BATTERED WOMEN: SELF-DEFENCE AND PROVOCATION

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

University of Cape Town 1993.

DECLARATION

I declare that this dissertation is my own, unaided work. It is being submitted as part of the requirements for the degree of Master of Laws in the Department of Criminal Law, University of Cape Town. It has not been submitted before for any degree or examination in any other university.

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14 March 1993

ACKNOWLEDGEMENTS

I would like to thank my supervisor, Prof Leeman, for guiding the dissertation to completion and for his helpfulness at all times.

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INTRODUCTION

The act of 'being battered' is within the realm of experience of many women and may involve not only actual physical assault but also psychologically debilitating practices, all of which occur in a society which seems to be unable to realise the extent of the problem. 'Wife beating' has always been deemed to be a personal, family problem, to be solved by the wife to the best of her abilities - it is seen as an internal family issue, not the business of neighbours or outsiders and certainly not within the purview of the police or the law.[1] The view therefore held by friends, neighbours and the police has generally been that these women 'encourage, elicit and enjoy this type of abuse'.[2]

The plight of battered women has only, within the last decade, become a topic of great concern, receiving particular attention in the United States and Britain.[3] The irony of this sudden interest in battery is that it has only arisen at the stage where violence against women finally harms men, that is, when battered

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[1] Rape is often an element of 'wife beating' - see Walker *The Battered Woman* (1979) 107-108; In South African law a husband is, legally speaking, incapable of raping his wife, even if the parties are estranged, not living together and the marriage has irretrievably broken down - *S v H* 1985 (2) SA 750 at 752; 'Considerations of public policy demand that marriage as an institution necessary for the maintenance of social life, should be protected and that nothing should be allowed "to impair the sanctity of its solemn obligations or to weaken the loyalty one spouse owes to the other".'- Hahlo *The South African Law of Husband and Wife* (1985) at 23; One is thus not really surprised that, in a country where the sanctity of marriage is revered and the 'marital rape exemption' still exists, the plight of the battered woman is either ignored or not taken seriously by the police and the legal system

[2] Van der Hoven 'The Community's Attitude Towards Wife Battering' *Acta Criminologica* (1989) 54

[3] Ross 'Battered Women: An Invisible Issue' *Unpublished Paper* (1992) 1

women kill their abusers.[4] Historically, the problem of battered women has always existed but never before has there been a public outcry against it. Our society builds the family up to be a place of refuge, a place of safety where people can escape the stresses of the outside world and thus in order' to maintain this idyllic image of the family, society has been guilty of sweeping the entire range of family violence under the carpet'.[5]

Many women are subjected to persistent violence but just how pervasive the problem is, is virtually impossible to ascertain, especially since one has to keep in mind that for every action taken publicly by battered women, there are many more who endure their plight silently. 'Battering' is, contrary to popular belief, a societal issue which transcends all classes - available information indicates 'that abuse is not determined by racial, ethnic or religious factors; nor by income levels or geographical areas'.[6] The myth that battering is a lower class phenomenon is perpetuated by the fact that lower income women seek the help of state hospitals; whereas, middle-class women utilise private doctors and hence do not become part of hospital statistics.[7]

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[4] Mahoney 'Legal Images of Battered Women : Redefining the Issue of Separation' *Michigan Law Review* (1991) 35; The feminist movement has also taken an interest in battered women's issues - see Walker, who is herself a feminist, *op cit* note 1 at XI-XII

[5] Walker *op cit* note 1 at X

[6] Crump 'Wife Battering' *SACC* (1987) 231

[7] *loc cit*

A recent survey conducted by the National Institute for the Prevention of Crime and Rehabilitation of Offenders (NICRO) in the districts of Wynberg, Cape Town, Athlone and Bellville in September of 1988 indicates that 423 cases of battering were reported over a period of one month.[8] House of Representatives social workers estimate that eight out of every ten women on their caseloads is battered.[9] Rape crisis estimates that between one in every six women is assaulted by her husband or lover.[10]

The fact that people do not believe that domestic violence occurs or alternatively that it is not a matter for public concern, is evidenced by the traditional responses of both the police and the legal system which tend to focus on the woman in a violent relationship rather than on the man[11] or the battering process and this creates a tendency to see the woman as the problem.[12] The question 'why didn't she leave ?' has thus far shaped both the legal and the social enquiry on battering with much academic

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[8] Nott 'Battered Women and the Criminal Justice System' *Unpublished Letter* 2

[9] *loc cit*

[10] *loc cit*

[11] Research has shown that batterer's come from all walks of life and without exception they deny, even in the face of evidence, that they hurt their partners. 'Thus the general picture of the batterer is that he is a man under stress from society and the market place, an under-achiever, dependant and unsure of himself, who needs help but refuses to recognise that he has a problem.' More research is desperately needed because these men need all the help we can give them - Crump *op cit* note 6 at 238

[12] 'The victim of marital violence is subjected to secondary victimisation by her own family, the community and criminal justice officials, who are of the opinion that she contributes to the violence, and probably deserves the hiding. People assume she must have done something terrible to elicit such a response from her husband...'- Van der Hoven *op cit* note 2 at 54

expertise developing in order to address this very question; but, what is really needed is an understanding by those agencies dealing with abused women, of the dynamics of the relationship between a battered woman and an abusive male, with all its underlying characteristics of intimacy, familiarity and dependency.[13] Thus it is clear that the reasons why battered women stay with their husbands, can only really be explained in the context of the battered woman syndrome because the psychological effects of repeated brutal beatings are beyond the understanding of the average person.[14] Chapter one of this paper will therefore begin with a description of the battered woman syndrome, for it is imperative that one have an understanding thereof before undertaking any sort of evaluation of the conduct of a battered woman who has killed her abuser.

Two of the possible defences which attorney's for battered women who kill their abusers, may utilise, are self-defence and provocation; however, both of these may be problematic in the light of the circumstances which surround the killing. Chapter two of this paper will examine the traditional requirements for self-defence and chapter three, the elements necessary for

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[13] Steele and Sigman 'Reexamining the Doctrine of Self Defense to Accommodate Battered Women' *American Journal of Criminal Law* (1991) 169

[14] Venesy '*State v Stewart*: Self-Defense and Battered Women: Reasonable Perception of Danger or License to Kill' *Akron Law Review* (1989) 95

provocation; and will highlight those areas which have proved to be problematic in mounting a defence for a battered woman who has killed. South African, English and American law will be discussed.[15]

[15] Studies from abroad indicate that the problem of battery is a universal one, with similar patterns; thus one can rely on the research and theories developed abroad and then link them to the South African situation - Ross *op cit* note 3 at 1. Research is needed in South Africa because with its various ethnic groups it is in the position to add unique knowledge to the topic - Crump *op cit* note 6 at 241

CHAPTER ONE : THE BATTERED WOMAN SYNDROME

There is, as yet, no single definition of the concept of a battered woman. Dr Lenore Walker, one of the leading forensic psychologists in this field in the United States, in her initial definition of the battered woman, emphasized the control of the woman by the batterer :

> A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.[16]

However the development of the battered woman syndrome resulted in a focus on incidents, in other words definitions would look toward the degree, frequency and kind of battery involved.[17] Walker was unhappy with her control-based definition because she found in practice that as women became more assertive so they encountered more abuse and it disturbed her to think 'that changes in power relationships may generate violence or that men

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[16] Walker *op cit* note 1 at XV

[17] Physical violence resulting in bodily injury was the generally accepted research standard in the areas of both wife and child abuse but Walker felt unable to ignore the claims of battered women who insisted that psychological abuse was often more harmful than the physical. She began collecting data on both forms and found that they could not be separated. Physical abuse is relatively easy to document but in order to measure psychological abuse, 'the severity must be estimated with both the frequency with which it occurs and the subjective impact it has upon a woman - see Walker *op cit* note 1 at XIV-XV

would resist changes in women's empowerment.'[18] Walker then adopted an incident-focused definition :

> A battered woman is a woman...who is or has been in an intimate relationship with a man who repeatedly subjects her to forceful physical and/or psychological abuse....'Repeatedly' means more than one assault [at least 'two acute battering incidents'].[19]

This definition 'is useful when women's experience must be described to a court'[20]; because, incidents can more often than not be proved and thus provide objective support for the woman's feelings and perceptions.

Feminist scholars have attempted to define battering by including the many ways in which women are harmed - thus also focusing on incidents.

> A battered woman is any woman who has been the victim of physical, sexual, and/or psychological abuse by her partner....Physical abuse is assault that ranges from hitting or slapping at one end of the continuum to homicide at the other [citing Pagelow]. Physical abuse may or may not be accompanied by physical injury and/or by the victims' attempts to defend themselves.[21]

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[18] Mahoney *op cit* note 4 at 29

[19] *loc cit*

[20] *Ibid* at 30

[21] *loc cit*

This definition is important from the point of view that it does not require that the woman should have suffered any physical injury; but on the other hand, it may cause problems in that one incident of violence in the course of a long term relationship is often seen as insufficient to constitute a battering relationship.[22] Hence Walker's requirement of 'repeatedly' makes good sense, in that it allows the judge to sort those women who have perhaps been struck once, from those in a battering relationship.[23]

Another definition which focuses more specifically on the actual incidents of assault is:

> '[B]attered women' are those who have been struck repeatedly, often experiencing different kinds of physically violent actions in one incident, and usually, by the time they are identified, having experienced a series of such incidents, each consisting of a cluster of violent acts.[24]

This definition because of its emphasis on 'striking' is also problematic because women who have experienced sexual abuse or have been threatened with a deadly weapon may not recognise their experience as a form of battering especially where they were not physically injured.[25]

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[22] *Ibid* at 30-31

[23] *loc cit*

[24] *loc cit*

[25] *loc cit*

The above provides just a selection of the many ways one can define a battered woman - not to mention the whole range of definitions available to explain lesbian battering, most of which 'considers the victim of domestic violence within the framework of continued attempts by the batterer to achieve and maintain dominance and control in the relationship'.[26] It is submitted that Walker's incident-focused definition is to be preferred because it best illustrates the experience of a battered woman; and by that it is meant that a woman who has been battered can recognise her circumstances within the definition. In addition, Walker's definition facilitates the submission of proof.

When a woman kills her abuser, she encounters the problem of the legal system being unable to understand her experience. A relationship within which battering occurs is beyond the understanding of most people and in particular people are unable to grasp for themselves why the woman failed to leave the relationship. The day to day routine of women's lives, the constant demands of their partner and children, are often not seen as relevant to an explanation of a violent marriage or relationship and thus expert testimony is essential to explain the experiences of abused women and the way in which said abuse alters their way of experiencing life.

In essence, expert testimony on battered woman syndrome is used to get the woman's story told and must demonstrate that this particular defendant 'historically experienced the components

[26] *Ibid* at 32-33

making up the battered woman syndrome and, accordingly, acted logically, reasonably and legally in taking a life to preserve her own.'[27] The testimony has to be used to overcome a number of historical and stereotypical notions namely : she should have left; why did she not make use of the courts, community resources and law enforcement personnel who could have helped her; she seems to lack remorse; there really was no imminent danger - and a number of other obstacles all of which seem to point towards anger, revenge, murder and cover-up.[28]

The defence of any battered woman who has killed her abusive partner may thus be said to hinge on the expert testimony given to explain what she went through, for it is the biographical and background history of the accused; for example, she was abused as a child, experienced mental torture and physical beatings which resulted in hospitalization on more than one occasion, she sought help from every available source, she left once before but he hunted her down - which will convert her from a heartless, cold-blooded killer to the tragic figure sitting before the court.

[27] Nodland 'Defending Battered Women : Everything She Says May Be Used Against Them' *North Dakota Law Review* (1992) 137

[28] *Ibid* at 134-35

The battered woman syndrome develops over a period of time in which a woman has been physically and psychologically[29] abused by a man with whom she has an intimate relationship, a spouse or lover; and therefore one may describe the syndrome as a 'collection of specific characteristics and effects of abuse on battered women'.[30] The battered woman syndrome attempts to explain the reactions of women trapped by domestic violence in terms of the cycle theory of violence and the theory of learned helplessness and may also include descriptions of their economic and social backgrounds.

In the United States, the most widely utilised and accepted explanation of the general characteristics making up the battered woman syndrome, is that of Dr Lenore Walker, who divides the relationship producing the syndrome into three phases :

> '[A] tension building phase, a release through acute battering and a final cycle of apparant contrition and remorse by the batterer.[31]

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[29] Six forms of abuse have may be identified - see Walker *op cit* note 1 at 78-184 [the categories and descriptions used here are my own]
1) Physical - hitting,punching, burning, stabbing, shooting
2) Psychological - controlling, threats, isolating, destruction of property and pets
3) Sexual - marital rape, forced unwanted sexual acts, physical attacks on sexual parts
4) Emotional - persistent attacks on self-esteem, belittling, degrading, criticising, undermining
5) Economic - money denied to the woman so that she has to manage with less than the amount needed to cover the household costs and is forced to do without
6) Social - isolated from friends and family, not allowed to go out and work, denial of access to telephone and family car

[30] Mahoney *op cit* note 4 at 36-37

[31] Nodland *op cit* note 27 at 132; Walker *op cit* note 1 at 56-70

During the first 'tension-building' phase, the battered woman tries to calm and please the battering male to avoid increasing violence[32] - minor battering incidents may occur, and the woman eventually adopts the batterer's belief that she deserves physical, sexual or verbal abuse.[33] The second stage is the violent one, with uncontrolled abuse and often the infliction of physical injury, following which the woman often reacts like a disaster victim, emotionally withdrawing for a short period of time and refusing to seek help.[34] The third stage is characterized by the battering male's loving behaviour during which time he will beg for forgiveness and promise not to do the same again, thus re-cementing the bonds of the marriage or relationship and providing positive reinforcement as to why she should not leave.[35] This third stage may last several months but will eventually progress into stage one of the violence cycle it is this 'cyclical nature' of the violence which, according to Dr Walker, explains the failure of the battered woman to leave the relationship, because she always thinks that things will improve.[36]

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[32] Walker *op cit* note 1 at 56-59

[33] Ogle 'Murder, Self-defense, and the Battered Woman Syndrome in Kansas [*State v Stewart*, 243 Kan. 639, 763 P. 2d 572 (1988)] *Washburn Law Journal* (1989) 402-3

[34] Walker *op cit* note 1 at 59-65

[35] *Ibid* at 65-70; see Nodland *op cit* note 27 at 133 - some battered women may even see the violence they experience as 'normal' having themselves come from homes where battering was the norm

[36] Nodland *op cit* note 27 at 133; As the battering relationship progresses, so the violence increases in frequency and severity, while the loving contrite behaviour declines - see Venesy *op cit* note 14 at 94

The following are some of the traits exhibited by battered women[37]:

- accepts traditional male and female roles
- is passive and placating : easily dominated
- doubts her own sanity
- her primary emotion is fear
- she believes she is worthless, low self esteem
- feelings of guilt that the marriage is failing
- the tendency to accept responsibility for the batterer's actions
- financially dependant on the batterer
- believes her children need a father
- fears reprisal if she leaves
- undergoes a personality change and is unable to think about the future
- lives her life from one beating to the next and thinks primarily of how to avoid the next beating
- has unshakable faith that things will improve or feels that there is absolutely nothing that she can do about her situation.

The above traits all contribute to an explanation of why battered women remain in their relationships. However, one of the most significant aspects of her problem is the condition of 'learned helplessness' which was developed as a psychological theory by Martin Seligman based on laboratory experiments conducted on

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[37] Mahoney *op cit* note 4 at 38; Nodland *op cit* note 27 at 133; Walker *op cit* note 1 at 31

animals and which shows that animals and people can learn to be helpless when faced with traumatic and frustrating conditions from which there appears to be no escape.[38]

Dr Walker applied the theory of learned helplessness to battered women and used it to dispute the so-called 'masochism theory' which would have one believe that these women enjoy the brutal beatings they receive and thus remain in the relationship.[39] As a by-product of the cycle of violence, women develop learned helplessness whereby they see any voluntary responses as futile. [40] Learned helplessness becomes part and parcel of a battered woman's survival and coping skills and in essence allows her to remain alive with as few serious injuries as possible but simultaneously results in the non-development of escape skills. The battered woman suffers from emotional paralysis and an inability to think clearly, both of which results in an inability to think about escape.

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[38] Walker *op cit* note 1 at 45-46; Caged dogs quickly learn to jump a partition when given a mild electric shock; if a light is switched on shortly before the shock they learn to jump to avoid the shock completely, however where the dog was placed in a position where it was unable to avoid the shock, it is then extremely difficult for the dog to later learn an avoidance response. The animal merely sits passively and endures the shock even though a jump across the partition would end its discomfort. 'Human subjects placed in experimental situations in which they are unable to control shock or loud noise make fewer escape responses, when escape is possible, than subjects who have not had a prior experience of helplessness.'

[39] *Ibid* at 47-48; see also Van Der Hoven *op cit* note 2 at 56; Crump *op cit* note 6 at 236-7

[40] *loc cit*

> Once women are operating from a belief of learned helplessness, the perception becomes reality and they become passive, submissive, 'helpless'. They allow things that appear to them to be out of their control actually to get out of their control.[41]

Moreover, when dealing with married women, there is an increased risk of learned helplessness because sex roles and stereotyping are taught within marriage and, what is more, society encourages the good wife to be passive and dependent. Financial dependency and responsibility for the children further this feeling of helplessness.[42]

> The unrelenting cycle of violence and feelings of helplessness place the battered woman in a constantly heightened state of terror because she believes that one day the batterer will kill her.[43]

The reason battered women do not talk about their problem or seek help is fear.[44] The fear experienced by a battered woman is all-permeating and motivates much of her behaviour whether she is

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[41] *Ibid* at 48

[42] Nodland *op cit* note 27 at 133; Many women have not had to earn their own living and know of no way to keep themselves if they leave their husbands. If they leave, they have nowhere to go and no-one to help - some countries do have shelters but these are also often overcrowded - Crump *op cit* note 6 at 234

[43] Venesy *op cit* note 14 at 95

[44] Ogle *op cit* note 33 at 402

aware of it or not. Threats of more violence frighten her into total silence, for after all, she has every reason to believe, having heard and seen what he has done in the past, that he will carry out his threats.

- 'If you ever leave me, I'll kill you'
- 'I would rather see the children dead than with you'

Leaving however does not always resolve the battered woman's problem because when the batterer finds her, as he generally will, their relationship and the abuse are much worse than before her escape and this time he might very well execute his previous threat and kill her.[45]

Thus, it is, that as the assaults escalate, the likelihood that the woman will act on her need to protect herself increases.

> In some cases, the battered woman resorts to violence, not while an assault is actually occurring, but rather during the lull between attacks. She knows the respite is only temporary. She sees it as the only time she has any real chance to defend herself.[46]

Battered woman kill therefore because there comes a time when it appears that no other remedy will save their lives. One of the main hurdles which expert testimony on the battered woman syndrome must help overcome, is to show that the killing was not

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[45] *loc cit*

[46] Steele and Sigman *op cit* note 13 at 171

premeditated - for then one is dealing with murder - but occurred in response to, or as a result of, years of abuse which led to feelings of such terror and fear in the battered woman that she firmly believed that if she did not kill her batterer at that particular moment, he would kill her first. She acts at that particular time because she feels it is the only one available to her - she does not plan ahead.

CHAPTER TWO : SELF-DEFENCE AND THE BATTERED WOMAN

'Classic' self-defensive action is embodied in male stranger-to-stranger assault where the victim uses only the amount of force necessary to resist the assault - and the attacker is killed.[47] The emotions that may understandably cloud the victim's judgement about the necessary amount of force, derive from the victim's fear of the attacker's violence and of his unknown potential for presenting an unknown life-threatening risk to the victim.[48] The victim of the assault must however reasonably believe that the danger of death is imminent.

In the case of battered women who act in self-defence, the context of their action is distinct from classic stranger-to-stranger assault; in that, they know their abuser and specifically know his potential for causing them physical injury.[49] These women may thus strike back at times that seem to the outsider less dangerous than the previous episodes of abuse, or may not seem life threatening at all.[50] Nevertheless, battered women may reasonably believe that their lives are at risk because the abuser does or says something which, in the past, has indicated great danger.

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[47] Blackman 'Potential Uses for Expert Testimony : Ideas Toward the Representation of Battered Women Who Kill' *Women's Rights Law Reporter* (1986) 230

[48] *loc cit*

[49] *loc cit*

[50] *loc cit*

The law governing self-defence in South Africa, England and the United States will be outlined and then discussed from the perspective of the battered woman, in order to highlight the particular problems which arise when a battered woman who has killed her abuser attempts to rely on self-defence.

The following issues are of particular relevance :

- there must be an 'imminent attack'; however, the battered woman often kills in a non-confrontational situation
- the defensive act must be necessary to avert the attack (this also encompasses the notion of reasonableness), that is, there must be absolutely no other way to prevent the attack; however, the battered woman, one could argue, has recourse to the police, the law or welfare agencies before resorting to such a drastic course of action
- whether or not there is a duty on the battered woman to flee or retreat.

I : THE POSITION IN SOUTH AFRICA

In order for an accused person to be held liable for an offence, the proscribed act he[51] is alleged to have committed must *inter alia* be unlawful.[52] Unlawful conduct is generally that which is in conflict with the criminal law.[53] An accused may however justify his otherwise unlawful act by raising as a defence a ground of justification.[54] One of the established grounds of justification is that of private defence.[55]

Burchell and Milton[56], offer the following definition of private defence:

> A person who is the victim of an unlawful attack upon person, property or other recognised legal interest may resort to force to repel such attack. Any harm or damage inflicted upon an aggressor in the course of such private defence is not unlawful.

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[51] For the purposes of brevity and readability, the use of *he* and *his* will be understood to mean *he/she* and *his/hers*

[52] Snyman *Criminal law* (1989) 67

[53] Visser and Mare *Visser and Vorster's General Principles of Criminal Law Through the Cases* (1990) 179

[54] Snyman *op cit* note 52 at 68

[55] See Burchell and Milton *Principles of Criminal Law* (1991) 109-20; Snyman *op cit* note 52 at 97-109. The term private defence is to be preferred to that of 'self-defence' because the latter implies that the only issue is the defence of the physical self or person but the defence is in actual fact also available for the protection of other persons and interests such as property, chastity and liberty - see Snyman *op cit* note 52 at 97; Burchell and Milton *Ibid* at 109. The term self-defence shall be used together with private defence in this paper because it deals specifically with the situation where an accused has killed to protect his own person.

[56] Burchell and Milton *op cit* note 55 at 109

Thus, where a person acts in private defence, he acts lawfully, provided that his conduct complies with the requirements of private defence and he does not exceed the limits thereof.

The concept that' justice should not yield to injustice' forms the basis for the recognition of private defence as a justification ground.[57] Generally, it is accepted that a citizen must first and foremost rely on the agencies of the State, namely the police and courts of law, to protect his legal interests; however, it is realised that it is not always possible for the State to provide immediate protection to each and every person thus, in such circumstances ' it is the inherent right of the individual, accepted by all law, both natural as well as civil to resort to private defence.'[58] In order that a person, who has resorted to private defence may escape criminal liability, he has to show that the defence was necessary in the situation in which he found himself and that it was a means appropriate to the danger which confronted him.[59] The attack and the defensive action must therefore both comply with certain requirements.

THE REQUIREMENTS OF THE ATTACK

1. An attack

Fear alone is not sufficient to justify a defence.[60] Private

[57] Snyman *op cit* note 52 at 98

[58] *loc cit*; Burchell and Milton *op cit* note 55 at 109

[59] Burchell and Milton *op cit* note 55 at 111

[60] *Ibid* at 112

defence may only be utilised where there is an attack which has already commenced or is imminent.[61] 'Commenced' means that private defence may only be resorted to where the attack has already begun and there is no time or opportunity to seek other forms of protection.[62] 'Imminent' means that the attack is about to begin immediately - what is important here, is not so much the imminence of the threat, but rather 'the immediacy of the response required to avoid the attack'.[63] Where the threat of attack is such that it cannot be avoided, the victim does not have to 'wait until the blow has fallen'[64] before defending himself but may act 'with such anticipation as is necessary for effective protection'.[65] The attack must not have been completed, for any measures taken after an attack has ceased, would be retaliatory rather than defensive and therefore not justified.[66]

[61] *loc cit*; Snyman *op cit* note 52 at 100; De Wet and Swanepoel *Strafreg* (1985) 75; Van Zyl Steyn 'Noodweer' *SALJ* (1932) 470

[62] Burchell and Milton *op cit* note 52 at 112

[63] *loc cit*

[64] *R v Hope* 1917 NPD 145 at 146

[65] Burchell and Milton *op cit* note 55 at 112

[66] *S v Mogohlwane* 1982 (2) SA 587 (T) discusses what constitutes a completed attack. The victim of a robbery had run from the scene to his home, obtained a weapon and returned to recover his property from the robber killing him in the process. The court, with reference to the doctrine of counter-spoliation, concluded that if the acts of the accused had been part of the *res gestae* of the robbery, they had been a response to an uncompleted attack upon legal interests and therefore justifiable in law. 'This case may also be relied on as authority for the view that a person is not expected to flee : in certain circumstances he is even entitled to run away and then return to confront his attacker. However, this principle must be applied restrictively and with circumspection lest people take the law into their own hands on an unacceptable scale.' - see Visser and Mare *op cit* note 53 at 201

The case of *Ex parte Die Minister van Justisie : in re S v Van Wyk*[67] dealt with the issue of the reasonableness of self-defence in those circumstances where a person's conduct anticipates an attack. *In casu*, a shopkeeper, who had tried every other manner of protection, rigged up a shotgun in such a way that a person breaking in would be hit in the leg. A person broke in and sustained a fatal wound. The shopkeeper, Van Wyk, was acquitted on a charge of murder but the Minister of Justice asked the Appellate Division to answer two questions of law: (1) whether one can rely on private defence when one kills or injures a person in defence of one's own property (to which they unanimously answered yes); and, (2) whether Van Wyk had exceeded the bounds of self-defence. The essential question to be asked in determining whether the bounds of self-defence were exceeded is whether the steps taken were the only reasonable means to protect the interests threatened. 'It is submitted that the majority of the judges correctly decided that the only reasonable option Van Wyk had was the setting of the gun.'[68] This case thus decided that one may, in order to defend one's property, pre-empt an attack by setting up a defensive mechanism some hours previously. Human life, it is submitted, is more valuable than property, so surely, a person who knows that an attack is going to occur but does not know precisely when - as is the situation with a battered woman who knows from past experience that her batterer is capable of carrying out his threats and thus fears for her life - may also pre-empt the attack and may still rely

[67] 1967 (1) SA 488 (A)

[68] Visser and Mare *op cit* note 53 at 197

on self-defence.

One of the main problems when dealing with the situation where a battered woman has killed her abuser is that there is usually no attack - either commenced or imminent. A cursory examination of the facts of the American case of *State v Stewart* [69] highlights this reality :

> Mike Stewart had abused and threatened his wife Peggy throughout their marriage. On the night of June 1, 1986, while Peggy lay in bed next to Mike, the words 'kill or be killed' kept going through her mind. Peggy got out of bed, took her husband's loaded gun from the spare bedroom and shot and killed Mike while he slept.

The battered woman, it must be remembered, operates from a position of extreme fear. She knows what her batterer is capable of and therefore has no reason to doubt that he will carry out his threats. Expert testimony thus becomes an essential tool in the defence of a battered woman because it can, through an explanation of the battered woman syndrome, offer reasons for the woman choosing that particular time to act - it can explain that she was convinced that the next time she would not survive the batterer's beatings.

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[69] *State v Stewart* 243 Kan. 639, 763 P.2d 572 (1988) at 574-575

The victim, it has already been stated, does not have to 'wait until the blow has fallen' before defending himself and thus Burchell and Milton argue that 'the victims of the' battered wife' syndrome ought to be allowed to pre-empt the anticipated and inevitable attack of the battering spouse.'[70] There is as yet no South African case law on this point but it has, as shall be seen in the following section, been dealt with by the American courts.

2.Protected interest

One may resort to private defence to protect one's life and to prevent serious bodily harm.[71] The privilege of private defence is not restricted to the interests of the person attacked but may be invoked to defend the interests of a spouse, child or parent.[72]

3. Unlawful

A person cannot act in private defence against lawful conduct.[73]

REQUIREMENTS OF THE DEFENCE

1.The defensive act must be necessary to avert the attack

Private defence is only justified if there is absolutely no other

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[70] Burchell and Milton *op cit* note 55 at 112

[71] *Ibid* at 113; Snyman *op cit* note 52 at 102; De Wet and Swanepoel *op cit* note 61 at 77; Van Zyl Steyn *op cit* note 61 at 473

[72] Burchell and Milton *op cit* note 55 at 114

[73] *loc cit*; Snyman *op cit* note 52 at 98; De Wet and Swanepoel *op cit* note 61 at 72; Van Zyl Steyn *op cit* note 61 at 648

way to avert or ward off the attack.[74] However, even if there are other remedies available, the defence is not unnecessary if at the time of the attack it was impossible for the threatened person to make use of these other alternatives.[75] The premise underlying private defence is, after all, that a person should be able to 'take the law into his own hands', so to speak, but only where the ordinary legal remedies do not afford him adequate or effective protection.

This then provides the second stumbling block for a battered woman who wishes to rely on self-defence; because, everyone will be asking the question: 'Why didn't she leave or seek help from other sources?'

Economic considerations and fear of what the batterer will do to her if he finds her are two of the main reasons why women do not leave. South Africa has only one shelter offering refuge to battered women[76]; so, she invariably has nowhere to go. Involvement with the welfare carries the risk that the woman's children will be taken away and placed in foster care, due to the violent home environment.[77] Friends, relatives and neighbours are generally unsympathetic and often hold the opinion that she must

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[74] *S v Van Wyk op cit* note 67 at 497H, 509C-D; Snyman *op cit* note 52 at 101; Burchell and Milton *op cit* note 55 at 115

[75] Snyman *op cit* note 52 at 102

[76] Crump *op cit* note 6 at 240 - England by comparison has over 200 shelters, all of which are full.

[77] Van Der Hoven *op cit* note 2 at 57

have done something to deserve the assault.[78]

Battered women are generally disappointed with the reaction of the police.[79] 'The common experience is that the police either fail to respond to calls for help, or merely warn male abusers.'[80] The reason why the police do not interfere is because they regard battering as a domestic affair and secondly they feel their time is wasted by countless women who lay charges only to drop them again.[81] The legal devices, interdicts and peace orders, available to protect women from continued male abuse have usually also proved inadequate in practice.[82]

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[78] *loc cit*

[79] *Ibid* at 56; Hansson 'Working Against Violence Against Women' In *Putting Women on the Agenda* (Ed) Bazilli (1991) 188

[80] Hansson *op cit* note 79 at 188

[81] Van Der Hoven *op cit* note 2 at 56. Women are hesitant to report or prosecute men (especially husbands) who beat them for a number of reasons : 1.FEAR - of further abuse in reprisal; 2.GUILT - feels she caused the violence; 3.SHAME - that she is unable to have a better marriage or relationship; 4.LOSS OF BREADWINNER - the perception (many times real) that the jailing and ultimate loss of the breadwinner would cause economic hardship; 5.SANCTITY OF MARRIAGE - strong religious beliefs that the union is to be maintained despite 'any problems'; 6.LOVE - nothing more need be said - see Pamphlet released by the *National Centre on Women and Family law* New York

[82] Hansson *op cit* note 79 at 188 - 'Interdicts are the most successful of the two because the police generally tend to respond to violations thereof but they are not granted speedily and are expensive [R2000], inflexible and often not suited to domestic situations. Peace orders although more economical and cheaper to acquire, are frequently ineffective in practice, because the police do not treat the violations of such orders as matters which deserve serious attention.' Hansson further recommends at 189 - a series of policies which will more effectively protect women; firstly, legislation should be introduced making it the legal duty of the police to respond to every call for assistance from an abused woman with a mandatory short term arrest policy; secondly, specially designed Domestic Violence Orders (DVO's) such as those used in Australia should be introduced, which can be tailored to suit individual need and the requirements of specific situations and thus DVO's are not limited to preventing physical violence but also sexual, financial, social, verbal, psychological and emotional abuse. DVO's may also be sought by *de facto* partners, parents, children and all those comprising a household. DVO's should be offered automatically and free of charge and in emergencies may be issued by the police and later ratified by a magistrate.

All of the above reactions only help to reinforce the battered women's feelings of helplessness. She may have discovered from past experience that her calls for help either go unanswered or that no satisfactory solution to her problem is found; and thus, this time around, she may decide not to call for help but to rather 'take the law into her own hands'. One could perhaps argue here that the ordinary legal remedies did not afford this particular battered woman adequate or effective protection and thus she, in her own mind and as a direct result of her experiences as a battered woman, felt she had no alternative other than to kill her batterer - before he carried out his threats and killed her.

A question which often arises in connection with whether or not the defensive act was necessary, is whether the attacked person should flee, if at all possible, in order to escape from (ward off) the attack. Where the circumstances are such that to flee would place the defender in an even more dangerous position then it goes without saying that he is entitled to stand his ground and defend himself.

Snyman[83] and Burchell and Milton[84] both state that the South African courts seem to adopt the view that, where it is not dangerous to do so, the attacked person should flee.[85] However, they both submit that there is no 'absolute duty to retreat' and

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[83] *op cit* note 52 at 102

[84] *op cit* note 55 at 116

[85] *R v Zikalala* 1953 (2) SA 568 (A) 571-72

that 'the approach of our law ought to be that the question of whether or not the defender could or should have retreated is merely one of the issues to be taken into account in assessing whether the defender's defensive act was allowed by law.'[86]

2.The defensive act must be reasonable

The limits of private defence are impossible to describe with any degree of precision because everything depends on the circumstances of the particular case. The approach to be favoured[87], which was adopted by the court in *S v Van Wyk*[88] is whether the defender acted reasonably when he defended himself or his property. In other words the court will look at what may reasonably be expected of the attacked party in the circumstances of each case.[89]

> This test allows the court to assess the defence in the context of factors such as the nature of the attack, the interest threatened, the relationship of the parties, their respective age, sex, size and strength, the location of the incident, the nature of

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[86] Burchell and Milton *op cit* note 55 at 116-17

[87] South African law had previously evolved a version of proportionality, whether the means used was commensurate with the danger. The problem with the proportionality rule however lies in determining between which two elements this 'certain balance' must exist : for example, must the balance be between the interest the defender is trying to protect and the interest he harms; or, must a balance exist between the attackers and defender's weapons - unrealistic for today. See Snyman *op cit* note 52 at 103; De Wet and Swanepoel *op cit* note 61 at 78

[88] *op cit* note 67 at 496

[89] *S v Ntuli* 1975 (1) SA 429 (A) at 437E; *S v Motleleni* 1976 (1) SA 404 (A) at 406

the means used in defence, the result of the defence.[90]

None of the above bodes well for the battered woman who kills her abuser; because her actions are not seen as reasonable.

3.Defence must be directed against the attacker.[91]
The right to private defence can be exercised only against the attacker and not against a third party.[92]

THE TEST OF PRIVATE DEFENCE

The test of private defence is an objective one[93] and therefore, each requirement of the attack and of the defence must be judged from 'the external point of view rather than in terms of the accused's perceptions and his assessment of the position at the time that he resorted to private defence'.[94] In other words all questions must be decided by the court on an assessment of the evidentiary circumstances and not according to the defender's

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[90] Burchell and Milton *op cit* note 55 at 118

[91] Snyman *op cit* note 52 at 104-5 adds a fourth requirement which has not yet been canvassed by the South African courts; namely, that the attacked person must be aware of the fact that he is acting in private defence. De Wet and Swanepoel *op cit* note 61 at 76-7 writes 'en sover my bekend het dit ook nog nie pertinent voor ons howe gedien nie'

[92] Snyman *op cit* note 52 at 101; Burchell and Milton *op cit* note 55 at 118; De Wet and Swanepoel *op cit* note 61 at 76; Van Zyl Steyn *op cit* note 61 at 470

[93] *S v Ntuli op cit* note 89 at 436; *S v Motleleni op cit* note 89 at 406C; De Wet and Swanepoel *op cit* note 61 at 80; Snyman *op cit* note 52 at 105

[94] Burchell and Milton *op cit* note 55 at 119

beliefs. The problem with this, as far as battered women are concerned, is that their perceptions and experiences as battered women are vital if one is to understand their actions. Any reliance on private defence will be impossible for the battered woman unless expert testimony on the battered woman syndrome is heard by the court and then used to make sense of the particular woman's life experience.

The courts have on occasion stated[95] that, in order to determine whether the defender acted in private defence, one should inquire 'whether the reasonable man in the circumstances in which X found himself would have acted in the same way (or to put it differently, whether X reasonably believed that he was in danger)'.[96] The' reasonable man' test is used here only to ascertain whether the defender's conduct was reasonable in so far as it is in accordance with what is usually acceptable to society and thus is really only an aid to determine whether the defender's conduct was lawful or unlawful.[97]

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[95] *S v Motleleni op cit* note 89 at 406 C-D

[96] Snyman *op cit* note 52 at 106

[97] *loc cit*

II : THE POSITION IN ENGLAND

Defence of the person, whether one's own or that of another, is regulated by the common law.[98] The general principle is that the English law

> 'allows such force to be used as is reasonable in the circumstances of the particular case: and, for the purposes of offences requiring *mens rea*, what is reasonable is to be judged in the light of the circumstances as the accused believed them to be, whether reasonable or not.'[99]

Therefore if the defender believed he was being attacked with a deadly weapon and he used only such force as was reasonable to repel such an attack, he has a defence to any charge of an offence requiring *mens rea* which arises out of the use of that force irrespective of whether or not he was mistaken or unreasonably mistaken.[100] However, if the offence may be committed by gross negligence or recklessness then a grossly negligent or reckless mistake would not suffice.[101]

The question to be asked, and answered by the magistrate or jury, is whether the force used was reasonable in the circumstances as the defender supposed them to be. The defender's opinion as to

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[98] Smith and Hogan *Criminal Law* (1988) 240

[99] *loc cit*

[100] *Ibid* at 241; See Williams *Criminal Law* (1961) 206-13

[101] *loc cit*

the reasonableness of his action is not conclusive proof but the court in the case of *White*[102] held that the test of reasonableness is not 'purely objective'. Force is used at a moment of crisis with the defender having no more than a few seconds to decide on his course of action and thus it is important that the jury not disregard the state of mind of the defender altogether.[103]

As Lord Morris said in the case of *Palmer v R*[104]:

> If a jury thought that in a moment of unexpected anguish a person had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.

The authority for the proposition that the defender is to be judged on the facts as he believed them to be, is to be found in the case of *Gladstone Williams*[105] which was subsequently approved by the Privvy Council in *Beckford v R*[106]. The court referred to the recommendation of the Criminal Law Revision Committee[107]: 'The common law of self-defence should be replaced by a statutory defence providing that a person may use such force as is

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[102] [1987] 3 All ER 416, CA

[103] *loc cit*

[104] [1971] 1 All ER 1077 at 1078

[105] (1984) 78 Cr App Rep 276, CA

[106] [1987] 3 All ER 425, [1987] 3 WLR 611

[107] Fourteenth Report (Cmnd.7844) para. 72(a) as quoted in Smith and Hogan *op cit* note 93 at 241-2

reasonable in the circumstances as he believes them to be in the defence of himself or any other person.' The court declared that this proposition represented the common law and although it may be argued that this ruling was obiter, the law 'has been settled beyond all doubt'[108] by subsequent decisions, the most recent of which is that of *Beckford*[109].

Whether a duty to retreat exists or not, is simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. There is no law which states that an attacked person must run away if he can; however, where retreat is the most sensible option and a person chooses to stay and fight, then the force will most likely be seen as unreasonable.[110] Glanville Williams is of the opinion that the defender must 'whenever possible, make a kind of symbolic retreat, or use words having a similar effect, in order to demonstrate that he is not the aggressor'[111] - the defender is not so much expected to run away, as to demonstrate by his actions that he does not want to fight, that is, that he is not the aggressor.[112]

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[108] Smith and Hogan *op cit* note 98 at 242

[109] *op cit* note 106

[110] Smith and Hogan *op cit* note 98 at 244

[111] Williams, G *Textbook of Criminal Law* (1983) at 505

[112] *loc cit*

There appears at present to be 'undue obscurity' about some aspects of self-defence and its relationship with the prevention of crime.[113] As already stated, defence of the person is regulated by the common law; however, arrest and the prevention of crime are governed by section 3 of the Criminal Law Act of 1967. Although the said Act makes no reference to the right of private defence, it is submitted that in so far as the right of private defence at common law differs from section 3 of the 1967 Act, it has 'probably been modified by that section'[114] - for in some cases it is virtually impossible to distinguish between private defence and the prevention of a crime.[115] Where the defender is both acting in private defence and seeking to prevent the commission of a crime, the law cannot have two sets of requirements regulating the same set of facts and thus it is submitted by Smith and Hogan[116] that section 3 of the Criminal

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[113] Griew 'Non-Fatal Offences and Self-Defence' *The Criminal Law Review* (1977) at 98

[114] see Harlow 'Self-Defence : Public Right or Private Privilege' *The Criminal Law Review* (1974) at 528-538 who argues that there are three possible meanings to the section : (1) Section 3 of the Criminal Law Act of 1967 totally replaces the defence of self-defence (2) section 3 deals only with public defence; the common law rules remain in being in respect of private defence (3) self-defence and section 3 co-exist as defences, but any common law rules inconsistent with the overall test of reasonableness are replaced - she explores these possible alternative meanings and attempts to assess which is preferable, coming to the conclusion albeit rather hesitantly that the third compromise situation seems to be the one operating in practice and is to be preferred

[115] Smith and Hogan *op cit* note 98 at 243; For example, if D goes to the defence of E whom P is trying to murder, he is exercising the right of private defence but simultaneously he is also seeking to prevent the commission of a crime; Williams *op cit* note 111 at 505 argues that the fact that 'the defender must do what he can to indicate to his adversary that he is willing to discontinue the fight is sufficient to show that the rules of private defence and the prevention of a crime are different' - the two defences are distinct and nothing in section 3 indicates otherwise: 'It is true that section 3(2) states that section 3(1) replaces the previous rules of the common law in relation to the purpose of preventing crime and arresting offenders, but the "purpose" of private defence is different, and is not affected.'

[116] *loc cit*

Law Act is applicable. 'The Act may be taken to have clarified the common law.'[117]

Section 3 of the Criminal Law Act reads as follows:

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

Thus it can only be reasonable to cause harm, where first it was necessary to do so in order to prevent a crime or effect an arrest or secondly where the evil which would follow from not acting is so great that a reasonable man would think himself justified in causing that harm to prevent that evil.[118] The degree of force permissable is the same whether one is dealing with private defence or the grounds for prevention of a crime; similarly, the nature of the crisis, in other words whether it results in great stress, is also taken into account.

As stated the common law right to defend oneself against attack overlaps with the statutory immunity for force used in the prevention of crime as set out in section 3 of the Criminal Law Act and which requires that the accused's action was at least

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[117] *loc cit*

[118] *Ibid* at 242-3

reasonable in the circumstances. However, if we take the common law as still applicable and/or as interpretative guidance then we can be more precise as regards the requirements to be fulfilled before the force is recognised as reasonable in the circumstances:-

- force to be necessary in order to prevent the attack
- force to be proportional to the attack
- the duty to retreat is part of the requirement.

The question which then remains to be answered is whether these requirements offer any assistance as regards the applicability of this defence to battered women who kill their abusers.

The traditional notion of self-defence involves a single attack which is warded off or repelled by a single defensive action. The battered woman is subjected to continuous attack, so what then is her position with regard to the duty to retreat. The court in the case of *Bird*[119] held that the duty to retreat is not strict; however, it is not 'premised on persistent, systematic, relational violence'[120] and thus it is important to consider how far the duty to retreat should apply to the persistently battered woman who will most probably have attempted to retreat on numerous occasions in the past. The question is whether we should expect these women to go on retreating indefinitely or on the occasion when she chooses, for whatever reason, not to retreat, ought we not to take into account the fact that she has retreated

[119] [1985] 2 All ER 513

[120] *loc cit*

before.[121] Wells submits that when dealing with battered women and the duty to retreat, one should make use of the right of a property owner to repel an intruder; for, 'the right to "stand fast" in defending one's home is itself a qualification of the duty to retreat'[122] and thus, by analogy, why should a woman not be able to defend her right to occupy her home without fear of attack.[123]

> This is not to advocate a general license to take the law into her own hands. Merely to suggest that when she eventually does retaliate we should take into account that it is not just her physical integrity which has been threatened by the violence but also her right to peaceful occupation of her home.[124]

The right to remain on one's own property may be coupled with the reasoning adopted by the Court of Appeal in the case of *Field*[125] where the argument that a victim had to avoid places where she knew, because of previous experience, of previous threats of attack, was rejected although it was added that there might be a prima facie duty to inform the police. In the case of a

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[121] Wells 'Domestic violence and self-defence' *New Law Journal* (1990) 127

[122] *loc cit*

[123] The Wells article deals specifically with married women, one wonders therefore whether this would apply to co-habiting couples as well.

[124] Wells *op cit* note 122 at 127

[125] [1972] Crim LR 435

battered woman, she most probably has tried to get help from the police in the past to little or no avail and if she has not attempted to get assistance one can ascribe it to the fact that she has absorbed the social message that battering is a private matter and hence must be dealt with in the home. Thus, if one can combine the right to remain on one's own property with the principle expressed in *Field*[126] it will give the battered woman a better chance of showing that the force she used was necessary in all the circumstances.

In addition to the requirement of necessity one needs also to consider that of proportionality. The proportionality rule involves a 'community standard of reasonableness' and is left to the consideration of the jury - it is based on the view 'that there are some insults and hurts that one must suffer rather than use extreme force'.[127] Lord Morris said in *Palmer*[128] that: 'A person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.' However a balance still needs to be struck between the right to life and the physical security of both attacker and victim. In the case of domestic violence we are talking about the use of lethal force 'to prevent persistent but not lethal physical bullying and violence'.[129] One could disagree with this assertion of Wells because the battered woman is in such a heightened and constant

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[126] *loc cit*

[127] Williams *op cit* note 111 at 506

[128] *op cit* note 104

[129] Wells *op cit* note 122 at 127

state of terror and has so-often been threatened in the past, that she reaches a stage where she firmly believes that next time her abuser will truly kill her. It is unfortunate that Wells, particularly since she is a woman herself, should hold the view that a battered woman is only protecting herself from 'non-lethal' violence.

The next question is whether the position of the battered woman would be at all affected if the criterion of section 3 of the Criminal Law Act of 1967 were applied, instead of the common law. Wells identifies two main problems with regard to using the criterion 'reasonable in the circumstances'.[130]

First, domestic violence (on those occasions when it is acknowledged) is still regarded by both society and the police as a problem to be solved within the family - it is not a problem with which society wishes to concern itself. Thus it is difficult, or near impossible 'to ask a jury to apply a generalised reasonableness standard to a situation whose existence they find hard to acknowledge.'[131] This is especially true when one considers that most of the jurors will be operating from a position encompassing certain stereotypical notions with regard to battered women; for example, why didn't she leave/report the abuse, she must have enjoyed it to have stayed. The jurors are unable to understand the very complex relationship between a battered woman and her batterer, not to mention the

[130] *Ibid* at 128

[131] *loc cit*

very real problems of economic dependency and all the other factors essential for an understanding of the appropriateness of the woman's actions. Expert testimony on the effects of abuse might help to remedy the situation but the court in England and Wales has yet to allow it.[132]

Secondly, the concept of reasonable force by a woman is a difficult one for a society to understand which is accustomed to self-defence as a male phenomenon.[133] The traditional scenario sees the man defending his wife, children and home and thus it is difficult to reconcile this with the notion of a female aggressor defending her life and the lives of her children. Jurors, not being acquainted with the concept of a female aggressor, have no yardstick against which to measure the reasonableness of the force used, although they are instructed to apply 'the apparently neutral and neutered concept of reasonableness'.[134] Many feminists would argue that this is not so - the concept of reasonableness is not neutral but highly gendered.[135]

> The mythical "reasonable man" notwithstanding the recent accommodation of sex and age [*DPP v Camplin* [1978] 2 All ER 168] remains 'resolute and

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[132] Edwards 'Battered women who kill' *New Law Journal* (1990) 1380

[133] Wells *op cit* note 122 at 128

[134] *loc cit*

[135] *loc cit*

recalcitrant in refusing to acknowledge let alone embrace the battered woman'.[136]

Women are also, so often perceived as different from men with regard to the rationality of their actions.[137] This in itself poses problems when one is dealing with the area of self-defence because only too often lack of self-control or some sort of mental abnormality will be asserted as is necessary for provocation or diminished responsibility; thus depriving the woman of the full defence offered by self-defence.[138]

Lastly, it is interesting to see what progress has been made by English law in the self-defence formulation presented in the draft code.[139] The code, despite the recognition in England of the problems arising with regard to battered women, does unfortunately not reflect any of these concerns.

Clause 44 would allow a person to use 'such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable', *inter alia*, to prevent a crime or defend himself. The fact that the Law Commission has qualified the word "necessary" with "immediately" worsens what is already an unfavourable position for battered women. A battered woman who kills her abuser may be able to prove that her use of

[136] Edwards *op cit* note 132 at 1380

[137] Wells *op cit* note 122 at 128

[138] *loc cit*

[139] Report No 177, HMSO, 1989

force was necessary in the circumstances but to prove that it was "immediately necessary" is virtually impossible given the fact that she could have left or called the police. This is especially so because sub-clause (7) reiterates the duty to retreat in the following terms:

> The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was immediately necessary and reasonable.

Mounting a battered woman defence on whatever ground is likely to be met with considerable incredulity[140] for it is evident that the law of self-defence is not equipped to deal with the problems particular to the defence of battered women who kill their abusers.

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[140] Edwards *op cit* note 132 at 1380

III : THE POSITION IN AMERICA

The doctrine of self-defence in American law justifies[141] the use of reasonable force when one who is not the aggressor, reasonably believes, he is in imminent danger of harm, and a particular degree of force is necessary to prevent that harm.[142] Reasonableness is thus said to be the key to self-defence.[143]

The law intends that self-help should be limited to those situations where it is really needed and thus both the case law and statutory formulations of self-defence require that there should be an attack and that said attack should be imminent.[144] Steele submits that in a battered woman's self-defence situation, with its history of assaults which become progressively worse over time, the law should treat the threat of yet another injury

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[141] See Diamond 'Criminal Law : The justification of self-defence' *Annual Survey of American Law* (1987) 673-74; American law draws a distinction between justified and excused conduct. 'A claim of justification maintains that the act is right; a claim of excuse concedes that the act in the abstract is wrong, but argues that the actor is not personally responsible for having committed the act.'- Kadish *Encyclopedia of Crime and Justice* (1983) Vol 2. 942. Killing in self-defence is regarded as justified conduct - *Ibid* at 943. Feminists have expressed concern with the difference between justification and excuse; with some arguing that all self-defence should be treated as excused because if self-defence is a justification, and justified conduct is conduct which we consistently encourage because it benefits society whenever similar circumstances arise, then the defence cannot rationally be expanded to encompass battered women who kill. Were all self-defence to be excused 'it would further the criminal justice system's interest in preserving the sanctity of human life, and fulfil the feminist goal of absolving battered women who kill of guilt without proclaiming that such women are inferior to men. An excuse analysis focuses on the pressure confronted by the defendant and the lack of available options.' Excuse theory may be said to be deterministic in that it involves a subjective judgement, it considers past elements of the defendant's circumstances which make her choice of conduct understandable - Mahan and Swebilius 'Battered women who murder their mates' *Unpublished Paper* (1989) 21-22

[142] La Fave and Scott *Criminal Law* (1986) 454

[143] Venesy *op cit* note 14 at 93

[144] Kadish *op cit* note 141 at 947

as sufficient.[145] A battered woman lives in a state of continuous fear that next time her batterer will kill her; with past experience of the batterer having carried out his threats of physical injury only helping to reinforce this fear.[146] Therefore, it is both unrealistic and unjust, to expect the battered woman to wait for yet another threatening movement or round of potentially deadly assaults from her batterer before she can exercise her right to use force in self-defence.[147]

As stated, the law allows the exercise of force in self-defence only if the unlawful attack is imminent. There is no duty to retreat; in fact, where a person is attacked in his own home, he need not retreat before using deadly force even if the opportunity to do so exists.[148]

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[145] Steele and Sigman *op cit* note 13 at 177

[146] *loc cit*

[147] *Ibid* at 178

[148] La Fave and Scott *op cit* note 142 at 460-61; Kadish *op cit* note 141 at 949 - the majority of American jurisdictions do not have a duty to retreat but where it does apply, it only has effect where the defendant has the opportunity to retreat safely. Although the jurisdictions following the rule are in the minority, it has been incorporated into the Model Penal Code of 1962 as s3.04(2)(b)(ii). Kadish is however of the opinion that the rule no longer finds much favour and that the English position will be adopted namely that a failure to retreat before using force will merely be considered together with all the other factors in determining whether the use of force was reasonable under the circumstances.

The concept of 'imminence' encompasses the idea that there should be no time left to summon the police or other aid.[149] One of the reasons behind requiring that a defender delay the use of force as long as possible, is that the chance always exists that the threatened harm might not occur.[150] This idea of withdrawal of an attack at the last minute, is seen as part and parcel of the masculine model of self-defence which adopts as a norm of social interaction between two equally matched aggressors, the notion of 'bluff and counterbluff'.[151] However, as far as a woman is concerned, there is no logical reason for her to believe that if she waits long enough, the threat will subside; if anything, her experience at the hands of her batterer teaches her that the opposite is likely - another attack is imminent - and thus her only opportunity for self-defence is to anticipate the attack.

The question which often poses the most problems is that of whether the victim's conduct threatened sufficiently serious harm to justify the use of deadly force; more so when dealing with a battered woman who has killed her abuser when he was sleeping, had his back turned towards her, had no weapon or was not even blocking her means of escape. The reasonableness of the woman's

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[149] Steele and Sigman *op cit* note 13 at 178; Kadish *op cit* note 141 at 947 - the Model Penal Code s 3.04 requires that the defendant believe that the force used was 'immediately necessary' for protecting himself against the force of another; the commentary to this section makes it clear that the drafters regard this as providing more flexibility than the original rule. Kadish argues that the requirement of immediacy, particularly in the context of a battering relationship should be abandoned, with emphasis being placed on the requirement that the force be 'necessary to prevent the perceived unlawful harm'.

[150] Steele and Sigman *op cit* note 13 at 178

[151] *loc cit*

perception that her partner posed a threat of serious injury must be considered in the light of a number of factors: the woman's smaller size, her lack of training and experience in hand-to-hand fighting, the traditional social pressure of women to respond with fear to a threatening situation, her partner's history of physical abuse and her frequent efforts to seek assistance from law enforcement officers.[152]

The Kansas Supreme Court has dealt extensively with these concerns.[153] The court first addressed the issues surrounding battered women who kill their abusers in the case of *State v Hundley* [154] which held that where self-defence is asserted, the abused wife can introduce evidence of her batterer's prior cruel and violent actions. Expert testimony is thus admissible to prove 'the nature and effect of wife beating'.[155] The court graphically described the terror and fear that characterises the battered woman and emphasised the 'build up of terror and fear that had been systematically created over a long period of time'.[156] The court repeatedly compared the battered woman's mental state to that of 'hostages, prisoners of war, and others under long-term life-threatening conditions'.[157]

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[152] Kadish *op cit* note 141 at 950

[153] A comparative analysis of the treatment of battered woman and self-defence issues across the States was impossible due to a lack of source material in the University of Cape Town library

[154] *State v Hundley* 236 Kan. at 464, 693 P.2d at 477 (1985)

[155] *Ibid* at 467, 693 P.2d at 479

[156] *loc cit*

[157] *loc cit*

Venesy writes that it is interesting that the court drew an analogy between the battered woman and a hostage or prisoner of war because in a hostage situation, where the victim is repeatedly told that he will be killed, it is accepted that he may act with deadly force whenever a suitable opportunity presents itself.[158] La Fave and Scott state that[159]:

> If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must ~~permit him to act~~ earlier - as early as is required to defend himself effectively.

The court in *Hundley* thus acknowledges that the battered woman was in 'an unending life-threatening situation'[160]; so the question is thus, why shouldn't she, like a hostage' not be able to seize the opportunity to defend herself when it arises ? The answer would appear to lie in the courts interpretation of the imminence of the harm and the woman's reasonable perception thereof.

In *Hundley*, the court held that the term' immediate' harm, rather than the statutory 'imminent', limited the jury's review of the evidence by excluding prior abuse which was necessary in order to evaluate the woman's perception of her need to defend, and

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[158] *op cit* note 14 at 100

[159] *op cit* note 142 at 458

[160] Venesy *op cit* note 14 at 100

thus was not to be preferred.[161] The word 'imminent' was seen as more accurately describing the situation in which the battered woman found herself, namely suffering from fear which had mounted over time.[162] This position was later confirmed in the case of *State v Hodges*[163] where the Kansas Supreme Court again held that 'immediate' harm was clearly incorrect.

In the case of *State v Stewart*[164] however, the Kansas Supreme Court ignored their traditional imminent standard and demanded an immediate 'confrontational circumstance' contemporaneous with the killing.[165]

The following are the facts of the *Stewart*[166] case. Peggy Stewart had been physically and emotionally abused by her husband, Mike, over a period of twelve years. Mike had brutally beaten and kicked her, sexually assaulted her daughters, shot one of her two pet cats and repeatedly held a shotgun to her head and threatened to pull the trigger. Peggy then escaped to Oklahoma to live with her daughter but within a month Mike found her and brought her back. Once home he threatened to kill her if she ever left again, told her not to bother with cleaning the house because she would not be around much longer and repeatedly sexually assaulted her.

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[161] *op cit* note 154 at 468-69, 693 P.2d at 480

[162] *loc cit*

[163] *State v Hodges* 239 Kan. at 74, 716 P.2d at 571 (1986)

[164] *op cit* note 69 at 639, 763 P. 2d at 572

[165] *Ibid* at 645, 763 P. 2d at 577

[166] *Ibid* at 640-53, 763 P. 2d at 574-81

The following evening after their return, Peggy thought about suicide and heard voices telling her 'to kill or be killed'. She shot Mike twice while he slept. At the time of the killing Peggy had access to two cars parked in the driveway; yet, immediately after the killing she ran to her neighbours believing that Mike was chasing her. Claiming self-defence Peggy pleaded not guilty to a charge of first degree murder. Expert testimony showed that Peggy was a victim of battered woman syndrome and thus the court instructed the jury on self-defence. The jury found Peggy Stewart not guilty.

The prosecution appealed to the Kansas Supreme Court on the point of whether the trial judge was mistaken in giving self-defence instructions when the victim was not threatening the defendant.[167] The court held that no self-defence instructions should have been given because Peggy Stewart was in no 'imminent' danger. In reaching this conclusion the court failed to apply the rule established in *State v Hill*[168] that a defendant is entitled to self-defence instructions if there is 'any' evidence supporting self-defence. The Kansas Supreme Court does accept evidence to show a systematic build up of fear and terror in the battered woman which causes her to reasonably believe that she needs to defend herself; yet it failed to accept it in Peggy

[167] *Ibid* at 640, 763 P. 2d at 574

[168] *State v Hill* 242 Kan. 68 at 69, 744 P. 2d 1228 at 1236 (1987)

Stewart's case and, in fact, chose to ignore:

- the evidence of past abuse
- the escalation of violence
- Mike's threat to kill her if she should leave him
- Mike's comments that she would not be around much longer.

The court demanded an overt act contemporaneous with the killing; but even if an immediate standard were applied, the circumstances immediately preceding Mike's sleep were contemporaneous with the killing.[169] The court stated that there were non-lethal methods, of which the twice divorced Peggy Stewart was aware, which would have enabled her to get out of the relationship.[170] The court concluded that abused women cannot be treated more leniently than other defendants claiming self-defence[171]; because to hold that a battered woman could shoot her sleeping partner when there is no 'imminent danger' of an attack would in actual fact allow the abused partner to execute her batterer.[172]

The statutory formulations of self-defence 'are similar in many states, but often differ on the standard used to determine if the defendant reasonably believed he was in imminent danger of bodily harm'.[173] Most states impose on the factfinder an objective

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[169] Venesy *op cit* note 14 at 100

[170] *op cit* note 69 at 643, 763 P. 2d at 576

[171] *Ibid* at 646, 763 P. 2d at 577

[172] *Ibid* at 648, 763 P. 2d at 579

[173] Diamond *op cit* note 141 at 674

standard of reasonableness in all cases.[174] This asks whether 'a reasonable person would have believed himself to be in imminent danger of unlawful bodily harm which could be avoided only by the action taken by the defendant'.[175] This is inadequate when applied to battered woman because it does not allow any consideration of characteristics unique to the defendant, nor does it allow any consideration of the woman's personal experience in a repeatedly abusive relationship with the batterer.[176] The predicament of a battered woman becomes patently unjust when her conduct is measured against a standard which does not contemplate the very circumstances which necessitate her behaviour.

A minority of states employ a subjective standard to evaluate the defendant's beliefs.[177] The factfinder who uses this approach will concentrate on 'whether the circumstances were such that the accused had an honest belief that force was necessary to defend

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[174] Steele and Sigman *op cit* note 13 at 175; Diamond *op cit* note 141 at 674

[175] *Ibid* at 675

[176] Steele and Sigman *op cit* note 13 at 176; Diamond *op cit* note 141 at 674

[177] *loc cit*; Diamond *op cit* note 141 at 675

himself'[178] - it does not ask whether a reasonable person would have had that belief, but looks at the 'defendant's mental state alone'.[179]

Those courts which acknowledge a battered woman's circumstances have chosen to adopt an 'expanded objective standard'.[180] This is also referred to by Diamond as 'the hybrid standard'[181] and is 'a compromise approach, which moves away from the strict reasonable person standard and allows the consideration of some, but not all, of the subjective evidence, and would incorporate the best elements of each approach'.[182] The 'hybrid' approach thus combines both subjective and objective elements.

> The subjective element of the hybrid approach requires that the defendant have an actual belief that deadly force is necessary. The objective element requires the defendant's belief to be reasonable, from the perspective of a reasonable person under the same circumstances.[183]

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[178] Diamond *op cit* note 141 at 675

[179] *loc cit*; The North Dakota Supreme Court in the case of *State v Leidholm* 334 N.W. 2d 811 (N.D. 1983) held that the subjective self-defence standard should be applied in North Dakota

[180] Steele and Sigman *op cit* note 13 at 176

[181] Diamond *op cit* note 141 at 683

[182] *Ibid* at 675

[183] *Ibid* at 683

It is submitted that the 'expanded objective standard' is fair to battered women because 'the self-defense situations in which a battered woman finds herself are different from those upon which traditional self-defense standards are based, yet similar to those encountered by other battered woman'.[184]

Diamond points out that the courts 'seem to be searching for a middle ground in the self-defense area'[185] - often professing to adopt one standard but in reality applying another.[186]

In Kansas, reasonableness as to imminence of danger and the need for deadly force is evaluated by a two-pronged self-defence test[187]:

- a subjective standard - the woman's own sincere and honest belief that it was necessary to kill in order to defend herself; and
- an objective standard - 'how a reasonable prudent wife would perceive the aggressor's demeanor'.[188]

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[184] Steele and Sigman *op cit* note 13 at 176; see Williams *op cit* note 111 at 687-688 - The main virtue of the objective approach is that it offers 'fixed and predictable standards' - a defendant must either show that he acted reasonably or be punished. The subjective standard however provides the juries with 'more fair and accurate information' with which to assess the defendant's guilt - it treats defendants as individuals. The hybrid approach although appearing to reduce the harshness of the objective standard, is also not an adequate solution. The subjective requirement is easily complied with because generally the defendant does have an honest belief that his use of force was necessary but re the objective requirement, it is still difficult for the defendant to establish that he acted as a reasonable person would have. The hybrid approach is still not flexible enough to allow the fair judgements of defendants

[185] *op cit* note 141 at 685

[186] *loc cit*

[187] Venesy *op cit* note 14 at 97

[188] *op cit* note 69 at 646, 763 P. 2d at 577

The cases of *Hundley*[189] and *Stewart*[190] both held that the standard should be the conduct of a reasonably prudent wife. The other view, adopted by the Kansas Supreme Court in *Hodges*[191], required a completely subjective standard of reasonableness. The court modified the traditional two-pronged test, which encompassed both subjective and objective elements, into a completely subjective test which asked that 'the jury should determine the defendant's reasonable belief based upon the defendant's mental state alone'.[192] A criticism which may be levelled against the American legal system, regards its handling of battered women and self-defence issues, is that a lack of uniformity exists.

> A reading of the 130 or more reported appellate cases that have developed in the past thirteen years since battered woman syndrome evidence was first presented in the American courtroom reveals appalling injustices to woman, because the closet of clothes that makes up the wardrobe of family violence cannot, in some judges' minds, be made to fit into one straightjacket of traditional self-defense law.[193]

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[189] *op cit* note 154 at 467, 693 P. 2d at 479

[190] *op cit* note 69

[191] *op cit* note 163

[192] *Ibid* at 72, 716 P. 2d at 569

[193] Nodland *op cit* note 27 at 131-32

Some legal scholars have thus suggested that the law develop a battered woman defence. Rosen[194] suggests that there are three ways to formulate a battered woman defence :

1) as a specialised application of the traditional rules of self-defence;
2) as an extension of the principles of self-defence to particular circumstances in which they otherwise would not apply;
3) as a new hybrid defence.

Steele and Sigman[195] point out that alternatives (1) and (3) 'could result in equal protection challenges' because they single out battered woman as a group which needs special and different treatment. Alternative number (2) may apply to other defendants as well in that it 'focuses on circumstances rather than on a particular gender group' and in the future, researchers might well identify a repetitive cycle of violence which would apply in cases where for example, children kill their abusive parents or the elderly kill their abusive caregivers.[196] This second alternative is thus to be preferred, for if other cycles of violence within relationships are identified, the expansion of traditional self-defence rules in the case of battered women will have paved the way.[197]

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[194] As quoted in Steele and Sigman *op cit* note 13 at 181

[195] *Ibid* at 182

[196] *loc cit*

[197] *loc cit*

The following two areas would benefit from expansion :

- uniform rules concerning the admissibility of expert testimony on the battered woman syndrome should be developed; for, such testimony is essential in order to get the woman's story told and simultaneously to educate both the judge and the jury so that they have a frame of reference from which to evaluate the woman's conduct[198];
- the traditional notions of who acts as the initial aggressor should be updated to encompass the cycle of repeated assaults inherent in the battered woman syndrome.[199]

Maguigan, however, argues that it is a widespread misperception that the doctrine of self-defence cannot accommodate battered women who kill their abusers.[200] She states that current reform efforts towards a redefinition of the law are based on two incorrect assumptions; firstly, that convictions of battered women result from the fact that most women do not kill in confrontational circumstances but rather during a lull in the violence or when the abuser is asleep; and secondly, that the existing self-defence law is defined in 'a narrow and male-identified fashion to encompass one-time-only and time-bound encounters between men of roughly equal size and strength'.[201] Maguigan offers empirical proof from a reading of the appellate

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[198] *loc cit*

[199] *Ibid* at 183

[200] Maguigan 'Battered Women and Self-defense: Myths and Misconceptions in Current Reform Proposals' *University of Pennsylvania Law Review* (1991) 381

[201] *Ibid* at 382

decisions that over 75 percents of women kill during a confrontation.[202] She also states that any redefinition of the law should proceed from the recognition of the fact that the criminal law does not proceed from the assumption of a 'one-time and time-bound encounter' but rather that it acknowledges that the most common homicide case is the one where the parties 'have a history with each other'.[203] Maguigan argues that the most important thing is for the defendant to be able to state her case fully and to provide whatever evidence is necessary to support her claim of entitlement to self-defence.

> [Her] conclusion, after review of the cases from [the above] perspective, is that the most common impediments to fair trials for battered women are the result not of the structure or content of existing law but of its application by trial judges.[204]

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[202] *Ibid* at 397

[203] *Ibid* at 407

[204] *Ibid* at 383

CHAPTER THREE : PROVOCATION AND THE BATTERED WOMAN

The law of self-defence, as outlined above, is clearly inadequate in so far as it is able to offer a defence for battered women who have killed their abusers. Admittedly the South African courts have not yet encountered a self-defence case where battering was an issue, but even if one considers the developments which have occurred in America, it is still evident that the position is unsatisfactory. It is thus submitted that as far as South African law is concerned, the defences of provocation and of non-pathological criminal incapacity are better able to accommodate the battered woman who has killed her abuser.

The defence of provocation in South African law may at the outset be distinguished from that of England and America on two grounds:

1) The South African court's accept that provocation (and other factors which affect the mental functions of the accused), can exclude both the actus reus and the mens rea, including criminal imputability, which is required for criminal liability[205], whereas, in both England[206] and America[207] provocation is only a factor which reduces murder to manslaughter notwithstanding the fact that the intention to kill has been established.

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[205] Snyman *op cit* note 52 at 155-56

[206] Smith and Hogan *op cit* note 98 at 331

[207] s 210.3(1)(b) of the Model Penal Code advocates this approach

2) The South African court's have only to determine whether the accused had criminal capacity[208], in other words, the accused must have the mental ability to appreciate the wrongfulness of his act and must be able to conduct himself in accordance with this appreciation; whereas, in England[209] and America[210] the court utilises a dual test, namely was the accused provoked to lose his self-control? - a subjective question; and, was the provocation enough to make a reasonable man do as he did? - an objective question.

I : THE POSITION IN ENGLAND

Prior to 1957 the 'classic' formulation of the common law rule of provocation was that of Devlin J in the case of *R v Duffy*[211]:

> Provocation is some act, or series of acts, done by the dead man to the accused, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

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[208] Snyman *op cit* note 52 at 154-55

[209] *DPP v Camplin* (1978) 2 All ER 168

[210] American Law Institute: Model Penal Code and Commentaries Part 11 at 55

[211] [1949] 1 All ER at 932

This common law formulation limits the nature of the provocative acts to those done by the dead man to the accused. Section 3 of the Homicide Act 1957, removes this limitation and as is submitted by Smith and Hogan[212], the only question seems to be whether the evidence is relevant to show that the accused was provoked, by things done or said, to lose his self-control.

The English common law on provocation has thus been modified by the Homicide Act 1957, section 3, which provides:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect, which in their opinion, it would have on a reasonable man.

The test of whether the defence of provocation is likely to succeed, has from as early as 1914 in the case of *R v Lesbini*[213]

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[212] *op cit* note 98 at 333

[213] (1914) 3 KB 1116

been a dual one. Lord Diplock in *DPP v Camplin*[214] sets out the test as follows :

> ...the conduct of the deceased to the accused must be such as 1) might cause in any reasonable or ordinary person and 2) actually causes in the accused a sudden loss of self-control as a result of which he commits the unlawful act that kills the deceased.

THE SUBJECTIVE CRITERION : actually causes in the accused a sudden and temporary loss of self-control.

The House of Lords, in the case of *Camplin*[215], stated that the Homicide Act 'abolishes all previous rules as to what can or cannot amount to provocation', however, the requirement for the subjective condition, that there must be 'a sudden and temporary loss of self-control', remains unchanged. In *Brown*[216] the court held that the jury should be directed to consider the subjective condition first. The accused, himself, must have been provoked[217]; even if the reasonable person would have lost his self-control but the accused did not, he, on a charge of murder, cannot rely on the partial defence of provocation. Although it

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[214] *op cit* note 210 at 172

[215] *op cit* note 210 at 716 C,G

[216] (1972) 2 All ER 1328 at 1333

[217] see Williams *op cit* note 111 at 528 - 'The defendant must have killed because he was provoked, not merely because the provocation existed. There must be a causal relationship between the provocation and the killing.'

is accepted[218] that provocation may extend over a long period of time, it must culminate in a sudden loss of self-control; for:

> ...circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation.[219]

The issue of 'cooling time' is not a question of law but merely another item of evidence in answering the question of whether the accused was deprived of his self-control.[220] Williams states that: 'The provoking event must be sufficiently recent for the defendant to be passionately affected by it at the moment of killing'.[221] He is ,however, of the opinion that the court's without admitting it' are, in certain cases relaxing the immediacy rule, especially in those cases where there is evidence of great stress resulting from physical cruelty by a spouse or parent; for, 'it is irrational to think of "simmering down" when jealousy and anger have been built up over the years'.[222] Williams does ,however, admit that the requirement of immediacy still applies at appellate level and the Criminal Law Revision

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[218] Smith and Hogan *op cit* note 98 at 335; See for a further discussion of cumulative provocation - Wasik 'Cumulative Provocation and Domestic Killing' *The Criminal Law Review* (1982) 29-37

[219] Devlin J in *Duffy* op cit note 212 at 932

[220] Smith and Hogan *op cit* note 98 at 335

[221] *op cit* note 111 at 529

[222] *Ibid* at 530

Committee (14th Report para.84) has also recommended that it be retained.[223]

THE OBJECTIVE CRITERION : might cause in any reasonable person a loss of self-control.

Fletcher[224] and Glanville Williams[225] both recognise that the use of the reasonable man as the standard against which the unlawful conduct of the accused is evaluated, is a contradiction in terms; for as Williams states : '[H]ow can it be admitted that the paragon of virtue, the reasonable man, gives way to provocation?'[226]

In cases of provocation, it is accepted that, society is prepared to make a concession for the 'frailty of human nature' and thus allows a reduction in liability from murder to manslaughter[227]; however, by applying a rigid objective standard of the reasonable man the reason for the reduction in liability can be defeated.

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[223] *loc cit*

[224] Fletcher *Rethinking Criminal Law* 246-47

[225] Williams 'Provocation and the Reasonable man' *Criminal Law Review* (1954) 740-42

[226] *Ibid* at 742

[227] *loc cit*

The case of *Bedder v DPP*[228] is a case in point. The eighteen year old impotent accused was taunted by the deceased when he attempted, in vain, to have sexual intercourse with her. The House of Lords confirmed that the jury was correctly instructed to ignore the impotency of the accused and thus they were correct to consider what effect the deceased's acts would have on a reasonable man, and not on a man who was sexually impotent. It is submitted that the most important factor, and in fact the very factor which led to the accused's loss of self-control, was ignored.

Section 3 of the Homicide Act, removed the power of the judge to dictate to the jury the characteristics of the reasonable man.[229] Lord Diplock, in *DPP v Camplin*, after rejecting the position as set out in *Bedder v DPP*, states[230] :

> In my opinion a proper direction to the jury on a question left to their exclusive determination by s3 of the 1957 Act would be on the following lines. The judge should state what the question is, using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other aspects sharing such of the accused's characteristics as they think would

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[228] (1954) All ER 801, (1954) 1 WLR 1119

[229] Smith and Hogan *op cit* note 98 at 337

[230] *op cit* note 210 at 175

affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but would also react to the provocation as the accused did.

The above extract evidences a gradual move away from the objective reasonable man to a more subjectivised reasonable man which is no longer so distinct from the circumstances as he was previously.

The court in *R v Newell*[231] went one step further and drew a distinction between universal and particular characteristics; it said :

> The offender must be presumed to possess in general the power of self-control of the ordinary man, save in so far as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man.

Universal characteristics, for example sex and age, are always attributed to the reasonable man whereas particular are only transposed from the accused to the reasonable man if the provocation is directly related to those characteristics. In the light of this decision it is thus submitted that the impotency

[231] (1980) 71 Cr App Rep 331 at 339

of the accused in the case of *Bedder v DPP*[232], would have modified the reasonable man test - the impotency of the accused was a particular characteristic which was directly connected to the provocation.

In *R v Newell*[233] the court indicated that certain criteria must be complied with in order to determine which characteristics can be attributed to the reasonable man :-

- must be definite and of sufficient significance to make the person different from the ordinary run of mankind
- must have a sufficient degree of permanence to warrant it being regarded as something constituting part of the individuals character
- applies to physical as well as mental qualities as well as indeterminate attributes such as race or creed
- there must be some real connection between the provocation and this particular characteristic
- mental deficiency is not a characteristic.

This distinction between particular and universal characteristics, introduces interesting questions regards female accused, with respect to pregnancy, pre-menstrual tension, menopause and of course those women who have been battered. The first three examples are biological characteristics and thus, in so far as they are directly related to provocation, they may well

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[232] *op cit* note 229 at 339

[233] *op cit* note 232 at 339

be seen to alter the reasonable man.[234] As far as the battered woman is concerned, the courts are not yet prepared to allow expert testimony on the effects of long term abuse[235] which results in the situation where the courts and jurors are unaware of the effects of 'perpetual victimisation and associative fear' and are thus unable to assess the impact which such abuse may have on the woman's assessment of her batterer's threats and future behaviour.[236]

Edwards states that[237]:

> The main concern of lawyers, researchers and academics over the years has been to argue not that the 'reasonable man' test be extended, but that the legal judicial erstwhile interpretation and construction of the meaning of provocation, and the heat of the moment be reevaluated in the light of advances made in the human sciences in the understanding of human behaviour and response.

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[234] Williams *op cit* note 111 at 540 - disagrees with the view of Lord Simon in *Camplin op cit* note 210 at 724 E that 'it would "presumably" be relevant to provocation that a female defendant was menstruating or in menopause' because, he says, the fact that a woman is menstruating or about to do so 'does not relate to provocation (or is most unlikely to do so). It may affect her "capacity for self-control" because it makes her irritable; but that is generally regarded as being governed by an objective test, which does not vary as between women who are menstruating and those who are not; and the same applies to menopause (which may of course affect men as well). To hold that evidence may be given to show that the defendant was in some way particularly liable to be provoked because of his own make-up and not for any reason connected with the particular provocation would considerably change the law, for the rule in the past has always been that the peculiar irritability or sensitivity or excitability of the defendant does not affect the evaluative test; and this, indeed, was recognised in *Camplin* (at 716 E) itself.'

[235] Edwards *op cit* note 132 at 1380

[236] *Ibid* at 1381

[237] *Ibid* at 1380

Women who retaliate following provocation find it difficult to satisfy the provocation criteria as presently applied. Heat of the moment has been given a narrow interpretation - a sudden uncontrollable outburst of anger, rage or passion - which does not allow for 'a prolongation of heat of the moment where the defendant may react over a period of time' nor does it allow for the situation where anger has been controlled over a long period of time until something occurs which proves to be the last straw.[238] Where the battered wife kills, the courts seem to take their lead from the case of *Duffy*[239], where Lord Devlin, said:

> Severe nervous exasperation or a long course of conduct of suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed the further removed an incident is from the crime, the less it counts.

The *Duffy* case dealt with a wife who had been subjected to brutal treatment by her husband and some time later while he slept, struck and killed him with a hammer. Although provocation had been advanced, she was found guilty of murder following Lord Devlin's direction to the jury.

Although there have been cases where retaliatory delay has not negated provocation[240] it is more likely that the approach in *Duffy* will be followed; as happened in the case of *Greig,HM*

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[238] *Ibid* at 1381

[239] *op cit* note 212 at 932

[240] Edwards *op cit* note 132 at 1381

Advocate v Greig[241], where the direction given by Lord Dunpark, could not have been more narrow :

> The essence of provocation is that the conduct of the deceased which immediately preceded - and I emphasise 'immediately preceded'...Now, there is evidence before you that the deceased was a drunkard... that he was a bully, that he assaulted his wife from time to time and that he made her life a misery. The remedy of divorce or judicial separation or actual separation is available to end this torment. But, if, one day the worm turns, if I may use that phrase, not under immediate threat of violence but by taking a solemn decision to end her purgatory by killing her husband, and by doing that very thing, is she not to be found guilty of murder.... If on the other hand you can find some evidence that the accused was provoked....

On appeal the judge said[242]:

> ...there were various expedients open to a women regularly subjected to rough treatment by her husband, to kill was not one of them....

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[241] (unreported) May 1979 - as referred to in Wasik *op cit* note 219 at 29-30; Edwards *op cit* note 132 at 1381

[242] *loc cit*

The most recent case in English law, in this area, is that of *R v Thornton*[243] where once again the case of *R v Duffy*[244] was applied. The Thornton marriage had a history of domestic violence and assaults, so much so, that in May 1989 the deceased assaulted his wife so seriously that it led to charges being laid.[245] Later that month after a series of rows over his heavy drinking, the deceased (while lying on the sofa) threatened to kill the appellant that very night while she slept and all because she asked him when he was coming to bed. She told him that she would kill him before he ever killed her and brought the knife which she had in her hand slowly down towards his stomack, thinking that he would ward it off. The knife entered his stomach, killing him.

The court held that in order to reduce a charge of murder to manslaughter on the ground of provocation, it had to be shown that the provocative conduct relied on, had suddenly and temporarily deprived the accused of the power of self-control.[246] Provocative acts in the course of domestic violence over a long period of time which did not cause sudden and temporary loss of self-control did not amount to provocation in law but might be considered by a jury as part of the context or background against which the accused's reaction to provocative conduct had to be

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[243] [1992] 1 All ER 306

[244] *op cit* note 212

[245] *op cit* note 244 at 309 B-C

[246] *Ibid* at 314 B-C

judged.[247] On the appellant's own statements and evidence, her action in stabbing the deceased had not been the result of sudden loss of self-control induced by the deceased's provocative statements.[248]

The experiences of a battered woman are thus legally irrelevant in English law, as far as the application of the concept of provocation, unless an acceptably provocative act occurs immediately before the incident in which the battered woman kills her abuser.

Bandalli is ,however, of the opinion[249] that when it comes to masculine experiences, provocation is applied loosely and the part played by the husband in the scheme of things is so often ignored. The typically masculine provocative situation is that of finding a wife in the act of adultery.[250] In the case of *Donachie*[251] for example, the husband was convicted of manslaughter after stabbing his wife twenty nine times. She had written to him whilst he was in prison and informed him that she was involved in another relationship and that their marriage was over - she also obtained an injunction against him on the ground that she was afraid that he would kill her (she must have offered proof of previous assault). The day after his release from prison

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[247] *Ibid* at 314 A-B

[248] *Ibid* at 316 E-F

[249] Bandalli 'Battered wives and provocation' *New Law Journal* (1992) 212

[250] *loc cit*

[251] (1982) 4 CAR (8) 378 as outlined by Bandalli *loc cit*

he found his wife and her boyfriend in bed together, he assaulted the boyfriend who then left. A while later he found his wife and entered into an argument with her - she told him in no uncertain terms that she wanted nothing more to do with him - she spat in his face and told him to go away - he then stabbed her to death. Although the appeal was against length of sentence, the court did not seem perturbed by the loose application of provocation. Eveleigh LJ stated[252]:

> So that while it is a case of provocation, it is also one where incidents giving rise to the provocation provided occurred at times which gave this appellant time for reflection.

The 'provocation' given by the deceased wife was being unfaithful and attempting to end the marriage. 'She provoked him by not being the stereotypical good and loyal wife.'[253] The issues of revenge, retaliation and timing, no longer seem to be important in the face of the wife's rejection of her husband.[254] The law seems to find the violence meted out by husbands understandable yet when a woman is threatened by her husband and has suffered years of abuse, it does not even attempt to come to an understanding of what drove the woman to kill, instead of fleeing.

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[252] *loc cit*

[253] *Ibid* at 213

[254] *loc cit*

II : THE POSITION IN AMERICA

The American law of self-defence, as outlined earlier on in this paper, has made significant progress in the area of battered woman who kill their abusers, through its recognition of the battered woman syndrome and the effect which it has on the life experience of a battered woman. The same, however, cannot be said with regard to the law of provocation, for, as is the position in England, the basis for the test for provocation is that of the reasonable man.

Manslaughter in American law includes those homicides which lack 'the very high degree of culpability which characterized the capital offense of murder but not so lacking in culpability to be non-criminal altogether'.[255] A distinction is drawn between voluntary and involuntary manslaughter but it is the former with which we are concerned. The factor which reduces homicide from murder to voluntary manslaughter is generally some act of the victim which prompts the intent to kill.[256]

> The usual rule is that an intentional homicide is manslaughter if the actor was provoked to kill by an adequate provocation and acted while provoked, before sufficient time had passed for a reasonable person to have 'cooled off'. It is not the provocative acts of the victim as such that reduce murder to manslaughter, but their effect on the actor.[257]

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[255] Kadish *op cit* note 141 at 862

[256] *loc cit*

[257] *loc cit*

The test for provocation at common law has both an objective and subjective requirement.[258]

The Objective Requirement

Bassiouni defines this as follows[259]:

> There is the recognition that whenever, an ordinary, reasonable person of average disposition receives adequate provocation of such a nature as to create passion of 'hot blood', and the circumstances are such that he or she does not have an opportunity to cool off, his or her acts will be considered in the light of (this) fact.

Kadish states that the law has 'tended to develop rather rigid rules about the kinds of provocative act that were 'adequate'.[260] The instances of adequate provocation which were generally recognised were : 1) mutual combat; 2) sudden affray; 3) violent battery; 4) assault and threats leading to battery; 5) fear; 6) adultery of either spouse witnessed or seen by the other; or, 7) words about a spouse's adulterous conduct.[261]

The issue of cooling off period is also an aspect of the requirement that the provocation be adequate. If the ordinary

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[258] American Law Institute *op cit* note 211 at 55

[259] Bassiouni *Substantive Criminal Law* (1978) 257

[260] Kadish *op cit* note 141 at 862

[261] Bassiouni *op cit* note 260 at 258-59; Kadish *op cit* note 141 at 862

reasonable person's passions would have cooled off between the time of the provocative act and the accused's conduct, the actions of the accused will not be partially excused.[262] Only a sudden provocation should thus be taken into account.

The criticisms directed against the objective test in English law as the criterion to determine what impulses society expects people to control applies equally to this test in American law. The American courts like the English courts (prior to the Homicide Act) were also loath to individualise the reasonable person test.[263]

The Subjective Requirement

The accused must have acted in the sudden heat of passion. It is not sufficient to show that a reasonable person would have lost his self-control in the circumstances. Similarly, with regard to the cooling off time, an accused who recovers from an affront with quickness and still kills, cannot rely on provocation if it is shown that the reasonable man's passions would not have cooled in that time.[264]

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[262] Bassiouni *op cit* note 260 at 260; La Fave and Scott *op cit* note 142 at 661

[263] American Law Institute *op cit* note 211 at 57-58

[264] *Ibid* at 60; La Fave and Scott *op cit* note 142 at

The Model Penal Code

Section 210.3(1)(b) reads as follows :

> 1) criminal homicide constitutes manslaughter when;
> (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

The availability of the defence of provocation has been extended by the Code to allow the jury to consider any act which may result in extreme emotional or mental disturbance. This, it is submitted, may well cover the situation of a battered woman who kills her abuser. The section in the Code provides a wider defence than section 3 of the English Homicide Act, 1957 which requires that the accused be provoked by 'things done or said'. The wording of the Code seems to indicate that an accused may rely on the section if suffering from extreme emotional stress not caused by 'things done or said' as long as there is a reasonable explanation thereof. The American courts have, in the area of self-defence, admitted expert testimony on the battered woman syndrome and thus it is submitted that if the same testimony were admissible here, it would amount to a reasonable explanation of the conduct of a battered woman who has killed her abuser. The formulation in the Model Penal Code appears thus to

be able to encompass the battered woman; even the test for reasonableness starts from the viewpoint of a person in the shoes of the battered woman.

III : THE POSITION IN SOUTH AFRICA

Criminal capacity[265] is an indispensable prerequisite for criminal liability.[266] The term criminal capacity is generally deemed to imply that the accused must first have the mental ability to appreciate the wrongfulness of his act, and must secondly be able to conduct himself in accordance with this appreciation.[267] Even if the accused is capable of appreciating the wrongfulness of his conduct, he cannot be held liable if he lacks the capacity to act in accordance with this appreciation.

Until 1981, it was generally accepted that there were only four factors which could affect criminal capacity; namely, mental illness[268], youth, intoxication[269] and provocation.[270] There had, as yet, been no recognition of a 'general' defence of criminal

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[265] The term 'criminal capacity' will be used throughout although the terms 'criminal responsibility', 'accountability', 'imputability' and the Afrikaans term 'toerekeningsvatbaarheid' may also be used to denote the same meaning

[266] Snyman *op cit* note 52 at 154-55

[267] *loc cit*

[268] Criminal capacity due to mental illness is dealt with in section 78(1) of the Criminal Procedure Act 51 of 1977

[269] The fact that intoxication could affect criminal capacity was finally decided in the case of *S v Chretien* 1981 (1) SA 1097 (A)

[270] Snyman *op cit* note 52 at

incapacity. Since then, however, the view has been put forward in both academic literature and the case law that factors other than the four mentioned above, such as extreme emotional stress, may also serve to exclude the criminal capacity of the accused.[271]

Until the decision in *S v Chretien*[272] in 1981, it was a firmly established principle of our case law that provocation could never be a complete defence. Provocation, it was accepted, had the effect of excluding the 'specific intent' required for murder and assault with intent to do grievous bodily harm; therefore, an accused could only be charged with the less serious crimes of culpable homicide and assault respectively.

The Appellate Division in *Chretien*[273] rejected 'the whole idea of "specific intent" in relation to the defence of intoxication'. Although the court was dealing specifically with intoxication, the question did arise as to whether there was any valid reason why the 'specific intent theory' should not be rejected for the defence of provocation as well; because, if intoxication could

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[271] A detailed discussion of the case of *S v Wiid* 1990 SASV 561 (A) which settled this question of law, follows.

[272] *op cit* note 270

[273] *Ibid* at 1103 H - 1104 A

exclude the voluntary nature of the accused's act, his criminal capacity and intention, then why should provocation not have the same effect.[274]

The case of *S v Arnold*[275] provides further, albeit indirect, support for the proposition that provocation should be a complete defence. The court held that at the time when he fired the fatal shot, he lacked criminal capacity.[276] The court, although it did not expressly describe Arnold's defence as one of provocation, indicated that his reliance on 'emotional stress' was in fact 'nothing other than a reliance on his reaction to provocation'.[277]

Then in the case of *S v Campher*[278], the majority of the Appellate Division, was of the opinion that severe emotional stress may in extreme circumstances result in a person completely lacking criminal capacity - such person would then have to be found not guilty.

It is thus submitted, in the light of the above, that extreme provocation, that is, provocation resulting in the accused's lack

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[274] A number of writers had previously argued that provocation should be a complete defence - See Strauss 'Opmerkings oor Toorn as Faktor by die vasstelling van Strafregtelike Aanspreeklikheid'(1959) *THRHR* at 23-24; Dean 'Provocation' (1964) *Responsa Meridiana* at 36

[275] 1985 (3) SA 256 (C)

[276] *Ibid* at 264 D

[277] *Ibid* at 264 C-D; Snyman *op cit* note 52 at 187

[278] 1987 1 SA 940 (A)

of criminal capacity is a complete defence in South African law[279] Snyman also states that' it should be borne in mind that anger arising from provocation is morally less reprehensible than intoxication'.[280] In *S v Chretien*[281], however, the court held that intoxication may completely exclude criminal capacity and thus afford a complete defence, so it is difficult to see why provocation, seeing that it is regarded as 'morally less reprehensible', should not have the same effect. Provocation in South African law, unlike England, is not to be viewed as a separate doctrine governed by rules of its own but merely 'as a set of facts to be judged in the light of the general requirements for criminal liability such as an act, unlawfulness, criminal capacity and *mens rea*'.[282]

At present in South African law, it is submitted, there is a general defence of criminal incapacity.[283] The primary concern of said defence is not the cause of the impairment of the accused's mental abilities but simply the question whether the accused's mental functions were impaired to such an extent that he could be described as criminally incapable at the time of the act in question. Such a defence could be described as 'non-

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[279] Snyman *op cit* note 52 at 188

[280] *loc cit*

[281] *op cit* note 270

[282] Snyman *op cit* note 52 at 188

[283] See Snyman 'Provokasie as 'n volkome verweer in die strafreg' (1991) *Consultus*; Burchell and Milton *op cit* note 55 at 232; Bergenthuin 'Die algemene toerekeningsvatbaarheidsmaatstaf'(1985) *De Jure* at 282; Pretorius 'Provokasie: die status quo' (1992) *Servamus* at 29

pathological criminal incapacity'[284] and is the opposite of incapacity which is the result of mental illness and which would thus fall within the ambit of section 78 of the Criminal Procedure Act.

The judgement of *S v Chretien*[285], although it dealt specifically with intoxication, was among the first to move away from the view that criminal capacity could only be affected by certain factors.

In *S v Van Vuuren*[286] the court, although it rejected the accused's reliance on provocation on the facts, nevertheless remarked that it was prepared to accept that criminal capacity could be excluded not only as a result of intoxication, but also by a 'combination of drink and other factors such as provocation and severe mental and emotional stress'.[287]

The case of *S v Arnold*[288] provides strong support for the acceptance of a defence of non-pathological incapacity. The accused after being unhappily married for some time, shot and killed his young wife. At the critical moment, according to the court. 'the deceased bent forward, displaying her bare breasts while she also referred to the strip-dancing. This was obviously

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[284] The term was first used in *S v Laubscher* (1) SA 163 (A) and has been used in subsequent decisions

[285] *op cit* note 270

[286] 1983 1 SA 12 (A)

[287] *Ibid* at 17 G-H

[288] *op cit* note 276

an act of provocation on the part of the deceased.'[289] The accused then shot and killed her. According to psychiatric evidence 'his conscious mind was so 'flooded' by emotions that it interfered with his capacity to appreciate what was right and wrong and, because of his emotional state, he may have lost the capacity to exercise control over his actions'.[290] The court held that as a result of emotional stress, the accused had acted 'unconsciously' when he fired the shot and therefore had not performed an act in the legal sense.[291]

> It is therefore logical to say that it is not only youth, mental disorder or intoxication which could lead to a state of criminal incapacity, but also incapacity caused by other factors such as extreme emotional stress.[292]

The court adds that if it could be assumed that he had in fact acted consciously, then the next question would be whether he had criminal capacity.[293] Burger J states that : 'A person is said to be criminally responsible or to have criminal capacity when he is able to appreciate the wrongfulness of his act and act accordingly.'[294] On the evidence, however, it cannot be said

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[289] *Ibid* at 261 G-H

[290] *Ibid* at 263 C-D

[291] *Ibid* at 263 G-H

[292] *Ibid* at 264 C-D

[293] *Ibid* at 263 H-I

[294] *loc cit*

whether it had been proved that the accused could have appreciated the wrongfulness of his act and acted in accordance with such appreciation.[295]

The case of *S v Campher*[296] is interesting from the point of view of its discussion of criminal capacity and because the accused appears from the facts to have been a battered woman although no reference is made specifically to this term at any point in the judgement.

Two weeks after their marriage, the deceased seriously assaulted the accused in front of her nine year old daughter - he then made her apologise and promise not to do it again.[297] He was domineering, had a short temper and regarded himself as her boss. When he became angry he was unable to control himself. He mocked her religion, was unable to tolerate her children from a previous marriage and forced her to send them to live with her former husband. He was obsessed with his racing pigeons yet made her do all the work and if she questioned him on anything he would lose his temper and hit her. He often compelled her to arm herself with a firearm and investigate noises at his pigeon coops at night, and also often insisted that she sit at his bedside throughout the night to protect him from evil spirits. Six months after the marriage the accused filed for divorce and went to stay

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[295] *Ibid* at 264 D

[296] *op cit* note 279

[297] These facts are obtained from the judgement at 944 A-J; 945 A-F

with friends in Port Elizabeth; the deceased sent her a telegram asking her to return because there was trouble - she went back to him, he convinced her to return to him and shortly thereafter he assaulted her again. Nevertheless she allowed him to return with her to Port Elizabeth (she climbed on the plane with two blue eyes) where he assaulted her again even though he had signed a letter stating that he would not hit her again. The accused did report him to the officials at his work but never laid a charge with the police although a lady from the Welfare was aware of the unhappy state of her marriage.

The above facts sketchy as they are, all seem to indicate that the accused was a victim of the battered woman syndrome. On the day of the shooting the deceased had again quarrelled with the accused and forced her to help him drill a hole in the dovecote. She, because of her tiredness, was unable to hold the lock properly with the result that the hole was crooked.[298] He swore at her and threatened to assault her with the screwdriver he had in his hand - he chased her into the house and she took a firearm out of the draw, with which to defend herself.[299] He then forced her back to the dovecote and ordered her to pray that God would make the crooked hole straight.[300] At that moment as a result of the emotional abuse she had endured (she was emotionally exhausted) she pulled the trigger of the firearm which she still held in her hand.

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[298] See 945 G-J; 946 D-F

[299] *Ibid* at 946 I-J

[300] *Ibid* at 947 B-C

Viljoen JA comes to the conclusion that the appellant had the ability to appreciate the wrongfulness of her conduct, but that she was unable to act in accordance therewith[301] because of the severe emotional stress she had been subjected to.[302] The lack of psychiatric evidence is pointed out but this does not preclude the court from making this finding.[303] At this point it should perhaps be noted that if expert testimony on the battered woman syndrome and its effects was allowed; then it would leave no room for any doubt that the appellant although she appreciated the wrongfulness of her conduct was unable to act in accordance with her appreciation because of her extreme fear of the deceased and what he would do to her but also because she perceived this as an escape opportunity. She felt unable to resist the impulse to destroy 'the monster'[304] because of all the suffering she had undergone at his hands and which had resulted in the build up of emotional stress. There are those who would perhaps ask why she did not leave; however, from the facts it is evident that on the day on which the shooting occurred, she did try and escape from their house but the deceased prevented her and it was at this

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[301] *Ibid* at 947 B-C

[302] *Ibid* at 956 A-B

[303] *Ibid* at 958 I

[304] *Ibid* at 956 C

stage that she picked up the revolver. He had then forced her back to the pigeon coop in circumstances in which it was not unreasonable to retain a firearm because she knew (from past experience) that she was in serious danger of being assaulted or that he would carry out his threat and kill her.

Jacobs JA held a contrary opinion, namely that where the appellant, as is accepted here, has the ability to appreciate the wrongfulness of her conduct, she cannot allege that an 'irresistible impulse' prevented her from controlling her conduct, unless this inability to act in accordance with her appreciation of wrongfulness was due to a mental illness or defect.[305] In the case of mental illness the appellant would have to be dealt with in terms of section 78 of the Criminal Procedure Act 51 of 1977.

Boshoff AJA accepts in principle that the defence of criminal incapacity can be extended to include non-pathological incapacity but he feels that it is impossible for the court to judge, in the absence of psychiatric evidence, whether the appellant suffered from a 'geestesversteuring' which affected her criminal capacity.[306] He thus is not prepared to find that the appellant lacked criminal capacity and accordingly confirmed her conviction of murder.[307]

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[305] *Ibid* at 947 D-E

[306] *Ibid* at 962 A-C

[307] The reason for the difference in the judgements of Viljoen JA and Boshoff AJA may be attributed to their opposing views on the necessity of psychiatric (expert) evidence

The interesting situation which arises in this case is that although on the law the majority of the court (*per* Viljoen JA and Boshoff AJA) held that emotional stress could lead to an absence of criminal capacity; on the facts, it was held (*per* Boshoff AJA and Jacobs JA) that the appellant was guilty of murder. Du Plessis remarks quite aptly that the judgement as a whole is unsatisfactory in that the ultimate decision is not based on the majority view of the law.[308]

In the case of *S v Wiid*[309] the Appellate Division appears to have removed the uncertainty that existed in our law regarding the question whether there exists a general defence of lack of criminal capacity, by unanimously deciding that there is such a defence.

In casu the appellant shot and killed her husband to whom she had been married for thirty two years.[310] The marriage relationship was extremely strained, *inter alia*, because of the deceased's unfaithfulness. The deceased had also assaulted the appellant on

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[308] Du Plessis 'The extension of the ambit of ontoerekeningsvatbaarheid to the defence of provocation - a strafregwetenskaplike development of doubtful practical value' (1987) *SALJ* 546

[309] 1990 SASV 119 (A); The cases of *S v Calitz* 1990 (1) SASV 119 (A) and *S v Smith* 1990 (1) SACR 130 (A) provide further support for the acceptance of the defence of non-pathological incapacity

[310] Facts at 564 H-J; 565 A-J; 566 A-D

two previous occasions - he was stated the court ' 'n man met 'n geweldige kort humeur'.[311] Once again we have evidence that the appellant was a battered woman[312] although the court did not consider this expressly.

The five months before the shooting saw the accused in a 'hoogs gespanne toestand'.[313] Her emotional stability was further increased as a result of her husband's current extra-marital affair. On the day of the shooting the deceased left the house early; the appellant was convinced that he had gone to see his mistress although he had promised her two days earlier that the affair was over. That evening, in the presence of another woman, the deceased assaulted the appellant breaking her nose, breaking one of her teeth off at the root and her spectacles. The witness testified that she was bleeding profusely from the nose and mouth. The deceased then went to the bedroom and shortly thereafter the appellant shot and killed him.

On the strength of *inter alia* psychiatric evidence led on behalf of the appellant the court found that she lacked criminal capacity at the moment she shot the deceased because she lost either the ability to distinguish between right and wrong or the ability to act in accordance with said distinction.[314] There

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[311] *Ibid* at 565 A-B

[312] Walker defines a battered woman as anyone who has experienced two or more abusive episodes - *op cit* note 1 at XV

[313] *Ibid* at 565 B-C

[314] *Ibid* at 569 D-E

seems to be some confusion in the judgement between the issues of the voluntary conduct of the appellant and the test for criminal capacity.[315] The court goes so far as to ask whether the appellant acted voluntarily[316] and then states that it is not consistent with her character or personality, also considering how much she loved the deceased in spite of everything, that she would have purposely killed him.[317]

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[315] *loc cit* '...bestaan daar redelike twyfel oor die vraag of die appellante willekeurig opgetree het'

[316] *loc cit*

[317] *loc cit*

CONCLUSION

The law of self-defence in both South Africa and England is unable to accommodate the circumstances of a battered woman who kills her abuser because of its requirements of 'imminent attack' and 'reasonable and necessary' defensive action. The utilisation of an objective test to assess reasonableness does also not favour the battered woman because her feelings and perceptions are not taken into account. The American law has made some progress in that it acknowledges the battered woman syndrome with its history of past abuse resulting in a build up of fear and terror; however the courts, as in the case of *State v Stewart*[318], do not always follow their own instructions. The standard of reasonableness has also been modified to encompass both objective and subjective factors and some States have in fact said that the standard to be applied is that of the reasonably prudent wife.[319] In spite of these changes, the ideal solution has not yet been found.

Burchell and Milton state that : 'One approach is consciously to extend the bounds of private defence to include such an accumulation of abusive conduct as constituting an unlawful "attack".[320] They are however of the opinion that in terms of the South African criminal law 'it is more desirable to treat such

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[318] *op cit* note 69

[319] *loc cit*

[320] *op cit* note 55 at 238

cases of wife battering under the principles governing the test of capacity'.[321]

The partial defence of provocation in England and America, hinging as it does on the reasonable man, is, unlike its more developed South African counterpart, unable to accommodate the unique circumstances of the battered woman. In South Africa, the battered woman who kills her abuser, will have an excellent defence in the form of non-pathological incapacity (as happened in the case of *S v Wiid* [322]) because all the court asks is whether she was able to distinguish between right and wrong and then act in accordance with that distinction. The battered woman syndrome, as outlined in chapter one of this paper, offers an explanation of the effects of long term abuse. The victim of such abuse often lives in constant fear for her life and is in an extremely heightened emotional state. The day does eventually occur when she firmly believes (this belief is often reinforced by previous experience of the batterer's behaviour) that he will carry out his threats and kill her, unless she kills him first - at the time when she acts she has only one thought on her mind and that is survival. The severe emotional strain and terror she has been subjected to leads, as expert testimony will show, to the situation where she is unable to distinguish between right and wrong and then to act in accordance therewith. She has tried to leave in the past, there is no help available to her now and

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[321] *loc cit*

[322] *op cit* note 272

the only solution in her mind is to kill or be killed. The defence of non-pathological incapacity is able to take into account the effect which abuse has on a persons criminal capacity and thus can be said to be tailor made to fit the situation where a battered woman kills her abuser. All that is now needed is a suitable set of facts and an amenable judge who will allow expert testimony on the battered woman syndrome to be led.

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