

Forget me not: Thoughts on the crossroads between law and medicine in assessing claims of amnesia

Memory is what we are: If we lose our memories, we lose our identity and sense of self.¹

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OPSOMMING

Vergeet-my-nie: Gedagtes oor die wisselwerking tussen die reg en die mediese wetenskappe by die beoordeling van geheueverlies

Geestesdeskundiges word op 'n gereelde basis gebruik om strafbare optrede te rekonstrueer. Een van die groot struikelblokke wat geestesdeskundiges in die gesig staar tydens die assesseringsfase hou verband met die geval waar die beskuldigde beweer dat hy of sy aan geheueverlies ly, hetsy van 'n tydelike- of permanente aard. Die bewering van amnesie, oftewel geheueverlies, lewer 'n uitdaging vir sowel die forensiese geestesdeskundige wat strewe daarna om sover moontlik aan juridiese standaarde te voldoen ten aansien van die lewering van 'n opinie, as vir regsgeleerdes wat hul sake tot die beste van hulle vermoë moet voordra. Een van die struikelblokke tydens die assessering van amnesie hou verband met die beoordeling van die waarheid of egtheid daarvan en dus om ware amnesie te onderskei van gesimuleerde amnesie. Hierdie artikel verskaf 'n oorsig rakende die aard van amnesie, die belangrikste oorsake daarvan asook die juridiese benadering tot amnesia, geskets teen die agtergrond van die wisselwerking tussen die reg en die mediese wetenskappe by die beoordeling van amnesie.

1 Introduction

Mental health professionals are frequently utilised within our criminal justice system to reconstruct criminal behaviour. One of the major obstacles facing such assessment process relates to the situation where the evaluatee claims total or partial memory loss (amnesia). The latter presents a challenge to both forensic practitioners attempting to meet specific legal standards, as well as legal practitioners striving towards the effective presentation of their cases. The most difficult aspect pertaining to the assessment of amnesia is ascertaining its authenticity and as such distinguishing true amnesia from malingered or “feigned” amnesia. In this article an overview will be provided as to the nature of amnesia, the major sources of amnesia as well as the legal approach to amnesia canvassed against the backdrop of the interplay between law and medicine in the assessment of amnesia.

1 Ford *Lies! Lies!! Lies!!! The Psychology of Deceit* (1996) 178.

2 Amnesia in General

Amnesia is generally a state of mind in which a person tends to suffer from partial or complete memory loss. Amnesia is also often referred to as a short-term memory condition in which the memory is disturbed.² The role of amnesia is addressed in this study as it frequently comes to the fore in respect of both non-pathological as well as pathological criminal incapacity. Vorster³ notes that memory is a complex function which is not limited to a certain area of the brain, but entails various parts functioning in conjunction with each other and that memory can be divided into three processes: registration, storage and retrieval. During amnesia there is a defect in one or more of these stages.

Rubinsky and Brandt define amnesia as:⁴

... a behavioural syndrome marked by a severe inability to acquire and retain new permanent memories (anterograde amnesia) often coupled with some degree of impairment in the retrieval of previously acquired memories (retrograde amnesia).

Kaplan and Sadock⁵ define amnesia as the “partial or total inability to recall past experiences.”

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- 2 Ellis “‘Emotional stress’ – ‘n nuwe handelingsuitsluitingsgrond” 1986 *De Jure* 348; Kaliski “The criminal defendant” in Kaliski *Psycholegal assessment in South Africa* (2006) 108-109; Van Rensburg & Verschoor, “Medies-geregtelike aspekte van amnesie” 1989 *TRW* 14 40-55; Rubinsky & Brandt “Amnesia and Criminal Law: a clinical overview” 1986 *Behavioural Science and the Law* 27; Rogers & Cavanaugh “Amnesia” 1986 *Behavioural Science and the Law* (Introductory Note to volume (4)) i; Morse “Why Amnesia and the law is not a useful topic” 1986 *Behavioural Science and the Law* 99; Hoor “Amnesia and criminal responsibility” 2000 *SACJ* 273; Vorster *An analysis of the amnesias with specific reference to ‘non-pathological sane automatism’* (PHD thesis 2002 University of the Witwatersrand). See also Gillespie “Amnesia: competent functions in remembering” 1996 *British Medical Journal* 1179-1183; Lennox “Amnesia: real and feigned” 1943 *American Journal of Psychiatry* 732-743; Lynch & Bradford “Amnesia: Its detection by Psychophysiological measures” 1980 *American Academy of Psychiatry and Law* 288-297.
 - 3 24. See also Whitty & Zongwill *Amnesia – Clinical, Psychological and Medicolegal Aspects* (1977) 60; Hoor 2000 *SACJ* 273 274. According to Vorster (24), the following factors may affect each stage of the process:
Registration – levels of arousal – any factors that could have a bearing on this relationship of importance of information to the self emotional state intelligence and filtering processes
Storage – structure and physiology of the brain
Retrieval – emotional factors arousal and all factors affecting this situation – specific associations Vorster notes that memories related to extreme emotion may sometimes be easily recalled but may also just as easily be erased.
 - 4 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 33; Hoor 2000 *SACJ* 273 274.
 - 5 Sadock & Sadock *Kaplan and Sadock’s Synopsis of Psychiatry – Behavioural Sciences/Clinical Psychiatry* (2003) 286.

According to Kaplan and Sadock,⁶ amnesia can be sub-divided into two categories:

- (i) Anterograde – loss of memory for or pertaining to events occurring after a point in time;
- (ii) Retrograde – loss of memory for or pertaining to events occurring before a point in time.

From a neuropsychological perspective, amnesia encapsulates more than merely a poor memory. Rubinsky and Brandt⁷ notes that although amnesia is most often traced in neurologically-disturbed patients, a variation of it can often be observed in persons who do not have any brain dysfunction.

According to Hirst, anterograde amnesia generally consists of six unique features:⁸

- (i) The rapid forgetting of new information;
- (ii) Normal short-term memory capacity which refers to the ability to maintain a small percentage of information for a brief interlude;
- (iii) Responsiveness to recognition probes;
- (iv) Responsiveness to retrieval cues which refers to the ability to remember when provided with clues;
- (v) Increased sensitivity to proactive interference,
- (vi) Preserved skill learning which entails the ability to learn and retain general tasks, rules and procedures.

Rubinsky and Brandt⁹ state that although not every amnesic patient displays all of the above features, it “is uncontested that it is a pattern of impaired and spared functions which characterises the amnesic syndrome”. Amnesia is accordingly not merely an inability to remember, but constitutes a “pathological inability of a particular selectivity, quality and severity.”¹⁰

According to Schacter,¹¹ there are four types of amnesia:

- (i) Chronic organic amnesia – “... pathological forgetting that is associated with a wide variety of neurological dysfunctions, including head injury, encephalitis, ruptured aneurysm, Korsakoff’s disease, anoxia, Alzheimer’s

6 Kaplan & Sadock 286.

7 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 2733.

8 Hirst “The Amnesic Syndrome: Descriptions and Explanations” 1982 *Psychological Bulletin* 455-460; Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 33.

9 *Ibid.*

10 *Ibid.*

11 Schacter “On the Relation between Genuine and Simulated Amnesia” 1986 *Behavioural Sciences and the Law* 47 48 as discussed in Hoctor 2000 *SACJ* 273 274-275. See also Roesch & Golding “Amnesia and Competency to Stand Trial: A Review of Clinical and Legal Issues” 1986 *Behavioural Sciences and the Law* 4.

disease” – patients typically display signs of both anterograde as well as retrograde amnesia.

(ii) Functional retrograde amnesia – “... memory loss of one’s name and personal past that is produced by severe psychological and emotional trauma ...”

(iii) Multiple personality amnesia – “... memory deficits observed in patients with multiple personality disease: Any one of the patient’s personalities may have little or no access to memories acquired by another ...”

(iv) Limited amnesia – “... a pathological inability to remember a specific episode, or small number of episodes, from the recent past ...”

Rubinsky and Brandt¹² also note that the specific form or manifestation of amnesia bears important implications for the different criminal defences. As such the most prominent causes of amnesia are alcoholism, epilepsy, head trauma or injury and psychogenic amnesia.¹³

3 Sources of Amnesia

3.1 Alcohol

There are mainly two instances in which alcohol could affect a person who subsequently claims amnesia at a later stage:¹⁴

- (i) Where acute ingestion of alcohol causes amnesia during the period of intoxication, or
- (ii) Where long-term alcoholism results in a chronic memory disorder.

Acute alcohol intoxication produces a state in which new information is inefficiently stored, and old information is difficult to retrieve.¹⁵ Short-term memory is impaired during intoxication with the severity of impairment being positively correlated with the level of alcohol in the blood.¹⁶ Rubinsky and Brandt¹⁷ state that as soon as blood-alcohol levels rise, the information-processing strategies used by alcoholics as well as social drinkers alternate from sophisticated strategies founded on semantic associations, to more primitive, idiosyncratic strategies.

Information gathered whilst a person is intoxicated is often only recalled when a person is in a similar physiological state. After a bout of heavy intoxication, there may be anterograde amnesia pertaining to events that occurred during this period of the so-called alcoholic “blackout”.¹⁸

12 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 36.

13 *Ibid.* See also Hocter 2000 *SACJ* 273 275-278; Van Rensburg & Verschoor 50-54.

14 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 36, Hocter 2000 *SACJ* 273 275.

15 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 36, Hocter 2000 *SACJ* 273 275.

16 *Ibid.*

17 *Ibid.* See also Ryan & Butters “Cognitive Deficits in Alcoholics” in *The Pathogenesis of Alcoholism* (eds Kissen & Begeiter)(1983) 485-538.

18 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 37-38.

Whenever a blackout arises, remote and immediate memory remains intact, but a short-term memory loss occurs in the sense that the intoxicated person is unable to recall events that occurred in the preceding five or ten minutes.¹⁹ Van Rensburg and Verschoor²⁰ state that a person with alcoholic amnesia is clearly aware of what he is doing from moment to moment while intoxicated, but as a result of a lack of retention of information he is unable to recall the events at a later stage.

3 2 Epilepsy

Cases dealing with individuals with epilepsy usually involve those with complex partial seizures.²¹ There are mainly three types of epileptic seizures: tonic-clonic- or grand mal seizures, absence- or petit mal seizures and psychomotor seizures.²²

Rubinsky and Brandt²³ state that criminal cases pertaining to individuals with epilepsy usually relate to those with complex partial (psychomotor) seizures. These complex partial seizures are often associated with abnormal electrical discharges from limbic structure underlying the temporal lobes, and accordingly they were once termed “temporal lobe epilepsy”.²⁴ Whilst experiencing a complex partial seizure, the individual does not experience a convulsion, but rather suffers a

“clouding” of consciousness and may engage in automatic behaviour and as such “behaves in quasi-purposeful ways, yet is unresponsive to the environment and is not storing new information. When the episode is over, the events which transpired during the *ictus* are not remembered.”²⁵

According to Van Rensburg and Verschoor epileptic amnesia can be characterised as being well-defined.²⁶ The person can generally recall all activities undertaken until the point where the seizure occurred.²⁷ Epileptic amnesia covers the period surrounding the attack but does not relate to the person’s past.²⁸

19 Hoor 2000 *SACJ* 273 275.

20 Van Rensburg & Verschoor 51; Hoor 2000 *SACJ* 273 275, See generally *R v H* 1962 (1) SA 197 (A) where the reliance on alcoholic amnesia coupled with automatism was unsuccessful.

21 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 38.

22 Van Rensburg & Verschoor (1989) 51. According to Van Rensburg and Verschoor “Grand Mal” seizures are associated with convulsions which can result injury on the part of the person suffering the seizure whereas “Petit Mal” seizures are fleeting moments of unconsciousness, which usually lasts a few seconds. See also Hoor 2000 *SACJ* 273 276.

23 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 38; Hoor 2000 *SACJ* 273 276.

24 *Ibid.*

25 *Ibid.*

26 Van Rensburg & Verschoor (1989) 52.

27 Van Rensburg & Verschoor (1989) 52; Hoor 2000 *SACJ* 273 276.

28 *Ibid.*

Rubinsky and Brandt²⁹ note that the interface between epilepsy-related cognitive impairments and criminal behaviour remain uncertain. They observe that physicians and legal professionals who have written on the medicolegal aspects of amnesia emphasising epilepsy, have often conflated the states of amnesia, automatism, and impaired consciousness.

3 3 Head Trauma

An accused person who commits a crime while in clear consciousness and full possession of his or her mental capacities and, either in the course of the act or subsequent thereto, sustains an injury to the head may suffer from retrograde amnesia in respect of the act and events prior to it, as well as anterograde amnesia (post-traumatic amnesia) afterwards.³⁰ It is, however, true that courts are generally not very sympathetic to claims of amnesia if, during the initiation of the act and at the time of the trial, there is no anterograde amnesia.³¹

3 4 Psychogenic Amnesia or “Dissociative Amnesia”

‘I have done that’ says my memory. ‘I cannot have done that’ says my pride and remains adamant – at last memory yields.³²

Psychogenic amnesia can be defined as a sudden inability to remember important information.³³ Rubinsky and Brandt³⁴ state that memory loss in respect of psychogenic amnesia is too extensive to be described by ordinary forgetfulness and is typically confined to incidents that took place before or surrounding the critical event or events. The memory impairment could accordingly be classified as the retrograde type. The memory loss in these instances can be for a certain period of time or for the rest of the person’s life.³⁵

Psychogenic amnesia is commonly known to be a method of suppressing unpleasant memories, but it could also be a reflection of a certain personality type predisposed to this type of memory loss.³⁶

Psychogenic amnesia is often the result of an “emotional block”. A person may experience an incident which he does not want to remember

29 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 38.

30 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 39; Hoorer 2000 *SACJ* 273 276. See also *S v Cunningham* 1996 1 *SACR* 631 (A) 639 B-C.

31 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 39; Hoorer 2000 *SACJ* 273 277. See also *Watkins v People* 158 Col 485 408P2d 425 1965 where the defence claimed that amnesia precluded the formation of criminal intent. The latter’s claim was unsuccessful. Amnesia does not preclude a normal state of consciousness, intelligence and rational thought.

32 Nietzsche *Beyond Good and Evil* (1886) aphorism 68.

33 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 41; Hoorer 2000 *SACJ* 273 277; Van Rensburg & Verschoor 46. American Psychiatric Association “*Diagnostic and Statistical Manual of Mental Disorders*” (1994) 477 (DSM-IV)

34 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 41.

35 *Ibid.*

36 Vorster 28.

or he experiences a traumatic event and escapes from this by forgetting.³⁷ Emotional trauma in respect of the commission of the crime can thus bring about psychogenic amnesia.

According to the DSM-IV, the diagnostic features unique to dissociative (psychogenic) amnesia are the following:³⁸

- (i) The essential feature of dissociative amnesia is an inability to recall important personal information, usually of a traumatic nature.
- (ii) It constitutes a reversible memory disturbance in which memories of personal experience cannot be retrieved verbally.
- (iii) Dissociative amnesia most commonly manifests as a retrospectively-reported gap or series of gaps in recall for aspects of the individuals' life history.
- (iv) It does not occur exclusively during the course of dissociative identity disorder, dissociative fugue, post traumatic stress disorder, acute stress disorder, or somatisation disorder and is not due to the direct physiological effects of a substance.
- (v) The symptoms induce clinically-significant distress or impairment in social, occupational, or other important areas of functioning.

Psychogenic amnesia typically starts abruptly, usually after the occurrence of serious psychosocial stress.³⁹ It generally also ends abruptly with complete recovery and it seldom repeats itself.⁴⁰

According to the DSM-IV,⁴¹ there are distinct types of psychogenic amnesia:⁴²

- (i) Localised amnesia – the individual fails to recall events that occurred during a circumscribed period of time, usually the first few hours after a profoundly traumatic event;
- (ii) Selective amnesia – a person can recall some, but not all of the events during a specified period of time;
- (iii) Generalised amnesia – failure of recall relates to the person's entire life;
- (iv) Continuous amnesia – this form of amnesia is defined as the inability to recall events subsequent to a specific time up to and including the present.

3 4 1 Examples of Psychogenic Amnesia is South African Case Law

It is extremely difficult to distinguish psychogenic amnesia from simulated amnesia, which renders the assessment of amnesia problematic and complex. A typical example within South African case

37 Van Rensburg & Verschoor 46.

38 DSM-IV 478.

39 Van Rensburg & Verschoor 47; Hoctor 2000 *SACJ* 273 277.

40 Van Rensburg & Verschoor 47.

41 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed (1994) (DSM-IV).

42 DSM-IV 478; Hoctor 2000 *SACJ* 273 278.

law in which the concept of psychogenic amnesia was addressed, is the case of *S v Henry*.⁴³

In *S v Henry*⁴⁴ the defence that was raised by the appellant was one of sane automatism. The appellant, a television technician in his late thirties, was charged in the Cape Provincial Division with two counts of murder and a third count of pointing a firearm in contravention of the Arms and Ammunition Act.⁴⁵ The first count of murder related to the killing of the appellant's ex-wife ("Mrs Henry") and the second to the killing of his ex-mother-in-law ("Mrs Symon"). The complainant in the alleged statutory offence was Mrs Symon's fiancé, Mr Thomas Davids.

The appellant raised the defence of sane automatism, claiming that he had no recollection of the shooting or of pointing the firearm at Mr Davids. The defence was rejected by the trial court and the appellant was convicted as charged.

On appeal, it was held per Scott JA⁴⁶ firstly that it is trite law that a cognitive or voluntary act is an essential element of criminal responsibility. It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology, the onus is on the state to establish this element beyond reasonable doubt.

Scott JA stated⁴⁷ that it had been repeatedly emphasised in the past that defences such as non-pathological automatism require careful scrutiny and circumspection. The *ipse dixit* of the accused to the effect that his act was involuntary and unconsciously committed must accordingly be weighed up and assessed against the backdrop of all the circumstances and particularly against the alleged criminal conduct viewed objectively.⁴⁸ Scott JA in addition held⁴⁹ that criminal conduct arising from an argument or some or other emotional conflict is frequently preceded by some sort of provocation and such loss of temper is a common occurrence and in appropriate circumstances it might possibly mitigate, but it will not exonerate. He held⁵⁰ that non-pathological loss of cognitive control or consciousness as a result of some

43 *S v Henry* 1991 1 SACR 13 (SCA). See also Le Roux "Strafregtelike aanspreeklikheid en die verweer van nie-patologiese oftewel gesonde automatisme" 2000 *De Jure* 190 - 193.

44 *Ibid.*

45 75 of 1969.

46 19 I-J.

47 20 C-I. See also *S v McDonald* 2000 2 SACR 493 (NPG) where a clinical psychologist for the State presented expert evidence to the effect that the appellant on account of the trauma surrounding the shooting which was the reason of the charge against the appellant, suffered from a state of retrograde dissociative amnesia – lacking the ability to recall matters after the event.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

emotional stimulus and resulting in involuntary conduct, ie psychogenic automatism, is most uncommon. In respect of expert evidence Scott JA held:

Generally speaking expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent or inconsistent as the case may be, with involuntary conduct which is non-pathological and emotion-induced. These, for example, may relate to such matters as the nature of the emotional stimulus which it is alleged served as a trigger mechanism for the condition or the nature of the behaviour or aspects of it which may be indicative of the presence or absence of awareness and cognitive control.

Scott JA discussed⁵¹ the occurrence of psychogenic amnesia and noted that it generally refers to the subconscious repression of an unacceptable memory. It was held that whilst it is generally accepted that automatism results in amnesia, it does not follow that the converse is true. In other words, amnesia is not necessarily indicative of automatism. An accused person may therefore genuinely have no subsequent recollection of a voluntary act giving rise to criminal responsibility. Consequently, expert evidence may be of assistance to the Court in explaining the accused's behaviour.

In addition he noted⁵² that finally, however, it is for the court to decide the true nature of the alleged criminal conduct which it will do not only on the basis of the expert evidence but in the light of all the facts and the circumstances of the case.

The only question in this case was whether the appellant was "acting" in a state of psychogenic automatism at the relevant time of the transgression and accordingly could not commit an act or acts giving rise to criminal liability.

It is interesting to note the aspects of expert evidence advanced by medical experts in respect of psychogenic automatism. Mr van Zyl, a clinical psychologist of Cape Town, who gave evidence on behalf of the appellant, was of the view that the appellant was indeed in a state of psychogenic automatism at the time of the shooting.⁵³ Dr Jedaar, who was called by the State in rebuttal, took the opposite view holding that the appellant had not been in a state of psychogenic amnesia.⁵⁴

It appears from the evidence that there was no difference of opinion between Mr Van Zyl and Dr Jedaar as to the nature of the stimulus or trigger mechanism that was required to induce a state of psychogenic automatism. There had to be some emotionally-charged event or provocation of extraordinary significance to the person concerned and the emotional arousal that it caused had to be of such a nature as to

51 *Ibid.*

52 *Ibid.*

53 21A.

54 21B-C.

disturb the consciousness of the person concerned to the extent that it resulted in unconscious or automatic behaviour with consequential amnesia. Dr Jedaar testified that there was nothing that he could find in the appellant's account of what had been said on the fatal evening or in the appellant's account of his own emotions at the time to suggest a stimulus of the kind required to trigger a state of automatism.⁵⁵ Mr Van Zyl suggested that what triggered the appellant's state of automatism was his intense frustration arising from Mrs Henry's refusal to let him have Robyn (his daughter) for the extra night.⁵⁶ This explanation, however, did not carry much weight.

Initially Dr Jedaar confined his evidence to certain general observations regarding automatism as he had not interviewed the appellant. At the request of the appellant's counsel the case was later postponed to enable Dr Jedaar to interview the appellant and investigate the matter further. Dr Jedaar subsequently testified that when he interviewed the appellant, the latter told him that he recalled grappling with Mrs Henry for possession of the firearm and that he feared that if she gained possession of it she would use it against him.⁵⁷ According to Dr Jedaar, his subjective experience immediately prior to the shooting was not one of anger or rage, but one of fear. According to Dr Jedaar, this was wholly at variance and inconsistent with an emotional stimulus of a kind that would induce automatism.

Another aspect of the appellant's behaviour upon which the state relied in order to demonstrate that he was acting consciously was what Dr Jedaar described as "avoidance behaviour".⁵⁸ By this he referred to the appellant's hurried departure from the scene which in his own version took place even before he had found out what had happened. Dr Jedaar considered this to be wholly inconsistent with the behaviour of a person who had just had an episode of automatism.⁵⁹ He testified that he would expect such a person to be in a bewildered and confused state.⁶⁰ The court accordingly held, on the facts, both objectively and on the appellant's own account of his emotions, that the facts revealed nothing to suggest a stimulus of the kind required to trigger a state of automatism.

It was held by Scott JA that in the absence of evidence of an identifiable trigger mechanism and in the light of indications of conscious behaviour inconsistent with automatism, that the evidence did not reveal a reasonable possibility that the appellant was in a state of automatism at the relevant time. The appeal accordingly had to be dismissed.

55 21D-F.

56 22B-C.

57 22H-I.

58 23E-F.

59 23E-G.

60 23F-G.

The court per Scott JA noted that the incidence of psychogenic automatism, which entails the non-pathological loss of cognitive control due to an emotional stimulus, is rare. The court also stated that automatism often results in amnesia but that the converse is not always true. Psychogenic amnesia, which entails the subconscious suppression of unacceptable memories of the event, is a relatively common occurrence. It is accordingly possible for a person to suffer from amnesia whilst the preceding conduct was completely voluntary.⁶¹

4 The Legal Approach to Amnesia

In *R v H*⁶² the court expressed great caution in respect of amnesia:

[D]efences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon the hypothesis that the accused is giving a truthful account of the events in question.

It is generally accepted that mere amnesia or loss of memory does not constitute a valid defence.⁶³

It remains an undeniable fact that expert evidence from forensic mental-health professionals will play a pivotal role in establishing the validity of a claim of amnesia. Rogers and Cavanaugh⁶⁴ expound on the difficulties encountered during the assessment of amnesia:

Much of forensic practice is predicated on the successful reconstruction of the criminal or civil issue in question. The assessment process is greatly complicated when the evaluatee claims partial or total amnesia regarding his/her thoughts, emotions, perceptions, and behaviour. Of these, only occasionally can behaviour be fully reconstructed. The others are interpersonal phenomena which, at best, can be inferred from observed behaviour. This is problematic both for forensic clinicians attempting to address comprehensively specific legal standards, and for participating attorneys in the effective presentation and advocacy of their cases.

61 See Le Roux 2000 *De Jure* 190 192.

62 *R v H* 1962 1 SA 197 (A) 208B. See also *S v Piccione* 1967 2 SA 334 (N) 335C-D, *S v T* 1986 2 SA 112 (O) 124A-D where it was held that the accused's amnesia was not attributable to involuntary or unconscious behaviour, but rather the desire to avoid the unpleasant. See also Ellis 348.

63 Strauss *Doctor, Patient and the Law* (1991) 129; Ellis 348; *S v Piccione* 335C-D; *R v Johnson* 1970 2 SA 405 (R); Kaliski 108. See also *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 (HL) 532G-H: "The term 'involuntary act' is, however, capable of wider connotations and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it. When a man is charged with dangerous driving, it is no defence for him to say 'I don't know what happened, I cannot remember a thing' ... Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time". See also *S v Van Zyl* 1964 2 SA 113 (A) 120; *S v Cunningham* 1996 1 SACR 631 (A) 635J-636A.

64 Rogers & Cavanaugh i.

In *S v Pederson*⁶⁵ the appellant was convicted in a regional court of the murder of his wife. On the day of the murder the appellant, who apparently suspected that the deceased was committing adultery, made enquiries as to her whereabouts, and was heard to say that he was going to kill her. The deceased was warned about this threat, but ignored it. On the morning of the murder the deceased returned to her flat. While she was there the appellant stabbed her as a result of which she died. The appellant's defences at the trial were:

- (i) that he had not acted voluntarily when he stabbed the deceased;
- (ii) even if there had been a voluntary act, that he had not at the time of the stabbing been capable of forming the intention of killing the deceased.

The Court made important observations pertaining to amnesia. The Court per Marnewick AJ stated that a decisive feature of cases where the accused had been held not to have acted voluntarily was that the accused in those matters had truly retained no memory of the events concerned.⁶⁶ This was crucial, as true absence of memory was a strong indication that an accused had acted involuntarily. Marnewick AJ explained⁶⁷ that retrograde loss of memory is a device employed by the psyche to suppress unpleasant memories and an individual can only have a memory of an incident or event if he had had sufficient intellectual capacity at the time of the incident or even had exercised a measure of control over his or her conduct.

Expert evidence by Dr Pillay, a psychologist, was advanced in support of the appellant's defences. He testified⁶⁸ that the appellant had probably suffered an "acute catathymic crisis":

Okay, what I'm suggesting is Mr Pederson does have the experience, encoded in his memory. What I'm contending is his ability to recall being affected by the nature of the trauma itself.

Later in his evidence Dr Pillay stated that he disagreed that Mr Pederson suffered from true amnesia. Dr Pillay opined that the memory was still present but that Mr Pederson was not able to recall it. Dr Pillay diagnosed the appellant's condition as post-traumatic amnesia due to the fact that the appellant's mind was unable to accept or integrate the experience, thus suppressing it. He stated that this was used as a defence mechanism to protect the individual from total disintegration.⁶⁹

In evaluating⁷⁰ the appellant's amnesia Marnewick AJ explained that for the defence of sane amnesia to succeed, the absence of control by the mind over the actions of the appellant must have been present. He commented that mere loss of memory was not and had never been a

65 *S v Pederson* 1998 (2) SACR 383 (NPD). See also Reddi "General Principles of Liability, Criminal Capacity, Sane Automatism" 1999 *SACJ* 87-91.

66 390G.

67 390G-H.

68 397A-B.

69 396I-J.

70 396G-H.

defence to a charge of murder and that such loss of memory formed part of a wider concept to be relevant at all. Retrograde amnesia on the other hand fell in a category of its own as it was premised on the very basis that the accused had some memory of the relevant events, but had since lost such memory.⁷¹ According to Marnewick AJ the statements of Dr Pillay destroyed the defence based on the absence of a voluntary or conscious act. For the events to be in the appellant's memory it would have been necessary for his cognitive functions to remain operative to a sufficient extent to record as memory the events which are witnessed and perceived by his senses. If the cognitive functions of his mind were intact to that extent, there was sufficient control of his mind over his actions to constitute his acts as voluntary acts in terms of the criminal law.

Dr Gilmer, a clinical psychologist called by the State in rebuttal, was of the opinion that Dr Pillay's opinion was dependent on the veracity of the appellant's own evidence. He explained⁷² that a catathymic episode requires a "splitting off of emotion, thought and action."

According to Dr Gilmer this did not occur with the appellant as there was a coherency between the appellant's emotions, thoughts and actions which ruled out the existence of a catathymic episode or emotional storm.

It was accordingly held on the facts, including Dr Pillay's evidence as to the nature of the appellant's alleged amnesia, that the appellant's conduct before and after the stabbing of the deceased, as well as the poor impression that the appellant made as a witness, the magistrate had rightly found that the appellant had acted voluntarily when he stabbed the deceased.⁷³ Accordingly the appeal against the conviction was dismissed.

In *S v Van der Sandt*⁷⁴ Labuschagne J held that the accused suffered from post-traumatic amnesia created as a defence mechanism as a result of the gruesome and traumatic nature of the crime. Such amnesia, it was held,⁷⁵ does not exclude criminal liability.

In *S v Majola*⁷⁶ the appellant had been convicted of murder in a regional court and sentenced to 15 years' imprisonment in terms of the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. The evidence revealed that he had stabbed his lover, who was eight months pregnant, with a penknife in her throat. The appellant's only defence was that he was unable to recall what had happened. And that he thus did not remember stabbing the deceased. Penzhorn AJ

⁷¹ *Ibid.*

⁷² 397.

⁷³ 395G-H as well as 399G-J.

⁷⁴ *S v Van der Sandt* 1998 (2) SACR 627 (W).

⁷⁵ At 638i-j. See also Du Toit *et al Commentary on the Criminal Procedure Act* (2007) 13-16 – 13-17; *S v Els* 1993 (1) SACR 723 (E) 730d-e; Reddi 88.

⁷⁶ *S v Majola* 2001 (1) SACR 337 (NPD).

rejected⁷⁷ this as a self-serving piece of evidence which was contradicted by the evidence of the State witnesses to the effect that the appellant simply came in and embarked on his aggressive path. Penzhorn AJ in addition held that, even if the appellant really did not remember, it did not assist him in the light of the evidence which was before the court. It was held⁷⁸ that no factual foundation was established for a defence of criminal incapacity, sane or insane automatism, but simply that the appellant could not remember what had happened. It was accordingly held that apart from a bare claim of amnesia there was simply nothing before the court indicative of unconscious or involuntary behaviour. The appeals against conviction and sentence were accordingly dismissed.

It is also clear that amnesia is most often raised in support of a claim of involuntary conduct or put differently, a defence of automatism.⁷⁹

Morse⁸⁰ correctly states that behavioural conditions such as amnesia do not require special legal treatment, but should instead be regarded as evidentiary factors which should be assessed when adjudicating more general legal doctrines.

It is important that courts approach the defence of amnesia with scrutiny and circumspection even where medical evidence is advanced in support of such claim, since medical evidence is often based upon the assumption that the accused has provided a truthful account of the relevant facts in question.⁸¹

Amnesia does not constitute a valid defence and will not affect criminal liability unless it is connected to either automatism or criminal capacity.⁸² It is clear that, when a person acts in a state of automatism, there is usually true amnesia, but the opposite is not always true.⁸³ Where the defence is one of lack of criminal capacity, the presence of amnesia will also not be the decisive factor.

In *S v Chretien*⁸⁴ Rumpff CJ stated:⁸⁵

Een van die probleme in verband met dade gepleeg in dronkenskap is natuurlik dat die beskonkene wel weet wat hy doen terwyl hy dit doen, maar dikwels later vergeet het wat hy gedoen het. Die blote feit dat hy vergeet het wat hy gedoen het, maak hom nie ontoerekeningsvatbaar nie.

77 340E-F.

78 341A.

79 Hoor 2000 SACJ 273 282. See also *S v Henry supra*.

80 Morse (1986) 99.

81 Hoor 2000 SACJ 273 279, *S v Moses* 1996 (1) SACR 701 (C) 713A-C, *S v Gesualdo* 1997 (2) SACR 68 (W) 74G-H.

82 Hoor 2000 SACJ 273 280; *S v Piccione* 335C-D.

83 Hoor 2000 SACJ 273 280; *S v Potgieter* 83A-B.

84 *S v Chretien* 1981 (1) SA 1097 (A).

85 1108C-D.

In assessing whether an accused's conduct was involuntary, it is clear that courts distinguish clearly between "true absence of memory" and "retrograde loss of memory after the event."⁸⁶

In *S v Gesualdo*⁸⁷ the court took into account the fact that the accused had amnesia in supporting the finding that the accused lacked conative capacity at the time of the commission of the crime. Evidence of amnesia could also be advanced in support of a finding of diminished criminal capacity.⁸⁸

5 Malingering or "Simulated Amnesia"

One of the main considerations underlying the reluctance of courts to accept claims of amnesia is the fact that many accused persons claiming amnesia are doing so deceptively. This problem is further exacerbated by the fact that there are no reliable procedures to distinguish true amnesia from simulated or feigned amnesia.⁸⁹

Van Rensburg and Verschoor state⁹⁰ that it is difficult to distinguish simulated amnesia from psychogenic amnesia. In cases of psychogenic amnesia a person simulates amnesia but he or she does generally not realise the reason for it except for gaining sympathy.⁹¹ In cases of simulated amnesia a person simulates amnesia in order to escape serious problems encountered at that point in time.⁹² Research suggests, however, that simulators or malingerers tend to overplay their role and perform less successful on memory tests than true amnesics.⁹³

Rubinsky and Brandt⁹⁴ note that statements concerning malingered amnesia within the legal literature which are at odds with neuropsychological knowledge tend to impair the courts' ability to effectively assess claims of amnesia.

Kaliski⁹⁵ correctly states that amnesia should only be regarded as a supportive indicator that, for example, an automatism occurred, and not as an excuse itself. Peter⁹⁶ also cautions that within the psycholegal context, malingering should always be borne in mind, especially when the amnesia conveniently shuts out important events. An accused person will typically have a detailed and specific recall of events up to and soon

86 Hctor 2000 SAC/273 284.

87 *S v Gesualdo* 1997 (2) SACR 68 (W).

88 Hctor 2000 SAC/273 285.

89 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 42.

90 Van Rensburg & Verschoor (1989) 49.

91 *Ibid.*

92 *Ibid.*

93 Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 43.

94 *Ibid.*

95 Kaliski 106.

96 Peter 136.

after the crime, with a period of so-called amnesia.⁹⁷ In such cases the nature and quality of the accused's actions should be carefully assessed.

6 Assessment of Amnesia

During the assessment of amnesia it is pivotal to evaluate the accused's conduct before, during and after the commission of the crime in order to ascertain whether he or she was aware of what he or she was doing.⁹⁸

Kaliski provides the following guidelines for the assessment of amnesia:⁹⁹

- (i) Amnesia is a symptom that may be indicative of a disorder, but is not a diagnosis and accordingly amnesia cannot be raised as a defence.
- (ii) An identifiable cause or reason for the amnesia, such as a blow to the head or intoxication, should exist.
- (iii) The pattern of the amnesia should be assessed with as much detail as possible. Anterograde amnesia should be more serious than retrograde amnesia. Kaliski also notes that persons claiming severe amnesia for events that took place relative long ago but with a relatively intact short-term memory are usually malingering.
- (iv) Memory for the triggering event may vary – where the alleged reason for the amnesia was a head injury, the person will lack memory for the moment of injury due to the fact that it will be submerged in the retrograde as well as the anterograde (post-traumatic amnesia). When the alleged cause relates to emotional events, the triggering event is usually recalled.
- (v) Intoxication, especially when an alcohol “blackout” is present, generally results in either an *en bloc* memory loss which entails lack of memory of events for the period of intoxication or *fragmentary amnesia* which entails some “islets of recall” in a general sea of amnesia.
- (vi) An accused may have a valid reason for having amnesia, but nevertheless be criminally accountable for his actions during the commission of the alleged crime.

The role of mental health professionals in the assessment of claims of amnesia is pivotal. It is, however, true that the interface of law and medicine during the assessment of amnesia is also often blurred and conflated.

Rubinsky and Brandt¹⁰⁰ note that there are “glaring gaps between psychological knowledge about amnesia, especially of the psychogenic variety, and knowledge needed by courts in determining the effect of alleged memory disorders on legal responsibility.” There are also marked gaps between psychological knowledge about amnesia and judicial application of such knowledge and principles.¹⁰¹ Most instances of

⁹⁷ *Ibid.*

⁹⁸ Van Rensburg & Verschoor 54; Ellis 349, Hoor 2000 *SACJ* 273 286.

⁹⁹ Kaliski 109.

¹⁰⁰ Rubinsky & Brandt 1986 *Behavioural Science and the Law* 27 43.

¹⁰¹ *Ibid.*

psychogenic amnesia tend to be more the result of the crime and not the cause thereof.

7 Conclusion

Claims of amnesia in support of defences such as automatism or criminal incapacity should be assessed by courts with caution and scrutiny.

The distinct cooperation between law and medicine in respect of the assessment of amnesia is summarised by Rubinsky and Brandt¹⁰² as follows:

Psychologists who testify as experts should expend greater energy in efforts to clearly and completely present relevant and timely scientific knowledge. Emphasis should be placed on elucidating both what is currently known and what is not currently known about amnesia. In return, legal professionals should attempt to understand and to apply correctly neuropsychological research findings to amnesia cases.

With sufficient cooperation between law and behavioural sciences in claims of amnesia, there will be less interdisciplinary confusion.

102 *Ibid.*