'BATTERED WOMAN SYNDROME': A POSSIBLE DEFENCE IN SOUTH AFRICAN LAW FOR WOMEN WHO KILL?

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DECLARATION

I, Nerisha Singh, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other university.

Signed and dated at Durban on the 13th day of March 2000.

Nerisha Singh

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INTRODUCTION

For criminal liability to result, the prosecution must prove beyond reasonable doubt, that the accused's conduct was accompanied by (1) criminal capacity; (2) fault (*mens rea*); and (3) voluntary conduct which was unlawful (*actus reus*).[1]

Unlawfulness

The accused's conduct must be unlawful in order to lead to criminal liability.[2] Snyman writes that 'unlawful' means 'contrary to the *bone mores* or legal convictions of the community'.[3] There must be no defence excluding unlawfulness available to the accused.[4] The general defences excluding unlawfulness of conduct are: private defence, necessity, impossibility, obedience to superior orders, consent, public authority, disciplinary chastisement, *de minimus non curat lex*, and *negotiorum gestio*.[5]

In my dissertation, I will focus on private defence and whether battered women who kill can successfully rely on such a defence. Snyman defines private defence as follows:

> 'A person acts in private defence, and his act is therefore unlawful, if he uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon his or somebody else's life, bodily integrity, property or

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[1] J M Burchell *South African Criminal Law and Procedure Volume 1 General Principles of Criminal Law* third edition (1997) Juta 33.

[2] J M Burchell *ibid* 34.

[3] C R Snyman *Criminal Law* third edition (1995) Butterworths at 90.

[4] J M Burchell *op cit* 34.

[5] J M Burchell *ibid* 34; C R Snyman *op cit* 97; P J Visser and J P Voster *General Principles of Criminal Law* third edition (1990) Butterworths 181.

other interest which deserves to be protected, provided the defence act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack.'[6]

It will be shown that the requirement of imminent attack, as currently defined in our law, makes it difficult for battered women who kill to rely on private defence. The importance of expert testimony and the admissibility thereof will discussed in the context of private defence.

Criminal Capacity

Before a person can be convicted of an offence, s/he must have criminal capacity. A person possess criminal capacity if s/he has the mental abilities required by law to be held responsible and liable for his or her unlawful conduct.[7]

The test by which criminal capacity is determined is whether the accused's mental faculties were at the time of the alleged offence sufficiently developed or impaired to render him or her capable or incapable of (a) appreciating the nature and quality of his or her conduct (insight into the deed); (b) appreciating the wrongfulness of his or her conduct (insight into unlawfulness); (c) acting in accordance with an appreciation of the nature and quality or wrongfulness of his or her conduct (control of conduct).[8] Persons are only responsible for their criminal conduct if the prosecution proves beyond a reasonable doubt, that at the time

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[6] C R Snyman *op cit* 97

[7] *ibid* 145.

[8] F F W Van Oosten 'Non-pathological criminal incapacity versus pathological criminal incapacity' (1997) 6 *South African Journal of Criminal Justice* 127 at 129; *S v Campher* 1987 (1) SA 940 (A); *S v Henry* 1999 (1) SACR 13 (SCA); *S v Ingram* 1995 (1) SACR 1 (A); *S v Moses* 1996 (1) SACR 701 (C); *S v Lesch* 1983 (1) SA 814 (O).

the conduct was perpetrated s/he possessed criminal capacity.[9] In others words, as is evident from the test set out above, the psychological capacities for insight and control.[10]

Up until 1981, it was widely assumed that the defence of incapacity could only be raised where the accused suffered from a mental illness or at the time of the incident was of an immature age.[11] In addition to the defences of mental illness or youth the defence 'non-pathological criminal incapacity' came to the fore and was introduced for the first time by Joubert JA in the 1988 case of *S v Laubscher*[12] to separate this defence from that of mental illness created in section 78(1) of the Criminal Procedure Act 51 of 1977.[13]

Mental Illness

In terms of section 78(1) of the Criminal Procedure Act[14] a person lacks criminal capacity if at the time of the commission of an act which constitutes an offence, s/he suffers from 'a mental illness or mental defect.'[13]

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[9] J M Burchell *op cit* 153.

[10] *ibid* 153.

[11] C R Snyman *op cit* 146.

[12] 1988 (1) SA 163 (A).

[13] C R Snyman *op cit* 152.

[14] 51 of 1977.

[13] In terms of this section: 'A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable -

(a) of appreciating the wrongfulness of his act; or

(b) of acting in accordance with an appreciation of the wrongfulness of his act;

shall not be criminally responsible for such act'.

Intoxication

Intoxication, whether induced by the consumption of alcohol or the intake of drugs, may deprive a person of the capacity to appreciate the wrongfulness of his conduct or the capacity to act with such appreciation.[14] The leading case on the effect of voluntary intoxication on criminal liability is the 1981 Appellate Division decision of *S v Chretien*.[15] Prior to *Chretien*, intoxication did not afford an accused a complete defence and the courts applied the so-called 'specific-intent' theory.

Therefore, before *Chretien's* decision in 1981 intoxication could have the effect of excluding 'specific-intent' and the person could not be convicted of the 'specific' intent crime with which he was charged but only of a less serious crime.[16]

The question of law reserved for decision by the Appellate Division in *Chretien* was 'whether on the facts found proven by the court the learned judge was correct in law in holding that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol.'

Rumpff CJ held that whenever someone commits an act is so drunk that he does not realise that what he has done is unlawful or that his inhibitions have substantially disintegrated, he can be regarded as not being criminally responsible, and if there is

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[14] J M Burchell *op cit* 183.

[15] 1981 (1) SA 1097 (A).

[16] C R Snyman *op cit* 211; P J Visser and J P Voster *op cit* 359; F F W Van Oosten *op cit* 127 at 134; *S v Johnson* 1969 (1) SA 201 (A).

reasonable doubt the accused must be given the benefit thereof.[17]

As a result of this judgment, an important question as to whether incapacity should only be limited to mental illness, immature age and intoxication arose.[18] In other words, whether these factors affecting criminal capacity should be extended to include factors such as provocation or emotional stress.[19]

Provocation

Provocation or severe emotional stress, may deprive a person of the capacity to appreciate the wrongfulness of his or her conduct or to act in accordance with this appreciation.[20] The origins of the defence of provocation can be traced back to section 141 of the old Transkeian Penal Code of 1886.[21] The Code was passed by the parliament of the Cape of Good Hope in 1886[22] and formed

> '.... part of the administrative machinery of the Cape colonial authorities for the Xhosa speaking people who occupied the area between the Great Kei and the Mtamvuna Rivers. However, it became the Criminal Code applicable to all people living in the Transkeian Territories regardless of race

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[17] at 1104.

[18] C R Snyman *op cit* 147.

[19] *ibid* 147.

[20] J M Burchell *op cit* 201.

[21] C R Snyman *op cit* 223; D S Koyana *The Influence of the Transkeian Penal Code on South African Criminal Law* (1992) Lovedale Press.

[22] D S Koyana *op cit* v.

or colour.'[23]

Koyana's work on the significance of the Code and its influence on South African criminal law is particularly useful. He demonstrates the influence of the Code on the general principles of liability.[24] He also demonstrates the influence of the Code in relation to specific offences such as fraud,[25] rape,[26] assault[27] and murder.[28]

'Provocation' in section 141 of the Transkeian Penal Code is defined as that which is 'sufficient to deprive any ordinary person of the power of self-control'. There was, therefore, an objective assessment of provocation - the test being whether a reasonable man would have lost his or her self control.[29]

In the1924 case of *R v Butelezi*[30] the court held that section 141 of the Transkeian Penal Code correctly expressed the South African law on the subject of provocation.[31] Soloman J A held:

'Our law on the subject is, as pointed out by Gardiner and Lansdown in their

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[23] *ibid* v.

[24] *ibid* 62-84.

[25] *ibid* 163.

[26] *ibid* 181.

[27] *ibid* 183.

[28] *ibid* 187.

[29] *ibid* 280.

[30] 1924 AD 160.

[31] J M Burchell *op cit* 279.

> treatise on criminal law, well expressed in section 141 of the Transkeian Penal Code of 1886 ... It would be difficult, I think, to improve upon that statement of law, which may be regarded as correctly laying down our law upon this subject.'[32]

Butelezi's case in effect, therefore, allowed for 'a full-scale application of section 141 of the Transkeian Penal Code in South African courts.'[33] In the 1959 case of *S v Krull* [34] Schreiner JA held that in considering the question of intention to kill, when provocation is accompanied by 'idiosyncrasies such as hotheadedness, conformity to objective standards must, for practical reasons be insisted on.'[35] According to Visser and Voster, the implication of the Appellate Division's objective test in this case in regard to the 'idiosyncrasies' would be to treat an accused who is inherently quick-tempered more severely than one who voluntarily became intoxicated.[36]

'The changing face of provocation'[37]

A frequently asked question after the *Chretien* decision was, if severe intoxication could exclude the basic elements of liability then why not provocation and severe emotional

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[32] at 162.

[33] D S Koyana *ibid* 88; see *R v Attwood* 1946 AD 331 and *R v Blockland* 1946 AD 940.

[34] 1959 (3) SA 392 (A).

[35] at 396.

[36] P J Visser and J P Voster *op cit* 394.

[37] C R M Dlamini 'The Changing Face of Provocation' (1990) *South African Journal of Criminal Justice* 130 at 130.

stress?[38] The 'changing face of provocation'[39] used by Dlamini aptly describes the move from an objective test to a subjective test used to determine provocation. The 'changing face of provocation' began with the 1949 case of *R v Thibani*[40] where the court regarded provocation 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 intent as well as the act beyond reasonable doubt.'[41]

This decision led to the diminishing influence of section 141 of the Transkeian Penal Code in our law[42] and it was in 1971 case of *S v Mokonto*[43] where Holmes J held:

> 'The test for intention being subjective, it seems to follow that provocation, which bears upon intention, must also be judged subjectively, whether or not it is accompanied by idiosyncracies ... Section 141 of the Transkeian Penal Code should be confined to the territory to which it was passed.'[44]

The 1983 case of *S v Van Vuuren*[45] started a new phase in the development of the defence

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[38] J M Burchell *op cit* 204; F F W Van Oosten *op cit* 127 at 139.

[39] C R M Dlamini *op cit* 130 at 130.

[40] 1949 (4) SA 720 (A); see also *S v Mangondo* 1963 (4) SA 160 (A).

[41] at 731.

[42] C R M Dlamini *op cit* 130 at 135.

[43] 1971 (2) SA 319 (A).

[44] at 326.

[45] 1983 (1) SA 12.

of provocation[46] where Diemont AJA held:

> 'In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing. Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability.'[47]

A few days later in the case of *S v Lesch*,[48] the crux of the accused defence was that conduct attributed to him could not be imputed to him as he, as a consequence of a rage reaction, did not have the capacity to act in accordance with his admitted awareness of the unlawfulness of his conduct. The court held that the accused's emotional and impulsive act did not suspend his accountability, especially as he had manifested signs of insight into and control over his conduct.

The importance of both *Van Vuuren* and *Lesch*, despite the fact that the accused were both convicted of murder, was that in both judgments provocation or emotional stress was considered relevant in the determination of the accused's criminal capacity.[49]

In a more recent case, the court in *S v Moses,*[50] the court held:

> '.... the law is clearly to the effect that where the provocation and emotional

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[46] F F W Van Oosten *op cit* 127 at 139.

[47] at 17.

[48] 1983 (1) SA 814 (O).

[49] J M Burchell *op cit* 205.

[50] 1996 (1) SACR 701 (C).

stress are raised as a defence, it is a subjective test of capacity without any normative evaluation of how a reasonable person would have acted under the same stress and stress.'

This subjectivisation of the defence of provocation, as is evident from our case law discussed in detail in chapter one,[51] has not brought about a uniform standard in the courts approach to the defence of provocation.[52] In some cases the courts are prepared to accept that provocation can be a complete defence,[53] whereas as in others the courts have not.[54] While in others, although the courts in principle have been prepared to accept that provocation can be a complete defence, they found that on the facts the defence could not succeed.[55] Even though the courts are commended for its flexibility, lack of a uniform standard to the defence of provocation may lead to uncertainty.[56]

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[51] *S v Mokonto* 1971 (2) SA 319 (A); *S v Arnold* 1985 (3) SA 257 (C); *S v Lesch* 1983 (1) SA 814 (O); *S v Campher* 1987 (1) SA 940 (A); *S v Laubscher* 1988 (1) SA 163 (A); *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Wiid* 1990 (1) SACR 331 (D); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Nursingh* 1995 (2) SACR 331(D); *S v Goitsemag* 1997 (1) SA SACR 99 (O).

[52] C R M Dlamini *op cit* 130 at 135.

[53] *S v Arnold* 1985 (3) SA 256 (C); *S v Mandela* 1992 (1) SACR 661 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Nursingh* 1995 (2) SACR 331(D); *S v Cunningham* 1996 (1) SACR 631 (A); *S v Moses* 1996 (1) SACR 701 (C); *S v Henry* 1999 (1) SACR 13 (SCA); C R M Dlamini *ibid* 130 at 135.

[54] *S v Campher* 1987 (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 331 (D).

[55] *S v Henry* 1999 (1) SACR 13 (SCA); *S v Seymour* 1998 (1) SACR 66; *S v Goitsemag* 1997 (1) SACR 99; *S v Phama* 1997 (1) SACR 485 (ECD); *S v Ingram* 1995 (1) SACR 1 (A); *S v Els* 1993 (1) SACR 723 (O); *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Pederson* 1998 (2) SACR 383.

[56] C R M Dlamini *op cit* 130 at 136.

'Battered woman syndrome'

In a case where a battered woman kills her abusive spouse, can she successfully raise the defence of provocation? I Leader-Elliott opines that in order to overcome the 'doctrinal restrictions' on the defence of provocation and self-defence, which often compelled such women to raise the defence of insanity, North America introduced the concept of 'battered woman syndrome'.[57] 'Battered woman syndrome' is a term used to describe 'a pattern of severe physical and psychological abuse inflicted upon a woman by her mate.' Pioneer researcher in this field, Dr L E Walker's theory is divided into two main components: (1) the 'cycle theory of violence which describes the course of violent behaviour in the relationship; and (2) 'learned helplessness which she uses to explain the often-asked question, 'why didn't she leave'?[58]

The battered woman often sees herself in a hopeless situation: 'kill or be killed'.[59] McColgan highlights the following factors which 'render women hostages of domestic violence' and makes any escape from that violence difficult except by the use of force:[60]

- 'the construction of the family as private and the resulting societal blindness to violence within it';[61]
- 'the power inequalities which result from men's greater earning potential and the

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[57] I Leader-Elliot 'Battered but not Beaten: Women who Kill in Self-Defence' (1993) 15 *The Sydney Law Review* 403 at 406

[58] L E Walker (1979) *op cit* 56.

[59] M A Buda and T L Butler 359 at 360.

[60] A McColgan 'In Defence of Battered Women who Kill' (1993) 13 *Oxford Journal of Legal Studies* 508 at 529.

[61] *ibid* 528.

resulting economic dependency of many women';[62]

- 'the isolation of many women within their homes and the subsequent alienation from formal and informal support structures';[63]
- 'the unavailability of decent alternative accommodation for women who leave their abusers';[64] and
- the fear of pursuit and greater injury or death.'[65]

In South African law, although there have been cases where battered women have killed their abusive spouses,[66] there has been no specific mention of 'battered woman syndrome'. In my dissertation I will consider whether 'battered woman syndrome' can be incorporated into South African law within the framework of our general principles. My discussion on 'battered woman syndrome' will be confined to battered women who kill. Both the capacity defence of provocation and the justificatory defence of private defence will also discussed in detail in order to determine whether battered women who kill can successfully rely on one or either of the defences.

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[62] *ibid* 528.

[63] *ibid* 528.

[64] *ibid* 529.

[65] *ibid* 529.

[66] *S v Campher* 1987 (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 331 (D).

CHAPTER ONE

The Defence of Provocation in South African Law

1.1. Recognition and an outline of the defence of provocation

Roman and Roman Dutch law did not excuse criminal conduct committed by person in a state of anger, jealousy or any other emotions, but only as a factor which might mitigate sentence if the anger, jealousy or any other emotions was justified by provocation.[67] In Roman-Dutch law provocation was likewise not regarded as a complete defence, but only as a ground for mitigation of punishment provided there were reasonable grounds for the accused's anger.[68] The rationale for this latter principle was the recognition that severe provocation might cause a person to act in the heat of the moment, and thus without direct intention or 'premeditation'.[69] In such cases the view was that he was guilty by reason of *culpa* and thus entitled to a lesser punishment, however, the provocation had to be substantial.[70]

The transformation of the doctrine of provocation which took place over the centuries, until recent times, was exclusively confined to England.[71] In English law, provocation was not considered to be a defence except in the particular case of murder, where in certain cases the provocation was considered to have prevented the killing from occurring 'with malice

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[67] J Burchell & J Milton *Principles of Criminal Law* (1997) Juta 279.

[68] C R Snyman 'Is there such a Defence in our Criminal Law as "Emotional Stress?"' *South African Law Journal* 1985 240 at 249.

[69] J M Burchell *op cit* 202.

[70] *ibid* 202.

[71] G Coss "'God is a righteous judge, strong and patient: and god is provoked everyday' A Brief History of the Doctrine of Provocation in England" (1991) 13 *The Sydney Law Review* 570 at 570.

of forethought'.[72] However, the provocation had to be 'reasonable', or in other words, 'of such a nature and degree that a person could not be expected completely to control himself or herself before the killing was reduced to manslaughter.'[73]

Coss, however, criticises the development of the doctrine of provocation in England:

> '.... the doctrine, as created by the judges and the judicially-inspired legislature had become entangled in a self-spun web of complexity. There had, arguably, been exhibited deplorable inconsistencies, distortions of principle, and unreal semantic wrangling from one case to the next. At times, heartlessness and injustice pervaded at the time'.[74]

In South Africa, the 1917 Criminal Procedure Evidence Act introduced a mandatory death penalty for murder. South African criminal law may well have followed the approach adopted by Roman and Roman-Dutch law had it not been for the introduction of the death penalty for murder.[75] The mandatory death penalty for murder, without a doubt, had an influence on the decisions by the South African courts not to follow the Roman-Dutch law stricter approach to provoked killings but rather to adopt a more lenient approach.[76]

The defence of provocation was introduced into our law by section 141 of the old

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[72] J Burchell and J Milton *op cit* 279.

[73] *ibid* 279.

[74] G Coss *op cit* 570 at 591.

[75] J Burchell & J Milton *op cit* 279.

[76] *ibid* 279.

Transkeian Penal Code.[77] In the 1924 Appellate Division decision of *R v Butelezi*,[78] the court held that section 141 of the Transkeian Penal Code of 1886 correctly expressed the South African law on the subject of provocation.[79] In terms of section 141:

> 'Homicide which would otherwise be murder may be reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation.
> Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
> Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received shall be questions of fact.'[80]

Therefore, where the defence of provocation was raised, in order to secure a conviction of culpable homicide under section 141, the following requirements had to be complied with: (a) the provocation must have consisted in a wrongful act or insult; (b) the provocation must have had the result that the accused lost his power of self-control; (c) the provocation must have been of such a nature that any ordinary person in the accused's position would have lost his power of self-control; and (d) the accused must have launched

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[77] C R Snyman *op cit* 223.

[78] *R v Butelezi* 1924 AD 160; *R v Attwood* 1946 AD 331; *R v Blockland* 1946 AD 940.

[79] J Burchell J Milton *op cit* at 279; C R Snyman *op cit* 233; P J Visser and J P Voster *op cit* 389.

[80] section 141 of the Transkeian Penal Code of 1886 as quoted by J Burchell and J Milton *op cit* 279.

his attack immediately following upon the provocation before there was time for his passion to cool.[81]

Section 141 recognised a type of partial excuse situation where even if the killing was intentional the conviction would be that of culpable homicide. A classic situation that would arise under section 141, as given by Van den Heever JA in the 1954 case of *R v Hercules*,[82] would be a husband who surprised his wife in the act of adultery and who killed her lover. Van den Heever JA held that the law recognised a:

> 'Hybrid or middle situation where there is an intention to kill but where that intention is not entirely but to some extent excusable'.[83]

Burchell and Milton, however, are critical of this approach adopted by Van den Heever JA:

> 'This approach is undoubtedly based on expediency, not logic or principle. Principle would demand that an intentional killing, if it is unlawful, must lead to a conviction of murder.'[84]

However, this 'hybrid or middle situation' was adopted by the courts to minimise severity of the Criminal Procedure Evidence Act 1917 which enforced a mandatory death sentence for murder.[85] Section 141 of the Transkeian Penal Code introduced into South African law in respect of provocation an objective test - the test being whether a reasonable person

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[81] C R Snyman *op cit* 223.

[82] 1954 (3) SA 826 (A) at 832.

[83] at 832.

[84] J Burchell and J Milton *op cit* 280.

[85] *ibid* 280.

would have lost his or her self control.[86] In the 1959 case of *R v Krull*[87] Schreiner J held, considering the question of intention to murder, when provocation is accompanied by emotions such as hotheadedness, conformity to objective standards must for practical reasons be insisted on.[88] He held:

> 'In any system of criminal law the problem is likely to arise of how best to reconcile the importance of enforcing proper standards, regarded objectively, with the importance of treating the individual fairly.'[89]

Therefore, prior to 1970 the approach adopted by the courts was that the 'defence of provocation' admitted that the accused's self-control had been impaired to such a degree that a conviction of culpable homicide was justified.[90] After 1970 the South African courts in dealing with the defence of provocation, began to favour the general principles approach thereby rejecting the special doctrine approach.[91] The two important cases in this regard are the 1971 and 1987 cases of *Mokonto*[92] and *Campher* respectively.[93] In the latter case it was held that in extreme cases the defence of provocation could exclude an

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[86] J Burchell J Milton *op cit* 280; C R Snyman *op cit* 223; P J Visser and J P Voster *op cit* 389.

[87] 1959 (3) SA 392 (A).

[88] at 396.

[89] at 396.

[90] J Burchell & J Milton *op cit* 280; C R Snyman *op cit* 223; see *R v Butelezi* 1924 AD 160; *R v Attwood* 1946 AD 331; *R v Blokland* 1946 AD 940; *R v Tshabalala* 1946 AD 1061; *R v Tenganyika* 1958 (3) SA 7 (FC).

[91] C R Snyman *op cit* 223.

[92] 1971 (2) SA 319 (A).

[93] 1987 (1) SA 940 (A).

accused's criminal capacity.[94]

1.2. Developments in our law and the so-called 'changing face of provocation'[95]

The objective test in regard to provocation set out by Schreiner J in the *Krull* case has been severely criticised. According to Burchell and Hunt:

> '.... to apply a subjective test in determining intention when intoxication is combined with provocation and yet to insist on an objective standard where the provocation is affected by idiosyncrasies or an abnormal mental state short of insanity, is not only inconsistent but also out of line with the new approach to provocation initiated by Schreiner JA himself in *R v Thibani* 1949 (4) SA 720 (A).'[96]

Visser and Voster are also critical of the objective test used to determine provocation:

> 'The implication of the Appellate Division's objective test in regard to idiosyncrasies would be to treat an accused who is congenitally quick-tempered more severely than one who voluntarily became intoxicated'.[97]

The 'changing face of provocation' began with the 1949 case of *R v Thibani*.[98] The court in this case regarded provocation as:

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[94] C R Snyman *op cit* 224.

[95] C R M Dlamini *op cit* 130 at 130.

[96] E M Burchell and P M A Hunt *South African Criminal law and Procedure Volume 1 General Principles of Criminal Law* second edition (1983) 313.

[97] P J Visser and J P Voster *op cit* 394.

[98] 1949 (4) SA 720.

'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.'[99]

This decision led to the diminished influence of section 141 of the Transkeian Penal Code in South African law.[100] Cases following the *Thibani* decision were undecided as to which test to follow and some cases used an objective test,[101] whereas others used a subjective test.[102] It was in the 1971 case of *S v Mokonto*,[103] that the Appellate Division finally decided that the approach in judging provocation must be completely subjective.[104] Visser and Voster submit that this case 'represents a sound and common sense approach to the significance of provocation.'[105]

In *Mokonto* the appellant had been convicted of murder. In an appeal, the court found that the appellant had had a belief that the death of his two brothers had been brought about by the deceased's evil powers as a witch and when he had confronted her she had said to him that he would not see 'the setting of the sun today'.[106] He struck her with a

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[99] at 731.

[100] C R M Dlamini *op cit* 130 at 135.

[101] see *S v Lubbe* 1963 (4) SA 459 (W).

[102] see *S v Mangondo* 1963 (4) SA 160 (A); *S v Dlodlo* 1966 (2) SA 401 (A); *S v Delport* 1968 (1) PH h172 (A).

[103] 1971 (2) SA 319 (A).

[104] P J Visser and J P Voster *op cit* 394.

[105] *ibid* 397.

[106] at 320.

cane knife and almost cut her head off.[107]

Holmes J A recognised that the distinction between murder and culpable homicide had created some difficulty in South African law in applying the pure Roman-Dutch law of provocation to an alleged crime of murder.[108] The learned judge found that the South African courts sought to resolve this difficulty by holding that section 141 of the Transkeian Penal Code correctly reflected our common law in regard to provocation.[109] He held that:

> '.... the test for intention being subjective, it seems to follow that provocation, which bears upon intention, must also be judged subjectively, whether or not it is accompanied by idiosyncracy ... where provocation is relevant to the extenuation there seems all the more reason for the exclusion of objectivism, since one is not considering the moral blameworthiness of the accused, and not his legal culpability under a system of law.'[110]

The learned judge held that section 141 should be confined to the territory for which it was passed.[111] It is submitted that the rejection of the objective test in respect of section 141 has paved the way for the recognition that what is important in the defence of provocation, is not so much the nature of the provocative act, as its effects on the accused's mental abilities or state of mind.[112] This case is also significant because Holmes J A held that

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[107] at 321.

[108] at 325.

[109] at 325.

[110] at 326.

[111] at 326.

[112] C R Snyman *op cit* 227; N A Matzukis 'Provocation: A Defence of Criminal Responsibility (1987) 16 *Businessman's Law* 245 at 246.

provocation may sometimes have exactly the opposite effect to that envisaged in section 141 and instead of excluding the intention to murder, it may in fact serve to confirm its presence.[113]

The court made it clear that the test is no longer how an ordinary reasonable man would have reacted to the provocation, but how the particular accused taking into account his personal characteristics such as jealousy or quick-tempered in fact reacted, and what his state of mind was at the crucial time.[114] However, the court did not go to the extent of saying that provocation could be a complete defence.[115]

1.3. Pathological incapacity

Prior to 1981, South African criminal practice generally recognised only two defences to criminal incapacity: youth[116] and insanity.[117] In light of the developments in our law, criminal capacity may also be lacking as a result of intoxication.[118]

The law relating to the criminal responsibility of insane persons is regulated by chapter 13

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[113] at 326; C R Snyman *op cit* 224; C R M Dlamini *op cit* 130 at 135.

[114] C R Snyman *op cit* 227.

[115] C R M Dlamini *op cit* 130 at 135.

[116] see *R v K* 1956 (3) SA 353 (A); *S v Van Dyk* 1969 (1) SA 601 (C); *S v S* 1977 SA 305 (O); *S v M* 1978 (3) SA 557 (Tk).

[117] see *S v Mahlinza* 1967 (1) SA 408 (A); *S v Kavin* 1978 (2) SA 731 (W); *S v McBride* 1979 (4) SA 313 (W); *S v Mnyandu* 1976 (2) SA 751 (A); *S v Mngomezulu* 1972 (1) SA 797 (A).

[118] see *S v Chretien* 1981 (1) SA 1097 (A); *S v Hartyani* 1980 (3) SA 613 (T); *S v Baartman* 1983 (4) SA 392 (NC).

of the Criminal Procedure Act.[119] Section 78(1) sets out the test, as recommended in the Rumpff Report (*Report of the Commission of Enquiry into the Respnsibility of Mentally Deranged Persons and Related Matters* RP 69/1967), to determine the criminal responsibility of mentally ill persons.[120] In terms of section 78 (1):

> 'A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable -
>
> (a) of appreciating the wrongfulness of his act; or
>
> (b) of acting in accordance with an appreciation of the wrongfulness of his act;
>
> shall not be criminally responsible for such act'.

The requirements for a defence of insanity require an enquiry into the: (1) relevant time of the offence; (2) mental illness or mental defect; (3) capacity to appreciate wrongfulness; (4) capacity to act in accordance with such appreciation.[121]

1.4. Intoxication

In light of the decision in *Mokonto*, a number of issues remained unresolved.[122] For instance: could severe provocation serve to exclude criminal capacity or even the voluntariness of conduct?[123] A frequently asked question after the 1981 decision in *S v*

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[119] Act 51 of 1977.

[120] C R Snyman *op cit* 157.

[121] J M Burchell *op cit* 163.

[122] J Burchell and J Milton *op cit* 281.

[123] *ibid* 281.

Chretien[124] was if severe intoxication could exclude the basic elements of criminal liability, then why not provocation?[125]

In *Chretien* the accused, whilst under the influence of liquor drove his car into a small crowd of people. He killed one person and injured five others and was charged with one count of murder and five counts of attempted murder. It was contended on behalf of the accused that in his state of intoxication he had believed that the crowd would disperse. On the one count of murder the accused was convicted of culpable homicide. On the five counts of attempted murder her was acquitted. The state then reserved the following question of law for consideration by the Appellate Division:

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

The learned Chief Justice held that someone who is dead drunk and is not conscious of what he is doing, is not liable because a muscular movement which is done in this condition is not a criminal act.[126] Therefore, if someone commits an act but he is so drunk that he does not realise what he is doing or he does not appreciate the unlawfulness of his act, he is not criminally responsible.[127] A court will only come to the conclusion, or have a reasonable doubt, on the ground of evidence which justifies it that, when someone indeed commits an act which would otherwise be an offence, he was intoxicated to such

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[124] 1981 (1) SA 1097.

[125] J M Burchell *op cit* 204.

[126] at 1103.

[127] at 1103.

an extent that he was not criminally responsible.[128]

Although the decision in *Chretien* cannot be faulted on grounds of logic or conformity with general principles it was harshly criticised for it practical effects, as a sober person would be punished for any criminal conduct but a drunk person would not merely because he was too drunk.[129] In order to negate the effect of the *Chretien* decision, the Criminal Law Amendment Act[130] was enacted. Sub-section 1 of the Act provides:

> 'Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty, except the death penalty, which may be imposed in respect of the commission of that act.'

The elements of the offence contravening the Act are set out in 1990 case of *S v Langa*:[131] (a) consumption or use of any intoxicating substance by the accused; (b) impairment of the accused's faculties to appreciate the wrongfulness of his or her act or to act in accordance with that appreciation as a result of the consumption or use of this substance; (c) knowledge that the substance consumed or used by the accused has the effect of impairing his or her faculties; (d) commission by the accused of any act prohibited by law

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[128] at 1106.

[129] J M Burchell *op cit* 188; see also C R Snyman *op cit* 215 and P J Visser and J P Voster *op cit* 377.

[130] 1 of 1988.

[131] 1990 (1) SACR 199 (W).

whilst his or her faculties were so impaired; and (e) that the accused is not criminally liable because his or her faculties are so impaired.

It appears, therefore, that in terms of the *Chretien* judgment, where a person is so intoxicated that he is incapable of committing a voluntary act, s/he would not be guilty of the crime with which s/he is charged.[132] However, s/he might be convicted of contravening section 1 of Act 1 of 1988. Burchell and Milton, however, are critical of this legislation:

> 'In order to reflect community perceptions on intoxication, the approach to the defence of intoxication taken in *Chretien* ... needs to be supplemented with a statutory offence covering the liability of a person who commits prohibited conduct while in a state of significant intoxication ... The South African legislative attempt to fill the gap created by the *Chretien* judgment, while accurately reflecting community sentiment in its mood, does not, in its detail and definition, succeed on these counts and requires legislative amendment.'[133]

Depending on the degree of intoxication, a person may lack either intention, criminal capacity or be incapable of committing a voluntary conduct. In terms of the *Chretien* judgment where a person who is intoxicated to such an extent that s/he lacks criminal capacity or is incapable of committing a voluntary act s/he will not be guilty of a of the crime s/he is charged with. However, s/he will be guilty of a contravention of Act 1 of 1988. It appears, however, that where a person is intoxicated to such an extent that s/he lacks intention s/he will not be guilty of a contravention of Act 1 of 1988. It is submitted that despite this criticism, a person who is incapable of acting would in fact be found guilty of a contravention of Act 1 of 1988 irrespective of the Act's shortcomings.

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[132] C R Snyman *op cit* 221.

[133] J Burchell and J Milton *op cit* 277.

1.5. Non-pathological incapacity

The term 'non-pathological criminal incapacity' came to the fore in cases where youth or mental illness was not pleaded.[134] It was introduced for the first time in the 1988 case of *S v Laubscher*.[135] This term was introduced by Joubert JA to separate this defence from that created by section 78, which he held applied to pathological disturbances of the mental abilities.[136] Although the court did not find it necessary to decide whether a defence such as 'non-pathological criminal incapacity based upon a total disintegration of a temporary nature' exists, it did not reject the possibility.[137] In the 1980's the Appellate Division in a number of cases held that incapacity could be a complete defence even if it were not the result of mental illness, immature age or intoxication.[138]

1.6. The defence of provocation

The 1983 case of *S v Van Vuuren*[139] represents a significant development with regard to the defence of provocation. The accused, who was convicted of murder and attempted murder in a shooting incident claimed that he had been drinking so heavily; that he had been so grievously provoked and was in such a state of mental distress that when he fired the weapon he had no knowledge of what he was doing. On appeal, the court rejected his defence of provocation on the facts, but Diemont AJA remarked obiter:

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[134] C R Snyman *op cit* 221.

[135] 1988 (1) SA 163 (A).

[136] at 167; C R Snyman *op cit* 152.

[137] P J Visser and J P Voster *op cit* 441.

[138] see *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Adams* 1986 (4) SA 882 (A); *S v Campher* 1987 (1) SA 940 (A); *S v Calitz* 1990 (1) SACR 119 (A); *S v Wiid* 1990 (1) SACR 561 (A); C R Snyman *op cit* 153.

[139] 1983 (1) SA 12 (A).

'I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress. In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing. Other factors which may contribute to the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is - what evidence is there to support such a conclusion.'[140]

In the 1983 case of *S v Lesch*,[141] the accused was charged with the murder of his neighbour.[142] The facts indicate that the accused was telephoned at work by his daughter, who informed him that their neighbour who in the past behaved in a threatening and aggressive manner towards them, had threatened both her and the accused.[143] The accused went home shortly thereafter, and after discussing the matter with his daughter he confronted the neighbour, despite his daughter's objections, with a revolver concealed in his pocket.[144] A confrontation took place whereupon the accused shot and killed the neighbour.[145]

It was contended on behalf of the accused:

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[140] at 17.

[141] 1983 (1) SA 814 (O).

[142] at 816.

[143] at 816.

[144] at 817.

[145] at 817.

'.... dat die toegeskrewe handeling hom nie toegreken kan word nie, omdat hy ten van die daad nie oor die vermoë beskik het om ooreenkomstig sy besef van die ongeoorloofdheid van sy handeling op te tree nie.'[146]

The defence also sought to rely on the 1981 case of *S v Chretien*:[147]

'.... dat die beskuldige se inhibisies wesenlik verkrummel het en dat hy daarom as ontoerekeningsvatbaar beskou moet word.'[148]

Psychiatric evidence was led to the effect that at the time of the offence the accused, although he was able to realise what he was doing and the consequences thereof, he lacked self-control:[149]

'Toe hy die oorledene fisies sien, het dit alles daartoe bygedra dat hy, om die getuie se woorde te gebruik, 'n orgastiese hoogtepunt bereik het, sodat daar geen selfbeheer meer was nie, alhoewel beskuldige se geestesvermoëns sodanig was dat hy besef het wat hy gedoen het en wat die gevolge van sy handeling was.'[150]

On the question of the accused's criminal capacity the court held:

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[146] at 816.

[147] 1981 (1) SA 1097 (A).

[148] at 825.

[149] at 822.

[150] at 822.

'Die vraag moet beantwoord word, nie aan die maatstaf van hoe die redelike man so gereageer het op die provokasie nie, maar hoe die beskuldige, subjektief sien, in ag genome al sy persoonlikheidseienskappe, inderdaad op die provokasie gereageer het'.[151]

The accused was convicted of murder. The court finding:

'Die beskuldige het getuig dat hy woedend kwaad geword het toe die oorledene hom die woorde toegevoeg het en dat hy geweet het dat hy die oorledene gaan skiet en die gevoel gekry het om die oorledene te vernietig. Die Hof bevind dat die provokasie nie die opset om te moor uitgesluit het nie, maar inderdaad bygedra tot die vorming van sodanige. Op die totaliteit van die aangevoerde getuienis bevind die Hof eenparig dat die Staat bo redelik twyfel bewys het dat beskuldige die oorledene wederregtelik en opsetlik gedood het.'[152]

Du Plessis writes that the most significant feature of this judgment was not the defence raised, but was the court's consideration and analysis of the defence in detail:[153]

'.... Hatting AJ was right in considering the defence and apparently tacitly assuming that loss of self-control ... could, in appropriate circumstances, amount to a complete defence on a charge or murder.'[154]

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[151] at 826.

[152] at 826.

[153] J R Du Plessis 'The extention of the ambit of ontoerekeningsvatbaarheid to the defence of provocation - a strafregwetenskaplike development of doubtful practical value' (1987) 104 *South African Law Journal* 539 at 541.

[154] *ibid* 541.

Despite the fact that the accused in both *Van Vuuren* and *Lesch* were convicted of murder, the importance of these judgments lies in the fact that provocation was considered relevant in the determination of the accused's criminal capacity.[155]

In the 1985 case of *S v Arnold*,[156] the accused was charged with the murder of his wife.[157] It was contended on behalf of the accused that at the time when the fatal shot was fired, because of emotional distress, he did not have criminal capacity and thus could not be held criminally liable for the shooting.[158] The court recognised and elaborated on several factors which caused the 'severe mental strain',[159] focusing particularly on the strained relationship that existed between the accused and the deceased.[160]

On the day of the incident in question the accused returned home from work and was in possession a gun, which he found necessary to carry as a result of the nature of the work he was involved in.[161] An argument ensued between the accused and the deceased:

> 'She said that she wanted to return to singing, dancing and cabaret and had found work, but would not say where. By cabaret she meant stripping. She also would not tell him where she was staying. Her refusal to tell him this, and where she had obtained work, upset the accused and the conversation repeatedly returned to these topics as well as her refusal to return ... During

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[155] J M Burchell *op cit* 205.

[156] 1985 (3) SA 257 (C); P J Visser and J P Voster *op cit* 400.

[157] at 257.

[158] at 257.

[159] at 257.

[160] at 258-259.

[161] at 260.

this conversation the gun went off, the bullet going in the opposite direction from where the deceased was sitting.[162]

The conversation between the accused and the deceased continued during which, according to the accused, she 'bent forward displaying her bare breasts while she also referred to the stripdancing.'[163] The court recognised this conduct of the deceased as the act of provocation.[164] Shortly thereafter a second gun shot was fired killing the deceased.[165]

A psychiatrist for the defence gave evidence to the effect that the accused's:

> '.... conscious mind was so "flooded" by emotions that 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 ... that the accused had acted subconsciously at the crucial time because of the emotional storm and hence that he could not say whether in fact the accused was conscious of what he was doing or not.'[166]

The court having regard to decided cases,[167] held that it was logical to say that not only youth, mental disorder or intoxication which can lead to a state of criminal incapacity, but

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[162] at 261.

[163] at 261.

[164] at 261.

[165] at 261-2.

[166] at 263.

[167] *S v Chretien* 1981 (1) SA 1097 (A);*S v Van Vuuren* 1983 (1) SA 12 (A); *S v Bailey* 1982 (3) SA 772 (A).

other factors such as severe emotional distress could also lead to criminal incapacity.[168] The court held that the state had not proved beyond reasonable doubt that when the accused killed the deceased he was acting consciously and not subconsciously.[169] The court further held, assuming that the accused acted consciously, it could not be proved on the evidence that the accused either could have appreciated the wrongfulness of his act or, if he did, that he was able to act in accordance with such appreciation.[170] The court found that the state had not proved the guilt of the accused and was accordingly discharged.[171]

On the basis of this case it seems, therefore, that provocation can be a complete defence to a charge of murder. Snyman, however, is of the opinion that this case was wrongly decided and argues that neither emotional stress nor any other form of provocation ought to be allowed to operate as a complete defence to a charge of murder.[172] He submits that the accused ought to have been convicted of culpable homicide as he had acted voluntarily when he handled the gun shortly before the fatal shot, that his handling of the firearm was negligent and it was this negligent conduct that caused the death of the deceased.[173] He further writes that:

> 'There are sound policy considerations for the rule that provocation should never be allowed to become a complete defence on a charge of murder, and these considerations should never be overlooked. This is in effect what

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[168] at 264.

[169] at 263.

[170] at 263-264.

[171] at 264.

[172] C R Snyman *op cit* 240 at 251.

[173] *ibid* 240 at 251.

happened in this case: in the process of discussing the role of criminal capacity and of allowing emotional stress to oust such capacity and lead to a complete acquittal, the court was in effect rewriting the law relating to provocation and destroying its basic tenets - that provocation cannot be a complete defence on a charge of murder.'[174]

The 'policy considerations' which Snyman refers to are (1) the law expects people to keep their emotions in check; (2) the fact that certain people are quick-tempered, emotional or impatient is no excuse for their criminal behaviour and (3) there would be a real danger that the law would find itself applying different criteria for different kinds of people: one for balanced, calm and considerate type of persons and another for impulsive and emotional persons.[175]

The 1987 case of *S v Campher*[176] is evidence of a division of opinion on the defence of provocation in the Appellate Division.[177] The accused was charged with the murder of her husband. The accused was subjected to abusive and degrading treatment by the deceased over a long period of time.[178] On the day of the incident in question, he insulted and attacked her and also forced her to help him with fixing his dovecote.[179] When the hole she was helping him drill on the dovecote turned out to be crooked he became extremely angry with her and had threatened to kill her with the screwdriver he was

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[174] *ibid* 240 at 245.

[175] *ibid* 248; C R M Dlamini *op cit* 130 at 132.

[176] 1987 (1) SA 940 (A); P J Visser and J P Voster *op cit* 411; J Burchell & J Milton *Cases and Materials* (1997) Juta 305.

[177] J R Du Plessis *op cit* 539 at 543.

[178] at 941-946.

[179] at 946.

holding.[180] Fearing for her life she ran back to the house:[181]

> 'Sy het kamer toe gehardloop. Toe sy sien hy is agter haar met die skroewedraaier het sy besluit om die vuurwapen uit die bedkassie te haal. Sy het dit dan ook gedoen. Hy het die slaapkamer binne gehardloop en sy het gedink hy sou skrik vir die vuurwapen maar dit het hom geensins afgeskrik nie. Hy was te woedend. Sy kan nie onthou hoe sy die vuurwapen gehou het nie. Sy was te geskrik gewees. Sy was alleen bang dat sy fisies aangerand sou word ... Al wat sy kon doen en gedoen het was om te bid.'[182]

The deceased then grabbed hold of her arm and forced her to return to the dovecote her to pray for the hole to become straight.[183] While she was on her knees and the deceased standing in front of her she shot and killed him with the gun that was in her hand.[184]

The accused was found guilty of murder and in an appeal it was contended on behalf of the accused that in light of the circumstances before and at the time of the killing, she could not be found guilty of murder:[185]

> 'In die aansoek om verlof om te appelleer, gerig aan hierdie Hof, is dit in die appellante se versoekskrif gestel dat die appellante se verdediging op twee verwere berus, naamlik dat die appellante in selfverdediging van haar eer

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[180] at 946.

[181] at 946.

[182] at 947.

[183] at 947.

[184] at 948.

[185] at 950.

en waardigheid die oorledene se dood veroorsaak het en dat die appellante onder die uiterste provokasie die dood can die oorledene veroorsaak het wat 'n skuldigbevinding aan strafbare manslag regverdig.'[186]

On the facts Boshoff AJA and Jacobs JA held that the accused was guilty of murdering her husband, while on the law Viljoen JA and Boschoff AJA held that emotional stress could in principle lead to an absence of criminal capacity and therefore a complete acquittal.[187]

Viljoen JA held:

'Die beginsels van ontoerekenbaarheid behoort te geld of die geestesversteuring of gemoedsomwenteling ookal deur drank of 'n heftige emosie veroorsaak is. Die verskillende geestestoestande behoort nie gekompartmentaliseer te wordnie; die beginsel moet slegs nagekom word deur die kriteria vir ontoerkenbaarheid toe te pas afgesien van die beskuldige se aberrasie tydelik of permanent van aard was.'[188]

The learned judge held that there was reasonable doubt as to whether the accused had the capacity to act in accordance with the wrongfulness of her act and act in accordance with such appreciation:[189]

'Dit is egter ook af te lei, uit uitdrukkings wat sy gebruik het, dat sy deur haar emosies oorweldig is om gevolg te gee aan die drang om die "monster" te

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[186] at 950-1.

[187] J M Burchell *op cit* 206.

[188] at 955.

[189] at 958; J M Burchell *op cit* 206.

vernitig.[190]

Viljoen JA concluded that the severe emotional stress from which the accused suffered, impaired her capacity to withstand the impulse to kill her husband and acquitted the accused:[191]

> 'Haar getuienis noop my tot die gevolgtrekking dat haar gees op die kritieke oomblik erg versteurd was en dat haar weergawe van haargemoedbewegings bestaanbaar is met 'n drang waarteen sy nie kon weerstand nie.'[192]

Boschoff JA and Jacobs JA, however, adopted a different approach. Boshoff AJA concluded on the basis of the lack of psychiatric evidence there was no evidence to show that the accused lacked the ability to appreciate the wrongfulness of her act or the ability to act in accordance with such appreciation:[193]

> 'Daar is ook geen psigiatriese of klinies-sielkundige getuienis wat enigsins kan aantoon dat die appellante wel 'n geestesversteuring gehad het wat die gevolg kon gehad dat sy nie oor die vermoë beskik het om die ongeoorloofheid van haar handeling te besef nie of om ooreenkomstig 'n besef van die ongeoorloofdheid van haar handeling op te tree nie. Die appellante het wel in haar getuinis vertel wat haar gewaarwordinge voor, tydens en na afloop van haar handeling was, maar volgens my beskeie mening is 'n Hof nie sonder die hulp van psigiatriese of klinisseielkundige

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[190] at 958.

[191] at 958.

[192] at 958.

[193] at 967; J M Burchell *op cit* 206.

> getuienis in die vermoë om te kan oordeelof sy op enige stadium aan 'n geestesversteuring gely het wat die vereiste gevolge vir ontoerekeningsbaarheig gehad het nie ... myns insiens was daar genoegsame gronde vir die Verhoorhof om die appellante aan moord skuldig te bevind dat daar versgatende omstandighede is'.[194]

Jacobs JA held that where an accused had the ability to appreciate the wrongfulness of his or her act, the defence of irresistible impulse would only be available where a mental illness or defect was present:[195]

> 'Ek is elk geval van mening dat die sogenaamde onweerstaanbare drang maatstafwat in ons reg voor 1977 erken toegepas is, heeltemal duer art 78(1)(b) van die Strafproseswet 51 van 1977 (die Wet) vervang is en dat, net soos voor die inwerkingtreding van die voormelde artikel van die Wet, n' persoon wat oor die vermoë beskik om die ongeoorloofdheid van sy handeling te besef maar nie oor die vermoë beskik om ooreenkomstig 'n besef van die ongeoorloofdheid van sy handeling op te tree nie, slegs dan strafregtelik nie toerekenbaar is vir so 'n handeling nie indien sy onvermoë om sy handeling ooreenkomstig sy besef in te rig die gevolg is van geestesongesteldheid of -gebrek.'[196]

Du Plessis prefers the approach adopted by Jacobs JA:

> 'Although this view of the law may not be in keeping with current strafregwetenskaplike theories, it is, with respect, eminently sound and

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[194] at 967.

[195] at 960; J M Burchell *op cit* 206.

[196] at 960.

socially acceptable. It may be summarised as being to the effect that the defence of insanity in the shape of determinism depriving the accused of the ability to resist an impulse he knows to be criminal, and resulting in his intentionally carrying out a criminal act, should be available only to the insane. For the sane to yield an impulse to commit a crime because of lack of self-control is criminal; to hold otherwise is to strike at the roots of the criminal law.'[197]

Matsukis submits that the effect of *Campher* is that provocation, no matter how extreme, cannot operate to exclude criminal capacity and is, therefore, not a complete defence in criminal law.[198] Du Plessis on the other hand is critical of the court's recognition of a general defence of criminal incapacity:

'*Campher* is unsatisfactory as a statement of law because of the divergent views of the judges of appeal on the law and the facts. If the majority view of the law gains acceptance, it can result in a weakening of our law of culpable homicide. One hopes with respect that the views of Jacobs JA will eventually be accepted by a bench of five judges of appeal.'[199]

In the case of 1988 case of *S v Laubscher*,[200] the accused was charged with the murder of his father-in-law and attempted murder of his wife and mother-in-law. It was contended on behalf of the accused:

'.... dat sy verweer van tydelik ontoerekeningsvatbaarheid toegeskryf moes

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[197] J R Du Plessis *op cit* 539 at 546.

[198] N A Matzukis *op cit* 245 at 248.

[199] J R Du Plessis *op cit* 539 at 550.

[200] 1988 (1) SA 163 (A).

word aan totale sielkundige ineenstorting of persoonlikheidsdisinyegrasie of geestelike verrbrokkeling van n' tydelike aard sodat hy onbewustelik en/of wilsbeheer gehandel het.'[201]

The trial court convicted the accused of murder on the grounds that he had 'acted voluntarily as he had powers of discernment and restraint so that he had not been criminally unaccountable but had rather suffered from diminished responsibility.'[202]

In an appeal, Joubert JA confirmed the conviction of the trial court:

'In die onderhawige geval het die appellant se verweervan totale sielkundige of persoonlikheids disintegrasie van n' tydelik aard tydens die pleeg van die beweerde misdade op 'n nie-patologiese toestand betrekking sodat dit op nie-patologiese ontoerekeningsvatbaarheid slaan. Slaag 'n verweer van nie-patologiese ontoerekeningsvabaarheid word daar betoog dat die beskuldige nie strafregtelik aanspreeklik is nie en dat hy nie aan die beweerde misdaad skuldig bevind kan word nie. Hy moet dan onskuldig bevind word, aldus die betog, en kan nie tot Presidentspasiënt verklaar word nie omdat hy nie aan 'n geestesonggesteldheid og geestesgebrek van 'n patologiese aard ly nie.'[203]

Although the court did not find it necessary to decide whether a defence such as 'non-pathological criminal incapacity based upon total personality disintegration of a temporary

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[201] at 166.

[202] at 165.

[203] at 167.

nature' could be available, it did not reject the possibility.[204]

In the 1990 case of *S v Calitz*,[205] the accused on a charge of murder, raised the defence of lack of criminal capacity of a temporary nature as a result of his being in a state of raging anger at the time of the commission of the assault which led to the death of the deceased.[206] The accused was convicted of murder by the trial court which found that he was not in a state of temporary mental incapacity at the time of the assault; that he was criminally responsible and that he had acted with *dolus evantualis*.[207]

In an appeal, Eksteen AR confirmed the decision of the trial court:

> '.... die Verhoorhof geregtig was om tot die gevolgtrekking te kom dat die appellant ten minste subjektief die moontlikheid dat die dood van die oorledene kon intree as gevolg van sy handeling, ingesien het, en hom net hierdie moontlikheid versoen het. Die woedebui waarin hy verkeer het ten tyde van die aanval kon wel sy wilsbeheer vermoë verminder het, sodat daar 'n verminderde toerekeningsvatbaarheid aan hom toegeskryf kon word. Dit sou egter nie 'n oorweging wees by die bepaling van strafregtelike aanspreeklikheid nie, maar slegs by die oorweging van die bestaan van versagtende omstandighede en by vonnisoplegging.'[208]

The court remarked that the fit of anger which the accused found himself in would only be

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[204] P J Visser and J P Voster *op cit* 441.

[205] 1990 (1) SACR 119 (A) at 121.

[206] at 123.

[207] at 123.

[208] at 129.

a considered in determining the existence of extenuating circumstances and in the imposition of sentence.[209]

In the 1990 case of *S v Wiid*,[210] the accused charged with the murder of her husband raised the defence of non-pathological criminal incapacity. In an appeal against her conviction, Goldstone JA found that there was reasonable doubt whether the accused had the necessary criminal capacity at the time of the shooting and that she ought to have been given the benefit thereof:[211]

> 'Appellante se geheue is wel onsamehangend of sporadies. Sy kan, byvoorbeeld, niks van die aanranding op haar onthou nie, maar kort daarna kon sy onthouwat onmiddellik voor die skietery plaasgevind het. Die skietery self kan sy nie onthou nie. Op die oog af geoordeel mag dit 'n onbevredigende kenmark van haar weergawe wees. Maar terselfertyd is daar geen sielkundige getuinis wat suggereer dat hierdie verskynsel teenstrydig is met 'n verlies van óf die onderskeidingsvermoë om die regmagtigheod of onregmagtigheid van haar handeling in te sien òf 'n verlies van die vermoë om daarvolgens te handel nie. Ek is van mening dat daar ten minste 'n twyfel bestaan of die appellante, ten tye van die skietery, toerekeningsvatbaar was. Die appellante behoort die voordeel van daardie twyfel gegun te word.'[212]

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[209] at 129.

[210] 1990 (1) SACR 561 (A).

[211] at 568-9.

[212] at 569.

In the 1992 case of *S v Mandela*,[213] the accused was charged with the murder of his fellow prisoner, the motive being revenge. The deceased had informed the prison authorities that the accused was in possession of certain weapons whereupon the appellant was sentenced to 30 days solitary confinement in terms of the Prison Regulations.[214] After having served his sentence, the accused murdered the unsuspecting deceased by attacking him from behind and stabbing him several times.[215]

The court recognised that the deceased's conduct had in a certain sense amounted to provocation.[216] For the defence of provocation to be successful, the court held:

> 'Wesenkenmerk van provokasie as versagtende faktor is die ommiddellikheid van die boosdoener se reaksie op die slagoffer se toornverwekkende handeling. Die boosdoener moet onverwyld en in die hitte van die oomblik tot sy geweldsdaad oorgaan. 'n Vertraagde vergeldingshandeling met voorbedagte rade is heeltemal die teengestelde van daardie momentele verlies aan of inkorting van selfbeheersing wat die waarmerk van provokasie dra. Waar, soos hier, die boosdoener eers na verloop van aansienlike tyd na die uittartende optrede, en nadat hy behoorlik geleentheid tot bedaring en besinning gehad het, sy slagoffer in koelen bloede om die lewe gebring het, kan daar van provokasie as versagtende faktor nouliks sprake wees.'[217]

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[213] 1992 (1) SACR 661 (A).

[214] at 664.

[215] at 664.

[216] at 664.

[217] at 665.

The court in the 1993 case of *S v Els*[218] found on the facts that the accused had not acted in a state of automatism. The facts revealed that in order to shoot the deceased, the accused must have taken the revolver out of a cupboard almost four yards from the toilet, which was some six yards from the kitchen where she had shot the deceased. The court distinguished this from the usual situation where automatism could occur where someone suddenly grabbed a gun and repeatedly fired shots.

The legal position with regard to the defence of non-pathological criminal incapacity was authoritively dealt with by the court in 1993 and 1994 *S v Kalogoropoulos*[219] and *S v Potgieter* respectively.[220] It appears from the decision in *S v Kalogoropoulos* that it is ultimately:[221]

> 'for the court to decide the issue of the accused's criminal responsibility for his actions, having regard to the expert evidence and to all the facts of the case, including the nature of the accused's actions during the relevant period.'[222]

Botha JA in *S v Kalogoropoulos* affirmed that an accused person who relies on non-pathological causes in support of a defence of criminal incapacity is required in evidence to lay a factual foundation, sufficient at least to create a reasonable doubt on the point.[223]

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[218] 1993 (1) SACR 723 (O).

[219] 1993 (1) SACR 12 (A).

[220] 1994 (1) SACR 61 (A).

[221] *S v Ingram* 1995 (1) SACR 1 (A).

[222] *S v Kalogoropoulos* 1993 (1) SACR 12 (A) at 21.

[223] at 21.

The need for careful scrutiny of the evidence presented in support of the defence of non-pathological criminal incapacity was stressed by Kumleben JA in the 1994 case of *S v Potgieter*.[224] The learned judged held:

> 'Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. The court recognised that stress, frustration, fatigue and provocation for instance, may diminish self-control to the extent that, colloquially put, a person 'snaps' and a conscious act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an involuntary act has been committed. The facts must therefore be closely examined to determine where the truth lies'.[225]

The significance of *Potgieter's* case lies in the fact that the courts will carefully scrutinise the defence of non-pathological incapacity and, if the version of the facts presented by the accused is held to be unreliable or untruthful, the psychiatric evidence based on the supposed truthfulness of the accused's version of the facts will not be accepted by the courts.[226]

The court in the 1995 case of *S v Kensley*[227] also considered the defence of provocation with caution. The court held that:

> 'As a matter of self-preservation society expects its members, even when

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[224] 1994 (1) SACR 61 (A).

[225] at 73-74.

[226] J Burchell *op cit* 208.

[227] 1995 (1) SACR 646 (A).

under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do ... It follows that the evidence on which a defence of sane criminal incapacity due to intense emotion is based, should be viewed with circumspection'.[228]

In 1995 case of *S v Ingram*[229] the court rejected the defence of non-pathological criminal incapacity. The court held that the accused was not so out of control as to have been incapable of exercising restraint and therefore remained accountable for his conduct.[230]

There have been significant developments with regard to the defence of provocation and the acceptance of provocation as a defence.[231] The courts have further extended this by recognising the defence where the accused's emotional disintegration occurred over a period of time, which is a notable development from the time when provocation could only be used for mitigation of sentence or for the imposition of a lesser offence where the accused had reacted immediately.[232]

1.6. Recent Cases

The recent cases discussed below indicate that the courts are prepared to recognise

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[228] at 658.

[229] 1995 (1) SACR 1 (A).

[230] at 8.

[231] see *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Adams* 1986 (4) SA 882 (A); *S v Campher* 1987 (1) SA 940 (A); *S v Claitz* 1990 (1) SACR 119 (A); S v Wiid 1990 (1) SACR 561 (A); *S v Goitsemag* 1997 (1) SACR 99 (O); *S v Moses* 1996 (1) SACR 701 (C); *S v Ingram* 1995 (1) SACR 1 (A); *S v Els* 1993 (1) SACR 723 (O).

[232] F F W van Oosten *op cit* 127 at 144.

provocation and emotional stress as factors which are capable of excluding the voluntariness of conduct or criminal capacity.[233]

In the 1995 case of *S v Nursingh*,[234] the accused was charged with three counts of murder, it being alleged that he shot and killed his mother, his grandfather and grandmother. It was contended on behalf of the accused that:

> '....by reason of his peculiar family circumstances and upbringing, he had a personality make-up which predisposed him to a violent emotional reaction in the event of other events occurring that would push that predisposition into a state of eruption. In other words, that at that moment and when those circumstances occurred to trigger off this disruption in his mind, it would become so clouded by an emotional storm that seized him that he would not have the mental ability to distinguish between right and wrong and act in accordance with that insight.'[235]

Squires J held that the onus was on the state to show that the accused had the necessary criminal capacity to establish and found *mens rea* necessary to commit an offence.[236] However, where an accused relies on non-pathological causes in support of a defence of criminal incapacity, then he is required to lay factual foundation for it in evidence, sufficient at least to create a reasonable doubt on the issue as to whether he had that mental capacity.[237] The learned judge also reinforced the need for the courts to approach such

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[233] J Burchell and J Milton *op cit* 291.

[234] 1995 (2) SACR 331 (D).

[235] at 332.

[236] at 334.

[237] at 334.

defence with caution:

> '.... the need to carefully scrutinise defences of this sort because of the ease with which they can be raised and the potential for mischief if they are upheld without sufficient and proper cause'.[238]

Evidence of prolonged sexual abuse was placed before the court, and a psychiatrist and a psychologist gave evidence to the effect that the previous history of abuse by the accused's mother triggered off a 'state of altered consciousness' which significantly reduced his awareness of normality with accompanying loss of judgement and self-control.[239] The psychologist testified that:

> '.... a person with a particular emotional vulnerability was incited by some stimulus, it results in an overwhelming of the normal psychic equilibrium by an all consuming rage, and a consequent disruption and displacement of logical thinking ... manifests itself ... in an explosion of aggressiveness that frequently leads to homicide'.[240]

Both experts explained that such an occurrence was a non-pathological one: it was non-recurring and during its occurrence 'ordinary motor movements' of the body could take place with normal efficiency.[241] The court found that, based on the evidence before it, a factual foundation had been laid which had at least established a reasonable doubt as to the accused's capacity to form criminal intent, and the accused was accordingly acquitted

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[238] at 336.

[239] at 333.

[240] at 333.

[241] at 333.

on all three counts.[242]

Burchell writes of this judgment:

> 'It is extremely difficult to find fault with the judgement of Squires J. He had heard all the testimony and formed the opinion there was a reasonable possibility that the accused was telling the truth and that the uncontested evidence of the psychiatrist and the psychologist led by the defence, was in his view, compelling. The test of capacity is subjective and if there is reasonable doubt whether capacity is present the accused must receive the benefit of such doubt. Nevertheless, one cannot help feel a measure of disquiet about the conclusion that an intelligent person, albeit under a good deal of stress, can shoot his mother and grandfather by firing three bullets into their bodies and his grandmother by firing four bullets into her body. In the past, the evidence of behavioural scientists regarding the unfortunate background circumstances faced by an accused would have been led, more appropriately, in mitigation of sentence. But, even if this evidence should be led on the issue of liability, was Nursingh under any more stress or pressure that the accused in *Potgieter* or *Campher*?'[243]

A case that also warrants analysis is 1996 case of *S v Moses*[244]. The accused was charged in a Provincial Division with murder. The only witness to the events in question was the accused, whose evidence was accepted by the court.[245] It appeared that the accused and the deceased were homosexual lovers and on the first occasion when the

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[242] at 339.

[243] J M Burchell *op cit* 210.

[244] 1996 (1) SACR 701 (C).

[245] at 701-06

accused had had unprotected penetrative intercourse with the deceased, the deceased revealed that he had AIDS.[246] The accused testified that he was provoked to an extent that he lost control over his actions, in that he could realise what he was doing but was so angry that he could not stop himself.[247] The accused gave a detailed history of his family situation and upbringing.[248] He came from a dysfunctional family and had been sexually abused by his father. [249] His evidence also revealed that he had a history of poor control and anger and was susceptible to anger and outbursts of violence.[250]

The court accepted that the accused had no motive or reason to kill the deceased and that the killing had clearly not been premeditated.[251] Hlophe J held that the:

> '... killing itself was a crystallisation of a number of factors such as suppressed anger relating to the accused's dysfunctional family background and sexual abuse by his father, equating the deceased with his father and the sense of betrayal, the accused vulnerability at the time of the killing in that his personal life was in shambles and he showed signs of severe depression, and the provocation itself and the subjective belief that the accused was going to die. It was a combination of these factors which led to the accused's controls collapsing at the time of the killing.'[252]

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[246] at 702.

[247] at 702.

[248] at 702.

[249] at 701-06.

[250] at 703-04.

[251] at 708.

[252] at 714.

The court accepted that expert testimony of Mr Yodaiken, Dr Gittleson and Dr Jeddar which supported the finding that it was reasonably possibly true that the accused lacked criminal capacity, and although the accused might possibly have retained some measure of control over his actions by the time of the infliction of the final wound, the State failed to prove beyond reasonable doubt that his control even at that stage was not significantly impaired.[253]

It is submitted that Burchell's criticisms in respect of the *Nursingh* case are also applicable here: was *Moses* under any more stress or pressure than the accused in *Potgieter* or *Campher* or *Nursingh*?[254] In the above cases there was evidence 'prolonged' provocation, whereas in *Moses* it was a 'once-off' incident. There were a number of provocative incidents in the above cases which led to an accumulation of anger over a period of time and finally the fatal incident in question.[255] For example in *Campher's* case the accused was subject to abusive and degrading treatment by the deceased over a long period of time; he mocked her religion; he was authoritarian and regarded her children as an incumbrance.[256] In the *Nursingh* case there was evidence that the accused was subjected to prolonged sexual, personal and psychological abuse by his mother.[257]

De Vos is also critical of the court's decision in *Moses* and argues that the court erred in acquitting Moses on the ground of lack of criminal capacity:[258]

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[253] at 714.

[254] J M Burchell *op cit* 210.

[255] R T du Toit 'Provocation to killing in domestic relationships' (1993) 6 *Responsa Meridiana* 230 at 249.

[256] *S v Campher* 1987 (1) SA 940 (A) at 942.

[257] *S v Nursingh* 1995 (2) SACR 331 (D) at 334.

[258] P de Vos '*S v Moses* 1996 (1) SACR 701 (C) Criminal capacity , provocation
(continued...)

'Never before in a South African court has a man been acquitted of murder where he flew into a sudden fit of rage and then systematically set about killing his victim. Never before, in the long line of cases in which the non-pathological criminal incapacity defence was developed, has a person been acquitted who became emotionally disturbed for only a brief period before and during the act. In case after case in which the defence was raised, or in which the court was prepared at least to consider it seriously, X's act was preceded by a very long period - months or years - in which his level of emotional stress increased progressively.'[259]

De Vos further highlights the dangers if the *Moses* decision is accepted:

'....there is a great danger that the non-pathological criminal incapacity defence will be abused by quick-tempered individuals who claim that they lacked criminal capacity after being provoked. Volatile members of society could then be acquitted for acts committed in a (momentary) state of rage when the law should aim to punish those who fail to control their rages and infringe on the rights of others in the process.'[260]

Scott JA in the 1996 case of *S v Cunningham*,[261] held that the natural inference is that in the absence of exceptional circumstances, the conduct of a sane person which gives rise

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[258](...continued)
and HIV' (1996) 9 South African Journal of Criminal Justice 354 at 358

[259] *ibid* 358.

[260] *ibid* 358.

[261] 1996 (1) SACR 631 (A).

to criminal liability is deemed to be consciously and voluntarily done.[262] Held further held:

> 'Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as the voluntary nature of the alleged *actus reus* and, if involuntary, that this was attributable to some cause other than mental pathology.'[263]

In the 1998 case of *S v Pederson*,[264] the accused was convicted in a regional court of the murder of his wife.[265] In an appeal, it was contended on behalf of the accused that at the time when he stabbed the deceased, he had acted involuntarily and was not capable of forming the intention to kill the deceased in that:

> '.... the stabbing occurred in a situation where all the appellant's controls and inhibitions had broken down, rendering him powerless in the grip of a mental storm which overwhelmed his mental equilibrium and disrupted his logical thought processes.'[266]

Marnewick AJ held that the question which fell to decided was:

> '.... whether the appellant's behaviour was sufficiently goal-directed to remove any reasonable doubt that he had acted voluntarily and

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[262] at 636.

[263] at 636.

[264] 1998 (2) SACR 383.

[265] at 385.

[266] at 387.

intentionally.'[267]

In such an enquiry he held:

> '.... the traditional starting point ... is that a sane adult has criminal capacity, unless there is some credible evidence to suggest otherwise.'[268]

In determining whether the appellant had acted involuntarily, the court held that regard must be had to the facts of the case, the expert evidence, and the nature of the accused's actions during the relevant period.[269] Marnewick AJ held:

> 'For the defence of sane automatism to succeed, the absence of control by the mind over the actions of the appellant must be present. Mere loss of memory is not and it never has been a defence to a charge of murder. The loss or absence of memory must be part of a wider concept to be relevant at all.'[270]

The learned judge of appeal referred to the cases of *Nursingh*, *Arnold* and *Wiid* where similar defences were raised and found that in each of these cases:

> '....all three of those accused had lived exemplary lives before and after the events when their victims were killed. All gave credible evidence. Each appeared to have a genuine lack of memory of the crucial moments during

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[267] at 397.

[268] at 397.

[269] at 384.

[270] at 396.

which the killings in their respective cases occurred.'[271]

In addition he found:

> 'In each of those cases there was no indication of drugs or alcohol playing a role. Not one of those accused had made threats against the safety of the victims in advance and, conversely, each of them doted upon the primary victim to the extent that the last thing they would decide was the death of that loved one, notwithstanding the poor treatment they received at the very hands of those persons they killed. In short, there was no reasonable explanation which would have made sense in those cases for the killings other than a complete loss of control such as one would encounter in an acute catathymic crisis.'[272]

With regard to the appellant's case, Marnewick AJ asked the following question:

> 'Is a complete loss of control to the extent that there could be no voluntary act a reasonable conclusion on the evidence, or is this the fairly standard case of a domestic killing by a jealous , even angry, husband, one who had taken some liquor and one who was about to be left for good by his wife and who later show himself to be full of remorse?'[273]

On the basis of the facts before the court, the learned judge found that it was the latter.[274]

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[271] at 398.

[272] at 398.

[273] at 399.

[274] at 399.

The court found that the accused was not intoxicated at the time of the incident.[275] He was violent to women with whom he had had close relations, enabling the court to conclude that his conduct on the day in question was not entirely out of character.[276] On the day of the incident he was violent towards the accused and had threatened to kill the deceased.[277] Marnewick AJ held that the accused was 'a terrible witness'[278] and 'lied repeatedly when it suited his case'.[279] The court found that the appellant's conduct:

> '.... was sufficiently goal-directed to show a conscious mind directing the appellant's actions.'[280]

Of particular importance, the court held:

> '.... even if a catathymic event or emotional storm were to have been present, one would need to determine its severity and effect on the appellant's ability to act voluntarily and if he did so act, his ability to distinguish between right and wrong and to conduct himself accordingly. Not every catathymic event gives rise to a total loss or lack of control.'[281]

The court found that the appellant had acted voluntarily and that his 'denial of any memory

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[275] at 399.

[276] at 397.

[277] at 397.

[278] at 395.

[279] at 395.

[280] at 399.

[281] at 397.

of the crucial events',[282] that is, that he lacked *mens rea* rendered his defence rather 'academic or theoretical.'[283] The appeal was dismissed.

In the 1999 case of *S v Henry*,[284] the accused was charged with the murder of his ex-wife and his ex-mother-in-law and a third count of pointing a firearm in contravention of the Arms and Ammunition Act 75 of 1969.[285] The accused raised the defence of 'sane automatism' claiming that he had no recollection of the shooting.[286] The trial court rejected his defence and he was convicted as charged.

In an appeal, the court summarised the accused defence as follows:

> '.... the basis upon which the appellant sought to avoid criminal responsibility was not lack of capacity in the sense that he could not distinguish between right and wrong or, if he could, that he was incapable of acting accordingly but at the critical time he was 'acting' in a state of automatism attributable to a cause other than mental pathology.'[287]

The court held that it was trite law that voluntary conduct was an essential element of criminal responsibility, and that where the voluntariness of the conduct in question was in issue, that the absence of voluntary conduct was attributable to a cause other than mental pathology, the onus was on the state to establish that element beyond reasonable

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[282] at 400.

[283] at 400.

[284] 1999 (1) SACR 13 (SCA).

[285] at 15-16.

[286] at 16.

[287] at 19.

doubt.[288]

The court emphasised that defences such as 'non-pathological automatism' required careful scrutiny:[289]

> 'By the very nature of things the only person who can give direct evidence as to the level of consciousness of an accused person at the time of the commission of the alleged criminal act, is the accused himself. His *ipsi dixit* to the effect that his act was involuntarily and unconsciously committed must therefore be weighed up and considered in light of all the circumstances and particularly against the alleged criminal conduct viewed objectively. It is not sufficient that there should merely have been a loss of temper. Criminal conduct arising from an argument or some other emotional conflict is more often than not preceded by some sort of provocation. Loss of temper in the ordinary sense is a common occurrence. It may in appropriate circumstances mitigate , but it does not exonerate. On the other hand, non-pathological loss of cognitive control or consciousness arising from some emotional stimulus and resulting in involuntary conduct, i e psychogenic automatism is most uncommon. The two must not be confused.'[290]

The court held further that while it was generally accepted that automatism resulted in amnesia, the converse was not true:[291]

> '.... amnesia is not necessarily indicative of automatism. An accused person

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[288] at 14.

[289] at 20.

[290] at 20.

[291] at 20.

therefore may quite genuinely have no subsequent recollection of the voluntary act giving rise to criminal responsibility.'[292]

The court recognised the importance of expert evidence in determining the voluntariness of the accused's conduct.[293] However, the court held that ultimately it is for the court:

'.... to decide the true nature of the alleged criminal conduct which it will do not only on the basis of the expert evidence but in light of all the facts and the circumstances of the case.'[294]

As to the nature of psychogenic automatism, the court held:

'There had to be some emotionally charged event or provocation of extraordinary significance to the person concerned and the emotional arousal that it caused had to be of such a nature as to disturb the consciousness of the person concerned to the extent that it resulted in unconsciousness or automatic behaviour with consequential amnesia. A moment's reflection, I think, reveals the extreme nature of the stimulus that is required. If the position were otherwise, psychogenic automatism would not be the extremely uncommon occurrence that it undoubtedly is.'[295]

The court having regard to the evidence, both objectively and on the appellant's own version, held that there was nothing to suggest a stimulus of the kind required to trigger

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[292] at 20.

[293] at 20.

[294] at 20.

[295] at 21.

a state of automatism.[296] Further, the court held on the facts, that even if the acts necessary to bring the firearm into readiness for firing were disregarded, the fact that the deceased was shot was a clear indication of aiming and firing.[297] Moreover, there were indications that the appellant knew what he had done, for example his 'avoidance behaviour' in hurriedly leaving the scene even before he had found out what had happened.[298] The appeal was accordingly dismissed.

It seems, therefore, that in South African law provocation can serve as a defence to criminal capacity.[299] However, it is clear that the courts will carefully scrutinise the basis of such a defence having regard to expert testimony, the credibility of the accused's testimony, the facts and the surrounding circumstances of the case.[300] Burchell and Milton write:

> '.... it appears that the South African courts are intent on applying a uniformly subjective criterion for capacity and favouring principle and internal logic above policy and expediency. The judgments of Burger J in *Arnold*, Viljoen JA and Boschoff AJA in *Camper*, Goldstone AJA in *Wiid* and Squires J in *Nursingh* places provocation and emotional stress on the same footing as youth, insanity and intoxication as factors which are capable of excluding the voluntariness of conduct or criminal capacity. The judgments raise questions of a fundamental nature: Logic may dictate that, if a preliminary examination is made into capacity in the context of youth, insanity and

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[296] at 21-22.

[297] at 22.

[298] at 23.

[299] C R Snyman *op cit* 228.

[300] J Burchell and J Milton *op cit* 295; see *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Ingram* 1995 (1) SACR 1 (A).

intoxication, the same preliminary inquiry should be relevant where provocation or emotional stress is in issue.'[301]

1.7. Problems facing our courts

From our case law, it is not clear to what extent a person should tolerate provocation as is evident from the *Campher* and *Laubscher* cases.[302] Although it can be argued that in these cases the provocation was so severe that the conduct of the accused can be excused.[303] As is evident from the cases discussed above, our courts have not adopted a consistent standard with regard to the defence of provocation.[304]

In *Arnold*, the court was prepared to accept that provocation can be a complete defence, whereas in other cases like *Campher* and *Laubscher*, the courts were not prepared to accept provocation as a complete defence.[305] Burchell and Milton observe that our courts have not yet drawn a clear distinction between provocation which is caused by human beings, and emotional stress which is a series of events caused by both human beings and surrounding circumstances over a long period of time.[306]

Dlamini commends the courts for its flexibility, however, he submits that such an approach may lead to uncertainty:

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[301] J Burchell and J Milton *op cit* 291.

[302] C R M Dlamini *op cit* 130 at 134.

[303] *ibid* 134.

[304] *ibid* 135.

[305] *ibid* 136.

[306] J Burchell and J Milton *op cit* 288.

'.... the major problem in the treatment of provocation has been an attempt to adopt and all-or-nothing approach ... it becomes obvious that provocation cannot be pigeon-holed into one or other category. It can fit into more than one. Depending on the intensity of provocation, provocation can be a ground excluding unlawfulness or a ground excluding *mens rea*.'[307]

Burchell and Milton observe, where an accused raises the defence of insanity and is successful, the accused faces a long period of institutionalisation.[308] On the other hand, if an accused raises the defence of non-pathological criminal incapacity and such a defence is successful, the accused is acquitted.[309] The question that arises is: 'how can the legislature or the courts limit the obvious injustice in this?'[310]

The policy considerations against a rule of law that provocation can be a complete defence are sound and convincing.[311] The law expects people to keep their emotions in check and the fact that certain people are quick-tempered is no excuse for their criminal conduct.[312] Further, there would be a real risk if the law applied different criteria for different kinds of people: one for people who are calm and composed, and another for those who are irrational or impulsive or emotional.[313] Snyman strongly advocates that neither emotional stress nor any other form of provocation should be a complete defence to a charge of murder:

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[307] *ibid* 137.

[308] *S v Kavin* 1978 (2) SA 731 (W).

[309] J Burchell and J Milton *op cit* 292.

[310] *ibid* 292.

[311] C R Snyman *op cit* 240 at 248.

[312] *ibid* 248.

[313] *ibid* 248.

'Are we not making it progressively easier for those who fall below the standards required by the law to contravene the law with impunity? Are we not diminishing the incentives to conform with the standards of law which are so vital to the upholding of the law? The search for criminal justice is not, as some 'subjectivists' would tend to believe, confined to a determination and recognition of the individual accused's personal knowledge and capabilities'.[314]

Du Plessis opines that the defence of provocation should not be considered as a complete defence, although it could be considered as a mitigating factor:[315]

'It is one thing to say a man behaved violently because he lost his self-control, it is an entirely different thing to say he behaved violently, or killed someone deliberately, because he could not do otherwise. The latter is an abnormal state of mind and should be investigated and dealt with in terms of chapter 13 of the Criminal Procedure Act of 1977, which deals with what I prefer to call the defence of insanity.'[316]

He further writes:

'An aspect of allowing ontoerekeningsvatbaarheid to operate as a defence to a charge of murder is that it becomes a complete defence, that is, if successfully raised not only does it negative *dolus*, it excludes *culpa* as well.

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[314] *ibid* 251.

[315] J R Du Plessis *op cit* 539 at 542.

[316] *ibid* 542.

In other words, it narrows the ambit of the crime of culpable homicide.'[317]

Provocation can in appropriate cases have an effect on the accused's criminal capacity, however, whether an accused was so provoked that he lost control of himself is a question of fact for the court to decide based on the evidence before it.[318] The courts carefully scrutinise such defence raised and do not consider every 'emotional storm'[319] or provocative act as one which gives rise to a total lack or loss of control.[320] The courts have to determine the severity and effect on the accused's ability to act voluntarily and if he did act, his ability to distinguish between right and wrong and to conduct himself accordingly.[321]

Provocation can exclude *mens rea* or exclude criminal capacity:[322] Where the defence of provocation excludes criminal capacity, the accused will be found not guilty.[323] However, the courts will not easily reach such a conclusion and must be convinced that that was the case.[324] Where the provocation had the effect of excluding *mens rea* in the form of intention, but not of negligence the accused may be convicted of a lesser offence requiring

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[317] *ibid* 542.

[318] C R M Dlamini *op cit* 130 at 137.

[319] *S v Pederson* 1998 (2) SACR 383 (NPD).

[320] *S v Pederson* 1998 (2) SACR 383 (NPD) at 397; S v Henry 1999 (1) SACR 13 (SCA) at 22.

[321] *S v Pederson* 1998 (2) SACR 383 (NPD) at 397.

[322] C R M Dlamini *op cit* 130 at 139.

[323] *ibid* 137.

[324] *ibid* 137.

negligence.[325]

Dlamini writes that provocation can serve as a ground of justification:[326]

> 'To regard provocation as a ground of justification does not involve conflict with principle. Unlawfulness is evaluated objectively so that asking the question whether it was reasonable for the accused to have been so provoked as to commit the act in question will not conflict with principle. Moreover, a ground of justification involves the weighing of the seriousness of provocation with the gravity of the offence committed. There must be an element of proportion. The accused, may have exceeded the bounds of justification, but it may not mean that he is guilty of the crime with which he is charged, because if he subjectively believed that he was acting upon a ground of justification he may have laboured under a mistake and a mistake, however unreasonable, excludes intention.'[327]

Therefore, although provocation has not been regarded as a ground of justification, there is nothing to prevent this from being the case.[328] The apparent conflict in our law was simply to regard provocation as a ground excluding *mens rea* and not one excluding unlawfulness.[329]

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[325] *ibid* 138.

[326] *ibid* 138.

[327] *ibid* 138.

[328] *ibid* 138.

[329] *ibid* 139.

CHAPTER TWO

Battered Woman Syndrome

Domestic violence is not a new phenomenon, neither are spousal killings.[330] In the last ten to fifteen years the plight of the battered woman has been exposed, revealing a problem of vast proportions.[331] Fredericks and Davids write that in South African and other countries such as Australia, England and the Unites States:

> '.... wife abuse is one of the most underestimated and under reported crimes. There are no official statistics regarding the number of wives that have been abused by their husbands. The lack of statistics is partly dues to the fact that many women fail to report violent incidents to the police because of fear of reprisal by their husbands. Other explanations for the lack of statistics could be that police either treat the reported incidence as part of the general statistics or that they are excluded on the basis that wife abuse is not a criminal act.'[332]

The seriousness of the problem of wife abuse is highlighted by Gibbs who finds that 'more American women are injured by the men in their life than by car accidents, muggings and rape combined'.[333] In a recent and highly publicised American case where a one Mrs L

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[330] Bartal F B 'Battered Wife Syndrome Evidence: The Australian Experience' *British Criminology Conferences* (1998) 1 *http://www.lboro.ac.uk/department/ss/BSC/bccsp/VOL1_08.HTM*

[331] A E Thar 'The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentary Analysis' (1982-83) 77 *Northwestern University Law Review* 348 at 348.

[332] I N Fredericks and L C Davids 'The Privacy of Wife Abuse' (1995) 3 *TSAR* 471 at 471.

[333] Gibbs 'Till death do us part' *Time* 18 January 1993 at 38; I N Fredericks and L

(continued...)

Bobbit cut off her husband's penis after he physically and emotionally abused her over a number of years has placed the issue of battered women in the spotlight. Dowd, however, highlights the negative implications of this case:

> '.... because the case involved an insanity defence ... it plays into the notion that all battered women are suffering from some kind of defect in reasoning that triggers an act of violence against their abuser ... that battered women are emotionally disturbed or mentally defective in some way, or that their presence in an abusive relationship suggests that there was something wrong with them to begin with.'[334]

Many battered women find themselves in a situation with no realistic alternative to the use of force against their abusive partners:[335]

> 'The battered wife, frustrated and unprotected by an ineffective legal network, often sees no choice but to kill or be killed. Police, prosecutors, judges and attorneys have been either unable or unwilling to provide adequate remedies for the battered spouse. The violence is fueled by inadequate procedures and authority for maintaining police custody or surveillance of wife-batterers who may have been arrested several times before their wives were forced to help themselves.' [336]

McColgan writes that the only way to prevent battered women killing their abusers is to

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[333](...continued)
C Davids *op cit* 471 at 473.

[334] M Dowd 'Battered Women and the Law' (1994) July *Trial* 62 at 62.

[335] A McColgan *op cit* 508 at 528.

[336] M A Buda and T L Butler *op cit* 359 at 360.

provide adequate alternative means of escape from the violence, and then condemn those who choose to use violence instead.[337] She concludes:

> 'Such a course of action would have the effect of saving the lives of battered women as well as those of their abusers. It is however a long term solution, and one which requires the commitment of Government rather than the law alone. In the meantime, society's failure to protect women from violence within their homes must be brought to the fore by defence lawyers and taken into account by those whose task it is to allocate blame.'[338]

2.1. Definition of a 'battered woman'

Mahoney writes that the term battered woman 'focuses on the woman and defines her through the battering experience.'[339] Use of the term is, however, problematic:

> 'Because the term 'battered woman' focuses on the woman in a violent relationship rather than the man or the battering process, it creates a tendancy to see the woman as the problem.'[340]

As a result of the 'stereotypical implications' associated with the term 'battered woman' many women resist applying the term to themselves.[341] Hooks highlights a further problem with the use of such term:

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[337] A McColgan *op cit* 508 at 529.

[338] *ibid* 529.

[339] M R Mahoney 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1 at 24.

[340] *ibid* 25.

[341] *ibid* 25.

> 'A category like "battered woman" risks reinforcing the notion that the hurt woman ... becomes a social pariah ... marked forever by this experience.'[342]

The term 'battered woman' is, however, preferred by many feminists as it emphasises 'that women, not men, are almost always the target of spousal abuse.'[343] It appears that the use of a less gender specific term such as 'spousal abuse' would have the effect of minimizing the emotional and physical abuse suffered by women in abusive relationships:

> 'The very substantial psychic damage done through the experience of violence may be minimized or denied through less woman-focused terminology. Although the term "battered woman" is unfortunate in its potential for stigma, no less specific term can capture this damage; the search for different language may lose a sense of the harm.'[344]

Dr Lenore Walker, who has written extensively on this field, defines a 'battered woman' as:

> '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. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If is occurs a second time, and

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[342] B Hooks 'Violence in Intimate Relationships: A Feminist Perspective' in L L O'Toole and J R Schiffman (editors) *Gender Violence Interdisciplinary Perspectives* New York University Press (1997) 283.

[343] M R Mahoney *op cit* 1 at 25.

[344] *ibid* 25.

she remains in the situation, she is defined as a battered woman.'[345]

Her definition of a battered woman in her second book published in 1984 is more incident-focused:

> 'A battered woman is a woman ... who is or has been in an intimate relationship with a man who repeatedly subjected her to forceful physical and or psychological abuse ...'[346]

Mahoney writes that Walker's definition is particularly useful when a battered woman's experiences have to be described to a court:

> 'First, the definition is incident-focused: incidents can be asserted and often proven as objective support for the woman's perceptions and feelings. Second the "repeatedly" requirement is a sorting mechanism that allows the judge or jury to consider the woman before them without accepting that any woman who has been struck even one time - a figure that may be familiar from their own relationships in ways they still deny - is susceptible to the development of battered woman syndrome.'[347]

Various attempts have been made to define a 'battered woman' and it appears that many of widely known definitions of battering incident-focused.[348] Browne's definition of battered women focuses on the incidents of assault:

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[345] L E Walker (1979) *op cit* xv.

[346] L E Walker (1984) *op cit* xi.

[347] M R Mahoney *op cit* 1 at 30.

[348] *ibid* 28.

'Battered women are those who have been struck repeatedly, often experiencing several different kinds of physically violent actions in one incident, and usually, by the time they are identified, having experienced a series of such incidents, each consisting of a cluster of violent acts.'[349]

Mahoney finds that definitions of battering that are incident-focused to be problematic:

'....this type of definition tends to direct attention away from the source of the violence - the struggle for power and control - and has the additional problem of emphasizing the very incidents women tend to minimize and fortifying an image women seek to deny.'[350]

She defines a battered woman as follows:

'A battered woman is a woman who experiences the violence against her as determining or controlling her thoughts, emotions, or actions, including her efforts to cope with the violence itself.'[351]

2.2. The Walker Cycle Theory of Violence[352]

The term 'battered woman syndrome' is used to describe the pattern of violence in abusive households and the effect of such violence on its victims.[353] Not all woman suffer from

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[349] A Browne *when Battered Women Kill* (1987) Collier McMillan Publishers 13.

[350] M R Mahoney *op cit* 1 at 28.

[351] *ibid* 93.

[352] L E Walker *op cit* (1979); L E Walker *op cit* (1984); L E Walker *op cit* (1989).

[353] D Bricker 'Fatal defence: An analysis of battered woman's syndrome expert (continued...)

'battered woman syndrome' and Walker writes that in order for a woman to be regarded as one who suffers from such syndrome she must go through the 'battering cycle' at least twice.[354] The 'cycle theory of violence' and 'learned helplessness' are the two main components of Walker's theory.

2.2.1. The Cycle Theory of Violence

The 'cycle theory of violence' describes the typical course of violent behaviour in a relationship in a repeating three phase pattern.[355] The three phases of this cycle which vary in duration and intensity are:[356]

(1) the tension-building stage

During this stage, the tension gradually escalates and minor battering incidents occur is likely to occur.[357] The abuse during this phase is likely to verbal abuse or minor physical abuse.[358] The woman responds by trying to appease her abusing in the hope of preventing the abuse from escalating.[359] Although she may succeed temporarily, the

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[353](...continued)
testimony for gay men and lesbians who kill abusive partners' (1993) 58 *Brooklyn Law Review* 1379 at 1381.

[354] L E Walker (1979) *ibid* xv.

[355] L E Walker (1979) 55; D Bricker *op cit* 1379 at 1419; I Leader-Elliot *op cit* 403 at 412.

[356] L E Walker (1979) *op cit* 55.

[357] L E Walker (1979) *op cit* 56.

[358] *ibid* 56-57.

[359] *ibid* 56-57.

tension usually escalates until she can no longer control her abuser.[360] At this pont, the second phase begins.[361]

(2) the acute battering incident

Although this stage does not last as long as the first stage, the tension and abuse continue to escalate to such an extent that there is an 'uncontrollable discharge of tensions.'[362] This stage is characterised by a 'barrage of verbal and physical aggression.'[363]

(3) kindness and contrite loving behaviour

During this stage the batterer behaves in a 'charming and loving manner.'[364] The batterer and begs for forgiveness; tries to assist the victim; showers her with gifts and promises that it will never happen again.[365] Walker writes:

> '.... the battered woman may join with the batterer in sustaining this illusion of bliss. She convinces herself, too, that it will never happen again; her lover can change, she tells herself.'[366]

Therefore, the third phase raises the victim's hopes that the cycle won't repeat itself and

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[360] *ibid* 56-57.

[361] *ibid* 59.

[362] *ibid* 59.

[363] L E Walker (1984) *op cit* 96.

[364] L E Walker (1979) *op cit* 65.

[365] *ibid* 65.

[366] L E Walker (1989) *op cit* 45.

that the abuser will change which provides reinforcement for remaining in the relationship.[367]

Walker writes that due to the recurring nature of the cycle, the victim is able to identify behaviour of the abuser which signals the beginning of the cycle. They in effect become 'hyper-sensitive' to such behaviour of the abuser.[368]

2.2.2. Learned Helplessness

The second element is that of 'learned helplessness' which helps to explain the often-asked question, 'why don't battered women leave?'[369] This element attempts to 'explain why the battered woman becomes a victim in the first place and how the process of victimisation is perpetuated to the point of psychological paralysis.'[370] Walker's theory suggests that women who are subject to abuse for a period of time often develop a sense of helplessness regarding their situation.[371] They feel helpless to change their situation and come to believe that no matter what they do or how they respond, there is nothing they can do to change the situation.[372] When a woman still experiences violence despite her change in behaviour, she begins to assume that she has no control over her situation.[373] Walker writes that the effect of this is:

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[367] L E Walker (1979) *op cit* 67.

[368] *ibid* 73.

[369] *ibid* 47; D Bricker *op cit* 1379 at 1420.

[370] L E Walker (1979) *op cit* 43.

[371] *ibid* 49-50.

[372] *ibid* 49-50.

[373] *ibid* 44-45.

'[A] destructive psychological spiral is established; the beatings lead to lowered self-esteem and learned helplessness, which in turn make her unable to escape; her inability to escape makes her feel even more inadequate and helpless and also leaves her in a relationship which will lead to further beatings, and which will further decrease her self-esteem.'[374]

Walker used experiments by psychologist Martin Seligman to explain this phenomenon of learned helplessness:

'Seligman and his researchers placed dogs in cages and administered electrical shocks at random and varied intervals. These dogs quickly learned that no matter what response they made, they could not control the shock. At first, the dogs attempted to escape through various voluntary movements. When nothing they did stopped the shocks, the dogs ceased any further voluntary activity and became compliant, passive, and submissive. When the researchers attempted to change this procedure and teach the dogs that they could escape by crossing to the other side of the cage, the dogs still would not respond. In fact, even when the door was left open and the dogs were shown the way out, they remained passive, refused to leave, and did not avoid the shock. It took repeated dragging of the dogs to the exit to teach them how to respond voluntarily again. The earlier in life that the dogs received such treatment, the longer it took to overcome the effects of this so-called learned helplessness. However, once they did learn that they could make the voluntary response, their helplessness disappeared.'[375]

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[374] *ibid* 45.

[375] *ibid* 46.

In applying 'learned helplessness' to the concept of battered women, Walker writes:

> 'Repeated batterings, like electrical shocks, diminish the 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 generalised her helplessness, the battered woman does not believe anything she does will alter any outcome, not just the specific situation that has occurred.'[376]

Walker's theory in effect, therefore, helps explain why the battered woman finds it difficult to leave the relationship:

> 'Hence battered women perceive themselves as engulfed in a whirlpool of pain and violence from which there is no liberation. In this situation, only two alternative emerge: submit to the abuse and risk death, or strike back ... A battered woman's sense of fear, loneliness, isolation, and guilt are planted and cultivated by a society that must ultimately choose among three plans of action - give her the right to strike back fatally, condemn her for what she could not prevent, or provide her with access to a genuine legal remedy.'[377]

2.3. Criticisms of the Walker Theory

Current theorists find the term 'battered woman syndrome' problematic as it creates an

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[376] *ibid* 50.

[377] M A Buda and T L Butler *op cit* 359 at 369-70.

image of pathology.[378] I Leader-Elliot refers to the term as 'an unhappy hybrid'.[379] The assumption that the choice to stay in the relationship is a pathological one or a consequence of a mental disorder 'masks the brute reality of domestic violence.'[380] Many women decide to stay despite the abuse and the violence in order to maintain a home, a family life for the children, or because for economic dependence, but according to I Leader-Elliot the simplest and most accurate explanation for a woman remaining in the relationship:[381]

> '[M]ay be found in her belief that her life in that relationship, and the relationship itself, was still worth defending ... there is no reason to assume that she stayed because she was psychologically incapable of leaving or that her choice to remain was irrational or pathological.'[382]

Walker with her 'learned helplessness' theory attempts to answer the question, 'why don't battered women leave?'[383] Both Browne and Dowd are critical of this question.[384] Browne writes this questions lies on the erroneous assumption that separation will end the violence.[385] She suggests:

> 'Another way to look at the issue is to ask, "Why should the *woman* leave?"

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[378] D Bricker *op cit* 1379 at 1381.

[379] I Leader-Elliot *op cit* 403 at 406.

[380] *ibid* 417.

[381] *ibid* 418.

[382] *ibid* 418.

[383] L E Walker (1989) *op cit* 47.

[384] A Browne *op cit* 110; M Dowd *op cit* 62 at 65

[385] A Browne *op cit* 110.

> Why should the victim and, possibly, her children, hit the road like fugitives, leaving the assailant the home and belongings, when he is the one who broke the law?'[386]

Feminist writers are critical of 'battered woman syndrome' for reinforcing negative stereotypes of women as helpless, irrational and passive and more importantly for failing to address the social, political and economic dimensions to battering relationships.[387] The description of battered women as 'helpless' has been challenged by Blackman:

> 'The suggestion that battered women are "helpless" is really a misnomer. Battered women are often are often resourceful and active in their efforts to avoid violence within the context of the relationship. They simply tend not to act in ways that would enable them to leave the relationship. Further, especially for battered women who kill, the suggestion in Walker's language that they must be "helpless" if they have been battered can function to predispose the jurors against them. The jurors may believe that a helpless woman could only endure the abuse, but could not respond in kind.'[388]

Crocker also recognises a conflict with the 'reasonable-man' test in self-defence cases:

> 'If the defendant has tried to resist in the past, the courts accepts this as evidence that rebuts her status as a battered woman. On the other hand, if the defendant has never attempted to fight back, the prosecution argues that

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[386] *ibid* 110.

[387] C J Simone "'Kill(er) man was a Battered Wife', the Application of Battered Woman Syndrome to Homosexual Defendants: *The Queen v McEwen*" (1997) 19 *Sydney Law Review* 230 at 231.

[388] J Blackman *Intimate Violence: A Study of Injustice* (1989) Columbia University Press 192.

the defendant did not act as a "reasonable man".[389]

I Leader-Elliot is critical of Walker's use of the dog experiments 'as metaphors to illustrate the effects of oppressive cruelty in the home'.[390] He writes:

> 'Walker's preoccupation with the theory of learned helplessness obscures the real reasons why they remain. There is no syndrome: the women in Walker's survey did not suffer from a psychological disorder. The experiments showed that dogs reduced to a state of learned helplessness made no attempt to escape from pain when escape was possible. The essential point of the experiment was to subject the dogs to maltreatment and present them with a simple and obvious means of escape ... there is no analogy, even on the level of a suggestive metaphor, with the dilemmas faced by most women in abusive relationships.'[391]

Walker's work is also criticised on the ground that emphasis on individual pathology merely reinforces existing prejudices that women face and encourages the common tendency to blame the victims of domestic violence for masochism.[392] Bartal opines that one of the problems with the syndrome is that it focuses on the psychiatric health of the battered woman rather than looking at the circumstances surrounding her actions.[393] Thus

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[389] P L Crocker 'The Meaning of Equality for Battered Women who Kill in Self-Defence' (1985) 8 *Harvard Women's Law Journal* 121 at 145.

[390] I Leader-Elliot *op cit* 403 at 416.

[391] *ibid* 416.

[392] I Leader-Elliot *op cit* 403 at 415-6.

[393] B F Bartal *op cit* 3.

her social, economic, cultural and political circumstances are ignored.[394] She suggests:

> 'The focus should be on the situation in which the woman was placed and what it is about her circumstances which caused her to kill her abuser. In this way her actions may be seen as rational, necessary and reasonable.'[395]

Crocker is critical of the use of 'battered woman syndrome' on the grounds that the courts seems to treat battered woman syndrome as a standard to which all battered woman must conform to:

> 'As a result, a defendant may be considered a battered woman only if she never left her husband, never sought assistance, and never fought back.'[396]

2.4. Recent studies on 'battered woman syndrome'

2.4.1. The theory of separation assault

The theory of separation assault is suggested by Mahoney 'as part of the feminist approach to law reform in this area.'[397] It is an attempt by Mahoney 'to use a social definition, a cultural concept, to resolve doctrinal problems in law.'[398] Mahoney's theory of separation assault is vital when assessing the conduct of battered woman as 'it provides

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[394] *ibid* 3.

[395] *ibid* 3.

[396] P L Crocker *op cit* 121 at 144.

[397] M R Mahoney *op cit* 1 at 94.

[398] *ibid* 71.

a partial explanation of women's actions that redirects attention to the batterer.'[399]

2.4.2. Definition of separation assault

Separation assault is defined as:

> '....the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain or regain power in a relationship, or to punish the woman for ending the relationship.'[400]

Therefore, separation assault refers to the abuse that the woman is subjected to at or after she decides on a separation or is in the process of preparing for separation.[401] This concept of separation assault shifts the focus from the victim to the batterer:

> 'Separation assault is effective in part because, rather than directly confronting existing stereotypes of battered women, it provides a partial explanation of women's actions that redirects attention to the batterer.'.[402]

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[399] *ibid* 70.

[400] *ibid* 65-66.

[401] *ibid* 65.

[402] *ibid* 70.

2.4.3. Separation assault and legal doctrine[403]

Mahoney argues that separation assault is not intended to create a new standard by which a woman's conduct is tested but should rather be seen as an attempt to 'promote a new understanding of violence against women.'[404] She further writes:

> 'Our understanding of "objective" reasonableness depends on our cultural institutions about normal experience and normal response. By reflecting a consciousness of power and control, and by emphasizing the dangers attendant upon separation, separation assault helps make women's experience comprehensible in law.'[405]

Separation assault in relation to custody disputes and self-defence cases will be discussed below.

2.4.3.1. Self-defence

The requirement of imminent attack as currently defined in our law and as well in foreign jurisdictions, make it difficult for battered women who kill to rely on self-defence. The theory of separation assault is particularly useful in such cases where battered women who kill seek to rely on self-defence. Expert testimony on 'battered woman syndrome' is of vital importance in assisting the courts to understand the reasonableness of the woman's conduct in light of the situation she found herself in.[406] Mahoney 'illustrates the relevance of the concept of separation assault to the issues of imminent danger and the

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[403] *ibid* 71.

[404] *ibid* 71.

[405] *ibid* 71.

[406] Expert testimony on 'battered woman syndrome' is discussed in chapter 3.

reasonableness of the woman's perception that self-defence is necessary.'[407]

Mahoney's theory of separation assault does not attempt to refute or challenge Walker's cycle theory of violence and learned helplessness:[408]

> '....by supporting the woman's rational perception of danger, the concept of separation assault supports that aspect of battered woman syndrome which emphasizes the woman's reasonableness and the normal character of her reaction to violence.'[409]

Further, the theory of separation assault does not call for the end of expert testimony:[410]

> 'Women still find it impossible to incorporate our own experience in the jury room unless the lens through which we perceive battered women has been entirely transformed ...there remains a critical need for expert testimony to explain to the jury things beyond their capacity for collective knowledge and discussion, even if these things are within their individual personal experience.'[411]

It is submitted that the theory of separation assault in relation to cases where self-defence is pleaded can be used to assist the court in understanding the reasonableness of her

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[407] *ibid* 80.

[408] *ibid* 82.

[409] *ibid* 81.

[410] *ibid* 82.

[411] *ibid* 82.

perception that self-defence was necessary in the circumstances.[412] However, the use of separation assault goes beyond the perceptions of the woman:

'The cultural redefinition of the dangers of separation go beyond the individual circumstances, her subjective perceptions persuaded her of danger. Rather, separation assault helps shift what judges and jurors "objectively" know as truth: To the extent that objective standards embody in law the shared cultural norms to allow "objective" perception itself to track more closely the painfully accrued understanding of women who have lived with violent partners.'[413]

2.4.3.2. Custody disputes

Upon separation or divorce, battered woman face the risk of losing custody of their children.[414] The difficulty faced by these women is whether or not to raise the issue of domestic violence at the custody hearing:[415]

> 'Women must ... decide whether to describe the violence against them - and risk judicial stereotyping - or keep silent, and allow the violence of their spouse to be judicially invisible.'[416]

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[412] *ibid* 82.

[413] *ibid* 89.

[414] *ibid* 44.

[415] *ibid* 46.

[416] *ibid* 46.

Women are often forced to strike bargains in custody determinations.[417] For example, instead of accepting orders of protection that specifically protect them from the batterer, they accept mutual orders of protection, in exchange for the batterer agreeing not to contest custody.[418] Further, if the woman decides to raise domestic violence at the custody hearing, the courts may not even find it relevant unless the child has been harmed.[419]

Recognition of separation assault in custody disputes can assist the courts in understanding the relevance of the past violence experienced by the woman and the relevance and nature of the present attacks:[420]

> 'Separation assault provides a link between past violence and current legal disputes by illuminating the custody action as part of an ongoing attempt, through physical violence and legal manipulation, to force the woman to make concessions or return to the violent partner.'[421]

Further, where there is evidence of a violent separation assault, the courts could carefully scrutinise the motive behind the custody dispute.[422]

2.4.4. Captivity

The analogy drawn between hostages and battered women is discussed in detail in

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[417] *ibid* 78.

[418] *ibid* 78.

[419] *ibid* 78.

[420] *ibid* 78.

[421] *ibid* 78.

[422] *ibid* 78.

chapter 4.

2.4.5. Power and control in the battering relationship

Mahoney discusses 'batttering as a struggle for power and control'[423] and suggests that placing greater emphasis on the attacks that women who attempt to leave the abusive relationship, exposes issues of power and control:[424]

> 'Exposing control attempts reveals the woman's struggle, rather than defining her according to the behaviour of her assailant.'[425]

She further argues that separation assault helps to reveal that the nature of battering involves questions of not only the violence, but also that of power and control.[426]

2.4.6. 'Why didn't she leave?'

Mahoney argues that 'violent pursuit of the separating woman must become part of our understanding of domestic violence to help eliminate the question "why didn't she leave" from our common vocabulary.'[427] She further identifies the following assumptions about separation underlie this question:

> '....that the right solution is separation, that it is the woman's responsibility

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[423] *ibid* 9.

[424] *ibid* 60.

[425] *ibid* 64.

[426] *ibid* 93.

[427] *ibid* 63.

to achieve separation, and that she could have separated.'[428]

Mahoney also argues that the assumption that women are free to leave the abusive relationship must be challenged:

> 'Law assumes - pretends the autonomy of women. Every legal case that asks the question 'why didn't she leave?' implies that the woman could have left. We need to challenge the coercion of woman's choices, reveal the complexity of women's experience and struggle, and recast the entire discussion of separation in terms of the batterer's violent attempts to control.'[429]

It is submitted, therefore, that in light of the above, Mahoney's theory of separation assault is of vital importance in assessing the conduct of battered women. Her research reveals that many women are subject to abuse when they have attempted to leave or have left the abusive relationship, highlighting the impact of the separation on the woman to the extent that 'fear of an ex-husband becomes part of a woman's life.'[430]

2.5. Principle works by Browne and Blackman

Browne in her 1987 book, *When Battered Women Kill* and Blackman in her 1989 book, *Intimate Violence: A Study of Injustice* avoid many of the pitfalls associated with the Walker cycle theory of violence.[431] Throughout her book Browne focuses on the brutality of the abuse which, according to Bricker, creates a 'stark and frightening portrait of the abusive

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[428] *ibid* 61.

[429] *ibid* 64.

[430] *ibid* 69.

[431] D Bricker *op cit* 1379 at 1340

relationship'.[432] In her study, Browne focused specifically on battered women who killed or attempted to kill their abusers.[433]

She compared this group to battered women generally where no fatal incidents occurred and found that the women were not significantly different in their level of education or employment status.[434] There were, however, significant differences between the men with whom the women were involved:

> 'Men in the homicide group used drugs more frequently than did men in the comparison group, and they become intoxicated much more often. They were also more frequently given to threats and assaultive behaviour: Significantly more men in the homicide group threatened to kill someone other than themselves; more of them abused a child or children, as well as their women partners; and their abuse of their mates was more frequent, more injurious, and more likely to include sexual assault.'[435]

With regard to the question as to why battered women fail to leave the relationship, Browne looks at the battered woman's practical problems in leaving such as fear of reprisals.[436] Although initially the victim may remain with the batterer out of love or a sense of commitment or responsibility to the batterer or children, the victims reasons for leaving

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[432] *ibid* 1433.

[433] A Browne *op cit* 181.

[434] *ibid* 181.

[435] *ibid* 183-84.

[436] *ibid* 111-4.

the relationship change over the course of the relationship:[437]

> '.... as the severity and frequency of abuse increases, three additional factors have a major impact on the women's decision to stay with violent partners: (1) practical problems in effecting a separation, (2) the fear of retaliation if they do leave, and (3) the shock reactions of victims to abuse.'[438]

She compares battered women to other victims of trauma, such as victims of wars and disasters and found that like these victims, battered women focus on survival and self-protection:[439]

> 'Like other victims, battered women's affective, cognitive, and behavioural responses are likely to become distorted by their intense focus on survival. They may have developed a whole range of responses such as controlling their breathing or not crying out when in pain, in an effort to mitigate the severity of abuse during violent episodes, but have not developed any plans for escaping the abusive situation.'[440]

Browne finds a close connection between battered women and prisoners of war:

> '"Fight or flight" responses are inhibited by a perception of the aggressor's power to inflict damage or death, and depression often results, based on the perceived hopelessness of the situation. The victims' perceptions of their

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[437] D Bricker *op cit* 1379 at 1433.

[438] A Browne *op cit* 110.

[439] *ibid* 122-5; D Bricker *op cit* 1379 at 1432.

[440] A Browne *op cit* 125-6.

alternatives become increasingly limited the longer they remain in the situation, and those alternatives that do exist often seem to pose too great a threat to survival.'[441]

Blackman's 'fundamental premise is that intimate violence does harm to a victim's concepts of justice.'[442] This harm to the victim's concepts of justice she writes:

'narrows the vision of the victim, diminishing the ability to perceive alternatives and leads to an unusual level of acceptance of cognitive inconsistency as a way of coping.'[443]

Blackman opines:

'This tolerance of inconsistency is a reflection of the fundamental inconsistency of their lives: that the man who supposedly loves them also hurts them. This characteristic of battered women is particularly important for jurors to understand, since it may cause her to describe the events of her life in ways that are seemingly contradictory and may be misinterpreted as signs of a generally poor memory or of bungled attempts to be deceptive. Typically though, these inconsistencies in no way serve the defendant's legal interests, and are best understood as the results of her efforts to make sense out of an inherently unsensible situation. One's lover is not supposed to be one's enemy'[444]

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[441] *ibid* 124.

[442] J Blackman *op cit* 116.

[443] *ibid* 117.

[444] *ibid* 194.

These authors have highlighted the seriousness of the problem of wife abuse - it seems that 'broken arms appear to be as much a part of intimate relationships as broken hearts'.[445] Many obstacles still face battered women and until society give these women more alternatives, the choice of kill or be killed gives battered women no choice at all.[446] The lack of alternatives available to battered women was highlighted in *State v Wanrow*:[447]

> 'In our society women suffer from a conspicuous lack of access to training in an means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons.'[448]

2.6. Case law and 'battered woman syndrome'

Judicial consideration of battered woman who kill has 'yielded divergent results in the various foreign jurisdictions.'[449] There have been some notably good decisions as will be discussed below. However, Wolhuter is critical of the judicial approach in South Africa, Canada, England and the United States with regard to the liability of a battered woman who kills her abuser:

> '.... her liability is determined in the context of established criminal-law defences and with reference to the ordinary principles of liability. No attempt is made to reformulate these principles in order to take cognisance of the

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[445] *ibid* 232.

[446] M A Buda and T L Butler *op cit* 359 at 390.

[447] 88 Wash.2d 221, 559 P.2d 548 (1977).

[448] at 558-559.

[449] L Wolhuter 'Excuse them though they do know what they do - the distinction between justification and excuse in the context of battered women who kill' (1996) *South African Journal of Criminal Justice* 151 at 155.

battered woman's experience ... it fails to take into account the powerlessness of the battered woman, either in the restricted sense of pathological effects of "battered woman syndrome" or in the extended sense of the structural power imbalances that underpin domestic violence. It is premised on an ideological conception of the battered woman as the agent rather than the victim of domestic violence that obfuscates the existence of these imbalances and thus perpetuates substantive gender inequality in criminal law.'[450]

2.6.1. South Africa

In South African law there are no cases that make mention of 'battered woman syndrome'. However, two cases that do come close to the notion of 'battered woman syndrome' are ones that deal with the South African defence of provocation. These cases are *Campher* and *Larsen* which was discussed in detail in chapter one.[451] No mention was made of 'battered woman syndrome' in either of these cases, but it seems that the provocation in the context of battered woman who kill is only relevant in the mitigation of punishment.[452] Whether 'battered woman syndrome' can be incorporated within the framework of our general principles will be discussed in chapter four.

2.6.2. Australia

Like English law, the Australian law of provocation requires both a subjective and an

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[450] *ibid* 158.

[451] *ibid* 157.

[452] *ibid* 157.

objective assessment.[453] According to I Leader-Elliot:

> 'Provocation is only available when an ordinary individual, similar to the accused in all those characteristics which might have a rational bearing on the degree of culpability, could have been driven to kill. The more closely the objective test is fitted to the facts of the case, the more likely it is that juries will be able to distinguish between those who deserve the benefits of the partial defence and those who do not. So long as they are within the generously defined bounds of normality, all those characteristics of the accused which tend to excuse the loss off self control and fatal retaliation can be imputed to the ordinary person for the purposes of the test.'[454]

In Australia the first case in which expert evidence of 'battered woman syndrome' was admitted in support of a defence of duress was in the 1991 case of *R v Runjanjic.*[455] The facts indicate that the defendant and a one Eriica Kontinnen were convicted of false imprisonment and various other offences against another woman. They raised the defence of duress and testified that they were compelled to participate in the offences by a man name Jan Hill whom Kontinnen later killed before her trial for false imprisonment.[456]

They successfully appealed to the Court of Criminal Appeal on the ground that expert evidence on 'battered woman syndrome' should have been admitted at their trial. King CJ set out the feature of the syndrome as follows:

> 'Studies by trained psychologists of situations of domestic violence have

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[453] R T Du Toit *op cit* 230 at 242.

[454] I Leader-Elliot *op cit* 403 at 460.

[455] (1991) 53 A Crim R 362.

[456] I Leader-Elliot *op cit* 403 at 408.

revealed typical patterns of behaviour on the part on the part of the male batterer and the female victim, and typical responses on the part of the female victim....Repeated acts of violence, alternating very often with phases of kindness and loving behaviour, commonly leave the battered woman in a psychological condition known as "learned helplessness". She cannot predict or control the outbreaks of violence and often clings to the hope that the kind and loving phase will become the norm. This is often reinforced by financial dependence, children and feelings of guilt. The battered woman rarely seeks helps because of fear of further violence. It is not uncommon for such women to experience feelings for their mate which they describe as love. There is often an all pervasive feeling that it is impossible to escape the dominance and violence of the mate. There is a sense of constant fear with a perceived inability to escape the situation.'[457]

At her trial for the murder of Hill, Kontinnen successfully relied on self-defence supported by expert testimony that she was affected by 'battered woman syndrome'.[458]

The case of *Queen v McEwen*[459] is the first case in Australia where 'battered woman syndrome' was raised by a homosexual man.[460] Robert McEwen was charged with the murder of his lover and partner, a one Thomas Hodgson, and during the course of his trial the following questions arose:

'Why would he stay in such an abusive relationship? Why did he not tell someone or seek help? Why of course in the end did this ... quiet, meek and

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[457] at 366.

[458] I Leader-Elliot *op cit* 403 at 408.

[459] unreported 18-25 April 1995 Supreme Court of Western Australia.

[460] C J Simone *ibid* 230 at 230.

> submissive young man ... suddenly stab his partner to death in a frenzied attack?'[461]

Simone comments that this case also raises the questions and issues about the ability of the legal system to recognise sexual orientation and homosexual relationships.[462] Simone is also critical of the use of 'battered woman syndrome' in this case and opines that it:

> '.... distorted more than it explained not only with respect to the particular responses of Robert McEwen to prolonged domestic violence, but more generally in relation to the nature and context of same sex battering ... Ultimately, Robert McEwen was more than a "battered wife". Perhaps the indecisive verdict of the jury reflected this.'[463]

With regard to the defence of provocation, according to I Leader-Elliot, the 1990 and 1991 cases of *Stingel v The Queen*[464] and *Kolalich v DPP*[465] respectively, indicate that the Court 'has taken the view that provocation is almost always an issue for the jury when the evidence suggests that oppressive or insulting behaviour could have led to the loss of self control and fatal retaliation.'[466] A number of decisions by the Australians courts show that the defence of provocation generally provides a 'fallback option', if it is proved that deadly

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[461] *ibid* 230.

[462] *ibid* 231.

[463] *ibid* 239.

[464] (1990) 171 CLR 312.

[465] (1991) 66 ALJR 25.

[466] I Leader-Elliot *op cit* 403 at 456.

force was neither reasonable nor necessary as a response to domestic violence.[467]

Many battered women face socio-economic disadvantages and find it difficult to leave a violent relationship especially where the are children involved.[468] According to I Leader-Elliot the Australian courts have:

> '.... displayed a more humane and compassionate understanding of the growth of rage, fear and resentment and the final triggering effects of minor incidents in the protracted history of abuse.'[469]

The Australian courts have dealt with a number of cases involving a battered woman who killed her abusive spouse and the recent cases indicate that the courts are prepared to allow provocation to reduce murder to manslaughter in cases where the loss of control occurred some considerable time after the provocative conduct of the deceased.[470] For example, where a battered woman kills her abuser while he is asleep.[471] The defence of provocation is, therefore, available where a period of time elapsed between the provocation and the subsequent killing.[472]

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[467] *ibid* 456; see *R v Hill* (1981) 3 A Crim R 397; *R v Collingburn* (1985) 18 A Crim R 294; *R v Pita* (1989) 4 CRNZ 660.

[468] J Tolmie 'Pacific-Asian Immigrant and Refugee Women who Kill their Batters: Telling stories that Illustrate the Significance of Specificity' (1997) 19 *The Sydney Law Review* 472 at 494.

[469] I Leader-Elliot *op cit* 403 at 410; *Parker v The Queen* (1963) 111 CLR 610 (HC).

[470] I Leader-Elliot *op cit* 403 at 458.

[471] *R v Kotinnen* unreported decision of the Supreme Court of South Australia, 27 March 1992.

[472] R T Du Toit *op cit* 230 at 237.

It appears therefore that Australian law in dealing with battered woman who kill, avoid the North American attempts to extend the operation of the law of self-defence by pleading incapacity, helplessness and mental disorder.[473] I Leader-Elliot writes:

> 'The Australian common law of self-defence is free from many of the restraints which bulk so large in North American case law and analysis. Reasonable necessity governs the availability of the defence and there are few, if any, more particular rules to constrain the operation of that general operation ... The peculiarly American preoccupation with distinctions between justification and excuse has not counterpart here. The fear of opening the floodgates to vigilantes whether in the subway or bedroom, does not exercise so pervasive an effect on the legal imagination. The law of the defences is more accommodating to defensive acts impelled by necessity.'[474]

2.6.3. Canada

The test for provocation in Canadian law also has a subjective and objective component.[475] Like English law, the defence of provocation is not available where a period of time elapsed between the provocation and the subsequent killing.[476] The subjective element of the test for provocation in Canadian law requires the actual provocation of the accused and the response to the provocation be sudden before there was time for the 'passion to cool'.[477]

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[473] I Leader-Elliot *op cit* 403 at 460.

[474] *ibid* 460.

[475] *ibid* 240.

[476] *ibid* 240.

[477] R T Du Toit *op cit* 230 at 240.

The 1990 case of *R v Lavallee*[478] was the first case in which the defence of 'battered woman syndrome' was successfully raised. In Canadian law this case offers the most comprehensive analysis of the position of battered women who kill.[479] In *Lavallee's* case Wilson J recognised that the sanctity of marriage protected wife battery and held:

> 'Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his 'right' to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick 'no thicker than his thumb' ... One consequence of this attitude was that 'wife battering' was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.'[480]

One the often asked question, 'why didn't she leave?', Wilson J held:

> '[I]t is not for the jury to pass judgement 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. If, after hearing the evidence ... the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the 'reasonable person'

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[478] (1990) 1 SCR 852.

[479] R T Du Toit *op cit* 230 at 237.

[480] at 872.

would do in such a situation.'[481]

Although this Canadian case greatly improves the position of battered woman who kill, Du Toit opines that this case 'might not be the unmitigated victory that it has been proclaimed.'[482] He writes:

> 'The very fact that the case had to be considered in the light of a "special defence", that of battered woman syndrome, suggests that while battered women's position is being granted special recognition, the courts wish to make it clear that it is a "special concession" to women, who by implication do not fit into the standard principles of criminal law.'[483]

2.6.4. The United States of America

I Leader-Elliot is of the opinion that the general acceptance of 'battered woman syndrome' in American society came about as a result of the need to overcome the deficiencies in the law of self-defence and provocation in respect of battered women who kill.[484] The four elements to the defence of provocation in American law are (1) reasonable provocation which is defined as provocation which would have roused a reasonable person in the heat of passion; (2) actual provocation, in other words, the defendant was actually roused to the heat of passion; (3) a reasonable man would not have cooled off; (4) the defendant did not in fact cool off.[485]

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[481] at 888-9.

[482] R T Du Toit *op cit* 230 at 241.

[483] *ibid* 241.

[484] I Leader-Elliot *op cit* 403 at 406.

[485] R T du Toit *op cit* 230 at 243.

As a result of the objective nature of the reasonable man test, there has been a reluctance by the courts to consider evidence of past abuse 'unless it occurred around the time of the killing.'[486] However, there have been some positive changes in this regard as is evident from the case of *S v Felton*[487] where the court held that the objective element of 'heat of passion' necessitates an inquiry into how an ordinary person who is a battered spouse would have responded to the provocative conduct.[488]

In the landmark decision of *State v Wanrow*[489] the Supreme Court of Washington reversed a battered wife's conviction for felony murder and first degree assault. The court based its decision on the issue that limited instructions to juries on the use of equal force used denied women defendants the equal protection of the law:

> 'The objective standard to be applied is that applicable to an altercation between two men. The impression created - that a 5'4" woman with a cast on her leg using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defence, unless the jury finds in her determination of the degree of danger to be objectively reasonable - constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.'[490]

The court also recognised the discrimination that women faced and stated that women are

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[486] *ibid* 236; see *Buhrle v State* 627 P.2d 1374 (Wyo. 1981); *People v White* 90 Ill. App. 3d 1067, 414 N.E.2d 196 (1980).

[487] 329 NW 2d 161.

[488] L Wolhuter *op cit* 151 at 157.

[489] 88 Wash.2d 221, 559 P.2d 548 (1977).

[490] at 558.

handicapped by a history of sex discrimination:[491]

> 'The respondent was entitled to have the jury consider her actions in the light of her own perceptions of her situation, including those perceptions which were the product of our nation's "long and unfortunate history of sex discrimination" ... Until such time as the effects of history are eradicated, care must be taken to ensure that our self-defence instructions afford women the right to have their conduct judged in the light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants.'[492]

McColgan writes that this decision marked a turning point in the United States as it recognised that reasonableness must be assessed in light of the defendant's circumstances and factors such as both the defendant's and deceased's size, strength, would have an impact on the reasonableness of the force used by the defendant:[493]

> 'The purpose is not to give battered woman who kill any special consideration, but such an individualised approach taking into account the circumstances surrounding the incident, which recognises and to an extent reduces the bias that such women face in a court of law.'[494]

Decisions by the courts in the United States on the question of admissibility of expert testimony on 'battered woman syndrome' will be discussed in chapter three. At the

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[491] at 548

[492] at 559.

[493] A McColgan *op cit* 508 at 521.

[494] *ibid* 521.

moment though it seems clear that the 'battered woman syndrome' has exposed the dilemma of battered women and the brutality of the violence they are forced to return to.[495] 'Battered woman syndrome' is not a defence, but is rather used to help the courts 'understand the life of a battered woman and the prism that she sees the world through'.[496]

The above foreign jurisdictions provide us with considerable jurisprudence in respect of battered women who kill. There are no cases in South African law that make specific reference to 'battered woman syndrome' and we have much to learn from the case law of foreign jurisdictions. Du Toit opines that the 'criminal law treatment' in South Africa of battered women who murder their abusers cannot be easily criticised:

> 'The first positive aspect is ... the formulation of the defence of provocation in South African law, in that it largely prevents the admittance of evidence of battered woman syndrome as being a "special concession" to women, and falling into the trap of tagging women as different. This is due to the emphasis South Africans courts seem to place on all evidence indicative of the mental state of the accused, and to do accept certain situations as *per se* provocative: thus greatly avoiding an androcentric conception as to what constitutes provocative action.'[497]

'Battered woman syndrome' has clearly placed the spotlight on the abuse woman are forced to deal with.[498] Crocker writes:

> 'Battered women do kill their husbands in self-defence based upon a

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[495] M A Buda and T L Butler *op cit* 359 at 389-90.

[496] M Dowd *op cit* 62 at 65.

[497] R T du Toit *op cit* 230 at 250.

[498] M A Buda and T L Butler *op cit* 359 at 389.

> reasonable perception of danger and imminent bodily harm. They are entitled to an equal opportunity to present their claims and to have their claims equally judged ... Only by confronting the tenacity of the double standard of justice, by developing a methology which challenges the view of women as other and recognises and values the differences between women and men, can we achieve legal equality not only for battered women, but for all women.'[499]

South African is not immune to the high number of cases involving wife battering. Neither are we immune to spousal killings. Whether 'battered woman syndrome' can be incorporated into our law will be discussed in detail in chapter four. For the moment though, 'battered woman syndrome' is not and should not be regarded as a defence used by battered woman who kill their abusive spouses. Rather, it is an attempt to help the courts understand the life of a battered woman explaining why she was unable to leave the abusive relationship. 'Battered woman syndrome' shows that the only choices a battered woman has is: 'submit to the abuse and risk death, or strike back.'[500]

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[499] P L Crocker *op cit* 121 at 153.

[500] M A Buda and T L Butler *op cit* 359 at 369.

CHAPTER THREE

Private defence and the admissibility of expert testimony

Battered women who kill have attempted to introduce expert testimony on 'battered woman syndrome'.[501] Such testimony is especially important where the battered woman seeks to rely on private-defence. However, the requirement that the attack must be imminent makes it difficult for such women to rely on private defence.[502] An objective test is adopted by the courts to determine the reasonableness of a battered woman's conduct.[503] This places battered women at a disadvantage as the court does not take into account the history, severity or effects of the abuse on the battered woman.[504] Rather, the reasonableness of her conduct is tested against the standard of the reasonable man.[505]

Evidence on 'battered woman syndrome' is, therefore, crucial in assisting the courts to understand the reasonableness of the battered woman's perceptions and her belief in anticipating an impending attack.[506] It is submitted that the arguments raised here might also be appropriate, where applicable, in respect of the defence of lack of criminal capacity.

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[501] A E Thar *op cit* 348 at 349.

[502] B Bjerregaard and N Blowers 'The Appropriateness of the *Frye* Test in Determining the Admissibility of the Battered Woman Syndrome in the Courtroom' (1996-7) 35 *University of Louisville Journal of Family Law* 1 at 6.

[503] *ibid* 6.

[504] A McColgan *op cit* 508 at 528.

[505] B Bjerregaard and N Blowers *op cit* 1 at 6.

[506] *ibid* 6.

3.1. Is 'battered woman syndrome' a proper subject for expert testimony?[507]

In the mid-1970's when feminists first began advocating for the rights of battered woman who killed, it was recognised that one of obstacles that such women faced was the way in which their cases were affected by bias and stereotypes against women in the criminal justice system.[508] Walker has recognised that the battering of women, like other crimes of violence against women, has been shrouded in myths:[509]

> 'The battered woman is pictured by most people as a small, fragile, haggard person who might once have been pretty. She has several small children, no job skills, and is economically dependant on her husband. It is frequently assumed she is poor and from a minority group. She is accustomed to living in violence, and her fearfulness and passivity are emphasised above all.'[510]

According to Bricker when a battered woman does go on trial for the murder of her batterer 'she faces the historic acceptance of wife-beating by the legal system and the social stereotypes of woman hood that may be held by the courts'.[511] Such stereotypes and anti-woman bias has affected a battered woman's case on two levels:

> 'First, societal expectations of women's role in the family and society had a strong influence on the fact-finder. Second the traditional doctrine of self-

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[507] *ibid* 351.

[508] D Bricker *op cit* 1379 at 1399-1400.

[509] L Walker (1979) *op cit* 18.

[510] *ibid* 18.

[511] D Bricker *op cit* 1379 at 1402.

defence was better suited to men who killed abusive male partners.[512]

She further writes:

> 'Stereotypes of women's passivity, submissiveness and unreasonableness skew the jurors perception of female defendant's. Juror's who harbour such stereotypes find it difficult to reconcile their image of the good/healthy/passive woman because the battered woman defendant who is on trial precisely because she was aggressive, and therefore "unfeminine" and "bad".'[513]

In the Canadian decision of *R v Lavallee*[514] the court recognised that since the abusive relationship is subject to myths and stereotypes which is 'beyond the ken of the average juror' it must be explained by expert testimony.[515] Crocker writes:

> 'Expert testimony attacks these myths and stereotypes by explaining why the defendant stayed in the relationship, and why she never sought help from police and friends, or why feared increased violence ... jurors ... may assume that the defendant stayed in the abusive relationship because the abuse was not serious or because she enjoyed it.'[516]

The court might assume that because the battered woman did not leave, the abuse was

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[512] *ibid* 1400.

[513] *ibid* 1403.

[514] [1990] 55 CCC (3d) 97 (SCC).

[515] at 113; L Wolhuter *op cit* 151 at 154.

[516] P L Crocker *op cit* 121 at 132-3.

not severe or did not leave happen at all, and expert testimony helps explain why battered women do not leave the abusive relationship:

- she may be financially dependant on her husband;
- she may not have access to ready cash or long terms means to support herself or her children;
- her friends or family may be reluctant to get involved; and
- battered women's shelters only provide temporary living quarters.[517]

In the case of *State v Hodges*,[518] the Kansas Supreme Court allowed expert testimony in part to 'help dispel the ordinary layperson's perception that a woman in a battering relationship is free to leave at any time.'

The importance of the testimony also lies in the fact that it explains why the battered woman responded to the danger in the way that she did:

> '.... the battered woman's response to the danger did not develop and cannot be understood in a vacuum. Rather, her response was molded by the passivity in which women have been trained. A battered woman who does not leave her husband, seek help, or fight back is behaving according to societal expectations. The cultural perception of marriage as a lifelong bond and commitment instructs a woman to stay and work to improve - not abandon - the marriage.'[519]

Bricker also points out that:

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[517] *ibid* 133-34.

[518] 716 P.2d 563 (Kan 1985).

[519] *ibid* 135.

'Not only does a battered woman on trial for killing her abusive spouse face this historic acceptance of wife-beating by the legal system, she also confronts the social stereotypes of womanhood that may be held by the judge and jury ... A woman who commits a violent act against her husband threatens jurors' sense of order and security because, by destroying the family unit, she repudiates her natural role as a caring, nurturing mother/wife. Furthermore, the jurors' own conceptions of the family as a safe, healthy environment may lead them to deny the existence of violence altogether. Rather than believe the woman, jurors choose to believe their own stereotype.'[520]

In South African law Du Toit writes that there are three facts which positively impact on the admissibility of expert testimony by the South African courts.[521] Firstly, in *Campher's* case, Boshoff J A explicitly acknowledged the need for psychiatric or psychological evidence to assess the imputability of the of the accused.[522] Du Toit writes:

'This call for expert evidence must surely suggest that expert evidence on battered women, especially due to the credibility and authority battered woman syndrome has attained, would be considered relevant, and thus admissible.'[523]

Secondly based on the *Wiid* case expert testimony on 'battered woman syndrome' would not even be an issue in South African law:

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[520] D Bricker *op cit* 1379 at 1402.

[521] R T du Toit *op cit* 230 at 248.

[522] *ibid* 248.

[523] R T du Toit *op cit* 230 at 248.

> 'It seems clear that once a foundation of lack of imputability has been laid in the evidence of the accused, the onus to prove imputability would rest on the State. Expert evidence would of course facilitate the laying of this foundation, adding credibility thereto, but it may not be essential. So, in South African law, expert evidence on the effect of battering may not only be admissible, but even superfluous.'[524]

Thirdly, Du Toit opines that because we do not have a jury system, the South African courts have been more liberal in admitting expert evidence.[525] However, battered women in South Africa face the same problems as other women in foreign jurisdictions:

> '.... due to entrenched ideas about family and marital relations, leading to lack of police response, lack of effective judicial protection, blame by the community, clerical inaction, financial dependance and lack of alternatives.'[526]

It is, therefore, submitted that 'battered woman syndrome' is a proper subject for expert testimony.

3.2. The substance of expert testimony on 'battered woman syndrome'[527]

The main goal of the expert witness is to explain why battered women generally, and with

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[524] *ibid* 248.

[525] *ibid* 248.

[526] *ibid* 249-50.

[527] A E Thar *op cit* 348 at 354.

particular reference to the defendant concerned, is in constant state of fear for her life.[528] The expert witness usually begins by describing 'battered woman syndrome' and its effects on the woman's state of mind, and explains why the woman is unable to leave the relationship highlighting the obstacles that she faces.[529] The expert can assist the court 'in understanding why a battered woman responds by killing rather than simply escaping the situation.'[530]

The expert then gives an opinion as to whether or not the defendant was a victim of 'battered woman syndrome'.[531] Expert opinion on whether the accused displays characteristics of the syndrome is also meant to provide an understanding for the defences of provocation, private defence or duress.[532] I Leader-Elliot writes:

> 'Expert evidence in support of a plea of self-defence can reinforce the validity of her perceptions of danger. When provocation is in issue, evidence of the characteristic reactions of the victims of domestic violence can reinforce the conclusion that fear or anger led to the loss of self control. It will serve a similar purpose when the emotional effects of duress are in issue.'[533]

It is submitted that where a battered woman who kills seeks to rely on private defence, the admissibility of expert testimony is of vital importance:

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[528] *ibid* 354.

[529] *ibid* 354.

[530] B Bjerregaard and A N Blowers *op cit* 1 at 6.

[531] *ibid* 354.

[532] I Leader-Elliot *op cit* 403 at 408.

[533] I Leader-Elliot *op cit* 403 at 410.

> 'The testimony may demonstrate how repeated physical abuse can heighten a battered woman's fear and her awareness of her husband's physical capabilities that she considers him as dangerous asleep as awake, as dangerous before an attack as during one.'[534]

Expert testimony on 'battered woman syndrome' can help dispel myths surrounding the offence of battering of woman.[535] Examples of such myths are that women enjoy or deserve to be beaten.[536]

3.3. Criticisms of the admissibility of expert testimony on 'battered woman syndrome'?

Where the battered woman seeks to rely on private defence, the use of expert testimony has been heavily criticised:

> 'The primary objection of its admissibility from critics is that it may lead to an effective "licence to kill" for battered women. If jurors are permitted to hear evidence of the victim's violence before moment at issue, they may conclude that even though the women's act was not committed in self-defence, she should be acquitted because the victim deserved to die.'[537]

The admissibility of such testimony is also criticised in that it may create a new standard of reasonableness in cases where battered women rely on private defence:

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[534] *ibid* 140.

[535] B Bjerregaard and A N Blowers *op cit* 1 at 7.

[536] *ibid* 7.

[537] D Bricker *op cit* 1379 at 1422.

> 'By permitting an expert to testify that objectively unreasonable behaviour was reasonable for one individual, the standard of reasonableness becomes wholly subjectivised leading to a violation of the general principles of self-defence.'[538]

It appears that the admissibility of such testimony has led to the creation of what is known as a 'good battered woman'.[539] This, Crocker recognises as the primary problem with the admissibility of 'battered woman syndrome' expert testimony:

> '.... it allows the legal system to continue considering the defendant's claim based on who she is, not on what she did ... it creates a very narrow range of options for a woman when she is judged by the legal system: either she is held to a battered woman's standard requiring strict adherence to judicially-imposed criteria, or she is relegated to meeting an inappropriate and inapplicable reasonable man standard.'[540]

With regard to violence in same sex relationships Bricker is of the opinion that because 'battered woman syndrome' relies on stereotypes for its impact,[541] once expert testimony has exhausted these stereotypes, the syndrome offers no explanation as to why violence occurs in same-sex relationships or why gays and lesbians have difficulty in leaving the relationship.[542] Browne writes that the use of the 'syndrome' is problematic and that the admissibility of expert testimony:

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[538] *ibid* 1422.

[539] *ibid* 1428.

[540] P L Crocker *op cit* 121 at 149-150.

[541] D Bricker *op cit* 1379 at 1430.

[542] *ibid* 1430.

'.... although intended to address damaging myths and misconceptions, also contributes in a way to the image of maladjustment and pathology. Just the use of the term "syndrome" connotes impairment to most people, including judges and jurors.'[543]

The attitude of the expert testifying is also important as Blackman notes:

'.... expert testimony can only be as good as the expert, and ... rests with her ability to retain a commitment to objectivity and the pursuit of real understanding. This process is fraught with dilemmas that come from the experts ego, values, and life experiences, from the adversarial nature of the courtroom process, and the limitations inherent in the research itself. In particular, a significant social-class bias has shaped research on battered women; and to date we do not know enough about the psychology of very poor battered women.'[544]

3.4. Safeguards against the improper use of 'battered woman syndrome' testimony[545]

'Battered woman syndrome' is not intended to give battered women a 'licence to kill'.[546] Thar notes that:

'expert scientific evidence always carries with it the special danger of

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[543] A Browne *op cit* 177.

[544] J Blackman *op cit* 211.

[545] A E Thar *op cit* 348 at 370.

[546] D Bricker *op cit* 1379 at 1422

> prejudicing, confusing, or misleading the jury. This danger stems from the aura of reliability which surrounds expert testimony, but which may not always be justified.[547]

For this reason, she writes, it is important to examine the safeguards which protect against the improper use of 'battered woman syndrome' and does acknowledge that there are several safeguards that do exist to prevent the improper use of expert testimony on 'battered woman syndrome'.[548]

The very nature of our adversarial system ensures safeguards against the improper use of such testimony.[549] The judge has a discretion on whether or not to admit the testimony thereby preventing the 'floodgates' from opening and allowing every expert from testifying as to information which is irrelevant and prejudicial; the prosecution has an opportunity to discredit the testimony and this can be done by attacking the qualifications of the expert, his or her method of analysis or the validity of her testimony.[550] Thar writes that:

> 'If the courts admit expert testimony on battered wife syndrome under the appropriate circumstances, the legal system that so often fails to protect the woman from her abuser at least will protect her right to self-defence.'[551]

According to Hoffman and Zeffert:

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[547] A E Thar *op cit* 348 at 370.

[548] *ibid* 370.

[549] *ibid* 372.

[550] *ibid* 372.

[551] *ibid* 373.

'The opinion of expert witnesses is admissible whenever, by reason of their special knowledge they are better qualified to draw inferences than the judicial officer'.[552]

Further, before evidence can be admitted, it must be relevant.[553] Legislation in section 210 of the Criminal Procedure Act 51 of 1977 provides:

'No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings.'

In *R v Trupedo*,[554] Innes J held:

'The general rule is that all facts relevant to the issue in legal proceedings may be proved. Much of the law of evidence is concerned with exceptions to this general principle ... But where its operation is not so excluded it must remain as the fundamental test of admissibility. And a fact is relevant when inferences can be properly drawn from it as to the existence of a fact in issue.'[555]

Therefore, evidentiary process provides sufficient safeguards against the improper use of

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[552] L H Hoffman and D Zeffert *op cit* 97.

[553] S E Van der Merwe *et al Evidence* (1983) Juta 53; L H Hoffman and D Zeffert *The South African Law of Evidence* fourth edition (1988) Butterworths 21.

[554] 1920 AD 58.

[555] at 62.

expert testimony.[556] Where a battered woman who kills seeks to rely on the defence of non-pathological criminal incapacity, the onus is on her to establish a factual foundation in regard thereof and expert testimony will assist her establishing this factual foundation.[557]

[556] *ibid* 373.

[557] *S v Henry* (1) SACR (SCA); *S v Nursingh* 1995 (1) SACR 331 (D).

CHAPTER FOUR

The way forward: provocation or automatism?

Having considered the defence of non-pathological criminal incapacity and the defence of provocation, I will now consider whether 'battered woman syndrome' can be incorporated into South African law within the framework of our legal principles.

4.1. Unlawfulness

Private defence,[558] as it is known in South African law, exists in order to allow persons to take steps to protect themselves where circumstances render it necessary for them to do so.[559] Society's main interest in limiting the use of private-defence is to limit the incidence of vigilante action:[560]

> 'As a general rule, the law does not permit persons to resort to force or violence to protect their interests, expecting that they will invoke the protection of the law and the agencies of law enforcement for this purpose. To allow otherwise would be to permit and condone private vengeance, retaliation and other forms of self-help to the detriment of peace, good order and the rule of law.'[561]

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[558] Private defence is often referred to as 'self-defence'. According to Burchell and Milton *op cit* 133, the term 'self-defence' implies that what is in issue is only the defence of the physical self which is misleading since the defence is in fact available for the protection of other persons and other interests such as property.

[559] A McColgan *op cit* 508 at 528.

[560] M A Buda and T L Butler *op cit* 359 at 372.

[561] J Burchell and J Milton *op cit* 133.

Private defence is defined by Burchell and Milton as follows:

> 'A person who is the victim of an unlawful attack upon person, property or other recognised 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.'[562]

In South African law, in order for a battered woman to successfully rely on private-defence, she must prove that: '(1) there was an attack (2) upon a legally protected interest and (3) that the attack was unlawful.'[563] Where the battered woman fails to satisfy these traditional elements of private-defence, the 'battered woman syndrome' defence itself will likely fail:[564]

> '....the doctrine of self-defence ignores the profound influence that external factors or pressures may have on the battered woman's behaviour.'[565]

A battered woman who finds herself being attacked by her abuser is 'entitled to retaliate against her attacker in legitimate self-defence.'[566] However, difficulties arise in applying private defence to the requirement of imminent attack in that the attack must be imminent or already commenced.[567]

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[562] J Burchell and J Milton *op cit* 133.

[563] *ibid* 136.

[564] M A Buda and T L Butler *op cit* 359 at 373.

[565] *ibid* 359 at 373.

[566] J Burchell and J Milton *op cit* 288.

[567] *ibid* 288.

Our case law indicates that provocation can in certain circumstances provide an accused with a complete defence. It is evident from these cases, except for *Moses*, where the defence of provocation was successfully raised, the killings were always preceded by a long period of emotional abuse.[568] The apparent conflict in our law was to regard provocation as a ground excluding *mens rea* and not one excluding unlawfulness.[569] Dlamini writes:

> 'There is no doubt that provocation can also overlap with private defence. Although provocation has not been regarded as a ground of justification, nothing prevents this from being the case. The ususal grounds which have crystallised in practice do not constitute a closed list but are no more than the usual grounds that are raised in practice ... the above approach is quite flexible and more realistic than to expect that the provoked person should in all cases turn the other cheek.'[570]

4.1.1. 'Traditional' and 'non-traditional confrontation' cases

Foreign jurisdictions have divided cases involving battered who kill into 'traditional confrontation' cases and 'non-traditional confrontation' cases:[571]

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[568] R T du Toit *op cit* 230 at 249; see *S v Mokonto* 1971 (2) SA 319 (A); *S v Arnold* 1985 (3) SA 257 (C); *S v Lesch* 1983 (1) SA 814 (O); *S v Campher* 1987 (1) SA 940 (A); *S v Laubscher* 1988 (1) SA 163 (A); *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Wiid* 1990 (1) SACR 331 (D); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Nursingh* 1995 (2) SACR 331 (D).

[569] C R M Dlamini *op cit* 130 at 138.

[570] *ibid* 130 at 138.

[571] M A Buda and T L Butler *op cit* 359 at 372; P L Crocker *op cit* 121 at 139; I Leader-Elliot *op cit* 403 at 439; A McColgan *op cit* 508 at 514.

'In non-traditional confrontation cases ... the woman acts in self-defence when the traditional doctrine would not consider the danger imminent ... where the abuser has verbally threatened the defendant, but not yet actually struck her; where the physical violence appears to have stopped, but the defendant continues to feel terrified and kills her husband when he reappears; and where the woman kills her husband while he is asleep or when his back is turned. In all these situations, a confrontations exists; it is simply different from the male norm ... In traditional confrontation cases, the battered woman uses self-defence against her husband during an actual physical attack.'[572]

Where a battered woman kills hers abuser in a 'non-confrontation' case, it will be difficult for her to rely on private defence because of the 'imminent attack requirement'. This element of private-defence fails to take into account the constant physical and mental abuse that a battered woman is subject to and that when she does kill her abuser it is during a 'lull in beatings' or when he is asleep or his back is turned.'[573]

4.1.2. The requirement of 'imminent attack' and battered women who kill

The requirement of 'imminent attack', as currently defined in our law, makes it difficult for battered women who kill to rely on private defence. It is submitted that it creates a 'rigid framework that fails to coincide with the reality'[574] that battered women face:

'Battered women in particular perceive danger and imminence differently from men. Because they become attuned to stages of violence from their

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[572] P L Crocker *op cit* 121 at 139.

[573] J Burchell and J Milton *op cit* 289.

[574] M A Buda and T L Butler *op cit* 359 at 375.

husbands, they may interpret certain conduct to indicate an imminent attack or a mere severe attack. A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman.'[575]

It is submitted that the requirement of 'imminent attack' in the context of battered women who kill is inappropriate.[576] The battered woman often cannot 'predict the onset of violence before the first blow is struck.'[577] The reasonableness of her conduct cannot be assessed in a vacuum.[578] Regard must be had to the history of the battered woman's marriage, the abuse suffered by her and her perceptions 'in anticipating an impending attack.'[579]

'....abuse often escalates in seriousness between one battering episode and the next, and many women who kill do so when they fear that they will be unable to survive the next episode.'[580]

With regard to this requirement of 'imminent attack' McColgan compares the plight of a battered woman to that of a person who finds himself or herself in hostage situation:[581]

'Where ... someone is held hostage by terrorists who let him know, expressly or by implication, that he is to be seriously injured or killed within the next

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[575] P L Crocker *op cit* 121 at 127.

[576] L Wolhuter *op cit* 151 at 155.

[577] *ibid* 151 at 155.

[578] A McColgan *op cit* 508 at 528.

[579] *ibid* 528.

[580] *ibid* 528.

[581] *ibid* 518.

few days, it is unlikely that the courts would require him to wait until a weapon was actually raised to him before they allowed him to use violence against his captors ... He cannot be entirely sure that his captors will carry out their threat to kill him, but neither can he reasonably be expected to postpone his use of force until a time when he will most probably not be able to defend himself, given the numerical superiority of his captors or the fact that they are armed and he is not ... His only feasible method of escape from the threatened danger might be to seize an opportunity to attack while his captor is asleep or otherwise vulnerable. The fact that his captors have put him in the situation where he has to make unpalatable decisions to avert what he considers to be a threat to his life or safety must mean that the role of the imminence requirement is outweighed by the unavailability to him of any realistic options besides submission and resistance.'[582]

On the face of it, the above analogy appears to be flawed in the sense that a hostage cannot escape the danger s/he faces, whereas a battered woman is not physically captured to the same extent. It is submitted, however, that such an interpretation risks perpetuating the myth that battered women can escape the abuse they experience. Many battered women find it difficult, if not close to impossible, to leave the abusive relationship for a number of reasons. For example, she may be economically dependant on her abuser; she may find it difficult to leave where there are children involved; and even fear of reprisals prevent her from leaving the abusive relationship. NiCarthy identifies 'fear of poverty'[583] as one of the reasons that makes it difficult for a battered woman to leave the abusive relationship:

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[582] *ibid* 508 at 518.

[583] G NiCarthy *Getting Free You Can End the Abuse and Take You Life Back* expanded on second edition (1986) The Seal Press 11.

> 'The fear of poverty or a greatly lowered standard of living is a major reason women stay in abusive situations, hoping year after year it will change and that they won't have to risk making it on their own.'[584]

It is submitted that the above analogy aptly describes the plight of a battered woman. The battered woman find herself in a similar position as that of the hostage, and taking into account the cycle of abuse she is constantly faced with,[585] the only option she believes she has is 'kill or be killed':[586]

> 'The lack of immediate physical peril would not prevent a hostage's use of force from being necessary and therefore potentially reasonable ... The same is true of a battered woman who believes that an attack will occur before she is able to effectively escape, and that she must therefore strike while her prospective attacker is made vulnerable by sleep or alcohol. She, like the hostage, is caught within a potentially life-threatening situation. Just as the hostage might take the view that a desperate bid for freedom might result in his death rather than his freedom, so too might the battered woman believe, and believe reasonably, that any attempt to escape would carry with it the risk of death rather than the promise of freedom. The possibilities of seeking police protection or of simple flight may not constitute adequate alternatives to the use of force as she may know from experience that either measure is simply a temporary one. Many abusive men use the threat of even greater violence to prevent their partners leaving the abuse, and one recognised aspect of continued abuse is the perception it creates in the

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[584] *ibid* 11.

[585] discussed in detail in Chapter 2.

[586] M A Buda and T L Butler *op cit* 359 at 369.

abused person of the abuser as all-powerful, inescapable.'[587]

In a 'non-confrontation' case, for example, where the battered woman kills her husband when his back is turned, it is important for the court to have regard to circumstances which the battered woman found herself in:[588]

> 'Even where a woman kills a sleeping partner, evidence of her circumstances may allow a jury to appreciate the absence of alternatives open to her, so that they may consider the reasonableness of her actions as they might those of a hostage who sees no alternative to the proactive use of force against a threat which may be rendered insurmountable if he waits to be attacked.'[589]

'Battered woman syndrome' is not and should not be seen as giving battered women a 'licence to kill'.[590] Rather it is an attempt at helping the courts understand the 'life of a battered woman'.[591] McColgan[592] refers to a decision of the Privy Council in *Palmer v R*,[593] where Lord Morris, on the reasonableness of the force used, held:

> '....in a moment of unexpected anguish a person attacked had done only

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[587] A McColgan *op cit* 508 at 519.

[588] *ibid* 528.

[589] *ibid* 528.

[590] D Bricker *op cit* 1379 at 1422.

[591] M Dowd *op cit* 62 at 65.

[592] A McColgan *op cit* 508 at 520.

[593] (Privy Council) [1971] A.C. 814.

what he honestly and instinctively thought was necessary.'[594]

Although reference to 'a moment of unexpected anguish' on the face of it appears to favour the traditional concept of self-defence.[595] Mcolgan writes:

> '....its importance lies in the recognition that the objective question of whether the defendant's use of force was reasonable must be assessed in the light of her circumstances, a recognition which is as valuable to the woman whose reaction is the product of months or years spent under a Damoclean sword of 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.'[596]

Smith, on the other hand argues that even though a battered woman may find a lack of adequate alternatives, the killing of the abuser in a non-confrontation case cannot be justified:

> '....even if it is true that the remedies available are inadequate , to hold that the deliberate killing of a sleeping or unconscious man is justified or even excused would be, in effect, to give his victim the right to execute him; and that, surely, cannot be right.'[597]

However, the reality is that battered women do kill. They kill in order to protect themselves when they are actually being physically attacked by their abuser, and they kill when their

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[594] at 832 as cited by A McColgan *op cit* 508 at 520.

[595] A McColgan *op cit* 508 at 520

[596] *ibid* 521.

[597] quoted by A McColgan *op cit* 508 at 527.

abuser is asleep. In both situations a confrontation exists, and particularly in regard to the latter case, private defence must take into account the perceptions of the battered woman at the time of the killing. The approach of McColgan to private defence in the context of battered woman who kill, is appropriate:

> 'The application of self-defence to many battered 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 defendant's use of force be reasonable is applied to cases other than those involving the traditional model of a one-off adversarial meeting between strangers.'[598]

It is submitted that for battered woman to rely on private defence, the requirement of 'imminent attack' must be interpreted in light of the circumstances a battered woman finds herself in.[599] The killing often occurs in a situation where she has 'a reasonable perception of danger and imminent bodily harm.'[600] Private defence should not be altered to create a new standard of reasonableness for battered women who kill, rather the reasonableness of her actions should be judged in light of the circumstances of her case regard being had to the history and severity of abuse, and of particular importance her perceptions in 'anticipating an impending attack.'[601]

4.2. Criminal capacity

A person is only liable for their conduct if at the time the conduct was perpetrated they

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[598] A McColgan *op cit* 508 at 527.

[599] L Wolhuter *op cit* 151 at 154.

[600] P L Crocker *op cit* 121 at 153.

[601] A McColgan *op cit* 508 at 528.

possessed criminal capacity.[602] In *Moses*, the court defined criminal capacity as 'the ability to decide between right and wrong, and the ability to act in accordance with that appreciation.'[603] Where the defence of non-pathological criminal incapacity is successful, the accused is acquitted:

> '....even in a homicide case, since the inquiry into the voluntariness of conduct or criminal capacity is anterior to the examination of fault, whether the fault element be intention (as in murder) or negligence (as in culpable homicide).'[604]

In light of our case law,[605] the onus rests on the state to prove beyond reasonable doubt that an accused could not only appreciate the difference between right and wrong but also that s/he was capable of acting in accordance with that appreciation.[606] However, the courts have emphasised that despite this onus on the state, it is for the accused to establish a factual foundation for the defence of temporary non pathological incapacity:[607]

> 'It is for the accused person to lay a factual foundation for his defence that non-pathological causes resulted in diminished criminal responsibility, and the issue is one for the Court to decide. In coming to a decision the Court must have regard not only to the expert evidence but to all the facts of the

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[602] J Burchell and J Milton *op cit* 225.

[603] at 712.

[604] J Burchell and J Milton *op cit* 292.

[605] *S v Campher* 1987 (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 561 (A); *S v Calitz* 1990 910 SACR 119 (A).

[606] *S v Kensley* 1995 (1) SACR 646 (A) at 658.

[607] *S v Campher* 1987 (1) SA 940 (A); *S v Wiid* 1990 (1) SACR 561 (A); *S v Calitz* 1990 910 SACR 119 (A).

case, including the nature of the accused's person's actions during the relevant period.'[608]

Where the defence of criminal incapacity is raised, a subjective test is used to determine the capacity of the accused at the time of the commission of the offence:

'A careful reading of case law also reveals that the Court looks at what was going through the accused's mind at the time of the commission of the offence. That is the subjective enquiry which takes account of surrounding factors such as the personality disorder of the accused, the fact that the accused may have been depressed, and so on. Thus the law is clearly to the effect that where provocation and emotional stress are raised as defence, it is a subjective test of capacity without any normative evaluation of how a reasonable person would have acted under the same strain and stress.'[609]

It is submitted that the approach adopted by the courts 'grants a more viable defence'[610] to battered women who kill. The test for capacity being subjective allows a court to have regard to the circumstances in which the battered woman found herself in:[611]

'Many women experience abuse as a cyclical occurrence where a period of increasing tension is followed by physical abuse which is in turn followed by remorse on the part of the abuser. A battered woman might a anticipate an impending attack from signals which have in the past marked the transition

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[608] *S v Di Blasi* 1996 (1) SACR (A) 1 at 7.

[609] *S v Moses* 1996 (1) SACR 701 (C) at 714.

[610] J Burchell and J Milton *op cit* 294.

[611] discussed in detail in chapters 2 and 3.

from the period of tension-building to the battering phase. Under such circumstances, evidence of the cyclical pattern as it has affected the defendant herself, rather than generalised expert evidence about the nature of woman-battering, can enable the jury to appreciate her apprehension of danger even where no threat is apparent to an onlooker. '[612]

It is debatable whether an objective test to criminal capacity should be adopted.[613] Burchell and Milton are critical of the approach adopted by the courts to the defence of non-pathological criminal incapacity in that where this defence is raised and successful the accused is acquitted, whereas where accused raises the defence of insanity and is successful s/he is committed to a mental institution:

'....the defence lacks definable, objective grounds. Under the current law, it also perpetuates inequality in the treatment of persons suffering from pathological as opposed to non-pathological incapacity. However, this inequality could be partially addressed by placing an evidential burden on the accused person raising the defence of pathological incapacity to adduce evidence of such condition, rather than prove the condition on a preponderance of probabilities, as at present. This result could be achieved by a constitutional challenge to the rule relating to onus in insanity cases.'[614]

In *S v Kensley*, Van den Heever recognises that the defence acquits persons who are quick-tempered in nature too easily, and that such defence is likely to be abused:

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[612] A McColgan *op cit* 508 at 528.

[613] N Boister 'General Principles of Liability' (1995) 8 *South African Journal of Criminal Justice* 367 at 368.

[614] J Burchell and J Milton *op cit* 294-5.

> 'Criminal law for the purposes of conviction ... constitutes a set of norms applicable to sane adult members of society in general, not different norms depending on the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do.'[615]

Bositer writes that Van Den Heever JA seems to indicate that an accused's 'personality defects' will not establish a defence of non-pathological criminal incapacity:

> '....an individuals bad temper, etc. will not excuse him. Instead, his lack of self-control in difficult situations is tested against the assumed capacity of the rest of the members of society to control themselves in such situations and found wanting; his subjective inability is tested against a normative standard - a standard that sounds like the standard of reasonableness.'[616]

However, even though a subjective test is used to determine capacity, the courts will carefully scrutinise the defence of non-pathological criminal incapacity and the importance given to psychiatric evidence will depend on the courts assessment of the credibility of the accused's own evidence:[617]

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[615] at 658.

[616] N Boister 'Principles of Criminal Liability' (1995) 8 *South African Journal of Criminal Justice* 367 at 368.

[617] J Burchell and J Milton *op cit* 294.

'Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. Thus - as one knows - stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person "snaps" and a conscious act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an involuntary act has been committed. The facts ... must be therefore be closely examined to determine where the truth lies.'[618]

The incorporation of 'battered woman syndrome' under criminal capacity should not be seen as creating a new standard of reasonableness for battered women who kill. It merely highlights the plight of a battered woman and the violence she is often forced to return to:[619]

'The legal system has historically left these women out in the cold, focusing on the violence only when the assailant has become the victim ... Regardless of how quickly our society realizes that it must give battered women legally enforceable means to escape abuse, their present choice to kill or be killed ultimately reduces to no choice at all.'[620]

4.3. Fault

Where it is proved that a person voluntarily committed unlawful conduct with criminal capacity, it may still be possible for him or her to escape liability by relying on a defence

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[618] *S v Potgieter* 194 (1) SACR 61 (A) at 73-4.

[619] M A Buda and T L Butler *op cit* 359 at 390.

[620] *ibid* 390.

which excludes fault:[621]

> 'Where intention is the fault element, an accused will not be liable where there is a reasonable doubt as to whether he possessed intention. Lack of intention to commit a crime may result from a variety of factors - the most important being ignorance or mistake as regards an essential element of liability or the existence of a defence excluding unlawfulness. Other factors that may provide a defence are youth, insanity, intoxication, provocation or emotional stress.'[622]

The accused's state of mind is important in the determination of whether an objectively unlawful act was committed with the required intention:[623]

> 'The inquiry into *mens rea* is not concerned with whether or not the accused may fairly be blamed for the unlawful act, but whether it was committed with the requisite "guilty" state of mind (*dolus malus*). In relation to intention the accused is acquitted if, subjectively, she lacked criminal capacity, was unaware of the wrongfulness of her conduct, or lacked intention on account of a ground excluding culpability, such as provocation or intoxication.'[624]

The Appellate Division in the 1982 case of *S v Bailey*[625] confirmed the absence of the concept of excuse in South African law. In the context of battered women who kill,

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[621] J Burchell and J Milton *op cit* 335.

[622] *ibid* 335.

[623] L Wolhuter *op cit* 151 at 160.

[624] *ibid* 160.

[625] 1982 (3) SA 772 (A).

Wolhuter writes that where a battered woman cannot comply with one of the elements of an unlawfulness defence such as private defence and the act is unlawful, the battered woman is guilty of murder, if one of the grounds excluding intention, such as provocation, are not complied with.[626] The consequences of this she writes:

> 'Despite the absence of blameworthiness, she cannot be excused. This approach augors ill for the attainment of substantive gender equality in criminal law in the context of battered women who kill.'[627]

Therefore, where a battered woman kills her sleeping abuser, she does not comply with the requirement that the act must be imminent under private defence and the act is regarded as unlawful, she will be found guilty of murder if she is unable to comply with one of the grounds excluding intention, such as provocation. However, where a battered woman seeks to rely on provocation as a defence excluding intention, the test involved in determining her *mens rea* is subjective:

> 'If a crime requiring intention was involved and the accused to so provoked that he lacked such intention then he should be acquitted of committing this crime. Intention is judged subjectively and provocations which bears on this intention must also be judged subjectively. No objective limits are placed on the inquiry.'[628]

The test being subjective, therefore, allows a court to have regard to the circumstances of

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[626] L Wolhuter *op cit* 151 at 161.

[627] *ibid* 161.

[628] J Burchell and J Milton *op cit* 345.

a battered woman, especially her perceptions in 'anticipating an impending attack.'[629]

[629] A McColgan *op cit* 508 at 528.

CONCLUSION

Although, in South African law there are no cases that make specific mention of 'battered woman syndrome' the plight of battered women has been highlighted by our case law where battered women have killed their abusive spouses. For example, in the *Campher*, *Wiid*, and *Potgieter* cases, the accused in all these cases were subject to violence and control that goes beyond what any person might bear.[630] These cases have attempted to deal with the problem of domestic violence. However, it is submitted that acquitting battered women on a charge of murder does not provide battered women with an escape from the abuse they constantly face.

It is submitted that the only way to eliminate or reduce the number of homicides, is to provided battered women with a more viable means of escape from the violence.[631] Battered women find themselves unable to leave the abusive relationship for a number of reasons. For example, many are economically dependant on the abusive spouse or find it difficult to leave the relationship where children are involved. Although a long term solution, the government must ensure that the law adequately protects women in such situations by providing legally enforceable means of escaping the abuse.[632]

In the meantime, however, many battered women find themselves in a situation where the only choice is to submit to the abuse or strike back.[633] In the foreign jurisdictions mentioned in chapter 2 'battered woman syndrome' was introduced in cases where a battered woman killed her abusive spouse in an attempt to explain the physical and

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[630] D Bricker *op cit* 1379 at 1436.

[631] A MCColgan *op cit* 508 at 529.

[632] M A Buda and T L Butler *op cit* 359 at 390.

[633] A McColgan *op cit* 508 at 528.

psychological effects of the abuse on the battered woman.[634] It is submitted that battered woman syndrome' is not intended to give battered women charged with the murder of their abusive spouses an easy way out. Rather it is an attempt to 'encourage judicial recognition of the need for expert evidence informing the court of the appalling realities of domestic violence in our society.'[635]

In South African law, except for our current law on private defence, 'battered woman syndrome' can be incorporated into our law within the framework of our general principles. In private defence, the element of 'imminent attack' does not take into account the circumstances in which a battered woman finds herself in. This requirement does not take into account the constant abuse which a battered woman is subjected to. It does not take in account that when she does retaliate with force it is not only during an actual attack, but also during a 'lull in the beatings' or when her abuser is asleep or his back is turned.[636] The test for criminal capacity and *mens rea*, on the other hand, being subjective, allows a court to have regard to the circumstances and plight of a battered woman.

In light of our case law, the defence of provocation can be successfully relied upon where the killings were usually preceded by a long period of emotional abuse.[637] Therefore, a battered woman who kills her abusive spouse after a long period of abuse, depending on whether she is able to establish a factual foundation, can rely on the defence of provocation. However, it is clear from the decided cases that the courts will carefully

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[634] L Wolhuter *op cit* 151 at 152.

[635] I Leader-Elliot *op cit* 403 at 460.

[636] J Burchell and J Milton *op cit* 289.

[637] R T du Toit *op cit* 230 at 249; see *S v Mokonto* 1971 (2) SA 319 (A); *S v Arnold* 1985 (3) SA 257 (C); *S v Lesch* 1983 (1) SA 814 (O); *S v Campher* 1987 (1) SA 940 (A); *S v Laubscher* 1988 (1) SA 163 (A); *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Wiid* 1990 (1) SACR 331 (D); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Nursingh* 1995 (2) SACR 331 (D).

scrutinise the basis of such a defence having due regard to all the circumstances of the case, the *ipsi dixit* of the accused and the psychiatric evidence offered in support thereof.

It is submitted that although our criminal law has attempted to deal with the problem of domestic violence, the policy ramifications go beyond our criminal law, and this requires the 'commitment of Government rather than the law alone.'[638]

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[638] A McColgan *op cit* 508 at 529.

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