

Pathological vs Non-Pathological Incapacity : Are the Differences in Requirements and Consequences Justified?

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ABSTRACT

This paper covers the criminal law defences of pathological incapacity and non-pathological incapacity in South African law which are used by defendants in criminal cases to refute the element of capacity that is necessary for the court to hold the accused criminally liable. Each defence has its own set of requirements and the result of successfully raising each defence also differs. The aim of this paper is to compare these different requirements and resultant punishments to determine whether those differences are justified in order to ascertain whether it is necessary to have these different requirements or whether it would be more reasonable to have a single set of requirements applying to both considering that both defences give the accused the potential to avoid being held fully accountable for their criminal conduct.

Previous work has, primarily, focused on whether the defences in general are justifiable rather than looking at whether the specific contents of the defences, particularly the requirements necessary to raise the defences, are justifiable. To address this gap, this paper shall explore and compare the requirements and principles adopted when these defences are raised, particularly where the burden of proof lies; whether expert evidence is required or not; the tests for each defence; the subjective versus objective approach to capacity and, ultimately, the consequences of a successful defence in either situation. A comparison between the South African formulation of these defences and the Canadian version of these defences is used to discover elements of the Canadian defences that may improve the South African formulations. These comparisons show that there is justification in having different requirements, however, there is room for a consolidation of some of the requirements and consequences to streamline and lend credibility to the defences.

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Chapter One

INTRODUCTION

1.1. INTRODUCTION

‘Controversial but necessary’

This is a phrase I believe best describes the South African criminal law defences of pathological criminal incapacity and non-pathological criminal incapacity.

For an individual to be held criminally liable in the eyes of South African law they have to engage in the unlawful conduct voluntarily, meaning that the act or omission by the individual must be the result of that individual exercising their free will.¹ If a person is unable to exercise that free will or unable to exercise self-control over their behaviour then the conduct is deemed involuntary.² Born out of that involuntariness are the two criminal law defences of pathological incapacity and non-pathological incapacity.

1.2. RESEARCH QUESTION

This thesis seeks to answer the question: ‘Are the differences in requirements and consequences between the pathological incapacity defence and the non-pathological incapacity defence justified?’ The test for pathological incapacity differs from the test for non-pathological incapacity, thus this thesis sets out to evaluate whether those differences are justified and whether those differences serve to respect and promote the rights of persons with disabilities or whether they are discriminatory and unnecessary. The point of this is to establish whether it is necessary to have these different requirements or whether it would be more reasonable to have a single set of requirements applying to both, considering that both defences have the potential to infringe on an individual’s rights whilst simultaneously possessing the potential to set free a guilty person.

These defences are of particular significance to South Africa’s criminal law landscape for a few reasons. Firstly, the defences are controversial, not only in South Africa but globally. There are conflicting views on the efficacy and effects of these types of defences. Secondly, the defences target a vulnerable group of society, namely, persons with mental disabilities and so there is a need to ensure that the defences protect the interests and rights of these persons whilst

¹ J Burchell *Principles of Criminal Law* 5ed (2016) 69-71.

² Ibid at 72.

ensuring that the interests of the public are also considered and protected. Thirdly, the defences are capable of being applied in very versatile circumstances, especially the non-pathological incapacity defence, which widens the reach of the defences. For these reasons, it is necessary to interrogate the defences to guard against their abuse and to guard against the defences themselves acting as tools of marginalisation and discrimination of a vulnerable group of people in our society. We have to ensure the defences meet the purpose for which they were fashioned.

1.3. DEFINITION

Pathological incapacity is colloquially known as the ‘insanity defence’ because it applies in situations where a person suffers from a mental disease or defect (now referred to as intellectual disability, which may be used interchangeably) that reduces or eliminates their capacity to either appreciate how wrong their behaviour is or to control their behaviour.³ Capacity is diminished by internal factors. Non-pathological incapacity, on the other hand, is the result of external factors such as intoxication or provocation and emotional stress which cause the individual to lack the capacity to appreciate the wrongfulness of their behaviour or exercise self-control.⁴ This thesis shall focus on non-pathological incapacity relating to provocation and emotional stress rather than any other type in order to make as precise and concise a comparison as possible.

Chapter 13 of the Criminal Procedure Act⁵ (CPA) regulates mental illness and criminal responsibility, thus, making it the legal authority governing the boundaries and functions of both the pathological and non-pathological incapacity defences. More precisely, section 78(1) of the CPA sets out the overall test for criminal capacity. The test is whether the accused can appreciate the wrongfulness of their conduct which is about determining if that person has insight or whether they can act in accordance with an appreciation of the wrongfulness of their conduct which is about that person’s self-control.⁶ Both defences embody this general test but have variations and additions that make each of them different to the other.

1.4. CONTROVERSY

Both pathological and non-pathological defences provide a person who has engaged in unlawful conduct the ability to refute and escape criminal liability because they are deemed to

³ Ibid at 275.

⁴ Ibid at 327.

⁵ 51 of 1977.

⁶ Ibid s78(1).

have not acted intentionally due to their lack of capacity. Without capacity, an individual cannot be held criminally liable for an offence. According to section 78(6) of the Act, if the pathological incapacity defence succeeds then the court will find the offender not guilty ‘by reason of mental illness or intellectual disability’.⁷ Essentially, despite committing the crime the criminal is not held responsible for their actions. For this reason, the defences prove to be a very controversial aspect of criminal law and warrants further analysis to understand the role they play in the criminal justice system and whether the controversy can be dispelled.

Some people believe that these defences create an avenue through which criminals can circumvent punishment by claiming that one of the defences applies to them when in reality they are able to appreciate the wrongfulness of their actions and are able to act in line with that appreciation, i.e. they do not meet the test for the defence.⁸ This is a valid concern considering the nature of these defences whereby mental disease or emotional stress is not easily ascertainable or perceivable by the everyday person or even a judicial officer tasked with the ultimate decision of whether an incapacity exists. This concern is amplified when it comes to more serious violent crimes such as murder or rape because of the devastating consequences associated with these crimes and the potential danger the offender poses to the community at large. The possibility that a murderer or rapist can escape criminal liability is alarming to the public and undesirable. Yet, these defences make such a situation possible.

The controversy of these defences does not only come from the lack of accountability that attaches to them, but it also has to do with how they affect the treatment and perception of persons with mental disabilities. In fact, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Committee on the Rights of Persons with Disabilities oppose the insanity defence altogether.⁹ In its 2009 Thematic Study on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, the OHCHR made it clear that the recognition of the legal capacity of persons with disabilities as required by the Convention¹⁰ necessitates the abolition of the insanity defence. This is based on the idea that declaring that an individual lacks capacity because of the existence of a disability, particularly a mental disability in this case, is discriminatory.¹¹ The OHCHR maintains this

⁷ Ibid at s78(6)(a) and (b).

⁸ ‘Is There A Need for The Insanity Defense?’ available at <https://law.jrank.org/pages/7666/Insanity-Defense-THERE-NEED-INSANITY-DEFENSE.html>, accessed on 24 June 2020.

⁹ Meron Wondemaghen ‘Testing Equality: Insanity, Treatment Refusal and the CRPD’ (2018) 25(2) *Psychiatry, Psychology and Law* 174-185.

¹⁰ Convention on the Rights of Persons with Disabilities [A/RES/61/106] Article 12 para 2.

¹¹ Wondemaghen op cit note 9.

position as shown in its 2017 report where it highlighted that the Committee on the Rights of Persons with Disabilities has repeatedly held that defences such as the insanity defence deny fair trial rights and lead to harsher consequences for persons with disabilities such as indefinite detention in a mental health institution.¹²

Despite this repeated, categorical admonishing of such defences by the United Nations global body, many countries still recognise the insanity defence in different ways, including South Africa and Canada which have both been greatly influenced by British legal tradition pertaining to these types of defences.¹³ This defiance signals that these criminal justice systems see the value in these kinds of defences and as such have decided to keep them. However, scepticism surrounding the defences still exists which indicates that there is still room for improvement. That is why this thesis aims to carry out a comparative exercise to highlight areas in which each of the defences can improve and become somewhat watertight to allay the concerns of those sceptics and critics.

1.5. VULNERABLE GROUP

The Constitution of South Africa¹⁴ recognises that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’.¹⁵ This includes people with disabilities who are, in fact, specifically protected from indirect or direct discrimination by the state under s9(3) of the Constitution. This protection makes these defences all the more in need of scrutiny in order to see if they meet this standard of non-discrimination set by the Constitution which is the supreme law of the country.¹⁶ The pathological and non-pathological defences directly affect the rights of persons with disabilities such as the right to human dignity¹⁷ and the right to freedom and security of the person.¹⁸ What has to be assessed about these defences is whether the way in which they affect those rights is justified in terms of the Constitution. One way to go about that is by assessing the legal tests that the court uses to determine whether an individual meets the criteria to successfully raise one of the defences and seeing to what extent those tests uphold constitutional values and rights.

¹² Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 2017 page 11 para 32.

¹³ Both South African and Canadian insanity defences developed from the M’Naghten rules which were formulated in Britain following the English case of *R v M’Naghten* (1843) 8 E.R. 718.

¹⁴ Constitution of the Republic of South Africa, 1996.

¹⁵ *Ibid* s9(1).

¹⁶ *Ibid* s1(c).

¹⁷ *Ibid* s10.

¹⁸ *Ibid* s12.

Furthermore, these defences are currently relevant due to the amendments made to sections 77 and 78 of the Criminal Procedure Act in 2017. This was in response to the Constitutional Court's decision in the 2015 case of *De Vos N.O. and Others v Minister of Justice and Constitutional Development and Others*¹⁹ where the court decided that the two sections were unconstitutional in so far as they made it compulsory for the accused who was found to have a mental illness or disability to be imprisoned or detained in a mental health institution with no alternative consequences available.²⁰ Since the Criminal Procedure Amendment Act 4 of 2017 came into operation to remedy the unconstitutionality of the sections, it is important to explore the sections as they now stand amended to see whether the consequences attached to successfully raising the pathological or non-pathological incapacity defences are in line with the constitution and uphold the rights of persons with disabilities. By comparing the differences in the consequences attached to successfully raising each of the defences and determining whether those differences are justified, we can get a better picture of how well these defences serve the constitutional agenda.

1.6. VERSATILITY

There have recently been highly publicised cases that have brought these defences, particularly the non-pathological incapacity defence, into the spotlight and have warranted a closer look at the application and use of these defences in our criminal justice system. This renewed publicity makes an examination of the justification of these defences more relevant now than before. The variety and seriousness of the cases in which the defences have been raised shows just how far reaching an effect these defences can have in the sense that there is a lot of flexibility in the types of offences that these defences can be used to defend. There is no closed list of offences for the defences to be used, as reiterated in chapter five. Their use can range from cases involving rape or murder to cases involving petty theft.

For example, in the 2019 case of *Momberg v S*²¹ the accused raised the non-pathological incapacity defence to her charges of *crimen injuria*²² because she was accused of berating law enforcement officers with racial slurs after she was the victim of a smash-and-grab. The use of the non-pathological incapacity defence in this case is of particular interest because it was raised in defence of racism. Racism is a highly emotionally charged subject in the world but in

¹⁹ 2015 (2) SACR 217 (CC).

²⁰ *Ibid.*

²¹ *Momberg v S* 2019 (2) SACR 505 (GJ).

²² The wilful injury to someone's dignity, caused by the use of obscene or racially offensive language or gestures.

South Africa particularly because of the country's long and deep-rooted history of colonialism and Apartheid where racism was the tool of the oppressor.²³ The accused was ultimately unsuccessful and was convicted of her charges, but had she been successful, it is arguable that a floodgate could have been opened for racists in similar situations to Vicki Momberg looking for justification for their actions. To the public, this could have been seen as a condonation or legal loophole for racists to get away with their damaging and unlawful conduct.

Another example of recent cases bringing these types of defences to the spotlight is the Diego Novella case of 2018²⁴ where the accused relied on the non-pathological incapacity defence against his murder charge. He was charged with murdering his girlfriend and argued that the consumption of substances caused him to experience a 'psychotic-like state'²⁵ whereby he believed that his girlfriend was a demon. The horrific details of this case, including that the victim was found with faeces and a derogatory note on her body, make the inducement of the non-pathological defence all the more concerning. Ultimately, the accused's defence was unsuccessful, and he was found guilty of murder.

Despite the defence failing in Novella's case, it highlighted the potential gravity that the success of such a defence has. That an individual who carries out a crime as gruesome as this can potentially be found not guilty and can be released back into society subject to conditions set by the court,²⁶ is distressing. That is why the need to ensure that those who succeed in using the defence are the intended beneficiaries. As a result, there is a burden on the criminal justice system to constantly ensure that the defences are correctly formulated to get the intended results and serve the intended purpose. This thesis aims to contribute to those criminal justice system goals by identifying what is working and what is not working in the formulation of the defences and proposing possible means of improvement.

1.7. THE GAP

Previous work related to pathological and non-pathological incapacity has mainly looked at the defences individually. Looking at the components of each of the defences and assessing their

²³ Robert E Gorelick 'Apartheid and colonialism' (1986) *The Comparative and International Law Journal of Southern Africa* 76.

²⁴ *S v D D Novella* CC19/16.

²⁵ *Ibid.*

²⁶ *Supra* note 5 s77(6)(a)(i)(dd).

constitutionality,²⁷ their procedural aspects²⁸ and their development in the law.²⁹ Even where the two defences have been looked at together and compared, the focus has been on figuring out which defence is more advantageous for the accused or more likely to succeed.³⁰ There are also no recent comparisons that take the amendments of 2017 into account, thus, there is a need for an updated comparison. What has not been adequately addressed is whether the differences between the requirements and results, as they stand amended, of each of the defences are justified in terms of the rights embodied in the Constitution and in line with the constitutional agenda of equal protection before the law which is the aim of this thesis.

If there is justification for certain differences, then there is a need to explain those justifications to demonstrate to critics and sceptics of these defences that they both serve a valuable and indispensable purpose in the criminal justice system. Where the differences are not justified, then there is a need to explore how that discrepancy can be resolved to make each of the defences stronger. This thesis looks at what one defence can learn or adopt from the other to improve it where the difference in a certain requirement appears to be unnecessary. Essentially, the aim is to look for if and where the formulations of the defences can be streamlined to make them more cohesive as a way to simplify and enhance the defences.

With the main objective being to carry out a comparison to identify areas of improvement, it is also befitting of this thesis to not only compare the defences with each other but also to take a look at another formulation of a similar defence in a different jurisdiction, namely Canada. This is to ascertain whether there are other improvements from outside influences that can be adopted to enhance the defences and reduce scepticism about them in terms of the protection they give persons with mental disabilities and the protection they give to the public.

1.8. METHODOLOGY

The methodology used in this paper is a desktop analysis involving comparative legal research methodology, whereby, the research is aimed at critically examining the different sources of law to see how and if the current state of the law can be changed. The comparison is between

²⁷ Marozane Spammers 'The constitutionality of Chapter 13 of the Criminal Procedure Act 51 of 1977' (2017) SACJ 339-362.

²⁸ Burchell op cit note 1 at 294.

²⁹ Shannon Hoctor 'Tracing the origins of the defence of non-pathological incapacity in South African criminal law' (2011) 17 *Fundamina : A Journal of Legal History* 70-82.

³⁰ FFW van Oosten 'Non-pathological criminal incapacity versus pathological criminal incapacity' (1993) 6 *South African Journal of Criminal Justice* 127-147.

the two criminal law defences themselves as well as a comparison between the South African criminal law jurisdiction and the Canadian criminal law jurisdiction.

The reason this paper uses a comparative legal research methodology is because it is a good way of highlighting the inadequacies and the strengths by cross referencing it to a similar legal framework that has similar objectives. In this case, the pathological incapacity defence and the non-pathological incapacity defence share a lot of similarities in terms of objectives and results which is why it is appropriate to compare them to one another to identify areas of improvement.

Furthermore, the comparison between the South African formulation of these defences and the Canadian formulation is apt as both legal systems have been greatly influenced by the British legal tradition and thus it would be interesting to see in what ways they are similar or different.

1.9. STRUCTURE

To achieve the aforementioned aim of exploring means of improvement or explaining the justification for its current construction, this thesis shall explore and compare the requirements and principles adopted when these defences are raised.

Chapter two shall explain pathological and non-pathological incapacity defences by giving a brief history of the defences and their statutory bases and describing different attitudes towards the defences and perceptions of the defences amongst legal scholars. This is to contextualise the defences and give a foundation to understand the development that has already happened so that the proposed future developments can effectively add onto that prior development.

Chapter three shall explore each requirement necessary to raise each of the defences and compare it to the requirements of the other defence, followed by an assessment of the justifiability of the differences between the requirements. The burden of proof is the first requirement assessed in this chapter where the difference between who the burden falls upon in each defence is compared. The next requirement is that of expert evidence where its necessity and utility is compared between the two defences. This is followed by an exploration of the tests for each defence, breaking them down to the cognitive function, conative function and affective function and comparing the role that those functions play in the capacity test of each defence. The final requirement assessed in this chapter is the use of an objective approach versus a subjective approach to capacity in each defence.

Chapter four shall look at the different possible results of successfully raising each of the defences and compare them by looking at the potential benefits and the disadvantages of each

consequence to the accused, society, and the criminal justice system. The essential question that shall be addressed in this chapter is whether the punishment fits the crime. To answer this question, the chapter shall analyse recent changes that have taken place in the law regarding the types of consequences the court is able to enforce. Then it looks at whether those amended consequences accord with the rights afforded to individuals by the Constitution.

Chapter five shall briefly explain the Canadian insanity and provocation defences and explore their formulation. It will then assess the applicability of some elements of the Canadian defences to the South African context. Lastly, it will look at the potential advantages of adopting particular elements of the Canadian formulations of the defences. The goal is to identify what works about the Canadian defences and why and to see if it can improve the South African formulation of the defence.

Finally, chapter six shall conclude by summarising the arguments put forward and show how these arguments establish that some of the differences in requirements between the defences are justified. This is because the differences are what create equity between the defences because to treat them exactly alike would be unjust and would defeat the objectives of the Constitution and the fulfilment of the rights afforded to individuals in the Bill of Rights. However, other differences in requirements and the differences in consequences are not justified and streamlining them would enhance the efficacy, credibility, and constitutionality of the defences.

CHAPTER TWO

THE DEFENCES

2.1. INTRODUCTION

This chapter shall explore the historical background to the pathological incapacity defence and the non-pathological incapacity defence. Exploring and understanding the origins of these defences and their development in South African criminal law provides us with the necessary context to be able to carry out a thorough comparison of the defences. Without context it is difficult to get a good grasp of the reasoning behind the differences in the formulations of the defences and their component parts. The reasoning gives insight into why the defences are structured the way that they are, and it allows more in-depth scrutiny of the defences because where the reasoning is flawed or weak in some respects, it becomes easier to address those flaws and weaknesses and subsequently restructure the defences. An interrogation of legal scholar perceptions of both defences is also useful in understanding the context of the defences as those perceptions shape the landscape within which the defences operate and highlight the problems and benefits of the defences.

2.2. PATHOLOGICAL INCAPACITY

To start at the beginning of the historical background of these defences, we must begin with the development of the pathological incapacity defence because it became a part of South African law long before the non-pathological incapacity defence did.¹ In fact, the non-pathological incapacity defence was born out of the pathological incapacity defence and so its origins are directly tied to the origins of pathological incapacity. In this way we see the first of a number of aspects in which the two defences share significant similarities that warrant inquiry into the possibility of streamlining the two defences to make them stronger.

South African criminal law principally comes from Roman-Dutch and English law² and the introduction and development of the pathological incapacity defence is no exception to the robust influence that both of these jurisdictions had on South African law. Roman-Dutch authorities adopted the Roman law idea that a person suffering from mental illness lacks

¹ J Burchell *Principles of Criminal Law* 5 ed (2016) ch 21.

² Shannon Hoctor 'Tracing the Origins of the Defence of Non-Pathological Incapacity in South African Criminal Law' (2011) 17 *Fundamina* 70-82.

criminal capacity (*doli incapax*) in the same way that a child lacks criminal capacity and, as such, should not be punished.³ This is the basic tenet behind the pathological incapacity defence as it stands today, the difference is that the defence has been elaborated to specify that the person must lack insight or self-control to qualify to use the defence. The Roman-Dutch influence is also evident in that an accused found not guilty by reason of mental illness today can potentially be released unconditionally.⁴ The Roman-Dutch understanding was that the mentally ill person should not be punished and so an unconditional release accords with this Roman-Dutch understanding because it allows the mentally ill person to escape punishment. In fact, an unconditional release is tantamount to being acquitted in the sense that the mentally ill person's rights and freedoms are not curtailed by imprisonment, or any other type of punishment, as they would be in a psychiatric hospital or correctional facility.

Similarly, the English law influence is evident in the current formulation of pathological incapacity in South African criminal law. In English law a mentally ill person was excused from being held criminally responsible based on the idea that they were unable to understand the nature of their actions due to their mental illness.⁵ This is very similar to the aforementioned Roman-Dutch concept which shows how it was possible for the South African version to be the result of a mixture of both of these ideas because they were so similar.

The English law principle came from the M'Naghten rules which were established in 1843 after the controversial case of *R v M'Naghten*⁶ where Daniel M'Naghten killed a man whom he believed to be the Prime Minister and was acquitted of murder because of his mental illness. The rules emerged after this case to answer questions about the criminal liability of insane persons and were based on the idea that a person was mentally ill if they suffered from a 'defect of reason' that rendered them unable to differentiate between right and wrong.⁷

The M'Naghten rules became a part of South African criminal law but were modified by the *Hay*⁸ case of 1899 which introduced the 'irresistible impulse' concept into South African law. The introduction of this concept meant that a determination of insanity was no longer only about lacking the ability to differentiate between right and wrong, it also included a determination of whether the person acted under the influence of an 'irresistible and

³ J Burchell *Principles of Criminal Law* 5 ed (2016) ch 20.

⁴ s78(6)(b)(i)(ee).

⁵ Burchell op cit note 3.

⁶ (1843) 8 E.R. 718; (1843) 10 Cl. & F. 200.

⁷ Burchell op cit note 3 at 276.

⁸ *Hay* (1899) 9 CTR 292.

uncontrollable impulse' despite possessing the ability to appreciate the wrongfulness of their act.⁹ In this way we see how the aspect of self-control made its way into the South African conception of pathological incapacity from very early on despite not being a part of the original English law that the South African criminal law had adopted. This variation is integral to the makeup of the defence today as exemplified by s78(1)(b) which embodies the self-control aspect of the defence.

English law influence in the South African formulation of the pathological incapacity defence is also apparent through the treatment of criminal capacity as a concept. As was the case in English practice, criminal capacity as a concept was not emphasised or given much attention to by the South African criminal justice system in the beginning of the 20th century.¹⁰ It was only towards the middle of the 20th century that the notion of criminal capacity began to emerge and went on to become an integral part of criminal liability in South African law where it was referred to as '*toerekensingsvatbaarheid*'.¹¹

Interestingly, the event in South African history that led to the most significant and notable development regarding pathological incapacity was the assassination of Prime Minister Verwoerd in 1966 by Demitrios Tsafendas. Ironically, it was also the attempted assassination of the British Prime Minister that led to the development of the M'Naghten rules which are integral to the insanity defence in Britain. The assassination of the Prime Minister in South Africa led to the development of the Rumpff Report which is integral to the pathological incapacity defence in South Africa. In both cases the accused pleaded not guilty on the basis of mental illness and in both cases the accused was successful in their defence. Both were high profile cases which attracted great attention and concern from the public which necessitated more clarity and direction regarding criminal responsibility of persons with mental illness.

As a result of the assassination and subsequent finding that the accused was not fit to stand trial for the murder due to mental illness, a commission of inquiry¹² was set up and headed by Judge Rumpff resulting in the previously mentioned Rumpff Report.¹³ The commission came to the conclusion in the report that the M'Naghten rules were not good enough and made

⁹ Burchell op cit note 3 at 276.

¹⁰ Shannon Hoctor 'Non-pathological criminal incapacity relating to provocation or emotional stress – an overview of developments in South African law' (2019) 49 *South African Journal of Psychology* 177–187.

¹¹ Ibid at 180.

¹² Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (Rumpff Commission) RP 69/1967.

¹³ Hoctor op cit note 2.

recommendations to replace the rules.¹⁴ This was a substantial move by the commission considering that the M’Naghten rules were the origin of the defence and shows that there was a move towards making the defence more applicable to the South African context rather than sticking by rules that had been transplanted from English law into South African law. This was in line with the wheels that had already been set in motion by the introduction of the ‘irresistible impulse’ test which had already begun to change the rules from their original form.

The report proposed, in place of the M’Naghten rules, a new framework around criminal responsibility that was based on a two-part test for capacity which entails cognitive capacity and conative capacity.¹⁵ Cognitive capacity pertains to the ability to distinguish between right and wrong which is why it can be summed up as amounting to insight.¹⁶ Conative capacity, on the other hand, is about the ability of a person to behave in accordance with that insight of being able to tell the difference between right and wrong which can be summed up as self-control.¹⁷ It is these two elements that were subsequently embodied in the Criminal Procedure Act¹⁸ through s78(1) which refers to the cognitive capacity¹⁹ and the conative capacity²⁰ respectively. Hence, the Rumpff Report laid the foundation for the statutory basis for the defence of pathological incapacity which came into force in 1977. The statute reads:

- (1) A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable-
- (a) of appreciating the wrongfulness of his or her act or omission; or
 - (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
- shall not be criminally responsible for such act or omission.²¹

This statute is the authority for raising the pathological incapacity defence today.

2.3. NON-PATHOLOGICAL INCAPACITY

Although s78 was drawn up with pathological incapacity as its focus and intended area of application, not long after the statute’s inception, the Appellate Division broadened the

¹⁴ Burchell op cit note 3.

¹⁵ Hoctor op cit note 2.

¹⁶ The ability to distinguish between right and wrong.

¹⁷ The ability to act in accordance with the distinction between right and wrong.

¹⁸ 51 of 1977.

¹⁹ s78(1)(a).

²⁰ s78(1)(b).

²¹ s78(1).

statute's application.²² This happened with regards to voluntary intoxication in the case of *S v Chretien*²³ which began the extension of the test in s78 beyond mental illness to non-pathological incapacity. According to Shannon Hoctor, 'Indeed, there was no reason why this should not occur.'²⁴ This implies that it was a natural progression for the test for pathological incapacity to be extended to non-pathological incapacity. However, I am somewhat sceptical of such an assertion because of the fact that the statute and the Rumpff Report were all premised on the criminal responsibility of people suffering from mental illnesses and mental disabilities. Thus, I would argue that perhaps another commission dealing with non-pathological incapacity may have been the next logical step to establish clear guidelines for the defence after wide consultation, as had been the case with the Rumpff Report. This could have potentially assisted in avoiding the problem that arose when it comes to non-pathological incapacity in the case of *S v Eadie* which shall be analysed later on in this chapter.

The non-pathological incapacity defence developed as a result of the courts adopting the statutory framework for pathological incapacity and applying it to non-pathological incapacity cases.²⁵ This has a lot to do with the fact that non-pathological incapacity as a complete defence does not have origins in Roman-Dutch and English law as large parts of South African law do,²⁶ particularly when it comes to provocation and emotional stress. In both the Roman-Dutch and the English approach, provocation, and emotional stress, as they are referred to now, were mitigating factors rather than complete defences for an accused.²⁷ This means that an accused could raise it, but it would not result in an acquittal. The best-case scenario would be a guilty verdict but for a lesser offence or having a lighter punishment ordered. Whilst the significant development of non-pathological incapacity can be attributed to cases dealing with provocation and emotional stress, it was the cases that dealt with intoxication that began the development and adoption of this defence.²⁸

Early South African law was in line with Roman-Dutch law in terms of refusing to recognise voluntary intoxication as a defence for criminal behaviour.²⁹ This was the case until the court in *S v Chretien* decided that intoxication of a substantial degree, such as being 'dead drunk',³⁰

²² Hoctor op cit note 10.

²³ 1981 (1) SA 1097 (A).

²⁴ Hoctor op cit note 2 at 78.

²⁵ Hoctor op cit note 2.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Burchell op cit note 1.

³⁰ *Chretien* supra note 23 at 1098.

has the ability to eliminate the voluntariness of a person's conduct as well as their criminal capacity and intention.³¹ This decision was surprising because of its stark departure from past practice. Even the previous case of *S v Johnson*³² was not as controversial when it ruled that voluntary drunkenness could only be accepted as a defence where that drunkenness led to insanity.³³ This ruling was more conservative than the ruling in *S v Chretien* because the threshold of insanity is higher and more difficult to reach than proving intoxication of a substantial degree.

According to Burchell, the decision by the court in *S v Chretien* was logically sound, however, it miscalculated the public's attitude towards intoxication at the time.³⁴ The idea that a person who gets drunk of their own volition and causes harm can escape liability was not all that popular with the public because it appeared as though the law was treating intoxicated offenders leniently.³⁵ As a result, the legislature intervened through the Criminal Law Amendment Act 1 of 1988 which states that a person who voluntarily consumes a substance that causes them to lack insight or self-control and commits a crime in that condition shall be criminally liable for that crime.³⁶ This was a positive step in the direction of quelling public concerns surrounding intoxication because it made people more accountable for their voluntary actions. Whereas under the *S v Chretien* ruling a person who voluntarily consumed an impairing substance so as to commit a crime would have a high chance of escaping liability, under the amendment that person no longer had a loophole to escape liability through.

Following the development of the non-pathological incapacity defence in terms of intoxication, the grounds of provocation and emotional stress began to gain momentum. The Rumpff Commission did not regard affective functions, which regulate emotions such as anger and love, as pertinent to the assessment of whether an individual has criminal capacity or not.³⁷ This shows that provocation and emotional stress were not factors that the commission regarded as relevant to determining whether a person had criminal capacity. The courts, however, did not adhere to the advice of the commission in this regard as they later came to recognise provocation as relevant to determining criminal capacity.³⁸ This first took place in

³¹ *Chretien* supra note 23.

³² 1969 (1) SA 201 (A).

³³ Burchell op cit note 1.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Criminal Law Amendment Act 1 of 1988 s1(1).

³⁷ Burchell op cit note 1 ch 22.

³⁸ *Ibid.*

the case of *S v Van Vuurem*³⁹ where the court held that other factors such as provocation and severe mental or emotional stress coupled with intoxication must be taken into consideration when determining criminal liability.⁴⁰ In this way the court extended the application of the defence of non-pathological incapacity to instances of provocation coupled with intoxication. This was a befitting progression from the developments that had been made in terms of intoxication as a ground for successfully raising the defence because intoxication was still involved, it was just taking it one step further by adding provocation. This was an incremental move because it was not a drastic departure from the past, however, it did open the way for more significant cases that lead to the integral development of the defence.

One of these significant cases was the case of *S v Arnold*,⁴¹ which was the first case where non-pathological incapacity based on provocation or emotional stress was successfully used as a defence in the Cape.⁴² The court in this case acquitted the accused who had murdered his wife on the basis of incapacity caused by severe emotional stress. The court used the previous cases of *S v Chretien* and *S v Van Vuuren* to justify this decision stating that:

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 distress.⁴³

In this way the court acknowledged 'extreme emotional distress' as a valid basis for criminal incapacity alongside the more established bases of youth, mental disorder, and intoxication.

*S v Campher*⁴⁴ was a couple of years later and it added to the strides already made in the area of provocation and emotional stress. Although the accused's conviction was ultimately confirmed by the court, Viljoen JA's judgment acknowledged that s78 of the Criminal Procedure Act can be used in determining non-pathological incapacity and not just pathological incapacity.⁴⁵ This was significant for provocation and emotional stress because it extended the criteria of insight and self-control to instances of provocation or emotional stress which gave the defences a more solid guide and a more authoritative footing in legal discourse. They became more certain defences with a supporting basis for their use and development.

³⁹ 1983 (1) SA 12 (A).

⁴⁰ *Ibid* at 17.

⁴¹ 1985 (3) SA 256 (C).

⁴² *Hector op cit* note 2.

⁴³ *Arnold supra* note 41 at 264.

⁴⁴ 1987 (2) SA 940 (A).

⁴⁵ *Ibid* at 954F.

*S v Laubscher*⁴⁶ further solidified that foundation when it set out the test for criminal capacity as:

the accused must have been able (1) to distinguish between right and wrong, viz to realise he was acting unlawfully, and (2) to act in accordance with that realisation by resisting the temptation to act unlawfully.⁴⁷

This was a significant step for non-pathological incapacity based on provocation or emotional stress according to Hoctor, because it provided a theoretical framework for the defence which further developed the foundational progress that had already been made in cases leading up to *S v Laubscher*.⁴⁸

Two further significant cases in the development of non-pathological incapacity based on provocation and emotional stress are *S v Nursingh*⁴⁹ and *S v Moses*.⁵⁰ *S v Nursingh* was in the Durban and Coast Local Division in 1995. In this case the accused was acquitted of murdering his mother, grandmother, and grandfather on the basis that he lacked criminal capacity due to ‘an emotional storm that seized him’.⁵¹ In *S v Moses* the accused was acquitted of murdering his homosexual lover after the deceased disclosed he had AIDS which resulted in the accused killing the deceased in a violent outburst. Both of these cases were high court cases and they were noteworthy because they exemplified the non-pathological incapacity defence based on provocation or emotional stress fully functioning in the courts and producing complete acquittals. This was positive for the development of the defence as it demonstrated its use, however, there was a significant amount of scepticism and concern that accompanied these cases particularly from judges themselves.

The concern had a lot to do with the resulting complete acquittals and the seemingly heavy reliance on the accused’s version of events. For example, Kumleben JA in *S v Potgieter*⁵² held that careful scrutiny of the evidence given by the accused is necessary especially considering that the reliability and truthfulness of the accused’s version of events is integral to laying the foundation of the defence.⁵³ This concern and discord with the defence is significant to explaining why the Supreme Court of Appeal sought to limit the defence in the case of *S v*

⁴⁶ 1988 (1) SA 163 (A).

⁴⁷ *S v Eadie* 2002 (1) SACR 663 (SCA) at 720.

⁴⁸ Hoctor op cit note 2.

⁴⁹ 1995 (2) SACR 331 (D).

⁵⁰ 1996 (1) SACR 701 (C).

⁵¹ *Nursingh* supra note 49 at 332.

⁵² 1994 (1) SACR 61 (A).

⁵³ *Ibid* at 73.

Eadie.⁵⁴ However, instead of limiting the defence, the judgment in *S v Eadie* ended up causing a great deal of confusion and obscurity around non-pathological incapacity based on provocation or emotional stress which has resulted in the defence being viewed as somewhat unclear and unsettled.

The court in *S v Eadie* blamed the concerning state of affairs surrounding the defence on a ‘misapplication’ of prior SCA decisions and on the attempt by courts to distinguish between automatism and non-pathological incapacity due to provocation or emotional stress.⁵⁵ In the eyes of the court, automatism and non-pathological incapacity are the same. The court also stated that ‘[p]art of the problem appears to me to be a too-ready acceptance of the accused’s *ipse dixit* concerning his state of mind.’⁵⁶ In terms of the latter assertion by the court, it succeeded, to a large extent, in addressing the concern regarding the heavy reliance on the accused’s version of events because it made clear that the accused’s version of events must be tested against objective criteria. These objective criteria are ‘the court’s experience of human behaviour and social interaction’⁵⁷ which introduce a more neutral viewpoint to the assessment of incapacity rather than solely relying on the viewpoint of the accused.

However, the court in *S v Eadie* has been criticised by legal scholars such as Hoctor⁵⁸ and Burchell,⁵⁹ for its conflation of the legal principles of automatism and non-pathological incapacity and the confusion that it has caused. The judgment determines that the second part of the capacity test which deals with conative capacity (self-control) is the same as sane automatism which is to do with involuntary conduct. In this way the judgment appears to be fusing aspects of capacity and voluntariness even though these are two separate elements that need to be proven to establish criminal liability. Hoctor refers to this as a ‘misguided approach’⁶⁰ and Burchell notes that the judgment ‘serves to add to the confusion’.⁶¹ The court was essentially asserting that provocation would only amount to a defence if it led to automatism or if cognitive capacity (insight) lacked, which ultimately makes the second leg of the capacity test (conative capacity) redundant when it comes to provocation and emotional stress. However, what is even more confusing is that despite this assertion, the court goes on

⁵⁴ 2002 (1) SACR 663 (SCA).

⁵⁵ *Ibid* at para 53 and 57.

⁵⁶ *Ibid* at para 64.

⁵⁷ *Ibid*.

⁵⁸ Hoctor *op cit* note 2.

⁵⁹ Burchell *op cit* note 37 at 331.

⁶⁰ Hoctor *op cit* note 2.

⁶¹ Burchell *op cit* note 59.

to say that it does not believe that the second part of the capacity test should be done away with.⁶²

Therefore, there is a great deal of confusion surrounding non-pathological incapacity based on provocation or emotional stress when it comes to the application of the capacity test. However, it appears that the defence continues to exist in its formulation prior to *Eadie*. For example, in the case of *S v Van der Westhuizen*⁶³ where the court cites the test set out in *S v Laubscher* pertaining to temporary non-pathological incapacity which includes the second leg of the capacity test. However, in the more recent 2018 case of *S v Oosthuizen and Another*⁶⁴ the court referred to the decision in *S v Eadie* noting that commentators argue that provocation as a defence of incapacity has been limited or ‘dealt the death knell’.⁶⁵ The judgment, however, neither confirmed nor rejected the decision of the case or the opinion of the commentators. Thus, as Hoctor stated, non-pathological incapacity based on provocation or emotional stress persists in a ‘state of flux’.⁶⁶

2.4. LEGAL SCHOLAR PERCEPTIONS

The uncertainty surrounding non-pathological incapacity based on provocation or emotional stress is only one of several problems that legal scholars highlight. In the previous chapter I spoke of public perceptions of the defences but now the focus here is on legal scholars perceptions because they have significant insight into the different aspects of the defences and the way they operate and the effect they have on the criminal justice system and society. Legal scholars also have great influence in the way laws, legal principles and, in this instance, criminal defences are treated in the courts as exemplified by several judgments that refer to the works of legal scholars in their judgments as authority for their decisions.⁶⁷ There are both negative and positive perceptions of both pathological and non-pathological incapacity which indicate where the defences are working well and where the problems are. From these perceptions we can get an idea of the overall attitude towards and perception of each of the defences by legal scholars.

⁶² *Eadie* supra note 53 para 57.

⁶³ 2011 (2) SACR 26 (SCA) para 39.

⁶⁴ 2018 (2) SACR 237 (SCA).

⁶⁵ *Ibid* at para 30.

⁶⁶ Hoctor op cit note 9 at 185.

⁶⁷ For example in *S v Hoho* 2009 (1) SACR 276 (SCA) para 16 the court refers to Milton, Snyman, Burchell and FFW van Oosten among other legal scholars in the judgment.

Certain aspects of the South African formulation of the insanity defence have been criticised by Stanley Yeo in his article *The Insanity Defence in the Criminal Laws of the Commonwealth of Nations*.⁶⁸ Yeo points out that the South African insanity defence does not include in its formulation the defect of not being able to appreciate the nature of the act.⁶⁹ The ability to appreciate the nature and quality of the act is a part of the cognitive defects under the M’Naghten rules.⁷⁰ Yeo calls the South African formulation’s neglect of this aspect of the insanity defence an ‘obvious oversight.’⁷¹ However, it has been argued that the second leg of the South African insanity defence which pertains to the ability to act in accordance with an appreciation of the wrongfulness of an act encompasses this aspect.⁷²

In addition to this counter argument, I think it is important to remember that the Rumpff Commission classified the M’Naghten rules as unsatisfactory and it is upon the report of this commission that the pathological incapacity defence in South African law was established and developed. Therefore, leaving out the capacity to appreciate the nature of the act appears to be a deliberate action. Thus, Yeo’s criticism appears to overlook the South African criminal law’s development of legal principles specific to the South African context that may borrow aspects from different jurisdictions and bare resemblance to other jurisdictions such as English law but are, ultimately, unique and particular to South Africa.

Another criticism Yeo makes is that the South African insanity defence goes against modern psychology by assuming that a person lacking the capacity to act in accordance with an appreciation of the wrongfulness of their act as a result of a mental illness or defect (conative function) would still have the capacity to distinguish between right and wrong (cognitive function).⁷³ Yeo is of the belief that, instead, the conative defect should have been referred to alone in the formulation of the defence.⁷⁴ However, even the court in *S v Eadie* recognised the plausibility of this when it stated ‘Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong, yet lose the ability to control one’s

⁶⁸ Stanley Yeo ‘Insanity defense in the criminal laws of the commonwealth of nations.’ (2008) 2008 *Singapore Journal of Legal Studies* 241-263.

⁶⁹ *Ibid* at 250.

⁷⁰ *Ibid* at 249.

⁷¹ *Ibid* at 250.

⁷² *Ibid*.

⁷³ *Ibid* at 255.

⁷⁴ *Ibid*.

actions it appears notionally possible.’⁷⁵ Whilst the possibility may be tenuous, the possibility remains which is what the capacity test appears to acknowledge.

Other legal scholars argue against an insanity defence, which in the case of South Africa is the pathological incapacity defence, altogether. For example, Tina Minkowitz argues that criminal defences based on mental disability portray people with mental disabilities as ‘less than moral equals with other persons’.⁷⁶ This casts a negative light on any type of insanity defence altogether because it intimates that this type of a defence is implicit in discriminating against persons with mental disabilities and perpetuates that discrimination.

This idea is supported by Angela Smith who argues that withholding responsibility, which a pathological incapacity defence effectively does, effectively says that a person with a mental disability should be controlled and treated rather than reasoned with.⁷⁷ This corroborates the idea that such a defence effectively treats the individual as less than anyone else because they do not get the same opportunity to have their thoughts and actions treated rationally as other people do. Jillian Craigie notes that these arguments suggest that the end result is ‘social exclusion’⁷⁸ for people with mental disabilities. In a country such as South Africa where individuals have the right to not be unfairly discriminated against based on disability, a strong argument could be made that the pathological incapacity defence perpetuates unfair discrimination and as such should be done away with. However, it is worth noting that the argument could also be made that whilst there is discrimination, it is not unfair because of s36 of the Constitution which allows for the limitation of rights if it is reasonable and justifiable.

Samantha Krause also criticises the defences as she argues that the capacity test, which is used in both defences, is flawed in that it fails to consider the fact that capacity can be present to varying extents. Krause’s assertion is that there are different levels of capacity, but the South African formulation of these incapacity defences treats capacity as either completely present or completely absent. Krause states: ‘[i]n other words, the question is not whether capacity is present, but to what extent it is present.’⁷⁹ This is particularly relevant in the context of battered women who kill their abusers whose responses often suggest that they did not completely lose

⁷⁵ *Eadie* supra note 54 para 59.

⁷⁶ Jillian Craigie ‘Against a singular understanding of legal capacity: Criminal responsibility and the Convention on the Rights of Persons with Disabilities’ (2015) 40 *International Journal of Law and Psychiatry* 8.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Samantha Krause *Defences Available to Battered Women Who Kill Their Abusers – A Comparative Analysis* (Doctor of Philosophy thesis, University of KwaZulu-Natal, 2009) 352.

self-control.⁸⁰ With the current understanding of the non-pathological incapacity test, those battered women would not be able to rely on the defence because it suggests that the individual must have totally lost self-control.⁸¹

On the other hand, there are advocates for the pathological incapacity defence as well as the non-pathological incapacity defence amongst legal scholars. Despite the aforementioned obscurity and confusion surrounding non-pathological incapacity and public scepticism (as discussed in chapter one), Shannon Hoctor appears to be a staunch supporter of the defence. Hoctor premises his support on the notion of blameworthiness where he argues that the defence is a positive move in the direction of recognising that people should only be punished if they are ‘blameworthy’.⁸² He links this notion to the right to dignity and the right to freedom and security of the person as outlined in the Bill of Rights.⁸³ This shows that whilst there is significant resistance and scepticism about the defence, particularly in terms of provocation or emotional stress, there are supporters who view it as necessary and constitutionally sound.

The pathological incapacity defence also finds support in Hoctor’s ‘blameworthy’ idea because the mental defect or illness is what takes away the individual’s blameworthiness and thus, they should not be punished. Furthermore, Yeo also points out the positive in the South African formulation of the insanity defence where he notes that it is better to avoid the term ‘natural’ completely when it comes to the defence and rather using the term ‘mental defect’ which is what the South African pathological incapacity defence does.⁸⁴

2.5. CONCLUSION

Thus, whilst there is a significant amount of negative discourse amongst legal scholars surrounding both of the defences, there is also some positive. The positive does, however, appear to be outweighed by the negative, dissenting, and sceptical voices which gives a good impression of the unsettled and controversial environment surrounding these defences. This indicates that it is necessary to address those concerns and criticisms about the defences and to do that, a comparison between the defences and their component parts seems like a good starting point because of how intertwined their origins and effects are. The next chapter will

⁸⁰ Ibid at 321.

⁸¹ Ibid.

⁸² Hoctor op cit note 10.

⁸³ Ibid.

⁸⁴ Yeo op cit note 68 at 246.

carry out this comparison to explore potential avenues of improvement to dispel the negative and dissenting opinions.

CHAPTER THREE

COMPARISON OF REQUIREMENTS

3.1. INTRODUCTION

This chapter looks at the fundamental requirements necessary to successfully raise both the pathological and non-pathological incapacity defences. By comparing the requirements of each defence with the other, this chapter assesses the justifiability and reasonability of having these different requirements for each of the defences and comes to a number of conclusions. Beginning with the issue of burden of proof, there is a strong and persuasive argument that can be made for the unconstitutionality and unfairness of the disparity between the defences in terms of this requirement. On the other hand, the difference in the necessity of expert evidence appears justified due to the distinct nature of each of the defences. Those distinctions also seem to justify the consideration of affective functions in the capacity test when it comes to non-pathological incapacity cases but not when it comes to pathological incapacity cases.

Lastly, the approach to the assessment of the defences by the courts is predominantly subjective. However, the incorporation of objectivity that has overtly happened with the non-pathological incapacity defence must happen for pathological incapacity to ensure the strength and credibility of the defences. The reasoning behind these assertions is set out in this chapter.

3.2. BURDEN OF PROOF

There is a presumption of sanity embedded in s78 (1A) of the Criminal Procedure Act 51 of 1977 (CPA)¹ that emanated from common law. This presumption came about as a result of the M’Naghten rules whereby the first rule stated, ‘Every man is presumed to be sane until the contrary is proved’.² This presumption came about due to a fear amongst English judges that accused persons would falsely claim insanity as a defence and so they decided to shift the burden onto the accused to prove their insanity as a safeguard of sorts.³

¹ ‘Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.’

² FFW Van Oosten ‘Non-Pathological Criminal Incapacity Versus Pathological Criminal Incapacity’ (1993) 6 *SACJ* 132.

³ John Milton ‘Law Reform: The Criminal Matters Amendment Act 1998 Brings Some Sanity (But Only Some) to the Defence of Insanity’ (1999) 12 *SACJ* 41-48.

What this presumption means is that an accused has the responsibility to prove that they suffer or suffered from a mental illness or intellectual disability at the time that they committed the criminal act of which they are accused. The accused must prove this on a balance of probabilities. The presumption allows the court to assume that the accused is sane unless the accused demonstrates the contrary.

Section 78 (1A) was inserted into the CPA along with s78(1B)⁴ in 1998 as amendments to the Act. Section 78 (1B) compliments s78(1A) in that it reinforces the presumption of sanity by stating that the burden of proof rests on the party that raises the pathological incapacity defence, who is invariably the accused. However, s78(1B) does provide for the possibility that the state may raise the issue of pathological incapacity and, if that is the case, then the state must also prove it on a balance of probabilities just as the accused would have to. The reality, however, is that the party that raises this defence is usually and in the majority of cases the accused and not the state.⁵

The presumption of insanity is controversial because of its creation of a reverse onus whereby the burden of proof is shifted onto the accused unlike in other criminal cases where the burden rests on the state. It is trite that South African law dictates that the burden of proof in criminal matters rests on the state and that burden must be discharged beyond a reasonable doubt.⁶ The main reason for this is due to the right of accused persons to be presumed innocent which is embodied in the Constitution under s35(3)(h) of the Bill of Rights which states that ‘Every accused person has a right to a fair trial, which includes the right—...to be presumed innocent, to remain silent, and not to testify during the proceedings’.⁷

The presumption of innocence is integral to criminal proceedings because the state accuses the defendant of a crime and then the defendant has to defend themselves against those accusations. Thus, a battle between the two sides emerges, however, in many cases the battle ground is uneven because the state is in a more advantageous position. The accused is not privy to the same resources as the state and a wrongful conviction infringes detrimentally on the rights of an individual, particularly the right to freedom and security of the person as well as the right to

⁴ ‘Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue.’

⁵ C R Snyman *Criminal Law* 6ed (2014) 169-170; Lirieka Meintjes-van der Walt ‘Making a Muddle into a Mess: The Amendment of s78 of the Criminal Procedure Act’ (2002) 15 *SACJ* 242-249.

⁶ *Robinson and Others v S* (AR18/2017) [2018] ZAKZPHC 22 para 19.

⁷ Constitution of the Republic of South Africa, 1996.

human dignity. The state, on the other hand, does not suffer as detrimental a defeat if a guilty person is set free. For these reasons, the presumption of innocence is necessary to afford the accused procedural fairness in the trial and to reduce the likelihood of a wrongful conviction.⁸ The presumption also serves as a safeguard for the accused against coercive behaviour by the state and as a way to ensure public confidence in the justice system.⁹ Without the presumption of innocence, the perception of the criminal justice system as fair and socially just is likely to decline amongst the public.

Furthermore, the court in *Woolmington v the Director of Public Prosecutions*¹⁰ held that in an accusatorial system of justice the presumption of innocence ‘runs like a golden thread’ through the system.¹¹ A reverse onus such as that created by the presumption of sanity directly contradicts the presumption of innocence, thereby infringing the accused’s right to a fair trial as entrenched in s35(3) of the Bill of Rights. The question then becomes whether this infringement or limitation of the right is justifiable in accordance with s36 of the Constitution which provides for the limitation of rights in certain cases. The Constitutional Court deliberately left this question open in the case of *S v Manamela*.¹² All the court had to say about the matter was that:

It is clear however that open and democratic societies permit the shifting of the burden of proof to the accused when it would not be disproportionately invasive of the right to silence and the presumption of innocence to do so.¹³

In this way the court indicates that it is potentially permissible but does not make a definitive decision on the matter.

However, I would argue that if the courts did tackle this question then the infringement of the presumption of innocence would be deemed unjustifiable. This is based on precedent which has shown that the imposition of a reverse onus has been interpreted by the courts as an unjustifiable infringement. For example, the Constitutional Court in *S v Zuma and Others*¹⁴ rejected the reverse onus presumption in s217(1)(b)(iii) of the CPA as an unjustifiable

⁸ Constantine Theophilopoulos(ed) et al. Criminal Procedure in South Africa: Procedural Law (2020) 103-104.

⁹ *S v Coetzee and Others* 1997 (1) SACR 379 (CC).

¹⁰ [1935] UKHL 1.

¹¹ Theophilopoulos op cit note 8.

¹² 2000 (1) SACR 414 (CC) para 30-31.

¹³ Ibid.

¹⁴ 1995 (1) SACR 568 (CC).

infringement of the presumption of innocence because the reverse onus presumption created the possibility for an accused to be convicted even though there was a reasonable doubt.¹⁵

Arguably, a similar effect happens in terms of the reverse onus in s78(1A) and s78(1B) of the CPA because the state no longer has to prove capacity beyond a reasonable doubt, the state just has to refute the accused's pathological incapacity defence. The argument could be made, however, that s78(1B) makes the infringement on the presumption of innocence justifiable because it states that whichever party raises the issue bears the burden of proof, so the burden is not fixed on the accused in every case. Even so, as previously mentioned, it is invariably the accused who raises the issue and so the practical effect is that the burden is fixed on the accused even though, in theory, it applies to both sides.

Further support for the constitutionality of the presumption of sanity and the reverse onus is based on the Canadian case of *R v Chaulk*¹⁶ where the majority of the Canadian Supreme Court held that the presumption and the onus on the accused were a justifiable limitation of an accused's presumption of innocence right and were thus constitutional.¹⁷ The reasoning that the court gave for this conclusion was that the task of disproving insanity was almost impossible and as such that would place an intolerable burden of proof on the prosecution if the onus was on them.¹⁸ However, John Milton's counter argument to this line of reasoning shows that the same cannot be said in the South African context.

Milton argues that disproving insanity in South African law is not as onerous and impossible as the court in *R v Chaulk* described because s79 of the CPA requires an accused who is alleged or thought to suffer from a mental illness to be referred for examination by a panel of psychiatric practitioners.¹⁹ Milton argues that if this panel makes a finding that the accused was not insane at the time the crime was committed then it cannot be said that it is nearly impossible to disprove insanity.²⁰ This counter argument is highly persuasive especially when we consider the considerable weight attached to expert evidence in cases such as these, which shall be discussed later on in this chapter. It is difficult for the state to claim that disproving insanity is as onerous as nearing impossibility when a report from a panel of experts providing the state with the very evidence that it needs to disprove insanity is a possibility in each of these cases.

¹⁵ Theophilopoulos op cit note 8 at 124.

¹⁶ [1990] 3 SCR 1303.

¹⁷ Snyman op cit note 5.

¹⁸ Milton op cit note 3.

¹⁹ Ibid.

²⁰ Ibid.

As such, it is not nearly impossible in the South African context and so placing the burden on the state to disprove insanity would not be intolerable, therefore, *R v Chaulk* is not applicable in this context. This further supports the assertion that the reverse onus in matters of pathological incapacity is unjustifiable.

Another problem with this reverse onus is its disproportionate application. The reverse onus only applies to cases of pathological incapacity but not to cases of non-pathological incapacity even though both defences are governed by s78 of the CPA. In cases of non-pathological incapacity, the burden of proving the accused's criminal capacity rests on the state which has to prove that capacity beyond a reasonable doubt.²¹ The state bears the onus, however, the accused who raises the defence of non-pathological incapacity must provide a basis for that defence through evidence.²² This is consistent with the standard practice in criminal matters and does not infringe on the right to be presumed innocent unlike in pathological incapacity defence cases.

The difference in burden of proof between the two defences has been criticised as potentially unconstitutional and unfairly discriminatory by legal scholars such as John Milton²³ and Lirieka Meintjes-van der Walt.²⁴ Scott JA also mentioned in *S v Kok*²⁵ that this difference in burden of proof cannot withstand constitutional scrutiny.²⁶ The difference is unfair because an accused who pleads pathological incapacity is hampered with a much more onerous burden of proof than an accused who raises the non-pathological incapacity defence. Having to prove something on a balance of probabilities forces the accused to have to play an active role in the trial, whereas, if the state has to prove something beyond a reasonable doubt then the accused can play a passive role in the trial. The accused has a right to remain silent according to the right contained in s35(3)(h) of the Bill of Rights and so the ability to play a passive role is important to upholding that right.

The more onerous burden on pathological incapacity defendants than non-pathological incapacity defendants is illogical for a few reasons. Firstly, a mentally ill person is the least likely to be able to prove their incapacity of all other persons,²⁷ yet they have a higher burden

²¹ *S v Eadie* 2002 (1) SACR 663 (SCA) para 2; Meintjes-van der Walt op cit note 5.

²² P A Carstens & J Le Roux 'The Defence of Non-Pathological Incapacity with Reference to the Battered Wife Who Kills Her Abusive Husband' (2000) 13 *SACJ* 180-189.

²³ Milton op cit note 3 at 46.

²⁴ Meintjes-van der Walt op cit note 5 at 245.

²⁵ 2001 (2) SACR 106 (SCA).

²⁶ *Ibid* at para 7.

²⁷ Snyman op cit note 5.

of proof than other accused people including accused people claiming non-pathological incapacity. Secondly, following on from Milton's argument that disproving insanity is not impossible because of the panel of experts that must examine the accused according to s79 of the CPA, disproving the defence of non-pathological incapacity is no less difficult than disproving the defence of pathological incapacity for the state. In fact, it appears to be easier for the state to get evidence in the form of a report from a panel of experts when it comes to pathological incapacity than with non-pathological incapacity because the examination is a must for pathological incapacity but only a possibility for non-pathological incapacity. This is evident in s78(2) of the CPA which states that:

If it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court *shall* in the case of an allegation or appearance of mental illness or intellectual disability, and *may*, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79. [own emphasis added]

The words 'shall' and 'may' show that for pathological incapacity the s79 examination is a requirement whereas for non-pathological incapacity it is optional.

Thus, the state is more likely to be better equipped in pathological incapacity cases than in non-pathological incapacity cases. In every pathological incapacity case, the s79 expert panel report is done which increases the likelihood of a report stating that the accused does not suffer from a mental illness which gives the state the evidence they need. However, when it comes to non-pathological incapacity cases the report does not always have to be done which decreases the likelihood of the state getting the strong evidence that they need to disprove the defence. Therefore, the level of difficulty of disproving the defences actually appears to be higher on the side of non-pathological defence cases than pathological defence cases which is why putting the onus on accused persons in the former rather than the latter seems erroneous.

Thirdly, in line with the idea of difficulty of proof, the non-pathological incapacity defence has the ability to be raised in a broader range of cases than the pathological incapacity defence as discussed in chapter one in relation to the versatility of the defence. Ranging from cases of battered women syndrome²⁸ to *crimen injuria*²⁹ and more, the non-pathological incapacity

²⁸ *S v Wiid* 1990 (1) SACR 561 (A).

²⁹ *Momborg v S* 2019 (2) SACR 505 (GJ).

defence has a greater potential for abuse by accused persons who were, in fact, of sound and capable mind at the time that they committed the crime. As a result of this, courts treat the defence very cautiously because it can be easily raised,³⁰ however, that caution does not appear to be reflected in the burden of proof.

The structure of the non-pathological incapacity defence should be applied to the pathological incapacity defence. This would mean that in pathological incapacity cases the burden of proof would rest on the state beyond a reasonable doubt with the accused only being required to provide an evidentiary basis for raising the defence rather than being required to prove their case on a balance of probabilities. This is a far less onerous imposition on the accused. This would not only remove the issue of unfair discrimination between the defences because they would now have the same burden of proof, but it would also remove the infringement on the right to be presumed innocent. In terms of constitutionality and reasonableness, this is a necessary amendment.

3.3. EXPERT EVIDENCE

In a criminal trial where either the defence of pathological incapacity or non-pathological incapacity is raised expert evidence is given by mental health professionals. This is one of the exceptions to the rule that opinion evidence is inadmissible.³¹ The reason for this exception is that the expert opinion of the mental health professional provides the court with information that the court does not have enough experience or knowledge about and that will assist the court in making its decision.³²

It is trite that experts in mental health are better positioned than the court to decide whether an accused did in fact lack criminal capacity at the time the crime was committed because of their specialised skill, knowledge and qualifications.³³ Whilst the ultimate judgment about capacity is a legal one for which judicial officers are experts, they need the assistance of mental health professionals, such as psychiatrists and psychologists, because the subject matter of mental disease or temporary insanity is not only legal in nature but also medical. Thus, mental health experts are best equipped to assess the mental state of accused persons because of their medical

³⁰ Carstens & Le Roux op cit note 22.

³¹ *Helen Suzman Foundation v President of The Republic of South Africa And Others* 2015 (2) SA 1 (CC) para 30.

³² Geert Philip Stevens 'Adjudicating Pathological Criminal Incapacity Within a Climate of Ultimate Issue Barriers: A Comparative Perspective' (2015) 38 *International Journal of Law and Psychiatry* 29-37.

³³ *Ibid.*

experience and knowledge of the subject matter. Nevertheless, the ultimate decision about capacity rests in the hands of the court.

When it comes to the defences of pathological and non-pathological incapacity, the necessity of the use of expert evidence in the trial varies. In cases dealing with pathological incapacity, expert testimony is statutorily required whereas in cases dealing with non-pathological incapacity expert testimony is not statutorily required.³⁴ As previously mentioned, the wording in s78(2) and s79 of the CPA indicates that an examination by a panel of experts is mandatory in relation to pathological incapacity but is optional when it comes to non-pathological incapacity. Furthermore, the term ‘mental illness’, which is used in the Act, has not been defined by the legislature which means that the court has to rely on expert evidence to give meaning to the term and determine the presence or absence thereof.³⁵ This omission appears deliberate and was supported by Rumpff JA in the case of *S v Mahlinza* where he stated that it would be dangerous to try and come up with general symptoms that would amount to and be recognised as a mental disease or defect.³⁶ The omission creates room for expert evidence from mental health professionals to be both relevant and pivotal. Without the expert evidence the court will not have enough information to make a final decision about the accused’s criminal capacity.

According to Burchell, mental illness and mental disorder are as much psychiatric concepts as they are legal concepts and so the overlap between them is inevitable.³⁷ Slovenko corroborates this notion when he states that ‘it [the term mental illness] becomes a fusion of legal and medical components’.³⁸ Accordingly, the connection between the legal determination of pathological incapacity and the medical determination is, largely, inseparable. Thus, to have adequate weight and reasoning underpinning it, a judgment stating that an accused is or is not pathologically incapable of criminal responsibility needs a psychological or psychiatric evaluation.

The value and necessity of expert evidence in a pathological incapacity case is undisputed. The problem, however, is when it comes to non-pathological incapacity. Whilst it is clear that statutorily there is no requirement for expert evidence, the question of whether expert evidence

³⁴ Van Oosten op cit note 2 at 127-147.

³⁵ Ibid.

³⁶ 1967 (1) SA 408 (A) 417.

³⁷ J Burchell *Principles of Criminal Law* 5 ed (2016) ch 20.

³⁸ R Slovenko ‘The Meaning of Mental Illness in Criminal Responsibility’(1984) 5 *The journal of legal medicine* 4.

is necessary when the defence of non-pathological incapacity is raised is not settled in case law. For example, the court in *S v Trickett*³⁹ concluded that there must be expert evidence to show the court that the unconscious nature of the guilty act could have been the result of reasons other than mental illness.⁴⁰ However, the court in *S v Calitz*⁴¹ stated that when it comes to non-pathological incapacity, unlike pathological incapacity, psychiatric evidence is not indispensable to the court because the court is able to decide based on the accepted facts of the case whether the defence has been successfully raised.⁴²

Both arguments put forward by the courts have merit, however, the argument put forward by the court in *S v Calitz* seems more persuasive. Expert evidence in a case dealing with non-pathological incapacity is useful to the court in terms of ruling out the presence of a mental illness or intellectual disability. This is what psychiatrists in South Africa are called to give testimony on in these types of cases.⁴³ However, ruling out the presence of a mental illness at the time of the crime does not prove the presence of other factors such as severe emotional stress or provocation. Thus, the evidence does assist but the extent of that assistance is fairly limited because it provides information about what is not there but not necessarily about what is there.

Furthermore, the connection between the legal concept of non-pathological incapacity and the medical and psychological concepts seems more tenuous than in the case of pathological incapacity. The cognitive and conative tests that determine the success of the non-pathological incapacity defence embody the concepts of insight and self-control which are a part of psychological theory.⁴⁴ This gives some support to the idea that expert evidence would serve a valuable function to the court's determination of capacity because the concepts in the legal sphere relate to those in the psychological sphere. However, non-pathological criminal incapacity is solely a legal term and the overlap between the legal and the psychological when it comes to pathological incapacity is a lot stronger considering that the legal needs the psychological to inform the decision and give meaning to the law. Therefore, it seems

³⁹ 1973 (3) SA 526 (T).

⁴⁰ *Ibid* at 537 D-E.

⁴¹ 1990 (1) All SA 382 (A).

⁴² *Ibid* at 127 A-D.

⁴³ Pierre Mauritz Joubert & Cornelius Werdie van Staden 'Behaviour that Underpins Non-Pathological Criminal Incapacity and Automatism: Toward Clarity for Psychiatric Testimony' (2016) 49 *International Journal of Law and Psychiatry* 10-16.

⁴⁴ Anne Kramers-Olen 'The Defence of Sane Automatism and Non-Pathological Criminal Incapacity in South Africa: An Epistemological Intersection Between Psychology and Law' (2019) 49 *South African Journal of Psychology* 188-198.

reasonable why expert evidence is mandatory for pathological incapacity but not for non-pathological incapacity.

Another problem is that in the case of non-pathological incapacity, the mental health professional's opinion is heavily reliant on the accused's *ipse dixit* about the events and their state of mind at the time of the crime.⁴⁵ As a result, reliability becomes questionable which puts the expert's testimony into a precarious position whereby the credibility can be fairly easily challenged. The level of influence that an accused's character can play in the determination of capacity is significantly heightened. If the accused is deceitful and dishonest then that has the potential to greatly influence the expert's testimony and thus influence the court's final decision. Even in a case where the accused is extremely honest and has no intention of misleading the expert, the accused's memory may be compromised especially when they have suffered extreme stress.⁴⁶ This is problematic because it also taints and negatively influences the expert's testimony. This influence is less likely in the case of pathological incapacity because to meet the standard of mental disease or defect the accused must suffer from 'some known or identifiable disease of the mind.'⁴⁷ This means that the expert can rely less on the accused's version of events and rather assess whether the accused presents any indications or symptoms of a disease of the mind which can be objectively assessed to formulate their opinion.

The fact that determining non-pathological incapacity does not involve the identification of a known or identifiable disease of the mind also makes it difficult for mental health professionals to make a diagnosis or conclusion.⁴⁸ Additionally, the compromised memory further contributes to the difficulty for the mental health professional to make an accurate or comprehensive diagnosis. Ailments pertaining to mental illness or mental disease are, predominantly, the area of expertise of psychiatrists and clinical psychologists and not altered mental states brought on by non-pathological causes.⁴⁹ Thus, the conclusion of the court in *S v Calitz* is persuasive because mental health experts are not always going to be best positioned to make a determination in non-pathological incapacity cases because it is not necessarily their area of expertise. For the expert evidence to be admissible it needs to be relevant which means that it needs to provide the court with information and knowledge beyond the court's

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Burchell op cit note 37 at 280.

⁴⁸ Carstens & Le Roux op cit note 22.

⁴⁹ Ibid.

capabilities based on skill and qualification.⁵⁰ If the mental health professional is no more qualified than the court because it is not their area of expertise, then their opinion evidence is irrelevant and the court can make a determination without it.

On the other hand, Carstens and Le Roux argue that expert evidence is essential for the defence of non-pathological incapacity to succeed because of the almost 'cautionary rule' that accompanies this defence.⁵¹ Courts are encouraged to treat this defence with a great amount of caution as exemplified in the case of *S v Kensley*⁵² where the court stated that 'the evidence on which a defence of sane criminal incapacity due to intense emotion is based, should be viewed with circumspection.'⁵³ The idea behind this seems to be that the exercise of caution entails making sure all relevant evidence is heard and taken into consideration in the court's decision making process. This is a reasonable idea and may be warranted in some cases, however, making expert evidence a mandatory requirement for non-pathological incapacity does not seem like a necessary conclusion from this idea.

Whilst requiring expert evidence for non-pathological incapacity would be helpful in terms of ruling out mental illness and assisting the court in exercising great caution when dealing with these cases, arguments against making this a mandatory requirement far outweigh these positives. The expert evidence does assist the court but only limitedly; the connection between the legal and psychological aspects of the defence are tenuous; the heavy reliance on the accused's version of events negatively affects the expert's credibility; it is difficult for the mental health professional to diagnose and it is not always within their range of expertise. Instead, the court should call on expert evidence if the particular circumstances of a case require it, but it should not be mandatory in every non-pathological case because it is most likely not always going to be useful or necessary. Therefore, the fact that the pathological incapacity defence makes expert evidence mandatory whilst the non-pathological incapacity defence does not is justified.

3.4. THE TESTS

The Rumpff Commission report identified three different types of human functions, namely, cognitive function, conative function, and affective function. Cognitive function relates to an

⁵⁰ Stevens op cit note 32.

⁵¹ Carstens & Le Roux op cit note 22 at 182.

⁵² 1995 (4) All SA 33(A).

⁵³ Ibid at 568 I-J.

individual's ability to think, understand, reason and have insight.⁵⁴ Conative function relates to an individual's ability to control their own behaviour and exercise free choice.⁵⁵ Affective function relates to the ability to feel emotions such as pleasure, anger, hatred, fear and distress.⁵⁶ The Commission recognised these functions as generally integrated but capable of disintegration under particular circumstances.⁵⁷ These functions underlie the test for criminal capacity and play critical roles in the discernment of a pathological incapacity or a non-pathological incapacity. The two defences are similar in that they both use the cognitive and conative functions in their tests; however, they differ when it comes to the use of affective functions.

The test for criminal capacity is set out in s78(1) of the CPA which applies to both pathological incapacity defences and non-pathological incapacity defences as a result of the judgment in *S v Laubscher*⁵⁸ which made it clear that even though the wording of s78(1) relates to pathological incapacity, the test is the same for both. The cognitive aspect of the test is embodied in s78(1)(a) which states that if a person is incapable 'of appreciating the wrongfulness of his or her act or omission;' then they will not be held criminally responsible for the offence. This is often referred to as the ability to have insight into the wrongful nature of the act.⁵⁹ Which, simply put, would be the ability to tell the difference between right and wrong.

The conative aspect of the criminal capacity test is embodied in s78(1)(b) of the CPA where it states that if an individual is incapable 'of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,' then they will not be held criminally responsible for the offence. What this means is that a person needs to be able to resist or avoid behaviour that goes against their understanding and insight into what is right and wrong.⁶⁰ The conative aspect and the cognitive aspect are independent of each other. The fact that a person is able to think and reason does not necessarily mean that they will be able to behave in accordance with that thinking and reasoning and do what they want and decide to do.⁶¹ Similarly, a person can

⁵⁴ *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* RP 69/1967 paras 9.7- 9.10.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ James Grant *Critical Criminal Law* (2018) RS 02 ch 11.

⁵⁸ 1988 (1) SA 163 (A).

⁵⁹ Burchell op cit note 37 at 278; Van Oosten op cit note 34.

⁶⁰ Pierre de Vos 'S v Moses 1996 (1) SACR 701 (C) Criminal Capacity, Provocation and HIV' (1996) 9 *SACJ* 354-360.

⁶¹ Grant op cit note 57.

behave in a particular way but lack insight into the virtue or error of that behaviour. The conative ability, as well as the cognitive ability in s78(1)(a), are essential components of the criminal capacity test that is used in a pathological and non-pathological incapacity case. Either the cognitive leg of the test or the conative leg of the test is sufficient to negate liability if proven.

The difference between the two defences in terms of the tests employed is when it comes to affective function which was identified by the Rumpff Commission in its report. The Commission warned against allowing affective functions to exclude criminal liability where insight (cognitive) and self-control (conative) were both present and unaffected.⁶² This particularly impacts non-pathological incapacity based on provocation and emotional stress because provocation and emotional stress are affective functions. The pathological incapacity defence does not take affective function into consideration as it solely focuses on the cognitive and conative aspects as set out in the test in s78(1). Thus, the pathological incapacity defence follows the Commission's recommendation precisely. However, the non-pathological incapacity defence based on provocation and emotional stress, to a large extent, contradicts the warning given by the Commission by allowing affective functions to significantly impact the determination of criminal capacity of an individual. Nevertheless, there is still an adherence to the warning in the sense that affective incapacity alone is insufficient to negate liability.⁶³

According to Pierre De Vos, '[a] person can only lack criminal capacity if it is found by the court that his actions were uncontrollable because of a complete disintegration of his emotions'.⁶⁴ The disintegration of emotions is the reason given for the lack of capacity under a non-pathological defence in the same way that a mental illness or intellectual disability is the reason for the lack of capacity under a pathological incapacity defence. Those reasons are what justify either a lack of insight or a lack of self-control. This shows that an interrogation of the affective function of the mind is the starting point and foundation of the defence when it comes to non-pathological incapacity. Once it is established that severe emotional stress or provocation was present, then it is about ascertaining whether that emotional stress or provocation affected the individual to such an extent that their cognitive or conative capacity was impaired. Thus, when it comes to non-pathological incapacity based on provocation and

⁶² Rumpff report supra note 54 at para 9.19 'Emotional impulsiveness or liability there does not, in our opinion, exclude responsibility, especially if the behaviour of the person concerned gives or has given evidence of insight and volitional control'.

⁶³ Burchell op cit note 37 at ch22; de Vos op cit note 60 at 357; Rumpff report supra note 54 at para 9.19.

⁶⁴ de Vos op cit note 60 at 358.

emotional stress, the affective function is the necessary first step in determining the success or failure of the defence.

The necessary role that affective function plays in the non-pathological defence and not the pathological defence is appropriate and reasonable because the nature of each of the defences varies and warrants the difference. When it comes to pathological incapacity, there is both a biological element as well as a psychological element whereas in non-pathological incapacity cases based on provocation or emotional stress, only the psychological element is relevant.⁶⁵ The presence of a mental illness or defect is what determines the biological element because of its endogenous nature. Whilst non-pathological incapacity has to do with the effect of external factors on a person's mind and behaviour. Thus, the affective function has a much greater role to play when it comes to non-pathological incapacity because external factors are what, predominantly, elicit feelings of pleasure, fear, anger, hatred etc. Mental illnesses, defects, or intellectual disabilities, on the other hand, are affected or even caused by affective functions of the mind to a small extent, if at all. Furthermore, mental illnesses that only affect the affective capacity of an individual do not come under the insanity concept.⁶⁶ This is illustrated in the case of *S v Kok* where the court stated that 'Loss of temper, that is to say a failure to control one's emotional reactions, is not to be confused with a loss of cognitive control.'⁶⁷

Therefore, the significant consideration and active role that the affective function of the mind plays in the determination of a non-pathological incapacity case is warranted due to the nature of the defence. Pathological incapacity cases have a far less need to consider the affective function of the mind due to the nature of the defence as well. The differentiation in approach in this respect is necessary to give full effect to each of the defences and recognise the difference in reasoning that underpins each of the defences.

3.5. SUBJECTIVE VS OBJECTIVE APPROACH

The test of capacity is subjective in its original form.⁶⁸ This means that the court must assess the issue from the perspective of the accused in question and not from the perspective of an abstract reasonable person. This makes sense if we consider that criminal capacity is concerned

⁶⁵ Van Oosten op cit note 34.

⁶⁶ Burchell op cit note 37 at 280.

⁶⁷ Kok supra note 25 para 22.

⁶⁸ Jonathan Burchell 'A Provocative Response to Subjectivity in the Criminal Law' (2003) *Acta Juridica* 23-47; Burchell op cit note 38 ch19.

with the particular individual's ability to have insight and self-control, not the ability of people in general because there is a presumption of sanity, as discussed earlier in this chapter. However, the view of the test of capacity as being strictly subjective appears to be changing, especially in terms of the non-pathological incapacity defence. In fact, Burchell is of the opinion that 'Capacity is, inherently, both a subjectively and an objectively assessed issue'.⁶⁹

Still, the objective component of capacity seems to be more extensively discussed and explored in the context of non-pathological incapacity and not pathological incapacity. Whilst Burchell's assertion speaks of capacity generally and not in relation to any one of the defences specifically, there is a need to make the objectivity that is, arguably, implicit in both defences clear and explicit. Otherwise pathological incapacity runs the risk of being viewed as purely subjective whilst non-pathological incapacity is viewed as both subjective and objective. This is bad because, as I shall argue, objectivity is both necessary and beneficial to the strength of both the defences.

The subjective part of non-pathological incapacity lies in the accused needing to prove that they lost self-control or insight due to provocation or severe emotional stress.⁷⁰ The objective part lies in the court considering whether an ordinary person in the position of the accused would have also been provoked to such a degree as to lose self-control or insight.⁷¹ This objectivity comes through in the form of inferential reasoning that the court is permitted to use when determining capacity in a non-pathological incapacity case. That inferential reasoning entails drawing legitimate inferences about the accused's capacity from objective circumstances.⁷² Navsa JA in *S v Eadie*⁷³ made it clear that inferential reasoning is necessary when it comes to non-pathological incapacity because there is too heavy a reliance on the accused's version of events to determine whether they did, in fact, suffer from a temporary loss of capacity due to provocation or emotional stress.⁷⁴

The objective criteria used by courts when carrying out inferential reasoning includes the accused's actions, surrounding circumstances and 'human experience, societal interaction and societal norms'.⁷⁵ By coupling the accused's version of events with these objective criteria in the capacity assessment, there is less room for abuse of the defence because the success or

⁶⁹ Ibid at 252.

⁷⁰ Grant op cit note 57 at ch13.

⁷¹ Ibid.

⁷² Burchell op cit note 68.

⁷³ 2002 (1) SACR 663 (SCA).

⁷⁴ Ibid at para 64.

⁷⁵ Ibid at para 65.

failure thereof no longer solely depends on what the accused says. There is more of a holistic look at the offence in question which will either add credibility or take away credibility from the accused's version of events. In this way, the inferential reasoning acts as a safeguard for the defence against abuse by individuals who view the defence as a legal loophole to be able to escape criminal liability when they did, in fact, have the requisite criminal capacity at the time of the offence. For example, a person who simply lost their temper and acted out of anger but was fully aware of their actions and had the ability to control their behaviour would find it a lot more difficult to successfully raise this defence because the existence of surrounding circumstances that would support their assertion of lacking capacity would most likely be very hard, if not impossible, to find.

A good example of the danger of using solely subjective criteria in determining the capacity of an accused is in the case of *S v Moses*.⁷⁶ In this case the accused murdered his lover after the deceased had told the accused that he had AIDS and claimed he lacked criminal capacity due to provocation. The court in this case stated that the subjective test for capacity did not have any room for any consideration about what the reasonable person in the accused's position would have done.⁷⁷ This purely subjective approach led to the court failing to take into consideration surrounding circumstances that indicated that the accused was exercising his will. These circumstances included the fact that the accused ran to the lounge to get an ornament which he beat the deceased with; went to the kitchen to get a knife to stab the deceased; went back again to the kitchen to get an even bigger knife to cut the deceased's throat and wrists and removed his fingerprints from what he had remembered he had touched once the murder was complete.⁷⁸ These actions are clearly indicative of an individual who was purposefully and knowingly trying to kill the deceased by all means possible. As De Vos stated, they '...are all clear indications that a volitional element was present in Moses' action.'⁷⁹

If the court in *Moses* had taken sufficient notice and consideration of the objective criteria surrounding the circumstances of the murder, it is highly likely that the ultimate decision would not have been to acquit the accused on the basis of a lack of capacity. Therefore, safeguards in the form of objective criteria are necessary in our criminal justice system to protect the credibility of the defence itself and to protect the potential victims of its abuse.

⁷⁶ 1996 (1) SACR 701 (C).

⁷⁷ Ibid at 714 B.

⁷⁸ Ibid at 705-706.

⁷⁹ de Vos op cit note 60 at 358.

When it comes to pathological incapacity, the courts have not explicitly stated that there is an objective element to the test of capacity as the court in *S v Eadie* did for non-pathological incapacity. However, interpretations of the capacity test show that objectivity is implicit in the test and is not purely subjective. It is in the second leg of the capacity test, the conative part, that the objective side of the capacity test appears. The second leg of the test relates to self-control and can summarily be classified as an inquiry into whether the accused could have behaved differently according to an interpretation of the *Eadie* judgment by Burchell.⁸⁰

This interpretation is persuasive because by inquiring into whether the accused had the ability to act in accordance with an appreciation of their insight into what is right and wrong, there is a comparison that has to happen between how the accused behaved and how a person with an appreciation of what is right and wrong would have behaved. The inquiry opens the door to a comparison with societal norms of level-headedness.⁸¹ If we accept this interpretation then the same would also apply to non-pathological incapacity since the conative leg of the capacity test is also used for non-pathological incapacity. Thus, the capacity test can be justifiably viewed as both subjective and objective for both defences.

The degree to which the objective criteria is used in the determination of capacity is what may vary for valid reason. It makes sense for non-pathological cases to take objective criteria into consideration almost always because of the heavy reliance on the accused's version of events to determine the psychological element of the defence, which makes up most of the evidence in support of the defence. Whereas, with pathological incapacity there is the biological element in the form of the requirement of a mental illness of endogenous origin which means that there is less reliance on the accused's version of events than there is in non-pathological incapacity cases and a pre-existing safeguard embedded in the nature of the pathological incapacity defence. Thus, the role that objective criteria play in the determination of capacity may be and, arguably, should be greater in non-pathological cases than in pathological cases. That is not to say, however, that objectivity should not be present in both defences because it does strengthen the credibility and accuracy of both of the defences.

Objectivity introduces more fairness because it works both ways, it can uncover circumstances or facts that work in favour of the accused or against the accused. Objectivity coupled with subjectivity allows the court to consider the case based on its own merits and within the context

⁸⁰ Burchell op cit note 68 at 39.

⁸¹ Ibid at 41.

of the particular circumstances surrounding the issue. As well as this, more evidence becomes relevant and can come before the court to help it in its adjudication of the matter. This is valuable in helping the court come to as accurate and just a decision as possible because the court will be better informed.

However, there are potential problems that can arise from the recognition and reliance on objective criteria. The problems are most evident when it comes to inferential reasoning because it creates room for the norms of the individual judge presiding over the matter to creep in and potentially exercise more influence over the decision than the perceived norms of society. As Burchell stated, ‘Inferential reasoning must never become a cloak for hiding the norms of individual judges.’⁸² Furthermore, the influence of the norms of individual judges can lead to judicial policymaking as judges may interpret and apply the law in ways that the legislature had not envisioned which breaches the separation of powers doctrine. However, these potential problems are mitigated to a large extent by the boundaries within which inferential reasoning must be exercised by the courts. For example, it is trite that inferences can only be drawn from proven facts in criminal trials.⁸³ As well as this, any objective factors considered by the court must be expressed with reasonable clarity to avoid infringing the certainty element of the principle of legality.⁸⁴

3.6. CONCLUSION

The defences differ in nature because the central part of each defence differs. For pathological incapacity, the component part and reasoning behind the existence of the defence is the element of mental illness. For non-pathological incapacity, the component part is the presence of provocation or emotional stress. There are various outcomes and conditions that attach to these component parts and, in turn, shape the defences and affect how a court approaches the defences. As a result, there are instances where the requirements necessary to raise these defences successfully are different and justifiably so, such as in terms of expert evidence and the functions relied on for the tests.

However, there are instances where a streamlining of the requirements is warranted and would assist the defences in terms of their credibility and constitutional compliance such as in terms of the burden of proof and the subjective versus objective approach.

⁸² Burchell op cit note 68.

⁸³ *R v Blom* 1939 AD 188 at 202–3.

⁸⁴ Burchell op cit note 68.

CHAPTER FOUR

COMPARISON OF CONSEQUENCES

4.1. INTRODUCTION

Having taken a fairly in-depth look at the component parts of each of the defences and the requirements necessary to successfully raise each of them in the previous chapter, it is fitting to turn now to the consequences attached to a successful defence. In the past there was a significant disparity between the result of successfully raising the pathological incapacity defence and successfully raising the non-pathological incapacity defence. That disparity has been lessened to a significant extent by amendments made to the Criminal Procedure Act 51 of 1977 (CPA), however, disparities remain.

This chapter compares the consequences of the two defences and the objective of such a comparison is to ascertain whether there is justification in the difference of consequences between the two defences. Thus, this chapter analyses some of the benefits and disadvantages of these consequences. Followed by an assessment of whether the consequences accord with the Constitution, particularly focusing on whether they uphold the rights of persons with disabilities as mandated by the Constitution. This chapter shows that it is necessary to merge and streamline the consequences of the defences so that the same options are available to the court to choose from to accommodate for the various cases and circumstances that come before the court when dealing with these defences.

4.2. PAST CONSEQUENCES

If an accused successfully raised the pathological incapacity defence prior to 1977, the court would find them ‘guilty but insane’ in accordance with s29(1) of the South African Mental Disorders Act 38 of 1916.¹ This was an interesting formulation of the verdict considering that the purpose of the defence is to determine that the accused was not criminally responsible for the act or omission due to their mental state at the time. A lack of criminal responsibility means that the individual is legally deemed to be not guilty.² However, this peculiarity was remedied when the Criminal Procedure Act 51 of 1977 came into operation as it changed the verdict of a successful pathological incapacity defence to a finding of ‘not guilty by reason of mental

¹ J Burchell *Principles of Criminal Law* 5 ed (2016) ch 20.

² Ibid.

illness or mental defect'.³ This is more consistent with the purpose of the defence which is to determine that the accused was not criminally responsible for the crime, thus, they are not guilty. However, it simultaneously acknowledges and makes explicit that the lack of guilt is solely due to the individual's mental state by qualifying the finding of not guilty with the phrase 'by reason of mental illness or mental defect'.

The verdict was followed by an inevitable committal of the accused because s78(6) of the CPA mandated the court to 'direct that the accused be detained in a mental hospital or prison pending the signification of the decision of a judge in chambers'.⁴ This provision was peremptory meaning that the court did not have the ability to deviate from this provision, so the court always had to order the detention of the accused in either a mental hospital or prison no matter the surrounding circumstances. There were no other options available for the court to choose from. This was, undoubtedly, a problematic provision for a few reasons.

Firstly, committal to an institution may not always be the most appropriate order in the circumstances of a particular case. For example, some mentally ill persons may be better served and receive more effective treatment in an outpatient programme or at home.⁵ Furthermore, the surrounding circumstances of a case are very rarely, if ever, identical to those of another case. The same is true when it comes to accused persons, no two accused persons are exactly the same. Thus, an across-the-board committal order that disregards these differences is not always going to be the most suitable solution for the court to impose in every case.

Secondly, the committal of an accused may lead to them serving as long a sentence as they would have had they been found guilty of the crime.⁶ This is problematic in the sense that differentiating the consequences of a verdict of guilty from those of a verdict of not guilty by reason of mental illness becomes more difficult if the outcome is more or less the same i.e., detention for a similar period of time. However, this issue is not as problematic because committal of an accused to a mental institution is accompanied with treatment for the mental illness they are said to suffer from. Accordingly, the length of time they spend in the institution may equate to or surpass that of an ordinary conviction because that is how long they need to be treated for, not necessarily for arbitrary reasons.

³ Section 78(6) Criminal Procedure Act 51 of 1977.

⁴ Section 11 of Criminal Procedure Amendment Act 33 of 1986.

⁵ Safura Abdool Karim 'Law to stop detention of mentally ill in prisons' *GroundUp* 10 February 2017, available at <https://www.groundup.org.za/article/laws-stop-imprisonment-mentally-ill/>, accessed on 22 January 2021.

⁶ FFW Van Oosten 'Non-Pathological Criminal Incapacity Versus Pathological Criminal Incapacity' (1993) 6 *SACJ* 146.

Thirdly, this compulsory order of detention had the potential to create a situation whereby a person who is no longer mentally ill is committed for an indefinite period of time.⁷ This was possible because the focal point of an inquiry into criminal responsibility in terms of s78 is the mental state of the accused at the time of the commission or omission of the conduct that constituted a crime.⁸ Thus, an accused may have been mentally ill at the time that they committed the crime which warrants them being found not guilty by reason of mental illness, however, the accused may have since recovered or no longer suffers from that mental illness by the time that they are on trial for the crime. Nonetheless, with the peremptory order of detention, the court had to order the committal of that accused who was no longer mentally ill. This seems counterintuitive and pointless, especially if that individual is committed to a mental institution for treatment when they are not in need of treatment. Leeuw AJ concurs with this as she stated that such a situation would be ‘patently irrational’ in *De Vos N.O and Others v Minister of Justice and Constitutional Development and Others*.⁹

Whilst the pathological incapacity defence yielded this problematic detention order, a successful non-pathological incapacity defence would result in a complete acquittal.¹⁰ This was exemplified by the three High Court decisions of *S v Arnold*,¹¹ *S v Nursingh*¹² and *S v Moses*.¹³ In all three of these cases the accused persons were charged with murder and successfully raised the non-pathological incapacity defence which resulted in them being completely acquitted.¹⁴ Thus, there was a significant disparity between the outcome of the two defences. One resulted in inevitable confinement whilst the other resulted in unconditional freedom.

4.3. CURRENT CONSEQUENCES

The situation as it stands today is different from the past in some respects and the same in others. The Criminal Matters Amendment Act 68 of 1998 amended s78 of the CPA and in doing so it, most notably, increased and diversified the kinds of orders that the court may give following a finding of not guilty by reason of mental illness. The court can now choose whether

⁷ Burchell op cit note 1 at 301.

⁸ S78(1) ‘A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness...’ [own emphasis added].

⁹ 2015 (2) SACR 217 (CC) para 39; cf chapter 1 note 19.

¹⁰ Lirieka Meintjes-van der Walt ‘Making a Muddle into a Mess: The Amendment of s78 of the Criminal Procedure Act’ (2002) 15 *SACJ* 243; Van Oosten op cit note 6; J Burchell *Principles of Criminal Law* 5 ed (2016) ch 22.

¹¹ 1985 (3) SA 256 (C).

¹² 1995 (2) SACR 331 (D).

¹³ 1996 (1) SACR 701 (C).

¹⁴ Burchell op cit note 10.

to detain the accused in a psychiatric hospital;¹⁵ or temporarily detain the accused in a correctional health facility in a prison;¹⁶ or admit the accused into a designated health establishment;¹⁷ or release the accused subject to certain conditions set by the court;¹⁸ or refer the accused to a Children's Court;¹⁹ or release the accused unconditionally.²⁰ This is a drastic change from the situation that existed before whereby the only option the court had was to commit the accused to an institution. The court now has the latitude, if the circumstances permit, to go as far as allowing the accused who successfully raises the pathological incapacity defence to be released unconditionally thus granting the accused complete freedom. However, the discretion to order detention in a psychiatric hospital or a prison remains.

The consequence of a successful non-pathological incapacity defence remains the same i.e. a complete acquittal. Therefore, where the comparison used to be between detention and a complete acquittal, the comparison is now between a number of options and a complete acquittal. There are benefits and disadvantages associated with either consequence, and some problems from the past still remain. These benefits and disadvantages give a better picture as to whether the consequences are justifiably different or whether there is greater merit in streamlining the consequences of the defences to be similar, if not the same, taking into consideration the interests of the various stakeholders such as the accused and the public.

4.4. BENEFITS AND DISADVANTAGES

One of the main benefits of the newly formulated s78(6) consequences of a successful pathological incapacity defence is the discretion that it gives the court which was absent prior to the amendments of the section. The court is no longer as restricted as it was in the past meaning that it has more latitude to consider the specific circumstances of the case and individual before it. As previously mentioned, some mentally ill persons may be treated more effectively in an outpatient programme or at home. With the option to send an accused found not guilty by reason of mental illness home with conditions,²¹ the court is now in a position to order outpatient treatment or treatment at home. Furthermore, there no longer has to be a situation whereby an accused who was mentally ill at the time of the crime but is no longer mentally ill at the time of their trial is detained. The court can now order a conditional or even

¹⁵Section 78(6)(b)(i)(aa) Criminal Procedure Act 51 of 1977.

¹⁶ Ibid at s78(6)(b)(i)(bb).

¹⁷ Ibid at s78(6)(b)(i)(cc) and s78(6)(b)(ii)(aa).

¹⁸ Ibid at s78(6)(b)(i)(dd) and s78(6)(b)(ii)(cc).

¹⁹ Ibid at s78(6)(b)(i)(ff) and s78(6)(b)(ii)(ee).

²⁰Ibid at s78(6)(b)(i)(ee) and s78(6)(b)(ii)(dd).

²¹ Ibid at s78(6)(b)(ii)(cc).

an unconditional release for such an individual. Thus, the court's order can now be more appropriate and suitable as there are more options available to apply to the different circumstances and scenarios that arise in various cases.

Another benefit of the amended s78(6) is that an order of detention in a psychiatric hospital or prison is now only allowed under certain prescribed circumstances: if the court believes it is in the public's best interest or in cases involving serious violent crimes such as murder, culpable homicide, or rape.²² There is a benefit in this provision for both the accused and the public. An accused who commits less serious crimes no longer has to worry about facing the same harsh fate as an accused who has committed a serious violent crime. In terms of the benefit for the public, the court is compelled to consider the public in making its decision about which order to impose; thus, the public's interests are prioritised, most importantly, in cases where the public is likely to feel most at risk or affected by the decision of the court, namely, cases where a potentially dangerous and violent offender may be released back into society. The provision creates a boundary within which the court must operate which limits the order of detention whilst still giving room for the court to exercise its discretion as it must deliberate and decide what is in the best interest of the public based on the case.

However, detention is still an option that the court can choose, and whilst it may no longer be compulsory, it still has its problems. The court may exercise its discretion incorrectly in a particular case - judges are not infallible after all - and decide detention is the most suitable order for a particular individual when they could have and should have opted for another one of the options. Additionally, the fact that the court can order an accused be 'temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available'²³ is an issue. This is problematic because whilst it is said to be temporary, the reality is that the waiting period for a bed to become available at a psychiatric facility can range from months to years.²⁴ This period of imprisonment may prove traumatic and damaging for the mentally ill or intellectually disabled person and has the potential to go so far as to worsen their ailment or condition.²⁵ This is disadvantageous as it works against the objective of getting the individual treatment and,

²² S78(6)(b)(i).

²³ S78(6)(b)(i)(bb).

²⁴ Karim op cit note 5.

²⁵ Ibid.

potentially, infringes the rights²⁶ of those mentally ill or intellectually disabled persons who have been forced to be in those harmful places and spaces by the criminal justice system.

On the other hand, the benefits of a complete acquittal when an accused successfully raises a non-pathological incapacity defence are mainly in favour of the accused. The result of an acquittal and an unconditional discharge²⁷ is beneficial for the accused as they get to walk free with no conditions hindering them in any way. The accused can, theoretically, return to their life with no consequences or punishments weighing them down. Practically, the accused may face ostracization from their community and difficulty in going back to work or performing daily tasks depending on the publicity of the case and public opinion. However, even though the accused may face some practical challenges, they are legally in the same position that they were in before the case as they have been acquitted of wrongdoing.

The disadvantage of a complete acquittal as the outcome of all successful non-pathological incapacity defences is that it also seems to disregard how cases and individuals differ and gives a ‘one-size fits all’ solution. Whilst it is not mandated as the s78(6) detention order was in the past, precedent has established that this is the order to be given in these cases.²⁸ The problem with this is that it does not consider situations whereby an individual does lack criminal capacity and is thus not guilty but where that person still poses a potential risk to the public or to themselves. For example, a person may have undergone a long period of provocation or emotional stress leading up to the crime that they committed but once the crime is committed, that does not necessarily mean that the effects of that sustained provocation or emotional stress have dissipated.²⁹ That individual may need treatment to ensure that they no longer pose any danger to either themselves or the public at large. In such a case, a complete acquittal would not be beneficial for both the accused or the public. A more suitable order may be for the person to be admitted to and detained in a designated health establishment as is the case when it comes to a mentally ill or intellectually disabled person.

4.5. CONSTITUTIONAL COMPLIANCE

The constitutional compliance of the consequences informs the justifiability of the consequences themselves and the difference between the consequences of either defence. The

²⁶ Rights such as the right to human dignity and the right to freedom and security of the person.

²⁷ James Grant *Critical Criminal Law* (2018) RS 02 125.

²⁸ *S v Nursingh* 1995 (2) SACR 331 (D); *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Moses* 1996 (1) SACR 701 (C); *S v Arnold* 1985 (3) SA 256 (C).

²⁹ For example in the case of battered woman syndrome, which is a sub-category of post-traumatic stress disorder, the trauma can last for months or even years.

constitutionality of the consequences that result from the success of either of these defences is linked to the extent that the consequences uphold the rights of the persons subject to those consequences. In the case of the pathological incapacity defence, those persons are persons with mental illness or suffer from an intellectual disability. As mentioned in previous chapters, persons suffering from mental illness and intellectual disabilities are a vulnerable group in society and, accordingly, are explicitly protected against unfair discrimination under s9 of the Constitution.

Of the orders available to the court to impose when an individual has been deemed not guilty by reason of mental illness under s 78(6), detention is the one that is most likely to be constitutionally questionable. Detention of these persons infringes their right to freedom and security of the person³⁰ because their movement is restricted, and their freedom is deprived whether they are in a prison or a psychiatric institution. However, s36 of the Constitution makes room for this right to be limited.³¹ Without delving into an in-depth limitations analysis as this would be beyond the scope of this thesis, there are particular parts of s36 that are pertinent to ascertaining the justifiability of the detention of mentally ill persons in terms of s78(6) of the CPA, namely, s36(1)(b) and (e).³²

Firstly, one of the main purposes of the limitation of the right to freedom and security of the person when they are deemed not guilty by reason of mental illness is for the protection of the public. As Alan Brudner stated, ‘detaining the innocent insane is also a violation of their right, but one that is justified by the social good that it produces.’³³ That social good encompasses things like public safety, the opportunity for reformation or rehabilitation and retribution. By incapacitating the individual, they cannot reoffend for the time that they are detained which contributes to a sense of public safety. Detaining the individual in a psychiatric facility means that they will receive treatment which creates the potential for that individual to be rehabilitated and, potentially, be reintegrated into society. Furthermore, detention conveys to both the individual and society at large just how much the behaviour that has led to the detention is

³⁰ Constitution of the Republic of South Africa, 1996 s12.

³¹ Ibid at s36(1) ‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

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

³² Ibid.

³³ Alan Brudner ‘Insane Automatism: A Proposal for Reform’ (2000) 45(1) *McGill Law Journal* 70.

reprehensible which serves a retributive purpose.³⁴ These are all social goods that strongly justify a detention order being issued, especially considering that a detention order is now only issued in the particular circumscribed circumstances unlike in the past when it was the inevitable order in all situations.

Secondly, when it comes to there being less restrictive means available to achieve the purpose,³⁵ the justification for detention is still strong because of the prerequisite circumstances that must exist before detention can be ordered. There are a number of other options available under s78(6) for the court to choose from in order to protect the public such as releasing the individuals with conditions that are deemed appropriate for the situation.³⁶ However, because the wording of the section is now such that detention is only a viable option when it comes to a violent crime or if it is in the interests of the public, when the detention is ordered now I would argue that it is most likely the least restrictive means to effectively protect the public and contribute to the aforementioned social goods in the situation. If the formulation of the section was still that of the past, then it would most likely fail to be justifiable in this regard because less restrictive means were available yet the section mandated detention regardless of the situation.

A complete acquittal, on the other hand, when it comes to a successful non-pathological incapacity defence does not appear to infringe the rights of the individual because he or she is set free. However, it could be argued that the rights of members of the public are potentially infringed by a complete acquittal of a person found not guilty of a crime because they were provoked or suffered from severe emotional stress at the time of the crime. Section 12(1)(c) of the Constitution states that everyone has the right ‘to be free from all forms of violence from either public or private sources;’ and it is the responsibility of all organs of state, including the judiciary, to uphold this right.³⁷ Therefore, by releasing a potentially dangerous and violent individual back into society, the court is potentially endangering members of the public who may be subjected to violence at the hands of that individual and thus failing to uphold the right to be free from violence. However, this conclusion is mainly based on the potential risk that the individual poses and risk is not a concrete or easily ascertainable thing. As Mark Brown stated,

³⁴ Michael S. Moore ‘The moral worth of retribution’ in A von Hirsch, A Ashworth and J Roberts (eds) *Principled Sentencing – Readings on Theory and Policy* 3ed (2009) 110-114.

³⁵ Constitution s36(1)(e).

³⁶ Section 78(6)(b)(i)(dd).

³⁷ Constitution s8(1).

Risks presented by an offender frequently are calculated in different and often contradictory ways and these differing conceptions of risk are used to justify a set of equally disparate and conflicting responses to the supposedly dangerous individual.³⁸

This shows that risk is not always a reliable means of measuring an individual's dangerousness.

If the court decided to detain the individual or inflict another form of punishment on the individual solely based on the potential risk that they may pose to the public then that would be unjust towards the individual considering that risk is not certain, and neither is it always an accurate predictor of future behaviour. Nevertheless, in the cases where the accused successfully raised the non-pathological incapacity defence, the complete acquittal order did not come after a consideration of risk or likelihood of recidivism or other circumstances. In *S v Moses*³⁹ the court even acknowledged in its findings that 'the accused has a history of poor control and anger. He is susceptible to anger outbursts and violence and this is part of his personality make-up.'⁴⁰ Yet the accused was acquitted and allowed to go completely free. This is where the complete acquittal order falls short as it does not adequately, if at all, consider integral circumstances such as chances of recidivism. Bearing in mind that the individual did commit the crime, they just lacked capacity at the time that they committed the crime. This is not the same as a person who is completely innocent of committing the crime and so the two should not be treated the same. One has offended before and the other has not in the eyes of the law.

A solution to this issue that would ensure that both the individual and the public's rights are upheld and protected is if the consequences available to the court under s78(6) for pathological incapacity cases were to be available to the court when it comes to non-pathological incapacity cases. This would be beneficial for the individual in the sense that if they still pose a threat to themselves or others then they can get the treatment they need because the court can order they be admitted to a health establishment or psychiatric hospital. For the public this would be beneficial because the court would have to consider what is most appropriate in the circumstances, especially when it comes to crimes involving serious violence, and the individual could possibly be removed from society if need be, thus contributing to public safety. Streamlining the consequences in this way would also strengthen the non-pathological

³⁸ Mark Brown 'Calculations of risk in contemporary penal practice' in M Brown and J Pratt (eds) *Dangerous Offenders* (2000) 93.

³⁹ *Moses* supra note 13.

⁴⁰ *Ibid* at 714D.

incapacity defence as it shows sceptics and naysayers that there are serious consequences attached and it is not simply a legal loophole that criminals can use to escape any sort of punishment or consequence for their actions. Criminals would also be discouraged from trying to rely on the non-pathological incapacity defence when it does not apply to them because it would no longer be as attractive as when it resulted in a complete acquittal.

4.6. CONCLUSION

The circumstances within which an order of detention can be imposed have been significantly narrowed following amendments to the CPA which has been beneficial for both the individual and the public. As well as this, there has been an addition of a number of other types of orders that the court can choose to give which have contributed greatly to s78(6) consequences appearing to be constitutionally compliant.

However, the consequence for non-pathological incapacity has remained the same, a complete acquittal, but the problem with this consequence is that it does not account for all possible situations and circumstances. Thus, there does not appear to be substantial justification for the difference in consequences between the two defences. This is why the consequences of the two defences should be streamlined by making the consequences applicable in a pathological incapacity case applicable to a non-pathological incapacity case. This would be beneficial in that it would give the court more discretion in these cases; there would be greater consideration of all surrounding circumstances; treatment could be rendered to an individual if necessary; it would strengthen the credibility of the non-pathological incapacity defence and it would not be discarding the original consequence, acquittal, but adding more options to accommodate for various cases.

CHAPTER FIVE

CANADIAN INSANITY AND PROVOCATION DEFENCES

5.1. INTRODUCTION

This chapter takes a brief look at the Canadian insanity defence and the Canadian provocation defence. Whilst there are a number of similarities between the formulation of the two defences with the South African formulation, there are also a few differences that set them apart. The Canadian insanity defence directly relates to the South African pathological incapacity defence as they both deal with mentally ill persons and the Canadian provocation defence directly relates to the South African non-pathological incapacity defence as they both deal with provoked persons.

The aim of this chapter is to explore whether there are elements of the two Canadian defences that can be transferred and adopted by the South African formulation of these defences for their enhancement. To do so, the chapter firstly addresses Canada's relevance and applicability to South African criminal law, generally, and to these criminal law defences more specifically. This is followed by an explanation of the two Canadian defences to contextualise what it is that the two South African defences, that have been discussed throughout this thesis, are being compared to. Lastly, this chapter looks at the applicability of some of the elements of the two Canadian defences to the South African context and the potential advantages of such an adaptation. There are lessons that the South African defences can learn from the Canadian defences which could add to the efficiency and credibility of the defences.

5.2. WHY CANADA?

As mentioned in chapter one, both South African and Canadian law has been greatly influenced by British legal tradition regarding this specific topic. More specifically, the M'Naghten rules¹ that deal with the criminal liability of insane persons became a part of both South African criminal law and Canadian criminal law. These rules form the foundation of the 'insanity defence' in Canada² and the pathological incapacity defence in South Africa³ with each jurisdiction applying modified versions of the rules in the form of these defences. This shows that these two jurisdictions are greatly linked when it comes to the criminal law defence of

¹ Established following the English case of *R v M'Naghten* (1843) 8 E.R. 718.

² J. C. McRuer 'Insanity as a Legal Defence' (1949) 61 *Canada Medical Association Journal* 489-495.

³ J Burchell *Principles of Criminal Law* 5 ed (2016) ch 20.

insanity as they emanate from the same foundation and, thus, embody similar fundamental principles. Both jurisdictions also recognise provocation as a defence to varying extents and so comparing the two is useful to see the differences and potentially learn something useful from those differences.

For these reasons, a comparison between the Canadian formulation and the South African formulation is apt as it is informative to see how another jurisdiction with the same legal foundation and basis for the defences has adapted and executed the defences. There are inevitably a number of similarities between the two jurisdictions because of the similar foundation but there are also differences that may reveal how South African criminal law can modify the two defences for the benefit of their credibility and efficiency.

5.3. CANADIAN INSANITY DEFENCE

Section 16 of the Canadian Criminal Code⁴ sets out the defence of mental disorder as it states that:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.⁵

The test predominantly focuses on the cognitive function, being the ability to discern right from wrong and good from evil.⁶

The test also embodies a presumption of sanity⁷ whereby the onus falls on the party alleging mental disorder to prove it on a balance of probabilities.⁸ The party alleging mental disorder can be the accused, the Crown, or the court itself.⁹ To successfully raise the defence, the accused must show or be shown to be incapable of making moral distinctions because of their mental disorder. That moral distinction is about whether the accused is capable of knowing that society views the offence as morally wrong.¹⁰

If the defence is successfully raised, the resulting verdict is ‘not criminally responsible on account of mental disorder’ and the accused may subsequently be discharged completely,

⁴ Criminal Code RSC 1985, c C-46.

⁵ Ibid at s16(1).

⁶ J. Arboleda-Florez ‘Insanity Defence in Canada’ (1978) 23 *Canadian Psychiatric Association Journal* 23-28.

⁷ Supra note 4 at s16(2).

⁸ Ibid at s16(3).

⁹ Simon N. Verdun-Jones ‘The Insanity Defence in Canada: Setting a New Course’ (1994) 17 *International Journal of Law and Psychiatry* 175-189.

¹⁰ Ibid.

discharged with conditions, or detained in a hospital.¹¹ Review Boards are the ones that make the decision whether to detain the accused after the verdict has been given in cases where the court has not made the decision and in cases where the court has decided not to grant an absolute discharge.¹²

5.4. CANADIAN PROVOCATION DEFENCE

Provocation in Canadian criminal law does not act as a complete defence, it is a partial defence that operates in very restricted circumstances.¹³ This means that if an accused successfully raises this defence he or she will not be acquitted of the crime, it will only reduce the charge to a less serious offence. Furthermore, the defence is only applicable to cases of murder¹⁴ which means that an accused cannot raise this defence against a charge of any other crime or offence other than murder, including attempted murder. So if successful, a charge of murder will be reduced to a charge of manslaughter.

The defence has been operational in Canadian common law courts for approximately 400 years¹⁵ and so it has a well-established history in Canadian criminal law. In addition, what constitutes a provocation in terms of this defence is very narrowly defined. The conduct of the victim needs to have amounted to a crime that is punishable by at least five years imprisonment and is sufficient to deprive an ordinary person of the ability to exercise self-control.¹⁶ The accused must also have acted suddenly in response to the provocation.¹⁷

5.5. INSANITY DEFENCE VS PATHOLOGICAL INCAPACITY DEFENCE

It is evident that there are a number of similarities between the Canadian insanity defence and the South African pathological incapacity defence. First, both defences have a presumption of sanity¹⁸ which results in a reverse onus and infringes the presumption of innocence, which both jurisdictions have deemed justifiable and necessary.¹⁹ Secondly, both defences look at the cognitive function in their assessment of incapacity.²⁰ Thirdly, the accused, the prosecution and

¹¹ Ibid.

¹² Ibid.

¹³ Isabel Grant & Debra Parkes 'Equality and the Defence of Provocation: Irreconcilable Differences' (2017) 40 *Dalhousie Law Journal* 455-496.

¹⁴ Supra note 4 at s232(1) 'Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.'

¹⁵ Wayne N. Renke 'Calm Like a Bomb: An Assessment of the Partial Defence of Provocation' (2010) 47 *Alberta Law Review* 729-778.

¹⁶ Supra note 4 at s232(2).

¹⁷ Ibid.

¹⁸ Criminal Procedure Act 51 of 1977 s78(1A).

¹⁹ *R v Chaulk* [1990] 3 SCR 1303 and Burchell op cit note 3 p298.

²⁰ Supra note 18 at s78(1)(a) and supra note 4 at s16(1).

the court are able to raise the issue of incapacity due to mental illness in both jurisdictions.²¹ Fourthly, the resultant verdicts of a successful defence in the two jurisdictions are almost identical in meaning. In Canada it is ‘not criminally responsible on account of mental disorder’ and in South Africa it is ‘not guilty by reason of mental illness or intellectual disability’.

However, there are some key areas in which the defences differ. Whereas the Canadian formulation focuses on the cognitive aspect, the South African formulation takes both the cognitive and conative aspects into account. This is an instance in which I believe the Canadian formulation could actually adopt something from the South African formulation. This is because the conative aspect is integral to the defence in the sense that even though a person may be able to have knowledge and reasoning that does not mean that they will be able to behave in accordance with that knowledge and reasoning.²² Thus, disregarding this aspect or not giving it a prominent role does not take the full scope of the defence into account.

An aspect of the defences that I believe South Africa can and should adopt from the Canadian defence is the use of the aforementioned Review Boards. These boards are composed of at least five members and have to have at least one psychiatrist as well as a senior judge as the chair of the board.²³ The boards differ from the s79 of the CPA panel for the purposes of enquiry and report in that these boards deal specifically with the sentencing stage of the trial whereas the s79 panel deals with the pre-verdict stage of the trial. This is a valuable mechanism in ensuring that the sentence given to the accused who successfully raises the defence is appropriate and necessary because the sentence is scrutinized by both legal and medical minds. Considering that both law and medicine play an integral and intertwining role in this defence at the trial stage, it is fitting for both to play an important role at the sentencing stage as well. Incorporating such a board into the South African system would also help in quelling public fears about the possibility of a dangerous offender being released back into society. Where both the trial court itself has considered the circumstances surrounding sentencing and the board of five experts have done the same, the likelihood of the public feeling more secure in the ultimate decision is higher. There is also a greater chance of fairness for the accused.

However, the feasibility of such an adaptation may be low considering the already strained resources available to the South African criminal justice system. Nonetheless, there may be a

²¹ *Supra* note 18 at s78(1B) and Verdun-Jones *op cit* note 9.

²² James Grant *Critical Criminal Law* (2018) RS 02 ch 11.

²³ Verdun-Jones *op cit* note 9.

way to circumvent this issue by giving the s79 panel the responsibilities and duties of a Review Board, thus negating the need to create an entirely new board.

5.6. PROVOCATION DEFENCE VS NON-PATHOLOGICAL INCAPACITY DEFENCE

The Canadian provocation defence and the South African non-pathological incapacity defence differ in significant aspects of their formulation. Firstly, the Canadian defence is only partial whilst the South African defence is complete. I think this difference is warranted considering that the two defences have differing historical backgrounds that have resulted in them having this difference. Whereas the Canadian defence has been applied as a standalone defence for about 400 years in Canada, the South African non-pathological incapacity defence developed as a result of the application of pathological incapacity principles to non-pathological incapacity cases.²⁴

Secondly, the Canadian provocation defence only applies to murder and no other crime whereas the South African defence does not have such a limitation and is used in a variety of types of cases.²⁵ The two defences are polar opposites, in this regard, representing the extremes of either side i.e. restricted to one type of case on the one hand and not restricted at all on the other hand. Both formulations have their issues in that too much leeway creates room for abuse and too little leeway excludes relevant individuals and circumstances that could benefit from the use of the defence. Thus, the more appropriate approach appears to be somewhere in the middle of these two approaches whereby there is enough room to accommodate relevant cases but not so much room that the defence can be easily abused.

Another aspect of the Canadian provocation defence that the South African formulation would possibly benefit from adopting is the limitation on what constitutes provocation that would warrant the application of the defence. The Canadian defence only recognises provocation that amounts to an offence punishable by at least five years imprisonment as sufficient provocation. This could be words or conduct that amount to crimes such as assault, threats, or criminal harassment.²⁶ Whilst this is a very narrow and restricted perception of provocation that has its own problems,²⁷ the underlying idea of limitation is what I believe is valuable. Limiting what

²⁴ Shannon Hocter 'Tracing the Origins of the Defence of Non-Pathological Incapacity in South African Criminal Law' (2011) 17 *Fundamina* 70-82.

²⁵ For example *Momberg v S* 2019 (2) SACR 505 (GJ) and *S v D D Novella* CC19/16 discussed in chapter 1.

²⁶ Grant & Parkes op cit note 13.

²⁷ Does not account for less serious acts of provocation that may occur over a long period of time or acts that are punishable by just a little less than five years imprisonment.

can be regarded as sufficient provocation to warrant the non-pathological incapacity defence succeeding would be beneficial in that it would reduce the likelihood of individuals trying to justify violent crimes that were in fact homophobic or racist driven crimes, for example. If this were the case, cases such as *S v Moses*²⁸ would be less likely to happen which would strengthen the credibility of the defence, so it is not seen as a means to escape responsibility for hate crimes or any other heinous crimes frowned upon by society.

5.7. CONCLUSION

There are a couple of things that the Canadian defence could potentially benefit from by adopting aspects of the South African defence such as giving the conative function more prominence in its test. The South African formulation could benefit from adopting the Review Boards as it would help with accuracy and efficiency in the sentencing stage.

The non-pathological incapacity defence also stands to gain from adopting some traits from the Canadian provocation defence such as narrowing the scope, to a certain extent, in terms of what types of cases the defence can be used in and limiting what constitutes provocation sufficient to raise the defence successfully. These adaptations and modifications would be of significant assistance in the goal to increase confidence in the defences and increase their credibility whilst reducing scepticism. This goes to show that there is still great room for improvement of the South African defences and whilst the focus of this thesis has been predominantly on what each defence can learn from each other to simplify and enhance it, there is also a need to look beyond the South African borders to further enhance the defences.

²⁸ 1996 (1) SACR 701 (C); the accused murdered his lover after the deceased had told the accused that he had AIDS.

Chapter Six

Conclusion

The pathological criminal incapacity defence and the non-pathological criminal incapacity defence are important defences in South Africa's criminal justice system because they acknowledge and thoughtfully consider how temperamental human nature and behaviour is. To ignore or discount the effects of mental illness and provocation on an individual would be unwise because it would render the criminal justice system out of touch with the reality of certain situations that lead to criminal conduct. Thus, these defences act as a protection to those individuals in our society who have involuntarily succumbed to the effects of mental illness or provocation so that they are not held criminally responsible for unlawful conduct that was out of their control.

Whilst the motive behind these defences is legitimate, there is still a large amount of scepticism and controversy surrounding the defences. Majority of both public sentiment and legal scholar opinions about the defences appear to be negative. Some view the defences as an avenue for criminals to circumvent punishment whilst others believe the defences lead to unfair discrimination against vulnerable groups in our society. Consequently, there is a need to enhance the formulation of these defences to quell sceptics, strengthen the credibility of the defences and ensure that they are in line with the Constitution. Improvement is necessary to ensure that the defences serve their intended purpose and get the intended results.

There are a number of aspects in which the two defences differ in their formulation. This thesis has shown that the question of whether these differences are necessary and justified can be answered in the affirmative with regards to some aspects and in the negative with regards to other aspects. This is the case when it comes to the requirements necessary to successfully raise the defences. Firstly, the difference in the burden of proof between the two defences results in unfair discrimination as an accused who raises the pathological incapacity defence has a much more onerous burden than an accused who raises the non-pathological incapacity defence for unjustified reasons. Secondly, the explicit incorporation of objectivity into the non-pathological incapacity test but not into the pathological incapacity test is unjust and detrimental to the pathological incapacity defence itself because the consideration of objective criteria provides safeguards to the defence and the potential victims of its abuse.

These two requirements, burden of proof and subjectivity vs objectivity, demonstrate where there is room for improvement for the defences by aligning the requirements. For the burden of proof, I have suggested in chapter three that the structure of the non-pathological incapacity defence should be applied to the pathological incapacity defence whereby the burden remains on the state, but the accused has to provide an evidentiary basis. This would allow for accused persons raising either one of these defences to be treated alike in terms of the burden of proof, thus, removing the issue of unfair discrimination and it would do away with the infringement of the right to be presumed innocent, thus, aligning the defence with the Constitution. In terms of the incorporation of objectivity, I suggested in chapter three that objectivity should be incorporated into the pathological incapacity defence test as explicitly as it is in the non-pathological incapacity defence test. Objectivity coupled with subjectivity allow for a holistic consideration of each case.

However, there are also areas in which the differences between the two defences are justified due to the particular nature of each of the defences and the difference in basis. For pathological incapacity, the defence finds its basis in mental illness and intellectual disability whereas for non-pathological incapacity (regarding provocation and emotional stress as this has been the type focused on in this thesis) the defence finds its basis in provocation and severe emotional stress. These foundational elements that give the defences their character and form, are two very different concepts and so it is inevitable that there are aspects in which difference is justified and necessary to effectively fulfil the purpose of the defences.

For example, when it comes to the requirement of expert evidence it is justified that the pathological incapacity makes it mandatory whilst the non-pathological incapacity defence does not. This is because the connection between the legal and psychological aspects of the non-pathological defence are tenuous and it is more difficult for a mental health professional to diagnose than in the case of a mental illness, amongst other reasons. As well as this, the difference in the use of the affective function in the capacity test of each of the defences is justified because the affective function has a greater role to play in the non-pathological incapacity defence than in the pathological incapacity defence. The affective function speaks directly to emotions which play a central role in the non-pathological incapacity defence but not in the pathological defence.

Moreover, it is not only the requirements of the defences that illustrate where there is room for improvement and where difference is justified. The differing consequences of the defences, in

the form of sentencing orders, show that it is necessary to align the outcomes of the two defences so that the same options available to a court in pathological incapacity cases are available in non-pathological incapacity cases to adequately accommodate for the various cases and circumstances that come before the court. By making the options of orders that can be given aligned, it strengthens the credibility of the non-pathological incapacity defence by allowing the consequences to be more appropriate. Thus, the difference in outcome is unnecessary and can lead to injustice as integral circumstances may be overlooked.

Additionally, the South African defences can stand to learn not only from each other but also from Canada. The adoption of Review Boards would further enhance the sentencing process of both defences alongside the adoption of a narrower formulation of the non-pathological incapacity defence when it comes to provocation and emotional stress. These adaptations could further strengthen the credibility of the defences and contribute, substantially, to ensuring that the defences are used for their intended purpose. Whilst a lack of resources may prove a significant obstacle for the adoption of these Review Boards, the possibility of getting around the obstacle is plausible, as shown in chapter five.

There is room for improvement and a significant amount of that improvement can be achieved by the defences aligning themselves closer to each other and adopting certain aspects from Canada in terms of requirements and consequences. However, there are also aspects in which the differences are necessary and trying to align the defences in these aspects would be a disservice to the nature and basis of the defences. Therefore, there is justification for the difference in certain requirements between the two defences but there is also a need to discard of the differences between other requirements and the consequences. This is to boost public and scholarly opinion, enhance the defences for the accused and strengthen the credibility of the defences for the benefit of the South African criminal justice system.

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