

Non-Pathological Criminal Incapacity
in South Africa – a Disjunction
Between Legal and Psychological Discourse?
A Case Study

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Word Count:

Abstract: 265

Main Body: 9990

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Acknowledgements

I would like to express my heartfelt appreciation to the following people:

My long-suffering family Peter, Dylan and Kate who supported and encouraged me through many ups and downs.

Advocate Craig Webster and Mushtak Parker who expressed interest in the research, gave up their time to discuss it with me and generously provided me with the transcripts.

My supervisor, Wahbie Long who consistently inspired and supported me; I will always remember your gentle wisdom and constant encouragement.

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Abstract

Over the last three decades, South African criminal law has seen the emergence of a defence currently labelled non-pathological criminal incapacity. Marked by controversy and debate from the outset, this defence has resulted in a head-on conflict between the disciplines of psychology and law in assessing the probative value of expert witness testimony. The juncture between psychological and legal discourse is riddled with a lack of consensus on legal and social constructs and constitutes a veritable semantic and conceptual minefield. The notorious road rage case, *S. v. Eadie* (2002) represents the current standing on the state of the non-pathological criminal incapacity defence. The overall aim of this project was to initiate an exploration into what would appear to be a significant knowledge gap at an interdisciplinary level. A rhetorical analysis of the psychological expert witness testimony in the *Eadie* case was conducted. The rhetorical moves and countermoves were examined with reference to the construction of the defence as well as the legitimization of ideological and institutional roles. Amongst other things, the study revealed a conflict between psychology and law on the interpretation of self-control, as well as role confusion in the interpretation of the reasonable person test and public policy. As such the involvement of expert witnesses in ultimate issue decisions is brought under the spotlight. This exploratory study makes a small inroad into understanding the basis of this disjunction as manifested in the non-pathological criminal incapacity defence; and formulates questions for potential future research in the area.

Keywords: non-pathological criminal incapacity; *S v Eadie*; psychology; criminal law; expert witness; self-control; rhetoric; disjunction.

1. Introduction

Psychological testimony plays a pivotal role in the determination of criminal incapacity in both pathological and non-pathological legal enquiries. Moreover, the question of criminal responsibility has received much media attention in recent years both internationally and locally with the emergence of seemingly highly creative legal defences couched in psychological jargon. American defence attorney, Alan Dershowitz (1994) has expressed concern that the legal system is being abused by so-called expert witnesses who use pseudo-science to serve political agendas in devising creative defences to evade criminal responsibility. He warns that this practise threatens the foundations of the American legal system. Dershowitz catalogued the various defences that have arisen which range from “black rage” and “urban psychosis” to the seemingly absurd “television psychosis” (pp. 321).

South African criminal law has paralleled this trend with the emergence of the controversial non-pathological criminal incapacity defence. Critics have called for clarity and research in this area with particular reference to the lack of empirical data on psychological testimony (Allan & Louw, 2001). Such research necessitates attempting to understand the impasse between law and psychology, informed in part by the fundamentally different epistemologies upon which they are based (Carson, 2011; Cutler & Kovera, 2011).

Historical and International Context of Non-Pathological Criminal Incapacity

Sections 78 and 79 of the Criminal Procedure Act (1977) deal specifically with the criminal capacity of the accused at the time that the crime was committed. Section 78(1) stipulates two tests: Section 78(1)(a) asks whether the accused has the cognitive ability to understand and appreciate the wrongfulness of the act, and section 78(1)(b) asks whether the accused then has the conative ability to act in accordance with this understanding of wrongfulness. Criminal capacity is lacking if either or both cognitive and conative functions are significantly impaired or non-existent.

The legal test for insanity in South Africa is rooted in English law, namely the M'Naghten's Rules of 1843. The M'Naghten test relied heavily on cognitive capacity (the scope was extended to conative capacity in *R. v. Koortz*, 1953) in ascertaining whether a mental illness or defect was present when the crime was committed. This is essentially a biological or pathological test and thus a threshold requirement for the defence of pathological criminal incapacity (Burchell & Milton, 2005). The defence cannot be raised where other areas of psychological functioning, such as affective (emotional) factors are

concerned. Instead, this area became the domain of non-pathological criminal incapacity which emerged in the 1980s in South African law where the courts began recognising extreme emotional stress and provocation of a temporary nature as a complete defence (*S. v. Arnold*, 1985; *S. v. Campher*, 1987; *S. v. Chretien*, 1981; *S. v. Laubscher*, 1988). Thus, the non-pathological incapacity defence developed through the common law unlike the insanity defence which is statutory. Of significance was that it became accepted as a general defence (rather than in terms of its specific manifestations such as provocation or intoxication), which places a heavy burden on the courts to guard against abuse and highlights the need for expert evidence (Snyman, 1992; Van Oosten, 1993). This burden is further exacerbated by the fact that our law uses a subjective test (placing itself in the shoes of the defendant) in assessing incapacity (Burchell & Milton, 2005; Pather, 2002).

Comparison of Non-Pathological Incapacity with Pathological Incapacity

An understanding of the essential differences between pathological and non-pathological incapacity is essential in determining the scope and arguable advantages of the latter (Van Oosten, 1993). The most notable advantage being that a successful non-pathological incapacity defence results in the accused's acquittal, whereas the successful insanity defence results in mental institution detention under section 78(6) of the Criminal Procedure Act (1977).

Table 1

Comparison of Non-Pathological Incapacity with Pathological Incapacity

Non-Pathological Incapacity	Pathological Incapacity
Lacking temporary criminal capacity	Lacking criminal capacity long-term
Common law defence	Statutory defence
Successful – complete acquittal	Successful – mental institution
Unsuccessful – jail	Unsuccessful – jail
Burden of proof on State to prove sanity of the accused	Burden of proof on accused to prove insanity
Expert testimony is discretionary	Expert testimony is compulsory
Test s78(1) – cognitive and conative	Test s78(1) – cognitive and conative

Whereas the statutory defence is prescriptive, the common law defence opens up a *lacuna* which, if successful, grants full exculpation. The non-pathological incapacity defence

has been described by Gillmer (1996 as cited in Africa, 2005, p. 401) as a “many-headed creature” in its creative potential and the role of psychological testimony could spell the difference between psychobabble and reliable, relevant evidence (Shuman & Gold, 2008).

Role of Psychological Testimony

Due in part to the amendments of section 78(2) by the Criminal Matters Amendment Act (1998), which conferred on the court a discretion to refer accused persons who raised the non-pathological incapacity defence for psychological observation, the probative value of expert evidence in support of the non-pathological incapacity defence is currently a highly controversial issue (Meintjies-van der Walt, 2002). Psychological testimony raises the awkward question as to how clinical and legal concepts can be reconciled; bearing in mind that what courts seek from psychologists is primarily psychological knowledge, not legal knowledge (Allan & Louw, 2001; Peay, 2011).

There is general scepticism amongst the psychiatric profession in regard to the non-pathological incapacity defence due to the ‘external causes’ of incapacity rather than known mental illnesses or mental defects (Kaliski, 2006, 2009; Stevens, 2011). In addition, due to the expert’s reliance on the accused’s *ipse dixit*¹ as regards their state of mind at the time of the alleged offence, if the accused’s evidence is questionable, the expert evidence must necessarily fail (Burchell & Milton, 2005; S. v. Eadie, 2002).

Whether psychological testimony is indispensable as a foundation for the non-pathological incapacity defence is as yet still unsettled (Van Oosten, 1993). Some cases have ruled that such testimony is not indispensable (S. v. Campher, 1987; S. v. Laubscher, 1988; S. v. Shivute, 1991), while others have held that (especially in regard to provocation) such evidence is crucial (S. v. Wiid, 1990). Where the expert evidence is led on the accused’s behalf, the burden of proof is required to create a reasonable doubt as to the existence of criminal incapacity (S. v. Campher, 1987).

Freckelton (1987) borrowing from Anglo-American law, suggests the following five criteria for assessing the validity of psychological testimony:

(i) experts must be specialists in their field of expertise; (ii) the expert’s field must be scientifically recognized; (iii) the expert evidence must go beyond common experience or knowledge; (iv) experts must state the foundation for their opinions; (v) experts should avoid

¹ The only proof we have of the fact is that the accused said it.

offering an opinion on the ultimate issue² in a case. In recent years the ultimate issue rule has been relaxed and it has not always been applied consistently. Allan and Louw (1997) suggest that practitioners should avoid expressing ultimate opinions unless explicitly asked by the judge to do so.

I would further submit that psychological testimony in support of the non-pathological incapacity defence is crucial given the subjective testing of the accused's state of mind and in light of the caution with which the courts approach this defence (Carstens & Le Roux, 2000).

Disjunction Between Psychological and Legal Discourse

Law is a language of rhetoric as well as profession of power (Sarat & Kearns, 1996). Under the common law, judges engage in a process of reshaping legal precedent by interpretation and, where necessary, by deferring to a new source of authority. Legal rhetoric not only makes law but it also validates social morality. Thus, every verdict on non-pathological incapacity also redefines public and social policy on the matter (Carroll & Forrester, 2005).

When considering the relationship between psychology and law in respect of the non-pathological incapacity defence, one has to bear in mind that whereas the question of the defence itself may well be rooted in psychology, the legal validity thereof is the final decision maker (Africa, 2005; Boister, 1996; Morse, 2007). Bersoff (1986) describes the relationship between law and psychology as a "highly neurotic, conflict-ridden ambivalent affair" (p. 155) and argues that the law has a normative thrust (in asserting moral and social values) that may conflict with the empirical emphasis familiar to psychologists.

On the other hand, psychology focuses on understanding and predicting human behavior, with much emphasis on research and empirical data as the standard for legitimate authority. The dynamic and ever-changing field of psychological research therefore poses a challenge to the courts given their adherence to the slow-changing principle of *stare decisis*³. This makes it difficult for the courts to readily change with shifting research findings when interpreting the facts of the case before them (Bersoff, 1986).

Different conceptual tools and ideologies. Further differences between psychology and the law include reference to the conceptual tools and aims of the respective disciplines. Law stresses personal agency, whereas psychology also looks at the significance of external factors beyond the individual's control; law seeks to establish liability for unlawful conduct, whereas psychology seeks to treat rather than condemn; law is retrospective, whereas

² Legal conclusions at stake in the prosecution of a crime.

³ The doctrine that a trial court is bound by precedent.

psychology is prospective; psychologists make deterministic assumptions and look for causes of human behaviour whereas lawyers assume free will and look for reasons (Haney, 1993; Reznek, 1997; Spammers, 2010). However I would submit that these differences are somewhat reductionist; in reality there is far more overlap between the disciplines. The non-pathological criminal incapacity defence is ironically, testimony to this argument itself in that the court gives credence to factors outside of the accused's control.

Terminology confusion. Many of the terms used in legislation pertaining to criminal responsibility which might seem to be psychological in origin, are in fact nothing more than legal constructs. For example the terms *insanity* and *criminal capacity* are purely legal constructs and are not psychological ones (Burchell & Milton, 2005). However Chetty (2008) argues that medical and psychological opinion is needed to add weight to the legal concept.

I would suggest that much of the conflict around the interpretation of terminology is deeply seated in the differences between the two disciplines and the language therein. The non-pathological criminal incapacity defence is highly illustrative of this point. On closer examination of the case law in this area, it becomes apparent that various psychological terms have been thrown about by defence lawyers in an attempt to explain phenomena which seemingly do not sit comfortably within either discipline (Africa, 2005; S. v. Lesch, 1983). Terms such as “emotional storm”, “narrowing of consciousness”, “annihilator rage” and “acute catathymic crisis” have emerged with the acceptance of this defence (S. v. Arnold, 1985; S. v. Campher, 1987; S. v. Lesch, 1983; S. v. Moses, 1996; S. v. Pederson, 1998).

Kaliski (2007) is critical of the non-pathological criminal incapacity defence and dismisses these highly inventive descriptions of mental state as being “unscientific” and simply another way of saying that the accused was “very very angry” (Kaliski, 2009, p. 4; Schopp, 1991). This opinion is supported by De Vos (1996), who expresses the concern that the non-pathological criminal incapacity defence will be abused by hot-tempered individuals who claim that they lacked criminal capacity as a result of being provoked. Hoctor (2001) maintains that the provocation defence used in S. v. Eadie (2002) illustrates a significant gap between law and psychology which needs to be addressed in order to obtain maximum benefit from expert evidence.

The Defence Rests - Non-Pathological Criminal Incapacity as it Currently Stands

The road rage case, *S. v. Eadie* (as an Appellate Division decision) represents the current *ratio decidendi*⁴ on the non-pathological criminal incapacity defence (2002). The case has seemingly added little clarity on the question of the current standing of the defence or the requisite criteria for lack of self-control. Snyman (2006) contends that the court in *Eadie*, although not wrong in convicting the accused, reached the verdict on flawed reasoning by equating the defence of sane automatism with conative incapacity, the second leg of incapacity (Spamers, 2010). In addition, the decision seemed to replace the existing subjective test for non-pathological criminal incapacity by introducing an element of objectivity as personified in the reasonable person test. On face value, the decision seems to abolish the availability of the non-pathological criminal incapacity defence insofar as it relates to conative incapacity. To date there has been no further clarification on the issue.

The non-pathological criminal incapacity defence is still a relatively new concept in South African law and Allan and Louw (2001) highlight the lack of empirical research on the role of the expert witness within the scope of this defence. The development of the defence has highlighted the disjunction between legal and psychological discourse; further research is needed on how best to facilitate a common goal in interpreting the individual's rights (Hoctor, 2001; Roscoe et al., 2009). The importance of language, its multiplicity of meaning and constructive powers within the context of competing discourses begs further research.

2. Rationale

It is hoped that this study will shine a spotlight on the problematic areas of the psycho-legal interface given the significant public policy implications of criminal responsibility law. Furthermore, it is hoped that this study will inform future research in this area by providing both lawyers and psychologists alike with insight into this disjunction, thereby seeking to establish a common ground of conceptual clarity and purpose in upholding the interests of justice. The legal profession would be assisted in a better understanding of the background to expert witness testimony and the limitations of clinical constructs to the application of law. Psychologist and psychiatrists will hopefully be given more insight into the ideological constraints of legal definitions and the ramifications of legal reasoning on both the individual defendant and wider public policy. In understanding these institutional and ideological differences, it is hoped that this study will contribute towards a more co-operative interaction in the future

⁴ The legal principle upon which the decision in a specific case is founded which is binding on courts of lower and later jurisdiction through the doctrine of *stare decisis*.

3. Aim of Research

The overall aim of this project was to initiate an exploration into what would appear to be a significant knowledge gap at an interdisciplinary level. The juncture between law and psychology is an uncomfortable one, riddled with a lack of consensus on legal and social constructs and a longstanding mutual suspicion between the disciplines. Yet every verdict on the basis of non-pathological criminal incapacity not only affects the individual rights of the defendant but has far reaching public and social implications.

In essence, the heart of this disjunction centres on language. Language as it manifests itself as a legal and psychological institution; language as it manifests itself in legal texts and psychological publications and finally, language as it manifests itself in persuasive action in the courtroom. This is the context within which expert psychological testimony is heard. In recognising psychological and legal language as rhetorical discourse, this research focussed specifically on the expert psychological testimony realised in *S. v. Eadie*, the current precedent for the non-pathological criminal incapacity defence. In particular this research asks:

1. What rhetorical moves and countermoves were employed in the (de)construction of the *S v Eadie* non-pathological criminal incapacity defence?
2. What institutional and ideological positions were legitimated through these moves?
3. What are the implications of the above for the non-pathological defence as well as the wider contextual implications of the psycho-legal interface?

Therefore, this exploratory study hoped to make a small inroad into understanding the basis of this conflict as manifested in the non-pathological criminal incapacity defence; and where possible develop and clarify ideas and formulate questions for potential future research in the area.

4. Theoretical Framework

A social constructionist framework was used, bearing in mind that there is no single definition for the term (Burr, 2003). Social constructionism draws attention to the fact that human experience, including perception, is mediated historically, culturally and linguistically and as such offers a “social critique” (Durrheim, 1997, p.181). Rather than trying to find one

complete definition, it is useful to see this theory of knowledge as sharing certain key assumptions as delineated by Burr (2003):

Firstly, the critical stance that it takes in regard to taken-for-granted knowledge. Rather than trying to demonstrate universal principles as in the positivist tradition, it foregrounds our particular habits of constructing the world and ourselves and questions our assumptions of knowledge. The understanding that knowledge is relative and also arises from practise gives constructionism a strong critical impetus. In this research project, much of the conflict around the interpretation of terminology is deeply seated in the differences between the two disciplines and the resultant psychological and legal constructs.

Secondly, social constructionism emphasises the cultural and historical specificity of knowledge, truth, identity, and our representations and categorisations of the world. A judge like any other human being, is a child of his/her times. Thus under the common law, where judges fashion new precedent, their use of legal language is conditioned by the same social, political, historical and cultural context as that of the rest of society.

Thirdly, it views knowledge as a product of on-going social process. Knowledge is inextricably linked to, and emerges as a product of activity and purpose, or as Burr (1995) puts it, of “social action” (p.5). This emphasises the dynamic nature of language wherein meaning is not static but evolves through social interaction and changing contexts. Accordingly, constructions sustain some patterns of social action and negate others. The ever-changing parameters of what is deemed to be non-pathological criminal incapacity, is a perfect example of society’s social construction of ‘responsibility’ through precedent and common law.

Language and Poststructuralism

The backdrop to social constructionism in this project is the post structural approach to language which holds that meaning in language is never immutable, is always open to challenge and transient by nature. If meaning is indeed always contestable, then language in turn forms the basis for potential conflict. By extension this brings up the question of power relations. The concept of power is of fundamental importance to the institutions of both law and psychology. “When we talk about conflict, we are inevitably dealing with power relations. So with the poststructuralist view of language we are drawn into a view of talk, writing and social encounters as sites of struggle and conflict, where power relations are acted out and contested” (Burr, 1995, p. 41).

5. Methods

Qualitative Research

This project focussed on describing and understanding the meaning of the language and knowledge used in psychological testimony within its courtroom and interdisciplinary context. Unlike quantitative research which focuses on measuring and controlling variables to quantify causal connections, the focus here is on understanding the construction and multiplicity of meaning within its natural setting. The word *insanity* for example means one thing in psychology, but has a very different interpretation in law. Thus meaning is not generated in a word by itself, but by the word in relation to its context. As such qualitative research takes into consideration the social, political, historical and socio-cultural background to both the legal and psychological disciplines.

Qualitative research values holistic enquiry, richness of detail, depth of understanding, subtleties and texture as opposed to reliability based on generalisation and ease of replication (Willig, 2001). Thus the case study sampling method used in this research, should not prejudice the exploratory aim of this project.

Validity, described by Willig (2001) as the extent to which research actually describes or measures that which it sets out to do, can be achieved in qualitative research in a number of ways. As it applies to this research, the text was examined in its natural adversarial state bearing the courtroom setting in mind, while reflexivity on the part of the researcher ensured that accountability was scrutinized throughout the research process.

Sampling and Data Collection

S. v. Eadie represents the current legal position on the non-pathological criminal incapacity defence. As an Appellate Division decision (the highest court in the land), this landmark decision set a legal precedent. Until an equivalent Appellate Division decision changes the ruling (or the law itself is changed), this binding precedent is currently authoritative on the meaning of the law within the scope of this defence. For this reason, it was an appropriate selection as a case study on the expert witness testimony which has helped shape this particular defence.

In addition, given that the research had to be manageable in terms of time and resource constraints, the sheer content of lengthy psychological testimony dictated against conducting a rhetorical discourse analysis on more than one legal decision. In *S. v. Eadie*, the psychological testimony is rendered by two psychiatrists and one psychologist, totalling 224

pages in total. This testimony read together with the actual court judgement itself, forms the *data corpus* for this case study.

The only legal entity with permission to uplift criminal case records from the Cape High Court upon written application by the researcher is Legal Transcriptions Western Cape. Given the prohibitive costs of such transcription, I instead approached the defence attorney and advocate directly. In addition to receiving useful background information on the case, I was supplied with a fully transcribed copy of the expert witness testimony by Eadie's Defence Counsel, Advocate Craig Webster.

Data Analysis

I used rhetorical analysis as a means of data analysis. In recognising that rhetoric is a form of discourse, I find Parker's wider definition of discourse useful; particularly where he states that discourse may be studied wherever there is meaning (Parker, 1999). Discourse in Foucauldian sense is not just the language itself but also the *way* that something gets talked about. Thus the *way* that something gets talked about is intimately connected to the way that it is ultimately *acted* upon. In the final sense therefore, discourse is a locus of *power*.

Discourse and power. The relationship of power and discourse is particularly pertinent to this research as it applies to the social and political history of both the legal and psychological disciplines. Discourse analysis as social critique "is concerned with exposing the ways in which language conspires to legitimate and perpetuate unequal power relations" (Willig, 1999, p. 10). To the extent that discourses are embedded and acted upon in power relations, they necessarily have political effects (Burr, 1995).

Discourse can be both the instrument and an effect of power (Foucault, 1978 as cited in Parker, 2005). Looking more closely at this insight and its particular application to this research, it is important to recognise the *bottom up* and *top down* approach that exists in both legal and psychological discourse. This approach highlights the fundamental duality inherent in discourse in that it is simultaneously constructing and restricting what can be known such that knowledge becomes linked to power (Young, 1987, King, 1986). In this research the legal system is a perfect example of both approaches at play. Law is as much adhered to as it is 'made'. The judge in any civil or criminal case has to defer to precedent and statute (top down) but at the same time he/she has scope to apply the law creatively (bottom up) to the facts of the case. Thus in reaching his/her decision, there is construction at play and ultimately there is power. The decision having a direct impact on the individual, which in turn has social and political implications once the decision becomes precedent. This feedback loop illustrates the circular nature of power throughout discourse. White (1985) illustrates this duality by

stating that: “Law is not just, or primarily, a set of commands working their way down from a group of legislators, bureaucrats, and judges to a population made the objects of manipulation through a series of incentives or disincentives. It is instead, a culture of argument perpetually remade by its participants in which rhetoric is understood as the art of establishing the probable by arguing from our sense of the possible.” (p. 686)

Wittgenstein (1967 as cited in Billig, 2009) famously maintained that language was a public social activity with a shared grammar. As such, he emphasised the pragmatic, instrumental use of language and this became the basis for his description of the language of law. This is a legal language whereby certain bodies have been given authoritative power to determine and alter personal relationships and behaviour through the use of words (Stroup, 1984). Wittgenstein’s contribution to the understanding of legal language is particularly crucial in a common law system where legal concepts have emerged from the resolution of actual conflicts, and are not merely deduced from abstract general principles of law.

So frequently is power hidden in the language of these disciplines that Parker (1992) insists that discourse analysts should seek to investigate what power relations are operating and in particular how forms of subjectivity are validated, while others are marginalised. “There is an intimate connection between power and institutions, and it is when discourses become embedded in institutions that they have the power to wrench our language away from its connection with our needs such that the subject is alienated” (p. 98).

Psychology as discourse is also answerable to the notion of “hidden power” in the scientific language it employs in its publications and research, and the professional opinions it offers in its diagnostic labels. Much of scientific writing is written in the passive voice, thus hiding the forces of agency at play in the attempts to assert an *objective* ascendancy on the notion of truth. Billig (2009) refers to this as the “reification” of language, stating that “ultimately we should not lose sight of the fact that the subject matter of any human psychology – whether discursive, behavioural, cognitive or whatever – is people” (p. 15).

In Danziger’s view scientific activity including psychology, is irreducibly social. Psychological classificatory terms create a framework for public discourse. To the extent that psychological language is part of social life, it is also necessarily political. Psychological categories have a political dimension because they are not purely descriptive but also *normative*. Adopting a particular psychological category and thereby implicitly rejecting a number of possible alternatives means establishing a certain norm for the recognition of human conduct (Danziger, 1997). The categories of psychological discourse have changed quite considerably over the course of time and will continue to do so; the challenge remains to

disclose the role of the “absent investigator” which lies behind every passive textual construction (Burr, 1995, p. 165).

Rhetorical discourse. I use the term “rhetorical discourse” purposefully here to highlight the fact that discourse and rhetoric blend comfortably. Billig describes rhetoric as “argumentative discourse” and suggests that within the broad field of discourse there are a variety of different approaches to language. This includes a “rhetorical flavour” which builds on the work of classical rhetoric in order to “stress the argumentative and persuasive nature of language” (Billig, 2009, p. 3).

Rhetoric emphasises the two-sidedness of human thinking, such that contradiction is central to the notion of argumentation. Billig suggests that the word “argument” has both an individual and social meaning; individual in the sense that a well-reasoned point of view is put forward, and social in the sense that a dispute between two people exists. Perelman (1979) refers to the centrality of criticism and justification in rhetoric, “every justification presupposes the existence or eventuality of an unfavourable evaluation of what we justify” (p. 138). Scientific research reveals its own inherent rhetorical dialogue as research findings are constantly being opposed (falsified) and restructured. Thus to the extent that we understand discourse to be dynamic and not static, the art of argumentation could be seen as the driving force of language. Rhetoric puts agency firmly in the hands of the discourse-user and implies that change is possible.

Law is the very profession of rhetoric and as such is often argumentatively constitutive of the language it employs. The courtroom context within which the psychological testimony is heard, represents both the heart of legal rhetoric and the stage upon which new meaning is constructed through “top down” and “bottom up” interpretations. It is here that psychological discourse comes face-to-face with legal discourse and rhetoric abounds. However inasmuch as rhetoric is the active, effectual method by which persuasion is articulated; discourse is the encompassing universe of dialogic communication.

Aristotle (trans. 1931) divided rhetoric, into five categories: *Ethos* - the source's credibility and the speaker's authority; *logos* - the logic and facts used to support a claim (induction and deduction); *pathos* - the emotional or motivational appeals; *telos* - the particular purpose or attitude of a speech; and *kairos* - the elements of a speech that acknowledge and draw support from the particular setting, time, and place that it occurs. Today these five ‘persuasive appeals’ are more commonly referred to as author, text, audience, purpose and context and as such provide a basic structure to any rhetorical analysis.

Parker's three auxiliary criteria. Parker (1992) identifies three auxiliary criteria, namely that discourses support institutions, discourses reproduce power relations and discourses have ideological effects. Fairclough (1992) refers to the "unilinear colonization" implicit in this legal code as the essential precondition for the effectiveness of the law in its function as ideology (p. 223). The issue of power and ideology as it applies to this research has already been highlighted; however Parker's specific mention of institutions which are "structured around and reproduce power" is particularly pertinent to this research (p. 12). Both law and psychology could be considered institutions within Parker's interpretation and this context will be considered in this analysis. Therefore, this analysis will combine a micro-level rhetorical analysis and a macro-level exploration of Parker's auxiliary criteria.

6. Ethical Considerations

Insofar as this research does not involve human participants and the transcripts are available for public perusal, there are no direct ethical issues that require attention.

7. Reflexivity

As a researcher I have been able to wear two hats; one as a litigation attorney and the other as a psychology student. This gave me added insight into the meanings and constructs of psychological and legal terminology. The context was also more familiar to me, particularly the adversarial courtroom setting in which many influences are brought to bear on expert witnesses giving testimony. Given my experience and knowledge, I felt more equipped to be able to weigh up and compare the language of both disciplines. I was also able to access the data more easily through my legal contacts which proved to be very advantageous given the prohibitive transcription costs. In addition I was able to attend a s79 forensic assessment at Valkenberg which afforded me great insight into what is involved in the 'production' of the reports upon which expert witness testimony is based.

However, just as I may have more insight, I also had to be wary of potential bias (such as my own attitude, both negative and positive, towards expert witnesses based on previous experiences). Thus I had to stand back and reflect upon my own perceptions throughout the course of this research. I endeavoured to remain as transparent and true to the text as possible while maintaining awareness of the viewpoint, bias and background that I might bring to the research.

8. Analysis and Discussion

This analysis examines the psychological testimony on behalf of the State by psychologist Stephen Lay (SL) and psychiatrist Sean Kaliski (SK) as well as that led on the accused's behalf by Ashraf Jedaar (AJ). Advocate Stephen (AdvS) appeared for the State and Advocate Webster (AdvW) for the accused. Excerpts provided are coded (as per the initials above) to distinguish the individual participants and numbered according to whether they form part of Examination-in-Chief (1) or Cross-Examination (2). All text in bold represent my emphases added.

Understanding Court Testimony

Expert witness testimony is the product of a court-referred s79 hearing where a forensic team consisting of occupational therapists, social workers, psychologists and psychiatrists conduct extensive interviews with the accused in order to assess criminal capacity and fitness to stand trial. A report based on this information is then compiled and submitted to court which then becomes the basis for the expert witness testimony.

The oral testimony in court and the subsequent transcription (*data corpus*) is aimed at multiple audiences, primarily the judge and assessors, secondarily the media and public in the courtroom and finally the wider public. In transcription format, we are robbed of the benefit of body language and intonation in analysing the testimony. Thus a contextual understanding of the courtroom setting is necessary. The court operates under a set of basic rules, formalities and assumptions that are unique to its functioning. Perhaps foremost of these and most uncomfortable to the expert witness, is the adversarial setting. The court context is a zero-sum game, there is only one winner and one loser and as such the expert witnesses are often the key to winning or losing. In understanding the production of these expert witness texts, it is essential to realise that the legal community controls how and what is said in the courtroom to a large extent. Lawyers' questions circumscribe what the expert witness can say and although the Examination-in-Chief may 'appear' interactive and spontaneous, it is in fact often rehearsed behind the scenes. The expert witness is constructed as a 'subject' through courtroom discourse comprising codified rules of procedure and conduct, as well as categorisation. From the outset the lawyers will engage in impression management in asking the expert witnesses to describe their qualifications and expertise regarding the case in question. Within the discursive constraints of the courtroom, each expert witness is constantly engaged in constructing a positive social identity, so as to counteract the threats to status

inherent in the adversarial nature of the proceedings and the hierarchical power structure of the courts.

The imbalance of power in the courtroom setting is evident from the outset as “turn-taking” formalities and circumscription of content is controlled by the advocate, while the judge (at the top of the courtroom hierarchy) is in turn referred to as “M’Lord” by both advocates and expert witnesses. Of fundamental importance is the understanding that the expert witness’s goals may be quite incompatible with those of the court. The court imposes its will on the witness in that they cannot negotiate the judge’s impression of them and may only answer what is asked.

Inter-textually the expert witness testimony must be understood to be part of a larger court record on a horizontal scale which consists of lay witness testimony and extensive legal argument. Vertically the text must be understood as forming part of a historically located precedent in a long line of legal decisions that preceded *S. v. Eadie*. Significantly, as this is a Supreme Court of Appeal case, the judges had the power to override previous decisions such that this precedent became binding on lower courts thereafter.

During the very early morning hours of Saturday 12 June 1999 on Ou Kaapseweg near Fish Hoek, Graeme Eadie (the accused) assaulted Kevin Duncan (the deceased), kicking and beating him to death in circumstances similar to what is commonly referred to as ‘road rage’. The accused admitted that he assaulted and killed the deceased. His defence was one of temporary non-pathological criminal incapacity resulting from a combination of severe emotional stress, provocation (the deceased had harassed and tailgated him in his car) and a measure of intoxication, thus placing in dispute whether at the critical time he could distinguish right from wrong and whether he could then act in accordance with that distinction. The High Court had rejected the defence and sentenced him to 15 years imprisonment of which five years were conditionally suspended. The accused appealed this decision. The primary issue in this appeal was whether the accused lacked criminal capacity at the time that he killed the deceased. It was conceded on behalf of the accused that at the relevant time he was able to distinguish right from wrong but it was contested that he was able to act in accordance with that appreciation. The Supreme Court of Appeal rejected his appeal but in doing so seemingly equated non-pathological criminal incapacity with the defence of automatism; and implicitly introduced an objective test for capacity which up until then had been subjective.

The Construction of Self-Control

The question of self-control which is pivotal to the second leg of the conative incapacity element (i.e. whether the accused was able to act in accordance with their knowledge of wrongfulness) of the non-pathological criminal incapacity defence is the crux of the dissension between the expert witnesses. The State psychiatrist describes his criteria for lack of self-control:

...if you are out of control you are incapable of directing your actions purposefully and in a goal-directed fashion, you are totally out of control... (SK1)

Under cross examination, the State psychiatrist vehemently asserts his authority as an expert witness and implies that the law's understanding would be different:

It means this man is very angry and he is channelling his anger in a very focused, goal directed fashion. That for me as a psychiatrist, I'm not talking law now, as a psychiatrist, that's not out of control. Out of control is where you are smashing everything... (SK2)

Notably the State psychiatrist's description of 'out of control' is not stated in expert jargon, instead he uses very informal language (and does so repeatedly throughout his testimony) and in so doing he is making a very powerful rhetorical appeal to the listener's 'common sense'. Powerful because it sends out a message that to believe otherwise would imply that the listener has none (common sense). By deliberately avoiding the use of expert jargon he is also refusing to give the question any legitimacy by not addressing it appropriately.

When asked by the State's counsel to draw inferences from Eadie's behaviour in taking his wife and children home after he attacked the deceased, the State psychiatrist replies:

Presence of mind, he had presence of mind... (SK1)

By implication he is therefore suggesting that lack of control would necessitate the opposite, an absence of mind. The State psychiatrist finally states his theory for lack of control at the end of his examination in chief:

...the most important thing is this automatic behaviour, you have to show that the person was in a state of automatism... (SK1)

Note that up until the Eadie case, the courts had only used automatism in making a finding on whether a “voluntary act” had been committed as part of the *actus reus*⁵ requirement for criminal liability. The word automatism is a perfect example of a term that has become a hybrid of both legal and psychological input. Originating in epilepsy medical literature, the term is now understood to refer to an unconscious or dissociative state which precludes voluntary muscular movement, e.g. a reflexive uncontrolled movement. Although found in clinical literature, the term is most often used in a forensic context when assessing criminal liability. The question of self-control (while ‘self-control’ is found in clinical diagnostic literature the more colloquial reference to ‘losing control’ is not) and the difference between the legal and psychological meaning is further highlighted by the testimony of the State psychologist under cross examination:

I also have a problem with the term “losing control”, what exactly does that mean, and it’s a point that we get in forensic psychiatry and psychology that we often get asked and I accept that he was obviously extremely angry, he was a volcano waiting to go off... (SL2)

Eadie’s counsel picks up on the psychologist’s metaphorical reference to “volcano” and later uses this to his advantage when he challenges him on the construct of self-control:

...because I want to put it to you Mr Lay... how does one stop a volcano when it begins to go off? (AdvW2)

The volcano metaphor ironically describes exactly what the accused’s counsel wanted to prove, that despite knowing that his actions were wrong, he was unable to “stop” himself acting upon that knowledge.

The disjunction between the two disciplines is noted by the accused’s counsel who states:

...it seems that semantically our disciplines don’t marry very neatly... (AdvW2)

The State psychologist reiterates this disjunction tentatively when put under pressure by the accused’s counsel:

I think what I’m saying is that loss of control is not a clinical term... It’s a very broad, general term and a lot can be inferred from it and I’m uncomfortable using it

⁵ The voluntary and wrongful act or omission that constitutes the physical components of a crime.

at all... I'm sorry to be vague but I just don't, I'm uncomfortable with these non-clinical terms... (SL2)

It is interesting to note that by the end of the State's case there has been no empirical research or direct clinical terminology offered in explanation for the loss of control. Yet both the State psychiatrist and psychologist openly refute Eadie's claim to loss of control. Only the State psychiatrist offers anything substantive by insisting that the accused would have to show sane automatism.

Eadie's psychiatrist seemingly makes very little headway in providing a more clinical explanation for his alleged lack of control. Yet his style is the direct antithesis of the State psychiatrist's in that his explanation for Eadie's behaviour is littered with formal wording and psychological jargon which only contributes to the confusion rather than adding to any clarity:

*M'Lord further evidence ... of dissociation and **therefore** evidence of an altered state of consciousness...dissociation is a psychiatric condition which affects the impairment of the integrated functioning of consciousness of memory, of motor behaviour and identity...**therefore** in a state of...we **therefore** have a state of dissociation...**therefore** had a disturbance of this...evidence **therefore** of impairment of his cognition and volition. (AJ1)*

The excessive use of the adverb "therefore" is perhaps indicative of an attempt to demonstrate a persuasive causal chain. That the court was not persuaded thereof, is clear from the judgement. It seems that the court may not be able to specify what constitutes self-control but they can certainly identify what they will accept.

The Assumption of Free Will Versus the Victim of Circumstance

The conflict around the interpretation of self-control is to some extent dictated to by the ideological differences between the two disciplines. In numerous experiments conducted to test free will, Rappaport (2011) states that research findings "show our 'free will' to be fragile and subject to manipulation and distortion" (p.18). Unlike the more deterministic premise of psychology, law is premised upon the jurisprudential assumption of free will and agency. The criminal law presumes that individuals actively and consciously choose to engage in criminal conduct. Thus in many cases, the premise of the judge regarding the freedom of choice in respect of behaviour will differ from that of the psychological testimony.

In light of the above, it is perhaps somewhat ironic to find the accused's psychiatrist engaged in an exercise of stating a legal premise which seemingly belongs more comfortably in the realm of jurisprudence:

*...there is this difficulty I think that the court has to answer in the sense that does he give up control, in other words makes a very conscious decision **or is control taken away from him**... (AJ2)*

The use of the passive voice indicates the lack of free will versus the 'conscious decision'. Significantly he acknowledges that this is a decision that the court will ultimately have to make. He persists in using the passive voice when describing Eadie:

...the behaviour, in other words the frenzied attack on the individual where he found himself unable to stop is indicative of uncontrolled behaviour... (AJ2)

The State psychologist also makes reference to the question of free will under cross examination and in so doing seemingly sides with the jurisprudential assumption of free will:

...the issue for me is whether one loses control or chooses to disregard one's normal inhibitions... (SL2)

The implicit reference to a lack of free will which underlies Eadie's case is vigorously defended when his counsel objects to the State counsel's cross examination of Eadie's psychiatrist:

*...He **decided** that he was going to assault the deceased, got into the car... (AdvS2)*

May I object to the question M'Lord, my learned friend has put to the witness that the accused decided – as if that is evidence before the court...I submit that that is a misleading question. (AdvW)

The accused's case is filled with references that construct Eadie as the victim, be it the depressed Eadie; Eadie who suffers from PTSD; or Eadie who harassed by the deceased, feared for the safety of his wife and children. The accused's psychiatrist skilfully places the audience in Eadie's shoes by using the 2nd person in reference to Eadie's experiences:

*...two issues which stand out for me...initially was **your** state of concern for the well-being of both his wife and children... (AJ1)*

The Reasonable Person – a Construction of ‘Normality’

As discussed above, up until the Eadie case, the assessment for criminal capacity had been a subjective test in that one had to place oneself in the shoes of the accused in assessing whether they had the requisite capacity. This would entail looking at the unique circumstances of the accused at the time leading up to, during and after the crime. In Eadie’s case it was therefore of particular importance to the State’s case that Eadie’s circumstances be deemed ‘not out of the ordinary’. As such Eadie’s case represents a move towards the objective reasonable person test, a common law fiction that reflects a composite of a society’s judgment as to how a typical member of the public should behave in situations similar to that of the accused. What comes through very powerfully in the Eadie case is the State’s construction of the reasonable person in its emphasis on ‘normality’, both metaphorically and literally.

*... do you mean to tell... me that all those hundreds of people who are under...are going to kill somebody? Because then we have a big problem in society, a huge problem... What you’ve got to show me, that there is something **really unique about this man, unique about the situation.** (SK2)*

*I’m surprised at your generalisation, Doctor, because you know that the court has the task of stepping into the shoes of the accused and trying to understand, **subjectively**, what was going on in his mind. (AdvW2)*

***No, I can’t accept that.** (SK2)*

Again, when Eadie’s circumstances are put to the State psychiatrist, he downplays them somewhat patronisingly and asserts ‘normality’ by placing himself in the picture:

You’re aware of the fact that the accused has a particular fear of death and particular fear of harm coming to his family? (AdvW2)

Join the club, me too... (SK2)

He was shouting and screaming at the deceased but he couldn’t hear it. Can you explain that? (AdvW2)

Again a very common experience that people have... (SK2)

The State psychiatrist again draws upon his own considerable experience as head of a well-known State institution in asserting his belief that there was nothing unique about the nature of the provocation that might have caused Eadie to lose control:

... nobody has become that angry that they've lost control of themselves altogether?
(AdvW2)

Oh I really would like to invite you to come to Valkenberg and listen to some of the stories we hear on the Cape Flats, where a guy says "jou ma se" and he picks up a knife and he stabs the other person 15 times. We've had millions of these cases in this court and really it's quite commonplace. It's commonplace. People lose their tempers and they don't care... (SK2)

The State psychologist is equally skilled at constructing normality when under cross examination in that he suggests that the courtroom audience may have had similar dissociative experiences:

...a certain degree of dissociation which is common...I'm sure everybody in this room has probably experienced this at some point in time. (SL2)

By contrast, the accused's psychiatrist sets out to prove that the circumstances were unique:

*...one could argue that it's not necessary to in fact even raise the issue of PTSD, that the events of the evening were **so significant**...(AJ2)*

Somewhat perversely, the accused's psychiatrist takes the extremity of the assault on the deceased, a factor that the courts would no doubt consider aggravating, to indicate that the behaviour was out of control:

In other words because Mr Eadie sustained the assault of the deceased you think it's an uncontrolled attack? (AdvS2)

Further evidence of uncontrolled behaviour, yes M'Lord. (AJ2)

Whereas legal counsel are clear that the test for incapacity is subjective, the nature of the criminal capacity test causes much confusion amongst the expert witnesses who constantly mix the semantic meaning of objective and subjective:

So it should not only be a subjective test but really an objective assessment of all the facts. (AJ2)

Even the State psychiatrist who has a legal background, indicates his confusion in this regard:

Can you tell me why not? (AdvW2)

Because doesn't the court put it in the shoes of a reasonable man as well? (SK2)

The critical question remains whether it should be a subjective or objective test. The State's construction of normality stands in sharp contrast to the accused's exaggerated description of 'out of character' behaviour .

Floodgates Rhetoric – Should Psychologists Argue Ultimate Issue?

Amongst the various criteria stipulated for expert witnesses above, Freckelton (1987) and Allan and Louw (1997) suggest that they should avoid commenting on ultimate issue. Ultimate decisions necessarily involve questions of morality and justice that lie outside the expert witnesses' domain of expertise. The non-pathological criminal incapacity defence, given its common law potential for creative defences, poses a potential threat to the interests of justice should its principles be carelessly interpreted. As such the courts have to weigh up the interests of the public versus the interests of the individual in assessing criminal incapacity.

With this in mind, what follows is an extract from defending Counsel's cross examination of the State psychologist which reveals the psychologists reluctance to concede "loss of control" for reasons that he is clearly loathe to admit:

But you don't acknowledge that principle? (AdvW2)

Those are legal findings; from a psychiatric and psychological point of view I have some difficulty with those. (SL2)

Why Mr Lay? (Adv W2)

*Because they imply that the person is completely innocent. I feel it's **dangerous** to use terms such as "he lost control" particularly in a psycho-legal case such as this ... I'm sorry to be vague but I just don't, I'm uncomfortable with these non-clinical terms. (SL2)*

*Would it be fair to put to you Mr Lay that in answering these questions you have a **preoccupation with guilt or innocence and not so much the question of the nature of the principle that's being put to you?**...because you're aware of the significance of*

that aspect as far as the accused's guilt or innocence is concerned aren't you Mr Lay?
(AdvW2)

I am. (SL2)

Closer analysis reveals that the State psychologist is making a 'floodgates' argument that is both a rhetorical strategy (the slippery slope argument) and a legal policy argument. As such, the psychologist is implying that once he opens the door by conceding that Eadie "lost control", that having started down the metaphorical slope, a flood of non-pathological criminal incapacity defence cases is likely to occur. This would represent the "danger" that the State psychologist makes reference to in that criminals would take advantage of this defence simply by claiming they had lost control.

The State psychiatrist vividly describes this slippery slope effect:

... you'll have a taxi driver do it in front of a whole audience of thousands...he is really angry and he is going to stab that guy 25 times... I'm struggling to think now why is that scenario so different from this scenario, because that's what you are trying to tell me. Because yes, those guys also lose control then, in your sense, that every single murder we get in this country, the guy's lost control otherwise they wouldn't kill. Every single murder in this country, the perpetrator has lost control... (SK2)

The State psychiatrist specifically hints at his floodgate concern when he states that:

*...but cases like S v Arnold really **opened the gates** and we have lots and lots of requests and subpoenas for this.* (SK2)

The accused's counsel confronts him on this when he argues that:

I have difficulty with you the head of the State psychiatry institution who evaluates these individuals, finding that that is not a fundamental premise upon which you base your assessment ... Do you understand my difficulty doctor? (AdvW2)

Your difficulty is you think I have a prejudiced position, that I have decided this defence doesn't exist so therefore whenever I get such a case I'm going to find a way to show that it doesn't exist... (SK2)

As someone previously trained in law, the State psychiatrist is clearly comfortable entering into legal policy arguments. Yet when challenged on legal principles which point to

his inaccuracy on the criteria for the incapacity test itself, the State psychiatrist is quick to abdicate his legal role:

There might be overlap but they are different defences and there are different principles which apply to the two defences. (AdvW2)

...can I propose that you argue that with the Court and not with me because I'm not really here in my capacity as a lawyer... I'm here as a psychiatrist and I'm going to give you a clinical psychiatric opinion, I'm not going to argue the law with you...

(SK2)

9. Summary and Conclusion

It has been argued by legal experts that the Eadie case brought the law in line with psychological reasoning but that it cannot hold with accepted legal principles. As such, expert evidence has seemingly added to rather than detracted from this confusion. To date there has been no clarification on the issue and until a decision supersedes that of Eadie, the principles established in the Eadie case remain the status quo on the non-pathological criminal incapacity defence. As such, the law must be recognised as a social practise which is hegemonic in itself, since it involves the imposition of an official code by the State onto the affairs of an individual

Therefore, while the law is an instrument of social construction, it also constitutes and produces social norms by criminalising undesirable behaviour. What is implied in the law as a code, is implicit in the reasonable person test in the form of norms and values that reflect a model for human behaviour. The reasonable person both dictates morality and suggests what may constitute acceptable human frailty. That a psychological discipline which concerns itself with causes of human behaviour and therapeutic intervention calls for an objective test (in the Eadie case) in preference to a subjective one, is highly suspect to say the least. The expert witnesses' function is and should be to render scientific evidence in accordance with their expertise. It is the law's function to concern itself with morality and public policy. It seems

somewhat paradoxical to use the reasonable man standard to test criminal responsibility, when the presence or absence of criminal capacity and/or intent is determined by a standard which ignores the mental state of the individual accused. Contrary to the fears of the State psychiatrist in the Eadie case, a move towards a subjective test is not an open season for a provoked person to kill anyone who crosses their path.

The issue of self-control which is pivotal to the defence of non-pathological criminal incapacity in the Eadie case takes on a highly controversial and seemingly nebulous construction within the psycho-legal interface. The conflicting evidence of the psychiatrists testifying on opposite sides seemingly neutralises the power of the expert witness and certainly begs the question as to the lack of “true” science in their testimony. However when we remember that the “truth” of science is competing directly with the “truth of law”, and that different ideologies attach themselves to each discipline, we begin to understand why we are faced with the multiplicity of meaning inherent in these constructs. For the lawyer, the most important question for forensic practice is whether the criminal incapacity existed or not whereas the psychologist is more concerned with what caused this incapacity, if any. However regardless of how the incapacity may have been caused, the question is always whether factually the legal criteria for incapacity have been met.

Self-control is also a character trait that embodies society's normative expectations, one of them being the assumption of responsibility. From a legal perspective, this presupposes freedom of will indicative of personal agency. Conversely psychologists follow a more deterministic school of thought. The ethical consequences of such research findings are somewhat sobering. If we are not in control of our actions, but rather such actions are predetermined by genes and neurons, how can we be held responsible for them, and how could we be fairly punished for transgressions? Fortunately it would appear that such research has far to go before it is able to undermine the fundamental principle of free will. Perhaps a more salient description of this difference would be that the law concerns itself with individual responsibility, whereas psychology also focuses on unconscious and uncontrollable forces. Thus we find the accused's counsel constantly referring to Eadie in the passive voice in its construction of the “victim” who lacked free will, while State counsel uses the active voice in reference to Eadie's behaviour wherever possible.

At first glance one might think that psychology does not concern itself with political issues, preferring to be seen as a rational science seeking to enlighten the archaic legal profession. However as discussed above, psychology prefers to cloak its writing in the passive voice in the name of positivistic science; yet we find it in the Eadie case adopting a

firm political stance towards legal matters. Using rhetorical slippery slope arguments and role reversal techniques, both the State psychiatrist and psychologist concern themselves with the possible “floodgate” consequences of a finding of lack of self-control. In so doing, the expert witnesses are entering the realm of ultimate issue decisions which necessarily involve questions of morality and law, and which usually form the exclusive domain of the law. The courts have been inconsistent in their application of the ultimate issue rule to expert testimony. I would suggest that much confusion would be avoided, if expert witnesses adhered to their principal role in lending expert evidence to the assessment of the accused’s incapacity leaving legal policy to the lawyers. Given the longstanding suspicion and mistrust between these two disciplines, the credibility of expert witnesses would be enhanced if they avoided expressing ultimate opinions unless explicitly asked to do so. In addition, the construct of the ‘reasonable person’ is also an area which should remain the sole domain of legal policy debate.

Limitations

This research is limited in its scope for generalisation given that it is a case study, however this is mediated by the fact that the Eadie case represents the current legal precedent for the non-pathological criminal incapacity defence. Moreover, the aim of this study was not to generalise but to present an in-depth qualitative analysis of the psychological testimony. Further, given that this research was based upon archival transcriptions, the text lacks any contextual feedback on facial expression, intonation and body language.

Suggestions for Future Research

Research into an acceptable psycho-legal working definition for the concept of self-control is crucial in bridging the gap between psychological and legal understanding in order to provide a compatible agenda for the determination of criminal incapacity. The current legal understanding of self-control is based on a compartmentalized model of cognitive, conative and affective functioning – one which cannot be supported by the current integrated understanding of both psychology and psychiatry alike. Further research is needed to refine and distinguish the differing forms of self-control impairment as well as the cognitive processes involved therein. An analysis of the case law construction of self-control from both a legal and psychological standpoint would be highly informative to both the legal profession and expert witnesses.

References

- Africa, A. (2005). Psychological evaluations of mental state in criminal cases. In C. Tredoux, D. Foster, A. Allan, A. Cohen, & D. Wassener (Eds.), *Psychology and the law* (pp. 384-410). Lansdowne, South Africa: Juta.
- Allan, A & Louw, D. A. (1997). The ultimate opinion rule and psychologists: A comparison of the expectations and experiences of South African lawyers. *Behavioural Sciences and the Law*, 15, 307-320.
- Allan, A., & Louw, D. A. (2001). Lawyers' perception of psychologists who do forensic work. *South African Journal of Psychology*, 31, 12-20.
- American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed., text rev.). Washington, DC: Author.
- Aristotle. De anima. Trans. J. A. Smith. *The works of Aristotle translated into English*. vol. 3, ed. W. D. Ross. Oxford: Clarendon Press, 1931.
- Bersoff, D. N. (1986). Psychologists and the judicial system: Broader perspectives. *Law and Human Behaviour*, 10, 151-165.
- Billig, M. (2009). Discursive psychology, rhetoric and the issue of agency. *Semen*, 27, 157-

184.

- Billig, M. (1996). *Arguing and thinking. A rhetorical approach to social psychology*. Melbourne, Australia: Cambridge University Press.
- Boister, N. (1996). Recent cases: General principles of liability. *South African Journal of Criminal Justice*, 9, 371-374.
- Burchell, J. M., & Milton, J. (2005). *Principles of criminal law (3rd ed.)*. Cape Town, South Africa: Juta.
- Burr, V. (1995). *An introduction to social constructionism*. London, Great Britain: Routledge.
- Carroll, A., & Forrester, A. (2005). Depressive rage and criminal responsibility. *Psychiatry, Psychology and Law*, 12, 36-43.
- Carson, D. (2011). Investigative psychology and law: Towards collaboration by focusing on evidence and inferential reasoning. *Journal of Investigative Psychology and Offender Profiling*, 8, 74-89.
- Chetty, V. (2008). Incapacity to determine criminal incapacity: mad or bad? A selected case study. *Acta Criminologica : CRIMSA Conference : Special Edition 2*, 129-138.
- Criminal Matters Amendment Act, 68 of 1998
- Criminal Procedure Act, 51 of 1977
- Cutler, L., & Kovera, M. B. (2011). Expert psychological testimony. *Current Directions in Psychological Science*, 20, 53-57.
- Danziger, K. (1997). *Naming the mind. How psychology found its language*. London, UK: SAGE Publications.
- De Vos, P. (1996). Criminal capacity, provocation and HIV. *South African Journal of Criminal Justice*, 9, 354-360.
- Dershowitz, A. M. (1994). *The abuse excuse and other cop-outs, sob stories, and evasions of responsibility*. New York, NY: Little, Brown and Company.
- Durrheim, K. (1997). Social constructionism, discourse and psychology. *South African Journal of Psychology*, 27, 175-182.
- Fairclough, N. (1992). *Discourse and social change*. Cambridge, MA: Blackwell Publishers

- Freckelton, I. R. (1987). *The trial of the expert: A study of expert evidence and forensic experts*. Melbourne, Australia: Oxford University Press.
- Gillmer, B. (1996). *Psycho-legal incoherence*. Paper presented at the meeting of the National Congress of the South African Psychological Society. Johannesburg, South Africa.
- Haney, C. (1993). Psychology and legal change: The impact of a decade. *Law and Human Behaviour, 17*, 371-398.
- Hocor, S.V. (2001). Road rage and responsibility about reasoning. *South African Journal of Criminal Justice, 14*, 195-211.
- Kaliski, S. Z. (2006). *Psycholegal assessment in South Africa*. Cape Town, South Africa: Oxford University Press.
- Kaliski, S. Z. (2009). 'My brain made me do it' – how neuroscience may change the insanity defence. *South African Journal of Psychiatry, 15*, 4-6.
- King, Michael. (1986). *Psychology in and out of court, A critical examination of legal psychology*. Elmsford, New York: Pergamon Press.
- M'Naghten's Case (1843) 10 Cl. & F. 200, § 847, 8 U.S.C. Rep. 718
- Meintjies-Van Der Walt, L. (2002). Making a muddle into a mess? The amendment of s78 of the Criminal Procedure Act. *South African Journal of Criminal Justice, 15*, 242-249.
- Morse, S. J. (2007). The non-problem of free will in forensic psychiatry and psychology. *Behavioural Sciences & the Law, 25*, 203-220.
- Parker, I. (1992). *Discourse dynamics: Critical analysis for social and individual psychology*. London, UK: Routledge.
- Parker, I. (1999). *Critical textwork: an introduction to varieties of discourse and analysis*. Buckingham, Philadelphia: Taylor and Francis Group.
- Parker, I. (2010). *Qualitative psychology. Introducing radical research*. New York, NY: Open University Press.
- Pather, S. (2002). Provocation: Acquittals provoke a rethink. *South African Journal of Criminal Justice, 15*, 337-352.

- Peay, J. (2011). Personality disorder and the law: Some awkward questions. *Philosophy, Psychiatry, & Psychology*, 18, 231-244.
- Perelman, C. (1979). *The new rhetoric and the humanities: Essays on rhetoric and its applications*. Dordrecht, Holland: D. Reidel.
- Rappaport, Z. H. (2011). The neuroscientific foundations of free will. In J. D. Pickard et al. (Eds.), *Advances and Technical Standards in Neurosurgery*. Wien: Springer-Verlag.
- Rex v. Koortz 1953 (1) SA 371 (A)
- Reznek, L. (1997). *Evil or ill? Justifying the insanity defence*. London, UK: Routledge.
- Roscoe, A., Rodway, C., Mehta, H., While, D., Amos, T., Kapur, N., (...) Shaw, J. (2009). Psychiatric recommendations to the court as regards homicide perpetrators. *Journal of Forensic Psychiatry & Psychology*, 20, 366-377.
- Sarat, A., & Kearns, T. R. (1996). *The rhetoric of law (4th ed.)*. Michigan, Ann Arbor: The University of Michigan Press.
- Schopp, R. F. (1991). *Automatism, insanity and the psychology of criminal responsibility: A philosophical inquiry*. Cambridge, United Kingdom: Cambridge University Press.
- Snyman, C. R. (1995). *Criminal law. (3rd ed.)*. Durban, South Africa: Butterworths.
- Shuman, J. D., & Gold, M. D. (2008). Without thinking: Impulsive aggression and criminal responsibility. *Behavioural Sciences and the Law*, 26, 723-734.
- Spamers, M. (2010). *A critical analysis of the psycholegal assessment of suspected criminally incapacitated accused persons as regulated by the Criminal Procedure Act*. (Unpublished Master's thesis). University of Pretoria, South Africa.
- State v. Arnold 1985 (3) SA 256 (C)
- State v. Calitz 1990 (1) SACR 119 (A)
- State v. Campher 1987 (1) SA 940 (A)
- State v. Chretien 1981 (1) SA 1097 (A)
- State v. Eadie 2002 (3) SA 719 (SCA)
- State v. Laubscher 1998 (1) SA 163 (A)
- State v. Lesch 1983 (1) SA 814 (O)
- State v. Mokonto 1971 (2) SA 319 (A)

- State v. Moses 1996 (1) SACR 701 (C)
- State v. Pederson 1998 3 All SA 321
- State v. Potgieter 1994 (1) SACR 61 (A)
- State v. Shivute 1991 (1) SACR 656 (NM)
- State v. Smith 1990 1 SACR 130 (A)
- State v. Wiid 1990 1 SACR 561 (A)
- Stevens, G. P. (2011). *The role of expert evidence in support of the defence of criminal incapacity*. (Unpublished doctoral thesis). University of Pretoria, South Africa.
- Stroup, D.G. (1984). Law and language: Cardozo's jurisprudence and Wittgenstein's Philosophy. *Valparaiso University Law Review*, 18, 331-371.
- Van Oosten, F. F. W. (1993). Non-pathological criminal incapacity versus pathological criminal incapacity. *South African Journal of Criminal Justice*, 6, 127-147.
- White, J.B. (1985). Law as rhetoric, rhetoric as law: The arts of cultural and communal life. *University of Chicago Law Review* 52, 684-702.
- Willig, C. (1999). *Applied discourse analysis: social and psychological interventions*. Buckingham, Philadelphia: Open University Press.
- Willig, C. (2001) *Qualitative research in psychology: A practical guide to theory and method*. Buckingham, Philadelphia: Open University Press.
- Young, A. (1987). How medicine tamed life. *Culture, Medicine and Psychiatry*, 11, 107-121.