

**DEFENCES AVAILABLE TO BATTERED WOMEN WHO
KILL THEIR ABUSERS - A COMPARATIVE ANALYSIS**

BY

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Abstract

Private defence is the civilized remnant of the ancient system of private vengeance as redress for wrong done. The Romans, in permitting self-help formulated the principle *moderatio inculpatae* (moderation in self-defence) which the European jurists later relied upon to develop a coherent doctrine of private defence. Certain types of intentional killings were no longer regarded as unlawful and therefore are not punished as murder. South African recognizes that killing is justifiable and therefore not murder. Despite the sound rationale underlying the defence, namely the upholding of justice theory where people acting in private defence perform acts where they assist in upholding the legal order, and despite the fact that the defence is established in both criminal law legal theory and practice, there are threshold problems with this rationale which has been subject to much academic criticism. Such criticism must be seen in the context of the wider debate surrounding the circumstances in which battered women kill their abusers - normally in circumstances where the threat is not imminent and therefore the need to uphold justice is not necessary.

The purpose of this enquiry is to examine the development and functioning of the defence and more particularly to do so in light of a comparison with the means currently utilized to criminalize conduct falling outside the bounds of self-defence: one of the parent systems of South African law, namely English law and the United States, where battered woman syndrome originated and a profound influence on the way in which the elements of the defence are interpreted in that jurisdiction. For instance, in American law subjective tests for self-defence have been developed such as the

particularizing standard. This standard asks whether a reasonable person with the accused's particular non-universal characteristics would have both perceived the situation as the accused perceived it and would have reacted to that perception by committing the accused's self-defensive act. If the answer is yes, then the act is considered reasonable. It assumes that individuals freely choose how to perceive and respond to a threatening situation but also acknowledge that certain kinds of non-universal characteristics (such as battered woman syndrome) exercise such a powerful causal force on individuals perceptions and actions that it would violate the voluntary act requirement when holding that individual who possess such a characteristic to a standard of conduct that does not take that characteristic into account. The study concludes with an assessment of the form the defence ought to take.

In South African law the defence consists of the conditions relating to an attack which includes: an attack, and protected interest and the attack must be unlawful. In respect of the conditions relating to the defence, the defence must be reasonably necessary to avert the attack and the defence must be directed against the attacker. Aspects of these elements have proved to be controversial. In particular, the condition of reasonably necessary to avert the attack has been called into question. Furthermore the requirement of imminence has been rendered especially controversial especially when viewed from the battered woman's perspective where battered woman syndrome plays a role i.e. the woman's internal makeup having an influence on the way she views the situation as opposed to an objective test is used to establish if the threat was imminent. While the English and American law elements of the duty to retreat, proportionality and reasonableness approximate the equivalent condition of reasonably necessary to avert

the attack, the focal point of this defence in these jurisdictions has similarly been the imminence requirement and the test utilized for self-defence i.e. objective or subjective standard. Prior to evaluating the utility of these elements, the various rationales posited as a justification for the defence will be examined.

It is submitted that while various rationales have been posited to form the basis of self-defence, the autonomy theory (narrowly circumscribed) should be followed in South African law and that the traditional elements for self-defence should remain in force. Regarding the requirement that the attack be reasonably necessary, it is submitted that the traditional mechanism for distinguishing justified from unjustified self-defensive acts should remain an objective test. This is so because by taking account of the knowledge the defender has of her attacker the legal requirements of private defence will eventually be equated with those required for putative self-defence. If putative self-defence goes to the issue of culpability, which is seen as a particular mental attitude or state of mind - South African law will be evincing a move toward a normative concept of fault. Such an approach has not proved unproblematic in South African law.

Both early and modern common law as well as modern case law has expounded a coherent statement of the elements of self-defence which include imminence as a core feature. The problem is that traditional imminence rules do not cater adequately for the battered woman's situation and for this reason theorists have advocated its abolition. The obvious problem with such a recommendation is that something must stand in its stead to distinguish legitimate cases from illegitimate cases of self-defence. In respect of the imminence requirement, the problems created by this standard cannot be solved

by replacing imminence with necessity or by claiming priority for necessity or by demanding that imminence means pacifist rather than the libertarian version of necessity. These positions pose the question but do not answer it. Furthermore, if the imminence question cannot be answered by assuming one side of the necessity debate, then it cannot be answered by referring to the distinction between justification and excuse. It is submitted that “instead of viewing objectivity as not being able to account for battered woman’s situation – the opposite conclusion should be reached – that by rethinking certain situational factors as a set of relatively innocuous and perhaps necessary normative propositions then the abused woman’s situation is consistent with some very standard propositions in the law of self-defence. If the abused woman is being attacked and the threat is imminent (in the traditional sense), then she should be able to avail to herself of self-defence, although it should be noted that the court should also consider the fact that the battered woman placed herself in this dangerous situation. However, the court would also have to take into consideration the difficulty that the abused woman faced in extricating herself from this position.

On the basis of a discussion of the various construals that inform the question of whether proportionality should form a necessary requirement for self-defence, including (i) the liberal aspiration to neutrality, (ii) constitutional norms and (iii) a duty of social solidarity to the state, it is submitted that proportionality should form an integral part of the requirements for self-defence. The test can be set out as follows: not only must the defence be necessary but also the means used by the accused for the purpose of averting the attack must be reasonable in the circumstances. This is in accordance with the autonomy theory. Therefore, would an “ordinary, intelligent and

prudent person in the accused's situation would react to establish if the self-defence claim was justifiable. However, it is submitted that not all the characteristics of the accused should be taken into account. Only those "characteristics which have the most (or direct) bearing on the accused's situation" should be considered.

Despite the rationales underlying self-defence, it has not been entirely clear whether an abused woman is expected to flee. It is submitted that there should be a duty to retreat. In the case of the abused woman, her situation is adequately catered for within the reasonableness neutrality perspective.

In respect of the defence of provocation, Roman and Roman-Dutch law did not regard anger, jealousy or other emotions as an excuse for criminal conduct, but only as a factor which might mitigate sentence, if the anger was justified by provocation. South African law with its parent system in Roman-Dutch law might have followed this lead had it not result of the Transkei Penal Code of 1887, it envisaged a type of a partial excuse: even if been for the introduction of the mandatory death penalty for murder in 1917. In 1925 as a killing was intentional, homicide which would otherwise be murder maybe reduced to culpable homicide. The test for provocation was thus an objective one. By 1949 in R v Thibani it was held that provocation was not a defence but a special kind of material from which in association with the rest of the evidence the court should decide whether the accused had acted involuntary or without intent to kill. This introduced a subjective test for provocation. But a number of crucial issues remained unresolved; could intense provocation or emotional stress serve to exclude criminal capacity or voluntary conduct. After the decision in Chretien, the question arose, if severe intoxication could

exclude these basic elements of liability then could it not also exclude provocation or emotional stress. At this point, the notion of criminal capacity came to the fore. This notion was unknown in South African common law and was adopted from Continental Legal systems, specifically Germany.

The notion took hold with the Rumpff Commission of Inquiry into the Responsibility of Deranged Persons and Related matters, the recommendations of which gave rise to the provision of section 78 (1) of the Criminal Procedure Act. In S v Mahlinza set out that criminal capacity of actor is an essential requirement necessary to establish criminal liability. Criminal capacity consists of cognitive component i.e. ability to distinguish between right and wrong and conative capacity i.e. the ability to act in accordance with the distinction. If either was lacking no liability would ensue. In S v Van Vuuren, the court expressed in unequivocal terms that the accused could not be held liable where failure to comprehend what he is doing is attributable to a combination of factors such as provocation or emotional stress.

The very idea of allowing provocation to function as a defence excluding an accused's criminal liability is inherently controversial. From a moral and ethical perspective people are expected to control themselves, even under provocation or emotional stress. To allow it to function as a complete defence as opposed to mitigating factor means that it gives credence to the belief that retaliation is justified in the eyes of the law and this is the very thing criminal law guards against. 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 constituted a serious

erosion of the notion of criminal capacity, with a concomitant “ripple effect” on other topics within the general principles of criminal law. The question this case has highlighted for South African law of non-pathological incapacity is whether the boundaries of the defence have been inappropriately extended. This is so since the court held not only that there is no distinction between the defence of automatism and non-pathological incapacity, and that it would have to be established that the accused acted involuntarily in order for her defence of lack of capacity to prevail, but furthermore held that the court should assess the accused persons evidence about his state of mind by weighing it against his actions and surrounding circumstances, thereby introducing an objective test. Theorists such as Burchell have considered this move “bold” and “encouraging” for its emphasis on objective norms, and the fact that it brings it into line with both the English and American jurisdictions, where not only is an objective element introduced into the enquiry, but where loss of self-control is not totally excusable since the law assumes that provoked party was not totally incapable of controlling anger. If an accused was unable to control himself, a full excuse would be defensible.

The notion of capacity has its approximate equivalent in the English and American law of provocation where the jury must consider the subjective question of whether the accused was actually provoked to lose self-control, the defence requires that a reasonable person in the same circumstances would have lost-self control and acted as the accused did. The South African notion of capacity is examined with reference to the way provocation is treated in these jurisdictions. Should non-pathological incapacity be equated with automatism, the established precedent in provocation and other cases of

non-pathological incapacity would have to be revised by implication, and would have serious implications for the principle of legality and restricting the scope of the defence for battered women. Furthermore, it is submitted that a move towards an objective test should not be followed. This is so since such an approach does not extend to encompass the battered woman's mental and emotional characteristics including recognized psychological disorder symptoms. This results in the court not having any meaningful way to determine whether the battered woman lost self-control and furthermore it will lead to increasing attention being directed at how far the objective test be tailored to fit the capacity of the accused. The problem with the capacity test is that it has created via the Criminal Procedure Act a new element of liability by drawing from both the general physical and the mental liability enquiries. Therefore, by duplicating the voluntary act requirement under *mens rea*, the courts have asked the same question twice. Once the accused is shown to be acting voluntarily, there will be a measure of goal-directed conduct. Where goal-directed conduct is present, it necessarily implies that there must be a level of capacity present in the case of the defence of non-pathological incapacity. In other words, the question is not whether capacity is present, but to what extent it is present. This point is not acknowledged by our courts: the concept of psychological fault underlying South African law offers no explanation for the fact that culpability is capable of gradation.

The effects of battering could be used to support a defence of diminished capacity, which focuses not on mitigating circumstances of the act, but rather on the actor's inability to form the requisite *mens rea* for the offence charged. However, the introduction of such a defence could only be achieved by returning to the rules relating

to provocation followed in South Africa prior to 1971. According to the specific intent doctrine, policy considerations require that an accused should not be completely acquitted. However, these considerations require that an accused should not be completely acquitted. However, these considerations also require that an accused not be convicted of murder but of culpable homicide. This compromise solution (of culpable homicide) can only be reached by treating provocation as a special defence, one which is not strictly adjudicated in terms of the general principles relating to culpability (*mens rea*). Furthermore, it is submitted that a subjective test must be applied, since Snyman's objective-subjective test leads to an illogical confusion between the subjective and objective elements.

(i)

STATEMENT

I, Samantha Krause, declare that:

- (i) The research reported in this thesis, except where otherwise indicated, is my original work.
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Samantha Krause

Date

As the candidate's Supervisor, I agree to the submission of this thesis.

Professor Shannon V Hocter

Date

(ii)

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- My family for their support and belief in me.
- Dawn Prinsloo for all her time and valuable assistance.

(iii)

DEDICATION

This dissertation is dedicated to the memory of my late dad, Dr. Sheldon Krause.

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CHAPTER 1
THE PROBLEM AND ITS SETTING

1. Introduction

Reddi places the prevalent problem of domestic violence in context:

“Law is dynamic. It evolves to keep pace with the demands of society. One of the demands has been the need to arrest the ubiquitous abuse of women. States have been called upon to take special cognisance of this pandemic of domestic violence which is unencumbered by issues of race, class or age. Most jurisdictions throughout the world, including South Africa, have responded to the call by creating legislation aimed not only at protecting women from domestic abuse but also at securing them a status commensurate to that enjoyed by all other citizens. Despite these commendable protections, it is a trite fact that women continue to be abused at an alarming rate. Even more alarming is the fact that many abused women, world wide, remain in abusive relationships”.¹

As Reddi notes “woman’s rights activists and women’s advocates have over the years sought to find reasons to understand this anomaly - hence the advent of the ‘battered woman syndrome (BWS)’”.²

¹ Reddi “Battered woman syndrome: some reflections on the utility of this ‘syndrome’ to South African women who kill their abusers” (2005) *South African Journal of Criminal Justice* 259 at 259-260. In South Africa this legislation includes the Domestic Violence Act 116 of 1998 and the Constitution of the Republic of South Africa 1996 which secures the position of women through various germane sections, namely, section 9 (right to equality), section 10 (right to human dignity), section 11 (right to life), section 12 (right to freedom and security of the person), section 13 (right not to be subjected to slavery, servitude and forced labour), section 14 (right to privacy) and section 15(1) (right to freedom of thought, belief, opinion, conscience and religion). According to the Domestic Violence Act of 1998 (section 1) domestic violence means: physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant’s residence without consent where parties do not share the same residence, or any other controlling or abusive behaviour towards a complainant where such conduct harms or may cause imminent harm to the safety, health or well-being of the complainant.

² Reddi supra (n 1) 260.

Dr. Lenore Walker, an American psychologist, is credited as a pioneer in this area of study. She has identified and defined the essential elements of the “battered woman syndrome”:

“A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. [In] order to be classified as a battered woman, the couple must go through the battering cycle at least twice”.³

At the core of battered woman syndrome lies the theory of “learned helplessness”⁴ and the cycle of violence theory.⁵ Learned helplessness is defined as a psychosocial theory for lack of response or passive behaviour in the face of the ability to act or respond to a threat. This was developed by Martin Seligman as a psychological theory based on laboratory experiments conducted on animals. It demonstrated that animals and people can learn to be helpless when faced with traumatic and frustrating conditions from which there appears to be no escape. For example, caged dogs learned to jump a caged partition when given a mild electric shock. If a light was switched on just before the shock, they learned to avoid the shock completely. However, where the dog was placed in a position where it was unable to avoid the shock, it was then extremely difficult for the dog to later learn an avoidance

³ Walker The Battered Woman (1979) 16. Walker’s book is regarded as the seminal piece on the study of battered women. In this book, Walker only made use of 110 test subjects for her research. This definition of “battered woman syndrome” which constitutes the original model for “battered woman syndrome” is problematic since it excludes from its operation, cases of men, children and same-sex relationships. For a general discussion on this topic see Toffel “Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths about Battered People Who Kill their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence” (1996) Southern California Law Review 337. The criticisms relating to gay relationships in respect of “battered woman syndrome” applies mutatis mutandis to lesbian relationships.

⁴ Walker supra (n 3) at 16; 42-54; 187.

⁵ Walker supra (n 3) 55-70; 187.

response.⁶ When such an analogy was applied to battered women, the correlation becomes evident: learned helplessness is a psychological paralysis that battered women experience and which contributes towards keeping them in abusive relationships.⁷ It is a psychosocial learning theory,⁸ whereby women, after repeated abuse, come to believe that they cannot control the abusive situation they find themselves in: “once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive and helpless”.⁹ A battered woman’s cognitive perceptions and motivation to act are altered:

“Repeated batterings... diminish the woman’s motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success [in the relationship] is changed. She does not believe her response will result in a favourable outcome, whether or not it might... She cannot think of alternatives”.¹⁰

According to Walker, the cycle of violence theory posits that battering generally involves an identifiable pattern. This pattern has three phases “a tension-building phase”,¹¹ “a release through acute battering”,¹² and “a final cycle of apparent contrition and remorse by the abuser”.¹³

⁶ In this respect see Seligman Helplessness: On Depression, Development, and Death (1975) 15-17.

⁷ Walker The Battered Woman Syndrome (1984) 43. Walker conducted a more extensive study with over 400 women, which led to the publication of this book. Although a larger sample group would give more credence to her theories, it did little to stifle criticism of her research. In this respect see, e.g., note 70.

⁸ Walker supra (n 7) 45-47.

⁹ Walker supra (n 7) 47.

¹⁰ Walker supra (n 7) 49-50.

¹¹ Walker supra (n 3) 56-59. In this phase relatively minor emotional, physical and verbal abuse escalates.

¹² Walker supra (n 3) at 59-65 notes that at this stage the abuser loses control of his emotions and the battering will progress in severity.

¹³ Walker supra (n 3) at 65-70 notes that this phase consists of calm, loving behaviour where the abuser is remorseful and this period is marked by a break from physical abuse.

Walker has noted that the last phase (“honeymoon” phase) offers a further reason why the battered woman remains with her abuser: she does not recognize the abuse as a pattern of behaviour but rather views these acts as generally unpredictable or due to her own fault. The battered woman believes this phase to accurately represent the present relationship.¹⁴

Walker’s battered woman syndrome is considered a sub-category of the generic Post-Traumatic Stress Disorder (PTSD) - an anxiety disorder¹⁵ which is included within the Diagnostic and Statistical Manual of Mental Disorders.¹⁶ Battered women experience psychological changes after repeated exposure to the trauma of being abused.¹⁷ Symptoms experienced by these women include: high arousal symptoms, including a heightened sense of danger; cognitive disturbances, such as intrusive memories; and high avoidance symptoms such as depression or repression.¹⁸

Rosen suggests that “the need for legislation¹⁹ and the development of ‘battered woman syndrome’²⁰ has developed as a result of the inability of the courts and criminal justice officials to deal with cases of battered women because they often

¹⁴ Walker supra (n 3) 68.

¹⁵ Cf Walker “Post-Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome” (1991) Psychotherapy 20 at 21. This psychiatric condition was first outlined in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (1987) 247.

¹⁶ Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) 424-429.

¹⁷ Walker supra (n 7) 326-330.

¹⁸ Walker supra (n 7) 327-330. But as Roberts in “Between the Heat of Passion and Cold Blood: Battered Woman’s Syndrome as An Excuse for Self-Defense in Non-Confrontational Homicides: Introduction” (2003) Law and Psychology Review 135 at 139 has noted: “critics have pointed out that the Diagnostic and Statistical Manual of Mental Disorders does not recognize the battered woman syndrome as a distinct mental disorder”.

¹⁹ For instance, the Domestic Violence Act 116 of 1998, as discussed in n 1.

²⁰ As discussed at pages 2-4 supra.

involve sympathetic accused who cannot fairly be blamed for their conduct but who would have no defence if the law were strictly applied”.²¹

In terms of South African law, a woman who is being attacked by her abuser may defend herself by means of self-defence using any means which are reasonable. This can include the use of deadly force. But where the battered woman kills her abuser in anticipation of a future attack,²² she will be acting unlawfully.²³ The conduct thus opens itself up to being interpreted as an act of punishment or vengeance, neither of which is justifiable as self-defence.²⁴ Textbook writers have thus focused their criticisms on the elements of the defence,²⁵ on the basis that they are not grounded in the reality faced by battered women.

In respect of criminal incapacity,²⁶ a battered woman can introduce evidence of the abuse to show the absence of criminal capacity as a result of non-pathological causes.

²¹ Rosen “The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill” (1986) American University Law Review 11 at 13.

²² As Rosen supra (n 21) at 13 notes: “despite the accused’s long-term victimization, she most likely would not have been killed or subjected to serious bodily injury on the occasion when she killed her abuser. Sometimes the problem arises because the woman perceived actual or threatened force to be deadly, when, objectively, it was not. In other cases, the accused killed in response to verbal threats unaccompanied by any contemporaneous overt physical aggression. The most difficult cases arise when the accused killed a sleeping or resting victim, or when the accused engaged in other behaviour inconsistent with self-defense”.

²³ For a discussion of the imminence requirement of self-defence in South African law, see chapter 2 at 46-48 infra.

²⁴ Reddi supra (n 1) 270.

²⁵ See for example Snyman Strafreg 5th ed (2006) 105-106.

²⁶ Writers such as Burchell and Milton in Principles of Criminal Law 2 ed (1997) at 281 create the impression that there is no distinction between provocation and emotional stress, instead stressing that what is of importance is that provocation or emotional stress can serve to exclude criminal capacity. (citing S v Van Vuuren 1983 (1) SA 12 (A) at 17g-h). Furthermore, Reddi supra (n 1) has noted that : “in terms of South African law, since ‘battered woman syndrome’ is not a mental illness, defect or disease, a woman claiming to be suffering from battered woman syndrome will not be able to successfully raise the defence of absence of criminal capacity as a result of pathological causes.

Reddi notes that “it would have to be shown that the incapacity was of a temporary nature, of a relatively brief duration, and originated from a cause such as severe emotional stress, provocation or similar emotional response which is not a result of a disease of the mind”.²⁷ This defence has been criticised not only on the basis of its very existence,²⁸ but also on its completely exculpatory nature.²⁹

In the United States, the stringency of self-defence law has been circumvented by finding that the battered woman should be acquitted because of temporary insanity.³⁰ Furthermore, to avoid the imminency problem, the courts introduced “battered woman syndrome” to inform the objective analysis required in self-defence law. This would show that a reasonable battered woman with battered woman syndrome, subjectively believed that her abuser, even in non-confrontational circumstances, represented an immediate threat to her life.³¹

Introducing syndrome evidence to satisfy this feature is undesirable. Self-defence is a justification defence, not an excuse.³² Dressler notes that the claim of a battered

But there is no bar to such a woman introducing evidence of the abuse that she had suffered to indicate absence of criminal capacity as a result of non-pathological causes” (at 277).

²⁷ Reddi supra (n 1) 277. For a discussion of the defence of non-pathological incapacity in South African law, see chapter 2 at 65-102 infra.

²⁸ Louw “S v Eadie: Road rage, incapacity and legal confusion” (2001) South African Journal of Criminal Justice 206 at 210-211.

²⁹ Burchell Principles of Criminal Law 3ed (2005) 431-432.

³⁰ Dressler “Battered Women and Sleeping Abusers: Some Reflections” (2006) Ohio State Law Journal of Criminal Law 457 at 461-462, citing McNulty The Burning Bed (1980) 269: (“When the battering victim Francine Hughes poured gasoline over her sleeping husbands bed and set him ablaze, her defense counsel successfully obtained an acquittal on insanity grounds, thanks in part to the testimony of a clinical psychologist that Hughes ‘experienced a breakdown of her psychological processes so that she was no longer able to utilize judgment...no longer able to control her impulses...[and] and unable to prevent herself from acting in the way she did”.

³¹ Dressler supra (n 30) 463. For a discussion of the variations of the subjective standard of self-defence in American law see chapter 4 at 181-187 infra.

³² For a discussion of self-defence as a justification in American law see chapter 4 at 179-180 infra.

woman pleading self-defence is that she has acted properly or at least not wrongfully, in doing what she did. She is not claiming, as she would if she were asserting the defence of insanity or any other excuse defence, that her conduct was wrongful but that she should not be blamed for her conduct. Therefore, justifications focus on the act; excuses focus on the actor.³³ But as Dressler has noted, battered woman syndrome evidence, (and indeed any syndrome evidence) speaks to the actor's state of mind, and not the act itself. It explains why the battered woman should be treated differently and therefore not blamed for her conduct, when others who commit the same act would be held liable.³⁴

This leads us to the question posed by Dressler: "how can we say that the belief is reasonable when we are judging the reasonableness from the perspective of someone who, by definition, is experiencing a set of symptoms that renders her state of mind abnormal?". Dressler goes on to note:

"The battered woman defence defines the woman as a collection of mental symptoms, motivational deficits, and behavioural abnormalities; indeed, the fundamental premise of the defence is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates".³⁵

³³ Dressler *supra* (n 30) 463. For a general discussion of the American law of self-defence see chapter 4 at 178-187; 194-204 *infra*.

³⁴ Dressler *supra* (n 30) 463.

³⁵ Dressler *supra* (n 30) 464. For a criticism of these subjective standards of self-defence see chapter 5 at 249-259 *infra*. But see also the discussion in chapter 5 at n 1035 *infra* (where some theorists such as Kinports are of the view that battered woman syndrome was not necessarily meant to connote a mental disease but rather describing a set of characteristics common to abused women).

In respect of provocation,³⁶ since the provocation defence mirrors the prototypically male pattern of behaviour; when applied to battered women, it does not fit the criteria. Furthermore, it is inadequate since it assumes that the natural response to provocation is an immediate one. If the battered woman does not kill at the moment of the threat to her, a voluntary manslaughter instruction is inappropriate. In the provocation defence, the evidence often indicates that the actual provocation to the battered woman occurred earlier than the killing, and that she had sufficient time to cool. This contradicts her heat of passion claim. A jury may treat a battered woman more leniently, but if the prosecution can show that the abused woman did not in fact suffer from “learned helplessness,” then the battered woman is without a paradigm that defends her against being punished disproportionately.³⁷

In English law, the Law Commission in its Partial Defences to Murder Consultation Paper,³⁸ considered the availability of self-defence to battered women who kill their abusers. The defence is only available if the force used by the woman is reasonable and necessary to protect her from an imminent attack. For this reason it is not available to an abused woman who fears violence in the future and kills her abuser while he is asleep. McColgan notes that that the law discriminates against abused women in such a context:

“The relative scarcity of female killers has resulted in a paradigmatically male ideal model and this, together with the incompatibility of aggressive force with stereotypical femininity, means that the apparently gender-neutral concept

³⁶ For a general discussion of the defence of provocation in American law see chapter 4 at 204-224 *infra*.

³⁷ Milgate “The Flame Flickers, but Burns on: Modern Judicial Application of the Ancient Heat of Passion Defense” (1998) Rutgers Law Review 193 at 216.

³⁸ No. 173, 2003.

of reasonableness is actually weighted against the female defendant”.³⁹

For the defence of provocation, women who kill their abusers are at a disadvantage if they do not act in a state which can legally be described as one of “sudden and temporary loss of control”. Furthermore, until recently in England, the cumulative effects of years of abuse were not taken into consideration. Until Smith (Morgan),⁴⁰ the mental characteristics arising from an abusive relationship (including BWS) could not be taken into account in respect of the ability to exercise self-control, but only if relevant to the gravity of provocation. The abused woman is unlikely as a matter of fact to kill in self-defence (as the term is understood in law). Due to her limited physical strength, it is uncommon for women to respond lethally when facing an immediate attack by her abuser. Battered women, therefore are compelled to rely on the defence of diminished responsibility.⁴¹

Noting these problems, in English law it has been argued for either the abolition⁴² or

³⁹ McColgan “In Defence of Battered Women who Kill” (1993) Oxford Journal of Legal Studies 508 at 515. For a discussion of the English law of self-defence see chapter 3 at 113-124 infra.

⁴⁰ [2001] 1 AC 146.

⁴¹ Ormerod Smith and Hogan’s Criminal Law 11th ed (2005) 461. Section 2 of the Homicide Act 1957 sets out the defence of diminished responsibility. For a discussion of the English defence of diminished responsibility see chapter 3 at 160-168. For a discussion of the English law defence of provocation see chapter 3 at 127-159 infra.

⁴² This is supported by theorists such as Edwards “Abolishing Provocation and Reframing Self-Defence-the Law Commission’s Options for Reform” (2004) Criminal Law Review 181 at 191 (moral indignation or temper can only properly be considered in mitigation of sentence, and is in agreement with Horder on this point); and Horder Provocation and Responsibility (1992) at 197; as well as Law Reform Commissions such as the Victoria Law Reform Commission Defences to Homicide: Issues Paper (2002) 20. Cf the Law Commission Consultation Paper, Partial Defences to Murder No. 290 of 2004 where powerful arguments were made for both the abolition and retention of the provocation defence at par 3.36 and 3.37. For a discussion of these points see chapter 3, 147 at n 684 and n 685.

modification of the defence of provocation.⁴³ Neal and Bagaric submit that “the defence of provocation is frequently criticized on the grounds that it is redundant;⁴⁴ confusing in relation to both the objective⁴⁵ and subjective⁴⁶ elements, invokes fictitious concepts (the ordinary person);⁴⁷ is male orientated,⁴⁸ and favours the dominant Anglo-Saxon-Celtic culture⁴⁹ to the exclusion of minority groups”.⁵⁰

On the basis of the above criticisms, a range of avenues for reform have been identified from abolishing or redefining the defence of provocation to the wholesale

⁴³ Editorial “Retaining Partial Defences to Murder” (1994) Journal of Criminal Law 5 at 6. Cf the Law Commission Consultation Paper No. 290 of 2004 at par 1.13 for a modified version of the provocation defence. For a discussion of this modified defence see chapter 3, 130 at n 686.

⁴⁴ Neal and Bagaric “The Ongoing Subservience of Principle to Tradition” (2003) Journal of Criminal Law 237 at n 11: “The defence is redundant because with the abolition of capital punishment, the reason for the development of the defence no longer exists, namely as a concession to human frailty when death was the penalty for murder”.

⁴⁵ See Yeo “Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism” (1992) Criminal Law Quarterly at 1 at 5 (noting that the test is inconsistent with the rationale of the defence as a concession to human frailty).

⁴⁶ See Bradfield “Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and Battered Wife” (2000) University of Tasmania Law Review 5.

⁴⁷ See for example Finkel “Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction” (1995) Nebraska Law Review 742 at 767.

⁴⁸ See Yeo “Sex, Ethnicity, Power of Self-Control and Provocation Revisited” (1996) Sydney Law Review 304 at 313 (noting that differentiating the capacity for self-control according to sex promotes the contentious stereotypes which depict women as the gentler sex who are normally passive and submissive in the face of provocation while men are normally active and aggressive). See also Forell “Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia” (2006) American University Journal of Gender, Social Policy and the Law 28 at 65, citing the Victorian Law Reform Commission, Defences to Homicide Final Report XV (Oct 2004) at 30: “Provocation is most often raised by men in the context of a relationship of sexual intimacy in circumstances involving jealousy or an apparent desire to retain control. The continued existence or availability of provocation in these circumstances may therefore be seen as sending an unacceptable message - that men’s anger and use of violence against women is legitimate and excusable. Some people have questioned how, in a supposedly ‘civilised’ society, can the desire to leave a relationship constitute behaviour which would provoke anyone to kill?”.

⁴⁹ Australian Law Reform Commission, Multiculturalism and the Law, Report No. 57 (1992) 183-184. See also Yeo supra (n 45) at 11-13 (noting that the standard for self-control should be set by reference to members of the accused’s own ethnic community).

⁵⁰ Neal and Bagaric supra (n 44) 238.

review of partial defences to murder. The English Law Commission⁵¹ recognized that judges alone could not cure the defects of the defence and for this reason legislation was required.⁵² However, it was decided to narrow the scope of provocation rather than abolish the defence completely.⁵³ Possible solutions have included adopting one of the approaches in Smith (Morgan),⁵⁴ to the recommendations of the New South Wales Law Reform Commission,⁵⁵ to adopting an extreme emotional disturbance requirement.⁵⁶ Furthermore, the Law Commission considered the creation of a new partial defence to murder of self-preservation.⁵⁷

In the United States many commentators assert that the current provocation doctrine whether based on the Model Penal Code (MPC) or not needs to change.⁵⁸

⁵¹ Law Commission Consultation Paper supra (n 38).

⁵² Ibid at par. 12.4.

⁵³ Elliot “What Future for Voluntary Manslaughter?” (2004) Journal of Criminal Law 253 at 260.

⁵⁴ The approach of either the majority in Smith supra (n 40) or the minority. For a discussion of these two approaches see chapter 3 at 144-146 infra.

⁵⁵ New South Wales Law Reform Commission Partial Defences to Murder: Provocation and Infanticide: Report 83 (1997) par 2.81.

⁵⁶ Law Commission Consultation Paper supra (n 38) par 12.35, thus replacing the requirement of sudden loss of temper. But see further par. 12.35 where it recognized that: “acting under ‘extreme emotional disturbance’ is a formulation which could be given a very wide interpretation. Many, if not most, people who kill are in a heightened state about something”.

⁵⁷ Law Commission Consultation Paper supra (n 38) at par 9.25 and 10.95. The Criminal Law Revision Committee recommended the introduction into English of a new partial defence to murder where excessive force was used in Self-Defence: Criminal Law Revision Committee, 14th Report, Offences Against the Person, CMND 7844 (1980) par. 288. The Law Commission would prefer this defence be known as “pre-emptive use of force in self-defence” (at 9.25 and 10.95) This defence would be available to abused women who kill, but it would not be limited to such offenders. As Elliot supra (n 53) at 262 notes: “the exact scope of any new defence is not made clear by the Law Commission and it does not at this stage proffer a possible definition”. See further Elliot supra (n 53) 262-263 who offers her own proposal of the form this defence should take.

⁵⁸ Dressler “Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject” (2002) Minnesota Law Review 959 at 984-987 (finding fault with the Model Penal Code’s extreme

Commentators have proposed three possible options: modifying existing doctrine,⁵⁹ creating certain categorical exclusions⁶⁰ and abolition of the defence.⁶¹ In respect of self-defence in the United States, commentators have argued for the expansion of the traditional elements of self-defence.⁶²

In respect of South African law, various solutions have been posited for the law of self-defence's failure to adequately cater for battered women. This includes allowing battered woman to be allowed to pre-empt the anticipated attack.⁶³ This could result in

emotional disturbance method of addressing provocation). For a discussion of the American Model Penal Code method of addressing provocation, see chapter 4 at 216-219 *infra*.

⁵⁹ See for example Dressler's version of a proper provocation defence (*supra* (n 58) at 994-997). It contains components of the Model Penal Code, the English Homicide Act of 1957 and American common law. It is consistent with the underlying rationale of the defence as a partial excuse based on partial loss of self-control, but one that does not undermine the normative anti-violence message of the criminal law.

⁶⁰ See for example Nourse "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) Yale Law Journal 1389 at 1394-1396 who argues for the idea of a "warranted excuse" According to Nourse, it is by focusing on emotion, rather than the act that her proposal distinguishes itself from the traditional model of provocation as partial justification. The law should see the accused's state of mind as something that in some cases, it should strive to protect. Unlike the partial justification model, Nourse's approach allows the defence to retain many features associated with excuse. Furthermore, the law need not impose an "objective standard" (at 1395). It may continue to focus on the accused's perception of the triggering act, rather than its quality in the abstract - something which the partial justification model rejects. Furthermore, the law may provide for cases in which emotion builds over time - a position that traditional models have typically rejected (at 1395). The options mentioned in n. 59-60 do not contribute to the value of the final analysis in chapter 5 *infra* and for this reason have been included here for the sake of completeness.

⁶¹ Miller "Comment, (WO)manslaughter: Gender and the Model Penal Code" (2001) Emory Law Journal 665 at 670-671. See also Howe "More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses - Rejoining the Provocation Debate, Courtesy of the Homosexual Advance Defence)" (1997) Sydney Law Review 336 at 337: "provocation operates as a deeply sexed excuse for murder and therefore should be abolished"). See further at 356 (where the writer notes that nowhere except in rape cases is the gendered or more accurately sexed nature of law more apparent than in so-called domestic homicide cases in which men kill women and then claim provocation).

⁶² This has included a move towards more subjective standards of self-defence. In this respect see chapter 4 at 181-187 *infra*. Other commentators have argued for replacing the traditional element of imminence with other alternatives. For an exposition of these other alternatives see chapter 5 at 277-290 *infra*.

⁶³ See chapter 5 at 231-232 *infra*.

the legal requirements of private defence being equated with putative self-defence.⁶⁴

Further, in respect of non-pathological incapacity, theorists have advocated a trend towards a more objective, or normative evaluation of the defence.⁶⁵

It is clear from the above discussion that the defences available to battered women are problematic, whether these defences explicitly recognize battered woman syndrome or not. The question thus remains: is BWS a convenient label or a real syndrome?⁶⁶

Furthermore, if battered woman syndrome relates to a collection of mental symptoms, battered women should not rely on the defence of insanity⁶⁷ or diminished

⁶⁴ See chapter 5 at 189-191 infra.

⁶⁵ For a discussion of a move towards an objective approach see chapter 5 at 270-281 infra.

⁶⁶ Morse in his article "The 'New Syndrome Excuse Syndrome'" (1995) Criminal Justice Ethics 3 at 3-4 notes: "Behavioural science is on the march. Psychiatrists and psychologists are identifying an ever-proliferating and often bewildering array of new syndromes or disorders. Some have received the clinical and scientific imprimatur of actual inclusion in the American Psychiatric Association's official diagnostic manual. Examples of the diagnostically respectable disorders include: 'Antisocial Personality Disorder', 'Post-traumatic Stress Disorder', 'Intermittent Explosive Disorder', 'Kleptomania', and 'Pathological Gambling'. DSM-IV characterizes other categories as in need of further study because their existence as discrete psychopathological entities is not yet sufficiently validated to warrant inclusion in the manual. Examples include 'Postconcussional Disorder', 'Caffeine Withdrawal', and 'Premenstrual Dysphoric Disorder'. Finally, and least respectably, some alleged syndromes have not received general provisional recognition as valid, but are advocated with varying degrees of success by clinicians and researchers who have supposedly identified them. Examples from the last group, which have been chosen from the mental health and legal literatures and from legal cases, where they often arise, include 'Battered Woman Syndrome'; 'Vietnam Syndrome', 'Child Sexual Abuse Syndrome', 'Holocaust Survivor Syndrome', 'Urban Survival Syndrome', 'Rotten Social Background', and 'Adopted Child Syndrome'. Morse supra at 4 goes on to note: "Many people now suffer from yet another new syndrome that I have identified, or at least given a name: the 'New Syndrome Excuse Syndrome'. The primary diagnostic criterion for the syndrome is an almost irresistible impulse to use the alleged discovery of mental abnormality as good reason to alter the criminal law". Morse supra at 4 states: "Why should this be when there are two good, extant doctrinal means to use evidence of mental abnormality or other background variables to mitigate or avoid criminal liability? These two are the negation of the mens rea required by the definition of the offence, usually improperly called diminished capacity, and the insanity defence".

⁶⁷ Goldman "Nonconfrontational Killings and the Appropriate use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defense and the Merits of Partial Excuse" (1994) Case Western Reserve Law Review 185 at 219-220 notes: "[battered women] may meet the standard for legal insanity in those jurisdictions applying the stricter M'Naughten test, as Post-Traumatic Stress Syndrome has been held to qualify as a 'disease of the mind' under this standard. It should be noted, however, that such cases typically involve chronic PTSD in its most severe form, with extreme symptoms involving hallucinations, reality delusions and dissociative reactions with episodes of depersonalization and/or derealization. During such a dissociative reaction, the individual lacks the 'substantial capacity either to appreciate the criminality of their conduct or to conform their conduct

responsibility⁶⁸ instead? This would result in very different outcomes for battered women.⁶⁹

to the requirements of [the] law.” Goldman *supra* at 221 goes on to note: “For the [battered woman] who successfully raises an insanity defense, there is the troubling issue of precisely what the post-acquittal outcome will be. Although there is no criminal culpability for the act, commitment to a mental institution typically follows. Commitment is designed to incapacitate the acquittee for the protection of society, and presumably to provide some sort of treatment for the underlying mental disease or defect. Forced incarceration is imposed because the acquitted [woman] has committed what would ordinarily be a serious criminal offence. Although commitment to an institution furthers the purpose of the criminal law by ensuring that there will be no further offences by the particular actor, it is neither intended nor considered to be criminal punishment because it is not imposed to express community condemnation of the acquittee’s original offence”.

⁶⁸ In respect of American law, Littman in “Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will” (1997) Albany Law Review 1127 at 1159-1160 notes: “Diminished responsibility seems to be a more appropriate substitute for heat of passion adequate provocation. The doctrine of diminished responsibility is ‘functionally equivalent to the rule of provocation, because it reduces the degree of murder (or murder to manslaughter), but involves the proof of the accused’s mental abnormality or defect’. This doctrine is more subjective than the adequate provocation test because it determines whether or not the accused should be held to the reasonable person standard in the first place”. Littman *supra* at 1160 goes on to note: “The notion of premeditation, which concerns the amount and extent of time the accused had to reflect upon the criminal act, is a distinguishing feature between the various degrees of murder. Diminished responsibility brings to this moment of mental self-reflection the requirement that the individual’s mind was mature and capable of understanding the seriousness of the action the individual was about to choose”. In respect of English Law section 2 (1) of the Homicide Act of 1957 stipulates: “where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility in doing or being a party to the killing”. See further Byrne [1960] 2 Q.B. 396 at 303: “Abnormality of mind, which has to be contrasted with the time-honoured expression in the M’Naughten Rules, ‘defect of reason’, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment”. Mackay in “The Abnormality of Mind Factor in Diminished Responsibility” (1999) Criminal Law Review 117 at 118 notes: “This dictum has had a profound effect on the development of diminished responsibility, thereby permitting psychiatric evidence of sexual psychopathy to be admitted as a form of abnormality of mind, irresistible impulse was introduced into English law. Since the Byrne decision, courts have been willing to accept a whole range of less serious mental conditions as falling within ‘abnormality of mind’ in order to ensure a lenient sentence or disposal”. But in South African law Burchell and Milton *supra* (n 26) at 295 note: “Where provocation (or emotional stress) does not succeed as a defence, the existence of some provocation or emotional stress experienced by the accused at the time of the commission of the crime or before may constitute a factor which diminishes the accused’s responsibility and leads to a reduction in the sentence or punishment”. See further S v Laubscher 1988 (1) SA 163 (A) at 168B-C; S v Smith 1990 (1) SACR 130 (A) at 135F-G; S v Shapiro 1994 (1) SACR 112 (A) and S v Di Blasi 1996 (1) SACR 1 (A).

⁶⁹ But Morse *supra* (n 66) notes five reasons why battered women cannot rely on the insanity defence: “(1) First, many of those accused suffering from the syndrome are not legally insane by virtue of any of the traditional tests, even if the syndrome has been generally accepted as valid. For example, many accused diagnosed with Post-traumatic Stress Disorder are not sufficiently out of touch with reality to convince the fact finder that they are legally insane. (2) Many of the new syndromes have not been recognized, and therefore courts rejects them or juries are wary of them because there is no recognized mental disorder to support it. (3) There is no generic partial responsibility doctrine, a type of lesser insanity defence, applicable at trial that would allow a less than fully normal but legally sane accused at least to mitigate guilt and punishment. Certain traditional doctrines, such as the provocation/passion formula or the Model Penal Code’s extreme emotional disturbance provision,

Furthermore, if “battered woman syndrome” is not a mental illness, this raises the issue of whether the courts are treating evidence⁷⁰ of such abuse in the correct way.⁷¹

both of which reduce intentional homicides from murder to manslaughter, are in fact partial responsibility doctrines that syndrome sufferers could utilize. (4) In some cases, advocates claim that the syndrome sufferer’s conduct should be justified, rather than excused, and the insanity defence is clearly an excuse” (at 7-8). Furthermore, Morse *supra* (n 66) at 5-6 notes two reasons why a battered woman cannot rely on the negation of mens rea: “(1) Contrary to popular belief and the misguided belief of many clinicians who do not understand the legal meaning of mens rea, mental abnormality including severe mental disorder, rarely negates the mens rea required by the definition of the offence. Many disorders may give people crazy reasons for doing what they do, but it virtually never negates the accused’s intention, knowledge, conscious awareness of the risk and other required mental states. (2) As a result of fears for public safety and other concerns, those states that permit the admission of evidence of mental abnormality to engage mens rea typically place strict restrictions on the accused’s ability to do so. The classic example of this is the distinction between so-called specific intent, which the law allows to be negated, and general intent, which the law does not allow to be negated”.

⁷⁰ It should be noted that “battered woman syndrome” has not always been well supported. For example, Faigman and Wright “The Battered Woman Syndrome in the Age of Science” (1997) Arizona Law Review 68 at 69 note: “The battered woman syndrome ultimately fails because it was never a matter of science to begin with, and yet it was treated as a ‘scientific fact’ by courts”. Faigman and Wright go on to criticize Walker’s cycle theory of violence and learned helplessness (see 2-4 *supra* for an explanation of these terms). In respect of learned helplessness they note: “First, the application of the psychological concept of learned helplessness to battered women who kill demonstrates a basic confusion in Walker’s understanding of this phenomenon. In the original research, dogs that were rendered helpless by being subjected to noncontingent electric shocks proved to be extremely resistant to learning to control their environment. From a theoretical perspective, therefore, one would predict that if battered women suffered from learned helplessness they would not assert control over their environment (at 78-79). Moreover, Walker failed to employ a control group, so any statement about the ‘helplessness’ of the battered women cannot be placed in any context. Finally, most of Walker’s subjects did not kill anyone” (at 79). In respect of the cycle theory of violence Faigman and Wright’s criticism can be summarized as follows (at 77): (1) Walker’s interview technique allowed the subjects to easily guess what the researchers hoped to verify in the study. Most scientists avoid this dilemma by disguising their hypothesis. (2) Walker’s interviewers not only knew the correct outcome, but reported their estimation of whether the subject substantiated that outcome, the subjects responses were not recorded, only the interviewers interpretation of the subjects answers were documented. Most scientists avoid this by employing interviewers who are not informed about the hypotheses being tested. (3) The cycle theory was posited in absence of any time frame that might give it legal meaning. The research does not indicate whether the elapsed time, - or the time between cycles is a few minutes, several hours etc. Walker’s study also omits any discussion of whether a period of normality occurs between the third phase and the onset of a new cycle. If this is the case, then cycle contains four phases. (4) Walker fails to empirically relate the cycle theory to the ‘cumulative terror’ that purportedly groups the accused in the interim between the batterer’s attack and her response. (5) Walker claims that her data indicates the existence of a distinct behaviour cycle. If the cycle is to have coherence, it must refer to the occurrence of all three stages-tension building, leading to the acute battering incident, followed by loving contrition - as a single relationship. Walker relates her data as follows: “In 65% of all cases... there was evidence of a tension-building phase prior to the battering, in 58% of all cases there was evidence of loving contrition afterward. In general, then, there is support for the cycle theory of violence in a majority of the battering incidents described by our sample” (*supra* (n 7) at 96-97). But as Faigman and Wright *supra* at 77 suggest: “Walker’s data does not support her conclusion. She proves data on tension building and loving contrition phases separately. This division offers little evidence regarding the number of women who experienced all three phases as a cycle. If sixty-five percent of all subjects experienced tension building before an acute battering incident and fifty-eight percent of all subjects experienced loving contrition after an acute battering incident, then it is likely that only about thirty-eight percent of the women actually experienced the entire cycle as studied”.

⁷¹ Schneider in “Resistance to Equality” (1996) University of Pittsburgh Law Review 477 at 512 noted that although some U.S. trial and appellate courts articulate the relevance of evidence of battering

As a result of the issues highlighted above, it is proposed to assess the defences available to battered women in light of a comparative study of both the English and American defences of self-defence and provocation. The study will conclude with an assessment of the findings in the context of their practical implications: the form that the defences should take. However, it is necessary to briefly examine the justification for using the particular systems employed and to facilitate an understanding of the way in which cases are prosecuted in the different jurisdictions.

1.1 Justification for choice of comparative systems

The underlying rationale for the legal systems chosen for the comparative analysis may be found in the historical development of South African criminal law. It is this author's intention to illustrate the primary features of such development, in order to describe in detail the influences of Roman-Dutch and English law upon South African criminal law culminating in the present position.

The roots of the South African criminal law (as the majority of South African common-law) can be found in Roman-law. The Twelve Tables⁷² for wrongful conduct to be punished by public authority can be considered the initial source of

correctly, many judges are confused. Some courts have employed a hybrid defence (citing Banks v State, 608 A. 2d 1249, 1252 (Md. Ct. spec. App. 1992): defence at trial was "an amalgamation of self-defence, hot-blooded response to provocation, and battered spouse syndrome"). Other have expressed confusion about defence strategy or 'specialized' application of traditional self-defence law to battered women, indicating that in practice there may well be a "battered woman syndrome defence". Schneider supra at n 57 cites the following case law to support her conclusion: State v Scott, 1989 WL 90613 (Del, Super, July 19, 1989) (defence attorney referred to client's defence as "battered woman's defence"); State v Vigil, 794 P. 2d 728, 729 (N.M 1990) (referring to a battered woman theory of self-defence).

⁷² Promulgated in 450 BC.

Roman provisions which provided for the modern conception of criminal law.⁷³ Delictual rules at this stage (with a penal character punishing wrongdoers) remained up until the Justinian rule, resulting in criminal law only gathering momentum in the Republic under the Principate.⁷⁴

Towards the end of the Republican period laws were enacted proscribing certain offences and setting out punishment for such offences. This became the basis of substantive criminal offences which developed out of Roman law (“*crimina publica*”). During the first five centuries AD the “*crimina extraordinaria*” came into existence incorporating all behaviour which was punished through the tribunals.⁷⁵

Justinian ordered the collection of various legal texts into one work: *Corpus Juris Civilis*.⁷⁶ Roman jurists did not directly advance the systematic study of criminal law. This was due to little attention paid to contemporary status and customs.⁷⁷ Due to the fall of the Western part of the Roman Empire to Germanic tribes, the customary laws of these tribes were introduced into Western Europe. But as a result of the introduction of Roman law, little remained of these customary laws which are significant for Roman-Dutch criminal law.

⁷³ Burchell and Hunt South African Criminal Law and Procedure 2ed (1983) Vol I: 12.

⁷⁴ Ibid.

⁷⁵ Snyman Strafreg 3ed (1992) 9.

⁷⁶ De Wet De Wet & Swanepoel Strafreg 4th ed (1985) 5. This work is broad authority for all currently recognized common-law crimes in South Africa.

⁷⁷ Burchell and Hunt *supra* (n 73) 18.

Roman law did not disappear completely (at the fall of the Roman empire) and while Roman law and Canon law exercised an influence on the customary law of Western Europe (in early Middle Ages) the Roman law only began to exercise its influence after the revival of the study of the Justinian compilation at the end of the eleventh century.⁷⁸

Both the Glossators and Commentators contributed to the rediscovery of Roman law. This was the direct result of these two groups writing longer commentaries on the Justinian texts. Their intention was to systematize and link them with prevailing statutory, customary and canon law.⁷⁹

After the revival of the study of Roman law (developed by medieval Italian jurists) the Justinianic compilation of Roman law became the “*jus commune*” of Continental Europe. As a result of the similarity between the common law of the various Western European countries, Dutch writers relied on legal sources not only from within their own province but also from other provinces of Netherlands and Italy, France, Spain and Germany.⁸⁰

In 1652 Van Riebeeck on orders of the Dutch East India Company established a settlement at the Cape of Good Hope. Its purpose was to provide water and victuals

⁷⁸ De Wet supra (n 76) 8.

⁷⁹ Burchell and Hunt supra (n 73) 19.

⁸⁰ Burchell and Hunt supra (n 73) 22-23.

for Dutch ships making their way to the Dutch East Indies. The law of the Cape Colony was specifically that of the Province of Holland. The law in force in that province was Roman law.⁸¹

In 1795, during the Napoleonic wars, the English seized the Cape in order to secure sea links with India and took it over as a British Colony in 1806. The “Roman-Dutch” law which then obtained in the colony remained in force. Roman-Dutch law survived only in those areas which had come under British rule and had left the Dutch Empire before it adopted a civil code based on the French Model.⁸²

Despite this, English Common law made its presence felt. This took the form of organizing and modernizing the structure of the court system of the new colony as well as its administration. The law of evidence and procedure (in both criminal and civil law) were restructured on the patterns of the Common law.⁸³

During this time the courts had to settle the classification of common-law crimes and also create exact definitions of their essential elements. In some cases courts achieved this with little help from English law. As a result of bringing order to Roman-Dutch authority, conflicts between writers were resolved, or attention was given to a

⁸¹ It had been received into Holland in the form given to it by Glossators and Commentators, and in the 17th and 18th centuries Dutch legal scholars adapted it with an admixture of Dutch Customary law: Grotius (1583-1645); Vinnius (1588-1657); Voet (1647-1713); Bynkershoek (1673-1743) and Van der Keessel (1738-1816).

⁸² Zweigert and Kotz *An Introduction to Comparative Law* 3ed (1998) 232.

⁸³ Zweigert and Kotz *supra* (n 82) 232-233.

particular problem of definition, or a “manageable” crime was crystallized out of wide-ranging, amorphous Roman-Dutch ones. However, in respect of most common-law crimes, there was a degree of English influence.⁸⁴ Further reasons for English influence included the fact that most judicial appointments came from three United Kingdom Bars, most were educated in English law, judges and practitioners were not familiar with Dutch, few had a command of Latin, and many old authorities were inaccessible and were poorly indexed.⁸⁵ Furthermore, there was uncertainty and a want in uniformity in the writings of Dutch jurists and also a preoccupation with punishment at the expense of the substantive law.⁸⁶

Despite the establishment of two independent Boer Republics (Orange Free State and Transvaal), these were incorporated into British Empire after winning Boer war in 1902. In 1910 they joined the Cape Colony forming the Union of South Africa, whose constitution was laid down by the British Parliament in the South Africa Act, 1909. After the creation of the Union of South Africa in 1910, the progressive anglicization of the law came to a stop.⁸⁷

⁸⁴ Burchell and Hunt South African Criminal Law and Procedure General Principles of Criminal Law Vol 1 (1970) 23.

⁸⁵ Ibid.

⁸⁶ Burchell and Hunt *supra* (n 84) 24.

⁸⁷ Zweigert and Kotz *supra* (n 82) 233. Several factors contributed to this including a sense of political independence from Britain, the recognition of English and Afrikaans as equal languages, training of native jurists, greater attention being paid to the texts of old Dutch writers and to the rules which have developed from them.

In conclusion it is clear that South African law is a hybrid legal system i.e. Roman-Dutch and English law have been fused together.⁸⁸ This stems from the fact that English influence is considerably greater in regard to the “pigeon-holing” and definition of the common-law crimes than in regard to the general principles of criminal liability. South African criminal law is stronger than its parent systems, its strength lying in a discriminatory and wide use of comparative sources available to it,⁸⁹ and because of its nature as a mixed system, South Africa can accommodate contributions from a greater variety of legal systems.⁹⁰

Due to the fact that English law has played a vital role in the development of South African criminal law, it is clear that modern English cases, writings, and developments in this area provide an important comparative source since:

⁸⁸ Zweigert and Kotz supra (n 82) submit that since Roman-Dutch and English law are so intermixed that it cannot without distortion be put into one or other pigeonhole: “Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England. Even if it were true that the whole of South Africa’s private and criminal law had remained pure Roman-Dutch law, the South African legal system as a whole would still be a hybrid one, in which civil and common-law elements jostle each other” (at 235, citing Hahlo and Kahn The South African Legal System and its Background (1968) 218).

⁸⁹ Burchell and Hunt supra (n 84) 37 state: “While creating order out of chaos of Roman-Dutch criminal law, by introducing detail and precision of the English law of crimes, and while avoiding most of the peculiar eccentricities of the English criminal law, including its needless proliferation of finely divided or overlapping offences, the courts have created general principles of criminal liability more logical, coherent and just than those of English Law”.

⁹⁰ Burchell and Hunt supra (n 84) 37. The Constitution of the Republic of South Africa of 1996 dictates that the common law should be developed with a view to giving effect to constitutional values. Section 39 (2) states: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”. Furthermore, the Constitution now mandates that the courts must look to other legal systems when interpreting the Bill of Rights. Section 39 (1) states: “When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law”.

“ South African criminal law is a hybrid system (one of the forbearers which is English law); and secondly because it is the plain truth that a code and the decisions under it cannot provide the kind of practical assistance to our courts which the English, American and Scottish law reports can and do provide”⁹¹.

Burchell and Hunt, note Hahlo and Kahn’s argument in this respect:

“Modern continental systems are codified, whereas the Roman-Dutch law is not. Continental judgments inevitably argue on specific code provisions, whereas courts in non-codified systems argue on abstract non-verbalised principles. This explains why our judges in the past derived greater assistance from the judgments of English, Scottish and American courts than from judgments of Continental tribunals, and will continue to do so in the future”.⁹²

It is this author’s contention that it is appropriate to undertake a detailed comparative analysis of South African law with one of the systems which acted as a parent system: English law. Furthermore, an analysis of American law will be undertaken since prior to its independence, those who settled in America agreed that the law of the several colonies should in principle be English Common law plus any statutes passed specifically for them. A further reason for the use of American law in this comparative analysis is the fact that the theory underlying BWS was first framed⁹³ in that jurisdiction.⁹⁴

⁹¹ Burchell and Hunt supra (n 84) 38.

⁹² Ibid, citing Hahlo and Kahn supra (n 88) at 38.

⁹³ As developed by Dr. Lenore Walker. In this respect see pages 2-4 supra.

⁹⁴ See further Roberts supra (n 18) at 143 setting out a historical exposition of the use of expert testimony in cases where an abused spouse kills her abuser. In 1977, the Supreme Court of Washington case of State v Wanrow 559 P. 2d 548 (Was. 1977) (holding that a woman in self-defence case was entitled to have the jury consider her actions in the light of her own perceptions of

While both English and American systems have developed and changed from the 19th century, it is this author's view that they add to the value of the enquiry as the two regimes may be compared to the South African regime which developed in part from the same 19th century roots.

the situation (at 559), the court held that to not allow the jury to consider this would violate equal protection (at 559). Roberts supra (n 18) at 143 notes that this case is the first step towards an objective reasonable-man standard in battered woman cases. Roberts at 143 notes that the first court ruling to admit expert testimony on battered woman syndrome was Ibn-Tamas v United States, 407 A.2d 626 (D.C. 1979) The court reasoned that the admission of the evidence was "relevant to establish the accused's credibility and helpful to the jury in their understanding of the accused's rationalization of her actions" (at 631). Roberts supra (n 18) at 143 goes on to state that: "since Ibn-Tamas supra decision, appellate courts in twenty-six states have addressed the admissibility of expert testimony on battered woman syndrome. Seventeen states have concluded that the testimony is admissible, with varying requirements for foundation evidence and extent of admissibility. Only three states have excluded the testimony on the merits". Roberts supra (n 18) at 143 notes that "the watershed moment for battered woman syndrome as a buttress to self-defence claim appeared in State v Kelly, 478 A.2d 364, 372 (N.J. 1984). The New Jersey Supreme Court found an expert's testimony on the subject of battered spouse syndrome essential to rebut the general misconceptions regarding battered women because the testimony, is aimed at an area where the purported common knowledge to the jury may be very much mistaken, an area where juror's logic drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge".

Chapter 2

The Battered Woman and South African Law

2. Introduction

The idea that unlawful conduct may be justified arises from the recognition that there may be circumstances that deprive the unlawful conduct of its blameworthiness (remove the social need to punish the accused for the performance of the conduct in question.)⁹⁵ Viewed from a narrow perspective unlawfulness can be seen as the absence of a defence excluding unlawfulness.⁹⁶

Recently, reference to the legal convictions of the community as the basis of criminality has appeared in various South African judgments.⁹⁷ In addition, the Constitution has had the effect of reducing the number of common-law and statutory crimes in its “facial attack” on offences which derive from a discredited morality. While the principle of legality still operates as a cautionary rule to prevent crimes being re-defined through the “back door”, the courts have harnessed the flexibility in this area to the task of dealing with the evolving nature of society. Therefore, it is clear that the definition of

⁹⁵ Burchell supra (n 29) 226.

⁹⁶ Burchell supra (n 29) 227.

⁹⁷ Burchell supra (n 29) 228. These cases include S v T 1986 (2) SA 112 (O) at 131F-H; S v Banda 1990 (3) SA 466 at 484A-B; S v Collet 1991 (2) SA 854 (A); S v Chretien 1981 (1) SA 1097 (A) 1103D-F and 1105F-G; S v Gaba 1981 (3) SA 745 (O) 751 and Clarke v Hurst NO 1992 (4) SA 630 (D) at 625G-H. Flack in “The South African Criminal Law under analysis in our new Constitutional Dispensation: Are we looking for an ‘Excuse’? An Exposition of S v Goliath 1972 (3) SA 1 (A)” (1999) Responsa Meridiana 78 at 81 notes that in the case of Clarke v Hurst No supra at 653A-C where it was held: “despite the fact, that by authorizing the removal of artificial medical support of a patient in a permanent vegetative state, the applicant curator would be intentionally killing another human being, action was held not to amount to murder. Notably, instead of bringing the conduct under the established justification ground of consent, as the patient concerned had made a Living will, the courts recognized a clearly demarcated situation in which prima facie criminal behaviour would be acceptable. The question of unlawfulness turned on the quality of life of such patients, examine from the perspective of the legal convictions of the community, which dictated that quality of life includes more than purely physiological functioning.”

unlawfulness as conduct which cannot be justified, which “hinges unlawfulness on the legal convictions of the community has found favour with the South African Courts.⁹⁸ Furthermore, the concept of the legal convictions of the community must be informed by the norms entrenched in the Bill of Rights.⁹⁹

One of the justification grounds excluding unlawfulness is that of self-defence. It is an extraordinary measure which permits the victim of an unlawful attack to take the law into her own hands where there are no other reasonable options available to her at the time of the attack but to act on her own initiative in order to avert or minimize the danger faced. For self-defence to be successfully raised, certain conditions need to be met in relation to both the attack, and the defensive measures taken. Of relevance is the requirement that the threat must be imminent or must have commenced. Therefore, an individual may not respond to an attack once it has ceased nor may one defend oneself in anticipation of being attacked at some future point. In terms of South African law, a battered woman who is being attacked by her abuser may defend herself against such an attack using any reasonable means necessary. The problem with this requirement is that in most cases abused women often defend themselves after the attack was completed against her.¹⁰⁰ This conduct opens itself up to being construed as an act of vengeance. Another difficult hurdle that a battered woman faces in self-defence claims

⁹⁸ Flack *supra* (n 97) 81.

⁹⁹ In this respect, Flack *supra* (n 97) at 82-83 goes on to note: “It is submitted that the concept of legal convictions of the community, while arguably more vague and uncertain, has a certain objective minimum. The judge may not impose his own subjective preferences onto the case but must seek the solution in the sentiments of all informed persons in society. Whatever the focus, the notion of legal convictions of the community has acquired a ‘constitutional dimension.’ The values to be taken into account have thus been articulated and set out in the Bill of Rights and operate as a clear guide to the exercise of judicial discretion. The Constitutional Court has indicated that the role of the judge in respecting constitutional values differs markedly from that of adhering to public opinion. Indeed, the legal convictions of the community consist of those values laid down in the constitution, which operate as a counterweight to majoritarian sentiment.”

¹⁰⁰ Reddi *supra* (n 1) 270.

relate to the objective components of the defence i.e. the reasonableness of the accused's conduct is judged from the perspective of a reasonable person in the same circumstances.¹⁰¹

The enquiry into reasonableness in the context of unlawfulness can accommodate only the generic facts or the physical act, assessed in terms of the constitutional rights, where the "reasonable man" test has become increasingly subjectivized to take into account a number of the personal characteristics of the accused. While it is important to accept the need for flexibility in the area of the justification ground,¹⁰² and although this makes objectivity more elusive, it is clear that there needs to be some sort of limit. This is one of the important questions which needs to be addressed in respect of battered women and self-defence: whether the limits of the objective test have been exceeded by taking her personal circumstances into account.¹⁰³

The purpose of this chapter is to examine each condition relating to self-defence in respect of both the attack and the defence, with specific attention focused on the imminence requirement and the objective test for self-defence. Furthermore, it needs to be established whether South African law, like other jurisdictions such as the United States, recognizes "battered woman syndrome"¹⁰⁴ and if this is not the case, then

¹⁰¹ Flack supra (n 97) at 85 notes that: "greater use of a flexible definition of unlawfulness yields the ability to balance the need for an objective standard of behaviour with a need to temper the harshness of criminal conviction as society changes. It does not threaten the importance of creating a uniform, objective standard of behaviour for South African citizens. It serves to provide a minimum of judicial discretion, based as it is on the constitutional values, in the context of substantive law, which can obviate the frustration of having to depend on the bureaucratic machinery of the state legislative process."

¹⁰² Reddi supra (n 1) 269.

¹⁰³ Flack supra (n 97) 83.

¹⁰⁴ For a discussion of "battered woman syndrome" see chapter 1 at 2-4.

whether the factors taken into consideration by the courts adequately take into account the perspective of the battered woman when evaluating the reasonableness of her conduct. If such factors do not adequately support a claim of self-defence then it is necessary to consider what impact these factors will have in informing the availability of relying on putative self-defence.

In South African law, the defence of non-pathological incapacity based on provocation and emotional stress has developed into a defence which excludes an accused person's liability. This development is founded on the principle-based approach to liability, which essentially holds that "unless a man has the capacity and fair opportunity or chance to adjust his behaviour to the law its penalties ought not to apply to him."¹⁰⁵ Despite the well-established nature of the defence of non-pathological incapacity, the law has been marred by some controversial decisions of the courts which have "constituted a serious erosion of the notion of criminal capacity, with concomitant "ripple effects on other topics within the established general principles of criminal law."¹⁰⁶ This chapter sets out the following objectives. It is first necessary to trace the development of the defence of non-pathological incapacity by means of examination of various case law. This will include a discussion of the notion of "toerekeningsvatbaarheid" (criminal capacity), as well as the position leading up to the controversial Eadie¹⁰⁷ decision as well as the decision itself and its judgment. It will also include consideration of the most recent case law on the topic, namely S v Marx.¹⁰⁸

¹⁰⁵ Hart Punishment and responsibility (1968) 181. It should be noted that the law makes no distinction between provocation and emotional stress. In this respect see the case of S v Laubscher supra (n 68).

¹⁰⁶ Snyman "The tension between legal theory and policy considerations in the general principles of criminal law" (2003) Acta Juridica 1 at 22.

¹⁰⁷ S v Eadie 2002 (1) SACR 663 (SCA).

¹⁰⁸ [2009] 1 All SA 499 (E).

A brief analysis will be done throughout the text, illustrating some of the main problems experienced with the provocation defence and whether it should in fact continue to remain a complete defence. Lastly, it will be necessary to consider whether the so-called “battered woman syndrome” is to be applied in relation to the defence of provocation or whether in fact the defence adequately takes cognizance of the battered woman’s experiences.

2.1 Self-defence

2.1.1 Development of the defence

Private defence is the civilized remnant of the ancient system of private vengeance as a redress for wrong done. The Romans, in permitting self-help formulated the principle “*moderatio inculpatae*” (moderation in self-defence) which the European jurists later relied upon to develop a coherent doctrine of private defence. Therefore, persons who, as a result of private defence, caused harm to another did not incur criminal liability if they had observed the principle of moderation.¹⁰⁹

Private defence was treated in a casuistic fashion by Roman-Dutch writers. It was only considered in relation to certain crimes such as homicide, assault, theft and malicious damage to property. Scholars began to expound private defence only at the beginning of the seventeenth century as a general defence relating to all crimes. Coherent statements of the elements of the defence only emerged in 1932.¹¹⁰

¹⁰⁹ *Code* 841; cited in Burchell supra (n 29) 232.

¹¹⁰ Steyn “Noodweer” (1932) *South African Law Journal* 462. Burchell supra (n 29) at 233 notes that writers such as Gardiner and Lansdown *South African Criminal Law and Procedure* (2nd ed) (1921) Vol I at 63-64; and Vol II at 1005-1009 followed the casuistic model of the Roman- Dutch writers, hardly mentioning “self-defence” as a general defence, reserving comprehensive discussion of the topic to the exposition of the law of justifiable homicide.

Jurists such as Steyn¹¹¹ were concerned with determining the bounds of moderation. According to him, this was to be tested according to the criteria of *tempus* (time), *modus* (method) and *causa* (cause). Steyn was of the view that the attack must have commenced and that the defence should have occurred at the time of the attack and not subsequently as retaliation (*ad defensionem, non ad vindictam*).¹¹² For this reason the means used to repel the attack had to be proportionate.¹¹³ Jurists held that where possible the victim of the unlawful attack should retreat rather than resort to force to defend himself.¹¹⁴

Finally the defence had to be in respect of a recognized interest. While some jurists restricted the scope of private defence to the protection of life and chastity; others extended the protection to include property¹¹⁵ and honour.¹¹⁶

¹¹¹ Steyn supra (n 110) 462. See also Van Warmelo “Noodweer” (1967) Acta Juridica 5.

¹¹² Steyn (n 110) at 470: “Self-defence cannot be relied on when the attack has already been completed or where the attack is to occur in the future. In respect of an attack which is yet to occur, only rules relating to protection are allowed. Defence against an already completed attack is revenge and falls outside the parameters of self-defence.” (own translation)

¹¹³ Steyn (n 110) at 471: “There must be a measure of proportionality in respect of the attack and the defence. The requirement of proportionality must have a bearing only on the nature and means of the attack and the defence. The question to be answered in each case is whether the means used to avert the attack under the circumstances was necessary.” Steyn at 471-472 goes on to state: “Notice should be taken of: (i) the time and place of the attack, (ii) the weapons or means used for the defence, (iii) the environment in which the attack took place and (iv) the relative strengths of the attacker and the defender”. See also Van Warmelo supra (n 111) at 22: “The reaction must have been the only reasonable means to protect themselves. The attack must have occurred immediately and must be linked to the defence, therefore it must have been imminent. The attack must have been unexpected, and the means used to defend themselves must not be out of proportion to the attack” (own translation).

¹¹⁴ See also Van Warmelo supra (n 111) at 22. This requirement was authoritatively stated by jurists such as Morkel and Verschoor “Oor die ‘bedoeling om te verdedig’ by noodweer” (1981) Tydskrif vir Regswetenskap 73.

¹¹⁵ Steyn supra (n 110) 466.

¹¹⁶ Ibid; Labuschagne “Noodweer ten aansien van nie-fisiese persoonlikheidsgoedere” (1975) De Jure 59.

The structure of the South African law of homicide has been derived from two traditions. Roman law (and less obviously Roman-Dutch law) is structured on the premise that only intentional killing is unlawful. On this basis the distinction between *dolus* and *culpa* is important since it distinguishes murder from other types of homicide. In respect of this approach, culpable homicide is not a lesser form of murder but constitutes a distinct crime with a separate basis of liability. English common law had as a premise the proposition that all homicides, whether intentional or unintentional, negligent or accidental, were unlawful. This approach only attached small significance to the distinction between *dolus* and *culpa* since such a distinction did not express the differences in English law between murder and manslaughter. For this reason English law saw no inherent objection to the premise that murder could be reduced to manslaughter regardless of whether X acted with *dolus* or *culpa*, since manslaughter is merely mitigated murder.¹¹⁷ South African law after a lengthy flirtation with the English structure¹¹⁸ has now firmly opted for the Romanistic form.¹¹⁹

Certain types of intentional killing are no longer regarded as unlawful and therefore are not punished as murder. South Africa recognizes that killing in self-defence is justifiable and therefore not murder.¹²⁰

Burchell offers the following definition of private defence:

¹¹⁷ Milton South African Criminal Law and Procedure Common-Law Crimes Vol II 3rd ed (1996) 311.

¹¹⁸ Milton supra (n 117) 312. In the form of the “partial excuse” cases which allowed murder to be reduced to culpable homicide.

¹¹⁹ Milton supra (n 117) 312. By rejecting the position that *dolus* could constitute the *mens rea* of culpable homicide.

¹²⁰ Milton supra (n 117) 312.

“A person who is the victim of an unlawful attack upon person, property or other recognized legal interest may resort to force to repel such attack. Any harm or damage inflicted upon an aggressor in the course of such private defence is not unlawful.”¹²¹

Burchell has noted that two important and yet somewhat conflicting themes shape the structure of the law of private defence. One is that private defence involves a choice between two evils, and that in choosing, the lesser evil is to be preferred. The evils are set out as follows. First, the harm threatened by an attack upon the interests of an individual. Secondly, harm perpetrated against the legal interest of the attacker, in the process of repelling the attack. The doctrine of the lesser evil requires that the defender should not inflict greater harm than that threatened by the initial attack. As Burchell notes “the central organizing principle of this approach is thus the comparative assessment of the harms involved”.¹²²

The opposing approach is one which justifies private defence using the concept of the autonomous individual. The theory underlying this approach is that every person has the right to protect her legal interests and is under no obligation to surrender these rights in order to avoid inflicting some evil on another person. According to this approach an individual who chooses to infringe the rights of another individual is the author of the harm that she suffers in the course of a defensive response to her attack.¹²³

¹²¹ Burchell supra (n 29) 230, who goes on to state at note 2: “This description refers to the fact that the citizen has been unable to rely upon the agencies of the state (the police and the courts) to protect his legal interest, and has been compelled to take the law into his own hands to defend his interests privately”. Furthermore, the term private defence is to be preferred to that of self-defence because the latter implies that the only issue is the defence of the physical self or person but the defence is in actual fact also available for the protection of other persons and interests such as property, chastity and liberty.

¹²² As Burchell supra (n 29) at 231 submits, the choice of evils doctrine also gives rise to the requirement that the person who is attacked should retreat, avoid or flee from the attack before resorting to force, since flight is the lesser evil. For an exposition of the various rationales used to explain the justification for defensive killings see chapter 5 at 231-238 infra.

¹²³ See further Burchell supra (n 29) 231: “This being so, there is no obligation on the person attacked to retreat in order to avoid the attack, nor is there a restriction upon means used to protect life or property”.

Snyman refers to two justifications for the existence of private defence. The protection theory emphasizes the individual and her right to defend herself against an unlawful attack.¹²⁴ Secondly, in respect of the upholding of justice theory, people acting in private defence perform acts whereby they assist in upholding the legal regime. Private defence is meant to prevent justice from yielding to injustice.¹²⁵ These acts are now subject to the Constitution.¹²⁶

Private defence forms part of South African common law. The courts are guided by the Constitution as to which approach is to be followed when a common-law principle, rule or doctrine appears to be in conflict with the Constitution. Section 39(2)¹²⁷ provides: “when interpreting any legislation and developing the common-law or customary law, every court, tribunal or forum must promote the spirit, purport and, objects of the Bill of Rights”. This essentially means that the common law must be “adapted or corrected, where applicable, to reflect constitutional values”.¹²⁸ Van Dijkhorst J gave the following summary of the meaning of the section:

“Section 35 (3) [now 39 (2)] is intended to permeate our judicial approach to interpretation of statutes and the

¹²⁴ Snyman “The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa” (2004) South African Journal of Criminal Justice 178 at 180.

¹²⁵ Snyman supra (n 124) 180-181.

¹²⁶ Constitution of Republic of South Africa 1996. As was held in S v Walters 2002 (7) BCLR 663 (CC): “Self-defence is treated in our law as a species of private defence...Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interests, in circumstances in which it is reasonable and necessary to do so...What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. The interests must now be weighed in light of the Constitution” (at par [53] n 66).

¹²⁷ Constitution of Republic of South Africa 1996.

¹²⁸ Ally and Viljoen “Homicide in defence of property in an age of constitutionalism” (2003) South African Journal of Criminal Justice 121 at 129-130. See section 1 of Constitution of Republic of South Africa 1996.

development of the common law with the fragrance of the values in which the Constitution is anchored. This means that whenever there is room for interpretation or development of our virile system of law that is to be the point of departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system.”¹²⁹

This assessment calls for a two-stage approach to be adopted. In respect of the first stage, the content and scope of the rights protected, including the meaning and objects of the challenged conduct, must be determined to establish if there is such deprivation or limitation.¹³⁰ If there is such a limitation, the enquiry would then proceed to the second stage of the inquiry. This stage entails a balancing process by applying a proportionality test, provided for in section 36 (1) of the Constitution. The party (abused woman) relying on the disputed conduct should demonstrate that the limitation is justifiable under the Constitution.¹³¹

While the Constitution does not establish a hierarchy of rights, judges and academics have acknowledged that some rights are more foundational, constituting a core of rights from which others are derived. O’Regan J, in S v Makwanyane¹³² earmarked the right to life as “antecedent to all other rights in the Constitution”.¹³³ The same is true of the

¹²⁹ Du Plessis v De Klerk 1995(2) SA 40 (T) at 501I-J.

¹³⁰ S v Walters supra (n 126) at par [26].

¹³¹ Ally and Viljoen supra (n 128) 130.

¹³² 1995 (6) BCLR 665 (CC).

¹³³ Ibid at par [326]. Ex parte Minister van Justisie: In re S v Van Wyk 1967 (1) SA 488 (A) is the benchmark decision for the proposition that killing in defence of property is justifiable. In this case the Minister of Justice reserved two questions for the Appellate Division: (a) May a person rely on private defence where he kills or wounds another to protect property? (b) If so were the bounds of private defence exceeded bearing in mind the circumstances of S v Van Wyk? While three separate judgments were delivered, the court was unanimous in its affirmative answer to the first question (at 501H; 504B and 509A). But as Ally and Viljoen supra (n 128) at 127 have noted, section 24 and section 37 (1) of the Criminal Procedure Act 56 of 1955 relied on by Steyn CJ were declared unconstitutional in Walters supra (n 126). According to section 24, a civilian is authorized to arrest a suspect, including someone suspected of property crimes such as theft and robbery. Section 37 (1) allows the civilian so authorized to use deadly force to prevent the escape of the suspect when the suspect flees and it is clear that an attempt is being made to arrest him. Steyn concluded his reasoning in Van Wyk supra by emphasizing that the suspect could be lawfully killed despite the fact

right to dignity, especially when taken together with the right to life.¹³⁴ To this should be added the right to bodily integrity. Ally and Viljoen note De Waal's discussion of the meaning of the right to bodily integrity:

“Violence against an individual is a grave invasion of personal security. Section 12 (1) (c) requires the state to protect individuals, both by refraining from such invasions itself and by discouraging private individuals from such invasions.”¹³⁵

To meet constitutional muster, the limitation must be closely linked to its purpose.¹³⁶ Abused women are entitled to protect their life therefore, can kill to achieve this. But an important factor in such an evaluation is whether less restrictive means are available to achieve the stated objectives. As Ally and Viljoen note, one way of posing this question is to reformulate some of the case law at common-law: “the use of violence especially lethal force, can only be justified if it is necessary (that is, if it is the only means to avoid death or grievous bodily harm).”¹³⁷ While it could be said that the battered woman could have left the abusive relationship, the law does not require the abused woman to leave her home, nor does it expect ordinary persons to display acts of

that he posed no harm or threat of harm to the citizen. Steyn CJ noted that an arrest, was not private defence, but justified his analogy by asserting that both instances form part of the societal interests in the protection of property. The judge concluded: “Consequently in our law it is not preposterous idea to assert that a person can kill in defence of a right other than life or limb” (at 497H) (own translation). Ally and Viljoen supra (n 128) at 128 note that no judicial pronouncement has as yet been given about the constitutionality of the common law as enunciated in S v Van Wyk.

¹³⁴ S v Makwanyane supra (n 132) at par [144]. The constitutional values protected by these rights are described in Makwanyane supra (n 132): “Together they [the right to life and human dignity] are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Taken away, all other rights cease” (at par [84]).

¹³⁵ Ally and Viljoen supra (n 128) 132, citing De Waal Bill of Rights Handbook 3ed (2000) 233.

¹³⁶ Section 36 (1) (d) of Constitution of the Republic of South Africa 1996.

¹³⁷ Ally and Viljoen supra (n 128) 133.

heroism. Thus harm (death or serious bodily injury of the abuser) caused as a result of the limitation can be justified when section 36 is applied.¹³⁸

Private defence is an extraordinary remedy that involves the infliction of harm upon another individual. To escape criminal liability for this act, the defender must be able to show that her resort to private defence conformed to the social and legal norms that result in the use of self-help by citizens. In respect of self-defence the norms that apply require that the defender be able to provide evidence that her resort to force was necessary in the circumstances she found herself in and that she used means appropriate to the danger that confronted her. These requirements for successfully invoking the defence are expressed as conditions that must have been present or complied with. Such “triggering” conditions relate to the nature of the attack and the nature of the defender’s response (the defence).¹³⁹ For a situation of private defence to arise, evidence must show (1) an attack upon a (2) legally protected interest and (3) that the attack was unlawful. However, it is necessary to first consider the test used for private defence, before engaging in a discussion of the elements.

2.1.2. The test for private defence

2.1.2.1 The objective test

Since 1947, it has been held that the question as to whether an accused, who relies on self-defence, has acted lawfully must be judged by objective standards. In applying this objective standard, it was held in S v Motleleni¹⁴⁰ that:

¹³⁸ Constitution of the Republic of South Africa 1996.

¹³⁹ Burchell supra (n 29) 233.

¹⁴⁰ S v Motleleni 1976 (1) SA 403 (A). For a discussion of the test utilized for self-defence in English law see chapter 3 at 113-116 and for the American law see 179-180 infra (objective test) and 181-187 infra (subjective standards).

“The question whether an accused, who relies on self-defence, has acted lawfully must be judged by objective standards. In applying these standards one must decide what the fictitious reasonable man, in the position of the accused and in light of all the circumstances would have done.”¹⁴¹

Snyman suggests “reasonableness is a relative concept, depending on the circumstances of each case”.¹⁴² Generally, it has been accepted that the “reasonableness” test is a vehicle to ascertain the legal convictions of the community or the community’s sense of equity and justice (*boni mores*). This has been described as an instrument of judicial policy.¹⁴³

In Government of the Republic of South Africa v Basdeo and Another¹⁴⁴ it was held that “the value judgment on which the application of the general criterion of reasonableness is based, are on considerations of morality and policy and the court’s perception of the legal convictions of the community, and entails a consideration of all the circumstances of the case”.¹⁴⁵

¹⁴¹ Ibid at 406C. This finding is in accordance with established precedent: R v Koning 1953 (2) SA 220 (T) 225: “A person is entitled to kill in self-defence if they can show that they had a bona fide belief as well as reasonable grounds for believing that they were being attacked” (own translation). In R v Bhaya 1953 (3) SA 143 (N) 149 the court stated that “the standard to be applied is that of a reasonable man both as regards the belief entertained by the appellant as to the imminence of an assault...” See further R v Hele 1947 (1) SA 272 (E) 297-298; R v Pope 1953 (3) SA 890 (C) 894-895; S v Mnguni 1966 (3) SA 776 (T) 778; R v Ndara 1955 (4) SA 182 (A); S v Ntuli 1975 (1) SA 429 (A) 436; S v De Oliviera 1993 (2) SACR 59 (A) 63I; S v Ferreira 2004 (2) SACR 454 (SCA) at par [38] 467C-D. Snyman supra (n 124) suggests that the test (reasonably believed that she was in danger) leads to the test of private defence (unlawfulness) being confused with the test of negligence (where one similarly has to enquire how the reasonable person would have acted) (at 111).

¹⁴² Snyman supra (n 124) 111.

¹⁴³ As per Satchwell J in S v Engelbrecht 2005 (92) SACR 41 (W) at par [330]. For a general criticism of the objective test for self-defence see chapter 5 at 273-275 infra.

¹⁴⁴ 1996 (1) SA 355 (A).

¹⁴⁵ Ibid as per Hefer JA at 367F.

In conducting such an enquiry, the court must be guided by values and norms underlying the Constitution.¹⁴⁶ The Constitution, being the supreme law of the land, is a system of objective, normative values for legal purposes. An approach to the “legal convictions” test would be informed by the foundational values of the Constitution, namely “human dignity, equality and freedom.”¹⁴⁷ Such an approach will have as its basis the circumstances and perceptions of the accused. Section 9 of the Constitution requires that courts have regard to the particular circumstances of the accused.¹⁴⁸

Although it has been noted that the objective test (reasonable person test) is subject to the qualification that the person acting in self-defence may not benefit from prior knowledge that he has of his attacker, which the reasonable person would not have,¹⁴⁹ it would appear as if the courts are moving towards a more qualified objective test of self-defence. This point is made clear by Holmes JA in S v Ntuli¹⁵⁰ where the learned judge noted that South African courts have always insisted that they must be careful to avoid the role of armchair critics, wise after the event, weighing the matter in the secluded security of the court-room. The approach is that “in applying these formulations [the triggering conditions] to flesh and blood facts, the courts adopt a robust attitude, not

¹⁴⁶ Constitution of the Republic of South Africa 1996.

¹⁴⁷ As per section 39 (2) of Constitution of Republic of South Africa 1996. Recognizing equality as “our constitution’s focus and organizing principle” (per Kriegler J in President of the Republic of South Africa v Hugo 1997 (1) SACR 567 (CC) (1997) (4) SA 1; 1997 (6) BLCR 708) in par [74] does not mean identical treatment or uniformity (National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (2) SACR 556 (CC), 1999 (1) SA 6, 1998 (12) BLCR 1517 in par [60]-[64]). In Engelbrecht supra (n 143) at par [339] Judge Satchwell noted: “The result is that the concept of equality must be understood in a substantive rather than a formal sense. Promoting substantive rather than a formal sense requires an acute awareness of the lived reality of people’s lives and understanding of how the real life conditions of individuals and groups have reinforced vulnerability, disadvantage and harm” (citing Daniels v Campbell NO and Others, unreported (PD Case No 1646/01)).

¹⁴⁸ Constitution of the Republic of South Africa 1996.

¹⁴⁹ Burchell and Hunt (n 73) 331.

¹⁵⁰ S v Ntuli supra (n 141).

seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence”¹⁵¹

This trend is being followed in battered woman cases as well. It would appear as if the courts are more willing to take into account the context in which an abused woman kills her abuser, having regard to her experiences, as well as the impact of the abuse upon her. In S v Ferreira¹⁵² the court held that:

“(h)er decision to kill and to hire others for that purpose is explained by the expert witnesses as fully in keeping with what research has shown that abused women do. It is something which has to be judicially evaluated not from a male perspective or an objective perspective but by the Court’s placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence such as that given here. Only by judging the case on that basis can the offender’s equality right... be given proper effect. It therefore means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment.”¹⁵³

¹⁵¹ Ibid at 437E. Thus the test must be applied by the court by putting itself in the position of the accused at the time of the attack. See further R v Jack Bob 1929 SWA 32; R v Cele 1945 NPD 173 at 276; R v Zikalala 1953 (2) SA 568 (A) at 573; R v K 1956 (3) SA 353 (A) at 359 and R v Hele supra (n 141). 1986 (2) SA 112 (O). In the case of S v T 1986 (2) SA 112 (O) the courts went so far as to say: “The actions of both the attacker and the defender leading up to the attack are relevant with reference to the question of whether the boundaries of self-defence have been exceeded. A person who is prone to violence can as a last resort rely on the defence whereby the question will be not what the reasonable person would have thought but what the defender knows about his attacker” (at 132) (own translation).

¹⁵² S v Ferreira supra (n 141).

¹⁵³ Ibid at par [40]. Critiques of the gendered nature of justification defences argue that such defences were developed from a male perspective and were shaped by the context and life experiences of men, hence, the “reasonable man” test. In this respect, it is important to note the comments in Lavallee v The Queen [1990] 55 CCC (3d) at 97: “(i)t strains credulity to imagine what the ‘ordinary man’ would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the hypothetical reasonable man”. The gendered dimension of domestic violence has been recognized by the Constitutional Court in Carmichele v Minister of Safety and Security and Another (Center for Applied Legal Studies Intervening) 2002 (1) SACR 79 (CC) (2001 (4) SA 938; 2001 (10) BCLR 995) where it was stated in par [62]: “sexual violence and the threat of sexual violence goes to the core of women’s subordination in society. It is the single greatest threat to the self-determination of South African women.” See also S v Baloyi 2000 (1) SACR 81 (CC) (2000 (2) SA 425; 2000 (1) BCLR) 86 at par [11] and [12]: “To the extent that it is systematic, pervasive and overwhelming

In S v Engelbrecht¹⁵⁴ Satchwell J held that self-defence is to be evaluated objectively, and is based on a consideration of what would have been reasonable in the situation the accused found herself in.¹⁵⁵ The judge went on to state that “the reasonable woman must not be forgotten in the analysis and deserves to be as much part of the objective standard of a reasonable person as does the reasonable man”¹⁵⁶ Therefore, on this basis it was held that:

“There is indeed compelling justification for focusing not only on the specific form which the abuse may have over time and in particular circumstances, but pertinently on the impact of abuse upon the psyche, make-up and entire world view of an abused woman.”¹⁵⁷

By taking into account the accused’s situation, the traditional requirements for self-defence have been relaxed. Furthermore, Satchwell J went on to state that in determining the lawfulness of the self-defensive act, the “attack” element has become more broadly defined:

gender specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form.”

¹⁵⁴ S v Engelbrecht supra (n 143). In this case the accused was a victim of domestic violence for a number of years. This included not only physical but also psychological abuse. On the day of the deceased’s death, he had been drinking and watching pornography. The deceased indicated to his wife that he wished to act out a scene in the video that he was watching. He told the accused that she should go into the bedroom so that he could shave her pubic region. While the deceased was submitting to the deceased’s demands, the accused’s daughter walked into the bedroom (at par [128]). Later that night the accused’s daughter accidentally knocked the deceased in the face (at par [130]). He screamed at her and hit her, and forbade the accused to talk to her daughter. If she failed to heed his instructions, she would be killed. The accused then proceeded to kill her sleeping husband by locking his thumbs in thumb cuffs behind him and tied a plastic bag around his head which subsequently caused him to suffocate (at par [10]-[11]).

¹⁵⁵ S v Engelbrecht supra (n 143) at par [327].

¹⁵⁶ S v Engelbrecht supra (n 143) at par [358]. The judge went on to quote R v Malott [1998] 1 SCR 123 (SCC) at par [40]. For a discussion of this case see chapter 5 at 251-253.

¹⁵⁷ S v Engelbrecht supra (n 143) at par [343]. By doing so, it could result in the circumstances being viewed as objectively reasonable, thus resulting in an acquittal.

“one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment.”¹⁵⁸

Furthermore, in regard to the imminence requirement, the court followed the finding in Lavallee¹⁵⁹ where it was held that requiring a systematically abused woman to wait until the commencement of an attack to defend herself is “tantamount to sentencing her to murder by installment.”¹⁶⁰ Satchwell J decided to reinterpret the common law to address this shortcoming:

“where abuse is frequent and regular such that it can be termed a ‘pattern’ or ‘cycle’ of abuse then it would seem that the requirement of imminence should extend to encompass that which is inevitable.”¹⁶¹

The judge went on to explain that in order to determine whether the action taken was necessary, it must be established to what extent the normal legal channels were ineffective.¹⁶² While Mrs. Engelbrecht’s efforts to leave her husband were taken into consideration, Satchwell J adopted a cautionary approach in this regard:

“[I] am of the view that the court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation or to escape the abusive spouse or partner. Judgment should not be passed on the fact that an accused battered woman stayed in the abusive relationship. Still less is

¹⁵⁸ S v Engelbrecht supra (n 143) at par [344].

¹⁵⁹ R v Lavallee supra (n 153). For a discussion of how self-defence is dealt with in Canadian law, see chapter 4 at 188-194.

¹⁶⁰ S v Engelbrecht supra (n 143) at par [348].

¹⁶¹ S v Engelbrecht supra (n 143) at par [349].

¹⁶² S v Engelbrecht supra (n 143) at par [352]. In this respect it should be noted that the accused went to great lengths to get away from her abuser: she instituted divorce proceedings against him (at par [91]); she left her husband a number of times (at par [70]); she tried to find work in another town (at par [99]); laid criminal charges against him (at par [67]-[69]) and tried to get protection orders against him (at par [88]).

the court entitled to conclude that she forfeited her right to self-defence for having done so.”¹⁶³

In discussing the proportionality requirement, Satchwell J noted that in the case of an abused woman her particular circumstances should be taken into account:

“the parties respective ages; relative strengths, gender socialization and experiences; the nature, duration and development of their relationship; the content of their relationship, including power relations on an economic, sexual, social, familial, employment and socio-religious level; the nature, the extent, duration, persistence of the abuse; the purpose of and achievements of the abuser; the impact upon the body, mind, heart, spirit of the victim; the effect on others who are aware of or implicated in the abuse; the extent to which it is possible for State-legislated, formal institutional, informal personal bodies and individuals to intervene to terminate the abuse; the extent to which it is possible for the abused victim to access and utilize any of the above channels in the event that they previously fail to unilaterally intervene to impose constitutional protections.”¹⁶⁴

Satchwell J went on to state that in evaluating whether the actions taken by the accused were reasonable, the analysis is partly objective and partly subjective.¹⁶⁵ Surely by placing emphasis on the accused’s individual circumstances, this will have the effect of subjectivizing the test for self-defence.¹⁶⁶ If this is correct, then Engelbrecht¹⁶⁷ case would have been better dealt with as an instance of putative self-defence. It is now necessary to consider the doctrine of putative self-defence, before returning to a consideration of the elements of self-defence.

¹⁶³ S v Engelbrecht supra (n 143) at par [356]. For similar commentary in respect of the Lavallee supra (n 153) case see chapter 4 at 188-194.

¹⁶⁴ S v Engelbrecht supra (n 143) at par [357].

¹⁶⁵ S v Engelbrecht supra (n 143) at par [358].

¹⁶⁶ However, theorists such as Burchell supra (n 29) at 243 suggest that such an approach does “not introduce an element of subjectivity, it means only that the matter is considered objectively in the particular circumstances of the case”.

¹⁶⁷ S v Engelbrecht supra (n 143).

2.1.2.3 Putative private defence

In Roman law it would appear as if no distinction was drawn between self-defence and the current notion of criminal fault.¹⁶⁸ In earlier cases, South African courts found that mistake of fact could only be excusable if it was reasonable.¹⁶⁹ In R v Mbombela¹⁷⁰ De Villiers JA held that:

“A reasonable belief, in my opinion, is such as would be formed by a reasonable man in the circumstances in which the accused was placed in the given case. The ‘reasonable man’ is in this connection the man of ordinary intelligence, knowledge and prudence. It follows that mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited. The particular point, however, which is raised by the question reserved, is whether there is only one type of ‘reasonable man’ who is to be taken as the legal standard, or whether in a case like the present, another type of reasonable man is to be conceived of, viz, ‘an ordinary native aged 18 years and living at home in his kraal’. I have no doubt that by the law of this country there is only one standard of the ‘reasonable man’.”¹⁷¹

Over time, the courts did away with the reasonableness requirement.¹⁷² In S v Sam¹⁷³

Myburgh J held:

“On the authority of the decided case law, it is my opinion that where intention (dolus) is a requirement for the offence charged, the state must prove knowledge of unlawfulness

¹⁶⁸ Labuschagne “Putative Noodweer: Opmerking oor ‘n Dadersubjektiewe Benadering to Misdaadoms krywing” (1995) Tydsrif vir die Hedendaagse Romeinse Hollandse Reg 116 at 119. See also Van Warmelo supra (n 111) 16.

¹⁶⁹ Labuschagne supra (n 168) 119.

¹⁷⁰ 1933 AD 269.

¹⁷¹ Ibid at 273.

¹⁷² Labuschagne supra (n 168) 119. In this respect see R v Z 1960 (1) SA 739 (A) at 743.

¹⁷³ 1980 (4) SA 289 (T).

beyond a reasonable doubt. The question as to whether the mistake of fact was reasonable or not, is not an issue here because the test is subjective. The notion of reasonableness or unreasonableness, and the degree thereof, in the circumstances and the facts of the case, only come into play when it has to be proved that the accused did indeed have a *bona fide* belief or not. It does not affect the legal concept in that capacity. It applies in either common law or statutory crimes where *dolus* is a requirement.”¹⁷⁴

In R v Ndara¹⁷⁵ the question as to whether the accused acted in putative self-defence was answered by Schreiner J:

“Now if full effect is given to these findings, there is a good deal to be said for the view that they amount to holding that the appellant believed that the conditions required for self-defence existed in his favour; if so it would be arguable that even though he was mistaken he should be treated as if those conditions did in fact exist. It should, however, be observed that there is no finding by the trial court that the appellant could reasonably have entertained more than a fear, perhaps a strong fear that his pursuers would not only hand him over to the police but would also themselves assault him. For a mistaken belief to operate in favour of the accused person it is commonly said that the belief must be reasonable... and the circumstances of this case provide a strong argument in favour of this view.”¹⁷⁶

In terms of current South African law, if a battered woman is not able to successfully plead self-defence due to the fact that the court found that her conduct was unlawful, objectively assessed,¹⁷⁷ then she may be acquitted of murder on the basis of putative private defence, which is subjectively assessed.¹⁷⁸

¹⁷⁴ Ibid at 294.

¹⁷⁵ R v Ndaru supra (n 141).

¹⁷⁶ Ibid at 185. This is in accordance with R v Silo 1945 WLD 134 135 and R v De Ruiter 1957 (3) SA 361 (A) 364.

¹⁷⁷ S v De Oliviera supra (n 141).

¹⁷⁸ Ibid at 163I-J, per Smalberger JA.

In S v De Oliviera¹⁷⁹ it was held that such a defence will be of assistance to an accused:

“who honestly believes his life...[is] in danger, but objectively viewed [it is] not.”¹⁸⁰

This honest, but incorrect belief would eliminate the necessary intention to commit such an unlawful act. Furthermore, the test for intention is subjectively assessed:

“The focus of attention in ascertaining whether or not intention existed is the woman’s subjective state of mind. The fact that her belief may have been unreasonable or even foolish under the circumstances is of no consequence at all as this enquiry does not concern itself with what a reasonable person would have done under the same circumstances.”¹⁸¹

This raises two points. Firstly, the issue here relates not to lawfulness but culpability.¹⁸² Secondly, if the abused woman does not have the requisite intention to commit murder, she will be acquitted. However, as Reddi notes, the abused woman will not necessarily escape liability:

“[t]his does not save the accused woman from possibly being convicted of culpable homicide. This is because negligence, not intention, is the fault element required for a culpable homicide conviction. To establish liability for this crime the test is whether the reasonable person would have foreseen that the remedy of self-defence was not lawful. The position at law is that if a reasonable person would have foreseen that the resort to self-defence was unlawful, then the accused is negligent for failing to foresee this. She would accordingly be guilty of culpable homicide.”¹⁸³

¹⁷⁹ S v De Oliviera supra (n 141).

¹⁸⁰ Reddi supra (n 1) 275. Cf S v Ngomane 1979 (3) SA 859; S v Ntuli supra (n 141).

¹⁸¹ Reddi supra (n 1) 275.

¹⁸² S v De Oliviera supra (n 141) 163I-J.

¹⁸³ Reddi supra (n 1) 275.

Reddi however notes that in the case of an abused woman, the “social framework or circumstances that may have impacted on the woman’s conduct would have a bearing on the determination of the woman’s culpability.”¹⁸⁴ Evidence of the “cyclical nature of abuse”¹⁸⁵ as well as the woman’s failed attempts at leaving her abuser would be highly relevant to inform putative self-defence.¹⁸⁶ For this reason, if a reasonable person, located in the extraordinary circumstances of the accused, would not have foreseen that the resort to self-defence was unlawful, then the abused woman cannot be expected to have such foresight. Reddi notes that “in these circumstances, her lack of foresight would not be regarded as negligent and a charge of culpable homicide would fail.”

It is submitted that putative private defence is highly relevant to the battered woman who kills her abuser in circumstances that fall outside the parameters of private defence as it may represent the difference between a conviction of murder and one of culpable homicide in South African law. At its most extreme it even may prove the difference between a conviction of murder and a complete acquittal.¹⁸⁷

¹⁸⁴ Reddi supra (n 1) 276.

¹⁸⁵ For a discussion of the cyclical nature of violence referred to in the Engelbrecht supra (n 143) see 40-41 op cit. From the battered woman’s viewpoint, the abuse would be inevitable, therefore prompting her to act.

¹⁸⁶ In this respect see n 161.

¹⁸⁷ Thus the result attained in the case of Lavallee supra (n 153) through self-defence can be achieved in South African law through the use of putative self-defence. For a discussion of this case, see chapter 4 at 188-194.

2.2 Requirements of the Attack

2.2.1 An Attack ¹⁸⁸

Fear alone is not sufficient to justify a defence.¹⁸⁹ Private defence may only be utilized where there is an attack which has already commenced or is imminent. Generally, the attack will involve some positive act, but this is not an essential requirement and private defence can be resorted to in respect of an attack that has already begun.¹⁹⁰

2.2.1.1 Commenced or imminent

The term “commenced” means that private defence may only be resorted to where the attack has already begun and there is no time to seek other forms of protection.¹⁹¹ As Burchell has noted, “imminent means that the attack is about to begin immediately – what is important here is not so much the imminence of the threat, but rather the immediacy of the response required to avoid the attack. If the nature of the attack is such that the threatened harm cannot be avoided, the victim should be entitled to act with such anticipation as is necessary for effective protection”.¹⁹²

¹⁸⁸ Although the attack must be unlawful (see R v Ndara supra (n 141) at 184; S v Kibi 1978 (4) SA 173 (E) at 183 states that although temporary use of someone else’s property without consent is not a crime, the owner may invoke private defence to remove the offender. However, participation in a duel cannot allow the parties to rely on private defence. See S v Jansen 1983 (3) SA 534 (NC). Only if one gives up the fight then the other party has no right to continue (Snyman supra (n 124) at 188).

¹⁸⁹ However, fear alone may be relevant to establishing the existence of “putative” private defence.

¹⁹⁰ Steyn supra (n 110) 470. See also 2.4.1.2 infra.

¹⁹¹ Burchell supra (n 29) 234. For a discussion of the imminence requirement in English law, see chapter 3 at 122-125 infra and American law, see at chapter 4 at 194-198 infra.

¹⁹² Burchell supra (n 29) 234. This does not mean, however, that the defender “must wait until the blow has fallen.” In respect of the attack see further R v Hope 1917 NPD 145 at 146; S v Mokgiba 1999 (1) SACR 534 (O) 550D-E: “The appellant was reasonable in his belief that his attacker did not come to visit him or to look for work. The actions of the attacker posed an immediate threat to the bodily integrity and the life of the man and his wife. The appellant was entitled to use all his strength and all the remedies he had at his disposal, even if these remedies meant that his attacker would die in the process. There was no duty on the appellant to wait until his attacker first physically harmed him, or to ask him what the purpose of his visit was, before he defended himself” (own translation). Further, the attacker must bear the risk because it is he who initiated the whole set of events by resorting to unlawful aggression. See R v Zikalala supra (n 151) 573A-B: “But the observation places a risk upon the appellant that he was not obliged to bear. He was not called upon to stake his life upon ‘a reasonable chance to get away.’ If he had done so he may well have figured as the

The attack must not have been completed and any measure taken after the attack has ended¹⁹³ would be retaliatory rather than defensive and therefore unjustified.¹⁹⁴ This is problematic as battered women normally kill in instances where their abuser is asleep or incapacitated and there is no imminent threat of harm. Although South African courts have not been called upon to decide whether an anticipatory defence on the part of an abused woman to an expected attack could be justified, our law has recognized the setting up of lethal mechanisms as precautionary measures in protection of commercial property.¹⁹⁵ While Burchell suggests that victims of battered woman syndrome ought to be allowed to pre-empt the anticipated and inevitable attack of the battering spouse,¹⁹⁶ it would appear that South Africa's courts are moving in that direction.¹⁹⁷

deceased at the trial instead of the accused.” See also S v Teixeira 1980 (3) SA 755 (A) at 765C: “Even on an armchair approach, it appears that with the deceased being less than a metre away from him, it would have been ‘an act of folly on the appellant’s behalf to have attempted to seek safety in flight.’”

¹⁹³ S v Mogohlwane 1982 (2) SA 587 (T). Y after being robbed by X, went home, collected a weapon, returned to the scene of the robbery and used force against X to recover his property. It was held that he had acted in lawful private defence in so far as his actions had been part of the *res gestae* of the original attack.

¹⁹⁴ R v Hayes 1904 TS 383; R v Kantolo 1912 EDL 154.

¹⁹⁵ Ex parte Minister van Justisie: In re S v Van Wyk supra (n 133).

¹⁹⁶ See further Burchell supra (n 29) at 234. Howie P in S v Ferreira supra (n 141) regarded evidence of spousal abuse as admissible in mitigation of sentence but also referred to the substantial body of international writing on such evidence as relevant to a self-defence plea (at par [37]). As a result of a cycle of physical and emotional abuse the accused in Ferreira felt “unable to escape by any other route than by homicide” (at par [35]). Howie P regarded the evidence on the abusive background to which Ferreira was subjected as “subjectively ... justifiable in mitigation of sentence” (at par [38]).

¹⁹⁷ It would seem that a defence undertaken after the attack has commenced and continued after the attack had ceased is not necessarily an unjustifiable defence. This view was expressed in S v Moloisana 1984 (1) PH H 16 (O). The court held that in assessing the “defence” after the attack had ceased was necessary to consider all the circumstances including the ease with which the “defence” once commenced could be terminated. However, this principle should be applied restrictively and with circumspection lest people take the law into their own hands on an unacceptable scale. (Cited in Visser and Mare Visser and Vorster’s General Principles of Criminal Law through the Cases (1990) 201).

In S v Engelbrecht¹⁹⁸ Satchwell J was of the view that where abuse can be termed a “pattern” or “cycle” of “abuse” then it would seem that the requirement of ‘imminence’ should extend to encompass abuse which is inevitable.¹⁹⁹ This would clearly dispense with the requirement that an attack be imminent and thus a person can defend themselves at any time.

2.2.1.2 Protected interest

Private defence may be resorted to only in respect of a legally recognized and protected interest in law.²⁰⁰ Many legal systems have approached the question of what interests may be protected by private defence in a casuistic fashion. This results in not all legal interests being recognized as the subject of the private defence.²⁰¹

¹⁹⁸ S v Engelbrecht supra (n 143).

¹⁹⁹ Ibid at par [349].

²⁰⁰ In S v Kamffer 1965 (3) SA 96 (T) it was held that a parent did not have the additional remedy of self-help in order to obtain access to a child. See also chapter 5 at 230 infra.

²⁰¹ Burchell supra (n 29) 235. It is universally agreed that a person is entitled to protect life (see R v Jack Bob supra (n 151); R v Manuele Sile 1945 WLD 134; R v Hele supra (n 141); R v Zikalala supra (n 151); R v K supra (n 151); R v Segatle 1958 (1) PH H 125 (A)); limb (see R v Cele supra (n 151); R v Patel 1959 (3) SA 121 (A) at 123; S v Jackson 1963 (2) SA 626 (A); S v Mtetwa 1967 (2) PH H 273 (N)); freedom (see R v Hayes supra (n 194); R v Mahomed (1906) 27 NLR 396; R v Kantolo supra (n 194); R v Mfusen (1923) 44 NLR 68; R v Jackelson 1926 TPD 685; R v Kleyn 1937 CPD 288; R v Karvie 1945 TPD 159); sexual integrity (see R v Nomahleki 1928 GWL 8); chastity (see S v Mokoena 1976 (4) SA 162 (O) at 163C-D to the effect that a man may use force to defend the chastity of his wife or sister); dignity (see S v Van Vuuren 1961 (3) SA 305 (E). In S v Ndlangisa 1969 (4) SA 324 (E) X was charged with insulting Y’s dignity by spitting in her face. He said he did so because Y was insulting him and he wished to stop her from doing so. This defence of private defence did not succeed, the court holding that X had “taken the law into his own hands when there were other remedies open to him”). Lastly, other persons can be protected (see R v Patel supra R v Mhlongo 1960 (4) SA 574 (A); S v Van Vuuren supra; (although it has been suggested by Gardiner and Lansdown supra (n 110) at 112 that the defence of third parties is only lawful where there is a relationship in which it is the defender’s moral or legal duty to act in defence of a third party, this view is not generally favoured, see Burchell South African Criminal Law and Procedure Vol I 3rd ed (1997) 80); and property (see S v Van Wyk supra (n 133); S v Mogohlwane supra (n 193), although Mogohlwane should not be understood to unequivocally support the provision that killing in defence of property is justifiable as in this case the defences of property and life were closely linked: “...his life or body were under threat... [be]cause his attacker wanted to injure him, the accused fatally stabbed him” (at 594B-C)). The issue which has yet to be determined by our courts is whether the Constitution allows for the use of lethal force to protect property when life or bodily integrity not threatened in process (see S v Walters supra (n 126) at par 53 n 66). As Ally and Viljoen supra (n 128) note: “the development by our courts of rules of the common law, which may entail a limitation of rights, must comply with section 36 of the Constitution. The common-law rule in S v Van Wyk violates at least the rights to life, human dignity and bodily security. In our view these deprivations are not in accordance with section 36. Applying the proportionality test, in principle means weighing

Section 7(2) of the Constitution requires the State to “respect, promote and fulfill the rights in the Bill of Rights”.²⁰² Foundational values of the Constitution include those of “equality” and “dignity”. Section 9(1) and (2) provide that “everyone is equal before the law and has the right to equal protection and benefit of the law” and that “equality includes the full and equal enjoyment of all rights and freedoms”, while section 10 provides that “everyone has an inherent dignity and the right to have their dignity respected and protected”.²⁰³ The protected rights include those in section 12 “to freedom and security of the person” which cover the rights “not to be deprived of freedom arbitrarily or without just cause; to be free from all forms of violence either from public or private sources; not to be treated or punished in a cruel, inhuman or degrading way” as also “to bodily and psychological integrity” which cover the rights “to make decisions concerning reproduction; to security in and control over their body”.²⁰⁴ In addition to common-law and statutory provisions for the protection of these rights, the legislature has enacted the Domestic Violence Act 116 of 1998, of which the Preamble states:

“Recognizing that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved ineffective; and having regard to the Constitution of South Africa; and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children,

the nature, importance and extent of the limitation of the right against the nature and importance of the objective of the limitation, which are the protection of property and prevention of crime (at 135).

²⁰² Constitution of the Republic of South Africa of 1996.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination against Women and the Rights of the Child; it is the purpose of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of State give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.”

The Domestic Violence Act²⁰⁵ has comprehensively defined “domestic violence” as including physical and non-physical forms of violence, all of which fall under the rubric of “controlling and abusive behaviour... where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the complainant”. It would appear that the Legislature has chosen to emphasize the effect of abusive conduct upon the victim as opposed to the specific form taken by such conduct.²⁰⁶

In S v Baloyi²⁰⁷ the Constitutional Court noted that domestic violence compels constitutional concern in a number of important respects. On the one hand, the Constitution:

“has to be understood as obliging the State directly to protect the right of everyone to be free from domestic violence. Indeed, the State is under a series of constitutional mandates which include the obligation to deal with domestic violence; to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.”²⁰⁸

On the other hand:

²⁰⁵ Domestic Violence Act supra (n 1).

²⁰⁶ As per Satchwell J in S v Engelbrecht supra (n 143) at par [157].

²⁰⁷ S v Baloyi supra (n 153).

²⁰⁸ Ibid at par [11].

“(t)o the extent that it is systematic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form... The non-sexist society promised in the foundational clauses of the Constitution, and the right to equality and the non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy immunity.”²⁰⁹

The Constitutional Court endorsed the view that domestic violence is “systematic, pervasive and overwhelmingly gender-specific”. It “both reflects and reinforces patriarchal domination and does so in a particularly brutal form”. It thus also implicates the core values of equality.²¹⁰

In Engelbrecht²¹¹ it was held that all those rights which were enshrined in the Constitution²¹² constituted the interests which were deserving of protection in this defence of justification. It followed that the interests which were attacked and which an abused woman could protect, include her life, bodily integrity, dignity, quality of life, her home, her emotional and psychological wellbeing, her freedom as well as the interests of her children. In short, the accused defended her status as a human being and/ or mother.²¹³

2.2.1.3 Unlawful

Private defence can only be resorted to in respect of an attack that is unlawful.²¹⁴ The fact that the attacker is insane and lacks criminal capacity does not cause the attack to

²⁰⁹ Ibid at par [12].

²¹⁰ Ibid.

²¹¹ S v Engelbrecht supra (n 143).

²¹² Constitution of the Republic of South Africa 1996.

²¹³ S v Engelbrecht supra (n 143) at par [345].

²¹⁴ Ntanjana v Vorster and Minister of Justice 1950 (4) SA 398 (C) at 404-405, R v Ndara supra (n 175) at 184. Furthermore, a person cannot defend himself against lawful arrest (see R v Ndara supra (n

be lawful and thus defence against such an attack is lawful.²¹⁵ However, private defence cannot be raised against the spontaneous attack of an animal because the law recognizes the fact that an animal cannot act unlawfully.²¹⁶

In the case of battered women the unlawful attack against which she defends herself or others may be one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment. Not all attacks are required to be directed at the abused woman herself but obviously there must have been some assault upon her for her to be considered abused. The attack may, but need not necessarily, be physical in nature and may include psychological and emotional abuse, degradation of life, diminution of dignity and threats to commit any such acts.²¹⁷

2.2.2 Requirements of the defence

2.2.2.1 The defensive act must be necessary to avert the attack

The defence employed by the abused woman must be necessary to protect the threatened interest: performing the defensive act must be the only way in which the abused woman can avert the threat to her rights or interests. This is decided on the facts

141) at 184; S v Aleck 1973 (1) PH H7 (R). Where the arrestor has used more force than necessary, it becomes unlawful and may, therefore be resisted. See S v Aleck supra. So too when the arrest itself is unlawful (see R v Hayes supra (n 194); R v Mahomed supra (n 201); R v Jackelson supra (n 201); R v Thomas 1928 EDL 401 (unlawful search). See also chapter 5 at 241 infra.

²¹⁵ Burchell supra (n 29) 237. Although the point did not arise for decision, private defence against an insane person succeeded in R v K supra (n 151). But see how this requirement is dealt with in English law at n 430 infra.

²¹⁶ Burchell supra (n 29) 237. It is true that instances of the use of force to avoid damage to property by animals have been treated as cases of private defence (see R v Staalmeister 1912 EDL 308; R v West 1925 EDL 80; Du Plessis v Van Aswegen 1931 TPD 332; R v Pope supra (n 141); S v Wassenaar 1966 (2) PH H 351 (T); S v Dittmer 1971 (3) SA 296 (SWA)). Strictly speaking, the defence in these cases is that of necessity, provided that the animal concerned is not being used as an instrument to commit harm by the attacker - if so, then it will constitute private defence.

²¹⁷ As per Satchwell J in S v Engelbrecht supra (n 143) at par [344].

of each case.²¹⁸ The basic idea underlying private defence is that a person is allowed to “take the law into her own hands”, as it were, only if the ordinary legal remedies do not afford her effective protection. The rationale underlying this defence has been stated as ensuring that “justice should not yield to injustice”.²¹⁹ As Snyman has submitted, “(t)he defence deals with nothing less than the protection of justice in the circumstances in which the police are unable because of their absence, to perform this task”. For this reason it is essential that the court critically examines the extent to which the “ordinary law of the land” was effective in preventing the precipitating unlawful attacks and freeing the abused from the attacks and their impact.²²⁰

The underlying and often unarticulated question is whether an abused woman has a duty to flee the attack(s) rather than defend herself by killing. Snyman argues that there is no duty upon the attacked person to flee because “this is a negation of the whole essence of private defence [which deals]... with the upholding of justice... not a capitulation to injustice”.²²¹ Burchell states that the South African courts seem to adopt the view that, where it is not dangerous to do so, the attacked person should flee.²²² However, he submits that “there is no absolute duty to retreat and that the approach of our law ought to be that the question of whether or not the battered woman could or should have retreated is merely one of the issues taken into account when assessing whether the abused woman’s defensive act was allowed by law.”²²³

²¹⁸ Burchell supra (n 29) 238; S v Van Wyk supra (n 133) at 497H, 509C-D.

²¹⁹ In respect of the justifications for the existence of private defence see pages 31-32 supra.

²²⁰ Snyman supra (n 25) 102.

²²¹ Snyman supra (n 25) 107.

²²² Burchell supra (n 29) 238-239.

²²³ Burchell supra (n 29) 239; S v Mguni supra (n 141) at 779. Snyman supra (n 124) 184 n 21 is of the view that it is unclear whether South African case law expects the attacked party to flee in cases where the defender will not be exposed to harm by doing so or jeopardizing another’s interests.

In Engelbrecht²²⁴ Satchwell J was of the view that bearing in mind the “hidden” or “concealed” nature of domestic violence which is frequently confined to the privacy of the home, she was cautious about requiring the abused woman (and her child(ren) to vacate their home leaving the abusive spouse in full occupation.²²⁵ The judge further held

Remarks made by our courts suggest that the defender should flee: R v Zikalala supra (n 151) 571-572; R v K supra (n 151) at 358H; R v Patel supra (n 201) at 123F; R v Mguni supra (n 141) at 779A; S v Dougherty 2003 (2) SACR 36 (W) at 50. The last-mentioned case provides an example where the line between retaliation and defence had become blurred. At the accused’s birthday party, guests had been seriously injured by unknown assailants outside his home on the night of the party. The accused held that since he feared for the safety of his guests, he took a firearm and went looking for the assailants. He came across two men whom he questioned concerning the earlier attack, and when they did not respond to his questions he pointed the firearm at them. One of the men, who was unarmed said “you will not use that” and started coming towards the accused, who, according to his evidence, fired “downwards in the direction of the deceased” but the deceased continued coming towards him. The accused then fired in the general direction of the deceased, killing him. The accused raised the defences of private and putative private defence. The court was of the view that in the circumstances he had acted unreasonably in not first aiming a non-fatal shot. The court, however, held that he lacked knowledge of unlawfulness required for murder in that he genuinely thought he was about to be attacked, but convicted him of culpable homicide as his reaction was negligent. Snyman supra (n 124) is of the view that the court should have upheld the accused’s plea of private defence. This was a classic case of private defence. Had the accused not shot at the deceased, he might have been overpowered and killed by his two attackers. To have expected him to run away would have amounted to expect him to “gamble with his life”. He was outnumbered two to one. He was no longer a young man (he was 63) whereas the two attackers were aged about 25 and 31 years (at 184 n 21). Snyman supra (n 124) at 185 goes on to state: “where the threat is one of personal injury the obvious possible way of avoiding the attack is to flee. Thus if harm can be avoided by flight, the accused should flee”. In respect of the question whether an attacked person is expected to flee in English law see chapter 3 at 116-117 infra; American law chapter 4 at 190-191 infra. However Burchell supra (n 29) at 245 does not agree with Snyman infra: “One cannot help wondering whether the accused was to some extent author of his own predicament by assuming the role of the police and searching for the culprits after the initial assault had already taken place. He could easily have alerted the police to the assault - leaving it to them to apprehend the wrongdoers. There would seem to be an element of retaliation about the accused’s conduct in Dougherty supra and perhaps a conviction of culpable homicide was the most pragmatic solution of those facts. What if the persons the accused had confronted had not been part of the original assault? Surely they could have defended themselves legitimately against his pointing a loaded gun at them? To regard his conduct as lawful, as Snyman does, would lead to the anomaly that they could not defend themselves against the accused’s attack. Where X and Y agree to engage in an unlawful fight (such as a duel) the combatants cannot invoke private defence to escape liability for the harm inflicted one upon the other, since their agreement cannot render the fight lawful”.

²²⁴ S v Engelbrecht supra (n 143).

²²⁵ *Ibid* at par [354]. See further Lavallee v The Queen supra (n 153) 97: “(t)raditional self-defence doctrine does not require a person to retreat from her home instead of defending herself: a man’s home may be his castle but it is also the woman’s home even if it seems to her more like a prison in the circumstances.” In the case of Engelbrecht supra (n 143) Judge Satchwell held that domestic violence was mainly enacted in a ritualistic form by Mr. Engelbrecht in two places which Mrs. Engelbrecht could call her own: her home and her place of work. Everyone’s home should be their castle and it was here that Mrs. Engelbrecht should have had a place of rest and a place to bring up her daughter. The deceased destroyed any possibility of peace in the flat they shared or where Mrs. Engelbrecht sought independent refuge from him as well as her place of work in the hospital where she had status as an individual and professional person quite independently of him. In this context, Judge Satchwell was of the view that it would be invidious for any court to expect Mrs. Engelbrecht to flee by leaving her home and abandoning her place of employment. Not only was this impractical and unfairly onerous upon her in the view of the court, but it failed to acknowledge who is the

that flight may be thought to encompass efforts made, not only to leave the home but also to approach State authorities such as the South African Police Service, the family violence courts, shelters, family and friends and so forth. The response to the unarticulated question as to why, if the violence was so intolerable, the abused woman did not leave her abuser long ago, should be that this question does not go to whether or not she had an alternative to killing the deceased at the critical moment. Nevertheless, as was stated in Lavallee,²²⁶ to the extent that her failure to leave the abusive relationship earlier may be used in support of the proposition that she was free to leave at the final moment, expert evidence can provide useful insights.²²⁷

Satchwell J was further of the view that the court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation or to escape the abusive spouse or partner. Judgment should not be passed on the fact that the battered woman stayed in the abusive relationship. Still less is the court entitled to conclude that she forfeited her right to private defence for having so done.²²⁸

perpetrator of the wrongdoing and who deserved to be removed from those places and from society (at par [400]-[401].

²²⁶ Lavallee v The Queen supra (n 153) 96.

²²⁷ S v Engelbrecht supra (n 143) at par [355].

²²⁸ S v Engelbrecht supra (n 143) at par [356]. While it is true that the right to act in private defence is subsidiary in nature, it takes effect only where the state is not there to protect a particular person. Thus where help is available from the State in the form of the SAPS, to protect a person, such a person should not, simply proceed to act in private defence. It would have been another matter if the SAPS did not perform their duties. The crux of the case in Engelbrecht supra (n 143) was whether Mrs. Engelbrecht gave the legal system and the SAPS a fair chance of helping her. The majority of the court was of the view that she did not.

There must be a certain balance between the attack and the defence.²²⁹ The limits of private defence are difficult to describe with any degree of precision since everything depends on the particular circumstances of the case. The approach to be favoured²³⁰ which was adopted by the court in S v Van Wyk²³¹ is whether the defender acted reasonably when he defended himself or his property. Put another way, the court will look at what may reasonably be expected of the attacked party in the circumstances of each case:

“This test allows the court to assess the defence in the context of factors such as the nature of the attack, the interest threatened, the relationship of the parties, their respective age, sex, size and strength, the location of the incident, the nature of the means used in the defence, the result of the defence.”²³²

²²⁹ As Snyman supra (n 124) at 189 notes: “The upholding-of-justice principle plays an important role in the rule that there must be a reasonable relationship between the attack and the defensive act - that is, the requirement of proportionality in private defence. The harm occasioned by the defensive action must be proportional to the legal interests of the defender that are endangered and that are being protected by him or her”. But as Snyman goes on to note at 189-190: “If one accepts the individual-protection theory as the only basis for private defence, it may be argued that the defending party may fend off imminent infringement of his or her rights without the defensive action necessarily being restricted in any way”. However, Snyman supra (n 124) at 190 goes on to conclude: “The legal order does not tolerate a gross disproportion between the interest protected by the defender and the interest he or she is attacking.... Disregard of the requirement of proportionality leads to law abuse - that is, disregard of the upholding-of-justice principle underlying the right to private defence”. In respect of whether there is a requirement of proportionality between the attack and defence in English law see chapter 3 at 157-159 infra; American law see chapter 4 at 200 infra.

²³⁰ South African law had previously evolved a version of proportionality: whether the means used was commensurate with the danger. The problem with the proportionality rule, however, lies in determining between which two elements this “certain balance” must exist. For example must the balance between the interest the defender is trying to protect and the interest he harms; or must a balance exist between the attacker’s and defender’s weapons? See Snyman supra (n 25) 109-110.

²³¹ S v Van Wyk supra (n 133). Steyn CJ held: “It must be conceded, in my view, that such a balancing is not acceptable as a general yardstick. Generally, as regards private defence, the interests of the attacker and the victim are seldom similar or equivalent. It is true that a slap cannot without more justify killing, but the avoidance of a serious non -deadly wound... can be balanced against the life of the attacker; and how does one measure the dignity or bodily integrity of a woman who has been raped against the life of the rapist? Proportionality will not do as a general basis for private defence. One who invades another’s rights, who defiantly ignores the prohibition, warning and resistance of the defender so that he can only be prevented by the most extreme measures, can with good reason be seen as the author of his own misfortune. It is he who is the outlaw, and he is prepared to risk death in violating another’s rights, why should the defender, who is unquestionably entitled to protect his rights, be viewed as the one reacting unlawfully if he uses deadly force rather than sacrifice his rights?” (at par [49] own translation).

²³² Burchell supra (n 29) 241. Most of these factors are mentioned in S v Trainor 2003 (1) SACR 35 (SCA) at 41-42, where it is acknowledged that there is a difficulty in determining the relevant factors. See also R v N’Thauling 1943 AD 649 at 654; R v Ndara supra (n 141) 184; S v Marert

When considering the proportionality between attack and defence, note should be taken of the surrounding circumstances, such as relative strength of the parties concerned, their gender, their age, the means they have at their disposal, the nature of the threat, the value of the interest that is threatened, and the persistence of the attack.²³³ No precise proportionality is required.²³⁴

In addition to the factors mentioned above, the court in Engelbrecht²³⁵ took into account factors which were relevant to the situation of the accused and which could be used to show that her actions were reasonable in light of her circumstances.²³⁶ While these factors noted by the court suggested that proportionality between the attack and defensive action on her part had played an important role, the assessors in the Engelbrecht²³⁷ case chose to emphasize help-channels which they felt Mrs. Engelbrecht had not utilized sufficiently,²³⁸ thus undermining the court's previous statements.²³⁹ However, had the court applied the coercive-control model, it would

1967 (1) PH H167 (A). Although the approach in South African law has involved a version of the proportionality principle, namely whether the means used were commensurate with the danger apprehended (R v Jack Bob supra (n 151); R v Zikalala supra (n 151)); some cases have favoured the test of reasonableness (see S v Ntuli supra (n 141) at 436D, 436E; S v Motleleni supra (n 140) at 406).

²³³ Snyman supra (n 124) 190. See also S v Van Wyk supra (n 138) at 496-497; S v Trainor supra (n 232) 41-42.

²³⁴ As Snyman supra (n 124) at 190 notes: "it need only be approximate proportionality". In S v Van Wyk supra (n 138) Steyn CJ held "Unlawful recompense does not serve as a fixed basis for self-defence" (at 497B) (own translation). See also S v Ntuli supra (n 141) at 437E: "The court adopts a robust approach, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence."

²³⁵ S v Engelbrecht supra (n 143).

²³⁶ For a description of the factors taken into account see 42 above.

²³⁷ S v Engelbrecht supra (n 143).

²³⁸ *Ibid* at par [418] and [448] at 151B-C and 157E-F.

²³⁹ Namely that proportionality between the attack and defence was important. See further the factors to be taken into account in determining such proportionality in respect of the abused woman in Engelbrecht supra (n 143) at 58.

become clear that she did not leave because the abuser controlled every aspect of her including the extent to which she obtained help and what would happen if she did.²⁴⁰

2.2.2.2 Defence directed against the attacker

The right of private defence can only be exercised against the attacker, not against a third party.²⁴¹

2.3 Provocation

2.3.1 Development of the defence

Roman-Dutch law did not recognize provocation as a complete defence but rather viewed anger as a mitigating factor.²⁴² De Wet argues that in Roman law, this issue was closely linked to the distinction that was drawn for sentence purposes between “premeditated” crimes and crimes committed “on impulse”. The latter category of crimes was not considered as serious as that of “premeditated” crimes.²⁴³

De Wet submits that, of the Roman-Dutch writers, only Matthaëus and Van der Keessel comprehensively discussed the issue of provocation. De Wet noted Matthaëus’ view that nature requires a person to control his passions and impulses. But where a person committed a crime while in a “reasonable” state of anger, that crime would be more

²⁴⁰ For a discussion of the coercive control theory see chapter 5 n 916 infra.

²⁴¹ Burchell and Milton supra (n 26) 142. See also chapter 5 at 315 infra.

²⁴² The discussion of the early development of the law of provocation as well as the development of non-pathological incapacity as a defence has been based on the structure adopted from Hoctor A Peregrination through the Law of Provocation, in Joubert (ed) Essays in honour of CR Snyman (2008) 110-133. Cf S v Mokonto 1971 (2) SA 319 (A) where Holmes JA held: “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” (at 324). In S v Mandela 1992 (1) SACR 661 (A) at 665 b-d the terms “provokasie” (provocation) and “toorn” (anger) appear to be used interchangeably. For a discussion of the English law of provocation see chapter 3 at 127-159 infra; American law chapter 4 at 204-224 infra.

²⁴³ Hoctor supra (n 242) at 110-111, citing De Wet supra (n 76) 131.

leniently punished than a “premeditated” one.²⁴⁴ In a similar vein, De Wet noted that the views of Moorman and Van der Keessel on the issue of anger corresponded closely with those of Matthaeus.²⁴⁵ The dominant view in Roman-Dutch law was thus that anger, could, at most, operate as a mitigating factor, rather than a ground excluding capacity, and then this was only where the anger was justified.²⁴⁶

2.3.1.1 The objective test

South African law might have followed the Roman and Roman-Dutch law, were it not for the introduction of the mandatory death penalty²⁴⁷ in 1917. Initially, under the influence of section 141 of the Transkeian Penal Code of 1886, the South African courts adopted the stance that provocation could never be a complete defence to killing. At most it could be a partial defence. Therefore, homicide which would otherwise be murder, could be reduced to culpable homicide if the individual who caused the death did so in the heat of passion occasioned by sudden provocation.²⁴⁸ It appears that the “crucial factor in the courts not adopting the Roman-Dutch approach to provocation was founded not so much in doctrinal preference as the need to take account of a

²⁴⁴ De Wet supra (n 76) 131, citing Matthaeus De Criminibus ad Lib XLV III Dig Commentarius (1644) Prol 2 14.

²⁴⁵ De Wet supra (n 76) 132, citing Moorman Verhandeling Over de Misdaden en der selver Straffen (1764) Inl 2 31; Van der Keessel Praelectiones ad Jus Criminale Vol 3 at 998 ff.

²⁴⁶ Hoctor supra (n 242) 111, citing De Wet supra (n 76) 131-132.

²⁴⁷ Burchell supra (n 29) 427.

²⁴⁸ The court’s adoption of the “specific intent” approach is evident in relation to provocation. See for example R v Potgieter 1920 EDL 254 where Gane AJ states “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 a justifiable heat of mind which prevents the accused from forming an actual intention which he would have been able to form had these circumstances of provocation not existed” (at 256).

ruthless sentencing regime, in terms of which the death penalty was mandatory with no provision made for extenuating circumstances”.²⁴⁹

Section 141, which was based upon English law,²⁵⁰ envisaged a type of partial excuse situation: even if the killing was intentional “homicide which could otherwise be murder [it] may be reduced to culpable homicide.”²⁵¹ By requiring the provocation to be sufficient to deprive an “ordinary person” of self-control, an objective test of provocation was introduced into South African law.²⁵²

In 1925 section 141 was accepted by the Appellate Division in R v Butelezi²⁵³ as reflecting the South African law on this subject.²⁵⁴ To determine whether intention was present, section 141 embodied an objective test: the question was not whether the accused lacked intention for murder but whether a fictitious, ordinary person would as a

²⁴⁹ Hoctor supra (n 242) 112; Burchell supra (n 29) 427. This is in terms of Criminal Procedure and Evidence Act of 1917. See also Hoctor supra (n 242) at 112 noting De Wet’s supra (n 76) statement that, there was temptation for judges to ensure, in circumstances where the killing was less blameworthy, that the death penalty was not in question by handing down a verdict of culpable homicide rather than murder (at 134).

²⁵⁰ Burchell supra (n 29) at 427 has noted that the Transkeian Penal Code was strongly influenced by the Indictable Offences Bill of Sir James Stephen, which was drafted as a code of English criminal law and the draft code of June 1879 differed little from Stephen’s original code. However, neither code was passed into law. In R v Pascoe 2 SC 427 where the accused was charged with the murder of his wife and her suspected lover (upon finding them together in the bedroom), Lord de Villiers instructed the jury that whilst killing in circumstances where a couple were caught in adultery was not justified, that this would be a case of culpable homicide, and not murder. A similar approach was adopted in R v Udiya 1890 NLR 222. In R v Tsoyani 1915 EDL 380, the accused were held to have exceeded the bounds of defence, but as a result of the provocation which they endured, it was held that the verdict should be one of common assault, rather than assault with intent to do grievous bodily harm.

²⁵¹ Burchell and Milton supra (n 26) 280. Cf R v Hercules 1954 (3) SA 826 (A) at 352F-H: “The law recognizes a hybrid or middle situation where there is an intention to kill but where that intention is not entirely but to some extent excusable”.

²⁵² Cf Hunt South African Criminal Law and Procedure Vol II 1st ed (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 criminals conduct by reference to community values”.

²⁵³ 1925 AD 160 at 162.

²⁵⁴ Ibid at 163.

result of provocation have lacked intention.²⁵⁵ Thus, an objective test of provocation was established in South African law.²⁵⁶ The objective test remained in force,²⁵⁷ until the case of R v Thibani.²⁵⁸

By 1949 the position regarding mens rea had been considerably altered. A move towards a more subjective approach for provocation was followed. In the case of R v Thibani²⁵⁹ Schreiner JA held 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.”²⁶⁰ In terms of such an approach, provocation is merely a factor taken into account in establishing the accused’s state of mind at the crucial time.²⁶¹

²⁵⁵ Burchell and Milton supra (n 26) 280.

²⁵⁶ Ibid.

²⁵⁷ R v Attwood 1946 AD 331; R v Blokland 1946 AD 940; R v Tshabalala 1946 AD 1061; R v Zwane 1946 NPD 396. This was the case, despite the courts occasionally applying a subjective test, holding that the accused was guilty of culpable homicide rather than murder on the basis that the provocation excluded intent, rather than because the accused was considered less blameworthy: cf R v George 1938 CPD 486 and R v Cebekulu 1945 (2) PH H 176 (A). See further the minority judgment of Stratford JA in R v Ngobese 1936 AD 296 at 306 and Rhodesian case of R v Maloko 1949 (2) Ph H 110.

²⁵⁸ 1949 (4) SA 720 (A), discussed by Hoctor supra (n 242) 113.

²⁵⁹ Ibid.

²⁶⁰ Ibid at 731. Hoctor supra (n 242) at 113 notes that Schreiner JA followed the developments of English case of R v Woolminton 1935 AC 462 and the South African cases of R v Ndhlovu 1945 AD 369. Despite a move towards a subjective test for provocation, the case of R v Kennedy 1951 (4) SA 431 (A) at 438h (the court in this case following the case of Attwood supra (n 257) demonstrated a move towards an objective approach. In R v Molako 1954 (3) SA 777 (O) support was shown for a subjective assessment of the effect of provocation on the accused. But the court was careful to point out that there should be no weakening of the principle that a sane person is responsible for the ordinary consequences of his acts (at 781B-G).

²⁶¹ Hoctor supra (n 242) at 113; Burchell and Hunt supra (n 73) 242.

In R v Tenganyika²⁶² the Federal Supreme Court was of the view that provocation had been given a restricted role in the Thibani²⁶³ case. The court was of the view that provocation could not only be used in the way suggested by the court, but also that it could be used in the way indicated in section 141. This comprised a two-stage test.²⁶⁴

First it should be enquired whether, despite the provocation, the accused, had the intent to kill, subjectively assessed. If the intent to kill was absent, the accused would be acquitted of murder, but found guilty of culpable homicide. However, if the accused did have the intent to kill, the second stage of the test would be whether the reasonable person would have lost his self-control in the circumstances (objective test). If this was the case, then the court would reduce the offence to one of culpable homicide, despite the presence of intention.²⁶⁵

In R v Krull²⁶⁶ the suggestion that provocation could be utilized in the way not only set out by the court but indicated in section 141 was rejected by the Appellate Division. The court was of the view that these two roles were incompatible with one another and that the approach in Thibani²⁶⁷ was the correct one. The role of the court in Krull²⁶⁸ was:

²⁶² 1958 (3) SA 7 (FSC).

²⁶³ R v Thibani supra (n 258).

²⁶⁴ Hoctor supra (n 242) at 114, discussing R v Tenganyika supra (n 262) at 12 and 11G; H; 13A, E. This would cater for principle (subjective approach to mens rea) and policy (to ensure that the accused would not be acquitted).

²⁶⁵ Hoctor supra (n 242) 114.

²⁶⁶ 1959 (3) SA 392 (A).

²⁶⁷ Hoctor supra (n 242) at 114-115, discussing R v Thibani supra (n 258).

²⁶⁸ R v Krull supra (n 266) and in the process dismissing the Tenganyika supra (n 262) approach for its mixture of both subjective and objective elements (at 399F, H).

“...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 self-control, but excluding mental abnormalities short of insanity and excluding normal personal idiosyncrasies [sic], he had the intention to kill.”²⁶⁹

Schreiner JA emphasized that an objective dimension to the examination of provocation was essential for practical purposes. The argument went that hot-headed individuals should not be allowed to give free reign to their emotions.²⁷⁰

2.3.1.2 The subjective test of intention

The subjective test is usually applied to a murder charge. The question to be asked is whether or not the accused had the intention to murder. In Mangondo²⁷¹ it was held that since criminal intention was now subjectively assessed, as opposed to the previous objective test applied, it was necessary to revise the law relating to provocation.²⁷² In Lubbe²⁷³ the question to whether the accused’s state of mind arose from “normal personal idiosyncrasies” would have to be determined by either a subjective or objective test. Jansen J noted the approach in R v Thibani²⁷⁴ where the Judge of Appeal held:

²⁶⁹ Ibid at 400A.

²⁷⁰ Ibid at 396FF. But as Hoctor supra (n 242) at 114 notes, if Schreiner JA’s intention was to set out a test without the conflation of both objective and subjective elements, this was not necessarily the result and therefore cannot necessarily be reconciled with Thibani supra (n 258).

²⁷¹ 1963 (4) SA 160 (A).

²⁷² Hoctor supra (n 242) at 115, discussing S v Mangondo supra (n 271) at 162E-F. The court went on to note that an objective test had been applied in the cases of Kennedy supra (n 260); Attwood supra (n 257) and Butelezi supra (n 253).

²⁷³ 1963 (4) SA 459 (W).

²⁷⁴ R v Thibani supra (n 258).

“...provocation seems to have assumed its proper place, not as a defence but 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.”²⁷⁵

Jansen J was of the view that the dictum favoured a subjective test. Furthermore, he was of the view that the phrase “excluding normal personal idiosyncrasies” from the Krull²⁷⁶ case did not reintroduce the objective test but meant rather that in a subjective consideration of the intention to kill, evidence of the accused’s personal idiosyncrasies must not be considered.²⁷⁷ The problem with this statement is that a subjective test of intention includes all subjective factors, idiosyncratic or not. Therefore, such factors must be taken into account, or the test for provocation will include an objective component.²⁷⁸

In S v Dlodlo,²⁷⁹ the Appellate Division approved the subjective test for the intention to kill where the defence of provocation²⁸⁰ was raised and in Delport²⁸¹ it was held that where the presence of intent was in question:

“...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

²⁷⁵ Ibid at 731.

²⁷⁶ R v Krull supra (n 266).

²⁷⁷ Hoorer supra (n 242) at 115, noting Burchell’s argument in “Provocation: Subjective or Objective” (1964) South African Law Journal 27 at 28-29.

²⁷⁸ Burchell supra (n 277) 29, cited in Hoorer supra (n 243) at 115.

²⁷⁹ 1966 (2) SA 401 (A).

²⁸⁰ Hoorer supra (n 242) at 115. Botha JA stated that the onus was on the prosecution to prove beyond reasonable doubt that the accused caused the injury “as a fact appreciated subjectively, the possibility of death resulting there from. The judge further noted: The subjective state of mind of an accused at the time of the infliction of 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” (at 264).

²⁸¹ 1968 (1) PH H53 (T).

available knowledge of how the human faculty of volition functions, is relevant to the determination of the state of mind of the accused concerned”.

In the Mokonto²⁸² case the Appellate Division came to the decision that provocation is a material factor to be taken into account in ascertaining whether the accused subjectively had a particular intention. The court also held that provocation may sometimes have a contrary effect to that provided for in section 141 of the Transkeian Penal Code: instead of negating the intention to murder, it may in fact confirm the presence of such intention.²⁸³ The court also noted that section 141 of the Transkeian Penal Code reflected an objective approach to provocation which was inconsistent with the “subjective approach of modern judicial thinking”²⁸⁴ which eschewed doctrines such as the presumption that an individual intends the reasonable and probable consequences of his act,²⁸⁵ and the *versari in re illicita* doctrine.²⁸⁶

2.4 Non-pathological incapacity

2.4.1 Introduction

From 1967, the notion of criminal capacity was introduced into South African law.²⁸⁷

The Report of the Commission of Inquiry into the Responsibility of Mentally Deranged

²⁸² 1971 (2) SA 319 (A). In this case, the accused, a young tribal Zulu, had been found guilty of murder with extenuating circumstances, of a woman whom he considered to be a witch. According to the accused’s evidence, the woman had on the fateful day told him: “You will not see the setting of the sun”. The accused had reason to take this threat seriously, since about a month previously the deceased had informed him and his two brothers that they were all going to die. This proved to be accurate as regards the two brothers, and with a view to averting such fate for himself, the accused killed the witch. He decapitated her with a cane-knife in order, so he explained, to prevent her from rising again, and he chopped off her hands since these had handled the “muti” (the medicine with which she allegedly caused the death of the two brothers).

²⁸³ S v Mokonto supra (n 282) 327B-C; 325D.

²⁸⁴ S v Mokonto supra (n 282) 325F-G.

²⁸⁵ S v Mokonto supra (n 282) 325G-H.

²⁸⁶ S v Mokonto supra (n 282) 324G-H, discussed in Hoctor supra (n 242) at 116.

²⁸⁷ Cf Snyman “Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg” (1989) Tydskrif vir die Regwetenskap 1 where the author notes that the notion of “criminal capacity” was adopted from the Continental legal systems, specifically German Law.

Persons and Related Matters²⁸⁸ investigated this notion and its findings gave rise to the provisions of section 78(1) of the Criminal Procedure Act.²⁸⁹ This section sets out the defence of mental illness. In the case of S v Mahlinza,²⁹⁰ the court was of the view that the criminal capacity of the accused was an essential requirement necessary to establish criminal liability.²⁹¹

According to the Rumpff Commission Report, criminal capacity consists of both the cognitive capacity and conative capacity. Cognitive capacity refers to the actor's intellectual abilities such as the ability to distinguish between right and wrong as well as the ability to perceive, to reason and to understand.²⁹² Conative capacity refers to the actor's ability to control her behaviour. In other words, to set a goal and decide whether or not to pursue it.²⁹³ Furthermore, the Rumpff Commission Report defined self-control 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. 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, is a crime actually committed. But where insight into the unlawfulness of the act, even though present, arouses no

²⁸⁸ RP 69/1967.

²⁸⁹ Act 51 of 1977.

²⁹⁰ 1967 (1) SA 408 (A).

²⁹¹ Ibid at 414G-H.

²⁹² Rumpff Commission Report supra (n 288) at par 9.9.

²⁹³ Hoctor supra (n 242) at 117, discussing RP supra (n 288) par 9.9.

aversion at all, so that insight cannot operate as a counter-motive, there is no self-control.”²⁹⁴

Where either of the two capacities are absent, the actor will be found to be lacking criminal capacity and therefore will not be held criminally liable for her actions.²⁹⁵

The Rumpff Commission²⁹⁶ identified a third type of mental function: affective functions. This relates to the actor’s emotions or feelings. The Rumpff Commission²⁹⁷ was of the view that such affective emotional disturbances should not exclude criminal liability,²⁹⁸ especially where the accused evidences “insight and volitional control in her conduct”.²⁹⁹

2.4.2 Development of the defence of non-pathological incapacity

Since the decision in S v Chretien,³⁰⁰ a new approach to provocation has been followed. The question now asked is whether provocation (that is, the accused’s angry response) could exclude the basic “elements” of liability - in the same way as intoxication can. In this case the Appellate Division dealt with the decision in S v Johnson.³⁰¹ The court held that the latter case was incorrectly decided due to its policy-driven conviction of

²⁹⁴ Rumpff Commission Report supra (n 288) at par 9.33.

²⁹⁵ Hoctor supra (n 242) at 118; Snyman supra (n 287) at 2.

²⁹⁶ Rumpff Commission Report supra (n 288).

²⁹⁷ Ibid at par 9.19.

²⁹⁸ It should be noted that a distinction needs to be made between voluntary conduct and criminal capacity, and between criminal capacity and fault. In respect of the voluntary conduct and criminal capacity distinction see R v Mkize 1959 (2) SA 260 (N) at 265E-F; S v Mahlinza supra (n 289) at 414H-415A. In respect of the distinction between criminal capacity and fault see Van der Merwe’s summary of the positions in “Toerekeningsvatbaarheid v ‘Specific Intent’ - die Chretien-beslissing” (1981) Obiter 142 at 148.

²⁹⁹ Rumpff Commission Report supra (n 288) at par 9.19, discussed in Hoctor supra (n 242) at 118.

³⁰⁰ S v Chretien supra (n 97).

³⁰¹ 1969 (1) SA 201 (A).

the accused. This was despite a finding that the accused did not know what he was doing. For this reason the court held that the decision was “juridically impure”.³⁰² The court went on to note that the specific intent doctrine was contrary to the precepts of South African law.³⁰³

The court went on to apply a principled approach to the issue of voluntary intoxication, namely that intoxication could exclude liability by negating various elements of liability. These include the requirement that the act must be voluntary;³⁰⁴ the accused had the necessary criminal capacity at the time of acting,³⁰⁵ and the requirement of fault in the form of intention (for crimes requiring intent).³⁰⁶

In S v Van Vuuren³⁰⁷ the question whether provocation could exclude basic “elements” of liability, in the same way intoxication can was addressed. In this case the judge also made a broader statement in respect of what is meant by provocation:

“I am prepared to accept that an accused should not be held criminally responsible for an unlawful act where failure to comprehend what he is doing, is not attributed to drink alone, but to a combination of drink and other factors such as provocation and severe mental or emotional stress. In principle there is no reason for limiting the enquiry to the case to where a man is too drunk to know what he is doing. Other factors which may contribute towards the conclusion that he

³⁰² S v Chretien supra (n 97) at 1103D, discussed in Hooror supra (n 242) at 120.

³⁰³ S v Chretien supra (n 97) at 1104A.

³⁰⁴ S v Chretien supra (n 97) 1104E-F; 1106E-F.

³⁰⁵ S v Chretien supra (n 97) 1104; 1106F-G.

³⁰⁶ Hooror supra (n 242) 121. It is important to note that the court qualified its wholesale acceptance of the principled approach to liability by qualifying his judgment. Rumpff CJ held that such an approach necessarily excluded those accused who made use of alcohol to commit the crime (at 1105G-H). The judge went on to note that any problem in adopting the principled approach lay more in the application as opposed to the legal principle (at 1105H).

³⁰⁷ S v Van Vuuren supra (n 26).

failed to realize what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing criminal liability”.³⁰⁸

In S v Lesch³⁰⁹ the traditional approach to provocation was expanded to include not only the loss of self-control caused by provocative words or conduct but also some emotional disturbances such as emotional stress. Although the accused was convicted of murder, it is important to note that the court adopted the same approach as in Chretien.³¹⁰ establishing the existence of the elements of voluntary conduct, criminal capacity and intention.³¹¹ Furthermore, the court was of the view that provocation, far from eliminating the intention to kill, actually contributed to the forming of such intent.³¹²

In S v Arnold³¹³ strong authority was laid down for the viewpoint that emotional factors could lead to an acquittal as a result of provocation. Arnold suffered from severe emotional stress to such an extent that when he shot his wife:

³⁰⁸ Ibid at 17G-H, per Diemont AJA.

³⁰⁹ 1983 (1) SA 814 (O).

³¹⁰ S v Chretien supra (n 97).

³¹¹ S v Lesch supra (n 309) at 825F-826A (per Hattingh AJ), discussed in Hoctor supra (n 242) at 123.

³¹² Hoctor supra (n 242) at 123, citing S v Lesch supra (n 309) 826A. See further 823G-824B where the terminology of the Rumpff Commission report (specifically para's 9.30, 9.32 and 9.33) are referred to in discussing the notion of criminal capacity.

³¹³ 1985 (3) SA 256 (C). In this case the accused was charged with killing his twenty-one year old wife. Prior to the day of the killing the accused had been subjected to a good deal of emotional stress. One of his sons from a previous marriage suffered from a serious hearing disability and because his second wife (the deceased) developed a hostile attitude to the boy, the accused had to place the child in a special home. The accused was very attached to the boy. The deceased's mother had moved in with the couple and she suffered from a hysterical condition. The relationship between the accused and the deceased was strained. Now and again she left the house to stay somewhere else but he managed to encourage her to return. On the day in question the accused had just taken his disabled son to the home after arguing with the deceased. Returning his son to the home was a traumatic event for the accused. On his arrival at this house, he encountered his wife. He had a pistol in his possession which he claimed he needed because his job involved handling large sums of money and sometimes his work took him into areas where there had been riots. When he encountered his wife on his return, he claimed that she was so positioned in the room that he was unable to put the gun in a secure place. He held the gun in his hand and during their discussions he hit it against the Couch to emphasize a point. The accused was upset because his wife did not tell him where she was staying and what work she was doing. During their conversation the gun went off, the bullet going in the

“...[H]is 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”.³¹⁴

The court was of the opinion that:

“...it is not only youth, mental disorder, or intoxication which could lead to a state of criminal incapacity, but also incapacity caused by other factors such as extreme emotional stress”.³¹⁵

At variance with this outcome was the fact that while the court accepted that it was reasonably possible that the accused was lacking capacity at the time of the death of his wife,³¹⁶ the court had prior to this found it reasonably possible that the accused was acting in a state of sane automatism at the time of the shooting.³¹⁷ Although the court was aware of the need to be cautious of accepting that the accused lacked capacity,³¹⁸ the judge was of the view that due to the most unusual facts of the case, the killing “was at variance with the whole conduct of the accused both before and after” were indicative of uncontrolled conduct. In other words the accused had been acting in a state of automatism.³¹⁹

opposite direction to where the deceased was standing. The accused admitted that he could not recollect reloading the pistol, but also conceded that he must have done so. Apparently the deceased then bent forward “displaying her bare breasts” and referred to her desire to return to her work as a stripper. The second shot was fired and the deceased was struck and killed. The court noted that this was obviously an act of provocation on the part of the deceased (at 261).

³¹⁴ S v Arnold supra (n 313) 263C-D (per Burger J).

³¹⁵ S v Arnold supra (n 313) 264C-D.

³¹⁶ S v Arnold supra (n 313) 264D.

³¹⁷ S v Arnold supra (n 313) 263G-H. It should be noted that psychiatric testimony was led on behalf of the accused, to the effect that at the time of the shooting the accused’s mind was so flooded with emotions that he may have acted subconsciously or may have lost the capacity to exercise control over his actions (at 263C-E). Thus both the voluntariness of the accused’s conduct and his capacity were placed in issue.

³¹⁸ S v Arnold supra (n 313) 264G-H.

³¹⁹ Hoctor supra (n 242) at 123, citing S v Arnold supra (n 313) 264E-F.

S v Campher³²⁰ confirmed the principle in Arnold.³²¹ The majority of the court accepted a general test for criminal capacity in South African law – a test wide enough to include provocation as a complete defence. In this case the three judges all delivered differing judgments resulting in separate majority findings on the facts and on the law. The accused’s case was rendered more complicated due to the fact that her counsel in the court a quo failed to raise the possibility that her conative capacity may have been lacking at the time of the killing, and further by the failure by defence counsel to adduce any expert psychiatric evidence. Two of the three judges agreed that the defence of incapacity is not limited to section 78 of the Criminal Procedure Act.³²² Jacobs JA held that in terms of the recommendations of the Rumpff Commission,³²³ section 78 of

³²⁰ 1987 (1) SA 940 (A). In this case the deceased (husband) of the accused had assaulted her and mocked her religion, forced her to send her children from a previous marriage to live with her former husband, forced her to clean his pigeon coops, on occasion compelled her to use the toilet outside the house at night, compelled her to arm herself with a firearm and investigate noises at his pigeon coops at night, and often insisted that she sit at his bedside throughout the night to protect him against evil spirits. On the day of the attack the accused had started the day in an exhausted state. The deceased had forced her to stay awake at his bedside throughout the night, to ward off the spirits he believed endangered him. He started the day in a characteristically bad mood; he quarreled offensively with all and sundry. He busied himself fitting a bolt-lock to his pigeon coop. The accused had to help him by holding a metal fitting while he bored a hole in the wooden door frame. She was in an extremely uncomfortable position and did not hold the fitting as requested; as a result the hole was not drilled straight and the screw intended for it would not fit. This enraged the deceased, who threatened the accused with a screwdriver. She fled to their house, but he followed her and prevented her from locking him out, she armed herself with a pistol. The deceased was too enraged to be deterred by this. He forced her back to the pigeon coop. She went there still armed with the pistol. There the deceased berated her on her knees to pray for the hole to become straight. The accused then shot the deceased.

³²¹ S v Arnold supra (n 313).

³²² According to Viljoen JA, the decision in S v Chretien supra (n 97) opened the door to the recognition of a defence of non-imputability even where the non-imputability stemmed from a temporary mental aberration. Viljoen adopted the view that the accused had laboured under an impulse which she could not resist, namely to destroy the “monster” (husband) that was threatening her (at 958I). As a result, she had been unable to act in accordance with a distinction between right and wrong, and was thus not imputable at the time of the fatal incident (at 960D-E). It is important that Viljoen JA was prepared to make this finding despite the fact that no expert evidence regarding the accused’s mental condition when she killed the deceased had been led. Viljoen concluded that, since the accused’s condition did not stem from a “mental illness or mental defect” she was to be acquitted without being declared a State President’s patient in terms of section 78 (6) of the Criminal Procedure Act (S v Campher supra (n 320) at 958). Viljoen JA also noted that the enquiry into capacity was a separate enquiry to that into intention, and must therefore precede it. Only once the accused has been found to have capacity would the court be required to assess intention (at 955C-F) Boshoff AJA shared the view adopted by Viljoen JA that a defence of non-imputability is not restricted to conditions stemming from a mental illness or defect, but includes cases where an accused suffers from a temporary mental aberration as a result of fear or emotional stress (at 965H-966B).

³²³ Act 51 of 1977.

the Criminal Procedure Act was so worded as to provide for criteria for the determination of the criminal accountability of someone who suffers from a “mental illness” or a “mental defect”.³²⁴

Ferreira notes that the fact that the application of section 78 has been so restricted does not mean that the criteria which have developed in the South African law and have now been embodied in the section cannot be applied to temporary impairment of person’s mental state. The principle of criminal accountability ought to apply regardless of whether the mental disorder or the change in the emotional condition was caused by liquor or severe emotional stress.³²⁵ As Ferreira goes on to note, “the different mental conditions should not be compartmentalized; a general principle should be followed by applying the criteria for accountability irrespective of whether the accused’s aberration was of a temporary or permanent nature”.³²⁶

The recognized psychological characteristics of criminal capacity were set out in S v Laubscher:³²⁷

³²⁴ Hoctor supra (n 242) 124. Jacobs JA noted that since the accused’s defence counsel had failed to lead psychiatric evidence and had failed to properly plead lack of capacity, it was impossible to determine if the accused lacked capacity at the relevant time (at 960D-E). He regarded the accused’s defence as one of “irresistible impulse”. He argued that such a defence only exists within the provisions of section 78 (1) of the Criminal Procedure Act and concluded that, since the accused had not suffered from a mental illness or defect and since this was not the case, (at 960E-962B) the conviction of murder was to be upheld (at 963H-I).

³²⁵ Ferreira Premenstrual Syndrome and Criminal Justice (1994) LLM 175.

³²⁶ Ibid. Du Plessis in “The extension of the ambit of ontoerekeningsvatbaarheid to the defence of provocation - a strafregwetenskaplike development of doubtful practical value” (1987) South African Law Journal 539 at 545 states that the Campher supra (n 320) decision can be criticized on the ground that, although the appeal was dismissed by a majority of the court (Boshoff AJA and Jacobs JA), a majority (Viljoen JA and Boshoff AJA) adopted the view that a general defence of non-imputability exists in our law outside the provisions of section 78 (1) of the Criminal Procedure Act. The ultimate decision is thus not based upon a majority view of the law.

³²⁷ S v Laubscher supra (n 68).

“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 recognized 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.”³²⁸

In S v Laubscher³²⁹ a distinction was drawn between statutory criminal incapacity³³⁰ and non-pathological criminal incapacity of a temporary nature. The latter can be a result of non-pathological condition that is not attributable to a mental illness or mental defect in the form of a pathological condition that is not attributable to a mental illness or mental defect in the form of a pathological disturbance of the conscious mind. The court held that it was not necessary to specify the condition which could lead to non-pathological criminal incapacity.³³¹

³²⁸ Ibid at 166D-167A (own translation). Ferreira supra (n 325) at 173-174 notes that consequently any factor, such as fear would be legally relevant if it led to the disruption of the cognitive and/or conative functions of the conscious mind. In this respect see S v Bailey 1982 (3) SA 772 (A) at 796C: “It is possible that the accused could be so afraid that he is not able to foresee the consequences of his actions, or that what he is doing is unlawful. In certain instances, he can in fact lack criminal capacity”.

³²⁹ S v Laubscher supra (n 68).

³³⁰ In terms of section 78(1) of the Criminal Procedure Act 51 of 1977. See also S v Calitz 1990 (1) SACR 119 (A) where the court recognized the existence of a general test for criminal capacity, despite the fact that the defence did not succeed in this case.

³³¹ Ferreira supra (n 325) 175. Cf Bergenthuin “Die algemene toerekeningsvatbaarheidsmaatstaf” (1985) De Jure 273 where the author has noted that it is unnecessary to define a “*numerus clausus*” of biological grounds which could lead to a lack of criminal capacity.

The issue of emotional stress constituting a complete defence was again considered in S v Smith³³² and S v Wiid.³³³ In Smith³³⁴ it was held that:

“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.”³³⁵

As a result, provocation or severe emotional distress may deprive an individual of the capacity to appreciate the wrongfulness of her conduct or to act in accordance with this appreciation, and for this reason it appears to constitute a complete defence to criminal liability.³³⁶

After the decision in S v Wiid³³⁷ it is clearly established that a general test for criminal capacity is finally accepted in South African law. Not only was the defence of non-

³³² S v Smith supra (n 68).

³³³ 1990 (1) SACR 561 (A).

³³⁴ S v Smith supra (n 68).

³³⁵ Ibid at 134J-135A, discussed in Ferreira supra (n 325) at 175.

³³⁶ Ferreira supra (n 325) 175. Cf Burchell and Milton supra (n 26) 239.

³³⁷ S v Wiid supra (n 333). In this case at 563F-J, the dictum in Laubscher supra (n 68) at 166F-167A was cited as a statement of the law relating to the defence of non-pathological incapacity in the only case in which the Appellate Division/Supreme Court of Appeal has upheld the defence. In this case the accused, who killed her abusive husband, was acquitted on the basis that she lacked criminal capacity as a result of the abuse that she had suffered. However, in this case, just before shooting her husband several times, the accused had been seriously assaulted by him, and there was some evidence compatible with the conclusion that she might have been concussed. But see further chapter 5 at 295-296 discussing the possibility that this case was wrongly decided. If this criticism of Wiid supra (n 333) is correct, then it limits the number of cases where the accused could successfully rely on the defence and for this reason it could be said that the existence of the defence borders on the theoretical. Cf S v Potgieter 1994 (1) SACR 61 (A) where Kumleben JA emphasized the need to subject the evidence adduced by the appellant in support of the defence of non-pathological incapacity with circumspection (citing S v Kensley 1995 (1) SACR 646 (A) at 658j; S v Van der Sandt 1998 (2) SACR 627 (W) at 636B-C); and that such a defence must be subjected to careful scrutiny by the courts (citing S v Goitsemang 1997 (1) SACR 99 (O) at 103I-104A; S v Gesualdo

pathological incapacity acknowledged but on appeal the defence also succeeded as a result of the application of this principle. It is clear that the cause of the dysfunction of the accused's conscious mind is irrelevant to determine liability – it only concerns the capacity of the accused to appreciate the wrongfulness of her conduct or to act in accordance with it.³³⁸

In Nursingh³³⁹ the accused, a university student, shot and killed his mother, grandmother and grandfather. The issue which the court had to decide was whether when committing these crimes, he had the capacity to appreciate the wrongfulness of his conduct and whether he had the capacity to act in accordance with such an appreciation. Defence counsel for the accused placed emphasis on the prolonged sexual abuse that his mother had subjected him to and the fact that the accused had “a personality make-up which predisposed him to a violent reaction”. Furthermore, his conduct on the night in question was “so clouded by an emotional storm” that he lacked criminal capacity. Evidence led by both a psychologist and psychiatrist gave evidence that the circumstances faced by the accused had triggered off a state of “altered consciousness” in the accused which deprived him of awareness of normality. The psychiatrist described the condition as:

(1997) (2) SACR 68 (W) at 74G-H). In this case it was held that the accused's own words that the conduct was uncontrolled in nature should be accepted, unless it can be said that such evidence “cannot be reasonably true” (at 73D-I). While the court correctly set out the principles to be taken into account when examining cases of non-pathological incapacity, it should be noted that Potgieter deals with automatism: despite this it proceeds to cite cases such as Kalogoropoulos 1993 (1) SACR 12 (A); Mahlinza supra (n 289) and Wiid supra (n 333) which deal with non-pathological incapacity.

³³⁸ Ferreira supra (n 325) 175-176. The trial court held that it may have been reasonably possible that the accused may have been concussed after the assault and during the time she fired the fatal shots thus accounting for the fact that she could not remember pulling the trigger of the pistol. The Appellate Division clearly emphasized that where a foundation for the defence of temporary non-pathological incapacity is laid, the State bears the burden of disproving this defence beyond reasonable doubt. Here the State was held not to have discharged this burden and the defence of temporary non-pathological incapacity succeeded.

³³⁹ 1995 (2) SACR 331 (D).

“...a separation of intellect and emotion, with temporary destruction of the intellect, a state in which, although the individual’s actions may be goal-directed, he would be using no more intellect than a dog biting in a moment of response to provocation”.³⁴⁰

The psychologist testifying on behalf of the accused went on to describe the “emotional storm” experienced by the accused as “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 aggressiveness that frequently leads to homicide”.³⁴¹

Both the medical experts testified that “conflict in a particular relationship, which leads to unbearable tension... is released in this violent way by some trigger event”.³⁴² Such an occurrence was not a pathological one and “ordinary motor movements of the body can take place with normal efficiency”.³⁴³

The accused was acquitted due to the absence of any psychological evidence led by the prosecution to challenge the defence raised by the accused. Squires J acquitted the accused on all charges on the basis that the counsel for the accused had laid a factual foundation which at least established a reasonable doubt as to whether the accused had the necessary criminal capacity.³⁴⁴

³⁴⁰ S v Nursingh supra (n 339) 333D-E. The court thus accepted that the accused’s series of goal-directed acts constituted only one act in each case.

³⁴¹ Burchell and Milton supra (n 26) at 285, citing S v Nursingh supra (n 339) at 333E-H.

³⁴² S v Nursingh (n 339) at 333H.

³⁴³ Burchell and Milton supra (n 26) at 285-286, citing S v Nursingh supra (n 339) at 333I.

³⁴⁴ Burchell and Milton supra (n 286) at 286, citing S v Nursingh supra (n 339) at 339B-E.

Burchell and Milton state that “this case leads to 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. In the past, evidence of behavioural scientists regarding the unfortunate background circumstances faced by an accused would have been led, more appropriately, in mitigation of sentence. Even if this evidence should be led on the issue of liability was Nursingh³⁴⁵ under any more stress or pressure than the accused in Campher?”³⁴⁶

In Moses³⁴⁷ the accused was acquitted of killing his homosexual lover. Three months after meeting, they engaged in their first act of unprotected sexual intercourse. Immediately after this act, the ‘deceased’ informed the accused of his ‘HIV-positive’ status. The accused flew into a rage beating and stabbing the deceased with various weapons. The deceased died as a result of the attack. Expert testimony regarding the accused’s mental state at the time of the killing was led by defence counsel. Both a psychiatrist and psychologist concluded that “due to the accused being in an annihilatory rage, he experienced a collapsing of controls, which resulted in him lacking the necessary capacity to be held liable for the fatal conduct.”³⁴⁸

De Vos is of the view that this case leaves South African law with dangerous precedent. Moses was clearly in a rage and emotionally disturbed for a brief period before and during the act. However, a volitional element was present in the series of acts. This indicates that the court failed to distinguish between uncontrollable actions and actions

³⁴⁵ S v Nursingh supra (n 339).

³⁴⁶ Burchell and Milton supra (n 26) 286; S v Campher supra (n 320).

³⁴⁷ 1996 (1) SACR 701 (C)

³⁴⁸ Ibid at 708G-711A.

which are controllable, but which the accused failed to control. Rage may mean that he decided not to control his actions, but it doesn't mean that they were uncontrollable.³⁴⁹

Louw notes that a further problem with the Moses³⁵⁰ case is that “the conceptual foundation of the defence’s case is the psychological contention that the accused’s controls ‘collapsed’. Although this does suggest a lack of self-control, the defence’s witness implied elsewhere that the accused’s controls might only have been diminished”.³⁵¹ The court did not draw this distinction and either result leads to an acquittal:

“Dr. Gittleson 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 behaviour in the light of what was wrong, was significantly impaired at the time of the killing”.³⁵²

The court went on to note:

“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 knew was right and wrong, was impaired. While he knew that it was

³⁴⁹ De Vos “S v Moses: Criminal Capacity, provocation and HIV” (1996) South African Journal of Criminal Justice 354 at 358. Cf Rumpff Commission Report supra (n 287) at par 9.26. Cf Louw supra (n 28) at 215 where the author notes that Moses is the first “in which a provocation defence has resulted in an acquittal where there was no long term abuse of the accused preceding the killing, either by the deceased or at all. In all previous judgments, the final provocative act, was metaphorically speaking, the last straw in a long history of abuse”. Cf Moses supra (n 347) at 703F-I where it was a single and isolated provocative act that sent the accused into a rage.

³⁵⁰ S v Moses supra (n 347).

³⁵¹ Louw supra (n 28) at 215, citing Moses supra (n 347) at 714H-I.

³⁵² S v Moses supra (n 347) at 710C-D.

wrong in principle, his awareness of the wrongfulness of what he was doing at the time was also impaired”.³⁵³

Furthermore, it is clear that diminished capacity has no influence on criminal liability.

At best it serves as a mitigating factor during sentencing.³⁵⁴

In Eadie³⁵⁵ the accused killed the deceased in circumstances which are commonly referred to as road rage. His defence was that at the time of the incident he lacked criminal capacity specifically in that he was unable to control his actions despite his ability to know what he was doing was wrong.³⁵⁶ Griesel J convicted the accused of murder. The judge was of the view that the accused while succumbing to road rage “did not lose control, but simply lost his temper”.³⁵⁷ What was of importance was that Griesel J indicated the difference between automatism and capacity, which was a distinction without difference.³⁵⁸

³⁵³ S v Moses supra (n 347) at 710H-I.

³⁵⁴ Speirs “Should provocation/emotional stress be regarded as a complete defence to criminal liability” (2002) Responsa Meridiana 65 at 72.

³⁵⁵ 2001 (1) SACR 172 (C). In this case, the accused under the influence of alcohol, drove home after spending the evening at a sports club. The accused was harassed by another driver who either drove behind the accused with his headlights on brightly or overtook the accused and then slowed down. When the two vehicles stopped at a set of traffic lights, the accused proceeded out his vehicle, with a hockey stick in his hand. When he approached the other vehicle, the driver’s door was opened and he struck the door with the hockey stick and broke it. He attempted to pull the door open at which time the deceased kicked it back at him. The accused then kicked the driver with both feet and punched him on the head. The driver then slumped towards the passenger’s seat. The accused punched him repeatedly on his face, pulled him out the vehicle and stood on his face with the heel of his shoe and then kicked the bridge of his nose (at 174C-175G). The driver died as a result of this assault.

³⁵⁶ S v Eadie supra (n 355) 177C-D.

³⁵⁷ S v Eadie supra (n 355) at 182I-J. For a criticism of this conflation of the notions of automatism and incapacity. See further Hoor “Road rage and reasoning about responsibility” (2001) South African Journal of Criminal Justice 195, Louw supra (n 28) at 206-207.

³⁵⁸ S v Eadie supra (n 355) at 178A-B: “There appears to be some confusion between the defence of temporary non-pathological 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”.

The conviction was taken on appeal “to establish whether the boundaries of the defence in question were 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”.³⁵⁹

The court³⁶⁰ attempted to gain clarity by dealing with its previous decisions relating to the defence of non-pathological incapacity. However, it proceeded to cite the cases of Potgieter,³⁶¹ Cunningham³⁶² and Henry,³⁶³ which deal with sane automatism to come to the conclusion that non-pathological incapacity has been equated with automatism.³⁶⁴ The court went on to critique the cases of Arnold,³⁶⁵ Moses³⁶⁶ and Gesualdo,³⁶⁷ as being out of line with existing case law. Thus the approach “adopted by this court in the decisions discussed earlier was not followed in these three cases”.³⁶⁸ The issue that the court had with these three cases was the fact that it is possible for a person to act consciously but at the same time not be able to act in accordance with one’s appreciation of what is right and wrong.³⁶⁹ Conduct is voluntary where it is subject to

³⁵⁹ S v Eadie supra (n 355) at par [3].

³⁶⁰ S v Eadie 2002 (1) SACR 663 (SCA) at par [29].

³⁶¹ S v Potgieter supra (n 337), cited at par [36].

³⁶² 1996 (1) SACR 639 (A), cited at par [39].

³⁶³ 1999 (1) SACR (SCA), cited at par [38].

³⁶⁴ Hoorcar supra (n 242) at 134, citing S v Eadie supra (n 360) at par [42]. The court also cited the cases of Francis 1999 (1) SACR 650 (SCA), cited at par [40] and Kok [2001] 4 All SA 291 (A), cited at par [41] in which terminological imprecision of the court added to the confusion.

³⁶⁵ S v Arnold supra (n 313), discussed at par [46].

³⁶⁶ S v Moses supra (n 347), discussed at par [49].

³⁶⁷ S v Gesualdo supra (n 337), discussed at par [50].

³⁶⁸ S v Eadie supra (n 360) at par [51], discussed in Hoorcar supra (n 242) at 135.

³⁶⁹ Hoorcar supra (n 242) at 135, citing the cases of S v Eadie supra (n 360) at par [46], referring to Arnold supra (n 313).

the conscious will of the accused, and therefore involuntary when not subject to the conscious will. There are numerous instances of conduct which may be involuntary but generally these are indicated by a lack of “goal-directed” behaviour. In other words, where an accused is able to direct his actions towards specific tasks, his actions must have been subject to her conscious will. Capacity appears to be similar to conduct in one respect. This relates to the second leg of the capacity enquiry: whether the accused was able to control herself in accordance with his appreciation of right and wrong. Therefore, capacity is absent where the accused lacks self-control. This is a source of confusion in respect of the provocation defence.³⁷⁰ The following statement in Eadie³⁷¹ illustrates this problem:

“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, such as Snyman...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.”³⁷²

The problem with the above formulation is that either the two defences are distinct or they are the same: they cannot be both the same in some circumstances and distinct in others.³⁷³

³⁷⁰ Louw supra (n 28) 207.

³⁷¹ S v Eadie supra (n 360).

³⁷² Ibid at 178A-C, discussed in Louw supra (n 28) at 207-208.

³⁷³ Louw supra (n 28) 208.

Automatism has been defined³⁷⁴ as involuntary behaviour³⁷⁵ that occurs in an altered state of consciousness and which is compulsive and repetitive and simple. More simply, it is the lack of concomitant or controlling will over the act³⁷⁶ (due to diverse causes)³⁷⁷ rather than a lack of consciousness which decides criminal liability.³⁷⁸ Despite the law's clear exposition on the law of automatism, the court in Eadie³⁷⁹ came to the conclusion that there is no distinction between conative capacity and automatism and that the two tests have now merged:

“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 control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test)”.³⁸⁰

³⁷⁴ Cf Hoxter “Just a spoonful of sugar’: Glycaemia, Insanity and Automatism” (2001) Obiter 241 at n 48 (citing Padfield “exploring a Quagmire: Insanity and Automatism” (1989) Cambridge Law Journal at 356 who points out that (like self-control) the legal definitions of both automatism and insanity bear little relationship to their medical counterparts – insanity is not a medical concept. Interpretation by the courts has served to limit the type of conditions that could give rise to the cognitive defence of insanity and automatism only exists in medical texts in relation to some forms of epilepsy.

³⁷⁵ South African courts have described involuntary conduct in the following terms – “mechanical activity” (Dhlamini 1955 (1) SA 120 (T) at 121); “unconsciousness” (R v Mkize 1959 (2) SA 260 (N) at 265); “automatic activity” (Ngang 1960 (3) SA 363 (T) at 365); R v H 1962 (1) SA 197 (A) at 209); “onwillekeurige handelings” (Johnson supra (n 301) at 205) and “involuntary lapse of consciousness” (Trickett 1973 (3) SA 526 (T) at 531.) (444H-445B): after a finding (at 445H) that the accused acted consciously and voluntarily (i.e. not in a state of automatism), the court concluded that in the absence of further evidence establishing a factual foundation to disturb such finding, the accused's defence of non-pathological incapacity could not succeed (at 445H-I).

³⁷⁶ Burchell and Miton supra (n 26) at 103 who define it as “controlled by conscious will.” See also De Wet and Swanepoel supra (n 76) at 49-50 and S v Chretien supra (n 97) at 104.

³⁷⁷ S v Van Vuuren supra (n 26) at 17G-H; S v Lesch supra (n 309); S v Arnold supra (n 313) and S v Campher supra (n 320) where it was held that automatism can be caused by provocation; and S v Mahlinza supra (n 289) at 161; R v Mawonani 1970 (3) SA 448 (RA) where it was held that automatism can be caused by dissociation.

³⁷⁸ McSherry “Critique and Comment, It's a man's world: claims of provocation and automatism in ‘intimate homicides’” (2005) Melbourne University Law Review 921, citing R v The Queen (1967) 121 CLR 205, 214.

³⁷⁹ S v Eadie supra (n 360).

³⁸⁰ Louw supra (n 28) 210-211, noted at par [56] of S v Eadie supra (n 360).

Navsa JA went on to state:

“I agree with Ronald Louw that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation”.³⁸¹

The effect of this approach is that it would have to be established that an accused was acting involuntarily in order for her defence of lack of cognitive capacity to prevail:

“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...In the present context [sic] the two are flip sides of the same coin’.³⁸²

Uniting the two tests would result in the “mental element” in the crime forming part of the inquiry into the existence of a voluntary act:³⁸³

“[t]he insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement.”³⁸⁴

The court conceded that such an approach would require a fundamental reinterpretation of the formulation of the defence of non-pathological incapacity set out in Laubscher:³⁸⁵

³⁸¹ S v Eadie supra (n 360) at par [57], discussed in Hoorcar supra (n 242) at 137.

³⁸² Ibid. In a more recent case of S v Scholtz 2006 (1) SACR 442 (E), Froneman J interprets the Eadie (supra (n 360)) court’s comments at para’s [57] and [58] as a warning against the tendency to interpret the two legs of the test as separate defences.

³⁸³ Snyman supra (n 106) 17. This approach is unsustainable since “Does the judge mean that the conduct requirement (voluntary act) and the culpability requirement merge into one vague, amorphous requirement called the ‘mental element?’” (at 16).

³⁸⁴ S v Eadie supra (n 360) at par [58].

³⁸⁵ S v Laubscher supra (n 68).

“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 be involuntary”.³⁸⁶

Such an approach flowed from previous decisions of the Supreme Court of Appeal. The court came to the conclusion that:

“...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”.³⁸⁷

Therefore, if the accused is not acting in a state of automatism, due to lost self-control, how can he be acting voluntarily, yet still not be able to control himself? The Eadie³⁸⁸ court acknowledged this point and held that the dissenting view – that automatism and conative capacity are distinct concepts is flawed and moreover, this view:

“...followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one’s emotions, does violence to the fundamentals of any self-respecting system of law...[n]o self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation”.³⁸⁹

³⁸⁶ Hoctor supra (n 242) at 138, citing S v Eadie supra (n 360) at par [58].

³⁸⁷ Hoctor supra (n 242) at 138, citing S v Eadie supra (n 360) at par [42].

³⁸⁸ S v Eadie supra (n 360).

³⁸⁹ Hoctor supra (n 242) at 138, citing S v Eadie supra (n 360) at par [60].

The conclusion reached in Eadie³⁹⁰ is problematic for battered woman since it limits the decision of Wiid.³⁹¹ This is so since the court failed to distinguish between uncontrollable actions, and actions which are controllable, but which the accused failed to control.³⁹² The result of this is that the court comes close to eliminating provocation/emotional stress as a defence for battered woman altogether.³⁹³ Hoctor notes that what the court had in mind with the Eadie³⁹⁴ case was the narrowing of the defence of non-pathological incapacity policy grounds.³⁹⁵ The result of this would be that:

“Established precedent in both provocation and other cases of alleged non-pathological incapacity would have to be revisited by implication – an approach that would have severe implications for the principle of legality by restricting the scope of the defence (for battered women) and so increasing the scope of criminality.”³⁹⁶

Should lost self-control equate with automatism, then a further problem arises. Goldman suggests that should the battered woman suffer from severe post-traumatic stress disorder (PTSD), battered woman syndrome (BWS) being a subcategory of this,

³⁹⁰ S v Eadie supra (n 360) at par [3].

³⁹¹ S v Wiid supra (n 333).

³⁹² Any goal-directed actions taken by the battered woman would prove to be a major obstacle to relying on the defence. This is so since persons acting in a state of automatism, do not take complex series of goal-directed actions. See 75-79 for a discussion of the cases of Nursingh supra (n 339) and Moses supra (n 347) in this respect.

³⁹³ Pather “Provocation Acquittals provoke a rethink” (2002) South African Journal of Criminal Justice 337 at 348. This is particularly salient if the facts of the case do not support self-defence.

³⁹⁴ S v Eadie supra (n 360).

³⁹⁵ Hoctor supra (n 242) 138. The stated objective of the judgment was to consider whether the boundaries of the defence had been inappropriately extended so as to negatively affect public confidence in the administration of justice (S v Eadie supra (n 360) at par [3]).

³⁹⁶ Burchell “A provocative response to subjectivity” (2003) Acta Juridica 23 at 38. This point was also acknowledged by Snyman supra (n 106) at 22.

she should be declared “insane” since PTSD qualifies as a disease of the mind. Does this mean that since non-pathological incapacity is no longer available as a defence that: (a) the accused should be declared a state president’s patient³⁹⁷ or (b) as McSherry notes “evidence of dissociation is generally raised to negate the element of voluntary behaviour. This could be problematic since the division between sane and insane automatism is complex one and depends upon whether or not the condition is a mental disorder.”³⁹⁸

The court in Eadie³⁹⁹ went on to note that although in principle, the test of capacity might remain subjective, the test had to be approached with caution. Navsa JA held:

“I agree that the greater part of the problem lies in the misapplication of the test [of capacity]. 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”.⁴⁰⁰

Navsa JA went on to note that while accused persons will continue to raise the defence of provocation, the “law, if properly applied, will determine whether that claim is justified”.⁴⁰¹ Burchell is of the view that the Judge of Appeal was not talking about

³⁹⁷ Goldman supra (n 67) 220.

³⁹⁸ McSherry supra (n 378) 921.

³⁹⁹ S v Eadie supra (n 360). The structure for the possible tests arising out of the Eadie supra (n 360) decision relating to the defence of provocation is adopted from both Hoctor supra (n 243) 148-159 and Burchell supra (n 396) at 28-42.

⁴⁰⁰ Burchell supra (n 396) at 28, citing S v Eadie supra (n 360) at par [64].

⁴⁰¹ S v Eadie supra (n 360) at par [65].

“revising the test of capacity but rather applying it correctly using permissible inferences from objective facts and circumstances”.⁴⁰²

The Eadie⁴⁰³ case recognized that it was important for the law to move away from a subjective approach to fault (which the court had followed in previous cases such as De Blom,⁴⁰⁴ Chretien,⁴⁰⁵ Campher⁴⁰⁶ and Wiid)⁴⁰⁷ to a more objective approach in establishing the accused’s fault: Navsa JA stated that the accused’s conduct should be weighed against “human experience, societal interaction and societal norms.”⁴⁰⁸ The judge went on to state:

“[N]o self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation. It is absurd to postulate that succumbing to temptation may excuse one from criminal liability.”⁴⁰⁹

Such a statement suggests the acceptance of an objective approach to non-pathological incapacity. Navsa JA went on to state:

⁴⁰² Burchell supra (n 396) at 28; Burchell supra (n 29) at 431. For example, Navsa JA is critical of the fact that, in one of the first instances where a South African court completely acquitted an accused who raised the defence of provocation (S v Arnold supra (n 313), the judge “readily accepted the accused’s ipse dixit, and did not give enough weight to his focused and goal-directed behaviour before, during and after the event”

⁴⁰³ S v Eadie supra (n 360).

⁴⁰⁴ 1977 (3) SA 513 A.

⁴⁰⁵ S v Chretien supra (n 97).

⁴⁰⁶ S v Campher supra (n 320).

⁴⁰⁷ S v Wiid supra (n 333).

⁴⁰⁸ S v Eadie supra (n 360) at par [45], and previous cases such as Henry supra (n 363); Kensley 1995 (1) SACR 646 (A); Kok supra (n 364).

⁴⁰⁹ S v Eadie supra (n 360) at par [60].

“It appears to me to be justified to test the accused’s evidence about his state of mind, not only against 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.”⁴¹⁰

The court should too easily accept the accused’s own evidence regarding provocation or emotional stress and is therefore entitled to draw “legitimate inferences, from what hundreds of thousands⁴¹¹ of other people would have done under the same circumstances” (i.e. looking at objective circumstances). The Eadie⁴¹² judgment “signals a warning that in future the defence of non-pathological incapacity will be scrutinized most carefully. Persons who may in the past have been fortunate enough to be acquitted in circumstances where they killed someone who had insulted them, will now find the courts ready to evaluate against objective standards of acceptable behaviour, the evidence adduced by them to support their defence of provocation/emotional stress”.⁴¹³ Therefore, such an inference could lead the court to disbelieving the accused when she says that she lacked capacity or acted involuntarily.⁴¹⁴

⁴¹⁰ S v Eadie supra (n 360) at par [64].

⁴¹¹ S v Eadie supra (n 360) at par [23].

⁴¹² S v Eadie supra (n 360).

⁴¹³ Burchell supra (n 396) at 28; Hooror supra (n 242) 150.

⁴¹⁴ Burchell supra (n 396) at 29 has noted that a comprehensive examination of the judicial precedent on provocation supports the view that the essence of the Eadie supra (n 360) judgment challenges only those few judgments of the courts in the past where too much deference has been paid to the accused’s version of the facts and not enough weight is given to a broader evaluation of this evidence in light of surrounding circumstances. Cf Burchell supra (n 396) n 19 where Burchell goes on to discuss this point: for instance, Navsa JA is critical of the fact that, in one of the first instances where a South African court completely acquitted an accused who raised the defence of provocation (S v Arnold supra (n 313), the judge “readily accepted” the accused’s ipse dixit, and did not give enough weight to his “focused and goal-directed behaviour before, during and after the event” (at par [46]). Although Navsa JA found that the case of S v Nursingh (n 339) (a High Court judgment acquitting an accused who had alleged that he had fatally shot his mother and grandparents as a consequence of severe, ongoing emotional stress resulting from sexual abuse) left him with a “sense of disquiet”, he could nevertheless explain the decision in terms of a combination of factors that were “extreme and unusual” (at par [48]). In S v Moses supra (n 347) (where an accused was acquitted of

Burchell submits that “it would be easy to focus on the objective norms and conclude that the test of capacity is now an objective one. Rather, the author is of the view that this passage refers to a process of inference, from what the accused’s mental processes ought to have been, to what they in fact were, that is crucial”.⁴¹⁵

In Eadie⁴¹⁶ Navsa JA goes on to explain why he thinks the accused “should be held responsible;” namely, the accused’s “goal-directed and focused behaviour, before, during and after the incident in question as indicating presence of mind,” and has the intention to be “violent and destructive”.⁴¹⁷

The Judge of Appeal’s conclusion indicates that the objective standards came into play when determining whether the accused’s *ipse dixit* is to be believed:

“How can we believe him when he says that his directed and planned behaviour was suddenly interrupted by a loss of control over his physical actions when those actions are consistent with the destructive path he set out on when he was admittedly conscious?”⁴¹⁸

In terms of such an approach it would follow that the court would eliminate the second element of the capacity test, namely the enquiry into conative capacity. However,

killing a gay partner who, after engaging in unprotected anal intercourse with the accused, had announced that he had AIDS was “[l]ess easy to explain”, per Navsa JA at par [49]).

⁴¹⁵ Burchell supra (n 396) 30.

⁴¹⁶ S v Eadie supra (n 360).

⁴¹⁷ Ibid at par [66].

⁴¹⁸ Ibid. Burchell supra (n 396) at 31 n 27 notes that this passage does allude to the *actio libera in causa* rule, whereby, if prior voluntary conduct, accompanied by the attendant mens rea and leading to the unlawful consequence exists, then liability can result even if at the time the consequence comes about, the conduct is technically involuntary.

Navsa JA maintained that the enquiry should remain, and that “whilst it may be difficult to envisage a situation where a person is able to distinguish between right and wrong, but is unable to control her actions, this is notionally possible”.⁴¹⁹

Burchell notes the reasons why he thinks the test of capacity remains subjective:

“otherwise, Navsa JA would have had to specifically over-rule all of the provocation cases since the early 1980’s including not only those cases where the defence of non-pathological incapacity (tested subjectively succeeded) but also those where the defence failed.”⁴²⁰

Burchell is of the view that a realistic way for a court to “rein in the application of the purely subjective concept of capacity, short of engaging in overt judicial legislation to make the test objective in nature, would be to fall back on the drawing of legitimate inferences of the presence or absence of subjectively-assessed capacity from objective circumstances.”⁴²¹ The author goes on to note the potential advantage of adopting such an approach:

“The potential problem with the relentlessly subjective approach to provocation is that it could be interpreted to reverse the appropriate rule so that it becomes – provocation of a sufficient degree will exclude capacity but in exceptional circumstances it will not. The drawing of legitimate inferences (using objective criteria) helps to place the rule in its true perspective: every person is presumed to act voluntarily and should control their emotions but, in very special circumstances, a person who succumbs to persistent emotional

⁴¹⁹ S v Eadie supra (n 360) at par [59].

⁴²⁰ Burchell supra (n 396) 31.

⁴²¹ Ibid.

abuse might escape liability by leading evidence of non-pathological incapacity or automatism, sufficient to raise a reasonable doubt as to the existence of criminal liability. This evidence would have to be tested, at the outset, against the court's expectations drawn from experience."⁴²²

Burchell goes on to note that:

"Implicit in the judgment of Navsa JA is a distinction between instances of provocation (or emotional stress) that have built up over a period of some time and those instances where a sudden flare-up results from particular insulting conduct. Naturally, gradual disintegration of powers of self-control is more condonable than a sudden flare-up of temper kills someone, would have to be sufficiently cogent create a reasonable doubt in his favour, before a court would consider acquitting him. Furthermore, the court would be entitled to factor into the sequence of inferential reasoning, leading to its conclusion on the credibility of the accused's evidence, an evaluation of the accused's version against judicial expectations of behaviour."⁴²³

Such an approach would be beneficial for battered women:

"For instance, in an exceptional case of reaching to persistent and brutal spousal abuse over a fairly lengthy period of time, an inference could more readily be drawn that capacity was lacking or at least not proven beyond reasonable doubt, than would be the case in regard to a person who claimed to have suddenly and unexpectedly flared up and assaulted another who had insulted him."⁴²⁴

⁴²² Burchell supra (n 396) 33; Hoctor supra (n 242) 151. Burchell supra (n 396) at 34 notes a further advantage of such an approach: "Inferential reasoning from the facts, as opposed to altering the test of capacity to reflect objectivity, allows the court to treat every defence in its own special way. For instance, X who kills Y but raises the defence that he genuinely, albeit mistakenly, believed that he was about to be attacked by Y, who had approached him with an upraised baseball bat, might more readily be believed than X who claims he lost control and killed Y, who had insulted him. Of course, inferential reasoning is resorted to most frequently where there is an absence of direct evidence and a reliance on circumstantial evidence. Evidence of a state of a person's mind or his or her mental capacity is most frequently circumstantial, or not able to be substantiated by direct evidence, apart from that of the person himself or herself. In fact, psychiatric or psychological evidence as to state of mind or criminal capacity is notoriously unreliable, because it is essentially based purely on the accused's ipse dixit. Hence, the need for inferential reasoning."

⁴²³ Burchell supra (n 396) 29.

⁴²⁴ Burchell supra (n 396) 29.

The practical result of drawing legitimate inferences of the presence or absence of subjectively-assessed capacity from objective circumstances is therefore not only to “rein in the application of the purely subjective concept of capacity,”⁴²⁵ but also to counteract the inherent dangers in accepting the ipse dixit of the accused.⁴²⁶

Disquiet with the practical effect of providing an accused with an acquittal has led to theorists suggesting a move towards an objective or normative assessment of capacity and intention:

“Was Navsa JA in Eadie, in fact, simply unearthing an objective aspect of the capacity enquiry, which had always been implicit in the concept of capacity but not until now judicially acknowledged?”⁴²⁷

Burchell has thus proposed a new test for conative capacity, consisting of both a subjective and objective criterion:

“If it is correct to regard the second leg of the capacity enquiry as the capacity to act differently then this enquiry must be an evaluation of the accused’s conduct against some other standard of conduct, extrinsic to the accused himself or herself. In other words, the test for capacity must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused’s conduct in the circumstances and against the standard of persons falling in a particular grouping.”⁴²⁸

⁴²⁵ Burchell supra (n 396) 33; Hoctor supra (n 242) 150-151.

⁴²⁶ Burchell supra (n 396) 34. See also Hoctor supra (n 242) at n 323 notes that Burchell supra (n 396) at 30 refers to cases such as Henry supra (n 363) and Kok supra (n 364) in explaining that this approach relates to the inherently objective process of proof, as opposed to the introduction of an objective test.

⁴²⁷ Burchell supra (n 396) at 26; 39.

⁴²⁸ Hoctor supra (n 242) at 155, discussing Burchell supra (n 396) 40. In respect of the Eadie supra (n 360) cases discussion of the importance of moving away from a subjective approach to fault see 263-264 supra. This discussion is perhaps what prompted Burchell supra (n 396) to come to the conclusion that an objective test be introduced to criminal capacity.

Such an approach, (even in cases where intention is the fault element required), would be closer to the Rumpff Commission approach (that severe emotional tension or impulsiveness should not be regarded as excluding volitional control) and the Roman-Dutch Law. This would lead to some of the finer distinctions drawn in English law.⁴²⁹

A move towards a more objective approach to establish loss of control would not only mark a turning point in the courts emphasis on subjectivity, but would also ensure a better balance between subjectivity in the construction of criminal liability.⁴³⁰ Burchell elucidates the purpose of such an approach:

“This approach might also provide an antidote for the untenable, and yet arguably logical, conclusion reached in certain South African judgments that extreme provocation (or even emotional distress) can serve to exclude criminal capacity. Surely everyone is capable of restraining his or her emotions and so provocation should not be permitted to exclude criminal capacity? However, if provocation impairs the actual exercise of free will to such an extent that a reasonable person in the circumstances would not have been able to control his emotions, then the accused could be acquitted.”⁴³¹

The practical result of a move towards a more objective approach is that:

⁴²⁹ Burchell and Milton supra (n 26) 293.

⁴³⁰ Hoctor supra (n 242) 158, citing Snyman supra (n 106) 22. See also Burchell “Criminal justice at the crossroads” (2002) South African Law Journal 579 at 587 n 44; 592 n 73 who viewed the Eadie supra (n 360) judgment as “bold” and “most encouraging” for its emphasis on the “objective norms of behaviour as a barometer against which to test...lack of criminal capacity.”

⁴³¹ Hoctor supra (n 242) at 148, citing Burchell “Heroes, poltroons and persons of reasonable fortitude-juristic perceptions on killing under compulsion” (1988) South African Journal of Criminal Justice 18 at 30. Cf Snyman “Is there such a defence in our criminal law as ‘emotional stress?’” (1985) South African Law Journal 240 at 250: “There is a real danger that excessive emphasis on the subjective approach may undermine the very nature of criminal law as a set of norms applicable to everybody in society: the ignorant are judged by their own subjective view of what the law is and this results in their being treated more leniently than those other unfortunate members of society who happen to know the law.” See also Speirs supra (n 354) at 79 (citing Louw) who suggests, that it results in punishment losing its reformatory and deterrent functions because an unstable criminal is no longer required to learn how to control his impulses.”

“capacity would seem to remain in principle, subjectively tested but the practical implementation of this test would accommodate the reality that the policy of the law, at least in regard to provoked killings, must be one of reasonable restraint.”⁴³²

This approach would also invoke a constitutional protection of dignity “by emphasizing norms of reasonable and level headed behaviour, and could further the respectful treatment of others, especially in limiting the scope of legitimate force permissible against even the provoker.”⁴³³ However, theorists such as Speirs notes that “by insisting on objective criteria in the capacity inquiry, the battered woman’s defence is made weaker than when taking a purely subjective approach.”⁴³⁴ In addition, the almost

⁴³² Burchell supra (n 396) 28. As Burchell supra (n 201) at 201 further explains these policy concerns: “Since it is a fundamental principle of modern systems of criminal justice that vengeance for harm suffered must be sought through the public criminal process and not by personal self-help, the criminal law is precluded from admitting the provocation should be a justification for unlawful conduct.”

⁴³³ Burchell supra (n 396) 38.

⁴³⁴ Speirs supra (n 354) 73-74. The psychiatric skepticism regarding the defence of non-pathological incapacity is illustrated in S v Kensley supra (n 408) at 652I-653B. One of the problems could be that it would be difficult for the court to determine which characteristics to take into account in the battered woman’s case. For a criticism of the objective test see chapter 5 at 338-350. Furthermore, the case of S v Ferreira supra (n 141) indicates that the courts have avoided the use of the term “battered woman syndrome” although the accused’s appeal was based mainly on the abuse that she suffered at the hands of the deceased prior to the contract killing. The case did however, refer with approval to Walker’s theory on “battered woman syndrome” called “the Cycle Theory of Violence”. For a discussion of this theory see chapter 1 at 2-4. In S v Engelbrecht supra (n 143) at para’s [342] and [343] at 132H-I the court accepted that fact that domestic violence, in all manifestations of abuse, was intended to and could establish a pattern of coercive control over the abused woman, such control being exerted both during the instances of active or passive abuse as well as the periods when domestic violence was in abeyance. There was compelling justification for focusing, not only on the specific form which the abuse could have taken over time and in particular circumstances, but pertinently on the impact of abuse upon the psyche, make-up and entire world-view of an abused woman. Thus as a result of Ferreira supra (n 141) and Engelbrecht supra (n 143) cases the courts while taking cognizance of the battered woman’s circumstances, have not explicitly recognized “battered woman syndrome”. While courts in other jurisdictions have acknowledged a battered woman’s defence based on “battered woman syndrome” (see for example chapter 4 American law at 204-206 infra), it is submitted that South African courts have not followed this trend since they do not really believe that the battered woman’s circumstances are sufficient to cause her to lack capacity. Cf Engelbrecht supra (n 143) at par [456] where the court held that: “it has not been argued that she (the accused) does not have criminal capacity. However, relevant for purposes of sentencing, the State has accepted the opinion of its own psychiatrist witness that she was, at the time of the killing, suffering from diminished criminal capacity”. Further problems would face the court should they accept “battered woman syndrome”: cf Ferreira supra (n 141) at 466B-C: “The court also held that the accused’s decision to have the deceased killed by persons hired for that purpose instead of leaving him, was explained by the expert witnesses, ‘a social worker’ and a gender co-coordinator as being in keeping with what experience and research has indicated to occur with abused women”. The problem with a generalization on the way battered women respond to battering is that they do not necessarily all respond in the same way.

‘cautionary rule’ approach taken to evidence given by her and by skeptical psychiatrists makes her defence seem completely hopelessness”.⁴³⁵

One of the more recent cases following in the wake of Eadie⁴³⁶ and dealing with the problematic issue of determining whether the accused acted lacked criminal capacity is that of S v Marx.⁴³⁷ The area of disagreement in this case is the contention by the defence that the murder was committed by the accused while in a state of “diminished responsibility”. In his statement, the accused admits firing the shots that killed his wife, but alleges at the time of the shooting that he suffered “very strongly from serious diminished responsibility” caused by months of taunting swearing and humiliation and that his marriage with the deceased was falling apart because of the deceased’s extra-

⁴³⁵ Speirs supra (n 354) 74.

⁴³⁶ S v Eadie supra (n 360).

⁴³⁷ S v Marx supra (n 108). In this case the accused was convicted of murdering his wife, Marieta Marx, by shooting her with a .38 special caliber revolver. On the day of the murder, the deceased came back from work and was irritable and aggressive, rude and abusive towards the accused. She confronted the accused with her intention to get divorced and acknowledged that she had slept with Basson. This left the accused depressed and he informed the deceased that he may commit suicide. He pled with the deceased to reconsider her decision to divorce him. The response from the deceased was that of encouraging him to commit suicide and to forget about her. At one stage he swallowed a small amount of Temic, a poisonous substance used for growing potatoes. The deceased, on realizing that he had taken the substance, called Mrs. Terblanche, a neighbour, to assist him. Initially he prayed to God not to punish the deceased for what she was doing to him. Later he changed, praying that God should punish her for her infidelity. He could then not perceive any indication of her repenting. The accused began to feel drowsy but was determined to remain awake so as to check whether the deceased would not leave and visit her lover during the night (at par [24]). He then fell asleep. When he awoke it was 3 am and when he went to check on his wife, she was dressed in a tracksuit. He asked for a reconciliation but was met with abuse. He left the room a number of times and repeated this procedure (at par [26]). After his approaches to the deceased were rejected “he remembered seeing his revolver lying on his bed and he recalled thinking that he would then commit suicide.” The accused remembers kneeling on the floor adjacent to the end of her bed with the weapon in his hand. The wife encouraged him to shoot himself (at par [27]). His memory was interrupted. His next memory was a vague recollection of feeling as if someone was pulling the revolver from his head. The accused interpreted that episode to mean that God was stopping him from committing suicide. According to the defence psychiatrists report, the next fragment of memory was of him standing on the left hand side of the bed and he saw Mia (one of his daughters) sleeping in the deceased’s bed and Chante-lee (another daughter) in a cot adjacent to the bed. His last fragment of memory was seeing a flash from the gun and hearing the first shot. He does not now whether that was personal recall, part of a dram or reconstruction. He was unable to recall the subsequent two shots. When he came to his senses both children had woken up from their sleep and they asked what was happening. He responded that he did not know. He took them out of the house without them releasing their mother was no longer alive (at 502).

marital affair with Mr. Basson. In the words of Mr. Meyer, a clinical psychologist, who testified in support of the defence:

“Based on the accused’s reconstruction of his functioning at the time of the crime, his mental state would have affected his cognitive, emotional and conative functioning to a point where under extreme provocation, it is probable that his judgment would have been impaired. However, just prior to the offence, he appears to have been able to differentiate between right and wrong and to act in accordance therewith having attempted to rationalize with the deceased shortly prior to the fateful shooting in the early hours of 3 May 2007.”⁴³⁸

He further concluded that:

“...the examiner is of the opinion that at the time of the execution of the crime the accused was able to differentiate between right and wrong and able to act in accordance with an appreciation thereof, albeit to significantly diminished extent, owing to synergistic interaction of internal and external forces.”⁴³⁹

Currently, South African criminal law does not recognize a defence of diminished responsibility. The only point at which the courts are willing to take account of factors relating to any type of diminished responsibility is at the sentencing stage.⁴⁴⁰ Defence counsel nevertheless went on to state that previous admissions should not stand as proof of allegations against the accused,⁴⁴¹ and that if they were valid i.e. standing as proof of what they purport to say, the second leg of criminal responsibility had not been covered: that leg is to the effect that after it has been established that the accused was

⁴³⁸ S v Marx supra (n 108) at 507.

⁴³⁹ Ibid.

⁴⁴⁰ Speirs (n 354) 75. It is this author’s submission that such a defence of diminished capacity as suggested by defence counsel in S v Marx supra (n 108) should be recognized in South African law. For a discussion of how such a defence would operate, see chapter 5 at 350-366.

⁴⁴¹ According to section 113(1) of the Criminal Procedure Act 51 of 1977.

able to appreciate the unlawfulness of the act in accordance with such an appreciation. Counsel for the prosecution responded by saying that the admission by the accused of the first leg of criminal capacity, does not stand alone, it weighs together with and against some other pieces of evidence before the court, for instance, that of the clinical psychologist. Sangoni J went on to quote the remarks made by Navsa JA in S v Eadie,⁴⁴² which he was of the view adequately addressed the issue:

“I agree with Ronald Louw that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation. Decisions of this court make that clear. I am, however, not persuaded that the second leg of the test expounded in Laubscher’s case should fall away. It appears logical that it has been shown that an accused has the ability to appreciate the difference between the right and wrong, in order to escape the liability, he would have to successfully raise involuntariness as a defence.”⁴⁴³

Sangoni J went on to note that the decision in Eadie⁴⁴⁴ does not make any distinction between sane automatism and non-pathological incapacity. The judge correctly noted that this decision is strongly criticized from some quarters.⁴⁴⁵ What was troubling about this decision was that the judge went on to state that the court felt itself bound by this decision and made reference to the following statement in Eadie:⁴⁴⁶

“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

⁴⁴² S v Eadie supra (n 360).

⁴⁴³ S v Marx supra (n 108) at 508, citing S v Eadie supra (n 360) par [57].

⁴⁴⁴ S v Eadie supra (n 360).

⁴⁴⁵ For example, making reference to Snyman’s supra (n 106) at 15.

⁴⁴⁶ S v Eadie supra (n 355).

criminal capacity.”⁴⁴⁷

The problem with this case is not only the fact that the court endorsed the finding in Eadie,⁴⁴⁸ but furthermore, Sangoni J held that the defence counsel did not raise a proper factual foundation for the defence of sane automatism which it alleged that the accused acted under. However, prior to this, the defence counsel asserted that the accused was acting in a state of diminished responsibility. Surely, these two issues are completely different and relate to different issues in law: in the case of automatism, the issue is unlawfulness and regarding diminished responsibility, the issue goes to culpability, which is dealt with in sentencing. Nevertheless, Sangoni J acknowledged the fact that what constitutes the core of a defence of sane automatism is the fact that the accused blacked out:

“Putting aside for a while what the clinical psychologist says about criminal capacity, he himself says he had a ‘black out’ resulting from non-pathological causes and does not know what happened. It is apparent that the said causes, whatever they are, as they are not specifically mentioned by him, emanate from emotional stress he has endured for some time. The effect is that he accepts that he acted but not voluntarily. In the heads of argument the defence contends that ‘the accused raises the defence known as sane automatism’. That is the defence relating to criminal liability (culpability) and not criminal capacity. The latter would have the leg that deals with ability to act according to his appreciation (conative function). The lack of the ability has not even been suggested in the evidence by the defence whereas it would be required to do so. Instead it has raised involuntariness as a defence. As a comment, it sounds inappropriate to plead guilty to murder with diminished responsibility, yet the accused relies on sane automatism as a defence. With either defence, the accused should lay some basis for it. If the accused does not, the general presumption of criminal capacity in favour of the State becomes decisive.”⁴⁴⁹

⁴⁴⁷ S v Marx supra (n 108) at 508, citing S v Eadie supra (n 355) at 178B.

⁴⁴⁸ For a criticism of this particular point see 81-84 above.

⁴⁴⁹ S v Marx supra (n 108) at 509.

Sangoni J noted numerous discrepancies in statements made by the accused. For instance, why would the deceased get under a blanket or get into pajamas in the first place if she intended to visit her boyfriend. The accused also stated that on the last occasion he visited the deceased's bedroom, before the shooting, he had picked up his firearm from his bed and walked with it to the deceased's room. He remembers standing on the left side of the bed where his daughter Mia was lying with deceased. The next thing he remembers was a flash from the revolver and he heard a shot. He does not recall the other two shots. He does not explain what triggered or could have triggered the loss of memory at that point.⁴⁵⁰ The accounts of events via the psychologist, Mr. Meyer, are very different. On this last occasion when the accused went to the room of the deceased he cannot recall whether he was carrying the weapon or not. This is a material discrepancy for a person who claims to have lost consciousness. Mr. Meyer also advises that when the accused saw the flash on the gun and heard the first shot he was unable to say whether that was a personal recall, part of a dream or a reconstruction. Having said that he was unable to recall the subsequent two shots, the question which arises is how the accused knew that he fired three shots and how he would have known that two out of the three were fired subsequently, that is after the one he heard. It also makes it difficult to conclude that it could reasonably possibly be true that the accused was not conscious of what was happening around him at the time of the shooting. It is also improbable that when seeing the flash of light from what he even then recognized as a firearm and hearing the loud bang that would not have brought him to his senses before the other shots were fired.⁴⁵¹

⁴⁵⁰ S v Marx supra (n 108) at 511.

⁴⁵¹ Ibid.

Counsel for the prosecution also leveled strong criticism at the conduct of the accused after he had regained his senses, that he acted rationally and misrepresented the position to his children, telling them that nothing had happened after they had inquired, taking them out of the room without being aware that their mother was no longer alive.

Furthermore, if the accused had serious intention to commit suicide, why only take small doses of Temic, instead of using it as an instrument to manipulate his wife into believing that he was serious when asking her to stop the divorce proceedings.⁴⁵²

Sangoni J went on to noted that “one could keep on guessing as to whether it was anger, provocation, emotional distress, fatigue and so on that resulted in the black-out. The intermittent restoration of senses during the period of shooting makes it difficult to accept that the accused was candid.”⁴⁵³

What one is left with is a very confusing case dealing with different issues. Counsel for the accused should have set out its defence as sane automatism. As Sangoni J noted, any evidence of a black-out would suggest the possibility of automatism.⁴⁵⁴ Had they set out a proper factual foundation for the case, they would have realized that the evidence they relied on did not adequately support this defence and therefore should have plead non-pathological incapacity instead. Whether the evidence of diminished responsibility was meant to be introduced as part of a defence of non-pathological incapacity is unclear. In this respect it is significant that the accused did not at any point in his testimony say that he was “under acute emotional distress and subjective

⁴⁵² Ibid.

⁴⁵³ *S v Marx* supra (n 108) 512.

⁴⁵⁴ Ibid.

provocation” nor did he allege that he acted in a “state of rage.” The accused said nothing about rage and provocation nor does he specifically link the emotional stress he apparently suffered from to his loss of memory or loss of self-control.

As to the contention that defence counsel was trying to introduce a new defence based on diminished responsibility, it would appear that this is indeed the case: while diminished responsibility is hardly a matter related to conviction, the defence insisted that the finding regarding this issue be decided at verdict stage. While Sangoni J is correct in the assertion that the accused did not act in a state of automatism, it is submitted that the court “passed the buck” in attempting to answer the difficult question as to what amounts to lost self-control by simply stating that it was bound by the decision of Eadie.⁴⁵⁵ With such confusing case law in its wake, it is not surprising that the court did not come to any other conclusion. The Eadie⁴⁵⁶ decision is fraught with inconsistencies. For instance, there are statements in this case implying that the conative leg of the test for criminal capacity is unnecessary as it amounts to the same as the test to determine the presence of a voluntary act.⁴⁵⁷ Other statements again amount to the exact opposite, namely that the second leg of the test to determine criminal incapacity is taken into consideration.⁴⁵⁸ Furthermore, in one passage the court alleges that the “phenomenon of sane people temporarily losing cognitive control is rare.”⁴⁵⁹ In South African law there is no such thing as cognitive control. Control is by definition

⁴⁵⁵ S v Eadie supra (n 360).

⁴⁵⁶ S v Eadie supra (n 360).

⁴⁵⁷ *Ibid* at par [57]. For this quote see n 382.

⁴⁵⁸ S v Eadie supra (n 360) at par [57]. The judge was not persuaded that the second leg of the test should fall away.

⁴⁵⁹ S v Eadie supra (n 360) at par [65].

refers to the conative leg of the test for criminal capacity, and not to the cognitive leg.⁴⁶⁰ Elsewhere, Navsa JA agrees with a person who declares that “the only circumstance in which one could lose control is where one’s cognitive functions are absent.”⁴⁶¹ This is not correct since it is one’s conative functions that fall apart when control is lost, not cognitive functions.⁴⁶² To quote Snyman “one cannot help but wonder whether [South African] court[s] in fact know what the concept criminal capacity really means.”⁴⁶³

2.5 Conclusion

One of the justification grounds excluding unlawfulness is that of self-defence. It is an extraordinary measure which permits the victim of an unlawful attack to take the law into her own hands where there are no other reasonable options available to her at the time of the attack but to act on her own initiative in order to avert or minimize the danger faced. For self-defence to be successfully raised, certain conditions need to be met in relation to both the attack, and the defensive measures taken. Of relevance is the requirement that the threat must be imminent or must have commenced. Therefore, an individual may not respond to an attack once it has ceased nor may one defend oneself in anticipation of being attacked at some future point. In terms of South African law, a battered woman who is being attacked by her abuser may defend herself against such an attack using any reasonable means necessary. The problem with this requirement is that in most cases abused women often defend themselves after the attack was

⁴⁶⁰ Snyman supra (n 25) 168.

⁴⁶¹ S v Eadie supra (n 360) at par [43].

⁴⁶² Snyman supra (n 25) 168.

⁴⁶³ Ibid (own emphasis).

completed against her.⁴⁶⁴ This conduct opens itself up to being construed as an act of vengeance. Another difficult hurdle that a battered woman faces in self-defence claims relate to the objective components of the defence i.e. the reasonableness of the accused's conduct is judged from the perspective of a reasonable person in the same circumstances.⁴⁶⁵

The enquiry into reasonableness in the context of unlawfulness can accommodate only the generic facts or the physical act, assessed in terms of the constitutional rights, where the "reasonable man" test has become increasingly subjectivized to take into account a number of the personal characteristics of the accused. While it is important to accept the need for flexibility in the area of the justification ground,⁴⁶⁶ and although this makes objectivity more elusive, it is clear that there needs to be some sort of limit. This is one of the important questions which needs to be addressed in respect of battered women and self-defence: whether the limits of the objective test have been exceeded by taking her personal circumstances into account.⁴⁶⁷

By taking such subjective factors into account, it has placed more emphasis on battered women relying on putative self-defence. In terms of current South African law, if a battered woman is not able to successfully plead self-defence due to the fact that the court found that her conduct was unlawful, objectively assessed,⁴⁶⁸ then she may be

⁴⁶⁴ Flack supra (n 97) 81.

⁴⁶⁵ Ibid.

⁴⁶⁶ Reddi supra (n 1) 270.

⁴⁶⁷ Reddi supra (n 1) 269.

⁴⁶⁸ S v De Oliviera supra (n 141).

acquitted on the basis of putative private defence, which is subjectively assessed.⁴⁶⁹ In S v De Oliveira⁴⁷⁰ it was held that such a defence will be of assistance to an accused “who honestly believes his life...[is] in danger, but objectively viewed [it is] not.”⁴⁷¹

This raises two points. Firstly, the issue here relates not to lawfulness but culpability.⁴⁷² Secondly, if the abused woman does not have the requisite intention to commit murder, she will be acquitted. However, as Reddi notes, the abused woman will not necessarily escape liability but could be convicted on the basis of culpable homicide. This is because negligence not intention is the fault element required in this case. Evidence of the “cyclical nature of the abuse”⁴⁷³ as well as the woman’s failed attempts at leaving her abuser would be highly relevant to inform putative self-defence.⁴⁷⁴

In respect of provocation, Roman and Roman-Dutch law did not regard anger, jealousy or other emotions as an excuse for criminal conduct, but only as a factor which might mitigate sentence, if the anger was justified by provocation. South African law with its parent system in Roman-Dutch law might have followed this lead had it not been for the introduction of the mandatory death penalty for murder in 1917.⁴⁷⁵ In 1925 as a result of the Transkeian Penal Code 1887, it envisaged a type of partial excuse: even if killing was intentional, homicide which would otherwise be murder maybe reduced to

⁴⁶⁹ Ibid at 163I-J.

⁴⁷⁰ S v De Oliveira supra (n 141).

⁴⁷¹ Ibid at 163I-J.

⁴⁷² Ibid.

⁴⁷³ Reddi supra (n 1) 275.

⁴⁷⁴ See n 161.

⁴⁷⁵ Burchell supra (n 29) 427.

culpable homicide.⁴⁷⁶ The test for provocation was thus objective.⁴⁷⁷ By 1949 it was held that provocation was not a defence but a special kind of material from which in association with the rest of the evidence the court should decide whether the accused had acted involuntary or without intent to kill. This introduced a subjective test for provocation.⁴⁷⁸ But a number of crucial issues remained unresolved; could intense provocation or emotional stress serve to exclude criminal capacity or voluntary conduct. After the decision in Chretien,⁴⁷⁹ the question arose, if severe intoxication could exclude those basic elements of liability then could it not also exclude provocation or emotional stress. At this point, the notion of criminal capacity came to the fore. This notion was unknown in South African common law and was adopted from Continental Legal systems, specifically Germany.

This notion took hold with the Rumpff Commission of Inquiry into the Responsibility of Deranged Persons and Related Matters, the recommendations of which gave rise to the provision of section 78 (1) of the Criminal Procedure Act.⁴⁸⁰ S v Mahlinza⁴⁸¹ set out that the criminal capacity of an actor is essential requirement necessary to establish criminal liability.

Criminal capacity consists of a cognitive component i.e. ability to distinguish between right and wrong and conative capacity i.e. the ability to act in accordance with the

⁴⁷⁶ Ibid.

⁴⁷⁷ See 59-60.

⁴⁷⁸ R v Thibani supra (n 258) at 731.

⁴⁷⁹ S v Chretien supra (n 97).

⁴⁸⁰ Act 51 of 1977.

⁴⁸¹ S v Mahlinza supra (n 289).

distinction. If either was lacking no liability would ensue.⁴⁸² In S v Van Vuuren,⁴⁸³ the court expressed in unequivocal terms that the accused could not be held liable where the failure to comprehend what he is doing is attributable to a combination of factors such as provocation or emotional stress.⁴⁸⁴

The very idea of allowing provocation to function as a defence excluding an accused's criminal liability is inherently controversial. From a moral and ethical perspective people are expected to control themselves, even under provocation or emotional stress.⁴⁸⁵ To allow it to function as a complete defence as opposed to mitigating factor means that it gives credence to the belief that retaliation is justified in the eyes of the law and this is the very thing criminal law guards against. Despite the well established nature of the defence of non-pathological incapacity, the law has been thrown into flux not only the Supreme Court of Appeal decision of S v Eadie⁴⁸⁶ and S v Marx.⁴⁸⁷ The Eadie⁴⁸⁸ case constituted a serious erosion of the notion of criminal capacity, with a concomitant "ripple effect" on other topics within the general principles of criminal law.⁴⁸⁹ The question this case has highlighted is whether the boundaries of the defence have been inappropriately extended.⁴⁹⁰ This is so since the court held not only that there

⁴⁸² Ibid at 414G-H.

⁴⁸³ S v Van Vuuren supra (n 26).

⁴⁸⁴ Ibid at 17G-H.

⁴⁸⁵ S v Eadie supra (n 360) at par [60].

⁴⁸⁶ S v Eadie supra (n 360).

⁴⁸⁷ S v Marx supra (n 108).

⁴⁸⁸ S v Eadie supra (n 360).

⁴⁸⁹ Snyman supra (n 106) 22.

⁴⁹⁰ S v Eadie supra (n 355) at par [3].

is no distinction between the defence of automatism and non-pathological incapacity,⁴⁹¹ and that it would have to be established that the accused acted involuntarily in order for her defence of lack of capacity to prevail,⁴⁹² but furthermore held that the court should assess the accused persons evidence about his state of mind by weighing it against his actions and surrounding circumstances, thereby introducing an objective test into capacity, which is otherwise subjectively assessed.⁴⁹³

Should non-pathological incapacity be equated with automatism, established precedent and other cases of non-pathological incapacity would have to be revised by implication, and this would have serious implications for the principle of legality and thereby restrict the scope of the defence for battered woman.⁴⁹⁴

⁴⁹¹ S v Eadie supra (n 360) at par [57].

⁴⁹² Ibid.

⁴⁹³ S v Eadie supra (n 360) at par [64].

⁴⁹⁴ Burchell supra (n 396) 31.

CHAPTER 3**THE BATTERED WOMAN AND ENGLISH LAW****3. Introduction**

A successful plea of self-defence is the legal acknowledgment that the accused's conduct was justified i.e. that is taken to have been correct under the circumstances. The focus is not on the personality of the accused but rather on her actions. The problem is that an examination of case law relating to self-defence suggests that very few battered women who kill their abusers have been able to successfully rely on self-defence. Therefore, if aspects of the doctrine of self-defence are examined from the standpoint of the battered woman, then certain questions emerge. These relate to the attack, the force used in response, and the requirement of reasonableness. It is the purpose of this chapter to examine each element of self-defence, focusing on the development of case law in this regard, and whether such law takes into account the experiences of battered women. Such an examination will answer the question as to whether any alteration or extension of the defence is required, or rather a rethinking of the way in which the requirement that the abused woman's use of force be reasonable is applied to cases other than those involving the traditional model of a once-off adversarial meeting between strangers.

Furthermore, it is necessary to offer an account of the partial defence of provocation as it operates in English law. Following an outline of the distinction between manslaughter and its history, the main problems surrounding the doctrine of provocation and how such a defence would be applied to battered women is highlighted as they emerge from the discussion of important cases. The current test for provocation will also be examined. The problem of cumulative provocation will also be examined and the

possibility of setting up a combined defence of provocation and diminished responsibility when evidence suggests that the abused woman was suffering from an abnormality of mind.

3.1 Self-Defence

3.1.1 Development of the defence

In the 16th century, theorists such as Coke were of the view that self-defence applied to voluntary killings which were done as a result of an “inevitable cause”. Such killings did not constitute a felony.⁴⁹⁵ An accused who claimed self-defence, was required to retreat safely, if possible. The exception to this rule was if a third party who was killed, offered to rob or kill for the accused.⁴⁹⁶ Coke did not recognize a justification defence of private self-defence as it is currently understood. He noted that an accused could be justified in killing another person only in circumstances that constituted a case-specific expression of the government’s law enforcement authority. Killings which were committed in self-defence were still subject to forfeiture of goods to the crown.⁴⁹⁷ Coke held that killings in self-defence of a third party who offered to murder or rob for the accused did not require forfeiture.⁴⁹⁸ The reason for this was that such killing advanced a law enforcement purpose and not because it was justified by private self-defence.⁴⁹⁹

In 1676, Hale noted acts that were necessary for maintaining peace in the kingdom:

⁴⁹⁵ Coke The Third Part of the Institutes of the Laws of England (1979) (reprint of 1644 edition) 55.

⁴⁹⁶ Coke supra (n 495) 56.

⁴⁹⁷ As Coke supra (n 495) at 56 notes: “And yet such a precious regard hath the law of the life of a man, though the cause was inevitable, that at the Common law he would have suffered death, ...yet he shall forfeit all his goods and chattels”.

⁴⁹⁸ Coke supra (n 495) 56.

⁴⁹⁹ Ibid.

those done where there was no necessity to perform such acts and which were felonies, and those acts based on self-preservation.⁵⁰⁰ He drew a distinction between the two, the former provided a public benefit defensive theory based on justification, while the latter a private necessity defensive theory based on excuse.⁵⁰¹ Hale argued that pursuant to the public benefit theory, where a person is indicted on felony charges and flees from arrest, killing him is not considered a felony.⁵⁰² Killing a resisting felon would also be justified under the public benefit theory. This is so since even a private individual doing this would be viewed as acting on behalf of the state.⁵⁰³ But in contrast, while private necessity also excused an accused from criminal liability, when relying on this defence, the accused could still be required to forfeit goods as a result of the killing. This was not the case with killings which were justified as a public benefit.⁵⁰⁴ Furthermore, those claiming private necessity had to retreat, if safe to do so, from the imminent attack.⁵⁰⁵

In 1765 Blackstone distinguished between justification and excuse in the law of homicide.⁵⁰⁶ He held that homicide was divided into three groups: justified, excused and felonious.⁵⁰⁷ Homicide was justified if it was committed due to some unavoidable necessity. Furthermore, it had to be without any will, intention or desire and without

⁵⁰⁰ Hale The History of the Pleas of Crown Vol 1 (1971) (reprint of 1736 edition) 53.

⁵⁰¹ Hale supra (n 500) 478.

⁵⁰² Hale supra (n 500) 489.

⁵⁰³ Hale supra (n 500) 489-492.

⁵⁰⁴ Hale supra (n 500) 478.

⁵⁰⁵ Hale supra (n 500) 481. As Hale supra (n 500) 481 notes: "This is so since the king and his laws are *vindices injuriarum* and private persons are not trusted to take capital revenge on one another". For a general discussion of this requirement see Hale supra (n 500) at pages 479-485.

⁵⁰⁶ Blackstone Commentaries on the Laws of England (1979) (reprint of 1765 edition) 177.

⁵⁰⁷ *Ibid.*

inadvertence or negligence and therefore without any blame.⁵⁰⁸ Blackstone went on to separate justifiable homicide into those that were authorized by the law, and those that were justified by permission rather than the command of the law.⁵⁰⁹

Homicides that were authorized included the execution of criminals and the killing of individuals who resisted arrest or assaulted law enforcement officers.⁵¹⁰ In other types of cases, the killing was justified because the law permitted rather than commanded it. Such killings were allowed for the following reasons: the advancement of public justice, or where it is committed for the prevention of some horrific crime.⁵¹¹ Blackstone noted that a uniform principle which ran through the law was that where a crime (which was capital) was to be committed by force, it was lawful for an individual to repel such force by causing the death of the attacker.⁵¹²

Blackstone was of the view that justifiable and excusable homicide differed. In the case of excuse, there was a degree of fault, although it was trivial. The law excludes guilt from a felony in such a case. However, Blackstone noted that in strictness, it was deserving of some degree of punishment.⁵¹³ Examples of excusable homicide included misadventure and self-defence.⁵¹⁴ He held that in all cases of accidental death the accused must have had fault on his part. Consistent with this reasoning, excusing self-

⁵⁰⁸ Blackstone *supra* (n 506) 178

⁵⁰⁹ Blackstone *supra* (n 506) 179.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*

⁵¹² Blackstone *supra* (n 506) 181.

⁵¹³ Blackstone *supra* (n 506) 182.

⁵¹⁴ *Ibid.*

defence was accorded to an individual who killed another defensively during an altercation, rather than the justification doctrine of private necessity, since in an altercation, both parties may and usually have some degree of fault, and for this reason would not hold the survivor entirely guilt-free.⁵¹⁵

Blackstone classified self-defence as a form of excuse rather than justification against an innocent aggressor. He was of the view that when such an aggressor unjustly threatened another person's life, the universal principle of self-preservation which prompts every person to save his own life rather than save another person's makes it an excusable though unavoidable necessity.⁵¹⁶

Force that caused injury, death or damage to property, could be justified or excused since the force used was reasonable in defence of certain public or private interests. Private defence was a general defence to any crime of which the use of force is an element or which is alleged to have been committed by the use of force.⁵¹⁷ The burden of disproving claims of private defence rested with the prosecution.⁵¹⁸ The law was found in a variety of sources. Defence of person or acting in defence of a third party, is still regulated by the common law.⁵¹⁹

The general principle is that the law allows the accused to use force as is objectively

⁵¹⁵ Blackstone supra (n 506) 187.

⁵¹⁶ Blackstone supra (n 506) 186.

⁵¹⁷ Ormerod supra (n 41) 329.

⁵¹⁸ The judge must give a clear direction on this issue. See O'Brien [2004] EWCA Crim 2900.

⁵¹⁹ Defence of property is regulated by the Criminal Damage Act 1971, and arrest and the prevention of crime by section 3 of the Criminal Law Act 1967.

reasonable in the circumstances as she believes them to be.⁵²⁰ Further, the accused's belief in the need to use force is subjectively assessed while the reasonableness of the accused's response and the amount of force used are objectively assessed on the facts as the accused believed them to be. The duty to retreat is a factor which is taken into account in establishing whether the use of force was reasonable. It is now necessary to consider these factors in detail.

3.2 Test for self-defence

Section 3 of the Criminal Law Act of 1967 regulates self-defence previously governed by common law.⁵²¹ It states:

“(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of common law on the question when force used for a purpose mentioned in the subsection is justified by that purposes.”

⁵²⁰ Ormerod supra (n 41) at 329 notes: “If the accused believed that she was being attacked with a deadly weapon and she used only such force as was reasonable to repel such an attack, she has a defence to any charge of an offence arising out of this use of that force. It is immaterial that she was mistaken and unreasonably mistaken”.

⁵²¹ As regards self-defence, defence of others and defence of property, the common-law defence survives only to the extent that it is not incompatible with the statutory defence. However in cases involving putative or mistaken self-defence, or where the aggressor is excusable, only the common-law defence will apply, as in these cases the actor cannot be said to be acting in the prevention of the crime. In English law a reasonable person test applied. See R v Rose: (1884) Cox CC 540: “If you think, having regard to the evidence, and drawing fair and proper inferences from it, that the prisoner at the bar acted without vindictive feelings towards his father when he fired the shot, if you think that at the time he fired that shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him, from the consequences of the homicide” (at 541-542). See also R v Smith (1937) 8 Car P 158; R v Weston (1879) Cox CC 346 351; R v Fennel 1970 3 All ER 215 (CA) 217.

The question, “was the force used reasonable in the circumstances as the accused supposed them to be,” is a question which is to be answered by the magistrates or jury.⁵²²

The authority for the proposition that the accused is to be judged on the facts as she believed them to be (subjective) is that of Gladstone Williams,⁵²³ repeatedly applied by the Court of Appeal⁵²⁴ and by the Privy Council in Beckford.⁵²⁵ In Williams⁵²⁶ it was held:

“In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury come to the conclusion that the accused believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved

⁵²² Ormerod supra (n 41) 329. For a discussion of the test utilized for self-defence in South African law see chapter 2 35-41 supra; for American law see chapter 4 at 179-180 infra (objective test), 181-185 infra (subjective standards).

⁵²³ (1984) 78 Cr App R 276, CA. But see Albert v Lavin [1981] 1 All ER 628 (QB) where Judge Hodgson held: “But in my judgment counsel’s ingenious argument for the appellant fails at an earlier stage. It does not seem, to me that the element of unlawfulness can properly be regarded as part of the definitional elements of the offence. In defining a criminal offence the word ‘unlawful’ is surely tautologous and can add nothing to its essential ingredients” (at 639). It is necessary to take note of the remarks of Donaldson LJ who agrees with this judgment: “On the law as it stands at the present it is no defence to a charge of assault that the accused honestly but mistakenly believed that circumstances existed which would have justified his action as being undertaken in reasonable self-defence unless there are reasonable grounds for that belief. However, an ill-founded but completely honest and genuine belief removes all or much of the culpability involved in the offence. It therefore provides powerful mitigation and in an appropriate case would justify a court granting an absolute discharge”.

⁵²⁴ Jackson [1985] RTR 257; Asbury [1986] Crim LR 258, CA; Fisher [1987] Crim LR 334, CA at 334-335; Beckford v R [1988] AC 130, [1987] 3 All ER 425, P. The court in Williams supra (n 523) also refers to the Criminal Law Revision Committee 14th Report, Offences Against the Person (Cmd 7844 (1980) in Pt IX, par 72 (a) which stipulates: “The Common Law defence of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person...”. See also the comment of Hodgson J in Albert v Lavin supra (n 523) (at 634) where he noted that: “(t)he law must be prepared, so far as it can do so, to look into the mind of the defendant and give him the benefit of the facts as they appeared to him”.

⁵²⁵ Beckford v R supra (n 524).

⁵²⁶ Gladstone Williams supra (n 523).

their case. If, however, the accused's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected...Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it".⁵²⁷

The court held that the statement represented the common law, as stated in Morgan⁵²⁸ and Kimber.⁵²⁹ The reasonableness of the accused's response and the amount of force used are to be assessed objectively on the facts as the accused believes them to be.⁵³⁰ The accused's belief that what she was doing was reasonable may be evidence, but no more, that it was reasonable. In Palmer⁵³¹ Lord Morris held:

"If there has been an attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his

⁵²⁷ Ibid at 415 (per Lord Lane).

⁵²⁸ [1976] AC 182. In the headnote of this case the law was set out as follows: "Since the prohibited act in an assault on a woman was the use of personal violence against the woman without her consent, the mens rea of the offence was the intent to use violence against her without her consent. It followed that the prosecution had to prove such intent, and conversely, that it was a good defence for the accused to show that he had honestly believed that the victim had consented to his actions".

⁵²⁹ [1983] 3 All ER 316, CA. Lawton LJ commented on the remark made by Hodgson J in Albert v Lavin *supra* (n 523) as follows: "We have found difficulty in agreeing with his reasoning, even though the judge seems to be accepting that belief in consent does entitle a defendant to an acquittal on a charge of assault. We cannot accept that the word 'unlawful' when used in a definition of an offence is to be regarded as 'tautologous'. In our judgment the word 'unlawful' does import an essential element into the offence. If it were not there, social life would be unbearable, because every touching would amount to a battery unless there was an evidential basis for a defence" (at 320). The position of Williams *supra* (n 523) was further cemented by Beckford v R *supra* (n 524) and R v Oatridge [1992] 94 Cr App R 367 370: "It is convenient to pause at this point to summarize the material law on self-defence ... In many cases of self-defence the following questions must be asked: (1) Was the accused under actual or threatened attack by the victim? (2) If yes, did the accused act to defend himself against this attack? (3) If yes, was his response commensurate with the degree of danger created by the attack? In answering this question allowance must of course be made for the fact that the accused has to act in the heat of the moment and cannot be expected to measure his response exactly to the danger... There are however, occasions where a further question must be asked: (1a) Even if the accused was not in fact under actual or threatened attack, did he nevertheless honestly believe that he was? ... If this question is answered in the affirmative (or more correctly, the prosecution does not establish that it should be answered in the negative), then the third question must be modified, so as to read: (3a) Was the response commensurate with the degree of risk which the accused believed to be created by the attack under which he believed himself to be?"

⁵³⁰ Owino (1996) 2Cr App 128 (A) 132.

⁵³¹ [1971] 1 All ER 1077.

necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence where the evidence makes it's raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence".⁵³²

3.3 Elements of self-defence

3.3.1 Reasonableness

The issue may arise as to what circumstances the accused genuinely believed to exist, especially where the accused's claimed belief, viewed objectively, is an unreasonable one. In such a case evidence of the accused's personal characteristics should, in principle, be admissible in so far as they bear upon his ability to be aware of, or to perceive the circumstances. But Martin (Anthony),⁵³³ decided, on policy grounds, that psychiatric evidence that the accused would have perceived the supposed circumstances as being a greater threat than would a normal person were not admissible. The court rejected an analogy with provocation⁵³⁴ since provocation applied only to murder and

⁵³² Ibid at 1078, applied in Shannon (1980) 71 Cr App R 192, [1980] Crim LR 438 and Whyte [1987] 3 All ER 416. Chan is of the view that: "This definition may not be broad enough to ensure that self-defence is available to battered women who eventually retaliate. Many decades of reasonable men shooting and clubbing each other to death produced a common law of self—defence which adequately speaks to men's needs. The difficulty arises when a woman, who is on average of smaller size than men and less likely to have any training in defending herself, is expected to fend off her attacker using reasonable force as deemed appropriate by the jury. This equal force rule is predicated on the assumption of two male adversaries, of equal size, strength and physical training. Is it, therefore, possible to apply this defence to the experiences of battered women who kill their abusers? If a woman kills with a lethal weapon, she may be acting outside the boundaries of the test and thus loses her right to plead self-defence" (Cited in Chan "A Feminist Critique of Self-Defense and Provocation in Battered Women's Cases in England and Wales" (1994) Women and Criminal Justice 39 at 43). Chan goes on to note: "that the argument of proportionality of force is based on what Ashworth calls the 'human rights' approach to self-defence which affords the attacker the right to life and physical integrity. However, in the case of wife abuse, striking a balance between the protection of the abuser's right to life and the abused woman's physical safety presents a dilemma. Since female offenders are more likely to use a knife or sharp instrument in their attack because they are not equal strength as their abuser, the result is that the woman's self-defensive action is more likely to be perceived as cold-blooded or premeditated". (Chan supra at 43, citing Ashworth "Self-Defence and the Right to Life" (1975) Cambridge Law Journal 282 at 289.

⁵³³ [2002] Crim LR 136. See also duty to retreat at 120-122 infra.

⁵³⁴ Ormerod supra (n 41) 331.

was not a complete defence. However, the court did not consider duress which applied to almost all crimes with the exception of murder and which was a complete defence. In Martin (DP)⁵³⁵ psychiatric evidence was admitted that the accused was suffering from a schizoid affective disorder which predisposed him to regard things said as being threatening, as opposed to an ordinary person, and to believe that threats would be carried out. Ormerod poses this question: “whether the policy considerations for private defence and duress are really different, or the cases are wrong?”. The court in Martin (Anthony)⁵³⁶ conceded that evidence of the accused’s physical characteristics could be admissible. Circumstances which would not be considered threatening by a robust young man may appear so to a frail elderly woman.⁵³⁷ The Criminal Law Revision Committee was of the view that the question as to when the use of force is reasonable could be answered as follows: “reasonable force, would take into account all the circumstances, including in particular the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means”.⁵³⁸ It could not be reasonable to cause harm unless (i) it was necessary to do so

⁵³⁵ [2000] 2 Cr App R 42.

⁵³⁶ Martin (Anthony) supra (n 533).

⁵³⁷ Ormerod supra (n 41) 331. The balancing of characteristics can give rise to difficult issues, especially in the case of a slight woman using lethal force against a physically stronger male whom she believes is about to attack her. The Law Commission in its recent 2004 consideration of Partial Defences to Murder recognized this difficulty. For their Judicial Studies Board Direction see Law Commission Consultation Paper supra (n 38) at par. 4.14.

⁵³⁸ Cmnd 2659, par [23]. Wells notes that: “This is an advancement for battered women in that juries were previously asked to apply the apparently neutral and neutered concept for reasonableness, but as many feminists argue, this is a chimera. It is not neutral but highly gendered. One of the ways in which women are perceived differently than men is in their rationality. The whole problem of rationality/irrationality is a particularly difficult one in terms of defences of course because sometimes rationality is of the essence as here with self-defence, but sometimes lack of control or mental abnormality is asserted as with provocation and diminished responsibility. Many cases of women retaliating against persistent domestic violence may be channeled into these partial defences precisely because they are more appropriate to the implicit gender assumptions made about women”. Wells goes on to state: “This is another reason why it is important to consider how well self-defence serves women in these situations because, unlike provocation and diminished responsibility, it does provide a full defence”. (Wells “Domestic Violence and Self-Defence” (1990) New Law Journal 127-128). Yeo in Unrestrained killings and the law: Provocation and Excessive Self-Defense in India, England and Australia (1998) at 322) submits: “In respect of BWS evidence of this syndrome could go to showing response patterns of battered women instead of indicating that they were suffering from a mental abnormality. Thus BWS could be used show that battered women did not

in order to prevent the commission of a crime or effect an arrest and (ii) the evil which would follow from the failure to prevent the crime or effect the arrest is so great that a reasonable person might consider himself justified in causing harm to avert that evil. Therefore, killing will be justified to prevent unlawful killing or grievous bodily harm, or to arrest a person where there is an imminent risk of causing death or grievous bodily harm if left at liberty. Ormerod submits that the question as to “what amount of force is reasonable in the circumstances?” is for the jury and never a point of law for the judge to consider.⁵³⁹ If the prosecution’s case does not provide material to raise the issue, the evidential burden then falls on the accused. In deciding whether the use of force is reasonable, the jury in Attorney General for Northern Ireland’s Reference⁵⁴⁰ asked the following question:

“Are we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or... believed by him to exist (b) in the circumstances and time available to him for reflection (c) could be of the opinion that the prevention of the risk or harm to which others might be exposed if the suspect were allowed to escape [or the defence of himself or another, or the prevention of crime or the defence of property] justified exposing the accused’s victim to the risk of harm to him that might result from the kind of force that the accused contemplated using.”⁵⁴¹

In self-defence the use of force must satisfy the test of reasonableness or proportionality.⁵⁴² If the harm caused is grossly disproportionate to the harm prevented

always respond proportionally to attacks, they used weapons due to strength differences, due to their knowledge of the batterer, they may anticipate future attacks and thus may strike out pre-emptively against their abuser etc”.

⁵³⁹ Ormerod supra (n 41) 334.

⁵⁴⁰ [1977] AC 105.

⁵⁴¹ Ibid at 137.

⁵⁴² In Owino supra (n 530) it was held: “The jury has to decide whether an accused honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect an accused must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be” (at 132-133). See also DPP v

the defence should fail.⁵⁴³ In so far as the reasonableness of the accused's response to an attack is assessed by reference to his state of mind in the circumstances, the justification of self-defence would appear to hinge on considerations that are excusatory in nature. If the accused was acting in a state of fear, panic or extreme anger, no blame is attributable to her for exceeding the limits of necessary force in self-defence.⁵⁴⁴ A more coherent approach to this matter would be to treat as justified only those cases of self-defence where the degree of defensive force employed was actually necessary and proportionate to the threat posed by the attack. Cases of putative self-defence,⁵⁴⁵ including those in which the accused due to stress or fear uses more

Armstrong-Braun [1999] Crim LR 416 (QB); Shaw v R [2002] 1 Cr App R 77 (PC) 84-87; Leverick in the article "Mistake in Self-defence After Drury" (2002) Juridical Review 35 at 38 submits that: "The approach taken by English law is, then something of a logically confused one. A mistake about the existence of an attack does not need to be reasonable but a mistake in relation to the amount of force required to repel that attack does require a reasonable basis". Leverick notes that the Law Commission attempted to justify this position by arguing that: "...[i]t is not for the defendant himself to adjudicate upon the reasonableness of the steps that he takes to prevent [an attack], because that would unfairly and dangerously exculpate defendants who had an irresponsible, irrational or anti-social notion of the extent to which it is acceptable to react when threatened with attack" (at 38, citing Legislating the Criminal Code: Offences Against the Person and General Principles Law Com No 128, 1993 66-67). Leverick supra at 39 goes on to state the English law position: "In English law, then, the position is that an unreasonable mistake in relation to the existence of an attack can lead to an acquittal on the basis of self-defence, provided the other requirements of the defence are made out. If, however the defendant honestly but mistakenly believes that a certain (excessive) degree of force is necessary to repel that attack, an acquittal on the basis of self-defence is ruled out".

⁵⁴³ Questions of proportionality need to be resolved in a broad and liberal manner eschewing the benefits of hindsight. Only in the plainest case should a judge, after finding that some force was necessary, remove a defence from the jury on the grounds of disproportionality.

⁵⁴⁴ In the case of putative self-defence where the accused mistakenly believes he is being attacked and uses force in self-defence it has been argued that contrary to the current approach in Anglo-American law the accused's defence should be regarded as excuse- rather than as justification-based. Thus her action remains wrongful but the accused may be excused on the grounds of mistaken belief. (Mousourakis Criminal Responsibility and Partial Excuse (1998) 187; Fletcher Rethinking Criminal Law (1978) 696). For a discussion of the proportionality requirement in South African law see chapter 2 at 56-58 supra; American law, chapter 4 at 200-202 infra.

⁵⁴⁵ Mousourakis supra (n 544) 188. The traditional Common law position that putative self-defence operates as a justification has been adopted by the drafters of the American Model Penal Code. Par 3.04 provides that the right of self-defence arises when "the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force". Par 3.09 (2) provides further, that in cases of putative self-defence, for the plea of self-defence to be accepted the accused's mistake must be reasonable. Fletcher supra (n 544) remarks that "the Common law and now the Model Penal Code and its progeny interweave criteria of justification and excuse in cases in which the defending actor reasonably, but mistakenly believes that he is being attacked. Those situations, which we shall call putative self-defence, are regularly called cases of justification. Assimilating putative justification to an actual justification undermines the matrix of legal relationships affected by a claim of justification (at 762-763). Leverick supra (n 542) at 43

force than is actually necessary should be dealt with under the excuse theory.⁵⁴⁶

3.3.2 Duty to retreat

In determining whether the use of force was reasonable, the court will first consider whether her use of force was necessary. Part of the requirement for the use of deadly force is the duty to retreat. Ashworth is of the view that the goal of this principle is “when an individual’s purpose in a threatening situation is to save himself from injury or death, it cannot be necessary for him to inflict harm on his assailant if there is a safe avenue of withdrawal open to him”.⁵⁴⁷ However the case of *Semayne*⁵⁴⁸ established the idea that “a man’s home is his castle and fortress, as well as for his defence against injury and violence, as for his repose.”⁵⁴⁹ Chan is of the view that “the duty to retreat from one’s home becomes a paradoxical situation for battered women since the attacks normally occur within the home and her attacker is not a stranger but a loved one. Yet,

submits that “it is not necessary to redefine mens rea of murder in a way that includes the absence of self-defence in order to avoid the attribution of criminal liability to the self-defender. An alternative is available to accommodate self-defence: to view self-defence not as part of the offence definition, but as a separate and supervening defence in its own right. As Leverick submits: “The defence of self-defence can be premised on two different bases: that of justification or that of excuse. In both instances, the defendant accepts that she has done something wrong (intentionally taken the life of another human being) but offers a reason for her conduct. The justification form of the defence applies where the accused correctly perceives that she is being attacked. The reason she offers up for killing the attacker is the fact that the attacker was threatening to kill her” (at 43).

⁵⁴⁶ Leverick supra (n 542) at 46-47 states that while punishment serves a conduct-guiding function, “this is not to suggest that the law should require long and drawn-out checks to be made in the face of an immediate life-or death situation. Allowance, of course must be made for the panic that someone is likely to experience in the heat of the moment if she becomes the subject of an unexpected attack...Requirements of reasonableness ‘can be sensitive to the fact that people may make mistakes under the pressure of circumstances’. But where the consequences of a mistake are as serious as the death of an entirely innocent human being, there is surely a duty on us, as far as is possible or reasonable in the circumstances, to take steps to check the accuracy of our beliefs. I would argue that we are all under an obligation as responsible citizens in society, to control our behaviour in this way”.

⁵⁴⁷ Ashworth supra (n 532) 285. See also the discussion on reasonableness at 116-118 supra. For a discussion of the duty to retreat in South African law see chapter 2 at 53-57 supra; and the duty to retreat in American law see chapter 4 at 198-199 infra.

⁵⁴⁸ [1605] 77 E.R. 194 (K.B.)

⁵⁴⁹ Ibid at 195. In *Hussey* (1924) 18 Cr App R 160 the right to stand fast in defending one’s home is itself a qualification of the duty to retreat.

she is expected to retreat from the supposedly safe haven of her home and from an attacker who lives with her”.⁵⁵⁰ Furthermore, although there is no absolute duty to retreat⁵⁵¹ before using force in self-defence,⁵⁵² “[I]t may in some cases be only sensible and clearly possible to take some avoiding action”⁵⁵³ and a “demonstration by [the accused] at the time that she did not want to fight is the best evidence that she was acting reasonably and in good faith in self-defence”.⁵⁵⁴

Where avoiding action is “sensible and clearly possible” the use of force by the accused will not be “reasonably necessary” and will for this reason not meet the requirements of self-defence.⁵⁵⁵ In Bird⁵⁵⁶ the court held that: “the duty to retreat is not strict; however, it is not premised on persistent, systematic, relational violence either”.⁵⁵⁷ As Chan notes, “the question is whether it should be expected of these women to go on defending themselves indefinitely, or on the occasion when she chooses, for whatever

⁵⁵⁰ Chan supra (n 532) 46.

⁵⁵¹ Bird [1985] 1 WLR 816.

⁵⁵² Bird supra. The Court of Appeal overruled previous dicta to the contrary.

⁵⁵³ Palmer supra (n 531) 1080 per Lord Morris.

⁵⁵⁴ Palmer supra (n 531) 1080-1081.

⁵⁵⁵ Chan supra (n 532) 46.

⁵⁵⁶ Bird supra (n 551).

⁵⁵⁷ *Ibid* at 513. The duty to retreat is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. (McInnes [1971] 3 All ER 295 at 302). Wells suggests that domestic violence is chronic, cyclical and often inescapable. The idea that a woman can leave and seek help is demonstrably untrue (“Battered woman syndrome and defences to homicide: where now?” (1994) The Journal of the Society of Public Teachers of Law 266 at 272). See further Raeder “The Double-Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence” (1996) University of Colorado Law Review 789 at 793 where it is held that coercion, control and domination are at the heart of domestic violence. While violence is instrumental in maintaining control, it is not the actual goal. Thus, emotional and financial coercion, as well as destruction of property together with physical battering maintains the male’s domination of his mate, leaving the battered woman with few options but to stay.

reason, not to retreat, ought we not to take into account the fact that she has retreated before”.⁵⁵⁸

3.3.3 Imminence of the attack

It has been accepted that an accused need not wait for the attacker to strike the first blow before she defends herself. In Devlin v Armstrong⁵⁵⁹ the Court of Appeal acknowledged that a “plea of self-defence may afford a defence not merely to counter an actual attack, but to ward off or prevent an attack which he honestly anticipated. In that case however the attack must be imminent”.⁵⁶⁰ The imminence requirement may appear to deny a self-defence claim to a woman who uses force other than in expiation of an attack which she believes is just about to occur, and is perhaps why many such killings are not readily perceived as being by way of self-defence.⁵⁶¹

In Palmer⁵⁶² Lord Morris did not lay down inflexible criteria but simply held:

⁵⁵⁸ Chan supra (n 532) 46. As was held in Field [1972] Crim LR 435 where the court rejected the argument that a victim had to avoid places where she knew, because of experiences of previous threats, that she might be attacked.

⁵⁵⁹ [1971] NI 13.

⁵⁶⁰ Ibid. Per Lord MacDermott LCJ at 33. In Beckford supra (n 524) it was held that a man about to be attacked does not have to wait for his assailant to strike the first blow, circumstances may justify a pre-emptive strike (at 144). The imminence requirement is based on the assumption that the situation is a one-time violent encounter most common when the adversaries are male, or in attacks by strangers. The possibility of repeated violence in the future, or the cumulative effects of repeated violence in the past, are not taken into account. Yet many battered women become aware when the violence is likely to escalate, having been repeatedly assaulted, and may retaliate during a lull in the battering incident or when their abuser is asleep. Chan supra (n 532) at 44 states: “the battered woman learns to recognize the small signs that precede periods of escalated violence. She learns to distinguish subtle changes in tone of voice, facial expression, and levels of danger. She is in a position to know, perhaps with greater certainty than someone attacked by a stranger, that the batterer’s threat is real and will be acted upon”. For a discussion of this requirement in South African law see chapter 2 at 46-48 supra, American law chapter 4 at 194-198 infra.

⁵⁶¹ McColgan supra (n 39) 517.

⁵⁶² Palmer supra (n 531).

“[I]f the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence.”⁵⁶³

This passage, while not necessarily requiring that the accused be under threat of immediate force before being allowed to use force in self-defence, makes it evident that the proximity of the expected attack is merely one factor to be considered in determining whether the accused’s use of force was necessary, or whether it was the result of revenge.⁵⁶⁴

A strict view of “imminence” then, should not, on the authority of Palmer⁵⁶⁵ cause an otherwise arguable plea of self-defence to be jettisoned where there is no realistic alternative open to the person threatened. The lack of immediate physical threat would not prevent a hostage’s use of force from being necessary and therefore potentially reasonable, although the requirement of proportionality would still have to be met.⁵⁶⁶ McColgan notes that “the same reasoning applies in the case of the battered woman who like the hostage is caught within a potentially life-threatening situation and who believes that an attack will occur before she is able to effectively escape and she must strike while her attacker is vulnerable. Alternatives such as seeking police protection or of flight may not constitute adequate alternatives to the use of force as she knows from experience that either of these measures is simply a temporary one”.⁵⁶⁷ Furthermore,

⁵⁶³ Ibid 1080-1081.

⁵⁶⁴ McColgan supra (n 39) 518.

⁵⁶⁵ Palmer supra (n 531).

⁵⁶⁶ McColgan supra (n 39) 519.

⁵⁶⁷ Ibid.

abusive men tend to use the threat of even greater violence to prevent their partners from leaving the abuse and one recognized aspect of continued abuse is the perception it creates in the abused person of the abuser as all-powerful, and inescapable. Even without expert evidence about the psychological effects of abuse the courts have accepted that an accused's failure to seek police protection in the context of duress will not necessarily prevent her from relying on the defence.⁵⁶⁸ The jury must have regard to any threats made by the abuser to the accused.⁵⁶⁹

If the jury is satisfied that the accused's use of force may have been necessary in the circumstances as they appear to her to exist, they should then consider whether the response was proportionate to the extent of the threat as it appeared to her to exist. Where the force used is judged excessive in relation to the harm threatened, neither section 3 of the Criminal Law Act nor the common law will assist her and she is liable to be convicted of murder in the absence of any other defence. The harshness of this rule is mitigated in practice by the recognition that "a person defending himself cannot weigh to a nicety the exact measure of his defensive action."⁵⁷⁰ While the accused's belief in the level of force required is not conclusive of the question, the jury should be instructed to treat as "the most potent evidence" of the reasonableness of such force the fact that 'in a moment of expected anguish a person attacked had done only what he honestly and instinctively thought was necessary.'⁵⁷¹

⁵⁶⁸ McColgan supra (n 39) 520. In Hudson & Taylor [1971] 2 QB 202 Widgery LJ stated that the jury should "have regard to his age and circumstances, and to any risks to him which may be involved in the course of action relied upon in deciding whether such an opportunity was reasonably open to the accused 'so as to render the threat ineffective as a defence'" (at 207). The Court of Appeal refused to deny the accused the defence of duress on the ground that the threat to them was not immediate.

⁵⁶⁹ McColgan supra (n 39) 520.

⁵⁷⁰ Per Lord Morris in Palmer supra (n 531) 1077. This mitigation was introduced since it is clear that the rule developed largely through cases concerning male accused.

⁵⁷¹ Palmer supra (n 531) 1078.

While Lord Morris's reference to "a moment of unexpected anguish" appears to privilege the traditional concept of self-defence in the context of a sudden, one-off attack, its importance lies in the recognition that the objective question of whether the accused's use of force was reasonable must be assessed in light of her circumstances, a recognition which is as valuable to the woman whose reaction is the product of months or years spent under threatened violence, as it is to the man whose ability to rationally assess the measure of response required to a sudden attack is adversely affected by the unexpected nature of that attack.⁵⁷²

3.4 Excessive self-defence

Where the accused is under no mistake of fact and uses force in self-defence, she either has a complete defence, or, if she uses excessive force, no defence. Even if she believed the force was reasonable, but even if, by the relaxed standard applied in this context, it was not, she made a mistake of law. This is not a defence and she will be guilty of murder. This is the English law position, affirmed by the House of Lords in Clegg.⁵⁷³ The accused, a soldier on duty in Northern Ireland, fired four shots at a car which did not stop at a checkpoint. The judge accepted that the first three shots had been fired, as the car had passed the soldiers and was already 50 feet down the road. The accused's murder conviction was affirmed by the House of Lords, holding that it is established law that killing by excessive force in self-defence is murder and that if a change is to be made, it is for Parliament, not the courts, to take. There is no partial defence resulting in a manslaughter conviction, as with provocation and diminished responsibility. The possibility was considered and rejected immediately after the Clegg decision.⁵⁷⁴

⁵⁷² McColgan supra (n 39) 520.

⁵⁷³ [1995] 1 All ER 334, [1995] Crim LR 418.

⁵⁷⁴ Ormerod supra (n 41) 342.

Although there have been cases in early English law where the partial defence of excessive self-defence was adopted,⁵⁷⁵ this defence was clearly rejected by the Privy Council in Palmer.⁵⁷⁶ In Australian law for instance, for such a defence to apply the following conditions would have to be met: (a) the accused must have honestly and reasonably believed that she was being attacked; (b) the accused must have honestly believed that the degree of force used was necessary in the circumstances to protect herself; (c) the accused's action would have been fully justified if excessive force⁵⁷⁷ had not been used.⁵⁷⁸

In Zecevic⁵⁷⁹ the High Court of Australia reversed its own earlier decisions, bringing Australian law into line with the law of England as expressed in Palmer.⁵⁸⁰ It was held that this change was needed to facilitate the jury's task of applying the law and not because the previous approach was wrong.⁵⁸¹ The defence of force, is open only to the

⁵⁷⁵ See, e.g. Cook (1639) Cro Car 537; Whalley (1835) 7 C & P 245; Patience (1837) 7 C & P 775. In the cases of Whalley and Patience, for example, the accused used deadly force to resist an unlawful arrest; in both cases the accused were found guilty of manslaughter.

⁵⁷⁶ Palmer supra (n 531). In this case it was held that "If in any of the above cases there is a suggestion that a measure of dispensation or tolerance, where a death is intentionally and unnecessarily caused, is to be found in the circumstances that someone is acting on a illegal warrant or is executing process unlawfully (Cook) it is not one that commended itself to their lordships.." (at 1083D).

⁵⁷⁷ In Viro (1978) 141 CLR 88 the High Court of Australia once more confirmed the doctrine of excessive defence, refusing to follow the decision of the Privy Council in Palmer supra (n 531).

⁵⁷⁸ Palmer supra (n 531) 1083.

⁵⁷⁹ (1987) 71 ALR 641.

⁵⁸⁰ Palmer supra (n 531) was followed despite the Australian courts previous recognition of the partial defence in the case of McKay [1957] ALR 648: "...if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter – not murder" (at 649, per Lowe J) and was confirmed by the High Court of Australia in Howe (1958) 100 CLR 448.

⁵⁸¹ According to Mason C.J., "The doctrine enunciated in Howe (supra (n 580)) and Viro (supra (n 577)) expressed a concept of self-defence which best accords with acceptable standards of culpability, so that the accused whose only error is that he lacks reasonable grounds for his belief that the degree of force used was necessary for his self-defence is guilty of manslaughter not murder" Zecevic supra (n 579) 646. In the same case Gaudron J. stated: "The proposition that it is manslaughter, not murder, where self-defence in relation to homicide fails by reason only that disproportionate force was used, is consonant...with the definitional difference between murder and voluntary manslaughter involving the presence or absence of malice aforethought" (at 669).

accused who acted under an honest mistake as to the degree of force needed to repel the attack. On the other hand, such a partial defence was not recognized in cases of putative self-defence where the accused honestly but unreasonably believed that he was being attacked. In terms of Australian law, in the latter cases the accused may be entitled to a complete defence only if her mistake was reasonable. The High Court referred to this as a “basic and complicating conceptual anomaly,”⁵⁸² an inconsistency that had to be removed. Another problem with the doctrine of excessive defence had to do with the difficulty the courts had in applying an objective test such as the one that applies in the context of provocation. The court recognized that although the doctrine of excessive defence no longer applies, the jury is still entitled to return a compromise verdict of manslaughter in such cases.⁵⁸³

3.5 Provocation

3.5.1 Development of the defence

In the later thirteenth century, culpable homicide was a single undivided offence. Its *mens rea* consisted of an intention to kill or to inflict grievous bodily harm.⁵⁸⁴ In 1390

⁵⁸² Zecevic supra (n 579) 666.

⁵⁸³ “There is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone” Zecevic supra (n 579) 653. The English Criminal Law Revision Committee has seemed to adopt the position that the doctrine of excessive defence as expressed in Howe supra (n 580) was right in principle and recommended its introduction in the context of self-defence and other defences.

⁵⁸⁴ Cal. Inq. Misc., vi 95, cited in Kaye “The Early History of Murder and Manslaughter” (1967) Law Quarterly Review 370. In 1310 the Commons complained that pardons for larcenies, homicides and robberies had been too freely granted, and secured a promise, which was not kept that pardons would not be granted except in the cases in which they had come to be regarded as unexceptionable: in the case of homicide, self-defence and misadventure. (*Rotuli Parliamentorum* ii, 171 a, 172, cited in Kaye supra at 378.) In 1347 the Commons complained that the too frequent issue of pardons had greatly encouraged murderers, robberies, homicides and felonies and seem to have asked parliament to remedy the matter by statute. The king returned an evasive answer: no charter was to issue *sil ne soit a l’honneur & profit de lui & de son people*, thus concealing whatever distinction had been intended to be drawn between murderer and homicide (Kaye supra at 378). It is clear that by homicide the Commons cannot have intended to denote justifiable or excusable killings, for which pardons were admitted to lie of course, and the only interpretation of these terms consistent with previous use of the term is that murder secret or stealth killing was intended, and by homicide all other culpable killings.

the Commons petitioned against the practice of issuing pardons. Their complaint was that the issue of pardons for murder, treason and rape had been granted too freely and also that general pardons i.e., for all felonies and pardons under the Statute of Gloucester, were entitled to pardons for homicide in self-defence and by misadventure, should not be granted in cases where culpable homicide had been committed.⁵⁸⁵ The Crown granted the petition but for obvious reasons defined the crimes for which pardons were not lightly to be granted with more precision than the Commons had utilized. Parliament's intention was to make the same divisions of culpable homicide as had been made on the earlier occasion: killings by secrecy or stealth, killing from ambush, and, as a residuary category, all other killings which gave rise to no recognized defence. The Statute thus introduced a new element in assault. The definition of murder, and the categorization of culpable homicide generally, adopted by the Statute of 1390 does not appear to have survived the fifteenth century.⁵⁸⁶

Within 30 years of the Statute the categories of assault became obsolete. Since the 1390 Statute had failed its purpose, as well as the fact that the degree of overlapping between the 1390 divisions had proven to be an unnecessary obstacle to framers of indictments, and since culpable homicide was equally capital, there seems to have been a consolidation of the two remaining divisions, murder and homicide par malice prepense.⁵⁸⁷ Furthermore, the word murder reverted to the broad general descriptive term for culpable homicide of any kind: in which sense it had sometimes been used before, in 1380 and 1390, a narrower interpretation had been put on it.⁵⁸⁸

⁵⁸⁵ *Rot. Parl.*, iii, 268, cited in Kaye supra (n 584) 391.

⁵⁸⁶ Kaye supra (n 584) 568.

⁵⁸⁷ Kaye supra (n 584) 569.

⁵⁸⁸ *Ibid.*

The distinction between murder and manslaughter was redefined following the enactment of a statute in 1547, which excluded the benefit of clergy⁵⁸⁹ from those found guilty of manslaughter.⁵⁹⁰

An important step towards the formulation of the modern doctrine of provocation came in the 19th century in the form of the concept of the reasonable person. This provided a universal standard of self-control by which an accused's response to the provocation would be assessed.⁵⁹¹ But, it was not until the early 20th century that the role of the

⁵⁸⁹ This related to the right of clerks in holy orders to be tried for crimes by ecclesiastical courts thus improving their chances of avoiding conviction. As this was deemed unfair, a number of statutes were enacted which removed the benefit of the clergy. 4 Hen. VIII, C.2; 23 Hen. VII, C. I, s. 3. Mousourakis supra (n 544) at 63-64 notes that through these statutes a tripartite classification of homicide was introduced. These included homicides committed with malice aforethought, punished by death; and homicides committed without prior malice (chance medley manslaughters) and homicides subject to royal pardon (excusable homicide) and the last category is that of justifiable homicide resulting in a full acquittal.

⁵⁹⁰ Edw. 6, C. 12. Mousourakis supra (n 544) at 64-65 is of the view that this statute resulted in murder being distinguished from manslaughter on the basis of the presence or absence of premeditation. Thus manslaughter would mean deliberate killing on the spur of the moment as understood by Coke and other commentators of the 16th and 17th centuries. The basis of the distinction resulted from the assumption that premeditated killing was more reprehensible than a killing which is unpremeditated. However the distinction between killing with malice aforethought and chance medley manslaughter proved problematic as it was difficult to prove malice. Gradually chance medley was abandoned and the test for manslaughter was the presence or absence of provocation. This development was brought about by the enactment of the Statute of Stabbing 1604 which removed the benefit of clergy from those who killed another by stabbing; where the victim had not drawn his weapon, even though the killing was committed without premeditation (Stat. 2 Jac. VI, C.8 (1604), (cited in Mousourakis supra (n 544) 66). The narrow scope of the Statute of Stabbing made its application difficult in certain cases. Thus to deal with such cases the judges in the 17th and 18th centuries laid down criteria to determine which conduct amounted to provocation. Further it was reconfirmed that provocation was not available to those who killed out of revenge. The emphasis on the wrongfulness of the provocative conduct exercised a large influence on the development of the provocation defence. The real basis of the defence was the law's compassion to human frailty. Thus it was believed that the accused as a result of provocation becomes so subject to passion that his ability to reason and exercise judgment is temporarily suspended. It was also recognized that that if the accused's response is out of proportion to the provocation, the presumption of malice would be negated. Mousourakis supra (n 544) at 67 is of the view that this approach is reflected in cases decided in 18th and 19th centuries such as Ayes (1810) R&R 166; Lynch (1832) 5C & P 324; 325; Hayward (1883) 6 C P 157; 159; Fisher (1837) 8 C & P 182 and Kelly (1848) 2 C & L 814. During this time, there was a shift in emphasis from the wrongfulness of the provocative conduct to the requirement of loss of self-control, although the courts continued to recognize and apply the categories of legal provocation as laid down by 17th and 18th century authorities. See Mousourakis supra (n 544) 66-67 for examples of these categories.

⁵⁹¹ Ashworth "The Doctrine of Provocation" (1976) Criminal Law Review 290. Welsh (1869) 2 Cox CC 336 is regarded by Ashworth as the starting point in the development of the modern law of provocation. In this case it was held that "...[I]n 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" (at 338). Mousourakis is of the view that there was no immediate recognition of the

Reasonable person in provocation received full recognition. In Lesbini⁵⁹² the court rejected the view that a lower standard of provocation applied to those suffering from mental disabilities. This showed that in all cases of provocation, it must be serious enough to affect the mind of a reasonable person.⁵⁹³ Until the passing of the Homicide Act 1957, the question of whether the conduct amounted to provocation was not a question of law but was for a judge and not the jury to decide?⁵⁹⁴

In 1949, the common-law definition of provocation was set out in Duffy:⁵⁹⁵ “Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually in the defendant, 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.” This definition was modified by section 3 of the Homicide Act of 1957. According to this section:

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together to lose self-control, the question of whether the provocation was enough to make a reasonable person do as they did shall be

reasonable person in provocation since the objective standard is not mentioned by Stephen in his Digest of the Criminal Law (1877) and A History of the Criminal Law of England (1883). Stephen simply laid down the different forms of conduct that amounted to provocation, pointing out that the success of the accused’s plea in such cases depended on whether the victims conduct came under one of the established categories of provocation and on whether the accused actually lost his self-control as a result. Only when these conditions were satisfied, was the offence reduced to manslaughter (See Mousourakis supra (n 544) 68). See articles 224-226 of Stephen’s Digest for the Common law position of the defence of provocation as it was reflected in the late 19th century as well as the acts in article 225 which amounted to provocation.

⁵⁹² [1914] 3 KB 116. See also Alexander (1913) 109 LT 745.

⁵⁹³ Ashworth supra (n 591) 298.

⁵⁹⁴ Mousourakis supra (n 544) 70. There is early case law which provides for provocation as a defence to a charge of attempted murder but this does not represent the present law which recognizes provocation as a defence to murder only. For a discussion of how South African law treats the provocation/emotional stress defence see chapter 2 at pages 67-102 supra; for a discussion of the American defence of provocation see chapter 4 at 204-224 infra.

⁵⁹⁵ (1949) 1 All ER at 932.

left to be determined by the jury; and in determining that question the jury should take into account everything both done and said according to the effect which in their opinion, it would have had on a reasonable person.”

Provocation operates as a partial defence to murder reducing murder to voluntary manslaughter. Since malice aforethought is defined as an intention to kill or to cause grievous bodily harm, provocation does not negative the required malice element of murder.⁵⁹⁶ Pleading provocation presupposes that the prosecution has provided sufficient evidence to justify the returning of a verdict of murder. If it is not proved beyond reasonable doubt that the accused had the *mens rea* for murder i.e. intention to kill, then they must find the accused not guilty of murder, and necessarily of manslaughter. However if the jury is of the view that the accused had the requisite intention of murder, they must convict her of manslaughter, if they found that she was provoked.⁵⁹⁷

3.5.2 Requirement of sudden loss of self-control

In dealing with a provocation plea, the jury must first consider the subjective question of whether the accused was actually provoked to lose her self-control.⁵⁹⁸ English common law has traditionally only catered for cases that involved an “immediate loss of self-control”.⁵⁹⁹

⁵⁹⁶ Mousourakis supra (n 544) 73.

⁵⁹⁷ Ibid.

⁵⁹⁸ Mousourakis supra (n 544) 80. The jury is entitled to consider all relevant circumstances, the nature of the provocative act and the manner in which the accused reacted, the sensitivity of the accused or otherwise and the time, if any, which elapsed between the provocation and the act which caused death. See also Davies [1975] QB 691 at 702. For a discussion of the American law treatment of this requirement of loss of self-control see chapter 4 at 219-224 infra.

⁵⁹⁹ Duffy supra (n 595). In R v Turner [1975] 1 QB 834 where it was held that although the House of Lords stated that the Homicide Act 1957 abolishes all previous rules as to what can or cannot amount to provocation, the courts held that the requirement of sudden and temporary loss of self-control had not been changed by section 3 of the Act. Furthermore, the English courts have yet to define loss of self-control with any precision. The law does not require a total deprivation of self-control otherwise the accused would have been in a state of automatism, a condition which results in a complete acquittal. It would be more in line with human reality to suggest that loss of self-control

In Ibrams,⁶⁰⁰ Thornton,⁶⁰¹ and Ahluwalia⁶⁰² the Court of Appeal reaffirmed that there

is not a single mental condition but can vary in intensity over a spectrum. See Phillips v R [1969] 2 AC 130 (where Lord Diplock held that “there is an intermediate stage between icy detachment and going berserk” (at 137).

⁶⁰⁰ [1981] 74 Cr App Rep 154. In this case the accused, who had been terrorized by the deceased over a period of time, killed the deceased following an agreement between them to do so. There was no evidence that on the day of killing the victim, that the victim had done anything to provoke him. The last provocation on the deceased’s part having been committed a few days earlier. The Court of Appeal held that the view that the formulation of a plan to kill and the lapse of time between the last act of provocation and killing negated the accused’s claim of loss of self control (Mousourakis supra (n 544) 63).

⁶⁰¹ [1992] 1 All ER 306, [1992] Crim LR 54. In this case the accused killed her husband who was an alcoholic and had been violent towards her on several occasions. The accused’s appeal was based on the argument that requiring a sudden and temporary loss of self-control was inappropriate particularly in a case where the accused was subjected to a long course of provocative conduct, which may sap the resilience and resolve to retain self-control when the final confrontation erupts (at 313). However, the Court of Appeal took the view that the requirement of loss of self-control has so long been an essential part of the provocation defence, that it could only be removed by legislative enactment. The court held that the distinction between acting while in control of oneself and acting under a sudden and temporary loss of self-control as drawn in Duffy supra (n 595) remained an important element of provocation: “[t]he distinction is just as, if not more, important in [this] kind of case...It is within the experience of each member of the court that in cases of domestic violence which culminate in the death of a partner there is frequently evidence given of provocative acts committed by the deceased in the past for it is in that context that the jury have to consider the accused’s reaction. In every such case the question for the jury is whether at the moment the fatal blow was struck the accused had been deprived for that moment of self-control which previously they had been able to exercise... We reject the suggestion that in using the phrase ‘sudden and temporary loss of control’ there was any misdirection of the jury” (at 314). Edwards and Walsh are of the view that: “while this ruling accepts the materiality of cumulative provocation, BWS and its place in the law remains to be tested. Little argument on BWS was adduced in this case. On appeal, the two psychologists for the defence gave evidence that she suffered from a mental disorder equivalent to BWS. The mainstay of arguments was that being the wife of a chronic alcoholic, she killed as a result of trying to cope with his volatile, unpredictable behaviour, violent continual drunkenness, mood swings, threats to herself and her daughter, drinking away their livelihood and his refusal to acknowledge that he needed help. According to Dr. Glatt an authority on alcoholism and whose evidence was not available at the first trial, this experience was like living on the edge of a volcano. Its effects he said would have been horrendous enough for an ordinary person of normal fortitude. But the accused was not ordinary. She suffered from a personality disorder medically attested and serious enough to be defined as abnormality of mind for purposes of section 2 of the Homicide Act which included vulnerable attention seeking behaviour, histrionic personality, past suicide attempts etc. This resulted in admission to hospital under Mental Health Act of 1983” (“The justice of retrial” (1996) New Law Journal 857 at 859).

⁶⁰² The same approach as was taken in Thornton supra (n 601) was adopted in Ahluwalia [1992] 4 All ER 889, [1993] Crim LR 63. The accused, who had endured ten years of violence and humiliation from her husband, threw petrol in his bedroom and set it alight. He succumbed to his injuries. Counsel for the defence challenged the applicability of the loss of self-control requirement. Reference was made to the “cooling off” period which has sometimes been applied to an interval of time between the provocation and the fatal act. Counsel held that although such an interval may indeed be a time for cooling and regaining control, in others the time lapse has an opposite effect (at 893). The court held that the loss of self-control is an essential element of provocation serving “to underline that the defence is concerned with the actions of an individuals who is not, at the moment when she acts or acts violently master of her own mind” (at 895). It has been submitted that women who have been subjected to long periods of violent treatment may react to the final act or words by a “slow-burn” reaction rather than by immediate loss of self-control. See Clarkson and Keating Criminal Law Texts and Materials 4th ed (1998) 691.

must be a “sudden and temporary loss of self-control,” as Devlin put in Duffy,⁶⁰³ and approved that judge’s further words:

“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.”⁶⁰⁴

In Ahluwalia⁶⁰⁵ counsel asked the court to consider “slow-burn” anger, an example of where there is no immediate trigger. The question was whether a person who killed during a state of slow-burn anger could really be said to be acting without self-control, since it amounted to abandoning not only the “sudden and temporary” element but also the requirement that there must be “loss of self-control”.⁶⁰⁶ The assumption that the act of provocation was in the circumstances foreseeable, or that the accused was used to the victim’s untoward behaviour may militate against a loss of self-control requirement of provocation.⁶⁰⁷

In contrast to the view that the courts may return to their earlier, broader conception of anger, their Lordships in Ahluwalia⁶⁰⁸ took the view that the phrase “sudden and

⁶⁰³ Duffy supra (n 595).

⁶⁰⁴ *Ibid* at 932.

⁶⁰⁵ Ahluwalia supra (n 602).

⁶⁰⁶ Clarkson and Keating supra (n 602) 692.

⁶⁰⁷ Mousourakis supra (n 544) 157. This position has been adopted in subsequent cases. See Ibrams supra (n 600) at 155 and Thornton supra (n 601) at 313. The over-rigid legal conceptualization of “heat of the moment” suggested only one psychological and/or physiological possibility or reaction. This oversimplified model of mechanistic man is a legal fiction. Lord Diplock in Camplin [1978] AC 705, [1978] 2 All ER 168 expressed some lurking doubts and found the “reasonable man” test a somewhat “inapt expression,” “since powers of ratiocination bears no obvious relationship to powers of self-control” (at 173).

⁶⁰⁸ Ahluwalia supra (n 602).

temporary loss of self-control” did not imply that an accused’s reaction to the provocation had to be immediate; it implied only that the accused’s act of killing must not be premeditated. Thus a delay between the provocation could be fatal to an accused’s plea since:

“[t]ime for reflection may show that after the provocative conduct made its impact on the mind of the accused, he or she kept or regained self-control. The passage of time following the attack may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation.”⁶⁰⁹

Thus the English Court of Appeal in Ahluwalia⁶¹⁰ had transformed the suddenness requirement in Duffy⁶¹¹ to a requirement which accommodated the slow-burn type of response to provocation. Such a move could be considered good policy since it presupposed judicial activism in that women who experienced slow-burn would also have lost their self-control suddenly at the point in time when their emotions erupted or boiled over. Thus a long history of provocation could be used to explain why the accused lost her self-control as a response to provocation, which when considered in the abstract, would not seem to warrant such a response. However, their Lordships in Ahluwalia⁶¹² further took the view that any change to the principles governing provocation would have to come from Parliament. Section 3 of the Homicide Act of 1957 is understood not to have altered the traditional position that provocation requires

⁶⁰⁹ Ibid at 895.

⁶¹⁰ Ahluwalia supra (n 602).

⁶¹¹ Duffy supra (n 595).

⁶¹² Ahluwalia supra (n 602).

a sudden and temporary loss of self-control. For this reason, where there is no evidence suggesting that the accused was provoked to lose her self-control, the judge is still entitled to withdraw the defence from the jury.⁶¹³

3.5.3 The objective test of provocation

The accused must not only have lost self-control as a result of provocation, but a reasonable person in the same circumstances must have lost self-control and acted as the accused did. This objective condition is known as the reasonable person test.⁶¹⁴ DPP v Camplin⁶¹⁵ set out the test as follows:

⁶¹³ Ibid at 895. For the Criminal Law Revision Committee's recommendation in this regard see CLRC, 14th Rep. Para 84. As Wasik puts it: "Cases of cumulative provocation should fall outside the scope of 'new murder.' The law should recognize that there are degrees of culpability even in deliberate killings. Whilst evidence of forethought and premeditation must always tell against the accused on sentence, the more lenient approach evident in some sentencing cases, which regards cumulative provocation as mitigating the offence rather than making it more serious, is recommended. The traditional view of provocation as 'concession to human frailty' is clearly important both on liability and on sentence, but in cases [of cumulative provocation] there must be proper weight given to the justificatory as well as the excusative element." ("Cumulative Provocation and Domestic Killing" (1982) Criminal Law Review 29 at 34-35).

⁶¹⁴ Yeo supra (n 538) 56. The subjectivizing of the objective test began in the case of Camplin supra (n 607). Prior to this, the test was purely objective with none of the accused's characteristics being attributable to the reasonable person. See Bedder [1954] 2 All ER 801, [1954] 1 WLR 1119 which provides a good example of this purely objective test. In Bedder ibid the jury was instructed to ignore the fact that the accused was impotent in deciding whether the victim's conduct amounted to provocation. The House of Lords held that this was a correct decision stating that the considerations regarding any physical or mental peculiarities of the accused lie outside the scope of the objective test: "It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that his could not be fairly done unless he was also endowed with the peculiar characteristics of the accused. However, the House held that that this makes nonsense of the test: "Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the 'reasonable' or the 'average' or the 'normal' man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man is endowed with abnormal characteristics, the term ceases to have any value...It would be plainly illogical not to recognize an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another... It is too subtle a refinement for my mind or, I think for that of a jury to grasp that the temper may be ignored but the physical defect taken into account" (at 803-804). The decision in Bedder ibid was reversed, following the introduction of section 3 of the Homicide Act 1957, under which a judge cannot direct the jury as to what characteristics the reasonable person should be endowed with. However, it was not until the decision in Camplin supra (n 607) that the effect of section 3 on the issue of characteristics was recognized. For a discussion of the move towards an objective test in South African law of non-pathological incapacity see chapter 2 at 86-94 supra. For a discussion of a move towards an objective test in the American defence of provocation see chapter 4 at 211-213 infra.

⁶¹⁵ Camplin supra (n 607).

“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.”⁶¹⁶

Cockrell is of the view that “the above statement suggests that the jury should make a distinction between matters going to the gravity of provocation and matters going to the standard of self-control. For the former they should be able to take into account all characteristics of the accused (subjective), whereas for the latter the accused should have to exercise ordinary powers of self-control that would be exercised by an accused of the same age and sex (objective)”.⁶¹⁷

In Newell⁶¹⁸ the Court of Appeal in explaining what characteristics may be taken into account in deciding whether the provocation offered was enough to make a reasonable person do as the accused did, referred with approval to a passage from McGregor,⁶¹⁹ a case decided by the New Zealand Court of Appeal:

⁶¹⁶ Ibid at 718. Allen is of the view that “where provocation is at large (not being confined to specific categories of conduct as it was in the past) it is important that the provocative conduct or words be seen in context, that context involves looking at them through the eyes of the accused in light of his or her characteristics, attributes, history, relationships and circumstances, in order to understand the meaning and significance which they attributed to the conduct or words. The ordinary person, is for the purposes of the objective test, provided with contextual information but remains a ordinary person of ordinary powers of self-control. These are not to be diminished by reason of the accused’s proclivities or deficiencies”. (“Provocation’s Reasonable Man – A Plea for Self-Control” (2000) Criminal Law Review 216 at 231) According to Green v R (1997) 148 ALR 659: “If this were to happen it would raise the danger of ‘jury verdicts and outcomes which would seriously offend the communities’ sense of justice by apparently indulging, or condoning, unrestrained ‘human ferocity’. It would sanction excessive conduct which allowed head-strong, violent people to take the law into their own hands in a way which no civilized society could permit. In effect, it would allow each individual to set the standards of his or her self-control that could be expected in face of any provocation”.

⁶¹⁷ Cockrell “Provocation: Characteristics relevant to Objective Test” (2004) Journal of Criminal Law 368 at 370.

⁶¹⁸ (1980) 71 Cr App Rep.

⁶¹⁹ [1962] NZLR 1069.

“It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of such significance to make the offender different from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual’s character or personality...[It includes] not only...physical but also mental qualities and as such more indeterminate attributes as colour, race and creed...Moreover...there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because of the characteristic.”⁶²⁰

In Morhall⁶²¹ the question was raised as to whether it is for the judge to decide whether a certain characteristic was consistent with the concept of the reasonable person and, whether such a characteristic should be taken into account by the jury. The House of Lords held that the accused’s addiction should have been taken into account since:

“[It] was a characteristic of particular relevance, since the words of the deceased which were directed towards the appellant’s shameful addiction to glue sniffing and his inability to break himself of it.”⁶²²

⁶²⁰ Ibid 1081-1082. Yeo supra (n 538) at 85 is of the view that it is important to note that Justice North had developed this test to determine what characteristics should be permitted to affect the power of self-control of an ordinary person. The English Court of Appeal overlooked this important aspect and applied the test to assessing what characteristics were relevant to the gravity of provocation.

⁶²¹ [1995] 3 All ER 659.

⁶²² Ibid at 661. Lord Goff emphasized that things relevant to the gravity of the provocation should not be confined to the characteristics but, could include “the accused’s history or circumstances in which he was placed at the time, and the history or circumstances did not cease to be relevant because they were discreditable. Furthermore, a ‘characteristic’ could be something temporary or transitory if the subject of taunts or insults. However, intoxication was not to be taken into account because that, like displaying lack of ordinary self-control, is excluded as a matter of policy.” Thus the distinction in Camplin supra (n 607) between matters relevant to the gravity of the provocation and matters relating to self-control was endorsed in Morhall supra (n 621). Horder in his article “Provocation’s Reasonable Man Reassessed” (1996) Law Quarterly Review 35 at 37 is of the opinion that a matter of fundamental importance arises out the recent endorsements in the “Camplin distinction”, namely the intelligibility of that distinction where “mental” characteristics are in issue. Horder is of the view that in McGregor supra (n 619) North J rightly adverted to the fact that “special difficulties...arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristics. Consider the example of drunkenness. In Morhall supra (n 621), Lord Goff thought that if a taunt were directed at someone on account of their drunkenness, then their drunkenness would have to be taken into account in assessing the gravity of the provocation. He added, however, that in such a case the jury would have also to be told that they should ignore the potential impact of the drunkenness on the level of self-control expected of the accused. In terms of this application of the “Camplin distinction” Lord Goff said at (at 338), “although the distinction is a fine one, it will I suspect, very rarely be necessary to explain it to a jury.”

However, the House noted that North J's judgment in McGregor⁶²³ must be treated with caution in light of the reservations expressed in relation to the judgment in the New Zealand Court of Appeal case of McCarthy.⁶²⁴ In this case North J's position that there must be direct connection between the provocation and the characteristic the accused seeks to rely upon to modify the objective standard was called into question. In McCarthy⁶²⁵ the accused had suffered brain damage and this affected his personality. Although the provocation offered was not aimed directly at this characteristic the court was of the view that the accused was entitled to have this characteristic taken into account.⁶²⁶ The court stated:

“[a] racial characteristic of the accused, his or her age or sex, a mental deficiency or a tendency to excessive emotionalism as a result of brain injury are examples of characteristics to be attributed to the hypothetical person. In a case where any of them apply, the ordinary power of self-control falls to be assessed on the assumption that the person has the same characteristics. The question is ...whether a person with ordinary power of self-control would have retained self-control notwithstanding such characteristics.”⁶²⁷

Yeo is of the view that the decision in Morhall⁶²⁸ is important for “playing down the test devised in McGregor”.⁶²⁹ In McGregor⁶³⁰ a characteristic qualifies for attribution to

⁶²³ McGregor supra (n 619).

⁶²⁴ (1992) 8 CRNZ 58, [1992] 2 NZLR 550.

⁶²⁵ Ibid.

⁶²⁶ Mousourakis supra (n 544) 92.

⁶²⁷ McCarthy supra (n 624) 67.

⁶²⁸ Morhall supra (n 621).

⁶²⁹ McGregor supra (n 619).

⁶³⁰ Ibid.

a reasonable person providing it satisfies three conditions. Regarding the characteristic of sufficient degree of permanence, the accused's gender satisfies this condition since an individual normally goes through life in the gender she was born with. However, there are certain features of a person's gender which may be "transitory in nature such as pregnancy, menstruation and menopause".⁶³¹ Yet these characteristics have been judicially recognized as relevant to the gravity of provocation.⁶³²

In respect of the condition that there must be a sufficient degree of differentiation from the ordinary run of humankind, it is debatable how at a general level it can be said that gender sets a person apart from the population, and yet gender has been judicially recognized as a characteristic which may be relevant to the gravity of the provocation.⁶³³ At a specific level, the Court of Appeal in Ahluwalia was prepared to regard battered woman syndrome as a characteristic affecting the gravity of the provocation because it satisfied this condition of sufficient differentiation.⁶³⁴ When seen in isolation; this could be considered a welcome development, since the court was acknowledging that a battered woman's perception of her circumstances might be considerably altered by the syndrome. What was objectionable was that the Court of

⁶³¹ Some may see these characteristics as sufficiently permanent in which case the uncertainty over the appropriate degree of permanency required by the test.

⁶³² Camplin supra (n 607) at 177 per Lord Morris and 180 per Lord Simon, Morhall supra (n 621).

⁶³³ Camplin supra (n 607) at 180-181 per Lord Simon; Morhall supra (n 621) at 892 per Lord Taylor CJ.

⁶³⁴ Ahluwalia supra (n 602) at 898. But see further Horder supra (n 622) at 38-39: "Consider BWS. Suppose the deceased had accused the defendant of being helpless and pathetic, upon which she lost self-control and killed him. The provocation seems to bear directly on the defendant's syndrome, but how is a jury to distinguish between the effect of that syndrome on the defendant's power of self-control and its effect on the gravity of provocation to her? In theory there may be a distinction, but could it be drawn in practice? The harsh reality is that mental peculiarities often affect powers of self-control in unpredictable ways, and when they do the defendant in question should plead diminished responsibility".

Appeal regarded as irrelevant the evidence that the accused suffered grievous ill-treatment at the hands of the victim if its effects fell short of the syndrome.⁶³⁵ Her experience of protracted physical, mental and emotional abuse would be highly relevant when evaluating the gravity of the provocation. It is important for the courts to regard battered women's perceptions of provocative conduct as the workings of a normal mind.⁶³⁶

A review of McGregor⁶³⁷ shows that it has problems when applied to determine whether accused's gender is relevant to the gravity of the provocation. The explanation for this was that the test was meant to apply to the power of self-control of a reasonable person and was not concerned with the gravity of the provocation.⁶³⁸ This was evident from reading the justification for prescribing the three conditions in McGregor⁶³⁹ which held:

“The offender must be presumed to possess the power of self-control of the ordinary man, save in so far as his power of self-control is weakened because of some peculiar characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man”.⁶⁴⁰

Being made aware of their real purpose, it becomes clear why the conditions might all

⁶³⁵ O'Donovan “Law's Knowledge: the Judge, The Expert, The Battered Woman, and her Syndrome” (1993) The Journal of Law and Society 427 at 432 notes that “the recognition of battered women's experiences by means of expert testimony in court will in future depend on the accused showing the effect of ‘grievous ill-treatment’ as such that it makes her a different person from the ordinary run of [women]”.

⁶³⁶ Yeo “The Role of Gender in the Law of Provocation” (1997) Criminal Law Journal 431 at 440-441.

⁶³⁷ McGregor supra (n 619).

⁶³⁸ Yeo supra (n 636) at 442-443. This point was briefly raised by McColgan supra (n 39) 512.

⁶³⁹ McGregor supra (n 619).

⁶⁴⁰ *Ibid* at 1081.

be necessary to limit the types of characteristics affecting the power of self-control of a reasonable person. North J felt the need to recognize certain characteristics affecting the power of self-control since New Zealand does not have a defence of diminished responsibility.⁶⁴¹ Accordingly, the sooner the test is removed from English law, the better.⁶⁴² Thus the only limitation placed on gender as a characteristic affecting the gravity of the provocation is that the provocation must have some bearing on gender and this limitation is easily satisfied when the provocation is viewed in connection with the gender roles of the accused.

In Luc Thiet Thuan⁶⁴³ the Privy Council referred approvingly to Ashworth's view that:

⁶⁴¹ Since English law does recognize such a plea, the accused with weakened powers of self-control should be pleading diminished responsibility instead of provocation. Furthermore, the McGregor supra (n 619) test is contrary to the ruling in Camplin supra (n 607) which stipulates that only gender and age of the accused are relevant to the power of self-control to be expected of a reasonable person (at 175). This was reaffirmed in Morhall supra (n 621) at 665-666. This ruling seems to have been overlooked by some commentators who have accepted the McGregor test as applied in Ahluwalia supra (n 602) without hesitation: see Nicolson and Sanghvi "Battered Woman and Provocation: The Implications of R v Ahluwalia" (1993) Criminal Law Review 728 at 732.

⁶⁴² The House of Lords in Morhall supra (n 621) noted that the McGregor supra (n 619) test had been disapproved of by the New Zealand Court of Appeal in McCarthy supra (n 624) at 558 on the ground that "the test goes somewhat too far". It is interesting to note that English Courts have said very little about the relevance of sex to the power of self-control. Apart from sex alongside age as going to the power, there is no clear indication in Camplin supra (n 607) that their Lordships meant for sex to affect the capacity for self-control. Yeo suggests that judgments contain statements which suggest contrary – that men and women are to be held to a single standard of self-control (Yeo supra (n 636) at 451). Nicholson and Sanghvi supra (n 641) state that to interpret it otherwise would breach the principle of equality before the law promotes contentious stereotypes which depict women as the gentler sex who are normally passive and submissive in the face of provocation which men are active and aggressive. Furthermore, the view that ordinary women have higher levels of self-control perpetuates the image of women who kill as being either aberrational or excessively pathological (at 204). Since sex was arguably not intended to affect the capacity for self-control, the House of Lords must have had some other purpose in mind. One interpretation is that the House mentioned sex only because it realized that to ask a jury to consider a gender-neutral person makes no sense (Yeo supra (n 636) at 451). This is supported by Lord Simon in Camplin supra (n 607) when he stated: "[a] reasonable woman with her sex eliminated is altogether too abstract a notion for my comprehension or, I am confident, for that of any jury... [I]t hardly makes sense to say... that a normal woman must be notionally stripped of her femininity before she qualifies as a reasonable woman" (at 180). Yet, in the context in which this comment appears shows that his Lordship was discussing the relevance of the accused's sex when assessing the gravity of the provocation and not in relation to the power of self-control. More fundamentally the Camplin supra (n 607) direction juxtaposes gender with age as going to the issue of a reasonable person's power of self-control is enhanced with the direction demarcating characteristics which relate to the gravity of the provocation. Yeo supra (n 636) is of the view that the House of Lords in Camplin supra (n 607) must have intended gender to serve some purpose other than merely "humanizing" the reasonable person (at 451).

⁶⁴³ [1996] 2 All ER 1033, [1996] Crim LR 433.

“[t]he proper distinction is that individual peculiarities which bear on the gravity should be taken into account, whereas individual peculiarities bearing on the accused’s level of self-control should not.”⁶⁴⁴

The judgment is of vital importance: it holds that unless the mental abnormality is the subject of taunts, it is not a relevant characteristic for the purposes of the objective test.⁶⁴⁵ Concerning the need for provocation to target a certain characteristic, this condition appears to be unduly restrictive. The line drawn between specific and non-specific references to an accused’s characteristic is too arbitrary. This does not mean that provocation need not have some bearing on the characteristic.⁶⁴⁶ What the law requires is a “real connection” between the provocation and the characteristics as

⁶⁴⁴ Ashworth supra (n 591) 293. In this case Lord Steyn dissented as he considered the view of the majority would lead to injustice. He was concerned, in particular with cases where there was evidence of post-natal depression, BWS, or personality disorder, all of which could be considered relevant when the jury were considering the subjective question of whether the accused may have been provoked to lose her self-control, but which would have to be discounted when considering the objective question, namely whether, a reasonable person might have been provoked to do as the accused had done. He considered that this position would leave the jury puzzled. Mousourakis supra (n 544) is of the view that the danger with Lord Steyn’s approach is that if mental conditions which impair the accused’s ability to exercise self-control for the purpose of the objective test, there is the danger that this may create the circumstances for injustice for victims by reducing the proscriptive sanction of criminal law: “I do not see how mental conditions reducing a person’s powers of self-control could fit into the provocation defence as characteristics that would modify but not preclude the objective test in provocation... Only provocations that are deemed serious enough to enrage an ordinary or reasonable person so that he may lose his self-control and kill could furnish a morally acceptable basis for a reduction of culpability” (at 235). Mousourakis supra (n 544) is thus of the view that there must be some moral basis for reduction of culpability and the basis must relate to the gravity of the provocation and not the deficiencies in the accused’s self-control. This maintains a link with the origins of the defence and its rationale serves to distinguish it from diminished responsibility. If the principle of fair labelling is important, the distinction which parliament enacted between manslaughter by reason of provocation (section 3 Homicide Act of 1957) and manslaughter by reason of diminished responsibility (section 2 Homicide Act of 1957) must be maintained (at 135).

⁶⁴⁵ Ormerod supra (n 41) 453. In this case the accused adduced medical evidence which showed that he suffered from brain damage and was prone to respond to minor provocation by losing his self-control and acting explosively. The Privy Council held that this was not a characteristic capable of being attributed to the reasonable man. The council’s reasoning was that to allow characteristics of this type was not consistent with the ruling in Camplin supra (n 607) that the reasonable man has the power of self-control to be expected of an ordinary person and would in effect remove the objective condition from provocation altogether. The council was of the view that the proper defence for an accused suffering from this sort of mental infirmity is diminished responsibility, not provocation. The Court of Appeal held that the English Court of Appeal went astray in Newell supra (n 618) by the “wholesale adoption without analysis” of a substantial part of the dictum of North J in the New Zealand case of McGregor supra (n 619) (cited in Toczek “The actions of the reasonable man” (1996) New Law Journal 835 at 835).

⁶⁴⁶ Yeo supra (n 636) 441.

opposed to the provocation having to be “directed at” the characteristic.⁶⁴⁷

The approach in Luc Thiet Thuan⁶⁴⁸ thus challenges the position adopted in a number of cases, including Ahluwalia⁶⁴⁹ where it was held that mental conditions, such as those

⁶⁴⁷ The Court of Appeal in Newell supra (n 618) at 339 used both these phrases citing McGregor supra (n 619) as authority. In support of the former phrase Horder supra (n 42) at 140-141 argues that provocation “directed at” a characteristic implies intention or knowledge on the provoker’s part whereas “a real connection” between the provocation and a characteristic may additionally encompass inadvertent provocations. The Court of Appeal in Dryden [1995] 4 All ER 987 at 998 applied a different phraseology such as that the characteristic was “specifically relevant” to the provocative conduct relied on to constitute a defence.

⁶⁴⁸ Luc Thiet Thuan supra (n 643). It was felt that the appropriate plea was diminished responsibility since mental abnormality was not a relevant characteristic for the objective limb of the test. Thus the test for this aspect of provocation seemed at this stage to have moved from a highly objective, narrow formulation, to a two-fold test, the first part of which injects an element of subjectivity whilst the second retains a suitable degree of objectivity.

⁶⁴⁹ Ahluwalia supra (n 602). Briggs, citing Horder, who in examining Morhall supra (n 621), concluded that for the purposes of voluntary manslaughter, a characteristic is relevant to the gravity of provocation only when the provocation given is directed at that characteristic. While it is true that, when provocative words are so directed, any such targeting (which extends to striking by unhappy accident, as has recently been made clear by the Privy Council in Luc Thiet Thuan supra (n 643)) of the accused’s Achilles heel may increase the gravity of that provocation. However, Horder goes on to note that this renders “battered woman syndrome”, as recent cases have called it, legally irrelevant to the gravity of provocation served in the form of domestic violence. Since Horder wrote, the Privy Council in Luc Thiet Thuan supra (n 643) has indeed reconfirmed that an accused who suffers from a general shortage of self-control (in casu, “some form of organic brain problem”), or who has a general susceptibility to all and any forms of provocation, does not raise an argument which goes to the gravity of the provocation, and accordingly cannot ask for it to be included in the analysis of this defence. But it is not obvious from this, or from Morhall supra (n 621) that Horder’s particular deduction must be correct. Provocative conduct needs a provoking individual. It was reiterated in Morhall supra (n 621) and in Luc Thiet Thuan supra (n 643) that characteristics of the accused may magnify the seeming gravity of the provocative words or deeds. Briggs is of the opinion that “it seems equally possible that a circumstance of the accused may mean that the very identity of the provoker himself renders acts or words graver than they would be coming from someone else. Take the husband who comes back from the pub shouting at his wife and who will probably be violent to her when he wakes from his stupor. Experience has taught her of the inevitability of this. This verbal provocation is more terrifying precisely because the accused, having long been abused by this individual knows what is coming next. Given the identity of the provoker her syndrome heightens the emotion stirred up by his act, not by the provocation in general (which would indicate no more than shortness of temper; Luc Thiet Thuan supra (n 643)), but by this specific form of it. Likewise, if a father who has sexually abused his child for years lets himself in to the bedroom and sits on the edge of the bed, the defendant’s “abused child syndrome” may mean that the act, innocent if performed by anyone else or if weighed without reference to this history of abuse, may one day drive the child to a loss of self-control. In neither case does the perception of provocation make sense in the absence of the “syndrome”; in both cases it gains its unique force from the particular feature of the accused. Just as certain taunts maybe sharpened by a characteristic of the accused, provocative acts may likewise be. Perhaps Lord Goff had this in mind in Morhall supra (n 621) when warning against undue reliance on the concept of the “characteristic”. It is suggested that where circumstances such as these heighten vulnerability to provocation which is particular in terms of substance, they fall well within the spirit and intendment of the Camplin supra (n 607) principle. If so, it should be recognized that there is more than one paradigm for how particular provocation, otherwise unremarkable to an officious bystander, conveys a unique horror for its victim. Its being directed at a characteristic is not, perhaps, the only way” (Briggs “Provocation Re-Reassessed” (1996) Law Quarterly Review 403 at 403-404).

relating to post-traumatic stress disorder, or battered woman syndrome, may be a relevant characteristic for the purposes of the objective test in provocation.⁶⁵⁰ The approach taken in these cases suggests that:⁶⁵¹

“[given] the right sort of evidence, reasonableness ought to be judged from the perspective of a syndrome sufferer...[In *Ahluwalia*] given the finding on the evidence, and the fact that the issue of the required link between the accused’s characteristics and the provocation had not been raised, this aspect of the judgment was only obiter. Nevertheless it may come to mark an important step in the liberalization of the reasonable person test by allowing consideration of any characteristic affecting the accused’s power of self-control.”⁶⁵²

The case of Smith⁶⁵³ (*Morgan*) casts doubt on the exclusion of individual

⁶⁵⁰ Similarly in *Dryden* supra (n 647) and *Humphreys* (1995) 145 NLJ 1032 the courts adopted the position that eccentric and obsessional personality traits, as well as abnormal immaturity are mental characteristics on which the jury should have been specifically directed. Thus, *Toczek* (supra (n 645) is of the view that if *Luc Thiet Thuan* supra (n 643) is correct, it has important implications for defence counsel advising clients charged with killing their abusers. If medical evidence is present that they killed their abusers, because their powers of self-control were reduced as a result of a condition such as BWS or Post Traumatic Stress Disorder, the proper defence to run is diminished responsibility not provocation (at 835).

⁶⁵¹ *Nicolson and Sanghvi* supra (n 641) 728.

⁶⁵² *Ibid* 732-733. This did not expressly occur in *Thornton* (No 2) supra (n 601) where the Court of Appeal ordered a retrial on the basis of evidence of BWS and a personality disorder which should have been left to the jury as characteristics to be attributed to the reasonable person. Lord Taylor CJ stated: “The severity of such a syndrome and the extent to which it may have affected a particular accused will no doubt vary and is for the jury to consider. But it may be relevant in two ways. First, 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 accused has endured abuse over a period, on the ‘last straw’ basis. Secondly, depending on the medical evidence, the syndrome may have affected the accused’s personality so as to constitute a significant characteristic relevant...to the second question the jury has to consider in regard to provocation” (at 1181-1182). On the second point, Lord Taylor CJ did not spell out whether BWS was solely relevant to the question whether a reasonable person might have been provoked or whether it was further relevant to consideration of the degree of self-control to be expected of a reasonable person.

⁶⁵³ *Smith* (*Morgan*) supra (n 40). In this case the accused killed a former friend in a dispute over the ownership of tools. The accused suffered from clinical depression which reduced his threshold for erupting into violence. The trial judge directed that this was neither here nor there when considering whether the reasonable person would have lost self-control. The Court of Appeal held that a depressive illness, not amounting to diminished responsibility but which might have reduced the accused’s threshold for erupting into violence as a relevant characteristic in considering the loss of self-control but certified a question for the opinion of Hoffman CJ. For a discussion of the subjective approach in South African law to non-pathological incapacity see chapter 2 at 67-79 supra; for a discussion of the subjective approach to provocation in American law see chapter 4 at 213-219 infra.

characteristics from the second limb of the test. The Court of Appeal certified the following question for the House of Lords to establish:

“Are characteristics, other than age or sex, attributable to the reasonable person, for the purpose of section 3 of the Homicide Act 1957 relevant not only to the gravity of the provocation to him but also to the standard of control to be expected?”⁶⁵⁴

The majority in Smith⁶⁵⁵ (Morgan) were of the view that this question should be

⁶⁵⁴ Ibid at 536.

⁶⁵⁵ Smith supra (n 40). See further R v Smith [2002] EWCA Crim 2671. In this case there were two matters which rendered the verdict of guilty of murder unsafe. The judge in summing up directed the jury to consider all the circumstances including the accused’s medical history, panic attacks and depression. But one of those occasions was in context of diminished responsibility. Repeatedly throughout summing up, the judge in relation to provocation focused on the long quarrel on the day of the killing (at [38]). This may well have led the jury to conclude that the accused’s medical history, although relevant to diminished responsibility was not relevant to provocation. To this extent, it may have been that they were misled. Secondly, the law in relation to provocation as clarified by Smith (Morgan) supra (n 40) namely that particular characteristic of the accused are to be taken into account by the jury in relation not only to whether the accused was provoked but also to whether the reasonable person would have been provoked must be taken to have been the law at the time of the accused’s trial. From the terms of the expert witness Dr. Eastman’s reports and in the implications of his evidence, the Smith (Morgan) case does not appear to have been in his mind at the trial. Eastman was also not asked to consider provocation and did not do so. The effect of his evidence before the judges was that he would have expressed the data from the accused’s medical history differently in the context of section 3 of the Homicide Act than in context of section 2. The essence of section 3 is that provocative conduct and its effect on someone with the characteristics of the accused. Further, more minor symptoms are relevant to provocation when they may not be to diminished responsibility. In the interests of justice they admitted Dr. Eastman’s evidence without embarking on further analysis and allowed quashed the conviction thus allowing the appeal (Per Rose LJ and Hughes JJ). In respect of Dr. Eastman’s thoughts that the accused was suffering from long-standing moderate depression and learned helplessness arising from BWS and that there was substantial impairment of responsibility by reason of consequent distortion of her thinking. Her apparent lack of remorse might simply be callousness or could be that her thinking remained distorted. A specific aspect of depressive illness is that irritable and lowered threshold for violence would in Dr. Eastman’s view have been relevant as a mental characteristic to loss of self-control in the context of provocation. Again evidence of cognitive distortion and the true belief in a woman such as Mrs. Smith that she did not have any way out, would have heightened effect of provocation on her (at [31]).

answered in the affirmative.⁶⁵⁶ While an objective element remained⁶⁵⁷ in the defence, the standard of behaviour to be applied was a matter only for the jury and not for direction by the judge.⁶⁵⁸ Thus the law now requires all mental and physical

⁶⁵⁶ Lord Hoffman in Smith supra (n 40) recognized that in present English law of provocation had serious logical consequences and moral flaws (at 159). In particular, he was critical not only of the gravity/control dichotomy as posed in Luc Thiet Thuan supra (n 643) which he stigmatized as unworkable and impossible to explain to juries (at 166-169) but also of a whole exercise of ascribing characteristics to the reasonable person (at 172-174). Lord Hoffman sees this as resulting from an attempt to marry two discordant ideas, the first being the old formula that the provocation must be such as to cause a reasonable person to act in the same way as the accused, and second the rule that section 3 of the Homicide Act of 1957 that no circumstances or characteristics should be excluded from the consideration of the jury. It is this, he says, that has given rise to such monsters as reasonable obsessive, reasonable depressive alcoholic etc (at 172).

⁶⁵⁷ Lord Hoffman was of the view that what is unworkable is not the principle of the objective test itself, but the traditional way of explaining it: "In my opinion... judges should not be required to describe the objective element in the provocation defence by reference to the reasonable man, with or without attribution of personal characteristics. They may instead find it more helpful to explain in simple language the principles of the doctrine of provocation. First, it requires that the accused should have killed while he had lost self-control and that something should have caused him to lose self-control. For better or worse, section 3 left this part of the law untouched. Secondly, the fact that something caused him to lose self-control is not enough. The law expects people to exercise control over their emotions... A tendency to violent rages or childish tantrums is a defect in character rather than an excuse. The jury must think the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should count as sufficient excuse, they have to apply what they consider to be appropriate standards of behaviour, on the one hand making allowance, for human nature and the power of emotions, but on the other hand not allowing someone to rely on his own violent disposition. In applying these standards of behaviour the jury represents the community and decides as Lord Diplock's said in Camplin's case... what degree of self-control 'everyone is entitled to expect that his fellow citizens will exercise in society as it is today'. (Smith supra (n 40) at 173) Stannard is of the view that: "the difference between the traditional test and Lord Hoffman's test is that the former is factual in nature while the latter is normative. In the traditional version the jury is asked to predicate a hypothetical person with certain characteristics and ask: do we think that the person would have acted as the accused, but in Lord Hoffman's version the jury makes a value judgment: do we think the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter" (*Towards a normative defence of provocation in England and Ireland*) (2002) Journal of Criminal Law 528 at 537). Lord Hoffman thus says he is going back to the original philosophy of section 3 of the Homicide Act of 1957: commenting on the changes made in section 3 he declares: "I do not think it possible to attribute to parliament in making this change any intent other than to legitimate the relaxation of the old law in those cases in which justice appeared to require it and to allow the jury in good conscience to arrive at a verdict which previously would have been perverse. In other words, the jury was given a normative as well as fact-finding function. They were to determine not merely whether the behaviour of the accused complied with some legal standard but could determine for themselves what the standard in the particular case should be" (Smith supra (n 40) at 163).

⁶⁵⁸ The reason for doing this was the need for the defence to be interpreted with sufficient sensitivity to differences between individual accused. Macklem and Gardiner in their article "Provocation and Pluralism" (2001) Modern Law Review 815 discuss the possibility that Lord Diplock in Camplin supra (n 607) meant to attribute different "characteristics" to the reasonable person for the purposes of different "objective" issues arising under section 3. But, the majority of the House of Lords in Smith [1998] 4 All ER at 238 denied that Lord Diplock meant to draw this distinction, the application of which would require excessive "mental gymnastics of the jury". However, Macklem and Gardner explored the possibility that Lord Diplock intended to draw exactly such a distinction: "There are three different issues in respect of which section 3 requires the jury to set standards by which the accused is to be judged, and in respect of each of these issues different facts about the accused and her background may bear on what counts as her meeting those standards (at 820). The

characteristics of the accused in relation to the gravity of provocation to be taken into account.⁶⁵⁹ Furthermore, all such characteristics are relevant to the level of self-control required,⁶⁶⁰ with the time-honoured exception of irascibility.⁶⁶¹

accused's cultural milieu may be relevant in determining whether the alleged words or deeds amount to provocation. In respect of how grave the provocation really was, it may be relevant whether the accused's actually possessed the characteristic about which she was taunted. In respect of whether she should have lost self-control to the point that she killed, it may be necessary to know what the role the accused occupied at the time. Facts about the defendant's background are needed to identify what would count as meeting the objective standard of reasonableness" (at 820).

⁶⁵⁹ Christie is of the view that the latter "substantially weakens the self-control element and thereby the objectivity of the partial defence of provocation". This could allow an accused to escape conviction for murder more easily, since having measured the gravity of the provocation through her viewpoint, the self-control required of her would only be that of the reasonable person who had all the accused's peculiar characteristics ("Pushing the Reasonable Man too Far?" (2000) Journal of Criminal Law 409 at 413). Heaton in his article "Anything Goes" (2001) Nottingham Law Journal 50 at 55-56 states: "The provocation excuse should be a concession to extraordinary external circumstances not to the extraordinary internal make-up of the accused. The moral foundation for the extenuation is the necessity or very serious provocation...If the reaction is essentially due to the internal character of the accused, his or her excusatory claim, if any, should sound in diminished responsibility. That is the proper defence for the abnormal. 'The defence of provocation is for those who are in a broad sense mentally normal' but who snap under the weight of very grave provocation." Martin holds that: "the view that while certain personality traits listed as unsuitable for consideration by jury as they examine the appropriate reasonable man in the circumstances. These forbidden traits include jealousy, obsession, possessiveness, and a tendency to childish tantrums. The female victim of violent abuse can have her history and experience taken into account, but the obsessively jealous woman will be judged by the standard of the reasonable woman who is not prone to obsessive jealousy. Any moral distinction between these examples notwithstanding, it is difficult to justify this division using legal principle" ("Continuing problems with provocation" (2005) New Law Journal 1363 at 1364).

⁶⁶⁰ See R v Cole [2005] EWCA Crim 1335. While in the accused in this case raised self-defence, the high point of this case would be the accused's statement: "I can't remember the knife going in or seeing blood... I did not feel in control". This would indicate a possible defence of provocation but the court entertained considerable doubt as to whether there was any loss of actual self-control, despite the fact that the accused had suffered abuse from the deceased as well as a history of severe abuse in Jamaica from a previous partner (at [44]). While the court accepted the account of abuse in Jamaica is capable of belief but its relevance to the alleged loss of self-control is a different matter (at [45]). There are partly by the reason of lies told by the accused to the police and partly because of the history of purporting to demonstrate how such a link exists, grounds for very seriously questioning the belief concerning accused's account of events at the time of the killing. It is to be observed that the time of the trial, no basis for post-traumatic stress disorder as having affected the accused was contemplated by any of the doctors. Thus in so far as the accused now purports to link that history with her state of mind and alleged loss of self-control at the time of the killing, the court did not regard her accounts capable of belief not least because there was no reason to think it might have affected the jury's verdict (at [49]).

⁶⁶¹ Stannard supra (n 657) posed the question as to whether Lord Hoffman's test will work in practice. The position in English law is complicated by section 3 of the Homicide Act of 1957 and the defence of diminished responsibility. Section 3 expressly provides for the jury to decide whether the provocation was sufficient to make the reasonable man do as he did and allows them to take into account everything both done and said according to the effect it would have had on the reasonable man. It could be asked how to avoid describing the objective element in provocation by reference to the reasonable person is enshrined in Statute. Lord Hoffman was of the view that the case of Welsh supra (n 591) when Keating J decided to borrow the concept from the law of negligence, did not imagine that he was changing the law, he merely thought he had hit on a felicitous way of explaining it. (Smith supra (n 40) at 172) Furthermore, it does not require them to go through mental gymnastics of attributing to that reasonable person the particular circumstances of the accused. A

R v Rowland⁶⁶² was referred to the Court of Appeal on the basis that there had been a change in the substance of the law on provocation following the decision in Smith (Morgan).⁶⁶³ In Rowland⁶⁶⁴ the accused submitted that he had become upset by his wife's withdrawal from the marital relationship, the couple having experienced a number of problems relating to various aspects of their marriage. Moreover, the accused suffered from Peyronie's disease (scar tissue causing a bend in the penis) and his wife had taunted him about this matter on various occasions. On the night of the incident, during the course of a heated argument, Mrs. Rowland attacked the accused, stuck her fingernails into his face; and taunted him about his medical condition, which was the last thing the accused claimed to remember until after the stabbing had occurred. The appeal was based on medical evidence which had not been submitted by the accused at the time of the original trial. A psychiatrist, Dr McClelland, examined the accused before the trial in 1997 and was then asked in 2001 to clarify his opinions as to the effects of the accused's personality on his actions. Dr. McClelland was of the view that, at the time of the stabbing, the accused was suffering from depression and that certain recognizable personality traits of the accused lowered his threshold for impulsive behaviour. Leading counsel for the accused explained that the reason for not introducing such evidence at the trial was that "as the law stood it seemed to me that

distinction must be drawn between the original concept and the exersence which have developed around it. In respect of this Lord Hoffman pointed out that "the 1957 Act made a miscellany of changes to the law of homicide which can hardly be described as amounting to a coherent and interlocking scheme" (Smith supra (n 40) at 168). According to him, if the question was asked whether Parliament contemplated such an overlap, in all probability, little thought was given to it (Smith supra (n 40) at 168). Stannard supra (n 657) states that: "Once we leave aside the particular problems caused by differing burden of proof problems and they don't affect the merits of Lord Hoffman's test, there is nothing unusual or difficult about the criminal law accommodating the overlapping of defences. One of the basic skills of lawyers is to argue defences in the alternative" (at 539).

⁶⁶² [2003] EWCA Crim 3636.

⁶⁶³ Smith supra (n 40). Subsequent cases continued to apply Smith (Morgan) supra (n 40) test (see Paria v State of Trinidad and Tobago [2003] UKPC 36, [2003] All ER (D) 287 (Apr); R v Roberts [2002] EWCA Crim 1069, [2002] All ER (D) 210 (Apr); R v Rowland supra (n 562).

⁶⁶⁴ R v Rowland supra (n 662).

much of the helpful comments which Dr. McClelland had provided in his report... were, in fact, inadmissible.”⁶⁶⁵

It was contended that in the light of the decision in Smith (Morgan),⁶⁶⁶ the jury should have been afforded the opportunity to hear Dr. McClelland’s evidence during the trial in 1997. Furthermore there was a strong possibility that the Court of Appeal might conclude that “the circumstances were such to make the loss of self-control sufficiently excusable to reduce the gravity of the offences from murder to manslaughter.”⁶⁶⁷

In R v Rowland⁶⁶⁸ the Criminal Cases Review Commission submitted the following to the Court of Appeal:

“...had the legal position at the time of trial been that determined by Smith (Morgan), it is likely that the defence would have sought expert opinion on the issue of provocation, the jury being provided with evidence of the appellant’s personal characteristics in support of such a defence. If the Court of Appeal accepted this submission, then the jury would have been able to take into account Mr. Rowland’s clinical depression in assessing not only the gravity of the provocation he experienced but also the effect this had on his ability to maintain self-control.”⁶⁶⁹

During its deliberations, the Court of Appeal in R v Rowland⁶⁷⁰ concluded that the Judicial

⁶⁶⁵ Ibid at 25.

⁶⁶⁶ Smith (Morgan) supra (n 40).

⁶⁶⁷ R v Rowland supra (n 662) at 25.

⁶⁶⁸ R v Rowland supra (n 662).

⁶⁶⁹ Ibid at 20.

⁶⁷⁰ R v Rowland supra (n 662). This case referred to Weller [2004] 1 Cr App R 1 where it was held that the trial judge’s failure to direct the jury to consider the accused’s unduly possessive and jealous nature did not render the conviction for murder unsafe provided the characteristics were not specifically removed from the jury’s consideration. The trial judge had directed simply that the jury should consider “what society expects of a man like this accused in his position”. The Court of Appeal suggested that: “The question whether the accused should reasonable have controlled himself

Studies Board's Specimen Direction on Provocation (April 2003) is one on which the judges may safely rely. Paragraph (iv) states:

“It is then for you to decide whether or not D's loss of self-control was sufficiently excusable to reduce the offence from murder to manslaughter. When deciding this, bear in mind that the law expects people to exercise control over their emotions. If a person has an unusually volatile, excitable or violent nature (or is drunk) he cannot rely on that as an excuse. Otherwise, it is entirely for you to decide what are appropriate standards of behaviour, what degree of control society could reasonably have expected of D, and what is the just outcome of the case. You should make allowances for human nature and the power of emotions. You should take into account [here deal with any characteristics of D which may have a bearing on the issue].”

Cockrell is of the view that it was the “unequivocal opinion” of the Court of Appeal that had the case been tried under present law, the defence would have admitted the evidence of Dr. McClelland. Furthermore, in relation to the second stage of the provocation test, the judge would have invited the jury to take into account the fact that, in the words of Dr. McClelland the “out of control behaviour was made the more likely by his [the accused's] depressive state”. R v Rowland⁶⁷¹ thus provided another opportunity for the Court of Appeal to reinforce the increasing subjective nature of the second limb of the test for provocation,⁶⁷² as confirmed by a majority of the House of Lords in Smith (Morgan).⁶⁷³

is to be answered by the jury taking all matters into account. This includes matters relating to the accused, the kind of man he is and his mental state, as well as the circumstances in which the death occurred. The judge should not tell the jury that they should, as a matter of law, ignore any aspect. He may give them some guidance as to the weight to be given to some aspects provided he makes it clear that the question is one which, as the law provides, they are to answer, and not him” (at 815).

⁶⁷¹ R v Rowland supra (n 662).

⁶⁷² Cockrell supra (n 617) 371.

⁶⁷³ Smith (Morgan) supra (n 40).

Smith (Morgan)⁶⁷⁴ does not represent the current state of affairs in English law. The question remains as to whether or not the current interpretation of the Homicide Act of 1957 accurately represents Parliament's intention? Lord Slynn in Smith (Morgan)⁶⁷⁵ suggests that it does:

“The jury must ask whether he [the accused] has exercised the degree of self-control to be expected of someone in his situation. It thus seems to me that the particular characteristics of the accused may be taken into account at both stages of the inquiry. I do not accept that the section intends the rigid distinction between the two parts of the inquiry...”.⁶⁷⁶

He continues:

“In my opinion justice requires that personal characteristics should be taken into account in the way I have indicated unless the section precludes it. In my view it does not.”⁶⁷⁷

Prior to the decision in Holley,⁶⁷⁸ the Law Commission's Report No. 290, “Partial Defences to Murder” (2004) highlighted some of the major problems inherent in the provocation defence. There was widespread dissatisfaction among consultees both with the theoretical underpinning of the defence of provocation and with its various component parts. The Law Commission was of the view that the defence was not underpinned by any clear rationale. It also noted that the rationale underlying provocation had become too loose, so that a judge may be obliged to leave the issue to

⁶⁷⁴ Smith (Morgan) supra (n 40).

⁶⁷⁵ Ibid at par [24]-[25].

⁶⁷⁶ Smith (Morgan) supra (n 40) at par 29.

⁶⁷⁷ Ibid.

⁶⁷⁸ [2005] UKPC 23, [2005] All ER (D) 190.

the jury when the conduct and/or the words in question were trivial.⁶⁷⁹ Furthermore, it was noted that the concept of loss of self-control has given rise to serious problems, especially in cases of “slow-burn” provocation.⁶⁸⁰ The Law Commission also took cognizance of the fact that controversy continued to exist around the objective test of provocation (that the provocation was enough to make a reasonable person do as the accused did),⁶⁸¹ which has been interpreted by the majority in the House of Lords in Smith (Morgan)⁶⁸² in a way that may enable an accused to rely on personal idiosyncrasies which make her more short-tempered than any other person.⁶⁸³

The Law Commission made powerful arguments for both the abolition⁶⁸⁴ and the retention⁶⁸⁵ of the defence. It also made recommendations⁶⁸⁶ to improve the law

⁶⁷⁹ Law Commission Consultation Paper No. 290 of 2004 at 3.20.

⁶⁸⁰ For a discussion of “slow-burn” provocation see 133-135.

⁶⁸¹ For a discussion of the factors of the objective test in provocation see 135-144.

⁶⁸² Smith (Morgan) supra (n 40).

⁶⁸³ For a discussion of this case see 144-147.

⁶⁸⁴ These arguments included the fact that a person who is sane and who kills another person unlawfully, with the intent required for murder, ought to be guilty of murder, irrespective of how substantial the provocation may have been. Provocation should be a mitigating factor taken into account at sentencing, not in defining the defence. Assessing sentence requires a balanced appraisal of the circumstances of the case, and this is not a jury function, but rather a judicial function. Furthermore, there are great difficulties in trying to define what may constitute provocation and how serious it has to be order to amount to a partial defence (at 3.36).

⁶⁸⁵ The Law Commission Consultation Paper No. 290 of 2004 at par 3.37 notes that there are moral and practical reasons for retaining the provocation defence. Where the accused’s conduct was caused by serious provocation, it is morally correct that this should be reflected in the way that society labels and sentences the accused. It is desirable that the factual and evaluative question whether the accused was provoked should be considered by a jury. A more lenient sentence for murder will be more acceptable to society if it results from a conviction by a jury of an offence not carrying the title of murder, rather than a decision by a judge after a conviction for murder. A partial defence such as provocation is justifiable in the law of murder, although no similar partial defence to non-fatal offences of violence exist, not only because the sentence for murder is fixed by law but also because of the unique gravity and stigma attached to murder. It would appear that the real problem with the provocation defence is not its underlying concept, but rather the way it has developed in law.

⁶⁸⁶ In an attempt to re-shape and restrict the circumstances in which provocation can be pleaded, the Law Commission has proposed reform of the defence (at par 1.13): “(1) unlawful homicide that would otherwise be murder should instead be manslaughter if: (a) the accused acted in response to (i) gross provocation (meaning words or conduct or a combination of words or conduct which caused the

relating to the defence.⁶⁸⁷ However, it is yet to be seen whether any case law will adopt these recommendations.

accused to have a justifiable sense of being seriously wronged); or (ii) fear of serious violence towards the accused or another; or (iii) a combination of (a) and (b); and (b) a person of the accused's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the accused might have reacted in the same or similar way, the court should take into account the accused's age and all the circumstances of the accused other than matters whose only relevance to the accused's conduct is that they bear simply on her general capacity for self-control. (3) The partial defence should not apply where (a) the provocation was incited by the accused for the purpose of providing an excuse to use violence, or (b) the accused acted in considered desire for revenge. (4) A person should not be treated as having acted in considered desire for revenge if she acted in fear of serious violence merely because she was also angry towards the deceased for the conduct which engendered that fear. (5) The partial defence should not apply to an accused who kills or takes part in the killing of another person under duress or threats by a third person. (6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

⁶⁸⁷ Horder "The Subjective Element in the Provocation Defence" (2005) *Oxford Journal of Legal Studies* 123 at 131 notes that the proposal would restore the law "more-or-less" to the state it was in 1946 when the House of Lords considered the provocation defence in *Holmes v DPP* [1946] AC 588. Viscount Simon held that words "of a most extreme and exceptional character might be sufficiently serious to warrant a direction on provocation to the jury" (at 600). The Law Commission is now of the view that mere rejection by a former partner is not the kind of provocation that should justify a direction to the jury on provocation (at par 3.144). The Report goes on to state: "It is sadly commonplace that when relationships break up there are often arguments and mutual recriminations. We think that it would be seldom that words spoken in such a situation could legitimately make the other party feel severely wronged, to the extent that a person of ordinary tolerance and self-restraint in such a situation might have used lethal violence; but there may be cases where one party torments another with remarks of an exceptionally abusive kind...there are bound to be borderline cases" (at par 3.147). Horder *supra* (at 132) is of the view that two issues should be noted. First, it is significant that, as this passage makes clear, for the Law Commission, 'gross' provocation may include rejection, confessions of infidelity, or the like, if accompanied by aggravating factors such as taunting. It is submitted that these can be situations in which, albeit rarely, 'one person's behaviour can put exceptional emotional pressure on the other. Second, in the draft proposals cited earlier, the Commission deliberately makes no provision for a subjective condition. There is no requirement that the accused have lost self-control or even acted in anger. It is enough that the accused did not act 'in considered desire for revenge' (clause 3 (b)). Horder *supra* (at 133) is of the view that by eliminating the subjective element, the loss of self-control dilemma is escaped, while simultaneously doing something to address the immediacy dilemma by excluding calculated revenge killings from the scope of mitigation. Horder goes on to note that by placing these two aspects of the reform proposals together, it seems that Smith and Hogan's famous example of how a killing, however, gravely provoked must be murder unless there was evidence of loss of self-control, will no longer be accurate: "A traditional example of extreme provocation is the finding of a spouse in the act of adultery; but if D, on so fining his wife, were to read her a lecture on the enormity of her sin and then methodically to load a gun and shoot her...D would be guilty of murder and it would be irrelevant that the jury may think that a reasonable man in like circumstances would lose self-control." (*Criminal Law* 9th ed (1999) 356-357) Horder *supra* at 133 submits that the Law Commission may decide to treat such a case as murder either because the judge will withdraw the issue from the jury or because the accused will fail to meet the requirement in clause 1 (b) (that a person of the accused's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint would have acted in the same way). But this raises two problems: "Surely, though one cannot have a situation in which, in the exercise of their discretion, some judges withdraw the issue of provocation from the jury solely because the accused has not acted in anger, however grave the provocation, whilst other judges leave the issue to the jury in such cases? Further, it places too much moral weight on the question whether the accused might have reacted in the same or similar way, to expect the jury to address not only the gravity of the provocation in all the circumstances, but also in Smith and Hogan's example. The abolition of any subjective element, a requirement for which can be dated back to the origins of the plea in the 16th century, detaches the plea of provocation from reliance on one of the key justifications for its legal recognition" (at 133).

The provocation defence took another turn with the Privy Council decision of Attorney General v Holley.⁶⁸⁸ Holley was viewed by the court as an opportunity to resolve the conflict between the Privy Council decision in Luc Thiet Thuan⁶⁸⁹ and R v Smith (Morgan).⁶⁹⁰ Following a retrial in the Royal Court in Jersey, the accused was convicted of murder. The Court set aside his conviction on the ground that the deputy bailiff had misdirected the jury on provocation. A conviction of manslaughter was substituted, and the Attorney General appealed to the Privy Council. Jersey law on provocation is identical to English law.

Upholding the appeal, Lord Nicholls delivered the majority judgment in Holley.⁶⁹¹ Lord Nicholls set out the contrasting models of provocation. Both are in two parts, and both begin with the subjective question of whether the accused was provoked into losing his self-control. It is within the second part, concerning the legislative reference to the “reasonable person” that the two models diverge. The Smith (Morgan)⁶⁹² model takes the view that the standard of self-control required to trigger the defence is not a constant standard. The jury should apply the standard one could expect of the particular individual in question, taking into account all of the individual’s particular characteristics. The Luc Thiet Thuan⁶⁹³ model on the other hand adopts a constant, objective standard of self-control. Having made the initial subjective assessment called

⁶⁸⁸ Holley supra (n 678). In this case the accused, an alcoholic, killed his girlfriend with an axe after she made comments affecting his self-esteem.

⁶⁸⁹ Luc Thiet Thuan supra (n 643).

⁶⁹⁰ Smith (Morgan) supra (n 40).

⁶⁹¹ Holley supra (n 678).

⁶⁹² Smith (Morgan) supra (n 40).

⁶⁹³ Luc Thiet Thuan supra (n 643).

for in the first part of the model, the jury must then ask whether a reasonable person with ordinary powers of self-control, subject to the same provocation would have reacted as the accused did. In this analysis the accused's particular characteristics are not considered.⁶⁹⁴

The Privy Council in Holley⁶⁹⁵ rejected the Smith Morgan⁶⁹⁶ model, but the majority did not criticize this model at a conceptual or intellectual level. Rather, they accepted that "it is one model which could be adopted in framing a law relating to provocation".⁶⁹⁷ Rather, the Privy Council employed constitutional arguments to justify its return to objectivity. The majority held that in the Homicide Act of 1957, parliament had adopted a uniform, objective standard. In Smith (Morgan)⁶⁹⁸ the court was said to stray too far from the law as set down by the legislature. It is for this reason alone that the Privy Council rejected the decision of the House of Lords. Their Lordships supported this finding by referencing the partial defence of diminished responsibility, in

⁶⁹⁴ Ibid at 293.

⁶⁹⁵ Holley supra (n 678). In R v Faquir Mohammed [2005] EWCA Crim 188, the accused a devout Muslim killed his daughter upon discovering her with a man in her bedroom. The trial judge directed the jury could consider his strongly held religious beliefs and depression when considering the question of whether the reasonable person would have lost self-control. The Court of Appeal held that the correct test was in Holley supra (n 678) namely that such characteristics should be ignored.

⁶⁹⁶ Smith (Morgan) supra (n 40).

⁶⁹⁷ Ibid at par 22.

⁶⁹⁸ Smith (Morgan) supra (n 40). In James [2006] EWCA Crim 14, the accused killed his wife with a kitchen knife. A psychiatric condition affected his ability to control his behaviour. The judge, following Holley supra (n 678) directed the jury that only his sex and age could be attributed to a reasonable person. His appeal was dismissed and the case then referred to the Privy Council by the Criminal Cases Review Commission. In Karimi [2006] All ER (D) 170 (Jan) the accused killed his estranged wife's lover with a knife, when he had been provoked by insults including the phrase "besharef", which means you have no honour. Karimi was convicted and reconvicted at subsequent retrial. He appealed to the Privy Council. Giving judgment, Phillips CJ said: "There is no wish to reduce the law on provocation to a game of ping pong" (at 180). It was held that the only relevant characteristic in relation to whether a reasonable person would have lost self-control are age and sex. This is a retrograde step for those with mental conditions (such as BWS) who kill under provocation where the loss of self-control has been affected by the condition (cited in Withey "Provocation Ping Pong" (2006) New Law Journal 299 at 300).

terms of section 2 of the Homicide Act of 1957. The majority held that an analysis of the provocation defence should acknowledge the pertinent role of diminished responsibility and in particular the possibility of relying on a defence where the accused suffers from an abnormality of the mind.⁶⁹⁹ Therefore, where the accused suffers from an abnormality⁷⁰⁰ of the mind, this renders inappropriate the application of the objective standard.⁷⁰¹

⁶⁹⁹ Martin supra (n 659) at 1364 notes that certain inconsistencies manifest themselves in Luc Thiet Thuan supra (n 643) as expounded in Holley (n 678). In Holley supra (n 678) the majority cited with approval Lord Diplock's finding in R v Camplin supra (n 607) that a jury can take into account the age and sex of the accused. The obvious arguments against this present themselves, particularly the complaint that if some subjective, variable traits can be relied on, it becomes arbitrary to allow these two factors to be considered by jury but not any others. In theory, by allowing sex and age to be bestowed upon the reasonable man, the so-called objective standard enables a scenario in which a middle-aged woman is judged to a significantly stricter standard than a young man. In this context, victims of battered woman syndrome who kill may receive scant consolation from Lord Nicholls' proclamation that diminished responsibility is apt to embrace some cases where it is inappropriate to apply to the accused the standard of self-control of an ordinary person (at par [16]).

⁷⁰⁰ Elliot supra (n 53) at 258 notes that diminished responsibility is being used on occasion pragmatically, where the court feels sympathy for the accused and the requirements of the defence of provocation are not satisfied. Consider for example the case of Ahluwalia (supra (n 602)). The defence was applied to an abused woman who killed her abusive partner. But such cases put strain on the law of diminished responsibility because, strictly speaking, the requirements for this defence may not have been satisfied. The Law Commission in its Consultation Paper, Partial Defences to Murder 2003 observes: "There appears to be some inconsistency in the willingness of psychiatrists to testify on the diagnoses of the accused's mental health. Some experts may be uncomfortable with classifying as an 'abnormality of mind' what essentially may be ordinary reactions to a highly stressful situation such as an abusive and violent relationship. This element of arbitrariness is far from ideal. Labelling such women as mentally ill also plays up to negative stereotypes of vulnerable women. This, in effect, pathologises woman's actions and implies that had her mental faculties not been impaired she would have continued to be a happy punch bag. There is further irony that the more robust the accused is, the less likely it is that she will succeed on a defence of diminished responsibility" (at par [10.778]-[10.78]). Reliance on diminished responsibility in this context places the focus of the defence on the woman's state of mind, when it would have been more appropriate to emphasize the abuse she suffered.

⁷⁰¹ Smith (Morgan) supra (n 40) at par 16. Martin supra (n 659) is of the view that post-Holley supra (n 678) the situation is no clearer: "Juries must again grapple with the counterintuitive distinction they are required to make between subjectivity in relation to whether the accused actually lost her self-control and objectivity as to the standard of self-control against which the accused is to be judged" (at 1364). Thus both the Luc Thiet Thuan (supra (n 643)) and the Smith (Morgan) (supra (n 40)) models are beset by inconsistencies, the arbitrary application of principles and an absence of clear logic". As Elliot supra (n 53) states: "The reasonable person does not kill and there is no moral reason why a person who has lost their temper should benefit from a defence. The courts are trying to achieve justice by taking into account the 'right' characteristics of the accused in applying the reasonable person test. But there are, in fact, no characteristics which can justify a partial defence based on a loss of temper" (at 257).

3.5.4 Proportionality and the reasonable person

According to the Homicide Act 1957, if there is evidence that the accused was provoked to lose her self-control; the judge is under a duty to put the defence to the jury. This is the case even where the accused's reaction may be disproportionate.⁷⁰²

Lord Diplock in Camplin⁷⁰³ held that Mancini⁷⁰⁴ is no longer to be treated as an authority on the law of provocation. Ormerod is of the view that "it would be wrong to tell the jury that fists might be answered with fists but not with a deadly weapon".⁷⁰⁵

This is so since if fists were answered with a deadly weapon, such a direction would take out of the jury's jurisdiction a question which is exclusively for their determination and on which their opinion is decisive.

In terms of section 3 of the Homicide Act of 1957, in applying the objective test, the jury should consider whether the provocation was enough to make a reasonable person do as the accused did.⁷⁰⁶ Thus even when acting under the heat of passion, the

⁷⁰² At common law the judge could withdraw the defence of provocation from the jury if he believed that there was no evidence suggesting that a reasonable person would have been provoked to lose her self-control and do as the accused did. (See Mousourakis supra (n 544) at 98).

⁷⁰³ Camplin supra (n 607).

⁷⁰⁴ [1942] AC 1, [1941] 3 All ER 272. In this case the accused's, a manager of a club, stabbed the victim to death with a knife-like instrument during a fistfight. In his appeal the accused argued that although he did not himself plead provocation, the judge should have directed the jury on the issue. The appeal was rejected since the judge does not have to direct the jury on provocation unless the mode of retaliation bears a "reasonable relationship" to the provocation. (See Ormerod supra (n 41) at 458). Thus in Mancini Lord Simon held: "The test to be applied is that of the effect of provocation on a reasonable man...so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance...to take into account the instrument with which the homicide was affected, for to retort, in the heat of passion induced by provocation, by simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation is the offence reduced to manslaughter" (at 9 & 27). This has come to be known as the "reasonable relationship rule", a restatement of the early law's proportionally requirement.

⁷⁰⁵ Per Devlin J in Duffy supra (n 595) at 932n.

⁷⁰⁶ Brown [1972] 2 QB 229 In this case Talbot J held: "[W]hen considering whether the provocation was enough to make a reasonable man do as the accused did, it is relevant for the jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act committed by the accused. It may be, for instance, that a jury might find that the accused's act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think

provocative act must retain a degree of self-control. This is so because only on such an assumption is the requirement of proportionality in provocation meaningful.⁷⁰⁷

In terms of section 3 of the Homicide Act, the objective and subjective differ. The questions to be asked are: (1) did the accused lose her self-control? and (2) was the provocation enough to make the ordinary person in the accused's shoes do as the accused did. It could not have been intended, that the jury should consider whether a reasonable person in full control of herself would have done what the accused did for the logical effect of that would be to eliminate the defence from the law.⁷⁰⁸ The objective test should be construed as it was in Phillips v R:⁷⁰⁹

“...the question...is not merely whether in their opinion the provocation would have made the reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did”.⁷¹⁰

therefore that a jury should be instructed to consider the relationship of the accused's acts to the provocation when asking was it enough to make a reasonable man do as he did?”(at 234).

⁷⁰⁷ Ormerod supra (n 41) 457. See Phillip v R supra (n 599) at 137 where Lord Diplock rejected the view that loss of self-control is an all or nothing concept. Reilly in “Loss of Self-control in Provocation” (1997) Criminal Law Journal 320 at 328 is of the view that the problem with the proportionality requirement is that it makes the provocation defence reliant upon the assessment of the accused's conduct after she lost her self-control rather than on giving in to her passion and losing control in the first place. See also Fletcher supra (n 544) 247-248. Reilly states that: “while on the one hand, a proportional response by a battered woman requires an ability to assess the gravity of provocation and to respond accordingly even up to the point of homicidal violence. On the other hand, loss of self-control suggests the possibility of a proportional response up to the point at which self-control is lost, after which the person is no longer capable of acting with any restraint whatsoever, regardless of how unreasonable the response might be. The incidence of loss of self-control inhibits the courts attempt to limit the scope of the defence through a requirement of proportionality. Balancing the competing demands of delimitation and congruity, the courts have obscured the application of a test of proportionality. See further the Criminal Law Revision Committees proposed reformulation of the test in provocation recommending that the jury should be invited to consider whether, from the viewpoint of the accused, the provocation offered can reasonably be regarded as providing sufficient ground for loss of self-control leading the accused to react against the victim with intent to kill (CLRC par [81]-[83]).

⁷⁰⁸ Ormerod supra (n 41) 459.

⁷⁰⁹ Phillips v R supra (n 599).

⁷¹⁰ Ibid at 137.

This makes the assumption that a person who has lost his self-control has acted with more or less ferocity according to the degree of provocation which caused the loss of self-control. The Privy Council rejected the argument:

“...that loss of self-control is not a matter of degree but is absolute, there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordship’s view false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon”.⁷¹¹

3.5.5 Self-induced provocation

The question whether an accused could rely on the defence of provocation where it appears that the provocation has been induced by the accused’s conduct towards the victim has been settled by section 3 of the Homicide Act 1957.⁷¹² In terms of section 3 the judge cannot withdraw the defence from the jury in such cases, but he may still draw the jury’s attention to the fact that the provocation was self-induced as a factor militating against the accused’s plea. It is for the jury to decide whether the accused’s claim that she was provoked is acceptable by taking into account everything done and said according to the effect which it would have on a reasonable person.⁷¹³

⁷¹¹ Ibid.

⁷¹² Mousourakis *supra* (n 544) 107.

⁷¹³ In Edwards [1973] AC 648, [1973] 1 All ER 152, PC the Privy Council adopted that position that in principle, the accused cannot rely on provocation when they caused the provocation. Further the condition that provocation must not have been a predictable result of the accused’s own actions does not seem to accord with section 3. However in Johnson [1989] 1 WLR 740, the accused was allowed to rely on the provocation defence although the provocation was a predictable result of the accused’s own offensive behaviour. the Court of Appeal expressed its disapproval of the position in Edwards stating: “In view of the express wording of section 3...we find it impossible to accept that the mere fact that an accused caused a reaction in others, which in turn led to him losing self-control, should result in the issue of provocation being kept outside a jury’s consideration. Section 3 clearly provides that the question is whether things done or said or both provoked the accused to lose his self-control. If there is any evidence that it may have done, the issue must be left to the jury”.

3.6 Diminished responsibility

3.6.1 Introduction

Diminished responsibility may provide the legal basis for dealing with cases of cumulative provocation that cannot be treated under the provocation defence. This could be the case where the accused was subjected to a long course of cruel and violent behaviour. She may then claim that she is experiencing such grave distress or depression so as to substantially diminish her capacity for self-control and, therefore, her moral responsibility for her actions. Pleading diminished responsibility instead of provocation in such cases would seem more appropriate where there is no final provocative incident occurring immediately prior to the killing, or where the battered woman's retaliation was preceded by planning and deliberation. Furthermore, such an approach might be adopted in a case where the conduct that triggered the battered woman's fatal response is not regarded as being capable of amounting to provocation (i.e. on the basis of the objective test as it applies in the circumstances of cumulative provocation).⁷¹⁴ In such a case the circumstances of cumulative provocation may provide a sufficient basis for supporting the battered woman's plea of diminished responsibility, even in those cases where no clear evidence of an abnormality of mind (in a strict medical sense can be brought forward).⁷¹⁵

In the case of Ahluwalia,⁷¹⁶ the Court of Appeal took the view that the trial judge's direction was correct in law and ordered a retrial on the basis that expert evidence of

⁷¹⁴ Mousourakis supra (n 544) 170. See also the Law Commission Consultation Paper No. 290 of 2004 at par 5.22 (stating that diminished responsibility is often the only defence to murder available to abused women "driven to kill".)

⁷¹⁵ Mousourakis supra (n 544) 170-171. Cf Mousourakis supra (n 544) at 164 citing Williams *Textbook of Criminal Law* (1983) at 544: "If they [abnormal people] want their abnormality to be taken into account, they must raise a defence appropriate to them – insanity or diminished responsibility."

⁷¹⁶ Ahluwalia supra (n 602).

the accused's been considered not in the context of provocation but in relation to diminished responsibility, which had not been pleaded at the first trial. McColgan notes that the case of Ahluwalia⁷¹⁷ has been hailed as a landmark in that "[f]or the first time, in a case where a battered woman kills her husband the court has taken on board as of legal relevance evidence of the psychological effects on her state of mind living in a battering relationship. Such a declaration of the admissibility of psychiatric evidence may enable future accused to mount challenges to juror's perceptions of domestic violence."⁷¹⁸

3.6.2 Development of the defence

The defence of diminished responsibility is provided for by section 2 of the Homicide Act 1957. According to section 2:

“(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if she was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired her mental responsibility for her acts and omissions in doing or being party to the killing.”

The accused is required in terms of section 2(2) to prove diminished responsibility⁷¹⁹ on the balance of probabilities.⁷²⁰ If successful, the accused will be convicted of

⁷¹⁷ Ibid.

⁷¹⁸ McColgan supra (n 39) 513.

⁷¹⁹ Mousourakis supra (n 544) at 164 notes that this defence was introduced in response to the recommendation of the Royal Commission on Capital Punishment for a broader insanity defence. Cf Cmnd 88932, 1949-1952.

⁷²⁰ R v Dunbar [1958] 1 QB 1; R v Ahmed Din (1962) 46 Cr App Rep 269; R v Bathurst [1968] 2 QB 99; R v Vinagre (1979) 69 Cr App Rep 104; Bradshaw v R (1985) 82 Cr App Rep 79, [1985] Crim LR 733.

manslaughter.⁷²¹ The Law Commission⁷²² noted that the main rationale which underlies the body of opinion favouring retention of diminished responsibility defence (even if the mandatory life sentence were to be abolished) is “fair and just labelling.” The Law Commission expressed the view that it is unjust to label as murderers those who are not fully responsible for their actions. The Commission made reference to the stigma which attaches to a conviction for murder, which is considered the most serious of all crimes. The reason why it is unjust is that the accused’s culpability is diminished.⁷²³ There is a clear moral distinction between murder and diminished responsibility killing, despite the presence of mens rea of the former offence. The Law Commission acknowledged that what was required is a new plea which appropriately reflects this moral distinction.⁷²⁴

In terms of section 2 of the Homicide Act 1957, it must first be proved that at the time of the killing, the accused suffered from an abnormality of mind. In Byrne⁷²⁵ Lord

⁷²¹ Mousourakis supra (n 544) at 166 notes that medical evidence must be submitted to support the claim that the accused was in fact suffering from an abnormality of mind arising from one of the causes specified in section 2(1) of the Homicide Act 1957. Cf Dix v R (1981) 74 Cr App R 306.

⁷²² Law Commission Consultation Paper No. 290 of 2004.

⁷²³ Ibid at par 5.18. Such a rational merits two comments. (1) Firstly, reference to culpability is problematic since English law has traditionally employed the concept of mens rea (in conjunction with *actus reus*) and in particular the distinction between intention and subjective recklessness, as a means of assessing culpability and labelling conduct. Murder stands at the apex of offences of physical violence because of the requirement of intent attached to *actus reus* of unlawful killing. Partial defences represent an exception to the general approach since they only come into operation if a jury is satisfied that the accused committed the conduct element and had the mens rea of murder. Therefore, such partial defences are anomalous and owe their existence solely to the mandatory sentencing regimes, which have always existed for murder (at par 5.19).

⁷²⁴ Law Commission Consultation Paper No. 290 of 2004 at 5.20. Furthermore, the Law Commission noted at 5.22 that the defence may enable a merciful but just disposition of certain types of cases where all parties consider it meets the justice of the case.

⁷²⁵ Byrne supra (n 68). In this case the accused killed a young woman and then mutilated her body. Medical evidence showed that he suffered from sexual urges which he found extremely difficult to resist, and furthermore that he had committed the killing while under the influence of such urges. Despite evidence that the accused knew what he was doing and that he was fully ware of the wrongful nature of his actions, the Court of Criminal Appeal quashed his conviction for murder and instead found him guilty of manslaughter.

Parker CJ defined the term abnormality of mind as follows:

“ ‘Abnormality of mind’, which has to be contrasted with the time-honoured expression in the M’Naughten Rules, ‘defect of reason’, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to for a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.”⁷²⁶

In Byrne,⁷²⁷ the court accepted that the accused’s condition was correctly described as “partial insanity” or “a condition bordering on insanity.”⁷²⁸ Mackay notes that the court’s dictum had a profound effect on the development of the defence of diminished responsibility:

“(by) allowing psychiatric evidence of sexual psychopathy to be admitted as a form of abnormality of mind, the concept of irresistible impulse was introduced into English law.

⁷²⁶ Byrne supra (n 68) at 403. Griew “The Future of Diminished Responsibility” [1988] Criminal Law Review 75 at 82 notes that for the defence of diminished responsibility to be accepted: “the accused had to have an abnormality of mind (of appropriate origin). This had a substantial effect upon one or more relevant functions or capacities (of perception, understanding, judgment, feeling, control). In the context of the case this justifies the view that her culpability is substantially reduced. Her liability is on that account to be diminished. More shortly: her abnormality of mind is of such consequence in the context of this offence that her legal liability for it ought to be reduced.” Furthermore, the Law Commission Consultation Paper No. 290 of 2004 at 5.22 took cognizance of the out-dated nature of the insanity defence as contained in the M’Naghten Rules. The narrowness of the rules, in the sense of their preoccupation with cognitive understanding, is seen to be reinforcing the need for a partial defence of diminished responsibility. In addition the stigma which attaches to being labeled insane makes the accused reluctant to plead insanity. In this respect Nicolson and Sanghvi supra (n 641) at 734 note: “But even if battered woman syndrome is developed to address the pertinent issues, it will always actively shift the emphasis from the reasonableness of the accused’s actions to her personality in a way which confirms existing gender stereotypes. Furthermore, battered woman syndrome suggests reliance on personal incapacity. This might lead not only to battered accused being treated as mentally abnormal, but also to the therapeutisation of domestic violence.”

⁷²⁷ Byrne supra (n 68) 406.

⁷²⁸ But cf Seers (1984) 79 Cr App Rep at 261 where the Court of Appeal adopted the position that judges should avoid comparing diminished responsibility to insanity for there may be cases in which the abnormality of mind upon which the defendant’s defence is based has nothing to do with an any of the conditions relating to the insanity defence.

Furthermore, the courts have been willing to accept a whole range of less serious mental conditions as falling within ‘abnormality of mind’ in order to ensure a lenient sentence or disposal.”⁷²⁹

Mousourakis notes that although no clear description is given of the causes referred to in section 2 of the Homicide Act of 1957, it would appear that “disease or injury” would in all likelihood pertain to physical injury or illness. Furthermore, the term “inherent cause” would encompass “functional mental disorders”.⁷³⁰ Examples of abnormalities of mind that were sufficient for the defence of diminished responsibility to be placed before a jury ranged from arrested intellectual development combined with psychopathic tendencies,⁷³¹ personality disorder induced by psychological injury,⁷³² reactive depression caused by marital difficulties,⁷³³ chronic alcoholism,⁷³⁴ and Othello syndrome.⁷³⁵

For a defence of diminished responsibility to succeed, it is required that the accused’s difficulty in exercising control over her conduct was substantially greater than that of a reasonable or normal person. To determine whether the accused’s responsibility was substantially impaired, the jury must adopt a broad, common sense approach.⁷³⁶

⁷²⁹ Mackay supra (n 68) 118.

⁷³⁰ Mousourakis supra (n 544) 168. Cf Sanderson (1993) 98 Cr App Rep 325; Fenton (1975) 61 Cr App Rep 261.

⁷³¹ Egan v R [1992] 4 All ER 470.

⁷³² Gittens [1984] QB 698.

⁷³³ Sanders (1991) 93 Cr App Rep 245.

⁷³⁴ Tandy [1989] 1 WLR 350.

⁷³⁵ Vinagre supra (n 720) 104. This term describes a morbid jealousy for which there is no cause.

⁷³⁶ Byrne supra (n 68) 406.

Pleading diminished responsibility is not without practical difficulties. For a diminished responsibility plea to be successful, the accused's mental abnormality has to fall within the scope of section 2(1) of the Homicide Act 1957.⁷³⁷ The qualifying words in this section can be traced back to the Mental Deficiency Act 1927. Although the 1927 formulation was intended to mean "however arising or caused" the 1957 version was clearly designed to have the opposite effect. In this respect, Mackay notes Griew's remarks in this regard:

"The terms 'inherent causes,' 'disease' and 'injury,' which need no explanation in the 1927 context, thus acquire a crucial significance in 1957. If the scope of the new defence is to depend on careful reading of the section, it becomes vital to know what kinds of causes are 'inherent', what kinds of trauma will count as 'injury' and what, indeed, is meant by 'disease'. None of these questions is easy or assured of a confident judicial answer."⁷³⁸

This could prove problematic since:

"It is perhaps not surprising that doctors should vary among themselves in how they used the four specified aetiologies, for they have no defined or agreed psychiatric meaning, and the phrase 'inherent causes' in particular is obviously capable of being interpreted in many different ways. More surprising was the fact that the reports frequently omitted any reference at all to the cause of the abnormality, thereby leaving the court without any written evidence as to the applicability of section 2(1). However, to ignore or overlook the bracketed clauses in this manner is far from satisfactory."⁷³⁹

In respect of battered women it should be noted that:

⁷³⁷ See 161-162 for a discussion of section 2(1) of the Homicide Act 1957.

⁷³⁸ Mackay *supra* (n 68) at 120, citing Griew *supra* (n 726) at 79.

⁷³⁹ Mackay *supra* (n 68) 120.

“Section 2 of the Homicide Act requires that the impairment of mental responsibility relied upon in a diminished responsibility plea results from an ‘abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any other inherent causes or induced by disease or injury)’ rather than merely from a serious emotional upset. This definition does not, on the face of it, apply to women who can see no escape from violence except through their own use of diminished responsibility.”⁷⁴⁰

Furthermore, pleading diminished responsibility presupposes an admission of mental abnormality.⁷⁴¹ However, some English courts have treated battered woman syndrome as evidence of a temporary personality condition, caused by abnormal circumstances, rather than a form of mental abnormality.⁷⁴²

3.6.3 Pleading Provocation and Diminished Responsibility together

In certain cases, such as those of cumulative provocation, the accused may be able to plead a combined defence of provocation and diminished responsibility.⁷⁴³ The practical effect of this would be the reduction of the offence from murder to manslaughter⁷⁴⁴ if the accused is found to be suffering from an abnormality of mind

⁷⁴⁰ McColgan supra (n 39) 513.

⁷⁴¹ One of the arguments against the retention of diminished responsibility defence has been highlighted by the Law Commission Consultation Paper No. 290 of 2004 at par 5.43: “Logically, since diminished responsibility reduces the accused’s responsibility for the killing, it ought to be viewed as a mitigating factor rather than a partial defence in a case where, by definition, the accused’s level of culpability is established by reference to traditional concepts of conduct and mens rea.” The Law Commission further notes that issues which are supposed to be addressed by mitigation are “artificially forced into the straightjacket of substantive liability. The defence was supposed to be introduced to sanitize the worst aspects of capital punishment.”

⁷⁴² Nicolson and Sanghvi supra (n 641) at 737. In Ahluwalia supra (n 602) Hobhouse J made it clear that his acceptance of the accused’s manslaughter plea was based on the evidence of diminished responsibility and not provocation. However, the Court of Appeal’s recognition of battered woman syndrome took place not in the context of diminished responsibility, but solely in relation to the objective condition of provocation. Moreover, the fresh evidence of diminished responsibility involved endogenous depression and not battered woman syndrome.

⁷⁴³ Cf Criminal Law Revision Committee, Working Paper on Offences Against the Person, August 1976, para 53.

⁷⁴⁴ According to Williams supra (n 715) 544-545: “Success in the combined defence of provocation and diminished responsibility has an advantage for the accused in respect of sentence: it may result in a more lenient outcome than a defence of provocation alone; and it is virtually free from the risk of life sentence that attends a defence of diminished responsibility by itself.”

and was provoked to lose her self-control.⁷⁴⁵

One of the reasons for pleading provocation and diminished responsibility together pertains to the uncertainty that surrounds the application of the objective test in provocation. This is result of the difficulty in distinguishing between individual characteristics of the accused that may be taken into account as modifying the reasonable person test and those characteristics that lie outside the scope of the test. Therefore, a combined plea would be a better strategy in case where it is unclear whether the reasonable person may be endowed with a particular mental characteristic of the accused or not.⁷⁴⁶

One of the main advantages of pleading diminished responsibility and provocation together is that once expert medical evidence is admitted it may become virtually impossible to disentangle the issues of loss of self-control, abnormality of mind and substantial impairment of mental responsibility. Furthermore, there seem to be indications that when the two pleas are run concurrently, the jury may be prepared to adopt a liberal approach towards each.⁷⁴⁷

⁷⁴⁵ Mousourakis supra (n 544) 172.

⁷⁴⁶ Mousourakis supra (n 544) 174. In the New Zealand case of Taaka [1982] NZLR 198, the Court of Appeal adopted the view that the obsessively compulsive personality of the accused should be regarded as a characteristic relevant to the issue of provocation and, as such, it should be taken into account by the jury in applying the objective test. In Gordon (1993) 10 CRNZ 430, post-traumatic stress disorder or battered woman syndrome may be regarded as a “characteristic” for the purposes of the provocation defence. However, Mousourakis supra (n 544) at 174 notes that these cases suggest a departure from the traditional jurisprudence of provocation, as the position adopted indicates that mental peculiarities may be viewed as a discrete exculpatory factor in defining provocation law. Furthermore, New Zealand law does not provide for a separate defence of diminished responsibility and this may explain the more liberal approach to the application of the objective test adopted in these cases.

⁷⁴⁷ Mackay “Pleading Provocation and Diminished Responsibility Together” (1988) Criminal Law Review 411 at 421.

However, a combined plea can prove problematic in that on the one hand, the defence of provocation concerns a loss of self-control in an ordinary person with a normal mind, while on the other diminished responsibility requires an accused to be suffering from an abnormality of mind. A verdict of manslaughter on both grounds is illogical, since the defence of provocation presupposes a reasonable person driven to killing, whereas unreasonableness is endemic in the case of diminished responsibility.⁷⁴⁸

3.6.4 Conclusion

Given the current ideal model of self-defence, it is clear that attention has to be drawn to its inequitable application to women who kill to defend themselves. In the absence of challenges to the common assumptions about when force is necessary in response to actual or threatened violence, and about the level of force which a woman might reasonably use against an unarmed abuser, such women will be unable to successfully plead self-defence.

The development of self-defence in English law clearly illustrates this trend. In the case of battered women, a plea of self-defence is only available if the force used by the women is reasonable and necessary to protect them from an imminent attack. It is, therefore, not available to an abused woman who fears violence in the future and kills her abuser, when for example, he is asleep or has his back turned to her.⁷⁴⁹ It is submitted that an abuser should not be allowed to benefit from the law of self-defence by making the

⁷⁴⁸ Mackay supra (n 747) 417. The Law Commission's final recommendation for a defence of diminished responsibility was held as follows: "A person, who would otherwise be guilty of murder, is not guilty of murder but of manslaughter if, at the time of the act or omission causing death, (1) that person's capacity to: (a) understand events; or (b) judge whether his actions were right or wrong; or (c) control himself, was substantially impaired by an abnormality of mental functioning arising from an underlying condition and (2) the abnormality was a significant cause of the accused's conduct in carrying out or taking part in the killing. "Underlying condition" was defined as meaning a pre-existing mental or physiological condition other than of a transitory kind (at par 5.47).

⁷⁴⁹ For a discussion of the imminence requirement in self-defence see 117-120.

battered women wait until she is being attacked before engaging in physical resistance. A strict view of imminence, then should not on the authority of Palmer,⁷⁵⁰ cause an “otherwise arguable plea of self-defence to be jettisoned where there is no realistic alternative open to the abused woman.”⁷⁵¹

The concepts of proportionality and necessity, through which reasonableness is to be judged have also developed at common law largely through cases involving male accused. The jury will of necessity focus on an idealized model of what is reasonable and assess the accused’s conduct against such a standard. The relative scarcity of female killers has resulted in a paradigmatically male ideal model and this together with the incompatibility of aggressive force with stereotypical femininity, means that the apparently gender-neutral concept of reasonableness is actually prejudicial to the battered woman.⁷⁵² For example, to assess if the battered woman’s use of force is reasonable, the court will need to establish if the use of force was necessary.⁷⁵³ Where an abused woman kills her abuser during the course of an attack by him, it is likely that her only alternatives to the use of force would consist of submission or flight.⁷⁵⁴ While the law does not require the abused women to flee her home, it would appear that failure to notify law enforcement authorities would indeed count against her at a trial. The law also does not take into account the fact that abusers tend to retaliate when law enforcement authorities are involved or where the abused woman leaves the home, the abuser tends to track her down and bring her home. Without investigating the

⁷⁵⁰ Palmer supra (n 531).

⁷⁵¹ McColgan supra (n 39) 519.

⁷⁵² McColgan supra (n 39) 516.

⁷⁵³ For a discussion of the requirement of reasonableness see 116-118.

⁷⁵⁴ For a discussion of the duty to retreat see 120-122.

psychological aspects of battered woman syndrome, it is clear that viewed from the woman's perspective her use of force, even if considered excessive, might be the only way to escape an escalating spiral of violence, which she believes will eventually end in her death.⁷⁵⁵ The proportionality requirement, which has developed through cases concerning male accused, and is generally taken to demand parity between the attack and defence and which is unfair were the attacker is male and the defender is female, it is clear that where the force used is judged to be excessive in relation to the harm threatened, neither section 3 of the Criminal Law Act 1967 nor the common law will assist her and she's liable to be convicted of murder.⁷⁵⁶ However, the harshness of this rule is mitigated in practice by the recognition that a person defending herself "cannot weigh to a nicety the exact measure of her necessary defensive action."⁷⁵⁷

The application of self-defence too many abused women who kill does not involve any alteration or extension of the defence, rather a rethinking of the way in which the requirement that the accused's use of force be reasonable is applied to cases other than those involving the traditional model of a once off adversarial encounter between strangers. Self-defence is regarded as a justificatory defence, and it is this aspect of it perhaps which underlies the unease which is expressed about its application in cases other than those in which it has traditionally been accepted.⁷⁵⁸

In terms of English common law, judges used to rule as a matter of law on the question of what could amount to provocation. The relevant conduct needed to be inherently

⁷⁵⁵ McColgan supra (n 39) 517.

⁷⁵⁶ McColgan supra (n 39) 520.

⁷⁵⁷ Palmer supra (n 531) 1078.

⁷⁵⁸ McColgan supra (n 39) 521.

objectionable.⁷⁵⁹ In terms of section 3 of the Homicide Act 1957, there is no limit as to what conduct could constitute provocation.⁷⁶⁰ Therefore, any legitimate conduct such as a baby crying, could be treated as provocation. This would remove the possible justification for allowing the defence. Further, the defence encourages a culture of blaming murder victims for their own deaths. Where the issue of provocation is raised, a trial risks focusing on the accused's behaviour rather than the deceased's conduct.⁷⁶¹

Women are more likely to kill their abusers as a result of the abuse they suffered. In the past provocation would not be available to abused women since there is often a time gap between the last provocative act of the victim and the killing. The case of Ahluwalia⁷⁶² was adapted to take into account the time delay. Despite these legal developments, the defence of provocation may still not be available to abused women, since they may not have reacted under the requisite loss of self-control. Instead, the killing may have been planned and deliberate.⁷⁶³

The objective test for provocation requires that a reasonable person would also have lost her self-control and killed in reaction to the provocation. This test seeks to impose a requirement that, even under provocation, the accused's conduct should not have fallen below a minimum standard expected in society.⁷⁶⁴ The problem with this test is that in today's society, a reasonable person never kills.⁷⁶⁵ Therefore, if a strictly

⁷⁵⁹ For a discussion of the English common law see 127-131.

⁷⁶⁰ For a discussion of section 3 of the Homicide Act 1957, see 130.

⁷⁶¹ Elliot supra (n 53) 255.

⁷⁶² Ahluwalia supra (n 602).

⁷⁶³ For a discussion of the requirement of loss of self-control, see 131-135.

⁷⁶⁴ For a discussion of the objective test of provocation see 135-144.

⁷⁶⁵ Elliot supra (n 53) 257.

objective test were to be applied, the defence would never be successful. For this reason the courts have watered down this objective standard, and will take into account certain of the accused's characteristics when applying the reasonable person test. However, case law suggests that the courts have had difficulty in determining which characteristics to take into account. While the court in Smith (Morgan)⁷⁶⁶ held that the jury is sovereign in determining which characteristics to take into account, this approach has not been strictly adhered to. The courts have vacillated between the objective and subjective approach. In Smith (Morgan)⁷⁶⁷ the standard of self-control required to trigger the provocation defence is not a constant standard. The jury should apply the standard one could expect of the particular individual with her particular characteristics. Such a standard would be beneficial for battered women, but was not adhered to for long.⁷⁶⁸ In Luc Thiet Thuan,⁷⁶⁹ the court adopted a constant, objective standard of self-control. The jury must ask themselves whether a reasonable person, with ordinary powers of self-control and subject to the same provocation, would have reacted as the accused did.⁷⁷⁰ In Holley,⁷⁷¹ the court again changed its mind and decided to return to an objective standard of self-control as expounded in Luc Thiet Thuan.⁷⁷² The application of provocation must be considered in the context of diminished

⁷⁶⁶ Smith (Morgan) supra (n 40). The Law Commission Consultation Paper No. 173, 2003 at par 4.150 held that the effect of this decision was to substantially lower the threshold of self-control and that leaving the decision to the essentially subjective judgment of individual jurors is wrong since it is likely to lead to idiosyncratic and inconsistent decisions.

⁷⁶⁷ Smith (Morgan) supra (n 40). For a discussion of this case see 144-147.

⁷⁶⁸ This would not, however, be based on sound policy reasons. In this regard see Heaton's criticism of the provocation defence at n 659.

⁷⁶⁹ Luc Thiet Thuan supra (n 643).

⁷⁷⁰ For a discussion of this case see 143-144.

⁷⁷¹ Holley supra (n 678).

⁷⁷² Luc Thiet Thuan supra (n 643).

responsibility. One should not distort the other.⁷⁷³ However, this standard remains problematic in that juries must still grapple with the distinction between subjectivity and objectivity.⁷⁷⁴ If nothing else, this case is a reminder that the law relating to provocation is flawed to an extent beyond reform by the courts. It would appear that the retreat to objectivity in Holley⁷⁷⁵ will remain the orthodox approach, at least until the government completes its review of the law relating to provocation.⁷⁷⁶

Diminished responsibility may provide the legal basis for dealing with cases of cumulative provocation that cannot be treated under the provocation defence. Where the accused has been subjected to a long period of abuse, she may claim that she was experiencing such distress or depression so as to substantially diminish her capacity for self-control, and therefore her moral responsibility for her actions.⁷⁷⁷ Pleading diminished responsibility in such a case would seem more appropriate where no final provocative incident occurred immediately prior to the killing, or where the battered woman's retaliation was preceded by planning and deliberation. The same approach could be adopted where the conduct that triggered the abused women's fatal response is not regarded as being capable of amounting to provocation (i.e. on the basis of the objective test as it applies to the circumstances of cumulative provocation). In this case the circumstances of cumulative provocation may provide a sufficient basis for supporting a plea of diminished responsibility. This is so even in cases where there is no clear evidence of an abnormality of mind.⁷⁷⁸

⁷⁷³ Holley supra (n 678). For a discussion of this case see 154-156.

⁷⁷⁴ Martin supra (n 659) 1364.

⁷⁷⁵ Holley supra (n 678).

⁷⁷⁶ Martin supra (n 659) 1364.

⁷⁷⁷ Mousourakis supra (n 544) 170.

⁷⁷⁸ Ibid.

However, such cases can put a strain on the law of diminished responsibility since strictly speaking, the requirements for the defence are not satisfied. The Law Commission notes that there appears to be some inconsistency in the willingness of psychiatrists to testify on the diagnosis of the accused's mental health. Furthermore, some experts may not be comfortable with classifying as an "abnormality of mind" what essentially may be ordinary reactions to highly stressful situations such as an abusive and violent relationship.⁷⁷⁹ Furthermore, labelling abused women as mentally ill also plays up to negative stereotypes by pathologizing a woman's actions and implies that had her mental faculties not been impaired she would have continued to be a "happy punch bag." There is also a further problem that if the accused is robust, she is less likely to succeed on a defence of diminished responsibility.⁷⁸⁰

⁷⁷⁹ Elliot supra (n 53) 258, noting the Law Commission's Consultation Paper No. 173 of 2003 arguments at par 10.78.

⁷⁸⁰ Elliot supra (n 53) 258, noting the Law Commission's Consultation Paper No. 173 of 2003 arguments at par 10.77.

CHAPTER 4**THE BATTERED WOMAN AND AMERICAN LAW****4. Introduction**

In the United States there is no single law of self-defence or provocation. This so since the federal system allows each state to define and understand the law relating to those defences differently. Due to the variety and discrepancy of understandings of these defences in each state, it would prove difficult to draw meaningful comparisons. For this reason it is necessary to consider these defences by virtue of broad substantive topics, discussing the general nature of self-defence and provocation and then illustrating and critiquing, some of their dominant variations. This is done since it makes little sense that counsel will set out to change the law. Rather, counsel is required to represent their client within the bounds of law in each jurisdiction.⁷⁸¹

This chapter seeks to critically examine the concept of “battered woman syndrome” and the impact that such evidence would have, if any, on the defences currently utilized by battered women, specifically self-defence and provocation. The emergence and increasingly widespread acceptance of new subjective standards marks an extremely important development in the doctrines of self-defence and provocation. This is particularly pertinent in cases where the defendant killed her abuser in a nonconfrontational situation in the case of self-defence or in the case of provocation where there was no direct provocatory act on the part of the abuser before the defendant’s homicidal act. This chapter seeks to provide a comprehensive discussion on the development self-defence and provocation, with specific emphasis being placed on the type of test utilized for both defences, notably the objective test, subjective test, particularizing standard as well as the Model Penal Code standard. This discussion will

⁷⁸¹ Ogle and Jacobs Self-Defense and Battered Women who Kill: A New Framework (2002) 93.

include providing a general definition of each standard of reasonableness, and will identify its basic rationale as well as the case law which has formed the basis for such tests. A brief critique will be given for each test in both defences to establish whether the subjectivized standards for self-defence and provocation are superior to the objective standard. Furthermore, a critique will be made of the other elements relating to the defences: in the case of self-defence emphasis will be placed on imminence, proportionality and duty to retreat. In the case of provocation the elements of focus will be “reasonable time to cool off” and “actual cooling off time.”

4.1 Self-defence

4.1.1 Early development of the defence

The importance of the legal concept of self-defence determines the scope of its application. Self-defence is justified to the extent that the natural law of self-preservation recognizes the inherent right to prevent the infliction of grievous bodily harm upon one’s person and to preserve one’s property, but the infliction of any harm upon others in the course of acting in self-defence is only excusable. As Bassiouni notes, “the right itself justifies the use of defensive means, whenever these means takes a material form causing harm to others; the original justification gives way to a personal defence in the nature of a condition which exonerates its beneficiary from criminal responsibility for acts arising out of the defence, providing these acts are properly performed within the scope of the defence”.⁷⁸²

Modern theories are concerned with the social policy of the question, so that social interest to be protected is weighed against the social harm which is to be prevented. The result of this balancing act will establish the means necessary to exercise protective

⁷⁸² Bassiouni Substantive Criminal Law (1978) 462.

rights without infringing upon various social interests. For this reason emphasis is thus placed on the use and exercise of the means available to the actor rather than upon the legal nature of the privilege itself. Social importance is therefore no longer placed on the source of the privilege. Rather it is placed upon the material conditions, which, by proper or improper application warrant or deny exoneration. The external manifestation of the privilege is what provides exoneration and not the legal nature of the concept. One consequence of this concept is to place all aspects of self-defence within the domain of a single test, distinguishing them only by means of the degree of the use of force utilized.⁷⁸³

From 1860 onwards, the common law in respect of self-defence held that it could be either justifiable or excusable under the following conditions.⁷⁸⁴ In respect of justification, there must be a reasonable,⁷⁸⁵ apparent danger of imminent⁷⁸⁶ death or grievous bodily harm.⁷⁸⁷ In respect of excuse, the danger does not have to be real, but on reasonable grounds, it must be believed to be real. In the case of both justification and excusable self-defence, where there is an altercation, the defender must retreat⁷⁸⁸

⁷⁸³ Bassiouni supra (n 782) 463.

⁷⁸⁴ Clarke and Marshall A Treatise on the Law of Crimes 7th ed (1967) 478-479.

⁷⁸⁵ Goodall v State, 1 Ore335, 80Am Dec 396 (1861).

⁷⁸⁶ The danger must be imminent, impending, not prospective, not even in the near future (Dolan v State 81 Ala 11, 1 So 1707).

⁷⁸⁷ Minor assaults not endangering life will not justify or excuse his killing his attacker or using a deadly weapon. (Clark and Marshall supra (n 784) 485). The homicide will be manslaughter (Reg v Hewlett, 1 F & F 91, (1858), Creighton v Com., 84 Ky 103, 7 Ky L Rep 785, 4 Am St Rep, 193 (1886)), although a person's right to kill in self-defence cannot be limited to his ability to distinguish between felonies and misdemeanors (State v Sloan, 22 Mont 293, 56 P. 364 (1921)).

⁷⁸⁸ The defendant need only retreat where he is able to do so in safety (Clarke and Marshall supra (n 784) 490; Allen v United States 164 US 492, 17 SCT 154, 41 L Ed 528 (1896)). According to certain common law authorities the retreat rule need not apply in the case of justifiable homicide. This distinction was recognized at both common law and some of the later authorities (Clarke and Marshall supra (n 607) 491-492; Rowe v United States 164 US 546, 17 S Ct 172, 41 L Ed 547 (1896)). In Erwin v State 29 Ohio St 186, 23 All Rep 733 (1896) the court held that a man who is without fault is not obliged to flee from his attacker. However, other courts have refused to recognize this distinction and have held that the assaulted person must retreat in all cases if he can do

as far as is necessary to safety before killing his attacker. Lastly, the person accused of the killing must not have been the aggressor or caused the provocation.⁷⁸⁹

4.2 Test for self-defence

Since the test utilized by the court will determine which kinds of evidence are admissible to support proof relevant to it, it becomes necessary to analyze some cases to understand how each of these tests operates. Case law illustrates how the law is changing in ways that allows battered women more latitude in presenting the facts of their cases.⁷⁹⁰ It is necessary to consider each test in turn. Self-defence can thus be defined as follows: “a person may use force upon another when she reasonably believes such force is necessary to protect herself or others from bodily harm and to protect her property from destruction or loss. Therefore, a person is relieved from criminal responsibility when, during the exercise of this lawful right in a reasonable manner, she causes harm to others or damage to property”.⁷⁹¹

so in safety (Brewer v State, 160 Ala 66, 491(1909) So 336; State v Donnelly, 69 Iowa 705, 27 NE 369, 58 Am Rep 234 (1886); State v Gardner, 96 Minn 318, 327,104 NW 971 (1905), 2 LRA (NS) 49). According to the castle doctrine a man is not bound to retreat from his house but may not justify a homicide to prevent a trespasser who has no intention to commit a felony (Clarke and Marshall supra (n 784)) 493; Carrol v State, 23 Ala 28, 58 Am Dec 282 (1853); State v Patterson 45 Vt 308, 12 Am Rep 200 (1873)). However when defending your home a person must act on appearances and if he acts in a bona fide and reasonable belief that the attacker intends to commit a felony against him and kills him the homicide is excusable because of mistake of fact (Clarke and Marshall supra (n 784) 493-494); State v Patterson supra; State v Terrell, 55 Utah 314, 186 P 108, 25 ALR 497 (1919)).

⁷⁸⁹ However, if he was at fault with or without intent, the homicide may be excusable provided he withdraws from the conflict in a bona fide and unequivocal manner. But where his attacker pursues him or attempts to, he may kill him.

⁷⁹⁰ Ogle and Jacobs supra (n 781) 106.

⁷⁹¹ Bassiouni supra (n 782) 463.

4.2.1 The objective test

Self-defence is regarded as a justification by most theorists.⁷⁹² For this reason, emphasis is placed on the self-defensive act, as opposed to the person who acted in self-defence. Further, some practical mechanism is required for distinguishing between justified and unjustified self-defensive acts. Traditionally, this mechanism was the objective standard. In People v Goetz⁷⁹³ it was held:

“[W]e have frequently noted that a determination of reasonableness must be based on the “circumstances” facing a defendant or his “situation”... Such terms encompass more than the physical movements of the potential assailant... [T]hese terms include any relevant knowledge the defendant had about the person. They also necessarily bring in the physical attributes of all persons involved, included the defendant. Furthermore, the defendant’s circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person’s intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances. The jury would have to determine in light of all “circumstances”... if a reasonable person could have had these beliefs.”⁷⁹⁴

⁷⁹² Dressler “Rethinking Heat of Passion: A Defense in Search of a Rationale” (1982) Journal of Criminal Law and Criminology 421 at 437. For a discussion of the test employed in the South African law of self-defence see chapter 2 at 35-41 supra; for the test employed in English law see chapter 3 at 113-116 infra.

⁷⁹³ 66 N.Y 2d 96, 506 N.Y.S 2d 18, 497 N.E. 2d 41 (1986). Goetz shot four men on a subway station when one of them approached him to ask for \$5. Goetz said he feared for his life and therefore shot in self-defence.

⁷⁹⁴ Goetz supra (n 793) 506. For an example of a battered woman case illustrating the objective test see State v Stewart, 763 O.2d 572, 579 (Kan. 1988). The Stewart marriage consisted of a long history of mental and physical abuse and on the day of the killing, although the defendant had access to two vehicles to make her escape, she proceeded to kill him. The trial court allowed the introduction of testimony relating to the abusive history of the marriage to allow the trier of fact to determine whether the defendant’s perception of danger was reasonable. The appellate court criticized the self-defence instruction of the trial court gave because it was not sufficiently objective. The jury had been instructed: “A person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor’s imminent use of an unlawful force. Such justification requires both a belief on the part of the defendant and the existence of facts that would persuade a reasonable person to that belief. You must determine from the viewpoint of the defendant’s mental state, whether the defendant’s belief in the need to defend herself was reasonable in light of her subjective impressions and the facts and circumstances known to her” (at 579). The Kansas Supreme Court further stated: “Our test for self-defence is a two-pronged one. We first use a subjective standard to determine whether the defendant sincerely and honestly believed it necessary to kill in order to defend. We then use an objective standard to determine whether the defendant’s belief was reasonable - specifically, whether a reasonable person in the defendant’s circumstances would have perceived self-defence is necessary.” The language utilized by the court could lead to the conclusion

The requirement that an individual's self-defensive act must be objectively reasonable in order to be justified, however, raises two important questions: (1) if the individual's act was not reasonable could the individual have acted otherwise?⁷⁹⁵ and (2) how does a jury determine whether an individual's act is "objectively" reasonable?⁷⁹⁶

In State v Cramer⁷⁹⁷ it was held that the unique perceptions of the battered woman as affected by battered women syndrome should not be taken into account in the objective test since this would change this test into a completely subjective test.⁷⁹⁸ The objective test requires that a "reasonable person" would have acted in the same way as the defendant, had they been confronted with the same circumstances and that the force used was reasonable in those circumstances.⁷⁹⁹

that not an entirely objective test was set out, but rather blended standards by suggesting that a comparison be made by comparing the defendant's conclusion to that reached by a reasonable person who had a history of abuse and one who had suffered abuse on the day of the killing" (Ogle and Jacobs *supra* (n 781) 109-110).

⁷⁹⁵ Heller in his article "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases" (1998) American Journal of Criminal Law 1 at 12 raises this point stating that: "Since self-defence justification version of the objective standard necessarily presumes that individuals possess free will. This standard does not ask whether a defendant in self-defence case could have avoided committing her self-defensive act; it asks only whether the defendant should have. The latter however, implies the former, because it is morally unjust to punish individuals for not living up to a standard of conduct they cannot, in fact live up to".

⁷⁹⁶ Heller *supra* (n 795) 12.

⁷⁹⁷ 17 Kan. App 2d 623, 841 P.2d 1111 (1993). In this case it was held that: "[O]ur reading of the Supreme Court decisions concerning battered women reveals no requirement that a jury be advised that it must employ an objective test based on how a "reasonably prudent battered woman" would react to a threat. Indeed, to employ such language would modify the law of self-defence to be more generous to one suffering from battered woman's syndrome than to any other defendant relying on self-defence" (at 1118).

⁷⁹⁸ Goldman *supra* (n 67) 7. However Dubin has noted that: "since a battered woman due to her long history with the deceased possesses a unique knowledge about his temperament and violent propensities which the jury does not possess, contextual information regarding the context from which she acts is crucial in order to make an equitable determination that she was acting unreasonably" ("Note: A woman's cry for help: why the United States should apply Germany's model of self-defence for Battered Women" (1995) ILSA Journal of International and Comparative Law 235 at 243-244.

⁷⁹⁹ As Maguigan notes, the choice of definition of reasonableness influences the rulings on admissibility of evidence of the social context in which the defendant acted and instruction regarding the significance of that evidence. It does not solely determine those questions and the most impact is from the jurisdiction's definition temporal proximity of danger ("Battered Women and Self-Defense:

4.2.2 Subjective standards of self-defence

4.2.2.1 The subjective test

The subjective standard eliminates the objective reasonableness requirement in totality.

In State v Leidholm⁸⁰⁰ the test was set out:

“The issue is not whether the circumstances attending the defendant’s use of force would be sufficient to create in the mind of a reasonable and prudent person the belief that the use of force is necessary to protect himself against immediate unlawful harm, but rather whether the circumstances are sufficient to induce in a defendant an honest and reasonable belief that he must use force to defend himself”.⁸⁰¹

The court by allowing consideration of the unique physical and psychological characteristics of a defendant, does not hold the defendant to an unrealizable standard of conduct.⁸⁰² By definition, this standard requires a jury evaluating a plea of self-defence in the context of a battered woman’s situation. This would entail considering

Myths and Misconceptions in Current Reform Proposals” (1991) University of Pennsylvania Law Review 413.

⁸⁰⁰ 334 N.W. 2d 811 (N.D. 1983). But see chapter 5 at 37-42 infra (South African law of self-defence evincing a move towards a subjective test).

⁸⁰¹ Ibid at 818. See also Smith v State Ga. 196, 486 S.E 2d 819 (1997), quoting Bechtel v State 840 P.2d 1 (Okla Crim App 1992); State v Garland, 694 A. 2d 564 (N.J. 1997) 575. Washington and Ohio also use a subjective test although their tests tend towards some objective elements. In State v Daws 104 Ohio App. 3d 448, 662 N.E. 2d 805 (1994) it was held: “In any case involving self-defence, the trier of fact is called upon to determine whether the defendant had an honest belief that she was in imminent danger of death or great bodily harm and that the use of force was her only means of escape. This test is subjective and the jury must consider the circumstances of the defendant and determine whether her actions are reasonable given those circumstances (at 810-811). See also State v Sallie 81 Ohio St. 3d 673, 693 N.E. 2d 267 (1998). See further the comments by Horowitz in “Justification and Excuse in the Program in the Criminal Law” (1986) Law and Contemporary Problems 109 at 126: “[E]xcuse is very much the product of the modern mind, as justification is not. Justification is at home with authority, including the pre-modern feudal and royal authorities. Excuse, on the other hand, calls out for individuation and is indeed linked to the growth of individualism as well as to the later growth of psychology, that preeminently individualist science”.

⁸⁰² Goldman supra (n 67) 204, as opposed to the completely objective standard. The subjective standard is thus determinist, and unlike the objective standard it does not have to assume that individuals freely determine their actions. In its view, an honest belief necessitates an individual to commit a self-defensive act, even if that belief was caused by a nonuniversal personal characteristic (Heller supra (n 795) at 62). Heller supra (n 795) suggests that even if it is impossible to maintain that an individual could have avoided acting on an honest belief that she needed to act in self-defence, once she was in the threatening situation that triggered that belief, it is still possible to maintain that she could have avoided getting into the triggering situation in the first place. Regardless of when during the battered woman’s history, she made the critical choice to kill her abuser, alternative courses of action must have been based on pre-existing principles and of course those pre-existing principles of

the history of battering and taking into account the abusive relationship as evidence to be presented at the trial.⁸⁰³ With this understanding, the appellate court said it would never be necessary to include reference to battering in the jury instructions, providing the standard is properly set out for the jury. While psychological characteristics and BWS⁸⁰⁴ can expand the temporal measure of imminence from the moment the abuser raised his hand based on subtle change in his manner that signals an imminent beating, the value society places on human life should not expand imminence to when the abuser is sleeping, thus allowing pre-emptive strikes.⁸⁰⁵

4.2.2.2 Greater Particularization

The particularizing standard asks whether a reasonable person with the defendant's particular non-universal characteristic(s) would have both perceived the situation as the defendant perceived it and would have reacted to that perception by committing the

choice, thus taken to its logical conclusion would excuse all criminal acts satisfying the "honest belief" requirement (at 62).

⁸⁰³ The court in Leidholm supra (n 800) gave this instruction, citing State v Hazlett 16 N.D. 426, 113 N.W. 37 4 (1907): "A defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect himself from apprehended death or great bodily injury" (at 380). When reasonableness is measured objectively, a self-defense instruction is warranted whenever there is some evidence of the defendant's subjective belief that the use of deadly force was necessary to prevent death or great bodily harm. The critical question for the jury is whether the defendant's decision to use lethal force was reasonable. The jury is entitled to get to that question whenever the defendant achieves the threshold of showing that she actually believed it was necessary. If she actually believed it was necessary, the jury then decides if that belief was reasonable in the judgment of the jury, she may be declared to have acted in self-defense (assuming the other requirements of the defense are also met). See also People v Scott 424 N.E. 2d 70 (Ill. App. Ct. 1981) at 72.

⁸⁰⁴ For a detailed discussion of the poor fit between Walker's syndrome theory and traditional elements of self-defence see chapter 5 infra at n 803 (altering traditional standard of self-defence to accommodate actor's personal psychology undermines notion of self-defence as a justification); n 832 (battered woman syndrome does little to support the claim that her perception was objectively reasonable); n 891 (the fact that the battered woman acted, does little to explain the break from helplessness).

⁸⁰⁵ Goldman supra (n 67) 207. Goldman supra (n 67) is further of the view that the use of syndrome testimony leads exactly to such a result, since there is no objective, external constraints on the imminence of the harm sought to be averted. Thus the necessity of killing is determined solely by the credibility of the defendant's testimony concerning her unique perception. This may work to the defendant's detriment in that the jury may infer dishonesty from her unreasonable actions, and the question then remains as to whether jurors can avoid making such unwarranted inferences (at 207).

defendant's self-defensive act. If yes, then the act is considered reasonable.⁸⁰⁶ Heller notes that the subjective standard eliminates the category of intentional self-defensive acts that satisfies the "honest belief requirement on the ground that if the defendant honestly believed she had to act in self-defence or she could not have acted otherwise, no matter how objectively unreasonable her act might have been." The particularizing standard makes the assumption that, individuals freely choose how they perceive and respond to threatening situations. However, it also acknowledges that certain kinds of non-universal characteristics (for example, suffering from battered woman's syndrome) exercise such a powerful causal force on an individual's perception and actions that it would violate the voluntary act requirement when holding individuals who possess such a characteristic to a standard of conduct that does not take that characteristic into account.⁸⁰⁷

Courts adopting this position are in agreement that in establishing objective reasonableness, a jury should be allowed to view the situation from a defendant's perspective. The extent to which American courts have used a particular characteristic to particularize the objective standard has varied. Characteristics approved by the courts have include "battered woman syndrome" and "specific cultural background".⁸⁰⁸ According to the "reasonable battered woman" standard, the jury should be instructed to measure the defendant's actions against those of the reasonable battered woman:

⁸⁰⁶ Heller supra (n 795) at 57. Heller supra (n 795) at 57 goes on to note that "the particularizing standard applies an objective standard of reasonableness to defendant's perceptions and actions, but particularizes that standard to take into account certain non-universal characteristics that a judge decides are morally and causally relevant to the defendant's self-defensive act. Since that decision is case specific, it is impossible to formulate a general definition of the particularizing standard. In general the definition is 'the reasonable battered woman'; the 'reasonable Laotian immigrant' etc."

⁸⁰⁷ Heller supra (n 795) 58.

⁸⁰⁸ Ogle and Jacobs supra (n 781) 117.

“One who is acting in self-defense may take the life of an aggressor if the aggressor poses a serious risk of serious bodily injury or death. The risk of serious bodily injury or death must be imminent, that is it must be such that a reasonable and prudent person standing in the shoes of the defendant (reasonable and prudent battered woman), knowing what the defendant knows and seeing what the defendant sees, would believe that serious bodily injury or death would result immediately if the aggressor were not killed.”⁸⁰⁹

This is done since:

“[T]he battered woman perceives danger faster and more accurately as she is more acutely aware that a new or escalated violent episode is about to occur. What is or is not an overt demonstration of violence varies with the circumstances. Under some circumstances slight movement may justify instant action because of reasonable apprehension of danger, under other circumstances this would not be so. And it is for the jury, and not for the judge passing upon the weight and effect of the evidence, to determine how this may be.”⁸¹⁰

⁸⁰⁹ State v Burtzloff 493 N.W.2d 1 (S.D. 1992) 9. See also State v Thomas 77 Ohio St. 3d 323, 673 N.E.2d 1339 (1997) at 1346. In People v Humphreys 13 Cal. 4th 1073, 921 P.2d 1, 56 Cal. Rptr. 2d 142 (1996) the question on appeal in this case was whether evidence of battering and BWS could be used to establish the reasonableness of the defendant’s perceptions as well. The Californian Supreme Court held that both kinds of evidence are admissible since: “although the ultimate test of reasonableness is objective, in determining whether a reasonable person in the defendant’s position would have believed in the need to defend, the jury must consider all of the relevant circumstances in which the defendant found herself” (at 1083).

⁸¹⁰ Kinports “Defending Battered Women’s Self-Defense Claims” (1988) Oregon Law Review 393 at 451-452. However, Rosen supra (n 21) is of the view that: “by instructing the jury to consider the psychological traits characteristic of battered women, the inquiry shifts from justification to excuse because it can no longer be said that anyone who acted as the defendant did behaved inappropriately. Rather the jury is being asked to acquit the defendant because she “suffered from an identifiable psychological syndrome that caused her to assess the dangerousness of the situation in a different manner than an average, ordinary person...[A]cquittal is dependent upon proving that [she] had... a disability that caused a mistaken, but reasonable belief in the existence of circumstances that would justify self-defence” (at 42). It should be noted that the particularizing standard is not completely determinist, since the standard does not take all of an individual’s nonuniversal characteristics into account. If all nonuniversal characteristics causally influence perception and action, not particularizing the “reasonable X’s standard to take all of an individuals nonuniversal characteristics into account would, in practice hold that individual to an unrealizable standard of conduct, in violation of the voluntary act requirement”. The particularizing standard is thus required to make a second philosophic assumption: namely, that individuals can, in fact, control the causal influence of their nonuniversal characteristics that are not used to particularize the objective standard. Only then can the particularizing standard plausibly maintain that, when a jury concludes that a battered woman’s self-defensive act was not the conduct of the hypothetical “reasonable battered woman,” the battered women could have perceived and acted as the “reasonable battered woman,” but chose not to (Heller supra (n 795) 84). However, Heller also recognizes that there are four major problems with the particularizing standard. First, since it is partially determinist, the particularizing standard is unable to explain why politically disfavoured characteristics such as racism or excessive irascibility should not be taken into account when assessing the reasonableness of a defendant’s self-defensive act. Second, the particularizing standard is unable to explain why the objective standard should be particularized to take into account only one of a defendant’s personal characteristics, instead of two,

4.2.2.3 Model Penal Code

The MPC standard assesses the objective reasonableness of the defendant's self-defensive act. It does not assess the objective reasonableness of the defendant's perceptions; rather it asks whether "under the circumstances as she believed them to be, the defendant's self-defensive act was reasonable."⁸¹¹

three, or all of them. Third, because it is partially intentionalist, the particularizing standard's determinist claims are vulnerable to broad time-framing. Fourthly, jurors cannot correctly apply the particularizing standard, because it requires them to assess the reasonableness of a defendant's self-defensive or provoked act in a manner that is cognitively impossible. For an in-depth discussion of these problems see Heller supra (n 795) 89-98.

⁸¹¹ Model Penal Code and Commentaries ss 210.3 (1) (b) (Official Draft and Revised Comments 1982). Ogle and Jacobs supra (n 781) at 119 have noted that in the most recent revision of the MPC formulation of self-defense, ss 3.04 contains no reference to reasonableness on its face. The Code sets out self-defense in the following way: "(1) Use of Force Justifiable for Protection of the person subject to the provisions of this section and of section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion... (b) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if: (i) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that (1) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor is assailed in his place of work by another person whose place of work the actor knows it to be...(c) except as required by paragraph...(b) of this subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which has no legal duty to do or abstaining from an unlawful action." This self-defence provision must be read in conjunction with section 3.09 which provides: "(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under section 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those section is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability". The New Jersey Supreme Court in State v Bowen 532 A. 2d 215 (N.J 1987) referred to this uncertainty in the Code but concluded that the legislature in expressly repealing the word "reasonable" abolished imperfect self-defence. The Nebraska Supreme Court in State v Eagle Thunder 226 N.W. 2d 755 (Neb. 1978) held that although the term "reasonableness" is absent from the Model Penal Code, its drafters made it clear that they did not intend that the defence of justification would be good if the actor behaved unreasonably in defending himself. Rather the drafters were trying to ensure that convictions for mere negligence did not occur. Thus the Model Penal Code structure provides a defense when the requisite culpability for the offense is purposeful, or knowing behaviour and imperfect when the requisite culpability is negligence or recklessness and perfect self-defence would not be available if a defendant's belief was honest but negligent or unreasonable. Rather the accused will be entitled to a jury instruction on the lesser crime of negligent homicide, a felony in the third degree in most jurisdictions (Ogle and Jacobs supra (n 781) at 119).

In State v Wanrow⁸¹² it was held:

“[t]he jury should have been allowed to consider the defendant’s knowledge of the victim’s reputation for aggression in making the crucial determination of the ‘degree of force which...a reasonable person in the same situation...seeing what (s)he sees and knowing what (s)he knows, then would believe to be necessary, the respondent [is] entitled to have the jury consider her actions in the light of her own perceptions of the situation.”⁸¹³

The MPC standard is based on a partial determinist account of human action. MPC standard divides an individual’s personal characteristics into two categories: characteristics that have causal influence that individuals can, and therefore must, control, and characteristics that have causal influence that individuals cannot, and therefore need not, control. The MPC stand distinguishes between characteristics which affect perception and nonuniversal characteristics which affect behaviour. Heller notes Williams’ argument in this respect:

“The question asked by the [MPC] test is whether, assuming the facts to be as the defendant believed them to be, those facts would come within the legal categories of provocation, or would be provocation for an ordinary man. What the objective test discountenances is unusual deficiency of self-control, not the making of an error of observation or inferences of fact.”⁸¹⁴

⁸¹² S v Wanrow supra (n 94).

⁸¹³ Ibid at 557. See also State v Dunning, 506 P.2d 321, 322 (Wash. Ct. App. 1973); and State v Norman, 378 S.E.2d 8, 12 (N.C. 1989) holding that the belief in the necessity of self-defence must be reasonable in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness.

⁸¹⁴ Heller supra (n 795) 70-71, citing Williams “Provocation and the Reasonable Man” (1954) Criminal Law Review 740 at 752. The MPC standard is thus only partially determinist. It assumes that although an individual’s perceptions are determined, how an individual reacts to her perceptions is the product of free will. Thus, the MPC standard must, in order to avoid running afoul of the voluntary act requirement, take all of an individual’s personal characteristics into account. It is difficult to imagine a personal characteristic that has no effect on either perceptions or actions. If this is the case there is no difference between the MPC standard and the subjective standard (Heller supra (n 795) at 75-76). For an example of how the MPC standard can collapse into the purely subjective standard see State v Leidholm supra (n 800) at 817-818: “The finder of fact must view the circumstances attending the defendant’s use of force from the standpoint of the defendant to

The MPC standard thus particularizes its reasonableness standard to take into account some nonuniversal characteristics - namely, those nonuniversal characteristics that affect how the defendant perceives the world. Heller notes Creach's remarks in this regard: "the more particularly and narrowly the jury defines the relevant reasonable person, the more likely it will be to find her response reasonable."⁸¹⁵

In conclusion, it is clear that the Model Penal Code adopts a standard of "reasonable" belief i.e. non-universal characteristics that affect how the defendant sees the world. In this respect it should be noted that similar developments have also taken place in the Canadian law of self-defence, where evidence of "battered woman syndrome" was admitted to determine the bounds of self-defence or at least the reasonableness of the defendant's beliefs that she was about to be attacked. It is now necessary to briefly consider these developments.

determine if they are sufficient to create in the defendant's mind an honest and reasonable belief that the use of force is necessary to protect himself from imminent harm. The practical and logical consequence of this implication is that a defendant's action is to be viewed from the standpoint of a person whose mental and physical characteristics are like the defendant's and who sees what the defendant sees and knows what the defendant knows. For example, if the defendant is a timid, diminutive male, the fact-finder must consider these characteristics in assessing the reasonableness of his belief. If, on the other hand, the defendant is strong and courageous and capable female, the fact, finder must consider these characteristics in judging the reasonableness of her belief".

⁸¹⁵ Heller supra (n 795) 71, citing Creach "Note: Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why" (1982) *Stanford Law Review* 615 at 620. Heller supra (n 795) at 76-78 notes that the MPC standard assumes that a defendant's self-defensive act could be found unreasonable even if it were viewed from a defendant's perspective, under the circumstances as she found them to be. Irrespective of how the defendant perceived her circumstances, her reaction to that situation must still satisfy the formal requirements of self-defence: immediate danger, reasonable force, nonaggressor status and duty to retreat before using deadly force. The problem is that in order to work, the MPC standard must assume that the defendant's perception of the circumstances gave rise to her self-defensive act did not encompass a perception that she was in immediate danger etc. If her overall perception of her external circumstances did encompass such perceptions, the jury would have to assume that those perceptions were correct, and thus could not find her self-defensive act unreasonable. To do otherwise would be to substitute its perception that her act did not satisfy the formal requirements of a self-defensive act for her perception that it did. The MPC expressly forbids such substitution.

4.2.2.4 The Canadian approach

The Canadian Supreme Court case of R v Lavallee⁸¹⁶ has been hailed as a landmark decision insofar as the court admitted expert testimony relating to “battered woman syndrome.” In this case the accused was acquitted on the basis of self-defence after she shot dead her common-law husband, Kevin Rust in the back of the head as he left the room.⁸¹⁷

On appeal,⁸¹⁸ the Supreme Court considered the question of whether expert testimony from a psychiatrist, concerning the defendant’s state of mind and “battered woman syndrome” was admissible to support a defence of self-defence.

In respect of the hypothetical reasonable man, the defendant’s perception of imminent harm and the need for deadly force do not appear to rest on reasonable and probable grounds. The reason proposed for this was that the defendant shot her unarmed husband in the back of the head as he was leaving the room. However, Wilson J argued that the court could not appreciate the defendant’s perspective without consideration of expert evidence on “battered woman syndrome.” The judge went on to note that battering relationships were subject to many myths and stereotypes and were, therefore, beyond the comprehension of the average juror. Thus, the importance of the majority judgment on this issue lies in its explanation of why such expert evidence may be helpful and

⁸¹⁶ R v Lavallee supra (n 153).

⁸¹⁷ The deceased had regularly abused the defendant over the years. On the night in question, an altercation ensued after a party held at the couple’s home. The deceased told the defendant that once everyone left “she would get it.” Handing her a rifle, he told her that if she didn’t kill him first, he would kill her. When the deceased turned to leave the room, the defendant shot him in the back of the head, killing him instantly.

⁸¹⁸ Struesser in “The ‘Defence’ of ‘Battered Woman Syndrome’ in Canada” (1990) Manitoba Law Journal 195 at 197 notes that in Canadian law, once self-defence is rejected, there is no middle ground and this leads to a verdict of murder and a mandatory prison term of ten years. Manslaughter is not available.

even necessary:

“Expert evidence on the psychological effect of battering of wives and common-law partners must, it seems to me, be both relevant and necessary in the present case. How can the mental state of the defendant be appreciated without it? The average member of the public (or the jury) can be forgiven for asking: why would a woman put up with this kind of treatment? Why 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 so-called ‘battered wife syndrome.’ We need help to understand and help is available from trained professionals.”⁸¹⁹

Therefore, expert evidence of the psychological effects of battering was relevant and necessary in this case to assist the court in determining the mental state of the defendant and ascertaining whether her belief in imminent harm and the need for lethal defensive force was reasonable:

“The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the reasonable man.”⁸²⁰

⁸¹⁹ R v Lavallee supra (n 153) 112. Cf R v Lavallee supra (n 153) at 111: “Judges and juries are not their own experts on human behaviour.” Boyle in “The Battered Wife Syndrome and Self-Defence: Lavallee v R” (1990) Canadian Journal of Family Law 171 at 173-174 notes that expert evidence is useful in assisting fact finders to avoid unwarranted assumptions. This recognition is important in terms of legal method on two levels: “First, feminist writing in general – and feminist analyses of law in particular have revealed, concern about issues being addressed in the abstract, divorced from the real experiences of women. One popular way of expressing this is to say that issues should be contextualized, that is, addressed in a context which includes an inquiry into the position of the women in a given situation. While not stated in so many words, the judgment does emphasize the need for decision-makers to be receptive to evidence about women’s experience of abuse as part of the context in which decisions about self-defence should be made. This judicial willingness to be open to perspectives and research which challenge intuitive views of the facts is clearly important not only to the issue of self-defence, but other issues as well. Second, judgment is methodically important in its gender specificity. The case seems to be part of a trend at the Supreme Court level toward recognizing the fact that people do not experience the world in gender neutral ways.”

⁸²⁰ R v Lavallee supra (n 153) at 114. The court at 114-115 referred with approval to the case of State v Wanrow supra (n 94) which held that women seldom have the necessary skills to defend themselves against a male attacker, without resort to weapons. Furthermore, the reasonableness of the action taken in defence must not be viewed in the same way as it would have been if both parties had been male.

Wilson J held that expert evidence on “battered woman syndrome” was needed to assist the court in applying two specific elements of the law of self-defence in the Canadian Criminal Code: the imminence requirement (section 34(2) (a)) and the necessity requirement (section 34(2) (b)).⁸²¹ To satisfy these two requirements, the defendant must demonstrate that she reasonably believed that she was in imminent danger of grievous bodily harm at the time she shot her husband and that she reasonably believed that lethal force was necessary to avoid this harm.⁸²²

The reasonableness requirement imposes an objective standard on the defendant’s subjective apprehension of danger and the need for deadly force and it places in issue her state of mind at the time when she acted in self-defence and therefore asks whether her perceptions were based on reasonable and probable grounds.⁸²³ The rationale behind the imminence requirement is that defensive force can only be justified if the defendant faces an uplifted knife or pointed gun, making it reasonable for her to suppose that there is no time to escape or to get help.⁸²⁴ On this reading of the law, the defendant’s defensive act would appear to be unjustified since her husband had turned his back on her, and it would appear that his threat to kill her was not imminent.⁸²⁵

⁸²¹ The provision relating to self-defence in section 34 of the Canadian Criminal Code (1985) reads as follows: “(2) Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.”

⁸²² R v Lavallee supra (n 153) at 113.

⁸²³ In relation to this question, the court cited Reilly v The Queen (1984) 15 C.C.C (3d) 1 at 7-8 which considered the interactions between the subjective and objective components of the law of self-defence in section 34(2) of the Canadian Criminal Code 1970.

⁸²⁴ Kazan “Reasonableness, Gender difference and Self-Defense Law” (1997) Manitoba Law Journal 549 at 553. Cf Reilly v the Queen supra (n 639) at 10; R v Baxter (1975), 27 C.C.C (2d) 96 (Ont. C.A.) and R v Bogue (1976), 30 C.C.C. (2d) 403 (Ont. C.A.)

⁸²⁵ Kazan supra (n 824) 555.

Despite this, Wilson J was of the view that the evidence of Dr. Shane, a psychiatrist cast doubt on this conclusion by providing an explanation for why the defendant reasonably feared imminent danger from her husband in her situation. The psychiatrist testified that the abuse suffered by the defendant was in accordance with Walker's cycle theory of violence.⁸²⁶ Wilson J maintained that the cyclical aspect of battering relationships begets a degree of predictability to the violence that is absent in isolated encounters between two strangers. This predictability of the battering cycle confers a special power of "heightened sensitivity"⁸²⁷ on battered women which imparts the unique ability to detect subtle changes in her abuser's usual pattern of violence that may signal an increase in the escalation of danger.⁸²⁸

Wilson J was of the view that a woman who has developed this "heightened sensitivity" to her abuser's behaviour need not wait until an attack was in progress before she could defend herself.⁸²⁹ Wilson J went on to explain:

"[D]ue to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat...therefore a battered woman need not wait until the physical assault is 'underway' before her apprehensions can be validated...it would be tantamount to sentencing her to 'murder by installment.'" ⁸³⁰

Wilson J went on to state that expert evidence on "battered woman syndrome" can show how the defendant meets the necessity requirement in self-defence law. To satisfy

⁸²⁶ Kazan *supra* (n 824) 556.

⁸²⁷ *R v Lavallee* *supra* (n 153) at 120.

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid.*

⁸³⁰ *Ibid.*, quoting *State v Gallegos* 719 P.2d 1268 (1986) at 1271.

this requirement, the defendant needs to show that she reasonably believed that shooting her husband was the only way to avoid grievous bodily harm or death.⁸³¹

To assist the court understand why the defendant stayed with her abusive husband, Dr. Shane testified that repeated exposure to abuse had induced a psychological condition which caused her to believe that she was powerless to escape:

“[a]lthough there were obviously no steel fences keeping her in [the defendant felt] there were steel fences in her mind which created for her an incredible barrier psychologically prevented her from moving out.”⁸³²

On this view, the defendant suffered from a form of “learned helplessness”⁸³³ which caused her to:

“[lose] the motivation to react and [become] helpless and... powerless... paralyzed with fear.”⁸³⁴

Wilson J was of the opinion that this evidence suggested that the defendant’s exposure to repeated abuse had made her a kind of psychological hostage to her husband. When Rust threatened to kill her on the night of his demise, her situation was not unlike that of a hostage who had just been informed by her captor that he would kill her in three days. Wilson J concluded that it would be reasonable for persons who found themselves in such a situation, to seize the first opportunity to kill their captor, rather than wait

⁸³¹ R v Lavallee supra (n 153) 121.

⁸³² R v Lavallee supra (n 153) 124.

⁸³³ R v Lavallee supra (n 153) 121.

⁸³⁴ R v Lavallee supra (n 153) 125.

until he makes his attempt to kill them instead.⁸³⁵ The judge emphasized the point that it is inappropriate that a woman's failure to leave her own home should be used to cast doubt on her plea of self-defence:

“[it] is not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so... the traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself. A man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances.”⁸³⁶

Therefore, it had to be decided by the jury,

“whether, given the history, circumstances and perceptions of the accused, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable.”⁸³⁷

As the appeal on issues of law were dismissed, the finding of the jury was upheld, and the defendant was acquitted on the basis of self-defence. It is evident that the importance of this case lies in the fact that Lavallee⁸³⁸ case acknowledged that women's experiences were not captured by the hypothetical construct “the reasonable man” and therefore proposed the admission of evidence of “battered woman syndrome” to counter this. Such expert testimony is relevant because (1) it reinforces the defendant's credibility; (2) it goes to state of mind of the defendant to show she honestly believes she was in imminent danger; and (3) it goes to the reasonableness of

⁸³⁵ R v Lavallee supra (n 153) 125.

⁸³⁶ Ibid.

⁸³⁷ Ibid.

⁸³⁸ R v Lavallee supra (n 153).

defendant's belief that she was in danger of death or grievous bodily harm. Evidence of an expert on battered woman syndrome assists the trier of fact in understanding the situation by dispelling any myths and misconceptions that the judge or jury may have about battered women.⁸³⁹

4.3 Elements of self-defence:

4.3.1 Imminence

For a battered a woman to successfully rely on self-defence, she has to prove that she perceived a threat of imminent harm from her abuser which requires defensive action. Imminent harm means more than fear and requires some overt act, gesture or spoken word at the time the homicide occurred.⁸⁴⁰

The question that now remains is what is meant by the term imminent harm and

⁸³⁹ Struesser supra (n 818) 198.

⁸⁴⁰ Bechtel v State supra (n 801) 28. Ogle and Jacobs supra (n 781) 451 note that battered women learn to distinguish subtle changes in the tone of the defendant's voice, facial expression, and levels of danger and is therefore in a position to know, with greater certainty than someone attacked by a stranger, that the abuser's threats are real and will be carried out (Bechtel supra (n 801) at 12) See also 141 supra for a discussion of this case. Ogle and Jacobs supra (n 781) at 123 give examples of cases with overt demonstrations of violence of an abuser which include the "look on his face" and "his heavy walk" as shown in People v Humphrey supra (n 809). In People v Garcia, 1999 WL 45 9470 (Colo. App. 1999) the cues were more subtle. In this case the defendant's husband had attempted to sexually assault her and threatened to kill her. She initially fought him off but then gave her a "look like he used to give me in Missouri and Kansas when I messed up, and I was going to get hurt pretty bad and... I just snapped" (at 5). Ogle and Jacobs are of the view that it is not clear to what extent these factors will be taken seriously and will be understood by judges. The courts clearly differ in their approaches and conclusions. In Bechtel v State supra (n 801) the Oklahoma Court of Criminal Appeals recognized that because of her intimate knowledge of the batterer, the abused woman perceives danger more quickly and accurately than others would and is more acutely aware that a new or escalated violent episode is about to occur. However, in State v Stewart supra (n 794) the court held that self-defence requires confrontation, and long-term abuse is no substitute for imminence as traditionally understood. See also State v Gallegos supra (n 830) at 1268, which followed the line of reasoning in State v Stewart supra (n 794) but was reversed on appeal and on remand the trial court was directed to give a self-defence instruction "whenever a defendant presents evidence sufficient to allow reasonable minds to differ as to all elements of the defence" (at 21). Furthermore, neither trial nor appellate courts ruled on whether these descriptions of clues are sufficient to justify the use of deadly force (Ogle and Jacobs supra (n 781) 123). For a discussion of the imminence standard in South African law see chapter 2 at 46-48 supra; for a discussion of imminence requirement in English law see chapter 3 at 113-116 supra. For a criticism of this element in relation to battered women see chapter 5 at 275-277; 290-292 infra. For alternatives to this standard see chapter 5 at 277-290 for other possible approaches.

whether this term adequately provides for situations in which battered women find themselves. In State v Hundley⁸⁴¹ the question was posed as to whether imminent harm was the same as immediate harm. The Court of Appeal acknowledged that “imminent” is broader and more inclusive term than “immediate” and that a jury focusing on “imminent” harm will not necessarily be bound by the time limitations that are associated with “immediacy” requirement:⁸⁴²

“Under the facts of this case, Betty finally became so desperate in her terror of Carl she fled. Her escape was to no avail. Her fear was justified. He broke through the locked door of her motel room and started his abuse again. Carl’s threat was no less life threatening with him sitting in the motel room tauntingly playing with his beer bottle than if he were advancing toward her. The objective test is how a reasonably prudent battered wife would perceive Carl’s demeanor. Expert testimony is admissible to prove the nature of wife beating just as it is admissible to prove the standard mental state of hostages, prisoners of war, and those under long-term life-threatening conditions. Thus, we can see the use of the word ‘immediate’ in the instruction on self-defence places undue emphasis on immediate action of the deceased, and obliterates the nature of the buildup of terror and fear which had been systematically created over a long period of time, ‘imminent’ describes the situation more accurately. Appellant aptly makes the following analogy under a more normal situation which further demonstrates the difference in the definition of ‘imminent’ and ‘immediately’. An aggressor who is customarily armed and gets involved in a fight may resent an imminent danger, justifying the use of force in self-defence, even though the aggressor is unarmed on the occasion. There may be no immediate danger, since the aggressor is in fact unarmed, but there is a reasonable apprehension of danger. In other words, the law of self-defence recognizes one may reasonably fear danger but be mistaken.”⁸⁴³

⁸⁴¹ 236 Kan 461, 693 P. 2d 475 (1985). In this case the defendant had endured ten years of abusive marriage. Abusive acts included her husband diluting her insulin medicine, choking her into unconsciousness, harassing her and threatening to kill her and members of her family. When she eventually left her abuser, he tracked her down to a motel where she was staying. He broke the door down and raped her. He then pounded a beer can on the nightstand next to her bed and demanded she buy him cigarettes. Instead she killed him with a gun she had purchased previously for her protection.

⁸⁴² Ogle and Jacobs supra (n 781) 124.

⁸⁴³ State v Hundley supra (n 841) 478-479.

While the Kansas Supreme Court based its decision on the distinction between subjective and objective, other courts have used the terms interchangeably.⁸⁴⁴ Section 3.04 [1] of the Model Penal Code allows a reasonable solution to this problem by requiring that the defensive force be “immediately necessary on the present occasion”. Such a standard addresses the relationship between the time of the defensive force and the time which it must be utilized to prevent such harm.⁸⁴⁵ This will operate in a fair manner in battered women cases:

“The central question involves the appropriate relationship between the necessity and imminence requirements. A standard allowing defensive force only when immediately necessary to prevent unlawful harm treats imminence of harm as a factor regarding necessity. That is, the defensive force is justified only if necessary to prevent an unlawful harm, and the imminence of that unlawful harm contributes to, but does not completely determine, the judgment of necessity. In unusual circumstances such as those confronted by the battered women, defensive force may be immediately necessary to prevent unlawful harm, although that harm is not yet imminent. In these cases, imminence of harm does not serve as a decisive factor in the determination of necessity. A standard allowing defensive force necessary to prevent delayed unlawful aggression, even if the present situation represents the last opportunity to prevent such harm.”⁸⁴⁶

⁸⁴⁴ People v Humphrey supra (n 809); State v Anderson, 785 S. W. 2d 596 (Mo. Ct. App. 1990); State v Gallegos supra (n 830). Schopp, Sturgis and Sullivan argue that the law does not distinguish between these two terms. These authors use the terms interchangeably and find no theoretical or statutory reason to dwell on a categorically imposed difference (“Battered Women Syndrome, Expert Testimony, and the Distinction between Justification and Excuse” (1994) University of Illinois Law Review 45 at 126).

⁸⁴⁵ Schopp, Sturgis and Sullivan supra (n 844) 67.

⁸⁴⁶ Schopp, Sturgis and Sullivan supra (n 844) 67-68. The merit of this proposition is best shown by contrasting it to the courts black –and –white declarations in People v Humphreys supra (n 809) and State v Stewart supra (n 794) in that the imminence requirement of traditional self-defence can never be met when a man is sleeping. See also State v Norman supra (n 813). The Model Penal Code (section 3. 04 of the Official Draft 1962) reflects this provides that self-defence may be employed when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. Thus the Code provides solid support for the position taken here that necessity is critically important element in determining the propriety of self-defense on a given occasion. The reference to the “present occasion” broadens the time frame enough so that a person who has good reason to believe that an assailant is about to launch an attack, can act before it is too late.

Bechtel⁸⁴⁷ held that not only must an individual be confronted with an imminent threat, but also that the perception of the threat must be a reasonable one. The court discussed the implications of this traditional understanding in respect of battered women:

“For the battered woman, if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent. Based on the traditionally accepted definition of imminence and its functional derivatives a battered woman, to whom a threat of serious bodily harm or death always imminent, would be precluded from asserting the defense of self-defense... Thus... an abused woman may kill her mate during the period of threat that precedes a violent incident, right before the violence escalates to the more dangerous levels of an acute battering episode. Or, she may take action against him during a lull in an assaultive incident, or after it has culminated in an effort to prevent a recurrence of the violence. And so, the issue is not whether the danger was in fact imminent, but whether, given the circumstances as she perceived them, the defendant’s belief was reasonable that the danger was imminent.”⁸⁴⁸

The court recognized that what was of crucial importance was the circumstances as the battered woman perceived, thus enabling her to rely on self-defence, where ordinarily no such defence would be available. This results in a more subjective test for imminence. One problem with such an approach is that the battered woman could always perceive herself to be in danger and therefore kill at any time.

Ogle and Jacobs are of the view that “emphasis on the defendant’s reasonableness enables the fact-finder to be released from the binding temporal quality that surrounds the imminence requirement and on the prosecutorial side emphasis on the

⁸⁴⁷ Bechtel v State supra (n 801).

⁸⁴⁸ Bechtel v State supra (n 801) 12. See also State v Gallegos supra (n 830). Thus the battered woman need not show evidence of an actual physical assault on the day she claimed defensive action. Thus the history of violence does not justify killing but is one element that should be available to prove the defendant’s state of mind and the reasonableness of her perception that danger was imminent.

reasonableness, enables one to question whether the response was one reasonably calculated to be defensive, even if the threat was immediate”.⁸⁴⁹

Furthermore, in establishing self-defence, the battered woman who kills her batterer in a non-confrontational situation must demonstrate not only that she reasonably believed that an attack was forthcoming but also that she reasonably believed that deadly force was necessary and proportionate to the impending attack.⁸⁵⁰

4.3.2 Duty to retreat

The majority⁸⁵¹ of jurisdictions hold that a defendant (who was not the initial aggressor), does not have to retreat even where she can do so in safety,⁸⁵² before using

⁸⁴⁹ Ogle and Jacobs supra (n 781) 129.

⁸⁵⁰ Schopp, Sturgis and Sullivan supra (n 844) 20-21. Schopp, Sturgis and Sullivan supra (n 844) at 21 go on to note that while case law does admit evidence of the abused woman’s history to establish reasonable belief in the necessity of deadly force in the case of confrontational or non-confrontational situations, non-confrontational cases are generally the most problematic. Expert testimony on battered woman syndrome can be introduced on the following basis. Evidence of past abuse could be admitted to support the battered woman’s exercise of deadly force in the circumstances and this would describe severe and continuous abuse. Thus some courts may exclude such evidence as relevant but inadmissible since highly prejudicial. But a well-established exception to the general rule against character evidence allows evidence regarding past abuse by the victim in homicide cases when there is controversy regarding the question as to who initiated the aggression. Lastly, the relative weight of the probative value and prejudicial effect will vary from case to case. If the former outweighs the latter in a particular case, then this evidence of past abuse should be admitted for the reasons stated. If the prejudicial effect outweighs the probative value in a particular case, then the evidence could not be admissible, but calling it part of a battered woman syndrome renders it no less prejudicial and no more probative. Thus, in each case, either the evidence be admitted under ordinary law or it should be precluded as overly prejudicial. Either conclusion depends on the relative weight of the probative and prejudicial effects of the evidence of past abuse without regard to the battered woman’s syndrome.

⁸⁵¹ People v Gonzales, 71 Cal. 569, 12 P. 783 (1887); Runyan v State, 57 Ind. 80, 26 Am. Rep. 52 (1887); Haynes v State, 451 So. 2d 227 (Miss 1984); Culverson v State, 106 Nev. 484, 797 P.2d 238 (1990). The minority of jurisdictions hold that the defendant must retreat before using deadly force if she can do so in safety. King v State 233 Ala. 198, 171 So. 254 (1936); State v Marish, 198 Iowa 602, 200 N.W. 5 (1924); State v Cox, 138 Me. 151, 23 A. 2d 634 (1941); State v Austin, 332 N.W. 2d 21 (Minn. 1983) Compare Gillis v United States, 400 A.2d 311 (D.C. App. 1979), purporting to adopt a middle position: there is no duty to retreat, but the failure to retreat may be considered by the jury in determining “whether a defendant, if he safely could have avoided further encounter by stepping back or walking away, was actually or apparently in imminent danger of bodily harm.”

⁸⁵² State v Anderson, 227 Conn. 518, 631 A.2d 1149 (1993); State v Abbott, 36 N.J. 63, 174 A.2d 881 (1961) quoting with approval from what is now the Model Penal Code ss 3. 04 (2)(b)(ii) (deadly force is not justifiable if the actor knows that he can avoid the necessity of using such force with complete safety by retreating) even in those jurisdictions which require retreat the defendant need

deadly force against someone whom she reasonably thought would kill her or cause her grievous bodily harm. If retreat is to be preferred over the use of deadly force, then it could be argued that alternative steps which could terminate the dangerous encounter should likewise be required in lieu of self-defence with deadly force.⁸⁵³

not retreat unless she can do so in complete safety and need not retreat from her home. (Beard v United States, 158 U.S. 550, 15 S.Ct 962, 39 L. Ed. 1086 (1895) (attacked on own land 50-60 yards from his house, but the case is not clear whether the defendant need not retreat wherever he is on his own land; State v Baratta 242 Iowa 1308, 49 N.W. 2d 866 (1951) (attacked in place of business); Burch v State, 346 Md. 253, 696 A.2d 443 (1997) (the defendant's dwelling)). As for the application of the rule where a defendant is outside his house, compare State v Pugliese, 120 N.H. 728, 422 A.2d 1319 (1980) (statute construed to adopt common law rule, and thus no retreat needed outside house but within curtilage) with State v Bonano, 59 N.J. 515, 284 A.2d 345 (1971) (reasoning "better rule" is to require retreat into the dwelling). The rule has even been held applicable to attack in one's social club, State v Marlow, 120 S.C. 205, 112 S.E. 921 (1922); his automobile, State v Borwick, 193 Iowa 639, 187 N.W. 460 (1922); and when a guest in another's house, 145 So. 816 (1933). Where the defendant was the original aggressor, see United States v Peterson, 483 P.2d 1222 (D.C. Cir. 1973); "the law is well settled that the 'castle' doctrine can be invoked only by one who is without fault in causing the conflict." Where the assailant is the occupant of the premises, see State v Shaw, 198 Conn. 372, 441 A. 2d 561 (1981); State v Bobbitt, 415 S.o.2d 724 (Fla. 1982); State v Grieson, 96 N. H. 36, 69 A.2d 851 (1949); State v Gartland, 149 N.J 456, 694 A2d 564 (1971) (upstairs bedroom in which wife slept not a separate dwelling within meaning of statute requiring retreat and thus wife has duty to retreat from husband's assault there before using deadly force). In Gartland supra, the court invited the state legislature to reconsider application of the retreat doctrine in the case of a spouse battered in her own home. Thus, the dispute regarding whether the battered woman syndrome renders the defendant unable to exercise the alternative of retreat is irrelevant to cases that occur in the home. Regardless of whether she could retreat, there is no legal reason why she should do so before using defensive force. Ordinary self-defence doctrine allows one to exercise defensive force, including deadly force, in one's own home when one has no safe alternative except retreat. (Schopp, Sturgis and Sullivan supra (n 844) 22). The Model Penal Code ss 3.04 (2)(b)(ii) expressly provides that deadly force is not permissible if the actor knows he can avoid the necessity for its use "by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take. The court went on to hold that there was no duty to retreat where the wife was charged with murder in killing of husband in their joint abode. The court reversed the murder conviction since the trial court had erroneously charged that the wife had duty to retreat (Hutcherson v State, 170 Ala. 29, 54 So. 119 (1910); a wife was convicted of first-degree murder in killing of her husband who had beaten her over a lengthy period of time and the instruction given regarding no duty to retreat was accurate but errors were made in handling of Battered Woman Syndrome necessitating the reversal of the conviction (Bechtel v State supra (n 801). For a discussion of this requirement in South African law see chapter 2 at 53-55 supra; English law chapter 3 at 116-117 supra. For a discussion of whether the duty to retreat condition be maintained in South African law see chapter 5 at 246-251. infra.

⁸⁵³ Case law seems to suggest unequal treatment of men and women who kill their assailants who have a history of assaulting and threatening them. See for example the cases of Brown v United States 256 US 335, 343, 41 S Ct 501, 65 L Ed 961, 18 ALR 1276 (1921) and State v Hundley supra (n 841) See further Dubin supra (n 798) who makes an in-depth comparison between these two cases (at 8). For examples of case law dealing with battered women where there is a duty to retreat see further S v Bobbit supra (n 852). In this case the wife was convicted of manslaughter in the killing of her husband. The Florida Supreme Court, in upholding the conviction, quashed the decision of the district court which had reversed the conviction. The district court had held that the privilege of non-retreat should be applicable despite the fact that the husband was not an intruder. However, the Supreme Court held that the privilege of non-retreat was not applicable where both the husband and wife had equal rights to be in the castle. The court emphasized the sanctity of human life should be preserved, wherever possible. However, the court noted that this decision does not leave the occupant of the home defenseless against the attacks of another legitimate co-occupant because any person placed in imminent danger of death or great bodily harm to himself by wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily

4.3.3 The requirement of proportionality

A defendant's claim of self-defence will only be successful if the degree of force used was reasonably related to the degree of harm threatened. As a result, proof that a battered woman used more force than necessary to protect herself will undermine her claim of self-defence.⁸⁵⁴ Battered women accused of killing their abusers have almost invariably used "deadly force" - that is, force which is intended to cause death or grievous bodily harm. Deadly force is not justified unless the abused woman reasonably believed that her abuser was about to kill her or inflict grievous bodily harm.⁸⁵⁵ Thus the proportionality requirement "serves as another way in which traditional self-defence law requires the defendant's acts to be objectively reasonable".⁸⁵⁶

As a general rule deadly force may only be used against deadly force. Since a battered woman's husband is often unarmed at the time she kills him,⁸⁵⁷ this doctrine has defeated battered women's self-defence claims.⁸⁵⁸

harm. In S v Leidholm supra (n 800) where the defendant asserted that the trial judge had instructed the jury improperly as to the duty to retreat doctrine insofar as the judge imposed a duty to retreat on the wife. Under N.D Cent. Code ss 12.1-05-07 (2) (b), a person has no duty to retreat from his dwelling unless he was the original aggressor or is assailed by a person who he knows also dwells there. Therefore, stated the North Dakota Supreme Court the trial judge did state the law correctly in instructing that the wife had a duty to retreat under the circumstances of this case. The court found no merit in the defendant's arguments that the statute violated the equal protection and due process clause of the United States Constitution in that it made an individual duty to retreat depends on status of assailant. See further S v Pontery N.J. 457, 117 A. 2d 473 (1955) where wife convicted of homicide. The court held that the instruction given by the trial judge that wife was under duty to retreat if possible was correct since common-law doctrine provided that a home owner need not retreat to the wall before acting in her defence was not applicable in a case in which the home where shooting occurred was jointly owned by husband and wife and both had equal right to be there.

⁸⁵⁴ Kinports supra (n 810) 428.

⁸⁵⁵ Kinports supra (n 810) 428-429.

⁸⁵⁶ Lee "The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification" (1998) Buffalo Criminal Law Review 191 at 204. For a discussion of this requirement in South African law see chapter 2 at 56-58 supra. For a discussion of the proportionality requirement in English law see chapter 3 at 118-120 supra. For a discussion of the suitability of this requirement for battered women see chapter 5 at 242-245 infra.

⁸⁵⁷ See for e.g., Mullis v State, 248 Ga. 338, 339-340, 282 S.E. 2d 334, 337-338 (1981); People v Davis, 33 Ill. App, 3d 105, 110, 337 N.E. 256, 260 (1975).

⁸⁵⁸ Kinports supra (n 810) 429.

Such a statement may lead to the conclusion that it would never be permissible to use a firearm against an unarmed aggressor. But as Lee notes “the proportionality requirement is concerned not only with the means of force (or the instrument of force), it is also concerned with the degree of force and the gravity of the harm threatened”.⁸⁵⁹ For example, if a small woman is threatened by a bigger unarmed man who is trying to choke her, the smaller woman may use a firearm against her attacker as long as the threatened attack is likely to cause death or grievous bodily harm. The use of deadly force in such a case meets the proportionality requirement since the small woman is using deadly force, defined as force likely to cause death or serious bodily injury, to combat deadly force.⁸⁶⁰ Thus while the law is concerned with the defendant’s reasonable perception⁸⁶¹ of the threatened force, it is not a controlling factor.⁸⁶²

⁸⁵⁹ Lee supra (n 856) 203.

⁸⁶⁰ Ibid, citing the case of State v Wanrow supra (n 94). This case involved a woman who shot an unarmed man whose reputation for aggression was known to her. The Washington Supreme Court held that the level of force available to her had to be assessed under two social context criteria: one specifically relevant to the facts on appeal and the other generally relevant to women confronting male aggression. First, the court held that a jury should be allowed to consider evidence of the attackers’ history of violence in determining whether the defendants force was proportional to the threat she perceived: “under the law of this state, the jury should have been allowed to consider [information about the appellants knowledge of the attackers reputation for aggressive acts] in making the critical determination of the degree of force which... a reasonable person in the same situation... seeing what [s]he sees and knowing what [s]he knows, then would believe to be necessary” (at 557) quoting State v Dunning supra (n 813). Secondly, the court noted the social reasons underlying the necessity for use of a weapon by a woman who is confronted with a male attacker: “In our society women suffer form a conspicuous lack of access to training and the means of developing those skills to effectively repel a male assailant without resorting to the use of deadly weapons (State v Wanrow supra (n 94) 558).

⁸⁶¹ Kinports supra (n 810) at 433 submits: “since the battered woman, based on her prior experience with her husband’s brutality and the disparity in size, strength, may reasonably conclude that her husband can kill her or cause serious bodily harm without using a weapon, and that her only means of defence is to arm herself”. See further State v Lynch, 436 So, 2d 567, 569 La. (1983).

⁸⁶² Lee supra (n 856) 205. Lee makes use of an example to illustrate this point: “If D comes across a boy waiving a toy gun at him, D may perceive that he is being threatened with deadly force and respond by shooting the boy with his own real gun. If we add the fact that the toy gun is pink, then D’s perception of being threatened with deadly force cannot be deemed reasonable. D’s use of a real gun (deadly force) to respond to the boy’s pink toy gun (non-deadly force) would fail the proportionality requirement” (at 205).

Most jurisdictions recognize that in at least some circumstances the attacker's fists can constitute deadly weapons, thus permitting the victim to attack using deadly force. One appellate court noted, "[i]t is a firmly established rule that the aggressor need not have a weapon to justify one's use of deadly force in self-defence, and that a physical beating may qualify as such conduct that could cause great bodily harm".⁸⁶³ This approach is appropriate where the parties' size, strength or physical condition differ substantially.

As the Oklahoma Criminal Court of Appeals noted:

"[I]t cannot be said to be true in all cases where fists are used in making an attack upon another that the person attacked would not be legally justified in the use of a deadly weapon...There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justified in repelling the assault by the use of a deadly weapon. It is conceivable that a man might be so brutal in striking a woman with his fists as to cause her death".⁸⁶⁴

4.4 Conclusion

The difficulties encountered by battered women in meeting a strict standard of self-defence has led to the introduction of lay and expert testimony to assist the trier of fact in understanding the context in which the crime was committed. Self-defence in non-confrontational situations, even with the introduction of expert testimony remains

⁸⁶³ See for e.g., People v Reeves, 47 Ill. App, 3d 406, 411, 362 N.E.2d 9, 13 (1977).

⁸⁶⁴ Easterling v State, 267 P. 2d 185, 188 (Okla. Crim. App, 1954), cited in Kinports supra (n 633) 431. As Kinports supra (n 810) at 431-432 notes, while not all injuries are immediately life-threatening, the law considers them severe enough to constitute serious bodily harm, that may be repelled by deadly force. See for e.g., People v Burroughs, 35 Cal, 3d 824, 831, 201 Cal, Rptr, 319, 323, 678 P.2d 894, 898 (1984) (defining serious bodily injury for purposes of setting penalties for various batteries as "[a] serious impairment of physical condition, including, but not limited to the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement"). See also People v Reed, 695 P.2d 806, 808 (Colo. Ct. App. 1984), cert. denied, 701 P.2d 603 (Colo. 1985) (defining serious bodily harm for purposes of self-defence to include injuries that involve substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of body).

questionable and creates controversy as to whether self-defence is indeed a viable option.

Various theorists have noted that battered women are “stretching the boundaries of self-defence beyond its acceptable limits”.⁸⁶⁵ They have noted that self-defence was designed to protect the sanctity of human life and to limit self-help which is accomplished by the doctrine’s strict requirements of necessity, proportionality and imminence.⁸⁶⁶

While a complete defence to killing an abuser would be preferable, several theorists hold the view that some form of voluntary manslaughter, as opposed to self-defence, is the appropriate legal response to the killings. They argue that extenuating circumstances such as a history of abuse, may be acknowledged in order to reduce a charge of murder to manslaughter.⁸⁶⁷ Smith notes that “as a balanced approach classifying the offense as voluntary manslaughter recognizes both crimes in context in which they occur: categorizing the abuse as a mitigating circumstance, while at the

⁸⁶⁵ Smith “Abused children who kill abusive parents: moving towards an appropriate legal response” (1992) Catholic University Law Review 141 at 158-159. Smith at n 119 makes reference to theorists such as Creach supra (n 638) to support her contention: see Creach supra (n 815) at 627-630 (arguing that acquittal despite a lack of sufficient evidence to support self-defence is contrary to the rule of law).

⁸⁶⁶ Smith supra (n 865) at 159. See also Smith supra (n 865) n 120 noting Creach’s comment (supra (n 815) at 628) comment: “restricting of self-defence doctrine is meant to deter self-help and require a genuine fear of imminent harm”; See Mihajlovich “Comment, Does plight make right: The Battered Woman Syndrome, expert testimony and the law of self-defense” (1987) Indiana Law Journal 1253 at 1269-1273: “the social goal of self-defense doctrine is to preserve human life and [t]o erode the proportionality and necessity components... is to broaden the range of circumstances under which a life can be legally taken without criminal sanctions”.

⁸⁶⁷ Smith supra (n 865) 160. See also Smith supra (n 865) n 130. For example, Creach supra (n 815) argues for expansion of the doctrine of imperfect self-defence to include killings in response to external forces sufficient to put defendant in genuine fear (at 635-638); Mihajlovich supra (n 866) at 1278-1281 explaining various strategies for categorizing murders by battered women of their attackers in non-confrontational situation as manslaughter where the defendant’s status as a battered woman would be recognized as an extenuating circumstance, arguing that such classification will allow battered women defendants to include their true emotions such as anger and fear in their defences to establish the reasonableness of their feelings of helplessness.

same time preserving the intent of self-defence doctrine by stressing the sanctity of human life and discouraging self-help”.⁸⁶⁸

4.5 Provocation

4.5.1 Development of the defence

Initially provocation was an evidentiary matter at a time when the word “aforethought” was assumed to have actual significance as used in the definition of murder. Intentional killing without any apparent motive must have been due to a concealed motive.⁸⁶⁹ However, a killing in sudden affray (initially referred to as “chance medley”)⁸⁷⁰ brought about its own explanation and did not leave room for imputation of premeditation and for this reason the offence was manslaughter. When it was acknowledged that murder required no actual premeditation a killing in a sudden rage brought about by an altercation was still held to be manslaughter but a different explanation for this was needed.⁸⁷¹ Such circumstances are so mitigating that the

⁸⁶⁸ Smith supra (n 865) 160-161. See also Smith supra (n 865) n 131. This balanced approach avoids the extreme outcomes of self-defence doctrine – convict of first degree murder or acquit. See further Creach supra (n 815) at 635: “Self-defences polar model is inadequate, while manslaughter provides a middle ground”.

⁸⁶⁹ Lombard Eirenarcha (1619), cited in Perkins Criminal Law 2nd ed (1969) 53. As Perkins supra at 34-35 has noted, the word “aforethought” was added to “malice” in the older cases to indicate a design thought out well in advance of the fatal act. But since many cases came before the courts for determination involving killings under a great variety of circumstances, less emphasis was placed upon the notion of a well-laid plan. Thus the only requirement in this regard was that it must not be an afterthought. Killing with malice is sufficient of itself to negative any possible notion of an afterthought, and apart from the historical background the word “aforethought” would not be needed. Perkins supra at 35 goes on to state: “the use of the word aforethought, however, must not be permitted to obscure the result. As a matter of law a killing may be with malice aforethought although it is conceived and executed ‘on the spur of the moment’. For example, if one should find himself alone with a political opponent, and should suddenly slay the other with a heavy iron bar which happened to be at hand, the slayer would be guilty of murder even if no such thought had ever entered his mind before, and he carried out the idea as rapidly as thought can be translated into action.” For a discussion of South African treatment of provocation/emotional stress see chapter 2 at 67-102 supra. For a discussion of the treatment of the provocation defence in English law see chapter 3 at 131-159 supra.

⁸⁷⁰ The term is sometimes employed to refer to homicide in a causal altercation but more properly refers to the altercation itself. See Blackstone supra (n 506) at 184, cited in Perkins supra (n 869) 53.

⁸⁷¹ East did not clearly distinguish the new theory from the old saying: “Herein is to be considered under what circumstances it may be presumed that the act done, though intentional of death or grievous

killer's state of mind could not be properly characterized as "malicious".⁸⁷²

In order for murder to be reduced to manslaughter under the "rule of provocation" there are four requirements:

(1) There must have been adequate⁸⁷³ provocation.⁸⁷⁴

bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone." 1 East P.C. 232 (1803), (cited in Perkins supra (n 869) 53).

⁸⁷² Such a killing "is regarded as done through heart of blood or violence, of anger and not through malice.." Commonwealth v Webster, 59 Mass. 295, 308 (1850) "There can be no such thing in law as a killing with malice and also upon the juror brevis of passion; and provocation furnishes no extenuation unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In the law they cannot co-exist." State v Johnson, 23 N.C. 354, 362 (1840).

⁸⁷³ To be adequate it is not necessary that the provocation would cause a reasonable man to commit intentional homicide but only that it would so inflame his passion as to tend to cause him from that moment to act from passion rather than reason, that, is to deprive a reasonable person of self-control (Perkins supra (n 869) 54). See also State v Watkins, 147 Iowa 556, 126 N.W. 691 (1910); State v Fisko, 58 Nev. 65, 70 P. 2d 1113 (1937). If an alleged provocation was so slight, or an actual provocation so great, as to leave no possible room for doubt as to the characterization it is not necessary for the court to ask the jury to make the only finding of fact possible under the circumstances. See also Holmes v Director of Public Prosecutions [1946] 2 All ER 124. Special circumstances are not ignored, even if they apply directly to the actor himself. Negligence, for example, is tested by the reasonable-man standard. But a blind man for example can't be expected to exercise the care of one with normal vision. In the case of a fire, a Fire Marshal who has been without sleep for 36 hours cannot be expected to act with the same judgment as someone who hasn't. But the fact that the standard is one of ordinary reasonable man precludes consideration of the innate peculiarities of the individual actor (cited in Perkins supra (n 869) 55-56).

⁸⁷⁴ It has been held that a wordy altercation will not itself be sufficient to mitigate to manslaughter a killing that is otherwise murder. See also State v Lee, 36 Del. 11, 171 A. 175 (1933). On the other hand a mutual encounter which goes beyond words to actual blows or to a manifestation of intent to use immediate and violent force may constitute adequate provocation; and in determining the adequacy of the provocation in such a case the entire quarrel, including the words, will be taken into consideration (Perkins supra (n 869) 57); see Regina v Smith, 4 F & F. 1066, 176 Eng. Rep 910 (1886)). In the case of battery not every technical battery is sufficient to constitute adequate provocation, but a hard blow inflicting considerable pain or injury will ordinarily be sufficient (Perkins supra (n 869) 60; see also Stewart v State, 78 Ala. 436 (1885)). In the case of words they are not recognized as adequate provocation to reduce a willful killing to manslaughter, however abusive, aggravating, contemptuous, false, grievous, indecent, insulting provoking or scurrilous they may be (see also People v Russel, 322 Fil. 295, 153 N.E. 387 (1926); State v Nevares, 36 N.N. 41, 71. 2d. 36 933 (1932); Commonwealth v Gelfi, 282 Pa. 434, 128 A. 77 (1925)). The soundness of this rule has been questioned (see e.g., Commonwealth v Hourgian 89 Ky. 305, 313, 12 S.W. 550, 552 (1889), State v Jarrott, 23 N.C. 76, 82 (1840). But cf Sawyers v Commonwealth, 18 Ky. L. re[. 657, 38. S.W 136 (1896); State v McNeill, 92 N.C. 812 (1885)). Insulting gestures alone are not adequate provocation (Perkins supra (n 869) 63; see also Coleman v State, 149 Ga. 186, 99 S.E. 627 (1919). Gestures indicating an intent to attack with deadly force may be adequate provocation in a mutual encounter (see Hall v State, 177 Ga. 794, 171 S.E. 274 (1933)) and under other circumstances may completely justify or excuse a homicide under the self-defence privilege (Perkins supra (n 869) 63; see also State v Mason, 115 S.C. 214, 105 S.E. 286 (1920)). Certain other outrageous acts may be found to constitute adequate provocation to reduce a voluntary homicide to manslaughter. These include a husband killing his wife whom he caught sleeping with another man (Dabeny v State, 113 Ala. 38, 21 So. 211, 212 (1897)) seduction of the defendant's infant daughter

- (2) The killing must have been in the heat of passion.⁸⁷⁵
- (3) It must have been a sudden heat of passion - the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool.⁸⁷⁶
- (4) There must have been a causal connection between the provocation, the passion, and the fatal act.⁸⁷⁷

Many American jurisdictions maintain the old distinction between voluntary and involuntary manslaughter, and award less severe punishment for involuntary than voluntary manslaughter. Some modern American statutes have discarded the adjectives (voluntary and involuntary) and instead divide manslaughter into degrees, reserving a

(State v Grugin, 147 Mo. 39, 47 S.W. 1058 (1898); Toler v State, 152 Tenn 1, 260 S.W. 134 (1924)), rape of his close female relative (State v Cooper, 112 La. 281, 36 So. 350 (1904); State v Flory, 40 Wyo. 184, 276 P. 458 (1929)), murder or serious injury of his close relative (People v Rice, 351 Ill. 604, 184 N.E. 894 (1933)) or the act of sodomy with his young son (Regina v Fisher, 8 Car. & P. 182, 173 Eng. Rep. 452 (1837)). Any effort to classify provocative acts into adequate and inadequate would be to substitute the early view in place of modern law (Perkins supra (n 869) 65).

⁸⁷⁵ “[P]rovocation furnishes no extenuation, unless it produces passion” (State v Johnson supra (n 872)). “Passion does not necessarily mean rage or anger. It includes any violent, intense, highly wrought or enthusiastic emotion.” (Perkins supra (n 869) 66); see also People v Borchers, 50 Cal 2d 321, 329, 325 P. 2d 97, 102 (1958)). Terror is one of the passions which may dethrone judgment and mitigate a killing to the level of voluntary manslaughter (see also People v Otwell, 61 Cal. Rptr. 427 (Cal. App. 1967)). The present requirement is measured by a subjective test, the question is whether the defendant killed in the actual heat of passion (Perkins supra (n 869) 66; see Green v State, 195 Ga. 759, 25 S.E. 2d 502 (1943)). To constitute the heat of passion in this requirement it is not necessary for the passion to be so extreme that the defendant does not know what he is doing at the time (see People v Freel, 48 Cal. 436 (1874); Dye v State, 127 Miss. 492 90 So. 180 (1922)). But it must be so extreme that for the moment his action is being directed by passion rather than by reason (Perkins supra (n 869) 66; see also Hannah v Commonwealth, 153 Va 863, 149 S.E. 419 (1929)).

⁸⁷⁶ Saunders v State, 26 Ga. App 475, 106 S.E. 314 (1921). If time has elapsed before the fatal act the defendant does not have the benefit of the rule of provocation even if his own mind is still inflamed by passion at the time of the killing. See also State v Robinson, 353 Mo. 934, 185 S.W. 2d 636 (1945); State v Lee supra (n 874). It has been recognized that one who controls his temper time after time, following repeated acts of provocation, may have his emotion so bottled-up that the final result is an emotional explosion, and that in such a case the “cooling time” begins to run not from earlier acts but from the “last straw” (Perkins supra (n 869) 67); see also Baker v People, 114 Colo. 50, 160 P. 2d 983 (1945); Ferrin v People, 433 P. 2d 108 (1967); People v Borchers, supra (n 875)). Passion may be suddenly revived by circumstances that bring the provocation vividly to mind (Perkins supra (n 869) 68; State v Florry, 40 Wyo. 184, 276 P. 458 (1929)). If the defendant’s passions did cool, which may be shown by such circumstances such as completing a transaction etc then the length of time intervening is immaterial (Perkins supra (n 869) 69; see also in re Fraley, 3 Okl. Cr. 719, 722, 109 P. 295, 296-297 (1910)). However, the greater the provocation the longer the cooling time (State v Connor, 252 S.W. 713 (Mo. 1923)).

⁸⁷⁷ Perkins supra (n 869) 69.

harsher penalty for first degree manslaughter. However, the modern trend demonstrated in the majority of recent recodifications, is for these to be but one single manslaughter crime.⁸⁷⁸

In American law provocation is a mitigating defence rather than a complete exculpatory defence. Provocation has the effect of mitigating the punishment for intentional homicides by reducing the crime from murder to voluntary manslaughter.⁸⁷⁹ It serves as an excuse, albeit a partial one.⁸⁸⁰ The central question in respect of the provocation defence is: when is an actor not personally accountable for being provoked to kill? The answer to this is that the actor is not liable for her provoked act if she could not have acted otherwise, that is, if she could not have avoided responding to the provocative act by killing her provoker.⁸⁸¹ In order for a defendant to have her intentional killing

⁸⁷⁸ LaFave Criminal Law (2003) 775. This is also the approach in the Model Penal Code ss 210.3.

⁸⁷⁹ The crime of voluntary manslaughter covers other situations as well, but in some of the modern codes the crime is limited only to the present situation. In State v Bradford, 618 N.W. 2d 782 (Minn. 2000), the court concluded that because “the domestic abuse murder statute evinces a legislative intent to increase the penalty for homicide that in some circumstances might be considered heat-of-passion manslaughter when the homicide occurs as part of a pattern of domestic abuse,” it necessarily follows “that heat-of-passion manslaughter is not a lesser-included mitigating offense of first-degree domestic abuse murder.” Except for this reasonable emotional condition, the intentional killing would be murder. In Commonwealth v Flax, 331 Pa. 145, 200 A. 632 (1938), it is said: “The law regards with some tolerance an unlawful act impelled by a justifiably passionate heart, but has no toleration whatever for an unlawful act impelled by a malicious heart.” For a discussion of the South African defence of non-pathological incapacity which includes factors such as provocation and emotional stress see chapter 2 at 67-102.

⁸⁸⁰ Heller *supra* (n 795) 22.

⁸⁸¹ Heller *supra* (n 795) 22. See further arguments noted by Heller at 22-23: Dressler says, “[t]he true reason for the law’s ‘concession to human weakness’-the reason why, if A kills P in sudden rage at his actions, the law will likely allow A to argue that the jury should reduce the homicide to manslaughter-is that the homicide is the result of an understandable and excusable loss of self-control arising from his anger” (“When ‘Heterosexual’ Men kill ‘Homosexual’ Men: Reflections on Provocation Law, Sexual Advantages, and the ‘Reasonable Man’ Standard” (1995) Journal of Criminal Law and Criminology 726 at 746). Furthermore, the emphasis on the actor’s “loss of self-control” is the logical implication of the fact that that provocation is an excuse. As Fletcher states: “Th[e] rationale of excuses rests on the assumption that either internal pressures... or external pressures...might so intrude upon the actor’s freedom of choice that the act committed under pressure no longer appears to be his doing. The act is attributable more to the pressure than to the actor’s free choice. If the act is not his, he cannot be blamed for having committed it” (“The Individualization of Excusing Conditions” (1974) Southern California Law Review 1269 at 1304).

reduced from murder to voluntary manslaughter, the test for provocation must be met: (1) an objective standard (the adequacy of the provocation without a cooling-off period as would be found by a reasonable person); and (2) a subjective standard (the accused was in fact provoked and acted in response to the provocation).⁸⁸²

4.5.2 Reasonable provocation

What the law considers as reasonable provocation changes as society evolves.⁸⁸³ As a result of this, there may be a future trend away from the usual practice of placing the various types of provocative conduct into pigeon-holes.⁸⁸⁴ Conduct constituting provocative conduct includes battery,⁸⁸⁵ mutual

⁸⁸² Littman *supra* (n 68) 1157.

⁸⁸³ Littman *ibid*. See also Holmes v Director of Public Prosecutions *supra* (n 873) for a suggestion that notions of what constitutes a reasonable provocation may change with the evolution of society from one age to the next. England followed up this suggestion by its Homicide Act of 1957, ss 3, providing that the jury should, in every case of a killing while actually provoked, determine whether the provocation was under the particular case reasonable.

⁸⁸⁴ LaFave *supra* (n 878) 778. See also Brown v United States, 584 A.2d 537 (D.C.App.1990) discussing this trend.

⁸⁸⁵ A light blow cannot constitute reasonable provocation. See Commonwealth v Rembiszewski, 363 Mass. 311, 293 N.E.2d 919 (1973) (scratches on defendant's face insufficient provocation for killing with deadly instrument); Commonwealth v Cisneros, 381 Pa. 447, 113 A. 2d 293 (1955). But a violent blow, with fist or weapon will suffice: People v Harris, 8 Ill.2d 431, 134 N.E.2d 315 (1956) (victim beat defendant severely with night stick); State v Ponce, 124 W.Va. 126, 19 S.E. 2d 221 (1942) (victim hit or shoved accused into a rock pile). Even where the defendant killed in response to a violent blow, he may not have his homicide reduced to voluntary manslaughter if he himself by his prior conduct was responsible for that violent blow: Lizama v United States Parole Comm'n, 245 F. 3d 503 (5th Cir.2001) (commission properly found that federal offence most analogous to defendant's Mexican crime was second degree murder rather than voluntary manslaughter, as violent blow defendant received from person he killed was prompted by defendant's attack upon a woman who other person then defended; State v Gaitan, 131 N.M. 758, 42 P.3d 1207 (2002) (not sufficient provocation here, as the defendant "intentionally and vigorously start[ed] the fracas with an aggravated battery"); State v Ferguson, 2 Hill (S.C.) 619, 27 Am. Dec. 412 (1835) (victim, trying to stop quarrel started by defendant, threw defendant against wall; defendant killed victim with knife). A comparison of the weapon used by the victim to inflict the blow upon the killer and the weapon which the latter used in retort should also be taken into account, (see Holmes v Director of Public Prosecutions *supra* (n 873)). Likewise, it is relevant to consider whether the killer, in responding, actually intended to kill or only intended to do serious bodily harm: State v Hoyt, 13 Minn. 132 (1868) as where a dagger is used in retaliation for a blow with a fist (Mancini v Director of Public Prosecutions, *supra* (n 704); see also State v Crisantos (Arriagas), 102 N.J. 265, 508 A. 2d 167 (1986) (stabbing in response to a light kick) or five lethal slashes with a straight razor for one wifely blow on the head with a small fireplace poker (Commonwealth v Webb, 252 Pa. 187, 97 A. 189 (1916)).

combat,⁸⁸⁶ assault,⁸⁸⁷ illegal arrest,⁸⁸⁸ adultery,⁸⁸⁹ injuries to third

⁸⁸⁶ Where two people engage in mutual combat, and during the fight one kills the other as the result of an intention to do so formed during the struggle the homicide has long been held to be manslaughter (see State v Smith, 123 N.H. 46, 455 A.2d 1041 (1983); the acts which have resulted in sufficient provocation in mutual combat cases have generally been unlawful in themselves; “a lawful act cannot provide sufficient provocation”. It is not necessary that the accused have been acting out of passion when the fight started: State v Inger, 292 N.W.2d 119 (Iowa 1980)) the notion being that the suddenness of the occasion rather than some provocation by the victim mitigates the intentional killing to something less than murder. Cases of intentional killings in mutual combat are generally treated on the basis of provocation in batteries. It is generally accepted (even in jurisdictions specifically listing “sudden quarrel” as a type of provocation) that a general heat-of-passion instruction, unaccompanied by a separate and distinct “sudden quarrel” instruction, is sufficient (United States v Martinez, 988 F.2d 685 (7th Cir. 1993); United States v McRae, 593 F. 2d 700 (5th Cir. 1979); State v Coop, 223 Kan. 302, 573 P. 2d 1017 (1978); Commonwealth v Peters, 372 MAA. 319, 361 N.E.2D 1277 (1977); overruled on other grounds, Commonwealth v Aponte, 391 Mass. 494, 462 N.E.2d 284 (1984)).

⁸⁸⁷ Where one attempts but fails to commit a violent battery upon another (thereby committing a criminal assault there is a disagreement in the cases as to whether the assault can arouse in a reasonable person that passion which will mitigate to manslaughter an intentional killing of the assaulter by the one assaulted. (CF State v Kizer, 369 Mo. 744, 230 S.W.2d 690 (1950) (victim assaulted defendant with axe but did not strike him; held, not a reasonable provocation), with Sikes v Commonwealth, 304 Ky. 429, 200 S.W. 2d 956 (1947) (accused entitled to voluntary manslaughter instruction after testifying that defendant did not strike him but was “acting like he was going to”). The better view is that an attack upon the accused which was unsuccessful may constitute adequate provocation in extreme cases, as where the attacker fires a pistol at him (Stevenson v United States, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1869)).

⁸⁸⁸ The cases are in dispute concerning the effect of an illegal arrest upon the passions of a reasonable person - some taking the view that such an arrest might reasonably arouse a heat of passion in him (see John Bad Elk v United States, 177 U.S. 529, 20 S.Ct. 729, 44 L.Ed. 874 (1900) when arrested person kills an arresting officer, that which might be murder if the arrest is lawful might be nothing more than manslaughter if the arrest is unlawful, and in some circumstances, like self-defence, might become crime; People v White, 333 Ill. 512, 165 N.E. 168 (1929); State v Burnett, 354 Mo. 45; 188 S.W.2d 51 (1945); Regina v Chapman, 12 Cox Crim. Cas. 4 (1871)), others are of the view that the reasonable person could not so be aroused (People v Bradley, 23 Cal.App. 44, 136 P. 955 (Dist.Ct.App.1913); Alsop v Commonwealth, 4 Ky.L.Rptr. 547 (1882)). The notion here is that a reasonable man would submit to the illegal arrest and then take legal means to secure his release, rather than resort to killing.) If an illegal arrest may be a reasonable provocation in some circumstances, it would seem that these circumstances should include the fact the accused knew or at least believed that his arrest was illegal, and perhaps that the accused knew or believed he was innocent of the crime for which he was arrested, since an innocent man would more reasonably be provoked by an illegal arrest than a guilty one. In any event, a lawful arrest cannot constitute sufficient provocation. See State v Madden, 61 N.J. 377, 294 .2d 609 (1972).

⁸⁸⁹ A husband who discovers his wife in the act of committing adultery is reasonably provoked, so that when, in his passion, he intentionally kills his wife or her lover, his crime is voluntary manslaughter rather than murder. (See People v McCarthy, 132 Ill.2d 331, 138 Ill.Dec. 292, 547 N.E.2d 459 (1989) (but court notes woman had terminated her relationship with the accused two months prior to the homicide); Rowland v State, 83 Miss. 483, 35 So. 826 (1904) (manslaughter when husband, upon discovery of wife committing adultery with lover, shot at lover and, missing, killed wife); Gonzales v State, 546 S.W.2d 617 (Tex.Crim.App. 1977) (manslaughter where husband shot lover found in bed with his wife). Compare Palmore v State, 253 Ala. 183, 43 So.2d 399 (1949) (husband killed wife, but held murder because a reasonable husband would have cooled); Reed v State, 62 Miss. 405 (1884) (husband killed paramour, but held murder because of cooling time). See also Burger v State, 238 Ga. 171, 231 S.E.2d 769 (1977) (husband’s testimony that he went blank upon finding wife with lover not sufficient evidence his killing of them was manslaughter)). So too a wife may be reasonably provoked into a heat of passion upon finding her husband in the act of adultery with another woman (Scroggs v State, 94 Ga.App. 28, 93 S.E.2d 583 (1956) (wife killed the other woman)) Thus it has been held that a reasonable though erroneous belief on the part of the husband

persons⁸⁹⁰ and words.⁸⁹¹

that his wife is committing adultery will do (State v Yanz, 74 Conn. 177, 50 A. 37 (1901); Maier v People, 10 Mich. 212, 81 Am.Dec. 781 (1862). Compare Commonwealth v Benjamin, 369 Mass. 770, 343 N.E.2d 402 (1976) (mere suspicion of adultery insufficient)). One case holds that the sudden sight of his wife's paramour in his mother-in-law's home might reasonably cause the husband, who knew his wife had been having an affair with the man to lose his ordinary self-control, mitigating his killing to manslaughter (People v Bridgehouse, 47 Cal.2d 406, 303 P.2d 1018 (1956)). The rule of mitigation does not extend beyond the marital relationship (see People v McCarthy supra (but court notes woman had terminated her relationship two months prior to the homicide); People v Pecora, 107 Ill.App.2d 283, 246 N.E.2d 865 (1969) (defendant's ex-wife told him she had been intimate with other men: held, not adequate provocation even if he "had not psychologically disengaged himself from the marital relationship since the divorce"). This limitation seems questionable in cases where there existed a longstanding relationship comparable to that of husband and wife. But in People v McDonald, 63 Ill.App.2d 475, 212 N.E.2d 299 (1965), where the defendant had lived with the woman he killed for some 25 years, the court ruled it would not apply the "exculpatory features of *crime passionel* to the killing of a mistress, regardless of the duration of the relationship."

⁸⁹⁰ A person may be provoked by conduct which causes injury to his close relatives (People v Rice, 351 Ill. 604, 184 N.E. 894 (1933) (evidence that victim slapped defendant's child and later quarreled with the accused held to support conviction of voluntary manslaughter); State v Grugin supra (n 673) (father, on learning that his son-in-law had ravished his young unmarried daughter, asked son-in-law why he did it and received reply, "I'll do as I damn please"; father killed son-in-law; held, a jury question whether this is reasonable provocation for voluntary manslaughter); State v Copling, 326 N.J.Super. 417, 741 A.2d 624 (1999) (while "persons can be provoked by conduct that causes injury to a relative," here the defendant's mother told him his younger brother had been attacked by person the defendant thereafter killed, mother also said brother "was uninjured" and thus there insufficient provocation here); State v Jones, 299 N.C. 103, 261 S.E.2d 1 (1980) (manslaughter instruction required where accused shot man trying to break into house of and threatening to defendant's mother and siblings); State v Flory supra (n 673) (son-in-law, on learning that the father of his wife had raped her, killed him; held, jury could find this to be voluntary manslaughter). It has been held that the rule does not extend beyond close relatives to more distant relatives and friends (State v Madden, 61 N.J. 377, 294 A.2d 609 (1972) (police officer's use of excessive force on another not basis for manslaughter verdict where, as here, the other person not a close relative of the accused); Commonwealth v Paese, 220 Pa. 371, 69 A. 891 (1908) (victim, in defendant's presence, severely beat defendant's friend; accused requested instruction that this was manslaughter if the attack aroused defendant's passion so as to destroy his self-control held properly refused, for the provocation rule does not extend to friends of the defendant. See also State v Coyle, 119 N.J. 194, 574 A.2d 951 (1990) (next door neighbour with whom the accused had close relationship and then a love affair)).

⁸⁹¹ Words alone will suffice (People v Valentine, 28 Cal.2d 121, 169 P. 2d 1 (1946) (violent argument) where the court further found it important to reconcile the two following comments upon this aspect of the law contained in prior opinions: "[1] Nothing is more surely calculated to arouse the blood of someone to a heat of passion than grievous words of reproach, yet [2] no words are sufficient provocation to reduce an offense from murder to manslaughter, at least if the words are informational (conveying information of a fact which constitutes a reasonable provocation when that fact is observed) rather than merely insulting or abusive words"; State v Copling supra (n 890) (defendant's mother told him the victim had attacked the defendant's younger brother); Sells v State, 98 N.M. 786, 653 P.2d 162 (1982); Commonwealth v Berry, 461 Pa. 233, 336 A.2d 262 (1975) (defendant's mother told him she had been assaulted by man and defendant then killed him)). Thus a sudden confession of adultery by a wife, or information from a third person that a wife has been unfaithful, has sometimes been held to constitute a provocation to the husband of the same sort as if he had made an "ocular observation" of his wife's adultery (Paz v State, 777 So.2d 983 (Fla.App.2000) (murder conviction reduced to voluntary manslaughter, as accused killed victim when defendant's wife indicated victim "has sexually assaulted" her); Raines v State, 247 Ga. 504, 277 S.E.2d 47 (1981) (defendant discovered wife carrying letter to her boyfriend, she admitted and taunted him with her adultery); Haley v State, 123 Miss. 87, 85 So. 129 (1920) (defendant's wife's sudden confession of adultery caused accused to kill her paramour; held, conviction of voluntary manslaughter affirmed); State v Flory, supra (n 890) (defendant's father-in-law raped his daughter, defendant's wife; wife told the defendant about it; defendant on seeing father-in-law a day later

In S v Guido⁸⁹² the New Jersey Supreme Court held that “a course of ill-treatment and oppression which closed in upon her so completely that her own death appeared for a while to be the only way out” could suffice for legal provocation.⁸⁹³

4.5.2.1 The objective test

The excuse version of the objective standard is determinist, but it is externally, not internally, determinist. In this view, the only actions that should be explained deterministically are actions not caused by an individual’s character – actions that because they result from overwhelming external circumstances, represent “a limited, temporal distortion of the actor’s character.”⁸⁹⁴ It does not excuse every act caused by honest provocation; it excuses only those provoked acts in which the provocation was

killed him; held, jury could find voluntary manslaughter. Compare Speake v State, 610 So.2d 1238 (Ala. Crim.App.1992) (“The wife’s ‘threat’ to ‘find someone else to have sex with’ is not an admission of past adultery,” but rather “is a threat of future misconduct that does not even imply the present existence of a specific paramour,” and thus “was neither so imminent nor so certain that the suggestion of adultery lessened the appellant’s culpability for the intentional killing”). Words have also been relied upon in an effort to reduce an intentional killing to voluntary manslaughter when the accused makes a claim of homosexual panic (“premised on the theory that a person with latent homosexual tendencies will have an extreme and uncontrollably violent reaction when confronted with a homosexual proposition. However here is no agreement on whether a nonviolent homosexual advance should ever qualify as reasonable provocation. Court decisions have reflected that there is no compelling reason why these homicides should be treated any differently than other “out-of-control” that the criminal justice system “punish[s] less severely than ordinary intentional killings.”) sometimes (e.g., Broome v State, 687 N.E.2d 590 (Ind.App. 1997); Thomas v State, 174 Ga.App. 560, 330 S.E.2d 777 (1985)) but usually not (State v Ewing, 30 Mass.App.Ct. 285, 567 N.E.2d 1262 (1991); State v Handy, 331 N.C. 515, 419 S.E.2d 545 (1992)) resulting in a jury verdict of voluntary manslaughter.

⁸⁹² 40 N.J. 191, 211, 191 A.2d. 45, 56 (1963). In this case the wife killed her husband because of violence or ‘the constant threat of it’ from a man who had to have his way and who would not let go of a woman who had her fill (at 196).

⁸⁹³ S v Guido supra (n 892) at 210. See further Hoyt v State, 21 Wis. 2d 284 291, 128 N.W. 2d 645, 649 (1964). A wife killed her husband after a history of physical abuse and humiliation; it was held that actions over a long period of time could have cumulative effect upon an ordinary person so that the provocation just before the shooting would be greatly magnified. See also Commonwealth v Stonehouse 521 Pa. 41; 455 A.2d 772; 1989 Pa. 42 where it was held that sufficient provocation to support a conviction for manslaughter may be established by the cumulative impact of a series of related events and the ultimate test for adequate provocation remains whether a reasonable man confronted with a series of events, became impassioned to the extent that his mind was “incapable of cool reflection”, citing Commonwealth v McCusker, 448 Pa. 382, 389, 292 A.2d 286, 290 (1972).

⁸⁹⁴ Fletcher supra (n 544) 802. For a discussion of the test utilized in South African law for non-pathological incapacity see chapter 2 at 67-79 supra. For a discussion of the test utilized for provocation in English law see chapter 3 at 135-144 supra.

such that “an ordinary, reasonable person [would] be overcome with emotion.”⁸⁹⁵ Thus in determining whether to excuse the defendant’s provoked act, the question is whether the act is “attributable to the actor’s character or to the circumstances that overwhelmed his capacity for choice.”⁸⁹⁶ In State of New Jersey v McClain⁸⁹⁷ it was held that because the test for the existence of adequate provocation is objective, the “fact that the defendant possesses some peculiar mental or physical characteristic, not possessed by the ordinary person, which caused him, in the particular case to lose her self-control is not relevant”. Thus the contention that the defendant was provoked by the victim’s conduct solely from her point as battered woman,⁸⁹⁸ as opposed to the objective view of

⁸⁹⁵ State v Felton, 329 N.W.2d 161, 172 (Wis. 1983). Donovan and Wildman “Is the Reasonable Man Obsolete: A Critical Perspective on Self-Defense and Provocation” (1981) Loyola of Los Angeles Law Review 435 at 462-467 are of the view that when this standard is strictly applied, it prevents the consideration of relevant circumstances particular to an individual case.

⁸⁹⁶ Fletcher supra (n 544) 801. The excuse-based objective standard’s uncritical distinction between an individual’s character and an individual’s external circumstances is troubling. That distinction necessarily implies that an individual’s character does not always causally influence how she perceives to her external circumstances. Heller supra (n 795) is of the view that if external circumstances are always mediated by an individual’s knowledge structures, the excuse-based objective standard cannot justifiably ask, as its external determinism requires, whether a particular provoked act is attributable to an actor’s character or circumstances that overwhelmed his capacity for choice, because all provoked acts are, in some sense attributable to an actor’s character (at 40). Since the excuse version of the objective standard cannot be based on external determinism since it is philosophically incoherent, the question remains as to whether there is an alternative. For a discussion on such an alternative and its criticisms, see Heller supra (n 795) 39-52.

⁸⁹⁷ 248 N.J. Super. 409; 591 A.2d 652; 1991 N.J. Super. 182. In this case the relationship was not always a happy one. The discord resulted from the decedent’s tendency to have affairs and the fact that he had fathered a child with another woman. His conduct would cause breaks in the relationship for a period of time. The decedent only assaulted her twice during her relationship, once in 1977 and the second time three to four years prior to his death. The defendant also understood the decedent to imply on several occasions that he would harm her if she ever elected to terminate the relationship. During the week preceding his death, the decedent did not physically assault nor verbally threaten the defendant (at 414). In fact she perceived his conduct as being detached. When he left the house to go to a bar, she followed him wanting to talk to him but he ignored her and she killed him.

⁸⁹⁸ Dr Kleinman the psychiatrist for the defence admitted that she was attempting to understand and explain the defendant’s actions from the defendant’s perception and her experience of the behaviour (at par [421]). It didn’t matter to Dr. Kleinman whether defendant’s perceptions were accurate or inaccurate, because battered women do kill at a time when they are that the moment not under any imminent threat, but there has been an underlying threat through the relationship. The thrust of Dr. Kleinman’s test was not an objective criterion of provocation but rather how battered woman would subjectively perceive those events and how that perception would affect the woman’s ability to act purposely or knowingly.

a reasonable person under the same circumstances, was specifically rejected.⁸⁹⁹

4.5.2.2 Subjective standards of provocation

In the past, subjective standards of reasonableness were seldom seen in provocation cases. However, questions have been raised concerning the fairness of a strictly objective reasonable person test for determining the adequacy of the provocation. It has been argued that at least some individual peculiarities should be taken into account “because they bear upon the inference as to the actor’s character that it is fair to draw upon the basis of his act.”⁹⁰⁰ As Macklem states:

⁸⁹⁹ Ibid at para’s [10]-[11]; State v Mauricio 117 N.J. 402, 411, 568 A.2d 879 (1990) at 411. Thus in S v McClain supra (n 897) the Supreme Court pointed out that the defendant’s attempts to rely on S v Kelly supra (n 94) was wrong: “We do not mean that experts’ testimony could be used to show that it was understandable that a battered woman might believe that her life was in danger when indeed it was not and when a reasonable person would not have so believed for admission for that purposes would clearly violate the rules set forth in S v Bess 53 N.J. 10 247 A2d 669 (1989). Expert testimony in that direction would be relevant solely to the honesty of defendant’s belief, not its objective reasonableness”. (ibid at 204) Thus the defendant’s reliance on S v Kelly supra (n 94) and S v Guido supra (n 892) for the proposition that evidence of prior physical abuse by the decedent may be sufficient to establish a finding of provocation was taken out of context. In Guido supra (n 892) there was evidence that the victim was actually injured on several occasions, that the decedent was a man who constantly threatened the defendant physically in order to get his way and that such a threat actually occurred within a short time preceding the victim’s death (at 195-196). In Kelly supra (n 94) there was evidence, although disputed, that the defendant’s husband was assaulting her and that she stabbed him in self-defence, fearing that he would kill her if she did not act (at 187-188). In both cases the physical threats or use of force were closely related in time to defendant’s actions. There is nothing in either Guido supra (n 892) or Kelly supra to suggest that the purely objective test for provocation had been abandoned.

⁹⁰⁰ LaFave supra (n 878) 784. Thus, it is quite uniformly held that the defendant’s special mental qualities such as for example because of sunstroke or head injury (People v Golsb, 63 Cal. App. 609, 219 P. 456 (1923) (sunstroke); State v Nevares supra (n 874) (head injury) or whether he is particularly excitable are not to be considered (People v Steele, 27 Cal.4th 1230, 120 Cal.Rptr.2d 432, 47 P.3d 225 (2002) (defendant’s evidence “that he suffered various mental deficiencies, that he had a psychological dysfunction due to traumatic experiences in the Vietnam War, and that he just ‘snapped’ when he heard the helicopter, may have satisfied the subjective element of heat of passion,” but “does not satisfy the objective reasonable person requirement”; “defendant’s evidence, if anything, shows diminished capacity, not heat of passion,” but legislature has abolished diminished capacity defence); State v Bailey, 256 Kan. 872, 889 P.2d 738 (1995); State v Shepherd, 477 N.W.2d 512 (Minn.1991); State v Little, 462 A2d 117, 118 (N.H. 1983) (defendant not entitled to instruction that reasonable man standard not applicable “if you find that the defendant is shown to have some peculiar weakness of mind or emotion not arising from wickedness of heart”); Jacobs v Commonwealth, 121 Pa. 586, 15 A. 465 (1888) (defendant proffered evidence that he had an excitable temperament held properly excluded; State v Rewolinski, 159 Wis.2d 1, 464 N.W.2d 401 (1990)). See also People v Pecora supra (n 889) holding that the defendant’s “special traits,” including his “religious beliefs” and “mental disturbance,” are not to be considered. The defendant does not qualify for voluntary manslaughter where, because of intoxication, he easily loses his self-control, that is to say he is to be judged by the standard of the reasonable sober man (LaFave supra (n 677) 784). See further Bishop v United States, passion”); Commonwealth v Knight, 37 Mass. App. Ct. 92, 637 N.E.2d 240 (1994); Warner v State, 56 N.J.L. 686, 29 A. 505 (Ct.Err. & App.

“[A]s a matter of principle, it would in my view probably be desirable if the existence of provocation were to be assessed by purely subjective standards. It seems both unfair and illogical to attempt to judge a defendant’s inevitable personal reasons for his loss of self-control in terms of the capacity for self-control of a hypothetical ordinary person.”⁹⁰¹

Recent decisions such as Ferrin v People⁹⁰² indicate that courts have shown a greater willingness to consider subjective factors while still giving lip service to the reasonable person requirement. The subjective standard eliminates the objective reasonableness requirement completely. In Moor v Licciardello⁹⁰³ it was held:

“[A]ll that is relevant to the actor’s guilt is that he did honestly believe it was necessary to use force in his own defence.”⁹⁰⁴

1894); Keenan v Commonwealth 44 Pa. 55, 84 Am.Dec. 414 (1862). For a discussion of the subjective test for non-pathological incapacity in South African law see chapter 2 at 64-77 supra. But see chapter 3 English law which vacillates between an objective and subjective test for provocation: 129-150 supra. But see further Bishop v United States 107 F.2d 297 (D.C.Cir 1939); People v Dooley, 944 P.2d 590 (Colo.App.1997) (rejecting defendant’s contention that the question is “whether another person possessing defendant’s personality traits - here, chronic mild depression and polysubstance abuse-would also have been provoked to act in a heat of would also have been provoked to act in a heat of passion”); Commonwealth v Knight, 37 Mass. App. Ct. 92, 637 N.E.2d 240 (1994); Warner v State, 56 N.J.L. 686, 29 A. 505 (Ct.Err. & App. 1894); Keenan v Commonwealth 44 Pa. 55, 84 Am.Dec. 414 (1862). For a discussion of the subjective test for non-pathological incapacity in South African law see chapter 2 at 67-79 supra. But see chapter 3 English law which vacillates between an objective and subjective test for provocation: 131-159 supra.

⁹⁰¹ Macklem “Provocation and the Ordinary Person” (1987) Dalhousie Law Journal 126 at 142. See also State v Hoyt, 128 N.W.2d 645 (Wis. 1964) urged the courts to adopt a purely subjective standard of provocation, because “[t]he objective, the ‘ordinarily-constituted man’ or the ‘reasonable man’ test leads juries and courts into inquires which are not relevant to the issue at hand. In assessing the manslaughter defense to a charge of a more serious homicide, we are not concerned with how most people would act under the circumstances of the case, nor are we concerned with what the accused ‘ought’ to have done comparing him with the morally ideal response under the circumstances.”

⁹⁰² Ferrin v People supra (n 876) (held: voluntary manslaughter instruction should be given where psychiatric testimony was that 15-year-old accused killed younger brother because of “pent-up” anger and emotion” from being depantsed by playmates, from being teased by brother and others about losing on pinball machine and failing in school, and from actions of superiority by younger brother).

⁹⁰³ 463 A. 2d 268, 272 (1983).

⁹⁰⁴ *Ibid* at 272. For a definition of the particularizing standard which is utilized both in the law of self-defence and provocation see 182-183 supra.

The extent to which to which American courts have particularized the objective standard has varied. Characteristics that have been utilized include battered woman syndrome⁹⁰⁵ and specific cultural background.⁹⁰⁶

⁹⁰⁵ For an example of a jury instruction in a typical provocation case, see, e.g., State v Felton supra (n 895) (“[T]he question is how an ordinary person faced with a similar provocation would react. The provocation can consist, as it did here, of a long history of abuse. It is proper in applying the objective test, therefore, to consider how other persons similarly situated with respect to that type...of provocation would react.”). Rosen supra (n 21) at 43 states: “The defence relies on persuading the jury that the defendant suffered from an identifiable psychological syndrome that caused her to assess the dangerousness of the situation in a different manner than an average, ordinary person including a woman who does not suffer from battered woman syndrome.” Dressler supra (n 680) at 752: “[A woman who suffers from battered woman syndrome] is so psychologically beaten down by her partner that she is emotionally paralyzed and, therefore does not perceive her world as an ordinary, non- battered woman (or battered woman not suffering from the syndrome) would view it. In a sense, a ‘reasonable woman suffering from battered woman syndrome’ is a ‘reasonable unreasonable person.’” However, see a comparable case of People v Knee 2002 Cal. App (unpublished). One of the issues on appeal was whether the court was correct in allowing the prosecutions instruction that prevented the jury from considering the defendant’s character, in particular his sexuality in its assessment of sufficiency of provocation. The defence acknowledged that the objective standard is that of a reasonable person, not the reasonable homosexual or bisexual person (People v Washington (1976) 58 Cal. App. 3d 620, 625-626). Furthermore, the defendant relied heavily on the case of People v Humphrey supra (n 809). While this case involved self-defence ie jury could consider defendant’s evidence as to whether defendant subjectively believed she needed to kill in self-defence, the jury was not instructed that it could consider this evidence in determining whether her subjective belief was also objectively reasonable (at 1084). The court clearly stated that their holding did not encompass the other situation namely that we are not changing the standard from objective to subjective or replacing reasonable person with the reasonable battered woman’s standard. The Evidence Code section 1107 is a rule of evidence only and makes no substantive change to the law (at 1087). Thus the court in Knee supra went on to state that there is a qualitative difference between a claim of self-defence and a claim of heat of passion. Thus in Humphreys supra (n 809) the defendant asserted self-defence under the Penal Code section 197 of justifiable homicide and the evidence of BWS went to the issue of not only her belief in the need to kill but also as to whether that belief was reasonable under the circumstances. In that respect the Evidence Code section 12107 specifically allows for introduction of BWS evidence (at par [24]-[26]). In this respect the quotation in People v Humphreys supra (n 809) at n 695 appears to be taken out of context.

⁹⁰⁶ See People v Aphaylath, 502 N.E.2d 998, 999 (N.Y. 1986) (finding expert testimony that “under Laotian culture the conduct of the victim wife in displaying affection for another man and receiving phone calls from an unattached man brought shame on accused and his family sufficient to trigger defendant’s loss of control” and was relevant to defendant’s provocation defence); People v Wu, 286 Cal. Rptr. 868, 883 (Cal. Ct. App. 1981) (holding that, in assessing defendant’s claim that “pre-existing stress” provoked her to kill her son Sidney, “[t]he testimony related to defendant’s cultural background was relevant to explain the source of such stress, as well to explain how Sidney’s statements could have constituted ‘sufficient provocation’ to cause accused to kill Sidney in a ‘heat of passion’”). Another version of the particularizing standard is that of a cultural defence. The motivation underlying the affirmative defence position is that current criminal law defences fail to meet the needs of cultural defendants because the law does not reflect the social and moral norms to which they are accustomed. This would provide judicial fairness and prevent the majority culture from using the justice system to overpower and suppress a different culture or group (Chui “Beyond Exclusion, Assimilation, and Guilty Liberalism” (1994) California Law Review 1053 at 1098). The question now arises as to how the law is to assess the liability of an individual who not only suffers from battered woman syndrome but also comes from another culture. Moore raises this issue: “While battered women in general must overcome myths involving psychological disabilities and images of victimization, African-American women for example must overcome stereotypes which are far more onerous. Specifically, African-American women are viewed as angry, masculine, domineering, strong and sexually permissive, characteristics which do not denote ‘victim’” (Moore “Battered Women Syndrome: Selling the Shadow to Support the Substance” (1995) Howard Law

4.5.2.3 Model Penal Code

The American Law Institute (ALI), the author of the MPC, recognized the limitations of the common-law formulation of voluntary manslaughter. The ALI criticized the common law as “substantially deficient for failing to confront the major policy questions posed by the offense”.⁹⁰⁷ Furthermore, the ALI found the common law to be underdeveloped, claiming that the defence existed in only the “barest skeletal delineation.”⁹⁰⁸ Miller has noted that “the ALI sought to unpack the elements of voluntary manslaughter and to rebuild a defence with solid public policy and doctrinal foundations”.⁹⁰⁹ The first innovation of the ALI releases voluntary manslaughter from the confinement of the “nineteenth century four,” eliminating the rigid rules that have developed with regard to the sufficiency of particular types of provocation. In place of the narrowly defined touchstone of “adequate provocation,” the ALI has broadened the applicability of voluntary manslaughter by utilizing extreme “emotional disturbance”.⁹¹⁰

Journal 297 at 302). For an in-depth discussion of the consequences of accepting such a cultural defence see further Sacks “An Indefensible Defense; On the Misuse of Culture in Criminal Law” (1996) Arizona Journal of International and Comparative Law 523 at 545-546; Volp “(Mis)identifying Culture: Asian Women and the ‘Cultural defense’” (1994) Harvard Women’s Law Journal 57 at 57-58; Unikel “Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence” (1992) North Western University Law Review 326 at 355).

⁹⁰⁷ MPC and Commentaries (Official Draft and Revised Comments 1982) s 210.3. cmt. 2.

⁹⁰⁸ Ibid. The ALI further indicated that the “skeletal delineation” of voluntary manslaughter statutes varied significantly from jurisdiction to jurisdiction. Miller supra (n 61) at n 74 notes that “one of the central goals of the MPC was to bring coherence, if not uniformity, to criminal law, and to put the house of penal jurisprudence into some kind of rational order.”

⁹⁰⁹ Miller supra (n 61) at 674, discussing the MPC 210.3 cmt. 5(a). Since the Model Code did not recognize diminished responsibility as a partial defence, the drafters were prepared to accept a “substantial enlargement” (at 50) of the traditional plea of provocation, which would relax the “rigid objectivity of the common law doctrine” (at 72) and allow personal characteristics to be taken into account in applying the plea.

⁹¹⁰ Kirschener, Litwack and Galperin “Multiple Cases with a Policy and Program focus: The Defense of Extreme Emotional Disturbance: A Qualitative Analysis of Cases in New York County” (2004) Psychology, Public Policy and Law 102 at 104. As stated in the MPC: “provocation has been a predominantly objective determination. It focuses on circumstances that would so move an ordinary person to kill that the defendant’s act of succumbing to that temptation, although culpable, does not warrant conviction for murder. It seeks to identify causes of intentional homicide where the situation is as much to blame as the actor (MPC and Commentaries (1980) 71).

The ALI was cautious: the extreme emotional disturbance (EED) had to be caused by a “reasonable explanation or excuse.”⁹¹¹ Such a qualification would provide the outer parameter of the voluntary manslaughter defence and would theoretically prevent abuse of the doctrine. The ALI turned its attention to the parameters of a “reasonable explanation,” creating the second major innovation in the voluntary manslaughter doctrine. The ALI created a balance of objective and subjective factors for the jury to consider in determining whether the homicide should qualify as a heat of passion defence. The Model Penal Code went on to note that:

“The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as the actor believed them to be.”⁹¹²

While perceptions do not have to be objectively reasonable in terms of the MPC standard; reactions to perceptions are still required to be reasonably objectively assessed.⁹¹³ The objective element of the inquiry remains fundamental, while the subjective element allows the jury to consider the individual defendant’s perceptions of

⁹¹¹ MPC 210.3(1)(b) (1962).

⁹¹² MPC ss 210.3(1)(b) 1980. Examples of provocation cases using the MPC standard include People v Cassassa, 404 N.E. 2d 1310, 1316 (N.Y) (1981): “[T]he determination whether there was reasonable explanation or excuse for particular emotional disturbance should be made by viewing the subjective internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however, inaccurate that perception may have been and assessing from that standpoint whether the explanation or excuse for his emotional disturbance was reasonable”.. See also State v Ortiz, 588 A.2d 127, 130 (Conn. 1991): “[T]he determination of whether there was a reasonable explanation or excuse for defendant’s extreme emotional disturbance... [is] to be made from the viewpoint of ‘a person in the defendant’s situation under the circumstances as the defendant believed them to be’”.

⁹¹³ While the language of the MPC avoids explicit sex bias of common law, it may have reinforced sexist norms. Nourse *supra* (n 60) has articulated the nature of the problem: “when they declined to judge the adequacy of provocation [the members of the ALI] rejected an approach that bestowed privileges on certain relationships. But getting rid of the categories, and forcing normative judgments on juries, did not prevent courts from deciding normative questions. It simply disguised these judgments by changing the ways we argued about them” (at 1379). Nourse goes on to state that it is more difficult to detect and correct procedures expressed in application rather than in the articulation, of the voluntary manslaughter doctrine” (ibid at 1380).

the circumstances.⁹¹⁴ Miller notes that since “the special situation of the actor then becomes relevant but ‘idiosyncratic moral values’ should not play a part in the decisional calculus”.⁹¹⁵ In respect of the battered woman the MPC formulation of voluntary manslaughter does not require that her violent reaction be an immediate one. The result is that prolonged tension can serve as a reason for the defendant’s emotional disturbance.⁹¹⁶

Kirschener et al notes that the authors of the MPC, in formulating the EED defence, wanted to avoid the problems that were perceived to exist with both the provocation and diminished responsibility defences, at least in their extreme forms, while still recognizing that certain manifestations of provocation and diminished responsibility justified mitigating the punishment for homicide. As the Commentaries to the MPC notes:

“The doctrine of diminished responsibility... has its cost. By evaluating the abnormal individual on his own terms, it decreases the incentive for him to behave as if he was normal.

⁹¹⁴ Thus virtually any reaction to any stimulus may be considered in an extreme emotional disturbance (EED) jurisdiction. For example, courts have allowed voluntary manslaughter instructions where the defendant was distressed about a restraining order that prohibited him from seeing his wife (Perry v Commonwealth, 839 S.W. 2d 268, 269 (Ky. 1992); and where a defendant was upset that his wife wanted to continue living separately (State v Little supra (n 900)). However not every defendant receives an EED instruction. For example, a husband who killed his wife because she asked for a divorce did not receive the instruction (People v Patterson, 347 N.E. 2d. 898, 908 (N.Y. 1976)). Courts have been reluctant to put a finger on the reason some defendants receive an EED instruction and others not. In the words of the Kentucky Supreme Court, “We find it unnecessary to define extreme emotional disturbance. It is sufficient [sic] to say that we know it when we see it” (Edmunds v Commonwealth, 586 S.W. 2d 24, 27 (Ky. 1979)). As Miller supra (n 61) at 674 suggests perhaps the reason for the distinction lies in whether the jury finds the defendant’s emotional disturbance was reasonable. This leads to a problem: juries have difficulties in understanding the ALI’s intended balance between objective and subjective enquiries into a defendant’s perception of alleged affront. Thus juries are asked to walk a line so fine it may be nonexistent. They must exercise independent moral judgment and at the same time adopt the defendant’s vantage point.

⁹¹⁵ Littman supra (n 68) at 1162, discussing MPC ss 210.3 cmt. 5(a).

⁹¹⁶ See for example People v Patterson, supra (n 914) where New York Court of Appeals explained: “It is sufficient that a significant mental trauma has affected a defendant’s mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicable coming to force”.

It blurs the law's message that there are certain minimal standards of conduct to which every member of society must conform...In short, diminished responsibility brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control.”⁹¹⁷

4.6 Actual Provocation

The question remains whether the accused was in fact provoked by the victim's conduct. If she is of cooler temperament than the reasonable person, and thus was not actually provoked, she is to be found guilty of murder.⁹¹⁸

4.7 Reasonable time to cool off

If the victim's conduct not only provokes, but reasonably provokes the defendant into a passion which robs her of her normal capacity for self-control, there still remains a

⁹¹⁷ Kirschener, Litwack and Galperin supra (n 910) at 103, discussing MPC (1980) p 71-72. Dressler supra (n 58) is of the view that: “The drafters of the MPC by allowing any reaction to any stimulus being considered have brought the defences of provocation and diminished capacity under one umbrella. Provocation deals with the emotions and actions of ordinary person, whereas diminished capacity relates to the thinking processes and actions of unordinary persons. Provocation deals with ordinary human weakness, while diminished capacity focuses on special weakness, or illnesses and pathologies” (at 459-460). For a discussion of the implication of a move toward a generic mitigation defence see Dressler supra (n 58) at 985-989.

⁹¹⁸ People v Gingell, 211 Cal. 53, 296 P. 70 (1931) (defendant, suspecting wife of adultery, decided to kill her, then found her in bed with paramour, then killed them both; held, murder, not manslaughter); People v Pouncey, 437 Mich. 382, 471 N.W.2d 346 (1991) (defendant's testimony “he was not angry” a bar to voluntary manslaughter instruction); State v Merrill, 428 N.W.2d 361 (Minn. 1988) (where the defendant only provoked into robbery of person he believed had raped his girlfriend and, in course of robbery, other robber killed that person, accused not entitled to manslaughter instruction); State v Robinson supra (n 876) (defendant, struck violently by victim, got a gun and stalked victim in a methodical and cold-blooded way; since there was nothing in defendant's movements to indicate any heat of passion, defendant held not entitled to manslaughter instruction); State v Agnesi, 92 N.J.L. 53, 104 A. 299 (Sup.Ct.1918) (defendant, knowing of his wife's adulterous relations with paramour, armed self with deadly weapon and went seeking the paramour, hoping to find him in the act, when he did, he killed paramour, held murder, not manslaughter); Fossett v State, 41 Tex.Crim. 400, 55 S.W. 497 (1900) (victim insulted defendant wife, which led to a fight in which defendant killed victim; instruction that it is manslaughter if defendant was so angered as to be incapable of cool reflection, but murder if he was capable, held proper; conviction of murder affirmed); Davidson v Commonwealth; 167 Va. 451, 187 S.E. 437 (1936) (defendant, struck violently by victim, chased and stabbed him to death, then told a friend “take my knife, I used it on him, and believe me, by God, I used it”; defendant testified that he acted in self-defence and was not thrown into a passion by the blow he received; conviction of murder held affirmed; this case indicates that one who claims he killed in self-defence and loses cannot well succeed in showing that he killed in a transport of passion). For a discussion of this requirement in English law see chapter 3 at 129-130 supra.

problem of reasonable time for the passion to cool whenever there is a time gap between the provocative act and the infliction of the fatal wound. According to the majority view, a provoked defendant cannot have her homicide reduced to voluntary manslaughter where the time elapsing between the provocation and the death is such that a reasonable person so provoked would have cooled,⁹¹⁹ and this is the case even although the defendant, who is slower to cool off than the normal person, has not in fact cooled off by the time she delivers the lethal blow.⁹²⁰ In People v Aris⁹²¹ the defendant asserted that in this case the fear built over a long period of time and therefore could to be subject to “a cooling off” period. However, the court was of the view that this characteristic of the case ignores the fact of the victim’s assault upon and threats to the defendant before victim fell asleep. Certainly it cannot be the position of the defendant that the assault and threats did not add to underlying fear she had of victim which had grown over the years. It proves too much to say that defendant’s underlying fear alone was sufficient to justify the killing, if that were so the defendant could have shot her husband to death at any time and not be guilty. A reasonable inference from the facts is that the defendant experienced a peak of fear while she was beaten and threatened

⁹¹⁹ LaFave supra (n 878) 786.

⁹²⁰ Ibid. See Sheppard v State, 243 Ala. 498, 10 So.2d 822 (1942) (husband learned of wife’s adultery, several days later killed her; held, conviction of first-degree murder affirmed; LaLonde v State, 614 P.2d 808 (Alaska 1980) (even if the defendant had not cooled, no manslaughter here because reasonable person would have cooled in the passage of several hours); State v Follin, 263 Kan. 28, 947 P.2d 8 (1997) (not voluntary manslaughter even if defendant still in heat of passion, as interval of 10 hours meant “more time intervened between the provocation and the killing than it would have taken an ordinary person to regain reason”).

⁹²¹ 215 Cal. App 3d 1178, 264 Cal. Rptr. 167. 1989 Cal. App 1187. In this case the defendant testified that her husband had beaten her, often severely and that she had left him many times during their 10 year relationship. By a mixture of threats and cajoling, the decedent invariably convinced the accused to take him back. On the night of the killing, the defendant testified that her husband beat her and threatened her that he didn’t think he was going to let her live till morning. The defendant believed that he was very serious. She waited about 10 minutes to make sure he was asleep; she went next door to get ice to ease the pain of blows to her face. She found a handgun on top of refrigerator and took it for protection. She testified she thought she needed it for protection because she felt that when she went back... he would probably be awake and would start hitting her again. Walking back to her house she was thinking that she was tired of it and had had it. She denied intending to kill her husband at that time. When she returned to bed she sat down and felt that she had to do it. It would be worse when he woke up. She felt that he was going to hurt her badly or even kill her and she shot him 5 times in the back.

which must have subsided somewhat after the assaults and threats ended.⁹²² Therefore, while a lag in time could indicate that the defendant had time to cool and that he/she acted with intention, in Fennel v Goolsby and AG of State of Pennsylvania, District, Attorney of Montgomery County⁹²³ the court held that while intent was an element of murder in the first degree and did not exclude intent from the definition of voluntary manslaughter, the court distinguished the two in the following manner: “It is a sudden and intense passion provoked by the victim which negates the malice required in murder and reduces the crime to voluntary manslaughter”.⁹²⁴

The minority view eliminates the reasonable-time test, submitting that if there is reasonable and actual provocation, the defendant’s crime is manslaughter, if, because of his peculiar temperament, he has not cooled off, though a reasonable person’s passion

⁹²² People v Aris supra (n 921) at 183. The court concluded by saying that while the instruction about “cooling off” was necessary to direct the jury’s attention to the issue of whether fear was attributable to the last round of beatings and threats and subsided by time defendant returned with the gun, the jury could be expected to understand that the cumulative fear could not have subsided during any “cooling off” period because it had not been produced by provocation that preceded the cooling off period (at 1203). See also Spinks v Money 1995 U.S. App. 16581. In this case the defendant was involved in abusive relationship with Williams from June 1987 till January 1989. On the day the day of the murder, the decedent accused the defendant of seeing another man and threatened to bang her head on the pavement until she was dead (at 686). The victim then struck her several times and she stabbed him with a knife she purchased at a drug store after the altercation, killing him. Jones J. wrote in a separate opinion that he challenged the premise that a few minutes is a sufficient cooling period to abate fears, passions and emotional stress that are often reacted by sustained involvement in an abusive relationship. He went on to state that there is mounting evidence that battered woman often react to cumulative passion built from past experiences of abuse when they kill their partners. (quoting Taylor “Comment, Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense” (1986) University of California Law Review 1679 at 1682).

⁹²³ 630 I. Supp, 451, 1958 U. S Dist 164 35. The defendant testified that during the last 3-4 years of marriage the abuse both physical and mental was almost constant. The decedent had a severe drinking problem and when drinking he became extremely violent and abusive. He threatened her verbally, pushed kicked, punched and tried to choke her, She claimed her husband often coerced sexual relations with her while drinking and stated that her husband did not allow her to sleep at night and often left to sleep in her daughter’s room, couch or bathtub. She claimed he frequently would not let her leave the house. She was eventually removed by the Pennsylvania Protection from Abuse Act but on her return, he phoned several hundred times a day. On the day the defendant killed her husband she drove her car to the service station where her husband was parked and struck his car while he was still in the car, she backed up and did it again and when he attempted to escape on foot she struck him down several times.

⁹²⁴ Fennel v Goolsby and AG of State of Pennsylvania, District, Attorney of Montgomery County supra (n 923) at 67 h.

would have subsided.⁹²⁵

What constitutes a reasonable cooling time will depend on the nature of the provocation and the circumstances surrounding its occurrence,⁹²⁶ a matter to be determined by the jury as a question of fact,⁹²⁷ unless the time is too short or so long that the court may hold that, as a matter of law, it was reasonable or unreasonable.⁹²⁸

Sometimes it can occur that there is a considerable time lapse between the victim's act of provocation and the defendant's fatal conduct - enough time for the passion to subside. In the meantime an event occurs which rekindles the defendant's passion. If

⁹²⁵ LaFave supra (n 878) 786; State v Hazlett, supra (n 803) (the question of whether there was sufficient cooling time for the passion to subside and reason to resume its sway, should be governed, not by the standard of an ideal reasonable man" but rather "from the standpoint of the defendant in the light of all the facts and circumstances"; conviction of murder held reversed because of instruction on manslaughter requiring for cooling time the time in which an ordinary man in like circumstances would have cooled); State v McCants, 1 Speers 384 (S.C.App. 1843) (defendant, beaten by victim in a fight, thereafter killed him and was convicted of murder, conviction held affirmed; fact that defendant cooled off slowly because intoxicated irrelevant; dictum that, in determining reasonable cooling time, not only the nature of the provocation, but also "the prisoner's physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits," among other things, may be considered); Davis v State, 161 Tenn. 23, 28 S.W.2d 993 (1930) (defendant's insane delusion that the victim had committed adultery with the defendant's wife prevented defendant from cooling off; conviction of murder held reversed). LaFave supra (n 878) is of the view that in principle, if a reasonable person standard (without regard to the defendant's mental and physical peculiarities) is required for provocation the same standard is equally applicable for cooling off purposes (at 786 n 92).

⁹²⁶ People v Harris supra (n 885) ("what constitutes a sufficient 'cooling-off period' depends upon the extent to which the passions have been aroused and the nature of the act which caused the provocation and, for that reason, no yardstick of time can be used by the court to measure a reasonable period of passion but it must vary as do the facts of every case"); State v Mauricio, supra (n 899).

⁹²⁷ LaFave supra (n 878) 787. In a few jurisdictions, however, reasonable cooling time is held to be a matter of law for the court to decide, e.g., Brewer v State supra (n 788).

⁹²⁸ State v Ramirez, 116 Ariz. 259, 569 P.2d 201 (1977) (denial of manslaughter instruction proper where over four and a half hours passed since defendant's learned of wife's adultery and his action in interim showed cool state of mind); People v Pouncey, 437 Mich. 382, 471 N.W.2d 346 (1991) (sufficient "cooling time" as matter of law, and this time briefly included going to "a safe harbor" and then "deliberate and reasoned act" of retrieving a gun); In re Fraley, supra (n 876) (victim shot and killed defendant's son; as a matter of law passion would cool in several months); State v Williford, 103 Wis.2d 98, 307 N.W. 2d 277 (1981) (no manslaughter instruction necessary where various provoking events occurred two weeks to four years earlier).

this new occurrence is such as to trigger the passion of a reasonable person,⁹²⁹ the cooling-off period should then start with a new occurrence⁹³⁰ - a fact which the cases have not always recognized.

The typical heat-of-passion manslaughter case is that in which one specific incident immediately produces a rage in the defendant. This could account for the fact that modern codes usually state that the defendant's passion must be "sudden."⁹³¹ However, a more realistic appraisal of how human emotions work compels the conclusion - which some courts have reached such as in People v Berry⁹³² that a reasonable provocation can be produced by a series of events occurring over a considerable period of time. When this is the case, the measurement of the cooling time as was held in People v Borchers⁹³³ should commence with the occurrence of the last provocative

⁹²⁹ LaFave supra (n 878) 787. An event which, standing alone, would not suffice to act as such a trigger may nonetheless suffice to rekindle an earlier passion. See, e.g., People v Berry, 18 Cal.3d 509, 134 Cal.Rptr. 415, 556 P.2d 777 (1976) (only event immediately before killing was wife's screaming, which was sufficient to rekindle passion regarding her earlier confession of adultery).

⁹³⁰ LaFave supra (n 878) 787; State v Flory supra (n 874) (victim, who was defendant's father-in-law raped the defendant's wife; when accused learned of it, he was in a reasonable passion, but he cooled off; next day he saw victim, who told him "I will keep the girl"; defendant killed victim; murder conviction held reversed, for jury is to determine reasonable cooling time; here "a situation to determine reasonable cooling time; here "a situation arose by which past facts were clearly recalled.")

⁹³¹ LaFave supra (n 878) 787. See for e.g., State v Gounagias, 88 Wash. 304, 153 P. 9 (1915) In this case the victim committed sodomy on accused. Later the defendant's acquaintances ridiculed the defendant and subjected him to insulting words and gestures. Later that day, when the accused entered a coffee house, the ten men present began to make suggestive remarks and gestures, which caused defendant to rush off and kill the victim. The defendant was convicted of first-degree murder and this was affirmed. The court held that the aforementioned evidence was inadmissible to reduce the homicide to voluntary manslaughter). In re Fraley supra (n 876) defendant, who killed victim who had several months earlier killed defendant's son, argued without success, which, upon seeing the victim, the recollection of old wrong engendered in the defendant a new passion which overwhelmed him. But consider further Whitsett v State, 201 Tenn. 317, 299 S.W.2d 2 (1957), where sudden sight of the author of the wrongs to the defendant without words, seems to have reasonably rekindled the passions of the accused against his wife's paramour.

⁹³² People v Berry supra (n 929).

⁹³³ 18 Cal. 3d 509, 134 Cal. Rptr. 415, 556 P.2d 777 (1976) (defendant's rage produced by an "accumulative series of provocations" from July 13 to July 26, during which time his wife "continually provoked defendant with sexual taunts and incitements, alternating acceptance and rejection of him," all "accompanied by repeated references to her involvement with another man".)

event.⁹³⁴

4.8 Actual cooling off

If the defendant has been reasonably provoked, and was actually provoked and a reasonable person in the defendant's position would not have cooled off, the defendant cannot have her homicide reduced to voluntary manslaughter if, because her passions subside more quickly than those of the ordinary person, she has actually cooled off by the time she commits his deadly act.⁹³⁵

4.9 Mistake as to provocation

Mistake in provocation occurs where a defendant intentionally kills another in a reasonable, but erroneous, belief that the victim has injured him, for example where the defendant is of the opinion that his wife is committing adultery, when she is not. It would seem that the provocation is adequate to reduce the homicide to voluntary manslaughter if the defendant reasonably believes that the injury to him exists, although he has not been injured.⁹³⁶ However, this issue is rarely addressed even in modern manslaughter statutes.⁹³⁷

⁹³⁴ LaFave supra (n 878) 787; Ferrin v People, supra (n 876). Taylor supra (n 922) is of the view that the prevalence of female victims and male defendants in cumulative rage cases suggests that cumulative terror and cumulative rage are new provocation defenses whose use to date excuses different kinds of conduct and operates in different ways for different defendants. Cumulative terror should serve as an emotion adequate for heat of passion manslaughter and cumulative rage should not as in case of Berry supra (n 728) and Borchers supra (n 933). Affronts to dignity and sexual pride should be coped with over time. The common pattern of violence against women by their male intimates demonstrated that earlier trivial episodes of physical violence are reliable predictors of future violence and that the violence is likely to escalate until it becomes life threatening (at 1719).

⁹³⁵ LaFave supra (n 878) 787.

⁹³⁶ LaFave supra (n 878) 788.

⁹³⁷ Ibid.

4.10 Conclusion

The concept of reasonableness has played a central role in cases of self-defence and provocation. The defendant could successfully rely on self-defence only if a “reasonable person in the defendant’s circumstances would have perceived self-defence as necessary.”⁹³⁸ A claim of provocation would only be successful only if the provocative act was such that “an ordinary, reasonable person [would] be overcome with emotion.”⁹³⁹ Therefore, a defendant who committed a reasonable self-defensive act would be entitled to an acquittal, whereas a defendant who committed a provoked act in response to reasonable provocation is guilty of voluntary manslaughter instead of murder.⁹⁴⁰

The doctrines of self-defence and provocation, despite having their common emphasis on reasonableness, have failed to answer the critical question: who is the reasonable person? Heller poses the question: “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.”⁹⁴¹ These questions have important implications for self-defence and provocation since the test utilized by the different states will have an impact on every element of the defence relied on by the accused and subsequently will ultimately impact on the defendant’s liability.

⁹³⁸ State v Stewart supra (n 794) 579. For a full discussion of the objective test of self-defence see 179-180.

⁹³⁹ S v Felton supra (n 895) 172. For a full discussion of the objective test of provocation, see 211-213.

⁹⁴⁰ Heller supra (n 795) 3-4.

⁹⁴¹ Heller supra (n 795) 4.

The current trend in American courts is to adopt a purely objective standard of reasonableness in both self-defence⁹⁴² and provocation cases.⁹⁴³ In such cases nonuniversal personal characteristics of the defendant cannot be imputed to the reasonable person. Such a position is rooted in the belief that subjective standards of reasonableness are antithetical to the fundamental principle of criminal law, that the law should be based on generally accepted standards of conduct applicable to all people. Since individuals necessarily differ in their personal characteristics, by definition a standard of reasonableness that takes such characteristics into account cannot apply an invariant standard.⁹⁴⁴

It should be noted that despite the tension between the subjective standards of reasonableness, and the criminal law's desire for general standards of conduct has not prevented courts from using subjective standards in both self-defence⁹⁴⁵ and provocation cases.⁹⁴⁶ It would appear that in these cases the courts have come to accept that the formal neutrality of the objective standard is systematically biased against the self-defence and provocation claims of individuals from groups which lack "significant

⁹⁴² Heller supra (n 795) at 109-119 notes that 30 American states have adopted this standard.

⁹⁴³ Heller supra (n 795) 109-119 notes that 41 American states have adopted an objective test for provocation. However states such as New Jersey and Pennsylvania have vacillated between the objective standard and the particularizing standard.

⁹⁴⁴ Heller supra (n 795) 4.

⁹⁴⁵ Heller supra (n 795) 109-119 notes that only 4 states make use of the subjective test for self-defence. These include Delaware; Kentucky; North Dakota and Ohio. 13 States make use of the Model Penal Code standard. It should, however be noted that certain states have vacillated between the objective test and the particularizing standard. These include Alabama; Florida and Georgia; Kansas; Louisiana; Maine; Massachusetts; Minnesota; New Jersey; New Mexico; Oklahoma; New York; Rhode Island; South Carolina; South Dakota and Texas. 6 States have made use of both the Model Penal Code and the particularizing standard such as California; D.C; Maryland; Missouri; Pennsylvania; Texas and Vermont. Furthermore, it should be noted that some states make use of three standards of reasonableness: the objective test, the Model Penal Code and the particularizing standard. These states include Michigan; New York and Washington.

⁹⁴⁶ Heller supra (n 795) 109-119 notes that in the case of provocation only 7 states make use of the Model Penal Code standard, whereas 2 states notably New Jersey and Pennsylvania make use of both the particularizing standard and the objective test.

economic, political and social power in American society, particularly women, the poor and non-whites.⁹⁴⁷

The courts now allow juries to consider a variety of the defendant's personal characteristics when determining the objective reasonableness of her self-defensive or provoked act. Various courts have allowed evidence of battered woman syndrome⁹⁴⁸ and gender-specific responses.⁹⁴⁹ However, such a development in the law has not been without problems. Use of battered woman syndrome to support a claim of self-defence transforms the standard from an objective to a subjective standard, in most cases defeating both the deliberate statutory enactment and the underlying purposes of the narrow self-defence doctrine itself.⁹⁵⁰ Beyond circumventing the statutory requirements in the overwhelming majority of states, the use of a subjective standard unacceptably expands the doctrine of self-defence. Such an expansion would infringe on the premise of the criminal law system that the preservation of life is an important value and that the taking a life will be exempt from criminality and punishment only in a narrow, societal-determined set of circumstances.⁹⁵¹ Furthermore, consideration of the fact that a particular defendant suffered from a psychological defect such as battered woman syndrome is inconsistent with the theoretical framework of justification. A claim of justification must always be grounded in the value of the act itself, rather than in the characteristics of the actor.⁹⁵² It should however, be noted that while expert

⁹⁴⁷ Heller *supra* (n 795) 4.

⁹⁴⁸ For a discussion of the particularizing standard in self-defence, see 182-184. For a discussion of the impact that battered woman syndrome testimony has on the provocation defence see 181-182.

⁹⁴⁹ See for e.g.; the case of *State v Wanrow* *supra* (94) at 558.

⁹⁵⁰ Goldman *supra* (n 67) 197.

⁹⁵¹ Goldman *supra* (n 67) 203.

⁹⁵² Goldman *supra* (n 67) 213-214.

testimony concerning battered woman syndrome to support legal self-defence is unacceptable in nonconfrontational killings, it is nonetheless highly relevant to the laws treatment of these killings. The fact that the killing is not self-defence does not mean that it is punishable as murder. In nonconfrontational killings, the proper focus of battered woman syndrome testimony should be on the history of abuse and its resultant psychological effects on the defendant as either a total or partial excuse for the killing.⁹⁵³ Therefore the most obvious foundation for a subjective psychologically based excuse is the provocation defence, where the defendant would be convicted of a crime less serious than murder, reflecting the defendant's reduced culpability.⁹⁵⁴

⁹⁵³ Goldman *supra* (n 67) 218.

⁹⁵⁴ Goldman *supra* (n 67) 224.

Chapter 5

Analysis of the defences available in South Africa to Battered Women who kill their abusers

In this section it is proposed to examine, firstly whether a coherent rationale exists for the criminalization of the conduct which exceeds self-defence and secondly, the utility and functioning of the elements of the self-defence. The analysis will finally encompass an assessment of the findings in the context of suggested alternative models for the criminalization of the conduct included in the present justification ground. Despite the well-established nature of the defence of non-pathological incapacity, South African law has been thrown into flux by various decisions of the court which have constituted a serious erosion of the notion of criminal capacity with concomitant ripple effects on other topics.⁹⁵⁵ Furthermore, since the traditional rules relating to this defence do not adequately cater for the battered woman's situation, the elements and functioning of the defence will be subject to critical examination, with the findings evaluated in the context of alternative models to establish which form the defence should take.

5. Analysis of the justification ground of self-defence

5.1 Rationales of the defence

The killing of another person and specifically intentional homicide (murder)⁹⁵⁶ is

⁹⁵⁵ See for example the case of S v Eadie supra (n 360) in chapter 2 supra at 77-92.

⁹⁵⁶ The structure of the South African law of homicide has been derived from two traditions. Roman law (and less obviously Roman-Dutch law) is structured on the premises that only intentional killing is unlawful. On this approach the distinction between *dolus* and *culpa* is vitally important, since it distinguishes murder. English law, on the other hand had as its central premise the proposition that all homicides, whether intentional or unintentional, were unlawful. Such an approach attaches only slight significance to the distinction between *dolus* and *culpa* since that distinction does not express the differences in English law between murder and manslaughter. After a lengthy flirtation with English Law structure, South African law has now firmly opted for the Romanistic form, by rejecting the proposal that *dolus* could constitute the mens rea of culpable homicide. (Milton supra (n 117) 311-312)

universally regarded as the most serious crime meriting punishment.⁹⁵⁷ This in part is due to the fact that “human life is considered a unique kind of good because it is a necessary condition for the enjoyment of all other goods”.⁹⁵⁸ It is also the result of the consequence of the Judeo-Christian concept of the sanctity of human life which forbids the taking of a life by another person.⁹⁵⁹

Notwithstanding the respect for the sanctity of human life, certain types of intentional killing are not considered unlawful and therefore not punished as murder. In accordance with other Western legal systems, South African law has recognized that killing in self-defence is justified and for this reason lawful.⁹⁶⁰ The justification ground of private defence is an old one, and in the historical development of criminal law never gained a place: rather it maintained its place. Since it forms part of the universally recognized natural-law requisites for upholding a legally ordered society, it can be said that this defence has no history.⁹⁶¹ Since the classical times, the right to defend oneself against an unlawful attack was considered to be an ancient right, expressed in the maxims

⁹⁵⁷ See Law Reform Commission of Canada, Report 3: Our Criminal Law: “...In truth, the criminal law is fundamentally a moral system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary, or else important, to society. When acts occur that seriously transgress essential values...society must speak out and reaffirm those values. This is the true role of criminal law...” (at 16).

⁹⁵⁸ See further Kadish “Respect for Life and Regard for Rights in the Criminal Law” (1976) Columbia Law Review 871 at 871.

⁹⁵⁹ Milton supra (n 117) 310. See also Fletcher supra (n 544) who states: “killing another human being is not only a worldly deprivation; in the Western conception of homicide, killing is an assault on the sacred, natural order. In the Biblical view, the person who slays another was thought to acquire control over the blood - the life force - of the victim. The only way that this life force could be returned to God, the origin of all life, was to execute the slayer himself. In this conception of crime and punishment, capital execution for homicide served to expiate the desecration of the natural order. The desecration, it is worth stressing, inhered in causing death, regardless whether the actor was fairly to blame for the killing; the expiation for the desecration worked by terminating the violation of the sacred order - namely the slayer’s control over the victim’s blood” (at 235-236).

⁹⁶⁰ Milton supra (n 117) 312.

⁹⁶¹ Snyman supra (n 124) 178-179.

naturalis ratio permittit se defendere (natural reason allows a person to defend herself against danger) and *vim vi repellere licet* (force may be repelled by force).⁹⁶²

Various rationales have been posited to explain the justification for defensive killings. In terms of the choice of evils theory, the defensive action is said to be justified when the harm avoided by the defender's action is greater than the harm caused by such action (including death or injury of the aggressor).⁹⁶³ But there are threshold problems with such a theory. While it is assumed that all human lives are of equal value, and where interests of the defender are compared to the interests of the aggressor, it is difficult to determine how such a defensive killing would be justified.⁹⁶⁴ One such response to this is that assuming the attacker is morally at fault in threatening the defender's life, the interest the aggressor has in his own life has in some way to be discounted.⁹⁶⁵ However it has been submitted that the "question of justification in this instance is overly dependent on contingencies unrelated to the victim's innocent or the aggressor's culpability in a particular instance".⁹⁶⁶

One possible solution to such difficulties is to suggest that even if avoiding harm to the defender is not a greater good than avoiding the death of the aggressor in this particular instance, permitting the victim to kill in such cases is, in the long run, "justified as a means to preserving life, since such action will operate as a sanction against unlawful

⁹⁶² D 9 2 4: *adversus periculum naturalis ratio permittit se defendere*; D 9 2 45 4: *vim enim vi defendere omnes leges, omniaque iura permittunt*; D 43 16 1 27: *vim vi repellere licere Cassius scribit idque ius natura comparator*. See also Spindel in Strafgesetzbuch Leipziger Kommentar Vol 2 10ed (1985) comments on section 32 of the German Penal Code paras 15-16; H Jescheck and T Weigend Lehrbuch des Strafrechts, Allgemeiner Teil 5ed (1996) 336 (cited in Snyman supra (n 124) at 179).

⁹⁶³ Fletcher supra (n 544) 858.

⁹⁶⁴ Ibid.

⁹⁶⁵ Ibid.

⁹⁶⁶ Green "Castles and Carjacks: Proportionality and the use of deadly force in defense of dwellings and vehicles" (1999) University of Illinois Law Review 1 at 20.

assaults”.⁹⁶⁷ Such a theory essentially converts an act-utilitarian approach to the lesser evils test into a rule-utilitarian approach.⁹⁶⁸ This approach has also been criticized.⁹⁶⁹

Followers of a natural law or theologically-based theory of morality have developed what is known as the principle of double effect. Such a theory allows action “in pursuit of a good end, even though evil consequences will follow, provided [both that] evil consequences are not a means to the good end and that proportionality between the good sought and evil suffered is preserved”.⁹⁷⁰ In terms of this theory, killing an aggressor is allowed since although killing such an aggressor is foreseeable, it is not truly intentional.⁹⁷¹ Many criticisms of this principle focus on whether a meaningful distinction between the effects that are intentional and effects that are merely foreseeable actually exists.⁹⁷²

A further theory of law of justified homicide is the moral forfeiture theory. In respect of this theory the aggressor forfeits the inalienable right to life which every individual is endowed.⁹⁷³ But such a theory poses problems: even if the right to life were forfeited by

⁹⁶⁷ Green supra (n 966) 20.

⁹⁶⁸ See also Wasserman “Justifying Self-Defense” (1987) Philosophy and Public Affairs 356 at 360 who makes the same point.

⁹⁶⁹ Green supra (n 966) 20. See further Kadish supra (n 958) who argues that if the deterrent rationale supports the use of deadly defensive force, it should then also support the use of deadly retaliative force, after the attack was thwarted (at 883). See also Green supra (n 966) n 87 who states that such retaliative use would obviously be contrary to the law of self-defence: “If two shipwreck victims were struggling for a plank capable of supporting only one, most of us would not regard one of them as justified in pushing the other off merely because the other had recently committed attempted murder” (quoting Wasserman supra (n 968) at 358-359).

⁹⁷⁰ Green supra (n 966) 21-22.

⁹⁷¹ Green supra (n 966) 23.

⁹⁷² Green supra (n 966) 23. See for example Hart supra (n 105) 122-125.

⁹⁷³ See Ashworth supra (n 532) 283.

one who threatens another's right to life, it does not necessarily follow that the right to life would be forfeited if an aggressor posed some lesser threat. The forfeiture theory entails some principle of proportionality. The defender's response must compromise only those rights that the aggressor has forfeited. Given that the aggressor forfeits her rights as a result of criminal conduct, it follows that the gravity of the defender's response can be no greater than the gravity of the aggressor's wrongful conduct. The difficulty is this: determining when the right to life is forfeited by an aggressor who threatens a defender's property or liberty, but not his life.⁹⁷⁴

In respect of the protection theory the emphasis falls on the individual and her right to defend herself against an unlawful attack. Every person has a natural right to protect herself.⁹⁷⁵ In terms of an absolute form of the autonomy theory, proportionality would not play a role: when aggression has been used against a person (even where it does not threaten his life or physical health) her personal autonomy is violated, and for this reason she can use any force including deadly force to protect her autonomy.⁹⁷⁶

South African law also accepts the upholding of justice theory: people acting in private defence perform acts where they assist in upholding the legal order. Private defence is meant to prevent justice from yielding to injustice because private defence comes into play only in situations in which there is an unlawful attack. Persons acting in private

⁹⁷⁴ Green supra (n 966) 21.

⁹⁷⁵ A prominent advocate of the personal autonomy approach is George Fletcher: "Killing an aggressor is permissible if it is the only means available to prevent the invasion of even a minor interest. Shooting an apple thief is rightful and proper if there is no other way to stop her. The rationale of this theory is that those in the right should never yield to wrongdoers. The only question is: who is in the right and who in the wrong. The competing interests are irrelevant." ("The Right to Life" (1979) Georgia Law Review 1371 at 1378).

⁹⁷⁶ Green supra (n 966) 24.

defence protect not only themselves but also the entire legal order.⁹⁷⁷ They act in place of the authorities since from a practical standpoint, it is impossible for the police always to protect all people in all places. The right to private defence therefore serves not only to protect the individual under attack but, at the same time, to maintain the legal order as a whole. The upholding of justice theory is important, since it influences the extent to which the right to private defence can be restricted by socio-ethical considerations.⁹⁷⁸

The implication of these rationales has given rise to the view that self-preference is legitimate in the case of killing in self-defence since an unjust aggressor forfeits certain rights. Some theorists have rejected such an approach.⁹⁷⁹ Furthermore, the sanctity of life is further entrenched by the Constitution in the formal recognition of the right to life.⁹⁸⁰ Other theorists have suggested the forfeiture theory is necessary to the

⁹⁷⁷ See for example Uniacke Permissible Killing: The self-defence justification of homicide (1994) who developed a theory called the right of self-defence: “When society emerges from a state of nature, the state recognizes a person’s fundamental right to self-preservation, and agrees to protect that right from violation by others. When the state is unable to fulfill its responsibility to the citizen the right to use deadly, defensive force remains with the citizen” (at 156-157). Thus the right of self-defence is a right to use necessary and proportionate force against an unjust immediate threat. For a discussion of the rationale underlying South African law see chapter 2 supra at 39-40.

⁹⁷⁸ Lenckner and Perron Strafgesetzbuch Kommentar, begründet von A Schonke und H Schroder 24ed (2001) comments on section 32 of the German Penal Code para 1; Spindel supra (n 962) at par [11] (cited in Snyman supra (n 124) 180).

⁹⁷⁹ See for example Kadish supra (n 958) at 884 (even if we can provide an account of how an aggressor forfeits the right to life, this will not give us a theory of justified homicide in self-defence).

⁹⁸⁰ Constitution of the Republic of South Africa of 1996 section 11: “Every person shall have the right to life”. As Ripstein in his article “Self-defense and Equal Protection” (1996) University of Pittsburgh Law Review 685 submits, it is important to both the law and morality of self-defence that the subjective and objective requirements not be combined in the wrong way. The two requirements are separate: one requires that the person claiming to have used force justifiably to have believed the use of force to be justified when using it; the other is a requirement that the force be justified - that it be reasonable in the circumstances (at 688). See further Fletcher “The Right and the Reasonable” (1985) Harvard Law Review 949 who submits that “mere belief cannot generate a justification” (at 972). However as Ripstein supra suggests to combine the requirements in this way is no different from supposing that a true belief cannot justify an action. The fact that it is believed does not justify the action. Rather, the fact that it is true justifies the action, but the agent can only appeal to that justification if she was aware of it at the time of the act. In the same way, the fact that it is reasonable justifies the action, but the accused can only appeal to it if she was aware of its reasonableness at the time of the act. To discuss reasonableness in this way is not talk from the agent’s subjective point of view (at 688).

justification since “the permissibility of one’s directly blocking unjust harm, even grave unjust harm such as the violation of one’s right to life has moral limits”.⁹⁸¹ The two conditions of necessary and proportionate force do not exhaust such limitations. The equal rights⁹⁸² of other people limits the positive right to act directly to resist, or ward off the infliction of unjust harm.⁹⁸³ Furthermore, the right of self-defence is part of a wider permission to use necessary and proportionate defensive force against an unjust threat⁹⁸⁴ itself and in this respect requires something akin to the theory of forfeiture.⁹⁸⁵ The possession of the right to life is conditional. Thus the condition relevant to the justification of self-defence is that an individual not be an unjust immediate threat to another person. Provided it is acknowledged that the possession of the right to life is

⁹⁸¹ Uniacke supra (n 977) at 191 notes that Rawls’ distinction between rational and the reasonable elucidates this point. A person behaves rationally when they act effectively to promote their own system of ends. They behave reasonably when they interact with others on terms of equality: “[r]easonable persons [are moved by a desire for] a social world in which they, as free and equal, can co-operate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with the others (*Political Liberalism* (1993) at 50). As Ripstein supra (n 980) submits, on the basis of this Kantian view, reasonableness is tied to the idea of equality. The root idea is that the reasonableness standard provides a like liberty for all compatible with a fundamental interest in the security of those things that are essential to protecting and exercising one’s capacity for freedom. Thus reasonableness does not reflect an abstract or empty formalism (at 689). The reasonableness standard proves the idea against which terms of social cooperation are to be judged.

⁹⁸² Uniacke supra (n 977) 191. As Uniacke suggests: “self defence is widely regarded not simply as a moral and legal justification of homicide, but more strongly as a positive right, an exception to, rather than a justified infringement of the general prohibition of homicide” (at 228).

⁹⁸³ The upholding of justice theory serves as basis for the rule that the attack must be unlawful. (Lenckner and Perron supra (n 978) par [19], cited in Snyman supra (n 124) 183).

⁹⁸⁴ Theorists such as Fletcher supra (n 975) submit that the notion of forfeiture is inappropriate to the justification of self-defence. He submits that the idea of forfeit relates to material possessions and incorporeal goods of a kind that can be transferred such as citizenship. Legal rights can be forfeited voluntarily or involuntarily and are forfeited even with regard to persons unaware of the forfeiture. If your legal right to something has been forfeited, this simply means that you are no longer the owner of the particular interest and the knowledge or intentions of anyone depriving you of that interest are irrelevant to the legality of the deed. The original conception of an outlaw was someone who had forfeited the right to life (at 1379). But as Uniacke supra (n 977) submits, there is not as Fletcher argues a plausible analogy between aggressors and outlaws. In modern western legal systems self-defence must be justified and this requires a proper intention, with knowledge of the circumstances, which would justify the conduct. If the aggressor really forfeited the right to life, such a justification would be irrelevant (at 199-200).

⁹⁸⁵ Uniacke supra (n 977) 200.

conditional - that it depends on our conduct, there is no conceptual difficulty.⁹⁸⁶ Natural rights are grounded in human nature. They are conditional rights: their continued possession, by those who possess these rights in virtue of their nature is conditional on conduct.⁹⁸⁷ While it is submitted that justification of homicide in self-defence requires the scope of the right to life be specified by reference to conduct, an appropriate specification of the right to life might be explicitly rejected, rather than neglected, in accounts of justified self-defence on the assumption that such specification would require what has effectively been criticized as the moral specification of rights i.e. that moral specification of human rights is circular.⁹⁸⁸ Thus if the possession and content of human rights is determined by a prior viewpoint about what is and isn't morally permissible, it is then circular to explain the permissibility of particular acts, such as homicide in self-defence, in terms of the non-violation of these rights. If such circularity cannot be eliminated, it would call into question the relevance in moral argument of an appeal to rights as independent permissions and constraints.⁹⁸⁹

The moral specification of human rights can avoid circularity, provided it is specified the scope of such rights in terms of what is just and unjust treatment of, and interference with the particular individual who possesses these rights.⁹⁹⁰ The appropriate specification of human rights, as reflecting what is just and unjust treatment of, and interference with, individual persons, cannot eliminate conflicts of rights.⁹⁹¹ The circularity to which attention is drawn highlights the daunting task of providing an

⁹⁸⁶ Uniacke supra (n 977) 210.

⁹⁸⁷ Thomson Self-Defense and Rights (1986) 361-371, cited in Uniacke supra (n 977) 211.

⁹⁸⁸ Uniacke supra (n 977) 211-212.

⁹⁸⁹ Ibid.

⁹⁹⁰ Uniacke supra (n 977) 211.

⁹⁹¹ Uniacke supra (n 977) 212.

independent defence of the specification of human rights as reflecting what is just and unjust treatment of, and interference with, the particular individuals who possess these rights.⁹⁹²

A unitary account of justified homicide in self-defence, as an exception to the general prohibition of homicide, requires that any unqualified right to life be conditional. The possession of an unqualified right to life (entailing the right not to be killed), depends on a person not being an unjust immediate threat to the equal rights of someone else. In other words, a person does not have an unqualified right not to be killed if they are an unjust immediate threat to another's life or proportionate interest.⁹⁹³ A more stringent version of this specification holds that possession of any right to life is conditional on a person not being an unjust immediate threat to another's life or proportionate interest.⁹⁹⁴ The former, less stringent, of these two versions allows someone who is an unjust immediate threat to have a qualified right to life, and can be wronged if killed.

⁹⁹² Ibid. This view is supported by Snyman supra (n 124): "The law cannot recognize a set of rules regarding private defence amounting to the attacked party bearing the risk of harm arising from possible reasonable mistakes that may be made in the course of the defensive action. It is the attacker who must bear the risk, because it is he or she who initiated the whole set of events by resorting to unlawful aggression or threats of aggression against the defender". See further Zikalala supra (n 151) at 573a-b. See further Ripstein supra (n 980) who submits that one aspect of the reasonableness standard is the allocation of risks. To divide risks reasonably, some balance must be struck between the liberty and security interests that all can be supposed to share. Thus if the innocent party takes precautions as are justified by an appropriate balance between the interests in liberty and security that all are supposed to share (i.e. by ensuring that attack is imminent, using reasonable force) then the innocent party behaves reasonably (at 689-690).

⁹⁹³ Uniacke supra (n 977) 213. This accords with the upholding of justice theory that there must be a reasonable relationship between the act and the defensive act. If one accepted the upholding of justice theory as the only basis for private defence it may be argued that the defending party may fend off imminent infringement of her rights without the defensive action necessarily being restricted in any way (Kuhl Strafrecht Allgemeiner Teil (1994) 185-186; Leckner and Perron supra (n 978) at par [1] cited in Snyman supra (n 124) 189). However, the legal order does not tolerate a gross disproportion between the interest protected by the defender and the interest she is attacking.

⁹⁹⁴ Uniacke supra (n 977) 213. But see Segeve "Fairness, Responsibility and Self-Defense" (2005) Santa Clara Law Review 383 at 445: "Uniacke's claim that there are two fundamental normative dimensions - what is justified overall and what is just in terms of rights - rather than one substantive normative category that takes account of all the relevant considerations, seems to reflect an explained assumption that there is something unique about rights in comparison to other normative facts. More specifically, it is difficult to find a convincing reason for considering the causal response of innocent aggressors and innocent threats as morally significant.

According to this less stringent specification, if a person is an unjust immediate threat to another's life, then the aggressor does not have a right that the innocent party not use necessary and proportionate defensive force. If the required degree of force is lethal, the aggressor does not have a right against the innocent party that they not be killed. But, if the innocent party uses force beyond what is necessary to ward off the aggressor, then the innocent party is at fault, and has violated the aggressor's right to life. According to the more stringent version of the specification, the aggressor is not wronged in going beyond what is necessary to ward off the threat posed. But, the innocent party's act is wrongful because it inflicts unnecessary harm.⁹⁹⁵ Implicit in this conception is the requirement of proportionality, which serves as a limiting factor.

The question remains as to whether there is any basis for justifying killing in self-defence if the courts are to disallow the use of battered woman syndrome testimony.⁹⁹⁶

Consider the remarks of Supreme Court Justice Harry Martin in his dissent in the Norman⁹⁹⁷ case:

“By his barbaric conduct over the course of twenty years, J.T Norman reduced the quality of the defendant's life to such an abysmal state that, given the opportunity to do so, the jury

⁹⁹⁵ Uniacke supra (n 977) 213. Various theorists have submitted that it is wrong to accept only one of the two reasons for the theories as correct, and to reject the other one as wrong. Both reasons for existence are valid and necessary to serve as underlying principles of the specific rules relating to private defence – hence the reference in German legal literature to a “dualistic private-defence theory” (Leckner and Perron supra (n 978) par [1], 47; Kuhl “Notwehr und Nothilfe” (1993) Juristische Schuling at 179, cited in Snyman supra (n 124) 181.) Most authors reject a monistic private defence theory that accepts only one of the above reasons for existence of private defence. Usually it is stated that that the protection theory is the corner stone of private-defence principles, but that this theory must be supplemented by the upholding-of-justice theory (Kuhl supra at 180).

⁹⁹⁶ Due to the problematic nature of battered woman syndrome (see chapter 1 supra at n 66 and n 70) and the courts' inability to determine how the syndrome evidence should be used (see chapter 1 supra at n 71)

⁹⁹⁷ S v Norman supra (n 813).

might well have found that she was justified in acting in self-defence for the preservation of her tragic life”.⁹⁹⁸

Consider further the dissent in a battered child syndrome case, in which a teenager, after years of alleged abuse, killed his father by ambush as the father came home at night, and then sought to claim self-defence:

“This case concerns itself with what happens - or can happen - and did happen when a cruel, ill-tempered, insensitive man roams, gun in hand, through his years of family life as a battering bully - a bully who, since his two children were babies, beat both of them and his wife regularly and unmercifully”.⁹⁹⁹

Dressler is of the view is that these two cases provide an implicit assertion of one potential argument for justification, namely the moral theory of forfeiture. Therefore, a person, who by his “willful, ongoing, egregious conduct may forfeit his right to life”. His death constituted no socially recognized harm to society.¹⁰⁰⁰

Dressler rejects this moral forfeiture theory as morally unacceptable. In the context of S v Norman¹⁰⁰¹ he argues that Judy Norman possessed a moral or natural right of autonomy, a right that J.T Norman violated on a daily basis. This entitled Judy to kill him to protect her autonomy. This theory of autonomy is preferable to the forfeiture theory since it does not require a claim that the abuser’s life is worth nothing. Rather, the focus is on the battered woman and her rights, and not on her abuser’s lack of rights. Furthermore, this theory adequately explains the normal self-defence situation:

⁹⁹⁸ Ibid at 21.

⁹⁹⁹ Jahnke v State, 682 P. 2d 991, 1011 (Wyo. 1984) (Rose, J. dissenting), overruled on other grounds by Vaughn v State, 962 P. 2d 149 (Wyo. 1998).

¹⁰⁰⁰ Dressler supra (n 30) 465.

¹⁰⁰¹ S v Norman supra (n 813).

when a person, backed against the wall by an imminent threat, kills her deadly attacker, her right of autonomy entitles her, if necessary, to take his life.¹⁰⁰²

It is this author's contention that the autonomy theory is the best justification for self-defence, but only when it is narrowly circumscribed. Traditionally, there are both proportionality and necessity limits placed on the theory. The battered woman's right to protect her autonomy by using deadly force is limited to cases in which such an extreme response is necessary.¹⁰⁰³ Stemming from both South African and American common law, a core feature of the self-defence law is that every person, even that of an aggressor should not be terminated if there is a less extreme way of resolving the problem.¹⁰⁰⁴

¹⁰⁰² Dressler supra (n 30) at 466 also supports this contention.

¹⁰⁰³ Richards in "Human Rights and Human Wrongs: Establishing a Jurisprudential Foundation for a Right to Violence: Rights, Resistance, and the Demands of Self-Respect" (1983) Emory Law Journal 405 at 426 notes: "[an] unqualified right of self-defence fails to accord to aggressors the modicum of respect that is, despite possibly wrongful or unprivileged aggression, their fair due. It introduces into the right of self-defence a punitive element which is alien to its justification not as an alternative form of punishment (which remains in the hands of the background state and its criminal justice system), but as a *faute de mieux* a form of private violence whose legitimacy rests completely on the circumstances of necessity and exigency in which it arises". Cf Fletcher "Domination in the Theory of Justification and Excuse" (1996) University of Pittsburgh Law Review 553 at 570 who argues that self-defence as a justification cannot be understood on moral grounds of what we may justly punish, but on grounds of political theory i.e. the proper allocation of power between the state and the citizen. The right of self-defence in criminal law is based on one of the inalienable rights of the person (the right to life) that the liberal state must, as a condition of its legitimacy, protect. When the liberal state cannot protect one of these basic rights, the citizen retains her right of self-defence to protect her rights.

¹⁰⁰⁴ Ibid. See also 178 supra. In respect of South African law see chapter 2 at pages 53-55 supra. For a less extreme way of resolving the problem in American law see duty to retreat chapter 4 at 190-191 supra and duty to retreat in English law in chapter 3 at 116-117 supra. But see Cohen "Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: Regimes of Private Tyranny: What Do They Mean to Morality and For the Criminal Law" (1996) University of Pittsburgh Law Review 757 at 794 who states that the state's failure to protect basic human rights is illegitimate. Legitimacy conditions of a liberal state crucially include protection of such human rights. This vacuum of legitimacy is a private tyranny, leaving a battered woman such as Judy Norman in a Lockean state of nature in which she is entitled to claim her right of self-defence: "A regime of private tyranny is a cruel mimicry of the role of the state, usurping its functions even as it distorts them in the service of a single, illegitimate end. That end is the gross maldistribution of the benefits and burdens of human existence, such that as in the case of the public tyrant, the private tyrant is benefited in whatever ways and to whatever extent he may choose. These burdens need not perfectly reinstate the tortures and terrors of the most extreme regimes of public tyranny to be violative of our most basic social and political norms: that each person has an equal right to the liberty of her person and property and to the legitimate pursuit of her own welfare, unless these rights have been overborne by the due process of the law". As Cohen supra at 782-783 notes, it is

The traditional requirement of imminency - a temporal requirement, a relative closeness in time between the aggressor's unlawful threat and the innocent person's defensive efforts to repel it - serves an important, life-affirming, purpose. To suggest that a battered woman should be able to kill today because eventually the abuser will inevitably kill is not an acceptable contention. This is so since it is difficult to imagine that it is necessary to kill to prevent deadly force from being inflicted further down the time-line. The greater the time span between the defensive act and the predicted act being defended against, the greater the options available to the battered woman. Some reasonable temporal requirement is therefore needed.¹⁰⁰⁵

The earlier the use of force is allowed, the greater the risk that the force used was not necessary. But, because deadly force is used - and the putative attacker is dead - it cannot be known for definite if the feared attack was going to occur and whether some other, less extreme, measure would have sufficed. There is also always the possibility

not difficult to understand why the resolve of many subjects of regimes of private tyranny would not sustain a run for freedom that is dependent on the law or other institutions. First, the reluctance of police to intervene in "domestic disputes" remains, despite official changes in policy. Second, when the police do intervene, often they do not do so effectively. As a matter of fact, it may be somewhere between difficult and impossible to create an effectively individualized strategy of deterrence against either the recurrence of the escalation of violence in many if not most instances. Third, judges may or may not put teeth of any kind into restraining orders, even when they grant them, and the orders themselves are subject to mishandling by the policies. Fourth, shelters for the abused are vulnerable to funding shortages and therefore, to unavailability. Lastly, blanketing any assessment of the risks versus the rewards of such a move - a move to entrust her life and safety and that of her dependent loved ones to remote, impersonally motivated, imperfectly coordinated, under-funded and ultimately under - responsive public processes and institutions will be the brute fact that a closer, immediate and unrelenting force of law has come to fill all of the interstices of her life, all of those physical and psychic spaces where individuals ordinarily live on their own terms, separate from the demands and the requirements of others. In conclusion Cohen *supra* at 783 notes: "Short of physical bondage, no regime of government could exert the constancy of pressure on individual liberty and freedom of will that a regime persistently devoted to the domination of a human being by another can enforce through the immediacy of its presence and the intricacies of its carefully tailored design. For reasons on both sides of the equation, then, there may be, and appear, no conventional means to escape".

¹⁰⁰⁵ Dressler *supra* (n 30) 467. See for e.g., Morse *supra* (n 66) at 12, who argues for the following standard: "If death or serious bodily harm in the relatively near future is a virtual certainty and the future attack cannot be adequately defended against when it is imminent and if there really are no reasonable alternatives, traditional self-defence doctrine ought to justify the pre-emptive strike".

that the abuser could have changed his behaviour, had he been allowed to live.¹⁰⁰⁶

Beyond this, there is also the possibility that some other event will intervene to render an apparent necessity to use deadly force inoperative.¹⁰⁰⁷

5.2 Theoretical Construct

It is submitted that it has been shown that self-defence is deeply rooted within criminal law. Thus, it remains to examine the elements of the defence in turn, in order to establish their essentiality and functioning.

5.2.1 Conditions relating to the attack

5.2.1.1 An attack

5.2.1.1.1 An objective test

It is submitted that since the autonomy theory is the best justification for self-defence, narrowly circumscribed, the question as to whether the accused who relies on self-defence, has acted lawfully, must remain objectively tested: “whether a fictitious reasonable person in the position of the accused and in light of all the circumstances would have done.”¹⁰⁰⁸ This would be in accordance with established precedent.¹⁰⁰⁹

¹⁰⁰⁶ Dressler supra (n 30) at 467. See further Dressler supra citing Alschuler in Preventive Pretrial Detention and the Failure of Interest - Balancing Approaches to Due Process” (1986) Michigan Law Review 510 at 557: “even funnel clouds turn around because they possess free will and sometimes defy predictions”.

¹⁰⁰⁷ Dressler supra (n 30) 467 notes, perhaps the batterer will have a debilitating stroke or perhaps he will abandon the family, thus freeing the woman from further abuse, and rendering deadly, autonomy-protecting force unnecessary.

¹⁰⁰⁸ S v Motleleni supra (n 140) at 406C. For the full quotation see chapter 2 at 36.

¹⁰⁰⁹ For examples of such precedent see chapter 2 at n 141.

Furthermore, a person acting in self-defence may not benefit from prior knowledge that she has of her attacker, which the reasonable person would have have.¹⁰¹⁰ The reason for this position is that self-defence is regarded as a ground of justification in South African law.¹⁰¹¹ The emphasis is placed on the act and not on the person who acted in self-defence.¹⁰¹² By requiring that a person's self-defensive act be objectively reasonable does however raise an important question: if the person's act was not reasonable could they have acted otherwise?¹⁰¹³ This point is critical since South African law only punishes voluntary acts.¹⁰¹⁴

¹⁰¹⁰ For a discussion of this requirement in South African law see chapter 2 35-40 supra.

¹⁰¹¹ Beecher-Monas "Symposium on Integrating Responses to Domestic Violence: Domestic Violence: Competing Conceptions of Equality in the Law of Evidence: (2001) Loyola of Los Angeles University Law Review 81 submits that "The justification of self-defence reflects a moral entitlement to repel wrongful violence where there is no viable alternative. The liberal philosophy upon which this idea is based conceives of an original state of nature where life was a war of each against all "men who entered into a social contract in which the state (and the rule of law) replaced the necessity of war" (at 92). However, she submits that "contrary to the liberal philosopher's insistence on neutral and rational rules as the most likely to achieve just results, relational scholars argue that consequences of rules are anything but just to half of humanity. The liberal view forming the dominant discourse of our legal system ignores the dominant experience for half of humanity, the experience of connectedness to give that experience voices, and the relational feminists argue that legal rules must accommodate the inequalities and interdependence of human beings. One way of putting this is that women suffer in ways that men do not, and that gender-specific suffering that women endure is routinely ignored or trivialized in the large (male) legal culture. To accomplish this, legal doctrine must accommodate the interplay between human agency and social structure. At the very least, if consequences of legal rules disadvantage women over men rules ought to be changed. Clearly, both visions of society, liberal and relational, have consequences for law, the way legal rules are justified depends upon the justification one views as legitimate" (at 94-95).

¹⁰¹² As Dressler supra (n 792) states: "[s]ociety either does not believe that the death of the human being was undesirable or that it at least represents a lesser harm than if the accused had not acted as he did" (at 473).

¹⁰¹³ Heller supra (n 795) 12.

¹⁰¹⁴ As Packer states: "[t]he idea of free will in relation to conduct is, in the legal system, a value preference having very little to do with the metaphysics of determinism and free will... [T]he law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were" (The Limits of Criminal Sanction (1969) 74-75). This is of course the crux of the problem: as Packer suggests: "The criminal law's intentionalism is an article of faith, not a philosophic claim" (at 74-75). Heller supra (n 795) at 31 submits that while it is possible to reject the justification-based objective standard of faith in free will, as with articles of faith we cannot disprove it either.

Since the concept of reasonableness necessarily entails the acceptance of the basic Hobbsean/Lockean¹⁰¹⁵ proposition that equal individuals in a state of nature cannot exercise complete freedom of action without interfering with each other's rights, in an attempt to mediate this inevitable conflict, reasonableness establishes an objective boundary between acceptable exercises of individual freedom and unacceptable interferences with the rights of others. This boundary is determined by looking to prevailing social norms.¹⁰¹⁶ To perform this function effectively, reasonableness must be facially neutral, so as to avoid protecting one individual's or group's interests at the expense of another's:

“Thus by seemingly allowing individuals to pursue their self-interest unless and until they interfere with the interests of others, ...[reasonableness] seems to overcome this conflict between the individual and the group, protecting collective security without threatening individual freedom”.¹⁰¹⁷

In a “conflict-sensitive plural law state such as South Africa, the reasonable person test could create problems of a special calibre”.¹⁰¹⁸ Consider the statement in Loabail Ltd v Bayfield Properties:¹⁰¹⁹

¹⁰¹⁵ For a discussion of these views see Hobbes Leviathan (1951) (reprint of 1651 edition) at 94-95 and Locke Two Treatises of Government (1960) (reprint of 1698 edition) at 309 and 346. For a discussion of the test utilized in South African law see chapter 2 35-41 supra. For a discussion of the test utilized for self-defence in English law see chapter 3 at 113-118 and American law see chapter 4 at 179-180 supra.

¹⁰¹⁶ Unikel supra (n 906) 329-330. As Unikel supra submits: “[t]he reasonable person is a personification of the community ideal of reasonable behaviour, determined by [the fact finder's] social judgment. This personification possess[es] and exercise[es] those qualities of attention, knowledge, intelligence and judgment that society believes are required of its members for the protection of their own interests and the interests of others. So defined the reasonableness principle in general and the reasonable individual in particular, constrain judicial decision-making by forcing judges to consider the societal consensus embodied in the concept of reasonableness when deriving results” (at 329).

¹⁰¹⁷ Unikel supra (n 906) 330.

¹⁰¹⁸ Labuschagne “Onpartydige regspraak in ‘n Pluraal Regstaat: opmerking oor die geregtigheidsonvriendelike kant van die redelike persoon-toets” (2000) Obiter 142 (own translation).

¹⁰¹⁹ [2000] 1 All ER 65 (CA).

“It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on facts, which may include the nature of the issue to be decided”.¹⁰²⁰

Surely such a statement is “idealistic and without basis in reality. Not only would it create an opening for abuse and manipulation, but in extreme circumstances it would lead to arbitrary decisions”.¹⁰²¹ Nowhere is this more pertinent in the case of abused women. The objective test does not allow the court to acknowledge variations in the way different people may respond to similar circumstances and does not take into consideration the nature of the abusive relationship between parties involved and it denies the existence of years of abuse and the familiarity that exists between the actor and the victim.¹⁰²² Any accused is entitled to have factors that are of particular relevance to their case taken into account, otherwise the objective test would be redundant.¹⁰²³ However, it is submitted that in the case of abused women, the courts have gone too far in qualifying the “objective test” for self-defence.

¹⁰²⁰ Labuschagne supra (n 1018) 142-143. What was objectionable to Labuschagne was the court’s further statement that: “we cannot, however conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge”. Clearly such information about the ethnic origin as well as cultural beliefs such as the belief in witchcraft would be of importance in determining whether the actor’s belief was reasonable. Delgado also supports this point: objective standard reflects the norms of the dominant cultural groups and excludes the values of other groups of society. (“Shadowboxing: An Essay on Power” (1992) Cornell Law Review 813). Other scholars have questioned the reasonable person’s standards neutrality in practice: “although the reasonable person standard is neutered, made politically correct and sensitized, the language of the law in an attempt to protect it from allegations of sexism, has not changes its content and character. Given that the reasonable person standard has evolved from the reasonable man who represented male norms and ideals, it still embodies many of the biases and male perspective inherent in the legal system as a whole.” (Brewer “Note, Missouri’s New Law on ‘Battered Spouse Syndrome: A Moral Victory, A Partial Solution” (1988) Saint Louis University Law Journal 251.

¹⁰²¹ Labuschagne supra (n 1018) 143 (own translation). Hart supra (n 105) has argued that individualization of such standards of self-defence was a requirement of basic fairness (at 136).

¹⁰²² Bjerregaard and Blowers “Chartering a New Frontier for Self-Defense Claims: The Applicability of the Battered Person Syndrome as a Defense for Parricide Offenders” (1994) University of Louisville Journal of Family Law 843 at 852.

¹⁰²³ Burchell supra (n 29) at 243 notes that this does not make the test subjective, it simply means that the matter is considered objectively in the particular circumstances of the case.

5.2.1.1.2 The impact of S v Engelbrecht on the objective test

In the Engelbrecht¹⁰²⁴ case the court was correct in stating that “the reasonable woman should not be forgotten in the analysis and deserves to be part of the objective test of the reasonable person.”¹⁰²⁵ What was objectionable about Satchwell J’s finding was her statement that “the focus should be on the impact that the abuse may have over time upon the psyche, make-up and entire world view of an abused woman.”¹⁰²⁶ The terms “psyche” and entire world view of an abused woman” tend to relate to the issue of culpability. Any issue relating to culpability is dealt with in terms of putative self-defence, which is subjectively assessed. Therefore, from her perspective “she would have honestly believed [her] life was in danger but objectively viewed, [it was] not.”¹⁰²⁷ If this is what Satchwell J had in mind, it was not expressly stated. No mention is made at any point in the judgment of this defence. While it may be difficult to establish which subjective factors should be taken into consideration,¹⁰²⁸ judges and defence counsel are expected to operate within the parameters set by the law: objective elements in criminal liability are objectively assessed in terms of *actus reus* and subjective or

¹⁰²⁴ S v Engelbrecht supra (n 143).

¹⁰²⁵ Ibid at par [358].

¹⁰²⁶ S v Engelbrecht supra (n 143) at par [343].

¹⁰²⁷ S v De Oliveira supra (n 141) 163I-J (own emphasis).

¹⁰²⁸ Snyman in his article “The Normative Concept of Mens Rea- A New Development in Germany” (1979) International and Comparative Law Quarterly 211 at 213 notes that it is difficult to maintain the simplistic separation of the preconditions of criminal liability between the purely objective and purely subjective elements. The theorist goes on to give a practical example. For instance the intention or subjective knowledge of the offender may sometimes be of cardinal importance in ascertaining whether there has been *actus reus*. This is particularly the case when one deals with offences requiring some intention or ulterior to the ordinary intention to perform an act: the mere intentional entry into a building as a trespasser only becomes burglary once it is established that the trespasser further intends to steal once inside the building. This example demonstrates that the distinction between *actus reus* an outward manifestation, and mens rea as the inward or mental manifestation of the crime, is rather arbitrary, and affords a shaky foundation upon which to construct a sound and scientific doctrine of criminal responsibility.

mental elements of the crime are transferred to the inquiry regarding the *mens rea* (state of mind) of the accused.¹⁰²⁹

The distinction remains important since altering the self-defence standard to accommodate the actor's personal psychology undermines the very notion of self-defence as a justification. Justification defences operate when the accused's act is the morally preferred option. Because justified acts are viewed as objectively preferable, the psychological, subjective peculiarities of the accused are generally irrelevant to the application of the justification defence.¹⁰³⁰ Therefore, advocates of the battered woman syndrome, who have argued that expert testimony is essential to help the reasonable person better understand the abused woman (i.e. whether the reasonable person in the position of the accused (i.e. abused woman) would have perceived a threat of imminent harm) are not correct in stating that such evidence merely contextualizes the objective test. Even under a contextualized objective test, the criminal law has never accepted the notion of a psychologically-individualized objective standard. Although an actor's objective circumstances can sometimes be considered to determine whether a reasonable person would share the actor's perceptions the law does not accept as reasonable a perception attributable to the accused's own unique psychological abnormality.¹⁰³¹

Assuming that Satchwell J is correct in incorporating the actor's altered perceptions (i.e. abused woman's psyche, make up and whole world view) into the objective test, it is submitted that this would still prove unworkable. Firstly, in cases of non-confrontational

¹⁰²⁹ Snyman *supra* (n 1028) 212.

¹⁰³⁰ Burke "Rational Actors, Self-Defense and Duress: Making sense not Syndromes out of the Battered Woman" (2002) North Carolina Law Review 211 at 242.

¹⁰³¹ Burke *supra* (n 1030) 241-242.

killings, despite expert testimony explaining how battered woman's syndrome affects individual perception, the judge (or the reasonable person) would have no meaningful way to determine whether a particular battered woman's belief in the imminence of danger is reasonable, even if viewed from her distorted perspective.¹⁰³² In light of the three distinct phases of the domestic violence cycle, the cycle theory itself seems to require knowledge of where the abused woman's allegedly defensive use of force fell within the cycle and how long each distinct phase typically lasted before one can determine the reasonableness of the perception of imminent harm. Therefore, if an abuser becomes contrite and apologetic immediately before he fell asleep intoxicated, it would follow from the cycle theory of violence that there was no imminent threat of harm – and no reasonable belief otherwise – until the contrition phase was complete and the tension-building phase was well under way.¹⁰³³ It has also been noted that even if the battered woman syndrome theory were helpful in supporting an abused woman's account of her subjective perceptions, the theory does little to support a claim that such perceptions were objectively reasonable. When an abused woman subjectively but unreasonably believes that her use of force is justified, she at best has a claim of putative self-defence, which mitigates punishment but does not wholly exculpate the accused.¹⁰³⁴

Secondly, even if the court were to disregard the source of perceptions as subjective psychological phenomenon,¹⁰³⁵ the actual effect of the syndrome on an actor's

¹⁰³² Goldman *supra* (n 67) 200-201.

¹⁰³³ Burke *supra* (n 1030) 241.

¹⁰³⁴ Burke *supra* (n 1030) 142.

¹⁰³⁵ Kinports "Deconstructing the 'Image' of the Battered Woman: so much activity, so little change: A reply to the critics of Battered Women's Self-Defense" (2004) [Saint Louis University Public Law Review](#) 155 at 170 notes that battered woman syndrome construct was not necessarily meant to connote a mental disease or defect, but was simply a convenient way of describing a set of characteristics that are common to many (but not all) abused women. Wallace "Beyond Imminence:

perceptions must be considered:¹⁰³⁶

“the battered [woman] by feeling isolated and afraid may respond more quickly and intensely if acting in self-defense. Moreover, the [woman] may be even quicker to perceive danger and overestimate the danger once perceived. The [woman’s] initial extreme responses to abuse become over-generalized and may occur in situations where there is no objective danger. What emerges is an extremely hyper vigilant anxious guarded woman. Just as society does not allow a person to claim self-defense simply because [s]he is extremely nervous or cowardly, it should not allow, a battered woman to do so simply because she is hyper vigilant”.¹⁰³⁷

5.2.1.1.3 Philosophical criticisms of subjectivized standards of self-defence

Numerous philosophical criticisms can also be leveled against any objective test which is particularized to take the accused’s personal circumstances into account. It is submitted that such criticisms can be starkly illustrated in foreign jurisdictions such as the United States of America who have gone too far in qualifying the objective test to the extent that it has created a separate reasonable woman standard,¹⁰³⁸ while other

Evolving International Law and Battered Women’s Right to Self-Defense” (2004) University of Chicago Law Review 1749 submits that battered woman syndrome has reinforced the familiar tendency to pathologize women’s behaviour, minimizing what seemed to be real issues. Obstacles to leaving violent relationship beyond the woman’s mental state, including economic, familial and legal barriers (at 1757). Dore supports this view: “[I]n practice the battered woman syndrome has created a paradigmatic battered woman who suffers from a psychological aberration that impairs her capacity to rationally assess or completely respond to an abusive situation. Instead of focusing on external social and economic factors that properly inform the battered defendant’s situation, the battered woman defense centers on internal capacity that renders her dysfunctional victims instead of rational survivors” (“Downward Adjustment and the Slippery Slope: The Use of Duress Defense of Battered Offenders” (1995) Ohio State Law Journal at 665 at 692).

¹⁰³⁶ Goldman supra (n 67) 201.

¹⁰³⁷ Goldman supra (n 67) 201. Whether the source of the perceptual defect is merely a personal idiosyncrasy or result of clinical syndrome, the result should be the same.

¹⁰³⁸ See Martin “Case Note” (1992) University of Cincinnati Law Review 877 at 891 (noting that under a wholly subjective standard, the actor’s state of mind is critical). As Goldman supra (n 67) notes “such a standard would incorporate perceptual irregularities caused by battered [woman] syndrome because it would allow the jury to judge the reasonableness of accused’s actions against the accused’s subjective impressions of the need to use force” (at 200). See further Hatcher “The Gendered Nature of the Battered Woman Syndrome: Why Gender Neutrality Does Not Mean Equality” (2003) New York University Annual Survey of American Law 21 at 31 who submits that the foundation of battered woman syndrome includes more than just the effects of battering itself,

courts have implicitly done this through further elucidation of a battered woman situation.¹⁰³⁹

Using such a standard conflicts with the basic principle of equality underlying the reasonableness standard in two respects. Firstly, because it relies exclusively on a specific group (women's) norms for its definition, the reasonable woman standard inappropriately adopts a group-rights, rather than individual rights, perspective.¹⁰⁴⁰

However group-rights advocates misunderstand the basic premise of individualism. Such groups assume that individualism regards people as purely atomistic, unconnected individuals who do not possess and are consequently unaffected by any group membership. This assumption is not correct as suggested by Locke's recognition of individual differences in a state of natural equality. Individualism recognizes the notion of a self-partiality constituted by group connection.¹⁰⁴¹

Secondly, the reasonable woman's standard is, by definition, non-neutral. It establishes female values and perceptions as arbitrarily differentiating between individuals and thus ignores the impact of wrongful conduct on the individual by focusing exclusively on that conduct's impact on the gender group of which the individual is a member.¹⁰⁴²

but extended further into the actor's mind-state to consider other experiences that contributed to her feelings of powerlessness.

¹⁰³⁹ Toffel supra (n 3) at 373 notes that: "Battered woman syndrome would be more beneficial to women if it focused on the coercive control aspects of all battering relationships, rather than on supposed psychological traits that women develop from battering. The syndrome could then portray the accused as reasonable and account for the complexity of their domestic violence experiences. Hostage survival strategy and Graham's Stockholm syndrome, which focuses on the victim's behaviour in life-threatening situations instead of psychological traits have been applied in research to battered women. They characterize battered woman's actions as survival strategies not learned helplessness".

¹⁰⁴⁰ Unikel supra (n 906) 349.

¹⁰⁴¹ Unikel supra (n 906) 351.

¹⁰⁴² Unikel supra (n 906) 352.

An individual-rights perspective calls for vitiating the victim's personal rights, while a group-rights approach subsumes the 'victim's' rights under a diffuse claim of affront to all womankind. Such an approach, if, carried to its logical extreme, would make an individual a victim of every criminal act, thus vitiating the rights of the actual victim.¹⁰⁴³

The use of a particularizing standard is justified by the determinist assumption that there are certain non-universal characteristic (such as battered woman syndrome, history of battering) that have a causal influence on perception and action which is so strong that it would violate the voluntary act requirement to use a purely objective standard to assess reasonableness.¹⁰⁴⁴

By adopting such a standard there is no distinctively legal (in the nonpolitical sense) way of distinguishing characteristics that are "properly" particularizable from 'characteristics' that are not.¹⁰⁴⁵ One response to this is politically acceptable, but philosophically unpersuasive. The argument is that it is fair to refuse to particularize the objective standard to take into account all non-universal characteristics because only some non-universal characteristics exert a genuinely uncontrollable causal influence on perception and action.¹⁰⁴⁶

¹⁰⁴³ Unikel *supra* (n 906) at 352.

¹⁰⁴⁴ Heller *supra* (n 795) 86.

¹⁰⁴⁵ Heller *supra* (n 795) 52-53. See further Donovan and Wildman *supra* (n 895): "[I]t may of course, be true that in many cases a jury's judgment as to the moral culpability of the reasonable person in the accused's situation will coincide with the actual personal culpability of the defendant. In other words the actual life experience of the individual defendant may correspond to the jury's notion of the life experience of the reasonable person. In that event, justice will arguably be done by using a reasonable person standard".

¹⁰⁴⁶ Heller *supra* (n 795) at 90. This position is supported by Fletcher *supra* (n 544) at 514. See further Kinports *supra* (n 810) at 419: "Unlike traits such as hotheadedness, drunkenness or cowardice, the traits or characteristics of a battered woman are not attributes that the woman can reasonably be expected to control..."

This position suffers from two weaknesses. The first is epistemological. While it may be true that there are controllable and uncontrollable non-universal characteristics, it is impossible to objectively identify the partial category into which any particular non-universal characteristic fits. Thus reasoned disagreement is always a possibility.¹⁰⁴⁷

The second problem is ontological. The position that only some non-universal characteristics are uncontrollable is philosophically irreconcilable with the particularizing standard's partial determinism. Determinism does not admit of degrees. Thus insofar as the particularizing standard holds that at least one nonuniversal characteristic is truly uncontrollable, it must accept the proposition that all nonuniversal characteristics are uncontrollable.¹⁰⁴⁸

There is a third response to the claim that it is impossible to objectively distinguish between nonuniversal characteristics that should be particularized and nonuniversal characteristics that should not be particularized. Even if it is true that all nonuniversal characteristics are causally uncontrollable at the time of the provoked acts, certain nonuniversal characteristics are part of an individual's character because of decisions she made of her own free will prior to committing the act, while other nonuniversal characteristics are part of an individual's character through no fault of her own. Excluding nonuniversal characteristics that fall into the former category from the

¹⁰⁴⁷ Heller *supra* (n 795) 90.

¹⁰⁴⁸ Heller *supra* (n 795) 91. As Morse *supra* (n 66) suggests: “[t]he fact that an accused may be able to pinpoint a cause for her use of violence i.e. history of abuse in the case of battered women - cannot give rise to a defense because presumably all phenomena of the universal are caused by the necessary and sufficient conditions that produce them. Allowing determinism or universal causation [to] underwrite responsibility threatens to undermine notions of personal responsibility that are vital to human dignity and the fair operation of the criminal justice system” (at 11).

category of particularizable characteristics, therefore, does not violate the voluntary act requirement.¹⁰⁴⁹

This response while consistent internally, is ultimately unpersuasive. First, insofar as it, no less than the previous response, leaves the particularizing standard's determinist component unaffected, it is vulnerable to the same determinist critique. In a hard determinist world, using broad time - framing to identify moments of responsibility does not escape determinism. Since actions which were taken prior to a provoked act are not less determined than the provoked act itself, an individual cannot be held responsible for any of her actions, irrespective of when those actions took place. Second, even in a world of softer determinism - in which at least some actions are not causally determined - it is still not clear whether there are nonuniversal characteristics on the basis of which an individual can be held responsible.¹⁰⁵⁰

Further, if the objective standard is particularized to take into account two or all of an individual's uncontrollable nonuniversal characteristics, applying a particularizing standard that does not take all of those characteristics into account necessarily violates the voluntary act requirement, since the standard would then require individuals to

¹⁰⁴⁹ Heller supra (n 795) 91. As Saitow notes: "The battered woman is not a reasonably prudent person. Her characteristics and personality have been severely affected by the abuse which she has endured. She should not be punished for being the victim of that abuse. Considering her acts only in the light of a reasonable person, when through no fault of her own, she does not qualify as one, is in essence condemning her for her suffering" ("Battered Woman Syndrome: Does the 'Reasonable Battered Woman' Exist?") (1993) New England Journal on Criminal and Civil Confinement 329 at 367. Rosen supra (n 21) argues that in battered woman syndrome cases, "[b]ecause [the] defendant responded to internal and external pressures for which she was not responsible, but which were created by her social reality as a battered woman, she is not to blame for her conduct" (at 43). See also Fletcher supra (n 544) 513-514.

¹⁰⁵⁰ Heller supra (n 795) 92. Consider, for example excessive irascibility, the nonuniversal characteristics for which an individual can properly be held responsible. Do individuals really choose to be excessively irascible or is their situation more like the situation of the battered woman who perceives and acts as a battered woman, not of her own volition, but because another individual forced her to endure perception and action-modifying suffering? Thus what looks like freely chosen characteristics invariably come to look like a socially determined psychological pathology-the kind that calls for treatment, not punishment?

control the causal influence of characteristics that have an influence which cannot be controlled.¹⁰⁵¹ Take the reasonable battered woman's standard: use of this standard assumes that using a purely objective standard to assess the reasonableness of provoked acts committed by battered women holds such women to an unrealizable standard of conduct. This standard also assumes that battered women react the same to their abuse. This is a doubtful proposition. Factors such race have an effect on how battered women perceive and react to the environment around them. The legal policies underlying the development of the reasonable woman's standard dictates the creation of a multitude of highly specific reasonableness standards incorporating the norms and ideals of particular groups into the decision-making process.¹⁰⁵² Further since each individual is predictably a member of more than one group (for example "Caucasian" and "female"), in order for reasonableness standard to sufficiently reflect the entire range of group norms related to any situation, those standards must be drawn to include all of a person's major group associations. As a result, a potentially endless number of specifically designed reasonableness standards are necessary in order to satisfactorily incorporate each individual's relevant group association.¹⁰⁵³

Having numerous standards of reasonableness is problematic. Raising a cultural defence precariously shifts the relevant focus of the judicial enquiry away from the nexus between the actor's state of mind and her act to the merits of her culture which

¹⁰⁵¹ Heller supra (n 795) 93.

¹⁰⁵² Unikel supra (n 906) 355.

¹⁰⁵³ Ibid. For example, a reasonable black woman's standard, a reasonable Asian gay man' standard etc. Thus an actor will state that she acted according to the dictates of her culture and therefore deserves leniency. However, there is no formal "cultural defence"; individual defence attorneys and judges use their discretion to present or consider cultural factors affecting the mental state or culpability for the accused (Volp supra (n 906) 57-58).

rely on group-rights perspective.¹⁰⁵⁴ Specialized reasonableness standards define individuals exclusively in terms of their specific group affiliations.¹⁰⁵⁵ Such differentiation violates both the concept of interchangeability which is central to individualism and implicitly allows biased actions by recognizing the legal and social importance of group membership. Secondly, specialized reasonableness standards are judicially impractical. Instead of leading to equality, adoption of such a cultural defence would promote prejudice and inequality. It may also raise the issue of unequal treatment, undermining the important tenet that the law should be applied uniformly.¹⁰⁵⁶ This can occur in two ways. Use of the cultural defence may mean that immigrant would-be victims have less protection than non-immigrant would-be victims receive.

Secondly, the distinction between an individual to whom the cultural defence is available and one to whom it is unavailable is blurry, problematic and at least partly unauthentic. A formal adoption of this defence would mean that the law will treat a member of one ethnic or cultural group more harshly than that of another group.¹⁰⁵⁷ The cultural defence position also makes a fatal assumption. By designating culture as the operational factor for excusing the actor's conduct, the position assumes that culture is

¹⁰⁵⁴ Chui *supra* (n 906) 1099. As Creach *supra* (n 815) notes: "The more narrowly the court defines the relevant reasonable person, the more likely it will be to find their response reasonable" (at 620).

¹⁰⁵⁵ Unikel *supra* (n 906) 355. For example, a "reasonable black woman" standard treats the individual for which it is designed as the member of both a particular racial group ("black") and a particular gender group ("woman").

¹⁰⁵⁶ Sacks *supra* (n 906) 545. There are several reasons for this. First, a number of definitional problems make it difficult to discern any systematic justification of or allowing members of some cultural groups but not others to use the defence. Moreover, if a principled basis did exist for determining which members of immigrant groups and U.S. subculture could employ the defence, there seems to be no basis for considering others to have a culture at all while implicitly assuming the United States, and U.S. law, lack one. Further, proponents of the cultural defence offer no principled basis for determining which customs should fall under the rubric of this defence (Sacks *supra* (n 906) at 543).

¹⁰⁵⁷ Sacks *supra* (n 906) 545-546.

a static element that can be qualified and neatly summarized. Rather, culture is a “lucid, constantly evolving concept”.¹⁰⁵⁸

The need to particularize the particularizing standard if taken to its logical conclusion, ultimately collapses into a purely subjective standard. The particularizing standard cannot satisfy the voluntary act requirement unless it takes all of the actor’s nonuniversal characteristics into account. But all characteristics are nonuniversal. For this reason the particularizing standard must take all of the actor’s characteristics into account to satisfy the voluntary act requirement - and given that “if every characteristic of the individual is taken into account, the case would be that they could not help doing as they did”. The particularizing standard is functionally the same as the purely subjective standard.¹⁰⁵⁹ Since it is determinist, the purely subjective standard confronts the law with an intractable dilemma: either abandon punishment entirely on the ground that it is never retributively just;¹⁰⁶⁰ or justify punishment on solely utilitarian

¹⁰⁵⁸ Chui supra (n 906) 1099. It is interesting to note that the defence also essentializes culture by defining it as the exclusive province of particular groups. Some groups have culture, others do not (at 102). According to Chui, culture cannot be defined through bright line tests or concrete categorization because it is by nature ambiguous. Defining the parameters of a group who could raise the defence would require creating a rule that would take into account the innumerable permutations of race, ethnicity, language, education, religion, culture, gender, length of residence in the country and age. Use of these factors to measure behaviour assimilation would be a difficult and subjective task at best.

¹⁰⁵⁹ Heller supra (n 795) 94-95. See also Unikel supra (n 906) 371. As Lee suggests: “[W]e cannot... allow the perpetrator of a serious crime to go free simply because that person believed actions were reasonable and necessary to prevent some perceived harm. To completely exonerate an individual no matter how aberrational or bizarre his thought patterns would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity contrary to fundamental principles of justice” (quoting People v Goetz supra (n 793). Lee goes on to state: “It unacceptably expands the doctrine of self-defense infringing on the premise of our criminal law system that preservation of life is an important value and that the taking of a life will be exempt from criminality and punishment only in a narrow, societal-determined set of circumstances” (Race and Self-Defense: Toward a Normative Conception of Reasonableness” (1996) Minnesota Law Review 368 at 386).

¹⁰⁶⁰ Heller supra (n 795) 105.

grounds.¹⁰⁶¹

The third problem with the particularizing standard is the commonsense counterpart of the first two: insofar as the standard is partially intentionalist, it cannot justify its determinism and therefore collapses into the justification version of the objective standard. The particularizing stand assumes that the causal influence of some nonuniversal characteristics is so powerful that it violates the voluntary act requirement to use an objective standard to assess the reasonableness of a provoked act committed by an individual who possesses one of those characteristics that may well be true at the moment the provoked act was committed. Nevertheless, even if the individual could not have avoided being provoked to kill, once she possessed a particular uncontrollable nonuniversal characteristic, she could always have avoided developing that characteristic in the first place. By definition, actions that are not caused by an uncontrollable nonuniversal characteristic are, from the standpoint of the particularizing standard, freely chosen, and it can't be said, that individuals are ever determined to develop uncontrollable nonuniversal characteristics, characteristics which will in certain instances, cause them to perform objectively unreasonable provoked acts - since those characteristics are always the end-products of actions that are themselves freely chosen. If this is the position, the particularizing standard cannot excuse an actor's "unreasonable" provoked act on the ground that the actor could not have avoided committing it. If the relevant time-frame is broadened enough, it is evident that she could have. The particularizing standard thus collapses into the justification version of the objective standard. Deprived of the ability to excuse an actor's provoked act on the ground that the actor could not have acted otherwise, the particularizing standard can

¹⁰⁶¹ Heller supra (n 795) 105. A system that does not impose retributive limits on punishment risk devolving into what Morse has appropriated called a "purely consequentialist dystopia- a system where under certain circumstances, even innocent people can be legitimately punished" ("Culpability and Control" (1994) University of Pasadena Law Review 1587 at 1589).

only justify such an act on the ground that she should not have been required to act otherwise.¹⁰⁶²

Battered woman syndrome provides an excellent example of the force of this critique. Those who defend the use of the “reasonable battered woman” standard are certainly correct to argue that women suffering from battered woman syndrome cannot be expected to perceive and react to threatening and provocative situations in the same way as women who do not. Nevertheless, opponents of the standard are also correct to argue that in nearly every battered woman syndrome case it is possible to identify moments when, prior to the time the syndrome became firmly established, the battered woman could have acted to avoid developing the syndrome.¹⁰⁶³ Therefore, battered woman syndrome does not explain why a woman initially becomes involved with her abuser, nor does it explain, why, after the initial beatings, she did not leave the relationship.¹⁰⁶⁴

Therefore, it is submitted that any reference to a standard of a “reasonable battered woman” should be rejected since it assumes that all battered women react the same to their abuse and would result in a potentially endless number of specially designed reasonableness standards. Such specialized reasonableness standards are problematic since they promote prejudice and inequality¹⁰⁶⁵ and ultimately collapse into a purely

¹⁰⁶² Heller supra (n 795) 95-96.

¹⁰⁶³ See further Kelman “Interpretive Construction in the Substantive Criminal Law” (1981) Stanford Law Review 591 at 594 who states: “[o]ften, conduct is deemed involuntary rather than freely willed because we do not consider the defendant’s earlier decisions that may have put [her] in the position of apparent choicelessness”.

¹⁰⁶⁴ Heller supra (n 795) at 96. A completely determinist account of human action can avoid such broad time framing; the partial determinisms that underlies the particularizing standard, however, cannot.

¹⁰⁶⁵ See 242-243 *ibid.*

subjective standard.¹⁰⁶⁶ It is also submitted that there is no real principle on which a decision could be reached as to whether one subjective factor should be considered and another not.

5.2.1.1.4 The impact of constitutional norms on limiting subjective factors

One possible solution to this dilemma is to argue that Constitutional norms could at least provide a broad-based “principle” or set of principles on which to draw such a distinction. The concept of unlawfulness, which hinges on the legal convictions of the community, has not only found favour with South African courts,¹⁰⁶⁷ but requires a judge not to impose his own subjective preferences onto the case but must seek the solution in the sentiments of “all enlightened individuals in society” or the “legal convictions of the community’s lawmakers.”¹⁰⁶⁸ The enquiry into reasonableness in the context of unlawfulness can accommodate only the generic facts or the physical act, assessed in terms of the constitutional rights, where the “reasonable man” test has become increasingly subjectivized to take into account a number of the personal qualities of the accused. Although there is a need for flexibility in the area of the justification grounds and this makes objectivity more elusive, there are has to be clear limits. Judges are expected to make value judgments in this context all the time, when they assess the extent to which an accused’s conduct falls within the limits of self-defence. The realm of objectivity is in the recognition of pre-existing limits. The use of discretion in applying such pre-existing rules is well-established, but it needs to be established if it is adequately countenanced.¹⁰⁶⁹ It is submitted that it is not. The

¹⁰⁶⁶ See 244 *ibid.*

¹⁰⁶⁷ See chapter 2 n 97 for examples of such cases.

¹⁰⁶⁸ Flack *supra* (n 97) 82.

¹⁰⁶⁹ Flack *supra* (n 97) 84.

concept fails to be objectivized sufficiently, and furthermore, judges are granted too much discretion in this respect. The Engelbrecht¹⁰⁷⁰ case is a clear example of such unfettered discretion. While the Constitution does not establish a hierarchy of rights, judges and academics have acknowledged that some rights are more foundational, constituting a core of rights from which others are derived. The right to life is antecedent to all other rights in the Constitution.¹⁰⁷¹ Surely the abuser's right to his life supercedes the abused woman's right to dignity or bodily integrity. While it could be stated that all three rights are of great importance, from an objective standpoint,¹⁰⁷² these rights have limitations and to meet constitutional muster, must be linked closely to its purpose.¹⁰⁷³ As Ally and Viljoen have noted "the use of violence especially lethal force, can only be justified if it is necessary (that is, if it is the only means to avoid death or grievous bodily harm)."¹⁰⁷⁴ Perhaps from the abused woman's position¹⁰⁷⁵ she was correct to kill her abuser. But it is submitted, that she had no way of knowing whether her abuser would have killed her at that very moment. Indeed the abuse had been going on for some time. Therefore, there was less restrictive means of extricating herself from her situation. She could have called the police or left. Although an abused woman is not expected to flee her home, in terms of the Constitution, it is submitted that the abuser's life takes precedence over the accused's right to remain in her home. Not only did Satchwell J in Engelbrecht¹⁰⁷⁶ not correctly identify whether the

¹⁰⁷⁰ S v Engelbrecht supra (n 143).

¹⁰⁷¹ S v Makwanyane supra (n 132) at par [326].

¹⁰⁷² S v Makwanyane supra (n 132) at par [144].

¹⁰⁷³ Section 36(1)(d) of the Constitution of the Republic of South Africa 1996. Ally and Viljoen supra (n 128) at 133 note that an important factor in this evaluation is the question whether less restrictive means are available to obtain the stated objectives.

¹⁰⁷⁴ Ally and Viljoen supra (n 128) 133.

¹⁰⁷⁵ Utilizing the test set out in the Engelbrecht supra (n 143) case.

¹⁰⁷⁶ S v Engelbrecht supra (n 143).

limitation on the accused's rights were justifiable,¹⁰⁷⁷ but the court failed to take cognizance of established precedence. Interpretation or development of the common-law requires that the court must promote the spirit, purport and, objects of the Bill of Rights, it is meant to adapt or correct applicable the applicable law to reflect common law, not to change it in its entirety.¹⁰⁷⁸ While proponents of "battered woman syndrome" have attempted to introduce such evidence in cases (including the Engelbrecht¹⁰⁷⁹ case) to explain the circumstances that may have impacted upon the woman's conduct, it is submitted that South African courts in any event, already do this to a limited extent as a matter of course. Various factors such as the nature of the harm threatened, the genders of the parties, the means that were at the accused's disposal, and their relative strengths are factors which the court would consider in assessing whether the killing was a reasonable response to the harm threatened.¹⁰⁸⁰ It is submitted that since no single profile of a battered woman exists, it would be inadvisable to expect the court to go to the point of assessing whether the killing was a reasonable response for a battered woman.¹⁰⁸¹

¹⁰⁷⁷ S v Walters supra (n 126) at par [26].

¹⁰⁷⁸ Ally and Viljoen supra (n 128).

¹⁰⁷⁹ S v Engelbrecht supra (n 143).

¹⁰⁸⁰ For a discussion of the factors taken into account as well as case law indicating these factors see chapter 2 at 56-57.

¹⁰⁸¹ Reddi supra (n 1) 273. See also S v Ferreira supra (n 141) where the court held that the first accused's decision to have the deceased killed by persons hired for that purpose, instead of leaving him, was explained by expert witnesses as being in keeping with "what experience and research" has indicated to occur with abused women. This the court maintained, should not be judged from a male perspective or an objective perspective but by the court locating itself, to the extent that was possible in the position of the woman concerned. The abused woman should therefore be treated with due regard for gender difference in order to achieve equality of judicial treatment (at 468A-B). Reddi supra (n 1) at 274 notes that there is nothing innovative about this approach in assessing the accused's moral blameworthiness. What is however, problematic, is the statement that the court should locate itself, in the exact position of the accused. If this is the case, the accused couldn't have helped but act like she did.

5.2.1.1.5 The distinction between self-defence and putative self-defence

Another problem that could result if the objective test does not sufficiently retain its objective character is that it will become increasingly difficult to distinguish between self-defence and putative self-defence. Consider for instance, the developments in the Canadian law of self-defence. In section 34(2) of the Canadian Code,¹⁰⁸² the term reasonable is expressly stipulated when determining the existence of the self-defence as well as determining the parameters of the accused's conduct. In R v Nelson¹⁰⁸³ the court held that the term reasonable does not exclude factors that are beyond the accused's control.¹⁰⁸⁴ It went on to note:

“If the young age of an accused is properly to be taken into account in applying the standard of reasonableness, then it would also be proper, in my view, to take into account a condition of arrested intellectual or mental development. Both situations can result in an accused having a mental age clearly below that of an adult and may equally affect his or her perception of, and reaction to, events. Both, too, are beyond the control of the accused.”¹⁰⁸⁵

The court went on to refer with approval to the comments made in the Canadian Supreme court case of R v Hill:¹⁰⁸⁶

“What lessons are to be drawn from this review of the case-law? I think it is clear that there is widespread agreement that the ordinary or reasonable person has a normal temperament

¹⁰⁸² Canadian Criminal Code (1985).

¹⁰⁸³ (1992) 71 CCC (3d) 449 (Ont CA). For a discussion of case law prior to 1992, see R v Lavallee supra (n 153), discussed in chapter 4 at 188-194.

¹⁰⁸⁴ Labuschagne “Noodweer, Die Redelike Man en Misdaadelementologiese Dinamiek” (1996) Tydskrif vir die Hedendaagse Romeinse-Hollandse Reg 666 (own translation).

¹⁰⁸⁵ R v Nelson supra (n 1083) at 468.

¹⁰⁸⁶ (1986) 25 CCC (3d) 322 (SCC) 335.

and level of self-control. It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness. In terms of other characteristics of the ordinary person, it seems to me that 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 conceptualize a sexless or ageless ordinary person. Features such as sex, age or race do not detract from a person’s characterization 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...”¹⁰⁸⁷

In R v Melaragni¹⁰⁸⁸ it was held that if the accused had private knowledge of his attacker, for example that the attacker is extremely aggressive, he is entitled to avail himself of such information when deciding whether or not to act in self-defence.¹⁰⁸⁹

In R v Patel¹⁰⁹⁰ Lamer J (giving judgment on behalf of the majority) held that:

“It can be seen from the wording of section 34(2) of the Code that there are three constituent elements of self-defence, when as here the victim has died: the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm, and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary. In all three cases the jury must seek to determine how the accused perceived the relevant facts and whether that perception was reasonable. Accordingly, this is an objective determination. With respect to the last two elements, this approach results from the language used in the Code...”¹⁰⁹¹

¹⁰⁸⁷ Ibid at 468. See also R v Tutton (1989) 48 CCC (3d) 129 (SCC) 143, per Lamer J.

¹⁰⁸⁸ (1992) 76 (CCC) (3d) 78 (Ont. Court, GD).

¹⁰⁸⁹ Ibid at 82.

¹⁰⁹⁰ (1994) 87 (CCC) (3d) 97 (SCC).

¹⁰⁹¹ Ibid at 7-8.

In light of section 34(2) of the Canadian Criminal Code, Lamer J went on to note:

“There is thus no formal requirement that the danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker.”¹⁰⁹²

In R v Malott¹⁰⁹³ defence counsel argued that in light of previous abuse suffered at the hands of her husband, the accused had acted in self-defence. Although the accused was found guilty of attempted murder, L’Heureux-Dube’s separate finding (McLachlin J concurring) is of importance to abused women: “allowing expert evidence in connection with battered wife cases, can be considered as legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly.”¹⁰⁹⁴ L’Heureux-Dube went on to point out that by allowing such expert testimony, it is now accepted that a woman’s perception of what is reasonable is influenced by her gender and personal experiences.¹⁰⁹⁵ She went on to state:

“This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman’s experience in order to inform the analysis of the particular events. But it is wrong to think of this development of the law as merely an example where an objective test – the requirement that an accused claiming self-defence must reasonably apprehend death or grievous bodily harm – has been modified to admit evidence of the subjective perceptions of a battered woman... The perspectives of women, which

¹⁰⁹² R v Patel supra (n 1090) at 8.

¹⁰⁹³ R v Malott supra (n 156).

¹⁰⁹⁴ Ibid at 469.

¹⁰⁹⁵ Labuschagne “Die Mishandelde Vrou-Sindroom, Die Redelike Persoon-Standaard en die Grense van Noodweer” (1998) Tydskrif vir die Hedendaagse Romeinse-Hollandse Reg 538 at 540 (own translation).

have historically been ignored, must now equally inform the ‘objective’ standard of the reasonable person in relation to self-defence.”¹⁰⁹⁶

Later, L’Heureux-Dube goes on to stipulate that the reasonable woman standard as another component of the reasonable person standard, in such cases must be taken into consideration.¹⁰⁹⁷ Regarding the inquiry into moral blameworthiness, the focus must be on the reasonableness of her actions within the context of her personal experience, as well as her experience as a woman, and not on her status as an abused woman and the fact that she suffered from battered woman syndrome.¹⁰⁹⁸ She went on to note:

“By emphasizing a woman’s ‘learned helplessness’, her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from ‘battered woman syndrome’ the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such emphasis comports too well with society’s stereotypes about women. Therefore, it should be scrupulously avoided because it only serves to undermine the important advancements achieved by the decision in Lavallee.”¹⁰⁹⁹

Various factors within the social as well as other types of context in which the abused woman finds herself, can play a role in answering the question why she did not leave her abuser¹¹⁰⁰ “which do not focus on those characteristics most consistent with stereotypes”.¹¹⁰¹ These factors include her economic dependency, children that have to be looked after, pressure to keep the family unit in tact, protecting the children against abuse, being afraid that she may lose custody of the children, inability to access social

¹⁰⁹⁶ R v Malott supra (n 156) at 470-471.

¹⁰⁹⁷ Labuschagne supra (n 1095) 540 (own translation).

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ R v Malott supra (n 156) 472.

¹¹⁰⁰ R v Malott supra (n 156) 472-473.

¹¹⁰¹ Labuschagne supra (n 1095) 540 (own translation).

support and the fear that the abuse will continue despite the fact that the woman has left her abuser.¹¹⁰² L’Heureux-Dube goes on to conclude:

“Where the reasonableness of a battered woman’s belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman’s experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women’s experiences are generally outside the common understanding of the average judge and juror, and that they should be presented in such a way as to focus on the reasonableness of the woman’s actions, without relying on old or new stereotypes about battered women.”¹¹⁰³

By insisting on a reasonable woman standard and the (partial) practical realization thereof by means of allowing expert testimony concerning battered woman syndrome in determining requirements and boundaries of self-defence by means of the reasonableness requirement, it would appear as if the reasonable person is starting to lose its objective nature:

“The anthropo-legal universal process of deconcretisation is incessantly eroding the so-called foundation of private defence in criminal law. Reference in this regard is made to subjective factors pertaining to the person being attacked as well as subjective factors pertaining to the attacker.”¹¹⁰⁴

¹¹⁰² R v Malott supra (n 156) 473.

¹¹⁰³ R v Malott supra (n 156) 473.

¹¹⁰⁴ Labuschagne “Die Proses van Dekonkretisering van Noodweer in die Strafreë: ‘n Regsantropologiese Evaluasie” (1999) Stellenbosch Law Review 68 (own translation).

A similar trend has been followed in American law¹¹⁰⁵ and is beginning to be demonstrated in the South African law of self-defence.¹¹⁰⁶ The end result of such an approach is that:

“It is predicted that the legal requirements for private defence will eventually be equated with those currently required for putative private defence.”¹¹⁰⁷

Not only is this process of deconcretisation inevitable, but it will eventually result in the criminal law element of unlawfulness becoming redundant.¹¹⁰⁸

5.2.1.1.6 The impact of moving towards a normative concept of fault

It is submitted that such an approach is to be avoided at all costs for the following reasons. Firstly, South African criminal law is traditionally connected with the psychological approach which separates the enquiry into criminal liability into two distinct components, each with their own focus:

“The psychological theory is irreconcilable with the indisputable presence of subjective components in the concept of wrongdoing (definitional elements plus unlawfulness). The psychological theory’s premise is that culpability is the receptacle of all ‘subjective’ requirements for liability; it is the

¹¹⁰⁵ For a discussion of a move towards subjective standards of self-defence see chapter 4 at 181-187. Similarly, the developments in the English law of self-defence are also demonstrating a move towards more subjectivized approach to self-defence. See chapter 3 at 116-120.

¹¹⁰⁶ For a discussion of the more subjectivized reasonable person test see chapter 2 at 39-41. See also the case of S v T supra (n 151) in chapter 2 at n 151.

¹¹⁰⁷ Labuschagne supra (n 1104) 68 (own translation). Labuschagne in “Geregtigheidse Misdaadelementologie en ‘n Subjektiewe Omskrywing van Noodweer: Opmerkinge oor Onlangse Ontwikkeling in die Engelse en Skotse Reg” (2003) Obiter 103 at 120 states that the whole objective test is excessive since the final question is based on what the person acting in self-defence thought. Therefore, why not just ask this question in the first place (own translation).

¹¹⁰⁸ Labuschagne supra (n 1107) 121 (own translation).

sum total of all the ‘internal’ requirements for liability.”¹¹⁰⁹

whereas:

“wrongdoing (the unlawful act) in turn comprises all the ‘external’ (objective) requirements”.¹¹¹⁰

According to normative theory of fault, culpability lies in the blameworthiness with which the unlawful act was committed. In this case the accused is personally blamed since he committed an act which met the definition of the proscription, despite being capable of acting differently. In terms of such an approach, “culpability is not a state of mind, but an evaluation of X’s intention. It is a “negative value judgment on the commission of an unlawful act.”¹¹¹¹ Blame is based on the following presuppositions: (1) the accused knew or could have known the circumstances which made her act correspond to the definition of the proscription and rendered it unlawful; (2) she was capable of acting in accordance with the law; (3) despite this she proceeded with the act, (4) in the circumstances under which the law could have expected her to act differently.¹¹¹²

In determining whether the accused’s conduct complies with requirement (4), the question to be decided is whether somebody else in the accused’s position would have withstood the pressure to commit the wrongful act. If the answer is yes, then the accused is to be blamed and the culpability requirement is satisfied. The test is

¹¹⁰⁹ Snyman “Private defence in criminal law - an unwarranted raising of the test of reasonableness - S v Dougherty 2003 (2) SACR 36 (W) (2004) Tydskrif vir die Hedendaagse Romeins-Hollandse Reg 327.

¹¹¹⁰ Ibid. Snyman Criminal Law (4th ed) (2002) at 142 notes that it affords a sounder explanation of the culpability requirement as well as a sounder basis for an acceptable classification of the requirements for criminal law.

¹¹¹¹ Snyman supra (n 25) 152 (own translation).

¹¹¹² Snyman supra (n 25) 153 (own translation).

normative. The accused is not measured by her own standards, for to apply such a test would mean that it would be very difficult to blame a bad person for her wrongful actions. The question is what the law would expect the average person in the accused's situation to do.¹¹¹³

Necessity in the form of coercion provides a useful example of the application of this test. Z orders X to kill Y and threatens to kill him if he refuses to execute the order. If X does kill Y, he acts unlawfully (due to the fact that killing another person even under coercion is a violation of material legal norms), but without culpability, since considering that the average person is not willing to sacrifice his life for another, it cannot be expected of X to act differently. Since X killed Y intentionally and unlawfully, on the application of the psychological theory of culpability, X would have been convicted of murder, but in terms of the normative theory of culpability, X is not guilty since he is not blameworthy.¹¹¹⁴

Since intention forms part of the concept of wrongdoing, the object of the blame includes this intention.¹¹¹⁵ While X's will or intention "plays" a role in the determination of blame, it is not, according to the normative theory, the essence of culpability. Rather, the essence of culpability is blameworthiness. While the psychological theory regards awareness of the of unlawfulness as forming part of intention,¹¹¹⁶ the normative theory draws a sharp distinction between intention¹¹¹⁷ and awareness of unlawfulness: intention plays a role in determining both wrongdoing and

¹¹¹³ Ibid.

¹¹¹⁴ Snyman *supra* (n 25) 155.

¹¹¹⁵ Snyman *supra* (n 1110) 141.

¹¹¹⁶ Snyman *supra* (n 1110) 142.

¹¹¹⁷ In the sense of colourless intention.

culpability, whereas the awareness of unlawfulness comes into the picture only when determining culpability, and therefore forms one of the cornerstones of the concept of culpability.¹¹¹⁸

A move towards a normative concept of fault would ultimately:

“render South African criminal law heir to vagueness, complexities, controversy, and contradictions, but would also be inconsistent and irreconcilable with some of its fundamental tenets and notions.”¹¹¹⁹

This would take the following form:

“First, it confuses and identifies criminal fault with various other elements of the crime and the aims and objects of criminal punishment; secondly, it confuses and identifies criminal fault with criminal liability, thus rendering the fault requirement tautologous and redundant and leaving intention and negligence in the air, thirdly, it transforms and expands crimes of intention to crimes of negligence and substitutes the specific notions of intention and negligence with a general notion of fault; and finally it subverts or abandons the fault requirement by partially or wholly substituting it with policy considerations and general prevention. Insofar as intention has a purely psychological content while negligence has a predominantly normative content, forcing both intention and negligence under a single normative fault umbrella goes as much against the grain of South African criminal practice as forcing both intention and negligence under a single psychological umbrella”.¹¹²⁰

¹¹¹⁸ Snyman supra (n 1110) 142.

¹¹¹⁹ Van Oosten “The Psychological fault concept versus the normative fault concept: Quo vadis South African Criminal Law?” (1995) *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg* 369.

¹¹²⁰ Van Oosten supra (n 1119) 369-370.

5.2.1.1.7 Factors which should qualify the objective test for self-defence

In respect of unlawfulness (i.e. private defence) the test is objective and should remain this way. The test to determine whether a defender's defensive conduct is reasonable has never been a high¹¹²¹ or low standard but simply a reasonable one.¹¹²² It is a relative concept depending on the circumstances of each case.¹¹²³ It is submitted that advocates of the battered woman syndrome have stretched the bounds of self-defence by asserting "that all the actor's subjective peculiarities should be transposed upon the hypothetical reasonable person".¹¹²⁴ The following factors should be utilized to qualify the objective test for self-defence in respect of battered women:

- gender (the fact that she is female)
- age
- relative strength of parties (the fact that the woman is under normal circumstances the weaker sex and therefore may have to use weapons to defend herself)
- nature of the threat

¹¹²¹ Govender v Minister of Safety and Security 2001 SACR 197 (SCA); S v MacKinnon 1995 (2) SACR 1 (CC) and Ex parte Minister of Safety and Security: In re S v Walters supra (n 126); S v Dougherty supra (n 223) 49h-i.

¹¹²² Rosen supra (n 21) at 409 submits: "[W]hile the criminal law does send out moral and, possibly, utilitarian messages, it is concerned primarily with determining fault after the fact. Thus one can reasonably say that an action is justified if it is an action that the law does not choose to punish". See further Dressler "Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code (1988) Rutgers Law Journal at 675 (who states that justified conduct is right, desirable, warranted, permissible, or at least tolerable conduct). Rosen supra (n 21) goes on to state that "[in] order to be justified the choice the actor makes need not be the best of all possible choices, or even the one choice that society prefers. It merely must be one that society believes should not be punished" (at 409). In this respect see further Fletcher "The Right Deed for the Wrong Reason: A Reply to Mr. Robinson" (1975) University of California Law Review at 306 (who states that self-defence appears to be better conceived as necessary evil rather than as the bringing about of a state of affairs that is affirmatively desirable).

¹¹²³ Snyman supra (n 1109) 330.

¹¹²⁴ Burke supra (n 1030) 291.

- history of the violence between the abuser and the abused
- persistence of the attack (the period of time over which the attack took place will play an important role, especially in determining imminence and proportionality)
- location of the attack
- attempts made to escape the abuse
- value of the interest threatened ¹¹²⁵

Any reference to mental and emotional characteristics, including recognized psychological disorder symptoms (such as “battered woman syndrome”, which is a subcategory of Post-Traumatic Stress Disorder) should not be included in qualifying the objective test. ¹¹²⁶ As Reddi has noted:

“It would be better for the court to ask whether a reasonable person in similar (but not all) of the circumstances would have considered the threat to be imminent. This is the standard that is already used in South African law. It is therefore submitted that no valuable purpose can be served in our law by admitting battered woman syndrome evidence with regard to the appraisal of harm aspect of self-defence under South African law”. ¹¹²⁷

It is submitted that on the basis of the criterion set out above, a battered woman will not be able to successfully plead self-defence. In respect of the value of the interest threatened, ¹¹²⁸ it could be submitted that the abused woman is entitled to act to save her life where the threat is imminent. However in terms of the *actio libera in causa*

¹¹²⁵ See chapter 2 at n 232 and n 233 for examples of case law that make use of these factors.

¹¹²⁶ This view is supported by South African writers such as Burchell and Hunt supra (n 84) 276 and De Wet and Swanepoel supra (n 76) 69.

¹¹²⁷ Reddi supra (n 1) 270-271.

¹¹²⁸ See 259-261 op cit.

rule,¹¹²⁹ it is submitted that this constitutional right ought to be curtailed. Consider a factual situation similar to that of S v Norman.¹¹³⁰ In this case Judy Norman stayed with her abusive husband for 20 years. But now imagine that Judy killed her husband in a confrontational situation (i.e. where the attack was imminent). A woman who stays in an abusive relationship for 20 years, cannot, when an attack is taking place (that is to say, it is imminent in the traditional sense), state that she killed her abuser because she feared for her life. She had been attacked numerous times before. What makes this time different from the other times. She stayed, knowing that a future attack was a very real likelihood. The persistence of the attack (over 20 years) would militate against her claim of self-defence. In respect of putative self-defence, the abused woman's perspective and what she knew is critical. If this is true, then she cannot reasonably claim that she knew her abuser would kill her. What would make this occasion, different from the others. If however, the abused woman "snapped" and really believed that her abuser would kill her, then she should be pleading non-pathological incapacity instead.¹¹³¹

5.2.1.1.8 Implications of using an objective test in unlawfulness and negligence

There are two shortcomings to utilizing an objective test in excluding unlawfulness in the case of self-defence. Firstly, this approach tends to be unrealistic, simply because a person's life cannot be quantified in terms of pre-established formulas.¹¹³² Secondly, the very same test which is used to assess negligence in South African law (i.e.

¹¹²⁹ Burchell and Milton supra (n 26) 109: "where a person through her own conduct, created a potentially dangerous situation, she is under a legal duty to prevent the danger from materializing."

¹¹³⁰ S v Norman supra (n 813). However, it should be noted that in this case, the jury was not allowed to consider the merits of self-defence, since she was not in a life threatening situation at the exact moment she killed her husband (at 594). Judy Norman was found guilty of voluntary manslaughter.

¹¹³¹ Burchell and Milton supra (n 26) 109.

¹¹³² Labuschagne in Coetzee (ed.) Gedenbundel H L Swanepoel (1976) 164.

external, physical rather than internal, psychological circumstances)¹¹³³ is now being utilized to determine unlawfulness.¹¹³⁴ This leads to confusion between the fault requirement and unlawfulness, as well as causing the grounds which exclude fault to be associated with justification grounds.¹¹³⁵ A further problem with utilizing the objective test, especially in the case of negligence fault criterion, is that in the case of all common-law crimes and statutory crimes require intention. This raises the point as to what the position would be if the accused in the case of acting negligently, intentionally killed his attacker. Therefore, must such negligence be reasonable for the accused to avail himself of self-defence. In such a case it could be argued that a reasonable person in the position of the accused would not have acted negligently and therefore the accused exceeded the bounds of self-defence. However, on the basis of what has just been said about the reasonable man, it is in no way convincing.¹¹³⁶

Furthermore, it can be shown that should the accused's negligence be considered a ground excluding fault, he can escape liability without his mistake of fact having to be

¹¹³³ Burchell and Hunt supra (n 84) at 193: "the court enquires whether the reasonable man in the situation of the accused would have guarded against the consequence in question."

¹¹³⁴ Does this now mean that negligence would have to be tested subjectively? The case of S v Ngema (1992) (2) SACR 651 (D) illustrates that the strictly objective approach in cases of culpable homicide should not be followed: "[I]t is clear that the days of full-blown objectivism, as exemplified by R v Mbombela supra (n 170) at 272) are past, and some evidence of subjectivizing the test for negligence is apparent... One must test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and dare I say it- race of the accused. The further individual peculiarities of the accused alone must, it seems to me, be disregarded." However, there are problems in testing negligence by means of a subjective test. Consider Milton's supra (n 117) statement at 386: "If a hot-tempered individual loses control of himself and (lacking intent to kill) causes death, he cannot be convicted of culpable homicide, for if we are to judge him by his own characteristics he has acted predictably and in accordance with the disposition which a variety of background influences have shaped." But as Louw in "S v Ngema 1992 (2) SACR 651 (D) The reasonable man and the tikoloshe" (1993) South African Journal of Criminal Justice 361 at 364 has noted that: "[I]f further individual peculiarities of the accused alone must...be disregarded then the potential for unfairness remains...The accused's conduct should be measured against what would be reasonable from him to do in the circumstances in terms of his own capabilities."

¹¹³⁵ Van Oosten " S v Van Antwerpen 1976 (3) SA 399 (T)" (1977) De Jure 179 at 180 (own translation).

¹¹³⁶ Ibid.

reasonable.¹¹³⁷ Even if the reasonable man test is replaced with a subjective test for fault in respect of intent, and the accused is able to escape criminal liability on this basis, it only means that in terms of crimes requiring intention, there are various tests for establishing fault criterion at different stages.¹¹³⁸

In terms of strict liability, the shortcomings of the reasonable man test are more apparent. Since fault in the case of strict liability is not a requirement for criminal liability, it is difficult to appreciate what applicability the reasonable man test would have here. With strict liability, the lawmakers specifically intended that there was a separation of fault as an element of the crime, and to now require a negligence test for justification grounds, would introduce fault via the “backdoor” and further confuse the meaning in that capacity.¹¹³⁹ In conclusion, not only have some courts considered it a step backwards in adopting an objective test for unlawfulness,¹¹⁴⁰ but it also impacts the question of whether self-defence is a ground excluding fault, but whether mistake of fact, if being a justification ground, whether it would lead to the question of unlawfulness being exempt from the reasonable man’s viewpoint or influence.¹¹⁴¹

5.2.1.2 Commenced or imminent

5.2.1.2.1 Introduction

The imminence requirement is at the heart of the justification of self-defence. The state is not always competent (whether through police or courts) to provide immediate and

¹¹³⁷ Ibid.

¹¹³⁸ Ibid.

¹¹³⁹ Ibid.

¹¹⁴⁰ S v Rabodila (1974) (3) SA 324 (O) 325; S v Ntuli supra (n 141) 436; S v Pretorius (1975) (2) SA 85 (SWA) 89; S v Nyokong (1975) (3) SA 792 (O) 794 and S v Motleleni supra (n 140) at 406.

¹¹⁴¹ Van Oosten supra (n 1135) 181, noting S v Goliath supra (n 97) 25, 29.

necessary protection due to every citizen with respect to their legal rights and interests. In such a case it is that individual's inherent right¹¹⁴² accepted by all law, both natural and civil¹¹⁴³ to resort to private defence providing the attack is imminent or about to take place.¹¹⁴⁴ By requiring imminence, there is an intrinsic limitation on the scope of self-defence.¹¹⁴⁵ However, specific self-defence cases dealing with battered woman scenarios have indicated that the traditional imminence requirement does not adequately cater for these situations. One of the most important problems faced by battered women who kill their abusers, is that they kill in non-confrontational situations where their claims are often rejected on the ground that it is unreasonable to believe that such an attack is imminent. Ossification of specific rules of self-defence have been predicated on what a reasonable response to deadly force might be, and this is based on the paradigm of an encounter between two men of roughly equal physical size and ability. The battered woman is clearly disadvantaged: a woman's reasonable response to physical violence is likely to be different from a man's because of her size, strength and socialization.¹¹⁴⁶ In light of this consideration, it is not unexpected that the imminence requirement has been one of the central points of academic and judicial criticism and has led judges and legal commentators to blur the edges of self-defence law in order to defend women's actions.

¹¹⁴² Cicero Pro Milone 4: "Natural reason permits one to defend oneself against danger".

¹¹⁴³ Van der Keessel supra (n 245) 48 811.

¹¹⁴⁴ Early South African common law (see chapter 2 at 36-40) as well as modern case law (S v Mogolwane supra (n 193)) have expounded a coherent statement of the elements of self-defence including imminence as a core requirement. For a discussion of the imminence requirement in South African case law see chapter 2 at 46-48 supra. For a discussion of the imminence requirement in English law see chapter 3 at 122-125 and American law chapter 4 at 194-198 supra.

¹¹⁴⁵ Rosen supra (n 21) 31.

¹¹⁴⁶ See Mitchell "Note: Does wife abuse justify homicide" (1978) Wayne Law Review 1705 at 1725 (arguing that in wife abuse cases, self-defence is "stretched beyond [its] legal limits." See further Hatcher supra (n 1038) at 22 where a traditional understanding of the elements of self-defence do not fit with a battered woman's experience in which imminence, reasonableness, proportionality, and attempts to retreat are much less apparent and more case-specific.

While there have been calls for the abolition of the imminence requirement in this respect,¹¹⁴⁷ the obvious problem with such an approach is that something must stand in its stead to distinguish legitimate cases of self-defence from illegitimate ones.¹¹⁴⁸

5.2.1.2.1.2 Replacing imminence with necessity

Some theorists have suggested that the way to solve the imminence dilemma is to focus on necessity. Schopp et al makes the case for necessity as follows:

“The central question involves the appropriate relationship between the necessity and imminence requirements. A standard allowing defensive force only when immediately necessary to prevent unlawful harm treats imminence of harm as a factor regarding necessity. That is the defensive force is justified only if necessary to prevent unlawful harm, and the imminence of that unlawful harm contributes to but does not completely determine the judgment of necessity. In unusual circumstances such as those confronted by... some battered women, defensive force may be immediately necessary to prevent unlawful harm, although that harm is not yet imminent. In these cases, imminence of harm does not serve as a decisive factor in the determination of necessity. A standard allowing defensive force only when necessary to prevent an imminent harm, in contrast, treats imminence of harm as an independent requirement for justified force in that the force must be necessary to prevent delayed unlawful aggression, even if the present situation represents the last

¹¹⁴⁷ Schulhofer “The Gender Question in Criminal Law” (1990) *Society, Philosophy and Policy* 105 at 127 arguing that the distinctive features of battering situations render the imminence requirement irrelevant. Schulhofer notes that this is consistent with the work of Dr. Lenore Walker who posited the theoretical construct i.e. cycle of violence which refers to a three stage recurrent pattern – “tension-building”, “acute battering”, and “loving contrition” that characterizes these relationships. The recurrent, yet unpredictable, nature of violence of violence plays a key role in explaining why a battered woman may not leave an abusive relationship. In addition, Seligman’s theory of learned helplessness explains the woman’s sense of ‘psychological paralysis. That is given the repetitive, yet unpredictable, nature of violence, the woman is eventually reduced to a state of perpetual fear and perceives that there is little she can do to alter her situation (Schulhofer supra at 127, citing Walker supra (n 3) at 65-70).

¹¹⁴⁸ Veinsreideris “The Prospective effects of modifying existing law to accommodate preemptive self-defense by battered women” (2000) *University of Pennsylvania Law Review* 3. See also Robinson *Criminal Law Defenses* (1984) at ss 131 (C) 132 (which includes eliminating imminence as a condition in totality but then it would function as a factor to be considered but would possess no greater significance than any other relevant factor).

opportunity to prevent such harm.”¹¹⁴⁹

They go on to note:

“[S]ome writers interpret necessity as the core of self-defence doctrine. Imminence of harm remains consistent with this theoretical foundation when it serves as a factor regarding judgments of necessity because in most circumstances the judgment that non-violent alternative will suffice is more likely to be accurate regarding imminent harm than a remote one. Imminence of harm can undermine these justificatory theories, however, if it is accepted as an independent requirement of the defence. In short, imminence of harm can promote the underlying justifications of self-defence when it serves as a factor to be considered in making judgments of necessity, but it can undermine those if it is accepted as an independent requirement in addition to necessity. For these reasons, the Model Penal Code and some commentators advocate some variation on the ‘immediately necessary’ formulation rather than ‘necessity and imminence.’”¹¹⁵⁰

Replacing imminence with necessity would allow the judge to consider evidence about prior abuse and threats as well as testimony about battered woman syndrome not only in the context of why the woman did not leave,¹¹⁵¹ but also in determining whether the

¹¹⁴⁹ Schopp, Sturgis and Sullivan supra (n 844) 67-69. Theorists have argued that imminence should be abandoned because the necessity requirement does all the moral heavy lifting. They argue that imminence just helps establish necessity. See for example Fletcher supra (n 1003) 553 at 561 takes the view that necessity should at least be an absolute requirement. See further Burke supra (n 1030) at 279 where she states that “because the requirement of imminence is an imperfect proxy to ensure that a defendant’s use of force is necessary, a better standard would require that the use of force be necessary”. Murdoch in his article “Is Imminence Really Necessary? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome” (2000) Northern Illinois University Law Review 191 at 217 states that: “whether a killing was necessary is a question of fact. Eliminating the imminence requirement from self-defense merely allows juries to realistically consider, given the totality of the facts of any given situation, whether the use of defensive force was necessary.”

¹¹⁵⁰ Schopp, Sturgis and Sullivan supra (n 844) 67-69.

¹¹⁵¹ Rosen “On Self-defense, Imminence, and Women who kill their abusers” (1993) North Carolina Law Review 387 at 406. Murdoch supra (n 1149) at 213-214 notes that in respect of non-confrontational killings, necessity has two bases in these situations. First, learned helplessness, a characteristic of battered woman syndrome limits a battered woman’s ability to act. Second, society’s ineffectiveness in intervening in these situations makes reliance on outside assistance at least dubious. For example, the case of S v Norman supra (n 813) exemplifies these principles. In this case the defence presented expert testimony that Mrs. Norman exhibited characteristic of Battered Woman Syndrome including learned helplessness (at 11). Learned helplessness results in a loss by the battering victim of the ability to take steps necessary to protect herself from further abuse. This condition leads to passivity and the inability to realistically assess danger. Even if an opportunity to escape the situation presents itself, the victim of battering may fail to take advantage of it. This condition has important implications for the doctrine of self-defence. Necessity entails a

abuse and threats produced a reasonable fear of death. In appropriate cases, the judge would be allowed to consider evidence of the availability and efficacy of alternatives to the use of lethal force to kill a batterer in non-confrontational setting as well as the woman's knowledge of these alternatives as these are indisputably relevant.¹¹⁵²

However, such an approach could be problematic. Firstly, if the traditional justification of necessity replaces the imminence requirement, a typical battered spouse may not be able to escape liability in every case. The necessity defense provides that there must have been no adequate alternative to act. Thus Walker's battered woman syndrome fails to provide an acceptable explanation for why the battered woman kills during a non-confrontational moment. If the cycle theory of violence is to be accepted, then it has to be accepted that the abused woman endures a continuous and heightened fear of abuse, even if her abuser is sleeping.¹¹⁵³ Furthermore, if the theory of learned helplessness is to be believed, then it has to be accepted that an abused woman not only lives in a constant state of terror, but also suffers from a cognitive incapacity to recognize any

lack of feasible alternatives. If because of the condition of learned helplessness, a battering victim is unable to take measures to protect herself short of using deadly force, the alternative measures are not feasible. Furthermore, because learned helplessness occurs due to continued abuse, the batterer is responsible for creating the condition. The parallel to traditional self-defence situations is clear, when a threatened harm is imminent, the abuser has limited his intended victims choice of action to one option because that is the only choice available due to temporal considerations".

¹¹⁵² Sebok in his article "Does an Objective Theory of Self-Defense demand too much?" (1996) University of Pittsburgh Law Review 725 at 748.

¹¹⁵³ Sebok supra (n 1152) notes that: "while the battered woman's 'epistemic' situation vis a vis her batterer due to privileged information she has on the batterer on the basis of an intimate relationship with him supports the claim that battered women are in a 'good position to predict their batterers' violence, but it does not support the conclusion that a battered woman's position is good enough to predict that it is highly probable that the batterer will inflict grievous bodily harm on her. The reason the battered woman's beliefs are held to be reasonable are based on her 'extra knowledge' not extra fear. Thus, if we believe that a battered woman can be wrong about her sincerely held beliefs, and we believe that an objective observer can determine either that battered woman's sincerely held yet wrong belief was formed unreasonably, then there must be some empirically describable set of facts that would characterize the conditions under which an observer would find that the battered woman's claim to epistemic privilege is warranted. One possible set of facts is the fact of her condition: her battery. But we must be careful about conflating a claim about injury with a claim about expertise (that the probable validity of a prediction by the battered woman about her husband inflicting harm is high). To accept such conflation without more evidence would simply reproduce a collapse into subjectivity Ripstein was trying to avoid when he rejected the claim that the proper test for epistemic privilege was sincere belief."

method of escape. It would then follow that the abused woman would remain passive even when her abuser is calm or asleep.¹¹⁵⁴

5.2.1.2.1.3 An “immediately necessary” standard?

If necessity remains part of the elements constituting self-defence, imminence which is merely intended as an exact expression of this standard does no work. Robinson has noted that:

“although the word ‘imminent’ appears to modify the nature of the triggering conditions, it seems, and the drafters of the Model Penal Code agree, that the restriction is more properly viewed as a modification of the necessity requirement. That is, as a practical matter actions taken in the absence of an imminent threat may not be necessary”.¹¹⁵⁵

The correct application of this necessity element would appear sufficient to thwart possible abuse of self-defence in cases where the use of force is not imminent.¹¹⁵⁶ To fully appreciate the relationship between imminence and necessity, it becomes necessary to consider Robinson’s hypothetical hostage scenario:

“Suppose A kidnaps and confines D with the announced intention of killing him one week later. D has an opportunity to kill A and escape each morning as A brings him his daily ration. Taken literally, the imminence requirement would

¹¹⁵⁴ While Walker supra (n 7) submits that a battered woman sometimes strikes back during a period of calm, knowing that the tension is building toward towards another acute battering incident, where this time she may die (at 142). Burke suggests this rebuttal to the argument does little to explain how women suddenly break from their helplessness. Furthermore, although it suggests why a battered woman may feel justified in using force in the absence of an imminent threat, Walker’s assertion undermines the argument that battered women reasonably perceive the coming threat as imminent (at 245-246). Further, Walker has difficulty explaining why the woman’s cognitive priority suddenly shifts from survival skills to escape skills. Thus, if battered woman has overcome her learned helplessness and can appreciate exit options, then the syndrome fails to explain why she exercises the option of deadly force. Additionally if Walker’s explanation for the shift from passivity to action is that the woman’s emotions have shifted to anger and disgust then the use of force would appear to be out of revenge rather than the need for self-protection (Burke supra (n 1030) 246-247).

¹¹⁵⁵ Robinson supra (n 1148) 131 (b) (3) at 76.

¹¹⁵⁶ Robinson supra (n 1148) at 76-77.

prevent D from using deadly force in self-defense until A is standing over him with a knife”.¹¹⁵⁷

Robinson answers this question in the negative:

“If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is not adequately handled by requiring immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier – as early as is required to defend himself effectively”.¹¹⁵⁸

In closing, Robinson notes that what is important is not the immediacy of the attack, but the immediate necessity of a response to an impending attack. Similarly, the MPC has offered its own version of the immediately necessary standard:

“The issue of force upon another person is justifiable when the actor believes that such force is immediately necessary for the purpose of preventing the use of unlawful force by such other person on the present occasion”¹¹⁵⁹

¹¹⁵⁷ Robinson supra (n 1148) section 131 (c) (1) 78. Diamond in his article “To Have but not To Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense Against Incapacitated Batterers” (2002) Columbia Law Review has suggested that the issue to address is not so much whether battered women must face an imminent threat of serious bodily harm before they kill, but how closely their situations resemble those of kidnap victims. To the extent that they do, the imminence requirement is already vitiated (at 758). This would offer a better theoretical basis for relaxing the imminence requirement than has existed and it would allow for distinctions between better and worse claims of justifications by focusing on the prime issue related to battering: control over another (at 760). Thus the significant benefit of applying a viable theory of self-defence to kidnapping in some battered woman cases is a subtle one: such a theory speaks directly to and requires evidence regarding the previous context of reactions between batterer and battered, for it is that context which must be relied upon to establish the presence of kidnapping. Where the limitation of the woman’s ability to escape from her batterer is at issue this defence cuts the knot which binds non-confrontational cases to the debate over imminence (at 771-772). While viewed from this perspective, the effects of coercive control are important, it is important to take into account other issues which factor into the battered woman’s experiences.

¹¹⁵⁸ Ibid.

¹¹⁵⁹ MPC ss 3.04 (1) (1985). Some scholars are of the view that this formulation correctly casts the balance between defenders and aggressors. See for example Schopp, Sturgis and Sullivan supra (n 844) at 69, states that “Immediate necessity, not imminence of harm, should be considered essential to self-defense claims, including those asserted by battered women”. Schulhofer supra (n 886) at 127 states that “Imminence is relevant only because it helps identify cases where flight or legal intervention will be impossible, so that violent self-help becomes truly necessary. The decisive factor is necessity, not imminence per se. Thus, the proper approach is to require, as proposed in Model Penal Code 3.04, that the use of force be ‘immediately necessary on the present occasion’”.

The problem with such a proposal is that “removed from the issue of reasonableness, there is little practical difference between the two standards.”¹¹⁶⁰ Further, the elimination of imminence and the implementation of the immediately necessary standard does not necessarily signify that a court will always disregard imminence in an abused woman’s case. Quite the opposite: “[e]liminating the imminence requirement in a specific case does not mandate a specific verdict... Nor does its elimination make the question of imminence irrelevant. Imminence remains, as do the other factors in the case relevant to the court’s core enquiry.”¹¹⁶¹ Furthermore, one theorist’s empirical research suggests that a move from “imminent” to “immediately necessary” could actually harm the abused woman’s chances of relying on self-defence: “[a] battered woman accused in a ‘imminent’ jurisdiction is more likely than her counterpart in an ‘immediate’ jurisdiction to get a jury instruction specifically on the relevance of the decedent’s past violence”.¹¹⁶²

5.2.1.2.14 The “immediately necessary” standard and self-preferential acts

Theorists such as Ferzan have submitted that the “immediately necessary” standard obscures the important distinction between self-defence and other self-preferential

Time in terms of the MPC “immediately necessary” formulation depends upon a reasonable belief in time, and controversies about time become controversies about the reasonable person and his view of time, objective or subjective. This satisfies the liberal ideal but it does little to resolve the meaning of necessity. This is but a single example of more general trend in which the criminal law has sought to attain neutrality by avoiding difficult normative questions. But as Fletcher states, the Model Penal Code was an experiment in a criminal law that purports to be precise and neutral but is without content, a contentlessness driven by a naive desire to prevent injustice by positive prescription (“Dogmas of the Model Penal Code” (1998) Buffalo Criminal Law Review 7-10.

¹¹⁶⁰ Veinsredieris supra (n 1148) 5. Schulhofer supra (n 1147) at 127 fails to explain how the two temporal requirements really differ. See also Vandenbraak “Note, Limits on the Use of Defensive Force to Prevent Extramarital Assaults” (1979) Rut-Cambridge Law Journal 643 at 652-653, who finds little difference in the MPC formulation from the traditional imminence formation. Furthermore, the MPC definition of imminence fails to explain when Robinson’s captive must act. How long must the hostage wait to attack? Similarly Robinson also views the Model Penal Code’s formulation as insufficient: “Under such a formulation, D may have to wait until his last chance to kill A, that is, on the morning of his impending execution” (supra (n 1148) at 131 (c) (2) at 79).

¹¹⁶¹ Veinsreideris supra (n 1148) 5.

¹¹⁶² Ibid.

acts.¹¹⁶³ Consider Ferzan's¹¹⁶⁴ reference to the two versions of the Regina v Dudley and Stephens¹¹⁶⁵ case. In the first version as it actually happened, four men were trapped in a life boat with no food to eat for twenty days. Dudley made a decision to kill and eat Richard Parker, a cabin boy, who had consumed considerable amounts of seawater, and was on the verge of death.¹¹⁶⁶ The men then proceeded with their plan but were rescued and charged with Parker's murder.¹¹⁶⁷ In determining whether the men had committed murder, the court noted that Parker was not a threat to the men, and they were therefore not acting in self-defence.¹¹⁶⁸ Because their claim did not sound in self-defence, the justificatory claim would have to be necessity – that the accused had chosen the lesser evil. However, the court did not allow necessity to be a defence to homicide, a limitation which remains the rule in many jurisdictions.¹¹⁶⁹

Now consider a hypothetical scenario where the accused in such a case claimed self-defence: the use of defensive force is premised upon an assessment of the probabilities and alternatives. For defensive force to be necessary, the defender must reasonably believe that harm is likely and that there is no alternative to the use of force. The difference between the two cases is that while the first is a self-preferential killing, the second is self-defensive. All self-defence cases are instances of self-preference, but not all self-preferential actions constitute self-defence. What is distinctive about the

¹¹⁶³ Veinsreideris supra (n 1148) 5-6.

¹¹⁶⁴ Ferzan "Defending Imminence: From Battered Women to Iraq" (2004) Arizona Law Review 213 at 247.

¹¹⁶⁵ 14 Q.B.D. 273 (1894).

¹¹⁶⁶ Ibid at 273-274.

¹¹⁶⁷ Regina v Dudley Stephens supra (n 1165) at 274.

¹¹⁶⁸ Regina v Dudley Stephens supra (n 1165) 273.

¹¹⁶⁹ Regina v Dudley Stephens supra (n 1165) at 279.

self-defence case is that the act of force is employed to ward off an unjust immediate threat.¹¹⁷⁰ On the other hand, in the first scenario, the act was not defensive as Parker did not pose a threat to the men. Ferzan thus states that self-defence is treated differently from other necessary acts of self-preservation. Although the killing may be objectionable, the right to self-defence cannot be denied. Current law reflects this sentiment.¹¹⁷¹ Further, while the argument for the abandonment of imminence is so that a defender should be able to act as early as is necessary to defend herself effectively, this can create problems since the “immediately necessary” standard operates independently of the intentions, capabilities, or actions of a putative aggressor.¹¹⁷²

Finally, not only does the necessity standard not require any recent intention or culpability on the part of the “aggressor” but it also treats the probability of threat and the availability of alternatives as even trade-offs. Therefore, a defender’s need to act may arise prior to the formation of a culpable intention by an aggressor. If the right to self-defence is simply a right to act as early as is necessary to defend oneself effectively, then the need to defend may arise much earlier than the initiation of any aggression. The question is how the “immediately necessary” act of self-defence can be distinguished from actions premised on the general justification of necessity. Both defences seem to begin and end with an assessment of need based on probabilities and alternatives. The need to act is the only morally relevant feature for both. Thus, the “immediately necessary” standard collapses all instances of self-preference into self-

¹¹⁷⁰ Ferzan supra (n 1164) 247-248.

¹¹⁷¹ Ferzan supra (n 1164) 249.

¹¹⁷² As Ferzan supra (n 1164) states, necessity is the least recognized justification and many recognize that necessity is not a defence to murder (at 249). While South African law of necessity is derived from the principles of the common law, it is available as a general defence to criminal liability, whether a common-law crime or a statutory provision is in issue. See S v Adams 1979 (4) SA 793 (T) 798F-H.

defence.¹¹⁷³ Furthermore, requiring that the action be “immediately” necessary will not prevent such a collapse. As Robinson notes, the immediacy requirement does little to resolve the question of whether his hostage may attack early or must wait until the knife is at his throat.¹¹⁷⁴

5.2.1.2.1.5 Imminence as a translator for necessity

Rosen submits that necessity is not a temporal concept; rather, it expresses the underlying concept of inevitability or unavailability. A necessity rule would ask whether the abused woman had any choice to act as she did in order to avoid the grave risk of death or seriously harm at the hands of her husband.¹¹⁷⁵ In Engelbrecht¹¹⁷⁶ the court followed a similar line of reasoning. It noted that the dictionary references to

¹¹⁷³ Ferzan supra (n 1164) 250. But see Kaufman “Self-Defense, Imminence, and the Battered Woman” (2007) New Criminal Law Review 342 at 353: “While Ferzan is right to insist on the distinction between imminence and necessity, she is wrong about the moral basis for the imminence rule. While it is true that self-defense is justified because it is a response to an unjust aggression, the problem is that an act of aggression does not suddenly become unjust at the very moment of imminence. Someone who is planning and preparing an unjust attack on me is already in the wrong and therefore one has the high moral ground against them even before he commences his attack. It is not plausible to insist that I must in every case wait until the attack is about to happen in order to be morally justified in taking action. The earlier one intervenes, the more likely it is that one is mistaken about the purported attacker’s intentions (and the less chance an aggressor will have to change his mind and withdraw his defensive attack).” Kaufman goes on to criticize Ferzan’s thesis: “Even more damaging to her thesis is the fact that as she recognizes the state is not prohibited from acting preemptively in the use of its police power. But this would make no sense if she were right that morality requires compelling evidence against her argument that morality does not in fact require police to wait until an attack is imminent, nor do we think that the police thereby become immoral aggressors. Quite the opposite. We insist that the police intervene as early as possible, once it is determined that an unjust aggression is under way. Its failure to do so is precisely the reason that has been given for allowing the battered women to use the morality of preemptive force. And this only raises the same question on which the proxy thesis founders is based: why should what is morally permissible for the state be impermissible for the individual?”

¹¹⁷⁴ Ferzan supra (n 1164) 250-251. Ferzan supra (n 1164) suggests that one way to prevent such a conceptual collapse is by stating that the ‘immediately necessary’ standard does not fully encompass the right to self-defence. Rather, the right to self-defence includes not only the need to act, but also more specifically, the need to respond to aggression. The first part of the test need not fulfill the requirements of the second. While we may certainly want to require not only that the defender’s action be necessary but also that the threat is of a certain type. But this is the important point. The trouble with the “immediately necessary” standard is that it is singularly focused on the needs of the defender, thus ignoring the defining aspect of self-defence – that self-defence is an action against a threat (at 251-252).

¹¹⁷⁵ Rosen supra (n 1151) 387.

¹¹⁷⁶ S v Engelbrecht supra (n 143).

“imminence” include not only something which is about to “happen” but also behaviour which is “expected” or “foreseen” especially where there is a pattern or cycle of violence.¹¹⁷⁷ The court endorsed the view that where the abuse is frequent and regular such that it can be termed a “pattern” or a “cycle” of abuse then it would seem that the requirement of “imminence” should be extended to encompass that which is “inevitable.”¹¹⁷⁸

Rosen notes that the best that can be made for the concept of imminence is that it is a fairly good “translator” for the concept of necessity even though the former is not the latter.¹¹⁷⁹ Rosen further notes that because the imminence requirement is “merely a translator for the necessity requirement”, the imminence requirement should be relaxed or eliminated in cases where necessity and imminence conflict:

¹¹⁷⁷ Thus, to the extent that her failure to leave the abusive relationship earlier could be used in support of the position that she had been free to leave at the final moment, expert evidence could provide useful insights. (*S v Engelbrecht* supra (n 143) at par [355] at 135E-G). Judge Satchwell made reference to the writings of Stark “Re-Presenting Woman Battering: From Battered Woman Syndrome to coercive control” (1995) *Albany Law Review* 973 when explaining the psychological impact to domestic violence on the battered woman. The judge stated that it was important to look at the pattern of overall coercive control present in the relationships, rather than specific instances of such control. Research reflects that it may be control more than violence that creates a psychological profile of a battered woman (at par [168]). The judge went on to quote Stark: “Work with battered women outside the medical complex suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to tall areas of a woman’s life, including sexuality; material necessities; relations with family; children, and friends; and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of ‘battered woman’ arises as much from the deprivation of liberty implied by coercion and control as it does form violence-induced trauma” (at 986).

¹¹⁷⁸ *S v Engelbrecht* supra (n 143) at par [349].

¹¹⁷⁹ Rosen’s necessity rule expresses the same “but for” condition that forms the core of Ripstein’s inevitability rule. Ripstein supra (n 980) argues that the conception of “imminent harm,” is simply an instantiation of the legal concept of “unavoidable” harm and that current American self-defence law is designed to guarantee that no one must endure an reasonable risk of unavoidable harm (at 698-704). He goes on to say that if imminence is nothing more than an instantiation of unavoidability, then it follows that if a battered woman has a reasonable belief that she will be seriously assaulted after her batterer wakes up, she is justified in killing him while he sleeps (at 704-705).

“In self-defence, the concept of imminence has no significance independent of the notion of necessity... [s]ociety does not require that the evil avoided be an imminent evil because it believes that an imminent evil is the only type of evil that should be avoided not, because an imminent threatened harm is necessarily worse than a non-imminent one. Rather, imminence is required because, and only because, of the fear that without imminence there is no assurance that the defensive action is necessary to avoid the harm”.¹¹⁸⁰

It has been suggested that if imminence is a translator of necessity principle, it translated two opposing views of necessity – necessity as an aversion to violence and necessity as a liberty and right. Theorists who support this do so based on a theory of self-defence that is heavily invested with pacifism and social responsibility toward the victim’s interest in life.¹¹⁸¹ The idea is that an accused’s act is justified when necessary means that the accused had no choice but to kill.¹¹⁸² But, this is not the only existing view of necessity. Theories of self-defence which focus on autonomy do so on the basis

¹¹⁸⁰ Rosen supra (n 1151) 387. This rationale is supported by writers such Kinports supra (n 1035) 182; Burke supra (n 1030) at 278 (observing that “as a factor acting independent of necessity, the immanency of the threat has no exculpatory value to a claim of self-defense”; LaFave and Scott Criminal Law (1986) ss 5.7 (d) (explaining that the rationale for the imminence requirement is that without imminence alternative to the use of force would be available and force would not be necessary); Robinson supra (n 1148) at ss 131 (C) (1) (explaining that the imminence requirement acts as a test for necessity, ss 131 (b) (3) “[A]s a practical matter actions taken in the absence of an imminent threat may not be necessary”. See further Fletcher supra (n 1003) who grounds imminence in political, not moral theory and whose position is as sophisticated as imminence as a proxy for necessity: “The imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent and unavoidable, the legislature can no longer make reliable judgments about which of the conflicting interests should prevail...the police are no longer in a position to intervene... . The individual right to self-defense kicks in precisely because immediate action is necessary”, (at 570). Fletcher rejects battered women’s claims despite overwhelming evidence that battered women make significant attempts to receive help from the police. Yet, in the same vein he states that the right to engage in self-defence is contingent on the ability of the state to intervene. In this respect, Zipursky in his article “Self-Defense, Domination and the Social Contract” (1996) University of Pittsburgh Law Review criticizes Fletcher: “The most serious qualification of Fletcher’s argument is that it shows only half of what it purports to show. What it shows is that in cases where objective imminence exists, self-defense should be permitted. However, that proposition (suitably qualified) has not been seriously in question. The more difficult proposition is that in cases where objective imminence does not exist, self-defense should not be permitted. Fletcher has said little in support of this latter proposition” (at 586).

¹¹⁸¹ Nourse “Self-Defense and Subjectivity” (2001) University of Chicago Law Review 1235 at 1271. See further Fletcher supra (n 1003) at 560 (“discussing the social point of view’ that requires proportionality rule sensitive to the competing interest in life of the aggressor.)

¹¹⁸² See Fletcher supra (n 1003) at 559 (“necessity speaks to the question whether some less costly means of defense...might be sufficient to ward off an attack.”)

that “right never yield to wrong”.¹¹⁸³ The argument is that the killing is “necessary when it serves to right the wrong of a deadly attack.”

These ideas of necessity, in turn present two contradictory theories of self-defence: pacifist and libertarian.¹¹⁸⁴ The pacifist theory emphasizes a view of necessity that “depends upon the need for the accused to avoid violence.”¹¹⁸⁵ The libertarian suggests that self-defence protects the rights of citizens to respond to unlawful aggression. But, neither the libertarian nor the pacifist can assert that they have their own debate about self-defence. None of these positions actually describes the law of self-defence.¹¹⁸⁶ The law positively permits self-help remedies in the majority of jurisdictions which allow the accused to “stand his ground” against an attack. If necessity meant what the pacifist theory suggests, it would in effect require retreat in every jurisdiction. This is not in accordance with current doctrine. Thus the law’s necessity is not always as “necessary” as it appears. This is especially the case “if by necessary we mean that the accused must choose the least violent or most pacifist alternative.”¹¹⁸⁷

¹¹⁸³ Nourse supra (n 1181) at 1271, citing Fletcher supra (n 544) 865.

¹¹⁸⁴ Nourse supra (n 1181) 1272. See further Robinson supra (n 1148) ss 131(a) at 69 (stating that “defensive force justifications rely on a balancing of evils”) The lesser evil approach assumes what Nourse is trying to put into question As Nourse supra (n 1181) puts it “it is the substance of the ‘costs and ‘benefits’ at stake” (at n 86).

¹¹⁸⁵ Nourse supra (n 1181) 1272. See Ashworth supra (n 532) 289 (“This might be termed the ‘human rights’ approach [and it] would result in a general duty to avoid the use of force where non-violent means of self-protection are reasonably open to the person attacked.”) This also has affinities with Fletcher’s “social variation of justifiable self-defence” to the extent that it recognizes the rights of the aggressor.

¹¹⁸⁶ Nourse supra (n 1181) submits that in this sense it should not be surprising since both positions, one by emphasizing the accused’s relationship to society and the other the accused’s relationship to the victim, focus on different aspects of a defence. It also makes sense since these theories, when taken to their logical extreme, would require either a drastic curtailment of the defence (in the case of the pacifist theory) or an extraordinary expansion (in the case of the libertarian theory) (at n 188).

¹¹⁸⁷ Nourse supra (n 1181) 1272.

The libertarian posits a different idea of necessity. This argument emphasizes the wrong inflicted to the accused and his right to respond. The implicit claim is that the self-defence law must acknowledge society's concern in preventing "private warfare" but that if the state goes too far in discouraging self-help, citizens will become the victims of violence. As with its pacifist opponent, the libertarian theory fails to describe current doctrine. The law in most jurisdictions refuses to look solely to the wrong of the victim/aggressor as the sole measure of self-defence. Instead doctrine has time after time conceived of the rules of self-defence in terms that require that citizens defer to government authorities. Most rules of self-defence can be reconceived not just as rules, that identify "real wrongs" but as rules which develop a system that protects society from vigilantism. Rules of proportionality, imminence and retreat require that in many cases the accused should retreat. Therefore, if the law never really embraced either the pacifist or libertarian vision of necessity, it is not unexpected to find both these ideas unresolved in doctrine, submerged in places, like imminence, where they are difficult to see or judge.¹¹⁸⁸

If this is correct, then we cannot with assurance solve the problem of imminence by replacing imminence with necessity, or by claiming priority for necessity or by demanding that imminence means that pacifist rather than the libertarian version of necessity. Each of these positions simply poses the question, it does not answer it.

5.2.1.2.1.6 Distinction between justification and excuse

It is therefore submitted that if the imminence question cannot be answered by assuming one side of the necessity debate, then it cannot be answered by referring to the distinction

¹¹⁸⁸ Nourse supra (n 1181) 1273-1274.

between justification and excuse. In respect of doctrine, reformers have suggested that imminence is really a question of the “battered woman’s perspective on imminence i.e. that a battered woman because of her experience is more sensitized to the cues signaling violence”. Such an approach was appealing since it “unified criminal law theory’s focus on individuation of the criminal law (emphasizing the individual characteristics of defendants) with the needs of women”.¹¹⁸⁹ This move has led to what is known as the establishment of reasonable woman standard.¹¹⁹⁰ The problem is that if imminence is viewed from a woman’s perspective her response to danger will always be reasonable and therefore imminent. It is submitted that not only has a subjectivized approach to self-defence proved problematic,¹¹⁹¹ but to qualify the objective test for self-defence in South African law leads to problems,¹¹⁹² notably a normative concept of fault which has its own set of problems.¹¹⁹³ Such an approach is untenable and is not to be accepted.

5.2.1.2.1.7 Should imminence be a requirement in South African law

Imminence and confrontation are concepts formed in the image of social, pre-legal, norms about the relative responsibility of the parties. Separated from their relational context, the battered woman cases often appear like their male counterparts – cases of

¹¹⁸⁹ Nourse supra (n 1181) 1266. But as Gauthier “Self-Defense and Relations of Domination: Moral and Legal Perspectives on Battered Women Who Kill: self-Defense and the Requirement of Imminence: Comments on George Fletcher’s Domination in the Theory of Justification and Excuse” (1996) University of Pittsburgh Law Review 615 at 618 suggests such a standard is contrary to the purpose of neutrality: “In restricting the scope of legitimate self-defense, it extends its protection to those who violate it, except where their violation deprives the victim of its protection, leaving her with no alternative to self-defense. Here the protection offered by the law assures, or is intended to assure, the transgressor that his violation will receive the measured response of society, and not the arbitrary response of the victim.”

¹¹⁹⁰ For a discussion of such a standard see chapter 4 at 182-184 supra (American Law).

¹¹⁹¹ For a criticism of this standard see 249-259 op cit.

¹¹⁹² For a discussion of these problems see 246-249 op cit.

¹¹⁹³ For a criticism of a move towards a normative concept of fault see 267-270 op cit.

weak threats in violent context. In the end, it is the battered woman cases that tell us that it is her relationship to the aggressor that is the most dominant influence, affecting whether the threat is viewed as imminent, the case as confrontational or her response as necessary. In other words, the abused woman's relation completes the law's claimed objectivity.¹¹⁹⁴

It is submitted that "instead of viewing objectivity as not being able to account for battered woman's situation – the opposite conclusion should be reached – that by rethinking certain situational factors as a set of relatively innocuous and perhaps necessary normative propositions¹¹⁹⁵ then the abused woman's situation is consistent with some very standard propositions in the law of self-defence.

While it is obviously true that if a reasonable person were defined to be just like the accused in every respect, he would arguably do exactly what the accused did under the circumstances. This however, is an inherent difficulty self-defence law confronts whenever it tries to determine which of the accused's characteristics are properly considered in making an objective inquiry: the perennial problem of "striking the balance between the defender's subjective perceptions and those of the hypothetical reasonable person."¹¹⁹⁶ It is submitted that the traditional element of imminence should

¹¹⁹⁴ As does Nourse supra (n 1181) at 1268.

¹¹⁹⁵ Nourse supra (n 1181) at 1287. See for example State v Fuller, 297 SC 440, 377 SE 2d 328, 331 (1989). The accused says that there was a "glint" of a gun, or it looked like the victim was reaching for the gun, or the victim's hands were raised as if to attack. The factors to be taken into account are set out at 271-273 op cit.

¹¹⁹⁶ Nourse supra (n 1181) 1287. In the U.S, if battered woman syndrome testimony is reduced to normative propositions (we imagine them to be jury instructions rather than expert testimony), then the syndrome is consistent with some very standard propositions in law of self-defence. For example, the proposition that prior threats and violence increase the credibility of a claim of future violence, since the 19th century, past threats and violence, including the victim's character for violence, have been considered highly relevant to a claim of self-defense, on questions of imminence, aggression and nature of threat.

remain in force. If the abused woman is being attacked and the threat is imminent (in the traditional sense), then she should be able to avail to herself of self-defence, although it should be noted that the court should also consider the fact that the battered woman placed herself in this dangerous situation.¹¹⁹⁷ However, the court would also have to take into consideration the difficulty that the abused woman faced in extricating herself from this position.¹¹⁹⁸

5.2.1.3 Protected interest

Private defence may only be resorted to in respect of any interest recognized and protected by the law. The South African Constitution does not establish a hierarchy of rights, but some are more foundational and constitute a core of rights: these include the right to life, the right to dignity and the right to bodily integrity.¹¹⁹⁹ The case of Engelbrecht¹²⁰⁰ highlighted the interests of the abused woman which were attacked and which she was entitled to protect, utilizing self-defence. These included her life, bodily integrity dignity, quality of life, her home, her emotional and psychological wellbeing, her freedom as well as those interests of her child(ren). In short, she defended her status as a human being and/or mother.¹²⁰¹

5.2.1.4 Unlawful

The general proposition is that self-defence is not available against the lawful use of

¹¹⁹⁷ In terms of *actio libera in causa*. See 272-273 op cit.

¹¹⁹⁸ See n 1263 below.

¹¹⁹⁹ Constitution of the Republic of South Africa 1996. For discussion of these rights in respect of battered women see chapter 2 pages 32-35 supra.

¹²⁰⁰ S v Engelbrecht supra (n 143).

¹²⁰¹ *Ibid* at par [345] at 133C-D.

force.¹²⁰² The same is true of force that is itself justified as self-defence. The principle is that if force is exercised as a matter of right, it would be self-contradictory to recognize a right to resist the exercise of the right. The important corollary of this proposition is that if the attacker is merely excused and not justified, then the attack is nonetheless contrary-to-right and in this sense unlawful.¹²⁰³

5.2.2 Conditions relating to the defence

5.2.2.1 The defensive act must be necessary to avert the attack

5.2.2.1.1 Introduction

Various construals inform the question of whether proportionality should form a necessary requirement of self-defence in South African law. These include (i) the liberal aspiration to neutrality, (ii) constitutional norms and (iii) a duty of social solidarity to the state. It is now necessary to consider each point in turn.

5.2.2.1.1.2 Liberal aspiration to neutrality

Self-defence is considered a preeminent liberal right: it exists prior to the formation of the liberal state,¹²⁰⁴ its persistence within the liberal state functions as a condition of the state's legitimacy.¹²⁰⁵ Self-defence is preeminently liberal in another sense too, since

¹²⁰² For a general discussion of this requirement in the various jurisdictions see chapter 2 at 51 (South African Law). For a discussion of the requirement of unlawfulness in English Law see chapter 3 at 113 supra and American Law in chapter 4 at 178 supra.

¹²⁰³ Per Fletcher supra (n 1003) 558-559.

¹²⁰⁴ See Gauthier supra (n 1189) 616 (“[A] legal system which failed to recognize the right...could have no valid claim on the allegiance or obedience of those it sought to bring within its sway”.)

¹²⁰⁵ Sepinwall “Defense of others and Defenseless ‘Others’” (2005) Yale Journal of Law and Feminism 328 at 350.

the contours of this right,¹²⁰⁶ and especially its proportionality requirement, are defined by liberals' cherished aspiration to neutrality. Such an obligation to neutrality requires that the state refrain from using moral values to guide government action. Thus when an individual assumes the state's role, she must abstain from allowing moral assessments of her attacker's worth to stipulate her response. The proportionality requirement encompasses this neutral restriction insofar as it requires that a defender's use of force not be greater than the force she faced.¹²⁰⁷ In this manner, the doctrine requires that a defender use mathematics rather than morals to determine a suitable response.¹²⁰⁸

The requirement that a defender's use of force be proportionate admits of various construals. This requirement encompasses that only equal force may be used in response to a threat or that the loss one inflicts should be of equal degree to the loss faced. Such formulations can be problematic since they suggest that the degree of force is quantifiable, despite the fact that it is generally a normative inquiry, as opposed to a

¹²⁰⁶ Sepinwall supra (n 1205) suggests two reasons for the state to constrain the citizen's right to self-defence: "First, every invocation of self-defense overrides the state's role in protecting its citizens. To ensure that this invocation is not a usurpation of state power, the state requires that the attack be impending, and the force used be necessary. Only when the imminence and necessity requirements are met can we be certain the defender did not improperly take matters into her own hands" (at 356). As Fletcher supra (n 1003) notes: "the elements that justify self-defense, are intended to exclude those who preemptively take the law into their own hands because such individuals exceed their authority as citizens, and in doing so, would subordinate others to their force" (at 570). Sepinwall supra (n 1205) suggests a second reason: the state circumscribes a citizen's right to self-defense to ensure that the protective right that the citizen invokes is consonant with the right that the state could invoke on her behalf. Since the latter right is constrained by the state's commitment to neutrality, the former right must be constrained in this way as well (at 356-357). See further Schneider supra (n 71) at 757 (arguing that the state also has an obligation to treat its citizens fairly, which may entail that the state act in a non-neutral regard insofar as it individualizes the constraints on self-defence for each accused.) In other words, the constraints on self-defence must reflect and "enforce requirements of political legitimacy". As such, they must be objective and public, disallowing, on these grounds, the relevance of person's beliefs (reasonable or not). But see Cohen supra (n 1004) at 757 (arguing that there is a countervailing legitimacy condition for the state-namely, that it protects human rights and that this condition is not always served by the state's commitment to neutrality).

¹²⁰⁷ Sepinwall supra (n 1205) 350. Snyman supra (n 124) at 184 also supports this contention.

¹²⁰⁸ In this respect see Fletcher "Proportionality and the Psychotic Aggressor: A Vignette of Comparative Criminal Theory" (1973) *Israel Law Review* 367 ("the premise of criminal law that individuals ought to be judged by what they do, not by their social status or general moral worth").

mathematical one. The fact that proportionality determinations are informed by moral assessments can be problematic since not only do they run foul of the liberal commitment to neutrality, but because they are not always accurate, and do not always operate uniformly in battered woman cases.¹²⁰⁹

One possible problem with the proportionality requirement is that it is indeterminate: “even on the facially value-neutral construction of proportionality as equivalency, it is still unclear what elements ought to figure in the proportionality determination.”¹²¹⁰ This becomes evident where the normative dimension of the proportionality inquiry is made explicit in various jurisdictions requirement of reasonableness. Theorists have challenged the objective standard of reasonableness on grounds that it is based on a male stereotype which is insensitive to the different experiences and perspectives of battered women,¹²¹¹ following the English and American law approaches would prove problematic.

English law makes use of the test: “such force is reasonable in the circumstances”.¹²¹² Even in the circumstances where the right to self-defence was objectively present; case law has mitigated the objective test. Applying the test formulated in Palmer,¹²¹³ the

¹²⁰⁹ Sepinwall supra (n 1205) 358-359. See further Beecher-Monas supra (n 1011) at 105 who gives a practical example. Consider the disparate treatment that men and women receive under the proportionality requirement. While differences in size are often taken into account in cases where one man defends himself against another man, these differences are often discounted in cases where it is a woman who defends herself against a man. While the weaker defender uses force greater than that which the defender faced, the use of force is often deemed permissible where the defender is male but impermissible where the defender is female.

¹²¹⁰ Sepinwall supra (n 1205) 361.

¹²¹¹ Kazan supra (n 824) at 550 submits that: “courts traditionally employ a standard of reasonableness modeled on the classic barroom brawl scenario, involving antagonists of equal size, strength and skill.”

¹²¹² As governed by the Criminal Law Act 1967 section 3 (1).

¹²¹³ Palmer supra (n 531).

Court of Appeal in Shannon¹²¹⁴ has said that the jury must bear in mind the position of the appellant at the moment of the attack. The statement of Lord Morris in Palmer¹²¹⁵ was referred to: where self-defence is reasonably necessary, "... a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive acts". Where the accused had done what he "honestly and instinctively thought was necessary that was most potent evidence that his reaction was reasonable".¹²¹⁶ The Court of Appeal in O'Grady¹²¹⁷ has explained the interpretation of the objective test in these circumstances. Lord Lane, relying on the explanation given by McCulloch J and the decision in the case of Williams¹²¹⁸ said:

"..Where the accused might have been labouring under a mistake as to the facts he must be judged according to that mistaken view, whether the mistake was reasonable or not. It is then for the jury to decide whether the accused's reaction was reasonable or not".¹²¹⁹

The circumstances then must be taken to be the circumstances perceived by the accused, and a jury must be directed in terms of the way in which a reasonable man would react, holding the same honest but unreasonable belief as the accused. This is the logic of the Lord Chief Justice's statement. Combining this with the Shannon/Palmer direction on reasonable force, the test seems far from truly objective.¹²²⁰

¹²¹⁴ Shannon supra (n 532).

¹²¹⁵ Palmer supra (n 531).

¹²¹⁶ Shannon supra (n 532) at 1088.

¹²¹⁷ [1987] 3 All ER 420.

¹²¹⁸ Williams supra (n 523)

¹²¹⁹ Ibid at 423. This approach was confirmed by the Court of Appeal in Whyte supra (n 532) at 418.

¹²²⁰ Giles "Self-Defence and Mistake: A Way Forward (1990) Modern Law Review 187 at 191.

The distinction between the objective and subjective test when applied to the question of reasonable force in self-defence, although semantically clear, is unclear in practice. Firstly, the jury must determine whether an accused acted instinctively before the Palmer¹²²¹ test can be applied. It is then an almost automatic assumption that this is a reasonable thing to do. The test also masks the extreme difficulty facing a jury asked to decide beyond reasonable doubt that an accused did not think something as opposed to deciding what he did think, and then going on to consider how a reasonable man, thinking the same, would have reacted.¹²²²

Another problem arises when the objective test is combined with the subjective test as to the question of the right to defend oneself: if the accused has made an honest but unreasonable mistake as to the right to act, it stands to reason that any test would provide little advantage to the accused if section 3 is interpreted literally.¹²²³ It becomes clear that in cases invoking mistaken self-defence either a definitional or a defence approach will produce a largely subjective test of liability.¹²²⁴

In American law, attempts by feminists to judge the reasonableness of a woman's act of self-help in a gender-neutral, individualized manner have proved problematic. The reasonable person should be placed in the position of the actor, in order to determine in terms of all the circumstances of the actor, including her history as an abused woman, the reasonableness of her belief in using deadly force. Expert testimony establishing this has proved to be a problem, not only because such an inquiry is inconsistent with the theory of justification, which necessarily assumes that any person who performs the

¹²²¹ Palmer supra (n 531).

¹²²² Giles supra (n 1220) 192.

¹²²³ Giles supra (n 1220) 193.

¹²²⁴ Giles supra (n 1220) 199.

same act under the same external circumstances has done the right thing, but because by including certain psychological traits¹²²⁵ of the individual in the circumstances, self-defence has moved closer to the realm of excuse.¹²²⁶

It is a fact that psychological symptoms associated with battered woman syndrome do seriously impair the cognitive abilities of battered women and when they do, South African courts correctly deal with the matter in sentencing. While it may be a true proposition that the symptoms associated with the syndrome are a “normal response to the trauma of repeated battering”,¹²²⁷ it does not follow from this fact that persons

¹²²⁵ Dutton in her article “Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome” (1993) *Hofstra Law Review* 1191 at 1197 submits that battered woman’s syndrome was originally defined as the psychological sequelae to domestic violence. Kazan supra (n 824) submits that to establish why this is so, it is necessary to consider the way the syndrome is usually characterized: the battered woman syndrome consists of both interpersonal (i.e. cycle of violence) and interpersonal (psychological responses alleged to occur in women who are battered) components. According to Walker, these responses may include depression, anxiety, low self-esteem, heightened sensitivity, and learned helplessness. In her view, there is a direct relationship between battering and the development of these psychological symptoms: “Repeated battering, like electrical shocks [in Dr. Seligman’s experiments on caged dogs], diminish the [battered] woman’s motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favourable outcome, whether or not it might. Next, having generalized her helplessness, the battered woman does not believe anything she does will alter any outcome. Finally, her sense of emotional well-being becomes precarious. She is more prone to depression and anxiety” (Walker supra (n 3) 49-50, cited in Kazan supra (n 824) at 559). Clearly if battered women do develop the psychological symptoms described by Walker it is difficult to see how we can rely on their perceptions of reasonableness in a court of law (Kazan supra (n 824) at 558). Later the theory was reformulated in terms of human depression, and was eventually applied to victimization (Dutton supra at 1197).

¹²²⁶ Rosen supra (n 21) 41-42. As Rosen supra (n 21) submits: “[E]xcusable self-defense would imply that her response was typically and idiosyncratically emotional. The doctrine would perpetuate the views that the woman could not have been rational in assessing the danger and that the legal system must accommodate for her mental and physical weaknesses” (at 42).

¹²²⁷ The claim that the battered woman syndrome is a normal response to a traumatic situation might be interpreted to mean three different things: (i) that the symptoms associated with the syndrome are statistically normal, in the sense that they are commonly manifested by victims of battering; (ii) that the symptoms of the syndrome are understandable, in the sense that we can understand how someone subjected to abusive treatment might develop these symptoms; or (iii) that the symptoms are normal in the sense that an individual who manifests these symptoms is free of functional impairment (Kazan supra (n 824) 561).

suffering from these symptoms are reasonable.¹²²⁸

It is important to note that the fact that the abused woman is suffering from a mental illness does not denote that all of her perceptions are unreasonable. The claim that symptoms associated with the syndrome are consistent with a mental disorder does not by itself resolve the issue of whether the woman suffering from the syndrome can form reasonable beliefs about imminent danger and the need for defensive force. A possible reply to this question depends upon whether the abused woman suffering from symptoms consistent with the syndrome can satisfy the conditions necessary for the formulation of a reasonable belief.¹²²⁹ It could be said that a reasonable belief is formed and held on the basis of ordinarily reliable violence as acquired by unimpaired perception and evaluated through normally sound reasoning and judgement.¹²³⁰ Such a consideration would suggest that a diagnosis of battered woman's syndrome is inconsistent with both ordinary and legal accounts of reasonable belief - symptoms of the syndrome may interfere with a battered woman's ability to exercise judgment and form reasonable beliefs. If women suffering from the syndrome are incapable of reasoning in a way that informs our ordinary conceptions of reasonableness, then it follows that attempting to characterize such women as reasonable invokes a different

¹²²⁸ Kazan *supra* (n 824) 560-561. As Schopp, Sturgis and Sullivan *supra* (n 844) maintain the first two interpretations of what syndrome advocates might mean by the term "normal" are compatible with viewing the syndrome as a psychological disorder which impairs reasoning. The third interpretation, which means free from functional impairment, is incompatible with the view that the syndrome refers to a psychological disorder (at 96). Thus while syndrome advocates argue against interpreting the battered woman syndrome as evidence of a psychological disorder, they seem to be committed to the view that victims of the syndrome are free from psychological impairment. But as Kazan *supra* (n 824) maintains such a position is hard to square with accounts of how the syndrome affects the battered woman's ability to accurately perceive, evaluate, and adaptively act upon her own situation (at 561).

¹²²⁹ Kazan *supra* (n 824) 562.

¹²³⁰ As postulated by Schopp, Sturgis and Sullivan *supra* (n 844) at 92.

standard of reasonableness for a battered woman.¹²³¹ It is submitted that such subjectivized standards of self-defence which have developed in American law, as well as the increasing subjectivization of the traditional objective test in South African law, does little to inform the proportionality requirement, but merely leads to the total collapse of such standards:

“[t]he particularizing standard must, therefore take all of the accused’s characteristics into account to satisfy the voluntary act requirement - in which case given that if every characteristic of the individual is taken into account... [s]he cannot help doing as [s]he did and the particularizing standard is functionally equivalent to the purely subjective standard.¹²³²

Proportionality thus becomes redundant: the use of force is proportionate if it aligns with an antecedent judgment about how much force she ought to have used. The proportionality requirement does not enlighten us as to whether the defender’s used force was proportionate or equivalent to the force that she faced. It merely demonstrates whether she used an amount of force warranted by her interests (i.e. normative inquiry).

Such an approach also threatens to undermine the principles which sustain the law of self-defence. In self-defence, ensuring that parties face equal risks requires that we impose an objective standard of reasonableness on a person claiming self-defence.¹²³³ But in Engelbrecht¹²³⁴ the accused only had to demonstrate that her subjective perception of fear was grounded in facts about her situation. A claim of justified self-defence in this case did not require that the defender be correct in her perception of

¹²³¹ Kazan supra (n 824) 562.

¹²³² Heller supra (n 795) at 94-95.

¹²³³ For a discussion of the objective test of reasonableness see chapter 2 at 35-41 supra.

¹²³⁴ S v Engelbrecht supra (n 143). For a discussion of the approach taken in Engelbrecht see chapter 2 at 39-41.

danger and the need for deadly force, since it is possible to reasonably but mistakenly believe in the need for self-defence. However, it is critical that the actor shows more than just an honest belief in the need for self-defence. Thus the claim by syndrome advocates that battered women's psychologically impaired perception should count as reasonable effectively asks the alleged assailant to bear the risk of the woman's perceived fear. This distributes the risks between the two parties unequally, making the battered woman's fear the measure of her alleged assailant's security and exposing the alleged assailant to unreasonable self-defence. Such a result conflicts with the idea that society should ensure that its members are protected against harm that may be inflicted to them as a result of another person's unreasonable perceptions of fear and danger.¹²³⁵

One alternative to overcome such indeterminacy is to dispense with it altogether. Imminence and necessity would be sufficient to justify self-defence. This could have benefits for battered women since the cost of the victim's relative harm ought to be borne by the individual who would attack her, and not imposed on her by limiting her ability to defend herself. In terms of the liberal theory, the court should treat threats to elements constitutive of oneself with special consideration because of the premium that liberalism places on an individual's autonomy¹²³⁶ and because of the necessary connection between autonomy and self-authorship. Elements of individual's lives have value because and to the extent they fit into concepts of the good. Threats aimed at identity strike at the source of value for everything else in our lives. Due to the

¹²³⁵ Kazan *supra* (n 824) 563-564.

¹²³⁶ Fletcher *supra* (n 544) states: "If person's autonomy is compromised by the intrusion, then the defender has the right to expel the intruder and restore the integrity of his domain. The underlying image is that of a state of warfare. An aggressor's violation of our rights is akin to an intrusion of foreign troops on our soil. As we are inclined to believe that any community has the absolute right to expel foreign invaders, any person attacked by another should have the absolute right to counteract aggression against his vital interest" (at 860).

foundational role of identity, a woman ought to be allowed to invoke a claim of self-defence where some identity - defining feature of her self is imperiled.¹²³⁷

A consequence of the right to defend oneself against identity - based threats is the right to use deadly force to safeguard one's dignity, which is a necessary precondition of the autonomous exercise of one's powers of self - authorship. This does not suggest that any assault on dignity warrants self-defence.¹²³⁸ It could be said that by synthesizing these two accounts, dignitary assaults justify self-defence only when they threaten to subordinate (or perpetuate the subordination) of the victim to her attacker.¹²³⁹

If self-defence were based wholly upon the rationale of individual's autonomy which requires an individual to take reasonable measures, then retreat must be the means available for warding off an attack wherever possible. As a rule there is no duty to retreat in South African law.¹²⁴⁰ Protecting the legal order is not limited to preventing wrongful acts but comprises protecting all of society's legitimate interests, including

¹²³⁷ Sepinwall supra (n 1205) 37.

¹²³⁸ Sepinwall supra (n 1205) at 381-382 notes that Hobbes and Locke differ in the scope of self-defence that they would permit: Hobbes supra (n 1015) explicitly denies a right to self-defence when the attack threatens one's dignity, rather than one's body: "[A] man receive words of disgrace,... and is afraid, unless he revenge it, he shall fall into contempt, and consequently be obnoxious to the like injuries from others; and to avoid this breaks the law, and protects himself for the future...This is a crime: For the hurt is not Corporeall, but Phantastical" (at 91). However Locke's supra (n 1015) account is more permissive as he argues that anyone who risks subordination may avail himself of the right to self-defence: "I have reason to conclude that he who would get me into his Power without my consent, could sue me as he pleased, when he had got me there, and destroy me too when he had a fancy to it...To be free from such force is the only security of my Preservation... It is Lawful for met to treat him, as one who has put himself into a State of war with me, i.e. kill him if I can; for to that hazard does he justly expose himself" (at 278).

¹²³⁹ Sepinwall supra (n 1205) 381-382.

¹²⁴⁰ See further duty to retreat at 246-251 supra.

those of the assailant. The theory of forfeiture of rights is no longer accepted, and the assailant does not lose all of his rights in a situation of self-defence.¹²⁴¹

Self-defence requires an unlawful attack, and it places the protection of autonomy of the abused woman and the protection of the legal order against the infringement of the autonomy of the attacker. Necessity does not require an unlawful attack, and places the protection of the defender's autonomy against the infringement of the victim's autonomy and injury to the legal order. If the victim has to relinquish a legitimate interest (to save an interest of greater value), then this indicates that the legal order does not provide complete protection for autonomous spheres. If protecting the legal order meant absolute prevention from infringement of autonomy, then the defence of justifiable necessity would not be recognized as a defence to criminal liability. On the other hand, harming a vital interest for the sake of preventing unlawful harm to a minor interest disrupts the legal order, as it expresses contempt for the vital interest. The rationale of protecting the legal order thus requires proportionality in self-defence. It would thus appear that self-defence is founded upon two rationales: protecting autonomy, which does not require proportionality, and protecting the legal order, which requires proportionality. It is submitted that in South African law, self-defence requires proportionality.¹²⁴² This approach would be consistent with the universal view of the proportionality requirement, as found in English law, American law and South African law.¹²⁴³

¹²⁴¹ Kremnitzer and Ghanayim "Twenty-five years of George P. Fletcher's Rethinking Criminal Law: Proportionality and the Aggressor's Culpability in Self-Defense" (2004) University of Tulsa Law Review 875 at 882-883.

¹²⁴² Kremnitzer and Ghanayim *supra* (n 1241) 892-893. See also Uniacke *supra* (n 759) at 157 who stipulates that whether self-defence is permissible depends on whether the force used was necessary and proportionate.

¹²⁴³ For a discussion of the proportionality requirement see chapter 2 at 56-58 *supra* (South African Law); chapter 3 at 118-120 *supra* (English Law) and chapter 4 at 200-204 *supra* (American law).

5.2.2.1.1.3 A duty of social solidarity

It should be noted that every individual in society is under a duty of social solidarity. This duty does not directly originate from the rationales of self-defence. But, such a duty does not constitute a legal policy consideration deriving from the nature of criminal law, but from a human law. The demand for proportionality in self-defence is necessitated by the humane nature of criminal law. Human criminal law cannot permit killing a thief. Any other approach would be inhumane, as it would not permit appropriate weight to the value of human life and would comprise the dangerous implication that property can be preferred over human life. The duty of social solidarity that leads to the narrowing of the scope of self-defence (i.e. by requiring proportionality) expresses social-ethics considerations and principles of human criminal law that apply to self-defence.¹²⁴⁴

Kremnitzer and Ghanayim illustrate this by means of the approaches of Kant and Hegel to self-defence and justifiable necessity. Kant does not recognize the utilitarian justifiable necessity as a defence to criminal liability. In a situation of necessity, the actor's attack is wrongful, even where we are concerned with saving a life at the expense of damaging property.¹²⁴⁵ Kant also does not recognize the duty of social solidarity that obliges every person to assist a person who is in danger. In a situation of necessity, the duty of solidarity derives from moral theory. Such an obligation is not legally enforceable. Kant views retreat as a form of relinquishing and negating self-defence¹²⁴⁶ and the right to self-defence is not conditional upon proportionality, that is,

¹²⁴⁴ Kremnitzer and Ghanayim supra (n 1241) 894.

¹²⁴⁵ Kremnitzer and Ghanayim supra (n 1241) 894-895, discussing Kant The Metaphysics of Morals (1991) (reprint of original) 60.

¹²⁴⁶ Kant supra (n 1245) at 253.

it cannot be lessened due to considerations of proportionality. If the legislature does so, the narrowing of the defence is unjustified.¹²⁴⁷

Hegel accepts the duty of social solidarity imposed upon every citizen, and recognizes justifiable necessity. Because Hegel views man as a social being who is under a legal duty of social solidarity, the demand for proportionality in self-defence is consistent with his approach, even if not explicitly stipulated. Thus based on these two views, if Kant had recognized social solidarity as a general legal duty (and not merely a moral duty), he would have recognized justifiable necessity as a defence to criminal liability and opens the door to limiting self-defence by a proportionality requirement. Furthermore, Kant recognizes a moral, as opposed to a legal obligation of social solidarity since he assumes the viewpoint of a rational, intelligent person, who is willing to help his fellow man. Therefore, there is no need for a legal duty of social solidarity. Kant's perspective is that of the ideal man, which does not reflect actual man.¹²⁴⁸ It is submitted that from an ordinary person's point of view (who does not necessarily constitute an ideal or rational being), a nominal obligation of social solidarity should be recognized as a general legal obligation, and thus utilitarian-based necessity and proportionality in self-defence should be recognized.¹²⁴⁹

5.2.2.1.1.4 Proportionality and constitutional considerations

The demand for proportionality can also be based upon constitutional considerations. In

¹²⁴⁷ Kremnitzer and Ghanayim supra (n 1241) 894-895.

¹²⁴⁸ Kremnitzer and Ghanayim supra (n 1241) 896.

¹²⁴⁹ Kremnitzer and Ghanayim supra (n 1241) at 895, discussing Hegel's viewpoint in Philosophy of Right (1952) (reprint of original) 85-86.

South African law where a modern constitution has been adopted,¹²⁵⁰ fundamental human rights are not limited to negative rights, but also positive rights in the sense that a person can demand that the state guarantee his fundamental rights, and the state is obliged not only to respect those rights, but also to actively protect them.¹²⁵¹ The more important a fundamental right, the more comprehensive the protection of that right.¹²⁵² Thus the battered woman's attacker does not lose his fundamental rights in a situation of self-defence.¹²⁵³ Her attacker is entitled to the constitutional protections offered by the state.¹²⁵⁴

In a case of self-defence, the main concern is the prevention of an unlawful harm to the legitimate interests of the abused woman by means of harming the interests of her abuser. From this standpoint (and that of the state), self-defence presents a conflict between the state's duty to protect the legitimate interests of the battered woman and its duty to protect the interests of her abuser. Therefore, the right of the victim to defend himself, as a right derived from the state's duty to protect the legitimate interests of individuals, cannot be unlimited. The choice presented by the state's duty must find its expression in a compromise intended to supply reasonable protection of the legitimate interests of both the battered woman and her victim (with consideration given to

¹²⁵⁰ Constitution of Republic of South Africa 1996. English law contains no constitutional declaration of fundamental rights. It is however a signatory to the European Convention on Human Rights.

¹²⁵¹ Section 7 (2) of Constitution of Republic of South Africa 1996 states: "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."

¹²⁵² See further Walters supra (n 126) which states that the rights to life, dignity and bodily integrity have been described as "collectively foundational to the value system prescribed by the Constitution" (at par [28]). Considered separately or as a cluster, they are the most important rights guaranteed by the Constitution. See further chapter 2 at 33-36 supra.

¹²⁵³ Ashworth Principles of Criminal Law 4th ed (2003) supports this view: "[T]here is little to commend the view that a criminal loses all his civil rights when he commits any offence (at 288).

¹²⁵⁴ As section 9 of the Constitution of the Republic of South Africa 1996 stipulates: (1) "Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms."

preserving the legal order). In terms of the actual constitutional protection of fundamental rights, it makes no difference whether we are looking at the assailant or the victim. However the scope of protection differs. Since the abuser is the one who unlawfully endangers the interests of the victim, and the victim is only warding off the assault, the unlawful attack is a consideration that weighs against the assailant. However, a consideration to the assailant's detriment does not translate into a total abandonment of proportionality that grants the victim an unlimited right to protect his interests, regardless of the cost to the abuser. Self-defence thus requires proportionality in the sense that the harm caused must not be disproportional to the harm prevented. Where we are considering endangering the abuser's life, we are concerned with preventing harm to the life or physical or sexual integrity of the victim. The demand for proportionality thus derives from the reasonableness requirements of a society's constitution.¹²⁵⁵ Moreover, self-defence is intended to preserve the legal order by granting every individual the right to ward off unlawful attacks. To protect the legal order is the state's duty, and it does so by means of its law enforcement agencies. The power to do so derives from the state's complete monopoly over the use of force. The right to employ force in self-defence is a right that is derived from the state's right and duty to maintain the legal order. Thus if the authority of state agencies to employ force is limited by the requirement of proportionality - then the right of an individual to employ force must similarly be limited in self-defence cases.¹²⁵⁶

5.2.2.1.1.5 Is there still a requirement of proportionality in South African law?

On the basis of the aforementioned discussion, proportionality should form an integral part of the requirements for self-defence. The test can be set out as follows: not only

¹²⁵⁵ See further Ashworth supra (n 1253) 142.

¹²⁵⁶ Kremnitzer and Ghanayim supra (n 1241) 899.

must the defence be necessary but also the means used by the accused for the purpose of averting the attack must be reasonable in the circumstances.¹²⁵⁷ This is in accordance with the autonomy theory. While it should be noted that South African law does not directly require that the defensive act be proportionate to the attack, it is qualified in the following manner: reliance on self-defence may fail in cases of extreme disproportionality.¹²⁵⁸ Furthermore, although the requirement has been expressed in different forms,¹²⁵⁹ the essence should remain the same: it is to be tested objectively. Therefore would an “ordinary, intelligent and prudent person in the accused’s situation would react to establish if the self-defence claim was reasonable?”¹²⁶⁰

However, it is this author’s submission that unlike the above formulation, not all the characteristics of the accused should be taken into account. Only those “characteristics which have the most (or direct) bearing on the accused’s situation” should be considered. It is submitted that Burchell and Hunt are incorrect in their assumption that “no single test is satisfactory and therefore all the factors must be taken into account in deciding whether in the circumstances of the particular case, the means used by the accused were reasonable and hence justified.”¹²⁶¹ The current objective test for self-defence is not totally devoid of subjective considerations and does take an abused

¹²⁵⁷ This formulation is currently utilized in South Africa and is set out in Burchell and Hunt supra (n 73) 277; R v Jack Bob supra (n 151) at 34; S v Mnguni supra (n 141) at 778; S v Van Wyk supra (n 133) at 499; 510; 515.

¹²⁵⁸ Reddi supra (n 1) at 271, citing S v T supra (n 97) at 34; S v Van Wyk supra (n 133) 498B.

¹²⁵⁹ For instance De Wet and Swanepoel supra (n 76) at 70 states that the means must not be more harmful than was necessary to avert the attack: R v Koning supra (n 141) at 233; whether the bounds of reasonable self-defence were exceeded: R v Mathlau 1958 (1) SA 350 (AD) at 355; 360; whether the accused exceeded the justifiable limits of defence: Ntanjana v Vorster and Minister of Justice supra (n 214) at 407.

¹²⁶⁰ R v Patel supra (n 201); S v Van Antwerpen (1976) (3) SA 399 (T); S v Motleleni supra (n 140); S v De Oliviera supra (n 141). S v T supra (n 97).

¹²⁶¹ Burchell and Hunt supra (n 84) 278.

woman's situation into account. For the purposes of this enquiry these factors will include the battered victim's actual history of abuse (including physical force exerted by the initial aggressor at the time or any prior displays of force, physical¹²⁶² or psychological,¹²⁶³ made by the initial aggressor)¹²⁶⁴ as well as the prior conduct of the abused woman¹²⁶⁵ and the relative size and strength of the parties,¹²⁶⁶ as well as other contextual factors.¹²⁶⁷ Furthermore, notice should be taken of the potential risks to the abused women in not acting as she did, and whether less drastic options¹²⁶⁸ were available to her at the time. In doing this, assessment must be made of the possibility that the initial aggressor would in fact have been stopped by a show of physical force

¹²⁶² Rosen supra (n 21) submits that evidence of surrounding circumstances should not be limited to the time immediately preceding the killing. Prior specific acts of violence should be admissible as well as the victim's general reputation for violence (at 38). Additional physical evidence or testimony confirming her account would be more persuasive. Emergency room records might confirm her claim of escalating violence or police reports (at 71-72).

¹²⁶³ Psychologist Harriet Goldhor Lerner has written about the ways in which people engage in see-saw games with each other, creating a potentially perpetual flow of angry reactions that never result in a positive change. Whenever one person makes a move to rebalance the see-saw, there is a countermove by the other party. The person who seeks to move to a new level of maturity, independence or self-assertion is almost certain to meet opposition from the other person in the relationship, who, no matter how well-intentioned, will feel anxiety about the change and the potential loss of the familiar. (Lerner The Dance of Anger (1985) 25-26, cited in Cook "Transforming the Story of Property Acquisition in Sexual Harassment Case into a Feminist Castle Doctrine" (1999) Virginia Journal of Social Policy and the Law 200 at 306).

¹²⁶⁴ Ntanjana v Vorster supra (n 214) at 409.

¹²⁶⁵ Labuschagne supra (n 1132) 168 who notes that this is relevant to the question of whether the bounds of self-defence have been exceeded. Cf S v Van Wyk supra (n 133) at 500-501.

¹²⁶⁶ Rosen supra (n 21) stipulates a list of factors which include: (1) her smaller size, socialization regarding passive attributes of femininity, and poor physical training. Therefore, it is perfectly reasonable for a woman to believe an unarmed man may be able to kill her. (2) A woman may reasonably feel the need to use a weapon to protect herself from an unarmed assailant (at 38).

¹²⁶⁷ Dutton supra (n 1225) posits a list of specific contextual factors that influence the battered woman: (1) fear of retaliation; (2) the economic (and other tangible) resources available to her; (3) her concern for her children; (4) her emotional attachment to her partner; (5) her personal emotional strengths, such as hope and optimism; (6) her race, ethnicity, and culture and (7) and her perception of the availability of social support (at 1232). It is submitted that Dutton is wrong to include her emotional and mental vulnerabilities in this list.

¹²⁶⁸ Cook supra (n 1263) at 308.

no greater than that exerted by him.¹²⁶⁹ Therefore, if these avenues were available but were not resorted to, the abused woman's conduct is unlawful and her defence will fail.¹²⁷⁰

If the abused woman exceeds the bounds of reasonable self-defence and kills her abuser, she may be found guilty of culpable homicide despite the fact that the killing was intentional.¹²⁷¹ But where the excess is immoderate, a verdict of murder will be returned.¹²⁷²

5.2.2.2 Duty to retreat

On the basis of the two rationales underlying self-defence in South African law, the question remains as to whether an abused woman is required to retreat from her home.

¹²⁶⁹ Reddi supra (n 1) 271.

¹²⁷⁰ Proportionality could further be satisfied on the basis that she attempted to obtain help from the police and family and friends on numerous occasions, but to no avail (Schopp, Sturgis and Sullivan supra (n 844) 71-72). In situations where help was elicited but failed, and the battered woman decides to stay, Mahoney's seminal article "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) *Michigan Law Review* 1 at 65-66 recognizing separation assault should be considered by the courts. This constitutes an attack on the woman's volition and body where her abuser seeks to prevent her from leaving, retaliate for the separation, or force her to return. It is an attempt to gain, retain, or retain power in the relationship. Thus separation tends to trigger escalated violence. While the issue of whether violence will ultimately follow the threat or departure will depend on the men with whom the woman is involved with, such separation always carries with documented certainty a high risk (at 58).

¹²⁷¹ Burchell and Hunt supra (n 84) 278. Cf R v Molife 1940 A.D 202 at 204-205; R v Koning supra (n 141) at 232-233; R v Mathlau supra (n 1259) 350. Burchell and Hunt supra (n 84) at n 67 go on to note De Wet and Swanepoel's supra (n 76) at 139 criticism in this respect: "South African common law does not justify a verdict of culpable homicide where the killing is intentional, and further it blurs the distinction between murder and culpable homicide."

¹²⁷² Burchell and Hunt supra (n84) 278. Cf R v Koning supra (n 141) at 233: " 'whether...the force used was so excessive, the shooting so premature' that the crime was murder 'or whether the facts show that what happened was an error of judgment.' "

According to the upholding of justice theory, if in the event of an unlawful attack, it is possible for the defender to flee from the attacker without the defender giving up her or another's protected interest, and without exposing herself to harm, the defender has no duty to flee.¹²⁷³ A duty to flee negates the essence of private defence. Private defence deals with the defence of the legal order, that is the upholding of justice. Fleeing does not constitute a defence but a "capitulation to injustice". Justice need not yield to injustice.¹²⁷⁴ When acting in private defence, the defender acts as one who upholds the law, since the state authority is not present to protect her.¹²⁷⁵ Thus the issue is not balancing the value of autonomy against the value of the aggressor's life, but whether the defender enjoys autonomy at the outset. If this is the case, then the notion of autonomy entails a right forcibly to reassert one's rightful position.¹²⁷⁶

Despite these rationales underlying self-defence, South African law is still not clear on whether the attacked party is expected to flee. Case law creates the impression that in such circumstances, the person should flee.¹²⁷⁷ It may be that under the influence of Anglo-American law, our law expects the attacked party to flee, in order to avoid the

¹²⁷³ This view accords with the view propounded in German criminal-law theory. See Leckner and Perron *supra* (n 978) at par 40; Roxin Strafrecht Allegeiner Teil Band (1994) 553-554; Jakobs Strafrecht allgemeiner Teil Die Grundlagen und die Zurechnungslehre (2001) 395-396, cited in Snyman *supra* (n 124) 184. For a discussion of the duty to retreat in South African law see chapter 2 at 53-55 *supra*, English law, chapter 3 at 120-122 *supra*; American Law, chapter 4 at 198-199 *supra*.

¹²⁷⁴ Snyman *supra* (n 124) 184.

¹²⁷⁵ This view is supported by authors such as Snyman *supra* (n 25) 107.

¹²⁷⁶ Snyman *supra* (n 124) 184, citing Fletcher *supra* (n 544) 865.

¹²⁷⁷ See R v Zikalala *supra* (n 151) 571-572; R v K *supra* (n 151) at 358g; R v Patel *supra* (n 201) at 123; S v Mnguni *supra* (n 141) at 779 A; S v Dougherty *supra* (n 223) at 50. Snyman *supra* (n 124) at n 21 is of the view that the reason for this could be that the court did not believe that the threat was imminent. However, the author goes on to suggest that the latter case has been held to be wrongly decided as it was a classic case of self-defence. Furthermore, Roman-Dutch law supported the proposition that the duty to flee exists even if no danger in retreating. Matthaues *supra* (n 244) 48 5 37; Moorman *supra* (n 245) 22 n 13. But as the case of Bird *supra* (n 551) at 513 suggests "Although the duty to retreat is not strict, it is not premised on persistent, systematic, relational violence".

attack.¹²⁷⁸ English law has expressed this sentiment well: in R v Julien,¹²⁷⁹ the court held “duty to flee in reality amounts to a duty to demonstrate an unwillingness to fight.. to temporize and disengage and perhaps to make some physical withdrawal”. Smith and Hogan submit: “if the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force”¹²⁸⁰ and in R v Bird¹²⁸¹ it was decided that in English law there is no rule that forces the attacked party to flee, but that the question whether she could have fled is one of several factors that are taken into account in deciding whether the defensive action was necessary, and whether the extent of the defence was reasonable. Snyman submits that in respect of American law: “[I]n some jurisdictions, a person may not use deadly force against an aggressor if he knows that he has a completely safe avenue of retreat.¹²⁸² However, most states do not recognize such a rule to flee”.¹²⁸³

¹²⁷⁸ Snyman supra (n 124) 184.

¹²⁷⁹ [1969] 2 All ER 586.

¹²⁸⁰ Snyman supra (n 124) 184, citing Smith and Hogan Criminal Law (1999) 257.

¹²⁸¹ Bird supra (n 551).

¹²⁸² Snyman supra (n 124) n 22, citing Dressler Understanding Criminal Law (1995) 304. Nineteen states follow this rule. Similarly, the Model Penal Code sides with these states requiring actor using deadly force to believe such force is necessary to protect himself against death serious bodily injury, kidnapping or sexual intercourse compelled by force or threat (MPC Code and Commentaries ss 3.04 (2) (b)).

¹²⁸³ Snyman supra (n 124) 184. Certain American states that do require a duty to retreat do recognize the castle doctrine exception: it is possible to stand your ground and fight when attacked in your home even if it is not known whether safe retreat is possible. Thus the castle doctrine recognizes the importance of the sovereign person’s ability to retain control of the single place in the world that is most clearly her own, not necessarily in the sense that the individual holds title to it, but rather in the sense that it is the place in which that person’s decisions and actions are least susceptible to intrusion from the requirements of others (See in Smith “State v Gartland: New Jersey Leaning Toward a more Lenient Application of the Duty to Retreat as it Affects Battered Women who kill their Partners” (1999) Women’s Rights Law Reporter 173 at 178. Aggergaard in “Criminal Law – Retreat from Reason: How Minnesota’s New No-Retreat Rule Confuses the law and cries for alteration” (2002) William Mitchell Law Review 657 at 665 suggests: “acting in necessity as a vindication of autonomy manifests itself most visibly in the castle doctrine”).

Blackstone's view is that the state is the upholder of individuals' rights has displaced the premise of personal autonomy as the appropriate defence of self-defence.¹²⁸⁴ Blackstone did this by rejecting Locke's analogy between combat and necessary defence.¹²⁸⁵ Beale however, has noted that the law's task is to provide the aggrieved party a remedy for the violation of their rights and this does not include protecting the aggressor's rights. If the right to use force is derivative of the state's control of force, then regulating the defence consistently reflects the interests both of the aggressor and the defender.¹²⁸⁶

One suggestion in respect of the duty to retreat is to recognize putative self-defence. However, it is submitted that by recognizing battered woman syndrome as being pertinent to the question as to why the battered woman did not retreat, other factors will also have to be taken into account to satisfy the court that she had no option but to act in a particular way.¹²⁸⁷ Such a standard is functionally equivalent to the subjective standard,¹²⁸⁸ which is in clear contradiction to the view that reasonableness must be facially neutral.¹²⁸⁹

A comparable argument could be made for the fact that the duty to retreat must, from an objective viewpoint, be necessary. Where an attack is not imminent, the battered

¹²⁸⁴ Fletcher *supra* (n 544) 867.

¹²⁸⁵ Blackstone *supra* (n 506) 180-181; 185. To quote Blackstone *supra* (n 506) 185: "And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour; because the king and his courts are the *vidices injuriarum*, and will give to the party wronged all the satisfaction he deserves".

¹²⁸⁶ Beale "Retreat from Murderous Assault" (1868) Harvard Law Review 567 at 581.

¹²⁸⁷ This refers to *vis compulsiva* as opposed to *vis absoluta* (i.e. automatism).

¹²⁸⁸ Heller *supra* (n 795) 94-95.

¹²⁸⁹ Unikel *supra* (n 906) 329-330.

woman is required to retreat. Such a position does not take into account the fact that a battered woman is more likely to be killed by her abuser when she leaves an abusive relationship¹²⁹⁰ and that women who flee often have no safe place to go.¹²⁹¹

It is submitted that the duty to retreat requirement should be maintained in self-defence law. In the case of the battered woman it is submitted that a battered woman's situation can be adequately catered for within the reasonableness neutrality perspective. Fletcher submits that since the requirement of imminence is political rather than moral, the element of self-defence known as an imminent attack must actually occur in the real world. This theorist has noted that the relationships between the parties, whether one is dominant and the other subordinate, should not matter. However, Fletcher goes on to note that where there is a gap between the theory of state protection and the abused woman's reality of the police's unresponsiveness, it essentially becomes more difficult to assess whether the courts should be required to recognize a broader than usual right of self-defence. The problem is to formulate a precise test of how poorly the police have failed in their duties and to determine a proportionate adjustment in the law of self-defence. On this basis, Fletcher's admits that the contention that the underlying relationship of dominance and subordination should not bear on the analysis of self-defence as justification is weak.¹²⁹²

As has been submitted previously courts have difficulty in seeing confrontational cases as confrontational because of the normative assumptions about what parties'

¹²⁹⁰ Aggergaard *supra* (n 1283) 671.

¹²⁹¹ Walker *supra* (n 3) submits that a woman who is repeatedly battered by her mate will eventually accept the situation and develop a feeling of learned helplessness (at 87). This psychological paralysis can be so severe that even if an avenue of escape presents itself the woman might be unable to act on it or unable to even perceive it exists.

¹²⁹² Fletcher *supra* (n 1003) 571.

relationships entails, the structure of the parties' relationships determines the post hoc view, the objective view not only of the temporal transactions but also of its confrontational character.¹²⁹³ As Snyman suggests, the question on whether there is a duty to retreat is academic since in practice the question at issue will usually not be whether the person should have fled, but whether she was entitled to go to the lengths she did in defending herself, in light of the surrounding circumstances, such as the nature of the threat and of the attacker's weapon (if he had one), the nature of the interest threatened and the ages and physical powers of the respective parties.¹²⁹⁴ Thus by recognizing the number of attempts made to escape her abuser as well as the issue of separation assault, the court can view the threat as continuous, not from the abused woman's view but objectively speaking.¹²⁹⁵

5.2.2.3 Defence must be directed against the attacker

If the battered woman, defending herself against her abuser's attack, accidentally assaults a third party in the process,¹²⁹⁶ it is submitted that the battered woman could justify her act on the ground of necessity,¹²⁹⁷ and furthermore could escape liability if

¹²⁹³ Nourse supra (n 1181) 1268. Schneider supra (n 71) at 523 submits: "[B]ut these cases challenge that dichotomy in fundamental ways, because they require us to understand a more complex version of social reality, a reality where choice is constrained by social experience, failure of state responsibility, and allocation of social resources. Traditional notions of individual agency and free will must be tempered by recognition of social circumstance, of situation, of the moral relations of domination". The author goes on to state that: "A more textured and contextual analysis of the interrelationship between women's oppression and women's acts of resistance are crucial, for we must understand both social context of women's victimization, or oppression, which shapes women's choices and constrains women's agency and resistance, and also recognize women's agency and resistance in a more nuanced way".

¹²⁹⁴ Snyman supra (n 25) 107-108.

¹²⁹⁵ See n 1035 supra.

¹²⁹⁶ See also chapter 2 at 58 supra.

¹²⁹⁷ For an approach replacing imminence with a necessity standard see 277-280 supra.

she lacked mens rea in respect of the assault upon another person.¹²⁹⁸

5.3 Conclusion

The purpose of this enquiry has been to examine the development and the functioning of self-defence in light of a comparison with the means currently utilized to criminalize conduct falling outside the bounds of self-defence: by examining English law and American law on this subject. Threshold problems with some of the elements of the defence have led to theorists attempting to extend the bounds of self-defence so as to take an abused woman's situation into account. It is submitted that since the autonomy theory (narrowly circumscribed)¹²⁹⁹ should be followed in South African law, the traditional elements for self-defence should remain in force.

These include an objective test for self-defence.¹³⁰⁰ A move towards subjectivized standards has proved to problematic¹³⁰¹ and taken to its ultimate conclusion, will result in a normative concept of fault.¹³⁰² In respect of the imminence requirement, the problems created by this standard cannot be solved by replacing imminence with necessity¹³⁰³ or by claiming priority for necessity or by demanding that imminence means a pacifist rather than the libertarian version of necessity.¹³⁰⁴ These positions pose the question but do not answer it. Furthermore, if the imminence question cannot be answered by assuming one side of the necessity debate, then it cannot be answered by

¹²⁹⁸ Burchell and Milton supra (n 26) 142-143.

¹²⁹⁹ In this respect see 242-254 op cit.

¹³⁰⁰ See 271-273 for an exposition of what this test would include.

¹³⁰¹ For a criticism of these subjective standards see 246-261 op cit.

¹³⁰² See 267-270 for a discussion of the implications of moving towards a normative concept of fault.

¹³⁰³ See 277-280 op cit.

¹³⁰⁴ See 287-289 op cit.

referring to the distinction between justification and excuse.¹³⁰⁵ It is submitted that “instead of viewing objectivity as not being able to account for battered woman’s situation – the opposite conclusion should be reached – that by rethinking certain situational factors as a set of relatively innocuous and perhaps necessary normative propositions¹³⁰⁶ then the abused woman’s situation is consistent with some very standard propositions in the law of self-defence. If the abused woman is being attacked and the threat is imminent (in the traditional sense), then she should be able to avail to herself of self-defence, although it should be noted that the court should also consider the fact that the battered woman placed herself in this dangerous situation. However, the court would also have to take into consideration the difficulty that the abused woman faced in extricating herself from this position.¹³⁰⁷

On the basis of a discussion of the various construals that inform the question of whether proportionality should form a necessary requirement for self-defence, including (i) the liberal aspiration to neutrality,¹³⁰⁸ (ii) constitutional norms¹³⁰⁹ and (iii) a duty of social solidarity to the state,¹³¹⁰ it is submitted that proportionality should form an integral part of the requirements for self-defence. The test can be set out as follows: not only must the defence be necessary but also the means used by the accused for the purpose of averting the attack must be reasonable in the circumstances.¹³¹¹ This is in accordance with the autonomy theory. Therefore would an “ordinary, intelligent

¹³⁰⁵ See 289-290 *op cit*.

¹³⁰⁶ See 291-292 *op cit*.

¹³⁰⁷ *Ibid*.

¹³⁰⁸ For a discussion of the liberal aspiration to neutrality see 293-303 *op cit*.

¹³⁰⁹ For a discussion of the impact of constitutional norms see 259-261 *op cit*.

¹³¹⁰ For a discussion of the duty of social solidarity see 304-305 *op cit*.

¹³¹¹ Burchell and Hunt *supra* (n 84) 277.

and prudent person in the accused's situation would react to establish if the self-defence claim was justifiable.¹³¹² However, it is this author's submission that unlike the above formulation, not all the characteristics of the accused should be taken into account. Only those "characteristics which have the most (or direct) bearing on the accused's situation" should be considered.¹³¹³

Despite the rationales underlying self-defence,¹³¹⁴ it has not been entirely clear whether an abused woman is expected to flee.¹³¹⁵ It is submitted that there should be a duty to retreat. In the case of the abused woman, her situation is adequately catered for within the reasonableness neutrality perspective.¹³¹⁶

5.4 Analysis of the defence of non-pathological incapacity

5.4.1 Introduction

The question concerning what the precise effect of provocation will be on an accused's criminal liability is not entirely clear. One of the reasons for this uncertainty is the fact that since 1971 there are no correctly reported cases in which the South African courts have expressly answered this question: it has to be assumed that provocation is currently dealt with by means of the general principles approach to criminal liability.¹³¹⁷ According to this approach, provocation is nothing more than a set of facts which has to be assessed by means of ordinary principles of liability. The question

¹³¹² See n 1260 op cit.

¹³¹³ See 271-273 for a discussion of which factors ought to be taken into account.

¹³¹⁴ For a discussion of these rationales see 311-312 op cit.

¹³¹⁵ See 310-315 op cit.

¹³¹⁶ For a discussion of this point see 313-314.

¹³¹⁷ Snyman "Die erkenning van objektiewe faktore by die verweer van provokasie in die strafreg" (2006) Tydskrif vir Regwetenskap 57 at 58 (own translation).

which has to be asked is whether, in spite of the provocation, the accused has committed an unlawful act which complies with the definitional elements and furthermore, whether she has criminal capacity and intention or negligence. Only once these requirements have been satisfied, can an accused be convicted of a criminal offence.¹³¹⁸

One of the main problems underlying the defence of non-pathological incapacity is the issue of lost self-control. According to South African law, capacity is absent when an accused lacks self-control.¹³¹⁹ However, it is far from clear in our law when self-control is absent:

“[t]he lack of clarity (surrounding lost control) has been exacerbated by confusing decisions of our courts. This is partly a result of the defence of incapacity, particularly its extension to cases involving provocation and mental stress, and partly a result of its application in practice.”¹³²⁰

It is submitted that the main reason for the problems surrounding this term has been the courts equation of the defence of automatism with non-pathological incapacity (or loss

¹³¹⁸ Snyman supra (n 25) 235 (own translation).

¹³¹⁹ S v Chretien supra (n 97) 1104; 1106F-G.

¹³²⁰ Louw supra (n 28) 207. Even theorists have differing views on what constitutes lost self-control. Visser and Vorster supra (n 197) submit that provocation may cause a person to become so angry that he: “loses all self-control and becomes so blind with rage that he cannot distinguish between right and wrong or act in accordance with such a distinction. In such a case... the accused will not be criminally accountable” (at 397). These writers seem to adopt the view that self-control is not an independent prerequisite for a defence of provocation but rather that a loss of self-control is indicative of a lack of imputability on the part of a provoked person. Similarly Burchell and Milton supra (n 26) employed the term “loss of self-control” in the context of provocation, but do not clearly set out the meaning of this term. Ackermann in A comparative Examination of the extent to which the South African and English legal systems recognize the Defence of Provocation in Homicide Cases (1993) LLM 40 suggests that since these textbook writers dealt with the issue of provocation under the heading of “capacity” it may be that in their view loss of self-control is equated with lack of imputability. Burchell supra (n 29) makes no reference to the term loss of self-control at all.

of self-control). This trend is clearly demonstrated in our case law and is now to be examined.

5.4.2 “Loss of self-control” and current South African case law

Consider the way case law has defined capacity: according to the formulation in section 78(1) of the Criminal Procedure Act,¹³²¹ namely the ability to act in accordance with the distinction between right and wrong.¹³²² Others have adopted Joubert JA’s formulation of the notion of capacity in Laubscher,¹³²³ which states that this ability is premised on the fact that the actor had the capacity for self-control (“weerstandskrag/wilsbeheervermoë”) such that he can resist the temptation to act unlawfully.¹³²⁴ Joubert JA also submitted another way of describing the capacity: the ability to exercise a free choice to act lawfully or unlawfully.¹³²⁵ The notion of capacity for self-control or ability to exercise a free choice to act lawfully or not, derived from the Rumpff Commission Report forms the basis for the description of conative capacity

¹³²¹ Act 51 of 1977.

¹³²² Hoctor supra (n 242) 159. See further Hoctor supra (n 242) at n 401 who makes reference to the cases of S v Lesch supra (n 309) at 823B; S v Campher supra (n 320) at 966D-E; S v Kalogoropoulos supra (n 337) at 17C; S v Els 1993 (1) SACR 723 (O) at 735C; S v Shapiro supra (n 68) 123E-F; S v Pederson 1998 (2) SACR 383 (N) at 397, 399-400A; S v Kali [2000] 2 All SA 181 (Ck) at 204H.

¹³²³ S v Laubscher supra (n 68) 166I-J.

¹³²⁴ Hoctor supra (n 242) 159-160:“...that he had the self-control to avoid the temptation to act unlawfully”. deurdad hy die weerstandskrag (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan’ (ibid) (“he had enough self-control to avoid the temptation to act unlawfully”) (own translation).

¹³²⁵ The full expression is “hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil” (“he had free will to choose whether to act lawfully or unlawfully). Hoctor supra (n 242) 49 at n 403 submits that the concluding phrase “onderworpe aan sy wil” (“subject to his will”) is redundant, and if incorrectly regarded as making reference to the voluntariness requirement, may further be the source of some confusion. The statement is entirely clear in meaning, and does not require any further qualification-after all, if the accused’s acts are not subject to his will, then he simply is not acting for the purposes of criminal liability.

in many judgments. Some judgments cite the dictum in Laubscher,¹³²⁶ others employ the terminology of “weerstandskrag”,¹³²⁷ others make reference to “wilsbeheervermoe (of weerstandsvermoë)”,¹³²⁸ and others make use of “die vermoë...om ooreenkomstig daardie onderskeidingsvermoe to handel deur die versoeking om wederegtelik op to tree te weerstaan”.¹³²⁹ Various judgments have also worded the description of conative capacity a little differently, focusing on whether the accused had the capacity to exercise restraint or control over his actions.¹³³⁰

Such definitions create the impression that battered women can only rely on the defence of non-pathological incapacity if they lacked total capacity/or totally lost self-control. This is problematic for battered women since response patterns demonstrated by these women suggest that they did not lose self-control when acting:

“[B]attered women appear calm during and after the killing and they generally use a weapon to strike the victim in stealth. Furthermore, the method of killing may be influenced by gender specific norms. For instance, their superior physical strength and training is more likely to make men use their fists

¹³²⁶ Hoctor supra (n 242) 160, who cites the cases of S v Wiid supra (n 333) at 563F-J and S v Van der Sandt supra (n 337) at 635E-I in this regard.

¹³²⁷ Hoctor supra (n 242) 160, citing S v Lesch supra (n 309) 823H and S v Campher supra (n 320) 949G, 950H-I, 951F-G, 956B.

¹³²⁸ Hoctor supra (n 242) 160, citing S v Van der Merwe 1989 (2) PH H 51 (A).

¹³²⁹ Hoctor supra (n 242) 160, citing S v Calitz supra (n 330) 128E-F.

¹³³⁰ Hoctor supra (n 242) 160. See also Hoctor supra (n 242) at n 410: S v Ingram 1995 (1) SACR 1 (A) at 4F, 7B-C, 8B-C. In S v Van Vuuren supra (n 26) at 17G the court cites Chretien supra (n 97) dictum at 1106, where the enquiry is whether the accused’s inhibitions had “wesenskaplik gekrummel” (“essentially crumbled”); in S v Adams 1986 (4) SA 882 (A) at 903D the court holds that “the accused’s inhibitions were completely disintegrated”; in S v Nursingh supra (n 339) at 338H-I that the accused’s rage was “irrational, unthinking and blind to all restraint”; and in S v Moses supra (n 347) the court accepted the expert evidence that the accused’s rage had “collapsed his controls” (at 709G-H) and impaired his “capacity to retain control” (at 710H-I) In S v Campher supra (n 320) at 957H-I, Viljoen JA refers to the accused’s defence as “onweerstaanbare drang” (‘irresistible urge or impulse’), which he elaborates on at 958I: “..die remmende effek teen of inhibering van die drang om die monster...te vernietig, heeltemal meegee het” (“the braking effect against or inhibition of the urge to destroy the monster completely gave way”) A more generic loss of self-control is referred to in S v Kalogoropoulos supra (n 337) at 24A, 26A; and S v Gesualdo supra (n 337) at 75B, 77G.

when angry. Women act with stealth because of smaller size, lesser physical strength and lack of physical training in fighting with their hands".¹³³¹

The way that case law has developed in South African law suggests that any goal-directed activity on the part of the accused militates against a loss of self-control and for this reason an accused's defence would fail if such activity was present.

In S v Lesch¹³³² the accused held in evidence that while he knew he was shooting the deceased, that he realized this to be wrongful but that he was too angry to act in conformity with that realization.¹³³³ The defence failed on the facts. Hattingh AJ held that the behaviour of the accused had been too rational throughout for the court to accept that the accused could not have refrained from killing the deceased had he wished to.¹³³⁴

The set of facts in Campher¹³³⁵ also suggest (despite prior abuse of the accused by her husband (the deceased) that goal-directed behaviour took place. The accused had to help the deceased fit a bolt-lock to his pigeon coop while he bored a hole in the wooden doorframe. Since she was in an extremely uncomfortable position, the hole was not bored straight which enraged the deceased, who threatened the accused with a screwdriver. She fled to their house, but he followed her to prevent her from locking

¹³³¹ Yeo supra (n 636) 453.

¹³³² S v Lesch supra (n 309). In this case the accused had an unusually offensive neighbour (the deceased) who made a habit of threatening and insulting the accused and more particularly his daughter, towards whom the accused had exceptionally tender feelings (at 817H-818A). On the day of the crime the deceased insulted and threatened the accused's daughter. She informed the accused of this telephonically. He came home, armed himself with a firearm, and went to the deceased to confront him concerning his behaviour. The deceased spoke rudely and aggressively to the accused. The accused fired one shot at the deceased. The deceased fell. The accused fired three more shots. The deceased died, and the accused asked a neighbour to take him to the police.

¹³³³ S v Lesch supra (n 309) 819A-B.

¹³³⁴ S v Lesch supra (n 309) at 825A-G.

¹³³⁵ S v Campher supra (n 320).

him out. She armed herself with a pistol. Despite this, the deceased forced her back to the pigeon coop. She went there still armed with the pistol and after the deceased had berated her, she fired a shot at a distance of 20 centimeters from the deceased, and the bullet entered his heart from behind. The problem with this case is that Viljoen JA was prepared to make a finding despite the fact that no expert evidence regarding the accused's mental condition when she killed the deceased had been led. While Viljoen JA concluded that a defence of non-imputability is not restricted to conditions stemming from mental illness or defect, but includes cases where accused suffered from a temporary mental aberration as a result of fear or emotional stress, the problem is the time period when she shot the deceased.¹³³⁶ Why did she not shoot the accused once she had the firearm on her person, instead of waiting and taking the firearm with her back to the pigeon coop? This indicates she had deliberated about whether to arm herself or not, hence indicating a choice and therefore militates against a loss of control.

In the case of Wiid¹³³⁷ (which is one of the few cases in which an accused was acquitted on the basis of non-pathological incapacity), the accused had suffered abuse at the hands of her husband over a period of time. It was shown that just before shooting her husband several times, she had been seriously assaulted by him and there was evidence to the effect that she might have been concussed. However, the acquittal in this case is problematic since, the facts of the case were arguably strong enough to lead one to the conclusion that not even the voluntariness of her conduct had been proven beyond reasonable doubt.¹³³⁸

¹³³⁶ Ibid at 958. For a full discussion of this case see chapter 2 at 69-71 supra.

¹³³⁷ S v Wiid supra (n 333).

¹³³⁸ Burchell supra (n 396) 41.

In the cases of Nursingh¹³³⁹ and Moses¹³⁴⁰ the problem of goal-directed behaviour was a major obstacle to the accused. In Nursingh¹³⁴¹ it was held:

“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 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.”¹³⁴²

Although the accused was acquitted in this case, the court had great difficulty in distinguishing the defence of non-pathological incapacity from automatism and intention. It becomes clear that the court conflated the defence of non-pathological incapacity with intention as well as automatism:

“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 falls to be considered, which is whether he could have formed the necessary level of intention to constitute the

¹³³⁹ S v Nursingh supra (n 339).

¹³⁴⁰ S v Moses supra (n 347).

¹³⁴¹ S v Nursingh supra (n 339).

¹³⁴² Ibid at 336F-H.

offence of murder”¹³⁴³

Clearly, the court was incorrect in its formulation of the capacity test: the capacity of the accused to know what he was doing, and the capacity to know that what he was doing was wrongful. Nothing in South African law resembles the capacity test in this format.¹³⁴⁴ At the outset the court did distinguish between intention and capacity, but did not maintain this distinction for long:

“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.”¹³⁴⁵

Although courts have in the past made reference to the capacity to form an intention, the current trend is to deal with capacity as a distinct element of liability (or more specifically, as a prerequisite for liability). It could be suggested that not too much should be made of the conflation here, but it is submitted that the court’s other references to the capacity test are too problematic to ignore:¹³⁴⁶

“In our law a man is responsible only for wrongful acts that he knows he is committing. Before he can be convicted of an offence, he must have the intellectual or mental capacity to commit it. That means an ability to distinguish between right and wrong and act in accordance with that appreciation. If that is lacking then obviously it follows he does not have the

¹³⁴³ Louw *supra* (n 28) 208, citing *S v Nursingh* *supra* (n 339) at 332E-F.

¹³⁴⁴ Louw *supra* (n 28) 208.

¹³⁴⁵ Louw *supra* (n 28) 208, citing *S v Nursingh* *supra* (n 339) 334B-C.

¹³⁴⁶ Louw *supra* (n 28) 208-209.

necessary capacity and it is for the prosecution to prove that he knew what he was doing.”¹³⁴⁷

This statement leads to the following conclusion: once capacity is absent, the onus shifts to the state to prove intention. This is not correct since once capacity is absent, the accused must be acquitted.¹³⁴⁸ The court then went on to conflate capacity and intention at its conclusion:

“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.”¹³⁴⁹

In Sv Moses¹³⁵⁰ complex goal-directed actions were taken by the accused:

“then he reached for an ornament next to the door about a meter from the bed.... As he picked it up the ornament broke and he let it go. He was angry at the time because he hated the deceased for abusing his trust and not confiding in him that he had AIDS and for allowing him to go on something that was weak as it had happened to him in the past. The experience of that night reminded him of how he was sexually abused by his father in the past. When the [ornament] broke off as he picked it up, he then ran into the lounge and picked up theblack cat ornament. He went back to the deceased in the bedroom and the deceased was trying to close the sliding door which could not close properly because it was broken. The accused pushed the door open and proceeded to the bedroom. At the time the deceased was motioning backwards towards the bed as the accused moved in. The accused hit him on the head with the cat...As he hit the deceased the thoughts were still flooding his mind. He was thinking about how he was to break the news at home, because many AIDS victims have difficulties in telling their families that they are HIV positive. He was also thinking of how he was going to die a horrible death and the fact that his future had now come to an end. He said all these thoughts were just flooding his mind at the same time. He even thought of not living anymore. He felt that he

¹³⁴⁷ S v Nursingh supra (n 339) 339A-B.

¹³⁴⁸ Louw supra (n 28) 209.

¹³⁴⁹ Louw supra (n 28) 209, citing S v Nursingh supra (n 339) 339D.

¹³⁵⁰ S v Moses supra (n 347).

was stupid and felt that he could not change things. He did not feel in control of things at that stage. He was not thinking properly. He could see what he was doing, but could not control himself. He was so furious.”¹³⁵¹

The court went on to discuss the accused’s actions:

The accused testified that he had struck the deceased twice with [the cat]. The second blow was inflicted while the deceased was down. Thereafter the accused ran to the kitchen and got hold of a smaller knife... He ran back to the deceased’s bedroom. The deceased at the time was in the process of getting up. He said he looked at him and he hated him. The deceased moved his hand as if to strike him. The accused ran back to the kitchen and got hold of a big knife... Thereafter he ran back to the deceased’s bedroom and cut the deceased’s throat and wrists.”¹³⁵²

It would appear as if the respective courts in the cases of Nursingh¹³⁵³ and Moses¹³⁵⁴ accepted that in both instances a series of goal-directed acts constituted only one act in each case.¹³⁵⁵ In Nursingh¹³⁵⁶ the court noted that:

The psychiatrist identified the resulting mental state as a separation of intellect and emotion, with temporary destruction of the intellect, a state in which, although the individual’s actions might be goal-directed, he would be using no more intellect than a dog biting in a moment of response to provocation.”¹³⁵⁷

¹³⁵¹ Ibid at 705D-I.

¹³⁵² Ibid.

¹³⁵³ S v Nursingh supra (n 339).

¹³⁵⁴ S v Moses supra (n 347).

¹³⁵⁵ Louw supra (n 28) 213. This deduction was reached without any reasons behind the conclusions drawn.

¹³⁵⁶ S v Nursingh supra (n 339).

¹³⁵⁷ Ibid at 333E.

The court went on to conclude that:

“it is not possible to distinguish between the three killings on the basis that the mother had caused, provoked the reaction more than the others. It was one and the same eruption that resulted in the three separate acts. It is really as though one explosion achieved all three deaths.”¹³⁵⁸

In Moses¹³⁵⁹ the court also accepted that the accused committed only one act:

“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.”¹³⁶⁰

This statement cannot be accepted. The court refers to two acts, hitting and stabbing. At the very least there were two stabbings as they involved two different knives.¹³⁶¹ But it is clear that the following suggests at least fourteen instances of goal-directed actions:

- Attempting to pick up an ornament in the bedroom;
- Running to the lounge to locate another weapon;
- Picking up the black cat ornament;
- Returning to the bedroom with the ornament;
- Forcing open the door of the bedroom;
- Striking the deceased twice with the ornament;

¹³⁵⁸ Louw supra (n 28) 213, citing S v Nursingh supra (n 339) 339C-D.

¹³⁵⁹ S v Moses supra (n 347).

¹³⁶⁰ Ibid at 709H-I.

¹³⁶¹ Louw supra (n 28) 214.

- Running to the kitchen to locate another weapon;
- Picking up a knife in the kitchen;
- Returning to the bedroom with the knife;
- Stabbing the deceased with the knife;
- Running back to the kitchen to locate yet another weapon;
- Selecting another and larger knife in the kitchen;
- Returning to the bedroom with the larger knife;
- Cutting the deceased's neck and both wrists (possibly constituting three separate acts).”¹³⁶²

It is submitted that Louw is correct in his submission that:

“To describe all the above as one act is, with respect, outrageous. However, once all acts are collapsed into one, the problem of goal-directed behaviour falls away. In my opinion the collapsing in both Nursingh and Moses is untenable and accordingly they were wrongly decided.”¹³⁶³

One theory suggests that the presence of goal-directed activity in the cases of Nursingh¹³⁶⁴ and Moses¹³⁶⁵ could be accounted for on the basis that the accused's affective functions have been affected as opposed to his conative function:

¹³⁶² Louw supra (n 28) 214.

¹³⁶³ Ibid.

¹³⁶⁴ S v Nursingh supra (n 339).

¹³⁶⁵ S v Moses supra (n 347). In acquitting Moses the court seemed to rely on the accused's unstable personality, which, according to the psychological evidence, resulted in his flying into a rage very easily. This combined with the final “provocation” of the accused's lover telling him that he was HIV positive, convinced the court that the accused possibly lacked the necessary self-control required for criminal capacity. The court thus found that the “killing was a crystallization of a number of factors (at 714F-H): “[s]uppressed anger relating to the accused's dysfunctional family background and the sexual abuse by his father, equating the deceased with his father and the sense of betrayal, the accused's vulnerability at the time of the killing and the provocation itself and the subjective belief that the accused was going to die a horrible death. It was a combination of these factors which led to the accused's controls collapsing at the time of the killing...Although the accused might possibly have retained some measure of control over his actions by the time of the

“The courts have conflated two different scenarios: where an accused owing to his volatile and emotional nature commits a crime due to a 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 controls and therefore a concomitant lack of criminal capacity.”¹³⁶⁶

The reason for such confusion could be traced back to the courts misinterpretation of the true nature of the second leg of the criminal capacity test (conative). The Rumpff Commission has defined the conative capacity as a person’s ability to control her behavior according to her insights. In other words unlike an animal, she is able to make decisions, set goals, pursue them and resist impulses or desires to act contrary to what

infliction of the final wound, the state has nevertheless failed to prove beyond reasonable doubt that his control even at that stage was not significantly impaired”. As Louw *supra* (n 28) at 215 suggests, the problem with this case is that the accused should not have been acquitted since there was no long term abuse preceding the killing either by the deceased or at all. In previous judgments, the final provocative act was, metaphorically speaking, the last straw in a long history of abuse. In all cases with the exception of the grandparents in *Nursingh* *supra* (n 339) the killing was directed against the abuser. While the accused in *Moses* *supra* (n 347) had a childhood history of physical and sexual abuse by his father, the relationship between him and the deceased was in fact a very good one. It was a single and isolated provocative act that sent the accused into a rage. It was furthermore, not the first rage he had experienced in his life (at 703F-I): Mr. Moses also gave evidence about his sexual orientation. It is no secret that he is a homosexual. He told the Court that when he was 21, he told his mother that he was gay. His mother was very upset about this and she told him to leave the common home and never come back. The accused was very angry and he felt that he had sacrificed his future for his family. Thereafter he went into a rage and literally smashed his mother’s house. He trashed his mother’s TV, crockery, the stove, the fridge, the washing machine, he pulled down the curtains, etc. He also tried to cut his wrists as he did not feel [like?] living anymore and he felt that his family did not appreciate what he had done for them. The police were called to the scene and they arrived after he had already trashed his mother’s house. The accused also told the court of another incident also involving an anger outburst. This was when he smashed his own car, the Toyota Cressida. His evidence was that he had an argument with his sister and he threw a plate of food on her and took a knife and the sister ran away and closed the door behind her. He was so upset thereafter; he took his car and drove at a speed that was excessive in the circumstances. The result was that the car was a write-off.

¹³⁶⁶ Cf the statement made in *Eadie* *supra* (n 360) highlighting this point: “Where an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to the act was the object of his anger, jealousy or hatred. As demonstrated, the courts have accepted such version of events from accused persons” (at par [61]).

her insight into right and wrong reveals to the person.¹³⁶⁷ Self-control in such a context, can be defined 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”.¹³⁶⁸ De Vos goes on to explain that a lack of self-control can lead to a lack of conative capacity:

“A lack of self-control can thus lead to a collapse of the 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.”¹³⁶⁹

As the Rumpff Commission explained the point:

¹³⁶⁷ De Vos supra (n 349) 357, discussing Report paras 9.19: “The uncontrolled emotional outbursts to which some people are liable are 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, volitional control is possible, unless the facts prove that there was disintegration of the other functions as well. Emotional impulsiveness or liability therefore 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”. See also S v Laubscher supra (n 68) at 166H-I; S v Calitz supra (n 330) at 126E; S v Wiid supra (n 333) 563H.

¹³⁶⁸ De Vos supra (n 349) 357. See further Snyman supra (n 106) at 15 who makes use of this definition of conative capacity.

¹³⁶⁹ De Vos supra (n 349) 357. As Morse “Excusing and the New Excuse Defenses: A Legal and Conceptual Review” (1998) Crime and Justice 384 at 359 states: “Clearly if an agent acts to satisfy such a desire, doing so will surely be an intentional act executed by an undeniably effective will, and there is no reason to believe that universal causation or determinism plays a special role in such cases. The agent may have strongly felt a need to satisfy the impulse, but why is this different from standard cases of people desiring to fulfill momentary, strong desires” Morse then goes on to pose the question what it would mean to say that such a desire was literally irresistible: “The lure of mechanism is clearly at work but should be resisted. After all, why should a powerful desire - really wanting something be assimilated to the patellar reflex? One possibility is that such impulses create hard choice, but if this is the case, hard choice analysis will do the work. Another possibility is that even if impulses do have coercive motivational force, it is impossible to differentiate irresistible impulses from those simply not resisted” (at 361).

“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”.¹³⁷⁰

On this basis then the cases of Nursingh¹³⁷¹ and Moses¹³⁷² were wrongly decided and the accused should have been found guilty instead of being acquitted. However, it is submitted that De Vos’s theory does little to explain the term “loss of self-control” in circumstances other than affective function.

5.4.3 Implications of S v Eadie

5.4.3.1 Automatism versus non-pathological incapacity

In Eadie¹³⁷³ it was held that despite the law’s clear exposition on the law of automatism, it was that no distinction could be drawn between automatism and non-pathological incapacity. If the two were distinct it would be possible to exercise conscious control over one’s actions (the automatism test) while simultaneously lacking self-control (the incapacity test).¹³⁷⁴ The court took this to mean that the two tests have now merged.¹³⁷⁵ Furthermore, such an approach would require a fundamental reinterpretation of the formulation of the defence of non-pathological incapacity set out in Laubscher.¹³⁷⁶

¹³⁷⁰ Report at par 9.26, cited in De Vos supra (n 349) at 358.

¹³⁷¹ S v Nursingh supra (n 339).

¹³⁷² S v Moses supra (n 347).

¹³⁷³ S v Eadie supra (n 360). See also S v Marx supra (n 108), discussed in chapter 2 at 95-102 where this court felt itself bound to the finding in Eadie.

¹³⁷⁴ Louw supra (n 28) at 210-211, noted at par [56] of the Eadie supra (n 360) judgment.

¹³⁷⁵ Louw supra (n 28) 211.

¹³⁷⁶ S v Laubscher supra (n 68). For a discussion of this point see chapter 2 at 81.

This case has far reaching implications for South African law. Firstly, it had the effect of narrowing the defence.¹³⁷⁷ It is not at all clear whether the defence of non-pathological incapacity continues to exist after Eadie.¹³⁷⁸ The end result of this is that:

“The question remains unanswered as to how a case will be handled where serious provocation is present. Would it be correct to suggest that provocation can reduce a charge of murder to manslaughter? It is clear that after the decision in Eadie, an accused can no longer rely on the claim that she was so angry that she lacked capacity and therefore should be found guilty.”¹³⁷⁹

However, such an approach would prove problematic since:

“Such a conclusion does not satisfy the sentiment in law. The most reasonable finding would be that the accused not be found guilty of the main charge of murder, but rather guilty of the reduced offence of culpable homicide. The question to be answered is on what grounds the court can reduce such liability. It would appear that in terms of the rules currently utilized by the courts, no grounds currently exist to reduce such liability.”¹³⁸⁰

It is submitted that by accepting the general approach to criminal law, it must be accepted that extreme provocation can lead to a state of automatism.¹³⁸¹ It is not clear

¹³⁷⁷ Hoctor supra (n 242) at 138. See also chapter 2 at 82-83.

¹³⁷⁸ S v Eadie supra (n 360). Snyman supra (n 106) 22 notes that the uncertainty arises out of the fact that the court did not expressly answer this question. Clearly, Navsa JA’s judgment only makes sense if it is assumed that there are certain mental states in which an accused may suffer from non-pathological incapacity without such incapacity resulting from provocation or intoxication. Examples of these mental states include certain manifestations of stress, shock or panic. The problem is that one cannot recall such mental states unconnected with provocation ever being reported in South African case law as a basis for the defence of non-pathological incapacity. The end result of this is that from a practical viewpoint, there is an extremely limited field of application for the defence. Its existence borders on the theoretical.

¹³⁷⁹ Snyman supra (n 1317) 60, citing Eadie supra (n 360) at para’s [57]-[58].

¹³⁸⁰ Snyman supra (n 1317) 61. As Snyman states: “The finding of manslaughter is nothing other than a halfway station between murder and culpable homicide. It satisfies the sentiment in law that most people (although not all) have a measure of sympathy” (at 60) (own translation).

¹³⁸¹ Hoctor supra (n 242) 157 n 383.

then why the court in the Eadie¹³⁸² case made reference to cases of automatism to support its contention that there is no distinction between the two defences. Clearly, the Eadie court was wrong to cite cases of automatism to highlight the fact that the two defences are not distinct: Potgieter,¹³⁸³ Cunningham,¹³⁸⁴ and Henry.¹³⁸⁵

Furthermore, the court added to this difficulty by criticizing the decisions of Arnold,¹³⁸⁶

¹³⁸² S v Eadie supra (n 360).

¹³⁸³ S v Potgieter supra (n 337) at par [36]. The defence of non-pathological incapacity in the form of the term “irresistible impulse” was raised as an alternative defence in this case. The court’s judgment was focused on the defence of automatism (see the discussion relating to matters of proof: 73B-D; 73I-74B; the expert testimony led on behalf of the accused and the state: 82C-84C; and Kumleben JA’s concluding remarks on the liability that he could not accept that the accused had acted “automatically”:84D. This is despite the fact that Kumleben JA cited Wiid supra (n 333) and Kalogoropoulos supra (n 337) in respect of evidential matters: 72H-73B; 73E-G.

¹³⁸⁴ S v Cunningham supra (n 362) at par [39]. In this case the court deals specifically with the automatism defence, which is rejected on the basis of a lack of factual foundation: 638J-639A.

¹³⁸⁵ S v Henry supra (n 363) at par [38], cited in Hoorcor supra (n 242) at 134. Scott JA clearly distinguished between the defence of non-pathological incapacity from sane automatism, which was in issue: 19H-I. In Eadie supra (n 360) the court also made reference to two other cases which did not prove helpful: Francis supra (n 364) at par [40] and Kok supra (n 364) at par [41]. The court a quo in Eadie supra (n 360) referred to Francis supra (n 364) as authority for there being no distinction between sane automatism and non-pathological incapacity: Schutz JA begins by equating the two concepts by the placing of the term “sane automatism” in brackets after the term “non-pathological criminal incapacity” (at par [1]), despite the clear indication that the plea related to whether “he was unable to control his actions” (ibid) Hoorcor supra (n 242) 135 n 219 submits that this confusion becomes more evident at par [3] and [4], where it is clear that the learned judge is conscientiously discussing the evidential requirements of sane automatism, despite the plea of incapacity. Later (at par [25]) Schutz JA confirms that the nature of the matter at hand was “a case of ‘sane automatism’”. Hoorcor supra suggests that despite this categorization, in discussing the criminal liability of the accused, the language is exclusively that of capacity: “concerning his ability to appreciate the wrongfulness of his actions...” (at par [27]), ... “he could control himself...[a]lthough his powers of self-control were substantially diminished his actions show they were not lost...” (at par [30]). Hoorcor supra suggest that perhaps it could be suggested that the court’s treatment of the accused’s “awareness of what he was doing” at par [26] indicates that it did canvass the actual content of the notion of sane automatism. Cf the case of S v Kok (n 364) where the court seemed to equate the concepts of incapacity and automatism without any justification for doing so (at par [25]): “the accused had the necessary criminal capacity and that the defence of so-called ‘sane automatism’ had to be rejected” since the accused had pleaded that he “lacked the necessary criminal capacity” (at par [3]). Furthermore, the judgment discusses the accused’s liability in the context of criminal capacity, despite the defence of automatism being dealt with exclusively in the court a quo (S v Kok supra (n 364)).

¹³⁸⁶ S v Arnold supra (n 313) at par [46]. The reason perhaps that reference was made to this case was the puzzling feature of this judgment: while the court found as a reasonable possibility that the accused was acting in a state of sane automatism at the time of the shooting (at 263G-H) the court then proceeded to hold that it was reasonably possible that the accused was lacking capacity at the time of the death of his wife (264D).

Moses¹³⁸⁷ and Gesualdo¹³⁸⁸ and concluded that the approach “adopted by this Court in the decisions discussed earlier” was not followed in these three cases.¹³⁸⁹

However, this approach is entirely consistent with the views expressed in the following cases which were cited by the court: Van Vuuren;¹³⁹⁰ Campher;¹³⁹¹ Laubscher;¹³⁹² Calitz;¹³⁹³ Wiid¹³⁹⁴ and Kalogoropoulos.¹³⁹⁵ If the Eadie¹³⁹⁶ case is correct and there is no difference between sane automatism and non-pathological incapacity, the accused must have acted involuntarily in order to rely on non-pathological incapacity as a defence.¹³⁹⁷ The problem appears to be that the court in Eadie¹³⁹⁸ in adopting this approach does not always interpret the term “involuntary conduct consistently”,¹³⁹⁹ and

¹³⁸⁷ S v Moses supra (n 347) at par [49].

¹³⁸⁸ S v Gesualdo supra (n 337) at par [50].

¹³⁸⁹ S v Eadie supra (n 360) at par [51], cited in Hoctor supra (n 242) 134.

¹³⁹⁰ S v Van Vuuren supra (n 26) discussed at par [30].

¹³⁹¹ S v Campher supra (n 320) at par [31].

¹³⁹² S v Laubscher supra (n 68) at par [32].

¹³⁹³ S v Calitz supra (n 330) at par [33].

¹³⁹⁴ S v Wiid supra (n 333) at par [34].

¹³⁹⁵ S v Kalogoropoulos supra (n 337), cited in Hoctor supra (n 242) at 136.

¹³⁹⁶ S v Eadie supra (n 360).

¹³⁹⁷ Hoctor supra (n 242) at 142, discussing S v Eadie supra (n 360) at par [57]. See further Snyman supra (n 106) at 14, who derives the same conclusion from the courts comments.

¹³⁹⁸ S v Eadie supra (n 360).

¹³⁹⁹ Hoctor supra (n 242) at 142 n 279 makes reference to par [57] where the court refers to a persons who was unable to exercise control over his movements and acted as an automaton as a result of disintegration of the psyche as follows: ‘his acts would then have been unconscious and involuntary’ (court’s emphasis) The author is of the view that it is not clear how someone’s acts could be unconscious and yet be voluntary, or involuntary and yet be conscious. Hoctor further makes reference to Snyman supra (n 1100) at 55 which he submits is pertinent: “if X’s conduct is involuntary, it means that ‘X is not the “author” or creator of the act or omission; it means that it is not X who has acted, but rather that the event or occurrence is something which happened to X” (writer’s emphasis). Hoctor submits that this throws into relief a further puzzling comment by the court, that ‘the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement’ (at

yet if it is assumed that the words “not conscious” and “involuntary” are used as synonyms, rather than as distinct conditions then it is clear that the dictum in the case of Laubscher¹⁴⁰⁰ will have to be reinterpreted.¹⁴⁰¹

It is submitted that by reading the second leg of the Laubscher¹⁴⁰² test as applying to involuntary conduct, “one is simply subverting the clear meaning of the dictum. Joubert JA is plainly referring to the mental faculties (‘geestesvermoens’) or psychological condition (‘psigiese gesteldheid’) of the accused when he sets out the psychological characteristic of criminal capacity: the capacity to distinguish between right and wrong, and the capacity to act in accordance with such distinction”. It is further submitted that there is no scope for argument that in this context the description of conative capacity as “[d]ie vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die weerstandskrag (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan...” can refer to involuntary conduct, as opposed to capacity to control the urge to offend, subjectively assessed.¹⁴⁰³ Thus the court’s statement that

par [58]). Clearly if the conduct in question is not voluntary, by definition the mind is non-functional.

¹⁴⁰⁰ S v Laubscher supra (n 68).

¹⁴⁰¹ Hoorcor supra (n 242) 142. See for instance par [42] and [58] of Eadie supra (n 360), referring to the dictum at 166G-167A of Laubscher supra (n 68) cited at par [32].

¹⁴⁰² S v Laubscher supra (n 68).

¹⁴⁰³ Hoorcor supra (n 242) 143. Hoorcor supra (n 363) at 202 discussed the terminological imprecision’s in the case of S v Laubscher supra (n 68) and S v Wiid supra (n 333). Joubert JA posed the question for the court to answer as follows: “The question is what the mental capacity of the accused was at the time of the commission of the alleged offence. He had a nervous breakdown or a disintegration of his personality which resulted in him acting involuntarily. In other words, did he act with self-control during the course of the alleged commission of the crime?”(at 171D) (own translation). It is clear that the lack of conative capacity does not necessarily result in involuntary behaviour. A similar mistake was made later where the learned judge stated: “Despite the fact that the accused’s acts were irrational and not in accordance with his personality, it is submitted that he did act voluntarily since he did have the capacity as well as the powers of self-control which indicates that he did not lack capacity” (at 173B) (own translation). In Wiid supra (n 333) the error made in the case of Laubscher supra (n 68) was perpetuated in this case. Here Goldstone AJA cited the question formulated by the court in Laubscher and concluded that there was reasonable doubt about the question whether “die appellante willekeurig opgetree het”. However, as Hoorcor suggests, the finding did not relate to voluntariness at all, but to a lack of capacity. In light of her “onbeheersde

there is no distinction between sane automatism and non-pathological incapacity based on previous dicta of the court is unfounded.¹⁴⁰⁴ Furthermore, the court's insistence in Eadie¹⁴⁰⁵ of the retention of the two-stage form of the concept of criminal capacity where the judge of appeal stated that "I am however, not persuaded that the second leg of the test expounded in Laubscher's case [viz the second leg of the traditional capacity]"¹⁴⁰⁶ and the later statement that "whilst it may be difficult to visualize a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one's actions, it appears notionally possible",¹⁴⁰⁷ to solve the problem of the automatism versus non-pathological incapacity debate,¹⁴⁰⁸ is unworkable:

"This is because the purported retention of the second leg of the test is nothing of the sort, since the negation of the second leg is effected by a totally different defence, viz. automatism, and thus the content of the notion of conative capacity, i.e. whether the accused was able to act in accordance with the distinction between right and wrong, is simply not assessed. Moreover, the subjective test for capacity is replaced by an

optrede" (uncontrollable actions) there was doubt as to whether she could be found to be "criminally capable".

¹⁴⁰⁴ Hoctor supra (n 242) 143. In par [57] Navsa JA refers to "highlighted parts of relevant dicta" in support of the statement that there is previous authority asserting the equivalence of the concepts. Hoctor supra (n 242) at 143 n 282 submits that all the indicated "highlighted parts" can be distinguished or explained: the passage from Chretien supra (n 97) at par [26] refers to evidential concerns; the inconsistency of the use of the highlighted term "willekeurig" (voluntary) found at 173B of Laubscher (supra (n 68) cited at par [32]) with the test at 166G-167A indicates (it is submitted) sloppiness rather than a proper equation of the concepts; similarly the use of the term "willekeurig" (voluntary) at 569C-D of Wiid (supra (n 333), cited at par [34]) in light of the use of the Laubscher dictum setting out the test for criminal capacity, and the eventual finding of "ontoerekeningsvatbaarheid" (lack of capacity) 569G) should not be regarded as a true equation of the concepts; the judgments in Potgieter supra (n 337) 163, cited at par [36], Henry (supra (n 363), cited at par [38]) and Cunningham supra (n 362), cited at par [39]) dealt with automatism and not incapacity and all references to "willekeurig"/ "voluntary" conduct should be interpreted accordingly; and the interchangeable discussion of the concepts in Francis supra (n 364) testifies to more confusion than true equation of the concepts.

¹⁴⁰⁵ S v Eadie supra (n 360).

¹⁴⁰⁶ *Ibid* at par [57].

¹⁴⁰⁷ S v Eadie supra (n 360) at par [59].

¹⁴⁰⁸ S v Eadie supra (n 360) at par [55].

objectively assessed criterion, in the form of the test for sane automatism. If one accepts that the first stage of the (actus reus), and that any inquiry into whether there is a blameworthy state of mind is a futile quest until the presence of an unlawful act has been established, then it is clear that the same test - assessing voluntariness - will be employed twice: initially, to establish that the accused acted voluntarily (and that his conduct is thus legally relevant), and then once again, once cognitive capacity is established, in lieu of the test for conative capacity. In the result, there is unnecessary duplication and confusion".¹⁴⁰⁹

The above discussion while helpful in illustrating the fact that automatism is a distinct from non-pathological incapacity and the fact that the second leg of the capacity test ought to be retained since it serves to distinguish the two defences, does little to explain what the term "loss of self-control" means or the fact that a lack of capacity does not necessarily mean that there is no voluntary conduct. While theorists¹⁴¹⁰ have suggested that there is a difference between the two defences, the fact remains that the same test is used for both in the sense that goal-directed behaviour will militate against relying on either defence.¹⁴¹¹

5.4.3.2 Objective or subjective test for capacity?

The practical effect of providing the accused who has killed her attacker with an acquittal has led to two major proposals: either openly embrace an objective (or normative) assessment of capacity and intention or resort to the initially objective enquiry implicit in the established, but mercurial domain of legal inference used to establish proof of subjective capacity.¹⁴¹² Burchell has noted that "reasoning by

¹⁴⁰⁹ Hoctor supra (n 242) at 147. This conclusion is reached by writers such as Burchell supra (n 396) at 35 and 37.

¹⁴¹⁰ Such as Hoctor supra (n 242). In this respect see the discussion at 314-318.

¹⁴¹¹ Louw supra (n 28) at 208, citing Eadie supra (n 355): "...either the defences are distinct or they are the same: they cannot be both the same in some circumstances and distinct in others." Louw supra (n 28) at 208 then poses the question: "If the same test applies to both automatism and incapacity, how is it possible to distinguish between the two concepts?"

¹⁴¹² Burchell supra (n 396) 28.

inference” could be one possible interpretation of the Eadie¹⁴¹³ judgment. In this judgment it was held that the court should not too easily accept the accused’s own evidence regarding provocation or emotional stress and is therefore entitled to draw “legitimate inferences, from what hundreds of thousands¹⁴¹⁴ of other people would have done under the same circumstances” (i.e. looking at objective circumstances). Therefore, the issue refers to a process of inference; from what the accused’s mental processes ought to have been, to what they in fact were is crucial. It is submitted that this interpretation of Eadie¹⁴¹⁵ is not to be accepted:

“Relying on the readiness of judges to draw legitimate inferences could be regarded as at best a band-aid solution and, at worst, an alternative that could both obfuscate the general principles of the criminal law and expose judges to the criticism that unprincipled normative decisions could be made under the guise of inferential reasoning.”¹⁴¹⁶

In respect of the first point, it has been noted that:

“Employing inferential reasoning is an uncontroversial standard practice in South African criminal law, where direct evidence of state of mind is lacking. Given that these are well-established evidential principles, which have been applied for many years in respect of the defence of provocation, one may wonder why, if Burchell’s suggestion is followed, the Supreme Court of Appeal should see fit to engage in a lengthy discourse on the matter?”¹⁴¹⁷

¹⁴¹³ S v Eadie supra (n 360). For a discussion of this approach see chapter 2 at 86-92.

¹⁴¹⁴ S v Eadie supra (n 360) at par [23].

¹⁴¹⁵ S v Eadie supra (n 360).

¹⁴¹⁶ Burchell supra (n 396) 32.

¹⁴¹⁷ Hoorntje supra (n 242) 151.

Irrespective of the expert psychiatric testimony that is led on behalf of an accused, it is submitted that the court remains the final arbiter of the accused's state of mind at the time of her unlawful act.¹⁴¹⁸ Kreigler J in S v Makhubele¹⁴¹⁹ explained in relation to the enquiry into *mens rea*:

“It is, of course, a subjective enquiry. What is to be investigated is the accused's state of mind at the time he inflicted the stab wound. That being the case, 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 as 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.”¹⁴²⁰

It is clear that the process of inferential reasoning would play a crucial role in establishing state of mind. In S v Ingram¹⁴²¹ Smalberger JA held that:

“[t]he longer the time lapse before the shooting, the more complex the intervening actions, the less likely it becomes that the accused acted out of control because of an inability to restrain himself.”¹⁴²²

Hocor notes that the confusion has arisen in the substantive law regarding the distinction between sane automatism and non-pathological incapacity:

“has its roots in the indiscriminate use of evidential dicta, which has tended to deal with the defences in the same terms.

¹⁴¹⁸ Hocor supra (n 242) at 163-164.

¹⁴¹⁹ 1987 (2) SA 541 (T).

¹⁴²⁰ Ibid at 546F-G, discussed in Hocor supra (n 242) at 164.

¹⁴²¹ 1995 (2) SACR 1 (A).

¹⁴²² Ibid at 7B-C.

Whilst the respective defences may well utilize similar evidential principles, it is important not to blur the crucial substantive distinction between the defences through indiscriminating citation of dicta relating to matters of proof. The fundamental distinction bears iteration in this context: in establishing the presence of automatism, the court resorts to an objective test focusing on the nature of the accused's conduct, whereas in relation to non-pathological incapacity the test is subjective, notwithstanding the invariable use of inferential reasoning to seek to establish the accused's state of mind."¹⁴²³

Another reason for not accepting "reasoning by inference" is a second point noted by Burchell, namely that "judges could make unprincipled normative decisions,"¹⁴²⁴ Burchell goes on to explain this statement:

"A potential problem with regarding inferential reasoning as supplying the answer, or at least a temporary answer pending legislative change, is that drawing inferences depends on the individual judge to ensure that reasoning of this nature successfully navigates the turbulent waters dividing subjective and objective tests. If negative inferences are too readily drawn, then the courts will expose themselves to the criticism that inferential reasoning is a mask for surreptitiously introducing into the criminal law objective, public-policy constraints, which should ideally be reflected in parliamentary consensus...At risk in an over-readiness to draw inferences from the facts of a case is not only blurring the thin line between subjectively and objective assessed elements of liability, but also infringing the principle of legality that places strictures of reasonable certainty on the scope of criminal law."¹⁴²⁵

A second possible interpretation of the Eadie¹⁴²⁶ case is that it is moving towards an objective assessment of capacity and intention. Burchell has proposed a new test for

¹⁴²³ Hctor supra (n 242) 165. See for example Eadie supra (n 360) at par [2], where Navsa JA cited the cases of Potgieter supra (n 337), Cunningham supra (n 362), and Francis supra (n 364) as authority for the evidential matters relating to the defence of "temporary non-pathological criminal incapacity," despite the fact that these cases dealt with the defence of sane automatism.

¹⁴²⁴ See Burchell's quote at 267 cited at n 1130.

¹⁴²⁵ Burchell supra (n 396) 33-34.

¹⁴²⁶ S v Eadie supra (n 360).

conative capacity, consisting of both a subjective and objective criterion.¹⁴²⁷ Such an approach, (even in cases where intention is the fault element required), would be closer to the Rumpff Commission approach (that severe emotional tension or impulsiveness should not be regarded as excluding volitional control) and the Roman-Dutch Law. This would lead to some of the finer distinctions drawn in English law.¹⁴²⁸

It is submitted that such an interpretation cannot be taken seriously as a rationale for the Eadie¹⁴²⁹ judgment. Not only was the Eadie court, by Burchell's admission oblivious of this alleged teasing out of such as-yet-undiscovered objective aspect,¹⁴³⁰ but it is further submitted that move towards an objective test for capacity is unable to work in practice.

If the question to determine capacity now becomes what the ordinary person, in the same circumstances as the accused would have done, it is necessary to consider what characteristics would be attributed to such an ordinary person. At the outset the term "reasonable person" is problematic since:

"[t]he reasonable person will never kill on the grounds of provocation alone, while a normal person might".¹⁴³¹

¹⁴²⁷ For a discussion of this approach see chapter 2 at 92-94.

¹⁴²⁸ Burchell and Milton supra (n 26) 293.

¹⁴²⁹ S v Eadie supra (n 360).

¹⁴³⁰ Burchell supra (n 396) 43.

¹⁴³¹ Snyman supra (1317) 70, citing McSherry and Naylor Australian Criminal Law's Critical Perspectives (2004) 495 (own translation).

The question now falls to what the ordinary person in the accused's position would have done. It is submitted that this approach is problematic since it does not consider the personal characteristics of the accused:¹⁴³²

“[an attempt to generalize rule of conduct results in] losing variability, individuality, and meaning, and ending up with deceptively low correlations that relate more to mythical exemplar than any particular person”¹⁴³³

but furthermore imposes dominant cultural values on others:¹⁴³⁴

“Objective standards of behaviour are predicated on the existence of a community consensus about what constitutes reasonable and ordinary behaviour...In determining the reactions of an ordinary person of a particular cultural background, there is also a risk that judges and juries may draw on discriminatory generalizations about cultures of minority groups of which they have little or no understanding...”¹⁴³⁵

Not only is the objective test problematic in its own right, but further problems arise when considering Burchell's normative test for capacity. Firstly, emphasis will be placed on external circumstances which can be identified neutrally and applied to all claims,¹⁴³⁶ and the attributes of the individual are abstracted to those of the “average member of society”, thereby introducing an element of subjectivity into the enquiry.¹⁴³⁷ Secondly, where such a defence is raised, the capacity element will be found to be

¹⁴³² Pather supra (n 393) 351.

¹⁴³³ Finkel supra (n 47) 767.

¹⁴³⁴ Louw supra (n 1134) 363.

¹⁴³⁵ Snyman supra (n 1317) 71.

¹⁴³⁶ Goldman supra (n 67) 199. See Goldman supra (n 67) at n 51 noting Harper et al The Law of Torts 2nd ed (1986) statement at section 16.2 at 389 that the reasonable person represents the average of the community in terms of foresight, caution, courage, judgment and self-control.

¹⁴³⁷ Goldman supra (n 67) 199-200.

present, either directly or by inference, and then the next enquiry into fault can be made. The accused can be found guilty, depending on *mens rea*, where subjective intention and knowledge of unlawfulness is proved. If intention or knowledge of unlawfulness is not established, a conviction of culpable homicide could follow, if negligence in regard to the death, tested objectively, could be established. In this way, a similar middle course to that of the English law finding of voluntary manslaughter as a result of provocation could be achieved without compromising South African law.¹⁴³⁸

Burchell goes on to explain how such an approach would apply to battered women: the subjective test not only takes account of the accused's subjective mental condition but also in determining the conative aspect of capacity, the court must determine whether the accused could reasonably be expected to have acted differently. Therefore a person, who in normal circumstances would have exercised self-restraint, kills the person who has abused her physically and mentally over a lengthy period of time, it could be said that she could not have acted any differently due to a characteristic (for instance, fear or depression) that is not rightly the target of criminal law.¹⁴³⁹

This approach is not unique but in fact applied in United States. While the doctrines of provocation and extreme emotional disturbance allow mitigation of the killing based on the subjective pressures faced by the accused, it also imposes secondary objective requirements. These requirements reflect the community values as to what degree of human weakness is understandable and therefore considered deserving of leniency. An accused would have to show not only that she lost self-control but given the nature of

¹⁴³⁸ Burchell supra (n 396) 46.

¹⁴³⁹ Ibid. Goldman supra (n 67) at 200 notes that other factors that would be taken into account by the court would include not only the battered woman's size, age and strength, but also her prior knowledge of the victim's propensities for violence as well as the victim's actual history of abuse.

the provocation experienced, losing control was a reasonable response.¹⁴⁴⁰ In almost all jurisdictions, physical abuse would clearly constitute reasonable provocation. In the case of the Model Penal Code, an accused must demonstrate that there is a reasonable explanation or excuse for the extreme mental or emotional disturbance experienced at the time of the killing. The reasonableness of the mental or emotional disturbance is “determined from the viewpoint of a person in the actor’s situation under the circumstances as she believes them to be.”¹⁴⁴¹ In English law provocation is also tested both objectively and subjectively.¹⁴⁴²

The problem with these approaches, whether following the objective/subjective approach of English law or applying the particularizing standard followed in the United States remains ultimately how far the courts should go in qualifying the test to include an abused woman’s characteristics. Examining English case law provides a practical example of why a Burchell’s subjective/objective test for capacity cannot work. In that jurisdiction, the courts have vacillated between an objective and subjective approach for provocation, and it has subsequently been considered “a game of jurisprudential tennis”.¹⁴⁴³ In Smith (Morgan)¹⁴⁴⁴ the self-control required to trigger the provocation defence is not a constant standard. The jury should apply the standard one could expect of the particular individual with her characteristics.¹⁴⁴⁵ In Luc Thiet Thuan¹⁴⁴⁶ the court

¹⁴⁴⁰ For a discussion of provocation defence in American law see chapter 4 at 204-224.

¹⁴⁴¹ For a discussion of the Model Penal Code’s extreme emotional disturbance defence see chapter 4 at 216-219.

¹⁴⁴² For a discussion of the provocation defence see chapter 3 at 130-159.

¹⁴⁴³ Martin supra (n 659) 1364.

¹⁴⁴⁴ Smith (Morgan) supra (n 40).

¹⁴⁴⁵ For a discussion of this finding see chapter 3 at 144-147.

¹⁴⁴⁶ Luc Thiet Thuan supra (n 643).

adopts a constant, objective standard of self-control. A jury would have to ask themselves whether a reasonable person, with ordinary powers of self-control and subject to the same provocation, would have reacted as the accused did.¹⁴⁴⁷ In the case of Holley¹⁴⁴⁸ the court returned to an objective standard of self-control, as expounded in Luc Thiet Thuan.¹⁴⁴⁹ The application of provocation must be considered in the context of diminished responsibility. One must not distort the other. This is problematic since a jury would still have to grapple with the distinction between subjectivity and objectivity.¹⁴⁵⁰ A further problem with the defence of provocation in determining whether certain subjective factors should be taken into account in the objective test, is that in that jurisdiction, an abused woman can use her situation to plead either provocation¹⁴⁵¹ or diminished responsibility¹⁴⁵² or both in the alternative.¹⁴⁵³ Surely if there is medical evidence to suggest that an abused woman killed because her powers of self-control were reduced as a result of a condition such as battered woman syndrome or post-traumatic stress disorder, the proper defence to run is diminished responsibility.¹⁴⁵⁴ This is just another example of how the courts have confused the issue relating to including subjective elements into the provocation test. This would also explain why the English courts were wrong in extending the requirement of loss of

¹⁴⁴⁷ For a discussion of this case see chapter 3 at 141-147.

¹⁴⁴⁸ Holley supra (n 678). See also Law Commission Consultation Paper (2004) in chapter 3 at n 687 which advocates an objective test. No mention is made of any subjective factors.

¹⁴⁴⁹ For a discussion of this case see chapter 3 at 154-156.

¹⁴⁵⁰ Martin supra (n 659) 1364.

¹⁴⁵¹ For a discussion of the provocation defence see chapter 3 at 130-159.

¹⁴⁵² For a discussion of the defence diminished responsibility see chapter 3 at 160-166.

¹⁴⁵³ For a discussion of pleading provocation and diminished responsibility together see chapter 3 at 166-168.

¹⁴⁵⁴ Toczek supra (n 645) 835. Thus English Court of Appeal decisions of Ahluwalia supra (n 602); Thornton supra (n 601) are wrong because they are based on the discredited McGregor supra (n 619) test since New Zealand doesn't have a diminished responsibility defence.

self-control to include “slow-burn” anger where there is no immediate trigger for the provocation.¹⁴⁵⁵ Therefore, in English law the defence of provocation should only apply to cases where there is a sudden and temporary loss of self-control.¹⁴⁵⁶

Further problems arise when considering Burchell’s formulation. Firstly, the court has no meaningful way of determining whether the battered woman lost self-control:

“[it] is impossible to establish certain mental capacity by asking what capacity she ought to have had”.¹⁴⁵⁷

Secondly, Burchell’s theory suggests that if intention or knowledge of unlawfulness is not established, a conviction of culpable homicide could follow, thus establishing a middle course similar to that in English law.¹⁴⁵⁸ It is submitted that this submission is not correct. The problem with this formulation is that it is merely question-begging: “how material needs the effects of the abnormality/and or disturbance be?” Formulated in this manner, the test is entirely circular: the standard necessary to mitigate murder to culpable homicide can only be established by reference to a class of cases which are appropriately labeled culpable homicide rather than murder.¹⁴⁵⁹ This is problematic for battered women since it is clinical commonplace that not all syndrome sufferers act the same. If the particular syndrome causes rationality problems or internal hard choice, not all syndrome sufferers will be equally irrational or face hard choices. Some whose

¹⁴⁵⁵ In this respect see R v Ahluwalia supra (n 602) in chapter 3 at 133-135.

¹⁴⁵⁶ In this respect see chapter 3 at 131-135.

¹⁴⁵⁷ Snyman supra (n 1317) at 69 (own translation).

¹⁴⁵⁸ For a discussion of this point see chapter 2 at 92-93.

¹⁴⁵⁹ Chalmers “Merging Provocation and Diminished responsibility: Some reasons for skepticism” (2004) Criminal Law Review 198 at 205.

behaviour is affected by the syndrome may be sufficiently irrational to warrant an excuse, but others may not be.¹⁴⁶⁰

The Model Penal Code's formulation of the extreme emotional disturbance (EMED) plea has given rise to similar problems and could give rise to the same problems in South African law:

“Ad hoc determination means that similar cases are likely to be treated differently, the law will be unpredictable, and that there is created the possibility of abuse of discretion by decision-makers, judge or jurors...the individualization of objective person decisions may seem principled but are in fact the product of unguided and disclosed discretion. The results may depend more on who the accused gets as a trial judge than on whether he deserves an extreme emotional disturbance mitigation”.¹⁴⁶¹

It is submitted that Burchell's theory would provide judges with an unacceptable amount of discretion. This can lead judges to feel sympathetic for acts committed by individuals sociologically similar to themselves and will discriminate precisely against those individuals it was designed to protect.¹⁴⁶² Heller notes Ward's comment that such “projective empathy” is unable to work:

“If the self is inseparable from its social circumstances...it follows that when I employ projective empathy to understand someone else's circumstances, I inevitably bring the foundational part of my 'self'-my own intelligence, self-esteem and courage, as well as my gender, race, and socio-economic background-to the experience in a way that prevents

¹⁴⁶⁰ Morse supra (n 1369) 384. As Morse supra (n 1369) at 385 suggests: “mens rea will be present and legal insanity or a generic equivalent will obtain because the syndrome sufferer's normative competence might not be fully undermined. Nonetheless, the syndrome might still sufficiently compromise the accused's rationality to warrant mitigation”.

¹⁴⁶¹ Robinson The Modern General Part: Three Illusions in Shute and Simester Criminal Law Theory: Doctrines of the General Part (2002) at 75, cited in Chalmers supra (n 1459) 205.

¹⁴⁶² Heller supra (n 795) 99.

any deep understanding of the other. Only if the person is substantially the same as I am - that is share my social circumstances -is there no distortion of understanding".¹⁴⁶³

It is submitted that the approach taken by the Model Penal Code may be unavoidable.

In South African law this amounts to maintaining a purely subjective approach for the capacity test:

“Unfortunately, while the Code purports to solve the problem of tailoring an objective standard to the accused, the solution it offers masks an illusion. Behind that illusion criminal law theory has yet to find a principle that will convincingly distinguish the characteristics that ought to be included from these that ought to be excluded when individualizing the reasonable person standard. In the absence of such a theory, let alone a workable provision implementing a theory, it is hard to see any approach other than the uncontrolled ad hoc discretion the Model Penal Code drafters have adopted”.¹⁴⁶⁴

Therefore, since there is no principle that will convincingly distinguish factors that should be included from those that ought not to be, Burchell’s approach (which in essence is the particularizing standard) collapses into a purely subjective standard.¹⁴⁶⁵

On this basis, and due to the fact that South Africa is a multicultural society, considerations of fairness and human reality demand an “open door” policy as being the only reasonable alternative:

“In general it can be said that the standards underlying the term ordinary person embodies the civilized norms which people are expected to comply with in society. These norms

¹⁴⁶³ Heller supra (n 795) 97, citing Ward “A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature” (1994) University of Chicago Law Review 929 at 944. See further S v Elliot 411 A.2d 3 (Conn. 1979) where the Supreme Court rejected the suggestion that it could be appropriate to leave the question to the jury in this way: “The Chief Reporter for the Model Penal Code has noted that ‘(t)he purpose [of the Codes formulation] was explicitly to give full scope to what amounts to a plea in mitigation based upon a mental or emotional trauma of significant dimensions, with the jury asked to show whatever empathy it can’...Those comments may be the rationale of the draft made but they ignore the realities of the courtroom” (at 7-8).

¹⁴⁶⁴ Chalmers supra (n 1459) 206, noting Robinson’s supra (n 1461) comment.

¹⁴⁶⁵ Snyman supra (n 1317) 69 (own translation).

must be compatible with the rights enshrined in the Constitution. Therefore, the court must take the context surrounding the accused into account: the history of the relationship between X and Y, especially if they are married to each other or had a long relationship. This is especially relevant where X, the woman has been abused over a period of time by her husband.”¹⁴⁶⁶

It is submitted that on the basis of the above discussion the Eadie¹⁴⁶⁷ case was wrong to introduce an element of objectivity into the capacity test. Just as the enquiry into establishing whether an accused had fault requires a subjective test, so the enquiry into establishing whether the accused had criminal capacity also requires a pure subjective test. Therefore, the issue of criminal capacity deals with the question of whether the accused (at the crucial time period) had the necessary mental capacity.¹⁴⁶⁸

5.4.3.3 Conclusion

The discussion of South African case law relating to non-pathological incapacity, especially in relation to the case of Eadie,¹⁴⁶⁹ demonstrates that there are fundamental problems with the defence of non-pathological incapacity. Notably that the test for automatism and capacity tend to be the same in practice, despite the fact that they are two distinct defences, each with their own set of rules. Secondly, the court in the case of Eadie¹⁴⁷⁰ attempted to introduce an element of objectivity into the capacity enquiry. What the court had in mind was narrowing of the defence on policy grounds. It is submitted that the court was correct in acknowledging the fact that non-pathological incapacity should not be a complete defence. However, it went about doing this in the wrong way.

¹⁴⁶⁶ Ibid.

¹⁴⁶⁷ S v Eadie supra (n 360).

¹⁴⁶⁸ Snyman supra (n 1317) 69 (own translation).

¹⁴⁶⁹ S v Eadie supra (n 360).

¹⁴⁷⁰ Ibid.

5.4.4 Specific-intent doctrine

It is submitted that there are two reasons why South African courts have not been able to properly distinguish between the defences of automatism and non-pathological incapacity. Firstly, the way the capacity test is set out in our law will inevitably lead courts to duplicate the voluntary conduct requirement (i.e. capacity is treated as a distinct element of liability or more correctly, as a prerequisite for liability):

“In terms of South African laws established general principles, it is already required that actus reus entails proof that the conduct of the accused is voluntary. It is normally stated that the accused’s conduct be subject to his conscious will. It is submitted that it is not necessary to ask the same question twice.”¹⁴⁷¹

Secondly, the fact that a lack of capacity (i.e. non-pathological incapacity) can lead to a total acquittal.¹⁴⁷² This places the outcome of the defence on the same footing as automatism. In both cases it creates the impression the accused could not control themselves and therefore in both cases the accused is deserving of an acquittal. This creates an anomaly. Once the accused is proved to have been acting voluntarily (i.e. not in a state of automatism), they can still lack capacity. However, there will still be goal-directed activity, and any goal-directed activity militates against a loss of self-control or a defence of automatism for that matter.¹⁴⁷³

It is submitted that where an accused is acting voluntarily, there will be a measure of goal-directed conduct. Where goal-directed conduct is present, it necessarily implies

¹⁴⁷¹ Louw “The End of the Road for the defence of Provocation?” (2004) South African Journal of Criminal Justice 200 at 204.

¹⁴⁷² S v Chretien supra (n 97).

¹⁴⁷³ For examples of case law where goal-directed actions on the part of the accused militate against loss of self-control see 303-318. While in some of these cases, the accused were acquitted, it is submitted that these cases were not correctly decided.

that there must be a level of capacity present in the case of the defence of non-pathological incapacity.¹⁴⁷⁴ In other words, the question is not whether capacity present, but to what extent it is present.¹⁴⁷⁵ This point is not acknowledged by our courts: the concept of psychological fault underlying South African law offers no explanation for the fact that culpability is capable of gradation.¹⁴⁷⁶ It is recognized and accepted that criminal capacity may range from full capacity to diminished capacity, intention may range from *dolus directus* to *dolus eventualis* and negligence may range from *culpa levis* to *culpa lata*.¹⁴⁷⁷

A shortcoming of advocating a normative theory of fault is that the argument that has been advanced in its favour may have merit in the single-phase German criminal justice system which treats issues of criminal liability and criminal punishment as part and parcel of the same enquiry, but it lacks merit in South African law which treats criminal liability and criminal punishment as two separate and distinct enquiries. As Van Oosten has noted, during the former enquiry, the existence of criminal fault is in issue. During the latter the degree of criminal fault is in issue.¹⁴⁷⁸

¹⁴⁷⁴ In this respect Reilly supra (n 707) at 325-326 has noted that: "Since there is an element of choice, there may never be a complete loss of self-control. If a person's reaction in an extreme emotional state is chosen, the element of excuse may disappear altogether. With no loss of self-control, there is only a state of violence which is at all times connected in a complicated way to a series of choices: a choice to get angry; a choice whether or not to translate the anger into aggression; a choice whether or not to enter a state corresponding to a loss of self-control in which one can act upon the aggression without restraint; and once in this state, a choice whether or not to act with homicidal violence".

¹⁴⁷⁵ See further De Vos supra (n 349) at 358 notes this point about the Moses supra (n 347) case. In this case the court pointed out that the accused's controls were significantly impaired, not completely absent (714H-I).

¹⁴⁷⁶ Van Oosten supra (n 1119) 579.

¹⁴⁷⁷ Ibid.

¹⁴⁷⁸ Ibid.

It is submitted that the problem with taking diminished capacity into account at sentencing is that if the effects of battering renders the abused woman less than “wholly moral agent” and therefore, less deserving of punishment,¹⁴⁷⁹ it is not really fair that it is taken into account only at sentencing.¹⁴⁸⁰ Snyman makes the use of the following example to illustrate this point. In Anglo-American systems, intent is divided into two groups. In the first group, X kills Y execution style, with premeditation. In such a case, X is deserving of the harshest punishment. In the second scenario, despite the fact that the X is shown to have killed Y with intention, X is deserving of a more lenient sentence where for example, it can be shown that Y reasonably provoked X. In such legal systems, acknowledgment is given to the moral blameworthiness in respect of the manner in which the deaths were caused, in that murder is acknowledged only in the first category. In the second scenario, X would not be found guilty of murder but of a less serious offence.¹⁴⁸¹ As Snyman has noted:

“In the legal systems (mentioned above) it has been acknowledged that not all intentional deaths need be treated in the same fashion. It has been noted that there are different gradations within the concept of intentional killings. The moral reproach of intentional causing of death can differ from case to case”.¹⁴⁸²

The problem is that South African law does not treat the distinction between crimes in the same way: we only have two crimes, that of murder and culpable homicide:

¹⁴⁷⁹ Goldman supra (n 67) 234.

¹⁴⁸⁰ Goldman supra (n 67) at 234-235 notes La Fave and Scott’s supra (n 878) argument on this point: “[t]he rehabilitation theory rests upon the belief that human behaviour is the product of antecedent causes, [and] that these causes can be identified (section 1.5(a) (3) at 24). Goldman supra (n 67) goes on to stress this point notes: “where the criminal act is the killing of an [abuser] by a [battered woman], an inextricable link between the history of severe, chronic abuse in the home and the act of deliberate killing of the abuser seems undeniable” (at 235).

¹⁴⁸¹ Snyman supra (n 1317) 66 (own translation).

¹⁴⁸² Snyman supra (n 1317) 65 (own translation).

“This has created a void in our law. The distinction between murder and culpable homicide is an oversimplification of a much more complex distinction. This oversimplification indicates a clear relationship to the question of the effect of provocation in respect of liability. If our law had three as opposed to two categories of crimes, it would be much easier to organize provocation: an accused would not be found guilty of murder or culpable homicide but a category between these two, which in the Netherlands or Germany is simply called manslaughter or intentional manslaughter. This is the relatively easy route that the Anglo-American jurisdictions have followed”.¹⁴⁸³

Perhaps, then it could be suggested that in cases such as Moses¹⁴⁸⁴ and Nursingh¹⁴⁸⁵ the courts were correct in acquitting the accused despite the fact that there was goal-directed activity indicating that the accused’s capacity in those cases were diminished, not absent. The way the law is structured in South African leaves the court with two options: acquit or convict. To classify these accused as murderers is not only unfair but undesirable.¹⁴⁸⁶

It is my submission that a diminished level of capacity should be recognized in South African law. The case of S v Schwarz¹⁴⁸⁷ illustrates how such a defence would apply in our law. In this case, the accused a police officer, acknowledged that he had stabbed the deceased (his wife) with a knife and chopped her with an axe with “direct intent to kill

¹⁴⁸³ Snyman supra (n 1317) 66 (own translation). See for instance LaFave and Scott supra (n 878) at 179-324 where the distinction is made between first degree murder, murder in the second degree and manslaughter. In English law there is a distinction between murder (malice aforethought), voluntary manslaughter (where X kills Y intentionally but there were circumstances where X was provoked leading to lesser liability) and involuntary manslaughter (negligent killing) In this respect see Smith and Hogan Criminal Law 10th ed (2002) 353-388, Allen Textbook on Criminal Law 7ed (2003) 292-322.

¹⁴⁸⁴ S v Moses supra (n 347).

¹⁴⁸⁵ S v Nursingh supra (n 339).

¹⁴⁸⁶ Snyman supra (n 1317) 67.

¹⁴⁸⁷ (1999) JOL 5626 (A) (unreported). See also S v Marx supra (n 108) in chapter 2 at 95-96, which adopts a similar view.

her.”¹⁴⁸⁸ The accused further submitted that he committed these crimes in a state of emotional stress¹⁴⁸⁹ and that it lead to a state of diminished capacity.¹⁴⁹⁰

The court was correct to reject the accused’s version of events: namely that his wife did finally admit to an affair.¹⁴⁹¹ Grosskopf JA was of the opinion that the stressful circumstances in which the deceased found herself in at the time shortly before her death would not have been conducive to making such a confession.¹⁴⁹²

Although the accused was convicted of murder, it is submitted that the importance of this judgment lies in the fact that the State accepted the accused’s plea that he committed the murder due to emotional stress which resulted in diminished capacity and therefore argued their case on this basis. Such an approach would bring South

¹⁴⁸⁸ Ibid at par [3].

¹⁴⁸⁹ In the weeks leading up to the murder, the accused was suffering from depression, and had on more than one occasion, assaulted his wife. He also suspected her of having an affair. The deceased had furthermore told the accused that she wanted to divorce him. The week before the murder, the accused, due to his mental state (depression), stayed away from work and went to see his psychiatrist Dr. Taylor, whom he told that he needed urgent help and that he be booked into hospital. However, no beds were available at that time (at par [7]). On the night in question, the accused organized a family get together, not only as a means of reconciliation, but also to get his wife to admit that she was having an affair. The accused had tape recordings which he alleged proved that his wife was having an affair. However, other family members, who heard these recordings, disputed the fact that it proved she was having an affair. When the other family members had left, the accused phoned his sister in law to ask if his brother was on his way, and confided in her that he was suicidal. According to the accused’s version of events, his wife called him one side and admitted that she was having an affair and wanted to talk about it. At this point the accused experienced a “red hot” sensation in his head and moved quickly in her direction. When she got up, he saw the knife and grabbed it and stabbed her. After this incident, the accused alleged that he didn’t remember what happened due to memory loss (amnesia). He did however recall his son tugging on his leg and then recalled seeing the axe in his hand (at par [13]).

¹⁴⁹⁰ S v Schwarz supra (n 1487) at par [3]. See also S v Sibiyi (1984) SA 91 (A) at 95H-96C; S v Laubscher supra (n 68) at 168A-C; S v Calitz supra (n 330) at 129B; S v Smith supra (n 68) at 135F-G and S v Ingram supra (n 1330) at 8C-D.

¹⁴⁹¹ S v Schwarz supra (n 1487) at par [16].

¹⁴⁹² The accused was in a highly emotional state at the time, and was on his way to hospital to be booked in for psychiatric treatment. Furthermore, the deceased had suffered abuse at the hands of the accused before, and was therefore scared of him.

African law into line with other jurisdictions and would move away from recognizing non-pathological incapacity as a complete defence:

“In both English and American law the provocation defence is structured in a way that suggests that people are not totally at the mercy of their emotions. The defence requires a diminished level of self-control rather than, as the test is literally expressed - a loss of self-control. A literal loss of self-control would entitle the accused to an acquittal. It would be more in line with human reality to suggest that loss of self-control is not a single mental condition but can vary in intensity over a spectrum.”¹⁴⁹³

This still leaves the extent of lost self-control for the defence unclear, other than the loss need not be complete.

In Schwarz¹⁴⁹⁴ the accused stated that on the advice of his advocate he changed his plea to guilty of murder with direct intent to kill. The problem that the court had with this contention was that the accused maintained throughout his trial that despite his plea, he suffered from memory loss and that he did not have the intention to kill her. The court was of the opinion that these two statements clearly contradicted each other.¹⁴⁹⁵ It is this author’s submission that the accused’s counsel was correct in pleading diminished capacity, and that the accused had acted with intent. The New South Wales court R v Croft:¹⁴⁹⁶ also set out the provocation defence as requiring intent:

¹⁴⁹³ Yeo supra (n 538) 48. See further Phillips v R supra (n 599) at 137: “there is an intermediate stage between icy detachment and going berserk.” Cf chapter 2 at 78-79 for a discussion of the Moses supra (n 347) case where the defences witness implied that the accused’s controls might only have been diminished. See also S v Marx supra (n 108) where defence counsel wanted a pronouncement on diminished responsibility at the merit stage of the case. For a discussion of this case see chapter 2 at 95-102.

¹⁴⁹⁴ S v Schwarz supra (n 1487).

¹⁴⁹⁵ Ibid at par [15].

¹⁴⁹⁶ (1981) 3 AR 307.

“It is of course, obvious that such a history must be taken into account in determining whether the provocative incident was such as could have caused an ordinary person, placed in all the circumstances in relation to the deceased as the accused then stood, to have so far lost self-control as to have formed an intent to kill or to do grievous bodily harm to the accused and that the accused did in fact so lose self-control”.¹⁴⁹⁷

The concluding words in this case indicate the extent of actual loss of self-control required for provocation. It comprises the mental state of a person who as a result of passion, becomes so emotionally charged as to form a murderous intention.¹⁴⁹⁸ Actual loss of self-control is therefore assessed by means of the mental element of murder.¹⁴⁹⁹ Therefore, any formation of intent on the part of the accused would indicate to the court that capacity was present to a certain extent.¹⁵⁰⁰

In the case of an abused woman, she should be able to use the effects of battering to support a defence of diminished capacity¹⁵⁰¹ which focuses not on the mitigating circumstances¹⁵⁰² of the act, but rather on the actor’s inability to form the requisite

¹⁴⁹⁷ Ibid at 321.

¹⁴⁹⁸ Yeo in “Case and comment: Peisley” (1992) Criminal Law Journal 197 at 199.

¹⁴⁹⁹ Yeo supra (n 538) 49.

¹⁵⁰⁰ This is in accordance with my earlier submission at 350-351.

¹⁵⁰¹ Goldman supra (n 67) at n 153 has noted that expert testimony concerning the psychological effects of chronic abuse can support the battered woman’s claim of diminished capacity: see Mihajlovich supra (n 866) at 1280-1281 (noting that a battered woman may argue that due to years of abuse, she is psychologically incapable of fully and completely considering her actions preventing her from forming the necessary intention for murder). See also Davidson “Post-Traumatic Stress Disorder” A Controversial Defense for Veterans of a Controversial War” (1988) Western Massachusetts and Mary Law Review 424-425 (noting that evidence of post-traumatic stress syndrome may frustrate the prosecutor’s attempt to prove sufficient mens rea or specific intent). Goldman supra (n 67) at n 147 has further noted that some scholars appear to use the terms diminished capacity and diminished responsibility interchangeably: see Robitscher and Huynses “In Defense of the Insanity Defense” (1982) Emory Law Journal 9 at 28 (referring to diminished capacity and two sentences later to “diminished responsibility” without making any distinction) But see further Sendor “Crime as Communication: An interpretive Theory of the insanity Defense and the Mental Elements of Crime” (1986) Georgia Law Review at 1430-1431 (distinguishing between diminished capacity which involves an accused’s inability to form a specific mens rea, and diminished responsibility, which involves the accused’s inability to act according to the law).

¹⁵⁰² Alternatively, the effects of battering may support a diminished responsibility claim (taken into account at sentencing) which focuses on the accused’s inability to guide her conduct according to

mens rea for the offence charged.¹⁵⁰³

“Diminished capacity recognizes that because the accused suffered from some abnormal mental condition not rising to the level of legal insanity, she lacked the capacity to act with a certain mental state. Thus, the accused’s culpability for the killing is lessened and she should be convicted only of a reduced offense. Typically, this involves evidence that an accused, because of her mental condition could not act with premeditation or deliberation required for murder”¹⁵⁰⁴

In such a case goal-directed behaviour by an abused woman would not militate against her claim that her capacity was diminished and therefore should be convicted of a lesser offence, providing that there is no evidence of premeditation, or “extensive planning” of the murder.¹⁵⁰⁵

The problem with the accused’s defence in Schwarz¹⁵⁰⁶ was that although a diminished capacity defence does require “murderous intent,” the accused must be shown to be acting with intent other than direct or specific intent. In other words, he must not act with premeditation, to be convicted of a lesser offence. However, the facts of the case clearly illustrate that he did act with premeditation: (1) the manner in which the accused managed to get his uncle and aunt to leave the house at the crucial time period, on the

relevant moral and legal factors. It recognizes that mental conditions less severe than those which qualify as legal insanity can impact upon the accused’s cognitive or volitional capacities in a manner that necessarily bears on criminal culpability (Goldman supra (n 67) at 277).

¹⁵⁰³ Goldman supra (n 67) 226. But some American jurisdictions do not allow any evidence of mental abnormality short of insanity. See for e.g., State v Gachot, 609 So. 2d 269, 276-278 (La. Ct. App. 1992) (stating that the accused could not present evidence of allegedly severe mental abuse by his parents, the murder victims, absent a plea of not guilty by reason of insanity, since the state does not recognize the diminished capacity doctrine) cert denied, 114 47.8 (1993).

¹⁵⁰⁴ Goldman supra (n 67) 226-227.

¹⁵⁰⁵ In this respect see 321-322 for a discussion of battered women’s response patterns.

¹⁵⁰⁶ S v Schwarz supra (n 1487).

pretext of sending them to a bank ATM to withdraw money for him and (2) the fact that the two murder weapons coincidentally happened to be in the bedroom.¹⁵⁰⁷ While it could be suggested that the requesting a relative to withdraw money from an ATM is not an unusual request, the fact that two deadly weapons were present in the bedroom, are more difficult to explain.

It is my submission that the introduction of a defence of diminished capacity as advocated by S v Marx¹⁵⁰⁸ and Schwarz,¹⁵⁰⁹ could only be achieved in South African law by returning to the rules relating to provocation followed in South Africa prior to 1971.¹⁵¹⁰ According to the specific intent doctrine, policy considerations require that an accused should not be completely acquitted.¹⁵¹¹ However, these considerations also require that an accused not be convicted of murder but of culpable homicide.¹⁵¹² This compromise solution (of culpable homicide) can only be reached by treating provocation as a special defence, one which is not strictly adjudicated in terms of the

¹⁵⁰⁷ Ibid at par [18].

¹⁵⁰⁸ S v Marx supra (n 108).

¹⁵⁰⁹ S v Schwarz supra (n 1487).

¹⁵¹⁰ For a discussion of this approach see chapter 2 at 59-63.

¹⁵¹¹ Therefore, the law must treat all people on equal footing. In S v Kensley supra (n 337) at 658G-I this sentiment was expressed: "Criminal law for purposes of conviction...constitutes a set of norms applicable to sane adult embers 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."

¹⁵¹² Assuming that all the requirements of the defence are complied with.

general principles relating to culpability (*mens rea*).¹⁵¹³ Rather, it must be treated as a special defence with its own rules.¹⁵¹⁴

How would such approach be applied practically in the case of battered women? If it can be shown that the abused woman (as result of provocation) was not acting voluntarily, and there was no goal-directed activity on her part, she can rely on automatism (according to the general principles approach, provocation can cause automatism). But where the effects of battering were of such a nature that the abused woman can be shown to be acting with a diminished level of capacity (this would necessarily entail a level of goal-directed activity on her part and possibly intention), she would be convicted of a lesser offence. Therefore, instead of convicting the battered woman who kills her abuser with intent, for a specific intent offence,¹⁵¹⁵ she will now

¹⁵¹³ Snyman supra (n 1317) 57. Snyman supra (n 25) at 235 sets out the general principles approach currently followed in South African law: “Provocation is nothing more than a set of acts which must be assessed like any other set of facts (such as a motor accident): one simply applies the ordinary principles of liability by asking whether, in spite of the provocation, x has committed an act which complies with the definitional elements and which is unlawful, and whether he had criminal capacity and intention or negligence. Only once all these requirements have been satisfied can X be convicted of the crime with which he is charged.”

¹⁵¹⁴ Snyman supra (n 1317) 57.

¹⁵¹⁵ Ashworth in Principles of Criminal Law 5th ed (2006) at 212 notes that in English law, where the crime charged is one of specific intent, intoxication may amount to a defence if it is sufficient to negative intention. This is the rule that has been established by the case of DPP v Majewski [1977] AC 443. This case divides crimes into offences of specific intent and offences of basic intent. Furthermore, it allows intoxication as a defence to the former but not to the latter. Burchell in “Intoxication and the Criminal Law” (1981) South African Law Journal at 177 notes that in the this approach in English law found its way into South African law through section 141 of the Transkeian Penal Code 1886. The English specific-intent rule was followed by South African courts in an attempt to reconcile the application of the maximum *actus non facit reum nisi mens sit rea* with the demands of public policy in protecting society from harmful conduct. For example, voluntary intoxication of a degree sufficient to negative the relevant “specific intent” is a good defence in that the accused is found not guilty of the crime charged but rather guilty of a less serious crime for which such a verdict is competent. Cf chapter 2 at 61-62 supra. Kotze J.A. in R v Jolly 1923 A.D. 177, the *locus classicus* of the objective approach said: “it is a rule or presumption of law that a person is taken to contemplate and intend the natural and probable consequences of his acts” (at 183). Pain in “Some reflections on our Criminal Law” (1960) Acta Juridica 289 at 298 notes that the presumption has been considered one of law by jurists such as Moorman supra (n 245) 2.1.18, textbook writers such as Gardiner and Lansdown South African Criminal Law and Procedure 6th ed (1957) at 53 and members of the bench. Authority for the specific intent rule can be found in the cases of R v Fowle 1906 TS 505 at 508-509 and an obiter dictum in R v Innes Grant 1949 (1) SA 753 (A) at 765. Burchell supra at 178-179 notes that certain post Johnson (supra (n 301)) provincial decisions create the impression that the specific intent rule was applied where the accused was charged with assault with the intent to do grievous bodily harm and was intoxicated to a degree

only be convicted of basic intent offence due to the effects of the battering on mental state.¹⁵¹⁶

There are possible shortcomings to treating provocation as a special defence. Van der Merwe has noted that:

“With the advent of the specific intent theory, the formal process of reduction in the verdict of the accused to a lesser crime was automatic. This had the effect of eliminating the difficult problem of proving that that the accused had the necessary *dolus* for the main offence for which he was charged. But what was problematic about this approach was that because sentence reduction was automatic, the normal deductions with reference to the accused’s conduct could not be made”¹⁵¹⁷

Secondly, there is difficulty in determining which crimes require “specific intent” and those that do not.¹⁵¹⁸ Thirdly, it is submitted that people who cannot form specific intent cannot form basic intent either.¹⁵¹⁹ Lastly, there has never been a clear division of crimes into specific intent and general intent.¹⁵²⁰ In response to the second argument, Ashworth has noted that various theories have been advanced in English law to explain why offences of murder and wounding together with theft, handling, and all crimes of

sufficient to negative such “specific intent”. A conviction of assault was reached in these cases without any investigation into whether the accused had the *mens rea* required for that crime (S v Johnson supra (n 301) 205 D-E; S v V 1979 SA 656 (A) 664 H. But as Pain supra notes, the presumption is one of fact, doing no more than shift an evidential burden to the accused. In this respect see R v Nsele 1955 (2) SA 145 (AD) at 151 and Beadle J in R v Ncetendaba 1952 (2) SA 647 at 652-653.

¹⁵¹⁶ This would be in accordance with the Mokonto supra (n 282) decision at 327B-C where it was held that provocation far from negating an intention to kill contributed to such intention.

¹⁵¹⁷ Van der Merwe “Toerekeningsvatbaarheid v ‘Specific Intent’ – die Chretien-beslissing” (1987) Obiter 142 at 150-151 (own translation).

¹⁵¹⁸ Burchell supra (n 1515) 178.

¹⁵¹⁹ Du Plessis supra (n 326) 547.

¹⁵²⁰ *Ibid.*

attempt are crimes of specific intent whereas, others are not. For instance, to argue that all these crimes require some form of further intent is unconvincing, since that is not true of murder. Moreover, many crimes contain some elements for which only intent will suffice and others for which recklessness is sufficient.¹⁵²¹ To quote Ashworth:

“This rather ramshackle law has proved workable. The courts have thus restricted the operation of the ‘inexorable logic’ of mens rea to the few offences of specific intent and, since most of them are underpinned by a lesser offence of ‘basic intent’, no great loss of social defence has occurred.”¹⁵²²

In response to the third criticism, the problems posed by the specific intent doctrine can be resolved by examining case law. In the case of Chretien¹⁵²³ the accused put in issue the question of whether he intended to knock down some pedestrians with his Combi. According to his version he had only been negligent and had not foreseen that his vehicle would possibly hit any of the people. The question before the court then became the question whether he had the (specific) intent to apply force to the person of his victims. Although it had been accepted that common assault was not a crime of specific intent, it became evident that on the issues raised at this particular trial it was. The question of how a person who cannot form a specific intent can form a general intent can be answered by referring to the Chretien:¹⁵²⁴ “It goes without saying that according to our law a court may find that because of the influence of liquor a person could not foresee a specific result which he would have foreseen had he been sober and that he is therefore guilty of a less serious crime”¹⁵²⁵

¹⁵²¹ Ashworth supra (n 1515) 212.

¹⁵²² Ibid.

¹⁵²³ S v Chretien supra (n 97).

¹⁵²⁴ Ibid.

¹⁵²⁵ Ibid at 1104B (Du Plessis translation).

Therefore:

“The issue is a matter of foresight. A person not fully in possession of his faculties may not be able to foresee a more remote consequence of his conduct, for example, the infliction of serious injury, but he might be readily capable of foreseeing an immediate consequence of his conduct, for example, the application of force to the person of another. Here common assault, the intentional application of force to the person of another, could be regarded as a crime of general intent, the specific intent in issue on these facts being the intent to bring about serious injury as a result of the application of force. What it really amounts to is that an intoxicated person who commits a serious assault may be able to cast doubt, because, because of his intoxication, on his ability to foresee that his conduct would result in grievous bodily harm to his victim. He may not be able to cast such doubt on his intention to apply force to his victim. This latter intention, after, all calls for less foresight than the former. Thus, on a fairly simple application of the rules relating to onus of proof, the ‘mystery’ of how a person who cannot form a specific intent can form a general intent is cleared up.”¹⁵²⁶

Consider another example. Consider the case of Campher¹⁵²⁷ but adapt the facts. Lets assume that Mrs. Campher had fired the shot at a distance of two metres and that she had not admitted to having the desire to destroy the ‘monster’ who was breaking her down emotionally. Let it also be assumed that she had said that in her extreme distress caused by emotional torment, fear, degradation, the mockery of her religion and the unmitigated unreasonableness and hostility of her husband, she had suddenly felt that she should retaliate, drive back this “monster”, do something to bring an end to his horrid behaviour. Therefore she shot at him wishing to hurt him but not thinking, in her mental anguish and confusion, that she would kill him. Depending on what type of witness she was and taking into consideration the indisputable facts pointing at confusion, the clouding of clear judgment and normal foresight on her part, and her general emotional distress, there would have been fairly good prospect of her being

¹⁵²⁶ Du Plessis supra (n 326) 548.

¹⁵²⁷ S v Campher supra (n 320).

convicted of culpable homicide. The main issue before the trial court would have been whether she had had the (specific) intent to kill or only the (general) intent to do some harm to the deceased in a dangerous and unreasonable manner. On the actual facts, that she had hit the deceased in the centre of the back, the bullet penetrating his heart, with a shot that had traveled no more than 20 centimeters, the prosecution would probably have been able to establish an intent to kill beyond a reasonable doubt had the hypothetical defence referred to above been raised. This analysis can be seen to resolve the question whether the prosecution can prove the intent it alleges, for instance, intent to kill or intent to inflict grievous bodily harm, in the face of the accused's reliance on intoxication or mental confusion to bolster her assertion that she had no such (specific intent).”¹⁵²⁸

The above suggested proposal would assist the court in dealing with cases involving a long history of abuse where no final provocative incident, occurring immediately prior to the killing, can be demonstrated, or where the accused's retaliation was preceded by planning and deliberation.¹⁵²⁹ Therefore from a practical viewpoint, a sudden loss of self-control would no longer be necessary, since the since the extension of the time element would take into account the “slow-burning” effects of prolonged and severe

¹⁵²⁸ Du Plessis supra (n 326) 548-549.

¹⁵²⁹ Horder supra (n 687) at 124 notes that recognizing the significance of a slow-burn response to provocation, has resulted in the English courts downplaying the significance of evidence that the accused armed herself and was set on revenge from the outset, evidence which ought to count against the possibility of an excuse. A classic example of this is the case of R v Ahluwalia supra (n 602). Forearming oneself is not, ipso fact, inconsistent with an adequate spontaneity of response for the purposes of a provocation plea. It all depends on whether the forearming was part-and-parcel of the (ex hypothesi) spontaneous angry response, or showed that the accused was set upon revenge. Likewise, a desire for revenge in the simple sense of retaliation is not inconsistent with spontaneously lost self-control; indeed, typically, it is such a desire that one loses control of. However Horder supra (n 687) at n 6 is correct in his assertion that to be “set” upon revenge as a matter of practical reasoning, to have decided on it before one loses self-control, is inconsistent with a provocation plea: see R v Ibrams supra (n 500) and Gregory (1982) 74 Cr App R 154. Therefore, the correct defence to be pleaded in these cases was diminished responsibility.

abuse,¹⁵³⁰ and this would retain the causal link between the provocative act and the reaction since the lapse of time sometimes heats rather than cools passions.¹⁵³¹ This would answer the question as to whether the accused's behaviour during her loss of self-control is "uncontrollable" (indicating a lack of choice and thus a lack of conative capacity to a certain extent) rather than merely "uncontrolled" (indicating a choice to give vent to her passions or emotions).¹⁵³²

One further point should be made concerning the notion that since provocation is now to be treated as a special defence, the court must apply not only a subjective test to determine the accused's culpability, but also an objective test, in order to satisfy policy considerations.¹⁵³³ It is submitted that this is not correct. As has been discussed elsewhere, there are practical problems in applying such a test, notably that it leads to indeterminacy¹⁵³⁴ and ultimately collapses into a subjective test. It is unclear how Snyman's test would work:

"It is impossible to establish whether X had certain intention or knowledge by asking whether she ought to have had the intention or knowledge."¹⁵³⁵

The test would be circular: unless the abused woman reacted as a reasonable abused woman would have, she won't be convicted of a lesser offence.¹⁵³⁶ It is clinically common

¹⁵³⁰ Pather A Comparative analysis of the defence of provocation LLM (2000) 93.

¹⁵³¹ Ibid.

¹⁵³² Ashworth *supra* (n 1253) 236.

¹⁵³³ Snyman *supra* (n 1317) 69 (own translation).

¹⁵³⁴ For a discussion of the problems in applying a subjective-objective test see 341-350 *op cit*.

¹⁵³⁵ Snyman *supra* (n 1317) 69 (own translation).

¹⁵³⁶ Chalmers *supra* (n 1459) 205.

place that not all abused woman suffering from post-traumatic stress disorder (or the effects of battering) act the same.¹⁵³⁷

The end result of this would be that:

[I]t amounts to illogical confusion between the subjective and objective.”¹⁵³⁸

It is submitted that since the test for intention is subjective,¹⁵³⁹ it should remain so.¹⁵⁴⁰

5.5 Conclusion

The question concerning what the precise effect of provocation will be on an accused’s criminal liability is not entirely clear in South African law. One of the reasons for this uncertainty is the fact that since 1971 there are no correctly reported cases in which the South African courts have expressly answered this question. It has to be assumed that provocation is currently dealt with by means of the general principles approach to criminal liability.¹⁵⁴¹ One of the main problems underlying the defence of non-pathological incapacity is the issue of lost self-control. According to South African law, capacity is absent when an accused lacks self-control.¹⁵⁴² However, it is far from clear in our law when self-control is absent. While theorists such as De Vos have suggested

¹⁵³⁷ Morse supra (n 1369) 384.

¹⁵³⁸ Snyman supra (n 1317) 69 (own translation).

¹⁵³⁹ As Snyman supra (n 1100) 239: “[T]he test is no longer how the ordinary or reasonable person would have reacted to the provocation, but how the particular accused, given his personal characteristics, such as quick temper, jealousy or a superstitious turn of mind, in fact reacted, and what his state of mind was at the crucial time.”

¹⁵⁴⁰ See chapter 2 at 64, including n 280 where the Appellate Division in Dlodlo supra (n 279) approved the subjective test for the intention to kill where the defence of provocation was raised. Furthermore, the rejection of the objective test in Mokonto supra (n 282) (chapter 2 at 65) illustrated that what is important is not the nature of the provocative act, but its effect on the accused’s mental abilities or state of mind.”

¹⁵⁴¹ See 318-319 op cit for a definition of this approach.

¹⁵⁴² See 320-321 op cit for ways in which the court have defined “loss of self-control.”

that the reason for the confusion could be traced back to the courts misinterpretation of the true nature of the second leg of the criminal capacity test (conative). According to this theorist, the courts have not clearly distinguished between conative function and affective function.¹⁵⁴³ It is submitted that this finding does little to explain what the term loss of self-control means other than in the context of affective function. It is this author's submission that the main reason for the problems surrounding this term has been the courts equation of the defence of automatism with non-pathological incapacity (or loss of self-control). This trend is clearly demonstrated in our case law.¹⁵⁴⁴ By duplicating the voluntary conduct requirement under mens rea the courts have asked the same question twice.¹⁵⁴⁵ Furthermore, the courts have complicated matters by attempting to introduce an objective element into the subjective test for capacity. This creates problems of its own, notably that it leads to indeterminacy.¹⁵⁴⁶

It is submitted that where an accused is acting voluntarily, there will be a measure of goal-directed conduct. Where goal-directed conduct is present, it necessarily implies that there must be a level of capacity present in the case of the defence of non-pathological incapacity. In other words, the question is not whether capacity present, but to what extent it is present.¹⁵⁴⁷ This point is not acknowledged by our courts: the concept of psychological fault underlying South African law offers no explanation for the fact that culpability is capable of gradation.¹⁵⁴⁸

¹⁵⁴³ For a discussion of De Vos's theory see 329-332 op cit.

¹⁵⁴⁴ For a discussion of the case law in this respect see 322-338 op cit.

¹⁵⁴⁵ For a discussion of this point see 350-351.

¹⁵⁴⁶ For a discussion of a move towards an objective approach and its potential problems see 341-350 op cit.

¹⁵⁴⁷ See 351-352 op cit.

¹⁵⁴⁸ In this respect see 352.

It is my submission that the effects of battering could be used to support a defence of diminished capacity which focuses not on the mitigating circumstances of the act, but rather on the actor's inability to form the requisite mens rea for the offence charged.¹⁵⁴⁹

However, the introduction of such a defence could only be achieved by returning to the rules relating to provocation followed in South Africa prior to 1971. According to the specific intent doctrine, policy considerations require that an accused should not be completely acquitted. However, these considerations also require that an accused not be convicted of murder but of culpable homicide. This comprise solution (of culpable homicide) can only be reached by treating provocation as a special defence, one which is not strictly adjudicated in terms of the general principles relating to culpability (mens rea).¹⁵⁵⁰ Furthermore, it is submitted that a subjective test must be applied, since Snyman's objective-subjective test leads to an illogical confusion between the subjective and objective.¹⁵⁵¹

¹⁵⁴⁹ For a discussion of this approach see 355-356 op cit.

¹⁵⁵⁰ For a discussion of the specific intent doctrine see 350-360 op cit.

¹⁵⁵¹ In this respect see 365 op cit.

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