A peregrination through the law of provocation

Shannon Hoctor

If weakness may excuse,
What murderer, what traitor, parricide
Incestuous, sacrilegious, but may plead it?
All wickedness is weakness.¹

INTRODUCTION

The very idea of allowing provocation to function as a defence excluding an accused person’s criminal liability is inherently controversial. Surely a person is expected to control his or her urges, emotions and passions? From a moral and ethical perspective it is clear that one is expected to control oneself, even under provocation or emotional stress. The community demands no less.² Thus, the argument goes, allowing provocation to function as a complete defence, as opposed to a mitigating factor acknowledging human frailty, cannot be countenanced:

... [W]ere one to do otherwise then one would be giving credence to the belief that retaliation is justified in the eyes of the law in certain circumstances and it seems to me that this is the very thing our criminal law guards against; it does not allow people to take the law into their own hands, and it would be coming very close to that to allow provocation to operate as a complete defence.³

It follows that weakness, in the realm of provocation at least, should not excuse. And yet, in South African law over the past quarter of a century the development of the defence of non-pathological incapacity based on provocation has allowed just that. This phenomenon is founded on the principle-based or psychological approach to liability, which holds, essentially, that ‘unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him’.⁴

Despite the well-established nature of the defence of non-pathological incapacity, the law has been thrown into flux by the decision of the Supreme Court of Appeal in S v Eadie,⁵ which, it is submitted, constitutes a serious erosion of the notion of criminal capacity, with a concomitant ‘ripple effect on other topics within the general principles of criminal law’.⁶ This chapter seeks to examine the issues arising out of the Eadie judgment as follows: first, by tracing the development of the defence of provocation in South African law,

¹ BA LLB LLM (UCT) DJuris (Leiden). Professor of Law, University of KwaZulu-Natal
³ PF Louw ‘Die algemene toerekeningsvatbaarheidsmaatstaf’ 1987 TSAR 362 at 368.
⁴ S v Zengeya 1978 2 SA 319 (RAD) at 321 A.
⁵ HLA Hart Punishment and responsibility (1968) 181.
⁶ 2002 2 SACR 663 (SCA).
⁷ CR Snyman ‘The tension between legal theory and policy considerations in the general principles of criminal law’ 2003 Acta Juridica 1 at 22.
within which inquiry the notion of ‘toerekeningsvatbaarheid’ or criminal capacity will be briefly discussed; secondly, by examining the position leading up to the Eadie decision, the judgment itself, and the evaluation of the judgment by Professors Burchell and Snyman; and thirdly, a concluding summation.

Two further points which should be noted: even though I have indulged myself in a lengthy disquisition, what follows does not have any pretensions to comprehensiveness. Indeed, the primary excuse for my discursive excesses is the critical importance of the debate underlying the issue of the nature of the provocation defence. Shortly, what should our system of criminal law look like? The discussion which follows is merely a modest contribution to this debate, submitted for the counsel of wiser minds. Further, it should be noted that whilst the discussion will focus on provocation, the point of departure is that the factors relating to emotional stress are often inextricably linked to provocation — that the two notions are, in Snyman’s words, ‘merely the flip sides of the same coin’ — and consequently the discussion proceeds on this basis.

DEVELOPMENT OF THE DEFENCE OF PROVOCATION

(EMOTIONAL STRESS)

From an objective to a subjective approach

Anger with a distinction being drawn between crimes that were committed with preméditation (proposito) and those committed on the spur of the moment

7 Indeed, the nature of legal scholarship is that one is almost always standing on the shoulders of those who have gone before. In this regard, I would like to acknowledge my debt to a number of people. First, Kallie Snyman’s thoughtful and thorough writings on the criminal law have never failed to challenge and inspire me. Despite his retirement, there is no doubt that his legacy will continue for many years in South African criminal law. I am grateful for his encouragement and example. Ronald Louw’s premature death has been a sad loss. In writing this piece, I was constantly aware of Ronald, and how profoundly and eloquently he would have dissented from some of my arguments below. His feisty discussion of criminal law theory and generosity of spirit are greatly missed. Finally, Solly Leeman’s gracious and wise guidance and gentle prodding to write have been the primary formative forces in my career. In the midst of the many hours of labour and discussion that we have shared, something priceless has emerged — a joy in the journey, and a genuine love for criminal law theory. I am exceedingly grateful to Solly for this gift. I readily acknowledge these men and my debt to their intellectual prowess, along with the many unacknowledged writers and students who have helped to shape my thinking.

8 Snyman n 6 above at 21; JM Burchell and JRL Milton Principles of criminal law (1994 revised reprint) 238; see also par [57] of S v Eadie n 5 above.

9 Holmes JA in S v Mokonto 1971 2 SA 319 (A) at 324F-G stated: ‘Provocation and anger are different concepts, just as cause and effect are. But, in criminal law, the term provocation seems to be used as including both concepts, throwing light on accused’s conduct.’ In S v Mandela 1992 2 SACR 661 (A) at 665b–d the terms ‘provokasie’ (provocation) and ‘toorn’ (anger) appear to be used interchangeably.

10 JC de Wet De Wet & Swanepoel strafreg (4ed 1985) 130. JG Bergenthuin Provokasie as verweer in die Suid-Afrikaanse Strafreg (1985) unpublished LLD thesis (University of Pretoria) 18 argues that D 50 17 48 indicates that there were instances in which provocation could be regarded as a defence excluding imputability. It seems that the sources (through the Republican, Classical and Post-Classical periods) are however not conclusive on this point — see discussion in Bergenthuin 11 22.
This approach appears to have been followed into the Middle Ages, with indications that on occasion anger could operate as a complete defence.\(^\text{11}\) The Roman-Dutch writers also regarded anger as a factor mitigating punishment, rather than a ground excluding capacity, and then only where the anger was justified.\(^\text{12}\)

This view of provocation was however subordinated to that of the English law in the practice of the courts. In \textit{R v Pascoe},\(^\text{14}\) where the accused was charged with the murder of his wife and her suspected lover (upon finding them together in the bedroom), Lord de Villiers instructed the jury that whilst killing in circumstances where a couple were caught in adultery was not justified, this would be a case of culpable homicide, and not murder. A similar approach (similarly involving a killing upon discovery \textit{in flagrante delicto}) was adopted in \textit{R v Údiya}.\(^\text{15}\) In \textit{R v Tsoyani}, the accused were held to have exceeded the bounds of defence, but as a result of the provocation which they endured, it was held that the verdict should be one of common assault, rather than assault with

\(^{11}\)The former were regarded as more serious than the latter - see D 48 19 11 2 and 16 2; D 48 11 7 3. Thus in D 48 5 39(38) 8 it is stated that a man who traps his wife in adultery and kills her \textit{impetus tractus doloris} should not be punished with the usual punishment of the \textit{lex Cornelia de sicariis}, but with a lighter punishment, as it is extremely difficult to control a reasonable passion. See further D 48 8 1 5; C 9 9 4 1; De Wet n 10 above at 131.

\(^{12}\)De Wet n 10 above at 131. The Italian writer Julius Clarus was however of the view that provocation could only serve to mitigate punishment - see Bergenthun n 10 above at 22 26.

\(^{13}\)EM Burchell, JRL Milton and JM Burchell \textit{South African criminal law and procedure} Vol I: General principles (2ed 1983) 306; De Wet n 10 above at 131. Matthaeus \textit{De Criminibus Prol} 2 14 states that passions such as love and rage cannot be regarded as complete defences since each person has the necessary reason to control such passions. Since the actor consciously falls in love, and consciously becomes angry, he cannot later claim that he was acting unconsciously if he acts fired by passion. See also Moorman \textit{Inf} 2 31; Van der Keessel \textit{Praelectiones ad jus criminale} Vol III 998; Van der Linden 2 1 5 (cited in De Wet \textit{ibid}); Barels \textit{Criminelle advyzen LXVIII. It appears that the indigenous criminal law of several tribes also treats provocation as a mitigating factor, as opposed to a factor giving rise to exculpation - see JMT Labuschagne and JA van den Heever \textit{"The effect of provocation and drunkenness on criminal and delictual liability in indigenous law"} (1995) \textit{Obiter} 51 at 55ff.

\(^{14}\)2 SC 427.

\(^{15}\)1890 NLR 222.
 intent to do grievous bodily harm. Thus the courts’ adoption of the English ‘specific intent’ approach is evident in relation to provocation. Nonetheless, it seems that the crucial factor for the courts not adopting the Roman-Dutch approach to provocation was not founded so much in doctrinal preference as the need to take account of a ruthless sentencing regime, in terms of which the death penalty was mandatory with no provision made for extenuating circumstances. As De Wet points out, there was temptation for judges to ensure, in circumstances where the killing was less blameworthy, that the death penalty was not in question by handing down a verdict of culpable homicide rather than murder. A convenient vehicle for such circumvention proved to be s 141 of the Native Territories Penal Code (NTPC, aka the Transkeian Penal Code), which was adopted by the Appellate Division, in R v Butelezi, as ‘correctly laying down our law upon this subject’. Thus, at this stage, the test for the defence of provocation, allowing for the reduction of the crime of murder to culpable homicide, was objective in nature, in that the provocation had to be such as would deprive a “reasonable man” of his power...
of self control'. This was consistent with the objective nature of the erstwhile test for intention, flowing from the presumption that a person was presumed to intend the natural and probable consequences of his actions. This approach to the defence of provocation, even after the law changed to allow courts to hand down a lesser sentence than the death penalty in cases of murder where extenuating circumstances were present.

Despite occasional instances where the court applied a subjective test for provocation – holding that the accused was guilty of culpable homicide rather than murder on the basis that the provocation excluded intent, or because he was considered less blameworthy – the objective test held sway, at least until R v Thibani. Schreiner JA, following the developments in the English case of R v Woolmington and the South African decision of R v Ndlovu, held that provocation had assumed its proper place...

... as a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt.

The subjective nature of the enquiry into provocation envisaged by this dictum is evident in the light of the focus on the accused’s state of mind. However the fact that the development towards a completely subjective test for provocation...
still had some way to go was evident from the entirely objective approach adopted by the Appellate Division in *R v Kennedy.* In *R v Molako* somewhat tentative support was evinced for a subjective assessment of the effect of provocation on the accused, although the court was careful to stress that there should be no weakening of the principle that a sane person is responsible for the ordinary consequences of his acts.

The next twist in the saga of the provocation defence came in the Federal Supreme Court case of *R v Tenganyika,* where the court (per Tredgold CJ) attempted to provide a solution that would cater for both principle and policy by setting out a two-stage test. First it should be enquired whether, despite the provocation (and in the context of other evidence), the accused, subjectively assessed, had ‘intent to kill’. If this was not present, the accused would be acquitted of murder, and found guilty of culpable homicide. If it was held that the accused indeed had the necessary intent to kill, the second stage of the enquiry would be, on an objective assessment, whether the reasonable person would have lost his self-control in the circumstances. If so, then the court would reduce the crime to culpable homicide, despite the accused’s intent to kill. Whilst the *Tenganyika* approach has received some academic support from South African writers, it seems clear that this objective approach, unlike that in *Thibani,* provides for, at least, a conviction of culpable homicide.

Schreiner JA had an opportunity to address this matter in *R v Krull,* and while dismissing the *Tenganyika* approach for an unjustified mixture of subjective and...
objective elements in both enquiries, he set out the duty of the trial court in such cases:

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

If it was Schreiner JA’s intention to set out a test without a conflation of subjective and objective elements, this was unfortunately not the result. As Burchell points out, in respect of ‘mental abnormalities short of insanity’ and ‘personal idiosyncrasies’ it appears as if conduct is assessed according to an objective standard. This approach smacks of inconsistency, and cannot be reconciled with the approach in Thibani. The difficulty with this approach is evident from the valiant, but ultimately failed attempt of Jansen J in S v Lubbe to corral all the aspects of this dictum into the confines of the subjective test. In order to accomplish this, Jansen J held that where Schreiner JA had used the phrase ‘excluding normal personal idiosyncrasies’ this did not entail use of an objective test, but simply meant that such factors should not be taken into account in the enquiry into subjective intent. However, by excluding evidence of personal idiosyncrasies the subjectivity of the test for provocation is inevitably compromised – either such factors on the part of the accused must be taken into account, or the test will include an objective aspect.

Nevertheless, it is clear that despite the difficulties in the formulation of the subjective test in Krull, the progression to a completely subjective criterion was gathering pace. Williamson JA, in S v Mangondo, noted that an objective test had been applied to provocation in the cases of Kennedy, Attwood, and Butelezi, as opposed to the subjective test which now applied for intention, and suggested that it was now necessary to review the law relating to provocation. Subsequent judgments followed the subjective trend, providing that where the provocation negated the accused’s intent, he or she could be acquitted of a crime requiring intention. Perhaps particularly notable in this regard were the

---

44 At 399F H.
45 At 400A.
46 EM Burchell ‘Provocation and intoxication’ 1959 SALJ 385 at 386.
47 Burchell and Hunt n 33 above at 246; see Strauss n 28 above at 20 who points out that a test which is at the same time both objective and subjective for the determination of one and the same intention is ‘onbestaanbaar’.
49 Note 48 above at 464H–465C.
50 Burchell n 48 above at 29; Naudé n 48 above at 70.
51 1963 4 SA 160 (A).
52 At 162E–F.
53 See, inter alia, S v Arnold 1965 2 SA 215 (C); S v Gerber 1966 (1) PH H53 (T); S v Dlodlo 1966 2 SA 401 (A); S v Lushozi 1968 (1) PH H21 (T); S v Delport 1968 (1) PH H172 (A). For examples of the application of the objective test for provocation in other Southern African
Appellate Division cases of *S v Dlodlo*, where the court’s unequivocally subjective approach was hailed by Dugard as ‘a rejection of the last remaining traces of objectivism in provocation’, and *S v Delport*, where it was held that where the presence of intent was in issue, it is self-evident that the trier of a fact is required to have regard to all the evidential material which, in the light of our available knowledge of how the human faculty of volition functions, is relevant to the determination of the state of mind of the accused concerned.

The death knell for the objective approach to provocation in relation to intent finally sounded in the Appellate Division case of *S v Mokonto*, Holmes JA, having rejected the accused’s defence that his conduct fell within the ambit of self-defence., proceeded to examine the alternative defence based on provocation. In this regard, the court held that s 141 of the Transkeian Penal Code reflected an objective approach to provocation which was inconsistent with the ‘subjective approach of modern judicial thinking’, which eschewed doctrines such as the presumption that a person intends the reasonable and probable consequences of his act, and the *versari in re illicita* doctrine.

In conclusion, it was held that s 141 of the Transkeian Penal Code should be confined to the territory for which it was passed, and that provocation was...
relevant to the subjective enquiry into intention.63 Finally, the court pointed out that, in casu, far from negating intention to kill, provocation contributed to such intention.64

Toerekeningsvatbaarheid
Up to this point, the courts examined the matter of provocation (along with other possible grounds for a defence, such as intoxication) from the perspective of the possible exclusion of the element of intention. However, increasingly, the notion of 'toerekeningsvatbaarheid' or criminal capacity was coming to the fore. Unknown in the sources of the South African common law, the notion was adopted from the Continental legal systems, more particularly the German law, but was largely confined to academic writings.65 The notion received wider exposure in 1967 when it was subjected to thorough investigation in the so-called Rumpff Commission Report (or to give the report its full title: the Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters),66 the recommendations of which gave rise to the provisions of s 78(1) of the Criminal Procedure Act,67 which sets out the defence of mental illness. Moreover, in the same year, the Appellate Division (per Rumpff JA) held in S v Mahlinza68 that the criminal capacity of the actor is an essential requirement in order to establish criminal liability.69 It is now generally accepted that criminal capacity consists of two components: cognitive capacity and conative capacity. Cognitive capacity refers to the actor's intellectual abilities, such as the ability to perceive, to reason and to understand, and consists of the ability to distinguish between right and wrong.70 A person who lacks cognitive capacity has inadequate insight into his or her behaviour.

63 At 326G–H. It is notable that the court explicated the law relating to provocation in the context of the specific intent doctrine, which was still very much applicable at this stage. This approach is trenchantly—and correctly—criticised by JMT Labuschagne ‘Vonnisbesprekings: R v Camplin [1978] 1 All ER 1236 (CA)’ 1979 De Jure 379 at 381.
64 At 327B–C. See also S v Grove-Mitchell 1975 3 SA 417 (A) at 423A. Both Van Rooyen n 57 above at 51 and Van der Merwe n 57 above at 196 question the failure of the court in Mokonto to interrogate more thoroughly the question of knowledge of unlawfulness on the part of the accused. These concerns foreshadow the groundbreaking case of S v De Blom 1977 3 SA 513 (A), where it was held that mistake of law could indeed negate fault. It was however confirmed (at 326H) that provocation could operate as a mitigating factor. In this regard, see also S v Masondo 1968 (2) PH H191 (N).
65 CR Snyman ‘Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg’ (1989) TRW 1. JC de Wet inevitably made a major contribution to the acceptance of ‘toerekeningsvatbaarheid’ into the academic mainstream through the systematisation of criminal law concepts in De Wet & Swanepoel Strafreg (see in particular: (1ed 1949); (2ed 1960)). DP van der Merwe ‘Toerekeningsvatbaarheid v “specific intent” – die Christen-beslissings’ (1981) Obiter 142 at 145 notes that the ‘specific intent’ doctrine had to be developed by the courts as a result of the element of criminal capacity not being properly recognised.
67 Act 51 of 1977.
68 1967 2 SA 408 (A).
69 At 414G–H. See also SA Strauss ‘Geestesongesteldheid en die strafreg: Die voorgestelde nuwe reeling in die Strafproceswetsontwerp’ 1974 THIRR 219 at 234.
70 Rumpff Commission Report n 66 above at par 9.9. Insight or understanding presupposes intelligence (par 9.31.).
and consequently acts in an irresponsible manner. Conative capacity refers to the actor's ability to control his or her behaviour, to set an aim and decide whether to pursue or reject it. In particular the concept of self-control (or powers of resistance) was defined in the Rumpff Commission Report as

... a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive. In normal non-criminal persons the idea of committing an unlawful act arouses aversion. Only where very strong motives are present to promote the execution of such an act, is a crime actually committed. But where insight into the unlawfulness of the act, even though present, arouses no aversion at all, so that such insight cannot operate as a counter-motive, there is no self-control.

If either of the two capacities are lacking, the accused will not be found to have possessed criminal capacity at the time of acting, and consequently should not be held criminally liable for any unlawful act carried out in this condition. It should, however, be noted that the law presumes that an accused is of sound mental health and is criminally responsible. Whilst the test developed in the Rumpff Commission Report, which was subsequently included in s 78(1), relates to mental illness, there does not appear to be any reason for objection for extending this test to non-pathological incapacity (arising from intoxication and provocation, for example). Indeed, it seems as if the courts have appropriated the s 78(1) test in evaluating non-pathological incapacity.

Apart from cognitive and conative factors, a third type of mental function was identified by the Rumpff Commission, those of affective functions. Affective functions relate to a person's feelings or emotions. The Commission clearly indicated that affective emotional disturbances as such ought not to exclude criminal responsibility, in particular where the accused evidences 'insight and

72Ibid par 9.9. This notion entered South African law, in the context of mental illness, as early as 1899 in R v Hay 16 SC 290 at 301, where it was stated that courts of law 'are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct, and choosing between right and wrong, although he may have the mental capacity to distinguish between right and wrong...'. This dictum was further applied in R v Westrich n 26 above at 469; S v Saaiman 19674 SA 440 (A) at 441D-E; and S v Makete 1971 4 SA 214 (T) at 215D-E. See also S v Hartiyani 1980 3 SA 613 (T) at 618H–619B.
73At par 9.33. This leg of the test has been described as 'weerstandskrag' in S v Lesch 1983 2 SA 814(0) at 823H.
74Snyman n 65 above at 2.
75S v Shivute 1991 2 SACR 656 (Nm) at 660e.
76Snyman n 6 above at 20 notes that in Germany, Switzerland and Austria affective disturbances such as emotional breakdown, anger, fear or panic can exclude culpability. See also Van der Merwe n 65 above at 146.
77See, eg, S v Smith 1990 2 SACR 130 (A) at 134j–135a.
79At par 9.19.
volitional control’ in his conduct. However, where intense emotional disturbance serves to negate the accused’s cognitive or conative capacity, then it can function to exclude criminal liability.

It is crucially important to distinguish between the requirement of voluntary conduct and criminal capacity, and between criminal capacity and fault. First, as regards the distinction between voluntary conduct and criminal capacity, some debate has arisen as to which element of liability the court should test for first. In distinguishing carefully between the elements, Jansen J in R v Mkize held that in the absence of a voluntary act, ‘there is no need to investigate the presence or absence of mens rea because it is necessarily excluded; nor is it necessary to investigate whether the person has criminal capacity’. However, in S v Mahlizanji, Rumpff JA (as he then was) found that the inquiry into capacity was of primary and decisive importance, and that where such an inquiry indicated a lack of capacity, there was no need to enquire further into fault or voluntariness of the accused’s conduct.

As Van der Merwe cogently observes, this approach is difficult to reconcile with the precedence which he gave the ‘act’-element in S v Chretien, and that the Mkize/Chretien approach ought to be followed, in that the test for a voluntary act ought to precede any other inquiry, in order to avoid an overlap between the ‘act’ and ‘capacity’ elements.

Second, there are similarly divergent views in respect of the distinction between criminal capacity and fault. Van der Merwe summarises the three positions as follows: (i) that the concepts are so independent that capacity remains a

---

80 Ibid. See also par 9.25-9.26. Thus where cognitive and conative capacity are present, liability will not be excluded on the basis of intense emotion. P de Vos argues that the court in S v Moses 1996 2 SACR 701 (C) erred by effectively acquitting the accused on grounds of lack of affective control (‘S v Moses 1996 2 SACR 701 (C) Criminal capacity, provocation and HIV’ (1996) SACJ 354 at 357–8). However, this notion is not dealt with in Hlophe J’s judgment, and the court clearly based its decisions on the accused’s ‘controls collapsing at the time of the killing’ (714g), ie lack of conative capacity.

81 S v Van der Merwe 1989 2 PH H51 (A); Louw n 2 above at 366, who concludes that ‘[d]ie affektiiewe vermoe het dus indirek juridies relevant geword’ (writer’s emphasis).

82 JM Burchell Principles of criminal law (3ed 2005) 183 states that in assessing voluntariness a two-stage inquiry applies: the first question is whether the accused is capable of controlling his or her conscious will (ie an inquiry into criminal capacity), and once this question is answered in the affirmative, the second question is whether the conduct was in fact controlled by his or her conscious will. Snyman, in contrast, emphasises that the inquiry into criminal liability must follow a particular sequence, and that the question of capacity (which Snyman groups under ‘culpability’) only arises once the act (and, in terms of Snyman’s scheme, compliance with the definitional elements, and unlawfulness) has been established (n 17 above at 32–38). De Wet n 10 above at 53 shares Snyman’s approach.

831959 2 SA 260 (N).

84 At 265E–F.

85 Note 68 above.

86 At 414H–415A.

87 Van der Merwe n 65 above at 147.

88 Ibid. AJ Middleton ‘n Belangwekkende nuwe beslissing mbt dronkenskap in die strafreg: Chretien 1981 2 SA 1097 (A)’ (1981) SACC 83 praises the approach adopted in Chretien for establishing a pure juridical and logical approach in respect of the concepts of the act and culpability, in that where there is no voluntary act, the enquiry into state of mind does not arise.
requirement in the case of no-fault liability; (ii) that the concepts are theoretically distinguishable, but are both constituent parts of the culpability element; and (iii) that the two concepts are practically indistinguishable in that the question whether the accused was capable of forming a particular intent is essentially the same inquiry as that into the presence of capacity.89 Van der Merwe notes, approvingly, that the ‘psychological’ approach was applied in Chretien (ie approach (i)), thus regarding capacity and fault as separate elements.90

It is important in explicating the notion of criminal capacity (toerekeningsvatbaarheid) to clearly distinguish it from fault. In respect of criminal capacity, the inquiry is whether the accused is capable of ‘something’, and whether that ‘something’ actually existed is only ascertained in the inquiry into fault.91

Lastly, the significance of the Rumpff Commission Report on the development of the defence of non-pathological incapacity is readily apparent from the case law: from forming a crucial constituent of the well-reasoned judgment in Lesch,92 to being cited in the judgment of Viljoen JA in Campher,95 the first Appellate Division judgment to specifically endorse the defence. Viljoen JA’s judgment was in turn cited in Laubscher,94 which set out the test for non-pathological incapacity.95

The genesis of the defence of non-pathological incapacity based on provocation/emotional stress – the 1980s

Although the basis of the defence raised was intoxication, the case of S v Chretien96 was fundamental to the genesis of the defence of non-pathological incapacity as a result of provocation or emotional stress.97 Given that the Rumpff Commission Report provided the theoretical underpinnings for the incipient

---

89Ibid 148. Van der Merwe labels these approaches as ‘psychological’, ‘mixed’ and ‘normative’ respectively.
90Ibid. Capacity and intent are therefore not congruent notions in the criminal law – see Strauss n 69 above at 234; S v Swanepeol 1983 2 SA 434 (A) at 454F-G; S v Adams 1986 4 SA 882 (A) at 99C-D.
91CHJ Badenhorst ‘Vrywillige dronkenskap as verweer teen aanspreeklikheid in die strafreg – ‘n suiwer regswetenskaplike benadering’ 1981 SALJ 148 at 151, who criticises the Chretien decision for some unclear phrasing in this regard.
92Note 73 above at 823F–824B.
93S v Campher 1987 2 SA 940 (A) at 951F–G, see also 954C–F for further reliance on the Rumpff Commission Report. Viljoen JA in turn cited the Lesch judgment (n 73 above) at 956E–957A.
94S v Laubscher 1988 2 SA 163 (A) at 167A–B, 167E.
95166G–167A.
96Note1 above. This case is discussed, with approval by Badenhorst n 91above; and in ‘S v Chretien 1981 1 SA 1097 (A) – Vrywillige dronkenskap en strafregtelike aanspreeklikheid’ (1981) TSAR 185.
97For discussion of an unreported case decided in 1981 – that of S v Mundell (C) – in which the court dealt with the defence of ‘rage reaction’ on the basis of negation of intent to kill, see JR du Plessis ‘Rage reaction: a variation on the theme of provocation’ (1983) Speculum Juris 74. In the Zimbabwean case of S v Turk 1979 4 SA 621 (ZR) at 623C–D it is clear that the court examined provocation as a defence which could negate intention, but did not address its possible impact on criminal capacity. Similarly, the treatment of the defence of provocation in Burchell, Milton and Burchell n 13 above at 306ff is solely focused on the question whether intention was negated.
defense of non-pathological incapacity, it was fitting that Rumpff CJ delivered
the unanimous judgment of the Appellate Division in Chretien. It is particularly
noteworthy that the court dealt sharply and decisively with two aspects: the
Appellate Division decision in *S v Johnson*, \(^9^8\) and the ‘specific intent’ rule. With
regard to the former matter, the court regarded its decision in the *Johnson* case
as juridies onsuiwer \(^9^9\) for its policy-driven conviction of the accused, despite the
court *a quo* in *Johnson* finding that the accused was acting mechanically at
the time of the infliction of the fatal harm. In respect of the latter, the court rejected
the notion of specific intent as contrary to South African law. \(^1^0^0\) The court
proceeded to apply a principled approach to the problem of voluntary
toxicication, holding that intoxication could exclude liability by negating
various elements of liability: the requirement that the act was voluntary, \(^1^0^1\) the
requirement that the accused had criminal capacity (*toerekeningsvatbaarheid*)
at the time of acting; \(^1^0^2\) and the requirement of fault in the form of intention (for
crimes requiring intent). \(^1^0^3\)

The court’s wholesale acceptance of the principled approach to liability, such
that an accused should not be subjected to punishment simply because he
voluntarily got himself into a state where he could not act subject to the control
of his will or did not have criminal capacity, was controversial. Not everyone
agreed that the legal convictions of the community would tolerate this situation.
Nevertheless, Rumpff CJ was very careful to qualify his judgment in two
significant respects. Firstly, this approach necessarily excludes the person who
makes use of alcohol in order to commit a crime. \(^1^0^4\) Secondly, if in applying this
approach courts were to accept too readily that an intoxicated person was not
aware of what he was doing and was thus lacking criminal capacity, this would
bring regspraak into diskrediet. In this regard, Rumpff CJ pointed out that any
potential problem in adopting the principled approach lies not so much in the
legal principle as such, but in the manner of its application. \(^1^0^5\) Rumpff CJ
proceeded to draw a distinction between diminished responsibility and lack of
capability, citing the statement of Hall \(^1^0^6\) describing the state of intoxication

\(^9^8\) 1969 2 SA 201 (A).

\(^9^9\) "Juridically impure" – n 17 above at 1103D.

\(^1^0^0\) At 1104A: ‘By ‘n behoorlike toepassing van ons reg is daar geen plek vir die besondere
benadering nie.’

\(^1^0^1\) At 1104E–F, 1106E–F.

\(^1^0^2\) At 1104H, 1106F–G.

\(^1^0^3\) This was the effect of the judgment, in answering in the affirmative the question of law raised
by the State: whether on the facts found proven by the court *a quo*, it was correctly held that the
accused on a charge of attempted murder could not be convicted of common assault where the
necessary intention for the offence charged had been influenced by the voluntary consumption
of alcohol?

\(^1^0^4\) At 1105G–H. This situation would be covered by the *actio libera in causa* rule, in terms of
which the accused who uses his intoxicated body as an instrument to commit a crime incurs
criminal liability – see Snyman n 17 above at 222–3; Burchell n 82 above at 182–3.

\(^1^0^5\) At 1105H.

\(^1^0^6\) J Hall *General principles of criminal law* (2ed 1960) 553–554 (at 1106A–B, where it is
wrongly cited as 534), in turn cited in JC de Wet *De Wet & Swanepoel strafreg* (3ed 1975)
119n120.
characterised by ‘a severe blunting of the capacity to understand the moral quality of the act at issue, combined with a drastic lapse of inhibition’. The position in South African law requires greater circumscription, according to Rumpff CJ:

Eers ... wanneer 'n persoon, wat 'n gevolghandeling pleeg, so besope is dat hy nie besef nie dat wat hy doen ongeoorloof is, of dat sy inhibisies wesenlik verkrummel het, kan hy as ontoerekeningsvatbaar beskou word.107

Only in highly exceptional cases will it be found that the effect of the intoxication was such as to exclude the accused’s capacity to know that what he is doing is unlawful, or such as to result in a fundamental disintegration of the accused’s inhibitions, and consequently that the accused lacked capacity.108 Amnesia on the part of the accused will not amount to a finding of incapacity without other credible evidence to this effect.109

Following the decision in Chretien, where the Appellate Division endorsed a radical shift from the predominance of policy concerns to those of principle in respect of intoxication, the question was whether the same approach would be adopted in relation to an area where there had always been a similar tension, that of provocation or emotional stress.111 The development of the law in this regard did not take long. In the year after the Chretien decision was handed down, the Appellate Division, in dealing with the defence of necessity, stated that an accused could be rendered so fearful as a result of threats that he could lack criminal capacity;110 a statement which clearly allows for a plea of provocation or emotional stress to exclude liability. However, before the implications of this obiter statement of the court could be teased out, the Appellate Division expressed itself in unequivocal terms on the point in S v Van Vuuren.112 Faced with a defence of lack of mens rea based on provocation and intoxication, reliant on the principles set out in Chretien, the court (per Diemont AJA) stated:

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

---

107 At 1106B–C.
108 See 1106C–E. The court reiterates the point that only on the basis of evidence which justifies the conclusion can there be a finding of non-pathological incapacity (at 1106F–G).
109 At 1108C–D.
110 Burchell n 17 above at 191 notes the possibility of provocation being treated in the same way as intoxication.
111 S v Bailey 1982 3 SA 772 (A) at 796C–D: ‘Dit is denkbaar dat hy so vreesbevange kan word dat hy nie behoorlik die gevolge van sy handelingen kan insien nie of kan insien dat wat hy doen wederregtelik is nie; in 'n uiterse geval kan hy selfs ontoerekeningsvatbaar word.’
112 1983 2 SA 12 (A). In Zimbabwe the approach adopted in Tenganyika (n 37 above) still held sway – see S v Nangani n 37 above at 807H.
unlawfulness of his act must obviously be taken into account in assessing his
criminal liability.\(^\text{113}\)

Once again, the court qualified its bold statement with a caveat that the critical
question in each case is whether the conclusion is fully supported by the
evidence.\(^\text{114}\)

In the next case in which a defence of non-pathological incapacity based on
provocation was raised, \(S v\ Lesch\),\(^\text{115}\) the court (per Hattingh AJ) carefully
weighed up the proven facts, along with psychiatric evidence led on behalf of
the accused, before confirming that none of the elements of liability had been
excluded by the provocation, thus upholding the murder conviction. It is evident
that the court adopted the same systematic approach as that in \(Chretien\),
establishing in turn the existence of the elements of voluntary conduct, criminal
capacity and intention.\(^\text{116}\) Ultimately the court held that the provocation
experienced by the accused, far from eliminating intent to kill, contributed to the
forming of this intent.\(^\text{117}\) It is noteworthy that Hattingh AJ explicitly adopted the
terminology of the \(Rumpff Commission Report\) in explicating the notion of
criminal capacity (\(toerekeningswatbaarheid\)) and its components, cognitive
capacity and conative capacity.\(^\text{118}\)

Given this development, it was perhaps inevitable that the defence of provoca­
tion or emotional stress would be successful at some point, and this occurred in
the case of \(S v Arnold\),\(^\text{119}\) where the accused was charged with the murder of his
wife. Psychiatric testimony was led on behalf of the accused to the effect that
at the time of the shooting the accused's mind was so flooded with emotions
that he may have acted subconsciously or may have lost the capacity to exercise
control over his actions.\(^\text{120}\) Thus both the voluntariness of the accused's conduct
and his capacity were placed at issue. In the absence of any psychiatric evidence
led on behalf of the State, the court (per Burger J), accepted the accused's
version of events\(^\text{121}\) and found him not guilty. In coming to this conclusion, the
court cited the cases of \(Chretien\), \(Van Vuuren\) and \(Bailey\), concluding on the
basis of the statements made in the latter two cases\(^\text{122}\) that the defence of
incapacity extends beyond factors such as youth, mental disorder and intoxica­
tion to ‘extreme emotional distress’. A puzzling feature of this judgment is that

\(^{113}\)At 17G–H. Whilst, it is submitted, the meaning of this statement is clear, the descriptions of
criminal capacity in the judgment (see, eg 18A, 22F–G) are somewhat less than precise.
\(^{114}\)At 17H. In casu it was held that the accused's plea of lack of mens rea was not supported by
the proven facts (see 22E–H), and consequently his conviction of murder and attempted murder
was confirmed.
\(^{115}\)Note 73 above.
\(^{116}\)See 825F–826A.
\(^{117}\)At 826A.
\(^{118}\)At 823G–824B, where paras 9.30, 9.32 and 9.33 are referred to.
\(^{119}\)1985 3 SA 256 (C).
\(^{120}\)At 263C–E.
\(^{121}\)See 262B–I.
\(^{122}\)The court at 263J–264C cited the dicta from the cases of \(Bailey\) n 111 above and \(Van Vuuren\)
n 112 above which are quoted in the text above.
having found as a reasonable possibility that the accused was acting in a state of sane automatism at the time of the shooting,\textsuperscript{123} the court then proceeded to hold that it was reasonably possible that the accused was lacking capacity at the time of the death of his wife.\textsuperscript{124} Whilst the court was aware of the need to be cautious of accepting too readily that the accused lacked capacity,\textsuperscript{125} it was held that the ‘most unusual’ facts in this case, in that the killing ‘was at variance with the whole conduct of the accused both before and after’ were indicative of uncontrolled conduct.\textsuperscript{126}

The Appellate Division was required to grapple once again with the question of whether provocation or emotional stress could found a defence excluding liability, and if so how this defence should be delineated, in \textit{S v Campher}.\textsuperscript{127} This case is remarkable for the fact that the three judges all delivered differing judgments, resulting in separate majority findings on the facts and on the law. It appears that the appellant’s case was rendered more difficult by the fact that her counsel in the court \textit{a quo} failed to raise the possibility that her conative capacity may have been lacking at the time of the killing, and further by the failure of the defence counsel to adduce any expert psychiatric evidence.\textsuperscript{128} Viljoen JA pointed out that given that the appellant had relied on an argument based on lack of self-control (albeit in an attempt to argue lack of intent)\textsuperscript{129} this was in essence an argument of lack of conative capacity, and proceeded to deal with the matter on this basis. Significantly, Viljoen JA commented that the criteria developed in section 78 of the Criminal Procedure Act\textsuperscript{130} were not restricted to incapacity related to mental illness, and thus they could be employed in assessing incapacity caused by non-pathological factors.\textsuperscript{131} Viljoen JA further pointed out that the enquiry into capacity was a separate enquiry to that into intention, and must precede it — only once the accused has been found to have capacity would the court be required to assess intention.\textsuperscript{132} In the absence of expert psychiatric evidence, it was incumbent on the court to determine of the appellant’s state of mind. Viljoen JA concluded that the appellant lacked conative capacity at the time of the shooting, since she was

\footnotesize{\textsuperscript{122}At 263G–H.\textsuperscript{124}At 264D.\textsuperscript{125}The court, at 264G–H, cited the admonition at 1106F–G in \textit{S v Chretien} n 17 above.\textsuperscript{127}Note 93 above.\textsuperscript{128}Arguments based on defence of \textit{dignitas}, and on provocation, with a view to the appellant being found guilty of the lesser crime of culpable homicide, were raised on the appellant’s behalf in the court \textit{a quo}, and were the arguments raised on appeal (see 949C–E; 950I–951B). For a discussion of the operation of the justification ground of defence in relation to legal interests such as \textit{dignitas}, see JMT Labuschagne ‘Noodweer ten aansien van nie-fisiese persoonlikeheids-goedere’ (1975) \textit{De Jure} 59.\textsuperscript{129}The term used by the court is ‘\textit{weerstandskrag’}.\textsuperscript{130}Act 51 of 1977.\textsuperscript{131}At 954F. Viljoen JA had earlier raised these arguments in \textit{S v Adams} n 90 above — see 903C–D.\textsuperscript{132}At 955C–F.}
unable to control or inhibit the urge to kill her abusive husband, and that the appellant should be acquitted. Jacobs JA, having noted that appellant’s counsel in the court a quo had failed to lead psychiatric evidence and had failed, on an interpretation of the appellant’s evidence, to properly plead lack of capacity, held that this made it impossible to conclude that the appellant lacked capacity at the relevant time. In any event, the learned judge concluded, the test for incapacity set out in section 78 only applies to cases where the accused’s self-control was negated by pathological factors, which was not the case in casu, and consequently the appeal against conviction should be dismissed. Boshoff AJA agreed that on an examination of the facts the appellant was rightly convicted of murder. However, the learned judge held further that the absence of criminal capacity was not limited to cases of mental illness, and could also apply to a temporary clouding of the mind (tydelike verstandelike beneweling). Thus although the majority of the court found the appellant guilty of murder on the facts of the case, the majority statement on the law confirmed the existence of a defence based on non-pathological incapacity.

The development of the defence of incapacity as a result of provocation or emotional stress took a significant step forward in the case of S v Laubscher. In this case the Appellate Division finally produced a theoretical framework to add to the foundations that had been laid in the previous cases. Referring to the work of Wiersma, and Snyman, along with dicta of Viljoen JA from Campher, the court (per Joubert JA) set out the recognised psychological characteristics of criminal capacity as follows:

Om toerekeningsvatbaar te wees, moet ’n dader se geestesvermoëns of psigiese gesteldheid sodanig wees dat hy regtens vir sy gedrag geblameer kan word. Die erkende psigologiese kenmerke van toerekeningsvatbaarheid is:

1. Die vermoë om tussen reg en verkeerd te onderskei. Die dader het die onderskeidingsvermoë om die regmatigheid of onregmatigheid van sy...
handeling in te sien. Met ander woorde, hy het die vermoë om te besef dat hy wedderregtelik optree.

2. Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die weerstandskrag (wilsbeheervennoë) het om die versoeking om wedderregtelik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.

Ontbreek een van hierdie psigologiese kenmerke dan is die dader ontoerekeningsvatbaar, bv waar hy nie die onderskeidingsvermoë het om die ongeoorloofdheid van sy handeling te besef nie. Insgelyks is die dader ten spyte daarvan dat hy wel die onderskeidingsvermoë het tog ontoerekeningsvatbaar waar sy geestesvermoë sodanig is dat hy nie die weerstandskrag het nie.\(^{145}\)

The recognition of this defence is further cemented by the first use of the term 'nie-patologiese ontoerekeningsvatbaarheid' (non-pathological incapacity).\(^ {146}\)

Although the court found that the appellant had the requisite criminal capacity at the time of acting, and that his murder conviction should therefore be confirmed,\(^ {147}\) the formulation of the defence in *Laubscher* remains the classic statement on the matter to this day.\(^ {148}\)

The refinement of the defence – the 1990s

After the decision in *Laubscher*, the future of the defence of non-pathological incapacity based on provocation or emotional stress seemed assured. However whilst the defence was raised on a number of occasions,\(^ {149}\) it had yet to meet with success in the Appellate Division. This situation changed with the case of *S v Wiid*, which once again involved an appeal against a murder conviction. The court (per Goldstone AJA) cited the formulation of the defence set out in *Laubscher*, in the course of finding on the basis of the evidence presented by appellant, including psychiatric evidence, that the State had failed to prove that the appellant had criminal capacity at the time of acting, and that she should therefore be acquitted.\(^ {150}\)

\(^{145}\) At 166G–167A (original emphasis).

\(^{146}\) At 167F. Thus, it was definitively established by the court that the defence of non-pathological incapacity had an autonomous existence, and was not merely a matter of "extend[ing] the defence of insanity to the sane" (JR du Plessis 'The extension of the ambit of ontoerekeningsvatbaarheid to the defence of provocation – as trafigwetenskaplike development of doubtful practical value' (1987) 104 SALJ 539 at 540). Griesel J’s approving reference to Du Plessis’s comment (in *S v Eadie* 2001 2 SACR 172 (C) at 177f) is a revealing indication of the learned judge’s discomfort with the notion of non-pathological incapacity.\(^ {147}\) At 173A–C.

\(^{148}\) The dictum in *Laubscher* n 94 above at 166F–167A was cited as a statement of the law relating to the defence of non-pathological incapacity in the only case in which the Appellate Division/Supreme Court of Appeal has upheld the defence, *S v Wiid* 1990 2 SACR 561 (A) at 563f–j.

\(^{149}\) See, for example, *S v Calitz* 1990 2 SACR 119 (A), which explicitly followed the formulation of the legal position set out in *Laubscher* (n 94 above) at 126d–g; *S v Smith* n 77 above, which noted the acceptance of the defence in *Laubscher* (at 134h–i); and *S v Hutchinson* 1990 2 SACR 149 (D) at 157d–f.

\(^{150}\) Note 148 above at 569g.
Since the case of *Wiid*, and prior to the case of *Eadie*, which will be discussed in detail below, the case law may be loosely categorised into three types: those cases where the focus was on issues relating to proof of the defence; those cases dealing with provocation or emotional stress where the defence did not exclude liability, but resulted in a finding of diminished responsibility; and those cases where the defence was successful, resulting in the accused being acquitted. The first two categories will be dealt with in this section, and the third in the next section, as the cases in this category serve as a precursor to the case of *S v Eadie*.\(^{151}\)

**Evidential aspects**

**Amnesia**

A defence of non-pathological incapacity invariably involves a claim of amnesia.\(^{152}\) However, the presence of amnesia can be attributed to a host of factors.\(^{153}\) Amnesia *per se* is not relevant to the issue of culpability,\(^{154}\) and partial amnesia following a stressful episode such as causing the death of another person is not diagnostically significant.\(^{155}\) In *S v Pederson*\(^ {156}\) it was held that a distinction must be drawn between true absence of memory, which is indicative of uncontrolled conduct, and retrograde loss of memory, which is simply a means, employed by the psyche, of suppressing unpleasant memories.\(^{157}\) The latter form of amnesia does not exclude criminal responsibility.\(^{158}\)

**Factual foundation**

It has been held that mere loss of temper cannot simply be equated with loss of cognitive control.\(^{159}\) In fact, the law presumes that an accused has the necessary criminal capacity, where there is no evidence of mental illness, even if the accused is angry and has consumed alcohol.\(^{160}\) Whilst bearing the burden of proof of criminal capacity, the State is thus assisted by this presumption, in the

---

\(^{151}\) Note 5 above.

\(^{152}\) For a general discussion of the impact of amnesia on criminal liability, see SV Hoctor ‘Amnesia and criminal responsibility’ (2000) 13 SACJ 273.

\(^{153}\) Poor recall of what had happened could be due to ‘alcohol, to involuntary suppression of memory from the consciousness as a defence mechanism precipitated by extreme stressful events, or to malingering’ – *S v Kensley* 1995 2 SACR 646 (A) at 653b-c.

\(^{154}\) *S v Kalogoropoulos* 1993 2 SACR 12 (A) at 21g–h; *S v Kensley* 1995 2 SACR 1 (A) at 4e; *S v Kensley* n 153 above at 653c; *S v Gesualdo* 1997 2 SACR 68 (W) at 74c–d; *S v Pederson* 1998 2 SACR 383 (N) at 396g–h. In the context of an enquiry into automatism, it was held on the facts of *S v Cunningham* 1996 2 SACR 631(A) at 638d–e) that there were ‘any number of possible causes [of amnesia] and in the absence of other indicators its presence did not justify a diagnosis of automatism’.

\(^{155}\) *S v Ingram* n 154 above at 4d. In *S v Els* 1993 2 SACR 723 (O) at 735d it was held that partial memory of events is inconsistent with a defence of non-pathological incapacity. See also *S v Eadie* n 5 above at par [44].

\(^{156}\) Note 154.

\(^{157}\) At 390f–h.

\(^{158}\) *S v Van der Sandi* 1998 2 SACR 627 (W) at 638i–j.

\(^{159}\) *Kok v S* [2001] 4 All SA 291 (A) at par [22]. The case is also reported at 2001 2 SACR 106 (SCA).

\(^{160}\) *S v Shivute* n 75 above at 660e; *S v Kensley* n 153 above at 660b–c; *S v Pederson* n 154 above at 400b; *S v Van der Sandi* n 158 above at 635i–j.
same manner as where with regard to the question of automatism, the State is assisted

by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily.\textsuperscript{161}

In order to negate the presumption of capacity, an accused relying on a defence of incapacity resulting from non-pathological grounds such as provocation or emotional stress\textsuperscript{162} is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable doubt on the point.\textsuperscript{163} Psychiatric evidence may be useful in establishing the factual foundation, but it is not indispensable.\textsuperscript{164} The court retains the discretion, in relation to non-pathological incapacity, whether to refer an accused for psychiatric observation (as contemplated in s 79 of the Criminal Procedure Act).\textsuperscript{165} Ultimately, the final decision rests with the court to determine whether the accused had the requisite criminal capacity at the time of acting, having regard to the expert evidence and to all the facts of the case, including the accused’s reliability as a witness and the nature of the accused’s actions at the relevant time.\textsuperscript{166} The court will approach the evidence on which a defence of non-pathological incapacity flowing from provocation or emotional stress is based with circumspection,\textsuperscript{168} and such a defence must be subjected to close scrutiny by the court.\textsuperscript{169} In particular, the

\begin{itemize}
\item \textsuperscript{161}S v Cunningham n 154 above at 635j–636a; S v Eadie n 5 above at par [2].
\item \textsuperscript{162}As opposed to where pathological incapacity is pleaded, and the \textit{onus of proof} rests on the accused.
\item \textsuperscript{163}S v Kalogoropoulos n 154 above at 21i–j; S v Eadie n 5 above at par [2]. See also S v Di Blasi 1996 2 SACR 1 (A) at 7c; S v Gesualdo n 154 above 154 at 74f; S v Van der Sandt n 158 above at 636a–b; S v Kali [2000] 2 All SA 181 (Ck) at 202d–e. The dictum in S v Kalogoropoulos was also cited in S v Potgieter 1994 2 SACR 61 (A) at 72j–73a, although inappositely so, as the Potgieter case dealt with the defence of sane automatism, and thus all argument was directed to this defence rather than incapacity (see 84e–f). It is however clear that similar concerns direct the approach in respect of a plea of sane automatism – as Scott JA stated in S v Cunningham n 154 above at 636a–b: ‘Common sense dictates that before this inference [that the accused was acting voluntarily] will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged \textit{actus reus}’.
\item \textsuperscript{164}S v Laubscher n 94 above at 172 E–F; S v Calitz n 149 above at 127c; S v Kalogoropoulos n 154 above 154 at 21i; S v Kok 1998 2 SACR 532 (N) at 545j–546a; S v Van der Sandt n 158 above at 636g; S v Eadie n 146 above at 180e–g; S v Volkman 2005 2 SACR 402 (C) at par [1]–[13].
\item \textsuperscript{165}Act 51 of 1977.
\item \textsuperscript{166}Section 78(2) of the Criminal Procedure Act. See S v Volkman n 164 above at par [7]–[8].
\item \textsuperscript{167}S v Harris 1965 2 SA 340 (A) at 365B–C; S v Kalogoropoulos n 154 above 154 at 21j–22a; S v Ingram n 154 above 154 at 4g–h; S v Di Blasi n 163 above at 7c–e; S v McDonald 2000 2 SACR 493 (N) at 501h–j; S v Eadie n 146 above at 180g–h; Kok v S n 159 above at par [22]; S v Eadie n 5 above at [2]. This applies equally to the situation where the issue is whether the accused acted voluntarily or in a state of automatism – S v Cunningham n 154 above 154 at 636b–c. That the court should be final arbiter of criminal responsibility accords with the fact that concepts such as ‘criminal capacity’ and ‘automatism’ are legal, and not psychiatric, concepts – see S v Kensing n 153 above at 652j–
\item \textsuperscript{168}S v Eadie n 5 above at 658j; S v Van der Sandt n 158 above at 636b–c.
\item \textsuperscript{169}S v Goitsemang 1997 2 SACR 99 (O) at 103i–104a; S v Gesualdo n 154 above 154 at 74g–h; S v Eadie n 5 above at [2]. In relation to the Goitsemang judgment, Pantazis (in ‘Criminal Law’ Annual Survey of South African Law 1997 610 at 615) suggests that the approach adopted is that
court will be exceedingly cautious in accepting the defence where the only basis for the defence is the *ipse dixit* of the accused. It follows that the reliability and truthfulness of the alleged offender is a crucial consideration in assessing the validity of the factual foundation laid by the accused for the defence. It has been held that the accused's own words that her or his conduct was uncontrolled in nature should be accepted, unless it can be said that such evidence 'cannot reasonably be true'.

**Diminished responsibility and mitigating circumstances**

Where it is determined that as a result of provocation or emotional stress the accused's criminal capacity was affected at the time of the unlawful act, it has been held that a finding of diminished responsibility may follow. Diminished responsibility is the diminished capacity to appreciate the wrongfulness of the particular act in question, or to act in accordance with an appreciation of its wrongfulness. Verdicts of diminished responsibility have ensued where the court has found 'a prolonged period of sustained and mounting mental strain', 'heightened tension', 'considerable stress', and 'extreme provocation'; '[a] state of intoxication and emotional stress...not conducive to totally rational thought and behaviour', and 'an immense amount of stress'. Further, where an accused has been affected by provocation or emotional stress and the court has not specifically found capacity to be excluded or diminished, these factors have nevertheless been considered in mitigation of sentence, giving rise to a lesser punishment. It has however been held that the promptness of the non-pathological factors cannot negate criminal capacity, but this is not borne out by the acknowledgement at 104g that provocation or emotional stress could exclude criminal capacity. Similarly, a defence of sane automatism will be closely examined—*S v Potgieter* n 163 above at 73j–74b, cited in *S v Ingram* n 154 above at 154 at 4j–5b. In *S v Gesualdo* n 154 above at 74g–h, Borchers J comments that a court 'would be unlikely to find that such state [incapacity] may have existed only by virtue of the accused's *ipsissima verba*'. *S v Potgieter* n 163 above at 73b; *S v Di Blasi* n 163 above at 7f; *S v Kali* n 163 above at 202f–g; *S v Eadie* n 146 above at 180g–i. Unfortunately this statement of the law is not a model of clarity—whilst discussing the issue in the context of automatism, the court then proceeds to cite cases such as *Kalogoropoulos*, *Mahlinza*, and *Wiid* which deal with an incapacity defence. However, as pointed out at 73e, this was the effective holding at 20a in the *Kalogoropoulos* judgment (n 154 above), which would thus constitute authority for the above proposition. *S v Laubscher* n 94 above at 168B–C; *S v Smith* n 77 above at 135f–g; *S v Shapiro* 1994 2 SACR 112 (A) at 120e–f; *S v Di Blasi* n 163 above at 6d; *S v Kok* n 164 above at 552b–c. 174 Cfs 78(7) of the Criminal Procedure Act, 51 of 1977; see *S v Shapiro* n 173 above at 123e–f; *S v Di Blasi* n 163 above at 7b–c. *S v Smith* n 77 above at 135f–g. *S v Shapiro* n 173 above at 121c–122b. *S v Ingram* n 154 above at 8h. *S v Kok* n 164 above at 553c. See, for example, *S v Meyer* 1981 3 SA 11 (A) at 17E–F, where the court identified 'jaloesie en provokasie' as causal factors in the accused's actions; *S v Els* n 155 above, where the accused's state of 'emosionele angs, bekommernis en benoudheid...as gevolg van...voortdurende aanrandings, drankgebruik en provokasie van die oorledene' was taken into account (at 735e–f); *S v Larsen* 1994 2 SACR 149 (A), where the accused was found to have been in a 'towering rage' as a result of jealousy, frustration and provocation when she killed the deceased (at 157d–e); *S v Aspeling* 1998 2 SACR 561 (C), where the accused's actions were held
offender’s response to the provocative conduct of the victim is an essential characteristic of provocation as a mitigating factor – thus the retaliation is required to be immediate and to take place in the heat of the moment.\textsuperscript{180} Furthermore, anger will only be held to mitigate punishment where the surge of emotion evoked thereby is justified in the eyes of the reasonable person.\textsuperscript{181}

THE NEW (OR OLD?) FRONTIER – *S v EADIE*

Thus it is evident that by the mid-1990s the defence of non-pathological incapacity based on provocation or emotional stress was well-established in South African law. This development was in accordance with the psychological approach to liability, in recognizing that where any element of criminal liability is absent, for whatever reason, the accused should not be found guilty of the crime in question. On the other hand, it is clear that the defence was never intended to provide blanket exculpation for irate or distraught accused. On the contrary, the stringent nature of the process of establishing the defence, along with the courts’ natural disinclination to hold that an accused had actually been incapacitated by such factors, arguably provides a sufficient safeguard against facile acquittals. There were, however, two\textsuperscript{182} cases in particular which raised the old fears about a defence based on an inability to control intense emotion.

The cases that caused the trouble

In *Nursingh*,\textsuperscript{183} the accused shot and killed his mother and maternal grandparents whilst, he claimed, in an emotional storm\textsuperscript{184} arising from prolonged, continuous and at times severe physical, psychological and sexual abuse, predominantly at the hands of his mother. In the absence of any psychological evidence led by the prosecution to challenge the defence raised by the accused, the court (per Squires J) held that counsel for the accused had laid a factual foundation which at least established reasonable doubt as to whether the accused to be ‘an angry and frustrated reaction to continuous provocation’ (at 574d–e). In *S v Mayekiso* 1990 2 SACR 238 (E) and *S v Matlhola* 1991 2 SACR 402 (BA), it was acknowledged that the respective accused had murdered their new-born infants in a state of considerable emotional stress, and that this should be reflected in the sentences imposed.

A third case over which a pall has been cast by the *Eadie* case (n 5 above at par [50]) is *S v Gesualdo* (n 154 above), where the accused killed a fellow Argentinean immigrant to South Africa in circumstances where their business and personal relationship had been soured by the acts of the deceased. The court held that the accused lacked conative capacity, and he was consequently acquitted on a charge of murder. This case has not been subjected to the same level of academic scrutiny as the other cases which will be discussed, which may be due at least in part to the fact that it did not have as high a profile (and thus the same level of media attention) as the other cases. It will also not be discussed in detail here.

A psychiatrist testifying on behalf of the accused described his mental state at the time of the shooting as ‘a separation of intellect and emotion, with temporary destruction of the intellect, a state in which, although the individual’s actions may be goal-directed, he would be using no more intellect than a dog biting in a moment of response to provocation’ (at 333d–e). A psychologist testifying for the defence described it as ‘an acute catathemic crisis’, resulting in ‘an overwhelming of the normal psychic equilibrium by an all-consuming rage, resulting in the disruption and the displacement of logical thinking’ manifesting itself in ‘an explosion of aggressiveness that frequently leads to homicide’ (at 333e–h).
had the necessary criminal capacity, and consequently acquitted the accused on all counts.185

This judgment has been the focus of some critical scrutiny. Burchell, whilst carefully avoiding any criticism of the judgment of Squires J, comments that

... one cannot help but feel a measure of disquiet about the conclusion that an intelligent person, albeit under a good deal of stress, can shoot his mother and grandfather by firing three bullets into their bodies and his grandmother by firing four bullets into her body, and escape criminal liability completely.186

Louw also points out his discomfort187 with the court’s acceptance of the psychiatric evidence that the killings could be regarded as ‘one and the same eruption’.188 Louw further criticises the judgment, for not providing ‘sounder reasons’ for its finding in that case and academic authority are not cited, and for its ‘grammatical errors and legal imprecision’.189 It is true that the judgment is not always a model of clear phrasing.190 It is however submitted that at no point does Squires J incorrectly state the law.191

The case of Moses192 arose out of the accused’s killing of his homosexual lover, upon the deceased’s revelation that he had AIDS, following unprotected intercourse between the accused and the deceased. The accused, who had a history of anger outbursts and violence, became enraged and successively attacked the deceased with an ornament, a small knife and a large knife. As in the Nursingh case, defence counsel led expert testimony regarding the accused’s mental state at the time of the killing from a psychologist and a psychiatrist, who similarly concluded that due to the accused being in an annihilatory rage, he experienced a collapsing of controls, which resulted in him lacking the

---

185 At 339b–c.
186 Burchell ‘non-pathological incapacity – evaluation of psychiatric testimony’ (1995) 8 S A C J 37 at 40–1. See also JM Burchell and JRL Milton Principles of criminal law (2ed 1997) 286. Burchell suggests that in order to provide safeguards that will prevent facile acquittals, the court should ensure that the prosecution should also lead psychiatric testimony where the defence has done so, which should ideally be heard after the factual issues of the case have been canvassed (at 41–2).
187 R Louw ‘S v Eadie: Road rage, incapacity and legal confusion’ (2001) 14 S A C J 206 at 213: ‘With respect the analogy of the intellect required of a dog when biting to a human being accurately firing ten bullets is a strained one.’ On this basis Louw argues that the case was wrongly decided (at 214).
188 Note 183 above at 339c–d.
189 Louw n 187 above at 209.
190 For example (n 187 above at 208), Louw’s criticism of the description of the test for capacity (n 183 above) at 332e–f (whether the accused ‘had the mental ability or capacity to know what he was doing and whether what he was doing was wrongful’) for not resembling the standard test is accurate. Other examples of lack of clarity may be found at 338g, where the court refers to the fact that ‘the accused’s mind was not functioning normally’ (which could indicate involuntary conduct) and at 333b, where sane automatism is described as a ‘similar situation’ to non-pathological incapacity.
191 It is clear throughout the judgment that the court is assessing (n 183 above at 332e–h) and indeed established (at 339b–c) the defence of lack of capacity. Louw’s criticism (n 187 above at 208) that the court conflated capacity and intention must be viewed in this light.
192 S v Moses n 80 above.
necessary capacity to be held liable for the fatal conduct. Although the prosecution did in fact lead expert psychiatric evidence in this case, the court (per Hlophe J) dismissed it as unhelpful, while accepting the evidence of the defence experts. Consequently, the accused was acquitted on the basis that he lacked criminal capacity at the time of the killing.

De Vos has criticised this judgment for its implications and possible future consequences:

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

Louw echoes these sentiments, arguing that the acquittal in Moses leaves us with a dangerous precedent, making killing permissible whenever someone flies into an ‘annihilatory rage’.

The judgment has also been criticised for allowing the defence to prevail in circumstances where, unlike in previous applications of the defence, the final provocative act was not ‘the last straw in a long history of abuse’. Further, the court’s statement that the accused’s self-control was ‘significantly impaired’ has been criticised as ambiguous, in that it fails to indicate whether the accused experienced an absence of self-control, which would impact on his liability, or merely diminished self-control, which would affect sentence.

*S v Eadie*

*The judgment*

The by now notorious facts of *Eadie* may be briefly summarised as follows. The accused was driving home with his family after an evening of merriment, when he encountered the deceased, who, it was later established, was similarly intoxicated. The deceased drove up behind the accused, with his lights on bright. When the accused allowed him to pass, the deceased slowed down considerably. When the accused passed the deceased, the deceased once again resumed his position directly behind the accused, still with his lights on bright. This pattern repeated itself a few times until the cars stopped at a set of traffic lights, and the...
accused got out of his car and proceeded to beat the deceased to death with a hockey stick.

The case was first heard in the Cape High Court, where the accused pleaded not guilty to murder and defeating or obstructing the course of justice, raising the defence of non-pathological incapacity primarily arising from provocation, and ensuing road rage. Griesel J, following an assessment of the psychiatric evidence led by counsel, as well as the reliability of the accused as a witness, (correctly, it is submitted) convicted the accused of murder and attempting to defeat or obstruct the course of justice. It was held that the accused, in succumbing to road rage, ‘did not “lose control”; he simply lost his temper’. Thus, it was held that the accused’s version that he was unable to control his actions at the critical time could not be accepted as reasonably possibly true in the light of the evidence before the court. Significantly, in the course of his judgment, Griesel J indicated that the differentiation between automatism and capacity was a distinction without a difference.

There appears to be some confusion between the defence of temporary non-pathological criminal incapacity, on the one hand, and sane automatism, on the other. The academic writers...point out that they are in fact two distinct and separate defences. At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity.

This judgment sparked some academic comment and criticism, notably for its conflation of the notions of automatism and incapacity. Louw seized the opportunity to critically examine the cases of Nursingh and Moses, in the course of a plea for a ‘reappraisal’ of the test for incapacity. He argues that it is ‘far from clear in our law when self-control is absent’, and consequently, since there is no actual distinction between automatism and lack of self-control, the second leg of the capacity inquiry should fall away, and capacity should be determined ‘solely on the basis of whether a person is able to appreciate the difference between right and wrong’.

---

202 Note 146 above at 182i–j.
203 At 184d–e.
204 At 178a–b.
205 See SV Hoctor ‘Road rage and reasoning about responsibility’ (2001) 14 SACJ 195; Louw n 187 above at 206.
206 At 207.
207 If the two were distinct, it would be possible to exercise conscious control over one’s actions (the automatism test) while simultaneously lacking self-control (the incapacity test)’ (at 211).
208 Ibid. Louw argues that once an accused is shown to have cognitive capacity, he or she may then raise involuntariness as a defence (ibid).