TRACING THE ORIGINS OF THE DEFENCE OF NON-PATHOLOGICAL INCAPACITY IN SOUTH AFRICAN CRIMINAL LAW

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1 Introduction

The defence of non-pathological incapacity is of recent vintage. In fact, three decades ago the defence simply did not exist. Although accused persons could escape criminal liability on the basis of youth (in terms of Roman-Dutch precedent) or mental illness (in terms of the defence set out in the relevant statutory instruments) resulting in a lack of criminal capacity (“toerekeningsvatbaarheid”), drunk or provoked accused could at best hope for the reduction of the crime (in terms of the specific intent doctrine) or some grounds for mitigation of sentence. There was, however, no question of liability being excluded. Although, as will be discussed later, the notion of non-pathological incapacity is somewhat under siege, it is now well-established that, in terms of this defence, if an accused at the time of committing the unlawful act, and as a result of a cause unrelated to mental illness, either was unable to distinguish between right and wrong (lack of cognitive capacity) or was unable to act in accordance with the distinction between right and wrong (or, in other words, was unable to control his or her actions – lack of conative capacity) he or she must be acquitted on the basis of lack of criminal capacity.

What is particularly interesting about this defence is how it came to have a place in South African criminal law. In essence, it will be submitted, the defence derives from the courts’ adoption of the content of the statutory definition of pathological incapacity (sans the reference to mental illness or defect), which definition flows from the report of a commission of inquiry, which in turn depends in crucial respects on the writings of a particular Dutch author that were relied upon by a very influential South African criminal-law academic. The manner in which this process unfolded is a story worth telling in itself, and this will be attempted in due course, but it is of significance that this

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 doctrine, unlike all the other elements of the general principles of criminal liability, did not stem from the generally acknowledged sources of South African law, Roman-Dutch law and English law.

2 **Historical context: The sources of South African criminal law**

A few remarks about the traditional sources of South African criminal law. Apart from statute, which is the source of certain offences, as well as a few rules pertaining to the operation of general principles, South African criminal law springs from Roman-Dutch and English law.

The roots of South African criminal law and of the vast bulk of South African common law in general, may be found in Roman law. The law of the Twelve Tables, promulgated in about 450BC, may be regarded as the first source of the Roman provisions that provided the modern conception of criminal law, whereby wrongful conduct is punished by the public authority. However, at this stage of the law, the emphasis was placed on the use of delictual rules, with a penal character, to punish the wrongdoer. These rules regulated self-help, not only enabling the victim to recover compensation, but also instituting a penalty which expressed societal disapproval of the wrongful act, and in so doing dissuaded the victim from taking the law into his own hands. The partly penal and partly compensatory nature of the Roman law of delict survived through to the reign of Justinian. It appears that “criminal law proper”, as administered by the public authority, only really gathered momentum in the late Republic and under the Principate.

Towards the end of the Republican period a set of laws were proclaimed proscribing certain offences, and prescribing punishment for such offences. These offences formed the basis of most of the substantive offences that developed out of Roman law, which later became known as “crimina publica” (as distinct from wrongful acts which gave rise to delictual actions). During the first five centuries AD, the so-called “crimina extraordinaria” came into being (offences regulated by imperial decree), which incorporated all the conduct that was punished through the tribunals. Justinian (who ruled as emperor from 527-565) ordered the collection of the various Roman legal texts into a single work which came to be known as the *Corpus iuris civilis*. Our principal sources of information regarding Roman criminal law are the so-called “libri terribiles”.

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5 Snyman *Criminal Law* (1995) 8. The most important of these laws are attributed to Sulla and date from the years 82-80BC.
6 Snyman (n 5) 9.
7 *Ibid*. “Crimina publica” and “crimina extraordinaria” may be classified together, as opposed to “delicta” (privata); “crimina publica” comprised offences regulated by leges; “crimina extraordinaria” comprised offences regulated by imperial decree; whilst “delicta” comprised delicts or torts.
books 47 (which deal with “crimina extraordinaria”) and 48 (which deal with “crimina publica”).

The Roman jurists did not directly advance the systematic study of criminal law greatly; partially because they paid little attention to the customs and statutes of their time. Nevertheless it may be argued that the Roman treatment of specific crimes greatly influenced later jurists in providing a basis for their work. Thus one may find in the Corpus iuris civilis broad authority for all the currently recognised common-law crimes in South African criminal law.

Following the fall of the western part of the Roman Empire to Germanic tribes, the customary laws of these tribes were introduced into Western Europe. However, after the reception of Roman law very little of significance for Roman-Dutch criminal law remained of these customary laws. Although Roman law did not altogether disappear in the west upon the fall of the Roman Empire, and whilst Roman law and canon law no doubt exercised an influence on the customary law of Western Europe in the early Middle Ages, Roman law only began to have a profound influence after the revival of the study of the Justinianic compilation at the end of the eleventh century.

The rediscovery of Roman law was the work of the Glossators, who wrote short explanatory notes or “glossae” on words or phrases of the Justinianic texts. However, it seems that apart from facilitating the “reception” of Roman law throughout Western Europe, these writers did not advance the development of criminal law, as their explanations of the Roman texts made no reference to the customs and statutes of the time. Far more significant for the development of the criminal law were the Commentators (or post-Glossators), who wrote longer notes or commentaries on the Justinianic texts, seeking to systematise these and to link them with the prevailing statutory, customary and canon law.

After the revival of the study of Roman law in Italy, the Justinianic compilation of Roman law as developed by the medieval Italian jurists gradually became the “ius commune” of Continental Europe. In this way it also became the “ius commune” or common law of the Netherlands by means of an amalgamation of Roman and local law which occurred between the thirteenth and seventeenth centuries. Since the common law of all the various Western European countries was markedly similar, the Dutch...
writers relied on legal sources not only from within their own province, but also from other provinces of the Netherlands and from Italy, Germany, France and Spain.\textsuperscript{17}

European law came to South Africa along with the first Dutch settlers who, under the leadership of Jan van Riebeeck, landed at the Cape in 1652 with the purpose of establishing a refreshment station for the Dutch East India Company (DEIC).\textsuperscript{18} The DEIC itself operated under a 1602 octrooi of the Estates-General of the United Netherlands. Whilst there was not much law of the United Netherlands itself, each province having its own system, the common-law principles applicable in each were similar.\textsuperscript{19} Van Riebeeck brought the Roman-Dutch law of Holland\textit{stricto sensu} to the Cape, as Roman-Dutch law was the law of the senior partner in the affairs of the DEIC, the province of Holland.\textsuperscript{20}

It seems that various pronouncements on the law by different authoritative bodies and persons led to little change.\textsuperscript{21} Nevertheless, Roman-Dutch law established itself as the system of law in force at the Cape prior to 1796.\textsuperscript{22}

In 1795 the Cape was captured by Great Britain and became British territory.\textsuperscript{23} However, Roman-Dutch law was not replaced by English law as the common law of the colony. After a brief period when the Cape was once again under Dutch control, the British recaptured the Cape in 1806.\textsuperscript{24} Once again there was no move to replace Roman-Dutch law as the common law, the new Articles of Capitulation providing that “the burghers and the inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto”.\textsuperscript{25}

Whilst there was talk later of replacing Roman-Dutch law with English law this was never officially implemented.\textsuperscript{26} The new colonial power however introduced telling changes in criminal procedure, which resulted in the introduction of English nomenclature and classification of crimes.\textsuperscript{27}

\begin{itemize}
\item[17] Idem 23.
\item[18] De Wet (n 3) 28.
\item[19] Burchell, Milton & Burchell (n 2) 28.
\item[20] For a detailed discussion of the era of the Dutch Republic and the rise of Roman-Dutch law, see Hahlo & Kahn (n 13) 524-565.
\item[21] Ibid. These potential sources included \textit{Placaaten} issued by the Governor and his Political Council, the statutes issued by the Estates-General, \textit{Placaaten} issued by the States of Holland, enactments arising from the Governor-General and the Council of Batavia, and the decisions of the \textit{Raad van Justitie} based at the Cape.
\item[22] De Wet (n 3) 34; see also Hahlo & Kahn (n 13) 571-575.
\item[23] For a general discussion of the administration of criminal justice at the Cape from 1795-1828, see Fine \textit{The Administration of Criminal Justice at the Cape of Good Hope 1795-1828} (PhD, University of Cape Town, 1991).
\item[24] For a discussion of the law at the Cape in the period 1806-1834, see Van der Merwe \textit{Regringsstellings en die Reg aan die Kaap van 1806 tot 1834} (LLD, University of the Western Cape, 1984).
\item[25] Burchell, Milton & Burchell (n 2) 31.
\item[26] De Wet (n 3) 35; see also Hahlo & Kahn (n 13) 575-578.
\item[27] Burchell, Milton & Burchell (n 2) 33 note that the Criminal Procedure Ordinance of 1828, amended and supplemented in 1830, substantially assimilated criminal procedure in the Cape courts to that prevailing in England, while an 1830 ordinance (72 of 1830 (C)) adopted the English law of evidence.
\end{itemize}
The eighty-years period prior to the Union of South Africa in 1910 was an important formative period for South African criminal law, with English law and procedure being immensely influential. Reasons for this dominance included: the fairly precise definitions and classification of English law in comparison to Roman-Dutch law; the education of judges and most practitioners in England;28 unfamiliarity with Dutch or Latin amongst practitioners; difficulty in accessing old authorities; and the fact that the writings of the Dutch jurists were found to be uncertain, lacking in uniformity, and excessively focused upon punishment at the expense of the substantive law.29 Moreover Roman-Dutch law had “stopped dead in its tracks in the Netherlands in 1809” with the introduction of the Napoleonic Code Pénal, dating from 1810, which was introduced into the Netherlands in 1811.30

Other provinces basically followed the lead of the Cape in accepting Roman-Dutch law as the common law, but also introduced wholesale changes in order to conform to standard legal practice.31 Inevitably this resulted in the widespread influence of English law, and the “anglicisation” of Roman-Dutch law, which resulted in a mixed system with roots in both English and Roman-Dutch law.32 Burchell and Hunt argue that South African criminal law is stronger than both its parent systems, its strength lying in “a discriminating and wise use of the comparative sources available to it. Because of its nature as a mixed system South African law can accommodate contributions from a great variety of legal systems”.33

Whilst this statement is no doubt correct, in criminal law it is highly unusual to adopt practices from other systems, however receptive the South African mixed system may be in theory.

3 The defence of non-pathological incapacity based on provocation

This brings us back to the issue under discussion: the development of the defence of non-pathological incapacity. Although some of the discussion that follows is focused on incapacity flowing from intoxication, the principal development of the notion of non-pathological incapacity arose out of cases where the accused’s mental state was affected by provocation or emotional stress, and the discussion will reflect this.

Anger or provocation could at most mitigate punishment in Roman law, with a distinction being drawn between crimes committed with premeditation (proposito) and

28 The development of the teaching of law in England is discussed by Twining in Blackstone’s Tower The English Law School (1994).
29 Burchell, Milton & Burchell (n 2) 34-35.
30 Idem 34. The Code Pénal replaced the Crimineel Wetboek voor het Koninkrijk Holland (a national penal code which had come into being in 1809) following the annexation of the Netherlands by France.
31 See the discussion in De Wet (n 3) 36ff.
32 See the discussion in Burchell, Milton & Burchell (n 2) 40-43.
33 Idem 49-50.
those committed on the spur of the moment (*impetus*). The former were regarded as more serious than the latter. Thus in *Digest* 48 5 39(38) 8 it is stated that a man who traps his wife in adultery and kills her *impetus tractus doloris* should not be punished with the usual punishment of the *lex Cornelia de sicariis*, but with a lighter punishment, as it is extremely difficult to control a reasonable passion. This view was apparently followed into the Middle Ages.

Roman-Dutch writers also regarded anger as a factor mitigating punishment, rather than excluding liability, and then only where the anger was justified. Hence Matthaeus states that passions such as love and rage cannot be regarded as complete defences since each person has the necessary reason to control his passions. Since a person consciously falls in love, and consciously becomes angry, he cannot later claim that he was acting unconsciously if his acts are fuelled by passion. A similar policy applies to voluntary intoxication – this cannot be regarded as a defence, even if the accused’s actions are uncontrolled as a result of his intoxication, since he consciously brought about this condition.

The Roman and Roman-Dutch view on provocation (and intoxication) was however subordinated to that of the English law in the practice of the courts. In terms of the English approach, the accused’s provocation could give rise to conviction for a lesser crime, based on the “specific intent” doctrine. In terms of this doctrine, where an accused was charged with a crime requiring a “specific intent”, such as murder or assault with intent to do grievous bodily harm, that “specific” intent could be negated by factors such as provocation or intoxication, resulting in a conviction for a less serious crime, for which a lesser form of *mens rea* (“basic intent”) was required, such as culpable homicide or common assault.

The adoption of this test dovetailed with the adoption of a ruthless sentencing regime, in terms of a 1917 statute which provided that the death penalty for murder was mandatory, but made no provision for extenuating circumstances. The use of the “specific intent” rule made it possible for judges to find that where the killing was less blameworthy, due to the “reduction” of the crime to a basic intent crime, such as culpable homicide, the death penalty was not in issue. At the same time, the test for intention in

34 De Wet (n 3) 130.
35 See *D* 48 19 11 2; *D* 48 19 16 2; *D* 48 11 7 3.
36 See further *D* 48 8 1 5; *C* 9 9 4 1; De Wet (n 3) 131.
37 De Wet (n 3) 131.
38 Burchell, Milton & Burchell (n 2) 306.
40 De Wet (n 3) 124.
41 On the specific intent rule, see Burchell “Intoxication and the criminal law” 1981 *SALJ* 177.
42 In terms of the Criminal Procedure and Evidence Act 31 of 1917.
43 See Hector (n 1) 113. This was achieved by the adoption of s 141 of the Native Territories Penal Code (Act 24 of 1886) as “correctly laying down our law” by the Appellate Division in *S v Butelezi* 1925 AD 160 at 163 and 170.
the early part of the previous century was objective in nature and so it was appropriate to assess whether the accused acted “reasonably” in losing his temper.44

In no small part through the influence of the writings of De Wet,45 who being influenced by certain Continental authors, such as Van Liszt, adopted a principled and systematic approach to criminal liability, the courts came to adopt a subjective test for intention by the middle of the previous century.46 Although this meant that courts were at liberty to regard any factor negating intent, including intoxication and provocation, as operating as a defence, in practice the deeply ingrained policy that did not allow voluntary intoxication or provocation to function as a full defence held sway. A particularly egregious example of the strength of the policy approach may be found in the 1969 case of Johnson,47 where the Appellate Division found the accused guilty of culpable homicide despite the trial court’s holding that his intoxication was of such a nature as to render his actions involuntary.

Up to this point the courts examined the issues of provocation and intoxication from the perspective of the possible exclusion of the element of intention. However, increasingly the notion of “toerekeningsvatbaarheid” or criminal capacity was coming to the fore. Unknown in the sources of the South African common law, the notion was adopted from the Continental legal systems, more particularly the German law, but was largely confined to the writings of De Wet.48 However, events were to take place that ensured that this notion would be foregrounded.

4 The Rumpff Report

On 6 September 1966 Prime Minister Verwoerd was assassinated in Parliament by Tsafendas, who was held not to be competent to stand trial for the killing on grounds of mental illness. The inevitable unease with which this decision was greeted in certain quarters was no doubt exacerbated by the fact that a person who had previously attempted to assassinate Verwoerd, Pratt, had also been held not to be competent to stand trial for his actions on the grounds of mental illness. A commission of inquiry was set up, under the chairmanship of Judge Rumpff, which examined the issues of criminal responsibility in relation to mental illness and produced a report, entitled the “Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters”.49

44 See Hoctor (n 1) 113-114.
45 The first edition of Strafreg was published in 1949, in which De Wet contributed the discussion of the general principles of criminal law, and Swanepoel wrote on specific crimes. This was followed by a second edition in 1960, and after Swanepoel’s death De Wet assumed sole responsibility for succeeding editions of the work in 1975 (3ed) and 1985 (4ed). For an appraisal of De Wet’s extensive influence on the development of criminal law doctrine see the various contributions in 1991 (4-2) SACJ 124-150.
46 In R v Nsele 1955 (2) SA 145 (A).
47 S v Johnson 1969 (1) SA 201 (A).
48 See the first edition of Strafreg (1949) 70.
49 RP 69/1967 (hereafter Report). See par 1 9, which places the inquiry in the context of the Pratt case (discussed in full at par 4 3-4 13 of the Report) and the Tsafendas case (discussed in full at par 4 14-4
The Commission consulted widely and produced a well-balanced report (also known as the Rumpff Report), in which a new model for criminal responsibility, based on both cognitive and conative capacity, was established. This model was to find its way into section 78 of the Criminal Procedure Act 51 of 1977. What I find significant is the number of crucial references the Rumpff Report makes to the work of Wiersma, *Over Toerekeningsvatbaarheid*.\(^{50}\) Wiersma was a psychiatrist, associated with the “Groninger School”, a group trained in philosophy and psychology.\(^{51}\) The founder and leader of this influential group, who favoured a theory of criminal responsibility founded on character,\(^{52}\) was the psychologist/philosopher Gerard Heymans.\(^{53}\) South African criminal law has at no time accepted that criminal responsibility can be based on character, which makes the frequent citation of Wiersma all the more remarkable. Yet the passages relied upon by the Commission do not deal at all with the issue of character. However, Wiersma’s work was highly recommended by De Wet in his groundbreaking *Strafrecht* in 1949 and it is evident that this is how the Commission came to adopt Wiersma’s approach.\(^{54}\)

Two citations are particularly noteworthy. In discussing the definition of responsibility and the criteria which may be employed to assess non-responsibility,\(^{55}\) the court refers extensively to the discussion in Wiersma of the three suggested criteria in his schema:\(^{56}\) the biological criterion (based entirely on clinico-psychiatric material),\(^{57}\) the psychological criterion (based on the presence of certain mental conditions, and without taking causes into account),\(^{58}\) and the mixed criterion (which applies both, requiring both

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50 Published in 1932.
51 See Van Bemmelen “Toerekeningsvatbaarheid en normaliteit” 1937 *THRHR* 228. Wiersma later changed his views – see Wiersma “Πάντων χρημάτων μέτρον άνθρωπος of Verbum Domini lucerna pedibus nostris” 1971 *Delikt en Delinkwent* 190.
52 Remmelink (n 51) 281.
53 See De Wet (n 48) at 70n(a), where he refers to *Over Toerekeningsvatbaarheid* (“in toto”) as a primary source in discussing “toerekeningsvatbaarheid”, and further at 73n(u), where he refers to this work as instructive (“insiggewend”), and indicates that he recommends it very highly (“wat ek besonder sterk wil aanbeveel”), in the context of mental illness.
54 In Chapter 2 of the *Report* at par 2 11 to 2 15.
55 Discussed in *Over Toerekeningsvatbaarheid* (1932) at 20. It is very significant that De Wet (n 48) 73-74 adopts exactly the same schema based on Wiersma’s work in discussing the issue of incapacity.
56 “The *biological* criterion is applied when the total volume of clinico-psychiatric material collected is deemed sufficient to exclude non-responsibility. In such a case the relevant criminal law would provide that a person in whom certain mental deviations are present is not punishable … In terms of this view, certain mental deviations are, theoretically at least, identified with non-responsibility. This view gives rise to a sharp distinction between responsibility and non-responsibility, without any transitional possibilities. Strict application of the biological criterion must result in the assumption of non-responsibility where, for example, moral defects exist which are of so major a nature as to be described by the psychiatrist as morbid or pathological. This cannot be, nor is it, accepted in practice, especially in the case of persons with relatively minor deviations such as certain psychopaths” (par 2 12 *Report*).
57 This criterion is defined in par 2 13 of the *Report* as follows: “The *psychological* criterion is applied when, as a result of the presence of certain mental conditions, or a particular mental characteristic or
a biological and a psychological symptom).\(^{59}\) Wiersma favours the last criterion,\(^{60}\) which the commission adopts in its recommendation of a two-part test for capacity, cognitive and conative capacity.\(^{61}\)

The second citation from Wiersma is perhaps even more significant in the light of recent developments in the law in the area of non-pathological incapacity, which will be discussed shortly. The concept of self-control, so central to the issue of conative capacity, is defined in the words of Wiersma:\(^{62}\)

By self-control is to be understood a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive. In normal non-criminal persons the idea of committing an unlawful act arouses aversion. Only where very strong motives are present to promote the execution of such an act, is a crime actually committed. But where insight into the unlawfulness of the act, even though present, arouses no aversion at all, so that such insight cannot operate as a counter-motive, there is no self-control. And where – the mixed criterion of course being applied – this absence of such reaction of aversion aroused by insight into the unlawfulness of the act is the result of some mental abnormality, the perpetrator must be held not responsible.

5 A defence based on provocation

Once the test for capacity recommended in the Rumpff Report had come into force in the form of section 78(1) of the Criminal Procedure Act,\(^{63}\) it did not take long before the courts were extending this test from mental illness to non-pathological incapacity. Indeed, there was no reason why this should not occur.

59 “Clinico-psychiatric factual material, preferably in the form of a diagnosis, is furnished, but then an indication has to be given as to whether the mental deviations found have given rise to a constellation of mental characteristics which exclude accountability for the act” (par 214 Report). Whilst the biological criterion – the psychiatric diagnosis – may be inadequately defined in legislation, in practice the necessary adjustments are made to render this criterion workable (ibid). In so far as the psychological component is concerned, without any provision being made in the text of the legislative provision, the judge can decide the weight of this criterion (par 215 Report).

60 n 51 at 29.

61 The Report at par 216, following the preceding discussion derived from Wiersma, identifies two psychological criteria: insight and self-control. These criteria are applied in other jurisdictions and are the basis for cognitive and conative capacity.

62 At par 933 of the Report.

63 Act 51 of 1977.
The case of *S v Chretien* was fundamental to the genesis of the defence of non-pathological incapacity. Given that the Rumpff Report provided the theoretical underpinnings for the incipient defence of non-pathological incapacity, it was fitting that Rumpff CJ delivered the unanimous judgment of the Appellate Division in this case, which dealt with a defence founded on intoxication. The Appellate Division criticised its own policy-driven conviction in *S v Johnson*, and rejected the notion of specific intent as contrary to South African law. The court then applied a principled approach to the problem of voluntary intoxication, holding that intoxication could exclude liability by negating any of the following elements of criminal liability: the requirement that the act be voluntary; the requirement that the accused had criminal capacity at the time of acting, and the requirement of fault in the form of intention (for crimes requiring intent).

Following the decision relating to intoxication in *Chretien*, the question was whether the same approach would be adopted in relation to an area which had always had a similar tension between policy and principle, that of provocation or emotional stress. In the 1983 case of *S v Van Vuuren*, the Appellate Division stated that where there was a combination of drink and other facts such as provocation and emotional stress, there was no reason in principle why the defence of non-pathological incapacity should not apply.

In the next case where a defence of non-pathological incapacity based on provocation was raised, *S v Lesch*, the court adopted the approach followed in *Chretien*, confirming the accused’s liability by establishing in turn the elements of voluntary conduct, criminal capacity and intention. It is noteworthy that the court explicitly adopted the terminology of the Rumpff Report in setting out the notion of “toerekeningsvatbaarheid” or criminal capacity, and its component parts, cognitive and conative capacity. In particular, in expressing the notion of self-control, the court referred to Wiersma’s definition in the Rumpff Report.

After the first successful plea of a defence based on provocation or emotional stress in the Cape case of *S v Arnold*, the Appellate Division was again required to grapple

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64 1981 (1) SA 1097 (A).
65 1969 (1) SA 201 (A). The court in *Chretien* regarded its decision in Johnson to be “juridies onsuiwer” (at 1103D).
66 At 1104A.
67 At 1104E-F; 1106E-F.
68 At 1104H; 1106F-G.
69 This was in effect what the court held in answering in the affirmative the question of law whether it was correct to not convict a person of common assault on a charge of murder where the necessary intention for the offence had been influenced by the voluntary consumption of alcohol.
70 1983 (1) SA 12 (A) at 17G-H.
71 1983 (1) SA 814 (O).
72 At 825F-826A.
73 At 823G-824B, referring to paras 9 30, 9 32 and 9 33.
74 Par 9 33, referred to at 823H-824B.
75 1985 (3) SA 256 (C).
with this question in *S v Campher*.\(^{76}\) Whilst the three judgments handed down all differed significantly, and ultimately the conviction was confirmed, in the judgment of Viljoen JA it was accepted that the criteria developed in section 78 of the Criminal Procedure Act could also be used in assessing incapacity caused by non-pathological factors.\(^{77}\) Boshoff AJA agreed that this defence was a possibility.\(^{78}\) Again, in the judgment of Viljoen JA, specific reliance is placed on the relevant sections of the Rumpff Report in setting out the content of this defence, including reference to Wiersma’s definition of self-control or “weerstandskrag”.\(^{79}\)

The development of the defence of incapacity as a result of provocation or emotional stress took a significant step forward in the case of *S v Laubscher*,\(^{80}\) in which the Appellate Division finally produced a theoretical framework to add to the foundations laid in the previous cases. In formulating the test for “toerekeningsvatbaarheid” or criminal capacity, setting out the ambit of both the test for cognitive capacity and conative capacity,\(^{81}\) the court once again referred to Wiersma in this regard, this time directly,\(^{82}\) as opposed to doing so via the paragraphs of the Rumpff Report. Again, Wiersma’s definition of self-control was specifically approved.

Following the *Laubscher* case, the defence of non-pathological incapacity arose numerous times in case law. This included a successful reliance on this defence in the Appellate Division case of *S v Wiid*.\(^{83}\) However, in the light of some disquiet over the facility with which the accused could rely on this defence, the Supreme Court of Appeal sought to limit the defence in the notorious case of *S v Eadie*.\(^{84}\) While the judgment is hardly a model of clarity,\(^{85}\) and academic opinion about what it decided differs,\(^{86}\) it seems that the practical effect of the judgment is to conflate the test for involuntary conduct or automatism with the test for conative capacity.\(^{87}\) The court, referring to the views of Louw, held that the notion of control in relation to voluntary conduct\(^{88}\) and the notion

\(^{76}\) 1987 (2) SA 940 (A).
\(^{77}\) At 954F.
\(^{78}\) At 965H-966B.
\(^{79}\) At 951F-H.
\(^{80}\) 1988 (1) SA 163 (A).
\(^{81}\) At 166G-167A.
\(^{82}\) (n 50) at 29-32, at 167A-B. This reference incorporates the cited portion from Wiersma at par 9 33 of the Report.
\(^{83}\) 1990 (1) SACR 561 (A).
\(^{84}\) 2002 (1) SACR 663 (SCA). For a detailed discussion of this case see Hecto (n 1).
\(^{85}\) See Hecto (n 1) 135-138.
\(^{87}\) See Hecto (n 1); and for a review of recent cases which have accepted that this is the effect of *Eadie*, including *S v Marx* [2009] 1 All SA 499 (E), see Hecto “General principles and specific crimes” 2009 (22-2) *SACJ* 248.
\(^{88}\) Such that the act must be subject to the control of the human will.
of self-control in relation to conative capacity are equivalent and that they may be regarded as one and the same thing.

If the tests do refer to the same concept, then it follows logically that they ought to be conflated. However, on a careful reading of the notion of “weerstandskrag” or self-control as explicated by Wiersma, it is submitted that this misguided approach can be avoided.

Wiersma explains that by self-control is to be understood a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive. This understanding of self-control, applicable to conative capacity, is self-evidently entirely different from the question of whether conduct is voluntary, in that it is subject to the control of the mind. If involuntary, the mind is cut off and thus the actions of the accused could never have been goal-directed in any proper sense of the word. As Snyman puts it, in the case of involuntary conduct something happens to the accused. In contrast, where the accused lacks conative capacity, he makes something happen; although he is unable to prevent himself from unlawful action, the action is entirely voluntary in that the mind and will are involved. An important distinction should also be noted between behaviour accompanied by conative incapacity which is uncontrollable, where there is an inability to exercise a free choice, which should not be regarded as blameworthy, as opposed to behaviour that is merely uncontrolled, and therefore blameworthy and susceptible to criminal liability.

In Eadie the Supreme Court of Appeal unfortunately does not engage with Wiersma’s conceptualisation of control, even though this was cited in both the Rumpff Report and case law, and was foundational in the formation of the defence of non-pathological incapacity.

6 Concluding remarks

The defence of non-pathological incapacity still subsists, although it seems, at least in respect of incapacity brought about by provocation (or its concomitant, emotional stress), that it has been drastically attenuated by the judgment of the Supreme Court of Appeal in Eadie. As noted elsewhere this development potentially has an especially deleterious effect on an accused such as the battered woman who kills, who would no longer be

89 Which holds that there cannot be criminal liability where an accused is unable to act in accordance with the distinction between right and wrong because his or her controls inhibiting him or her from unlawful conduct (in other words self-control) have broken down as a result of, for example, provocation.
90 At par [70] the court (per Navsa JA) states that “it must now clearly be understood that an accused can only lack self-control when he is acting in a state of automatism”.
91 See par 9.33 of the Report.
93 This is the terminology of Ashworth Principles of Criminal Law (1999) 236.
94 Hoctor (n 87) 252.
able to rely on a negation of the capacity for self-control (conative capacity),\textsuperscript{95} instead having to rely on the much narrower defence of sane automatism. The \textit{Eadie} court’s retreat from a subjective notion of capacity, and in turn its infringement of the right to dignity, which is the constitutional basis of the principle of culpability,\textsuperscript{96} is regrettable. It is to be hoped that the innovative and positive development which the defence of non-pathological incapacity comprises, in ensuring that only the blameworthy accused will be punished, will not come to naught. In pleading for the recognition of the significance of this defence, and the negative consequences of its being undermined by policy-based arguments, it is fitting that we recognise De Wet’s central role in introducing, and supporting, the notion of “toerekeningsvatbaarheid” in South African criminal law, and that the theoretical content of this defence in South African law originated in the Rumpff Report, which in turn stems largely from the views of the Dutch psychiatrist Wiersma, which made such an impression on De Wet.\textsuperscript{97}

\textbf{Abstract}

The controversial defence to criminal liability of non-pathological incapacity has developed in the last thirty years, through case law. However, the origin of the defence in South African law can be traced to the report of a commission of inquiry, which was influenced by the work of the South African criminal law academic JC de Wet. Both the commission of inquiry – the “Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters” (RP 69/1967) – and De Wet rely in crucial respects on the work of the Dutch psychiatrist Wiersma. This article places the development of the South African criminal law in its historical context, before examining the unusual manner in which the defence of non-pathological incapacity has developed, with particular reference to the application of the defence to the issue of provocation. In conclusion, the most recent case law is placed in the context of the origins of the defence.

\textsuperscript{95} Described by Wiersma (n 52) 185 as “het vermogen tot kritische zelfbepaling … om de eerbiediging en overtreding van normen in eigen hand te houden”.

\textsuperscript{96} Accepting that the legitimacy of punishment is based on responsible moral agency and the ability to exercise self-determination in choice of action – see Hoctor (n 1) 166-167.

\textsuperscript{97} De Wet continued to refer to Wiersma’s \textit{Over Toerekeningsvatbaarheid} in the fourth (and final) edition of \textit{Strafrecht}; see (n 3) 109 n 40.