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# Women, Domestic Violence and the Legal Duties to Protect Children: Towards a Constitutional Approach

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## INTRODUCTION

The abuse of women and children is rife in South Africa. According to South Africa's Progress in Realising Children's Rights: A Law Review 2014,[1] the South African Police Services (SAPS) statistics for the period of 2011/2012 reports that approximately 25 862 children were victims of sexual offences and 23 000 were physically assaulted of which almost half were suffering from grievous bodily harm. It was also found that approximately 1 018 children were murdered in South Africa in 2009 and of this 45% resulted from child abuse.[2] Furthermore, three women are murdered each day in South Africa in the context of domestic violence and it is estimated that approximately 35% to 40% of children have witnessed their mother being beaten and are viewed as co-victims of the domestic violence.[3]

There is a prevalence of child abuse in households where there is spousal violence.[4] Literature reveals that a child is three times more likely to be abused by his or her father or a father figure than by his or her mother.[5] In a survey of battered women shelters approximately seventy percent of children who attended the shelter with their mother were also abused or neglected.[6] Furthermore, battered women were six times more likely than non-battered women to have their children reported to authorities for being abused.[7] A study completed by UNICEF in 2012 found that children exposed to domestic



[1] Proudlock *According to South Africa's Progress in Realising Children's Rights: A Law Review* page 168.
[2] Above at 168.
[3] See n1 at 169.
[4] Davidson *Child Abuse and Domestic Violence: Legal Connections and Controversies*. Family Law Quarterly, Vol 29, No 2. 1995 357.
[5] Above at 357.
[6] See n4 at 357.
[7] See n4 at 358.

violence perpetrated against their mothers often display the same psychological distress as those who themselves were abused.[8]

There is a legal responsibility on a woman to stop the abuse of her child, this responsibility applies irrespective of the abuse she has endured. This dissertation seeks to investigate where a woman fails to protect her child, in cases where both she and her child are abused and suggests a development in law accordingly.

In the first chapter of this dissertation I use the case of *S v Rudman*[9] to illustrate the problem the dissertation sets out. The case will also highlight the failure by the court to follow its own reasoning in that there was a positive duty on the accused to act. I will also explore the literature around battered woman syndrome (BWS),[10] to show that there is a justifiable reason why women who suffer from BWS sometimes cannot act, or perceive that they cannot act, to protect their children from violence. I will discuss the possible offences that a woman can be charged with for failing to prevent the abuse or murder of her child, namely being an accessory after the fact or being guilty of an omission. It will be shown that there has been a shift from the statutory failure to protect, set out in the Child Care Act[11] that has not been carried over to its successor the Children's Act,[12] to a reliance on the common law duty to protect, based on a protective relationship. I then compare the South African law dealing with the failure of a woman to act in the above cases to the law in the United States (US) and the United Kingdom (UK) to show that the approach taken in



[8] DSD, DWCPD and UNICEF. 2012. Violence Against Children in South Africa. Pretoria: Department of Social Development/Department of Women, Children and People with Disabilities/UNICEF 19.
[9] S v Rudman 2013 JDR 0713 (GNP).
[10] It must be noted that this dissertation uses the term 'battered woman syndrome' as this is the term used in the legal discourse around women who are battered. This dissertation is focused on the law and thus the use of the term is for consistency with legal discourse. I do however, agree with Dutten when she states that the definition of 'battered woman syndrome' is not altogether clear and can prove to be problematic. She suggests that the term be redefined. See Dutton (1993) "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome," *Hofstra Law Review*: Vol. 21: Iss. 4, Article 2, 1191 at 1193. She cites two issues with using the term, the first is that the testimony given by women who have been battered refers to more than simply their psychology and the second is that the psychological realities of women who have been battered are diverse and cannot be simplified to a single unified profile (at 1195).
[11] Child Care Act 74 of 1983.
[12] Children's Act 38 of 2005.

these jurisdictions is more restrictive than in South Africa and provides no defences that accommodate BWS whatsoever.

In the second chapter of the dissertation I will argue that there must be a a common law defense developed for women suffering from BWS and charged with a failure to protect crime. This development should take place in terms of section 39(2) of the Constitution.[13] I then focus on the cases of *Carmichele*[14] and *Masiya*[15] to illustrate how the courts have historically gone about developing the common law in terms of section 39(2). In order to justify the development of the common law I will compare the rights of children and women as set out in the Constitution. I will go on to apply a proportionality enquiry, which will weigh up the right of a woman to freedom and security of person[16] versus the right of the child to be protected from harm. I will aim to shown that although the rights of the child is of paramount importance, the failure to protect laws that find women suffering from BWS guilty of failure to protect, is an unjustifiable limitation of her rights.

In the third chapter of my dissertation I will discuss the position of our law with regard to the acknowledgement of BWS as a defence, and why this is inadequate. This will form part of the justification for the proposal to develop the common law. I suggest that there be a development in the defence of non-pathological incapacity, which makes it compulsory for an expert witness to testify to the state of the accused's ability to act in accordance with her ability to understand the wrongfulness of the action.



[13] Constitution of South Africa Act 108 of 1996. Hereinafter referred to as 'the Constitution".
[14] Carmichele v Minister of Safety and Security (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001).
[15] Masiya v DPP (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007).
[16] Section 12 of the Constitution.

# CHAPTER 1

## 1.1. S v RUDMAN AND THE COURT'S FAILURE TO ACKNOWLEDGE THE PRESENCE OF BWS

*Rudman* focuses on the death of Baby Wade, an infant child murdered by his father (Nolan Schoeman) after prolonged abuse. Schoeman was found guilty of the murder of Baby Wade and the child's mother (Marissa Rudman) was found guilty of being an accessory after the fact.[17] At no point during trial was evidence produced showing that Rudman perpetrated any abuse against her child.[18] Furthermore, Rudman testified that there were occasions when she asked Schoeman to leave the family home and on two occasions took the child to the hospital for medical attention.[19] The case exhibits the problem of women being found legally responsible to prevent the abuse of their children by their partner, even when they themselves are being regularly abused.

Schoeman's abuse of Baby Wade was severe and spanned the entirety of Baby Wade's short life. Evidence of prior abuse, not constituting the final cause of death, included: twenty-two rib fractures, both forearms having been previously broken, trauma to his left lung, trauma to his thorax, finger marks and bruises on his face, neck and chest and marks on the soles on his feet.[20] The cause of death of the child was severe trauma to his head that resulted in his brain swelling to such a degree that his skull was pushed apart.[21] Rudman's older child (Ethane) testified in court and explained, "I saw Nolan hit Baby Wade on the head with the fist. I can't remember what happened after that... Baby Wade was sleeping. He was still sleeping after he was hit." Ethane concluded that Baby Wade, "was in heaven because Nolan hurt him".[22]



[17] See n9 para 58.
[18] See n9 para 58.
[19] See n9 para 32 and 37. Rudman had taken Wade Pretoria West Hospital yet discharged the baby while he was still ill, she testified that the child was mistreated in hospital.
[20] http://m.timeslive.co.za/thetimes/?articleId=8336600. Accessed on 24/10/2014.
[21] http://m.timeslive.co.za/thetimes/?articleId=8336600. Accessed on 24/10/2014.
[22] http://www.thenewage.co.za/mobi/Detail.aspx?NewsID=48995&CatID=1007. Accessed on 24/10/2014.

Schoeman was sentenced to thirteen years in prison whereas Rudman, who had not actively committed any of the abuse against Wade, was found guilty and sentenced to 10 years in prison.[23] The court remarked during sentencing that Rudman had displayed no remorse for the death of her child and had "constantly" aided and abetted Schoeman in his abuse of her child "by allowing accused 2 to assault the baby to such an extent that he died of horrendous injuries."[24]

The court failed to appreciate the effect of past abuse suffered by Rudman and its influence on her ability to actively intervene in the abuse of her child as well as her perceived inability to leave Schoeman. Rudman testified to her childhood and formative years being plagued with abuse and neglect. During her childhood Rudman stayed with her mother and maternal grandparents.[25] Her mother suffered from bi-polar disorder and her grandfather often beat her grandmother.[26] Similarly, her stepfather would often beat her mother too. Rudman witnessed the beatings of both her mother and grandmother.[27] Her mother remarried and Rudman was molested by her then step-grandfather.[28] Her mother again got divorced and Rudman was sent to live with her maternal grandparents.[29] In 1994 she was raped and fell pregnant as a result, the child was later adopted in December 1994.[30]



Rudman's young adult life was also not free from hardship. She married a Mr Collings and gave birth to Ethane.[31] Allegedly Mr Collings was an alcoholic and would beat her. They were divorced when Ethane was four years old.[32]

Rudman then met Schoeman at a bar and the very same evening she asked him to move in with her. During their time together both were abusing drugs.[33] Schoeman had a job as a personal trainer and when their situation began to

[23] See n9 para 58.
[24] See n9 para 54 – 55.
[25] See n9 para 24.
[26] See n9 para 24.
[27] See n9 para 24.
[28] See n9 para 24.
[29] See n9 para 25
[30] See n9 para 25.
[31] See n9 para 26.
[32] See n9 para 26.
[33] See n9 para 29.

improve, they decided to have a baby. Around 2008 both of them lost their jobs. They found themselves unemployed and without any form of transportation.[34] Schoeman's drug dependency escalated and it is alleged that he kicked Marissa Rudman, which resulted in the premature birth of Baby Wade.[35] Whilst Baby Wade was fighting for his life in hospital, another altercation took place between Schoeman and Rudman over a leather jacket that he had sold without her permission; Schoeman then assaulted Rudman again.[36]

During the trial Rudman's council attempted to show that she was a battered woman and that this explained her perceived inability to intervene in the abuse of her child.[37] The court did not adequately engage in the literature around BWS and so failed to see the numerous psychological and behavioural similarities between Rudman and women who suffer from BWS. An example of this is the court's response to the evidence of the expert witness Ms Heath. Ms Heath testified that Rudman

> *learned very early on to survive by escaping through distraction and denial and by playing for sympathy and at times unconsciously reverting to the more involuntary defence mechanism of dissociation and repression [and that] she "stepped on many toes through her... distortion of reality.*[38]

In reply to Ms Heath's testimony, which aimed to explain why Rudman had removed Baby Wade from the hospital whilst he was still ill and on another occasion failed to ask a person living at her home for a lift to the hospital, the court found that it simply could not agree with Ms Heath's statement.[39] The court failed to offer any persuasive reasoning in support of its disagreement with the evidence of the expert witness. Instead it judged Rudman's actions, such as her perceived inability to leave Schoeman, which is common in cases of BWS, as being the very reason to disregard her as suffering from BWS. This is emphasised when the court states, "[i]t is... doubtful that she suffers

[34] See n9 para 29.
[35] See n9 para 29.
[36] See n9 para 30.
[37] See n9 para 37.
[38] See n9 para 31.
[39] See n9 para 32.

from ‘battered woman’s syndrome’, as she frequently chased accused 2 away, only to invite and allow him to come back again.”[40]

Not only does Rudman’s case deal with the failure of the court to consider the evidence of BWS, it also highlights the fact that women tend to be sentenced to almost equivalent sentence to the actual perpetrator of the abuse and murder of their children, thus punishing her almost equally for failing to act.

## 1.2. BWS AND THE EFFECTS ON A WOMAN’S ABILITY TO ACT TO PROTECT HER CHILD

In order to show that a woman that suffers from BWS has an inability to act and that the court should therefore develop a common law defence based on this inability and the rights of a woman suffering from BWS that are limited by failure to protect laws, the empirical studies on BWS acts as evidence.

Lenore Walker describes a woman suffering from BWS as being “repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her into doing what he wants without regard for her rights as an individual. The woman who is battered perceives that she has no right against the batterer’s behaviour”. [41] The woman who is battered often perceives that she has no option of leaving the abuser, whether this is true or not. Communities on the other hand find this type of situation very difficult to comprehend and commonly hold the view that battered women have an unfettered choice in these situations. This prejudice is not only prominent in communities yet has seemingly been endorsed as fact by our courts. For instance as mentioned above, in Rudman’s case the court stated that “it is further doubtful that she suffers from ‘battered woman's syndrome’, as she frequently chased accused 2 away, only to invite and allow him to come back again.”[42]

[40] See n9 para 37.
[41] Walker *Who are the Battered Women?* 1977 Frontiers: A Journal of Women Studies, Vol. 2, No. 1 52-57.
[42] See n9 para 37.

In her seminal writing Walker introduces a psychological perspective for why women often stay in abusive relationship.[43] She describes nine commonalities shared by those who are battered, they include: low self-esteem, belief in a prescribed role of a woman, belief in taking responsibility for the abuser's actions, suffering from guilt and denying feelings relating to terror and anger, being able to manipulate the environment at home enough to prevent violence or death, suffering from severe stress reactions, using intercourse to establish intimacy with the abuser and a failure to look for outside assistance.[44]

Walker outlines two theories that encompass the commonalities expressed above. She employs these theories to explain why the woman who is battered stays with her abuser. The theories she presents are referred to as the 'learned helplessness theory' and 'cycle of violence theory'.[45] The 'learned helplessness theory' is based on the studies of Martin Seligman.[46] Seligman conducted the experiments on caged dogs. He would administer shocks to the dogs at varied intervals; the dogs soon learned that no matter what their actions were they could not control the shocks administered to them. Although initially the dogs would try to avoid the shocks, after a period of time, the dogs became submissive to the treatment. Even when the researchers gave the dogs an escape route the dogs were conditioned to such an extent that they chose not to escape, or did not perceive success in attempting to escape. After experimenting on dogs Seligman reformed the experiment and began testing it on humans, which yielded a similar outcome.[47] Brown summarises Walker's 'learned helplessness theory' as indicating that women often lack motivation to respond, and become passive after continuous assaults.[48] The cognitive ability of the woman to perceive success in being able to leave the abuser or to envision the continuous assaults stopping is changed. She does not believe that her response in the situation will have a successful outcome, whether or not it might.[49] Singh describes that in Walker's experiments she



[43] Walker *The Battered Woman* 1980.
[44] Brown *When the Bough Breaks: Traumatic Paralysis – an Affirmative Defense for Battered Mothers* 2005 Willian Mitchell Law Review 190 at 197.
[45] As above at 197.
[46] See n44 at 197.
[47] See n44 at 197.
[48] See n44 at 199.
[49] See n44 at 199.

found that woman who have been through an abusive incident tend to fall into the category of learned helplessness and her behaviours can be categorised as BWS.[50]

The 'cycle of violence theory' is made up of three phases. These are: the 'tension-building stage', the 'acute beating incident', and finally 'loving contrition'.[51] The woman will go through the first two phases in order to experience the love and remorse of the abuser in the third phase.[52] The first phase, the 'tension-building stage', is characterised by the woman sensing that the abuser is becoming increasingly edgy and prone to a negative reaction to things that frustrate him.[53] The woman will then often try to reduce or remove any irritants from the environment to pacify the abuser.[54] Women who are battered take the responsibility of creating a calm environment for their abusers and they "rationalise their conduct of appeasement of the abuser with the belief that any resulting abuse must be their fault."[55] Walker compares the woman's attempts to control the situation to the work of fire fighters.[56] She described that

> *[l]ike firefighters dealing with a brush fire, many women have learned to catch these little outbursts and calm their men down for a short period of time; this gives the women the feeling that they really have control over the batterer's behaviour.*[57]



The woman who is battered is under the misapprehension that if she behaves well she will not be beaten. To attempt to achieve this, Walker explains that the woman will then try, at all times, to be alert to the abuser's moods in order to appease him.[58] However, the woman will not be able to control every factor, so tension will increase which will result in the 'acute battering incident'.[59] The 'acute battering incident' forms the second phase of the

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[50] Singh *Self-defence as a ground of justification in cases of battered women who kill their abusive partners* 2009 62.
[51] See n44 at 200.
[52] See n44 at 200.
[53] See n41 at 53.
[54] See n41 at 53.
[55] See n50 at 64.
[56] See n41 at 53.
[57] See n41 at 53.
[58] See n41 at 53.
[59] See n41 at 53.

cycle.[60] Walker's studies show that the period between the first phase and the second are not set and tend to fluctuate.[61] The final phase is the phase of 'loving contrition'.[62] This is characterised by remorse and loving behaviour by the abuser and forgiveness by the woman who is battered.[63] The abuser regrets his actions and to make up for this he treats the woman in a loving way. Walker describes the abuser as "becom[ing] the kind of a husband or lover that woman have been socialized to expect – generous, sweet, lavish with gifts and attention, kind, sensitive to her every want and need."[64]

Walker explains that a woman may try to provoke the abuser into the acute battering incident because the stress and anxiety of the first phase becomes too painful for the woman to bear and she knows that the abuse will come regardless.[65] The woman thus reduces the anxiety from the 'tension-building phase' and brings about the 'loving contrition phase' faster.[66] In one particular interview Walker encountered the case of a woman who had suffered the 'acute battering incident' on many occasions, committed by her husband.[67] On the specific occasion that was the subject of the interview, the woman wanted to attend a family party and wanted the abuser to treat her with the love and care of the 'loving contrition phase', so she provoked the 'acute battering incident'.[68] Walker describes that to the woman,

> *[in] the context of the total perspective, her behaviour makes sense. The reward is not the beating, as the masochistic stereotype would suggest, but rather a kind and loving escort for this party. The beating was less offensive than the anticipated pleasure from the reward.*[69]

Walker's theory on BWS and why women stay had remained the authoritative position until the late 1970's. At that point there was a movement away from focusing only on the psychology of the woman who is battered and expanding

[60] See n41 at 53.
[61] See n41 at 53.
[62] See n41 at 54.
[63] See n41 at 54.
[64] See n41 at 54.
[65] See n41 at 54.
[66] See n41 at 54.
[67] See n41 at 54.
[68] See n41 at 54.
[69] See n41 at 54 to 55.

the focus to look at other possible factors affecting her choice. Rothenburg cites this theory for why women stay in these abusive relationships as the 'multi-victimization argument'.[70] According to the theory a woman who is battered does not choose to stay with the abuser on her own volition but instead due to coercion.[71] Furthermore, the theory does not solely blame the abuser but instead addresses the multiple forces that affect the woman's choice to leave.[72] The four groups that affect the woman's volition are: the abuser, society, institutional failure and the patriarchal nature of society.[73] The abuser's effect on the volition of the woman steers BWS away from the view of the strict adoption of the 'learned helplessness theory' and 'cycle of violence theory'.[74] The effect of this group on the woman's volitions creates the situation where the woman has an inability to leave the abusive relationship due to coercion by the abuser.[75] This limit in volition is not due to learned helplessness as Walker would assert but instead is a coping mechanism due to having no other alternative options.[76]

Society informs the second group affecting volition of women who are battered.[77] Rothenburg described this as being both the tacit and explicit condonation of violence by men against women.[78] He explains that women are socialised into a gender-specific role and then pressurised by society to remain in this role and stay in the abusive relationship.[79]

The third group is constituted by the failure of institutions to adequately assist women who are battered. The institutional failure is not isolated to one type of institution. The failure to help and support women who are battered is a problem in institutions such as the police, government, the legal system, medical practitioners and psychologists.[80] Women often choose to stay in the

[70] Rothenberg, B. (2003). "We Don't Have Time For Social Change": Cultural Compromise and the Battered Woman Syndrome. Gender & Society, 17(5), 771 at 774.
[71] See n70 at 774.
[72] See n70 at 774.
[73] See n70 at 774.
[74] See n70 at 774.
[75] See n70 at 774.
[76] See n70 at 782.
[77] See n70 at 774.
[78] See n70 at 774.
[79] See n70 at 774.
[80] See n70 at 775.

abusive relationship when they find that they cannot get proper assistance outside of that relationship.[81]

In South Africa institutional inadequacy is widespread. Ludsin explains that

> *South African women face enormous hurdles in accessing domestic violence legislation, beginning with unsympathetic, and often hostile, police when reporting an incident of violence. State prosecutors treat domestic violence allegations less seriously than other criminal complaints. Further, the State fails to provide adequate shelter and aid to battered women seeking to leave their abusive partners.*[82]

The final factor is the patriarchy in society in general.[83] Rothenburg sets out features of a patriarchal society that affect a woman's choice to be able to leave the abusive relationship. These include: the difference in earning potential of women and men, the essentialism of women in having the responsibility to stay home and look after the children, a lack of education and/or the lack of any job skills.[84] Women become trapped in these relationships by the mere fact that there is no alternative because of the inherent structure of society. Essentially the violence against women is universally criticised yet because of the patriarchal structure of society and the unwillingness to reform, the violence is being implicitly condoned.



The theories of 'learned helplessness', 'the cycle of violence' and the 'multi-victimisation argument' all attempt to explain the perceived, or in some instances real, inability of a women to leave the abuser. They corroborate the idea that this inability to leave is characteristic of those suffering from BWS.

The next issue is whether a woman who is battered always has the ability to protect her child from her abusive partner. Protection can be achieved in numerous ways such as the woman leaving the abuser, informing authorities or physically protecting the child. It has been shown above that there is a

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[81] See n70 at 775.
[82] Ludsin *South African Criminal Law and Battered Women Who Kill: Discussion Document 1* Centre for the Study of Violence and Reconciliation 2003 9.
[83] See n70 at 775.
[84] See n70 at 775.

likelihood in cases of BWS that the woman will be unable to leave the abuser yet these theories do not explicitly deal with the ability of a woman to leave the abuser where her child's life may be in danger. In some cases of child abuse the abuser is not intentionally acting against the child. He may inadvertently harm the child when he attempts to assault his female partner or alternatively if the child tries to protest or intervene in the assault of his partner.[85]

Woman who are battered often find that they feel that they cannot intervene in the abuse of their children for numerous reasons. One such reason is linked to the inability to leave the abusive partner as discussed above, yet rather than this being focused on the woman's own interests, women often feel that by staying they can protect their children. According to Davidson, an advocate against domestic violence,

> *children [are] one of the most common reasons that many of us stay. We can better protect our children if we are there and can see the abuser than if we're on the run, and he has the opportunity and advantage of being able to track us down.*[86]

Women also reported that they are threatened to return home with their children or find themselves in the situation where they simply cannot financially support the family without the abuser and have to return home.[87] On the other hand sometimes women simply do not know that their partners are abusing their children. In some cases of sexual abuse the abuser threatens the child that revealing the abuse will split-up the family or that there will be further or increased violence.[88]

In some instances the battered woman is aware that if she reports the abuse to authorities she will be seen as permitting, condoning or failing to act to prevent the abuse of her child by the abuser and her children may be

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[85] Davidson Child Abuse and Domestic Violence: Legal Connections and Controversies *Family Law Quarterly* Vol. 29, No. 2, Special Issue on Domestic Violence (Summer 1995) 357 at 358.

[86] See above at 363 referring to Buel's. *The dynamics of Family Violence, Conference Highlights, Courts and Communities: Confronting Violence in the Family* (1993) 11.

[87] See n85 at 363.

[88] See n85 at 366.

removed from her care. The woman is aware that she will be viewed as the guilty party and punished by having her children removed. With this in mind the woman may develop an unwillingness to cooperate with the courts and agencies, which ultimately prolongs the abuse of both herself and her children.

Women who are battered along with their children may find that they are unable to leave their abusive partners. This does not solely emerge strictly from the effects of BWS on the woman but extends to external factors such as homelessness, threats of increased or intensified violence and a lack of reasonable help from authorities. If women cannot leave these abusive relationships (with or without their children) due to numerous factors then they should be able to rely on BWS as a defence for crimes related to their failure to act.

### 1.3. CRIMINAL OFFENCES WOMEN SUFFERING FROM BWS ARE COMMONLY CHARGED WITH

A woman who is found guilty of an offence relating to her passivity in preventing the death of her child is most often charged as an accessory to murder, an accessory after the fact, or with an omission. The above are all competent verdicts to murder. Competent verdicts can be described as being offences that require less to be proven than a more proof-onerous offence in the same category. Alternatively, they also include an attempt to commit an offence.[89] Chapter 26 of Criminal Procedure Act sets out some types of competent verdicts. Culpable homicide is a type of competent verdict with the more proof-onerous offence being murder. Culpable homicide is easier to prove than murder because the form of culpability is negligence, rather than intention.[90] In the case of murder there is a requirement that the accused voluntarily and intentionally caused the death of the victim. [91] Culpable homicide on the other hand requires the court to ask whether a reasonable person in the position of the accused would have foreseen the death of the

[89]Criminal Procedure Act 51 of 1977 at section 256
[90] Snyman *Criminal Law* 4th ed. 2006 426.
[91] Above at 422.

victim.[92] Although there are numerous competent verdicts that an accused can be charged with in cases of the abuse or murder of a child, the focus of this dissertation will be on the charge of being an accessory after the fact and omissions based on a duty to act.

In Rudman's case she was found guilty of being an accessory after the fact. In order to be found guilty, one must have participated in the crime or furthered the crime that was committed.[93] There must be an attempt to help the perpetrator of the crime, or the accomplice to the crime in trying to escape justice.[94] Intention is required for one to be guilty as an accessory after the fact, there is however not a clear rule on what the intention must be based on.[95] In LAWSA it states that in some cases the intention is based on knowledge of the commission or attempted commission of the crime, where the accessory attempts to help the perpetrator evade justice.[96] In other cases however, there needs to be the intention to help the perpetrator in evading prosecution and defeating the ends of justice.[97] It is argued that the reason why the accessory associates herself with the crime is not relevant when dealing with intention and this in actual fact concerns the motive for acting.[98] It is submitted that all that is required is that the accessory associate herself with the offence with the knowledge of the commission.[99]



An accessory after the fact is not liable for the same offence for which the principal perpetrator is liable and furthermore is not liable for an equal sentence.[100] The court has discretion as to the duration of sentence, yet it

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[92] See n90 at 426.
[93] See n90 at 274.
[94] See n90 at 274.
[95] Reference Works, Indexes, Dictionaries and Diaries, Law of South Africa Volume 6 - Second Edition Replacement Volume, Criminal Law, General Principles, Participation1, Accessory after the fact1 at 137.
[96] See above para 137.
[97] See n95 para 137. For cases of the former see *R v Jongani* 1937 AD 400 406; *R v Van Rensburg* 1943 TPD 436 442; *R v Keppler* 1945 WLD 27 30 36; *R v Xaki* 1950 4 All SA 172 (E); 1950 4 SA 332 (E) 333H; *R v Gani* 1957 2 All SA 236 (A); 1957 2 SA 212 (A) 222; *S v Rossi-Conti* 1971 2 All SA 306 (RA); 1971 2 SA 62 (RA) 68F and the latter *R v Abrams* (1882) 1 SC 393 398; *R v Van Rensburg* supra 441 (cf the reference in fn 1 supra); *R v Von Elling* 1945 AD 234 239–240; *R v Swart* 1945 GWL 12 17; *R v Munango* 1956 1 All SA 105 (SWA); 1956 1 SA 438 (SWA) 440F; *S v D* 1966 4 All SA 394 (N); 1966 4 SA 267 (N) 273E–F 274C.
[98] See above at para 137.
[99] See n95 para 137.
[100] See n95 para 137.

cannot be more than that of the principal perpetrator's.[101] The mitigating and aggravating circumstances in the matter will inform the sentence given.[102]

According to Snyman an accessory after the fact can take the form of an omission.[103] This is however limited to only one scenario, where there is a positive duty to act.[104] He explains that our criminal law can be broken down into two separate categories of actions; the one is based on prohibitive norms and the other is based on imperative norms.[105] The prohibitive norms are the category most people think of when they think of criminal law. These are norms that require one not to act, such as 'do not steal' or 'do not murder'. Imperative norms on the other hand are norms that require certain active conduct. It would be unlawful not to act in the case of imperative norms.[106] Imperative norms are few in number, this is because the law usually does not require one to actively go out and act, or to phrase it differently; the law does not bother itself with those who do not act. Requiring an individual to act is a greater infringement on an individual's freedom and autonomy than not requiring an individual to act.[107] The determination of what acts are actually classified as imperative norms are decided upon by looking at whether an individual has a legal duty to act. A moral duty is not sufficient to deem an act an imperative norm.[108] Snyman supplies a list of omissions, yet states that this is in no way a closed list.[109] The list includes certain things which are positive duties in and of themselves such as: accepting responsibility to control a dangerous object or animal and then failing to do so[110], a protective relationship[111], a previous positive act[112]. The list further includes things that



[101] See n95 para 140 and section 191(2) of the Criminal Procedure Act.
[102] The court in sentencing Rudman took into consideration the mitigating factors of her childhood as well as the circumstances she and Schoeman found them in at the time of Baby Wade's murder. However, the aggravating circumstances outweighed the mitigating insofar as Rudman "allow[ed] accused 2 to assault the baby to such a extent that [the child] died of horrendous injuries." (See n9 para 57).
[103] See n90 at 275.
[104] See n90 at 275.
[105] See n90 at 59.
[106] See n90 at 59.
[107] See n90 at 59.
[108] See n90 at 59.
[109] See n90 at 60 – 61.
[110] An individual who has undertaken the care of a monkey, which then bites and kills a child, is liable for an omission in looking after the wild animal.
[111] This is the focus of this essay, the case where a parent does not act in the protection of their child from abuse.

create positive duties but are not positive duties in and of themselves such as: a statute[113], an order of court[114], a contractual agreement[115], and a certain office one holds.[116]

The question of what constitutes a legal duty to act was decided in *Minister van Polisie v Ewels.*[117] It was held that courts must judge if the lack of action is regarded as wrongful when the circumstances of the case are such that the omission is seen with moral indignation and the 'legal convictions of the community' would require that it should be regarded as wrongful.[118] In the case of *S v Williams*[119] the court was confronted with deciding whether the failure by a police officer to report a crime was a legal duty or not, and if so, whether it would be considered to be an omission. The court first looked at the fact that there was a duty set out in section 5 of the Police Act.[120] The duty was deemed a statutory duty to act and failure to do so would be an omission. The court then also focused on whether there was also a common law legal duty to act. It confirmed previous case law that stated that a common law duty is established by looking at the convictions of the community and specifically asking whether the lack of action would cause surprise or indignation in the community. In this case the court held that the inaction of the police officer to report a crime would cause both surprise and indignation in the community and would thus be considered to be a common law duty.[121]



The type of omission in the case of mothers who fail to protect their children is one based on either a statute or a common law duty to act. In *R v Chenjere*[122]

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112 If an individual lights a fire and it sets alight someone else's house. If that individual fails to extinguish the fire then this constitutes an omission. See n90 at 61.
113 This is similar to the duty imposed on the police in the case of *S v Williams* (see n119) where the police had a legal duty due to the provisions of the Police Act.
114 If an order of court requires a municipality to render proper accounts of rates and the municipality fails to do so then this is contempt of court, an omission. See *The Hellinic Community of JHB & Another v City of Johannesburg 2013/31204* (unreported).
115 If an individual is employed as a lifeguard and fails to act when someone is drowning, this constitutes an omission of a duty to act set out in an employment contract.
116 Above at n90 at 61
117 Minister van Polisie v Ewels 1975 (3) SA 590 (A).
118 See above at para A – B.
119 S v Williams 1998 2 SACR 191 (SCA).
120 Police Act 7 of 1958.
121 See n119 para 9.
122 R v Chenjere 1960 1 SA 473 (FC).

Briggs elaborates on what circumstances a protective relationship might exists. He states that a positive duty

> *arises where the potential victim is helpless through infancy, senility or illness and the potential killer stands, either naturally or through a deliberate acceptance of responsibility, in a protective relationship to the victim.*[123]

The matter of *S v Thathana*[124] is an example of the reliance of the court on the common law duty to act based on a protective relationship. The court held that the accused that had brutally murdered both his wife and daughter had had a duty to protect both. This duty stemmed from his having a protective relationship as both a husband and a father.[125] In the judgment Masipa held that

> *I have... considered the relationship between the accused and the deceased. As husband and father the accused had a duty to protect the two deceased. Instead, he was the one who abused them and eventually ended their lives.*[126]

The statutory duty to protect a child was discussed in *S v Letsoale.*[127] In this matter the accused was found guilty of raping his niece. The duty to protect was based on the constitutional right of a child set out in section 28(1) of the Constitution to be protected from abuse.[128] The court extended this duty beyond that of the child's parents to other familial members and stated, "[i]n this case, as in a number of cases, the child was violated by the very person whose duty it was to protect her. The accused abused the confidence of both the child, the mother and close family members." In the above cases the protective relationship was deemed to exist between the perpetrator and the child, yet the courts have held that there is duty on a mother to protect her child from the abuse of a third party. This duty to protect arose in terms of 50(1)(a) of the Children's Care Act.[129]

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123 See above at 482.
124 S v Thathana 2008 (1) SACR 494 (W).
125 See above at 499.
126 See n124 at 499.
127 S v Letsoale 2004 JDR 0422 (T).
128 Above at 8.
129 See n11.

In the matter of *S v Hooper and Another,*[130] Cecilia Hooper's husband was found guilty of assault with intent to do grievous bodily harm for the attack on Hooper's two children.[131] He was sentenced to two years imprisonment for each of the children.[132] Hooper was found guilty of allowing the abuse of the children based on the duty to protect established by the Children's Care Act and was sentenced to the same period as her husband, except that half the sentence was suspended for five years.[133] [134]

As one can see from the above, in South African law there is a positive duty on parent to protect her child from abuse. This extends to the case of abuse at the hands of a third party, such as a woman's intimate partner. This duty arises from both the common law and previously statutory law.

In Rudman's case the prosecutor charged her with being an accessory after the fact yet did not argue that there is a common law or statutory duty to protect, instead the argument is based on the assertion that Rudman performed a positive action that aided and abetted Schoeman without asserting there was a duty to act. This is incorrect, as the prosecutor should have either aimed at proving an omission or alternatively proving the charge of being an accessory after the fact was based on a common law duty to protect (which he failed to do). It is possible that the prosecutor did not proceed with a charge of an omission, as it is infrequently used in criminal law at present (rather it is found almost exclusively in delict). Alternatively, the prosecutor was potentially unwilling to base the charge of being an accessory after the fact on an omission based on a statutory duty to protect because the Child Care Act has not been explicitly carried over to the offence to the Children's Act.[135] Yet, the prosecutor could still have relied on the charge of



[130] S v Hooper and Another (32/91) [1992] ZASCA 169.
[131] Above para 2.
[132] See n130 para 2.
[133] See n130 para 3. Hooper's sentence emphasises the court's view that a mother has a duty to protect her child and failing to do so will attract a sentence almost equal to that of the actual perpetrator.
[134] It must be noted that the crime of failure to protect, as created by s50(1)(a) of the Child Care Act was not carried over to the Children's Act. Thus, in order to rely on a statutory duty to protect one should infer this duty from the constitution as done above in *S v Letsoale* (n127).
[135] See s50(1)(a) of the Child Care Act and *S v Letsoale* (n127) at 8.

accessory after the fact based on a common law duty to protect or a statutory duty to protect inferred from the Constitution.

The court went on to rely on evidence of Rudman's inaction such as Rudman's failure to keep Baby Wade in hospital and failing to request a lift to the hospital to tenuously support the argument that she actively aided and abetted Schoeman, as evidence of being an accessory after the fact.[136] Although Snyman does suggest that being an accessory after the fact can in certain circumstances be based on an omission based on a duty to act, the court fails to mention such a duty.[137] Instead, the court assumes failure to act can simply constitute the positive actions of aiding and abetting. I therefore submit that the court incorrectly argued that Rudman had aided and abetted Schoeman through positive action and that the court should first have shown that there was a duty to act due to the protective relationship shared between Rudman and her child and then looked at whether her inaction was sufficient to constitute finding her guilty as an accessory after the fact.

In Rudman's case the court did not set out to what degree a woman must actively intervene to protect her child from the attack of a third party, in order to escape liability.[138] This threshold of active conduct to be performed by a woman is missing from South African case law. The court, if insistent on employing a duty to protect, needs to describe what the threshold is, such as reasonableness, and what conduct would be deemed reasonable. The court would furthermore need to look at the degree of danger the woman would have to put herself in to be considered to have reasonably attempted to prevent harm to her child. This threshold is employed in the United States (US) and the United Kingdom (UK) to some extent and could potentially inform South African law.

## 1.4. FOREIGN LAW ON FAILURE TO PROTECT

[136] See n9 para 32.
[137] See n90 at 275.
[138] As stated previously, omissions are predominantly relied on in delict rather than criminal law. This appears to be because the law (criminal) does not usually require an individual to actively do something and furthermore this infringes on an individual's autonomy. There is no case law that the author is aware of that deals with common law omission of failing to protect a child in criminal law, there is however case law on statutory omissions but they are few in number. See *S v Hooper and Another* at n130.

In the United States (US) there are certain thresholds that must be met for a woman to be found guilty of failing to protect.[139] The failure of a woman to intervene in the abuse of her child by a third party falls under specific statutory laws, these laws are in place in every state in the US.[140] Most states employ a strict liability test in deciding if there was a failure to protect the victim rather than the commonly employed objective test.[141] This means that the inaction of a mother to protect her child will qualify as failure to protect whether this was intentional or not.[142] In New Mexico, under the 2011 New Mexico statutes, Chapter 30 'Criminal Offences' it states that

> *[a]buse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing a child to be: (1) placed in a situation that may endanger the child's life or health; (2) tortured, cruelly confined or cruelly punished; or (3) exposed to the inclemency of the weather.*[143]

The commission of this abuse, if found to be negligent, results in a first degree felony conviction which consists of 18 years imprisonment, however if the child dies, then the sentence can be increased to life.[144] Another example of strict liability is in Arizona law where Chapter 13 'Child or vulnerable adult abuse; emotional abuse; classification; exceptions; definitions' states that

> *[u]nder circumstances likely to produce death or serious physical injury, any person who causes a child or vulnerable adult to suffer physical injury or, having the care or custody of a child or vulnerable adult, who causes or permits the person or health of the child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offence.*[145]



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[139] It must be noted that this dissertation is not seeking to provide a full comparative survey of the foreign law applicable in this matter. The foreign law referred to in this dissertation is being employed to show that in many jurisdictions the law around women suffering from BWS and failing to protect her child does not consider any defense based on BWS and is thus insufficient.

[140] Enos *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 Harv. Women's L. J. 229 1996 237.

[141] See above at 229 - 230.

[142] See n140 at 237.

[143] NM Stat § 30-6-1 (1996 through 1st Sess 50th Legis) . See https://s3.amazonaws.com/buzzfeed-media/Images/2014/09/buzzfeednews_failuretoprotectlaws.pdf accessed on 14/10/2015.

[144] See above.

[145] Ariz. Rev. Stat § 13-3623.

If an individual is found guilty she faces up to 24 years in prison for the commission of the crime of abuse.[146]

Enos correctly acknowledges that the 'failure to protect' doctrine used in the US is a valuable tool in aiming to effectively protect children.[147] Yet, it is not realistic as it fails to acknowledge the vulnerable position of women in society. Enos asserts that a strict liability approach does not take into account all possible factors that may prevent a woman suffering from BWS from acting.[148] This approach places the rights of the child as paramount to those of the mother. There is an absence of a mechanism to weigh-up the rights of the child against that of the mother resulting in the rights of a woman to dignity, equality and security and bodily integrity being entirely ignored. Enos presents two examples from US case law to show the severity of a strict liability approach in the context of failure to protect. In *Terri Williquette v State,*[149] the court held that leaving a child with someone who was known to abuse the child "demonstrates a battered mother's intent and effort to perpetuate the abuse" and thus the individual can be held directly liable for child abuse under legislation.[150] In the *State v Aleen E. Walden,*[151] the Supreme Court of North Carolina held that a parent's failure to take all reasonable steps to protect her children from a third party's attack is evidence of the parent's consent and contribution to the crime being committed against his or her child.[152]



Although Enos states that only three US states provide statutory defences for 'failure to protect' crimes, at this point in time the number has increased to eight.[153] A commonality in the defences of all eight states is that one must

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146 Above at n145.
147 See n140 above at 229.
148 See n140 above at 230.
149 Terri Williquette v State 385 N.W.2d. at 243. The case dealt the mother of two children who allegedly knew her husband had repeatedly abused both children physically and sexually. The court found that she had taken no action to stop the abuse of her children and had instead left the children in the father's sole physical custody for hours at a time whilst knowing the history of abuse perpetrated against the children.
150 Above at 243.
151 State v Aleen E. Walden 293 S.E2d 780, 787 (N.C. 1982). The case dealt with the mother who was present during the beating of her five children by her partner. A belt with a metal belt buckle was used to whip the children and consequently the children suffered severe bleeding and bruising as a result thereof. The court decided that the mother, Walden, has not taken reasonable steps to prevent the abuse of the children.
152 See n140 at 239.
153 See n140 at 237 and n143.

show that the accused had a reasonable apprehension that acting in trying to stop or prevent the act of abuse would result in 'substantial bodily injury' to herself or to her child.[154] I submit that the reasonable apprehension of substantial bodily injury threshold is too onerous. In terms of Arizona's statute 'substantial bodily injury' is defined as

> *mean[ing] physical injury that creates a reasonable risk of death or that causes serious or permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.*[155]

This can be compared to Minnesota where the definition of 'substantial bodily harm' is

> *bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.*[156]

The law thus requires that a woman must actively place herself in an acceptable degree of danger to protect her child or she will be guilty of failing to protect. The notion of an acceptable or reasonable degree of harm as a threshold is unreasonable and fails to accord women rights such as freedom and security, bodily integrity and dignity. A woman has her rights limited based solely on the fact that she is a mother and is expected to protect her child. Her value as a human being is determined by the protection she affords her child notwithstanding the physical and psychological harm she may endure in doing so.

Another issue stemming from the 'failure to protect' doctrine is the effect that removing the non-violent woman will have on her child.[157] Enos argues that it is entirely justifiable to remove children from the abusive parent when the dangers the child faces outweighs the benefit of staying with that parent,

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[154] See n140 at 237. These include Arkansas, Hawaii, Iowa, Minnesota, Ohio, Oklahoma, South *Carolina and Texas.* An example is in the statutes of Hawaii that states "[i]t shall be a defense to prosecution under sections 709-903.5(1) and 709-904(1) if, at the time the person allowed another to inflict serious or substantial bodily injury on a minor, the person reasonably believed the person would incur serious or substantial bodily injury in acting to prevent the infliction of serious or substantial bodily injury on the minor" (Hawaii Rev. Stat § 709-903.5).

[155] A.R.S. *§*13-3623 Subd F5.

[156] Minn. Stat. § 609.015 Subd 7A.

[157] See n140 at 231.

however the removal of the non-violent woman by sending her to prison or the removal of the child from a non-violent battered mother into foster care cannot be justified.[158] Enos further suggests that if state institutions disempower or prevent the abuser from committing the abuse then the mother of the child will no longer be in danger and she could then safely remove her child from harm. This avoids the process where the state further traumatises the child by making him or her go through the legal system and prevents the destruction of the non-violent family unit.[159]

In the UK, the Domestic Violence, Crime and Victims Act[160] was put in place to deal with a perceived loophole in the law where those persons jointly accused of the murder of a child would escape justice.[161] Smith explains that prosecutors were faced with the problem of having to ascertain which individual caused the death of the child in a household of individuals.[162] The specific section of the act aimed at curbing the problem, states that even if you were not the individual who performed the act that killed the child you can be found guilty of an offence if you were a member of the household, had frequent contact with the child and perceived that the child would suffer substantial bodily harm if you did not take reasonable steps to prevent the attack.[163] Smith welcomed the new legislation and stated

> *it is refreshing to see a new statute which adopts a measured approach to the issue that a person who has a duty to protect a victim from harm, is expected to take some action and not simply stand by and do (and subsequently say) nothing.*[164]

This view echoes public concern and expectation around the fact that the family member should be held to account for the death of the child to the court.[165] Although Smith is correct in asserting that there should be a duty on

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158 See n140 at 231.
159 See n140 at 231.
160 Domestic Violence, Crime and Victims Act 2004.
161 Smith *Which of you did it?* Guildhall Chambers 1 – 4 at 1. http://www.guildhallchambers.co.uk/files/CausingorAllowingDeathChildorVulnerableAdultRS05.pdf. Accessed on 10/11/2015.
162 Above at 1.
163 See n160 at section 5. The offence of failing to protect in terms of the act can receive a sentence of fourteen years in prison, a fine, or both.
164 See n161 at 2.
165 See n161 at 2.

a parent to protect her child from an attack, the matter cannot be simplified to a blanket liability on all family members without taking into account potential abuse suffered by a women in the household who has also been beaten by the primary perpetrator.

In the matter of *R v Haskey*[166] a mother of a two-year-old girl was sentenced, on appeal, to eighteen months imprisonment for her failure to protect her daughter from the abuse of the mother's partner.[167] The mother had called an ambulance as the child had a burn mark on her foot, yet later after being examined it was found that the child had bruises around her eye, on her cheek, behind her ear lobes, on her forearm, on her buttocks and thigh.[168] In evidence submitted to the court by Haskey she claimed that her partner had allegedly physically and emotionally abused her.[169] Evidence submitted in a psychiatric report stated that Haskey suffered from an anti-social personality disorder and she lived a "chronically unstable and anti-social lifestyle" and needed to address her choices of relationships.[170] Although the sentence in Haskey's case was not extremely excessive, it is still problematic. When a court is faced with individuals that need psychological assistance and support, it elects to imprison the woman rather than recognising her inability to act or look for other avenues of rehabilitation to avoid splitting up the family unit.

In the matter of *R v PR*[171] the accused was, on appeal, sentenced to one-year imprisonment.[172] In this matter R had taken her child, who had been abused by her partner, to the hospital on numerous occasions but had not followed the doctor's advice for the child to be admitted to hospital.[173] The child had suffered injuries resulting from abuse from R's boyfriend; the abuse included fractured ribs, a fractured hand, a fractured femur and a fractured pelvis.[174] It was submitted to the court that R had been in abusive relationships since she was about 16 years of age.[175] She was also scared of her partner and found

[166] R v Haskey 2011 WL 4529324, [2011] EWCA Crim 2208.
[167] As above para 1.
[168] See n166 para 4.
[169] See n166 para 8.
[170] See n166 para 10.
[171] R v PR 2002 WL 31442293, Neutral Citation Number: [2002] EWCA Crim 1619.
[172] See above
[173] See n171.
[174] See n171.
[175] See n171.

him overbearing.[176] The court simply played lip service to this in its judgment and stated that it was a helpful submission, yet failed to consider the evidence in sentencing the accused.[177] Once again the court found that a prison sentence was the appropriate punishment for a mother suffering from BWS without considering her specific situation.

In the case of both the US and the UK it can be seen that failure to protect laws do not consider evidence of historical abuse or the presence of BWS as forming part of any type of defense. The courts in both have shown that evidence of abuse is not considered as having a serious effect on a woman psychologically and thus has no real weight in affecting the final decision taken by the judge. At this point it is evident that in jurisdictions around the world there is a need for the development of a defense in criminal law that takes full account of historical abuse and BWS and applies this in the decision making process around conviction first and, if conviction is appropriate, then in mitigating sentence.



[176] See n171.
[177] See n171.

## CHAPTER 2

### 2.1. DEVELOPMENT OF THE COMMON LAW: DIRECT VERSUS INDIRECT APPROACHES

The laws criminalising a woman's inability to act in protecting her child fails to consider any of the rights that women have in terms of the Constitution, such as the right to equality[178], dignity[179] and freedom and security of person[180] or any of the values of the Bill of Rights. The common law needs to be developed to be aligned with the Constitution and promote the values of the Bill of Rights. This can be achieved through the direct or indirect application of the Bill of Rights.

The direct application of the Bill of Rights requires that the rights contained in the Bill of Rights are directly applicable to laws as they are paramount law, and overrides any other law.[181] Where normal legal remedies are not sufficient to give proper effect to a fundamental right then the Bill of Rights can generate its own remedies.[182] Direct application of the Bill of Rights imposes duties on specific actors and a breach of that duty is a violation of a constitutional obligation.[183] Indirect application on the other hand involves the application of an 'objective normative value system' established by the Bill of Rights and more generally by the Constitution.[184] The value system needs to be respected whenever common law or legislation is interpreted, developed or applied.[185] Indirect application does not override law or bring about its own remedies, but instead "respects the rules and remedies of ordinary law, but demands furtherance of its values through the operation of ordinary law".[186]

According to Currie and De Waal the distinction between direct and indirect application was extremely significant in the Interim Constitution but less so in

[178] See the Constitution at s9.
[179] See the Constitution at s10.
[180] See the Constitution at s12.
[181] Currie & de Waal The Bill of Rights Handbook 5th ed (2009) 32.
[182] Above at 32.
[183] See n181 at 35.
[184] See n181 at 32.
[185] See n181 at 32.
[186] See n181 at 32.

the current Constitution.[187] Indirect application was important in the Interim Constitution as the interim Bill of Rights did not apply directly to horizontal cases. Yet, even if an individual was not directly bound there was still the option of using indirect application in developing the common law and interpreting legislation, as the law had to recognise the rights in the interim Bill of Rights.[188] The case of *Du Plessis*[189] galvanised the distinction between direct and indirect application with reference to the 'two-track' jurisdictional scheme of the Interim Constitution. The 'two-track' system regarded development of the common law as non-constitutional and left this in the realm of work of the Appellate Division.[190] The Constitutional Assembly were troubled by the confinement of the application of the Bill of Rights to direct vertical application so when the 1996 Constitution was introduced it contained section 8(2) which ensured that rights were directly horizontally justiciable. [191]

Woolman disagrees with the assertion that the distinction between the direct and indirect approach is insignificant in terms of the 1996 Constitution. He finds it problematic that the Constitutional Court has often chosen not to use the direct application of the Bill of Rights and instead relies on the indirect application of the Bill of Rights.[192] He locates the problem with using the indirect approach in that it involves a "[f]laccid analysis in terms of three vaguely defined values — dignity, equality and freedom" instead of the more rigorous interrogation of the rights which the direct approach sets out.[193] This is a problem inherent to the indirect approach, as it does not offer any provision similar to the limitation clause, which demands that the court interrogate things such as the nature of the right.[194] Interrogating the nature of the right requires the court to give substance to the rights set out in the Bill of Rights, which enables litigants to know what having a certain right entails.[195] In using the indirect approach the court must develop the law in terms of the



187 See n181 at 32.
188 See n181 at 33.
189 Du Plessis v De Klerk 1996 (3) SA 850 (CC).
190 See n181 at 34.
191 See n181 at 34.
192 Woolman 'The Amazing, Vanishing Bill of Rights' (2007) SALJ 762.
193 Above at 763.
194 See the Constitution at section 36 (1)(a).
195 See n192 at 763.

values of the Bill of Rights, which are human dignity, equality and freedom.[196] This does not require the court to give content to the right and as Woolman suggests, it often "leaves readers of a judgment at a loss as to how the Bill of Rights might operate in some future matter".[197]

I agree with the argument set out by Woolman, yet in order to have the common law developed to achieve the desired outcome in having the position of women who suffer from BWS acknowledged, it is imperative to evaluate the consequences of both indirect and direct application and choose the most appropriate form of application based on that. Employing the direct interpretation would have the unintentional consequence of invalidating the common law, if it were found to infringe on a specific right and pass the limitation inquiry. The invalidation of the common law duty to protect is not required as it is extremely important in guarding the rights of children and aiming to prevent abuse by any third party. The common law however needs to be aligned with the values of the Bill of Rights and acknowledge the position of vulnerable groups.

In the case of *Carmichele* the court dealt with the development of the common law in relation to the law of delict and focused specifically on women as a vulnerable group that are one of the primary subjects of gender based violence in South Africa.[198] In the matter the applicant argued that the Minister of Safety and Security was liable for the failure of the police to protect her in terms of the duty she alleged the police owe the public, and women in particular, to prevent them from being victims of violent crimes.[199] By relying on this duty the applicant alleged that the police breached this duty, did so negligently and that there was a connection between the breach of the duty and the damage caused, thus the requirements for a delict.[200] Counsel for the applicant argued that the common law required development in order to acknowledge that the police have a legal duty to protect the applicant from a

[196] See the Constitution at section 1(a) and section 7(1).
[197] See n192 at 763.
[198] See n14 para 4.
[199] See n14 para 25.
[200] See n14 para 25.

third party and that the development of the common law with regard to the spirit, purport and objects of the Bill of Rights is a constitutional obligation.[201]

The court in *Carmichele* discussed the obligation on the judiciary to develop the common law.[202] According to Ackermann and Goldstone this obligation exists based on the fact that section 173 of the Constitution states that the Constitutional Court, Supreme Court of Appeal and the high courts have the inherent power to develop the common law taking into account the interests of justice.[203] Section 7 of the Constitution states that the state must respect, protect, promote and fulfil the right of the Bill of Rights and section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary, the executive and the legislature. Section 39(2) provides that when the court develops the common law it must promote the spirit, purport and objects of the Bill of Rights. From this Ackermann and Goldstone conclude that "[i]t follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."[204] The court goes on to set out a two-stage approach, which it describes as not being able to be "hermetically separated from one another".[205] The first stage requires one to look at the common law and see whether it takes regard to section 39(2) objectives and if it needs to be developed to do so. The second stage requires that if the common law did not have regard to the section 39(2) objectives then how can it be developed in order for it to meet the objectives.[206] The court considered the common law relating to omissions and in seeing whether it should be developed looked at

[201] See n14 para 28 and 30.
[202] See n14 para 33.
[203] See n14 para 33.
[204] See n14 para 33. It is not entirely clear that the argument presented by the court implicitly leads to the conclusion that there is an obligation on the judiciary to develop the common law as the court simply sets out a series of sections from the Constitution but fails to present how they actually work together in creating the obligation. According to Fagan "The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development" 2010 SALJ 611-627 Fagan argues that the Court in *Carmichele* was wrong in endorsing the view that the court has an obligation to develop the common law. Fagan argues that the development of the common law is only a secondary role of the court and should be applied "when the rights in the Bill of Rights, justice and the rules of the common law justify not only one way, but rather several alternative ways, of developing the common law, the spirit, purport and objects of the Bill of Rights may provide reasons for preferring one of those ways of developing the common law over the others." (page 611 – 612).
[205] See n14 para 34.
[206] See n14 para 34.

the rights to life, dignity and security and safety of an individual as set out in the Bill of Rights.[207] The court then looked at the state's obligation in terms of section 8(1), where it must respect, protect, promote and fulfil the rights in the Bill of Rights and found that there was a duty on the state to act where these rights may be infringed, even if this is by a third party.[208] In finality the court held that the common law was to be developed in such a way that in special circumstances the law of delict affords the applicant the right to claim damages if the police were negligent by breaching a duty to project.[209]

In determining the special circumstances of this case the court looked beyond a generalised interpretation of the right to life, dignity and safety and security of an individual and the duty on state to protect and fulfill these rights and took a gendered perspective to approach the rights by focusing on the vulnerable position of women in society.[210] The court referred to the submission of the *amicus curiae* which stated that "[s]exual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women" and that "[t]he courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."[211] The *amicus* emphasised that there are few things more important to women than being free from sexual violence.[212] The court went on to acknowledge that in terms of international law and specifically the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), South Africa has a duty to prohibit all gender-based discrimination and take appropriate measures to prevent the violation of that right.[213]

In the case of *Masiya*[214] the court was faced with the development of the common law definition of rape to include the penetration of the anus and

[207] See n14 para 44.
[208] See n14 para 44.
[209] See n14 para 78.
[210] See n14 para 64.
[211] See n14 para 64.
[212] See n14 para 64.
[213] See n14 para 64.
[214] Above at n15.

whether or not the definition should remain gender-specific.[215] The court's decision in *Masiya* was not entirely correct and should have relied on the finding of the magistrate court and high court which opted for the development of the common definition of rape whereas the Constitutional court decided not to extend the definition of rape to include the non-consensual penetration of a male's anus.[216] The court stated that

> *the issue before us then is whether the current definition of rape needs to be developed to include anal penetration within its scope. The facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis... This Court has stressed that it is not desirable that a case should be dealt with on the basis of what the facts might be rather than what they are.*

This view of the court stands at odds with the court's own view in *Carmichele* where it said there was an obligation on the court to develop the common law in line with section 39(2) and that

> *[i]t needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.*[217]

In developing the common law the court once again uses a gender-focused perspective. The approach taken by the court was to focus on the "inequality and discrimination engendered by the definition and the resultant inadequate and discriminatory sentences".[218] The court referred to the Declaration on the Elimination of Violence Against Women, which imposes a duty on member states to enact laws, and policies that would eliminate violence against women.[219] The court argued that non-consensual anal penetration of a female constitutes violence as set out above as it is of equal intensity as vaginal rape.[220] The court then looked at the common law criminalisation of rape and held that the object of the criminalisation is to protect the dignity, sexual

[215] See n15 para 12.
[216] See n15 para 29.
[217] See n14 para 31.
[218] See n15 para 36.
[219] See n15 para 37.
[220] See n15 para 37.

autonomy and privacy of women as the most vulnerable group and that this is in line with the "values enshrined in the Bill of Rights".[221] The court concluded that the extension of the definition to include anal penetration "would protect the dignity of survivors, especially young girls who may not be able to differentiate between the different types of penetration"[222] and although the consequences of "anal penetration might be different to those caused by non-consensual penetration of the vagina... the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter."[223]

I propose that our courts consider the development of a common law criminal defense by balancing the vulnerable position of women in society and the scourge of gender based violence in South Africa, as echoed in both *Carmichele* and *Masiya,* against the rights of the child. If it is found that there has been as unjustified limitation, which I argue there is, on the rights of the woman then the common law must be developed as suggested above.

## 2.2. THE RIGHTS OF THE CHILD

The rights of the child are set out in section 28 of the Constitution. This section gives additional protection to children over and above the rights accorded to everyone in terms of the Bill of Rights. The rights are fully expanded upon in the Children's Act.[224] The most relevant rights set out in section 28 in relation to violence against children are that: every child has the right to the care of a parent or family, or to alternative care if removed from

[221] See n15 para 37.

[222] It is important to note that trauma and infringement of rights created by rape concerns more than simply the confusion around the 'hole' as the evidence of Dr Grabe might suggest (para 38); the actual act of sexual violence perpetrated against the victim whether there is penetration or not or whether this is done by a sexual organ or not, is what affects the dignity of the individual and creates the trauma. This is captured in the definition for rape contained in section 3 of the Criminal law Sexual Offences and Related Matters Amendment Act 32 of 2007.

[223] See n15 para 37.

[224] Section 1 of the Children's Act defines 'care' which includes sections of the Constitution such as "family care or parental care" (section 28(1)(b)), "a suitable place to live" (section 28(1)(c)); "to be protected from maltreatment, neglect, abuse or degradation" (section 28(1)(d)) and "a child's best interests are of paramount importance in every matter concerning the child" (section 28(2)). The best interest of the child is then further expanded upon in section 9 of the Children's Act.

the family environment,[225] every child has the right to be protected from maltreatment, neglect or abuse[226] and that a child's best interests are of paramount importance in all matters which concern a child.[227] The right of the child to parental or family care places a duty on the parents and the family of a child to provide care to the child, as well as placing a duty on the state to respect and support the institution of the family. Bekink argues that the right aims to preserve healthy relationships between parents and children and imposes an obligation on the state to respect parental care by limiting its interference therein only to situations where it is justified to do so.[228] The definition of care as set out in the Children's Act includes: a place to live, conditions which promote a child's wellbeing, financial support, protections from maltreatment and abuse both physically and emotionally, maintaining a relationship with the child and generally upholding and ensuring the best interest of the child.[229]

The duty to protect is not explicitly set out in the Children's Act. Yet, in terms of its predecessor the Child Care Act, there was an explicit duty on a parent, or person-having custody over child to protect the child from third parties and failure to do so resulted in an offence.[230] Section 305(3)(a) of Children's Act states that

> *[a] parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person- abuses or deliberately neglects the child".*[231]

The duty to protect could be read into the legislation by focusing on the definition of 'care' in section 1 of the Children's Act. 'Care' is defined, in part, as "protecting the child from maltreatment, abuse, neglect, degradation,

[225] See n12 at section 28(1)(b).
[226] See n12 at section 28(1)(d).
[227] See n12 at section 28(2).
[228] Bekink *"Child divorce": a break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parent* 186.
[229] See n12 at section 1.
[230] See n11 at section 50(1)(a).
[231] See n12 at section 305(3)(a).

discrimination, exploitation and any other physical, emotional or moral harm or hazards".[232] A failure to actively provide care, specifically against abuse of a child, would ultimately need an accompanying offence or the provision would be meaningless. Section 150 of the Children's Act sets out what factors define a child as being in need of care and protection, this includes: a child which may be at risk if returned to the custody of the parent as there is reason to believe that the he or she will be exposed to circumstances which may seriously harm his or her physical, mental or social well-being[233], a child in a state of physical or mental neglect[234] or a child which is being maltreated, abused, deliberately neglected or degraded by a parent.[235] Once it has been determined that a child is in need of care and protection the child can be removed from the harmful environment either by way of court order or without a court order. Removal of the child by court order is done through a process of making application to a presiding officer who must immediately appoint a social worker to investigate the situation. The officer may then also, if it appears necessary for the safety and wellbeing of the child, order that the child be removed to a temporary place of safety. The parents or care-givers of the child must be notified of this within 24 hours of the child's removal. The removal can be done by any person identified in the court order with or without the accompaniment of the police.[236] In the case of removal of the child without a court order, this can only be done by a police officer or a designated social worker. There must be reasonable grounds to believe that the child needs care and protection and secondly the child needs "immediate urgency protection".[237] It must be shown that the delay in attaining a court order will jeopardise the child's safety and wellbeing. The removal of the child set out above is only temporary and the duty to determine whether the removal should be permanent then rests on the shoulders of the court.[238] This is not a decision that is made without extensive evidence. In both of the above cases of removing the child the best interest of the child must be of utmost

[232] See n12 at section 1(a)(c).
[233] See n12 at section 150 (1)(g).
[234] See n12 at section 150 (1)(h).
[235] See n12 at section 150 (1)(i).
[236] See n12 at section 151.
[237] See n12 at section 152 (1)(a)(ii).
[238] See n12 at section 152(4).

importance in deciding whether the child should be removed from the situation and taken to a place of safety.

Apart from the obligation on parents, guardians or care-givers to properly care for the children which they have rights and responsibilities over, and the obligation on the state to remove children when there is not proper care and it is in the best interest of the specific child, there also rests an obligation on other individuals with regard to children who appear to have been abused, neglected or maltreated which they encounter in their profession. The duty does not only rest on doctors or nurses as commonly thought. This duty is quite expansive and includes among others: correctional officials, dentists, homeopaths, labour inspectors, legal practitioners, ministers of religion, occupational therapists, teachers and traditional health practitioners.[239] The individual must conclude on reasonable grounds that the child has been abused in a manner causing physical injury, sexual abuse, or deliberate neglect. This must be reported to a child protection organisation, the provincial department of social development or to a police official.[240] A person failing to report the abuse can be found guilty of an offence in terms of section 305 (1)(c) of the Children's Act and section 54 of the Criminal Law Sexual Offences and Related Matters Amendment Act.[241] In terms of section 54 of the Sexual Offences Act an individual has knowledge of a sexual offence committed against a minor, has reasonable belief or who has suspicion must report the matter or can face a fine or a period not exceeding 5 years imprisonment.

In a UNICEF study in 2012 it was found that children from violent homes are at a greater risks of physical abuse, as the co-morbidity between domestic violence and child abuse is close to 40%.[242] Furthermore, in a study done by the Medical Research Council in 2009, it was found that approximately 3 children are murdered in South Africa per day and of the total murders

[239] See n12 at section 110(1).
[240] See n12 at section 110(1).
[241] Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2000. Hereinafter referred to as the "Sexual Offences Act".
[242] See n8 at 19.

recorded 44.5% are due to abuse and neglect.[243] "Filicide is a form of murder where a parent (not necessarily a biological parent) kills one or more of his or her children".[244] There are three different terms used for the killing of a child by its parent or parents depending on the age of the child. The first is neonaticide, which is the killing of a new born child by its biological parent within the first 24 hours of delivery. The second is infanticide, which is the killing of a child within its first year of life. The third is filicide[245], which is the killing of a child, which is over one year old.[246] Research has shown that neonaticide is the most prevalent form of child killing, followed by infanticide, then early filicide and late filicide. Mothers are the most likely to commit neonaticide and infanticide, whereas fathers are most likely to commit filicide.[247] There are five categories describing why a parent chooses to kill his or her child or children. The categories were pioneered by PJ Resnick.[248] The first type is altruistic or mercy killing, where the parent kills the child in order to relieve the actual or perceived suffering of the child.[249] The second type is psychotic child killings, where the parent kills the child in response to hallucinations, impulses, delusions or paranoia.[250] The third type is the killing of an unwanted child (this is most likely to be case in instances of neonaticides).[251] The fourth type is accidental child killings where the parent did not actually intend to kill the child.[252] The fifth type is spousal revenge or retaliation killings, this is where one parent kills the child to exact revenge or exert power over the other spouse.[253] In the context of domestic violence and child abuse in this dissertation the last three categories are most applicable.[254] The most frequent of these killings is accidental child killings,



[243] Mathews et al South African Medical Research Council RESEARCH BRIEF AUGUST 2012 Patterns In South Africa: Is There A Link To Child Abuse? at 1.
[244] Whitenear-Nel *Sentencing filicidal parents: A discussion in the context of two recent cases: S v Saziso Notice Mtshali Case Number CC 147/09, and S v Shaw 2011 (1) SACR 368 (ECG)* 93.
[245] Note that filicide is used as a general term for child killings, unless otherwise specified.
[246] See n244 at 93.
[247] See n244 at 93.
[248] Resnick *Child murders by parents: A psychiatric review of filicide American Journal of Psychiatry* (1969) 73.
[249] See n244 at 94.
[250] See n244 at 94.
[251] See n244 at 94.
[252] See n244 at 94.
[253] See n244 at 94.
[254] See n244 at 94.

where the abuse of the child goes too far and results in the child's death, which is similar to what occurred in the Rudman matter.

In South African law at present a parent who kills his or her child and is a first time offender has a prescribed minimum sentence of 15 years.[255] There can however be a higher sentence imposed if the circumstances warrant such and likewise a lower sentence can be imposed if there are substantial and compelling circumstances which would result in such a sentence being disproportionate to the offence.[256] The two cases presented by Whitear-Nel, act as examples of the increase in length of a sentence and the decrease of the length of sentence of a person who commits filicide. In the case of *S v Shaw,*[257] the father of two children aged four and seven killed both his children after an argument with his wife.[258] This type of killing can be characterised as a revenge or retaliation killing.[259] This is emphasised in the court's words, when it said

> *[i]t is, on the contrary, clear... that the accused hanged his two children in order to punish his wife for resisting his control. It is difficult to imagine a more callous, cold-blooded and despicable deed. The accused used his children as pawns to be sacrificed in his battle with his wife.*[260]

In considering the accused's case, the court held that he was an, "extremely poor and unconvincing"[261] witness in comparison to his wife. It was furthermore found from his testimony that he was "entirely self-centred and manipulative".[262] The accused at no point showed any remorse for the killing of the children and although he claimed that he was suffering the loss of his children and how difficult this was for him, the court stated

> *[t]he fact that he was the cause of the deaths of two innocent children appears to have escaped him entirely in his hypocritical attempts to portray himself as*

[255] See n244 at 95.
[256] See n244 at 96.
[257] S v Shaw 2011 (1) SACR 368 (ECG) 93.
[258] See n244 at 95.
[259] See n244 at 94.
[260] See n257 at 376.
[261] See n257 at 375.
[262] See n257 at 375.

*one of the victims. His evidence in this regard is once again a striking illustration of his utter self-absorption.*[263]

In consideration of the accused's case as well as mitigation of sentence, where the accused claimed that the children had quick and painless deaths from being hanged, the court sentenced the accused to a life sentence.[264]

On the other hand, in the unreported judgment of *S v Saziso Notice Mtshali*,[265] the accused killed her two children and attempted to kill herself. This occurred after she had been invited during school holidays to visit the father of her children and on arrival he denied them entrance into his house and beat the accused. The accused did not have enough money to travel home and was left in a despairing situation. She then decided that her situation would not improve so she strangled both her children while they slept and she tried to commit suicide by overdosing on pills. The accused woke later and realised she had killed her children and went directly to the police station to report the crime and admit what she had done.[266] In the above matter the filicide can be considered to be altruistic or mercy killing.[267] The testimony of psychologist Professor Schlebush at trial emphasised the accused's state of mind. The court referred to Professor Schlebush's testimony and stated



*the accused's behavioural response to the situation she found herself in [was] most likely the result of psychological decompensation, in other words the inability to cope with her situation, which would have been exasperated by her feelings of hopelessness/abandonment, the traumatic stress she had experienced, physical and verbal abuse (abused woman syndrome) and depression she experienced consequent to her dysfunctional relationship with the deceased's father and the resulting situation in which she found herself with her two children. Her normal adaptive resources would have failed her in that she was psychologically overwhelmed resulting in... behavioural dyscontrol.*

[263] See n257 at 376.
[264] See n257 at 376.
[265] S v Saziso Notice Mtshali Case Number CC 147/09.
[266] See n244 at 98.
[267] See n244 at 94.

*She then emphatically believed that the only solution for her children was to die."*[268]

The court in considering the sentence, accepted that the accused's case was not one where retribution in the form of a prison sentence was required. The court furthermore accepted that the accused was not a danger to society and this was why removing her from society was unfavourable. It was a crime that was highly unlikely to reoccur.[269] The accused was sentenced to ten years imprisonment, wholly suspended for a period of 5 years, on condition that she was not convicted of a crime involving assault during that period, and in respect of which she is sentenced to an unsuspended term of imprisonment with no option of a fine.[270] She was furthermore convicted to correctional supervision for a period of three years.[271]

In comparing the Rudman matter to the above cases it would likely be classified as an example of filicide where the child was accidentally killed. The prolonged abuse of Baby Wade was intentional, yet his ultimate death was arguably not the intention of Schoeman. Instead Baby Wade finally succumbed to the extensive abuse perpetrated against him.



There is no definitive common profile of a parent who kills his or her child yet there are certain factors that seem to correlate in cases of filicide. The factors include:

*individual vulnerability (in whatever form), economic stress, low level education, mental pathology (such as depression, psychosis or neurosis), youthfulness, substance abuse and intoxication, social isolation, a lack of social support, stress (the loss of a job and the threat of a spouse leaving are common stressors), and previous suicide attempts.*[272]

The factors given by Whitenear-Nel pertaining to individuals who commit filicide are relevant in the circumstances of both Marissa Rudman and Nolan

[268] See n265 at 9.
[269] See n244 at 100.
[270] See n244 at 100.
[271] See n244 at 100.
[272] See n244 at 94.

Schoeman. Rudman and Schoeman were in a dire financial position at the time of Baby Wade's death as both were unemployed[273], both suffered stress in relation to their economic circumstances. They were both drug users and even more so in the two weeks prior to Baby Wade's death[274], both were very likely to have had psychological issues arising from the abuse they endured as children[275] and Schoeman was not a well-educated man having left school in grade 9 after having failed twice.[276] In the case of Schoeman and Rudman their psychological history of abuse as well as the circumstances they found themselves in at the time of Baby Wade's death gave to a heightened possibility of either or both of them being perpetrators of filicide. What is evident is that although both may have had a likelihood to commit filicide, only Schoeman perpetrated the crime. It is thus not in dispute that Nolan Schoeman was deserving of the sentence handed down to him of 12 years for the murder of Baby Wade. However, the sentence of Rudman of 10 years imprisonment for being an accessory after the fact to the murder of her child, is in my view not justifiable as the court fails to take into account her psychological state from years of abuse and her psychological state at the time of the offence due to the presence of BWS.



I shall now explore in more detail, the rights of women suffering from BWS, like Rudman, the effect of failure to protect laws on these rights and how the law should be developed in light of spirit, purport and objects of the Bill of Rights.

## 2.3. THE RIGHTS OF A WOMAN

The court in Rudman stated that "an innocent baby was tortured and killed by the people who was (sic) supposed to cherish and protect him... The gravity of the offense must bear more weight that the accuseds' interests."[277] In the matter of *V v V*,[278] the court stated that "situations may well arise where the best interest of the child requires that action is taken for the benefit of the child

[273] See n9 para 42.
[274] See n9 para 29.
[275] See n9 para 24-25 and 41.
[276] See n9 para 41.
[277] See n9 para 12.
[278] V v V 1998 (4) SA 169 (C).

which effectively cuts across the parents' rights".[279] In both of the above matters the courts adopt an approach, which puts the rights of the child above those of the mother. This is partly understandable as children are a vulnerable group in society and the courts are placed in a position that must emphasise the best interest of children as paramount.[280] Yet, this approach fails to consider the fact that there is no hierarchy of rights in the Constitution.[281] By wrongly focusing solely on the rights of the child, the vulnerability of women in society is ignored. Currently the law forces women who suffer from BWS, as a result of an abusive partner, to actively protect their children from abuse from that same abusive partner and consequently this infringes on a woman's rights to dignity[282], life[283], equality[284], to be free from all forms of violence from either public or private sources[285], not to be treated or punished in a cruel[286], inhuman or degrading way and to security in and control over their body.[287]

By making the failure to protect laws obligatory and furthermore punishable by criminal sanction, in cases where a woman suffers from BWS the laws limit many of a woman's rights. At this point, however, I would specifically like to focus on a woman's right to dignity.

At present our courts have not given a comprehensive definition of dignity,[288] yet Currie and De Waal assert that the courts have traced the origins of the right to dignity back to philosopher Immanuel Kant where dignity is considered to be that which gives a person intrinsic worth.[289] According to Kant



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279 Above at 189.
280 See the Constitution at section 28 (2).
281 South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others (CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC) (21 September 2006) "In our constitutional scheme a right entrenched in the Bill of Rights is certainly not absolute. Nor do we subscribe to a hierarchy of entrenched freedoms and fundamental rights" (para 91).
282 See the Constitution at section 10.
283 See the Constitution at section 11.
284 See the Constitution at section 9.
285 See the Constitution at section 12(1)(c).
286 See the Constitution at section 12(1)(d).
287 See the Constitution at section 12(2)(b). I will focus specifically on the rights to dignity and equality while I maintain that all of the rights mentioned above are relevant in this matter.
288 Jordaan *'Autonomy as an Element of Human Dignity in South African Case Law '* The Journal of Philosophy, Science & Law Volume 9, September 8, 2009 at 3
289 See n181 above at 273. Currie and De Waal make this assertion based on page 198 of Chaskalson *'Human Dignity as a Foundational Value of our Constitutional Order'* (2000) 16 SAHRJ 193 and the judgment of Ackerman in S v Dodo 2001 (3) SA 382 (CC) para 38 which states "[h]uman beings are not commodities to which a price can be attached; they are creatures with

"[a]utonomy is said to be the ground of dignity, and this is a property of the will of every rational being."[290] According to Jordaan the view that dignity encompasses autonomy of the individual was spelled out implicitly in the case of *Ferreira.*[291] Ackermann states that

> *[h]uman dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential.... Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own.*[292]

The use of the term 'freedom' can be used interchangeable with the term 'autonomy' in the above quote; one is free when one acts autonomously and when one is not restricted in making decisions about one's life.

The court has also explicitly referred to autonomy in the matter of *NM*[293] where O'Regan, for the minority, states that "[u]nderlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them."[294] Similarly in *Barkhuizen*[295] Ngcobo states that "[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.[296]

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inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."

[290] Kant Groundwork of the Metaphysics of Morals trans. H.J. Paton 1964 at 103

[291] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

[292] Above para 49.

[293] NM and Others v Smith and Others (CCT69/05) [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC).

[294] Above para 145.

[295] Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[296] Above para 50.

In light of the above cases autonomy can be interpreted as making up part of the right to dignity and the value of dignity within our Constitution. The limitation of one's autonomy as an individual, physically or mentally, can then be deemed a limitation on one's right to dignity as well as going against one of the values in the Bill of Rights. In the instance of a woman who is suffering from BWS and who is then legally forced to act in the protection of her child, when that child is being abused by the woman's abuser, the limitation on the right to autonomy becomes twofold. In the first instance the woman's intimate partner robs the woman's of autonomy through the process of violence. In many instances she cannot escape, or perceives that she cannot escape, she is subject to violence that she cannot control, sex that is not always consensual, she may be prevented from working, her every movement may be monitored and controlled, she may be starved of emotional support from her intimate partner and even alienated from her family. All these are limitations of her autonomy and an infringement of her dignity. The next instance of having her autonomy taken away is by the state. This occurs when the state forces the woman to act, where failure to do so will result in a conviction. The woman cannot act because of the actual or perceived danger of doing so, this affects her autonomy to choose whether or not to intervene. The woman may legitimately be physically and mentally unable to protect her child yet in the eyes of the law she has no choice in the matter, she must do what for her is impossible. The choice for the woman is not her own because she is bound by two paths that she did not choose voluntarily; the one is an inability to act due to the abuse she has endured and the other is the obligation to act set out by the law.

Another right that is also affected by failure to protect laws is that of equality. The courts often assert that women are primary care givers. When a woman then fails to act to stop the abuse of her child the courts are demonstrably stricter with their punishment. This is echoed through the cases of both *Rudman* and *Hooper* where both women were found to have failed to act and were given sentences almost equal to that of the actual perpetrator, who was in both cases their partners.[297] In imposing almost equivalent sentences for women who fail to protect to that of the actual perpetrator the courts infringe

[297] See n9 at para 58 and n130 para 2.

on the woman's right to equality. The infringement of equality through the process of stereotyping or essentialist views was clearly explained by Kriegler in *Hugo*[298] where he argued that

> *women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind.*

It is furthermore an infringement on a woman's equality by failing to consider the vulnerable position she holds within society. The Constitutional Court in both *Carmichele* and *Baloyi* addressed the vulnerability of women to gender based violence. In acknowledging that women are vulnerable to gender based violence the courts must similarly acknowledge the effect that this violence may have on a woman's ability, both mentally and physically, to act in defending her child from abuse.



In her speech at the Dullah Omar Memorial Lecture in 1999,[299] Pillay emphasised that implementation of law is important in achieving the rights of women. She explained that "equality before the law loses its meaning when laws are not given full effect" and furthermore factors influencing the rights of women are "women's lack of access to justice, or gender-blind or gender-insensitive judiciary [which] undermine women's rights to equal opportunities and treatment."[300] When looking at the rights of women in society it is pertinent to examine the status of these rights through the lens of substantive equality, which is revealed in Pillay's statements above.

Substantive equality unlike formal equality requires, "...attention to context, the intersection of different grounds of disadvantage, difference, and positive

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[298] President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) para 80.
[299] Pillay *Dullah Omar Memorial Lecture in 1999 Women's Rights in Human Rights Systems.*
[300] Above at 41.

obligations upon the state."[301] Even with the above as a starting point to attempt to set out the foundations of substantive equality, the full meaning of substantive equality and what it actually requires is contested.[302] Yet, as Albertyn writes, "[e]quality of opportunity, equality of results, dignity, the recognition and affirmation of difference, social inclusion, and redistributive justice vie as the lodestone of substantive equality."[303] Albertyn in her paper, Substantive Equality and Transformation in South Africa,[304] looks at using substantive equality as a legal tool in achieving transformation in law and society.[305] She states that the legal form of substantive equality, which is used by the Constitutional Court, focuses on, "context, impact, difference and values", and that this has the potential to bring about social and economical change. Yet, she finds that there is an impasse of transformation insofar as the courts still battle with institutional issues such as the separation of powers doctrine, the "capacity and willingness" of judges to consider the "multiple systematic inequalities" which are still pervasive in our society and the development of jurisprudence in line with transformative ideas to inform the doctrines which form the basis of equality claims.[306] Albertyn holds that although there is some broadening of equality jurisprudence it is in the form of "inclusionary" rather than "transformative" equality. She explains that "inclusionary" equality is an approach, which aligns itself with the idea of inclusion into the *status quo*.[307] This acts in broadening social recognition yet it does not deal with the foundations of inequality that continue to spread systemic inequality.[308] This type of approach deals with the consequences of the normative views, which stem from ingrained inequality rather than attempting to redefine the foundations of inequality through legal and social transformation.[309]

Albertyn sketches how the inclusionary approach affects the case of women

[301] Albertyn et al *Introduction: Substantive equality, social rights and women: A comparative perspective* (2007) 23 *SAJHR* 209 page 209.
[302] Above at 209.
[303] See n301 at 209.
[304] Albertyn, C. "Substantive Equality and Transformation in South Africa" at 253.
[305] Above at 253.
[306] See n304 at 254.
[307] See n304 at 256.
[308] See n304 at 256.
[309] See n304 at 256.

in society. An inclusionary approach would recognise that women are disadvantaged as mothers and accommodate this, yet there would be no investigation into the basis of this disadvantage and furthermore no change in the "underlying ideas of gender that establish the different, unequal and static roles and institutional positions for women and men as parents."[310] With the current adoption of the inclusionary approach to equality this means that there "remain[s] clear legal and social boundaries that are both normative and doctrinal, that sustain conventionally gendered ideas of society — women, family, marriage and sexuality."[311]

The more preferable approach to equality is what Albertyn calls the "transformatory approach".[312] This approach not only addresses inequalities but also seeks to try to "shift the power relations that maintain the *status quo*". This is a process of changing the framework that underlies the perpetuation of inequalities and changes the normative views associated thereto.[313] A transformatory approach to inequality against women would, according to Albertyn, locate the understanding of women's disadvantage within the framework of inequality, it would then break-down these understandings by finding new interpretations of equality and using these interpretations to create new remedies that can uphold an egalitarian view of gender roles.[314]

The Constitutional Court dealt with the role of women as mothers in the matter in *Hugo.* In the majority judgment handed down by Goldstone, the court sets out the present position of the woman with regard to child rearing and emphasises that this position is a stereotype to which woman have been socialised into.[315] Goldstone stated that although it may be a privilege to have children and that there is undeniable pleasure which one can derive therefrom "there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy."[316] For Goldstone the burden on women who raise children is both a social and an economic one.[317] This is

[310] See n304 at 254.
[311] See n304 at 254.
[312] See n304 at 256.
[313] See n304 at 256.
[314] See n304 at 256.
[315] See n298 paras 37 – 39.
[316] See n298 para 38.
[317] See n298 para 38.

worsened in cases of woman who have no skills and very limited financial support.[318] These women find themselves in the situation where they cannot compete in the labour market not only due to their lack of skills but also because they are expected to look after their children.[319] This ultimately bolsters the inequality experienced by women. For Goldstone, the blame lies squarely on the men in relationships with these women as he states that "[t]he failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship."[320] Goldstone cites that historically housekeeping and rearing children were provided as reasons why woman were excluded from other spheres and until these responsibilities are shared equally we will fail to achieve an egalitarian society.[321] In the minority judgment, Mokgoro strongly asserts the notion of transformative equality is to change the normative view, which perpetuate that the place of a woman is within the home and rearing her children. She states

> *[s]ociety should no longer be bound by the notions that a woman's place is in the home, (and conversely, not in the public sphere), and that fathers do not have a significant role to play in the rearing of their young children. Those notions have for too long deprived women of a fair opportunity to participate in public life, and deprived society of the valuable contribution women can make. Women have been prevented from gaining economic self-sufficiency, or forging identities for themselves independent of their roles as wives and mothers. By the same token, society has denied fathers the opportunity to participate in child rearing, which is detrimental both to fathers and their children.*[322]

Albertyn emphasises that although the court does recognise the "responsibilities and complexities of motherhood",[323] it does not recognise the group of vulnerable fathers and in so doing it fails to break down "sex-based barriers of gender"[324] and does not employ a transformatory approach in this regard.[325]

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[318] See n298 para 38.
[319] See n298 para 38.
[320] See n298 para 38.
[321] See n298 para 38.
[322] See n298 at 93.
[323] See n304 at 262.
[324] See n304 at 263.
[325] See n304 at 262 – 263. The dissenting judgment of Kriegler embraces a far more tranformatory approach to that of the majority judgment. See n298 at 80.

In *S v Baloyi*[326] the Constitutional Court dealt with section 3(5) of the Prevention of Family Violence Act[327] which the respondent had claimed was constitutionally invalid based on it infringing upon his constitutional right to a fair trial. In judgment, Sachs sketches how domestic violence functions in society and upholds normative gender-constructs [328] He explains that domestic violence "is systematic, persuasive and overwhelmingly gender-specific"[329] and domestic violence "both reflects and reinforces patriarchal domination, and does so in a particularly brutal form".[330] Sachs goes on to explain how the criminal justice system fails women through its "ineffectiveness" in dealing with matters of domestic violence and thus in result "intensifies the subordination and helplessness of the victims". [331] Furthermore, this failure to adequately address domestic violence "sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little" and the "terrorisation of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systematic sexist behaviour are normalised rather than combatted."[332]

Sachs argues that there is a constructional duty on the state to prevent violence against women in terms of section 12(1) read with section 7(2) of the Constitution as well as an obligation to protect women based on the "non-sexist society promised in the foundational clauses of the Constitution"[333], which he grounds in section 1 and section 9 of the Constitution.[334] He goes on to explain that a woman's right to equality and non-discrimination which are protected in terms of section 9 are undermined when men are not found guilty of abuse.[335] The court found that the accused's right to fair trial was not affected by section 3(5) of the Prevention of Family Violence Act and the

[326] S v Baloyi and Others (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86 ; 2000 (2) SA 425 (CC) (3 December 1999) .
[327] Prevention of Family Violence Act 133 of 1993.
[328] See n326 at para 12.
[329] See n326 at para 12.
[330] See n326 at para 12.
[331] See n326 at para 12.
[332] See n326 at para 12.
[333] See n326 at para 12.
[334] See n326 at para 12.
[335] See n326 at para 12.

interpretation by the High Court of section 3(5) was incorrect and did not infringe on the accused's right.[336] The court achieved this outcome by favouring the interpretation of section 3(5) which took into consideration that "the Constitution and South Africa's international obligations require effective measures to deal with the gross denial of human rights resulting from pervasive domestic violence" and the application of section 39(2) of the Constitution.[337]

## 2.4. LIMITATION OF A WOMAN'S RIGHT TO FREEDOM AND SECURITY OF THE PERSON BY THE RIGHT OF THE CHILD TO BE PROTECTED

As discussed above, a woman suffering from BWS has many rights affected by failure to protect laws. I have, however, chosen to focus on the right of the mother to freedom and security of the person as a specific right that must then be weighed against the right of the child to be protected against maltreatment, neglect, abuse and degradation. The Constitutional Court has stated that under the principle of subsidiarity a specific right such as one to freedom of security of the person should be the basis of a claim rather than a more general right such as dignity.[338] In regard to the right to dignity Woolman explains that it is very seldom used as a first order rule. He explains that a first order rule is a rule which "alone [is] dispositive of a constitutional matter".[339] He adds that in dignity jurisprudence in South Africa where a court can identify the infringement of a more specific right dignity will not add to the enquiry.[340]

Children experience limitations on many of their rights through individuals, like their parents, failing to abide by the laws that require that they be protected by their care-givers. The right that will be of specific focus in the case of the child is the right of the child to be protected against maltreatment, neglect, abuse

[336] See n326 at para 31.
[337] See n326 at para 26.
[338] Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.
[339] Woolman & Bishop *Constitutional Conversations* 2008 at 207.
[340] See above at 207. Woolman goes on to argue that dignity is more often used as a second order rule or a correlative rule. See 208 – 209.

and degradation.[341] In order to show that in certain cases a woman's freedom and security of the person should be considered as trumping the right of a child to be protected by his or her mother against maltreatment, neglect, abuse and degradation a balancing of the rights must be done. I will focus on the case of *Khumalo and Others v Holomisa* and show the court relies on a type of proportionality enquiry, which fits Robert Alexy's[342] proportionality structure, to balance rights when indirect application of the Bill of Rights is applicable.*[343]* Whilst there is no direct application of section 36(1) of the Bill of Rights, an analogous enquiry which involves proportionality is apposite and utilised by the courts.

In *Khumalo* the court deals with two competing rights, the right of dignity on the one hand and freedom of expression on the other.[344] The applicant requested that there be a development of the common law of discrimination whereby the plaintiff would have the onus of showing that the alleged defamatory statement is in fact false.[345] The court begins by describing the right to freedom of expression. It states that "[f]reedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of all human beings."[346] The idea that the media is a space for the development of a democratic society is emphasised by the court, yet the court notes that the media is both a bearer of rights and a bearer of constitutional obligations when it comes to freedom of expression.[347] The court explains that the media has a "constitutional duty to act with vigour, courage, integrity and responsibility", if the media chooses to stray from this obligation then "the constitutional goals will be imperilled." [348] The court then moves on to engage in a description of the right to dignity, which is the central right on which a defamation claim is based.[349] The court describes the value of dignity

[341] Section 28(1)(d) of the Constitution.
[342] Alexy *A Theory of Constitutional Rights* 2002.
[343] Khumalo and Others v Holomisa (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771. Hereinafter referred to as 'Khumalo'.
[344] See n343 para 1-2.
[345] See n343 para 2.
[346] See n343 para 21.
[347] See n343 para 22.
[348] See n343 para 24.
[349] See n343 para 26.

> *[as] not only [being] concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.*[350]

After having described both the right to freedom of expression and dignity the court endeavours to balance the rights to freedom of expression with dignity to determine if the common law requires development.[351] The court looks at the right to freedom of expression and compares it to common law defamation.[352] The court considers the value of truth in a defamation claim and states that it only really has value insofar as it is a defence aimed at negating unlawfulness.[353] In part of its argument in questioning the constitutionality of the rule, the court states that it is sometimes difficult to determine if a statement is true or not and thus the onus is on the defendant if he chooses to use this as a defense.[354] The effect of the defendant having to prove truth of a statement without the option of a relying on reasonable publication is described by the court as causing a "chilling effect on the publication of information".[355] Yet, this chilling effect is lessened by the availability of the defence of reasonable publication.[356] The court finally argues that due to the defendant having a defence of reasonable publication and looking at the difficulty of proving truth, it is fair that the onus of showing proof is not placed on the plaintiff and rather on the defendant; if the defendant cannot prove the untruthfulness of the comment then they can rely on reasonable publication.[357]

The court appears to be using a type of proportionality enquiry above. The key element that is utilised by the court is an attempt to find a way to optimise each right, echoing the language used by Robert Alexy in his analysis of the

[350] See n343 para 27.
[351] See n343 para 28.
[352] See n343 para 35 – 46.
[353] See n343 para 37.
[354] See n343 para 38.
[355] See n343 para 39.
[356] See n343 para 41.
[357] See n343 para 44.

proportionality enquiry.[358] On the one hand, the press must be able to express itself and not be held to a standard that would prevent it from publishing important information that the public should see. On the other hand, the reputation and dignity of individuals must be protected from potential wide-spread damage that can be caused by the press. In attempting to do so, the court tries to evaluate effectively whether there is alternative construction of the law that could achieve the purpose of protecting the freedom of expression of the press whilst having a lesser impact upon the dignity of an individual. To require a plaintiff to prove the falsity of a statement in the press, places too little emphasis on their dignity as doing so is difficult. On the other hand, requiring the press to prove the truth of a statement it publishes may be too high a standard to require that would create a chilling effect. The court suggests a third way whereby the press will have a duty to prove that it was 'reasonable' to publish the article in question. The onus moves to the press but its burden is not as difficult as proving truth. A balance is achieved between these two rights.

In the circumstances considered in this dissertation, the right of a woman to freedom and security of person[359] needs to be balanced against the child's right to be protected against maltreatment, neglect, abuse and degradation in order to determine if a common law defence should be developed that can protect women who suffer from BWS from conviction where they fail to protect their children. As stated above, I suggest a balancing test analogous to a proportionality enquiry be employed in finding a nuanced legal position that is fair and gives equitable effect to the competing normative claims in these circumstances.

In echoing the approach in *Khumalo* the substance of both rights must be explored briefly. In regard to freedom and security of a person the court in *Coetzee*[360] stated that in cases of imprisonment there is a "manifest and

[358] See n342 at 135 – 136 .
[359] The specific right to bodily and psychological integrity where the woman has the right to security in and control over her body is most applicable. See section 12(2)(b) of the Constitution.
[360] Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others (CCT19/94 , CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631.

substantial invasion of personal freedom"[361] and the court in *Ferreira*[362] stated of the right that "individual freedom is a core right in the panoply of human rights. The right to human dignity... is specifically entrenched in section 10 and has been categorised by this Court, together with the right to life."[363] In terms of the courts description of the right, it can be seen that the right to freedom and security affects some of the most paramount rights in our Constitution, being both dignity and life. The right of the child on the other hand not to be subjected to acts which constitute maltreatment, neglect, abuse and degradation is similarly wide reaching and affects rights such as dignity and life and freedom and security.

The first subset of a proportionality enquiry, suitability, asks if the current state of the law, which fails to provide a defence for women who fail to protect their children, meets its purpose.[364] The purpose of the failure to protect laws is to protect children as fully as possible from harm and accords with the principle of the best interest of the child.[365] The law includes punishment for those direct perpetrators of violence, third parties who have a legal duty to protect a child (such as a parent) and in terms of reporting, numerous individuals (such as doctors, teachers, religious leaders) as a way of ensuring children are protected at every conceivable level. In light of this the use of failure to protect laws are suitably linked to the purpose. Yet, where women are suffering from BWS and are seriously abused, however, it is not clear that they are capable of acting. It is therefore unclear to me that anything is achieved by seeking to punish them where they are unable to act.

In terms of necessity, and similarly to the *Khumalo* case, one must ask if there is a legal position that can be less absolutist than holding that a woman should under all circumstances be liable if she fails to protect her child.[366] Such a position seems extremely restrictive of a woman's rights if she is unable to act and then imprisoned for this. By developing a defence in terms of the common law which allows her to avoid liability in such circumstances, a

[361] See above at 44.
[362] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1
[363] See above at para 47.
[364] See n342 at 135 – 136.
[365] Section 28(2) of the Constitution.
[366] See n342 at 135 – 136.

less restrictive means can be adopted which has a lesser impact on the rights of women. Such a defence should not provide an exception for all individuals who fail to protect and should be narrowly defined to only include those who can show that they suffer from BWS. In that way, the purpose of protecting children is maintained whilst a lesser impact on the rights of women is achieved. The final element of balancing requires comparing the harm to the right, which is the imprisonment of an individual who could not have acted otherwise, against the benefit of the limitation that is the protection of the child.[367] The harm of the right is substantial insofar as it affects a woman's freedom, autonomy, dignity and movement. It also arguably flies in the face of the law that someone who cannot have acted otherwise be found guilty of committing a crime. In comparison, the limitation of the benefit would be slight as it would be limited to cases where a woman has the onus to prove that she suffers from BWS and was unable to act in defence of her child. This would not do away with failure to act laws, as they would still be applicable to every other individual who has the mental and/or physical ability to intervene in the abuse of a child.

In light of the above I propose that the common law must be developed to include a defence for cases of failure to protect crimes whereby a woman who proves that she is suffering from BWS is acquitted.



[367] See n342 at 135 – 136.

## CHAPTER 3

### 3.1. BWS AS PART OF A DEFENSE – THE CASE OF SELF DEFENSE IN SOUTH AFRICAN LAW

At present South African jurisprudence has very few successful cases of employing BWS as part of a defence for criminal sanction. The cases that have dealt with BWS do so only as a part of a defence where a woman has killed her abusive partner. Currently there is no self-standing defence of BWS and because of this BWS has been used to inform certain elements of defences. In jurisprudence throughout the world there have been attempts to employ self-defence in criminal matters dealing with women who kill their abusive intimate partners.[368] The problem that arises in successfully using self-defence is that the woman's actions in these cases do not fulfil all the definitional elements of self-defence. The elements of self-defence include: a response to an unlawful attack which has commenced or is imminent but not yet completed, the attack must be upon one's legally protected interest, the act of self-defence must be reasonable in response to the initial attack and if there is the possibility of avoidance or retreat that would not incur more danger to the defender, then the defence cannot be used.[369]

The definitional elements of reasonableness and imminence prove to be the hurdle in cases of women claiming self-defence as the threat is not strictly imminent.[370] Reasonableness is based on whether or not the woman believes that she is protecting herself from imminent harm.[371] Ludsin states that the test is to look at the reasonableness of the "defendant's belief as to each element of self-defence."[372] However, Snyman points out that reasonable belief is often confused with the test for negligence.[373] He holds that when looking at decisions taken by the courts it appears that the test of the reasonable person in cases of self-defence is mainly used to determine "whether X's conduct was reasonable in the sense that it accorded with what

[368] See n155 and n161.
[369] Hoctor *Criminal Law in South Africa* 2013 68 – 69.
[370] See n90 at 111.
[371] See n82 at 16.
[372] See n82 at 16.
[373] See n90 at 111.

is usually acceptable in society".[374] Imminence on the other hand is limited to cases where the threat is about to occur or is in the process of occurring.[375] The element of reasonableness and imminence become intertwined, as it must be shown that the woman reasonably believed the threat was imminent.

Ludsin argues that a strict interpretation does not take into account that women may continue to be threatened even after the confrontation has finished and wrongly assumes that a woman can escape once the attack has concluded.[376] She suggests a more flexible approach be taken to determine if this element has been met by accepting that the violent act is inevitably due. This can be based on the historical pattern of abuse experienced by the woman and expert testimony on the inadequacies of law enforcement.[377] The reasonableness criterion is then only employed in order to determine if the woman's conduct was lawful or unlawful.[378]

In *S v Ferreira*[379] it was described that women who were abused by a partner and go on to murder this partner believe subjectively that there is no alternative way to protect their rights to bodily integrity and freedom from violence other than by murder.[380] The test that is created is based on the subjective belief of the woman that the threat is still present even after the attack. This is preferable to using an objective test of whether a reasonable person would consider the threat to have been completed or not.[381] Although the court in the above matter made a progressive movement towards expanding the element of reasonableness, it went on to conclude that this would not be considered imminent enough to escape criminal liability altogether.[382] Based on this, the accused in this matter was sentenced to a reduced sentence rather than an acquittal.[383]



[374] See n90 at 111.
[375] See n82 at 15.
[376] See n82 at 16.
[377] See n82 at 16.
[378] See n90 at 111.
[379] S v Ferreira and Others (245/03) [2004] ZASCA 29; [2004] 4 All SA 373 (SCA).
[380] Above at para 44.
[381] See n379 at para 45.
[382] See n379 at para 44.
[383] See n379 at para 56.

In the matter of *S v Engelbrecht*[384] Satchwell held that self-defence is a full defence available for woman suffering from BWS yet this depends on the circumstances of each case.[385] In considering cases of alleged domestic abuse Satchwell states that "[i]t is necessary to understand what is encompassed by the concept of "domestic violence" and the core features thereof", in order to characterise the behaviour of the abuser towards the abused".[386] Furthermore, "[i]t is appropriate to recognise the "hidden" and "unacknowledged" character of this behaviour in our society before assessing the evidence of those who claim it did or did not exist in the Engelbrecht relationship. It is advisable to evaluate the responses of the criminal justice system, as well as informal family and social networks, before passing judgement on Mrs Engelbrecht's own behaviour."[387] According to Satchwell where abuse is frequent and can be said to constitute a pattern, the requirement of imminence should be extended to include abuse that is not strictly imminent.[388] When looking at the reasonableness criteria she suggests that courts adopt the reasonableness approach presented by Chief Justice McLachlin and Justice L'Hereaux-Dubé in *Lavallee v The Queen.*[389] In this matter before the Canadian Supreme Court it was held "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".[390]



In this matter the majority of the court found Mrs Engelbrecht was guilty of the premeditated murder of her husband.[391] The court however took into consideration the extensive and prolonged abuse of Mrs Engelbrecht by the deceased and decided that Mrs Engelbrecht would not receive any further time in prison. It was held that her 17-month period as an awaiting trial prisoner was deemed sufficient punishment for the crime.[392] It was significant that Mrs Engelbrecht detained only until the rising of the court after sentencing

384 S v Engelbrecht 2005 (2) SACR 41 (W).
385 Above at para 340.
386 See n384 para 145.
387 See n384 para 145.
388 See n384 para 349.
389 Lavallee v The Queen 55 CCC (3d) 97.
390 See n384 para 358.
391 See n384 at para 2.
392 See n384 at para 43.

in her matter.[393] With the court in Engelbrecht finding that in cases of BWS and intimate partner killings self defence coupled with BWS may be employed as a possible defence, there is the opportunity for courts to similarly redefine defences related to women who fail to protect their children due to suffering from BWS.

In the matter of *Engelbrecht*, Satchwell states that

> *[c]ritiques of the gendered nature of justification defences argue that such defences were developed from a male perspective and were shaped by the context and life experiences of men [and] ...the implications of the gendered background to these defences is that the development of the elements of the recognised defences has largely ignored women's lives and their experience of violence*[394]

In light of the above it is clear that South African common law need to be developed to acknowledge the position of women suffering from BWS who fail to protect their children from the abuse of their intimate partner. I suggest that the development of the criminal doctrine around culpability; suggesting it adopts a normative approach rather than a psychological approach. Furthermore, I suggest that the defence known as 'non-pathological criminal incapacity' be developed to include the case of women suffering from BWS.

The psychological theory of culpability, or the 'descriptive theory', is influenced by legal positivism, which holds that laws are nothing more than a neutral set of rules that are not dependant on what is considered as being just or prudent.[395] The psychological theory refers **"**simply to a state of consciousness, or to acting with a particular end in mind".[396] The theory focuses on the psychological connection between the accused's act and the ensuing result.[397] This mental part of culpability refers to *mens rea*, which is the subjective requirement for culpability and often referred to as 'the mental

[393] See n384 at para 58.
[394] See n384 at para 335 – 336.
[395] See n90 at 150.
[396] Fletcher '*Criminal Theory in the Twentieth Century*' Contemporary Legal Scholarship: Achievements and Prospects: Criminal Law 265 at 274.
[397] See n90 at 146.

element of the crime' this takes the form of either intention or negligence.[398] When focusing on whether someone intended to commit an act, such as in the case of being an accessory after the fact or intentionally failing to protect, the psychological approach would find it sufficient that the accused intended to commit the act, it would not consider if the accused can be fairly blamed for what she did or whether the law could have expected her to have acted any differently.[399] A criticism of the psychological theory is that a person is seen as guilty or innocent solely focused on her intention. This does not consider whether she should actually be blameworthy. Stribopoulos uses the term 'moral innocence' which can be used to describe a lack of blameworthiness; he suggests that the psychological approach "inevitably cast[s] a net of culpability which ensnares persons whose conduct is "morally innocent". [400]

An example, suggested by Stribopolous, which highlights the puzzling consequences of employing the psychological approach, is that of a father who comes across a bag of marijuana in his son's bedroom, puts the bag in his pocket with the intention of addressing it with his son but forgets about the bag and is later charged with possession of narcotics.[401] The father has the requisite intent for the crime, yet the circumstances surrounding this are simply not what we would consider blameworthy or not deserving of condemnation.[402]



In order to address such consequences Snyman suggests we develop the law of culpability to follow the normative theory of culpability.[403] The normative theory finds that the essence of culpability lies in blameworthiness with which the unlawful act was committed.[404] Snyman describes this as being the view that "in the eyes of the law [the accused] is personally blamed because he committed an act which complied with the definitional elements while he was capable of acting differently or refraining from acting wrongly."[405] In the case of the normative theory in order to determine if the accused intentional

[398] See n90 at 146.
[399] See n90 at 146.
[400] Stribopoulos *The Constitutionalization of 'Fault' in Canada- A Normative Critique* (1999). Criminal Law Quarterly, Vol. 42, pp. 227-285, 1999 at 229.
[401] Above at 259.
[402] See n400 at 259.
[403] See n90 at 146.
[404] See n90 at 153.
[405] See n90 at 153.

conduct was culpable the circumstances surrounding the act must have been normal.[406] Snyman's suggestion takes on an objective element in the determination of historically subjective culpability.[407] One would look at the accused's state of mind and whether the intent was present but in order to ask if she was to blame one would ask if someone else in the accused's position had "withstood the pressure or temptation to commit the wrongdoing".[408]

In applying this to the case of women who fail to protect, the intention element would be present. The woman would have intended not to act or intended to help the perpetrator in evading justice yet the next step according to the normative theory would be to look at the circumstances she finds herself in and ask whether a person in a similar circumstance would have been able to act differently and based on this the conclusion on whether the accused should be blamed can be made. In looking at whether a person in the accused position would have acted differently the court would have to consider the literature around BWS and the effects as mentioned above on one's ability to act, may it be physical or mental.

Counsel for the accused in *Engelbrecht* suggested a similar type of development in terms of the normative theory but applied this to the element of reasonableness in the defence of self-defence. The proposed defence would highlight the inadequacies of the psychological theory of culpability by applying a "normative dimension to the evaluation of capability".[409] The reasonableness criteria would look at the abuse suffered by the accused as well as the failure of the legal system to protect her.[410] If it was deemed to be substantial then it will absolve her from blameworthiness in intent to kill.[411]

Counsel in *Engelbrecht* suggested that in a test for culpability the accused should bear an evidentiary burden to adduce evidence of the domestic violence suffered and the period during which it was suffered. Expert evidence could be used to describe the physical or psychological captivity of the accused, what avenues of escape she sought, her basis for thinking she

[406] See n90 at 153.
[407] See n90 at 153.
[408] See n90 at 153.
[409] See n384 at 200.
[410] See n384 at 221.
[411] See n384 at 221.

would die or suffer severe injury and the weakening or erosion of her will to act in accordance with her appreciation of right or wrong.[412]

This approach could be applied to the case of culpability in cases of BWS. Once intention has been shown the accused could then adduce evidence to support the claim that she suffers from BWS and acted in line with what is common behaviour for women suffering from BWS.[413] The state would then have to refute this.[414]

## 3.2. NON-PATHOLOGICAL SECRIMINAL CAPACITY BASED ON BWS

A potential option for the development of a defence to acknowledge the common symptoms of BWS and thus be the basis of an acquittal for charges relating to a failure to protect is non-pathological criminal capacity. The defence of non-pathological criminal capacity is based on common law and should not be confused with the defence of insanity, which has been developed through statute.[415]

Non-pathological incapacity is a defence, which negates the second leg of the criminal capacity enquiry.[416] The first leg of the enquiry asks if the accused had the cognitive ability to understand and appreciate the wrongfulness of the act, the second leg deals with the cognitive ability to act in accordance with it. In South African law in the 1980's the defence was employed and recognised that both emotional stress and provocation of a temporary nature were are reasons why someone may justifiably be unable to act in accordance with the appreciation she has that the act is wrongful and should therefore be acquitted on that basis.[417]

Importantly the defence, if successful, does result in an acquittal and this is different to the defence of insanity, which will order the accused become a ward of the state.[418] Furthermore unlike in the case of insanity, non-

[412] See n384 at 224 – 225.
[413] See n384 at 255.
[414] See n384 at 255.
[415] Nelson Non-Pathological Criminal Incapacity in South Africa – a Disjunction Between Legal and Psychological Discourse? A Case Study at 3.
[416] Above at 2.
[417] See the cases of S v *Arnold 1985* (3) *SA* 256 (C) *1985* (3); *S v Campher 1987* 1 *SA* 940 (A); *S v Chretien*, 1981 (1) *SA* 1097 (A); S v *Laubscher 1988* (*1*) *SA 163 (A*).
[418] See n415 at 3.

pathological insanity places the burden to prove that there was no non-pathological insanity on the state.[419] One area that is problematic in the current structure of the defence is that the testimony of expert witnesses is only discretionary, whereas in the case of insanity this is compulsory.[420] The need of expert witnesses is of utmost important on cases dealing with BWS. Without having the testimony of someone who is qualified and understands the nuances of BWS the accused's evidence will be inadequate which would be very likely to result in a conviction. The use of an expert witness needs to be compulsory in cases where the accused is basing her claim of non-pathological criminal incapacity on the fact that she suffered or suffers from BWS.

Nelson explains the problem between the discourses of law and psychology and why it is important to use an expert witness such as a psychologist in cases dealing with non-pathological incapacity.[421] She argues that law has different conceptual tools and aims to psychology.[422] Law stresses that individuals have personal agency whereas psychology focuses on the significance of the effect of external factors on that are beyond and individuals control and influences the individual's conduct.[423] Psychology has the view of determinism to a certain extent and looks at the causes of actions whereas law assumes the free will of the individual and focuses on the results of the action.[424] Law cannot be insulated against the conclusions reached about human behaviour in psychology, law is focused on rules that regulate human conduct and prohibits undesirable conduct but it is not a study of the mind of human beings. It is not desirable for judges, who are experts of law and not psychology, to make decisions about a person's ability to cognitively understand and act in accordance with that understanding. Individuals, such as psychologists and psychiatrists, are experts in the field and should therefore give evidence, which explains the conduct of individuals and whether this conduct was performed with the requisite capacity.

[419] See n415 at 3.
[420] See n415 at 3.
[421] See n415 at 5.
[422] See n415 at 5.
[423] See n415 at 6.
[424] See n415 at 6.

The use of the defence of non-pathological incapacity needs to be developed to make the evidence of expert witnesses compulsory; this would be in line with the spirit, purport and object of the Constitution. Trials where there is a refusal to hear the expert evidence in relation to BWS would severely prejudice the accused. It would be to such a degree as to constitute an unfair trial as the evidence required for the accused to potentially be acquitted will either not be heard or it will be averred and not explained by someone who understands the nuances of BWS. The matter will then possibly be decided upon by a judge who does not understand the effects BWS on an accused's capacity to act or the discourse of psychology and this could result in a conviction for failure to protect rather than an acquittal.

## CONCLUSION

In conclusion, by using the case of *S v Rudman* as a case study it has been shown that the problem faced by women suffering from BWS by either having an inability to act or alternatively perceiving an inability to act, in protecting their children from an abusive partner is not acknowledged in our law as a justifiable defence. I have set out the characteristics of BWS, which can affect a woman's ability to act, and an ability to leave the abusive situation. Many women find themselves being convicted based on this failure to act, with their sentence being almost equal to that of the partner who actually abused or murdered the woman's child. It has also been shown that in *S v Rudman* the court incorrectly charged the accused with being an accessory after the fact when it should have relied on an omission based on a protective relationship. I have also explored the possible offences that women who have failed to protect have been charged with as well as the requirements of each; namely the being an accessory after the fact and an omission based on a protective relationship. I looked at the gap created in the law with the movement from the Child Care Act to the Children's Act insofar as the Child Care Act specifically creates a crime of failing to protect a child from a third party whereas the children's Act has no such provision. I have argued that with the lack of carry over of the offence from the Child Care Act to the Children's Act, the courts have been relying on common law omissions based on a protective

relationship. I have compared South African law dealing with failure to protect with that of the US and the UK and concluded both have a more onerous duty on women in terms of its law and offers no acknowledgement of the vulnerable position of women who suffer from BWS. This has gone on to show that this issue is not isolated to South Africa and that although it is not a novel problem it is an under-acknowledged one. In light of all of the above I went on to suggest that common law defences around failure to protect must be development. This would be done in terms of section 39(2) of the Constitution, by adopting an indirect approach. I compare the rights of both children and women in arguing for the development of the common law and hold that although children's rights will have to be limited marginally, this is justifiable when comparing it to the degree of limitation of the rights of women suffering from BWS in finding them guilty of inaction. Finally I look at the place of BWS as part of a defence in South African law at present. I then proceed to suggest that the defence of non-pathological incapacity be developed to make the testimony of expert witnesses compulsory based on the fact that law and psychology concern themselves with very different discourses and that judges are not qualified to make decisions around the psychological state of an individuals and should rely on the evidence given by psychologists.

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