UNIVERSITY OF CAPE TOWN

An Analysis of Psychological and Legal Conceptions of the Defence of Non-pathological Criminal Incapacity

by

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ABSTRACT

The defence of non-pathological capacity presents challenges for both law and psychology because it acknowledges that psychological factors other than mental illness, are grounds for complete exculpation. In this sense, South African law differs from its Anglo-American counterparts as it recognises that non-pathological factors play a role in negating criminal responsibility. Legal and mental health professionals are instrumental in the application of the defence, but both case law and literature reflect differences in the way in which the defence is understood and applied. Disagreement within and between disciplines adds to the controversial nature of the defence.

This study examines the interpretation and practical application of the defence by mental health professionals and lawyers. It explores how participants' understanding of the defence informs its application in practice. A sample of ten participants including mental health professionals (comprising psychologists and psychiatrists) and lawyers (comprising advocates) was chosen, in order that a comparison be drawn between the two groups. Semi-structured interviews were conducted so as to enable in-depth exploration of issues regarding conceptions of criminal responsibility, the role of expert testimony and the conceptual understanding and application of the defence.

The data was analysed thematically and the results were tabulated so as to provide a comprehensive comparison between mental health professionals and lawyers. Three main themes namely, conceptions and assessment of criminal responsibility, salient factors considered in the defence, and perceptions of the defence, emerged along with several sub-themes. This reflected areas of consensus and disagreement between participants. There was overwhelming agreement between both groups as to the conceptions and assessment of criminal responsibility. The majority of practitioners cited the elements of sane automatism as salient factors in the defence. There were several areas of disagreement in the perceptions of the defence which reflected differences both within and between groups.

Two salient issues, regarding the moral undertones of expert testimony, and the conceptual confusion between pathology and 'non-pathology', emerged from the analysis. These issues are discussed so as to highlight some of the difficulties which arise in the application of the defence from a mental health perspective.

Contents

Chapter 1 : Introduction

This chapter provides an overview of the thesis. It contextualises the study by outlining the rationale and aims and provides a brief outline of the various chapters.

Rationale of the study

Mental illness is one of several factors which is recognised by South African law as negating criminal responsibility. Statutory provision in the form of the insanity defence, has been made for people who suffer from mental illness and who cannot be held responsible for their actions. Consequently, the law acknowledges that mentally ill offenders cannot be sanctioned in the same way as sane offenders (Snyman, 1995). Thus where mental illness and criminal responsibility are concerned, the law is clear as to the legal test which has to be applied, the nature of expert testimony which has to be adduced, and the disposition of such offenders.

Developments in the last twenty years have resulted in judicial recognition of the role of psychological factors, other than mental illness, in the negation of criminal responsibility. This notion is enshrined in the defence of non-pathological criminal incapacity and encompasses the idea that transient mental states are grounds for exculpation. The acceptance of this defence into South African law not only signalled a significant step forward, but also widened the scope of expert testimony to include psychological evidence.

The defence of non-pathological incapacity, unlike the insanity defence, is predicated on temporary mental impairment. Thus no pathology is present and impairment can be due to a wide range of factors including emotional stress or provocation. From a legal perspective, the courts are concerned with whether a person's cognitive and/or conative functioning has been impaired to such an extent that s/he cannot be held responsible. In the absence of pathology, various psychological factors have been held to affect responsibility. The explanatory frameworks provided by psychological testimony therefore endeavour to account for temporary impairment.

The defence has received much attention from legal commentators and these discussions have largely focussed on its form and content, as well as the factors which the courts have taken into account in passing judgement. These discussions have also focussed on the content of expert psychological testimony in cases where it has been adduced, thereby considering reasons why

courts have either accepted or rejected such testimony (Snyman, 1989; 1991; 1995; Rumpff. 1990; Burchell, 1995; Boister, 1996). While the defence has been the focus of legal debate, it has also received some attention from mental health professionals, albeit to a lesser extent. The focus of discussion in these circles has been on the nature of expert evidence which is adduced (Van Rensburg & Verschoor, 1989; Strauss, 1995; Van der Merwe, 1997). However the role of expert testimony in these cases has raised particular challenges for experts, and Zabow (1990) says that they 'have been less than successful in attempting to adapt theory, diagnosis and clinical method to the framework of existing legal standards' (p.5). In addition, Strauss (1995) says that in these cases experts do not have recourse to textbook diagnoses which can describe temporary cognitive or conative impairment.

Given that commonly accepted textbook diagnoses for temporary impairment do not exist, the defence has been interpreted by experts in various ways. Consequently, various psychological terms have been bandied about in an attempt to explain phenomena which do not fall within the parameters of pathology. The proliferation of terms to describe various psychological phenomena, has coincided with the increasing popularity of the defence and it would seem as if such terminology has become part of the parlance of this defence. Gillmer (1996) describes the defence as a 'many-headed creature' which can embody anything from a 'total psychological disintegration' to a 'narrowing of consciousness', 'a separation of intellect and emotion', 'annihilator rage', 'dissociation' or 'good old-fashioned automatism' (p. 20). It would seem as if psychology has attempted to provide the language and understanding to describe those non-pathological states which do not fit into the law's conception of human nature. However, Gillmer (1996) questions whether psychology has not been complicit in assisting the law with diagnoses to support claims of temporary impairment, in order that courts view these as more credible and therefore acceptable as grounds for non-responsibility. These ideas beg the question as to what exactly constitutes this defence and what role expert testimony fulfils.

While the defence has been discussed in various articles, it appears as if very little research has been done in this area. Where studies have been undertaken, they have largely been confined to theoretical analyses of the defence either from a legal or psychological perspective. Van der Merwe (1996) approaches his study from a legal point of view, and traces the development of the defence and the way in which it has become entrenched in South African law. He does not

provide a critical analysis of its development nor does he explore some of the contentious issues surrounding it. Petty (1998) analyses the defence from a psychological perspective by focussing on how current psycho-legal conceptions of conative functioning have resulted in incoherent and inconsistent rulings by the courts. His work provides insight into the difficulties which arise when the disciplines of law and psychology intersect. It points to how differences in conceptualisation have led to ambiguities and inconsistencies in the interpretation of the defence. While Petty's (1998) work is incisive, his study is confined to a conceptual analysis which explains how the stage is set for a 'veritable semantic and conceptual minefield' (p.12) in court. While there is value in a theoretical analysis, it is more useful to explore how it has been interpreted and used in practice. An investigation into how legal and mental health practitioners understand and apply this defence may add to, and possibly illuminate some of the debates surrounding it.

Aims of the study

Lawyers and mental health professionals constitute two of the main protagonists in the arena of the defence of non-pathological criminal incapacity which in itself presents challenges for both law and psychology. The differences in interpretation and application has sparked controversy both within and between these professions. For example, mental health professionals differ in the way they construe the defence, resulting in a myriad of diagnostic categories which ostensibly fall with the rubric of temporary mental conditions. Lawyers, on the other hand, have interpreted the test for capacity in different ways thus exploring the parameters of the defence. For this reason the study compares two groups of mental health professionals and lawyers, to examine the practical use of the defence.

The study focuses on two broad areas:

1. It compares the conceptual understanding of participants in each group with reference to criminal responsibility, the role of expert testimony and the defence of non-pathological incapacity. It is important to explore these issues at a conceptual level, so as to establish how this informs the interpretation and application of the defence.
2. It compares how participants apply their understanding of the defence in practice. This is important so as to establish whether or not lawyers and mental health professionals are in agreement as to what constitutes the defence.

Overview of the thesis

In comparison to Anglo-American jurisdictions, South Africa is unique in its acknowledgment of the defence of non-pathological incapacity as a full defence in law. This defence is seen as a derivative of the insanity defence which itself has been a source of contention in other jurisdictions. As will be shown in Chapter 2, a comparison of the development and application of the insanity defence in these jurisdictions, provides a basis for understanding its application in South Africa. In addition, the discussion focuses on the contentious debates surrounding the role of psychiatric and psychological factors in the assessment of criminal responsibility. It therefore provides a foundation for understanding how the defence of non-pathological incapacity has posed challenges for both law and psychology.

Given that the aim of this study was to compare practitioners' conceptions and application of the defence, a qualitative framework was employed. The use of semi-structured interviews with a small sample of lawyers and mental health professionals, enabled in-depth exploration of their views. Chapter 3 focuses on the methodological framework employed in the study and highlights the sample selection, the construction of the interview schedule and the way in which the data was analysed.

Three main themes with several sub-themes emerged from the thematic analysis. In order to provide a comprehensive comparison of the views of mental health professionals and lawyers, the data was tabulated. As will be shown in Chapter 4, there were several areas of consensus which seemed to indicate that practitioners shared a common understanding of the defence. The two groups agreed on the conceptions and assessment of criminal responsibility, while there were some differences in the salient factors considered in the defence, and perceptions of the defence.

The thematic analysis raised interesting questions as to what constitutes 'non-pathology' and whether issues of morality permeate practitioners' application of the defence. Chapter 5 explores the concept of 'non-pathology' and discusses the moral undertones of expert testimony. In conclusion, it deviates from the norm by reflecting on some philosophical ideas about the defence.

Chapter 2 : Literature Review

This chapter focuses on the role which psychiatry and psychology play in the assessment of criminal responsibility in England, the United States of America and South Africa. It will compare the insanity defence (pathological criminal incapacity) as it is applied in Anglo-American jurisdictions so as to forge an understanding of its application in South Africa. In particular, the chapter focuses on how psychological factors other than mental illness, have come to be acknowledged in the assessment of criminal responsibility. It will also highlight the debates which have arisen within the legal arena, regarding the inclusion of such expert testimony.

The term insanity refers to a legally defined state of mind and does not refer to a particular psychiatric or psychological disorder. In fact, as will be shown, legal conceptions of insanity may be far removed from psychiatric or psychological conceptions of mental illness. When this defence is raised, the court is concerned as to whether the accused can be held criminally responsible in light of the purported mental disease or defect (Reed and Seago, 1999). There are various legal tests which have to be complied with when this defence is raised, and while there are differences in various jurisdictions, the defence has its roots in English law.

2.1 The McNaughton Rules and the Insanity Defence in England

The legal test for insanity in England is rooted in the McNaughton Rules of 1843 which stemmed from a murder trial where the accused was found 'not guilty on the ground of insanity'. This right-from-wrong test is concerned with the accused's legal responsibility at the time of the alleged offence and Card (1992, p.127) summarises it as follows:

> (a) Everyone is presumed sane until the contrary is proved.
> (b) It is a defence to a criminal prosecution for the accused to show that he was labouring under such a defect of reason, due to disease of the mind, as either not to know the nature and quality of his act or, if he did know this, not to know that he was doing wrong.

According to Reed and Seago (1999), in order for the court to return a verdict of 'not guilty by reason of insanity', the burden of proof is on the accused to prove that impaired insight or inability to appreciate wrongfulness, was caused by a pathological mental condition. If this is proven then the accused cannot be held criminally culpable and a successful defence of insanity results in commitment to a psychiatric hospital. A verdict of 'not guilty by reason of insanity' implies that retribution cannot be exacted from the accused and commitment to a psychiatric

hospital is not intended as punishment, instead it serves the purpose of providing the patient with treatment while also protecting the public. Given that a sentence is not imposed, a patient can theoretically be detained for life. However, his/her progress is reviewed regularly and if the prognosis is good and the patient ostensibly does not pose a threat to him/herself or society, then the hospital may recommend a discharge which has to be ratified by the court (Kruger, 1980).

The McNaughton test relies heavily on the accused's cognitive capacity which may have compromised his/her insight and judgment. 'Defect of reason due to disease of mind' is central to the defence and does not consider other aspects of psychological functioning viz. affective (emotional) and conative (volitional) functioning, which are integral to human nature. The defence cannot be raised if the offence was committed because of emotional upheaval caused by emotions such as rage, jealousy or stress. Equally, it is not possible to raise the defence of insanity where the accused has committed an alleged offence because of poor self-control as would be in the case of an 'irresistible impulse'. Card (1992) criticises the McNaughton Rules as being too restrictive because they do not allow for a defence of 'irresistible impulse'. He says that the narrow focus on impaired cognitive capacities, ignores the reality that mental illness can impair conative functioning.

As mentioned previously, insanity is a legal term and may be far removed from psychiatric and psychological conceptions of mental illness and mental disorder. The onus is on the court to decide on the accused's criminal responsibility but expert testimony is required to ascertain whether capacity has been affected by mental illness. The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (cited in Read and Seago, 1999) provides that a jury cannot make a finding with regards to insanity and unfitness to plead unless they have received expert testimony from at least two medical practitioners, one of whom must be an expert on mental illness. The role of the expert is pivotal at various stages of the trial - in the case of unfitness to plead, evidence is submitted at the beginning of the trial to ascertain whether the trial can proceed. Where the accused is found fit to plead but doubts are raised as to his/her capacity at the time of the alleged offence, the testimony will focus on the mental disorder which compromised this capacity.

English law therefore explicitly requires psychiatric evidence of mental illness and its concomitant effects, where the defence of insanity is concerned, and there seems to be no leeway for psychologists to impart their expertise. Perhaps this may explain why affective and volitional factors do not fall within the ambit of this defence as they can be better understood within a psychological framework as opposed to a strictly medical model.

2.1.1 Insane vs Sane Automatism

While expert testimony is important, English courts have developed their own conceptions of 'disease of mind' in the last two decades by referring to internal and external factors which may impair reasoning and insight.

Insane automatism which encompasses unconscious reflex actions caused by mental illness, can be seen as a variant of the insanity defence in that it also requires the 'disease of mind' criterion. The essential difference is that with automatism the court focuses on the voluntariness of the act and consequently whether it constitutes an act in law (Allen, 1995). Internal biological factors such as epilepsy, schizophrenia, organic psychosis, senile dementia and diabetes have been held to be diseases of the mind in that their symptoms may contribute to psychological impairment. The courts have held that an accused who suffers from such a biological condition and acts in an automaton state, cannot be held criminally responsible as the act occurred outside of conscious awareness. A successful defence of insane automatism results in a verdict of 'not guilty by reason of insanity' which requires mandatory commitment to a psychiatric hospital for an indefinite period of time. The conditions governing commitment are therefore the same as with those who have been found not guilty under the insanity plea (Reed and Seago, 1999).

Sane automatism on the other hand, is not caused by a disease of mind but results from external factors such as a blow to the head which may temporarily cloud consciousness. Thus the person is not able to exercise volitional control. Sane automatism can also be brought about by severe psychological stress which results in dissociation. Dissociation involves 'a disruption in the usually integrated functions of consciousness, memory, identity or perception of the environment' (Barnard, 1998, p. 28). Given that there is an impairment in the integration of functions, the person may be unable to exercise volitional control and cannot be held

blameworthy. A successful defence of sane automatism will result in acquittal (Card, 1992). English courts have been circumspect when such a defence is raised as it has been viewed as providing offenders with an easy way out when all other avenues have failed.

Card (1992) in commenting on the popularity of the insane automatism defence in England, says that instead of risking a 'not guilty by reason of insanity' verdict, pleas are often changed to guilty so as to avoid the stigma of an insanity trial. Given the stigma surrounding an insanity verdict and the concomitant committal to a psychiatric hospital, the insanity defence is rarely raised even though it is a general defence. It is more likely to be raised when the charge is murder and even then the accused is likely to enter a plea of diminished responsibility which has greater latitude (Reed and Seago, 1999).

As will be shown, developments in the law have allowed for factors other than cognition and rational capacity to be considered in the assessment of criminal responsibility. While English law does not employ terms such as non-pathological incapacity (temporary insanity) to describe these defences, it has couched this rationale in the defences of diminished responsibility and provocation.

2.1.2 Diminished Responsibility

Given the narrow scope of the insanity defence, the concept of diminished responsibility was introduced into English Law via the Homicide Act 1957, s2 :

> (1)Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing ....
> (3)... [he] shall be liable instead to be convicted of manslaughter.
>
> (Cited in Power, 1967, p.185)

This defence only applies to the charge of murder and is therefore not a general defence. In essence it is raised if all the elements of criminal liability have been met, but it has been shown that the accused's responsibility has been substantially impaired by an 'abnormality of mind'. As a result it allows for the charge to be reduced from murder to manslaughter which in turn has implications for sentencing. Whereas the penalty for murder is life imprisonment, the court has greater discretion where the charge is manslaughter and may impose a prison sentence or remand

the accused to a psychiatric hospital (Allen, 1995).

There has been much debate as to what constitutes an 'abnormality of mind' and how this may differ from the definition of insanity in the McNaughton Rules. In some instances the courts have referred to 'partial or borderline insanity' such as in the case of Byrne (cited in Allen, 1995) where the court defined the accused's inability to control his sexual impulses as constituting an 'abnormality of mind'. What is significant about this case is that the aberration of mind was taken to include volitional factors, and his inability to control his impulses was seen as a mitigating factor. While provisions in the Homicide Act 1957 s2 were meant to rule out affective factors, the courts have subsequently considered emotions such as rage and jealousy as giving rise to an 'abnormality of mind' which substantially impairs responsibility (Allen, 1995). In fact, the inclusion of affective and conative factors have resulted in successful defences involving irresistible impulse, reactive depression, dissociative disorders and pre-menstrual syndrome (Clarkson and Keating, 1990). This represents a move away from the circumscribed provisions of the McNaughton Rules. While the defence of diminished responsibility does not allow for complete exculpation, it affords those offenders who do not meet the criteria for the insanity defence, a viable recourse.

It stands to reason that expert testimony is required to establish that an abnormality of mind existed at the time of the offence. However legal commentators have questioned the role which psychiatrists and psychologists play in assessing diminished responsibility. In a report by the Butler Committee on Mentally Abnormal Offenders (cited in Clarkson and Keating, 1990), the proficiency of these experts in assessing degrees of mental responsibility was questioned, since this is a concept of law and morality and not of psychiatry or psychology. The Committee questioned whether the accused's ability to conform to the law could be measured clinically, given that the law requires a substantial impairment of mental responsibility. Allen argues that 'the question of substantial impairment is inappropriate for medical witnesses as it is one of degree and whether it exists depends not only on the medical evidence but on all the evidence of the case relating to the facts and circumstances of the killing' (1995, p. 128). He argues that the courts have allowed expert opinion in these matters so as to produce a greater range of exemptions from murder, and medical experts have interpreted the provisions within the Act very

widely. As a result, the defence has been used in cases of mercy-killings where the accused kills because s/he believes that the victim's suffering is relieved, and killing through jealousy. Expert testimony therefore serves the purpose of providing mitigating evidence which will hopefully sway the court's sympathies into reducing the charge (Clarkson and Keating, 1990).

Legal commentators such as Allen (1995) and Clarkson and Keating (1990) point to the cynical manner in which psychiatric testimony has been viewed by the courts. Not only are they concerned with the difficulties which arise when psychiatrists have been asked to assist the court in answering legal questions, but it would seem that where psychological factors other than mental illness are at stake, psychiatry's conceptions and interpretations of human behaviour are questioned. Kapardis (1999) argues that psychological evidence has been approached even more warily and courts have in fact equated psychological knowledge (excluding knowledge regarding mental illness) with common sense. These views of expert testimony are deeply rooted in legal principle and have resulted from the rule of evidence of 'common knowledge and experience' which allows for the admission of expert testimony only if it provides the court with information which lies outside the common knowledge and experience of the jury (Kapardis, 1999). This principle was further outlined by Lawton LJ in R v Turner (1975) QB 834 (at 841):

> [i]f on the proven facts a judge or jury can form their own conclusions without help, then opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgement more difficult. The fact that an expert witness had impressive qualifications by that fact alone make his opinion on matters of humane nature any more helpful than the jurors themselves; but there is a danger that they may think it does'
>
> (Lawton LJ cited in Kapardis, 1999, p. 2).

While provisions within the Turner judgement have largely been expanded so as to allow for the inclusion of psychological testimony on a wide range of issues, the 'common knowledge' rule has not been abrogated by disuse in English law (Kapardis, 1999). Perhaps this may explain why courts are wary of such testimony particularly where the assessment of criminal responsibility is concerned. This ambivalence also seems to be fuelled by the concern that experts should not be imbued with the power to answer what are essentially legal questions.

2.1.3 Provocation

In English law, the partial defence of provocation stems from common law and its terms have been modified by s3 of the Homicide Act 1957 which provides :

> Where on a charge of murder there is evidence on which a jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether 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.
>
> (Cited in Reed and Seago, 1999, p.314).

The essence of the defence is that the provocation must have caused the accused to suddenly and temporarily lose self-control thereby killing the person. It considers that the same kind of provocation might also have caused the 'reasonable man' to experience such a loss of self-control and to react in the same way (Card, 1992). Thus the conduct of the accused is judged in terms of this dual test. As with the defence of diminished responsibility, if a defence of provocation is successful, then the charge of murder is reduced to manslaughter. Clarkson and Keating (1990) say that with the enactment of this defence, the law seems to regard the conduct of the provoked accused as being less blameworthy than an accused who has premeditated murder, although the former cannot be completely exonerated. They argue that the 'law recognises that man is not in perfect control of his emotions and actions, particularly when subject to great pressure' and therefore it has 'compassion for human infirmity' (Clarkson and Keating, 1990, p.641).

As forementioned, there are two issues at stake in this defence. Firstly, there must be evidence of a subjective loss of control which is sudden and temporary. This implies that the offence must be in direct response to the provocation and not a response to past provocative words or acts. Thus the court will not accept the defence if the accused has had time to collect his/her thoughts and feelings before killing the person. This so-called 'cooling time' substantially weakens the defence in that the act can then be said to contain elements of pre-meditation. However this does not mean that the courts have been averse to acknowledging the effect of cumulative provocation which may result in the death of the provoker (Clarkson and Keating, 1990). Cases involving women who have been charged with killing their abusive partners have been defended under this banner and have posed challenges for the law. Battered woman syndrome, which is the effect of the partner's continuous abuse on a woman's psychological and emotional state, may result in her experiencing the proverbial last straw. This could result in a temporary loss of control in which

the partner is killed (Roth and Coles, 1995). However, the law still requires that there be no cooling off period between the provocation and the killing. In order for a defence by an abused woman to succeed, she will have to prove that her actions were in direct response to some form of provocation and not a result of years of cumulative abuse. While the debate regarding the status of cumulative provocation continues, it points to the fact that the court is entitled to consider the relevant background to the case. Not only will the court focus on the words or conduct which led to a loss of self-control but it may also consider the context within which the killing occurred (Theron du Toit, 1993).

The second issue to be considered is the objective question of whether a 'reasonable man' would have been provoked to lose self-control and react in the same manner as the accused. How is a reasonable man construed by the law? Allen (1995) says that the reasonable man is one who has the level self-control which can be expected of an ordinary person who is the same age and sex as the accused. In addition, there are other personal characteristics (physical and mental) which may explain the gravity of the provocation because these were targeted by the provoker. Thus the court must focus on the relationship between the characteristic and the provocation when considering the response of the reasonable person.

Reed and Seago (1999) say that the courts have articulated that psychological factors such as battered woman syndrome, post-traumatic stress disorder and personality factors should be relevant to a defence of provocation as it would help to explain violent reactions. However, since the 'reasonable man' test is the yardstick by which these actions are measured, there are no legal provisions for expert testimony. It is incumbent upon the defence to find ways of submitting mitigating evidence regarding the accused's psychological characteristics in order to paint a more complete picture. Reed and Seago (1999) argue that this has been problematic in that there have been instances where courts have expressly rejected such evidence as they have felt that it is unrelated to the two legs of the test for provocation. It would also seem that while the courts have come to acknowledge the salience of psychological factors, they remain mindful of the 'common knowledge and experience' rule and as a result have directed juries to concern themselves with the 'reasonable man' test without the assistance of expert testimony.

The preceding discussion has focused on the way in which psychiatric and psychological

testimony has been viewed by English courts in the assessment of criminal responsibility. Even though the courts have broadened the scope of the common knowledge rule and allowed for the admission of such testimony, ultimately issues of criminal responsibility boil down to a question of law - it is up to the court to decide if the requirements of the legal tests have been met.

2.2 The Insanity Defence in the United States of America

The insanity defence in the United States of America has been the focus of much attention in the last two decades. The defence has been considered to be an evidentiary matter which is concerned with the essential elements of an offence viz. actus reus and mens rea. Thus in order for the defence to succeed, it is incumbent upon the defence to prove that one of these elements is lacking. Where mental illness impairs the accused's capacity to appreciate wrongfulness, there can be no mens rea (Slovenko, 1995).

Following the public outcry against the 1982 insanity acquittal of John Hinckley for the assassination attempt on President Reagan, state and federal legislatures were forced to re-evaluate their formulations of the defence. A wide range of reforms were proposed so as to restrict its use and to make it less viable as a defence (Steadman, McGreevy, Morrissey, Callahan, Robbins and Cirincione, 1993).

Slovenko (1995) says that these reforms can be broadly classified into 3 areas :

(1) Adjudication reforms which focus on the plea stage of the court proceedings. These reforms have involved modifications of one or more of the following :

(a) substantive tests of criminal responsibility (i.e. cognition vs control);

(b) standard of proof (i.e. preponderance, clear and convincing or evidence beyond reasonable doubt)

(c) burden of proof (i.e. accused or prosecution)

(d) role of expert testimony (i.e. findings of fact vs conclusory testimony on ultimate issues)

(2) Disposition reforms which focus on the post-adjudication stage of the court proceedings. These reforms have involved modifications of one or more of the following :

(a) post-acquittal evaluation

(b) location of confinement (psychiatric facility or prison)

(c) burden of proof of mental illness and dangerousness for continued confinement

(d) right to release hearings

(e) final release authority

(3) Combination reforms which involve a mixture of both adjudication and disposition reforms.

Steadman et al. (1993) say that most of these reforms were designed to make the law more restrictive and consequently a reduction in insanity pleas and acquittals was envisaged. This resulted in some states changing their legal tests for insanity from liberal to more restrictive ones. The rush to reform also prompted other states to change the verdict of 'not guilty by reason of insanity' (NGRI) to 'guilty but mentally ill' (GBMI). This made provision for the imprisonment of the offender along with psychiatric treatment. Other reforms included the abolition of the defence, which resulted in the adoption of the mens rea standard in determining criminal responsibility.

As previously mentioned, the insanity defence became the subject of public (and subsequently legislative) scrutiny only as a result of the Hinckley acquittal. Prior to this there was little public concern about the issues and debates regarding the interplay between psychiatry and law. Instead, the morality and viability of the defence were of central concern. As a result, the pre-Hinckley era was characterised by debate regarding the various tests for insanity which were in use in federal jurisdictions.

2.2. 1 The Legal Tests for Insanity

The McNaughton Rules

The debate centering on efforts to integrate the burgeoning body of psychiatric knowledge with legal principles, led to a reappraisal of the McNaughton Rules which was the standard test for insanity until the1950's. While it is still applied in various American jurisdictions. it has been criticised for its exclusive focus on cognition which does not permit complete and adequate psychiatric testimony. In addition, it has been criticised for 'forcing' the psychiatrist into the role of ethical judge as opposed to delivering expert testimony (Slovenko, 1995).

The Durham Rule

Given the difficulties associated with the McNaughton Rules, the Durham Rule was formulated so as to circumvent McNaughton's shortcomings. The Durham Rule states that 'an accused is not

criminally responsible if his unlawful act was the product of mental disease or defect' (Slovenko, 1995, p.22). In formulating this rule, Judge David Bazelon sought to 'open up' the insanity defence to working class people as he reasoned that their crimes resulted from socio-economic factors such as poverty. The rationale was that the deprivation and abuse which arose from impoverished living conditions, inevitably gave rise to traumatised individuals who could not be held responsible for their actions. The euphoria surrounding the medicalisation of poverty was short-lived as it did not bridge the gap between law and psychiatry as Judge Bazelon had intended. Instead it gave rise to increased tension between jurists and psychiatrists as it allowed the latter too much scope in determining responsibility. This perceived encroachment on what was a matter of legal principle, resulted in a decline in the application of this rule (Slovenko, 1995).

The application of both the McNaughton and Durham Rules within American jurisdictions has been fraught with tension between jurists and expert witnesses. Henderson (1988) argues that legal tests regarding criminal responsibility seem to require that psychiatrists give evidence in relation to moral issues even though jurists purport to work from the assumption that they are not equipped to do so. However, in practice, when expert witnesses are asked to express an opinion on the accused's mental state at the time of the offence, that opinion may include some kind of moral judgement. The application of both McNaughton and Durham have therefore subtly steered expert witnesses into the moral arena which traditionally belongs to the jurist.

The American Law Institute Test

Following the failure of the Durham Rule, the American Law Institute (ALI) recommended that :

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.
>
> (American Law Insititute Model Penal Code, Section 4.01)

The ALI test was adopted in the majority of American jurisdictions and is currently favoured in those where the insanity defence is still in use. Its popularity has superceded the use of the McNaughton Rules in that it requires 'substantial' incapacity as opposed to complete incapacity, and an appreciation of wrongfulness as opposed to the cognitively oriented 'know' required by McNaughton. The ALI test also includes the criterion of volitional incapacity which acknowledges that lack of control may be longstanding in duration. This was included in

opposition to the 'irresistible impulse' test which implies a sudden and momentary loss of control. Various modifications of the ALI test have been adopted in several states which view it as providing greater latitude than the McNaughton Rules (Slovenko, 1995).

Slovenko (1995) argues that it is difficult to establish the current status of the insanity defence in America, given the many changes which it has undergone in various states. Current debate has centred on whether or not the defence should be abolished completely, particularly because it is seen as a way out for those who should feel the full force of the law. Some proponents of abolition argue that criminal responsibility is a matter of law and should be left to juries for deliberation and not to the assessment of psychiatric experts. Slovenko says that they argue that 'psychiatry is corrupting the criminal justice system by expanding the concept of mental illness, always at the expense of the concept of responsibility' (1995, p.34).

2.2.2 Automatism

The American approach to automatism shares commonalities with the English approach even though the former does not explicitly employ the concepts of sane and insane automatism in its federal law. Schopp (1995) says that the American Penal Code recognises that involuntary behaviour can arise from pathology and a successful defence will result in a NGRI verdict and commitment to a psychiatric centre. The American Penal Code also recognises that automatism may result from non-pathological causes such as dissociation which is often described as psychological blow automatism. This complete splitting between mental and physical activity renders the accused incapable of controlling his/her actions (Schopp, 1995). A successful defence of sane automatism results in acquittal. While English courts have clear-cut guidelines as to the interpretation of this defence, American courts have failed to develop any clarity as to their interpretations. Schopp (1995) says that some courts have viewed automatism as a variation of the insanity plea while others have expressly rejected this notion and considered it as a separate defence. This uncertainty has increased the scepticism with which the defence is viewed particularly in cases where dissociation is claimed to be the causative factor. This is because a complete splitting of mental and physical activity, is very rare clinically. Finkel (1988) refers to sane automatism as an 'atypical' insanity defence because the jury rules on whether there was an act and does not concern itself with the existence of disease of mind or the issue of intent. He

argues that psychiatric testimony provides 'the room, shadings, and interpretative leeway' (Finkel, 1988, p. 291) which enables lawyers to employ the defence if other avenues have failed.

As can be seen from the above, the insanity defence in America has been fraught with controversy. Public opinion has contributed greatly to the evolution or abolition of the defence in various jurisdictions, where the negation of criminal responsibility has been deemed unacceptable. The concern that offenders should be adequately punished for their deeds, has extended to defences such as diminished capacity which allow for varying degrees of criminal responsibility.

2.2.3 Diminished Capacity

Morse (1984) describes the doctrine of diminished capacity as 'undiminished confusion'. He says that both courts and legal commentators have confused the concepts of diminished capacity and diminished responsibility when in fact the latter is a variant of the former. Diminished capacity allows the psychiatrist to testify as to the accused's mental condition without the accompanying NGRI plea. Testimony as to mental state at the time of the offence, is introduced so as to negate the requirement of intent. The consequences of a successful plea is that the accused is exonerated from the initial charge of murder and may be found guilty of manslaughter. Thus it does not result in complete exculpation as in a NGRI plea, nor is there mandatory commitment to a psychiatric facility.

Morse (1984) says that diminished responsibility on the other hand, allows for the consideration of mitigating evidence of cognitive or volitional impairment which would not negate the intentional or volitional requirements of the insanity test. Diminished responsibility is more than an evidentiary issue and is an independent defence which is employed for both the reduction of a charge (i.e. murder to manslaughter) and in mitigation of sentence. Morse (1984) says that there is a fine line between diminished capacity and diminished responsibility which has resulted in confusion between the two.

The doctrine of diminished capacity has, like the insanity defence, been a bone of contention in various American jurisdictions. Slovenko (1995) says that the doctrine has been adopted in

approximately one third of the states and is primarily employed in cases of first-degree murder. Where the defence has not been adopted, the rationale has been that criminal responsibility cannot be assessed in varying degrees and that only insanity negates criminal intent. In fact, it has been argued that the defence of diminished capacity is merely the introduction of the insanity defence in another form, which does not carry the consequences of a NGRI verdict.

2.2.4 Provocation

While there has been a trend away from the doctrine of diminished capacity, some American jurisdictions still recognise the common law defence of provocation which also has the effect of reducing a charge of murder to manslaughter. Dressler (1982) says that the American Law Institute's Model Penal Code defence of 'extreme emotional disturbance', where a person is subjected to overwhelming stress and has an extreme reaction, has largely been replaced by the defence of provocation which negates the existence of malice. The ALI recognises provocation as a mitigating factor in homicide cases because it concedes that the accused was provoked to such an extent, that s/he was unable to exercise self-control. Unlike in English law, American courts do not hold that words alone are grounds for provocation and therefore some physical threat has to be present (Dressler, 1982). The notion of physical harm and the accused's reaction to it, has played a role in the recognition of battered women's syndrome as grounds for provocation. As with considerations made by English courts, American jurisdictions have also come to accept the effects of cumulative physical provocation on a woman's ability to control her behaviour. However, since American courts employ the 'reasonable man' test, criticisms have been levelled at it as it seen as ignoring social reality and the subjective experience of women (Theron du Toit, 1993).

The proliferation of 'syndrome' evidence in both diminished capacity and provocation defences in American jurisdictions, has resulted in a rather ambivalent relationship between the legal and mental health professions. On one hand, manuals such as the Diagnostic and Statistical Manual of Mental Disorders (1994) has provided expert witnesses with a range of disorders which may explain and hopefully exculpate the accused's criminal behaviour. This is to the perceived advantage of lawyers in that it provides scientific grounds for arguing partial responsibility. However, legal commentators such as Dershowitz (1994) are sceptical of this kind of evidence

and refer to the 'abuse excuse' as a means of evading responsibility. He comments on psychiatry and psychology's complicity in helping offenders to evade appropriate punishment by providing them with 'cop-outs' and 'sob stories' couched in psychological jargon. He feels that this kind of evidence threatens the foundations of the American legal system.

The preceding discussions have focused on the status of the insanity defence in American and English jurisdictions. As has been shown, the defence has been fraught with controversy because it was formulated as a means of negating criminal culpability and has therefore been subject to public and legislative scrutiny. While this contentious situation has primarily occurred within American jurisdictions, the controversy raised by the role of psychiatric and psychological testimony in establishing legal principles, seems to have plagued both English and American courts. South Africa on the other hand, seems to have adopted a more liberal approach and it would seem that the judiciary has been more accepting of the role of psychological factors in its understanding of human behaviour.

2.3 The Insanity Defence in South Africa

As with the American system, the roots of South Africa's insanity defence lie within English Law. In the late nineteenth century the scope of the McNaughton Rules was broadened in South Africa so as to include the 'irresistible impulse' rule. The courts acknowledged that mental illness or defect could impair conative functioning and therefore negate responsibility (Kruger, 1980). In R v Koortz 1953 (1) SA 371 (A), the reformulated McNaughton Rules were accepted by the court:

> A person is not punishable for conduct which would in ordinary circumstances have been criminal if, at the time, through disease of mind or mental defect -
> (a) he was prevented from knowing the nature and quality of the conduct, or that it was wrong; or
> (b) he was the subject of an irresistible impulse which prevented him from controlling such conduct
> (Gardiner and Lansdown cited in Kruger, 1980, p.156).

Where the insanity defence was raised, most cases were decided under the 'irresistible impulse' rule but several difficulties arose in its application. These centred around establishing whether in fact the impulse derived from mental illness and not from emotional factors such as jealousy, greed or revenge. In addition, it was difficult to establish whether the impulse was indeed irresistible and whether the accused genuinely had no control over it (Burchell, Milton & Burchell, 1983). These problems and perceived loopholes within the law were addressed by the

Rumpff Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (RP 69/1967), following the assassination of Hendrik Verwoerd by a mentally ill offender (Kruger, 1980). While the questions raised by this case did not match the upheaval caused by the Hinckley acquittal in the United States, there was sufficient cause for concern regarding the criminal responsibility of mentally ill offenders. The Rumpff Commission concluded that a person's responsibility for his/her actions is based on the ability to exercise free choice and the ability to distinguish between right and wrong (Kruger, 1980). The recommendations of the Commission subsequently gave rise to the provisions in Section 78(1) of the Criminal Procedure Act (51 of 1977) (herein after referred to as the CPA) which states:

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

These criteria which courts apply with respect to responsibility embody a right-from-wrong-test which assesses the capacity to act according to the appropriate insight. The test has biological (i.e. presence of mental illness) and psychological components (i.e. impairment of cognitive and/or conative functions) and a successful defence requires the presence of both. The law does not provide a definition of mental illness or mental defect and therefore makes provision for expert psychiatric testimony to establish this (Van Oosten, 1990). However, Snyman (1995) says that the fact that a person has been declared mentally ill in terms of the Mental Health Act 18 of 1973, does not imply that s/he is also mentally ill in terms of s78(1) of the CPA. This is because the latter is chiefly concerned with how mental illness negates responsibility, and not with the nature of mental illness itself.

A successful defence of insanity will result in a verdict of 'not guilty by reason of mental illness' and the accused will be remanded into the care of a state psychiatric hospital for an indefinite period of time (Kruger 1999). Provision is made for the review of the patient's progress and the hospital may recommend a discharge based on the prognosis of the illness and the danger which the patient poses to him/herself and society. This process has to be ratified by the courts, particularly where the offence has been violent (Kruger, 1980).

The criterion of pathology as diagnosed by a psychiatrist, means that South African law has

retained the 'disease of mind' criterion of the McNaughton Rules, by focussing on cognitive functioning. However the law provides some latitude by acknowledging that mental illness can impair conative functions and therefore the second leg of the test makes provision for this (Burchell, Milton & Burchell, 1983). As will be discussed in greater detail later on, South African law also recognises the defence of non-pathological incapacity, which substantially broadens the circumstances within which an accused may be exculpated. Thus provocation, emotional stress, threats and fear are some of the circumstances falling within the ambit of this defence (Snyman, 1989). What is significant at this point in the discussion, is that the test for both pathological and non-pathological incapacity is the same. Petty (1998) argues that this is problematic as the provisions within s78(1) of the CPA are applied to what are in fact, two distinct mental states. The test is applied where pathology negates responsibility as well as where affective and volitional factors lead to non-responsibility. The dilemma which this poses is exacerbated by the fact that because the law construes mental illness in terms of the degree of criminal responsibility, no diagnostic parameters have been set. Thus not all diagnostic categories of mental illness are recognised by the courts because they are concerned with whether the accused met the criteria for the test and not with the illness itself. Petty (1998) feels that the lack of conceptual clarity and the fact that the test is applied to both pathological and non-pathological incapacity, places the expert witness in a rather difficult position. Given that experts are called to testify to cognitive and/or conative impairment, the same kind of evidence may be adduced in cases of pathological and non-pathological incapacity. The essential difference is that in the former, mental illness (however that may be defined) is diagnosed, while in the latter other psychological factors are taken into account. Thus in practice the defences can be raised in the alternative. Petty highlights the fact that the boundaries between the defences of pathological and non-pathological incapacity are blurred thus resulting in 'an anomalous, circuitous process whereby the court applies the test for criminal capacity...' (1998, p. 4).

2.3.1 Automatism

The provisions within s78(1) of the CPA are chiefly concerned with the extent to which mental illness affects criminal capacity. Thus while the court acknowledges that an offence has been committed, its chief concern is whether the accused can be held criminally responsible. However, when there is doubt as to whether the act was voluntary, the defence of automatism is raised

(Kruger, 1999). South African courts as with English courts, distinguish between sane and insane automatism because a verdict of not guilty has differing consequences for these variants of the defence. Sane automatism does not have a pathological basis and may arise from factors such as concussion, intoxication, amnesia or dissociation. A finding of not guilty results in acquittal. Insane automatism on the other hand, derives from mental illness and a finding of not guilty results in confinement to a state psychiatric hospital for an indefinite period of time (Burchell, Milton and Burchell, 1983). In a defence of sane automatism the onus of proof is on the State but the accused has to lay a foundation for the defence in evidence. As in other jurisdictions, claims of sane automatism are viewed with caution by South African courts because it relies on the accused's account of an event which allegedly occurred in an automaton state. In addition, this defence is seen as providing a way out, because psychological testimony can be adduced without questioning the accused's sanity. The difficulty which arises is that expert psychological evidence is based on a claim of a discrete period of dissociation which occurred some time before the assessment. Kruger (1999) says that the reliability and truthfulness of the accused are crucial factors in laying a factual basis for the defence. This raises the question as to whether the expert is placed in the position of assessing the reliability of the accused or whether such claims are accepted on the face of what the accused has said. This points to an ethical and professional dilemma - does the expert have to assume the role of moral judge when asked to adduce evidence of such a nature? In addition, if the accused's truthfulness is questioned by the court, how is the expert testimony which is based on the accused's account, then viewed?

Burchell, Milton and Burchell (1983) say that psychiatric and psychological expert testimony is based on an examination of the accused some time after the offence has occurred and therefore it has to rely on the accused's version of events. This has prompted courts to be circumspect about such testimony, in light of the guidelines of the Rumpff Commission:

> The courts usually accept well-grounded and responsible evidence from psychiatrists. The testimony of psychiatrists is not accepted (1) when the court does not accept the facts upon which the psychiatrist based his diagnosis and (2) when the psychiatrist's conception of non-responsibility in a particular case does not agree with that of the court
>
> (cited in Burchell, Milton and Burchell, 1983, p. 278).

While the courts do not view psychiatric testimony lightly, it would seem as if they do apply some kind of cautionary rule in instances where sane automatism is raised. This caution extends to other defences of a temporary non-pathological nature.

2.3.2 Diminished responsibility

South African law, in line with English and American jurisdictions, also enshrines the doctrine of diminished responsibility which acknowledges that there are varying degrees of criminal responsibility. Section 78(7) of the Criminal Procedure Act (51 of 1977) states that:

> If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

In terms of this provision, the accused's illness does not fulfil the requirements for the legal test of insanity but is considered to be a mitigating factor in the level of responsibility. Psychopathy, epilepsy and mental retardation are some examples which have been forwarded as part of this defence. A defence of diminished responsibility does not afford the accused complete exculpation, but may result in a reduced sentence instead of indefinite confinement to a state psychiatric hospital (Burchell, Milton & Burchell, 1983).

2.3.3 Provocation

South African law differs greatly from the way in which American and English jurisdictions view the defence of provocation. Snyman (1991) says that provocation has become a full defence in South African law and a successful outcome results in the negation of criminal capacity and therefore the accused will be acquitted. Provocation may constitute words or behaviour or a combination of the two, and the test which is applied is subjective (Snyman, 1995). Unlike the objective, 'reasonable man' test applied in American and English jurisdictions, South African law is concerned with the effect of provocation on the accused, taking into account personal characteristics such as temperament which may explain behaviour. In addition, the courts consider the accused's state of mind at the time of the offence (Theron du Toit, 1993).

An example of the way in which expert testimony has been adduced in this defence, is that of spousal homicide. Theron du Toit draws on the work of Hoffman and Zeffert (1988) by saying that '[t]he opinion of expert witnesses is admissible whenever, by reason of their special knowledge or skill, they are better qualified to draw inferences than the court. The admissibility of the evidence of expert witnesses is furthermore governed by the relevance of that evidence' (1993, p. 247). She says that developments within case law regarding spousal homicide, have

pointed to the need for psychiatric or psychological evidence in ascertaining criminal responsibility. In the case of S v Campher 1987 (1) SA 940 (A), the court acknowledged this need and consequently expert testimony regarding battered woman syndrome was considered to be relevant and admissible. However, as cases such as S v Wiid 1990 (1) SACR 561 (A) have shown, expert testimony is not indispensable, particularly when a factual foundation for non-responsibility has been laid in evidence. The result is that the onus is on the State to prove that the accused was criminally responsible. When a factual foundation has been laid, expert testimony may serve the purpose of facilitating this process but in the final analysis, it may well be superfluous (Theron du Toit, 1993). This antithetical situation highlights the difficulties which arise in defences which fall within the ambit of non-pathological incapacity. On one hand, expert testimony serves the purpose of outlining the psychological factors which lead to non-responsibility. On the other, expert testimony is not required by law because the court may be in a position to make a finding based solely on the factual evidence (Van Oosten, 1993).

2.3.4 Non-pathological criminal incapacity

In the last twenty years, South African courts have come to recognise the salience of psychological factors in the assessment of criminal responsibility. The provisions within s78(1) of the CPA have been interpreted in such a way, that factors other than mental illness have been considered in the issue of non-responsibility (Strauss, 1995). Thus the biological component of this test (i.e. mental illness) is not the sole negating factor and psychological factors such as affective and conative functions have been held to affect criminal capacity. Burchell (1995) questions whether South African law is correct in applying a subjective test of criminal capacity and prefers a normative yardstick such as the 'reasonable man' test which is applied in Anglo-American jurisdictions. He argues that particularly where provocation or emotional stress have been raised as defences, it is useful to have some kind of objective test by which to measure the accused's behaviour. In addition, he does not view the complete exculpation offered by these defences as being justifiable.

The defence of non-pathological incapacity refers to a wide range of temporary emotional reactions which may affect the accused's ability to distinguish between right and wrong or the ability to act in accordance with an appreciation of wrongfulness (Snyman, 1989). As with the

concept of insanity, non-pathological incapacity is not a psychological construct and merely refers to non-responsibility which does not arise from mental illness. This term was first coined in S v Laubscher 1988 (1) SA 163 (A) where the judge sought to distinguish the defence, which centred on the 'tydelike aantasting van die geestesvermoens'(954F-G) (temporary disturbance of psychological functions), from mental illness. The defence has been interpreted to include a wide range of psychological phenomena which have been described as 'emotional collapse', emotional stress, 'total disintegration of personality' or have included reactions such as shock, fear, anger or tension. Courts have also accepted that temporary disturbance of cognitive and/or conative abilities may result from provocation which the accused has suffered at the hands of the victim, a situation which often occurs within the context of spousal abuse (Snyman, 1995).

Several landmark cases heralded the acknowledgement of non-pathological incapacity as a complete defence in South African law. In S v Arnold 1985 (3) SA 256 (C), the accused shot and killed his wife with whom he had a longstanding conflictual relationship. Subsequent to their marital separation, the deceased became a striptease artist which exacerbated the conflict. Prior to the shooting, the couple were involved in a serious argument and the deceased bent forward, displayed her bare breasts, and referred to stripdancing. The court found that this was an act of provocation on the part of the deceased which rendered the accused incapable of distinguishing between right and wrong and consequently unable to exercise control over his actions. In fact, the expert evidence stated that the accused's 'conscious mind was so flooded by emotions that it interfered with his capacity to appreciate what was right or wrong and because of his emotional state, he may have lost his capacity to exercise control over his actions' (263C-D). The court found that the emotional stress which the accused had been subjected to resulted in an automaton reaction, and therefore he was acquitted. While the court accepted that no act in the legal sense was committed, it acknowledged that factors such as 'extreme emotional stress' can result in non-responsibility.

In S v Campher 1987 (1) SA 940 (A), the accused was charged with the murder of her husband following years of marital strife. The deceased was verbally and physically abusive throughout their marriage and on the day of the offence had engaged the accused in an argument. He forced her to help him drill a hole in the lock on the birdcage but she was unable to assist him and

consequently the hole was skew. The deceased then threatened to attack her with a screwdriver whereupon the accused ran into the house to fetch a gun to protect herself. The deceased forced her back into the cage and instructed her to kneel and pray for the hole to straighten. As a result of her emotional state she killed the deceased. The court found that the accused could not rely on the defence of provocation and found her guilty with extenuating circumstances. However on appeal, the court considered whether in fact the accused was criminally responsible. While the conviction was upheld for several reasons, two of the judges acknowledged that the defence of non-pathological incapacity exists as a complete defence in South Africa law. Significantly, no expert testimony was led by the defence and therefore the court had to rely on the accused's account of the effects of cumulative provocation by the deceased. However, the acknowledgement of factors other than mental illness in the negation of criminal responsibility signalled a significant step forward in South African law.

In S v Laubscher 1988 (1) SA 163 (A) the accused killed his father-in-law after an argument which he had with his wife concerning their child. The accused felt that his wife's parents were undermining his role as father and were intruding upon his marital relationship. The shooting occurred as result of a conflictual relationship with his parents-in-law which had lasted for two and a half years. Following the argument with his wife, the accused confronted his father-in-law whereupon he fired twenty-one rounds into various rooms thereby killing the deceased. Both psychological and psychiatric evidence was led at the trial and the accused was said to have suffered from a 'total personality disintegration' which implied a negation of responsibility. However both the trial and appeal court held that the expert testimony did not accord with the facts of the case. These facts showed that the accused demonstrated insight into what he was doing and that his actions were goal-directed and voluntary. The Laubscher judgement also commented that expert testimony is not indispensable in this defence and that the court is in a position to make a decision based on the facts of the case.

These three cases paved the way for the recognition of psychological factors in the negation of criminal capacity and distinguished South African law from its Anglo-American counterparts who adopt a more conservative approach.

Snyman (1995) says that for a successful defence, it is not necessary for the accused to prove that the emotional reaction resulted from specific causes or pathology. If the court after perusing the evidence, is satisfied that at the time of the offence the accused's cognitive and/or conative abilities were impaired, then the defence will be successful. Unlike the insanity defence, the accused does not bear the onus of proof, instead the State is required to prove that s/he is criminally responsible. However, the accused has to lay a foundation in evidence which the State then has to rebut (Boister, 1997). Burchell (1995) argues that there is an 'inherent injustice' in placing the burden of proof on the accused claiming insanity, while a plea of non-pathological incapacity places the onus of proof on the state. This 'injustice' is extended to the successful outcomes of these defences. In the former, it means confinement to a psychiatric hospital while the latter provides for complete acquittal. Burchell (1995) feels that a complete revision of legislation and burden of proof standards may address these problems but he is not optimistic about this occurring. It would seem that the courts are intent on applying the subjective test of criminal capacity particularly in the case of non-pathological incapacity.

Given that this defence allows for the consideration of psychological factors in negating criminal responsibility, the concern has arisen that it may be abused by those who have exhausted all other avenues in an attempt to escape punishment. Snyman (1991) says that the courts have therefore treated such defences with great caution because they can be easily raised. In the same way that courts are circumspect with regards to sane automatism, so too do they view non-pathological incapacity. Snyman (1995) says that in those cases in which the defence has been considered seriously, the accused had shown a cumulative build-up of stress and/or provocation, which resulted in temporary impairment of cognitive and/or conative functioning. While the whole notion of temporary emotional reactions suggests an interplay of psychological phenomena, there is no statutory requirement for expert evidence in such cases. Snyman (1995) says that while a significant number of reported cases have relied on expert testimony, it is unclear whether the courts consider this evidence as indispensable for the defence to succeed. Kruger (1999) however, argues that psychiatric and psychological evidence do not play an indispensable role because the court itself is in a good position to make a decision based on the facts of the case. Burchell (1995) feels that this indecision regarding the importance of expert testimony, is detrimental in that there are instances when courts do not receive a balanced view of the accused's actions, particularly

when the state has not adduced psychiatric or psychological evidence. He suggests that judges should require the state to lead such evidence so as to mitigate against a one-sided view of the accused's behaviour.

The ambivalent attitude which courts have towards expert testimony, is further fuelled by their concern regarding the accused's reliability and truthfulness, since this defence hinges on the accused's account of events. Burchell (1995) says that the defence of non-pathological incapacity by its very nature, is viewed with caution and if the accused's reliability and truthfulness is questionable then expert testimony will also be viewed in the same light. He argues that one of the problems which arises in the forensic assessment of an accused, is that it occurs before the evidence has been heard in court. Burchell (1995) feels that in the pursuit of the truth, it would be advisable to allow the expert to re-evaluate his/her opinion after the factual evidence has been led. He feels that greater weight may be given to such evidence after it has been established that the accused has provided the court with a convincing account of events.

While South African law seems to have adopted a more liberal approach to the insanity defence than its Anglo-American counterparts, it has been plagued with controversies surrounding the role of psychiatric and psychological testimony in the defence of non-pathological incapacity. The discussion has shown that South African courts have been more accepting of the role of psychological factors in negating criminal responsibility, but it would seem that a rather ambivalent attitude towards expert testimony prevails. As Boister concludes '[t]his indicates clearly that the crucial aspect of the defence of non-pathological criminal incapacity is not its psychological validity but its legal validity' (1996, p. 373).

Chapter 3: Methodology

This chapter outlines the method of research which was employed in the study. It discusses various methodological issues such as the qualitative framework employed, the nature of the sample, the data collection process and the analysis of the data.

3.1 Research design

In order to explore conceptions of the defence of non-pathological incapacity, this study compared the views of a group of a lawyers with a group of mental health professionals who have experience in working with the defence. Semi-structured interviews were conducted with participants and the results were analysed thematically.

3.2 Sample

The 'snowball' method of sampling was used to identify potential participants as it was necessary to target professionals who had some experience in working with the defence of non-pathological incapacity. This sampling method is beneficial when appropriate resources from which to sample are not available. It involves identifying one 'sampling unit' who is then asked to identify potential participants who will meet the requirements of the research (Mason, 1996).

A clinical psychologist who is attached to the forensic unit at a state psychiatric hospital was asked to provide the names of mental health professionals (psychiatrists and clinical psychologists) who had experience in adducing psychological testimony in this defence. 'Experience' was defined in terms of the number of cases in which the practitioner had participated. Thus in the case of lawyers, potential participants had to either have prosecuted or defended at least two cases in which the defence was at stake. In the case of mental health professionals, potential participants had to have presented expert testimony in at least two cases in which the defence was forwarded. A list of ten names comprising clinical psychologists and psychiatrists was generated and each person was contacted telephonically to enquire whether they had any experience in working with the defence. Their assistance was then requested in the study. Six of the ten agreed to participate in the study while the other four did not have any experience with this defence and therefore declined to participate. An advocate who has had some experience in this defence was asked to provide a list of names of other lawyers with similar work

experience. A list of ten names was generated and each person was contacted telephonically to request their assistance in the study. Four advocates agreed to participate while the remainder declined because of work commitments. Thus the sample comprised mental health professionals (3 clinical psychologists and 3 psychiatrists) and lawyers (4 advocates). Of the mental health professionals, two worked in the public service while the other four were in private practice. Of the four advocates, three worked in the public service while one was in private practice.

Given that the defence of non-pathological incapacity is infrequently raised in court, the number of practitioners who have experience in this defence is limited. In addition, the resource base was limited to the Cape Town region because the participants had to be accessible for interviews. The small population from which to sample and the geographical limitations, therefore resulted in a limited number of participants who were eligible for this study.

3.3 Method of data collection

Semi-structured interviews were conducted with each of the participants so as to elicit their conceptual understanding of the defence and its application in practice. Each interview was tape-recorded with the consent of the participants and lasted approximately one hour.

Mason (1996) provides useful guidelines which were used to compile an interview schedule to explore the views of participants. She suggests that broad research questions be used as a point of departure from which 'mini-research questions' are generated. These 'mini- research questions' then serve as a basis for developing questions or topics to be explored in the interview (Mason, 1996). The two broad areas of focus for the study, namely, an investigation into participants' conceptual understanding of the pertinent issues regarding the defence, and the application of this understanding in practice, were used as point of departure for generating questions to be explored in the interview (see Appendix A). The rationale behind each of these questions will be discussed in turn.

1. Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?

Since the defence of non-pathological incapacity hinges on the assessment of criminal responsibility due to non-pathological factors, it was necessary to ascertain how lawyers and

mental health professionals defined the concept of criminal responsibility as this understanding guides the assessment and understanding of such cases.

2. The following dictum by Ogilivie Thompson JA in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility :

'... it must be borne in mind that...in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'.

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?

Given that the literature reflects the court's ambivalence to psychological testimony in this defence, as well as its indecision as to the indispensability of such evidence (Snyman, 1995; Kruger 1999), it was necessary to explore how practitioners viewed the role of expert testimony in such cases. It was necessary to explore the level of importance accorded to such testimony and whether they felt that the defence could successfully be forwarded without it.

3. What was the nature of the cases which you were involved in, where the defence of non-pathological incapacity was raised?

Landmark cases such as S v Arnold 1985 (3) SA 256 (C), S v Campher 1987 (1) SA 940 (A) and S v Laubscher 1988 (1) SA 163 (A) involved murders where the accused and deceased had some kind of familial or intimate relationship. A review of the relevant reported cases over the last ten years revealed that the defence of non-pathological incapacity is usually raised where the charge is murder and where the crime has occurred within the context of an intimate relationship. However defence has also been raised in other kinds of cases such as in S v Van Zyl 1996 (2) SACR 22 (A), where the charge was assault with intent to do grievous bodily harm and where the accused and victim did not know each other. In order to gain insight into whether the ambit of the defence is limited to violent crimes, participants were asked to reflect on the kinds of cases which they had been involved in.

3.1 Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support (forward/prosecute) such a defence?

One of the main aims of this study was to explore participants' conceptions of the defence and

how they apply this understanding in practice. In order to elicit the kinds of factors which they would consider, mental health professionals were asked to reflect on a case in which they had provided expert testimony while lawyers had to reflect on a case in which they had either been the defence or prosecuting advocate. This question was primarily used as a device to enable participants to think concretely about the factors which they had taken into account when presented with a case where such a defence was raised.

3.2 Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?

Consequent to the preceding question, participants were asked to list the pertinent factors which they would always consider when such a defence is raised. In this way both their interpretation of the defence and their application of this understanding could be elicited.

3.3 In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1. Cumulative build-up of emotional stress prior to event
2. Cumulative physical/emotional/sexual abuse by deceased prior to event
3. Physical and/or verbal threats by deceased
4. Breakdown of conscious awareness and volitional control
5. Automatic behaviour which lacks conscious direction
6. Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder

Given that the interpretations of the defence have been varied and that the courts have subsequently considered a wide range of psychological phenomena, a list of factors which have been considered in several cases was generated (see S v Wiid 1990 (1) SACR 561 (A); S v Potgieter 1994 (1) SACR 61 (A); S v Nursingh 1995 (2) SACR 331 (D); S v Moses 1996 (1) SACR 701 (C); S v Pederson [1998] 3 All SA 321). The participants were asked to comment on whether or not they would consider any of these factors in addition to those which they would normally consider to be pertinent to the defence. The list was therefore used to ascertain whether participants' conceptions of the defence were narrowly defined or whether they were prepared to consider additional factors within the latitude of this defence.

4. Do you think that the defence of non-pathological incapacity is synonymous with sane automatism?

Consequent to the preceding question and with regard to the apparent conceptual confusion between sane automatism and the defence of non-pathological incapacity, participants were also asked whether they thought that the two were synonymous. This conceptual confusion is referred to by Petty (1998) who says that courts have come confuse the volitional aspect (loss of control) of the test for criminal capacity with the involuntariness associated with automatism.

5. Do you think that there is a particular psychological or mental state which can lead to non-responsibility?

As has been discussed in the literature review, the defence allows for psychological factors other than mental illness, to be considered as grounds for non-responsibility. It therefore follows that courts have come to acknowledge the existence of certain psychological states which can negate responsibility. However, this has not been without controversy and they have fact been quite circumspect when such claims are raised. For this reason participants were asked to comment on whether they believed that transient psychological states were grounds for exculpation and if so, what the nature of these states were.

6. Do you think that the defence of non-pathological incapacity is a valid defence?

Consequent to the above question, participants were asked to comment on the validity of the defence so as to establish whether in fact they felt that it was justified in providing an avenue for those who claim non-responsibility on the basis of non-pathological factors.

7. Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony (opinion) been accepted by the court and on what basis?

In order to gain insight into the factors which courts have taken into account in their deliberations, participants were asked to comment on the success of cases in which they had been involved. This question provided an avenue for exploring the factors which courts have considered as being relevant, as well as a means of establishing a sense of the extent to which the defence has succeeded.

A similar interview schedule was employed for both lawyers and mental health professionals. Various words were substituted with ones which were relevant to the specific profession (i.e. those denoted in brackets).

3.4 Data Analysis

The data elicited during the interviews was transcribed (see Appendix D) and analysed thematically. The transcripts were divided into two groups (mental health professionals and lawyers) so as to enable the identification of areas of consensus and areas of difference both within and between the groups.

The coding technique forwarded by Miles and Huberman (1994) was used to identify pertinent themes which emerged from the data. This technique involved re-reading the interview transcripts a few times so as to identify emergent themes. The relevant sections of the transcript were then colour-coded so as to reflect the various themes (see Appendix B). In order to ensure that the themes which were identified were a reliable reflection of the abstractions of the interviews, Miles and Huberman (1994) suggest that the data be coded by another practitioner. This technique of 'check-coding' enabled a sharper definition of the meaning of the codes and the data which they represent. For this reason, two transcripts (one from each group) were selected and coded by a colleague. The agreement was in the 85% range (six out of seven themes) which indicated that the data relating to each theme was representative of that theme (see Appendix C).

Three main themes emerged from the analysis, with several sub-themes. A comparison of the two groups comprising mental health professionals and lawyers was made, by focussing on areas of consensus and areas of difference where these themes were concerned.

Chapter 4: Results

This chapter presents an analysis of the data which was obtained from the interviews. Three main themes, namely, conceptions and assessment of criminal responsibility, salient factors considered in the defence, and perceptions of the defence, emerged along with several sub-themes. A summary of each group's responses as they relate to a particular theme, is presented in tabular form so as to facilitate the comparison between mental health professionals and lawyers.

4.1 Conceptions and assessment of criminal responsibility

Definitions of criminal responsibility

Table 4.1.1 Mental health professionals' definitions of criminal responsibility

Definitions of criminal responsibility	Level of consensus[1]
- Criminal responsibility is a legal and not a psychological construct - The ability to appreciate wrongfulness i.e. to know right from wrong - The ability to act in accordance with that appreciation	6

Table 4.1.2 Lawyers' definitions of criminal responsibility

Definitions of criminal responsibility	Level of consensus
- The ability to distinguish between right and wrong - The ability to act in accordance with that appreciation i.e. to be able to direct your will accordingly	4

A comparison of mental health professionals' and lawyers' definitions of criminal responsibility reveals that there is consensus as to the essential elements of this concept. Both groups cited the two legs of the test for criminal capacity as being central to the definition of criminal responsibility. They referred to the provisions within Section 78(1) of the Criminal Procedure Act 51 of 1977 which recognises that a person cannot be held criminally responsible if s/he is incapable of appreciating wrongfulness or acting in the accordance with that appreciation. Criminal responsibility is a legal and not a psychological construct and refers to the mental ability which a person must have in order to be held liable for an offence. It is an essential requirement for criminal liability and it has to be established that a person had the requisite mental capacity to

[1] The **level of consensus** refers to the number of practitioners out of each group (mental health professionals n=6 and lawyers n=4) who were in agreement regarding a particular theme.

commit an offence (Snyman, 1995). Given that the courts' are concerned with whether the requirements of the legal test have been met, it stands to reason that both groups in this study employed the legal definition of responsibility. While their particular applications of this definition may differ, both mental health professionals and lawyers were concerned with the requirements of the legal test. Thus it can be seen that from both legal and psychological points of view, criminal responsibility was defined in statutory terms.

The role of expert testimony

Table 4.1.3 Mental health professionals' views of the role of expert testimony

Role of expert testimony	Level of consensus
- Experts provide opinions on the accused's mental state at the time of the offence - Experts provide opinions regarding the impairment of cognitive and/or conative functioning due to psychological factors - Experts do not make a finding regarding criminal responsibility - that is the court's role	6

Table 4.1.4 Lawyers' views of the role of expert testimony

Role of expert testimony	Level of consensus
- The role of expert testimony is not as crucial as in the defence of mental illness - Experts assist the courts in determining responsibility by providing opinions on factors in the person's background which could have led to the offence - Experts provide opinions on the person's mental state at the time of the offence - The court will assess the factual foundation on which the expert testimony is based and will disregard it if that foundation is incorrect	4

Both groups agreed that the role of expert testimony in the defence of non-pathological incapacity is to provide the court with an opinion regarding the accused's mental state at the time of the offence. Thus the role of the expert is not to pronounce whether or not a person is criminally responsible, instead s/he will adduce evidence regarding the cognitive and/or conative impairment of the person at the relevant time. Essentially what this points to is that experts

provide the court with opinions which may help to establish whether the requirements for the test for criminal capacity have been met. Given that responsibility is a legal question, this falls within the ambit of the law and not psychology or psychiatry. In light of this, the parameters which both groups have defined in this study, make sense in that they viewed expert testimony as being another body of evidence which courts have to consider. While both groups were in agreement, the lawyers stressed the fact that such testimony is subjected to the same scrutiny as all the other evidence in these cases. It seems that the courts view such testimony in a rather dubious light, particularly because it is based on the accused's account of a transient condition, and does not hinge on pathology. Judgements such as S v Potgieter 1994 (1) SACR 61 (A) and S v Kalogoropolous 1993 (1) SACR 12 (A) reflect the views expressed by the lawyers in that they highlight the fact that it is the court's role to determine responsibility and that expert testimony does not fulfil an indispensable role in these cases. While both groups in this study were in agreement as to the role of expert testimony, the subtle difference related to how lawyers viewed the importance of this role.

The role of factual evidence

Table 4.1.5 Mental health professionals' views of the role of factual evidence

Role of factual evidence	Level of consensus
- The facts of the case are a crucial aspect which informs the forensic assessment of the accused - The factual evidence is central to assisting the court in determining responsibility	4
- The facts are not an important consideration in the forensic assessment of the accused - Clinical opinion will not change even if the factual foundation upon which it is based is unfounded	1

Table 4.1.6 Lawyers' views of the role of factual evidence

Role of factual evidence	Level of consensus
- The courts are in a position to make a finding on the facts alone - The facts of the case are crucial in this defence - Expert testimony is not indispensable and will be disregarded if its factual basis is found to be untrue	4

The majority of mental health professionals agreed with the lawyers that factual evidence has an important role to play in the defence of non-pathological incapacity. 'Factual evidence' refers to the objective facts of the case and includes forensic evidence and testimony from witnesses. This kind of evidence enables the court to construct an objective picture of events surrounding the offence. The facts were considered to be important by practitioners because it impacted on their particular work. For mental health professionals, factual evidence was important because it informed their forensic assessment of the accused by providing a picture of the circumstances surrounding the offence. This view is substantiated by cases such as S v Kalogoropolous 1993 (1) SACR 12 (A) where the court acknowledged that the expert witnesses had taken into account the facts deposed to in the trial, and had drawn inferences about the appellant's control over his actions. In the same judgement the court also stated that it routinely engages in the same exercise i.e. it draws inferences about the accused's behaviour from the objective facts which are deposed. Thus the factual evidence is crucial in these cases as it objectively points to whether or not the accused was temporarily mentally impaired. This view was shared by lawyers in the study who pointed out that because expert testimony does not fulfil an indispensable function, the courts are in a position to make a finding based on the facts alone. Thus to a large in extent, both groups were in agreement as to the importance of factual evidence in these kinds of cases.

4.2 Salient factors considered in the defence

Free responses

Table 4.2.1 Salient factors elicited through free response (mental health professionals)

Salient factors considered in the defence	Level of consensus
'Sane Automatism' The accused's behaviour before, during and after the incident is very important : - Antecedent event involving a build-up of emotional stress and/or discord - Trigger event which constitutes provocation of some kind - The absence of complex, goal-directed behaviour - The presence of reflex actions, automatic behaviour - The absence of conscious thought with an inability to appreciate wrongfulness or act in accordance with that appreciation - Complete amnesia for the event	4

'Catathymic crisis' - The presence of a personality disorder which predisposes the person to reduced capacity - The emergence of transferential issues between accused and deceased - A catathymic crisis which constitutes a sudden emotional crisis resulting in behaviour which can be out of character or reflect a particular pattern eg. rage reactions - The person is able to regain equilibrium after the offence - The person is able to recall what transpired i.e. there is no amnesia for the offence	1
'Psycho-social history' - History of major stresses in the past which is typified by a theme of loss - History of previous trauma which has left the person emotionally scarred - Emotional overload prior to event - Person suddenly acting out of character prior to and during the event -Trigger event	1

Table 4.2.2 Salient factors elicited through free response(lawyers)

Salient factors considered in the defence	**Level of consensus**
'Sane Automatism' The person's behaviour before, during and after the offence is crucial : - Trigger event which constitutes provocation (eg. long-build-up of aggression, alcohol or drugs) - The person loses the ability to reason or control his/her actions - Automatic behaviour which lacks conscious direction - Complete amnesia for the offence (as opposed to selective amnesia)	3
'Importance of factual evidence' The facts of the case must accord with the defence - A focus on the factual evidence which points to cognitive and/or conative impairment	1

The majority of practitioners in both groups cited the elements of sane automatism as being salient factors in the defence. The accused's behaviour before, during and after the offence was an important consideration in determining whether or not s/he acted in a goal-directed manner. The precipitating factor must be a 'trigger' which may constitute provocation of some kind. This is followed by an automatic act which lacks conscious direction and s/he experiences amnesia for the event. Thus practitioners highlighted the sequential elements in the defence which point to

temporary cognitive and/or conative impairment. The factors which these practitioners listed, point to the fact that they considered the defence of non-pathological incapacity to be predicated on both legs of the test for criminal capacity - thus both cognition and volition must be impaired for such a defence to succeed. This view is in direct contrast with the views of two mental health professionals who listed factors which do not expressly require that both legs of the test for criminal capacity be satisfied. Thus for example, where a catathymic crisis was claimed such as in S v Moses 1996 (1) SACR 701 (C), the defence was predicated on the second leg of the test, i.e. conative functioning. The Moses judgement highlighted the fact that the defence can be predicated on either of the two legs and that it is possible for someone to lose control while still being able to appreciate the consequences of his/her actions. While the overriding view seems to be that the essential elements of the defence constitute sane automatism, 'dissenting' practitioners raise the important point as to ways in which the defence (and thereby the legal test) can be interpreted.

Cued responses

Table 4.2.3 Salient factors elicited through cued response (mental health professionals)

Cued responses	**Level of consensus**
Cumulative build-up of emotional stress prior to event	6
Cumulative physical/emotional/sexual abuse by deceased prior to the event	5
Physical and/or verbal threats by the deceased	5
Breakdown of conscious awareness and volitional control	6
Automatic behaviour which lacks conscious direction	5
Inability to exercise control over actions	6
Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness	5
Intoxication (drug and/or alcohol)	3
Previous psychiatric history	3
Personality disorder	3

Table 4.2.4 Salient factors elicited through cued response (lawyers)

Cued responses	Level of consensus
Cumulative build-up of emotional stress prior to the event	4
Cumulative physical/emotional/sexual abuse by deceased prior to event	4
Physical and/or verbal threats by the deceased	4
Breakdown of conscious awareness and volitional control	4
Automatic behaviour which lacks conscious direction	4
Inability to exercise control over actions	4
Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness	3
Intoxication (drug and/or alcohol)	2
Previous psychiatric history	4
Personality disorder	2

The majority of mental health practitioners agreed with the lawyers that the first seven cued responses were important elements in the defence. These factors pertained to the particular sequence of events surrounding the offence i.e. antecedent event, 'trigger', cognitive and conative impairment, amnesia. This finding concurs with the free responses where participants highlighted the factors which they considered to be pertinent to the defence. The remaining three cued responses did not receive overwhelming support in each group. Where participants agreed, the rationale was that these factors make a person vulnerable to reacting in particular ways and therefore should be grounds for exculpation. Those participants who disagreed as to the importance of these factors, did not consider intoxication, psychiatric history or personality disorder to be essential elements of the defence. The argument was that a consideration of these factors would raise various problems pertaining to the person's potential to re-offend if s/he was exonerated. In addition, if a person was particularly vulnerable because of these factors, then s/he would be expected to avoid situations which may result in violence. This view seems to be underpinned by the notion of antecedent responsibility whereby the individual can be held responsible if s/he chooses to be in situations where there is a likelihood of susceptibility to violent reactions (Snyman, 1995). Thus participants in this study believed that it is the

individual's responsibility to avoid such provocative situations. The individual's predisposition to vulnerability raises questions as to whether s/he can be expected to always react in that way, and if so, should society not be protected from them? While there was a high degree of consensus amongst practitioners regarding the first seven cued responses, the last three responses were the source of contention. The latter raised the question as to whether the courts have a 'duty' to excuse individual vulnerability or whether their responsibility to society's norms and values, supercedes this.

4.3 Perceptions of the defence

Conceptions of sane automatism and non-pathological incapacity

Table 4.3.1 Mental health professionals' conceptions of sane automatism and non-pathological incapacity

Sane automatism vs non-pathological incapacity	Level of consensus
The concepts are not synonymous : - Sane automatism requires a clinical diagnosis of dissociation - Non-pathological incapacity has a much wider ambit and can cover a wide range of diagnoses	4
The concepts are synonymous : - Sane automatism constitutes automatic behaviour which lacks conscious direction. It is characterised by cognitive and conative impairment and amnesia - A clinical diagnosis of dissociation is made	2

Table 4.3.2 Lawyers' conceptions of sane automatism and non-pathological incapacity

Sane automatism vs non-pathological incapacity	Level of consensus
The concepts are not synonymous : - Non-pathological incapacity can be predicated on either of the two legs of the test for criminal capacity eg. conative functioning can be impaired while cognitive functioning remains intact - Sane automatism requires an impairment of both cognitive and conative functioning which results in a dissociative episode	2
The concepts are synonymous : -The evidence must show that the person was not acting in a goal-directed manner	2

The majority of mental health professionals agreed that sane automatism and non-pathological incapacity are not synonymous. The lawyers, on the other hand, were split as to whether or not

the two are synonymous. While there were differences in the number of responses between the two groups, the reasons which each group offered were similar. The diagnostic features of dissociation were considered to be the essential elements of a defence of automatism while non-pathological incapacity was seen as allowing for a wider range of diagnoses. Gillmer's (1996) review of several cases involving the defence of non-pathological incapacity, reveals that it encompasses a wide range of psychological phenomena such as a 'total psychological disintegration', a 'narrowing of consciousness', 'a separation of intellect and emotion' as well as sane automatism. Thus the latter has been accepted by the courts as falling within the rubric of the former. On one hand, this situation can be understood since sane automatism arises from non-pathological causes. However, the question before the court is whether an involuntary act was committed and if so, it does not constitute an act in law. In light of this, the accused cannot be held liable because the actus reus is an essential element of criminal liability (Snyman, 1995). Thus the requirements for voluntariness of the act is the central issue in automatism while in the case of non-pathological incapacity, the focus is on the requirements for criminal capacity. Petty (1998) points out that the courts have not resolved the differences between the two defences, which merely adds to the confusion as to whether in fact they boil down to one and the same thing. This semantic and perhaps conceptual confusion, may explain why some practitioners in this study viewed the two as being synonymous, thereby giving the defence a clear-cut diagnosis i.e. dissociation. This seems to avoid the 'psycho-babble' (Gillmer, 1996, p. 20) which the courts have allowed in the defence of non-pathological incapacity.

Exculpatory psychological states

Table 4.3.3 Mental health professionals' perceptions of exculpatory psychological states

Exculpatory psychological states	**Level of consensus**
Exculpatory psychological states do exist : -Examples: personality disorders(except anti-social), impulse control disorders, post-traumatic stress disorder, depression, dissociation, rage dyscontrol disorder -These conditions can make a person vulnerable to impaired capacity	5
Exculpatory psychological states do not exist : -Psychological states can only diminish responsibility and not completely negate it -An acknowledgment of such conditions as grounds for non-responsibility would defeat the retributive aspect of criminal law	1

Table 4.3.4 Lawyers' perceptions of exculpatory psychological states

Exculpatory psychological states	**Level of consensus**
Exculpatory psychological states do exist : - An interplay between personality factors, socio-economic circumstances and alcohol abuse can make a person vulnerable to committing violent crime - It is conceivable that a person can be provoked to such an extent that s/he loses control and reacts violently	2
Exculpatory psychological states do not exist : - Only pathological states (mental illness) can lead to criminal incapacitation - non-pathological states cannot lead to cognitive or conative impairment	1
Unable to commit to an answer	1

The majority of mental health professionals agreed that certain psychological states can be grounds for exculpation, while the lawyers were split on this theme. Where there was consensus, the examples which were given ranged from personality disorders (such as borderline personality disorder) to depression and dissociation. The central aspect which all participants referred to was that these conditions predisposed the individual to impaired capacity. Thus the interplay between external factors such as provocation, and internal factors such as a personality disorder, would render a person non-responsible. From a mental health perspective, a wide range of biological, psychological and social factors are taken into account in order to explain human behaviour. This may explain why this group was more accepting of the existence of exculpatory psychological states. While the number of 'dissenting' practitioners was negligible, they raised thought-provoking points. One objection raised by a mental health professional, was that an acknowledgment of such states would mean that most murders would be excusable and this would defeat the retributive aspect of criminal law. This seems to reflect a concern for the morality of excusing such behaviour and whether, in doing so, the purpose of criminal law would not be subverted. Another objection raised by an advocate, centred around the belief that only mental illness can impair cognitive and conative functioning and that sane individuals are able to exercise control over their actions. This reflects the view that an interplay between internal and external factors cannot render a person non-responsible as s/he is able to exercise his/her will regardless of the circumstances. The contrast provided by the overwhelming consensus amongst mental health practitioners and the lack of consensus amongst the lawyers, points to how

individual behaviour is construed by their disciplines, as well as to whether issues of morality impinge on the way in which non-pathological states are viewed.

Validity of defence

Table 4.3.5 Mental health professionals' perceptions of the validity of the defence

Validity of the defence	**Level of consensus**
The defence of non-pathological incapacity is valid : - There are psychological states which can lead to non-responsibility and therefore the defence is justified in acknowledging this - Because of its latitude, the defence is open to abuse by offenders who do not have other legal avenues open to them	4
The defence of non-pathological incapacity is not valid : - Only pathological states can impair cognition and volition - The defence is not justified in acknowledging that non-pathological factors, such as affect, can impair cognitive and conative functioning	2

Table 4.3.6 Lawyers' perceptions of the validity of the defence

Validity of the defence	**Level of consensus**
The defence of non-pathological incapacity is valid : - People cannot be held responsible for acts which they did not commit intentionally or over which they had no control	3
The defence of non-pathological incapacity is not valid : - Only pathological factors can impair cognitive or conative functioning - Loss of control due to non-pathological factors cannot be accepted as grounds for non-responsibility because people are able to exercise control	1

The majority of practitioners in both groups agreed that the defence of non-pathological incapacity is valid. Agreement (and disagreement) on this theme was linked to how participants viewed exculpatory psychological states. Thus where the existence of exculpatory psychological states was acknowledged, participants agreed that the defence was justified in recognising these factors. However, these participants raised concerns that it may be open to abuse by offenders who are trying to evade punishment. It was seen as a loophole in the law which enabled offenders to easily claim exculpatory transient mental states. While in practice these claims are often refuted by courts, the defence seems to provide recourse when all other avenues have failed. Snyman (1995) says that while the law cannot punish those offenders who did not intentionally commit a crime, the courts are circumspect towards claims that non-pathological factors have

negated responsibility. This is because the defence can be easily raised and the burden of proof is on the State. While the courts do not seem to question the validity of the defence, case law reflects their circumspection regarding claims made by offenders. The status quo is that it has been accepted as a valid defence in South African law but this does not mean that it will succeed easily. Where participants in this study stated that the defence was not valid, this related to their scepticism regarding the existence of exculpatory non-pathological states. Thus only pathology was held to negate criminal capacity. It would therefore seem that they felt that defence was not justified because the existence of 'true' non-pathological states was questionable. While to a large extent there was agreement as to the validity of the defence in South African law, the reservations expressed by some participants point to a moral concern about providing an easy way out for those who should in fact be punished. This can be understood in terms of a legal point of view, but it is interesting that mental health professionals have also been drawn into this moral debate.

4.4 Additional theme : Nature and quality of State expert testimony vs defence expert testimony

Table 4.4.1 Nature and quality of State expert testimony vs defence expert testimony

Nature and quality of expert testimony	Mental health professionals	Lawyers
-State expert testimony only focuses on automatism -The courts have been influenced by this perspective such that the defence is often interpreted in this way -The forensic assessments by state experts are limited	4	1

An additional theme which emerged from the views of five participants (who were private practitioners), concerned the nature and quality of State expert testimony as opposed to defence expert testimony. While this theme did not emerge in all the interviews, it was deemed important because it related to how the adversarial nature of the legal system lays the foundation for opposing views regarding the interpretation of an accused's transient mental state. This theme revolved around private practitioners' perceptions that State experts defined the defence only in terms of sane automatism. This in turn seemed to influence the court's perceptions of the defence. The quality of State experts' assessments was criticised for not employing a wider range of psychological assessment techniques. The quality of reports written by these experts was

highlighted as being of a formulaic nature. Thus the form and content of State experts' enquiries was seen as problematic. The participants felt that this did not allow for alternative ways of interpreting the defence or for acknowledging a variety of transient mental states. In addition, the perceived influence of State experts on judicial understanding of psychological phenomena did not leave much leeway for defence expert testimony, particularly when it was not predicated on proving automatism. While on one hand, the adversarial system allows for diametrically opposing views, this may well exacerbate the rather tenuous position occupied by such testimony. The following quotation reflects the sentiments of one practitioner who felt that State experts were too rigid and formulaic in their interpretation of the defence :

> In a sense all I'm doing there is providing psychological evidence to the judge which he will link to the rest of the evidence. I don't hold the burden of determining responsibility. That's the difference between the evidence as I lead it and what I've heard coming out of Valkenberg. They tend to say this so - this person is responsible, this person has capacity, no explanation, there was no automatism and therefore they have capacity and that's it. That's very nice for the judge and I've seen certain judges respond to that because they don't have to raise the questions which the defence raises but to me that is the most simple way - quite a binary way - it considers no psychological theory, it doesn't consider the facts in terms of the psychological theory, it's looking purely at the narrow definition of capacity.[2]

Thus it can be seen that these private practitioners felt that State experts' perspectives 'damaged' the psychological standing of the defence by limiting it to sane automatism.

[2]Mental health professional 1 : verbatim quotation from the interview (see Appendix D)

Chapter 5: Discussion

This chapter provides a discussion of the salient issues which emerged from the data analysis. On one level, the analysis revealed the areas of consensus and disagreement between mental health professionals and lawyers, regarding the defence of non-pathological incapacity. At a meta-level the themes generated thought-provoking questions about how interpretations and applications of the defence are underpinned by issues of morality and a confusion between pathology and 'non-pathology'.

The discussion is presented in the following way:

Firstly, it considers the ways in which psychological discourse has been contaminated by legal conceptions of morality. It explores this idea by referring to the various themes which emerged from the analysis. The discussion then illustrates this notion of contamination with various examples from the analysis. Illustrations are provided so as to capture the essence of the issues which emerged at a meta-level.

Secondly, it focuses on the apparent confusion between pathology and 'non-pathology' by arguing that the concepts seem to refer to the same thing. The discussion then explores this circular reasoning by drawing on examples from the analysis.

Finally, the discussion departs from the norm by posing some philosophical ideas regarding the defence of non-pathological incapacity. This departure is not directly linked to the analysis itself but flows from the salient issues referred to above. It explores the idea of 'moral character' as a novel way of understanding both legal and moral excuses and arrives at some understanding of the core issues of the defence.

5.1 A contamination of psychological discourse

From the analysis in Chapter 4, it can be seen that the areas where there was an overwhelming consensus, pertained to the conceptions and assessment of criminal responsibility. The sample of ten participants were in agreement as to what constitutes criminal responsibility and the role which expert testimony plays in its assessment. Both lawyers and mental health professionals agreed that criminal responsibility is a legal construct which refers to a person's mental capacity at the time of the offence. Consequent to this, both groups of participants agreed that the role of expert testimony is to provide opinion on the individual's mental state. Thus the role of

determining responsibility belongs to the court, while experts, merely offer additional evidence which may assist it in this process. An example which illustrates this, is the following mental health professional's view:

> My role is to determine the mental state of the individual at the relevant time and the facts of the case are very important and relevant to that. In other words, is there any change in his mental state prior to, during and after the offence, and that opinion we can then offer the court. The decision is the court's and not ours but we need to argue for changes in the person's mental state during the relevant period. It's a legal matter and we make clinical judgements about the person's behaviour and the ability to perform.[3]

However, as lawyers within this study emphasised, expert testimony does not fulfil an indispensable function in cases of this nature, and therefore the court is in a position to make a finding based on the factual evidence. Given that such cases rely on the subjective account of the accused, the courts have emphasised the importance of factual evidence, as this seems to represent an objective yardstick whereby they are able to determine whether or not cognition and/or volition was impaired. This view was held by all the lawyers while the majority of mental health professionals stressed that factual evidence was important in helping them to ascertain how the impairment occurred. From the results it can be seen that mental health professionals and lawyers purport to engage with the concept of responsibility in different ways. The former is concerned with explaining how impairment occurred while the latter is concerned with proving whether the person meets the requirements of the test for capacity. On the surface it would seem as if the parameters between lawyers and mental health professionals are clearly defined. In fact, the views expressed by participants concur with the views of the court in S v Cunningham 1996 (1) SACR at 636 *b-c* (A) where Scott JA stated the following:

> It follows that in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned. But ultimately it is for the court to decide the issue of the voluntary nature or otherwise of the alleged act and indeed the accused's responsibility for his actions. In doing so it will have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused's actions during the relevant period.

The assessment of criminal responsibility is therefore a legal and moral issue and the views expressed in this study are in line with judicial thinking. However, it is argued that the issue is not that straightforward. The question arises as to whether the disciplines of law and psychology have managed to maintain parameters such that the former evaluates and judges individual behaviour while the latter merely attempts to explain it. Even though participants in the study emphasised that mental health professionals are not equipped to determine responsibility, this

[3]Mental health professional 2(see Appendix D)

does not mean that their moral views do not impinge on the way in which they view cases of this nature.

The majority of mental health professionals agreed that exculpatory psychological states exist and listed several conditions such as personality disorders, depression and dissociation, which fall under this rubric. The purported vulnerability and susceptibility of individuals who suffer from these conditions, require that they should not be accountable for their actions. The reasoning seems to be that the same considerations which are extended to mentally ill offenders, should be extended to those who suffer from transient mental conditions. Thus in the same way that the former do not receive moral or legal condemnation, so too should the latter. An example which illustrates this is the following mental health professional's view :

> I would have to say personality disorders because that would render the person vulnerable to stressors and cause them to react in a particular way. I would say that such a situation would lead to non-responsibility. I wouldn't risk any other specific diagnosis but would say a personality disorder plus the stressors. Take for example, Borderline personality disorder, where the person can be quite impulsive and can have quite intense emotion and put that person in a very difficult situation where a lot of things build-up - you can expect that person to somehow have an outburst of emotion. I don't like to say that we can excuse all kinds of crime but in certain people we can explain why they did what they did - not out of maliciousness it was just a reaction to stressors.[4]

Thus it would seem as if there is some moral flavour to how such individuals (and cases) are perceived. The issue seems to be that individuals who are particularly vulnerable because of their psychological make-up, should not be classified as 'bad'. They do not fall within the same category as habitual offenders and therefore should not be measured with the same legal and moral yardstick. This perception seems to have extended to the way in which participants in the study viewed the validity of the defence.

The majority of mental health professionals and lawyers agreed that the defence is justified in acknowledging that non-pathological factors are grounds for exculpation. While participants expressed reservations regarding the potential for abuse by offenders, they agreed that there are instances when it is valid. The underlying notion seems to be that individuals who commit offences because of psychological vulnerability, should not be punished. Given that these individuals are unlikely to re-offend, they cannot be categorised with ordinary criminals and therefore should not be sanctioned. The idea seems to be that the defence rightfully provides a

[4]Mental health professional 3(see Appendix D)

legal and moral excuse for those individuals who are not intrinsically bad. An example which illustrates this, is the following view expressed by a mental health professional:

> Yes, I think that it is valid because I agree with the law. It's alternative thinking to the idea that someone is wrong so let us punish them. I believe that in law as well you have to understand this person and what they did in order to rehabilitate them. And from that point I think it's important that we can point out the person's problems with psychotherapy - rather than let them sit in jail for a few years. We can build someone up again and that is why I think that it is valid.[5]

The moral undertones of the views expressed by mental health professionals, in particular, may be understood when one considers the expectations of the Rumpff Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (RP 69/1967) :

> What is required of the psychiatrist and the psychologist is a sense of responsibility, towards the views of society and the purpose and essence of punishment...
>
> (cited in Burchell, Milton and Burchell, p. 257, 1983).

It would seem as if mental health professionals are expected to be mindful of the link between criminal responsibility and the retributive aspect of punishment. Therefore they are expected to assist the courts in ensuring that those who are bad are punished while those who suffer from pathology should not be sanctioned.

From the above it can be seen that there has been a contamination of psychological discourse by the moral underpinnings of the law. After all, when experts are asked to testify to impairment due to non-pathological factors, they are offering an opinion regarding non-responsibility, albeit at subtle level. Henderson (1988) argues that courts require experts to forward opinions in relation to moral issues since legal tests for responsibility are concerned with moral questions. He suggests that when experts are asked to offer an opinion, their testimony may include some kind of moral judgement.

It would seem that this contamination of psychological discourse by the law, has occurred somewhat surreptitiously. Where non-pathological incapacity is concerned, the law has been faced with a conundrum in that it has not made statutory provision for the recognition of affective factors which have become integral to the defence. It has therefore turned to psychology whose explanatory frameworks have provided viable recourse (Gillmer, 1996). Thus it would seem that the legal and moral conundrum which faces lawyers, has subtly been transferred to mental health practitioners. These ideas are borne out by Gillmer, Louw and Verschoor (1997)

[5]Mental health professional 3(see Appendix D)

who question whether 'psychologists are called as expert witnesses to give opinion based on scientifically derived principles ' or whether psychology is 'allowed in when jurists are loath to grasp the social and moral nettles which they have permitted to grow around the feet of those in the adversarial arena' (p. 20).

5.2 Pathology vs non-pathology

In eliciting the factors which participants considered to be pertinent to the defence of non-pathological incapacity, seven out of ten listed the elements of the defence of sane automatism. The majority of mental health professionals referred to the diagnosis of dissociation as being pertinent to this defence, while two lawyers listed elements of sane automatism as it is defined in law. This interpretation of the defence is illustrated in the following view expressed by a mental health professional :

> You have to assess the person at three main stages - before the offence, during and after the offence. The most critical aspect is during the offence and what I need to be convinced of is that the person behaved automatically. In other words they weren't cognitively able to know right from wrong and they weren't able to control themselves... What one is looking for is an antecedent event where the person was subjected to a lot of conflict or stress, which built up to a crescendo, and then there's a trigger which is usually provocation of some sort... Afterwards, the person comes to, they realise what they've done, feel bewildered and often don't try and get away, but try and help. But there is supposed to be amnesia - if you were in a true automatic state, you must have amnesia because your mind couldn't lay down memories.[6]

This definition of sane automatism was also reflected in the cued responses, which revealed that the majority of lawyers and mental professionals agreed that five basic elements i.e. antecedent event (trigger), cognitive and conative impairment, automatic behaviour and amnesia, were important aspects of the defence. Where mental health professionals disagreed with this definition, they offered other diagnoses such as personality disorders, which illustrated the presence of some kind of pathology. A review of several cases reveals that the courts have considered the elements of the test for capacity and consequently, whether a voluntary act was committed. Expert testimony on the other hand, while considering some if not all the elements listed above, has not necessarily confined itself to defining the defence in terms of dissociation (see S v Wiid 1990 (1) SACR 561 (A); S v Potgieter 1994 (1) SACR 61 (A); S v Nursingh 1995 (2) SACR 331 (D); S v Moses 1996 (1) SACR 701 (C); S v Pederson [1998] 3 All SA 321; S v Henry 1999 (1) SACR 13 (A)). Even though expert testimony in these cases differed in terms of diagnoses, the conclusion is that established diagnostic categories such as dissociation or personality disorders were considered as typifying the defence. However, these diagnoses were

seen as referring to conditions which ostensibly fall within the rubric of 'non-pathology' i.e. conditions which are not pathological in nature. This notion extended to participants' views about the existence of exculpatory psychological states. From a mental health perspective, a wide range of diagnostic categories were listed as falling within the rubric of temporary non-pathological states. Five participants listed conditions such as post-traumatic stress disorder, depression, and personality disorders, while two lawyers listed the features of automatism. While these conditions were forwarded as examples of 'non-pathology', they in fact fall within the range of pathologies as defined in the DSM IV (1994). This begs the question as to how one distinguishes between pathology and 'non-pathology', when they in fact refer to the same diagnostic categories. After all, since dissociation has specific features, when is it pathological and when is it not? If a particular personality type is prone reacting in particular ways, when is the behaviour pathological and when is it not? While arguments are made for a distinction between pathology and 'non-pathology', it is unclear how this is achieved. Even if the idea of a *temporary* state is used as a yardstick, how does this account for personality disorders, which are enduring conditions? It would seem as if there is some circularity in the way that pathology and 'non-pathology' are construed. Since there is a lack of textbook diagnoses for temporary impairment (Strauss, 1995), this leaves practitioners with recourse to the nosology of pathological conditions. Ultimately it seems as if existing notions of pathology have been moulded to fit the requirements of the defence of non-pathological incapacity.

These claims may seem exaggerated but when one considers that the circular reasoning stems from the test for capacity, then the challenge facing mental health professionals in particular, becomes clear. In addition, the question then changes from *how* one distinguishes between pathology and 'non-pathology', to *when* this distinction becomes pertinent. Essentially the test for criminal capacity is applied to both pathological and non-pathological states which means that the same expert psychological evidence can be adduced in both instances (Petty, 1998). From a legal point of view, the issue is not the nature of pathology or 'non-pathology', instead it has to be proven that the accused suffered from cognitive and/or conative impairment. Thus the requirements of the test are crucial and lawyers are not caught up in the diagnostic confusion experienced by mental health professionals. The latter have to provide explanations for

[6]Mental health professional 4 (see Appendix D)

impairment, by making diagnoses which fall within either pathology or 'non-pathology'. However, the nature of the diagnosis depends on the kind of defence which is forwarded. It would seem that the distinction between pathology and 'non-pathology' is made when there is hope of an acquittal and, of course, in the absence of florid psychosis. The distinction therefore, is more than mere semantics. In the face of florid psychosis with poor prognosis, the insanity defence is forwarded. Where seemingly sane individuals commit unthinkable crimes, some explanation which does not fully qualify as pathology but retains the same scientific credibility, is forwarded. Thus the argument seems to be that in the latter, the person was 'a bit mad' but not insane enough to be hospitalised indefinitely. If this sounds confusing then it may well be a reflection of the current state of affairs as far as the psychological interpretation and application of the defence is concerned. Petty (1998) argues that the root of the problem lies in the application of the same test for both pathological and non-pathological incapacity which results in the boundaries being obfuscated between the two.

5.3 Philosophical reflections on the defence of non-pathological incapacity

The two salient issues which emerged from the analysis, revolved around morality and the conceptual confusion regarding pathology and 'non-pathology'. While it may seem that these problems only plague the defence of non-pathological incapacity, these kinds of debates have plagued the insanity defence in Anglo-American jurisdictions. As was discussed in Chapter Two, the heart of the debate within the American legal system in particular, has been whether the insanity defence is justified as a legal and moral excuse. The concern for punishment and the rule of law have provided fuel for the debate between American commentators from legal, philosophical and mental health backgrounds. While these debates have focussed on the insanity defence in that jurisdiction, this does not mean that useful inferences cannot be used to understand the defence of non-pathological incapacity as it is applied in South Africa. Despite the fact that the two defences are essentially different, the philosophical questions regarding excusable and punishable behaviour are the same. The framework forwarded by Reznek (1997) is informed by philosophy and psychiatry and provides a useful vehicle for further exploring the defence. His analysis includes an understanding of those psychological conditions which do not fall within the rubric of the traditional insanity defence and which require closer analysis to

establish whether they qualify as excuses. Reznek's (1997) analysis may help to provide some interesting insights into the issues surrounding the defence of non-pathological incapacity.

It is conceded that this brief philosophical interlude represents a departure from the normal form and content of a study of this nature. The ideas which are forwarded depart from the foundations set in Chapter Two, and therefore do not deal with the elements of the defence per se, but present a further attempt at establishing what underlies the current legal precept. It is argued that by gaining some insight into the philosophical roots of this defence, this may illuminate some of the niggling questions around the ways in which the defence is interpreted and applied.

Reznek's (1997) central concern is whether the insanity defence is justified and consequently, which circumstances qualify as grounds for excuse. He argues that in order to understand the notion of excuses, one has to understand the concept of *moral character*. While the notion of intent is central to criminal responsibility, the concept of moral character is important in understanding who *deserves* to be punished. A person's moral character traits refer to dispositions which incline him/her to act morally or immorally. Moral character is central to the kinds of excuses which are accepted in law, and the the concept of 'evil character' which is the 'propensity to harm others in the pursuit of his own selfish interests' (Reznek, 1997, p. 13), is important in understanding who should be sanctioned. Evil characters therefore, should be punished because they are intrinsically bad and can always be expected to behave in immoral ways. This brings one to the question of who deserves to be excused.

There are circumstances such as stress and provocation and indeed mental illness, which can temporarily change a person's character such that s/he commits an evil deed. However, this does not mean that the person is intrinsically evil. The argument is that such behaviour should be excused because an underlying good character exists i.e. s/he is not evil and therefore should not be punished (Reznek, 1997). The distinction between evil characters and good characters who commit evil deeds, leads one to question how to establish whether a person has a good character. The key issue is whether the person was 'acting out of character' such that criminal behaviour is seen as an aberration of normal behaviour brought about by abnormal circumstances (such as stress, provocation, duress). Reznek's (1997) analysis concludes that conditions such as mental

illness and factors such as extreme emotional stress can result in temporary changes in moral character and consequently, these circumstances should qualify as grounds for excuse.

How can Reznek's ideas be applied to the understanding of the defence of non-pathological incapacity?

The concept of moral character provides a thought-provoking way of understanding why sane individuals are capable of committing heinous offences. A review of several reported cases shows that where individuals experienced provocation, momentarily they were not themselves, and were capable of inflicting harm on other people (see S v Arnold 1985 (3) SA 256 (C); S v Wiid 1990 (1) SACR 561 (A); S v Nursingh 1995 (2) SACR 331 (D) . The picture painted in these cases reveal individuals who fall within the rubric of what Reznek (1997) considers to be good characters. They were not evil and did not routinely inflict harm on others. Instead, the circumstances surrounding the offence such as extreme emotional stress and provocation, were abnormal, and gave rise to behaviour which did not fall within the individual's normal repertoire. Expert testimony in these cases focussed on the antecedent factors which gave rise to the offence and emphasised that the accused was a sane individual whose capacity was temporarily impaired by these factors. The importance of understanding the antecedent events in cases of non-pathological incapacity, was emphasised by participants in this study as they believed that it created the milieu within which to understand why the person acted out of character (see Chapter 4: Salient factors considered in the defence). The nub of the defence is that criminal beahviour is not intrinsic to the person's behavioural repetoire and therefore society does not have to be protected from him/her. In addition, because the law recognises that capacity can be impaired temporarily, such behaviour should be excused. As has been discussed in Chapter Two, South African law has in the last two decades, accepted these circumstances as grounds for legal excuse (Snyman, 1995). Perhaps at a moral level the defence has caused greater debate, particularly because there is concern that it provides leeway for those who are trying to evade punishment. However, if one takes Reznek's (1997) argument into account, then it may bring some closure to these debates. If one accepts that there are non-pathological factors which can impair the capacity of a character which is essentially good, then it follows that a temporary change in moral character can occur.

Reznek's ideas concerning temporary change in moral character may also be useful when exploring the apparent differences in diagnostic categories which are used to describe non-pathological states. Given that experts often differ in terms of diagnosis, this results in situations where they seem to be referring to different things. As has been discussed in Chapter Four (see Nature and quality of State expert testimony vs expert testimony), the adversarial nature of the legal system lays the foundation for opposing expert views on transient mental conditions. This may well contribute to the way in which expert testimony is viewed by the courts but may also serve to further muddy the waters as far as psychological interpretations of the defence are concerned. The case of S v Moses 1996 (1) SACR 701 (C) is a pertinent example as it illustrates how disparate arguments between the prosecution and defence, resulted in disparate testimony by experts. The expert for the prosecution focussed on sane automatism and emphasised that only pathology can impair capacity. The defence expert on the other hand, focussed on the accused's inability to control himself after being provoked. His actions were sketched within the context of a wide range of psychosocial factors. At the end of the day both experts were trying to explain the accused's actions even though different diagnoses were used. If one adopts Reznek's ideas concerning temporary change in moral character, then it is possible that they were unwittingly questioning the accused's moral character. Reznek argues that,

> 'Extreme emotions change a person's desires, values and beliefs - that is his character... They might be law-abiding , caring people when not subjected to such pressures. But when provoked, they cease to care, becoming different moral characters. When the original character is restored -when the person has calmed down and cares more about others - we have no inclination to punish him as he is a different character from the one who acted '
>
> (1997, p.229).

Similarly, the same understanding can be applied to automatism, in that Reznek (1997) argues that a person in a dissociated state is acting on a narrow set of values and desires which is different from the normal character. He says that this may explain why goal-directed acts can be committed in such states because the person is completely focussed on satisfying a single desire.

If one adopts the concept of moral character as being central to understanding non-pathological conditions, then various diagnostic categories may merely be describing the same thing. Whether it be 'total psychological disintegration', 'a narrowing of consciousness' or 'dissociation' (Gillmer, 1996, p. 20), a temporary change in moral character is the underlying construct which is being described.

Reznek's (1997) argument that the excuse of temporary change in moral character be accepted as grounds for exculpation in American federal law, provides an interesting tool for interpreting the defence of non-pathological incapacity in South Africa. This presents challenges for the law as it may require that the test for capacity be revisited. In addition, the excuse of character change is useful for psychology as it may provide a focal point which experts can work from. This may resolve some of the tensions which arise when experts offer diametrically opposing views by encouraging questions pertaining to psychological processes in relation to changes in moral character.

REFERENCES

Allen, M. J. (1995). *Textbook on Criminal Law*. London: Blackstone Press.

American Model Penal Code Section 4.01.

American Psychiatric Association (1994). *Diagnostic and Statistical Manual of Mental Disorders* (4th edition).

Barnard, P. G. (1998). Diminished capacity and automatism as a defence. *American Journal of Forensic Psychology,* 16(2), 27- 62.

Boister, N. (1996). Recent cases: general principles of liability. *South African Journal of Criminal Justice,* 9(3), 371-374.

Boister, N. (1997). General principles of liability. *South African Journal of Criminal Justice*, 10(3), 314-318.

Burchell, E., Milton, J. R. L.& Burchell, J. M. (1983). *South African Criminal Law and Procedure. Vol 1: General Principles of Criminal Law.* Cape Town: Juta.

Burchell, J. (1995). Non-pathological incapacity: evaluation of psychiatric testimony. *South African Journal of Criminal Justice*, 8(1), 37- 42.

Card, R. (1992). *Criminal Law.* London: Butterworths.

Clarkson, C. M.. V. and Keating, H. M. (1990). *Criminal law: texts and materials.* London: Sweet and Maxwell.

Criminal Procedure Act, No. 51 of 1977.

Dershowitz, A. (1994). *The Abuse excuse: Cop -outs and sob-stories and evasion of criminal responsibility.* Boston: Little, Brown & Co.

Dressler, J. (1982). Rethinking heat of passion: a defence in search of a rationale. *Journal of Criminal Law and Criminology*, 73, 425.

Finkel, N. J. (1988). *Insanity on Trial.* New York: Plenum Press.

Gillmer, B. (1996). Psycho-legal Incoherence. Paper presented to the National Congress of the South African Psychological Society. Johannesburg, September 1996.

Gillmer, B., Louw, D.,Verschoor, T., (1997). Law and psychology: An exploration of the conceptual interface. *South African Journal of Criminal of Justice*, 10(1), 19-22.

Henderson, R. (1988). Criminal Responsibility: A view of counsel. *Medicine, Science and Law*, 28(1), 31-35.

Kapardis, A. (1999). *Psychology and Law: A critical introduction.* Cambridge: Cambridge University Press.

Kruger, A. (1980). *Mental health law in South Africa.*. Durban: Butterworths.

Kruger, A. (1999). Accused: Capacity to understand proceedings: Mental illness and criminal responsibility. In E. Du Toit; F. De Jager; A. Paizes; A. Skeen & S.Van der Merwe (eds). *Commentary on the Criminal procedure Act (Service 22).* Cape Town: Juta.

Mason, J. (1996). *Qualitative researching.* London: Sage.

Miles, M.B. and Huberman, A.M. (1994). *Qualitative data analysis* (2nd ed.) London: Sage.

Morse, S. (1984). Undiminished confusion in diminished capacity. *Journal of Criminal Law and Criminology*, 75(1), 1-55.

Petty, C. (1998). The psychopathology of self-control in the context of criminal capacity in South African law. Unpublished MA thesis, University of Stellenbosch.

Power, D.J. (1967). Diminished responsibility. *Medicine, Science and Law*. 7(4), 185-191.

Reed, A. and Seago, P. (1999). *Criminal Law.* London: Sweet and Maxwell.

Reznek, L. (1997). *Evil or ill? Justifying the insanity defence.* London: Routledge.

Roth, D. and Coles, E .(1995). Battered Woman Syndrome: A conceptual analysis of its status vis-a-vis DSM IV mental disorders. *Medicine and Law.* 14, 641-658.

Rumpff, F. (1990). Feite of woorde? *Consultus*. 3(1), 19-22.

Schopp, R. F. (1991). *Automatism, insanity and the psychology of criminal responsibility : A philosophical enquiry.* Cambridge: Cambridge University Press.

Slovenko, R. (1995). *Psychiatry and criminal culpability.* New York: John Wiley.

Snyman, C. R. (1989). Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg. *Tydskrif vir Regswetenskap*, 14(1), 1-15.

Snyman, C. R. (1991). Provokasie as volkome verweer in die Strafreg. *Consultus*,4(1), 35-38.

Snyman, C. R. (1995). *Criminal Law.* (3rd edition). Durban: Butterworths.

Steadman H., McGreevy, M., Callahan, L., Robbins, P. and Cirincone, C. (1993). *Before and after Hinckley: evaluating insanity defence reform.* New York: Guilford Press.

Strauss, S. A. (1991). *Doctor, patient and the law.* (3rd edition). Pretoria:Van Schaik.

Strauss, S. A. (1995). Nie-patologiese ontoerekeningsvatbaarheid as verweer in die strafreg. *South African Practice Management*, 16(4), 14-34.

Theron Du Toit, R. (1993). Provocation to killing in domestic relationships. *Responsa Meridiana*, 6, (3), 230-252.

Van der Merwe, F.W. (1996). Nie-patologiese ontoerekeningsvatbaarheid as verweer in the Suid-Afrikaanse strafreg. Unpublished LLM thesis, University of South Africa.

Van der Merwe, R.P. (1997). Sielkundige perspektiewe op tydelike nie-patologiese ontoerekeningsvatbaarheid. *Obiter*, 18(1), 138-144.

Van Oosten, F. F.W. (1990). The insanity defence: its place and role in criminal law. *South African Journal of Criminal Justice,* 3(1), 1-9.

Van Oosten, F. F.W. (1993). Non-pathological criminal incapacity versus pathological criminal incapacity. *South African Journal of Criminal Justice*, 6(2), 127-147.

Van Rensburg, P. and Verschoor, T. (1989). Medies-geregtelike aspekte van amnesie. *Tydskrif vir Regswetenskap*,14(2), 40-54.

Zabow, T. (1990). Conditions other than mental illness or mental disorder in 'criminal' and 'diminished responsibility' (-the meaning of psychiatric disorder in criminal responsibility). *Psychiatric Insight*, 7(1), 4-5.

Cases

R v Harris 1965 (2) SA 340 (A)

S v Arnold 1985 (3) SA 256 (C)

S v Cunningham 1996 (1) SACR 631 (A)

S v Campher 1987 (1) SA 940 (A)

S v Henry 1999 (1) SACR 13 (A)

S v Kalogoropoulous 1993 (1) SACR 12 (A)

S v Laubscher 1988 (1) SA 163 (A)

S v Moses 1996 (1) SACR 701 (C)

S v Nursingh 1995 (2) SACR 331 (D)

S v Pederson [1998] 3 All SA 321

S v Potgieter 1994 (1) SACR 61 (A)

S v Van Zyl 1996 (2) SACR 22 (A)

S v Wiid 1990 (1) SACR 561 (A)

APPENDIX A: Interview Schedule

1. Biographical Information
1.1 Psychologist :
Psychiatrist :
Advocate :

1.2 Work experience:

1.3 No of cases involving non-pathological incapacity :

2. Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?

3.The following dictum by Ogilivie Thompson JA in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility :

'... it must be borne in mind that...in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'.

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?

4. What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?

4.1 Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support (forward/prosecute) such a defence?

4.2 Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?

4.3 In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1. Cumulative build-up of emotional stress prior to event
2. Cumulative physical/emotional/sexual abuse by deceased prior to event
3. Physical and/or verbal threats by deceased
4. Breakdown of conscious awareness and volitional control
5. Automatic behaviour which lacks conscious direction

6. Inability to exercise control over actions
7. Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder

5. Do you think that the defence of non-pathological incapacity is synonymous with sane automatism?

6. Do you think that there is a particular psychological or mental state which can lead to non-responsibility?

7. Do you think that the defence of non-pathological incapacity is a valid defence?

8. Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony (opinion) been accepted by the court and on what basis?

APPENDIX B: Coding

Codes employed in the analysis

CR/DEFN - definition of criminal responsibility

PSY/ROLE - role of expert testimony

FAC/EVD - role of factual evidence

FREE/RESP - salient factors elicited through free response

CUED/RESP - salient factors elicited through cued response

AUT/NPI - sane automatism and non-pathological incapacity

EXC/PSY - exculpatory psychological states

VAL/DF - validity of the defence

APPENDIX C: Inter-rater reliability

Inter-rater reliability of sub-themes elicited from the interviews

Sub-theme	Agreement	Disagreement
Definitions of criminal responsibility	√	
Role of psychological testimony	√	
Role of factual evidence		√
Salient factors elicited through free response	√	
Salient factors elicited through cued response	√	
Conceptions of sane automatism and non-pathological incapacity	√	
Exculpatory psychological states	√	
Validity of the defence	√	

Agreement on 6 of the 7 sub-themes : Inter- rater reliability of 85%

Inter-rater reliability on main themes

Theme	Agreement	Disagreement
Conceptions and assessment of criminal responsibility	√	
Salient factors considered in the defence	√	
Perceptions of the defence	√	

Agreement on all 3 main themes: Inter-rater reliability of 100%

APPENDIX D: Interview Transcripts

Mental health professional 1

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
Well, I just define it in terms of the Act in terms of the ability to know right and wrong. To be able to act in accordance with that. I don't think that there is any psychological definition which I have found which improves on that or, detracts from that. It's a very clear definition and when I approach a case I use that definition.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility:

'... it must be borne in mind that.... in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
Purely in an advisory role you see I see myself as expert witness and informing and trying to give information to the judge to help him to come to a decision about criminal responsibility. Can I give you an example to illustrate this? In the Hermanus murders I gave evidence in mitigation with one of the defendants. I can't remember their names but the case was well-publicised. These two youngsters went out on a murdering spree one night and in the morning there were three corpses and one badly assaulted man. It was about two years ago. But in that case in the middle of my evidence the judge turned to me and said I don't understand this case and I said that's my problem too - the defendant had not taken me into his confidence so I all I can do is conjecture on what happened and this is my conjecture in term of the process. That in essence captures what I am trying to say. In a sense all I'm doing there is providing psychological evidence to the judge which he will link to the rest of the evidence. I don't hold the burden of determining responsibility. That's the difference between the evidence as I lead it and what I've heard coming out of Valkenberg. They tend to say this so - this person is responsible, this person has capacity, no explanation, there was no automatism and therefore they have capacity and that's it. That's very nice for the judge and I've seen certain judges respond to that because they don't have to raise the questions which the defence raises but to me that is the most simple way - quite a binary way - it considers no psychological theory, it doesn't consider the facts in terms of the psychological theory, it's looking purely at the narrow definition of capacity - as I said in the beginning I will approach it with that definition and then begin to examine capacity in terms of the evidence and my psychological assessment and then advise the judge about what happened; about how I believe what happened in terms of the crime - he will make the determination, what psychiatrists at Valkenberg have a tendency to do is to make the determination without providing all the little steps which led up to the crime. One way or the other way in terms of the defence or prosecution - and I've been asked to testify for the prosecution - there was a case where the person claimed no memory and when I assessed him I found that he was quite psychopathic and a pathological liar. I could explain the events leading up to the crime and that is what I did. I produce as much information as I can to help the judge to come to a decision about capacity.

Have you been asked to pronounce an opinion on capacity?
I have been goaded into the position of pronouncing my opinion on capacity - I have dealt with it once very badly but mostly well. The particular case was the Marazwe case where I was misled by the accused, he had shot a man who had humiliated him in the naval mess. He went and got a gun, came back and just discharged the magazine into the man. It presented very clearly as a case of catathymic crisis and I was happy to appear for him. The advocate hadn't considered all the facts of the case - what I hadn't been told was that on the way back to the mess he had stopped to salute the officer - so then I had to change my theory of catathymic crisis to diminished capacity - the cross-examination was about diminished capacity. The prosecutor quoted from the Appellate Division which said that an emotional storm of any kind is no excuse for murder - although there are a couple of AD decisions which dispute that, the issue then became one of trying to define capacity. The approach taken by the court was that you either have capacity or you don't - I said that it is possible for capacity to be diminished by certain factors. I think that I lost credibility because I didn't have all the facts from the start. So as you can see all the facts are crucial.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
In the Moses case we had all the evidence, the guy had been a good and very reliable witness. The man had a history of rage reactions - he had them three or four times in the past, and he had gotten into rages which extended over a very long period of time. On one occasion he had smashed up his sister's home I think and on another he had tried to drive people off the road and in these instances he was in a rage. These things he had volunteered early on in the assessment and he was presenting a defence; because he didn't know what we were looking for, this fitted into that kind of process. What I felt was important when he got into these rages was that each time the person had fallen into a transference relationship with him, so he was reaching back into very early experiences and particularly with the father figure who had been abusive. Those were if you like, the kindling factors - in the backdrop of course we had the personality disorder and I don't believe that you can even consider non-pathological incapacity without personality disorder and those are the factors which then presented. He was also depressed at the time, then this event happened and he lost it. The court struggled a bit with his behaviour after the event but I think that it's irrelevant, because it's a non-pathological process, when you gain equilibrium, you are very conscious.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
So these are the factors I would look at - background factors - is this an offence preceded by similar kinds of behaviour, and is it in the context of a transference, is it in a context a of a personality disorder. That doesn't rule out the possibility that you can have a single event as in the Marazwe case but then other factors come into play. Let me explain because it is quite complicated. In the Moses case the outcome - rage reaction and attack were similar. In the Marazwe case what we had as similar the reaction of humiliation - it just so happened that on this particular occasion he took it one step further - I think that there were other factors - he had an abnormal EEG which the judge wouldn't allow

nor the evidence from FA - he wouldn't accept that. He liked the Valkenberg evidence which was simple - no fugue state therefore he is guilty, he's got capacity. There was a personality disorder, brain damage - so there are whole lot of other factors which predispose the personality to such reactions. I'm very bad with names of cases but in the case of the kid who killed his mother and grandmother in Natal, the psychiatrist made a similar finding and I think that it is consistent. The guy who wrote the book on Violent Attachments also seems to make that point - that we have to look at these behaviours in terms of personality. So in my opinion it is a personality disorder which predisposes to reduced capacity and then we get particular events which occur in that particular case - a background of abuse, the emergence of transference issues, similar kinds of abuse happening now and then you have the catathymic crisis or fugue state or whatever it is. If you don't have those three components then it is very difficult to mount the defence.

If you look at the Cohen case - that I think was a catathymic crisis. V gave the evidence- he used a very interesting concept which hasn't been used again. He referred to the impeccability of the personality. I wouldn't go along with that - if you say that he was such an impeccable person that whatever his wife told him was too much for his impeccable personality to deal with and so he broke down. He had to say something like that because the judge said that 'he either pleads guilty or I'm going to hang this guy'. I wouldn't use such a defence - he's such a good guy that he couldn't tolerate it so he killed the guy.

You have referred to the concept of a catathymic crisis - how would you define it?
Catathymic simply means emotional crisis and it's been sound since the 1950's as a defence - it accounts for those sudden episodes of violence - a good example a child hurts the mother and she lashes out without even thinking. It explains those sudden murders which seem inexplicable. It can be out of character or be part of a consistent pattern - the Nursingh case which was out of character but I think there what happened there was the pressure cooker model - there was steam building up and this kid had been abused over a long period of time. The kid cracks and then follows with a sequence of normal activities leading to the murder of two people. As soon as the steam is discharged it's all over and everything is normal.

We are talking about a specific psychological process in which there are certain consistent patterns- this idea which Valkenberg has that one commits an act and has no memory for it is ridiculous - we all have episodes where we do something wrong like run a red light and then say 'oh my god what have I done' - that's a kind of catathymic episode where you flip modalities - where you act on impulse without the mediation of a thought process and you have memory for it. I think that the kind of thing which would drive a person to lose memory is far more elaborate, far more complicated and we don't often see it. Valkenberg are on a good wicket because one doesn't ever see this kind of thing - where someone has had an amnestic state unless it's due to an epileptic state or schizophrenia. But they rule out the possibility of a catathymic episode in certain personality disorders and I think that that is wrong because it confuses the courts. I don't believe that catathymic crisis or NPI is a defence - I think that it is a mitigation but then I don't like it when psychiatrists use old fashioned psychiatry to rule even that possibility out. I think that it possible for clients to get an acquittal but I think that the person is guilty of murder.

I think that very rarely it's valid as a full defence. You see in the Moses case, both the psychiatrist and I were upset at the acquittal. We thought that he would get 10 years instead of life. People often say that he had a great defence team and I said no, he had a great prosecution team because they didn't prove their case - they were proving that there was no automatism - and there was none, we never said that there was. I don't think that S understood the defence - he was on some kind of mission. It was interesting, Moses came to the advocate after the trial and said 'can I have my car back' So as you can see we are dealing with a personality disorder here and diminished capacity on the second leg.

Do you think that the defence of non-pathological incapacity is synonymous with sane automatism?
I think that if the courts understood psychology better then there would be no need for a balanced view - if they understood what psychologists and some psychiatrists were saying then there would be no need for that. The fallacy of the psychiatric arguments which people like Valkenberg are using merely confuse the issue. Unfortunately in the Marazwe case the judge didn't understand psychology and I couldn't get through to him for love or money. He was an acting judge for starters and handled the case very badly. He entered into examination and cross examination and had no respect for the process. His child had been hospitalised during this time - he had me in the box for 12 hours and lost his temper on the second day. At the end he gave a sentence of 8 years which you couldn't get for murder. He discounted FA's evidence even though Valkenberg hadn't done an EEG - that in itself was cause for reasonable doubt. Until you can sophisticate the bench you are going to need lots of rebuttal witnesses. That is why they accept the old school psychiatry - he's a bad guy, he knew what he was doing. - its very simple - either it's pathological or not, they don't take a history - what I do in 10-15 hours they don't do in 3 weeks so it's not helpful. Part of my anger with them is that it's not a debate - if I go into the witness box and I've got a psychiatrist who offers a competent assessment and I'm debating my assessment with his then what we are doing is trying to come to a middle point that can advise the judge. I don't like offering a diametrically opposite view to another professional but I can't help that because they are presenting such puerile psychiatry. But if we have a debate, we can adduce evidence supported by literature and then help the court to come to a conclusion even if we differ at some point - we can make concessions but come to some agreement. But in every case I've been involved in, they've offered the same defence - you know exactly what the guy is going to say when he enters the witness box. I'd like to see cases where it turns on points of psychological process rather than in large disparities in diagnostic categories. So what I would have liked Valkenberg to have debated in the Moses case is whether a history of aggression is sufficient to account for the murder - where is the divide when he previously stopped short of hurting other people - why in this case was it different. I had to argue why it went that far - that should really have been the turning point - what were the psychological processes intrinsic to his personality which may explain his behaviour. And then the judge could have come in and said in terms of his understanding of criminal capacity, was Y's argument sufficient to explain the behaviour. And that wasn't necessary in this case because of their stance. And of course it adds to the judicial confusion - you have one guy coming in and saying 'bad guy -good guy' while the one comes in with science fiction - what is catathymic crisis - some kind of religiosity? It's weird for a judge to sit in a case like this but if both people are agreeing on it but the debate turns on a particular point then its a different matter.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
Generally they've been murder cases always the same kind of relationship where there's a violent attachment - whether its long or short term. The Horne case is coming up in November and a brilliant case for this defence. He is of German extract has no father and was raised by his mother - he was left on his own a lot and she beat him with a hanger. Eventually he gets into a children's home - he gets himself a lover at the age of 15, she is an older woman and he sees her every afternoon after school. One day he arrives, and she has left - she is heartbroken. Prior to that incident he was racing on his bike with friends on Table Mt and he falls and sustains brain damage but recovers. He has a history of drugging, had 27 jobs, he smokes dope, crack etc and goes from woman to woman. He gets involved with an abusive woman - he does everything for her. She is a masseuse and he takes her around to clients - what he doesn't know is that she is a prostitute - consciously that is.

One day they have a row, he's washing the dishes, she's screaming at him, she comes up to him and stamps on his foot and she says at least the other men pay me - in stamping on his foot she breaks it. He's holding a carving knife and slides it into her and does that three times and she's dead. My question to him was why did you stop after the third time and he said that she said 'I'm dying' - he came to and she dropped into the floor. He gets hysterical, phones the police, gets into the bath, cuts his wrists. A wonderful case of a catathymic crisis - He will get acquitted I think. He had a previous girlfriend who used to beat him up and he never retaliated - I interviewed her. He has a history of non-violence although the prosecution is going to say that he said that he was going to kill her. But judges don't quite realise that there is difference between I'm going to kill you and I'm going to kill you. They were saying that to each other and the state will argue that there was premeditation. That's the kind of case where you have one-on-one violent attachment usually with a history extending into childhood The FBI calls it the disorganised domestic homicide which is a mainly what I've dealt with.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Inability to exercise control over actions
5.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
6.Breakdown of conscious awareness and volitional control
7.Automatic behaviour which lacks conscious direction
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder

I'll tell which of these I wouldn't consider...
1.Cumulative build up of stress I would agree with
2.Cumulative abuse is important
3.Physical and or verbal threat by victim - has not really been a factor in the cases which I have seen. Psychological or emotional threats I would most definitely consider. A physical threat would be a different defence that would be self-defence.
4.Inability to exercise control - is an interesting one because they have said that they knew what they were doing but couldn't control themselves, so I would go with that one.
5.I'd consider the inability to remember but in terms of screening for other pathologies but not in terms of this defence
6.Conscious awareness can be shattered like glass in these episodes and that has some impact on volitional control and I would like to see what the potential is for this personality to fragment and under what circumstances and what is the history. So in the Horne case for example, he had a good history of control but when she broke his foot it shattered the controls.
7.I'd eliminate automatic behaviour very quickly because if it is there I'd be looking at pathology.
8.Intoxication - I don't think that it's relevant - people can get very drunk and still have control
9/10. A previous psychiatric history is very important and if the personality disorder isn't there it isn't a non-pathological defence.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
Yes there is such a state - Borderline PD - and if you understand the structure of such a personality - its tendency to split I'm talking about the actual mechanism of the personality, the existence of very primitive defences and the core of anger which is basis of the personality disorder I think you see how vulnerable these people are and the interpersonal relationships are always transferential no matter who they're dealing with. So they are always in a catathymic state - they are always on the edge and you never know where you stand with them. The thing about the catathymic state is that it occurs mentally and they are always in a ruminative state - they get cut off at a traffic light yesterday and they are still angry about it today - they are still loading themselves emotionally and if you try to talk themselves out of it they get angry at you. And if you are going to use this defence it will have to contain these elements otherwise it will be very difficult to argue it.

Do you think that the defence of non-pathological incapacity is a valid defence?
I think that it's a valid defence only in particular cases - as a general rule it should be used in mitigation so in Moses it wasn't a complete defence but in Horne it is. In mitigation it points to a reduced capacity and when it's a complete defence it points to no capacity. In the Horne case, the speed at which things happened, the violence involved and then again the amount of abuse over months and years, the history of being abused and not being violent then this episode stands out as being different - then this is much more of a catathymic episode and therefore a full defence. In Moses he had similar rage reactions before, which shows a pattern and points to diminished capacity. I get approached by attorneys who say this guy has no memory and see the defence as a window of opportunity and if they can find somebody to say that that is so then they will go with it. And when you interview the guy you realise that he is a hundred miles away from the defence - attorneys don't understand the defence. If you take this thing to court you have to be incredibly sure of what you are saying. Two things happen if you aren't sure - firstly the court goes with Valkenberg's defence and that is no good for other people who come along and lead this defence and the whole field of psychology gets a bad reputation. The window has two panes to it - the one is the actual defence and the other is mitigation

I think that in this country it's a very bad defence to have because there is no death penalty - if there was one then people would very quickly own up under the defence. You get less of a sentence for killing someone than for stealing his money. You can get away for it. And this is why in America, the equivalent diminished capacity or temporary insanity is very rarely used - so if you are guilty you'll be executed whereas here you lose and that's it. So this is serious stuff and you can't mess with the defence - attorneys have to think very carefully about this and not just look for someone to support them. I sent the Moses judgement to attorneys in America and they said that he had a very good prosecution team.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
I've never had my testimony rejected outright - elements have been accepted or it has been accepted in its entirety. The reason is that I take a lot of care in what I present. I remember I did a case in Jo'burg - it was a patient of mine who had pinched something for the third time - he was charged with theft. I remember going beyond the facts and the magistrate came down on me like a ton of bricks - I learnt my lesson - keep to what is factual, relevant and to what you can argue and defend and don't go beyond it. And that is why it has always been accepted or accepted part. Even in Marazwe it was accepted in part because at the end of it all I wasn't aware of the full facts and this affected my testimony

Mental health professional 2

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
Criminal responsibility in terms of the law refers to the ability to appreciate the wrongfulness of the act and to act in accordance with that appreciation. If you want to break that down further then you look at what the ability to appreciate means and which factors affect the behaviour which flows from that. There are three measures cognitive, conative and emotive which are recognised by the law. In other word there is intellectual appreciation, emotional appreciation and the ability to perform self-control. And then the one thing which is not part of criminal responsibility but often reflects it, namely mensa rea which is the guilty mind or ability to plan an act. The first thing is the ability to appreciate wrongfulness which means that you must be conscious to appreciate wrongfulness - any impairment of consciousness will immediately affect responsibility. Intellectual appreciation - refers to grades of intelligence testing and higher cognitive function. All three factors are determined by mental illness or defects and the issue is whether we are dealing with pathological or non-pathological factors which can be things like intoxication. In other words are those three measures impaired by pathological or non-pathological factors.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility.

'... it must be borne in mind... that in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'.

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
My role is to determine the mental state of the individual at the relevant time and the facts of the case are very important and relevant to that. In other words, is there any change in his mental state prior
to, during and after the offence and that opinion we can then offer the court. The decision is the court's and not ours but we need to argue for changes in the person's mental state during the relevant period. It's a legal matter and we make clinical judgements about the person's behaviour and the ability to perform.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
The cases largely have been homicidal murder cases usually of marital or relationships discord - the crimes of passion cases but it could be other kinds of relationship like discord with a boss but usually a case of intense amnesia is mounted and then the issues are non-pathological. I can't think of a case where a stranger was the victim in such a defence.
In terms of criminal capacity involving mental illness - about 2520 cases. In terms of non-pathological incapacity were less frequent - not many went to court so I had about 5 a year so in total about 35 cases in the last 7 years.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
Let me just say that in not one of the cases which I've testified in was the defence upheld - it's always failed so I don't believe that the defence actually exists. The case of Michael Europa where this chap was accused of murdering his wife. There had a been a long history of discord and issues of infidelity of the wife which was the issue of their arguments. In a last ditch stand the two of them went away for the weekend and there was lots of drinking, even on the way home. When they got there she went about her chores and he was carving a chicken with a knife and then for some reason he went to bedroom and found a photo of his wife sprawled on the boardroom table with her lover and he brought it to the kitchen and pasted it on the cupboard. He continued carving the chicken, the wife came into the kitchen and he confronted her with the photograph which was nothing new. He then systematically went about stabbing her about 40-odd times. It basically started in the kitchen progressed into the lounge then the bedroom, bathroom etc as she was being chased. He then wrapped the knife and threw it into the neighbour's yard. He then went to the garden and waited for the police. Those are the facts of the case. The defence obviously argued that it was a non-pathological defence in the sense that there are four criteria which were fulfilled. Firstly, was there antecedent build-up of discord usually of an emotional nature and increasing in intensity and that was the case. Secondly, was there a trigger factor and there was - the confrontation about the photograph. Thirdly, was there a severe degree of unprovoked violence and that was considered. And of course amnesia for the event. This is what the defence put forward. The reason the whole thing fell was in terms of my argument - Firstly, there was a sufficient period for reflection or rumination and planning to occur before he acted violently. Secondly, despite him stabbing her after being provoked, it wasn't done automatically and not in one area but it was followed behaviour which requires a certain amount of thoughtful action and that negated the defence. What the judge termed dolus eventualis referred to the fact that even though he didn't have intent, he had it on the basis of that behaviour. If I did not have the facts of the case I would very well have given him the benefit of the doubt because he was so emotionally charged that he could very well have suffered a loss of control. I used the photographs of the crime scene to map out what happened. I think that another case which illustrates this is about this guy who killed his mother-in-law and wife. He was estranged from his wife and there was some wrangling about custody issues. He went to talk about it to his wife as he daughter wanted to stay over - she then tried to get him out of the house, he then shot her, turned around and saw the mother-in-law and shot her - he went into another room confronted the mother-in-law's boyfriend with the gun and then left. He drove around with his daughter before notifying the police. I was called in at the end stage not having evaluated the guy and the defence argued that - can you offer an opinion only based on the facts of the case. Of course you can't do that on the basis of the photographs - you have to evaluate him clinically and marry that with the facts and we sent him for observation and were then able to present a stronger case and the defence was dismissed.

The veracity of the evidence is relevant to the mental state because if a person is lying he is not mentally ill and he can appreciate wrongfulness and can therefore mount an exculpatory defence. Secondly in this defence, malingering is very relevant and we have to determine truthfulness even though ultimately it's for the court to decide whether to accept what is said - we have to comment on mental state.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
Well, personality functioning, emotional status of relationship are important and as I said the four factors have to be there - Antecedent build-

up, the trigger, the automatic act and then amnesia - often cases focus on the act without considering the other factors and you can't have that - you have to present all those factors. However if you look at the legal definition which only focuses on the act and the amnesia and not the other factors which I've mentioned. The defence is sane automatism because we look at reflexes and there is no capacity for thoughtful reflection and even if it is seemingly goal-directed it must be automatic. Once you start thinking or acting with a conscious mind then the defence falls flat I've not had a case of automatism and don't believe that it exists although it would be prejudicial for me to admit that -I've had to do that under oath. Although, there are grades or degrees of the defence which can be used and we move away from the absolutes - I'm talking about diminished capacity on the basis of emotional issues. I'm thinking about Z's case - a chap who had been accused of hacking is wife to death - he claimed automatism I was on the state's side and he acted for the defence. It was open and shut because the accuse had to prise the axe in from underneath the burglar bars to get it through the window - he then bashed the wife up. The son came into the room and he took him aside and told him 'sit maar so' and continued - there was an interruption to the whole thing. Z then went for diminished capacity on the basis of emotional issues - it affects sentencing - he got four years suspended for two and was out in 18 months for killing his wife.

I think that another one which needs sorting out with the lawyers is the issue of loss of control. Not non-pathological incapacity but the issue of control which is a very different matter. Moses for example claimed that - my problem is that I don't think that non-pathological factors can impair control. I've only seen pathological factors affecting control- such as command hallucinations or delusions. I can't see emotional factors overwhelming control or cognition to such a degree. The rage reactions which they spoke about is merely a theoretical construct it's a means of explanation but it can't impair physical behaviour. The issue is that it's expected of any sane person to reflect on behaviour when they are emotionally charged and to act in a responsible manner - we often are enraged but we expected to act responsibly and that requires thought. If you do act you either wilfully are letting go or it was pre-meditated. I don't think that you can divorce the elements you must see it in totality.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Inability to exercise control over actions
5.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
6.Breakdown of conscious awareness and volitional control
7.Automatic behaviour which lacks conscious direction
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder

The first seven would form part of those four factors which I spoke about earlier. The last three I think create a context for the defence. The inability to control actions may be an element of the defence but not a defence in itself. In other words we spoke about degrees of impairment and this would be relevant to that. So in a state of intoxication you may ask do you lose control - and the courts have accepted this as a defence although we may argue differently, because we are saying that if you are that impaired by intoxication then you cannot perform. This can be a real minefield where drug usage is involved especially in small amounts. But then again where people have used drugs it becomes a pathological condition because consciousness is impaired and it acts centrally. Thus you have insane automatism because even though the drug is an extrinsic factor which is taken in, it acts internally to cause a pathological condition. Thus there's a lot of confusion about the sane vs insane automatism.

Previous psychiatric history is very broad - obviously it doesn't refer to the fact that the person is mentally ill - but it has an effect in terms of mitigation of sentencing as opposed to the actual event. A recent case where a guy was accused of killing a neighbour who refused sexual intercourse with him illustrates this. He is a known schizophrenic who was psychotic prior to the offence and relapsed after the event and even though he was accountable at the time of the offence, the court considered his history and it affected the sentencing. On the one hand, with non-pathological incapacity what does happen with the so-called cumulative build-up of stress is that often there have been episodes of a depressive nature and it becomes relevant to the emotional quality of that antecedent build-up. In the same way personality disorder will also come into consideration but at the end of the day both depression and personality disorder are conscious issues and non-pathological in nature and will not affect criminal capacity. What the defence does is to say that don't look at things in black and white: in absolutes, rather look at the person in totality and consider things like intoxication and personality - these factors create the milieu or context for understanding what happened.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
Yes, only if you can prove beyond reasonable doubt that a particular personality is vulnerable to dissociation. In other words, in periods of extreme stress or trauma that there has been documented evidence of dissociation, then if it happens during the offence then I will accept it, but you have to prove previous periods of dissociation. Dissociation is therefore the psychological state and comes from a personality type which is vulnerable to dissociative amnesia. There may some sort of pre-existing psychiatric condition such as depression which adds to this but I would be looking for dissociative amnesia in this defence.

Do you think that the defence of non-pathological incapacity is a valid defence?
I don't think that people can act without conscious control - there always has to be an element of consciousness in the act - that is the most pertinent thing. But I think that if under stress a person can truly dissociate then perhaps it's valid but in my limited experience that has never happened. If there is such a person then the court will ask you if the issue of antecedent liability doesn't come into these - should the person not be taking preventative measure to avoid such dissociative episodes.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
Well, except for Moses, my testimony has always been accepted. I think that the problem there was that it was not a problem with my testimony but rather with the prosecution who went for the defence of automatism while the defence went for loss of control - so they were at cross-purposes and the prosecution didn't pick up on that. But then again, to focus on loss on control was problematic purely because there was very deliberate action during the entire event - he used three different weapons retrieved from three different areas - the statue was in the lounge, knives in the kitchen and lamp in the room. He had to go to three different places and come back and assault the chap - there was no way that

there was loss of control. If you look at mental state before during and after - he cleaned that place up and it was spotless no fingerprints, no blood spattered all over the place - what mental state allows one to do that. Secondly, the guy solicits sex from a hitchiker. The other thing was that he came there for a business transaction and the deceased sold his car for sex so the guy knew full well what was involved. A second thing which was relevant was the revelation of HIV status which of course he had to consider in terms of his lifestyle and relationship status - it couldn't have been something very overwhelming and new. So that defence should never have been upheld. I think that in the judgement there were certain submissions which he thought was true - this person was assessed as having borderline personality disorder and had rage reactions previously and there was evidence that there was a pattern - I agreed with that. And that was what perhaps helped to uphold the judgment. The defence team went to town on the history which went into reams and reams and compared to our little half a page report which obviously couldn't compare in quality. Having said that I must say that it's not so much in terms of the preparation it's the interpretation which is important and that is sometimes not seen - in the context of all this evidence it is what you make of it that matters and the judge was unable to see this. And that is why the judge accepted the prepared argument purely because it was planned and prepared. If you wanted a fifth factor to this defence then it would be quality of information - This defence is based purely on information - both clinical reports and evaluation and all other information. This doesn't mean that the state has less access to information because in another case that I did, I acted for the defence and the state went to town and produced extensive neuropsychiatric reports for their case - and all the defence had was me. So it really is not so much access to information but the interpretation and when you give your opinion you have to be able to back it up with evidence. And of course psychodynamic elements are often brought in and that confuses the whole thing. There are a few guys who like doing that like T. He speaks of many years of experience and that has to be credited but he often uses that psychodynamic jargon which confuses the court. And of course another thing which often happens is that he changes his mind a lot and that doesn't gel with the court. You have to sound credible then courts will be more accepting of your opinion.

Mental health professional 3

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
To my knowledge criminal responsibility is when the person is psychiatrically healthy and recognised as an adult in terms of the law (ie over 18 years); and that person has full knowledge of what s/he has done and knows the difference between right and wrong. I'm focussing mostly on psychological issues as I feel that I would be overstepping my boundaries if I get too close to what the legal eagles are saying; but you have to look at their definitions as well to know what they term as criminal responsibility. So that we can see if my findings fit in with what they see as criminal responsibility. Otherwise at the end of the day we are looking at two different things. I look at cognitive ability and broad emotional factors.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility :

'.. it must be borne in mind... that I the ultimate analysis the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
Our role is basically to explain to the court how the person was functioning at that stage and how that functioning could lead to that behaviour. To me it is not to try and explain the crime but rather the functioning of the person. I do think that we can comment on criminal responsibility but we shouldn't have the final say. But as this quote says, the expert evidence is also very important. I have noticed that in the cases that I've done, our opinion normally weighs quite a lot. However if I can reflect on my experience this morning in court, once we get to things that's technically difficult in psychiatry and psychology to explain in court, I think they sometimes don't take our opnion because they don't understand what we are trying to say. And it is sometimes very difficult to explain psychological conditions to them. So this morning I had to explain that this person over a four week period had a clouded sensorium over a four week period and he can't remember his actions - he can remember some but not all of it. Now for them, this person is malingering and to try and explain that it is a possibility - that it is real dysfunction and not malingering and they can't understand that. You can see from their facial expressions and the questions they ask afterwards that they don't understand. And I don't think that it is really our inability to explain that is the problem - if you aren't working in the field of psychology or psychiatry then sometimes our concepts are difficult to understand and that in itself is difficult. For example cognitive, affective and conative - those three things they don't understand. Trying to explain that cognitively this guy couldn't concentrate and his memory was stuffed up and with the affect he had a major depressive disorder which is something that can be seen and then how his will was affected. These three things come out of their own notes with regard to the three legs which the decision stands on - but their questions show that they don't even understand those concepts. I do feel we can comment on whether a person had the cognitive ability or conative ability to something. I really don't think that we can leave it up to the law because if they don't understand what we are trying to say about the three legs, then how can they make a decision - if that is what it rests on. I think that the facts of the case don't always explain the functioning of the person. The onus rests on the State to prove that this person was not incapacitated so how are they going to do that without expert testimony.

This morning in court the magistrate asked me what I had based my opinion on and I said that I had taken into account what the accused had told me as well as my assessments. He asked me if the facts on which I had based my opinion on changed, whether my opinion would change. I said that my opnion wouldn't change because the clinical picture wouldn't change. The clinical picture stays the same regardless of whether the facts of the case change.

So do you think that the factual evidence is not that important in these kinds of cases?
The facts of the case have nothing to do with me - I am not a lawyer or policeman so I don't have to concern myself with that. Even if the facts should change as the magistrate suggested, my clinical picture wouldn't change - after all that is what I'm qualified to do - to provide a clinical picture of the person. So the facts are not that important in my view and my assessment does not depend on that. As I said, I don't think that they can make a finding without our input and the facts

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
Two were murder, two fraud and 1 theft (shoplifting). The murders were where one person shot the partner so they were in a relationship.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
I will take this morning's one because it is freshest in my memory. He was charged with fraud. He was very into sport and he made a false insurance claim for stolen sport gear. What also happened was that he had an injury just before all this happened; he hurt his knee and had to have an operation. He was in immense pain and after the operation the doctor told him that he would probably never walk again. Sport is this man's life so I started with the emotional side of this loss and what this meant to him. So I looked at his history psychodynamically, what makes his ego and what makes him tick. And then other factors of loss such as the death of his dad around this time, the pain which he was experiencing and the role of medication and I got the doctor to give his opinion. And with the injury which he had he had concussion and that was taken into consideration. I looked at the cognitive and emotional effects and the physical pain. I took all these factors into consideration to explain how they led up to the emotional situation which he was in so that he couldn't decide and react. He committed the fraud during this sensorium. I feel that we have to explain more than the act, we have to explain the person.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
I would also look at major stresses of the past, previous traumas and what kind of scars they left on them. I would look at the emotional overload in this person combined with the stressors. In both the murder cases there was abuse in the past and obviously left the necessary psychodynamic scars which would be there for people to react when other things come their way later in life. Mostly in these defences, it's where someone suddenly acted out of character and you have to explain that. And you need information like this otherwise you can't. You have to explain what made this person vulnerable to a certain trigger event. I have to make sure that there is no psychopathy otherwise you are looking at malingering as well.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5.Automatic behaviour which lacks conscious direction
6.Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder
1.Definitely
2.Yes
3. Yes
4.Yes
5.Yes - that happens in most of the cases and that is what they will have a problem with - they can't understand why the person can't remember. One has to try and explain psychogenic amnesia as something which may come out after years of therapy but at the moment is not psychologically there for the person.
6.Yes
7. I haven't had one like that but I know that there have been cases like that
8.That's very often the case - like in the situation this morning
9. Yes - things like depression or anxiety makes a person vulnerable
10. That's a difficult one and I try to steer clear of it but yes, PD is very often there - Anti-social and borderline specifically. I try not to make too much of an issue of it because you get caught up in all sorts of tangles trying to explain that the person is just like that and that this is a disorder - it is difficult to get that across. A PD is not an excuse but it makes a person vulnerable to certain stresses and in such situation things happen.

Do you think that sane automatism and non-pathological incapacity are synonymous?
No, I think that non-pathological incapacity can be interpreted in various ways - it isn't restricted to a diagnosis of dissociation alone - which is what automatism refers to.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
I would have to say personality disorder because that would render the person vulnerable to stressors and cause them to react in a particular way. I would say that such a situation would lead to non-responsibility. I wouldn't risk any other specific diagnosis but would say a personality disorder plus the stressors. Take for example, Borderline personality disorder where the person can be quite impulsive and can have quite intense emotion and put that person in a very difficult situation where a lot of things build-up. You can expect that person to somehow have an outburst of emotion. I don't like to say that we can excuse all kinds of crime but in certain people we can explain why they did what they did - not out of maliciousness it was just a reaction to stressors. A trigger event is normally necessary to cut-out pre-meditation. And when I think of the stressors - all the cases I did carried a strong theme of losses of relationships like death in the family or moving home.

Do you think that the defence of non-pathological incapacity is a valid defence?
Yes. I think that it is valid because I agree with the law. It's alternative thinking to the idea that someone is wrong so let us punish them. I believe that in law as well you have to understand this person and what they did in order to rehabilitate them. And from that point I think it's important that we can point out the person's problems with psychotherapy - rather than let them sit in jail for a few years. We can build someone up again and that is why I think that it is valid.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
Well this morning's one still has to be decided. But in the other four, my testimony was accepted and the people were acquitted. In three cases there were rebuttal witnesses and the fourth one a report was submitted but the expert didn't appear. In this morning's case there were no rebuttal witnesses and my opinion was supported by the psychiatrist. And the rebuttal witnesses are also not a nice thing - having two psychologists with different opinions gives psychology a bad name - you can have five psychologists with five different opinions. The reason for the court accepting my arguments is that where there were rebuttal witnesses their assessments weren't very good. For example in one the diagnosis was post-traumatic epilepsy, which isn't even in the DSM IV and personality problems - this is after 30 days observation in the state hospital. And I saw the person for only a few hours.

Mental health professional 4

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
There's the legal definition of mens rea. It's basically the ability to form intention. There's the cognitive aspect of knowing right from wrong and being able to exercise judgement in accordance with that. There are many psychologists and psychiatrists who apply their own definitions of what criminal capacity entails and I think that they argue that as long there are psychological - psychiatric factors at play those to some degree diminish criminal capacity. But essentially it is a legal concept.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility .

'... it must be borne in mind... that I the ultimate analysis , the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
Any mental health professional offers basically one extra piece of evidence which the court uses. We provide another piece which the court can consider - we don't provide all the assessment of criminal responsibility. What generally happens in our courts is that they accept the experts' opinions entirely - there's a problem they have when experts disagree - they accept the best reasoned argument - and if there's one expert then it's very rare that the court would reject that expert. What the mental health professional has to say is usually crucial especially where non-pathological incapacity is concerned. It will decide which way the case is going. First of all our courts are becoming more subjective in the way they look at things. In the old days the defendant in particular crime was found guilty and would just receive a particular sentence. Nowadays courts are more interested in what the person is thinking and feeling and what his willpower was at the time of the offence and that is why experts are being used increasingly. So the courts are very interested in what the person's subjective feelings were particularly when provocation was involved and what the effect of the provocation was. You need the expert evidence and it depends on where you put that expert evidence - you make a finding on the facts first and then expert testimony is used in extenuation or mitigation. But the way it is used now - it is used a complete excuse and with that I don't agree.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
30 NPI cases
All murder cases - usually in intimate relationships : husband-wife, girlfriend-boyfriend relationship and I've had a couple where it's been a sexual encounter where the person has been shocked by what has been asked of them.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
In 1992 I assessed a lady called Connie Potgieter who had a long stormy relationship with a successful businessman in PE. On the day that they got married he asked her to sigh an ANC and she didn't want to do it and he called off the wedding. It was very humiliating for her as she had to walk through guests and announced that the wedding was off. He then threw her out of the house and she then returned with a gun and hid it under a mat in the bathroom where he couldn't see and then shot him. She claimed that he had tried to grab her and hit her head against the wall. She was so dazed by this that in an automatic state she went and fetched a gun and shot him once through the heart. Now there the facts of the case didn't support her and there were also suggestions that he was fast asleep at the time but what was interesting was that the psychiatrist for the defence made this huge issue about how the ego disintegrated and even though it had occurred over a long period of time, she didn't know what she was doing. I just said look at her actions at the time - they were very purposeful - she wasn't someone who was used to handling the gun and when she went to the bathroom she had to look for it. She had to prepare for firing
and she has to know what she was going to use it for. I was quite prepared to entertain diminished responsibility because she had been humiliated and was very angry. I couldn't find a trigger - they tried to produce a trigger - that just before he had pushed her up against the wall and banged her head and she had found this to be extreme provocation and acted accordingly - but I didn't find that.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
You have to assess the person at three main stages - before the offence, during and after the offence. The most critical aspect is during the offence and what I need to be convinced of is that the person behaved automatically, in other words they weren't cognitively able to know right from wrong and they weren't able to control themselves. So they have to act in an automatic way and that is where the cases fall down - from the evidence the accused showed some sort of planning and some new set of actions which he couldn't have learnt before, so his mind must have been working and he was acting purposefully and he therefore must have known what he was doing. Volition was probably reduced by anger or something like that but that is not a complete excuse. What one is looking for is an antecedent event where the person was subjected to a lot of conflict or stress which built up to a crescendo and then there's a trigger which is usually provocation of some sort - it usually unexpected and caught them unawares and of an unexpected intensity - they knew that it was coming but not to that extent - this brings on an automatic state where someone is killed. Afterwards, the person comes to, they realise what they've done, feel bewildered and often don't try

and get away but try and help. But there is supposed to be an amnesia - if you were in a true automatic state, you must have amnesia because your mind couldn't lay down memories. Most cases get referred because of the claim of amnesia. I try and workout what the person's actions were.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?

1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5. Automatic behaviour which lacks conscious direction
6. Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder

I wouldn't consider the last three as being elements. The reason is that intoxication reduces your control anyway and then you would have to try and distinguish between non-pathological due to emotional stuff or due to intoxication. When a person is intoxicated you are in a different territory. I would only consider it if the person was a new user but if you've been taking something for awhile then you know what the consequences are. So if you drink alcohol for the first time and do something strange then you may be excused although some people will argue that everyone knows the effects of alcohol anyway so it can't be excusable.
Psychiatric history does not imply that you have no control over yourself - even a schizophrenic has control and they don't go around killing. Psychiatric history takes you into different territory as the disorder which caused the person to lose control takes precedence - then you are talking about pathological incapacity.
Personality disorder is very much on the fence because it isn't pathological but it can't be non-pathological because it is intrinsic to the person. What you then say is that the person can be expected to behave in such a way - it will place the thing in context. I would take it into account and perhaps motivate for diminished responsibility. But then again what if the PD is psychopathy then diminished responsibility becomes risky because then dangerousness comes in. This defence rests on the assumption that the person won't do it again. So if you rest it on pre-existing PD you can't say that because it will happen again because the personality is involved.
Automatic behaviour which lacks conscious direction is the most important as far as I'm concerned. This is the nexus of the defence. All of them are elements of the defence : 1-3 are antecedents for 4-7 which are in turn what you'd expect from dissociation.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
I hate to say that I don't think there is because there are always exceptions but generally no. Psychological states diminish responsibility they don't excuse you entirely. From our side it is difficult to argue this because you are starting with a person's personality over which they have no control and when you are looking at a particular PD where you don't have much control over what you do, and you are under psychological stress and get uptight and kill somebody it is logical for us that the person couldn't control themselves. But the flip side is that such people mostly are able to exercise control and if they do lose it, it's a relative thing in terms of the defence. Most psychological conditions can lead to diminished responsibility and not complete exculpation. I think that dissociation exists and under extreme anger people often describe being depersonalised and derealised. If I said that it leads to non-responsibility then it means that all murder is excusable because most murders are committed under extreme pressure and there is always an element of dissociation - but I have to go with public policy and say no.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
The court has mostly accepted my testimony and there was only one case I think where they didn't accept my testimony. In short a chap stabbed his stepmother 40 times and the court asked me whether after the second or third blow he could have lost control and I said yes. So the court acquitted him because they couldn't determine which of the 45 strokes actually killed her. In other words if stroke no 10 went through her heart, was that not the stroke where he didn't know what he was doing?. And at the time I had no inkling where this was going - as far as I was concerned when he made one blow he was guilty for all of them.

Whenever you can show convincingly which is just about always that the person was acting purposefully then there is no way around it - they do something that there was a moment of reflection and then move on. Very often the courts just need one expert to show this moment of reflection. Once you can form plans you must know what the consequences are.

Do you think that the defence of non-pathological incapacity is a valid defence?
No, because it is very hard to prove that someone acted automatically because of psychological factors. I can see that happening with pathological factors but I can't see it and be convinced that a person acted automatically because of emotional factors. The are possibilities such as PTSD where a person is tapped on the shoulder and is right back at the battle scene and without thinking shoots and does something automatically - that I can see happening. But the essence of automatic behaviour is that it is behaviour which has been well-rehearsed before and given certain cues is brought out. So I can see certain policemen drawing a firearm automatically because they are used to handling weapons. So there are rare instances where it would apply but generally not. The problem with the legal perception is that they are always looking for so-called valid defences - they say if you crack or snap it's a valid defence like the crimes of passion - he cracked or snapped when he caught his wife in bed with his best friend and shoots him - but is it really valid to shoot a man because he is having sex with his friend's wife? Not really - for that matter if someone says something really horrible to you - is it valid to take out a knife and stab him? I feel that it is a retrogressive step in the law because you should be responsible for your actions. The defence also allows malingering - once everyone knows what the defence is about are you going to tell me that I can tell the court definitely what was going on in his mind at the time - that he wasn't as angry as he said he was or that what this person said to him or what his wife did to him didn't affect him as he said it did, or that he doesn't really have amnesia - malingering is a problem and I find it all the time.

Mental health professional 5

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
The capacity to form intent and to discern between right and wrong and the capacity to act in terms of that knowledge. Criminal responsibility is not a psychological concept and therefore I use the legal definition.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility .
'... it must be borne in mind... that I the ultimate analysis , the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
Our role is to put in front of the court the presence or the absence of psychological factors which may have been relevant to the actions of that person. But the decision as to whether that person was responsible or not that is a legal and not a psychological decision.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
3 cases - 2 were murder charges and the third I can't remember. The one was a man who shot his girlfriend. The other was a policeman who shot the alleged rapist of his child - the Mpengesi case. I now remember the third one it was about the dentist who poisoned an ex-girlfriend's new boyfriend. He then tried to poison himself so as to divert attention - he was found not guilty but not on psychological grounds - the evidence was never led and the case went on the facts. I wasn't convinced that there were non-pathological factors although the defence looked for those but I never actually testified in that case although I compiled a report.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
The Mpengesi case was the most recent and was the purest argument for non-pathological incapacity. I felt that was enough grounds to diagnose acute stress disorder, there was amnesia, a period of uncharacteristic behaviour, inappropriate behaviour and certainly the antecedent traumatic experience of discovering that his child had been raped by this man. Then the way in which he handled his gun was not the way in which a policeman would handle a gun and there these signs which supported the idea that he probably had amnesia for that time because he was in a state of numbness and shock - I diagnosed acute stress disorder and in terms of that he could not have had criminal capacity.
There were differences in my opinion and the State expert's - they didn't consider acute stress disorder, transient conditions, or anxiety disorder or depression - they were looking for psychosis and that is what they generally tend to do - hard evidence - that is easy. When they were cross-examined they said that they had considered it but it was not mentioned in the notes or anything so there was a lot of argument about that. The information was available to them but they hadn't considered it and I found it - and this is one of the criticisms - they had said that an EEG had been done but it hadn't been done - had it been done they would have found an abnormal EEG and a history of frontal head injury with the implication that his behavioural control may have been impaired across his whole lifetime - given all these other factors it can explain why it spilled over. And it was disappointing that the judge in his findings didn't make any reference to this evidence - it was essentially that he was policeman and that he knew the consequences of his actions, he should not have gone back to the police station - it was after he arrived there that he shot the man. The judge was not convinced that he was not aware of what he was doing. He accepted the state's case that he had criminal capacity.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
Well I think that the question of non-pathological refers to those psychological states which can be defined as abnormal or disordered but of a transient nature that's different to pathological capacity. If the person is mentally ill and not responsible for eg psychotic then it's relatively clear-cut. But when it gets to transient conditions - when a person's momentary condition was such that he didn't have control over his behaviour that is non-pathological incapacity. One looks for a person acting out of character a person's behaviour reflecting cognitive impairment, emotional impairment or a mood disorder, strange behaviour, any symptoms of whatever mental disorder which are of a transient nature.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5.Automatic behaviour which lacks conscious direction
6.Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder
1.Yes, I think is pretty common - it is unlikely to happen just after meeting someone except of course if it is very traumatic
2. Only in one of the cases - the accused alleged that the man had molested him as a youngster - that's the only case so I can't say that's a feature
3. Yes, I think that is usually a part
4. Yes
5. Yes
6. Yes

7. Yes
8. Yes but that is a difficult one to argue legally - you know what the effect is so you shouldn't be taking it: but from a psychological point of view most definitely
9. Yes
10. Yes, should be considered although I haven't really had experience with it in my cases. However, it damages the defence because if it is a PD then society must be protected from the person. On the other hand, it may explain why the person behaved in that way - so it should be considered.

Do you think that sane automatism and non-pathological incapacity are synonymous?
No, I think that non-pathological incapacity is much wider because you can have various diagnoses of transient conditions. Automatism refers to dissociation alone and that is very specific.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
I think PTSD, Acute Stress Disorder, depression, rage dyscontrol disorder, temporal lobe epilepsy, bipolar ½ - manic phase, personality disorder (although not a defence in itself).

Do you think that the defence of non-pathological incapacity is a valid defence?
It creates problems because it is so open to interpretation that's up to the judge and doesn't seem to succeed that often because the state psychiatrists have been very careful to put that forward. And T has influenced the bar and judges about automatism who are therefore very careful in that respect. I think that it can be abused because it is too open for interpretation but I wouldn't know what is a better alternative - at least it recognises that it is not only clearly psychotic people who are criminally non-responsible but that there are other psychological factors which may affect this. At least it opens the possibility of recognising these factors but with that comes the possibility for abuse - it must be more carefully defined but how that must be done, I wouldn't know.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
In the Mpengesi it wasn't accepted as we discussed. In the other one, although it was the plea or defence they brought in psychological factors to show that he wasn't his normal self at that point - the state hadn't picked up on that issue - that was more than 10 years ago and then the concept of non-pathological incapacity wasn't as popular - and there the judge interrupted during the expert testimony and was angry because he said that the defence hadn't proved the case and so couldn't proceed with that kind of testimony. So in my experience it is a defence that is not easily accepted.

Mental health professional 6

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
It's important to note that criminal responsibility is not clinical term - it's a legal term and therefore we should not be commenting on criminal responsibility but on mental state at the time of the offence. But then I have to go onto the concept of diminished responsibility which clearly is in relation to the mental state - the question now is whether we use the concept of responsibility, accountability or culpability and clinically we have difficulty with all three - we tend to lump them all together but there is a difference. With responsibility we are going back to the McNaughton type rules - where the question is whether they appreciate the wrongfulness of the act and whether they can act accordingly. And that is where the levels of responsibility apply - it's not all or nothing - there are levels.
I think that it is difficult for us clinically because this is a non-pathological state which means it's transient - unless you are on the scene, you are trying to piece together a jigsaw puzzle of what happened and it's extremely difficult if you don't have good historians or good witnesses - if you've got good witnesses then it's easy to put together and then you've got a good case - then it's easy to comment. But you actually comment on what the possibilities were - is it probable or is it possible and you are moving into the legal arena -it's not exact. I have had one case where I've been absolutely convinced on all the facts that it was so and in others I'v been damn sure but it's all been a case of giving the patient the benefit of the doubt. So how do you we do it - we don't have a crystal ball.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility :

'... it must be borne in mind... that I the ultimate analysis , the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
I think that we are expressing opinions and not giving a decision and the judge must decide on the facts. It also depends on the witness - how he relates to you and if he can tell you properly and describe what happened and that is what happens in non-pathological incapacity - he has some degree if not all amnesia - how do you evaluate someone like that?

Are you asked to pronounce an opinion on responsibility?
The question of responsibility is often asked but my answer is that it is the decision of the court and that I can comment on his mental state at the time - the court can then take this into account, because responsibility is more than just mental state at the time - I will not comment on that.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
100 which includes successful and unsuccessful- And of course a lot of them were previously under diminished responsibility. With the Laubscher decision, that brought about a lot of cases under this banner. Before that we had Arnold then we had Chretien and then Buchner - and it just snowballed. In British law in the case of R v Cartwright, the judge said that he didn't want to hear this evidence as it's the defence of

the destitute. The last big one was that one before the new Act. The big problem is the onus of proof in the way the legislation goes a the moment. It just doesn't make sense that you can present your defence but the state has to rebut it without the information that the defence has - you have to have all the information to assist with the facts of the case.

Mostly people with either with a combination of alcohol and emotional stress or with situations of domestic violence - so it could involve alcohol along with emotional arousal and disturbed control which results in murder. I've had cases of concussion - which is problematic because if it's pathological it's intrinsic and if it's non-pathological then it's extrinsic - I don't agree with this - then it's either insane or sane automatism. We also had a series which completely failed which involved sexual offences where loss of control was claimed - but we completely rebutted that. Epilepsy has also been forwarded as non-pathological but it is pathological. Drugs and loss of control and impulse control disorders - so-called kleptomania - we had a shoplifting case which actually went the wrong way as she had temporal lobe epilepsy so it became pathological incapacity. Child abuse, we've had others in medical conditions where things like diabetes were involved or where a man had a minor stroke and couldn't control the car - it wasn't non-pathological but he wasn't culpable. PTSD, before it became so fashionable - for example guys who came back from the Angolan war and were true cases of PTSD. Rage reactions like road rage - not that I know what that is. Dissociative states come up frequently - Dissociative Identity Disorder. I've mentioned a wide range but the majority have involved emotional arousal.
You can see how vast this is - this is the defence of the destitute. Because of the doubt and because you don't have all the information people go for the gap - because of the probability, possibility and trying to get a doubt. Because the expert can't say yes or no there's a doubt and they then go for an appeal.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
A case which came out right at the beginning before it became fashionable - before Chretien - 'inhibisies het wesenlik verkrummel'. S v Mundell was defended by F and prosecuted by K. Mundell was living with a girlfriend - he was a part-time student in engineering and she worked at Mobil. He was a nice guy and they had a good relationship. He started to get depressed, not coping with his studies - then there were relationship difficulties, he was very possessive and she wanted to go out while he wanted to stay at home. He came home one night and she wasn't there. He panicked, he looked for her and had a couple of drinks to calm down. Because of his depression he was sexually dysfunctional and she had admonished him about this - and that hurt him. She comes in the door - he is distressed and says 'where the hell have you been? I've been worried sick' and she says 'it's got nothing to do with you, you're not my boss'. She walks past him and goes to the bedroom and changes and goes to have a bath. He gets angry and asks where she's been - she's says that she doesn't want to tell him because he will harm her and she had hidden his knife away. He looks for it and finds it in the cupboard. He goes back to the bathroom and says 'you see I found it' and says that he wouldn't hurt her. She tells him to get out and not to look at her like that because he is not her man anymore. Clinically the factors are here even though the argument may not be so legally. He then asks her why he is not her man and she says that she's been with his best friend and he is a better man. Now whether she meant sexually we don't know, but psychodynamically he interpreted in this way. So he is standing over her in the bath and stabs her five times and walks out. He picks up the phone and is reasonably dazed because we got the tape recordings of the flying squad and he is not making sense - he doesn't come around immediately. He asks them to come immediately and the police find him in a complete dissociative state. This wasn't a complete non-pathological case because he had to get the knife and had to inflict the wounds on the object of this anger - so there was some control and some awareness - those were the days of the 'irresistible impulse'. I was asked by the defence whether Mundell's 'inhibisies wesenlik verkrummel' - I said that I understood it as him being disinhibited. I was asked if his inhibitions could have significantly disintegrated - and I said not completely. They used Chretien where intoxication was the central case. Th judge found him guilty but found extenuation and because of his mental state - he was sentenced to seven years and I managed him for five years in the prison. He was unable to remember anything and was in a true dissociative state and also had PTSD. The evidence commented on his mental state at the time of the offence. I don't like the term non-pathological so I introduced the term 'diminished responsibility due to mental state, not due to mental illness' in Laubscher.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
I think that I'd like to see no pathology; a background of precipitation that is a trigger episode, marked arousal without goal-directed behaviour for which there is amnesia for the event. I'd like to have a dazing afterwards without full recovery. And also I don't want to see complex actions, we are talking about reflex actions - that is automatism. No conscious thought has to be involved - that is automatism.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5.Automatic behaviour which lacks conscious direction
6.Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder
1. Important one
2.Yes
3.Yes
4.Yes
5.Yes
6.That is important - complete amnesia
7.Yes
8.Often present
9. No
10. Ok - for eg the impulsivity of the psychopathy - but this is a slippery slope kind of defence because is the psychopath going to get off because he can't control himself. So I'm not so sure about this.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
Impulse control disorders maybe - if it is there because I think that they can control themselves or even explosive disorders some PD's.

Do you think that the defence of non-pathological incapacity is a valid defence?
I think that it is abused - but it is valid in very rare cases - there was only case where I felt that it was valid where someone had a blow on the head and was completely concussed - and that was a case of automatism and not non-pathological incapacity. I think that they are different concepts - automatism is easier to comment on because I can give you a clinical diagnosis such as dissociation. Whereas non-pathological incapacity is a broad wishy-washy term which doesn't have a direct clinical diagnosis - it covers a wide range of things.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
5/6 have been successful - because there was enough doubt raised and the state couldn't prove otherwise. The unsuccessful cases were as a result of the fact that the defence couldn't show that the person lacked cognitive and/or volitional capacity which rendered him non-responsible.

Lawyer 1

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
Criminal responsibility refers to the fact a person can be held accountable for his deeds. It takes into account whether he appreciates what he is doing and the wrongfulness thereof and whether he is able to direct his will accordingly.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility:

'... it must be borne in mind... that I the ultimate analysis , the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'.

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
One must consider whether the person suffers from mental illness or defect and in this case the psychiatrist's opinion is final. However where this is not the case and the person doesn't suffer from mental disease or defect, then the final decision rests with the judge. He will decide on the basis of all the evidence whether the person is responsible or not. The psychologist will base his opinion on what the accused has told him and the judge then has to decide whether this account is consistent with the factual evidence - he considers all the evidence to determine whether the person was cognitively or conatively impaired.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
In 1996 I did a case where a guy claimed that at a certain point he did not know what he was doing. He and his colleagues were at a nightclub where they had been drinking. He was upset because one of his colleagues had left him behind. He went to his room to fetch his gun and then went to the gate where the guard was - he asked his colleague why he had left him behind and then 'snapped'. His next memory was when he had an accident with his motorcycle . According to witnesses he had grabbed the deceased and then shot wildly around him. He also shot another person but did not kill him. From the facts it became clear that at one point during all of this, he returned to his room and wrote a letter to his mother apologising for what had happened. He had stolen the motorbike and had apparently planned to commit suicide but had the accident.

All the facts show that he was responsible and that he knew what he was doing and that it was wrong. So as you can see in situations like this it amounts to much more than what the psychologist has to say because he is not aware of all the factual evidence and that is what the court takes into account - his opinion is one of the factors which is considered. Sometimes the experts disagree and therefore the court cannot leave the decision to them - it must make its finding based on the factual evidence. I have found that the court tends to accept the opinions of the state witnesses because they seem to be better able to motivate their opinions.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
5 cases
All murder cases where the accused knew the deceased and often alcohol was involved. And of course where the was some kind of discord between parties - often in family relationships. Often there were only two people present and then the factual evidence becomes important because you don't have other witnesses besides the accused.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
All the factual evidence is important and has to point to the fact that the accused did not know what he was doing and therefore couldn't control his actions - it must be proved that he acted automatically and that he had no memory of his actions - this has never succeeded in my experience but it often forms the basis of this defence. They usually argue that the accused was provoked to such an extent that he reacted and didn't know what he was doing and then had no memory of it or he was so angry that he couldn't control himself even though he knew that what he was doing was wrong.

Do you think that sane automatism and non-pathological incapacity are synonymous?
I don't think that they are one and the same thing, and people confuse the two terms. Non-pathological incapacity is a legal term and the court will interpret a claim of sane automatism as non-pathological incapacity - so it is used as one and the same thing even though I don't think that they are. Because there are instances such as when your volitional control is diminished and you couldn't control yourself - that isn't

automatism because in these kinds of cases you may well appreciate wrongfulness but couldn't act in accordance with that appreciation. Non-pathological incapacity is a broader term than automatism because it encompasses more than automatic behaviour. What usually happens in these cases is that the defence does not reveal what their defence is going to be - so they won't call it non-pathological incapacity or automatism - they will lay down the factual basis for the defence and say that the accused at a certain point didn't know what he was doing and had no memory - they usually leave it up to the court to decide - they are quite vague about what the defence is going to be. This results in the prosecutor sometimes not picking up on the defence and when no expert evidence is led it makes it worse because at the end they may only reveal it. But expert testimony is important if you want to prove or disprove the defence - it adds weight to the case if you want to convince the judge. It's not fatal if you don't lead the evidence but it does add weight to your case. Of course this defence is often used when nothing else will work.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5.Automatic behaviour which lacks conscious direction
6.Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder
1. Definitely
2. Yes
3. I think that it depends on the personality of the accused and how he reacts in such situations but I don't think that the threats are so important.
4. This is important
5. Not that important - because we aren't really concerned with the fact that he can't remember afterwards - we are concerned with his capacity at the time of the offence - whether he knew what he was doing or whether he could control himself
6. Yes
7. Yes - that is the first leg of the test
8. A big no because I think that your volitional control may be diminished but I don't believe that it can be to the extent that you can't control yourself at all - besides you know full well what you are doing.
9. That is important
10. I don't think that is important because in the case of psychopathy you can't be excused for that - so it shouldn't be an important factor.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
I can't give a definitive yes or no because I'm not very familiar with psychological or psychiatric categories.

Do you think that the defence of non-pathological incapacity is a valid defence?
I think that it is valid but haven't had a case where it had been valid. I am thinking about provocation where a person can get so angry that he behaves uncharacteristically. Whether such a thing is true is another thing - and if that can be proved then the defence is valid. You can't punish someone for an act which he did not intentionally commit or over which he had no control.

Where the defence of non-pathological incapacity has been raised, in how many instances has your testimony been accepted by the court and on what basis?
In my experience it has never been successful because everything pointed to the fact that the person was aware of what he was doing, was able to control his actions and still went ahead and committed the act.

Lawyer 2

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
Criminal responsibility is the state of mind of the accused at the time of the incident. I would look at what happened before and after so as to assess what the criminal intent was at the time.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility:

'... it must be borne in mind... that I the ultimate analysis , the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?

I think that they can play quite an important role but I don't mean that they can lead the court by the nose by telling it whether the person was criminally responsible at the time - they are adept at interpreting the person's actions- so what we might see as abnormal may well be normal in terms of that specific person's make-up. I really feel that in murder cases it is always useful to have expert opinion to help us with our understanding of the person. I think that they can comment on responsibility but of course that will be based on the account that the accused gave them - they often come to court with this view and when you put to them the factual findings then they have to concede that they are

wrong especially where diminished responsibility is concerned. They can express their opinion but they must be open to factors such as the facts of the case. The problem is that often experts do not familiarise themselves with the contents of the docket and this leads to problems in court. Another problem is that the defence does not disclose everything that they have - and then they spring it on the psychologist or psychiatrist when they are in court and then they have to think on their feet. An example is S v Thompson which is a rape case and we led the evidence afterwards and then new information was submitted by the defence and then I had to recall the state's witnesses. They see it as their right to silence. In this case the Supreme Court of Appeal was very scathing of the defence expert as he wanted to put the accused in the best possible light - they claimed diminished responsibility but their defence backfired - they diagnosed ADHD while the state experts diagnosed Borderline PD which doesn't have a good prognosis and therefore should be a candidate for life imprisonment. The psychological factors which were taken into account were his support systems which were very poor, and his low level of emotional maturity. So it's important how the evidence is presented as it can backfire. He was sentenced to life imprisonment.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account?
S v Henry - this guy was divorced from his wife, they had three kids and he was very close to the youngest one and she would spend weekends with him. There were a lot of problems between him and his ex-wife particularly because she was seeing somebodyelse at that stage. He went to drop the child at home one evening and she was upset and didn't want to go inside. He went to the house and announced himself at the door - he said that he wanted to ask if she could stay with him. He had the gun with him and there was evidence that he removed the gun from the holster before going into the house. There were other people in the house and they heard a number of shots after the argument. He said that he couldn't recall anything but under cross-examination he was able to remember some things - he had selective amnesia and could not remember the bad bits - he remembered the argument and seeing her falling down and someone else entering the room whom he fired shots at. He then walked out of the house and it was clear that he had goal-directed actions during this period. That is why it blew up in his face - there was no trigger before he left the car which could have set off the situation, the argument was not out of the ordinary as the situation had been like that for a long period of time and this was not the first time that the child was unhappy to go home. The fact that he had selective amnesia also counted against him - so the court did not uphold the sane automatism defence. J's defence was commended by the court because it was so clear and unbiased. The defence claimed that the argument was the trigger which caused him to snap and because he was such a good shot he could fire without thinking. But the type of weapon used, required that the weapon be cocked every time before shooting and that requires some thought. It was only at the end of the defence case that J testified and he had the whole record and had the facts and could base his opnion on that as well.

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
One would look at some kind of trigger which would cause the person to lose their ability to reason which can be as a result of a long build-up of aggression or due to alcohol or drugs - it doesn't really matter. The immediate actions at time of crime - is it goal-directed - it's a big problem if you don't have any other witnesses but then you can use the forensic evidence to explain what happened. Thirdly, his actions immediately after the offence. And of course if there is amnesia then it has to be complete - you can't have selective amnesia. Amnesia can be taken into account but it doesn't always have to be there.

For example this case which is starting now S v Philander - the woman who strangled her daughter - in this case until minutes before she killed the child she was fine and there were no signs of stress and anxiety. Afterwards she indicated to the son that the little one was sleeping when she was in fact dead - she told him not to disturb her as she had a bad night - which means that she knew that she had done something wrong. You would not expect someone who did such a thing to react like that- when she came out of the 'snapped' state - to try and hide it - she would should be bewildered and upset, horrified at the realisation of what she had done. In addition, she was not in a trance-like state as she still prepared his sarmies and said good-bye to him at the door.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5.Automatic behaviour which lacks conscious direction
6.Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder
1. Obviously
2. Yes
3. Yes - but you don't need NPI defence because this can fall under self-defence. But then again the expert can argue that this acted as a trigger and then of course you have to take that into account.
4. If there is drug or alcohol intake
5. Yes
6. Yes
7.Yes - but we don't see that often
8. Yes
9. Yes
10. Yes

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
I haven't seen one and I don't think that there is any situation where you are in such a state that you don't know what you are doing or have no control over it. Unless of course you are mentally incapacitated and have mental illness and then you would use the insanity defence

Do you think that the defence of non-pathological incapacity is a valid defence?
I haven't found it to be because I don't believe that you can act and not be aware of what you are doing. I think that all of us are in good control of our emotions and if you let yourself lose control then that is a conscious decision

Do you think that sane automatism and non-pathological incapacity are synonymous?
I think that perhaps from the state side we seem to see it very much as the same thing - I haven't thought that much about it but I guess that is how it is seen.

Lawyer 3

Psychologists and psychiatrists are involved in various instances in assisting the court in assessing criminal responsibility - how would you define the concept of criminal responsibility?
In terms of the law if the person can appreciate the wrongfulness of the act and act in accordance with an appreciation of wrongfulness then the law considers them responsible for something which breaches a societal law or norm. So I think that there should be that link between the act and the intent to act unlawfully. I think it seems to me that over a long passage of time the various elements have been distilled and today it is compartmentalised and when any element is absent then he can't be responsible - so the guilty mind and the act are important. The law now emphasises personal responsibility but a person may think one thing and the court sees it differently.

The following dictum by Ogilivie Thompson J A in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility .

'... it must be borne in mind... that I the ultimate analysis , the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the Court itself. In determining that issue - initially the trial Court and on appeal this Court - must of necessity have regard not only to expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'

The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility - how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
The court jealously guards its function and at the end of the day expert evidence is relegated to being of assistance in helping the court to making a decision and the court is not bound by it. It will make its own independent assessment of the expert evidence and the facts of the case and quite often that is why the expert evidence is disregarded in cases of this nature where you are dealing with non-pathological incapacity. So the court will almost always find on the facts that the foundation on which the evidence is based is not correct and therefore disregard the evidence. The interstices between two disciplines which don't communicate - they speak different languages and don't understand each other and this doesn't lead to a very suitable approach. In SA we have an adversarial system as opposed to an inquisitorial system- you have opposite sides involved in some form of civilised warfare and that is not conducive to what the truth really is- everyone has their own experts and own opinions as to what happened. There is a need for expert testimony but the law needs to come to grips with psychological and psychiatric concepts - and I think that is where the problem lies.

What was the nature of the cases which you were involved in where the defence of non-pathological incapacity was raised?
9 cases - a very popular defence in the last years
Generally murder cases - and it is fairly common that it happens in intimate relationships. But I also had a case of housebreaking and theft.

Valkenberg has an extremely conservative approach and are fixated on the concept of sane automatism - I explained with the Moses case, the defence goes beyond just automatic behaviour and encompasses a range of emotional/psychological factors which can affect capacity

Generally speaking which factors would you consider to be pertinent to a defence of non-pathological incapacity?
The actual facts of the case must accord with the defence. And I've had cases where the accused comes and says that he is guilty and then you listen to the facts and then legally and morally he might be guilty but on the legal precepts he might be innocent. For example in the Moses case he wanted to plead guilty but when I listened to the facts of the case I realised that he has a case for non-pathological incapacity. I then get an expert opinion and usually in these cases they diagnose Borderline or Mixed PD. I concern myself with whether the two legs of the test are satisfied and whether the expert's opinion accords with this.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
In Moses, the defence was predicated on the fact that he could not control himself and therefore we were looking at conative functioning because he could in fact appreciate wrongfulness at the time. One of the first things that I noticed was the extraordinary levels of violence as he almost decapitated the deceased. A problem which arose was that there were in fact three acts which he committed so I emphasised the level of violence and that he meant to kill the person. There was a real danger in that court could say that he knew what he was doing and could act in accordance with that. Valkenberg argued that was goal-directed behaviour while I said that the levels of violence was a result of lack of control so I tried to turn it on its head. The first weapon was inappropriate because it was a fragile ornament and I argued that whatever happened must have been a trigger and he must have reacted instantaneously and impulsively and very little thought was put into it and from there the violence escalated- it was like a supertanker and once it is on course at a certain speed no-one can stop it. I argued that on the face of it, it may have seemed like three acts but in fact it was only one act and that is why I purposefully went on the second leg because I knew that I would have problems on the first leg. Of course it could be argued that he knew what the consequences of his actions would be because he wanted to kill this guy. I was assisted by the fact that the prosecutor was not on top of things because he argued that our case was mitigatory and not exculpatory which flew in the face of various AD decisions. I led evidence of his previous rages and the cumulative build-up which culminated in something which happened over a very short space of time.

Which factors which would you consider to be pertinent to a defence of non-pathological incapacity?
I think that you have to look at the nature of the crime - was a gun used? You are talking about automatism - it's an automatic act. If the person has never fired a gun before then you have to ask how a person who has no control over his will or is not conscious, can load a weapon. Also where was the gun - was it on his person or did he have to go elsewhere to get the gun. You have to ask what was the trigger - what caused the person to explode or erupt? If there was this explosion and he happened to have the gun in his hand, how did he know how to load the weapon if he was not acting consciously. And then of course it is important to look at his background. Did he have amnesia - I would doubt his claim if he

does not have amnesia. You have to look at the person's behaviour before during and after the crime. These factors which I would consider to be important.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity?
1.Cumulative build-up of emotional stress prior to event
2.Cumulative physical/emotional/sexual abuse by deceased prior to event
3.Physical and/or verbal threats by deceased
4.Breakdown of conscious awareness and volitional control
5.Automatic behaviour which lacks conscious direction
6.Inability to exercise control over actions
7.Inability to recall events during a discrete period of time as a result of a breakdown of conscious awareness
8. Intoxication (drug and/or alcohol)
9. Previous psychiatric history
10. Personality disorder
I don't specifically refer to these items and I leave it up to the experts. Provocation certainly forms the basis for most of these cases. Intoxication certainly comes up especially in motor vehicle accidents. All of these certainly come up in one form or another - certainly a prior history helps as was shown in Moses. Amnesia is a difficult one because courts can't understand that whole concept and of course the accused can also simulate it because they think that they can get off.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
It's a difficult issue because that is where you get breakdown between the law and the demands of society - illegal behaviour has to be punished but in certain circumstances the law acquits people. But that is a moral rather than a legal issue. The problem is that in a place like the Western Cape, there are high levels of alcohol abuse and a large number of crimes are committed when people are intoxicated - that combined with poor education, high levels of frustration and anger and inappropriate coping skills - it is not inconceivable that a large number of crimes are committed under these circumstances - but if people are constantly acquitted on these grounds then society will not be appeased. Alcohol definitely plays a role in violent crime and when you bring all these factors together then it falls under the rubric of non-pathological incapacity and that of course leads to non-responsibility.

Do you think that the defence of non-pathological incapacity is a valid defence?
Yes. if it is utilised properly because the whole principle underlying criminal law is that a person is only responsible for acts which are under their control. If a person because of their own unique psychological make-up married with certain circumstances and events are like two trucks racing towards each other. I think in those circumstances it is valid and see it as a progression of the existing legal precept and taking it to its ultimate logical conclusion. But courts are very loathe to uphold the defence and the facts take precedence - they take the line of Valkenberg and look at goal-directed and purposive behaviour - and if you retain a memory then it is particularly bad. I have a problem with that because they fixate on automatism - they say non-pathological incapacity doesn't exist because there is always goal-directed behaviour. It is far too reductionisstic. I certainly don't think that non-pathological and sane automatism and are one and the same thing.

Only Moses was successful. The others weren't because the court felt that the person acted in a goal-directed manner.

Lawyer 4

Psychologists and psychiatrists are involved in various instances in assisting the court is assessing criminal responsibility – how would you define the concept of criminal responsibility?
It is the ability to firstly distinguish between right and wrong and if you can distinguish between the two then you are able to direct your will accordingly., In other words I know that it is wrong and can stop myself from doing it. Criminal responsibility can stand on two legs. In the first place, I am unable to distinguish between right and wrong and am not able to perceive that or secondly, I have the ability to distinguish between right and wrong but am unable to control or direct my will accordingly. There is no psychological definition for responsibility and therefore they use the legal definition and focus on cognition and volition.
The role of the expert is to focus on the cognitive and conative abilities of the person and the factual evidence - this what determines the assessment. It also depends on whether he is testifying for the state or for the defence. The information which he gets from the accused who claims that he is non-responsible and the factual evidence must concur and on that basis he must determine whether the person is responsible. The defence experts base their findings on more than just the facts because they have more information regarding his background available to them. For example, they have information regarding the accused's emotional experiences when he was a child and all those other experiences which affected him when he was growing up – they can show repetitive behaviours or patterns which may not be available to state experts – they therefore base their findings on this kind of information.
The state has a huge problem with this. If a person is mentally ill then the burden of proof rests on him to prove that he is mad, to use a basic term but in the case of non-pathological incapacity the burden rests on the state and it is a huge problem because it is subjective. What was the subjective capacity of the person at the specific time and this depends on the accused who must account for his capacity at the relevant time. By the time the state closes its case, it still hasn't heard this account. What happens is that the state has to call an expert who works solely with the facts and does not have the background information which the defence is privy to. I had a case where I had to re-open my case three times to recall the psychologist to rebut the accused's testimony – just because new information was offered after his testimony. One would expect this to be put to the expert during his testimony but this doesn't always happen.

How do you account for the differences in the assessment by private and state experts?
It's not about time – the problem is that the state expert doesn't have the statutory right to consult with the accused and I have to call him before he has even had the opportunity to assess the accused. Of course the accused has the right to silence and the burden is on the state to prove his criminal capacity. In these cases we look at things like provocation and the psychologist looks for the trigger which caused this violent reaction.

Very often the state psychologist doesn't know about the accused's background – for example that his father abused him when he was younger and when the deceased smacked him all that he saw was his father hitting him – the man whom he looked up to as a father figure. This information has an effect on the case – but the benefit is that you can recall your expert to rebut that testimony.

So are you saying that in these kinds of cases the accused is not always assessed by the state expert?
Well, in fact there is no statutory requirement for the accused in these cases to be sent for observation to a state psychiatric institution. In any even when someone is referred it is not to assess non-pathological incapacity but criminal capacity – on the surface it may seem as if we are looking at non-pathological incapacity. So if a question regarding capacity is raised then we send the accused to determine if there were any pathological causes and whether he is fit to stand trial. However, because the directive of the court is about capacity it often happens that the state experts also look for non-pathological causes anyway – they often have the facts of the case at hand because we provide them with it
There is a problem in these kinds of cases – the precedents have shown that it must be based on some psychological opinion. But there are problems in the legal process itself because the defence doesn't disclose much and often they don't tell you at the start that they are going to argue non-pathological incapacity. Of course the factual evidence is the most important thing and the problem is that the experts base their opinions on the accused's account – and the facts may prove that the accused was unreliable – thus the testimony on which this is based becomes problematic.

Do you think that there are degrees of responsibility?
I'm trying to think of an example. Take for example relationship problems between and man and woman where there's a lot of friction. On one occasion, he smacks her and she picks up a knife and stabs him to death. At first glance we may say that in the first place he shouldn't have smacked her but that was no cause for the stabbing. However if we looked further into their history we may find that he beat her every night and that she had laid numerous charges with the police. There are records to show her injuries and therefore you have a case of diminished capacity. She was responsible at the time but her ability to exercise control over her actions was severely impaired – it's as if her will had been completely broken even though cognitively there was no impairment. Of course she was responsible because she knew that her actions could lead to his death but she was unable to control herself because conatively she was impaired. So capacity is not an all-or-nothing thing – there are degrees and this has an influence on sentencing.I had a case of a man who shot his wife 15 times – it was pre-meditated. He shot his wife after she had thrown him out of the house – he waited until the domestic arrived for work the next morning and then followed her into the house as he did not have a key. He shot his wife in bed. From the facts it was evident that his entire life had revolved around this woman and he was devastated by the separation – he was given 7 years because of this. I don't agree with the sentence in this case but have to say that there are circumstances when diminished capacity plays a role.

The following dictum by Ogilvie Thompson JA in R v Harris 1965 (2) SA 340 (A) at 365 B-C, reflects the court's perspective of the role of expert testimony in the assessment of criminal responsibility :
'...it must be borne in mind that...in the ultimate analysis, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists, but by the Court itself. In determining that issue - initially the trial Court; and on appeal this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period'
The judge expresses a particular view on the role of expert testimony in the assessment of criminal responsibility – how would you view the role of psychologists and psychiatrists in the assessment of criminal responsibility?
I think that the role of psychologists is of cardinal importance but in cases other than mental illness. our courts have ruled against the experts. Even though they are experts in the filed of emotional factors and post-traumatic stress, at the end of the day what matters is the factual evidence. In other words, are the facts acceptable and what can be deduced from that. A psychologist may say that his client had stress and that his father molested him when he was a child. Then he was in a bar and a man came up and touched his thigh by accident and he turned around and stabbed him. The court will say let's look at the facts and it may come to light that this isn't what happened. Prior to the incident he had told his friend that he was going to stab the next guy who comes past him. Then the touching of the thigh won't be the motivating factor anymore. You understand what I mean. So there are reasons why the psychologist's testimony is rejected. I still regard it as being important because he will tell you what the effect of provocation will be on someone who is emotionally overwrought or troubled. We don't live in an ideal world – not all of us were physically abused or fought in the war and therefore the psychologist is needed to enlighten you about the effects of such experiences on a person. But in cases of non-pathological incapacity, the role of the psychologist is less important and not as pivotal as in cases of mental illness.
In this case the Appeal Court judge said that in cases of non-pathological incapacity, the role of the psychologist or psychiatrist is not that important and ultimately it is for the court to decide whether the person has capacity or not. The factual evidence has to support the claim that the person did not intend to kill - the facts are very important in these kinds of cases. So I agree that the role is not the alpha and omega in these cases - of course they have a role to play but it isn't that crucial. In court, the psychologists are expected to be the judge but they are not in a position to do that - the court is in a better position to judge the facts. Often what happens is that an expert will come and say that the person is non-responsible and this finding is based on a particular fact. But then what happens is that the court finds that that fact does not exist or is unacceptable and then the expert's findings cannot be accepted. Another thing that can happen is that the accused can lie to the police about what happened and then of course we have to question his reliability and can't accept what he is saying, as true. So the role of the expert is not that crucial as when there is a case of mental illness.
Criminal responsibility is legal term and it is important to find out if the psychologist or psychiatrist know what it means - a general term which we use is 'did he know what he was doing?'. We are asking legal question here - about cognition and volition. Often experienced experts know that we are concerning ourselves with this, but the newer experts sometimes just focus on the cognitive abilities and forget the volitional aspect.

Could you provide an example of a case of non-pathological incapacity in order to highlight the factors which you took into account to support such a defence?
In this case S v September the accused was buying food in a shop while under the influence of dagga and alcohol. He was diagnosed as a psychopath. Well, he hassled another customer who told him to get lost. He saw this as a challenge and when this guy turned to leave, he stabbed him a few times and the guy died. He went back and robbed the shop – he felt victorious and wanted to show off to his friends who were also in the shop. Then he attacked two guys who were walking on the opposite side of the road. The police were called and by this time there was some ructions in the next street. They found him fighting with his family who were trying to get him into the house. The police tried to arrest him and he broke the doors of the van. He also broke the handcuffs by pulling them apart. According to their psychiatrist he was non-responsible and he was acquitted. On appeal however, it was argued that he was responsible because if you looked at the facts then it was evident that all the time he had to be conscious of what he was doing. He saw these things as a challenge. It was evident that throughout the

whole process he was evaluating his actions and acting consciously. There was no evidence of amnesia and he did not question what had happened at all. He was cool, calm and collected the day after all of this.

In addition to the factors which you have already outlined, would you consider any of the following to be pertinent to a defence of non-pathological incapacity ?

3.1.1 Cumulative build up of emotional stress prior to the event - Yes
3.1.2 Cumulative physical/emotional/sexual abuse by deceased prior to event - yes
3.1.3 Physical and/or verbal threats by the deceased - Yes
3.1.4 Breakdown of conscious awareness and volitional control - Yes
3.1.5 Automatic behaviour which lacks conscious direction Yes
3.1.6 Inability to exercise control over actions - Yes
3.1.7 Inability to recall events during a discrete period of time as a result of breakdown of conscious awareness- Yes
3.1.8 Intoxication (drug and/or alcohol) - no
3.1.9 Previous psychiatric history - yes
3.1.10 Personality disorder – no

Do you think that the defence of non-pathological incapacity is a valid defence?
Yes.I think that it is valid because I think that there it is possible for someone to be provoked to such as extent that he loses control. Of course the problem is that it is open for abuse because people will use it if the can't get joy anywhere else. But I think that ultimately there are instances although, very rare where such a defence would be valid.

What was the nature of the cases which you have been involved in where the defence of non-pathological incapacity has been raised?
Generally murder and in some cases like the one I mentioned earlier, the accused just ran amok but mostly it happens in families - where the one spouse kills the other. So usually there is a relationship between the accused and the deceased.

Do you think that the defence of non-pathological incapacity is synonymous with sane automatism?
Yes I think that they are one and the same thing – that is how we interpret it.

Do you think that there is a particular psychological or mental state which can lead to non-responsibility?
That's a difficult one. I think that a person can be provoked to such an extent that they can lose control over their actions - but these things are always difficult to prove and in all of my cases the defence has never been upheld. So while I think that there is such a thing which can excuse behaviour, the courts are very sceptical about it.

Where the defence of non-pathological incapacity has been raised, in how many instances has your opinion been accepted by the court and on what basis?
None of the cases which I have prosecuted have succeeded. I have done 5 such cases and in none of these could automatism be proven.