

Author: S Goosen

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BATTERED WOMEN AND THE REQUIREMENT OF IMMINENCE IN SELF-DEFENCE

S Goosen*

1 Introduction

Certain types of intentional killing are no longer regarded as unlawful, and therefore are not punished as murder. South Africa recognises that killing in self-defence is justifiable, and therefore not murder.¹ Burchell offers the following definition of private defence:

A person who is the victim of an unlawful attack upon person, property or other recognized legal interest may resort to force to repel such attack. Any harm or damage inflicted upon an aggressor in the course of such private defence is not unlawful.²

Burchell has noted that two important and yet somewhat conflicting themes shape the structure of the law of private defence. One is that private defence involves a choice between two evils, and that in choosing, the lesser evil is to be preferred. The evils are set out as follows. Firstly, the harm threatened by an attack upon the interests of an individual. Secondly, harm perpetrated against the legal interest of the attacker, in the process of repelling the attack. The doctrine of the lesser evil requires that the defender should not inflict greater harm than that threatened by the initial attack. Burchell notes: "the central organizing principle of this approach is thus the comparative assessment of harms involved".³

The opposing approach is one which justifies private defence using the concept of the autonomous individual. The theory underlying this approach is that every person has the right to protect their legal interests, and is under no obligation to surrender

* Samantha Goosen. LLB (UPE), LLM (Criminal Justice) (UPE), PhD (UKZN). Post-doctoral Research Fellow, University KwaZulu-Natal. Law lecturer, University of KwaZulu-Natal. Email: goosens@ukzn.ac.za.

¹ Milton *Common Law Crimes* 312.

² Burchell and Milton *Principles of Criminal Law* (2005) 230.

³ Burchell and Milton *Principles of Criminal Law* (2005) 231.

these rights in order to avoid inflicting some evil on another person. According to this approach, an individual who chooses to infringe the rights of another is the author of the harm suffered in the course of a defensive response to an attack.⁴

Snyman refers to two justifications for the existence of private defence. The protection theory emphasises individuals and their right to defend themselves against an unlawful attack. In respect of upholding justice theory, people acting in private defence perform defensive acts, thereby assisting in upholding the legal order. Private defence is meant to prevent justice from yielding to injustice. These acts are now subject to the *Constitution*.⁵ This point was noted in *S v Walters*,⁶ that:

self-defence is treated in our law as a species of private defence ... Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interests, in circumstances in which it is reasonable and necessary to do so ... What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. The interests must now be weighed in light of the Constitution.⁷

Private defence forms part of South African common law. The courts are guided by the *Constitution* as to which approach is to be followed when a common-law principle, rule or doctrine, appears to be in conflict with the *Constitution*. Section 39(2) provides that "when interpreting any legislation and developing the common-law or customary law, every court, tribunal or forum must promote the spirit, purport and, objects of the Bill of Rights". This essentially means that the common law must be "adapted or corrected, where applicable, to reflect constitutional values".⁸ Van Dikhorst J gave the following summary of the meaning of the section:

Section 35(3) [now 39(2)] is intended to permeate our judicial approach to interpretation of statutes and the development of the common law with the fragrance of values in which the Constitution is anchored. This means that wherever there is room for interpretation or development of our virile system of law

⁴ Burchell and Milton *Principles of Criminal Law* (2005) 231.

⁵ *Constitution of the Republic of South Africa*, 1996. Herein referred to as "the *Constitution*".

⁶ *S v Walters* 2002 7 BCLR 663 (CC).

⁷ *S v Walters* 2002 7 BCLR 663 (CC) 53.

⁸ Ally and Viljoen 2003 *SACJ* 129-130.

that is to be the point of departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system.⁹

This assessment calls for a two-staged approach to be adopted. In respect of the first stage, the content and scope of the rights protected - including the meaning and objects of the conduct challenged - must be determined to establish if there is such deprivation or limitation.¹⁰ If there is such a limitation, the enquiry would then proceed to the second stage. This stage entails a balancing process which applies a proportionality test provided for in section 36(1) of the *Constitution*. The abused woman relying on the conduct stipulated should be able to demonstrate that the limitation is justifiable under the *Constitution*.¹¹

While the *Constitution* does not establish a hierarchy of rights, judges and academics have acknowledged that some rights are more foundational, constituting a core of rights from which others are derived. In *S v Makwanyane*,¹² O'Regan J earmarked the right to life as "antecedent to all other rights in the Constitution." The same holds true for the right to dignity, especially when taken together with the right to life. To this should be added the right to bodily integrity. Ally and Viljoen note the meaning of the right to bodily integrity:

Violence against an individual is a grave invasion of personal security. Section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by discouraging private individuals from such invasions.¹³

To meet constitutional muster, the limitation must be closely linked to its purpose.¹⁴ Abused women are entitled to protect their lives, and therefore can kill to achieve this purpose. However, an important factor in such an evaluation is if less restrictive means were available to achieve the stated objectives. As Ally and Viljoen note, one way of posing this question is to reformulate some of the case law as common law: "the use of violence, especially lethal force, can only be justified if it is necessary;

⁹ *Du Plessis v De Klerk* 1995 2 SA 40 (T) 501i-j.

¹⁰ *S v Walters* 2002 7 BCLR 663 (CC) para 26.

¹¹ *S v Walters* 2002 7 BCLR 663 (CC) para 326.

¹² *S v Makwanyane* 1995 6 BCLR 665 (CC).

¹³ Ally and Viljoen 2003 *SACJ* 132.

¹⁴ Section 36(1)(d) *Constitution*.

that is, if it is the only means to avoid death or grievous bodily harm".¹⁵ While it could be said that the battered woman could have left the abusive relationship, the law does not require the abused woman to leave her home, nor does it expect ordinary persons to display acts of heroism. Therefore the death or serious bodily injury of the abuser caused as a result of the limitation can be justified when section 36 is applied.¹⁶

Private defence is an extraordinary remedy that involves the infliction of harm upon another individual. To escape criminal liability for this act the defender must be able to show that her resort to private defence conformed to the social and legal norms that result in the use of self-help by citizens. In respect of self-defence the norms that apply require that the defender be able to provide evidence that the resort to force was necessary in the circumstances that she found herself in, and that she used means appropriate to the danger that confronted her. These requirements for successfully invoking the defence are expressed as conditions that must have been present or complied with. Such "triggering" conditions relate to the nature of the attack and the nature of the defender's response (the defence).¹⁷

For a situation of private defence to arise, evidence must show (a) an attack, (b) upon a legally protected interest; and (c) that the attack was unlawful.

The first requirement is that there must have been an attack. Fear alone is not sufficient to justify a defence.¹⁸ Private defence may be utilised only where there is an attack which has already commenced or is imminent.¹⁹ The term "commenced" means that private defence may be resorted to only where the attack has already begun and there is no time to seek other forms of protection.²⁰ Burchell notes that "imminent means that the attack is about to begin immediately - what is important here is not so much the imminence of the threat, but rather the immediacy of the

¹⁵ Ally and Viljoen 2003 *SACJ* 132.

¹⁶ *Constitution of the Republic of South Africa*, 1996.

¹⁷ Burchell and Milton *Principles of Criminal Law* (2005) 233.

¹⁸ However, fear may be relevant to establishing the existence of "putative" private defence.

¹⁹ Steyn 1932 *SALJ* 462.

²⁰ Burchell and Milton *Principles of Criminal Law* (2005) 234.

response required to avoid the attack. If the nature of the attack is such that the threatened harm cannot be avoided, the victim should be entitled to act with such anticipation as is necessary for effective protection."²¹ It was noted in *S v Mokgiba*²² that—

The appellant was reasonable in his belief that his attacker did not come to visit him or to look for work. The actions of the attacker posed an immediate threat to the bodily integrity and the life of the man and his wife. The appellant was entitled to use all his strength and remedies he had at his disposal, even if these remedies meant that his attacker would die in the process. There was no duty on the appellant to wait until his attacker first physically harmed him, or to ask him what the purpose of his visit was, before he defended himself.²³

In *R v Zikalala*²⁴ the court held that:

The observation places a risk upon the appellant that he was not obliged to bear. He was not called upon to stake his life upon a 'reasonable chance to get away.' If he had done so he may well have figured as the deceased at the trial instead of the accused.²⁵

The attack must not have been completed, and any measure taken after the attack has ended²⁶ would be retaliatory rather than defensive and therefore unjustified. This is problematic, as battered women tend to kill in instances where their abuser is asleep or incapacitated and there is no imminent threat of harm. Some academics have suggested that victims of battered woman syndrome ought to be allowed to pre-empt the anticipated and inevitable attack of the abusive spouse, and it would appear as if South African courts are moving in that direction. Since 1947, South African law has dealt with the question of whether an accused who relied on self-defence and acted lawfully must be judged by objective standards. This point was demonstrated in *S v Motleleni*.²⁷

²¹ Burchell and Milton *Principles of Criminal Law* (2005) 234.

²² *S v Mokgiba* 1999 1 SACR 534 (O).

²³ *S v Mokgiba* 1999 1 SACR 534 (O) 550d-e.

²⁴ *R v Zikalala* 1953 2 SA 568 (A).

²⁵ *R v Zikalala* 1953 2 SA 568 (A) 573a-b.

²⁶ *S v Mogohlwane* 1982 2 SA 587 (T). Y after being robbed by X, went home, collected a weapon, returned to the scene of the robbery, and used force against X to recover his property. It was held that he had acted in lawful private defence in so far as his actions had been part of the *res gestae* of the original attack.

²⁷ *S v Motleleni* 1976 1 SA 403 (A).

The question whether an accused, who relies on self-defence, has acted lawfully must be judged by objective standards. In applying these standards one must decide what the fictitious reasonable man, in the position of the accused and in light of all the circumstances would have done.²⁸

Snyman suggests that "reasonableness is a relative concept, depending on the circumstances of each case".²⁹ Generally, it is accepted that the "reasonableness" test is a vehicle to ascertain the legal convictions of the community or the community's sense of equity and justice (*boni mores*). This has been described as an instrument of judicial policy.³⁰ In *Government of the Republic of South Africa v Basdeo*³¹ the court noted that—

the value judgment on which the application of the general criterion of reasonableness is based, is on considerations of morality and policy and the court's perception of the legal convictions of the community, and entails a consideration of all the circumstances of the case.³²

In conducting such an enquiry, the court must be guided by values and norms underlying the *Constitution*. The *Constitution*, being the supreme law of the land, is a system of objective, normative values for legal purposes. An approach to the "legal convictions" test would be informed by the foundational values of the *Constitution*, namely "human dignity, equality and freedom".³³ Such an approach will have as its basis the circumstances and perceptions of the accused. Section 9 of the *Constitution* requires that courts have regard to the particular circumstances of the accused.³⁴

Although it has been noted that the objective test is subject to the qualification that the person acting in self-defence may not benefit from prior knowledge that he has of his attacker, which the reasonable person would not have,³⁵ it would appear as if

²⁸ *S v Motleleni* 1976 1 SA 403 (A) 406c.

²⁹ Snyman 2004 *SACJ* 178.

³⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 330.

³¹ *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A).

³² *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 367f.

³³ Section 39(2) *Constitution*.

³⁴ Section 9 *Constitution*.

³⁵ Burchell and Hunt *South African Criminal Law* (1983) 331.

the courts are moving towards a more qualified objective test of self-defence. This point was made clear in *S v Ntuli*³⁶ where Holmes JA noted that the South African courts have always insisted that they must be careful to avoid the role of armchair critics, wise after the event, and weighing the matter in the secluded security of the court-room. The approach is that "in applying these formulations [the triggering conditions] to flesh and blood facts, the courts adopt a robust attitude, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence".³⁷

In *S v Engelbrecht*³⁸ the accused had been the victim of domestic violence for a number of years. This included not only physical but also psychological abuse. On the day of the deceased's death he had been drinking and watching pornography. The deceased indicated to his wife that he wished to act out a scene in a video that he was watching. While the accused was submitting to the deceased's demands, the accused's daughter walked into the bedroom.³⁹ Later that night, the accused's daughter accidentally knocked the deceased in the face.⁴⁰ He screamed at her and hit her, and forbade the accused to talk to her daughter. If she failed to heed his instructions, he said she would be killed. The accused then proceeded to kill her sleeping husband by locking his thumbs in thumb cuffs behind him and tied a plastic bag around his head which subsequently caused him to suffocate.⁴¹ In this case, Satchwell J held that self-defence had to be evaluated objectively, and is based on a consideration of what would have been reasonable in the situation the accused found herself in.⁴² The judge noted that "the reasonable woman must not be forgotten in the analysis and deserves to be as much part of the objective standard of a reasonable person as does the reasonable man".⁴³ Therefore, on this basis it was held that:

³⁶ *S v Ntuli* 1975 1 SA 429 (A).

³⁷ *S v Ntuli* 1975 1 SA 429 (A) 437e.

³⁸ *S v Engelbrecht* 2005 2 SACR 41 (W).

³⁹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 128.

⁴⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 130.

⁴¹ *S v Engelbrecht* 2005 2 SACR 41 (W) paras 10-11.

⁴² *S v Engelbrecht* 2005 2 SACR 41 (W) para 327.

⁴³ *S v Engelbrecht* 2005 2 SACR 41 (W) para 328.

There is indeed compelling justification for focusing not only on the specific form which the abuse may have over time and in particular circumstances, but pertinently on the impact of the abuse upon the psyche, make-up and entire world view of an abused woman.⁴⁴

By thus taking into account the accused's situation the court relaxed the traditional requirements for self-defence. Satchwell J went on to state that in determining the lawfulness of the self-defensive act, the "attack" element has become more broadly defined: "one individual incident of abuse, a series of violations or an on-going cycle of maltreatment".⁴⁵

With regards to the imminence requirement, the court followed the finding in the Canadian case of *R v Lavallee*,⁴⁶ where it was held that requiring a systematically-abused woman to wait until the commencement of an attack to defend herself is "tantamount to sentencing her to murder by instalment".⁴⁷ Satchwell J decided to reinterpret the common law by adopting the Canadian approach to address this shortcoming:

where abuse is frequent and regular such that it can be termed a 'pattern' or 'cycle' of abuse then it would seem that the requirement of imminence should extend to encompass that which is inevitable.⁴⁸

The judge went on to explain, that in order to determine if the action taken was necessary, the extent to which it was necessary would have to be established, as also to what extent the normal legal channels were ineffective. While Mrs Engelbrecht's efforts to leave her husband were taken into consideration, Satchwell J adopted a cautionary approach in this regard:

[I] am of the view that the court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation or to escape the abusive spouse or partner. Judgment should not be passed on the fact that an accused battered

⁴⁴ *S v Engelbrecht* 2005 2 SACR 41 (W) para 343.

⁴⁵ *S v Engelbrecht* 2005 2 SACR 41 (W) para 344.

⁴⁶ *R v Lavallee* 1990 55 CCC (3d) 97.

⁴⁷ *R v Lavallee* 1990 55 CCC (3d) 97 para 348.

⁴⁸ *R v Lavallee* 1990 55 CCC (3d) 97 para 349.

woman stayed in the abusive relationship. Still less is the court entitled to conclude that she forfeited her right to self-defence for having done so.⁴⁹

In discussing the proportionality requirement, Satchwell J noted that in the case of an abused woman, her particular circumstances should be taken into account:

the parties respective ages; the relative strengths, gender socialization and experiences; the nature duration and development of their relationship; the content of their relationship, including power relations on an economic, sexual, social, familial, employment and socio-religious level; the nature, the extent, duration, persistence of the abuse; the purpose of and achievements of the abuser, the impact upon the body, mind, heart, spirit of the victim; the effect on others who are aware of or implicated in the abuse; the extent to which it is possible for State-legislated, formal institutional, informal personal bodies and individuals to intervene to terminate the abuse; the extent to which it is possible for the abused victim to access and utilize any of the above channels in the event that they previously failed and to unilaterally intervene to impose constitutional protections.⁵⁰

Satchwell J went on to note that in evaluating if the actions taken by the accused were reasonable, the analysis is partly objective and partly subjective.⁵¹ Placing emphasis on the accused's individual circumstances could have the effect of subjectivising the test for self-defence. This raises the question: if the Engelbrecht case is correct, would it not have been better dealt with as an instance of putative self-defence? In terms of current South African law, if a battered woman is not able to successfully plead self-defence because the court found her conduct was unlawful, objectively assessed,⁵² then she may be acquitted of murder on the basis of putative private defence, which is subjectively assessed.⁵³ In *S v De Oliveira*⁵⁴ it was held that such a defence would be of assistance to an accused "who honestly believes his life ... [is] in danger, but objectively viewed [it is] not".⁵⁵ This honest but incorrect belief would eliminate the necessary intention to commit such an unlawful act. Furthermore, the test for intention is subjectively assessed:

⁴⁹ *R v Lavallee* 1990 55 CCC (3d) 97 para 356.

⁵⁰ *R v Lavallee* 1990 55 CCC (3d) 97 para 357.

⁵¹ *R v Lavallee* 1990 55 CCC (3d) 97 para 358.

⁵² *S v De Oliveira* 1993 2 SACR 59 (A).

⁵³ *S v De Oliveira* 1993 2 SACR 59 (A) 163i-j.

⁵⁴ *S v De Oliveira* 1993 2 SACR 59 (A) 163i-j.

⁵⁵ Reddi 2005 *SACJ* 275.

The focus of attention in ascertaining whether or not intention existed is the woman's subjective state of mind. The fact that her belief may have been unreasonable or even foolish under the circumstances is of no consequence at all as this enquiry does not concern itself with what a reasonable person would have done under the same circumstances.⁵⁶

Furthermore, the "social framework or circumstances that may have impacted on the woman's conduct would have a bearing on the determination of the woman's culpability".⁵⁷ Evidence of the "cyclical nature of abuse" as well as the woman's failed attempts at leaving her abuser would be highly relevant to inform putative self-defence.⁵⁸ For this reason, if a reasonable person located in the extraordinary circumstances of the accused would not have foreseen that the resort to self-defence was unlawful, then the abused woman cannot be expected to have such foresight. In such circumstances "her lack of foresight would not be regarded as negligent and a charge of culpable homicide would fail".⁵⁹ It is submitted that putative self-defence is highly relevant to the abused woman who kills her abuser in circumstances that fall outside the parameters of private defence, as it may represent the difference between a conviction of murder and one of culpable homicide in South African law. At its most extreme, it may even prove the difference between a conviction of murder and a complete acquittal.⁶⁰

The second requirement is that the private defence may be resorted to only in respect of a legally recognised protected interest in law. Many legal systems have approached the question of what interests may be protected by private defence in a casuistic fashion, and this results in not all legal interests being recognised as the subject of the private defence.⁶¹ Section 7(2) of the *Constitution* requires the State to "respect, promote and fulfil the rights in the Bill of Rights".⁶² The foundational values of the *Constitution* include those of "equality" and "dignity." Sections 9(1) and

⁵⁶ Reddi 2005 *SACJ* 275.

⁵⁷ Reddi 2005 *SACJ* 276.

⁵⁸ Reddi 2005 *SACJ* 276.

⁵⁹ Reddi 2005 *SACJ* 276.

⁶⁰ Reddi 2005 *SACJ* 276.

⁶¹ Burchell and Milton *Principles of Criminal Law* (2005) 235. It is universally agreed that a person is entitled to protect: life (see *R v Jack Bob* 1929 SWA 32; *R v Zikalala* 1953 2 SA 568 (A)); limb (see *R v Cele* 1945 NPD 173; *R v Patel* 1959 3 SA 121 (A) 123); dignity (see *S v Van Vuuren* 1961 3 SA 305 (E)); sexual integrity (see *R v Nomahleki* 1928 GWL 8).

⁶² *Constitution of the Republic of South Africa*, 1996.

9(2) provide that "everyone is equal before the law and has the right to equal protection and benefit of the law", and that "equality includes the full and equal enjoyment of all rights and freedoms," while section 10 provides that "everyone has an inherent dignity and the right to have their dignity respected and protected".⁶³ The protected rights include those in section 12 "to freedom and security of the person", which cover the rights "not to be deprived of freedom arbitrarily or without just cause; to be free from all forms of violence either from public or private sources; not to be treated or punished in a cruel, inhuman or degrading way", and also "to bodily and psychological integrity", which covers the rights "to make decisions concerning reproduction; to security in and control over their body".⁶⁴ In addition to common-law and statutory provisions for the protection of these rights, the legislature has enacted the *Domestic Violence Act* 116 of 1998, of which the Preamble states:

Recognizing that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are amongst the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships and that the remedies currently available to the victims of domestic violence have proved ineffective; and having regard to the Constitution of South Africa; and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of the State towards ending violence against women and children including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination against Women and the Rights of the Child; it is the purpose of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of State give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence.

The *Domestic Violence Act* has comprehensively defined "domestic violence" as including physical and non-physical forms of violence, all of which fall under the rubric of "controlling and abusive behaviour ... where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the complainant". It

⁶³ *Constitution of the Republic of South Africa*, 1996.

⁶⁴ *Constitution of the Republic of South Africa*, 1996.

would appear that the legislature has chosen to emphasise the effect of abusive conduct upon the victim, as opposed to the specific form taken by such conduct.⁶⁵

In *S v Baloyi*⁶⁶ the Constitutional Court noted that domestic violence compels constitutional concern in a number of important respects. On the one hand, the *Constitution*:

... has to be understood as obliging the state directly to protect the right of everyone to be free from domestic violence. Indeed, the State is under a series of constitutional mandates which include the obligation to deal with domestic violence; to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.⁶⁷

On the other hand,

to the extent that it is systematic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form ... The non-sexist society promised in the foundational clauses of the Constitution, and the right to equality and the non-discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy immunity.⁶⁸

The Constitutional Court endorsed the view that domestic violence is "systematic, pervasive and overwhelmingly gender-specific." It "both reflects and reinforces patriarchal domination and does so in a particularly brutal form". It thus also implicates the core values of equality.⁶⁹

In *Engelbrecht*⁷⁰ it was held that those rights which were enshrined in the *Constitution* constituted the interests which were deserving of protection in this defence of justification. It followed that the interests which were attacked and which an abused woman could protect include her life, bodily integrity, dignity, quality of

⁶⁵ *S v Engelbrecht* 2005 2 SACR 41 (W) para 157.

⁶⁶ *S v Baloyi* 2000 1 SACR 79 (CC).

⁶⁷ *S v Baloyi* 2000 1 SACR 79 (CC) para 11.

⁶⁸ *S v Baloyi* 2000 1 SACR 79 (CC) para 12.

⁶⁹ *S v Baloyi* 2000 1 SACR 79 (CC) para 12.

⁷⁰ *S v Engelbrecht* 2005 2 SACR 41 (W).

life, her home, her emotional and psychological wellbeing, her freedom, and the interests of her children. In short, she could defend her status as a human being and/or mother.⁷¹

Thirdly, the private defence can be resorted to only in respect of an attack that is unlawful.⁷² The fact that the attacker is insane and lacks criminal capacity does not cause the attack to be lawful and thus defence against such an attack is lawful.⁷³ In the case of an abused woman, the unlawful attack against which she defends herself or others may be one individual incident of abuse, a series of violations, or an ongoing cycle of maltreatment. Not all attacks are required to be directed at the abused woman herself, but obviously there must have been some assault upon her, for her to be considered abused. The attack may, but need not necessarily, be physical in nature, and may include psychological and emotional abuse, degradation of life, diminution of dignity, and threats to commit any such acts.⁷⁴

The defence employed by an abused woman must also comply with certain requirements. First of all, she must prove that the defensive act was necessary to avert the attack, in other words, the defence employed by the abused woman must be necessary to protect the threatened interest. Performing the defensive act ought to be the only way in which the abused woman can necessarily avert the threat to her rights or interests. This is decided on the facts of each case.⁷⁵ The basic idea underlying private defence is that a woman is allowed to "take the law into her own hands," as it were, only if the ordinary legal remedies do not afford her effective protection. The rationale underlying this defence has been stated as ensuring that "justice should not yield to injustice".⁷⁶ As Snyman has noted, "[t]he defence deals with nothing less than the protection of justice in the circumstances in which the police are unable because of their absence, to perform this task". For this reason, it is essential that the court critically examines the extent to which the "ordinary law of

⁷¹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 345.

⁷² *Ntanjana v Vorster and Minister of Justice* 1950 4 SA 398 (C) 404-405.

⁷³ Burchell and Milton *Principles of Criminal Law* (2005) 237.

⁷⁴ *S v Engelbrecht* 2005 2 SACR 41 (W) para 344.

⁷⁵ *Ex Parte Minister of Justice: In re S v Van Wyk* 1967 1 SA 488 (A) 497h.

⁷⁶ Snyman *Criminal Law* (2006) 102.

the land" was effective in preventing the precipitating unlawful attacks, and freeing the abused from the attacks and their impact.⁷⁷

The underlying and often unarticulated question is if an abused woman has a duty to flee the attack(s) rather than defend herself by killing. Snyman argues that there is no duty upon the attacked person to flee, because "this is a negation of the whole essence of private defence [which deals] ... with the upholding of justice ... not a capitulation to injustice".⁷⁸ However, he submits that "there is no absolute duty to retreat and that the approach of our law ought to be that the question of whether or not the battered woman could or should have retreated is merely one of the issues to be taken into account when assessing whether the abused woman's defensive act was allowed by law".⁷⁹

In *Engelbrecht* Satchwell J considered that bearing in mind the "hidden" or "concealed" nature of domestic violence, which is frequently confined to the privacy of the home, she was cautious about requiring the abused woman (and her children) to vacate their home, leaving the abusive spouse in full occupation.⁸⁰ The judge further held that flight may be thought to encompass efforts made not only to leave the home but also to approach state authorities such as the South African Police Service, the family violence courts, shelters, family and friends, and so forth. The response to the unarticulated question as to why, if the violence was so intolerable, the abused woman did not leave her abuser long ago, should be that this question does not go to whether or not she had an alternative to killing the deceased at the critical moment. Nevertheless, as was stated in *Lavallee*,⁸¹ to the extent that her failure to leave the abusive relationship earlier may be used in support of the proposition that she was free to leave at the final moment, expert evidence can provide useful insights.⁸²

⁷⁷ Snyman *Criminal Law* (2006) 102.

⁷⁸ Snyman *Criminal Law* (2006) 107.

⁷⁹ Burchell and Milton *Principles of Criminal Law* (2005) 239.

⁸⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 354.

⁸¹ *R v Lavallee* 1990 55 CCC (3d) 96.

⁸² *S v Engelbrecht* 2005 2 SACR 41 (W) para 355.

Satchwell J noted that the court must, in this context, be extremely cautious in seeking to rely upon examination of the efforts taken by an abused woman to extricate herself from the abusive situation, or to escape the abusive spouse or partner. Judgment should not be passed on the fact that the battered woman stayed in the abusive relationship. Still less is the court entitled to conclude that she forfeited her right to private defence by having so done.⁸³

There must be a certain balance between the attack and the defence.⁸⁴ As Snyman notes—

The upholding-of-justice theory principle plays an important role in the rule that there must be a reasonable relationship between the attack and the defensive act - that is, the requirement of proportionality in private defence. The harm occasioned by the defensive action must be proportional to the legal interests of the defender that are endangered and that are being protected by her. However, when accepting the individual protection theory as the only basis for private defence, it could be argued that the defending party may fend off imminent infringement of her rights without the defensive action necessarily being restricted in any way. The problem is that the legal order does not tolerate gross disproportion between the interest protected by the defender and the interest she is attacking ... Disregard of the requirement of proportionality leads to law abuse - that is, disregard of the upholding-of-justice principle underlying private defence.⁸⁵

The limits of private defence are difficult to describe with any degree of precision, since everything depends on the particular circumstances of the case. The approach to be favoured, which was adopted by the court in *In re Ex Parte Minister of Justice: S v Van Wyk*,⁸⁶ is whether the defender acted reasonably when he defended himself or his property. Put another way, the court will look at what may reasonably be expected of the attacked party in the circumstances of each case:

This test allows the court to assess the defence in the context of factors such as the nature of the attack, the interest threatened, the relationship of the parties, their respective age, sex, size and strength, the location of the incident, the nature of the means used in the defence, the result of the defence.⁸⁷

⁸³ *S v Engelbrecht* 2005 2 SACR 41 (W) para 356.

⁸⁴ Snyman 2004 SACJ 189.

⁸⁵ Snyman 2004 SACJ 189-190.

⁸⁶ *Ex Parte Minister of Justice: In re S v Van Wyk* 1967 1 SA 488 (A).

⁸⁷ *Ex Parte Minister of Justice: In re S v Van Wyk* 1967 1 SA 488 (A) para 49, discussed in Burchell and Milton *Principles of Criminal Law* (2005) 241.

In addition to the factors mentioned, the court in *Engelbrecht* took into account factors which were relevant to the situation of the accused, and which could be used to show that her actions were reasonable in the light of her circumstances. These include:

The parties respective ages; relative strengths, gender, socialization and experiences; the nature, duration and development of their relationship; the content of their relationship, including power relations on an economic, sexual, social, familial, employment and socio-religious level; the nature, the extent, duration, persistence of the abuse; the purpose of and achievements of the abuser; the impact upon the body, mind, heart, spirit of the victim; the effect on others who are aware of or implicated in the abuse; the extent to which it is possible for State-legislated, formal institutional, informal personal bodies and individuals to intervene to terminate the abuse; the extent to which it is possible for the abused victim to access and utilize any of the above channels in the event that they previously failed to unilaterally intervene to impose constitutional protections.⁸⁸

While these factors noted by the court suggested that proportionality between the attack and defensive action on her part had played an important role, the assessors in *Engelbrecht* chose to emphasise help-channels which they felt Mrs Engelbrecht had not utilised sufficiently⁸⁹ - thus undermining the court's previous statements that proportionality between the attack and the defence was important.

Secondly, the right of private defence can be exercised only against the attacker, not against a third party.⁹⁰

The third requirement, namely the one of imminence, lies at the heart of the justification of self-defence and forms the focal point of this discussion.⁹¹ This intrinsic limitation on the scope of self-defence ensures that citizens act only when the state has failed to protect their legal rights.⁹² However, the case of *S v*

⁸⁸ *Ex Parte Minister of Justice: In re S v Van Wyk* 1967 1 SA 488 (A) para 357.

⁸⁹ *Ex Parte Minister of Justice: In re S v Van Wyk* 1967 1 SA 488 (A) paras 418, 448.

⁹⁰ Burchell and Milton *Principles of Criminal Law* (1997) 142.

⁹¹ The attack should not yet have been completed (*S v Mogohlwane* 1982 2 SA 587 (T). Any measure taken after the attack has ended would be retaliatory rather than defensive (*R v Hayes* 1904 TS 383).

⁹² Rosen 1986 *Am U L Rev* 31.

Engelbrecht,⁹³ which deals with the position of a battered woman acting in self-defence, seems to suggest that the traditional imminence requirement does not adequately cater for these women's situations. For instance, Mrs Engelbrecht killed her husband in a non-confrontational situation: while he slept she locked his thumbs in thumb cuffs behind his back and tied a plastic bag around his head in order to suffocate him.⁹⁴ A claim of self-defence in terms of the general principles of South African law could be rejected on the ground that it was unreasonable to believe that such an attack was imminent. The conduct would therefore open itself up to being interpreted as an act of punishment or vengeance, neither being justifiable as self-defence.⁹⁵ Ossification of specific rules of self-defence has been predicated on what a reasonable response to deadly force might be, and this is based on the paradigm of an encounter between two men of roughly equal physical size and ability. In such cases, the abused woman is clearly disadvantaged: a woman's response to physical violence is likely to be different from a man's because of his size, strength and socialisation.⁹⁶ The need for legislation⁹⁷ and the development of the "battered woman syndrome" to expand the imminence requirement has therefore developed as a result of the inability of the courts to deal with cases of abused women. This is because they often involve an accused who is deserving of sympathy and who cannot fairly be blamed for her conduct, but who would have no self-defence claim if the law were strictly applied.⁹⁸ For instance, in *Engelbrecht*⁹⁹ the court adopted the Canadian approach, where it was held that where the abuse can be termed a "pattern" or "cycle" of abuse, then it would seem that the requirement of imminence should extend to encompass abuse which is inevitable.¹⁰⁰

There have been numerous calls for the abolition of the imminence requirement. The problem is that something must stand in its stead to distinguish legitimate cases of self-defence from illegitimate ones. The focus of this article will be the variations

⁹³ *S v Engelbrecht* 2005 2 SACR 41 (W).

⁹⁴ *S v Engelbrecht* 2005 2 SACR 41 (W) para 10-11.

⁹⁵ Reddi 2005 SACJ 270.

⁹⁶ Hatcher 2003 *NYU Ann Surv Am L* 22.

⁹⁷ *Domestic Violence Act* 116 of 1998.

⁹⁸ Rosen 1986 *Am U L Rev* 13.

⁹⁹ *S v Engelbrecht* 2005 2 SACR 41 (W).

¹⁰⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 349.

advanced for the imminence requirement, and why these theories will not be practically applicable to South African law.

2 Different standards of imminence

2.1 An "immediately necessary" standard

Robinson notes that while the term "imminent" appears to modify the nature of triggering conditions, it seems as if the restriction is more properly viewed as a modification of the necessity requirement.¹⁰¹ Practically speaking, actions taken in the absence of an imminent threat may not be necessary.¹⁰² Consider the hypothetical hostage scenario, where X kidnaps Y and holds him hostage. X announces that in one week's time he will kill Y. Each morning X brings Y's daily-food ration. Should the imminence requirement be taken literally, it would prevent Y from using deadly force until X is standing over him with a knife.¹⁰³ If the concern over the limitation is simply to exclude threats of harm that are too remote to require a response, the problem cannot be solved by requiring immediacy of the threat, but the immediacy of the response necessary in defence. Removed from the issue of reasonableness, there is little practical difference between "imminence" and "immediately necessary." It can further be suggested that the elimination of the "imminence" and the implementation of "immediately necessary" does not necessarily signify that a court will always disregard imminence in an abused woman's case.¹⁰⁴

The problem is that an "immediately necessary" standard obscures the important distinction between self-defence and other self-preferential acts.¹⁰⁵ In the original version of *Regina v Dudley Stephen*,¹⁰⁶ four men were trapped in a life boat with no food to eat for twenty days. Dudley made a decision to kill and eat Richard Parker, a

¹⁰¹ Robinson *Criminal Law Defenses* 76.

¹⁰² Robinson *Criminal Law Defenses* 76.

¹⁰³ Robinson *Criminal Law Defenses* 78.

¹⁰⁴ Veinsreideris 2000 *U Pa L Rev* 623.

¹⁰⁵ Veinsreideris 2000 *U Pa L Rev* 614.

¹⁰⁶ *Regina v Dudley Stephen* 14 QBD 273 (1894).

cabin boy, who had consumed considerable amounts of seawater, and was dying.¹⁰⁷ After the three men had killed Parker they were rescued and charged with his murder.¹⁰⁸ Since Parker had not been a threat to the men, they were not acting in self-defence, but would have to rely on necessity: that they had chosen the lesser evil. However, the court did not allow necessity to be a defence for murder.¹⁰⁹

Furthermore, consider a hypothetical scenario where the accused in such a case claimed self-defence: the use of defensive force is premised upon an assessment of the probabilities and alternatives. For defensive force to be necessary, the defender must reasonably believe that harm is likely, and that there is no alternative to the use of force. The difference between the two cases is that while the first is a self-preferential killing, the second is self-defensive. All self-defence cases are instances of self-preference, but not all self-preferential actions constitute self-defence. What is distinctive about the self-defence case is that the act of force is employed to ward off an unjust immediate threat.¹¹⁰ However, in the first scenario, the act was not defensive, as Parker did not pose a threat to the men. It is submitted that self-defence is treated differently from other necessary acts of self-preservation. Although the killing may be objectionable, the right to self-defence cannot be denied. Current law reflects this sentiment.¹¹¹ Further, while the argument for the abandonment of imminence is so that a defender should be able to act as early as is necessary to defend herself effectively, this can create problems since the "immediately necessary" standard operates independently of the intentions, capabilities, or actions of a putative aggressor.¹¹²

While it could be correct to insist on a distinction between imminence and necessity, it could also be argued that the moral basis for the imminence rule is not correct. While it is true that self-defensive acts are justified responses to unjust acts of aggression, the problem is that an act of aggression does not suddenly become

¹⁰⁷ *Regina v Dudley Stephen* 14 QBD 273 (1894) 273-274.

¹⁰⁸ *Regina v Dudley Stephen* 14 QBD 273 (1894) 274.

¹⁰⁹ *Regina v Dudley Stephen* 14 QBD 273 (1894) 279.

¹¹⁰ Ferzan 2004 *Ariz L Rev* 247.

¹¹¹ Ferzan 2004 *Ariz L Rev* 249.

¹¹² Ferzan 2004 *Ariz L Rev* 249.

unjust at the very moment of imminence.¹¹³ The individual who is planning the unlawful attack is already in the wrong even before the attack commences. However, it goes against common logic to wait until the attack is about to commence in order to be morally justified before acting to ward off the attack. However, this does pose the problem that the earlier the intervention occurs, the more likely it is the person is mistaken about the attacker's intentions (and the less chance an aggressor will have to change his mind and withdraw his defensive attack). However, a presumption of serious harm is stronger when the abuser has a history of such conduct. Furthermore, such a presumption can be viewed as analogous to the "bright line rules" that have developed in the body of constitutional law governing police searches and seizures. An example of this would be the amendment to section 49(2) of the *Criminal Procedure Act*,¹¹⁴ where such force is justified if:

- a) the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- b) there is substantial risk that the suspect will cause imminent or future death or grievous bodily harm; and
- c) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.

The "future danger" principle is expressly used in the new section 49. Furthermore, in circumstances resembling private defence, it holds that an arrestor is justified in using deadly force intended or likely to cause death or grievous bodily harm to a suspect only if there is a belief on reasonable grounds, *inter alia*, that "there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed".¹¹⁵ While it has been suggested that using lethal force to affect an arrest implies that it is the nature of the offence which the suspect

¹¹³ Kaufman 2007 *New Crim L Rev* 342.

¹¹⁴ *Criminal Procedure Act* 51 of 1977.

¹¹⁵ Bruce 2003 *SAJHR* 436

has committed which provides the motivation for the use of lethal force, the case of *S v Govender*¹¹⁶ quotes *Tennessee v Garner*¹¹⁷ to demonstrate the point:

[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.¹¹⁸

This is essentially not a test of the seriousness of an offence but rather a test of the threat which the individual poses of "serious physical harm to others".¹¹⁹ As Bruce notes:

[w]hat the test in effect is that an individual who has (is reasonably believed to have) committed a crime involving the infliction or threatened infliction of serious physical harm, has thereby defined himself as posing a danger of such harm to other people. The test put forward in *Garner and Govender* is therefore a test of future danger, and the motivation for the use of lethal force, that of preventing future harm.¹²⁰

The two most important requirements in terms of this section for a successful reliance on the defence are the requirements that the conduct should be necessary and proportional.¹²¹ The problem in the case of abused women using pre-emptive force is that the requirement of imminence is not the only consideration in determining whether their conduct is justified. Not only should the abused woman's conduct be necessary, but also proportionate when acting to defend herself. The demand for proportionality can also be based upon constitutional considerations. The more important a fundamental right, the more comprehensive the protection of that right.¹²² Thus, the battered woman's attacker does not lose his fundamental

¹¹⁶ *S v Govender* 2001 4 SA 273 (SCA).

¹¹⁷ *Tennessee v Garner* 471 US 1 (1985).

¹¹⁸ *Tennessee v Garner* 471 US 1 (1985) 11-12, quoted in *S v Govender* 2001 4 SA 273 (SCA).

¹¹⁹ Bruce 2003 *SAJHR* 446.

¹²⁰ Bruce 2003 *SAJHR* 447.

¹²¹ Snyman *Criminal Law* (2006) 131.

¹²² See further *S v Walters* 2002 7 BCLR 663 (CC) para [28], which states that the rights to life, dignity and bodily integrity have been described as "collectively foundational to the value system prescribed by the Constitution".

rights in a situation of self-defence.¹²³ Her attacker is entitled to the constitutional protections offered by the state.¹²⁴ In the case of self-defence, the main concern is the prevention of an unlawful harm to the legitimate interests of the abused woman, by means of harming the interests of her abuser. From this standpoint (and of the state), self-defence presents a conflict between the state's duty to protect the legitimate interests of the battered woman on the one hand, and its duty to protect the interests of her abuser on the other hand. Therefore, the right of the abused woman to defend herself, as a right derived from the state's duty to protect the legitimate interests of all individuals, cannot be unlimited. The choice presented by the state's duty must find its expression in a compromise intended to supply reasonable protection of the legitimate interests of both the abused woman, and her abuser. In terms of the actual constitutional protection of fundamental rights, it makes no difference whether we are looking at the abuser or the victim. However, the scope of protection differs. Since the abuser is the one who unlawfully endangers the interests of the abused woman (her right to life, dignity and bodily integrity), and she is merely warding off the assault - the unlawful attack is a consideration that weighs against the abuser. The fact that the abuser has committed an unlawful act (or is about to) does not translate into a total abandonment of a proportionality requirement. In other words, his wrongful act does not grant the abused woman an unlimited right to protect her interests, regardless of the cost to the abuser. Self-defence thus requires proportionality, in the sense that the harm caused must not be disproportional to the harm prevented. Where we are considering endangering the abuser's life, we are concerned with preventing harm to the life or physical or sexual integrity of the victim. The demand for proportionality thus derives from the reasonableness requirements of a society's Constitution.¹²⁵ Moreover, self-defence is intended to preserve the legal order by granting every individual the right to ward off unlawful attacks. The protection of the legal order is the duty of the state, and it does so by means of its law-enforcement agencies. The power to do so derives from the state's complete monopoly over the use of force. The right to employ force in self-defence is a right that is derived from

¹²³ Ashworth *Principles of Criminal Law* 288.

¹²⁴ Ashworth *Principles of Criminal Law* 288.

¹²⁵ See further Ashworth *Principles of Criminal Law* 142.

the state's right and duty to maintain the legal order. Therefore, if the authority of state agencies to employ force is limited by the requirement of proportionality - then the right of an individual to employ force must similarly be limited in self-defence cases.¹²⁶

Furthermore, case law does not seem to be clear on whether an abused woman should flee,¹²⁷ despite the rationale that justice should not yield to injustice.¹²⁸ When acting in private defence, the abused woman acts as one who upholds the law, since the state authority is not present to protect her.¹²⁹ The issue is not balancing the value of autonomy against the aggressor's right, but whether the abused woman enjoys autonomy at the outset.¹³⁰ One suggestion in respect of the duty to retreat is to recognise putative self-defence - if viewed from the abused woman's perspective. However, as has been noted by acknowledging the impact that the battered woman syndrome had on her psyche, make-up and whole worldview¹³¹ as being pertinent to the question as to why the battered woman did not retreat - other factors will also have to be taken into account to satisfy the court that she had no option but to act in a particular way.¹³² If the objective test is qualified with the battered woman syndrome, it is submitted that there will be little difference between self-defence and putative self-defence. The objective test will become the functional equivalent of the subjective test. This is in clear contradiction of the view that reasonableness must be facially neutral.¹³³ A comparable argument could be made for the fact that the duty to retreat must, from an objective viewpoint, be necessary. Where an attack is not

¹²⁶ Kreminitzer and Ghanayim 2004 *U Tulsa L Rev* 895.

¹²⁷ Case law suggests that she should flee: *R v Zikalala* 1953 2 SA 568 (A) 571-572; *R v K* 1956 3 SA 353 (A) 358G; *R v Patel* 1959 3 SA 121 (A) 12; *S v Mnguni* 1966 3 SA 776 (T) 778, 779A.

¹²⁸ Snyman 2004 *SACJ* 184.

¹²⁹ Snyman 2004 *SACJ* 184.

¹³⁰ Snyman 2004 *SACJ* 184. See further *S v Baloyi* 2000 1 SACR 79 (CC) para [11]: "The Constitution has to be understood as obliging the State directly to protect the right of everyone to be free from domestic violence. Indeed, the State is under a series of constitutional mandates which include the obligation to deal with domestic violence; to protect both the right of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way".

¹³¹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 343.

¹³² Heller 1998 *Am J Crim L* 94-95.

¹³³ Heller 1998 *Am J Crim L* 95.

imminent, the battered woman is required to retreat. Such a position does not take into account the fact that a battered woman is more likely to be killed by her abuser when she leaves an abusive relationship,¹³⁴ and that women who flee often have no safe place to go.¹³⁵ Nevertheless, such a duty should be maintained, since the abused woman's situation can be adequately catered for within the reasonableness neutrality perspective. Since the requirement of imminence is political rather than moral, the element of imminence must actually occur in the real world. It is submitted that where there is a gap between the theory of state protection and the abused woman's reality of the police's unresponsiveness, it essentially becomes more difficult to assess whether the courts should be required to recognise a broader than usual right of self-defence. The problem is to formulate a precise test of how poorly the police have failed in their duties, and to determine a proportionate adjustment in the law of self-defence. Any underlying relationship of dominance and subordination should not bear on the analysis of self-defence, since the justification is weak.¹³⁶ As Snyman suggests, the question of whether or not there is a duty to retreat is academic, since in practice the question will usually not be whether the person should have fled, but whether she was entitled to go to the lengths she did in defending herself, in the light of the prevailing circumstances.¹³⁷

Another theory suggests that necessity is not a temporal concept, but rather expresses the underlying concept of inevitability or unavoidability. A necessity rule would ask if the abused woman had any choice to act as she did, in order to avoid the grave risk of death or serious harm at the hands of her husband.¹³⁸ In *Engelbrecht*¹³⁹ the court followed a similar line of reasoning. It noted that the dictionary references to "imminence" include not only something which is about to "happen", but also behaviour which is "expected" or "foreseen" - especially where there is a pattern or cycle of violence. Thus, to the extent that her failure to leave the abusive relationship earlier could be used in support of the position that she had

¹³⁴ Aggergaard 2002 *Wm Mitchell L Rev* 671.

¹³⁵ Walker *Battered Woman* 87.

¹³⁶ Fletcher 1996 *U Pitt L Rev* 571.

¹³⁷ Snyman *Strafreg* 107-108 (own translation).

¹³⁸ Rosen 1993 *N C L Rev* 387.

¹³⁹ *S v Engelbrecht* 2005 2 SACR 41 (W).

been free to leave at the final moment, expert evidence could provide useful insights.¹⁴⁰ Judge Satchwell made reference to the writings of Stark¹⁴¹ when explaining the psychological impact of domestic violence on the battered woman. The judge stated that it was important to look at the pattern of overall coercive control present in the relationships, rather than specific instances of such control. Research suggests that it may be control more than violence that creates the psychological profile of a battered woman.¹⁴² The judge went on to quote Stark:

Work with battered women outside the medical context suggests that physical violence may not be the most significant factor about most battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family; children, and friends; and work. Sporadic, even severe violence makes this strategy of control effective. But the unique profile of 'battered woman' arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma.¹⁴³

The court further endorsed the view that where the abuse is frequent and regular, such that it can be termed a "pattern" or a "cycle" of abuse, then it would seem that the requirement of "imminence" should be extended to encompass that which is "inevitable".¹⁴⁴

2.2 Imminence as a translator for necessity

Another theory which has been suggested is that imminence is a fairly good "translator" for the concept of necessity, even though the former is not the latter.¹⁴⁵

It has been noted that because the imminence requirement is "merely a translator

¹⁴⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 355.

¹⁴¹ Stark 1995 *Alb L Rev* 973.

¹⁴² *S v Engelbrecht* 2005 2 SACR 41 (W) para 168.

¹⁴³ Stark 1995 *Alb L Rev* 986.

¹⁴⁴ *S v Engelbrecht* 2005 2 SACR 41 (W) para 349.

¹⁴⁵ Rosen's necessity rule expresses the same "but for" condition that forms the core of Ripstein's inevitability rule. Ripstein 1996 *U Pitt L Rev* 685, argues that the conception of "imminent harm," is simply an instantiation of the legal concept of "unavoidable" harm, and that current American self-defence law is designed to guarantee that no one must endure a reasonable risk of unavoidable harm (698-704). He goes on to say that if imminence is nothing more than an instantiation of unavoidability, then it follows that if a battered woman has a reasonable belief that she will be seriously assaulted after her batterer wakes up, she is justified in killing him while he sleeps (704-705).

for the necessity requirement", the imminence requirement should be relaxed or eliminated in cases where necessity and imminence conflict. The reason for this is that in cases of self-defence, the concept of imminence will have no importance independent of necessity. The evil to be avoided is to be avoided not simply because it is "imminent" and therefore is worse than non-imminent harm, but rather imminence is required because without it there can be no assurance that defensive action will be necessary to avoid the harm.¹⁴⁶

If it is true that imminence is a translator of the necessity principle, it translates two opposing views of necessity - necessity as an aversion to violence, and necessity as a liberty and a right. Theorists, who support this, do it on the basis of a theory of self-defence that is heavily invested with pacifism and social responsibility toward the victim's interest in life.¹⁴⁷ The idea is that an accused's act is justified when necessary, since he had no choice but to act in the manner in which he did.¹⁴⁸ However, this is not the only existing view of necessity. Theories of self-defence which focus on autonomy do so on the basis that "right never yields to wrong".¹⁴⁹ The argument is that the killing is necessary when it serves to right the wrong of a deadly attack.

These ideas of necessity in turn present two contradictory theories of self-defence: pacifist and libertarian.¹⁵⁰ The pacifist theory emphasises a view of necessity that "depends upon the need for the accused to avoid violence".¹⁵¹ The libertarian theory suggests that self-defence protects the rights of citizens to respond to unlawful aggression. However, neither the libertarians nor the pacifists can assert that they have their own debate about self-defence. None of these positions actually describes the law of self-defence.¹⁵² The law positively permits self-help remedies in the

¹⁴⁶ Rosen 1993 *N C L Rev* 387.

¹⁴⁷ Nourse 2001 *U Chi L Rev* 1271.

¹⁴⁸ See Fletcher 1996 *U Pitt L Rev* 559, where the author states that "necessity speaks to the question whether some less costly means of defense ... might be sufficient to ward off an attack".

¹⁴⁹ Nourse 2001 *U Chi L Rev* 1271.

¹⁵⁰ Nourse 2001 *U Chi L Rev* 1272.

¹⁵¹ Nourse 2001 *U Chi L Rev* 1272.

¹⁵² Nourse 2001 *U Chi L Rev* 1272 submits that in this sense it should not be surprising, since both positions, one by emphasising the accused's relationship to society, and the other the accused's

majority of jurisdictions which allow the accused to "stand his ground" against an attack. If necessity meant what the pacifist theory suggests, it would in effect require retreat in every jurisdiction. This is not in accordance with current doctrine in South African law.¹⁵³ Thus, the law's necessity is not always as "necessary" as it appears. This is especially the case "if by necessary we mean that the accused must choose the least violent or most pacifist alternative".¹⁵⁴

The libertarian posits a different idea of necessity. This argument emphasises the wrong inflicted upon the accused and his right to respond. The implicit claim is that the self-defence law must acknowledge society's concern in preventing "private warfare", but that if the state goes too far in discouraging self-help, citizens will become the victims of violence. As with its pacifist opponent, the libertarian theory fails to describe current doctrine. The law in most jurisdictions refuses to look solely to the wrong of the victim/aggressor as the sole measure of self-defence. Instead, doctrine has time after time conceived of the rules of self-defence in terms that require that citizens defer to government authorities. Most rules of self-defence can be reconceived not just as rules that identify "real wrongs", but as rules which develop a system that protects society from vigilantism. Rules of proportionality, imminence and retreat require in many cases that the accused should retreat. It is true that the right to act in private defence is subsidiary in nature and takes effect only where the state is not there to protect a particular person. Therefore, where help is available from the state (via the SAPS) to protect the person, such a person should not simply proceed to act in private defence. It would be a different story if the SAPS did not perform their duties. This is therefore the crux of the case: whether Mrs Engelbrecht afforded the legal system, the SAPS, and society, a fair chance of helping her. To put this another way, was her final act of killing Mr Engelbrecht the only reasonable option available to her?¹⁵⁵ The majority of the court

relationship to the victim, focus on different aspects of a defence. It also makes sense since these theories, when taken to their logical extreme, would require either a drastic curtailment of the defence (in the case of the pacifist theory) or an extraordinary expansion (in the case of the libertarian theory).

¹⁵³ Case law creates the impression that the person should flee: see note 31.

¹⁵⁴ Nourse 2001 *U Chi L Rev* 1272.

¹⁵⁵ *S v Engelbrecht* 2005 2 SACR 41 (W) para 402.

was of the opinion that she did not afford the legal system a fair chance of assisting her. There were numerous other options available to her. She was a strong and intelligent woman with qualifications and a profession, who was able to work. She could have left Mr Engelbrecht. She was capable of evicting Mr Engelbrecht and had successfully evicted him in the past, when his behaviour displeased her. She had asked him to leave her flat when he and his parents were drinking excessively - which he did. She had not sought the assistance of the Social Welfare Department or other well-publicised non-governmental organisations.¹⁵⁶ In addition, a reasonable woman in Mrs Engelbrecht's circumstances would have, ought to have, and should have closed the door behind her after she had thumb-cuffed Mr Engelbrecht, gone to the neighbour, and summoned the police.¹⁵⁷ In addition, Mrs Engelbrecht had very supportive friends and colleagues who would go to extraordinary lengths to assist and help her.¹⁵⁸

When considering the evidence placed before the court, it became clear that the legal system, including SAPS and the domestic violence court, had been prepared to assist Mrs Engelbrecht. However, she had lost interest in the various actions that she had instituted. She had not appeared in court on the dates set down for the actions she had instituted, or she had decided not to pursue the matters. In her evidence she submitted that she had not been notified of the dates when her cases were to be heard. However, this claim did not hold any merit. She could have tried to find out when her cases were going to be heard or reinstated the actions.¹⁵⁹ Therefore, if the law never really embraced either the pacifist or libertarian vision of necessity, it is not unexpected to find both these ideas unresolved in doctrine, submerged in places, like imminence, where they are difficult to see or judge.¹⁶⁰ If this submission is correct, then we cannot with assurance solve the problem of imminence by replacing imminence with necessity, or by claiming priority for necessity or by

¹⁵⁶ *S v Engelbrecht* 2005 2 SACR 41 (W) para 424.

¹⁵⁷ *S v Engelbrecht* 2005 2 SACR 41 (W) para 426.

¹⁵⁸ *S v Engelbrecht* 2005 2 SACR 41 (W) para 429. For instance, Dr Du Preez's kind gesture of giving her R3000 as a deposit for a new flat.

¹⁵⁹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 429.

¹⁶⁰ Nourse 2001 *U Chi L Rev* 1273-1274.

demanding that imminence means the pacifist rather than the libertarian version of necessity. Each of these positions simply poses the question - it does not answer it.

2.3 Distinction between justification and excuse

The imminence question can also not be answered by referring to the distinction between justification and excuse. South African criminal law is traditionally connected with the psychological approach which separates the enquiry into criminal liability with two distinct components, each with its own focus:

The psychological theory is irreconcilable with the indisputable presence of subjective components in the concept of wrongdoing (definitional elements plus unlawfulness). The psychological theory's premise is that culpability is the receptacle of all 'subjective' requirements for liability; it is the sum total of all the 'internal' requirements for liability.¹⁶¹

In terms of the normative theory of fault, culpability lies in the blameworthiness with which the unlawful act was committed. In this case, the accused is personally blamed since he committed an act which met the definition of the proscription, despite being capable of acting differently. In terms of such an approach, "culpability is not a state of mind, but an evaluation of X's intention". It is a "negative value judgment on the commission of an unlawful act".¹⁶²

Some reformers suggest that imminence is really a question of the "battered woman's perspective on imminence ie because of her experience she is more sensitized to cues signalling violence".¹⁶³ Emphasising the individual characteristics of the accused has led to the establishment of the "reasonable battered woman" standard.¹⁶⁴ Although the court in *S v Ferreira*¹⁶⁵ did not directly refer to battered woman syndrome (BWS), it would seem as if the court were indirectly giving credence to it:

¹⁶¹ Snyman 2003 *THRHR* 327.

¹⁶² Snyman *Criminal Law* (2001) 142.

¹⁶³ Nourse 2001 *U Chi L Rev* 1266.

¹⁶⁴ Nourse 2001 *U Chi L Rev* 1266.

¹⁶⁵ *S v Ferreira* 2004 2 SACR 454 (SCA).

Her decision to kill and hire others for that purpose is explained by expert witnesses as fully in keeping with what experience and research has shown that abused women do. It is something which has to be judicially evaluated not from the male perspective or an objective perspective but by the court placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence.¹⁶⁶

Only by judging the case on this basis could the abused woman's right to equality, dignity, freedom from violence and bodily integrity be given effect.¹⁶⁷

In a similar vein, in *Engelbrecht*¹⁶⁸ Satchwell J noted that the "reasonable woman must not be forgotten in the analysis and deserves to be as much part of the objective standard of a reasonable person as does the reasonable man".¹⁶⁹ Therefore, there is "compelling justification for focusing not only on the specific form which the abuse may have over time and in particular circumstances, but pertinently the impact the abuse had on the psyche, make-up and entire world view of an abused woman".¹⁷⁰ Therefore, in determining the lawfulness of the self-defensive act, the "attack" element has become more broadly defined: "one individual incident of abuse, a series of violations or an ongoing cycle of maltreatment".¹⁷¹ Following *Lavallee*,¹⁷² it was held that "in requiring the systematically abused woman to wait until commencement of the attack to defend herself" is "sentencing her to murder by instalment".¹⁷³ For this reason, Judge Satchwell reinterpreted the common law to address this shortcoming, by stating that "where the abuse is frequent and regular such that it can be termed a 'pattern' or 'cycle' of abuse, then it would seem that the requirement of imminence should extend to encompass that which is inevitable."¹⁷⁴ In determining whether the action taken was necessary or not, it had to be established to what extent normal legal channels were ineffective,¹⁷⁵ and her

¹⁶⁶ *S v Ferreira* 2004 2 SACR 454 (SCA) para 40.

¹⁶⁷ *S v Ferreira* 2004 2 SACR 454 (SCA) para 40.

¹⁶⁸ *S v Engelbrecht* 2005 2 SACR 41 (W).

¹⁶⁹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 358.

¹⁷⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 343.

¹⁷¹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 344.

¹⁷² *R v Lavallee* 1990 55 CCC (3d) 97.

¹⁷³ *S v Engelbrecht* 2005 2 SACR 41 (W) para par 348.

¹⁷⁴ *S v Engelbrecht* 2005 2 SACR 41 (W) para 349.

¹⁷⁵ *S v Engelbrecht* 2005 2 SACR 41 (W) para 352.

particular circumstances had to be taken into consideration.¹⁷⁶ The end result of such an approach was that in evaluating whether the actions taken were reasonable, the analysis was partly objective and partly subjective.¹⁷⁷

In answering the question of how frequent the abuse must be in order to be described as a pattern or inevitable, it is submitted that there is no single, defining profile of an abused woman. There are many diverse "profiles" of abused women, since the abuse does not affect them all in the same way, nor do they necessarily respond identically to the abusive circumstances. In *Engelbrecht*¹⁷⁸ the court noted that trauma and reason can both co-exist within battered women. Since they live in circumstances where the danger and threat are ever-present, this may encourage the development of "survivor" logic. For this reason it becomes essential that they develop a heightened capacity to assess incipient violence based on prior experience, and their familiarity with their abusers "warning" signs and tactics. To be able to understand the psychological impact of domestic violence it becomes necessary to look at the pattern of overall coercive control present in the relationship, rather than at specific instances of such control. Dr Walker, who posited the theoretical construct on which "battered woman syndrome" is based, proposed the cycle of violence theory, which refers to a three-stage recurrent pattern - "tension-building", "acute battering", and "loving contrition" - that characterises these relationships. The recurrent yet unpredictable nature of the violence plays a key role in explaining why an abused woman may not leave the relationship. Further, Seligman's theory of learned helplessness explains the woman's sense of "psychological paralysis".¹⁷⁹ Her cognitive perceptions and motivation to act are altered, since "repeated battering ... diminish[es] the woman's motivation to respond. She becomes passive". Secondly, her "cognitive ability to perceive success [in the relationship] is changed. She does not believe her response will result in a favourable outcome, whether or not it might ... she cannot think of alternatives".¹⁸⁰ In this respect, it could be submitted that "battered woman syndrome" is considered a sub-category of the generic Post

¹⁷⁶ *S v Engelbrecht* 2005 2 SACR 41 (W) para 357.

¹⁷⁷ *S v Engelbrecht* 2005 2 SACR 41 (W) para 358.

¹⁷⁸ *S v Engelbrecht* 2005 2 SACR 41 (W).

¹⁷⁹ Schulhofer 1990 *Soc Phil & Pol* 127.

¹⁸⁰ Schulhofer 1990 *Soc Phil & Pol* 127, discussing Walker *Battered Woman* 65-70.

Traumatic Stress Disorder (PTSD) - an anxiety disorder¹⁸¹ which is included within the Diagnostic and Statistical Manual of Mental Disorders.¹⁸² The coercive control theory does not require physical violence then, but only that the victim perceives that there is no means of escape as a result of the abuser's behaviour. On this basis, it would seem as if the extension of the imminence requirement as articulated in the *Engelbrecht*¹⁸³ case would be justified only in cases involving battered women who have experienced some sort of cognitive disturbance.

The problem is that if imminence is viewed from an abused woman's perspective, her response to danger will always be reasonable and therefore imminent. The subjective perceptions of the accused, even if well founded on BWS, will still have to pass the objective test.¹⁸⁴ This standard has led to the subjectivising of the test for self-defence. The terms "psyche" and "entire world view of an abused woman" tend to relate to the issue of culpability. Any issue relating to culpability is dealt with in terms of putative self-defence, which is subjectively assessed. Therefore, from her perspective "she would have honestly believed [her] life was in danger but objectively viewed, [it was] not".¹⁸⁵ If this is what Satchwell J had in mind, it was not expressly stated. No mention is made at any point in the judgment of this defence. While it may be difficult to establish which subjective factors should be taken into consideration, judges and defence counsel are expected to operate within the parameters set by the law: objective elements in criminal liability are objectively assessed in terms of *actus reus* and subjective or mental elements of the crime are transferred to the enquiry regarding the *mens rea* (state of mind) of the accused.¹⁸⁶ The reason for this position is that self-defence is regarded as a ground for justification where the emphasis is placed on the act and not on the person who acted in self-defence. Accommodating an actor's personal psychology would undermine this ground for justification.¹⁸⁷

¹⁸¹ Walker 1991 *Psychotherapy* 21.

¹⁸² APA *Diagnostic and Statistical Manual* 424-429.

¹⁸³ *S v Engelbrecht* 2005 2 SACR 41 (W).

¹⁸⁴ Reddi 2005 *SACJ* 269.

¹⁸⁵ *S v De Oliveira* 1993 2 SACR 59 (A) 163i-j.

¹⁸⁶ Snyman 1979 *Int'l & Comp L Q* 212.

¹⁸⁷ Burke 2002 *N C L Rev* 242.

Perhaps it could be suggested that Satchwell J was in fact alluding to the fact that the test of reasonableness incorporated both objective and subjective components, but that the appreciation of the situation by the abused woman and her belief as to the reaction required needs "an objectively verifiable basis for such perception", which could be elicited through a combination of evidence, including expert evidence.¹⁸⁸ The problem is that in determining if the accused acted lawfully, the test must remain objective: what the fictitious reasonable person in the position of the accused, and in the light of all the circumstances, would have done.¹⁸⁹ The problem is that a person acting in self-defence may not benefit from the prior knowledge that she has of her attacker,¹⁹⁰ and it seems as if South African courts are moving towards a more qualified objective test of self-defence. In *S v T*¹⁹¹ the court went so far as to say that—

The actions of both the attacker and the defender leading up to the attack are relevant with reference to the question of whether the boundaries of self-defence have been exceeded. A person who is prone to violence can as a last resort rely on the defence whereby the question will be not what the reasonable person would have thought but what the defender knows about his attacker.¹⁹²

Requiring that a person's self-defensive act be objectively reasonable raises an important question: if the person's act was not reasonable, could they have acted otherwise?¹⁹³ This point is critical, since South African law punishes only voluntary acts.¹⁹⁴ The concept of reasonableness necessarily entails acceptance of the basic Hobbsean/Lockean proposition that equal individuals in a state of nature cannot exercise complete freedom of action without interfering with each other's rights. Therefore, in an attempt to mediate this inevitable conflict, reasonableness establishes an objective boundary between acceptable exercises of individual freedom and unacceptable interferences with the rights of others. This boundary is

¹⁸⁸ *S v Engelbrecht* 2005 2 SACR 41 (W) para 359.

¹⁸⁹ *S v Motleleni* 1976 1 SA 403 (A) 406c.

¹⁹⁰ Burchell and Hunt Burchell and Hunt *South African Criminal Law* (1983) 331.

¹⁹¹ *S v T* 1986 2 SA 112 (O).

¹⁹² *S v T* 1986 2 SA 112 (O) 132 (own translation).

¹⁹³ Heller 1998 *Am J Crim L* 12.

¹⁹⁴ Packer *Limits of Criminal Sanction* 74-75.

determined by looking to prevailing social norms.¹⁹⁵ However, it is submitted that the courts have gone too far in qualifying the objective test in the manner set out in *Engelbrecht*.¹⁹⁶ Assuming Satchwell J is correct in incorporating the actor's altered perceptions (ie the abused woman's psyche, make-up and whole-world view) into the objective test, this would prove unworkable. First, in cases of non-confrontational killings, even where there is expert testimony explaining how the battered woman's syndrome affects individual perception, the judge has no meaningful way to determine whether that abused woman's belief in the imminence of danger is reasonable when viewed from her distorted perspective.¹⁹⁷ In the light of the fact that the cycle of domestic violence has three distinct phases the judge would need to know where the abused woman's allegedly defensive use of force fell within the cycle, and how long each distinct phase typically lasted, before being able to determine the reasonableness of the perception of imminent harm. Therefore, if an abuser becomes contrite and apologetic immediately before he fell asleep intoxicated, it would follow from the cycle theory of violence that there was no imminent threat of harm, and no reasonable belief otherwise, until the contrition phase was complete and the tension-building phase was well under way.¹⁹⁸ In other words, once the abuser has been very violent towards her, any implied or minor act of violence can be potentially understood by the woman as a reasonable and imminent threat to her physical integrity.¹⁹⁹ A further problem is that this model presumes that all abused women would have similar perceptions of and respond along similar lines to dangerous situations. Not all abused women share the same perception of the degree of immediacy of a threat, nor do they respond in the same way.²⁰⁰ Furthermore, even if battered woman syndrome was useful in supporting an abused woman's account of her subjective perceptions, the theory would do little to support a claim that such perceptions were objectively reasonable. Where an abused woman subjectively but unreasonably believes that her use of force is justified, she

¹⁹⁵ Unikel 1992 *NWU L Rev* 329-330.

¹⁹⁶ *S v Engelbrecht* 2005 2 SACR 41 (W).

¹⁹⁷ Goldman 1994 *Case W Res L Rev* 200-201.

¹⁹⁸ Burke 2002 *N C L Rev* 241.

¹⁹⁹ Reddi 2005 *SACJ* 270.

²⁰⁰ Reddi 2005 *SACJ* 270-271.

has a claim of putative self-defence which may lead to an acquittal.²⁰¹ Second, even if the court were to disregard the source of her perceptions as a subjective/psychological phenomenon, the actual effect of the syndrome on an actor's perceptions would have to be considered. While it is true that a battered woman who is afraid and isolated might respond more quickly and intensely to a "threat" and therefore might overestimate the danger, it is clear that her initial extreme responses to abuse might become over-generalised and might occur in situations where there is no objective danger.²⁰²

While the argument of putative self-defence is available, if the objective test does not sufficiently retain its objective character it will become increasingly difficult to distinguish between self-defence and putative self-defence. Consider for instance the developments in the Canadian law of self-defence. In section 34(2) of the *Canadian Code*²⁰³ the term "reasonable" is expressly stipulated when determining the existence of self-defence, as well as in determining the parameters of the accused's conduct. What is interesting is that Lamer J in *R v Patel*²⁰⁴ noted that in terms of the wording of section 34(2) of the Code, there are three constituent elements of self-defence: (a) the existence of an unlawful assault; (b) a reasonable apprehension of a risk of death or grievous bodily harm; and (c) a reasonable belief that it is not possible to protect oneself from harm except by killing. It was necessary to determine if the accused's perception was reasonable (objectively determined).²⁰⁵

The judge went on to note that—

there is no formal requirement that danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger, and a reasonable belief that she could not extricate herself otherwise than by killing the attacker.²⁰⁶

²⁰¹ *S v De Oliveira* 1993 2 SACR 59 (A).

²⁰² Goldman 1994 *Case W Res L Rev* 201.

²⁰³ *Canadian Criminal Code*, 1985.

²⁰⁴ *R v Patel* 1994 87 (CCC) 3d 97 (SCC).

²⁰⁵ *R v Patel* 1994 87 (CCC) 3d 97 (SCC) 7-8.

²⁰⁶ *R v Patel* 1994 87 (CCC) 3d 97 (SCC) 8.

Further, it would appear as if the term "reasonable" does not exclude factors that are beyond the accused's control.²⁰⁷ Nowhere is this view more pertinent than in the case of *R v Lavallee*,²⁰⁸ a landmark decision insofar as the court admitted expert testimony relating to battered woman syndrome.

In respect of the hypothetical reasonable man, the accused's perception of imminent harm and the need for deadly force did not appear to rest on reasonable and probable grounds. The reason proposed for this was that the accused shot her unarmed husband in the back of the head, as he was leaving the room. Wilson J noted that the court could not appreciate the accused's perspective without the consideration of expert evidence on battered woman syndrome:

How can the mental state of the accused be appreciated without it? The average member of the public can be forgiven for asking why would the woman put up with that treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect her to pack her bags and go. Where is her self-respect?²⁰⁹

Expert evidence of the psychological effects of battering was therefore relevant and necessary to assist the court in determining the mental state of the accused and ascertaining whether or not her belief in imminent harm and the need for lethal defensive force was reasonable, since "the definition of what is reasonable must be adapted to the circumstances which are, by and large, foreign to the world inhabited by the reasonable man".²¹⁰ The judge noted this expert testimony in assessing two specific elements: imminence²¹¹ and necessity.²¹² To satisfy these requirements for self-defence, the accused had to demonstrate that she reasonably believed that she

²⁰⁷ *R v Nelson* 1992 71 CCC (3d) 449 (Ont CA). These include not only the young age of the accused in determining reasonableness, but also conditions of arrested intellectual or mental development. In *R v Melaragni* 1992 96 (CCC) (3d) 78 (Ont Court GD) 82, it was held that where the accused has private knowledge of his attacker (that the attacker is extremely aggressive), he is entitled to avail himself of such information when acting in self-defence.

²⁰⁸ *R v Lavallee* 1999 55 CCC (3d) 97.

²⁰⁹ *R v Lavallee* 1999 55 CCC (3d) 114.

²¹⁰ *R v Lavallee* 1999 55 CCC (3d) 114.

²¹¹ Section 34(2)(a) *Canadian Criminal Code*, 1985.

²¹² Section 34(2)(b) *Canadian Criminal Code*, 1985.

was in imminent danger of grievous bodily harm at the time she shot her husband, and that she reasonably believed that lethal force was necessary to avoid this harm.²¹³

The reasonableness requirement imposed an objective standard on the accused's subjective apprehension of danger and the need for deadly force, and it placed in issue her state of mind at the time when she acted in self-defence: it asked whether her perception was based on reasonable and probable grounds. The rationale behind the imminence requirement was that defensive force can only be justified if the accused faces an uplifted knife or pointed gun, making it reasonable for her to suppose that there is no time to escape or get help.²¹⁴ On this reading of the law, the accused's defensive act would appear unjustified since her husband's back had been turned and therefore the threat was not imminent.²¹⁵ Despite this, Wilson J maintained that the cyclical aspect of battering relationships begets a degree of predictability to the violence that is absent in isolated encounters between strangers. Predictability therefore confers heightened sensitivity, which imparts a unique ability to detect subtle changes in the abuser's usual pattern of violence that may signal an escalation in the imminence of danger.²¹⁶

Given this "heightened sensitivity", the abused woman did not need to wait until the attack was in progress to defend herself, since—

Due to their size, strength, socialization and lack of training, women are typically no match for men in hand-to-hand combat ... therefore she need not wait until the physical assault is 'underway' before her apprehensions can be validated ... it would be tantamount to sentencing her to 'murder' by instalment.²¹⁷

Wilson J went on to state that expert evidence on "battered woman syndrome" could show how the accused meets the necessity requirement in the law of self-defence. To satisfy this requirement, the accused needed to show that she reasonably

²¹³ *R v Lavallee* 1999 55 CCC (3d) 113.

²¹⁴ Kazan 1997 *Man L J* 553.

²¹⁵ Kazan 1997 *Man L J* 555.

²¹⁶ *R v Lavallee* 1999 55 CCC (3d) 120.

²¹⁷ *R v Lavallee* 1999 55 CCC (3d) 120.

believed that shooting her husband was the only way to avoid grievous bodily harm or death.²¹⁸ To assist the court to understand why the accused stayed with her abusive husband, Dr Shane testified that repeated exposure to abuse had induced a psychological condition which caused her to believe that she was powerless to escape, since "[a]lthough there were obviously no steel fences keeping her in [the accused felt] that there were steel fences in her mind which created for her an incredible barrier psychologically which prevented her from moving out".²¹⁹ Based on this view, the accused suffered from a form of "learned helplessness"²²⁰ which caused her to "[lose] the motivation to react and [become] helpless and ... powerless ... paralyzed with fear".²²¹ The judge considered that this evidence suggested that the accused's exposure to repeated abuse made her a kind of psychological hostage to her husband. When Rust (the husband) threatened to kill her on the night of his demise, her situation was not unlike that of a hostage who had just been informed by her captor that he would kill her in three days. The judge concluded that it would be reasonable for persons who found themselves in such a situation to seize the first opportunity to kill their captor, rather than to wait until the husband made his attempt to kill them instead.²²² The judge emphasised the point that it was inappropriate that a woman's failure to leave her own home should be used to cast doubt on her plea of self-defence, since—

[It] is not for the jury to pass judgment on the fact that an accused battered woman stayed in the relationship. Still less is it entitled to conclude that she forfeited her right to self-defence for having done so ... the traditional self-defence doctrine does not require a person to retreat from her home instead of defending herself. A man's home may be his castle but it is also the woman's home even if it seems to her more like a prison in the circumstances.²²³

Therefore, it had to be decided by the jury "whether, given the history, circumstances and perceptions of the accused, her belief that she could not preserve

²¹⁸ *R v Lavallee* 1999 55 CCC (3d) 121.

²¹⁹ *R v Lavallee* 1999 55 CCC (3d) 124.

²²⁰ *R v Lavallee* 1999 55 CCC (3d) 121.

²²¹ *R v Lavallee* 1999 55 CCC (3d) 125.

²²² *R v Lavallee* 1999 55 CCC (3d) 125.

²²³ *R v Lavallee* 1999 55 CCC (3d) 125.

herself from being killed by Rust that night except by killing him first was reasonable".²²⁴

On appeal the issues of law were dismissed, the finding of the jury was upheld, and the accused was acquitted on the basis of self-defence. It is evident that the importance of this case lays in the fact that the court acknowledged that women's experiences were not captured by the hypothetical construct "the reasonable man", and therefore proposed the admission of evidence of "battered woman syndrome", to counter this. Such expert testimony is relevant, because (a) it reinforces the accused's credibility; (b) it goes to the state of mind of the accused to show she honestly believes she was in imminent danger; and (c) it goes to the reasonableness of the accused's belief that she was in danger of death or grievous bodily harm.²²⁵ This finding found support in *R v Malott*,²²⁶ where L'Heureux-Dube's finding is of importance to abused women, since "allowing expert evidence in connection with battered wife cases can be considered as legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly".²²⁷ The judge went on to point out that by allowing such expert testimony it is now accepted that a woman's perception of what is reasonable is influenced by her gender and personal experiences.²²⁸ The judge noted that such a legal development was significant, since—

it demonstrated a willingness to look at the whole context of women's experience in order to inform the analysis of particular events. But it is wrong to think of this development of the law as merely an example where an objective test - the requirement that an accused claiming self-defence must reasonably apprehend death or grievous bodily harm - has been modified to admit evidence of the subjective perceptions of a battered woman ... The perspectives of women, which have historically been ignored, must now equally inform the "objective" standard of the reasonable person in relation to self-defence.²²⁹

²²⁴ *R v Lavallee* 1999 55 CCC (3d) 125.

²²⁵ Struesser 1990 *Man L J* 198.

²²⁶ *R v Malott* 1998 1 SCR 123 (SCC).

²²⁷ *R v Malott* 1998 1 SCR 123 (SCC) 469.

²²⁸ Labuschagne 1998 *THRHR* 538 (own translation).

²²⁹ *R v Malott* 1998 1 SCR 123 (SCC) 470-471.

The judge stipulated that the reasonable woman standard was another component of the reasonable person standard.²³⁰ Regarding the enquiry into moral blameworthiness, the focus had to be on the reasonableness of her actions within the context of her personal experience, as well as her experience as a woman, and not on her status as an abused woman and the fact that she suffered from battered woman syndrome, and the judge went on to state that by

emphasizing learned helplessness, her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from "battered woman syndrome" the legal debate shifts from the objective rationality of her actions to preserve her own life, to those personal inadequacies which apparently explain her failure to flee from her abuser. Such emphasis complies too well with society's stereotypes about women. Therefore, it should be scrupulously avoided, because it only serves to undermine the important advancements achieved by the decision in *Lavallee*.²³¹

By insisting on a reasonable woman standard and the (partial) practical realisation thereof by means of allowing expert testimony concerning battered woman syndrome in determining the requirements and boundaries of self-defence by means of the reasonableness requirement, it would appear as if the standard of the reasonable person is starting to lose its objective nature. This is so because—

the anthropo-legal universal process of deconcretisation is incessantly eroding the so-called foundation of private defence in criminal law. Reference in this regard is made to subjective factors pertaining to the person being attacked as well as subjective factors pertaining to the attacker.²³²

A similar trend has been followed in American law and is beginning to be demonstrated in the South African law of self-defence. The end result of such an approach may be that "it is predicted that the legal requirements for private defence will eventually be equated with those currently required for putative private defence".²³³ Not only is the process of deconcretisation inevitable, but it will eventually result in the criminal law element of unlawfulness becoming redundant.²³⁴

²³⁰ Labuschagne 1998 *THRHR* 540 (own translation).

²³¹ Labuschagne 1998 *THRHR* 540 (own translation).

²³² Labuschagne 1999 *Stell L R* 68 (own translation).

²³³ Labuschagne 1999 *Stell L R* 68.

²³⁴ Labuschagne 2003 *Obiter* 121 (own translation).

3 Should imminence remain a requirement in South African law of self-defence?

It is submitted that the *Engelbrecht*²³⁵ case unacceptably broadened the scope of private defence in its unanimous opinion that further domestic violence was imminent or inevitable.²³⁶ On the one hand, it could be suggested that Satchwell J correctly considered the legal convictions of society in determining the unlawfulness of the conduct. The imminence requirement was in fact applied. However, this was done in terms of the legal convictions of society, which now also include a consideration of the fundamental human rights as guaranteed in the Bill of Rights. Therefore, perhaps Satchwell J did not in fact dispense with the "imminence" requirement. Instead, she clearly delineated the extended meaning of the imminence requirement by noting that the cycle of abuse was in fact "inevitable". Furthermore, given the provisions of sections 8 and 39 of the *Constitution* and the consideration of fundamental human rights in the determination of unlawfulness, precedent is no longer an obstacle in the way of the adaptation of the common-law requirement of imminence to comply with the values on which South African society is based.

While it could be argued that constitutional norms could at least provide a broad-based "principle" or set of principles on which to draw distinctions in determining which factors should be considered in extending the imminence requirement, it is submitted that this view is impractical. The concept of unlawfulness, which hinges on the legal convictions of the community, has not only found favour with South African courts, but requires the judge not to impose his own subjective preferences onto the case, but to seek the solution in the sentiments of "all enlightened individuals in society" or the "legal convictions of the community's lawmakers".²³⁷ The enquiry into reasonableness in the context of unlawfulness can accommodate only the generic facts or the physical act, assessed in terms of the constitutional rights, where the "reasonable man" test has become increasingly subjectivised to

²³⁵ *S v Engelbrecht* 2005 2 SACR 41 (W).

²³⁶ *S v Engelbrecht* 2005 2 SACR 41 (W) para 398.

²³⁷ Flack 1999 *Responsa Meridiana* 82.

take into account a number of the personal qualities of the accused. Although there is a need for flexibility in the area of the grounds for justification, and this makes objectivity more elusive, there have to be clear limits. Judges are expected to make value judgments in this context all the time, when they assess the extent to which an accused's conduct falls within the limits of self-defence. The realm of objectivity is in the recognition of pre-existing limits. The use of discretion in applying such pre-existing rules is well-established, but it needs to be established if it is adequately countenanced. It is submitted that it is not. The concept fails to be objectivised sufficiently, and furthermore, judges are granted too much discretion in this respect. The *Engelbrecht*²³⁸ case is a clear example of such unfettered discretion.

While the *Constitution* does not establish a hierarchy of rights, judges and academics have acknowledged that some rights are more foundational than others, constituting a core of rights from which others are derived. The right to life is antecedent to all other rights in the *Constitution*.²³⁹ Surely the abuser's right to his life supersedes the abused woman's right to dignity or bodily integrity? It is therefore submitted that Satchwell J went too far when she declared that "even the quality of life, her home, her emotional and psychological wellbeing, her freedom as well as those interests of her children are protected by the right to private defence".²⁴⁰ While it could be stated that all three rights are of great importance, from an objective standpoint²⁴¹ these rights have limitations and to meet constitutional muster must be linked closely to its purpose.²⁴² As Ally and Viljoen have noted, "the use of violence, especially lethal force, can only be justified if it is necessary, that is, if it is the only means to avoid death or grievous bodily harm".²⁴³ Perhaps from the abused woman's position²⁴⁴ she was correct to kill her abuser. However, it is submitted that she had no way of knowing whether her abuser would have killed her at that very

²³⁸ *S v Engelbrecht* 2005 2 SACR 41 (W).

²³⁹ *S v Makwanyane* 1995 6 BCLR 665 (CC) para 326.

²⁴⁰ *S v Engelbrecht* 2005 2 SACR 41 (W) para 345, discussed in Snyman *Criminal Law* (2006) 106 n 36.

²⁴¹ *S v Engelbrecht* 2005 2 SACR 41 (W) para 144.

²⁴² Section 36(1)(d) *Constitution*. Ally and Viljoen 2003 *SACJ* 133, note that an important factor in this evaluation is the question of whether or not less restrictive means are available to obtain the stated objectives.

²⁴³ Ally and Viljoen 2003 *SACJ* 133.

²⁴⁴ Utilising the test set out in *S v Engelbrecht* 2005 2 SACR 41 (W).

moment. Indeed, the abuse had been going on for some time. There were therefore less-restrictive means of extricating herself from her situation. She could have called the police or left the premises.²⁴⁵ Although an abused woman is not expected to flee her home, in terms of the *Constitution*, it is submitted that the abuser's life takes precedence over the abused woman's right to remain in her home. Not only did Satchwell J in *Engelbrecht*²⁴⁶ not correctly identify whether or not the limitation on the accused's rights was justifiable,²⁴⁷ but the court failed to take cognisance of established precedence. Interpretation or development of the common law requires that the court must promote the spirit, purport, and objects of the Bill of Rights. It is therefore meant to adapt or correct applicable law to reflect common law, not to change it in its entirety.²⁴⁸ While proponents of the "battered woman syndrome" have attempted to introduce such evidence in cases (including the *Engelbrecht* case) to explain the circumstances that may have impacted upon the woman's conduct, it is submitted that South African courts - in any event - already do this to a limited extent, as a matter of course.²⁴⁹

Later on, however, the court goes on to state that "the accused had not afforded the legal system, the South African police Service and society a fair chance of helping her. It had not been objectively reasonable in all the circumstances for the accused to kill the deceased when she did".²⁵⁰ How many times would it be necessary for the accused to have contacted the police before it would have been sufficient for her to have killed her husband? If the violence is to be viewed as "inevitable", if the abused woman is suffering from "battered woman syndrome", then it becomes clear that she could not have acted other than the way she did. It is submitted that the traditional element of imminence should remain in force. If the abused woman is being attacked and the threat is imminent (in the traditional sense), then she should be able to avail to herself of self-defence, although it should be noted that the court should also consider the fact that the battered women placed herself in this

²⁴⁵ *S v Engelbrecht* 2005 2 SACR 41 (W) para 448.

²⁴⁶ *S v Engelbrecht* 2005 2 SACR 41 (W).

²⁴⁷ *S v Walters* 2002 7 BCLR 663 (CC).

²⁴⁸ *Ally and Viljoen* 2003 SACJ 133.

²⁴⁹ See the case of *S v Steyn* 2010 1 SACR 411 (SCA).

²⁵⁰ *S v Steyn* 2010 1 SACR 411 (SCA) paras 418; 448.

dangerous situation.²⁵¹ In the case of *S v Norman*,²⁵² Judy Norman stayed with her abusive husband for 20 years. But now imagine that Judy killed her husband in a confrontational situation (ie where the attack was imminent). A woman who stays in an abusive relationship for 20 years cannot when an attack is taking place (that is to say when an attack is imminent in the traditional sense) state that she killed her abuser because she feared for her life. She had been attacked many times before. What makes this time different from the other times? She stayed, knowing that a future attack was a very real likelihood. The persistence of the attack (over 20 years) would militate against her claim of self-defence. In respect of putative self-defence, the abused woman's perspective and what she knew are critical. If this is true, then she cannot reasonably claim that she knew her abuser would kill her. Again, what would make this occasion different from the others? If, however, the abused woman "snapped" and really believed that her abuser would kill her, then she should be pleading non-pathological incapacity instead.²⁵³ Therefore any reference to mental and emotional characteristics, including recognised psychological disorder symptoms (such as "battered woman syndrome") should not be included in qualifying the objective test.²⁵⁴ Therefore—

It would be better for the court to ask whether a reasonable person in similar (but not all) of the circumstances would have considered the threat to be imminent. This is the standard that is already used in South African law.²⁵⁵

While it is obviously true that if a reasonable person were defined to be just like the accused in every respect, he would arguably do exactly what the accused did under the circumstances. This, however, is an inherent difficulty that self-defence law confronts whenever it tries to determine which of the accused's characteristics are properly considered in making an objective inquiry: the perennial problem of

²⁵¹ In terms of *actio libera in causa*.

²⁵² *S v Norman* 378 SE 2d 8 12 (NC) 1989.

²⁵³ Burchell and Milton *Principles of Criminal Law* (1997) 109.

²⁵⁴ This view is supported by South African writers such as Burchell and Hunt *South African Criminal Law* (1970) 23 and De Wet and Swanepoel *Strafreg* (1985) 69.

²⁵⁵ Reddi 2005 *SACJ* 270-271.

"striking the balance between the defender's subjective perceptions and those of the hypothetical reasonable person".²⁵⁶

The case of *S v Steyn*²⁵⁷ is a case in which courts have demonstrated that they are competent to take the abused woman's situation into account. In this case the accused shot and killed her former husband when he threatened her with a knife.²⁵⁸ The deceased had abused the accused both mentally and physically over a number of years.²⁵⁹ On the night of the shooting, the accused told the deceased that she had contacted her medical aid to ascertain if they would pay for the treatment of her anxiety disorder. This statement sent the deceased into a rage and he threatened and choked her. As a result she fled to the bedroom. However, since she was not in good health and required food before taking medication for numerous medical conditions,²⁶⁰ she ignored the deceased's instructions to remain in the bedroom. When the deceased saw her his reaction was immediate and violent. He jumped up and proceeded towards her with a steak knife that he had been using to eat his meal with. She perceived this threat as deadly serious, and fearing for her life she raised her revolver and fired a single shot.²⁶¹

In determining whether the attack was imminent, the court *a quo* held that when the accused left her bedroom in order to fetch food from the kitchen, a reasonable person in the accused's position would have foreseen the possibility that the deceased in the condition and mood he was in might attempt to attack her. Therefore a reasonable person would not have proceeded to place herself in the position of danger where she might be forced to use a weapon to defend herself. The court found that in this instance she had acted unreasonably and therefore

²⁵⁶ Reddi 2005 *SACJ* 279-271.

²⁵⁷ *S v Steyn* 2010 1 SACR 411 (SCA) paras 418; 448.

²⁵⁸ *S v Steyn* 2010 1 SACR 411 (SCA) para 1.

²⁵⁹ For instance, he would often tell her that he would slit her throat, with a smile on his face, and regularly locked her in the bedroom for extended periods of time. She often kept food in her bedroom to sustain herself during these periods.

²⁶⁰ These included high blood pressure, a stomach ulcer, and chronic back pain (*S v Steyn* 2010 1 SACR 411 (SCA) para 5).

²⁶¹ *S v Steyn* 2010 1 SACR 411 (SCA) para 10.

negligently.²⁶² The Court of Appeal found that the court *a quo* had misdirected itself by confusing the question of unlawfulness with the test of negligence.²⁶³ At any rate, the test for negligence would arise only once it had been established that the accused's conduct was unlawful.²⁶⁴

The court of appeal then turned its attention to the question of the lawfulness of the accused's conduct. The court noted that the conduct of the alleged offender was to be measured against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of society, and therefore considered lawful.²⁶⁵ Modern legal systems do not insist on strict proportionality between the attack and the defence. Rather, the proper consideration is whether - taking all factors into account - the accused acted reasonably in the manner in which she defended herself or not.²⁶⁶ The factors relevant to the decision in this regard would include the following: first, the relationship between the parties; second, their ages and respective genders (given that Mrs Steyn was female, and that women tend under normal circumstances to be the physically weaker sex, she may have had to resort to the use of weapons to defend herself); third, the location of the attack; fourth, the nature, severity and persistence of the attack between the parties; fifth, the nature of any weapon used in the attack; sixth, the nature and severity of any injury or harm likely to be sustained in the attack; seventh, the means available to avert the attack; eighth, the nature of the means used to offer defence; ninth, the nature and extent of the harm likely to be caused by the defence; and lastly, the value of the interest(s) threatened.²⁶⁷

When considering if these factors are sufficient to take the abused woman's situation into account, it becomes clear that they are adequate. For instance, in relation to the location of the incident it is clear that it could not have been expected of the accused to gamble with her life by turning her back on the deceased, who was

²⁶² *S v Steyn* 2010 1 SACR 411 (SCA) para 17.

²⁶³ *S v Steyn* 2010 1 SACR 411 (SCA) para 18.

²⁶⁴ *S v Steyn* 2010 1 SACR 411 (SCA) para 18.

²⁶⁵ *S v Steyn* 2010 1 SACR 411 (SCA) para 18.

²⁶⁶ *S v Steyn* 2010 1 SACR 411 (SCA) para 19.

²⁶⁷ *S v Steyn* 2010 1 SACR 411 (SCA) para 19.

extremely close to her and about to attack her with a knife, in the hope that he would not stab her in the back. She would have had to turn around in order to return to her bedroom, by which time he would have been upon her and flight would have been futile.²⁶⁸ In relation to the history of the relationship between the accused and the deceased, it was such that she never had been able to resist him or his unlawful assaults during the many years that she had been the subject of his abuse. This shows that her training in conflict management had been of no use to her in her daily life. She had clearly been dominated by him.²⁶⁹ Given that she was in an emotional state and frightened as a result of having been assaulted by the deceased, she was entitled to leave her bedroom, in her own home, in order to get food. There was nothing unlawful in her action in doing so, and it cannot have been expected of her to telephone for assistance every time she needed to do something in her own home.²⁷⁰

What these factors demonstrate is that the court already takes the abused woman situation into account, to a limited extent, as a matter of course. Since no single profile of a battered woman exists, it would be inadvisable to expect the court to go so far as to attempt to assess whether or not the killing was a reasonable response for a battered woman.²⁷¹ However, the court would also have to take into consideration the difficulty that the abused woman faced in extricating herself from this position.

3 Conclusion

By utilising an imminence requirement, the courts have been able to limit the intrinsic scope of self-defence. Although it has been noted that the traditional requirement of imminence does not adequately cater for battered women's situations, it is submitted that the variations that have been introduced in foreign law will not work in principle in South African law. Not only does no precedent exist

²⁶⁸ *S v Steyn* 2010 1 SACR 411 (SCA) para 21.

²⁶⁹ *S v Steyn* 2010 1 SACR 411 (SCA) para 23.

²⁷⁰ *S v Steyn* 2010 1 SACR 411 (SCA) para 23.

²⁷¹ Reddi 2005 *SACJ* 175.

for the use of such varied standards of imminence, but the range of criticisms levelled at these suggests that it would be better to stay with the *status quo*: the traditional element of imminence. Furthermore, any reference to the "reasonable battered woman" standard is unnecessary, since South African courts already take the abused woman's situation into account, to a limited extent, by considering several factors when determining whether the abused woman acted reasonably. One case which has illustrated this point well is *S v Steyn*.²⁷² By rethinking certain factors in the situation as a set of relatively innocuous normative propositions, the abused woman's situation is consistent with standard propositions in the law of self-defence.

²⁷² *S v Steyn* 2010 1 SACR 411 (SCA).

Bibliography

Aggergaard 2002 *Wm Mitchell L Rev*

Aggergaard SP "Criminal Law-Retreat from Reason: How Minnesota's New No-retreat Rule Confuses the Law and Cries for Alteration" 2002 *Wm Mitchell L Rev* 657-694

Ally and Viljoen 2003 *SACJ*

Ally D and Viljoen F "Homicide in Defence of Property in an Age of Constitutionalism" 2003 *SACJ* 121-136

APA *Diagnostic and Statistical Manual*

APA *Diagnostic and Statistical Manual of Mental Disorders* 4th ed (APA Washington 1994)

Ashworth *Principles of Criminal Law*

Ashworth A *Principles of Criminal Law* 4th ed (Oxford University Press Oxford 2003)

Bruce 2003 *SAJHR*

Bruce "Killing and the Constitution - Arrest and the Use of Lethal Force" 2003 *SAJHR* 430-454

Burchell and Hunt *General Principles of Criminal Law* (1970)

Burchell EM and Hunt PMA *South African Criminal Law and Procedure: General Principles of Criminal Law* Vol 1 (Juta Cape Town 1970)

Burchell and Hunt *General Principles of Criminal Law* (1983)

Burchell EM and Hunt PMA *South African Criminal Law and Procedure: General Principles of Criminal Law* Vol 1 2nd ed (Juta Cape Town 1983)

Burchell and Milton *Principles of Criminal Law* (1997)

Burchell JM and Milton JRL *Principles of Criminal Law* 2nd ed (Juta Cape Town 1997)

Burchell and Milton *Principles of Criminal Law* (2005)

Burchell JM and Milton JRL *Principles of Criminal Law* 3rd ed (Juta Cape Town 2005)

Burke 2002 *N C L Rev*

Burke AS "Rational Actors, Self-Defense and Duress; Making Sense not Syndromes out of the Battered Woman" 2002 *N C L Rev* 211-316

De Wet and Swanepoel *Strafreg*

De Wet JC and Swanepoel HL *Strafreg* 4th ed (Butterworths Durban 1985)

Ferzan 2004 *Ariz L Rev*

Ferzan KK "Defending Imminence: From Battered Women to Iraq" 2004 *Ariz L Rev* 213-262

Flack 1999 *Responsa Meridiana*

Flack L "The South African Criminal Law under Analysis in our new Constitutional Dispensation: Are we Looking for an 'Excuse'? An Exposition of *S v Goliath* 1972 (3) SA 1 (A)" 1999 *Responsa Meridiana* 69-78

Fletcher 1996 *U Pitt L Rev*

Fletcher GP "Domination in the Theory of Justification and Excuse" 1996 *U Pitt L Rev* 507-553

Goldman 1994 *Case W Res L Rev*

Goldman LE "Non-confrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-defense and the Merits of Partial Excuse" 1994 *Case W Res L Rev* 185-250

Hatcher 2003 *NYU Ann Surv Am L*

Hatcher GH "The Gendered Nature of the Battered Woman Syndrome: Why Gender Neutrality Does not Mean Gender Equality" 2003 *NYU Ann Surv Am L* 21-50

Heller 1998 *Am J Crim L*

Heller K.J "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-defense and Provocation Cases" 1998 *Am J Crim L* 1-120

Kazan 1997 *Man L J*

Kazan P "Reasonableness, Gender Difference and Self-defense Law" 1997 *Man L J* 549-576

Kaufman 2007 *New Crim L Rev*

Kaufman WRP "Self-defense, Imminence, and the Battered Woman" 2007 *New Crim L Rev* 342-369

Kremnitzer and Ghanayim 2004 *U Tulsa L Rev*

Kremnitzer M and Ghanayim K "Twenty-five Years of George P. Fletcher's Rethinking Criminal Law: Proportionality and the Aggressor's Culpability in Self-defense" 2004 *U Tulsa L Rev* 834-875

Labuschagne 1998 *THRHR*

Labuschagne JMT "Die Mishandelde Vrou-sindroom, Die Redelike Persoonstandaard end ie Grense van Noodweer" 1998 *THRHR* 538-541

Labuschagne 1999 *Stell L R*

Labuschagne JMT "Die Proses van Dekonkretisering van Noodweer in die Strafbreg: 'n Regsantropologiese Evaluasie" 1999 *Stell L R* 56-68

Labuschagne 2003 *Obiter*

Labuschagne JMT "Geregtigheids Misdaadelementologie en 'n Subjektiewe Omskrywing van Noodweer: Opmerking oor Onlangse Ontwikkeling in die Engelse en Skotse Reg" 2003 *Obiter* 103-120

Milton *Common Law Crimes*

Milton JRL *South African Criminal Law and Procedure: Common Law Crimes* Vol 2 3rd ed (Juta Cape Town 1996)

Nourse 2001 *U Chi L Rev*

Nourse VF "Self-defense and Subjectivity" 2001 *U Chi L Rev* 1189-1235

Packer *Limits of Criminal Sanction*

Packer HL *The Limits of Criminal Sanction* (Stanford University Press California 1969)

Reddi 2005 *SACJ*

Reddi M "Battered Woman Syndrome: Some Reflections on the Utility of this 'Syndrome' to South African Women Who Kill Their Abusers" 2005 *SACJ* 259-278

Ripstein 1996 *U Pitt L Rev*

Ripstein A "Self-defense and Equal Protection" 1996 *U Pitt L Rev* 685-724

Robinson *Criminal Law Defenses*

Robinson PH *Criminal Law Defenses* Vol 1 (West St Paul, Minn 1984)

Rosen 1986 *Am U L Rev*

Rosen CJ "The Excuse of Self-defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill" 1986 *Am U L Rev* 1-56

Rosen 1993 *N C L Rev*

Rosen RA "On Self-defence, Imminence, and Women Who Kill Their Abusers"
1993 *N C L Rev* 371-387

Schulhofer 1990 *Soc Phil & Pol*

Schulhofer SJ "The Gender Question in Criminal Law" 1990 *Soc Phil & Pol* 76-105

Snyman 1979 *Int'l & Comp L Q*

Snyman CR "The Normative Concept of Mens Rea - A New Development in Germany" 1979 *Int'l & Comp L Q* 184-211

Snyman *Criminal Law* (2002)

Snyman CR *Criminal Law* 4th ed (Butterworths Durban 2002)

Snyman 2003 *THRHR*

Snyman CR "Private Defence in Criminal Law - An Unwarranted Raising of the Test of Reasonableness - *S v Dougherty* 2003 (2) SACR 36 (W)" 2003 *THRHR* 325-331

Snyman 2004 *SACJ*

Snyman CR "The Two Reasons for the Existence of Private Defence and Their Effect on the Rules Relating to the Defence in South Africa" 2004 *SACJ* 178-192

Snyman *Strafreg*

Snyman CR *Strafreg* 5th ed (Butterworths Durban 2006)

Snyman *Criminal Law* (2008)

Snyman CR *Criminal Law* 5th ed (Butterworths Durban 2008)

Stark 1995 *Alb L Rev*

Stark E "Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control" 1995 *Alb L Rev* 973-1026

Steyn 1932 *SALJ*

Steyn IVZ "Noodweer" 1932 *SALJ* 462-478

Struesser 1990 *Man L J*

Struesser L "The 'Defence' of 'Battered Woman Syndrome' in Canada" 1990 *Man L J* 185-195

Unikel 1992 *NWU L Rev*

Unikel R "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence" 1992 *NWU L Rev* 326-375

Veinsreideris 2000 *U Pa L Rev*

Veinsreideris ME "The Prospective Effects of Modifying Existing Law to Accommodate Pre-emptive Self-defence by Battered Women" 2000 *U Pa L Rev* 613-644

Walker *Battered Woman*

Walker LE *The Battered Woman* (Harper Row New York 1979)

Walker 1991 *Psychotherapy*

Walker LE "Post Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Woman Syndrome" 1991 *Psychotherapy* 20-35

Register of cases

Canada

R v Lavallee 1999 55 CCC (3d)

R v Malott 1998 1 SCR 123 (SCC)

R v Melaragni 1992 96 (CCC) (3d) 78 (Ont Court GD)

R v Nelson 1992 71 CCC (3d) 449 (Ont CA)

R v Patel 1994 87 (CCC) 3d 97 (SCC)

England

Regina v Dudley Stephens 14 QBD 273 (1894)

South Africa

Du Plessis v De Klerk 1995 2 SA 40 (T)

Ex Parte Minister of Justice: In re S v Van Wyk 1967 1 SA 488 (A)

Government of Republic of South Africa v Basdeo 1996 1 SA 355 (A)

Ntanjana v Minister of Justice 1950 4 SA 398 (C)

R v Cele 1945 NPD 173

R v Hayes 1904 TS 383

R v Jack Bob 1929 SWA 32

R v K 1956 3 SA 353 (A)

R v Nomahleke 1928 GWL 8

R v Patel 1959 3 SA 121 (A)

R v Ziklalala 1953 2 SA 568 (A)

S v Baloyi 2000 1 BCLR 86 (CC)

S v De Oliviera 1993 2 SACR 59 (A)

S v Engelbrecht 2005 2 SACR 41 (W)

S v Ferriera 2004 2 SACR 454 (SCA)

S v Govender 2001 4 SA 273 (SCA)

S v Makwanyane 1995 6 BCLR 665 (CC)

S v Mnguni 1966 3 SA 776 (T)

S v Mogohlwane 1982 2 SA 587 (T)

S v Mokgiba 1999 1 SACR 534 (O)

S v Motleleni 1976 1 SA 403 (A)

S v Ntuli 1975 1 SA 429 (A)

S v Steyn 2010 1 SACR 411 (SCA)

S v T 1986 2 SA 112 (O)

S v Van Vuuren 1961 3 SA 305 (E)

S v Walters 2002 7 BCLR 663 (CC)

United States

S v Norman 378 SE 2d 8 12 (NC) 1989

Tennessee v Garner 471 US 1 (1985)

Register of legislation

Canadian Criminal Code, 1985

Constitution of Republic of South Africa, 1996

Criminal Procedure Act 51 of 1977

Domestic Violence Act 116 of 1998

List of abbreviations

Alb L Rev	Albany Law Review
Am J Crim L	American Journal of Criminal Law
Am U L Rev	American University Law Review
APA	American Psychiatric Association
Ariz L Rev	Arizona Law Review
Case W Res L Rev	Case Western Reserve Law Review
Int'l & Comp L Q	International and Comparative Law Quarterly
Man L J	Manitoba Law Journal
N C L Rev	North Carolina Law Review
New Crim L Rev	New Criminal Law Review
NWU L Rev	North Western University Law Review

NYU Ann Surv Am L	New York University Annual Survey of American Law
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Soc Phil & Pol	Social Philosophy & Policy
Stell L R	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg/South African Journal of Roman-Dutch Law
U Chi L Rev	University of Chicago Law Review
U Pa L Rev	University of Pennsylvania Law Review
U Pitt L Rev	University of Pittsburgh Law Review
U Tulsa L Rev	University of Tulsa Law Review
Wm Mitchell L Rev	William Mitchell Law Review

BATTERED WOMEN AND THE REQUIREMENT OF IMMINENCE IN SELF-DEFENCE

S Goosen*

SUMMARY

Should the South African courts abolish the traditional imminence standard, something must be used to stand in its place. The identification of the various alternatives which have been suggested to replace imminence - most notably the establishment of the "reasonable woman standard" as advanced in the case of *S v Engelbrecht* 2005 (92) SACR 41 (W) - has moved the law of self-defence into the realm of subjectivity. The end result not only undermines self-defence as a justification defence, but is also unworkable for a number of reasons. For instance, utilising expert testimony to explain how the battered woman's syndrome affects individual perception would leave a judge with no meaningful way to determine if that abused woman's belief in the imminence of danger was reasonable, even if viewed from her distorted perspective. It is suggested that no reference need be made to the "reasonable battered woman", since South African courts already do this to a limited extent by taking a number of factors into account in determining if the abused woman acted reasonably. By rethinking certain factors in the situation as a set of relatively innocuous normative propositions, the abused woman's actions can be judged in accordance with standard propositions in the law of self-defence.

KEYWORDS: Imminence and battered women; abused women; necessity and abused women; self-defence; self-defence and abused women; defences for abused women; battered woman syndrome and imminence; "immediately necessary"; right to life; putative defence; cycle of violence; proportionality and self-defence; justification and excuse and self-defence

* Samantha Goosen. LLB (UPE), LLM (Criminal Justice) (UPE), PhD (UKZN). Post-doctoral Research Fellow, University KwaZulu-Natal. Email: Goosens@ukzn.ac.za.