

## NOTES / AANTEKENINGE

### THE DEFENCE OF PROVOCATION – WHERE ARE WE NOW?

#### 1 Introduction

The legal development towards treating provocation and emotional stress as factors that may create reasonable doubt as to the presence of criminal capacity is not only novel but revolutionary (Burchell *Principles of Criminal Law* 5ed (2014) 328). Essentially, the law has recognised that a person who causes the death of another can be acquitted of murder, despite suffering no mental illness or defect at the time of killing, if evidence points to provocation and/or severe emotional stress at the time of the commission of the killing leading to a loss of criminal capacity (Carstens and Le Roux “The Defence of Non-Pathological Incapacity with Reference to the Battered Wife Who Kills Her Husband” 2000 SACJ 180).

This dynamic approach is based on the psychological or principle-based approach to criminal liability, which is founded on the idea that unless an individual possesses the capacity or the fair opportunity to regulate her behaviour in accordance with the requirements of the law, she should not be liable for the unlawful consequences of her behaviour. In terms of the psychological or principle-based approach, where any subjective element of criminal liability is lacking, the accused cannot be convicted of the offence in question. The particular focus of this note is non-pathological incapacity or “emotional collapse”, which has been attributed to emotions such as fear, shock and anger (Carstens and Le Roux 2000 SACJ 181). In this regard it is notable that the Rumpff Commission report expressly held that, in contrast to cognitive and conative functions, which can exclude capacity, and thus criminal liability (see further below), “affective emotional disturbances” do not *per se* do so, “especially if the behaviour of the person concerned gives or has given evidence of insight and volitional control” (RP 69/1967: *The Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters* par 9.19, hereafter “Rumpff Report”). Nevertheless, where such “affective emotional disturbances” contribute to a lack of either cognitive or conative capacity, they are indeed relevant to liability.

Criminal capacity or “toerekeningsvatbaarheid” is one of the cornerstones of the system of criminal liability (Du Plessis “The Extension of the Ambit of Ontoerekeningsvatbaarheid to the Defence of Provocation – a Strafrechtswetenskaplike Development of Doubtful Practical Value” 1987 SALJ 539 notes that the term “toerekeningsvatbaarheid” has several translations in English, including “criminal imputability” and “criminal responsibility”).

Before its introduction, South African courts looked at provocation through the lens of *mens rea* – that is, they saw the possibility of provocation negating the element of intention (Hoctor “A Peregrination Through the Law of Provocation” in Joubert (ed) *Essays in Honour of CR Snyman* (2008) 110–118). The notion of criminal capacity came to the fore in South African criminal law when it was the subject of investigation by the Rumpff Commission in the wake of the assassination of Hendrik Verwoerd by Demetrio Tsafendas, who was held not to be capable of standing trial by reason of mental illness (Rumpff Report par 1.9). The Rumpff Report informed the drafting of the test for criminal capacity set out in section 78 of the Criminal Procedure Act (51 of 1977). While this test was formulated in the context of establishing possible pathological incapacity, the test came to be employed in respect of the test for non-pathological incapacity. In this regard, the landmark case of *S v Chretien* (1981 (1) SA 1097 (A)) indirectly played a pivotal role in the development of the defence of non-pathological incapacity as a result of provocation and emotional stress. While the *Chretien* case dealt specifically with the question whether voluntary intoxication could provide a complete defence to criminal liability by *inter alia* negating capacity, it also provided a foundation for the wider development of the defence of non-pathological incapacity (see Hoctor in Joubert (ed) *Essays* 121; Stevens *The Role of Expert Evidence in Support of the Defence of Criminal Incapacity* (2011) unpublished LLD (University of Pretoria) 119).

This development occurred naturally and inevitably. Once it was held in *Chretien* that voluntary intoxication could exclude criminal liability on the basis of rendering the accused’s conduct involuntary, or by negating the accused’s criminal capacity, or by excluding the accused’s intention (although intoxication does not negate negligence, as the reasonable person may drink, but never gets drunk), the expansion of the defence of incapacity was entirely foreseeable. After all, in terms of the prevailing psychological theory of criminal liability, wherever one (or more) of the elements of liability (identified above) was excluded as a result of some *external factor*, the accused perforce must be entitled to a defence (the term “external factor” is used to distinguish this type of defence from an analogous defence based on mental illness). While this approach is anathema to those who would prefer that policy considerations should be decisive in determining which factors should be entitled to provide the basis for a defence excluding criminal liability, there are, arguably, strong and principled arguments for supporting the approach adopted in *Chretien*. It is surely an overriding concern that no one who genuinely lacks one or more of the elements of criminal liability, on whatever basis, should be regarded as blameworthy, and subjected to punishment. How could this not be an egregious infringement of the accused’s rights?

On this fertile theoretical soil, the defence of non-pathological incapacity soon expanded beyond the basis of voluntary intoxication. Thus, the Appellate Division in *S v Bailey* (1982 (3) SA 772 (A) 796C–D) noted that fear could exclude capacity. Shortly thereafter, the same court in *S v Van Vuuren* (1983 (2) SA 12 (A) 17G–H) held that a *combination* of intoxication and provocation (or severe emotional stress) could be the basis for successful reliance on the defence of non-pathological incapacity (authors’ own emphasis). Indeed, a theoretical framework for the defence was

carefully formulated by the Appellate Division in *S v Laubscher* (1988 (2) SA 163 (A) 166G–167A), along with the classic two-stage test for the defence of non-pathological incapacity, which is: (1) the accused's ability to distinguish between the wrongfulness or otherwise of his or her conduct (cognitive capacity), and (2) the capacity to act in accordance with such an appreciation. This development of the law by the then-highest court in the land culminated in a successful reliance on this defence in *S v Wiid* (1990 (2) SACR 561 (A)), in which, following a humiliating and traumatic assault by the deceased (the accused's husband), she had shot him dead.

After some noteworthy High Court decisions in which this defence was successfully relied upon (such as *S v Nursingh* 1995 (2) SACR 331 (D), *S v Moses* 1996 (1) SACR 701 (C) and *S v Gesualdo* 1997 (2) SACR 68 (W)), it was raised before the Supreme Court of Appeal in *S v Eadie* (2002 (1) SACR 663 (SCA)).

## 2 The case of *Eadie*

While the formulation of the defence in *Laubscher* (*supra*) remains the classic statement on the matter to this day, despite the well-established nature of the defence, the Supreme Court of Appeal sought to redefine the defence in *Eadie*. The case was originally heard in the Provincial Division of the Cape High Court, where the accused pleaded not guilty to murder and defeating/obstructing the course of justice (reported at *S v Eadie* (1) 2001 (2) SACR 172 (C)) and unsuccessfully raised the defence of non-pathological incapacity primarily due to provocation and road rage.

Snyman has stated that the judgment is “one of the most enigmatic judgments of the Supreme Court of Appeal in the field of the general principles of criminal law during the past half century” (Snyman *Criminal Law* 6ed (2014) 161). It is unfortunate that the judgment may be considered as a “good example of a correct decision arrived at for the wrong reasons” (Snyman “The Tension between Legal Theory and Policy Considerations in the General Principles of Criminal Law” 2003 *Acta Juridica* 1 14).

While the confirmation of the appellant's conviction was not in doubt, the court (per Navsa JA) saw fit to engage in an analysis of the defence of non-pathological incapacity in the context of provocation. Much has been written about this judgment, and given that the judgment is indeed extraordinary in many respects, all the attention is warranted (see, *inter alia*, Snyman *Criminal Law* 160–64; Burchell *Principles of Criminal Law* 329–332; Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 2ed (2016) 198–200; Hoctor *Peregrination passim*). Unfortunately, much of the commentary on the judgment has been rather less than complimentary, again, for good reason. Two notable features of the judgment are the scant attention paid to the development of the defence of non-pathological incapacity, and the rather selective (and sometimes inaccurate) citation of previous authority (Hoctor in Joubert (ed) *Essays* 135–138). Nevertheless, the judgment from the outset seemed to be less about a careful examination of the law, with the court describing its quest (par 3) as being to investigate whether “[t]he boundaries of the defence ... have been inappropriately extended, particularly in decisions of Provincial or Local

Divisions of the High Court, so as to negatively affect public confidence in the administration of justice". If the court had in fact confined itself to the terms of this analysis, much confusion and academic gnashing of teeth could have been avoided. Instead, it drew (par 56) on the writing of Louw ("*S v Eadie: Road Rage, Incapacity and Legal Confusion*" 2001 SACJ 206 210–211) where it is stated:

"[L]ogic dictates that we cannot draw a distinction between automatism and lack of self-control ... if the two were distinct it would be possible to exercise conscious control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test)".

As Snyman has cogently pointed out (*Criminal Law* 162), the law allows for precisely this possibility in the context of children under 14 years of age, who may be able to perform voluntary acts, but may nevertheless be held by the courts not to incur criminal liability as a result of lack of capacity. Nonetheless, the court found this line of reasoning apposite to its critical assessment of the non-pathological incapacity defence, and duly concluded that "there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation" (par 57).

It follows that it would have to be established that an accused was acting involuntarily in order for her defence of lack of conative capacity to prevail. The court did not shy away from this conclusion (par 57):

"It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence ... the two are flip sides of the same coin."

While the court's patchy treatment of the existing case law makes it difficult to accept that the defence of non-pathological incapacity based on provocation or emotional stress has been summarily jettisoned – can such a drastic step really occur solely by implication? – this seems to be the only conclusion that can be drawn from the unequivocal dicta cited above. Having said this, the court itself provided some contra-indications that this was what it was seeking to achieve. Hence, Navsa JA stated (par 57) that he was "not persuaded that the second leg of the test expounded in *Laubscher's* case [the test for conative capacity] should fall away", and then (par 59) commented that "[w]hilst it may be difficult to visualize a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one's actions it appears notionally possible".

### 3 Critique of *Eadie*

There are two major difficulties arising from the *Eadie* judgment handed down by the Supreme Court of Appeal. The first is undoubtedly the court's conflation of the defence of non-pathological incapacity with the defence of sane automatism (par 57, 70). Ultimately, according to the court, the second leg of the test for criminal capacity – that is, the test for conative capacity – and the test to determine if conduct was voluntary are the same. As Snyman cogently points out (*Criminal Law* 162), these are two completely different concepts:

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“If the conative leg of the test of criminal incapacity is not complied with, it means that X is indeed able to control his bodily movements by subjecting his muscular contractions to the control of his will or intellect, but that he is unable to resist the temptation to act in a way that differs from what his insights have taught him.”

Essentially, the crux of the matter is that even though a person performs a voluntary act he may still lack the ability to act in accordance with his appreciation of right and wrong. In terms of established legal principles, the two defences are fundamentally distinct, sane automatism relates to the ability to exercise control over muscular movement of an individual and assesses if the muscular movements were subject to the will of an individual, while the defence of non-pathological incapacity relates to the ability to act in accordance with insight into right and wrong.

Ultimately, a person may still lack capacity even where the conduct is voluntary. Hence, voluntariness of an act cannot and should not be equated with self-control. If it is accepted that there is no difference between the two defences, then the result is that an accused person would have to show involuntary conduct in order for the defence of lack of conative capacity to succeed.

Equating the enquiry into voluntariness with the enquiry into conative capacity is irreconcilable in the light of the same court's statement in *Chretien*, where it was held that if a person, owing to the effects of intoxication, is not able to differentiate between right and wrong and also does not have the capacity to act in accordance with this appreciation, then the individual does not possess criminal capacity.

While it is true that the defence of non-pathological incapacity owing to provocation and emotional stress has had its controversies – namely, the acquittals in the cases of *S v Arnold* (1985 (3) SA 256 (C)), *S v Nursingh* (*supra*), and *S v Moses* (*supra*) – it is the conflation of the defence of non-pathological incapacity with the defence of sane automatism by the court in *Eadie* that has added the most uncertainty regarding the nature and operation of the defence.

The effects of this approach are not limited just to this defence but have the potential to cause a ripple effect on other areas of law as well. (Snyman *Criminal Law* 163 argues that the entire defence of non-pathological incapacity has been abolished by implication.) The fusing of two distinct elements of criminal liability unfortunately changes the legal principle; this new development is not limited to cases involving provocation but may extend to cases involving emotional stress and other cases where the presence of criminal capacity is disputed (Burchell *Principles of Criminal Law* 331). Snyman states that in effect the defence has been abolished, not only in circumstances where provocation has caused the incapacity, but may also extend to cases where incapacity was caused by stress, shock, concussion, panic or fear, since these states are closely tied to emotional stress brought on by provocation and which may be difficult to separate (*Criminal Law* 164).

The purpose of the test to determine if conduct was voluntary is to assess if the individual was capable of directing muscular movement according to will and intellect (Snyman 2003 *Acta Juridica* 15). Principally, there is a distinct difference between making a decision and having the ability to

execute the decision. As Snyman points out, to treat a defence based on absence of criminal capacity owing to extreme provocation as being identical to a defence based on absence of a voluntary act “contradicts the elementary principles of the construction of criminal liability” (Snyman *Criminal Law* 162).

The revision of the test for conative capacity is unwelcome, as it will have direct implications for those individuals who have a genuine need for the defence of non-pathological incapacity owing to provocation and emotional stress. The changes brought about by *Eadie* are especially prejudicial towards the battered woman or any victim of abuse who suffers a loss of self-control and kills her abuser, since a conflation of the concepts of conative capacity and sane automatism requires the accused to prove that her actions were involuntary. It seems that, as a result of this judgment, loss of self-control resulting from provocation and emotional stress is therefore no longer acknowledged. This development is prejudicial to the battered woman especially since the defence of sane automatism is narrower and more difficult to prove. (Burchell *Principles of Criminal Law* 332 argues that the *Eadie* judgment should not apply to domestic abuse cases.)

The second problematic aspect of *Eadie* relates to the possible introduction of an objective test into the capacity inquiry. Upon a holistic reading of the *Eadie* case, it is clear that the court wished to curtail the operation of the defence in the light of the perceived facility of the acquittals in *Arnold*, *Nursing* and *Moses*.

The introduction of an objective test alters the nature of the defence; the test has refashioned the defence to the extent that it becomes a different defence. This distortion is a direct result of the court in *Eadie* basing its judgment on policy considerations rather than the established and well-developed foundational principles of criminal liability.

If one accepts the dicta in *Eadie* at face value, the impact of the judgment is extraordinary – that is, the abandonment, by implication, of an innovative yet well-established development in South African criminal law founded on extensive precedent, much of which derives from the SCA (or in its previous guise, the Appellate Division). South African criminal law had eventually thrown off the shackles of an objective approach to intention in *R v Nsele* (1955 (2) SA 145 (A)); see discussion in Burchell, Milton and Burchell *South African Criminal Law and Procedure Vol I: General Principles* 2ed (1983) 141–142), abandoned the *versari in re illicita* doctrine in *S v Van der Mescht* (1962(1) SA 521 (A)) and *S v Bernardus* (1965 (3) SA 287 (A)), and discarded the *ignorantia juris non excusat* rule in *S v De Blom* (1977 (3) SA 513 (A)). The subjectivisation of criminal capacity, and the development of the defence of non-pathological incapacity (toerekeningsvatbaarheid) followed, founded on the landmark decision of *S v Chretien* (*supra*). Thus, at a time when human rights were being violated on a massive scale in apartheid South Africa and criminal law was being misappropriated to ensure political order, the substantive criminal law being developed through the courts upheld the foundational justification of criminal liability leading to punishment: that it is as autonomous moral agents, with an entitlement to freedom of action and the ability to exercise self-determination in their choice

of actions, that persons are assessed (see Hoctor "Dignity, Criminal Law and the Bill of Rights" (2004) *SALJ* 304 309).

It is submitted that the import of an entirely objective enquiry (assessing the voluntariness of an act) into an entirely subjective enquiry thus does violence to the principled and constitutionally sensitive development of the notion of non-pathological incapacity in South African criminal law. Moreover, if we accept that the legitimacy of punishment is founded on responsible moral agency and freedom to choose to do wrong, then any attempt to assess criminal liability without the subjectively assessed capacity to choose how to act is a clear infringement of the right to dignity, which is the constitutional basis of the principle of culpability (see Hoctor in Joubert (ed) *Essays* 166–167, and sources cited therein).

It may be argued that the introduction of an objective test in the context of criminal capacity is inherently unfair and unjust as it requires a uniform standard of behaviour from individuals in a society that is extremely diverse in terms of education, cultural and racial background. One of the most persuasive arguments against the implementation of an objective test is therefore that it essentially imposes dominant cultural values on others. It seems that the court in *Eadie* wittingly redefined the defence by adding objective factors to the test for capacity, with the aim of shrinking the boundaries of the defence.

The psychological or principle-based approach to provocation and emotional stress developed by the South African criminal law was a positive development, as it preserves the integrity of the law by applying an approach that is in line with logic and the rights and values enshrined in the Constitution of South Africa. Unfortunately, the well-established principled nature of the defence has been drastically curtailed by *Eadie*. In light of the problems generated by *Eadie*, it may be argued that the law must be restored to the two-stage assessment of criminal capacity set out in *Laubscher (supra)*. The principle-based or psychological approach to criminal liability is preferred as it is compatible with the fundamental values of the criminal justice system and is in line with the ethos of the Constitution.

#### **4 What is the current position in relation to the defence of provocation?**

In light of the somewhat equivocal statements about whether the defence continues in its present form (as in par 57, cited above), found cheek by jowl with seemingly categorical statements denying such possibility (as in par 56–57, cited above), the question then arises: what *is* the state of the law on the defence of non-pathological incapacity based on provocation or emotional stress? Has the defence indeed been entirely negated by the *Eadie* judgment? Is it now merely a historical footnote in the annals of criminal liability, a once-subjective spectral apparition now found making occasional ghostly appearances in the solidly objective automatism defence? Or (despite the apparently plain-speaking dicta to the contrary) has the defence indeed been retained in its original form, and does all that the judgment amounts to is a less-than-helpfully-worded warning about the perils of poor application of the law?

It is plain that the expressed wisdom since *Eadie* overwhelmingly favours the former interpretation. As indicated above, Snyman (*Criminal Law* 163) states that the defence of non-pathological incapacity has been abolished. Burchell (*Principles of Criminal Law* 329) agrees that the effect of the judgment is that provocation could only amount to a defence if it led to involuntary conduct, as do Kemp *et al* (*Criminal Law in South Africa* 199, 201) and Jordaan ('The Principle of Fair Labelling and the Definition of the Crime of Murder' 2017 *TSAR* 569). One of the present writers has also made this point in some detail (Hoctor in Joubert (ed) *Essays* 110ff). It is not only writers that have adopted this interpretation. In High Court judgments in *S v Beukes* (2003 JDR 0788 (T)), *S v Ngobe* (2004 JDR 0216 (T)), *S v Hughes* (2004 JDR 0263 (T)), *S v Scholtz* (2006 (1) SACR 442 (E)) and *S v Marx* ([2009] 1 All SA 499 (E)), the courts have dutifully echoed the refrain from the *Eadie* case – that sane automatism and non-pathological incapacity are one and the same thing, and that the latter defence could only succeed if there were evidence of involuntary conduct.

Is the matter not settled then? Well, not entirely. It appears that the concept of non-pathological incapacity lives on, in its original pre-*Eadie* form, where it is mentioned in the context of cases discussing diminished capacity (see *DPP, Tvi v Venter* 2009 (1) SACR 165 (SCA) par 21; *S v Mathe* 2014 (2) SACR 298 (KZD) par 16), but the concept is also mentioned without comment, or any indication that it no longer exists (or even that it exists in a different form) in cases such as *S v Engelbrecht* (2005 (2) SACR 41 (W)), *S v Volkman* (2005 (2) SACR 402 (C)), and *S v Longano* (2017 (1) SACR 380 (KZP)). None of these cases turned on the content of the notion of non-pathological incapacity, unlike *S v Ramdass* (2017 (1) SACR 30 (KZD) par 6), in which, despite citing the statement in *Eadie* (par 57, cited above) conflating sane automatism and conative capacity, the court specifically refused to apply this to cases of intoxication, holding that *S v Chretien* (*supra*) still remains the leading authority. Thus it is notable that the concept is apparently still extant. This perception is further strengthened by recent Supreme Court of Appeal cases such as *S v Van der Westhuizen* (2011 (2) SACR 26 (SCA)) and *DPP, Grahamstown v Peli* (2018 (2) SACR 1 (SCA)). In the *Van der Westhuizen* case, in the context of discussing diminished capacity, Cloete JA referred to the defence of "temporary non-pathological criminal incapacity", citing (par 39) the classic *Laubscher* test in the case of *S v Ingram* (1995 (1) SACR 1 (A) 4e–g). There is thus no indication in *Van der Westhuizen* that the *Eadie* judgment has changed the legal position regarding either the content or availability of this defence. In the *Peli* case, the court, again discussing diminished capacity, once again (par 9) reiterated the standard test for non-pathological incapacity, this time citing, *inter alia*, a passage from the *Eadie* case (notably), where Navsa JA refers to the doctrine on the basis of the standard test in *Laubscher* (*Eadie* par 26).

In light of the differing indications in the case law (the academic conclusion seems reasonably monolithic), what exactly is the status in our law of the defence of non-pathological incapacity based on provocation or emotional stress? Perhaps it is fitting to let Navsa JA have the last word in this regard. In the recent bail decision of *S v Oosthuizen* (2018 JDR 0725 (SCA)), Navsa JA (par 30) briefly referred to the debate around the defence without any unequivocal statement that the *Eadie* decision has changed the



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law in any way. Instead, he concluded the brief reference to the defence in a supremely enigmatic way:

“Commentators have stated that since this court’s decision in *S v Eadie* ... provocation leading up to a lack of criminal capacity as a defence has been limited, if not dealt the death knell.”

So much for the views of commentators, but the questions around the defence in the light of the *Eadie* decision remain.

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