

**An analysis of the Battered Wife Theory in the context of the crime
of murder in South African criminal law**

submitted in partial fulfilment of the requirement for the degree LLM by:

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ABSTRACT

This dissertation examines the criminal law defences as well as various psychological theories available to the accused who killed his or her abuser after a period of severe abuse.

The study first examines the Constitution of the Republic of South Africa to determine whether or not the Constitution allows for the development of the criminal law defences and whether or not the existing defences are in line with the Constitution. Thereafter a discussion on domestic violence in South Africa follows. The occurrence of domestic violence, the legislation dealing with domestic violence and the case law are examined. The shortcomings of The Domestic Violence Act and the social effect of domestic violence are also discussed.

The dissertation continues with a discussion on the various criminal law defence as well as the psychological theories available to a “battered spouse” who killed his or her abuser.

The main findings of the dissertation are that the criminal law defences are available to the “battered spouse” who killed her abuser. The “battered spouse” can rely on private defence, pathological or non pathological criminal incapacity depending on the facts of the matter. Further, although the Constitution may require development of the criminal law the psychological theories discussed does not and cannot at this stage serve as independent defences to a charge of murder. The psychological theories themselves must first be properly developed and the war between law and medicine must be resolved before the theories can be developed as independent criminal law defences. It is however important to realise that each of the psychological theories can be used to prove the existence of the existing criminal law defences. The “battered spouse” should therefore rely on one of the established criminal law defences. Lawyers and advocates alike should take care to develop the arguments they use in defence of their clients in order to bring their clients situation into the ambit of the relevant acknowledged criminal law defence.

**Man got this woman to take his seed
His got the power she got the need
She spends her life through pleasing up her man
She feeds him dinner or anything she can
She cries alone at night too often
He smokes and drinks and doesn't come home at all
Only women bleed
Only women bleed
He makes your hair grey he's your life's mistake
All she's really looking for is an even break
He lies right at her
You know she hates this game
He slap her once in a while and she lives and love in pain

-Only women Bleed, Alice Cooper-**

CHAPTER 1: INTRODUCTION

1.1 Context of the study

- 1.1.1 Introduction
- 1.1.2 The Common law
- 1.1.3 The South-African Law
- 1.1.4 A comparison of the common law and the Legislation.
- 1.1.5 The relevant psychological-legal literature on the subject of the battered spouse.
- 1.1.6 A comparison of the psychological-legal literature and the position in the South-African law.
- 1.1.7 Conclusion and recommendation

1.2 Purpose of the study

The purpose of the study is to examine the viability and possibility of the “battered spouse theory” as a defence to a murder charge. The theory will be examined as a form of private defence; here the case of *S v Steyn*¹ plays an important role as the case sets out the applicable principles.

The discussion will focus on the requirements of an imminent unlawful human attack. Further attention is paid to the “battered spouse theory” as a pathological defect or mental illness rather than a non-pathological situation as such an approach places the defendant in the ambit of sections 77, 78, and 79 of the Criminal Procedure Act² and allows the “battered spouse”³ to rely on pathological criminal incapacity as a defence to the murder charge.

The purpose of the study is to determine which defence is the most relevant defence which is available to the victim when she⁴ commits murder. The Criminal Procedure Act was examined to determine whether or not the provisions of the Criminal Procedure Act are applicable to the victim allowing her to rely on pathological

¹ *S v Steyn 2010 (1) SACR 411 (SCA)*.

² The Criminal Procedure Act 51 of 1977, Herein after The Criminal Procedure Act

³ Herein after the Battered spouse will be referred to as the victim as she/ he is the victim of the abuser even after the abusers death.

⁴ In the text reference to one gender includes the other gender.

criminal incapacity with the result that she will be admitted to a psychiatric institute where she will receive the necessary treatment.⁵

The study is an attempt to clear up the mess and confusion surrounding the victim and her defence to the crime she committed under the influence or as a result of the behaviour of the abuser.⁶ The purpose of the study is to determine the victim's exact defence and the implications of the defence.

Another purpose of the study is to examine the law surrounding non-pathological criminal incapacity and to determine whether or not the defence is available in the South African law and what the requirements of the defence are.⁷ This examination is undertaken as the writer acknowledges the fact that in certain instances the victim will not suffer from a mental defect or illness as defined in the Criminal Procedure Act.

The study is undertaken to provide a victim suffering from a psychological defect or total disintegration of the personality⁸ brought on by the abuse with a defence. The writer will also examine expert evidence regarding non-pathological criminal incapacity to determine the availability of expert evidence on the subject. Proper expert evidence is essential as it remains the courts' duty to determine the criminal capacity of the defendant and the defendant has the duty to lay a proper foundation for her defence.

The purpose of expert evidence is thus to provide the court with guidelines and a justification for its decision regarding the accused mental capacity.⁹ The purpose of the study is clear and the writer examines the most commonly used defences to determine which defence is best suited for a battered spouse.

⁵ Act 51 of 1977; Kaliski in Kaliski *et al* in "*Psychological Assessment in South Africa*"(2006) 43.

⁶ The person who applied the abuse and the "battering or abuse" onto the victim, the diseased in the case where a murder was committed.

⁷ *S v Eadie* 2002(1)SACR 663(SCA), *S v Wiid* 1990(1)SACR 561(A).

⁸ *S v Kavin* 1978(2) SA 731(W).

⁹ *S v S* 1995(1) SACR 50 (ZS) at par 60b; *Holtzhauzen v Roodt* 1997(4)SA 766(W)

1.3 Research questions

The following questions are asked:

- 1.3.1 Which of the already recognised defences is the most relevant and viable defence for the battered spouse? How should these defences be conducted?
- 1.3.2 Can a battered spouse (the victim) rely on the defence of criminal incapacity due to a pathological defect, or is her defence private defence?
- 1.3.3 Can the Imminent attack requirement of private defence be extended to include the situation where a spouse lives in a constant state of fear induced in her by a cycle of violence?¹⁰
- 1.3.4 Can the state of fear and the cycle of violence create a pathological defect in the victim with the result that the victim can rely on pathological criminal incapacity?
- 1.3.5 Can the victim rely on non-pathological criminal incapacity? Or has the defence been abolished in its entirety? If the defence is still available to the accused what are the requirements and parameters of the defence?

1.4 Hypothesis

During this study the writer noted that a great deal of the literature is opposed to the “battered spouse” using pathological criminal incapacity or private defence as a defence to a charge of murder, although the case law now clearly determines that the battered spouse can in certain circumstances rely on private defence¹¹. The writer hopes that the study will show that the battered spouse theory as either a form of private defence or pathological criminal incapacity is a viable defence to murder.¹²

For this study the writer will base the research on the premise that the study will show that the victim can successfully rely on either private defence or pathological

¹⁰ The case of *S v Steyn supra* note 1.

¹¹ *S v Steyn supra* note 1.

¹² The barterer for ease of reading this will remain the same throughout the study.

criminal incapacity as a defence to a murder charge. The writer also starts her study on the premise that the imminent attack requirement can be extended to the victim who lives in a constant state of fear and who is subjected to the cycle of violence.¹³

Further the writer hopes to show that the battered spouse theory is either a form of private defence or non pathological criminal incapacity. The study will only reflect the position in heterosexual relationships where a husband beats his wife or life partner. The writer however acknowledges that violence and abuse can occur in all relationships and that the “battered spouse” (victim) can be any person in an intimate relationship with another.

The writer chose not to use the battered wife in the title as this would be a reinforcement of the myths that battering only happens to women in heterosexual relationships. The writer in turn hopes that the use of the “battered spouse” can make the topic open to discussion and development of the topic to apply in homosexual relationships (gay and lesbian relationships) and heterosexual relationships where the wife batters the husband.¹⁴

The writer also examines and gives due regard to the psychology of the “battered spouse” as it would be pointless to consider the effects of battering and abuse on the victim’s (spouses) behaviour and physical outcomes without giving due consideration to the physical including psychological effect of the abuse on the victim.

The writer also although using the term battering reminds the reader that abuse which influences behaviour is not limited to physical acts such as battering and includes psychological, emotional and sexual abuse.¹⁵

The writer further hopes to indicate that the principles required to have the battered spouse (victim) found not guilty has over time been developed and that the principles are already entrenched in South- African law.

¹³ For a description of the cycle of violence see Walker “*The Battered Women*” (1980)

¹⁴ *S v Arnold* 1985 (3) SA 256(C).

¹⁵ The various forms of abuse which can occur in a intimate relationship is defined in section 1 of the Domestic Violence Act 116 of 1998

1.5 Methodology

In this study the writer uses a qualitative approach to the issue at hand. The sources examined are done so for their authority and not their quantity. The writer will attempt to reconfigure private defence and the battered spouse theory in terms of the Constitution and the South-African legal position. To achieve this goal the writer examined the “battered spouse” theory as a form of private defence as the victim lives in a constant state of fear with a predictable pattern of violence.

Alternatively the writer examines the position of the victim as having a pathological defect brought on by the trauma inflicted by the abuser. The lifestyle and actions which the victim have been exposed to over a period of time would have affected the victim’s manner of thought and the manner in which the victim functions. Such an approach will then bring the victim into the realm of sections 77, 78 and 79 of the Criminal Procedure Act. To achieve this goal the writer examined the effects of the battering and abuse on the victim. The conditions created by the abuse and the effects of the abuse which can be diagnosed in the victim must then be defined and classified under a known mental illness/ defect of which post traumatic stress syndrome¹⁶ seems the most fitting. This approach should allow the victim to receive the treatment required to deal with the trauma created by the abuser in the victim.

Further the writer took a historic approach as she examines the common law on private defence and the court decisions influenced by the common law. A Part of the study will be done in a descriptive manner as the writer describe the decisions made by the court and identify the recurring trends and developments within the case law.

All of this will be done to identify the position of the victim in the South African legal system and to open a place in the law for the victim, her defence and to grant the victim (battered spouse) a fair trial. The case law and the common law have to be examined to determine the exact extent of the private defence and pathological criminal incapacity so as to extend and develop the defences to make them accessible to the victim (battered spouse).

Regarding the defence of non-pathological criminal incapacity the writer assesses whether or not the defence is still available to the victim and the writer discusses the defence in detail with specific reference to *S v Eadie*.¹⁷ If the defence is still available

¹⁶ Herein after PTSD. Recognised as a mental defect in the DSM V under anxiety disorders.

¹⁷ *S v Eadie supra* note 7.

to the victim an argument will be made as to why the defence is the most suitable defence for the victim in a particular set of circumstances.

This defence will be examined for cases where it is clear that the defect the victim suffered from is not of a pathological nature but is rather of a non-pathological nature. Instances where this defence will be relevant is where the victim suffered a complete disintegration of the personality¹⁸, temporarily lost the ability to act in accordance with her appreciation of what is wrong and right but this loss of control is due to an external factor.¹⁹ As this defence is not based on a pathological illness it requires evidence of a non-pathological character which includes evidence on the psychology of the victim, therefore the writer examines the cycle of violence, compliant victim syndrome and Stockholm syndrome.²⁰

This is done in an attempt to diagnose the victim with a recognised and treatable personality or psychological disorder so that the victim can receive the help required by her to be able to re-establish and relearn the skills required to conduct a normal life and the activities associated with a normal life.

1.6 Motivation

The motivation for the study has many facets and aspects which may influence the study. The purpose of the study assesses the defence a battered spouse can invoke when she is charged with murder. The writer's aim is to determine which defence is the most reliable or relevant for the "battered spouse". The motivation of the study is the fact that the legal position surrounding the battered spouse should be clarified and the legal defences should be established.

A further motivation for the study is the fact that the confusion surrounding the battered spouse is leading to the unjust, unfair and unequal treatment of defendants. The defendant's case is largely determined by her defence counsel's ability to argue

¹⁸ *S v Kavin supra* note 8; Kaliski 40

¹⁹ *S v Kavin supra* note 8.

²⁰ Stevens " *The role of expert evidence in support of the defence of criminal incapacity*" (LLD Dissertation UP 2011)

and interpret the law. This unjust treatment should be combated as the Constitution²¹ requires equal treatment of people.

The writer is thus motivated by the uncertainty surrounding the “battered spouse” to find some form of justice for the defendant as it is not only the murder victim who must receive justice but the victim of abuse also deserves justice. The writer’s motivation is thus to clarify the murky waters of the battered spouse theory and the criminal law defences.

The writer’s study is further motivated by the science of psychology which recognises some of the aspects and behavioural patterns identifiable in the battered spouse, while the law does not recognise the battered spouse theory or any of its characteristics as individual defences.

The writer’s motivation to take part in this study is so that she can contribute to the legal discourse and bring about change in the situation mentioned above. Further it is important to ask these questions to determine the legal position of the defence and to gain clarity of the legal position of the battered spouse in South African law.

It is important to ask these questions as the Constitution²² not only grants equality but demands that the right to equality be enforced by law. The treatment and the current situation where a victim is punished for protecting herself while the abuser has not been punished for endangering the victim is unfair and not in accordance with the Constitution. For example, a woman who kills her husband in self defence is prosecuted for murder even though the woman laid various criminal charges against the abusing husband. Not once was the abusing husband prosecuted for his crimes.²³ This situation only occurs because the crimes committed against the women are often not deemed as serious as murder. The crimes seem less serious as the victim often withdraws the complaints against her abuser out of fear for rejection, live without the abuser and punishment by the abuser.

The writer wants to address the situation so that the victim can obtain the help needed to turn her life around and to develop the skills needed to be a productive part of society. The writer is motivated by the unfairness and unreasonableness of the situation and the consequences of the situation.

²¹ Section 9 of The Constitution of the Republic of South Africa, 1996.

²² The Constitution of the Republic of South Africa, 1996 herein after the Constitution.

²³ See for example the facts in *S v Engelbrecht* note 31

1.7 Literature outline

The basic literature which will be examined is the Constitution, case law and legislation pertaining to private defence and pathological criminal incapacity in South-African Criminal law.

Further the writer examines journal articles and electronic sources on the topic as these sources contain and indicate the nature and extent of the discourse surrounding the stated criminal defences and their application.

The writer firstly, examines the basic and introductory literature by writers such as Snyman²⁴ and Burchell.²⁵ These texts in criminal law are authoritative as it explain and set out the basic criminal legal concepts in a easily understandable manner.

These sources give the reader a basic knowledge to build on and enhance the reader's basic understanding of the topic. This in turn provides the reader with the necessary tools to undergo a less superficial examination of the topic.

The writer then goes on to examine case law in which the concepts of private defence²⁶ and pathological criminal incapacity have thoroughly examined. It is much easier to examine and understand case law if the said case law is examined with reference to the explanations offered by academic writers. These sources though much more authoritative than text books contain very few explanations of the relevant legal concepts and often their explanations are difficult and complicated.

Thereafter the writer goes on to examine legislation and the Constitution as these two sources are the most authoritative sources available in South African law. Legislation is often unclear, difficult to understand and to apply; therefore, the legislation is examined as a primary source and the case law as a secondary source is used to clarify the legislation.

The Constitution as the supreme law of South Africa has to be examined so as to determine the minimum standard of rights, privileges and responsibilities of each person in South Africa and each victim and perpetrator.

²⁴ Snyman Criminal Law 6th ed (2008).

²⁵ Burchell & Milton Principles of Criminal Law (2005).

²⁶ *S v Steyn supra* note 1.

The writer also examined the relevant journals and commentary concerning the different criminal defences relevant to this topic. Journal articles contain the discourse on the topic and indicate the changes in the legislation and trends in law. Further it has authoritative value as the articles contain opinions not just by academics but also of practising attorney's.

Journals should be approached with due diligence as they contain relatively short versions of some writers opinion and of the law. Journals primarily reflect the writer's opinion of the law and therefore the reader of the journal must still examine the original text.

The writer also examined electronic sources which is available on the topic. Some of these sources are journals while other contains guidelines to the Domestic Violence Act²⁷. These sources are important because just as hard copy journals these sources can contain valuable information. The other electronic sources which are found can serve as an indication of the domestic violence problem and the reasons why battered women stay in the abusive relationships.

The electronic sources also tend to be newer sources; therefore, more in touch with the composition of society. This can shift the focus from the heterosexual couples to homosexual relationships and so doing make the defences and the study all inclusive. This study is limited to the occurrence of battering in heterosexual relationships. Although the writer is of the opinion that such a study is presently necessary and in the future will become even more necessary.

Other sources which have been examined by the writer are research documents which have been compiled after proper research and discussion. The research documents²⁸ clearly describe the battered women theory, the documents clearly and unequivocally indicate the shortcomings and the problems surrounding the application of the battered spouse theory. These research documents are of great worth as the documents not only have a practical approach to the problem but the documents also offer suggestions on how the problems can be corrected. The documents are also authoritative as the documents were written for the Centre for

²⁷Guidelines for the implementation of the Domestic Violence Act for the Magistrate. Obtained from http://www.issafrica.org/crimehub/uploads/2008_DVGuidelines.pdf. Last visited on 4 September 2012.

²⁸ Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1 & 2. Centre for the Study of Violence and Reconciliation, 2003

the Study of Violence and Reconciliation²⁹ with the purpose of addressing the problems in South Africa relating to domestic violence and abuse. These research documents also take into account the practical effects of the theory and abuse.

1.8 Structure/outline

1.8.1 Chapter one contains the introduction, the definitions of importance and the relevant legislation which the writer will examine in this study.

This chapter is an introductory chapter which purpose is to define the relevant terminology and outline the discussion which will take place in the study.

1.8.2 In the second chapter the writer examines the manifestation of domestic violence in South Africa to describe the phenomenon and to set the tone of the dissertation. The discussion is used to determine the position and situation regarding the existence of domestic violence. The various forms of abuse, as contained in the Domestic Violence Act 116 of 1998, are discussed in detail.³⁰ The discussion ranges from a discussion on physical abuse, including but not limited to battering, rape, and any threat of physical violence towards the accused, to a discussion on psychological abuse as all forms of abuse is relevant and important for the study. Focus is placed on psychological abuse as this form of abuse often goes unnoticed and unacknowledged and the form of abuse may be as traumatic as physical abuse. Its effect may even surpass that of physical abuse.

1.8.3 Chapter three will contain an examination of the Constitutional law regarding the criminal defences and the rights of victims and accused. The Constitution is examined to determine whether or not the Constitution allows for an extension of the criminal defences. The chapter will discuss the Constitution as a piece of legislation granting and ensuring victims' rights but also as a guideline for conduct generally. The relevant case law will be discussed in conjunction with the relevant sections from the

²⁹ . Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1 & 2. Centre for the Study of Violence and Reconciliation, 2003

³⁰ Domestic Violence Act 116 of 1998.

Constitution. The chapter will establish the victim's constitutional rights, privileges and duties. The chapter will where necessary compare the constitutional position with the status quo. This is done to determine whether or not the defences must be expanded and developed.

1.8.4 In chapter four the writer examines the common law as found in South-African Case law and the Common law defence of private defence. The discussion of private defence naturally requires a discussion of the requirements of the defence as developed through law and judgments. The writer will specifically focus on the imminent attack requirement and the cycle of violence interpreted and used to comply with this requirement.

The writer will in this chapter focus on the manner in which the defence needs to be developed to make the defence available to the victim. The most important cases will be discussed in accordance with date of Judgment therefore a large part of the study will focus on the recent cases of *S v Engelbrecht*³¹, *S v Eadie*³² and most importantly and recently *S v Steyn*³³ which is currently the *locus classicus* on private defence.

1.8.5 Chapter five will contain a discussion of the relevant psychological-legal literature and the psychological defences available in South African law. This examination takes place to determine the defences and their ambit which is available to the "battered spouse". The defences range from pathological criminal incapacity to the battered spouse theory and Post Traumatic Stress Syndrome. The writer will give specific focus to the "battered spouse theory." The writer notes that when one examines the "battered spouse theory" it is important to acknowledge that the theory consists of various elements these elements include the cycle of violence, learned helplessness and coercive control. These symptoms will be discussed individually and with reference to other psychological theories which can be applicable to the victim.

³¹ *S v Engelbrecht (centre for applied legal studies intervening as amicus curiae) 2004 (2) SACR 391 (W).*

³² *S v Eadie supra note 7.*

³³ *S v Steyn supra note 1.*

These theories include but are not limited to the Stockholm syndrome and Compliant Victim Syndrome.³⁴

The chapter will also examine the legal position surrounding expert psychological evidence, the use of psychological evidence during criminal trials and the probative value to be attached to the expert evidence.

Other non-legal and plain psychological text will also be examined to determine whether or not the legal-psychological literature is on par with the developments in psychology. The writer does this as it is important for the study that the law accept the developments made in psychology and that these developments be made part of the law.³⁵ Currently there seems to be a “*war between law and medicine*” or psychology³⁶ and the writer hope to address this problem.

1.8.6 In chapter six the writer will discuss the conclusion and recommendations. This chapter will conclude the study by summarising the study and then making the relevant recommendations. The chapter will show that when all the relevant literature is studied and applied the “battered spouse” will be able to claim that she acted in private defence³⁷ and alternatively that the “battered spouse” suffers from a pathological defect and therefore the battered spouse will be able to rely on pathological criminal incapacity. The battered spouse will then be able to receive psychological treatment in accordance with sections 77, 78, 79 of the Criminal Procedure Act.

Alternatively the writer will show that the defendant can rely on non-pathological criminal incapacity brought on by the behaviour of the abuser.³⁸

In the recommendations the writer will apart from making suggestions about the process which has to take place also recommend the use of

³⁴ See Stevens “*Unravelling the entrapment enigma: mental health experts in the assessment of battered women syndrome and coercive control advanced in support of non pathological criminal incapacity*”(1)& (2) 2011 JCRDL 432-448 and 585- 604 where the writer discussed for example: Stockholm syndrome and Post Traumatic Stress Disorder.

³⁵ *Holtzhauzen v Roodt* supra note 9; *S v S* supra note 9.

³⁶ Stevens 83; Kaliski 40 – 50.

³⁷ This statement is supported by the case of *S v Steyn* supra note 1.

³⁸ *S v Eadie* supra note 7.

terminology which is easily understandable but which carries the same meaning in both psychology and law.

1.8.7 In Chapter seven the writer sets out the bibliography and acknowledges the sources examined in the study.

1.9 Definitions of importance

1.9.1 Battered spouse: a spouse/ person repeatedly subjected to violence and abuse including assault, threats or harm by the other spouse or partner. The spouse later ends up killing the abuser.

1.9.2 Battered women: A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her into doing something the abuser wants her to do without any concern for her rights³⁹.

It is a woman who has been subjected to some form of violence and whose behaviour has been altered due to the violence. A battered woman has a specific set of characteristics these are: dependence on her attacker, learned helplessness coercive control.

1.9.3 “Battered women incident focused definition: *“a battered women is a women who is or has been in an intimate relationship with a man who repeatedly⁴⁰ subjects her or who repeatedly subjected her to forceful physical and /or psychological abuse...⁴¹* This definition is more useful when describing women’s experiences to the court and this definition is most often preferred by academics and researchers.

³⁹ Walker (1980)107-108.

⁴⁰ Repeatedly meaning more than one assault took place during a set period of time.

⁴¹ Oswell “Battered Women: Self-defence and provocation” (LLM Dissertation Stellenbosch 1993); Walker (1980) 107-108.

- 1.9.4 Battered women the combined definition: a battered women is any women who has been the victim of physical⁴², sexual, and/ or psychological abuse by her partner.⁴³
- 1.9.5 Criminal capacity: Is the ability to appreciate the wrongfulness of the conduct and to act in accordance with such appreciation. The criminal capacity must be determined before fault can be determined.
- 1.9.6 Coercive control:⁴⁴ This is where the abuser gained control over the actions and thoughts of the victim by means of coercion.
- The coercion takes place through punishment and reward and by the application of violence, physical and otherwise, onto the victim until the victim is in such a state that the victim complies with the behaviour and expectations of the abuser.
- 1.9.7 Diminished responsibility: the accused is criminally responsible for his/ her act but her capacity to appreciate the wrongfulness of her act or the ability to act in accordance with the appreciation of the wrongfulness of the act was diminished by mental illness or defect. Diminished capacity is usually due to a mental deficiency which does not amount to insanity.⁴⁵
- 1.9.8 Domestic violence: refers to different types of harmful and destructive behaviour directed at one spouse by another spouse but the definition goes further and includes life partnerships and people in other forms of relationships. It includes emotional and psychological abuse⁴⁶ as defined in the Domestic Violence Act.
- 1.9.9 Emotional, verbal and psychological abuse: the definition of this form of abuse is also found in the Domestic Violence Act. The Act determines that the abuse:

⁴² Physical abuse is assault that ranges from hitting to homicide. See 1.9.8 for the definition of physical abuse.

⁴³ Walker (1980).

⁴⁴ See for example Stark "Coercive control" 2010.

⁴⁵ Criminal Procedure Act S 78(7); Kaliski 103

⁴⁶ Domestic Violence Act 116 of 1998.

“means a pattern of degrading or humiliating conduct towards a complainant including repeated insults, ridicule or name calling, repeated threats to cause emotional pain or the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security.”⁴⁷

1.9.10 Insanity: mental disease or defect may deprive persons of the capacity to appreciate the wrongfulness of their conduct and/ or to act in accordance with the appreciation of their conduct. A person who suffers from mental condition that has such an affect is said to be insane in terms of the Criminal Procedure Act.

1.9.11 Learned helplessness: this concept entails that the battered spouse due to psychological and physical abuse and manipulation learns to be helpless and the belief that she cannot survive or function without the abuser is embedded in her psyche resulting in the continuation of the her relationship with the abuser.⁴⁸

1.9.12 Mental health care practitioner: *“a psychiatrist or registered medical practitioner or a nurse, Occupational therapist, psychologist or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation.”⁴⁹*

1.9.13 Mental illness: has no scientific medical meaning but is a legal term to describe certain medical states that excuse persons from criminal liability⁵⁰.

No formal definition of mental illness but the defect must at least consist of *“a pathological disturbance of the accused mental capacity and not a mere temporary mental confusion which is not attributable to a mental abnormality but rather to external stimuli”⁵¹*

⁴⁷ Sec 1 of the Domestic Violence act 116 of 1998.

⁴⁸ Walker (1980); see also Spammers *“A critical analysis of the psycho-legal assessment of suspected criminally incapacitated accused persons as regulated by the Criminal Procedure Act”* (LLM Dissertations 2010 UP)

⁴⁹ As defined in Sec 1 of the Mental Health Care Act 17 of 2002.

⁵⁰ Burchell and Milton page 375; Kaliski 46 & 97

⁵¹ *S v Stellmacher* 1983(2) SA 181 (SWA) at 187H; Kaliski 47

1.9.14 Non-pathological: the mental illness was caused by an external factor or some external stimuli.

1.9.15 Private defence: a person who is the victim of an unlawful, imminent, human attack on his or her person or on his or her property may use force to ward off the attack. The damage caused by such a defensive action is not unlawful.

1.9.16 Pathological: only mental disorders or illness arising as a result of a “*disease of the mind*”⁵² can qualify as a mental illness in terms of S 78 of the Criminal Procedure Act.⁵³

Pathological: the disease is internal or was caused by some internal disease in the mind of the accused.

1.9.17 Physical abuse: the Domestic Violence Act defines this form of abuse as “*any act or any threatened act of physical violence towards a complainant.*”

1.9.18 Sexual abuse: Sexual abuse is defined in the Domestic Violence Act as “*any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant.*”⁵⁴

The Criminal Law (Sexual Offences and Related Matters) Amendment Act, Sexual Offences Act, act 32 of 2007⁵⁵ does not define Sexual abuse but it does create sexual crimes and defines sexual assault. Sexual assault although it is a sexual crime remains a form of Domestic Violence and accordingly theoretically there are multiple options for the victim by which to proceed against the abuser.

⁵² Burchill & Milton page 375; Kaliski 104

⁵³ Criminal Procedure Act 51 of 1977: Kaliski 38

⁵⁴ Sec 1 of the Domestic Violence Act 116 of 1998.

⁵⁵ Hereafter the Sexual Offences Act, act 32 of 2007

Chapter 2: The manifestation of domestic violence in South Africa

1. Introduction

The purpose of the chapter is to define, understand, and establish the occurrence of domestic violence in the South African context, with specific focus on the manner in which domestic violence manifests itself in intimate relationships,⁵⁶ including but not limited to, domestic relationships. Domestic relationships⁵⁷ include a variety of relationships including the relationship between a husband and wife and the relationship between live-in partners.⁵⁸ The Domestic Violence Act, which is applicable in a strict set of circumstances, requires the presence of a domestic relationship. The Act defines a domestic relationship as:

“A relationship between a complainant and a respondent in any of the following ways:

- a) they are married to each other,*
- b) they live together or lived together in a relationship in the nature of marriage...*
- c) they are the parents of a child or are persons who have or had parental responsibility for that child.*
- d) family members related by consanguinity etc.*
- e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration.*
- f) they share or have recently shared the same residence.*

The definition makes it unambiguous that a domestic relationship is more than just a husband and wife relationship.

⁵⁶ Campbell “Health consequences of intimate partner violence” 2002 *The Lancet* vol 359. At www.theLancet.com (Accessed 2012/06/23)

⁵⁷ S 1 of the Domestic Violence Act 116 of 1998.

⁵⁸ Labuschagne “Die Mishandelde Vrou, Die Redelike Persoon Standaard en Die Grense van Noodweer” 1998 *JCRDL* 538.

The definition makes provision for other types of relationships such as co- inhabitant relationships and it is wide enough to cover almost any relationship wherein persons can find themselves. It is important to note that other factors may influence the existence of a domestic relationship. For example; the fact that two people are siblings does not mean that a domestic relationship exist between the parties.⁵⁹ Domestic relationships entail more than a close physical proximity between victim and perpetrator. The relationship requires that a special bond exist between the victim and perpetrator. This situation allows the abuser to continue the abuse physically, emotionally and psychologically.

Over the years since the acceptance of the Domestic Violence Act, the courts have considered many cases dealing with domestic violence. Therefore, the Domestic Violence Act has been developed and interpreted in such a manner and to such an extent that the act has obtained a solid meaning and application. The Court in *S v Baloyi*⁶⁰ interpreted the Act and the concept of Domestic violence as; “*violence within the confines of the family unit, often hidden from view by reason of the helplessness of the victim and the position of power of the abuser.*”⁶¹

Various cases⁶² examined the extent and occurrence of domestic violence. These cases also illustrate the problems associated with domestic violence. The writer acknowledges the fact that when one examines domestic violence certain perceptions, which aren’t always accurate, exist and are called to the fore.⁶³

⁵⁹ The unreported judgment *Daffy v Daffy* (659/2011) [2012] ZASCA 149 (28 September 2012) Case No: 659/2011.

⁶⁰ *S v Baloyi* (Minister of Justice & another intervening) 2000 (2) SA 425 (CC) par 11-12.

⁶¹ *S v Baloyi* par 11-12 *supra* note 60 as confirmed in *Daffy v Daffy* *supra* note 59.

⁶² *S v Engelbrecht* *supra* note 31, *S v Ferreira* 1994 (1) SACR 200 (C), *S v Wiid* *supra* note 7; *S v Marais* 2010 (2) SACR 606 (CC); See also *Basdew NO v Minister of Safety and Security* 2012 (2) SACR 205(KZD).

⁶³ S 1 of Act 116 of 1998: For a full definition see chapter 1 of the study. Here it is important to note that domestic violence is defined in our law as any degrading or humiliating behaviour or conduct. See Brakel & Brooks “*Law and Psychiatry in the Criminal Justice System*” (2001) 128-130 where the writer discusses the questions such as why the spouse didn’t leave; Labuschagne 1998 *JCRDL* 540- 541; Ludsin “*South African Criminal Law and Battered Women Who Kill Discussion Document* 1.2003.” 21 obtained from: http://www.csvr.org.za/docs/gender/south_african_criminal1.pdf (Accessed 08.09.2012).

These perceptions often referred to as “myths” include the following:

Firstly, that only woman in poor and middle classes are battered and victims of domestic abuse.⁶⁴

Secondly, the myth that women ask to be abused and deserves the abuse which they suffer must also be dealt with. The myths surrounding the female psyche and behaviour hold little truth as domestic violence does not discriminate between people based on social standing or financial positions. Domestic violence occurs in all classes of social standing and takes place indiscriminate of race, culture, religion or any other factor. This can be deduced from an examination of the case law, the complainant, the accused, and the area and demography from which the victim and accused stem.⁶⁵

In one case, the victim can be from a middle class background and in another case the victim can be from a poorer background, however, there are also victims who come from the “high” class of society.⁶⁶ Although the degrees of abuse may differ, all victims essentially experience the same abuse. Therefore, the myths regarding women and their inherent weakness should be disposed of.

Further, the myth that women enjoy abuse is contradicted by the women who fight back by either following through with the prosecution,⁶⁷ or by murdering or assaulting their abusers.⁶⁸

Domestic violence in South Africa is a common occurrence with which many citizens are confronted on a daily basis. Yet, the reporting of domestic abuse is lacking and it is often held as a private affair.⁶⁹ It is also an occurrence of which the presiding

⁶⁴ Walker (1980).

⁶⁵ The case law is indicative of this as the “victims” (the accused) come from all races and demographics. For example *S v Wiid* 561 *supra* note 7 was a wealthy woman while *S v Engelbrecht* *supra* note 31 was of lower social and financial standing ; See also *S v Baloyi* at 86g-87a *supra* note 60

⁶⁶ *S v Engelbrecht* *supra* note 31; *S v Ferreira* 200 *supra* note 62; *S v Arnold* *supra* note 14; *S v Wiid* 561 *supra* note 7;

⁶⁷ For example see *S v Roberts* 2000 (2) SACR 522 (SCA); *S v Singh* 2002 (2) SACR 562 (SCA).

⁶⁸ See *S v Wiid* 561 *supra* note 7; *S v Ferreira* 200 *supra* note 62;

⁶⁹ *S v Baloyi* at 86 g to 87 the judgment of Sachs J *supra* note 60 ; see also *S v Bergh* 2006 (2) SACR 225 (N) at 231; Wolhuter “Excuse them though they do know what they do- the distinction between justification & excuse in context of battered women who kill” 1996 SACJ 153; Brown &

officer often does not have the necessary personal or specialized knowledge. In this case, the court should hear expert evidence on the matter.⁷⁰ This has as a result that domestic violence, due to underreporting and the privacy, with which domestic violence is covered, cannot be sufficiently addressed by the legislature and social support structures.

Even though the legislature, courts, and the state are attempting to control and abolish domestic violence, they are failing to do so. The failure is due to the fact that the state does not have accurate figures and information surrounding the occurrence of domestic violence and the fact that there aren't effective measures of law enforcement in place.

Further, as indicated in the case of *S v Arnold*⁷¹ females are not the only gender subjected to abuse. This case is one of the few reported cases where the husband was repeatedly subjected to abuse by his wife and he later went on to kill his wife.

In the *Arnold* case, it was not unusual for the wife to belittle the husband. Further, from time to time the wife became violent towards him. In these violent episodes, the wife would physically assault her husband. The behaviour continued until *Arnold* killed his wife. The *Arnold* decision is clearly indicative that spousal or intimate partner⁷² abuse can occur in any intimate relationship and that domestic violence is a problem in South Africa. The case is indicative of the fact that all genders and all persons can become victims of domestic violence regardless of how happy or balanced the relationship started or on which good premise the relationship may seem to have started and developed.

Esbensen et al "*Criminology: Explaining crime and its context, Chapter 11*" (6th edition) (2007) 470 ; Clark "Cold Comfort: A commentary on the prevention of family violence act" 1996 *SAJHR* 588-590; Fredricks & Davids "The privacy of wife abuse" 1995 *TSAR* 471 – 487; Kaliski 151

⁷⁰ See *Holtzhauzen v Roodt supra* note 9; Labuschagne 1998 *JCRDL* 540- 541.

⁷¹ *S v Arnold supra* note 14: See also *S v Ndeleman* 1993(2) *SACR* 615 (0); See also *S v Laubscher* 1988 (1) *SA* 163 (A); See also *Buzawa & Buzawa "Domestic violence: the Criminal Justice Response"* (1990); Brakel & Brooks (2001) 130-133.

⁷² The relationship which exists between two persons who are in a special relationship with one another and who shares an emotional bond and a residential dwelling.

Further, a multitude of cases exists where women and children are subjected to abusive treatment.⁷³ Men who find “*their women*”⁷⁴ in the arms of a lover may also proceed to kill the lover out of jealous rage.⁷⁵

Male abusers often punish their wives for their disobedience when the wife acts in a manner other than that of which the abuser approves.⁷⁶ These men often succeed with the defence of provocation⁷⁷ due to emotional stress and automatism. Whereas women who kill their abusers and then raise the defence of emotional stress often do not succeed with this defence. This only emphasises the discrepancies present in the law.

There are various forms of abuse, and certain measures have been put in place to acknowledge the problem of domestic violence. These measures include the Domestic Violence Act, the accompanying regulations, as well as the guidelines published by the Minister in order to assist the magistrate when dealing with issues of domestic violence.⁷⁸

Other forms of violence, which cannot be classified or reduced to a specific form of abuse, often also occur and the intimate partner may be exposed to such forms of violence. The exposure to violence committed by the victim’s partner can reinforce certain ideas and perceptions the victim has of both her abuser and her. In this

⁷³ For examples see note 3 *supra*; *S v Van der Westhuizen 2011 (2) SACR 26 (SCA)* where the husband and his wife had a history of marital discord which eventually led to the husband shooting and killing all three children; See also *Director of public prosecution, Transvaal v Venter 2009 (1) SACR 165 (SCA)* where the husband shot and killed his children and attempted to kill his wife after a domestic dispute;

⁷⁴ For example *S v Mdingela 1977 (3) SA 322 (O) at 323G* where Steyn J express his discomfort with the fact that a husband cannot deliver “*even a moderate corporal correction to an erring wife.*”; *S v Campher 1987(1) SA 940 (A)* in this case evidence was lead and accepted that the husband (the abuser) deemed himself his wife’s boss; Also see Walker (1980).

⁷⁵ *S v Mnisi 2009 (2) SACR 227(SCA)*.

⁷⁶ See for instance the facts of unreported case *S v Visser case number 343/07 judgement delivered on 6/10/2010 and 7/10/2010*, North Gauteng High Court Pretoria; *S v Engelbrecht supra* note 31; and also *S v Engelbrecht supra* note 23 where the victim testified about the abusers behaviour; *S v Campher supra* note 74 where the husband exerted such control that he even controlled his wife’s religion.

⁷⁷ The perimeters of provocation as a defence has now been set by *S v Eadie supra* note 7 and the defence will in the future be more difficult to proof.

⁷⁸ Guidelines for the Implementation of the Domestic Violence Act for the Magistrate obtained from www.justice.gov.za/docs/articles.html . (Accessed 2012/05/23)

manner, the exposure to these situations can reinforce the domestic violence when it does occur and therefore the victim lives in fear and under the abuser's control.⁷⁹

2. Definition of abuse

South African law recognises various forms of domestic violence and the South African legislature has enacted legislation to deal with it.

Before the writer discusses the legislation and legislative reform, the writer will first clarify what the term domestic violence and domestic abuse entails.

The Domestic Violence Act⁸⁰ defines domestic violence as; “*physical abuse, sexual abuse, emotional, verbal, psychological, economic abuse including intimidation, harassment, stalking, damage to property, and entry into complainant's residence without consent,*⁸¹ *and any other controlling or abusive behaviour towards a complainant.*”⁸²

The Domestic Violence Act is the first Act to include psychological abuse under the definition of abuse; therefore, in theory, a victim is protected from abuse amounting to psychological abuse but which does not include physical abuse. Accordingly, the victim should be able to rely on private defence when she acts or strikes back against psychological abuse.

As described by Ewing, the women should be able to act in “*psychological self-defence*” when her psychological composition and well-being is under attack or when her psychological well-being is being threatened by her abuser.⁸³ The definition of domestic violence/ abuse is extensive. Therefore, the definition allows a variety of situations to be covered. It is however not that extensive or wide to be unclear and confusing.

⁷⁹ Warren & Hazelwood *et al* “The Disturbed Mind, compliant victims of the sexual sadist.” 1993 *Australian Family Physician*, vol 22 nr 4; See also Ludsin & Vetten “*Spiral of entrapment: abused women in conflict with the law*” (2005) 67.

⁸⁰ Act 116 of 1998.

⁸¹ The defendant and complainant do not share the same residence.

⁸² S 1 Act 116 of 1998.

⁸³ Ewing “*Battered women who kill: psychological self-defence as legal justification*” (1987). “*Chapter 6 why battered women kill: a theory of psychological self-defence, Chapter 7 psychological self-defence as legal justification.*”

The definition makes it apparent that abuse can take various forms as the definition is wide enough to allow development and acceptance of new forms of violence.

From the definition, it can be deduced that the legislature acknowledges the fact that abuse and violence can take many forms which may still be unknown or undefined. The definition of domestic violence has been considered and the meaning of the definition is plain; therefore, the writer will now proceed to discuss the various forms in which domestic violence manifests itself.

3. Forms of domestic violence

The Domestic Violence Act in section 1 defines domestic violence as:

“Physical abuse, sexual abuse, emotional, verbal, psychological, and economic abuse.” The Act goes further to include *“intimidation, harassment, stalking, damage to property, entry into the complainant’s residence without consent, and any other controlling or abusive behaviour.”*⁸⁴

If the definition is read in its totality and in conjunction with the rest of the Domestic Violence Act, it is clear that the definition includes both physical and psychological abuse. It is also clear that the Domestic Violence Act takes the dynamics of the relationship, which can often be warped, into the equation when dealing with domestic violence. The writer will first discuss the various forms of physical abuse. Thereafter the writer will proceed to discuss psychological and emotional abuse.⁸⁵

3.1 Physical abuse

a) Introduction

The Domestic Violence Act defines physical abuse as *“any act or threatened act of physical violence towards a complainant.”*⁸⁶ The definition is wide enough to include

⁸⁴ S 1 Act 116 of 1998.

⁸⁵ See S 1 for the definition of emotional and psychological abuse as well as chapter 1 of the study.

⁸⁶ S 1 Act 116 of 1998.

many acts and the definition resembles the definition of assault but is not limited to acts of assault.

Assault is defined as the unlawful and intentional infliction of harm on the person of another, or the unlawful and intentional threat to inflict harm on the person of another, which moves the threatened to believe that the threatening party has the intent and ability to do that which he threatens. Assault can be any act or omission which harms, or threatens to harm, the bodily integrity of the victim.⁸⁷

The definition of physical assault contained in the Domestic Violence Act therefore resembles and might even be the definition of assault, altered to fit into the context of domestic violence.

Therefore, physical abuse as domestic abuse can take various forms including rape, sexual abuse, assault, and conduct which can be defined as battering. Battering is an all-inclusive term used to describe situations where physical violence of a non-sexual nature occurs. Battering as a form of abuse is a common form of abuse and is often kept in privacy and secrecy by the victim.⁸⁸

Domestic violence is often seen as a private affair which the parties should deal with themselves, and that the public should not be involved in people's private affairs.⁸⁹. Victims are often told by family members that they should seek counselling and that their own behaviour is the cause of the abuse.⁹⁰

⁸⁷ *S v Matle 1984 (SA) 748 (NC) 751* where the court specifically focused on the requirements of assault; See also Snyman "*Criminal Law 5th ed*" (2008) 432; Burchell "*Principles of Criminal Law*" (2005) 680.

⁸⁸ See the case law as contained in fn 2 *supra* and various other decision in which the complainant did not report the case or only reported the case later.

⁹⁰ Kennedy "Sexual Abuse, Sexy Dressing and the Eroticization of Domination" 1992 *New England Law Review Vol 26, P 1309*; See also *S v Mdingela supra* note 74 at 323G: Steyn J express his discomfort with the fact that a husband cannot deliver "*even a moderate corporal correction to an erring wife*"; *S v Zuma 2006 (2) (SACR) 191 (W)*.

⁹⁰ Kennedy "Sexual Abuse, Sexy Dressing and the Eroticization of Domination" 1992 *New England Law Review Vol 26, P 1309*; See also *S v Mdingela supra* note 74 at 323G: Steyn J express his discomfort with the fact that a husband cannot deliver "*even a moderate corporal correction to an erring wife*"; *S v Zuma 2006 (2) (SACR) 191 (W)*.

b) The abuser

The abuser is often charming, well behaved and considered when in public. Abusers are often of high standing in society and are gentle and controlled people. Accusations of domestic violence and abuse often seem farfetched and unreliable as it is impossible for the police, the community, and often the respective families to phantom that the abuser could have acted in the manner as stated by the victim. This is due to the fact that the physical violence and the behaviour being accused of, goes against the personality and behaviour usually exhibited by the abuser.⁹¹

These are just some of the factors and realities which play a role in the prevention and prosecution of domestic violence.

3.1.1 Battering

a) Definition and general discussion

Battering *per se* is not recognised as a form of abuse as the term battering is an all-inclusive term. The Domestic Violence Act⁹² in itself does not define battering.

Battering is an “Umbrella term” and a form of physical abuse/violence. Battering includes kicking, punching, slaps, shoving, burning with cigarettes, and other abusive behaviour and behaviour which can commonly be defined as assault. Although the Domestic Violence Act and other legislation do not define battering case law and legal writings has developed a definition.

The definition is wide enough to include all forms of physical abuse. There are various cases which reinforces the definition of battering⁹³. Due to the various forms of violence which the term battering encompasses it is a very common form of domestic violence. Even though battering is a common occurrence in South Africa, and many women are subjected to it, the abuse often remains unreported.

⁹¹ Warren & Hazelwood *et al* 1993 *Australian Family Physician*, Vol 22 no 4; Stark “Coercive control” 2010

⁹² Act 116 of 1998.

⁹³ See the facts of the relevant cases in fn 7 *supra* which indicate that battering is only a part of the abusive behaviour.

The general perception of the occurrence of battering is underestimated and under reported due to the fact that the violence has been and, in a manner, still is seen as a private affair in which the police should not interfere. Some victims do not report the abuse out of shame, others out of fear for the abuser. Regardless of the reason for not reporting battering, abuse is and will always be serious and should be combated.

b) Occurrence of battering and the cycle of violence

Battering as a form of violence often occurs as part of a pattern of behaviour and occurs due to the presence of certain circumstances and motives.

In other words, the physical battering of the victim usually does not occur in isolation. The battering is usually preceded by some other form of abuse, such as emotional abuse, where the abuser shouts insults at the victim. Verbal abuse, where the abuser threatens the victim, may also occur. In some circumstances, small acts of aggression such as threats, not amounting to physical violence, can also occur.⁹⁴

In certain situations, the battering is followed by other forms of abuse such as sexual or emotional abuse.⁹⁵ The occurrence of battering or physical violence is unpredictable. In some relationships, there can be a single instance of battering during the duration of the relationship, while in others the battering occurs almost daily.⁹⁶ After the occurrence, either the victim ends the relationship or the abuser does not repeat the behaviour, or the battering become routine.

The last mentioned is more often the case, and the battering tends to be repetitive, usually in a set and predictable cycle. Writers refer to this predictable pattern of battering and abuse as “*the cycle of violence*.”⁹⁷ *The “cycle of violence”* consists of

⁹⁴ See the relevant case law such as *S v Steyn supra* note 1; *S v Wiid supra* note 7 ; *S v Engelbrecht supra* note 31; Ludsin & Vetten 70; See also Herman “Complex PTSD: a syndrome in survivors of prolonged and repeated trauma.” *JTS* (1992) (5) 377- 391.

⁹⁵ S 1 Act 116 of 1998.

⁹⁶ Ludsin & Vetten (2005) 68- 69.

⁹⁷ *S v Engelbrecht 41 supra* note 31; *S v Ferreira 200 supra* note 62; see also Walker (1980); Reddi “Battered Women Syndrome: some reflection on the utility of this ‘syndrome’ to South African women who kill their abusive husbands” 2005 *SACJ* 259- 278.

three different stages, each often with different effects on the different victims and abusers.⁹⁸

The victim submits to the conduct of the abuser while the conduct of the abuser escalates.⁹⁹ The cycle has the effect that the victim learns certain behavioural patterns and she then modifies her behaviour and personality accordingly.¹⁰⁰ An effect of this is that it becomes unnecessary for the abuser to physically abuse the victim, as a certain look or manner of conduct is sufficient to indicate to the victim what is going to occur if the current behaviour continues.¹⁰¹

Battering and physical violence has devastating consequences on the personality and wellbeing of the victim. The battering modifies the victim's behaviour.¹⁰² Battering is usually of a non-sexual nature but it may occur with other forms of abuse. The preceding discussion calls for a discussion on sexual abuse.

3.2 Sexual abuse

a) Introduction

Sexual abuse can take on various forms including rape, sexual assault, and often, sexual acts with animals.¹⁰³ Sexual abuse often does not occur in isolation, and the abuse is usually preceded by some other form of physical violence or emotional abuse. After the sexual abuse has ceased, the other forms of abuse may still occur. Sexual abuse contains an element of violence, therefore forming part of the “*cycle of violence*”¹⁰⁴ often detected and visible in abusive relationships.

⁹⁸ Ludsin “*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*” obtained from: http://www.csvr.org.za/docs/gender/south_african_criminal1.pdf which the writer. (Accessed 08.09.2012) Walker (1980); Reddi 2005 SACJ 259- 278.

⁹⁹ *S v Potgieter 1994(1) SACR 61(A)*: Where the women testified that she stayed because she believed that he will change his behaviour if she changed her behaviour.

¹⁰⁰ This occurrence is known as learned helplessness; Walker (1980); Reddi (2005) SACJ 259- 278; Ludsin, “*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*” obtained from: http://www.csvr.org.za/docs/gender/south_african_criminal_1.pdf (accessed 08.09.2012) 57. Stark 2010

¹⁰¹ Ludsin 2004 SAJHR 642- 643.

¹⁰² *S v Visser supra* note 76; see also Ludsin & Vetten (2005) 77.

¹⁰³ *S v Visser supra* note 76

¹⁰⁴ Walker (1980); Reddi 2005 SACJ 259- 278.

The result is that sexual abuse forms part of the greater pattern of abuse, and sexual abuse has a set function in the abusive relationship. The function is to emphasise the subordination and humiliation of the victim. This submission is confirmed by the definition of sexual abuse.

In this chapter the most prominent and common forms of sexual abuse will be discussed and therefore, attention will be paid to rape, sexual assault, and self sexual assault. The Domestic Violence Act includes sexual abuse in the definition as; “*any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant*”¹⁰⁵ The definition makes it clear that the sexual integrity of the victim is important.

However, the Sexual Offences Act (hereafter the Sexual Offences Act)¹⁰⁶ remains the Act which has to be consulted if individual acts of sexual abuse are to be defined as sexual offences since the Sexual Offences Act codifies sexual crimes in South Africa.

The writer acknowledges that the Sexual Offences Act redefined the sexual offences and that The Act amended certain offences. Further, it is important to note that most of the case law was decided before the Sexual Offences Act; therefore, the writer will refer to the abuse and the offences committed under the previous legislation by their previous name, or where possible, under the name as it is now known.

The fact that a new Act came into being does not detract from the fact that the definition as contained in the Domestic Violence Act is insufficient, and that other legislation can be consulted to determine the extent of the sexual abuse.

Most of the forms of sexual violence a victim can be exposed to, can be brought home under the Sexual Offences Act. Therefore, when the legislation is properly read and applied, the victim of domestic violence has two avenues by which she can proceed. Either the victim can act in accordance with the Domestic Violence Act which does not lead to criminal liability, or the victim can rely on the Sexual Offences Act which creates statutory offences. Therefore, in theory, the victim is protected by two different Acts and the abuser is in contravention of both. The writer will start the discussion on sexual abuse by discussing rape.

¹⁰⁵ S 1 Act 116 of 1998.

¹⁰⁶ The Criminal Law (Sexual Offences and related matters) Amendment, Sexual Offences, Act 32 of 2007.

3.2.1 Rape

a) General

Rape is a form of not only physical violence, but also a form of sexual violence. This form of violence occurs frequently but remains unreported. This is due to the fact that victims often do not have the resources or opportunity to attend to the police station, while other victims are ashamed of the rape. Some victims do not report the rape due to fear of the consequences. Victims are often told and placed under the impression that their behaviour caused the rape, and therefore the victims often believe they somehow deserved to be raped or abused.¹⁰⁷

Further, where rape occurs in the marriage, even though South African Criminal law now recognises marital rape¹⁰⁸, it is often not seen as rape since it is a woman's duty to keep her husband satisfied, and that "*by marriage, the wife has given the husband irrevocable consent to intercourse*"¹⁰⁹

Further, it must be kept in mind that rape is generally regarded as not only a sexual crime, but also an aggressive crime with dominance and anger as motivator and underlining factor. Rape is therefore regarded as an aggressive crime.

b) Definition and occurrence

i) Definition before the Sexual Offence Act

Before the decision of rape as entertained in the decision of *Masiya v DPP*¹¹⁰ (hereafter *Masiya*) and the Sexual Offences Act, rape was defined as vaginal penetration of a woman by a man without the woman's consent. The definition was too narrow and the legislature amended it in 2007.

¹⁰⁷ *S v Zuma* 90 *supra* note 92: where the defence contended that the victim in the circumstances invited the sexual act by way of her clothing and the fact that she was wearing a mini skirt; Ewing (1987) 16-18; *S v Mdingela supra* note 74; See also Kennedy 1992 *NELR* Vol 26, 1309; Makofane "Factors compelling women to remain in relationships"; *Acta Criminologica* 2002 vol 15(1) 84-92. Where the writer discusses the factors keeping women in abusive relationships one of which is that the cultural expectations may require the women to "take it" or "its part of the marriage."

¹⁰⁸ S 5 of act 133 of 1993; Mphahlele "From Legal Rape to a Crime: Does that solve the Problem?" 1993 *TRW* 165; Clark 1996 *SAJHR* 589.

¹⁰⁹ See *S v Ncanywa* 1993(1) *SACR* 297 (CKA); Clark 1996 *SAJHR* 587- 590.

¹¹⁰ *Masiya v DPP* 2007 (8) *BCLR* 827 (CC).

The Sexual Offences Act however only came into operation in December of 2007. It is important for this study to also refer to rape before the Sexual Offences Act as victims of abuse often suffered abuse in the form of anal sexual penetration without their consent, but this was not regarded as rape as the penetration was not vaginal. The perpetrator could therefore not have been guilty of rape and could at most have been guilty of indecent assault.

As most of the cases examined were decided before the Sexual Offences Act, it is important to note that these victims were subjected to what now classifies as rape, but which was not acknowledged as rape at the time of occurrence. This was an added frustration for the victims to deal with.

Further, a result of the definition was that a man, even though he was sexually penetrated, could not claim that he was raped by his attacker. The definition clearly discriminated between victims, and the definition as a whole was unsatisfactory. The court in *Masiya*¹¹¹ accordingly changed the definition of rape. The Court's definition was adopted and expanded by the legislature. In essence, *Masiya* started to pave the way for the application of the Sexual Offences Act.

ii) Definition of rape after the Sexual Offences Act

The Sexual Offences Act¹¹² defines Rape in Section 3 as; "*the unlawful and intentional act of sexual penetration of the complainant without the consent of the complainant*"¹¹³ This offence is clearly more comprehensive and inclusive than the offence of rape as found in the common law and the case law before the 2007 decision of *Masiya*. Before the *Masiya* case, rape was limited to the vaginal penetration of a woman by a man without her consent. Thus, the act of rape was confined to women and the definition did not include penetration other than vaginal.

The Sexual Offences Act expanded the definition of rape to include acts which were previously only regarded as indecent assault, and the definition of rape is now gender and anatomically neutral. The Sexual Offences Act's definition of Rape and other sexual offences has the effect that when any other legislation dealing with

¹¹¹ *Masiya v DPP supra* note 110

¹¹² Act 32 of 2007.

¹¹³ See S 3 of Act 32 of 2007.

sexual abuse is considered, the Sexual Offences Act must be taken into account. Accordingly, the application of the Domestic Violence Act and the interpretation of the legislation have given substance to the definition of sexual abuse.

The expansion of the definition and the resulting offences created the situation where a person can, in more circumstances, be guilty of a sexual offence. This extension of the rape definition in the Sexual Offences Act, and the fact that the Domestic Violence Act also recognises sexual abuse, has the result that sexual abuse, as contained in the Domestic Violence Act, is more concrete and substantial. An examination of the legislation and case law indicates that not only women are victims of rape or abuse¹¹⁴ but that male rape also occurs.¹¹⁵

One feminist writer on crime and law titles her work “*The Phenomenon of Rape.*”¹¹⁶ In this document, she discusses the occurrence of rape, not only in the marriage, but also in intimate relationships. The writer talks about her own experiences of the rape and the procedure which followed the report of the rape. The document is clearly very personal, and in the writer’s opinion, a true reflection of the situation which confronts the victims of rape. The writer of the document also continues to discuss rape statistics. This document is just one example of the commonality of rape.

Rape can take various forms including but not limited to vaginal rape, anal rape, rape by a man of a woman, rape of a man by a man (male rape), rape of a man by a women, and corrective rape.

Corrective rape can occur in intimate relationships. The relationship does not need to be or contain a sexual element. For instance, a father and his daughter are also in an intimate relationship. Corrective rape is largely found in the black community, and the purpose of the rape is to cure homosexuals from there “disease”. This form is not directly relevant to the study and therefore the writer does not discuss corrective rape in detail.

¹¹⁴ *S v Arnold supra* note 14; see also *S v Laubscher supra* note 72

¹¹⁵ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others* 1998(2) SACR 556(CC) at page 559- 560.

¹¹⁶ Du Toit “*a Phenomenology of Rape: forging a new vocabulary for action*” in Gouws ‘*unthinking citizenship* 253-274.’

The research shows that the most common form of rape is where a women's is raped by a man. This is also the form of rape on which most research and discussions have taken place. Therefore, the writer focuses on this form of rape.

Other forms of rape such as corrective and male rape need to be addressed, but this study is not directly relevant to the current study. Therefore, the writer will not go into an in-depth discussion on the topic.¹¹⁷

3.2.2 Sexual Assault

a) Definition

Another form of violence under physical abuse is that of sexual assault. The offence of sexual assault is regulated and defined by the Sexual Offences Act¹¹⁸.

The Sexual Offences Act in section 5(1) states that:

“a person who unlawfully and intentionally sexually violates a complainant, without the consent of the complainant, is guilty of the offence of sexual assault” and continues in section 5(2) as follows;
“a person who unlawfully and intentionally inspires the belief in a complainant that the complainant will be sexually violated, is guilty of the offence of sexual assault.”

This definition clearly shows that a threat which the victim reasonably believes can, or will be instituted by the attacker amounts to a sexual offence. The definition as described broadens the scope of sexual assaults. The spouse or partner who believes that the abuser is able to do that which he threatens, is subjected to domestic violence, and more specifically, to physical and sexual assault. This is the situation since the definition expressly states it as the *status quo*, and the definition of sexual assault is a repetition of the definition of common assault with the added element of a sexual nature.

When the definition is compared to that of common assault, it is clear that due to the similarities of the definitions, the same principles applicable to common assault

¹¹⁷ The writer keeps the topic narrow as the purpose of the chapter is to lay a foundation for the rest of the study.

¹¹⁸ Act 32 of 2007.

should *mero motu*¹¹⁹ apply to sexual assault. Thus, it is clear that a spouse can now be subjected to assault, with a sexual nature, without being subjected to common assault.

b) Occurrence

Even though the Sexual Offences Act is relatively new legislation, multiple decisions have been based on the legislation. The court decisions make it clear that the courts take sexual offences such as sexual assault seriously. The case law also indicates that contrary to general perceptions and myths¹²⁰ which exist, sexual abuse and assault is not limited to a specific gender, stereotype, race, or sexual orientation. The case law clearly indicates that sexual assault occurs everywhere and can take place even in marriages.

In previous years, the wife in the relationship was deemed to be the servant of the husband, and if the spouses were legally married, the husband could not have been found guilty of rape or sexual assault of his wife. After 1993, the law changed and now the husband can be found guilty of any sexual crime against his wife. Therefore, if a husband's acts fall within any of the definitions contained in the Sexual Offences Act, he is guilty of a sexual offence. The implication is that the action may also amount to domestic violence. The writer acknowledges and realises that there are other forms of sexual offences and that they are all contained in the Sexual Offences Act.¹²¹

All of the sexual offences are important. However, some are less relevant to the study as a discussion of the offences will not contribute to the larger theme of the study. Accordingly, the writer will not discuss all sexual offences in depth.

As with rape and assault, this form of abuse does not discriminate between persons and it occurs across all demographics and all classes of society. The abuse is usually of such a private nature that reporting thereof often does not take place.¹²²

¹¹⁹ The court can make an order out of own movement.

¹²⁰ Walker (1980); See also *S v Ndeleman* *supra* note 71.

¹²¹ Act 32 of 2007.

¹²² Wolhuter 1996 SACJ 151-166.

3.3 Psychological abuse

a) Definition

The Domestic Violence Act now includes psychological abuse and defines psychological abuse as

“a pattern of degrading or humiliating conduct, towards a complainant, including;

a) repeated insults, ridicule or name calling,

b) repeated threats to cause emotional pain or

c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty ,integrity or security. ¹²³

The provision echoes other common law crimes known and accepted in the South African criminal law system. Some of the offences remind the reader of the offence of *crimen injuria*¹²⁴.

However, the offences differ as psychological abuse has a certain set context, and regard the set context as detrimental. Apart from the Domestic Violence Act, the South African criminal law does not recognise psychological abuse. For the writer, this is indicative of the fact that the legislature took the dynamics of the law and the domestic relationship into account when drafting the Domestic Violence Act. The Domestic Violence Act, in essence, codified the crime of criminal *injuria* in the domestic relationship, and by doing so provided the victim with a statutory remedy.

The writer makes this statement with reference to the decision in *S v Umfaan*.¹²⁵ The court held that *dignitas* is the “*valued and serene condition in his social and individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.*”

¹²³ S 1 Act 32 of 2007.

¹²⁴ Definition: the unlawful and intentional defamation of a person’s privacy or self worth. The defamation must be of a serious nature; The definition was confirmed in *S v Sharp 2002 (1) SACR 360 (Ck) 372b*.

¹²⁵ *S v Umfaan 1908 TS 62*.

The definitions, although not directly and not *verbatim* the same, do overlap and intend to protect the same legal interest. The definition of psychological abuse is however focused on cyclical behaviour taking place within a set relationship.

The legislature does not provide the practitioner with practical guidelines on the enforcement of the Domestic Violence Act, and therefore the legislature does not ease the process of enforcement of the Domestic Violence Act for the victims. Psychological abuse is often difficult to identify as psychological abuse is usually not publicly visible. This form of abuse takes place in the privacy of the victim's home, and usually centres around aspects which is confined to the minds and being of victim and abuser.

The abusers, just as the emotional abusers, tend to be charming and intelligent. The abusers often do not exhibit the same characteristics in public as they do in the privacy of their homes. This phenomenon often makes the woman's claims of abuse and rape seem spiteful and vengeful since the abusers' families and friends often cannot believe the accused capable of the alleged conduct. The behaviour seems totally out of character for the accused.

When psychological abuse is present, the abuse is usually excessive and the consequences always devastating. The victim can be called names ranging from bitch to whore,¹²⁶ and treated in a manner befitting the name. Other victims are beaten, scared, threatened, kept without food for days, isolated, and raped.

The acts might be physical but the psychological traumas they inflict often outweigh the physical trauma.¹²⁷

The facts from case law examined indicate that the form of abuse often occurs in conjunction with other forms of abuse. However, exceptions do exist and it is possible that the psychological abuse can take place without the presence of the other forms of abuse.¹²⁸ As it is clear from the different cases, the victims were often deprived of some life sustaining substance. The act was committed against the victim as a form of physical bodily violence. It is also important to acknowledge the intent with which the acts were committed. Where these acts are committed with

¹²⁶ *S v Visser. supra* note 76

¹²⁷ *S v Visser supra* note 76.

¹²⁸ Reddi 2005 SACJ 262: The writer states that abuse can be of a psychological nature only and that physical abuse isn't a requirement.

the intent to humiliate or degrade, the act amounts to a form of psychological abuse as the abuser intended to harm and instil fear in the victim.¹²⁹

By combining psychological abuse with other forms of abuse, the total destruction of the women's self-esteem can be brought about.¹³⁰ Psychological abuse often brings about a change in the manner in which the women behaves and acts. It can also have an effect on the manner in which the victim thinks and functions.

Further, the form of abuse can occur during the victim's childhood and thus shape her thoughts and behaviour, making her susceptible to future abuse and violence. The victim then enters into a relationship thinking the treatment which she is subjected to natural and normal. For the writer, this is indicative that behaviour can be learned, making this form of abuse an effective tool in installing "*learned Helplessness*¹³¹" in the victim. The victim learns to be helpless and the abuse continues. As long as the abuse continues in a manner which does not exceed the known parameters of the relationship, or of the abuse the victim is accustomed to, the victim will remain compliant.

Should the abuse exceed the known limits, the victim may lash out or adapt her behaviour, but that may not always be the case.¹³² Should the victim change her behaviour, she will be the one acting outside the perimeters of the relationship, and such behaviour may be met with extreme violence. Usually it is when either of these two situations occur that the victim kill the abuser.¹³³

Psychological abuse is often the precursor to other forms of abuse. The abuser's behaviour often starts with psychological abuse where the abuser curse, insults and degrades his victim. Thereafter, if the victim does not respond in the manner which the abuser hoped the victim would, the behaviour often escalate. The abuser will often change his behaviour and start his physical assault on the victim.¹³⁴

¹²⁹ *S v Engelbrecht supra* note 31; *S v Ferreira supra* note 62; *S v Laubscher supra* note 72; *S v Steyn supra* note 1.; *S v Wiid supra* note 7; see also Herman 1992 *JTS* 377- 391.

¹³⁰ *S v Visser supra* note 76; *S v Kavin supra* note 8

¹³¹ Walker (1980); see also Spammers ;Van Der Kolk "Psychological Trauma" *American Psychiatric Press, Washington D.C.* 1987

¹³² *S v Visser supra* note 76; Ludsin & Vetten (2005) 77.

¹³³ *S v Wiid supra* note 7 ; *S v Engelbrecht supra* note 11;

¹³⁴ A man or woman who is experiencing abuse.

The psychological abuse often occurs with a set purpose of domination and getting the victim to submit to the will of the abuser. Further, the abuse is used to break down the reserves, morality, and personality of the victim. Psychological abuse is a powerful tool in the hands of the abuser as it allows the abuser to instil the belief that the victim is the cause of the abuse in the victim. The victim adapts her behaviour with the hope that the abuser will adapt his too, and change.¹³⁵

The woman will often claim that she is being psychologically abused but proof of psychological abuse is difficult to obtain. To determine whether psychological abuse occurred, a victim must be subjected to a psychological and a psychiatric evaluation. The victim's psychological composition before and after the occurrence of domestic violence must be determined and compared to each other, and where possible, the victim's psychological composition must be compared to an external source.

The consequence is that psychological and psychiatric evidence becomes an integral part of the investigation into the abuse, and the rules pertaining to the evidence must be carefully scrutinized as only certain forms of psychological inflictions, which sufficiently alter the victim's mental state,¹³⁶ can place the victim within reach of the Criminal Procedure Act¹³⁷. An example of such an infliction is PTSD which is recognised in the DSM V, under anxiety disorders, and this criterion can be used to identify some of the traumatic effects on the battered spouse.¹³⁸

Psychological abuse often does not result in a mental defect or illness as defined in the Criminal Procedure Act, and therefore, the problems which the battered spouse experiences often go unnoticed and untreated. Mental defects or illnesses, which do not amount to mental defects in terms of the Criminal Procedure Act, often go unacknowledged by the courts and practitioners.

¹³⁵ *S v Potgieter supra* note 99.

¹³⁶ Stevens 2011 *JCRDL* 432-448 where the writer discussed for example: Stockholm syndrome and Post Traumatic Stress Disorder; Herman 1992 *JTS* 377- 391; Jones et al " Post Traumatic Stress Disorder in victims of domestic violence" *Trauma Violence and Abuse* 2001.

¹³⁷ The Criminal Procedure Act 51 of 1977 see S 77, 78, 79 which has a limited effect and may in certain circumstances be of no or little use.

¹³⁸ DSM V; Carstens & Le Roux "*The defence of non pathological incapacity with reference to the battered wife who kills her abusive husband*" 2000 *SACJ* 180 -189; See also Brakel & Brooks (2001) 117-128.

A general hierarchy in the Courts holds psychological evidence secondary to that of psychiatrist. This distinction and hierarchy is contained in the Criminal Procedure Act in section 79. S 79 clearly indicates that the accused must be examined, if the court finds it necessary, by one psychologist and three different psychiatrist's.¹³⁹ The hierarchy which exists in practice was created to “*prevent the flood gates from being opened to women who commit murder.*”

Thus, the Criminal Procedure Act differentiates between people suffering from psychiatric and psychological problems. Such a differentiation may be of a discriminatory nature and constitutionally questionable¹⁴⁰.

It is the writer's submission that the time has come to give due regard to the evidence of psychologists in all criminal matters, especially those regarding domestic violence where the victim claims that psychological abuse took place.¹⁴¹ During the research, it became clear that the victims experience the abuse as real and threatening, and that the abuse may dictate their actions. This can include committing crimes on instruction, or on behalf of the abuser.

Although the victims may be aware that their actions are unlawful or immoral, they have been conditioned and are unable to resist the orders received from the abuser as they were enticed and manipulated into believing that they cannot survive without the abuser and that he is omnipresent.¹⁴² One woman who relied on this defence testified that her abuser manipulated and psychologically abused her to the extent that it felt as if “*Dirk het my skedel oopgesaag en hy het sy skedel oop gesaag en hy het my brein uit gehaal en hy het syne gevat en dit in my kop gesit.*”¹⁴³

It is the writer's opinion that although this is only one case, if proper psychological evaluations were done on the victims of psychological abuse, more of these

¹³⁹ S 79 of Act 51 of 1977; Kaliski 95

¹⁴⁰ The Constitution of the Republic of South-Africa, 1996.

¹⁴¹ The cases of *S v S supra* note 9 at par 60b and *Holtzhauzen v Roodt supra* note 9 supports the submission of the writer; *S v Engelbrecht supra* note 31

¹⁴² *S v Visser supra* note 76; *S v Engelbrecht supra* note 31; Herman 1992 *JTS* (5) 377- 391.

¹⁴³ *S v Visser supra* note 76 at 57 where the interview with Finesse is quoted by Eksteen WR (as he then was); Brakel & Brooks (2001) 132- 133 the writers indicate that the abuser has the ability to convince the victim to commit a crime on his behalf.

comments and testimonies will be heard. This can serve as an indication of why the abused partner remains in the relationship and acts in certain manners¹⁴⁴.

Psychological assessments will also assist the legal practitioner in arriving at a fit and proper solution for the victim and can influence the prevention. It is therefore clear that psychological abuse experienced in a cycle has the same effect, if not worse, on the victim as physical abuse.

The abuse teaches the victim a pattern of behaviour. This aspect, together with the fact that the victims believe they are the cause of the abuse, can be described as coercive control¹⁴⁵. Coercive control,¹⁴⁶ coupled with frequent abuse, results in “learned helplessness”¹⁴⁷ in the victim. The victim remains in the abusive relationship because the victim believes she wouldn’t be able to survive without the abuser.

Therefore, it is the writer’s submission that although all abuse should be abolished, psychological abuse needs special attention since this form of abuse is used as an entrapment tool. The abuse not only leaves physical scars but the mental and psychological damage can remain with the victim forever. Psychological abuse may also influence third parties, for example children, who are connected to the abusive relationship.¹⁴⁸ Further, the abuse must be examined since the average legal practitioner isn’t often confronted with the topic and might not be knowledgeable.

Therefore, the abuse remains unknown¹⁴⁹ and by implication, the abuse remains an avenue for the abusers.

¹⁴⁴ Makofane 2002 *Acta Criminologica* vol 15(1) 84-92.

¹⁴⁵ Ludsin & Vetten (2005) 77; Stark 2010; Stevens 2011 *JCRDL* 432-448 and 585- 604 where the writer discussed for example: Stockholm syndrome and Post Traumatic Stress Disorder; Herman 1992 *JTS* 377- 391.

¹⁴⁶ See note 76 and 84 for sources on Coercive control.

¹⁴⁷ Walker (1980); Spammers; Van Der Kolk 1987 *Psychological Press* Washington D.C.

¹⁴⁸ In for example *S v Engelbrecht supra* note 31 the women feared for the safety her child and killed the abuser now the child has a diseased parent and a parent in jail; See also *S v Van der Westhuizen supra* note 73

¹⁴⁹ In this regard the court in *Holtzhausen v Roodt supra* note 9: stated that it would be irresponsible for a presiding officer not to hear expert evidence on a subject of which the presiding officer has no or little expert knowledge.

This discussion leads the writer to the next form of abuse which also often go unacknowledged and which can be closely connected to the other forms of abuse already discussed. The writer will now discuss emotional abuse.

3.4 Emotional abuse

a) General discussion

This form of abuse is defined in s 1 of the Domestic Violence Act and the definition is the same as that of psychological abuse. The Domestic Violence Act acknowledges that emotional abuse can occur. For the writer, the problem with the definition is contained in the fact that emotional and psychological abuse is included in the same definition, and by implication addressed as a single concept. In other words, emotional abuse and psychological abuse is reduced to one concept. This is problematic as a person's emotions can influence his psychological composition, and his psychological composition can influence his emotional experiences. The emotional is however not the only factor which influences the psychology. Further, the combination downplays the importance of emotional abuse. Although the psychological and the emotional are connected and may influence each other, the two are separate entities with separate functions and trigger mechanisms.

Emotional abuse must be understood and identified separately as it has to be addressed and combated jointly and separately with the other forms of abuse. The Domestic Violence Act neglects to differentiate between psychological and emotional abuse. The two forms of abuse often occur together but the one may occur without the other.

During the research, the writer also found that some writers¹⁵⁰ are of the opinion that the human psyche consists of three different components.

¹⁵⁰ Snyman "Is there such a defence in Our Criminal Law as 'Emotional Stress'?" 1985 *SALJ* 248; Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters RP 69/1967; Hoctor "Tracing the origins of non pathological incapacity in South African criminal law" *Fundamina* 17 (2) 2011. 77; Chetty "Incapacity to determine criminal capacity: mad or bad?: a selected case study" *Acta Criminologica* :CRIMSA Conference: special edition 2008, 132 &136.

These components are the cogitative, the conative, and the affective. They are however not three distinguishable and separate components. These “components” each form part of the greater, and are interdependent. If either one of the components malfunction, or if a disorder or trauma is present in the component, the effects can spill over to the other components.

Each component of the brain and the psyche regulates a different yet specific function, and controls a different part of a person’s behaviour. Each of the functions will be discussed separately to give the reader enough information to understand the devastation and effects of emotional abuse.

b) The Cognitive function

The cognitive function is that function of the psyche which controls actions and consists of a person’s subjective knowledge or perceived knowledge.¹⁵¹ It can also be described as a person’s intellectual functions.¹⁵² When this component is unaffected, the person thinks and behaves normally. He is able to think rationally, can control his thoughts, and realises the effects which possible actions may have.¹⁵³ The person has the ability to decide whether to respond to stimuli, and has the ability to foresee the consequence of his reaction to the stimuli.

When this function is defective, the person cannot think rationally or clearly about the situation in which he finds himself. The person struggles to make rational choices, and is unable to realise the unlawfulness or the consequences of his actions. The person will be able to rely on pathological or non- pathological criminal incapacity if he committed a crime under these circumstances. The defendant must however lead expert evidence which establishes that he was, at the time of acting, unable to distinguish wrong from right, or to realise the unlawfulness of his actions. The function or ability is not directly influenced by emotional abuse and it also does not, in the writer’s opinion, form the main target of emotional abuse.

¹⁵¹ Snyman (2008) 188- 189; Snyman “The tension between legal theory and policy considerations in the general principles of criminal law” *Acta Juridica* 2003 [Part A: General Principles of Criminal Liability and Specific Offences] 14 -20.

¹⁵² Snyman 1985 *SALJ* 248- 249 ; Kaliski 40

¹⁵³ Le Roux “Strafregtelike aanspreeklikheid en die verweer van tydelike nie patologiese ontoerekeningsvatbaarheid- verlies van konatiewe geestes funksie onderskei van blote verlies van humeur” 2002 *JCRDL* 478, 480- 481.

c) The Conative

The conative controls bodily reactions to thought and perceptions of wrong and right.¹⁵⁴ This function controls the actions of the person in response to his thoughts. It forms the second leg of the criminal responsibility test as contained in s 78(1) (b) of the Criminal Procedure Act.

The conative is the ability to act in accordance with one's perception of wrong and right. The test can also be described as the physical component of the capacity test.¹⁵⁵ It entails the ability to control one's actions according to one's will. If a person is unable to direct his behaviour according to his perception of wrong and right, and this inability is due to a mental defect or illness, the person may be able to rely on s 78(1) (b) to escape criminal liability. The defendant must, however, prove that even though he realised the unlawfulness of his actions, he was unable to direct his actions accordingly. The defence must be approached with caution so as not to confuse this inability with automatism. *S v Eadie* is an example of where the court confused the principles and such confusion must be avoided at all cost.¹⁵⁶

The conative function can be influenced by various factors including the emotional composition of the person. However, the Criminal Procedure Act requires the inability to be brought on by a defect of a pathological nature. Therefore, the emotional abuse should be of such a nature that it establishes a pathological or physical defect in the victim before the defendant will be able to rely on the defence of criminal incapacity in accordance with S 78(1) (b) of the Criminal Procedure Act.

d) The affective or Emotive

This function controls a person's emotional responses to thoughts and external stimuli. The function deals with a person's emotions or feelings.¹⁵⁷ The component can be influenced by internal stimuli, such as a pathological defect or an external stimulus, such as provocation. One pathological defect which is known to influence

¹⁵⁴ Snyman 2003 *Acta Juridica* 14 -20. Snyman 1985 *SALJ* 248- 249; Kaliski 40

¹⁵⁵ Louw "S v Eadie: the end of the road for the defence of provocation?" 2003 *SACJ* 200, 204 206.

¹⁵⁶ *S v Eadie supra* note 7; Snyman 2003 *Acta Juridica* 14 -20. ; Burchell (2005) ; Louw "S v Eadie: Road rage, incapacity and legal confusion" 2001 *SACJ* 206- 208. Le Roux 2002 *JCRDL* 478- 481.

¹⁵⁷ Snyman 1985 *SALJ* 248- 249; Van Oosten "Non- pathological criminal incapacity versus pathological criminal incapacity" 1993(6) *SACJ* 127- 147,130; Kaliski 40

the emotional composition of the sufferer is Post Traumatic Stress Disorder (here - after PTSD).¹⁵⁸

This is a clear example of where a person suffers emotional disorders and changes due to a traumatic event which had previously occurred.¹⁵⁹ The development and effect of PTSD clearly indicates that there is room for development and acceptance of the affective function in criminal law.¹⁶⁰ An argument for recognition of the affective section, when considering criminal capacity, can be made with reasonable ease but the affective is not yet recognised by the Criminal Procedure Act. The Criminal Procedure Act specifically determines that the criminal capacity consists of the cogitative and the connotative while the affective remain unacknowledged¹⁶¹. The literature has, however, recognised the discrepancy in the law, and the Domestic Violence Act recognises the affective as an object of abuse.

Even though the Domestic Violence Act indicates that emotional abuse exists, it is not clear whether or not the court will prosecute emotional abusers as such a prosecution though possible, is unprecedented.¹⁶²

The available criminal case law on the specific topic is limited; therefore, the writer searched for comparable principles already contained in South African law. The writer found that the principles and definition of *crimen injuria* overlap with that of emotional abuse.¹⁶³ Therefore, the writer examined the law on *crimen injuria*. When the case law regarding *crimen injuria* is considered, it is clear that, just as with psychological abuse, emotional abuse can almost be equated to *crimen injuria* with the exception that *crimen injuria*, in the context of emotional abuse, is limited to domestic violence.

This comparison is indicative of the fact that the abuse will have to be, in accordance with the law on *crimen injuria*, of an extreme nature before it will constitute an

¹⁵⁸ Stevens 2011 *JCRDL* 432-448 and 585- 604.

¹⁵⁹ Carstens & Le Roux 2000 *SACJ* 185-187.

¹⁶⁰ In many cases the defendant displayed symptoms of PTSD see for example *S v Kok 2001 (2) SACR 106 (SCA)*. See also Herman 1992 *JTS* 377- 391; Brakel & Brooks (2001) 190-133.

¹⁶¹ Snyman 1985 *SALJ* 248- 249

¹⁶² The writer was unable to find case law dealing with emotional abuse as the primary form of abuse. The case law on the battered spouse does however include emotional abuse as a part of the larger occurrence of abuse.

¹⁶³ See the discussion on psychological abuse for the definition etc of *injuria*.

offence.¹⁶⁴ The writer comes to this conclusion by referencing the *crimen injuria* case law where the principle that “*in ordinary hurly-burly of everyday life, a man must be expected to endure minor and trivial insults to his dignity.*”¹⁶⁵ Further, the concept of the reasonableness must also be considered. A person can only be guilty of the offence of *crimen injuria* if the reasonable person in the situation would have felt defamed or injured. What constitutes a reasonable person is a factor which the courts should determine with reference to the circumstances of each case. The concept of a reasonable person is described in *S v Burger*¹⁶⁶ at 879 as “*one does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver.*”¹⁶⁷

The writer is of the opinion that even though the Domestic Violence Act provides for emotional abuse, the Act is an exception and that generally, emotional abuse isn't punishable by law. Further, it is also clear that the case law and legal writing only acknowledges the effect of the connotative and cognitive sections on the actions of a person.

Therefore, the writer is of the opinion that the Domestic Violence Act and its application lies outside the normal reach of South African legislation. Because of all these factors, the writer acknowledges that emotional abuse occurs, and that the abuse is usually combined with some other form of abuse. The writer is of the opinion that it is an extremely difficult task to prove emotional abuse, and that courts can only start to consider emotional abuse once courts and the legislature start acknowledging the third component of the human psyche.

The terminology emotional abuse and the definition provided for the abuse is misleading as the abusive behaviour does not need to be focused on the disintegration of the emotions of the victim.

The definition of emotional abuse refers to any conduct which is “*degrading or humiliating.*” This has the effect that physical acts or other physical conduct which amounts to degrading or humiliating behaviour which influence a person's emotional

¹⁶⁴ The reasonable person in the circumstances will have to objectively feel violated.

¹⁶⁵ *S v Walton 1958(3) SA 693 (R).*

¹⁶⁶ *S v Burger 1968 (4) SA 877(A) 879.*

¹⁶⁷ *S v Burger supra note 166*

state may be held as emotional abuse.¹⁶⁸ For example; every time a women is sexually abused, she is also being abused emotionally as the event influences' her emotions. The intent of the conduct is to degrade and exercise power over the victim. The abusive behaviour is of a "*degrading and humiliating nature*"¹⁶⁹ and the abuse usually has a set pattern which can form a cycle. The cycle often contains periods where there is no abuse. It then changes to periods where there is severe abuse before the cycle enters a reconciliation stage.¹⁷⁰ In the reconciliation state, the abuser attempts to reconcile the relationship and apologises for his behaviour. The cycle which occurs fulfils the definition of emotional abuse requiring degrading and humiliating behaviour.¹⁷¹

Therefore, it is the writer's submission that the physical and other forms of abuse indirectly amounts to emotional abuse. When emotional abuse is examined in context, it is clear that emotional abuse occurs during and after physical abuse, and that emotional abuse cannot be separated from psychological abuse.

However, it remains unclear whether or not emotional abuse is recognised and punishable by law.¹⁷²

3.5 Economic abuse

a) General discussion

Economic abuse is another form of abuse which the Domestic Violence Act recognises and defines in Section 1 of the Domestic Violence Act.

The battered spouse is often a victim of economic abuse. However, the occurrence of economic abuse is not limited to the battered spouse. Any person who is in a domestic relationship can be subjected to economic abuse.

Before the application and manifestation of economic abuse can be determined, one must first determine what economic abuse is and what it entails. To start the

¹⁶⁸ See Section 1 Act 116 of 1998 which defines emotional abuse.

¹⁶⁹ S 1 Act 116 of 1998.

¹⁷⁰ Walker (1980)

¹⁷¹ S 1 Act 116 of 1998 defines emotional and psychological abuse.

¹⁷² The writer cannot find any case law which primarily surrounds emotional abuse.

determination, the writer looks at the definition contained in the Domestic Violence Act.

According to the Domestic Violence Act economic abuse “includes;

a) The unreasonable deprivation of economic of financial resources to which a complainant is entitled under law, or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence.

b) the unreasonable disposal of household effects or other property in which the complainant has an interest¹⁷³.

The definition, in the writer’s opinion, makes it clear that there is a wide range of behaviour which can be classified as economic abuse. Therefore, the legislature added the requirements of reasonableness and lawful entitlement. Actions and behaviour which may seem unfair does not necessarily amount to abuse if such action is reasonable in the circumstances.

What is deemed reasonable will have to be determined according to the reasonable person principle and will be determined with regard to the facts of each case. The principle provides grounds for both victim and accused to act upon as both parties may deem their actions reasonable. This difficulty may keep the victim from reporting the abuse.

Economic abuse is apparent in all of the cases the writer examined in relation to the battered spouse.¹⁷⁴ It is clear that the victim has been subjected to economic abuse as the abuser usually isolates the victim from society, and not only determines who she befriends but also what work she does if he allows her to work at all.¹⁷⁵ The abuser will often check up on the victim at her work, and his behaviour may even result in her losing her job. Such behaviour will amount to economic abuse.¹⁷⁶ The writer is of the opinion that this form of abuse often occurs, but remains unreported

¹⁷³ S 1 Act 116 of 1998.

¹⁷⁴ See note 3. Makofane 2002 *Acta Criminologica* vol 15(1) 84-92.

¹⁷⁵ See the facts of *S v Engelbrecht supra* note 31; *S v Ferreira supra* note 62; *S v Wiid supra* note 7; ,where it is recognised that the husband often checked in at his wife’s work and the husbands action sometimes leads to the women losing their jobs.

¹⁷⁶ As defined in S 1 Act 116 Of 1998.

as it is difficult to prove. The victim of the abuse is usually financially drained to such an extent that the victim is dependent on the abuser, and realises that she cannot sustain herself and her children, if there are any, without the support of the abuser.¹⁷⁷ This form of abuse, combined with psychological and emotional abuse, traps the victim in the abusive relationship. The victim may realise that she is in an abusive relationship but due to the effect of the abuse, the victim believes that she cannot escape the omnipresent and omnipotent abuser.¹⁷⁸

Since this chapter deals with domestic violence, the writer examined cases not dealing with the battered spouse but with domestic violence *per se*, however, what the writer found is that the cases dealing with domestic violence mostly focus on the physical and sexual abuse of the victims.

The economic abuse which the victims suffer, as with emotional abuse, is dealt with on the sideline and as part of the larger picture of the abuse and the surrounding circumstances.

Even though the legislation deals directly with the economic abuse, and recognises the abuse as a valid form of abuse, the case law appears to be lacking on the topic. This is disappointing as there clearly is room to develop this form of abuse in the South-African legal system.

Further, the term economic abuse should not be used as an indication that only certain groups of people suffer this form of abuse since all people can be subjected to abuse. The only requirement is that the financial support must be unreasonably and unlawfully withheld from the victim.¹⁷⁹ Whether this is a high-class person whose spouse controls everything the victim does, or whether it is a poor family where one spouse deprives the other of their rightful income is irrelevant. The form of abuse occurs irrespective of race and social standing.¹⁸⁰ The form of abuse is also almost always present in varying degrees.

¹⁷⁷See note 3 for cases; Kaliski 149

¹⁷⁸ Herman 1992 *JTS* 377- 391; see also Herman in Ludsin & Vetten (2005) 73.

¹⁷⁹ S 1 Act 116 of 1998.

¹⁸⁰ See note 3 for the most relevant cases. See also *S v Bergh supra note 69*; *S v Baloyi supra note 60*; *S v Roberts supra note 67*: Kaliski 146

4. Conclusion

The chapter acknowledges and discusses the different forms of domestic violence. The forms of abuse and the case law show that domestic violence is truly problematic in South Africa.¹⁸¹

The discussion is indicative of the fact that each manifestation of domestic violence can occur on its own, or in conjunction with another manifestation of domestic violence. Domestic violence has a cluster nature as it mostly occurs in combination with other forms of abuse.

Further, the discussion showed that most forms of domestic abuse could also be classified as other forms of abuse or offences in accordance with other legislation for example; certain behaviour can be defined as a sexual offence while it is also a form of domestic violence.¹⁸²

The discussion further showed domestic violence to be a common occurrence and that although there are some prosecutions for domestic violence, the law and prosecutions are largely lacking. This is because certain forms of abuse are prosecuted while other forms of abuse aren't since it is often too difficult to prove. The case law and the material law indicates that a discrepancy exist between the legislation and the enforcement.¹⁸³

This study of domestic violence is important for the dissertation as it lays the foundation, and outlines the problem of domestic violence and abuse which the battered spouse face on a daily basis. The chapter is further indicative of the reasons why the women stay and often take the law into their own hands. This chapter is to be regarded as a foundation for the study and this chapter will be referred to where necessary.

¹⁸¹ There are many cases on the subject, legislation and judicial guidelines has been produced. See also *supra* note 97; Kaliski 146 - 147

¹⁸² See the definition of domestic abuse in Act 116 of 1998.

¹⁸³ See *supra* note 3.

Chapter 3: the Constitutional Position

1. Introduction

This chapter contains an examination of the South African Constitutional law with specific focus on the Criminal Law defences available to victims, the rights of victims, and the rights of the accused. This study is undertaken to determine whether or not the Constitution¹⁸⁴ allows for an extension of the Criminal Law defences. In this chapter, the writer will discuss the Constitution as a fundamental piece of legislation granting and ensuring victim rights but also as a guideline for conduct generally.

The relevant case law will be discussed in conjunction with the relevant sections from the Constitution. The chapter will establish the victim's and the abuser's constitutional rights, privileges and duties

2. The Constitution

The Constitution is the “*supreme law of the Republic*” of South Africa.¹⁸⁵ It is the foundation on which all law is built. The Constitution provides the minimum standard of protection which a person may rely on. Further; Section 8 of the Constitution binds all persons, natural or juristic, and authorities who functions or reside in South Africa.¹⁸⁶

The Constitution thus has a horizontal and vertical application. This dual application of the Constitution consequently ensures that all conduct and Procedure are measurable against the Constitution, and that any conduct or procedure not in line with the Constitution can be declared unconstitutional and invalid by a competent court.¹⁸⁷

¹⁸⁴ The Constitution of the Republic of South Africa, 1996. (Hereafter the Constitution).

¹⁸⁵ S 2 of the Constitution.

¹⁸⁶ S 8 (1) and 8 (2) of the Constitution determines the application of the Constitution.

¹⁸⁷ S 2 of the Constitution read with S 172: *powers of the court in constitutional matters. The High Court can declare actions/ conduct constitutionally invalid and make any order that is just and equitable including (i) an order limiting the retrospective effect of the declaration of invalidity and (ii) and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

If a competent court declares the provision or conduct invalid, the court may make an order wherein it suspends the invalidity of the provision for a period, and on certain conditions allow the legislature or competent authority time to correct the infringement.¹⁸⁸ The infringing party will then need to alter their conduct, bringing it in line with the Constitution.

The Constitution contains all the rights and duties required to govern and sustain a just and fair society in accordance with the spirit, objects and purport of the Constitution.¹⁸⁹ Further; section 39(1) (a) of the Constitution requires the Court, when interpreting the Bill of rights to promote the values of the Constitution.¹⁹⁰ The writer will now examine the most prominent rights in the Constitution as they apply to victim and offender.

3. Victim rights

The Constitution, more specifically chapter two, the Bill of Rights, provides all persons in the Republic with a minimum standard of rights. This Bill of Rights contains the “*cornerstone of democracy*”¹⁹¹ and the rights include the right to: equality¹⁹², human dignity¹⁹³, life¹⁹⁴, freedom and security of the person¹⁹⁵, privacy¹⁹⁶, and environment.¹⁹⁷ The Bill of Rights is not limited to these rights. The writer will now discuss the most important and prominent of these rights in the context of victim rights.

¹⁸⁸ S 172(1) - 172(2) (d) of the Constitution.

¹⁸⁹ S 39 (2) of the Constitution.

¹⁹⁰ S 39 (1) *when interpreting the Bill of Rights, a Court, tribunal or forum must (a) Promote the values that underlie an open and democratic society based on human dignity, equality and freedom.*

¹⁹¹ S 7 (1) of the Constitution.

¹⁹² S 9 of the Constitution.

¹⁹³ S 10 the Constitution.

¹⁹⁴ S 11 the Constitution.

¹⁹⁵ S 12 the Constitution.

¹⁹⁶ S 14 the Constitution.

¹⁹⁷ S 24 the Constitution.

3.1 Equality

The first right under discussion is that to equality as contained in Section 9 of the Constitution. Section 9(1) is of utmost importance since the section determines that “everyone is equal before the law and deserves equal protection and benefit of the law”¹⁹⁸. The right to equality has been discussed in various court judgments¹⁹⁹ and has in the course of time been clarified and interpreted. Therefore, the writer does not deem it necessary to enter into a protracted discussion on the wording or its interpretation. Section 9(2)²⁰⁰ determines that “equality includes the full and equal enjoyment of all rights and freedoms.” When sections 9(1) and 9(2) are read in tandem, it is abundantly clear that all people are equal before the law and therefore the victim (defendant) and the abuser (deceased) must be granted the same rights.

The fact that the victim had killed the abuser does not grant the abuser additional, or stronger constitutional rights.

The contrary is true since South African law gives preference to the right of the defender and holds that the attacker’s rights must head those of the defender.²⁰¹ During a criminal trial the defendant’s constitutional rights must be upheld, and may become even more important. The Court in *S v Makwanyane* confirmed this principle by holding that even though a person is detained or guilty of a heinous crime the court must be cautious when limiting a person’s constitutional rights.²⁰²

The defendant also gains the protection offered by section 35 of the Constitution.²⁰³ The rights of the victim (the defendant), the deceased, and the complainant should be on equal footing.

The Constitutional Court in *Carmichele v Minister of Safety and Security and another*²⁰⁴ found that the state has an obligation to protect the rights of the

¹⁹⁸ S 9(1) of the Constitution.

¹⁹⁹ *Carmichele v Minister of Safety and Security and another (Centre for applied legal studies intervening) 2002 (1) SACR 79 (CC); National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others supra* note 115

²⁰⁰ the Constitution.

²⁰¹ *S v Goliath 1972(3)SA 1 (A)*.

²⁰² *S v Makwanayane & another 1995 6 BCLR 665 (CC)*.

²⁰³ Arrested, detained and accused persons.

²⁰⁴ *Carmichele v Minister of Safety and Security and another supra* note 199

complainant and victims of violent crime since all persons are equal, and deserve equal protection before the law.

Section 9, as the rest of the Constitution is, however, not limited to the rights of abuser and victim. The nature of the right is such that it applies to every person and all government institutions in South Africa. Therefore, all victims who kill their abusers should receive equal treatment before the law. This is currently not the case where some victims appear before sympathetic judges, resulting in lenient sentences being handed down as in the case of *S v Ferreira*,²⁰⁵ while other victims, before less sympathetic judges, receive harsher sentences.²⁰⁶ The sentences handed down by the courts have a wide spectrum ranging from acquittals,²⁰⁷ to convictions with light sentences²⁰⁸ and the imposition of penal sentences against which the defendant must then appeal.²⁰⁹

In short, this right obliges the state and private individuals to comply with national legislation in a manner which does not arbitrarily and unfairly discriminate between persons on any of the listed grounds, or any other grounds which cannot be justified in terms of section 36²¹⁰ of the Constitution. Further, it also has a result that sentences in similar situations should not be extreme or differ greatly. The rights of the victim may not be made subordinate to the right of any third party, including the state.

The right to equality is closely linked to that of human dignity since a person cannot be treated with dignity if differentiation is made between him and another on any of the grounds listed in Section 9 (3).²¹¹ This principle was also confirmed in the case of *S v K*²¹² where the court held the crime of sodomy unconstitutional as it discriminates on ground of sexual orientation which is one of the listed grounds in S

²⁰⁵ *S v Ferreira supra note 62*

²⁰⁶ Ludsin “*Ferreira v the State: a victory for women who kill their abusers in non-confrontational situations*” 2004 SAJHR 642.

²⁰⁷ *S v Steyn supra note 1.*

²⁰⁸ *S v Ferreira supra note 62*

²⁰⁹ Ludsin 2004 SAJHR 642.

²¹⁰ The limitation of rights. This section limits the application of the rights contained in the Bill of Rights.

²¹¹ Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

²¹² *S v K [1997] 4 All SA 129 (C).*

9(3) of the constitution. Therefore, the writer will now discuss the right to human dignity.

3.2 Human dignity

The victim has the right to human dignity, life, and security of the person. Human dignity²¹³ is central to the Constitution²¹⁴ and entails that everyone has the right to have his or her dignity respected, protected, and advanced.

The protection of the right to dignity requires the law to acknowledge the value and worth of all individuals.²¹⁵ The right is of such importance that the court in *S v Makwanayane & another*²¹⁶ included a discussion on Human dignity in the decision regarding the death penalty and the value of human life as “*without dignity, human life is substantially diminished*”²¹⁷. The *Makwanyane* court also included the right not to be subjected to “cruel and inhumane punishment or treatment” in the right to human dignity. Thus, no person may be subjected to treatment which can be deemed cruel and inhuman as such treatment would infringe on the right to dignity as contained in the Constitution.

Degrading treatment can have the effect of reducing a person’s citizenship to a “*second rate citizenship*”²¹⁸ thereby detracting from self-worth, the public’s regard of said victim, and infringing the rights to citizenship²¹⁹ and human dignity.²²⁰

²¹³ S 10 of the Constitution.

²¹⁴ *S v Walters* 1995(3) SA 391 (CC).

²¹⁵ *S v Makwanayane supra* note 202 where the life of a convicted murder was spared due to the acknowledgement of the right to Human Dignity; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others supra* note 115, 558- 560; Barrett “Dignatio and the human body” 2005 SAJHR 525.

²¹⁶ *S v Makwanayane supra* note 202

²¹⁷ *S v Makwanayane supra* note 202 per O’Regan J.

²¹⁸ Du Toit ‘A phenomenology of rape: forging a new vocabulary for action’ in Gouws ‘*unthinking citizenship* 253-274; Barrett 2005 SAJHR 527.

²¹⁹ S 20 of the Constitution.

²²⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 558-560 *supra* note 115

Due to the nature of the domestic relationship and the conduct of the abuser, the right to human dignity is often infringed. Domestic violence not only infringes on the right to dignity but also simultaneously violates numerous fundamental rights.²²¹

These infringements are usually difficult to prove as the victim considers the abuser's behaviour as natural or the infringements take place in the privacy of her own home with little evidence other than her word²²². The abuser's physical assaults, rape, and verbal attacks may amount to criminal acts but due to the nature of the crimes and the effects which the crimes have on the victim, all of said crimes will violate the victim's right to dignity. According to Singh,²²³ domestic abuse goes beyond merely violating the right to dignity. The domestic abuse and intimate partner violence strips "*the recipient of the most fundamental rights to equal treatment, dignity, and respect*"²²⁴. The abuse may therefore constitute both a criminal and a Constitutional infringement.

Generally, criminal law punishes the infringement of dignity as the crime of *crimen injuria*. If however, the infringement is of such a nature that it exceeds the bounds of *crimen injuria*, the victim may have a civil claim for the infringement of her constitutional rights.

Further, the investigation and court procedures are intent on finding the legal truth, and not the protection of dignity and human rights. To reiterate the point, the writer examined the *Carmichele's*²²⁵ case, and newspaper articles and publicity surrounding the case. The victim here clearly illustrates the point when she states to a journalist that she would rather "*be raped/assaulted on the day the initial rape took place every year for the rest of her live than face the court procedure again*" (*my translation*).²²⁶

²²¹ Kruger "Addressing Domestic Violence: to what extent does the law provide effective measures?" *Journal of Juridical Science* (2004) 29(1), 152- 173.

²²² In for example *S v Engelbrecht supra* note 31; *S v Potgieter supra* note 99; *S v Steyn supra* note 1.; and *S v Eadie supra* note 7 the court warns that the *ipse dixit* of the defendant is insufficient and the court must consider the circumstances of each case.

²²³ Singh "The fundamental rights to equality, religion and custom- disaggregating the contest, in context of domestic violence" 2002 *Journal for Juridical Science* 27(2), 159 -169.

²²⁴ Singh 2002 *Journal for Juridical Science* 27(2), 159 -169.

²²⁵ *Carmichele v Minister of Safety and Security and another supra* note 199

²²⁶ RAPPORT, 7 OCTOBER 2007 reported and quoted Alix Carmichele: "*Ek sal eerder elke jaar op dieselfde dag weer deur Coetzee aangerand word as om die lang hofstryd weer deur te maak.*"

These feelings of hopelessness are shared by many victims since they cannot go through the criminal trial without suffering some form of discomfort or humiliation. Even though victims have the right to dignity and this right is constitutionally supported, infringements often take place. The courts and legislature need to address this problem.

The purpose of the chapter is not to solve Constitutional matters but to determine the reach of the constitutional rights. The writer will therefore not delve into a discussion on solutions. The writer will now proceed to define the next constitutional right of the victim which can be closely linked to that of human dignity.

3.3 Life

The exact definition of life can differ from person to person. The criteria of what constitutes life can have multiple answers ranging from breathing as the sole prerequisite, to the requirement that life must be substantive and of a measurable quality.

Therefore, when a court is considering the right to life, the court must consider arguments and opinions regarding the quality of life.

Can it truly be life if the quality of that life is of a horrendous and threatening nature? To answer the question the writer examines constitutional case law. In the case of *S v Makwanyane*,²²⁷ the court had to decide on the constitutionality of the death penalty.

After hearing various arguments, the court took a number of factors into consideration. In the final judgment, the Court discusses the death penalty and the sanctity of life. The *Makwanyane* court goes on to expand the right to life beyond mere existence.²²⁸

According to *S v Makwanyane*,²²⁹ the right to life as contained in the Constitution is considered the most important right of a person and that life is more than mere existence.

²²⁷ *S v Makwanyane*. *supra* note 202

²²⁸ Bruce "Killing and the Constitution- arrest and the use of lethal force" 2003 *SAJHR* 430.

²²⁹ *Carmichele v Minister of Safety and Security and Another* *supra* note 199.

The court per O'Regan at 506 para 326 held that:

“Without life, in the sense of existence, it would not be possible to exercise rights or be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to life as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values... the right to live incorporates the right to dignity... the right to life is more than existence - it is a right to be treated as a human being with dignity.”²³⁰

This interpretation of the right to life²³¹ presents the victim with difficulty as she not only has the right to life but also has the obligation to respect the life of another since *“a Culture of respect for human life and dignity, based on the values reflected in the constitution, has to be engendered”²³²*

Considering the *Makwanyane* decision, the right to life can be infringed in a number of ways. Firstly, the right to life is infringed by the abuser through the physical killing of the victim.

Secondly, the right can be infringed by an abuser assaulting or raping the victim.²³³ Thirdly, the abuser can infringe the right to life by exhibiting abusive behaviour or through exercising extreme control over the victim to the extent that the victim loses the freedom of choice and bodily movement to such a degree that there cannot be life in the manner as indicated in *Makwanyane*. An abuser exhibiting control over the victim such that the victim's life is reduced to mere existence is infringing on her right

²³⁰ *S v Makwanayane supra* note 202.

²³¹ Sec 11 of the Constitution.

²³² See the judgment of Justice Langa in *S v Makwanayane supra* note 202 at 665; Burchell *“unravelling compulsion draws provocation and intoxication into focus”* 2001 SACJ 363- 364.

²³³ As in *Carmichele v Minister of Safety and Security and another supra* note 199; See also *Chapman v S [1997] 3 All SA 277 (A)* where the court held that the crime of rape infringes the fundamental rights of the victim and that women deserve protection of these rights.

to life.²³⁴ Where her existence is made secondary to that of the abuser,²³⁵ such an infringement cannot be justified since it does not comply with the requirements of the limitation clause.²³⁶

The court in *S v Walters*²³⁷ held that infringements on the right to life and dignity would rarely be justifiable under section 36²³⁸ as “the *right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory.*”

As the right to life extends beyond mere existence, a person who is manipulated to act in a manner which detracts from her dignity or humanity cannot be said to have life in the manner described by the Court in *Makwanyane*. The abuser will be infringing on her right to life in accordance with the judgement given by the court in *Makwanyane*. The life must be one, in line with humanity and dignity,²³⁹ in other words, she must be able to live freely and in the manner of her choosing. Therefore, where a person is denied the right to life in accordance with her own decisions, her right to life is infringed.

Further, the writer acknowledges that the right is subject to the limitation clause as contained in section 36 of the Constitution. The limitation clause has a very specific and limited application and the requirement set by the section is such that the rights in the Bill of Rights cannot easily be limited. The court in *Makwanyane* confirmed the principle by stating that life is so important that it would be difficult to find a justifiable limitation. The court was reluctant to limit the right to life of a convicted prisoner, and therefore the writer is of the opinion that the abuser who infringes on the rights of the victim cannot argue that the infringement is justifiable.²⁴⁰ The court must lead the

²³⁴ This is in accordance with the judgement of O'Regan in *S v Makwanayane supra* note 202: where she holds that the right to life is mere than existence and that a person must be able to effect control over her own life.

²³⁵ Du Toit '253-274 *supra* note 117

²³⁶ Sec 36 of the Constitution of the Republic of South Africa, 1996.

²³⁷ *S v Walters supra* note 214.

²³⁸ The Constitution. Sangero, “*Self-defence in Criminal Law*” (2006) 40-44.

²³⁹ Sec 10 of the Constitution of the Republic of South Africa.

²⁴⁰ See the facts and judgement of *S v Makwanyane supra* note 202

way when protecting the sanctity of life and expects the public and other state organs to do the same.²⁴¹

Another aspect deserving mention is the criminal investigation process and the court process. The investigation and the court processes are not skewed on dignity or the right of life, but are intent to find, detain, and punish criminals.

Therefore, the process can often be robust resulting in the rights of victims and accused sometimes being infringed. A conviction can also have an effect on the victim's right to life but most often, the abuser is the one who infringes the victim's right to life. Closely linked to the right to life is the right to freedom and security which the writer will now discuss.

3.4 Freedom and Security

The right to freedom and security of the person is contained in section 12 of the Constitution and entails that:

“Everyone has the right to freedom and security of the person which includes the right-

- a) not to be deprived of freedom arbitrarily or without just cause.*
- b) ...*
- c) To be free from all forms of violence from either public or private sources.*
- d) Not to be tortured in any way, and*
- e) Not to be treated or punished in a cruel, inhumane or degrading way.²⁴²*

Section 12 goes further and in Section (2) the right is extended to include *“the right to bodily and psychological integrity which include the right to security and control over their body.”*

This section embodies the principle of automatism determines that a person has the final right over his body.²⁴³ The person must be allowed to decide what that person

²⁴¹ See the judgment of Langa J in *S v Makwanyane supra* note 202.

²⁴² Sec 12(1) - 12(1)(e) of the Constitution.

²⁴³ Bruce 2003 SAJHR 430.

wants to do with his body and he must be given the opportunity to act within the ambit of that decision.

This principle has been confirmed in many civil cases against, for example, doctors who perform unwanted medical procedures. The court in *S v Walters*²⁴⁴ held the right to physical integrity in high regard and deemed that the “*Constitution demands respect for life, dignity and physical integrity of every individual.*”

When this section of the Constitution is examined with reference to the most prominent case law regarding battered women,²⁴⁵ it becomes evident that this right is often infringed by abusers who not only physically assault, but also exhibit control over their victims’ movements and conduct, creating the belief that the abuser is omnipresent and omnipotent. This is done so that the abuser becomes the most important and powerful person in the lives of their victims.²⁴⁶

The right to psychological integrity as entrenched in section 12 can also be violated through threats and psychological or emotional abuse. This form of deprivation of bodily freedom and integrity is closely linked to the right of life and dignity. These rights are all co-dependent on each other, form a unit and are “*collectively foundational to the value system prescribed by the constitution.*”²⁴⁷

The right to freedom and security of the person can again be examined with reference to the *Makwanyane* decision. The court held that before a person’s life can be taken, it must be acknowledged that to infringe on a person’s bodily freedom and integrity amounts to a serious infringement. The court further held that the basic rights cannot be separated from each other.

Further, the intentional and unlawful removal of a person’s bodily freedom and security can amount to a criminal offence.

This right is of such importance that South African law acknowledges that the person should have full and final control over their bodily functions so much so, that patients

²⁴⁴ *S v Walters supra* note 214.

²⁴⁵ This list is not all inclusive *S v Engelbrecht supra* note 31; *S v Ferreira supra* note 62; *S v Wiid supra* note 7

²⁴⁶ Herman (1992) *JTS* 377- 391.

²⁴⁷ *S v Walters supra* note 214; See also Carstens & Pearman “*Foundational Principles of South African Medical Law*” (2007) 248.

have been able to claim damages caused by doctors who performed un-requested medical procedures.

Further, this right is also confirmed by the crime of abduction which criminalises the deprivation of a person's bodily freedom and security without the person's consent. The constitutional court has not yet had to deal with the constitutionality of the offence.

The right to bodily freedom and integrity, as all other rights, can only be limited in accordance with section 36 of the Constitution. Closely linked to this right is that to privacy. The writer will next discuss the right to privacy and the law relating to it.

3.5 Privacy

The right to privacy as contained in the Constitution consists of various aspects including the right to "*a sphere of private intimacy and autonomy which allowed us to establish and nurture human relationships without interference from the outside community.*"²⁴⁸ The right to privacy in the Constitution as contained in Section 14 is held in high regards by the legislature and courts.

The Constitution defines privacy in section 14 and the right to privacy includes:

the right not to have

- a) their person or home searched,*
- b) their property searched,*
- c) their possession seized,*
- d) the privacy of their communications infringed.*²⁴⁹

The right to privacy is of utmost importance and is connected to the right to life and dignity since infringement of privacy can lead to the devaluation of a person's dignity. This can also affect a person's quality of life.

²⁴⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 558 *supra* note 115.

²⁴⁹ Sec 14 of the Constitution.

The Court in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*²⁵⁰ held that the right to dignity is a fundamental right. As the Constitution has horizontal and vertical application,²⁵¹ the right to privacy can be infringed by private and juristic persons. When examining this definition, it is clear that infringement of the right can take various forms and the infringement may be publicly visible. However, public visibility is not a requirement.

The abuser can infringe the right of the victim in various ways. Often, the abuser exercises such control over the victim that the victim's right to privacy is infringed where the abuser attempts to control all of the victim's communications, actions, access to friends and movements. The abuser infringes on the victim's privacy with the intention to isolate and humiliate.²⁵²

The victim's attempt to guard this right may be justified as South African law allows a person to defend their rights if there is no other form of protection available, or if the protection which is available is not easily accessible. Further, if the protection will only become available after the infringement has occurred, the victim may defend her rights either in private defence or out of necessity.

South African criminal law recognises the value and importance of the right to dignity since it contains the crime of *crimen injuria* - the unlawful and intentional infliction of harm on a person's dignity and privacy.

This crime arises when one person's dignity is infringed and diminished by the actions of another. The crime affects the person's rights under section 10²⁵³ and 14²⁵⁴ of the Constitution. This right is of such importance that the victim does not need to be aware of the fact that the accused is infringing on her privacy²⁵⁵. The recognition of the right in criminal law confirms the constitutional importance of the right of dignity.

²⁵⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others supra note 115, 559- 560*: the court found that the crime of sodomy infringes the right to privacy as it refuses gay men the right to express their sexuality without exposing themselves to prosecution.

²⁵¹ *Horizontality and uBuntu; Baloro and others v University of Bophuthatswana and Others 1995 (8) BCLR 1018 (B)*.

²⁵² For example see *S v Visser supra note 76; S v Engelbrecht supra note 31*

²⁵³ Dignity.

²⁵⁴ Privacy.

²⁵⁵ *Rex v Holliday 1927 CPD 395*.

3.6 Environment

The right to environment, as contained in section 24 of the Constitution, is one which does not often come to the fore in abuse, domestic violence or battered spouse cases. The writer is of the opinion that this is a *lacuna* as the right creates valuable grounds on which to proceed and the right can contribute greatly to the position of the victim.

The Constitution defines the right to environment as follows:

“Everyone has the right:

*a) to an environment that is not harmful to their health or well-being,”*²⁵⁶

This could imply that a person’s surroundings must be of such condition that it advances rather than detracts from their lives. The court must promote a safe and healthy environment, which is not harmful to the individual or to society as a whole.²⁵⁷ After substantial research, the writer formed the opinion that the victims in several of the cases where exposed to an environment, hazardous to their physical and psychological health since it was their environment which exposed them to the abuser. In their attempts to get away from the abuser, the victims could further be exposed to other sources of harm.

The abuser creates an environment, usually one of fear, and this can be seen as an infringement of the victim’s constitutional right to an environment which isn’t harmful to her health or well-being.

The constant exposure to such an environment makes the victim complacent to the extent that she accepts the environment as normal. The environment of fear can also help to induce psychological change in the victim.²⁵⁸

If the facts of the cases are considered, and the psychology of the victim is taken into account, then it is clear that the victim’s right to an environment which is not harmful to her health is infringed.

²⁵⁶ S 24(a) of the Constitution.

²⁵⁷ *Port Elizabeth Municipality v Various Occupier 2004 (12) BCLR 1268 (CC)* confirmed this duty on the court and municipality.

²⁵⁸ Herman (1992) *JTS* (5) 377- 391.

4. The limitation clause

Due to the nature of society, it may at times be necessary to limit the rights of certain people. Therefore, Section 36 of the Constitution forms the limitation clause and provides that a right contained in the Bill of Rights may only be limited by:

“a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

- a) the nature of the right;*
- b) the importance of the purpose of the limitation;*
- c) the nature and extent of the limitation;*
- d) the relation between the limitation and its purpose and*
- e) less restrictive means to achieve the purpose.²⁵⁹*

The writer examined this section and acknowledges that it may limit the rights of persons, but only if such a limitation would not be unreasonable and unjust.²⁶⁰ However, it is also apparent that it will be difficult to limit, for example, the right to life.²⁶¹ The writer is of the opinion that if all the rights are examined as one unit, it is clear that the rights of the victim may be limited. However, the rights of the abuser may never supersede the rights of the victim and *vica versa*. A careful balancing act has to be administered with due diligence and full awareness of the rights and the consequences of the said rights.

Further, this section makes it clear that the rights contained in the Bill of Rights may only be limited by a law of general application, therefore; a private person may never limit the rights of another. Before rights in the Bill of Rights can be limited, the person requesting the limitation must prove compliance with the factors as set out in section 36.

²⁵⁹ S 36(1) (a)- (e) of the Constitution.(here after the limitation clause).

²⁶⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others supra* note 115 ; See also *S v Walters supra* note 214 & 294 where the court held that the rights of the guilty yields to the rights of the innocent.

²⁶¹ *S v Makwanayane supra* note 202.

The person requesting the limitation must also prove that such a limitation is fair and just in a society based on equality, dignity and democracy. Therefore, the Constitutional court will be hesitant to limit rights since one person will never be able to show that his right to dignity, privacy or equality etc supersedes that of another person.²⁶² Thus, the person requiring the limitation cannot, out of his own, attempt to limit the rights of another person.

The writer acknowledges that some rights may be limited but a society based on equality and dignity which strives to uphold the spirit and purport of the Constitution cannot limit fundamental rights such as life, equality, and dignity.

5. Enforcement of rights

Given that rights would be useless without a method by which it can be enforced, the Constitution also provides such mechanism. The enforcement of rights is contained in Section 38 of the Constitution and provides that anyone listed in the section may approach a competent court alleging that a constitutional right has been infringed or is being threatened.

These persons can be summarised as (a) persons acting in their own behalf, (b) a person who acts on behalf of someone who is incapable of acting for himself. (c) A person acting as a member of a group. (d) A person who acts in public interest, and lastly (e) an association can act on behalf of its members. In cases of domestic violence and spousal or intimate partner abuse, it will usually be the person acting on his own behalf but other possibilities do exist.

6. Rights of the abuser

The writer examined the rights of the victim in detail and established the most relevant rights of the victim. The principle of equality in South African law, as contained in Section 9 of the Constitution, has as a consequence that the rights on

²⁶² *S v Makwanayane supra* note 202: Where the court found that even though the defendant disregarded the sanctity of another person's life and infringed his constitutional rights the defendant remains a person and thus his rights must be protected.

which the victim can rely is *meru motu* the same for the abuser therefore the writer will not repeat the discussion.

The abuser has the exact same rights as the victim and as with the victim, the rights may only be limited in accordance with section 36 of the Constitution. According to the *Makwanyane* decision, when the courts deal with the rights of the abuser they have to weigh up his rights with that of the victim. This amounts to the weighing up of the innocent parties rights against that of the guilty party and in this process the rights of the innocent must outweigh the rights of the guilty, the abuser. The *Makwanyane* court expressed this principle in the following terms; “*the approach taken in law is to balance the rights of the aggressor against the rights of the victim, and favouring the life or lives of the guilty*”²⁶³ The court in *S v Walters*²⁶⁴ court confirmed the decision.

7. Constitutionalality of the criminal law defences

The Constitutional rights of all parties has now been defined and clarified. The writer can now determine the scope of the protection on which the parties can rely. Therefore, the writer is now in a position to discuss the constitutionality of the defences available to the victim.

This chapter will deal only with the constitutional aspects regarding the different defences. It will not contain a discussion on the elements of the defences with the exception in instances where certain elements of the defence have been constitutionally questioned.

7.1 Private defence

The *Makwanyane* court in its discussion on the sanctity of life and the limitation on the right to life dedicates a part of the discussion around private defence. The case acknowledges that a person may under set circumstances; protect his legal interest by using lethal force and acting in private defence.

²⁶³ *S v Makwanayane supra* note 202.

²⁶⁴ *S v Walters supra* note 214.

The *Makwanyane* court confirms the right to private defence and holds that the rights of the guilty must yield to the rights of the innocent.²⁶⁵ Before a person can act in private defence, they have to comply with the set requirements. If the set requirements were complied with the conduct would be lawful and constitutional. Private defence is a justifiable limitation on the rights of the aggressor.

Another constitutional case which deals with the constitutionality of private defence is *S v Walters*.²⁶⁶ This case dealt specifically with killings by police officials under the ambit of sec 49 of the Criminal Procedure Act.²⁶⁷ The court did discuss private defence since it is an integral part of the requirements of s 49. The court found that a police officer could act in private defence to protect his own life or the life of other innocent parties. The court further also found that a person could act in private defence to protect his or her own life.

The decision confirms the common law principle of private defence and the requirements of private defence. The court acknowledges that the action must be reasonable in the circumstances. However, it warns that an armchair approach cannot be adopted since it is important to judge the actions in the light of the knowledge a party had at the time of acting, and not judge the conduct according to some future knowledge the party can obtain after the incident.

While the court in the *Walters*²⁶⁸ case is not convinced that a person can kill another in private defence to protect her property, the *Makwanyane* case did not doubt that a person can kill in private defence in order to protect his property.

Constitutional cases on the topic confirm the defence and its requirements. As further corroboration of the legality of private defence, the writer examined certain civil and criminal judgements.

In criminal judgements the court upheld the defence when it complied with all the relevant requirements.²⁶⁹ In civil judgements, the courts often had to decide whether or not a dependant can claim damages against the police officer for the killing of the breadwinner.

²⁶⁵ *S v Walters supra* note 214 see also *S v Makwanayane supra* note 202

²⁶⁶ *S v Walters supra* note 214.

²⁶⁷ Use of lethal force in effecting arrest.

²⁶⁸ *S v Walters supra* note 214.

²⁶⁹ See for example *S v Steyn supra* note 1.

Thus, the court had to determine whether or not the accused acted in private defence. If the court found that the actions were in private defence, the court would not grant damages to the complainant, and in so doing, confirmed the legality of private defence.²⁷⁰

7.2 Pathological criminal incapacity

The Criminal Procedure Act²⁷¹ has acknowledged this form of incapacity for a number of years. The Constitution, however, does not directly refer to the defence of pathological criminal incapacity.

The writer does not deem this lack of reference problematic as the Constitution allows for the extension of common law and criminal law defences. The constitutional court, in *Carmichael v Minister of Safety and Security and another*, confirmed that the criminal defenses can be developed and the development must take the values of the Constitution into consideration.²⁷²

The extension of the criminal law defences are authorised by Section 8²⁷³ which regulates the application of the Constitution.

Section 8 holds that:

Sec 8(1) the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.

Section 8 continues in section 8(3) when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection 2,

a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

²⁷⁰ *Snyders v Louw 2009 (2) SACR 463 (C).*

²⁷¹ Act 51 of 1977.

²⁷² *Carmichele v Minister of Safety and Security and another supra note 199*

²⁷³ The Application of the Constitution.

- (b) *may develop rules of the common law to limit the right, provided that the limitation is in accordance with S 36(1).*

This is indicative of the fact that the courts can develop new defences as these are not fixed or set in stone.²⁷⁴ The defence has been scrutinised in the past by various courts²⁷⁵ and by various writers.²⁷⁶

The court in *S v Kok*²⁷⁷ expressed concern about the constitutionality of the differentiation that the common law makes between the defence of pathological and non-pathological criminal incapacity²⁷⁸. The Court in *S v Kok*²⁷⁹ did not address the issue but voiced doubt whether the distinction between the two defences could stay in place since this placed the onus of proof on two separate parties depending on the defence. Such a differentiation cannot be in line with the Constitution. However, at this stage, neither of the two defences has been examined by the Constitutional court. Until a case where the defences are challenged comes before the court, the constitutionality of the defence remains unanswered. A judgement on the defences will be welcomed to remove any uncertainty.

7.3 Non-pathological criminal incapacity.

As with pathological criminal incapacity, the common law defence has been accepted and developed in case law. Further, the Constitution also allows for the development of the defence in terms of section 8 of the Constitution. The defence has thus far not been considered by the constitutional court, and therefore has not had the privilege to scrutinise the defence and develop it in line with the Constitution. The various courts have however interpreted the defence and reached various decisions.

²⁷⁴ Grant "Defences under the Protection of State Information Bill: Justification and the demands of certainty" 2012 SAJHR 328.

²⁷⁵ See for example *S v Stellmacher supra* note 51; *S v Wiid supra* note 7; *S v Ferreira supra* note 62
S v Engelbrecht supra note 31; *S v Kok supra* note 160

²⁷⁶ Burchell & Milton(2005); Snyman (2012).

²⁷⁷ *S v Kok supra* note 160

²⁷⁸ *S v Kok supra* note 160.

²⁷⁹ *S v Kok supra* note 160.

The defence is also distinguished from that of pathological criminal incapacity. Since the defence is not directly recognised in the Criminal Procedure Act, it could be argued that the criminal defence is that of the common law criminal incapacity, while pathological criminal incapacity is a statutory defence.²⁸⁰ This distinction may be constitutionally questionable.²⁸¹ The development of the defence is far from complete.

The judgements of *S v Eadie*²⁸² and *S v Engelbrecht*²⁸³ demonstrates the confusion surrounding the defence. The judgement in *Eadie* equates provocation with non-pathological criminal incapacity and in so doing, abolishes some of the defences, while *Engelbrecht* later applies and develops the defence. A decision by the constitutional court would be welcomed to gain clarity.

8. Conclusion

The chapter started by defining and interpreting the constitutional rights available to both victim and accused. The chapter also indicated the reach of these rights. Together with this, the chapter discussed the constitutionality of the defences and the writer found that the defences are constitutional.

The chapter indicates that although there have been attempts to show that certain defences or aspects regarding the defences are unconstitutional, it is clear that private defence, pathological criminal incapacity, and non-pathological criminal incapacity are constitutional. The difference in the manner in which those who are criminally incapacitated due to pathological mental illness and those suffering from non-pathological criminal incapacity are treated can be constitutionally questionable since the distinction differentiates between the two groups of persons.²⁸⁴

The Constitution and Constitutional law clearly strive to uphold a just and equitable society. The other Courts follow their lead to protect the fundamental rights of victims and accused. The Court has thus far not delivered an unambiguous

²⁸⁰ Van Oosten “Non- pathological criminal incapacity versus pathological criminal incapacity” 1993 SACJ 127- 147; *S v Laubscher supra* note 72 166-168; Kaliski 38

²⁸¹ *S v Kok supra* note 160 at 110 - 111.

²⁸² *S v Eadie supra* note 7.

²⁸³ *S v Engelbrecht supra* note 31.

²⁸⁴ *S v Kok supra* note 160

judgement regarding the constitutionality of pathological and non- pathological criminal incapacity. The writer will, in the following chapters, discuss each of the defences in detail and will draw a comparison between the defences as they currently are, and the constitution to determine whether or not the defences can be developed further.

Chapter 4: Private defence

1. Introduction

In this chapter, the writer examines the common law as found in South-African Case law and more specifically common law defence of private defence. The writer will also examine the requirements, as developed through the case law, which have to be met for the defence to be available to the accused. The writer will specifically focus on the requirement of an imminent attack, and how the “cycle of violence” can be interpreted and applied.

Various²⁸⁵ cases were decided before the Constitution of the Republic of South Africa²⁸⁶ (hereafter the Constitution) was entrenched, and it is to these cases which the writer turns to find the interpretation of private defence. Even after the enactment of the Constitution, the courts still have to find the defence in the common law since that is the origin and it will not be found in any specific legislation.

The writer will, in this chapter, focus on the development of the defence in order to make the defence available to the victim who had killed her abuser. The most important cases will be discussed in accordance with date of Judgement ;therefore, a large part of the study will focus on the recent cases of *S v Ferreira*²⁸⁷; *S v Engelbrecht*²⁸⁸ ;*S v Eadie*²⁸⁹ and most importantly and recently, *S v Steyn*²⁹⁰, which is currently the *locus classicus* on private defence in the context of criminal law.²⁹¹

²⁸⁵ For example *S v Ntuli 1975 (1) SA 429 (A)*, see also *S v Goliath supra* note 201; *S v K supra* note 212

²⁸⁶ The Constitution of the Republic of South Africa, 1996.

²⁸⁷ *S v Ferreira supra* note 62

²⁸⁸ *S v Engelbrecht supra* note 31

²⁸⁹ *S v Eadie supra* note 7

²⁹⁰ *Steyn supra* note 1

²⁹¹ *S v Engelbrecht supra* note 11; *S v Eadie supra* note 7; *S v Steyn supra* note 1; *S v Ferreira supra* note 62

2. Private defence

2.1 Legislation governing private defence

As indicated in the introduction, this chapter will focus on private defence. The first pertinent principle to be acknowledged is that the defence remains a Common Law defence and must therefore be found in case law. The defence is sanctioned by Section 36 of the Constitution which provides for the limitation of rights. Secondly, the defence has a very specific ambit and application; therefore, it will not apply to a situation which falls outside the definition. Thirdly, neither the Criminal Procedure Act²⁹² nor the Constitution explicitly refers to private defence.

However, the Criminal Procedure Act in section 49²⁹³ contains the provision authorising the use of force when effecting arrest and by doing so, the legislature and the act indirectly acknowledge private defence. Section 49 recognises that police officers has the right to use force, often lethal, to effect an arrest and this can be viewed as a statutory recognition of private defence under very specific circumstances. The court in *ex parte Minister of Safety and Security and others: in re S v Walters*²⁹⁴ confirmed the principle that a police officer may use the force necessary to effect an arrest, and that the use of force will amount to legitimate private defence. Apart from section 49, no other legislation recognises private defence.

2.2 Common Law regarding private defence

Since common law regulating private defence is not written law, the writer had to examine case law to determine the content and application. The writer will discuss the relevant case law as it applies to the different aspects of private defence, starting with the definition.

²⁹² Act 51 of 1977.

²⁹³ S 49: use of force in effecting arrest (hereafter referred to as s 49).

²⁹⁴ *S v Walters 2002 (2) SACR 105 (CC)*.

2.2.1 Definition

Private defence is the infliction of harm or use of force on an attacker by a defendant protecting himself, his legal interest or a third party from an unlawful human attack.²⁹⁵

Private defence can be described as: the defender warding off an unlawful imminent attack or commenced attack which is aimed at the defendant's legal interest or a third party, with the result that the person on whom the defensive action is aimed suffers some damage²⁹⁶. A person other than the party who initially acted unlawfully may not suffer damages.

Private defence can be defined as follows: a person acts in private defence when that person wards off an unlawful, humane commenced or imminent attack. The attack must be directed at his life, someone else's life, his property or any other protected legal interest.

The following summary clearly indicates the requirements of the defence and that which is needed to establish private defence:

- i) The defendant was unlawfully attacked²⁹⁷.*
- ii) The defendant had reasonable grounds for thinking that he was in danger of death or serious injury.*
- iii) The means of private defence were not excessive in relation to the danger and*
- iv) The means used were the only means or the least dangerous means whereby the defendant could avoid the danger.”²⁹⁸*

With the definition itself now clear, it is pertinent to discuss the aspects of the definition since non-compliance will lead to criminal liability. The different aspects will be discussed relative to each of the requirements of private defence.

²⁹⁵ *S v Patel 1959(3) SA 121 (A)*; *S v Ntuli supra* note 285; see also *S v Goliath supra* note 201; Reddi 2005 SACJ 259-278; Labuschagne 1998 JCRDL 539- 540.

²⁹⁶ *S v Steyn supra* note 1.; *S v Mokgiba 1999 1 SACR 534 (O)*.

²⁹⁷ Snyman (2008) Chapter 4 part 1; *S v Engelbrecht supra* note 31; Burchell & Milton (2005) 230- 245.

²⁹⁸ *Snyders v Louw supra* note 274, *S v Walters supra* note 294 & 214; *S v Engelbrecht supra* note 31; Burchell & Milton (2005) 230 – 245; Labuschagne 1998 JCRDL 540.

2.2.2 Requirements

i) General discussion

Since the definition of private defence broadly contains the requirements as set out earlier in the chapter, the writer will now discuss the requirements in a logical order. Firstly, the writer follows the lead of Snyman and separates the requirement into two groups.²⁹⁹ The first group of requirements deals with the attack while the second group deals with the defensive act. These requirements have been confirmed by the court in various decisions of which the most important are *S v Joshua*³⁰⁰, *S v Trainor*³⁰¹ and *S v Steyn*³⁰²

ii) Requirements of the attack

a) Unlawful human attack

The attack has various facets. Firstly, the attack must be an unlawful human attack. In other words, a person must attack the defendant either by using his body or by using an animal as a weapon.

If the attack is not perpetrated by a person, the defendant cannot lawfully act in private defence as there was no unlawful human attack. Private defence is not relevant where an animal spontaneously attacks a person.

The definition and the requirement is confirmed by the court in the case of *R v K*³⁰³ and *S v Engelbrecht*³⁰⁴ These cases indicate that the existence of an unlawful attack is dependent on the circumstances and the facts of each case but usually, an unlawful attack is one, unsanctioned by law and the attack cannot be justified by the law or any of the criminal defences. For example, a person who attempts to resist

²⁹⁹ Snyman (2008)

³⁰⁰ 2003 (1) SACR 1 (HHA);

³⁰¹ 2003(1) SACR 35 (HHA).

³⁰² 2010(1) SACR 411 (HHA). *R v K* 1956(3) SA 353 (A)

³⁰³ *R v K* 1956 (3) SA 353 (A). The facts of the decision are as follow: the defenders mother was mentally ill and she spent about 9 years in a facility for the mentally ill. The mother tended to exhibit violent behaviour towards her family. On the day of the incident the defender took an appeal where after a fight broke out. The mother physically assaulted her child where after the child stabbed his mother twice with a pocket knife.

³⁰⁴ *S v Engelbrecht* 2005(2) SACR 41(W)

arrest will be acting unlawfully as one cannot act in private defences to escape from a legally sanctioned act.³⁰⁵ The crux of the requirement is thus that the attack must be unlawful and unjustifiable.

Here, it is important to note that the attack can consist of either a commission or an omission, and that the nature of the attack is irrelevant. Where one alleges that there was an attack by way of omission, the claimant must prove that there was a legal duty to act against the attacker.³⁰⁶

Another aspect important when considering the unlawfulness of the attack is whether the attack must be accompanied by fault. Here, the most important case is *R v K* where the court held that the attack does not need to be accompanied by fault or criminal liability, as long as the attack is an unlawful attack. The defendant can lawfully ward off the attack without gaining criminal liability even where his attacker was not criminally responsible or did not have fault.

The court in *Jansen*³⁰⁷ found that a person who kills his attacker in a prearranged fight could not claim private defense as the attack against him was not unlawful.

b) Protected legal interest

The second requirement of the attack is that the attack must be directed towards a protected legal interest. The ambit of the term legal interest must be determined in the light of the Constitution which now not only requires equal treatment of persons, but also demands respect for basic human rights such as dignity.³⁰⁸

Therefore, the term protected legal interest has a very broad scope and a protected legal interest can range from property, one's own life, the life of another, or a person's dignity.³⁰⁹ This submission is supported by *S v Engelbrecht and Ex parte*

³⁰⁵ *R v Ndara* 1955 (4) SA 182(A) 183; *S v Kibi* 1978 (4) SA 173 (E) at 180; De Wet & Swanepoel "Strafreg" 72.

³⁰⁶ Kaliski 40 - 45

³⁰⁷ *R v Jansen* 1983(3) SA 534(NK).

³⁰⁸ Goosen "Battered Women and the Requirement of Imminence in Self-Defence" *PER* 2013 (16) 1 pg 72.

³⁰⁹ *S v Walters supra* note 294 & 214

*die minister van Justisie: in Re S v Van Wyk*³¹⁰ where the courts discussed the ambit of a legal interest, and found that property qualifies as a legal interest. Further, in *R v Van Vuuren*³¹¹ the court held the dignity of a third party as a legal interest. In all of the said cases, private defence was upheld and found legally justifiable.

The first decision which is important to consider in determining the ambit of the term “protected legal interest” is that of *R v Van Vuuren*.³¹² In this case, the Court had to determine whether or not a person can act in private defence to protect another person’s dignity. In this case, the husband acted to protect his wife’s dignity

The Court in the *Van Vuuren* case confirmed that a person could act in private defence to protect the rights of a third party, including that third party’s right to dignity. This has the result that dignity is regarded as a protected legal interest.

Another decision important for the discussion of “protected legal interest” is that of *S v Makwanyane*.³¹³ *The S v Makwanyane* decision is of primary importance when considering the death penalty as the case deals with the importance and role of human rights. The court therefore discussed dignity and other basic rights at great length. This discussion clearly indicates that human dignity is a primary right inherent to all people and worthy of protection to such an extent that one can act in private defence to protect ones dignity.

The third discussion which the writer deems important to discuss is that of *Van Wyk*. *The Van Wyk* decision was decided before the Constitution and *Makwanyane*. The facts of the *Van Wyk* case appear from the judgment and can be summarised as follows:

The defendant was the owner of a store which had been broken into on multiple occasions and the defendant suffered financial loss due to the thefts.

After a while and out of desperation, the defendant set up a shotgun with the intent to injure and scare the next person breaking into the shop. The defendant put up

³¹⁰ *Ex parte die minister van Justisie: in Re S v Van Wyk* 1967(1)SA 488(A).

³¹¹ 1961(3) SA 305. (Hereafter *R v Van Vuuren*)

³¹² The facts of the case are as follows: the defendant’s wife was insulted by a colleague of the defendant. The defendant then took the complainant by the arm and told him to watch his behaviour. The defendant then laid a complaint of assault. The defendant claimed that he acted in private defence to protect the dignitas of his wife.

³¹³ *S v Makwanayane & another supra* note 202

warning signs which indicated that protective measures have been put in place. A theft took place and the gun went off killing the thief.

The court in *Van Wyk* found that due to the nature and the frequency of the loss suffered by the defendant, his actions constituted private defence. The court found that property is a legally protected interest which can be protected in private defence as long as the protective measures are reasonable. This decision confirms that one's property may be protected by the use of private defence. However, the decision may need to be revisited in the light of *S v Makwanyane* as the *Makwanyane* case clearly regards certain rights, such as a person's dignity, more important than other rights.

The last case dealing with protected legal interest which the writer will discuss is *S v Engelbrecht*.³¹⁴ In this case, the wife suffered constant abuse at the hands of her spouse. The defendant had previously attempted to flee and to obtain help but no good came of it. After another instance of abuse, the wife killed her husband by drugging and smothering him. The defendant pleaded that she had acted in private defence and legitimately protected her psychological and physical integrity. The court had to consider whether or not psychological and physical integrity constitute a legal interest which can be protected in private defence.

The court considered what constitutes a legal interest in light of the Constitution, and found that a legal interest must be extended to include all rights as contained in the Bill of Rights.³¹⁵ This includes the defendant's right to psychological and physical integrity.³¹⁶

From these decisions, it is apparent that the term protected legal interest has a very broad scope and may range from a physical component to a non-physical and useable factor such as psychological integrity. It is further clear that under the new constitutional disposition the ambit protected legal interest will still have to be determined.

³¹⁴ *S v Engelbrecht supra* note 31 & 304

³¹⁵ Chapter two of the Constitution of the Republic of South Africa, 1996.

³¹⁶ See Section 12 of the Constitution: freedom and Security of the person.

c) Imminent or commenced attack.

The third requirement of the attack is that the attack must have commenced or must be imminent. An attack which may be situated in the future, or which is situated in the past does not qualify, and one cannot act in private defence to ward off either. The writer will now discuss the two attacks separately.

ci) Commenced attack

The requirement holds that the attack must have commenced or must be imminent and may not have been completed by the attacker. If, by the time the defendant reacts, the attack has already been completed, the defendant will be retaliating and the defensive act will then be unlawful.

To determine what constitutes a commenced attack and the limits of the requirement, the writer examined *S v Mogohlwane*.³¹⁷ This case illustrates the principle and was ground-breaking in law as it clearly sets the boundaries for the commenced attack. The facts of *S v Mogohlwane* are as follows:

The defendant had all of his important belongings in a bag which he carried with him. He took a taxi going home in an informal settlement. When the defendant arrived at his destination, he got off the taxi where he was accosted by the deceased. The deceased attempted to take his bag from him by asking him to hand it over, and by trying to rip the bag from the defendant's hands. When the defendant resisted, the attacker pulled out an axe and threatened the defendant. Hereafter, the defendant handed over the bag and fled home to seek help. However, the defendant could not get anyone to assist and instead grabbed a knife off the table. The defendant returned to the place of the attack and found his attacker still there. In his attempt to regain possession of his bag, he was once again threatened by the attacker with the axe. The defendant then stabbed the attacker and reclaimed his belongings.

The court now had to decide whether or not the attack had commenced, and whether or not the time span between the original attack and the defensive act was of such an extent that it negated the private defence.

³¹⁷ *S v Mogohlwane* 1982(2) SA 587(T).

The court in *S v Moghlowane* found that the time span between the attack and the defensive act was not so great to negate the commenced attack requirement. The court further found that all of the defendants' actions constituted one defensive act, thereby allowing the defendant to rely on private defence. The court concluded that the defendant acted in private defence and that the defensive act followed immediately upon a commenced attack.

This finding is important because if the court had found that the defendant's acts weren't one continuous act, then the attack would have been completed and the defendant's acts would have amounted to retaliation. Such a finding would have left the defendant unable to rely on private defence since one cannot act in private defence against an already completed attack.

cii) Imminent attack

The second possible attack against which one can defend oneself in private defence is where the attack is imminent.³¹⁸ The requirement of an imminent attack is a bit more problematic and complex than the commenced attack as other factors could influence a defendant's perception of what is imminent. The imminent attack requires that there is a real threat of attack on the defendant and that the defendant must perceive the attacker's conduct as such a threat.

In other words, the imminent attack requirement necessitates that a reasonable person in the circumstances would have believed that an attack will take place or would have taken place had he not acted.

Fulfilment of this requirement is dependent on what can be deemed a reasonable belief. What constitutes a reasonable belief is determined in accordance with the reasonable person test. This test entails that the court must determine whether or not the reasonable person in the circumstances would have believed that an attack was imminent, would have acted in the same manner, and whether or not the defendant's conduct was in line with the *boni mores*.

It is important to note that the law does not require the defendant to wait for the "*first blow to fall*." The defendant may take preventive measures and may act before the

³¹⁸ Burchell & Milton (2005) 234.

attack commences to protect her legal interest.³¹⁹ South African Criminal law does not expect the defendant to first suffer some form of damage before taking defensive measures. The defendant is allowed to take pre-emptive measures to prevent damage and to protect her legal interest.³²⁰

The court in *S v Engelbrecht* found that in the context of domestic violence, where the abuse takes place to such an extent that it can be described as a pattern or cycle, the imminent attack requirement must be extended to include abuse which is inevitable.³²¹

The court acknowledged that in cases of domestic violence, the spouse may be able to recognize behavior and conduct which would usually lead to an attack or abuse. The court found that when considering the reasonability of the belief that an attack may occur, the court must give due consideration to the personal knowledge of the defendant and the impact of the abuse on the psyche of the defendant.³²² The defendant will have to lead expert testimony to support her belief. This will include testimony on the perceptions and behavioral patterns of abused or battered spouses. The use of expert testimony has long been recognized in our law. The law recognizes that it would be irresponsible for a court with no personal knowledge of the situation in which the defendant lives, to disregard expert knowledge in determining the reasonableness of the accused conduct.³²³

The court in *S v Engelbrecht* started with the development of the imminent attack requirement and the court in *S v Steyn* further expanded on the subject.³²⁴ *S v Steyn*³²⁵ is the *locus classicus* on the imminent attack requirement. In *S v Steyn*, the court extended the imminent attack requirement to the situation of the battered spouse. In other words, the court extended the imminent attack requirement to the situation where a spouse can, due to the “*cycle of violence*,” predict the next attack

³¹⁹ Ludsin “South African Criminal Law and Battered Women Who Kill: Discussion Document 2” 2003 <http://www.csvr.org.za/docs/gender/southafricancriminal2.pdf>. [Accessed 08.09.2012]; *S v Mokgiba supra note 296*

³²⁰ *S v Mokgiba supra note 296, 550 D-E; Ex parte die minister van Justisie: in Re S v Van Wyk supra note 310; see also S v Engelbrecht supra note 31 & 304*

³²¹ The court followed the decision of *R v Lavallee 1990 55 CCC (3d) 97 para 349*.

³²² *S v Engelbrecht supra note 31 & 304 para 343; Goosen 2013 PER 78*.

³²³ *S v Engelbrecht supra note 31; Holtzhausen v Roodt supra note 9; S v S supra note 9 at par 60b*.

³²⁴ *S v Engelbrecht supra note 31 para 344*.

³²⁵ *S v Steyn supra note 1*.

and then kill the abuser in order to prevent an attack. The imminent attack requirement is now applicable where the attacks are reasonably predictable due to the fact that they occur in a cycle and the abused has learned how to predict the attacks.

This development came about as the law recognised the expert testimony regarding abused spouse's ability to recognise behaviour which signals the commencement of an attack. The law acknowledges that spouses in abusive relationships are able to identify the behaviour which usually precedes the physical attacks by their abusers.³²⁶

The result of the *S v Steyn* decision is that an abused spouse who kills in a non-confrontational situation can now rely on private defence if she can show that an attack was imminent.

iii) **Requirements of the defensive act.**

The second group of requirements relate to that of the defence. These requirements resemble that of the attack, but are directed at the defendant. The requirements will be discussed in order.

a) **The defence must be directed at the attacker.**

Private defence requires that the defence must be directed at the attacker, and a third party may not sustain injuries or suffer damage. If the defensive act is not directed at the attacker but against a third party, the defendant cannot claim to have acted in private defence. If the defensive action is directed at a third party and not the attacker it can, at most, be a form of necessity as described and confirmed by the decision of *S v Goliath*.³²⁷ Such conduct will never amount to private defence. It is important to note that when a person defends himself in private defence, only the attacker may suffer damages. The moment a third party suffers damages, the

³²⁶ *S v Ferreira supra note 62*; see also Ludsin "Ferreira v the State: a victory for women who kill their abusers in non-confrontational situations" 2004 *SAJHR* 642.

³²⁷ *S v Goliath supra note 201*; See also Burchell "Unravelling compulsion draws provocation and intoxication into focus" 2001 *SACJ* 363- 364.

defender cannot rely on private defence. The defender will then have to rely on necessity to justify his behaviour.

b) Defensive act must be necessary to protect the legal interest.

Before the writer can determine whether the defensive act is necessary to protect a legal interest, it must first be determined what would qualify as a legal interest. The writer previously discussed the legal interest, and it is abundantly clear that a legal interest can be any right contained in the Bill of Rights.³²⁸

The defensive act must serve the purpose of defending the legal interest. This requirement further entails that the means used to defend the legal interest must be the only reasonable means available to protect the legal interest.³²⁹ In other words, there must be no other means available to the defendant.

The defensive action must be necessary to ward off the attack.³³⁰ The requirement also demands that the defendant uses the least harmful means to ward off the attack. If the defendant wards off an attack in a manner which causes more harm than necessary, the defensive measure will not be reasonable and the defendant will not succeed with a claim of private defence as the defensive actions are unlawful.³³¹

It is important to note that this requirement does not give the defendant the right to take the law into his own hands. The requirement does, however, give the defendant the right to react proportionally to the attack upon himself or his legal interest.³³²

The defendant is only permitted to act if he had exhausted all other available measures or if, once he came under attack, the time and the nature of the attack did

³²⁸ *S v Engelbrecht supra* note 31 & 304

³²⁹ *S v Engelbrecht supra* note 31.

³³⁰ *Govender v Min of Safety and Security 2009(2) SACR 87 (D)*.

³³¹ Snyman "Chapter 4 part 1"; Snyman "The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa" 2004 SACJ 178; *S v T 1986 (2) SA 112 (O)*; see also *S v Engelbrecht supra* note 31 & 304; Goosen 2013 PER 1, 71- 121.

³³² Sangero, "Self-Defence in Criminal Law" (2006) 45 – 47: the writer discusses the implication of the unlawful attack on the victim and acknowledges that the doctrine of self defence requires proportionality. See page 166- 178: where the proportionality requirement is discussed in detail.

not permit him to exhaust all other measures, or the measures he used was, at the time of the attack, the only measures available to him.

It is also important to note that the actions must be judged according to the circumstances of the case. An armchair approach cannot be used to judge the reasonableness or necessity of the actions³³³.

Due to the fact that all remedies must be exhausted it is important to examine the law surrounding *excursus*. This examination must take place as it is important to determine whether or not there is a duty on the defendant to flee..

If a duty to flee exists, then a defendant who did not attempt to flee before acting cannot claim private defence as he did not exhaust all the means available to him. If a duty to flee does not exist, then a defendant can claim private defence even where he did not attempt to flee. Therefore, the writer will next discuss the law on *excursus*, or the duty to flee.

bi) Duty to flee

On the law of *excursus*, various opinions exist and academic writers differ only slightly. Snyman³³⁴ expresses the opinion that whether or not there is a general duty to flee is still uncertain.³³⁵ Snyman is of the opinion that no general duty to flee exist³³⁶ because to “*acknowledge that the duty to flee exist is to deny the nature of private defence.*”³³⁷

Snyman continues and indicates situations in which there aren't a duty to flee. The first situation identified by Snyman is where the defendant can ward off the attack by merely injuring the attacker instead of killing the attacker.

The second situation Snyman refers to is where the act of fleeing itself will expose the defendant to danger and harm. If the defendant will be placed at risk by fleeing

³³³ *S v Engelbrecht supra* note 31; Ludsin “South African Criminal Law and Battered Women Who Kill: Discussion Document 2” 2003 <http://www.csvr.org.za/docs/gender/southafricancriminal2.pdf>. Accessed 08.09.2012.

³³⁴ Snyman (2008) “Chapter 4 part 1”; Snyman 2004 SACJ 178.

³³⁵ The court in *S v Steyn supra* note 1 confirms that the law on this point is not clear cut.

³³⁶ Snyman 2004 SACJ 178,184-187.

³³⁷ Snyman 2004 SACJ 178 ,186-187.

from the attack, the law does not expect the defendant to flee. The defendant may then use force to ward off the attack.³³⁸ The court in *Rex v Zikalala 1953(2)SA 568(A)*³³⁹ found that there is no duty on a defendant to flee where flight will expose him to danger as “ a man is not bound to expose himself to the risk of a stab in the back , when by killing his assailant he can secure his own safety.”³⁴⁰ The answer seems a bit vexed and the case law is not clear on this principle. Another case which deals with duty to flee is *S v Steyn*. The court in *S v Steyn*, at 418, supports the opinion of Snyman that where the defendant is placed at risk by the act of fleeing, there is no duty on the defendant to flee from the attack.

The third situation is where the victim is attacked in her home. The law does not expect a person to flee from her own home to escape an attack on her legal interest.³⁴¹ This is supported by Burchell³⁴² who stated that the man is the “king of his castle” and therefore the law cannot expect her to flee her house.

Another case dealing with the law of *excursus* is that of *S v Engelbrecht*.³⁴³ In this decision, the court focused the discussion of *excursus* on situations of domestic violence. The court found that when considering the reasonableness of the defensive act and whether or not the means used was the only means available to the accused, a court must take the dynamics of the abusive relationship into account.

The court further found that when considering flight and what constitutes flight, it must take into consideration attempts made by the accused to flee the home. The court found that the enquiry into flight is more substantial and does not stop at finding out whether or not she physically attempted to leave the house.

The defendant’s attempts to approach state authorities, such as the police, must also be taken into account when one considers the duty to flee.³⁴⁴ The court does, however, warn that the fact that the spouse did not attempt to leave the communal

³³⁸ *R v Zikalala 1953(2)SA 568 (A) at 571- 572, S v Patel supra note 295 at 123F, S v Mnguni 1966 (3)SA 776(T) at 779.*

³³⁹ *Rex v Zikalala supra note 338.*

³⁴⁰ *Rex v Zikalala supra note 338 at 572; Goosen (2013) PER 1, 71- 121.*

³⁴¹ Snyman (2008)

³⁴² Burchell & Milton (2005) 230- 254.

³⁴³ *S v Engelbrecht supra note 31 & 304.*

³⁴⁴ Goosen 2013 *PER* (16) 1 pg 84; *S v Engelbrecht supra note 31.*

house, cannot be indicative of the fact that she forfeited her right to private defense as the court must take the personal circumstances of the defendant into account. These circumstances include the dynamics of the abusive relationship. The requirement of flight can only be properly understood and interpreted when expert evidence is considered.³⁴⁵

The court, in *Engelbrecht* par 354,³⁴⁶ held that the “*traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself*.” Further, the Court in *Engelbrecht*³⁴⁷ limited the obligation to flee to those situations where flight is reasonable and does not expose the defendant to any harm or the risk of harm.

There is no clear-cut answer regarding situations outside the specific ambit of the four situations as set out. Thus, the question of whether or not there is a general duty to flee remains ambiguous.

The leading case in the question of *excursus* is that of *S v Zikalala*³⁴⁸ where the court found that in that specific situation, the defendant did not need to attempt flight as the act of flight in itself would have exposed the defendant to danger. The *Zikalala* judgement, read with the *Engelbrecht*³⁴⁹ judgment, confirms the situations as described by Snyman but the judgments does not bring clarity on the duty to flee in situations outside of those described by Snyman.

The *Dougherty*³⁵⁰ decision also discusses the duty of flight, but in the writer’s opinion, such a discussion is unnecessary as the conduct was clearly that of private defence. The writer’s opinion on the *Dougherty*³⁵¹ case is supported by Snyman who held that, in his opinion, the case decision is wrong as the defensive actions constituted private defence leaving a discussion on the duty of flight unnecessary and confusing.

³⁴⁵ Ewing “*Battered women who kill: psychological self-defence as legal justification*” (1987) 12- 23; Labuschagne 1998 *JCRDL* 540- 541.

³⁴⁶ *S v Engelbrecht supra* note 31 par 354.

³⁴⁷ *S v Engelbrecht supra* note 31

³⁴⁸ *R v Zikalala supra* note 338 at 571- 572 see also *Govender v Min of Safety and Security supra* note 330

³⁴⁹ 2005 (2) *SACR* 41 (W).

³⁵⁰ *S v Dougherty* 2003 (2) *SACR* 36(W).

³⁵¹ *S v Dougherty supra* note 350

In the writer's opinion, the situations as described by Snyman and confirmed by the court in *S v Steyn* must be accepted and developed. The writer prefers the approach taken by the court in *S v Engelbrecht* as it is focused on a specific set of facts. Such an approach is less likely to lead to misinterpretation. The writer does, however, acknowledge that this approach may be too narrow. The ideal might lie somewhere in the middle of *Steyn* and *Engelbrecht*.

This study does not deal with the duty to flee and therefore, in the writer's opinion, the discussion of the duty to flee is sufficient. It is important to note that the writer concludes that there is no general duty of flight on a defendant, and that in certain circumstances it would be unreasonable to expect the defendant to flee.

c) Reasonable relationship between defensive act and attack.

This requirement is closely linked to the requirement that the defence must be essential as the defensive act cannot be reasonable if it is unnecessary. There has to be a reasonable relationship between the attack and the defensive act. What is reasonable can only be determined with reference to the facts of the situation. The requirement that a reasonable relationship must exist between the defensive act and the attack can also be described as the proportionality requirement.

In other words, the defensive action cannot be excessive but has to be proportional to the attack.³⁵² Proportionality between the attack and the defensive act is not strict or precise as the "*court adopts a robust attitude, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence*".³⁵³ The court in *S v Trainor*³⁵⁴ confirmed this principle and emphasised that the defence must be proportional to the attack, and that the relationship between the attack and the defensive act must be reasonable.

³⁵² Sangero "Self-defence in Criminal Law" (2006) 47. *S v Walters supra note 294*; Goosen 2013 *PER* (16) 1 pg 71- 121

³⁵³ *S v Ntuli supra note 285*

³⁵⁴ *S v Ntuli supra note 285 at 437 par 7*; *S v Trainor 2003 (1) SACR 35 (SCA)*.

Further, the court in *Trainor* set out various factors which can influence the reasonableness of the relationship. These factors were confirmed and expanded by the court in *S v Steyn*.³⁵⁵

The factors are:

1. *The relationship between the parties*
2. *Their respective ages, gender, and physical strengths*
3. *The location of the incident*
4. *The nature, severity and persistence of the attack*
5. *Nature of any weapon used in attack*
6. *Nature and severity of any injury or harm likely to be sustained in attack*
7. *The means available to avert attack*
8. *Nature of means used to offer defence; and*
9. *The nature and extent of harm likely to be caused by the defence.*

These factors are only guidelines and other factors may influence the proportionality of the relationship between the defensive act and the attack.³⁵⁶

The defensive act does not need to be directly proportional to the attack as “*modern legal systems do not insist upon strict proportionality between the attack and defence, believing rather that the proper consideration is whether, taking all factors into account, the defender acted reasonably in the manner in which he defended himself or his property.*”³⁵⁷ The establishment of “proportionality is a question of fact rather than of law”³⁵⁸ as each case must be determined on its own merit.

³⁵⁵ *S v Steyn supra* note 289.at 417.

³⁵⁶ Labuschagne (1998) JCRDL 540- 541: where the writer quotes Judge L’ Heureux- Dube decision in *R v Malott* (1998) 121 CCC (3d) 456 (SCC) 470-471: where the Judge holds the opinion that the battered wives subjective experiences and knowledge informs the objective test of private defence. For more factors which can be taken into account see *S v Engelbrecht supra* note 31 as well as *R v Lavallee supra* note 321, para 349.

³⁵⁷ Burchell 243 see also Snyman (2008) Chapter 4.

This does not mean that the damage caused by the defensive act must directly correlate with the damage caused by the attack. Since it is impossible to formulate the precise relationship between the attack and the defence, the only requirement is that, in the circumstances, the relationship between the attack and defensive act must be reasonable.

Another aspect which can influence the proportionality requirement is the protected legal interest. The interest which the defendant protects does not need to be the same as the legal interest which the attacker threatens. The Court in *S v Engelbrecht*³⁵⁹ confirmed this principle where it found that all the rights as contained in the Bill of Rights can be protected in private defence, and that the defendant can kill her attacker to protect her physical and psychological integrity.

The weapons used to defend the legal interest must also be given consideration when determining proportionality.³⁶⁰ The weapon used to protect the legal interest does not need to be the same as the weapon used to harm the interest as this would allow the attacker to choose the weapon with which the defendant may protect himself.³⁶¹ However, the proportionality requirement requires the defendant to use the least harmful means available to him. Therefore, if the defendant can ward off an attack by using his fists only, he may not shoot to kill the attacker as one cannot “shoot to kill someone who attacks you with a fly swatter.”³⁶²

The court in *R v Patel*³⁶³ confirmed that a person may use a firearm in private defence if, at that time, it was the only means by which the defendant could protect the legal interest. Further, the nature of the interest protected does not need to be the same as the nature of the interest infringed by the attacker. Thus, a person can, for instance, protect the dignity of another person by harming the physical integrity of the attacker³⁶⁴ or taking the life of the attacker.³⁶⁵

³⁵⁸ *S v Trainor supra* note 354; see also Snyman (2008).

³⁵⁹ *S v Engelbrecht supra* note 31

³⁶⁰ *S v Trainor supra* note 354 at p 41 par 13; *S v Steyn supra* note 1. see also Snyman (2012)

³⁶¹ Snyman (2008 & 2012); *S v Trainor supra* note 354 see also *S v Steyn supra* note 1.

³⁶² Snyman (2008 & 2012); see also *S v Engelbrecht supra* note 31

³⁶³ *R v Patel supra* note 295

³⁶⁴ *Ex parte die minister van Justisie: in Re S v Van Wyk supra* note 310; see also *R v Van Vuuren supra* note 311

³⁶⁵ *R v Patel supra* note 295; *S v Steyn supra* note 1.

It is impossible to devise a precise test for what will constitute reasonable defensive actions. Thus, each case has to be determined on its own merit since the facts and circumstances of each case will influence that which can be considered reasonable.³⁶⁶

The fulfilment of the requirement is dependent on a question of fact rather than a question of law. In other words, the defensive action must, in the circumstances, be proportional to the attack.³⁶⁷ Only after all the factors as discussed had been taken into account can one determine whether or not the relationship between the attack and the defence was reasonable.

Only once these factors were all taken into account and weighed against each other can the court determine whether or not the defensive act was proportional to the attack.

If the court finds that the defensive act is proportional to the attack, then the defendant acted lawfully and in private defence. If the court finds that the defensive act was not proportional to the attack, the defendant did not act in private defence and his act may then be unlawful.

The general principle is that if the defendant could have protected the legal interest in a manner which would have caused less damage than the means which he did use, the defensive act will not be proportional to the attack.³⁶⁸

The defendant must use the means of defence which will cause the least amount of damage to the attacker. For instance, where the attack can be warded off successfully by using ones fists, it would be unreasonable to shoot the attacker. Snyman expressed this reasonability sentiment by stating that “*one may not shoot to kill another who attacks you with a fly swatter.*”³⁶⁹ Where the defendant could have used measures which would have caused less harm but failed to use those measures, her conduct will exceed the parameters of private defence as her conduct

³⁶⁶ *S v Steyn supra* note 1. at 417 see also *S v Engelbrecht supra* note 31

³⁶⁷ *S v Steyn supra* note 1.

³⁶⁸ *S v T supra* note 331 at 128 D- E; *R v K supra* note 303; *S v Engelbrecht supra* note 11; *S v Steyn supra* note 1; Goosen 2013 *PER* (16) 1 pg 72 – 74; Ally and Viljoen 2003 *SACJ* 132.

³⁶⁹ *S v T supra* note 331; *S v Steyn supra* note 1 at 417; Snyman (2008) 109; *R v Patel supra* note 295.

will not be reasonable or proportional.³⁷⁰ However, the law does not require the defendant to place herself unnecessarily at risk, and therefore she will not be faulted for using a fire arm instead of her fists if she complies with all the requirements as set out in the case law.

d) Defender must be aware of the fact that she is acting in private defence.

The last requirement of the defensive act is that the defender must be aware of the fact that he is acting in private defence.³⁷¹ The defender must have knowledge of the private defence. The defender cannot act, and afterwards claim that he acted in private defence if he, at the time of acting, was unaware of the fact that he was acting in private defence. In other words, the defender must consciously act in private defence and he must have the will to defend his legal interest.

His defensive act cannot be of a coincidental nature.³⁷² This is stipulated in the requirement to insure that private defence does not become coincidental and to prevent abuse and misuse of the defence.

The requirement has two practical implications. The first is that the requirement prevents the misuse of private defence in situations which can be described as “*provoked private defence*”³⁷³. Provoked private defence is where the defender provokes the attack with the intention to retaliate and cause harm to the attacker.³⁷⁴ In other words, the defendant deliberately acts in a manner which provokes an attack and he then defends himself.

This requirement is partially illustrated by the case of *R v Jansen*³⁷⁵ where the court found that a person who willingly participates in a pre-arranged fight could not claim private defence if he kills the other party as both parties are acting unlawfully from

³⁷⁰ *S v Engelbrecht supra* note 31.

³⁷¹ Snyman (2008 & 2012) Chapter 4 part 1; Snyman 2004 SAJC 178.

³⁷² Snyman 2004 SACJ 178 (187); Van Oosten “Wederegtelikheid- n skuldtoets?” 1977 JCRDL 90-93; Labuschagne “Oorskryding van die grense van noodweer: Ngpomane 1979 (3) SA 859(A)’ SACC 1979 (3) 271 at 273; Labuschagne “Die uitskakeling van toeval by strafregtelike Aanspreeklikheid” 1985 *De Jure* 155 at 158.

³⁷³ Snyman (2008 & 2012)

³⁷⁴ Snyman 2004 SACJ 178 (187)

³⁷⁵ *R v Jansen supra* note 307.

the onset of the fight. This principle is important because without it, the law would allow an unlawful act to become lawful without justification by means of private defence.

The second implication is that private defence is excluded where the defensive act can be coincidentally attributed to private defence.³⁷⁶ In other words, the fact that the defendant defended a legal interest was only a coincidence.

For example, where the defendant had been attacked and acted spontaneously, and in so doing protected a legal interest without being aware of it cannot claim to have acted in private defence. Since he was not aware of the fact that he was acting in private defence, the defendant can at most claim to have acted out of necessity.

2.2.3 The test for Private defence

The matter must be judged objectively with reference to the particular circumstances of each case.³⁷⁷ The test for private defence can be described as an objective test.³⁷⁸ This must, however, be scrutinised carefully to prevent the court from taking an “armchair” approach to the situation and to prevent the court from judging the case using knowledge gained after the fact. Further, the test for private defence is only objective in as far as it is used to determine whether or not true private defence exists, and to distinguish true private defence from putative private defence³⁷⁹.

Further, the reasonable person test³⁸⁰ is used to determine whether the defensive actions were reasonable and in line with the *boni mores* of the community, in the circumstances, and therefore lawful.³⁸¹

³⁷⁶ Snyman (2008 & 2012) 110 ; Van Oosten 1977 *JCRDL* 90 at 93; Labuschagne (1979) 3 *SACC* 271 at 273; Labuschagne 1985 *De Jure* 155 at 158

³⁷⁷ Burchell & Milton (2005) 242

³⁷⁸ See *S v Ntuli supra note 285*: The conduct must be measured according to how the reasonable person in the circumstances would have conducted his behaviour; *S v De Oliveira* 1993 (2) *SACR* 59 (A) 63.

³⁷⁹ Snyman (2008 & 2012) Chapter 4 part 1; Ludsin “South African Criminal Law and Battered Women Who Kill: Discussion Document 2” 2003 <http://www.csvr.org.za/docs/gender/southafricancriminal2.pdf>. Accessed 08.09.2012

³⁸⁰ *S v Naidoo* 1997 (1) *SACR* 62 (T)

³⁸¹ Snyman (2008 & 2012)

The test for private defence is in essence an objective test with a subjective element. This is because an objective test is used to determine whether or not true private defence existed, while a subjective test is used to determine intent.³⁸²

The judge must, as far as possible, attempt to place himself in the same situation as that in which the defendant was in at the time of the incident. Having done so, the judge must determine whether the reasonable person in that specific situation would have acted in the same manner.³⁸³ If it is found that the reasonable person in the situation would have acted the same, the defendant will comply with the test for private defence. If, however, the court finds that a reasonable person in the circumstances would have acted differently than the defendant did, the defendant does not comply with the test for private defence and the defendant may then attract criminal liability for either murder or culpable homicide.

The test for private defence in situations where the battered women stands trial, is susceptible to critique as it is the opinion of some writers that the battered spouse theory should be used to determine what is reasonable under the circumstances. Other academics argue that since the reasonability test already requires the presiding officer to take notice of the circumstances of each case, the battered spouse theory is unnecessary. These writers also argue that since all circumstances differ, it is impossible to formulate as single theory to describe all battered women. Therefore, they argue the reasonable person test as currently applied is sufficient and should not be altered.³⁸⁴

2.2.4 Effect of private defence

The definition and requirements will be fulfilled when the defensive act complies with all the requirements of the defence. Partial fulfilment of the requirements is a possibility. Such partial fulfilment may prevent the defendant from relying on private defence, but the defendant may still be able to rely on either putative private defence

³⁸² Reddi 2005 SACJ 275; *S v Mokonto* 1971(2) SA 319(A); Burchell "Criminal Justice at the Cross Roads" 2002 SACJ 587- 588; Louw "S v Eadie: Road rage, incapacity and legal confusion" 2001 SACJ 206- 208; Hoctor "Tracing the origins of non pathological incapacity in south African criminal law" *Fundamina* 17 (2) 2011. 77; De Wet and Swanepoel "Strafreg"

³⁸³ Burchell & Milton (2005) 243

³⁸⁴ Goosen 2013 *PER* 1, 72 – 74;

or necessity depending on the circumstances of each case. If the requirements are fulfilled, the defendant will be acquitted. If the requirements are only partially fulfilled, the defendant will not be acquitted and the defendant then has to negate the other requirements of criminal liability such as intent.

If the requirements are not fulfilled because the defendant exceeded the boundaries of private defence, another set of rules apply. The writer will discuss exceeding private defence separately.

The effect of the defence eliminates criminal liability in that it excludes the unlawfulness of the act.³⁸⁵ The unlawfulness is excluded as the defendant acted to protect a legal interest, the defensive act was proportional to the attack, and since the defendant was justified in acting³⁸⁶.

2.2.5 Exceeding the bounds of private defence

It is possible to have non-compliance where the requirements of private defence is not met, so the boundaries of private defence can be exceeded. This will result in the defensive act being unlawful.³⁸⁷ The defendant in these circumstances can be guilty of either crimes requiring intent, or crimes requiring negligence³⁸⁸ depending on the facts of the case.

When considering this element of the defence, it is important to distinguish between the situation where the defensive action leads to the death of the attacker, and the situation where the attacker is only injured.

Where the attacker is killed by the defensive actions, the normal principles of fault apply to determine whether or not the defender is guilty of murder or culpable homicide. Where the principles of fault indicate the defender had fault in the form of intent (*dolus*), she will be guilty of murder. If the principles only indicate negligence (*culpa*) she will be guilty of culpable homicide. If the defendant knowingly and

³⁸⁵ *S v De Oliviera supra* note 378 at 63-64.

³⁸⁶ Burchell & Milton (2005) 243

³⁸⁷ Burchell & Milton (2005) 240

³⁸⁸ *S v Ntuli supra* note 285

intentionally exceeded the boundaries of private defence, she will be guilty of a crime requiring intent.³⁸⁹

It is important to note that in most situations where the boundaries of private defence are exceeded, the defendant would have acted intentionally as the defendant acted to protect his interest.

In most situations where private defence is present, the defendant would have directed her will to commit the act. This does not mean that the defendant possessed fault in the form of *dolus* to cause the death of the attacker. Wrongfulness consists of both the intention to act in an unlawful manner, and knowledge of the unlawfulness of the act. Private defence only excludes the unlawfulness of the application of the force, and not the intent to apply said force³⁹⁰. If the defendant did not possess both of the components, the defendant cannot be held criminally responsible for crimes requiring *dolus*, as there is non-compliance with the requirements of wrongfulness.

If the boundaries of private defence are exceeded but intent isn't present, the implication is that the defendant acted negligently and other rules of law become applicable. Negligence is determined according to the reasonable person test. In other words, would a reasonable person in the situation have foreseen that she is exceeding the boundaries of private defence, and would she have acted to prevent herself from exceeding the limits of private defence?

If the answer to both the questions is yes, the defendant negligently exceeded the boundaries of private defence, and the defendant will then be liable for crimes requiring intent.³⁹¹ Where negligence is present, it is important to address the law surrounding putative private defence.

2.2.6 Putative private defence

Putative private defence can be seen as a sub category of private defence. The writer will discuss the defence systematically.

³⁸⁹ *S v Ntuli supra note 285* in the case the defendant was found guilty of assault.

³⁹⁰ *S v Ntuli supra note 285 at 429*.

³⁹¹ Snyman (2008 & 2012) chap 4 part 1.

a) Definition

Putative private defence exists where a defendant reasonably, but wrongfully, believes that she is acting in private defence while acting to protect her life or legal interest.³⁹² Private defence occurs where a defendant reasonably believes she is acting in private defence, and the belief, although reasonable, is wrong.³⁹³

The defence does not exclude fault but it does draw culpability into question.³⁹⁴ The defendant's "*honest but erroneous belief that his life or property was in danger may exclude doubt.*"³⁹⁵ Putative private defence differs from private defence as private defence excludes unlawfulness while putative private defence may exclude intent.³⁹⁶

This principle is confirmed by the court in *S v Naidoo*³⁹⁷ where the court found that putative private defence excludes intent as the defender does not have knowledge of the unlawfulness as required by the unlawfulness requirement.

Unlawfulness is excluded since the defendant did not have knowledge of the unlawfulness of the defensive act, and therefore the defendant's intent is excluded.³⁹⁸ The defendant may however still be convicted of crimes requiring negligence if she should have foreseen the consequences of her actions, and if the reasonable person would have acted to prevent those consequences.³⁹⁹ However, if the defendant cannot prove that he reasonably feared death or serious injury, the defence of putative private defence must fail and the defendant will be liable on the charge of murder.⁴⁰⁰

2.2.7 Effect of putative private defence

If the actions only partially comply with the requirements of private defence, the defence will not exclude unlawfulness.

³⁹² Snyman (2008 & 2012) 112; see also Burchell & Milton (2005) 243; *S v Joshua supra* note 12.

³⁹³ Burchell 2001 SACJ 366 -367.

³⁹⁴ Burchell & Milton (2005) 243 ; *S v De Oliveira supra* note 378 .

³⁹⁵ *S v De Oliveira supra* note 378 at 60.

³⁹⁶ Reddi 2005 SACJ 275.

³⁹⁷ *S v Naidoo supra* note 380 ;

³⁹⁸ Burchell & Milton (2005)242- 243.

³⁹⁹ *S v Naidoo supra* note 380; Snyman ; see also Burchell & Milton (2005) 243

⁴⁰⁰ *S v Joshua supra* note 12.

Putative private defence affects the culpability of the defendant; therefore, the defence may “*exclude the defendant’s dolus in which case liability for the person’s death based on intention will also be excluded.*”⁴⁰¹ The defendant may still be liable for crimes requiring negligence.

In other words, the effect of putative private defence is that it excludes intent and the defendant can, if she complies with all the requirements of private defence, also exclude negligence. If negligence is present, putative private defence may result in the defendant receiving a lesser sentence than she would have received if found guilty for a crime requiring intent.

3. Conclusion

The chapter discussed private defence and all the requirements of the defence. It’s been established that if the defendant complies with all the requirements of private defence she will have a complete defence.

Private defence leads to acquittal as the defence excludes the defendant’s liability by excluding the wrongfulness of the act. Seeing as the wrongfulness is excluded, it is unnecessary to examine any of the other factors required for criminal liability. The defendant who succeeds with the defence acted lawfully, and the resultant acquittal is based on merit.

However, if not all of the requirements of the defence are met,, the defendant will have to address the other requirements of criminal liability as the defendant would then have acted unlawfully. A person who is found to have acted unlawfully can be guilty of either a crime requiring intent, such as murder, or a crime requiring negligence, such as culpable homicide.

Partial fulfilment of the requirements necessitates further investigation and enquiry to establish whether putative private defence existed. What is apparent is that the defence cannot be determined or interpreted without proper knowledge of the facts surrounding the defensive act, and the defence is dependent on the circumstances

⁴⁰¹ *S v De Oliviera supra note 378 at 63-64.*

of each case.⁴⁰² If private defence fails, the defendant may, in certain situations, rely on either putative private defence or necessity.

Further, the defence has been upheld by various court judgments, and finds entrenchment in s 49 of the Criminal Procedure Act. This is indicative of the progression made in the development of the defence.

An example of the progression is *S v Steyn*⁴⁰³ where the court developed the imminent attack requirement to include the situation where the attack has become predictable.

The writer set out to examine private defence and to clarify the defence in order to avoid confusion between the defence and other possible criminal law defences such as necessity. Further, putative private defence was distinguished from “real private defence.”⁴⁰⁴ The writer distinguished between the two as putative private defence stems from private defence. The defences differ and in law, this difference is substantial⁴⁰⁵ as putative private defence affects culpability while private defence affects unlawfulness.

The examination of the case law and the legal writings shows that private defence has not “*gained a place: rather maintained its place*” in South African criminal law⁴⁰⁶ and that it has essentially always been part of South African criminal law.

The case law shows the development of the defence to apply to situations for which it was not originally meant. An example of such this is *S v Steyn*⁴⁰⁷ which extends the “imminent attack” requirement to the situation of the battered spouse. The writer is of the opinion that the development in *S v Steyn* is proof that private defence can be developed and interpreted in a meaningful way which can be of assistance to the abused.

To determine whether private defence can still be developed, the defence must be compared to the constitution. The discussion of the constitution took place in the

⁴⁰² *S v De Oliveira supra* note 378 at 63- 64 ; *S v Ntuli supra* note 285; *S v Steyn supra* note 1.; these are just some of the relevant cases. Also see Burchell & Milton (2005) 230- 245.

⁴⁰³ *S v Engelbrecht supra* note 31; *S v Ferreira supra* note 62; *S v Steyn supra* note 1.

⁴⁰⁴ Snyman (2008 & 2012)

⁴⁰⁵ *S v De Oliveira supra* note 378 at 63- 64.

⁴⁰⁶ Snyman 2004 SACJ 178

⁴⁰⁷ *S v Steyn supra* note 1.

previous chapter. From these discussions and the case law, it is understandable that there are differing opinions about the defence. The writer is of the opinion that *S v Walters*⁴⁰⁸ and *S v Makwanyane*⁴⁰⁹ is sufficient to indicate that the defence is constitutional and can be justified in terms of the constitution. The ambit of the defence may have to be revisited but it is apparent that the defence is in line with the constitution.

⁴⁰⁸ *S v Walters supra* note 214

⁴⁰⁹ *S v Makwanayane & another supra* note 202

CHAPTER 5: PSYCHO-LEGAL DEFENCES

1. Introduction

In this chapter the writer will discuss the psycho- legal defences to murder committed by the battered spouse. These defences include but are not limited to pathological and non-pathological criminal incapacity.

The writer will also discuss the relevant psychological-legal literature to determine the exact content and application of the “battered spouse” theory, as explained and set out in South African law and psychology. The result is that other psychological theories which have been developed through years of psychological study but which have not been developed into criminal law defences will also be examined. These theories include but are not limited to Post Traumatic Stress Disorder,⁴¹⁰ the battered spouse theory and learned helplessness.

Therefore the chapter examine and discuss the effects of abuse on the psychological composition of the battered spouse. One of the questions which the writer deems important is whether or not the state of fear and the “cycle of violence” can cause a pathological defect in the battered spouse. Such a defect will result in the victim being able to rely on pathological criminal incapacity.⁴¹¹ A second important question which needs to be addressed is if the state proves that the defendant does not qualify for the defence of pathological criminal incapacity can the defendant still attempt to rely on non- pathological criminal incapacity or did *S v Eadie*⁴¹² abolish the defence in its totality?

The writer will discuss each of the defences in its totality and separately. However, before a sensible discussion of the defences can occur the perimeters of the defences have to be set and the relevant definitions need to be clarified.

⁴¹⁰ herein after PTSD.

⁴¹¹ *S v Baily 1982(3) SA 772(A)* the court answered this question in the affirmative; *S v Kavin supra* note 8, 732

⁴¹² *2002 (1) SACR 663 (SCA)*.

2. Criminal capacity

Criminal capacity can be defined as the ability to appreciate the wrongfulness of one's conduct and to act in accordance with such appreciation.⁴¹³ In other words it is a person's ability to think, apprehend and act accordingly. Thus criminal capacity is a two pronged test.⁴¹⁴ The first aspect is the cognitive ability to appreciate the wrongfulness of one's conduct.⁴¹⁵ The second leg is the connotative leg of the test which entails the physical ability to direct ones conduct according to the cognitive appreciation of the wrongfulness of one's conduct.⁴¹⁶

S 78 of the Criminal Procedure Act⁴¹⁷ contains the test as described by the writer. Various court decisions have also defined and confirmed the test as described⁴¹⁸ but this does not mean that the test isn't susceptible to critique.⁴¹⁹

Further it is important to note that should either of the functions be absent the accused will not be criminally liable due to pathological criminal incapacity or non pathological criminal incapacity depending on the circumstances of each case.⁴²⁰ If

⁴¹³ Snyman "C(2012) 164; Burchell & Milton, *Principles of Criminal Law* (2005); De Wet & Swanepoel "Strafreg" 3rd ed at 72; Van Oosten "Non- pathological criminal incapacity versus pathological criminal incapacity" 1993 SACJ 127- 147; *S v Ngobese & others 2002 (1) SACR 562 (W)*; Kaliski 41.

⁴¹⁴ Snyman "The tension between legal theory and policy considerations in the general principles of criminal law" 2003 *Acta Juridica* 16- 17; Louw "S v Eadie: the end of the road for the defence of provocation?" 2003 SACJ 200-206; Le Roux 2002 JCRDL 478- 481; Kaliski 105

⁴¹⁵ Snyman "Is there such a defence in Our Criminal Law as 'Emotional Stress'?" 1985 SALJ 248- 249; Snyman (2012) 188 – 189; Van Oosten 1993 SACJ 127- 147, 128; Carstens "criminal liability & sentencing for murder committed with diminished criminal capacity due to provocation – S v Mnisi 2009(2) SACR 227 (SCA) 2010" 2010 *De Jure* 388- 394.

⁴¹⁶ Snyman (2012) 159-166; Burchell & Milton (2005); Snyman 1985 SALJ 248- 249; s 78(1) (a) and (b) of the CPA; *S v Chretien 1981 (1) SA 1097(A)*; *S v Van Vuuren supra* note 310; Meintjies- van Der Walt "Making a muddle into a mess? The amendment of s 78 of the Criminal Procedure Act" 2002 SAJCL 242; Louw 2003 JSACJ 200-206; See also Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters RP 69/1967.(Rumpff commission)

⁴¹⁷ Act 51 of 1977.

⁴¹⁸ Snyman 1985 SALJ 248- 249; *S v Arnold supra* note 14; *S v Wiid supra* note 7 *S v Engelbrecht supra* note 31; *S v Eadie supra* note 7.

⁴¹⁹ Chetty "Incapacity to determine criminal capacity: Mad or bad?: a selected case study" *Acta Criminologica* 2008; Le Roux 2002 JCRDL 478- 481.

⁴²⁰ Snyman (2012) 167- 167; Spammers

however one of the functions is only impaired such impairment will lead to diminished responsibility and may serve as a mitigating factor during sentencing.⁴²¹ This will however be discussed under the appropriate headings.

Another important aspect which needs to be noted is the fact that the determination of criminal capacity precedes that of fault and that if the criminal capacity is excluded by either a pathological or non pathological defect. The inquiry into the guilt and fault of the accused becomes irrelevant and unnecessary. In other words a mental illness or defect as well as a non- physical factor may exclude criminal capacity.⁴²² The defence used depends on what excludes the criminal capacity thus criminal incapacity consists of two separate defences.⁴²³

If a defendant wants to rely on either of the defences the defendant must lay a foundation for the defence and it is the states duty to rebut such evidence.⁴²⁴ The state is however assisted by the presumption that a sane person who engages in conduct which would ordinarily result in criminal liability does so consciously and voluntarily. This presumption has the result that the foundation laid by the defendant must create reasonable doubt regarding the accused criminal liability.⁴²⁵

3. Diminished responsibility

The writer will now discuss diminished responsibility as it is an alternate defence available to the accused. It should however be kept in mind that diminished

⁴²¹ Section 274 (1) of the Criminal Procedure Act 51 of 1977 provides for minimum sentencing and the deviation from the minimum sentences; Snyman 1985 *SALJ* 248- 249; Snyman (2012) 181; *S v Mnisi supra* Note 75, 231 – 232; S 78(7) Criminal Procedure Act; Carstens 2010 *De Jure* 388-394; Ludsin “*South African Criminal Law and Battered Women Who Kill: Discussion Document 2.2003.*” obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012

⁴²² Snyman (2012) 154- 164 & 181; Van Oosten 1993 *SACJ* 127- 147; Spammers ; *S v Campher supra* note 74; Louw “*S v Eadie: the end of the road for the defence of provocation?*” 2003 *JSACJ* 200-206

⁴²³ Van Oosten 1993 *SACJ* 127; Louw 2003 *JSACJ* 200.

⁴²⁴ S 78(1)(1B); *S v Kavin supra* note 8; Carstens & Le Roux 2000 *SACJ* 180 -189; *S v Stellmacher supra* note 51 181,183; *S v Wiid supra* note 7,561; Van Oosten 1993 *SACJ* 127- 147,141, *S v Eadie supra* Note 7

⁴²⁵ Louw 2003 *SACJ* 200-206; *S v Eadie supra* note 7; S 78(1)(1A) of the Criminal Procedure Act; Reddi 2003 *SACJ* 73 - 74; *S v Wiid supra* note 7; Kaliski 103

responsibility is not a defence in the pure sense of the word but rather serves as a mitigating factor.⁴²⁶ The defence serves as justification and not excuse.⁴²⁷

Diminished responsibility exist when an accused is criminally responsible for his act but his conduct is deemed less blameworthy due to the fact that his capacity to appreciate the wrongfulness of his act or the ability to act in accordance with the such appreciation is diminished by mental illness or some other non-pathological factor. The defendant's mental facilities are impaired.

Diminished responsibility reduces culpability and not criminal responsibility and so doing it mitigates sentence.⁴²⁸ The defence is often raised in situations where the defendant attempts to rely on incapacity due to mental deficiency which does not amount to insanity.⁴²⁹

The definition, as contained in the Criminal Procedure Act, is problematic as the definition specifically provides for a diminishment in capacity which is brought on by a pathological defect or mental illness.⁴³⁰

The section distinguishes between defendants suffering from pathological defect and those suffering from a non-pathological defect. This distinction may be constitutionally questionable but as this study does not revolve around the constitutionality of the defence the writer will not continue the discussion.

The defendant who attempts to rely on diminished responsibility in cases where a mental defect or illness is absent will have to rely on the common law to support her defence of diminished responsibility and will have to lay the foundation for the defence.⁴³¹

⁴²⁶ Grant "Defences under the protection of state information bill: justification and the demands of certainty" 2012 *SAJHR* 328; Louw 2003 *JSACJ* 200; S 78(7) of the Criminal Procedure Act; Carstens 2010 *De Jure* 388- 394; *S v Mnisi supra Note 75*; Snyman (2012) 182.

⁴²⁷ Hoctor "Tracing the origins of non pathological incapacity in south African criminal law" *Fundamina* 17 (2) 2011, 75; Snyman (2012) 181; Grant 2012 *SAJHR* 328.

⁴²⁸ *S v Mnisi supra Note 75*, 227-229; Hoctor "Tracing the origins of non pathological incapacity in South African criminal law" *Fundamina* 17 (2) 2011, 75; Carstens 2010 *De Jure* 388- 394; Wolhuter 1996 *SACJ* 160; Stevens 2011 *JCRDL* 585- 604; Kaliski 41

⁴²⁹ Criminal Procedure Act s 78(7).

⁴³⁰ S 78(7).

⁴³¹ Carstens 2010 *De Jure* 388- 394; *S v Mnisi 2009 supra note 75*; Stevens 2011 *JCRDL* 585- 604,604.

Here theories such as PTSD and the battered wife syndrome can be effective in establishing whether or not the victim's conduct is less blameworthy than it would have been if not for the presence of the mental illness or defect. The writer will now discuss each of the psycho-legal defences which South African law acknowledges.

4. Pathological criminal incapacity

The first of the defences influencing criminal capacity is pathological criminal incapacity. Pathological criminal incapacity is criminal incapacity which arises due to the presences of a mental illness or defect.⁴³² Pathological criminal incapacity is contained in the Criminal Procedure Act in s 78(1) (a) & (b).⁴³³ The section determines that if a person cannot differentiate between wrong and right or he cannot act in accordance with such appreciation due to a pathological defect that person does not have criminal capacity and therefore he cannot be found guilty for the specific crime charged with.⁴³⁴ This form of incapacity has the result that the defendant must be found not guilty due to mental illness or defect. In other words the fact that she could either not appreciate the wrongfulness of her conduct or could not act in accordance with such appreciation will be the reason why she is found not guilty or receives a lighter sentence.⁴³⁵

This does not mean that the accused will go unpunished as the Criminal Procedure Act allows the judge or magistrate to use their discretion and make any one of the relevant orders contained in S 78(6).⁴³⁶ The definition makes it unambiguously clear that only a mental disorders or illness can exclude criminal capacity. What constitutes a mental illness or defect is an important component which must be considered as the Criminal Procedure Act does not define mental illness or defect.

⁴³² S 78 of the Criminal Procedure Act; Spammers

⁴³³ Act 51 of 1977.

⁴³⁴ Snyman 1985 *SALJ* 246- 247; Meintjies- van Der Walt 2002 *SACJ* 242; Le Roux & Stevens "Pathological Criminal Incapacity and the conceptual interface between Law and Medicine" 2012 *SACJ* 46-47.

⁴³⁵ Le Roux & Stevens 2012 *SACJ* 47; Snyman (2012) 175 -176; Van Oosten 1993 *SACJ* 127- 147; S 78(6) (a); Kaliski 41

⁴³⁶ Criminal Procedure Act, 1977; Van Oosten 1993 *SACJ* 127- 147

a) Mental illness

The Criminal Procedure Act requires the presence of a mental illness or defect before a defendant can rely on pathological criminal incapacity. The Act sets mental illness or defect as the “*threshold*” for the defence⁴³⁷ yet the Criminal Procedure Act does not define the term “mental illness or defect” and one has to look to the Mental Health Care Act⁴³⁸ for the definition of mental illness or defect. This is a *lacuna* in the law and the situation needs to be addressed as the current situation is undesirable and ineffective.

The Mental Health Care Act defines mental illness or defect as “*a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis.*”⁴³⁹ In other words only a “*disease of the mind*”⁴⁴⁰ can qualify as a mental illness in terms of the Mental Health Care Act. What classifies as a disease of the mind is unclear and is a matter of opinion which opinion will depend on the facts presented to the diagnostician. What is evident from the definition is that the defect or illness has to be of a pathological nature.

The defect must be situated within the body of the accused and cannot be some external factor. An external stimulus which may have altered the defendant’s state of mind or may have influenced her perceptions of wrong and right is left out of the equation. An external stimulus may allow the defendant to rely on non-pathological criminal incapacity which is a separate defence and will therefore be discussed separately.⁴⁴¹

As the definition contained in the Mental Health Care Act falls outside the ambit of the Criminal Procedure Act it may only serve as a guideline for the court. The court cannot be held bound by the definition to illustrate with an example: the fact that the

⁴³⁷ Le Roux & Stevens 2012 SACJ 47; Kaliski 46

⁴³⁸ Act 17 of 2002; Kaliski 97

⁴³⁹ S 1 Act 17 of 2002 Meintjies- van Der Walt 2002 SACJ 242; Le Roux & Stevens 2012 SACJ 46 - 47; Chetty “Incapacity to determine criminal capacity : mad or bad?: a selected case study” *Acta Criminologica* 2008, 132.

⁴⁴⁰ Burchill and Milton (2005) 375; Meintjies- van Der Walt 2002 SACJ 249.

⁴⁴¹ *S v Mahlinza* 1967(1) SA 416; *S v Swart* 1978(1) SA 503 (C); Smith “Battering, forgiveness and redemption.” *Journal of Gender, Social Policy & the Law* [Vol. 11:2] 921- 962; Snyman (2012) 176 – 177; Louw 2003 SACJ 200-206, 200.

accused has been declared a state patient or mentally ill in terms of the civil law can be taken into consideration but the courts aren't bound by such a determination as it remains the trial courts duty to determine the criminal capacity of the accused.⁴⁴² Further the definition is confirmed by the case law and the definition has been interpreted and defined accordingly.⁴⁴³ The second aspect of mental illness which needs to be noted is that the mere presence of a mental illness or defect is insufficient to establish the defence of pathological criminal incapacity.⁴⁴⁴ The mental illness must affect the defendant's ability to appreciate the wrongfulness of his actions or to act in accordance with such an appreciation.⁴⁴⁵ What is clear is that the Criminal Procedure Act focus is not on the specific mental illness but on the effects of the mental illness on the defendant.

b) Appreciation of unlawfulness

The Criminal Procedure Act in S 78(1) (a) requires that the defendant must be unable to appreciate the wrongfulness of his actions.⁴⁴⁶ Therefore it is important to determine what is meant with the requirement and what to appreciate the wrongfulness of one's actions means. This requirement can be described as the mental element to criminal capacity enquiry.

The writer examined the case law and the Criminal Procedure Act and it is apparent from the definition that it requires a person to realize what is wrong and what is right. He must be able to realise that his conduct is wrongful. The distinction must be that of the reasonable person in the situation. The requirement implies the ability to think rationally and thoroughly.

If the defendant does not have the ability to appreciate the wrongfulness of his actions i.e. he cannot distinguish between wrong and right then the defendant cannot be held criminally liable for his actions. The requirement is more than the mere

⁴⁴² Snyman (2012) 176; *S v Kavin supra* note 8,736- 737; Louw 2003 *JSACJ* 200-206; Kaliski 45

⁴⁴³ Snyman 1985 *SALJ* 248- 249; Le Roux & Stevens 2012 *SACJ* 47; Chetty "Incapacity to determine criminal capacity : mad or bad?: a selected case study" *Acta Criminologica* 2008.

⁴⁴⁴ Le Roux & Stevens 2012 *SACJ* 47; Burchell & Milton (2005) 370- 374; Snyman (2012) 176 – 177.

⁴⁴⁵ S 78(1) (a) & (b).

⁴⁴⁶ S 78(1) (a) and (b); Meintjies- van der Walt 2002 *SAJCL* 242.

ability to think it is the ability to realise that the action or the results of the action will cause harm or constitute an offence.

This requirement forms the connotative ability of the person to think and to have insight into his conduct. This requirement is however subjected to the requirement that the inability be caused by a mental illness or defect.⁴⁴⁷ In other words the person must be unable to think rationally due to the presence and effect of a mental illness or disease.

If however it is found that the defendant has the ability to distinguish between wrong and right the second leg of the test comes into operation. This means that only after it has been determined that the defendant has the ability to appreciate the wrongfulness of his actions can the court make an enquiry into whether or not the defendant had the ability to act in accordance with said appreciation. If the court finds that this ability or function is impaired to such an extent that it excludes criminal capacity the second leg of the test becomes irrelevant.

If the ability is only diminished such a diminishment can be used as a mitigating factor during sentencing.⁴⁴⁸ The diminishment does not preclude the court from entering the second leg of the enquiry.

c) Direction of action

This leg of the test becomes relevant after the court found that the accused could appreciate the wrongfulness of her conduct. This aspect can be described as the physical element of the incapacity enquiry as the leg of the test deals with physical bodily movements. The question here is whether or not the defendant had the ability to direct his body to act in accordance with his appreciation of wrong and right.

In other words could his brain or mind have stopped him from behaving in a certain manner? If he had the ability to direct his actions in accordance with his appreciation of the wrongfulness of his conduct he has the necessary criminal capacity and can be held responsible for his acts. If he did not have the ability to direct his behaviour and this inability is due to a mental illness or defect then he will comply with the

⁴⁴⁷ Snyman (2012) 176- 177; Sec 78 of the Criminal Procedure Act 1977.

⁴⁴⁸ S 78 (7) of the Criminal Procedure Act, 51 of 1977.

second leg of the test as contained in section 78(1) (b).⁴⁴⁹ The presence of the inability to act according to one's appreciation of the wrongfulness of one's acts is sufficient to exclude criminal capacity. If either the ability to appreciate the wrongfulness of the act or to direct one's acts in accordance with such appreciation is absent then criminal capacity is absent. It is important to distinguish the inability to act in accordance with the appreciation of wrongfulness from automatism.⁴⁵⁰

Automatism is a separate defence and although it may resemble the second leg of the incapacity test it is not as suggested by the court in *S v Eadie*⁴⁵¹ the same as the second leg of the incapacity test. Automatism will however be discussed separately and completely after the discussion of non-pathological incapacity as it has bearing and effect on the totality of the criminal capacity defence.

5. Non-Pathological Criminal Incapacity

Non-pathological criminal incapacity developed over time to provide for the situation where a person does not have criminal liability due to presence of some external factor which excludes either the person's ability to appreciate the wrongfulness of his conduct or to act in accordance with such appreciation.⁴⁵²

Thus non-pathological criminal incapacity is where a person's ability to appreciate the wrongfulness of his conduct or to act in accordance with such an appreciation is absent due to a non-pathological or external factor.

The cause of the incapacity is situated outside the defendant's body. The external factor does not amount to a mental illness.⁴⁵³ Further the incapacity is often only

⁴⁴⁹ The Criminal Procedure Act 51 of 1977; See also Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters RP 69/1967.(Rumpff commission)

⁴⁵⁰ Meintjies- van Der Walt 2002 *SAJCL* 242; *Snyman* (2012) 165 – 172; Louw 2003 *JSACJ* 200-206; Spammers ; Le Roux 2002 *JCRDL* 478- 481; Louw 2001 *SACJ* 206- 216.

⁴⁵¹ *S v Eadie supra* note 7 ; Spammers

⁴⁵² Louw 2003 *SACJ* 200-206; *Snyman* (2012) 168 – 169; *S v Arnold supra* note 14; Louw 2003 *SACJ* 200-206.

⁴⁵³ Hoctor "Tracing the origins of non pathological incapacity in South African criminal law" *Fundamina* 17 (2) 2011 p 70; Van Oosten 1993 *SACJ* 146 ; Grant 2012 *SAJHR* 328 ; This stimulus has been held as emotional stress, provocation and total disintegration of a person's personality; *Snyman* (2012) 166- 168.

temporary or short term.⁴⁵⁴ The incapacity is very rarely long term though the effects of the incapacity may be long term. There are various discussions on what constitutes non- pathological incapacity and what may cause the incapacity. The development of the defence can be traced back to the case *S v Arnold*⁴⁵⁵, *S v Wiid*⁴⁵⁶ and *S v Laubscher*⁴⁵⁷ which effectively grounded and entrenched the defence in the South African legal system. These decisions provide the accused with the possibility of raising a complete defence should she be able to provide sufficient compelling evidence to justify the defence.

The abovementioned decisions held that there are external factors which can influence the mental capacity of a defendant these include provocation⁴⁵⁸, emotional stress⁴⁵⁹ and total personality disintegration.⁴⁶⁰

The law on what constitutes non-pathological criminal incapacity and what may influence or cause such incapacity is fraud with controversy. Some writers acknowledge the importance of the defence of criminal incapacity while other writers deem the defence unnecessary and problematic.⁴⁶¹ Often the availability of the defence and the application of the defence depend on the quality of the legal advice rendered and the presiding officers understanding of the law.

⁴⁵⁴ Carstens & Le Roux 2000 SACJ 180 -189; Ludsin, “*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*” obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; *S v Wiid supra* note 7

⁴⁵⁵ The court for the first time recognised an incapacity caused by an external factor other than youth, mental disorder or intoxication by recognising provocation / emotional stress as a complete defence; Snyman 1985 SALJ 248- 249; Meintjies- van der Walt 2002 SAJCL 242 ; see also *S v Campher supra* note 76

⁴⁵⁶ 1990 (1) SACR 561 (A); Snyman (2012) 168 – 169.

⁴⁵⁷ 1988 (1) SA 163(A).

⁴⁵⁸ *S v Eadie supra* note 7; *S v Moses 1996 (1) SACR 701 (C)*; *S v Wiid supra* note 7; Louw 2003 JSACJ 200-206.

⁴⁵⁹ *S v Wiid supra* note 7; *S v Arnold supra* note 14; *S v Moses supra* note 458 the minority judgement in *S v Campher supra* note 74; Hoctor “Tracing the origins of non pathological incapacity in South African criminal law” *Fundamina* 17 (2) 2011; 75; Snyman 1985 SALJ 240; Stevens 2011 JCRDL 432-448 & 585- 604; Louw 2003 JSACJ 200-206; Kaliski 52

⁴⁶⁰ *S v Kavin supra* note 8; *S v Arnold supra* note 14; Kaliski 40

⁴⁶¹ Louw 2001 SACJ 206- 216.

This situation was deemed unfavourable and in 2002 in *S v Eadie*⁴⁶² the Supreme Court of Appeal finally altered the position through the majority judgment handed down by Navsa J. The *Eadie* Judgment creates confusion as it can be interpreted in various manners.⁴⁶³ Therefore it has become imperative to determine whether or not the defence of non-pathological criminal capacity still exists in South African criminal law.⁴⁶⁴

The court in *S v Eadie*⁴⁶⁵ had to determine whether or not the defendant acted under the influence of provocation and whether or not the provocation affected him to the point that he was non-pathologically incapacitated. The court in this case found that the defendant could not rely on non-pathological criminal incapacity due to provocation.

The facts of the case and the evidence clearly showed that severe provocation was present but that this did not influence him to the extent that he was incapacitated. The court also found that there is a difference between losing one's temper and being non-pathologically incapacitated. Before the writer expands on the judgment it is important to consider the facts of the decision.

The facts of *S v Eadie* are as follow:

The defendant and the victim were driving on the road when the victim started provoking the defendant by driving slowly in front of him. The defendant would then over take the victim. After the defendant over took the victim, the victim would flash his light and over take the defendant only to drive slowly in front of him. The victim was toying with the defendant and he attempted to provoke the defendant.

The behaviour was repeated several times before the two cars came to a standstill at a traffic light. At the traffic light the defendant got out of his car and confronted the driver. An argument ensued and the defendant returned to his car, removed his hockey stick from the car and attacked the car and the driver. The defendant attacked the driver, killing him; he then left the scene, cleaned himself up, returned to the scene, through the murder weapon away, and then lied to the police about his conduct and what occurred at the scene.

⁴⁶² 2002 (1) SACR 663 (SCA).

⁴⁶³ Carstens 2010 *De Jure* 388- 394; Louw 2001 SACJ 206- 216, 207 Stevens 2011 *JCRDL* 432-448.

⁴⁶⁴ *S v Eadie supra* note 7; Stevens 2011 *JCRDL* 432-448, Snyman (2012) 169.

⁴⁶⁵ *S v Eadie supra* note 7.

The facts of the case suggest goal directed behaviour as the defendant's actions are planned and he is clearly aware of his conducts repercussions. The court considered all the facts of the case including the conduct of the defendant after the incident.

The defence also argued that during the process of planned actions, the assault, the defendant somewhere lost the ability to appreciate the wrongfulness of the conduct or to act in accordance with such wrongfulness. The court held that such a defence must be rejected as it "*stretches credibility*" when a person claims that he, while acting with full cognitive and conative ability, lost either one of these abilities.⁴⁶⁶

Further the court emphasised that it is important to distinguish between non pathological criminal incapacity and pure loss of temper. The reasonable person must exercise control over his faculties and the law cannot allow people to rely on his inability to exercise self control as a defence to murder.

Loss of temper and control is insufficient and does not establish non-pathological criminal incapacity.⁴⁶⁷ Further goal directed and planned behaviour is indicative of criminal capacity⁴⁶⁸ this is supported by the presumption that sane people who act unlawfully do so consciously and willingly.⁴⁶⁹ A defendant cannot under these circumstances claim that he acted automatically or did not have criminal capacity.

The writer is of the opinion that the conviction of *Eadie* was the correct judgment but the premise on which the judgment is based is incorrect as the judgment confuses the legal principles.⁴⁷⁰ The judgment was reached by an argument based on policy considerations and not on pure law. The judgement of the court in *Eadie* is subject to critique and can be interpreted in at least four different ways.⁴⁷¹

The most common of these interpretations is that the court in *S v Eadie* abolished the defence of non pathological criminal incapacity, specifically the second leg of the

⁴⁶⁶ *S v Eadie supra* fn 7; Louw 2003 JSACJ 201- 202. Reddi "SALJ; Louw 2003 SACJ 200-206,202.

⁴⁶⁷ Snyman (2012)169 – 170.

⁴⁶⁸ *S v Kok supra* note 160; Kaliski 52

⁴⁶⁹ S 78(6) of the Criminal Procedure Act, 1977; *S v Eadie supra* note 7; Louw 2003 JSACJ 200-206.

⁴⁷⁰ *S v Eadie supra* note 7; Snyman 2002 *Acta Juridica* 14 – 15; Le Roux 2002 JCRDL 478- 481.

⁴⁷¹ Snyman (2012) 167- 173, 247- 248 ; Burchell and Milton only discuss three of the interpretations; Louw 2003 JSACJ 200; Carstens 2010 *De Jure* 388- 394; Snyman " *The tension between legal theory and policy considerations in the general principles of criminal law*" 2003 *Acta Juridica* [Part A: General Principles of Criminal Liability and Specific Offences] 1- 22,22.

incapacity test, and that the court equates non-pathological incapacity due to emotional stress/ provocation to the defence of automatism.⁴⁷² This interpretation effectively abolishes the defence of non pathological criminal incapacity.

The three other interpretations which can be made, as described by Burchell⁴⁷³ are:

Firstly “*that the decision focuses on the accepted process of judicial inference of the presence or absence of subjective criminal capacity from an examination of objective facts and circumstances*”⁴⁷⁴

Secondly the judgment restricts the ambit of the defence of criminal incapacity to the situation where automatism is present. This interpretation requires the redefinition of the actual subjective criterion of capacity and so doing makes the test for criminal capacity objective instead of subjective.⁴⁷⁵

In this way the defence of non- pathological criminal incapacity will be equated to that of automatism and non-pathological criminal incapacity will be abolished. The third and last interpretation is that Navsa J identified an essential objective aspect in an otherwise subjective test.⁴⁷⁶ This interpretation has the effect of emphasising that courts should not too readily accept the accused *ipse dixit* regarding the presence of abuse and criminal incapacity.⁴⁷⁷ The interpretation makes expert evidence from both the defence and the prosecution essential to establish the criminal incapacity.⁴⁷⁸

⁴⁷² *S v Eadie supra* note 7; Snyman (2012) 175; Stevens 2011 *JCRDL* 432-448 & 585- 604; Meintjies-van der Walt 2002 *SAJCL* 242; Louw 2001 *SACJ* 206- 216; Snyman 1985 *SALJ* 240; See Stevens 2011 *JCRDL* 432-448 & 585- 604; Snyman (2008) 169 – 170; Snyman “*The tension between legal theory and policy considerations in the general principles of criminal law*” 2003 *Acta Juridica* 1- 22; Louw 2003 *JSACJ* 200-206; Le Roux 2002 *JCRDL* 481; Stevens 2011 *JCRDL* 432-448; Kaliski 51

⁴⁷³ Burchell & Milton (2005); Stevens 2011 *JCRDL* 432-448.

⁴⁷⁴ Burchell & Milton (2005); Louw 2003 *JSACJ* 200. Stevens 2011 *JCRDL* 432-448; Kaliski 48

⁴⁷⁵ Louw 2003 *JSACJ* 200-206; Carstens 2010 *De Jure* 388- 394; Stevens 2011 *JCRDL* 432- 448.

⁴⁷⁶ Louw 2001 *SACJ* 211- 212; Snyman 2003 *Acta Juridica* 21- 22; Carstens 2010 *De Jure* 388- 394. Stevens 2011 *JCRDL* 432-448; Kaliski 39

⁴⁷⁷ Grant 2012 *SAJHR* 328; Burchell & Milton (2005); Ludsin “*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*” obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; Stevens 2011 *JCRDL* 432-448.

⁴⁷⁸ Van Oosten 1993 *SACJ* 127- 147; Carstens 2010 *De Jure* 2010 388- 394. ; Louw 2003 *JSACJ* 201- 202; Tredoux *et al* “*Psychology and Law*” (2005) Chapter 13 “*psychological evaluations of*

The interpretation further places the requirement of expert evidence on par with the requirements of pathological criminal incapacity.

Snyman⁴⁷⁹ in his 2012 book also discuss the different interpretations and he supports some of the interpretations of Burchell.⁴⁸⁰ Snyman however goes further and states that one can accept that the defence of non-pathological criminal incapacity due to provocation has been abolished but that it is possible for the defence to be found on other factors.⁴⁸¹

Snyman⁴⁸² opines that the decision of *S v Eadie*⁴⁸³ must be interpreted as the court requiring a defendant to proof his claim of non - pathological criminal incapacity by leading expert evidence regarding his mental state. If this interpretation is followed then it is clear that the defence continues to exist and that a defendant has to proof the factor that he claims caused his incapacity and this cause must be sufficiently serious.⁴⁸⁴ Therefore a person who claims that his incapacity was brought on by emotional stress must proof that the emotional stress was of such a nature that it could have affected him and influenced his behaviour.⁴⁸⁵ The cases of *S v Arnold*⁴⁸⁶ and *S v Kavin*⁴⁸⁷ serves as examples of where the defendant proved the factors stated influenced or caused the incapacity.

The writer supports the opinion held by Snyman and Stevens⁴⁸⁸ and is of the opinion that the judgment of *S v Eadie*⁴⁸⁹ makes expert evidence essential for the battered spouse to rely on the defence of non- pathological criminal incapacity.

mental state in criminal cases”;Stevens 2011 JCRDL 432-448; Le Roux 2002 JCRDL 478-481;Carstens 2010 De Jure 388- 394; Kaliski 46

⁴⁷⁹ Snyman 2012; Burchell and Milton(2005).

⁴⁸⁰ Burchell & Milton (2005).

⁴⁸¹ Snyman (2012) 173; these include emotional stress as defined in *S v Arnold supra* note 14.

⁴⁸² Snyman (2012).

⁴⁸³ *S v Eadie supra* note 7

⁴⁸⁴ Grant 2012 SAJHR 328; Carstens 2000 SACJ 180 -189.

⁴⁸⁵ *S v Laubscher supra* note 72; *S v Eadie supra* note 7; *S v Campher supra* note 74; Snyman 1985 SALJ 240 ; Grant 2012 SAJHR 328; *S v Arnold supra* note 14; *S v Baily supra* note 411; Kaliski 51 ⁴⁸⁶ *supra* note 9; Kaliski 51

⁴⁸⁷ 1987(2) SA 731 (W).

⁴⁸⁸ Stevens 2011 JCRDL 585- 604.

⁴⁸⁹ *S v Eadie supra* note 7.

The writer also submits that the defence of non-pathological criminal incapacity is still available for the battered spouse. The battered spouse will have to lay a proper foundation for the defence and she will have to lead expert evidence regarding her mental state and her psychological composition. It is the writer's opinion that this position is to be preferred as it prevents the flood gates from being opened to persons killing their spouses but it also provides justice to the victim who suffered abuse.⁴⁹⁰ The defence apart from excluding criminal liability may also serve as a mitigating factor for sentence. It is important that the defence must not be confused with Automatism which the writer will now discuss.

6. Automatism

Automatism is a state wherein a person acts automatically without thought or control. It is a state where a person acts reflexively and automatically. The conduct is involuntary and spontaneous.

A person's cognitive and conative abilities do not find application.⁴⁹¹ In lay men's language automatism can be describe as a state wherein a person acts automatically without any thought about his actions and muscle control is non-existent.⁴⁹²

The defence is not often relied upon and the defence may be confusing and difficult to apply. The most important developments regarding automatism can be found in the case of *S v Stellmacher*⁴⁹³ where the court had to determine the exact ambit and requirements of the defence. The judgment is important as it establishes two separate defences namely sick and sane automatism. The distinction between the two defences is important as the two defences not only have different causes but also have different requirements and different minimum standards.

Sane automatism can be described as the situation where a person reacts reflexively to an external stimulus. The occurrence is usually of short duration and is temporary

⁴⁹⁰ Stevens; Grant 2012 *SAJHR* 328.; Kaliski 54

⁴⁹¹ Snyman (2012)178 – 179; Spammers 28-30; *S v Eadie supra* note 7.

⁴⁹² 1983(2) *SA* 181 (SWA); Snyman (2012) 165 - 1179; Burchell & Milton (2005) 370- 374: See Stevens 2011 *JCRDL* 432-448 & 585- 604, 493; Le Roux 2002 *JCRDL* 478- 481; *S v T supra* note 330 at 123 &130; Le Roux 2002 *JCRDL* 478- 481.

⁴⁹³ 1983(2) *SA* 181 (SWA); *S v Campher supra* note 74,955.

in nature.⁴⁹⁴ Muscle control is lacking and all thought and rationality is absent. The act does not qualify as an act in the judicial sense of the word as the will to act and the physical control required is absent for example a person suffers a bee sting, gets a fright and swerves her car off the road.

Sick automatism is a state wherein a person acts reflexively and automatically due to the presence of an internal stimulus.⁴⁹⁵ In other words the person does not exercise control over his bodily movements and his mind does not attempt to counter the action due to some internal factor. The distinction between the types of automatism is unnecessary and confusing and the crux of the defence remains the automatic and reflexive act of the defendant.⁴⁹⁶

Thought and mental faculties does not play any part in the actions. A great example of sick automatism is where a person who is having an epileptic fit or convulsions accidentally hits a bystander. The person may have hit the bystander but as there wasn't control over the action, the action cannot be deemed a legally punishable act.

The defence of automatism excludes the first requirement for criminal responsibility as the defence excludes the act and without a lawfully punishable act a crime cannot be committed.⁴⁹⁷ Once the act has been excluded it becomes unnecessary to enquire into the presence of all the other requirements of criminal liability and any enquiry into the defendant's criminal liability will be *obiter*.⁴⁹⁸

Further a state of automatism is often accompanied by the presence of amnesia this does however not mean that whenever amnesia is present a person acted in a state of automatism.⁴⁹⁹ Of the two defences the defence of sane automatism is the most problematic as it resembles the defence of non-pathological criminal incapacity and it

⁴⁹⁴ Snyman (2012) 179 – 180; Le Roux 2002 *JCRDL* 478- 481; Kaliski 38

⁴⁹⁵ Snyman (2012) 180 – 181; *Psychology and Law* (2005) Chapter 13 “psychological evaluations of mental state in criminal cases”; Spammers; Le Roux 2002 *JCRDL* 478- 481.

⁴⁹⁶ Spammers; *S v Moses supra* note 458; Stevens 2011 *JCRDL* 432-448.

⁴⁹⁷ Snyman (2012) 169 – 172; Louw 2003 *JSACJ* 200- 206; Kaliski 37; *R v Schoonwinkel* 1953 (3) SA 136 (C) ; *R v Mkize* 1959 (2) SA 260 (N)

⁴⁹⁸ Meintjies- van Der Walt 2002 *SAJCL* 245; *S v Stellmacher supra* note 51; Stevens; Snyman (2012)153- 154; Louw 2003 *JSACJ* 200-206, 203; Snyman (2012) 165- 171; Louw 2001 *SACJ* 208- 209; Snyman 1985 *SALJ* 240.

⁴⁹⁹ *Stellmacher supra* note 51; *S v Kavin supra* note 8; Spammers; Carstens 2010 *De Jure* 388- 394; *S v Chretien supra* note 416; Kaliski 106

may also resemble syndromes such as PTSD.⁵⁰⁰ This resemblance has in the past lead to confusion and therefore there are varying opinions on the availability of the defence.

The judgment of Navsa in *S v Eadie*⁵⁰¹ is case and point. The decision has been discussed in its totality but the writer deems it important to emphasise that the court in *Eadie* equated the second part of the capacity test to automatism. In the writers opinion this equation is susceptible to critique and is, with respect, wrong.⁵⁰²

The case law preceding *Eadie* makes the difference between the two defences unambiguously clear. For example in *S v Moses*⁵⁰³ the court distinguishes between automatism and lack of self control and states that the defences are separate. *S v Campher*⁵⁰⁴ supports this division and describes self-control as “weerstandskrag” in other word the court held self control as the ability to offer resistance to the impulse to act.

In this case the court found that the defendant was so overwhelmed by the abuse that she suffered an emotional disturbance which prevented her from acting in accordance with her appreciation of the wrongfulness of her conduct.⁵⁰⁵

The description of automatism as a reflexive act and criminal capacity as the ability to offer resistance emphasises the differences between the defences. The writer’s opinion is further supported by various writers of which Snyman is one and who indicates that *Eadie* can have up to four interpretations.⁵⁰⁶ The defence of automatism differs from that of criminal incapacity as automatism excludes the act whereas criminal incapacity attempts to exclude the wrongfulness of the act.⁵⁰⁷

⁵⁰⁰ Meintjies- van der Walt 2002 SAJCL 248; Louw 2001 SACJ 206- 208.

⁵⁰¹ *S v Eadie supra* note 7; Snyman (2012) 170 – 173.

⁵⁰² Louw 2001 SACJ 206- 216; Meintjies- van der Walt 2002 SAJCL 244; Snyman (2012) 169 – 172; Snyman 2003 *Acta Juridica* 1- 22; Louw 2003 JSACJ 201- 202; Stevens 2011 JCRDL 432 – 448; Louw 2003 JSACJ 200-206,204; Le Roux 2002 JCRDL 478- 481; Kaliski 53.

⁵⁰³ 1996 (1) SACR 701 (C); Kaliski 52; *S v Nursingh 1995(2)SACR 331 D*

⁵⁰⁴ *S v Campher supra* note 74 at,940; Louw 2003 JSACJ 200-206.

⁵⁰⁵ Louw 2003 JSACJ 200-206; The minority judgement of *S v Campher supra* note 74 at 940.

⁵⁰⁶ *S v Eadie supra* note 7; Snyman (2012). Carstens 2010 De Jure 388- 394

⁵⁰⁷ This distinction was made unambiguously clear in *S v Moses supra* note 458; Louw 2003 JSACJ 200-206; *Psychology and Law* (2005) Chapter 13 “psychological evaluations of mental state in criminal cases”; Stevens 2011 JCRDL 432-448; Le Roux 2002 JCRDL 478- 481.

As automatism is a state where a person acts reflexively the defence requires that the defendant's acts must not be goal directed and that the person should lack awareness of his environment and his conduct. This is not a requirement of either forms of criminal incapacity and lack of memory or knowledge of the environment cannot be taken as indicative of the defence of criminal incapacity.⁵⁰⁸

Another aspect which is unique to automatism is that the defence requires the presence of a trigger mechanism which is of an extreme or extraordinary nature. The trigger mechanism must be of such nature that it controls the body and excludes all bodily and intellectual control over the act.⁵⁰⁹

In the case of criminal incapacity the trigger mechanism is usually in a form which the accused is used to but which exceeds the normal parameters of abuse or alternatively the incapacity could have developed over a period of time and could be due to some external unknown trigger.⁵¹⁰

7. The battered spouse theory

The writer notes that the "battered spouse theory" in itself does not constitute a defence but it is a collective name for a multitude of symptoms.⁵¹¹ In other words "battered spouse theory" consists of various elements these include the cycle of violence, learned helplessness and coercive control.⁵¹² The theory "*describes a pattern of psychological and behavioural symptoms found in women living in violent*

⁵⁰⁸ Reddi "General Principles of Liability" 2003 (16) SACJ 73 - 74.

⁵⁰⁹ Reddi " 2003 (16) SACJ 73 - 74; S v Stellmacher *supra* note 51; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; S v Ingram 1999 (2) SACR 127 WLD; Kaliski 50 – 53 & 105

⁵¹⁰ Reddi " 2003 (16) SACJ 73 – 74; S v Stellmacher *supra* note 51; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012.

⁵¹¹ See *supra* note 16; Carstens & Le Roux 2000 SACJ 180 -189; Stevens 2011 (74) JCRDL 432-448; Carstens 2010 De Jure 388- 394;

⁵¹² See Stevens 2011 JCRDL 432-448 & 585- 604: where the writer discussed for example: Stockholm syndrome and Post Traumatic Stress Disorder; Wolhuter 1996 SACJ 151-166,152.

relationships” and is the “*cumulative effect*” of abuse on the victim.⁵¹³ Currently the purpose of the theory is not to excuse the victim of the crime but to assist the court when determining which of the criminal capacity defences are applicable and what the effect of the abuse was on the victim with reference to sentence mitigation.⁵¹⁴ The battered women syndrome is also often used to support a defence of non-pathological criminal incapacity or provocation.⁵¹⁵

Stevens⁵¹⁶ however points out that the theory must be scrutinized carefully as abused women are often referred to as battered women. Such a description is problematic as not all abused women are battered women. He further emphasises that the woman’s psychological reactions to the abuse is often referred to as battered women syndrome. Stark points out that in these relationships the physical abuse may often not be the most prominent factor in the relationship.⁵¹⁷

The theory is merely a tool to indicate the affects of abuse and the psychological changes which occur in the victim.⁵¹⁸ The argument made by Stevens is supported by that of Walker⁵¹⁹ who described the battered women theory as a pattern of psychological and behavioural symptoms found in women who are living in battering relationships.⁵²⁰ Further the writer acknowledges that these symptoms will be discussed individually and with reference to other psychological theories which can

⁵¹³ See Stevens 2011 *JCRDL* 432-448 & 585- 604; Reddi 2005 *SACJ* 259-278; Wolhuter 1996 *SACJ* 151-166.

⁵¹⁴ Reddi 2005 *SACJ* 259-278; Wolhuter 1996 *SACJ* 151-166; Ludsin “*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*” obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; *S v Potgieter supra* note 99; Stevens 2011 *JCRDL* 432-448; Kaliski 345

⁵¹⁵ Wolhuter 1996 *SACJ* 151-152; Brakel & Brooks (2001); Louw 2003 *SACJ* 200-206; Stevens 2011 *JCRDL* 432-448.

⁵¹⁶ 2011 *JCRDL* 432-448.

⁵¹⁷ Stark; Stevens 2011 *JCRDL* 432-448; *Walker* (1980).

⁵¹⁸ Sloveko described the theory as syndrome evidence to describe a cluster of symptoms to either establish the occurrence of a particular traumatic even or to explain the behaviour of a victim. Carstens 2010 *De Jure* 388- 394; Reddi 2005 *SACJ* 259-278.

⁵¹⁹ Leonor walker found and developed the psychological theory of battered women in “the battered Women.”

⁵²⁰ Battering relationship in this context refers to all abusive relationships. The concept of psychological abuse was at the time in which walker wrote still unknown and unresearched. Carstens & Le Roux 2000 *SACJ* 185-187.

be applicable to the victim including but not limited to Stockholm syndrome and the compliant victim syndrome.⁵²¹

Before the writer can discuss the battered spouse theory as a part of the criminal justice system it is important to determine what the definition of a battered spouse is and who qualifies as battered spouses or persons. This definition is important as it is required to determine the ambit of the theory and to bring the battered person into the ambit of the psycho-legal defences.

7.1 Definition of battered spouse

The definition of a battered spouse is controversial as firstly there are various definitions which can be applicable. These definitions have the same basic features but it is these features which makes the definitions problematic as certain words call certain perceptions to the fore.

The battered spouse theory has as its most radical disadvantage the fact that the name itself suggests only physical violence and the existence of a spousal relationship. The theory in itself seems to disregard other forms of abuse and relationships wherein persons might find themselves.

The definitions which exist will now be discussed and range from Walker's⁵²² definition of a battered women to the battered spouse as defined by Ludsin and Vetten.⁵²³

a) Walker's definition

According to Walker⁵²⁴ a battered women is "*a woman who was repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something the barterer wants her to do without any concern for her*

⁵²¹ See Stevens 2011 *JCRDL* 432-448 & 585- 604: the discussion of Stockholm syndrome and Post Traumatic Stress Disorder; *S v Visser supra* note 76.

⁵²² Walker (1979) 107-108.

⁵²³ See Stevens 2011 *JCRDL* 432-448 & 585- 604 in support of Ludsin & Vetten.

⁵²⁴ Walker (1979) 107-108.

rights".⁵²⁵ At first glance the definition seems straight forward and uncomplicated but once examined it becomes clear that this is not the case as the definition requires more than a single instance of abuse. When the totality of Walker's work is examined it becomes clear that the definition requires the presence of a battering cycle. A battering cycle consists of three phases. These three phases are the tension building phase, the phase of violence and the redemption phase.⁵²⁶ The definition however goes further and Walker requires that a spouse or person has to go through the cycle at least twice before she can be described as a battered person or spouse.

As Walker was the primary researcher on the battered women theory her theory developed and her definition developed into two further sub categories as this was required by the academic and practical application of the theory.⁵²⁷ The two definitions are the incident focused definition and the combined definition.

b) Battered women incident focused definition

Walker in this definition describes a battered woman as a "*women who is or was in an intimate relationship with a man who repeatedly subjects her to forceful physical and /or psychological abuse*".⁵²⁸ The definition resembles the original definition as described by Walker and can be useful when the defence describes the woman's experiences to the Court. Further the definition is of high academic value as it allows the academic to examine and scrutinise the law and the social and psychological factors present in the relationship. The definition emphasises the cyclical nature of the abuse and allows for the acceptance of psychological abuse both factors which is essential for the existence of the battered women syndrome.

As is clear from the discussion under (a) the cycle of violence needs to be present and the person must have been through the cycle at least twice. Without the presence of the cycle of violence one cannot rely on the battered women syndrome.

⁵²⁵ Walker (1979) 107-108.

⁵²⁶ Wolhuter 1996 SACJ 151-152; Each of these phases will be discussed individually under the heading "the cycle of violence"; Walker (1979) 107-108.

⁵²⁷ Both of the definitions are set out in the introductory chapter of the text therefore the definitions will only be summarised before their discussion.

⁵²⁸ Oswell; Walker (1979) 107-108; Reddi SACJ 259-278.

The definition is however not sufficient as it does not provide for all circumstances and a further definition developed.

c) Combined definition

This definition combines the incident based definition with the general theory surrounding the battered spouse. This definition is broader than the incident based theory and is not dependant on the presence of any one specific incident.

The definition is a more generalised definition and describes a battered woman as any woman who has been “the *victim of physical, sexual, and/ or psychological abuse by her partner*”. The definition is wide and provides for any physical abuse whether it be assault, rape or homicide.⁵²⁹ This definition runs the risk of being too broad and impractical as it fringes on being vague. The definition further does not require the presence of the cycle of violence thus any women who has ever been beaten may attempt to rely on the definition. It is this anomaly which makes the previous definition the choice of the academic and the courts.

The definition as the incident focused definition recognises the psychological aspect of abuse. The definition further coincides with the Domestic Violence Act.⁵³⁰ The definitions make it clear that physical violence is not a requirement without which the syndrome cannot exist. It is in this regard that the refined definitions must be preferred to the original definition of the battered women. The definitions are broad enough to accommodate both the threat of violence and psychological abuse.

7.2 The cycle of violence

As is clear from the definitions discussed the first important aspect of the battered spouse theory is the cyclical infliction of violence on the victim. The cycle of violence describes the dynamics of the relationship and explains how the victim is enticed back into the relationship with the barterer through the use of remorse and affection.

⁵²⁹ Walker (1979) 107-108.

⁵³⁰ Domestic Violence Act 116 of 1998.

The cycle of violence reinforces the battering and the abusive relationship.⁵³¹ The cycle consists of three phases.⁵³² Each of the phases has its own dominant characteristic and serves a specific purpose.

The cycle in its totality serves the purpose of establishing and sustaining control over the victim. The cycle is designed to coerce the victim into compliance with the request and requirements of the abuser.⁵³³ The occurrence can also be described as coercive control.⁵³⁴ The first component is the tension building phase, the second the infliction of violence and the third phase of the cycle is the reconciliation phase. The reconciliation phase often precedes the violent bouts. The writer will now discuss each of the phases in the cycle.

i. The tension building phase

The initial stage of the relationship can be described as the honeymoon phase. In this phase the abuser is loving and caring, he places the needs of the victim above those of his own. During this phase he makes the victim fall in love with him and the characteristics he exhibits are the same as those which he exhibits in public.

The phase does not have a set time period and can differ in length depending on the surrounding circumstances. With each cycle the phase tends to become shorter and more volatile. The onset and end of the phase is unpredictable and the phase can end at any given moment. Further the onset and completion of the phase can be influenced by stress factors outside of the relationship such as the abusers work stress. The worse the external circumstances the easier the chance of the abuser reverting to physical violence therefore this phase is often unpredictable and can suddenly and unexpectedly come to an end. The phase can however be described as the tension building phase.⁵³⁵ During this phase the tension builds and small

⁵³¹ Walker (1979) 107-108; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; Reddi 2005 SACJ 259-278;

⁵³² Wolhuter 1996 SACJ 151-152.

⁵³³ Ludsin & Vetten (2005) 67; Reddi 2005 SACJ 259-278

⁵³⁴ Stark "Coercive Control" 2010; See Stevens 2011 JCRDL 432-448 & 585- 604: where the writer discussed for example: Stockholm syndrome and Post Traumatic Stress Disorder.

⁵³⁵ Wolhuter 1996 SACJ 151-152.

arguments might take place but the abuser will not inflict physical violence on the victim.

The end of this phase is riddled with small conflicts and near the end of the phase small bouts of violence can be observed and the abusers behaviour slowly starts to change.⁵³⁶ The tension builds during this phase and accumulates in a violent outburst. This violent outburst sets the second phase into motion.

ii. The period of sever abuse

The second phase of the cycle is the violent phase. This phase is the shortest of the phases but it is the most dangerous and physically brutal of the phases. Apart from the physical character of the phase one must also take into account the impact which the physical violence has on the psychological composition of the victim.

This phase is wrought with conflict and is characterised by the infliction of physical violence the victim. The violence and abuse can range from physical beatings to psychological trauma. The physical abuse may include the infliction of sexual abuse or the abuse may contain sexual elements and acts which degrades the victim.⁵³⁷ The infliction of the violence often occur after a stressor event which may include the victim acting in a manner of which the abuser does not approve and which conduct he believed cannot be corrected by the threat of violence. All of this is done with the set purpose of regulating and controlling the victim's behaviour.

The violence may be severe but usually the violence starts as small incidents which escalate over time. The violence usually has set parameters and as time passes and the cycle repeats itself the violence escalates resetting the parameters of the abuse. This has the effect that the victim slowly grows accustomed to more server and persistent instances of violence.⁵³⁸

⁵³⁶ For example see *S v Engelbrecht supra* note 31; *S v Wiid supra* note 7,; Ludsin & Vetten (2005) 67 ; *S v Visser supra* note 76; Walker (1979) 107-108.

⁵³⁷ Campbell, "Health consequences of intimate partner violence" *The Lancet* vol 359 13 April 2002 found at the lancet.com last visited June 2012.

⁵³⁸ Buzawa & Buzawa (1990) 10; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 2.2003." obtained from: http://www.csvr.org.za/docs/gender/south_african_criminal1.pdf (visited on the 08.09.2012)

Shifting of the parameters of the violence has the effect of adapting the victim's behaviour to such an extent that it effectively changes her behaviour. In other words the cycle places the abuser in the position to control and he directs his victim's behaviour through the installation of fear and dependence. The occurrence and the existence of the cycle is of such a nature that it enables the victim to predict violent conduct of the abuser.⁵³⁹ Therefore victims of abuse are able to predict the onset of the phase in the cycle and may act in a preventative manner to minimise the abuse while other victims may after observing a specific gesture or behaviour react to such behaviour in a violent manner.⁵⁴⁰ This may result in either the death of the abuser or the abused.⁵⁴¹

An excellent example of such a case is *S v Engelbrecht*⁵⁴² where the wife killed her husband and it was shown that certain behaviours preceded the onset of violence and that the wife acted preventatively when she killed her husband.⁵⁴³ If the facts of the case is examined it is clear that the reason for the killing was the fact that the abuse exceeded the known perimeters and that she reached a point where she "snapped." The women's spirit and nature is so changed and broken that she cannot continue and the abusers conduct forces her to act in a violent manner. His death is often seen as the only way to bring the abuse to an end.⁵⁴⁴

It is important to note here that the emphasis is not on the severity of the abuse, although this may have an effect on the victim's response, but on the cyclical nature of the occurrence of the violence.⁵⁴⁵ After the infliction of the violence and verbal abuse the victims conduct is directed and the abuse served its purpose. The abuser then ends the phase when his violent conduct ends and the relationship enters the last phase of the cycle.

⁵³⁹ *S v Visser supra* note 76; Louw 2003 SACJ 200-206.

⁵⁴⁰ *S v Engelbrecht supra* note 31; *S v Wiid supra* note 7; *S v Campher supra* note 74; *S v Visser supra* note 76; Louw 2003 SACJ 200-206; Grant 2012 SAJHR 328; Reddi 2005 SACJ 270.

⁵⁴¹ *S v Wiid supra* note 7; *S v Engelbrecht supra* note 31 ; *S v Ferreira supra* note 62

⁵⁴² *S v Engelbrecht supra* note 31

⁵⁴³ *S v Engelbrecht supra* note 31;

⁵⁴⁴ Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 2" 2003 <http://www.csvr.org.za/docs/gender/southafricancriminal2.pdf>. (Visited 08.09.2012)

⁵⁴⁵ Walker (1979) 107-108.

iii. The reconciliation

During this phase the abuser apologises for his actions and tries to make up for his deeds. The abuser is repentive and promises to change his behaviour he further also promises never to repeat his behaviour. The abuser appears sincere and genuine when they make their apologies and declare their remorse.⁵⁴⁶ The abuser will shower the victim with gifts and compliments to win back her affections.⁵⁴⁷ The conduct and the remorse tend to work and the victims often believe that the abuser means what he says and that he will change.

The victims also tend to believe that they can change the abuser and that if she changes her behaviour the abuser will not react violently. It is this belief and the remorse which moves the victim to give the abuser a second chance and she rekindles the relationship. In this phase the abuser will not show any signs of violence and he will cool down.⁵⁴⁸ During this phase calm and peace governs the relationship. This phase can however be described as the calm before the storm as the violent phase always follows on this phase. The victims often believe that the abuser will change and accept his apologies' further the victim's hope that the abuser will change.⁵⁴⁹

During this phase the victim experiences various emotions which she internalises further the behaviour of the abuser internalises hope in the victim and it is this internalisation of emotion which traps the victim in the relationship.⁵⁵⁰ The three phases together control the victims' behaviour and trap her in the relationship. The victim can usually predict the onset of each phase and may in due course alter her behaviour so as to minimize the impact and occurrence of each phase.⁵⁵¹

The psychological effect of this phase has a much greater impact on the victim than the abuse. It is the promise of change and the manipulation which binds the victim to the relationship. The victim is then kept in the relationship by a combination of fear and hope.

⁵⁴⁶ Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92.

⁵⁴⁷ Buzawa & Buzawa (1990) 159; Wolhuter 1996 SACJ 151-166; Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92.

⁵⁴⁸ Wolhuter 1996 SACJ 151-166, 152.

⁵⁴⁹ Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92; Walker (1980)

⁵⁵⁰ Wolhuter 1996 SACJ 151-152.

⁵⁵¹ *S v Visser supra* note 76; Walker (1980); Kaliski 159

This phase is the final phase of the cycle of violence and it effectively traps the victim in the relationship. The cycle creates a feeling of entrapment and learned helplessness in the victim.⁵⁵² The writer will discuss learned helplessness separately as it is important to understand this characteristic in the battered spouse as it explains some of the victim's behaviour.

b. Learned helplessness

Learned helplessness is not an independent criminal law defence but it is an integral part of the battered spouse theory.⁵⁵³ As the theory is not a criminal law defence it cannot be used to negate the victims guilt but the theory may be used to explain her conduct and to support a defence of non-pathological criminal incapacity and in extreme cases pathological criminal incapacity.

Alternatively the theory can be used as a factor to mitigate sentence and place the victims conduct in its proper perspective.⁵⁵⁴ Learned helplessness can be described as the manifestation of the psychological element of abuse. This theory is a social learning theory.⁵⁵⁵ The theory can also be used to explain why the battered women becomes a victim in the first place and "*how the process of victimization is perpetuated to the point of psychological paralysis.*"⁵⁵⁶ It describes how the women learns to be helpless and dependant as she realises that she has no control over the events which take place in her life. The victim beliefs that she cannot exist or life without the abuser and she becomes passive. This passiveness creates an inability to leave the relationship therefore even when given a way out the women choose to remain in the relationship. The victim is dependent on the abuser who has to provide for her physical as well as mental and psychological wellbeing.⁵⁵⁷

⁵⁵² Wolhuter 1996 SACJ 151-166; Spammers

⁵⁵³ Carstens 2010 *De Jure* 388- 394.

⁵⁵⁴ *S v Arnold supra* note 14; *S v Kavin supra* note 8; *S v Moses supra* note 458; Louw 2003 SACJ 200-206; Wolhuter 1996 SACJ 151-166; Brakel & Brooks (2001) 130 - 133; Ludsin "*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*" obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012

⁵⁵⁵ Stevens ; Walker (1980).

⁵⁵⁶ Walker (1980).

⁵⁵⁷ Walker (1980) 40 – 44; Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92; Wolhuter 1996 SACJ 151-166.

The abuser is omnipresent and omnipotent and the victim believes that she cannot exist without the abuser. The abuse removes the victim's ability to function independently from the abuser. If the abuser is dissatisfied with a situation the victim will modify and adapt her behaviour according to the needs and requirements of the abuser.⁵⁵⁸ The victim is conditioned to such an extent that she is helpless in every sense of the word. She cannot think for herself and only acts when instructed and then only in the manner instructed. This form of dependence is severe and it has been described as a symbiotic relationship where the victim is so latched on to the abuser that survival without the abuser seems nearly impossible.⁵⁵⁹ Learned helplessness extends further than her physical care it also establishes the general belief in the victim that she cannot sustain herself. This utter helplessness experienced by the women explains why most of the victims are unemployed and why those victims who are employed usually does work that is menial and pointless. The work does not reinforce self confidence.

The fact that the abuser often earns more than the victim and therefore provides for the victim and the victim's family reinforces the victim's belief and dependence it also emphasises the victim's incapability to provide for herself and her family.⁵⁶⁰ The abuse operates in the following manner: when the victim acts on the instructions of the abuser and satisfies his needs the victim is rewarded but if the victim acts in a manner which is inconsistent with the instructions or wishes of the abuser she will be punished.⁵⁶¹ This punishment and reward system teaches the victim what is acceptable and what isn't. This form of punishment and reward removes the victim's need and ability for independent thought and can alter her self concepts. Over time the victim will lose the ability to function and think independently and she will react robotically to the abuser. The inability to think freely and independently makes the victim even more dependent on the abuser as she is unable to solve problems without the guidance of the abuser and the victim is unable to make decision without prior instruction from the abuser.⁵⁶²

⁵⁵⁸ Reddi 2005 SACJ 259-278

⁵⁵⁹ Walker (1989) 42; Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92.

⁵⁶⁰ Walker 43 – 44; Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92.

⁵⁶¹ Walker 43 – 44.

⁵⁶² Warren & Hazelwood *et al* "The Disturbed Mind, compliant victims of the sexual sadist. Australian Family Physician, vol 22, no 4, April 1993.

The reach of learned helplessness is such that the abuser does not have to be physically present to control the victim's behaviour.⁵⁶³ The victims know what the consequences of independent and unsanctioned actions are and therefore the thought and the knowledge of what the abuser is capable of is enough to direct and control the victim's behaviour. This characteristic of the battered wife syndrome is important as a victim cannot claim to be a battered person if she does not possess learned helplessness. It often occurs that these women reach a breaking point and then kill their abuser as they believe that it is the only way they will gain their freedom. These women also often hire persons to kill their abusers because they feel that if they should attempt it themselves they will only fail and that they had to act pre-emptively.⁵⁶⁴

The effect of domestic violence on the victims' learned helplessness cannot be disregarded. The secrecy which clouds domestic violence leads to the internalisation of emotions creating the perception in the victim that domestic violence is a private affair enhancing the victim's learned helplessness.⁵⁶⁵ In this phase the question of why the women did not leave often becomes important. Makofane⁵⁶⁶ is of the opinion that the question of why the women did not leave the relationship should be irrelevant as it should not be the women's responsibility to leave when the man is the one who is infringing and breaking the law.

The court in *S v Wiid*⁵⁶⁷ was confronted with the question of flight. The court had to consider various opinions which included psychological and legal opinions on the topic. The defence argued that the wife did not leave the abusive relationship due to the fact that she was conditioned to believe that she could not survive without the abuser and that she would suffer even harsher treatment should she attempt to leave. The victim is also trapped in the relationship as she knows that she is even more vulnerable outside of the relationship. Outside of the relationship she would be exposed to the possibility of the abuser finding her, and assaulting her, as well as the

⁵⁶³ *S v Visser supra* note 76; Spammers

⁵⁶⁴ Walker 47; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 2.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; Reddi 2005 SACJ 259-278.

⁵⁶⁵ Wolhuter 1996 SACJ 151-166; Walker 47.

⁵⁶⁶ Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92; Supported by Snyman (2012) who argues that there isn't a duty to flee on the victim.

⁵⁶⁷ *S v Wiid supra* note 7

inability to obtain work and the inability to provide for and protect her children. These fears are instilled in the victim by the abuser and forms part of learned helplessness. The victim believes that there is no escape and therefore she remains where she is.

The victim also knows that if she should attempt to leave the relationship the abuser has the means to find her and the abuse she will then suffer will exceed the abuse previously experienced. In other words the victims conduct is directed by fear of the abuser⁵⁶⁸ and the victim has a choice between staying in a “*physically dangerous house or face the prospect of becoming a marginalized person.*”⁵⁶⁹

As the victim believes that she will also be subjected to abuse by the abuser and that there is no escape the victim may form the perception that the death of the abuser will be the only escape. These victims are usually the victims who hire people to commit the murder on their behalf. The *S v Wiid*⁵⁷⁰ judgment is unique in the sense that it recognised non- pathological criminal incapacity in a situation where the victim herself did not commit the murder but had hired a person to act on her behalf.

It is therefore clear that learned helplessness is an integral part of the battered spouse theory. It is also apparent that if learned helplessness is absent then the abuser will not be able to control and manipulate the victim. Thus learned helplessness is a requirement of the battered spouse theory and forms an essential part of the abusive behaviour. The theory is one of the essential elements required to control the victim.

8. Coercive control.⁵⁷¹

The coercive control theory explains the nature and the effects of domestic abuse on the victim. The model requires more than the infliction of violence on the abuser. It requires the abuser to inflict violence and domination on the victim with the set purpose of exerting complete control over the victim. For example the abuser will determine whether or not the victim will work and what she will wear.

⁵⁶⁸ Louw 2003 SACJ 200-206; Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92; Wolhuter 1996 SACJ 151-166.; walker.

⁵⁶⁹ Roberts *supra* note 67; Makofane 2002 *Acta Criminologica* vol 15, 84- 92.

⁵⁷⁰ *S v Wiid supra* note 7

⁵⁷¹ Stevens 2011 JCRDL 432-448 & 585- 604: where the writer discussed for example: Stockholm syndrome and Post Traumatic Stress Disorder.

There are various definitions which exist but most of the definitions overlap and the requirements are basically the same therefore the writer refers to only two of the definitions available. The first definition of importance is that as described by Stevens who defines coercive control as an ongoing pattern of “*sexual mastering by which abusive partners, almost exclusively males, interweave physical abuse with three equally important tactics: intimidation, isolation and control*”.⁵⁷² This definition emphasises the sexual element of abuse and the power structures in the relationship.

The second definition of importance is that of Ludsin and Vetten⁵⁷³ who describes coercive control as the systematic and repetitive infliction of psychological trauma and violence. In other words coercive control is the control an abuser exhibits over the victim with the purpose of subjecting the will of the victim to that of the abuser. This definition is important as it emphasises the psychological component of coercive control. When these two definitions are examined carefully and used in conjunction it is apparent that coercive control includes both the infliction of physical, psychological trauma as well as “*intimidation, isolation and control*”⁵⁷⁴ on the victim with the purpose of instilling fear and helplessness in the victim to such an extent that the helplessness and dependence becomes part of the victims personality. This fusion eliminates her sense of self and establishes the abusers control.⁵⁷⁵

The repetitive infliction of violence and the constant presence of the abuser have the effect that the victim starts to believe that her abuser is Omni-present and Omnipotent and thus she is coerced into submission. The different strategies used to establish control will now be discussed.

a) Physical violence/ Control

The first strategy is usually the infliction of violence. This method is effective as the infliction of violence, including sexual violence, and harm onto the victim instils fear in the victim. The infliction of violence also allows the abuser to gain control over the

⁵⁷² Stevens 2011 *JCRDL* 432-448 & 585- 604, 587 + 558

⁵⁷³ Ludsin & Vetten 67

⁵⁷⁴ Stevens 2011 *JCRDL* 432-448 & 585- 604, 587 + 558

⁵⁷⁵ Stevens 2011 *JCRDL* 432-448 & 585- 604, 558; Kaliski 148- 149

victim's bodily movements and conduct. The violence is used to enforce a system of punishment and reward.

In other words behaviour which the abuser disapproves of is punished by the infliction of violence and harm whereas behaviour which the abuser approves is rewarded by the abuser refraining from abusive behaviour and in certain circumstances the victim may even receive words of praise or gifts. The system of punishment and reward is effective as it establishes certain behavioural patterns. This is due to the fact that certain actions are associated with negative consequences while others are associated with positive consequences. Therefore the victim who dislikes the negative consequences will direct her actions in a manner which corresponds with the positive consequences.⁵⁷⁶

Further it is important to acknowledge the purpose with which the violence is inflicted.⁵⁷⁷ The purpose of the violence is to degrade the victim, to rid the victim of her autonomy⁵⁷⁸ and to establish the abusers control.

Another important aspect of control is that it entails more than just the control over the bodily functions of the victims. It includes the abuser taking control over the lifestyle and life choices of the victim. The abuser often takes control of the physical appearance of the victim as he decides what she will wear and how she will conduct herself. The abuser also gains control over the victim by deciding whether or not she works and if she works what kind of work she may conduct. As part of the control the abuser will monitor her movements and may often appear unannounced at her place of work.

Further the abuser will attempt to control her friends and access to persons and external influences and may refuse her access to those persons he believes may undo his control. This is done to isolate the victim from other people and external influences as it becomes difficult to control a person as long as that person has external influences and can obtain assistance from other people.⁵⁷⁹ It is however important to note that violence occurs to keep the victim in control and when the abuser realises that he is starting to lose control he will exhibit violent behaviour to reinforce his control.

⁵⁷⁶ Walker (1980) 40- 43

⁵⁷⁷ Stevens 2011 *JCRDL* 432-448

⁵⁷⁸ *S v Visser supra* note 76; Herman 1992 *JTS* 377- 391; Stevens 2011 *JCRDL* 585- 604.

⁵⁷⁹ Reddi 2005 *SACJ* 2005 259-278

Therefore if the women attempts to leave the house he will find her and the abuse will be even more sever.⁵⁸⁰ This is done to establish and reinforce his control over the victim. The victim becomes little more than the abusers property of which he can dispose off at will. This is apparent to both victim and abuser. Thus the woman is trapped in the relationship and the only way out seems to be the death of either of the parties. The women will therefore cope with the abuse till it reaches such an extent that she realises that if she does not kill him he will surely kill her and she beliefs she has no other choice but to kill or be killed.

b) Intimidation

The second technique used is intimidation. This strategy is not only directed at the physical appearance of the victim but its primary focus is on the emotional and the psychological composition of the victim. The abuser will not only intimidate her through his physical conduct towards her but he will also attempt to scare and control her family and friends. This is done to sever her bonds with external influences and to remove the effect of all external influences.

The intimidation is used to re-enforce the abusers control over the victim and to ensure her future compliance.⁵⁸¹ The intimidation can take on various forms and may range from the threat of physical violence towards the victim or a family member to the threat of abandoning her. The threats usually have the desired impact as the victim may previously have been subjected to the threatened conduct. Therefore the fear which the victim experience is real and is based on a realistic premise.

The threat of violence and death is often followed with exhibitions of genuine violence. The combination of threat and the exhibition of violent behaviour instil fear in the victim and effectively change the victim's behaviour.⁵⁸² Essentially the abuser takes control of that which the victim requires to exercise free will and control over her life.

⁵⁸⁰ Makofane 2002 *Acta Criminologica* vol 15(1) 84- 92; Wolhuter 1996 SACJ 151-166.

⁵⁸¹ Reddi 2005 SACJ 259-278; Stevens 2011 JCRDL 585- 604

⁵⁸² Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1 & 2 "2003; <http://www.csvr.org.za/docs/gender/southafricancriminal2.pdf>. Last visited 08.09.2012; S v Visser *supra* note 76.

c) Isolation

Isolation is the final strategy used during coercive control. This strategy is used in conjunction with the other strategies but it may be the most important of the strategies as the other two strategies cannot be effective if the victim isn't isolated.

The crux of this method is that the victim must be isolated from other influences and that the abusers influence must if not the only influence at least be the strongest influence. If the abuser want to control his victim it is essential to control and regulate that to which she is exposed. To accomplish this abuser will start to isolate her from other people so doing the abuser effects social isolation over the victim⁵⁸³. This is done by the abuser taking control over her choices and most abusers do not allow their victims to continue employment. Thereafter the abuser will start to influence her relationships with other people. He will become violent and jealous and will by behaving in such a manner sever her friendships with other people.

Further the abuser will attempt to sever her bonds with her family often this is done by moving her into his house and banning her family from his house or refusing her contact with her family members.⁵⁸⁴ The abuser may also start arguments between family members. The conduct of the abuser minimises and often removes all external contact. He will also control her work situation and may show up unannounced and he may ruin her work relationships.

After the abuser succeeds in isolating the victim he will start to influence her and control her. This can be done readily as she is in his house and the only exposure she gets is that which he shares with her. His influences and opinions is the only influences she has access to and this starts to shape her perceptions and thoughts until such a time that she shares his perceptions and ideas. When the abuser managed to achieve this result he will have isolated her effectively and he can then leave her be as she will not abandon him because he has become her god and as long as the cycle continues she will remain in the relationship.⁵⁸⁵

⁵⁸³ Warren & Hazelwood *et al* "The Disturbed Mind, compliant victims of the sexual sadist. Australian Family Physician, vol 22, no 4, April 1993; Carstens & Le Roux 2000 SACJ 180 -189.

⁵⁸⁴ *S v Visser supra* note 76; Stevens 2011 JCRDL 432-448

⁵⁸⁵ *S v Visser supra* note 76; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1&2 .2003." obtained from: <http://www.csvr.org.za/docs/gender>

It is apparent that where these strategies are used in conjunction with the infliction of violence the model forms an effective method for establishing and maintaining control over the victim. Further the theory explains why the victim does not leave the relationship. It has also become apparent that the theory has the effect of making it appear as if the victim voluntarily gave up her self control where in actual fact her self control was taken from her through abuse and manipulation.

The manipulation and effect of this method is to such an extent that these women may commit crimes on the instruction of the abuser or on behalf of the abuser.⁵⁸⁶ The crimes appear voluntary and the victims are held accountable but if due regard is had of the victims mental composition it will become clear that the crimes were indeed involuntary and that the victim was coerced into the commission of the crime.⁵⁸⁷ It is therefore understandable why this theory is an integral part of the battered spouse theory.

9. Stockholm syndrome

Another theory and psychological condition which exists and which has been accepted in psychology is that of Stockholm syndrome. This syndrome describes the emotional attachment between victim and abuser and can often be observed in victims of kidnappings who have been detained for any substantial period, as well as persons who have been rescued from cults. The syndrome was first developed to accommodate these victims therefore the syndrome is premised on the behaviour observed in these victims.⁵⁸⁸

[/southafricancriminal1.pdf](#) which the writer last visited on the 08.09.2012; Wolhuter 1996 SACJ 151-152; Ludsin & Vetten 67

⁵⁸⁶ This can be deduced from the case law as examined. The victims acted in a manner which is normally contrary to her usual conduct. For example see *S v Visser supra* note 76 and *S v Campher supra* note 74 who was very religious and was forced to blasphemy; Warren & Hazelwood *et al* "The Disturbed Mind, compliant victims of the sexual sadist. Australian Family Physician, vol 22, no 4, April 1993. 101- 102

⁵⁸⁷ *S v Visser supra* note 76

⁵⁸⁸ The cult's indoctrination will direct the victims actions and corrective therapy has to be applied to change the victims behaviour and psychology; Stevens 2011 JCRDL 432-448.

One of the characteristics which can be observed in the victim is the victim's utter dependence on her abuser. The victim regards the abuser as an essential part of her life and being. As the abuser is her only resource of information and the only influence in her life the victim will remain loyal to the abuser. When a victim is under the influence of this syndrome she may experience feelings of love and tenderness towards her abuser. Due to the close physical proximity between victim and abuser as well as the fact that she is dependent on her abuser the victim becomes loyal towards the abuser. It is often found that when attempting to rescue a victim from the abuser the victim will attack the rescuers as she attempts to protect her abuser. Often even after the victim and abuser has been separated she will remain loyal towards her abuser.⁵⁸⁹ This is supported by the cases where the victim attacked the police official who was sent to her aid when he attempted to arrest the abuser.⁵⁹⁰ It is often said that due to the close nature of the relationship and the physical proximity between the abuser and victim the victim falls in love with the abuser.⁵⁹¹

It has become apparent that before the syndrome can take a hold on the victim there are some important aspects which needs to be present. Firstly the victim must be isolated from all other influences. Secondly the victim must over a relatively long period be exposed to the abuser as the syndrome develops over time. The victim must be exposed to the abuser and must be fully dependant on the abuser.

If the victim can still be exposed to external influences and if her behaviour is voluntary it may become difficult to proof the existence of the syndrome. Further the abuser therefore needs to be in complete control of his victim, which control he gains by applying coercive control.⁵⁹² The less contact the victim has with outside influences the faster the syndrome will manifest itself in the victim and the abuser will be able to manipulate the victim's behaviour.⁵⁹³ As with coercive control the victim will be exposed to influences which reinforce the abusers point of view and opinions all other influences are kept from the victim.

The syndrome resembles that of the battered spouse theory but Stockholm syndrome is much more profound and requires the complete isolation of the victim.

⁵⁸⁹ Reddi 2005 SACJ 259-278 . 259-278; Stevens 2011 JCRDL 432-448

⁵⁹⁰ Stevens 2011 JCRDL 591

⁵⁹¹ S v Visser *supra* note 76; Stevens 2011 JCRDL 432-448

⁵⁹² Stevens 2011 JCRDL 585- 604

⁵⁹³ Stevens 2011 JCRDL 558

The battered spouse theory is not quite as severe as Stockholm syndrome. The victim who suffers from Stockholm syndrome differs from the battered spouse as these people are kept captive and not allowed any external contact further the syndromes differ as the victims of Stockholm syndrome are usually strangers to their captures while the battered spouse theory requires at least an intimate relationship between the parties. The abusers neighbours and family will most of the time be unaware of the presence of the victim in the abusers life. While the battered spouse still has external contact and her presence isn't a secret. It is this difference which has the result that the battered spouse isn't as isolated as the captured victim.

It is however important to acknowledge the fact that a battered spouse may also develop Stockholm syndrome. The difference between battered spouse theory and Stockholm syndrome is what makes Stockholm syndrome problematic for the battered spouse. The spouse will have to prove that she was so isolated from external influences that the perceptions of the abuser became hers and that she "fell in love" with the abuser to such an extent that he became her only influence and that because of his influence she could not act differently. The battered spouse although isolated is however not so isolated and uniformed that this defence can be a complete defence.

The defence can however explain many of the behavioural characteristics of the battered spouse and may be helpful when used in support of the defence of non-pathological incapacity. The syndrome can even be used to support a defence of pathological criminal incapacity if it can be proven that the circumstances were of such a nature that the dependence leads to a pathological change in the victim. For example the sensation of being in love is caused through a chemical reaction. If it can be proven that over a sufficient period of time this chemical reaction caused an internal change then such a change can be the foundation for a claim of pathological criminal incapacity.⁵⁹⁴

10. Compliant Victim Syndrome

This syndrome overlaps with the battered spouse theory as well as Stockholm syndrome it has however been developed with specific reference to the victims of the

⁵⁹⁴ Carstens & Le Roux 2000 SACJ 180 -189

sexual sadist.⁵⁹⁵ The syndrome emphasises the power structure of the relationship and is indicative of the effect of sexual abuse on the victim. As the syndrome is premised on the sexual domination of the victim and the abuse will almost always have a sexual element.

As the syndrome deals with the power balance in the relationship it is important to consider the structure and composition of the relationship. Examining and understanding the structure of the relationship enables the examiner to understand the purpose and effect of the structural composition of the relationship. When the relationship is examined it is apparent that the power balance is unequal and that the majority of the power in the relationship is vested in a single party, the abuser. This structural power imbalance has as a result the fact that one party becomes submissive while the other dominates.

The dominant regulates the conduct of the submissive and where such a submission is involuntary or without consent the domination will amount to abuse. The power structure spans through all aspects of the parties lives and it entails more than only the sexual domination of the submissive. The power imbalance can be found throughout the relationship. In other words the partner who is the dominant, often revered to as the sexual sadist, will start to dominate other aspects of the submissive lifestyle. This means that the dominant will start to exert control over the submissive turning her into his victim. He will control her lifestyle, clothing and external influences such as who she may befriend. He will accomplish this by controlling her conduct and may often resort to humiliating her publicly. The abuser will conduct himself in such a manner that the victim becomes dependant on him and his approval. Therefore this syndrome explains why the victim, the submissive, will not report the abuse or leave the relationship.⁵⁹⁶

The theory goes further to explain that even if the abuse is reported the victim will deny the abuse or the victim will attempt to protect the abuser. Further the theory continues to explain that the victim due to her dependence may participate in sexual conduct which she would not usually exhibit or approve of. The abuser through his conduct slowly extends the parameters of known and accepted sexual behaviour

⁵⁹⁵ Warren & Hazelwood *et al* "The Disturbed Mind, compliant victims of the sexual sadist. Australian Family Physician, vol 22, no 4, April 1993.

⁵⁹⁶ Walker (1987);Ludsin & Vetten 67

and the victim learns that behaviour she once believed unacceptable is acceptable and normal.⁵⁹⁷

Further the sexual sadist often also has violent tendencies and violent behaviour can be exhibited. The violence which underlie the relationship also serves as a method of keeping the victim inline and compliant. Communication in the relationship often does not take place and when a decision has to be made the submissive will often revert to the dominant. The interaction between the parties usually contains elements of violence which directs the victim's behaviour.⁵⁹⁸

11. Post Traumatic Stress Disorder

Post Traumatic Stress Disorder (PTSD) is a disorder which is commonly known under American war veterans or persons who have been exposed to extreme and/ or repeated traumatic events. It is important to note that the trauma could have been either observed or experienced by the sufferer. PTSD is a disorder which affects the psychological composition of the sufferer and may manifest itself in various ways. PTSD always has some or other form of physical manifestation. For example the sufferer may be hypertensive or may react violently to loud noise.⁵⁹⁹

Seeing as the disorder is a result of the exposure to long and/ or repetitive trauma or violence the disorder can be triggered by the repeated exposure to domestic violence and abuse.⁶⁰⁰

In cases of battered spouses the trauma is often the physical infliction of violence it may however also be the observation of the violence on the person's around the victim.⁶⁰¹ Further, the violent atmosphere and the fear experienced by the victim can also lead to the onset of PTSD. The violence and abuse or the threat thereof cannot be insignificant or minimal. In other words the violence has to be of a sever nature

⁵⁹⁷ S v Visser *supra* note 76

⁵⁹⁸ Reddi 2005 SACJ 259-278

⁵⁹⁹ Herman 1992 JTS 377- 391.

⁶⁰⁰ Reddi 2005 SACJ 263; Campbell "Health consequences of intimate partner violence" The Lancet vol 359 13 April 2002 found at the lancet.com last visited June 2012; Carstens & Le Roux 2000 SACJ 180 -189; Brakel & Brooks (2001) Carstens & Le Roux 2000 SACJ 185-187.

⁶⁰¹ Reddi 2005 SACJ. 259-278

or at least of such a nature that it would affect the reasonable person. Further the violence must have an effect on the psychological composition of the victim.⁶⁰²

The disorder is as of yet not recognised as a criminal law defence. This does not mean that the disorder cannot be developed into a defence and progress in this regard has already been made. The progress is situated in the fact that the DSM VI now recognises PTSD as a psychological disorder under the heading of anxiety disorders.⁶⁰³ Therefore, if the DSM serves as the guide to determine the existence of a mental illness or defect with regard to criminal incapacity the battered spouse can rely on the disorder.

The victim will have to prove the existence of PTSD and that it affected her behaviour. PTSD will then be the mental defect on which her claim of pathological criminal incapacity is based.

The disorder is problematic as there are reported cases where the disorder was faked and there have also been false reports of the disorder.⁶⁰⁴ There are various reports of malingering and thus the syndrome is met with great circumspection and scepticism.⁶⁰⁵ The disorder as it influences the mental composition of the sufferer and as it has a physical manifestation, as describes above, may result in the person reacting spontaneously to certain situations, sounds or conduct. If this does occur then the person reacts without any thought or bodily control in other words the reaction is automatic. The fact that the Act is instinctive and automatic may bring the accused into the ambit of the defence of automatism. Thus PTSD can be used not only as a manner of proving a mental defect but as a tool to bring the defendant into the ambit of the defence of automatism.

The use of PTSD to justify the defence of automatism may be of more use to a battered spouse because if she can prove compliance with the remaining requirements of automatism she will have a complete defence and can be acquitted. If she however opts to use PTSD as an disorder to prove her incapacity and the court

⁶⁰² Brakel & Brooks 2001; Stevens 2011 *JCRDL* 585- 604; Carstens 2010 *De Jure* 388- 394; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 2.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012

⁶⁰³ DSMV ; Brakel & Brooks (2001)

⁶⁰⁴ Brakel & Brooks (2001)

⁶⁰⁵ Brakel & Brooks (2001)

goes accord with the argument she might find herself where she although acquitted is instituted in a state mental facility until such time as a judge releases her from the institute. This position is unfavourable and therefore the writer is of the opinion that PTSD must be examined and developed so as to proof the existence of automatism rather than proofing the existence of either pathological or non-pathological criminal incapacity.⁶⁰⁶

12. Expert evidence

When any of the theories or syndromes discussed is raised as a defence to murder expert evidence becomes pivotal.⁶⁰⁷ The need for expert evidence is illustrated by the case law as well as the legislation which in sections 77, 78 and 79 of the Criminal Procedure Act specifically require expert evidence to be lead in support of the defence of pathological criminal incapacity.⁶⁰⁸ Section 78 of the Criminal Procedure Act requires the defendant to lay a foundation for the defence raised. Which foundation must be of such a nature that it at least establishes reasonable doubt regarding the victim's criminal capacity.⁶⁰⁹ The victim who raises the defence has to rebut the presumption that she is sane and in control of her faculties. She also has to rebut the presumption that her acts were voluntary.⁶¹⁰

The only manner in which the presumption can be rebutted is by leading expert evidence regarding the victim's mental and psychological state. The evidence must be based on theory as well as actual behaviour which have been observed in the victims and victims generally. Further the expert cannot be allowed to repeat other person's findings and he himself must have personally examined the victim. In other words the legislation requires that the expert must indeed be an expert on the field in

⁶⁰⁶ Reddi 2005 SACJ 259-278; Van Oosten 1993 SACJ 127- 147,131

⁶⁰⁷ Van Oosten 1993 SACJ 127- 147, 131; *S v Kavin supra* note 8; Carstens & Le Roux 2000 SACJ 180 -189; Tredoux *et al "Psychology and Law"* (2005) Chapter 13 "*Psychological evaluations of mental state in criminal cases*"; Carstens 2010 *De Jure* 388- 394; Stevens 2011 *JCRDL* 432-448 Carstens & Le Roux 2000 SACJ 185-187.

⁶⁰⁸ S 78 of Act 51 of 1977; Carstens 2010 *De Jure* 388- 394; Van Oosten 1993 SACJ 127- 147; *S v Kavin supra* note 8; Carstens & Le Roux 2000 SACJ 180 -189; Kaliski 42 - 43

⁶⁰⁹ Louw 2003 SACJ 200-206; *S v Eadie supra* note 7; s 78(1)(1A) of the Criminal Procedure Act; *S v Stellmacher supra* note 51 ;Van Oosten 1993 SACJ 127- 147,140- 143

⁶¹⁰ *S v Eadie supra* note 7. ; Louw 2003 *JSACJ* 200-206; *S v Francis* 1999(1)*SACR* 650 (SCA); Kaliski 103

which he testifies. The expert must have sufficient knowledge on all aspects about that which he testifies and his knowledge cannot be purely theoretical or a repetition of another person's knowledge.⁶¹¹

As the court objects to punishing the insane and detaining them with the normal prison population proper expert evidence is essential.⁶¹² It is for these reasons that the Criminal Procedure Act provides for the examination of the accused and the leading of expert evidence in support of pathological and non-pathological criminal incapacity. The Criminal Procedure Act determines that the defendant may be examined by three psychiatrist and where required one psychologist.⁶¹³ The Act goes further than just determining the amount of experts which may testify it also determines what happens when the report is unanimous and the situation where the report isn't unanimous.⁶¹⁴

When the sections dealing with the examination of the accused is examined it becomes apparent that the Act contains a hierarchy which prefers the evidence of psychiatrist over that of psychologist. Not only because the Act places them first but also because the Act provides for the evidence of more psychiatrist than psychologist. Further the Act does not provide for expert evidence lead by other experts such as social workers, Neuro-psychologists or neurologists. The Act is very simplistic in its description and acceptance of experts and does not take into account the various aspects of the human condition and the various aspects which may influence the human condition, mental and or psychological composition.

This hierarchy also has as a result that the evidence of psychiatrist is to be preferred above that of psychologist. The Acts approach to expert evidence is problematic as the hierarchy disregards the differences between a psychiatrist and a psychologist

⁶¹¹ Grant 2012 SAJHR 328; Swikkard & Van Der Merwe "Principles of the law of evidence (2nd ed) chapter 8 & 31; Spamers 65; Swikkard & Van der Merwe (edt) "*Beginsel van die bewysreg, hoofstukke 4,6,8*" (2009);Stevens 2011 JCRDL 432-448; Kaliski 343 – 344; Meintjies – Van der Walt "*Expert evidence in the Criminal Justice Process: A Comparative perspective*" (2001)

⁶¹² Louw 2003 SACJ 200-206; Carstens 2010 *De Jure* 388- 394

⁶¹³ S 79 of the Criminal Procedure Act 51 of 1977. Ludsin "*South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003.*" obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; *S v Siko* 2010(2)SACR 406 (ECB),406; *S v Ramokoka* (2006) SACR 57(W) 587

⁶¹⁴ *S v Kavin supra* note 8; S 79 of The Criminal Procedure Act 51 of 1977, This is however not important for the discussion and therefore the writer will not elaborate on the point.

and it does not take into account that a psychologist may be in a better position to form opinions on certain matters while a psychiatrist will be in a better position to form an opinion on a different aspect of the defendants composition.⁶¹⁵

When one considers using an expert to testify it is important to consider the facts of the case as each case is unique and the facts will determine which type of evidence is the most essential. The Criminal Procedure Act as it currently reads does not take this factor into account and does not make provision for the differing circumstances. For example a psychiatrist cannot comment on the psychological composition of the defendant as he is educated in physical illness of the brain which may cause deviations in behaviour. In the same instance a psychologist cannot form an opinion on the cause of a pathological illness as he isn't educated or trained to make such a determination. Therefore if one is confronted with a disease of the mind the psychiatrist opinion will be valuable if it is however a deviation in the psychological composition of the accused then the opinion of the psychologist will be indispensable.

The case law also require the defendant to lay a foundation for her defence. The case law does not expressly state that expert evidence should be lead in cases where non- pathological criminal incapacity is raised but due to the judgement. In *S v Eadie*⁶¹⁶ it has become clear that a defendant must lay a foundation for her defence. Therefore the Judgment made expert evidence not only essential but pivotal. It is however important to note that the court isn't bound by expert evidence and that the evidence may only serve as a guideline for the court as it remains the courts duty to determine the defendants criminal capacity.⁶¹⁷

Another important aspect which needs to be addressed is the fact that expert evidence is often subject to critique because it is often argued that the expert evidence is based on the *ipse dixit* of the accused.⁶¹⁸ The court has in various cases

⁶¹⁵ Spammers; Stevens 2011 *JCRDL* 432-448

⁶¹⁶ *S v Eadie supra* note 7 ; Van Oosten 1993 *SACJ* 127- 147; *S v Kavin supra* note 8; Carstens & Le Roux 2000 *SACJ* 180 -189

⁶¹⁷ Snyman (2012) 176 - 179; *S v Kavin supra* note 8,736- 737; Louw 2003 *JSACJ* 200-206; Spammers; Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 2.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012; Kaliski 45

⁶¹⁸ Grant 2012 *SAJHR* 328 ; Louw 2003 *JSACJ* 200-206 Stevens 2011 *JCRDL* 432-448; Ludsin, "South African Criminal Law and Battered Women Who Kill: Discussion Document 1.2003."

expressed its concern with this occurrence. The occurrence can be avoided by obtaining permission from the court to allow the expert to sit through the trial and hear all the evidence and to then question him regarding his opinion and whether or not his opinion has been influenced and to what extent his opinion was influenced by the evidence which was lead in court.

Another problem experienced with expert evidence is that the Criminal Procedure Act does not contain any guidelines on how to evaluate the evidence or on how the evaluations must take place. The Criminal Procedure Act outlines the qualities and qualifications which the experts must have but it does not contain guidelines regulating the enquiries. Thus the result of the enquiry is based on the set procedures followed by the establishment and the practitioners. Therefore there can be discrepancies between patients as all institutions do not have the exact same guidelines and policies.⁶¹⁹ The writer is of the opinion that not only should expert evidence be limited and qualified to their specific fields but guidelines determining how the enquiry should be conducted should be standardised and put in place.

13. Conclusion

In this chapter the most prominent of the psycho-legal defences as found in the South African criminal law context was discussed. The main focus was on the defences of pathological and non-pathological criminal incapacity. The discussion of the psychological theories made it abundantly clear that the theories itself at this stage of their development cannot constitute criminal law defences. The theories can however be used in support of the already accepted criminal law defences.

The psychological theories as they are currently understood may serve to explain the victims conduct but it cannot serve as a manner of justifying or excusing her behaviour. The exception to this is PTSD as PTSD is recognised in the DSM V as a pathological defect which can influence criminal capacity and the argument can be made that if the victim manages to proof the existence of the disorder she may be able to rely on pathological criminal incapacity. Even PTSD is not without problems

obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012

⁶¹⁹ See S 79 of the Criminal Procedure Act; Reddi 2005 SACJ 259-278

as PTSD now amounts to a mental defect such a defence could lead to the admission of the victim in a state mental institution where she could be held indefinitely until a judge in chambers authorises her release.⁶²⁰ The second problem is that the DSM serves only as a guide and should the victim rely on PTSD and fail she would have admitted most of the elements required for a crime. The writer is however of the opinion that the elements of PTSD indicates that the conduct is automatic in response to an external trigger. If the concept is understood in such a manner it resembles automatism and therefore it can be used to bring the defendant into the ambit of the defence. The defence of automatism is to be preferred to that of pathological criminal incapacity as it excludes the act and if upheld will result in the acquittal and release of the victim.

Having considered all the relevant legislation and case law it is apparent that the victim would be better suited if she relies on either non-pathological, pathological criminal incapacity or automatism as her defence and use the different theories in conjunction to proof the existence of the defence.

The theories as they are currently are insufficient and the theories need to be developed and adapted before the victim will be able to rely on them. When considering the psychological composition and criminal capacity of the victim it is clear that although psychology and the law often cross paths their paths are mostly divergent. Psychology and law seems to be at war⁶²¹ with each other and until the law gives significant recognition to the study of psychology the defences as they are now will yield the best results for the victim.

⁶²⁰ Section 76 to Section 79 of the Criminal Procedure Act, 51 of 1977; Kaliski 46 - 47

⁶²¹ Le Roux & Stevens 2012 SACJ 46-47; Boland "Anglo American insanity defence reform: war between law and medicine" (1999): law and psychology ; Spammers ; Stevens

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

1. Introduction

This chapter summarises and discusses the conclusions and recommendations of the study. The chapter will show that when all the relevant literature is studied and applied the “battered spouse” will be able to claim that she acted in private defence, alternatively the “battered spouse” will be able to prove that she suffers from a pathological defect. Such a defect will result in the battered spouse being able to rely on pathological criminal incapacity and thus she will be able to receive psychological treatment in accordance with sections 77, 78 and 79 of the Criminal Procedure Act⁶²².

2. Summary

The first chapter contains the definitions and terminology of importance this chapter is important as it sets the framework for the rest of the study.

7.1 Domestic violence

The discussion on domestic violence can be found in the second chapter of the study as the parameters of the study needs to be set and the context of the study needs to be addressed. The chapter therefore examined the occurrence of domestic violence. The chapter also examined the legislation regarding domestic violence and found several discrepancies in the legislation and protection of the victims. The writer also found that the legislature does not sufficiently address the problem of domestic violence as protection order are easily obtained but the enforcement of such orders is timorous and costly.⁶²³ The discussion of domestic violence also served to place domestic abuse and violence in its proper perspective.

⁶²² Act 51 of 1977; Kaliski 42 – 44

⁶²³ The Domestic Violence Act provides the abused to easily obtain a protection order but when said order is infringed the domestic violence court must deal with the matter and these courts suffer the same problems other courts do due to abuse of process and over filled court rolls.

The topic was discussed as it is important to acknowledge both the rights of persons and the magnitude of domestic violence. Without an understanding of domestic violence one cannot understand the reactions of a battered person as their reactions are shaped by specific influences and situations.

Another important aspect which the writer addresses is the myths surrounding abuse and domestic violence. The writer is of the opinion that before one can successfully address domestic violence one must address the myths surrounding women and spousal abuse. The writer found that contrary to popular belief women are not the only gender who can be subjected to abuse.⁶²⁴ The writer also found that the definition of domestic abuse should be re-considered and acknowledged that the abuses can exist wherever there is a domestic or intimate relationship between the parties.⁶²⁵ To conclude the writer found that the occurrence of domestic violence is problematic and universal and should be addressed universally.

7.2 The Constitution

In the third chapter the writer discussed the Constitution⁶²⁶ and the rights of both victim and accused. The discussion is important as legal rights and defences cannot exist in isolation.⁶²⁷ The effect of the Constitution on domestic violence, the various theories and criminal law defences should be considered. This acknowledgement also brings into focus the fact that the rights of the victim may require the extension of the defences and the development of the theories which the writer discussed.

The discussion on the Constitution emphasises the need to apply the Constitution in South Africa. Further the discussion has the effect of emphasising the need for equality and freedom in a South African society. The chapter discusses the rights of the victims as well as the abusers. The writer found that when the rights of both the victim and accused is considered and read with the Constitution and the constitutional case law it is evident that the rights of victim and abuser should be weighed against each other and that the rights of the innocent outweigh the rights of

⁶²⁴ *S v Campher supra* note 74; *S v Engelbrecht supra* note 31; *S v Kavin supra* note 8 *supra* note 14

⁶²⁵ A domestic relationship is defined in the Domestic Violence Act as well as in the case of *Daffy v Daffy supra* note 59.

⁶²⁶ The Constitution of the Republic of South Africa, 1996.

⁶²⁷ Section 2 of the Constitution of the Republic of South Africa, 1996.

the guilty⁶²⁸ thus the rights of the victim receives precedence over that of the abuser.

During the study of the defences and the Constitution it became clear that the defences can still be developed and that such developments must take place in line with the Constitution. The study further showed that the rights contained in the Bill of Rights⁶²⁹ may in these circumstances require the development of the defences to align the defences with the Constitution.⁶³⁰ Further the discussion showed that some defences may distinguish between men and women and may in certain circumstances require the victim of abuse to put her at risk. Such an effect is unjustifiable in South African law; therefore, it should be developed to take the Bill of Rights into account. The writer is therefore of the opinion that the Constitution does not only provide for the development of the defences but requires the development of the defences. On the other hand the Defence of private defence may need to be reconsidered as it currently allows the victim to kill in the protection of property while the constitutional case law clearly provides that the rights of dignity and life should be held in the highest regard possible.⁶³¹ Therefore it is doubtful that the killing of a person to protect property can withstand constitutional muster.

3. The criminal law defences

Due to the complexity of the various criminal defences the writer separated the defences according to type. Therefore the writer discussed private defence and the psycho-legal defences separately.

The writer also discussed the constitutional position surrounding the defences. Each defence was discussed in it's totality and was compared to the Constitution to see whether or not the defence can withstand constitutional muster.

⁶²⁸ Burchell and Milton (2005) 230; *S v Makwanyane supra* note 202

⁶²⁹ Chapter two of the Constitution of the Republic of South Africa, 1996.

⁶³⁰ Ludsin "South African Criminal Law and Battered Women Who Kill: Discussion Document 1 & 2.2003." obtained from: <http://www.csvr.org.za/docs/gender/southafricancriminal1.pdf> which the writer last visited on the 08.09.2012

⁶³¹ *S v Makwanyane supra* note 202; *S v Walters supra* note 214 & 294 ; *Ex parte die Minister van Justisie: in Re S v Van Wyk supra* note 310; Goosen "Battered Women And The Requirement Of Imminence in Self-Defence" 2013 *PER* 71- 121

7.1 Private defence

The writer examined private defence and found that the defence is considered constitutional and that the defence has been tested and is by and large in aligned with the Constitution. The writer further found that the requirements of the defence although now subjected to the Constitution remains the same and continues to apply to the battered spouse. Here it is however important to note that the final word on the constitutionality of the defence has not been had yet as there are aspects which has to be addressed. Currently the law allows a person to kill another in private defence while protecting his property.⁶³² This position may in the future be constitutionally questionable as the case law clearly indicates that certain rights may be held in higher regard than other rights an example of this preference of rights can be found in the case of *S v Makwanyane*⁶³³ where the court spared the life of a murderer as it held his right to dignity and life in higher regard as the rights of the victim. The *Makwanyane* case as well as the *S v Walters*⁶³⁴ case holds that all other rights are subject to the rights to life and dignity. It is thus clear that the Constitutional Court may reach a point where it will be forced to consider this aspect and the court will then have to reconsider the extent of private defence.

The writer examined the requirements of the defence and the manner in which it should be applied to suit the needs of the battered spouse. The writer found that the requirements should be applied as usual and that the requirements aren't as problematic as they may seem.

In the writes opinion the most important development which has thus far occurred is the extension of the imminent attack requirement to include an attack which is ineffable or predictable.⁶³⁵ The victim who kills her abuser in non-confrontational circumstances will now be able to rely on private defence, if she complies with the rest of the requirements of the defence. Here the requirement of a reasonable act may be problematic as reasonableness will have to be determined subjectively and

⁶³² *S v Walters supra* note 214; Ex parte die minister van Justisie: in Re *S v Van Wyk supra* note 310; Goosen "Battered Women And The Requirement Of Imminence in Self-Defence" *PER* 2013 1, 71-121

⁶³³ *S v Makwanayane supra* note 202

⁶³⁴ 1995(3) SA 391 (CC)

⁶³⁵ *S v Steyn supra* note 1.

individually. The effect of the extension is that it allows the battered spouse to rely on private defence in a non confrontational situation.

The writer also discussed putative private defence as a form of private defence. The victim who negligently killed her abuser or who believed that she was acting in private defence while in actual fact she wasn't may be able to rely on the defence as the defence excludes *dolus*⁶³⁶. The writer is of the opinion that this defence is not utilized properly and that this defence may be ideal to address a charge of murder in cases where the defendant attempts to rely on the battered spouse theory. The reasoning is as follows: often a defendant after relying on private defence and failing will attempt to rely on one of the psycho- legal defences instead of putative private defence. She can utilise the theory to proof that she lacked the intent to kill the defendant. The reasonableness of her act in the situation will then be considered and the subjective facts of the matter then become relevant. This in turn can proof that she acted reasonably in her situation and can lead to her acquittal. She has to show that she believed that she was acting in self defence. The state must then proof that her belief was incorrect and that the belief was objectively unreasonable.⁶³⁷

The defendant will then rely on expert evidence to proof that her belief was reasonable in the circumstances and such evidence may lead to an acquittal.

3.2 Psycho-legal defences

When considering the Psycho-legal defences it is important to note that although many theories exist there are only two legal recognised psycho-legal criminal defences. The defences are pathological and non-pathological criminal incapacity. The defences are contained in the Criminal Procedure Act⁶³⁸ and although the Act is insufficient it is still the governing legislation. All other theories and authority may only be of assistance to the legal scholar and practitioner.

⁶³⁶ *S v Joshua supra* note 12

⁶³⁷ *S v Engelbrecht supra* note 31 ;Stevens 2011 *JCRDL* 432-448

⁶³⁸ Act 51 of 1977

The writer considered the defences in their totality starting with the constitutional position surrounding the defences. The writer found that although the defences might contain some discrepancies they are in essence constitutionally justifiable.

The writer then continued to discuss the requirements and the application of the defences and found that if the requirements are properly examined and understood then the defence can be applicable to the battered spouse.

If the battered spouse claims pathological criminal incapacity she has to lay a foundation for the defence by leading expert evidence. It is important that both the prosecution and defence realise the importance of expert evidence and lead proper evidence.⁶³⁹ The writer found that a major problem with the defence is the fact that expert evidence isn't lead properly. The writer is of the opinion that this is due to the fact that there aren't any guidelines in place which governs the manner in which expert evidence is lead.

It should also be noted that due to the court's decision in *S v Eadie*⁶⁴⁰ expert evidence has become pivotal when claiming pathological or non- pathological criminal incapacity.

To conclude the writer found the defences to be constitutional and that the defences as they currently are is sufficient to provide for the situation at hand. It is also abundantly clear that both of the defences require expert testimony and that the testimony should be determined by the facts, which facts should be objective. The test for her criminal capacity however remains subjective.⁶⁴¹ The expert evidence should thus be based on the totality of facts and evidence and not on the *ipse dixit* of the accused.

The result of the abovementioned discussions is that the defendant may rely on any one of the defences independently, jointly or in the alternative. In other words the defendant can claim Private Defence, Pathological or none pathological criminal incapacity. The facts of the case will however dictate which of the defences are the most relevant and is the best suited for the defendant.

⁶³⁹ Spammers; *S v Eadie supra note 7*. Carstens & Le Roux 2000 SACJ 185-187.

⁶⁴⁰ 2002 (1) SACR 663 (SCA)

⁶⁴¹ Spammers ; Kaliski 39

4. The syndromes

The writer discussed various syndromes which have previously been relied upon in criminal trials. These theories include the “Battered Spouse Theory” and “Post Traumatic Stress Syndrome”.

Each of the theories was discussed separately and in great detail. When the theories are examined it is clear that they may be constitutionally justifiable, as the syndromes attempt to protect the rights of the victims, and the possibility exists that the defences can be developed further.

4.1 The Battered Spouse Theory

The writer discussed the theory and the authority on the subject to determine whether or not the defence constitutes a complete and separate defence to a charge of murder. The short answer is that it does not. The short answer is however insufficient and only partially correct.

This is due to the fact that the writer found: firstly that there is room to develop the defence and that the Constitution and the theory itself provides for the development. Secondly the writer found that the defendant will be better suited if she utilized the theory to bring her situation present under either pathological, non-pathological criminal incapacity or private defence. The writer found that the battered spouse theory in conjunction with the coercive control theory explains the behaviour and the reactions of the defendant and it is herein that her defence lies. The defendant who uses the theories to explain her reactions will have to lead expert evidence regarding her behaviour and it is this evidence which may bring her into the ambit of any of the already recognised defences. The writer found that the South African criminal law is not advanced enough to accept the theory as a complete defence and before the theory can be accepted the law and psychology should be brought on par as the law and psychology seems to be at war.⁶⁴²

⁶⁴² Stevens; Spamers; Kaliski 52

4.2 Post Traumatic Stress Disorder

Post Traumatic Stress Disorder is a disorder which has been discussed by various⁶⁴³ writers and features in some of the case law. The theory is however not prominent or extensive. The writer examined the theory as a possible defence to a charge of murder on which the battered spouse may rely. The writer found that the DSM VI now recognises PTSD as a disorder. The recognition of PTSD as a mental disorder takes the defendant one step closer to being able to rely on the syndrome as a defence.

The recognition is however not sufficient to constitute a defence as the DSM VI only serves as a guideline and the court aren't bound by the findings of the DSM. The court has various other factors to consider before it accepts the syndrome as a complete defence. The writer is however of the opinion that the syndrome explains the defendants conduct and can be used to bring the defendant into the ambit of pathological criminal incapacity. The defendant who relies on PTSD in essence rely on Pathological criminal capacity as the only disorders which can be used to sustain the defence is those recognised by the DSM.⁶⁴⁴ In other words the DSM VI recognition of PTSD is that which makes the defence unavailable as an independent defence. The recognition allows the defendant to use the syndrome to explain her behaviour and to justify her reliance on pathological criminal incapacity.

4.3 Compliant victim syndrome & coercive control

The writer examined both these theories and found that although the theories explain the defendant's behaviour they do not serve as criminal defences. These syndromes explain the victim's behaviour and may justify either the defence of non pathological criminal incapacity, pathological criminal incapacity or private defence. Further the theories clearly cannot constitute criminal defences as the defences cannot stand alone and they defences cannot survive constitutional muster. The theories are in the writer's opinion a repetition of some of the characteristics of the battered spouse theory and PTSD.

⁶⁴³ Stevens; Herman 1992 *JTS* 377- 391; *S v Visser supra* note 76; Carstens & Le Roux 2000 *SACJ* 185-187.

⁶⁴⁴ American Psychiatric Association (2000) *Diagnostic and statistical manual of, mental disorders – DSM V*.

Therefore the writer is of the opinion that the theories should serve only to explain the defendant's behaviour and to bring the defendant's behaviour into the ambit of the other already acknowledged defences. As the law and psychology develops the theories may at a later stage become available as defences but South African law is not ready for such a measure.

5. Recommendations

The writer recommends that the victim rely on the defences as they exist in South African law. The writer does this as it is clear that the defences have been developed sufficiently. The writer also opines for the general recognition of the terminology and theories.

The writer further recommends that the Criminal Procedure Act be amended to include a definition of mental illness. This definition must not be made to limit the presiding officer's discretion but to establish certainty about the terminology and the ambit of the illness as the terminology currently are medical terminology and not legal terminology.⁶⁴⁵ The writer also holds the opinion that the Criminal Procedure Act should be amended to provide for the situation where none pathological criminal capacity is raised and the necessity of expert evidence in this regard.⁶⁴⁶

With reference to expert testimony the writer recommends that the distinction between a psychologist and a psychiatrist be taken into account and that The Criminal Procedures Act must provide for the evidence of both these expert professions in equal dimensions. The writer suggests that the hierarchy contained in The Act be removed and that the experts be treated equally. The writer is also of the opinion that guidelines must be put in place to serve as guidelines for the leading of expert evidence in battered spouse cases.

The writer further suggests that the psychological theories be properly investigated and developed so as to be in line with the Constitution and the Criminal Procedure Act. The writer suggests that law take cognisance of the psychology and the developments in psychology. It would in the writer's opinion be a valuable contribution to South African law if the presiding officers were schooled in the social

⁶⁴⁵ Spammers

⁶⁴⁶The effect of *S v Eadie supra* note 7 is that expert evidence is now essential; Spammers

sciences as well as the law.⁶⁴⁷ The writer also suggests that the presiding officers should be encouraged to hear expert opinions on topics on which they aren't well informed but that the purpose of the evidence should remain to assist the court in reaching a decision.⁶⁴⁸

6. Conclusion

The writer found that the various defences available to the defendant is sufficient and can be of assistance to the battered spouse who killed her husband. The writer is of the opinion that the syndromes should be utilised in such a manner that it serves to emphasise and explain the victim's behaviour. The syndromes can thus be used to proof any of the already recognised defences in South African criminal law.

After a proper examination of the various theories, syndromes and criminal law defences it is the writer's opinion that the syndromes and theories cannot as they are now be complete defences to a charge of murder. When the defences are examined it becomes clear that the main problem with the defences is not the fact that there is limited recognition of the defences but with the legal practitioners understanding and interpretation of the criminal law and the defences.

The writer further found that South African law is not on par with the developments in psychology and the medical sciences. Therefore the defendant would be better suited if she relied on the defences already available and recognised in South African criminal law. When South African law acknowledges the importance of the social sciences the defendants will be able to rely on the theories as defence. At present the law and medicine is still at war and the defendant who attempts to rely on the psychological theories instead of the acknowledged defences is taking a gamble. The writer is however of the opinion that the defences as recognised are sufficient and care must be taken when advocating these cases as proper advocacy and research may help the victim avoid many of the problems experienced when the defences are raised.

⁶⁴⁷ Spammers

⁶⁴⁸ *Holtzhauzen v Roodt supra* note 9; Labuschagne 1998 *JCRDL* 540- 541; Kaliski 345; *S v Harris* 1965 (2) SA 340 (A)

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