A COMPARATIVE EXAMINATION OF THE EXTENT TO WHICH THE SOUTH AFRICAN AND THE ENGLISH LEGAL SYSTEMS RECOGNIZE THE DEFENCE OF PROVOCATION IN HOMICIDE CASES

by

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PREFACE

The research for this thesis was carried out in the Faculty of Law at the University of Cape Town, Rondebosch, during 1992, under the supervision of Professor I Leeman.

This thesis represents original work by the author which has not been submitted in any form to another University. Where use was made of the work of others, it has been duly acknowledged in the text.

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INTRODUCTION

On charges of murder or assault, it often appears that the accused's aggression was immediately preceded by provocative behaviour e.g. taunts or insults by the victim which induced anger or rage in the accused and which gave rise to his aggression. [1] The present study aims to address the question whether, in South African law, a defence is available to an accused in such cases. Since the issue of provocation in South African law usually arises in homicide cases, this study will be restricted to such cases.

It will be shown that, during the past couple of decades, the South African law relating to provocation has undergone significant development. In 1925, the Appellate Division [2] declared s 141 of the Native Territories Penal Code [3] to be an accurate reflection of the South African law relating to provocation. In terms of this section, provocation could operate as a partial defence on a charge of murder : where an accused successfully raised the defence he would be convicted of culpable homicide. Recently, however, it has become clear that provocation may operate as a complete defence, resulting in an accused leaving the court as a free person. [4]

It will be argued that the above development reflects a general shift in our law, starting in the 1950's, from a policy-based to a principle-based approach to criminal liability. According

to Snyman [5], a policy-based or empirical approach is characterised by the tendency to think inductively i.e. to reach conclusions with reference to particular cases or examples from the past rather than with the aid of general principles. This results in the creation of a body of loose and incoherent 'defences', 'justifications' and 'excuses'. The law is thus guided by considerations of common sense and public policy.

In contrast to a policy-based approach, Snyman [6] identifies a principle-based or systematic approach to criminal liability. He argues that this approach is characterised by a systematic and analytical method of reasoning which tends to be deductive. This approach results in the emergence of a coherent system of legal principles rather than a collection of incidental and unconnected rules.

As Holmes JA correctly stated in Mokonto [7],

> "(p)rovocation and anger are different concepts, just as cause and effect are."

It will be shown that, in keeping with a principle-based approach to criminal liability, our courts now focus upon the effect of provocation. The centre of the inquiry has become the ways in which such anger or rage impact upon the elements of criminal liability rather than the provocative conduct itself. It may thus be more appropriate to describe the

subject of the present study as 'anger or rage'. Nevertheless, for the sake of convenience, the term provocation will be employed in the following discussion.

For the purpose of this study a psychological theory of criminal liability will be adopted. In terms of this theory, the elements of criminal liability may be divided into two groups viz the objective elements, which include the actus and unlawfulness, and the subjective elements which include imputability and mens rea. [8] Each of these substantive elements will be examined in order to assess the impact, if any, that provocation may have upon them. The relevance of provocation to mitigation or extenuation will not be considered.

In contrast to the principle-based approach to provocation that has emerged in South African law, the English law relating to provocation is strongly policy-based. In terms of the latter approach a defence of provocation is only available on a charge of murder, and can operate only as a partial defence on such a charge by reducing it to voluntary manslaughter. [9] It is submitted that, in the light of the divergence between the South African and the English law relating to provocation, a comparative analysis of these approaches will facilitate an assessment of our law on this issue. For this purpose the English law of provocation will be briefly set out, and some of the merits and demerits of the English approach will be considered.

Finally, some of the policy considerations underlying the view that provocation ought not to operate as a complete defence will be considered briefly, as well as the question whether the interests of criminal justice are served by allowing a person who kills a provoker to escape punishment completely.

PROVOCATION IN SOUTH AFRICAN LAW

2.1 An Overview of the Historical Development of the South African Law Relating to Provocation

2.1.1 Roman and Roman-Dutch Law

According to De Wet and Swanepoel [10], Roman law recognised anger as a mitigating factor. These writers argue that, in Roman law, this issue was closely linked to the distinction that was drawn for sentence purposes between 'premeditated' crimes and crimes committed 'on impulse'. The latter category of crimes was not considered to be as serious as that of 'premeditated' crimes. Thus, for example, a man who killed his wife upon discovering her in the act of adultery was given a lighter punishment than that ordinarily prescribed for murder, since the aggressor's passion in such a situation was considered to be extremely difficult to control. [11]

De Wet and Swanepoel [12] submit that, of the Roman-Dutch writers, only Matthaeus and Van der Keessel comprehensively discussed the issue of provocation. According to Matthaeus, nature requires a person to control his passions and impulses. However, where a person committed a crime while in a 'fair' or 'just' state of anger, that crime would be more lightly punished than a 'premeditated' crime. The views of Moorman and Van der Keessel on the issue of anger corresponded fairly

closely with those of **Matthaeus**. The dominant view in **Roman-Dutch** law was thus that anger could, at most, operate as a mitigating factor.

2.1.2 South African Law

Burchell and Hunt [13] argue that South African law might have followed the **Roman** and **Roman-Dutch** approach to provocation but for the fact that, until 1935 when the extenuating circumstances rule was introduced [14], the death penalty was obligatory for murder. Provocation could thus not operate to mitigate sentence.

In 1925, the Appellate Division in S v Butelezi [15] declared s 141 [16] of the Native Territories Penal Code [17] to be an accurate reflection of the South African law relating to provocation. Snyman [18] summarises the requirements of this section as follows:

a) the provocation must have consisted of a "wrongful act or insult"

b) the provocation must have been of such a nature that the accused was deprived of his "power of self-control"

c) the provocation must have been of such a nature that an "ordinary person" would have been deprived of the

"power of self-control"

d) the accused's aggression must have immediately followed the provocation.

Section 141, which was based upon English law [19], envisaged a type of partial excuse situation: where an accused who killed intentionally [20] successfully raised the defence, a conviction of culpable homicide would follow without the need for proof of negligence. By requiring the provocation to be sufficient to deprive an "ordinary person" of the "power of self-control", an objective test of provocation was introduced into our law : the question was not only whether the accused became angry, but whether a fictitious "ordinary person" also would have become angry. [21]

The adoption of the provisions of s 141 by the Appellate Division in Butelezi, although followed in subsequent cases [22], has been severely criticised by some writers. Thus, Koyana [23] argues that it was wrong for the courts to take a section of statute that was specially designed for a particular area in order to meet conditions prevailing within it, and declare it applicable to South Africa, for which it was never meant. He contends that, whereas it may be acceptable for the legislature of one country to adopt the legislation of another, the courts ought not, wittingly or unwittingly, to take such a task upon themselves.

Following the decision in Butelezi, our courts grappled with the question whether the objective requirement of the 'ordinary person' embodied in s 141 was relevant to the test for provocation, or whether the test was merely whether, subjectively considered, the accused had the intention to kill. This question was finally settled in 1971 in S v Mokonto [24] where the Appellate Division held that s 141 of the Native Territories Penal Code was to be confined to the territory for which it was passed, and that provocation was relevant to the question whether, subjectively considered, the accused had the intention to kill.

Provocation could not operate as a complete defence, however. Instead, our courts applied the English doctrine of specific intent according to which crimes could be divided into two groups: those requiring a specific intent and those requiring an ordinary intent. The view was held that provocation could negative the specific intent required for a conviction of murder, with the result that the accused would be convicted of the less serious crime of culpable homicide. [25]

The Appellate Division decision in S v Chretien [26], which dealt with the issue of voluntary intoxication, had a significant impact on our law relating to provocation. In this case, the court endorsed a principle-based approach to criminal liability and held that, in exceptional cases, intoxication could lead to a lack of intention. It was also held obiter that intoxication could lead to a lack of voluntary conduct or

imputability. [27] Further, the Appellate Division rejected the **specific intent** theory in connection with intoxication.

In Arnold [28] the Cape Provincial Division, on the authority of the decision in Chretien, held that provocation could have the effect of negating voluntary conduct.

After the decision in Chretien, our courts began to recognise a general defence of non-imputability in terms of which even non-pathological factors such as anger or emotional stress could lead to a lack of imputability. In S v Wiid [29], the Appellate Division acquitted the appellant on the basis of such a defence, thus finally establishing it in our law.

2.2 The Effect of Provocation on an Actus

It is accepted in our law that there can be no question of criminal liability without voluntary conduct. [3Ø] Some uncertainty exists, however, regarding the content of the requirement of voluntariness. [31]

In R v Dhlamini [32] the accused, who had just half-waked out of a nightmare, fatally stabbed a person sharing his hut. He was acquitted on the basis of the court's finding that he had acted

> "...mechanically without intention, volition or motive". [33]

Visser and Vorster [34] submit that, although conduct need not be 'desired' in order to be voluntary, it must be subject to the control of the human will. Similarly, Snyman [35] argues that conduct will be voluntary where an accused is able to subject his bodily movements to the control of his will or intellect.

A defence of involuntary or unconscious conduct is often described as **automatism**. South African law distinguishes between **insane** automatism (which stems from a mental illness or defect) and **sane** automatism (which may stem from factors such as sleep, hypnosis, a black-out or an epileptic fit). A successful defence of **insane** automatism results in the accused

being detained as a State President's patient, whereas a successful defence of sane automatism results in an acquittal. [36]

Obiter support for the view that provocation may negate the voluntariness of conduct can be found as early as 1949 in R v Thibani. [37] In that case Schreiner JA stated as follows:

> "Provocation (is) 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." [38]

Although the above dictum was not explicitly rejected in subsequent cases, the proposition that the voluntariness of conduct might be negated by provocation was not considered by our courts until the 1980's.

In 1981 in S v Chretien [39], the Appellate Division, per Rumpff CJ, stated obiter as follows:

> "In die strafreg is 'n handeling alleen dan 'n handeling wanneer dit deur die gees beheer word. In die geval van die onwillekeurige spierbewegings van 'n papdronke is daar geen sweem van beheer nie en is dit dus nie eers nodig om oor skuld te filosofeer nie". [40]

The statements quoted above paved the way for the view that provocation, like intoxication, could render an accused's conduct involuntary. In 1983, the Supreme Court endorsed this view in S v Arnold [41]. The facts of this case are briefly sketched below.

The accused was charged with murdering his wife. On the day of the fatal incident an argument erupted between the parties, during which the deceased threatened to leave the accused in order to pursue a career in strip-dancing. During the course of the argument the accused held a pistol, which he carried on account of his job, in his hand. One shot was accidently fired, but missed the deceased. The argument continued and at the critical moment, according to the court,

> "the deceased bent forward displaying her bare breasts while she also referred to the strip-dancing. This was obviously an act of provocation on the part of the deceased." [42]

A second shot was fired, killing the deceased. According to the accused, he could not remember aiming the gun or pulling the trigger.

The first question addressed by the court was whether or not the accused performed "an act in the legal sense". [43] Burger J re-affirmed the principle that conduct which is not voluntary or conscious carries no legal significance, and

approvingly quoted the obiter statements by Rumpff CJ in Chretien as set out above. The court concluded that, taking into account all the evidence as well as the accused's conduct in the witness box, it had not been established beyond a reasonable doubt

> "that when the accused killed the deceased he was acting consciously and not subconsciously" [44]

and thus acquitted him.

According to Ellis [45], an important factor which led the court to the above conclusion was its finding that not a single statement by the accused could be branded as untrue. Ellis suggests that the court must have been strongly influenced by the fact that the state, unlike the defence, did not lead any psychiatric evidence, nor did it dispute the opinion expressed by Dr Gittelson, for the defence, that the accused may have acted subconsciously at the crucial time.

Ellis [46] submits further that although the court in Arnold relied upon Chretien as authority for the proposition that there can be no criminal liability without voluntary conduct, the finding in Arnold that the accused did not commit an "act in the legal sense" is not supported by that case. He argues that, whereas the court in Chretien held obiter that unconscious conduct would be involuntary, Arnold involved conduct that was merely subconscious.

According to Ellis [47], a person acting **subconsciously** retains a degree of consciousness, whereas a person acting **unconsciously** does not. In his view, only **unconscious** conduct can be considered to be involuntary. He thus considers the finding of automatism in Arnold to be wrong.

This judgement has also been criticised by Snyman. [48] Although he does not endeavour to dispute the court's finding that the accused was so overcome with emotion that he acted involuntarily, Snyman argues that the Court was incorrect in regarding the involuntary nature of the accused's conduct at the moment that he fired the fatal shot as a reason for finding him not guilty. He states that the requirement of voluntary conduct is subject to the following exception:

> "If on a charge of culpable homicide, the evidence shows that, prior to the involuntary conduct the accused performed a voluntary act, that such voluntary act was causally related to the subsequent (fatal) involuntary conduct, and that the prior voluntary act was, under the circumstances, negligent in the sense that a reasonable man would have foreseen that such an act might result in the fatal occurrence, then the accused is not entitled to rely upon the involuntary nature of his conduct as a defence." [49]

Snyman [50] argues convincingly that, although the court in Arnold did not make a specific finding to the effect that the

accused acted consciously at the time when he fired the first shot, this could logically be inferred from the fact that the judgement contains a description of events that took place between the firing of the two shots, coupled with the fact that the accused must have been the only person who could have told the court what happened at this time. In Snyman's view the relevant voluntary conduct was thus the failure of the accused, at the time when the first shot was fired, to get rid of the gun or to put it out of action. He argues that, in this respect, the accused was negligent since the 'reasonable man' would have taken steps to prevent the gun from going off a second time. He suggests that, on this footing, the accused should have been convicted of culpable homicide.

Ellis [51] has similarly criticised the failure of the court in Arnold to consider a verdict of culpable homicide. He points out, however, that the principle of antecedent liability outlined above does not constitute an exception to the rule that involuntary conduct is not punishable, since antecedent liability follows from the application of the ordinary principles of criminal law.

A defence of automatism was also raised in S v Smith [52], but was rejected by the court on the facts. It is noteworthy that, in this case, the Appellate Division did not reject the possibility that factors such as anger or emotional stress might, in certain circumstances, render an accused's conduct involuntary. It is thus submitted that the decision in Smith

is reconcilable with the ratio decidendi of Arnold.

Bergenthuin [53] argues that provocation cannot have the effect of negativing voluntary conduct. He concedes that intoxication may have that effect but submits that, whereas intoxication may lead to a total lack of consciousness, provocation may only lead to a 'narrowing' of consciousness.

In my view, the above argument cannot be supported. Strauss [54] argues cogently that extreme anger may affect an actor in such a way that he "does not know what he is doing". Although Strauss adopts the view that such a condition will negative imputability, Dean [55] points out that, in fact, such a condition will negative the voluntariness of conduct. Dean argues that provocation may also render an accused so blinded by rage that he has no control over his physical movements at all. In such cases the accused cannot be said to have acted voluntarily.

In the light of the above discussion, it is clear that our courts are prepared to accept that provocation may, in certain circumstances, operate as a complete defence by negativing the voluntariness of conduct. In my view, this approach is logical and systematic and is in keeping with a principle-based model of criminal liability.

2.3 The Effect of Provocation on Unlawfulness

Snyman [56] points out that the criminal law does not prohibit conduct **in abstracto** but specific types of conduct committed in specific circumstances. Conduct which conflicts with such a prohibition may be described as **prima facie** unlawful. [57] A number of justification grounds have, however, become crystallised in our law. [58] In circumstances where such a justification ground is present, **prima facie** unlawful conduct is rendered lawful, so that no actual infringement of the legal prohibition in question will have occurred. [59]

It is generally recognised that there is no **numerus clausus** of justification grounds. By applying the criteria of 'objective reasonableness' or the 'legal convictions of the community', our courts are prepared, in appropriate circumstances, to find that conduct was justified on the grounds of considerations other than those contained in the recognised and well-known grounds of justification. [60] In S v I [61] the accused had invaded the complainant's privacy with the aim of gathering evidence of adultery. The court held that, in the light of

> "...the modes of thought prevailing in our community at this time, judged in accordance with what is in the public interest and in accordance with the Court's conception of contemporary **boni mores**",

the accused's conduct was not unlawful.

It cannot be disputed that **prima facie** unlawful conduct of a provoked person may, in certain circumstances, be brought within the ambit of a recognised justification ground. For example, where an aggressor threatens a victim with immediate personal violence that threat, which may amount to provocation, may also constitute an unlawful threatening attack against which the provoked person may lawfully defend himself. [62] Bergenthuin [63] correctly points out, however, that reference to provocation in such cases will be unnecessary.

It can be argued that, in certain circumstances, a prima facie unlawful response to provocation may, by the application of the criterion of objective reasonableness, be held to be lawful despite the fact that the accused's conduct does not fall within the ambit of a crystallised justification ground. Although this argument has not yet been considered by our courts in the field of criminal law [64], it is supported by, inter alia, Bergenthuin [65], Dlamini [66] and Van Rooyen. [67] Dlamini correctly points out that to view provocation as a justification ground does not involve conflict with principle.

Van Aswegen [68] argues that to view provocation as a justification ground would shift the focus of the inquiry from the subjective state of mind of the accused to the nature of the provocative conduct. The question would be whether, having regard to the degree of provocation and the response elicited by it, that response could be said to be objectively reasonable

and in proportion to the provocation.

In my view, it is difficult to imagine provocation of such a nature as to be objectively proportional to the killing of the provoker. It is thus submitted that our courts are unlikely to accept the view that provocation may operate as a justification ground in homicide cases. [69]

CAPACITY.

2.4 The Effect of Provocation on Imputability

Imputability [70] is an essential prerequisite for criminal liability. The test for imputability requires that, at the time of the alleged commission of an offence, the accused had the mental ability to distinguish between right and wrong as well as the capacity to act in accordance with that distinction. [71]

Burchell and Hunt [72] as well as Snyman [73] adopt the view that imputability forms part of the mens rea requirement. I submit, however, that Visser and Vorster [74] are correct in stating that imputability is a separate element of every offence. Thus, the existence of imputability has to be established before an investigation into mens rea becomes relevant. [75] This approach was endorsed by Viljoen JA and Boschoff AJA in Campher. [76]

The question whether provocation may render an accused non-imputable is closely linked with the question whether our law

recognises a general defence of non-imputability. Such a general defence would mean that any factor, including provocation, which renders an accused incapable of distinguishing between right and wrong or of acting accordingly, will be judicially relevant. [77] Some recent judicial decisions will be analysed below, and it will be demonstrated that such a general defence of non-imputability has become established in our law.

As early as 1959, Strauss [78] argued strongly in favour of the view that provocation may negate imputability. However, until recently this view was largely ignored. Our courts adopted the view that, apart from the common law presumptions relating to persons under the age of fourteen [79], the only defence of non-imputability in our law was set out in s 78 (1) of the Criminal Procedure Act. [80] This section provides as follows:

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

Where such a defence is successfully raised, an accused is found not guilty but is detained in a mental hospital or prison pending the signification of the State President. [81]

In S v Chretien [82], however, the Appellate Division, per Rumpff CJ, adopted the following obiter view on the question of the impact of intoxication on the imputability of an accused:

> "...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 wesentlik verkrummel het, kan hy as ontoerekeningsvatbaar beskou word." [83]

Although the above statement blurs the distinction between imputability and intention [84], it was approvingly quoted by Diemont AJA in S v van Vuuren. [85] In this case the appellant argued that, when he killed the deceased, he was non-imputable as a result of a combination of intoxication and provocation. Although this defence failed on the facts of the case, the Appellate Division stated obiter that, where a combination of drink and other factors such as provocation and severe mental or emotional stress rendered an accused unable to comprehend what he was doing, he would not be criminally responsible. The court adopted the view that, in such cases, the critical question would be whether there was sufficient evidence to support the conclusion that the accused failed to appreciate the unlawfulness of his act or that he failed to realise what

was happening. [86]

In S v Lesch [87] the accused, who was charged with murdering his neighbour, argued that, at the time of the killing, he had been non-imputable on account of his extreme anger. He conceded that he had appreciated the wrongfulness of his conduct, but submitted that he had not been able to act in conformity with that appreciation.

Hatting AJ tacitly assumed that a defence of non-imputability based upon extreme anger existed in our law and that, in appropriate circumstances, it could operate as a complete defence on a charge of murder, resulting in an accused leaving the court as a free person. The defence failed on the facts, however, since the court concluded that the behaviour of the accused at the crucial time had been too rational to support a finding that he had been unable to restrain himself from killing the deceased. [88]

Further support in favour of a general defence of non-imputability can be found in S v Arnold. [89] The court clearly adopted the view that there is no **numerus clausus** of factors which may negate imputability, and stated as follows:

> "...it is not only youth, mental disorder or intoxication which could lead to a state of criminal incapacity, but also incapacity caused by other factors such as extreme emotional stress" [90]

Although the above statement indicates a willingness on the part of the courts to recognise a general defence of non-imputability, it is of persuasive value only, as Arnold was acquitted on the ground that his conduct, having been unconscious, did not constitute an act in the legal sense. [91]

According to Snyman [92], the most important judgement which paved the way for the recognition of provocation as a complete defence was S v Campher. [93] In this case the appellant had been convicted of murdering her husband. At the time of the killing she had suffered under extreme emotional stress. On appeal, the question arose whether she was imputable at the time of the fatal incident. The appeal was considered by three Judges of Appeal, each of whom delivered a separate judgement.

According to Viljoen JA, the decision in S v Chretien opened the door to the recognition of a defence of non-imputability even where the non-imputability stemmed from a temporary mental aberration. The learned Judge of Appeal adopted the view that the appellant had laboured under an impulse which she could not resist, namely to destroy the "monster" - the deceased - that was threatening her. As a result, she had been unable to act in accordance with a distinction between right and wrong, and was thus not imputable at the time of the fatal incident. It is noteworthy that Viljoen JA was prepared to make this finding despite the fact that no expert evidence regarding the appellant's mental condition when she killed the deceased had been led. Viljoen JA thus concluded that, since the

appellant's condition did not stem from a "mental illness or mental defect" she was to be acquitted without being declared a State President's patient in terms of s 78 (6) of the Criminal Procedure Act. [94]

Du Plessis [95] submits that the above judgement may be summed up as follows: our law recognises both sane (or non-pathological) non-imputability and insane (or pathological) non-imputability. Although a defence based upon either of these conditions will result in an accused being acquitted, a defence based upon the latter condition will result in the accused's detention as a State President's patient.

Boshoff AJA shared the view adopted by Viljoen JA that a defence of non-imputability is not restricted to conditions stemming from a mental illness or defect, but includes cases where an accused suffers from a temporary mental aberration as a result of fear or emotional stress. However, Boshoff AJA adopted the view that such a defence could not succeed in the absence of expert evidence by clinical psychologists or psychiatrists. He concluded that, since such evidence had not been presented, the appeal could not succeed.

Jacobs JA regarded the appellant's defence as one of 'irresistible impulse'. He argued that such a defence only exists within the provisions of s 78 (1) of the Criminal Procedure Act and concluded that, since the appellant had not suffered from a mental illness or defect, the conviction of

murder had to be upheld. [96]

The Campher judgement on the whole can be criticised on the ground that, although the appeal was dismissed by a majority of the court (Boshoff AJA and Jacobs JA), a majority (Viljoen JA and Boshoff AJA) adopted the view that a general defence of non-imputability exists in our law outside the provisions of s 78 (1) of the Criminal Procedure Act. The ultimate decision is thus not based upon a majority view of the law. [97]

In S v Laubscher [98], the Appellate Division again considered a defence based upon a lack of imputability. Joubert JA re-affirmed the principle that imputability is a pre-requisite for criminal liability and stated that:

> "Die erkende psigologiese kenmerke van toerekenings-vatbaarheid 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 wederregtelik optree.
> 2. Die vermoë om ooreenkomstig daardie onderskeindings-vermoë te handel deurdat hy die **weerstandskrag** (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig

of onregmatig te handel, onderworpe aan sy wil." [99]

Joubert JA raised the question whether a defence of non-pathological non-imputability existed in our law but did not consider it necessary to decide this question, since the court found that the accused had been imputable at the relevant time. Although it is thus not entirely clear whether the court in Laubscher was of the view that such a defence exists in our law, it is noteworthy that Joubert JA repeatedly referred to the judgements of Viljoen JA and Boshoff AJA in Campher without implying that they could be wrong. Snyman [100] thus concludes that the judgement in Laubscher is compatible with the existence of a general defence of non-pathological non-imputability.

S v Calitz [101] provides obiter support for the existence of a general defence of non-imputability. In this case the Appellate Division considered an appeal against a conviction of murder. The appellant argued that he had killed the deceased in a fit of anger and that, as a result, he had not been imputable. He conceded that he had been able to distinguish between right and wrong, but argued that he had lacked the capacity to act in accordance with that distinction.

The Appellate Division, per Eksteen JA, approvingly quoted the description of the elements of imputability as set out by Joubert JA in Laubscher, and adopted the view that imputability

could be negatived by non-pathological factors of a temporary nature. [102]

Regarding the question of psychiatric evidence, the court supported the view adopted in Laubscher that such evidence was not a prerequisite for successful reliance upon a defence of non-pathological non-imputability, since a court would be capable of assessing whether, on the evidence before it, the defence had been proved. [103]

The above findings are of persuasive value only, since the court found that the appellant had been imputable at the relevant time. One of the reasons advanced by the court for this finding was that the appellant's evidence reflected a fair degree of detail concerning the sequence of events surrounding the killing. In the court's view, this fact was incompatible with the appellant's allegation that he had lacked the capacity to act in accordance with a distinction between right and wrong. [104]

A defence of non-pathological non-imputability was raised in S v Smith. [105] In an appeal against a conviction of murder, the appellant submitted that, as a result of an 'emotional storm' arising from humiliation and frustration, she had been unable to distinguish between right and wrong. [106]

The court found that, in the light of the evidence before it, the appellant was criminally responsible at the critical time.

It was thus not necessary to decide whether a non-pathological factor such as an 'emotional storm' could negative imputability. It may be noted, however, that there is no indication by the court that a defence of non-pathological non-imputability does not exist in our law.

In S v Wiid [107] a defence of non-pathological non-imputability was successfully raised for the first time, resulting in an acquittal. The appellant, who was charged with murdering her husband, had shot him during the course of a violent argument. She set out her defence as follows:

> "6 Toe ek oorledene geskiet het, het ek as gevolg van verskeie faktore waarskynlik onbewustelik opgetree en nie besef dat my handeling wederregtelik is nie.
>
> 7 Ek was ook nie in staat om enige beheer oor my gemelde handeling uit te oefen nie. Derhalwe was my handeling nie strafregtelik toerekenbaar nie.
>
> 8 My ontoerekeningsvatbaarheid was tydelik van aard en is nie aan enige permanente of tydelike geestesongesteldheid of gebrek (soos in art 78 van die Strafproseswet bedoel) toe te skryf nie." [108]

In my view, the above statement discloses three possible defences, viz that the appellant:

1. acted unconsciously, and thus involuntarily;
2. lacked an awareness of the unlawfulness of her

conduct, and thus lacked intention;

3. lacked the capacity to act in accordance with a distinction between right and wrong, and was thus not imputable.

It may be that the appellant's allegation that she acted unconsciously as well as her allegation that she was not aware of the unlawfulness of her conduct were advanced in support of the proposition that she was not imputable. Such a position is untenable, however, since the question of imputability does not arise where an accused acts unconsciously. Also, the question of intention only arises once it has been established that an accused was imputable.

In any event, it seems that Goldstone AJA addressed only the defence of imputability. He approved the distinction adopted in Laubscher between the capacity to distinguish between right and wrong and the capacity to act in accordance with that distinction. Goldstone AJA also approved the view adopted in Laubscher that, where one or both of these capacities are absent, there can be no criminal liability. [109]

Regarding the onus of proof where a defence of non-pathological non-imputability is raised, Goldstone JA approved the statement in Mahlinza [110] that the onus rests upon the state to rebut such a defence where the accused lays a foundation for the defence in the evidence.

The court concluded that, taking into account all the evidence, a doubt existed whether the appellant was imputable at the time of the shooting. She was thus acquitted.

It is noteworthy that, although the deceased's conduct was clearly provocative, Goldstone AJA did not expressly refer to provocation. Instead, the deceased's conduct was regarded merely as part of the factual situation to which the principles of criminal liability (including the requirement of imputability) were to be applied. Thus, a purely principle-based approach to provocation was endorsed by the Appellate Division.

In the light of the decision in Wiid, it is clear that a general defence of non-imputability has been established in our law. Thus, even non-pathological factors such as provocation or emotional stress may negative imputability. Such non-imputability constitutes a complete defence, and will lead to an acquittal.

Academic opinion is divided on the question whether a defence of non-pathological non-imputability ought to be available to a person who engages in unlawful aggression against a provoker. On the one hand, there are writers who argue against allowing such a defence. These writers adopt the view that, in the interests of the community, a provoked person ought to control his emotions. On the other hand, there are writers who argue that criminal liability ought to be determined solely by the

application of the general principles of criminal liability.

Louw [111] concedes that a number of arguments may be advanced in favour of the recognition of a general defence of non-imputability. He argues that such an approach is both logical and 'juridically pure'. He points out that the recognition of such a defence creates a new defence for mentally healthy persons. Also, the availability of such a general defence is defensible on the ground that, unlike voluntary intoxication, non-pathological non-imputability cannot be considered to be a manifestation of the will of an accused.

Louw [112] submits, however, that a general defence of non-imputability ought not to be recognized. He argues that the primary aim of the law is not to serve science or logic. Thus, where a judge changes, extends or rejects a rule of law, he ought to be guided not merely by logic but by underlying politico-legal considerations.

According to Louw [113], the following politico-legal considerations are relevant to the present issue. It is expected of a normal person to control his passions and impulses. Furthermore, self-control ought to be maintained, even in the face of extreme provocation or emotional stress. Also, the law ought to forbid acts of revenge.

Louw [114] argues further that, by recognising a general defence of non-imputability, punishment loses its reformative

and deterrent functions, since an emotionally unstable criminal is no longer required to learn how to control his passions and impulses.

In my view, the above argument is unsound. Louw [115] concedes that a condition of non-pathological non-imputability cannot be considered to be a manifestation of the will of an accused. It thus follows that considerations of deterrence and reform will, in any event, be meaningless in the context of imputability since punishment can have neither a deterrent nor a reformative function where conduct stems from a condition that is not a manifestation of the accused's will.

Du Plessis [116] similarly criticises the defence of non-pathological non-imputability. He concedes that the recognition of such a defence is logically consistent but submits that it is socially unacceptable since it amounts to making the defence of insanity available to the sane without placing the onus of proof on the accused and without the accused being faced with the undesirable prospect of being treated as a State President's patient.

In my view, the above criticism cannot be supported. Burchell and Hunt [117] point out that insanity is the only common-law exception to be general principle that the onus of proof rests upon the prosecution. The position adopted in Wiid on the question of the onus of proof is therefore in accordance with principle. Furthermore, since non-pathological non-

imputability is not attributable to a mental illness, the accused does not represent a danger to society, and thus there is no reason why he ought to be referred to an institution for the mentally ill. [118]

Du Plessis [119] argues further that, since a successful defence of sane non-imputability results in an acquittal regardless of whether the crime in question requires **dolus** or **culpa**, such a defence narrows the ambit of the crime of culpable homicide. In my view, this argument loses sight of the fact that, by applying the ordinary principles of criminal law, a person who kills while in a condition of non-pathological non-imputability may nevertheless be convicted of a crime which requires either **dolus** or **culpa** on the basis of antecedent liability.

Snyman [120] argues strongly in favour of a defence of non-pathological non-imputability. He submits that such a defence is based upon the principle that criminal liability can only follow where an accused is able to appreciate the wrongfulness of his conduct and to act in accordance with that distinction.

Visser and Vorster [121] similarly support the recognition of a defence of non-pathological non-imputability. These writers submit, however, that such a defence places a heavy burden upon the courts to guard against potential abuse. For example, an accused who has no valid defence may raise the defence of non-imputability in a desperate bid to avoid liability. Visser and

Vorster [122] suggest that this concern may be addressed by requiring an accused to lay a proper and scientifically accepted foundation for his defence. In this regard it is noteworthy that in Wiid the Appellate Division held that such a foundation had to be laid by the accused in order for the defence to succeed.

2.5 The Effect of Provocation on Mens Rea

According to the psychological theory of criminal liability which is accepted by South African courts [123], mens rea consists of an unlawful mental condition [124] which may manifest itself in the form of either dolus or culpa. Both dolus and culpa will be discussed below in order to assess the effect, if any, that provocation may have on them.

2.5.1 Dolus

As early as 1925, it was accepted by the Appellate Division in Butelezi [125] that provocation could lead to a lack of intention. However, this approach was based upon a misinterpretation of s 141 of the Native Territories Penal Code. [126] Snyman [127] points out that this section presupposed that, in the circumstances in which it was applied, the accused in fact had the intention to murder. Nevertheless, the Appellate Division implicitly adopted the view that s 141 embodied a test to determine whether or not intention was present. [128]

In terms of the above approach, the question was not merely whether the accused lacked the intention to murder, but also whether a fictitious 'ordinary person' would, as a result of provocation, have lacked intention. [129] Thus, an objective test of provocation was established in our law. Despite criticism by South African writers [130], this approach was followed in a number of subsequent cases. [131]

In 1949, however, the first cracks in the objective approach to provocation appeared in R v Thibani. [132] In this case Schreiner JA stated obiter that provocation was not a defence but factual material from which it had to be determined whether or not the accused had acted intentionally. [133] This approach, which inclines towards a subjective approach to provocation, helped to loosen the grip which s 141 had on our law. [134] Furthermore, by rejecting the view of provocation as a matter governed by the mechanical rules of s 141, this decision represents a development towards a principle-based approach to criminal liability in terms of which provocation is merely an aid in determining the accused's state of mind at the crucial time.

In R v Krull [135], however, Schreiner JA qualified the approach adopted in Thibani. The learned Judge of Appeal adopted the view that, where provocation was combined with intoxication, both of these factors were to be considered together in deciding whether, subjectively, intention was present. However, Schreiner JA stated obiter that, where an

accused's state of mind resulted from mental abnormality short of legal insanity, or idiosyncrasies such as hot-headedness or timidity, an objective test of provocation had to be applied. [136]

The above approach has been criticised by Burchell and Hunt [137], who point out that it is inconsistent, as well as out of line with the approach adopted by Schreiner JA himself in Thibani. Furthermore, as Visser and Vorster [138] point out, the approach adopted in Krull would mean that an accused who is congenitally quick-tempered would be treated more severely than one who became voluntarily intoxicated.

In S v Mokonto [139], the Appellate Division, per Holmes JA, stated as follows:

> "1. Sec. 141 of the Transkeian Penal Code should be confined to the territory for which is was passed.
> 2. In crimes of which a specific intention is an element, the question of the existence of such intention is a subjective one, namely, what was going on in the mind of the accused.
> 3. Provocation, inter alia, is relevant to the question of the existence of such intention.
> 4. Provocation, subjectively considered, is also relevant to extenuation or mitigation." [140]

The above views, however, are of obiter value only since, on

the facts of the case, the court found that the provocation, far from negativing an intention to kill, actually caused it.

The judgement in Mokonto, which was widely welcomed by South African writers [141], represents a **principle-based** approach to provocation to the extent that it rejected the application of s 141 in our law. A **principle-based** approach is also reflected in the court's view that provocation is relevant to the question whether intention is present, and that the test in this regard is subjective. Snyman [142] correctly points out, however, that in the Mokonto judgement the effect of provocation on criminal liability was still considered to be limited to intention. Furthermore, the court in Mokonto still applied the **specific intent** theory.

Strauss [143] argues that anger induced by provocation cannot have the effect of excluding intention on the part of an imputable person. He argues that such anger, instead of negating intention, is evidence of it.

In my view, the above proposition cannot be supported. In S v De Blom [144] the Appellate Division unequivocally endorsed the view the knowledge on the part of an accused that his conduct is unlawful is an essential element of intention. According to De Wet and Swanepoel [145] this decision has been accepted without criticism in our case law. In my view, it is not inconceivable that an accused may become so angry as a result of provocative conduct by his victim that he is unaware

of the unlawfulness of his conduct. As Dlamini [146] points out, such a situation may arise where a provoked person commits an unlawful act while subjectively, albeit mistakenly, believing that he is acting upon a ground of justification. Such a mistake, however unreasonable, will exclude intention.

Snyman [147] points to a further way in which provocation may impact upon intention. He argues that, since murder is a materially defined crime which is defined in terms of the causing of death, an accused must have foreseen the consequences of his act - viz the victim's death - in order to be convicted of murder. Where the provocation is of such a nature that the accused does not foresee the victim's death, he cannot be said to have acted intentionally.

The Appellate Division in S v Goosen [148] has recently held that, on charges of murder, intention in the form of dolus eventualis is not present in cases where the perpetrator's conception of the causal chain leading to the victim's death differs markedly from the actual causal chain. In my view, it is not inconceivable that such a misconception as to the causal link may arise as a result of anger or emotional stress induced by provocation. In such cases there will be no intention.

Visser and Vorster [149] concede that provocation may have the effect of negating intention. They submit, however, that provocation will seldom have this effect.

The question arises whether, in the light of the principle-based approach to provocation that is now being followed in our law, the concept of 'loss of self-control' is still relevant to the issue of provocation. This question will be briefly considered below.

Burchell and Hunt [150] state that

> "(p)rovocation will only avail as a defence to criminal liability if it resulted in a loss of self-control to such an extent as to negative the requisite intention for the crime charged."

These writers thus adopt the view that 'loss of self-control' negates intention.

According to Visser and Vorster [151], provocation may cause a person to become so angry that he

> "...loses all self-control and becomes so blind with rage that he cannot distinguish between right and wrong or act in accordance with such distinction. In such a case...the accused will not be criminally accountable."

In the light of the above statement it seems that Visser and Vorster do not consider 'loss of self-control' to be an essential, independent prerequisite for a defence of provocation. Rather, these writers seem to adopt the view that

'loss of self-control' is indicative of a lack of imputability on the part of a provoked person.

A similar approach is followed by Burchell and Milton. [152] These writers employ the term 'loss of self-control' in the context of provocation, but do not clearly set out the meaning of this term. However, since the textbook by these writers deals with the issue of provocation under the heading 'Capacity' it may be that, in their view, 'loss of self-control' can be equated with a lack of imputability.

Snyman [153] supports the view that 'loss of self-control' can be equated with a lack of imputability, more specifically an absence of conative capacity i.e. the capacity to act in accordance with a distinction between right and wrong. Snyman argues cogently, however, that the concept 'loss of self-control' is only appropriate in a legal system such as that of England where the concept of imputability is not recognised.

It is submitted that the concept 'loss of self-control' is no longer relevant to the issue of provocation in our law. Although this concept has not yet been expressly rejected by our courts [154], it is noteworthy that it does not appear in Arnold, Smith, Calitz or Wiid. It is thus submitted that, although there may be some similarity between a lack of conative capacity and 'loss of self-control', the use of the latter term ought to be avoided in our law since it merely clouds the issue of provocation without serving any real

purpose in the inquiry into the liability of an accused.

2.5.2 Culpa

Prior to 1981, a conviction of culpable homicide automatically resulted where a defence of provocation was successfully raised. This approach flowed from the provisions of s 141 of the Native Territories Penal Code and from the application of the doctrine of specific intent. In Chretien, however, Rumpff CJ stated as follows:

> "Wat ons reg betref, behoort die hele ideë van 'specific intent' in verband met drank, soos dit in die Engelse reg verskyn, as onaanvaarbaar beskou te word." [155]

Although the above statement refers only to intoxication, Snyman [156] questions whether there is any valid reason why the specific intent theory should be rejected for the purposes of the defence of intoxication but not for the purposes of the defence of provocation. In my view, this question must be answered in the negative. Thus, where an accused is charged with murder and it is found that, as a result of provocation, he lacked intention, a conviction of culpable homicide will only follow upon proof of negligence. [157]

In South African law, culpa or negligence is determined with reference to the concept of the 'reasonable man'. In R v Meiring [158] the Appellate Division stated that

"(n)egligence can never be disentangled from the facts, but its existence is best ascertained by applying to the facts of each case the standard of conduct which the law requires. And that standard is the degree of care and skill which a reasonable man would exercise under the circumstances. " [159]

In homicide cases involving provocation the test of negligence is linked to two central questions:

a) Would the reasonable man have foreseen the possibility of death ensuing from a failure to curb his emotions?
b) Would the reasonable man have taken steps to guard against that possibility?

Where both of these questions are answered in the affirmative, negligence will be attributed to an accused who fails to foresee the possibility of the victim's death, or who foresees that possibility but does not take those steps which the 'reasonable man' would have taken to guard against it. [160]

In South African law, the standard of the 'reasonable man' is essentially objective i.e. no account is taken of the personal characteristics of an accused. [161] Thus, the educational level, intelligence, experience, knowledge or disabilities of an accused are ignored for the purpose of the 'reasonable man' test. [162] The test does contain subjective elements,

however. The question is how the 'reasonable man' would have behaved in the circumstances in which the accused found himself. [163]

According to Bergenthuin [164], it is not inconceivable that the 'reasonable man' may react violently to provocation. He argues that the 'reasonable man' is not a superior being, but is capable of experiencing emotions such as love, jealousy and disappointment. Bergenthuin illustrates this argument by pointing out that even the Biblical character Moses became angry and destroyed the tablets of stone upon which the Ten Commandments were written.

Snyman [165], on the other hand, adopts the view that it is highly improbable that the 'reasonable man' will ever lose his temper. He thus contends that, in practically all cases of provocation where an accused charged with murder succeeds in proving that he lacked dolus, he will be convicted of culpable homicide.

It is submitted that Snyman's view on the present issue is compelling. In the light of the objective test of negligence applied in our law, characteristics such as hot-headedness or a volatile temperament are disregarded for the purpose of the 'reasonable man' test. As Holmes JA stated in Burger [166], the reasonable man

"...treads life's pathway with moderation and common

sense."

In my view, the killing of another while in a state of anger cannot be reconciled with moderation and common sense.

Heyns [167] argues that the 'reasonable man' test applied by our courts reflects Western standards, and quotes the following statement by Holmes JA in Mokonto [168] in support of this argument:

> "(T)he common law of South Africa in regard to murder and self-defence reflects the thinking of Western civilisation. Hence...belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages."

Heyns [169] submits that the adoption of such a standard in a divided and heterogenous society such as exists in South Africa will result in the alienation of a large section of the community from the legal system.

Whiting [170] similarly criticises the essentially objective test of negligence applied in our law. He argues that, in certain circumstances, this test may lead to a person being held criminally liable without there having been blameworthiness on his part. In his view, this test makes no allowance for the widely differing circumstances and mores of the various South African communities. Instead, it requires

everyone, whether they are rural tribesmen or city dwellers, to observe the same standard. Whiting illustrates this argument as follows: where a young black man who believes in witchcraft makes a mistake of fact which he would not have made but for his belief, his mistake will be judged to be unreasonable (and therefore negligent) since the reasonable man, being free of such beliefs, would not have made such a mistake.

In Attorney-General, Natal v Ndlovu [171], the Appellate Division has recently recognised the shortcomings of the 'reasonable man' test. In this case the court recognised that, because of the heterogeneity of South Africa's population and the widely differing levels of education and development that prevail within it, the application of the traditional test of the 'reasonable man' may sometimes lead to unfairness and injustice. [172]

In an attempt to address the shortcomings of the objective test of negligence, some writers have proposed a subjective test. Whiting [173] submits that the traditional, inflexible standard of the 'reasonable man' should be replaced with an individualised standard of proper care. An accused would then be judged by the standard of what could fairly and reasonably have been expected of him personally. Such an approach would take into account the knowledge, experience and capacities of the accused in determining whether his conduct was negligent.

It is submitted that, although the above test may be more acceptable than a purely objective test of negligence, its implementation will be problematic since it retains reference to the concepts of 'fairness' and 'reasonableness'. Although a more subjective approach to these concepts is advocated by Whiting, it is not clear to what extent the test will be subjectivised. For example, an intoxicated person who kills a provoker might believe that he is acting in self-defence. Can the accused's intoxication then be taken into account in determining whether he was negligent?

De Wet and Swanepoel [174] appear to discard the 'reasonable man' test entirely, and suggest that the test of negligence should involve the following question:

> "... die vraag is dus of hierdie besondere beskuldigde in hierdie gegewe omstandighede te kort geskiet het in die inspanning van sy geesteskragte om die feit wat hom ten laste gelê word, te vermy"

In terms of this approach, negligence is seen as a failure to make the best use of one's mental powers so as to avoid the commission of a wrong. [175] The hot-headedness or volatile temperament of an accused would thus be relevant to the issue of negligence.

Dean [176] argues that the above test merely gives more content to the standard against which an accused's conduct will be

evaluated in order to assess whether or not he was negligent. In his view, this standard will be that of a man with the same mental make-up of the accused but who makes full use of the mental capabilities at his disposal. He argues that the above standard would be just as hypothetical as that of the 'reasonable man'.

An argument that is commonly raised against the introduction of an individualised test of negligence is that such a test, by merging the standard of evaluation with the conduct to be evaluated, renders evaluation impossible. [177] In my view this argument fails to recognise that an individualised standard such as the one proposed by De Wet and Swanepoel does not assess an accused against the norms of his own behaviour, but against the standard that he could have attained, given his mental capabilities.

A further argument which could be raised against the adoption of an individualised test of negligence is that the courts may experience difficulty in inquiring into some of the subjective questions with which its application would be concerned. [178] In my view, however, the merits of an individualised test of negligence outweigh this difficulty.

2.6 A Synopsis of the South African Law Relating to Provocation

In the light of the above discussion, it can be concluded that a principle-based approach to provocation has been established in our law. Our courts have rejected the view that provocation constitutes a separate doctrine, governed by its own set of rules, and now recognise that provocation constitutes factual material to which the ordinary principles of criminal liability are to be applied. The relevance of provocation to the elements of liability is briefly summarised below.

S v Arnold [179] is authority for the view that provocation may have the effect of rendering an accused's conduct involuntary. In such cases the accused will be acquitted.

In principle, there is no reason why our courts may not in future consider prima facie unlawful conduct to be justified by provocation. It has been submitted, however, that it is highly unlikely that a provoked homicide will ever be considered to be justified.

The Appellate Division in S v Wiid [180] has recently confirmed the existence of a general defence of non-imputability in our law. Where provocation has the effect of rendering an accused incapable of distinguishing between right and wrong or of acting in accordance with that distinction, he will be acquitted.

Provocation may negative intention, in which case an accused cannot be convicted of murder. The test of intention is purely subjective. Since the decision in Chretien [181], the doctrine of specific intent no longer forms part of our law. Thus, where intention is negatived by provocation, negligence must be proved for a conviction of culpable homicide. It has been submitted that, in the light of the objective test of negligence applied by our courts, it is unlikely that a provoked homicide will ever be considered to be reasonable.

3

PROVOCATION IN ENGLISH LAW

3.1 The Common Law Relating to Provocation

During the seventeenth century the doctrine of provocation emerged in England as a partial defence which operated to reduce a killing, which would otherwise have been murder, to manslaughter. [182] According to Ashworth [183], this development took place within a rigidly structured law of homicide. Killings were presumed to have been committed with malice aforethought. Where there was no evidence of express malice, the law would imply malice. It came to be accepted that provocation could negate the element of malice that was required for a conviction of murder, the view being held that such evidence showed that the cause of the killing lay in the provocative conduct of the deceased rather than in some secret hatred on the part of the defendant.

In applying the doctrine of provocation, the courts distinguished a number of categories of provocation which were considered to be 'sufficient' to rebut the presumption of malice in homicide cases. In R v Mawgridge [184], Lord Holt CJ set out the following such categories:

a) angry words followed by a physical assault

b) the sight of a friend or relative being assaulted

c) the sight of a citizen being unlawfully deprived of

his liberty

d) the sight of a wife trapped in adultery

It is noteworthy that, at common law, words unaccompanied by physical violence were not considered to be 'sufficient' provocation to reduce a killing to voluntary manslaughter. [185]

In order for a defence of provocation to succeed, there had to be an actual, sudden and temporary 'loss of self-control'. [186] This implied a causal relationship between the provocation and the killing i.e. the defendant must have killed because he was provoked, and not merely because provocation existed. [187] Furthermore, it was held that there could be no 'loss of self-control' where the defendant had time to reflect upon the provocation before killing the victim, or where the killing was committed in revenge. [188]

According to Ashworth [189], the categories of 'sufficient' provocation outlined above had never been regarded as fixed for all time, and gradually the English courts abandoned the view that any physical assault was in law sufficient provocation. The question then became one of the relative severity of an assault. The standard of the 'reasonable man' emerged during the nineteenth century as the embodiment of the degree of seriousness of the provocation that was required for the defence. Smith and Hogan [190] argue that the concept of the reasonable man in the sphere of provocation first made its

appearance in Welsh [191] where Keating J expressed the concept as follows:

> "What I am bound to tell you is, that in law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonable-minded person to lose his self-control and commit such an act." [192]

Painter [193] cites a number of cases which show that, at common law, the courts generally adopted a fairly inflexible approach to the 'reasonable man' test by not allowing account to be taken of the accused's own physical and mental constitution. Thus, neither mental deficiency, pregnancy nor drunkenness were considered to be relevant to the reasonable man test. [194]

The above approach reached its zenith in Bedder v DPP [195]. The accused, who was sexually impotent, was charged with murdering a prostitute who had taunted him about his failure to have intercourse with her. The House of Lords refused to recognise the accused's impotence as a characteristic which could be taken into account in determining whether the prostitute's conduct amounted to such provocation as would cause a reasonable person to lose his self-control. Instead, it approved the following statement by the trial judge:

"...an unusually excitable or pugnacious individual, or a drunken one or a man who is sexually impotent is not entitled to rely on provocation which would not have led an ordinary person to have acted in the way which was in fact carried out." [196]

The decision in Bedder has been described as absurd, since the jury were directed to assess the effect of the prostitute's taunts on the defendant by assessing the effect that such taunts would have on a person who was not impotent. [197] Similarly, Ashworth [198] submits that the decision made bad law, since it is impossible to assess the gravity of provocation without reference to the characteristics of the accused at whom the taunts were directed.

The rigid and inflexible approach to the reasonable man test which existed at common law was significantly qualified by S 3 of the Homicide Act.

3.2 Section 3 of the Homicide Act

In 1957 the British Parliament enacted the Homicide Act. The material provisions of section 3 of this Act provide as follows:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or both

together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion it would have on a reasonable man."

English [199] points out that the above section does not provide an exhaustive statement of the law of provocation. Thus, provocation continues to be a defence at common law, although significantly modified by section 3. This section modified the common law in two important ways:

a) It abolished all previous rules as to what could or could not amount to provocation, including the rule that words unaccompanied by violence could not amount to provocation.

b) It provides that if there is any evidence that the accused, at the time of the killing, lost his self-control, the judge is bound to leave to the jury the question whether a 'reasonable man' would have responded to the provocation as the accused did.

Section 3 creates a test which leaves two questions for the jury to consider:

(a) whether the defendant actually lost his self-control as a result of provocation (the subjective question), and

(b) whether a 'reasonable man' would have been provoked to lose his self-control and act as the defendant did. [200]

Each of these questions will be discussed below.

3.2.1 The Subjective Question

Section 3 of the Homicide Act has preserved the common law requirement that the defendant must actually have lost his self-control. In addressing this question, a number of factors may be taken into account, including the manner in which the victim's death was brought about, the length of time between the provocation and the killing, and all the other circumstances tending to show the state of mind of the defendant. [201]

According to Williams [202], the essence of the subjective question lies in the requirement that there must be a causal relationship between the provocation and the killing. Williams argues, however, that the concept of 'loss of self-control' is useless and misleading. He states as follows:

> "And what is the point of saying that killing in the heat of anger involves loss of self-control? One who kills in a rage does what he wants to do in those circumstances,

just as much as the calculating robber does." [203]

3.2.2 The Objective Question

The 'reasonable man' test which emerged at common law has been preserved by s 3 of the Homicide Act. The following discussion will illustrate some of the dilemmas facing the English courts in the application of this test.

Clarkson and Keating [204] point out that the question of 'what the reasonable man looks like' i.e. what characteristics of the defendant he may be said to possess, has long perplexed the judiciary. It will be demonstrated below that the standard of the 'reasonable man' test has become increasingly individualised, with the result that the courts are prepared to incorporate a number of subjective factors into the concept of the 'reasonable man'.

In DPP v Camplin [205] the inflexible approach which was followed in common law regarding the characteristics which the 'reasonable man' could acquire was qualified. The accused, who was fifteen years old, killed a middle-aged man after the latter had performed a homosexual act with him against his will and had then laughed at him.

The question which the court had to address was whether the degree of self-control to be expected of the accused was that of a reasonable adult, or that of a reasonable boy of the same

age as the accused. The House of Lords adopted the view that:

> "to require old heads upon young shoulders is inconsistent with the law's compassion of human infirmity..." [206],

and concluded that the accused's conduct ought to have been evaluated against the standard of an ordinary boy of the same age as himself. Lord Diplock, speaking with the concurrence of the other Lords on this particular point, proceeded to describe the 'reasonable man' as follows:

> "a person having the power of self-control to be expected of an ordinary person of the same sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation." [207]

On the question of whether the age of an accused is relevant to the degree of self-control, the House of Lords confirmed the view adopted by the Court of Appeal in Camplin that nothing could be more ordinary or normal than to be aged fifteen. It is thus arguable that the ratio decidendi of Camplin is not in conflict with the statement in Bedder that any unusual physical characteristics of an accused must be ignored.

Williams [208], however, questions the logic of holding the age of an accused to be relevant to the question of what degree of

self-control is expected of him. He argues that self-control should be acquired contemporaneously with the acquisition of the physical power to kill. He concedes, however, that the approach adopted in Camplin works in the direction of leniency.

Williams [209] argues further that the view expressed in Camplin that the sex of an accused is relevant to the degree of self-control expected of him, cannot be supported. He submits that such a view would operate to the disadvantage of women since, if it is accepted that women, viewed in the abstract, are less likely than men to yield to an impulse of violence, then a women who yields to such an impulse would be more blameworthy than a man.

Regarding the other 'characteristics' which, according to Camplin, the 'reasonable man' might acquire, Lord Diplock's view revised the proposition stated in Bedder that any unusual physical characteristics of the accused are irrelevant in determining the degree of self-control to be expected of the accused.

Lord Diplock pointed out that one of the important changes brought about by s 3 of the Homicide Act was the abolition of all previous rules as to what could or could not amount to provocation, including the rule that words unaccompanied by violence could not amount to sufficient provocation. He argued that the effect of this change was to mitigate in some degree the harshness of the common law of provocation, and that this

mitigatory effect would be stultified by excluding all those factors which would affect the gravity of taunts and insults when applied to the person to whom they were addressed. Lord Diplock thus stated that:

> "(t)o taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunts are founded are true than it would be if they were not." [210]

In my view, the above statement is correct. As Clarkson and Keating [211] point out, some insults will be meaningless unless the racial and cultural background is taken into account. The following example given by Lord Simon in Camplin illustrates this point: the term 'dirty nigger' would mean little if said to a white man, but would be quite insulting when said by a white man to a coloured man. [212]

The judgement in Camplin thus seems to distinguish between characteristics such as age and sex which are assumed always to be relevant to an analysis of the 'reasonable man', and characteristics such as race and physical infirmities which will only be relevant where a provocative taunt or insult relates directly to such a characteristic. Although the basis for this distinction does not clearly appear from the judgement, some writers suggest that the first mentioned

characteristics are universal ones whereas the second group are peculiar to the individual accused. [213]

In my view, the above distinction is unworkable. Lord Simon in Camplin suggests that characteristics such as pregnancy could be included in the description of the 'reasonable man'. [214] It is not clear whether such a characteristic is to be regarded as universal or as peculiar to the accused. This observation also applies in respect of homosexuality, menstruation and menopause.

It is noteworthy that the House of Lords in Camplin was determined not to allow an accused to rely upon

> "...his exceptional excitability (whether idiosyncratic or by cultural environment or ethnic origin) or pugnacity to ill-temper or drunkenness." [215]

Thus, the above-mentioned 'characteristics' cannot be grafted onto the 'ordinary person' for the purpose of determining whether that notional individual would have reacted as the accused did. [216] According to Williams [217], this approach is rooted in the idea that a member of an excitable race ought not to be judged by a more generous standard than that pertaining to a more phlegmatic race.

In Newell [218], the Court of Appeal qualified the somewhat individualised approach to the 'reasonable man' followed in

Camplin by adopting a restricted interpretation of the term 'characteristics'. The defendant, a chronic alcoholic, killed a friend who made disparaging remarks about his girlfriend. Lord Lane approvingly quoted the following statement from the New Zealand decision of McGreggor [219]:

> "It is not every trait or characteristic of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality." [220]

The court adopted the view that the defendant's alcoholism, his grief at the defection of his girlfriend as well as his state of confusion following a drug overdose were of a transitory nature and could thus not be considered as 'characteristics'. These factors were thus held to be irrelevant to the question whether the 'reasonable man' would have lost his self-control.

Hodgson [221] concedes that the term 'characteristics' cannot be interpreted to include the matters advanced by the defendant in Newell in support of his defence. She argues, however, that it does not accord with the realities of emotional experience giving rise to provocation to maintain that words, which would otherwise be capable of leading to a loss of self-control,

cannot amount to provocation if the circumstance which caused the accused to react to them as he did was of a temporary or transient nature.

Lord Lane in Newell also approved the requirement set out in McGreggor that, in order for a characteristic to be relevant to an analysis of the 'reasonable man', there must be a real connection between the nature of the provocation and that characteristic. To this extent, the approach adopted in Camplin was thus re-affirmed. In line with this approach, Lord Lane also approved the following statement in McGreggor:

> "In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded." [222]

However, in Raven [223] the above dictum was not applied. In that case, the defendant who had a physical age of twenty two, had a mental age of nine. No direct connection existed between the provocation and the defendant's mental deficiency. Nevertheless, the jury was directed to judge the defendant with reference to a 'reasonable man' who had the mental age of the defendant.

Williams [224] suggests that the ruling in Raven may perhaps be justified as an extension to 'mental age' of the Camplin rule for ordinary age. He also points out, however, that the concept of 'mental age' is only a convenient expression for

performance in an intelligence test, and is not normally regarded in law or in psychology as a substitute for actual age.

Clarkson and Keating [225] suggest that the authority of the decision in Raven must be in doubt, considering the gloss put upon Camplin in Newell. They argue that, although the justice of the decision in Raven is beyond question, it makes substantial inroads into the notion of the 'reasonable man'. Whereas these writers are prepared to accept that the 'reasonable man' may be aged fifteen, they question whether the 'reasonable man' may ever be mentally deficient.

It is arguable that the above cases illustrate the failure of the 'reasonable man' test to determine who ought to be punished and who ought in part, at least, to be excused. Clarkson and Keating [226] argue that this test has in itself become so concretised and glorified that the real question, viz whether the defendant could be expected to control the impulse to kill, has been lost from sight.

The 'reasonable man' requirement in the sphere of provocation has been subjected to a torrent of academic criticism. Thus, it is argued that the 'reasonable man' requirement requires an almost impossibly high standard of conduct. [227] Hodgson [228] submits that the 'reasonable man' is a figment of the judicial imagination and is hopelessly out of touch with the realities of life. Williams [229] questions whether the "paragon of

virtue", the 'reasonable man', can ever give way to provocation.

The Criminal Law Revision Committee has recommended a number of changes to the test for provocation as set out in s 3 of the Homicide Act. They recommend that:

> "...the law of provocation should be reformulated and in place of the reasonable man test the test should be that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leaving the defendant to react against the victim with a murderous intention. This formulation has some advantage over the present law in that it avoids reference to the entirely notional 'reasonable man' directing the jury's attention to what they themselves consider reasonable - which has always been the real question.
>
> (We) recommend that the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered." [230]

Painter [231] points out that the test embodied in the above recommendations is more liberal than the present law. In my view, Painter is understating the position. The

recommendations do not expressly require a 'real connection' between the characteristics of the accused and the provocation, as is presently insisted upon by the courts, and thus represent a radical subjectivisation of the evaluative requirement. In fact, the recommendations refer to circumstances rather than characteristics. It can thus be argued that even factors of the kind that were excluded from consideration in Newell may, in terms of the recommended approach, be taken into account in assessing whether the accused's loss of self-control was reasonable. A further subjectivisation of the test of provocation is contained in the recommendation that the jury be allowed to consider the facts as they appeared to the defendant.

Prevezer [232] argues that the above recommendations, which have not yet been implemented, do not provide a true solution to the difficulties inherent in the 'reasonable man' test, since their implementation would result in the creation of a new body of case law relating to what can reasonably afford a sufficient ground for loss of self-control, comparable to that which related to the qualities of the 'reasonable man'. Problems similar to those pertaining to the 'reasonable man' test would thus emerge.

3.3 A Synopsis of the English Law of Provocation

In the light of the above discussion it can be concluded that the English law of provocation reflects a policy-based approach. Provocation is considered to be a separate doctrine governed by its own set of rules. A defence of provocation is only available on a charge of murder and, if successful, will result in a conviction of voluntary manslaughter.

Section 3 of the Homicide Act [233] has retained the requirement that the provocation must have resulted in an actual loss of self-control on the part of the accused. This requirement is assessed subjectively, and all factors which may throw light upon the accused's state of mind are considered to be judicially relevant.

Section 3 of the above Act requires further that the provocative conduct was enough to make a 'reasonable man' do as the accused did. The standard of the 'reasonable man' is essentially objective but has, to some degree, become individualised.

In Camplin [234], the House of Lords qualified the proposition adopted in Bedder [235] that any unusual physical characteristics of an accused are irrelevant to an analysis of the 'reasonable man'. On the authority of Camplin, the 'reasonable man' will acquire the age and sex of an accused.

The decision in Camplin supports the view that the 'reasonable man' may acquire other personal characteristics of an accused such as his race or physical infirmities. It appears, however, that such characteristics will only be relevant where a direct connection exists between them and the provocation, e.g. where a taunt or insult relates directly to them. This approach is endorsed in Newell [236] but has not been consistently followed. [237]

4

A COMPARATIVE ASSESSMENT OF THE SOUTH AFRICAN AND THE ENGLISH LAW OF PROVOCATION

Van Niekerk [238] argues that, in addressing the question of the relevance of provocation to criminal liability, the law is faced with two opposing considerations. On the one hand, there is the legitimate demand on the part of an accused that justice must be meted out in a way which takes into account all the circumstances which may throw light on his conduct. On the other hand, there is the demand that, in the interests of society at large, a person should control his emotions even when provoked.

In the light of the discussion above on the English law of provocation, it is submitted that English law places an emphasis upon the latter consideration. This emphasis is clearly reflected in the essentially objective standard of the 'reasonable man' against which the conduct of a provoked person is assessed. It has been pointed out that, despite a process of subjectivisation, this test precludes a consideration of personal characteristics of an accused such as mental deficiency, hot-headedness or excitability.

In my view, the application of such an objective standard may lead to injustice, especially in a heterogenous and diversified community such as ours, which is characterised by a great variation in the development and sophistication of its people.

Many of the arguments which have been raised against the objective test of negligence followed in our law [239] are also applicable to the objective standard of the 'reasonable man' embodied in s 3 of the Homicide Act.

In an attempt to address some of these concerns, the English courts have held that the 'reasonable man' may acquire some of the characteristics of the accused. It has been demonstrated above, however, that this process of individualisation has created some insoluble problems and has resulted in a number of fine and unworkable distinctions as to which characteristics may be relevant in this regard.

It is submitted that some of the difficulties faced by the English courts in the implementation of the 'reasonable man' test flow from an attempt to strike a balance between treating the individual fairly and enforcing proper standards. Thus, a person who kills in response to provocation is considered to be less blameworthy than one who kills in cold blood, but not free from blame. [240]

The above approach is reflected in the arguments by some South African writers that the subjective approach adopted in South African law on the issue of provocation leans too far in the direction of treating the individual fairly, thus compromising the enforcement of the law as a standard applicable to everybody in society. Some of these arguments have been discussed above in the context of a general defence of non-

imputability. [241]

It may be questioned, however, whether there are any compelling reasons why, in provocation cases, the community good requires a compromise of the fair treatment of an individual. As Burchell and Hunt [242] point out, the purpose of the criminal law is the infliction of punishment. The question whether a person who kills in response to provocation ought to be punished may thus be considered against an analysis of some of the theories of punishment.

One of the most significant theories of punishment is that of general deterrence. In terms of this theory, the object of punishment is to punish an offender in such a way that others, through fear of receiving a like punishment, will refrain from committing a similar crime. Burchell and Hunt [243] point out that the underlying premise of this theory is that humans are rational beings who always think before acting, and thus base their conduct on a careful calculation of the gains and losses involved.

In my view, it cannot be said of an accused who acts involuntarily or without imputability or intention, that his conduct is calculated or rational. It is thus submitted that the punishment of such a person cannot have a deterrent effect.

According to the retribution theory, the punishment inflicted on an offender is justified on the ground that it is

'deserved'. This implies that the accused was free to choose his conduct and that he was able to act in accordance with the law. [244] In my view, the punishment of a person who behaves involuntarily or without imputability or intention as a result of provocation cannot be justified in terms of the retribution theory, since it cannot be said that he was free to choose his conduct or that he was able to act in accordance with the law.

It is submitted further that the punishment of persons who kills in response to provocation will not necessarily have a reformative effect. Snyman [245] argues that punishment may only have this effect where an accused is aware of the unlawfulness of his conduct. There can be no such awareness where an accused acts involuntarily or where he lacks the capacity to distinguish between right and wrong, or where he does not appreciate the wrongfulness of his conduct.

In the light of the above discussion, I submit that the strongly subjective, systematic and principle-based approach to provocation adopted in South African law is to be preferred to the objective, policy-based approach followed in England. In my view, the interests of criminal justice are not served by punishing a person who acts involuntarily, without imputability or without intention.

CONCLUSION

By declaring s 141 of the Native Territories Penal Code to be an accurate reflection of the South African law of provocation, the Appellate Division in Butelezi established a policy-based approach to provocation in our law. Provocation was considered to be a separate doctrine, governed by its own set of rules. The application of the doctrine of specific intent meant that provocation could not operate as a complete defence but would reduce the crime of murder to culpable homicide.

Starting in the 1950's, however, the South African courts started to steer our law in the direction of a principle-based approach to criminal liability. Provocation began to be viewed as factual material to which the principles of criminal liability were to be applied. This approach is strongly reflected in S v Chretien where Rumpff CJ adopted the view that intoxication could negate the voluntariness of conduct, imputability or intention. Further, the court rejected the specific intent doctrine in the context of intoxication.

The decision in Chretien had a marked influence on our law relating to provocation. In Arnold, the accused was acquitted on the basis of the court's finding that, as a result of provocation, he had not performed an "act in the legal sense". Although the decision in this case has been criticised by Snyman, as well as Ellis, it indicates that our courts are

prepared to find that provocation may negative voluntary conduct.

The decision in Chretien paved the way for the recognition of a general defence of non-imputability in terms of which any non-pathological factor, including anger or emotional stress, which negatives the capacity of an actor to distinguish between right and wrong or the capacity to act accordingly, will lead to an acquittal. The existence of such a defence, which was accepted in principle in a number of Appellate Division decisions, was firmly established in our law in Wiid. Some of the arguments against allowing such a defence have been considered, and it has been submitted that the recognition of such a general defence is in accordance with the principle-based approach to criminal law now being followed by our courts.

It has been shown that provocation may be relevant to the question whether intention is present. Since the decision in Mokonto, there is no doubt that this question is subjectively considered. It has been submitted that, in the light of the decision in Chretien, the specific intent doctrine no longer applies in our law. Thus, where provocation negatives an intention to murder, an accused will be found not guilty on that charge. A verdict of culpable homicide will not automatically follow, but will depend upon proof of negligence.

It has been argued that, in terms of the objective test of

negligence applied by our courts, it is unlikely that a provoked homicide will ever be considered to be reasonable. The objective standard of negligence has been criticised, however, and it has been submitted that the interests of criminal justice would be better served by a purely subjective test of negligence such as the test proposed by De Wet and Swanepoel.

It has been argued that, in principle, provocation may operate as a justification ground. However, it is unlikely that a provoked killing will be considered by our courts to be objectively reasonable.

It can be concluded that our law has reached the point where provocation is considered to be merely part of the factual material to which the ordinary principles of criminal liability are to be applied. In principle, provocation may now be relevant to any element of criminal liability.

In contrast to the above approach, the English law of provocation is strongly policy-based. A defence of provocation is only available on a charge of murder, and may only operate as a partial defence by reducing that crime to voluntary manslaughter. It has been demonstrated that the concept of the 'reasonable man' test is problematic, and that the courts have grappled with the question as to which characteristics of an accused are relevant to the determination of the 'reasonable man'. The courts have allowed some personal characteristics

of an accused to be relevant in this regard. However, this approach has given rise to a number of fine and unworkable distinctions.

The relative merits of the South African and the English approaches to provocation have been considered briefly. It has been submitted that, in the light of some of the theories of punishment, there are no compelling reasons why a person who kills in response to provocation ought not, depending on the circumstances of the case, to be allowed to escape punishment completely. For this reason, it is submitted that the policy-based approach in English law in terms of which provocation may never operate as a complete defence, must be rejected.

In conclusion, it has been submitted that the subjective, principle-based approach to criminal law followed in South Africa is preferable to the objective, policy-based approach followed in England.

REFERENCES

1 Snyman **Strafreg** (1992) 249

2 See R v Butelezi 1925 AD 160

3 Act 24 of 1886

4 Snyman 'Provokasie as 'n Volkome Verweer in die Strafreg' (1991) Consultus 35

5 Snyman **Criminal Law** (1989) 14

6 Snyman (n 5) 14

7 1971 (2) SA 319 (A) 324

8 Snyman (n 5) 142

9 Voluntary manslaughter does not have an exact equivalent in our law. According to Bergenthuin, voluntary manslaughter is, in effect, murder committed under extenuating circumstances. **Provokasie as Verweer in die Suid-Afrikaanse Strafreg** (unpublished LLD thesis) Pret (1985) 71

10 De Wet & Swanepoel **Die Suid-Afrikaanse Strafreg** (1985) 130

11 De Wet & Swanepoel (n 10) 130, 131

12 De Wet & Swanepoel (n 10) 131

13 Burchell & Hunt **South African Criminal Law and Procedure** Vol 1 **General Principles of Criminal Law** 2 ed (1983) 306

14 See Act 46 of 1935

15 1925 AD 160

16 The material provisions of this section are as follows:

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

Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool."

17 Act 24 of 1886

18 Snyman (n 1) 251 - 252

19 De Wet & Swanepoel (n 10) 133

20 Burchell & Hunt (n 13) 309 See, however, the interpretation given to s 141 in Butelezi (n 2), discussed below at 2.5.1

21 Snyman (n 1) 252

22 See R v Blokland 1946 AD 940
R v Attwood 1946 AD 331
R v Tshabalala 1946 AD 1061

23 Koyana 'The Influence of the Transkei Penal Code of 1886 on South African Law in the Field of Provocation' (1987) 77, 78

24 See Mokonto 1971 (2) SA 319 (A)

25 Snyman (n 1) 252

26 1981 (1) SA 1097 (A)

27 1104, 1106

28 1985 (3) SA 256 (C)

29 1990 (1) SACR 561 (A)

30 Visser & Vorster General Principles of General Law Through the Cases 3 ed (1990) 46

31 Bergenthuin 'Provokasie in the Suid-Afrikaanse Strafreg' (1986) De Jure 98 - 109, 263 - 278 266

32 1955 (1) SA 120 (T)

33 122

34 Visser & Vorster (n 30) 46

35 Snyman Criminal Law (n 5) 48

36 Visser & Vorster (n 30) 48

37 1949 (4) SA 720 (A)

38 at 731 Emphasis supplied.

39 1981 (1) SA 1097 (A)

40 1104

41 1985 (3) SA 256 (C)

42 261

43 263 The court also, without it being necessary, went further to discuss the question whether the accused was criminally accountable at the time of the fatal incident. 262 - 264 The court's views on this question are discussed below at 2.4

44 263

45 Ellis '"Emotional Stress" - 'n Nuwe Handelingsuitsluitingsgrond?' (1986) De Jure 340 - 353 342, 343

46 Ellis (n 45) 351

47 Ellis (n 45) 351

48 Snyman 'Is there such a Defence in our Criminal Law as

"Emotional Stress" ?' (1985) South African Law Journal 240 - 251 243

49 Snyman (n 48) 243 For a comprehensive discussion of antecedent liability, see Rabie, A 'Actiones Liberae in Causa' (1978) Tydskrif vir Hendendaagse Romeins-Hollandse Reg

50 Snyman (n 48) 244

51 Ellis (n 45) 352

52 1990 (1) SACR 130 (A)

53 Bergenthuin (n 31) 267

54 Strauss 'Opmerkings oor Toorn as Faktor by die Vasstelling van Strafregtelike Aanspreeklikheid' (1959) Tydskrif vir Hendendaagse Romeins-Hollandse Reg 14 - 26 24

55 Dean 'Provocation' (1964) Responsa Meridiana 36-43 39

56 Snyman (n 1) 69

57 Visser & Vorster (n 30) 179

58 For a discussion of these justification grounds, see Visser & Vorster (n 30) 181 - 301

59 Visser & Vorster (n 30) 179

60 Visser & Vorster (n 30) 294

61 1976 (1) SA 781 (RA)

62 Bergenthuin (n 31) 269

63 Bergenthuin (n 31) 270

64 See Bester v Calitz 1982 (3) SA 846 (O) where the court accepted the proposition that provocation may operate as a justification ground in the law of delict

65 Bergenthuin (n 31) 269

66 Dlamini 'The Changing Face of Provocation' (1990) South African Journal of Criminal Justice 130 - 139 138

67 Van Rooyen 'S v Lesch 1983 (1) SA 814 (O) Moord-toorn-ontoerekeningsvatbaarheid' (1983) De Jure 376 - 377 376

68 Van Aswegen 'Bester v Calitz 1982 (3) SA 865 (O) Actio Injuriarum-belediging-provokasie-regverdigingsgrond' (1982) De Jure 368 - 371 370

69 It may be noted, however, that in Ex Parte Die Minister van Justisie: in re S v Van Wyk 1967 (1) SA 488 (A) the Appellate Division adopted the view that, in principle, a person who commits homicide in order to protect his own property can rely upon the justification ground of private defence. Furthermore, in S v Goliath 1972 (3) SA 1 (A) the Appellate Division adopted the view that the killing of an innocent person may be justified by necessity.

70 Imputability may also be expressed as 'criminal capacity' or 'accountability'

71 Visser & Vorster (n 30) 305

72 Burchell & Hunt (n 13) 234

73 Snyman (n 5) 155

74 Visser & Vorster (n 30) 305

75 Du Plessis 'The Extension of the Ambit of Ontoerekeningsvatbaarheid to the Defence of Provocation - A Strafregwetenskaplike Development of Doubtful Practical Value' (1987) South African Law Journal 539 - 550 539

76 1987 (1) SA 940 (A)

77 Louw 'Die Algemene Toerekeningsvatbaarheidsmaatstaf (1987) Tydskrif vir die Suid-Afrikaanse Reg 362 - 370 365

78 Strauss (n 54) 14

79 A child under the age of seven is irrebuttably presumed to be non-imputable, whereas a child between the ages of seven and fourteen is rebuttably presumed to be non-imputable.

80 Act 51 of 1977

81 See s 78 (6)

82 1981 (1) SA 1097 (A)

83 1106

84 Since the decision in De Blom 1977 (3) SA 513 (A) it has been unequivocally accepted in our law that knowledge of unlawfulness forms an essential element of intention. An accused who is not aware "dat wat hy doen ongeoorloof is" acts without intention, but may nevertheless be criminally imputable.

85 1983 (1) SA 12 (A)

86 17

87 1983 (1) SA 814 (O) For a discussion of this case, see Van Rooyen (n 67)

88 825

89 1985 (3) SA 256 (C)

90 at 264

91 at 263

92 Snyman (n 4) 36

93 1987 (1) SA 940 (A)

94 958

95 Du Plessis (n 75) 545

96 960, 962

97 Du Plessis (n 75) 546

98 1988 (1) SA 163 (A)

99 166, 167

100 Snyman 'Die Verweer van Nie-patalogiese Ontoerekeningsvatbaarheid in die Strafreg' (1989) Tydskrif vir Regswetenskap 1 - 15 10

101 1990 (1) SACR 119 (A) 126

102 at 126

103 at 127

104 at 127

105 1990 (1) SACR 130 (A)

106 at 134

107 1990 (1) SACR 561 (A)

108 at 563

109 at 563

110 1967 (1) SA 408 (A)

111 Louw (n 77) 368

112 Louw (n 77) 368

113 Louw (n 77) 368

114 Louw (n 77) 369

115 Louw (n 77) 368

116 Du Plessis (n 75) 545

117 Burchell & Hunt (n 13) 280

118 Snyman (n 100) 12

119 Du Plessis (n 75) 542

120 Snyman (n 5) 195

121 Visser & Vorster (n 30) 411

122 Visser & Vorster (n 30) 411

123 Bergenthuin (n 31) 272

124 Burchell & Hunt (n 13) 125

125 1925 AD 160 For a comprehensive discussion of dolus and its different forms, see Snyman (n 1) 189 - 217

126 Discussed above at 2.1.

127 Snyman (n 1) 252 Snyman bases this argument upon the opening phrase in s 141 which reads: "Homicide which would otherwise be murder..." (Emphasis supplied)

128 161, 166, 169, 172

129 Snyman (n 1) 252

130 For a discussion of some of these criticisms, see the article by Koyana (n 23)

131 The following cases where an objective approach to provocation was followed are cited by Burchell and Hunt (n 13):

R v Attwood 1946 AD 331

R v Tshabalala 1946 AD 1061

R v Kennedy 1951 (4) SA 431 (A)

R v Molako 1954 (3) SA 777 (O)

132 1949 (4) SA 720 (A)

133 731

134 Snyman (n 1) 253

135 1959 (3) SA 392 (A)

136 396, 397

137 Burchell & Hunt (n 13) 313, 314

138 Visser & Vorster (n 30) 394

139 1971 (2) SA 319 (A)

140 326

141 Visser & Vorster (n 30) 397,
Van Niekerk 'A Witch's Brew from Natal - Some Thoughts on Provocation' (1972) South African Law Journal 169 - 174 171
Koyana (n 23) 79, 80

142 Snyman (n 5) 186

143 Strauss (n 54) 24

144 1977 (3) SA 513 (A)

145 De Wet & Swanepoel (n 10) 154

146 Dlamini (n 66) 138

147 Snyman (n 5) 190

148 1989 (4) SA 1013 (A) at 1025

149 Visser & Vorster (n 30) 397

150 Burchell & Hunt (n 13) 316

151 Visser & Vorster (n 30) 397

152 Burchell & Milton Principles of Criminal Law (1991) 245

153 Snyman (n 1) 255, 256 Snyman submits, however, that in cases where an accused does not loose his self-control, it can be concluded that he was imputable and that he acted intentionally. 256 This submission seems to conflict with Snyman's view that provocation may operate to negative intent in the case of an accused who is imputable. 256

154 Snyman (n 1) 255

155 1981 (1) SA 1097 (A) at 1103, 1104

156 Snyman (n 5) 187

157 Snyman (n 1) 259

158 1927 AD 41

159 45

160 See Ngubane 1985 (3) SA 677 (A) at 687. Whiting 'Fault and Criminal Liability' (1991) South African Law Journal 431 - 452 at 434 footnote 16 points out that, in cases where an accused has caused another's death by an unlawful assault and is charged with culpable homicide, there is no need to inquire whether he took those steps which the reasonable man would have taken to guard against the victim's death, since the answer to such an inquiry would invariably be that the reasonable man would have refrained from assaulting the victim. In cases involving antecedent liability, however, this inquiry is of central importance - see Snyman's criticism of the Arnold decision discussed above at 2.2

161 Although there have been indications in our law of an inclination towards a more subjective assessment of negligence (see Burchell & Hunt (n 13) 200 - 203), the objective standard of the reasonable man was endorsed by the Appellate Division in S v Ngubane 1985 (3) SA 677 (A) where Jansen JA stated as follows at 686:

> "The view generally held by our Courts is that culpa is constituted by conduct falling short of a particular standard, viz. that of the reasonable

man...Although the reasonable man standard may to some extent be individualised in certain circumstances, it remains an objective standard."

162 Burchell & Hunt (n 13) 198

163 Burchell & Hunt (n 13) 198

164 Bergenthuin (n 31) 277

165 Snyman (n 1) 257, 260

166 1975 (4) SA 877 (A) at 879

167 Heyns 'Reasonableness in a Divided Society' (1990) South African Law Journal 279 - 303 281

168 1971 (2) SA 319 (A)

169 Heyns (n 167) 281

170 Whiting (n 160) 439, 440

171 1988 (1) SA 905 (A)

172 Whiting (n 160) 448, 452 Whiting argues that, although the recognition by the AD is gratifying, the court's reasoning is problematic. In deciding whether the mens rea form implicitly required by s 8 (1) (d) of the Publications Act 42 of 1974 was dolus or culpa the court, instead of considering the merits of a reformed test of negligence, adopted the view that the shortcomings of the present test were a reason for holding that the mens rea implicitly required was dolus and not culpa. The court thus treated the shortcomings of the traditional test as if they were shortcomings of negligence itself.

173 Whiting (n 160) 445

174 De Wet & Swanepoel (n 10) 161

175 Whiting (n 160) 440

176 Dean (n 55) 39

177 Whiting (n 160) 448

178 Whiting (n 160) 448

179 1985 (3) SA 256 (C)

180 1990 (1) SACR 561 (A)

181 1981 (1) SA 1097 (A)

182 Ashworth 'The Doctrine of Provocation' (1976) The Cambridge Law Journal 292 - 320 292

183 Ashworth (n 182) 292

184 (1707) Kel. 119

185 See the statements by Lord Holt at 130 - 137

186 See Duffy [1949] 1 All ER 932

187 Williams **Textbook of Criminal Law** (1978) 480

188 Duffy [1949] 1 All ER 932

189 Ashworth (n 182) 298

190 Smith & Hogan **Criminal Law** 5 ed (1983) 303

191 (1869) 11 Cox C.C. 336

192 339

193 Painter 'Provocation, the Reasonable Man and the Criminal Law Revision Committee' (1977) New Law Journal 708 - 710 709. The cases cited by Painter are:
Alexander (1913) 9 Cr. App. R. 139
Lesbini [1914] 3 KB 1116
Smith (1914) 11 Cr. App. R. 36
McCarthy [1954] 2 All ER 262

194 See, however, Raney (1942) 29 Cr. App. R. 14 cited by Painter (n 193) at 709 where the Court of Criminal Appeal seemed to adopt the view that the fact that the accused

had only one leg was relevant to the reasonable man test.

195 (1954) 38 Cr. App. R. 133

196 141

197 Editorial comment [Judy Hodgson] New Law Journal (1980) 618

198 Ashworth (n 182) 301

199 English 'Provocation and the Reasonable Man Test in England and New Zealand' (1979) New Zealand Universities Law Review 169 - 175 170. English points out, for example, that s 3 does not state what the effect of a successful plea of provocation is, viz that the offence is reduced to manslaughter.

200 Elliott & Allen **Elliott and Wood's Casebook on Criminal Law** 5 ed (1989) 497

201 Stephen **A Digest of the Criminal Law** 9 ed (1950) 219

202 Williams (n 187) 528

203 Williams (n 187) 528

204 Clarkson & Keating **Criminal Law: Text and Materials** 2 ed (1990) 644

205 [1978] 2 All ER 168

206 at 174

207 at 174

208 Williams (n 187) 539

209 Williams (n 187) 539

210 at 174

211 Clarkson & Keating (n 204) 649

212 at 181

213 Clarkson & Keating (n 204) 502

214 at 724

215 per Lord Simon at 694

216 English (n 199) 173

217 Williams (n 187) 490, 491

218 (1980) 71 Cr. App. R. 331

219 [1962] NZLR 1096

220 331

221 Hodgson (n 197) 618

222 331

223 [1982] Crim.L.R. 51

224 Williams (n 187) 540

225 Clarkson & Keating (n 204) 648

226 Clarkson & Keating (n 204) 644

227 Painter (n 193) 709

228 Hodgson (197) 618

229 Williams (1954) Crim.L.R. 751 at 742 quoted by Painter (n 193) at 709

230 14th Report Cmnd. 7844 (1980) s 81

231 Painter (n 193) 710

232 Prevezer 'Criminal Homicides other than Murder' [1980] The Criminal Law Review 530 536

233 Homicide Act 1957

234 [1978] 2 All ER 168

235 [1954] 38 Cr. App. R. 133

236 (1980) 71 Cr. App. R. 331

237 See the discussion above of Raven at 3.2.2

238 Van Niekerk (n 141) 169

239 See the discussion above at 2.5.2

240 Clarkson & Keating (n 204) 639

241 See the discussion above at 2.4

242 Burchell & Hunt (n 13) 2

243 Burchell & Hunt (n 13) 75, 76

244 Snyman (n 5) 141

245 Snyman (n 5) 141

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