss penal code contain provisions to a similar effect.¹⁵¹⁷ Therefore it is incredible to assert that these Continental legal systems are not self-respecting or worthy of respect.¹⁵¹⁸

As mentioned previously, the concept of criminal capacity is derived from Continental law, which has been highly influential in the development of "toerekeningsvatbaarheid".

¹⁵¹³ Rumpff Commission Report *supra* (n 187) at 9.19.

¹⁵¹⁴ Snyman *supra* (n 2) at 164, Hoctor *supra* (n 1) at 162.

¹⁵¹⁵ Hoctor *supra* (n 1) at 162.

¹⁵¹⁶ Snyman *supra* (n 77) at 20 referring Section 20 of the German Penal Code.

¹⁵¹⁷ Snyman *supra* (n 77) at 20.

¹⁵¹⁸ Snyman *supra* (n 77) at 20.

Therefore like the Continental law, South African law has justifiably recognised and accepted that affective disturbances can exclude criminal capacity.

Furthermore, the fear in allowing a defence based on provocation and emotional stress stems from fears of facile acquittals. The case of Moses¹⁵¹⁹ is often used to support the argument that affective disruptions should not impinge on the capacity inquiry, it is clear from analysis of the accused's evidence, the accused stated that he was furious¹⁵²⁰, the emotion of fury, feeling of betrayal and hurt,¹⁵²¹ these fall under the category of affective functions of the mind. Essentially the accused hated the deceased, however the accused displayed controlled behaviour as opposed to uncontrollable, it is only the latter which results in a total disintegration of capacity.

The Moses¹⁵²² judgment is an example of a case where the principles of the defence were incorrectly applied. Acquitting an accused after systematically killing a person out of hate and fury meant that society is subjected to the "whims of the short-tempered"¹⁵²³ who chose not to control their action. However, it is submitted that the recognition of affective functions in Moses is not the problem, the problems lies with assessing when self-control is lacking. If the principles of the defence are correctly applied, then there is not need to fear the basis of the defence. It is therefore submitted that the source of the incapacity should be irrelevant, where there are indications that an accused suffered a complete disintegration of criminal capacity an acquittal must follow, this is the heart of the defence of non-pathological incapacity.

The case of Moses¹⁵²⁴ is problematic not because the accused was acquitted because affective functions were disturbed, but despite indications of the presence of cognitive capacity in the conduct of the accused, the accused was acquitted.¹⁵²⁵ The court failed to assess if the accused's acts were in accordance with his insights. In accomplishing a

¹⁵¹⁹ S v Moses supra (n 16).

¹⁵²⁰ S v Moses supra (n 16) at 705g-h.

¹⁵²¹ S v Moses supra (n 16) at 705e-f.

¹⁵²² S v Moses supra (n 16).

¹⁵²³ Louw supra (n 215) at 216.

¹⁵²⁴ S v Moses supra (n 16).

¹⁵²⁵ Rumpff Commission Report supra (n 187) at 9.25-9.26.

series of different acts, there are strong indications that that the accused did not suffer a loss of self-control.

5.1.4. The requirement of loss of self-control

The notion of self-control is in itself controversial both in South African law and in English and Canadian law. It has been argued by academics such as Louw that there is no clear understanding of the actual nature of the concept loss of self-control and attributes this confusion to the notion being a “legal construction without a psychological foundation”.¹⁵²⁶

In support of this argument Louw¹⁵²⁷ makes reference to Eadie¹⁵²⁸ where the court stated:

“With regard to the question of “losing control”, both Dr Kaliski and Mr Lay had great difficulty with the concept, which is not a psychological term”.¹⁵²⁹

The court made a lame attempt to resolve this standoff between the legal fraternity and the medical community by relying on “legal jealousy”¹⁵³⁰ and stated:

“The fact of the matter is that in the final analysis the crucial issue of the appellant’s criminal responsibility for his actions at the relevant time is a matter to be determined, not by psychiatrists, but by the court itself”¹⁵³¹

Louw argues that while it is trite that the courts are the final arbiter of all decisions, the decisions must be based on a sound foundation. In the present context a sound psychological foundation for the concept of “loss of self-control” is lacking, therefore its place in this area of law is questionable.¹⁵³² However, it is submitted that a strong legal foundation supporting the notion of loss of self-control exists; this was provided in

¹⁵²⁶ Louw supra (n 215) at 210.

¹⁵²⁷ Louw supra (n 215) at 210.

¹⁵²⁸ S v Eadie supra (n 18).

¹⁵²⁹ S v Eadie at supra (n 18) at 178i-j, discussed in Louw supra (n 215) at 210.

¹⁵³⁰ Louw supra (n 215) at 210.

¹⁵³¹ S v Eadie supra (n 18) at 180d-e.

¹⁵³² Louw supra (n 215) at 210.

the influential Rumpff Commission Report¹⁵³³ which provides sufficient credence to this notion.

The notion of capacity for self-control or the ability to exercise free choice to act lawfully or not stemmed from the Rumpff Commission Report¹⁵³⁴ and forms the foundation for the description of conative capacity in many judgments.¹⁵³⁵ Certain judgments¹⁵³⁶ employ the definition provided in the dictum of Joubert JA in Laubscher¹⁵³⁷ such as Wiid¹⁵³⁸ and Van der Sandt.¹⁵³⁹

In other judgments, conative capacity has been described differently, focusing on the capacity to exercise restraint.¹⁵⁴⁰ The requirement of loss of self-control is considered an integral part of the provocation defence not only in South African but England and Canada.

In terms of the Rumpff Report¹⁵⁴¹ the notion of self-control or “weerstandskrag” was explained. The conflation of the two concepts, that is voluntary conduct and conative capacity, stems from a lack of understanding of the definition of self-control as explicated by Wiersma in the Rumpff Report.¹⁵⁴²

¹⁵³³ Rumpff Commission Report supra (n 187).

¹⁵³⁴ Rumpff Commission Report supra (n 187).

¹⁵³⁵ Snyman supra (n 77) at 18.

¹⁵³⁶ In S v Lesch supra (n 249) and S v Campher supra (n 8) the term of “weerstandskrag” was used.

¹⁵³⁷ S v Laubscher supra (n 1).

¹⁵³⁸ S v Wiid supra (n 8) at 563F-J.

¹⁵³⁹ S v Van der Sandt (1998) 2 SACR 627 (W) at 635E-I.

¹⁵⁴⁰ Hoctor supra (n 1) at 160 fn 410, see Krause supra (n 290) at fn 1330: In S v Nursingh supra (n 16) at 338H-I the accused was described as “irrational, unthinking and blind to restraint”; in S v Moses supra (n 16) at 710H-I the accused “capacity to retain control”. See S v Ingram supra (n 306) at 4F,7B-C and 8B-C. In S v Van Vuuren supra (n 246) at 17G the court cites Chretien supra (n 204) at 1106, the enquiry into whether the accused’s inhibitions had “weselik verkrummel” (essentially crumbled). In S v Adam 1986 (4) SA 882 (A) at 903D, the court describes the accused’s inhibitions as having been completely disintegrated. In S v Kalagoropoulos supra (n 306) at 24A and 26A and S v Gesualdo supra (n 308) at 75B and 77G a general approach was taking to describe loss of self-control.

¹⁵⁴¹ Rumpff Commission Report supra (n 187) at para 9 33; discussed by Hoctor supra (n 1485) at 81.

¹⁵⁴² Rumpff Commission Report supra (n 187) at para 9.33 discussed by Hoctor supra (n 1485) at 81.

On this point reference can be made to the Rumpff Commission report where it was stated:

“When a man kills his friend in a fit of rage, his behaviour does not spring from any blind, impulsive drive or uncontrollable emotion. He is performing a goal-directed act. In his (momentary) rage he has not controlled himself, but his action was by no means uncontrollable, as in cases of automatism”.¹⁵⁴³

The definition of self-control, cited in the Rumpff Report¹⁵⁴⁴ and the case law unfortunately did not resonate with the court in Eadie despite the concept being foundational in the development and formulation of the defence.¹⁵⁴⁵

In Eadie the court stated:

“The courts have conflated two different scenarios: where an accused owing to his volatile and emotional nature commits a crime due to lack of sufficient self-control, and the situation where an accused, through a long series of events finds herself in a state where there has been complete disintegration of her control and therefore a concomitant lack of criminal capacity”¹⁵⁴⁶

Self-control and its relation to conative capacity are distinct from the assessment on the whether an action was voluntary. In respect of voluntary conduct, the mind of the accused is not responsible for actions committed, the actions are performed “mindlessly” and goal-directed actions will not be possible.¹⁵⁴⁷

According to Wiersma, self-control refers to the nature of the perpetrator and his insight into the unlawful nature of an act and prevents execution of the unlawful act, creating a counter-motive; self-control in terms of this definition is subject to the mind of the accused and is distinguishable on this basis of voluntary conduct.¹⁵⁴⁸

¹⁵⁴³ Rumpff Commission Report supra (n 187) at para 9.26.

¹⁵⁴⁴ Rumpff Commission Report supra (n 187).

¹⁵⁴⁵ Hoctor supra (n 1485) at 81.

¹⁵⁴⁶ S v Eadie supra (n 18) at para 61.

¹⁵⁴⁷ Rumpff Commission Report supra (n 187) at para 9.33.

¹⁵⁴⁸ Rumpff Commission Report supra (n 187) at para 9.33.

Snyman correctly states that with involuntary conduct something happens to the accused, the accused cannot prevent himself from performing the unlawful action but his “mind and will” are involved and the actions are totally voluntary.¹⁵⁴⁹ Furthermore, behaviour due to a lack of conative capacity is considered uncontrollable and therefore actions as a result do not attract blame and criminal liability since the agent was unable to exercise free will. The distinction between uncontrollable and uncontrolled actions is crucial, since the latter attracts criminal liability.¹⁵⁵⁰

De Vos defines self-control as “a disposition of the perpetrator through which her insight into the unlawful nature of the particular act can restrain her from, and thus set up a counter-motive to, its execution.”

De Vos accurately explains this link:

“A lack of self-control can thus lead to a collapse of this conative functioning of the mind and hence criminal incapacity. Such conative function (which when affected excludes criminal 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 actor. While there is volitional activity on the part of the actor, volitional control will be possible, unless the facts demonstrate that there was a disintegration of the other functions as well. Although the affective function of an individual’s mind may be impaired by provocation or other factors, this on its own will have no bearing on the finding on whether the accused had the requisite criminal capacity or not”.¹⁵⁵¹

Du Plessis, a proponent of this view argues that in its purest form, the defence of “toerekeningsvatbaarheid” or the lack of criminal capacity should be available only to those who at the time of the commission of the crime were by reason of a mental defect or mental illness and not able to appreciate the wrongfulness of his or her act or not be able to act in accordance with that appreciation.¹⁵⁵²

Hence, if a person acts in either of the two conditions, the accused must have been suffering from a mental defect. The “extension” of the defence of non-pathological

¹⁵⁴⁹ Snyman supra (n 2) at 55.

¹⁵⁵⁰ Ashworth supra (n 57) at 236 discussed by Hoctor supra (n 1485) at 81.

¹⁵⁵¹ De Vos supra (n 346) at 357.

¹⁵⁵² Du Plessis supra (n 182) at 540.

incapacity to the intoxicated and to the “sorely provoked” has amounted to the defence of insanity being made available to the sane.¹⁵⁵³

It is thus contended that the condition of lack of self-control can only be caused by a mental defect and if no mental defect exists then this confirms that a person can differentiate between right and wrong and therefore act in accordance with this appreciation cannot occur.¹⁵⁵⁴ Du Plessis argues that it is unacceptable for the law to allow a sane person to claim a loss of self-control. This should not operate as a complete defence to a murder charge especially when the accused admits that the killing was committed intentionally.¹⁵⁵⁵

The basis of this argument is that is one thing for attribute violence to a loss of self-control, but to commit a deliberate killing and attribute it to lost self-control is another.¹⁵⁵⁶ Du Plessis is thus of the opinion that the latter scenario indicates an abnormal state of mind and should therefore be dealt with and investigated in terms of the “insanity defence” that is Chapter 13 of the Criminal Procedure Act of 1977.¹⁵⁵⁷

In essence, a claim of non-pathological incapacity which is characterised by a loss of self-control, according to Du Plessis is a form of insanity and thereby a form of pathological incapacity.¹⁵⁵⁸

However, it is submitted that this argument is invalid since the defence of non-pathological incapacity due to provocation and emotional stress has a unique quality that is it is a defence for the sane and accommodates a middle ground in respect that the effects of provocation or emotional stress short of sanity is recognised, the law through the defence of non-pathological incapacity rightfully acknowledges that due to emotional distress in the form of fear, anger and extreme emotional turmoil cause a disintegration of capacity resulting in actions become uncontrollable and therefore not blameworthy.

¹⁵⁵³ Du Plessis supra (n 182) at 540.

¹⁵⁵⁴ Du Plessis supra (n 182) at 540.

¹⁵⁵⁵ Du Plessis supra (n 182) at 542.

¹⁵⁵⁶ Du Plessis supra (n 182) at 542.

¹⁵⁵⁷ Du Plessis supra (n 182) at 542.

¹⁵⁵⁸ Du Plessis supra (n 182) at 542.

In this light, Hoctor argues that the comments by Du Plessis are not well-founded, as the fact that the term non-pathological incapacity has been coined gives the defence its recognition and identity in its own right. In the influential case of Laubscher, the court laid down the theoretical framework for the defence and added to established case law supporting the principles on which criminal capacity is based, it was definitively established that the defence of non-pathological incapacity has an autonomous existence and this means that the defence was not created by merely extending the insanity defence to the sane; detractors of the defence have failed to understand the purpose and the nature of the defence which has created confusion and contempt towards a defence based on provocation defence.¹⁵⁵⁹

5.1.5. The role of expert evidence

There are a few important issues which relate to the expert evidence where the defence of non-pathological incapacity due to provocation and emotional stress is concerned. In the South African context, expert evidence is not a prerequisite and is not considered to be indispensable; a plea of non-pathological incapacity may therefore be raised without the leading of expert evidence.¹⁵⁶⁰

However, the courts approach a defence based on non-pathological incapacity with caution and circumspection, and therefore success of a case will depend on expert evidence.¹⁵⁶¹ In the majority of the reported cases in which the defence was pleaded, expert evidence was led in respect of the accused's mental capabilities at the time of the incident in question.¹⁵⁶² The courts in South Africa have approached a defence based on non-pathological incapacity with caution therefore expert evidence in support of this defence is considered important.¹⁵⁶³

It is submitted that there is a shortcoming of the defence of non-pathological incapacity is that there is uncertainty in respect of the necessity of expert evidence in laying the

¹⁵⁵⁹ Hoctor supra (n 1) at 127 discussing S v Laubscher supra (n 1) at 167F.

¹⁵⁶⁰ S v Laubscher supra (n 1) at 161-167, Calitz supra (n 295) at 119-121.

¹⁵⁶¹ Carstens and Le Roux supra (n 3) at 181-182.

¹⁵⁶² Van Oosten supra (n 186) at 141.

¹⁵⁶³ Carstens and Le Roux supra (n 3) at 182.

factual foundation for the defence. There are cases such as Campher¹⁵⁶⁴ and Wiid which indicate that expert evidence may be essential.¹⁵⁶⁵

The uncertainties and debate regarding admissibility of expert testimony in cases involving the provocation defence are not limited to South Africa but extend to England and Canada where admissibility of expert evidence has garnered some attention.¹⁵⁶⁶ In England and Canada the general position is that expert evidence is inadmissible in cases involving provocation; however, in England this approach has been the subject of criticism as it is contended that that certain behaviours or mental states cannot be understood without the assistance of medical practitioner who specialises in the field of psychiatry or psychology.¹⁵⁶⁷

However, it has been contended the scope of admissible evidence should be widened to include abnormal and usual states of mind that cannot be categorised as mental illness and may not be understood by a lay person even with common sense.¹⁵⁶⁸ It is thus argued that expert testimony can be very useful in such cases as it may aid in understanding the mind-set of the accused at the time of commission of the offence.¹⁵⁶⁹

In Canada, Australia and New Zealand evidence relating to battered woman syndrome has been admitted in cases. Syndrome evidence has been regarded as important as it may shed light on the emotional makeup of the accused at the time of the commission of the killing and factors that made him or her more prone to provocation.¹⁵⁷⁰

In South Africa, the courts have used a range of terminology in defining the symptoms of the battered woman's syndrome, this includes the terms such as "impulsive mania" in

¹⁵⁶⁴ S v Campher supra (n 8).

¹⁵⁶⁵ Van Oosten supra (n 186) at 141, see also S v Calitz supra (n 296) at 119.

¹⁵⁶⁶ T. Ward "Usurping the role of the jury? Expert evidence and witness credibility in English criminal trial" (2009) 13 International Journal of Evidence and Proof 83 at 83.

¹⁵⁶⁷ Colman and Mackay supra (n 974) at 49.

¹⁵⁶⁸ Colman and Mackay supra (n 974) at 49.

¹⁵⁶⁹ Mackay and Coleman supra (n 979) at 95.

¹⁵⁷⁰ Mackay and Coleman supra (n 979) at 95.

the case of Campher¹⁵⁷¹ and “emotional flooding of the mind” in Smith¹⁵⁷² and in Potgieter¹⁵⁷³ the court termed this phenomena as an “emotionally distraught and unable to exercise a normal degree of self-control”.¹⁵⁷⁴

The reactions of a battered woman to an abusive situation may differ greatly, some women might react in fear or anger, or resort to substance abuse or self-blame, or slip into a state of depression. In this light the effect of abuse may not meet the criteria which support a clinical diagnosis in certain circumstances.¹⁵⁷⁵

In jurisdictions such as the United States, battered woman syndrome is often utilised and regarded as a form of post-traumatic stress disorder; however, battered woman syndrome is not regarded as a mental disease or defect.¹⁵⁷⁶ Essentially expert evidence has been utilised to explain to the court why the accused as well as the deceased behaved in the manner in which they did. Syndrome evidence has been especially useful in cases involving cumulative provocation and the impact of long-term abuse on the accused. Expert evidence may aid in showing that the accused may have been more prone to provocation.¹⁵⁷⁷

Assessment of the provocation defence in England and Canada reveals that both jurisdictions take a cautious approach in admitting expert evidence in cases involving provocation due to the concern that the jury or the judge in certain instances may attach too much weight to the evidence, this essentially usurps the role of the jury in making a decision on the central issue.

¹⁵⁷¹ S v Campher supra (n 8).

¹⁵⁷² S v Smith supra (n 301).

¹⁵⁷³ S v Potgieter supra (n 390).

¹⁵⁷⁴ Carstens and Le Roux supra (n 3) at 188.

¹⁵⁷⁵ M. Reddi. “Battered Woman Syndrome: Some Reflections on the Utility of this “Syndrome” to South African Women who Kill their Abusers” (2005) 3 South African Journal of Criminal Justice 259 at 262

¹⁵⁷⁶ Reddi supra (n 1575) at 262, S.Kaliski Psycholegal Assessment in South Africa (2007) at 4 states that clinicians in South African base their diagnosis from the categories listed in DSM-IV or ICD-10.

¹⁵⁷⁷ Reddi supra (n 1575) at 262.

However, in cases involving cumulative provocation like the battered woman syndrome, expert evidence is considered to be important issue in both Canada and England relating to the admission of expert evidence where mental illness is not in issue therefore forensic psychiatric evidence seen as unnecessary and irrelevant since the provocation defence is a defence for the sane.

The concerns relating to over-reliance on expert testimony and the fear of experts usurping the courts authority is a valid one. There seems to be a struggle in achieving a balance in this area in regard to accepting the importance of expert evidence in coming to a fair and just result while also ensuring that the views of the expert don't unduly influence the court. This problem can be illustrated in the case of Nursingh.¹⁵⁷⁸ A critical feature of this case was that the state did not lead expert evidence regarding the state of mind of the accused while the defence did lead expert evidence. This case highlights evidentiary problems specifically related to how expert evidence is governed in cases involving non-pathological incapacity due to provocation and emotional stress.

The Nursingh¹⁵⁷⁹ case demonstrates the importance of expert evidence and more importantly highlights the need for judges to demand expert evidence to achieve a balanced view and may aid in assessing the validity of the accused's version of the defence. Besides the glaring imbalance in respect of expert evidence in Nursingh,¹⁵⁸⁰ there are issues emanating from the expert testimony itself which reveal a lack of understanding of legal concepts.

The role of that expert evidence played in Arnold¹⁵⁸¹ is significant. Firstly, the State did not lead expert psychiatric evidence either in support of their case or challenge the opinions of the evidence led by the defence witness Dr.Gittleson who testified that the accused's conscious mind was flooded by emotions which interfered with his capacity to appreciate what was right and wrong, therefore due to the severity of his emotional disturbance the accused might have lost the capacity to exercise control over his actions.

¹⁵⁷⁸ S v Nursingh supra (n 16).

¹⁵⁷⁹ S v Nursingh supra (n 16).

¹⁵⁸⁰ S v Nursingh supra (n 16).

¹⁵⁸¹ S v Arnold supra (n 16).

Dr.Gittelson further stated that the accused had acted subconsciously at the significant moment.

This case is another example of expert witnesses blurring the lines between the defences of non-pathological incapacity and sane automatism which amounts to “fudging of doctrinal distinctions”.¹⁵⁸² This error proved problematic in this case as the court relied on the uncontested evidence by the defence and found that it could find beyond a reasonable doubt that the accused acted consciously when killing the deceased. This case is an example of the important role that expert evidence may play in proving a case based on criminal capacity or incapacity.¹⁵⁸³

This poses a potential problem especially if the court places reliance on the views of experts. It is submitted that this factor is critical as it tipped the scales in favour of the defence as the judge did not obtain a balanced view. In assessing the case law involving the non-pathological incapacity due to provocation and emotional stress it is apparent that there is a tendency of experts such as psychologists and psychiatrists to conflate the defence of sane automatism and non-pathological incapacity.¹⁵⁸⁴

This poses a problem, especially when a court places reliance on that testimony, as stated previously, the views of the medical community may at times be in conflict with that of legal doctrines; however, the onus is on the court to decide on legal principles. It is submitted that the role of the criminal law is different to that the medical fraternity. Hence, when expert testimony is led, cognisance of this fact must be taken into account.

It is submitted that the court in Eadie¹⁵⁸⁵ placed over-reliance on expert evidence at the expense at the expense of legal principle, which resulted in fundamental adverse changes to the defence, the views of experts such as psychologists and psychiatrists should not be allowed to encroach and undermine legal principle, since the legal

¹⁵⁸² Hoctor supra (n 355) at 201.

¹⁵⁸³ Stevens supra (n 13) at 133-134.

¹⁵⁸⁴ Hoctor supra (n 1) at 166.

¹⁵⁸⁵ S v Eadie supra (n 18).

principle may not always be compatible with those views and opinions of the medical community.¹⁵⁸⁶ This constituted a fundamental error in the Eadie¹⁵⁸⁷ judgment.

There is disagreement between medical professionals (who often give expert testimony) and the law since a loss of self-control is a legal phenomenon and cannot be attributed to a pathological condition.¹⁵⁸⁸ Mental health practitioners do not in most circumstances draw a distinction between the defences of sane automatism on the one hand and loss of self-control emanating out the absence of conative functions.¹⁵⁸⁹

Psychiatrists and other mental health care professionals are in most circumstances called to give evidence as expert witnesses. However, ironically, the medical fraternity doubt the very existence of the defence of non-pathological incapacity therefore in most cases cannot a link between a dissociative state or amnesia (sometimes suffered by accused persons raising the defence of non-pathological incapacity) to psychiatric diagnosis will not be made.¹⁵⁹⁰

This was the situation in the case of Kensley where the expert witness, a forensic psychiatrist determined that the accused suffered from “no pathology recognised in psychiatry”.¹⁵⁹¹ In most cases the sceptism by mental health practitioners towards the defence of non-pathological incapacity is problematic to the accused since in most cases a psychiatrist may be only willing to concede the possibility of diminished responsibility (which results in an acquittal) and not a lack of criminal capacity.

Furthermore, though the onus is on the state to prove that the accused possessed criminal capacity beyond a reasonable doubt, the accused is still under a duty to lay a factual foundation and will require expert evidence to meet this requirement.¹⁵⁹² It is

¹⁵⁸⁶ Hoctor supra (n 1) at 165.

¹⁵⁸⁷ S v Eadie supra (n 18).

¹⁵⁸⁸ Stevens supra (n 13) at 82-83.

¹⁵⁸⁹ Kaliski supra (n 1576) at 52.

¹⁵⁹⁰ Carstens and Le Roux supra (n 3) at 182.

¹⁵⁹¹ S v Kensley supra (n 12) at 652i-653h.

¹⁵⁹² Carstens and Le Roux supra (n 3) at 183.

doubtful that a factual foundation based on a report by a sceptic of the defence will be sufficient.

Stevens argues that this differing view has resulted in some measure of inconsistency in respect of the weight that may be attached to expert evidence, and that this results in inconsistent probative value being attached.¹⁵⁹³ Furthermore, courts have provided little guidance in the rules pertaining to admissibility and how the evidence should be assessed. The lack of structure or framework regulating admission and assessment of expert evidence is troubling and can be attributed to some of the controversies relating to this defence.

In the South African context it has been argued that it is in the interests of justice that the victim of battering (the battered accused) receive evaluation by the relevant mental health practitioners as along with counselling to ensure that she is prepared for trial and is emotionally capable of collecting evidence needed in her defence. The evidence of psychologists, psychiatrists and social workers may be crucial to the accused's defence.¹⁵⁹⁴

The medical community may not give credence to legal constructs such as loss of self-control; however, it is submitted that the court must make a decision based on established legal principle even when faced with expert testimony that undermine such concepts. As Burchell argues, the role of expert testimony is to assist the court in obtaining a balanced view and to assess the credibility of the accused's claim of criminal incapacity and it is in this light that the court must attach value to expert evidence.¹⁵⁹⁵

It is submitted that the nature and basis of a defence must be understood by a court and in instances where the legal principles are undermined or distorted by experts, the court is under a duty apply utilise the evidence to the extent that it sheds light on the case at hand. Expert evidence should not be of overriding importance.

¹⁵⁹³ Stevens supra (n 13) at 411.

¹⁵⁹⁴ Carstens and Le Roux supra (n 3) at 187.

¹⁵⁹⁵ Burchell supra (n 1320) at 41.

It is submitted that in Eadie¹⁵⁹⁶, the conflation of the defence of sane automatism with the defence of non-pathological incapacity is partly due to this over-reliance. The conflation is expected since from the perspective of the medical fraternity little recognition is given to the defence of non-pathological incapacity despite it being recognised in criminal law and underpinned by a solid theoretical foundation.

Stevens correctly argues that the exact role and impact of the expert evidence in Eadie¹⁵⁹⁷ is difficult to assess as Navsa JA clearly preferred the expert testimony put forth by Dr Jedaar while the testimony of Dr Kaliski contributed in part to the conflation of the defence of non-pathological incapacity and sane automatism. The testimony of Dr Jedaar was not given much weight due to the conflicting views given in testimony in a previous case. It is debatable if the court would have still reasoned that the notions of non-pathological incapacity and sane automatism were not distinct had another expert other than Dr Jedaar had given testimony which clarifies certain aspects regarding both defences.¹⁵⁹⁸ Furthermore, it is apparent that there is a gap between law on the one hand and the medical community (specifically psychiatry and psychology).¹⁵⁹⁹

In the context of the role of expert evidence in the defence of pathological incapacity, Stevens and Le Roux state that at face value the interaction between law and medicine is less controversial; however, a “post-mortem of the interface between law and medicine in cases of pathological criminal incapacity reveals a different picture.”¹⁶⁰⁰

This interface is described by Hiemstra¹⁶⁰¹ and where the view taken by psychiatry is described as being a nurturing one where human beings are considered as a dynamic entity. The aim of medicine is to treat and not to condemn whereas in contrast the

¹⁵⁹⁶ S v Eadie supra (n 18).

¹⁵⁹⁷ S v Eadie supra (n 18).

¹⁵⁹⁸ Stevens supra (n 13) at 280.

¹⁵⁹⁹ Stevens supra (n 13) at 280.

¹⁶⁰⁰ J. Le Roux and G.P. Stevens “Pathological criminal incapacity and the conceptual interface between law and medicine” (2012) 1 South African Journal of Criminal Justice 44 at 44.

¹⁶⁰¹ Le Roux and Stevens supra (n 1600) at 45 citing A Kruger Hiemstra’s Criminal Procedure (May 2011), Service Issue 4) 13-3.

criminal law aims to ascertain if individuals should be punished for their conduct.¹⁶⁰² This view is in accordance with the Rumpff Report¹⁶⁰³ where it was stated that psychiatry is essentially therapeutic and is concerned with the morality of law.¹⁶⁰⁴

Le Roux and Stevens argue that it is this difference between the essential purpose of the law and of psychiatry that has created the lack of mutual appreciation. The scepticism of the medical community towards the defence of non-pathological incapacity is a major problem since the assessment of the defence by medical professionals is essential.¹⁶⁰⁵

Stevens correctly argues that the one of the problems facing the defence of non-pathological incapacity is that a legal framework governing the assessment of evidence upon which the defence relies does not exist, whereas in the case of pathological incapacity the defence is governed by the Criminal Procedure Act¹⁶⁰⁶.¹⁶⁰⁷

Furthermore, expert evidence is not mandatory in cases where the defence of non-pathological incapacity is raised and the court has only a discretionary power to refer an accused for observation.¹⁶⁰⁸ This is a problem with the defence. Stevens thus argues that both defences i.e.: non-pathological incapacity and pathological incapacity must be governed by the same rules relating to expert evidence.¹⁶⁰⁹

It is submitted that Stevens is correct in stating that there is a framework regulating aspects of expert evidence where the defence of non-pathological incapacity is involved. However, it is submitted that in applying the same regulations to the defence of non-pathological incapacity may result in the fundamental distinction between the two types of defences fading away. The effect this may be adverse to the victims of abuse such as the “battered women” who run the risk of being categorised as insane or deranged when

¹⁶⁰² Le Roux and Stevens *supra* (n 1600) at 45.

¹⁶⁰³ Rumpff Commission Report *supra* (n 187).

¹⁶⁰⁴ Rumpff Commission Report *supra* (n 187) at para 9.39.

¹⁶⁰⁵ Le Roux and Stevens *supra* (n 1600) at 45.

¹⁶⁰⁶ *Supra* (n 1).

¹⁶⁰⁷ Stevens *supra* (n 13) at 821.

¹⁶⁰⁸ Stevens *supra* (n 13) at 411-412.

¹⁶⁰⁹ Stevens *supra* (n 13) at 2-3.

they in fact may not possess a mental disorder or defect. This may defeat the purpose of having a defence based on non-pathological incapacity which addresses the needs of the sane, if the two defences are merged in that they are regulated by the same framework.

This has resulted in tension between the legal community and the medical community which has diminished the value of expert evidence in cases where the defence is raised.¹⁶¹⁰ In terms of the expert testimony, the notion of loss of self-control is not a clinical term but is merely a legal concept.¹⁶¹¹

In the case of Mahlinza¹⁶¹² Rumpff JA emphasised that the concepts of “criminal liability” and “elements of a crime” are legal concepts, whereas the concepts of “mental illness” and “mental defect” are psychiatric ones. Furthermore, when the mental capabilities of an accused is investigated in order to make a finding regarding criminal capacity the evidence of medical experts is important but not conclusive.¹⁶¹³ This point is especially significant in relation to the views of medical health practitioners to cases involving of non-pathological incapacity and sane automatism, which are fundamentally different in terms of legal doctrine in South African law.

It is submitted that Stevens has highlighted a definite disconnect between the way law views its principles and way the medical community views legal principles. This is unfortunate since the expert testimony in cases where the defence is raised is important and it is intended to provide an outcome which is in line with justice and fairness.¹⁶¹⁴

If there is a tension or conflict regarding the significance of the notion of loss self-control, it is submitted that the court must rely on legal principle rather than the influence of expert testimony when laying down the law. Stevens has argued that expert testimony contributed to the courts conflation of sane automatism and non-pathological

¹⁶¹⁰ Le Roux and Stevens supra (n 1600) at 280.

¹⁶¹¹ Le Roux and Stevens supra (n 1600) at 280.

¹⁶¹² S v Mahlinza supra (n 189).

¹⁶¹³ S v Mahlinza supra (n 189) at 416B.

¹⁶¹⁴ Stevens supra (n 13) at 83.

and has led to major disintegration of the defence most of which is extremely unfortunate.¹⁶¹⁵

Better co-operation has to be ensured between the law and the medical community, so that outcome is in line with the principles of justice and fairness in cases where the defence of criminal capacity is pleaded.¹⁶¹⁶ The disregard of scientific knowledge is totally unjustifiable and recognition must be accorded to modern science, if the law does not accord such recognition to modern science then it runs the risk of “degenerating into some kind of intellectual game unrelated to the realities of life”.¹⁶¹⁷

This being said, it is however not the place of the medical community to demand that the assessment of criminal responsibility be exclusively a psychiatric one. It is the role of the law to define minimum standards of acceptable behaviour. However, it is pivotal that scientific psychiatric knowledge be provided when the defence of criminal capacity is raised. Courts must welcome such evidence to the extent that it assists in explaining the behaviour and mind set of the accused at the time of commission of an offence. Medical professionals must adhere to the rules and boundaries of psychiatric evidence.

The role of medical professionals in this context is thus to provide assessment as opposed to providing a concluding opinion of criminal responsibility. This point was made clear in the case of Gesualdo¹⁶¹⁸ where the court stated that the defence of non-pathological mental incapacity is one of law and not of psychology.

It is thus submitted that this factor indicates that some of the problems with the defence lie not with founding principles but relate largely to the application of the principles of the defence, furthermore there are aspects relating to evidentiary matters that are in need of review, this specifically pertains to scepticism of expert witness and the weighting

¹⁶¹⁵ Stevens supra (n 13) at 83.

¹⁶¹⁶ Le Roux and Stevens supra (n 1600) at 49.

¹⁶¹⁷ Le Roux and Stevens supra (n 1600) at 66 make this point in addressing relationship between law and the fields of psychology and psychiatry when the defence of non-pathological incapacity is assessed. However, it is submitted that the issues raised are not limited to pathological incapacity but extend to the defence of non-pathological incapacity due to provocation and emotional stress as well.

¹⁶¹⁸ S v Gesualdo supra (n 308) discussed by Boister supra (n 309) at 315.

attached to expert opinion; furthermore, providing the court with a balanced well-rounded view cannot be undervalued, especially when the defence has used expert testimony there is a need for rebuttal by the prosecution.

Courts must guard against being overly influenced by expert evidence since it is ultimately the courts assessment of the accused's state of mind that is final and ruling if criminal capacity was absent, in making this determination the court assesses the facts of the case along with determining if the accused can be classified as a reliable witness and the nature of the accused conduct at the time of the killing.¹⁶¹⁹ Hoctor argues that the court "should neither be carried away nor cowed by expert evidence", the role of expert is that it simply forms one component of all the evidence led.¹⁶²⁰

The court in Makhubele respect of the test into *mens rea*:

"...the accused's evidence of what was going on in his mind, what his thoughts were, what emotions he felt, what urges or impulses, is of vital importance. That evidence is to be evaluated in the context of the evidential material as a whole, the ultimate objective being to establish as best one can, from fallible data and with imperfect knowledge of the functioning of human volition, what the accused's state of mind was at the time in question."¹⁶²¹

Principles governing the admissibility of expert evidence was summarised in the case of Engelbrecht :

"Firstly, in the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to tender her or him an expert in particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the court. Fourth, the expertise of any witness should not be elevated to such heights that the courts own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the court must be proved by admissible evidence, either facts within the personal knowledge of expert or on the basis of facts proven by others. Sixth, the opinion of such witnesses must not usurp the function of the court."¹⁶²²

¹⁶¹⁹ S v Harris (1965) 2 SA 340 (A) at 365B-C, S v Kalagoropoulos supra (n 306) at 21J-22a; S v McDonald (2000) 2 SACR 493 (N) at 501h-j; S v Ingram supra (n 306) at 4g-h; S v Eadie supra (n 18) at 2. Hoctor supra (n 1) at 129 states that this principle applies equally to cases involving the defence of sane-automatism or whether the accused acted voluntarily.

¹⁶²⁰ Hoctor supra (n 1) at 165.

¹⁶²¹ S v Makhubele (1987) 2 SA 541 (T) at 547F-G discussed by Hoctor supra (n 1) at 165.

¹⁶²² S v Engelbrecht (2005) 2 SACR 41 at 26.

The court possesses the discretion on whether the accused should be referred for psychiatric evaluation as laid out in s 79 of the Criminal Procedure Act¹⁶²³.¹⁶²⁴ This will go a long way in ensuring that a defence of non-pathological incapacity due to provocation and emotional stress will not lead to a facile acquittal. Clarity is needed to address uncertainties regarding whether expert evidence is required to lay a factual foundation. Some cases courts have felt that the court itself is in a position to decide when assessing accepted facts whether the defence has been made out.¹⁶²⁵

Burchell recommends that two practical solutions may be available. Firstly, a judge should require the prosecution to lead expert psychologist and psychiatrist testimony. This will test the evidence led by the defence against the evidence led by the State.¹⁶²⁶ This procedure is similar to the provisions relating to insanity under section 79 of Criminal Procedure Act 1977 which provides for evidence from a court appointed psychiatrist as well as a psychiatrist appointed by the defence.¹⁶²⁷

It is submitted that in light of the difficulties relating to expert evidence governing the defence of non-pathological incapacity, a provision to this effect will ensure the law in this area is consistent and will also as a safeguard to prevent facile acquittals. It is submitted that this change advanced by Burchell will solve the problems relating to expert testimony, the aim of the expert testimony will be to obtain a “balanced view” which is better than a one sided perspective.¹⁶²⁸

In the case of Potgieter the court stressed the importance of scrutinising the evidence of the accused and stated:

“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

¹⁶²³ Criminal Procedure Act of 1977.

¹⁶²⁴ Hoctor supra (n 1) at 129, See S v Volkman (2005) 2 SACR 402 (C) at para 7-8.

¹⁶²⁵ Van Oosten supra (n 186) at 141.

¹⁶²⁶ Burchell supra (n 1320) at 41.

¹⁶²⁷ Burchell supra (n 1320) at 41.

¹⁶²⁸ Burchell supra (n 1320) at 41-42.

be present after either a deliberate or an involuntary act has been committed. The facts...must therefore be closely examined to determine where the truth lies.”¹⁶²⁹

The court in Potgieter¹⁶³⁰ was not entirely convinced on the truthfulness of the accused’s version. The court ruled that the version of the accused could not be reasonably true and was rejected by the court. The factual foundation was held to be absent. The significant aspect of this case was that the court rejected the expert psychiatrist evidence since the cogency of this evidence was based on an account that was ruled to be false. This case highlights the problems of attaching too much weight to expert evidence which ultimately rests on the truthfulness of the accused’s version.¹⁶³¹

In this respect, Burchell proposes that the expert evidence should be led after evidence relating to the accused’s version of events has been heard. Expert witnesses would thus have an opportunity to re-evaluate their evidence after hearing the facts of the case as well as hearing the accused’s version being tested at cross-examination. This is important since the psychiatric evidence is largely based on the cogency of the accused’s version of events.¹⁶³² It is submitted that Burchell’s solutions are indeed practical and will address the problems relating to expert evidence.

Carstens and Le Roux have correctly argued that in the light of the realities of violence against women and the killings arising out of battered women syndrome, expert evidence of mental health practitioners such as psychologists and psychiatrists are of paramount importance in the defence of such accused. Furthermore, psychiatry should recognise the trauma arising out of battered women syndrome in order to keep up to date with the law.¹⁶³³ This will go a long way in closing the gap between law and psychiatry since the law has recognised the adverse effects of abuse on the emotional health of a person, undermining the sceptical position of the medical fraternity.

¹⁶²⁹ S v Potgieter supra (n 390) at 73-74 discussed by Burchell supra (n 1320) at 38-39.

¹⁶³⁰ S v Potgieter supra (n 390).

¹⁶³¹ Burchell supra (n 1320) 38.

¹⁶³² Burchell supra (n 1320) at 42.

¹⁶³³ Carstens and Le Roux supra (n 3) at 189.

The courts have in cases defended their stance in this regard. In Gesualdo¹⁶³⁴ the court rejected the view of psychiatrist who could not accept that a person who suffered from no mental illness or physical defect and who was able to distinguish between right and wrong could not act in accordance with such appreciation since there was no medical reason in psychiatry or science that could justify such a condition.

In this respect the court stated:

“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”¹⁶³⁵

This court placed reliance on the findings of the courts in previous cases rather than the opinions of expert witnesses.¹⁶³⁶ Unfortunately, this was not the case in Eadie¹⁶³⁷ which has led to the erosion of the defence of non-pathological incapacity.

It is submitted that a framework regulating admissibility of expert evidence must be developed. Furthermore; the role of expert evidence in cases involving the defence of non-pathological incapacity must be addressed. The need for psychiatric evaluation must be investigated with the precise extent and nature of evaluation also being determined. It is submitted that this should take the form of an out-patient psychiatric evaluation for a maximum period of 5 days. It is submitted that even though an accused may raise the defence of non-pathological incapacity and not pathological incapacity, there are specific instances, such as where post-traumatic stress disorders are involved and the effects arising out of battered woman syndrome that may require explanation by mental health experts.

It is in the interests of justice that accused persons receive psychiatric evaluation when, besides providing a safeguard against facile acquittals, it will aid the court in making a determination. It is apparent that there is lack of a framework regulating the role of

¹⁶³⁴ S v Gesualdo supra (n 308).

¹⁶³⁵ S v Gesualdo supra (n 308) at 77g.

¹⁶³⁶ Boister supra (n 309) at 317-318 discussing S v Gesualdo supra (n 309).

¹⁶³⁷ S v Eadie supra (n 18).

expert evidence in the defence of non-pathological incapacity; this is problematic to accused persons requiring expert evidence in laying a factual foundation for the defence. The benefits of streamlining expert evidence in the defence will ensure consistency in cases.

In addressing the problem of differing opinions between the legal fraternity and the medical fraternity in relation to the validity of a defence of non-pathological incapacity it is submitted that the scepticism of expert witnesses towards the defence of non-pathological incapacity still poses a threat in the form of influencing the court as long as there is lack of clarity regarding the nature and very existence of the defence which currently plagues the defence, this is attributed to Eadie¹⁶³⁸ which essentially brought the law in line with neuroscience by equating the defence with sane automatism.¹⁶³⁹ This is a travesty of justice as it results in limiting the functioning of the law and is a direct result of the court's misunderstanding of the law on an elemental level.

5.1.6. Apparent introduction of an objective test in Eadie

There has been much debate regarding the need for an objective test within the defence of non-pathological incapacity due to provocation and emotional stress. There have been proposals by academics such as Snyman and Burchell to bring South African criminal law in line with other jurisdictions such as the Anglo-American systems, by incorporating an objective test into the defence of non-pathological incapacity due to provocation and emotional stress, essentially to prevent abuse of the defence by setting an acceptable standard of behaviour in society with the aim of discouraging or deterring criminal behaviour.¹⁶⁴⁰

Burchell, a strong proponent of this view has advocated for an objective test in the form of the "reasonable" or "ordinary person" and proposes a normative evaluation of how a "reasonable person would have acted under the same strain and stress" and states that

¹⁶³⁸ S v Eadie supra (n 18).

¹⁶³⁹ Kaliski supra (n 1576) at 54 states that "As a result of the *Eadie* judgment the defence of temporary non-pathological criminal incapacity has been brought into line with a psychiatric (neurological) understanding of automatism, ..."

¹⁶⁴⁰ Burchell supra (n 2) at 326, Burchell supra (n 1320) at 41, Snyman supra (n 1) at 164, Snyman supra (n 77) at 22.

the advantages of allowing a “judicial value judgment” when faced with cases where violent acts are committed are:

“..help to facilitate adherence to norms of reasonable behaviour implicit in the common law of South Africa, and other countries, and reflected in a Constitutional Bill of Rights that protects the life, physical integrity, dignity and freedom not only of persons accused of criminal conduct, but also of the victims of crime.”¹⁶⁴¹

In terms of this proposal, focus is centred on the rights of the victim, therefore holding society at large to a single uniform standard may discourage possible criminal behaviour. In terms of Burchell’s view, the purpose of an objective test will also be to establish an acceptable standard of conduct in society in line with the Constitution and the Bill of Rights.¹⁶⁴²

Proponents for the introduction of an objective test stem from concerns regarding the ability of the court to properly assess the validity of the defence. It is thus argued that the addition of an objective element to the purely subjective enquiry will assist the court in establishing if the defence is valid.¹⁶⁴³

In this light, Burchell has argued that an entirely subjective test for capacity may not be correct without a normative assessment of how a reasonable person would have reacted in the circumstances of the accused in cases where non-pathological incapacity based on provocation and emotional stress are raised as a defence. Furthermore, Burchell notes that the need for an objective evaluation was also acknowledged by Anglo-American systems.¹⁶⁴⁴

Essentially, there are views that a purely subjective assessment is inherently imbalanced; therefore the objective test is considered necessary to provide much-needed balance against the flexibility of the subjective test, especially considering the nature of a defence based on provocation and the inherent dangers of abuse of the

¹⁶⁴¹ Burchell supra (n 17) at 592.

¹⁶⁴² Burchell supra (n 179) at 370.

¹⁶⁴³ Stevens supra (n 13) at 265.

¹⁶⁴⁴ Burchell supra (n 1320) at 41.

defence.¹⁶⁴⁵ The incorporation of an objective test will undoubtedly satisfy policy considerations. Hoctor states that it is the responsibility of the judge to apply the value and norms of the society when arriving at a decision, however though concerns regarding crime are justified, they should not be determinative.¹⁶⁴⁶

It has been argued that in order to achieve this balance a combination of subjective and objective factors should form part of the capacity inquiry, rather than a purely subjective assessment.¹⁶⁴⁷

Snyman has held the opinion that the use of purely subjective criteria may not be correct and attributes this “obsession” with subjectivity to the influence of De Wet and Swanepoel:

“a belief has been created that the more subjective factors are introduced into the concept of culpability, the more enlightened and civilised the criminal law system becomes. This introduction of subjective factors was overdone especially as far as the principles governing ignorance or mistake of law, intoxication and provocation are concerned.”¹⁶⁴⁸

In an attempt to provide for a solution to the problem of provocation and emotional stress allowing for a total acquittal, Burchell suggests:

“...to accept that in fact provocation or emotional stress can exclude capacity in regard to all crimes (including murder) but on grounds of policy only provocation or emotional stress which would have induced a reasonable person to succumb to the pressure will excuse... in the interests of the security of the community, in cases of violence perpetrated under provocation or emotional stress, only reasonable lack of capacity for self-control or reasonable loss of self-control should excuse.”¹⁶⁴⁹

Furthermore, Snyman’s initial view on the defence of provocation was that it could not and should not operate as a complete defence since the recognition of provocation as a complete defence “would herald yet another victory for the subjective approach to criminal liability.”¹⁶⁵⁰ Snyman argues that the defence of non-pathological incapacity

¹⁶⁴⁵ Burchell supra (n 17) at 592.

¹⁶⁴⁶ Hoctor supra (n 1) at 147

¹⁶⁴⁷ Snyman supra (n 121) at 22

¹⁶⁴⁸ Snyman supra (n 121) at 22.

¹⁶⁴⁹ Burchell supra (n 84) at 23.

¹⁶⁵⁰ Snyman supra (n 121) at 250.

should be limited and care must be taken not to extend it carelessly since the law expects people to keep their emotions in check and should not apply different rules for different types of people hence an overly subjective approach is dangerous.¹⁶⁵¹

In respect of the issue at hand, that is the decision in Eadie,¹⁶⁵² academic opinion has focused on the possible introduction of an objective test into the inquiry into criminal capacity.¹⁶⁵³ It is submitted that the lack of clarity in this regard poses many difficulties in itself as currently it leaves the defence of non-pathologically incapacity due to provocation an emotional in a state of uncertainty; the extract below has been the source of debate for the apparent introduction of an objective test into the inquiry for criminal capacity, Navsa JA stated:

“I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused's ipse dixit concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence.”¹⁶⁵⁴

There have been differing interpretations of the import of the Eadie¹⁶⁵⁵ judgment in relation to the possible introduction of an objective test into the capacity inquiry, notably Burchell, in an earlier analysis of the Eadie¹⁶⁵⁶ judgment proposed three different interpretations of the judgment, these will be considered and discussed forthwith.¹⁶⁵⁷

In terms of the first interpretation, Burchell states that the judgment may not have been an attempt to change the law, but simply emphasized the need to recognize objective factors in the process of judicial inferential reasoning by which the presence or the

¹⁶⁵¹ Snyman supra (n 1) at 159.

¹⁶⁵² S v Eadie supra (n 18).

¹⁶⁵³ See discussion in Hoctor supra (n 1) at 149-160.

¹⁶⁵⁴ S v Eadie supra (n 18) at 64.

¹⁶⁵⁵ S v Eadie supra (n 18).

¹⁶⁵⁶ S v Eadie supra (n 18).

¹⁶⁵⁷ Burchell supra (n 84) at 27.

absence of the subjective notion of capacity is assessed and this is entirely compatible with the existing precedent on the subjective assessment of capacity.¹⁶⁵⁸

The process of inferential reasoning is resorted to on regularly especially in cases where direct evidence is absent and the court is forced to rely on circumstantial evidence.¹⁶⁵⁹ Assessing an accused's state of mind or mental capacity involves the assessment of circumstantial evidence in most cases and cannot be supported by evidence other than that of the accused. Burchell argues that evidence of expert such as psychiatrists and psychologists are notoriously unreliable, because it is based almost entirely on the *ipse dixit* of the accused, this problem justifies the need for inferential reasoning.¹⁶⁶⁰

Hence according to Burchell, it is clear that the court had no intention of revising the test for capacity but rather, the court was concerned that the law was not being applied properly and consistently using permissible inferences from objective facts and circumstances.¹⁶⁶¹

Navsa JA emphasised that the court must guard against too readily accepting the accused's evidence and is entitled to draw legitimate inferences "from what hundreds of thousands" of people would have acted in the similar position.¹⁶⁶² This inference would assist the court by questioning the accused's claim of incapacity or involuntary conduct under due to provocation or emotional stress.¹⁶⁶³

Burchell further contends that the courts thorough examination of the case law on provocation supports the view that the core of the Eadie¹⁶⁶⁴ judgment is to challenge certain previous judgments "...where too much deference has been paid to the accused's

¹⁶⁵⁸ Burchell supra (n 84) at 28.

¹⁶⁵⁹ Hoctor supra (n 1) at 152.

¹⁶⁶⁰ Burchell supra (n 1303) at 34.

¹⁶⁶¹ Burchell supra (n 84) at 31.

¹⁶⁶² S v Eadie supra (n 18) at para 23.

¹⁶⁶³ Burchell supra (n 84) at 29.

¹⁶⁶⁴ S v Eadie supra (n 18).

version of the facts and not enough weight is given to a broader evaluation of this evidence in the light of surrounding circumstances.”¹⁶⁶⁵

In support of this argument, Burchell points to the court’s criticism of Arnold¹⁶⁶⁶ where it was stated that the judge “readily accepted” the accused *ipse dixit* without adding enough weight to the “focused and goal-directed behaviour of the accused before, during and after the event.”¹⁶⁶⁷ In this light, Burchell suggests that the Eadie¹⁶⁶⁸ judgment issues a warning that in the future, the defence of non-pathological incapacity will be scrutinized more carefully and that the courts should not be too readily accepting of the accused’s evidence about his or her state of mind.¹⁶⁶⁹

Hence, in the past luck may have favoured certain individuals who were acquitted because they were insulted; however, after Eadie¹⁶⁷⁰, the courts will evaluate evidence against objective standards of acceptable behaviour.¹⁶⁷¹

In terms of this interpretation, capacity remains in principle subjectively tested; however, the application of the test contains the reality that the policy of law is that when provoked killings are in issue, it must be one of reasonable restraint Burchell points out that Navsa JA was explicit in stating that there is no fault in the test for capacity but that there was a problem in which the test has been applied.¹⁶⁷²

In respect of the court’s criticism of Moses¹⁶⁷³ and Arnold,¹⁶⁷⁴ Burchell contends that if the court was critical of the court’s misapplication of the subjective principle of capacity

¹⁶⁶⁵ Burchell supra (n 85) at 29.

¹⁶⁶⁶ S v Arnold supra (n 16).

¹⁶⁶⁷ S v Eadie supra (n 18) at para 46.

¹⁶⁶⁸ S v Eadie supra (n 18).

¹⁶⁶⁹ Burchell supra (n 84) at 29.

¹⁶⁷⁰ S v Eadie supra (n 18).

¹⁶⁷¹ Burchell supra (n 84) at 29.

¹⁶⁷² Burchell supra (n 84) at 30-31.

¹⁶⁷³ S v Moses supra (n 16).

¹⁶⁷⁴ S v Arnold supra (n 16).

when too much reliance was placed on the *ipse dixit* of the accused. Thus, it was the conclusion that was criticised and not the legal principle that was applied.¹⁶⁷⁵

Therefore, interpreting the words of the court to mean that the capacity test has been changed to objective is probably reading too much into the court's statement and the real meaning is being overlooked; that is, the court emphasised the real issue was the process of inference into the accused's thought process and this is the crucial fact.¹⁶⁷⁶

Thus, in this light, Burchell argues that the test remains subjective and if the test was changed then Navsa JA would have to specifically over-rule all cases dealing with provocation dating back from the 1980's and Navsa JA could not have been expected to drastically overrule an extensive amount of judicial authority by implication, therefore that the route taken by the court was acceptable and the emphasis on inferential reasoning would apply to all other cases where any element of criminal liability was disturbed.¹⁶⁷⁷ According to Burchell, it is clear from the statement by Navsa JA that the court was not talking about revising the test for capacity but rather it was concerned with applying principles correctly.¹⁶⁷⁸

The second possible interpretation of the Eadie¹⁶⁷⁹ judgment advanced by Burchell, involves a redefinition of the criminal capacity element wherein the test for conative capacity moves from being subjective to objective. Burchell acknowledges that the second interpretation is more radical since it will result in a possible restriction of the ambit of the defence of lack of capacity to cases where automatism is present. This involves a dramatic redefining of the actual subjective criterion of capacity, shifting the test of capacity from a subjective into an objective domain.¹⁶⁸⁰

¹⁶⁷⁵ Burchell supra (n 84) at 31.

¹⁶⁷⁶ Burchell supra (n 84) at 30.

¹⁶⁷⁷ Burchell supra (n 84) at 31.

¹⁶⁷⁸ Burchell supra (n 84) at 28.

¹⁶⁷⁹ S v Eadie supra (n 18).

¹⁶⁸⁰ Burchell supra (n 84) at 27 discussing S v Eadie supra (n 18).

In terms of third possible interpretation for this aspect of the Eadie¹⁶⁸¹ judgment, Burchell contends that the court in essence identified an objective aspect that was always present in our law but had gone unrecognised by our court.¹⁶⁸² This interpretation is less radical than then the second one, essentially in terms of this theory; Navsa JA did not replace the existing subjective test of capacity with an objective one, but succeeded in identifying an essential, qualified objective component in an otherwise subjective test of capacity which until Eadie¹⁶⁸³ was not acknowledged judicially.¹⁶⁸⁴

Burchell's view in this regard has since changed and states that the court in Eadie although recognising the role that inference plays in ensuring the defence of provocation and emotional stress remains within reasonable limits, expressly rejected the option of "objectifying" the inquiry into criminal capacity. Therefore, according to Burchell, the court mindfully chose not to abolish the defence in its entirety.¹⁶⁸⁵

In order to solve the vexed question of whether an objective test has been added to the capacity inquiry it is essential to determine what the court in Eadie¹⁶⁸⁶ set out to achieve. It is submitted that the court set out to restore public confidence by implementing changes to the defence of non-pathological incapacity due to provocation and emotional stress; especially in light of the Moses¹⁶⁸⁷ and Nursingh¹⁶⁸⁸ which threatened to place the criminal law in disrepute.

The court in Eadie based its judgments on policy considerations. The following statement indicates this intention when Navsa JA commenced with the following statement stating that:

¹⁶⁸¹ S v Eadie supra (n 18).

¹⁶⁸² Burchell supra (n 84) at 39.

¹⁶⁸³ S v Eadie supra (n 18).

¹⁶⁸⁴ Burchell supra (n 84) at 39.

¹⁶⁸⁵ Burchell supra (n 2) at 326

¹⁶⁸⁶ S v Eadie supra (n 18).

¹⁶⁸⁷ S v Moses supra (n 16).

¹⁶⁸⁸ S v Nursingh supra (n 16).

“whether the boundaries of the defence in question have been inappropriately extended, particularly in decisions of Provincial or Local Divisions of the High Court, so as to negatively affect public confidence in the administration of justice”¹⁶⁸⁹

One can interpret the aforementioned statement to imply that the scope of the defence has been increased unjustifiably and is not in line with policy. The use of the word “boundaries” indicates that the court sought to limit the scope which may positively affect public confidence in the administration of justice. Hence, it is apparent that the court undertook a policy based assessment of principles underpinning the defence of non-pathological incapacity due to provocation and emotional stress.¹⁶⁹⁰ The aim of the court was to re-align the defence in terms of policy.

The court expressed further its concern that the defence of non-pathological incapacity has become “a popular defence”¹⁶⁹¹, it is submitted that this statement by the court can be interpreted to mean that court is concerned that “flood gates” have been open to the defence when assessing previous cases it perceived a number of facile acquittals and thus sought to limit the application of the defence through the introduction of an objective test. The court specifically cautioned against readily accepting the accused's *ipse dixit* regarding provocation or emotional stress.¹⁶⁹²

The court in Eadie¹⁶⁹³ may have felt that in certain cases too much reliance was placed on the accused’s version which resulted in unjustified acquittals and the only way in which to solve this problem was to introduce and objective test. However Hoctor

¹⁶⁸⁹ S v Eadie supra (n 18) at para 3.

¹⁶⁹⁰ Hoctor supra (n 1) at 135, 140.

¹⁶⁹¹ S v Eadie supra (n 18) at para 28 The court stated: “to maintain the confidence of the community in our system of justice the approach of this court , established over almost two decades and described earlier in this judgment should be applied consistently. Courts should bear in mind that the phenomena of sane people temporarily losing cognitive control, due to a combination of emotional stress and provocation, resulting in automatic behaviour, is rare. It is predictable that accused persons will continue in numbers to persist that their cases meet the test for non-pathological incapacity. The law if properly applied will determine whether that claim is justified.”¹⁶⁹¹

¹⁶⁹² Burchell supra (n 84) at 31.

¹⁶⁹³ S v Eadie supra (n 18).

correctly points that in fact the court has identified a possible problem which relates to evidentiary matters and not with the substantive principles.¹⁶⁹⁴

Upon a holistic reading of the Eadie¹⁶⁹⁵ judgment it is clear that the court had concerns that the defence was being abused and in order to address the sorry state of affairs in the realm of non-pathological incapacity due to provocation and emotional stress introduced an objective test to assist the court in assessing the validity of the accused's version.

It is therefore submitted that Burchell's first possible interpretation is unlikely, the courts intention was to drastically curtail scope of the defence of non-pathological incapacity due to provocation and emotional stress and in order to effect this change; the introduction of objective factors into the capacity inquiry was the only option. Hence, the second possible interpretation put forward by Burchell, though radical and drastic, is more likely to reflect the intention of the court.

The court admits that the misapplication of the test is the main contributor of the problems surrounding the defence and the second contributor are the courts who have failed in assessing the validity of the accused's version of events. In this light, the court justifies using general experience of human behaviour and social interaction , which essentially amounts to comparison of the accused's behaviour to a uniform or universal standard of behaviour, this amounts to the introduction of an objective test and redefining of the subjective test of capacity; hence, Burchell's second interpretation though radical , is the one which has the highest probability of representing the correct import of courts statement when assessed in light of the policy based back drop of the judgment.

Furthermore, in respect of the Burchell's third interpretation, it is submitted that in light of the precedent and the principles underlining the test for criminal capacity, it is unlikely that an objective aspect of the capacity inquiry was suddenly unearthed by the court in Eadie.¹⁶⁹⁶ In this respect, Hoctor is correct in stating that although this is an interesting interpretation, it cannot be taken seriously as a rationale for the judgment

¹⁶⁹⁴ Hoctor supra (n 1) at 139.

¹⁶⁹⁵ S v Eadie supra (n 18).

¹⁶⁹⁶ S v Eadie supra (n 18).

especially in the light of the fact that the court was “oblivious of this alleged teasing out of such an as yet undiscovered objective aspect”.¹⁶⁹⁷

It is submitted that the subjective nature of the capacity inquiry is its cornerstone; the shift to an emphasis on subjectivity from the emphasis of objectivity which characterised the criminal law in the past was deliberate and was a progressive step in South African criminal law as the nature of the capacity inquiry is centred on what was happening in the mind of the accused at the time of the incident, similar to the shift to the subjective nature of intention, therefore the purely subjective nature of the capacity inquiry was not accidental and it is extremely unlikely the courts have overlooked a hidden objective aspect.

The view that an objective test was indeed introduced has been espoused by most commentators.¹⁶⁹⁸ Snyman approvingly states that the judgment in Eadie¹⁶⁹⁹ has marked a turning point in regard to the courts emphasis on subjectivity as it may reintroduce an objective evaluation into the provocation defence thereby creating a necessary balance between subjectivity and objectivity in the construction of criminal liability.¹⁷⁰⁰

Louw states that it is apparent that the court did intend to introduce an objective test since it made reference to previous judgments in support and in anticipation of criticism made the statement¹⁷⁰¹ “Critics may describe this as policy yielding to principle”.¹⁷⁰² Louw argues that although the judgment is thorough, it goes too far when an objective test is introduced to determine loss of control and therefore should be reviewed because it is not in line with the considered decisions of the court or with general principles.¹⁷⁰³

¹⁶⁹⁷ Hoctor supra (n 1) at 156.

¹⁶⁹⁸ Hoctor supra (n 1) at 166, Louw supra (n 5) at 206, Snyman supra (n 77) at 22.

¹⁶⁹⁹ S v Eadie supra (n 18).

¹⁷⁰⁰ Snyman supra (n 1) at 164.

¹⁷⁰¹ Louw supra (n 5) at 203.

¹⁷⁰² S v Eadie supra (n 18) at para 64.

¹⁷⁰³ Louw supra (n 5) at 205 states that an alternate interpretation of the statement is that it is not the introduction of an objective test but rather a statement that the court should consider surrounding circumstances in order to assess the accused’s criminal capacity.

Hector argues that it is clear that the court was disapproving of cases such as Moses¹⁷⁰⁴ hence the motive was to prevent facile acquittals by adding objective factors to the assessment for criminal capacity.¹⁷⁰⁵ If it is accepted that the court in Eadie¹⁷⁰⁶ introduced an objective test, and majority of commentators believe that this is the case, it is crucial to assess the ramifications of an introduction of an objective test. It is submitted that the court, in its quest to reform the defence, reduced the scope of the defence further. This is problematic in light of the fact that the defence is traditionally viewed with circumspection by the courts and will not succeed easily as it is.¹⁷⁰⁷

The critical question remains whether this new defence will serve the same purpose as the defence as it existed before the Eadie¹⁷⁰⁸ judgment and if the perceived problems that of the facile acquittals of the “old defence” have been resolved by the introduction of an objective test. In order to assess the precise impact of the addition of an objective test to the provocation defence is best assessed by analysing the functionality and utility of the objective test used in jurisdictions such as England and Canada. This will give insight into the possible difficulties of employing an objective method of analysis within the realm of provocation.

In conducting the literature review, it is clear that there are problems associated with the provocation defence in both England and Canada, the objective test in both jurisdictions have been the subject of debate for many years and has been the subject of numerous challenges in both jurisdictions, especially concerning the application objective test, these criticisms will be discussed forthwith .

¹⁷⁰⁴ S v Moses supra (n 16).

¹⁷⁰⁵ S v Eadie supra (n 18) at para 3, discussed by Hector supra (n 1) at 135.

¹⁷⁰⁶ S v Eadie supra (n 18).

¹⁷⁰⁷ Carstens and Le Roux supra (n 3) at 181-182

¹⁷⁰⁸ S v Eadie supra (n 18).

5.1.7. The rationale underpinning reasonable/ordinary person standard

Canada and England have a strong bias for the use of an objective test within their respective provocation defences. Thus the model of the reasonable person¹⁷⁰⁹ or ordinary person is favoured to determine if the reasonable man would have lost control in the same way as the accused.¹⁷¹⁰

However, it is correctly argued that if the yardstick of the reasonable person is interpreted literally, two consequences should ideally follow. The first is that this ground of extenuation should seldom succeed seeing that a reasonable person would hardly ever commit an intentional killing, and if he does it will either be in self-defence or in an attempt to protect another person. Secondly, if it is found that the conduct of the accused was reasonable in the circumstances, and then an acquittal should be granted. A valid argument is that reasonable conduct should not attract criminal liability.¹⁷¹¹

However, this is not the case and a successful verdict of manslaughter still garners harsh prison sentences. Long terms of imprisonment under these circumstances is only justified if it the conduct was blameworthy¹⁷¹²

Despite criticisms of the objective test in the form of the reasonable man or ordinary person, this hypothetical construct has and continues to be a principal figure in the landscape of the law in Canada and England¹⁷¹³ The reason for the use of objective lies in the rationale underlying the objective test which is first and foremost to assess the validity of the defence and to prevent abuse of the provocation defence by stopping an accused from relying on self-serving and self-generated excuses.¹⁷¹⁴

¹⁷⁰⁹ See chapter 3 at 87 for discussion of the emergence of the reasonable man test in English law; See chapter 4 at 179 for discussion of the ordinary person test in term of section 232 (2) of the Criminal Code.

¹⁷¹⁰ Norrie supra (n 837) at 282.

¹⁷¹¹ Simester and Sullivan supra (n 684) at 348-449

¹⁷¹² Ibid.

¹⁷¹³ M. Moran Rethinking the Reasonable Man-An egalitarian reconstruction of the objective standard (2010) at 1.

¹⁷¹⁴ Nelson supra (n 1050) at 1024.

Ashworth states that the objective test serves to set a minimum standard of self-control and it is important to distinguish the element of self-control from other elements relating to personality traits. In this light, weakening of the objective standard would be wrong as the law would inevitably allow the exceptionally excitable or pugnacious individual to use the provocation defence and unjustifiably receive a manslaughter conviction as opposed to a murder conviction.¹⁷¹⁵

It is clear that the objective test in the provocation defences in both England and Canada functions to ensure that the scope of the defence is not over-extended. Preventing abuse of the defence is the factor which drives the argument in favour of an objective test. The main concern centres on whether the law or its application promotes the right of the individual to equal protection by the law.¹⁷¹⁶ This notion has been the main justification behind the objective test in England and Canada, as it serves to protect against abuse of the defence and it ensures citizens are held to a uniform standard of behavior.¹⁷¹⁷

It seems evident that in both jurisdictions great emphasis is placed on deterrence of criminal behaviour and this is the overriding factor behind the objective tests in both England and Canada. One of the main arguments for the objective test and other limitations imposed in the Canadian defence is centered in the concern that the defence may be too readily accepted and the importance in deterring uncontrolled anger leading to homicide.¹⁷¹⁸

However, it is submitted that there is a fundamental failing in reasoning behind deterrence as it presupposes free will is in operation. Essentially this entails deterring the killing of an individual by another who suffered a loss control and was not in control of the choices he made or put in another way, unable to resist the unlawful act. The

¹⁷¹⁵ Freedman *supra* (n 699) at 16 discussing views of Ashworth *supra* (n 462) at 299-300.

¹⁷¹⁶ Renke *supra* (n 28) at 768.

¹⁷¹⁷ Sahni *supra* (n 1135) at 150 argues that subjectivising the objective test can have adverse effects on a society especially where homophobia, racism and a culture of violent behaviour is rampant. For instance, a scenario could arise where an accused person who was the recipient of a homosexual advance could claim that his retaliation was in accordance with what an ordinary homophobic person in his circumstance would do regardless of the slight the advance was or even if it was imagined.

¹⁷¹⁸ Hill *supra* (n 1064) at 324, see discussion of Tran *supra* (n 1008) in chapter 4 at 188 where the court cautioned against subverting the logic of the objective test by adding subjective factors.

argument for deterrence assumes that the exercise of free will in a circumstance where free will is lacking. The justification of deterrence behind an objective test in respect of the provocation defence predicated on a lack of self-control is flawed as it presupposes the presence of free-will, provocation is a quintessentially an excuse wherein the law exercises leniency due to the lack of free-will.¹⁷¹⁹

It is submitted that in light of these arguments, the quest to deter crime using an objective test, especially in the context of the provocation defence, is illogical. The crucial issue is whether an objective test can deter behaviour that was beyond the control of the individual in the first place, due to the lack of criminal capacity. It must be stated that preventing abuse of the law is a valid concern; deterrence should not be an overriding factor when it comes to developing and implementing law. This is especially pertinent when provocation and emotional stress are concerned, since the effect of provocation and emotional stress on an individual may differ from person to person.

It is submitted that these concerns related to abuse of the defence are unfounded, as the courts acknowledge that experiencing a total lack of incapacity due to provocation and emotional stress is an extremely rare occurrence,¹⁷²⁰ Hoctor argues that even though in principle a court might not refuse to hear a plea based on non-pathological incapacity emanating from road rage, however on grounds of policy such court is not likely to exculpate the accused on these grounds, hence the defence is most likely to be successful in exceptional cases only.¹⁷²¹ It is submitted that with proper understanding and application of principles together with proper scrutiny of relevant evidence,¹⁷²² the courts themselves must be entrusted to provide the necessary safeguards to prevent abuse of the defence, thus the introduction of an objective test is not only unworkable but also unnecessary.

¹⁷¹⁹ Quigley supra (n 1015) at 250; Ashworth supra (n 462) at 310-311 states, in respect of the partial defence of provocation, the argument that the objective standard serves as a deterrent to the ill-tempered man should be viewed with some skepticism when impulsive crimes are concerned, since the only direct deterrent factor is limited to the distinction between the penalty for a conviction of murder and the possible sentence for manslaughter due to provocation

¹⁷²⁰ *S v Eadie* supra (n 18).

¹⁷²¹ Hoctor supra (n 355) at 204.

¹⁷²² Snyman supra (n 2) at 166.

5.1.7.1. The objective test constitutes an unjust imposition of dominant cultural values.

It is submitted that another significant problematic feature of the objective test in both the Canadian provision as well as the provision in English law relates to the objective tests inability to respond to different social realities and for “superimposing a notion of abstract equality where systematic inequality is the norm.”¹⁷²³ One of the most persuasive arguments against the implementation of an objective test is therefore that it essentially “imposes dominant cultural values on others.”

The application of an objective can thus be problematic and dangerous, as Louw correctly argues:

“When values change, the reasonable man changes; the apparently objective test carries the real danger of imposing dominant cultural values on other...Each case of reasonableness must be determined taking into account of all relevant facts regarding the accused’s capabilities.”¹⁷²⁴

This criticism is key, especially in light of the history and racial and social-economic diversity in South Africa, furthermore, social and economic back ground may differ immensely from person to person and it is unfair and unjust to apply a uniform standard which cannot take cognisance such differences.¹⁷²⁵

It is submitted that introducing an objective test is inherently unfair and unjust as it requires a uniform standard of behaviour from individuals in a society which is extremely diverse in terms of education, cultural and racial background.

Louw comments:

¹⁷²³ Nelson supra (n 1050) at 1026.

¹⁷²⁴ R. Louw “S v Ngema 1992 (2) SACR 651 (D) The reasonable man and the tikloshe” (1993) 6 South African Journal of Criminal Justice at 363.

¹⁷²⁵ New South Wales Law Reform Commission para 2.20, (cited by S. Pather “Provocation - Acquittals Provoke a Rethink” (2002) 15 South African Journal of Criminal Justice 337 at 351) The Law Reform Commission of New South Wales stated that the inclusion of an objective test in the form of a reasonable person is unworkable as it does not consider the personal characteristics of the accused when criminal liability is assessed.

“[S]tarkly illustrates that potential unfairness of the use of an objective reasonable man test in a heterogeneous society where the actor may be measured against an unattainable standard, culturally or otherwise.”¹⁷²⁶

Especially in light of the history and racial diversity of South Africa; furthermore, social and economic back-ground may differ immensely from person to person.¹⁷²⁷ An important argument against the adoption of an objective standard relates to the changing face of society, in that the law must be adaptable to different circumstances and changes that might take place within an ever-changing and evolving society. How would an objective test within the provocation defence adapt?

It is submitted that it is not adaptable, as there is little room for adapting the reasonable man according the changing values of society. The provisions in England and Canada are example of this; the out-dated values system of a bygone era have caused tremendous problems relating to various types of discrimination, notably gender discrimination.

If one considers the historical origins of the provocation defence where a man’s wife was considered his property, therefore entitling him to kill his wife’s lover if found in the act of adultery, the legal convictions of modern-day society does not consider the circumstances of such a killing acceptable, how will the objective test account for the changing values of society to ensure the law is in line with the will of the people.

The law must be multi-dimensional and adaptable in order to serve its intended purpose. This point was made clear in the Australian case of Moffa, where the court criticised the application of the objective ordinary person test and states:

“The objective test is not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin ,climate and other living condition, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary

¹⁷²⁶ Louw supra (n 1724) at 361.

¹⁷²⁷ New South Wales Law Reform Commission para 2.20, (cited by Pather supra (n 1725) at 351, the Law Reform Commission of New South Wales stated that the inclusion of an objective test in the form of a reasonable person is unworkable as it does not consider the personal characteristics of the accused when criminal liability is assessed.

South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances.”¹⁷²⁸

This criticism has a special significance in the South African context, especially considering the diverse nature of the population. For instance in case of Mbombela¹⁷²⁹, the accused killed the deceased because he was believed that the deceased was actually a “tikoloshe”. In certain African cultures, a “tikoloshe” is believed to a mischievous evil creature. The “tikoloshe” is highly feared therefore killing it was in accordance with culture. The Appellate Division however disagreed and found the killing unreasonable since a reasonable man could not have such a belief.

This case reveals the possible injustice that can ensue with applying a uniform standard in the form of the reasonable man test, since the attributes of the reasonable man will be differ according to the value and belief system of each community.

In this regard Yeo makes a valid argument and states:

“To insist that all these different ethnic groups conform to the one standard of behaviour set by the group having the greatest numbers (or holding the political reins of power) would create gross inequality. Equality among the various ethnic groups is achieved only when each group realizes the other’s right to be different and when the majority does not penalise the minority groups for being different.”¹⁷³⁰

It is submitted that the critical question concerning the introduction of an objective standard in the form of “reasonableness”, is what content should be given to this concept especially considering the extreme divides in the value structures of South Africans.¹⁷³¹ Determining whose values to reflect in this standard is problematic, should it reflect Western standards or African standard, determining this standard would be difficult and implementing it may prove problematic. Heyns argues that in a country as diverse as South African, utilitarianism means that that the values and will of the majority of the country would be imposed on the minority, certain values are known to

¹⁷²⁸ Moffa (1976-77) 13 A.L.R 225 (Aust.H.C) cited by Quigley supra (n 995) at 22.

¹⁷²⁹ S v Mbombela supra (n 107).

¹⁷³⁰ S. Yeo, “Power of Self-control in Provocation and Automatism” (1992) 14 Sydney Law Review 3,12.

¹⁷³¹ C. Heyns “Reasonableness” in a divided society” (1990) 107 South African Law Journal 266 at 279.

considered more important than life therefore “such an approach would simply be a recipe for a blood bath.”¹⁷³²

In terms of this argument, if a standard is determined, the other pertinent question is to what degree of rigidity should characterise the objective standard. The rationale underpinning the idea of “reasonableness” is the pursuit of fairness and in achieving fairness all individuals of a society should be held to the same standard. The standard of the reasonable man test holds individuals in a society to a minimum standard of behaviour, determined by Western standards.¹⁷³³ Determining what the legal convictions of a community as diverse as South Africa’s, will be a tremendous task.

The objective test is a standard feature in the provocation defence of most common law jurisdictions and presents most of the same problems in these jurisdictions. Furthermore, in most of these jurisdictions it is clear that there is disquiet with enforcing a rigid single objective standard in societies which are becoming more and more diverse in nature.¹⁷³⁴ In Canada, the application of the objective test is problematic since juries are required to construct the hypothetical ordinary person without guidance from the trial judge.¹⁷³⁵

Especially when the objective test is considered to be the cornerstone of criminal law and a flexible objective test is feared for possibly eroding the principles of criminal law, which is to encourage reasonable and responsible behaviour from members of the society it governs.¹⁷³⁶

This stringent application of the courts was considered harsh for not allowing the relevant circumstances and context behind the act or insult. This indicates that the use of an objective test in trying to uncover what was going on in the mind of human being is fundamentally illogical and application of this standard would be difficult besides being

¹⁷³² Heyns supra (n 1731) at 294.

¹⁷³³ Heyns supra (n 1731) a 281.

¹⁷³⁴ Clough supra (n 20) at 125 (English law) see discussion in chapter 3 at 109 and 127; Stuart supra (n 70) at 544-545(Canadian law) see discussion in chapter 4 at 179.

¹⁷³⁵ Quigley supra (n 995) at 25.

¹⁷³⁶ Stuart supra (n 70) at 544-545.

extremely unfair. The use of “reasonable man” or the “ordinary man” to determine acceptable behaviour has been justifiably described as “oxymoronic”.¹⁷³⁷

5.1.7.2. Difficulties in application of an objective test

It is observed that in respect of the provocation defence in English and Canadian law, one of the main areas of dissatisfaction with the defence surrounded the objective test and the dilemma regarding which characteristics should be attributed to the “reasonable person” in the objective test.¹⁷³⁸

These problems are directly linked to standard of the “ordinary” or “reasonable” person and determining which characteristics should be given to the ordinary/reasonable person has been controversial in jurisdictions such as England and Canada.¹⁷³⁹ The objective test was also found to be difficult to interpret the accused’s attributes and indicates that the scope of the objective does require some flexibility. Determining the attributes of the reasonable/ordinary man has proved extremely challenging.¹⁷⁴⁰

As Heller pertinently asks:

“Is the reasonable person simply Everyman, an individual without race, class, gender, or any other non-universal characteristics? Or is the reasonable person someone who resembles the defendant herself, possessing some or all of the defendant’s characteristics?”¹⁷⁴¹

In terms of English law and the now repealed Homicide Act of 1957, the reasonable man test created confusion in cases as the judges found great difficulty in explaining the attributes of the “reasonable man” to the jury who grappled with this concept.¹⁷⁴² The difficulties with the application of the objective test featured prominently in the Law Commissions report concerning reformation of the defence.¹⁷⁴³

¹⁷³⁷ Clough supra (n 20) at 118.

¹⁷³⁸ Quigley supra (n 995) at 25.

¹⁷³⁹ See discussion in Chapter 3 at 127 and in Chapter 4 at 179.

¹⁷⁴⁰ Allen supra (n 462) at 216.

¹⁷⁴¹ Wells supra (n 798) at 106 citing K.J Heller “Beyond the Reasonable Man? A sympathetic but Critical assessment of the use of subjective standards of reasonableness in Self-defence and Provocation” (1998) 26 A, J Cr L 1 at 4.

¹⁷⁴² Clough supra (n 20) at 124.

¹⁷⁴³ See Chapter 3 at 127 for findings of the Law Commission.

The Law Commission identified problems with the objective test becoming more subjective than it should be, especially considering the interpretation given by the Court in Morgan Smith¹⁷⁴⁴.¹⁷⁴⁵ There was a clear tendency of the courts in England to “soften” the rigidity of the objective test by adding certain attributes of the accused to the hypothetical reasonable man. This raised fears that safeguards to the provocation defence was diminishing with subjectivising the objective standard. One of the difficulties of the old defence can be attributed to the inconsistency application of legal principles of and policies due to the tendency of the courts to subjectivise the objective test.¹⁷⁴⁶

This is due to an elementary problem related to the existence of an inherent contradiction, i.e. the reasonable person does not kill and from a moral standpoint there should be no reason why a short-tempered person should benefit from a defence based on loss of temper as this was fundamentally flawed and could not be justified.¹⁷⁴⁷

With these criticisms in mind, the provocation defence in England was changed in an attempt to solve the problems of the defence in terms of section 3 of the Homicide Act. The reasonable person test received criticism for being “anthropomorphised” to ridiculous lengths.¹⁷⁴⁸ Hence in terms of the old provocation defence the application and construction of the reasonable person was troublesome to the extent that it became unworkable and eventually lead to its exclusion from the new defence. Interestingly, the new defence has done away with terms like “reasonable man” and “ordinary person”, however standards of reasonableness and ordinariness still play a prominent role.¹⁷⁴⁹

It is submitted that the reluctance to use the terms like “reasonable” and “ordinary” indicates that these notions are considered problematic, constructing and determining the parameters of reasonableness is difficult if not impossible within the defence of

¹⁷⁴⁴ Smith (Morgan) supra (n 715).

¹⁷⁴⁵ Norrie supra (n 837) at 282,

¹⁷⁴⁶ Norrie supra (n 837) at 282.

¹⁷⁴⁷ Elliot and Quinn supra (n 525) at 82.

¹⁷⁴⁸ Mitchell and Mackay supra (n 823) at 1.

¹⁷⁴⁹ Yeo supra (n 869) at 11.

provocation. In terms of the new defence in term of the Coroners and Justice Act, there are only two characteristics which may be taken into consideration when determining the defendant's capacity for self-control, age and sex. In this respect the scope of the defence is reduced in certain ways.¹⁷⁵⁰

A fundamental error in the rationale behind limiting characteristics to just "sex" and "age", the new law ignores other factors which may have made the defendant more prone to being provoked, for instance alcoholism cannot be considered if the taunt is not related to the defendant being an alcoholic. If this link is not present then the defendant has to seek refuge in the defence of diminished responsibility. Norrie correctly argues that this factor makes the new provision not only narrower but also irrational.¹⁷⁵¹

The conflict between the Privy Council and The House of Lords regarding the characteristics that should be taken into account in the objective test represents the discord and disagreement which plagued the courts and are as a result of difficulties inherent in applying an objective test.¹⁷⁵² This lack of consensus left the objective test and the defence of provocation in disarray.¹⁷⁵³

The confusion regarding application of the objective test led to inconsistent decisions. The objective test was sometimes applied stringently and sometimes an overly flexible approach was taken. The lack of consistency in this regard resulted in certain decisions being socially unacceptable; this is evident where a less rigid application of the objective test was applied. This led to undesirable characteristics being taken into account, these included glue sniffing¹⁷⁵⁴ addiction and attention-seeking personality traits becoming authentic considerations.¹⁷⁵⁵

¹⁷⁵⁰ Norrie supra (n 837) at 282, at 283.

¹⁷⁵¹ Section 54(1) (c) of Coroners and Justice Act 2009; Norrie supra (n 837) at 283; This is in accordance with the position adopted in the case of Holley supra (n 670) which overruled the Smith (Morgan) supra (n 715), this approach was welcomed since it was considered to be good law (despite only being at Privy Council level) as it proclaimed that self-control should be constant.

¹⁷⁵² Elliot and Quinn supra (n 525) at 79

¹⁷⁵³ Elliot and Quinn supra (n 525) at 79.

¹⁷⁵⁴ Morhall supra (n 713).

¹⁷⁵⁵ Mitchell and Mackay supra (n 823) at 1; The Law Commission agreed with the position of the minority in Morgan(Smith) supra (n 715) and affirmed the decision in Holley supra (n 670) that

The new approach to the objective test is in line with the approach in Camplin¹⁷⁵⁶ and the ruling of the Privy Council in Holley.¹⁷⁵⁷ The new objective criteria reflects the view of the Privy Council who ruled that self-control was uniform and objective. Therefore the jury should not make an assessment of the self-control which the defendant was able to exercise as an individual. It is on this principle that the new provision is seemingly founded upon.

By only allowing the general characteristics of age and sex, the objective test retains its objective nature in the English defence to a large extent. It is submitted that by insisting on retaining a restrictive objective test, the new English defence will suffer similar problems of the old defence¹⁷⁵⁸ Similar problems may potentially arise with the law allowing certain characteristics to be considered and disallowing others, it is submitted that the inclusion of the characteristic of “sex” may be an example of this as it is uncertain what the exact role is that this “characteristic” will play.¹⁷⁵⁹

The addition of “sex” as a characteristic has generated criticism, with Yeo correctly arguing that by giving recognition to the defendant’s sex, the Act potentially created controversy since it might condone the argument that women generally have a higher level of self-restraint and tolerance than men.¹⁷⁶⁰ The impact of this is that it might further perpetrate the stereotype that woman who kill are "either aberrational or evil monsters or excessively pathological."¹⁷⁶¹ Yeo states that this potential gender

matters affecting the accused’s general capacity for self-control and those that affect the gravity of the provocation directed at the defendant should be differentiated, however this excluded the characteristic of age.

¹⁷⁵⁶ Camplin supra (n 580) see discussion in Chapter 3 at 113.

¹⁷⁵⁷ Holley supra (n 670), See Chapter 3 at 109-110 and at 117 for discussion of this case and the approach of the Privy Council to the restrictiveness of the objective test.

¹⁷⁵⁸ Norrie supra (n 837) at 282, one of the other problems identified with the old defence was that the law could not distinguish between those characteristics that should ethically be permitted to excuse and those that should not. In not recognising the link between the provoking factor and the provoked conduct although narrows the scope of the new defence.

¹⁷⁵⁹ Norrie supra (n 837) at 281.

¹⁷⁶⁰ Yeo supra (n 869) at 11.

¹⁷⁶¹ Yeo supra (n 869) at 11.

discrimination may have been the reason why the Law Commission did not include “sex” as a factor that should be taken into account in the objective test.¹⁷⁶²

With regard to allowing age to be considered as a general characteristic, the Law Commission stated “capacity for self-control is an aspect of maturity, and it would be unjust to expect the same level of a 12- year -old and an adult”.¹⁷⁶³ It must be argued that the new law is still not clear what the role age plays; there is uncertainty on whether it impacts on the defendants capacity for tolerance and self-restraint or if it is relevant to the circumstances of the defendant. The Law Commission had acknowledged these issues and stated that “mental age is a complex subject”, but stated that the objective test would be undermined if psychiatric and psychological evidence concerning maturity was scrutinized. Although it may have been sensible to extend the objective test, the Law Commission did not support such a move due to policy reasons’.¹⁷⁶⁴

In respect of the objective test in the provocation defence in Canada, it must be noted that nature of the problems experienced in English law is very similar to those experienced in Canadian law. The objective test in the Canadian provocation defence¹⁷⁶⁵ operates to assess whether the act or insult was sufficient to deprive an ordinary person of self-control.¹⁷⁶⁶

The objective test has undergone a certain amount of change over the years; the Supreme Court of Canada initially followed the approach of the English case of

¹⁷⁶² Yeo supra (n 869) at 11 in reference to *Murder, manslaughter and Infanticide* (2006) supra (n 799) at para 5.38, In *Partial Defences to Murder* (2004) supra (n 799) the Law Commission argued that the law should be gender neutral unless absolutely necessary, in respect of the “fear” trigger, this could indicate that women are more vulnerable than men who are generally physically stronger.

¹⁷⁶³ *Partial Defences to Murder* (2004) supra (n 799) at para.3.110; Norrie, supra (n 837) at 288 is correct in arguing that recognizing age as impacting on capacity for self-control may be problematic since the focus is not on age but on maturity. Arguments put forward centre around determining the true maturity of a person, for instance an adult could possess the maturity of a child.

¹⁷⁶⁴ Edwards supra (n 650) at 238 discussing *Partial Defences to Murder* (2004) supra (n 799) at para 3.1.30).

¹⁷⁶⁵ Section 232(2) of the Criminal Code.

¹⁷⁶⁶ Roach supra (n 26) at 252.

Camplin¹⁷⁶⁷ in Hill¹⁷⁶⁸, wherein the stringent objective test was relaxed to the extent that it allowed the attributes of sex and age of the defendant to be attributed to the reasonable man. Evidently, the Supreme Court of Canada found difficulties in applying a stringent objective test. It is submitted that concerns of this nature indicate that the basis for the provocation defence in Canada is inherently problematic which results in the tendency to subjectivise the objective test.

However, despite being partly relaxed by the case of Hill,¹⁷⁶⁹ questions surrounding which individual factors of the defendant should be considered still remained. The tendency to relax the objective test in the Canadian provocation defence occurred again in the more recent case of Thibert¹⁷⁷⁰ where the Supreme Court examined (in a concerted way) the objective standard in the provocation defence after a decade since Hill¹⁷⁷¹ and like Hill,¹⁷⁷² the courts attention was focused on application of the ordinary person test.¹⁷⁷³

It is submitted that law makers have battled for decades to solve the problems associated with the objective test to little avail. Like England, Canada is also grappling with the common problem of interpretation and application of the objective test. The case of Thibert¹⁷⁷⁴ illustrates this point, this case has been widely criticised by academics for the outcome and it is argued that the nature of the objective standard has been changed

¹⁷⁶⁷ Camplin supra (n 580).

¹⁷⁶⁸ Hill supra (n 1064) see chapter 4 at 179-180 for discussion of this case.

¹⁷⁶⁹ Hill supra (n 1064).

¹⁷⁷⁰ Thibert supra (n 1053) at 51; Roach supra (n 26) at 256-257 argues that the proper focus in Thibert should have been on the deceased's taunts just before the shooting however the approach of the majority has given significance to the breakup of the marriage and its history.¹⁷⁷⁰ The decision of the court to assess conduct using the standard of the married man may potentially excuse male violence towards women based on the breakup of the relationship.

¹⁷⁷¹ In Hill supra (n 1064) the Supreme Court acknowledged this problem and stated that it would be fair to consider the accused's age as an "important contextual consideration." Currently it would be an error in law if a jury was not instructed to consider the reaction of ordinary person of the accused's age when applying the objective test to determine loss of self-control.

¹⁷⁷² Hill supra (n 1064).

¹⁷⁷³ Hyland supra (n 25) at 146.

¹⁷⁷⁴ Thibert supra (n 1053).

so drastically that it resembles the subjective test.¹⁷⁷⁵ The controversies generated by the Thibert¹⁷⁷⁶ judgment stem from the courts decision that a greater number of the accused's characteristics should be taken into account when applying the ordinary person standard.¹⁷⁷⁷ Evidently, the court adopted a less cautious approach wherein the ordinary person was given a contextual definition.¹⁷⁷⁸

However, the court in Thibert¹⁷⁷⁹ has been criticized for this approach and commentators have argued that in effect this cannot be called an objective standard.¹⁷⁸⁰ It has been replaced by a subjective standard and remains the objective standard only in name.¹⁷⁸¹ The Thibert¹⁷⁸² has shifted the provocation defence onto new ground by rejecting the distinction between a uniform standard of self-control and an

¹⁷⁷⁵ Sahni supra (n 1135) at 144;149-150: argues that this is dangerous since widening the objective standard to such a degree as done in Thibert undermines goal of encouraging behaviour which is reasonable and responsible. This in effect creates an ordinary person who is the "ordinary distraught, angry man whose wife has been having an affair and who has not slept for 34 hours."; Goman supra (n 980) at 488 believes that the accused killed another human being out of jealousy and anger and not because he was provoked. The accused deliberately sought out his wife with a loaded firearm hence it is outrageous that he be able to use the defence of provocation.

¹⁷⁷⁶ Thibert supra(n 1053) at 19 The court analysed previous case law regarding the ordinary person test and stated: "In summary then, the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control."; Sahni supra (n 1120) at 148 argues that the statement made by Cory J is inconsistent with the case of Hill supra (n 1064) , Cory J takes the ordinary person test further by allowing the history and background of the relationship between the accused and the victim to be taken into account in the application of the objective standard.

¹⁷⁷⁷ Sahni supra (n 1135) at 148-149,150: states that even though Cory.J in maintains that application of the objective test is dependent on the facts of each case, his analysis of Thibert allows for consideration of certain traits which should not form part of the objective standard. Recognition of factors such as distress caused by an extra marital affair and lack of sleep in the objective test is undesirable.

¹⁷⁷⁸ Nelson supra (n 1050) at 1042-1043.

¹⁷⁷⁹ Thibert supra (n 1053).

¹⁷⁸⁰ Hyland supra (n 25) at 148: Hyland argues that that Thibert has significantly altered the objective test and has eroded the significance of the objective standard, by preferring an entirely individualised objective test.

¹⁷⁸¹ Sahni supra (n 1135) at 144-143.

¹⁷⁸² Thibert supra (n 1053).

individualized test to determine the gravity of the provocative act and adopting instead an ordinary person test which is individualized.¹⁷⁸³

The basis of the criticism towards this case is the impact of this development is that it may increase the scope of the provocation defence. Accused persons may argue that due to their personal attributes, it was reasonable for them to have lost self-control in their circumstances which led to the killing of their victim, regardless of how trivial the victim's provocative act was.¹⁷⁸⁴

It is submitted that a subjectivising of the objective test should not lead to such result, this indicates that with or without an objective test the provocation defence in Canada is fundamentally flawed. Though, it must be noted that the success rate of the provocation defence remains low and judges have not broadened the objective standard significantly since the case of Thibert.¹⁷⁸⁵

Stuart, in this light refers to the law reform bodies in New Zealand¹⁷⁸⁶ and South Australia¹⁷⁸⁷ who have called for purely subjective tests which make room for personal characteristics, idiosyncrasies and other factors including low intelligence.¹⁷⁸⁸ The problems relating to the objective test in England and Canada leads to the ultimate conclusion that the provocation defence as a whole in England needs re-examination since the assessing of what amounts to provocation is relative in different cultures.¹⁷⁸⁹

¹⁷⁸³ Hyland supra (n 25) at 169; Sahni supra (n 1135) at 150 argues that the danger of this approach is that the Thibert judgment has given virtually limitless use of the defence since all accused persons can argue that their individual attributes gave rise to a loss of self-control which was reasonable. If lack of sleep and distress from extra marital relationships are allowed consideration then this leaves the door wide open for attributes such as homophobia and racism.

¹⁷⁸⁴ Hyland supra (n 25) at 169.

¹⁷⁸⁵ Thibert supra (n 1053).

¹⁷⁸⁶ New Zealand Law Reform Committee, *Report on Culpable Homicide* (1977).

¹⁷⁸⁷ Criminal Law and Penal Methods Reform Committee of South Australia, *4th Report : The Substantive Criminal law* (1977) at pp.21-24 cited by Stuart supra (n 70) at 545.

¹⁷⁸⁸ Stuart supra (n 70) at 545 notes that this view received support albeit from the minority in the Australian High Court case of Moffa supra (n 1728).

¹⁷⁸⁹ Wells supra (n 798) at 104, at 106 states that the central debate regards how to reflect the different contexts in which people kill within the homicide laws.

As discussed previously, the courts in South Africa have struggled with application of principles of the defence of non-pathological incapacity which resulted in controversial acquittals,¹⁷⁹⁰ although academics have attributed the tendency to easily acquit to the lack of an objective test and an over emphasis of subjectivism. However, it is submitted calls for an objective test is misguided, it is clear that the objective test has posed difficulties especially in regard to application. Aligning South African law with England or Canada will amount to a regression to a law that is out of touch with the realities of society and with a law that cannot be successfully applied, the result of adopting an objective test is likely to be problematic and lead to an outcome that is inherently unjust.

As Louw correctly argues, an objective test, whether relative or absolute, will always lead to an unsatisfactory compromise since the accused will be judged against the standards of someone else.¹⁷⁹¹

This argument is supported by the results of the comparative analysis which reveal that the objective test in both jurisdictions is inherently troublesome and the source of most of the controversy surrounding the provocation defence. Furthermore, critics of the objective test and its restrictive nature, attribute the problems regarding gender inequality in both the England and Canadian provisions to limiting the range of characteristics that can be taken into account when applying the objective test.

This essential trait of the reasonable man test must be criticised for undermining the goal of eradicating discrimination. There has been debate in Canada regarding whether the objective test should become more subjective due to the increasing need for introducing individualising factors in cases involving provocation.¹⁷⁹² It is the function of the criminal justice system to discourage criminal behaviour, however in this instance it comes at a severe price, as it adversely impacts society at large by unjustifiably reducing the scope and distorting the function of the provocation defence which is to aid individuals who suffer a loss of self-control.

¹⁷⁹⁰ S v Moses supra (n 16) and S v Nursingh supra (n 16) and S v Arnold supra (n 16).

¹⁷⁹¹ Louw supra (n 1724) at 364.

¹⁷⁹² Roach supra (n 26) at 259-260.

5.1.7.3. Objective test for capacity subject to constitutional challenge

The policy-based approach of Eadie¹⁷⁹³ is centred on the concept of “reasonableness”, however a valid argument raised by Hoctor is that the judgment subverts the principle upon which the concept of justification of the criminal law is based. It is in terms of the principle of individual autonomy that individuals must be held accountable for his or her own conduct.¹⁷⁹⁴ Therefore, individuals are autonomous moral agents who possess the right to freedom of action, therefore it is in light of this principle they are held responsible for their actions.¹⁷⁹⁵

The principle of criminal responsibility founded on culpability is based on the recognition that the individual is a moral entity who is capable of understanding and of choosing.¹⁷⁹⁶ Reverence for the right to dignity of an individual entails recognising that all individuals are permitted to make choices which are as unique as they are.¹⁷⁹⁷

An important part of the principle of autonomy is the normative element which states that individuals should be accorded respect and must be considered as agents who are capable of independent agency. This principle lies at the heart of Ronald Dworkin's philosophy that every individual is entitled to respect and equality.¹⁷⁹⁸

The principle of autonomy therefore accords great importance to the rights of the individual such as the right to liberty in the context of what the state is allowed to do in a given situation. A crucial aspect of this principle is therefore that individuals must be protected from official censure through the criminal law except if it can be shown that they chose to act in the manner in question.¹⁷⁹⁹ This is in line with Hart's eminent philosophy that an individual should not be held criminally liable if the capacity and fair

¹⁷⁹³ S v Eadie supra (n 18).

¹⁷⁹⁴ Hoctor supra (n 1) at 166.

¹⁷⁹⁵ Hoctor supra (n 1) at 166 citing A. Ashworth Principles of criminal law (1999) 3ed at 27.

¹⁷⁹⁶ Hoctor S V “Dignity, criminal law and the Bill of Rights” (2004) 121 SALJ 304 at 309.

¹⁷⁹⁷ *Ibid* at 312.

¹⁷⁹⁸ R. Dworkin Taking Rights Seriously (1977) at 180 discussed by Ashworth supra (n 57) at 24.

¹⁷⁹⁹ Ashworth supra (n 57) at 24.

opportunity to behave otherwise is absent.¹⁸⁰⁰ Therefore, if the principle of autonomy is to be respected, the State must let individual's decide the manner in which they are to behave and refrain from usurping this right.

Raz delineates the three main characteristics of the autonomy-based doctrine of freedom:

“First, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent the denial of freedom, but to promote it by creating the conditions of autonomy. Third, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others.”¹⁸⁰¹

In terms of the present study and the issue of enforcing an objective test for capacity devoid of a subjective test for capacity, it is submitted that this is in clear violation of the right to dignity which forms the basis for culpability.¹⁸⁰² Dworkin states that the most important characteristic of Western political culture is the belief in the human dignity that the individual possesses.

In this regard, Dworkin states:

“[T]hat people have the moral right- and the moral responsibility- to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own conscience and convictions... [i]ndeed the most basic premise of Western democracy- that government should be republican rather than despotic- embodies a commitment to that conception of dignity.”¹⁸⁰³

Dignity is a fundamental tenet upon which the criminal law is built. There is a commonality between the criminal law and constitutional law, which is the perception of the individual, rooted in the principle of autonomy of the self and on the right of

¹⁸⁰⁰ H.L.A Hart Punishment and Responsibility (2008) 2nd ed, chapter 6, discussed by Ashworth supra (n 57) at 25.

¹⁸⁰¹ J.Raz The Morality of Freedom (1986) at 425.

¹⁸⁰² Hoctor supra (n 1796) at 309.

¹⁸⁰³ R.Dworkin Life's Dominion (1993) at 166-167.

human dignity. In terms of this principle, an individual should not be regarded as an object or instrument.¹⁸⁰⁴

In this light, and in terms of the principle of autonomy, the introduction of an objective test for cognitive capacity can be subjected to constitutional challenge for unjustifiably infringing on the right to dignity, granted by section 10 of the 1996 Constitution. The imposition of a fixed standard of behaviour upon the individual, in the form of the reasonable person / ordinary person standard deprives the individual of free choice and individual autonomy, the right to dignity of the individual is therefore infringed.

The constitutional law as well as the criminal law is based on the principles of liberal philosophy where individuals are presumed to be morally autonomous. An assumption exists that the fundamental ability to appreciate reality and differentiate between right from wrong exists. The preservation of the right to dignity entails that the value and the worth of an individual is protected.¹⁸⁰⁵ The application of an objective test within the capacity inquiry violates the right to dignity.

Furthermore, it is submitted that, apart from the infringement of the right to dignity, the right to freedom and security of the person in terms of section 12(1) (a) of the 1996 Constitution may also be unjustifiably infringed by the introduction of an objective test in Eadie.¹⁸⁰⁶ Holding an accused person accountable to the standard of a reasonable person is unconstitutional because the capacity and fair opportunity to behave otherwise may not have existed.

Furthermore, it is submitted that it is not possible to make a correct assessment of the mind of an individual who is accompanied by mental baggage in the form of life experiences, with an objective assessment; hence, it is not only illogical but also contrary to the principles which underpin the notions of justice to apply objective criteria to assess criminal capacity. The theoretical approach which focuses on the state of mind of an accused person should remain.¹⁸⁰⁷ Every human being is distinct thus

¹⁸⁰⁴ Hoctor supra (n 1796) at 306.

¹⁸⁰⁵ Hoctor supra (n 1796) at 305.

¹⁸⁰⁶ Hoctor supra (n 1) at 167.

¹⁸⁰⁷ Snyman supra (n 1) at 13.

their reaction or capacity for self-control to a provocative act or emotional stress may differ from individual to individual in light of this inherent uniqueness.

Ashworth contended that the doctrine of provocation in England is reproached with a “cruel inconsistency” in that it aims to act as a concession to human frailty although applying the same standard to individuals who may possess unequal capacity, this results in a concession to “normal” people but not to others possessing lower levels of capacity. Therefore in terms of this principle the subjective and objective test express core feature of provocation in England, which is that it is a ground for extenuation?¹⁸⁰⁸ Therefore, the function of the objective test relates to the element of partial element and the assessment of the conduct of the provoker.¹⁸⁰⁹

In this respect it is illogical to make an assessment of a reaction arising out of severe provocation or emotional stress using an objective test; this may result in a travesty of justice being done both to the accused and to society in general. It is submitted that the degree of response to a stressful situation varies from person to person, therefore in this light; it seems unjust to bring in objective elements into a defence which focuses on an individual’s response and state of mind at a crucial point in time. Judging an individual’s mind-set is the heart of the defence, and in this view, an objective test has no place.

It must be remembered that the criminal law serves to protect the rights of the people it governs by enforcing certain rules, these are all engineered with the intention of protection of individuals and preserving the well-being of the community. The defence of non-pathological incapacity due to provocation and emotional stress has been developed principally to accommodate a handful of individuals who in rare and exceptional circumstances and owing to certain events suffer a total loss of control due to non-pathological factors.

¹⁸⁰⁸ Ashworth supra (n 462) at 317.

¹⁸⁰⁹ Ashworth supra (n 462) at 317.

It is submitted that the introduction of an objective test in Eadie¹⁸¹⁰ is problematic. It has been the source of controversy since time immemorial because on a fundamental level it is illogical. The tendency of the courts in England and Canada to individualize the objective test represents a natural inclination since making such an assessment without attributing subjective factors will lead to a travesty of justice. It is submitted that the adoption of an objective test would be highly problematic and create significant uncertainty and confusion within the defence.

5.1.7.4. Implications of an objective test introduced in Eadie

The implications of an objective element alters the nature of the defence, it has been reworked to the extent that the defence becomes a different defence. This distortion is a direct result of the court in Eadie¹⁸¹¹ basing its judgment on policy considerations rather than the established and well-developed foundational principles to criminal liability.

Hence, the criticism of the Eadie¹⁸¹² case is based on the courts attempt to remedy a perceived troublesome aspect of law without a proper impact assessment of the wider implications of an objective test, essentially the court digressed from years of precedent due to its disagreement or confusion and being unduly influenced by the convictions of the community.

As Louw fittingly argues:

“While calls for a more policy-driven application of our law might appease public sentiment, such calls do not always lead to good law. Where a policy shift is not logical, it may appear to coincide too readily with public opinion. The introduction of an objective policy based test for provocation does not make legal sense.”¹⁸¹³

It is submitted that the introduction of an objective standard will not only negate the positive developments made since the landmark case of Chretien¹⁸¹⁴, but will also prejudice the defendant, comparing character traits and type of reaction to a generic

¹⁸¹⁰ S v Eadie supra (n 18).

¹⁸¹¹ S v Eadie supra (n 18).

¹⁸¹² S v Eadie supra (n 18).

¹⁸¹³ Louw supra (n 5) at 203.

¹⁸¹⁴ S v Chretien supra (n 204).

standard which in itself is hard to determine will lead to more confusion and uncertainty. Rumpff CJ in Chretien¹⁸¹⁵ fittingly stated that “the need to punish criminal conduct versus the undesirability of penalising a person for conduct for which, owing to voluntary drunkenness, he was not responsible”.¹⁸¹⁶

It is the responsibility of the courts when basing decisions on policy grounds, to keep in mind the values and the norms of society it is responsible for and to apply these values when making a pronouncement. Judges have the task to “perform a balancing act between two competing values, each in itself a worthy and desirable one”.¹⁸¹⁷

In this respect, Louw highlights the importance of ensuring a balance that when tailoring the law along lines of policy while simultaneously ensuring the new approach built on a solid foundation of legal principle. Louw thus states that a movement towards “a more normative approach to our criminal law heralded by public sentiment aghast at the country’s alarming crime rate, but it is not in line with the considered decisions of the court and it is not in line with our general principles. It ought to be reviewed.”¹⁸¹⁸

Louw correctly argues that the principles of law should not be so binding that it cannot be relaxed when the interests of justice are concerned, but if the court makes a change to principle it must be done with caution and careful consideration of what exactly will be in the interests of justice. This can be achieved if the interests of the accused are balanced with the interests of the public.¹⁸¹⁹

It is submitted that the court in Eadie¹⁸²⁰ failed to maintain this balance rather it created a drastic imbalance in favour of policy by blatantly disregarding foundational principles of the defence of non-pathological incapacity. It is thus submitted that the court in

¹⁸¹⁵ S v Chretien supra (n 204).

¹⁸¹⁶ S v Chretien supra (n 204) at 66.

¹⁸¹⁷ M.M Corbett “Aspects of the role of policy in the evolution of our common law (1987) 104 SALJ 52 at 67.

¹⁸¹⁸ Louw supra (n 5) at 206.

¹⁸¹⁹ Louw` supra (n 5) at 205.

¹⁸²⁰ S v Eadie supra (n 18).

Eadie¹⁸²¹ unwittingly redefined the defence with the addition of objective factors in the test for capacity, with the aim of shrinking the boundaries of the defence.

In reference to public policy and its influence on legal decisions, Hoctor cites the landmark case of Makwanyane,¹⁸²² where the Constitutional Court “did not merely adopt the majority community view favouring the death penalty”.¹⁸²³ Dlamini states when policy is considered, factors relating to society must be considered, and that is needed to improve society, the functioning of the community and aiming to benefit its citizens. Principle on the other hand is different; justice and fairness takes precedence over all other considerations it is “a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or other dimension of morality”.¹⁸²⁴

The court in Eadie¹⁸²⁵ was under the same duty to affect such a balancing act in relation to provocation or emotional stress. It is clear from the changes made to the defence of non-pathological incapacity due to provocation and emotional stress that the court did not achieve such a balance, rather the import of Eadie prejudices criminal law and individuals of society at the same time. Concerns regarding the safety of society and crime control are important, these concerns should not be pivotal.¹⁸²⁶

It is clear that in an attempt to solve the controversies of the provocation defence, courts and academic writers are of the belief that the introduction of an objective standard is the solution to preventing facile acquittals,¹⁸²⁷ however, Louw correctly argues that the problem lies in the need to find a way of validating provocation as a defence while preventing facile acquittals.¹⁸²⁸

¹⁸²¹ S v Eadie supra (n 18).

¹⁸²² S v Makwanyane (1995) 2 SACR 1 (CC).

¹⁸²³ Hoctor supra (n 1) at 147.

¹⁸²⁴ Dworkin supra (n 1798) at 22 cited by Dlamini supra (n 89) at 137.

¹⁸²⁵ S v Eadie supra (n 18).

¹⁸²⁶ Hoctor supra (n 1) at 147.

¹⁸²⁷ Krause supra (n 290) at 350 states that the court was correct in acknowledging that non-pathological incapacity should not be a complete defence despite the court’s reasoning for this view being flawed.

¹⁸²⁸ Louw supra (n 5) at 204.

5.1.8. Provocation defence in England and Canada inherently problematic

In analysing the respective provisions governing the provocation defence it is clear that both England and Canada have struggled with their respective provisions. It is in light of the many problems and criticisms of the defence in both jurisdictions that have spurred critics to call for abolition of the provocation defence in England and Canada. Mitchell states that the abolition of the old provocation defence in England was not surprising since one of the underlying problems was that the difficulty in identifying a clear rationale behind the defence.¹⁸²⁹ The former defence in England was extremely problematic, calls for abolition were made on the basis that it is “bound to encourage and exaggerate a view of human behaviour which is sexist, homophobic, and racist.”¹⁸³⁰

The rationale for the defence in Canada and England is to prevent an injustice occurring wherein a person is convicted of murder despite being undeserving of a conviction. In this regard, Wells argues that the provocation defence in England carries a message, for one, though it is based on the concession to human frailty principle, it is also based on the actions of the victim or another person other than the accused.¹⁸³¹ In respect of Canadian provision, Renke states that the doctrine of provocation “accommodates the complexity of being human” and plays an important role in the administration of justice.¹⁸³²

¹⁸²⁹ Mitchell supra (n 555) at 131 states that some commentators have categorised the rationale of the provocation defence as being excusatory in nature seeing that the accused lost control due to the provocation and therefore being less culpable, second school of thought subscribed to by writers such as Ashworth believe an element of justification exists in the requirement loss of self-control. In terms of the third school of opinion regard the rationale as partial responsibility due to the disturbed mental state of the accused.

¹⁸³⁰ C. Wells Provocation: The case for Abolition-Rethinking English Homicide (2000) at 85, at 86 Wells argues that though the partial defence of provocation is well established in the English common law, the defence is categorised under voluntary manslaughter and this is peculiar given that a successful plea of provocation results in the reduction in culpability yet the law categorises this defence as voluntary manslaughter. The relationship between the provocation defence and other defences such as self-defence and diminished responsibility brings about practical and conceptual difficulties

¹⁸³¹ Wells supra (n 1830) at 86.

¹⁸³² Renke supra (n 28) at 778.

However, it is submitted that a significant problem preventing the proper functioning of the provocation defences in England and Canada is the respective objective tests as well the problematic concept of loss of self-control. It is submitted that the provocation in both jurisdictions is rampant with internal contradictions; the requirement of loss of control which is a fundamental requirement in both the defences in England and Canada is criticised since it is postulated against the objective test of the reasonable/ordinary man makes the defence impractical and therefore unusable.¹⁸³³

The loss of self control requirement is problematic in both jurisdictions and is the major cause of gender discrimination against the battered women.¹⁸³⁴ It is submitted that the concept of self-control lacks content and is superficial, since the description of the concept is founded on outward physical displays of loss of self-control such as “going beserk”¹⁸³⁵ which associated with anger above other emotions. What is evident though is that the concept of self-control is deeply linked to angered states and the so called “eruptive moment”.¹⁸³⁶ The requirement of loss of self-control is considered an essential part both the respective jurisdictions, as it is the only factor which differentiates provocation cases from other cases involving premeditating killings.

The problem with this approach and with the vague short-sighted concept of loss of self-control in England and Canada is it easily excludes individuals who may have not suffered a loss of self-control resulting from anger or rage, this applies to the “battered women” and other individuals who have experienced abuse and act out of fear. The “eruptive moment” is lacking so the traditional concept of loss of self-control in England and Canada is incompatible with killings arising out of fear or emotional stress.¹⁸³⁷

¹⁸³³ Wells supra (n 1830) at 105 suggests three broad options. The first would be to expound upon the objective test, second option is to abandon the objective test altogether. The final option, the wholesale abolition of the provocation defence.

¹⁸³⁴ Edwards supra (n 650) at 228.

¹⁸³⁵ Edwards supra (n 650) at 224.

¹⁸³⁶ Edwards supra (n 650) at 228.

¹⁸³⁷ Edwards supra (n 650) at 228.

England should be commended for strides made in this area and addition of “fear” as a qualifying trigger in the new loss of control defence. However the same cannot be said for Canada where the requirement of “suddenness” characterising both the provocation and retaliation are insurmountable obstacles for women. The requirement that the loss of self-control must be sudden, together with the requirement that the provocation must be sudden have resulted in gender discrimination against the abused persons who kill their perpetrator such as the battered women.¹⁸³⁸

This common area has troubled the provocation defence in England and still poses an issue in the Canadian provocation defence concerns the battered woman and how to bring her within the ambit of the provocation defence. These points of criticisms relate to the question of whether cumulative provocation should be accepted to ensure that the partial defence better caters for the abused woman.¹⁸³⁹

It is argued that the sexist foundations which influenced the law on provocation continued with the section 3 of the Homicide Act, the previous defence was criticised for discriminating against woman when they assumed the form of either the deceased or defendant.¹⁸⁴⁰ Furthermore, the experiences of the battered woman were not fully understood by judges and jurors and this problem has made the provocation defence a risky option for the battered woman.¹⁸⁴¹

Horder states that men are more prone to lose control in the manner set out by Devlin J in Duffy¹⁸⁴² whereas women would likely experience a more complex set of emotions, especially where the provoker is an abusive husband, a woman would likely have mixed motives comprising of fear and anger.¹⁸⁴³ According to Horder, this reaction is characteristic of someone who is physically less powerful and aggressive than the male provoker. Anger at the provoker would be lessened by the fear of possible reaction to an angry response. The “mixed” reaction results in delayed loss of control and may likely

¹⁸³⁸ Quigley supra (n 1015) at 253, Renke supra (n 28) at 749.

¹⁸³⁹ Elliot and Quinn supra (n 525) at 82.

¹⁸⁴⁰ Edwards supra (n 650) at 240-241.

¹⁸⁴¹ Elliot and Quinn supra (n 525) at 82.

¹⁸⁴² Duffy supra (n 550).

¹⁸⁴³ J. Horder Excusing Crime (2004) at 97.

leave the provoked with a heightened emotional state. In this light battered women were not sufficiently accommodated by the law.¹⁸⁴⁴

Over the last two decades, the requirements of the defence were “stretched” in order to bring the battered woman within the ambit of the defence.¹⁸⁴⁵ Despite reformation of the provocation defence in English law, the new provisions are still subjected to criticism, since the defence of the battered woman, whose reaction objectively assessed, will be considered to be excessive since an ordinary person with a normal degree of tolerance and self-restraint would not have used excessive force.¹⁸⁴⁶

Recognising fear as a qualifying trigger to loss of self-control is generally a welcomed addition, it will favour the battered woman, battered woman will still need to be subjected to the loss of self-control test.¹⁸⁴⁷ Despite this favourable change, the question of how well battered woman will benefit by the new defence still remains to be seen. It is submitted that some of the problems which plagued the old defence of provocation still persist, although to a lesser extent.

This objective assessment of capacity for self-control in English law is still troublesome and has the potential to cause the battered woman to fail in her defence. It is submitted that the problems of gender discrimination may persist since the foundations and principles upon which the new Act is based may be to blame as the law has possibly gone from being biased towards men to now being biased towards women and discriminatory to men.

It is evident that both England and Canada have grappled with problems relating to the gendered nature of the provocation defence. These relate to providing a defence for the battered woman and the criticisms that the provocation defence provides a safe haven for those that commit spousal, specifically homicides involving the murder of female intimate partners. Of particular concern was the increasing number of cases where the provocation defence was raised where the circumstances involved sexual jealousy and

¹⁸⁴⁴ Horder *supra* (n 556) at 129.

¹⁸⁴⁵ Edwards *supra* (n 650) at 226.

¹⁸⁴⁶ Miles *supra* (n 930) at 32.

¹⁸⁴⁷ Mitchell and Mackay *supra* (n 823) at 5,-6.

extra-marital affairs.¹⁸⁴⁸ In England, it is these factors which influenced the decision by the Home Secretary to request an assessment by Law Commission to assess the partial defences, especially its operation in cases involving domestic violence.¹⁸⁴⁹

The problem of domestic homicides in most cases involve the killing of women by men, women are considered to represent at least three quarters of domestic homicides in Canada, Australia as well as the United States.¹⁸⁵⁰ “Provocation has acquired some standing in other jurisdictions as a defence for abused women who kill but it has not as yet been effectively used in Canada.”¹⁸⁵¹

After analysis of the provocation defence in Canada, it is evident that spousal homicides and the gendered nature of the provocation defence is one of the foremost problems in that jurisdiction. The Canadian provocation defence has been criticized for assisting jealous husbands who witness their wives in the act of adultery succeed with their defence.¹⁸⁵²

Most of the controversy surrounding the provocation defence centres not only on the purpose of the defence but also the application. It is contended that one of the fundamental short-comings of the defence is that it excuses violent reactions to both violent and non-violent acts. This form of excusing violence is outdated by modern

¹⁸⁴⁸ These cases inevitably involved scrutiny of the deceased’s reputation and should the defence succeed, it also sends out a negative message that the law blames the deceased for her own demise.

¹⁸⁴⁹ Elliot and Quinn *supra* (n 525) at 84.

¹⁸⁵⁰ Forell *supra* (n 1019) at 162 citing U.S Department of Justice Bureau of Justice Statistics, *Crime Data Brief: Intimate Partner Violence, 1993-2001* 1 (2003).

¹⁸⁵¹ Baker *supra* (n 1006) at para. 193; Nelson *supra* (n 1050) states men usually kill out of jealousy or rage in the “heat of passion”; Forell *supra* (n 1019) argues this is in stark contrast to women who will usually kill their abusers out of fear and despair. In this way “heat of passion” has replaced the honour killing as the basis for provocation. Forell further argues at 163 (discussing Thibert *supra* (n 1053) and Stone *supra* (n 999) that the boundaries of “heat of passion” have been undesirably extended making any form of infidelity or even an attempt to end a relationship sufficient for a defence in provocation. Feminists have emphatically argued for men who kill their intimate partners out of possessiveness or rage to be convicted of murder and not manslaughter, provocation law in Canada and the decisions by the Supreme Court “remain solicitous to men who kill their intimates out of jealousy or rage”.

¹⁸⁵² Goman *supra* (n 994) at 499.

standards of society.¹⁸⁵³ The partial defences in Canada has been the subject of review by the Department of Justice¹⁸⁵⁴ unfortunately legislative reform doesn't seem likely due to conflicting opinions regarding options of reform.¹⁸⁵⁵

The controversy surrounding the defence relate both to its purpose and its application.¹⁸⁵⁶ Hence, the theory underpinning the defence as well the practical application is flawed. In terms of the theoretical underpinning of the defence, which is the recognition of human frailty, Nelson argues that the defence operates more to excuse violence in a manner which is out-dated by modern standards of thinking.¹⁸⁵⁷

This troubling aspect has led to calls for the abolishment of the defence or at least some form of limitation. However, the criticisms of the loosening of the objective test is misplaced; the underlying rationale for the defence is flawed and therefore results in confusion and inconsistent judgments. The problem of gender discrimination in the form of alleged bias towards jealous husbands illustrates that the provocation defence failed catch up with an ever-changing society, this illustrates that the law governing the provocation defence failed to evolve alongside the needs of society and in accordance with a progressive society.¹⁸⁵⁸

¹⁸⁵³ Nelson supra (n 1050) at 1060-1061.

¹⁸⁵⁴ Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property (1998) at 1-20.

¹⁸⁵⁵ Stuart supra (n 70) at 547.

¹⁸⁵⁶ Nelson supra (n 1050) at 1060.

¹⁸⁵⁷ Nelson supra (n 1050) at 1060; Roach supra (n 26) at 251 states people have a legal right to leave a relationships and to occasionally make disapproving remarks about the ex-partners and that the court's continued refusal to acknowledge this legal right in its broad interpretations could deny equal rights and protection to women.

¹⁸⁵⁸ Edwards supra (n 650) at 223-241: the problematic requirement of sudden loss of self-control was the main perpetrator of this inequality, in not recognising the different ways in which people may react to circumstances. Other problems which contributed to this gender discrimination was that the law did not recognise emotions such as fear as a factor that could undermine self-control. In regard to the addition of fear as a trigger to loss of self-control, Edwards argues that the philosophical foundations of the new defence of "fear-and-anger-loss of self-control" are incompatible. The reason for this criticism is rooted in the different way in which men and women lose self-control. Loss of self-control occurs in many ways depending on the qualifying trigger, it is good that the new defence gives recognition to this fact.

It must be noted that the provocation defences in both jurisdictions have failed to evolve to suit the changing nature of society, the defence has been criticised for failing to break away from its sexist roots wherein a man was entitled to kill upon discovering his wife in the act of adultery. Criticism that the defence is solicitous to men who kill their intimate female partners is a serious indictment on the justice system. Provocation defence enables jealous partners from escaping full might of the law by raising provocation and escaping with a manslaughter conviction.

The prevalence of spousal homicides in Canada and the perception that the provocation defence protects scorned men who kill their lovers have cast the provocation defence in a bad light, it is for this reason that feminists want men to be held more accountable. By the law and not be allowed to escape with a conviction of manslaughter.¹⁸⁵⁹ It is argued that this practice has no place in a modern and civilized society. The family and friends of the deceased are put through agonizing court processes where “dirty laundry” about a loved one is exposed. The law is seen as serving the perpetrator rather than protecting the victim.¹⁸⁶⁰

Like the provocation defence in England, the provocation defence in Canada also reflects the law’s inability to evolve to suit modern-day thinking. It is cases such as Thibert¹⁸⁶¹, which have become the centre of the debate in recent times in Canada and has further fuelled these criticisms. It has been argued that judgments such as Thibert¹⁸⁶² operate “to elevate jealous husbands to a class or group with special characteristics that

¹⁸⁵⁹ Forell supra (n 1019) at 162, Nelson supra (n 1050) at 1063 argues that one of the concerning aspects of the defence is that it excuses violent reactions to both violent and non-violent acts. This factor is of major concern to already marginalised communities. Nelson further argues that the defence reinforces patriarchal ideals. The out-dated notions of women being the property of their husbands are still given support by the courts. Furthermore, battered women cannot find refuge in the defence and this is according to Nelson is attributed to the requirement that the accused must have acted on the sudden.

¹⁸⁶⁰ Forell supra (n 1019) at 162.

¹⁸⁶¹ Thibert supra (n 1053).

¹⁸⁶² Thibert supra (n 1053).

must be considered when determining if murder was a reasonable response to a deceased's words.”¹⁸⁶³

It has been argued that this development is ironic since the Supreme Court in Thibert¹⁸⁶⁴ has returned the defence to its origins where women were seen as property and adultery was an invasion of property and provocation served the purpose of assisting men who avenged their honour with murder.¹⁸⁶⁵

In this light it is contended that the basis of provocation in Canada has changed from killing to protect one's honour to killing in “heat of passion”. The concept of killing in the “heat of passion” now encompasses any form of infidelity or attempting to end a relationship.¹⁸⁶⁶ Currently, the defence is considered a licence to kill arising from jealousy. The nature of the defence needs to be properly understood, as an accused must succeed only in rare cases where loss of self-control was extreme.¹⁸⁶⁷

The defence should only succeed in exceptional cases. In this regard Grant argues that fears of an increased number of men being excused as a result of troubling decisions such as Stone,¹⁸⁶⁸ did not materialise since statistics support the suggestion that judges have taken spousal homicides seriously and consider the killing of an intimate partner to be a heinous act.¹⁸⁶⁹ However, despite this observation and the argument by Grant, it is submitted that women are still at a great risk of being killed by an intimate partner and

¹⁸⁶³ Gorman supra (n 994) at 499, at 415 citing K.Roach “Provocation and Mandatory Life Imprisonment” (editorial) (1999), 41 C.L.Q 273 argues that the defence should not be allowed to excuse murder because of jealousy. Some commentators have gone as far as to propose that the defence should be abandoned altogether in cases involving spousal homicides.

¹⁸⁶⁴ Thibert supra (n 1053); Gorman supra (n 994) at 494 is critical of the court's reasoning that it is acceptable that the history of the relationship between the accused and the deceased should be taken into account. The killing occurred because the deceased had an affair with the defendant's wife and not because of any provocation.

¹⁸⁶⁵ Gorman supra (n 994) at 478-479.

¹⁸⁶⁶ Forell supra (n 1019) at 162.

¹⁸⁶⁷ Gorman supra (n 994) at 480-481.

¹⁸⁶⁸ Stone supra (n 999).

¹⁸⁶⁹ Grant supra (n 1013) at 814-815.

this doesn't change the fact that there are problems with the defence which affords little protection for women both when they are the victim or the defendant.¹⁸⁷⁰

In effect the Supreme Court has ensured that the old rule that a man who kills his adulterous wife should not receive life imprisonment. Thibert¹⁸⁷¹ has undoubtedly made it difficult for a judge to refuse to put the provocation defence to the jury where the killing involved adultery by the defendant's wife.¹⁸⁷²

It is therefore submitted that the defence in Canada should be reframed to include killings committed by the battered women by recognising loss of self-control due to cumulative provocation. This may entail the abandonment of the requirement of suddenness; this will bring victims of abuse, such as the battered woman within its ambit.

It is often contended that in modern forward-thinking legal systems a defence based inherently on an enraged state should not be allowed. Calls for abolition of the provocation defence both in South Africa and in jurisdictions such as Canada and England are based on this argument. It is also argued that the leniency afforded by the law to the hot-tempered individual in the form of the provocation defence has wider implications especially considering the possible adverse impact on marginalised sectors of society such as homosexuals.¹⁸⁷³

¹⁸⁷⁰ Gorman supra (n 994) at 494-495 consideration of the history of the relationship may allow jealous husbands to escape a murder conviction, This allows a husband to brood over the events pertaining to the troubled relationship with his wife, then using a single act such as choosing to break up as an avenue to murder her. This does not amount to provocation and is not a temporary loss of self-control.

¹⁸⁷¹ Thibert supra (n 1053).

¹⁸⁷² Trotter supra (n 1187) at 669; Gorman supra (n 980) at 479 states that Thibert is not aberration but is a reflection of 16th and 17th century thinking, where adultery was considered there greatest form of provocation. The history of the defence in Canadian criminal law illustrates the purpose of the provocation defence which was assist jealous husbands who witnessed their wives in the act of adultery and committed murder. If the defence of provocation were to be abolished, the out-dated thinking found in Thibert would be reflected in sentencing. Gorman states that it is unfortunate that the courts in Canada ensured the continuance of this out-dated thinking.

¹⁸⁷³ Elliot and Quinn supra (n 525) at 82.

It is submitted that the objective test in both England and Canada have led to inconsistent case law and thus the cause of much uncertainty and controversy. Firstly, in Canada, the current defence in terms of 232 of the Criminal Code¹⁸⁷⁴ is beset with controversies, for one, the provision is criticised for its complexity which has resulted in the courts struggling with interpretations and application.¹⁸⁷⁵ Furthermore, in the subjective test regulating the loss of self-control and the lack of consensus regarding the characteristics to be taken into account in the objective test are problematic features of the provocation defence in Canada.¹⁸⁷⁶

In England, the new defence attempted to clear the confusion regarding the objective test and extend the scope of the defence in order to make it more accessible to vulnerable groups like battered woman. However, despite these attempts certain problems still persist and commentators argue that many ambiguities and confusion still persist.¹⁸⁷⁷ It is submitted that the problems associated the objective test in both jurisdictions have led to another major problem, that of gender discrimination. In England the provisions governing the provocation defence have undergone reformation due to various problems; one of the foremost issues was the problem relating to providing a defence which would encompass the battered woman. After extensive consultation and investigation the new law enacted provided a wider defence which

¹⁸⁷⁴ Stuart supra (n 70) at 544-545: argues that the defence of provocation is unnecessarily complex and thereby unacceptable.

¹⁸⁷⁵ Stuart supra (n 70) at 544-545.

¹⁸⁷⁶ Stuart supra (n 70) at argues that an alternative to a purely subjective test would be to recognise that at the outset the test be subjective but ultimately objectivity takes over. This compromise approach was endorsed by the English Law Revision Committee. This bold approach would make the murder under extenuating circumstances broader. Stuart states that adopting such an approach would bring honesty and directness to the complex homicide laws, At 544-545 Stuart contends that this approach would entail the removal of the initial reasonable person test thereby solving the conundrum of which individual factors to consider. All characteristics would be taken into account including characteristics such as hot-temperedness. Although a transition into total subjectivity raises questions of bogus defences succeeding, Stuart asserts that this worry is unfounded if there is reliance on the inherent common sense of the triers of fact.

¹⁸⁷⁷ Leigh supra (n 907) at 2, Withey supra (n 875) at 12, Mitchell and Mackay supra (n 823) at 2, Norrie supra (n 823) at 307.

encompassed a loss of self-control due to fear as well as anger. The old defence in England was reviewed and reformed in 2009.¹⁸⁷⁸

A major problem with previous defence in England was the difficulty in encompassing persons who kill their abusers, such as the battered woman within its ambit. The gendered nature of the defence prevented abused women from accessing the defence. The battered woman had to rely on defences such as diminished responsibility which was not necessarily the correct defence. This caused a major travesty of justice since the law catered for the men while discriminating against women. However, despite reformation of the provocation defence in England, the battered woman may continue to be faced with the problem of trying to persuade the jury that the amount of force used to kill the victim was “justifiable”, especially in circumstances where the abuse perpetrated was not serious.¹⁸⁷⁹

It is submitted that this does pose a problem since this requirement will be assessed objectively; hence the battered woman still faces a tough challenge as this means that the killing must have been justifiable in the eyes of the jury and not in the mind of the accused.¹⁸⁸⁰ The difficulty in achieving gender equality is due to the stringent nature of the objective test.¹⁸⁸¹ It is submitted that discrimination of many forms will result from the application of an objective test into the provocation defence.

It is submitted that apart from the many difficulties associated with the objective test, the subjective test and the requirement of the loss of self-control have proven equally troubling. It is submitted that the reason for these problems can be attributed to the

¹⁸⁷⁸ However, despite reformation of the defence, it is submitted that the new provisions are lacking in certain respects, for instance, the requirement that the provocative act must be “extremely grave in character” might cause confusion and controversy since it is not clear which circumstances this will cover.

¹⁸⁷⁹ Edwards *supra* (n 650) at 240.

¹⁸⁸⁰ Edwards *supra* (n 650) at 232, 240.

¹⁸⁸¹ The new provision in terms of the Coroners Act is perceived to be prejudicial to men and criticised on this basis. The new provision in England has received immense criticism for seemingly prejudicing men by virtue of the provision excluding extra-marital affairs from being a qualifying trigger; this is evidence that obtaining a balance in the form of a codified provision is difficult and may lead to some form of discrimination due to imposed limits.

underlying rationale underpinning the provocation defence in England and Canada, which is inherently flawed. It is submitted that the concept of self-control is problematic as the concept lacks content since it is linked strongly to enraged states. This results in a bias towards men who are known for losing their tempers suddenly as opposed to women who may lose self-control slowly and in many circumstances out of fear. It is submitted that this has resulted in problems associated with gender discrimination and the failure to curb the scourge of spousal homicides.

The historical survey together with the comparative analysis of the provocation defence in English law and Canadian law reveal that the defence of provocation emerged essentially to accommodate weakness of human nature and frailty in circumstances where the killing can be considered less blameworthy usually on moral grounds, for example; where a husband killed his wife upon discovery of an adulterous affair, historically this killing would be committed in defence of honour.

This basis for the provocation defence in England and Canada continued for many decades despite criticisms, the defence is trenchantly criticised for maintaining remnants of this out dated law. Critics of the provocation defence in both England and Canada have argued that it is not applicable to modern times where gender equality is enshrined.¹⁸⁸² These criticisms of the defence relate to the perceived bias towards favouring of an angered state which ultimately means bias towards men who are more inclined to react on impulse and in a fit of rage, this is argued to be discriminatory against women who react differently to provocative situations.¹⁸⁸³

However, allegations of gender discrimination in relation to the ambit of the defence and incidents of spousal homicides still feature prominently in England and Canada and are hard to ignore, this has fuelled condemnation at allowing a defence based on

¹⁸⁸² Horder *supra* (n 556) 123-124. Horder posed the pertinent question of why should someone who killed out of fear rather than anger be deprived of the defence, since fear can undermine self-control especially in cases where the provoker is more powerful.

¹⁸⁸³ In England and Canada the provocation defence is structured around the concept of loss of self control and the belief that, it is the responsibility of the law to accommodate a particular human failing, which in this case is the tendency to lose self-control in response to provocation

provocation which is perceived to aid the jealous husband or the revenge killer and furthermore deprive individuals such as the battered woman from a defence.

In light of the problems related to gender discrimination against the battered women and intimate femicide associated with the provocation defence in England and Canada it is worth assessing if these issues pertain to the defence of non-pathological incapacity due to provocation and emotional stress in South Africa. In South Africa, violence against women and children are prevalent and disturbing social evils.¹⁸⁸⁴

Burchell states that the traditional subjective approach to provocation and emotional stress excluding provided the best foundation for building a defence of non-pathological incapacity that would accommodate that battered women or other abused persons in circumstances involving prolonged domestic abuse.¹⁸⁸⁵ Victims of abuse such as the battered women may have, in terms of the defence of non-pathological incapacity due to provocation and emotional stress, introduced evidence of abuse to show that criminal capacity was lacking due to such causes such as severe emotional stress or provocation. The accused must show that the incapacity was temporary and brief and the retaliation did not emanate from a pathological disease or defect.¹⁸⁸⁶

Carstens and Le Roux note that the courts in South Africa are *ad idem* on the following aspects: if the assault was not imminent the defence of private defence may not be appropriate, furthermore the “battered woman syndrome” results in severe mental trauma which is categorised as being non-pathological and a killing committed while in this traumatic state is usually a once-off occurrence.¹⁸⁸⁷ However, the radical changes

¹⁸⁸⁴ Burchell supra (n 2) at 329-30 states that recognition has been given in literature to the “battered woman syndrome” and evidence based on this syndrome has been admitted in courts in South Africa, notably the Supreme Court of Appeal case of Ferreira (2004) 2 SACR 454 (SCA) where the court accepted the evidence on the physical and psychological abuse committed upon the accused was held by the court to be substantial and compelling and justified the need to impose a more lenient sentence of 6 years imprisonment, however the accused served three years already, the remaining three of the six years was suspended.

¹⁸⁸⁵ Burchell supra (n 2) at 333.

¹⁸⁸⁶ Reddi supra (n 1575) at 278.

¹⁸⁸⁷ Carstens and Le Roux supra (n 3) at 188 citing S v Nursingh supra (n 16).

effected by the Eadie¹⁸⁸⁸ case may have restricted the test for non-pathological incapacity which may extend to provocation and emotional stress.¹⁸⁸⁹

It is submitted that in light of the scourge of domestic abuse and the prevalence of “battered woman syndrome” where victims kill their perpetrators while in a state of trauma and possibly lacking capacity, the pronouncements of Eadie¹⁸⁹⁰ are highly problematic and does a disservice to victims of abuse who are left without the most viable defence available in South African law since it has been equated with sane-automatism and will require the accused to show involuntary conduct, this will result in the accused failing in this defence and receiving a conviction which may not be in the interests of justice. Even though the defence of non-pathological incapacity due to provocation and emotional stress is viewed with great circumspection by the courts, it is submitted that it is vital that the law accommodates individuals of abuse within its ambit and provide the opportunity for a “fighting chance”.

It is submitted an objective assessment of these requirements is inherently unjust and illogical and does little to address the injustices of the past in terms of gender discrimination. The attempt at reform is to be applauded but certain problems still persist despite changes, as Edwards states that the new provocation defence may be the “dogs breakfast” that many have held it to be.¹⁸⁹¹

¹⁸⁸⁸ S v Eadie supra (n 18).

¹⁸⁸⁹ Burchell supra (n 2) at 333 states (in light of Eadie) that the subjective approach towards the defence of putative private defence may be better suited to providing a just and fair result for those individuals who find themselves in the situations involving abuse as opposed to the objectively assessed defence of private defence founded upon the concept of an immediate threat of danger.

¹⁸⁹⁰ S v Eadie supra (n 18).

¹⁸⁹¹ Edwards supra (n 650) at 240 citing Baroness Mallalieu, HL Hansard, vol.712, col.577, 7 July 2009; “Over the past 10 years, I have had to attend , as all practising barristers have, continuing professional development conferences , when the new law is explained to the criminal bar. Time and again , I have had people turn to me, look at me in disbelief and say,”how on earth did you let that pass through the House of Lords?” All I can say is that gallant attempts have been made that have not succeeded. However, if these clauses on provocation go through I shall not be able to show my face again there at all. The phrase “dogs breakfast” would be a “kindness”.

The defence of non-pathological incapacity having been approached with caution, it is submitted that South African criminal law has managed to prevent provocation and emotional stress being used or abused by jealous lovers to perpetrate crimes against their partners, the defence of non-pathological incapacity is not known for enabling or encouraging gender violence, furthermore in respect of accommodating persons such as the “battered woman” it is submitted that by recognising that affective functions may lead to loss of self-control, the defence of non-pathological incapacity due to provocation and emotional stress becomes the favoured defence for the battered women.

In this light the defence of non-pathological incapacity is preferred over the provisions in England and Canada as the theoretical underpinning is sounder whereas a coherent rationale for the defence in England and Canada is lacking in respect of the loss of self-control requirement, the objective test and the fact that it is uncertain whether the defence is a justification or an excuse. In terms of the defence of non-pathological of non-pathological incapacity where the defence is judged according to the psychological approach, the accused may be acquitted on legal principle and lack of blameworthiness rather than a misguided view of accommodating human frailty.

5.3. Conclusion

The aim of this study was to re-assess the defence of non-pathological incapacity due to provocation and emotional stress in South African law, which despite being inherently controversial, continues to occupy a place in the law. The criminal law in South Africa has recognised the negative impact of provocation and emotional stress on self-control which may lead to the lack of criminal capacity. It must be stated that the defence of non-pathological incapacity due to provocation and emotional stress is not only important, but also a necessary and valid defence.

The psychological or principle-based approach to provocation and emotional stress by the South African criminal law was a positive development as it preserves the integrity of the law by applying an approach which is in line with the rights and values of the Constitution of South Africa. The study reveals that the defence is a necessary part of the criminal law as it recognises a state of lack of capacity brought about by non-pathological factors. It is the most suitable defence for abused persons such as the battered woman amongst others. Unfortunately, the well established principled nature of

the defence has been drastically curtailed by the notorious case of Eadie.¹⁸⁹² The problematic reasoning in Eadie¹⁸⁹³ has eroded the founding principles of the defence. The conflation of the defence of sane automatism with conative capacity is therefore the most troubling aspect of this case.

On a fundamental level, the effect of the pronouncements in Eadie¹⁸⁹⁴ is highly prejudicial to society in general; an individual who suffered a lack of capacity due to provocation and emotional stress. This is inherently unjust. Therefore in light of the problems generated by Eadie¹⁸⁹⁵ and the after a critical analysis of the defence preceding Eadie,¹⁸⁹⁶ it is submitted that the law must be restored to the two-stage assessment of criminal capacity in terms of Laubscher.¹⁸⁹⁷ The principle-based or psychological approach to criminal liability is preferred as it is compatible with the fundamental values of the criminal justice system and in line with the ethos of the Constitution.

Assessing the current state of the defence was necessary, especially in light of the dramatic and far-reaching changes brought about by the Eadie¹⁸⁹⁸ decision. In order to achieve this objective, this investigation traced the evolution of the defence of non-pathological incapacity due to provocation and emotional stress in South African law, from its early roots where emphasis was placed on objectivity and where provocation was a partial defence. The development of the provocation defence in English law and Canadian law was also traced; English law is one of the common law parent systems of South African law, thus assessing how both jurisdictions treat provocation within the criminal law system provided insight into the underlying values of provocation in two compared jurisdictions.

In studying the development of the defence in South African law, it is clear that there is controversy and confusion surrounding aspects of the defence. Analysis of South

¹⁸⁹² S v Eadie supra (n 18).

¹⁸⁹³ S v Eadie supra (n 18).

¹⁸⁹⁴ S v Eadie supra (n 18).

¹⁸⁹⁵ S v Eadie supra (n 18).

¹⁸⁹⁶ S v Eadie supra (n 18).

¹⁸⁹⁷ S v Laubscher supra (n 1).

¹⁸⁹⁸ S v Eadie supra (n 18).

African case law reveal that certain decisions, namely Arnold,¹⁸⁹⁹ Moses¹⁹⁰⁰ Nursingh¹⁹⁰¹ and the landmark case of Eadie¹⁹⁰² have been the source of debate , controversy and much confusion. It is submitted that in both the cases of Moses¹⁹⁰³ and Nursingh¹⁹⁰⁴ the court erred in acquitting the accused.

The acquittals in these cases caused outrage, especially considering the gravity of the killings. In the Nursingh¹⁹⁰⁵ case, the accused killed three people and was acquitted this ignited debate, with many commentators questioning the validity of the defence and raised concerns regarding the dangers of a defence which was perceived to be inherently dangerous to society, and questions the integrity of the criminal law.

However, in Moses,¹⁹⁰⁶ the accused systematically went about killing the deceased in his quest to exact revenge from the deceased, the facts of this case strongly indicates the presence of criminal capacity. The acquittals by the court drew immense criticism with many academics arguing that extending the defence of non-pathological incapacity to accommodate disruption in affective functions was unacceptable and not in line with the influential Rumpff Commission Report which cautioned against recognising emotional responses linked to affective functions impinging on the inquiry into criminal capacity.

Certain commentators felt that the defence of non-pathological incapacity due to provocation and emotional stress was therefore intrinsically problematic since it allowed for an accused to easily receive an acquittal as demonstrated by Arnold,¹⁹⁰⁷ Moses¹⁹⁰⁸ and Nursingh¹⁹⁰⁹.¹⁹¹⁰ These concerns led to calls for an addition of an objective test into

¹⁸⁹⁹ S v Arnold supra (n 16).

¹⁹⁰⁰ S v Moses supra (n 16).

¹⁹⁰¹ S v Nursingh supra (n 16).

¹⁹⁰² S v Eadie supra (n 18).

¹⁹⁰³ S v Moses supra (n 16).

¹⁹⁰⁴ S v Nursingh supra (n 16).

¹⁹⁰⁵ S v Nursingh supra (n 16).

¹⁹⁰⁶ S v Moses supra (n 16).

¹⁹⁰⁷ S v Arnold supra (n 16), see criticisms of this case by Snyman supra (n 121) at 250.

¹⁹⁰⁸ S v Moses supra (n 16).

¹⁹⁰⁹ S v Nursingh supra (n 16).

¹⁹¹⁰ Snyman supra (n 121) at 250-251, Burchell supra (n 1320) at 41.

the capacity inquiry to ensure that judges are better able to assess the validity of the accused's defence thus curbing the problems of facile acquittals and ensuring just and fair results.¹⁹¹¹

However, it is submitted that upon careful analysis of the judgment in both Arnold,¹⁹¹², Moses¹⁹¹³ and Nursingh¹⁹¹⁴ suggest that the principles underpinning the defence of non-pathological incapacity due to provocation and emotional stress may not have been applied correctly thus resulting in unfair acquittal.

The Moses¹⁹¹⁵ and Nursingh¹⁹¹⁶ case demonstrates a major failing in the court's reasoning since, upon assessment of the facts in both cases convincingly suggest that both the accused in these cases performed clear goal directed actions which strongly indicates that criminal capacity was not present. Furthermore, there are indications that the court failed to distinguish between diminished capacity and lack of capacity, and the accused may only experience diminished capacity which is a factor that is taken into account in sentencing and does not amount to an acquittal.

It is therefore submitted that it is a misconception that the defence of non-pathological incapacity allows murderers to escape conviction. Moses¹⁹¹⁷ and Nursingh¹⁹¹⁸ demonstrate that if legal principle is not applied correctly to the facts of each then the outcome of the case will be questionable.

One of the main undertakings of this study was to analyse the leading case of Eadie¹⁹¹⁹ in order to determine the how this case has changed the defence of non-pathological incapacity due to provocation and emotional stress. This case has received some praise

¹⁹¹¹ Burchell supra (n 1320) at 41.

¹⁹¹² S v Arnold supra (n 16).

¹⁹¹³ S v Moses supra (n 16).

¹⁹¹⁴ S v Nursingh supra (n 16).

¹⁹¹⁵ S v Moses supra (n 16).

¹⁹¹⁶ S v Nursingh supra (n 16).

¹⁹¹⁷ S v Moses supra (n 16).

¹⁹¹⁸ S v Nursingh supra (n 16).

¹⁹¹⁹ S v Eadie supra (n 18).

and a lot of criticism. The Eadie¹⁹²⁰ case effected fundamental changes to the defences to the extent that the defence of non-pathological incapacity may have been abolished.

Firstly, it is clear that the court, in light of the acquittals in Arnold,¹⁹²¹ Moses¹⁹²² and Nursingh¹⁹²³ undertook a mission, driven primarily by policy considerations to severely curtail the operation of the defence by basing its findings on legal theory. However, the results of this quest were disastrous for both policy and principle. It is submitted that the Eadie¹⁹²⁴ judgment created two problems; firstly, the defence of non-pathological incapacity was equated with the defence of sane automatism, this is inherently troubling since it results in the scope of the defence being drastically reduced, an individual would have to show involuntary conduct in order to successfully plead the defence.

Effectively, the defence of non-pathological incapacity was reduced to the defence of sane automatism. The courts conflation of the defence of non-pathological incapacity to that of sane automatism is fundamentally incorrect as the two defences are distinct since they apply to two different elements of criminal liability.

Furthermore, the impact of Eadie¹⁹²⁵ on the existing provocation defence is grave, since an accused would only be able to rely on the defence if involuntary conduct was shown. This result is dire, it is submitted that the defence of non-pathological incapacity due to provocation and emotional stress serves an important societal need. For instance, the victims of abuse like the battered women of society for one will be left without a defence, despite having suffered a loss of criminal capacity. This leaves no other avenue but plead diminished capacity which still results in a conviction.

The practical implications of the judgment are that the test for voluntary conduct or automatism is the same as the test for conative capacity.¹⁹²⁶ This change will adversely

¹⁹²⁰ S v Eadie supra (n 18).

¹⁹²¹ S v Arnold supra (n 16).

¹⁹²² S v Moses supra (n 16).

¹⁹²³ S v Nursingh supra (n 16).

¹⁹²⁴ S v Eadie supra (n 18).

¹⁹²⁵ S v Eadie supra (n 18).

¹⁹²⁶ Hoctor (n 1485) at 81.

impact other areas of criminal law, specifically; voluntary conduct being a prerequisite for liability and the effect of intoxication affects liability.¹⁹²⁷ If it was the courts intention to limit the scope of the defence it should have went about doing so in a different manner, without resorting to reasoning which is unsound and not in line with precedent.¹⁹²⁸ However, convicting a person who lacked criminal capacity is inherently unjust and unconstitutional.

The Eadie¹⁹²⁹ case was an opportunity to bring clarity to the defence however this opportunity was squandered, the court has not provided the correct solution for the dilemma's facing the defence. Equating loss of control with automatism has come close to eliminating the defence all together, even as a partial defence.¹⁹³⁰

The Eadie¹⁹³¹ judgment has been praised for its emphasis on policy considerations, however the basis for the changes effected are unsound, and have come at the expense of the founding principles of the defence, thus creating distortion and confusion in the fundamental legal principles of criminal liability. The attempt at reformation of the defence has backfired and in the aftermath is mere shadow of the defence that once was. Furthermore, the effect of the conflation is that for all practical purposes the defence non-pathological incapacity due to provocation and emotional stress was abolished.¹⁹³²

This is development has drastically diminished the scope defence of non-pathological incapacity due to provocation and emotional stress to the extent that it may only exist in

¹⁹²⁷ Snyman supra (n 77) at 22; Louw supra (n 5) at 205 argues essentially lack of conative capacity has been confused with involuntary conduct; clearly the court in had a problem with accepting that an individual can lack the ability to act in accordance with the appreciation of right and wrong (conative capacity) whilst still possessing capacity. This scenario is impossible since a person cannot act as an automaton, for example, while experiencing an epileptic seizure or while sleep-walking and simultaneously possessing the capacity to know what he was doing while in this state was wrong.

¹⁹²⁸ Louw supra (n 5) at 206

¹⁹²⁹ S v Eadie supra (n 18).

¹⁹³⁰ Louw supra (n 5) at 204.

¹⁹³¹ S v Eadie supra (n 18).

¹⁹³² Snyman supra (n 77) at 21-22.

theory, and if the defence survived, it has greatly diminished in scope.¹⁹³³ This has created enormous uncertainty and confusion within a well-developed area of law which was not in need of reformation.

The other significant problem with the Eadie¹⁹³⁴ judgment is the introduction of an objective test into the inquiry into criminal capacity.¹⁹³⁵ It is apparent that the court was intent on sending a message to society not to give into emotions and to control their tempers and not to seek refuge in the defence of non-pathological incapacity, it with this concern in mind that the court sought to remedy this perceived problem through the addition of an objective test. Furthermore, it is clear that the court's understanding of the purpose and operation of the defence of non-pathological incapacity due to provocation and emotional stress is weak. The defence does not operate where free will is in operation, therefore the very basis of the court's motive to deter "succumbing to temptation" is incorrect.¹⁹³⁶

In order to determine if detractors are indeed correct in advocating for the incorporation of an objective standard into the capacity inquiry, a comparative analysis was conducted with the respective provisions governing the provocation defence in England and Canada.

In the South African context the development of the defence has followed a distinct and unique path. The element of criminal capacity has become a cornerstone of South African criminal law, recognition of criminal capacity makes the defence of non-pathological incapacity due to provocation and emotional stress a distinguishing feature of the criminal law.

¹⁹³³ Snyman supra (n 77) at 21 states that the defence may survive in cases where incapacity is alleged due to factors such as shock, panic, tension and fear. It is argued further that these states have a close relation to provocation and cannot be separated practically; Hoctor supra (n 1) at 148 states there is still a place for the defence despite the developments in Eadie, however the defence has been drastically attenuated.

¹⁹³⁴ S v Eadie supra (n 18).

¹⁹³⁵ S v Eadie supra (n 18) at para 64, Louw supra (n 5) at 202-203.

¹⁹³⁶ Hoctor supra (n 1) at 148 discussing S v Eadie supra (n 18) at para 60.

This difference is fundamental cannot be ignored, the defence in South African relating to provocation has digressed from its English origins to the adoption of concept of criminal capacity which is the heart of the defence unlike the defence in England and Canada where the concept of loss of self-control is vague, lacks content and rooted an outdated perception of loss of self-control.

The provocation defence is a codified partial defence in both Canada and England. It is submitted there are various pitfalls associated with codifying. The defence may become pigeon holed and thereby reducing the scope. This can result in various types of discrimination. As the comparative analysis reveals, gender discrimination and applying provisions to an ever changing society has posed many difficulties. Hence, it is submitted that codification of the defence will not suit South Africa due to the diversity of our the society that is still coming to grips with vast cultural differences and inequalities of the past that still play a role in the lives of many.¹⁹³⁷

In terms of these arguments it is submitted that the defence of non-pathological incapacity should not be codified. Codification of the defence may not ensure consistency of judgments. The problems with ambiguity and interpretation of provisions in Canada and England demonstrate the difficulties associated with codification.

Furthermore, a fundamental different is that successfully pleading provocation in England and Canada cannot lead to an acquittal, the rational behind the adoption of a “middle ground” approach is also a controversial aspect of the defence since it is uncertain whether the defence in both jurisdictions amount to justification or an excuse, and some commentators have argued that the reason for the laws leniency stems from avoiding the mandatory life sentence for murder.If this was abolished then it has been contended that there would not be a need for the provocation defence. Furthermore, these provisions contain both a subjective test and an objective test.

¹⁹³⁷ Dlamini supra (n 89) at 137 states that the biggest problem in the treatment of provocation is that the approach taken has been an “all or nothing” approach. This approach is incorrect since provocation cannot be pigeon holed into one category or the other; it can fit into more than one. This will depend on the specific circumstance of each case and after considering the intensity of the provocation which element is excluded.

It is submitted that this area of criminal law requires an assessment of the mind-set of the accused at the time of the killing and applying a strict set of criteria to make this determination is illogical. Therefore the incorporation of foreign provisions or ideas must take cognisance of these factors. Besides this major difference, other differences are also present hence it would be most unwise to incorporate laws from jurisdictions where founding principles on which the defence is based differs.

It is evident that the objective test is considered to be a necessary element in both the English and Canadian provocation defences, with its main purpose being to ensure that the provocation defence is not abused. The rationale underpinning the objective test in the form of the reasonable man or ordinary person test is to hold society to a uniform standard of behaviour.¹⁹³⁸ However, the standard of the reasonable/ordinary person has been criticized for being contradictory since an ordinary or reasonable person doesn't kill when provoked.¹⁹³⁹

Furthermore, this rigid standard has been criticized for being too harsh, especially considering that the provocation defence is a partial one in England and Canada. In Canada this perceived harshness has been tempered by case law which allows the characteristics of the accused to be considered in certain instances.¹⁹⁴⁰

A significant finding of the comparative analysis reveals that the objective test has posed numerous difficulties in application. The problem of the objective test in the form of the reasonable or ordinary person centres on identifying the characteristics of the reasonable/ordinary person and applying this uniform standard to the accused. In Canada and in other common law jurisdictions, the objective test in the form of the ordinary person standard was rigid and inflexible, in that none of the unique characteristics of the accused could be attributed to the ordinary person such age, sex, race or physical disability.

¹⁹³⁸ Quigley *supra* (n 995) at 21.

¹⁹³⁹ Moffa *supra* (n 1728), per Murphy J (dissenting); Colvin *supra* (n 1069) at 222 states that the objective test operates to restrict the defence to those defendants whose conduct the juries can empathize with. Colvin argues that if this is the intention then it would be better if the juries are allowed to make an evaluative judgment directly on the conduct of the accused.

¹⁹⁴⁰ Thibert *supra* (n 1053).

In the controversial Canadian case of Thibert¹⁹⁴¹ the court increased the scope of the objective test, allowing consideration of past insults and the background of the relationship.¹⁹⁴² The English cases of Smith (Morgan)¹⁹⁴³ and Holley¹⁹⁴⁴ represent the differing opinions of the Privy Council and House of Lords on this issue. The on-going debate left the provocation defence in England in a state of confusion. Due to the persisting problems of the objective test the Law Commission proposed reformation of the defence.

It is therefore evident that there is a definite tendency of the courts in both England and Canada to relax the objective test by attributing an increased number of characteristics of the accused to the reasonable/ordinary man. The restrictive nature of the objective test can be attributed for leading to inconsistent application of principle, resulting in confusion and has led to diverging opinions on the limitations that should be placed on the attributes of the reasonable man/ ordinary person.

Clearly, England and Canada have struggled with creating a balance in respect of the problem of accommodating human weakness while simultaneously ensuring that a person's right not to be killed by enraged individuals is protected. This delicate balance has seemed elusive and almost impossible to achieve. This indicates that fundamentally, the rationale for the objective test is flawed and application of this rigid standard is practically unworkable since the courts are unable to effectively apply a stringent objective standard, a just and fair result cannot be obtained especially considering the nature and differing effects of provocation on different individual.

It is submitted that the biggest problem with an objective assessment is that it requires the same standard of behaviour of all members of society. In South African law, the defence of non-pathological incapacity is indeed innovative yet workable on a practical level since it is based on sound criminal law principles which are without unnecessary complexities.

¹⁹⁴¹ Thibert supra (n 1053).

¹⁹⁴² Gorman supra (n 994) at 494.

¹⁹⁴³ Smith (Morgan) supra (n 715).

¹⁹⁴⁴ Holley supra (n 670).

In the South African context, criticisms targeted at the subjective nature of the inquiry are misguided. The purely subjective test for criminal capacity ensures just and fair outcomes in line with principles of dignity and fairness. A purely subjective test is the only way in which provocation defence can function effectively.

The comparative analysis has proven this point, the provocation defence in the Canada and England contain both an objective and subjective test. The purpose of both tests is to ensure that the law creates a balance between policy and principle, however this has proven difficult. Therefore, it is submitted that the proposal for the addition of an objective test in the form of a reasonable or ordinary person is potentially problematic for several reasons.

Firstly, it is submitted that this favoured approach is unworkable on a practical level and instead of bringing balance to the defence will result in more confusion and difficulty. Courts will struggle to determine which of the accused characteristics take into account and which should not. Problems with application of the objective test are prevalent in England and Canada.

Therefore, in this light, it is submitted that calls for the introduction of an objective test into the provocation defence in South Africa will open a Pandora's Box of issues. A proper application and understanding of the defence will prevent facile acquittals. The introduction of an objective test is an unwelcome development as it does not suit the defence and ultimately is not necessary. In a diverse nation such as South Africa an objective assessment will not be in the interests of justice since it results in the unjustifiable imposition of dominant cultural values.

South Africa has a diverse population with differing cultures and peoples of different socio economic backgrounds due to the political history of the country set it apart not only from England and Canada but from the rest of the world. This important fact supports the argument against the incorporation of provisions from both Canada and England. As Snyman argues that the danger of an objective test is that judges and juries, when determining the reaction of an ordinary person belonging to a certain culture, may

raw on discriminatory generalisations about certain cultures of minority groups even where there is little understanding of that culture.¹⁹⁴⁵

The imposition of an objective test is subject to constitutional challenge, assessing criminal capacity with an objective inquiry may infringe on an individual's right to dignity by undermining the foundational requirement that individuals are autonomous moral agents who are entitled to freedom of action, and therefore depriving the individual of the right to choose how to behave goes against the constitutional foundations upon which the principles of criminal culpability are based.¹⁹⁴⁶

Certainly, it is true that the law needs to maintain a balance between recognizing human weakness and ensuring society is protected. Only in exceptional circumstances should the law allow leniency when a human being is killed.¹⁹⁴⁷ The law recognizes that certain exceptional circumstances may in rare instances cause a lack of criminal capacity hence the defence not only justified but based on sound legal principle and serves a societal need which is ultimately the purpose of the justice system. An individual cannot be held criminal liable for an act which was committed without criminal capacity. This would result puts the criminal law in disrepute and place the justice system in bad standing.

The defence of non-pathological incapacity due to provocation and emotional stress has developed in South African law over many years¹⁹⁴⁸; it possesses a moral foundation as well as a solid legal underpinning. The defence is difficult to prove and the courts have a natural disinclination to make a finding that the accused was in fact totally incapacitated by factors such as provocation and emotional stress and that this provides sufficient safeguard to protect against underserving acquittals.

The recognition that a state of lack of criminal capacity does occur due to non-pathological causes such as provocation and emotional stress is a necessary validation,

¹⁹⁴⁵ Snyman "Die erkenning van objektiewe faktore by die verweer van provokasie in die strafreg" (2006) *Tydskrif vir Regwetenskap* 57 at 71, cited by Krause supra (n 290) at 343.

¹⁹⁴⁶ Hoctor supra (n 1796) at 309.

¹⁹⁴⁷ Sahni supra (n 1175) at 151.

¹⁹⁴⁸ See Chapter 2 at 17 for development of the defence in South African law.

on this basis the defence serves an important need in society and has earned its place in South African criminal law.¹⁹⁴⁹ It is clear that the defence in South Africa should follow its own route as both defences of provocation have their own separate criticisms that suggest that they cannot be adopted directly into the South African defence on provocation. This further supports the view that the defence as it existed before the Eadie¹⁹⁵⁰ judgment did justice to the South African society and was in line with fundamental principles of South African criminal law.

As discussed previously, the provisions in England and Canada are far from perfect and problems concerning interpretation and application of the provisions still pose difficulties for judges and juries especially in application of the objective test in both England and Canada. The structure of the defence in both England and Canada is intrinsically troublesome. The requirement of loss of self-control lacks content and a source of confusion as it was never fully explained in English law.¹⁹⁵¹ Hence, it is unwise to adopt the English model of the provocation defence since it is far from perfect and serves the needs of a society which is dramatically different from South Africa.

The defence of non-pathological incapacity due to provocation and emotional stress as it existed before the Eadie¹⁹⁵² decision was innovative and based on years of well-reasoned precedent. The courts in South Africa were not faced with the problems concerning the application of the objective test, unlike England and Canada. This is due to the development of element of criminal capacity and the defence of non-pathological incapacity which was an innovative, unique and well-reasoned concept, and these developments opened the doors for provocation and emotional stress to be considered as defence excluding capacity.

¹⁹⁴⁹ Navsa JA in S v Eadie supra (n 18) stated that such a state is notionally possible, the court recognises the defence and if it is accepted that such a state of non-pathological incapacity is possible due to provocation or emotional stress.

¹⁹⁵⁰ S v Eadie supra (n 18).

¹⁹⁵¹ Yeo supra (n 865) at 184; Mitchell and Mackay supra (n 823) at 1.

¹⁹⁵² S v Eadie supra (n 18).

In conclusion, it must be stated that the defence of non-pathological incapacity due to provocation and emotional stress is not only important, but also a necessary and valid defence.

The psychological or principle-based approach to provocation and emotional stress by the South African criminal law was a positive development. The defence is a necessary part of the criminal law as it recognises a state of lack of capacity brought about by non-pathological factors. It is the most suitable defence for abused persons such as the battered woman amongst others. Unfortunately, the well established principled nature of the defence has been drastically curtailed by the notorious case of Eadie. The problematic reasoning in Eadie has eroded the founding principles of the defence. The conflation of the defence of sane automatism with conative capacity is therefore the most troubling aspect of this case.

On a fundamental level, the effect of the pronouncements in Eadie is highly prejudicial to society in general; an individual who suffered a lack of capacity due to provocation and emotional stress. This is inherently unjust. Therefore in light of the problems generated by Eadie and after a critical analysis of the defence preceding Eadie, it is submitted that the law must be restored to the two-stage assessment of criminal capacity in terms of Laubscher. The principle-based or psychological approach to criminal liability is preferred as it is compatible with the fundamental values of the criminal justice system and in line with the ethos of the Constitution.

5.4 Recommendations

The Eadie¹⁹⁵³ judgment is problematic on several levels and has brought tremendous confusion and uncertainty to the defence of non-pathological incapacity due to provocation and emotional stress. The status of the defence of non-pathological incapacity due to provocation and emotional stress is in limbo as a result of Eadie¹⁹⁵⁴ and is therefore in need of review; Supreme Court of Appeal must redress the defence in light of the problematic pronouncements of Eadie¹⁹⁵⁵ and bring some much needed clarity to this area of the criminal law. Judicial intervention is necessary in order to bring clarity to the defence of non-pathological incapacity due to provocation and emotional stress by returning the law as it existed before the Eadie¹⁹⁵⁶ judgment, this entails overruling Eadie.¹⁹⁵⁷

It is proposed that the law must be restored to the purely subjectively assessed two stage test for capacity as it was delineated in Laubscher.¹⁹⁵⁸ Furthermore, it is evident that here have been problems regarding the tendency of the courts and expert witnesses conflating the defence of sane automatism and the defence of non-pathological incapacity, this has led to uncertainty and confusion and ultimately inconsistencies in case law when the courts rely too heavily on expert testimony which results in the erosion of legal principles. This problem must be addressed; the Supreme Court of Appeal needs to provide clarity in this regard by emphasizing that the defence of non-pathological incapacity is distinct and separate from the defence of sane automatism.

In light of the comparative analysis this approach is preferred, the defence of non-pathological incapacity due to provocation and emotional stress is on a well reasoned foundation based on legal principle. Unlike the defences in both England and Canada which are based on the misguided need to accommodate human frailty and predicated on the problematic concept of loss of self-control. This is where the defence in both jurisdictions fail as it is based on sympathy rather than on principles of criminal

¹⁹⁵³ S v Eadie supra (n 18).

¹⁹⁵⁴ S v Eadie supra (n 18).

¹⁹⁵⁵ S v Eadie supra (n 18).

¹⁹⁵⁶ S v Eadie supra (n 18).

¹⁹⁵⁷ S v Eadie supra (n 18).

¹⁹⁵⁸ S v Laubscher supra (n 1).

liability. It is submitted that the concept of loss of self-control lacks content in both England and Canada.

It is submitted that South African law has not experienced problems with gender discrimination within the realms of the provocation defence unlike England and Canada. South African criminal law has progressed and come out of out-dated founding principles whereas England and Canada have not evolved much from the inception of the provocation defence, whereas South African law has made tremendous strides in this regard, the progressive nature of the development of the defence ensures that it is not biased to one gender, the defence does not serve the purpose of the jealous husband unlike English law and Canadian law

The defence of non-pathological incapacity is a simple formulation which lacks the unnecessary complexities and unfair rigidity of both the English and Canadian codified provisions. A coherent rationale exists which provides for a solid basis for providing an acquittal if in the rare instances it is found that criminal capacity is lacking due to provocation and emotional stress.

The subjective nature of the capacity inquiry allows for an accurate assessment of loss criminal capacity. Furthermore, the decision to assess criminal capacity subjectively was correct, the objective test and the notion of the reasonable man in assessing the effect of provocation are inherently problematic. The restrictive natures of the provocation defence in England and Canada have led to problems of gender discrimination by not encompassing persons such as the battered woman. The recognition of affective functions causing lack of criminal capacity has brought persons such as the battered women within the scope of the defence, this was a positive and forward thinking development in South African law.

The South African criminal law system in respect of the provocation defence is unique and more enlightened.

Burchell and Milton have stated in the context of South African law in its historical perspective:¹⁹⁵⁹

“Our criminal law is stronger than both its parent systems. The courts have created order out of the chaos of Roman-Dutch criminal law and strengthened it by the introduction of the detail and precision of the English law of crimes. At the same time our courts have avoided most of the peculiar eccentricities of the English criminal law, including its needless proliferation of finely divided or overlapping offences, and have created general principles of criminal liability more logical, coherent and just than those of English law.”

However it is also submitted that the problems associated with defence prior to the Eadie¹⁹⁶⁰ decision cannot be ignored must be addressed with the view of preserving the defence while effecting changes pertaining to evidentiary matters, namely the regulation of expert testimony and defining the roles of experts .

The problem of uncertainty in regard to the necessity of expert witnesses in pleading the defence, this lack of clarity must be addressed. A possible solution would be to formulate a framework regulating the role of expert testimony which addresses the issue the importance of referring accused's persons for psychiatric evaluation. This is especially important considering the nature of defence, which involves emotional stress, emotional collapse, shock, fear as well as provocation even though these emotional disturbances are non-pathological in nature the law should provide for an avenue wherein accused's person may be referred for short periods of psychiatric evaluation. It has generally been accepted that the battered women suffers from a state of post-traumatic stress disorder therefore regulating this area of the law in order to allow for referrals for psychiatric evaluation and counselling is essential.

The defence of non-pathological incapacity is lacking in this respect, consultation and review of this area is required with the view of formulating a structure that could form part of the provisions of the Criminal Procedure Act of 1977.

¹⁹⁵⁹ J.M. Burchell and J. Milton Principles of Criminal Law 1st ed (1991) at 27.

¹⁹⁶⁰ S v Eadie supra (n 18).

Furthermore, from the assessment of the Nursingh¹⁹⁶¹ case that the lack of expert evidence on the part of the prosecution may have deprived the court of a balanced view regarding the accused's version of events. Thus, it is proposed that expert testimony should be mandatory. This will ensure that the court obtains a balanced, well informed view, which will work to prevent facile acquittals and ensure consist outcomes of cases.

Furthermore, expert evidence should be led after evidence relating to the accused's version of events has been heard. Expert witnesses would thus have an opportunity to re-evaluate their evidence after hearing the facts of the case as well as hearing the accused's version being tested at cross-examination. This is important since the psychiatric evidence is largely based on the cogency of the accused's version of events.¹⁹⁶² These proposals will ensure that established principles which were eroded by Eadie¹⁹⁶³ are restored while addressing a clear void in the defence of non-pathological incapacity due to provocation and emotional stress.

¹⁹⁶¹ S v Nursingh supra (n 16).

¹⁹⁶² Burchell supra (n 1320) at 42.

¹⁹⁶³ S v Eadie supra (n 18).

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